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Delhi High Court

Vishal Yadav vs State Of U.P. on 2 April, 2014

Author: Gita Mittal

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 16th April, 2013
Clarifications and Reserved on: 22nd November, 2013
% Date of Decision: 2nd April, 2014

\+ CRL.A. 741/2008

VISHAL YADAV ..... Appellant
Through : Mr. Ram Jethmalani, Sr. Adv. with Mr. Sanjay Jain, Mr. Vinay Arora, Ms. P.R. Mala, Ms. Ruchika Bhan, Mr. Pranav Diesh, Mr. Karan Kalia and Mr. Ashish Dixit., Advs.

versus

STATE OF U.P. ..... Respondent
Through : Mr. Dayan Krishnan, ASC with Ms.Ritu Gauba, APP, Ms.Swati Goswami, Mr. Nikhil A.Menon and Ms. Manvi Priya, Advs.
Mr. P.K. Dey, Adv. with Mr.Kaushik Dey, Adv. for the complainant.

WITH

\+ CRL.A. 910/2008

VIKAS YADAV ..... Appellant
Through : Mr.U.R. Lalit, Sr. Adv. with Mr. Sumeet Verma and Ms. Charu Verma, Advs.

versus

STATE OF U.P. ..... Respondent
Through : Mr. Dayan Krishnan, ASC with Ms. Ritu Gauba, APP, Ms.Swati Goswami, , Mr. Nikhil A.Menon and Ms. Manvi Priya, Advs.
Mr. P.K. Dey, Adv. with Mr. Kaushik Dey, Adv. for the complainant.

AND

\+ CRL.A. 145/2012

SUKHDEV YADAV ..... Appellant
Through : Mr.Ravinder Kumar

Kapoor, Adv. with Mr.Chaman
Sharma, Adv.

Versus

STATE & ANR. ..... Respondents
Through : Mr. Dayan Krishnan,
ASC with Ms.Ritu Gauba, APP,
Ms.Swati Goswami,
Mr. Nikhil A.Menon and Ms.
Manvi Priya, Advs.
Mr. P.K. Dey, Adv. with Mr.
Kaushik Dey, Adv. for the
complainant.

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MR. JUSTICE J.R. MIDHA

1. Justice to all - the accused, the society as well as a fair chance to prove to the prosecution - is not only an integral part of the criminal justice system but it is its prime objective. This finds reiteration by the Supreme Court of India in the judgment reported at (2012) 8 SCC 263, Dayal Singh and Ors. v. State of Uttaranchal when the court emphasized thus:

> —34. Where our criminal justice system provides safeguards of fair trial and innocent till proven guilty to an accused, there it also contemplates that a criminal trial is meant for doing justice to all, the accused, the society and a fair chance to prove to the prosecution. Then alone can law and order be maintained. The courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. Both are public duties of the judge. During the course of the trial, the learned Presiding Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the Court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not subverted. For truly attaining this object of a —fair trial‖, the Court should leave no stone unturned to do justice and protect the interest of the society as well.‖

2. In the two trials giving rise to these appeals, these are the public duties which the learned Trial Judges have endeavoured to discharge. While adjudicating upon these appeals, it is these very duties which we have been called upon to perform.

3. The appellants in Crl. Appeal nos.741/2008 and 910/2008 have assailed the judgment dated 28th May, 2008 in SC Case No.78/2002 whereby they stand convicted for commission of offences under Sections 364, 302, 201 of the Indian Penal Code and the order on sentence dated 30th May, 2008. Whereas the appellant in Crl.Appeal No.145/2012 has laid a challenge to the judgment dated 6th of July 2011 whereby he stands convicted for commission of the same offence in SC Case No.76/2008 and order on sentence dated 12th of July 2011.

By the present judgment, we propose to decide the challenge to the judgments dated 28th of May 2008 and 6th July, 2011 on which detailed arguments have been addressed.

The case of the prosecution

4. We may first briefly notice the case of the prosecution. The Katara family were residents of 7 Chelmsford Road, New Delhi, an official accommodation allotted to Shri Nishit M. Katara, government servant. The family consisted of his wife Nilam Katara; their elder son Nitish Katara (deceased) and a second son Nitin Katara.

5. In the year 1998, Nitish Katara joined the IMT, Ghaziabad in order to pursue an MBA (PGDBM) course. In his class, he befriended Gaurav Gupta, Bharat Diwakar and Bharti Yadav (daughter of Shri D.P. Yadav, Member of Parliament and an industrialist). Bharti Yadav's best friend from childhood, Shivani Gaur, was also studying at IMT Ghaziabad but pursuing a different course at that time, i.e. the PGDEM course, specializing in marketing.

6. The course finished in the year 2000 whereafter Bharat Diwakar and Gaurav Gupta moved away to their respective home towns while Nitish Katara took a job with Reliance General Insurance in Delhi itself as his father was ill. Bharti continued to reside in the National Capital Region as well. In around January, 2001 with passage of time the friendship of this young couple blossomed into a love affair. This relationship was known to Bharti's family members and relatives including her sister Bhawna Yadav, mother Umlesh Yadav, brother Vikas Yadav, cousin brother Vishal Yadav as well as her maternal aunt (_mami‟ -mother's brother's wife/wife of Bharat Singh) and paternal aunt (_bua' -father's sister).

It is the prosecution case that this relationship was not palatable to Vikas and Vishal Yadav, and that they were opposed to it. This aversion was the motive for the abduction and murder of Nitish Katara.

7. An alliance was fixed of Shivani Gaur with one Amit Arora, and they got engaged on 4th June, 2001. Their marriage was fixed on the night of 16th February, 2002. To this wedding, Shivani Gaur invited the family of Bharti Yadav as well as the family of Nitish Katara. She also invited her old friends Bharat Diwakar and Gaurav Gupta.

8. To attend the wedding and other related ceremonies, Bharat Diwakar came to Delhi from Madhya Pradesh and stayed with the family of his friend Nitish Katara at 7 Chelmsford Road, New Delhi. The two friends attended the sangeet ceremony in connection with the marriage on the night of 15th February, 2002 where Nitish Katara danced with Bharti. On 16th February 2002, Nitish Katara and Bharat Diwakar went in a hired taxi to participate in Shivani Gaur's wedding and they reached the wedding venue around 10:00/10:15 pm and greeted the bride. Bharti Yadav was on the dias with the bride and they got a picture taken at the wedding with Bharti Yadav and the bride (Exh PW 6/2).

9. Vikas and Vishal Yadav also went to Shivani Gaur's wedding and the prosecution led evidence that they reached there after 11:00 pm.

10. Gaurav Gupta came to attend the wedding from Faizabad on the 16th of February, 2002 itself and was picked up from the railway station by another friend namely, Yashoman Tomar. He was dropped at the wedding venue by Yashoman Tomar at about 11:15/11:30 p.m.

11. While Nitish Katara, Bharat Diwakar and Gaurav Gupta were eating dinner, a young person approached Nitish Katara and took him aside. Bharat Diwakar subsequently learnt that the name of this person was Vishal Yadav.

12. As per the prosecution, between midnight and 12:30 a.m., Nitish Katara was thereafter spotted with the three appellants in a Tata Safari bearing Punjab registration No.PB-07H- 0085 outside the venue by

security guards; then by Ct. Inderjeet Singh and Ct. Satender Pal Singh (police personnel on checking duty in gypsy Chetak 13) parked a little distance from the Diamond Palace Banquet Hall and finally by Ajay Kumar at the Hapur Chungi. Nitish Katara was not seen alive thereafter.

13. Bharat Diwakar and Gaurav Gupta finished their meal and decided to return to their respective accommodations. Upon receipt of a message about Yashoman Tomar's arrival to pick up Gaurav, they searched for Nitish Katara at the wedding venue but could not find him. Gaurav Gupta also made unsuccessful efforts to contact Nitish Katara on his mobile. Bharat Diwakar had also unsuccessfully tried to contact Nitish Katara on the telephone and thereafter decided to return to 7 Chelmsford Road, New Delhi. He left the wedding venue and reached the Katara residence alone at about 3:00 am in a hired taxi.

14. It appears that in the meantime, Bharti Yadav became frantic as her brothers and Sukhdev @ Pehalwan had taken away Nitish Katara. She made desperate attempts to reach him on his phone. She also tried to track her brothers by calling the landline numbers at her residence but was unable to find them. By 7:00 am of the 17th of February 2002, Bharti Yadav had called up Bharat Diwakar several times out of anxiety to know the whereabouts of Nitish Katara.

15. Back at 7 Chelmsford Road, New Delhi, Nilam Katara (mother of Nitish Katara) was surprised to see Bharat Diwakar returning alone. In answer to the query of Nilam Katara as to why he returned alone, he could not give any satisfactory answer and went off to sleep.

16. Nilam Katara was also unsuccessful in contacting Nitish Katara on his mobile phone. Unable to sleep because of anxiety, she saw that all the family cars were parked outside her house. She woke Bharat Diwakar up and asked him as to how Nitish Katara would return home. Bharat Diwakar disclosed to her that they had gone to Ghaziabad by taxi in which he alone had returned and that Nitish would come with somebody else. Bharat Diwakar also stated to Nilam Katara that he had not met Nitish Katara before returning to Delhi. He had no answer as to how he derived the knowledge that Nitish will come with somebody else.

17. Nilam Katara then took Bharti Yadav's phone number from Bharat Diwakar and called her from the landline phone. Bharti Yadav disclosed that she was also unsuccessful in reaching Nitish Katara. Bharti Yadav also asked Nilam Katara as to whether the boys (Bharat Diwakar and Gaurav Gupta) had not told her that her brothers Vikas and Vishal Yadav had taken Nitish Katara away from the wedding. Bharti Yadav also informed Nilam Katara that her brothers were not informing her about anything and that Nilam Katara should speak to her father.

18. When questioned again, Bharat Diwakar told Nilam Katara that he had been told by Rohit Gaur (brother of the bride Shivani Gaur) that Vishal Yadav was the person who had called away Nitish Katara and who had seen Nitish Katara going with Vishal Yadav.

19. Nilam Katara made desperate calls to Shri D.P. Yadav who also told her that he had heard something and would call her if he got any information. To a second phone call, he told her that he was busy in elections and would get back to her.

20. Nilam Katara also rang up Bharti Yadav to tell her that if she is not able to get any information about her son, she would go to the police station to lodge a complaint and that she would be giving Bharti's name as well in the complaint. To that Bharti Yadav responded that Nilam Katara should give Bharti's name to the police even if it was a slur to her family and that Nilam did not know what they were doing to her son.

21. On 17th February, 2002 between 11:30 am and 12:00 noon, having failed to ascertain the whereabouts of her son, Nilam Katara lodged a complaint with the police station Ghaziabad.

22. The handwritten complaint made by PW-30 Nilam Katara on 17th February, 2002 was in vernacular which was registered as FIR No.192/02 under Section 364 of the IPC (Exh.PW-1/A) and the translation thereof reads as follows:

> ―SHO, P.S. Kavi Nagar My son Nitish Katara on 16th February, 2002 had attended the marriage of Shivani Gaur R/O 53, Model Town, Ghaziabad in the Diamond Palace. Nitish ate dinner with his friend Diwakar and Gaurav Gupta. Bharat Diwakar had told that while they were eating dinner, Vishal s/o Late Kamal Raj Yadav came to them. Rohit s/o B.K. Gaur had told that Vikas s/o Sh. D.P. Yadav and Vishal s/o Late Sh. Kamal Raj Yadav R/o Ghaziabad had come at about 12- 12.30. Nitish was taken out by Vishal and Vikas while talking to him. When Bharat could not see him there, he returned to our house. I am apprehensive that some untoward incident may have happened.
>
> Nitish (my son) and Bharti Yadav D/o Sh. D.P. Yadav had studied together between 1998 to 2000 at the IMT and shared a friendship. Possibly (_sambhavtah') Vishal, Vikas did not like this friendship. Therefore, you are requested to record this information and kindly undertake the necessary action.

Nilam Katara 7, Chelmsford Road (Exh.PW-1/A)‖ In this complaint thus she stated that her son was missing; she had briefly written about his relationship with Bharti Yadav and made a reference to possible objections thereto by her brothers Vikas and Vishal Yadav. SI Anil Somania was appointed as the investigating officer in the case.

23. From the police station, Nilam Katara contacted Bharti Yadav on her mobile when Bharti informed that she has been taken away to Faridabad to her sister's house; that nobody was telling her anything and that Nilam Katara should search for her son as time was crucial. Nilam Katara was unable to get any information from Shri D.P. Yadav's house where she met Bharti Yadav's mother Umlesh who knew close details of Nilam Katara's family. Bharti Yadav was physically spirited away from her residence in Ghaziabad and sent to Faridabad on the 17 th of February 2002 itself.

24. At about 9:00/9:15 am in the morning of 17th February, 2002, Police Station Khurja received a message from Shri Virender Kumar that a badly burnt dead body was lying on the Shikharpur Road near Khurja. Inspector Chander Pal Singh proceeded to the spot with Constable Mudassar Khan and found a dead body which had been burnt beyond recognition in a _khai' (gorge/pit) near the road. The panchnama of the dead body (Exh.PW3/2A) was recorded with regard to the recovery of the dead body as well as the steps taken by the police to identify the body on that day.

25. A post-mortem was conducted on the corpse on the 18th of February 2002 by Dr. Anil Singhal, an Orthopaedic Surgeon in the District Hospital, Bulandshahr who opined the cause of death as ―death due to coma as a result of ante mortem head injury with post mortem burn‖.

26. The doctor had observed a fracture injury about 7 cms above the left eyebrow of the dead body. The post mortem report (Exh.PW3/3) also shows a lacerated wound measuring 3x2 cms.

27. A message was received by Police Station Ghaziabad on 19 th February, 2002 about the discovery of the dead body which was lying in the mortuary.

28. On the 21st of February 2002, S.I. Anil Somania took Smt. Nilam Katara for identification of the dead body to the mortuary in Khurja. Nilam Katara identified the body as that of her son, Nitish Katara by examining his left palm which was not burnt and comparing it with her own hand, as Nitish Katara had unusually small hands.

29. In order to further confirm the identity of the dead body, the police took steps for getting a DNA examination conducted on samples drawn from the dead body and compared it with samples drawn

from Nilam Katara and her husband Nishit Katara. These samples were sent for DNA examination to Central Forensic Science Laboratory, Calcutta. A report dated 7th March, 2002 (Exh.PW17/1) received from the laboratory concluded that the dead body belonged to biological son of Nilam Katara and Nishit M. Katara. It is in evidence that Nitish Katara was cremated only on 12th March, 2002.

30. In the meantime, after the registration of the case on 17 th of February 2002, the police at Ghaziabad took intensive steps to search for Vikas and Vishal Yadav, brothers of Bharti Yadav. Despite best efforts, they could not be traced at their residence or the known places which they usually visited till Anil Somania saw a TV report to the effect that Vikas and Vishal Yadav had been arrested that morning by police station Dabra in District Gwalior in the early hours on 23rd February, 2002. Immediate steps were taken by Anil Somania to travel to Dabra so as to arrest the brothers in the present case. The two were brought to Ghaziabad and produced before the Court of Chief Judicial Magistrate , Ghaziabad on 25th February, 2002 (_CJM Ghaziabad' hereafter).

31. On 25th February, 2002, the investigating officer sought police custody remand of the accused persons to record their statements under Section 161 of the Cr.P.C. The CJM, Ghaziabad granted permission and the Investigating Officer proceeded to the Ghaziabad Jail to record the statements of the two accused.

32. Both Vikas and Vishal Yadav gave disclosure statements on the 25th of February 2002 which were recorded by Investigating Officer Anil Somania in the case diary as per the requirement in U.P. In view of the bar under Section 162 of the Cr.P.C., he did not obtain the signatures of the two accused. These statements were confessional in nature however, they made disclosure of the following facts:

(i) One _Pehalwan' was an accomplice in the crime.

(ii) Knowledge of the place of the crime and the place where the dead body had been burnt.

(iii) Vikas Yadav knew the place where he had concealed the weapon of the offence was concealed and that he could get it recovered. Vishal Yadav knew the place where he had concealed the cell phone and wrist watch of the deceased and could get them recovered.

(iv) The place where the Tata Safari vehicle which was used by the appellants and Pehalwan to commit the offence was concealed.

33. It is noteworthy that on 25th February, 2002, the police also made an application to the CJM, Ghaziabad informing the court about the inclusion of commission of offence under Sections 302 and 201 of the IPC in the diary. Appropriate endorsements were recorded in the records accordingly.

34. According to the police, on the 2nd of March 2002, they were permitted to record a statement under Section 161 of the Cr.P.C. of Bharti Yadav at her residence in Ghaziabad. At the time of recording of the statement of Bharti Yadav by Anil Somania accompanied by one police official Anju Bhadoria, her father Shri D.P. Yadav remained present. In this statement (Exh.PW35/AB), Bharti Yadav had disclosed the full particulars of the _Pehalwan' (disclosed by Vikas and Vishal Yadav) as _Sukhdev Pehalwan'. He was also present in Shivani Gaur's wedding on the night of 16th February, 2002 and that _Sukhdev Pehalwan' was working in their liquor vends in Bulandshahr, U.P. She also stated that Nitish Katara had been taken away by these people from the wedding of Shivani Gaur itself. Bharti disclosed about her relationship with Nitish Katara, exchange of gifts etc.

35. Armed with this information, on 3rd February, 2002 the police laid a trap to apprehend Sukhdev @ Pehalwan in Bulandshahr area. He could not be physically apprehended but the police laid their hands on a guarantee card bearing a photograph and his complete address (Exh.PW22/A1 in the trial of Sukhdev Yadav).

36. A separate police team was constituted for apprehension and arrest of Sukhdev Pehalwan. Raids were conducted in several places but he could not be apprehended even at his native village. Arrest warrants from the court were also of no consequence. On 31st March, 2002, Sukhdev Yadav was consequently declared a proclaimed offender, an award was declared for information about him and a proclamation for the reward was published in a newspaper with a photograph and also telecast on T.V. An arms licence for a double barrel gun which was held by Sukhdev Yadav from Bulandshahr, U.P. was got cancelled in the year, 2002 by the Investigating Officer.

37. So far as investigation against Vikas and Vishal Yadav is concerned, in view of the disclosures made by them, the police made an application to the CJM, Ghaziabad on 26th February, 2002 seeking police custody remand so as to effect the recoveries pursuant thereto. The court directed production of the two accused who were produced in court on the 27th of February 2002. In the presence of their counsel as well as Vikas and Vishal Yadav, the court granted 24 hours police custody remand starting from 9:00 am of 28th February, 2002 to 9:00 am of 1st March, 2002. The court had already permitted counsel to be present with the accused persons during the police remand.

38. On the 28th of February 2002, the investigating officer took custody of Vikas and Vishal Yadav from the Ghaziabad jail and got their medical done. Shri Satpal Singh Yadav, Advocate accompanied the accused. These appellants first pointed out the spot near the Aughwar Railway crossing as the site of the crime as well as the spot where the dead body was thereafter burnt on the Khurja - Pahasu road. Site plans were drawn by the police. Thereafter, Vikas Yadav proceeded to a clump of _pattel' bushes and, after searching, took out a hammer (with blood stains on one end of the hammer head) from amongst the bushes. Vishal Yadav searched in another clump of _pattel‟ bushes and pulled out a wrist watch from amongst them which, as per the prosecution, was worn by Nitish Katara on that fateful night. No mobile phone was recovered. A combined recovery memo of the above (Exh.PW34/1) was recorded by the police. The recovery memo was signed by Vishal Yadav and also dated by him. Vikas Yadav not only signed the recovery memo but endorsed receipt of the copy thereof. A copy of the same was given at the spot itself to the accompanying counsel for the accused Shri Satpal Singh Yadav who acknowledged receipt thereof.

39. As per the disclosure statement Vikas and Vishal Yadav then led the police party to Alwar, Rajasthan for recovery of the Tata Safari vehicle. Three places were searched as pointed out by the accused but the Tata Safari vehicle could not be traced. For want of time, the police returned to Ghaziabad and after medical check-up, they lodged Vikas and Vishal Yadav in custody.

40. As the Tata Safari vehicle and the mobile phone of the deceased remained to be recovered, the police made another application on 1st March, 2002 seeking police custody remand for the same. The CJM, Ghaziabad rejected this application. The police moved the Sessions Court which by an order dated 6th March, 2002 held that the power vested in the CJM court which alone had to consider the remand prayer. A fresh application was thereafter filed before the CJM, who, by an order dated 8th March, 2002, granted two days police custody remand from 2:00 pm of 9th March, 2002 to 2:00 pm of 11th March, 2002 for the purpose of recovery.

41. By then Vikas and Vishal Yadav had been taken to police station Dabra, District Gwalior in connection with the cases registered against them there. They effectively managed to delay handing over of their custody to Ghaziabad police. While in transit towards Punjab, the accused informed the police that the Tata Safari vehicle was at the taxi stand, Shamshan Ghat, Panipat. The accused persons were taken to this spot. However, nothing was found at this taxi stand. The accused then informed the police that the car was pearl green in colour and bore registration no. PB-07-H-0085 and that the same was at their factory at Karnal. The two accused thereafter led the police party to the premises of A.B. Coltex at Karnal, a burnt down factory which was lying closed. They got the Tata Safari bearing the

above registration number recovered on 11th March, 2002 from these premises. The accused persons refused to sign the recovery memo of the Tata Safari vehicle (Exh.PW27/1).

42. The Investigating Officer was continuing with the investigation and during the course thereof, recorded statements amongst others of Ct. Inderjit Singh and Ct. Satender Pal Singh who were police personnel on patrol duty in police Gypsy Chetak-13 which was parked a little distance away from the Diamond Palace Banquet Hall on the night of 16th/17th February 2002. The prosecution led evidence to show that the three accused persons and Nitish Katara came away from the Diamond Palace Banquet Hall in the Tata Safari vehicle at around midnight on that night. Though in the witness box Ct. Inderjit Singh has attempted to separate Vishal and Vikas Yadav from the deceased by stating that while the two brothers were in a long car, Nitish Katara was seated in a Tata Safari with one other person. However, this part of his statement was disbelieved by the trial court. We shall discuss this aspect of the evidence in detail in a later part of the judgment. However even from Ct. Inderjit Singh's evidence, it was established even in his evidence that Vikas and Vishal Yadav, Nitish Katara and one more person were on the road coming from the Diamond Palace Banquet Hall around midnight on 16th February, 2002 and travelling in the same direction. In his statement under Section 161 Cr.P.C. Ct. Satendra Pal Singh stated that four persons including the three appellants and a fourth in a red kurta were in the Tata Safari which came from the said banquet hall. He identified the person in the red kurta as Nitish Katara from photos.

43. On 18th March, 2002, the Investigating Officer Anil Somania recorded the statement under Section 161 of the Cr.P.C. of Ajay Kumar to the effect that at about 12:00/12:15 in the night intervening 16th/17th February, 2002 he had spotted the Tata Safari near Hapur Chungi, Ghaziabad. The vehicle was being driven by Vikas Yadav, while Nitish Katara (deceased) was sitting on the passenger seat next to him; Vishal Yadav sat behind the driver while Sukhdev Yadav was sitting behind the deceased.

44. The recovered hammer was sent for a forensic examination.

By the report dated 6th of March 2002, the serologist confirmed presence of human blood on the narrow end of the hammer.

Trial of Vikas and Vishal Yadav

45. On completion of investigation, the chargesheet was filed against Vikas and Vishal Yadav on 6th April, 2002 in the court of CJM, Ghaziabad. Thereafter on 6th April, 2002 the case was committed to the court of the Sessions Judge, Ghaziabad.

46. It is necessary to note that Nilam Katara filed a writ petition in the Supreme Court of India being Crl.Writ No. 22/2002 which was withdrawn on 26th February, 2002 by her in order to move the Delhi High Court for appropriate directions. Immediately, thereafter she filed Crl.Writ No. 247/2002 in this court seeking issuance of writ of habeas corpus and other directions to the police. Nilam Katara had impleaded Vikas and Vishal Yadav as respondents in this matter.

Before the Writ court, the investigating agency had placed detailed status reports setting out the several steps taken during investigation including the searches, recording of statements; disclosures as well as recoveries; etc. During the course of hearing before us, parties were called upon to inform the court about all previous litigation as well as the orders passed by the courts. Unfortunately other than few orders placed before us, we have not had the benefit of reading the pleadings.

47. Vikas and Vishal Yadav had also approached higher courts including the High Court of Judicature at Allahabad. Despite our queries, we have not been informed about either the content of the petitions filed by them or the orders passed thereon.

48. In the meantime, Nilam Katara filed a petition being Transfer Petition No. 449/2002 before the Supreme Court of India praying for transfer of the trial against Vikas and Vishal Yadav to Delhi. The Supreme Court first passed an order dated 22nd May, 2002 staying the further proceedings before the trial court at Ghaziabad. By a subsequent order dated 22nd August, 2002, transferred the trial to the Sessions Court at Delhi. Accordingly the trial of Vikas and Vishal Yadav was conducted by the trial court in Patiala House, New Delhi.

49. By an order dated 23rd November, 2002, the following charge was framed against Vikas and Vishal Yadav for commission of offences under Section 302/201/34 of the IPC:

> —I, S.N. Dhingra, Addl. Sessions Judge, N.Delhi, do hereby charge you accused 1. Vikas Yadav and Vishal Yadav as under- That you both alongwith co-accused Sukhdev @ Pahlwan (PO) kidnapped Nitish Katara from Diamond Place, Shastri Nagar, within the jurisdiction of PS Kavi Nagar, Ghaziabad on the night of 16th and 17th Feb. 02 at about 12.30 (midnight) with the intention to murder him and thereby you both committed offence punishable u/s 364 r/w sec.34 IPC and cognizance of the offence is taken by this court against both of you.
>
> 2. That you both alongwith co-accused Sukhdev @ Pahlwan (PO) after kidnapping Nitish Katara, killed him, with intention to kill him on 17.2.02 at a place around or near Khurja Bulundshahar or Khurja Pahasu Road, UP and thereby you both committed offence punishable u/s 302 r/w sec.34 IPC and cognizance of the offence is taken by this court against both of you.
>
> 3. That after murdering Nitish Katara, you both alongwith co-accused Sukhdev @ Pahlwan (PO) removed all signs of identification including clothes from his body and poured inflammable material on his body and burnt his body on the abovesaid Khurja - Pahasu Road and caused evidence of murder disappear with th4e intention of screening yourself and your co-accused from legal punishment and thereby you committed offence u/s 201 IPC and cognizance of the offence is taken by this court against both of you. And I hereby direct that you both be tried for the above-mentioned offences.‖

50. Vikas and Vishal Yadav pleaded not guilty and claimed trial.

During the trial, the prosecution examined 43 witnesses. On 20thApril, 2007 and 26th April, 2007 the statements of Vishal Yadav and Vikas Yadav respectively were recorded under Section 313 of the Cr.P.C. The accused persons opted to lead defence and examined 23 witnesses in defence.

51. After detailed consideration of the entire evidence on record, the learned trial court passed a judgment dated 28th May, 2008 whereby Vikas and Vishal Yadav were convicted for the offences with which they were charged. By a separate order dated 30th May, 2008, Vikas and Vishal Yadav were sentenced to undergo life imprisonment and to pay a fine of Rs. 1 lakh each under Section 302/34 IPC in default each to undergo simple imprisonment for 1 year. Both convicts were further sentenced to rigorous imprisonment for 10 years and fine of Rs. 50,000/- each under Section 364/34 IPC in default each to undergo simple imprisonment for 6 months. The convicts were further sentenced to rigorous imprisonment for 5 years and were to pay a fine of Rs.

10,000/- each under Section 201/34 IPC in default each to undergo simple imprisonment for 3 months.

Sukhdev @ Pehalwan 's Trial

52. We now propose to consider the second trial which became necessary because of the abscondance of Sukhdev @ Pehalwan who absconded after the incident during investigation and could be arrested only on 23rd February, 2005. Sukhdev @ Pehalwan was arrested when he shot at police party from

police station Patcherawa Village, District Kushi Nagar, U.P. at the night of 11th February, 2005 at 1:30 am. Upon his search, in the right hand one country made pistol .315 bore was found and from the pocket of his pant two live cartridges were recovered. One used cartridge from the chamber of the country-made pistol and one used cartridge lying on the spot was also found. Sukhdev @ Pehalwan was arrested by the police station Dewaria and FIR No.56/2005 was registered under Section 307/7 Criminal Law (Amendment) Act. Another FIR bearing no.57/2005 was registered against him under the Arms Act.

53. The prosecution has examined PW-21 retired S.I. Umakant Pandey; PW-20 S.I. Ajit Kumar Misra about the arrests and the case in District Kushi Nagar against Sukhdev Yadav.

54. Information about the arrests was given to the Ghaziabad police by a fax message (Exh.PW22/A2 in Sukhdev's trial) as well as telephone on 11th February, 2005. He was produced before the court of Chief Judicial Magistrate, Ghaziabad. Further investigation was completed by the police against Sukhdev @ Pehalwan and a supplementary chargesheet against him was filed in the court where the trial of Vikas and Vishal Yadav was pending.

55. Vikas and Vishal were already facing trial by SC Case No. 78/2002. By the 23rd of February 2005. By now 37 prosecution witnesses stood examined in Vikas and Vishal Yadav's case.

56. The case against Sukhdev @ Pehalwan was registered as SC No.117A/2006 and was placed before the same Trial Judge trying SC Case No.78/2002 against Vikas and Vishal Yadav. After pronouncement in SC No.78/2002, this case was transferred by the District and Sessions Judge and registered as SC Case No.76/08.

57. After hearing the appellant Sukhdev @ Pehalwan on charge, by an order dated 13th April, 2006, it was directed that charges under Section 364/302/201 read with Section 34 of the IPC be framed against him. Accordingly, the following charge was framed against Sukhdev @ Pehalwan-

> —I, Ravinder Kaur, Additional Sessions Judge, New Delhi do hereby charge you Sukhdev @ Pehlwan as follows:
>
> Firstly, that you alongwith co-accused Vikas Yadav and Vishal Yadav kidnapped Nitish Katara from Diamond Palace, Shashtri Nagar within the jurisdiction of PS Kavi Nagar, Ghaziabad on the night of 16th and 17th Feb. 2002 at about 12:30 (midnight) with the intention to murder and thereby you committed offence punishable U/s 364 r/w Sec.34 IPC and within my cognizance.
>
> Secondly, that you alongwith co-accused Vikas Yadav and Vishal Yadav after kidnapping Nitish Katara, killed him, with intention to kill him on 17/2/02 at a place around or near Khurja, Bulandshahr or Khurja Pahasu Road, UP and thereby you both committed offence punishable U/s 302 r/w Sec.34 IPC and within my cognizance.
>
> Thirdly, that after murdering Nitish Katara, you alongwith co-accused Vikash Yadav and Vishal Yadav removed all signs of identification including cloths from his body and poured inflammable material on his body and burnt his body on the abovesaid Khurja Pahasu Road and caused evidence of murder disappear with the intention of screening yourself and your co-accused from legal punishable and thereby committed an offence U/s 201 IPC and within my cognizance.

I hereby direct that you be tried by this court for the above mentioned offences.‖ As he pleaded not guilty, he was put to trial on the said charges.

58. Sukhdev @ Pehalwan assailed the order directing framing of the charge as well as charge by way of Crl.Rev.No.275/2006 which was dismissed by an order passed on 26th April, 2007.

59. It is noteworthy that in the meantime, the two trials were being conducted on the same date. The record reflects that the common order-sheet was recorded on each date which included the presence of all the appellants as well as their respective counsels. The case of State v. Vikas Yadav & Ors. was treated as the main case.

60. Recording of evidence in Vikas and Vishal Yadav's matter was completed and finally the judgment came to be passed on the 28th of May 2008, Sukhdev @ Pehalwan's case was transferred for completion of trial by an order dated 25 th July, 2008 of the District Judge. The remaining prosecution evidence and the defence evidence was completed and finally judgment was rendered on 6th July, 2011.

61. During this trial, the prosecution examined 23 witnesses most of whom had been examined during the trial of Vikas and Vishal Yadav. Some of the witnesses examined during the previous trial were either not relevant for this trial given the allegations against Sukhdev Yadav or were given up as having been won over. On 6th July, 2007 the Special Public Prosecutor gave up Bharti Yadav and Bharat Diwakar as prosecution witnesses. Thereafter on 10th July, 2007 the prosecution similarly gave up Gaurav Gupta as a prosecution witness. The Special Public Prosecutor adopted the statements of Dr.Anil Singhal and Ms. Nilam Katara as well as a few other witnesses which had been made in Vikas and Vishal Yadav's case as their statements in Sukhdev @ Pehalwan 's trial with the consent of the accused who was given full opportunity to cross-examine them.

62. The incriminating circumstances which had come in the evidence against Sukhdev @ Pehalwan were put to him in his statement under Section 313 of the Cr.P.C. in which he set up a case of an absolute denial about involvement in the crime. Sukhdev @ Pehalwan denied his presence at Shivani Gaur's wedding on the night of 16th February, 2002 as well as his presence in the Tata Safari vehicle in which the deceased was alleged to have been abducted and killed.

63. Sukhdev @ Pehalwan set up a defence that the police had wanted him to become a witness against Vikas and Vishal Yadav, and, upon his refusal, he was falsely implicated in the case. In support of his defence that he was at his native village on the fateful night and also thereafter, one Keshwar Singh, was examined as DW-1 who testified that from 2002 till 2005 Sukhdev @ Pehalwan was living in his native village Tanuwar, District Khushinagar, UP and that he was picked up from his house in the year 2005. Sukhdev @ Pehalwan also examined as DW-2 the Nodal Officer of the Bharti Airtel Ltd.

64. After a close examination of the entire evidence brought by the prosecution, the statement of the appellant under Section 313 of the Cr.P.C. as well as the defence evidence, the learned Trial Judge has passed a considered judgment dated 6th July, 2011 finding Sukhdev Yadav @ Pehalwan guilty of commission of the offence under Section 364/302/201 read with Section 34 of the IPC. The learned Trial Judge considered the order on sentence separately and by an order dated 10th July, 2011 awarded the sentence of imprisonment of different periods and fines which shall be considered separately.

Present appeals

65. As noted above, Vishal Yadav has challenged his conviction by the judgment dated 28th of May 2002 by Crl. Appeal No.741/2008 while Vikas Yadav has filed Crl. Appeal No.910/2008. Sukhdev Yadav has assailed the judgment dated 6th July, 2011 by way of Crl.Appeal No. 145/2012. The challenge rests primarily on the ground that there was no evidence at all to support the guilt of the appellant; that the prosecution had failed to establish any motive against the appellants; that there was no credible evidence of the appellants being in the company of the deceased either at the wedding, outside the venue or anywhere else in the Tata Safari vehicle. It has been contended that the evidence

led by the prosecution was shaky and not credible and that the appellant has been convicted on sheer conjectures and surmises.

66. During the course of the submissions by counsels for the three appellants, we have noted that the witnesses and entire evidence led by the prosecution in Sukhdev trial is part of Vikas and Vishal Yadav's trial. We also find that the submissions made on behalf of the three appellants over lap and their examination requires a reading of the same oral and documentary evidence as well as judicial precedents. We have therefore, heard the three appeals together and propose to decide these three appeals (Crl.Appeal No 741/2008, 910/2008, Crl.Appeal No 145/2012,) by a common judgment, of course, specifically adverting to separate grounds pressed before us on behalf of any of the appellants and also noting the manner in the evidence on a particular fact or circumstances pointed out by the parties.

67. The trial court record showed that the complainant Nilam Katara was represented throughout the two trials. She has been throughout appearing in the appeals as well. No objection was raised by the appellants to her presence or representation on her behalf before us. We also find it in the interest of justice to permit her to be represented in the court and assist us in the hearing of the present appeals. We have consequently heard the submissions on behalf of the complainant as well.

68. For the purposes of convenience, we propose to consider the above challenge made by Sukhdev @ Pehalwan to his conviction under the common heads with the submissions made on behalf of the Vikas and Vishal Yadav inasmuch as the prosecution is relying on the evidence of the same witnesses in both trials.

69. Inasmuch as many of the witnesses examined during the trial of Vikas and Vishal Yadav, were also examined during Sukhdev @ Pehalwan's trial, so as to give a complete overview, we are hereunder extracting the particulars of the prosecution witnesses in the two trials hereunder:-

Name of Witness (Sh./Smt./Ms.)	PW in Vikas and Vishal Yadav	PW in Sukhdev @ Pehalwan	Remarks
HC Nem Pal Singh	1		Duty officer who recorded the FIR No.
Chet Ram	2	16	Finger Print expert
Dr.Anil Singhal	3	18	Post-mortem and cause of death
Insp. Chander Pal Singh	4		Khurja police - recovery of dead body
Ct. Mudassar Khan	5		Khurja police - recovery of dead body
Smt.Archana Sharma	6	4	Photographer
Ram Lakhan Singh	7		TIP of wrist watch
Dr. T.D. Dogra AIIMS	8	17	Under his supervision the blood samples for DNA test taken from dead body.
STA from Registrar of			Proved that Shri D.P. Yadav was a Director

Companies, Punjab, Himachal and Chandigarh.			in Oswal Sugar Ltd.
Dr.Sanjeev Lalwani	10	15	Collected blood samples for DNA from dead body.
Shivani Gaur	11		Friend of deceased
Kulwant Kaur	12		Proved that Tata Safari PB-07-H-0085 stood registered in the name of Oswal Sugar Ltd.
Bhagwan B. Mathur	13		Proved that Nitish Katara, Bharti Yadav, Shivani Gaur, Bharat Diwakar and Gaurav Gupta were students at IMT Ghaziabad.
Sandeep Goel	14	2	Owner of Diamond Palace Banquet Hall
Vijay Kumar	15	5	Photographer
Ved Pal Yadav	16		Owner taxi hired by Nitish on 16th February, 2002
Ramesh Chand Makholia	17	13	Sub Insp. who collected the samples for DNA from AIIMS on 25.02.2002
Hemant Narainan	18		Proved passengers flight manifest dated 24th August, 2000 to Mumbai of Flt.No.9W332
Jai Prakash Pandey	19		Security Guard at Diamond Palace Banquet Hall
Yashoman Tomar	20	1	Friend of deceased
Deepak Gupta	21		Nodal Officer, Hutchisson Essar Telecom Ltd. Proved call records of phone of Matrix, Kunal, Vijay, Yashoman Tomar and Matrix Renteten
R.K. Singh	22		Nodal Officer, Bharti Cellular Ltd.
Virender Singh	23		Proved phone numbers of Bhawna Singh and phone no.910154964
Shadi Ram	24		Taxi driver on the night of 16/17 February, 2002
Bharat Diwakar	25		Friend of deceased
Gaurav Gupta	26		Friend of deceased
Sultan	27		Employee of A.B. Coltex - to prove

			recovery of Tata Safari vehicle.
Ct. Inderjeet Singh	28	12	Part of police patrol Gypsy Chetak 13 near Banquet Hall
Ct. Brij Mohan Mishra	29		Posted at P.S. Dabra Distt. Gwalior
Nilam Katara	30	10	Mother of the deceased
Umesh Sharma	31		Guard Security agency
Satender Pal Singh	32	11	Part of police patrol Gypsy Chetak 13 near Banquet Hall
Ajay Kumar	33	14	Witness of last seen together
S.I. J.K. Gangwar	34	19	Investigating Officer
Ct. Anil Somania	35	22	Investigating Officer
Revati Lau	36		NDTV reporter
Insp. Ashok Bidharia	36		SHO P.S. Dabra, Gwalior as Town Inspector
Dr. A.K. Sharma	37		Proved DNA Test Report
Bharti Singh Yadav	38		Sister of Vikas and Vishal Yadav
Nitin Katara	39	9	Brother of deceased
Shivendra Tiwari	40		Asstt. Manager, HDFC Bank
Gulshan Arora	41		Nodal officer Hutchison Essar Telecom Ltd. who proved cell I.D. chart.
Bhawna Yadav	42		Sister of Vikas and Vishal Yadav
Shri S.P. Singh	43		Commercial Officer, BSNL, Ghaziabad. Proved phone numbers of D.P. Yadav.
Shri M.K. Katara	CW-1		Proved Shri D.P. Yadav was a Director in the Oswal Sugars Ltd.
Ajit Kumar Misra		20	S.I. (about arrest)
Umakant Pandey		21	S.I. (about arrest)

70. In their defence, Vikas and Vishal Yadav examined 26 witnesses 10 of whom were advocates. So far as Sukhdev Yadav was concerned, he examined two witnesses in his defence. We shall discuss the testimonies of these defence witnesses as we deal with the rival contentions hereafter.

71. In the first trial, out of 43 witnesses, all except for one material public witness either had to be declared hostile or were won over or influenced. And these included police personnel. Witnesses prevaricated on the same issues. Material embellishments and improvements were also on the same point. Interestingly witnesses resiled from their previous statements under Section 161 of the Cr.P.C. recorded by the Investigating Officer on identical facts - would this be called fate? Or is it too much of a coincidence?

72. The arrest of two of the appellants was clearly stage managed with a definite purpose. The third accused who was declared a proclaimed offender as he could not be traced at his known addresses, surfaced when the examination of 37 prosecution witnesses in the trial of the other two co-accused had already been completed. He made a dramatic entry and could be arrested after firing at a police patrol party!

73. Despite the investigation being conducted under judicial scrutiny of not only the Chief Judicial Magistrate, Ghaziabad but also this court in Crl.Writ No.247/2002, before us police action has been subjected to protracted objections. The trials bring to fore the manner in which well-placed accused persons are able to put pressure on the public witnesses and public prosecutors in the very capital of India, in a trial court room not even half a kilometer from this court, and barely a kilometer from the Supreme Court, as the discussion hereafter will amply demonstrate.

74. Mr. Ram Jethmalani, learned senior counsel appearing in Crl.Appeal No.741/2008, Vishal Yadav v. State has urged with all the vehemence at his command that the conviction cannot be sustained because the proceedings which ended in the verdict, cannot be called a trial in accordance with the procedure prescribed by law within the meaning of Article 21 of the Constitution of India. It is contended that the procedure prescribed in the Code of Criminal Procedure is the procedure prescribed by law within the meaning of expression in the Constitution. The contention is that the case does not disclose just an erroneous decision by the learned Trial Judge on one or more debatable point of views but is a wholesale violation of the Code of Criminal Procedure (Cr.P.C.), the Evidence Act and the elementary principle of criminal justice. Mr. Jethmalani would urge that the inevitable consequence of this submission being made good is acquittal or retrial and that the appellant Vishal Yadav is entitled to the first, failing which to the second. These overreaching submissions embrace the arguments made on behalf of the other appellants as well.

75. After giving our considered thought to the submissions and having closely examined the record, we find that some very pertinent questions arise from the record of trial court for consideration in the matter. Therefore before examining the submissions in the context of the proceedings and evidence recorded during the trial, we propose to articulate some of these questions as they are of prime importance.

76. Whether the presumption in accordance with law that a person is presumed innocent till proven guilty beyond reasonable doubt as well as the constitutional right to silence of an accused person entitles an accused person to actively engage in obstructing trial; subverting due process; suborning witnesses and leading false evidence? The question which has to be answered is as to whether an accused person can orchestrate non-existent or technical errors during trial and then assert a mistrial entitling him to an acquittal or a retrial?

77. Protracted arguments have been made and piecemeal objections pressed to specific facts in prosecution evidence before us even though there is not whit of cross examination thereon during the two trials nor were such objections urged before the trial judges. Is this legally permissible?

78. The question which bodes an immediate answer is can defence be permitted to first intimidate witnesses during trial, suggest answers to not only defence but prosecution witnesses as well, to compel contradictions and omissions on the trial court record, then to urge that there were

inconsistencies in the evidence led by the prosecution? What is the effect on the outcome of the trial of the conduct of an accused person in setting up false pleas in applications as well as in leading false defence evidence?

79. Is it permissible for accused persons to pressurize prosecutors in the case and then urge conflict and prejudice?

80. Is the precept that ―justice must not only be done but seem to be done‖ applicable only one way, that is towards the accused person? Is there no duty or responsibility of and upon the defence to ensure that the trial is fair to society, victim, complainant and, most importantly, that it is not impeded? Is it not high time that the right of a fair trial be enforced in favour of the victim as well as the witnesses in the trial and their secondary traumatization by aggressive and intimidating defence posturing prevented?

81. Can accused persons exercise control over appearance of witnesses in court, successfully ensure a witness' avoidance from testifying for over three and a half years, be permitted to urge prejudice by delays? Do such persons deserve indulgence and preferential hearings?

82. Can an accused person abscond, not for days, weeks or a few months, but for over three years and then be permitted to set up a plea or be believed that he was innocently pursuing normal pursuits at his native village, oblivious of the coercive process against him including warrants of attachment executed at his native village, announcements of rewards for information about him; public notices in print and electronic media?

83. Are accused persons not answerable for such pressure created and demands made on the already stretched police force as well as the criminal justice system? Who is to be held liable for the colossal wastage of public and judicial resources provided at public cost because the investigators were misled and protraction of the trial?

What is the impact of each, or, all of the above? These are some of the issues which also we have attempted to answer.

84. The instant case also manifests the restrictions within which many women in this country grow and survive in the Indian society. It epitomizes the limitations in choosing a life partner, even in the case of an educated, articulate young lady from a well-placed family in the National Capital Region.

Jurisdiction of the appellate court dealing with a criminal appeal

85. The right to prefer appeal against conviction by the trial court and the power of the appellate court are governed by Section 386 of the Cr.P.C. Exercising appellate jurisdiction, the High Court is fully empowered to review the entire evidence and all relevant circumstances upon which the impugned order is founded and to arrive at its own conclusion about the guilt or innocence or the accused bearing in mind that the initial presumption of innocence as well as the burden on the prosecution to prove its case beyond reasonable doubt always exists. It has been held that the appellate court's jurisdiction is co-extensive with that of the trial court in the manner of assessment, appraisal and appreciation of evidence and also to determine the disputed issues. (Ref. (1974) 4 SCC 603, Khem Karan & Ors. v. State of U.P.; (1999) 6 SCC 29, Rajan v. State of M.P.; and (1975) 3 SCC 16, Chandrakant Ganpat Soritkar v. State of Maharashtra).

86. It is trite that just as a trial court, the appellate court is duty bound to test the evidence extrinsically as well as intrinsically and to consider all circumstances thoroughly. The appellate court is permitted to substitute the finding of the trial court by its own only if it arrives at a different conclusion on re-assessment of the evidence if the conclusion of the trial court is perverse or based on no evidence. (Ref. AIR 1995 SC 2265 Lal Mandi v. State of Bengal)

87. We are bound by the above principles in consideration of the present matter.

Evaluation of evidence- proof beyond reasonable doubt

88. Before embarking on the long journey of examination and adjudication compelled by the sheer volumes of the records as well as written submissions placed before us, the lengthy oral arguments on every aspect of the trials as well as law on the issues, we would remind ourselves of the principles on which the evaluation of evidence has to be effected. The doctrine of presumption of innocence casts the burden on the prosecution to prove its case against the accused persons beyond reasonable doubt. It is trite that doubt to the guilt of the accused should be substantial and not flimsy or fanciful. This is best stated in the words of the Supreme Court in (1988) 4 SCC 302, State of U.P. v. Krishna Gopal wherein the court had observed as follows:

> —25. A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to —proof‖ is an exercise particular to each case. Referring to the interdependence of evidence and the confirmation of one piece of evidence by another a learned Author says [—The Mathematics of Proof-II‖ : Glanville Williams: Criminal Law Review, 1979, by Sweet and Maxwell, p. 340 (342)] :
>
> —The simple multiplication rule does not apply if the separate pieces of evidence are dependent. Two events are dependent when they tend to occur together, and the evidence of such events may also be said to be dependent. In a criminal case, different pieces of evidence directed to establishing that the defendant did the prohibited act with the specified state of mind are generally dependent. A juror may feel doubt whether to credit an alleged confession, and doubt whether to infer guilt from the fact that the defendant fled from justice. But since it is generally guilty rather than innocent people who make confessions, and guilty rather than innocent people who run away, the two doubts are not to be multiplied together.
>
> The one piece of evidence may confirm the other.‖ Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an over-emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused person arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case.
>
> 26. The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately, on the trained intuitions of the Judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimisation of trivialities would make a mockery of administration of criminal justice.‖

89. While examining the degree of proof in criminal cases, in (1947) 2 All E.R. 372, Miller v. Ministers of Pensions stated

- —that degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail

to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence ―of course, it is possible but not in the least probable,‖ the case is proved beyond reasonable doubt...‖ All that the principle enjoins is a reasonable skepticism, not an obdurate persistence in disbelief. It does not demand from the judge a resolute and impenetrable incredulity. He is never required to close his mind to the truth.

90. In (1990) 1 SCC 445, Gurbachan Singh v. Satpal Singh, the Supreme Court quoted observations of Lord Denning in Bater v. Bater in (1950) 2 All.E.R. 458 that the standard adopted by the prudent man would vary from case to case, circumstances to circumstances. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicions or thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice, according to law.

91. When would it be held that prosecution had failed to establish its case beyond reasonable doubts entitling accused to benefit of doubt?

In (1990) 3 SCC 190, Vijayee Singh v. State of U.P., the court quoted Lord Denning and Lord Du Paraq, J. on the concept of the benefit of reasonable doubt in para which is reproduced below:

> ―30. Lord Denning, J. in Miller v. Minister of Pensions [(1947) 2 All ER 372, 373 H] while examining the degree of proof required in criminal cases stated:
>
> ―That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence ―of course, it is possible but not in the least probable,‖ the case is proved beyond reasonable doubt....‖ Regarding the concept of benefit of reasonable doubt Lord Du Paraq, J. in another context observed thus:
>
> ―All that the principle enjoins is a reasonable scepticism, not an obdurate persistence in disbelief. It does not demand from the judge a resolute and impenetrable incredulity. He is never required to close his mind to the truth.‖
>
> 92. The expressions ―proof beyond reasonable doubt‖ and entitlement of an accused person to ―benefit of doubt‖ are regularly used by us. But what are their contours? A very valuable discussion on this issue is to be found in the judgment authored by O. Chinnappa Reddy, J. in (1979) 1 SCC 355 K. Gopal Reddy v. State of AP wherein reiterating the fundamental principle of criminal jurisprudence that the accused is entitled to the benefit of any reasonable doubt, the court placing reliance on the afore noticed enunciation by Lord Denning in Miller (Supra), elaborated the principles thus:
>
> ―9. ...To entitle an accused person to the benefit of a doubt arising from the possibility of a duality of views, the possible view in favour of the accused must be as nearly reasonably probable as that against him. If the preponderance of probability is all one way, a bare possibility of another view will not entitle the accused to claim the benefit of any doubt. It is, therefore, essential that any view of the evidence in favour of the accused must be reasonable even as any doubt, the benefit of which an accused person may claim, must be reasonable. ―A reasonable doubt‖, it has been remarked, ―does not mean some light, airy, insubstantial doubt that may flit through the minds of any of us about almost anything at some time or other; it does not mean a doubt begotten by sympathy out of reluctance to

convict; it means a real doubt, a doubt founded upon reasons [Salmon, J. in his charge to the jury in R. v. Fantle reported in 1959 Criminal Law Review 584]...

...In Khem Karan v. State of U.P. [(1974) 4 SCC 603 : 1974 SCC (Cri) 689 : AIR 1974 SC 1567] this Court observed:

―Neither mere possibilities nor remote possibilities nor mere doubts which are not reasonable can, without danger to the administration of justice, be the foundation of the acquittal of an accused person, if there is otherwise fairly credible testimony.‖ (Emphasis supplied)

93. The Supreme Court has stated that the efforts by the criminal court should not be to prowl for imaginative doubts. Unless the doubt is of a reasonable dimension which a judicially conscientious mind entertains with some objectivity, no benefit can be claimed by the accused. [(1999) 3 SCC 507, State of Rajasthan v. Teja Ram.]

94. The caution articulated by the Supreme Court in (2002) 5 SCC 234, Devender Pal Singh v. State of NCT of Delhi also emphasises that perfection in a case may not be natural when it stated thus:

―53. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicions and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let a hundred guilty escape than punish an innocent.

Letting the guilty escape is not doing justice according to law. (See Gurbachan Singh v. Satpal Singh [(1990) 1 SCC 445 : 1990 SCC (Cri) 151 : AIR 1990 SC 209] .) Prosecution is not required to meet any and every hypothesis put forward by the accused.

(See State of U.P. v. Ashok Kumar Srivastava [(1992) 2 SCC 86 : 1992 SCC (Cri) 241 : AIR 1992 SC 840] .)

54. If a case is proved perfectly, it is argued that it is artificial; if a case has some flaws, inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish. [See Inder Singh v. State (Delhi Admn.) [(1978) 4 SCC 161 : 1978 SCC (Cri) 564 : AIR 1978 SC 1091] .] Vague hunches cannot take the place of judicial evaluation.

―A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. ... Both are public duties....‖ (Per Viscount Simon in Stirland v. Director of Public Prosecution [1944 AC 315 : (1944) 2 All ER 13 : 113 LJKB 394] quoted in State of U.P. v. Anil Singh [1988 Supp SCC 686 : 1989 SCC (Cri) 48 : AIR 1988 SC 1998] , SCC p. 692, para 17.)‖

95. In (1978) 4 SCC 161, Inder Singh & Anr. v. State (Delhi Administration) V.R. Krishna Iyer, J. wrote that ―credibility of testimony, oral and circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny... Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human processes. Judicial quest for perfect proof often accounts for police presentation of fool-proof concoction. Why fake up? Because the court asks for manufacture to make truth look? No, we must be realistic.‖

96. It is trite that accused persons are entitled to get benefit of doubt only when the prosecution fails to prove its case. The proof beyond reasonable doubt is a guiding factor and not an absolute rule. The

evidence in the present case has to be scrutinized on these principles.

Given the magnitude of the challenge, we have divided our consideration under the following headings:

I What was the motive behind the offence?

(paras 97-497) II Disclosures made by Vikas and Vishal Yadav on the 25th of February, 2002 to the Investigating Officer - whether believable?

(paras 498-603) III Recovery of hammer and wrist watch on the 28th of February 2002 (paras 604-705) IV Recovery of Tata Safari vehicle (paras 776-828) V Whether the Esprit watch recovered pursuant to the disclosure by Vishal Yadav belonged to Nitish Katara? (paras 829-853) VI Whether the recovered hammer was the weapon of offence? (paras 854-957) VII Whether Nitish Katara was last seen alive in the company of the appellants? (paras 958-1083) VIII Last seen at the Hapur Chungi - evidence of Ajay Kumar Katara, a chance witness (paras 1084-1312) IX Pinpointing the time of death and its proximity to the timing of the deceased being last seen alive with the accused (paras 1313-1342) X Challenge to the identity of the recovered dead body by Sukhdev @ Pehalwan in Criminal Appeal No.145/2012 (paras 1343-1367) XI Reversal of burden of proof (paras 1368-1395) XII Whether the appellants absconded after the crime - if so, effect thereof? (paras 1396-1430) XIII Whether defence evidence to prove alibi to displace the evidence of last seen and explain period of abscondance is believable?

(paras 1431-1567) XIV Arrest of Vikas and Vishal Yadav at Dabra, District Gwalior on the 23rd of February, 2002 (paras 1568-1581) XV Abscondance of Sukhdev Yadav @ Pehalwan and his arrest on 23rd February, 2005 (paras 1582-1604) XVI What is the legal impact of this abscondance?

(paras 1605-1613) XVII Falsity of the defence plea - effect (paras 1614-1623) XVIII Vikas Yadav's interview with the press -

whether admissible in evidence?

(paras 1624-1643) XIX Abduction and defect in framing charge (paras 1644-1708) XX Failure to put incriminating circumstances under Section 313 (paras 1709-1728) XXI The Prosecution Failed to Produce Unimpeachable Evidence of the Innocence of Vishal Yadav- Failure to Examine Kamal Kishore - Effect (paras 1729-1784) XXII Did the appellants share common intention of committing the offences? (paras 1785-1838) XXIII Ajay Kumar Katara stands discredited in a sting operation conducted on him (paras 1839-1869) XXIV Defects in investigation if any and impact thereof? Role of courts where investigation is tardy (paras 1870-1911) XXV W.P.(Crl.)No.247/2002 decided on 14th October, 2003 (paras) [(2003) ILR 2 Delhi 377] (paras 1912-1916) XXVI Conduct of accused persons (paras 1917-2005) XXVII Principles governing probative value of circumstantial evidence (paras 2006-2011) XXVIII Nitish Katara's murder - an ―honour‖ killing?

(paras 2012-2026) We now propose to discuss the above issues in seriatim:

I What was the motive behind the offence?

The discussion on this subject is being considered under the following sub-headings:

(i) Submissions of the appellants

(ii) Judicial precedents

(iii) Prosecution evidence on motive

(a) Vikas Yadav is the brother of Bharti Yadav and Bhawna Yadav and they are the children of Shri D.P. Yadav. Vishal Yadav is their first cousin (son of Shri D.P. Yadav‟s sister „Bua‟) Sukhdev @ Pehalwan was employed at their liquor business in Bulandshahr at the relevant fact

(b) & Nitish Katara, Bharti, PW 26 Gaurav Gupta, PW 25

(c) Bharat Diwakar, PW 11 Shivani Gaur studied at the IMT, Ghaziabad

(d) The involvement of deceased Nitish Katara and Bharti Yadav in an intimate romantic relationship and that they were contemplating a permanent life long relationship culminating in marriage

(e) The relationship between Bharti and Nitish Katara was disapproved by Vikas Yadav and Vishal Yadav

(iv) Effect of failure to cross examine a witness despite opportunity

(v) Testimony of a witness declared hostile :

evidentiary value

(vi) Knowledge of Bharti‟s family members about the relationship

(vii) The statements attributed to Nitish Katara by PW-

30 Nilam Katara and PW-39 Nitin Katara are admissible under section 32(1) of the Indian Evidence Act

(viii) Testimony of Nilam Katara - whether unreliable?

What constitutes „contradictions‟, „improvements‟ and „significant omissions‟?

(ix) Conduct of Bharti Yadav on the 17th of February, 2002 and thereafter; her reactions, and utterances to Nilam Katara and Nitin Katara; conversations with Bharat Diwakar after Nitish Katara had been abducted and prior to anyone learning that he had been murdered

(x) Regarding involvement of Vikas and Vishal Yadav -

Spontaneous utterances by Bharti Yadav during the continuation of the transaction are admissible under Section 6 of the Evidence Act

(xi) E-mails sent by Bharti Yadav to Nitin Katara after the 17th of February, 2002

(xii) Bharti Yadav‟s statement under Section 161 of the Cr.P.C.

97. So far as motive for commission of the offence is concerned, the prosecution placed a definite case before the trial courts. The prosecution led evidence to the effect that Bharti Yadav (daughter of Shri D.P. Yadav) was romantically involved with the deceased Nitish Katara so much so that they were looking towards establishing permanency in their relationship.

98. Vikas Yadav son of Shri D.P. Yadav is Bharti's brother.

Vishal Yadav is the son of Bharti's _bua' (father's sister) and therefore a first cousin. As socially accepted, a cousin brother especially one who is as close as Vishal was to Vikas Yadav, is commonly referred to and treated as a brother.

99. The involvement between Bharti and Nitish Katara was not acceptable to the family members of Bharti Yadav. Her brothers Vishal and Vikas Yadav were averse to the same.

100. Sukhdev @ Pehalwan was an employee of the family of Shri D.P. Yadav at their liquor vend in Bulandshahr and used to roam around with Vikas Yadav, indicating close association certainly more than that a mere employee sharing of motive is to be inferred from these incriminating circumstances. Therefore, Vikas Yadav, Vishal Yadav and Sukhdev @ Pehalwan abducted Nitish Katara and murdered him in a pre-meditated manner driven by this specific motive.

(i) Submissions of the appellants

101. The appellants took the defence that they did not even know Nitish Katara and completely denied existence of any relationship between Bharti and Nitish Katara. It was the defence plea that even if such relationship existed, they were completely ignorant about the same. The brothers, Vikas and Vishal Yadav took the position that they could not have opposed the relationship if they had no knowledge about it.

102. Mr. U.R. Lalit, learned senior counsel appearing for Vikas Yadav has contended that there is no evidence at all to suggest that the appellants nurtured any motive which could lead them to the commission of the crime. As per learned senior counsel, the prosecution had failed to lead any evidence that the accused persons knew the deceased at all. The prosecution had also failed to lead any evidence of the relationship between Nitish Katara and Bharti Yadav or their marriage being discussed in the family or that any of the accused persons had knowledge of any love affair between Bharti Yadav and Nitish Katara. It is contended that the learned trial judge has erred in placing reliance on the letter Exh. PW-30/C-1 and Exh. PW-30/C-4 to hold that the same established any motive on the part of accused persons. Mr. Lalit would submit that the letter at best shows that Bharti Yadav was in love with Nitish Katara. The submission is that the words ―sab samjhate hain darate hain‖ in the letter does not mean that anybody was threatening Bharti Yadav. Learned senior counsel would contend that there is no evidence at all that the family of Bharti Yadav was opposed to their relationship or alliance. It is submitted that the maintenance of the bank account by Bharti Yadav at the address of Nitish Katara is of no consequence. There is no evidence to show that the accused persons had any knowledge about it. It only shows that Bharti kept the same secret for some good reason of her own. Learned senior counsel would question that if Vikas Yadav did not even have knowledge of the affair between Bharti and Nitish Katara, where is the question of his opposition to the same?

103. Learned senior counsel has drawn our attention to the observations of the trial court in para CXXVIII of the judgment where the judge has noticed that Vikas Yadav though present in the lockup, chose not to appear in the court on the dates when Bharti Yadav had testified. It is also contended that the entire case of motive is based on inadmissible hearsay statements attributed to the deceased by his mother PW-30 Nilam Katara and brother PW-39 Nitin Katara.

104. Mr. Ram Jethmalani, learned senior counsel appearing for Vishal Yadav has also urged that the entire evidence led by the prosecution on motive is inadmissible in law. It is urged that even though the trial court refers to the testimony of nine witnesses i.e. PW-30, 38, 39, 42, 21, 22, 34, 35 and to some extent PW-25, only the testimony of two witnesses on this aspect i.e. PW-30 Nilam Katara and PW-39 Nitin Katara requires to be seen.

105. Appearing for Vishal Yadav, Mr. Ram Jethmalani, learned senior counsel repeatedly submitted that appellant Vishal Yadav also does not challenge that there was deep intimacy between Bharti Singh

and Nitish Katara which was in the nature of a healthy love affair with the full potential of flowering into a marriage. He submits that this appellant only challenges the prosecution case that Vishal Yadav had knowledge of the marriage proposal or that he was opposed to such an alliance.

106. Mr. Jethmalani, learned senior counsel has submitted at the bar that Vishal Yadav also does not dispute the following established facts:-

(i) that the body which was recovered on 18th February, 2002 was that of Nitish Katara, son of Shri N.M. Katara and Smt. Nilam Katara;

(ii) the result of the DNA test which confirmed the identity of the body as Nitish Katara.

107. Mr. Jethmalani contends that Vishal Yadav is not the son of Shri D.P. Yadav; he belongs to a different family and that there is no evidence on record to show that Vishal Yadav nursed any animosity to an alliance between the deceased and Bharti Yadav. The contention is that the evidence led by the prosecution is grossly insufficient to prove disapproval on his part to any marriage in furtherance of the intimacy or of any motive nurtured by Vishal Yadav leading to committal of the offence of murder.

108. Learned senior counsel submits that disapproval of the marriage leading to murder must be founded on sound overt evidence which is not there in this case; that the prosecution has led no evidence of any person opposing the alliance between Bharti and Nitish Katara. The submission is that there is also no evidence that any of her parents, siblings or relatives had asked Bharti not to marry Nitish Katara. It has been urged that the motive to kill a person must be found on the individual acts of the accused persons and that in the case at hand there was no direct or indirect communication with even the deceased to stop seeing Bharti Yadav.

109. Mr. Ram Jethmalani has pressed that the evidence of PW-30 Nilam Katara to the extent that Nitish had made the statement to her that Bharti Yadav's brothers were opposed to their relationship was admissible as a fact by application of Section 60 of the Indian Evidence Act, but so far as the truthfulness of the statement is concerned, the statement was double hearsay as PW-30 had merely testified that Nitish repeated to her what Bharti Yadav had told him. It is contended that a surviving witness Bharti was available and examined by the prosecution who has not supported the prosecution. Therefore, the contents of the statement attributed to Nitish are inadmissible. Learned senior counsel has also drawn our attention to question nos. 11, 12 and 13 put to Vishal Yadav under Section 313 of the Cr.P.C. in this regard.

110. It is urged by Mr. Jethmalani that PW-30 never told the police that Nitish Katara had made the statement which she has attributed to him in court. It is submitted that even in the complaint lodged on 17th February, 2002, PW-30 Nilam Katara has merely used the word ―possibly‖ (_sambhavtah') supporting the defence that Vishal Yadav had no opposition to the friendship of Nitish and Bharti. Learned senior counsel has contended that the case of the prosecution is that only Vishal Yadav took Nitish out whereas in Exh.PW 1/A, PW-30 had stated that both Vikas and Vishal Yadav took him out.

111. Mr.Ravinder Kumar Kapoor, Advocate for Sukhdev Yadav in Criminal Appeal No. 145/2012 contends that so far as Sukhdev Yadav is concerned, it is a case of no evidence. Mr. Kapoor, learned counsel appearing for Sukhdev @ Pehalwan has contended that Sukhdev was introduced at a later stage and was not named in the complaint made by Smt. Nilam Katara on which FIR No 192/2002 was registered. Therefore, the name of Sukhdev @ Pehalwan surfaced at a late stage in the investigation. Learned counsel has urged that Sukhdev @ Pehalwan's name surfaces for the first time in the disclosure attributed to Vikas and Vishal Yadav on 25th of February, 2002; Bharti Yadav's statement under Section 161 of the Cr.P.C. recorded on 2nd of March, 2002 and the statement under Section 161 of the Cr.P.C. of Sh. Ajay Kumar recorded on 18th of March, 2002. Learned counsel submits that

Sukhdev @ Pehalwan has been implicated in the case even though there was no evidence of his being present at the Banquet Hall; or his being in the Tata Safari vehicle which is alleged to have been used in the commission of the offences and that his involvement is completely fabricated subsequently.

112. Mr. Kapoor has submitted that the prosecution has not made out any motive for commission of the offence on the part of Sukhdev Yadav.

113. In the present case, as an alternative to the above submission that there is no evidence of motive, learned senior counsels would contend that even if it could be held that motive stood established, it is urged that there is no admissible evidence of the appellants having motive to commit the offences under Sections 364, 302 and 201 of the IPC and the evidence led by the prosecution against the appellants deserves to be closely scrutinized.

114. Given the extensive submissions made by all counsels in the matter on the issue of motive, it is first necessary to consider its relevance so far as establishing the guilt of an accused person is concerned.

(ii) Judicial precedents

115. We may firstly examine the parameters laid down by judicial precedents of the importance of motive in a criminal offence; the contours within which it must be examined and the nature of the evidence required to establish it.

116. In (2000) 4 SCC 515 State of U.P. v. Babu Ram, the Supreme Court has stated that ―motive is a relevant factor in all criminal cases whether based on the testimony of eye witnesses or circumstantial evidence. The question in this regard is whether the prosecution must fail because it failed to prove the motive or whether inability to prove the motive would weaken the prosecution to any perceptible limit.‖

117. Mr. Dayan Krishnan, learned Additional Standing Counsel for the State has drawn our attention in this regard to the pronouncement of the Supreme Court reported at (2011) 3 SCC 654 Sheo Shankar Singh v. State of Jharkhand and Anr. In para 15 of this pronouncement, the Supreme Court has noticed the difference in the significance of proof of motive where prosecution is based upon circumstantial evidence and where it relies upon the testimony of eye witnesses in following terms:

> ―15. The legal position regarding proof of motive as an essential requirement for bringing home the guilt of the accused is fairly well settled by a long line of decisions of this Court. These decisions have made a clear distinction between cases where the prosecution relies upon circumstantial evidence on the one hand and those where it relies upon the testimony of eyewitnesses on the other. In the former category of cases proof of motive is given the importance it deserves, for proof of a motive itself constitutes a link in the chain of circumstances upon which the prosecution may rely. Proof of motive, however, recedes into the background in cases where the prosecution relies upon an eyewitness account of the occurrence. That is because if the court upon a proper appraisal of the deposition of the eyewitnesses comes to the conclusion that the version given by them is credible, absence of evidence to prove the motive is rendered inconsequential. Conversely, even if the prosecution succeeds in establishing a strong motive for the commission of the offence, but the evidence of the eyewitnesses is found unreliable or unworthy of credit, existence of a motive does not by itself provide a safe basis for convicting the accused. That does not, however, mean that proof of motive even in a case which rests on an eyewitness account does not lend strength to the prosecution case or fortify the court in its ultimate conclusion. Proof of motive in such a situation certainly helps the prosecution and supports the eyewitnesses. See Shivaji Genu Mohite v. State of Maharashtra [(1973) 3 SCC 219 : 1973

SCC (Cri) 214] , Hari Shanker v. State of U.P. [(1996) 9 SCC 40 : 1996 SCC (Cri) 913] and State of U.P. v. Kishanpal [(2008) 16 SCC 73 : (2010) 4 SCC (Cri) 182]‖ .

(Emphasis supplied)

118. Mr. Dayan Krishnan, learned additional standing counsel for the State and Mr. P.K. Dey appearing for the complainant have also placed reliance on the pronouncement of the Supreme Court in (2010) 9 SCC 747, Santosh Kumar Singh v. State through CBI with regard to the importance of the existence of motive in a case resting on circumstantial evidence. In Santosh Kumar Singh (supra), the Supreme Court had agreed with the petitioner's contention that though motive alone cannot form the basis of the conviction "but in the light of other circumstances, the motive goes a long way in forging the links in the chain‖.

119. On the aspect of importance of motive in a case of circumstantial evidence, the judgment of the Supreme Court in (2011) 12 SCC 554, Amitava Banerjee v. State of West Bengal also sheds valuable light. The legal position as laid down by Wills in his book _Circumstantial Evidence' and in prior judicial pronouncements was relied upon by the court which may usefully be extracted and reads as follows:

—41. Motive for the commission of an offence no doubt assumes greater importance in cases resting on circumstantial evidence than those in which direct evidence regarding commission of the offence is available. And yet failure to prove motive in cases resting on circumstantial evidence is not fatal by itself. All that the absence of motive for the commission of the offence results in is that the court shall have to be more careful and circumspect in scrutinizing the evidence to ensure that suspicion does not take the place of proof while finding the accused guilty.

42. Absence of motive in a case depending entirely on circumstantial evidence is a factor that shall no doubt weigh in favour of the accused, but what the courts need to remember is that motive is a matter which is primarily known to the accused and which the prosecution may at times find difficult to explain or establish by substantive evidence.

43. Human nature being what it is, it is often difficult to fathom the real motivation behind the commission of a crime. And yet experience about human nature, human conduct and the frailties of human mind has shown that inducements to crime have veered around to what Wills has in his book Circumstantial Evidence said:

—The common inducements to crime are the desires of revenging some real or fancied wrong; of getting rid of rival or an obnoxious connection; of escaping from the pressure of pecuniary or other obligation or burden of obtaining plunder or other coveted object; or preserving reputation, either that of general character or the conventional reputation or profession or sex; or gratifying some other selfish or malignant passion.

44. The legal position as to the significance of motive and effect of its absence in a given case is fairly well settled by the decisions of this Court to which we need not refer in detail to avoid burdening this judgment unnecessarily. See Dhananjoy Chatterjee v. State of W.B. (1994) 2 SCC 220, Surinder Pal Jain v. Delhi Admn. 1993 Supp. (3) SCC 91, Tarseem Kumar v. Delhi Admn. 1994 Supp. (3) SCC 367, Jagdish v. State of M.P. (2009) 9 SCC 495, Mulakh Raj and Ors. v. Satish Kumar and Ors. (1992) 3 SCC 43."

(Emphasis supplied)

120. Reliance has also been placed on 2011 (5) AD (Delhi) 351, Anil Kumar v. State wherein it was held as follows: -

—50. It has been urged by the learned Amicus Curiae that where the case depends solely on circumstantial evidence, it is essential for the prosecution to prove motive for commission of the crime. This is true that the present case is based solely on circumstantial evidence and the prosecution has not come out with any motive for the Appellant to have committed the murder of his Mami. But there is always motive for commission of any crime. The Courts look for some motive in circumstantial evidence because it provides an additional link, to the Court that it is the accused who has committed the crime.‖ (Underlining by us)

121. Before us, it has been argued by Mr. Ram Jethmalani, ld.

senior counsel that motive does not supply a link in the chain of incriminating circumstances, but it only makes assurance doubly sure. In this regard, reference was made to the pronouncement of the Supreme Court on the rule of motive in a case of circumstantial evidence in the judgment reported at (1972) 4 SCC 142 Udaipal Singh v. State of U.P. wherein it has been held as follows:-

—11. Now, from the very nature of things apart from the inmates of the house there could be no eye witness of the occurrence of this case and the prosecution had, therefore, necessarily to rely on circumstantial evidence only. In cases where only circumstantial evidence is available at the outset one normally starts looking for the motive and the opportunity to commit the crime. If the evidence shows that the accused having a strong enough motive had the opportunity of committing the crime and the established circumstances on the record considered along with the explanation- if any- of the accused, exclude the reasonable possibility of anyone else being the real culprit then the chain of evidence can be considered to be complete as to show that within all human probability the crime must have been committed by the accused. He may, in that event, safely be held guilty on such circumstantial evidence...‖ (Underlining by us)

122. Mr. Ram Jethmalani, learned senior counsel has urged at some length that it is not sufficient merely to establish existence of a motive. The prosecution has to establish that the motive was of such magnitude as to incite or motivate a person to commit murder. The following observations of the Supreme Court in (1999) 4 SCC 370 State of H.P. v. Jeet Singh are material and a complete answer to this untenable proposition advanced on behalf of the appellant:

—33. No doubt it is a sound principle to remember that every criminal act was done with a motive but its corollary is not that no criminal offence would have been committed if the prosecution has failed to prove the precise motive of the accused to commit it. When the prosecution succeeded in showing the possibility of some ire for the accused towards the victim, the inability to further put on record the manner in which such ire would have swelled up in the mind of the offender to such a degree as to impel him to commit the offence cannot be construed as a fatal weakness of the prosecution. It is almost an impossibility for the prosecution to unravel the full dimension of the mental disposition of an offender towards the person whom he offended...‖ (Emphasis supplied)

123. Mr. P.K. Dey, ld. counsel for the complainant has placed reliance on the pronouncement of the Supreme Court reported at (1998) 9 SCC 238 Nathuni Yadav v. State of Bihar wherein the court held thus:

—16. ...The mere fact that motive alleged by the prosecution is not strong enough for others to develop such a degree of grudge would not mean that the assailants had no serious reasons to do this.

17. Motive for doing a criminal act is generally a difficult area for prosecution. One cannot normally see into the mind of another. Motive is the emotion which impels a man to do a particular act. Such impelling cause need not necessarily be proportionally grave to do grave crimes. Many a murders have been committed without any known or prominent motive. It is quite possible that the aforesaid impelling factor would remain undiscoverable. Lord Chief Justice Champbell struck a note of caution in R. v. Palmer (Shorthand Report at p. 308 CCC May 1856; thus:

―But if there be any motive which can be assigned, I am bound to tell you that the adequacy of that motive is of little importance. We know, from experience of criminal courts that atrocious crimes of this sort have been committed from very slight motives; not merely from malice and revenge, but to gain a small pecuniary advantage, and to drive off for a time pressing difficulties.‖ Though, it is a sound proposition that every criminal act is done with a motive, it is unsound to suggest that no such criminal act can be presumed unless motive is proved. After all motive is a psychological phenomenon. Mere fact that prosecution failed to translate that mental disposition of the accused into evidence does not mean that no such mental condition existed in the mind of the assailant. In Atley v.

State of U.P. AIR 1955 SC 807 : it was held ―that is true, and where there is clear proof of motive for the crime, that lends additional support to the finding of the court that the accused was guilty but absence of clear proof of motive does not necessarily lead to the contrary conclusion.‖ In some cases, it may not be difficult to establish motive through direct evidence. While in some other cases inferences from circumstances may help in discerning the mental propensity of the person concerned. There may also be cases in which it is not possible to disinter the mental transaction of the accused which would have impelled him to act. No proof can be expected in all cases as to how the mind of the accused worked in a particular situation. Sometimes, it may appear that the motive established is a weak one. That by itself is insufficient to lead to any inference adverse to the prosecution.‖ (Emphasis by us)

124. In AIR 2005 SC 418, Ranganayaki v. State by Inspector of Police, relied upon by Mr. Jethmalani, the Supreme Court reiterated the principle laid down in Nathuni Yadav (supra).

125. It thus stands considered, observed and held in authoritative judicial precedents that the extent or death of feeling magnitude; weakness or strength; reasonableness or unreasonable of motive does not have a bearing on the existence or impact of the mental condition of the person accused for commission of the offence. The submission of ld. senior counsel therefore that the motive propounded by the prosecution was insufficient to impel or instigate the appellants has no factual or legal basis.

126. We may also examine the principles which would apply when the prosecution failed to adequately establish motive or when evidence of motive for the offence is absent. It is urged before us by the State that even if motive is not established in cases based on circumstantial evidence, conviction is possible. In this regard reference has been made to the pronouncement of the Supreme Court in (1992) 3 SCC 43, Mulakh Raj v. Satish Kumar. It was argued before the Supreme Court that the case was based on circumstantial evidence and motive being absent, the prosecution had failed to establish the important link in the chain of circumstances to connect the accused. This contention was rejected by the Supreme Court observing as follows:

―17. ...We find no force in the contention. Undoubtedly in cases of circumstantial evidences motive bears important significance. Motive always locks up in the mind of the accused and some time it is difficult to unlock. People do not act wholly without motive. The failure to discover the motive of an offence does not signify its non existence. The

> failure to prove motive is not fatal as a matter of law. Proof of motive is never an indispensable for conviction. When facts are clear it is immaterial that no motive has been proved. Therefore, absence of proof of motive does not break the link in the chain of circumstances connecting the accused with the crime, nor militates against the prosecution case...‖ (Underlining by us)

127. The above principle stands reiterated by the Supreme Court in its later judgments reported at (2006) 11 SCC 323 Bhimappa Chandappa Hosmani and Ors. v. State of Karnataka; (2006) 10 SCALE 369 Yuvaraj Ambar Mohite v. State of Maharashtra).

128. Mr. Jethmalani has referred to the precedent reported at (2006) 12 SCC 512, Raj Amber Mohite v. State of Maharashtra (para 34) which has also been relied upon by the trial court. This judgment notices that the circumstances brought on record by the prosecution clearly demonstrated that it was the appellant alone who committed the murder. In this view of the matter, absence of motive was held to be immaterial. In so holding the court placed reliance on the earlier pronouncement reported at (2002) 7 SCC 157: 2002 SCC Crl.1637, Mani Kumar Thapa v. State of Sikkim. No absolute proposition of law that if motive is absent, a person cannot be convicted has been laid down herein.

129. We shall consider the submission as we examine the grounds on which the appellants challenge the prosecution evidence.

130. On this issue, in AIR 1955 SC 807, Atley v. State of Uttar Pradesh, in para 6, the Supreme Court had held as follows: -

> ―6. ...That is true; and where there is clear proof of motive for the crime, that lends additional support to the finding of the court that the accused was guilty but the absence of clear proof of motive does not necessarily lead to the contrary conclusion. If the prosecution had proved by clear evidence that the appellant had reasons of his own for getting his first wife out of the way, that would have lent additional assurance to the circumstantial evidence pointing to his guilt. But the fact that the prosecution has failed to lead such evidence has this effect only, that the other evidence bearing on the guilt of the accused has to be very closely examined...‖ (Underlining by us)

131. The above observations of the Supreme Court thus do not militate against the well settled principles on the importance of motive in a case of circumstantial evidence. The Supreme Court has declared the legal position that while proof of motive lends support to the finding of the guilt, its absence does not establish innocence. Absent evidence of motive, the prosecution evidence has to be strictly examined.

132. It therefore needs no further elaboration that motive is an important link in a case resting on circumstantial evidence. It is well near impossible for the prosecution to lead evidence on the full extent of the mental condition of the accused persons towards the deceased. Law does not require the prosecution to establish such brimming ill will as would motivate a person to kill before the existence of motive could be accepted as a circumstance in the chain of circumstantial evidence to establish a charge of murder. Failure to lead evidence that the person accused was nurturing such vengeance or evidence as would naturally lead him to commit the offence would not by itself defeat the prosecution.

(iii) Prosecution evidence on motive

133. Let us now examine the prosecution submissions to establish motive. It is urged by Mr. Dayan Krishnan, ld. Additional Standing Counsel for the State that the following facts and circumstances stand proved on record before this court: -

 Vikas Yadav is the brother of Bharti Yadav and Bhawna Yadav and they are the children of Shri D.P. Yadav. Vishal Yadav is their first cousin (son of Shri D.P. Yadav's sister _Bua') Sukhdev @ Pehalwan was employed at their liquor business in Bulandshahr at the relevant fact.

 Nitish Katara, Bharti, Gaurav Gupta and Bharat Diwakar pursued the MBA course together at IMT, Ghaziabad between 1998 and 2000 and therefore knew each other.

 Shivani Gaur had gone to school with Bharti. She was pursuing the Executive MBA course at IMT, Ghaziabad and so knew Bharti's MBA friends.

 Nitish Katara and Bharti were involved in an intimate romantic relationship and that they were contemplating a lifelong relationship, even culminating in marriage.

 The relationship between Bharti and Nitish Katara was disapproved by Vikas Yadav and Vishal Yadav.

 Conduct of Bharti Yadav on the 17th of February, 2002 and thereafter; her reactions, and utterances to Nilam Katara and Nitin Katara; conversations with Bharat Diwakar after Nitish Katara had been abducted and prior to anyone learning that he had been murdered.

 Regarding involvement of Vikas and Vishal Yadav - Spontaneous utterances by Bharti Yadav during the continuation of the transaction are admissible under Section 6 of the Evidence Act.

134. Mr. Krishnan submits that the above facts and circumstances stand established by credible evidence and prove that the appellants had and shared the motive to commit the offence. Mr. P.K. Dey, learned counsel for the complainant Nilam Katara has supported the State in the submission.

135. In the trial of Vikas and Vishal Yadav, the prosecution has examined six witnesses to establish motive which included PW-18 Hemant Narainan - Sr. Executive Jet Airways; PW- 30 Nilam Katara; PW-38 Bharti Singh; PW-39 Nitin Katara; PW-40 Shivendera Tiwari - Asstt. Manager HDFC Bank; and PW-42 Bhawna Yadav

136. We may now examine the evidence to establish the above facts and circumstances listed by Mr. Krishnan noticed hereinabove in seriatim.

(i) Vikas Yadav is the brother of Bharti Yadav and Bhawna Yadav and they are the children of Shri D.P. Yadav. Vishal Yadav is their first cousin (son of Shri D.P. Yadav‟s sister „Bua‟) Sukhdev @ Pehalwan was employed at their liquor business in Bulandshahr at the relevant fact. These facts in evidence are not disputed by the appellants.

(ii)&(iii)Nitish Katara, Bharti, PW 26 Gaurav Gupta, PW 25 Bharat Diwakar, PW 11 Shivani Gaur studied at the IMT, Ghaziabad.

137. The prosecution examined Shri Bhagwan B. Mathur (PW-

> 13) who was an Executive Coordinator at the IMT, Ghaziabad who proved Exh.PW-13/1 to PW-13/5. He has established that Nitish Katara, Bharti Singh, Bharat Diwakar and Gaurav Gupta had pursued the full time PGDBM Course at the institute during 1998-2000 and that Shivani Gaur (a close friend of Bharti Yadav) was a student of PGDEM full time course from 1999-2000.
>
> PW-13 Shri Bhagwan B. Mathur was not cross-examined on behalf of any of the accused persons. His evidence is corroborated by the testimonies of PW-11 Shivani Gaur; PW-25 Bharat Diwakar; PW-26 Gaurav Gupta; PW-30 Nilam Katara and PW-38 Bharti Singh Yadav.

(iv) The involvement of deceased Nitish Katara and Bharti Yadav in an intimate romantic relationship and that they were contemplating a permanent life long relationship culminating in marriage

138. Mr. Ram Jethmalani, learned senior counsel for Vishal Yadav has conceded this fact, while Mr. U.R. Lalit, learned senior counsel appearing for Vikas Yadav has strongly contested existence of any romantic involvement between the two.

139. The prosecution has strongly relied upon the testimony of (PW-30 in the first trial) Nilam Katara, mother of the deceased Nitish Katara. Nilam Katara has testified that her elder son Nitish took admission in IMT Ghaziabad in the MBA Course in the year 1998 after finishing his graduation from Venkateswara College, Delhi. He completed his MBA in the year 2000 and joined as a management trainee with the Reliance General Insurance. He was confirmed as an Assistant Manager with Reliance General Insurance about one month before his death and his last office was located in the Hans Plaza, Connaught Place, New Delhi. The Connaught Place branch of the BNP Paribas Bank was in the building adjoining Nitish's office. The witness testified that Bharti Singh, Gaurav Gupta, Bharat Diwakar and Shivani were close friends of her son Nitish. The first three had also studied in the same course as Nitish in the IMT, Ghaziabad. She attributes the friendship of Nitish to Bharti to their being in the same course as well as in the same project at the IMT, Ghaziabad.

140. Nilam Katara has given an explanation for why Bharti used the last name _Singh' as well and has explained that Bharti's family consisted of her father Shri D.P. Yadav, her mother (probably Umlesh); an elder sister Bhawna Yadav, and two brothers Vikas and Kunal Yadav.

141. PW-30 further stated that after completion of the MBA Course, most of the friends of her deceased son moved out of Delhi while Nitish was compelled to stay in Delhi because of his father's health condition. Bharti also did not move or take up any job and the two became close friends. This friendship grew into a love affair and both of them used to organize get-togethers when other friends visited Delhi. The witness testified that she inferred this closeness from the increasing size of the flower bouquets being sent by Bharti, especially on Nitish's birthday in April, 2001. Nilam Katara sensed the growing intimacy from a mother's instinct as well. She states that when questioned Nitish would not give a clear answer till December, 2001.

142. The above testimony of Nilam Katara stands corroborated by the testimony of her son Nitin Katara, the younger brother of the deceased.

143. To prove the intimacy between Nitish Katara and Bharti, the prosecution has led evidence on the record on the following aspects: -

(a) Cards, notes and letters sent by Bharti to Nitish Katara as well as an album given by her on 14 th February, celebrated as Valentine‟s Day.

(b) Bharti and Nitish Katara made a day trip to Mumbai on 24th August, 2000 to celebrate her sister Bhawna Yadav‟s birthday with her fiancé Deepak Yadav.

(c) Outstation trips of Bharti and Nitish Katara to Fatehpur Sikri, Jim Corbett National Park and other places.

(d) Photographs reflecting intimacy.

(e) Bharti‟s bank account with BNP Paribas Bank, Connaught Place, New Delhi.

(f) Expensive gifts given by Bharti.

(g) Call records of phone no.9811283641 being used by

Nitish Katara and phone no. 9810038469 being used by Bharti Yadav established that they were in a relationship.

144. We may consider the evidence on record which corroborates the oral testimony of Nilam Katara PW-30 and Nitin Katara PW-39 with regard to the relationship of the deceased Nitin Katara with Bharti.

(a) Cards, notes and letters sent by Bharti to Nitish Katara

145. It stands established on record that after the PGDBM course got over, while Bharat Diwakar, Gaurav Gupta went away, Nitish Katara stayed in Delhi and also continued to remain in close proximity with Bharti Singh. As the other friends went away, Bharti and Nitish Katara became close to each other.

146. A certificate dated 27th February, 2002 (Ex.PW38/X4) issued by the Oswal Sugar Limited with its headquarters at B-14, Gulmohar Park, New Delhi is on record certifying that Bharti was working as its Manager Coordination.

147. PW-30 Nilam Katara has proved on record numerous cards and letters sent to Nitish by Bharti declaring her intense feelings for him. The witness was in a position to identify Bharti's handwriting as she also had received a number of cards from her with her handwriting and signatures. The witness gave a graphic description of the signatures and handwriting of Bharti to explain its distinctive features.

148. The witness also pointed out that the deceased Nitish was also known by the family nickname _Chimpu'. Bharti had her own nicknames for him which included _Pudda‟ etc. Nitish similarly used to call Bharti by the nick name _Ghughu' or _Chuha' because of her petite figure.

149. PW-30 had stated that she had shown all the intimate cards written by Bharti to Nitish; the album etc. to the investigating officer. However, he had chosen only two birthday cards out of the lot which were proved on record as Exh.PW -30/1 and 30/2. These cards demonstrated beyond any doubt the existence of a deeply romantic relationship between Bharti Yadav and the deceased.

150. Nilam Katara also produced and proved on record the letters and cards written by Bharti to Nitish Katara which are Ex. PW 30/C-1 to Ex.PW 30/C-79. Also included a bed sheet as Ex PW 30/C-74 and three diaries from Ex PW 30/C-70 to Ex PW 30/C-71 and Ex PW 30/C-72 and Ex PW 30/C-79 as a Valentine's Day album given by Bharti to the deceased.

151. On 14th February, 2001, celebrated as Valentine's Day, Bharti addressed a card in Hindi (Ex PW 30/C-15) to him.

152. In a card dated 17th October, 2001 (Ex PW 30/C-3), while referring to Nitish Katara being lodged in her heart, Bharti has scribed that ―you stayed for 10 months‖, thereby bearing out that the love affair commenced in January, 2001.

153. On his birthday on 20th April, 2001, Bharti has addressed thirteen birthday cards to Nitish Katara, each one making intensely passionate wishes about the two of them and declarations to him. (Ex PW 30/C-9; Ex PW 30/C-10; Ex PW 30/C-11; Ex PW 30/C-16; Ex PW 30/C-25; Ex PW 30/C-26; Ex PW 30/C-27; Ex PW 30/C-31; Ex PW 30/C-33; Ex PW 30/C-34; Ex PW 30/C-38; Ex PW 30/C-53 and Ex PW 30/C-66).

154. Two deeply romantic cards both dated 17th May, 2001 were addressed by Bharti to Nitish Katara. In the cards dated 17 th May, 2001 (Ex PW 30/C-29) it was printed that ―now that I have found

you....I want to spent my life with you‖. A large number of cards do not bear a date but reference to the date can be discerned from the nature of the card, for instance birthday cards which can relate only to the definite event.

155. Our attention has been drawn to the card which was dated 11th July, 2001 (Ex PW 30/C-4). Another card dated 17th October, 2001 (Ex PW 30/C-42) again refers to the romantic relationship between the two as well as permanency in their relationship and reads thus: -

> "[In print on the cover] "I believe (call me naive) that a lover can be a best friend. I believe in loving you for hours and days and weeks and years on end. I believe in the idea of a soul mate. I‟ll always believe (call me naïve)"
>
> [In print inside the card] And I believe because of you.
>
> [Handwritten notes in the card] "Chimpoo darling.. ...and i also believe that my best friend will always remain my best friend beside the fact that he‟s my lover too.... Coz I wud neva like to loose my best friend.... in him i found the most adorable, lovable, huggable and the most caring, concerned creature of tis planet .... So i always wan u 2 b .... Neva change from my friend to a lover (only) i wan both.... (ain‟ti selfish?) butchaltahai. 4 me seeing is believing.... So, if i c a change in u.... i l believe it..... Luv ya loads Ghughu"

156. While there is also a card dated 19th October, 2001 (Ex.PW30/C50), four cards were given by Bharti to Nitish, each dated 17th November, 2001,(Ex.PW30/C23; Ex.PW30/C43; Ex.PW30/C49 and Ex.PW30/C61)

157. Nitish Katara unfortunately was killed on the night intervening 16th - 17th February, 2002. We find on record a card dated 25th January, 2002 (Ex PW 30/C-63), barely three weeks before he was killed, wherefrom it appears that Nitish was not well and Bharti sent flowers along with this card which reads as follows: -

> "Dearest Chimpu, Take real good care of yourself....n get well real soon!! i 2 love u n miss u a lot....n also wanted 2 cum n c u....give these flowers 2 u myself but....m not sure wen next i‟ll c u....hope it‟ll b soon! Dun worry may b my normal phases....u take care of urself. Bye, love u loads, Ghugu N do let me kno afta u hav ur medicine n brfast....lunch....dinner....love u!"

158. Bharti Singh also sent a Valentine's Day card dated 14 th February, 2002 (Ex PW 30/C-21), i.e., two days before Nitish Katara was killed, to him. This card reads as follows:-

> In print on the cover:
>
> "Sometimes ...
>
> I think, that you would just as soon let things go as they are, than to open up and talk it all over - I know it‟s not really in your nature, to delve too deeply into things... maybe it‟s a little scary, but it‟s hard for me to understand us, what we‟re about and where we‟re going, if we don‟t share now we feel .....
>
> I need for us to be closer than we are - I believe we have something extra-special, but i need to know now you feel...
>
> I need you to talk to me."
>
> Handwritten:

"I LOVE U"

Happy Valentines Sweetheart ! Love u 2day n always Ghugu."

159. There are more undated cards (Ex.PW30/C30;

Ex.PW30/C42 and Ex.PW30/C65) which make unequivocal declaration of her deep love, and the desire for a permanent and life time relationship-cum-commitment.

160. An undated letter (Exh.PW-30/C-1) written by Bharti to the deceased Nitish Katara reflects her extremely agitated state of mind about the state of affairs and her regret that she could not please everyone. The relevant extracts of the letter reads as follows: -

"...Hey Chimpu, don't you think wat a jerk I m? And I completely agree with you... i m a jerk!!!! u hate my "pata naiz" and " kuch naiz". ... but they are part of me..... that is wat bharti is make up of .... very irritatin‟..... rite????now m not asking you but m damn sure and infact tellin u tht u did not just made a mistake.... u made a blunder by choosin me.....Agree!!! u cannot leave.... neither can i..... coz i love u and i love more than nebody or nething in this world....infact i consider u as my world.....

....From last 6 months m just hopin that things will change from better to gud....but u know wat they are going the opposite way..... they are turnin from bad to worse..... I cannot talk to nebody..... nobody.... u know how lonely I feel at times..... tumhe gussa aata hai tou tum phir b nikal laete ho... jaa raha hu?? kahan? Pata nai..... agar mai aisi situation may hu tou bolo mai kya karoon?

.... may b that is why i stepped into this relationship because again I was lonely and I wanted sumbody... who can understand me and keep me happy..... but i guess m always xpectin too much from u.... but i can't help it..... seriously i can't ....

Chimpu, i wanted more of u.... more of ur time..... more of ur love.... ur concern... ur attention.... everythin....mai saadi hui rahti hu.... kya karun.... Sorry ! But kuch kar nahi sakti..... har cheez is tum aadat daal loge... haina? But i don't want that.... i don't want that u sud jhelo me..... i want u to understand me and accept me.... i want to live life... and i want u live..... it seems as if u r suffocatin urself with me... u want explaination for each and everythin in life which I can't give...things mite b too certain in ur life always but they r notin my case.... things which i myself don't know how can i tell u????

small things like days plan... want m doin next etc..... and above all m really sorry i cannot cannot please everyone..... even i want a breather sumwhere..... which i always try to find in u but somehow u always get irritated n instead of feelin better i feel bad... broken !!!! I love u Chimpu I love a lot.... can't live without u... can't imagine my life without u but..... i still don't know where exactly m headin too..... and at this point of time m unable to figure out nething..... PLEASE HELP ME !. " The pressure on Bharti is obvious and her agitation is deep.

161. As per the photocopy of her passport on the record of the trial court, Bharti was born on 20th of July, 1978. After the love affair blossomed from January, 2001, Nitish had a birthday on 20th April, 2001, while Bharti's birthday fell on 20th July, 2001. It appears that the two were not able to spend this birthday together despite their wishes to be together in circumstances apparent from her letter dated 22nd July, 2001 (Exh.PW-30/C-4) addressed to Nitish Katara.

162. Mr. Dayan Krishnan has drawn our attention to this letter dated 22nd July, 2001 which was written by Bharti who had been taken away by her family to Shimla on her birthday in which she expressed extreme distress and unhappiness at her separation on her special day from the deceased.

The ld. trial judge has heavily relied on this letter which, apart from making unequivocal declarations of her feelings for the deceased Nitish Katara (referred to by the nickname _Chimpu' therein), also states as follows:

> "Clarke‟s Hotel 22/07/01 The Mall 2:30 am Shimla - 171001, INDIA Dearest Chimpu I know kinda weird gettin nother written note from me. But I just wanted to let you know that "I love you" more than these words can express. All I want in my life is to be with you always. I guess I‟we never prayed so much for anything in my life as I pray for you to be with you, to be in your arms. You are my sweetest dream come true and one thing about which I am damn sure is that I cannot live without you. If I have a life, its with you otherwise for sure I am not gonna live. There is only one thing I am scared off.....that is one fine day you turning to me and asking me to xxxx off. Because then I am nowhere without you there is no meaning in my life..... I can feel a vaccum within me without you. You are the only thing oops! I mean the only one I ask for ..... I will do anything for you but cannot even bear the mere thought of living without you.
>
> Chimpu I love you and I love you a lot. Sweatheart, I don‟t know why I am writing this to you but I really really missed you on my birthday. I cried. . I howled and did exactly the way you wanted me to do.... And you know what hurted me the most.... The fact that I was not able to even see your face on my birthday.....You hugging me and wishing me face to face just remained a dream for me I know from next year onwards you will always be there.... but honey this year would never come back..... this was my first birthday... and it was not with you and I was tou not even close to you I was very far away.... Sabko happy rakhna hai haina?..... Nai sweatheart I am not complaining and I am not cribbing I am just telling you that I didn‟t feel good and next year is too far abhi n thank you! Pudda I felt like the luckiest person on earth when I received your cards in your sweet special way..... ur gesture was so sweet that I don‟t have words to define..... after each card I was waitin for nother.....even after receiving the last letter, I was still waiting for one another. Yahan ka mausam bahut haseen phir be dill to udaas hai yun to tumse door sahi main dil to tumhare paas hai." Love you naa! (*) yaha the weather is damn sexy.... The cool breeze, clouds in your feet, thanda..... ummm eyerything is just perfect the only thing which is missing is you. Its almost 3.00 in the night..... everything is quiet... I can clearly hear the drizzling sound... can feel the thandi hawa and the silence of the night... just wish you were here to hold me in your arms and I could lie there in your lap like a baby.... but then again a dream of mine (n it will pucca come true one day!!) I am missing you Chimpu... badly tumhari bahut yaad aayi saara din, saara waqt.... Pata nai kab tumsae milungi.... Ya, hopefully on Tuesday... m just waiting.....I want to fly away and come to you and be with you in your arms cuddly n cozy... but hard luck) Baby I am missing you! Please aa jaao na mere paas! Please. I love you Chimpu, you are my life my love cannot live without you.... Life does not have any meaning without you.. kabhi saath mat leave karna varna survive nahin kar paungi... promise karo please.... that you will always be with me and for me, will never betray or cheat me.... I won‟t be able to take it..... Sab mujhe darate hai, samjhate hai but I trust you mere trust ko kabhi tootnay matt dena... I love you.... Ab mujhe cute baby is tarah hug karo.... Kissi do and promise dou ki u will always be mine."
>
> (Emphasis supplied)

163. This letter dated 22nd July, 2001 (Ex. PW-30/C-4) written at 2.30 a.m. from the Clark's Hotel, Mall, Shimla-171001 laments the fact that Bharti Yadav had been taken to Shimla and separated from Nitish Katara on her birthday. It reflects the deep feelings nurtured by the scribe for Nitish Katara.

Agonizing over their separation Bharti has stated therein to keep everybody happy. This letter clearly refers to her being pressurized and put into fear with regard to her relationship with Nitish Katara. The writer remorsed that this year would never come back; that it was her first birthday (obviously after their relationship blossomed in January, 2001) and it was not with Nitish Katara when she was not even close to him but very far away. It unequivocally declared the depth of her love and clearly stated that, ―from next year onwards u‟ll always b there‖. Clearly, the writing reflects that Bharti was anticipating permanency in their relationship. The letter documents the opposition to Bharti's relationship with Nitish and the fact that everybody was dissuading her (_samjhate hai‟) as well as trying to instill fear (_sab mujhe darate hai‟) but she remained undaunted as she trusted Nitish.

164. Mr. Krishnan has also drawn our attention to the specific question put to Bharti Yadav in the witness box as to whether she had intended to marry the deceased Nitish Katara. The witness stated at one place that she used to like him but there was no proposal for marriage. She has further stated that she was very close to him. Even if this statement was accepted, when examined against the background of the repeated declarations in the contemporaneous writings by her, it is established beyond doubt that they shared a deeply loving relationship and had every intention of permanency (_lifetime') in their relationship.

165. Mr. Dey has submitted that Bharti Yadav though initially avoided admitting her letters, photos, etc. sent to Nitish Katara but has ultimately admitted that she had written several letters, cards and photographs placed on record. She has clearly attempted to deny that there was a proposal for marriage as she wanted to save her brothers.

166. The nature of the relationship is manifested by a Valentine's Day album made by Bharti Yadav and given to the deceased Nitish Katara (Exh.PW-30/C-75), Exh.PW-30/C-80 and PW- 30/C-83, on the 14th of February. It is noteworthy that Valentine's day fell on 14th February, 2002, barely two days before Nitish was murdered. In the album prepared by Bharti Yadav for the deceased Nitish Katara she calls him by his nick name _Chimpu' and _Pudda' - her own names for him, while she has signed it with her nick name _Ghughu'.

167. The learned trial judge has discussed this aspect in detail and held that the fact that Bharti Yadav has not used the word _marriage' in the letter is not conclusive of the matter. The author has declared her feelings for Nitish openly and clearly in the letters. The cards and the letters lead to no other conclusion. The trial judge has also not accepted the argument of the defence that one sentence in the letter is inconsequential. This sentence has to be read in the background of the other communications, the conduct of the parties and other circumstances. It is a well settled principle that evidence has to be considered as a whole and not piecemeal.

168. The intensely emotional correspondence and the cards written by Bharti reflect the progression of her relationship with Nitish Katara from friendship to that of deep romance and also clearly manifest their intention of making the relationship life-long.

169. It is trite that there will seldom be direct evidence of a relationship of the kind brought out by the prosecution, or of knowledge of family members of it as well as that of their reaction to it. These are matters which have to be inferred and deduced from examination of the proven circumstances. The few details from the timeline revealed in the evidence on record establish not only the depth of the relationship between the deceased Nitish Katara and Bharti but also the opposition that she was facing to the relationship from her family.

170. We may also note that the question before this court is not whether there was a relationship which was to culminate in marriage or not. The existence of and the depth of the relationship has assumed importance because of the prosecution case that it was the boiling point which triggered the commission of the offence by the accused brothers, the reason being their opposition to same. What

triggers off a negative emotion or violence in the mind of a human being has no absolute parameters or gradation or benchmarks. Opposition by relatives may be even to mere acquaintance or association with a person.

171. The attempt on behalf of Vikas Yadav to dispute closeness between his sister and the deceased and distance himself from them is thus belied by the extensive documentary evidence and the emotional revelations contained therein.

(b)Day trip to Mumbai on the 24th of August 2000 to celebrate the birthday of sister Bhawna Yadav

172. The prosecution also led evidence in the trial of Vikas and Vishal Yadav of their day trip to Mumbai on 24th August, 2000 to celebrate her sister Bhawna's birthday. These three were accompanied by Bhawna's fiance Deepak Yadav and Bharti's best friend Shivani Gaur.

173. It is in evidence that Nilam Katara per chance happened to be in Mumbai for a business trip on 24th August, 2000 when she was compelled to change her travel plans as her meeting got delayed and she had decided to travel by Jet Airways instead of the Rajdhani train as scheduled. When she called up her son Nitish, he disclosed that he was also in Bombay for Bhawna's birthday celebrations. Nilam Katara met Nitish at the Mumbai Airport and he pointed out these friends to her.

174. Bharti first prevaricated that she was not sure about the presence of Nitish Katara in the Mumbai trip but, at a later stage in her testimony, admitted that she visited Mumbai along with Nitish Katara on 24th August, 2000.

175. PW-18 Hemant Narainan, a senior executive of Jet Airways proved the passenger manifest in respect of the flight no.900332 on 24th August, 2000 from Delhi to Mumbai as Exh.PW-18/1 and 18/2 which contains the name of the deceased Nitish Katara, Bharti Yadav and the other persons who had accompanied them.

176. It is also in the testimony of Bharti as well as Bhawna Yadav that on that date, Bhawna was only engaged to Deepak Yadav. As per the wedding invitation (Ex. PW 30/ C-76), Bhawna Yadav got married to Deepak Yadav only on 29th January 2001. A day trip of such nature is certainly not a usual happening. It was certainly not so in 2000. A small and exclusive group had joined in these celebrations in Mumbai. It unequivocally points to the special relationship between Bharti Yadav and Nitish Katara. It also establishes that her sister Bhawna, her fiancée Deepak Yadav as well as best friend Shivani Gaur were aware of the same.

(c) & (d) Outstation trips of Bharti and Nitish Katara to Fatehpur Sikri, Jim Corbett National Park and other places and photographs reflecting intimacy

177. Some photographs Exh.PW-11/1 to 4 of the deceased Nitish Katara and Bharti have been proved on record in the evidence of their friend Shivani Gaur. It is also in evidence and established from the photographs that Bharti Yadav and the deceased Nitish Katara had travelled to Fatehpur Sikri, Agra (Ex. PW 11/2, 4) and the Jim Corbett National Park (Ex. PW-11/1). The photographs also show trips to other places outside Delhi (Ex. PW-11/3) made by them. These photographs have been admitted by Bharti in her evidence. These photographs had been handed over by Nilam Katara to the police during the investigation of the murder of her son. Other photographs were proved as Exh.PW-30/C-80 and Exh.PW-30/C-83.

178. It has been argued by Mr. Krishnan, learned Additional Standing Counsel that PW-38 Bharti has testified that she was close to the deceased and in reference to the photographs had stated that ―the intimacy judged from photos is not just to him.‖ It is urged that the same suggest that the feelings were mutual and reciprocal. Mr. Dayan Krishnan points out that these photographs do not feature any other person(s) but only the deceased and Bharti in close proximity feature in these photographs.

179. While the trip to Fatehpur Sikri could have been a day trip keeping in mind the distance involved, Jim Corbett National Park would not have been a day trip.

180. The photos certainly establish not only the fact that they made out station trips but also shared a relationship which was more than mere friendship.

(e) Bharti‟s Bank Account with the BNP Paribas Bank, Connaught Place, New Delhi

181. PW-30 Nilam Katara has stated that the last office of the deceased was at the Hans Plaza, Connaught Place in New Delhi and that the branch office of the BNP Paribas Bank was in the adjoining building.

182. Nilam Katara has testified that Bharti was maintaining an account with the BNP Paribas Bank, Connaught Place and had given Nitish's address (7 Chelmsford Road, New Delhi) as her own residential address to this bank. She further testified that Bharti Yadav's statement of account used to come to her (the Kataras) residence.

183. The witness proved a photocopy of a letter received by the bank from Bharti (bearing the signatures of Bharti) which was also taken by the investigating officer during investigation.

184. In Vikas and Vishal Yadav's trial, PW-40 Shivendra Tiwari has proved that the account no. 0031000144111 with the HDFC Bank, Suryakiran Branch, Connaught Place, New Delhi was the salary account held by Nitish Katara. The witness also produced the cheque bearing no.239166 (Exh.PW-40/B) issued from this account by the deceased Nitish Katara on the 15th of September, 2001 in favour of Bharti Singh. This cheque was received by the HDFC Bank from the BNP Paribas Bank, Barakhamba Road, New Delhi for clearance which was effected on 18th September, 2001 which bore the signatures of the authorized signatory at point A (Exh.PW-40/A).

185. The evidence on record establishes that this cheque was utilized by Bharti for opening her bank account with the BNP Paribas Bank.

186. In the witness box Bharti unequivocally admitted that she had given Nitish's residential address as her own with the BNP Paribas Bank and that she had submitted the account opening form (Exh.PW-38/X-2) containing such address.

187. It is in Bharti's evidence that shortly after the death of Nitish Katara, she had moved an application (Exh PW38/X-3) on 1st March, 2002 to the Branch Manager of the BNP Paribas Bank wherein she wrote that ―I have changed my address from 7, Chelmsford Road, New Delhi-110001 to B-14, Gulmohar Park, New Delhi-14‖. This request dated 1st of March 2002 was accompanied by certificate (Ex.PW30/X4) issued by Oswal Sugar Limited to the effect that since July, 2000 she was working as a Manager Coordination at the office at B-14, Gulmohar Park. It was further requested in this letter dated 1st of March, 2002 that the address be changed in the account and all documents and correspondence be sent to her new address.

188. It is thus evident that at the time of opening the bank account, Bharti Yadav had two addresses in Delhi. The first being B-14, Gulmohar Park where from the family company Oswal Sugars Limited was operating, which was also a residence-cum-office, and where she worked as a Manager Coordination. Bharti had available a second address at 15, Balwant Rai Lane, New Delhi which was the official accommodation of her father Shri D.P. Yadav since he was a Member of the Parliament. Despite having these two addresses, she gave the address of the deceased Nitish Katara as her own for opening the bank account and also used a cheque given by him for opening it.

189. In her oral testimony before the trial court, Bharti attempted to prevaricate and refused to admit or deny that she had sought change of the address in the BNP Paribas Bank to B-

14, Gulmohar Park, New Delhi where her sister Bhawna had an office. This conduct of Bharti and her avoidance to make any statement in her testimony is itself illustrative of the pressure on her to save her brothers at all costs. She stands so pressurized that she orally denies even such facts which stand established by documentary evidence or which are so obvious that oral testimony to the contrary is completely unbelievable.

190. We find that the trial court has rightly held these to be important pieces of evidence, supporting not only the closeness of Bharti with the deceased, but also the fact that she had cause to keep it secret from her family. The timing of the request to change address is eloquent of the pressures on Bharti as well.

191. The fact that she had opened a bank account giving Nitish's address using a cheque given by him and was operating it thus establishes not only the depth of their involvement but also evidences objections of her family to the same, given her need to maintain the account surreptitiously. Her reluctance and prevarication about giving details about the account indubitably establishes the pressure to which she is being subjected not to reveal the truth.

(f) Expensive gifts

192. Nilam Katara as PW - 30 has testified that in December of 2001, Bharti had gifted Nitish Katara an expensive watch of the ESPRIT make which she bought from the Ansal Plaza. It is in evidence that Nitish Katara was wearing this watch when he was murdered and that the watch has been also recovered at the instance of the Vishal Yadav.

193. Nilam Katara has also testified about Bharti's gift of a golden chain with claws to her deceased son. She had argued with her son about accepting such expensive presents from Bharti Yadav. Her younger son, Nitin Katara (PW-39) corroborates the receipt of these gifts by Nitish from Bharti.

194. Bharti has made a bald denial that she gifted the articles to Nitish. Her testimony ends up as a tale of prevarications and initial denials. The evidence on these gifts of Nilam Katara and Nitin Katara (PWs 30 and 39) is clear and unequivocal. In fact Nilam Katara - PW 30 states that she had argued with her son Nitish about accepting expensive presents from Bharti - a very natural reaction of a mother's concern about proprieties.

195. The testimony of Nilam and Nitish Katara with regard to the gifts is completely unchallenged by the appellants in their cross-examination and remains unrebutted which proves the veracity of their evidence. It inspires confidence and has to be believed.

196. We also find that amongst the cards proved on record Ex PW 30/C-69 is a tag accompanying a gift. Bharti has endorsed the words ―Phor my life Chimpu‖ (_Phor‟ being _for‟) which clearly suggests that this little card (Exh.PW30/C-69) accompanied a gift.

197. It therefore stands established that Bharti gifted expensive items to the deceased Nitish Katara, reinforcing the intensity of their relationship.

(iv)(g) Call records of phone no.9811283641 being used by Nitish Katara and phone no. 9810038469 being used by Bharti Yadav established that they were in a relationship

198. One additional factor pointing to the close tie between Bharti and Nitish Katara deserves to be noticed.

199. The prosecution also established that Nitish Katara was using the cell phone no.9811283641.

200. The prosecution has also examined PW-22 Sh. R.K. Singh who is working as a nodal officer with the Bharti Cellular Limited to prove the call records relating to the cell no.98110038469 which was

being used by Bharti Yadav. The call records for the telephone no.9810154964 which was being used by Bharat Diwakar (subscriber as per Exh.PW- 22/1).

201. The witness has also established that the cell no.9810038469 stood registered in the name of Bhawna Singh at R-4/32, Raj Nagar, Ghaziabad, U.P. He established the details of the calls made and received on this phone between 1st February, 2002 to 31st March, 2002. He had brought the computer printout containing the details of the calls made which was proved on record as Exh.PW-22/2.

202. Several prosecution witnesses have testified to the effect that Bharti was using the mobile no.9810038469. There is considerable evidence that this mobile number stood registered in Bhawna Yadav's name (Bharti's elder sister), who has admitted this fact in her evidence. (Ex.PW22/1).

203. PW-21 Deepak Gupta who was working as the nodal officer working with Hutchison Essar Telecom Limited has explained that for reading connections from a cell phone to another cell phone or from a cell phone to a landline or vice- versa, the cell phone company has installed communication tower/cell sites at different places. Each cell phone is given a particular cell ID number which indicates location of the site/tower. Whenever a call is made/received by a cell phone serviced by the company, the data as well as the ID of the call is automatically recorded in a central computer installed at the head office of the company.

204. The location IDs between the year 2002 to 2004 have been proved by PW-41 Gulshan Arora, nodal officer of Hutchison Essar as Exh.PW-41/A.

205. Shri Deepak Gupta (PW 21 in Vikas and Vishal Yadav's trial) proved the computer printout in respect of phone no.9811283641 which was being used by Nitish Katara as Exh.PW-21/1 for the period 1/1/2002 to 1/3/2002. The witness explained that the Exh.PW-21/1 being the data chart relating to this phone number, contains a five digit number in which the cell ID is indicated by the three middle digits. The first and the last digit relate to the antennas etc.

206. So far as the cell IDs of the Bharti Cellular Ltd. are concerned, Shri R.K. Singh has explained that in the call record which has been produced by him, the cell ID is mentioned in the cell column in four digits. The first three digits indicate the cell tower installed by the company. The testimony of this witness could not be challenged in the cross-examination conducted on behalf of Vikas Yadav while Vishal Yadav did not cross examine this witness despite opportunity.

207. In the first trial, PW 25 Bharat Diwakar; PW 30 Nilam Katara; PW 39 Nitin Katara as well as PW 25 Gaurav Gupta have categorically testified that cell number 9810038469 was being used by Bharti and that they were calling on this phone and speaking to her. They also claimed to have received phone calls from her using this very cell phone.

208. The prosecution has proved the call records of Nitish Katara's cell phone (Exh. PW 21/1) as well as those of Bharti (Exh.PW22/2). These call records establish that 47 phone calls have been exchanged between Bharti (cell number 9810038469) and Nitish (9811283641) from 1st of January, 2002 till the 16th February, 2002. It further shows that between 1st January, 2002 till 16th February, 2002, 33 phone calls have also been received on Nitish's cell no.9811283641 from the STD Code 0120 (for Ghaziabad) and the landline numbers 4713790, 4751083 as well as 4714101. As per the prosecution, these phones were installed at the residence of Shri D.P. Yadav at Ghaziabad. Additionally, there were 57 calls exchanged between Bharti using the same mobile and Nitish Katara from his landline number in January, 2002 and 30 calls till 16th February, 2002.

209. The frequency of these calls coupled with the letters and cards lead to only one conclusion, that both of them shared a relationship which was more than mere friendship.

210. It is important to note that in her testimony, Bharti Yadav admits having written and given the letters, cards as well as the Valentine's Day album to Nitish Katara. She has also admitted her having used the above noticed nick names of the deceased as well as her own nick names. Bharti Yadav has specifically admitted that the letters Exh.PW-30/C-2 and Exh.PW-30/C-4 are in her handwriting. She has also admitted all the letters and cards which have been exhibited in the testimony of PW-30 Nilam Katara. She admits their photographs as well. Though Bharti orally attempts to distance herself from a close relationship with Nitish, her oral testimony if disproved by this documentary evidence which also corroborates the oral testimonies of PW-30 Nilam Katara and PW-39 Nitin Katara about the deeply romantic relationship which existed between the deceased and Bharti. This documentary evidence also establishes the opposition of Bharti's family to it. We shall discuss this circumstances hereafter.

(e) The relationship between Bharti and Nitish Katara was disapproved by Vikas Yadav and Vishal Yadav

211. The prosecution led evidence before the trial court that the intimacy of the deceased with Bharti Yadav was of such extent that they were planning to marry and that this intimacy was not palatable to Vikas and Vishal Yadav. The opposition to the relationship was for two reasons: firstly, that the deceased did not belong to the Yadav caste and secondly, that Nitish Katara belonged to a family of government servants. It is the case of the prosecution that this aversion to the relationship motivated them to get rid of the deceased.

212. The accused persons have completely denied knowledge of any such intimacy between Bharti and the deceased or of their plan to spend their lives together. Premised on this ignorance is the submission that therefore the question of their opposition does not arise.

213. The mother of the deceased, Nilam Katara, (appearing as PW-30 in Vikas and Vishal Yadav's trial) testified that in December, 2001, the deceased Nitish told her about his love for Bharti and that they were contemplating getting married; that he was not in a hurry to marry as he wanted to settle down first but Bharti's father was already looking for a match for her and that she might have to disclose their love to her father. PW 30 Nilam Katara further stated that ―Nitish had told me that Bharti was planning to tell her father about their intention to marry and that her brothers knew about her intentions but they were averse to her marriage with him but she would be able to convince her father‖. Nilam Katara has stated that Bharti was confident of being able to convince her father after her brother left town after the elections and his marriage. Bharti was waiting for her brother to leave town before telling her father. The witness talks about the apprehensions harboured by Bharti about disclosing their intentions to her father.

214. The same disclosure was made by Nitish Katara to his brother Nitin Katara to whom also he had specifically told about the opposition to the relationship by Vikas and Vishal Yadav. Nitin Katara also testified that Nitish had told him that Bharti's father Shri D.P. Yadav was not in favour of their relationship but she was hopeful that Shri D.P. Yadav would approve the relationship in the end.

215. Both Mr. U.R. Lalit learned senior counsel for Vikas Yadav, Mr. Ram Jethmalani, learned Senior Counsel for Vishal Yadav have urged at great length that the only evidence that the brothers (appellants) had knowledge of such love affair is the inadmissible evidence of a double hearsay to the effect that the deceased Nitish Katara had told his mother Nilam Katara that Bharti had told him that the appellants were opposed to his relationship.

216. It is urged that such hearsay of hearsay has to be excluded from consideration. In support of this submission, reliance has been placed on the pronouncement of the Madhya Pradesh High Court reported at AIR 1959 MP 84 Chakrapani Jagannath Prasad v. Chandoo Sahadeo and Anr. In this case, an appeal was filed before the High Court of Madhya Pradesh by Chakrapani Shukla who was the returned candidate from the constituency no.164 for the Madhya Pradesh Legislative Assembly

elections. An election petition had been filed by Chandoo Sahadeo and Surya Prasad Mishra contesting candidates, challenging his election. So far as double hearsay was concerned, reference to a statement of the respondent in the election petition has been made in para 37 of the judgment in the following terms:-

> —37. Surya Prasad also admitted that he and Chandoo, the candidate, had no connection or concern with each other regarding the election till 7 March 1957. This, of course, was in answer to the allegation that immediately after his retirement Chandoo started canvassing for the P. S. P. candidate. A great deal of Surya Prasad's testimony was wrongly admitted being entirely hearsay and on some matters hearsay of hearsay. We quote an instance:
>
> "The person who informed me about the retirement notice having been signed by Chandoo of Balodabazar have been cited as witnesses by me. They also said that they had heard about it."
>
> Such kind of evidence should have been excluded being not only hearsay but hearsay of hearsay. It could not have possibly be read and it is this evidence which seems to have coloured the decision of the Tribunal because it had before it such inadmissible evidence.‖

217. Mr. Jethmalani has submitted at length on the exceptions to the rule of hearsay and cited Criminal Evidence (5th Edition) of Richard May and Steven Powles in support of his submission that while the fact that Nitish Katara made the statement attributed to him by his mother and brother may be admissible as evidence of the fact that it was made, but this admissibility does not prove its truthfulness. The rule is explained in this text thus :-

> —8-03 Hearsay distinguished from —original evidence‖ Hearsay evidence should also be distinguished from —original evidence‖. Original evidence of a statement is admissible, not to prove that a statement is true, but to prove that it was made.
>
> The following are examples of original evidence.
>
> 8-04 (1) A statement as a fact in issue A statement may be admissible because it is itself a fact in issue, for example words of provocation when provocation is the defence to a murder charge or threatening abusive or insulting words in a case under s.4 of the Public Order Act 1986. Thus, in Chapman (1969) 2 Q.B. 436 the issue was whether or not a doctor had objected to a breath specimen being taken from the defendant, and it was held that a police officer could give evidence to that effect."

218. Mr. Dayan Krishnan on the other hand has submitted at some length that under Section 8 of the Indian Evidence Act, 1872, any fact which shows or constitutes the motive or the preparation for any fact in issue or relevant fact, is a relevant fact and admissible as such. It is contended that Sections 6 to 8 of the Indian Evidence Act, 1872 are evidence res gestae which are exceptions to the rule of hearsay.

219. Learned Additional Standing Counsel has contended that evidence of previous relationship as well as background evidence are also admissible under the exception to the hearsay evidence rule. Mr. Krishnan has placed the relevant extracts from Phipson on Evidence (16th Edition); the Law of Evidence by Chief Justice M. Monir (15th Edition); and the 69th Report of the Law Commission of India on the Indian Evidence Act, 1872 in support of his submissions. Mr. Krishnan has also referred to the pronouncements of the Supreme Court reported at (1972) 1 SCC 107 Damodarprasad Chandrikaprasad and Ors. v. State of Maharashtra; (2005) 11 SCC 600 (para 205) State (NCT of Delhi) v. Navjot Sandhu ; (2009) 6 SCC 450 (para 19) Javed Alam v. State of Chhattisgarh ; (1973) 1 SCC 471 R.M. Malkani v. State of Maharashtra in support of his submissions. Learned Additional Standing

Counsel for the State has also relied on the Privy Council judgment reported at AIR 1947 P.C. 19 Smt. Bibhabati Devi v. R.N. Roy (also placed before us by Mr. Ram Jethmalani, learned Senior Counsel).

220. In order to decide on the objection raised by learned senior counsels on behalf of the appellants, Vikas and Vishal Yadav before us that the testimony of Nilam Katara and Nitin Katara, to the extent that it relates to information given by Nitish Katara to them, is hearsay, it is necessary to examine the scheme of the Indian Evidence Act, 1872.

221. Sections 6 to 8 of the Indian Evidence Act, 1872 are placed in Chapter II titled ―Relevancy of facts‖. The relevant extracts thereof read as follows:-

> ―6. Relevancy of facts forming part of same transaction. - Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.
>
> Illustrations
>
> (a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.
>
> xxx xxx xxx
>
> 7. Facts which are occasion, cause or effect of facts in issue. - Facts which are the occasion, cause, or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.
>
> 8. Motive, preparation and previous or subsequent conduct. - Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.
>
> The conduct of any party, or of any agent to any party, or any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.
>
> Explanation 1. - The word ―conduct‖ in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.
>
> Explanation 2. - When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.
>
> Illustrations
>
> (a) A is tried for the murder of B.
>
> The facts that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant.
>
> xxx xxx xxx
>
> (e) A is accused of a crime.

The facts that, either before or at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favorable to himself, on that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

xxx xxx xxx

(h) The question is, whether A committed a crime.

The facts that, A absconded after receiving a letter warning him that inquiry was being made for the criminal, and the contents of the letter, are relevant.

(i) A is accused of a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

(j) The question is, whether A was ravished.

The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which the complaint was made, are relevant. The facts that, without making a complaint, she said that she had been ravished is not relevant as conduct under this section, though it may be relevant as a dying declaration under section 32, clause 1, or as corroborative evidence under section 157.

(k) The question is whether A was robbed.

The fact that, soon after the alleged robbery, he made a complaint, relating to the offence, the circumstances under which, and the terms in which the complaint was made, are relevant.

The fact that he said he had been robbed without making any complaint, is not relevant, as conduct under this section, though it may be relevant as a dying declaration under section 32, clause 1, or as corroborative evidence under section 157.‖

222. As to what constitutes _previous relationship; reference may usefully be made to the commentary on the same in Phipson on Evidence (16th Edition).

—(ii) Previous relationship cases In Ball, Lord Atkinson suggested, during argument, that the prosecution must be entitled to prove previous acts or words of the accused demonstrating his enmity towards the deceased, as being probative of guilt on a murder charge. His Lordship saw the evidence as establishing motive. Though, in context, these remarks might have been seen to say no more than that the evidence would, in consequence, come within the permissive part of Lord Herschell L.C.'s formulation of the similar fact rule in Makin v. Attorney-General for New South Wales,Kennedy J. had, in an earlier case, treated previous relationship cases as comprehended by the res gestae idea. In his words, the matters in question were —properly admitted to proof as integral parts of the history of the alleged crime for which the accused is on his trial‖.

In Berry, doubt was cast upon Lord Atkinson's remarks in Ball, but that case was explained in Williams on the basis that the evidence of previous relationship was too remote in time from the matters at hand. In Williams itself, those remarks were said correctly to state the law, though the case is itself ambiguous as to whether the principle flows from the res gestae idea or from a Makin- type exception.

The continuing legal force of Ball, and a judicial preference for Williams over Berry, has recently been confirmed by the Court of Appeal in Phillips. Though on the facts of that case, it would have been possible to justify admission of evidence showing the accused's bad relationship with his wife, who he was accused of murdering, as rebutting his own claim to have had a good relationship with her, the court specifically held that evidence was also admissible, in its own right, as tending to show the accused to have a motive for murdering her.‖

223. There is a second extension to the common law res gestae doctrine which is described as —background evidence cases‖ by Phipson in paras 19 - 25 which reads as follows:

> —It is now clear that a second extension to the res gestae doctrine has taken place. The source of this part of the law is the following statement of Purchas L.J. in Pettman (unreported) (May 2, 1985, C.A.):
>
> —.....where it is necessary to place before the jury evidence of part of a continual background of history relevant to the offence charged in the indictment and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence.‖ Though the stated law is capable of encompassing previous relationship cases, it extends well beyond them. Clearly, evidence about the parties' relationship before the date of the offence could be described as part of the background of history.‖ (underlining by us)
>
> 224. Phipson has noticed in Chapter 31 that _res gestae' is a latin phrase without an exact English translation. The expression is used in the common law to refer to —the events at issue or others contemporaneous with them.‖

225. Evidence of motive would fall in the category of what is known as _previous relationship' as also as _background evidence' which are evidence res gestae and has been treated as exceptions to the bar against hearsay evidence, hence admissible.

226. Our attention has also been drawn to the 69th Report of the Law Commission of India on the Indian Evidence Act. Section 8 of the Indian Evidence Act has been considered in para 7.54 of the report. The observations of the Law Commission on Section 8 of the Act in para 7.57 and 7.58 shed light on the questions which have been raised before this court which may usefully be extracted and read thus:

> —7.57. The classes of facts which become relevant under Section 8 fall into three broad groups, namely, (a) facts showing motive, (b) facts showing preparation, and (c) facts showing conduct,- in each case, it being necessary that some connection between the fact sought to be brought under Section 8 and some other fact already in issue or relevant, is established.
>
> 7.57A. As to motive, as the etymology of the word indicates, a motive is strictly, that which moves or influences the mind. It has been said that an action without a motive would be an effect without a cause: the particulars of external situation and conduct will, in general, correctly denote the motive for the criminal action. Statements accompanying acts are often necessary to show the animus of the action. 7.58. In some cases, motive may have an importance of its own, being an ingredient of the crime or tort, - e.g. motive on a privileged occasion in relation to defamation. When motive is such an ingredient, it is not merely a relevant fact, but is a part of the —fact in issue‖ as defined in the Act, because on motive depends the existence of the liability in such cases. Then, there may be cases where motive

may affect the extent of the liability, and is, therefore, a fact in issue. In all these cases, evidence of motive can be given under Section 5, and recourse to Section 8 is not needed. However, even where Section 5 does not apply, motive may be relevant under Section 8. It has been said that the section embodies, in a statutory form, the rule of evidence that the testimony of res gestae is always allowable when it goes to the root of the matter concerning the commission of the crime. 7.59. In a consideration of the cause or occasion of a fact, or the state of things under which it happened, nothing can be more material than to know whether any person had an interest in its happening, or took any measures calculated to bring it about. For this reason, motive and preparation become of the utmost importance. If A is found murdered, the fact that B had a strong motive for wishing A dead is, so far as it goes, a piece of evidence against B. So, if A is poisoned with arsenic, the fact that B, shortly before, procured arsenic, or made arrangements by which he would have access to A's food, points, in a measure, to B being the poisoner, and would be relevant fact at his trial.‖ (Underlining by us)

227. As per the Law Commission Report, Section 8 is the common law rule of evidence in a statutory form that testimony of res gestae is admissible when it goes to the root of the matter concerning the commission of the crime.

228. Motive is thus not only a relevant fact, is an integral part of the fact in issue.

229. Mr. Sumeet Verma, learned counsel appearing for Vikas Yadav has placed reliance on a Division Bench pronouncement of this court reported at 2009 (3) JCC 2436, Sohan Sahai v. State to contend that the evidence on motive is hearsay and, therefore, inadmissible. In this case, the prosecution has relied on two witnesses PW-3 and PW-4 in support of the contention that Mangli Bai (daughter of the deceased Surat Ram and accused Asad Bai) was married to PW-4 and had returned to her parents from her matrimonial house after 15 days of marriage. Whereas the deceased Surat Ram wanted her to return to matrimonial house, his wife Asad Bai did not wish her to return to PW-4 instead she wanted her to marry the appellant Sohan in consideration of Rs.1,500/-. This was the motive for which the deceased was allegedly murdered. In his cross-examination PW3 was unable to state the exact nature of the conversation which used to take place between deceased Surat Ram and his wife Asad Bai regarding their doubt. He categorically admitted that he was never present during such conversation. PW-3 was also not an eye-witness to any such conversation between Asad Bai and her deceased husband. The court held that PW-4 being the husband of Mangli Bai was an interested witness as it was inferred that he was nursing a grouse against Asad Bai for not allowing her daughter to return to the witness and her matrimonial home. He was unable to give any details as to whom Asad Bai wanted Mangali Bai to marry. It was in this background that the testimony regarding the motive part was held to be hearsay and therefore, inadmissible in evidence. The judgment has been rendered purely in the facts and circumstances of the case without laying a principle which could prohibit admissibility of the statement attributed to Nitish in the present case.

The facts in the instant case are completely different as noticed by us hereinabove.

230. At this stage, we may appropriately also refer to the commentary on the rule against hearsay by Chief Justice M. Monir in the „Law of Evidence‟ (15th Edition) and exceptions to the rule against hearsay. Section 60 of the Indian Evidence Act is the statutory provision incorporating the rule that oral evidence in all cases, must be direct. There are however some exceptions to this general rule. The learned author has noted the exceptions :-

―The Privy Council in the case of Subramaniam v. Public Prosecutor, (1956) 1 WLR 965 observed, „Evidence of a statement made to a witness who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the

evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made. The fact that it was made quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or some other persons in whose presence these statements are made... ...The prosecution case as stated by the informant, mother of the deceased was that when she along with her son was returning to her evidence from laundry, the accused appeared and pointed pistol on the chest of the deceased and assaulted him with dagger. Just after the occurrence of murder a large number of persons including family members came on the spot on cry of the informant to whom she disclosed about the occurrence. The evidence of the aforesaid witnesses is not totally inadmissible or irrelevant. Their statements are admissible on the point of conduct of the informant as well as factum of statement given by the informant just after the occurrence. It is also admissible on the point of recovery of blood stained dagger and revolver from the place of occurrence...‖

231. In the section dealing with statements made by persons not examined as witnesses which may in some cases amount to ―original‖ as distinguished from ―hearsay‖ or ―derivative‖ evidence, the text states as follows :-

―Statements made by persons not examined as witnesses may in some cases amount to ―original‖ as distinguished from ―hearsay‖ or ―derivative‖ evidence e.g., statements which are part of the res gestae, (Section 6) whether actually constituting a fact in issue, as a libel or a contract, or and explaining accompanying a fact in issue, as the cry of the mob during a riot: statements expressing knowledge, intent, or mental or bodily feeling (Section 14), statements amounting to acts of ownership, as leases, licenses, and grants (Section 13): complaints in cases of rape; statements constituting motive (Section 8). Verbal statements made by the deceased in respect of the circumstances of the transaction which resulted in his death can be proved by the oral evidence of persons who heard them, in other words, by persons to whom they were made (Dr. Jai Nand v. Rex, 1949 A 291 : 1949 ALJ 60: 50 Cr LJ 498).‖ (Emphasis by us)

232. Mr. Krishnan has pointed out that so far as proximity of the complaint to the crime and spontaneity is concerned, in the very first written complaint made by Nilam Katara in the morning of 17th February, 2002 to the police station Kavi Nagar itself, the witness had stated that the accused persons were averse to Bharti and Nitish's relationship and had expressed suspicion about the accused being involved in the disappearance of her son. This complaint was registered as an FIR on the basis of which the investigation was started.

233. It is pertinent to mention that at the point of time, when the complainant Nilam Katara had lodged the police complaint on 17th February, 2002 (Exh.PW1/A) she had no knowledge as to what had happened to her son and believed that he was alive. Nilam Katara has explained as PW 30 that when she made the first complaint to the police, she only believed her son to be missing. She was aware of the aspirations of her son Nitish Katara and his feelings for Bharti Yadav as well as their intentions of converting their relationship into a permanent relationship of marriage. As mother of a missing child who was at that time only concerned about tracing out her missing son, she had made the first complaint. She was not aware that her son had been murdered. She was only interested in finding him. She was also aware that Vikas and Vishal Yadav were closely related to Bharti. In the witness box she has stated that Bharat Diwakar had told her that Nitish had been taken from his company by Vikas and Vishal Yadav and she premises her belief that her son could be with them. The Yadav's were her son's prospective in- laws. At that time the mother was not expecting the worst and would not have wanted to sour relations with prospective in-laws of her son without anything more. The report was only in the nature of a missing person report made with the intention that the police search for her son. It is natural

that she did not want to cause any estrangement in a possible relationship between the two families, if her apprehensions were found misplaced. It is obvious that Nilam Katara has carefully chosen the word ―sambhavta‖ while making the complaint while referring to the appellants and has also suggested their aversion to the relationship in these circumstances. Nothing turns upon the fact that Nilam Katara has not elaborated or detailed the nature of the relationship shared between Nitish Katara and Bharti Yadav or that she has not mentioned Nitish's disclosure in her police complaint.

234. Our attention has been drawn to the pronouncement reported at (1972) 1 SCC 107 Damodarprasad Chandrikaprasad and Ors. v. State of Maharashtra (para 13) wherein the Supreme Court has observed that though the first information is not substantive evidence, one of the purposes for which it can be used is to show the implication of the accused to be not an afterthought or that the information is a piece of information res gestae. In certain cases, the First Information Report can be used under Section 32(1) of the Indian Evidence Act and under Section 8 of the Indian Evidence Act as evidence of the cause of the informant's death or as part of the informer's conduct.

235. In support of the submission that evidence under Section 8 of the Evidence Act is relevant and admissible, our attention has been drawn to the pronouncement of the Supreme Court reported at (2005) 11 SCC 600 State (NCT of Delhi) v. Navjot Sandhu wherein it has been held as follows :-

> ―205. Before proceeding further, we may advert to Section 8 of the Evidence Act. Section 8 insofar as it is relevant for our purpose makes the conduct of an accused person relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. It could be either a previous or subsequent conduct. There are two Explanations to the Section, which explains the ambit of the word ―conduct‖.
>
> xxx The conduct, in order to be admissible, must be such that it has close nexus with a fact in issue or relevant fact. Explanation 1 makes it clear that the mere statements as distinguished from acts do not constitute ―conduct‖ unless those statements ―accompany and explain acts other than statements‖. Such statements accompanying the acts are considered to be evidence of res gestae.‖

236. The disclosure by Nitish Katara to his mother Nilam Katara and brother Nitin Katara on the subject of his relationship with Bharti Yadav and the opposition thereto of her family members especially Vikas and Vishal Yadav are relevant as evidence of motive which led to commission of the offences of Nitish Katara's abduction and murder and admissible as evidence res gestae under Section 8 of the Indian Evidence Act as an exception to the hearsay rule.

237. Mr. Jethmalani, learned Senior Counsel has not disputed the fact that Nitish Katara had made the statement to his mother and brother, and that this was a relevant fact and so admissible under Section 8 of the Indian Evidence Act, 1872. Mr. Jethmalani has restricted his challenge to the truth of the statement and contended that there was no proof of the same. The evidence led by the prosecution has to be scrutinized from this perspective.

238. The further question which has been posed is with regard to the truth of the statement so admitted and how the same is to be established.

239. We may examine section 3 and 60 of the Indian Evidence Act which read as follows: -

> ―Section 3 - Interpretation clause In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:-
>
> "Fact".-"Fact" means and includes- (1) any thing, state of things, or relation of things, capable of being perceived by the senses;

(2) any mental condition of which any person is conscious.

xxx xxx xxx

(b) That a man heard or saw something, is a fact.

(c) That a man said certain words, is a fact.

xxx xxx xxx

(e) That a man has a certain reputation, is a fact.

" Relevant."-- One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts."

Section 60 -Oral evidence must be direct. Oral evidence must, in all cases whatever, be direct; that is to say-- if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it; if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it; if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner; if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds: Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable: Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.‖

240. On this aspect, reference requires to be made to the pronouncement of the Privy Council reported at AIR 1947 P.C. 19 Smt. Bibhabati Devi v. R.N. Roy (also known as the _Bhowal Sanyasi case'). In this case, a challenge was laid to evidence given by four witnesses referred to as the ―Maitra‖ group whom the trial court accepted as unimpeachable witness and whose evidence he accepted as virtually conclusive proof of the time of alleged ―death‖ as having taken place at dusk between 7 and 8 o' clock. In the case, the time of death or apparent death at Darjeeling was crucial. If the death took place shortly before midnight and not at dusk, the fact would have been fatal to the plaintiff's case. The learned judges of the majority in the Calcutta High Court placed reliance on this evidence. The evidence of these four witnesses as described by the trial judge is noted in para 17 of the judgment and reads as follows:

―The evidence of these gentlemen is that one day they were seated in the common room of the (Lewis jubilee) Sanatorium before dinner - that would be about 8 p.m. - chatting, each does not recollect all the rest, but each recollect the day, and the fact they used to be in the common room before dinner. They recollect the day, not the date or anything, but the day when a certain thing happened when they were so seated and there were others too, a man came with the news that the Kumar of Bhowal was just dead, and he made a request for men to help to carry the body for cremation. Principal Maitra has distinct recollection of this request - the news broken upon the talk they were having the things have stuck in his memory.‖

241. The Privy Council noted that the man who so came in the common room had not been identified and was not a witness. It was further agreed that according to Hindu customs, cremation when possible

would immediately follow the death. The appellants were questioning the admissibility of the statements and the above request for help attributed to the unidentified man. On this statement, the Privy Council had observed as follows:-

> ―18. Their Lordships are of opinion that the statement and request made by this man was a fact within the meaning of Sections 3 and 59 of the Indian Evidence Act of 1872, and that it is proved by the direct evidence of witnesses who heard it, within the meaning of Section 60; but it was not a relevant fact unless the learned judge was entitled to make it a relevant fact by a presumption under the terms of Section 114. As regards the statement that the Kumar had just died, such a statement by itself would not justify any such presumption, as it might rest on mere rumour, but, in the opinion of their Lordships, the learned judge was entitled to hold, in relation to the fact of the request for help to carry the body for cremation, that it was likely that the request was authorized by those in charge at " Step Aside," having regard to " the common course of " natural events, human conduct and public and private " business," and therefore to presume the existence of such authority. Having made such presumption, the fact of such an authorized request thereby became a relevant fact, and the evidence of the Maitra group became admissible. Accordingly, this contention fails.‖ (Emphasis supplied)

242. Mr. Sumeet Verma, learned counsel for the appellant has vehemently urged that no presumption can be drawn with regard to aversion or opposition of the appellant to the sister's relationship with the deceased Nitish Katara. It is urged that there is no evidence whatsoever on any instance of opposition, resistance or threat/warning by the accused brothers to the deceased or to Bharti.

243. Placing reliance on the pronouncement of the Supreme Court reported at (2012) 4 SCC 722, Govindaraju @ Govind v. State, it is urged that no presumption can be raised against the accused, either of fact or in evidence. There can be no dispute at all with this well settled principle. The judgment in Govindaraju (Supra) was rendered in the facts of the case wherein there was no evidence to support the case of the prosecution. However, the submission of learned counsel for the appellant that the reading of the evidence of the prosecution in the present case would require presumption of truth of hearsay evidence is misconceived.

244. In this regard, the applicable principles on which the evidence has to be scrutinised have been laid down by the Privy Council in Bibhabati Devi (Supra). This court is required to consider the entire evidence, that is, all the proven circumstances on record to reach the conclusion with regard to the truth of the statement attributed to the deceased Nitish Katara.

245. Bharti's fears of her family and apprehensions because of the disapproval are also established from her conduct as well as her testimony in the witness box wherein she has done her utmost not only distance herself from any association with Nitish Katara but has completely denied the close ties which she had with him. It is her testimony of denial which has compelled the trial court as well as this court to closely scrutinize the evidence led by the prosecution on the issue of the nature of her relationship with Nitish.

246. Bharti's fear was apparent from her statement in the letter dated 21st July, 2002 (Ex.PW30/C4) that ―sab mujhe darate hai samjhate hai‖. The expression ―sab‖ has to be read in the context of where Bharti was placed when she was writing the same. She had been taken away from Delhi even though she wanted to spend her birthday on 20 th July, 2001 with Nitish Katara and was writing the letter in the dead of the night at about 02:00 a.m. Her insecurity is based on this ―darana‖ (being put in fear by everybody) when she beseeched Nitish never to break her trust. She exhorts him in her letter to join her in Shimla while making repeated declarations of her feelings.

247. The testimony of PW-30 Nilam Katara on this aspect deserves to be carefully examined. There are two aspects to the same. The witness has nowhere stated that Nitish was narrating something that Bharti had told him. The witness has made a categorical statement that Nitish had told her about the following facts: -

"(i) that Bharti was planning to tell her father about their intention to marry"; and "(ii) that her brothers knew about her intention but they were averse to her marriage with him but she was confident that she would be able to convince her father."

248. PW-30 Nilam Katara further testified that Nitish had told her that Bharti was waiting for an opportune time and that she was waiting for her brothers to go out of town after the elections. Nitish further told PW-30 that her (Bharti's) brother's marriage was fixed for 6th March, 2002 and Bharti was hopeful that after marriage, he would go out and she would be able to talk to her father and convince him.

249. The above testimony would also show that Nitish had made a categorical and positive statement regarding the fact that Bharti's brothers had knowledge of their intention to marry and their objections to the same. There was also a positive statement made by Nitish to his mother Nilam Katara that Bharti was confident that she would be able to convince her father. Therefore PW-30 Nilam Katara has given evidence of what was in Nitish's personal knowledge and was told to his mother as a fact. This statement is not mere repetition of something Bharti told Nitish which he repeated to his mother and she in turn gave oral evidence about it. The statement is not double hearsay. It was therefore, a fact within the meaning of the expression in Section 3 which could be proved by oral evidence in terms of Section 59 of the Indian Evidence Act, 1872.

250. A specific question was put to PW-30 Nilam Katara as to which brother of Bharti was averse to such an alliance. She categorically answered that the two accused persons (Vikas and Vishal Yadav) were averse to this alliance. This statement is not hearsay, but an assertion of the fact that Nitish gave this information to her.

251. PW-39 Nitin Katara (who is Nitish's younger brother) testified that Nitish had told him also that Bharti and he were madly in love with each other and they wanted to get married. PW-39 has also said that Nitish had told him that this relationship was not approved by her brothers Vishal and Vikas Yadav. This part of his testimony is statement of facts by Nitish to his brother Nitin. Nitish is further stated to have said that Bharti had told him (Nitish) that her father Shri D.P. Yadav was not in favour of the relationship but Bharti was hopeful that Shri D.P. Yadav would approve of this relationship in the end.

252. Existence of deep feelings between the deceased Nitish Katara and Bharti were within their personal knowledge as well as their expectations from this relationship. Similarly, the knowledge about the objection to this relationship on the part of the Bharti's brothers would be something which would be known to both of them.

253. The statements attributed to Nitish Katara by Nilam Katara and Nitin Katara are in the nature of confidences by Nitish to his mother and younger brother of his feelings for and relationship with Bharti Yadav and the difficulties in terms of opposition from her father and brothers being encountered by them.

254. It was natural and normal conduct for a son to disclose his relationship as well as apprehensions to his mother Nilam Katara as well as his brother Nitin Katara.

255. The only witness who could have appeared in the witness box to corroborate this statement was Nitish Katara who was no more.

256. It is important to note that in her complaint to the police (Exh.PW1/1) registered as FIR Exh.PW-1/2 as well as statement under Section 161 of the Cr.P.C., PW 30 Nilam Katara refers opposition by the brothers to the relationship of Nitish Katara and Bharti. In her statement under Section 161 of the Cr.P.C., Exh.PW-30/DA (recorded on 17th February, 2002) PW-30 has again specifically stated that Bharti's father Shri D.P. Yadav and brothers were averse to their relationship.

257. In the instant case, as per the testimony of PW 30, Nilam Katara, Nitish had made the above statement to his mother Nilam Katara in December, 2001. He was tragically killed in the night intervening 16th / 17th February, 2002. The statement therefore would have been made only two and a half month prior to his death. In the light of the proven circumstances, the gap of two and a half months from December, 2001 to 16th /17th February, 2002 when the statement was made to Nilam Katara that Nitish Katara was murdered, would not impact the admissibility of the statement.

(iv) Effect of failure to cross examine a witness despite opportunity

258. Both Mr. Dayan Krishnan, the learned Additional Standing counsel as well as Mr. P.K. Dey, learned counsel for the complainant have submitted that the testimony of PW 30 Nilam Katara in respect of Nitish's confidences and the statement attributed to him was not challenged at all in cross-examination.

259. Our attention has been drawn to the protracted cross-

examination of PW-30 Nilam Katara by counsels separately on behalf of Vikas Yadav and Vishal Yadav.

260. On behalf of Vikas Yadav the cross-examination of Nilam Katara is restricted to confronting her with her statements recorded under Section 161 of the Cr.P.C. In her cross- examination as well, Nilam Katara has made a positive statement about the fact that Bharti was planning to tell her father about her feelings for Nitish and her intent to marry him.

261. In her cross examination by counsel for Vikas Yadav, Bharti has also clearly stated that the mother of Nitish Katara was aware of her closeness with Nitish. She corroborates PW-30 Nilam Katara when she testified about Nitish also mentioning to her, his own mother's discomfort with their relationship also because Bharti belonged to a particular family and Nilam Katara had warned him about his relationship with her because of her caste and her parentage.

262. Nilam Katara has mentioned that she had considered the pros and cons of the alliance and that she also had her own objection to the marriage; that she had told her son Nitish that it would not be a suitable marriage but her son was adamant about it. Nilam has testified that she told Nitish about possible interference and that Bharti's brother was already facing a criminal case etc. According to Nilam Katara, her son was looking at everything through tinted glasses and was adamant about marrying Bharti.

263. In the cross-examination by learned counsel appearing for appellant Vishal Yadav, PW-30 Nilam Katara had reiterated the above statement made by her, she further identified Bharti's two brothers as the two accused persons present in court who were averse and hostile to the relationship. PW- 30 reiterates her statement that her own family including herself being agreeable to the marriage since Bharti loved her son and wanted to marry him. In her cross-examination, the witness also repeated her testimony that Bharti was waiting for an opportune time to talk to her father and that her brother's marriage was fixed for 6th March, 2002 after elections and that she was waiting that when her brother would go out after his marriage, she would talk to her father and convince him about her marriage.

264. Nitin Katara has also attributed a categorical statement to Nitish. He has also not been cross-examined at all by any of the accused persons on this. Nitin has testified that Bharti used to treat him

like a little child and was always concerned about his well-being.

265. The cross examination of Nilam Katara and Nitin Katara shows that not a single question has been put to the witnesses challenging either the factum of such statement made by Nitish Katara to his mother Nilam Katara and brother Nitin Katara or their correctness. No suggestion has been put either to Nilam Katara or Nitin Katara that there was no permanent relationship being contemplated by the two or that the appellants had no knowledge about such relationship or that they had no objection to the alliance or on any aspect of the case of the appellants which is being set up before this court. The impugned judgment also shows that no argument to this effect even was laid before the learned trial court on this aspect. On application of the well settled principles, the only conclusion is that they have accepted the evidence as correct and admit the same.

266. It would, therefore, appear that neither Vikas nor Vishal Yadav challenged either the factum of the statement attributed to Nitish by his mother PW-30 Nilam Katara nor the correctness of the contents of the statement before the learned trial court.

267. In answer to a query as to the effect of the failure of the defence to cross examine PW-30 Nilam Katara or PW-39 Nitin Katara on the disclosure by the deceased Nitish Katara to them, a stand has been taken by learned Senior Counsels for the appellants Vikas and Vishal Yadav that the said testimony was hearsay and therefore, completely inadmissible. It is submitted that, therefore, there was no necessity to cross examine any witness on inadmissible evidence.

No argument to this effect was laid before the trial courts.

The submission before this court that the failure to cross examine was because the evidence of the witness was inadmissible is really in the nature of an afterthought in the present appeals inasmuch as the witnesses have not been cross-examined on any of the material points with regard to which they have testified. This explanation for the failure to cross-examine the witness is clearly untenable.

268. The learned Trial Judge has also noted several factual assertions by the witness which were not challenged by the defence in the cross-examination. We find that neither Nilam Katara nor Nitish Katara have been cross-examined on their testimony about Nitish's confidences to them. No suggestions with regard to the disclosure of Nitish Katara about his love affair with Bharti Yadav; their intention to marry or the opposition to the marriage were put. Several other material facts in the evidence of the witnesses have gone completely unchallenged. The learned Trial Judge has consequently presumed that the testimony of the witnesses to the extent it was not subjected to cross-examination stood accepted by the defence and was truthful.

269. The position which emerges from the record of the trial courts is that witness after witness has not been cross- examined on the substantive testimony but being merely confronted with previous statements made under Section 161 of the Cr.P.C., we had put a query to learned counsels as to the effect thereof. In this regard, Mr. Dayan Krishnan, learned additional standing counsel for the State has assisted this court with the position in law as emerges in judicial pronouncements.

270. This very issue also fell for consideration before the Supreme Court in a judgment reported at (1998) 3 SCC 561 State of U.P. v. Nahar Singh. We find that the principle in this behalf was laid down by Lord Herschell L.C. in Browne v. Dunn (1893) 6 R 67. The observations of Lord Herschell have been cited with approval by the Supreme Court of India in this judgment. Para 13 and 14 of the judgment on this aspect deserve to be considered in extenso and read as follows:-

> —13. It may be noted here that part of the statement of PW 1 was not cross-examined by the accused. In the absence of cross- examination on the explanation of delay, the evidence of PW 1 remained unchallenged and ought to have been believed by the High Court.

Section 138 of the Evidence Act confers a valuable right of cross-examining the witness tendered in evidence by the opposite party. The scope of that provision is enlarged by Section 146 of the Evidence Act by allowing a witness to be questioned:

> (1) to test his veracity,
>
> (2) to discover who he is and what is his position in life, or

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

14. The oft-quoted observation of Lord Herschell, L.C. in Browne v. Dunn, (1893) 6 R 67 clearly elucidates the principle underlying those provisions. It reads thus:

"I cannot help saying, that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which, it is suggested, indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the box, to give an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses."

This aspect was unfortunately missed by the High Court when it came to the conclusion that explanation for the delay is not at all convincing. This reason is, therefore, far from convincing.‖ (Emphasis by us)

271. Another pronouncement placed before us on this issue by Mr. Krishnan is reported at (2001) 7 SCC 69 Rajinder Pershad (Dead) by LRs v. Darshana Devi. In this case, an issue was raised with regard to validity of service of the notice. The tenant had contested that the postman was on leave of two days including the date on which he claimed to have tendered the notice. The postman was however not cross-examined on this aspect. The Supreme Court rejected the challenge to the service of the notice on account of the failure of the tenant to cross examine the postman. The court had placed reliance on the aforenoticed principles laid down in Nahar Singh (supra) and observed as follows:

—4. ...We are afraid we cannot accept these contentions of the learned Counsel. In the Court of the Rent Controller, the postman was examined as A.W. 2. We have gone through his cross-examination. It was not suggested to him that he was not on duty during the period in question and the endorsement "refused" on the envelope was incorrect. In the absence of cross- examination of the postman on this crucial aspect his statement in the chief-examination has been rightly relied upon. There is an age old rule that if you dispute the correctness of the statement of a witness you must give him opportunity to explain his statement by drawing his* attention to that part of it which is objected to as untrue, otherwise you cannot impeach his credit...‖ (Underlining by us)

272. So far as the evidence with regard to a conversation is concerned on the impact of failure to cross-examine the witness who deposed thereto, we may also usefully refer to the commentary on the issue in Phipson on Evidence (16th Edition) in para 12 - 35 at pg 338A which is to the following effect:

> —(20) Duty to cross-examine 12-35 As a rule (General rule was quoted by the Court of Appeal in Deepak Fertilizers Ltd. v.
>
> Davy McKee Ltd. [2002] EWCA Civ 1396) a party should put to each of his opponent's witnesses in turn so much of his own case as concerns that particular witness, or in which he had a share, e.g. if the witness has deposed to a conversation, the opposing counsel should put to the witnesses, any significant differences from his own case. If he asks no questions he will generally be taken to accept the witness's account (R v Hart (1932) 23 Cr.App.R 202, considered in R. (Wilkinson) v. Director of Public Prosecutions 167 J.P. 229, QBD) and will not be permitted to attack it in his final speech: nor will he be allowed in that speech to put forward explanations where he has failed to cross examine relevant witnesses on the point.‖

273. On the same aspect, reference also deserves to be made to the authoritative commentary by Sarkar in the Law of Evidence 17th Edition (reprint at pg 211 at pg 2730). The relevant extract thereof reads as follows:

> —Effect of Omitting or Not Cross-Examining a Witness on Essential Points.
>
> [Suggestions].--The skillful cross-examiner must hear the statements in examination-in-chief with attention, and when his turn comes, he should interrogate the witness on all material points that go against him. If he omits or ignores them, they may be taken as an acceptance of the truth of that part of witness's evidence. Generally speaking, when cross-examining, a party's counsel should put to each of his opponent's witnesses, in turn, so much of his own case as concerns that particular witness or in which he had a share. Thus, if a witness speaks about a conversation, the cross- examining lawyer must indicate by his examination how much of the witness's version of it he accepts and how much he disputes, and to suggest his own version. If he asks no questions, he will be taken to accept the witness's account [Flanagan v. Fahy, 1918, 2 1R 361, 388-89 CA: Browne v. Dunn, infra; see Odgers' Pleading, 13th Ed pg 261; Powell 9th Ed p. 531 : Wig Vol.2 para 1371; Phipson, 11th Ed p.649; see also Chunilal v. H.F. Ins Co., A 1958 Pu 440; Babulal v. Caltex (India) Ltd., A 1967 C 205]. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice [Carapiet v. Derderiem, A 1961 C 359. In this case P B MUKHARJI J, relied on and quoted the observations of LORDS HERSCHELL and HALSBURY in Browne v. Dunn, 6 R 67, 76-7, reproduced under s. 146 post under heading : "Testing veracity and impeaching credit"; S v. Bhola, A 1969 Raj 220]. Therefore an omission or neglect to challenge the evidence in chief on a material or essential point by cross-examination, would lead to the inference that the evidence is accepted, subject of course to its being assailed as inherently incredible or palpably untrue [See Sachindra v. Nilima, A 1970 C 38, 63; Bhag Kaur v. Piara Singh, 1999 (1) PLJR 306 (P &H)].
>
> xxx xxx xxx Whenever a statement of fact made by a witness is not challenged in cross-examination, it has to be concluded that the fact in question is not disputed [State of Himachal Pradesh v. Thakur Dass, 1983 CrLJ 1694, 1701 (HP) : (1983) 10 Cri LT 370]. If there is no cross-examination of a prosecution witness in respect of certain facts it will only

show the admission of that fact [Motilal v. State of Madhya Pradesh, 1990 CrLJ NOC 125 MP). Where however, several witnesses are called to prove the same point, it is not always necessary that they should all be cross-examined.

—Failure to cross-examine, however, will not always amount to an acceptance of the witness's testimony, e.g. if the witness has had notice to the contrary beforehand, or the story is itself of an incredible or romancing character [Browne v. Dunn, Sup; (quoted in Sukhraji v. STC, A 1966 C 620)] or the abstention arises from mere motives of delicacy, as where young children are called as witnesses for their parents in divorce cases, or when counsel indicates that he is merely abstaining for convenience, e.g. to save time‖ [Phip 11th Ed p.649].‖ (Emphasis by us)

274. It is therefore well settled that the accused persons having failed to cross examine witnesses on critical aspects in their testimony, cannot be permitted to impeach such evidence. If the testimony of a witness was being challenged by them, they were bound to have given a chance to the witness to make any explanation with regard to the same.

(v) Testimony of a witness declared hostile: Evidentiary value

275. It is trite that the testimony of a hostile witness cannot be treated as completely effaced or washed of the record in its totality. To the extent, the version of such witness is found dependable on a close scrutiny, it can be accepted by the court. In this regard, reference may usefully be made to the pronouncement of the Supreme Court reported at (2012) 4 SCC 327, Bhajju @ Karan Singh v. State of M.P.

—35. Now, we shall discuss the effect of hostile witnesses as well as the worth of the defence put forward on behalf of the appellant- accused. Normally, when a witness deposes contrary to the stand of the prosecution and his own statement recorded under Section 161 Cr.P.C., the prosecutor, with the permission of the court, can pray to the court for declaring that witness hostile and for granting leave to cross- examine the said witness. If such a permission is granted by the court then the witness is subjected to cross-examination by the prosecutor as well as an opportunity is provided to the defence to cross-examine such witnesses, if he so desires. In other words, there is a limited examination-in-chief, cross-examination by the prosecutor and cross-examination by the counsel for the accused. It is admissible to use the examination-in-chief as well as the cross- examination of the said witness insofar as it supports the case of the prosecution.

36. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence. Section 154 of the Act enables the Court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party.

37. The view that the evidence of the witness who has been called and cross-examined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law. The Courts may rely upon so much of the testimony which supports the case of the prosecution and is corroborated by other evidence. It is also now a settled cannon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied upon by the prosecution. These principles have been encompassed in the judgments of this Court in the cases:

(a) Koli Lakhmanbhai Chanabhai v. State of Gujarat [(1999) 8 SCC 624 : 2000 SCC (Cri) 13] ,

(b) Prithi v. State of Haryana [(2010) 8 SCC 536 : (2010) 3 SCC (Cri) 960] ,

(c) Manu Sharma v. State (NCT of Delhi) [(2010) 6 SCC 1 : (2010) 2 SCC (Cri) 1385] and

(d) Ramkrushna v. State of Maharashtra [(2007) 13 SCC 525 : (2009) 2 SCC (Cri) 427] .‖

276. In the pronouncement of the Supreme Court reported at 1991 (3) SCC 627 titled Khujji @ Surendra Tiwari v. State of Madhya Pradesh as well, the Supreme Court placed reliance on the earlier pronouncements reported at (1976) 1 SCC 389, Bhagwan Singh v. State of Haryana, (1976) 4 SCC 233 Rabindra Kumar Dey v. State of Orissa and (1980) 1 SCC 30 Syad Akbar v. State of Karnataka and held that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. It had been held that the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof.

277. In Khujji (supra) the evidence of two eye-witnesses was challenged by the prosecution. The court agreed with the submission of the learned counsel for the State that the evidence of these two witnesses with regard to the factum of the incident deserves to be scrutinized. PW-4 was found in the company of the deceased at the place of occurrence. It was observed by the Supreme Court that immediately after the incident, within less than an hour thereof, PW 4 went to the police station and lodged the first information report. The court observed that though the first information report was not substantive evidence but the fact remains that immediately after the incident, and before there was any extraneous intervention, PW 4 went to the police station and narrated the incident. The first information report was a detailed document and it was not possible to believe that the investigating officer imagined those details and prepared the document Ex. P-3. The Supreme Court observed that the detailed narration about the incident in the first information report went to show that the subsequent attempt of PW 4 to disown the document, while admitting his signature thereon, is a shift for reasons best known to PW 4. The only area where the witnesses had not supported the prosecution and have resiled from their earlier statements is regarding the identity of the assailants. PW-4 had identified the appellant in his examination-in-chief but in his cross-examination had stated that the accused and the co-accused had their backs towards him and he could not see their faces while he could identify the remaining persons. The court held that on reading of his entire evidence, his statement in cross- examination on the question of identity of the appellant and his companion was a clear attempt to wriggle out of what he had stated earlier in his examination-in-chief and that he had ample opportunity to identify the assailants. His evidence with regard to the time, place and manner of the incident as well as the identity of assailants was found to be acceptable.

278. On the issue of the witnesses turning hostile and the extent to which their testimony can be relied upon, we may also refer to the observations made in AIR 2012 SC 3539, Shyamal Ghosh v. State of West Bengal. The relevant portion reads as follow:-

> ―33. ...The mere fact that these two witnesses had turned hostile would not affect the case of the prosecution adversely. Firstly, it is for the reason that the facts that these witnesses were to prove already stand fully proved by other prosecution witnesses and those witnesses have not turned hostile, instead they have fully supported the case of the prosecution.....It is a settled principle of law that statement of a hostile witness can also be relied upon by the Court to the extent it supports the case of the prosecution. Reference in this regard can be made to the case of Govindaraju alias Govinda v. State by Sriramapuram P.S. and Anr. [(2012) 4 SCC 722: AIR 2012 SC 1292 :2012 AIR SCW 1994]."

279. In the pronouncement of the Supreme Court reported at (2012) 4 SCC 722 titled Govindaraju alias Govinda v. State by Sriramapuram P.S. and Anr., the Supreme Court observed that the evidence of hostile witnesses has to be dealt with greater caution to ensure that justice is done.

—36. It is also not always necessary that wherever the witness turned hostile, the prosecution case must fail. Firstly, the part of the statement of such hostile witnesses that supports the case of the prosecution can always be taken into consideration. Secondly, where the sole witness is an eyewitness who can give a graphic account of the events which he had witnessed, with some precision cogently and if such a statement is corroborated by other evidence, documentary or otherwise, then such statement in face of the hostile witness can still be a ground for holding the accused guilty of the crime that was committed. The court has to act with greater caution and accept such evidence with greater degree of care in order to ensure that justice alone is done. The evidence so considered should unequivocally point towards the guilt of the accused.‖

280. The law applicable to cases involving the hostile witness was summarized in the pronouncement of the Supreme Court reported at (2010) 9 SCC 567 Muniappan v. State of Tamil Nadu held as follows:-

> —83. ...the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence.
>
> 84. In the instant case, some of the material witnesses i.e. B. Kamal (PW 86) and R. Maruthu (PW 51) turned hostile. Their evidence has been taken into consideration by the courts below strictly in accordance with law. Some omissions, improvements in the evidence of the PWs have been pointed out by the learned counsel for the appellants, but we find them to be very trivial in nature.
>
> 85. It is settled proposition of law that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded. After exercising care and caution and sifting through the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witness. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of the incident, minor discrepancies are bound to occur in the statements of witnesses. (Vide Sohrab v. State of M.P. [(1972) 3 SCC 751 : 1972 SCC (Cri) 819 : AIR 1972 SC 2020] , State of U.P. v. M.K. Anthony [(1985) 1 SCC 505 : 1985 SCC (Cri) 105], Bharwada Bhoginbhai Hirjibhai v. State of Gujarat [(1983) 3 SCC 217 : 1983 SCC (Cri) 728 : AIR 1983 SC 753],State of Rajasthan v.Om Prakash [(2007) 12 SCC 381:(2008) 1 SCC (Cri) 411], Prithu v. State of H.P. [(2009) 11 SCC 588:(2009) 3 SCC (Cri) 1502], State of U.P. v.Santosh Kumar [(2009) 9 SCC 626:
>
> (2010) 1 SCC (Cri) 88] and State v. Saravanan [(2008) 17 SCC 587 : (2010) 4 SCC (Cri) 580].) (Emphasis by us)

281. These principles were reiterated in a later pronouncement reported at (2011) 11 SCC 111 Rameshbhal Mohanbhai Koli & Ors. v. State of Gujarat. The testimony of witnesses who have turned hostile in the present case therefore cannot be rejected in totality. It has to be examined based on these principles.

Discussion

282. It is also important to note that so far as the opposition of Vikas and Vishal Yadav to the association/relationship of Bharti with Nitish Katara is concerned, evidence was given thereof in both trials by not only Nilam Katara, but by her son Nitin Katara as well.

283. It has been submitted by Mr. Ram Jethmalani that in answer to question no. 11 put to Vishal Yadav under Section 313 of the Cr.P.C., he has stated that he did not know that deceased Nitish Katara had told his mother PW-30 that Bharti Yadav wanted to marry him and that Bharti had stated that Vikas, Vishal and Shri D.P. Yadav were averse to their marriage but she was confident that she would be able to convince her father. Vishal had further stated that he had no reason to object to the marriage of his cousin sister.

284. So far as Vikas Yadav is concerned, in answer to question nos. 12 and 15 put to him in the statement under Section 313 of the Cr.P.C., he denied knowing Nitish Katara as well as having knowledge of any intimacy between Bharti Yadav and Nitish Katara. He also denies that there was any opposition to the said marriage. He claimed that his family was educated and that even his marriage was fixed in a middle class family.

285. The accused persons were fully aware of the case of the prosecution. They had received all documents including the statements which had been recorded under Section 161 of the Code of Criminal Procedure by the investigating officer during investigation. The accused persons before this court were not illiterate or impoverished but were well placed in society. They had the best of legal assistance and their defence was being conducted by a team of able legal professionals.

There is no cross-examination of either of the witnesses on any material aspect of their evidence. Such portions are deemed to be admitted by the appellants.

286. We may also note the caution drawn by courts on the issue of the failure of the defence to make suggestions to the prosecution witnesses and the extent that this can be used only to lend assurance to the prosecution case, but not for filling gaps in the prosecution evidence.

In such circumstances, in (2007) 4 AD (Crl.) SC (445), Subhash v. State of Haryana, the Supreme Court held that there was no reason to disbelieve the sequence of events narrated by prosecution witness as nothing has been suggested to him as to why he should give false evidence against the appellant.

So far as the prosecution witnesses in the instant case are concerned, it is the same position. The aforestated legal position shall bind evaluation of their testimonies. If found truthful, the evidence of witnesses not subject to cross examination, shall bind the appellants.

287. We have examined and rejected the legal objection to the admissibility of the statement attributed to Nitish Katara by his mother and brother. Therefore having failed to challenge the statements, the same shall bind the appellants in accordance with law.

288. In the light of the above discussion, we are also unable to agree with Mr. U.R. Lalit, ld. senior counsel and Mr. Sumeet Verma, ld. counsel for the appellant that the testimony of PW-30 Nilam Katara with regard to the statement of the deceased was knowledge derived by Nitish Katara from Bharti and that the same could not have been within the knowledge of Nitish himself. Reading of the statement of not only Nilam Katara, but also the statement of her younger son Nitin Katara would show that this was not so. We also find that no such case was set up by the appellants before the trial court.

289. The suggestion therefore, by learned senior counsel for the appellants to the effect that it is a double hearsay i.e. to say that Nitish Katara was repeating information given by somebody else is not borne out from the testimony of his mother and brother. Therefore the submission that the same was double hearsay is incorrect.

290. The statement made by Nitish Katara to his mother Nilam Katara and brother Nitin Katara is relevant as evidence of motive, covered as evidence res gestae falling within the exception to the hearsay rule under Section 8 of the Indian Evidence Act, 1872 and hence admissible in evidence. The

several facts and documents proved by the prosecution and the unchallenged testimony of the witnesses with regard to the statements lead to the only possible inference that is of the opposition of the appellants to the intimacy between Nitish Katara and their sister. The evidence on record establishes beyond doubt the truth of the contents of the statements made by Nitish Katara to his mother and brother. The conclusions arrived at in the impugned judgments, are the only possible conclusions from the established facts and circumstances.

291. Before parting with this discussion on motive, we must note that we have been compelled to dwell hereinabove several acts of Bharti conducted clandestinely to conceal knowledge about them from third persons, be it letters, cards and photographs; a bank account giving Nitish's address; trips and outings with Nitish; gifts etc. Why this crime is a pertinent question in this case resting on circumstantial evidence.

292. Had Bharti stepped into the witness box and truthfully acknowledged her relationship with Nitish, this entire discussion and analysis of her letters and cards to the deceased may have been rendered unnecessary. While privacy concerns of a witness deserves every respect, however, it cannot be permitted to impede the course of criminal justice. If Bharti Yadav had stood by her commitment to Nitish Katara, in the witness box, the alternative defence about its ignorance (which has been set up) was still available to the appellants. But then, it is not for this court either to guide the witness or suggest what accused persons must do. Bharti Yadav has opted for the course she has adopted, obviously guided by legal experts and family. A serious crime has taken place. Bharti therefore can make no grievance that her letters, cards, photographs and phone details are part of record of court proceedings and judgments.

(vi) Knowledge of Bharti‟s family members about the relationship

293. So far as the knowledge of the other relatives of Bharti Yadav of her intention to marry Nitish and opposition to the relationship is concerned, the prosecution has led evidence on the issue. PW-30 Nilam Katara has categorically testified that "the brothers of Bharti Singh were averse and hostile and they are the 2 accused persons in court". In answer to a specific question by the defence as to which of the brothers of Bharti was averse to her marriage to Nitish, the witness has categorically stated that the two accused persons present in court (i.e. Vikas Yadav and Vishal Yadav) were averse to the marriage of Bharti and Nitish.

294. Nitish Katara had told his mother in December 2001 that Bharti's brothers were averse to their relationship. This shows that they had knowledge of the same. He made the same statement to his brother.

295. PW-30 Nilam Katara has also stated that when she visited the house of Bharti Yadav on 17th February, 2002 in search of her missing son, Bharti's mother Mrs. Umlesh Yadav knew all about the Katara family including details of the sickness of her husband and his surgery; the weddings in the Katara family etc. Again Nilam Katara was not cross-

examined on this aspect at all. This testimony establishes that Bharti's mother was aware of the proximity between Bharti and Nitish Katara.

296. In the statement of Bharti Yadav under Section 161 of Cr.P.C. (Ex.PW 35/AB) recorded on 2nd March, 2002, Bharti has stated that her _bua' (father's sister) and _mami' (wife of mother's brother) knew about her affair with Nitish Katara. This statement is substantiated by the call records of Nitish Katara's cell phone no.981128364 (Exh.PW22/2). These records reflect incoming calls from telephone nos. 4721001 and 4720020 which phone lines had been installed in Shri Bharat Singh's house. Shri Bharat Singh is Bharti Yadav's maternal uncle (_mama') and even appeared as her attorney before the trial court. Several outgoing calls from these numbers to Nitish's cell phone are reflected in Nitish

Katara's cell phone records. Obviously Nitish Katara was known to Bharat Singh's household. The only bridge between Nitish and them was their relationship to Bharti.

297. PW-38 Bharti has taken a stand that she did not have a close relationship with Nitish and her brothers and father were not aware about any relationship. However, there were several calls to Nitish Katara's cell phone from landline no. 4713790, 4751083 and 4714101 which stood installed at the residence of Shri D.P. Yadav in Ghaziabad manifesting that Bharti's statements in her evidence are incorrect testimony.

298. It stands established that on the 24th of August 2000, Bhawna Yadav (sister of Bharti) accompanied by her fiancée, Deepak Yadav; sister Bharti, as well as Shivani Gaur, Nitish Katara went to Mumbai for a day trip to celebrate her birthday. Thus an exclusive group of closely attached sisters, friends and a fiancée went on this special trip. Bhawna and Bharti lived in one house with their parents and brothers including Vikas Yadav. It is not possible to believe that the family members of Bhawna and Bharti Yadav, which included their brothers and parents did not know of Bhawna's birthday on 24th August, 2000 or about the celebrations taking place in Mumbai! Birthdays are family occasions more so in which a fiancée was joining. The family would be expected to be aware of the participants in the birthday celebrations. Bharti's sister Bhawna was certainly aware of the relationship. In normal course even Deepak Yadav (Bhawna's fiancee)'s family would also be aware of his prospective bride's birthday and of the celebrations in Mumbai.

299. It stands proved in evidence that Vishal Yadav though uninvited attended Shivani Gaur's wedding with Vikas Yadav. Vishal Yadav was so close to Vikas Yadav, that, as per their defence, they accompanied one another to several functions on the fateful night, where one or the other or both were invited. It is also established that the two brothers roamed together in Ghaziabad. Their houses were located to close proximity in the same colony in Ghaziabad. They were closely related to each other. These facts point to only one conclusion and that is of the closeness of these two appellants.

300. Bharti wrote the letter dated 22nd July, 2001 (Exh.PW-30/C-

> 4) wherein she laments the fact that she has been separated from Nitish on her birthday and taken away to Shimla away from him on her birthday. The forced separation, clearly a conscious act, also points towards the fact that Bharti's relatives were aware of her attachment with Nitish and their aversion to it. We have also noticed heretofore also the clear and unambiguous statement made by Bharti in Exh.PW- 30/C-4 to Nitish clearly reflecting opposition of persons close to her to her relationship with Nitish Katara.

301. The very fact that Bharti Yadav opened a bank account surreptitiously giving Nitish's address as her own (despite two addresses in Delhi) is a strong circumstance which also corroborates the fact that Bharti Yadav's family was disapproving of their relationship, so much so that she feared from them and took recourse to subterfuge to assert her independence and further her aim of cementing her closeness to Nitish.

302. Both Vikas Yadav and Vishal Yadav have denied knowledge of the relationship as well as their opposition to it in the statements recorded under Section 313 of the Cr.P.C. So far as Vikas Yadav is concerned, the same was put to him as question no.8 and as questions no. 3 and 5 to Vishal Yadav. Given the above proven facts and circumstances, this denial is inconsequential.

303. In his statement under Section 313 of the Cr.P.C., in answer to the question no.16 Vikas Yadav has stated that he had a free and frank relationship with his sister. In this background, the statement of his sister PW-38 Bharti that the information about her friendship with Nitish Katara was personal information and so her family did not know about it is clearly unbelievable.

304. While witnesses may prevaricate, speak lies or withhold the truth, documents and events speak for themselves and cannot be altered. None of the cards which were received by Nitish Katara were posted by Bharti, they have all been physically handed over by her. This fact also manifests the extensive number of times that the two might have met. The records of Bharti Yadav's bank account in the BNP Paribas Bank; the voluminous letters, cards, diaries, album and photographs as well as the call records by themselves establish not only the depth of the relationship of Bharti with the deceased, but also the apprehensions and fears nurtured by PW 38 Bharti stemming from the opposition of her relatives to the relationship.

305. The extent of the fear nurtured by Bharti because of the opposition is apparent from her conduct which has been proved on record and noticed by us above.

306. So far as the impact of the knowledge of the relationship and aversion to it is concerned, in the factual background established in the present case we find no force in the submission made on behalf of Vikas Yadav that, mere knowledge of the relationship and being averse to it, is insufficient to give motive to the appellants to murder.

307. Aversion or opposition to relationship does not necessarily require prior assault or actual threat. Bharti is closely related to the appellant Vikas Yadav. They were cohabiting in one house as part of the same family. There is also no gradation of the extent of intimacy or level of two persons' friendship or intimacy, which could incite aversion. Similarly, there can be no particular point at which the opposition may instigate a person to kill another who is perceived to be responsible for the cause of the opposition.

308. Having been taken through the trial court record in detail and having examined the same, we agree with the learned trial judges that there is relevant and admissible evidence on record which leads to only one conclusion that Bharti was involved in a romantic relationship with Nitish Katara and they were looking to permanency therein. The prosecution has established amongst other that Bharti's mother (Umlesh), her _mami‟, her _bua‟ (father's sister), her sister Bhawna, her brother-in -law Deepak Yadav, her brothers Vikas and Vishal, her father Shri D.P. Yadav and family members as well as friends Shivani Gaur, Bharat Diwakar, Bharat Gupta. During the investigation, Shivani's brother Rohit Gaur also gave a statement to the police about Bharti's involvement with Nitish Katara. Bharti's family members were aware of the same. It also stands established that Bharti's brother Vikas Yadav (her real brother), Vishal Yadav (her cousin brother) as well as her father Shri D.P. Yadav were so averse to her relationship with Nitish Katara that she resorted to clandestine in several acts noticed above. The evidence on record also proves that Bharti nurtured the hope that she could convince her father to accept this relationship.

309. There can be no direct evidence with regard to state of mind as aversion or a relationship which cannot manifest in physical terms. Inference has to be drawn from the surrounding circumstances.

310. In Smt. Bibhabati Devi v. R.N. Roy(supra), the Privy Council laid down that from the circumstances which stand proved on record beyond reasonable doubt before the court, the court is adequately empowered to draw a presumption about the truth of a statement. The statement attributed to the deceased Nitish Katara by his mother PW-30 Nilam Katara as well as PW-39 Nitin Katara, has to be examined conjointly with the aforenoticed proven facts.

311. In the judgment dated 28th May, 2008, the learned Trial Judge has concluded that Bharti's family including Vikas Yadav and Vishal Yadav had knowledge of their affair and that they had decided and were planning to get married. The learned trial judge has also held that Bharti's brothers were opposed to the alliance.

312. So far as Sukhdev @ Pehalwan, is concerned, in the judgment dated 6th July, 2011, the learned Trial Judge has noted the above finding that Vikas Yadav and Vishal Yadav had a strong motive to eliminate the deceased Nitish Katara which stood established in the trial and that the accused, Sukhdev @ Pehalwan being in the employment in the liquor shop business of the family of the accused shared in that motive which has to be inferred from the incriminating circumstance of the three appellants being found and seen together in the company of the deceased.

(vii) The statements attributed to Nitish Katara by PW-30 Nilam Katara and PW-39 Nitin Katara are admissible under section 32(1) of the Indian Evidence Act

313. There is yet another aspect to this issue which has been urged by Mr. Dey, learned counsel for the complainant. It is submitted that the statements of the deceased about the aversion of Vishal Yadav and Vikas Yadav to his relationship with Bharti, to his mother Nilam Katara as well as brother Nitin Katara are admissible under section 32(1) of the Indian Evidence Act.

314. The relevant extract of Section 32(1) of the Indian Evidence Act reads as follows: -

> —32. Case in which statement of relevant fact by person who is dead or cannot be found, etc. is relevant - Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases -
>
> (1) When it relates to cause of death - When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.
>
> xxx xxx xxx‖
>
> 315. This statutory provision thus relates to inter alia statements by a person who is dead with regard to following categories of statements:-
>
> (i) Cause of death, or,
>
> (ii) —.....any of the circumstances of the transaction which resulted in his death‖, in a case in which the cause of that person's death comes into question.

316. We have held that the statement of Nitish Katara about the aversion of Bharti's brothers to his relationship with Bharti in the mouth of his mother and brother is res gestae under Section 8 of the Indian Evidence Act as evidence of motive.

317. Mr. P.K. Dey, learned counsel for the complainant has urged that this statement is also part of the circumstances of the transaction which has resulted in his death. The submission is that the cause of Nitish Katara's death is in question in the present case and such statement would therefore, be admissible under Section 32(1) of the Evidence Act. To support this submission reliance has been placed on judicial pronouncements reported at AIR 1955 TC 87, Thanuvan Retnakaran v. State; 1997 (4) SCC 161, Rattan Singh v.

State of H.P.; 2002 (1) SCC 22, Patel Hiralal v. State of Gujarat; 2010 (9) SCC 64, Amar Singh v. State of Rajasthan and 1958 SCr 1495, Virsa Singh v. State of Punjab.

318. In the judgment reported at AIR 1955 TC 87 Thanuvan Retnakaran v. State, the deceased Sumathi, an unmarried daughter of PW 1, was seduced by the first accused who was her neighbour and a son of a rich man of the locality, resulting in her getting pregnant. The first accused with the help of the second accused, his neighbour and companion, attempted to procure an abortion which failed. The first accused had given Sumathi all sorts of hopes and promised to accept her as his wife. But when the attempt to bring about the abortion failed, he began to back out. By Makaram 1128, (corresponding to January 1953) Sumathi had advanced to six months pregnancy; this fact began to gain currency in the locality. Sumathi herself mentioned this to some of her friends and neighbours and also the fact that the first accused was responsible for the same. She also stated that if the first accused refused to accept her as his wife, she would go to his house and commit suicide by hanging. News of Sumathi's pregnancy came to the notice of her father PW 1. Though Sumathi had denied this to her mother, the parents were able to ascertain the fact through Sumathi's friends, particularly PW 5, who was her uncle's daughter. Out of shame PW 1 left the house and this aggravated the feelings of Sumathi. She had disclosed the fact of her pregnancy to her friends PW 5 and 6; and to PW

8. She had also mentioned that the 1st accused was responsible for the same.

319. The first accused was away from the locality and when he was not to be seen for few days, Sumathi began to enquire about his whereabouts. She mentioned this fact to PW 10 who mentioned it to PW 11. When the first accused returned, he came to know of the developments and also of Sumathi's talk with PW 10. On 25th January, 1953, the first accused met Sumathi on his way to Karottu junction. He consoled her and promised to take her to a separate house which he had arranged for her stay. On 27th January, 1953, the first accused again met Sumathi and told her to be ready to go to her new house. She left her house in the evening and waited for the first accused at the appointed place. At about 8 p.m. accused number one and two came and took her to the forest reserve and murdered her. In para 6 of the pronouncement the court held- ―It was the prosecution case that the first accused wanted to do away with Sumathi because of her pregnancy through him. It was therefore a circumstance which had some proximate relation to her death.‖ The court held that her statement to the witnesses (PWs 5; 6 and 8) of her condition and of the person responsible for it ―would be admissible in evidence under Section 32(1) of the Evidence Act as it would be a circumstance of the transaction that led to her death.‖ In support of this submission that the statement of Sumathi was so admissible in evidence, reliance was placed on AIR 1939 PC 47 titled Narayanaswami v. The Emperor by the court.

320. Reliance has also been placed before us on the principle laid down by the Supreme Court in (1997) 4 SCC 161 titled Rattan Singh v. State of H.P. In this case, it was alleged that in the night of 6th July, 1982, when all the inmates of Kanta Devi's house were sleeping in the courtyard of the house, the deceased Kanta Devi cried out that appellant was standing there with a gun. During the trial, an issue arose with regard to this utterance by Kanta Devi. The pronouncement examined the question whether such statement is admissible under Section 32(1) or under Section 6 of the Indian Evidence Act, as substantive evidence which can be acted upon with or without corroboration in returning a finding of guilt of the accused. The principles governing the admissibility of a statement made under Section 32(1) of the Indian Evidence Act have been authoritatively laid down by the Supreme Court in the following terms:-

> ―12. If the said statement had been made when the deceased was under expectation of death it becomes dying declaration in evidence after her death. Nonetheless, even if she was nowhere near expectation of death, still the statement would become admissible under Section 32(1) of the Evidence Act, though not as dying declaration as such, provided it satisfies one of the two conditions set forth in the sub-section. This is probably the one distinction between English law and the law in India on dying declaration. In English law, unless the declarant is under expectation of death his statement cannot acquire the passport of admissibility, [Sharad Birdhichand Sarda v. State of Maharashtra (1984) 4 SCC 116:

1984 SCC (Cri) 487: AIR 1984 SC 1622 and Tehal Singh and Ors. v. State of Punjab 1980 Supp. SCC 400: 1979 SCC (Cri) 722: AIR 1979 SC 1347].

13. Section 32(1) of the Evidence Act renders a statement relevant which was made by a person who is dead in cases in which cause of his death comes into question, but its admissibility depends upon one of the two conditions : Either such statement should relate to the cause of his death or it should relate to any of the circumstances of transaction which resulted in his death.

14. Three aspects have to be considered pertaining to the above item of evidence. First is whether the said statement of the deceased would fall within Section 32(1) of the Evidence Act so as to become admissible in evidence. Second is whether what the witnesses have testified in Court regarding the utterance of the deceased can be believed to be true. If the above two aspects are found in the affirmative, the third aspect to be considered is whether the deceased would have correctly identified the assailant?

15. When Kanta Devi (deceased) made the statement that appellant was standing with a gun she might or might not have been under the expectation of death. But that does not matter. The fact spoken by the deceased has subsequently turned out to be a circumstance which intimately related to the transaction which resulted in her death. The collocation of the words in Section 32(1) "circumstances of the transaction which resulted in his death" is apparently of wider amplitude than saying "circumstances which cause his death". There need not necessarily be a direct nexus between "circumstances" and death. It is enough if the words spoken by the deceased have reference to any circumstance which has connection with any of the transactions which ended up in the death of the deceased. Such statement would also fall within the purview of Section 32(1) of the Evidence Act. In other words, it is not necessary that such circumstance should be proximate, for, even distant circumstances can also become admissible under the sub-section, provided it has nexus with the transaction which resulted in the death. In Sharad Birdhichand Sarda's case (cited supra) this Court has stated the above principle in the following words:

—The test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be confined in a strait- jacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death.‖

16. Even apart from Section 32(1) of the Evidence Act, the aforesaid statement of Kanta Devi can be admitted under Section 6 of the Evidence Act on account of its proximity of time to the act of murder. Illustration 'A' to Section 6 makes it clear. It reads thus:

—(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the bystanders at the beating or so shortly before or after it as to form part of the transaction is a relevant fact.

(emphasis supplied)

17. In either case, whether it is admissible under Section 32(1) or under Section 6 of the Evidence Act, it is substantive evidence which can be acted upon with or without

corroboration in finding guilt of the accused.

18. But then the court must be assured of the remaining two aspects i.e. reliability of the evidence and accuracy of the contents of the pronouncement...‖

321. On the same aspect, reliance has been placed on the judicial pronouncement reported at (2002) 1 SCC 22 Patel Hiralal Joitaram v. State of Gujarat. In this case, on 21st October, 1988, Asha Ben, the deceased was set ablaze at the time and place mentioned in her statements. On 21st October, 1988 itself a FIR was registered on the statement made by the deceased to the police officer (PW 10). In the meantime, the Executive Magistrate (PW 1) on being informed by the doctor who examined the lady, visited the hospital and recorded her statement around 11:15 a.m. The prosecution relied on the statement made by the deceased for establishing the identity of the culprit which included the statement given by her to her husband; to the Executive Magistrate and the police in the FIR. The defence challenged the identity of the assailant. The name of the appellant, his scooter number as well as name of his father-in-law were the three specifications indicating the identity of the appellant. The deceased expired 25 days after the incident on 15 th November, 1988. The prosecution placed sufficient material to show that the three identification features referred by her related only to the appellant. The statement made by the deceased woman in the FIR wrongly mentioned the second part of the name of the accused. This was clarified by her in a clarificatory statement made under Section 161 of the Cr.P.C. The Sessions Judge rejected the statements of the deceased. However, the High Court came to the conclusion that the trial court had grossly erred in rejecting these statements and concluded that the identity of the assailant had been unmistakably established as against the appellant.

322. The Supreme Court was called upon to consider as to whether the clarificatory statement made by the deceased to the Investigating Officer was admissible under Section 32 of the Evidence Act. It was further urged by the appellant that the statement under Section 161 of the Cr.P.C. related only to the parentage of the accused and was, therefore, inadmissible under Section 32 of the Evidence Act. The Supreme Court observed that if the statement was held to be admissible under Section 32(1) of the Evidence Act, it would stand exempted from the prohibition contained in Section 162 of the Cr.P.C.. So far as its admissibility under Section 32(1) of the Evidence Act is concerned, the following discussion by the Supreme Court sheds light on the issue under consideration before us:

—29. The above provision relates to the statement made by a person before his death. Two categories of statements are made admissible in evidence and further made them as substantive evidence. They are: (1) his statement as to the cause of his death; (2) his statement as to any of the circumstances of the transaction which resulted in his death. The second category can envelope a far wider amplitude than the first category. The words "statement as any of the circumstances" are by themselves capable of expanding the width and contours of the scope of admissibility. When the word "circumstances" is linked to "transaction which resulted in his death" the sub-section casts the net in a very wide dimension. Anything which has a nexus with his death, proximate or distant, direct or indirect, can also fall within the purview of the sub-section. As the possibility of getting the maker of the statement in flesh and blood has been closed once and for all the endeavour should be how to include the statement of a dead person within the sweep of the sub-section and not how to exclude it therefrom. Admissibility is the first step and once it is admitted the court has to consider how far it is reliable. Once that test of reliability is found positive the court has to consider the utility of that statement in the particular case.‖ (Emphasis supplied)

323. In Patel Hiralal Joitaram v. State of Gujarat (supra) with regard to the admissibility of the clarificatory statement, the Court observed as under:-

—32. Taking cue from the legal position as delineated above we have to consider now whether the statement of Asha Ben in Ext. 67 related to any circumstance connected with her death. We cannot overlook the fact that the context in which she made such statements was not for resolving any dispute concerning the paternity of a person called Hiralal or even to establish his parentage. It was in the context of clarifying her earlier statement that she was set ablaze by a man called Hiralal whose second name happened to be mentioned by her as Lalchand. When subsequently she was confronted by the investigating officer with the said description to confirm whether it was Hiralal, son of Lalchand who set her to fire, she made the correction by saying that she made a mistake inadvertently and that it was Hiralal Joitaram who did it and not Hiralal Lalchand. Thus Ext. 67 is inextricably intertwined with the episode in which she was burnt and eventually died of such burns. Looking at Ext.67 from the above perspective we have no doubt that the said statement would fall within the ambit of Section 32(1) of the Evidence Act.‖

324. Mr. Dey, learned counsel for the complainant has also placed reliance on the pronouncement of the Supreme Court in (2010) 9 SCC 64 Amar Singh v. State of Rajasthan. In this case on 5th May, 1992 the deceased was married to the appellant and on 8th March, 1993 she was found dead in her in laws house. A report was lodged with the police by the uncle of the appellant on the same date stating that while the deceased was boiling water, she got engulfed in flames and died. On the same day, another written report was lodged with the police by the father of the deceased, that the deceased used to be harassed and humiliated in connection with demand of dowry and on receiving the information that she has died in an electric current accident, he rushed to the spot and found the body in charred condition. It was in the evidence of PW 4--mother of the deceased, that after her marriage, the deceased came to them several times and about one month prior to her death also she came and complained about the demand of scooter and harassment by her mother in law as well as taunts from the appellant with regard to dowry. The last time when she came, she stayed for two days and returned and one month thereafter she was murdered.

The appellant had objected to the admissibility of the statements made by the deceased to PW 2 (her father); PW 3 (her mother); and PW 5 (her brother) regarding harassment and demand of dowry either under Section 60 or 32 of the Evidence Act.

325. The Supreme Court was called upon to examine the statement attributed to the deceased which was made one month before her death to her mother. The statement was allegedly made by the deceased with regard to the taunts, demands for scooter, cash as well as teasing her for not meeting the demand of dowry within a couple of months before her death. It was held that these statements relate to the circumstances of the transaction which resulted in her death within the meaning of expression under Section 32(1) of the Indian Evidence Act and are therefore admissible in evidence. The discussion by the Supreme Court in paras 18, 19 and 20 is relevant and reads as follows:-

—18. Clause (1) of Section 32 of the Evidence Act provides that statements made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question, are themselves relevant facts. In the present case, the cause of death of the deceased was a question to be decided and the statements made by the deceased before PW 4 and PW 5 that the appellant used to taunt the deceased in connection with the demand of a scooter or Rs.

25,000 within a couple of months before the death of the deceased are statements as to —the circumstances of the transaction which resulted in her death‖ within the meaning of Section 32(1) of the Evidence Act.

19. In Pakala Narayana Swami v. King Emperor [(1938-39) 66 IA 66 : AIR 1939 PC 47] Lord Atkin held that circumstances of the transaction which resulted in the death of the declarant will be admissible if such circumstances have some proximate relation to the actual occurrence. The test laid down by Lord Atkin has been quoted in the judgment of Fazal Ali, J. in Sharad Birdhichand Sarda v. State of Maharashtra [(1984) 4 SCC 116 : 1984 SCC (Cri) 487] and His Lordship has held that Section 32 of the Evidence Act is an exception to the rule of hearsay evidence and in view of the peculiar conditions in the Indian society has widened the sphere to avoid injustice. His Lordship has held that where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and which reveal a tell-tale story, the said statements would clearly fall within the four corners of Section 32 and, therefore, admissible and the distance of time alone in such cases would not make the statements irrelevant.

20. The difference in the English law and the Indian law has been reiterated in Rattan Singh v. State of H.P. [(1997) 4 SCC 161 : 1997 SCC (Cri) 525] and it has been held therein that even if the deceased was nowhere near expectation of death, still her statement would become admissible under Section 32(1) of the Evidence Act, though not as a dying declaration as such, provided it satisfies one of the two conditions set forth in this section. The argument of Mr Sharma, therefore, that the evidence of PW 4 and PW 5 regarding the statements made by the deceased before them are hearsay and are not admissible is misconceived.‖

326. Mr. Dey, learned counsel for the Complainant has also placed reliance on the judgment reported at ILR (2010) MP 2433, Sulabh Jain v. State of M.P. In this case a statement by a complainant made two and a half months before her death apprehending death at the hands of the accused was held to be admissible under Section 8 as well as Section 32(1) of the Indian Evidence Act in their trial after she was killed. The relevant extract of the judgment deserves to be considered in extenso and reads thus:-

―9. A complaint in writing made to the police by a person who dies sometime thereafter, expressing apprehension of death at the hands of certain person is admissible in evidence under Sections 32(1) and 8 of the Evidence Act, when the person whose conduct is the source of the apprehension, is charged with the offence of murder of the person making the complaint. The statement is admissible as relating to "the circumstances of the transaction which resulted in his death", within Section 32(1). It cannot be held in such cases that there was no proximate connection between the death of the complainant and the complaint from the fact that the complaint was made nearly two and half months before the death. Thus, on complaint lodged by father of the deceased to Police in which statement of the deceased was recorded and she expressed her apprehension of death at the hands of accused before two and half months before the death is admissible under Section 32 of the Evidence Act.‖

xxx xxx xxx

11. Here in the present case, on the basis of written complaint, lodged by the father of the deceased, statement of the deceased-Princy Jain was recorded before the then DIG, Bhopal in which she expressed apprehension of her death at the hands of present applicant and thereafter within a period of two and half-months she died, therefore her statement recorded before the then DIG, Bhopal would be admissible in evidence as per Sub-section (1) of Section 32 of the Evidence Act The learned Trial Court has not committed any legal error in allowing the application vide impugned order dated 26.4.2010.‖

327. Reference is to be made to the decision of Fazal Ali, J. in Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116 : 1984 SCC (Cri) 487 wherein, after referring to the decisions in

Hanumant Govind Nargundkar v. State of Madhya Pradesh, AIR 1952 SC 343: 1952 SCR 1091; 1953 CrLJ 129; Ratan Gond v. State of Bihar, AIR 1959 SC 18; 1959 SCR 1336: 1959 CRLJ 108; Pakala Narayan Swami, AIR 1939 PC 47: 40 CR LJ 364; Manohar Lal v. State of Punjab, 1981 Cr LJ 1373 (P&H), it was held thus:-

> —12. We fully agree with the above observations made by the learned Judges. In Protima Dutta v. State[(1977) 81 Cal WN 713] while relying on Hanumant case [AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] the Calcutta High Court has clearly pointed out the nature and limits of the doctrine of proximity and has observed that in some cases where there is a sustained cruelty, the proximity may extend even to a period of three years. In this connection, the High Court observed thus:
>
> —The _transaction' in this case is systematic ill-treatment for years since the marriage of Sumana with incitement to end her life. Circumstances of the transaction include evidence of cruelty which produces a state of mind favourable to suicide. Although that would not by itself be sufficient: unless there was evidence of incitement to end her life it would be relevant as evidence.‖ (Underlining by us)
>
> 328. On the question of admissibility under Section 32 of the Indian Evidence Act a statement made by a person who is dead, as to the circumstances of the transaction which resulted in his death, our attention has been drawn to the authoritative text by Sarkars in Law of Evidence (16th Edition, 2007). The authors have quoted Lord Atkin in Pakala Narayana Swami v. Emperor, A 1939 PC 47:

(1939) (40) Cri LJ 364 thus:-

> —It has been suggested that the statement must be made after the transaction has taken place, that the person making it must be at any rate near death, and that the "circumstances" can only include the acts done when and where the death was caused. Their Lordships are of opinion that the natural meaning of the words used does not convey any of these limitations. The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction : general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible....‖Circumstances of the transaction" is a phrase, no doubt, that conveys some limitations. It is not as broad as the analogous use in "circumstantial evidence" which includes evidence of all relevant; facts. It is on the other hand narrower than "res gestæ". Circumstances must have some proximate relation to the actual occurrence....it will be observed that —the circumstances are of the transaction which resulted in the death of the declarant.‖

329. At page 725 of the text, the authors have further observed as follows:-

> —K.T. Thomas, J. of the Kerala High Court while speaking on behalf of the Full Bench in State v. Ammini, (1987) 1 Ker LT 928: 1988 Cri LJ 107 observed that the Supreme Court in AIR 1984 SC 1622; 1984 Cri LJ 1738 adopted the interpretation that the expression "any of the circumstances of the transaction which resulted in his death" is wider in scope than the expression "the cause of his death". In the light of the said decision of the Supreme Court, motive factor available in the statement of the deceased cannot be discarded as a remote circumstance, if it is otherwise intimately connected with the circumstances of the transaction which resulted in his death. The statement of the deceased must disclose that the circumstances specifically narrated by him have some direct or proximate bearing on the causes contributed in the transaction which ultimately resulted in his death. The

deceased need not say or apprehend that he would be killed by the person whose conduct was referred to in his statement. At the time of giving the statement, there was no chance of having any inclination in the mind of the deceased that such person would do away with his life for the circumstances disclosed by him. Such circumstances shall only be intimately connected with the circumstances of the transaction which resulted in his death (Sooraj v. State, 1994 Cri LJ 1155, 1162 (Ker)

330. Mr. Sumeet Verma, learned counsel for the appellant has strongly contested that the statement attributed to Nitish Katara by PW-30 Nilam Katara forms part of ―any of the circumstances of the transaction which resulted in his death‖ under Section 32(1) of the Indian Evidence Act for the reason that statement was purportedly made approximately two months prior to the death of the deceased and that the appellant was averse to the relationship was merely an innocuous statement to express opposition. It is contended that the circumstances of the transaction which resulted in the death could have been only prior assault or at least some threat by the accused persons. General expressions of fear or suspicion again a particular individual or otherwise which are not directly related to the occasion of the death would not be admissible under Section 32 of the Indian Evidence Act. It is further submitted that the expression ―circumstances of the transaction‖ under Section 32(1) of the Indian Evidence Act are not as broad as the analogous use of the expression in circumstantial evidence which permits admission of evidence of all relevant facts and that it is narrower than res gestae.

331. In support of this objection reliance has been placed on the pronouncement of the Supreme Court reported at 1966 CAR 281 (SC), Shiv Kumar and Others v. State of U.P. In this case, PW-1 Triveni Prasad has stated that the deceased Mata Prasad had told him before the occurrence that he had his meal earlier as he was going to Lakhimpur on tractor. This statement was held to be inadmissible under Section 32(1) of the Indian Evidence Act as a circumstance of the transaction which resulted in his death by the Supreme Court holding as follows:-

―5. It is clear that if the statement of the deceased is to be admissible under this section it must be a statement relating to the circumstances of the transaction resulting in his death. The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed, but general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible. A necessary condition of admissibility under the section is that the circumstance must have some proximate relation to the actual occurrence. For instance, a statement made by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding or that he was going to meet a particular person, or that he had been invited by such person to meet him would each of them be a circumstance of the transaction, and would be so whether the person was unknown or was not the person accused. The phrase ―circumstances of the transaction‖ is a phrase that no doubt conveys some limitations. It is not as broad as the alalogous use in ―circumstantial evidence‖ which includes evidence of all relevant facts. It is on the other hand narrower than ―res gestae" [See Pakala Narayana Swami v: The King Emperor(1)]. As we have already stated, the circumstance must have some proximate relation to the actual occurrence if the statement of the deceased is to be admissible under S. 32(1) of the Evidence Act. In the present case, however, we are satisfied that the statement of Mata Prasad made to Triveni Prasad is not a statement relating to the ―circumstances of the transaction‖ within the meaning of S. 32(1) and therefore not admissible. But even if the statement of Mata Prasad is omitted from consideration there is sufficient evidence to prove that the occurrence took place at 8-30 A.M. on November5; 1964 as alleged for the prosecution. P.W.1 Triveni Prasad, P.W.2 Puttu Lal and P.W.3, Ganga Din have all deposed that the murder took place at 8-30 A.M. and the evidence is corroborated by the statement

of P.W.5 Dr. Bhardwaj that there was semi digested food in the stomach of the deceased Mata Prasad. The High Court has relied upon the evidence of these witnesses for reaching the conclusion that the murder was committed about 8-30 A.M. as alleged by the prosecution.‖

332. In Shiv Kumar (Supra), the statement attributed to the deceased certainly had no proximate relationship to the actual occurrence other than stating that he had his meal early because he was proceeding to particular place. No other statement had been made. The statement had no proximate relationship to the occurrence at all.

333. The statement attributed to the deceased in the instant case has to be examined in the context of whether it relates to the circumstances of the transaction resulting in his death.

334. Mr. Sumeet Verma, learned counsel for the appellant has placed reliance on the pronouncement of the Supreme Court reported at AIR 39 Privy Council 47 Pakala Narayana Swami v. The Emperor in support of his submission that the statement merely suggesting a motive for the crime cannot be admitted in evidence unless it is so intimately connected with the transaction itself that it has to be a circumstance of the transaction.

335. The submission of learned counsel is that a bald statement, as in the present case, that the accused's brothers were averse to the relationship, without any further allegation of overt resistance or opposition by way of beatings, threats, warnings, etc., cannot be treated as a _circumstance of the death' within the meaning of the expression in Section 32 of the Indian Evidence Act.

336. In Pakala Narayana Swami (supra), the widow of the murdered person testified that on the date of the murder her husband showed a letter and told her that he was going to Berhampur as the accused's wife had written to him and told him to come on the 20th of March, 1937 to receive payment of his dues. The prosecution had proved 15 letters and notes proving transactions involving borrowing of money by the accused's wife from the deceased. The question raised before the Privy Council as to whether this statement of the widow about what she claimed had been told by the deceased was admissible under Section 32(1) of the Indian Evidence Act, 1872. The Privy Council had held as follows:-

—8. A variety of questions has been mooted in the Indian Courts as to the effect of this Section. It has been suggested that the statement must be made after the transaction has taken place, that the person making it must be at any rate near death, that the "circumstances" can only include the acts done when and where the death was caused. Their Lordships are of opinion that the natural meaning of the words used does not convey any of these limitations. The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction: general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible. But statements made by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding, or that he was going to meet a particular person, or that he had been invited by such person to meet him would each of them be circumstances of the transaction, and would be so whether the person was unknown, or was not the person accused. Such a statement might indeed be exculpatory of the person accused. "Circumstances of the transaction" is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in "circumstantial evidence" which includes evidence of all relevant facts. It is on the other hand narrower than "res gestae." Circumstances must have some proximate relation to the actual occurrence: though, as for instance, in a case of prolonged poisoning they may be related to dates at a considerable

distance from the date of the actual fatal dose. It will be observed that "the circumstances" are of the transaction which resulted in the death of the declarant. It is not necessary that there should be a known transaction other than that the death of the declarant has ultimately been caused, for the condition of the admissibility of the evidence is that the cause of (the declarant's) death comes into question." In the present case the cause of the deceased's death comes into-question. The transaction is one in which the deceased was murdered on 21st March or 22nd March: and his body was found in a trunk proved to be bought on behalf of the accused. The statement made by the deceased on 20th or 21st March that he was setting out to the place where the accused lived, and to meet a person, the wife of the accused, who lived in the accused's house, appears clearly to be a statement as to some of the circumstances of the transaction which resulted in his death. The statement was rightly admitted.‖ (Emphasis supplied)

337. The Privy Council has not laid the absolute proposition that every statement merely suggesting motive for a crime cannot be admitted in evidence. It has been held that a statement suggesting motive for a crime would be admissible in evidence if it is so intimately connected with the transaction itself ("has a proximate relation to the actual occurrence") that it has to be a circumstance of the transaction. A statement about a reason which would motivate the crime could form part of the circumstances of the transaction which resulted in the death of a person.

338. The appellant Vikas Yadav has placed reliance on the pronouncement of the Supreme Court reported at 2008 (3) SCALE 315 Vinay D. Nagar v. State of Rajasthan. The Supreme Court had referred to the principles laid down in Sharad Birdhichand Sarda v. State of Maharashtra, 1984 Cri LJ 1738; Rattan Singh v. State of Himachal Pradesh, AIR 1997 SC 768; and Kans Raj v. State of Punjab, AIR 2000 SC 2324 and has reiterated the same. The Supreme Court again stated that the test of proximity could not be too literally construed and where the death takes place within a very short time of the marriage or the distance of time is not spread over more than 3-4 months, the statement may be admissible under Section 32.

339. In Vinay D. Nagar (supra) the court was considering the statement of the deceased Kallu made to the police under Section 161 of the Cr.P.C. in a previous case where he was the witness against the appellant. The court observed that the statement under Section 161 of the Cr.P.C. was with regard to the involvement of the appellant in the abduction of boys and had ―no remote connection or reference to the death of the deceased" and thus would not be admissible under Section 32 of the Indian Evidence Act. The court had also observed that although the statement recorded by the police could be proved as there would not be any bar under Section 162 of the Cr.P.C. for proof of such a statement, but such statement would not be admissible under Section 32 of the Indian Evidence Act. It could not have been relied upon by the prosecution to prove the motive for commission of the crime by the appellant. There can be no dispute at all with these well settled principles of law.

340. The proposition urged by Mr. Dey in the present case is that the statement made by Nitish Katara to his mother and brother is so intimately connected with the transaction itself that it has to form part of the circumstance of the transaction and, therefore, be admissible in evidence under Section 32(1) of the Indian Evidence Act. We have held that the statements establishing motive for the crime are relevant and admissible as evidence res gestae under Section 8 of the Indian Evidence Act. We therefore do not propose to adjudicate upon this submission.

(viii) Testimony of Nilam Katara - whether unreliable ? What constitutes „contradictions‟, „improvements‟ and „significant omissions‟?

341. Before the learned trial judges as well as before this court, the appellants have strongly canvassed the submission that Nilam Katara, mother of the deceased as well as Nitin Katara, brother of the

deceased have made improvements in the court testimony over their statements recorded under Section 161 of the Cr.P.C. which was reason sufficient for disbelieving these two witnesses.

342. We find that in the cross-examination of these witnesses they have only been confronted with their statements under Section 161 of the Cr.P.C. in matters of detail. There is no cross-examination on their substantive evidence at all.

343. Before proceeding to examine the contentions laid by ld.

senior counsels for Vikas and Vishal Yadav as well as ld. counsel for Sukhdev @ Pehalwan , it is essential to consider the scope of Section 161 of the Cr.P.C. This statutory provision empowers any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government to, by general or special order, prescribed in this behalf, acting on the requisition of such officer, to examine orally any person supposed to be acquainted with the facts and circumstances of the case.

344. Section 161(2) of the Cr.P.C. mandates that ―such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture‖.

345. So far as the purpose for which such statements could be utilized, reference has to be made to Section 162 of the Cr.P.C. which permits use of statement only for inquiry or trial as per the procedure provided in the section. As per the explanation to Section 162 of the Cr.P.C. "an omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact."

346. The principles on this issue are well settled and stand reiterated by the Supreme Court in the judgment reported at AIR 2012 SC 3539, Shyamal Ghosh v. State of West Bengal placed by Ms. Ritu Gauba, APP wherein it has been stated as follows:

> ―68. From the above discussion, it precipitates that the discrepancies or the omissions have to be material ones and then alone, they may amount to contradiction of some serious consequence. Every omission cannot take the place of a contradiction in law and therefore, be the foundation for doubting the case of the prosecution. Minor contradictions, inconsistencies or embellishments of trivial nature which do not affect the core of the prosecution case should not be taken to be a ground to reject the prosecution evidence in its entirety. It is only when such omissions amount to a contradiction creating a serious doubt about the truthfulness or creditworthiness of the witness and other witnesses also make material improvements or contradictions before the court in order to render the evidence unacceptable, that the courts may not be in a position to safely rely upon such evidence. Serious contradictions and omissions which materially affect the case of the prosecution have to be understood in clear contradistinction to mere marginal variations in the statement of the witnesses. The prior may have effect in law upon the evidentiary value of the prosecution case; however, the latter would not adversely affect the case of the prosecution.
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> 69. Another settled rule of appreciation of evidence as already indicated is that the court should not draw any conclusion by picking up an isolated portion from the testimony of a witness without adverting to the statement as a whole. Sometimes it may be feasible that admission of a fact or circumstance by the witness is only to clarify his statement or what has been placed on record. Where it is a genuine attempt on the part of a witness to bring

correct facts by clarification on record, such statement must be seen in a different light to a situation where the contradiction is of such a nature that it impairs his evidence in its entirety.

70. In terms of the Explanation to Section 162 Cr.P.C. which deals with an omission to state a fact or circumstance in the statement referred to in sub-section (1), such omission may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether there is any omission which amounts to contradiction in particular context shall be a question of fact. A bare reading of this Explanation reveals that if a significant omission is made in a statement of a witness under Section 161 Cr.P.C., the same may amount to contradiction and the question whether it so amounts is a question of fact in each case. (Sunil Kumar Sambhudayal Gupta v. State of Maharashtra[(2010) 13 SCC 657 : (2011) 2 SCC (Cri) 375] and Subhash v. State of Haryana [(2011) 2 SCC 715 : (2011) 2 SCC (Cri) 689].

71. The basic element which is unambiguously clear from the Explanation to Section 162 Cr.P.C. is use of the expression ―may‖. To put it aptly, it is not every omission or discrepancy that may amount to material contradiction so as to give the accused any advantage. If the legislative intent was to the contra, then the legislature would have used the expression ―shall‖ in place of the word ―may‖. The word ―may‖ introduces an element of discretion which has to be exercised by the court of competent jurisdiction in accordance with law. Furthermore, whether such omission, variation or discrepancy is a material contradiction or not is again a question of fact which is to be determined with reference to the facts of a given case. The concept of contradiction in evidence under criminal jurisprudence, thus, cannot be stated in any absolute terms and has to be construed liberally so as to leave desirable discretion with the court to determine whether it is a contradiction or material contradiction which renders the entire evidence of the witness untrustworthy and affects the case of the prosecution materially.‖ (Underlining by us)

347. Mr. Dey, learned counsel for the Complainant has extensively placed reliance on Section 145 of the Evidence Act to elaborate the purpose of, as well as the circumstances in which, the previous statement of witness under Section 161 of the Cr.P.C. can be used. It is urged that such statement can be used for cross-examining the witness for which purpose the witness is not required to be confronted with the previous statement. The second purpose for which the statement may be used is challenging the testimony of a witness as against his previous statement, in which case the previous statement must be put to the witness.

348. Mr. Dey has also argued that in order to contradict the witness in terms of Section 145 of the Indian Evidence Act, the previous statement has to be proved ―in accordance with law‖. The statement under Section 161 of the Cr.P.C. has to be proved by questioning the investigating officer who has recorded the same as to what he called upon the witness to answer. It is pointed out that in the present case, no question at all was put to the investigating officer with regard to the statement of witnesses recorded by him under Section 161 of the Cr.P.C. The investigating officer was not questioned by the appellants as to what queries he put to the witnesses or their responses.

349. It has further been urged that the admissibility of the statement recorded under Section 161 of the Cr.P.C. in evidence is prohibited under Section 162 of the Cr.P.C. Only such part of the statement with which the witness is confronted can be accepted. Learned counsel has urged that there is no second part of Section 145 of the Evidence Act and therefore, it is not open to the appellant to argue that there are any improvements over or contradictions with any previous statement.

350. In this regard, Mr. Dayan Krishnan has placed the pronouncement of the Supreme Court reported at (2000) 4 SCC 484, Jaswant Singh v. State of Haryana before us. The observations of the Supreme Court in paras 47 to 49 with regard to the scope of Section 161 and 162 of the Cr.P.C. are material and read as follows:-

> —47. Section 161(2) of the Code requires the person making the statements —to answer truly all questions relating to such case put to him by such officer....‖. It would, therefore, depend on the questions put by the police officer. It is true that a certain statement may now be used under Section 162 to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872. Previously, the law was as enunciated in Tehsildar Singh v. State of Uttar Pradesh AIR 1959 SC 1012: 1959 Supp. (2) SCR 875: 1959 Cri LJ 1231 as omissions, unless by necessary implication be deemed to be part of the statement, cannot be used to contradict the statement made in the witness- box.
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> 48. Now the Explanation to Section 162 provides that an omission to state a fact in the statement may amount to contradiction. However, the explanation makes it clear that the omission must be a significant one and —otherwise relevant‖ having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact.
>
> 49. Reading Section 161(2) of the Criminal Procedure Code with the Explanation to Section 162, an omission in order to be significant must depend upon whether the specific question, the answer to which is omitted, was asked of the witness. In this case the Investigating Officer, PW 13 was not asked whether he had put questions to Gurdeep Kaur asking for details of the injuries inflicted or of the persons who had caused the injuries.‖ (Emphasis supplied)

351. Given the prescription of Section 161 of the Cr.P.C. and the above enunciation of law, if the testimony of a witness is to be challenged on the ground that it contains improvements over the statement made by him under Section 161 of the Cr.P.C., it would be essential to question the investigating officers as to whether a question with regard to the same was put by him to the witness or not. In other words, the cross- examination of the investigating officer as to whether he had asked the witness about such matter is essential. In case he answers in the affirmative, only thereafter would it be open to the opposite party to successfully challenge a witness's statement as being an improvement over a statement recorded by the investigating officer under Section 161 of the Cr.P.C.

352. Nilam Katara has categorically stated that she had answered all queries made by the investigating officer of her. Wheresoever she has been asked as to whether she told the investigating officer about the facts stated in her testimony, the witness has categorically stated that she had answered only the specific queries made by the investigating officer. At other places she has stated that the investigating officer did not ask her about a particular aspect and therefore, she did not tell him about the same. At several places, the witness has stated that she had made a reference to a particular event without giving the full details thereof. It would, therefore, appear that the witness did not volunteer information but has answered the questions put by the investigating officer. This is in consonance with the requirement of Section 161 of the Cr.P.C.

353. Nilam Katara has testified that she had informed the police about the address given by Bharti Yadav for the bank account with the BNP Paribas Bank account opened by her. Nilam Katara stated that she had told the police that Bharti was planning to tell her father about her intention to marry Nitish and that her brothers knew about the same, that they were averse to the same but she was confident that she (Bharti) would be able to convince her father. She also stated that she had shown all the cards, letters album, bedsheet to the investigating officer but he chose only two.

354. We find that the trial court has noticed that in Nilam Katara's statement under Section 161 of the Cr.P.C. (Exh.PW-30/DA and DB) also it has been stated that her son Nitish was in love with Bharti and wanted to marry her; the witness and her family were agreeable to their marriage since Bharti loved her son and wanted to marry him; while Bharti's father Shri D.P. Yadav and her brothers Vikas and Vishal were not agreeable.

355. The testimony of Nitin Katara has been assailed only on confrontations with Exh.PW30/DA and DB. However no question was put to the investigating officer with regard to his queries to the witness while recording their statements under Section 161 of the Code of Criminal Procedure.

356. We have also been taken through the cross-examination of Anil Somania, the Investigating Officer in the present case who has recorded the statements of Nilam Katara and Nitin Katara under Section 161 of the Cr.P.C. We have not been able to find a single question by the appellants to the investigating officer as to whether he had put questions to them with regard to the facts about which the witnesses testified in court, especially such portions of their statements under Section 161 of the Cr.P.C. with which the witnesses were confronted when under cross-examination. The statements under Section 161 Cr.P.C. were therefore shown to the witnesses by the defence for the purposes of pointing out contradictions and improvements without cross examining the investigating officer with regard to the queries made by him from the witnesses.

357. It is trite that in case the defence seeks to rely on any part of the testimony of a witness which is contradictory with a previous statement made by him, the witness has to be given an opportunity to explain the same.

358. In (2001) 10 SCC 6 titled Majid v. State of Haryana, the issue was whether the evidence of PW-6 Hasham could be contradicted with the evidence of DW-1 Jamaluddin unless at least the attention of PW-6 has been drawn to the fact that he had stated such inconsistent version to DW 1 ? The court held as follows:

> —14. If the former statement was in writing or was reduced to writing, Section 145 of the Act requires that attention of the witness must be called to those parts of it which are used for the purpose of contradicting him. Here the statement allegedly made by PW 6 to DW 1 was not in writing, nor was it reduced to writing. Nonetheless, if the object of examining DW 1 as a witness was to discredit PW 6, it is only fair to insist that PW 6 himself should have been given an opportunity to explain it. Without PW 6 being asked about that aspect, it is unreasonable to expect PW 6 to explain about it. Hence it is immaterial that the statement claimed by DW 1 as made to him by PW 6 was not reduced to writing.‖

359. It is contended on behalf of the appellants that testimony of Nilam Katara in court contains material improvements over her statement recorded in the First Information Report as well as her two statements (Ex.PW30/DA and Ex.PW30/DB). The learned Trial Judge has rejected this contention and concluded that the facts which she narrated in court are only explanations and elaboration of what she had informed to police in the FIR and her statements under Section 161 of the Cr.P.C.

360. Some of the precedents which shed valuable light on similar objections deserve to be considered and are considered hereinafter. So far as the contents of FIR are concerned, in a judgment of the Supreme Court reported at (2006) 10 SCC 163 S. Sudershan Reddy and Ors. v. State of Andhra Pradesh, the court laid down the following:-

> —18. ...It is well settled that FIR is not an encyclopaedia of the facts concerning the crime merely because of minutest details of occurrence were not mentioned in the FIR the same cannot make the prosecution case doubtful. It is not necessary that minutest details should be stated in the FIR. It is sufficient if a broad picture is presented and the FIR contains the

broad features. For lodging FIR, in a criminal case and more particularly in a murder case, the stress must be on prompt lodging of the FIR.... ‖

361. On the same aspect, we find that the Trial Court in its judgment has referred to the judgment of the Allahabad High Court reported at 1998 Cri.L.J. 2064 Dharmendra Singh v. State of U.P., which also noted the requirement of details in the statement under Section 161 Cr.P.C. in the following terms:-

—28...The F.I.R. and the statement recorded under Section 161, Cr.P.C. are not encyclopaedia, to give each and every minute details which had come into light during the deposition in the Court. Sometime witnesses do not think it proper to get it mentioned in the F.I.R. or in their statements recorded under Section 161, Cr. P.C. but it does not mean that the facts do not exist.‖

362. The Supreme Court had occasion to compare a deposition in court as against a statement under Section 161 of the Cr.P.C. by a witness in the judgment reported at (2000) 8 SCC 457, Narayan Chetanram Chaudhary v. State of Maharashtra, which reads as follows:-

—43. On an analysis of the statement of PW 2 (which is part of Vol. 4 of the paper-book), his statement under Section 161 Cr.P.C. and the deposition made by him on 15-10-1984 during investigation (which is part of Vol. 3 of the paper-book) we have come to a conclusion that there is no material improvement, much less contradiction in the deposition made by him before the trial court after being granted pardon. The so-called improvements are in fact the details of the narrations extracted by the Public Prosecutor and the defence counsel in the course of his examination-in-chief and cross- examination.‖ (Underlining by us)

363. The extreme stand being pressed on behalf of the appellants ignores the hard realities and the difficult situation of Nilam Katara who must have been struggling to come to terms with the tragic circumstances in which her 23 year old son was murdered. We have noted herein the difficulties she has faced to ensure an effective investigation in the case. She identified the badly burnt body of her son in a mortuary in Bulandshahr on the 21st February, 2002.

364. The first complaint dated 17th February, 2002 which was the basis of the First Information Report was made at a time when the complainant Nilam Katara (PW30 in Vikas Yadav's trial and PW10 in Sukhdev Yadav's trial) was only looking for her missing son. The witness has explained that she was under tremendous trauma when she lodged the FIR as well as when she made the statement to the police; that she made a _umbrella' statement at that time and she was under great tension due to her son. She also stated that she only told in these circumstances whatever was required by the police and that in a court deposition, she has spoken with more clarity and more detail.

365. The evidence on record shows that the dead body of Nitish Katara was handed over to her and cremated on 12 th March, 2002. Ex.DW 30/DB i.e. her second statement under Section 161 of the Cr.P.C. was recorded on 14th March, 2002 which was only two days after the cremation. The trauma of Nitish Katara's family was compounded by the apprehensions and expectations of untoward incidents at the hands of the accused persons who, it is on record, were exercising tremendous influence in the community.

With regard to the statement recorded by the police, his mother PW 30 Nilam Katara has explained that her statement under Section 161 of the Cr.P.C. was recorded two days after his cremation when she was under tremendous emotional pressure and tension. It is also in the statement of the witness that Nitish Katara's father was very ill at that time. The witness explained that there was certainly more clarity of vision in her mind and she could think sensibly when she was deposing in the court.

366. Faced with the huge influence of the family of the accused persons, she was apprehensive about the fairness of the investigation and was compelled to move first, the Supreme Court by way of a writ petition and then this court by way of W.P.(Crl.) No.247/2002 on 27th of February, 2002 seeking court directions with regard to the investigation. This mother was not only struggling to ensure that the investigation proceeded in the right manner but at the same time was compelled to ensure that important evidence is not lost and is preserved without the mental space or the time to grieve over the tragic murder of her young son and at a time when she had not even cremated him.

367. Clearly any variance between the statement made by the witnesses to the investigating officer or to any other person and the testimony in court cannot be held to be in contradiction or an improvement in the eyes of the law unless it is shown that the same was put to the investigating officer and he rendered an explanation that the same was asked of the witness. This was not done by the appellants during trial and the testimony of the witnesses including Nilam Katara and Nitin Katara remains unchallenged. It is, therefore, not possible to hold that there are contradictions or improvements by Nilam Katara and Nitin Katara between their testimonies in court and their statements recorded under Section 161 of the Cr.PC. which could discredit their testimony in court.

In our view, the learned Trial Judge has therefore, rightly concluded that in her testimony, Nilam Katara has merely elaborated the contents of the FIR as well as upon facts stated in her statements recorded under Section 161 of the Cr.P.C. The evidence of Nitin Katara has also for the above reasons, been rightly accepted by the ld. Trial Judge.

(ix) Conduct of Bharti Yadav on the 17th of February, 2002 and thereafter; her reactions, and utterances to Nilam Katara and Nitin Katara; conversations with Bharat Diwakar after Nitish Katara had been abducted and prior to anyone learning that he had been murdered

368. Mr. Dayan Krishnan, learned Additional Standing Counsel for the State as well as Mr. P.K. Dey, learned counsel for the complainant place extensive reliance on the evidence of the post abduction telephone calls and conversations between 16th/17th February, 2002 between different persons before the body of the Nitish Katara was discovered and the admissibility in evidence of these conversations.

369. The phone records tell a story by themselves. They corroborate oral testimonies of witnesses and deserve to be considered in some detail.

370. The appellants have not challenged the relevance, admissibility, authenticity or correctness of the cell call records before us. Mr. Dayan Krishnan, learned Additional Standing Counsel has placed reliance on paras 150 and 151 of the pronouncement of the Supreme Court reported at (2005) 11 SCC 600 (para 205) State (NCT of Delhi) v.

Navjot Sandhu to contend that the requirements under Section 65(b) of the Indian Evidence Act had been complied with by the prosecution.

150. According to Section 63, secondary evidence means and includes, among other things, ―copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies‖. Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. It is not in dispute that the information contained in the call records is stored in huge servers which cannot be easily moved and produced in the court. That is what the High Court has also observed at para 276. Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Irrespective of the compliance with the requirements of Section 65- B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under

the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in sub-section (4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65.

151. The learned Senior Counsel Mr Shanti Bhushan then contended that the witnesses examined were not technical persons acquainted with the functioning of the computers, nor do they have personal knowledge of the details stored in the servers of the computers. We do not find substance in this argument. Both the witnesses were responsible officials of the companies concerned who deposed to the fact that they were the printouts obtained from the computer records. In fact the evidence of PW 35 shows that he is fairly familiar with the computer system and its output. If there was some questioning vis-à-vis specific details or specific suggestion of fabrication of printouts, it would have been obligatory on the part of the prosecution to call a technical expert directly in the know of things. The following observations of the House of Lords in the case of R. v. Shephard [1993 AC 380 : (1993) 1 All ER 225 : (1993) 2 WLR 102 (HL)] are quite apposite: (All ER p. 231b-c) ―The nature of the evidence to discharge the burden of showing that there has been no improper use of the computer and that it was operating properly will inevitably vary from case to case. The evidence must be tailored to suit the needs of the case. I suspect that it will very rarely be necessary to call an expert and that in the vast majority of cases it will be possible to discharge the burden by calling a witness who is familiar with the operation of the computer in the sense of knowing what the computer is required to do and who can say that it is doing it properly.‖ Such a view was expressed even in the face of a more stringent provision in Section 69 of the Police and Criminal Act, 1984 in the UK casting a positive obligation on the part of the prosecution to lead evidence in respect of proof of the computer record. We agree with the submission of Mr Gopal Subramanium that the burden of prosecution under the Indian law cannot be said to be higher than what was laid down in R. v. Shephard [1993 AC 380 :

(1993) 1 All ER 225 : (1993) 2 WLR 102 (HL)] .

371. The evidence of the cell phone records in the instant case therefore cannot be doubted.

372. The prosecution has proved the cell phone call records by examining the employees of the cellular phone service providers detailed below:-

Mobile phone number	Service provider	Witness who proves the records
9811220691 Yashoman Tomar	Hutchison Essar Telecom Ltd.	PW 21 Deepak Gupta (Exh PW 21/4)
9811283641 Nitish Katara (Matrix)	Hutchison Essar Telecom Ltd.	PW 21 Deepak Gupta
9810038469 Bhawna Singh (phone used by Bharti Singh)	Bharti Cellular Ltd.	PW 22 R.K. Singh (Exh PW 21/6)
9810154964 Bharat Diwakar	Bharti Cellular Ltd.	PW 22 R.K. Singh
Cell ID chart from Hutchison year 2002 to 2004	Essar Telecom	PW 41 Gulshan Arora

Ltd.

373. The prosecution has proved the call records of Nitish Katara's cell phone 9811283641 (Exh.PW21/1) as well as those of Bharti 9810038469 (Exh.PW22/2).

374. Mr. P.K. Dey, ld. counsel for the complainant has also placed before us a tabulation of the calls reflected in Exh.PW-22/1, and Exh.PW-22/2. The above statement of Bharat Diwakar stands corroborated by the call records of Bharti Exh.PW-22/1, which have also been extracted by the learned Additional Standing Counsel. As per these documents, the extract of calls made on 17th February, 2002 from and to Bharat Diwakar's mobile number 9810154964 to and from Bharti Yadav on the cell no.9810038469, reads thus:

Mobile No. of Bharat Diwakar	Incoming Outgoing Bharti's no.9810038469	Time on Date	and Tower location (Place/ID)	Call Duration in Seconds

9810154694 Outgoing 04.06. Hrs. 53/ Kavinagar 21 17.2.2002 (GZD) 9810154694 Incoming 06.41 Hrs. 142/Rajnagar 49 17.2.2002 (GZD) 9810154694 Incoming 06.55 Hrs. 142/Rajnagar 71 17.2.2002 (GZD) 9810154694 Incoming 07.18 Hrs. 51/Nand Gram 14 17.2.2002 (GZD) 9810154694 Incoming 08.01 Hrs. 51/Nand Gram 38 17.2.2002 (GZD) 9810154694 Incoming 08.18 Hrs. 142/Rajnagar 7 17.2.2002 (GZD) 9810154694 Incoming 08.43 Hrs. 51/Nandgram 123 17.2.2002 (GZD) 9810154694 Incoming 21.37 Hrs. 661/Faridabad 192 17.2.2002 Sector - 15 9810154694 Incoming 17.46 Hrs. 661/Faridabad 73 17.2.2002 Sector - 15

375. Exh.PW-22/2 reflects a call from the cell phone number 9810038469 (Bharti's) to PW 25 Bharat Diwakar at the above number on 16th Feb-2002 at 17:20:59 hours (about 05:21 pm) which call lasted for 15 seconds while he called up the same number at 19:00:46 hrs (about 07:00 pm), which call lasted 51 seconds. These calls were made before Bharat Diwakar proceeded to Shivani Gaur's wedding.

376. PW-25 Bharat Diwakar has further categorically testified that he had received a call from Bharti using cell phone no.9810038469 at about 4.06 a.m. on the 17th of February, 2002 on his cell phone. Thereafter he received calls from Bharti on 17th February, 2002 on his mobile at 6.41 a.m.; 6.55 a.m.; 7.18 a.m.; 8.08 a.m.; 8.18 a.m. and 8.43 a.m. As per the witness, all these calls were made by Bharti from her cell phone no. 9810038469.

This testimony was not challenged by the defence and the witness has not been cross-examined on this statement at all.

This documentary evidence proves that on 17th February 2002, eight phone calls have been exchanged between Bharat Diwakar and Bharti Yadav starting as early as at 4:06:34 hours to 21:37:04 hours lasting between 21 seconds to 192 seconds. It amply corroborates the oral testimony of the witnesses and demolishes Bharti and Bhawna Yadav's testimonies with regard to the cell phone.

377. Let us also examine the evidence of phone calls exchanged between Gaurav Gupta and Bharti Yadav as well. It is in the testimony of PW 26-Gaurav Gupta that he had come for Shivani's wedding from Faizabad and did not have roaming facility on his own phone. Gaurav Gupta had stayed with another friend Yashoman Tomar (PW 20) in Noida. As noted above Yashoman Tomar was using cell number 9811220691. Gaurav Gupta has testified that he used this cell phone to make calls to Bharti on her cell number 9810038469. This is again corroborated by the call details in Exh.PW 22/2 which shows that three calls having been made from Yashoman Tomar's cell number 981122691 on 17 th

February, 2002 between 6:49:29 hours (06:49 am) to 22:38:37 hours (10:38 pm) lasting 60 seconds; 11 seconds and 98 seconds respectively.

378. It is in the testimony of PW-30 Nilam Katara that she was using the mobile phone bearing no.9810206291 and that the landline nos. 3366629 and 3747555 were installed at her residence at 7, Chelmsford Road, New Delhi. This is also confirmed by the customer bill Exh.PW-22/1.

379. PW-30 Nilam Katara has testified that when her son did not return home, she took Bharti Yadav's cell number from Bharat Diwakar and called Bharti twice between 7 and 7.30 a.m. on the 17th of February, 2002. Her testimony as PW 30 in Vikas and Vishal Yadav's trial about her actions on the 17th February, 2002 may be usefully extracted and reads thus:

"Q. What further efforts you made to locate your son.

A. Thereafter I took Bharti‟s cell no. from Bharat. I called up Bharti twice on that morning as far as I remember. I had called her somewhere around 7 - 7.30 AM from land line of our house. Bharti was very upset when I talked to her on telephone. I told her that Nitish had not come back. She told me that she had also been trying to contact on his cellphone but she had not been able contact except once. I am not sure whether it was Bharti who had been able to speak to Nitish or Bharat or Gaurav Gupta, but somebody had talked to her only once. Bharti asked me that if these boys i.e. Bharat and Gaurav had not told me that Nitish had been taken away by her brothers. I told her that they had not informed me this.

xxx xxx xxx

Q. Did she tell the name of her brother who

had taken Nitish away (question is objected. Objection is overruled) A. She had told me the names of both accd. persons Vikas and Vishal who had taken away Nitish. I asked her where they had taken him. Then she told me that they were not telling her anything and I should talk to her father. I then asked Bharat, then Bharat told me that Rohit Gaur had told that the boy who had called Nitish was Vishal and Rohit Gaur had seen him going with both of them i.e. Vikas and Vishal. I told Bharat that he should go and locate Nitish. He might be still in the same hotel.

xxx xxx xxx

Q. What further steps did you take to locate your son.

A. I called up Sh. D.P. Yadav on telephone

and he told me that he had heard that something has happened and as soon as he comes to know he shall contact me. I again called DP Yadav after sometime and he told me that he was busy with his election and he would get back to me.

xxx xxx xxx I spoke to Bharti again and I told her that if I am not able to find out about my son I would be going to PS and reporting the matter and I would be giving her name then Bharti told me that `Anti do you know what they are doing with your son‟ please lodge the report and give my name and if it amounts to a slur to my family let it be so.‟‟‟ xxx xxx xxx I had lodged this written complaint between 11.30 am and 12 noon at PS Kavi Nagar, GBD. I had stayed at PS upto 2.30 or 2.45 p.m. as I was waiting if some news of my son could be there. I did not get any news of my son at the PS. I made one phone call to Bharti from PS on her cell and she told me that she was being taken to Faridabad at her sister‟s

house and nobody was telling her anything and I should look for my son, as the time was crucial. From Police stn., I decided to go to house of DP Yadav to meet mother of Bharti, I requested police persons to show me the house, they took me to the house and pointed-out to house and then left.

xxx xxx xxx I then went to the house and mother of Bharti herself had opened the door and took me inside, I confirmed from her and she told me that she was mother of Bharti. She spoke to me courteously and behave with me nicely. I told her about my son having been taken by Vikas and Vishal. She said that she had talked to Bharti and Bharti had spoken to Vikas specifically and Bharti had been told by Vikas that they had met Nitish at the marriage and they had not taken him away.‖ (emphasis by us)

380. Mr. Dey, learned counsel for the complainant has tabulated the calls made from or received by Nilam Katara's landline numbers 3747555 and 3366629 as well as those from her cell number 9810206299 from/to Bharti on the cell no.

9810038469 on the 17th and 18th of February, 2002 from the proven call record which shows the following:-

Calls made by Nilam Katara from her landlines	Incoming to Bharti Mobile No.9810038469	Time Date	and Tower location (Place/ID)	Call Duration in Seconds
3366629	Incoming	06.17 Hrs 17.2.2002	142/Rajnagar (GZD)	37
3366629	Incoming	06.40 Hrs. 17.2.2002	728/Lohia Nagar GZD.	63
3747555	Incoming	07.13 Hrs. 17.2.2002	728/Lohia Nagar GZD.	50
3747555	Incoming	07.22 Hrs. 17.2.2002	142/Rajnagar (GZD)	41
3747555	Incoming	07.33 Hrs. 17.2.2002	142/Rajnagar (GZD)	67
3366629	Incoming	08.04 Hrs. 17.2.2002	51/Nand Gram GZD.	92
3366629	Incoming	08.15 Hrs. 17.2.2002	51/Nand Gram GZD.	114
3747555	Incoming	08.18 Hrs. 17.2.2002	142/Rajnagar (GZD)	38
3747555	Incoming	08.37 Hrs. 17.2.2002	142/Rajnagar (GZD)	41
3366629	Incoming	08.50 Hrs. 17.2.2002	142/Rajnagar (GZD)	182
3747555	Incoming	10.03. Hrs. 17.2.2002	142/Rajnagar (GZD)	105
3747555	Incoming	11.43 Hrs. 17.2.2002	142/Rajnagar (GZD)	67
3747555	Incoming	06.57 Hrs. 18.2.2002	661/Faridabad, Sec.15.	597
3747555	Incoming	07.30 Hrs. 18.2.2002	661/Faridabad, Sec.15.	110
3747555	Incoming	11.40 Hrs. 18.2.2002	661/Faridabad, Sec.15.	143
3747555	Incoming	16.54 Hrs. 18.2.2002	661/Faridabad, Sec.15.	66

Calls made by Nilam Katara from her Mobile No. and vice versa	Incoming and Outgoing to Bharti's Mobile No.9810038469	Time and Date	Tower location (Place/ID)	Call Duration in Seconds
9810206299	Incoming	14:08 Hrs 17.2.2002	142/Rajnagar (GZD)	67
9810206299	Outgoing	20.11 Hrs 17.2.2002	661/Faridabad, Sector 15.	220
9810206299	Incoming	9:11 Hrs 19.2.2002	661/Faridabad, Sector 15.	23
9810206299	Outgoing	9:12 Hrs 19.2.2002	57/Faridabad, Sector 8.	54

381. PW-30 Nilam Katara has orally testified that PW-38 Bharti Yadav and she were constantly in touch with each other and that Bharti Yadav was calling her from the telephone no.9810038469. There is no cross examination of the witness on this testimony. The above testimony is thus amply corroborated on record in the trial by the established documentary evidence of the call records of the phone no.9810038469 for the month of February, 2002 proved on record as Exh.PW-22/1 and PW-22/2. The above extract establishes that Nilam Katara made the first call to Bharti from her landline as early as 6:17 am on the 17th of February, 2002. Thereafter she has called at 6:40 am, 7:13 am, 7:33 am, 8:04 am, 8:15 am, 8:18 am, 8:37 am and 8:50 am. The calls lasted from 37 seconds to 182 seconds. At 10:03 am Nilam Katara's call to Bharti has lasted 105 seconds. She has again called at 11:43 am and spoken for 67 seconds.

These calls support her testimony about telling Bharti that she was going to seek police help.

382. The above tabulation from the call records also reflect the call from Nilam Katara's mobile no. 9810216299 to Bharti cell no. 9810038469 at 14:08:22(2:08 pm) on the 17th of February lasting 67 seconds. This piece of documentary evidence supports Nilam Katara's aforenoted oral testimony that she was at the PS Kavi Nagar from 11:30 am to 2:45 pm and that she had spoken to Bharti on her cell from the police station.

383. The call records also establish that after 14:08 hrs, calls were received by Bharti at Faridabad. Bharti has also called Nilam Katara's mobile number on the 17th February, 2002 at 20:11 hrs (08:11 pm) and spoken for 220 seconds to her. One of the calls on Nilam Katara's landline received from Bharti is on the 18th of February, 2002 at 06:57 hrs (6:57 am) they have spoken for 597 seconds. They have again spoken at 7:30 am for 110 seconds and at 11:40 am for 143 seconds.

384. PW39-Nitin Katara stated in his testimony that ―when I called Bharti Yadav on 17.2.02 around 7.30/8 pm she appeared to be quite upset and she told me that she had last seen Nitish with Vikas Yadav and Vishal Yadav.‖ ..... ―During the period 18.2.02 till 20.2.02 she called me on my mobile and once or twice on land line, at that time I was having two land line connections bearing No.23747555 and 23366629 at my residence. She was worried and she wanted me to contact everyone in her family and she stressed upon me to contact her father Sh DP Yadav. She also told me that I should not give time to DP Yadav otherwise he would made it a political gimmick. She cried several times on telephone.‖

385. The prosecution has established that Nitin Katara was based in Pune and used two cell phones, one for Pune and another used for Delhi.

386. A similar tabulation of the calls made and received by Nitin Katara from and on his Pune mobile number 9822288216, to and from Bharti (using the cell phone no.9810038469) as per the proven call records reads as follows:

Calls from Nitin Katara's Pune Cell	Incoming and Outgoing on Bharti's 9810038469	Time and Date	Tower Location (Place/ID)	Duration in Seconds
9822288216	Incoming	19.43 Hrs. 17.2.2002	661/Faridabad Sec. 15	16
9822288216	Incoming	19.44 Hrs. 17.2.2002	661/Faridabad Sec. 15	21

387. An extract of calls made and received from and on Nitin Katara's Delhi cell number 9811297136, to and from Bharti (on the cell phone no.9810038469) reads as follows:

Mobile No. of Nitin Katara	Incoming and Outgoing on Bharti's mobile	Time and Date	Tower Location (Place/ID)	Duration in Seconds
9811297136	Outgoing	11:14 Hrs18.2.2002	661/Faridab ad sec. 15	60
9811297136	Outgoing	16.45 Hrs 18.2.2002	661/Faridab ad sec. 15	120
9811297136	Incoming	16.53 Hrs 18.2.2002	661/Faridab ad sec. 15	15
9811297136	Outgoing	22.45 Hrs 18.2.2002	661/Faridab ad sec. 15	233
9811297136	Outgoing	00.08 Hrs 19.2.2002	661/Faridab ad sec. 15	20
9811297136	Incoming	09:19 Hrs 19.2.2002	661/Faridab ad sec. 15	182
9811297136	Outgoing	10:33 Hrs 19.2.2002	661/Faridab ad sec. 15	50
9811297136	Incoming	11:02 Hrs 19.2.2002	661/Faridab ad sec. 15	193
9811297136	Incoming	12:30 Hrs 19.2.2002	661/Faridab ad sec. 15	36
9811297136	Incoming	12:33 Hrs 19.2.2002	661/Faridab ad sec. 15	28
9811297136	Outgoing	13:32 Hrs 19.2.2002	661/Faridab ad sec. 15	88
9811297136	Outgoing	14:29 Hrs 19.2.2002	661/Faridab ad sec. 15	36
9811297136	Outgoing	15:10 Hrs 19.2.2002	661/Faridab ad sec. 15	65

388. Having noted the above, it is necessary to also examine the testimony of Bhawna Yadav (PW 42) which was recorded on two dates in the trial of Vikas and Vishal Yadav with regard to the cell phone no.9810038469.

389. So far as the mobile phone no.9810038469 is concerned, Bharti's sister PW-42 Bhawna Yadav has claimed that the cell number 9810038469 was registered in her name at the address R-4/32, Raj Nagar, Ghaziabad, U.P. She further testified that R-4/32 was really the servant's quarter attached to the main house which was bearing number R-4/16 in Ghaziabad, U.P. and that the main house was owned by her father namely Shri D.P. Yadav. She offers no explanation as to why she registered the phone against the servant quarter. There can really be no reasonable explanation as to why a phone connection would be taken at the address of servant's quarter unless the intention was to prevent knowledge thereof to the property owner. This act itself indicates that though permitted to her sister and brothers, Bharti was not allowed use of even a cell phone and that, to prevent detection her sister had got her one using the servant quarter's address.

390. PW-38 Bharti has simply denied knowledge that phone no.

9810038469 was registered in the name of her sister at their residential address or she was using the same or any cell phone. She completely denied receipt of any phone calls from Bharat Diwakar, Nilam Katara, Gaurav Gupta or Nitin Katara. She claimed that she could not remember even the landline number of the telephone at her residence!

391. At the same time Bhawna Yadav (appearing as PW 42 on the 9th of March, 2007 in her brother's trial) has stated that till 16th February, 2002 evening, this cell phone was in her exclusive possession and thereafter, while she was attending the wedding of Shivani Gaur, she had left the cell phone with her driver in the car which she collected from him sometime in the evening of 17th February, 2002. She further stated that her driver had received a single call from Nilam Katara on the phone on that day and she had returned the call to Nilam Katara in the evening of 17th February, 2002 from Faridabad. She denied making any calls from this mobile to Bharat Diwakar on 16/17th February, 2002 between 4 a.m. to 10.30 p.m. The witness also denied receiving any calls from Gaurav Gupta during this period.

392. But Bhawna's lies stand caught out when the marriage video (Ex.PW42/1) was played during her testimony. In this video she has been filmed with a cell phone in her hand. A second cell phone was also handed over to her by her friend Lata in the video which has been noted by the trial judge. Bhawna Yadav still insisted that she had left her phone (a third phone) with her driver.

393. Interestingly Bhawna Yadav made all these categorical denials in the first part of her examination-in-chief on 9th of March, 2007. The Special Public Prosecutor sought leave to put leading questions to this witness with regard to cell numbers being used by her father, brother Vikas Yadav, husband Deepak Yadav. At this stage when the Special Public Prosecutor was putting these questions to her, Bhawna Yadav did not let her testimony be concluded on this date and sought deferment on the ground that her child was unwell. Thereafter, it appears that better sense appears to have prevailed over this witness. She appears to have realized the fool hardiness of her denials when pitted against not only the oral testimony of the several prosecution witnesses, but also the documentary evidence of call records and the tower locations which identified where the cell phone no.9810034689 was located.

Consequently in the latter part of her statement on 28th March, 2007, Bhawna Yadav changed her stand and, in contradiction to her prior evidence, now stated that she could not recollect how many times she and Nilam Katara had exchanged calls; whether she had called Bharat Diwakar from the said cell phone or how many calls have been received from Nitin Katara as well as Gaurav Gupta.

394. It is not the case of Bhawna Yadav that she was friends with either Bharat Diwakar or Gaurav Gupta. The duration of their calls to the cell number 9810038469 reflects that the party calling had

conversation with the person answering the phone. The conversation has even lasted several minutes.

395. If the claim made by PW 42 Bhawna Yadav is accepted, then Exh.PW 22/2 reflects several calls having been made or received from Bharat Diwakar; Gaurav Gupta; Nilam Katara; Nitin Katara when the phone was in the possession of Bhawna's driver. There is no reason at all why any of these persons would have had such frequent and long conversations with Bhawna Yadav's driver!

396. We therefore find from the above narration that as per Exhs.PW-21/1 and PW 22/2, after 11:00 PM: of the 16th of February, 2002:

(i) Bharat Diwakar exchanged 8 calls with Bharti on the phone number 9810038469 which lasted from 7 seconds to 192 seconds;

(ii) Nitin Katara exchanged 14 calls with cell phone no.9810038469 between the evening of 17 th February, 2002 till the evening of 19th February, 2002 lasting between 16 seconds to 233 seconds;

(iii) Nilam Katara from her mobile phone (9810206299) exchanged two phone calls on 17th February, 2002 and two phone calls on 19th February, 2002 with Bharti on the cell phone no.9810038469.

(iv) Apart from the above calls on the mobile, between 6:17 am to 10:03 pm on the 17th of February, 2002, Nilam Katara made eleven calls on 17th February, 2002 (including five calls from her land line number 3366629 and six calls from her land line number 3747555) to cell phone no.9810038469 which lasted between 37 seconds to 182 seconds. Again on 18th February, 2002, Nilam Katara made four phone calls from her land line number 3747555 to Bharti on the cell phone no.9810038469 which ranged from 66 seconds to 597 seconds (almost 10 minutes).

397. The only permissible conclusion from the evidence on record is that Bhawna does not recollect who or how many times calls were received on 9810038469 for the sole reason that this cell phone was never used by her but was with her. This cell phone was actually being used by her sister Bharti as testified by the several witness.

398. A perusal of the call records (Exh.PW-22/2) pertaining to 9810038469 shows that at 15:42:37 on 16th February, 2002, a call was received on this cell phone from the cell no.9811283641 which was being used by Nitish Katara.

399. The call records of all the phone numbers of Nitish Katara;

> Bharti Yadav (cell phone no.9810038469); Bharat Diwakar and Yashoman Tomar clearly established that these phones were located in Ghaziabad on the night of 16 th/17th of February, 2002.

400. The electronic phone records coupled with the testimony of the representatives of the phone companies and service providers as well as that of the family members and friends of Nitish Katara belie the stand taken by Bharti and Bhawna Yadav. The unchallenged oral testimony of Bharat Diwakar; Gaurav Gupta; Nilam Katara; Nitin Katara and Yashoman Tomar to the effect corroborated by the documentary evidence with regard to the call details and tower locations establishes beyond any doubt that Bharti was using the cell phone 9810034689.

401. The above discussion persuades us to hold that there is no error in the finding of the learned Trial Judge's that mobile phone no.9810038469 was being used by Bharti Yadav and she exchanged several calls with Nilam and Nitish Katara, Bharat Diwakar, Gaurav Gupta and Yashoman Tomar noticed by us hereinabove.

(x) Regarding involvement of Vikas and Vishal Yadav -

Spontaneous utterances by Bharti Yadav during the continuation of the transaction are admissible under Section 6 of the Evidence Act

402. It has been contended by Mr. P.K. Dey, learned counsel representing the complainant that the case of the prosecution was that all the appellants abducted the deceased Nitish Katara and murdered him. The case of the prosecution rests on circumstantial evidence and that the prosecution has proved all the circumstances which form a complete chain.

403. We now propose to examine the submission made by Mr. Dayan Krishnan, ld. Additional Standing Counsel for the State as well as Mr. P.K. Dey, ld. counsel for the complainant based on utterances attributed to Bharti in the phone calls made shortly after Nitish Katara was found missing from the wedding venue and examine the relevance and admissibility of the same.

404. Ld. counsel have placed the evidence of Nilam Katara (who testified as PW 30 in Vikas and Vishal Yadav's trial) extracted above to the effect that at about 7:30 a.m. on the morning of 17th February, 2002 she had called Bharti (on cell phone 9810038469). During this conversation Bharti had questioned her as to whether the boys (that is, Bharat Diwakar (PW 25) and Gaurav Gupta (PW 26) had not told her (Nilam Katara) that Nitish had been taken away by her brothers.

Nilam Katara has testified that Bharti Yadav had spontaneously uttered the words, without any kind of pressure or inducement. It is argued that this utterance was made by the real sister of Vikas Yadav and cousin Vishal Yadav who would certainly not falsely implicate her brothers.

405. The appellants on the other hand have contended that there is delay between Nitish Katara being taken away and Nilam Katara's utterance and that the same has to be rejected. Delay has to be considered not from the mere fact that a few hours may have passed since the time Nitish was taken away but the factual situation has to be examined in real terms.

406. Mr. P.K. Dey, learned counsel for the complainant has urged that when Bharti Yadav had blurted out that her brothers had taken Nitish Katara with them, the transaction of abduction was continuing. The transaction ended only upon apprehension of the appellants on 23rd February, 2002 at Dabra or in the alternative, only on 21st of February, 2002 when the unknown dead body was identified as possibly that being of Nitish Katara by his mother Nilam Katara. The submission of learned counsel is that the evidence of the spontaneous utterances by Bharti Yadav on 17th February, 2002 and thereafter were part of the same transaction and therefore admissible by virtue of Section 6 of the Indian Evidence Act.

407. Given the submission of learned counsel for the complainant, it is necessary to examine the provisions of Section 6 of the Indian Evidence Act dealing with relevancy of the facts forming part of same transaction as well as illustration A thereunder which reads as follows:-

—Section 6. Relevancy of facts forming part of same transaction.-

Facts which, though not in issue are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Illustrations

(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after is as to form part of the transaction, is a relevant fact.

xxx xxx xxx

408. It is urged that the expression ―same transaction‖ in Section 6 of the Indian Evidence Act relates to continuity of action and purpose and it is neither the distance nor the proximity of time which is material in assessing the continuity.

409. In this regard reliance has been placed on the pronouncement of the Division Bench reported at AIR (33) 1946 Patna 40, Hirday Singh and Ors. v. Emperor wherein the court has held that ―it is not the distance nor the proximity of time which is so essential in order to consider which is „the same transaction", as the continuity of action and purpose‖. This case related to a dacoity and on the issue under consideration, the Division Bench observed that the ―carrying out of a successful dacoity, that is to say, successful not only in securing the loot but carrying it off, inevitably involves previous concert and planning; and continuity of action in carrying out the joint purpose can be said to continue until the stolen property has been successfully got away to the place of concealment. In the case before us the dacoits were intercepted while still returning home with their booty. Some were arrested with the booty, and they were rescued, not by friends or sympathizers from their village, but by others of their number, who were returning behind them and who also had not yet reached home. In my judgment, from the time they set out on their expedition until they get safely home with their booty, everything done by the dacoits, which is directed, towards the successful completion of the crime, the getting away of the culprits, and the concealment of the booty, may fairly be described as part of the same transaction."

410. This pronouncement was followed by the Kerala High Court in the judgment reported at 1994 (2) KLJ 944 titled Ponnappan v. State. In this case, one Sukumara Kurup was believed to be the victim of a murder and a body was found in flames in a motor car inferno later it was revealed that the body was not of Sukumara Kurup, but of one Chacko to make a facade that he had been killed. Evidence was led of PW - 36 (who was close neighbour of Sukumara Kurup) to the effect that second accused had told PW-36 later that Sukumarakurup was alive. The appellant had challenged the admissibility of this evidence as being only hearsay evidence and a statement made by one of the accused. The court noted Section 14 of the Evidence Act as making facts, showing the existence of a state of mind such as knowledge, relevant when the existence of such state of mind is relevant.

The said statement made by the second accused indicating his knowledge that it was not Sukumarakurup who was in flames in the car was undoubtedly relevant and therefore, was held to be admissible in evidence.

411. So far as present consideration is concerned, in Ponnappan (Supra), PW - 1 (an approver in the case) also deposed that when the deceased got into their car, he had told them of his identity as Chacko, a film representative hailing from Alleppey. These particulars were disclosed by the deceased when PW-1 asked him about it. This statement was also challenged on behalf of the appellant on the ground that this statement of the deceased would not fall within the ambit of Section 32 of the Evidence Act and would therefore, be inadmissible in evidence. The State had relied on Section 6 of the Evidence Act in support of its admissibility.

412. In the judgment authored by K.T. Thomas, J. (as his Lordship then was), the court had construed the expression ―transaction‖ as appears in Section 6 of the statue and observed thus-

―29. The word "transaction" in the section in its largest sense can be termed as the group of facts so connected together as to be referred to the crime itself. Whether a series of acts are so connected together as to form the same transaction is a question of fact. Proximity of time, continuity of action and unity of purpose or design are factors governing the same question of fact.

30. A similar expression "to form the same transaction" was used in Section 235(1) of the Code of Criminal Procedure, 1898 [corresponding to Section 220(1) of the present Code].

S.R. Das, J. (as he then was) speaking for a Division Bench of the Calcutta High Court has interpreted the said expression in Becharam Mukherji v. Emperor, A.I.R. 1944 Cal 224, as purely a question of fact "depending on proximity of time and place, continuity of action and unity of purpose and design." Almost an identical expression can be traced in Section 223(a) of the present Code (which corresponded to Section 239 of the old Code). Jafar Imam, J. (as he then was) speaking for a Division Bench of the Patna High Court has interpreted it in Hirday Singh v. Emperor, A.I.R. 1946 Pat 40, as this: "It is not the distance nor the proximity of time which is so essential in order to consider what is 'the same transaction' as the continuity of' action and purpose". Their Lordships were considering the facts of a dacoity in which transaction took place even while carrying off the booty and that was also held to be part of the same transaction. We do not think that the said wider interpretation should not be imported to the expression "part of the same transaction" in Section 6 of the Evidence Act as well.

31. Statement made by the deceased to the culprits while he was taken inside the car disclosing his identity is a fact so connected with the fact in issue as to form part of the same transaction in that larger perspective. So we hold that there is evidence to show that deceased himself divulged his identity as Chacko, the film representative from Alleppey. There is no reason to think that the deceased would have given a wrong identity as he had no cause for impersonating to be someone else.‖ (Emphasis by us)

413. In the pronouncement of the Supreme Court reported at (2009) 13 SCC 80 Bhairon Singh v. State of Madhya Pradesh, the Supreme Court was considering the admissibility of oral evidence of PW-4 and PW -5 about what the deceased had said against the accused about the treatment meted out to her, so as to sustain the conviction under Section 498A of the IPC.

414. In this precedent, the accused persons stood acquitted of offences punishable under Section 304 B as well as 306 of the IPC. The trial court had held that the death of the wife (ten years after the marriage) was neither homicidal nor suicidal but accidental. However relying on the oral testimony of PW-4 and PW-5, the two brothers of the deceased, to the effect that after one year of gauna, she had been subjected to torture and harassment for dowry, the trial court had held that the accused was guilty of the offence punishable under Section 498A of the IPC and 30 of the Dowry Prohibition Act. In their deposition, PW-4 and PW-5 stated that their sister told them that the accused was torturing him as he wanted her brothers to arrange a job for him or house at Ganj Basoda be given to him or Rs.1 lakh be given to enable him to do some business. They deposed that ―as and when their‖ sister came to the house she told them that the accused used to insert cloth in her mouth and give beatings for dowry. Apart from this statement, there was no other evidence of torture and harassment to the deceased.

415. The court therefore considered as to whether the statement attributed to the deceased could be used as evidence for returning the finding of guilt of the deceased for the commission of offence punishable under Section 498A of the IPC. The counsel for the State had placed reliance on Section 6 of the Evidence Act to submit that the statement would be admissible as res gestae. The court had considered the scope of Section 6 of the Evidence Act in the following terms:-

―21. The rule embodied in Section 6 is usually known as the rule of res gestae. What it means is that a fact which, though not in issue, is so connected with the fact in issue ―as to form part of the same transaction‖ becomes relevant by itself. To form a particular statement as part of the same transaction utterances must be simultaneous with the incident or substantially contemporaneous that is made either during or immediately before or after its occurrence.‖ It was thereafter observed in the facts and circumstances of the case that the statement of PW-4 and PW-5 about what the deceased had told them against the accused was inadmissible under Section 6 of the Evidence Act.

416. Learned counsel for the complainant has placed reliance on the commentary titled ―The Law of Evidence" (23rd Edition, 2010) by Ratanlal and Dhirajlal wherein the expression ―transaction‖ appearing in Section 6 of the Evidence Act has been explained thus:

> ―2. Transaction - Meaning of If facts form part of the transaction which is the subject of enquiry, manifestly evidence of them ought not be excluded. The question is whether they do form part, or are too remote to be considered really part of the transaction before the court. A transaction is a group of facts so connected together as to be referred to by a single legal name, as a crime, a contract, a wrong or any other subject of inquiry be relevant to the fact in issue, although it may not be actually in issue, and although, if it were not part of the same transaction it might be excluded as hearsay. [Chain Mahto v. The Emperor (1906) 11 CWN 266, 270] A transaction consists both of the physical acts and the words accompanying such physical acts whether spoken by the person doing such acts, the person to whom they were done or any other person or persons.
>
> Such words are admissible in evidence as parts of a transaction.
>
> Illus. (a) under this section shows that what is said and done by the accused A and the victim B, at the time of the incident, if given out by the by-standers, form part of the same transaction and becomes relevant. The statement that in illus. (a) is relevant only if it is that of a person who has seen the actual occurrence and who uttered it simultaneously with the incident or so soon thereafter as to make it reasonably certain that the speaker is still under the stress of the excitement caused by his having seen the incident. What is admissible under this section is a fact which is connected with the fact in issue as _part of the same transaction'. A transaction may consist of a single incident occupying a few minutes or it may be spread over a variety of facts, etc. occupying a much longer time and occurring on different occasion or different places. Where the transaction consists of different acts, in order that the chain of such acts may constitute the same transaction, they must be connected together by proximity of time, proximity or unity of place, continuity of action and community of purpose or design. [Hadu v. State 1950 Cut 509: AIR 1951 Ori 53] Illustration (b) indicates that acts done at different places and times may form part of the same transaction.
>
> A transaction in its ordinary sense is some business or dealing which is carried on or transacted between two or more persons [Gujju Lall v. Fatteh Lall (1880) 6 CAL 171 (FB)]. Such of those statements made whether at the same time and place or at different time and places, as are connected with the fact in issue also form part of the same transaction. [Krishna Ram Das v. State, AIR 1964 ASSAM 53]. Facts leading to the circumstances as to the nearness of the place, continuity of the act and the purpose or design have been considered as a part of the same transaction. [Babu Lal v. W.I.T. Ltd. AIR 1957 Cal 709; Kashmira Singh v. State, 1965 JK 37 ; Kridey Singh v. R., AIR 1946 Pat 40].
>
> Where the children of the deceased were heard crying and saying that their mother was being killed, it was held that such statements of the children can be admitted under this Section. (Sawal v. State, AIR 1974 SCC 778) When a witness stated that he was told by other witnesses that the accused was beating the deceased at about the time of occurrence, it was held that such evidence was admissible as part of res gestae. [Badruddin v. State of Maharashtra 1981 CrLJ 729 (SC)].‖ (Emphasis by us)

417. Mr. P.K. Dey, learned counsel for the complainant has also placed reliance on the American Jurisprudence Vol.29-A (2nd Edition) on the portion dealing with hearsay statements which are in the

nature of excited utterances relating to any event or condition which may be admissible as a hearsay exception. In this regard in the Section 865 titled _Excited utterances', this hearsay exception has been explained thus: -

> —S. 865. Excited utterances Hearsay statements relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition - that is, —excited utterances‖ - are ordinarily admissible in evidence. [United States v Campbell (ND III) 782 F Supp 1258, 34 Fed Rules Evid Serv 661 (applying Federal Rule of Evidence 803(2); W.C.L. v. People (Colo) 685 P2d 176; State v Sneed 327 NC 266, 393 SE2d 531.] In this regard, the Federal Rules of Evidence contain a hearsay exception for excited utterances. (FRE. Rule 803(2) Annotations : When is hearsay statement an —excited utterance‖ admissible under Rule 803(2) of the Federal Rules of Evidence, 48 ALR Fed 451). To come within the excited utterance exception to the hearsay rule, a statement must be a spontaneous declaration by a person whose mind has been suddenly made subject to an overpowering emotion caused by some unexpected and shocking occurrence, which that person had just participated in or closely witnessed, and made in reference to some phase of that occurrence which he perceived. (Commonwealth v. Blackwell, 343, Pa Super 201 494 A2d 426) The basis for the excited utterance exception to the hearsay rule is that the perceived event produces nervous excitement, making fabrication of statements about that event unlikely. Since an excited utterance is made under the immediate and uncontrolled domination of the senses, rather than reason and reflection, and during the brief period when consideration of self-interest cannot be fully brought to bear, the utterance may be taken as expressing the real belief of the speaker as to the facts just observed by him4. (People v. Fuelner (1st Dist) 104 III App 3d 340, 60 III Dec. 87 432 NE2d 986).
>
> Whether a statement fits within the excited utterance exception to the hearsay rule is to be determined on the facts of the particular case. (Commonwealth v. Blackwell 343 Pa Super 201 494 A2d 426). The exception applies only if (1) a startling event or condition occurred; (2) the statement was made while the declarant was under the stress of excitement caused by the event or condition (3) the statement relates to the startling event or condition. Generally, the sufficiency of the event or occurrence to qualify as the startling event is not questioned.
>
> The primary consideration for the trial court is whether the utterance is, because of the circumstances, reliable. However, courts have not attempted to confine the application of the excited utterance exception solely to indisputably reliable statements. Courts look primarily to the effect of a particular event upon the declarant, and, if satisfied that the event was such as to cause adequate excitement, the inquiry is ended [W.C.L. v. People (Colo) 685 P2d 176].
>
> S. 866 Statements of present mental, emotional or physical condition Statements that shed light upon the declarant's then-existing mental, emotional or physical condition typically are admissible as an exception to the hearsay rule, and may be offered to prove the declarant's condition. The subsequent conduct, or his intent, plan, or motive at the time the statement was made.‖ (Emphasis supplied)

418. The excited utterances exception to the hearsay rules applicable in the United States of America has been explained as being similar to the Common Law res gestae exception (Ref: W.C.L. v. People (Colo) 685 P2d 176)

419. Our attention has also been drawn to Blackstone's Criminal Practice (1994) wherein also it was explained that res gestae or the common law exception to the hearsay rule in which admissibility depends on proof of the _close and intimate connection' between the exciting events in issue and the making of the statement, the theory being that the spontaneity of the utterance is some guarantee against concoction. The authors have relied on the several judicial pronouncements placed before us by Mr. Dayan Krishnan, learned Additional Standing counsel for the State which we have noticed above.

420. John Henry Wigmore in "Evidence in Trials At Common Law" (Volume 6) reiterates that for the declaration to be admitted as an exception to the hearsay rule, the declaration may be admissible even though subsequent to the occurrence, provided it is near enough in time to allow the assumption that the exciting influence continued‖.

421. Learned counsel for the complainant has also placed reliance on the commentary by Archbold in „Criminal Pleading, Evidence and Practice - 2009‟ wherein Section 11 - 3 of (Chapter II) the author has considered Section 114 of the Criminal Justice Act, 2003.

422. We have been called upon to consider whether Section 6 of the Indian Evidence Act makes the spontaneous utterances by PW - 30 Bharti Yadav to Nilam Katara and Nitin Katara admissible in evidence.

423. Reliance has also been placed on Law of Evidence by Chief Justice M. Monir (15th Edition Vol 1) wherein it is authoritatively stated as follows:-

> —11. Section 6 is an Exception to Hearsay Rule Section 6 of the Evidence Act is an exception to the aforesaid hearsay rule and admits of certain carefully safeguarded and limited exceptions and makes the statement admissible when such statements are proved to form a part of the res gestae, to form a particular statement as a part of the same transaction or with the incident or soon thereafter, so as to make it reasonably certain that the speaker is still under stress of excitement in respect of the transaction in question. [Vasa Chandrasekhar Rao v. Ponna Satyanarayana, AIR 2000 SC 2138 : (2000) 6 SCC 286 : 2000 CrLJ 3175; Javed Alam v. State of Chattisgarh, 2009 (8) SCALE 68] Section 6 of the Evidence Act is an exception to the general rule whereunder the hearsay evidence becomes admissible. But for bringing such hearsay evidence within the provisions of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there should not be an interval, which would allow fabrication. The statements sought to be admitted, therefore, as forming part of res gestae, must have been made contemporaneously with the acts or immediately thereafter.
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> xxx xxx xxx
>
> 12. Statements Admitted under Section 6 are Original Evidence and not Hearsay The statements which are admissible under this section do not come under the rule against hearsay because, as has been aptly remarked, —in such cases it is the act that creates the hearsay, and not the hearsay the act‖ [Phipson Evidence, 14th Edn., para 29-13]. It is no objection to their relevancy that they are admissions in favour of their maker, as such statements admissible for or against either party (Phipson Evidence, 14th Edn., para 29-
>
> 14).
>
> 13. Maker of the Statement Need not be Called to Prove it Since the section makes such statements a —relevant fact‖, they may be proved by the evidence of any person who hears them, and it is not necessary that their maker should appear in Court to prove them (Dysart

Peerage, 6 app Case P 516; Baleman v. Bailey, 5 TR 512; Phipson Evidence, 14th Edn., P. 58).

14. Statements which are Admissible as Part of the Transaction are Substantive Evidence In English law, statements which become admissible as part of the transaction are not, in general, evidence of the truth of the matter stated. [Phipson Evidence, 14th Edn., P. 712] It is, however, submitted that, under the Act, such statements may be treated as substantive evidence, i.e., as evidence of the truth of the matter stated, inasmuch as the section does not in any way limit their relevancy to any particular purpose.

15. Statements which are a Part of the Res Gestae may be Admissible under Section 157 or Section 155 A statement which is admissible under Section 6 as a part of the transaction may also be used, under Section 157 or Section 155, to corroborate or to contradict the testimony of its maker in Court. The place where a murder was committed was occupied by a number of persons besides the deceased and the eye- witnesses. The evidence showed that these persons came up immediately after the murder and it was alleged that they were informed by the eye-witnesses as to who the culprits were. It was held, that though those persons did not actually see the culprits, their evidence was material, not with a view to prove the actual fact of murder, which was in `issue', but to prove the `relevant fact' that, just after the event, the eye-witnesses disclosed the names of the culprits to those who came there, this relevant fact being so connected with the fact in issue as to have necessitated the giving of evidence on that relevant fact itself. (Malendra Pal v. State, 155 ALL 323) Where the witnesses stated that they not only saw but also relied on the statements of other persons made immediately after the occurrence that the accused was the assailant, the Supreme Court ruled that even if it were taken that the witnesses relied on the statements of other persons made at the scene immediately after the occurrence, the evidence was admissible as that of a `relevant fact'(Jetha Ram v. State of Rajasthan, AIR 1979 SC 22 (para 1): (1978) 4 SCC 425).‖ (Underlining by us)

424. The commentary by Sarkar in the Law of Evidence extracts from judicial pronouncements and notes that the following has been held admissible as res gestae under Section 6 of the Evidence Act:

―For the application of Section 6, it is necessary that the fact must not be too remote but a part of single transaction. In the instant case it was immediately after the incident that prosecution witness came to the spot on hearing shouts and gained the knowledge through another person present there that it was the accused appellant who had stabbed the victim. This evidence is clearly admissible under Section 6 of the Evidence Act and same is corroboration of the eye-witness account [Arjun v State of U.P. 2003 (46) ACC 233 (ALL)] In a Calcutta case it has been observed that the ―essence of the principle of res gestae is that since the hearing of the witness concerned about the occurrence from the mouth of the eye-witnesses who has not given deposition about the occurrence before the Court was immediately after the occurrence, so much so, that it formed part of the same transaction and the said eye-witness had no time or scope to look up any false story‖. (Rameshwar Hembram v. State of W.B. 2002 Cal CrLR(Cal) 276) Section 6 of the Evidence Act pertain to the principle of res-gestae which means, as per Law Lexicon, ―Things done, or liberally speaking the facts of the transactional the facts of a transaction explanatory of an act or showing a motive for acting; matters incidental to a main fact and explanatory of it; including acts and words which are so closely connected with a main fact as will constitute a part of it, and without a knowledge of which the main fact might not be properly understood, even speaking for themselves, though the instinctive words and acts of participants, not the words and acts of participants when narrating the events, the circumstances, facts and declaration which grow out of the main fact, and

contemporaneous with it and serve to illustrate its character or those circumstances which are the automic and undersigned incidents of a particular litigated act and are admissible when illustrative of such act [Vinod Kumar Boderbhai v. State of Gujarat 1999 CriLJ 1650 (1662) (Guj)]‖

425. Reliance has also been placed by learned counsel on the pronouncement of the US Supreme Court reported at 418 US 683 titled Richard M. Nixon v. United States. In this case subpoenas were issued directing production of tapes which were objected on the following grounds:-

―The most cogent objection to the admissibility of the taped conversations here at issue is that they are a collection of out-of- courts statements by declarants who will not be subject to cross-examination and that the statements are therefore inadmissible hearsay. Here, however, most of the tapes apparently contain conversations to which one or more defendants named in the indictment were party. The hearsay rule does not automatically bar all out-of-courts statement by a defendant in a criminal case. Declarations by one defendant may be also be admissible against other defendants upon a sufficient showing, by independent evidence, of a conspiracy among one or more other defendants and the declarant and if the declaration were at issue were in furtherance of that conspiracy. The same is true of declarations of co-conspirator who are not defendant in the case on trial.‖

426. Mr. P.K. Dey, learned counsel for the complainant has also placed reliance on the judgment of the Privy Council reported at (1971) 3 ALL ER 801 titled Ratten v. Reginam wherein the court discussed the circumstances for admissibility of hearsay evidence as part of res gestae and exclusion. The relevant extract thereof which has bearing on the present matter reads as follows:-

―The possibility of concoction or fabrication where it exists is on the other hand an entirely valid reason for exclusion and is probably the real test which judges in fact apply. In their Lordships' opinion this should be recognized and applied directly as the relevant test: the test should be not the uncertain one whether the making of the statement was in some sense part of the event or transaction. This may often be difficult to establish: such external matters as the time which elapses between the events and the speaking of the words (or vice versa), and differences in location, being relevant factors but not, taken by themselves, decisive criteria. As regards statements made after the event it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded. Conversely, if he considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, he should exclude it. And the same must in principle be true of statements made before the event. The test should be not the uncertain one, whether the making of the statement should be regarded as part of the event of transaction. This may often be difficult to show. But if the drama, leading up to the climax has commenced and assumed such intensity and pressure that the utterance can safely be regarded as a true reflection of what was unrolling or actually happening, it ought to be received.

The expression _res gestae' may conveniently sum up these criteria, but the reality of them must always be kept in mind; it is this that lies behind the best reasoned of the judge's rulings.‖ (Emphasis supplied)

427. The pronouncement of the House of Lords reported at (1987) 1 ALL ER 513 titled R v. Andrews as well as the judgment of the Court of Appeal reported at (1991) 1 ALL ER 232 titled R v. McCay placed before us are in similar terms.

428. There is thus extensive discussion on whether the res gestae principle is an exception to the rule of hearsay in criminal proceedings. Phipson has considered three situations in which the res gestae principle may operate as an exception to the hearsay rule in criminal proceedings. The same include spontaneous statements made by a person so overpowered by an event that the possibility of concoction or distortion can be disregarded.

429. The exception to the hearsay rule contained in Section 6 of the Indian Evidence Act has fallen for consideration before Indian Courts as well. In this regard reliance was placed on the Division Bench pronouncement of Calcutta High Court reported at AIR 1958 Calcutta 482, Chhotka v. State. In this case, two statements made by the two co-accused identifying the appellant as the assailant had been admitted in evidence. In appeal, the appellant objected that the statements of the bystanders and the co-accused were not admissible. The Court held as under:-

> —23. Section 6 of the Evidence Act and the succeeding sections embody the rule of admission of evidence relating to what is commonly known as res gestae. Acts or declarations accompanying or explaining the transaction or the facts in issue are treated as part of the res gestae and admitted as evidence...
>
> 24. The obvious ground of admission of such evidence as is referred to in Section 6 is the spontaneity and immediacy of the act or declaration in question. The facts deposed to must form part of the transaction. The requirement is that the statement sought to be admitted must have been made contemporaneously with the act or immediately after it and not at such an interval of time from it as to allow of fabrication or to reduce the statement to a mere narrative of past events.
>
> xxx xxx xxx
>
> 26. There seems to be another objection open to the appellant. Section 6 appears to provide for proof of statements which are more or less of a collateral nature; not the principal fact but the subsidiary ones which are so connected with the facts in issue as to form part of the same transaction are relevant... ‖

430. Learned counsel for the complainant has also submitted that the prosecution has established the existence of state of things. It is contended that the prosecution has fully established the fear in the mind of the public so far as the power and influence wielded by the accused persons and their family. It is urged that this Court is bound to draw an inference of the continuity of such influence and fear existing within reasonable time.

431. In this regard, reliance has been placed on the judgment of the Supreme Court reported at 1966 (I) SCR 758 titled Ambika Prasad Thakur and Ors. v. Maharaj Kumar Kamal Singh and Ors.

> —...Now, if a thing or a state of things is shown to exist, an inference of its continuity within a reasonably proximate time both forwards and backwards may sometimes be drawn. The presumption of future continuance is noticed in Illustration (d) to s. 114 of the Indian Evidence Act, 1872. In appropriate cases, an inference of the continuity of a thing or state of things backwards may be drawn under this section, though on this point the section does not give a separate illustration. The rule that the presumption of continuance may operate retrospectively has been recognised both in India...‖

432. To buttress the submission that spontaneous utterances are an exception to the hearsay rule. Mr. Dayan Krishnan, learned Standing counsel has placed reliance on the judgment reported at (1996) 6 SCC 241 titled Gentela Vijayavardhan Rao v. State of Andhra Pradesh and (2009) 6 SCC 450 titled Javed Alam v. State of Chhattisgarh.

433. In (1996) 6 SCC 241 Gentela Vijayavardhan Rao and Anr.

v. State of Andhra Pradesh, a judicial magistrate had recorded statements of PW-5 and PW-7 who had sustained burns in the incident and it was believed that as the others who had received burn injuries, they might succumb to the burns. These two witnesses had survived. The High Court had relied on their statements on the premise that ―it is relevant and admissible as res gestae under Section 6 of the Evidence Act‖. The question before the Supreme Court was whether the statements could be considered as res gestae and admissible as relevant under Section 6 of the Evidence Act whereby they became substantive evidence. In this regard, the court had observed as follows:

> ―15. The principle or law embodied in Section 6 of the Evidence Act is usually known as the rule of res gestae recognised in English Law. The essence of the doctrine is that fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" becomes relevant by itself. This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or atleast immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of res gestae. In R. v. Lillyman [(1896) 2 QB 167 : (1895-99) All ER Rep 586] a statement made by a raped woman after the ravishment was held to be not part of the res gestae on account of some interval of time lapsing between making the statement and the act of rape. Privy Council while considering the extent upto which this rule of res gestae can be allowed as an exemption to the inhibition against hearsay evidence, has observed in Teper v. R [(1952) 2 All ER 447] thus :
>
> ―The rule that in a criminal trial hearsay evidence is admissible if it forms part of the res gestae is based on the propositions that the human utterance is both a fact and a means of communication and that human action may be so interwoven with words that the significance of the action cannot be understood without the correlative words and the dissociation of the words from the action would impede the discovery of the truth. It is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it that they are part of the thing being done, and so an item or part of the real evidence and not merely a reported statement.‖ The correct legal position stated above needs no further elucidation.‖ (Emphasis by us)
>
> 434. In the facts of the case, the Supreme Court found that there was some appreciable interval of time between the acts of incendiarism of which the appellants were accused and the judicial magistrate recording statements of the victims. The court held that the interval blocked the statements from acquiring legitimacy under Section 6 of the Evidence Act.

435. In the judgment of the Division Bench of the High Court of Chhattisgarh dated 20th March, 2006 passed in Crl.App. Nos.594/2000; 716/2000; 1239/2000 and 783/2005, Samar Vijay Singh Tomar and Anr. v. State of Chhattisgarh and connected appeals filed by co accused Samar Vijay Singh Tomar and Raj Kumar Tiwari. Soon after the incident, eye witnesses made statements to the doctor and the father of the deceased. However, in the witness box, they turned hostile on account of fear and threats by the accused. The issue before the court was admissible under Section 6 of the Evidence Act as evidence res gestae

436. It is necessary to consider some facts in this case. The prosecution's case was that on 3rd December, 1998 Kumari Preeti Shrivastava, a student of B.A. Final in Government Girls College,

Ambikapur was sitting with Kumari Vijaylaxmi Mishra PW-7, Kumari Seema Mishra PW-8 and Kumari Nisha Thakur PW-17 in the campus of the College since the second period was free. Her bag and tiffin were kept by the side of the road. Other girls were basking in the sun inside the campus. At about 10.45 A.M., a jeep driven by Samar Vijay Singh entered the college campus and crushing the bag and the tiffin of Kumari Preeti Shrivastava underneath, went ahead. Other appellants, that is, Rajkumar Tiwari, Javed Alam and Ganesh Kashyap were accompanying Samar Vijay Singh in the jeep. Seeing her tiffin and bag crushed by the jeep, Kumari Preeti Shrivastava decided that she would stop the jeep on its return and ask the driver to make good the loss and tiffin which had been crushed. She consequently stopped the jeep on its return and called upon Samar Vijay Singh to repair the tiffin and the bag for her. On this, the occupants of the jeep started laughing. The girls noticed that the occupants of the jeep were calling each other by names and thereby learnt the identities of the persons accompanying Samar Vijay Singh.

Kumari Preeti refused to get out of his way when being asked to do so by Samar Vijay Singh failing which, he threatened to crush her under the jeep. The other co-accused exhorted him to crush Kumari Preeti if she did not give way. Upon this, Samar Vijay moved the jeep ahead and pushed Kumari Preeti who fell down. When the girls were about to move for picking up Preeti, Samar Vijay Singh reversed and then accelerated the jeep ahead, crushing Preeti's head under the jeep in the process and ran away with the co-appellants.

437. Kumari Vijaylaxmi PW-7, threw a stone on the jeep, which hit the bumper of the jeep. She noted down the number of the jeep on her palm. Kumari Lalita Yadav PW-6, attempted to hold one of the appellants but she was pushed and fell down. Kumari Vijaylaxmi noticed that the jeep had a "Vote for the Congress" sticker on its back number plate. The girls therefore, informed Assistant Professor Smt. Archana Singh PW-9 and Assistant. Professor Smt. Pratibha Singh PW-10 about the incident who along with Kumari Lalita Yadav PW-6, Kumari Vijaylaxmi PW-7, Kumari Kumudini Kerkatta PW-4 and Kumari Urmila Paikra PW-5 took the injured Kumari Preeti to the District Hospital, Ambikapur.

438. The FIR was lodged by Tarachand Sahu PW-11, the clerk of the Girls College. Kumari Preeti was first examined by Dr. M.L. Beatrice PW-3, Chief Medical and Surgical Superintendent Holy Cross Hospital who was informed by Kumari Vijaylaxmi PW-7 and Kumari Lalita Yadav PW-6 about the incident whereupon in her report Ex.P-4, she wrote "Hit by jeep on the head and knocked down and passed over by front and back wheel of the jeep".

439. Shri R.L. Shrivatava PW-32, father of Kumari Preeti Shrivastava reached the hospital and inquire about the incident from the girls who were present there. He was informed by the girls about the names of the occupants and the driver of the jeep at the hospital as well as about the incident. The investigation further revealed that appellant Rajkumar had, soon after the occurrence, gone to Abhaydeep Singh PW-2 and told him that the Jeep driven by Samar Vijay Singh had dashed against a girl. Statement of Abhaydeep PW-2 was recorded under Section 164 of Cr.P.C which was exhibited on record as Ex.P-3. It appears that ASI Hardeep Singh PW-36 on 3rd December, 1998 had recorded the statements of Kumari Vijaylaxmi PW-7 and Kumari Lalita Yadav PW-6 under Section 161 of Cr.P.C. at the District Hospital which also gave an absolutely similar description of the incident and the manner in which they learnt the name of the driver and the occupants of the jeep.

440. In the witness box before the learned trial court, Kumari Vijaylaxmi PW-7 and Kumari Lalita Yadav PW-6 suppressed the entire truth while Kumari Seema Mishra PW-8 blurted out the same when she was declared hostile in cross-examination by the prosecutor.

441. Shri R.L. Shrivatava PW-32, in the witness box testified about the information received by him from the girls about the names of the occupants and the name of the driver of the jeep as well as the incident as part of res gestae and admissible under Section 6 of the Indian Evidence Act. Reliance was

also placed on the information given by Kumari Vijaylaxmi PW-7 to Dr. M. L. Beatrice PW-3 which was recorded by her. Reliance was also placed on the statement of the girls recorded under Section 161 of the Cr.P.C.

442. The appellant had taken serious objection to the admissibility of the statement attributed as having been made by PW 6 and PW 7 to Shri R.L. Shrivatava PW-32, with regard to the information received by him to the following effect:

(i) immediately after seeing his daughter Kumari Preeti in coma outside the minor operation theatre Shri R.L. Shrivatava had asked the crowd as to what had happened and where. This was soon after the occurrence when the girls were in a state of shock and blurted out truthfully the incident as to what had happened when he reached the hospital within the minutes of the occurrence. There was not even the remotest possibility, even a threat of chance, for concoction or improvement by any one at that juncture.

(ii) There was no malice no fabrication or case of falsely implicating innocent persons and therefore, the learned trial judge has rightly relied on the testimony of Shri R.L. Shrivastava PW - 32 with regard to the statement of the girls as forming part of res gestae and holding it admissible under Section 6 of the Evidence Act.

(iii) The testimony of Kumari Vijaylaxmi PW-7 who accompanied the injured Preeti to the hospital gave the same history of the incident to Dr. M.L. Beatrice PW- 3 which was recorded in the report Ex.P-4 which contained the name of Kumari Vijaylaxmi PW-7 as the person giving the history of the incident.

443. The High Court found that Kumari Vijaylaxmi PW-7 was under fear while giving the evidence in court and did not have the courage to speak the truth. Kumari Seema Mishra PW-8 blurted out during cross-examination some traces of the truth which was labelled as unfair and dishonest cross-examination by the learned senior counsel for the appellants. The court held that the conduct of Shri R.L. Shrivastava PW

- 32 in asking questions and making the inquiries from the girls who were outside the operation theatre was natural conduct of an anxious father and their response about the details of the incident and the identity of the boys was also spontaneous.

444. The High Court therefore, agreed with the view taken by the trial court that the statements made by the Kumari Lalita Yadav PW-6 and Kumari Vijaylaxmi PW-7 to Shri R.L. Shrivastava PW - 32 were admissible under Section 6 of the Evidence Act as res gestae despite the fact that the girls turned hostile in the witness box since their statements were made to Shri R.L. Shrivastava PW - 32 soon after the occurrence when the girls were in a state of shock and there was not even the remotest possibility or even a thread of a chance of falsehood having crept in or their being tutored. There was no chance for concoction or improvement by any one at that juncture. The court also noted that the statement under Section 161 of the Cr.P.C. of the girls was recorded at the hospital on 3rd December, 1998 itself. It was further noted that the utterances made by the above mentioned witnesses to Mr. R.L. Srivastava at the hospital was not only wholly unrebutted by the appellant in cross-examination but also inspired confidence. It was further observed that Shri R.L. Shrivastava would not have the slightest motive for implicating innocent persons and shielding the real culprits responsible for the murder of his daughter.

445. This matter was carried in appeal to the Supreme Court and which challenge was rejected by the judgment reported at (2009) 6 SCC 450 Javed Alam v. State of Chhattisgarh. The Supreme Court reiterated the principles laid down in its earlier pronouncement in (1996) 6 SCC 241 Gentela Vijayavardhan Rao and Anr. v. State of Andhra Pradesh to the effect that Section 6 of the Evidence Act is an exception to the rule of evidence that hearsay evidence is not admissible. The test for applying the

rule of res-gestae is that the statement should be spontaneous and should form part of the same transaction, ruling out any possibility of concoction. The court agreed with the above conclusion of the trial court and the Division Bench of the High Court with regard to the admissibility of the statements made by PW 6, PW 7 and PW 8 to PW 32.

446. The Supreme Court also noted that most of the so called eye-

> witnesses resiled from their statements made during investigation. The witnesses were classmates of the deceased who were with her at the time of her murder. The court observed in para 15 that it was a classic case of deficiency in the criminal justice system to protect the witnesses from being threatened by the accused; that unfortunately, in cases involving influential people the common experience is that witnesses do not come forward because of fear and pressure.

447. Reference has also been made to yet another judicial precedent reported at (1973) 1 SCC 471 R.M. Malkani v. State of Maharashtra wherein the court was concerned with the admissibility of a tape recorded conversation of a telephone call made by one Dr. Motwani to the appellant. In para 23, the court had observed as follows: -

> —23. Tape recorded conversation is admissible provided first the conversation is relevant to the matters in issue; secondly, there is identification of the voice: and, thirdly, the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape record. A contemporaneous tape record of a relevant conversation is a relevant fact and is admissible Under Section 8 of the Evidence Act. It is res gestae. It is also comparable to a photograph of a relevant incident. The tape recorded conversation is therefore a relevant fact and is admissible under Section 7 of the Evidence Act.‖

448. In the instant case, the evidence of Nilam Katara with regard to Bharti's utterance on the 17th of February, 2002 is admissible as evidence of the facts relevant to the following issues:-

(i) as rebutting the defence's case that Nitish had never accompanied Vikas and Vishal Yadav from the wedding venue

(ii) The anxiety and fear in the mind of Bharti with regard to the danger to Nitish Katara at the hands of her brother and cousin.

449. It is asserted that Bharti Yadav has also not made any such disclosure even in the statement attributed to her under Section 161 of the Cr.P.C.

450. In this regard, the Privy Council pronouncement reported at (1971) 3 ALL ER 801 at 805, (1972) A.C. 378 Ratten v. R. has been referred to which laid down a new approach. The appellant was charged with the murder of his wife by shooting her with a shotgun. He accepted that he had shot her, but his defence was that the gun had gone off accidentally, whilst he was cleaning it. There was evidence that the deceased was alive and behaving normally at 1:12 p.m. and less than ten minutes later she had been shot. To rebut that defence, the prosecution called evidence from a telephone operator as to a telephone call which she had received at 1: 15 p.m. from the deceased's home. She said the call came from a female who sounded hysterical and who said _get me the police, please', gave her address, but before a connection would be made to the police station, the caller hung up. The appellant objected to that evidence on the ground that it was hearsay and did not come within any of the recognized exceptions to the rule against the admission of such evidence. The Judicial Committee held that the telephone operator's evidence had been rightly received. They concluded that the evidence was not hearsay, but was admissible as evidence of facts relevant to the following issues. First, as rebutting the defendant's statement that his call for the ambulance after he had shot his wife was the only call that went out of

the house between 1:12 p.m. and the 1:20 p.m. by which time his wife was dead. Second, that the telephone operator's evidence that the caller was a woman speaking in an hysterical voice and capable of relating to the state of mind of the deceased and was material from which the jury was entitled to infer that Mrs. Ratten was suffering from anxiety or fear of an existing or impeding emergency. In this judgment, Lord Wilberforce has stated the legal position thus:

> —The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on —testimonially‖, i.e, as establishing some fact narrated by the words. Authority is hardly needed for this proposition but their Lordship will restate what was said in the judgment of the Board in Subramaniam v. Public Prosecutor (1956) 1 WLR 965 at 970: Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.‖ (Underlining by us)

451. So far as to what tests should be applied before such evidence is admitted, the circumstances and the manner in which such evidence must be examined was best stated by Lord Wilberforce (at page pp390-391 of Ratten) in the following terms:

> —The possibility of concoction, or fabrication, where it exists, is an entirely valid reason for exclusion, and is probably the real test which judges in fact apply. In their Lordships' opinion this should be recognised and applied directly as the relevant test : the test should be not the uncertain one whether the making of the statement was in some sense part of the event or transaction. This may often be difficult to establish: such external matters as the time which elapses between the events and the speaking of the words (or vice versa), and differences in location being relevant factors but not, taken by themselves, decisive criteria. As regards statements made after the event it must be for the Judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded. Conversely, if he considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, he should exclude it. And the same must in principle be true of statements made before the event. The test should be not the uncertain one, whether the making of the statement should be regarded as part of the event or transaction. This may often be difficult to show. But if the drama, leading up to the climax, has commenced and assumed such intensity and pressure that the utterance can safely be regarded as a true reflection of what was unrolling or actually happening, it ought to be received. The expression _res gestae' may conveniently sum up these criteria, but the reality of them must always be kept in mind: it is this that lies behind the best reasoned of the judges' rulings.‖ (Emphasis by us)

452. After considering Scottish, Australian and United States authorities, Lord Wilberforce summarized the principle (which has been noticed by Phipson) as follows:

> —These authorities show that there is ample support for the principle that hearsay evidence may be admitted if the statement providing it is made in such conditions (always being those of approximate but not exact contemporaneity) of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused.‖

453. It was further emphasized that no general rule could be laid down and that it was a matter for the trial judge to decide whether such conditions existed that he may take the statement into account.

454. Phipson also refers to the judicial pronouncement reported at (1978) 66 Crl.App. R 252, R v. Nye and Loan in which identification evidence with regard to the defendant was admitted as part of the res gestae. The court had asked and answered the following questions:-

> —Was there spontaneity in the identification? Was there an opportunity for concoction?

Was there any real possibility of error?‖ In this case, it was held that the evidence was properly admitted.

455. It is trite that res gestae is an established exception to the hearsay rule. The question, therefore, which judges would pose are whether the evidence was relevant? Whether the statement was spontaneous without there being opportunity for concoction or distortion and whether there is a real possibility of error? We shall first consider the submissions of the appellants to the admissibility of the evidence of Bharti's utterance before reverting to this discussion.

Objections of the appellants to the argument that the utterances of Bharti Yadav in the morning of 17th February, 2002 were in continuation of the transaction and admissible under Section 6

456. Mr. Sumeet Verma, learned counsel for the appellant has responded contending that the statement attributed to Bharti Yadav in the morning of 17th February, 2002 was not a part of the statements under Section 161 of the Cr.P.C. of either Nilam Katara (PW 30) or Ms.Bharti (PW 38). It is additionally urged that Bharti, appearing as a prosecution witness had categorically denied even having spoken to Nilam Katara.

457. It is submitted by Mr. Sumeet Verma, learned counsel for the appellant, that the challenge of the appellant to such statement is fortified by the fact that Bharti was cross- examined by the learned APP. Yet no suggestion was put to her that she (Bharti) had made any such statement or utterances to Nilam Katara. In the absence of such statement in the testimony of Bharti, no such statement can be attributed to this witness.

458. We have discussed at length heretofore the bald and absolute denial by Bharti of any interaction with Nilam Katara; Bharat Diwakar; Gaurav Gupta and Nitin Katara at any point of time and have found the denial to be untrue. In view of Bharti's denial to any phone contact, there is no question of her giving evidence with regard to such statement and the objection of learned counsel for the appellant based on Bharti's denial is unfounded.

459. So far as the confrontation of Nilam Katara with her statements under Section 161 of the Cr.P.C. is concerned, we have noticed above that Nilam Katara clearly stated that she answered all questions which were put by the investigating officer to her. She had also explained the circumstances in which her two statements under Section 161 of the Cr.P.C. were recorded.

460. Our attention has been drawn to the testimony of Nilam Katara in which she had stated that she did not remember if she had told police as to whether she had a talk with Bharti over the phone at about 7/7:30am or that she was very upset or that Bharti Yadav had told her that she had also been trying to contact Nitish on his cell phone and that she told her that Nitish had not come; or that she told her that she had also not been able to contact Nitish, except once on his cell.

461. Our attention has also been drawn to the fact that Nilam Katara was confronted with the portion of her statement under Section 161 (Ex. PW 30/DA-DB) where the facts were recorded in a different manner. It was mentioned that the witness contacted Bharti on the cell twice and told Bharti Yadav about the non-arrival of Nitish at his residence and her inability to contact him. It is also recorded that

Bharti told Nilam Katara she also was unable to contact him and that she had no knowledge. The witness had already clarified in her examination-in-chief that once contact was made with Nitish but it was made by one out of his several friends but she did not know who made the contact.

462. We have noticed above the mandate of Sections 161 and 162 of the Cr.P.C. as well as the settled legal position that it is necessary to question the investigating officer with regard to the inquiry made by him under Section 161 of the Cr.P.C. from the witnesses.

463. The appellants in the instant case have not questioned the investigating officer who recorded the statements of the witnesses under Section 161 of the Cr.P.C. at all as to the queries put by him to the witness(es). IO Anil Somania was not questioned by any of the appellants on what he queried from the witnesses. In this background, nothing would turn on the fact that any part of the evidence of a witness did not feature in the statement recorded under Section 161 of the Cr.P.C. Certainly, no finding can be returned that there was improvement in her testimony of the witness in this background. Nor is it permissible or possible to disbelieve Nilam Katara on the ground that this part of her testimony did not feature in her statements under Section 161 of the Code of Criminal Procedure.

464. So far as the objection of learned counsel for the appellant that no suggestion pertaining to the statement attributed to Bharti was put to Bharat Diwakar (PW 25) and Gaurav Gupta (PW 26) is concerned, the same is so obviously misconceived. Nilam Katara was examined as PW 30 when she testified about Bharti's utterances. Bharat Diwakar and Gaurav Gupta appeared as PW-25 and PW-26 and had testified prior to her. There would have been no occasion therefore for putting such a statement by Nilam Katara to them. Even otherwise Bharti's utterance was in her telephonic conversation with Nitish's mother.

465. It has lastly been submitted by Mr. Sumeet Verma, learned counsel for the appellant that the transaction of the offence had ended with the death of the deceased, which as per the prosecution case, was in the early hours of 17th February, 2002. The submission is that, therefore, the alleged utterances of Bharti to Nilam Katara as well as the statement attributed by Nitin Katara are at grossly belated stages and, therefore, cannot be treated as a res gestae evidence under Section 6 of the Evidence Act.

Discussion

466. Bharti made a statement to the police on 2nd March, 2002 (Exh.PW35/AB) that after Nitish was taken by the appellants from the wedding she made several calls to her residence to track all of them but was unsuccessful. This statement is corroborated by the call records (Exh.PW 22/2) wherein several calls have been made to her residential land lines from the cell no.9810038469. Bharti would be most interested in ensuring the well-being of Nitish whom she cared for deeply. Certainly his mother Nilam and brother Nitin Katara would be the other persons who would be as concerned, if not more, in assuring Nitish's safety.

467. The tabulation of the calls between Bharat Diwakar's mobile phone no.9810154964 and mobile phone no.9810038469 used by Bharti shows that she made phone calls to him in the very early hours of the morning of 17th February, 2002. The call record also shows that the first of such calls was made from Bharti Yadav's mobile at 04:06 hrs which lasted 21 seconds. Thereafter between 06:41 hrs to 08:43 hrs on the 17th February, 2002, there were six phone calls which lasted from 7 seconds to 123 seconds.

468. The tabulation of the phone calls shows that on the 17 th of February, 2002 when Nitish Katara went missing, there were eleven calls between Nilam Katara's landline number and Bharti Yadav's phone between 06:17 hrs to 11:53 hrs. The duration of the calls varied from 37 seconds to 182 seconds. Additionally there were calls on the cell phone between Nilam Katara and Bharti on the 17th of February, 2002 which lasted from 67 seconds to 220 seconds. The call records extracted above also

show that there were several calls on the 18th and 19th of February, 2002 between Nilam Katara's phone numbers and the phone number which Bharti Yadav was using.

469. Exchange of phone calls at 4.00 am or 6.00 am is not a normal event, especially when these calls are being exchanged between friends, that too of not the same gender.

470. The timing and frequency of these calls between Bharti on the one hand and Nilam Katara as well as Bharat Diwakar on the other reflects Bharti as distraught with anxiety and extremely agitated about the well-being of Nitish Katara after he was taken from the wedding venue by her brothers and Sukhdev Pehalwan as she was aware about her brother's disapproval of her relationship with him.

471. Bharti had her first conversation with Nilam Katara at 7:30 a.m. on the 17th February, 2002. At that time Nitish Katara was not returned home from the wedding and his mother was desperately trying to ascertain his whereabouts. Neither Bharti nor Nilam Katara had even begun to suspect that something so wrong may have happened to him.

472. We have above considered the evidence in detail and rejected Bharti's testimony that she did not use any cell phone or that she did not speak to Nilam or Nitin Katara or Bharat Diwakar at all on the 17th of February, 2002.

473. Bharti Yadav's outburst when Nilam Katara called her in the morning of 17th February, 2002 was a completely spontaneous and natural reaction of a person to disclose to the mother the truth about Nitish, she deeply cared for, having been taken away. Bharti Yadav was by then frantic with anxiety as is evident from her unsuccessful efforts to locate her missing brothers as well.

474. The prosecution has led evidence agitated of Bharti's state in the later part of the 17th February, 2002 as well when Nitish was still missing. PW 39- Nitin Katara (brother of Nitish Katara) has also testified that on 17th February, 2002 at about 7:30/8:00 p.m, he had telephoned Bharti from Pune and that Bharti Yadav appeared to be quite upset and told him that she had last seen Nitish Katara with the appellants. Bharti Yadav was in a distracted state of mind and wanted Nitin Katara to contact everyone in the family. Bharti emphasized that Nitin should contact her father Shri D.P. Yadav and cried several times on the phone.

475. We now examine the question whether the utterance was during the continuance of the _transaction' is required by Section 6 of the Evidence Act. It is the prosecution case that the utterances by Bharti were made to Nilam and Nitin Katara when the transaction of abduction was continuing as Nitish was believed to be alive and only missing. As per Nilam Katara, she finally left her residence for physically searching for him at the marriage venue and lodged the police complaint at PS Kavi Nagar between 11:30 am and 12:00 noon. FIR No.192/2002 was registered under Section 364 of the IPC on 17th February, 2002 at 11:30 a.m. Despite the search launched for them by the police neither the accused brother's nor the appellant were traceable at all known addresses.

476. On 17th February, 2002 an unidentifiably badly burnt corpse unknown body was discovered by the police station Khurja. PW 35 S.I. Anil Somania received a phone call from SI C.P. Singh of the PS Khurja (PW 4) only on 19th February, 2002 with regard to the recovery of an unknown dead body. This body was identified on 21st February, 2002 by the complainant Nilam Katara as possibly being that of her son Nitish Katara. Therefore, till the 21st of February 2002, everybody believed that Nitish Katara was alive and simply missing.

477. The appellants Vikas Yadav and Vishal Yadav who were arrested in a case under the Arms Act only on 23rd February, 2002 by police Dabra, District Gwalior, M.P. were absconding.

478. PW 25 Bharat Diwarkar was not cross-examined on his testimony on the possession of the mobile phone no.9810154964; or on his testimony about the phone calls made by him or received by him from

Bharti.

479. We find that PW 30, Nilam Katara PW 39 Nitin Katara were not cross-examined on the issue that there was no phone calls between them and Bharti Yadav. There is also no cross-examination to the effect that Bharti Yadav did not make any statement or that she did not utter the words attributed to her. No suggestion was given to them that Bharti was not using the mobile number 9810038469. It was never put to them that they spoke to Bhawna Yadav and not to her sister Bharti.

480. To accept the objections of the appellants that there was delay in Bharti's utterance rendering it prompted and not spontaneous, would result in a travesty of justice. It would be contrary to human conduct and normal unfolding of events.

481. The conversation between Nilam Katara and Bharti as well as Nitish Katara and Bharti Yadav were proximate to the occurrence and a spontaneous reaction to the query about Nitish by Nilam Katara from her. Neither Nilam Katara nor Bharti Yadav knew that Nitish Katara had been murdered by them. These conversations thus took place during the continuation of the transaction of abduction of the deceased Nitish Katara during which period the appellants were also absconding. The above utterances of Bharti Yadav were unprompted, contemporaneous and also reflect the state of her mind. The evidence of Bharti's spontaneous utterance is admissible as evidence res gestae under Section 6 of the Indian Evidence Act.

(xi) E-mails sent by Bharti Yadav to Nitin Katara after the 17th of February, 2002

482. Apart from the utterance by Bharti to Nilam Katara, it is also in evidence that Bharti Yadav sent a series of e-mails to Nitin Katara between 19th and 24th of February 2002 contents whereof reflect her distraught state of mind; tension about Nitish's well-being as well as her brother's involvement in his not being traceable.

483. Nitin Katara has testified that in February, 2002, he was using e-mail i.d.: ZINDA_LAASH@hotmail.com. He further stated that between 19th to 24th February, 2002, he received five e-mails from Bharti Yadav using her e-mail i.d.: oopcie@yahoo.com. These e-mails have been produced on record as Exh.PW-9/Mark A-1 to A-5 during his testimony. Bharti refers in these mails to Nitish by his pet name Chimpu. She refers to Nitin Katara as _chottu'. The contents of these e-mails reflect the extreme anxiety of the sender about Nitish and also the fact that she was corresponding secretly with Nitin.

484. These e-mails also manifest that Bharti had been confined at some place and not permitted to interact by her family. Even on the 20th of February, 2002, Bharti wrote that she hoped to see Nitish soon. She did not know even on 24th February, 2002 that Nitish had been murdered in the morning of the 17th of February, 2002. These e-mails speak for themselves and read thus:

> —From:
>
> It's Meah <oopcie@yahoo.com> To:
>
> Zinda_laash@hotmail.com Date:
>
> ```
> Wed, 20 Feb 2002 07:53:04-0800 (PST)
>       Reply All Forward Delete Put in
> Folder....InboxSent    MessagesDraftsTrash
> Canankx
> Baby!            BHAISAAAAABCHAT
> BABESDILLIWAALIS                    IN
> ```

PUNEmelissaMODERNITESsnap s Printer Friendly Version soory! me again... parr kya karun u r t only person jissay i can hav ne info bout chimpu.....i cant tell where i m n why? bus all i can do rite now is request u taht plz dun let neone kno taht m still in touch with u.....coz' it not only bout me there r several other ppl who r on stake hope u undrstnd....rahi baat mere in touch rehne ki woh tou mai kaise na kaise karke rahungi he....jab tak chimpu mil nahi jata m there 4 u n netime u want me.....pata nai mai tujhe baar bar kyu pareshan kyu kar rahi hu.....tum pehle se he itna pareshan hoge.... jaise he koi b khabar mile please let me kno..... 2moro is 21st m waitin..... batana huh..... aur haan do ask my father ki jab unke bacche par baat aayi tou its hurtin then y cant he feel wen its on chimpus parents?

take care bacche! i'll bother u again....

uncle aunty ka b dhayaan rakho..... bye n take care hope 2 c chimpu n u soon! ========== From :

It's Meah <oopcie@yahoo.com> To :

ZINDA_LAASH@HOTMAIL.COM Subject :

wil cal u soon! Date :

Wed, 20 Feb 2002 22:19:58-0800 (PST) did u c the d newzpapers n d newz on t.v..... chottu m tellin u these ppl r playin gamin n earin time.... dun give them time.... my dad is only concern bout his elections n his son..... afta herein his comment i dun think so hes even bothered to find chimpu... hes only concerned bout his son n savin him n his political carrer.... n did u notice he is tryin 2 get a bail frm allahbad... dun let it happen....kyuki agar yeh bail mil gayi tou i dunno 4 how long they can actually drag it.... n times of india says that i've made a comment... fuk man howz it possible..... u kno it... i kno it... kuch karr bacche... kuch karrr.... Dun give them time.. i beg u please dun give them time..... my dad is makin it a political issue...aur agar yeh ik political conspiracy prove ho gaya tou koi b kuch nai karr payega... sab log yuni bach jayenge....

aaj 5th day ho gaya n no news of him. awaaz tak nai sunai uski... kaha hai, kaisa hai... kuch pata nai... i'll try n call u frm sumwhere as soon as possible.....

tum apna dhyan rakho...

aur bhai ko dhund nikalo.....

howz aunty n uncle (hope u r takir care of uncles medicine) mai jaldi he tumhe call karti hun.... tumhe jaise he kuch pata chalta hai plz batao... m watin frm a gud news frm ur side.... take care bacche! n b strong! MERE DAD KO KAHI SE B DHOONDO N UNSE BAAT KARO.. APNA BHAI WAPAS MANGOU.... PRESSURISE HIM... SCARE HIM... DO NETHING.. BHAI WAPAS LAAO! ....JALDI! ========== From :

It's Meah <oopcie@yahoo.com> To :

zinda_laash@hotmail.com Date :

Sun, 24 Feb 2002 06:33:15 - 0800 (PST) chottu plz mujhse baat karr... atleast tell me ki chimpu ki koi khabar... kaha hai? kaisa hai? plz ussay dhund lo naaa.... please! please bacche mujhe itna tou bata dou ki abhi tak mila ya nahi.... please! ========== From :

It's Meah <oopcie@yahoo.com> To :

zinda_laash@hotmail.com Subject :

ne news?

Date :

Tue, 19 Feb 2002 10:55:39 - 0800 (PST) m continuosli tryin 2 get in touch with u .... parrr kuch ho nahi paa raha... m unable 2 send msges on ur cell...if u can then plz do let me kno bout chimpu.....kuch pata chala? kaha hai, , kaisa hai ... ne contact with neone? kya ho raha hai.. kya chal raha hai... plz try n lemme kno.....

wil mail u again...

but u take care, , , ,dun loose hope n dun giveup! take care of aunty n uncle 2! me as soon as possible in touch hone ki koshish karungi....u take care bacche nn please please please find ur brother! From:

It's Meah <oopcie@yahoo.com> To:

zinda_laash@hotmail.com Date :

Wed, 20 Feb 2002 00 : (4:37 -0800 (PST) u r absolutely rite...my father certainly is a deplomatic guy....but i trust u n hav full faith in god n ―chimpu‖ .... i told u na that he said hes neva gonna leave me ....n same here n wen 2 ppl want d same thing god cant deny it....ab ye tou even u can undrstnd that y m unable 2 talk 2 u....only coz of help of few lovin welwishers m able 2 get in touch with u tis way .....n if disclose taht m stil talkin 2 u...i'll b cut off frm tis source also....‖ (Emphasis by us)

485. Nitin Katara was extensively cross-examined on the e-mails Exh.PW-9/A-1 to A-5 but the defence could not shake his testimony.

486. Nitin Katara reaffirmed that he had handed over the e-mails which were received by him to the police. He denied the defence suggestion that the e-mails marked Exh.PW-9/ Mark A-1 to A-5 were forged or fabricated or that they were not handed over during investigation to the police. The investigating officer completely failed to investigate into the matter to establish that these mails were actually sent by Bharti Yadav.

487. These mails if proved in accordance with law would fortify our conclusion that so far as Bharti, Nilam Katara and Nitish Katara are concerned, on the 17th of February 2002, Nitish stood abducted which transaction, even on had not come to an end.

(xii) Bharti Yadav‟s statement under Section 161 of the Cr.P.C.

488. Before proceeding in the consideration, it is necessary to notice the statement of Bharti Yadav recorded by IO Anil Somania PW-35 on 2nd March, 2002 under Section 161 of the Cr.P.C. i.e. during investigation as it revealed critical facts for the first time and enabled the police to make headway into the investigation.

489. Bharti appeared as PW-38 in Vikas Yadav's trial. She was found resiling from the above statement recorded on 2nd March 2002 (Exh. PW-35/AB) under Section 161 of the Cr.P.C. by SI Anil Somania during investigation. She was permitted to be cross-examined by the Special Public Prosecutor. She had quibbled over recording of her statement by the police during investigation when, in answer to the question by the Special Public Prosecutor as to whether she had made a statement to the police, she

stated that one of the lady police official had a _conversation' with her but she did not know whether it was reduced to writing. In her cross-examination, she testified that after 3/4 days of Shivani Gaur's marriage, she was interrogated by the police with regard to the present case. She further stated that whatever _they' asked her, she had replied. She stated that she did not _know' if it was reduced to writing. This is contradicted by her as she volunteered that she had not read her statement which clearly shows that her statement had been reduced to paper. At a later place, when questioned that her statement was recorded by the police on 2 nd March, 2002, Bharti Yadav replied that _I do not know if it was my statement to the police but I did have conversation with the police but I do not remember the date when this conversation took place'. Of course, she insisted that she never had conversation with Anil Somania, the Investigating Officer in the present case and that she had only a conversation with the lady police!

490. While being cross-examined on 29th of November 2006 by Shri B.S. Joon, Special Public Prosecutor for the State she stated that she must have lodged some complaint with some higher authorities that her brothers were being falsely implicated. She admits that she had sent these complaints through her uncle Bharat Singh to various authorities. Her counsel handed over a photocopy of a complaint (Ex.PW38/X1). Bharti was unable to produce any proof of dispatch of this complaint to any of the authorities mentioned thereon, i.e., DGP Police, Headquarter Lucknow or the Governor of UP; SSP Ghaziabad or the SO P.S. Kavi Nagar, Ghaziabad.

491. The complaint itself bears no date. On the first page of the complaint there is receipt of one photocopy of the complaint with some initials which are dated 25th March, 2002. This receipt of the photocopy does not reflect the authority on whose behalf the person has received it. By this communication, Bharti had only wanted a copy of her statement recorded by the police.

492. The prosecution and learned counsel for the complainant have heavily relied upon the admission of the witness in para 2 of Ex.PW38/X1 as she admits therein that she had made a statement to the police on 2nd March, 2002 and she has only sought copy of the statement recorded by the police on 2 nd March, 2002.

493. The learned Trial Judge has elaborately considered the statement made by Bharti Yadav under Section 161 of the Cr.P.C. We may note certain essential revelations therein which actually triggered off investigation into aspects which were not known to the police prior thereto. The several facts revealed in Bharti's statement (Exh.35/AB) several them for the first time, can be usefully summed up as follows:

(i) Though she was named Bharti Yadav, her certificates contain her name as Bharti Singh.

(ii) After finishing B.Com, she had pursued MBA course at the IMT from 1998 to 2000.

(iii) Bharat Diwakar, Nitish Katara, Gaurav Gupta and Shivani Gaur were also studying with her.

(iv) Shivani Gaur was her special friend.

(v) While studying at the IMT, she became friends with Nitish Katara.

(vi) Nitish Katara used to come from Delhi in his green colour Gypsy bearing registration no.DL-3CE-3636.

(vii) Her friendship with Nitish Katara slowly converted into a love relationship and she started loving Nitish Katara from her heart.

(viii) They remained in contact even after 2000 when they finished the course at IMT and used to keep talking on the phone.

(ix) They had got themselves photographed together and also used to go for outings.

(x) Nitish Katara loved her a lot and had spoken to his mother about their marriage.

(xi) On the Valentine‟s Day being 14th February, 2002, she had met Nitish Katara, got photographed with him and also exchanged Valentine Day‟s gifts.

(xiii) She had visited the residence of Nitish Katara to give the wedding invitation card of her sister Bhawna‟s wedding.

(xiv) Nitish Katara and friends used to visit her residence.

(xv) On the 15th of February, 2002, one day before Shivani‟s wedding, ladies sangeet had been organized at her house no.58, Model Town, Ghaziabad in which function, she and her friends had danced.

(xvi) Shivani‟s wedding on 16th February, 2002 at Diamond Palace, Kavi Nagar was attended by her elder sister Bhawna; her mother, Shri Umlesh Yadav; her brother, Vikas; her bua‟s son Vishal.

(xvii) her brother Vikas Yadav, had come to the wedding in his Tata Safari car accompanied by Vishal Yadav and Sukhdev Pehlwan who was a resident of Dewaria and was employed in their Bulandshahr liquor office. (xviii) Bharat Diwakar, Nitish Katara and Gaurav Gupta had also attended the wedding.

(xix) Bharti Yadav had got herself photographed with her said friends as well as Nitish Katara and the bridal couple.

(xx) She had also danced with Nitish Katara. (xxi) After jai mala, the guests went from the hall to eat dinner.

(xxii) At about 1:30 am in the night, she learnt that Nitish Katara had been called and taken away by her brother Vikas Yadav and Vishal Yadav as well as Sukhdev Pehlwan. On hearing this, she got restless. (xxiii) She searched for Nitish Katara in the Diamond Palace but despite the search, she could not find either her brother‟s Vikas Yadav and Vishal Yadav as well Sukhdev Pehlwan or Nitish Katara.

(xxiv) On the night of the marriage, at about 2:15 am, she used her mobile phone no.9810038469 and spoke to phone no.4713790 at her residence. After that, she spoke to 4714101. She spoke at these numbers at her residence several times because she suspected that Vikas Yadav and Vishal Yadav as well as Sukhdev Pehlwan may do some untoward incident („apriye ghatna‟) to Nitish Katara because they had not liked her dancing with Nitish Katara and getting herself photographed with him.

(xxv) At about 4:00 am, she rang up Bharat Diwakar on phone no.9810154964 and enquired about Nitish Katara because they had come together from Delhi. (xxvi) At 6:00 am, Bharat Diwakar called twice on her mobile number.

(xxvii)She received a phone call from Gaurav Gupta using his friend‟s phone no.9811220691. He also said that Nitish was not traceable (xxix) At about 7:00 am, Bharat Diwakar called again and he said that Nitish‟s whereabouts were not known.

(xxx) She had gifted Nitish a wrist watch of the Espirit make which she had purchased on 15th December, 2001 from Shoppers Stop in Ansal Plaza, South Extension from her own money.

(xxxi) At about 7:30 am, Nitish‟s mother Nilam Katara rang her up and also told her that Nitish had not reached home.

(xxxii) She again received call at around 8:00 am from aunty, Nilam Katara who asked for her father‟s phone number.

(xxxiii) She also gave a statement about her contact with Nitin Katara (the younger brother of Nitish Katara) including their e-mail ids.

(xxxiv) Bharti Yadav also disclosed that on 16th February, 2002, she had received a call from Nitish‟s phone no.9811283641 on her mobile no.9810038469 at about 3:00 pm when he had said that since they were going to meet at the wedding, they would talk there and that they would stay together at the wedding. (xxxvi) Her „mami‟ (mother‟s brother‟s wife), wife of Shri Bharat Yadav knew the facts about her relationship with Nitish Katara.

(xxxvii) Her „bua‟ (father‟s sister) had also come to know about the same. She had told them that she loved Nitish. They had all said that after the elections, they will place the wedding proposal before Shri D.P. Yadav.

494. Prior to her statement on 2nd March, 2002, the police had no details about the identity of Pehalwan disclosed by Vikas Yadav and Vishal Yadav as their accomplice in the crime. It is Bharti Yadav who disclosed that the Pehalwan was named _Sukhdev'; and that he was a resident of Dewaria and also that he was an employee in the liquor business of their family at Bulandshahr. It is only because of this revelation that the police has effected raids in Bulandshahr on the very next day, i.e., the 3rd of March, 2002 and were able to recover the guarantee card disclosing his address and photograph. All efforts to arrest him proceeded from this information.

495. In Exh. PW-35/AB Bharti also corroborated the disclosure of the accused persons that they had come to the wedding in a Tata Safari vehicle. The phone calls referred to in her statement under Section 161 Cr.P.C. (Exh. PW35/AB) are all corroborated from the documentary evidence of the call record. Several other details noted above have been investigated by the police and stands proven during trial from the other evidence brought on record.

496. The Investigating Officer Anil Somania has categorically stated that he had recorded the statement of Bharti Yadav under Section 161 of the Cr.P.C. (Ex.PW 35/AB) at her residence 4/16, Raj Nagar, Ghaziabad in the presence of a lady S.I. Anju Bhadoria as well as Shri D.P. Yadav, father of Bharti Yadav. It has been established that the statement stands recorded in the case diary. The investigation was subjected to contemporaneous judicial scrutiny. The material testimony of the Investigating Officer Anil Somania, so far as faithfully recording of statement Ex.PW 35/AB remains unchallenged. The above narration would show that Bharti Yadav had actually made the statement ExhPW35/AB and resiled therefrom in court only to assist her brothers from prosecution.

497. The learned trial jugdes have concluded that Vikas and Vishal Yadav were averse to the relationship between their sister Bharti Yadav and Nitish Katara and this provided the motive leading to the commission of the offence. It has been held that Sukhdev @ Pehalwan shared the same motive. In the light of the above detailed discussion, we agree with the findings of the learned trial judges in the judgment dated 28 th May, 2008 and 6th July, 2011.

II Disclosures made by Vikas and Vishal Yadav on the 25th of February, 2002 to the Investigating Officer - whether believable?

The discussion on this subject is being considered under the following sub-headings:

(i) There was delay in recording of disclosures -

rendering it suspect

(ii) Disclosure statements must be disbelieved as they are neither signed nor bear thumb impression of the makers

(iii) Contents of disclosure statements

(iv) Disclosures not attested by any jail authority

(v) Whether such disclosures possible - given the alleged prior conduct of the appellants

498. Mr. U.R. Lalit as well as Mr. Ram Jethmalani, ld. senior counsel have contended that two separate disclosure statements were made by the appellants to the Investigating Officer. The first disclosure statement made on 25th February, 2002 is attributed to Vikas Yadav (Exhibit PW- 35/16) which led to the recovery of a hammer at his instance. A second disclosure statement (Exhibit PW-35/17) stands attributed to Vishal Yadav as having been made on the same day about inter alia a wrist watch and mobile, leading to recovery of only the wrist watch. The police also rely upon the recovery of the Tata Safari.

499. In this regard, Mr. Lalit, learned senior counsel has pointed out that PW-35 Sub-Inspector Anil Somania obtained transit remand of the accused persons on 24th February, 2002 from the court at Dabra (Ex PW 35/13) and brought them to Ghaziabad. Mr Lalit's contention is that the statement of Anil Somania that he did not talk to the accused persons while they were in transit is unbelievable.

500. The accused persons were produced in custody on 25th February, 2002 before the Chief Judicial Magistrate in Ghaziabad when they were remanded to judicial custody. SO Anil Somania thereafter made an application on 25th February, 2002 to the court of the Chief Judicial Magistrate, Ghaziabad (Exh.PW-35/15) praying for permission to record their statements.

501. It is the case of the prosecution that on the 25 th of February, 2002 SI Anil Somania proceeded to the jail where, first, Vikas Yadav made a disclosure statement (Exh.PW-35/16) followed by the disclosure statement made by Vishal Yadav (Exh.PW-35/17). The statements were recorded in the room of the DSP. Neither of the statements was signed by the accused person to whom it is attributed.

502. So far as the disclosure statements are concerned, Mr. U.R.

Lalit senior counsel for Vikas Yadav has further submitted that though the disclosure statement was recorded in the office of the DSP Jail, his counter signatures were not taken which would have established his presence when the statements were recorded.

503. It is submitted by the counsel for the accused that the contents of the two disclosure statements (Ex PW 35/16 and Ex PW 35/17) were identical, except for few cosmetic changes. If the disclosures were actually made, the conduct of the IO would be different. No steps as per prescribed procedure from the stage of recording of disclosures till sending recovered articles for a forensic examination have been taken.

504. It is urged that the alleged statements were never made by the two accused persons. It is further submitted that the contents of the statements attributed to these appellants are in the nature of confessions which were made while they were in police custody and are hence inadmissible in evidence given the prohibition under Sections 24 to 27 of the Indian Evidence Act.

505. Learned senior counsel have also submitted that these statements were completely inadmissible on account of the prohibition contained in Sections 161 and 162 of the Cr.P.C. Learned senior counsel points out that Section 162 prohibits the police from obtaining signatures of the person making a statement to the police. Mr. Ram Jethmalani, learned senior counsel has urged that Section 162 of the Cr.P.C. has been wantonly disobeyed; that statements recorded under Section 161 of the Cr.P.C. have been exhibited in full and read as substantive evidence. The objection is that findings of fact in vital areas have been based only on the police statement, consideration whereof stood prohibited under Section 162 of the Cr.P.C.

506. Mr. Jethmalani, learned senior counsel would contend that the first disclosure statement attributed to Vikas Yadav made the disclosure about everything and therefore the police had discovered all facts therefrom. Learned senior counsel submits that both the disclosure statements talk of acts of both the accused persons. Learned senior counsel has contended that the recoveries were effected three days after the making of the disclosure statements, the delay manifesting that no disclosures were made and that the recovery was not genuine.

507. In support of the same contention, learned senior counsel has also relied upon para 14.27 of the CBI (Crime) Manual 2005 published by the Government of India. This manual of the year 2005 frames guidelines applicable to the CBI.

508. Mr. Jethmalani, learned senior counsel has also relied upon para 19 of the pronouncement reported at (2005) 9 SCC 94 State of Punjab v. Ajaib Singh in support of his submission which reads thus:

> —19. The High Court has also commented upon the recovery of weapons allegedly made at the instance of the accused. It has noticed the fact that the alleged disclosure statements were not supported by the evidence of any independent witness and even the Serologist's report did not give any clear opinion about the origin of the blood allegedly found on the weapons since the blood on the weapons had disintegrated. The High Court was also of the opinion that the motive suggested by the prosecution did not appear to be a sufficient motive for the respondents to commit such a ghastly offence.‖ No binding principle of law is laid down in para 19 extracted above which has relied upon by the appellant is not relevant.

The Supreme Court has only noted the observations of the High Court therein.

509. It is further urged that in the event that there are more than one disclosure statements by multiple accused persons which have led to one and the same discovery, only the disclosure made in the statement which is first in point of time would be admissible. In this regard, learned counsel has placed reliance on the judgment reported at (1994) 5 SCC 152 Sukhwinder Singh etc v. State of Punjab.

510. We propose to examine the objections to the disclosure statements in seriatim hereafter.

(i) There was delay in recording of disclosures - rendering it suspect

511. It has been argued on behalf of the appellants that the accused persons were arrested on 23rd February, 2002 by the Dabra police and were alleged to have made the detailed disclosures with regard to the commission of the offence only on 25th February, 2002 which was most illogical and really impossible.

512. To deal with this submission, it is necessary to examine what the Investigating Officer was doing after the 23rd of February 2002. Answering this objection of delay taken by the appellants, Mr. Dayan Krishnan has taken us through the testimony of the Investigating Officer Anil Somania (PW-

35) who has explained the several steps which were necessitated and taken by the police till the disclosure statements made by the appellants were recorded. This statement of Anil Somania has not been challenged by the appellants by way of cross-examination.

513. Let us examine these steps undertaken by the police. It is in evidence that PW-35 Anil Somania received information from police station Khurja on 19th February, 2002 of the fact that an unidentified dead body had been recovered in its jurisdiction on the 17th of February 2002. He therefore proceeded to Khurja at 9:00 pm on the 19th of February 2002 but was unable to meet Inspector C.P. Singh. As the deceased as well as Vikas and Vishal Yadav were untraceable, he thereafter went to Udyog Vihar,

Gurgaon to search for them as the accused had an office there. Anil Somania also learnt about the sugar mill belonging to the accused persons in Mukeria (Punjab) and a farm house in Dhanari (UP). In order to search for the appellants, he sent his SO, A.P. Bhardwaj to the farm house.

514. On 20th February, 2002, the Investigating Officer went to the houses of the accused persons in their search but the houses were locked. The Investigating Officer then moved an application for issuance of proceedings under Section 82/83 of the Cr.P.C. for attachment of their property. He also obtained warrants for their arrest and pasted them at the houses of the accused persons. On the same day, the Investigating Officer recorded statements of Nitin Katara and Rohit Gaur under Section 161 of the Cr.P.C.

515. On 21st February, 2002, the IO hereafter contacted Nilam Katara, Ajay Prasad and Nitin Katara and went to the mortuary to identify the dead body. After seeing the body, Smt. Nilam Katara identified the body as being that of her son from his one hand which had not got burnt. The Investigating Officer then made an application to the CJM, Bulandshahr to seize the dead body and brought the dead body to the All India Institute of Medical Sciences (AIIMS).

516. On the 22nd of February, 2002, the Investigating Officer got the blood samples of the parents of the deceased taken as well as the finger prints of the deceased. These were imperative for identification of the dead body and confirmation thereof. The I.O. then went to the licensing authority to get the said finger prints of the deceased. He also went to the SSP, Ghaziabad and to get a copy of the wireless message sent to the immigration office. On the same day, the Investigating Officer seized some photographs and greeting cards which were produced by Nilam Katara.

517. On the 23rd of February, 2002, Vikas Yadav and Vishal Yadav were arrested by the police in Dabra at 4.30 a.m. Interestingly, the Dabra police produced these two appellants before the local magistrate only at about 11.30 p.m. on 23 rd February, 2002 and sought their judicial custody.

518. On the 23rd of February, 2002, itself the Investigating Officer Anil Somania learnt through television that the accused persons Vikas and Vishal have been arrested in Dabra. Accordingly on instructions he made a police party and left for Dabra. On reaching there, Anil Somania learnt that the accused persons had been taken for production before the Judicial Magistrate. The Investigating Officer immediately moved an application before the Magistrate not to release the accused persons on bail.(Ex.PW 35/11).

On 24th February, 2002, the Investigating Officer recorded the statements of the police officials at Dabra and applied for a two day transit remand. Upon the application (Ex.PW 35/13) being approved, the custody of accused persons could be secured by the Investigating Officer only at about 3.30 pm on 24th February, 2002. The application referred to the FIR No.192/2002 registered under Section 364 of the IPC by the P.S. Kavi Nagar and abduction (_apaharan') of Nitish Katara against the appellants. A reference has been made to Case No. 99/2002 and 192/2002 both under Section 25 of the Arms Act, Section 41(1)(4) of the Cr.P.C. registered at Dabra.

519. The appellants moved an application before the Dabra Court wherein they mention Section 302 of the IPC. As on that date, the Police Station at Ghaziabad had registered FIR No. 192/2002 only under Section 364 of the IPC. Section 302 was added only on 26th February, 2002. Mr P.K.Dey, learned counsel for the complainants has urged that this suggests that the appellants, being the authors of the crime, were aware of the murder of Nitish Katara, even before the police learnt of it.

520. It is further in the testimony of the Investigating Officer that he had started from Dabra on 24th February, 2002 at 3.30 p.m. and reached the O.P. (Outpost) Kachehari on 25th February, 2002 at about 5 a.m.

521. Anil Somania has categorically stated that there was no opportunity to interrogate the accused persons in Dabra and that he did not talk to the accused persons with regard to the case or interrogate them as in Uttar Pradesh no statement can be recorded without permission of the Magistrate when the accused are in custody. This testimony has not been challenged in cross-examination by the appellants. It has not been disputed before us as well.

522. The accused persons were produced in the court of CJM, Ghaziabad on the 25th of February 2002 at about 10 a.m. who remanded them to judicial custody. PW-35 Investigating Officer Anil Somania also moved an application on the same day under Section 161 of the Cr.P.C. (Ex.PW-35/15) for permission to record the statements of Vikas and Vishal Yadav.

523. On getting permission from the CJM for recording the statement of the accused persons, the Investigating Officer S.O. Anil Somania proceeded to Ghaziabad jail on 25th February, 2002 itself and requested the jail authorities to produce the appellants before him for the purposes of interrogation. The appellants were so produced before the Investigating Officer, who recorded the information furnished by the appellants one after another in the case diary itself. He had first recorded the voluntary disclosure statement of Vikas Yadav and thereafter the voluntary statement made by Vishal Yadav.

524. It is evident from the above that till such time the accused persons were arrested and the dead body recovered by the Khurja police identified, the entire effort and energy of the Investigating Officer and the police was rightly devoted to tracing out Nitish Katara and the appellants. The Investigating Officer was required to follow due process. The appellants do not dispute the requirement that court permission was required to record their statements as they were under arrest. The permission was granted on the 25th of February 2002 and the statements recorded on the same date. There was therefore no delay at all in interrogating the accused persons or recording their statements. The above narration and discussion also supports the prosecution that such statements were actually made by Vikas and Vishal Yadav.

(ii) Disclosure statements must be disbelieved as they are neither signed nor bear thumb impression of the makers

525. Learned Senior Counsels submit that in the present case the disclosure statement is not signed by the accused persons nor bears their thumb impressions and, therefore, must be completely disbelieved. Learned senior counsel submit that this is not correct as signature lends acceptability. Once a signature is taken, voluntariness is assured. Considering the antecedent events, learned Senior Counsels contends that it would have been prudent to obtain signatures of the accused.

It is contended that therefore there is no satisfactory material at all to show that the disclosure statements were voluntarily made by the accused persons or that they were genuine.

526. In support of this submission reliance has been placed on the pronouncement reported in AIR 1995 SC 2345, Jaskaran Singh v. State of Punjab. The narration of the relevant portion of the facts contained in para 2 and the principles laid down by the Supreme Court in para 8 deserve to be considered in extenso and they read as follows:-

> —8. So far as the conscious possession of the weapon Ex. M/O/4 is concerned, the disclosure statement, Ex. P-9 inspires no confidence. Firstly because none of the two panch witnesses, Yash Pal and Sukhdev Singh, ASI, have been examined at the trial and secondly because the disclosure statement does not bear the signatures or the thumb impression of the appellant. Even, the recovery memo of the revolver and the cartridges, Ex. P-9/A, which is also attested by Yash Pal and Sukhdev Singh, ASI does not bear either the signatures or the thumb impression of the accused. The absence of the signatures or the thumb impression of an accused on the disclosure statement recorded under Section 27 of

the Evidence Act detracts materially from the authenticity and the reliability of the disclosure statement. ...‖ (Emphasis supplied)

527. Before us, reliance has been placed by Mr. U.R. Lalit, learned senior counsel also on the Division Bench pronouncement of the Karnataka High Court reported at 1998 Criminal Law Journal 2479, Felix Joannas v. State of Karnataka. In this case, apart from the recovery of a shoe lace on the voluntary statement of the accused, there was no material to connect the accused with the crime. The Division Bench placed reliance on the judgment of the Supreme Court in Jaskaran Singh (supra) and held that the confession of the accused was not signed by him and, therefore, could not be relied upon.

528. Mr. Lalit, Advocate has placed the pronouncement of the Supreme Court reported at (2003) 9 SCC 277, Golakonda Venkateswara Rao V. State of Andhra Pradesh before us. In this case, neither the disclosure statement nor the recovery memo bore the signatures of the accused. The Supreme Court observed that the provisions of Section 27 of the Indian Evidence Act are based on the view that if a fact is actually discovered in consonance with the information given, some guarantee follows thereby that the information is true and consequently the said information can safely be allowed to be given as evidence because if such information is further fortified and confirmed by the discovery of articles or the instrument of crime and which leads to the belief that the information about the confession made is to the articles of crime, then it cannot be false. In this case, pursuant to the disclosure, the appellant took the party to the well and disclosed that the body had been thrown into it. The water level in the well was of about 6½ feet. The body was recovered with the help of swimmers when plastic bangles and a jacket as well as the cement pole piece kept to prevent the body from floating was also recovered. Thereafter, the accused led the party to a place towards the western side of the nearby shed and dug out a spot from where pieces of ‗lehenga‟ were recovered.

529. It has been urged by Mr. U.R. Lalit that in a given case the prosecution may be able to establish the making of a disclosure by evidence other than the signature or by thumb impressions of the accused person. It could be by the evidence of panchas who were present at the time of the making of the disclosure. Placing reliance on Jaskaran Singh (supra), learned counsel for the appellant has also contended that the disclosure statement inspires no confidence because the disclosure statements do not bear the signature or the thumb impression of the appellant.

530. At first blush, the judgment rendered in Jaskaran Singh (supra) would appear to suggest that it is an absolute proposition of law that a disclosure statement has to mandatorily contain the signature or thumb impressions of the person making it. The entire submissions of learned senior counsels for both Vikas and Vishal Yadav rest on such reading of the requirement in law. This however, is not the correct legal position. Our attention has been drawn by Mr. Dayan Krishnan to a suo motu review by the Supreme Court of the afore-noticed judgment dated 25th April, 1995 in Jaskaran Singh v. State of Punjab passed in Criminal Appeal No. 472/1985. By its order dated 25th April, 1996, the Supreme Court reviewed the portion highlighted in the extract reproduced in the previous paragraph of the Jaskaran Singh (supra) and ordered as follows: -

―We have examined the judgment in Crl. Appeal No.472/1985 decided on April 25, 1995, reported in 1995 Crl.L.J. 3992. The following corrigendum be issued: -

Page	Instead of	Read
Page 6, Line 8 to 17	–does not bear the signatures or the thumb impression of the appellant. Even, the recovery memo of the	–was made long time after the appellant was taken into custody by the investigating

revolver and the cartridges, Ex.P-9/A, which is also attested by Yash Pal and Sukhdev Singh, ASE does not bear either the signatures or the thumb impression of the accused. The absence of the signatures or the thumb impression of an accused on the disclosure statement recorded under Section 27 of the Evidence Act detracts materially from the authenticity and reliability of the disclosure statement.‖‖

agency and it is doubtful whether the same was voluntarily made by the appellant‖

The Supreme Court thus reviewed and recalled its earlier finding that absence of signatures or the thumb impression of the accused on the disclosure statement under Section 27 of the Evidence Act detracted materially from the authenticity and reliability of the disclosure.

531. With regard to the same objection that there were no signature on the disclosure statement, our attention has been drawn to the pronouncement reported at 1996 Cri LJ 350, Bhakua Kampa v. State of Orissa wherein it was held as follows:

—17. xxx During investigation, as stated by the Investigating Officer, the appellant Bhakua made a statement that he had concealed a Tabli in one of the rooms of his house under the paddy puda. So saying appellant Bhakua led the Investigating Officer and showed the said place from which the Investigating Officer seized the Tabli. The statement of appellant Bhakua has been recorded by the Investigating Officer in the case diary and the same has been marked as Ext. 14 in court describing it as a disclosure statement. The learned Sessions Judge has observed that the same is inadmissible as only a separate statement to the effect signed by appellant Bhakua would have been admissible in evidence. This is a strange proposition of law stated by the learned Sessions Judge. Law nowhere requires that in order to be admissible under Section 27 of the Evidence Act, the statement of the accused in custody must be taken down by the Investigating Officer on a separate paper along with his signature. A copy of this judgment be transmitted to the concerned Sessions Judge for his information and future guidance.‖ (Underlining by us)

532. We may usefully refer to the judgment in Golakonda Venkateswara Rao v. State of A.P. (2003) 9 SCC 277 wherein these very objections were not accepted by the court holding thus:-

—14. Learned counsel for the appellant contended that the disclosure statement and recovery of the articles is doubtful and no reliance can be placed on such disclosure statement and recovery of MOs. He further contended that the materials recovered were not sealed by the police. Hairpins and bangles said to have been recovered were not produced before the Court and these circumstances will make the recovery all the more doubtful. The counsel relied on the decision of this Court rendered in Jaskaran Singh v. State of Punjab, [1997 SCC (Cri) 651; AIR 1995 SC 2345), wherein in para 8 at p. 2347, it was pointed out

that the disclosure statement inspires no confidence because none of the two panch witnesses Yash Pal and Sukhdev Singh have been examined at the trial and secondly, because the disclosure statement does not bear the signature or the thumb impression of the appellant and also the recovery memo does not bear the signature or thumb impression of the accused. Every case has to be decided on its own facts. The facts of that case do not fit in the facts of the case at hand. In the present case, as already noticed, PW-6 and PW-12 were examined to prove the disclosure as well as the recovery pursuant to the disclosure statement of the appellant. In the instant case, while it is true that neither the disclosure statement nor the recovery memo bear the signatures of the accused but the fact remains that pursuant to the disclosure statement MOs have been recovered from the well and dug out from a place which is pointed out by the appellant, leaves no manner of doubt that the recovery of MOs has been made on the basis of the voluntary disclosure statement. In Jaskaran Singh case (supra) the recovery memo Ex.P-9/A relates to revolver and the cartridges. There the appellant had denied the ownership of the crime revolver and the prosecution had led no evidence to show that the crime weapon belonged to the appellant. The observation of this Court was in that context. In the instant case, as already noticed, the recovery is pursuant to the disclosure statement offered by the appellant. The fact that the recovery is in consequence of the information given is fortified and confirmed by the discovery of wearing apparel and skeletal remains of the deceased which leads to believe that the information and the statement cannot be false.‖ (Emphasis supplied)

533. Law in fact, contains an embargo under Section 162(1) of the Cr.P.C. whereby the police is prohibited from obtaining the signatures of the person making the disclosure statement. Mr. Dayan Krishnan has placed reliance on the Division Bench pronouncement of the Madras High Court in 2003 CrLJ 2372, Natrajan v. UT of Pondicherry. In this case, placing reliance on the suo motu review in Jaskaran Singh (supra), the court held that the Investigating Officer was not required to obtain signatures of the accused persons in any statement attributed to him while preparing the seizure memo.

The Madras High Court also noted that the bar to obtaining signatures on statements recorded during investigation under Section 162 of the Cr.P.C. would not apply to the statement under Section 27 of the Indian Evidence Act. Reliance was placed on the judicial precedent reported at 1999 Crl. L.J. 2588, State of Rajasthan v. Teja Ram. It was therefore held that as a result, though there is no requirement to obtain signatures of the accused on the disclosure statement, however, if signatures have been obtained, there is nothing illegal about it.

534. Mr. Dayan Krishnan, learned additional standing counsel for the State submits that judicial precedent has held that law does not mandate obtaining signatures of the accused even on seizure memos.

535. In this regard reliance is made to the ratio of the decision of the Supreme Court in paras 29 and 30 of (1999) 3 SCC 507, State of Rajasthan v. Teja Ram which reads as follows: -

―29. That apart, the prohibition contained in sub-section (1) of Section 162 is not applicable to any proceedings made as per Section 27 of the Evidence Act, 1872. It is clearly provided in sub-section (2) of Section 162 which reads thus:

―Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of Section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of Section 27 of that Act.‖

30. The resultant position is that the investigating officer is not obliged to obtain the signature of an accused in any statement attributed to him while preparing seizure- memo for the recovery of any article covered by Section 27 of the Evidence Act. But if any

signature has been obtained by an investigating officer, there is nothing wrong or illegal about it....‖ (Underlining by us)

536. On the same issue, in 2012 (8) SCALE 670, Dr.Sunil Clifford Daniel v. State of Punjab, the court reiterated the principles laid down in the Teja Ram (supra). After referring to the earlier pronouncement, the court held as follows: -

―25. However, in State of Rajasthan v. Teja Ram, AIR 1999 SC 1776, this Court examined the said issue at length and considered the provisions of Section 162(1) Cr.PC. Section 162(1) reads, a statement made by any person to a police officer in the course of an investigation done, if reduced to writing, be signed by the person making it. Therefore, it is evident from the aforesaid provision, that there is a prohibition in peremptory terms and law requires that a statement made before the Investigating Officer should not be signed by the witness. The same was found to be necessary for the reason that, a witness will then be free to testify in court, unhampered by anything which the police may claim to have elicited from him. In the event that, a police officer, ignorant of the statutory requirement asks a witness to sign his statement, the same would not stand vitiated. At the most, the court will inform the witness, that he is not bound by the statement made before the police. However, the prohibition contained in Section 162(1) CrPC is not applicable to any statements made under Section 27 of the Indian Evidence Act, 1872 (hereinafter called 'Evidence Act'), as explained by the provision under Section 162(2) Code of Criminal Procedure....‖ (Emphasis supplied)

537. It is urged by Mr. Dayan Krishnan that the objection pressed by the appellants is devoid of legal merit as there is no requirement also to formally record the disclosure in writing. It could be oral as well. On this aspect, in the judgment reported at (2011) 13 SCC 621 (para 120), Mohd. Arif v. State, the court held as follows: -

―120. It has been held in Suresh Chandra Bahri v. State of Bihar : 1995 Supp (1) SCC 80 that even if the discovery statement is not recorded in writing but there is definite evidence to the effect of making such a discovery statement by the concerned investigating officer, it can still be held to be a good discovery. The question is of the credibility of the evidence of the police officer before whom the discovery statements were made. If the evidence is found to be genuine and creditworthy, there is nothing wrong in accepting such a discovery statement.‖ (Emphasis supplied)

538. Such being the position in law, the challenge to the disclosure in the instant case on the ground that they are not signed has no legal basis. On this issue, in Mohd. Arif v. State of NCT (supra), it was held as follows: -

―168. Firstly speaking about the formal arrest for the accused being in custody of the investigating agency he need not have been formally arrested. It is enough if he was in custody of the investigating agency meaning thereby his movements were under the control of the investigating agency. A formal arrest is not necessary and the fact that the accused was in effective custody of the investigating agency is enough. It has been amply proved that the accused was apprehended, searched and taken into custody. In that search the investigating agency recovered a pistol from him along with live cartridges, which articles were taken in possession of the investigating agency. This itself signifies that immediately after he was apprehended, the accused was in effective custody of the investigating agency.

169. Now coming to the second argument of failure to record the information, it must be held that it is not always necessary. What is really important is the credibility of the evidence of the investigating agency about getting information/statement regarding the

information from the accused. If the evidence of the investigating officer is found to be credible then even in the absence of a recorded statement, the evidence can be accepted and it could be held that it was the accused who provided the information on the basis of which a subsequent discovery was made. The question is that of credibility and not the formality of recording the statement. The essence of the proof of a discovery under Section 27, Evidence Act is only that it should be credibly proved that the discovery made was a relevant and material discovery which proceeded in pursuance of the information supplied by the accused in the custody. How the prosecution proved it, is to be judged by the Court but if the Court finds the fact of such information having been given by the accused in custody is credible and acceptable even in the absence of the recorded statement and in pursuance of that information some material discovery has been effected then the aspect of discovery will not suffer from any vice and can be acted upon‖.

(Underlining by us)

539. The objection of the appellants is also no longer res integra and stands authoritatively settled by the Supreme Court of India in the judgment reported at (2005) 11 SCC 600, State v. Navjot Sandhu in para 207, wherein it was held as follows: -

―206. We have already noticed the distinction highlighted in Prakash Chand case [(1979) 3 SCC 90 : 1979 SCC (Cri) 656 : AIR 1979 SC 400] between the conduct of an accused which is admissible under Section 8 and the statement made to a police officer in the course of an investigation which is hit by Section 162 Cr.P.C.. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer, the place where stolen articles or weapons used in the commission of the offence were hidden, would be admissible as ―conduct‖ under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct, falls within the purview of Section 27, as pointed out in Prakash Chand case [(1979) 3 SCC 90 : 1979 SCC (Cri) 656 : AIR 1979 SC 400]. In Om Prakash case [H.P. Admn. v. Om Prakash, (1972) 1 SCC 249 : 1972 SCC (Cri) 88 : AIR 1972 SC 975] this Court held that: (SCC p. 262, para 14) ―[E]ven apart from the admissibility of the information under Section 27, the evidence of the investigating officer and the panchas that the accused had taken them to PW 11 (from whom he purchased the weapon) and pointed him out and as corroborated by PW 11 himself would be admissible under Section 8 of the Evidence Act as conduct of the accused.‖

207. Coming to the details of evidence relating to hideouts and recoveries, it is to be noted that the accused Afzal is alleged to have made a disclosure statement to PW66- Inspector Mohan Chand Sharma on 16th December, 2001. It is marked as Ext.PW64/1. In the said disclosure statement, all the details of his involvement are given and it is almost similar to the confessional statement recorded by the DCP. The last paragraph of the statement reads thus:

"I can come along and point out the places or shops of Delhi wherefrom I along with my other associates, who had executed the conspiracy of terrorist attack on the Parliament, had purchased the chemicals and containers for preparing IED used in the attack, the mobile phones, the SIM Cards and the Uniforms. I can also point out the hideouts of the terrorists in Delhi. Moreover, I can accompany you and point out the places at Karol Bagh wherefrom we had purchased the motorcycle and Ambassador car. For the time being, I have kept the said motorcycle at Lal Jyoti Apartments, Rohini with Nazeer and I can get the same recovered..."

> This statement has been signed by Mohd. Afzal. In fact it is not required to be signed by virtue of the embargo in Section 162. The fact that the signature of the accused Afzal was obtained on the statement does not, however, detract from its admissibility to the extent it is relevant under Section 27.‖

540. Of course, recovery of a material fact on the pointing out of the accused person premised on the disclosure will lend weight to the credibility of the disclosure.

541. Section 162 of the Cr.P.C. specifically stipulates that no statement by any person to a police officer in the course of investigation, if reduced to writing, shall be signed. However, this prohibition does not apply if the statement would be covered under Section 27 of the Evidence Act. There is no mandatory requirement under Section 27 of the Indian Evidence Act that the disclosure must be signed.

542. Therefore there is no absolute proposition that every disclosure statement has to be disbelieved if it is unsigned or does not bear the thumb impression of an accused. The rule requiring procurement of signatures is really a rule of safety, prudence and propriety only. The signing of the disclosure statement is only one of the indicators of the voluntariness of the statement. It is open to the prosecution to show that the disclosure was actually and voluntarily made by other evidence as well.

543. There is no prescribed mode for recording of the disclosures under Section 27 of the Indian Evidence Act, 1872, as has been provided under Section 164 of the Cr.P.C. or even under Section 15 of the Terrorist and Disruptive Activities (Prevention) Act, 1987.

544. Law permits that a disclosure statement may be oral or in writing. It is also unnecessary that at the time of the disclosure, there must be formal arrest. It would suffice that the movements of the person making the disclosure were under control of the police officer recording the disclosure.

545. The truth of the making of a disclosure statement lies in the credibility of the investigating officer who enters the witness box to prove the fact that such disclosure was voluntary made by an accused person while under police custody and/or control.

546. It is also lawful that the information furnished by the person in custody can be recorded by the investigating officer in the case diary. This was the requirement in the State of Uttar Pradesh. There is also no requirement to have the same signed in the case diary.

547. Let us now examine the facts of the present case in the light of the above legal position. It is an admitted position before us that in Uttar Pradesh investigating officer had to make an application for taking the accused to police custody from judicial custody to record their statement. The submission of the appellants is that they were in police custody when their statements were recorded.

548. In the instant case, the investigating officer was given permission to interrogate the accused persons by the court of the Chief Judicial Magistrate, Ghaziabad. The investigating officer thus recorded their statements on the 25 th of February, 2002 which were in the nature of statements under Section 161 of the Cr.P.C., in the case diary. That the statements included disclosures of the above facts cannot negate requirements of statutory compliances. In view of Section 162 of the Cr.P.C., these statements could not have been got signed from the accused persons.

549. We have noted above the fact that the appellants Vikas and Vishal Yadav did not challenge the making or voluntariness of the disclosure statements during trial. Instead, when the investigating officer prayed for police custody remand to effect recoveries pursuant thereto, they filed applications seeking permission for their advocates to accompany them during the proceedings. They nowhere denied the making of the disclosures to SO Anil Somania. It was never stated that they did not use the Tata Safari vehicle or that the police was falsely attributing the disclosure statements to them. The

objection thus pressed before this court is a clear afterthought, which is contrary to record and legally untenable. The proceedings of the court, the applications filed by these appellants and their conduct amply establish the fact that the disclosure statements were actually and voluntarily made by Vikas and Vishal Yadav.

550. The investigating officer Anil Somania has been examined in the witness box who has testified that he was given permission by the C.J.M., Ghaziabad for recording statement of the accused persons. The statements were made voluntarily without any force, pressure or undue influence in the jail itself. He first recorded statement of accused Vikas Yadav and then of accused Vishal Yadav. He proved the disclosure statement of Vikas Yadav on record as Ex.PW35/16 and the statement of Vishal Yadav as Ex.PW35/17. He also stated that all statements under Section 161 of Cr.P.C. and all other proceedings have been recorded in case diary only and not on a separate sheet as in UP police where he is in service all statements are recorded in case diary. He stated that all statements have been correctly recorded by him.

551. This testimony could not be shaken in cross examination.

Nothing has been pointed which would impact the credit worthiness of the police witnesses or the prosecution evidence.

552. It has come in the evidence of the investigating officer Anil Somania that normal practice in Uttar Pradesh was not to get signatures of the accused persons on disclosure statement. This position is also not disputed.

553. After the transfer of the case to the District Courts in Delhi, Vikas Yadav and Vishal Yadav had filed the vakalatnama of Shri G.K. Bharti, Advocate in the trial court on record. An application dated 11th October, 2002 under Section 295 of the Cr.P.C. read with Section 91 of the Cr.P.C. for production and admission and denial of documents which were allegedly not supplied/relied upon by the prosecution/investigating agency was filed by Vishal Yadav before the trial court captioning it in the case titled State v. Vishal Yadav under the signatures of Shri G.K. Bharti and Shri J.P. Jain, Advocates. In this application, the applicant had made a reference to certain disclosures recorded by the police at Dabra and subsequently by the Ghaziabad Police at Ghaziabad stating as follows:-

> — 8. That though the disclosure recorded at Dabra and subsequently by the Ghaziabad Police at Ghaziabad, are not admissible in the eye of law, as both were obtained forcibly and under duress but the relevance of summoning the said disclosure can be judged from the fact that U.P. Police was having knowledge of certain facts which were earlier they were likely to attribute to Sukhdev Pehlwan, but with a malafide intention they preferred to plant and fabricate the evidence against the present application/accused and his co-accused, though the present accused and his co-accused are altogether travelling in different boats. So the evidence becomes much more relevant and has a vital bearing over the aspect of planting and fabricating evidence against the applicant/accused.‖

554. The applicant in para 8 above therefore refers to disclosures recorded at Dabra. There is a reference to subsequent disclosure recorded by the Ghaziabad Police at Ghaziabad; and that these disclosures were obtained forcibly and under duress. No details of the same are mentioned. The applicant has asserted that UP police had knowledge of facts which were to be attributed to Sukhdev @ Pehalwan but were planted and fabricated against the applicant and his co- accused.

555. It is important to note that in this application, the applicant nowhere states that no disclosure was made by him. The applicant also did not state that signatures had been obtained on blank papers as he does at a later stage when while challenging the recoveries, reference is made to the disclosures as well.

556. The challenge before us that the disclosure statements have to be disbelieved as they were not signed fails to consider the possibility of a disclosure statement being made orally.

557. In the instant case, wide publicity was given to the commission of offence. Searches and raids were effected to locate the appellants, initially for Vikas and Vishal Yadav and after 2nd of March 2002 for Sukhdev @ Pehalwan as well yet as they were not traceable. Pursuant to disclosure statements, Vikas and Vishal Yadav pointed out to the police officers the place where the offence was committed as well as where the weapon used in the commission of offence and the belongings of the deceased were hidden. They also got recovered the hammer which was the weapon of offence and the wrist watch of the deceased. We find that independent of whether the statement made by the accused false within the purview of Section 27, it is admissible as _conduct' under Section 8 of the Indian Evidence Act. It has been so held in State v. Navjot Sandhu (supra) placing reliance on (1979) 3 SCC 90, Prakash Chand v. State (Delhi Administration).

558. The evidence of the investigating officer coupled with the conduct of the appellant; their response to the police applications for custody remand to effect recoveries premised on the disclosure statements as well as the recoveries of the hammer, wrist watch and Tata Safari vehicle effected on the pointing out of these appellants, amply proves the truthfulness of the investigating officer and the making of the disclosure statements by Vikas and Vishal Yadav. The objection to the genuineness of the disclosure statements on the ground that they were unsigned are without factual basis and legal merit and hereby rejected.

(iii) Contents of disclosure statements

559. It is contended that according to the prosecution, both Vikas and Vishal Yadav made confessional statements which were recorded by PW-35 Anil Somania and no other statement was made. Learned senior counsel has painstakingly taken us through the disclosure statements attributed to Vikas and Vishal Yadav and urged that the identity of the language shows that the same are clearly doctored statements.

560. So far as the contents of the disclosure statement are concerned, it is pointed out by Mr. U.R. Lalit, learned senior counsel that in the disclosure statement attributed to Vikas Yadav (Ex.PW-35/16), the name of a third accomplice _Pehalwan' is revealed. It has also been stated that Vikas Yadav could point out the spot where the deceased was murdered; the spot where his dead body was burnt and the spot where the hammer was hidden and that he could take out the hammer. Mr. Lalit, Advocate would submit that these facts are relevant if the prosecution could establish that the statement was voluntarily made, and only to that extent the disclosure would be admissible under Section 27 of the Indian Evidence Act.

561. An objection has been urged before this court also of the fact that identical disclosure statements are attributed to both Vishal (Exh.PW-35/B) and Vikas Yadav (Exh.PW-35/16). It has been argued by Mr. Ram Jethmalani, learned Senior Counsel that according to the prosecution, Vikas's disclosure statement (Exh.PW-35/16) was first in time. It is urged that in view of the disclosure statement attributed to Vikas Yadav, it has to be held that recoveries were made pursuant to the disclosure which was first in point of time. No disclosure can therefore be attributed to Vishal.

562. Both Mr. Lalit as well as Mr. Jethmalani, learned senior counsel have placed reliance on the Privy Council pronouncement reported at AIR (34) 1947 Privy Council 67, Pulukuri Kottaya and ors. v. Emperior. The Privy Council clearly laid down the position that the ―fact discovered under Section 27 of the Indian Evidence Act is not equivalent to object produced‖. In para 10 of the judgment, it was held that :-

—10. Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. 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. ..... In their Lordships view it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate-distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.‖ (Emphasis supplied)

563. It is also strongly objected that the entire statement as having been made by the appellants to the police is not admissible in evidence and that the prosecution could have relied only such part of the statement which leads to the discovery of a relevant fact would be admissible in evidence. Yet the entire disclosure statements have been exhibited in the instant case.

564. Our attention is drawn by Mr. Jethmalani to the questions put to Vishal Yadav while recording his statement in accordance with the provisions of Section 313 of the Cr.P.C. It is urged that the entire disclosure statement was wrongly put to him as is manifested from a reading of question number 100 and other questions.

565. Mr. Jethamalani has drawn our attention to the pronouncement of the Supreme Court in the Parliament House attack case reported at (2005) 11 SCC 600 State (NCT of Delhi) v. Navjot Sandhu. In this case, reliance was placed by the prosecution on disclosure statement made to the Investigating Officer. The disclosure statement was made by the accused Afzal to PW-66 M.C. Sharma on 16th December, 2001 which was almost similar to the confession statement recorded by the DCP. We have noted para 207 of the pronouncement wherein the court has concluded that the fact that signatures of the accused Afzal were obtained on the statement does not, however, distract from its admissibility to the extent it is relevant under Section 27. The principles laid down by the Supreme Court with regard to interpretation of Section 27 of the Evidence Act, 1872 shed valuable light on the issues raised before this court and deserve to be considered in extenso. The same reads as follows:-

—114. The interpretation of Section 27 of the Evidence Act has loomed large in the course of arguments. The controversy centered round two aspects:-

(i) Whether the discovery of fact referred to in Section 27 should be confined only to the discovery of a material object and the knowledge of the accused in relation thereto or the discovery could be in respect of his mental state or knowledge in relation to certain things

- concrete or non-concrete.

(ii) Whether it is necessary that the discovery of fact should be by the person making the disclosure or directly at his instance? The subsequent event of discovery by police with the aid of information furnished by the accused

- whether can be put against him under Section 27?

These issues have arisen especially in the context of the disclosure statement (Ex. PW 66/13) of Gilani to the police. According to the prosecution, the information furnished by Gilani on certain aspects, for instance, that the particular cell phones belonged to the other accused - Afzal and Shaukat, that the Christian colony room was arranged by Shaukat in order to accommodate the slain terrorist Mohammad, that police uniforms and explosives 'were arranged' and that the names of the five deceased terrorists were so and so are relevant under Section 27 of the Evidence Act as they were confirmed to be true by subsequent investigation and they reveal the awareness and knowledge of Gilani in regard to all these facts, even though no material objects were recovered directly at his instance.

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119. We have noticed above that the confessions made to a police officer and a confession made by any person while he or she is in police custody cannot be proved against that person accused of an offence. xxx Section 27 which unusually starts with a proviso, lifts the ban against the admissibility of the confession/statement made to the police to a limited extent by allowing proof of information of specified nature furnished by the accused in police custody. In that sense Section 27 is considered to be an exception to the rules embodied in Sections 25 and 26 (vide AIR 1962 SC 1116). Section 27 reads as follows:

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

120. xxx The decision of the Privy Council in Kotayya's case, which has been described as a locus classicus, had set at rest much of the controversy that centered round the interpretation of Section 27. ...

121. The first requisite condition for utilizing Section 27 in support of the prosecution case is that the investigating police officer should depose that he discovered a fact in consequence of the information received from an accused person in police custody. Thus, there must be a discovery of fact not within the knowledge of police officer as a consequence of information received. Of course, it is axiomatic that the information or disclosure should be free from any element of compulsion. The next component of Section 27 relates to the nature and extent of information that can be proved. It is only so much of the information as relates distinctly to the fact thereby discovered that can be proved and nothing more. It is explicitly clarified in the Section that there is no taboo against receiving such information in evidence merely because it amounts to a confession. At the same time, the last clause makes it clear that it is not the confessional part that is admissible but it is only such information or part of it, which relates distinctly to the fact discovered by means of the information furnished. Thus, the information conveyed in the statement to police ought to be dissected if necessary so as to admit only the information of the nature mentioned in the Section. The rationale behind this provision is that, if a fact is actually discovered in consequence of the information supplied, it affords some guarantee that the information is true and can therefore be safely allowed to be admitted in evidence as an incriminating

factor against the accused. As pointed out by the Privy Council in Kotayya's case, "clearly the extent of the information admissible must depend on the exact nature of the fact discovered and the information must distinctly relate to that fact". Elucidating the scope of this Section, the Privy Council speaking through Sir John Beaumont said "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 the accused". We have emphasized the word 'normally' because the illustrations given by the learned Judge are not exhaustive. The next point to be noted is that the Privy Council rejected the argument of the counsel appearing for the Crown that the fact discovered is the physical object produced and that any and every information which relates distinctly to that object can be proved. Upon this view, the information given by a person that the weapon produced is the one used by him in the commission of the murder will be admissible in its entirety. Such contention of the Crown's counsel was emphatically rejected with the following words:

> "...If this be the effect of Section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the Legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect..."
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> xxx xxx xxx‖
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> (Emphasis supplied)

566. An objection has been raised in the instant case with regard to the entire disclosure statement having been marked as an exhibit and having been put to the accused as against them while recording the evidence under Section 313 of the Cr.P.C.. In this regard, in para 143 of State (NCT of Delhi) v. Navjot Sandhu (supra), the Supreme Court clarified the legal position with regard to the extent of admissibility of a disclosure and observed as follows:-

—122. The approach of the Privy Council in the light of the above exposition of law can best be understood by referring to the statement made by one of the accused to the police officer. It reads thus:

—...About 14 days ago, I, Kotayya and people of my party lay in wait for Sivayya and others at about sunset time at the corner of Pulipad tank. We, all beat Beddupati China Sivayya and Subayya, to death. The remaining persons, Pullayya, Kotayya and Narayana ran away. Dondapati Ramayya who was in our party received blows on his hands. He had a spear in his hands. He gave it to me then. I hid it and my stick in the rick of Venkatanarasu in the village. I will show if you come. We did all this at the instigation of Pulukuri Kotayya.‖ The Privy Council held that "the whole of that statement except the passage 'I hid it' (a spear) and my stick in the rick of Venkatanarasu in the village. I will show if you come" is inadmissible. There is another important observation at paragraph 11 which needs to be noticed. The Privy Council explained the probative force of the information made admissible under Section 27 in the following words:

—...Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law.‖ xxx xxx xxx

143. How the clause-"as relates distinctly to the fact thereby discovered" has to be understood is the next point that deserves consideration. The interpretation of this clause is not in doubt. Apart from AIR 1947 PC 67 Pulukuri Kottaya v. Emperior‟s case, various decisions of this Court have elucidated and clarified the scope and meaning of the said portion of Section 27. The law has been succinctly stated in (1976) 1 SCC 828 Inayatullah's v. State of Maharashtra case. Sarkaria, J. analyzed the ingredients of the Section and explained the ambit and nuances of this particular clause in the following words:

"...The last but the most important condition is that only "so much of the information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word 'distinctly' means 'directly', 'indubitably', 'strictly', 'unmistakably'. The word has been advisedly used to limit and define the scope of the provable information. The phrase 'distinctly relates to the fact thereby discovered' is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered."

In the light of the legal position thus clarified, this Court excluded a part of the disclosure statement to which we have already adverted.‖ (emphasis supplied)

567. The Supreme Court in Navjot Sandhu (Supra) then cited the discussion in Pulukuri Kotayya to the effect that the _fact discovered' within the Section is not restricted to the object produced but includes the knowledge of the place from which the object is produced and knowledge of the accused as to this, and that the information given must relate distinctly to this fact. This position was explained by the court as follows:

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

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142. There is one more point which we would like to discuss i.e. whether pointing out a material object by the accused furnishing the information is a necessary concomitant of Section 27. We think that the answer should be in the negative. Though in most of the cases the person who makes the disclosure himself leads the Police Officer to the place where an object is concealed and points out the same to him, however, it is not essential that there should be such pointing out in order to make the information admissible under Section 27. It could very well be that on the basis of information furnished by the accused, the Investigating Officer may go to the spot in the company of other witnesses and recover the

material object. By doing so, the Investigating Officer will be discovering a fact viz., the concealment of an incriminating article and the knowledge of the accused furnishing the information about it. In other words, where the information furnished by the person in custody is verified by the Police Officer by going to the spot mentioned by the informant and finds it to be correct, that amounts to discovery of fact within the meaning of Section 27. Of course, it is subject to the rider that the information so furnished was the immediate and proximate cause of discovery. If the Police Officer chooses not to take the informant-accused to the spot, it will have no bearing on the point of admissibility under Section 27, though it may be one of the aspects that goes into evaluation of that particular piece of evidence.

(Underlining by us)

568. In (2007) 2 SCC 310, Amit Singh Bhikham Singh Thakur v. State of Maharashtra also the Supreme Court had reiterated the principle declared in Pulukuri Kotayya v. King Emperor (supra).

569. It has been urged that Section 27 of the Evidence Act does not contemplate discovery only of the place but also of the fact that certain articles were kept at a particular place which facts must relate to commission of an offence. In this regard in addition reliance has been placed on the judicial pronouncement reported at (1969) 2 SCC 872, Jaffar Hussain Dastagir v. State of Maharashtra (paras 5 and 7) —5. ...Section 27 is a proviso to Section 26 and makes admissible so much of the statement of the accused which leads to the discovery of a fact deposed to by him and connected with the crime, irrespective of the question whether it is confessional or otherwise. The essential ingredient of the section is that the information given by the accused must lead to the discovery of the fact which is the direct outcome of such information. Secondly, only such portion of the information given as is distinctly connected with the said recovery is admissible against the accused. Thirdly, the discovery of the fact must relate to the commission of some offence. The embargo on statements of the accused before the police will not apply if all the above conditions are fulfilled. If an accused charged with a theft of articles or receiving stolen articles, within the meaning of Section 411 IPC states to the police, —I will show you the articles at the place where I have kept them‖ and the articles are actually found there, there can be no doubt that the information given by him led to the discovery of a fact i.e. keeping of the articles by the accused at the place mentioned. The discovery of the fact deposed to in such a case is not the discovery of the articles but the discovery of the fact that the articles were kept by the accused at a particular place. In principle there is no difference between the above statement and that made by the appellant in this case which in effect is that —I will show you the person to whom I have given the diamonds exceeding 200 in number‖. The only difference between the two statements is that a —named person‖ is substituted for —the place‖ where the article is kept. In neither case are the articles or the diamonds the fact discovered.

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7. This Court had to consider the scope of Section 27 of the Evidence Act in K.

Chinnaswamy Reddy v. State of Andhra Pradesh. [1963-3 SCR 412] There the appellant was convicted under Section 411, of the IPC by an Assistant Sessions Judge. He was tried along with another person who was convicted under Sections 457 and 380 of the IPC. A house had been burgled and valuable articles stolen. During the course of investigation the police recovered 17 ornaments on the information given by the appellant. The other accused had also given information on the basis of which another stolen ornament was recovered. Overruling the interpretation of the Sessions Judge, this Court held that the whole of the statement related distinctly to the discovery of the ornaments and was admissible under Section 27 of the Evidence Act. It was said:

―These words (namely, where he had hidden them) having nothing to do with the past history of the crime and are distinctly related to the actual discovery that took place by virtue of that statement.‖ The contention that in a case where the offence consisted of possession even the words ―where he had hidden them‖, would be inadmissible as it amounted to an admission by the accused that he was in possession of them was rejected on the ground that if the statement related distinctly to the fact thereby discovered it would be admissible in evidence irrespective of the question as to whether it amounted to a confession or not. There can be no doubt that the portion of the alleged statement of the appellant extracted by us would be admissible in evidence.‖ (underlining by us)

570. Placing reliance upon the judgment of the Supreme Court reported at (2003) 7 Supreme 478; (2003) 12 SCC 199, Praveen Kumar v. State of Karnataka, it was urged that the disclosure statements (Ex.PW 35/16 and Ex.PW 35/17) were not signed by independent witnesses and consequently no reliance can be placed on the recovery effected pursuant thereto. This submission of the appellants is not supported by the pronouncement of the Supreme Court in Praveen Kumar (supra). In this case, recovery was effected on the next date of making the disclosure statement. The Supreme Court had held that this fact would not affect the prosecution case. In Praveen Kumar (supra), the Supreme Court has declared the legal position in the following terms:-

―21. Section 27 does not lay down that the statement made to a police officer should always be in the presence of independent witnesses. Normally, in cases where the evidence led by the prosecution as to a fact depends solely on the police witnesses, the courts seek corroboration as a matter of caution and not as a matter of rule. Thus, it is only a rule of prudence which makes the court to seek corroboration from an independent source, in such cases while assessing the evidence of the police. But in cases where the court is satisfied that the evidence of the police can be independently relied upon then in such cases there is no prohibition in law that the same cannot be accepted without independent corroboration. In the instant case nothing is brought on record to show why the evidence of PW 33 IO should be disbelieved in regard to the statement made by the accused as per Ext. P-35. Therefore, the argument that the statement of the appellant as per Ext. P-35 should be rejected because the same is not made in the presence of an independent witness has to be rejected.‖

571. On the clear declaration of the law on the fact discovered, it was held by the Supreme Court that the expression ―fact discovered‖ is not equivalent to or restricted to only object discovered. It includes knowledge of the place where the recovered object was kept as well.

572. Learned senior counsels have contended that it is impossible to believe that any such disclosure statement was made and that they were highly improbable. The submission is that the disclosure statements were required to be supported by independent witnesses but are not so in the instant case. No legal requirement for the disclosure statement to be witnessed is pointed out.

573. The principles set out above as to the standards on which the probative value of the disclosure must be evaluated are well settled and have been well settled above. The entire evidence of the prosecution including the disclosure statements evaluated and its admissibility determined on the credibility of this evidence.

574. It is urged that the failure of the prosecution to examine the two independent witnesses in whose presence the alleged recoveries were effected also militates against the genuineness of not only the alleged recoveries but also of the disclosure statements

575. The appellants have placed reliance on the pronouncement of this court reported at 115 (2004) DLT 541, Kavinder v. State. This judicial precedent has not considered binding judgments of the

Supreme Court including the judgment reported in 2012 (8) SCALE 670, Dr.Sunil Clifford Daniel v. State of Punjab and, therefore, is not binding. So far as the objection to the absence of witnesses to the recoveries are concerned, we are examining this aspect later.

576. Answering the objection of learned Senior Counsels to the disclosures in view of the similarity of their language, Mr. Dayan Krishnan, learned Standing Counsel has submitted that this does not impact either the making of or the voluntariness of the disclosures. It also does not affect the admissibility.

577. Mr. Krishnan submits that law prescribes no format for recording a disclosure and that courts have accepted even joint disclosure statements. Reliance is placed on the provisions of Section 13(2) of the General Clauses Act and the judicial pronouncement in State (NCT) v. Navjot Sandhu (para 145) (supra) in support of this submission. It is contended by the State that the recording of joint or consecutive disclosures of more than one accused persons is also legally permissible.

578. In State (NCT of Delhi) v. Navjot Sandhu (supra), on this issue, the Supreme Court had observed as follows:-

> —145. Before parting with the discussion on the subject of confessions under Section 27, we may briefly refer to the legal position as regards joint disclosures. This point assumes relevance in the context of such disclosures made by the first two accused viz. Afzal and Shaukat. The admissibility of information said to have been furnished by both of them leading to the discovery of the hideouts of the deceased terrorists and the recovery of a laptop computer, a mobile phone and cash of Rs. 10 lacs from the truck in which they were found at Srinagar is in issue. Learned senior counsel Mr. Shanti Bhushan and Mr. Sushil Kumar appearing for the accused contend, as was contended before the High Court, that the disclosure and pointing out attributed to both cannot fall within the ken of Section 27, whereas it is the contention of Mr. Gopal Subramanium that there is no taboo against the admission of such information as incriminating evidence against both the informants/accused. Some of the High Courts have taken the view that the wording "a person" excludes the applicability of the Section to more than one person. But, that is too narrow a view to be taken. Joint disclosures to be more accurate, simultaneous disclosures, per se, are not inadmissible under Section 27. 'A person accused' need not necessarily be a single person, but it could be plurality of accused. It seems to us that the real reason for not acting upon the joint disclosures by taking resort to Section 27 is the inherent difficulty in placing reliance on such information supposed to have emerged from the mouths of two or more accused at a time. In fact, joint or simultaneous disclosure is a myth, because two or more accused persons would not have uttered informatory words in a chorus. At best, one person would have made the statement orally and the other person would have stated so substantially in similar terms a few seconds or minutes later, or the second person would have given unequivocal nod to what has been said by the first person. Or, two persons in custody may be interrogated separately and simultaneously and both of them may furnish similar information leading to the discovery of fact. Or, in rare cases, both the accused may reduce the information into writing and hand over the written notes to the police officer at the same time. We do not think that such disclosures by two or more persons in police custody go out of the purview of Section 27 altogether. If information is given one after the other without any break almost simultaneously, and if such information is followed up by pointing out the material thing by both of them, we find no good reason to eschew such evidence from the regime of Section
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> 27. However, there may be practical difficulties in placing reliance on such evidence. It may be difficult for the witness (generally the police officer), to depose which accused spoke what words and in what sequence. In other words, the deposition in regard to the

information given by the two accused may be exposed to criticism from the stand point of credibility and its nexus with discovery. Admissibility and credibility are two distinct aspects, as pointed out by Mr. Gopal Subramanium. Whether and to what extent such a simultaneous disclosure could be relied upon by the Court is really a matter of evaluation of evidence. With these preparatory remarks, we have to refer to two decisions of this Court which are relied upon by the learned defence counsel.‖ (Emphasis by us)

579. We may also make reference to para 146 of Navjot Sandhu (supra) wherein the court has considered the earlier pronouncement reported at (1983) 1 SCC 143 : 1983 SCC Crl. 139 Mohd. Abdul Hafiz v. State of Andhra Pradesh and held as follows: -

―146. In Mohd. Abdul Hafeez v. State of Andhra Pradesh, 1983 Cri LJ 689, the prosecution sought to rely on the evidence that the appellant along with the other two accused gave information to the IO that the ring (MO

1) was sold to the jeweller-PW3 in whose possession the ring was. PW3 deposed that four accused persons whom he identified in the Court came to his shop and they sold the ring for Rs.325/- and some days later, the Police Inspector accompanied by accused 1, 2 and 3 came to his shop and the said accused asked PW3 to produce the ring which they had sold. Then, he took out the ring from the showcase and it was seized by the Police Inspector. The difficulty in accepting such evidence was projected in the following words by D.A. Desai, J. speaking for the Court:

"Does this evidence make any sense? He says that accused 1 to 4 sold him the ring. He does not say who had the ring and to whom he paid the money.

Similarly, he stated that accused 1 to 3 asked him to produce the ring. It is impossible to believe that all spoke simultaneously. This way of recording evidence is most unsatisfactory and we record our disapproval of the same. If evidence otherwise confessional in character is admissible under Section 27 of the Indian Evidence Act, it is obligatory upon the Investigating Officer to state and record who gave the information; when he is dealing with more than one accused, what words were used by him so that a recovery pursuant to the information received may be connected to the person giving the information so as to provide incriminating evidence against the person".

There is nothing in this judgment which suggests that simultaneous disclosures by more than one accused do not at all enter into the arena of Section 27, as a proposition of law.‖

580. In para 147 of State (NCT of Delhi) v. Navjot Sandhu (supra), the Supreme Court further observed as follows :-

―147. Another case which needs to be noticed is the case of Ramkishan Mithanlal Sharma v. State of Bombay, 1955 CriLJ 196. The admissibility or otherwise of joint disclosures did not directly come up for consideration in that case. However, while distinguishing the case of AIR 1948 PC 82, Gokulchand Dwarkadas Morarka v. R. decided by Bombay High Court, a passing observation was made that in the said case the High Court "had rightly held that a joint statement by more than one accused was not contemplated by Section 27". We cannot understand this observation as laying down the law that information almost simultaneously furnished by two accused in regard to a fact discovered cannot be received in evidence under Section 27. It may be relevant to mention that in the case of 1952 SCR 839 Lachhman Singh v. State this Court expressed certain reservations on the correctness of the view taken by some of the High Courts discountenancing the joint disclosures.‖ It is, therefore, well settled that disclosures of the same fact may be made simultaneously by two

accused persons who are being separately interrogated or similar information leading to discovery of fact may be given by accused persons one after another, i.e., consecutively. The same are possible and there is no bar to the admissibility of such disclosures under Section 27.

581. Before this court protracted arguments laying piecemeal challenge to different portions of evidence and the procedure followed by the police have been laid. We, however, are guided by the well settled principles of law governing criminal trials and evaluation of evidence. The court is required to evaluate the entire evidence on the issue before arriving at its conclusions about the truthfulness of the disclosures.

582. Vikas Yadav and Vishal Yadav were investigated on the same day one after another by the Investigating Officer Anil Somania. They both narrated the unfolding of the same events which narration was reduced to writing as their separate statement in the police case diary. Both of them disclosed their knowledge of the involvement of a third accomplice _Pehalwan'; place where the crime was committed as well as the place where the body was burnt. They differ only in knowledge about the physical objects they could get recovered (while Vikas refers to the hammer, Vishal refers to a mobile phone as well as wrist watch). Is it not, but natural, that the statements would be couched in similar language?

583. So far as admissibility is concerned, only the following portion of Vikas Yadav's statement (Exh.PW-35/15) lead to the discovery of relevant facts which are admissible in evidence under Section 27 of the Indian Evidence Act:

(i) Vikas Yadav had gone to Shivani's wedding with Vishal Yadav in his Tata Safari vehicle which he could get recovered from Alwar, Rajasthan.

(ii) one Pehalwan was also involved in the incident.

(iii) he could point out the places where Nitish Katara had been killed and burnt.

(iv) he could point out the place where the hammer was hidden by him and could get it recovered.

584. Similarly, in his statement, (Exh.PW-35/17), Vishal Yadav also discloses that he also could point out where Nitish was murdered and the spot where the dead body was burnt and that the Safari vehicle was in Alwar, Rajasthan.

Vikas Yadav additionally stated that Vikas and his family had been invited to Shivani Gaur's wedding and that he could get recovered the mobile phone and wrist watch. He reiterated Vikas Yadav's statement that one Pehalwan was also involved with Vikas and Vishal Yadav.

585. The involvement in the commission of the offence thus of a third person referred to as _Pehalwan' has been disclosed for the first time in the disclosure statements of the co-accused Vikas Yadav and Vishal Yadav. The permissibility and legality thereof has been discussed in the judicial pronouncement AIR 1946 Sind 43, Ismail v. Emperor. In this case, the conviction of Ismail was based, inter alia, upon his own confession giving information about Karimdino as well as the confession of this co-accused. The police found the involvement of Karimdino as a fact discovered as the result of Ismail's confession. This rendered the statement of Ismail as to the whereabouts of Karimdino admissible under Section 27 of the Evidence Act as evidence against Ismail and could not be altogether ignored.

586. In the present case Vikas and Vishal Yadav both disclose one after another that Pehalwan was also involved.

587. The investigating officer Anil Somania has testified that on 25th February, 2002, after receiving permission from the CJM, Ghaziabad for recording the statements of the accused persons vide order (Exh.PW-35/15), he had proceeded to the Ghaziabad jail and recorded the statements in his case diary. He first recorded the statement of Vikas Yadav (Exh.PW- 35/16) and then of the accused Vishal Yadav (Exh.PW- 35/17). It is explained in court that the entire statements, though confessional, made disclosures of relevant facts had to be given an exhibit mark as the same was part of the police case diary and not on separate sheets.

588. The disclosure statement in the instant case have been made one after another by the accused persons. In view of the settled legal positions, the objection to their admissibility on the ground that they were so made or contains a narration of events in similar language would not by itself impact their genuineness. These disclosures are admissible under Section 27 of the Evidence Act in the light of the principles laid down in para 145 of Navjot Sandhu (supra).

589. On 26th February, 2002, Anil Somania submitted his report in writing to the CJM, Ghaziabad (Ex.PW 35/20) about the addition of Section 302 and 201 of the IPC in the FIR No.192/2002.

590. On 26th February, 2002 itself, the Investigating Officer filed a separate application (Ex.PW 35/21) in the court of the CJM, Ghaziabad informing the court that pursuant to the permission granted by the court, the statements of accused Vikas Yadav and Vishal Yadav were recorded on the 25th February, 2002 in the district jail Ghaziabad in which statements they made admissions with regard to the crime and detailing their disclosures. The Investigating Officer therefore, prayed for three days police remand for effecting recovery of these articles and also to get full information about the site of the occurrence.

591. On both the applications, the Chief Judicial Magistrate Ghaziabad passed orders dated 26th February, 2002 for summoning the accused Vikas and Vishal Yadav for 27th February, 2002 (Ex.PW 35/21A).

592. The learned CJM heard the application on 27th February, 2002 for remand in the presence of the appellants Vikas and Vishal Yadav as well as their counsels. The accused persons did not file any application or make objections disputing the making of or the correctness of the disclosure statements referred to by the police. The court accordingly granted 24 hours police custody remand starting from 9:00 a.m. of 28 th February to 1st of March, 2002 to effect the recoveries. It appears that the court also directed that during the remand, the accused persons could keep one advocate with them.

593. It is important to note the manner in which the appellants proceeded thereafter in the matter. Shri Rajender Chaudhary, Advocate (DW 3) along with three other counsels Shri Ram Sharan Sharma, Shri Shishu Pal Sharma and Shri Suresh Yadav filed an application on behalf of Vikas Yadav (Ex.DW 3/A) immediately thereafter referring to the police remand ordered by the court and praying that the aforementioned advocates remain with the accused during the investigation. An identical application was filed on behalf of Vishal Yadav by Shri Jai Karan Sharma; Shri Sharma; Shri Satpal Yadav and Shri Ram Kumar Yadav, Advocate (Ex.DW3/X).

On these applications, the court recorded that there was no ground for grant of the prayer as the order already stood passed for having advocate during the police remand (Ex.DW3/C).

594. It is important to note that no submission was made on the 27th of February, 2002 in their above applications by either Vikas or Vishal Yadav to the effect that the disclosure statements had not been made by them or that no such statement was recorded by the investigating officer.

595. The challenge to the genuiness and admissibility of disclosure statement by Vikas and Vishal Yadav premised on similarity of contents is therefore devoid of merit and rejected.

(iv) Disclosures not attested by any jail authority

596. The appellants have lastly argued that the disclosures must be disbelieved for the reason that they are not attested by any authority from the jail even though it was the case of the prosecution that the disclosure statements were recorded in the office of Dy. Superintendent of Police Dy. SP in the jail.

597. In this regard, it will be useful to examine the testimony of the investigating officer PW-35 Anil Somania. When cross- examined on the making of the disclosure statement, he has stated that both the accused were in the same District Jail, Ghaziabad and they were brought into the office of the Dy SP for the purposes of their interrogation. While the investigating officer was interrogating them, the Dy SP was engaged in some work of his own. Mr. Dayan Krishnan, learned Additional Standing Counsel for the State has pointed out that in this background, the Dy SP would have no knowledge of the proceedings of the interrogation by the IO and was, therefore, incompetent to attest the statement.

Mr. Krishnan has urged that in case the Dy SP attested the statement in these circumstances, the same would have been hit by the rule of hearsay which is both written as well as oral.

598. No legal requirement for such attestation is pointed out.

599. We deal with these disclosures leading to recoveries of physical objects hereafter. However, the fact that is important is not that the hammer; watch and Tata Safari vehicle were recovered but the knowledge of the accused person about the place where they were hidden and to be found.

600. The failure to have the disclosures attested by the jail authorities is therefore, of no consequence in the present case, so far as their credibility is concerned.

In the end, it is held that Vikas and Vishal Yadav were actually voluntarily made the statements Exh.PW-35/16 and Exh.PW-35/17 respectively disclosing relevant facts which disclosures are admissible by virtue of Section 27 of the Indian Evidence Act.

(v) Whether such disclosures possible - given the alleged prior conduct of the appellants

601. The submission of the defence is that it was the prosecution case that the accused persons were absconding, shifting from place to place and it would belie common sense that such persons would call upon the police to record disclosure statements and rattle off confessional statements after barely two days in jail.

602. We may be accused of stereotyping. However, in our quest for the answer to the question raised on behalf of appellants by Mr. U.R. Lalit as to how somebody who was absconding would blurt out confessions and disclosures immediately after their arrest, the answer is to be found in the unique style of the appellants in everything that they have done in this case, their sheer arrogance manifested from their conduct during trial and the impunity with which they set up a false defence.

603. The same reeks of a sense that they are above the law and come what may, the hands of law cannot reach them, no matter what they do. Secure in this belief they have challenged the police and the course of law with impunity. This is why they blurted out their disclosures confident that they could successfully challenge them later. The submissions made before us manifest this strategy. We shall point out the instances which elaborate this aspect in the portion of this judgment where we have discussed conduct of the appellants hereafter. We are appalled at the stance of the appellants and style adopted before and during trial which manifests that the appellants have been brazen and reckless in their disrespect of all systems especially the investigating agency and the trial courts.

III Recovery of hammer and wrist watch on the 28th of February 2002 The discussion on this subject is being considered under the following sub-headings:

(i) Submissions of the appellants

(ii) The case of defence - whether believable

(iii) Whether search and combing operations carried out at the spot by the Khurja police on 17th February, 2002?

(iv) Whether Ghaziabad Police visited the spot between 17th and 28th February, 2002?

(v) Recoveries from open place accessible to all

(vi) No public witness to recovery examined - effect of

(vii) Khurja Police not joined in the recoveries

604. Investigation in the matter had thus moved and the investigating officer had disclosure statements of the accused persons to proceed on 26th February, 2002, PW-35, the Investigating Officer gave the report to the Chief Judicial Magistrate in respect of the addition of Section 302 and 201 of the IPC to the case. An application was also moved by the IO Anil Somania before the CJM, Ghaziabad seeking police custody remand (Ex.PW-35/21) of the two accused persons. The application stated that as per the disclosure statements of the accused recorded on 25th February, 2002, the Tata Safari used in the commission of the offence, the mobile phone of the deceased and the weapon of offence had to be recovered.

605. Learned senior counsels for the appellant have pointed out that this application does not make any mention of a wrist watch. However, it has been suggested by the prosecution that this application, therefore, manifests that the items recovered were not planted and that the recoveries were made pursuant to the disclosures.

606. On this application, the learned Chief Judicial Magistrate passed an order summoning the accused persons on 27 th February, 2002. The application of the investigating officer was considered on 27th February, 2002 (Exh.PW-3/B) and twenty four hours police custody remand from 9:00 am on the 28th February, 2002 to 1st March, 2002 was granted in the presence of the accused persons and their counsel. As has already been noticed by us, no objection was made by the accused that no disclosures were made by them to the police officials and that no police remand was necessary. Instead Vishal Yadav and Vikas Yadav moved applications through several counsels for accompanying them while they would be in police custody for effecting the recoveries. The learned Chief Judicial Magistrate permitted one lawyer to be present with them during the period of the police custody.

607. PW-35 Anil Somania has stated that on 28th February, 2002 he had gone to the jail after recording DD No.11 in the General Diary of the Police Station (PW-35/22) and took the accused in police custody from the jail at 9.25 a.m. He was accompanied by SI J.K. Gangwar, SI Tej Ram and five constables. According to the prosecution, DW-22 Satpal Singh Yadav, lawyer of the appellants also joined the police party.

608. The prosecution had also examined PW-34 J.K. Gangwar who accompanied the Investigating Officer Anil Somania during the recovery. PW-34, SI J.K. Gangwar has stated that after their medical examination on 28th February, 2002, the accused persons led the police party from Bulandshahr to Khurja road near Agwar Railway Crossing (14 kms) which spot they had reached around 12 noon. The accused Vikas Yadav first pointed out the place where Nitish Katara was killed which was about 25 steps before the railway crossing of Agwar. A site plan of the place pointed out was prepared by Anil Somania (Ex.PW 35/23). The accused persons then led the police party to Khurja Shikharpur road and pointed out the place where the body of Nitish Katara was burnt and recovered, a place near the fields of Zahir, Advocate. A site plan of that place was prepared as well.

609. S.I. J.K. Gangwar stated that thereafter Vikas Yadav had searched among _pattel' bushes and had taken out the hammer. The bushes were 7 steps away from the place which was pointed out by him as the spot where the dead body was burnt.

610. So far as the wrist watch is concerned, according to SI Anil Somania, a little away from there, the accused Vishal Yadav went into the field and brought out the wrist watch again from the midst of _pattel' bushes, about five steps from the hammer, and gave it to him. The mobile phone could not be recovered.

611. Two public witnesses, Raghu and Aslam were joined as panchas in these proceedings. Shri Satpal Singh Yadav, Advocate was present at the time of the recoveries on the pointing out by the accused persons. PW-35 Anil Somania also stated that Shri Satpal Singh Yadav, Advocate was at that time the President of the Bar Association and was a practicing advocate of the Ghaziabad courts.

612. It is the case of the prosecution that after the pointing out and recovery of the hammer by Vikas Yadav and that of the wrist watch by Vishal Yadav, a joint recovery memo prepared at the spot. This recovery memo has been proved on record by PW-34 SI Gangwar as Exh. PW-34/1.

613. The recovery memo was read over to the witnesses after it was scribed. The recovery memo was signed by both Vishal and Vikas as well as Shri Satpal Singh Yadav, Advocate, who has been examined as DW-22.

614. It contains the signature of two panchas as well - Raghu and Aslam. Ex.PW-34/1 has also been signed by SI Anil Somania, SI J.K. Gangwar, Constable Dinesh Kumar, Constable Vinod Kumar Singh.

615. As per the recovery memo Ex.PW-34/1, both the accused persons pointed out the place where the dead body was burnt. Thereafter, they took 7 steps towards the north-west, first Vikas took out a blood stained iron hammer from the cluster of _pattel' grass in a pit (gaddha). Ex.PW-34/1 further records that thereafter Vishal went ahead and took about 5 steps to the north of the place wherefrom the hammer was recovered and took out one wrist watch of Esprit make from amongst the bushes.

616. SI J.K. Gangwar was also categorical that Shri Satpal Singh Yadav, Advocate was present (who was an advocate of the accused persons) when the recoveries were made on their insistence. The witness proved the recoveries as well as recovery memo as Ex. PW-34/1. SI Gangwar has explained that Shri Satpal Singh Yadav, Advocate refused to sign the recovery memo as a witness stating that he was the advocate of the accused person and would not be able to defend the case on his behalf if he becomes a witness. In answer to a specific question, PW-34 categorically stated that Shri Satpal Singh Yadav, Advocate of the accused persons had taken the copy of the memo at the spot and he signed the original memo after writing that he has received the copy. The advocate's endorsement and signatures were exhibited as Ex. PW34/13.

617. A pointed question was put to the witness with regard to the nature of the bushes. SI Gangwar stated that the bush was a kind of grass which is called _pattel' in Uttar Pradesh and is used for making straw roofs, that is, thatched roofs. In answer to the question as to what was the height of the bushes, SI Gangwar stated that the bushes were around 2 ½ to 3 feet in height at that time. The witness further categorically stated that the hammer which was recovered by Vikas Yadav from among the bushes, was not visible from the road to the police team.

SI Anil Somania as PW-35 corroborates the above testimony of PW-34 S.I. Gangwar.

618. The hammer was sent for forensic examination on 16 th April, 2002. As per the crime report received on 17th May, 2002 (Exh.PW-3/3), the hammer had human blood on it, though there is no report on its grouping.

619. Thereafter, the appellants led the investigating officer to Alwar, Rajasthan for effecting the recovery of the Tata Safari vehicle. Three separate placed were searched but the Tata Safari could not be recovered and the police party returned to Ghaziabad around midnight. Upon return to Ghaziabad a medical examination was conducted of the two appellants on the night of 28th of February 2002.

620. On 1st March, 2002, Anil Somania produced the appellants before the CJM, Ghaziabad and the appellants were remanded to judicial custody.

(i) Submissions of the appellants

621. The appellants have urged that the dead body was recovered on 17th February, 2002. Learned senior counsel has urged at length that the prosecution has attributed joint acts to the accused throughout the investigation. It is submitted by Mr. U.R. Lalit, learned Senior Counsel that the prosecution claims to have recovered a hammer and wrist watch from the same area eleven days thereafter on the 28th of February, 2002.

622. The investigating officer claims to have prepared the sketch of the railway crossing at Aughwarpur where Nitish Katara was murdered. (Exh.PW-35/23). Learned senior counsel has contended that according to the investigation they recovered a hammer on the disclosure of Vikas Yadav and a wrist watch on the disclosure of Vishal Yadav. It is further submitted that the prosecution claims to have effected the recovery in the presence of two public witnesses Raghu and Aslam vide the recovery memo Ex. PW-34/1.

623. Learned senior counsel has pointed out that in terms of orders passed by the court, the accused was accompanied by an advocate. During this search, the Tata Safari vehicle could not be recovered.

624. The recovery is challenged on the ground of delays in recording the statements under Section 161 of the Cr.P.C. PW-35 Inspector Anil Somania has attributed statements to panchas Raghu and Aslam on 25th March, 2002 whereas recoveries were effected on 28th February, 2002. Statements of PW 4 Inspector C.P. Singh, SSI C.P. Singh, PW 5 Ct. Mudassar Ali and Ct. Mahender were recorded only on 31 st March, 2002. The submission is that these delays in recording the statements about recovery proceedings render the recovery itself suspicious and unreliable.

625. The challenge to the recoveries is laid inter alia on the ground that the Ghaziabad police requested no assistance from the Khurja police and that no public witnesses were present there. No efforts to join public witnesses were made and the names of witnesses have not been mentioned in the police diary which only makes a reference to _janta ke gawah'. It is contended that the investigating officer has not mentioned the time of recording the statements of Raghu and Aslam. He did not know these persons and has made no inquiries qua them. Learned senior counsel has urged at length that there has been conscious effort to make out ignorance of material details by the police.

626. The claim of the prosecution is challenged by Mr. Lalit, learned senior counsel also urging that there are contradictions in the testimony of SI Anil Somania (PW-35) vis-à-vis the testimony of PW-34 Sub-Inspector J.K. Gangwar who accompanied him during the investigation.

627. It is urged that knowledge of the place where the body was found, was with the Investigating Officer on 21st February, 2002 when he met the SHO of the District Khurja. In any case, the accused persons are alleged to have made the disclosure statements on 25th February, 2002 and, therefore, from this date the Investigating Officer Anil Somania (PW-

35) admittedly had knowledge of the place where the hammer was allegedly hidden. This being so, the police could have proceeded to investigate and search for the weapon. It did not have to effect recovery based on the alleged disclosures. Any intelligent police officer would not wait for a court order of police custody remand etc. but would have proceeded immediately to the spot.

628. Learned senior counsel would object that as per the disclosures, the reflected recoveries were to be effected from another jurisdiction. If this was so, police would have arranged for panchas to accompany them. Here the police claims that two members of the public, one Raghu and one Aslam came along on bikes and immediately became amenable to participating in the recovery proceedings. Their statements under Section 161 of the Cr.P.C. were recorded only on 25th March 2002. It is contended that these facts show that the panchas were there on pre-arrangement of the police and they were not examined in court as the prosecution was apprehensive about their ability to withstand cross-examination. For this reason, there is reference only to _janta ke gawa' in the roznamcha, without mentioning the names of the witnesses. The sketches of the recovered items were also not prepared rendering the recoveries suspected. It is submitted that all the above circumstances point to only one conclusion that the recovered articles have been planted.

629. Mr Lalit has further urged that it is the prosecution case that the body was burnt to render its identification difficult. Such persons would not throw the weapon of offence or the belongings of the deceased in such close proximity to the dead body and the recoveries smack of planting of the articles by the police.

630. Learned senior counsel has further submitted that PW 4 Inspector Chander Pal Singh and PW 5 Constable Mudassar Khan from P.S. Khurja who recovered the dead body as well as PW 23 Shri Virender Singh (informed the police about the body) found nothing at the spot soon after information was received that a dead body was lying at the spot. Even the panchnama of the dead body recorded that nothing incriminating was found.

631. On behalf of the other appellants as well challenge to the recoveries is pressed on these very grounds.

(ii) The case of defence - whether believable

632. In their defence evidence, the accused set up a case that their advocates were working as a defence team and it was their joint decision that DW-3 Rajender Chaudhary shall accompany the accused persons. In this regard the defence has examined two advocates, Shri Rajender Chaudhary, Advocate as DW-3 and Shri Satpal Singh Yadav, Advocate as DW-22 in support of their aforenoticed plea.

633. Mr. Lalit, ld. senior counsel contends that DW-3 Shri Rajinder Chaudhary was present with the appellants on the 28th of February 2002 and that no recoveries were effected.

He has urged that the DW-3 was present at both Khurja and Alwar and that the truth of his statement is manifested by the application made by him on 1st March, 2002 to the court.

634. Given the above narration of the prosecution case, it would be useful to deal with the testimony of these two witnesses.

635. DW-3 Shri Rajender Chaudhary, Advocate has claimed that it was he who had accompanied the police and the accused persons on the 28th of February, 2002 and that no recoveries were effected at the instance of the accused persons. He states that they had returned to Ghaziabad from Alwar around midnight.

636. But the recovery memo bears receipt and sign of DW-22 Shri Satpal Singh Yadav, Advocate. In this testimony, DW- 22 admits receipt of the recovery memo but claims that the police had given him the memo at about midnight on 28th February, 2002 in his chamber. Shri Satpal Singh Yadav suggests that he was in his chamber even at midnight as he was busy with bar elections. When cross-examined on this aspect he states that elections were only in mid March but he does not recollect the exact date.

The witness admits that he did not inform the CJM that the police had served him the memo in the midnight.

637. The State has emphasised the fact that DW-22 does not state that Rajender Chaudhary was accompanying the police at midnight when they came to serve the recovery memo. If the testimony of DW-22 was to be accepted, then DW-3 Shri Rajender Choudhary should have accompanied the police when they served the recovery memo upon Shri Satpal Singh Yadav. He ought to have known about it there and then. Neither of them says so. Instead Shri Satpal Singh Yadav merely states that he had informed Rajender Chaudhary, Advocate about the receipt of such memo, manifesting that Shri Rajender Chaudhary did not accompany the appellants on the 28th of February 2002.

638. The learned Trial Judge has noted that if the recovery memo was served as stated by DW-22 upon him in his chamber at midnight, he would have dated his receipt as 1 st March, 2002 and not 28th February, 2002 as had been done by him. The learned Trial Judge has found the testimony of Shri Satpal Yadav unbelievable for the reason that he claims that he did not go through the contents of the recovery memo especially in such a high profile case involving influential clients.

639. Shri Rajinder Choudhary, Advocate and Shri Satpal Yadav, Advocate have claimed to be part of one team. In an era of mobile phones, if the events had unfolded in the manner testified by DW-3 Rajender Chaudhary, DW-22 Satpal Yadav would have contemporaneous knowledge of the day's events. DW-22 would have certainly known what had transpired in Khurja and that recoveries had been effected.

DW-22 Advocate Satpal Yadav was the president of the Ghaziabad Bar Association and would be wielding substantial authority. The police could not have dared to effect manipulations or pressure his clients or tried to serve a fabricated document upon him. Yet he does not record any objection on the recovery memo that its contents reflecting recovery of the hammer and wrist watch at the instance of Vikas and Vishal Yadav respectively were incorrect or false.

640. DW-3 Shri Rajender Choudhary has claimed that on the 1 st of March 2002 he moved the application and affidavit (Ex.3/D and Ex.3/E) upon being informed by the court that the police had claimed to have effected the recoveries.

641. It is also important to note that even in the application dated 1st March, 2002, Vikas and Vishal Yadav did not dispute the fact that their statements recorded on 25th February, 2002 by the Investigating Officer under Section 161 of the Cr.P.C. making the aforenoted disclosures.

In this application dated 1st March, 2002 (Ex.DW 3/D) DW- 23, Rajender Chaudhary claimed that he had accompanied his clients Vikas and Vishal Yadav from the district jail Dhasna while they were in police custody remand on the 28th of February 2002. In this application, the applicant stated that he remained in a separate car while the accused persons were with the police in an another private vehicle. The application further stated that no recoveries of watch or hammer were effected at the instance of the appellants. The application stated that a fabricated (_farzi') police recovery memo had been prepared by the police and that the accused persons had told the applicant (Shri Rajender Chaudhary) that while on the way, the police had threatened and forcibly obtained the signatures of the appellants on 5-6 blank papers. When he protested with the SHO Kavi Nagar and the Investigating Officer about this, the applicant was told that he should address the court and not them. By way of this application dated 1st March, 2002, the applicant prayed that the application and affidavit be directed to be made a part of the case diary of the Investigating Officer.

The application was accompanied by an affidavit (Exh.DW3/E) of Shri Rajender Chaudhary, Advocate.

642. The authenticity of the recovery memo Exh.PW-34/1 has therefore been assailed primarily on the ground that Shri Satpal Singh Yadav, Advocate was not present at the spot and instead Shri Rajender Chaudhary, Advocate was present and that no recovery was affected.

643. We find from the record that DW-3, Rajender Chaudhary has made conflicting claims to support his version that he was the advocate who accompanied the police party and the accused persons on 28th February, 2002. DW-3 firstly stated that the court had verbally directed him to go with the police and the accused persons. At a subsequent stage of his testimony, he stated that he was chosen as the consensus candidate from among the group of lawyers who had filed the applications.

644. The witness denied any association or acquaintance with Shri Satpal Singh Yadav, Advocate - DW-22 expressing his inability to recall even whether Shri Satpal Singh Yadav, Advocate was the then President of the Bar!

645. DW-22, Shri Satpal Singh Yadav, Advocate has testified that he had informed Shri Chaudhary on 1st March 2002 at about 11 am in the court premises that he had received a copy of the recovery memo and shown it to him as well. However, DW-3, Shri Rajender Chaudhary, though admits that he met DW-22 before he went to the court, does not say that he saw the recovery memo.

646. DW-3 states that he was told about the seizure memo in his chamber at 10 / 10.30 a.m.). Yet neither the application dated 1st March, 2002 (Exh.DW-3/D) nor the affidavit Exh.DW3/F filed by DW-3 Rajender Choudhary make any reference to the recovery memo which has been received by DW-22 Satpal Singh Yadav. It is important to note that neither the application nor the supporting affidavit makes any mention of either the fact that Shri Satpal Singh Yadav, Advocate had informed him about the receipt of the seizure memo or the contents thereof. On the contrary, DW-3 has testified that he was told by the court that as per the police record, recovery of a hammer and watch was affected and he filed the application as a result thereof. DW-3 has further testified that vide the order (Ex. DW-3/C) the court had dismissed his application.

647. In the application (Exh.DW-3/D) filed by DW 3 Rajender Chaudhary, for the first time a case was set up that 5 - 6 blank papers were got signed when the accused were taken on the 28th of February, 2002 for recovery.

648. In his statement under Section 313 of the Cr.P.C., Vikas Yadav has in blatant contradiction stated that blank papers were got signed by him at the Agra Police lines during transit from Dabra to Ghaziabad. He has claimed that at one go, almost 20 blank sheets were got signed by the police from them under coercion. He has specifically alleged that the disclosures and recovery memos have been fabricated on these sheets.

649. It is important to note that Vishal Yadav does not make any such allegation.

650. The appellant, Vishal Yadav has categorically stated that he has neither filed any application nor affidavit complaining that his signatures were obtained on any blank papers by the police or that he did not make any disclosure leading to any recoveries.

651. No complaint or application was made by either Vikas Yadav or Vishal Yadav on the 28th of February 2002 or thereafter to the CJM, Ghaziabad; S.P., Ghaziabad; CMO, MMG Hospital when their medical examination was conducted that their signatures were taken on blank papers or if no recovery was effected pursuant to their pointing out.

652. We also find that the investigating officer, Anil Somania has not been cross-examined on the aspect of the signatures of the accused persons on the recovery memo being obtained on blank papers. It is not open to the appellants to challenge the recovery memo on any such ground.

653. Unfortunately protracted submissions compelling a close scrutiny of the voluminous trial court record has been necessitated because of the testimony of these witnesses which is contrary to the record. The submissions of ld. counsel also are not supported by the evidence. It is not the case of the defence that the two accused persons were made to sign on the same blank papers. In the instant case, there is a single recovery memo (Ex.PW34/1) recording the recovery of both hammer and wrist watch which contains the signatures of both the accused persons.

654. The recovery memo Exh.PW-34/1 scripted in vernacular contains the signatures of Vikas and Vishal Yadav. Vishal Yadav had even put the date of 28th of February, 2002 under his signature on receipt of the recovery memo. Vikas Yadav has endorsed ―Received Copy‖ in English below his signature. The placement of the signature of the appellants also shows that they have affixed their signatures just below the writing of the police. The recovery memo runs into two pages. The signatures are on the second page. The above clearly manifests that the signatures of the appellants were not obtained on any blank papers and they received the copy of the seizure memo after the recoveries were effected and the documents were scribed by the police officials. Sh. Satpal Singh, Advocate has also endorsed on the recovery memo that he has received one copy in vernacular and also mentioned the correct date. He has affixed signature in English thereon.

655. It is in evidence that the police team returned to Ghaziabad only around 11:30 pm whereafter the accused persons had to be medically examined. The learned Trial Judge has thus rightly questioned the correctness of the defence as to where was the time for the police to prepare the recovery memo on blank signed papers of the accused persons?

656. Is there a legal requirement of obtaining the signatures of the accused persons on a recovery memo? The Supreme Court has considered this issue in para 26 of 2012 (8) SCALE 670, Dr.Sunil Clifford Daniel v. State of Punjab. The Court placed reliance on its earlier pronouncement in Golakonda Venkateswara Rao v. State of Andhra Pradesh (supra) and held as follows: -

> ―26. In Golakonda Venkateswara Rao v. State of Andhra Pradesh, AIR 2003 SC 2846, this Court once again reconsidered the entire issue, and held that merely because the recovery memo was not signed by the accused, will not vitiate the recovery itself, as every case has to be decided on its own facts. In the event that the recoveries are made pursuant to the disclosure statement of the accused, then, despite the fact that the statement has not been signed by him, there is certainly some truth in what he said, for the reason that, the recovery of the material objects was made on the basis of his statement. The Court further explained this aspect by way of its earlier judgment in Jaskaran Singh (supra) as, in this case, there was a dispute regarding the ownership of a revolver and the cartridge recovered therein. The prosecution was unable to lead any evidence to show that the crime weapon belonged to the said Appellant and observations were made by this Court in the said context. The court held as under:

The fact that the recovery is in consequence of the information given is fortified and confirmed by the discovery of wearing apparel and skeletal remains of the deceased which leads to believe that the information and the statement cannot be false.‖ (Underlining by us) It is therefore well settled that even failure to obtain the signatures of the accused persons on the recovery memo would not vitiate recoveries effected pursuant to the disclosure statements. In the instant case, the recoveries have been effected pursuant to the disclosures in the presence of Shri Satpal Yadav, Advocate who was President of the Ghaziabad Bar Association. The investigating agency has taken the precaution of obtaining signatures of the accused as well as the counsel though in the form of a receipt on the recovery memo at the spot. We now have to examine the credibility of the defence plea.

657. So far as the cross-examination of PW-34 SI J.K. Gangwar is concerned, the witness has stated that he had not told in his statement under Section 161 of the Cr.P.C. about the presence of Shri Satpal Singh Yadav, the advocate of the accused. PW-34 however categorically denied the suggestion that advocate Shri Satpal Singh Yadav was not on the spot or that no recovery memo was handed over to DW 22 Shri Satpal Yadav, Advocate.

658. We find that no question was put to PW-35 Anil Somania (Investigating Officer) who has recorded the statement of SI Gangwar under Section 161 of the Cr.P.C. as to whether he had questioned him on this aspect. On application of the principles laid down by the Supreme Court in (2000) 4 SCC 484, Jaswant Singh v. State of Haryana, it has to be held that the failure to mention in his statement under Section 161 of the Cr.P.C. by PW-34 SI J.K. Gangwar of the fact that Shri Satpal Singh Yadav, Advocate accompanied the accused persons when recoveries were effected is not a contradiction in any manner so as to impact the evidence on this issue.

659. The appellants are educated and well placed in life. They were guided, not by single counsel, but had teams of lawyers for their defence. The allegation of coercion on the part of the Ghaziabad police against the appellants is completely vague. The facts militate against the truth of the appellants' contention taken for the first time in their statements recorded under Section 313 of the Cr.P.C., that their signatures were obtained on blank papers by the police.

660. It is also difficult to accept the defence version of the recovered articles being planted given the close scrutiny in the case of the police action by the media as well as the ongoing scrutiny by the courts; the prompt and aggressive judicial interventions by the accused persons; the presence of the lawyer of the accused during the recovery proceedings pursuant to court orders; the wide reach and extent of the influence of the accused persons; the status and profile of their family. Given all of the above the investigating officers would not have dared to plant evidence against the accused persons, especially of the kind of physical articles which were recovered. The complainant has expressed strong reservations about certain critical areas of the investigation based on the influence of the accused and their families. We separately consider material omissions by the police during investigation, their effect and whether any benefit enures as a result to the appellants.

661. Who could be accused of planting articles for the recovery and why? The family members of the deceased would be interested only in ensuring that the real culprits who were responsible for the deceased's abduction and murder were punished. Nilam Katara, mother of the deceased and Nitin Katara, his brother would have no motive at all to falsely implicate the accused persons, so as to plant belongings of the deceased or a weapon to get false evidence of recovery at the instance of the accused persons.

662. The defence has neither attributed any such motive on the part of Nilam Katara (the mother) or Nitin Katara (brother of the deceased) nor has any suggestion been made by the defence to these two persons in the witness box that they have falsely implicated the appellants. There is not even a remotest suggestion to the witnesses of any previous enmity of the witnesses with the accused persons.

663. Till the 28th of February 2002, it was not confirmed to Nilam Katara as to whether it was actually her son who had been murdered. Nilam Katara was struggling to ensure that investigation was properly conducted. By then she had already approached the Supreme Court. Thereafter she had filed Crl.Writ No.247/2002 which was listed on 28 th February, 2002. We have asked the question as to why would she falsely implicate any person? She would be the person most interested in establishing the truth.

664. For all these reasons we are unable to differ with the finding of the learned trial judge that it was DW-22 Satpal Singh Yadav who accompanied the police and the accused during the police remand on the 28th of February 2002 and not DW- 3 Shri Rajender Choudhary.

665. Learned defence counsel has contended that Anil Somania stands contradicted by PW-34 SI J.K. Gangwar on this aspect as according to PW-34 search of their persons or vehicles was not given before joining Raghu and Aslam in the recovery. PW-35 Anil Somania however stated that search of their persons was given before joining the public persons in the recovery. At its worst, the statement by Anil Somania is an embellishment in the witness box or it is equally possible that S.I. J.K. Gangwar overlooked this aspect. This contradiction or omission by itself is not sufficient to taint the recovery.

666. It is urged that even though, according to the prosecution, DW-22, Satpal, Advocate had accompanied the accused persons during the recovery proceedings, he was not cited in the chargesheet as a witness. The prosecution filed an application to examine Shri Satpal Yadav, Adv. which was rejected by the trial court by order dated 29 th July, 2006. This order was challenged before the Hon'ble High Court and vide its order dated 6th August, 2007 allowed prosecution to examine the witness. It would appear that the prosecution thereafter decided not to examine Shri Satpal Singh Yadav, Advocate as a witness. He was then examined as a defence witness. It is clearly evident therefrom that the witness was not supporting the prosecution case. The prosecution was therefore justified in opting not to examine Shri Satpal Singh Yadav, Advocate as a prosecution witness.

667. We find that even DW-23 Rajender Chaudhary did not pursue this application which establishes that the same was filed only to create false evidence and does not negate the presence of Shri Satpal Singh Yadav, Advocate with the appellants at the spot when recoveries were effected. The defence evidence of DW-3 and DW-22 to the contrary is not believable.

668. We find that the learned Trial Judge has extensively analyzed the testimony of DW-3, Rajender Choudhary and DW-22, Satpal Choudhary and disbelieved it noting the following:-

(i) DW-3 claimed that while on way, both the accused persons had told him that police had obtained signatures on blank papers. He took no steps at all pursuant thereto.

(ii) DW-3 was not aware that on 27th February, 2002, Chief Judicial Magistrate had allowed police custody remand of only 24 hours w.e.f. 9:00 am on 28th February, 2002. DW-3 had deposed that _he accompanied both the accused during police custody remand of three days w.e.f. 28th February, 2002 to 1st March, 2002'. The learned Trial Judge notes that the witness forgot that there are only 28 days in February and that this answer suggested that he was neither aware of the court order nor accompanied the accused persons.

(iii) DW-3 claimed that the court had orally directed him to accompany the accused persons. The witness was not aware as to whether any application was moved on behalf of the accused before the Chief Judicial Magistrate, Ghaziabad by any advocate seeking permission to accompany the accused during the police custody remand. DW-3 stated that there was no written order by the court that they have to accompany the accused persons and that the court had merely directed him verbally to do so! The learned Trial Judge has observed that thereafter in answer to a suggestive question by Shri G.K. Bharti, Advocate, he stated that he had chosen to accompany the accused persons with the consent of lawyers of the two accused.

(iv) The witness claimed that he had orally informed the court that he was appointed to accompany the accused persons and that no recovery was effected in his presence but the court told him about the police recovery on hammer and watch at the instance of the accused persons. So he moved the application on 1st March, 2002 (Ex.DW3/D) with his affidavit (Ex.DW3/E) on which the court made the order (Ex.DW3/F).

(v) In Ex.DW3/D, Shri Rajender Choudhary had written that he remained with the police vehicle in his own private vehicle no.DL-5CB-4595. In the witness box, DW-3 could not give the make of the

vehicle and further claimed that it was a vehicle arranged by the parokar on behalf of the accused persons.

669. The recoveries were effected in the presence of Shri Satpal Singh Yadav, Advocate, the counsel for the accused persons. The testimony of PW-34, S.I. J.K. Gangwar and PW-35 Anil Somania and then categorical statements that Shri Satpal Singh Yadav, Advocate accompanied the police party and the accused persons at the time of recovery; details of the recoveries; preparation of the recovery memo on the spot; signatures of the accused persons; the witnesses; the endorsement by their lawyer as well as the reason for the same remains unassailed and no question was put to the witness in this regard. There is no challenge also to statement of the investigating officers that copy of the recovery memo was received by the advocate at the spot itself. No suggestion has been put to the investigating officers to the effect that he had made an incorrect statement with regard to the presence of Shri Satpal Singh Yadav, Advocate. No suggestion was given to the investigating officers on the lines of the testimony of DW-3 Rajender Chaudhary and DW-22 Satpal Singh Yadav.

670. The application dated 1st March, 2002 filed by Shri Rajender Chaudhary (DW 3) did not seek any action against the Investigating Officer for recording any false statement. No objection was made that false evidence has been created even though the same is an extremely serious matter. Interestingly, no orders appeared to have been passed on this application nor has copy thereof been furnished to the police authorities or the prosecution. A bare reference thereto is contained in the order dated 1st of March, 2002.

671. The learned Trial Judge has noted the pointed questions with regard to the disclosures and recoveries put to both the accused persons in their statements recorded under Section 313 of the Cr.P.C. Question nos. 130, 142, 143 and 144 made categorical reference to the recoveries and recovery memos. In all these questions, it was put to Vikas Yadav that advocate Shri Satpal Singh Yadav had accompanied them and was present at the time of the recovery; that copy of the recovery memo was received by him at the spot and he made an endorsement (Ex.PW34/1A) with regard to receipt of copy of the recovery memo; that Shri Satpal Yadav refused to sign the memo as a witness on the plea that he was an advocate of the accused persons and if he signs he would become a witness to the recovery and would not be able to defend the case on their behalf.

Similar questions were put to accused Vishal Yadav as well.

672. In response, the two accused persons merely denied the recoveries and presence of Shri Satpal Yadav. However, neither of the two accused stated that DW-3, Shri Rajender Choudhary, Advocate had accompanied them or was present at the spot.

673. The appellants do not deny their signatures on the recovery memo. Other than the vague assertions set up by DW-3, Shri Rajinder Chaudhary in his application dated 1 st March, 2002 states that signatures of the appellants were obtained on 5 or 6 blank papers during the police remand on 28 th February, 2002 while the appellants have nowhere stated that their signatures were obtained on blank papers during the police remand on 28th February, 2002. Instead a contradictory and false claim is set up by Vikas Yadav that his signatures were obtained on 20 black sheets at the Agra police line during police remand from Dabra to Ghazibad. Clearly the challenge to the recoveries effected on 28th of February 2002 on behalf of the appellants on the grounds considered above is untenable and hereby rejected.

(iii) Whether search and combing operations carried out at the spot by the Khurja police on 17th February, 2002?

674. Learned senior counsels have vehemently urged that the genuineness of the alleged recoveries must be disbelieved inasmuch as police officials must have visited the site on the Shikharpur Road

when the body was recovered on 17th February, 2002 and must have conducted a proper search when nothing was found by the police.

675. It is submitted that the disclosure statements were recorded on 25th February, 2002, while the alleged recoveries were effected only on 28th February, 2002. It is contended that between the 17th and 28th of February 2002 the prosecution had ample opportunity for planting the articles which were recovered. It is urged that the alleged recoveries on the 28 th of February, 2002 of a hammer and watch from the same spot, a place which is open and accessible to all also clearly shows that the same were planted.

676. Mr. Lalit also questions that if the body had to be burnt to destroy its identity, why would the person responsible for such a heinous crime throw the hammer as a weapon of offence or the watch near the body? It is urged that this would be most illogical and that hence the recoveries on 28th February, 2002 were clearly fake.

677. The recovery was challenged by Mr. U.R. Lalit, learned senior counsel who submitted that when the panchnama for the body was prepared (Exh.PW-3/2), it specifically stated that nothing incriminating was found. In this regard reference is made to the testimony of PW-4 Inspector Chander Pal Singh, PW-5 Ct. Mudassar Khan and PW-23 Shri Virender Singh.

678. Mr. Ram Jethmalani, learned senior counsel has placed reliance on the judicial pronouncement reported at (1998) 8 SCC 552 Krishan Mohar Singh Dugal v. State of Goa in support of the above objection. In this precedent, on a scrutiny of the evidence of the witnesses and the panchnama, the Supreme Court found that the police was already informed about the place where the narcotic substance was kept and held that therefore this was not a case where the offending article was taken out by the accused from the place of concealment after leading the police to that place which the police did not know about earlier. The coconut tree from whose stem the charas was allegedly recovered, was admittedly standing in an open place accessible to all.

679. Learned Senior Counsels have contended that it has come in the evidence of PW-4 Inspector Chander Pal Singh that people were coming to see the body on the 17th of February 2002 and the place was thus known to the whole world. PW- 4 has testified that he told the place from where the dead body was recovered to SO Anil Somania on the 21st of February 2002. It is urged that the police already knew of the spot and, there was no recovery on 28th of February 2002 of any article pursuant to the disclosures as the place of recovery. It is contended that the recoveries therefore were made from an open place known to all and cannot be relied upon to support the conviction of the appellants.

680. So far as the wrist watch is concerned, learned senior counsel would contend that there is no evidence at all that the deceased was wearing the watch alleged to have been recovered was the same watch that the deceased was wearing when he went to the wedding. In this regard, reliance is placed on the pronouncement of the Supreme Court reported at (2002) Crl.LJ 925 Kevji and Ors. v. State of Rajasthan. The binding principles on evaluation of evidence laid down in this case read as follows:

> —20. ...The legal position with regard to the recoveries made from the accused persons in pursuance of their disclosure statements under Section 27 of the Indian Evidence Act are as under. Under Section 27 of the Indian Evidence Act, 1872 information by accused leading to recovery of crime weapons is admissible but such admissibility of such information does not render the evidence pertaining to information reliable. According to the Apex Court's pronouncement of Kami v.

State of M.P. (9), while testing reliability of such evidence the court must see whether it was voluntarily stated by the accused, if on facts information given by the accused under Section 27 is found to be voluntarily given and further that in pursuance of such information crime articles are

recovered at the instance of accused person and proved so by cogent and convincing evidence then and only then such facts discovered can be used against the accused person. But admissibility alone would not render the evidence pertaining to the above information reliable. Where place of concealment is already known to police such recovery at the instance of the accused looses importance because in such circumstances the said recovery cannot be said to be on the basis of disclosure statement of the accused, in this respect K.M. Dugal v. State of Goa (10), can be referred to. Even if some articles are recovered at the instance of the accused persons, unless and until those articles implicate the accused in commission of the crime the said recovery loses significance.‖ Reliability of evidence admitted under Section 27 of the Evidence Act as well as recoveries effected pursuant thereto therefore rests on whether the place of concealment of the required article was already known to the police. If this is so, then obviously the recovery cannot be held to be pursuant to the disclosure by an accused.

681. Mr. Sumeet Verma, ld. counsel for Vikas Yadav has placed reliance on pronouncement of the Supreme Court at (2012) 4 SCC 722, Govindaraju @ Govinda v. State, wherein the recoveries were doubted for the reasons contained in para 51, which reads as follows:

> ―51. Now, we will come to the recoveries which are stated to have been made in the present case, particularly the weapon of crime. Firstly, these recoveries were made not in conformity with the provisions of Section 27 of the Evidence Act, 1872. The memos do not bear the signatures of the accused upon their disclosure statements. First of all, this is a defect in the recovery of weapons and secondly, all the recovery witnesses have turned hostile, thus creating a serious doubt in the said recovery. ...‖

682. The recoveries in the instant case have to be tested on these principles.

683. In the instant case, the disclosures have been made by Vikas and Vishal Yadav on 25th February, 2002 in their statements under Section 161 of the Cr.P.C. which we have found reliable. Pursuant thereto recoveries have been effected on the 28th of February 2002. We have noted that the recovery memo bears the signatures of the appellants as well as their counsel. The making of the disclosure statement as well as the recoveries at the instance of the accused persons are supported by the oral testimony of the investigating officers.

684. We may advert to the testimony of PW-23 Shri Virender Singh, the village pradhan who had first reported the discovery of the dead body to the police. Testifying as PW- 23, Virender Singh stated that he had found the body on the 17th of February, 2002 at around 9/9.15 am while he was passing by on his jeep on the right side of the road and had informed the Khurja police. In his cross-examination, the witness stated that from the position of the body one could see 10-20 feet all around and that the police was searching an area of 100-200 metres; that they were roaming in the area. To roam in an area is different from a search and combing operation carried by the police.

685. The prosecution has also established discovery of the body in the testimony of PW-4 Inspector Chander Pal Singh who was posted as the Inspector-in-Charge of the P.S. Khurja in February, 2002 and investigated the case between 17th and 26th of February, 2002. PW-4 has stated that at about 9.10 a.m. on 17th February, 2002 information was received from one Shri Virender Singh at the Police Station that one dead body was lying on Shikarpur road. This information was recorded as DD No.12 (Exh.PW-4/A) alongwith the departure of the witness with his staff for the spot. They started from the police station at about 9.10 a.m. and reached the spot within 10-15 minutes. They remained at the spot upto 3 p.m. on 17th February, 2002.

686. The police found a male dead body lying in a _khainuma gaddha' _khaai‟ (gorge/pit) adjoining the kachha portion of the road at the spot. No one identified the dead body which was photographed (Exhs.PW-4/2 and 3). The panchnama of the dead body Exh.PW-3/2A was prepared by Chander Pal Singh. The witness categorically stated that as per the panchnama, the right hand of the body was burnt

with other body parts but the left hand and its fingers were not burnt. The panchnama was witnessed by public persons, Surender Singh, Zamil, Zarif, Devi and Mukesh. Their parentage and full addresses are given in the panchnama itself.

687. In his cross-examination Inspector Chander Pal Singh has testified that when he reached the spot on the 17th of February, 2002, there was a crowd of about 50 persons around the dead body; that people had been coming and going around the dead body for the purposes of its identification thereafter. The body was stated to be lying with its head on the west side and feet in the east direction about six steps away from the pucca part of the road. The witness had also taken the burnt ash and samples near the dead body which were sealed and deposited as case property at the Police Station Khurja.

688. Inspector Chander Pal Singh was also extensively questioned with regard to searching the area around the dead body on 17th February, 2002.

It is in the testimony of the witness that there was a tubewell about 50 steps away from the place where the body was found. In answer to a specific question as to whether he had searched the area around the dead body, the witness had stated that he had only _seen' the place near the body. In answer to another pointed question on the issue, the witness stated that he did not go upto the tubewell. The witness also stated that the field on the south side was not searched by him. There is a categorical answer by the witness that he had not given any instructions to his subordinate staff to search the area around the dead body. The witness also stated that he did not find any weapon or incriminating article near the dead body. The witness further stated that though trees were shown in the site plan Exh.PW-4/4, he had not shown the bushes specifically nor had he marked any pit.

689. On the nature of the search which was effected on 17 th February, 2002. Mr. Lalit, senior advocate has also drawn our attention to the evidence of PW-5, Constable Mudassar Khan who stated that on 17th February, 2002, the police team had started by about 09.10 a.m. from the police station and reached the spot within 10-15 minutes. The police team had stayed at the spot where the dead body had been recovered till around 2-3 p.m. He refers to no search or combing operations.

690. It is in the testimony of Ct. Mudassar Khan that the dead body was in a pit about 3-4 steps from the road. The witness stated that he had seen the place surrounding the body (spot) but had made no measurement as to how many feet he had gone upto. Ex.PW-4/4 shows that the tubewell was at a distance of about 50 steps from the dead body. The police persons had gone in one or the other direction. The witness could not recollect if there was any tubewell. PW-5 Constable Mudassar Khan had also testified that he had not gone into the fields. He further stated that nothing was recovered upto 15-20 steps.

691. The appellants contend that nothing was recovered by either PW-4 Inspector Chander Pal Singh or PW-5 Constable Mudassar Khan around the dead body up to about 15-20 paces. The appellants have therefore, challenged the recovery of the hammer by the accused Vikas Yadav 6 - 7 steps from the place of burning of the dead body as pointed out by him and recovery of the wrist watch about 5 steps by Vishal Yadav from the place where the accused Vikas Yadav had recovered the hammer.

692. Mr. Dayan Krishnan, the learned Additional Standing Counsel for the State has contended that there is no evidence at all of a search or combing operation conducted at the time of the recovery of the body. The police had not carried out any combing operations or intensive search of the place where the body was found or around it.

693. Mr. Dayan Krishnan submits that the evidence on record has to be read in its entirety having regard to the nature of the site where the dead body was recovered. Our attention has been drawn to the

photographs of the dead body which were taken by the police (Ex. PW-4/2). These photographs reflect that there was long grass in the area close to the spot where the body was found.

694. Mr. Krishnan has submitted that the Khurja police having knowledge of the fact that an identified body had been found and the place where it had been found can not impact the genuineness of either the disclosure statements recorded by Ghaziabad police or the recoveries effected pursuant thereto. The learned Additional Standing Counsel has urged that this issue is no longer res integra and stand settled in the pronouncements of the Supreme Court in (2011) 3 SCC 685, Ramesh and others v. State of Rajasthan and (1973) 3 SCC 662 Karan Singh v. State of U.P.

695. First and foremost let us examine what was the position at the spot where the body was discovered? Idle bystanders curious about the body which had been found would have gathered. Light is shed on the prevalent situation by the recovery memo prepared by PW 4 at the spot. The relevant extract of Panchanama (Ex PW 3/2A) of the unknown dead body dated 17th February, 2002 is extracted hereafter:

> —.....Hast suchna amad dwara telephone mein SI C.P. Singh mein arakshi 1090 Mahender tatha arakshi 614 Mudasar Ali, SHO/Inspector Shri Chander Pal avam unke humrahi arakshigan (illegible) Tomar tatha 378 Arvind (illegible) sarkari - UP 13/E 1570 mey (illegible) Om Prakash, babat milne shahar (illegible) Shikarpur Road par ki Janch (illegible) hetu thane se (illegible) Ba-vahan) UD No.12/0910 AN 17.02.2002 ravana hokar Shikarpur Road par, baad lene (?) panchayatnama Jild va nakal rapat uprokt Pahasu Shikarpur Tiraha se karib 1 KM ki doori par Shikarpur Road pe aaya hun. Sarak ke uttar ki aur (illegible) hi bani khainuma gaddha mein jiske uttar mein Jahir vakil putra khuda baksh niwasi Sarai Allo thana khurza (illegible) BSR mein ek agayaat vayakti ka karib75% jala shav pada hai. Pehchan mein nahi aa raha hai. Moke par kafi bhir ekatrit hai. SHO/Inspector mahodya ke netritva nirdeshan mein SI CP Singh us agyat shav ki shinakhat karane mein mashruf hoon. Padosi gaon Baharai, Amra tatha Murari AN evam Khurja Shahar ke bahut se vayaktiyon ko jeep sarkari mein _____hailer dwara vyaapak prachar prasaar karakar moke par bulvaya gaya hai. Senkron ki sankhaya mein aas paas ke shetra ke vayakti akatrit hein. Sabhi se mritak agyat ki shinakhat karane ka prayas yudh sthar par kiya ja raha hai. Parantu shav atyadhik jala hone se chehra purantah jala hone tatha pehchan ke kabil na hone ke karan mritak agyan ki shinakhat nahi ho sakhi hai. Itna bhi nahi pata chal pa raha hai ki yah mritak hindu hai ya musalman. Ataha bahalat majburi mein SI/SHO mahodye ke nirdeshan mein panchayatnama mustav karne mein mashruf hota huin. Niji tor par pratiyek vyakti se mritak agyat ke shav (illegible) sahit shinakhat hetu vyapak prachar avam prasar karane hetu rangeen photographer Shikarpur Road se bulaya (illegible) gaye hai. Bhid me se hi panch vyaktiyon ko panchan kiya jata hai.....‖

696. The translation of the relevant extract of the Panchanama (Ex PW 3/2A) of the unknown dead body dated 17th February, 2002 reads as follows:

> —...Quite a crowd has gathered on the spot. I, Sub Inspector C.P. Singh, am busy in getting the unknown body identified under the leadership and directions of SHO. People from the neighbouring villages of Behrai; Amra; Murari and Khurja City have been called to the spot in the Government Jeep, after effecting wide publicity and broadcast through hailer. Hundreds of people from the surrounding areas have gathered. Efforts to get identification of unknown deceased are being effected from all of them on war footing through every person.

But because the dead body is mostly burnt, its face fully burnt and beyond recognition, therefore identification of the dead body could not be possible. It is not even possible to tell whether the body is

of the Hindu or a Muslim. Therefore, by force of circumstances, I, Sub-Inspector under the direction of the SHO accordingly get myself busy in preparing the `Panchanama'. I have personally asked every person to identify the dead body. For the purpose of publicity and broadcast, colour photographer has been called from Shikarpur Road. From the crowd, five people have been appointed as panchas.....‖ (Emphasis supplied) It was thus not as if only a few bystanders had gathered at the spot. On the contrary, the police had gathered public from several villages to get the body identified. Exh.PW- 3/2A records that _senkron' (hundreds of) people had gathered. It is therefore implausible that the Khurja police could have combed the area looking for hidden articles on the 17th of February 2002 in these circumstances.

697. The learned Trial Judge in the judgment dated 28th May, 2008 has noted the testimony of Inspector Chander Pal Singh that when he reached the spot to recover the dead body, there were about 50 persons and thereafter people had been just coming and going. PW-4, Inspector Chander Pal Singh has stated that he had conducted only inquest proceedings and prepared the panchnama (Ex.PW3/2). PW-4, Inspector Chander Pal Singh in his cross-examination has admitted that he had not shown the pattel bushes specifically in the site plan (Ex.PW4/4). The spot from where the dead body was recovered is not disputed by the appellants.

698. The learned Trial Judge has adverted to the clear testimony of the investigating officers SI J.K. Gangwar (PW-34) and SI Anil Somania (PW-35) with regard to the existence of the bushes. SI J.K. Gangwar had explained that the bushes were called „pattel‟ in U.P. which were used for making thatched roofs and were to the height of about 2-3 feet. This oral testimony was corroborated by the photographs (Ex.PW4/2 and Ex.PW4/3) of the dead body.

699. SI J.K. Gangwar has stated that the hammer recovered by Vikas Yadav from among these bushes was not visible from the road. The witness also stated that they were not able to see the earth beneath the bushes as the place was covered by the bushes. His testimony has not been challenged in cross examination. No suggestion was given to the witness by the appellants that there were no bushes at the spot or that the hammer and the wrist watch could be seen by the public.

700. Anil Somania (PW-35) was subjected to a protracted cross-

> examination. He explained that the wrist watch was recovered from bushes of small wheat plants/crop and that there were many such like bushes in the area. So far as the topography is concerned, PW-35 clarified that from the main road, first of all there was a kachha rasta, then bushes and then fields. It is in evidence that the dead body was recovered from a gorge (referred to _khainuma gaddha‟ or loosely referred to as _pit' or _gorge').

701. PW-4, Inspector Chander Pal Singh has testified that he had not given any instructions to his subordinate staff to search the area around the dead body. PW-4 Inspector Chander Pal Singh denied all suggestions by the defence to suggest that during his presence on the spot on 17th February, 2002, the police had carried out search operations.

702. PW-4 Inspector Chander Pal Singh and PW-5 Ct. Mudassar Khan stated that they had only seen and not effected any search for any articles. Even if it were to be held to be contrary, it stands established that the hammer and wrist watch were not in the open and were not visible to all. So they could not have been recovered by the police on the 17 th of February, 2002.

703. The learned Trial Judge has noted that the photographs of the dead body show dense bushes towards the feet of the deceased and there were leaves spread all around the ground. The photographs Ex.PW4/13 show bushes on the left side of the dead body as well.

704. The learned Trial Judge also notes the specific question put in cross-examination by counsel for Vikas Yadav to PW-23, Virender Singh regarding inspection of the place by the police. The witness has testified that he did not know if the police were removing the bushes with _dandas' (sticks) although police was roaming in the surrounding area. It has held that the accused persons therefore, admitted the presence of dense bushes which were required to be removed by dandas to effect the search.

705. When subjected to cross-examination by Shri S.K. Sharma, learned counsel for Vishal Yadav, PW-23 Virender Kumar claimed that on the 17th of February, 2002, he had not seen any drag-marks or tyre-marks or shoe-marks around the dead body. When questioned by the court, he admitted that he had to remove people in the crowd to see whether there were any such marks to ascertain where the dead body had come from. No such statement is to be found in his examination- in-chief. He has further stated that when he removed the crowd, he only got space for putting one step. This clearly shows that the crowd at the spot was so heavy that PW-23, Virender Singh could not even stand at the spot properly. The drag marks or shoe marks, if any, would clearly stand obliterated by the foot prints of the crowd.

706. The failure of PW-4 Inspector Chander Pal Singh to reflect the existence of these bushes in the site plan (Ex.PW4/4) has been termed as faulty investigation by the learned Trial Judge who has rightly held that no benefit thereof can be given to the accused persons.

707. Pursuant to information about the existence of a dead body at the spot, Inspector Chander Pal Singh had proceeded to the spot to only conduct inquest proceedings under Section 174 of the Cr.P.C. It has been noted that Inspector Chander Pal Singh had only limited powers under Section 174 of the Cr.P.C. which were to ascertain whether the person had died an unnatural death under suspicious circumstances and if so, the apparent cause of the death. Inspector Chander Pal Singh was not required to assume the role of an Investigating Officer involved in investigating commission of an offence on that date.

708. The appellant submitted that in the inquest form, the police mentioned that nothing incriminating had been recorded. It is necessary to examine the inquest form. The query which the person filling the inquest form was required to answer was to furnish a list of property and weapons which was found on or near the dead body and method of arrangement thereof. It does not refer to articles which required a search. The evidence on record establishes the huge crowd collected near the body for its identification. The evidence establishes no search by the police. The answer in the inquest form relates to articles on the body or near to it. It cannot possibly refer to articles hidden in bushes which have been recovered on the 28th of February 2002 on the pointing out of the accused persons.

709. The observations of the Supreme Court in (2011) 3 SCC 685, Ramesh and others v. State of Rajasthan in similar circumstances deserve to be considered in extenso and read as follows:

> —58. We have absolutely no reason to differ on the principle of honesty and fair investigation. However, we do not find any reason here in this case to hold that the investigation was in any way unfair. We have already held that merely because the recoveries were made from the same place which was already visited by the police, that would itself not dispel the evidence of discovery and recovery. This we have held on the basis of the peculiar evidence led in this case. True it is that the investigation officer should have thoroughly searched the premises of Gordhan and Bharat Kumar on 9.2.2003 itself. However, if the accused agreed to discover different things on different dates and those things were actually found in pursuance of the information given by the accused, the discoveries cannot be faulted for only that reason.‖ (Emphasis by us)

710. On this aspect, reference may also be made to (2000) 6 SCC 269, State of Maharashtra v. Damu and others. In this case, the Supreme Court had held as follows: -

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

711. On the same issue, reference may be made to the pronouncement of the Supreme Court in (1973) 3 SCC 662, Karan Singh v. State of U.P. The factual aspect and the findings of the court in para 3 are as follows -

—xxx There was also the fact that the blood stained knife (Ext. 5), with which the murder was committed was recovered at the instance of the appellant. We have not been impressed by the argument on behalf of the appellant that this evidence is not admissible under the provisions of Section 27 of the Evidence Act as the police already knew about the place where the knife could be found. This argument is wholly without substance. This was based on the fact that the appellant first told the police that he would show them the knife and then took them to the place where the knife was hidden. We consider that both the courts below were undoubtedly right in holding that there was no substance in this contention, and the evidence regarding the recovery of the knife was admissible. The courts below were not impressed by the appellant's denial of the various facts proved against him and his statement that he was in his own village Pachkaura at the time of occurrence. We have carefully considered the evidence in this case and see no reason to differ from the conclusion arrived at by the courts below. xxx xxx.‖ (Emphasis by us)

712. From the evidence led by the prosecution on record, it would appear that there were no combing operations or proper searches carried out by the Khurja police on 17th February, 2002. There were bushes of grass (pattel) of the height of between 2 and 3 feet at the spot. The recovered articles were hidden in two separate clumps of bushes, concealed from prying eyes.

713. The circumstance therefore that the police from Khurja had visited the spot to recover the dead body, without finding any of the recovered articles would not by itself vitiate the genuineness of the recoveries on the 28th of February 2002 or the validity and admissibility thereof.

(iv) Whether Ghaziabad Police visited the spot between 17 th and 28th February, 2002?

714. Mr. U.R. Lalit, learned senior counsel for the appellant has contended that from the testimony of PW-23 Virender Singh, it is established that shortly after the body was discovered, the Ghaziabad police came to the spot on 21st February, 2002 and no article was recovered. It is submitted that this supports the defence contention that there actually no article to be recovered.

715. Learned senior counsel refers the statement of PW-4 Inspector Chander Pal Singh to the effect that he met Anil Somania on 21st February, 2002. It is contended that this statement establishes, without doubt, the fact that the Ghaziabad police had information about the case and would not have kept quiet. However, this submission fails to consider the fact that it was an unidentified body burnt beyond recognition that had been recovered by the Khurja Police. At that time no one knew that the body was of Nitish Katara.

716. On this aspect, our attention has also been drawn to the statement of PW-5, Ct. Mudassar Khan from the Khurja district who stated that some police officers from Ghaziabad had visited only the mortuary on 20th February, 2002.

717. It is in the testimony of PW-4 Inspector Chander Pal Singh of the Khurja police station (Vol.1, 67) that on 21st February, 2002 he had a telephonic conversation with the SO Kavi Nagar and that he also talked to him on 21st February, 2002. PW-4 however states that he had not taken the Ghaziabad police from the CJM office to the place where the dead body was found.

718. In the cross-examination by Shri K.N. Balgopal, Advocate on behalf of the accused Vikas Yadav, PW-23 Virender Singh vaguely stated that one or two days after the discovery of the body, he had seen the Ghaziabad police on the spot when he was passing from that road. He stated that he had stopped his jeep on seeing the police as well as public and enquired as to what was happening. So far as identification of the police personnel is concerned, the witness had not verified from the police but he stated that he had asked the same from the public. The witness did not know the name of any of the police personnel who were there on that day. The witness also claims to have seen a jeep bearing a Ghaziabad number from which he deduced that the police was from Ghaziabad. This witness was not only the Pradhan of the village but claims to have been a Member of the District Board between 1987-1992.

719. The witness was explicit about the time at which he saw the dead body as well as the details of when he made the police report on 17th of February 2002 about the dead body lying at the spot. However, he could not give the date or time on which he claims to have seen the Ghaziabad police at the spot.

PW-23, Shri Virender Singh appears to have been clearly influenced by the accused persons. There is nothing to support his presence at the spot after one or two days of the incident. He did not even notice bushes near the dead body. Furthermore, so far as seeing the Ghaziabad police at the spot after one or two days is concerned, the witness again does not say so in his examination-in-chief and made up the statement only in his cross-examination without any specifics. In any case, the statement of PW-23 that the police he claims to have seen at the spot where from Ghaziabad is a conjecture. It is clearly unreliable and cannot be believed.

720. The learned Trial Judge has held that the manner in which the dead body was brought to the pit is not known. There is no eye-witness account of what happened. These factual details would be in the special knowledge of the accused persons.

(v) Recoveries from open place accessible to all

721. We have noted above the submission of learned senior counsels that the recoveries on the 28th of February have to be rejected on the ground that they were effected from an open place, accessible to all. They have contended that the recoveries deserve to be disregarded for this reason as well.

722. We have already discussed the topography of the area where the body was discovered as well as of the place wherefrom the recovery is effected. The body was in a _khainuma gaddha‟. There were several clumps of _pattel' bushes in the area standing 2 to 3 feet tall. It is in the evidence of SO Anil Somania, the Investigating Officer that the hammer was recovered by Vikas Yadav 6-7 paces away from where the body was recovered by searching amongst _pattel' bushes. The wrist watch was recovered by Vishal Yadav again after searching from another clump of bushes. Neither the hammer nor the wrist watch were visible to the eye. It is also established on evidence that the bushes were so thick, that it was not possible to see the ground below them.

723. SO Anil Somania also describes the location of the spot. He has stated that adjacent to the main road there is a _kachcha' (unmetalled) road; then bushes and then fields. After crossing the bushes they had gone to a wheat field. PW-35 had stated that the distance between the place of recovery of the dead body and the wrist watch was 50-20 paces. PW-34 S.I. J.K. Gangwar corroborates Anil Somania on all scores. The witnesses maintained that the accused persons had searched for the recovered items in the

bushes and taken them out. Despite the search, the mobile phone of the deceased could not be recovered. The defence was unable to dent this testimony of either PW 34 S.I. J.K. Gangwar or PW 35 Anil Somania. The prosecution has thus established beyond doubt that the recovered articles were concealed by the accused persons in the bushes, which places were known only to them, even though the bushes were growing on open land.

724. It is argued by Mr. Dayan Krishnan, learned counsel for the State that even if it could be held that the police had searched the place without finding the recovered articles when it visited the spot when the body was discovered or visited the spot again thereafter is inconsequential so far as the legality, validity and admissibility of the recoveries in the present case are concerned. In this regard, reliance has been placed on the pronouncement of the Supreme Court reported in (2011) 3 SCC 685, Ramesh and others v. State of Rajasthan. In this case, different things were recovered on different dates from the same place on information received from the accused. These recoveries were challenged by the accused persons on the ground that the recoveries were effected from the same place which had already been visited by the police more than once. The court rejected the objections holding as follows: -

> —32. We are of the clear opinion that the High Court was absolutely correct in believing the recoveries and discoveries also, particularly, as against the accused Ramesh. There may be some irregularities here and there or some casual investigation by the police, however, we do not think that the investigation in this case was tainted. There was absolutely no reason for the police to falsely implicate Ramesh (A-3) and the other two accused persons. True it is that Phalodi is a small place and there was great tension prevailing on account of the robbery, however, that by itself will not be the reason for police to falsely implicate Ramesh (A-3) and the other two accused persons. Nothing has been brought in the cross-examination of the police officers and, more particularly, the cross- examination of Kishan Singh (PW-35), the Investigating Officer. Before going to the other cited cases, we would consider the case of Gordhan Lal (A-1).
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> 39. We are not impressed by the contention raised that the police have seized the gold chain on 19.2.2003 even when they had visited the same place on 9.2.2003 for recovering the cloths on 13.2.2003 for recovering the other ornaments including the Katordan. It is quite possible that the police were not able to recover all the ornaments in one go. The High Court has given good reasons to set aside the finding of the Trial Court to the effect that this recovery was not proved. In fact, there is clear cut evidence on record that the ornaments which were recovered on 13.2.2003 were kept in a Katordan. ...‖ (Underlining by us)

725. In the instant case as well it is in evidence that the recovered articles were hidden and were not visible. But for the disclosures and their searching and bringing them out by the accused persons, the articles would not have been recovered. The later conduct of the accused persons in leading the police to places unknown to it and setting the Tata Safari vehicle recovered further lends reliability to both the disclosure statements as well as the recoveries.

726. Investigating Officer Anil Somania appearing as PW-35 has categorically stated that he had not gone to the Khurja Police Station on the 17th, 18th or 19th February, 2002 or to the place where the dead body was recovered wherefrom recovery of the other articles was effected on 28th February, 2002 at the instance of the accused persons. He has categorically stated that he had not seen the place of recovery beforehand. The Investigating Officer Anil Somania has explained in detail what he was doing between 21st and 25th February, 2002. His testimony remains unchallenged. We see no reason to disbelieve the investigating officer that he had not visited the spot where the body was recovered from 17th till 28th February, 2002.

727. The absolute proposition pressed before us that recovery having been effected from an open place, must be mandatorily disbelieved, stands rejected by the Supreme Court. In this regard Mr. P.K. Dey, learned counsel for the complainant has placed reliance on the pronouncement of the Supreme Court reported at (1999) 4 SCC 370, State of HP v. Jeet Singh -

> —26. There is nothing in Section 27 of the Evidence Act which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is "open or accessible to others". It is a fallacious notion that when recovery of any incriminating article was made from a place which is open or accessible to others, it would vitiate the evidence under Section 27 of the Evidence Act. Any object can be concealed in places which are open or accessible to others. For example, if the article is buried on the main roadside or if it is concealed beneath dry leaves lying on public places or kept hidden in a public office, the article would remain out of the visibility of others in normal circumstances. Until such article is disinterred its hidden state would remain unhampered. The person who hid it alone knows where it is until he discloses that fact to any other person. Hence the crucial question is not whether the place was accessible to others or not but whether it was ordinarily visible to others. If it is not, then it is immaterial that the concealed place is accessible to others.
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> 28. In the present case, the fact discovered by the police with the help of (1) the disclosure statements and (2) the recovery of incriminating articles on the strength of such statements is that it was the accused who concealed those articles at the hidden places. It is immaterial that such statement of the accused is inculpatory because Section 27 of the Evidence Act renders even such inculpatory statements given to a police officer admissible in evidence by employing the words: "Whether it amounts to confession or not".
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> (Emphasis by us)

728. This judicial pronouncement was followed by the Supreme Court in the judgment reported at (2010) 14 SCC 129, Jon Pandian v. State wherein it has been held as follows: -

> —56. It has been held by this Court in State of Himachal Pradesh v. Jeet Singh, 1999 (4) SCC 370 that even if there are no witnesses present and the confession is made only to the Investigating Officer, still the discovery can be accepted. In this case that did not happen. The confessional statement was undoubtedly made before a witness who entered the witness box and offered himself for cross-examination. Therefore, the fact that the confessional statement was made cannot be disputed nor can it be disputed that Kumar (A-9) ultimately discovered the veechu aruval from the cremation ground.
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> 57. It was then urged by the learned Counsel that this was a open place and anybody could have planted veechu aruval. That appears to be a very remote possibility. Nobody can simply produce a veechu aruval planted under the thorny bush. The discovery appears to be credible. It has been accepted by both the Courts below and we find no reason to discard it. This is apart from the fact that this weapon was sent to the Forensic Science Laboratory (FSL) and it has been found stained with human blood. Though the blood group could not be ascertained, as the results were inconclusive, the accused had to give some explanation as to how the human blood came on this weapon. He gave none. This discovery would very positively further the prosecution case.‖ (Underlining by us)

729. In the judgment reported at 2000 (56) DRJ (Suppl) 566 (DB) Tahir and Ors. v. State relied upon by Vishal Yadav before us, this court following Jeet Ram (supra) laid down the principle thus: -

—15. It is also pleaded by learned counsel for accused that the nylon rope was discovered from a place easily accessible on 28.3.1988 i.e. after about two weeks of alleged occurrence on the basis of information given at least 24 hours earlier i.e. on 27.3.1988. There is nothing in Section 27 of the Evidence Act which renders statement of the accused inadmissible if recovery of the article was made from any place which is "open or accessible to others". xxx‖ (Emphasis supplied)

730. It may be noted that in Tahir and Ors. v. State (supra), the court rejected the recovery because the prosecution evidence was silent on the aspect as to the manner of concealment and the place of concealment. It is not so in the present case.

731. Mr. Sumeet Verma, Advocate appearing for Vikas Yadav has relied upon the pronouncement reported at 2008 (1) JCC 277, Mani v. State of Tamil Nadu; AIR 1963 SC 1113, Prabhoo v. State of Uttar Pradesh and 2008 (1) SCALE 399, Sattatiya @ Satish Rajanna Kartalla v. State of Maharashtra in support of the submission that there was no disclosure statement admissible under Section 27 of the Indian Evidence Act nor any recovery pursuant thereto.

732. In 2008 (1) JCC 277, Mani v. State of Tamil Nadu, the material objects said to have been produced by accused Nos. 1 and 2 were recovered about 300 feet away from the dead body of Shiva Kumar. The body was discovered on 25 th November, 1996. The witness was not certain even as to who made what discovery. The court observed that it would be impossible to believe that the inspector did not search the nearby spots and that all the articles would remain in an open and unguarded area till 6th December, 1996 when the recovery has been allegedly made. Further, there was contradiction with regard to the investigation which was carried out. The articles which were so allegedly recovered included a blood stained rose colour full sleeves shirt; blood stained green colour sweater; blood stained lungi having green, red and black stripes and one blood stained koduval with human hair. The court had completely disbelieved the case of the prosecution on other circumstances including motive; failure of the prosecution to prove that the house where the blood stains were found belonged to or was possessed exclusively by the appellant; that the clothes which were recovered belonged to the appellant. It was on a consideration of all these factors that the Supreme Court observed that the discovery of the relevant articles alleged to have been made in the open ground though under the bush more than 10 days from the incident would be without any credence. In para 20, it was observed that —it does not stand to any reasons that the concerned Investigating Officer did not even bother to look hither and thither when the dead body was found. We are, therefore, not prepared to accept such kind of farcical discovery which has been relied upon by the courts below without even taking into consideration all the vital facts‖.

733. As noticed above, the court has disbelieved the recoveries in Mani (supra) from a consideration of the entirety of the evidence placed on record and the facts which stand established. There is a difference between recovering the large number of clothes from under a bush as against a wrist watch or a hammer hidden in clumps of bushes as in the present case. The evidence in the case in hand shows that it was not possible to see the ground below the pattel bushes.

734. In AIR 1963 SC 1113, Prabhoo v. State of Uttar Pradesh, the court placed reliance on the principles laid down in the Privy Council pronouncement in Pulukuri Kotayya v. Emperor and in para 10 the court observed that through mere production of blood stained articles of the appellant, it cannot be concluded that the appellant had committed the murder. Even if somebody else had committed the murder and the blood stained articles have been kept in the house, the appellant might produce the same when interrogated by the police. Therefore, it could not be held that the fact of production of the articles was consistent only with the guilt of the appellant and inconsistent with his innocence. The prosecution in the present case is not relying on the sole circumstance of the recoveries at the instance

of the accused persons. Several other circumstances stand established. The evidence has to therefore be comprehensively examined which exercise we have undertaken.

735. In AIR 2008 SC 1184, Sattatiya @ Satish Rajanna Kartalla v. State of Maharashtra, the court disbelieved the prosecution theory regarding recovery of a half blade for the reason that the same was recovered from the road side beneath a wooden board in front of a building. The court also examined the material contradictions in the testimony of the witness in the context of the last seen evidence. The recovery was allegedly effected from an open place and everybody had access to the site where the blade was recovered. Therefore, it is not the rejection of the recovery alone which has weighed with the court in allowing the appeal but other circumstances as well.

736. Mr. Sumeet Verma, learned counsel for Vikas Yadav also relied upon the Division Bench pronouncement reported at 1997 Cri. LJ 3813, Puran Lal v. State of U.P. wherein the recovery of the head of the deceased and other articles was allegedly about 40 paces away from the place where the dead body was found and both places were in the field of Harbhajan Singh on the bank of the lake. The recovery effected on the alleged statement given by the appellant was disbelieved on the ground that there were material discrepancies in the evidence of the prosecution witnesses. There were discrepancies with regard to the timing of the PW-10, the Investigating Officer reaching the spot. The court observed that the dead body as well as the head of the deceased and other articles were found on the border of the field of Harbhajan Singh, a place which was accessible to all. There was evidence that 40-50 labourers used to work at the farm. In this background, it was observed that the place being accessible to all, there was no reason why the head and other articles would not have been noticed by those who have visited the scene of occurrence. In this case, a thorough search was made on 13th and 14th April, 1989 and before the making of the recovery on the pointing out of the appellant, the Investigating Officer had been at the scene of the occurrence for about 1 ½ hours. Therefore, it could not be said that nobody knew about the head and other articles lying at the spot from where the same were allegedly recovered. In this background, the Supreme Court observed that exclusive knowledge of the head and other articles lying at the place of the alleged recovery could not be attributed to the appellant.

737. The learned Trial Judge has noticed a pronouncement of the Supreme Court reported at 1998 (1) JCC (SC) : 1998 SCC (Crl.) 711 State of Punjab v. Sarup Singh which was relied upon by the appellants in support of the plea that the recoveries were effected from an open place and therefore unreliable. In this case, the recovery was effected by the Investigating Officer in the presence of the maternal grandfather of the deceased. In this background, it was held that the recovery was not in the presence of any independent person and consequently it was held to be unsafe to rely upon the recovery evidence.

738. It is not so in the instant case. The recoveries have been effected on the pointing out of the accused persons in the presence of the police personnel; public witnesses as well as their Advocate, Satpal Yadav. The recovery of the hammer was effected at the instance of Vikas Yadav, while the watch was recovered at the instance of Vishal Yadav who had taken the wrist watch out of another clump bushes that these articles were not visible to the public. It is in evidence that they had to search for the articles.

739. In the present case the defence did not cross-examine PW-

> 35, Investigating Officer also on the aspect of the recovery of the hammer and the wrist watch. The exact place where these two articles were concealed was in the exclusive knowledge of the accused persons. It stands established that the investigating officer had no prior knowledge about it.

740. The learned Additional Standing counsel for the State has also pointed out that given the nature of the place where the articles were hidden, it is not of significance that the place was not cordoned off by the police. It was a bushy area and only the accused persons knew exactly where the articles were hidden.

741. On the same issue, reference may usefully be made also to the pronouncement of the Apex Court in (2011) 5 SCC 258 Kulvinder Singh and Anr. v. State of Haryana. In this case, on a disclosure made by one of the accused, a blood stained barchha was recovered from a sugar cane field. It had been thrown at place where it was not visible to all. Motive stood distinctly proved. Both the appellants had been seen immediately before the occurrence at the place of the occurrence and the deceased had come there shortly thereafter. They, therefore, had the opportunity to kill the deceased. After the occurrence, they were seen running together from the place of occurrence. It was held that recovery of the blood stained barcha at the disclosure of the co-accused Jasvinder Singh was a circumstance which can be safely relied upon for the conviction of the appellant.

742. It is therefore well settled that merely because recovery has been affected from the place accessible to the public or an open place, it is not sufficient to discredit the recovery as not being genuine or authentic.

743. The question which has to be answered is as to whether the place was ordinarily visible to others. In the instant case, there is no evidence at all that the watch and the hammer were visible to the public. Therefore, merely because the bushes and the _pattel' bushes in which the hammer and watch were concealed were in a public place would not render the recoveries suspicious.

(vi) No public witness to recovery examined - effect of

744. Mr. U.R. Lalit, learned senior counsel has argued at some length that panchas should have been kept ready by the police and taken by the police to the spot. Learned senior counsel submits that the police has claimed that two public witnesses, Raghu and Aslam, were available at the spot and witnessed the recovery. The submission is that it was essential for the police to have produced these two public witnesses during trial. This not having been done would show the evidence of the police with regard to the recoveries as tainted and the recoveries would have to be disregarded.

745. Mr. Dayan Krishnan, learned Additional Standing Counsel has urged at some length that while effecting a recovery under Section 27 of the Indian Evidence Act, there exists no legal requirement for public witnesses to be present on the spot. In support of this contention, reliance has been placed on the pronouncements of the Supreme Court reported at (2001) 1 SCC 652, State (Govt. of NCT of Delhi) v. Sunil and Anr. and 2012 (8) SCALE 670, Dr.Sunil Clifford Daniel v. State of Punjab (paras 25 and 26) and (2008) 12 SCC 173, Ashok Kumar Choudhary v. State of Bihar.

746. In (2001) 1 SCC 652, State v. Sunil, the court pointed out the distinction between a search conducted by the police to find out a thing or document about which the officer effecting the search has no prior idea as to where it is kept as against a recovery of an object pursuant to information supplied by the accused. The discussion and findings of the Supreme Court on this aspect shed valuable light on the consideration before this court and deserve to be considered in extenso. The court held as follows: -

> —19. In this context we may point out that there is no requirement either under Section 27 of the Evidence Act or under Section 161 of the Code of Criminal Procedure, to obtain signature of independent witnesses on the record in which statement of an accused is written. The legal obligation to call independent and respectable inhabitants of the locality to attend and witness the exercise made by the police is cast on the police officer when searches are made under Chapter VII of the Code. Section 100(5) of the Code requires that such search shall be made in their presence and a list of all things seized in the course of

such search and of the places in which they are respectively found, shall be prepared by such officer or other person —and signed by such witnesses‖. It must be remembered that a search is made to find out a thing or document about which the searching officer has no prior idea as to where the thing or document is kept. He prowls for it either on reasonable suspicion or on some guesswork that it could possibly be ferreted out in such prowling. It is a stark reality that during searches the team which conducts the search would have to meddle with lots of other articles and documents also and in such process many such articles or documents are likely to be displaced or even strewn helter- skelter. The legislative idea in insisting on such searches to be made in the presence of two independent inhabitants of the locality is to ensure the safety of all such articles meddled with and to protect the rights of the persons entitled thereto. But recovery of an object pursuant to the information supplied by an accused in custody is different from the searching endeavour envisaged in Chapter VII of the Code. This Court has indicated the difference between the two processes in the Transport Commr., A.P., Hyderabad v. S. Sardar Ali [(1983) 4 SCC 245 : 1983 SCC (Cri) 827 : AIR 1983 SC 1225] . Following observations of Chinnappa Reddy, J. can be used to support the said legal proposition: (SCC p. 254, para 8) —Section 100 of the Criminal Procedure Code to which reference was made by the counsel deals with searches and not seizures. In the very nature of things when property is seized and not recovered during a search, it is not possible to comply with the provisions of sub-sections (4) and (5) of Section 100 of the Criminal Procedure Code. In the case of a seizure under the Motor Vehicles Act, there is no provision for preparing a list of the things seized in the course of the seizure for the obvious reason that all those things are seized not separately but as part of the vehicle itself.‖

20. Hence it is a fallacious impression that when recovery is effected pursuant to any statement made by the accused the document prepared by the investigating officer contemporaneous with such recovery must necessarily be attested by the independent witnesses. Of course, if any such statement leads to recovery of any article it is open to the investigating officer to take the signature of any person present at that time, on the document prepared for such recovery. But if no witness was present or if no person had agreed to affix his signature on the document, it is difficult to lay down, as a proposition of law, that the document so prepared by the police officer must be treated as tainted and the recovery evidence unreliable. The court has to consider the evidence of the investigating officer who deposed to the fact of recovery based on the statement elicited from the accused on its own worth.‖ (Underlining by us)

747. The Supreme Court thus has authoritatively laid down that there is no requirement in law of obtaining signatures of independent witnesses on the record in which the statement of an accused is prescribed or on the recovery memo regarding the recovery of an object pursuant to the disclosure statement made by the accused person. It has also been held that the statement cannot be disbelieved only for the reason that no public witnesses have been examined by th prosecution in support thereof.

748. The effect of non-examination of a public witness to the recovery was also considered by the Supreme Court in the pronouncement reported at (2012) 8 SCALE 670, Dr. Sunil Cliford Daniel v State of Punjab placing reliance on earlier pronouncement and considering the provisions of Section 162(1) of the Cr.P.C. and held as follows: -

—25. However, in State of Rajasthan v. Teja Ram : AIR 1999 SC 1776, this Court examined the said issue at length and considered the provisions of Section 162(1) Code of Criminal Procedure., Section162(1) reads, a statement made by any person to a police officer in the course of an investigation done, if reduced to writing, be signed by the person making it. Therefore, it is evident from the aforesaid provision, that there is a prohibition in

peremptory terms and law requires that a statement made before the Investigating Officer should not be signed by the witness. The same was found to be necessary for the reason that, a witness will then be free to testify in court, unhampered by anything which the police may claim to have elicited from him. In the event that, a police officer, ignorant of the statutory requirement asks a witness to sign his statement, the same would not stand vitiated. At the most, the court will inform the witness, that he is not bound by the statement made before the police. However, the prohibition contained in Section 162(1) Code of Criminal Procedure. is not applicable to any statements made under Section 27 of the Indian Evidence Act, 1872 (hereinafter called 'Evidence Act'), as explained by the provision under Section 162(2) Code of Criminal Procedure. The Court concluded as under:

—The resultant position is that the Investigating Officer is not obliged to obtain the signature of an accused in any statement attributed to him while preparing seizure memo for the recovery of any article covered by Section 27 of the Evidence Act. But if any signature has been obtained by an Investigating Officer, there is nothing wrong or illegal about it.‖

26. In Golakonda Venkateswara Rao v. State of Andhra Pradesh : AIR 2003 SC 2846, this Court once again reconsidered the entire issue, and held that merely because the recovery memo was not signed by the accused, will not vitiate the recovery itself, as every case has to be decided on its own facts. In the event that the recoveries are made pursuant to the disclosure statement of the accused, then, despite the fact that the statement has not been signed by him, there is certainly some truth in what he said, for the reason that, the recovery of the material objects was made on the basis of his statement. The Court further explained this aspect by way of its earlier judgment in Jaskaran Singh (supra) as, in this case, there was a dispute regarding the ownership of a revolver and the cartridge recovered therein. The prosecution was unable to lead any evidence to show that the crime weapon belonged to the said Appellant and observations were made by this Court in the said context. The court held as under:

—The fact that the recovery is in consequence of the information given is fortified and confirmed by the discovery of wearing apparel and skeletal remains of the deceased which leads to believe that the information and the statement cannot be false.‖

749. In Dr.Sunil Clifford Daniel (supra), when the appellant made a disclosure statement, a panchnama was prepared and recovery panchnamas were also made. The same were duly signed by two police officials and one independent panch witness who was not examined in the trial. The question arose before the court with regard to the effect of non-

examination of this independent panch witness and the sanctity of the evidence in respect of the recovery made only by the two police officials. The Supreme Court observed that only the investigating officer was a competent person to answer such query and that it was quite possible that the witness was not alive or traceable. With regard to the misplaced notion that actions of the police officers should be approached with initial distrust, it was also observed in this case that no question had been put to the investigating officer in his cross-examination as to why the prosecution had withheld the said witness.

750. Mr. Dayan Krishnan has urged at length that the fact that Raghu and Aslam were not examined during trial by the prosecution does not in any manner affect the case of the prosecution. It is urged that given the testimony of the police witnesses in support of the disclosures and the recoveries and there being no legal requirement to examine public witnesses in support of both, it is not necessary to

examine each and every witness with regard to a particular fact. Multiplication of evidence is wholly unnecessary and it is open to the prosecution to not examine such person who will not depose truthfully in the witness box. Placing reliance on Section 231 of the Cr.P.C., it is urged that it is the prerogative of the prosecution to lead evidence to establish its case.

751. Reference in this regard has to be made to the pronouncement of the Supreme Court reported in (1975) 3 SCC 851, Shanker v. State of UP. In this case, the Supreme Court rejected a similar objection as has been raised by the appellants before this court for non-examination of cited witnesses by the prosecution. Two persons who had been cited as eye-witnesses by the prosecution were withheld. The appellant argued that these eye-witnesses were withheld without any reasons and that an adverse inference should be drawn that these independent witnesses, if produced, would have falsified the account given by PWs 2, 3 and 4. Repelling this contention, the court held as follows:-

> —14. This contention also does not appear to be well-founded. It is on record that on September 16, 1972, the Public Prosecutor submitted an application to the trial court, for discharge of these witnesses on the ground that they had been won over by the defence, and consequently, the prosecution did not want to examine them as their witnesses. The defence Counsel disputed this assertion of the Prosecutor. But he did not make any request for their examination as court witnesses under Section 540 of the Cr.P.C. so that the defence might get an opportunity to cross-examine them, although it seems that the witnesses were then in attendance. On the contrary, the Court's order recorded on that application, gives the impression that the defence informed the Court that it did not want to examine them. It is thus too late in the day to argue that these witnesses were withheld by the prosecution for any ulterior motive. This contention was not raised before the High Court. It was no doubt agitated in the trial court and was rightly rejected.‖

752. The court also found force in the contention of the prosecution that the witnesses were —won over‖ by the accused in the sense that they were not prepared to give evidence in the case for fear of their lives or otherwise.

753. On the issue of non-examination of a public witness on an aspect on which the police led evidence, our attention has been drawn to the pronouncement reported at (2008) 12 SCC 173, Ashok Kumar Choudhary and others v. State of Bihar where in para 7, the Supreme Court observed that —it will be erroneous to lay down as a receipt of universal application that non-examination of a public witness by itself gives rise to an adverse inference.‖

754. On the aspect that the prosecution is not bound to examine all witnesses cited by it, reliance has been placed on the pronouncement reported at (2000) 7 SCC 490, Hukum Singh v. State of Rajasthan, wherein the court held as follows: -

> —13. When the case reaches the stage envisaged in Section 231 of the Code the Sessions Judge is obliged "to take all such evidence as may be produced in support of the prosecution." It is clear from the said section that the Public Prosecutor is expected to produce evidence "in support of the prosecution" and not in derogation of the prosecution case. At the said stage the Public Prosecutor would be in a position to take a decision as to which among the persons cited are to be examined. If there are too many witnesses on the same point the Public Prosecutor is at liberty to choose two or some among them alone so that the time of the Court can be saved from repetitious depositions on the same factual aspects. That principle applies when there are too many witnesses cited if they all had sustained injuries at the occurrence. The Public Prosecutor in such cases is not obliged to examine all the injured witnesses. If he is satisfied by examining any two or three of them, it is open to him to inform the Court that he does not propose to examine the remaining

persons in that category. This will help not only the prosecution for relieving itself of the strain of adducing repetitive evidence on the same point but also helps the Court considerably in lessening the workload. Time has come to make every effort possible to lessen the workload, particularly those Courts crammed with cases, but without impairing the cause of justice.

14. The situation in a case where the prosecution cited two categories of witnesses to the occurrence, one consisting of persons closely related to the victim and the other consisting of witnesses who have no such relation, the Public Prosecutor's duty to the Court may require him to produce witnesses from the latter category also subject to his discretion to limit to one or two among them. But if the Public Prosecutor got reliable information that any one among that category would not support the prosecution version he is free to state in Court about that fact and skip that witness being examined as a prosecution witness. It is open to the defence to cite him and examine him as defence witness. The decision in this regard has to be taken by the Public Prosecutor in a fair manner. He can interview the witness before hand to enable him to know well in advance the stand which that particular person would be adopting when examined as a witness in Court.

15. A four Judge Bench of this Court has stated the above legal position thirty five years ago in Masalti v. State of Uttar Pradesh [1964] 8 SCR 133. It is contextually apposite to extract the following observation of the Bench:

It is not unknown that where serious offences like the present are committed and a large number of accused persons are tried, attempts are made either to terrorise or win over prosecution witnesses, and if the Prosecutor honestly and bona fide believes that some of his witnesses have been won over, it would be unreasonable to insist that he must tender such witnesses before the Court.

16. The said decision was followed in Bava Hajee v. State of Kerala, 1974 CriLJ 755. In Shivaji Sahabrao Bobade v. State of Maharashtra, 1973 CriLJ 1783, Krishna Iyer J., speaking for a three Judge Bench had struck a note of caution that while a Public Prosecutor has the freedom "to pick and choose" witnesses he should be fair to the Court and to the trust. This Court reiterated the same position in Dalbir Kaur v. State of Punjab, 1977 CriLJ 273.‖

755. Our attention has been drawn to the pronouncement of the Supreme Court reported at (1978) 4 SCC 435, Madan Singh v. State of Rajasthan. In para 9 of this pronouncement, the court held as follows:-

―9. The only other material on which the prosecution can connect and appellant with the crime is the recovery of the fired cartridge, Ex.9 and the seizure of the pistol Ex.8 and the deposition of the ballistic expert, PW9. It is found that the witnesses who have been examined for attesting the seizure have not supported the prosecution version. On behalf of the defence it was submitted that the seizure witnesses were men of status in the village and their not supporting the recovery would be fatal to the prosecution. We would rather not place any reliance on the witnesses who attested the seizure memo. If the evidence of the investigating officer who recovered the material objects is convincing, the evidence as to recovery need not be rejected on the ground that seizure witnesses do not support the prosecution version. xxx‖

756. In this case witnesses to the seizure did not support the prosecution version. Despite that, the court did not reject the prosecution case, but did not place reliance on this evidence. Instead the court

evaluated the evidence of the investigating officer's evidence and found it reliable and accepted the prosecution case in view thereof.

757. Non-examination of the public witnesses or cited witnesses by the prosecution therefore, does not automatically lead to the presumption that they have been withheld for ulterior motive. It is always open to defence to apprise the court about the non-examination and to make an application to seek summoning of these witnesses as court witnesses under Section 311 of the Cr.P.C. Such objection can be pressed only if the defence made efforts to have the witness summoned as a court witness. Even then, the court would be required to scrutinize the credibility and sufficiency of the evidence brought on record by the prosecution de hors the evidence of the public witness with regard to the facts sought to be established.

758. Let us now consider the factual matrix with regard to the appearance of Raghu and Aslam. In the instant case, Anil Somania, the investigating officer in his cross-examination on behalf of Vishal Yadav has stated that after the recovery, the recovery memo was prepared first and thereafter the wrist watch was kept in a cloth and sealed. He further stated that except the two witnesses, Raghu and Aslam, nobody else was present in the fields and there was less traffic on the road.

759. The witness further stated that Aslam and Raghu, who were the public witnesses to the recoveries, were residents of Khurja and that they had met him for the first time at the spot. Anil Somania further stated that though he had taken all possible steps for their production in the court premises, yet they did not appear to give evidence.

760. The Supreme Court has commented on the indifferent attitude of members of the public in investigation and crimes and their reluctance to come forward to depose before the courts. In the judgment reported at (1988) Suppl. SCC 686, State of U.P. v. Anil Singh, it has been held that it is not proper to reject the case for want of corroboration of independent witnesses if the case made out is otherwise true and acceptable.

761. The failure to examine Raghu and Aslam, witnesses to the recoveries, has to be scrutinized having regard to this course of conduct. It is first and foremost necessary to scrutinize the evidence brought on record with regard to the recoveries and examine its creditworthiness. The court would then consider whether there is any need for corroboration of the evidence on record and to scrutinize the failure to examine independent witnesses from this perspective.

762. In the cross-examination by Sh. K.N. Balgopal, senior advocate on behalf of Vikas Yadav, the investigating officer Anil Somania has mentioned that Raghu and Aslam had met him in the court after filing of the challan. In further cross- examination, the witness has stated that on the warrants issued to these persons it was mentioned that both the witnesses were not traceable but the order dated 7 th August, 2003 revealed that Raghu was personally served and that the order also mentioned in detail regarding the whereabouts of the other witness. Anil Somania stated that Raghu and Aslam did not meet him in the court.

763. The record of the trial court shows that summons for the appearance of these witnesses were issued by the court. The learned trial judge was constrained to direct bailable warrants of arrest to be issued vide order dated 7th August, 2003. Therefore, the prosecution took several steps to procure the presence of Raghu and Asl5am in court. However, their appearance could not be secured. It has been argued that these witnesses had been won over by the accused persons and did not appear for this reason.

764. The very fact that Raghu and Aslam did not appear in the court despite coercive process leads to no other conclusion except the fact that they had either been won over or were scared to do so. It is

sufficiently established that the prosecution took adequate steps for securing the attendance of these witnesses. No adverse finding can be recorded against the State for their non-appearance.

765. So far as these two persons are concerned, it is important to note that this aspect of the matter has also not been brought to the notice of the court by the defence. Despite the evidence of the investigating officer proving the disclosure statements and the recovery memo on record by the investigating officer, no objection was taken that the public witnesses had not been examined.

766. It is trite that it is the quality of the prosecution evidence which is required to be examined. PW-34, SI J.K. Gangwar as well as PW-35 Anil Somania, investigating officer have been examined to prove the recoveries. If their testimony is found truthful and accepted, there may not be any need for other witnesses (including the public witnesses) whose evidence would have been repetitive and burdensome. We have noted above the evidence of the prosecution witnesses including the investigating officers S.I. Anil Somania and S.I. J.K. Gangwar which remains unimpeached.

767. It is suggested by the defence that SI J.K. Gangwar at one time was posted as a subordinate with Mr. A.K. Kaul (father of Nilam Katara). We may note that Shri Kaul is stated to have retired 16 years prior to 2002. Therefore the fact that Nilam Katara's father was at sometime SI Gangwar's superior is also too remote to establish any influence of the said Mr. Kaul over the testimony of the investigating officer.

768. In conclusion, we find that the prosecution took all steps necessary to secure the appearance of the two witnesses but was not successful. We see no reason to disbelieve the recoveries of the hammer and wrist watch on the ground that public witnesses thereto did not appear in the witness box to atleast the recoveries.

(vii) Khurja Police not joined in the recoveries

769. An objection has been raised by learned senior counsel on behalf of the appellants that the recoveries must be disbelieved for the reason that the same were allegedly effected by the Ghaziabad police within the jurisdiction of police station Khurja. It is contended that no recovery was effected by the police of Khurja. The police at Ghaziabad had no jurisdiction to conduct investigations in Khurja. The action of the Ghaziabad police in conducting the same without joining the Khurja police was illegal and must be so rejected.

770. Learned Senior Counsel for the appellants have contended that no explanation is forthcoming from the record as to how the officials from the Police Station at Ghaziabad carried out recoveries and seizures at a place which was admittedly beyond their jurisdiction and located within the jurisdiction of the PS Khurja. It is urged that the fact that the prosecution does not disclose the reason why the Khurja Police were not joined in the investigation is a material factor which indicates that no recoveries were in fact effected at the instance of the accused persons.

771. In this regard, our attention has been drawn to the testimony of the Investigating Officer, PW-35 Anil Somania who has stated that he did not join the Khurja police in the investigations and the recoveries effected on 28th February, 2002.

772. This objection was answered by the prosecution which has pointed out that upon the discovery of the dead body, a case being Crime No.216 was registered by PS Khurja. PW-4 Inspector Chander Pal Singh from the police station Khurja was the Investigating Officer in the case from 17th February, 2002 only upto 26th February, 2002. As per the orders of the DIG, the case being Crime No.216 was thereafter transferred to police station Ghaziabad for investigation. Therefore, there was no requirement of taking assistance of the Khurja police for effecting recoveries as, in terms of the order

of the DIG, the jurisdictional police station for investigation of the crime was the police station Ghaziabad.

773. It is also evident from the testimony of Inspector C.P. Singh that no investigation was conducted by the Khurja police at all into the case.

774. The above narration of facts would show that the case related to Ghaziabad police station. There is thus substance for the submission of learned Additional Standing Counsel for the State that there was, therefore, no need to inform or join the police at Khurja in the investigation. The recoveries in any case cannot be doubted merely because the Khurja Police was not joined.

775. In our view therefore it is not possible to doubt the authencity of the recoveries on the grounds pressed by the appellants. The view we have taken and findings of the ld. Trial Judges are supported by the evidence on record and authoritative judicial precedents.

IV Recovery of Tata Safari vehicle The discussion on this subject is being considered under the following sub-headings:

(i) Introduction of a Mercedes car as used by the appellants in the night of 16th February, 2002

(ii) The defence case - the Tata Safari vehicle was under repairs with Nawab Motors from 16th February till 10th March, 2002

776. Pursuant to the disclosure statements Exh.PW35/16 and 35/17, the other recovery which the police effected at the joint instance of both the appellant brothers that of the Tata Safari vehicle recorded in the memo (Ex.PW27/1).

777. The prosecution case was that on the 16th of February, 2002, Vikas and Vishal Yadav accompanied by Sukhdev Pehlwan came in a Tata Safari bearing registration No.PB-07H-0085 to the Diamond Palace, Banquet Hall where the marriage of PW-11 Shivani Gaur was being solemnized and after the abduction of Nitish Katara, they took him away in this vehicle.

778. How did a Tata Safari vehicle surface in the whole matter?

> The first time information about the use of the Tata Safari vehicle by the appellants is revealed in the disclosures effected by Vikas and Vishal Yadav in their statements (Exh.PW-35/16 and Exh.PW-35/17) recorded by the police under Section 161 Cr.P.C. on the 25th of February 2002. As per these statements, the Tata Safari vehicle belonging to Vikas Yadav was allegedly used in the commission of the offence. Based on these disclosures, Investigating Officer Anil Somania sought the police custody remand of the two accused persons to effect recoveries of inter alia the Tata Safari.

779. So far as the recovery of the vehicle is concerned, the prosecution has relied on the testimony of SI J.K. Gangwar; SI Anil Somania and Shri Sultan Singh examined as PWs 34, 35 and 27 respectively in Vikas Yadav's trial. The police officers were examined as PW19 and PW22 in Sukhdev's trial respectively. The prosecution did not examine Sultan Singh in Sukhdev's trial. The testimony of PW-34 J.K. Gangwar whose testimony is corroborated by the evidence of PW-35 Anil Somania and their cross-examination on this aspect.

780. As per the police record, Ct. Satender Pal Singh as well as Ct. Inderjeet had revealed in their statements under Section 161 of the Cr.P.C. recorded on 4th March, 2002 that on the night of 16th/17th February, 2002 at around 12:15 a.m., a Tata Safari was seen coming from Diamond Palace towards Hapur Chungi occupied by the appellants and one other person having a round face, who was wearing a red kurta, was also sitting next to the driver. Prior thereto in her statement dated 2nd March, 2002

(Exh.PW35/AB) Bharti Yadav (PW 38 in the first trial) also disclosed that the appellants used a Tata Safari vehicle on the fateful night.

781. Ct. Satender Pal Singh a driver in the police gypsy Chetak 13 which was parked near the Diamond Palace Banquet Hall had also spotted the appellants in the Tata Safari vehicle in the night of the 16th/17th of February 2002. Though he did not know the registration number of the Tata Safari vehicle but he clearly stated that it was of Punjab.

782. We have noted that by the order dated 27th February, 2002 police custody was granted by the court to effect the recoveries of the articles disclosed which included the Tata Safari vehicle. Pursuant to the disclosure made by them, Vikas Yadav and Vishal Yadav deliberately misled the police to three different places in Alwar on the 28th of February, 2002 for recovering the vehicle. The police was first led to the Maharaja Building, Alwar where the offices of the accused persons were situated. Nothing was recovered therefrom. Thereafter they led the police party to the Siriska Palace Hotel in Alwar, as according to them the vehicle and the mobile phone of the deceased would be recovered from there. This again turned out to be a fruitless exercise. They lastly led the police party to Shanti Kunj, a house in Alwar where also no recovery could be effected (search memos in this regard were recorded by the police - Exh.PW 35/25, PW 35/46 and PW 35/47). As the period of the police remand was coming to an end, the police party was compelled to return to Ghaziabad. During this sojourn, it was disclosed that vehicle may be at Dhanari (U.P), Hoshiarpur (Punjab) or Chandigarh.

Thus on the 28th of February, 2002, the Tata Safari vehicle used by the accused persons as well as the mobile phone of the deceased, both of which were disclosed by the accused, could not be recovered during the remand.

783. The accused persons were produced before the CJM, Ghaziabad and PW-35 Anil Somania made a further application (Ex.PW 35/28) on 1st of March, 2002 seeking their ten days police remand for effecting the recovery of the vehicle and mobile phone. It was also stated that during the police remand, the appellants had provided assurance that the Tata Safari vehicle could be recovered from Dhanari (Budaun) or Hoshiarpur (Punjab) or Chandigarh and had further disclosed that the mobile phone of deceased Nitish Katara was also in the same car.

784. In the order dated 1st of March, 2002 passed on this application, the CJM noted that the accused Vikas Yadav in his statement under Section 161 Cr.P.C. had disclosed that he could point out the place where the Tata Safari vehicle was hidden in Alwar. However, the same could not be recovered when the police visited various places in Alwar. The court has also noticed that after recovery of the hammer and watch, the appellants were lodged in prison after their medical examination and that the police did not use the remaining time available with them on the previous occasion of police remand. The CJM was of the view that the colour and the vehicle number was not available and therefore, there was no basis for conducting a search for the vehicle in different places. The court also noted that as per the accused persons, the mobile phone was also in the vehicle. For these reasons, the court was of the view that there was no need for any further police remand and the prayer of the police in this regard was rejected.

785. It is pertinent to note that by a separate order passed on 1st of March, 2002, the CJM Ghaziabad directed that as a matter of abundant caution, a photocopy of the case diary [from serial no. dated 28th February, 2002 (Saat Vark)] be kept in sealed cover and the accused persons be informed. Thus the disclosure statements became part of court record.

786. A revision was filed being Crl. Rev. No.73/2002 by the State in the court of Sessions Judge, Ghaziabad challenging this order dated 1st of March, 2002. This revision was opposed on behalf of Vishal and Vikas Yadav who even challenged its maintainability. The revision was dismissed by an order dated 6th of March, 2002 with the following observations :-

"Before parting with I may refer to Section 167(2) of the Cr.P.C. which authorizes only Magistrate to grant or refuse police custody remand. The Revisional court has got no power to give or refuse police custody remand. The Revisional Court can only look into the illegality or irregularity of the order passed by the Magistrate. The Learned DGC (Crl.) has submitted that heinous crime is alleged to have been committed by the accused. The statements of the accused were recorded under Section 161 of the Cr.P.C. wherein they confessed their guilt and stated to give out the hammer by which the accused caused murder of the deceased and the wrist watch and mobile of the deceased. They further stated to point out Safari car by which the deceased was taken to Delhi and from there to the place where he was done to death. Recovery of Safari etc. could have proved relevant links in the chain of circumstances to bring home the guilt to the accused. The learned Magistrate while granting police custody remand should have given thought to these facts. I find weight in the submission in the Learned DGC (Crl.) that the Learned Chief Judicial Magistrate ought to have given due weight to these facts and should have accordingly accorded time.

With these observations the revision has to be dismissed."

Thus the revisional court was of the view that only the Magistrate could pass an order in this regard.

787. We have extracted these orders to emphasise that the above orders making a reference to the disclosure statements given by Vikas and Vishal Yadav were passed in the presence of the accused persons. The orders refer to recoveries of the hammer and watch pursuant thereto and on the pointing out of the accused. No protest was made by either Vikas or Vishal Yadav about either the making of the disclosure statement or the recovery of the articles pursuant thereto at their instance or on their pointing out. This by itself would be sufficient to completely reject the objections thereto on behalf of the appellants.

788. In the meantime, the appellants Vikas and Vishal Yadav were required to be produced in the Dabra Court in cases under the Arms Act. Accordingly, after their one day police remand was over, they were sent to judicial custody and thereafter on 6th March, 2002 they were sent to Dabra along with SI J.K. Gangwar pursuant to DD No.36 in this regard (Ex.PW 35/36).

789. On the 8th of March, 2002, an application was made by the co-investigating officer before the CJM, Ghaziabad for five days police custody. However, the Chief Judicial Magistrate granted police custody remand w.e.f. 2:00 pm on 9 th March, 2002 till 2:00 pm on 11th March, 2002 only.

790. After this order, a joint application (Ex. DW-6/5) was moved on behalf of Vikas and Vishal Yadav on the 8th of March, 2002 by Shri Neeraj Gautam, Advocate seeking permission from the court that two laywers be allowed to accompany the accused persons during the 48 hours police remand. This application was allowed by an order of the same date. (Ex. DW-6/6). Noteably, again, Vikas and Vishal Yadav did not dispute either the disclosure statements or the recoveries attributed to them. They also laid no claim that they had not gone to Shivani Gaur's wedding in a Tata Safari vehicle or that they had used a Mercedes car.

791. It is noteworthy that armed with this order, SI Anil Somania accompanied by a police force as well as the S.P., Ghaziabad, proceeded to Dabra, where Vikas Yadav and Vishal Yadav were lodged in jail.

792. We may now note the manner in which these appellants obstructed the police in obtaining their custody. On the 9th of March, 2002, PW-35 Anil Somania handed over to the court of Judicial Magistrate-I, Dabra a copy of the order dated 8th March, 2002 passed by the Chief Judicial Magistrate, Ghaziabad regarding police remand of the accused persons. The hearing of this application was fixed

for 1.00 pm. The application was opposed on behalf of the accused persons who contended that the directions by the Chief Judicial Magistrate, Ghaziabad were not in the name of the court in Dabra. This objection was rejected.

793. The Judicial Magistrate, Dabra was informed on behalf of the appellants Vikas and Vishal Yadav that they had challenged the order of the Chief Judicial Magistrate, Ghaziabad by way of the writ petition which was slated for hearing at 3.30 pm in the High Court of Allahabad. The matter was listed repeatedly thereafter at the instance of the accused persons who contended that at 5.15 pm; then at 5.45 pm hearing in the writ petition was going on. It was only at 6.25 pm, the Judicial Magistrate noted that no stay order has been received and that the application for postponing the remand was void (Ex.PW-35/39). But by now it was already late for the jail authorities to hand over custody of these appellants to the Ghaziabad police. Thus valuable time out of the specific period of the police remand permitted by the CJM, Ghaziabad was squandered at the instance of these accused.

794. The Ghaziabad police could get custody of Vikas Yadav and Vishal Yadav only at about 9:26 am on the 10 th of March, 2002 and they commenced the journey to Chandigarh for recovery of the Tata Safari vehicle. While on the way to Chandigarh, when the police party stopped for lunch, the accused now disclosed to the investigating officer that the Tata Safari Car was either parked at the taxi stand behind the Shamshan Ghat, Panipat or at his factory in Karnal. It is in evidence that Vikas Yadav disclosed the registration number of vehicle as PB-07H-0085 and that it was of pearl green colour. The police were taken to the taxi stand where again no vehicle could be recovered.

795. The Tata Safari Vehicle was finally recovered on 11th March, 2002 at 11:00 a.m. at the instance of the accused Vikas Yadav and Vishal Yadav jointly from the burnt down factory premises of a firm named A.B. Coltex in Karnal. It is in evidence that Oswal Sugar Limited of which Shri D.P. Yadav (father of Vikas Yadav) was one of the directors formed part of the management of AB Coltex. The Tata Safari bore registration no.PB-07-H-0085 - A recovery memo Exh.PW27/1 was scribed which the accused refused to sign.

796. It is in the evidence of PW-12 Ms. Kulwant Kaur that the recovered vehicle stood registered in the name of Oswal Sugar Ltd., PW-9 and CW-1 Shri M.K. Katara proved the fact that Sh. Dharam Pal Singh alias Shri D.P. Yadav (father of Vikas Yadav) was a Director in the Oswal Sugar Ltd.

797. The seizure memo of the Tata Safari (Exh PW 27/1) does not contain the signatures of the accused persons and has been challenged on this ground. The Investigating Officer has stated that the accused persons had refused to sign the seizure memo of the Tata Safari. If the police actually had in their possession blank papers bearing the signatures of the accused persons, they would very well have scribed the disclosure statements and seizure memos on such papers and avoided all objections.

798. Vikas Yadav, Vishal Yadav and their advocate also refused to sign recovery memo of the vehicle (Ex.PW27/1). The investigating officer has made an endorsement to this effect on the recovery memo itself.

(i) Introduction of a Mercedes car as used by the appellants in the night of 16th February, 2002

799. The accused persons claim to have left Diamond Palace Banquet Hall in the night of 16th February, 2002 after meeting the bride and bridegroom in Vikas's Mercedes. The ‗Mercedes' vehicle was introduced for the first time in the case at a grossly belated stage in the cross examination of PW-42, Bhawna Yadav (sister of Vikas Yadav) recorded on 28th March, 2007. DW-12 Ashok Gandhi also makes a convoluted reference to a Mercedes.

800. We have considered above the fact that Vikas and Vishal Yadav in their disclosure statements recorded on 25th of February 2002 disclosed that they were using a Tata Safari vehicle in the night of

16th of February 2002. Several other witnesses including Ct. Satender Pal singh, Ct. Inderjeet Singh and Ajay Kumar have also testified about the use of the Tata Safari vehicle on the night of 16th / 17th February, 2002.

801. The accused accompanied by their counsel led the police on an inter state trip on the 28th of February 2002 to Alwar, Rajasthan for the recovery of this Tata Safari vehicle. Thereafter they disclosed that the vehicle could be in U.P. or Punjab. On the 9th of March 2002, they led the police team way beyond Ghaziabad to Panipat, Haryana, till it was finally recovered from burnt factory premises of Vikas Yadav's father in Karnal. The appellants were accompanied by counsel.

802. It is in evidence that PW 35 Anil Somania recorded the statement of Vikas Yadav's sister Bharti Yadav under Section 161 Cr.P.C. on 2nd of March 2008 in the presence of their father Shri D.P. Yadav referring to the use of the Tata Safari vehicle by the appellants. By then Vikas and Vishal Yadav had already been taken by the police on the 28th of February, 2002 to Alwar, Rajasthan to search for the Tata Safari vehicle. Neither his father nor sister stated that Vikas Yadav had left Diamond Palace Banquet Hall in a Mercedes.

803. For a lay person to refer to the vehicle in which Vikas and Vishal Yadav had been seen in the night of 16/17 th February, 2002 as a _long vehicle' nowhere rules out the vehicle as being the Tata Safari as its dimensions are larger than that of an ordinary car.

804. Given the active participation of the accused and their lawyers right from the initial stages of the investigation, it is impossible that the relatives, friends and counsels of Vikas and Vishal Yadav did not know about the several steps taken for the recovery of the Tata Safari vehicle including the applications for the police custody remand of the accused for its recovery and the revision petition before the Sessions Judge. No one objected to the applications nor protested its seizure on any ground. They did not inform the CJM, Ghaziabad that no Tata Safari car was used by them on 27 th February; 1st March or 8th March, 2008 when the orders on the police remand application were passed. The Sessions Court was also not informed on 6th March, 2002 that on the night of the 16th February, 2008, they were using a Mercedes car. Instead the appellants filed applications that their counsels accompany them during the police remand.

805. Till the end of both trials, or even till date, no details or particulars of the Mercedes have come on record in terms of its registration number, ownership, etc. It is clearly evident that the Mercedes has been introduced merely as a red herring to controvert the evidence on record about the recovered Tata Safari vehicle was really the vehicle used for the commission of the offence.

(ii) The defence case - the Tata Safari vehicle was under repairs with Nawab Motors from 16th February till 10th March, 2002

806. The defence however sought to establish that the Tata Safari vehicle recovered at the instance of the appellants was under repair from the morning of 16th February, 2002 till 10th March, 2002 with M/s Nawab Motors, E-11, Sector-11, Noida and was not used by the accused persons on the night of the 16th of February 2002.

807. Mr. Dayan Krishnan, Ld. Additional Standing Counsel for the State has pointed out that the defence evidence led with regard to Tata Safari car was not believable and was in fact false.

808. The appellants examined DW-2 Madhumohan Nair and DW-

9 Shakti Chand who were both employees of the Nawab Motors, C-24, Sector-8, Noida to establish this defence.

809. DW-2 Madhumohan Nair sought to prove that the Tata Safari vehicle remained with M/s Nawab Motors from 16th February, 2002 till 10th March, 2002. In support thereof, reliance was placed on job cards and requisition for different parts in respect of the vehicle, as reflected in a computer statement Ex.DW-2/A. The trial court had noticed that the computerized statement was neither legible nor signed by the concerned authorized person of the workshop. The exhibition of the documents was subject to furnishing of legible and attested copies of the same. This was not done. The witness was unable to read even the chasis number or the engine number of the vehicle from the document (DW- 2/A). Payments for parts and the works undertaken were in cash. So there were no documents to support payments. The witness could not recollect as to whether any service tax had been paid. The witness was also unable to support the submission of motor parts being requisitioned for the said vehicle by any entry in the stock register or the store register. No contemporaneous record to establish that the said Tata Safari had at all entered the gate of Nawab Motors, as claimed, was produced.

810. DW-2, Madhumohan Nair gave evidence that as per the practice of the firm, at the time of delivery of a vehicle, a gate pass was given to the customer which he delivers to the guard at the exit gate of the company in order to take away his vehicle.

811. To establish that the vehicle was returned on 10th March, 2002, the appellants are relying on a gate pass issued by Nawab Motors. The defence witnesses failed to produce the original gate pass to show that the vehicle was returned only on 10th March, 2002 which, if existed, ought to have been submitted at the exit gate of the workshop when the vehicle exitted.

812. The gate pass (Ex.DW-2/3) which was produced, was not accompanied by any contemporaneous records of the company; the register in which the entries regarding issuance of the gate pass is made. The witness did not produce the same despite directions to do so. Neither DW-2 nor DW-7 were personally concerned with issuing the gate pass with regard to the vehicle or with regard to requisitioning the spare parts.

813. DW-7, Shaktichand, also sought to produce on record certain documents of transactions by the electronic mode without compliance of the Section 65-B of the Evidence Act. The same is legally impermissible. He was unable to render any explanation for the manner in which these records are maintained. Other related witnesses were also examined by the defence including DW8 Gaurav Aggarwal and DW11 Om Bir Singh. Their testimony is also not believable.

814. DW2 stated that the vehicle was repaired within 3 to 4 days after it was received in the company on 16th February, 2002. Yet it was delivered only on 10th March, 2002. No repair which was so time consuming is revealed in the evidence.

815. DW2 also categorically stated that payments are accepted by the company in cash. There is no explanation as to why the payment relied upon by the defence was made by cheque.

816. The ld. Trial Judge has closely scrutinized the record and held that there is no credible evidence establishing either that the vehicle was sent to Nawab Motors for repairs on the 16 th of February 2002 or that it was delivered back only on the 10th of March 2002.

817. The learned Trial Judge has disbelieved the evidence of these defence witnesses for the following additional reasons as well:-

(i) Even though, a register containing the entries recording the vehicle numbers was maintained, no register to prove the entry of the Tata Safari vehicle in Nawab Motors was produced.

(ii) Even though the defence witnesses claimed that the vehicle was ready for delivery on 19th February, 2002 yet delivery was taken only on the 10th of March 2002. No details as to who brought

the vehicle to the Nawab Motors or the particulars of the person who took delivery there have been given.

(iii) There was no evidence to the effect that the amount reflected in the accounts of Oswal Sugar Limited as having been paid to Nawab Motors was actually in respect of repairs/service charges of the Tata Safari allegedly sent for repairs on 16 th February, 2002. It was in evidence that since 2002, the servicing and repairs of Tata Safari vehicle was being undertaken by Nawab Motors. Though the bill raised by Nawab Motors was for only Rs.14,811/-, the defence has inexplicably sought to prove payment of Rs.25,000/-.

818. The learned Trial Judge has pointed out that the premises of the company A.B. Coltex had been burnt for several years before the arrival of the police and the factory was lying closed. A question has been raised as to how and why a vehicle would be delivered after repairs to premises in such condition? This question could not be answered by the appellants before us as well.

819. When on 27th February, 2002 and 1st March, 2002, the investigating officer, PW-35 Anil Somania moved the application for police custody remand of the appellants for recovery of the Tata Safari, Shri Rajinder Chaudhary, Advocate purporting to be acting on behalf of Vikas Yadav, also made an application to the court of the Chief Judicial Magistrate Ghaziabad praying that counsel be permitted to accompany them.

820. We find that neither the appellants nor their counsels informed the Chief Judicial Magistrate's court either on 27th of February, 2002 or on 1st of March, 2002 when they were present in the court, either that the Tata Safari was not involved in the commission of any offence or that the vehicle was with the Nawab Motors since 16th February, 2002.

821. On the contrary, they permitted the Chief Judicial Magistrate to grant custody / remand for the recovery of the Tata Safari firstly, by order dated 25th February, 2002 and then again by the order dated 8th March, 2002.

822. It is also evident from the above narration that if the vehicle was actually with the Nawab Motors, since 16 th February, 2002, Vikas Yadav and Vishal Yadav would have led the police to the premises of Nawab Motors at Noida. Instead, the very fact that they took the investigating officer to Alwar, on the 28th February, 2002; to Panipat on 10th March, 2002 and then to Karnal on 11th March, 2002 where it was recovered that Tata Safari vehicle was not with M/s Nawab Motors.

823. No such question or suggestion was put to the investigating officers as well when they appeared in the witness box as PW 34 S.I. J.K. Gangwar and PW 35 S.I. Anil Somania and testified about the vehicle. No question or suggestion in either of the trials was put to any other prosecution witness that Tata Safari was with the Nawab Motors since 16 th February, 2002 as well.

824. In his statement under Section 313 of the Cr.P.C., Vikas Yadav has contradictorily stated that the vehicle was left with workshop on the late evening of the 15th of February, 2002 and not on the 16th of February 2002 as stated by the defence witnesses. He gives no particulars of the workshop.

825. It is only five years thereafter, that the defence for the first time claimed through the testimony of the defence witnesses, DW-2, Madhumohan Nair recorded on 5th July, 2007 as well as the testimony of DW-7 Shakti Chand and DW-8 Gautam Aggarwal that the Tata Safari was with the Nawab Motors, Noida since 16th February, 2002.

826. So far as PW27 Sultan Singh is concerned, he was a signatory to the recovery memo Ex.PW27/1. However, in his testimony in court even though he has admitted that recovery was effected in his presence, he stated that he had signed on a blank paper. This person was an employee of Shri D.P.

Yadav who was a Director in M/s A.B. Coltex. The Trial Judge has rightly concluded that this witness was coming to the support of the defence.

827. We agree with the trial judge that the appellants Vikas and Vishal Yadav set up a false plea that they had not gone to the wedding of Shivani Gaur on the 16th of February, 2002 in a Tata Safari vehicle but in a Mercedes car.

828. It therefore, stands established on record that the Tata Safari vehicle bearing registration No.PB-07H-0085 stood registered in the name of M/s Oswal Sugar Limited, G.T. Road, Mukeria Hoshiarpur and that Shri D.P. Yadav, father of Vikas Yadav was one of its Directors. The vehicle was recovered at the instance of the accused persons at the premises of A.B. Coltex, Karnal, a firm in whose management Shri D.P. Yadav, father of Shri Vikas Yadav had interest. The defence case that the vehicle was under repairs with Nawab Motors at Noida is false.

(V) Whether the Esprit watch recovered pursuant to the disclosure by Vishal Yadav belonged to Nitish Katara?

829. PW-30 Nilam Katara, mother of Nitish has testified that in December, 2001 Bharti Yadav had gifted a wrist watch of make Esprit to Nitish Katara. The appellant, Vishal Yadav, made a disclosure statement on the 25th of February 2002 to the effect that he could get a watch recovered. On 28th of February 2002, a wrist watch (make Espirit) was in fact recovered at the instance of Vishal Yadav from amidst thick bushes of _Pattel' near the spot where the dead body was recovered. A joint recovery memo (Exh.PW-34/1) of the hammer as well as the wrist watch was scribed by the investigating officer.

830. In order to establish the correctness of the recovery and the statement on this aspect made by PW-30 Nilam Katara, the prosecution caused a Test Identification Parade (TIP) of the recovered watch to be undertaken. In this regard, the testimony of PW-7, Ram Lakhan Singh (Special Executive Magistrate, Ghaziabad) is relevant. This witness was authorized to conduct TIP of persons as well as of property and was posted as the Special Executive Magistrate at the relevant time. He was approached by the SHO, PS Kavi Nagar on 2nd April, 2002 who made a written request for getting the identification of the wrist watch from Smt. Nilam Katara. The recovered wrist watch (Exh.PW-7/Article 1) was produced before PW-7 in a sealed condition. Five similar watches brought by a contractor D.D. Aggarwal and were mixed up by contractor with the watch in question (Exh.PW-7/Article 1). Nilam Katara correctly identified the recovered watch (Ex.PW-7/3) as the watch gifted by Bharti to Nitish which he was wearing on the night of the 16 th of February 2002. The testimony of this witness could not be shaken in his cross-examination. After its identification, the wrist watch, was again sealed by him.

831. Appearing in the witness box, Nilam Katara has described the apparels as well as the accessories which Nitish Katara was wearing when he went to attend Shivani Gaur's wedding which included the said Espirit wrist watch and a gold chain with tiger claw both of which had been gifted to him by Bharti in December. The deceased was also carrying his mobile phone bearing no.9811283641.

832. Nilam Katara has testified that on 2nd April, 2002 in proceedings conducted in the Kacheri, from amongst similar watches, she had identified the Espirit wrist watch (Exh.PW- 7/Article 1) which Nitish was wearing on 16th February, 2002 when he had gone to attend the marriage of Shivani and that had signed the memo of identification of the wrist watch (Exh.PW-7/3). In court the witness identified the watch Exh.PW7/A-2 as the one worn by Nitish when he had gone to attend Shivani's marriage and identified by her on 2nd April, 2002 during investigation.

833. Nilam Katara was extensively cross-examined by learned counsel appearing for Vishal Yadav on her identification of the watch. However, the testimony of the witness could not be shaken. A

suggestion was put to the witness that when Nitish Katara had gone to the marriage, he was wearing a round watch with a metallic chain which the witness categorically denied. The witness insisted that her son was wearing the square watch Exh.PW-7/Art.1 which had been recovered. She also denied that he was wearing a round watch in the photograph of the marriage Exh.PW-6/D-4.

834. The appellants have challenged the recovery of the wrist watch at the instance of Vishal Yadav on the ground that there was no evidence that the deceased Nitish Katara was wearing a wrist watch when he attended the marriage of Shivani Gaur. The appellants also challenged identification of the wrist watch conducted by PW-7 Shri Ram Lakhan, Special Executive Magistrate on the ground that instead of mixing similar watches, watches of different makes and shapes were mixed up which enabled the witness to identify the watch by reading the brand thereof as the watch had been planted by her and the police. The appellants have alleged a conspiracy on the part of the complainant and the police hatched on 20th February, 2002 resulting in incorporation of the existence of the wrist watch in the statement of Smt. Nilam Katara. The recovery of the watch was challenged on the ground that the bill for purchase thereof was not produced by the complainant. We have already noted above as to why would Nilam Katara do anything to implicate innocent persons for the murder of her son instead of insisting that the really guilty be punished? There is no answer forthcoming to this query.

835. It is also objected that Nitin Katara, brother of the deceased was not called upon to effect the identification of the wrist watch. So far as this objection is concerned, before the trial court, Nitin Katara had expressed inability to identify the same and no purpose would have been served by requiring him to participate in a TIP.

836. Before examining the testimony of the witness any further, it is necessary to note certain proceedings on the record of the Trial Court.

The prosecution had examined PW-6, Archana Sharma who was running a photo studio in the name of Quality Photo Service. On the night intervening 16th/17th February, 2002, her employee Vijay Kumar (examined as PW-15) had gone to the Diamond Palace Banquet Hall for taking still photographs and videography of the marriage of Shivani Gaur. Vijay had taken the photographs and prepared the video which was handed over to her with negatives of the same. PW-6 had prepared an album of the photographs which was handed over along with negatives to the concerned family. The witness stated that the police had taken positives of some of the photographs of the marriage. Archana Sharma proved the photographs Exh.PW6/2, Exh.PW6/3 and Exh.PW6/4 on record as those taken by Vijay and given by her to the appellants. The negatives of these photographs were collectively proved as Exh.PW6/5. It stood established, therefore, that the photograph (Exh.PW6/2) was the original copy prepared from one of the negatives which was exhibited collectively as Exh.PW6/5.

837. Surprisingly, during her cross-examination by the defence, this witness testified that apart from the photographs exhibited in the court, she had brought 3-4 other positive prints which were not put in the album as they were not considered good. The witnesses produced these photographs as Exh.PW6/D1 and Exh.PW6/D4. Importantly, the witness did not have the negatives of such photographs.

838. Out of these photographs, we are concerned with one photograph (Exh.PW6/D3) which was produced by PW-6 for the first time while under cross examination Exh.PW- 6/D3 was pressed as an original photograph while PW6/D4 was its enlarged copy. The defence sought to establish before us as well that PW6/2 is actually the photograph Exh.PW6/D3 with amendments having been made (in Exh.PW6/2) regarding the wrist of the boy standing in the photograph wearing a red kurta. In the photograph Exh.PW- 6/D3, round watch with a metallic chain has been deviously added to the wrist of Nitish Katara who featured in the photograph as the person wearing a red kurta.

839. The learned Trial Judge has viewed strictly the conduct of this witness who has prepared the photographs (Exh.PW6/D1 to Exh.PW6/D4) when no such directions were given by the court to produce any photographs from a photo studio. There was no explanation as to why Archana Sharma did not have the negatives of the photographs. Or why, if this photograph existed, she did not hand it over to the investigataing officer? Without negatives, the Trial Court has rightly doubted the genuineness of these photographs.

840. During her re-examination by the Special Public Prosecutor , PW-6 Archana Sharma admitted that she had prepared Exh.PW6/D1 to Exh.PW6/D4 after the police had taken away the three negatives (Exh.PW6/5) and that these photographs were prepared from positives. She did not disclose at whose instance, the photographs were prepared and the manner in which they were produced on record without any direction from the court. The learned Trial Judge has concluded that PW-6 Archana Sharma was acting at the instance of the accused persons and that the photographs which were produced were not genuine photographs.

841. In the witness box, PW-15, Vijay Kumar tried to favour the defence by deposing that he had also taken the photograph - Exh.PW6/D3 and Exh.PW6/D4 in the marriage of Shivani Gaur. But he was unable to support this statement by production of any negatives. In response to a court query, the witness could not recollect whether he had taken photographs in any marriage before or after 16 th February, 2002. This witness also admitted that a positive print can be prepared from another positive print of the photograph. He could not state as to whether the photographs shown to him had been made from a negative or prepared using a computer from positives. Clearly the witness was under the influence of the accused persons and made the unfortunate effort to support the dishonest efforts of the defence to prove morphed photographs as originals.

842. In an attempt to establish that the photograph (Exh.PW6/2) was not an original photograph clicked at the wedding of Shivani Gaur, the defence also examined DW-15, Vikram Garg and DW-16, Mahender Sharma. DW-15 was shown the photographs (Exh.PW6/2, Exh.PW6/D3 and Exh.PW6/D4) and was asked to identify the original amongst them. He replied that Exh.PW6/D3 was the original photograph while Exh.PW6/D4 was its enlargement. This witness claimed that in the photograph (Exh.PW6/2), certain amendments were made in the wrist of the boy who was standing in the photograph wearing a red kurta.

843. In photograph - Exh.PW6/D3, the person in the red kurta was wearing a wrist watch in his left hand. No such watch was visible in the photograph - Ex.PW6/2. In his cross- examination by the prosecution, DW-15, Vikram Garg admitted that even with eyes which were intact, he could not state as to whether the photographs (Exh.PW6/2, PW6/D3 and PW6/D4) were prepared from negatives or are digital photos. He stated that he had to scan it to prove the same.

The witness admitted that neither the photographs were taken clicked in his presence nor the enlarged copy (Ex.PW6/D4) was prepared in his presence.

844. When shown the three negatives (Exh.PW6/5 colly.), the witness admitted that Exh.PW6/2 was prepared from one of the negatives which was shown to him. The learned Trial Judge has noted the interference and the tutoring of DW-15 on behalf of the appellants at this stage to overcome the clear admission by the defence witness. At this stage, Mr. G.K. Bharti, Advocate for Vikas Yadav, whispered something into the witness' ear whereupon the witness took a somersault and stated that as the negative shown to him was small in size and four people were appearing in the photograph, and so he could not state as to from which negative the photograph - Exh.PW6/2 was prepared.

845. DW-15 Vikram Garg admitted that he was seeing the photographs - Exh.PW6/2, Exh.PW6/D3 and Ex.PW6/D4 for the first time in the court. The witness also admitted that jewellery or anything can be added or deleted from the photograph by editing.

846. The fact that Exh.PW6/2 was an original photo prepared from proven negatives already stood established in the testimony of Archana Sharma during the trial.

847. DW-16, Mahender Sharma had enlarged the photograph which had been got produced. He stated that he could manipulate the photo in any manner given the softwares noted above. Even face expressions can be changed and that not only wrist watch, even shackles can be shown on the hands on the legs of the person in the photo.

848. It appears that permission was sought by the appellants for taking enlarged photographs of the photographs filed in court by the prosecution. Instead of calling a photographer in court for preparation of the enlarged photograph from the negatives which were available on record, the defence called a computer expert, who with the help of a scanner, took an impression of the positive print of the photograph available on record. From such positive print, the defence got prepared photographs which were got produced on record in the testimony of prosecution witness, PW-6 Archana Sharma. The photographer who had come to the court, had admitted that he could manipulate a photograph in any manner. The Trial Court has noted that the softwares namely, Adobe Photoshop, Adobe Premier etc. were available in the market and with these softwares, any manipulation of photo, clothes, colour, etc. was possible, that accessories could be added or removed from a person. These remarks were noted in the cross-examination of PW-7, Shri Ram Lakhan, Special Executive Magistrate when the defence sought to cross-examine him with regard to the photographs.

849. In fact, Nitish Katara is wearing a full sleeved red kurta in the photographs. The complete wrist of Nitish Katara is not visible for this reason in the original photograph (Ex.PW6/2).

850. It is also noteworthy that no suggestion was given to the Investigating Officer or Nilam Katara that the photograph (Ex.PW6/2) was a manipulated one or that the recovery of the Esprit watch was planted upon the accused Vishal Yadav.

851. It stands established from the witnesses' testimony that it is possible to digitally introduce wrist watches, jewellery, etc. on to scanned images and create altered positive photographs. The Trial Court has also noted that the defence has fabricated the photograph (Ex.PW6/D3) and thereafter to mislead the court, got its enlargement (Ex.PW6/D4) prepared. The learned Trial Judge has noted the conduct of the defence witness. On a consideration of the evidence on record, it has been held that Exh.PW6/2 was not the original but only a copy with amendments. In these circumstances, the learned Trial Judge has correctly concluded that Ex.PW6/D3 and Ex.PW6/D4 were morphed photographs and were a dishonest attempt of the defence to show that the deceased Nitish Katara was not wearing the recovered Esprit watch at the time of the marriage of Shivani Gaur but was wearing a round watch with a metallic chain.

852. The recovery of the wrist watch of Espirit make at the instance of Vishal Yadav on the 28th of February 2002 stands established in the statement of the investigating officers, PW-4, S.I. J.K. Gangwar and PW-35 Anil Somania. The fact that the Esprit watch owned by Nitish Katara was not found in his house on the 17th of February 2002 stands established in the testimony of his brother, Nitin Katara. Nilam Katara, mother of the deceased, established the facts that Bharti Yadav had gifted a wrist watch of the Espirit make in December, 2001 and also a gold chain with the tiger claw pendant; that Nitish was wearing not only the Esprit watch but also the golden chain with the pendant of the tiger claw when he had gone to attend Shivani Gaur's wedding on the night of 16th February, 2002. The Espirit watch which was recovered at the instance of Vishal Yadav was identified by Nilam Katara before PW-7, Shri Ram Lakhan, Special Executive Magistrate as the watch which was worn by the deceased on the unfortunate night. This watch was identified by Nilam Katara in the court as well and was thereupon exhibited as Exh.PW7/Article 2A. The testimony of Nilam Katara could not be shaken

in the cross- examination and she categorically denied that her son was wearing a round wrist watch as shown in the photograph - Exh.PW6/D3.

853. It has therefore been rightly held in the impugned judgment that the wrist watch (Ex.PW7/Article 2A) which was recovered by Vishal Yadav on 28th February, 2002 pursuant to the disclosure statement (Ex.PW 35/17) was the wrist watch worn by Nitish Katara on the night of 16th February, 2002 when he had gone to attend the marriage of Shivani Gaur.

VI Whether the recovered hammer was the weapon of offence?

The discussion on this subject is being considered under the following sub-headings:

(i) Opinion of the doctor - evidentiary value

(ii) Nature, shape and size of hammer

(iii) Examination of head injury of the deceased

(iv) Whether the head injury was possible by a fall?

(v) Failure to ascertain origin of the blood on the hammer

(vi) Whether the fact that the hammer was not shown to the doctor during investigation impacts its admissibility in evidence or evidentiary value?

(vii) Failure to prepare a sketch of the hammer (Exh.P-1) at the time of its alleged recovery - effect thereof

(viii) Burns: Whether ante or post mortem

(ix) Whether there exist inconsistencies between inquest and the post-mortem report? If so, then the effect thereof

854. The appellants have submitted that even if the recovery of the hammer was to be believed, the prosecution has miserably failed to establish that the recovered hammer was the weapon of offence. This submission is premised firstly, on the argument that PW-3 Dr.Anil Singhal, the doctor who conducted the post-mortem has testified that there is less chance and less possibility of the single head injury having been caused by the hammer since the dimensions of the lacerated wound did not tally with the dimensions of the hammer and further that a hammer wound would produce a depression type of fracture whereas the deceased had suffered a comminuted fracture on his scalp. Secondly, it is urged that the prosecution has failed to establish that the blood on the hammer was of the blood group of the deceased. The third submission on behalf of Vikas Yadav is that the prosecution has not traced finger prints of the appellant on the hammer. The fourth submission pressed before us is that the investigating officer did not prepare a sketch of the hammer allegedly recovered and also did not seek the doctor's opinion during investigation as to whether the fatal injury was possible with the hammer. It is submitted that this last circumstance renders suspect the very claim of the recovery of the hammer by the prosecution.

855. Mr. Dayan Krishnan, learned Additional Standing Counsel for the State has, on the other hand, contended that apart from the evidence admissible under Section 27 of the Indian Evidence Act with regard to the knowledge of the place and consequential recovery of the hammer attributable to Vikas Yadav, the fact that the hammer recovered at the instance of the accused was the weapon used in the

commission of the offence is amply corroborated by medical and forensic evidence. Mr. P.K. Dey, learned counsel appearing for the complainant has supported the prosecution case as well.

856. In order to appreciate the rival contentions, it is necessary to first and foremost examine the post-mortem report. On the 18th of February, 2002 at 03.00 p.m, a post-mortem was conducted on the recovered dead body by Dr.Anil K. Singhal, an orthopaedic surgeon at the District Hospital, Bulandshahr since August, 1997,. A request for conducting the post-mortem was made by the police to this doctor vide a request letter dated 17th February 2002 (Ex. PW-3/1) enclosing some additional papers. In the witness box, the doctor has testified that a dead body of an unknown male person was brought in by Constable Muddasar and Constable Mohinder of PS Kotwali Khurja on 18th February, 2002 in a sealed condition.

857. In his testimony in court, the doctor proved the post-mortem report Ex.PW-3/3 and also testified about his observations on external and internal examination as well as ante and post mortem injuries.

858. As per the post-mortem report Ex. PW-3/3, the examination of the body revealed the following: -

PM done on dead body of unknown aged about 30 yr/m/R/o unknown body sent by SO P/S Kot. Khurja Nagar in a sealed cloth seal found correct and intact, along with (9) enclosures REPORT OF POST MORTEM EXAMINATION Post mortem examination done Unknown male on body of Place : Buland Shahar Date : 18/2/2002 Time : At 3:00p.m.

Police's sepoy : Ct. 1090 Mahender and Ct. 614 Mudassar (P/S Kot. Khurja Nagar) identified the body.

S.No. :	66/2002
Length:	5'9‖
Sole :	9‖
	Charred hair (black)
	1/2‖ length on skull
Approximate time since death:	About two days

External examination

1. (a) Muscularity : Muscular built
   (b) Stoutness : Stout

(c) Emaciation : Burn all over body except hand and feet

(d) Rigormortis : Chest, abdomen and anterior wall lost , organs exposed and burnt

(e) Decomposition: Hairs charred small ½ inch only Tongue protruded Face neck and body black but no vesicles Intestines congested, Left elbow joint opened, No clothes on body, Penis entirely charred and black.

2. Antemortem Injuries Antemortem Injuries:

one lacerated wound 3 cms x 2 cms left side of head and 7 cm above left eyebrow x cavity deep.

Post mortem Injuries Deep burn all over body, more on neck chest and abdomen, abdomen peritoneum and thigh, lungs exposed, burnt black intestine, Intestines ____black, penis half burnt, thigh muscle exposed, record. No line or redness and vassicals and no sign of recurative process

3. Membranes - congested brain not liquid

4. Brain - congested and lacerated correspond left side lacerated wound. Soft and pulpi.

5. Base - NAD

6. Vertebrae - Not open

7. Spinal Cord - Not expound

8. Neck - Haemotoma of about ½ ltr. present from skull cavity. Thorax (sic thorax) a. Walls, Ribs, Certilages - Burnt b. Plura - Burnt c. Larynx, Trachia....

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d. Right lung                    burnt blackish, on cutting inside
e. Left lung                     yellowish
f. Pericardium -
g. Heart - empty
h. Vessels - NAD


 i. Other details -
Abdomen
1. Bhittiyan - burnt as noted
2. Peritoneum - burnt as noted
3. Cavity - Intestine yellowish
exposed
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4. Buccal cavity, teeth, toungue and pharynx - protruded

5. Oesophegus -NAD

6. Contents - empty

7. Small intestine - NAD

8. Large intestine - NAD

9. Gall bladder - full

10. Pancreas

11. Spleen NAD

12. Kidneys

13. Bladder - empty

14. Genitals - NAD Reason of death Death due to coma as a result of ante-mortem head injury and postmortem burn Place : Bulandshahr Date : 18.02.2002

-sd-

(Anil Singhal) Medical Officer Dead body and P.M. reports after P.M. examination handed over to company constable along with dead body of the P.M.Exam.

-sd/-

(Anil Singhal)

859. An important fact which requires to be borne in mind is that on 18th February, 2002, PW-3 Dr.Anil Singhal was conducting a post-mortem on a dead body of an unknown person recovered from a roadside. Not only was there serious injury on the body but it was also in a badly burnt condition, without any clothes and with no means of its identification at all. The following discussion would show

how the post-mortem report and the testimony of PW-3 reflect the casualness with which the post-mortem has been conducted, perhaps influenced by the fact that its identity was not known.

860. In the post mortem report the doctor has thus mentioned the existence of a comminuted skull fracture. The doctor has opined that the injury on the head was sufficient to cause death in the ordinary course of nature.

861. Both parties have dealt at length on the nature of the fracture injury which was found on the skull of the deceased. The submission of the prosecution is that medical literature recognizes a comminuted fracture as a complication of a depressed fracture and that the emphasis on there being a marked distinction between the two, as is being pressed by the defence was inconsequential.

862. Given the contentions of both sides, we may firstly examine the medical texts placed by parties before us in support of their submissions. In order to understand the impact of injury to the skull and nature of resultant fracture, reference deserves to be made to the Forensic Pathology by Vincent J. Di Maio (2nd Edition) (at Page 148-151) which gives the following explanations:

> ―In any fall or blow to the head, the degree of deformation of the skull, the generation of a fracture and the extent of any fracture produced is dependent on a number of factors :
>
> □ The amount of hair □ The thickness of the scalp □ The configuration and thickness of the skull □ The elasticity of the bone at the point of impact □ The shape, weight and consistency of the object impacting or impacted by the head □ The velocity at which either the blow was delivered or the head strikes the object xxx xxx xxx A depressed skull fracture occurs when the skull is struck with an object having a relatively large amount of kinetic energy but a small surface area, or when an object with a large amount of kinetic energy impacts only a small area of the skull. The scalp does not significantly affect the nature of the injuries to the skull. Large deformations occurring a distance from the point of impact are no longer present. At the point of impact, there is a depressed fracture, possibly with fragmentation. The fractures are due to failure of the inner surface of the skull secondary to the inbending. An example of this type of fracture is the circular depressed fracture of a hammer blow (Figure 6.3). Here there are no linear fractures radiating to or from the circular depression in the skull..."

863. Our attention has also been drawn to the authoritative text Forensic Medicine and Toxicology by J.B. Mukherjee wherein depressed and comminuted fractures are described by the learned author thus -

> ―Depressed Fractures When the portion of fractured bone is driven inwards, it is known as depressed fracture. It is often designated as ―fractures a la signature‖, as the pattern or shape of the fracture often points towards the shape of the offending weapon or agent. This type of fracture of skull has got great medicolegal significance, as it often suggests the probable manner of application of violence and also the relative position of the victim and the assailant at the material moment.
>
> Blow with heavy weapon having small striking surface such as hammer, knob of stick or lathi, axe, brick bat etc. will cause localized depressed fracture of the skull when its outer table will be driven into the diploe, the inner table usually getting fractured irregularly with comminution of fragments, which will injure the meninges and the brain underneath. When a hammer is used, the part of the weapon that strikes the skull first i.e. (the base of the striking surface nearest the assailant), will be driven more deeper than the rest of the striking surface; this edge will shelve more downwards to the main depression, being bordered by a cliff like terrace formed by compression of tables of skull at the margin of the fracture. The depression will be somewhat circular looking, more or less like the shape,

diameter or radius of the hammer. This type of depression of the skull will thus suggest the position of the assailant.

xxx xxx xxx Comminuted Fractures In this type, the bone gets broken into multiple pieces, occurring often as complications of fissured or depressed fractures. These are usually caused by fall from height, traffic accidents or from blows by heavy weapons with a large striking surface; alternatively by forcible or repeated blows more or less over the same area, by weapons having a relatively small striking surface. This can also result from a kick by an animal or by a bullet.

When there is no displacement of the comminuted fragments, the area will look like a spiders' web or mosaic. Fissured fractures usually radiate for varying distances from the area of comminution in all directions. When the violence applied is forcible, the comminuted fragments may get displaced; some of them may be recovered from the brain substance.

Comminuted fractures occur more frequently, when the person is struck with head supported, than when it is free to move.‖ (Emphasis supplied) It is therefore stated that a hammer blow will cause a localized depressed fracture ―with communication of fragments which will injure the meninges and the brain underneath‖. It is also clear that comminuted fracture is a complication of a depressed fracture. In the instant case, also there was a lacerated wound in the brain below the skull fracture.

864. The learned author (J.B. Mukherjee) has also discussed the variation in the resultant injury being dependant on the portion of the head which is hit as well as on the strength of the impact in the following terms:

―Hence head injuries can occur from: (i) An impact of some object against a fixed head (ii) An impact of some object against a head free to move (iii) An impact of the head against some relatively stationary object, causing sudden arrest of motion.

By the way to explain the matter, the lethality of a hammer-head striking the head, will depend upon its weight and the speed with which it is swung, while that of the bullet will be due to its velocity, though it's weight will be negligible. Weapons having small striking surface will produce localized depressed fractures, depending upon the degree of violence used; the area of damaged skull may not be bigger than that of the striking face. A heavy hard blunt weapon having a large striking face, even if used with lesser degree of force, will produce comminuted fracture of the skull bones with extensive lesion in the brain. The greater the violence, more will be the damage caused. Less violence is required to produce fracture on the temple in comparison, to cause the same effect elsewhere. The effect of the blow will also get modified, if the surface area bearing the weight of impact is big and wide.

xxx xxx xxx Again the effects of a blow to the head will be modified, if it is free to move away from the blow. In case, the head is free and unsupported at the time of strike, the "shearing movement imparted to the brain", is more likely to cause contusion and laceration of the cortex rather than a fracture, as is seen in case of fall on the back of head. When the striking object is flat and large, a fissured fracture with or without stellate communition at the point of impact is likely to occur accompanied with variable injury to the brain underneath. When the head strikes the ground reinforced by weight of the body, it is likely to bend as to the shape of the striking surface resulting in fissured fracture.

The amount of damage to the contents of the skull will depend upon the degree and direction of force.‖ (Emphasis by us)

865. Mr. Dayan Krishnan, learned Additional Standing Counsel has also placed the exposition in Medical Jurisprudence and Toxicology (Law, Practice and Procedure) by Dr. K.S. Narayan Reddy (3rd Edition, 2010) before us. This learned author has stated thus:

> —2. Depressed Fractures: They are produced by local deformation of the skull. In this, fractured bone is driven inwards into the skull cavity. The outer table is driven into the diploe, the inner table is fractured irregularly and to a greater extent and may be comminuted. They are also called —fractures a la signature‖ (signature fractures), as their pattern often resembles the weapon or agent which caused it. Localised depressed fractures are caused by blows from heavy weapon with a small striking surface, e.g., stone, stick, axe, chopper, hammer, etc. Depth varies according to the velocity with which the impact is delivered. Rarely only the inner table may be fractured under the site of impact, leaving intact the outer table. Sometimes, the depressed fracture may involve the outer table only. A violent blow with the full face of a weapon completely detaches almost the same diameter of the bone, which is driven inwards. A less violent blow, or an oblique blow, may produce a localized fracture with only partial depression of the bone. When a hammer is used, the fracture is circular or an arc of a circle, having the same diameter as the striking surface, and usually there are no radiating linear fractures. The part of the skull which is first struck shows maximum depression.
>
> xxx xxx xxx
>
> (3) Comminuted Fractures: In a
>
> comminuted fracture there are two or more intersecting lines of fracture which divide the bone into three or more fragments. They are caused by a significant force striking over a broad area, such as crushing head injuries, vehicle accidents, fall from a height on a hard surface, and from repeated blows by weapons with a large striking surface, e.g., heavy iron bar or poker, an axe, thick stick, etc. They may also result from a kick by an animal or by a bullet. It is often a complication of fissured or depressed fracture. When there is no displacement of the fragment, it resembles a spider's web or mosaic. Fissured fractures may radiate for varying distances from the area of comminution (fragmentation). When the force is great, the broken pieces of bone are displaced and some may enter the brain and others may be lost.‖

866. The position with regard to a comminuted fracture and depressed fracture is made succinctly clear by the exposition on the same in Lyon's Medical Jurisprudence and Toxicology (11th Edition) (as revised by Professor T.D.

Dogra and Lt. Col. Abhijeet Rudra) where in the distinction between the two fractures it is stated thus:

> —(c) Comminuted fractures- In comminuted fractures, the bone is broken into two or more pieces. In the case of comminuted fractures the area of comminution is frequently oval or circular in shape, the included bone may be broken into several pieces, and one or more of these fragments are depressed. Impact or blows almost invariably cause these injuries with heavy instruments. Very extensive comminution may be the result of a fall on the head.
>
> (d) Depressed fractures- Depressed fractures are those in which portions of the fractured bone are driven inwards into the skull cavity. A depressed fracture when caused by a heavy instrument with a small striking surface is often localized, the shape may give valuable information as to the weapon used in inflicting it (signature fracture). Where heavy cutting abjects are used the initial impact slices through the bone on one edge, often producing an

ivory-like shine. On removal, the second edge of the wound tends to get cracked, leaving a wound that has one smooth and one irregular edge.‖

867. Apart from the medical texts noted above, reference may usefully be made to the following extract from Modi‟s Medical Jurisprudence and Toxicology which the learned trial judge has also relied upon-

―(xxii) As per the Modi's Medical Jurisprudence and Toxicology ―depressed fractures are those in which portions of fractured bones are driven inwards into the skull cavity. A depressed fracture when caused by a heavy instrument with a small striking surface is often localised, the shape may give valuable information as to the weapon used in inflicting it.‖ ―In comminuted fracture the bone is broken into two or more pieces. In the case of comminuted fractures the area of comminution is frequently oval or circular in shape, the included bone may be broken into several pieces and one or more of these fragments are depressed. These injuries are almost invariably caused by blows with heavy instruments.‖

868. PW-3 Dr. Anil Singhal has endorsed the skull fracture on the deceased as a comminuted fracture premised on his view that there were no pieces of bone. However, in the testimony of the doctor, it is confirmed that there were multiple pieces of the skull which he did not count. The literature noticed above, also indicates that if the bone is in more than two pieces, it is called a comminuted fracture, which is only a complication of the depressed fracture. Therefore merely because the doctor has endorsed comminuted fracture on the post mortem report Exh.PW-3/1, it is not conclusive of the matter.

869. The medical authorities support the view that the depressed fracture is also possible by a hammer blow. Actually a comminuted fracture is merely a complication of the depressed fracture A hammer blow will cause a localized depressed fracture of the skull when its outer table gets driven into the diploe, with the inner table getting fractured irregularly with comminution of fragments which will injure the meninges and the brain underneath. Thus, if the bone is in more than two pieces, it is referred to as a comminuted fracture. It would thus appear that the two are not in completely separate water tight compartments.

870. The nature of the injury is dependent on the portion of head which is struck; the extent of force used; whether the head is free to move or not amongst other factors. The nature of the fracture would also depend on the hardness, shape, thickness of the bone as well as curvature, if any, in the impacted body surface.

(i) Opinion of the doctor - evidentiary value

871. Learned senior counsels and counsels for the appellants have urged at some length that the doctor's opinion with regard to the nature of the fracture as well as the impossibility of the hammer being the weapon of the offence binds the prosecution. We therefore propose to examine judicial precedents which have considered the question of the evidentiary value which is to be attached to a doctor's opinion.

872. On the other hand, Mr. Dayan Krishnan, learned Standing Counsel as well as Mr. P.K. Dey, learned counsel for the complainant have urged that the doctor was himself not clear on the medical principles with regard to the nature of the fracture and vaguely referred to medical jurisprudence without pointing out any medical treaties based on which he rendered his opinion. They also dispute the appellants' submission that the doctor has opined that the hammer could not be the weapon of the offence.

873. So far as the evidence of a medical witness is concerned, he is called in as an expert under Section 45 of the Indian Evidence Act to render an opinion upon a medical examination conducted by him of a person.

874. What is the value of the opinion evidence of a doctor conducting the post-mortem? In (1992) 3 SCC 204 Madan Gopal Kakkad v. Naval Dubey, the medical officer appearing as PW 4 had given the opinion that only an attempt to rape had been made. The High Court had rejected the oral testimony of witnesses which pointed towards rape in view of the medical opinion rendered by PW-4. On the basis of this opinion, the respondent was found guilty of the offence only under Section 354 of the IPC. The Supreme Court considered judicial precedents and the weight to be attached to such a medical opinion in paras 34-36 of the Madan Gopal Kakkad (supra) and held as under:

> —34. A medical witness called in as an expert to assist the Court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of the symptoms found on examination. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the Court.
>
> 35. Nariman, J. in Queen v. Ahmed Ally, (1869) 11 Sutherland WR Cr 25 while expressing his view on medical evidence has observed as follows:
>
> —The evidence of a medical man or other skilled witnesses, however, eminent, as to what he thinks may or may not have taken place under particular combination of circumstances, however, confidently, he may speak, is ordinarily a matter of mere opinion.‖
>
> 36. Fazal Ali, J. in Pratap Misra v. State of Orissa, (1977) 3 SCC 41 : 1977 SCC (Cri) 447 : AIR 1977 SC 1307 has stated thus:
>
> ... [I]t is well settled that medical jurisprudence is not an exact science and it is indeed difficult for any Doctor to say with precision and exactitude as to when a particular injury was caused ...as to the exact time when the appellants may have had sexual intercourse with the prosecutrix.‖‖
>
> 875. Mr. Sumeet Verma appearing on behalf of the appellant has contended that in view of the factual differences between the present case and Madan Gopal Kakkad (supra), the discussion and principles laid down in Madan Gopal Kakkad (supra) would have no application to the present case. The distinction drawn by Mr. Verma is erroneous inasmuch as this court is concerned with evaluation of the medical opinion given by the doctor and the principles laid down by the Supreme Court on evaluation of medical expert testimony has to guide our consideration in the instant case as well.

876. This question also fell for consideration before the Supreme Court in AIR 1999 SC 2416 Mohd. Zahid v. State of Tamil Nadu and the court observed as follows:

> —24. We are aware of the fact that sufficient weightage should be given to the evidence of the doctor who has conducted the post mortem, as compared to the statements found in the text books, but giving weightage does not ipso facto mean that each and every statement made by a medical witness should be accepted on its face value even when it is self-
>
> contradictory.‖ (Emphasis supplied)

877. In the judgment reported at (2006) 1 SCC 283 (para 21), Vishnu @ Undra v. State of Maharashtra, the court rejected the opinion of the doctor with regard to age of the girl in view of the evidence of fact from the mouth of her parents which was corroborated by the register of date of birth of the Greater Bombay Municipal Corporation and the evidence of the doctors where the girl was born. The court in para 20 held as follows:

> —20. It is urged before us by Mr Lalit that the determination of the age of the prosecutrix by conducting ossification test is scientifically proved and, therefore, the opinion of the doctor that the girl was of 18-19 years of age should be accepted. We are unable to accept this contention for the reasons that the expert medical evidence is not binding on the ocular evidence. The opinion of the Medical Officer is to assist the court as he is not a witness of fact and the evidence given by the Medical Officer is really of an advisory character and not binding on the witness of the fact.‖

878. The above principles would bind this court in evaluating the medical opinion vis-à-vis the other evidence which has been brought on record.

879. In a recent judgment of the Supreme Court of India reported at (2012) 8 SCC 263, Dayal Singh v. State of Uttaranchal, how the deceased Pyara Singh suffered death was explained by PW-2, 4 and 6 eye witnesses whose presence at the spot could not be doubted and who had testified about the assault by the accused on the deceased with lathis. The doctor who conducted the post-mortem, reflected that he had not noticed any injuries upon the person of the deceased externally or even after opening him up internally. The investigating officer had noticed three apparent injuries on the deceased. The court observed that the course of events as recorded in the investigation pointed more towards the correctness of the prosecution case than otherwise. Dayal Singh and other accused persons took a stand of complete denial in their statements under Section 313 of the Cr.P.C. as well as ignorance about whether Pyara Singh had died as a result of injuries. In these facts, the Supreme Court authoritatively laid down the principles in evaluating expert evidence and the duty of the court in its consideration of the evidence:

> "29. This brings us to an ancillary issue as to how the Court would appreciate the evidence in such cases. The possibility of some variations in the exhibits, medical and ocular evidence cannot be ruled out. But it is not that every minor variation or inconsistency would tilt the balance of justice in favour of the accused. Of course, where contradictions and variations are of a serious nature, which apparently or impliedly are destructive of the substantive case sought to be proved by the prosecution, they may provide an advantage to the accused. The Courts, normally, look at expert evidence with a greater sense of acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution. In Kamaljit Singh v. State of Punjab [2004 Cri.LJ 28], the Court, while dealing with discrepancies between ocular and medical evidence, held, "It is trite law that minor variations between medical evidence and ocular evidence do not take away the primacy of the latter. Unless medical evidence in its term goes so far as to completely rule out all possibilities whatsoever of injuries taking place in the manner stated by the eyewitnesses, the testimony of the eyewitnesses cannot be thrown out.‖

880. Placing reliance on the aforenoticed observations of the Supreme Court in Madan Gopal Kakkad v. Naval Dubey (supra) in para 30 of Dayal Singh (supra), the court held that:

> —30. Where the eye witness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive.

xxx xxx xxx

31. Profitably, reference to the value of an expert in the eye of law can be assimilated as follows:

"The essential principle governing expert evidence is that the expert is not only to provide reasons to support his opinion but the result should be directly demonstrable. The court is not to surrender its own judgment to that of the expert or delegate its authority to a third party, but should assess his evidence like any other evidence. If the report of an expert is slipshod, inadequate or cryptic and the information of similarities or dissimilarities is not available in his report and his evidence in the case, then his opinion is of no use. It is required of an expert whether a government expert or private, if he expects, his opinion to be accepted to put before the court the material which induces him to come to his conclusion so that the court though not an expert, may form its own judgment on that material. If the expert in his evidence as a witness does not place the whole lot of similarities or dissimilarities, etc., which influence his mind to lead him to a particular conclusion which he states in the court then he fails in his duty to take the court into confidence. The court is not to believe the ipse dixit of an expert.

Indeed the value of the expert evidence consists mainly on the ability of the witness by reason of his special training and experience to point out the court such important facts as it otherwise might fail to observe and in so doing the court is enabled to exercise its own view or judgment respecting the cogency of reasons and the consequent value of the conclusions formed thereon. The opinion is required to be presented in a convenient manner and the reasons for a conclusion based on certain visible evidence, properly placed before the Court. In other words the value of expert evidence depends largely on the cogency of reasons on which it is based."

[See: Forensic Science in Criminal Investigation and Trial (Fourth Edition) by B.R. Sharma]

32. xxx xxx xxx

33. ..... The skill and experience of an expert is the ethos of his opinion, which itself should be reasoned and convincing. Not to say that no other view would be possible, but if the view of the expert has to find due weightage in the mind of the Court, it has to be well authored and convincing. Dr. C.N. Tewari was expected to prepare the post mortem report with appropriate reasoning and not leave everything to the imagination of the Court. He created a serious doubt as to the very cause of death of the deceased. His report apparently shows an absence of skill and experience and was, in fact, a deliberate attempt to disguise the investigation.

34. We really need not reiterate various judgments which have taken the view that the purpose of an expert opinion is primarily to assist the Court in arriving at a final conclusion. Such report is not binding upon the Court. The Court is expected to analyse the report, read it in conjunction with the other evidence on record and then form its final opinion as to whether such report is worthy of reliance or not. Just to illustrate this point of view, in a given case, there may be two diametrically contradictory opinions of handwriting experts and both the opinions may be well reasoned. In such case, the Court has to critically examine the basis, reasoning, approach and experience of the expert to come to a conclusion as to which of the two reports can be safely relied upon by the Court. The assistance and value of expert opinion is indisputable, but there can be reports which are, ex facie, incorrect or deliberately so distorted as to render the entire prosecution case

unbelievable. But if such eye-witnesses and other prosecution evidence are trustworthy, have credence and are consistent with the eye version given by the eye-witnesses, the Court will be well within its jurisdiction to discard the expert opinion. An expert report, duly proved, has its evidentiary value but such appreciation has to be within the limitations prescribed and with careful examination by the Court. A complete contradiction or inconsistency between the medical evidence and the ocular evidence on the one hand and the statement of the prosecution witnesses between themselves on the other, may result in seriously denting the case of the prosecution in its entirety but not otherwise."

(Emphasis by us)

881. Mr. P.K. Dey, learned counsel for the complainant has also supported the arguments on behalf of the prosecution and has further urged that the opinion of the doctor is not conclusive of the matter and that this court has to form its own opinion on the basis of the available material. In support thereof, reliance has been placed on the pronouncement of the Supreme Court reported on (1999) 5 SCC 96, State of Haryana v. Bhagirath wherein the court held thus:

―15. The opinion given by a medical witness need not be the last word on the subject. Such an opinion shall be tested by the court. If the opinion is bereft of logic or objectivity, the court is not obliged to go by that opinion. After all opinion is what is formed in the mind of a person regarding a fact situation. If one doctor forms one opinion and another doctor forms a different opinion on the same facts it is open to the Judge to adopt the view which is more objective or probable. Similarly if the opinion given by one doctor is not consistent with probability the court has no liability to go by that opinion merely because it is said by the doctor. Of course, due weight must be given to opinions given by persons who are experts in the particular subject.

16. Looking at the width of the wound on the neck (4.5 cm) and its length (14 cm) a doctor should not have ruled out the possibility of two successive strikes with a sharp weapon falling at the same situs resulting in such a wide incised wound. If the doctor does not agree to the possibility of causing such a wound the doctor should have put forth cogent reasons in support of such an opinion. But PW 7 did not give any such reason for the curt answer given by him that such an injury could not have been caused by two strikes with the same weapon or with different weapons of the same type. We are, therefore, not persuaded to entertain any doubt regarding the prosecution version on that score.‖ (Emphasis added)

882. It is well settled therefore that the medical expert merely rendering a medical opinion is not a witness of fact. The evidence of such expert is really of an advisory character, merely an _opinion' and does not bind the witness of the fact. The medical expert is required to put before the court the relevant material, informing the court on the technical aspects of the case, including explanation of medical terminology. The medical expert must provide reasons to support his opinion and the result should be directly demonstrable.

883. The evidence of a medical expert rests on his ability acquired from his special training and experience which enable him to place before the court important facts which may otherwise escape the attention of the court.

884. The opinion of the medical expert must be reasoned. The reason should be based on certain visible evidence and properly placed before the court. It is trite that the worth of the expert evidence depends largely on the cogency of the reasons on which it is based.

885. Perfunctory reports, bereft of reasoning, failing to note important observations on the condition of the person medically examined; reports carelessly and negligently recorded; which are slipshod, inadequate, cryptic would be rejected. Such reports and opinion may be a result of a deliberate attempt to misdirect the prosecution.

886. Similarly the testimony of the medical expert may be contrary to his written report. It may contain material additions and improvements, to assist the defence. A solemn duty is cast on the court to carefully scrutinize and analyse the evidence of the medical expert and the report given by him as against the ocular and other evidence on record, with regard to the condition of the person or body examined and other relevant facts and circumstances. In all eventualities, whether the report requires to be accepted or rejected, the court must form its own opinion on the merits of the matter, bearing in mind that medical jurisprudence is not an exact science. It is not possible for a medical expert to opine with precision and exactitude as to the exact time of a crime or occurrence.

887. The above narration would show that the absolute proposition urged on behalf of the appellants that the doctor has mentioned the injury on the skull of the deceased as a comminuted fracture or that there is less possibility of it having been caused by a hammer blow binds this court is not supported by authoritative judicial precedents.

888. The opinion given by Dr.Anil Singhal, PW-3 has to be examined on the above binding principles and in the background of other circumstances which have been brought on record.

(ii) Nature, shape and size of hammer

889. Let us first and foremost examine the nature, shape and dimensions of the hammer, the recovery memo (Exh.PW34/1) dated 28th February, 2002. As per this memo, the hammer was made of iron; the hammer head was broad on one side and narrow on the other side. The relevant extract of the description of the hammer in the memo (Exh.PW-34/1) reads as follows:-

> —...pehle abhiyukt Vikas uparokt ne sadak ke gadde mein khade patel ke jhundo ke beech mein se ek hathodi lohe ki samay kareeb 12:45 baje nikalkar dete huye bataya ki maine issi hathodi se apahrit Nitish Katara ke sir mein chot pahuchakar hatya ki thi jisme lakdi ka kala baith pada hai. Jiski lambai kareeb ek valisth (sic vitastaa) char angul tatha hathodi lohe ki lambai kareeb 6 angul choudai kareeb do angul hai. Hathodi ki ek paendi chaukor hai tatha doosri taraf patli hai jisme khoon laga hai. xxx‖ Translation of the above extract roughly reads thus:
>
> —...the first accused Vikas took out from the ‗pattel' bushes situated in a pit on the road an iron hammer at approximately 12:45 and while handing it over he stated that he used this hammer to injure the abducted Nitish Katara on his head to kill him. The hammer had a wooden handle whose length was approximately one „valisth‟ (sic vitastaa) and ‗char angul‟ (four fingers). Length of the iron hammer (head) was approximately „6 angul‟ (six fingers) and it was „do angul‟ (two fingers wide). The base of the iron hammer (head) was square and the other side was thin (patli) which had blood on it. xxx‖ (Emphasis supplied)
>
> 890. One ‗valisth' is equivalent to span-distance of stretched out palm between the tips of a person's thumb and the little finger, about ten inches which was the size of the handle of the hammer. The hammer head was thus around two male fingers wide (approx. 6 cms) and six male fingers long (approx. 18 cms). The base of the hammer was square. The other side was narrower and blood stained. The doctor has nowhere opined that the injury was not possible with the hammer. The recovery memo (Exh.PW-34/1) therefore explicitly discribes the hammer which was recovered.

(iii) Examination of head injury of the deceased

891. Mr. P.K. Dey, learned counsel for the complainant has drawn our attention to the placement of a head injury on the deceased. The post-mortem report records that there was an ante-mortem lacerated wound of 3 x 2 cms on the left side of the head of the deceased seven centimeters above the left eyebrow. The impact of the blow can be made out from the fact that apart from the fracture on the frontal bone, even the brain was congested and lacerated, which laceration corresponded with the wound on the skull.

892. It is well established that there are significant differences in the densities of different bones in the skull. Furthermore, medical research has established that there is variation in density even amongst different sites of the same bone in the skull, be it the parietal, frontal, temporal, occipital or zygomatic bone. [Ref: Material Properties of the Human Cranial Vault and Zygoma, by Jill Peterson and Paul C. Dechow, Texas A and M University System Health Science Center Dallas, Texas].

893. It needs no further elaboration that the type of skull fracture that results from use of force depends on several factors which, inter alia, includes the shape of the part of the skull which is struck; the mobility of the skull; presence of hair; whether any coverings on the head (in the nature of cap, hat, turban, etc.); the weight and velocity of the weapon; amount of force; and variation in the thickness of the bone.

894. Mr. P. K. Dey has submitted that the frontal bone which was involved in the present case, forms the forehead and the upper part of the orbital cavities in the skull, is thicker than the other bones of the skull, and thus it would offer more resistance to the pressure of an injury. He refers to Modi's authoritative text "A Textbook of Medical Jurisprudence and Toxicology" which states that the cranium varies in thickness and varies place to place. We find substance therefore, in the submission that hammer blow on the frontal bone results in radiation of energy and may result in a comminuted fracture as a complication or variation of the depressed fracture.

895. Learned senior counsel for the appellants have pressed an absolute proposition that a hammer blow cannot result in a comminuted fracture. Learned senior counsel for the appellants have contended that a hammer blow would result in a depressed type of fracture alone.

896. However even PW-3 Dr. Anil Singhal has accepted as partially correct that comminuted fracture and depressed fracture are both caused by hard objects and the use of blunt force and that the nature of the fracture depends upon the extent of force used. The doctor at another place stated that it was written in medical jurisprudence books that a hammer would produce a depressed type of fracture.

The medical texts extracted above point out that comminuted fractures are caused by blunt force applied with high force with large surface area of object and depressed fractures are caused by hard objects applied with high force, surface area of the object to be small and there is possibility of a bone piece being separated and going into the skull.

897. Mr.Dey has pointed out that the nature as well as dimensions of the injury would depend not only on the nature of the body surface which was struck by the weapon, that is, whether it was flat or curved surface, but also upon the shape and size of the weapon used. It needs no elaboration that the left side of the head is not a flat surface. Therefore, a hammer impacting the left side of the head striking a curved portion of the head (possibly elliptical) and would be able to contact only a small surface area. It also cannot be disputed that the hitting with the hammer would result in blunt force on the body surface. The recovery memo records that there was blood on the narrower side of the hammer head.

898. A specific question was put by the Special Prosecutor to the doctor as to whether the possibility of the injury inflicted on the skull of the deceased having been caused by the hammer could be ruled out.

The doctor admitted that such possibility could not be ruled out. Though the doctor vacillates in the cross-examination, when he states that there is less chance of the injury being caused by the hammer, the doctor did not rule out the possibility of the injury having been caused by the hammer.

899. When further cross-examined on the difference between a depressed and a comminuted fracture, PW-3 stated that in a comminuted fracture, a fracture is in multiple pieces and in a wide area, while in a depressed area the fracture is localized and is in the shape of instrument used. Further broken pieces of the bone go inside the body organs. Clearly this doctor was merely attempting to defend his opinion in Exh.PW-3/3, even though it may not confirm to authoritative medical texts.

900. In the doctor's testimony, there is also evidence that there were multiple pieces of the bone which he had not counted. PW-3 Dr. Anil Singhal has also not bothered to mention this important fact in the post mortem report. The skull fracture was on the frontal bone. In his cross examination, the doctor reiterated the position that he did not find any piece of bone in the skull. The post-mortem records that even the brain was congested and lacerated! Haematoma of half litre is noted in the post mortem report. The use of extreme force is evident from the nature of the fracture; the laceration of the brain as well as the presence of the haematoma of half a litre in the left skull cavity. The doctor has not bothered to notice and mention three essential facts in the post-mortem report or to explain the reasons for the lacerations or the haemotoma.

901. Dr. Anil Singhal testified that he opined the age of the corpse because the police had so mentioned the age on the inquest form! At another place, we find reference to the dentures without the doctor giving the dates on which particular teeth grow in the human body. The doctor notes that the stomach was empty without examining the rest of the organs and makes no observations about the status of the intestines.

902. Mr. P.K. Dey has argued that there was half litre haematoma (blood coagulation) in the brain cavity, and since 91% of blood is water, this would mean that there was extensive loss of blood. He has referred to the textbook "Anatomy and Physiology for Nurses"by Evelyn C. Pearce which states the following:-

Composition of Blood. Blood serum or plasma is made up as follows:

Water	91.0 per cent	(Albumin, globulin, prothrombin and fibrinogen)
Protein	8.0 per cent	
Salts	0.9 per cent	(Sodium Chloride, Sodium bicarbonate, salts of calcium phosphorus, magnesium, and iron, etc.

903. Mr. Dey has urged that as noted by PW 3 Anil Singhal in his post mortem report, the heart was also empty. It is urged that the blood loss shows that there was use of force on the body of the deceased which resulted in the blood loss. Unfortunately the doctor has recorded no reasons for this blood loss from the heart.

904. We may also usefully refer to (2003) 6 SCC 380 Thaman Kumar v. State of Union Territory of Chandigarh, wherein the Supreme Court, inter alia, dealt with inconsistency or variation between the size and dimensions of the weapon of assault and the injury caused on the deceased. In this case, a chadar (sheet) was rolled into the shape of a rope and was put around the neck of the deceased and pulled from both ends. While the ligature mark on the neck of the deceased was 1/2 cm, the thickness of the rope (made by twisting a chadar) as stated by eye witnesses came to 6/7 cm. It was argued before the Supreme Court that therefore the injury found on the deceased could not have been caused in a manner deposed to by the eyewitnesses and thus there is a conflict between the medical evidence and ocular evidence. Although involving eye witnesses, this case is similar to the case at hand. While rejecting this contention, the Supreme Court held as follows:

> —16. The conflict between oral testimony and medical evidence can be of varied dimensions and shapes. There may be a case where there is total absence of injuries which are normally caused by a particular weapon. There is another category where though the injuries found on the victim are of the type which are possible by the weapon of assault, but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon. The third category can be where the injuries found on the victim are such which are normally caused by the weapon of assault but they are not found on that portion of the body where they are deposed to have been caused by the eyewitnesses. The same kind of inference cannot be drawn in the three categories of apparent conflict in oral and medical evidence enumerated above. In the first category it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful. However, in the second and third categories no such inference can straight away be drawn. The manner and method of assault, the position of the victim, the resistance offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and many other similar factors will have to be taken into consideration in judging the reliability of ocular testimony.‖ (Emphasis by us) It is therefore not possible to conclude that the dimensions of the weapon of injury must in every case correspond with the dimensions and size of the injury.

905. In the present case, when questioned by the prosecutor, we find that even PW-3 Dr. Anil Singhal had answered that it was true that if there was an injury with a hard object on the skull, it was not necessary that the wound should correspond with the dimensions of the object. PW-3 further stated that he had only mentioned the dimension of the injury but not its shape. The doctor was shown the hammer in the witness box. Yet the doctor has also not bothered to correlate the injury to the hammer head, which was broad on one side and narrow on the other side. There was blood on the narrowside.

906. In the case in hand, the post mortem report reveals the extensive damage caused to not only the skull, but also to the brain by the fatal injury of the deceased. It is in the evidence of the doctor that there were multiple pieces of the bone.

The possibility of the hammer having caused the injury has not been ruled out.

907. It was noteworthy that PW-3 Dr. Anil Singhal was not cross-

examined on behalf of Vishal Yadav despite opportunity.

908. So far as the cause of death is concerned, the doctor has opined that death resulted due to coma as a result of ante- mortem head injury and the burns were post-mortem as well.

909. We note one important factor that the learned trial judge has physically examined the hammer and compared the dimensions of the injury with the small flat surface of the hammer. The impugned judgment records that the small flat surface of the hammer was almost similar to the dimension of the

injury and, therefore, it could not be stated that the injury on the left frontal bone of the deceased which was sufficient to cause death, has not been caused by the hammer. The learned Trial Judge has carefully analysed the positioning and nature of the injury on the skull of the deceased and also concluded that it was not possible that the entire base of the weapon would leave a mark in the shape of the weapon at the place where it struck the skull. It has been noted that the dimension of the wound would be approximate to the striking area of the weapon.

910. The above discussion would show that the absolute proposition urged on behalf of the appellants that the doctor has mentioned the injury on the skull of the deceased as a comminuted fracture, which could not have been caused by a hammer blow. The same is contrary to the medical jurisprudence noted above and has to be rejected.

911. In fact, the doctor has not stated that the injury was not possible by the hammer blow.

912. It is important to note that Dr. Anil Singhal was an orthopaedic surgeon. He did not have specialized training in forensic science, a highly technical subject to render an opinion as an expert on the subject. Dr. Anil Singhal was therefore really qualified only to make observations about the bones and injuries thereto. It was essential for a forensic expert to examine the dead body as well as the hammer and give an opinion about the injuries and the cause for it. Dr. Anil Singhal did not have the expertise to give an authoritative opinion on the issue as to whether the hammer was the weapon of offence.

913. The post mortem report is hopelessly incomplete. The vacillations by the doctor manifest attempts to create doubts. But there is no doubt about the single injury on the head of the deceased. In fact, the doctor was shown the hammer and he himself has stated that the injury was possible by that hammer. Unfortunately in his sketch and incomplete report, the doctor has not correlated the injury to the size of the hammer which could have very well caused the injury to the skull of the deceased. In fact the opinion that the fracture was a comminuted fracture is contrary to authoritative medical texts and conflicts with the observations of the doctor himself. The opinion of the doctor on the nature of the fracture and that there is less possibility of the injury having been caused by the hammer is incorrect and is rejected.

914. The conclusion by the learned trial judge that the recovered hammer was the weapon of offence is supported by the testimony of the doctor, observations in the post mortem report, medical tomes and a physical examination of the hammer as well as the dimensions of the hammer.

(iv) Whether the head injury was possible by a fall?

915. In answer to a question in the cross examination by the defence, the doctor has suggested that a wound of the nature on the skull of the deceased could be caused when a person falls and hits a hard surface/substance/stone. Mr. U.R. Lalit, learned senior counsel for the appellants argues that this suggestion by the doctor would also negate the prosecution case that the hammer was the weapon of offence.

916. If this proposition were to be accepted, it would mean that a wound of this nature could be caused when a moving person hits a stationary hard surface.

917. Our attention stands drawn by Mr. Dayan Krishnan, learned Additional Standing Counsel for the State to medical literature and authorities which abounds on the subject and shows that when a moving head hits a flat surface, the same results in what is termed as `countrecoup injury' and will result in a lesion in an area opposite to the point of impact. In this regard, Dr. K.S. Narayan Reddy in the afore-noticed text states as follows: -

―CONTRECOUP LESIONS: Coup (blow, impact) means that the injury is located beneath the area of impact, and results directly by the impacting force. Contrecoup means that the lesion is present in an area opposite the side of impact.

...Contrecoup injuries are not seen if the head is well fixed and cannot rotate.

Contrecoup inury is caused when the moving head is suddenly decelerated by hitting a firm surface, e.g., striking the head on the ground during a fall, usually seen in traffic accidents. Subdural or subarachnoid haemorrhage may be caused as a countercoup lesion. The sudden arrest of the head results in the brain which is still in motion, striking the arrested skull. A blow to the head causes the skull to move forward, but the brain lags behind for a brief period and the skull strikes the brain (acceleration injury). Another factor responsible for countercoup injury is formation of a cavity or vacuum in the cranial cavity on the opposite side of impact, as the brain lags behind the moving skull. The vacuum exerts a suction effect which damages the brain. Occipital injuries produce severe and extensive contrecoup lesions in the frontal region.

...A blow to the head produces coup contusions, while contrecoup contusions are either small or absent. A fall on the head produces contrecoup contusions while coup contusions are small or absent. Contrecoup injuries are rare before the age of three years. Contrecoup injury is seen in skull, brain, liver, heart and lungs.‖ (Underlining by us)

918. J.B. Mukherjee in the Forensic Medicine and Toxicology explains the result of a moving head hitting a stationery surface as follows:

―Contre-Coup injury: It is a form of brain injury in which, damage of the brain is noticed exactly opposite the site of impact as under the blow itself. This injury depends upon the acceleration-decelleration strains; hence it will occur only when a moving head is struck or comes to a sudden halt on impact; it will not be seen when the head at the time of injury, is well fixed, held immovable and can not rotate. In such contre coup injury, because of sudden rotation of the head and consequent movement of brain inside the skull, lacerations and contusion of the brain occurs from forcibly striking against rough projections on the base of the skull or by impact against dural partitions, lesions showing up just on the opposite surface of the point of contact. Thus occipital impact will result in contre-coup bruising and laceration of the undersurface of frontal lobes and tips of temporal lobes; similarly blows over left parietal region will produce contre-coup lesion over external surface of frontal and temporal lobe of the opposite side."

(Underlining supplied)

919. As per Jai Singh P. Modi in the textbook of Medical Jurisprudence and Toxicology (24th Edition, 2011) (pages 587 - 588), "conter-coup injuries which are caused by rotation will not occur, if the head is so well fixed that it cannot rotate at all when it receives a blow."

920. Ex. PW-3/1, the post-mortem report does not show existence of any countrecoup lesions or injuries which would have occurred if the skull injury was caused by a fall. There is no doubt in the present case so far as the place of force being applied on the brain which is identified by the place of the fracture. The laceration in the brain were behind the fracture. A countercoup laceration shows up opposite to the point of contact on the head. Hence the theory as suggested by the defence to the doctor of the deceased having fallen on a hard surface/substance/stone and suffered the fracture on the skull has to be rejected.

921. As per the post mortem report, the tongue of the dead body is protruding. Mr P.K. Dey urges that the tongue protrudes if the wind pipe or the neck is pressed to immobilize a person. It is urged that the fact that the tongue was protruding shows that the neck was pressed, and the defence suggestion that the injury is caused by a fall is thus belied by this fact as well.

(v) Failure to ascertain origin of the blood on the hammer

922. It has been objected on behalf of the appellants that the prosecution has failed to ascertain the origin of the blood on the hammer. It is urged that there is no evidence that the blood of the deceased was found on the hammer which renders doubtful that it was the weapon of offence.

923. It is not disputed that the recovered hammer was sent for a forensic examination to the Forensic Science Laboratory, Malviya Nagar, New Delhi-110012 and the forensic report (Exh. PW-35/57) dated 29th April, 2002 was received on the 17th of May 2002 from the laboratory therefrom. As per the forensic report, an iron hammer with a wooden handle having brownish stains on the iron part of the hammer was sent for a forensic examination. This serological report dated 29th April, 2002 Exh.PW-35/57 reports that human blood was detected on the iron hammer using serological techniques.

It is well settled that existence of human blood on a weapon is an important circumstance to be taken into consideration.

924. The appellants have urged that the failure to ascertain its origin, renders the serological finding of no consequence. This issue is not res integra. In the judgment reported at (1999) 3 SCC 507, paras 25-27), State of Rajasthan v. Teja Ram, on this failure of the serologist, the Supreme Court held as follows: -

> —25. Failure of the Serologist to detect the origin of the blood, due to disintegration of the serum in the meanwhile, does not mean that the blood stuck on the axe would not have been human blood at all. Sometimes it happens, either because the stain is too insufficient or due to hematological changes and plasmatic coagulation that a Serologist might fail to detect the origin of the blood. Will it then mean that the blood would be of some other origin? Such a guess work that blood on the other axe would have been animal blood is unrealistic and far-fetched in the broad spectrum of this case. The effort of the criminal court should not be to prowl for imaginative doubts. Unless the doubt is of a reasonable dimension which a judicially conscientious mind entertains with some objectivity, no benefit can be claimed by the accused.
>
> 26. Learned Counsel for the accused made an effort to sustain the rejection of the above said evidence for which he cited the decisions in Prabhu Babaji v. State of Bombay and Raghav Prapanna Tripathi v. State of UP. In the former Vivian Bose J. has observed that the Chemical Examiner's duty is to indicate the number of blood stains found by him on each exhibit and the extent of each stain unless they are too minute or too numerous to be described in detail. It was a case in which one circumstance projected by the prosecution was just one spot of blood on a dhoti. Their Lordships felt that "blood could equally have spurted on the dhoti of a wholly innocent person passing through in the circumstances described by us earlier in the judgment." In the latter decision, (Raghav, Prapanna Tripathi supra) the Court observed regarding the certificate of a chemical examiner that inasmuch as the blood stain is not proved to be of human origin, the circumstance has no evidentiary value "in the circumstances" connecting the accused with the murder. The further part of the circumstance in that case showed that a shirt was seized from a dry cleaning establishment and the proprietor of the said establishment had testified that when the shirt was given to him for drycleaning, it was not bloodstained.

27. We are unable to find out from the aforesaid decisions any legal ratio that in all cases where there was failure of detecting the origin of the blood, the circumstance arising from recovery of the weapon would stand relegated to disutility. The observations in the aforesaid cases were made on the fact situation existed therein. They cannot be imported to a case where the facts are materially different."

(Underlining by us)

925. This judicial pronouncement was followed by the Supreme Court in (1999) 9 SCC 581 (para 27) Molai and another v.

State of M.P. and in (2001) 2 SCC 205 (para 20) Gura Singh v. State of Rajasthan.

926. In Molai and another (Supra), the prosecution had recovered a knife at the instance of the accused. It was found that it did have human blood but the blood group could not be determined. The Supreme Court considered the issue as to whether in the absence of determination of blood group, it would be unsafe to connect the recovered knife with the crime in the instant case and attribute its use by the accused persons. Placing reliance on the principle laid down by the Supreme Court in Teja Ram (supra), it was held that it would be an incriminating circumstance if the blood was found to be of human origin. The FSL report had certified that the blood on the knife was of human origin.

927. In para 20 of Gura Singh v. State of Rajasthan (supra), on the same aspect the Supreme Court observed as follows: -

—In view of the authoritative pronouncement of this Court in Teja Ram's case we do not find any substance in the submissions of the learned counsel for the appellant that in the absence of the report regarding the origin of the blood, the trial court could not have convicted the accused. The Serologist and Chemical Examiner has found it that the chadar (sheet) seized in consequence of the disclosure statement made by the appellant was stained with human blood. As with the lapse of time the classification of the blood could not be determined, no bonus is conferred upon the accused to claim any benefit on the strength of such a belated and stale argument. The trial court as well as the High Court were, therefore, justified in holding this circumstance as proved beyond doubt against the appellant."

(Emphasis by us)

928. The issue with regard to the effect of failure to match the blood on an article with the blood group of an injured/deceased person has been authoritatively considered by the Supreme Court in the judgment reported at 2012 (8) SCALE 670, Dr.Sunil Clifford Daniel v. State of Punjab holding as follows:

—28. Most of the articles recovered and sent for preparation of FSL and serological reports contained human blood. However, on the rubber mat recovered from the car of Dr. Pauli (CW.2) and one other item, there can be no positive report in relation to the same as the blood on such articles has dis-integrated. All other material objects, including the shirt of the accused, two T-shirts, two towels, a track suit, one pant, the brassier of the deceased, bangles of the deceased, the under-garments of the deceased, two tops, dumb bell, gunny bag, tie etc. were found to have dis-integrated.

29. A similar issue arose for consideration by this Court in Gura Singh v. State of Rajasthan AIR 2001 SC 330, wherein the Court, relying upon earlier judgments of this Court, particularly in Prabhu Babaji Navie v. State of Bombay, AIR 1956 SC 51; Raghav Prapanna Tripathi v. State of U.P., AIR 1963 SC 74; and Teja Ram (supra) observed that a

failure by the serologist to detect the origin of the blood due to dis-integration of the serum, does not mean that the blood stuck on the axe would not have been human blood at all. xxx xxx.

30. Learned Counsel for the Appellant has placed very heavy reliance on the judgment of this Court in Sattatiya @ Satish Rajanna Kartalla v. State of Maharashtra, AIR 2008 SC 1184, wherein it was held that in case the Forensic Science Laboratory Report/Serologist Report is unable to make out a case, that the blood found on the weapons/clothes recovered, is of the same blood group as that of the deceased, the same should be treated as a serious lacuna in the case of the prosecution.

The Appellant cannot be allowed to take the benefit of such an observation in the said judgment, for the reason that in the aforementioned case, the recovery itself was doubted and, in addition thereto, the non- matching of blood groups was treated to be a lacunae and not an independent factor, deciding the case.

31. A similar view has been reiterated in a recent judgment of this Court in Criminal Appeal No. 67 of 2008, Jagroop Singh v. State of Punjab, decided on 20.7.2012, wherein it was held that, once the recovery is made in pursuance of a disclosure statement made by the accused, the matching or non-matching of blood group (s) loses significance.

32. In John Pandian v. State represented by Inspector of Police, Tamil Nadu, (2010) 14 SCC 129, this Court held:

―The discovery appears to be credible. It has been accepted by both the courts below and we find no reason to discard it. This is apart from the fact that this weapon was sent to the forensic science laboratory (FSL) and it has been found stained with human blood. Though the blood group could not be ascertained, as the results were inconclusive, the accused had to give some explanation as to how the human blood came on this weapon. He gave none. This discovery would very positively further the prosecution case.‖ (Emphasis added)

33. In view of the above, the Court finds it impossible to accept the submission that, in the absence of the report regarding the origin of the blood, the accused cannot be convicted, upon an observation that it is only because of lapse of time that the classification of the blood cannot be determined. Therefore, no advantage can be conferred upon the accused, to enable him to claim any benefit, and the report of dis- integration of blood etc. cannot be termed as a missing link, on the basis of which, the chain of circumstances may be presumed to be broken."

(Emphasis supplied)

929. It is argued by the defence that the Investigating Officer did not ask for the blood group on the hammer which would have identified the source of the blood. The report of the Central Forensic Science Laboratory, Biology Division on the blood on the hammer (Ex.PW 35/57) is on a printed format. The learned Trial Judge has noted that this printed format contains the following three columns:-

(i)	Exhibits.
(ii)	Species of origin.
(iii)	ABO Group/remarks

930. While the first two columns stand filled-up by the laboratory, the third has been left blank by it. No fault can be attributed to the investigating agency for the same. The ld. Trial Judge has observed that only the laboratory could have explained the reason thereof and it was open for the defence to call for such evidence but it did not do so. It was held that therefore nothing would turn on the failure of the laboratory to give the blood group of the blood on the hammer.

931. The appellants were unable to challenge the categorical finding of the laboratory in Exh.PW-35/37 that the blood on the hammer head was human blood. It therefore stands established that human blood was detected on the hammer which was recovered, which is a material circumstance.

The failure to ascertain the blood group or to match it with that of the deceased or to explain its origin is not a critical factor and the accused cannot claim or derive any benefit from the same.

(vi) Whether the fact that the hammer was not shown to the doctor during investigation impacts its admissibility in evidence or evidentiary value?

932. Learned senior counsels for the appellants have contended at some length that the prosecution was unable to justify the lapse of not sending the recovered hammer to the post- mortem doctor for eliciting his opinion on whether it was possible to inflict the fatal injury by it. It was contended that the same casts doubt on the recovery having been effected, as well as suggests that the prosecution was not confident of getting a favourable opinion.

933. In this regard, Mr. Dayan Krishnan, ld. Additional Standing Counsel for the State has drawn our attention to the fact that the body was recovered on 17th February, 2002 and the post- mortem was conducted on the 18th of February 2002. The hammer was recovered thereafter only on the 28th February, 2002. In this background, the recovery cannot be doubted for the reason that the hammer was not shown to the doctor who conducted the post-mortem.

934. Mr. Dayan Krishnan, learned Additional Standing counsel for the State has urged that there is no legal requirement that a weapon of crime has to be mandatorily shown to the doctor during investigation. It is contended that law requires that the weapon of crime must be shown and opinion elicited during the testimony in court. In this regard, reliance has been placed on the pronouncements reported at (1976) 1 SCC 172 Kartarey and Ors. v. State of Uttar Pradesh (para

26) and (2010) 6 SCC 525 (para 14) Niranjan Panja v. State of West Bengal.

935. In (2010) 6 SCC 525, Niranjan Panja v. State of West Bengal, the murder weapon was never produced before the court and necessary witnesses were not examined. There was hardly any evidence of recovery of the so-called weapon. The Supreme Court held that the High Court wrongly accepted the evidence of the recovery of the so- called murder weapon as the said recovery could not be relied upon in the absence of the weapon being produced in the court. The doctor's opinion about the injury being possible by the weapon was held to be unacceptable as the weapon was not shown to the doctor in the court. Consequently in Niranjan Panja (supra), the Supreme Court ruled thus: -

"14. The High Court has accepted the evidence on the recovery of the so-called weapon. We fail to follow as to how the said discovery could at all be relied upon in the absence of the weapon being produced before the court. Again, the High Court has also commented upon the medical evidence of Dr.Ardhenu Bikash Das, the Medical Officer (PW 11) when he spoke about the injuries upon the dead body being possible by siuli katari. In the absence of siuli katari being seen by the doctor in the court, this evidence should have been discarded. It seems that the so-called weapon of the offence was lost. The High Court had also expressed its displeasure and directed that the circumstance under which the said

weapon was lost should be informed to the Court and also as to who was responsible for the loss of the material weapon. We do not see any traces about the same. Therefore, the High Court has merely relied upon the said discovery made in the absence of siuli katari and recorded under Section 27 of the Evidence Act, 1872 and the theory of "last seen together". From this, the High Court has proceeded to hold that the chain of circumstances was complete against the accused and the only unmistakable inference of the same was in favour of the culpability of the accused. We have already pointed out as to how the so-called circumstances were totally innocuous or suspicious."

(Emphasis supplied)

936. In (1976) 1 SCC 172, Kartarey and others v. State of Uttar Pradesh, the _chhura' recovered from one of the co-accused was neither shown to the medical witness nor was his opinion specifically invited as to whether all or any of the injuries caused could be with that weapon. The court emphasized the importance of eliciting the opinion of the medical witness on the aspect of the possibility of the injuries having occurred with the alleged weapon of offence in the following terms: -

"26. We take this opportunity of emphasizing the importance of eliciting the opinion of the medical witness, who had examined the injuries of the victim, more specifically on this point, for the proper administration of justice, particularly in a case where injuries found are forensically of the same species, e.g. stab wounds, and the problem before the Court is whether all or any of those injuries could be caused with one or more than one weapon. It is the duty of the prosecution, and no less of the Court, to see that the alleged weapon of the offence, if available, is shown to the medical witness and his opinion invited as to whether all or any of the injuries on the victim could be caused with that weapon. Failure to do so may, sometimes, cause aberration in the course of justice. Fortunately, in the instant case, the number, nature and dimensions of the injuries of the deceased, as deposed to by Dr. Sohan Lal, afford a sure indication that they were caused with three different weapons. xxx"

(Emphasis by us)

937. The issue which is pressed by the appellants before us is that the failure to obtain an opinion of the doctor with regard to the recovered weapon and the fatal injury during investigation is critical to the case. There is no statutory provision on this aspect. A reading of the judicial pronouncements on the subject noticed hereinabove, lends support to the view that the failure to seek an opinion of the medical expert on alleged weapon during investigation is an important circumstance which has been examined in the context of the other evidence produced on record.

938. It is however trite that having elicited an opinion during investigation would not by itself sufficient and that the alleged weapon of offence has to be put to the expert in the witness box. The mandate of law is that it is the duty of the court as much as that of the prosecution to ensure that an alleged weapon of offence is put to the medical expert and his opinion elicited as to whether injuries were possible to have been inflicted by the weapon or not.

939. A medical witness is only an expert witness who tenders his opinion on his evaluation of the facts and circumstances proved on record. His testimony is not evidence of fact and, therefore, it is open to the court to rely on other forensic and ocular evidence to arrive at its own conclusions.

940. In the instant case, the alleged weapon of offence was subject to a forensic examination and the report thereof has been proved during trial. The hammer was shown to the doctor in court as well as his

opinion elicited thereon. Therefore, the failure to show the hammer to the doctor during the course of investigation is not a circumstance on which the recovery of the hammer could be doubted or would negate the finding that it was the weapon of offence.

(vii) Failure to prepare a sketch of the hammer (Exh.P-1) at the time of its alleged recovery - effect thereof

941. Mr. U.R. Lalit, learned senior counsel appearing for Vikas Yadav has urged that no sketch of the hammer (Exh.P-1) was prepared or is available which would have facilitated confirmation of its identity at the trial. It is urged that the failure to prepare a sketch is yet another important circumstance which casts a doubt over the recovery of the hammer and authenticity of the hammer which was produced in court.

942. To examine this objection, it is essential to refer to the recovery memo Exh. PW-34/1 prepared at the time of the recovery of the hammer which has been extracted by us. We have found that Exh.PW-34/1 contains a detailed description of the hammer including its dimensions and shape. All details which enable identification of the hammer have been recorded in the recovery memo, thereby excluding all possibility of doubt as to the identity of the hammer. The unshaken testimony of the investigating officer who proved the hammer as the one recovered by the accused is also reliable and trustworthy. Therefore, failure to prepare the sketch could at the most be considered a lapse by the investigating officer.

(viii) Burns: Whether ante or post mortem

943. This, point though not orally argued, however, Mr. R.K.

Kapoor, learned counsel for Sukhdev Yadav has placed it in his written submission.

944. So far as this issue is concerned, it is again necessary to refer to the testimony of PW-3 Dr.Anil Singhal who has categorically opined that the death was due to coma as a result of ante-mortem head injury and that the burns were post-mortem. He has further explained that the coma was a result of head injury and that at different levels of coma, the person may be alive. The doctor has explained his conclusion as to why the burns were post-mortem by the fact that there was absence of redness and vesicles. The doctor had conceded that he had not checked the trachea for existence of carbon or soot which would have been there if the burns were ante mortem. The doctor also does not describe the kind and degree of the burns, except noting that they were present all over the body.

945. The absence of vesicles is not a conclusive test to conclude whether the burns were post-mortem or ante-mortem (Ref Tailor's Principles and Drugs of Medical Jurisprudence, 12th Edition, page 332 J.B. Mukherjee (supra) page 430). Shri J.B. Mukherjee in his authoritative (at page 430-432) has noted that, in very badly charred bodies, the distinction between ante-mortem burns and post-mortem burns is difficult.

946. The opinion given by the doctor as regards the coma supports his finding that the burns were post-mortem. The post-mortem report which was recorded on the examination of the dead body also records that the burns were post- mortem. This position was not challenged by any of the appellants in either trial. No argument was laid before the trial court or even before this court on this aspect.

947. A perusal of the third charge framed against the appellant also shows that the appellant proceeded to trial on the assumption that the burns were post-mortem which has never been challenged at any stage. In view thereof, such a challenge is not available to the appellant in the present proceedings and at this stage.

(ix) Whether there exist inconsistencies between inquest and the post-mortem report? If so, then the effect thereof

948. A letter requesting the post-mortem (Exh.PW-3/2) of the unidentified dead body was prepared by Inspector Chander Pal Singh of the Police Station Khurja. The request letter with the inquest report (Exh.PW-2/A) and the relevant papers were sent with the body for the post-mortem. FIR No.216/02 was registered on 19th February, 2002 at the Police Station Khurja and the investigation was taken up by PW-4 Insp. Chander Pal Singh. After receipt of the report of the post-mortem, the case was registered under Section 302/201 of the IPC which was mentioned in DD No. 46 at 20.30 hours on 19th February, 2002 (Exh.PW-3/2B).

949. The head proficient was called upon to take finger prints of the dead body in the mortuary who had reported on the back of Exh.PW-3/2 that on account of the burning of the skin of the fingers, it was not possible to get any fingerprint of the deceased.

950. Mr. Ravinder Kumar Kapoor, learned counsel for the appellant, Sukhdev Yadav has raised an argument that there was inconsistency between the inquest report and the post- mortem report. It was contended that certain injuries recorded in the post-mortem report find no mention in the inquest report.

951. Mr Kapoor, states that there is no head injury as per the inquest report. It is submitted that there was no head injury also in the photograph of the dead body (Ex PW 3/2) while the post mortem report mentions the existence of the ―lacerated injury on the head, 3 cms by 2 cms, left side of head about 7 cms above left eye brow, cavity deep‖.

952. On the other hand, placing reliance on the pronouncement of the Supreme Court in (2009) 6 SCC 600, State of UP v. Shobhnath and (2010) 10 SCC 374, Sambhu Das v. State of Assam, Mr. Dayan Krishnan has contended that merely because there exists a discrepancy between the endorsements in an inquest report and those contained in a post-mortem report will not cast any doubt on the veracity of the post- mortem report.

953. In (2009) 6 SCC 600, State of Uttar Pradesh v. Shobhanath and others, the court pointed out the fact that the inquest report is prepared by the police who are not experts as doctors, and held that the inquest report was not admissible in evidence. It was observed by the court thus:

> "23. So far as the inquest report is concerned, the same is prepared by the police who are not experts like the doctors and therefore no such weightage could be given to the inquest report. It is also settled law that inquest report cannot be treated as a piece of admissible evidence. One of the main grounds for acquitting the respondent- accused by the High Court was alleged discrepancies in the aforesaid reports which according to us is based on misreading of evidence and misappreciation."
>
> (Underlining by us) The inquest report being inadmissible in evidence for this reason, discrepancies with the post mortem report cannot impact the veracity of the prosecution case.

954. In (2010) 10 SCC 374, Sambhu Das alias Bijoy Das and another v. State of Assam, the court again had occasion to consider the impact of discrepancies between the inquest report and a post-mortem report and placing reliance on precedents laid down the legal position as follows:

> "23. Inquest report and post mortem report cannot be termed to be substantive evidence and any discrepancy occurring therein can neither be termed to be fatal nor even a suspicious circumstance which would warrant a benefit to the accused and the resultant dismissal of the prosecution case. The contents of the inquest report cannot be termed as

evidence, but they can be looked into to test the veracity of the witnesses. When an officer incharge of Police Station receives information that a person had committed suicide or has been killed or died under suspicious circumstances, he shall inform the matter to the nearest Magistrate to hold Inquest. A criminal case is registered on the basis of information and investigation is commenced under Section 157 of Cr.P.C. and the information is recorded under Section 154 of Cr.P.C. and, thereafter, the inquest is held under Section 174 Cr.P.C.

24. This Court in the case of Podda Narayana v. State of A.P., (19756) 4 SCC 153 has indicated that the proceedings under Section 174 Cr. P.C. have limited scope. The object of the proceedings is merely to ascertain whether a person has died in suspicious circumstances or an unnatural death and if so, what is the apparent cause of the death. The question regarding details as to how the deceased was assaulted or who assaulted him or under what circumstances, he was assaulted is foreign to the ambit and scope proceeding under Section 174. Neither in practice nor in law was it necessary for the Police to mention these details in the Inquest Report. In George v. State of Kerala, (1998) 4 SCC 605, it has been held that the Investigating Officer is not obliged to investigate, at the stage of Inquest, or to ascertain as to who were the assailants. In Suresh Rai v. State of Bihar, (2000) 4 SCC 84, it has been held that:

"15. ....Under Section 174 read with Section 178 of Cr. P.C., Inquest Report is prepared by the Investigating Officer to find out prima facie the nature of injuries and the possible weapon used in causing those injuries as also possible cause of death."

25. This Court has consistently held that Inquest Report cannot be treated as substantive evidence but may be utilized for contradicting the witnesses of the Inquest..."

(Underlining by us)

955. In view of the above enunciation of law, it is well-settled that an inquest report is prepared by the police who are not medical experts. It is not a substantial piece of evidence. No weightage can be given to such reports or the errors contained therein.

956. Given the afore-noticed legal position so far as the present consideration is concerned, nothing also would turn the objection on behalf of the appellant-Sukhdev Yadav or the other appellants that there were inconsistencies between the inquest report and the post-mortem report.

957. The inquest report could at the most have been utilized for contradicting the witnesses of the inquest. But it was not done so. For this reason as well, the submission of the appellant premised on contradictions between the inquest report and the post mortem has to be rejected.

VII Whether Nitish Katara was last seen alive in the company of the appellants?

The discussion on this subject is being considered under the following sub-headings:

(i) Presence of Nitish Katara as well as the appellants at Shivani Gaur's wedding at the same time

(ii) Documentary evidence regarding location of Nitsh Katara at around 1/1:30 a.m. (Electronic call records of Nitish Katara's cell phone No. 9811283641 (Exh PW21/1)

(iii) Presence of the deceased as well as appellants at the wedding at the same time

(iv) Outside the wedding venue - evidence of last seen

958. The prosecution case of the deceased having been seen alive in the company of the three appellants in the Tata Safari vehicle driven by Vikas Yadav shortly before his death and discovery of his dead body, can be divided into different stages - the first being at the wedding venue; secondly, a little distance outside the venue by Constables Inderjeet Singh and Satender Pal Singh who were part of a police patrol car Chetak 13 and thirdly by Ajay Kumar Katara at Hapur Chungi around 12:15/12:30 am. The appellants submit that there is no credible evidence of any of the above as the prosecution evidence on the same has to be discarded.

959. Mr. U.R. Lalit, learned senior counsel has urged that the prosecution case is that the deceased Nitish Katara and the appellants Vikas and Vishal Yadav left the Diamond Banquet Hall between 12-12.20 a.m. The prosecution examined PW-19 Jai Prakash Pandey, a Security Guard; PW-31 Umesh Sharma, also a Security Guard; PW-28 Constable Inderjit Singh and PW-32 Ct. Satender Pal Singh in this regard. Our attention has also been drawn to the statement of Bharat Diwakar athat Nitish Katara was called away while he was eating dinner with Gaurav Gupta and him, at 11/11:30 pm. PW-26 Gaurav Gupta to the effect that the deceased left the place where he was eating dinner at about 12/12.15 a.m.

960. As per the prosecution case the appellants and Nitish were next spotted a little distance away from the Banquet Hall at 12/12:15 am by Ct. Inderjeet Singh and Ct. Satender Pal Singh who were part of the police patrol team in police Gypsy Chetak 13.

961. It is further submitted that PW-33 Ajay Katara has testified that around 12.20 a.m./12.30 a.m. on the night intervening 16/17th February, 2002, he had seen the deceased Nitish Katara with Vikas and Vishal Yadav as well as Sukhdev @ Pehalwan in a Tata Safari vehicle at the Hapur Chungi.

962. As against the above, PW-11 Shivani Gaur, the bride; PW-

> 42 Bhawna Yadav and PW-32 Bharti Singh/Yadav have stated that the deceased was still at the Banquet Hall at around 1.30 a.m.

963. Learned senior counsel has also pointed out that PW-19 Jai Prakash Pandey and PW-31 Umesh Sharma on the one hand and PW-11 Shivani Gaur, PW-38 Bharti Yadav and PW-42 Bhawna Yadav on the other have been disbelieved by the learned Trial Judge in this behalf.

964. Mr. Lalit has submitted that the statement made by PW-11 Shivani Gaur is corroborated by the testimony of PW-38 Bharti who stated that after midnight, at about 1/1.30 a.m. after most of the guests had left, she along with her friends including Nitish Katara had taken dinner. She had also stated that the appellants Vikas Yadav and Vishal Yadav had come early and went away without dinner.

965. On the same issue Mr. Lalit relies on the evidence of PW-42 Bhawna Yadav who stated that Vikas and Vishal Yadav reached the wedding venue around 10.30/10.45 p.m. and left after 10-15 minutes at around 11 p.m. in a black Mercedes car. PW-42 had also stated that when she had dinner around 1 a.m., Nitish Katara was with them but he did not eat dinner with them.

Shivani Gaur (examined as PW-11 in the first trial and as PW-7 in Sukhdev's trial) has stood by the testimony given by her in Vikas and Vishal Yadav's trial and maintained that she had seen Nitish Katara around 01.15/01.30 a.m. of 17th February, 2002 while she was leaving for her phera ceremony. It has been argued by Mr. Ravinder Kumar Kapoor that PW-7 Shivani Gaur was the witness who had last seen the deceased person alive and not the other witnesses examined by the prosecution.

966. It has been argued by Mr. Jethmalani that the one circumstance sought to be proved by the prosecution against Vishal Yadav is to the effect that he had taken away the deceased when he was eating dinner with his friends Bharat Diwakar and Gaurav Gupta. It is urged that Bharat Diwakar appearing as PW 25 had failed to identify the accused as this person in court. Learned senior counsel

would contend that if two views on a construction of the evidence are possible, the view favourable to the accused must be adopted.

967. On behalf of appellant Vishal Yadav it is submitted by Mr. Ram Jethmalani, learned senior counsel that the prosecution has attempted to establish that the deceased was last seen alive in the company of the accused persons firstly outside the Diamond Palace Banquet Hall; and then around 12 or 12.30 a.m. in the night intervening 16/17th February, 2002 by Ajay Katara near the Hapur Chungi. The deceased was found murdered around 9:30 a.m. on 17th February, 2002.

968. Learned senior counsel has urged that even if the testimony of PW-33 Ajay Kumar was to be accepted, there was no admissible evidence that from 12.20 a.m. the deceased was continuously in the company of Vishal Yadav.

969. Mr. Jethmalani has drawn our attention to the testimony of PW-35 Investigating Officer Anil Somania. It is pointed out that PW-35 started investigation in the case on 17th and 18th February, 2002 and has stated that he searched for Vikas and Vishal Yadav but neither the accused nor the deceased were traceable. Anil Somania stated that on the 17th of February 2002, he came to Delhi at Kothi No.15, Balwant Rai Mehta Lane which was allotted to Shri D.P. Yadav, father of Vikas Yadav who was an M.P. but could not trace the accused persons even at this accommodation. However, one Kamal Kishore met him at the Balwant Rai Mehta Lane residence who was brought to the Police Station Tilak Marg and his statement was recorded there (Exh.PW-35/4). The witness stated that Kamal Kishore was working as a security guard of Shri D.P. Yadav, M.P. at Delhi.

970. Before this court, it has been urged that the exhibited statement of Kamal Kishore recorded under Section 161 Cr.P.C. showed that at 1:00/1:30 a.m. Vikas Yadav and the deceased Nitish Katara had come to the Balwant Rai Mehta Lane premises of Shri D.P. Yadav with the driver Anil. It is urged that therefore there is evidence that Vishal had parted company with Vikas Yadav. Mr. Jethmalani has also contended that the statement of Kamal Kishore showed that Nitish Katara was alive at 1.30 a.m. and that he was in the company of Vikas Yadav only.

971. It is urged that in view of the above, no reliance can be placed on the testimony of PW-33 Ajay Kumar to support the plea that the deceased was last seen alive in the company of both Vikas and Vishal Yadav. It is urged that the prosecutor did not examine Kamal Kishore as a witness because he wanted to charge Vishal Yadav as the second accused.

972. Learned senior counsel would contend that the only evidence against Vishal Yadav was that he had been seen at the wedding of Shivani Gaur in the company of Vikas Yadav, at the gate of the Banquet Hall as well as at the Hapur Chungi and there was no evidence at all that Vishal Yadav did not part company with Vikas Yadav thereafter.

973. Learned senior counsel has urged at some length that the testimony of Ajay Kumar (PW-33) deserves to be disbelieved also for the reason that prior to March, 2002, witnesses merely referred to a long car. There was no reference whatsoever to a Tata Safari vehicle and that a reference to a Tata Safari is made only in statements recorded after a Tata Safari vehicle was recovered in March, 2002, clearly manifesting the concerted effort on the part of the prosecution to frame Vishal Yadav in a false case after setting up the recovery of the vehicle. In this regard, learned senior counsel has referred to the evidence of PW-19 Jai Prakash Pandey, a security guard at the Banquet Hall who was declared hostile and was cross-examined by the prosecutor.

974. Mr. Jethmalani has argued that in this background, the evidence of the deceased and the accused having been seen together at a marriage before getting into a car or thereafter is no evidence of the deceased having been last seen alive in the company of the accused persons.

975. Learned senior counsel has also placed reliance on the pronouncement of the Supreme Court reported at 2002 (6) SCALE 266 Bodh Raj @ Bodha and Ors. v. State of Jammu and Kashmir. In this case, the Supreme Court stated as follows:

> —35. The last seen theory comes into play where the time gap between the point of time when the accused and deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that accused and deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases....‖

976. In the pronouncement reported at (2006) 10 SCC 681 titled Trimukh Maroti Kirkan v. State of Maharashtra, the Supreme Court stated as follows:

> —22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. In Nika Ram v. State of H.P. [(1972) 2 SCC 80 : 1972 SCC (Cri) 635 : AIR 1972 SC 2077] it was observed that the fact that the accused alone was with his wife in the house when she was murdered there with —khukhri‖ and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt. In Ganeshlal v. State of Maharashtra [(1992) 3 SCC 106 : 1993 SCC (Cri) 435] the appellant was prosecuted for the murder of his wife which took place inside his house. It was observed that when the death had occurred in his custody, the appellant is under an obligation to give a plausible explanation for the cause of her death in his statement under Section 313 CrPC. The mere denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the commission of murder of his wife....‖ (Emphasis supplied)

977. This well settled principle was reiterated by the Supreme Court in the judgment reported at (2011) 11 SCC 754, Sk. Yusuf v. State of West Bengal placing reliance on the earlier pronouncement reported at (2008) 15 SCC 449, Mohd. Azad alias Samin v. State of West Bengal and (2011) 3 SCC 109, State through Central Bureau of Investigation v. Mahender Singh Dahiya.

978. In support of the submission that the evidence led by the prosecution was wholly insufficient on the issue of the deceased having been last seen alive in the company of the appellants, reliance has been placed by Mr. U.R. Lalit on the pronouncement reported at (2007) 3 SCC 755 State of Goa v. Sanjay Thakran wherein it was held thus:

> —31. Before we analyse the evidence...we would refer to certain decisions of this Court on the point of —last seen together‖. It is a settled rule of criminal jurisprudence that suspicion, however grave, cannot be substituted for proof and the courts shall take utmost precaution in finding an accused guilty only on the basis of circumstantial evidence....
>
> xxx xxx xxx

> 32. In Ramreddy Rajesh Khanna Reddy [(2006) 10 SCC 172 : (2006) 3 SCC (Cri) 512 : JT (2006) 4 SC 16] this Court further opined that even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.
>
> xxx xxx xxx
>
> 35.....Even if we believe the evidence of PW 11 that he saw D-1 in the company of A-1 walking towards the beach and thereafter saw A-1 returning alone after 30 to 45 minutes, there has been a time gap of about 2¼ hours when A-1 and D-1 were last seen together and when the dead body of D-1 was found at around 00.30 a.m. at Benaulim Beach. No evidence was led by the prosecution to prove the fact that there was no possibility of any other person approaching D-1 on the beach which is a public place, during the intervening period when A-1 was last seen with the deceased and when the crime was detected.‖ (Underlining by us)

979. Reliance was also placed by Mr. Jethmalani, Sr. Advocate on a judgment of this court reported at 2000 (56) DRJ (Suppl) 566 (DB) Tahir and Ors. v. State. In para 13 of this judgment, the court held thus: -

> ―13. The last seen theory comes into play where the time gap between the point of time when the accused and deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of crime becomes impossible. It would be difficult to positively establish that the deceased was last seen with the accused since there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that accused and deceased were last seen together, it would be hazardous to come to a conclusion of guilt...‖

980. On the issue of last seen evidence, Mr. Jethmalani learned senior counsel has also placed strong reliance on the pronouncement of the Bombay High Court reported at (2000) Vol. 102 (2) Bom.L.R. 188 Slim Babamiya Sutar ALIAS Jamadar v. The State of Maharashtra wherein the principle was succinctly laid down in the following terms :-

> ―10A. We wish to point that the circumstance of last seen in order to constitute an incriminating circumstance in a murder case must be in close proximity with the recovery of corpse of deceased. The rationale for this is that only in such a contingency would it probablise the inference that the person with whom the deceased was last seen in all probability murdered him. And unless such an inference is probablised it would not be an incriminating circumstance.‖ (Underlining by us)

981. There can be no dispute with the principles laid down in the judicial precedents placed before us so far as the last seen alive theory is concerned. The evidence led by the prosecution has to be tested on these binding principles which we commence hereafter.

(i) Presence of Nitish Katara as well as the appellants at Shivani Gaur‟s wedding at the same time

982. It is the case of the prosecution that the accused Vikas and Vishal Yadav were present at the wedding celebrations of PW-11 Shivani Gaur from where they abducted the deceased Nitish Katara and that the deceased was last seen alive in the company of Vikas and Vishal Yadav alongwith Sukhdev Pehlwan.

983. The prosecution case rests on the evidence of the deceased having been last seen alive at and outside the venue of the wedding of Shivani Gaur and Amit Arora in the company of the appellants. The evidence in this regard revolves around the departure of Nitish Katara from the wedding celebrations of PW-11 Shivani Gaur.

984. There is no dispute that Shivani Gaur's wedding was fixed for the 16th February, 2002 at the Diamond Palace, Banquet Hall, Kavi Nagar, Industrial Area.

985. The bride Shivani Gaur reached the venue at about 9 p.m.

986. Bharat Diwakar was staying with the deceased Nitish Katara in his Chelmsford residence in Delhi. On 15 th February, 2002, Bharat and Nitish had attended the ladies sangeet in which Bharti had also participated.

987. On the 16th of February 2002 Bharat Diwakar (PW-25) and Nitish Katara left the Katara residence for the wedding between 9:30 p.m. to 10: 00 p.m. They reached the venue at around 10:15 p.m. The photographs Ex.PW6/2 as well as video cassettes Ex.PW 42/1 bear testimony of the fact that the "baraat" (bridegroom party) had not arrived at the venue by that time. The deceased and Bharat Diwakar did meet the bride and also got themselves photographed with Bharti and her. The bridegroom does not feature in this picture.

988. So far as Nitish Katara's presence at the wedding is concerned, the testimony of Bharat Diwakar (PW-25) as well as their friend Gaurav Gupta (PW 26) in Vikas Yadav's trial is material. Bharat Diwakar and Nitish Katara reached the Diamond Banquet Hall at about 10.15 p.m. in a hired car. After wishing the couple, PW-25 has testified that Nitish Katara, Gaurav Gupta and he left for the adjoining garden where the food arrangement had been made. While they were eating dinner at around 11-11.15 p.m., one young male came to them and enquired as to which of them was Nitish Katara. Nitish identified himself to that person at which they moved away from them and were talking. Bharat Diwakar and Gaurav Gupta continued with their meal. Thereafter, Bharat Diwakar (PW-25) did not meet either Nitish or that person and he did not know where they went.

989. A strenuous effort was made before the trial courts and also before us on behalf of the appellants to create a doubt with regard to the time at which the deceased was last seen at the wedding venue. As noticed above, it is in the testimony of Bharat Diwakar that the deceased was called away when he was eating dinner with his friends. PW-26 Gaurav Gupta is confused about the time at which he reached the Banquet Hall. It is noteworthy that PW-26 Gaurav Gupta had travelled down from Faizabad the very same evening and was actually dropped at the venue by another friend PW-20 Yashoman Tomar. There is, therefore, reasonable possibility of the witness being disoriented about the actual time when he reached the wedding. However, this witness is also categorical that only Bharat, Nitish and he had gone for dinner together and there was no one else with them.

990. It is necessary to also examine the testimony of Shivani Gaur, Bharti Yadav and Bhawna Yadav on this aspect. PW- 11 Shivani Gaur states that at her wedding she took her meal at 12.30 or 1 a.m. and at that time she saw Nitish Katara on one side but did not see him take his meal.

991. Given her testimony, the court has put a specific question to PW-11 Shivani Gaur to tell as to which of her friends left the wedding venue at what time. She answered that she would not know because they came to the stage, got photographs clicked, ate food and went away. She also testified that since it was very crowded she did not know who came and went away when. All that this witness could say was that Swati, Puja, Priti and Vipin and Amit were her friends who left last at about 12.30 a.m.when she was going for dinner. PW-11 makes a specific statement that all her other friends left before 12.30a.m. She also explained that she was able to state that these were the last people who left because, at that time, the crowd was not much and they actually came to her and said good bye. PW-11

is also categorical that at the time of the satpati ceremony which lasted from 1:30 a.m. to 4:30 a.m., only her close friends Bharti Yadav, her sister Bhawna and one Lata were present. She further stated that she had lastly seen Nitish Katara at around 1:30 a.m. when after taking her meal, she was going for the saptbadi.

992. The learned trial judge has held that PW-11 Shivani Gaur has made a tutored and false statement that she saw Nitish Katara at about 12:30/01:00 a.m and again at 01:30 a.m. The trial judge has held that the witness has so testified only to assist the defence in challenging the testimony of PW-33 Ajay Katara that he had seen Nitish Katara in the company of all the appellants at Hapur Chungi around 00:20 hrs or 00:30 hrs. The learned trial judge has completely disbelieved the testimony of this witness.

993. The testimony of PW-11 with regard to the timings at the wedding is incredulous and impossible to say the least. In her photographs (Exh PW6/1-4, Shivani Gaur, a bride, is not wearing a watch. The assessment of her testimony by the learned trial court judge is correct and cannot be faulted.

994. We have noted PW-38 Bharti's statement that she was merely friendly with Nitish. It is also in her testimony that on 16th February, 2002, she had sat with PW-11 Shivani Gaur throughout the marriage. She has also testified that she remained at the wedding till the _vidai ceremony‟ whereas others left after wishing the couple. PW-38 has also stated that her mother; brother Vikas ; cousin Vishal and sister Bhawna had also attended the wedding. Amongst her friends, Nitish Katara, Gaurav Gupta, Bharat Diwakar, Lata and Vipin also attended the wedding.

995. So far as the departure of Nitish Katara from the wedding venue is concerned, Bharti was unable to recollect the exact time when her friends including Nitish had left the venue. She stated that it was late and only a few guests were left and the phera ceremony were about to take place.

996. The evidence on record manifests the pressure to which Bharti Yadav was subjected to toe the defence line. Immediately after the wedding, she was physically spirited away from her residence in Ghaziabad and sent to Faridabad on the 17th of February 2002 itself. This stands established from call records of the cell phone no.9810038469 which she was using.

997. Nitin Katara has placed on record e-mails which he says that he received from Bharti Yadav wherein she clearly stated that she could not even disclose her whereabouts and was writing furtively. These mails till 24th February, 2002 reflect the deep anguish and pain the witness was undergoing as well as her ignorance of the plight of Nitish Katara, admittedly a close friend, if not more, at what she also believed and at the hands of her brothers. She beseeched Nitin Katara on the cell and e-mails to trace Nitish at the earliest and expresses hope to see both of them shortly. What is shocking is that this young, educated, articulate adult was kept in the dark about recovery of Nitish's dead body even till 24th February, 2002.

998. Matters don't end here and towards the end of September/October 2002, Bharti Yadav is sent away to U.K. ostensibly to pursue an academic course but, as the trial court record reflects, it was really a blatant attempt to prevent her appearance in court as a witness.

999. PW-38 Bharti Yadav appeared in the witness box on 29 th November, 2006. The witness was represented by counsel during her testimony. As she was completely resiling from her previous statement, the learned Special Public Prosecutor for the State was permited to cross-examine her. On the 29th of November, 2006 while under cross-examination by the Special Public Prosecutor, the witness sought an adjournment on the ground that she was unwell prior to the lunch recess.

1000. Bharti Yadav's testimony reflects that she has done her utmost to resist the pressures. But then Vikas Yadav is her brother and Vishal Yadav, a first cousin. So in the previous part of her testimony,

she only attempts to distance herself from Nitish. Finding herself unable to support the false defence case, she utilizes the shield of ill health to get an adjournment on the 29th of November 2006. On the next day she is still not able to make a positive assertion of any false fact relating to Nitish Katara in her cross examinations by the Special Public Prosecutor or by the Senior Counsel for Vikas Yadav or ld. counsel for Vishal Yadav. Clearly realizing the reluctance of this witness, the defence then adopted an ingenious method of bringing the false statement into the evidence. Recourse was taken to putting the false assertaion of fact, as a suggestion to the witness. Bharti Yadav appears to have finally succumbed to the pressures at the final stage when she conceded to the suggestion by Shri S.K. Sharma, Ld. counsel for Vishal Yadav to the effect that she had dinner with her friends including Nitish Katara around 1:00 am. Unfortunately for the prosecution, while putting the suggestion, learned counsel for Vishal Yadav had completely overlooked Shivani Gaur's categorical statement that Nitish did not eat dinner with them.

1001. The appellants also overlooked the fact that Nitish had come to the wedding with Bharat Diwakar. Shivani Gaur, Bharti and Bhawna Yadav make no reference to Bharat Diwakar's presence at 1:30 am. His own evidence is to the contrary.

1002. Bharti's evidence that she ate dinner with Nitish Katara is also contrary to the unchallenged evidence of PW 25 Bharat Diwakar and PW 26 Gaurav Gupta who stated that the three of them were together at dinner and do not mention that Bharti presence at that time them.

1003. We may also note that while recording the testimony of PW-

> 42 Bhawna Yadav, the video cassette, Ex.PW42/1 of the marriage ceremony of Shivani Gaur was played in court on the 9th of March 2007. The trial court has observed that in the video cassette, Bharti is not with the bridal couple when it was proceeding towards the dining table. PW 42 Bhawna also admitted that Bharti was not at the dining table with the couple and the other people. The court observed that the complete table had been filmed and that PW 42 Bhawna also was not eating when the bridal couple was taking dinner. Bharti featured in the video with the bridal couple only at the _Vedi' for the phera ceremony rendering her testimony about eating dinner with Nitish at 1:30 am undubitably false. The learned trial judge has therefore, correctly held on this aspect that the testimony of PW-38 Bharti on this aspect also does not inspire any confidence.

1004. Interestingly during her testimony PW-38 Bharti does not categorically deny that Vishal Yadav had sought out Nitish Katara when he was with his other friends and taken him out of the marriage hall but merely stated that she had no knowledge. So was the answer to other similar questions with regard to Nitish having been taken by the appellants in a Tata Safari vehicle. She also nowhere stated that the appellants had not come to the venue in the Tata Safari vehicle.

1005. Even more important is the fact that if this testimony was true, PW-38 Bharti Yadav would have been anxious to enter the witness box as such testimony would have facilitated the defence of her brothers and prevented the long incarceration for her brother and her first cousin. This fact by itself goes a long way to support the findings of the trial judge that the witness has been produced after wait of over three and half years only when the defence was confident that she could be influenced by her family to make a testimony which facilitated her brothers' defence.

1006. This discussion would be incomplete without referring to the evidence of PW-42 Bhawna Yadav on the duration of Nitish Katara's presence at the wedding. It is important to note that in PW-42's examination-in-chief on 9th March, 2007, the witness is categorical that Bharti and she were throughout together in the marriage function at the Diamond Palace. In answer to a specific question as to whether Bharti parted company from her at any time during the marriage function, Bharti Yadav had

stated that she could not say _if she went aside' for a minute or so during the marriage function. This statement is contradictory to the statement of PW 11 Shivani Gaur as well as PW-38 Bharti.

1007. Bhawna Yadav sought deferremnt of her evidence on 9th March, 2007. She resumed on 28th March, 2007. In her cross examination on 28th March, 2007 PW 42 Bhawna Yadav voluntered that on that date she had dinner about 01:00 a.m and Nitish Katara was with _us' but he did not have dinner with _us'. She admitted the suggestions that in the video she had been shown at one time at the dining table with Shivani Gaur but was not eating food at that time.

1008. The reason for the deferment by Bhawna Yadav is obvious.

She had not stated what she was supposed to so as to assist her brothers. On the next date Bhawna Yadav, a sister of Vikas Yadav, introduced a Mercedes into the case in which the two brothers left the wedding venue. Interestingly she says while Vikas was driving it, Vishal sat on the rear seat which is strange as the passenger seat was vacant! It was thus a desperate attempt by the appellants at the last stages of Bhawna's cross-examination to establish that Nitish Katara was at the wedding long after Vikas and Vishal Yadav left the venue in a Mercedes.

1009. The photographs Ex.PW6/1, PW6/2 and PW6/3 as well as the wedding cassette show that neither PW 11 Shivani Gaur nor PW 38 Bharti are wearing a watch. These witnesses would have no manner of knowing the time of the departure of any person. It is in any case unbelievable and completely unnatural that either a bride, or her accompanying best friend, would be keeping tabs on the arrival or departure of guests.

1010. These witnesses had no recollection of important events and essential circumstances in their daily lives. PW-11, Shivani had a selective amnesia. She could not recollect significant details while giving her testimony in Vishal and Vikas's trial. The information about which the witness stated that she cannot remember is information which any person would normally be expected to remember. Yet despite passage of four years, when she cross-examined on 13th September, 2006, she had total recollection of date, time and length of period of Vikas and Vishal Yadav's visit to her wedding and time she claims to have seen Nitish Katara.

Bhawna Yadav could not remember as to who accompanied her to Mumbai in the extraordinary day trip to celebrate a birthday - not an everyday trip. She does not recollect even the occupation or phone number of her husband or the landline of her house.

Bharti's evidence is also replete with what she could not recollect, including ordinary details of her residential landline numbers and places where the photographs on record were taken.

1011. In the judgment dated 28th May, 2008, the learned Trial Judge has noted that Bhawna Yadav was not cited as a witness and was examined only to prove call records of cell phone no.9810038469 and that the accused persons took complete benefit of her appearance as a prosecution witness, introducing new things in her cross-examination.

(ii) Documentary evidence regarding location of Nitsh Katara at around 1/1:30 a.m. (Electronic call records of Nitish Katara‟s cell phone No. 9811283641 (Exh PW21/1) 1012. The oral evidence given by Shivani Gaur, Bhawna Yadav and Bharti on the aspect of presence of Nitish Katara at the wedding venue at 01:00 a.m. or thereabouts is contrary to the unchallenged evidence of Bharat Diwakar and Gaurav Gupta.

1013. This oral testimony of Shivani Gaur, Bharti Yadav and Bhawna Yadav is falsified by documentary evidence on record which we now propose to examine.

1014. Bharat Diwakar has explained to the court that Nitish's friends had noticed at about 12.15 p.m. that Nitish had not rejoined them. The witness had also stated that when Nitish did not return till 12.45 a.m., he and Gaurav Gupta had unsuccessfully searching for Nitish. He could not be found at the wedding venue. They tried calling Nitish on his cellphone but could not make contact. However, Gaurav Gupta succeeded in establishing contact with Nitish on his cellphone at about 1 a.m. 1015. The above oral testiomy of witnesses requires to be examined in the context of the documentary evidence led by the prosecution. That Nitish Katara was in possession of his cell phone is undisputed. The location of Nitish Katara's cell phone is concerned is established from his electronic call record proved by the testimony of PW-21 Deepak Gupta. As per Exh.PW-21/1, from 10:00 pm on 16th February, 2002 till the last registered call on his phone, the following calls were received by or made from Nitish Katara cell phone as well as the tower location serving it :-

S.No.	Phone No.	Call timing	Location ID with location	Direction	Duration
01	9811220691	22:24:05	11581 (Kavi Nagar, Ghaziabad)	Incoming	1:08
16th February, 2002	Yashoman Tomar (used by Gaurav)				
02	9811034829	00:35:40	12252 (Ghaziabad, Raj Nagar)	Incoming	0.20
17th February,	Bharti				
03	9811034829	00:40:44	12252 (Ghaziabad, Raj Nagar)	Incoming	0:21
17th February,	Bharti Yadav				
04	9810154964	00:43:14	12252 (Ghaziabad Raj Nagar)	Incoming	0:25
17th February,	Bharat Diwakar				
05	9810154964	00:46:27	12252 (Ghaziabad, Raj Nagar)	Incoming	0:07
17th February,	Bharat Diwakar				
06	9811220691 (by Gaurav Gupta) Yashoman Tomar's cell	00:58:26	12252 (Ghaziabad, Raj Nagar)	Incoming	0:17
17th February, 2002					
07	9810154964	1:11:18	12253 (Ghaziabad, Raj Nagar)	Incoming	0:20
17th February,	Bharat Diwakar				

1016. The above shows that there were incoming calls to Nitish's phone no.9811283641 from Bharat Diwakar's cell phone no.9810154964 at 12:43:14, 12:46:27 and 1:11:18. There were calls received on Nitish Katara's mobile from mobile no.9811220691 which stood registered in the name of Yashoman Tomar which Gaurav Gupta has claimed to have made at 22:24:05 hours and 12:58:26 hours. The call records also show that there were two incoming calls from phone no.9811034829 which was being used by Bharti at 00:35:40 and 00:40:44 hours. Thus Nitish Katara received around eights calls from different people which included Bharat Diwakar, Gaurav Gupta and Bharti all of whom were

admittedly at the wedding at the Diamond Palace Banquet Hall till 01:00 a.m. If he was still at the wedding venue at Diamond Palace Banquet Hall as stated by Shivani Gaur, Bharti Yadav and Bhawna Yadav, there would be no occasison for them to be calling Nitish Katara on his cell phone.

1017. It stands established that the Diamond Palace Banquet Hall was in Kavi Nagar which was served by the cell tower ID 11581 (Exh.PW-21/1) also located in Kavi Nagar.

1018. Except the first call from Yashoman Tomar's phone which shows that Nitish Katara was at or around Kavi Nagar, Ghaziabad, all the other phone calls were received when he was at or around Raj Nagar in Ghaziabad.

1019. At around 1 a.m., an incoming call was received by Nitish Katara's cell phone at location ID 12253 which corresponds to Raj Nagar, Ghaziabad. This proves that Nitish Katara was not at the wedding venue at 1 a.m. when this call on his cell phone was received by him.

1020. The evidence of PW 25 Bharat Diwakar and PW 26 Gaurav Gupta coupled with the documentary evidence of electronic records proved by PW-21 (Exh.PW-21/1) establishes that after midnight Nitish was not at the Diamond Palace Banquet Hall.

1021. In his examination-in-chief Bharat Diwakar stated that around 12:45 am, after Gaurav Gupta and he finished eating, they both tried calling Nitish on his cell phone but could not get through to him. He thereafter started inquiring in the Diamond Palace Banquet Hall as to whether the person wearing a red kurta had been seen by anybody when he was told that he was talking with a person named Vishal. It is evident from the above that Bharat Diwakar had learnt at the wedding itself about the name of the person who had taken Nitish as being Vishal. The court questioned Bharat Diwakar as to who had told him the name of the person with whom Nitish had left the wedding as Vishal. In response Bharat Diwakar stated that he could not recollect the name of the person who told him so. Bharat Diwakar confirmed that he had made inquiries from all those persons who were standing on the gate if they had seen any person in a red kurta leaving. At that time he was told that the name of the person with whom Nitish had gone was Vishal.

1022. When Bharti Yadav appeared as PW-38 in her brother's trial and was questioned about Vishal Yadav approaching Bharat Diwakar, Gaurav Gupta and Nitish Katara at the marriage function and taking Nitish Katara out of the marriage hall, Bharti Yadav did not deny this fact categorically but only claimed that she had no knowledge. Bharat Diwakar (PW-

25) has stated that Nitish Katara was called away from their company at 11/11.15 p.m. So far as the timing, the time at which Nitish Katara left the Banquet Hall or evidence about his being outside the wedding venue is concerned, we shall discuss it hereafter.

(iii) Presence of the deceased as well as appellants at the wedding at the same time 1023. Let us examine the evidence on the aspect of the presence of the accused persons at the wedding. So far as the presence of Vikas and Vishal Yadav at the wedding is concerned, the bride Shivani Gaur (PW-11). stated that Vikas and Vishal came around 11/11.15 p.m. and after greeting the couple they went away without taking a meal. Shivani Gaur has also stated that the accused Vikas and Vishal Yadav had told her husband that they had to go to a polling booth and could not stay long for which reason they did not eat their meal.

1024. There is no dispute that Nitish Katara was also present at the wedding at that time.

1025. The photographs Ex.PW6/2 (featuring Shivani Gaur with Bharat Diwakar, Nitish Katara and Bharti); Exh.PW6/3 as well as Exh.PW6/4 (featuring the bridal couple with Vishal Yadav in a (black jacket) and Vikas Yadav (in a white shirt) have also been proved on record establish the presence of the deceased and the accused person respectively at the wedding.

1026. Mr. Kapoor has referred to the statement of PW-7 Shivani Gaur whose wedding was attended by Vishal and Vikas Yadav as well as the deceased Nitish Katara on the night intervening 16/17th February, 2002. He submits that the witness, who was the bride on that day, stated that she had seen Nitish Katara around 1/1.30 a.m. while leaving for the phera ceremony and therefore the prosecution case that Nitish was abducted by the three appellants must fail.

1027. Before proceeding any further, the question which begs an answer is whether it was possible to see the main entrance of the Banquet Hall premises from the dias which was located insde the hall? To answer this question it is essential to visualize the position at the Diamond Palace Banquet Hall.

1028. It is in the evidence of PW-14 Sandeep Goyal, owner of the Banquet Hall that the banquet hall has one office block and one shed. There are three gates of 13 feet width. The main entrance is in the direction of the north east of the plot. It is in the testimony of PW-42 Bhawna Yadav that the venue was enclosed with the boundary walls of the height of 8 feet or more with grill fixed thereon. Inside the banquet hall there was open space and then the banquet hall. To access the banquet hall, a few steps had to be climbed.

1029. In his cross-examination, Gaurav Gupta further stated that the main gate of the venue was on the main road; then on both sides there were _kanats' (marquees) followed by four or six stairs for entering the marriage hall. The garden where dinner was laid was on the right side and that more than 500 to 600 people who were moving around were taking their meals.

1030. The sitting arrangement for the bride and groom was made at the centre of the hall which had a wall in the centre. PW-14 Sandeep Goyal has stated that the dinner arrangement on 16 th February, 2002 was made in the lawn which, if facing the banquet hall, fell on to right side of the banquet hall.

1031. The main gate was around 35 to 40 feet from the main road.

The venue had to be accessed by the ramp of 35 feet from the main road to the gate of the plot.

1032. So far as the venue is concerned, it has emerged in the testimony of Bhawna Yadav that the boundary wall of the premises was of the height of about 8 feet or more with grills fixed thereon. Inside the boundary wall there was open space and then the Banquet Hall which could be accessed by a few steps.

1033. It is noteworthy that Shri Sandeep Goel, owner of the Diamond Palace Banquet Hall (PW-2 in Sukhdev Pehalwan's case). He confirmed that the entire main gate is not visible from the dais where the bride and the bridegroom are seated and only the upper portion of the main gate is visible therefrom. Therefore it was not possible to see from the dias as to who was leaving the wedding venue.

1034. Shivani Gaur (PW-11) stated that the wedding on 16th February, 2002 was preceded by a sangeet on 15 th February, 2002 which was attended by her friends Bharti Yadav, Nitish Katara and Bharat Diwakar. It is in the testimony of this witness that she and her husband were sitting on the dias in the Banquet Hall on 16th February, 2002 from 10.20 p.m. till 12.30 a.m. on 17th February, 2002 and that the meal for the baraat started at 10.00 or 10.30 p.m. at a place different from the hall.

1035. Shivani Gaur testifying as PW-7 in Sukhdev Pehalwan's trial, again in her cross-examination stated that Vikas and Vishal Yadav had come to meet her on the dais on the wedding site at 10.30 pm and left immediately thereafter. A clarification was sought from the witness by the court as to what she meant from leaving immediately. The witness explained that they left the dais where she was sitting with the bridegroom after getting their photographs clicked in a hurry. When further querried, the witnesses pleaded ignorance about when they left the venue hall as she was seated on the dais. It is evident therefrom that the witness certainly did not know when Vikas and Vishal Yadav actually left the wedding venue as she was on the dais till after 12.30 on that night.

1036. PW-38 Bharti Singh corroborates PW-11 in her statement that Vikas and Vishal had come together to the marriage venue and did not eat dinner. So far as Vikas and Vishal Yadav's departure is concerned, Bharti has stated that she saw them leaving the place (dias) where the couple was sitting between 10.30 p.m. and 11 p.m. She accepts the suggestion that she could not state as to what time they left the Diamond Palace Banquet Hall after leaving the hall and with whom.

1037. Let us examine what the third witness who has attempted to assist the defence has to say. PW-42 Bhawna Yadav is also a daughter of Shri D.P. Yadav and sister of Vikas and Bharti Yadav. It is interesting that at the initial stages of her cross- examination, on the 9th of March 2007, Bhawna Yadav accepted the suggestion that Vikas Yadav and Vishal Yadav were not appearing in any frame of the wedding cassette Exh.PW-42/1. She also accepted the suggestion that they had attended the marriage for only 10 minutes and had left.

1038. Bhawna Yadav was examined as the second last witness on by the prosecution. By this time the accused persons were aware of the entire case of the prosecution. Amongst other proven facts, the prosecution had proved the disclosure statements and recoveries of the Tata Safari which the accused had to demolish. There was also evidence of the deceased being seen in the company of the appellants which had to be displaced. Bhawna Yadav has also stated that she was near the stage when the accused had come to the bridal couple to wish them. In cross-examination of Bhawna Yadav on the 9th of March 2007, the defence tried to establish that she was present at the gate of the Banquet Hall when the accused persons were leaving alone. Bhawna was closely related to Vikas and Vishal Yadav. If her testimony to this effect was true, why did she not tell these facts to the investigating agency when they were frantically searching for her brothers in February, 2002 till she was being cross- examined as a witness in 2007? Why did she not come forward about the mercedes vehicle for five years?

1039. Unmindful of the excuse attributed by PW-11 Shivani Gaur to Vikas Yadav for their early departure from the wedding that he had to go for some election work, Bhawna Yadav introduced the early exit of Vikas Yadav to the ground that he had to reach Karnal to attend some function manifesting that by 2007 when prosecution evidence was almost over, some shades of the defence case were taking shape. Of course the defence blundered even here. It is not the case of Vikas and Vishal Yadav that they went to Karnal from the wedding. They have put up a case that they had gone to attend a function in Ghaziabad itself after attending Shivani's wedding.

1040. Despite stating that she never went out of the hall and stayed with the bride after her brothers had left the same, Bharti wrongly suggests that she saw her brothers leaving the marriage venue.

1041. The testimony of Shivani Gaur is also completely contrary to any normal conduct, especially given the admitted position that there were hundreds of guests (600 - 700) at the wedding who were moving around. There would have been lot of hustle bustle involving the guests trying to meet the bridal couple. It is therefore obvious that neither Shivani Gaur nor any other person including Bharti Yadav and Bhawna Yadav could have seen from the dias inside the Diamond Banquet Hall as to what was transpiring at place where the dinner was laid or at the venue gate.

1042. The prosecution had been able to completely demolish the defence suggestion that the accused persons were seen leaving the marriage venue at 11:00/11:30 pm on 16 th February, 2002 unaccompanied by Nitish Katara as it was not possible to visualize the main gate of the banquet hall from the dias where the witnesses Shivani Gaur and Bharti were placed. It is also not possible to accept Bhawna Yadav's testimony on this point. Therefore the testimony of these three witnesses about the time of departure of Vikas and Vishal Yadav has to be rejected.

(iv) Outside the wedding venue - evidence of last seen 1043. We may now examine whether the prosecution could establish that accused and the deceased were seen together outside the wedding venue. Four witnesses were examined in support of this submission.

Jai Prakash Pandey and Umesh Sharma were examined as PW-19 and PW-31 respectively in Vikas Yadav's trial. They were posted as security guards at the Diamond Palace Banquet hall on 16th February, 2002.

1044. The statement of Jai Prakash Pandey under section 161 of the Cr.P.C. was recorded on 17th Feburary 2002 (Ex PW 19/A) and the statement of Umesh Sharma was recorded on 17th March 2002 (Ex PW 31/1). In the statements under Section 161 of the Cr.P.C., they had stated that they saw one boy wearing a red colour kurta, churidar pajama and white colour shawl shaking hands with some boys standing outside Diamond Palace and thereafter sitting in a long car/Tata Safari which vehicle went towards the west side at a fast speed. While Jai Prakash Pandey (Ex.PW19/1) learnt the next day that one boy namely, Nitish Katara, whom he did not know, was missing from the marriage function, Umesh Sharma stated that he learnt the same after 2 - 3 days from the newspaper and TV. In his statement under Section 161 Cr.P.C., these witnesses had confirmed that the victim was the same boy who was wearing the red kurta and churidar pajama who had gone in the Tata Safari vehicle.

1045. The learned Trial Court has recorded observations on the conduct of this witness, Jai Prakash Pandey noting that in his cross-examination by the Special Public Prosecutor for the State, the witness stated that he knew that in this case, the accused Vikas Yadav is a son of Shri D.P. Yadav while Vishal Yadav is his cousin brother. As against this statement during investigation, during his cross-examination by the defence counsel in court, the witness stated that he had neither seen the accused persons nor did he know them. The learned Trial Judge has found the conduct of Umesh Sharma (PW-31) also unnatural, suspicious and unbelievable as he testified that he was not aware of the present case. Both these witnesses resiled from their previous statements, were declared hostile and their testimonies have been completely rejected by the learned trial judge. Their statements have been brought to our attention. We see no reason to disagree with the view taken by the learned trial judge.

1046. The learned Trial Judge has also found conduct of Umesh Sharma, (PW-31 in Vikas Yadav's trial), who did not support the prosecution case, unbelievable. The learned Trial Judge has held that the his conduct of this witness shows that he had met somebody who had informed him of the manner in which he should give his testimony and therefore, he did not support the prosecution case. The court has also noted on the statement of the witness that he had come to the court earlier on summons but was told by some advocate that he was late and therefore he had gone back and not entered the court room. The trial court has correctly rejected the testimony of PW-19, Jai Prakash Pandey and PW-31, Umesh Sharma.

1047. On the aspect of proving the presence of Vikas, Vishal Yadav, as well as Sukhdev Pehalwan outside the venue, the prosecution examined as a witnesses Ct. Inderjeet Singh and Ct. Satender Pal Singh in both trials. In Vikas and Vishal Yadav's trial, they were examined as PW-28 and PW-32 respectively, while in Sukhdev Yadav's trial, they were examined as PW-12 and PW-10 respectively.

1048. It is in evidence that on the night of the 16th - 17th February, 2002, a police patrolling car bearing Chetak 13 was patrolling in the area covering the area of Chiranjiv, Kavi Nagar, Vivekanand Nagar and Shastri Nagar which includes the area in which Diamond Palace Banquet Hall is situated.

This patrol car was being driven by driver Ct. Satender Pal Singh. It was manned by Ct. Inderjeet Singh with two home guards. Both these constables have testified that at about 11:15 p.m. and 11:30 p.m., their patrol car was positioned near the Diamond Banquet Hall. Chetak 13 was on the road coming from Diamond Palace Banquet Hall and facing it. Ct. Satendra Pal Singh testified that the Chetak 13 was parked at a distance of 10/15 steps from the Banquet Hall at a turning. He testified that at about 12:15/12:30 while checking vehicles on the night of 16th February, 2002, they stopped a Tata Safari which was being driven by Vikas Yadav and there were two - three persons more sitting in the

vehicle. Though he would not identify the deceased Nitish Katara in court when shown the picture, however he categorically stated that Vishal Yadav was seated in the rear portion of the Tata Safari.

1049. Despite extensive cross-examination on behalf of Vikas and Vishal Yadav, Ct. Satender Pal Singh (as PW-32) remained steadfast that the police vehicle remained at the location from 11.30 pm to about 12.45 am and that they had stopped the Tata Safari in which Vikas and Vishal Yadav were travelling at around 12:15/12:45 am. with two other persons.

1050. In his evidence, PW-28 Ct. Inderjeet Singh has admitted that while performing the patrolling duty he had seen Vikas Yadav and Vishal Yadav present in the court, sitting in a long car. He also admits that their car was checked between 12:00 mid night to 12:15 a.m. for arms, ammunition or anything objectionable. In answer to the court question PW- 28 also admitted that he had seen ―Nitish Katara in a Tata Safari vehicle when he was on duty on that road‖. The witness stated that when this Tata Safari was checked, "there were 2 - 3 persons in that Tata Safari - two in the front and one in the back and the person whose photograph was shown was in the front‖.

1051. The witness was shown photographs of Nitish Katara whom he identified as the person on the front in the Tata Safari Vehicle 12.30 a.m. in the night of 16/17th February, 2002.

At this stage, the prosecutor pointed out that the witness was resiling from the statement made by him under Section 161 of the Cr.P.C. and he was permitted to cross-examine the witness.

1052. It is necessary to notice the obstruction by the defence counsel at this stage. The prosecutor asked the witness PW 28 Ct. Inderjeet Singh if he had told anyone that he had seen the accused persons present in court as well as Nitish Katara in the same car coming from the Diamond Palace. This question was objected to by the defence, and this objection was overruled by the court. The observations of the court in the proceedings recorded on 25th April, 2003 with regard to what transpired in the trial are material and deserve to be extracted. The same reads as follows:-

> ―The defence counsel instead of allowing the witness to answer are answering themself in the court and the above question the objections were raised 10 times despite making it clear to the counsel that they have been and understood but the counsel persisted to see to it that the witness is tutored and educated. Let the witness answer‖ 1053. After such obvious tutoring, the witness of course thereafter denied that he had told such fact to anybody and then he went on to depose that the accused and Nitish Katara were in separate cars.

1054. It is noteworthy that in answer to a court question, Ct.

Inderjeet Singh had stated that he knows the accused persons had contested elections and he has seen his photo in the television. He has also tendered explanation as to why he had initially stated in his testimony that he has seen the accused persons for the first time in the court whereas he has later stated that he had seen them on the night of 16/17 th February, 2002.

1055. PW-32 Ct. Satender Pal Singh stated that he knew Vikas and Vishal Yadav from before 16th February, 2002 as he had seen them roaming in the area with their friends. At around 12:15/12:30 , i.e., past midnight, while checking the vehicles coming from Diamond Palace on 16th February, 2002, he had stopped the vehicle of the accused persons who were in a Tata Safari which was being driven by Vikas Yadav. The witness clearly stated that Vishal Yadav was sitting in the rear seat of the Tata Safari.

1056. In his evidence PW-32 Ct. Satender Pal Singh admits that on 4th March, 2002, the Investigating Officer Anil Somania, S.O. at PS Kavi Nagar made an inquiry from him in regard to the incident and that he had shown photographs Ex.PW11/5 (of Nitish Katara) as well as Ex.PW6/4 (photograph of Vikas and Vishal Yadav). The witness testifies that he had told the Investigating Officer that he had seen Vikas and Vishal Yadav in the Tata Safari as well as 2- 3 persons but he did not know all of them.

The witness further clarified in the cross-examination that apart from Vikas Yadav, there were three more persons in the vehicle and that this is what he had said earlier.

1057. PW 32 Ct. Satender Pal Singh was even able to recollect the clothes worn by the accused on that night. He stated that one of the accused was in a black jacket and the other one in a white shirt. He was shown the wedding photograph Ex.PW6/4 and in that photograph Vishal Yadav is wearing a black jacket while Vikas Yadav was wearing light colour shirt. The witness stated that the accused Vikas Yadav and Vishal Yadav were wearing the same clothes in the photographs as they were wearing when he saw them on the night intervening 16th / 17th February, 2002 in the Tata Safari.

1058. The photograph Exh PW6/3 is contextual and corroborates the oral testimony of Ct Satender Pal Singh who identifies the accused persons by these clothes when he spotted them after they left the Diamond Palace Banquet Hall that night.

1059. The witness also testified that the Tata Safari had a Punjab registration number. The recovered vehicle bore a Punjab registration number.

1060. Even though Ct. Satender Pal Singh had to be declared hostile, however, he unequivocally confirms the presence of the three appellants as well as a fourth person in a red kurta in the Tata Safari vehicle coming from the Diamond Palace Banquet Hall on the fateful night. No doubt could be created on this part of the testimony in the cross-examination.

1061. The witness tried to create confusion about telling the Investigating Officer that one boy wearing red colour kurta who was sitting in the passenger seat next to Vikas Yadav in the front seat of the Tata Safari vehicle had a round face. He had also stated that later on it was learnt by him that the boy in the red kurta, who was seen by him in the vehicle of Vikas Yadav, had been kidnapped and murdered by them. In cross-

examination by the prosecutor, the witness stated that he had also not told the Investigating Officer that the windows of the vehicle, which was being driven by Vikas Yadav, were rolled down and that apart from Vikas Yadav there were three more persons in the car.

1062. It is important to note that the witness was confronted with the photograph of Nitish Katara Exh.PW11/5. The witness stated that he could not say whether the person in the photograph was in the Tata Safari driven by the accused Vikas Yadav or not. The witness thus does not deny the presence of Nitish Katara in the Tata Safari vehicle.

1063. The demeanour of the witness was also observed and noted by the court while recording his statement. The learned trial judge has noted on 29th of May, 2003 that ―during his testimony in between the witness has expressed his desire to discontinue as he was getting hopeless‖. The court gave him water and gave him assurance so that the witness continued thereafter. The sense of hopelessness expressed by the witness bears testimony to the pressure upon him with regard to his testimony. As his subsequent testimony reflects, even the trial court was unable to instill confidence or security in the witness to frankly and freely give an open account of what he had witnessed that fateful night.

Interestingly, his cross-examination was thereafter got deferred at the instance of the counsel for the accused persons. The witness was then subjected to extensive cross- examination with regard to his very presence at the spot; his assignments and duties.

1064. We may also consider the evidence of these witnesses in the trial of Sukhdev @ Pehalwan (the appellant in the Criminal Appeal No.145/2012).

1065. Ct. Satender Pal Singh was examined as PW-10A in Sukhdev @ Pehalwan 's trial (who had been examined on 29th May, 2003 in the first trial) on the 1st December, 2006. By and large, he reitereated

his earlier testimony. Ct. Satender also categorically identified the appellant Sukhdev @ Pehalwan present in court as the person also sitting in the rear seat of the Tata Safari.

1066. As the witness was resiling from his earlier statement under Section 161 of the Cr.P.C. again on the identity of the deceased being the person sitting in the front passenger seat, Ct. Satender Pal Singh was permitted to be cross-examined by the Special Public Prosecutor in Sukhdev's trial as well. In this cross-examination, the witness stated that he had learnt that Nitish Katara had been kidnapped and murdered and taken away by Vikas and Vishal Yadav in the Tata Safari along with the accused (Sukhdev Pehalwan) present in court.

1067. In Sukhdev's trial also Ct. Inderjeet Singh (who was with Ct.

Satender Pal Singh in the police patrol gypsy Chetak 13 in the night of 16th / 17th February, 2002) completely resiled from his statement recorded under Section 161 of the Cr.P.C. Just as in the first trial, he again attempted to create a dichotomy and introduced a story of two vehicles, one in which the appellants Vikas Yadav and Vishal Yadav were travelling and the other in which the deceased Nitish Katara was travelling. Ct. Inderjeet Singh was again permitted to be cross-examined by the Special Public Prosecutor.

1068. In his cross-examination by the Special Public Prosecutor, Ct. Inderjeet Singh stated that a person wearing a red kurta was sitting in the Tata Safari vehicle which was stopped by him in a patrol car at Chetak 13 in the night of 16 th / 17th February, 2002. The witness also admitted that there was sufficient light at the T-point where they were stopping the vehicles.

1069. The testimonies of (PW-32 and PW-10 respectively) Ct.

Satender Pal Singh and (PW-28 and PW-12 respectively) Ct. Inderjeet Singh in the two trials is eloquent of the manner in which these two police constables have been either won over or sufficiently intimidated by the defence so as to resile from their statements under Section 161 of the Cr.P.C. to prevent the truth from coming out.

1070. We have noted the well settled principles applicable to witnesses who are declared hostile. The testimony of these witnesses has to be scrutinized on those principles.

1071. Despite these witnesses not stating the complete truth, certainly crucial facts noted above stand established even from such testimony and their cross-examination by the prosecutor.

1072. The learned Trial Judges have closely scrutinized the testimony of these witnesses and found them trustworthy on certain crucial facts. We have been taken through the testimonies and also find their evidence supporting the prosecution on some critical facts noted above.

1073. Ct. Inderjeet Singh has tried to create a doubt on the prosecution case that the accused and the deceased were in the same vehicle at around 12:30 a.m on the night intervening 16th/17th February, 2002. However, it is evident from his testimony that even this hostile witness admits that the accused persons and the deceased Nitish Katara had left Diamond Palace at the same time. The witness still establishes that Nitish Katara as well las one more person were in a Tata Safari. It is not even the defence case that Nitish Katara owned or had come to the wedding in a Tata Safari vehicle that fateful night. On the contrary, it is Vikas Yadav father's company which owned the Tata Safari vehicle. It was subsequently recovered at the instance of the accused persons. Ct. Inderjeet Singh also establishes the fact that Nitish Katara was not at Shivani Gaur's wedding at 1/1:30 a.m. of 17th February, 2002. He thus falsifies the testimony to this effect of Shivani Gaur (in both trials) as well as that Bharti and Bhawna Yadav (in Vikas and Vishal Yadav's trial). Most importantly, the witness established the fact that Vikas and Vishal Yadav as well as Nitish Katara and one more person were travelling on the same road in the same direction towards Hapur Chungi at the same time on the said night. It is obvious that

the witness has not stated the truth in the witness box and has attempted to cloud the testimony of Ct. Satender Pal Singh.

1074. From the testimony of PW-32 Ct. Satender Pal Singh, it stands established that a Tata Safari being driven by Vikas Yadav with Vishal Yadav and two other passengers was stopped just outside the Diamond Palace Banquet Hall (10 to 15 steps away) between 00:15 hours and 00.30 hours (referred to as 12.15 a.m. and 12.30 a.m. on the trial court record) on 17th February, 2002. Appearing as PW-10 in Sukhdev's trial as well, Ct. Satender Pal Singh categorically identified Sukhdev @ Pehalwan present in court as seated in the back seat of the Tata Safari. He also categorically testified that the person who was sitting by the side of the driver was wearing a red kurta, though in his statement under Section 161 of the Cr.P.C., he had identified this fourth person as the deceased.

1075. The testimony of Ct. Satender Pal Singh as PW 10 in Sukhdev's trial which has been challenged by counsel for the appellant Sukhdev Yadav Pehalwan on the ground that the witness was unreliable and there was delay of two weeks in recording his statement during investigation as well as contradictions between his testimony qua the testimony of PW-12 Ct. Inderjeet Singh. . It is submitted that the 4th statement of Ct. Satendra Pal Singh was recorded only on March, 2002 by the Investigating Officer.

1076. Mr.Ravinder Kapoor, counsel for Sukhdev vehemently contends that there are several discrepancies in the initial testimony of PW-10 Ct. Satender Pal Singh as against his testimony when cross-examined by the Special Public Prosecutor.

1077. We find that this objection was made in Vikas and Vishal Yadav's trial as well. The ld. judge noted that the police witness was appearing in the trial in December, 2006, more than 4 ½ years after the incident which took place in February, 2002. Reliance was placed on the pronouncement of the Supreme Court in (2000) 12 SCALE 742, Shankara Naik v. State of Karnataka to the effect that discrepancies are bound to appear in the testimony of the witness whose evidence is recorded long after the incident.

1078. We have already dealt with the aspect of delay in recording the statement of witnesses under Section 161 of Cr.P.C. and considered the explanation for the delay tendered by the Investigating Officer. These witnesses were police personnel who were present near the Banquet Hall and testified about what they had observed during the performance of official duty. It is also noteworthy that Ct. Inderjeet Singh and Ct. Satender Pal Singh did not witness any crime. There was nothing alarming in the fact that a Tata Safari was stopped by the police in which four persons including the deceased were seated. In fact given the publicity attached to the case and the preoccupation of the investigating officer with efforts to trace out the appellants and the missing person, these two constables should have revealed the information about what they had seen. But they did not do so. The IO would have no information about the events of that night. In these circumstances, the delay in recording the statement of these witnesses by the investigating officer during investigation cannot impact the veracity of their testimony.

1079. It is settled law that evidence on an issue is to be read as a whole. The court is not required to conduct a minute dissection of details in the evidence of each witness as is suggested on behalf of the appellants so as to discard the testimony of every witness. A holistic consideration of facts and circumstances established on record is to be effected by the trial judge bearing in mind human nature; its susceptibility to suggestions, influence, fear; oversight on account of passage of time between the occurrence and the date of testimony; relationship to and position of accused persons; normal tendencies of human beings to improvise and embellish; as well as the authority, influence, connections and outreach of the parties to the litigation which could impact the independence of the witnesses.

1080. The evidence of Shivani Gaur, Bharti Yadav and Bhawna Yadav that Vikas and Vishal left the wedding venue alone at 11/11:30 pm, and that they saw Nitish Katara at the wedding venue around 1/1:30 am is clearly not worthy of any credence. This evidence has been rightly rejected by the learned trial judges.

1081. The conjoint reading of the evidence of Bharat Diwakar, Gaurav Gupta, Yashoman Tomar, Shivani Gaur, Ct. Inderjeet Singh and Ct. Satender Pal Singh establishes that the appellants as well as one person wearing a red kurta being Nitish Katara remained at the wedding venue at the same time and left it together in the Tata Safari vehicle bearing a Punjab registration number. The documentary evidence of the call records establishes that after midnight, Nitish Katara was not at the Diamond Palace Banquet Hall. Ct. Inderjeet Singh resiled from his previous statement on the identification. However it is established that the Tata Safari was travelling towards Hapur Chungi where Ajay Kumar saw and identified its inmates. It stands proved beyond doubt as discussed in the next part that Ajay Katara was sitting in the passenger seat of the said Tata Safari vehicle driven by Vikas Yadav.

1082. The evidence of PW-28 Ct. Inderjeet Singh and PW-32 Ct.

Satender Pal Singh establishes that the deceased Nitish Katara was seen in the company of the appellants in a Tata Safari vehicle bearing a Punjab registration number at a turn 10 to 15 steps from the Diamond Palace Banquet Hall (near the Hapur Chungi) at about 12:15/12:30 am (00:00 hrs to 00:15 hrs) on the night of 16th/17th February 2002. The vehicle was being driven by Vikas Yadav. Nitish Katara was seated besides him while Vishal Yadav and another person were in the rear seat.

1083. The facts proved as above have therefore to be considered and evaluated with the other evidence brought on record.

VIII Last seen at the Hapur Chungi - evidence of Ajay Kumar Katara, a chance witness 1084. The prosecution has lastly placed reliance on the testimony of one Ajay Kumar (examined as PW-33 on 31st May, 2003 in the trial of Vikas and Vishal Yadav and as PW-14 in Sukhdev's trial) as a chance witness who has given evidence of having last seen the deceased Nitish Katara alive in the company of the accused persons at the Hapur Chungi after midnight of the 16th of February 2002. In his testimony on 31st May, 2003, this witness had stated that on 16th February, 2002, he had gone to Ghaziabad to meet a friend called Subhash Chand, an employee of the U.P. Police, on his scooter. After meeting Subhash Chand, at about 12.10 am on the night intervening 16/17th February, 2012, he started from Ghaziabad to return to his residence at Delhi. While returning on the road at the Hapur Chungi crossing (_chauraha‟) his scooter had gone out of order and stopped.

1085. Just at the place where his scooter had stopped, a Tata Safari vehicle being driven by Vikas Yadav had approached the spot from behind. The witness identified Vikas Yadav as present in court and stated that Vikas Yadav had told him to remove the scooter from the road in a very uncivilized manner. This altercation / exchange had taken place between 12 / 00.30 am in the night intervening 16th / 17th February, 2002.

1086. The witness further stated that he knew Vikas Yadav from before. As he had been spoken to rudely, the witness went to the Tata Safari vehicle. He knew three out of the four persons in the Tata Safari vehicle. The witness identified these three as Vikas Yadav S/o Shri D.P. Yadav; Vishal Yadav S/o Shri Kamal Nath Yadav (identified as present in court) and the third being a stout Pehalwan named Sukhdev. So far as the fourth person is concerned, the witness stated that he did not know him and that this fourth person was wearing a red kurta and a shawl. Ajay Kumar claimed that later when he saw his photograph on television, he realized that the fourth person in the Tata Safari vehicle was Nitish Katara whose identity he confirmed in court from the photograph Exh. PW-11/5.

1087. Ajay Kumar further stated that Nitish Katara was sitting in the front seat adjoining the driver seat; that Vishal Yadav was sitting behind the driver Vikas Yadav, while Sukhdev @ Pehalwan was sitting behind the deceased. The Tata Safari being driven by Vikas Yadav was bearing the registration no. PB 07 H 0085 which number he had noted on a slip of paper.

1088. Ajay Kumar further stated that after he brought the scooter to one side of the road, the vehicle of the accused persons passed. On examination, he found that the plug of his scooter contained some dust/foreign material which he cleaned and thereafter he started his scooter and also went on his way.

1089. The witness has stated that he learnt about the involvement of Vikas and Vishal Yadav in the present case on 1st March, 2002 whereupon he went to the police station on 2nd March, 2002 but he could not meet the Investigating Officer (IO). He thereafter again went to the police station Kavi Nagar, Ghaziabad on 12th March, 2002 but could not meet the investigating officer on this date as well. He thereafter went to the police station on 18th March, 2002 when he met the IO and gave a statement to him about what he had witnessed.

1090. The witness has identified the Tata Safari seized by the police as being the vehicle seen by him on the night of 16/17th February, 2012 driven by the accused Vikas Yadav which was exhibited as Exh.PW 33/P-1.

1091. In the trial against Sukhdev Yadav, the prosecution examined Ajay Kumar as PW-14 on 27th July, 2007 who reiterated the statement that he made as PW-33 in the trial of Vikas and Vishal Yadav. The witness additionally identified Sukhdev@Pehalwan present in court as sitting with Vikas Yadav on the rear seat.

Ajay Kumar thus claimed to be at the spot per chance and gave unshaken testimony.

1092. Before examining the several objections urged on behalf of the appellants to the credibility of Ajay Kumar's testimony, we may firstly refer to settled legal principles for construing the evidence of chance witnesses. Mr. Dayan Krishnan, learned Additional Standing Counsel for the State has drawn our attention to important judicial precedents dealing with chance witnesses. In (2012) 5 SCC 216 Hira Lal Pandey v. State of U.P., challenge was laid to the testimony of PW-2, a chance witness whose evidence was discarded. The Supreme Court held that the veracity of PW-2 had been tested in cross-examination and his evidence was thus reliable. On the issue of chance witnesses, in para 27 of the report, the court observed as follows :-

> —27. We do not also think that the evidence of PW 2 could have been discarded on the ground that he was only a chance witness. The incident took place when the deceased were travelling on a motorcycle on the road and PW 2 was also coming on the same road on his cycle when he saw the incident. This Court has held inThangaiya v. State of T.N. [(2005) 9 SCC 650 : 2005 SCC (Cri) 1284] (SCC p. 653, para 8) that if a murder is committed in a street, only passers-by will be witnesses and their evidence cannot be brushed aside or viewed with suspicion on the ground that they were mere chance witnesses. Moreover, PW 2 has been named in the FIR as one of the persons who were coming on a cycle from Dhata side and as one of the persons who shouted at the appellants not to fire.‖ 1093. We may usefully also refer to the pronouncement reported at (2005) 9 SCC 650 Thangaiya v. State of T.N. wherein a similar objection as is taken in the present case to the presence of Ajay Kumar was dealt with. In para 8 of this judgment, the Supreme Court observed as follows: -
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> —8. Coming to the plea of the accused that PW 3 was a —chance witness‖ who has not explained how he happened to be at the alleged place of occurrence, it has to be noted that the said witness was an independent witness. There was not even a suggestion to the

witness that he had any animosity towards the accused. In a murder trial by describing the independent witnesses as ―chance witnesses‖ it cannot be implied thereby that their evidence is suspicious and their presence at the scene doubtful. Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere ―chance witnesses‖. The expression ―chance witness‖ is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country where people are less formal and more casual, at any rate in the matter of explaining their presence. Therefore, there is no substance in the plea that PW 3's evidence which is clear and cogent is to be discarded.‖ (Emphasis supplied) 1094. On the same issue, reference also deserves to be made to (2012) 4 SCC 79 Mano Dutt and Another v. State of Uttar Pradesh, the relevant protion whereof reads as follows:-

―25. There can be cases where it would be but inevitable to examine such witnesses because, as the events occurred, they were the natural or the only eyewitnesses available to give the complete version of the incident. In this regard, we may refer to the judgments of this Court in Namdeo v. State of Maharashtra [(2007) 14 SCC 150 : (2009) 1 SCC (Cri) 773] . This Court drew a clear distinction between a chance witness and a natural witness. Both these witnesses have to be relied upon subject to their evidence being trustworthy and admissible in accordance with the law.‖ 1095. In (2010) 6 SCC 673 Balraje v. State of Maharashtra, the Supreme Court has placed reliance on the statement of eye witnesses who were stated to be interested and of even inimical disposition towards the accused observing as follows :-

―30. In law, testimony of an injured witness is given importance. When the eyewitnesses are stated to be interested and inimically disposed towards the accused, it has to be noted that it would not be proper to conclude that they would shield the real culprit and rope in innocent persons. The truth or otherwise of the evidence has to be weighed pragmatically. The court would be required to analyse the evidence of related witnesses and those witnesses who are inimically disposed towards the accused. But if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same. Conviction can be made on the basis of such evidence.‖ (Emphasis supplied) 1096. On the issue of the credibility of a chance witness, Mr. Ram Jethmalani, learned senior counsel has placed reliance on (1996) 7 SCC 163 State of Punjab v. Gurdeep Singh. In this case, a charge under Section 306 of IPC-abetment of suicide was laid against the respondents. A dowry death was alleged. Three witnesses, the mother, aunt and cousin of the deceased stated about demands of dowry and consequential ill-treatment of the deceased by her in-laws. The letters written by the deceased to her parents and sister however did not indicate that she had ever been taunted or humiliated on account of dowry demand or that she was physically or mentally tortured in her in-laws house. The prosecution examined one PW-6 Madhuban as a chance witness who claimed to have visited a house of the friend close to the house of the accused when he heard some noises coming from the house of the accused and he heard that Jyotibala was being instigated to commit suicide by burning or by drowning. In para 8 of the report, the court ruled that the evidence of PW-6 should not be accepted. It was observed that none of the neighbours (who would have included the friend who PW-6 claimed to have visited) had been examined in the case. It was, therefore, held that the

evidence of such chance witness without being corroborated by any other independent witness did not inspire confidence.

No absolute proposition that the testimony of every chance witness has to be corroborated has been laid by the Apex Court. The judgment has been rendered in the facts of the case. It lays down no absolute principle of law as is being pressed by learned senior counsel for the appellant.

1097. From the above narration, it cannot be held that merely because a witness is a chance witness, his testimony has to be viewed with suspicion. The test for reliability, whether the witness be a material witness or a chance witness, is the trustworthiness and admissibility of his testimony. The evidence of Ajay Kumar has to be tested on these principles.

Submissions on behalf of Vikas Yadav 1098. It has been urged by Mr. U.R. Lalit, lea rned senior counsel for Vikas Yadav that there is no explanation at all for the delay between 16th February, 2002 till 18th March, 2002 when the statement of Ajay Kumar was recorded under Section 161 of the Cr.P.C. by the police. The submission is that there is no evidence to support the statement of this witness that he had gone to the police station on 2 nd or 12th March, 2002. The conduct of the witness in only asking for the Investigating Officer Anil Somania at the police station and leaving when he was told that he was not there is unbelievable. Mr. Lalit has contended that this conduct would show that Ajay Kumar is really Somania's man and for this reason he did not approach any other police officer at the police station. It is contended that the witness could have gone to any other senior officer at the police station. Moreover, Ajay Kumar was not the witness last seen, it was Kamal Kishore who was last seen with the deceased even as per the charge sheet. Therefore, the statement of PW-33 to the effect that he visited the police station on 2 nd and 12th March, 2002 does not inspire any confidence.

1099. Mr. U.R. Lalit, learned senior counsel has pointed out that so far as the identity of the accused persons is concerned, Ajay Kumar has stated that it was on seeing photographs of Vikas and Vishal Yadav in the TV news that he was certain that in the night on 16/17th February, 2002 he had seen them in the Tata Safari. It is urged that the witness had stated that he barely had a two minute interaction in the night time with the appellants and it is impossible that he could identify the persons in the car in this time.

1100. Learned senior counsel has contended that the information about the involvement of the accused persons in commission of the offence was in the public domain because they were being mentioned on television and press reports. It is urged that the photographs of the accused persons were also being freely circulated and for all these reasons their belated identification by Ajay Kumar is meaningless.

1101. Mr. U.R. Lalit, learned senior counsel has also urged that the testimony of PW-33 inspires no confidence when tested against the evidence of PW-35 Anil Somania who was the investigating officer; that Anil Somania has denied that Ajay Kumar gave him any slip mentioning the car number when his statement was recorded and also that Ajay Kumar did not tear any above mentioned slip in his presence.

1102. Extensive submissions have been made with regard to the width of the road to challenge the incident or the spot position as testified by the witness. Mr. Lalit urges that Anil Somania has also clarified that the width of the road between Kavi Nagar and Hapur Chungi after the divider was about 20 feet and therefore, the testimony of Ajay Kumar about the Tata Safari stopping because of the obstruction created by his scooter is false. It is further urged that Anil Somania has not prepared any site plan of the Hapur Chungi or the location where Ajay Kumar's scooter broke down or where he accosted the accused persons. It is urged that the investigating officer has not cared even to verify the address of the witness and that the recording of his statement was intentionally not mentioned in the

case diary. The submission is that for all these reasons, Ajay Kumar is a planted witness whose testimony must be rejected outright.

1103. Mr. Sumeet Verma, learned counsel appearing for Vikas Yadav has urged that as per the testimony of Ajay Kumar, the deceased was seen in the company of the appellants at around midnight in the night intervening 16/17th February, 2002. His body was found in the morning at about 9 a.m. i.e. after a time gap of almost nine hours and 60 kms away from Hapur Chungi, the place where Ajay Kumar claims to have seen them. It is urged that this testimony fails the test of proximity of time as well as location test for it to be considered a circumstance that the deceased was last seen alive in the company of the appellants which could be held against them to sustain a conviction for murder of the deceased.

1104. Mr. Verma has further urged that according to Ajay Kumar, the vehicle in which he had seen the appellants and the deceased was proceeding towards Delhi. The body was discovered near Khurja which is in the opposite direction.

He also draws our attention to the alleged statement of one Kamal Kishore brought on record allegedly recorded by the Ghaziabad police. In this statement it was stated that around 1/1.30 a.m. he had seen Vikas Yadav, the driver and a person in a red kurta. It is therefore argued that the evidence Ajay Kumar was therefore not evidence of last seen.

Submissions on behalf of Vishal Yadav 1105. Mr. R. Jethmalani, learned senior counsel on behalf of Vishal Yadav, has challenged the veracity of this witness submitting that the witness has made a false statement that he is residing in Delhi; and that he actually lives with his family in Village Bamroli in the District Agra, about three hours drive from Delhi and another one hour drive from Ghaziabad. It is further urged that the place where Ajay Kumar has claimed to have encountered the Tata Safari at the Hapur Chungi is at the portion of the road which goes to Delhi, a place far away from the witness' usual home and at a late hour in the night when persons would normally be in their homes with their families. It has further been contended that Ajay Kumar has not claimed to have been abused by the driver of the car. No description has been given of the uncivilized manner in which the driver spoke to him. It is unbelievable that any person would note a vehicle number in the manner stated by Ajay Kumar.

1106. To support the submission that the plea of Ajay Kumar residing at Delhi is false, it is urged that he was unable to produce a single document in support of his plea that he was residing in tenanted accommodation - he had no rent receipt or election card; ration card or any other document at Delhi. It is urged that there are too many coincidences in the statement of PW-33 Ajay Kumar rendering his story implausible and impossible.

1107. It is pointed out that it is in the testimony of PW-33 that he is also a Katara, a caste to which the deceased belonged and that he also hailed from Village Bamroli which is where the Kataras originated from and is therefore an interested witness who is to be so disbelieved.

1108. Placing reliance on the statement of the Investigating Officer Anil Somania, ld. senior counsel would submit that the statement of the witness to the effect that the Tata Safari car had to stop because of the broken down scooter is incorrect. It was pointed out that the Investigating Officer had stated that the width of the road, after the divider, towards Hapur towards Delhi is about 20 feet, and that from the main road to PCA, the kuchha road was seven feet wide. Therefore even if a scooter had broken down, there was enough room and no need for the Tata Safari to stop.

1109. It is urged by learned senior counsel that the prosecution had attributed disclosure statements to the accused and also claimed to have recovered the Tata Safari on 11th March, 2002. The car number

would have been known therefrom. The evidence of Ajay Kumar was therefore planted to fill lacunas in the prosecution case.

1110. Challenging the identifications of the occupants of the Tata Safari by this witness, learned senior counsel has contended that this witness was wearing goggles in court and, therefore, there was some difficulty with his vision. It is urged that the trial court wrongly denied opportunity to the appellants to cross examine him with regard to his capacity to see.

1111. Learned senior counsel would contend that by momentarily viewing who is inside the car, it is not possible to identify four persons, especially when he did not know one of them. It is even more implausible that Ajay Kumar could identify a red kurta and a white shawl.

1112. Learned senior counsels for the appellants have also challenged the testimony of the witness on the ground that Ajay Kumar took no legal action against the car driver for which purpose claimed to have noted the number on the slip. It is pointed out that the investigating officer has stated that Ajay Kumar did not give him any slip mentioning the number of the car when his statement under Section 161 Cr.P.C. was recorded and that he did not tear any slip in the IO's presence. It is urged that even his claim that he preserved the slip till 18th March, 2002 is absurd.

1113. Ajay Kumar has also been extensively cross-examined on the aspect that the detailed statement given by him in his examination-in-chief was not part of his statement under Section 161 of the Cr.P.C. which was exhibited on record as Exh.PW-33/DA.

1114. Placing reliance on the pronouncement of the Supreme Court reported at (1996) 7 SCC 163 State of Punjab v. Gurdip Singh and Ors., it is urged that the claim of Ajay Kumar being a chance witness must be carefully scrutinized and his reasons for being at the claimed place must be extremely credible and convincing.

Submissions on behalf of Sukhdev @ Pehalwan 1115. Learned counsel for Sukhdev @ Pehalwan has also submitted that PW-14 Ajay Kumar (who was examined as PW-14 in Sukhdev Pehalwan's trial) has made efforts to conceal his real identity as a Katara casting doubt on the credibility of his testimony.

1116. It is urged by Mr. Kapoor, ld. counsel that no abuses were given to Ajay Kumar by Vikas Yadav. The only statement attributed to Vikas Yadav is that he told Ajay Kumar to remove the scooter. Therefore, there was no occasion for Ajay Kumar to go up to the car of the accused. It is urged that the allegation that he was abused is an improvement in the witness box and a contradiction as the same is not reflected in the statement under Section 161 of the Cr.P.C made by Ajay Kumar. In this regard, the previous statement of the witness recorded under section 161 Cr.P.C., contains a mention that ―uncivilized language‖ was used by the accused even though abusive language is not specifically mentioned. The submission is that Ajay Kumar being a chance witness, it was not safe to act upon his statement. It is urged that Ajay Kumar must be disbelieved inasmuch as no corroborating evidence was led to support his presence at the spot, which could have been easily established by evidence of Subhash Chander whom he claimed to have visited. This according to Mr. Kapoor, by itself is sufficient to reject the testimony of the witness.

1117. Mr. Kapoor, learned counsel has submitted that Ajay Katara did not state in his statement under Section 161 of the Cr.P.C. that Vikas Yadav had spoken to him in an uncivilized manner. Our attention was drawn to the statement of Ajay Kumar Katara under Section 161 of the Cr.P.C. wherein he has attributed the following statement to Vikas:

―Vikas ne mujhse kaha ki apna scooter jaldi hatao‖.

1118. We now propose to examine the above objections of the appellants in the following seriatim:

(A) Ajay Kumar is an interested witness as he hails from the same village as the father of the deceased (B) Whether a test identification parade (TIP) was mandatory to establish the identity of the accused persons? (C) The delay in recording statement under Section 161 of the Cr.P.C. of Ajay Kumar by the investigating officer establishes that he was a planted witness rendering his testimony suspicious and unbelievable (D) Challenge to the implausibility of the occurrence on account of the width of the road (E) Whether the variance in testimony of Ajay Kumar and Investigating Officer Anil Somania about tearing of slip discredits his entire testimony?

(F) Ajay Kumar was not a resident of Delhi (G) Whether the trial stands vitiated as the prosecutor was permitted to put leading questions to Ajay Kumar? (H) Prejudice caused to appellants by the ld. Trial Judge in the first trial by denial of the opportunity to put the questions relating to the condition of the eyes of the witness Ajay Kumar - its effect (I) Ajay Katara was not asked to identify Tata Safari vehicle at the police station - effect thereof (J) Failure of the prosecution to verify the address of Subhash Chand We now propose to discuss the above issues in seriatim:

(A) Ajay Kumar is an interested witness as he hails from the same village as the father of the deceased 1119. We may first and foremost examine the challenge by the defence to the credibility of PW-33, on the ground that he was also a _Katara' hailing from the village Bamroli, from which the family of the deceased Nitish Katara originated.

1120. In the cross-examination by counsel for Vishal Yadav, the witness revealed his full name as Ajay Kumar Katara and stated that he did not use the surname Katara as part of his name. The witness denied the suggestion that he was a resident of House No.433, Nagla Taal, Village Bamroli Katar, P.S. Bhoki, District Agra but admitted his full address being village Bamroli, P.S. Bhoki, District Agra. He has categorically denied any relationship between his family and the family of Nitish Katara. He admitted that he had cast his vote once or twice in the village. He has also denied that the family of Nishit Katara (father of the deceased) at any point of time lived in village Bamroli or that Virender Katara and Karan Singh Katara ever lived in the village Bamroli.

1121. Nitin Katara as well as Ajay Katara have, in their respective testimonies, made unequivocal denials that they were related to each other or knew each other from before.

1122. Both the mother of the deceased Nilam Katara as well as his brother Nitin Katara also categorically denied that they ever lived in village Bamroli.

1123. Mr. Dayan Krishnan, learned Additional Standing Counsel for the State has submitted that Nilam Katara was the most natural witness to whom questions ought to have been put with regard to her family and relatives. Her testimony was recorded for the first time on 30th April, 2003 and then on subsequent dates. She was not cross-examined on any such aspect at all. Even in the trial of Sukhdev Yadav, where Nilam Katara appeared as PW-14, though some questions were put to her about the family of Ajay Kumar, no suggestion or cross-examination was put to her about whether he was related to her or not.

1124. We have heretofore referred to the rule laid down in (1893) 6 R 67 Browne v. Dunn which was approved by the Supreme Court in (1998) 3 SCC 561 State of U.P. v. Nahar Singh and also (2001) 7 SCC 69 Rajender Prasad v. Parshana Devi about the effect of failure to cross examine a witness. The appellants having failed to put any question to Nilam Katara in this regard, cannot raise such issue before this court. The evidence on record unequivocally shows that there was no relationship between Ajay Katara or the family of the deceased Nitish Katara which included Nilam Katara and Nitin Katara.

1125. Mr. S.K. Sharma, Advocate appearing for Vishal Yadav has submitted that a suggestion was put to PW-33 Ajay Kumar to the effect that he was connected with Smt. Nilam Katara and he had been

planted as a witness to make a false statement for implicating the accused. The witness has denied all suggestions that he was deposing falsely as he belonged to the same community as that of the deceased or that he had not gone to visit Subhash Chand.

1126. In the trial of Vikas and Vishal Yadav, PW-39 Nitin Katara has admitted that he knew some other person named Ajay Prasad who belonged to village Bamroli. The defence thereafter has extensively put suggestions to Nitin Katara to the effect that Ajay Prasad is the same person known as Ajay/Ajay Katara/Ajay Kumar all of which were denied by him. Nitin Katara explained that Ajay Prasad was one of his relatives alongwith others who came in contact with him during the investigation of the case. The witness categorically denied that he had introduced Ajay Prasad as a witness in the case or that Ajay Prasad was accompanying him or his mother regularly to the police station at Ghaziabad.

1127. This submission of the appellants must fail on another count.

Who is an ―interested witness‖? An interested witness is one who is interested in securing conviction of a person out of vengeance or enmity. (Ref: 2009 (14) SCALE 54 Ram Bharosey v. State of U.P.) 1128. In (1996) 1 SCC 65 Kartik Malhar v. State of Bihar, the court not only defined an interested witness but also observed that mere relationship would not taint the testimony of a natural witness. The court held as follows :-

> ―15. As to the contention raised on behalf of the appellant that the witness was the widow of the deceased and was, therefore, highly interested and her statement be discarded, we may observe that a close relative who is a natural witness cannot be regarded as an interested witness. The term _interested' postulates that the witness must have some direct interest in having the accused somehow or the other convicted for some animus or for some other reason. In Dalbir Kaur (Mst) v. State of Punjab [(1976) 4 SCC 158 :

1976 SCC (Cri) 527 : AIR 1977 SC 472] it has been observed as under: (SCC pp. 167-68, para

11)‖ (Underlining by us) 1129. In (2011) 9 SCC 698 Rakesh Kumar and Anr. v. State of M.P., the Court considered the evidentiary value of the testimony of a related witness observing as follows :-

> ―18. Evidence of related witness can be relied upon provided it is trustworthy. Mere relationship does not disqualify a witness.
>
> Witnesses who are related to the victim are as competent to depose the facts as any other witness. Such evidence is required to be carefully scrutinised and appreciated before reaching to a conclusion on the conviction of the accused in a given case.
>
> [See Himanshu v. State (NCT of Delhi)[(2011) 2 SCC 36 : (2011) 1 SCC (Cri) 593] and Bhajan Singh [(2011) 7 SCC 421 : (2011) 3 SCC (Cri) 241] .] xxx xxx xxx
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> 24. It does not appeal to reason as to why the witness would falsely enrope the appellants and other accused in such a heinous crime and spare the real culprits to go scot-free. In the FIR, Anil (PW 11) has disclosed that his father Khemchand (PW 10), Ishwar Nayak (PW 6) and Dharmendra (PW 12) reached the place of occurrence at a later stage. As the parties were known to each other being the residents of the same village, the identity, etc. was not in dispute.
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> 25. The trial court had appreciated the evidence on record, and reached the conclusion to the effect that Anil (PW 11) was a trustworthy witness and had been an eyewitness to the incident. He had faced grilling cross-

examination. However, no discrepancy or error could be shown in spite of the fact that he was nephew of Kailash (deceased). On careful scrutiny of his deposition, his statement was found trustworthy. The court further held that even if the other witnesses on the spot had not supported the prosecution case, Anil (PW 11) was a natural witness and had seen the incident.‖ (Emphasis supplied) 1130. It is trite that an eye-witness version cannot be discarded by the court merely on the ground that such eye witness happened to be a relation or a friend of the deceased. In (2012) 7 SCALE 165, Dayal Singh and Ors. v. State of Uttaranchal, the Supreme Court held that "the concept of interested witness essentially must carry with it the element of unfairness and undue intention to falsely implicate the accused. It is only when these elements are present, and statement of the witness is unworthy of credence that the Court would examine the possibility of discarding such statements. But where the presence of the eye-witnesses is proved to be natural and their statements are nothing but truthful disclosure of actual facts leading to the occurrence and the occurrence itself, it will not be permissible for the Court to discard the statements of such related or friendly witness".

1131. On this very issue, reference can usefully be made to the pronouncement of the Supreme Court reported at (2010) 7 SCC 759 Dharnidhar v. State of Uttar Pradesh wherein the court held as follows:-

> —12. There is no hard-and-fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the court. It will always depend upon the facts and circumstances of a given case. In Jayabalan v. UT of Pondicherry (2010) 1 SCC 199, this Court had occasion to consider whether the evidence of interested witnesses can be relied upon. The Court took the view that a pedantic approach cannot be applied while dealing with the evidence of an interested witness. Such evidence cannot be ignored or thrown out solely because it comes from a person closely related to the victim. The Court held as under: (SCC p. 213, paras 23-24) —23. We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim.‖ (Underlining by us) 1132. In para 33 of the judgment (2012) 4 SCC 79, Mano Dutt v.

State of U.P., the court held that conviction of an accused was possible on the statement of a sole witness, even if he was a son of the deceased and thus, an interested party. The condition precedent for such a conviction is that the statement of such witness should satisfy the legal parameters laid down by the Supreme Court. Once those parameters are satisfied and the statement of the witness is trustworthy, cogent and corroborated by other evidence produced by the prosecution, oral or documentary, then the court would not fall in error of law in relying upon the statement of such witness. The observations of the Supreme Court in para 24, 26 and 27 of the pronouncement may be usefully extracted and read as follows:-

> —24. Another contention raised on behalf of the appellant-accused is that only family members of the deceased were examined as witnesses and they being interested witnesses cannot be relied upon. Furthermore, the prosecution did not examine any independent witnesses and, therefore, the prosecution has failed to establish its case beyond reasonable doubt. This argument is again without much substance. Firstly, there is no bar in law in examining family members, or any other person, as witnesses. More often than not, in such cases involving family members of both sides, it is a member of the family or a friend who comes to rescue the injured. Those alone are the people who take the risk of sustaining injuries by jumping into such a quarrel and trying to defuse the crisis. Besides, when the

statement of witnesses, who are relatives, or are parties known to the affected party, is credible, reliable, trustworthy, admissible in accordance with the law and corroborated by other witnesses or documentary evidence of the prosecution, there would hardly be any reason for the Court to reject such evidence merely on the ground that the witness was a family member or an interested witness or a person known to the affected party.

xxx xxx xxx

26. This Court, in the said judgment, held as under: (Namdeo case [(2007) 14 SCC 150 : (2009) 1 SCC (Cri) 773] , SCC p. 161, paras 28-

29)

xxx xxx xxx

_29. It was then contended that the only eyewitness, PW 6 Sopan was none other than the son of the deceased. He was, therefore, _highly interested' witness and his deposition should, therefore, be discarded as it has not been corroborated in material particulars by other witnesses. We are unable to uphold the contention. In our judgment, a witness who is a relative of the deceased or victim of a crime cannot be characterised as _interested'. The term _interested' postulates that the witness has some direct or indirect _interest' in having the accused somehow or the other convicted due to animus or for some other oblique motive.'

27. It will be useful to make a reference of another judgment of this Court, in Satbir Singh v. State of U.P. [(2009) 13 SCC 790 :

(2010) 1 SCC (Cri) 1250] , where this Court held as under: (SCC p. 799, para 26) —26. It is now a well-settled principle of law that only because the witnesses are not independent ones may not by itself be a ground to discard the prosecution case. If the prosecution case has been supported by the witnesses and no cogent reason has been shown to discredit their statements, a judgment of conviction can certainly be based thereupon.

Furthermore, as noticed hereinbefore, at least Dhum Singh (PW 7) is an independent witness. He had no animus against the accused. False implication of the accused at his hand had not been suggested, far less established.‖ (Emphasis supplied) 1133. A similar view was taken by the Supreme Court in the case reported at (2009) 13 SCC 790 Satbir Singh and Ors. v. State of Uttar Pradesh.

1134. On the necessity of examining relatives or interested persons as witnesses, in AIR 2012 SC 3539, Shyamal Ghosh v. State of West Bengal which has been placed by Ms. Ritu Gauba, learned APP before us, it has been observed thus:

—55. In the present case, the examination of the interested witnesses was inevitable. They were the persons who had knowledge of the threat that was being extended to the deceased by the accused persons. Unless their statements were recorded, the investigating officer could not have proceeded with the investigation any further, particularly keeping the facts of the present case in mind. Merely because three witnesses were related to the deceased, the other witnesses, not similarly placed, would not attract any suspicion of the court on the credibility and worthiness of their statements.‖ 1135. Mr. Sumeet Verma, learned counsel for the appellant has placed reliance on the pronouncement of the Supreme Court reported at 2003 (7) SCALE 270, Maruti Rama Naik v.

State of Maharashtra in support of his submission that the testimony of Ajay Kumar deserves to be rejected for the reason that he was a highly interested person. In this case, two persons had died in an assault with deadly weapons. PW-3 allegedly received injuries. The prosecution solely relied on the evidence of PW-3 and 4 as well as some recoveries made at the instance of the appellants. The testimony of PW-3 and 4 was rejected on the ground that they were highly interested witnesses, either being related to the deceased or owing allegiance to the faction to which the victims belonged; as well as the fact that their conduct after the incident was highly artificial. In this case, PW-3 did not mention the names of the appellants as being the assailants. There was also no explanation either for the delay in recording the statement under Section 161 of the Cr.P.C. nor for the material omission by PW-3. So far as PW-4 was concerned, he did not inform anyone that he had not witnessed the incident. There was no evidence as to how the police learnt that PW-4 was a witness to the incident. Delay in recording his statement remained unexplained while the recoveries were also doubted for having been made long after the incident. The testimony of PW-3 and 4 during trial was rejected in these circumstances and not merely because the witnesses were persons interested.

1136. It is to be seen therefore as to whether such circumstances are made out in the present case, so as to discredit the testimony of Ajay Kumar.

1137. The witness stated that he had learnt only on 28th February, 2002 that Nitish Katara was a resident of Delhi and that he had no information about the residence of Nilam Katara or any of her family members so as to tell them about what he had seen between 16 and 17th February, 2002. In his cross- examination, the witness stated that it was only on 1 st March, 2002 upon seeing the photograph of Vikas and Vishal Yadav on the TV news, he was certain in his heart that they were the same Vikas and Vishal Yadav who had been seen by him on the night of 16/17th February, 2002 in the Tata Safari.

1138. The trial judge also observed the fact that the fact that the witness did not immediately give his statement to the police despite media reports is not a factor to outrightly condemn him as an unbelievable witness.

1139. The challenge to the testimony of Ajay Kumar on account of his three matrimonial alliances and disputes with his spouses which included criminal cases, certainly cannot impact his credit worthiness so far as testimony in a case unrelated to his marriages is concerned. Instability in matrimony or personal matters cannot impact either competence to testify about facts witnessed nor the veracity of the witness's testimony.

1140. Ajay Kumar was a commoner who had no interest in any of the persons involved in the incident. It is not even the case of the appellants that the witness nurtured any ill will vengeance or animus against them. No suggestion to this effect has been given. Just because the ancestors of the deceased complainant and the witness came from the village from which ancestors of the deceased hailed without anything more, the witness cannot be termed as an interested witness and his testimony so discarded. On the contrary, if the witness felt a kinship with Nitish Katara's family, he would be interested in the truth being brought out and persons actually responsible for the crime being punished, not in implicating innocent persons, thereby letting the guilty go scot free.

1141. Other than the fact that the ancestors of the deceased and the family of the witness hailed from the same village, no other reason has been or even suggested as to why the witness would support the complainant. There is no evidence that Ajay Kumar had any acquaintance with the family of the deceased. The reason suggested is too remote to constitute such _interest' as to discredit testimony of the person in court. The defence have also suggested no substantial reason at all as to why he would falsely depose against them. We find ourselves unable to agree with the objection of the appellants that the testimony of Ajay Kumar Katara must be rejected because he won an interested witness.

(B) Whether a test identification parade (TIP) was mandatory to establish the identity of the accused persons?

1142. Before us all the appellants have submitted that the dock identification of the appellants by Ajay Kumar Katara deserves to be outrightly rejected as the police failed to conduct a TIP during investigation.

1143. Under Section 9 of the Indian Evidence Act, facts which establish the identity of the accused persons are relevant facts.

1144. Mr. Dayan Krishnan has drawn our attention to the testimony of Ajay Kumar that he recognised the three accused persons prior to the night of 16th /17th February, 2002. It is submitted that the witness truthfully stated that he did not recognize the fourth person in the Tata Safari but he accurately described his wearing apparel. Therefore, there is no reason to doubt his clear evidence with regard to the court identification of the accused persons. Learned Additional Standing counsel has contended that the challenge by learned senior counsels for Vikas and Vishal Yadav as well as by Mr. Kapoor on behalf of Sukhdev @ Pehalwan to the identification in court of the appellants as the occupants of the Tata Safarai vehicle on the ground that the prosecution had failed to conduct a test identification parade during investigation is of no significance. In support of his submissions on this issue, reliance has been placed on (2011) 3 SCC 654, Sheoshankar Singh v. State of Jharkhand and (2002) 7 SCC 295, Dana Yadav v. State of Bihar.

1145. In the present case, it is an admitted position that the police did not conduct Test Identification Parades to get the appellants identified during the investigation. Before taking up the objection, let us first examine the evidence of Ajay Kumar Katara on identification. We have noted above the witness' testimony to the effect that Vikas Yadav son of Shri D.P. Yadav was driving the vehicle; and that Vishal son of Shri Kamal Nath Yadav was sitting behind the driver; a third person being a stout pehalwan named Sukhdev was sitting along side in the rear while a fourth person wearing a red kurta and a shawl seated next to the driver were its other occupants. The witness correctly identified Vikas and Vishal as present in court. He identified Nitish Katara from his photographs. The witness stated that he usually kept visiting Ghaziabad as several people knew him and he was in the profession of preparing horoscopes and selling gems.

1146. Appearing as PW-14 in Sukhdev's trial, Ajay Kumar has again reiterated that he knew Vikas Yadav from before since he was a known personality being the son of M.P. Shri D.P. Yadav and the whole of Ghaziabad knew him. Ajay Kumar further stated that he knew Vishal Yadav at that time since he used to roam around alongwith Vishal Yadav.

1147. Ajay Kumar in his testimony as PW-33 on 31st May, 2003 named the three appellants as seated in the Tata Safari vehicle and stated that he did know the fourth person with them. He identified the three appellants in their respective trials and Nitish Katara from a proven photograph.

1148. With regard to identity of this fourth person the testimony of the witness in the first trial is as follows:

> —...The fourth person was not known to me, he was wearing a Red Kurta and shawl later on I saw his photograph on TV and learnt that he was deceased. I have seen the photograph Ex. PW 11/5 it was the same person, who was the fourth person in TATA safari and was wearing same clothes.‖ 1149. Exh.PW11/5 is a photograph of Nitish Katara. Ajay Kumar thus recognized Nitish Katara as the fourth occupant apart from the appellants in the Tata Safari from his photographs.

1150. It is also in his testimony that there was light at the spot.

While explaining about the event of his scooter stopping, the witness has stated in his examination-in-chief that there was an electric pole near the spot where his scooter had gone out of order and a PCO booth which was closed. The witness denied the suggestion that normally there was no electricity on the road where the accident took place. Thus the witness proved illumination on the spot.

1151. The cross-examination on behalf of Vishal Yadav is on similar lines without any suggestion or question being put to him on his identification of the accused persons or that PW- 33's claim that he knew the accused persons from before was incorrect or to the effect that he had made a false deposition.

1152. Our attention has been drawn to the suggestion put to PW-33 in his cross-examination to the effect that prior to 16th February, 2002, he was not friendly to Vikas or Vishal Yadav or inimical to them or on visiting terms to them. It was never the witness's case that he was friendly with or on visiting terms with Vikas or Vishal Yadav. The witness has merely reiterated identification of Vikas and Vishal Yadav in his testimony when he stated that on seeing the photograph of Vikas and Vishal Yadav, the correctness of their identity was reinforced.

1153. So far as the identification of Sukhdev @ Pehalwan is concerned, in his trial, appearing as PW-14 Ajay Kumar stated that he knew Sukhdev as he used to look after the liquor shop of Shri D.P. Yadav at Bulandshahr and he had also seen him in the company of accused Vikas Yadav in Ghaziabad. The witness testified that he purchased liquor from that shop.

1154. Mr. Kapoor, learned counsel appearing for Sukhdev @ Pehalwan urged at length that the story of purchasing liquor from the shop in Bulandshahr was wholly implausible. We note that the defence does not dispute that Sukhdev @ Pehalwan was manning the liquor shop run by Shri D.P. Yadav or that the witness or the accused persons had not been going around Bulandshahr as well as Ghaziabad.

1155. Ajay Kumar further stated that he knew Sukhdev as he not only used to look after the liquor shop of Shri D.P. Yadav at Bulandshahr, but he had also seen him in the company of Vikas Yadav in Ghaziabad. The witness has explained the circumstances in which he would effect his liquor purchases from the shop. Ajay Kumar explained that he used to visit the liquor shop of Shri D.P. Yadav in Bulandshahr since liquor was cheaper there. In answer to a court question, the witness stated that he did not go to Bulandshahr from Ghaziabad. However, when returning to Ghaziabad from his visits to Agra, this liquor shop in Bulandshahr fell on the way and so he visited it. He has also testified that he had also seen Sukhdev @ Pehalwan in the Ghaziabad area in the company of the other accused persons.

Despite extensive cross-examination, the testimony of the witness about purchasing liquor from the shop of Shri D.P. Yadav in Bulandshahr where the accused Sukhdev was employed, could not be shaken.

1156. Let us first and foremost examine what is the purpose of conducting a TIP during investigation? Is holding a TIP mandatory and a requirement in every case? In (2011) 3 SCC 654 Sheoshankar Singh v. State of Jharkhand, the court explained the purpose of the TIP and reiterated the principles laid in judicial precedents on which identification of accused persons by a witness need be evaluated. The discussion by the Supreme Court on this issue may usefully extracted and reads as follows:

> "46. It is fairly well settled that identification of the accused in the court by the witness constitutes the substantive evidence in a case although any such identification for the first time at the trial may more often than not appear to be evidence of a weak character. That being so a test identification parade is conducted with a view to strengthening the trustworthiness of the evidence. Such a TIP then provides corroboration to the witness in

the court who claims to identify the accused persons otherwise unknown to him. Test identification parades, therefore, remain in the realm of investigation.

47. The Code of Criminal Procedure does not oblige the investigating agency to necessarily hold a test identification parade nor is there any provision under which the accused may claim a right to the holding of a test identification parade. The failure of the investigating agency to hold a test identification parade does not, in that view, have the effect of weakening the evidence of identification in the court. As to what should be the weight attached to such identification is a matter which the court will determine in the peculiar facts and circumstances of each case. In appropriate cases the court may accept the evidence of identification in the court even without insisting on corroboration.

48. The decisions of this Court on the subject are legion. It is, therefore, unnecessary to refer to all such decisions. We remain content with a reference to the following observations made by this Court in Malkhansingh v. State of M.P. [(2003) 5 SCC 746 : 2003 SCC (Cri) 1247] : (SCC pp. 751-52, para 7) —7. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration.

(See Kanta Prashad v. Delhi Admn. [AIR 1958 SC 350 : 1958 Cri LJ 698] , Vaikuntam Chandrappa v. State of A.P. [AIR 1960 SC 1340 : 1960 Cri LJ 1681] , Budhsen v. State of U.P. [(1970) 2 SCC 128 : 1970 SCC (Cri) 343] and Rameshwar Singh v. State of JandK [(1971) 2 SCC 715 : 1971 SCC (Cri) 638])‖ (Emphasis supplied) 1157. The Supreme Court relied on the principles laid down in Malkhansingh v. State of M.P. (2003) 5 SCC 746 in paras 10 and 16 in the judgment reported at (2005) 11 SCC 600 (paras 227 and 228) State (NCT of Delhi) v. Navjot Sandhu to hold thus:-

—227. It is well settled that conducting the test identification parade relates to the stage of investigation and the omission to conduct the same will not always affect the credibility of the witness who identifies the accused in the court. ...

228. The earlier observation at para 10 is also important: (SCC p. 753) —10. It is no doubt true that much evidentiary value cannot be attached to the identification of the accused in court where identifying witness is a total stranger who had just a fleeting glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first

time in court.‖ (Emphasis supplied) 1158. On the issue of the test identification parade, the principles culled out in (2002) 7 SCC 295 Dana Yadav v. State of Bihar are authoritative and bind the present consideration. The relevant extract thereof reads as follows:

—38. In view of the law analysed above, we conclude thus:

(a) If an accused is well known to the prosecution witnesses from before, no test identification parade is called for and it would be meaningless and sheer waste of public time to hold the same.

(b) In cases where according to the prosecution the accused is known to the prosecution witnesses from before, but the said fact is denied by him and he challenges his identity by the prosecution witnesses by filing a petition for holding test identification parade, a court while dealing with such a prayer, should consider without holding a mini-inquiry as to whether the denial is bona fide or a mere pretence and/or made with an ulterior motive to delay the investigation....

....But in case either prayer is not granted or granted but no test identification parade held, the same ipso facto cannot be a ground for throwing out evidence of identification of an accused in court when evidence of the witness, on the question of identity of the accused from before, is found to be credible. The main thrust should be on answer to the question as to whether evidence of a witness in court to the identity of the accused from before is trustworthy or not. In case the answer is in the affirmative, the fact that prayer for holding test identification parade was rejected or although granted, but no such parade was held, would not in any manner affect the evidence adduced in court in relation to identity of the accused. But if, however, such an evidence is not free from doubt, the same may be a relevant material while appreciating the evidence of identification adduced in court.

(c) Evidence of identification of an accused in court by a witness is substantive evidence whereas that of identification in test identification parade is, though a primary evidence but not substantive one, and the same can be used only to corroborate identification of the accused by a witness in court.

(d) Identification parades are held during the course of investigation ordinarily at the instance of investigating agencies and should be held with reasonable dispatch for the purpose of enabling the witnesses to identify either the properties which are the subject-matter of alleged offence or the accused persons involved in the offence so as to provide it with materials to assure itself if the investigation is proceeding on right lines and the persons whom it suspects to have committed the offence were the real culprits.

(e) Failure to hold test identification parade does not make the evidence of identification in court inadmissible, rather the same is very much admissible in law, but ordinarily identification of an accused by a witness for the first time in court should not form the basis of conviction, the same being from its very nature inherently of a weak character unless it is corroborated by his previous identification in the test identification parade or any other evidence. The previous identification in the test identification parade is a check valve to the evidence of identification in court of an accused by a witness and the same is a rule of prudence and not law.

(f) In exceptional circumstances only, as discussed above, evidence of identification for the first time in court, without the same being corroborated by previous identification in the test identification parade or any other evidence, can form the basis of conviction.

(g) Ordinarily, if an accused is not named in the first information report, his identification by witnesses in court, should not be relied upon, especially when they did not disclose name of the accused before the police, but to this general rule there may be exceptions as enumerated above.‖ (Emphasis supplied) The objection taken by the appellants has to be examined on these legal principles.

1159. So far as Sukhdev @ Pehalwan is concerned, other suggestions made by the defence counsel to the witness also support his presence in the vehicle in question as testified by Ajay Kumar (as PW-14 in Sukhdev Pehalwan's trial). Probably in order to establish that Nitish Katara was not under any fear or threat in the car learned counsel for Sukhdev has suggested the following to PW-14 Ajay Kumar Katara in the cross-examination recorded on 27th July, 2007:

―Except accused Vikas who had abused me on the intervening night of 16-17/2/02, no other occupant of the vehicle had said anything.

Again said I do not remember if any other occupant of the vehicle uttered any words. It is correct that at that time all the occupants of the vehicle were sitting comfortably. It is incorrect to suggest that normally there is no electricity on the road where the incident took place.‖ It is pointed out to us that thus Sukhdev @ Pehalwan admitted the presence of the appellants in the vehicle.

1160. We have noted above also the suggestion by counsel for Sukhdev @ Pehalwan to Ajay Kumar Katara (PW-14) that Nitish Katara was sitting comfortably with the accused persons in the vehicle when he saw them at Hapur Chungi. It is submitted that it was for the accused person to come out with an explanation as to how and when they parted company with the deceased.

1161. We find that the appellants neither put a single question nor was any suggestion put to PW-33 Ajay Kumar that he did not know the accused persons from before or that what he had stated was false. Thus correctness of the identification has also not been assailed in the cross-examination.

1162. It is in evidence that the Tata Safari vehicle in which the witness identified the accused and a fourth person had come to a halt and the witness went upto it. The windows of the vehicle were rolled down. Ct. Satender Pal Singh has also stated that the windows of the vehicle were rolled down. The interaction lasted two minutes. This period is certainly sufficient to identify persons one knows and notice someone unknown. That is the reason why Ct. Satender Pal Singh was also able to identify the occupants of the vehicle.

1163. The evidence of Ajay Kumar on identification of Vikas and Vishal Yadav and Sukhdev @ Pehalwan could not be shaken by any cross-examination in the trials. He thus affirmatively established the identity of the four occupants of the vehicle as being the three accused persons and the deceased.

1164. In the present case, Ajay Kumar Katara recognised and knew the accused persons from long before the incident of the night of 16th / 17th February, 2002. The witness correctly identified the three accused persons present in the court room and the fourth from proven photographs. The witness denied the suggestion that he was seeing Sukhdev for the first time in court or that he had identified him at the instance of the police. The witness volunteered that he had seen him several times. We fail to see as to what purpose would be served by conducting a TIP in these facts.

1165. There is yet another reason as to why no useful purpose would have been served by conducting the TIP. Apart from the above testimony of Ajay Kumar about his knowing and recognizing the accused persons from before, it is in the evidence of Anil Somania, the investigating officer that wide publicity stood given of the identity of the accused persons including their photographs as well in the print and electronic media. In fact, the accused persons strongly rely upon the evidence of the publicity given to the case and their photographs being flashed by the media shortly after the incident. This

publicity had been necessitated as the accused persons were not traceable at their known addresses or their places of business. Anil Somania has also disclosed as to how a guarantee card of Sukhdev Yadav was recovered on 3rd of March 2002 carrying his photograph and full address. Proceedings under Section 82 of the Cr.P.C. had been necessitated against all three appellants. While Vikas and Vishal Yadav were arrested on 23rd February, 2002 in Dabra, Sukhdev Yadav could be arrested only on 23 rd February, 2005. Given the wide publicity given to the appellants and the fact that Ajay Kumar recognized them from before, holding a test identification parade would have been a sheer waste of public time and resources. It would have served no worthwhile purpose.

1166. It is trite that holding of a TIP relates to a stage of investigation. It is equally well settled that even an omission to conduct a TIP in the case of a first time identification of an accused in the dock by a witness, will not ipso facto affect the credibility of the witness. [Ref.: Sheo Shankar Singh (Supra)].

1167. Though it was also open to them to do so, the accused persons made no application at all requesting a test identification parade as noted in para 38(b) of Daya Yadav (supra).

1168. Given the circumstances of the present case, the challenge to the identification on the sole ground that the investigating agency had failed to conduct a test identification parade is unwarranted.

(C) The delay in recording statement under Section 161 of the Cr.P.C. of Ajay Kumar by the investigating officer establishes that he was a planted witness rendering his testimony suspicious and unbelievable 1169. Before us, Mr. U.R. Lalit, learned senior counsel assails the truth of the testimony of Ajay Kumar on the ground that the occurrence took place on the night of the 16/17th February, 2002. However, the statement of PW-33 Ajay Kumar was recorded by the investigating officer SI Anil Somania only on 18th March, 2002. The submission is that the delay in recording the statement in the instant case, clearly suggests that the prosecution was aware of the fact that there was no evidence to connect the accused persons with the incident and consequently PW-33 Ajay Kumar was planted as a chance witness to fill in the gaps in the prosecution story.

1170. Mr. Jethmalani, learned senior counsel has contended that the statement of PW-33 Ajay Kumar has been recorded for the first time only on 18th March, 2002 and that the delay in recording his statement is crucial in the instant case and he must be disbelieved on this ground alone. In support of this contention, reliance is placed on the pronouncement of the Supreme Court reported at (1978) 4 SCC 371 Ganesh Bhavan Patel and Anr. v. State of Maharashtra.

1171. Mr. R.K. Kapoor, Advocate appearing for Sukhdev @ Pehalwan also supports the challenge to PW-14 Ajay Kumar's testimony on the ground that there was unexplained delay in recording the statements under Section 161 of the Cr.P.C. of Ajay Kumar.

1172. On the other hand, Mr. Dayan Krishnan, learned Additional Standing Counsel for the State has urged that the delay has to be examined from the stand point of the Investigating Officer alone. The submission is that the delay on the part of Ajay Kumar in reporting the fact that he had seen the accused along with the deceased on the fateful night has been adequately explained and is therefore not fatal to the prosecution case.

1173. We may first examine the legal parameters on which a challenge to the testimony of a witness on the ground of delay in his examination by the Investigating Officer has to be tested.

1174. Mr. U.R. Lalit has drawn our attention to the pronouncement reported at (2011) 1 JCC 646 Yogesh v. State on the issue of non-recording of a statement u/s 161 of the Cr.P.C. The relevant portion reads as follows:-

> —7. .....In any event, we find that the statement of PW-2 [Jagdish] was recorded on 12.12.1995, i.e., more than three months after the date of the incident, i.e., on 16.09.1995

as also long after the date of arrest of Yogesh and the recording of his purported disclosure statement on 22.09.1995. There is no explanation as to why PW- 2 Jagdish's statement was recorded after such a long time gap. This in itself is sufficient to cast doubts on the testimony of PW-2 [Jagdish] insofar as his "last seen evidence" is concerned.

It is clear that if the testimony of PW-2 is taken out from the equation, the entire case of circumstantial evidence against the appellant Yogesh breaks down.‖ 1175. On the issue of delay in examination of a witness by the IO, reliance has been placed on (2011) 3 SCC 654 Sheoshankar Singh v. State of Jharkhand. In this case, the incident occurred on 14th April, 2000 while the statement of the eye witness came to be recorded on 2nd June, 2000. The following observations of the court on the issue under consideration make useful reading:

—66. The legal position is well settled that mere delay in the examination of a particular witness does not, as a rule of universal application, render the prosecution case suspect. It depends upon the circumstances of the case and the nature of the offence that is being investigated. It would also depend upon the availability of information by which the investigating officer could reach the witness and examine him. It would also depend upon the explanation, if any, which the investigating officer may offer for the delay. In a case where the investigating officer has reasons to believe that a particular witness is an eyewitness to the occurrence but he does not examine him without any possible explanation for any such omission, the delay may assume importance and require the court to closely scrutinise and evaluate the version of the witness but in a case where the investigating officer had no such information about any particular individual being an eyewitness to the occurrence, mere delay in examining such a witness would not ipso facto render the testimony of the witness suspect or affect the prosecution version.

67. We are supported in this view by the decision of this Court in Ranbir v. State of Punjab [(1973) 2 SCC 444 : 1973 SCC (Cri) 858] where this Court examined the effect of delayed examination of a witness and observed: (SCC pp. 447-48, para 7) —7. ... The question of delay in examining a witness during investigation is material only if it is indicative and suggestive of some unfair practice by the investigating agency for the purpose of introducing a got-up witness to falsely support the prosecution case. It is, therefore, essential that the investigating officer should be asked specifically about the delay and the reasons therefor.‖

68. Again in Satbir Singh v. State of U.P. [(2009) 13 SCC 790 : (2010) 1 SCC (Cri) 1250] the delay in the examination of the witness was held to be not fatal to the prosecution case. This Court observed: (SCC p.

800, para 32) —32. Contention of Mr Sushil Kumar that the investigating officer did not examine some of the witnesses on 27-1-1997 cannot be accepted for more than one reason; firstly, because the delay in the investigation itself may not benefit the accused; secondly, because the investigating officer (PW 8) in his deposition explained the reasons for delayed examination of the witnesses.‖ (Emphasis by us) 1176. On the same aspect, reference can usefully be made to the pronouncement reported at (2010) 6 SCC 1 Sidharth Vashisht @ Manu Sharma v. State (NCT of Delhi). The following observations of the Supreme Court, wherein a similar objection by Mr. R. Jethmalani, learned senior counsel was considered, are illuminative on the issue before this court:

—151. Mr Ram Jethmalani, the learned Senior Counsel for the appellant Manu Sharma by placing various decisions contended that the delay in recording statements of witnesses is fatal to the case of the prosecution, when the trial court rightly accepted the same, however, the High Court committed an error in ignoring the said vital aspect. For this, the learned

Solicitor General submitted that the said contention is based on an incorrect understanding of law and its wrong application to the facts of this case.

152. The first judgment relied on by the learned Senior Counsel for the appellant Manu Sharma is in Ganesh Bhavan Patel v. State of Maharashtra [(1978) 4 SCC 371 : 1979 SCC (Cri) 1] . In that case, the witnesses were known and could have been examined when the investigating officer visited the scene of occurrence or soon thereafter. In the present case, there were about 100 or more persons present at the party. The identity of all such persons took substantial amount of time to determine. Consequent to the large number of witnesses, their interrogation also consequently took a substantial amount of time. Unlike the said decision, in the present case, there are no concomitant circumstances to suggest that the investigator was deliberately making time with a view to give a particular shape to the case. The details of investigation conducted on each day are very clearly brought out in the evidence of the various witnesses.

Furthermore, the identity of the appellant as a suspect in the present case was not the consequence of any delay. Thus, the delay, if any, in recording the evidence of witnesses in the present case cannot be considered as an infirmity in the prosecution case.‖ 1177. Reference may usefully be made also to the observations of the Supreme Court in the pronouncement reported at (2004) 1 SCC 414 (para 17) Banti alias Guddu v. State of M.P. wherein the court held as follows :-

—17. As regards delayed examination of certain witnesses; this Court in several decisions has held that unless the Investigating Officer is categorically asked as to why there was delay in examination of the witnesses the defence cannot gain any advantage therefrom. It cannot be laid down as a rule of universal application that if there is any delay in examination of a particular witness the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for the delayed examination is plausible and acceptable and the court accepts the same as plausible, there is no reason to interfere with the conclusion [See (1973) 2 SCC 444 Ranbir and Ors. v State of Punjab and (2002) 8 SCC 45 Bodhraj @Bodha and Ors. v. State of Jammu and Kashmir.‖ 1178. Reliance has been placed on the judgment reported at (2003) 1 JCC 97 Kiledar Singh and Ors v. State of MP wherein the statement of PW 3 under Section 161 was recorded after 77 days of the incident. Doubt was created about the presence of PW 3 on the spot. The court held that even though doubt had been created, they found no reason to believe his explanation that he had gone out and so his statement was recorded with delay. This was held to be not fatal to the prosecution's case. The relevant para is extracted as follows:

—12. The next ground urged was that the statement of PW 3 was recorded by the police after a delay of 77 days. It was submitted that the explanation given for recording the statement so belatedly could not be believed.

Undoubtedly, the statement has been recorded after considerable delay. However, considering the fact that the presence of PW 3 at the place of incident cannot be doubted, we see no reason to disbelieve the explanation that the statement was recorded belatedly as PW 3 had gone away to some other place.‖ 1179. Our attention has also been drawn to the pronouncement reported at (2004) 13 SCC 279 Prithvi (Minor) v. Mam Raj.

In this case, in para 22, the court reiterated the well settled position in law while considering the judgments cited before it that.

—22. The respondents placed reliance on the observations of this Court in Balakrushna Swain v. State of Orissa [(1971) 3 SCC 192 :

1971 SCC (Cri) 313 : AIR 1971 SC 804] and in State of Orissa v.Brahmananda Nanda [(1976) 4 SCC 288 : 1976 SCC (Cri) 596 : AIR 1976 SC 2488], AIR at p. 2489, para 2 and contended that the evidence of appellant Prithvi was not believable because of the long delay in recording the statement. We are afraid that neither case lays down an absolute proposition of law that delay per se destroys the credibility of witnesses' statements. The judgments merely point out that unexplained delay in recording the statement gives rise to a doubt that the prosecution might have engineered it to rope the accused into the case. Delay in recording the statement of the witness can occur due to various reasons and can have several explanations. It is for the court to assess the explanation and if satisfied, accept the statement of the witness.‖ (Emphasis supplied) 1180. During the course of hearing, Ms.Ritu Gauba, learned APP has drawn our attention to a reasoned pronouncement of the Supreme Court reported at AIR 2012 SC 3539 Shyamal Ghosh v. State of West Bengal wherein almost all the submissions made in the present proceedings were raised before the Supreme Court. In this case, the deceased was restrained by the accused persons while on his way back from visiting one Chander De on his Avon bicycle. The deceased was first strangulated at about 9:00 pm on 29th September, 2003 and then murdered by them on the mid- night of 29th/30th September, 2003. With the intention of causing disappearance of evidence of murder, the accused severed the head, legs, hands and body of the corpse by sharp cutting weapon; put the same in gunny bags, carried it in a Maruti Van at about 9:00 pm on the following day and left the same at Pathulia Danga-dingla by the side of Barrackpore Dum Dum Highway near the electric tower and in front of the garden of one Tapan Santra. This was noticed at about 10:00 pm on that day by PW 15, who reported the matter to the police.

1181. During the trial, the prosecution placed reliance on the testimony of PWs 8 and 19 who were chance witnesses. The appellant challenged their testimony on the ground of their being interested witnesses and also the fact that the statement of PW 8 was recorded after a delay of twenty one days in which he did not disclose the name of anyone. Just as in the present case, the State took a plea that delay in recording the statement has been explained and that the investigating officer was actually prevented by the acts of the appellants in expeditiously completing the investigation. It was also submitted that the explanation tendered by the State deserves to be accepted in the light of the well settled principles laid down by the Supreme Court. On this aspect, we find that the Supreme Court has noted the circumstances in which delay was bound to occur in recording the statement of the witnesses. Such circumstances as noted by the Supreme Court in Shyamal Ghosh (supra) deserve to be considered in extenso which read as follows:-

> ―51. On the contra, the submission on behalf of the State is that the delay has been explained and though the investigating officer was cross- examined at length, not even a suggestion was put to him as to the reason for such delay and, thus, the accused cannot take any benefit thereof at this stage. Reliance in this regard on behalf of the State is placed on Brathi v. State of Punjab [(1991) 1 SCC 519 : 1991 SCC (Cri) 203] ,Banti v. State of M.P. [(2004) 1 SCC 414 : 2004 SCC (Cri) 294] and State of U.P. v. Satish [(2005) 3 SCC 114 : 2005 SCC (Cri) 642] .
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> 52. These are the issues which are no more res integra. The consistent view of this Court has been that if the explanation offered for the delayed examination of a particular witness is plausible and acceptable and the Court accepts the same as plausible, there is no reason to interfere with the conclusion arrived at by the courts. This is the view expressed in Banti [(2004) 1 SCC 414 : 2004 SCC (Cri) 294]. Furthermore, this Court has also taken the view that no doubt when the Court has to appreciate the evidence given by the witnesses who are closely related to the deceased, it has to be very careful in evaluating such evidence but the mechanical rejection of the evidence on the sole ground that it is that of an interested witness would inevitably relate to failure of justice (Brathi [(1991) 1 SCC 519 : 1991 SCC (Cri) 203]). In Satish [(2005) 3 SCC 114 : 2005 SCC (Cri) 642] , this Court further held

that the explanation offered by the investigating officer on being questioned on the aspect of delayed examination by the accused has to be tested by the Court on the touchstone of credibility. It may not have any effect on the credibility of the prosecution evidence tendered by other witnesses.

53. The delay in examination of witnesses is a variable factor. It would depend upon a number of circumstances. For example, non-

availability of witnesses, the investigating officer being preoccupied in serious matters, the investigating officer spending his time in arresting the accused who are absconding, being occupied in other spheres of investigation of the same case which may require his attention urgently and importantly, etc.

54. In the present case, it has come in evidence that the accused persons were absconding and the investigating officer had to make serious effort and even go to various places for arresting the accused, including coming from West Bengal to Delhi. The investigating officer has specifically stated, that too voluntarily, that he had attempted raiding the houses of the accused even after cornering the area, but of no avail. He had ensured that the mutilated body parts of the deceased reached the hospital and also effected recovery of various items at the behest of the arrested accused. Furthermore, the witnesses whose statements were recorded themselves belonged to the poor strata, who must be moving from one place to another to earn their livelihood. The statement of the available witnesses like PW 2, PW 4, PW 6, and the doctor, PW 16, another material witness, had been recorded at the earliest. The investigating officer recorded the statements of nearly 28 witnesses. Some delay was bound to occur in recording the statements of the witnesses whose names came to light after certain investigation had been carried out by the investigating officer.‖ (Emphasis by us) 1182. An absolute proposition has been urged on behalf of the appellants that the testimony of Ajay Kumar deserves to be rejected on the sole ground that there was gross delay in the recording of his statement under Section 161 of the Cr.P.C. by the investigating officer. In the pronouncement reported at (2004) 13 SCC 279 Prthivi (Minor) v. Mam Raj and Ors., the Supreme Court rejected such proposition in the following terms -

―22. The respondents placed reliance on the observations of this Court in (1971) 3 SCC 192 Balakrushna Swain v. State of Orissa, and in (1976) 4 SCC 288 State of Orissa v.

Brahmananda Nanda, and contend that the evidence of appellant Prithvi was not believable because of the long delay in recording the statement. We are afraid that neither case lays down an absolute proposition of law that delay per se destroys the credibility of witnesses' statements. The judgments merely point out that unexplained delay in recording the statement gives rise to a doubt that the prosecution might have engineered it to rope the accused into the case. Delay in recording the statement of the witness can occur due to various reasons and can have several explanations. It is for the court to assess the explanation and if satisfied, accept the statement of the witness.‖ (Underlining by us) 1183. Mr. Jethmalani had placed (1978) 4 SCC 371, Ganesh Bhavan Patel and Anr. v. State of Maharashtra before us. This case related to an eye witness account of an incident given by PWs Welji, Pramila and Kuvarbai. The court observed that there was serious doubt about their being eye witnesses of the occurrence on account of the undue delay on the part of the investigating officer in recording their evidence. It was observed that ―one unusual feature which projects its shadow on the evidence of PWs Welji, Pramila and Kuvarbai and casts a serious doubt about their being eyewitnesses of the occurrence, is the undue delay on the part of the investigating officer in recording their statements. Although these witnesses were or could be available for examination when the investigating officer visited the scene of occurrence or soon thereafter, their statements under Section 161 Cr.P.C. were recorded on the following day. Welji (P.W. 3) was examined at 8 a.m., Pramila at 9.15 or 9.30 a.m., and Kuvarbai at 1 p.m. delay of a few hours, simpliciter, in recording the statements of eyewitnesses may not, by itself, amount to a serious infirmity in the prosecution case. But it may assume such a character

if there are concomitant circumstances to suggest that the investigator was deliberately marking time with a view to decide about the shape to be given to the case and the eyewitnesses to be introduced. A catena of circumstances which lend such significance to this delay, exists in the instant case"' There is, therefore, no absolute proposition that every delay in recording statements by the investigating officer has to result in discarding the evidence of such witnesses.

1184. We may note that in Ganesh Bhavan Patel (supra) case the circumstances which weighed in favour of discarding the testimony of these witnesses were that the FIR was belated; the order in which the investigating officer recorded the statement of witnesses; the excuse set up by the IO that they did not want the girls and the women-folk to be present in the Police Station at that hour of the night when the offence occurred; and the circumstance that the names of the eye- witnesses were not mentioned anywhere in the record till the morning of 30th November, 2009 even though the incident had occurred on 29th November, 1969. It was held that all these circumstances went towards casting a cloud of suspicion on the credibility of the entire warp and woof of the prosecution story.

1185. It has been pointed out by Mr. Dayan Krishnan that the Supreme Court has referred to and distinguished the pronouncement in Ganesh Bhavan Patel v. State of Maharashtra (Supra) in para 152 of Sidharth Vashisth (supra) which has been relied upon on behalf of the appellants before this court and extracted above.

1186. It is therefore trite that delay in recording statements of witnesses per se would not necessarily be fatal to the prosecution case but the lack of explanataion for the delay or the nature of the explanation which may be relevant and have a bearing thereon. The fact as to whether the investigating officer had knowledge of the existence of the witness and still did not record his statement is an extremely pertinent matter. Preoccupation of the investigating officer with urgent aspects of the investigation, say, arrest of absconding accused, effecting searches and recoveries, and other such matters may be considered valid explanation for the delay occasioned in recording the statements. The delay may have occurred because the number of witnesses whose evidence had to be recorded was large and time consuming. The Supreme Court has held that delay in recording the statement is material only if it suggests a malpractice by the investigating agency to set up a case and cobble together some kind of a prosecution to falsely implicate the accused persons. The nature of the revelations of the witness whose statement was delayed may also be a factor to be considered by the court.

1187. We find that it is equally well settled that even if there is some delay, unless the investigating officer is specifically questioned thereon, no benefit can be derived thereon by the accused. A duty is imposed to carefully scrutinize the explanation, if any, tendered by the investigating agency, or lack of it for the delay and to evaluate whether it impacts the credibility of the witness or the prosecution case in any manner.

1188. The delay in recording the statement of Ajay Kumar by the Investigating Officer Anil Somania has to be scrutinized in the light of these guiding principles. The first question which arises before this court is as to whether the investigating officer knew about the existence of witness and did not examine him deliberately. It is to be seen as to whether the investigating officer deliberately bid time to introduce false evidence to obtain a wrongful conviction of the appellants.

1189. Our attention is drawn to the statement of Ajay Kumar who in his cross-examination on behalf of Vikas Yadav has stated that he was a regular reader of newspapers and that between 18 to 28th February, 2002, he had read the newspapers once or twice. So far as watching television is concerned the witness stated that the media was giving news about the murder of Nitish Katara between 18th February and the 28th February, 2002 as well as information that the accused persons were suspected of having committed the murder. The witness admitted the suggestion that he had told the investigating officer when he finally met him that on the television and in newspapers, the photograph of deceased

Nitish Katara was being shown repeatedly and that he had already read the news about the murder in the newspapers.

1190. Appearing as PW 14 in Sukhdev's trial, the witness has explained that it was coming on television that Anil Somania was investigating the case. He has therefore, sourced his knowledge about the name of the investigating officer to information he received from television. Anil Kumar categorically stated in his cross-examination that he did not have the courage to go to the superior officers of the police and also that he did not know Anil Somania before he met him on 18th March, 2002.

1191. In his testimony in Sukhdev's trial as PW-14, Ajay Kumar reiterated his statement in Vikas and Vishal Yadav's trial and stated that his conscience had persuaded him to go to the police station.

1192. On the issue as to why the witness did not disclose the purpose of his wanting to meet Anil Somania to the police in his visits to the station on 2nd and 12th March, 2002, the witness has explained that he was apprehensive that it would be leaked out as he was scared of Shri D.P. Yadav.

1193. In the judgment dated 28th of May 2002, the learned Trial Judge has noted that it was only on 25th February, 2002 the finger prints of the dead body were matched with the finger prints of the deceased from his driving licence record. There is no evidence at all on record to show as to when this fact was disclosed by the media or as to when the identity of the dead body belonging to Nitish Katara came to the knowledge of the witness. In this background, the learned Trial Judge has held that there was nothing abnormal in the conduct of the witness in harnessing courage and approaching the police on 2nd March, 2002 despite knowledge of the influence and reputation of the accused persons and the family. It has been rightly observed that the witness had no personal interest in the matter and therefore, no motivation to act in a hurry.

1194. So far as the failure to discuss the incident with anyone till 18th March, 2002 is concerned, the witness stated that he disclosed the episode only to the investigating officer Anil Somania who met him on that day as he apprehended that if he revealed the information to anyone also, it would be leaked and he would be killed. The witness has further stated that he was also given security since 24 th April, 2002 under court orders after he made a complaint to the court and senior police officers and that he had security till date.

1195. As far as whether Ajay Kumar was speaking the truth with regard to the non-availability of Anil Somania on 2nd and 12th March, 2002 is concerned, our attention has been drawn by Mr. Krishnan, learned Additional Standing Counsel to the deposition of the investigating officer Anil Somania as PW-

35. The investigating officer has explained that on 2nd March, 2002, he had proceeded for investigation from the police station at 9.30 a.m. after recording GD No.14 (Exh.PW-35/29). The witness has stated that on 2nd March, 2002, he had returned to the police station only at 23: 25 hours. In this regard, GD No. 52 recorded in the police station was proved before the trial court as Exh.PW-35/30. This contemporaneous evidence (documentary as well as oral) establishes that the investigating officer was not available in the police station between 09:30 hours and 23:35 hours on the 2nd of March 2002.

1196. Corroboration of Ajay Kumar's testimony that the investigating officer was also not available on 12th March, 2002 when he went to the police station, is to be found in the further testimony of the investigating officer SI Anil Somania who has stated that on 12th March, 2002, he had left the police station at 11.10 a.m. as he was assigned law and order duty on the occasion of Shivratri and has proved GD No.24 (Exh.PW-35/41) on record. He returned to the police station at 21:35 hours and recorded GD No.42 (Exh.PW- 35/42) in this regard. Ajay Kumar therefore, could not have met the investigating

officer on the 12th of March, 2012. This was also the day when Nitish Kumar's body was finally put to rest and he was cremated.

1197. It is in the evidence of Ajay Kumar that he did not know Anil Somania from before and he was able to meet the investigating officer only on the 18th of March 2002 when the investigating officer recorded not only his statement. It is noteworthy that the statements of Shivani Gaur and her husband Amit Arora, were also recorded on this date.

1198. It is emphasized by Mr. Dayan Krishnan, learned Additional Standing Counsel for the State that till the time Ajay Kumar actually met the investigating officer and disclosed his knowledge of the events stated, the investigating officer had no knowledge about the witness or his knowledge of the events. It is submitted that in this background, no delay can be attributed to the investigating officer in recording the statement of the witness.

1199. Our attention has been drawn to the testimony of PW-35 Anil Somania wherein he had stated that on 18th March, 2002, Ajay Kumar had also told him (Anil Somania) that he had come to give his statements earlier. The investigating officer has also clearly stated that he did not know Ajay Kumar and that the witness may be knowing his particulars because he was the SO of the police station. Anil Somania also confirmed that the witness Ajay Kumar had informed him that he did not think it proper to inform the aforenoticed facts to anybody else or any other police official except the investigating officer because they were not trustworthy. The investigating officer has clearly stated that no constable told him that Ajay Kumar had come to meet him.

1200. The witness further stated that he was unaware that Nishit Katara, husband of the complainant Nilam Katara belonged to Ajay Kumar's village Bamroli (actually called Bamroli Katara). Despite extensive cross-examination on the issue of delay, there is no material at all on record to show that the investigating officer had the remotest clue about the existence of PW-33 Ajay Kumar before the 18th of March, 2002. No question has been put to the Investigating Officer that he knew about Ajay Kumar who was available and that he was deliberately marking time despite knowledge that the witness was available. The investigating officer cannot, therefore, be faulted for recording the statement of PW-33 Ajay Kumar on 18th March, 2002 when he learnt about his existence which was on the very first occasion after getting information about his existence.

1201. The appellants have not set up a case that Ajay Kumar was inimical or on visiting terms with any of them. It is pertinent to note that Ajay Kumar makes no allegation against Shri D.P. Yadav for the period before his deposition as well.

1202. So far as delay by Ajay Katara in informing the investigating officer is concerned, he was also not witness to any crime but had merely seen Vikas, Vishal Yadav, Sukhdev @ Pehalwan as well as a person wearing a red kurta in the Tata Safari vehicle near the Hapur chungi on the night of 16/17 th February, 2002. It is from media reports and TV telecasts that Ajay Kumar realized that the fourth person whom he had seen in the company of the accused persons was Nitish Katara in the Tata Safari vehicle on the fateful night.

1203. In (2008) 11 SCALE 557, Gunnan v. State of A.P., it has been held that unless the investigating officer was categorically asked as to why there was delay in examination of the witness, the defence cannot take any advantage therefrom. It is therefore trite that mere delay in recording the statement of a witness during investigation may not be a ground to disbelieve the witness unless the investigating officer was categorically asked as to why there was delay in examination of the witness. Admittedly, no question was put to the investigating officer on behalf of Vikas, Vishal Yadav or Sukhdev @ Pehalwan as to why and how the delay occurred in recording the statement of any of the witnesses during investigation. This reason by itself is sufficient to reflect the submission that Ajay Kumar's testimony has to be disbelieved because of delay in recording his statement during investigation.

1204. Both Ajay Kumar Katara and the IO Anil Somania have explained the circumstances in which though Ajay Kumar went to the police station on the 2nd and 12th of March 2002, but he could not meet the investigating officer. Anil Somania has established that he did not know about the existence of Ajay Kumar prior to 18th March, 2002 and he has recorded his statement on the same date. The appellants have been unable to establish any circumstance which would enable this court to conclude that Anil Kumar was a planted witness at the hands of the complainant or the prosecution. We therefore are unable to agree with the appellants that there is unexplained delay in recording the statement under Section 161 of Cr.P.C. Ajay Kumar, the prosecution witness or that his testimony deserves to be rejected for this reason.

1205. ―Hue and cry‖ notices with photographs are issued in order to get members of the general public to give evidence about any knowledge that they might have with regard to a criminal offence. It is, therefore, expected that members of the public would respond to photographs in the print or electronic media and to approach the police. The response or reaction to such notice varies from person to person. In this case as well notices were issued, photographs published.

1206. Ajay Kumar was not a witness to any criminal act and had merely seen four persons sitting in a car. In the instant case two vehicles - one Ajay Kumar's scooter, the other, a Tata Safari vehicle after the brief interlude, move on their respective paths. The scooter driver (Ajay Kumar) returns home. He subsequently sees news of the murder in newspapers and on television. Photographs of the deceased and the suspects are being published by the media. He is able to connect the two persons being named as the possible assailants of the deceased he had seen in the Tata Safari on the night of 16/17th February, 2002 at the Hapur Chungi. He also learns the name of the investigating officer from the television reports and decides that he must tell the police about what he had seen on the fateful night. He is also unrelated to the deceased and has no reason to be concerned.

1207. Ajay Kumar has testified about his fears about giving information about family members of influential persons which made him reluctant to approach the police till his conscience got the better of him. Even after he approached the police, his diffidence is apparent from the manner in which he approached the police on the 2 nd and 12th of March, 2002 when, upon learning about the absence of the Investigating Officer, he went away without meeting anyone else. This is not unusual. Procrastination about visits to doctors, dentists, police etc. are well known when apprehension about painful procedures or fear of authority discourages many people.

1208. We have noted it in detail the extreme preoccupation of the investigating officers during this period. Extensive searches in several States to trace the appellants as well as the deceased were necessitated. Disclosure by two of the accused persons led to recoveries being effected on their pointing out. Again to recover the Tata Safari vehicle the accused deliberately misled the police to different cities in different States. For every step, the Investigating Officer had to take the CJM's permission. Vikas and Vishal Yadav deliberately complicated the matters for the Ghaziabad police by getting themselves implicated in criminal cases in Dabra, Distt. Gwalior necessitating permissions from the court in Dabra as well as shifting of their custody between two places. Identification of the dead body was itself a difficult matter requiring a DNA examination. Forensic examination of the recovered article was also necessary. The parties also approached higher courts which proceedings had to be attended by the investigating agency. Till the 18 th of March 2002, Investigating Officer Anil Somania had no knowledge about the existence of the witness Anil Kumar. The investigating officer has explained his actions on every day of investigation from the 17th of February 2002 and cannot be faulted for not recording the statement of Ajay Kumar prior to 18th of March 2002.

1209. The learned trial judge has found no fault with the testimony of Ajay Kumar either because of delay in his approaching the police or his conduct. The learned trial judge has rightly noted that so far as the police was concerned, the identity of the dead body was established only on 25th February, 2002

when the finger prints from the dead body were matched with the finger prints of the deceased Nitish from the record of his driving license. In the light of the observations of the Supreme Court and the facts and circumstances of the case, we see no reason to disagree with the findings of the learned Trial Judges on this aspect.

(D) Challenge to the implausibility of the occurrence on account of the width of the road 1210. The appellants challenge the implausibility of the occurrence at Hapur Chungi on the ground that the width of the road was such that even if the scooter of the witness Ajay Kumar had actually broken down, there was more than enough passage for another vehicle to pass on its side. Consequently, even if Ajay Kumar's scooter had broken down as alleged, there was no need at all for the Tata Safari vehicle to stop. It is pointed out that the investigating officer Anil Somania had stated that the road was 20 feet wide and that there was a kuchha road of 7 feet and that even Ajay Kumar has stated that the road was 15 feet wide.

1211. In the witness box, Ajay Kumar has explained that the scooter had broken down just in the middle of the road and was in a slanting position due to which it was causing obstruction to the other vehicles at Hapur Chungi. The witness states that he had crossed the round-about and was on the road leading to Delhi when the vehicle of the accused persons came along the road coming from Diamond Palace. The witness stayed firm on the aspect that no vehicle could have passed without him removing the scooter from the place where the scooter had broken down.

1212. Ajay Kumar has been extensively cross-examined on the aspect of the width of the road and that despite the scooter having stopped on the road, there was sufficient passage for another vehicle to pass without having to remove the scooter.

1213. In his examination-in-chief, we find that Ajay Kumar did say that the scooter had stopped in the middle of the road and on its side was a pole, so a vehicle could not pass from there.

1214. Ajay Kumar also could not be shaken on his statement that the vehicle of the accused persons had stopped just behind him and he had been asked to remove the scooter.

1215. In his testimony, the Investigating Officer, Anil Somania has stated that the vehicles could not go on the kuchha road and that one heavy vehicle cannot overtake another heavy vehicle if the speed is fast. The investigating officer has further stated that there was a sign board of the police station at the spot.

1216. The site position which emerges therefore is that on the right side of the vehicle was a divider while on the left side, the main road was flanked by a kuchha road. There was an electricity pole as well as a sign board of a police station at the spot. Vehicles could not travel on the kuchha area flanking the road.

1217. In support of their defence that the road was wide and that there was sufficient space for the Tata Safari to pass even if the scooter had broken down, the appellants examined as a defence witness DW-13 Sarvesh Kumar Harit. He has testified with regard to a site plan prepared on 1st August, 2007 which would obviously not depict the status of the road in the year 2002. This witness had no personal knowledge about the matter and did not know as to how many times, the road had been renovated since 2002. The witness did admit that the area had undergone several changes.

1218. It would, therefore, appear that the Tata Safari vehicle was compelled to stop not because there was insufficient space on the side but because it was right behind the scooter. The location of Ajay Kumar's scooter, whether on the right/middle or left side of the road is also of no consequence. In view of this position, any variation between the statement of the width of the road between PW-33 Ajay Kumar and PW-35 Anil Somania loses significance.

1219. The appellants also question Ajay Kumar's attribution of utterances made by Vikas Yadav, the driver of the vehicle at that time. Let us now examine the reason put forth by the witness for going up to the vehicle.

1220. So far as the conduct of Vikas Yadav is concerned, Ajay Kumar has stated that Vikas Yadav asked him in a very loud tone to remove the scooter and that the entire episode of his going up to the vehicle and coming back and removing the scooter took between 2-3 minutes.

1221. Ajay Kumar (PW-33) has stated in the first trial that Vikas Yadav who was driving the Tata Safari, spoke to him in an uncivilized manner. In cross-examination, he stated that Vikas Yadav spoke in a loud voice and told him to remove the scooter.

1222. Mr. Dayan Krishnan, learned Additional Standing Counsel has drawn our attention to the testimony of Ajay Katara as PW-14 in the trial of Sukhdev @ Pehalwan wherein he reiterated his previous statement in the Vikas Yadav trial and testified that ―the scooter stopped moving and the moment I got down from the scooter a vehicle Tata Safari came from the side of Kavi Nagar Police Station at a fast speed from behind and accused Vikas Yadav whom I knew before the aforesaid incident asked me to remove the scooter from the road immediately‖. In answer to a question as to whether other vehicles could pass, Ajay Kumar (as PW-14) has stated ―however, the vehicle of the accused had stopped just behind me, I was asked to remove the scooter‖. In answer to a court question in Sukhdev Pehalwan's case, the witness stated that the vehicle of the accused stopped behind him immediately after half a minute when his scooter had stopped at the spot. The time of course has to be an estimation. What the witness is conveying is merely that the interval was short.

1223. It needs no elaboration at all that even polite words when spoken in a rude manner could incite anger in the person so addressed. Civility, or not, in speech would be a matter of perception in the mind of the person addressed. It is not the content of the utterance or the words used alone which would determine a person's reaction or the import. The manner of address may assume importance, especially in incidents involving outsiders or in public places as on the street.

1224. In the instant case, the witness has testified about Vikas Yadav telling the witness to move his scooter. Facially the demand by Vikas Yadav seems innocuous. It appears that Ajay Kumar Katara took umbrage at the manner in which he was being told and had, therefore, stepped towards the driver of the Tata Safari vehicle. Mere reference by the witness to what was uttered by the driver as _abuse' in his testimony in Sukhdev Yadav's trial would not in any way lead to a conclusion that the testimony of the witness was a lie.

1225. More often than not, if a vehicle breaks down in the middle of the road, people do not move the broken vehicle to the shoulder of the roads. It is often seen that they commence repairs to the vehicle in the middle of the road, unmindful of and without concern for the traffic behind which has to pass. Furthermore, when moving at a fast speed, if the vehicle in front stops suddenly, it is difficult to immediately bypass it and perforce one would be compelled to initially come to a halt, may be swerve or even have to reverse and then pass the vehicle which has stopped. This appears to be the scenario which emerged when Ajay Kumar's scooter broke down compelling the Tata Safari, immediately behind, to come to a halt. The demand made by Vikas Yadav to Ajay Kumar to move his scooter does not appear to stem from a necessity because there was no space, but smacks of arrogance and irritation of the car driver at the compulsion to unnecessarily stop (or even to break speed). That this was necessitated by a mere scooter, would have aggravated the irritation. It may have no relation at all to sufficiency or insufficiency of free space beyond the scooter.

1226. The reaction of the driver of the Tata Safari vehicle is also not uncommon. It is also not unusual for persons in larger vehicles to take umbrage upon being compelled to stop because somebody's vehicle has broken down in their path, compelling them to slow down, or, as in the present case, come

to a complete halt. Such arrogance is more often than not displayed on our roads. That the person who is told to move his vehicle which is blocking the way, instead of complying with the demand, goes to the person who is making the demand to confront or accost him, is also something which is not unusual.

1227. In terms of the provisions of Section 161 of the Cr.P.C. and the judgment of the Supreme Court in Jaswant Singh v. State of U.P. (supra), the defence was required to question the investigating officer as to whether he had put questions to Ajay Katara with regard to all of the above as well as the manner and the tone used by the accused person. No such question has been put to SO Anil Somania. In this background, it cannot be held that the testimony of Ajay Katara in the witness box is either an improvement or a contradicition.

1228. We find that the Ld. Trial Judge in the judgment dated 28th May, 2008 has analysed the material on record and rejected these objections of the appellants.

1229. In Sukhdev Pehalwan‟s trial as well, the learned Trial Judge has carefully considered the challenge by the appellants to the narration of events by Ajay Kumar Katara based on the contention that the road was wide enough to permit the Tata Safari to pass, even if Ajay Katara's scooter had broken down and rejected the same. In the judgment dated 6th July, 2011, the learned Trial Judge has observed that the witness's testimony that he was compelled to go close to the vehicle of the accused persons because of the uncivilised language used by Vikas Yadav when he had to halt his Tata Safari immediately behind the scooter of the witness, was ―usual human behaviour reaction and it could not be described as behaviour abnormality‖.

1230. It is also noted by the ld. Judge that no question was put and there was no evidence to the effect that the Tata Safari was not compelled to come to stop because of the scooter obstructing its passage.

1231. We find that the question is not as to whether the vehicle could have passed by the scooter or not but whether it was forced to come to a halt because of the scooter coming to a sudden halt or not.

1232. The incident on the Hapur Chungi is also plausible inasmuch as it is in the testimony of Ajay Kumar that the car was immediately upon his scooter and stopped just behind the broken down scooter. Ajay Kumar has testified that he had just stopped when the Tata Safari vehicle came from behind on his left side. The testimony of Ajay Katara in this regard is quite clear and devoid of any ambiguity. Merely because the total width of the road was such that more than one vehicle could pass simultaneously could not detract from the manner in which the two vehicles have been forced to stop.

We are of the considered view that the entire issue about the width of the road is irrelevant with regard to the turn of events at the Hapur Chungi on the fateful night given the established facts on record before us.

(E) Whether the variance in testimony of Ajay Kumar and Investigating Officer Anil Somania about tearing of slip discredits his entire testimony?

1233. Learned senior counsels on behalf of the appellants as well as Mr. Kapoor, learned counsel for Sukhdev Yadav have dwelt at length on the statement by Ajay Kumar that he noted the registration number of the Tata Safari in which he had seen the accused and the deceased in the right of the 16th/17th February of 2002 and that he tore the slip in front of the investigating officer PW-35 Anil Somania. This statement of Ajay Kumar is not corroborated by the testimony of the Investigating Officer Anil Somania. The submission is that this is a material contradiction completely discrediting Ajay Kumar who deserves to be therefore disbelieved.

We now propose to consider what is the effect of this divergence on the worth of the evidence of Ajay Kumar Katara? Is it a contradiction in material terms which would persuade us to disbelieve the

witness?

1234. Certain essential facts are required to be borne in mind in order to appreciate this statement. PW-33 Ajay Kumar is not a witness to the recovery of the car. The Tata Safari vehicle was recovered on the pointing out of the accused pursuant to the disclosure statement. No dispute to this material evidence is raised by the appellants. Even if evidence about the slip is rejected, it only contained the registration number of the vehicle. The witness has remained categorical that the vehicle which had stopped was of the Tata Safari make.

1235. On the aspect of the conduct of witnesses, some observations made by the Supreme Court on the variations in the manner in which people, who may be witnesses to in criminal offences, may react deserve to be noticed. The Supreme Court has discussed and laid down the law on variations, discrepancies, omissions, improvements and contradictions between different parts of testimony of the witness as well as between narrations of different witnesses about the same fact or circumstances in several judgments. In this regard, para 11 of the judgment reported at (1999) 9 SCC 595 Leela Ram (Dead) through Duli chand v. State of Haryana wherein reference is made to several judicial precedents, is material and read as follows :-

> —9. Be it noted that the High Court is within its jurisdiction being the first appellate court to reappraise the evidence, but the discrepancies found in the ocular account of two witnesses unless they are so vital, cannot affect the credibility of the evidence of the witnesses. There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefore should not render the evidence of eyewitnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence. In this context, reference may be made to the decision of this Court in State of U.P. v. M.K. Anthony [(1985) 1 SCC 505 : 1985 SCC (Cri) 105 : AIR 1985 SC 48] . In para 10 of the Report, this Court observed: (SCC pp. 514-15) —10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals.‖
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> 10. In a very recent decision in Rammi v. State M.P. [(1999) 8 SCC 649] with Bhura v. State of M.P. [(1999) 8 SCC 649] this Court observed: (SCC p. 656, para 24) —24. When an eyewitness is examined at length it is quite possible for him to make some

discrepancies. No true witness can possibly escape from making some discrepant details. Perhaps an untrue witness who is well tutored can successfully make his testimony totally non-discrepant. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence. But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.‖ This Court further observed: (SCC pp. 656-57, paras 25-27)

25. It is a common practice in trial courts to make out contradictions from the previous statement of a witness for confronting him during cross-

examination. Merely because there is inconsistency in evidence it is not sufficient to impair the credit of the witness. No doubt Section 155 of the Evidence Act provides scope for impeaching the credit of a witness by proof of an inconsistent former statement. But a reading of the section would indicate that all inconsistent statements are not sufficient to impeach the credit of the witness.

xxx xxx xxx

26. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Only such of the inconsistent statement which is liable to be _contradicted' would affect the credit of the witness.

xxx xxx xxx

27. To contradict a witness, therefore, must be to discredit the particular version of the witness. Unless the former statement has the potency to discredit the present statement, even if the latter is at variance with the former to some extent it would not be helpful to contradict that witness (vide Tahsildar Singh v.State of U.P. [AIR 1959 SC 1012 : 1959 Supp (2) SCR 875]).‖ xxx xxx xxx

11. The Court shall have to bear in mind that different witnesses react differently under different situations: whereas some become speechless, some start wailing while some others run away from the scene and yet there are some who may come forward with courage, conviction and belief that the wrong should be remedied. As a matter of fact it depends upon individuals and individuals. There cannot be any set pattern or uniform rule of human reaction and to discard a piece of evidence on the ground of his reaction not falling within a set pattern is unproductive and a pedantic exercise.

12. It is indeed necessary to note that one hardly comes across a witness whose evidence does not contain some exaggeration or embellishment -- sometimes there could even be a deliberate attempt to offer embellishment and sometimes in their overanxiety they may give a slightly exaggerated account. The court can sift the chaff from the grain and find out the truth from the testimony of the witnesses. Total repulsion of the evidence is unnecessary. The evidence is to be considered from the point of view of trustworthiness. If this element is satisfied, it ought to inspire confidence in the mind of the court to accept the stated evidence though not however in the absence of the same.‖ (Emphasis by us) 1236. The judgment of the Supreme Court in Leela Ram (supra) was followed in another judgment reported at (2011) 9 SCC 698, Rakesh & Anr. v. State of M.P.

1237. The following observations of the Supreme Court in the judgment reported at 1988 Supp SCC 241 : 1988 SCC (Cri) 559 : AIR 1988 SC 696 Appabhai v. State of Gujarat in para 11 of the report

(SCC pp. 245-46) and para 13 (SCC page 245-247) on the variation in the reactions of different people to the same occurrence and appreciation of evidence are also topical and read as follows :-

> —Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. The court therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability, if any, suggested by the accused.

The court, however, must bear in mind that witnesses to a serious crime may not react in a normal manner. Nor do they react uniformly. The horror-stricken witnesses at a dastardly crime or an act of egregious nature may react differently. Their course of conduct may not be of ordinary type in the normal circumstances. The court, therefore, cannot reject their evidence merely because they have behaved or reacted in an unusual manner.‖ (Emphasis supplied) 1238. In (2011) 8 SCC 65 State of Rajasthan v. Abdul Menon, the court stated thus:-

> —32. Some discrepancies or some variations in minor details of the incident would not demolish the case of the prosecution unless it affects the core of the prosecution case. Unless the discrepancy in the statement of witness or the entire statement of the witness is such that it erodes the credibility of the witness himself, it may not be appropriate for the Court to completely discard such evidence.‖ 1239. Again in the judgment reported at (2011) 7 SCC 295, Wamman and Ors. v. State of Maharashtra, the court reiterated its previous decision thus:

> —33. In Gurbachan Singh v. Satpal Singh [(1990) 1 SCC 445:1990 SCC (Cri) 151] this Court has held that despite minor contradictions in the statements of prosecution witnesses, the prosecution case therein has not shaken and ultimately accepting their statement set aside the order of acquittal passed by the High Court and restored the sentence imposed upon them by the trial court.‖ 1240. In AIR 2012 SC 3539, Shyamal Ghosh v. State of West Bengal, on this aspect, the court has laid down the principles which would guide the present adjudication thus:-

> —46. ...Undoubtedly, some minor discrepancies or variations are traceable in the statements of these witnesses. But what the Court has to see is whether these variations are material and affect the case of the prosecution substantially. Every variation may not be enough to adversely affect the case of the prosecution. The variations pointed out as regards the time of commission of the crime are quite possible in the facts of the present case. Firstly, these witnesses are rickshaw pullers or illiterate or not highly educated persons whose statements had been recorded by the police.
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> Their statements in the court were recorded after more than two years from the date of the incident. It will be unreasonable to attach motive to the witnesses or term the variations of 15-20 minutes in the timing of a particular event as a material contradiction. It probably may not even be expected of these witnesses to state these events with the relevant timing with great exactitude, in view of the attendant circumstances and the manner in which the incident took place.‖ (Underlining by us) It is thus well settled that every contradiction or discrepancy would not render unacceptable the entire evidence of a witness.

1241. It is often found that in the witness box, witnesses make statements of matters not stated by them before to the investigating officer. Such witnesses render themselves open to criticism, and there evidence to challenge, by the other side on the ground that it is an improvement or a concoction whereas it may only be the reaction of the witness to the importance he is receiving as a witness in the court. The statement may contain additional matters which may not be material, or, which in any case make no impact on the core evidence. Do such additions and improvements impact the substantive evidence of the witness? The answer to this question is to be found in the observations of the Supreme Court in para 13 of the judgment reported at (1988) Supp. SCC 241, Appabhai v. State of Gujarat. On the issue of appreciation of evidence in such eventuality, the court ruled thus:

> —13. The court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance.

The errors due to lapse of memory may be given due allowance. The court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the court. The courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy.‖ (Underlining by us) 1242. In the judgment reported at (2001) 8 SCC 86 para 3 Sukhdev Yadav v. State of Bihar, the Supreme Court has noted that —there would hardly be a witness whose evidence does not contain some amount of exaggeration or embellishement sometimes there would be a deliberated attempt to offer the same and sometimes the witnesses in their over anxiety to do better from the witness box detail out an exaggerated account—.

1243. These principles were reiterated by the Supreme Court in a recent judgment reprted at (2012) 5 SCC 777 Ramesh Harijan v. State of U.P. The court also authoritatively ruled that the maxium _falsus in uno, falsus in ombnibus' is not a recognized principle in administration of criminal justice and the court is to give paramount importance to ensure that there is no miscarriage of justice. The court has also noted that witnesses can not help embroidering a story in the witness box and that the court must appraise the evidence to assess the extent to which the testimony is creditworthy. To sum up, the evidence of a witness ought not to be discarded as a whole, but the embroidered or embellished portion only would be left out of consideration. These observations of the court bind us in considering the objection of the appellants to the testimony of Ajay Kumar. Several precedents find reference and we therefore are extracting the relevant portion thereof which reads thus:

> "25. Undoubtedly, there may be some exaggeration in the evidence of the prosecution witnesses, particularly that of Kunwar Dhruv Narain Singh (PW 1), Jata Shankar Singh (PW
>
> 7) and Shitla Prasad Verma (PW 8). However, it is the duty of the court to unravel the truth under all circumstances.
>
> 26. In Balaka Singh v. State of Punjab [(1975) 4 SCC 511 : 1975 SCC (Cri) 601 : AIR 1975 SC 1962] , this Court considered a similar issue, placing reliance upon its earlier judgment in Zwinglee Ariel v. State of M.P. [AIR 1954 SC 15 : 1954 Cri LJ 230] and held as under: (Balaka Singh case [(1975) 4 SCC 511 : 1975 SCC (Cri) 601 : AIR 1975 SC 1962] , SCC p. 517, para 8) —8. ... the court must make an attempt to separate grain from the chaff, the truth from the falsehood, yet this could only be possible when the truth is

separable from the falsehood. Where the grain cannot be separated from the chaff because the grain and the chaff are so inextricably mixed up that in the process of separation, the court would have to reconstruct an absolutely new case for the prosecution by divorcing the essential details presented by the prosecution completely from the context and the background against which they are made, then this principle will not apply.‖ xxx xxx xxx

29. In Sucha Singh v. State of Punjab [(2003) 7 SCC 643 : 2003 SCC (Cri) 1697 : AIR 2003 SC 3617] (SCC pp. 113-14, para 51) this Court had taken note of its various earlier judgments and held that even if major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, it is the duty of the court to separate grain from chaff. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim falsus in uno, falsus in omnibus has no application in India and the witness cannot be branded as a liar. In case this maxim is applied in all the cases it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of credence, and merely because in some respects the court considers the same to be insufficient or unworthy of reliance, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well.‖ (Emphasis supplied) 1244. In para 31 of Ramesh Harijan v. State of U.P. (supra), this court concluded thus:

―Therefore, in such a case the paramount importance of the court is to ensure that miscarriage of justice is avoided. The benefit of doubt particularly in every case may not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. A reasonable doubt is not an imaginary trivial or merely possible doubt, but a fair doubt based upon reason and common sense.‖ 1245. On the aspect of effect of contradictions, inconsistencies, embellishments, improvements and omissions in evidence, our attention is also drawn to the pronouncement reported at (2010) 13 SCC 657, Sunil Kumar Sambhudayal Gupta (Dr.) v. State of Maharashtra wherein the court made the following important observations:

―30. While appreciating the evidence, the court has to take into consideration whether the contradictions/omissions had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. The trial court, after going through the entire evidence, must form an opinion about the credibility of the witnesses and the appellate court in normal course would not be justified in reviewing the same again without justifiable reasons. (Vide State v. Saravanan [(2008) 17 SCC 587 : (2010) 4 SCC (Cri) 580 : AIR 2009 SC 152] .) xxx xxx xxx

34. In State of Rajasthan v. Kalki [(1981) 2 SCC 752 : 1981 SCC (Cri) 593 : AIR 1981 SC 1390], while dealing with this issue, this Court observed as under: (SCC p. 754, para 8) ―8. ... In the depositions of witnesses there are always normal discrepancies however honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence, and the like. Material discrepancies are those which are not normal, and not expected of a normal person.‖

35. The courts have to label the category to which a discrepancy belongs. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. (See Syed Ibrahim v. State of A.P. [(2006) 10 SCC 601 : (2007) 1 SCC (Cri) 34 : AIR 2006

SC 2908] and Arumugam v. State[(2008) 15 SCC 590 : (2009) 3 SCC (Cri) 1130 : AIR 2009 SC 331] .)

36. In Bihari Nath Goswami v. Shiv Kumar Singh [(2004) 9 SCC 186 : 2004 SCC (Cri) 1435] this Court examined the issue and held: (SCC p. 192, para 9) —9. Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test the credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility.

37. While deciding such a case, the court has to apply the aforesaid tests. Mere marginal variations in the statements cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier.

The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution case, render the testimony of the witness liable to be discredited.‖ (Emphasis supplied) 1246. It is therefore trite that the conduct of a person in the witness box various from person to person and a solemn duty is attached to the role of the judge in appreciating the evidence which has been led. The judicial pronouncements emphasise that witness testimony has to be examined keeping in mind that exaggerations or embellishments on the part of human beings appearing in the witness box are in fact natural. It is well settled that it is only contradiction in material particulars and not in matters of detail which would render the testimony of witnesses unacceptable.

1247. It is equally well settled that embellishments in testimony would also by themselves not detract from a truthfulness of the testimony of a witness and that the court has to separate embellishments from the factual narration.

1248. Variations in testimony in minor details thus are immaterial so far as appreciation of evidence is concerned. It is contradictions and variations in material particulars which would require the court to evaluate the extent of the witness to be considered credible.

1249. Mr. P.K. Dey, learned counsel for the complainant has drawn out attention to the pronouncement of the Supreme Court reported at 1988 (Supp) SCC 686, State of U.P. v. Anil Singh wherein also the court considered the aspect of rejection of the prosecution version for various reasons including improvements in the court testimony. The court has again made observations with regard to the conduct of persons in the witness box, especially with regard to the embellishments to the prosecution story in the witness box.

These observations deserve to be considered in extenso and read as follows:

—15. Of late this Court has been receiving a large number of appeals against acquittals and in the great majority of cases, the prosecution version is rejected either for want of corroboration by independent witnesses, or for some falsehood stated or embroidery added by witnesses. In some cases, the entire prosecution case is doubted for not examining all witnesses to the occurrence. We have recently pointed out the indifferent attitude of the public in the investigation of crimes. The public are generally reluctant to come forward to depose before the court. It is, therefore, not correct to reject the prosecution version only on the ground that all witnesses to the occurrence have not been examined. Nor it is proper to reject the case for want of corroboration by independent witnesses if the case made out is otherwise true and acceptable. With regard to falsehood stated or embellishments added by the prosecution witnesses, it is well to remember that there is a tendency amongst witnesses in our country to back up a good case by false or exaggerated version. The Privy Council

had an occasion to observe this. In Bankim Bihari Maiti v. Matangini Dasi [AIR 1919 PC 157 : 24 Cal WN 626] the Privy Council had this to say (at p. 628):

―That in Indian litigation it is not safe to assume that a case must be a false case if some of the evidence in support of it appears to be doubtful or is clearly untrue. There is, on some occasions, a tendency amongst litigants ....to back up a good case by false or exaggerated evidence.‖

16. In Abdul Gani v. State of Madhya Pradesh [AIR 1954 SC 31 : 1954 Cri LJ 323] Mahajan, J. speaking for this Court deprecated the tendency of courts to take an easy course of holding the evidence discrepant and discarding the whole case as untrue. The learned Judge said that the court should make an effort to disengage the truth from falsehood and to sift the grain from the chaff.

17. It is also our experience that invariably the witnesses add embroidery to prosecution story, perhaps for the fear of being disbelieved.

But that is no ground to throw the case overboard, if true, in the main. If there is a ring of truth in the main, the case should not be rejected. It is the duty of the court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses. It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform.‖ (Underlining by us) 1250. In the cross-examination conducted by counsel for Vishal Yadav, Ajay Kumar has stated that he noted the number of the Tata Safari vehicle on a slip because Vikas Yadav had talked to him in an uncivilized manner and humiliated him and so he had at that time entertained the intention to report the matter. PW-33 explained that he dropped the idea of reporting the matter because of the fact that Vikas Yadav was the son of an M.P.

1251. It is noteworthy that even Ajay Kumar does not state that he had given the slip (on which he noted the number of the vehicle) to the investigating officer. He has merely stated that he revealed number of the car from the slip and thereafter he had torn the same in the police station in presence of SO Anil Somania.

1252. The tearing of the slip on which the witness claimed to have written the registration number of the Tata Safari vehicle is irrelevant to the matters in issue. At its highest, Ajay Kumar may have embellished his testimony when he says that he tore the slip before the investigating officer.

1253. In his cross-examination, Ajay Kumar stated that he had noted down the number of Tata Safari ―as the accused had talked to me in uncivilized manner and humiliate me with the intention to report but looking at the fact that he was son of an MP, I dropped the idea. I after making stt to Mr. Somania told number from the slip in which I noted. Thereafter I torn it ―. The witness denied the suggestion that the Investigating Officer had shown him the Tata Safari standing in the police station and that he has also told the witness that he was recording the number of the Tata Safari in his statement.

1254. The witness has thus explained that he did not take action against the driver Vikas Yadav because he was aware of the connections of his father as well as the influence (‗terror') wielded by him.

1255. It is well settled that every discrepancy or variation in the evidence does not affect, the adjudication by the court or tilt the balance of justice in favour of the accused in every case. It has been repeatedly emphasized by the Supreme Court that there are only such contradictions and variations in material particulars which are of a serious nature and which apparently or impliedly are destructive of

the substantive case sought to be proved by the prosecution, which may provide an advantage to the accused.

1256. In view of the above discussion, at its highest if it was to be held that there was a contradiction in the testimony of two witnesses, the impact of such embellishment would be, to that extent such part of the testimony of the witness would required to be ignored and nothing more. In view of the established facts on record, the same by itself is insufficient to reject the testimony of Ajay Kumar as an untruthful witness.

1257. It was the appellants Vikas and Vishal Yadav who made the disclosures about the use of the Tata Safari vehicle on the night of the 16th of February 2002 in the commission of the crime. The accused led the police to Alwar (Rajasthan); Panipat (Hariyana) and finally to Karnal and pointed out the Tata Safari vehicle in the factory of their father.

1258. Even Ct. Satender Pal Singh has testified that the Tata Safari in which he had spotted the three appellants and a fourth person had a registration number of Punjab. Ajay Kumar was not a witness to the recovery of the vehicle. Therefore even if his testimony about the slip was ignored, it would not impact the truth or veracity of the rest of the prosecution case.

1259. The witness stood by his testimony on all material counts and could not be shaken in cross examination. His testimony that the appellants were in a Tata Safari vehicle has not been dented.Other than PW 35 Anil Somania denying the slip being torn in his presence, no other contradiction is pointed out by the appellants. The Investigating Officer would have been more concerned about carefully recording the statement, rather than noticing the actions of the witness. It is very probable that tearing of the slip escaped his notice. Looked at from any angle, this contradiction between the testimony of Ajay Kumar and SO Anil Somania is not a contradiction which impacts the core of the prosecution case.

The testimony of the witness cannot be thrown out for this reason.

(F) Ajay Kumar was not a resident of Delhi 1260. In both trials, Ajay Kumar disclosed his address as House no.D-50/1, Gali No.10, Brahampuri, Shahdara, Delhi where he lived from September, 2001 to 2002 as a tenant of Harish Chand on the monthly rent of Rs.800/- per month for which no receipt was being issued by the landlord and for which there was no rent agreement. The witness claimed that the landlord of the house in Delhi in Brahmpuri was known to him and that he was in the profession of preparing horoscope and selling gems, for which he kept visiting people.

1261. The appellants have challenged Ajay Kumar's claim that he was a resident of Delhi and submitted that he had no reason to be on the road leading to Delhi at the Hapur Chungi on the fateful night.

1262. In his cross-examinations Ajay Kumar reitereated the above statement made in his examination-in-chief. The statements of the witness could not be successfully challenged. The witness was extensively cross-examined about his residence in Delhi when the witness had explained that his family lived in Agra; that he had come to Delhi to start the work of preparing horoscopes in Delhi and therefore he was living alone in the rented house but since his work of preparing horoscopes did not run properly in Delhi, he went back to Agra. As he lived for only a short period on rent in Delhi, no election card, ration card or any other document was prepared bearing his Delhi address.

1263. In case Ajay Kumar had made a false deposition, it was open for the appellants to examine Harish Kumar as a defence witness. The appellants opted not to call the landlord even though they had full details of Ajay Kumar's landlord. The appellants have all led evidence in defence.

1264. The investigating officer did not see reason to disbelieve the witness. The credibility of the witness on this aspect cannot be doubted. The submission on behalf of the appellants to the effect that the investigating officer ought to have further verified and corroborated this claim of the witness is completely misplaced.

(G) Whether the trial stands vitiated as the prosecutor was permitted to put leading questions to Ajay Kumar? 1265. It has been argued by Mr. U.R. Lalit, learned senior counsel that the learned trial court has unfairly permitted leading questions to be put by the Special Public Prosecutor to Ajay Kumar which clearly suggested the answer and the entire trial would stand vitiated for this reason. In support of this submission, reliance has been placed upon the pronouncement of the Supreme Court reported at (1993) Supp. 3 SCC 745 Varkey Joseph v. State of Kerala.

1266. Appearing on behalf of Vishal Yadav, Mr. Ram Jethmalani, learned senior counsel also has contended that the learned trial Judge repeatedly allowed leading questions to be put to the witness on crucial points which was not permissible under Sections 141 and 142 of the Evidence Act. It is submitted that this action was not justified by any reasoned order.

1267. Before us, the following questions which were put to Ajay Kumar have been so objected to by learned senior counsel for Vikas Yadav and counsel for Vishal Yadav:

(i) "How many persons were found by you in Tata Safari?"

(ii) "You were told to remove the scooter, was there not sufficient road passage available for passing of the vehicle overtaking your scooter?"

(iii) "What was the source of light?"

(iv) "What was the colour of the pain (sic pane) of the window?"

(v) "When did you come to know about the involvement of Vikas and Vishal Yadav in this case?"

(vi) "Can you identify the vehicle if shown to you?"

1268. Mr. Dayan Krishnan, learned Additional Standing Counsel on the other hand has urged that there is no absolute proposition that leading questions can never be put to the witness. Sections 141, 142 and 143 of the Indian Evidence Act deal with leading questions. Section 141 of the Indian Evidence Act defines leading questions to mean ―any question suggesting the answer which the person putting it wishes or expects to receive‖. As per section 142 of the Indian Evidence Act, questions of an introductory nature are not leading questions and can be put to the witnesses.

1269. Before specifically dealing with the questions to which the objection is made, we may consider the applicable legal principles on this issue. Our attention is drawn to the authoritative text by Phipson on Evidence (16th Edition) wherein the author has pointed out three exceptions to the prohibition against putting leading questions to a witness and has stated as follows (12-21 at pg 1031):-

> ―As the rule is merely intended to prevent the examination from being conducted unfairly, the judge has a discretion, which is not open to review, to relax it when he considers it necessary in the interests of justice. It is always relaxed in three cases: introductory or undisputed matter; assisting memory; and contradiction.

To shorten proceedings, and bring the witness as quickly as possible to the material points of the case, it is not only permissible, but proper, to lead him as to matters which are introductory, or not really in dispute. Frequently one counsel will indicate to oppositing counsel that the witness may be led up to a particular point.

A question which merely directs the attention of the witness to a particular topic, without suggesting the answer required, is not objectionable. In an old example from a civil case of slander that ―A was a bankrupt whose name was on the Bankruptcy List, and would appear in the next Gazette", a witness who had spoken of only the first two statements was allowed to be asked, ―Was anything said about the Gazette?‖ Where one witness is called to contradict another as to expressions used by the other, the witness may be asked not merely what was said, but whether the particular expressions were used, since otherwise a contradiction might never be arrived at. Where, however, the conversation is not proved merely for the purpose of contradiction, the latter question is improper. It is sometimes appropriate to ask the witness for their version of a conversation before asking whether particular expressions were used.‖ (Emphasis by us) 1270. On the same aspect, the above well settled legal position is reiterated by the leading expert on the subject M.C. Sarkar in his authoritative text „Law of Evidence‟ in the following manner: -

―Exceptions to the Rule.--The following are exceptions to the general rule that leading question shall not be asked in examination-in- chief.

(1) Introductory or Undisputed Matter.--The court shall permit leading questions as to matters which are introductory or undisputed or which have been sufficiently proved (s. 142 2nd para). The rule that leading questions should not be asked in examination-in-chief "must be understood in a reasonable sense; for if it were not allowed to approach the points at issue by such questions, examination would be most inconveniently protracted. To abridge the proceedings, and bring the witness as soon as possible to the material points on which he is to speak, the counsel may lead him on that length and may recapitulate to him the acknowledged facts of the case, which have been already established. The rule, therefore, is not applied to the part of the examination, which is merely introductory of that which is material" [Tay s. 1404]. It is therefore not only permissible but proper to lead on matters introductory or undisputed. It saves much time.

(2) Identification.--The attention or a witness may be directly pointed to some persons or things, for the purpose of identifying them. For instance, it is usual to ask a witness if the accused is the person whom he refers to. This form of question is obviously unsatisfactory and the testimony does not carry much weight. "In the present day it is considered the proper method for counsel merely to ask, Do you see the person in court? and leave the witness to identify the prisoner" [Powell 9th Ed pp. 528- 29]. It is advisable not to lead under such circumstances.Although it would be perfectly regular to point to the accused and ask a witness if that is the person to whom his evidence relates, yet if the witness can, unassisted, single out the accused, his testimony will have more weight [Best s. 643]. As to identification evidence, see ante pg 88-89.

(3) Contradictions.--A witness may be asked leading questions in order to contradict statements made by another witness, e.g. if A has said that B told him so and so; B may be asked, Did you ever say that to A?

xxx xxx xxx (4) Helping Memory.--The rule will be relaxed where the inability of a witness to answer questions put in the regular way obviously arises from defective memory [Best s. 642]. Thus, where a witness has on account of illness, illiteracy, old age or failing memory, or other cause apparently forgotten a fact or a name, and all attempts to recall it to

his mind by ordinary questions have failed, his attention may be drawn to it by a question in leading form. The object is to revive or refresh his memory by drawing his attention to a particular topic without suggesting the answer. Thus, where a witness stated that he was unable to remember the names of the members of a firm, but that he could recognise and identify them if they were read to him, LORD ELLENBOROUGH allowed it to be done [Acerro v. Petroni, 1 Stark 100]. xxx (5) Hostile Witness.--If a witness called by a party appears to be hostile or interested for the other party, and exhibits a desire to suppress the truth, the court may in his discretion allow leading questions to be put, i.e. allow him to be cross-examined (see s. 154 post). (6) Complicated Matter.--The rule will be relaxed, where the inability of a witness to answer a question put in the regular way arises from the complicated nature of the matter as to which he is interrogated [Best s. 642]. The above six exceptions must not be taken as exhaustive. The court has always a wide discretion in the matter, and it will allow leading questions to be put wherever it considers necessary in the interests of justice. Indeed the judge has, says Taylor, a discretionary power--Not controllable by the court of appeal [see Lawdon v. L, 5 IR CLR 27]--of relaxing the general rule, whenever, and under whatever circumstances and to whatever extent, he may think fit, though the power should only be exercised so far as the purposes of justice plainly require [Tay s.

1405]. It is the court, and not the counsel for the Crown, who can determine whether leading questions should be permitted, and the responsibility for the permission rests with the court [Barindra v R, 37C 467 14 CWN 114].‖ (Underlining furnished) 1271. Let us now examine the judicial precedent relied upon by the appellants. In para 10 and 11 of (1993) Supp.3 SCC 745 Varkey Joseph v. State of Kerala on the issue under examination, the Supreme Court held as follows:-

―10. The most startling aspect we came across from the record is that the criminal trial was unfair to the appellant and the procedure adopted in the trial is obviously illegal and unconstitutional. The Sessions Court in fairness recorded the evidence in the form of questions put by the prosecutor and defence counsel and answers given by each witness. As seen the material part of the prosecution case to connect the appellant with the crime is from the aforestated witnesses. The Sessions Court permitted even without objection by the defence to put leading questions in the chief examination itself suggesting all the answers which the prosecutor intended to get from the witnesses to connect the appellant with the crime. For instance, see the evidence of PW 1, ―Then I saw Jose (appellant) coming from the north and going towards south‖. Did you notice his dress then? Yes. He had worn a white Dhoti ... Did you notice his Dhoti? Yes. I had seen two or three drops of blood on his Dhoti. Suddenly I had a doubt‖. Similarly PW 4 also at that time ―Did anyone from Ramanattu House come for tea? Yes. Jose came. When did Jose came to have tea? I do not remember ... Did Jose come on the previous day. Yes came about 6 p.m. in the evening. Did he say anything? He brought a bag and said let it be here I shall take this bag after some time ... What was the dress of the accused when he came to the shop? He was wearing white Dhoti and tied a cloth on his hand. Have you noticed anything particular on the Dhoti? No‖. Similar leading questions were put to other witnesses also to elicit on material part of the prosecution case in the chief examination itself without treating any of the witnesses hostile. xxx xxx

11. Leading question is one which indicates to the witnesses the real or supposed fact which the prosecutor (plaintiff) expects and desires to have confirmed by the answer. Leading question may be used to prepare him to give the answers to the questions about to be put to him for the purpose of identification or to lead him to the main evidence or fact in dispute. The attention of the witness cannot be directed in chief examination to the subject

of the enquiry/trial. The court may permit leading question to draw the attention of the witness which cannot otherwise be called to the matter under enquiry, trial or investigation. The discretion of the court must only be controlled towards that end but a question which suggests to the witness the answer the prosecutor expects must not be allowed unless the witness, with the permission of the court, is declared hostile and cross-examination is directed thereafter in that behalf. Therefore, as soon as the witness has been conducted to the material portion of his examination, it is generally the duty of the prosecutor to ask the witness to state the facts or to give his own account of the matter making him speak as to what he had seen. The prosecutor will not be allowed to frame his questions in such a manner that the witness by answering merely ―yes‖ or ―no‖ will give the evidence which the prosecutor wishes to elicit. The witness must account for what he himself had seen. Sections 145 and 154 of the Evidence Act are intended to provide for cases to contradict the previous statement of the witnesses called by the prosecution. Sections 143 and 154 provide the right to cross- examination of the witnesses by the adverse party even by leading questions to contradict answers given by the witnesses or to test the veracity or to drag the truth of the statement made by him. Therein the adverse party is entitled to put leading questions but Section 142 does not give such power to the prosecutor to put leading questions on the material part of the evidence which the witness intends to speak against the accused and the prosecutor shall not be allowed to frame questions in such a manner to which the witness answer merely ―yes‖ or ―no‖; but he shall be directed to give evidence which he witnessed. The question shall not be put to enable the witness to give evidence which the prosecutor wishes to elicit from the witness nor the prosecutor shall put into witness's mouth the words which he hoped that the witness will utter nor in any other way suggest to him the answer which it is desired that the witness would give. The counsel must leave the witness to tell unvarnished tale of his own account.

Sample leading questions extracted hereinbefore clearly show the fact that the prosecutor led the witnesses to what he intended that they should say on the material part of the prosecution case to prove against the appellant which is illegal and obviously unfair to the appellant offending his right to fair trial enshrined under Article 21 of the Constitution.

It is not a curable irregularity.‖ (Underlining by us) 1272. Mr. Dayan Krishnan has contended that Varkey Joseph (supra) has been explained in (2010) 6 SCC 87 Siddharth Vashisht @ Manu Sharma v. State (Govt. Of NCT of Delhi):-

―227. Mr Ram Jethmalani, learned Senior Counsel next contended that the Public Prosecutor in the present case had put a leading question to Malini Ramani regarding identification of the accused Manu Sharma. We verified the said question. The question put by the Public Prosecutor, was at best clarificatory, and by no stretch of imagination can be termed as a leading question favouring/eliciting an answer favouring the prosecution. The evidence of Ms Malini Ramani two paragraphs prior to the leading question and two paragraphs thereafter, if read in conjunction with each other clarifies the whole scene and sequence of events.

228. Learned senior counsel has relied upon the judgment in Varkey Joseph v. State of Kerala 1993 Supp (3) SCC 745 to support his contention. The said judgment is clearly distinguishable. On the facts in that case, this Court found that the prosecutor had put leading questions, without objections by the defence, to several material and key witnesses regarding the culpability of the accused. The extent of the leading questions put, were on the facts of that case found to violate the constitutional right of a fair trial of the accused. The facts of the present appeal are wholly different. The petitioner had adequate and competent legal representation before the trial Court and leading questions, if any, put by the prosecutor were objected to by the defence and several questions were disallowed by the trial court.

Furthermore, the finding of guilt of the appellant herein by the High Court has not been on account of any of the answers elicited to any such questions. It is not as if every single leading question would invalidate the trial. The impact of the leading questions, if any, has to be assessed on the facts of each case.‖ (Emphasis by us) 1273. The absolute proposition urged on behalf of the appellant Vikas Yadav is, therefore, clearly not correct. In view of the principles laid down in Sidharth Vashisht @ Manu Sharma (supra), the discussion in the authoritative texts above and the statutory provisions, the court has to assess the extent of the leading questions put to the witness and whether on the facts of the case, it tantamounted to violation of the constitutional right of a fair trial of the accused. The court would also assess as to whether the finding of the guilt of the accused was on account of answers elicited to any such question. It is well settled that it is not every leading question which would violate the trial and that the impact of leading questions has to be assessed in the facts of the case.

1274. The above narration would also show that to the rule that leading questions are impermissible, there are recognised exceptions which include questions involving introduction or undisputed matter; identification; to bring out a contradiction; helping the witnesses memory; during cross- examination of a hostile witness; and concerning a complicated matter.

1275. Let us examine the objection on behalf of the appellant to the questions in the present case which have been noticed above. So far as the question no.(i) noted above with regard to the number of persons in the car is concerned, it does not suggest the answer. The question is also not answered by a mere _yes' or a _no'. The foundation of this question has already been laid down in the testimony of the witness when he stated that Vikas Yadav, present in court, whom he knew from before driving Tata Safari told him in a very uncivilized manner to remove his scooter from the road. The question in the category of _identification'.

1276. In his testimony as PW-14 in Sukhdev's trial, Ajay Kumar had stated that the Tata Safari vehicle was being driven by Vikas Yadav. He identified the other passengers in the vehicle as the other accused persons Vishal Yadav and Sukhdev Pehalwan, and gave the description of the fourth occupant of the vehicle 1277. So far as question no.(ii) is concerned, Mr. Sumeet Verma, learned counsel for the appellant Vikas Yadav has vehemently urged that if it were not for this leading question, there was no evidence at all of the width of the road/location/space for a vehicle to overtake the scooter. We have discussed above that the width of the road or the availability of road space for a vehicle to overtake the scooter is not relevant given the manner in which the events unfolded at the spot. For the view taken by us, nothing would turn on question at S. No.(ii) above or the answer to it.

1278. Before us, no real objection has been laid to the aforenoticed questions at serial no. (iii), (v), (vi). In any case, it would appear that question no. (iii), (v), (vi) are also questions of introduction and are strictly not leading questions. The witness had referred to the existence of a pole while explaning the place where his scooter had broken down suggesting existence of a light source at the spot. The question at serial no.(iv) was really in the nature of identification of the vehicle.

1279. The questions reproduced above are in the nature of questions of introduction or identification or questions which are helping the memory of the witness which are some of the recognised exceptions to the rule that leading questions are impermissible in the examination-in-chief.

1280. In the present case, even if it were to be held that these questions were leading questions, the same would not ipso facto and by itself vitiate the trial. In this regard, Section 167 of the Evidence Act would have to be applied. This statutory provision reads as follows:

> ―167. No new trial for improper admission or rejection of evidence.- The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient

evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.‖ 1281. In the judgment reported at AIR 1989 SC 2206, Owners and Parties Interested in M.V. "Vali Pero" v. Fernandeo Lopez, the Supreme Court held as follows:-

―Procedure is meant to subserve and not rule the cause of justice. Where the outcome and fairness of the procedure adopted is not doubted and the essentials of the prescribed procedure have been followed, there is no reason to discard the result simply because certain details which have not prejudicially affected the result have been inadvertently omitted in a particular case.

In our view, this appears to be the pragmatic approach which needs to be adopted while construing a purely procedural provision. Otherwise, rule of procedure will become the mistress instead of remaining the handmaid of justice, contrary to the role attributed to it in our legal system.

In AIR 1930 Calcutta 212, Emperor v. Ermanali relating to a criminal prosecution, the Calcutta High Court held thus:

―In criminal proceedings it is of the utmost importance that a just and reasonable decision on the merits should not be disturbed because in the course of the proceedings some flaw can be detected that is not fundamental and which is not proved to have worked injustice to the accused, although it may constitute a breach of the rules of criminal procedure.‖ (Emphasis by us) 1282. Again in 1995 (2) BLJR 1152 Krishna Kumar Agrawal v.

Jai Kumar Jain, the court observed that :-

―If legal technicalities cannot be wholly excluded, they shall at least be prevented from materially impending the course of judicial proceedings, and the attainment of that substantial justice which is their only aim‖ 1283. In III (2010) ACC 208, New India Assurance Co. Ltd. v.

Col. Surinder Pal, it was held that:

―Improper admission or rejection of evidence is not by itself a ground for reversal of a decision, if there is other evidence to support it.

If the Court considers that after leaving aside the evidence that has been improperly admitted, there was enough evidence on the record to justify the decision of the lower Court, or that if the rejected evidence were admitted the decision ought not have been affected thereby, no Court of appeal should set it aside.

The improper admission of evidence is not in itself ground for a new trial or reversal of decision, if independently of the evidence of improperly admitted there is sufficient evidence to justify the decision.‖ (Underlining by us) 1284. Of course violation of constitutional rights would be completely impermissible and intolerable. But it is for the objector to make out such a case. The appellants do not plead any such violation.

1285. Apart from citing Varkey Joseph (supra), it is not pointed out by the appellants as to how the trial was unfair to the appellants or as to what was the prejudice caused to them by the questions.

1286. On a consideration of the totality of the evidence brought on record from every angle, we find that the finding of guilt of the appellant does not rest on the answers to these questions alone. Several other witnesses have given testimony on these very matters. The appellants were represented by a team

of legal experts who were extensively cross examining the witnesses. No foundation has been laid for violation of any of the constitutional rights of the appellants.

1287. For all thse reasons and the well settled legal principles, the objection on behalf of appellants with regard to leading questions having been permitted to be put to PW-33 is without substance and of no legal consequence.

(H) Prejudice caused to appellants by the ld. Trial Judge in the first trial by denial of the opportunity to put the questions relating to the condition of the eyes of the witness Ajay Kumar - its effect 1288. Ajay Kumar gave his evidence as PW-33 on 31st May, 2003.

It appears that he was wearing goggles in the court room while testifying. In his cross-examination, the witness had stated that the goggles were not powered, but were normal glasses and that he used to wear them regularly except in the night. Sh.K.N. Balgopal who was appearing on behalf of Vikas Yadav submitted that he had seen the right eye of the witness and that there was white lining in his right eye, a genital defect and that he wanted to question Ajay Kumar about this. The trial court had rejected the request to put any question on this aspect to the witness and had directed the witness not to answer any question on the observation of defect in his eye by defence counsel.

1289. It has been urged before us that the refusal by the learned trial court to permit the appellants to question the witness about the condition of his eyes has caused material prejudice to the appellants who have been deprived of an opportunity to challenge the ability of the PW-33 Ajay Kumar with regard to his eye sight and thereby his material testimony.

1290. Unfortunately the appellants did not place before this court the complete facts on this aspect. The above direction by the trial court on 31st May, 2003 was separately challenged before this court by way of Crl.Misc. (M) 3664/2003 and 366/2003 by Vikas Yadav and Vishal Yadav which were decided by a judgment dated 9th September, 2003 reported at 2003 (108) DLT 357 : (2004) 1 JCC 43 Vikas Yadav v. State of Uttar Pradesh. Our attention is drawn to the following observations made by the court in paras 13 and 14:-

> —13. However, the allegations made in this petition and even the perusal of some of the observations made by the learned ASJ referred above do not present a pleasant picture and it appears that the atmosphere during the trial always remains surcharged and tenseful. Counsel for the petitioners states that he always is under the threat of being humiliated or dealt with curtness and such a conduct of the learned ASJ has the effect of the client loosing faith in the competence of his lawyer. For instance, Judge was not expected to ask the witness not to remove his goggles which apparently he was not wearing due to eye infection or any eye ailment and direct him not to answer any question put up by the counsel on that aspect.
>
> Counsel wanted to see whether witness has perfect eye-sight to be able to see in the late night darkly hours. Even the learned APP states that such direction to the witness is bound to cause prejudice to the prosecution case itself as the accused may, at the end of trial take undue advantage.

14. Be that as it may, the least that is expected from the Court is to deal with the lawyer in a respectful manner as he too is an officer of the court and not to give the impression to the accused that he is not getting a fair trial. Justice or fairness in trial should not only be done but should always seem to be done. Since the trial is in progress, it will be not proper to transfer the case to another court in the midstream but at the same time the trial court can be given certain directions to allay the apprehension of the petitioner that the procedure as prescribed by law is not being followed by the learned ASJ.‖

1291. Ajay Kumar's evidence in the first was completed on 31stMay ,2003 that is before the above

order was passed. Despite the observations of this court in the judgment dated 9th September, 2003, none of the appellants filed any application under Section 311 of the Cr.P.C. for recalling Ajay Katara in the witness box at any point of time. Instead they proceeded with the remaining trial of the case. Mr. Dayan Krishnan, learned Additional Standing Counsel for the state has pointed out that several applications were filed by the appellants under Section 311 of the Cr.P.C. to examine witnesses but no request was ever made to re- examine Ajay Kumar so as to question him on his eye sight.

1292. It is submitted that Vikas and Vishal Yadav sought to examine two witnesses namely Deepak Aggarwal and Dr. Manish Garg in defence to prove the deficiency in the eye sight of Ajay Kumar and that he was unable to see clearly in one eye. For this purpose, an application was filed for their dasti summons. This application was rejected by an order passed on 10th August, 2007 which reads as follows :

> —10.8.2007 Pr. Sh. B.S. Joon, Spl PP for State Ms. Vandana counsel for accused Vikas Yadav, adv. She has submitted that the witnesses are on the way to the court but held up in the traffic jam. As such the matter be adjourned at 12.30 pm.
>
> 12.30 pm At this stage, Ms. Vandana, counsel for accused Vikas Yadav has appeared and has moved an application seeking dasti summons of two defence witnesses namely Deepak Agarwal and Dr. Manish Garg. She is directed to produce Mr. Bharti, adv. for showing relevancy of these two witnesses.
>
> At this stage, Sh.BS Joon, Spl PP for State. Sh. Kaushik Dey, counsel for the complainant, Accused Vishal Yadav on bail with Sh. S.K. Saxena, adv., Accused Vikas Yadav in custody with Sh.GK Bharti, adv. have appeared. Adv.
>
> Mr. Bharti has submitted that both these wistnesses are relevant since through their testimony it is to be proved that PW Ajay Katara is a false witness. It is submitted that these doctors would also prove that Ajay Katara has an artificial eye of stone as he concealed this fact from the court. It is submitted that during his cross-examination the defence counsel wanted to question the witness regarding the fact that his right eye was having a general defect and there was white lining in his right eye but he was disallowed to put any such question. It is submitted that witness concealed this fact that he could not see from one eye. On the other hand the Spl.PP has submitted that the defence cannot be allowed to produce any such evidence since no such suggestion was given to the witness that he could not see from one eye or had an artificial eye. Further that Adv. Mr. Bharti was also sitting in the court and was advising Adv. Bajaj, counsel for accused Sukhdev Yadav when PW Ajay Katara was examined and cross-examined against accused Sukhdev but even at that time no such suggestion was given to the witness. After hearing the submission of both the parties and going through the material on record, I find that the defence was not allowed to put any question to PW 33 Ajay Katara with regard to any defect in his right eye and as such no evidence has come on record that PW 33 had an aritifical eye as claimed by the defence. At the same time witness Ajay Katara during his testimony has no where claimed that he could see with both eyes or could not see with both eyes, as such no medical evidence can be allowed to be produced by the defence to that effect, particularly when PW Ajay Katara would not be available to rebut the same. As such both the doctors referred above are allowed to be summoned in defence only with regard to the fact that PW Ajay Katara is an interested witness and no such evidence shall be allowed through these witnesses that PW Ajay Katara has an artificial eye. Moreover it is of no consequence even if PW Ajay Katara has one artificial eye as it is not the case of the prosecution that the accused is totally blind and cannot see the happenings around. The defence counsel has submitted that today there are no defence witnesses to be examined today. He has further

> submitted that by the order of the Hon'ble High Court the defence has been given time till 20/9/07 to conclude the defence evidence and two witnesses which were dropped by this court namely Sandeep Mishra and Rambir Singh Bharodia as per the direction of Hon'ble High Court are to be examined on 20/8/07. Now to come up for recording the statement of these witnesses on 20/8/07 at 11 am. The defence is directed to produce DW Dayashankar and Jai Singh, adv. on 29/8/07 at 11 am.

Regarding the press clippings the defence counsel has submitted that these would be filed on 20/8/07.‖
1293. The appellants accepted the correctness of the order dated 10th August, 2007 and did not challenge it any further.

1294. An application under Section 311 of the Cr.P.C. was filed on 12th May, 2008. Another application was filed on 26th May, 2008 regarding an alleged sting operation also under Section 311 of the Cr.P.C.

1295. The application of Vikas Yadav under Section 311 of the Cr.P.C. moved on 12th May, 2008 was disposed of as infructuous at the instance of Shri G.K. Bharti, Advocate who did not press this application in view of the admission of the sting operation by Ajay Katara. Thereafter Vishal Yadav moved the second application under Section 311 Cr.P.C. for summoning Subhash Yadav, Mr. Sharma, Ajay Katara, his security guards; Tanu Choudhary and her parents which was disposed of by an order passed on 27 th May, 2008.

1296. However no application was filed by the appellants seeking the recall of Ajay Katara. In no application, the appellants made a prayer for recall of the witness with regard to questions which were earlier disallowed about the condition of the eyes of the witness. It is evident that the appellants had abandoned challenge to the eye sight of the witness.

1297. In the Sukhdev Yadav trial, while being cross-examined, Anil Kumar had denied the suggestion that on 31 st May, 2003 while his statement was being recorded (in the Vikas Yadav trial), he was wearing dark glasses and not spectacles. The witness further stated that the glasses which he was wearing at the time of deposition were plain glasses without any number. The witness also explained that since he had hurt his right eye during childhood, he had to wear those glasses and that he had weak eye sight on the one eye.

1298. The above narration from the record of the two cases shows that the appellants do not allege that Ajay Kumar was visually impaired and unable to see. They allege deficiency in the vision in one eye only and nothing more. Challenge to the witness' testimony in cross examination is not based on his vision.

1299. In view of the above discussion, there is substance in the submission of the State that the appellants had made a conscious choice and abandoned all objections to the denial by the trial court of the opportunity to cross examine Ajay Kumar with regard to his eye sight. No objection on such ground can be legally pressed at this stage.

(I) Ajay Katara was not asked to identify Tata Safari vehicle at the police station - effect thereof 1300. An objection stands pressed before us that Ajay Kumar Katara was not asked to identify the Tata Safari vehicle at the police station. This objection raised on behalf of the appellants is being noticed only for the sake of rejection.

1301. During recording of the examination-in-chief of the witness Ajay Kumar in the trial of Vikas and Vishal Yadav, the learned Special Public Prosecutor had asked the witness if he could identify the recovered vehicle if shown to him and requested the court for showing the vehicle to the witness. This

was objected to. The extract of trial court proceedings dated 31st May, 2003 in this regard reads as follows:-

> —Ld. Defence Counsel objects to the identification of vehicle by witness on the following grounds:-
>
> 1. That the witness has not stated that the vehicle was involved in any crime;
>
> 2. the witness was not the witness of the recovery of vehicle;

3. the witness had not stated while giving the regn. number that he would be able to identify the vehicle.‖ 1302. The objection was rejected and the witness identified the recovered Tata Safari as the car seen by him on the night of 16th / 17th February, 2002 which was being driven by Vikas Yadav and occupied by the others noted earlier.

1303. It is not disputed that Ajay Kumar was also not a witness for the recovery of the Tata Safari. No question at all was put to the Investigating Officer Anil Somania in this regard who proved the recovery on the pointing out of the accused. In the circumstances, failure to get the vehicle identified cannot impact the prosecution case. The trial courts have accepted the testimony of Ajay Kumar on this aspect. The evidence led by the prosecution would therefore be comprehensively examined.

1304. Ajay Kumar's testimony about the identity of the persons in the Tata Safari on the fateful night has to be examined in the context of the disclosure statements of Vikas and Vishal Yadav both of whom had named the Pehalwan as their accomplice in the commission of the offence. Bharti Yadav in her statement under Section 161 Cr.P.C. (Exh.PW-35/AB) recorded on 2nd March, 2002 also stated that Sukhdev Pehalwan, an employee in their liquor business was her brothers, (Vikas and Vishal Yadav's) companion in the crime in the instant case.

1305. The testimony of Ajay Kumar establishes beyond any doubt that Vikas Yadav, Vishal Yadav, Sukhdev @ Pehalwan and the deceased Nitish Katara were actually travelling in the same Tata Safari vehicle at around 12:20/12:30 am (0020/0030 hours) on the road from the Diamond Palace Banquet Hall. The vehicle was being driven by Vikas Yadav. Nitish Katara was seated in the front passenger seat, next to Vikas Yadav. Vishal Yadav sat behind the driver in the rear of the vehicle while Sukhdev @ Pehalwan sat behind Nitish Katara.

(J) Failure of the prosecution to verify the address of Subhash Chand 1306. In the efforts to establish that Ajay Kumar had made a false statement that he visited one Subhash Chand in the PAC barracks on the night of 16th of February, 2002 . Vikas and Vishal Yadav examined as DW-23, one Inspector Satyavir Singh. DW-23 had testified that he was residing in the residential complex of the 47th Battalion, Ghaziabad for the last about 14 years; that the 47th Battalion was equipped with sophisticated weapons to fight terrorism and fundamentalists which are stored in the armoury magazine. The residential complex was surrounded by a wall which an entry and exit point at which points police is posted for all 24 hours. A register is maintained to monitor the entry and exit of all outsiders to and fro residing in the complex. Particulars of date, names, particulars of the person whom they want to visit, time and purpose of the visit and whether the person was visiting the complex was on a vehicle was maintained in the register. The number of the vehicle is also entered in the register.

1307. The witness was not asked by the appellants if Subhash Chand was residing in this particular complex or if he could give information about the visitors to it on 16 th February, 2002! This witness was unable to give the area of the complex of the 47th Battalion. DW-23 does not make any disclosure with regard to persons who visited the complex on 16th February, 2002 when Ajay Kumar claimed to have visited Subhash Chand. He does not produce any record of the register allegedly maintained at the entry point or record of gate passes which would have been issued to a visitor as claimed by him. In

this background, the oral testimony of this witness unsupported by documents which he claims existed, does not controvert Ajay Kumar's testimony that he had gone to Ghaziabad to to visit Subhash Chand.

1308. The testimony of DW-23 also shows that there is a third gate as gate no.3. He testifies that there are about 1000 residential quarters in the complex and that he was not assigned guard duty at the gates. Even if the testimony of DW-23 was accepted as a whole, there is nothing in the statement with regard to persons who have visited the complex on 16th February, 2002.

1309. The accused in both the trials did not dispute the identity of Subhash Chand, his occupation or friendship with the witness. Anil Kumar Katara was cross-examined on behalf of Vishal Yadav when he denied that Subhash Chand was in _PAS'. The witness stated that he was in the UP police and that he lived in police quarters and that the quarters of Subhash Chand was situated in the campus of Prantiya Suraksha Bal which had four gates. Anil Kumar had denied being stopped at the gate at entry or that a register was maintained there.

1310. In the trial of Sukhdev, Ajay Kumar Katara stated that Subhash Chand was a Hawaldar who was residing in the PAC compound, Ghaziabad which had 1500 quarters and that he was residing on the ground floor corner house. The witness denied knowledge about any register being maintained by the security guard and stated that he was never stopped while entering the blocks and had never been asked to make any entry. The witness statd that he used to enter the PAC compound from the side of G Block.

1311. Looked at from any angle, Anil Kumar Katara has remained steadfast about his visit to Subhash Chand in Ghaziabad on the night of 16th of February, 2002 in his testimony in both trials. This testimony could not be challenged by the defence. The evidence of DW-23 Inspector Satyavir Singh also does not dent the evidence of Ajay Katara at the Hapur Chungi on the fateful night at the stated time. Further evidence on this aspect would be a surplusage. Requiring the prosecution to further verify the address of Subhash Chand is unnecessary. The failure of the prosecution to do so is of no legal consequence therefore.

1312. So far as Ajay Kumar is concerned, it is perfectly normal for a person to visit a fellow villager and friend. No doubt can be attached to the presence of the person at the spot for this reason. There is no suggestion at all on behalf of any of the appellants that the witness was nurturing any ill will or had any malafide or enemity against the appellants. There is nothing unnatural about the scooter of the witness breaking down as well. The learned trial judge has accepted his testimony. We see no reason to doubt the same.

IX Pinpointing the time of death and its proximity to the timing of the deceased being last seen alive with the accused 1313. In order to establish the time of death, the prosecution examined Dr. Anil Singhal as PW-3 who had conducted the post-mortem (Exh.PW-3/3). This report has referred to a post-mortem conducted on an unidentified body on 18 th February, 2002 at about 3.00 p.m. According to this report, the proximate time of the death was around two days prior to the conduct of the post-mortem. It is pointed that as per Exh.PW-3/3 if computed backwards from the time of conduct of the post-mortem, the death of Nitish Katara would have occurred at around 3.00 p.m. of the 16 th of February 2002. Mr. R.K. Kapoor, ld. counsel for Sukhdev @ Pehalwan has relied heavily on this observation of the doctor to displace the prosecution case.

1314. Mr. U.R. Lalit, learned senior counsel has also drawn our attention to the evidence of PW-3 Dr. Anil Singhal to the effect that the stomach of the deceased was empty at the time of conducting the post mortem/autopsy; that it was possible that the body on which he had conducted the post mortem might not have taken food for 24 hours or more but he could not say exactly how much. The appellants have heavily relied on the medical evidence that the stomach of the deceased was empty as a factor which points towards the time of death. It is submitted that for this reason as well it is not possible to

pin point the time of death and therefore, the last seen together evidence of the prosecution must fail the test of proximity.

1315. So far as emptying of the stomach or presence of semi-

digested food in the stomach is considered, it is well settled that digestion of food rests on too many variables to be a reliable basis to determine the time of death. (Ref: (1993) Supp (3) SCC 678 (para 6) Sardul Singh and Ors. v. State of Punjab and (2004) 10 SCC 598 Ram Bali v. State of U.P) 1316. In (1993) Supp (3) SCC 678 (para 6) Sardul Singh and Ors.

v. State of Punjab, the Supreme Court observed as follows :-

―6. We see absolutely no reason to discredit the evidence of the three eyewitnesses whose presence cannot be doubted. Now coming to the semi-digested food, it cannot be ruled out that the old lady might not have eaten anything earlier. Merely because the illiterate witnesses stated that they took their meals immediately before the occurrence cannot by itself be a circumstance to discredit their evidence on the basis of medical evidence regarding the presence of semi-digested food. It is also clear from the textbooks on medical jurisprudence that the stomach contents cannot be determined with precision at the time of death. .....‖ 1317. In (2004) 10 SCC 598 Ram Bali v. State of U.P., on this aspect, the court also noted thus:

―10. Even otherwise, the plea that the medical evidence is contrary to the ocular evidence has also no substance. It is merely based on the purported opinion expressed by an author. Hypothetical answers given to hypothetical questions, and mere hypothetical and abstract opinions by textbook writers, on assumed facts, cannot dilute evidentiary value of ocular evidence if it is credible and cogent. The time taken normally for digesting of food would also depend upon the quality and quantity of food as well, besides others. It was required to be factually proved as to the quantum of food that was taken, atmospheric conditions and such other relevant factors to throw doubt about the correctness of time of occurrence as stated by the witnesses. Only when the ocular evidence is wholly inconsistent with the medical evidence the court has to consider the effect thereof. This Court in Pattipati Venkaiah v. State of A.P. [(1985) 4 SCC 80 : 1985 SCC (Cri) 464 : AIR 1985 SC 1715] observed that medical science is not yet so perfect as to determine the exact time of death nor can the same be determined in a computerised or mathematical fashion so as to be accurate to the last second. The state of the contents of the stomach found at the time of medical examination is not a safe guide for determining the time of occurrence because that would be a matter of speculation, in the absence of reliable evidence on the question as to when exactly the deceased had his last meal and what that meal consisted of.

In Nihal Singh v. State of Punjab [AIR 1965 SC 26 : (1965) 1 Cri LJ 105] it was indicated that the time required for digestion may depend upon the nature of the food. The time also varies according to the digestive capacity. The process of digestion is not uniform and varies from individual to individual and the health of a person at a particular time and so many other varying factors.‖ (Underlining by us) 1318. Food has to pass through the alimentary canal and moves from organ to organ. The speed at which it moves from one to another depends on the constituents of what was imbibed. No witness, including the mother and friends of the deceased were questioned on when or what did the deceased last eat. Some foods get digested faster than others. The amount of liquid in the food partaken would also require to be factored in. There is no evidence before us to the effect that Nitish Katara had actually eaten food at the wedding or its nature.

> During the process of digestion, food travels from the stomach to the small intestine to the large intestine. PW 3 Dr. Anil Singhal in his postmortem report (Ex PW 3/3) has not given any information as to whether there was any food in his small or large intestines. In this background, it would be unsafe to rely on the absence of food in the stomach to pinpoint the time of death so as to discredit the last seen together evidence.

1319. On the other hand, Mr. Dayan Krishnan has urged that the prosecution had established that the time of death is proximate to the time when the deceased and the accused were last seen together in the car which was in their exclusive possession and control. Mr.Krishnan has also submitted that it is a settled position of law that the time of death cannot be established scientifically and precisely and it has to be based on a combination of several factors. In support of this submission, reliance has been placed on the pronouncements of the Supreme Court reported at (2011) 9 SCC 698 (para 15) Rakesh v. State of M.P. and (2006) 13 SCC 65 (para 21-22) Baso Prasad. v. State of Bihar.

1320. In para 15 of (2011) 9 SCC 698, Rakesh Kumar v. State of M.P., the Supreme Court placed reliance on an earlier pronouncement reported at (2005) 10 SCC 374 (para 8) Mangu Khan v. State of Rajasthan and had held as follows:-

> —15. In Mangu Khan v. State of Rajasthan [(2005) 10 SCC 374 : 2005 SCC (Cri) 1535 : AIR 2005 SC 1912] this Court examined a similar issue wherein the post-mortem report mentioned that the death had occurred within 24 hours prior to post-mortem examination. In that case, such an opinion did not match with the prosecution case. This Court examined the issue elaborately and held that physical condition of the body after death would depend on a large number of circumstances/factors and nothing can be said with certainty. In determining the issue, various factors such as age and health condition of the deceased, climatic and atmospheric conditions of the place of occurrence and the conditions under which the body is preserved, are required to be considered.

There has been no cross-examination of the doctor on the issue as to elicit any of the material fact on which a possible argument could be based in this regard. The acceptable ocular evidence cannot be dislodged on such hypothetical basis for which no proper grounds were made. In Baso Prasad v. State of Bihar [(2006) 13 SCC 65 : (2007) 2 SCC (Cri) 567 : AIR 2007 SC 1019] , while considering a similar issue, this Court held that exact time of death cannot be established scientifically and precisely.‖ (Underlining by us) 1321. Mr.Krishnan, learned Additional Standing Counsel for the State has pointed out that the witness had stated that there was no freezer to store the body which had been kept in the open and that no scientific test was performed on the body. The body was badly burnt and that it was the winter season which is also a factor which would impact putrefication the estimation of death, another important factor considered by forensic experts to suggest possible timing by death of a person.

1322. PW-3 Dr. Anil Singhal had stated that in the instant case, putrefaction of the body had not started completely. The witness stated that putrefaction normally starts 1½ days after the death. As per the autopsy report, (Exh.PW-3/3) and the testimony of PW-3, he conducted the autopsy from 3 p.m. on 18th February, 2002. This would bring the time of death to the intervening night of 16/17th February, 2002. It needs no elaboration that the period mentioned by the doctor has to be construed as a range of timing.

1323. To support the submission that Dr. Anil Singhal had estimated the time of death as the intervening night of 16/17th February, 2002, Mr. Krishnan, learned Additional Standing Counsel has placed the relevant extract from Taylor‟s Principles and Practice of Medical Jurisprudence (12th Edn.) as well as Modi‟s Medical Jurisprudence and Toxicology (23rd Edn.) Reliance has been placed on the

Chapter on putrefaction or decomposition and autolysis and the observations of the learned author on clear changes in the body; onset of rigor mortis and the green discoloration of the body.

1324. Learned Additional Standing Counsel for the state has also placed reliance on the authoritative text of J.B. Mukherjee on Forensic Medicine and Toxicology which lays down basic guiding principles for estimation of the time of death in a simplified manner and reads as follows:

> ―ESTIMATION OF TIME SINCE DEATH The forensic pathologist on holding an autopsy examination has always got to answer how much time has elapsed since death, specially in connection with a homicide case, to help the police in investigation of the case, to exclude some suspects and to prevent the culprit to take shelter under an ―alibi‖. During deposition in the Court of law the autopsy surgeon will be asked to give his precise opinion as to time of death of the deceased in question.
>
> The autopsy Surgeon, hence, should keep record of all available data having bearing on this issue, while performing postmortem examination of the body. But it is never possible to fix up exact date and time of death by any findings of autopsy examination, though some close and reasonable approximation of the time of death should always be aimed at. It will rather be rash, to pronounce the exact time of death in the witness box; in an attempt to do so, there is every likelihood for the bounds of accuracy being overstepped and consequent injustice meted out.
>
> While calculating the time of death, the fact should not be overlooked that the time of death does not necessarily coincide with the time of assault. Hence while holding post-mortem examination, the forensic pathologist should better note down data not only towards determination of approximate time elapsed since death but also in respect of time interval between assault and death, if possible.
>
> ..... After all, human body never behaves with mathematical precision, either when alive or dead.
>
> Hence it can be rightly concluded that it is extremely difficult to deduce accurately the time of death from post-mortem changes alone, when other nonmedical evidences should also be taken due consideration of.
>
> The following P.M. findings may help in estimation of time since death within reasonable limit A. xxx xxx xxx B. Within 2 hours:
>
> (a) to (c) xxx xxx xxx
>
> (d) Rigor mortis will appear in the eye muscles and at times in the muscles of jaw but definitely in the involuntary muscles, towards the end of two hours of death usually.

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C.     Within 3-6 hours:

(a)    xxx     xxx     xxx

(b)    Rigor mortis gets well developed, all over
       the body, by 4 hours of death.

D.     Between 6-12 hours:

(a) to (c)     xxx     xxx   xxx
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(d) Rigor mortis remains well developed all over the body.

E. Between 12-24 hours:

(a) Rigor mortis will usually be in the phase of disappearance from the face, neck, upper and lower limbs specially in the summer but not in the winter. In summer, rigor mortis will completely pass off by 18 hours if not surely within 20-24 hours of death.

(b) Greenish patch of discoloration is usually present over Rt iliac fossa in the summer by 18 hours of death. It may also be noticed over the trunk, chest, face, arms and legs specially in the summer by 20-24 hours but not in winter.

F. Between 24-48 hours:

(a) Ordinarily rigor mortis passes off in summer within 20-24 hours of death approximately, but in winter it may continue upto 36 hours to 48 hours or even more, depending upon the climatic and other conditions.‖ 1325. We find that even though PW-3 Dr. Anil Singhal estimated that the range period for the time of death is about two days before conducting the autopsy, he has himself also stated that the death could have happened on the night of 16/17 th February, 2002.An examination of the forensic medical literature as well as the evidence of PW-3 Dr. Anil Singhal thus clearly points to the fact that the death of the deceased took place in the night intervening 16/17th February, 2002.

1326. There is evidence that the deceased was seen alive after midnight at the Hapur Chungi. The call records (Exh.PW- 21/1) of the phone of the deceased also establish that he was alive at this time. The observation by the doctor that the time of death was two days before conducting the post mortem is therefore without any basis and is hereby rejected.

1327. We now propose to examine if it is possible to ascertain the time of death from other evidence on record.

1328. PW 25 Bharat Diwakar and PW 30 Nilam Katara have spoken about their unsuccessful efforts to reach Nitish at his mobile phone in the very early hours of the 17 th of February 2002.

1329. The prosecution has established that Nitish Katara and Bharat Diwakar left 7 Chelmsford Road, New Delhi left together on the 16th of Feburary, 2012. It is in evidence that Bharat Diwakar left the wedding venue alone between 02:00 a.m. - 02:15 a.m. on the 17th of February, 2002 and that he reached 7 Chelmsford Road at around 03:00 a.m. on 17th of February 2002 without Nitish Katara. The driver Shri Shadi Ram (PW 24) of the vehicle in which he returned proves this fact.

1330. As PW 25 Bharat Diwakar did not give any satisfactory answer about Nitish Katara to PW 30 Nilam Katara when he returned alone from the wedding, Nilam Katara tried to contact Nitish on his cell phone (which would be after 3:00 am.) but was unable to make contact.

1331. We may note that PW 38 Bharti Yadav was confronted with the statement (Mark PW35/AB) attributed to her under Section 161 Cr.P.C. which was recorded by the Investigating Officer Anil Somania on 2nd March, 2002. She denied the portion marked _W to W' of this statement where it was recorded that at about 0:00-2:00 a.m. when Bharti came to know that her brothers Vikas Yadav and Vishal Yadav along with Sukhdev Pehlwan had taken away Nitish Katara, she tried to contact Nitish Katara on his mobile phone but there was no response which increased her tension and thereafter she called on the residence number. This part of Exh.PW35/AB is corroborated by the documentary evidence as these calls by Bharti are duly reflected in the call records (Exh.PW 22/2) of her cell phone no.9810038469.

1332. Nitish Katara's call records (Exh.PW21/1) establish that he had received two calls from Bharti's cell (9811034829), one at 00:35:40 hours (00:35 a.m.) lasting 00:20 seconds and a second call at 00:40:44 ; lasting 00:21 seconds 1333. As per Ex PW 22/2, phone calls have been made from Bharti's cell phone to Bharat Diwakar's cell phone at 6:41 a.m., 6:55 a.m., 7:15 a.m., 8:08 a.m., 8:18 a.m. and 8:43 a.m. of the 17th of February 2002.

1334. At around 05:30 a.m., PW 30 Nilam Katara woke up PW 25 Bharat Diwakar and told him that Nitish had still not reached home and that his cell phone was also switched off.

1335. It is in the evidence of PW 23 Virender Singh resident of village Kalakure that at about 09:00 a.m. / 09:15 a.m. of 17 th of February, 2002 he was going to Khurja in his jeep from his village and when he was about one kilometer before Khurja he saw one naked dead body lying on the right side of the road in a burnt condition and that the small crowd had gathered at the side of the road. From his cell phone, he made a call to the PS Kotwali giving information about the presence of the dead body and went on to Khurja. This dead body was subsequently identified as that of Nitish Katara.

1336. As per the call records, the last call received on Nitish Katara's cell no.9811283641 was at 1:11:58 am from mobile no.9810154964 (by PW-26 Gaurav Gupta) showing the tower location of Raj Nagar, Ghaziabad. No call was made or received on it thereafter.

1337. Mr. Dayan Krishnan, learned Additional Standing Counsel for the state has argued that the prosecution has discharged its burden of proving the proximity of the last seen evidence to the time of death. Reference is made to the pronouncement of the Supreme Court in (2007) 3 SCC 755 (para 31-34) State of Goa v. Sanjay Thakran and Anr.

Para 34 of the pronouncement deserves to be extracted in extenso and read as follows :-

> —34. From the principle laid down by this Court, the circumstance of last seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is after (sic of) a considerable long duration. There can be no fixed or straitjacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author of the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third

party, then a relatively wider time gap would not affect the prosecution case.‖ (Emphasis by us) 1338. It is therefore trite that there cannot be any absolute parameter for assessing the last seen evidence and proximity in time as well as place to the time of death. It has been held that if there was exclusivity of the place, position and control when the accused persons were last seen together with the deceased as well as the place where the incident occurred, without there being any possibility of intrusion to that place by any third party, then a relatively wider time gap would not effect a prosecution case.

1339. The evidence of Ajay Kumar proves that Nitish Katara was alive at 12:20/12:30 am (00:20 am/00:30 am). We have noted above evidence that Nitish Katara was alive even till 1.00/1.30 am on the 17th February, 2002. The last call on his cell phone has been registered at 1:11:18 on the 17th of February 2002.

1340. The above narration clearly shows that it was impossible to even get through to Nitish Katara after this last call on his cell phone at 01:11:18 hours on 17th of February, 2002. Bharti could not reach him around that time or at 02:00 a.m. His mother unsuccessfully tried to contact him after 3:00 am. All these established facts and circumstances point towards the fact that he had been murdered after 01:11:18 hrs. Nitish's body was discovered not very long therafter in a _khai' on an uninhabited piece of land which had only fields in the vicinity.

1341. Thus the prosecution has discharged its burden so far as the proximity between the time at which the deceased and accused were last seen alive together evidence and the time of death in the present case is concerned.

1342. Let us examine the objection premised on the proximity of the place test. The deceased was last seen alive in the company of the accused persons in the middle of the night of 16/17th February, 2002 in a Tata Safari vehicle driven by Vikas Yadav with the other two appellants on the rear seat. It has been proved that the Tata Safari vehicle belonged to the company in which one of the directors was the father of Vikas Yadav, who was uncle of Vishal Yadav and employer of Sukhdev @ Pehalwan. The evidence on record establishes that the accused persons and the deceased were travelling in the vehicle. The conduct of Vikas Yadav reflects his resentment at being compelled to stop by Ajay Katara's scooter and the anxiety to move on. We have discussed above the call records which point towards Nitish not being permitted to receive calls. He has not been able to make any call from his phone. Undoubtedly, the appellants were not only in exclusive possession and control of the vehicle but also had Nitish their custody and under their absolute control. The possibility of intrusion or intervention by any third party is, therefore, ruled out. Information about the body was received by the Khurja police at 9.00/9.15 am from PW-23 Shri Virender Singh.

Therefore the circumstance of last seen together in the present case is a relevant fact which has to be taken into consideration for assessing the culpability of the appellants.

X Challenge to the identity of the recovered dead body by Sukhdev @ Pehalwan in Criminal Appeal No.145/2012 1343. It is submitted by Mr.Ravinder Kumar Kapoor, Advocate on behalf of the appellant-Sukhdev @ Pehalwan that the original documents relied upon by the prosecution in Sukhdev Yadav's case were on the record of the trial against Vikas Yadav and Vishal Yadav. Mr. Kapoor submits that as per these documents vis-à-vis the testimony of Nilam Katara, the body which was recovered by the police on 17 th February, 2002, was not that of Nitish Katara. Learned counsel would contend that the record of the trial appears to suggest reference to four different human corpses. It is contended that the dead body which was recovered on the 17th of February, 2002 was not of Nitish Katara.

1344. Mr.Kapoor contends that in the statement of PW-10 Nilam Katara, she had stated that she had identified the body as that of Nitish Katara from his face, left foot and left hand and made a statement that his right leg was missing.

1345. Our attention has been drawn to the report dated 21 st January, 2003 (Exh.C-1) of the Central Forensic Science Laboratory. It is urged that the police had sent a parcel containing sealed samples of different parts of the dead body as well as blood samples of Nilam Katara and Mr. N.M. Katara for DNA examination to be conducted thereon. Exh.C-1 shows that as Exh.D, the police had sent a human femur bone of the right side of the body. It is, therefore, contended by Mr. Kapoor that the samples sent for the DNA profiling to the Central Forensic Science Laboratory, Calcutta were not that of the body which was recovered by the police and identified by Nilam Katara as that of Nitish Katara.

1346. We find that apart from the femur bone, the police had forwarded samples of various other parts of the body including blood stains, tissue samples etc. on which DNA profiling was undertaken by the laboratory and it was opined that the allele of the samples matched those of N.M. Katara as well as that of Nilam Katara. The body was not subjected to chemical analysis to ascertain whether any combustible material was utilized to burn the dead body.

1347. The photograph (Ex. PW 4/2) of the body recovered by the police on 17th February, 2002 shows that the body had both the lower limbs.

1348. Mr. Kapoor, learned counsel has pointed out that the post-

> mortem report (Exh.PW 3/3) does not mention that any leg was missing. Learned counsel has also placed reliance on the sketch of the body which forms part of inquest report Exh.PW 3/2. It is urged that the officer who conducted the inquest has carefully shaded the burnt area of the body and has shown burns on both legs.

1349. We find that as per the panchnama of the dead body (Exh.PW-3/2A) proved by Inspector C.P. Singh, under the heading _condition of the dead body', it is noted that the right leg was bent from the knees while the left leg was almost straight. This may be the reason for the confusion about the status of the leg.

1350. Nilam Katara had appeared as PW 30 in the trial of Vikas Yadav and Vishal Yadav and her statement was first recorded on 30th April, 2003 when she had testified that body recovered by the police on the 17th was that of her son, Nitish Katara. In the trial of Sukhdev Yadav, the evidence of Nilam Katara as PW 10 was recorded on 27th November, 2006 i.e. after a period of more than four years. Passage of time could be another cause for the discrepancy. Given the clear testimony of this witness, this could be the result of a recording error as well. Nothing would thus turn on the isolated sentence in Nilam Katara's statement.

1351. Learned counsel has urged that the inquest report shows injury on the stomach and the left leg. It pertinently makes no mention of a head injury. The post-mortem report, however, referred to a skull fracture and a lacerated wound 3 centimeter by 2 centimeters on left side of the head and about 7 centimeter above the left eyebrow which had a deep cavity. The submission is that no such wound has been noted by the police officer on the inquest form and, therefore, the body which was produced for the post-mortem was not the same body on which the inquest form was recorded. The inquest report notes that the face and head were in a burnt condition.

1352. The police official who filled the inquest was not a medical expert. The inquest report also makes no mention of any leg missing from the corpse. We have discussed at length the limited reliance that may be placed on the inquest report. Furthermore, no challenge was laid on the omission to notice the head injury nor an explanation sought from any witness. The post-mortem notes the head injury as an ante-mortem injury. The suggestion on behalf of the appellant Sukhdev that the injury was caused after recovery of the dead body is clearly untenable.

1353. We also find that Sukhdev laid no challenge during trial that the post-mortem was not conducted on the body recovered by the police.

1354. Mr.Kapoor, learned counsel has contended that the evidence in the instant case was being manipulated to bring home a finding of guilt of the appellant. He refers to the endorsement by the ―report proficient‖ on 18th February, 2002 which forms part of the inquest proceedings to the effect that skin of the fingers was burnt for which reason, it was not possible to take the finger prints of the body. Learned counsel has contended that as against this clear statement, the police has introduced one Shri Chet Ram, a finger print expert.

1355. We find that PW-16 Shri Chet Ram was summoned in the Sukhdev Yadav trial whence he stated that he adopted his previous statement given in Vikas Yadav case. This witness was examined as PW 2 in the earlier trial. Sukhdev Yadav was granted an opportunity to cross-examine the witness. However, he refused to cross-examine the witness and a statement was made that the cross-examination of the other accused persons was adopted by him as well.

1356. This submission does not need to detain this court inasmuch as the trial court has rejected the evidence of PW 16 Chet Ram. It was noted that the prosecution had failed to prove that Nitish Katara was the holder of a driving licence and therefore the statement of Shri Chet Ram to the effect that he had identified the finger prints as that of Nitish Katara based on alleged comparison with finger prints at the Regional Transport Office, was unworthy of credence. This submission of learned counsel for the appellant Sukhdev therefore has to be noted only to be rejected.

1357. Mr.Ravinder Kumar Kapoor, learned counsel for the appellant Sukhdev has urged that the fixation of the age of the person whose dead body was found by the police by Dr. Anil Singhal would also show that it was not that of Nitish Katara. In this regard, it is pointed out that as per the college identity card (Exh.PW 13/5), Nitish Katara was born on 20 th April, 1978 and, therefore, as on 16/17th February, 2002, he would be slightly over 23 years of age. Learned counsel has pointed out that in the inquest report, the age of the person whose body was recovered, is mentioned as 30 years. The post-mortem report also reflects the proximate age of the dead person as 30 years.

1358. Learned counsel has relied on the answer of Dr. Anil Singhal (examined as PW-18 in Sukhdev's trial) to the query on behalf of the defence to the effect as to whether the body could be 30 years of age as well as 40 years also? In answer to this question, the doctor had stated that it may be. The doctor had also stated that his determination showed that the body was not of a child nor of an old person; that it would, therefore, appear, that the person was over 16 years of age and less than 30 years of age. The doctor has clearly stated that he had written the age of the deceased as 30 years on the post-mortem report because it was so mentioned in the police documents. So far as his own assessment is concerned, the doctor had stated that the denture of the dead body was complete i.e. he had 16x16 teeth and, therefore, the proximate age should have been the same.

1359. The post mortem report (Ex. PW 3/3) reports that the age of the dead body is 30 years. In Sukhdev's trial, it is urged by counsel for the accused Mr Kapoor that since Nitish Katara was 23 years of age, the dead body was not that of Nitish Katara. The doctor has stated that he mentioned the age of the corpse as the police had so mentioned it. The doctor had placed reliance on the denture of the deceased as well.

1360. Mr. P.K. Dey on the other hand contends that the dead body had 16+ 16 teeth, which falls in the age group of 18-25 years. He refers to Wheeler‟s Dental Anatomy, Physiology and Occlusion (Ninth Edition) by Stanley J. Nelson which states that the formation of the roots of the third molars are completed in the age category of 18 to 25 years, after the formation of the roots of all other teeth is complete. The relevant table is reproduced as follows:

Table 2.2 Chronology of Permanent Teeth TOOTH FIRST CROWN EMERGENCE ROOT EVIDENCE COMPLETED (ERUPTION) COMPLETE OF (YEARS) (YEARS) D (YEARS) CALCIFICAT ION C (canine) 6,11 4-5 mo 6-7 11-12 13-15 P1(pre- 5,12 1 ½ - 1 ¾ yr 5-6 10-11 12-13 molar) P2 (pre- 4,13 2-2 ½ yr 6-7 10-12 12-14 molar) M1 (molar) 3,14 At birth 2½-3 6-7 9-10 M2(molar) 2,15 2 ½ - 3 yr 7-8 12-13 14-16 M3(molar) 1,16 7-9 12-16 17-21 18-25 1361. The doctor records no data or explanation for opining the age of the deceased in this manner. Therefore the age estimation is contrary to medical science as a person may have thirty teeth after 18 years of age.

1362. Medical science is not a definite science. Assessment of age is effected by radiological and denture examination as well as by physical appearance. The age estimation given by the doctor in the instant case is premised solely on the status of his denture. No radiological examination was effected. The doctor had clearly stated that he had incorporated the age mentioned by the police as the age of the person on whose body he had conducted the post-mortem. The body having been burnt, no proximation of age at the time of the incident or thereafter could have meaningfully effected. Even otherwise, we find that on medical examination, the doctors can only prescribe the possible range of age and never opine a definite age stipulation as in the instant case. Therefore, the mentioning by the doctor of a definite age of the person by the doctor on the post-mortem form is of no consequence as it is based on a statement on the inquest request which itself has no factual basis. The identity of the body cannot be doubted on such opinion of its age by the doctor.

1363. The mother of the deceased has categorically identified the recovered body as that of her son Nitish Katara.

1364. It is important to note that during trial, no challenge at all has been laid by or on behalf of Sukhdev @ Pehalwan to the statement made by either Nilam Katara, the investigating officer, the doctors or to the DNA report to the effect that the body which was recovered by the police was not that of Nitish Katara and that more than one corpse was used at the different stages of the investigation. No question was put to any of the witnesses including the police officers or the doctors who could have clarified the position.

1365. We also find that there is no challenge or dispute at any stage and in any manner that the tissue samples sent to the All India Institute of Medical Sciences (AIIMS) were not of the body which had been recovered by the police. Learned counsel contests only the identity of the corpse which was recovered by the police on the 18th February, 2002.

1366. The unchallenged testimony of the witnesses and the documentary evidence supporting it leave no room to doubt that the body recovered by the police on 18 th February, 2002 was of Nitish Katara. This fact is admitted by Vikas and Vishal Yadav.

1367. Furthermore, the learned Trial Judge in the trial of Sukhdev Yadav @ Pehalwan, in the impugned judgment dated 6th July, 2011, clearly records that there was no challenge to the identity of the dead body as the issue was not raised by the defence counsel and the identity stood established by the prosecution witnesses. It has been righlty held that the identity of the deceased was ascertained and confirmed through DNA and fingerprint testing. For all these reasons there is no merit in the challenge before this court on behalf of Sukhdev Yadav to the identity of the dead body.

XI Reversal of burden of proof 1368. It is contended before us by Mr. Krishnan, ld. Standing Counsel that the prosecution has proved beyond reasonable doubt that the deceased died shortly after he was last seen alive in the company of the accused. Placing reliance on Section 106 of the Evidence Act, Mr. Dayan Krishnan urges that therefore the burden to show what happened to the deceased while he was in their custody shifts to the accused persons. It is urged that upon failure of the accused persons to do so, by virtue of Section 114 of the Indian Evidence Act, the court would infer the existence of certain facts.

1369. By virtue of Section 101 of the Evidence Act, every person alleging a fact has to prove it asserting existence of facts, cannot prove those facts exists if he desires any court to give judgment as to any legal right or liability depending on such facts.

1370. Section 106 is an exception to the above requirement as it imposes a burden of proving a fact which is within the knowledge of such person irrespective of the onus to do so.

1371. In support of this submission, reliance has been placed on the pronouncement of the Supreme Court reported at (2000) 8 SCC 382 State of W.B. v. Mir Mohammad Omar and Ors. In this case, a 29 year old young businessman of Kolkata was abducted and killed by the accused persons who chased the deceased to several places before forcibly dragging him away. Thereafter, the deceased was not seen alive by his kith or kin.

1372. The Supreme Court had concluded that there was abundant evidence to show that the deceased was abducted by the accused on the night in question for the purpose of murdering him. The circumstance of the abduction by the accused; their having taken the deceased out of the sight of the witnesses; recovery of the murdered body of the deceased a few hours later without his shirt; recovery of the shirt which the deceased was wearing at the time of abduction concealed by the respondents, were established in the evidence led by the prosecution.

1373. The abductors had not given any explanation as to what happened to the deceased after he was abducted by them. The Session Judge had acquitted the accused persons of murder holding that there was a missing link in the chain of events after the deceased was last seen together with the accused persons and discovery of the dead body. The Supreme Court considered this very evidence in (Mir Mohd. Omar (supra) as well as the finding by the learned Sessions Judge and held as follows:-

> —31. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty.
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> 32. In this case, when the prosecution succeeded in establishing the afore-narrated circumstances, the court has to presume the existence of certain facts. Presumption is a course recognised by the law for the court to rely on in conditions such as this.
>
> 33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process the court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case.
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> 34. When it is proved to the satisfaction of the Court that Mahesh was abducted by the accused and they took him out of that area, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning process would enable the Court to draw the presumption that the

accused have murdered him. Such inference can be disrupted if the accused would tell the Court what else happened to Mahesh at least until he was in their custody.

35. During arguments we put a question to learned senior counsel for the respondents based on a hypothetical illustration. If a boy is kidnapped from the lawful custody of his guardian in the sight of his people and the kidnappers disappeared with the prey, what would be the normal inference if the mangled dead body of the boy is recovered within a couple of hours from elsewhere. The query was made whether upon proof of the above facts an inference could be drawn that the kidnappers would have killed the boy. Learned senior counsel finally conceded that in such a case the inference is reasonably certain that the boy was killed by the kidnappers unless they explain otherwise.

36. In this context we may profitably utilise the legal principle embodied in Section 106 of the Evidence Act which reads as follows: "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

37. The section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the Section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference.

38. Vivian Bose, J., had observed that Section 106 of the Evidence Act is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. In Shambu Nath Mehra v. The State of Ajmer, AIR 1956 SC 404 : 1956CriLJ794 the learned Judge has stated the legal principle thus:

This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are 'especially' within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word 'especially' stresses that. It means facts that are pre-eminently or exceptionally within his knowledge.‖ (Emphasis by us) 1374. Our attention has also been drawn to the pronouncement of the Supreme Court reported at (2012) 1 SCC 10 Prithipal Singh and Ors. v. State of Punjab and connected matters.

This case relates to allegations of police atrocities, custodial deaths and illegal detention against police personnel. The deceased was a human rights activist and was investigating and exposing illegal activities of police who were alleged to have killed innocent people in fake encounters and cremated their unidentified bodies unceremoniously, during the disturbed period in Punjab. He remained unyielding despite the police trying to threaten and discourage him from doing so. Pursuant to a criminal conspiracy, the deceased was abducted, brought to a police station, tortured, murdered and his dead body thrown in a canal. The defence set up a plea of alibi which was held as not proved. The motive of the commission of crime was proved. Prosecution witnesses were threatened and implicated in false cases in which they were subsequently acquitted. The PWs could muster the courage to testify only after security was provided. PWs 2, 7 and 15 identified the appellant police officials as persons who had abducted the deceased while PW-14 deposed about his illegal detention, torture, elimination of the deceased in the police station. In this background, in

para 53 of the report, the court reiterated the principles on the shifting of the burden of proof under Section 106 of the Indian Evidence Act to the accused persons which were laid down in State of West Bengal v. Mir Mohd. Omar (supra).

Discussing the effect of failure to discharge the burden of proof, the unsubstantiated plea of alibi which the appellants and the effect of taking such a false plea as well, in para 78 and 79 of Prithipal Singh & Others v. State of Punjab (supra) of the report, the court held as follows :-

—53. In State of W.B. v. Mir Mohammad Omar [(2000) 8 SCC 382 : 2000 SCC (Cri) 1516 : AIR 2000 SC 2988] this Court held that if fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of the accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. (See also Shambhu Nath Mehra v. State of Ajmer [AIR 1956 SC 404 : 1956 Cri LJ 794] , Sucha Singh v. State of Punjab [(2001) 4 SCC 375 : 2001 SCC (Cri) 717 : AIR 2001 SC 1436] and Sahadevan v. State [(2003) 1 SCC 534 :

2003 SCC (Cri) 382 : AIR 2003 SC 215] .) xxx xxx xxx

79. Both the courts below have found that the accused/appellants have abducted Shri Jaswant Singh Khalra. In such a situation, only the accused person could explain as what happened to Shri Khalra, and if he had died, in what manner and under what circumstances he had died and why his corpus delicti could not be recovered. All the accused/appellants failed to explain any inculpating circumstance even in their respective statements under Section 313 Code of Criminal Procedure. Such a conduct also provides for an additional link in the chain of circumstances. The fact as what had happened to the victim after his abduction by the accused persons, has been within the special knowledge of the accused persons, therefore, they could have given some explanation. In such a fact-situation, the Courts below have rightly drawn the presumption that the Appellants were responsible for his adduction, illegal detention and murder.‖ (Emphasis by us) 1375. We may note that the pronouncement of the Supreme Court in State of West Bengal v. Mir Mohd. Omar (supra) has been followed not only in Prithipal Singh v. State of Punjab but also in (2003) 11 SCC 761 (para 4) State of M.P. v.

Lattora as well as (2001) 4 SCC 375 (para 20) Sucha Singh v. State of Punjab.

1376. In 2001 (4) SCC 375, Sucha Singh v. State Punjab, two persons were taken away by armed assailants from their house at night and their dead bodies, studded with gunshot injuries, were found next morning lying near their house. When the abductors withheld the information which was within their knowledge, it was held that a presumption in the circumstances of the case can be drawn that the abductors were responsible for murder of the deceased on application of Section 106 and 114 of the Evidence Act.

1377. Para 17 of the pronouncement in Sucha Singh (supra) notes the submission by Mr. U.R. Lalit, Senior Counsel pleading for reconsideration by the Supreme Court's prior decision in Mir Mohd Omar (supra) in the following terms:-

—16. Shri U.R. Lalit, learned Senior Counsel raised his contention on the above score that even assuming that the appellant was one among the persons who took away the deceased, that circumstance alone is not sufficient to hold him to be one of the killers of the deceased. According to the Senior Counsel a finding beyond abduction cannot be fastened on the appellant.

17. Recently this Court has held in State of W.B. v. Mir Mohd. Omar [(2000) 8 SCC 382 : 2000 SCC (Cri) 1516] that the principle embodied in Section 106 of the Evidence Act can be utilised in a situation like this. Shri U.R.

Lalit pleaded for reconsideration of the said legal position. According to him, the ratio laid down in that decision is not in tune with the well-accepted principle of criminal law that the accused is entitled to keep his tongue inside his mouth as the burden is always on the prosecution to prove the guilt of the accused...‖ (Underlining by us) 1378. To meet the said contention the Supreme Court extracted the above observations in para 31 from the decision in Mir Mohd (supra). These contentions were rejected by the Supreme Court holding as follows:-

—18. Learned Senior Counsel contended that Section 106 of the Evidence Act is not intended for the purpose of filling up the vacuum in prosecution evidence. He invited our attention to the observations made by the Privy Council in Attygalle v. R. [AIR 1936 PC 169 : 37 Cri LJ 628] and also in Stephen Seneviratne v.R. [AIR 1936 PC 289 : 37 Cri LJ 963] In fact the observations contained therein were considered by this Court in an early decision authored by Vivian Bose, J., in Shambhu Nath Mehrav. State of Ajmer [AIR 1956 SC 404 : 1956 Cri LJ 794] . The statement of law made by the learned Judge in the aforesaid decision has been extracted by us in State of W.B. v. Mir Mohd. Omar [(2000) 8 SCC 382 : 2000 SCC (Cri) 1516]. xxx xxx

19. We pointed out that Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases where the prosecution has succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the court to draw a different inference.

20. We have seriously bestowed our consideration on the arguments addressed by the learned Senior Counsel. We only reiterate the legal principle adumbrated in State of W.B. v.Mir Mohd. Omar [(2000) 8 SCC 382 : 2000 SCC (Cri) 1516] that when more persons than one have abducted the victim, who is later murdered, it is within the legal province of the court to justifiably draw a presumption depending on the factual situation, that all the abductors are responsible for the murder. Section 34 IPC could be invoked for the aid to that end, unless any particular abductor satisfies the court with his explanation as to what else he did with the victim subsequently, i.e., whether he left his associates en route or whether he dissuaded others from doing the extreme act etc. etc.

21. We are mindful of what is frequently happening during these days. Persons are kidnapped in the sight of others and are forcibly taken out of the sight of all others and later the kidnapped are killed. If a legal principle is to be laid down that for the murder of such kidnapped there should necessarily be independent evidence apart from the circumstances enumerated above, we would be providing a safe jurisprudence for protecting such criminal activities. India cannot now afford to lay down any such legal principle insulating the marauders of their activities of killing kidnapped innocents outside the ken of others.‖ (Underlining by us) 1379. Mr. Sumeet Verma, learned counsel for Vikas Yadav has urged that in the present case as well, it is the case of the prosecution that the deceased had stated in the

phone call at 1:11:18 hrs. on 17th February, 2002 that he was at the IMT. It is urged that any third person could have intervened at the IMT. Learned counsel has also submitted that it was the prosecution case that Anil driver was with the deceased when the deceased was last seen alive by Kamal Kishore. The submission is that prosecution has miserably failed to establish the event of the deceased having been last seen alive in the company of the accused person which evidence stands disproved by Kamal Kishore. Learned counsel would submit that in this background, the principles laid down in Mir Mohd. Omar (supra) would not apply to the instant case. We have discussed in detail each of the circumstances pointed out by Mr. Sumeet Verma, learned counsel as well as their impact in detail in the foregoing paras. We have disbelieved the truth of the statement attributed to Kamal Kishore and doubted the making of the statement attributed to Nitish Katara in the phone call at 1:11:18 hourse. We have also considered the inadmissibility of the statement attributed to Kamal Kishore. It has also been noticed that the evidence of the call records of Nitish Katara's cell phone, completely destroys the truth of the statement attributed to Kamal Kishore.

1380. Mr. Sumeet Verma, learned counsel has contended that in any case close proximity in the event of last seen together with the time and place of commission of the crime as in the instant case, there can be no onus upon the accused to show what happened to the deceased when he was in their custody. It is submitted that in this background failure to give any explanation in their examination under Section 313 Cr.P.C. could not be taken to be circumstance pointing towards their guilt.

1381. In support of this submission reliance was placed on the pronouncement of this court reported at 2012 2 JCC 1092 Riaz Ali v. State. In this case, there was no credible evidence of the deceased having been last seen in the company of the accused persons. The court was therefore, not called upon to examine the issue of reversal of the burden of proof. Other circumstances also favoured the hypothesis of innocence of Riaz Ali. The present case is entirely different.

1382. We have found the evidence of last seen in the present case credible as well as proximate to the time of death. Other circumstances pointing towards the guilt of the appellants have been separately discussed above. Riaz Ali (supra) have no application to the present case and the burden of proof clearly shifted to the appellants to explain what had happended to the deceased.

1383. We may note the observations of the Supreme Court in the pronocement reported at 2003 (8) SCC 93 Amit @ Ammu v. State of Maharashtra wherein the court held as follows:-

> —9. The learned counsel for the appellant has placed reliance on the decision of this Court by a Bench of which one of us (Justice Brijesh Kumar) was a member in Mohibur Rahman v. State of Assam [(2002) 6 SCC 715 : 2002 SCC (Cri) 1496] for the proposition that the circumstance of last seen does not by itself necessarily lead to the inference that it was the accused who committed the crime. It depends upon the facts of each case. In the decision relied upon it has been observed that there may be cases where, on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide. The present is a case to which the observation as aforesaid and the principle laid squarely applies and the circumstances of the case cast a heavy responsibility on the appellant to explain and in absence thereof suffer the conviction. Those circumstances have already been noticed, in which case such an irresistible conclusion can be reached will depend on the facts of each case. Here it has been established that the death took place on 28th March between 3 and 4 p.m. It is just about that much time that the appellant and the deceased were last seen by PW 1 and PW 11. No explanation has been offered in the statement by the appellant recorded under Section 313 Cr.P.C..

His defence is of complete denial. In our view, the conviction for offence under Sections 302 and 376 has been rightly recorded by the Court of Session and affirmed by the High Court.‖ (Emphasis supplied) 1384. Mr. Sumeet Verma, learned counsel appearing for Vikas Yadav has vehemently urged that the judgment in Mir Mohd. Omar has been explained in the pronouncement reported at (2005) 11 SCC 133 (para 20 and 21) Murlidhar and Ors. v. State of Rajasthan. In this case, the prosecution led evidence of not only the deceased and the accused being last seen together but the prosecution also set up two eye witnesses. The court completely disbelieved the testimony of eye witnesses. In this factual background, it was held that the principles laid down in Mir Mohd. Omar (surpa) could not apply. In the present case there are no eye witnesses. The prosecution is relying completely on circumstantial evidence. Thus the pronouncement in Muralidhar (Supra) is of no avail to the appellants in the present case.

1385. Some light on the question of the drawing a presumption is thrown by judicial precedents on Sections 114 illustration (a) and 106 of the Indian Evidence Act which enable an inference to be drawn that in a case involving theft and murder a person in possession of stolen articles is guilty of the said offences. In the judgment reported at (1995) 3 SCC 574 Gulab Chand v. State of M.P., the court referred to several judicial precedents and held as follows:-

> ―4. ...It is true that simply on the recovery of stolen articles, no inference can be drawn that a person in possession of the stolen articles is guilty of the offence of murder and robbery. But culpability for the aforesaid offences will depend on the facts and circumstances of the case and the nature of evidence adduced. It has been indicated by this Court in Sanwat Khan v. State of Rajasthan [AIR 1956 SC 54 : 1956 Cri LJ 150] that no hard and fast rule can be laid down as to what inference should be drawn from certain circumstances. It has also been indicated that where only evidence against the accused is recovery of stolen properties, then although the circumstances may indicate that the theft and murder might have been committed at the same time, it is not safe to draw an inference that the person in possession of the stolen property had committed the murder. A note of caution has been given by this Court by indicating that suspicion should not take the place of proof. It appears that the High Court in passing the impugned judgment has taken note of the said decision of this Court. But as rightly indicated by the High Court, the said decision is not applicable in the facts and circumstances of the present case. The High Court has placed reliance on the other decision of this Court rendered in Tulsiram Kanu v. State [AIR 1954 SC 1 : 1954 Cri LJ 225] . In the said decision, this Court has indicated that the presumption permitted to be drawn under Section 114, Illustration (a) of the Evidence Act has to be read along with the ―important time factor‖. If the ornaments in possession of the deceased are found in possession of a person soon after the murder, a presumption of guilt may be permitted. But if several months had expired in the interval, the presumption cannot be permitted to be drawn having regard to the circumstances of the case.

In the instant case, it has been established that immediately on the next day of the murder, the accused Gulab Chand had sold some of the ornaments belonging to the deceased and within 3-4 days, the recovery of the said stolen articles was made from his house at the instance of the accused. Such close proximity of the recovery, which has been indicated by this Court as an ―important time factor‖, should not be lost sight of in deciding the present case. It may be indicated here that in a later decision of this Court in Earabhadrappa v. State of Karnataka [(1983) 2 SCC 330 : 1983 SCC (Cri) 447], this Court has held that the nature of the presumption and Illustration (a) under Section 114 of the Evidence Act must depend upon the nature of evidence adduced. No fixed time-limit can be laid down to determine whether possession is recent or otherwise and each case must be judged on its own facts. The question as to what amounts to recent possession sufficient to justify the presumption of guilt varies according as the stolen article is or is not, calculated to pass readily from hand to hand. If the

stolen articles were such as were not likely to pass readily from hand to hand, the period of one year that elapsed cannot be said to be too long particularly when the appellant had been absconding during that period. In our view, it has been rightly held by the High Court that the accused was not affluent enough to possess the said ornaments and from the nature of the evidence adduced in this case and from the recovery of the said articles from his possession and his dealing with the ornaments of the deceased immediately after the murder and robbery a reasonable inference of the commission of the said offence can be drawn against the appellant. Excepting an assertion that the ornaments belonged to the family of the accused which claim has been rightly discarded, no plausible explanation for lawful possession of the said ornaments immediately after the murder has been given by the accused. In the facts of this case, it appears to us that murder and robbery have been proved to have been integral parts of the same transaction and therefore the presumption arising under Illustration (a) of Section 114 Evidence Act is that not only the appellant committed the murder of the deceased but also committed robbery of her ornaments. We therefore, do not find any reason to interfere with the impugned decision of the High Court and accordingly this appeal fails and is dismissed.‖ 1386. We may usefully refer also to a judgment of the Andhra Pradesh High Court in W.P.No.13369 of 2009, decided on 17th February, 2010 Smt. Sattiveera Venkata Satya Ananta Laxmi v. The General Manager, South Central Railway, The Superintendent of Police, Government Railway Police and The Tehsildar on the issue of presumption of certain facts. The court noticed Section 114 of the Indian Evidence Act 1872 which permits ―The court to presume existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to facts of the particular case.‖ As to how the presumption is to be drawn it was laid down as follows:

> ―8. Presumption of fact is nothing but logical inference of the existence of one fact drawn from other proved or known facts, without the help of any artificial rules of law, and they are always rebuttable. The legal consequence of drawing a presumption is to cast on the opponent the duty of producing contrary evidence. A presumption upon a matter of fact, means that common experience shows the fact to be so generally true that courts may notice the truth. The presumptions of fact are in truth but mere arguments of which the major premise is not a rule of law. They depend upon their own natural force and efficiency in generating belief or conviction in the mind, as derived with those connections, which are shown by experience, irrespective of any legal relations. The effect of this provision is to make it perfectly clear that courts of justice are to use their own common sense and experience in judging of the effect of particular facts. Perhaps the most important rule as to presumptions is that they must be based upon facts and not upon inferences or upon other presumptions. No presumption can with safety be drawn from another presumption. The fact presumed should have direct relation with the fact from which the presumption is drawn; but when the facts are established from which presumptions may be legitimately drawn, it is the province of the Court to deduce the presumption or inference of fact. If the connection is too remote or uncertain, it is the duty of the court to exclude either the testimony from which the presumption is sought to be deduced or to instruct the Court that the evidence affords no proper foundation for any presumption. Where the fact, giving rise to a presumption under Section 114, is undisputed and no explanation negativing the presumption is offered, the Court is justified in laying the onus proper where, but for the presumption, the onus could not be laid.

(Emphasis by us) 1387. The appellants are alleged to have taken the deceased Nitish Katara from the Diamond Palace Banquet Hall. The deceased was last seen alive in the company of the appellants in a Tata Safari vehicle bearing PB-07H0-0085 which was being driven by Vikas Yadav while the other appellant sat on the rear seat. This vehicle was registered in the name of M/s Oswal Sugar Ltd. in which Vikas Yadav's father Shri D.P. Yadav was a director (PW-12 Kulwant Kaur; PW-9 Vikram Singh

and CW-1 Sh. M.K. Katara). The appellants thus had complete control over the vehicle and the deceased. The prosecution has led evidence that the deceased was last seen alive in the company of appellants at the Hapur Chungi in the said Tata Safari car. The time gap between the deceased being last seen alive in the company of three appellants and the recovery of dead body was in close proximity. The appellants have not set up a defence that there was any intrusion by any third party. No explanation has been offered by the appellants as to how and when they parted the company of the deceased.

1388. It has been argued that in any circumstance, the failure of the accused to explain what happened to the deceased after he was last seen alive in their company, in any case is an additional link in the chain of circumstances established by the prosecution. In this regard our attention is drawn to the pronouncement of the Supreme Court reported at (2006) 12 SCC 254, State of Rajasthan v. Kashi Ram. In this case, the Supreme Court held thus -

> —23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 if 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 and theory or hypothesis compatible within 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., AIR 1960 Mad 218.

24. There is considerable force in the argument of counsel for the State that in the facts of this case as well it should be held that the respondent having been seen last with the deceased, the burden was upon him to prove what happened thereafter, since those facts were within his special knowledge. Since, the respondent failed to do so, it must be held that he failed to discharge the burden cast upon him by Section 106 of the Evidence Act. This circumstance, therefore, provides the missing link in the chain of circumstances which prove his guilt beyond reasonable doubt.‖ Therefore, failure of the accused to explain what happened to the deceased after he had been last seen alive in the company of the accused is an additional link in the chain of incriminating circumstances.

1389. It stands established in the evidence of the prosecution witness Ajay Kumar to the effect that he had seen the accused and the deceased person together in the Tata Safari around 12.30 a.m./1.00 am on 17th February, 2002.

1390. On 25th February, 2002, Vikas and Vishal Yadav made disclosure with regard to the place of commission of the crime; the spot where the body was burnt; the spot where the hammer used in the crime; as well as wrist watch and mobile phone of the deceased had been concealed. They disclosed that they had used a Tata Safari vehicle. Pursuant thereto, on the 28th February, 2002, they pointed out the spot where the crime was committed and where the body was burnt. After searching amongst separate clumps of bushes (_pattel' of height of 2-3 feet), Vikas Yadav got recovered watch of the make Espirit. These recoveries were effected in the presence of their counsel Shri Satpal Singh Yadav,

Advocate. No family member of Nitish Katara (including his mother Nilam Katara) was present in these proceedings.

1391. Pursuant to the disclosures on that very day (i.e., the 28 th of February, 2002) the brothers deliberately led the police to three premises in Alwar, Rajasthan wherefrom the Tata Safari vehicles could be recovered.

1392. On the 11th of March 2002 Vikas and Vishal Yadav then led the police to different cities in three different states till the Tata Safari vehicle used for commission of the crime was recovered. The appellants absconded immediately after the occurrence. By application of the principles laid down in State of West Bengal v. Mir Mohd. Omar, the defence was required to explain as to what happened to the deceased while he was in their company. Section 106 of the Evidence Act would squarely be applicable and the accused would be required to discharge the burden of proving what had happened to the deceased after they were last seen together. There is no explanation at all from the accused persons in this regard.

1393. In the instant case, we have discussed at length the evidence brought on record and concluded that there is proximity of time between the deceased having been last seen alive in the company of the accused persons and the time of his death. The defence has not tendered any explanation as to what happened to the deceased while he was in their company. The only evidence led by the defence is that of total denial. The pleas of alibi set up have not been substantiated and have been completely disbelieved by us.

1394. Upon considering the evidence led by the prosecution and the proven circumstances on record, applying the principles laid down by the Supreme Court in State of West Bengal v. Mir Mohd. Omar, (Supra) the presumption can be drawn that the appellants had abducted Nitish Katara and are responsible for his murder.

1395. The above facts and circumstances from an unbroken chain of circumstances which point only to the guilt of the appellants while the individual circumstances by themselves would not be sufficient to arrive at the finding of guilt of the appellants. However, the linkages of the proved circumstances are complete and militate against the innocence of the appellants.

XII Whether the appellants absconded after the crime - if so, effect thereof?

1396. Mr. Jethmalani has urged that the prosecution has attempted to bring the circumstance that the accused persons were absconding from 17th of February, 2002. Learned senior counsel has submitted that to do so, it is not sufficient to say that the accused was not at a place where he could normally be found for the court to draw the inference that the subsequent conduct of the appellants was that of guilty persons. The prosecution must also keep a watch over places where the accused is to be normally found. Learned senior counsel has urged that Vishal Yadav was the father of a three year old child in February, 2002 while Vikas Yadav was to marry shortly thereafter and there was no question of their absconding. The submission is that there is nothing on record to show that the police made any inquiries from their houses.

1397. The further submission is that there must be clear evidence led by the prosecution that the accused persons had the knowledge that they were wanted in any case or reasonably suspected of commission of any offence. It is urged that the prosecution has led no evidence in this case other than their names being flashed in the press.

1398. Mr. Jethmalani has urged at great length that the prosecution has to give evidence of the actual address to which they had proceeded and who they met there. It has been contended that the prosecution was required to lead positive evidence that the premises to which they had proceeded was

actually the address of the accused persons. It is submitted by the defence that the evidence led by the prosecution is hopelessly insufficient in this regard. Learned senior counsel has further contended that even the Investigating Officer PW-35 Anil Somania has wrongly stated that the addresses were available in the FIR and he does not give the actual houses to which they had proceeded.

1399. Learned senior counsel has further submitted that to hold abscondance against the accused, it is insufficient for the prosecution to merely say that the accused persons were absconding from a place at a particular time. The police must prove an attempt by the accused to hide. The police had to keep a watch over the residence and then leave a notice. Positive evidence of the address of the accused persons was required to be stated in the witness box and that the prosecution has failed to lead any evidence on any of the aforenoticed circumstances. It is submitted that no question was put to the accused persons while recording their statements under Section 313 of the Cr.P.C. with regard to their address.

1400. In support of these submissions, reliance has been placed on the pronouncement reported at AIR 1970 Bombay 438 Dinkar Bandhu Deshmukh and Anr. v. State. In para 21 of this pronouncement, the Bombay High Court has held as follows :-

> —21. That leaves for consideration only the additional bit of evidence as against accused No. 2 viz., that he was absconding for a week after the incident. The date of the offence was was arrested, only on the 28th of December 1968. In order that the Court can legitimately draw the inference that the subsequent conduct of an accused was that of a guilty person and not of an innocent man, there must be proper material placed before the Court. All that the prosecution has placed before the Court in the present case are two bald statements, both made by Police Sub-inspector Borkar: (1) that the second accused was not in the village on the day soon after the incident when the police went there; and (2) that Police Sub-Inspector Borkar had sent about four constables in search of accused No. 2 to some villages. That evidence is, in my opinion, wholly insufficient to lead to the inference that the second accused was absconding since the date of the incident. In order to lead to that inference, the investigating police officer must lay before the Court further evidence to show that continuous watch was kept at the house of the accused concerned, and that a watch was also kept by him at the places which the accused frequented, including his place of work, but the accused did not turn up at all at any of those places during a certain period of time. xxx xxx.‖ (Underlining by us) 1401. On the effect of abscondance as to whether it would lead to inference of the guilt of a person reliance has been palced on AIR 2011 SC 200 Paramjeet Singh alias Pamma v. State of Uttarakhand, wherein the Supreme Court reiterated the applicable principles in the following terms:
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> —32. In Matru @ Girish Chandra v. The State of U.P., AIR 1971 SC 1050, this Court repelled the submissions made by the State that as after commission of the offence the accused had been absconding, therefore, the inference can be drawn that he was a guilty person, observing as under (para 15):
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> "The appellant's conduct in absconding was also relied upon. Now, mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime such is the instinct of self- preservation. The act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case. Normally the courts are disinclined to attach much importance to the act of absconding, treating it as a very small item in the evidence for sustaining conviction. It can scarcely be held as a determining link in completing the chain of circumstantial evidence which must admit of no other reasonable hypothesis than that of

the guilt of the accused. In the present case the appellant was with Ram Chandra till the FIR was lodged. If thereafter he felt that he was being wrongly suspected and he tried to keep out of the way we do not think this circumstance can be considered to be necessarily evidence of a guilty mind attempting to evade justice. It is not inconsistent with his innocence."

33. A similar view has been reiterated by this Court in Rahman v. State of U.P., AIR 1972 SC 110;State of M.P. v. Paltan Mallah and Ors., AIR 2005 SC 733; and Bipin Kumar Mondal v. State of West Bengal, JT 2010 (7) SC 379.

34. Abscondance by a person against whom FIR has been lodged, having an apprehension of being apprehended by the police, cannot be said to be unnatural. Thus, mere abscondance by the appellant after commission of the crime and remaining untraceable for a period of six days itself cannot establish his guilt. Absconding by itself is not conclusive proof of either of guilt or of a guilty conscience.‖ (Emphasis supplied) Abscondance per se, after commission of a crime is not by itself proof of guilt of a person.

1402. It was the case of the prosecution that after committing the murder of Nitish Katara on the intervening night of 16/17 th February, 2002, the three accused persons, Vikas Yadav, Vishal Yadav and Sukhdev @ Pehalwan absconded. It is contended that the factum of abscondance of the accused immediately after commission of the crime was not conduct of innocent persons. It was further urged that the same would be an added circumstance which points towards the guilt of the accused.

1403. So far as tracking the accused persons after 16th February, 2002 is concerned, Mr. Dayan Krishnan, learned Additional Public Prosecutor for the State has drawn our attention to the evidence of PW-34 SI J.K. Gangwar and the Investigating Officer PW-35 Anil Somania. Let us examine the steps taken by the police to trace the appellants. PW-35 stated that on 17th February, 2002, in his absence, the FIR No. 192/2002 was registered under Section 364 of the IPC at Police Station Kavi Nagar naming Vishal Yadav and Vikas Yadav. He received a copy of the FIR while investigating another case and reached the police station at about 2.00 p.m. on 17 th February, 2002 and thereafter started investigation in the case. The witness has stated that the addresses of the accused persons were given in the FIR and that he searched for them at their houses in Sector 4 and 5, Ghaziabad. Neither they were traceable at their houses nor Nitish Katara was to be found there. In his cross-examination, the witness has stated that the houses of Vishal Yadav and Vikas Yadav were situated at a distance of only 3 kms from police station Kavi Nagar.

On 18th February, 2002, the witness again went and searched for the accused persons at their houses, but without any positive result. PW-35 further stated that he was accompanied by lady SI Anju Bhadoriya, when he went to the houses of the accused persons. Only the mothers of the accused persons met him in their resepective houses and that they had signed the copy of the search memos in respect of these searches (Ex. PW-35/2 and PW-35/3).

1404. PW-35 has also testified about searches made for Vikas and Vishal Yadav at the Diamond Palace Banquet Hall as well as in other localities in Ghaziabad which were the possible hideouts of the accused persons.

1405. The Investigating Officer also visited the official residence allotted to Shri D.P. Yadav, father of Vikas Yadav at 15, Balwant Rai Lane, Delhi where also neither the accused persons nor the deceased could be found.

1406. On 19th February, 2002, PW-35 Anil Somania searched for the accused persons at their offices in Udyog Vihar, Gurgaon but he could not find them there. PW-35 Anil Somania also learnt that the accused persons were involved in a sugar mill in Mukeria, Hoshiarpur (Punjab) and also could be at

the farm house at Dhanari, District Budaun, UP and that he should search for the accused persons in these two places. On 19th February, 2002, the Investigating Officer sent SI A.P. Bhardwaj to search for them at the Dhanari farm house owned by the accused. On 19th February, 2002 PW-35 himself searched for the accused persons again at their houses in Ghaziabad but could not find them there.

1407. On 19th February, 2002, PW-35 also received telephonic information from Sh.C.P. Singh, PS Khurja that a dead body was recovered in his area on 17th February, 2002. SI Anil Somania states that at about 9 p.m. on the night of 19th of February, 2002, he went to Khurja.

1408. On the next day, that is, 20th February, 2002, PW-35 again went to the houses of the accused persons at Raj Nagar but this time found them locked. In these circumstances, on 20th February, 2002 PW-35 Anil Somania was constrained to initiate legal process in court of CJM, Ghaziabad against the accused persons and non bailable warrants of arrest were obtained against Vikas and Vishal Yadav. PW-35 also made an application in the court of Chief Judicial Magistrate, Ghaziabad for issuance of process under Section 82/83 of the Cr.P.C. (Exh.PW-35/8) for attachment of the properties of the accused persons. In this application he stated that he searched for the accused at their residences B-14 Gulmohar Park, New Delhi; R-4/16 Raj Nagar and other possible hideouts such as the Oswal Sugar Mill in Mukeria Hoshiarpur (Punjab) and an agricultural farm in Dhanari, Dist. Bidaun. While recording their statement under Section 313 of the Cr.P.C., we find that the accused persons have given the same Raj Nagar addresses as those mentioned by the police. The warrants of arrest also could not be executed as the accused persons were not at their house.

Thus the submission of learned Senior Counsel that there is no evidence of the addresses at which the police searched for the appellants is contrary to record.

1409. Our attention is also drawn to the testimony of PW-34 SI J.K. Gangwar who joined investigation for the first time on 19th February, 2002 and participated in the investigation as and when required by the investigating officer Anil Somania. PW-34 SI J.K. Gangwar has corroborated PW-35 about the police search for Vikas and Vishal Yadav on 19 th and 20th February, 2002.

1410. PW-35 has clearly stated that he also pasted the notice of attachment of the properties at the houses of the accused persons. At the same time, the witness took steps for recording of the statement of witnesses under Section 161 of the Cr.P.C. as well as identification of the body recovered at Khurja. However, despite best efforts the witness was unsuccessful in arresting the two accused persons.

1411. The categorical statements by the Investigating Officer about the searches made by them have been not even remotely challenged by the accused persons. There is not a whit of cross-examination nor any suggestion that the investigating officers were making false statements that they visited the residence of the accused persons.

1412. So far as the knowledge of accused persons with regard to their being wanted in the present case is concerned, in their statement under Section 313 of the Cr.P.C., Vishal Yadav has volunteered as the answer to question no.217 to the effect that —I remained in Ghaziabad till 19/2/02 and when I came to know that I was being framed in this case, I left for Allahabad on 20/2/02 where I had to meet my brother Vikas who had also left for Allahabad. We contacted Adv. Sh. A.N. Mishra, narrated the circumstances to him and he advised us that as we were being harassed, we should go and surrender before the local court at Ghaziabad. From Allahabad we took the next available train to Delhi to reach Ghaziabad, on the way alighted at Dabra for refreshments but were falsely implicated as stated above."

1413. Vikas Yadav has stated that at Bisoli on the 19 th of February, 2002, he learnt about his implication in the case.

1414. Vikas and Vishal Yadav have admitted that they acquired knowledge of their being wanted in the case involving Nitish Katara's demise in this manner.

1415. These were already times of mobile/cell phones and people remained closely connected. The police personnel appear to have visited every known address of the two appellants, Vikas and Vishal Yadav. It is in evidence that they met their mothers on the 18th of February, 2002, went to execute warrants of arrest, pasted orders of attachment outside their houses. It is impossible to belive that the appellant were not informed by their family members (including mothers) on 17th February, 2002 that the Ghazibad police was searching for them.

1416. We are here concerned with literate well placed respectable citizens who were guided by able legal experts. Would not any law abiding citizen react to attachment notices pasted outside his house and take steps in accordance with law?

1417. In the statements recorded by IO Anil Somania under Section 161 of the Cr.P.C. of Vikas and Vishal Yadav after they were arrested on the 25th of February 2002, there was disclosure of a third accomplice named _Pehalwan'. Better particulars of this _Pehalwan' were revealed by PW-35 Bharti Yadav in her statement recorded on 2nd March, 2002 under Section 161 Cr.P.C. (Exh.PW-35/AB) when the Investigating Officer learnt his full identity as _Sukhdev Pehalwan', an employee at their liquor business at Bulandshahr. The witness also stated that he searched for Sukhdev Yadav at Bulandshahr on the 3rd and 4th of March, 2002 and thereafter made an application for attachment of his properties under Section 83 of the Cr.PC as he was also evading arrest. We are considering the conduct and arrest of Sukhdev @ Pehalwan separately, hereafter.

1418. The case of the prosecution that despite best efforts, Vikas and Vishal Yadav were not found at any of their known addresses and were absconding is fully proved in the testimony of SI Anil Somania and SI J.K. Gangwar. Their action of abscondance is a relevant piece of evidence the value would be considered upon with the other facts and circumstances established by the prosecution.

1419. The accused persons had been arrested by the Dabra Police under the Arms Act early that morning but had been taken for production before the Judicial Magistrate at his house at 11 p.m. in the night. On the night of 23rd February, 2002 itself, SI Anil Somania rushed with a handwritten application before the learned Judicial Magistrate, Distt. Dabra, Gwalior, MP (Ex. PW-35/11A) to the effect that the accused Vikas Yadav and Vishal Yadav were wanted in the present case; that because these two persons were being produced in the night at 11 p.m. before the judge, therefore, it was not possible for the Ghaziabad police to take any other steps and therefore, the two accused persons be not released on bail.

1420. On 24th February, 2002, the SO, Anil Somania moved an application (Ex. PW 35/13A) before the court of the Judicial Magistrate, Dabra stating that the accused persons have been named in FIR No. 192/2002 under Section 364 IPC (P.S. Kavi Nagar) prayed for two days transit remand of these two persons that they could be produced before the Chief Judicial Magistrate, Ghaziabad in the present case.

1421. The accused persons kept moving the frivolous applications before the Magistrate at Dabra to avoid their custody being handed over to the Ghaziabad police.. On the 24th of February, 2002 at 4:21 p.m. both Vikas Yadav and Vishal Yadav jointly filed an application before the court of Judicial Magistrate, First Class stating that the PS Kavi Nagar, Ghaziabad had registered a case against them; that the police of Ghaziabad wanted to take them away on account of political pressure and in collusion with the opposition and that they planned to kill the applicants in a fake encounter. A prayer was made that the custody of the applicants be not handed over to the PS Kavi Nagar at night as they harboured apprehensions regarding their security.

1422. Vishal Yadav also filed objections on the 24th of February 2002 that under Section 79 of the Cr.P.C., the Ghaziabad police was required to mandatorily obtain warrants of arrest from the concerned magistrate as the police wanted to take the applicant from one state to another, which the Ghaziabad police was not having. A prayer was made that the Kavi Nagar, Ghaziabad police be directed to obtain a warrant from the concerned court and to formally arrest only thereafter.

1423. In para 1 of the objections, Vishal Yadav mentions that Ghaziabad police wanted to arrest Vishal Yadav in the case under Sections 364, 302, 201 of IPC. In para 1 of the joint application, reference is again made to the case under Section 302 of the IPC. It is urged by Mr. P.K. Dey, learned counsel for the complainant that at the time of making of this application, FIR No.192/2000 registered by PS Kavi Nagar was simply under Section 364 IPC. Sections 302 and 201 IPC had not been added therein. Mr. Dey points out that it was only on 25th February, 2002 upon receipt of the report of the DNA test conducted on the samples from the dead body as well as Nilam Katara and her husband that it was confirmed to the police that the body recovered at Khurja on 17th February, 2002 was actually that of Nitish Katara.

Therefore, commission of offences under Section 302/201 of the IPC was added to the FIR only therafter pursuant to the order of 27th February, 2002 passed by the Chief Judicial Magistrate, Ghaziabad.

1424. Mr. P.K. Dey, learned counsel has urged that Vishal Yadav and Vikas Yadav have mentioned Section 302 IPC in the applications which were filed by them before the Judicial Magistrate at Dabra on 24th February, 2002 as well as 25th February, 2002 even though it had not been incorporated in the FIR, only because of their complicity in and from their knowledge of the murder of Nitish Katara and destruction of evidence.

1425. Upon grant of transit remand, Anil Somania took custody of the accused persons from the jail at Dabra and finally started for Ghaziabad in the evening of 24th February, 2002 after recording the departure in the Daily Diary (Exh. PW-36/8) of PS Dabra.

1426. The two accused persons were produced before the court of Chief Judicial Magistrate on 25th February, 2002. The court directed that Vishal and Vikas Yadav be kept for a period of 14 days, i.e, till 11th March, 2002 in judicial remand and directed preparation of the warrants under Section 167 of Cr.P.C.

1427. Thereafter, on 27th February, 2002, both Vikas Yadav and Vishal Yadav had been produced from jail in the court of the Chief Judicial Magistrate pursuant to the order dated 25th of February, 2002 passed on the application for police remand. The learned Chief Judicial Magistrate perused the report of the investigating officer as well as the case diary (_CD') . The investigating officer made a request to the court for addition of offences under Section 302/201 IPC. The court accordingly proceeded under Section 167 of the Cr.P.C. and while directing addition of Section 302/201 of the IPC, noted that the accused had already been directed to be remanded to custody till 11th March, 2002. It was directed further that the warrant of the accused persons under Section 167 be prepared under Sections 364, 302 and 201 IPC.

Explanation of Vikas and Vishal Yadav in their statement under Section 313 of the Cr.P.C.

1428. This case of the prosecution that the appellants absconded after the incident was put to both the accused persons while recording their statement under Section 313 of the Cr.P.C.

1429. The question nos. 66 to 70 put to Vikas Yadav under Section 313 are relevant on this aspect. At the end of the questions by the court Vikas Yadav attempted to explain that after he left the marriage venue at the Diamond Palace Banquet Hall he had gone with Vishal to attend the party of Amit Gandhi

in Raj Nagar. Thereafter Vishal left for his house while he left for Karnal to attend a havan and a ring ceremony. After attending these, he went to his factory in Mukeria. In the evening of 18th February, 2002, he left for Bisoli and early in the morning of 19th February, 2002 reached his constituency. In Bisoli, he learnt that he had been implicated in a false case. He consequently proceeded to Allahabad which he reached in the morning of 20th of October, 2002 and contacted Shri Arvind Mishra, Advocate. Vishal also reached there the next morning when they met Mr. A.D. Giri, Senior Advocate and Mr. Jai Singh, Advocate when it was deemed to surrender before the concerned court at Ghaziabad.

1430. Questions No. 45, 92, 93 and 94 were put to Vishal Yadav were in this regard who also denied the fact that he absconded without anything more. He claimed that on the 19th of February, 2002, he was in his house at Ghaziabad and that he had his cousin in Allahabad where they went to take legal advice.

XIII Whether defence evidence to prove alibi to displace the evidence of last seen and explain period of abscondance is believable?

The discussion on this subject is being considered under the following sub-headings:

(i) Ring ceremony at the Gandhis on the night of 16th February, 2002

(ii) Ceremony at the house of the Diwan's in Karnal on the 17th of February 2002

(iii) Vikas Yadav's visit to sugar factory at Mukeria at 7:10 pm on 17th February, 2002

(iv) Alibi of Vikas Yadav with regard to the visit on 18th of February 2002

(v) Visit of Vikas Yadav to Bisauli on the 19th and 20th of February 2002

(vi) Defence plea that Vikas Yadav reached Allahabad on the 20th where Vishal joined him on the 21st of February 2002 to take legal advice

(vii) Train journey from Allahabad 1431. To negate the prosecution allegation of abscondance against them, the appellants, Vikas and Vishal Yadav as well as Sukhdev @ Pehalwan have led defence evidence to establish their plea of alibi.

1432. It is pointed out by Mr. P.K. Dey, learned counsel appearing for the complainant that the accused persons opted to lead their evidence and examined 26 witnesses ten of whom (DW-1 Sh. Ashok Gandhi, DW-3 Rajender Chaudhary, DW- 4 Pawan Kumar Diwan, DW-5 Adv Sh. Rajkumar Yadav, DW 6 Sh. Neeraj Gautam, DW-12 Arvind Mishra, DW-17 Sandeep Mishra, DW-19 Jai Singh, DW-21 Samar Singh, DW-22 Satpal Yadav) were practicing advocates. Mr.Dey has assailed the testimony of these witnesses as being false and that it failed to demolish the prosecution case.

1433. Proof of alibi to disprove their presence at the alleged place is relevant by virtue of Section 11 of the Evidence Act which states that facts not otherwise relevant are relevant if they are inconsistent with any fact in issue, or relevant fact; or if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable. Therefore the question as to whether the appellants were at Hapur Chungi at 12:00/12:30 pm in the night of 17th February, 2002 or on the Shikharpur Road where the crime was committed or any other place is a relevant fact.

1434. Is there a lesser burden on the accused person to establish the plea of alibi? On this question reliance has been placed on the pronouncement reported at (1996) 6 SCC 112 Hari Chand & Anr. v. State of Delhi , where the accused persons set up such a plea of alibi. It has been held by the Supreme Court that the defence has to prove the same to the hilt. The Court has stated that "that an alibi is not an

exception (special or general) envisaged in Indian Penal Code or any other law. It is only rule of evidence recognized in Section 11 of the Evidence Act that facts which are inconsistent with the facts in issue are relevant." Therefore the accused also has to discharge burden of proof beyond reasonable doubt.

So far as the nature of evidence to prove a plea of alibi is concerned, in (1984) 1 SCC 446, State of Maharashtra v. Narsingrao, Gangaram Pimple, the Supreme Court has held in para 18 that _it is well settled that a plea of alibi must be proved with absolute certainty to completely exclude the possibility of the person concerned at the place of occurrence'.

1435. In Crl.App.No.830/2005 decided on 24th March, 2006, Mohinder Singh v. State of Punjab, the Supreme Court had declared that ―the onus to prove alibi rests heavily on the accused‖.

1436. Placing reliance on the pronouncement reported at (1997) 4 SCC 496, Rajesh Kumar v. Dharamvir and Ors., (para 23), it was urged that the appellants having set up a plea of alibi were required to prove the same with absolute certainty. In Rajesh Kumar (supra) the defence witness claiming to be the advocate of the accused in a pending case, had stated that at the relevant time the accused was in his office. The court disbelieved the testimony of the defence witness as no contemporaneous document was produced in support of the defence statement or to prove the plea of alibi. In these circumstances, the court held as follows: -

> ―23 ...It is trite that a plea of alibi must be proved with absolute certainty so as to completely exclude the presence of the person concerned at the time when and the place where the incident took place. Judged in that context we are in complete agreement with the trial Court that the testimony of D.W. 2, for what it is worth, does not substantiate the plea of alibi raised on behalf of the accused Shakti Singh.‖ (Underlining supplied) 1437. We hereafter consider the joint defences set up by the appellants Vikas and Vishal Yadav and follow up by a discussion as to the effect of the appellants abscondance after the incident.

We shall consider the case of Sukhdev Yadav separately.

(i) Ring ceremony at the Gandhis on the night of 16th February, 2002 1438. Vikas and Vishal Yadav have claimed that at about 11.30 pm on 16th February, 2002 they were present at the house of DW-1 Ashok Gandhi to attend the ring ceremony of his son Amit Gandhi. Thereafter Vikas Yadav left for Karnal on 17th February, 2002 as in the morning he had to attend a Hawan followed by a ring ceremony in the afternoon of DW-14 Manuj Diwan at Karnal. So far as Vishal Yadav is concerned, it is his plea, that after attending the ring ceremony at DW-1 Ashok Gandhi's house he walked to his house. To substantiate the above, Vikas and Vishal Yadav have examined DW-1 Ashok Gandhi.

1439. Sukhdev @ Pehalwan has set up a plea that he was living in his native village on 16th February, 2002 and on all material dates thereafter till his arrest in February 2005 and that he has nothing to do with the crime.

1440. Mr. Dayan Krishnan has urged that DW-1 Ashok Gandhi, DW 4 Pawan Kumar Diwan and DW 14 Manuj Diwan are closely associated with the accused persons and their families and are false witnesses. It has been urged that the very silence all the defence witnesses for a period of five years since the occurrence on 16th/17th February, 2002 till their testimonies from 3rd July 2007 to 6th August 2007 shows that they have been set up to support a false defence which was not put to any of the prosecution witnesses.

1441. The question which has to be answered as to whether the appellants have been able to establish the defence pleas of alibi.

1442. The defence has sought to establish that Vikas and Vishal were only very briefly (15 minutes) at the wedding of Shivani Gaur on the night of 16th February, 2002 and that after attending the wedding of Shivani Gaur, they proceeded to the ring ceremony of Sh.Amit Gandhi, son of Shri Ashok Gandhi.

1443. The defence examined Sh. Ashok Gandhi, an income tax advocate by profession who was a resident of R-2/233, Raj Nagar, Ghaziabad as DW-1 to establish the fact that Vikas and Vishal Yadav had attended the ring ceremony of his son Amit Gandhi at the Gandhi residence. The function started at his residence at about 8.30 p.m. of the 16th February, 2002 and the rituals took 1-2 hours. The witness had testified that guests started coming at about 10 p.m. to his residence. The prospective parents-in-laws (Vijs) of his son were accompanied by Mrs.D.P. Yadav, mother of Vikas Yadav and the younger brother of accused Vishal Yadav whose name the witness did not know.

1444. DW-1 Ashok Gandhi further stated that Vikas and Vishal Yadav reached his residence later on, though he could not tell the exact time because he was not wearing a wrist watch. He, however, could state that they were there approximately around 11/11.30 p.m. As per DW-1, they had told him that they had taken their meal at his house; stayed at a party for about 1 / 1 ½ hours and left at about 12 / 12.15 midnight. Interestingly, as per DW-1, Vikas' mother Mrs.D.P. Yadav, who came with the bride-to-be, left at 10 p.m. 1445. DW-1 further stated that the ring ceremony was attended by 150-200 persons and that he had welcomed and seen off all the guests personally while remaining at the gate throughout till about 1.30 a.m., by which time all the guests had left. As per DW-1, while leaving, the accused persons had touched his feet and he had offered a packet of sweets which his servant had kept in Vikas's vehicle. Vishal Yadav was handed over the packet of sweets as he was residing at a walkable distance and that he walked away towards his house with the packet of sweets in his hand. The witness also stated that the car to which the sweets were sent through the servant was an exclusive saloon car and that it must have been a Mercedes.

1446. So far as his acquaintance with the family of Sh.D.P. Yadav is concerned, DW-1, Sh. Ashok Gandhi stated that his two children studied with Vikas and Vishal in the same school (Delhi Public School).

1447. DW 1 was clear that Vikas Yadav and Vishal Yadav were not invited to the ceremony either by him or by his son, Amit Gandhi. DW-1 also stated that his son had invited only his friends to his ring ceremony. He stated that Vikas and Vishal Yadav were invited to the function by the prospective in-laws of his son. This deposition makes it clear that Vikas and Vishal Yadav were not friends of Gandhis, certainly not of Amit Gandhi.

1448. DW-1 produced an invitation card (Exh.DW-1/D-1 to 5) in evidence. It is noted in the impugned judgment that Ex. DW-1/D-1 to 5, produced by DW 1 ran into 5 sheets. The cards for the functions do not mention celebration of any ring ceremony on 16th February, 2002 in the house of DW-1 Ashok Gandhi. There is a card for a _Lagan Ceremony‟ on the 16th of February, 2002. In his cross-examination DW-1 Ashok Gandhi refers to a _roka ceremony' as well. DW-1 Ashok Gandhi has explained that in the lagan ceremony at 7.00 pm, his daughter-in-law's parents were accompanied by a pandit who read out the „lagan‟ stating the date and time when the „saptpati‟ (wedding ceremony) was to be performed. There is no mention of the presence of the daughter-in-law.

1449. As per DW1, the ring ceremony was a small function. This function was to be performed at the residence of the groom to be. If such a function was actually held, the bride's side (the Vij's) would normally take only close relatives and friends. The invitation card would then be from the Vij family, not the Gandhis, and such invitation ought to be in the invitees possession. Vikas or Vishal Yadav were guests of Vij. Therefore, the appellants ought to have produced a card by which they had been invited by the Vij's family. they No such card has been produced or proved in evidence.

1450. The learned Trial Judge has disbelieved the celebration of any function at 11.30 pm also for the reason that as per the card the lagan ceremony was scheduled at 7.00 pm. 1451. The witness produced no photographs of the function which contained any other family member of either of the two accused persons, even though DW-1 had claimed that Mrs.D.P. Yadav and the younger brother of Vishal Yadav (who he wrongly named as Kunal) had attended the ring ceremony. While Mrs.D.P. Yadav is the mother of Vikas Yadav, we are informed that Kunal is actually the name of the younger brother of Vikas Yadav. From this testimony, it is evident that DW-1 Ashok Gandhi could not even distinguish between Vikas or Vishal Yadav.

1452. DW-1 further testified that Amit Gandhi's wedding was performed on 20th February, 2002 at the Le Meridien Hotel. There is no evidence that either Vikas, Vishal Yadav or any of their family members attended the wedding. The witness did not produce the CD or any photograph of the wedding ceremony.

1453. In the witness box, DW-1 stated that the function was both video-graphed and photographs were also taken. When his statement was recorded on 3rd July, 2007, the witness produced three photographs without negatives and, therefore, they were given the mark DW-1/D1 to D3 by the trial court. In his testimony, the witness also described the contents of the photographs. He pointed out that in the photograph mark DW-1/D1 and DW-1/D2, Vikas and Vishal Yadav were dancing with his other relatives and the photographs marked DW-1/D3 featured Vikas Yadav with the father of Megha Vij, daughter-in-law of DW-1.

1454. The witness did not produce the video cassette / CD of the ring ceremony function stating that it was in the custody of the father-in-law of his son, whom he had given another set as he had wanted the same and that since they were out of station and reached home yesterday, he could not collect the same. The trial judge deferred the further examination-in- chief of this witness for want of negatives. On 4th July, 2007, DW-1 again stated that he could not bring the negatives of the photographs as undertaken the previous day since he could not locate them. He stated that he would try to locate the negatives from the concerned photographer and sought 3-4 days time to do so. It was only on the 9th July, 2007 that DW-1, Sh.Ashok Gandhi produced three negatives which was accepted on recorded as Exhibit DW-1/D4 - 1 to

3. The photographs were consequently also given exhibit marks as Exh.DW-1/D1 to D3.

1455. The witness admits that neither he nor his son Amit Gandhi is appearing in any of the photographs. DW-1 has also admitted that no ring ceremony is being performed in the photographs which he had produced. The photographs bear neither the date nor time. None of the photographs contained the house number or the name plate of the witness to enable identification of the place where these photographs had been taken. In Ex. DW-1/D3, there is a third person also a lady who was identified by DW-1 as being the wife of Sh.Rajender Gandhi, his elder brother.

1456. In his cross-examination on 9th July, 2007, the witness stated that he brought the negatives from his house which he obtained from his _samdhi' (son's father-in-law). The witness did not know where these negatives were collected from. The witness denied the suggestion that the negatives have been prepared from the positive photographs which the witness had produced.

1457. The oral testimony of the witness shows that after repeated adjournments, the witness had produced three single negatives. In answer to question as to how many negatives were there in one roll of photographs, the witness had stated that he had received the negatives in strips containing five negatives. The witness was further cross-examined that he had produced only three negatives out of strips. In answer, the witness stated that the other two negatives were pertaining to his son and daughter-in-law and that after cutting out those two negatives, he has produced three negatives in the court. The witness, therefore, himself stated that the negatives had been tampered with. The witness

had neither brought the other two negatives which he claimed to have cut nor did he bring any payment receipt of the photographer or the bill.

1458. The witness was unable to give the name of the photographer who took the photographs, (Exh.DW-1/D1 - D3) when questioned and took the excuse that the photographer was engaged by the family of his daughter-in- law! This by itself is unbelievable - for a function in his house, DW-1 Ashok Gandhi had not engaged any photographer. This statement also falsifies his oral testimony that he (DW-1) had given the video to the Vij's. Though DW-1 does not even know the name of the photographer, he would get the negatives from the photographer (that too one engaged by the Vij's). Though DW-1 denied the suggestion to this effect, we find substance in the objection that the photographs were morphed and not genuine.

1459. So far as the photographs Ex. DW-1/1 to 3 are concerned, the learned Trial Judge has held that the defence has failed to prove that these photographs were clicked in any ring ceremony or that they were actually taken on 16 th February, 2002 between 11.30 pm and around 12.30 of that night. No photograph of the actual ring ceremony or the roka ceremony was produced on record. Other than three photographs, no album or any video cassette of such function was produced on record. The learned Trial Judge has held that the witness does not state that such documents are not available and has, therefore, drawn adverse inference for withholding such documents, which are within the special knowledge and power and possession of the witness.

1460. Therefore, even if we accept that the photographs relate to a function held at the residence of DW1, they do not establish that the function was held on 16th February, 2002. For all these reasons, the photographs are therefore of no evidentiary value so far as the defence claim is concerned.

1461. Apart from the above, there is an even more fundamental reason why the testimony of DW-1 Ashok Gandhi inspires no confidence and deserves to be rejected. DW 1 Ashok Gandhi admits that on 20th, 21st or 22nd February, 2002 he came to know through the newspaper about the implication of Vikas and Vishal Yadav in the crime committed on the night of 16th/17th February, 2002. Despite reading the said news, he did not approach the police or any court to inform the higher authorities that the accused persons could not have committed the offence as they were attending the function at his house at the said night.

1462. The learned Special Prosecutor specifically put it to this witness that even as an advocate whether he had tried to contact the police or any court to inform them that the accused persons had been falsely implicated in the case and that at the relevant time they were present in his function. The witness testified that if a crime like murder was committed in his presence then he was definitely required to report the matter to the police. The accused persons were amongst the 150 people who had come to the function as guests; that there were number of cases pending in different courts where persons are falsely implicated and as such he was not supposed to go to the court in every case.

1463. The witness further stated that he never tried to meet the accused persons after they were being produced in court at Ghaziabad. He volunteered that unless he was called by somebody he had no business to go to a particular place. The witness explains that as per his knowledge, higher authorities were required to be informed only if somebody committed a crime and that he was not required to give information in favour of those who had not committed any crime! In answer to a court question, DW 1 answered that if somebody had been falsely implicated to his knowledge and he was aware that the person concerned is innocent, certainly he would approach the higher authorities.

1464. When the Special Public Prosecutor put to the witness that he had not produced the photographs and the marriage card before the police or in any court if Vikas and Vishal Yadav were innocent, DW-1 Sh.Ashok Gandhi answered that it was to be tested by the court whether the person is innocent or not.

1465. The witness answered that after the engagement function on 16th February, 2002, he met the accused Vishal Yadav on 30th May, 2007 and the accused Vikas Yadav in the Trial Court on 3rd July, 2007. The witness stated that he met Shri D.P. Yadav for the first time on 1st July, 2007. Realising that he was entering troubled waters, this witness again retracted his earlier statement and said Vishal Yadav had approached his son and not him.

1466. The Supreme Court discredited the account of defence witnesses in (2003) 12 SCC 516 Gyasuddin Khan @ Md. Gyasuddin v. The State of Bihar on the ground that the defence witnesses never appeared before the police to give their version and appeared before the court for the first time to give their evidence. The Supreme Court disbelieved the testimony of the witnesses because they withheld important information and held as follows:

> —13. The defence witnesses' account was rightly disbelieved by the trial Court and the High Court. First of all, it must be noted that these witnesses never came forward to give their version before the police. There is no explanation as to why they should, as law abiding citizens, withhold the important information. The defence witnesses 1 to 5 came forward with an omnibus version that ten to fifteen persons armed with rifles and guns came from the east of the police picket and began firing after surrounding the picket. Some of them stated that they noticed some persons inside the camp falling to ground after receiving the shots and further stated that they noticed some policemen running away. According to the witnesses, none of those alleged miscreants could be identified by them. The trial Court at paras 18 and 19 discarded their evidence on a critical analysis and probabilities. The discussion of the High Court is at paragraph 22.

We are in agreement with the that Court and the High Court that the defence evidence is not trustworthy.‖ 1467. It is noteworthy that the defence gives no explanation for the most telling circumstance - the complete silence of DW-1 Shri Ashok Gandhi, a practising advocate, for the long period of more than five years from the night of 16th/17th February, 2002 till 3rd July 2007 when he came to court. Even though it has been repeatedly said that people on the street are reluctant to get involved in the problems of other persons, however DW-1 was not merely a member of the public. He was a lawyer by training and profession and has claimed that he was a practitioner on the income tax side. DW-1 had knowledge at the earliest about the serious crimes and also that Vikas and Vishal Yadav stood implicated therein. However, DW-1 would have been fully aware of the value and impact of his statement and the documents, if true, had he produced them before the police at the earliest in 2002. Such evidence was an extremely relevant piece of evidence as it would disprove the presence of the accused with the deceased at the wedding venue or at Hapur chungi as set up by the prosecution. Instead the witness claims to have waited till he was requested in the year 2007 by Vishal Yadav to testify in his defence. The witness did not even send a written submission nor copy of the photographs or the video to the police authorities.

1468. It is impossible to believe that if events unfolded as he testified, Ashok Gandhi - DW 1 an advocate, would keep quiet for over five years and then volunteer a testimony to absolve them from involvement, that too without summons, at the instance of and in favour of persons with whom he has no connection.

1469. This silence despite knowledge of the incarceration and implication for such serious offences of abduction and murder for such a long period is one more circumstance which renders the testimony of DW-1 incredible and not reliable.

1470. The learned Trial Judge has therefore rightly disbelieved this statement and doubted the conduct of DW-1 Ashok Gandhi holding that if such evidence really existed, the same would have been collected and placed before the authorities at the earliest 1471. When cross-examined by the Special

PP for the State, DW-1 stated that he was not a summoned witness. The witness further stated that he had appeared before the court at the instance of Vishal Yadav who had approached his son with the request that if there were some photographs of the engagement ceremony, the same should be produced in the court. DW-1 stated that he had never been approached by Vikas Yadav.

1472. In his cross-examination, the witness completely disowned any acquaintance with Vikas Yadav or Vishal Yadav. He unequivocally also denied the suggestions that his son was friendly to the accused persons. The witness has thus come to court to depose without being served with court summons in favour of two persons who are neither his nor his son's acquaintances let alone friends.

1473. We are also unable to find an answer to the question as why Ashok Gandhi should come to the witness box in these circumstances when Vikas and Vishal Yadav were really guests of the Vij's? If the ring ceremony actually took place, and was attended as claimed, it is someone from the Vij family who ought to have come forward as a witness. But no one has.

1474. It is noteworthy that if the accused persons had been at the function as alleged, not only DW-1 but several other persons would have been witness to the same. It is the family members of Megha Vij who are alleged to have invited the Yadav cousins and requisitioned the photographer were best positioned to testify on the issue. They have not been examined.

1475. Additionally, the defence made no suggestion in the cross-

> examination of the prosecution witnesses including Ct. Satender Singh, Ajay Katara or the IO, namely, Shri J.K. Gangwar or Anil Somania that Vikas and Vishal Yadav could not be present outside the Diamond Palace Banquet Hall or at Hapur chungi at the stated time for the reason that they were attending a function of the ring ceremony at the house of DW-1 Ashok Gandhi.

1476. It has been argued by Mr. Dayan Krishnan, learned Additional Standing Counsel for the State that the fact that the son's in-laws were unwilling to provide the photograph or the negatives and more photographs clearly points to the fact that the evidence of the witness was false.

1477. In the judgment dated 28th May, 2008, the learned Trial Judge has carefully analysed the evidence on record and has found that though DW-1 has referred to a ring ceremony, the presence of the girl who was to be engaged has not been proved in the ceremony. DW-1 also does not make any reference to the presence of Megha Vij but refers to the fact that her parents came to the ceremony along with Mrs. D.P. Yadav and the younger brother of Vishal Yadav. He also refers only to the departure of ―family members of my daughter-in-law‖. A material fact noted by the learned Trial Judge is that the ring ceremony would normally take place at the bride's house and that it is a function which is arranged by the girl side, never at the groom's. No challenge is laid to these findings.

1478. We find that PW-11 Shivani Gaur testified that the accused persons informed her husband that they were not taking their meals as they had to go to the polling booth. PW-42 Bhawna Yadav has however stated that her brother Vikas Yadav told her that he had to reach Karnal to attend some function for which reason they were in a hurry and so were leaving Shivani Gaur's wedding early. In his own statement made under Section 313 of the Cr.P.C., Vikas Yadav improved on the above when in answer to the question No.238, Vikas Yadav stated that he had told Bhawna that he had to reach Karnal for another function and also to reach his constituency via Mukeria. At no point of time, till the examination of DW-1, did the appellants make any reference to any function which Vikas Yadav had to attend in the house of DW-1 Ashok Gandhi.

1479. We have disbelieved the testimony of Shivani Gaur, Bharti and Bhawna Yadav that the two appellant brothers Vikas and Vishal Yadav left at 11:00 am. it has been held that the appellants and

deceased left together at around midnight. For this reason as well appellants could not have attended any ceremony at the Gandhis as claimed.

1480. The above narration would show that the evidence led by the defence that Vikas Yadav and Vishal Yadav attended a ring ceremony of Amit Gandhi in the night of 16 th/17th February, 2002 is not credible. There is no evidence that these two accused were invited to the wedding. No document in the nature of a card or reliable photograph establishing that such a ceremony actually took place have been produced. No document of date or time of the ceremony is forthcoming.

The witness was not wearing a watch, yet is inexplicably exact about the time at which the accused reached and left as well as the make of Vikas Yadav's car. In the above discussion, we have rejected the use of a Mercedes by the accused on the night of 16th February, 2002.

1481. We agree with the trial court that the testimony of DW-1 Ashok Gandhi is therefore a complete afterthought and does not inspire any confidence.

(ii) Ceremony at the house of the Diwan‟s in Karnal on the 17th of February 2002 1482. We may now examine the plea set up by Vikas Yadav. Vikas and Vishal Yadav have attempted to establish that after attending the ring ceremony at the Gandhis, Vikas Yadav proceeded to Karnal to attend the _paryojan' ceremony relating to the marriage of DW-14 Manuj Diwan - at the house of his father DW 4 Sh. Pawan Kumar Diwan and that he was there from 3:00 a.m. till after lunch on the 17th of February, 2002.

1483. It is in evidence that DW-4 Pawan Kumar Diwan was a partner of Shri D.P. Yadav in liquor business in Rajasthan, Haryana and U.P. and had family relations with him as well.

1484. The witness stated that the „Paryojan‟ function relating to the marriage of his son Manuj Diwan (DW-14) was organised on 16th February, 2002 in his house in 204-L, Model Town, Karnal. The Sagan ceremony was scheduled for the morning of 17th Feburary, 2002 following by ring ceremony at the Highway Green, Karnal on the Chandigarh Road. The witness stated that the family of Shri D.P. Yadav was invited in the aforesaid functions. DW-14 mentions the presence of Vikas Yadav in the ring ceremony which started around 9.30/10 a.m. on 17th February, 2002.

1485. As per DW - 4, the Paryojan ceremony was over by 2:30 am of the 17th of February 2002. Vikas Yadav reached his house in Karnal at about 3 a.m. on the night intervening 16/17th February, 2002. On account of the house being crowded with guests, DW-4 offered him the alternative of accommodation either in the house or in a room booked at the Karnal lake.

1486. DW-14 Manuj Diwan has stated Vikas Yadav left after taking lunch on the 17th of February 2002 at approximately 2/2.30 p.m. 1487. The trial court has noted that the witnesses could not produce any record of booking of rooms at Karnal Lake where the accused was hosted. No invitation card at all for the functions allegedly celebrated on 16th or 17th February, 2002 was produced. There is thus no evidence of the claimed arrival of Vikas Yadav at 3 am at Karnal or the functions being actually held on the 17th of February 2002 or Vikas Yadav's participation therein.

1488. So far as the evidence of DW-4 Pawan Kumar Diwan about the date and timing of Vikas Yadav's arrival/departure as well as the functions is concerned, it is noteworthy that DW- 4 Pawan Kumar Diwan was unable to give even the correct date of his son's marriage. This fact by itself casts doubt about the functions having been actually held on 17 th February, 2002 and not on some other date.

1489. As per DW-14 Manuj Diwan the ring ceremony started at about 9.30 or 10 am and lasted till about 4 pm. He claimed that Vikas Yadav had reached the venue before they reached it for attending the function and remained there till around 3 pm. The learned Trial Judge who saw the CD has stated

that the CD Ex. DW-4/1 does not show Vikas Yadav presence in the function before or at the time of the ring ceremony. It does feature Vikas Yadav sitting with Manuj. The same is however not dated.

1490. DW-4 also produced two photographs which were initially marked as DW-4/A and B and later exhibited as Exh DW14/C and D. These photographs bore neither the date nor the time at which they were taken. In order to explain the failure to approach the police with the evidence of Vikas Yadav's visit, DW-4 had set up a story that in his absence Ghaziabad police visited his house at Karnal and saw the photographs of the ring ceremony. DW-4 has advanced an explanation that after 15-20 days of the arrest of the accused persons, when he was in Alwar, he received a telephone call from his residence at Karnal that _some' police officers from Ghaziabad had visited his residence and they were shown the photographs of the function. By that time, the album was not received from the photographer and his children had brought the photographs from the photographer and shown them to the police. The witness further stated that his children disclosed to him that the circle around the face of the accused Vikas in the photograph mark Exh.DW-4/B was marked by the police. The witness had stated that his children also told him that some photographs were taken away by police.

1491. DW-14-Manuj Diwan, son of DW-4 states that he was at home when the police came. However, DW 14 Manuj Diwan contradicts his father and says that he does not know who has encircled the photograph.

1492. The witness neither made a complaint nor filed any application in the Karnal or Ghaziabad court with regard to the alleged visit by the Ghaziabad police to his residence. He claimed that since the police had already reached his residence at Karnal and verification stood done by it from his residence, therefore, he did not inform any court or police officials.

1493. The learned Trial Judge has carefully analysed the evidentiary value of the photograph Ex. DW-14/A. DW-14 produced the entire album relating to his ring ceremony Ex. DW-14/A is the only photograph in the entire album featuring the accused. Though DW-4 Pawan Kumar Diwan had produced the photographs Exh.DW-4/A and B (later exhibited as Ex. DW-14/C and D). However, neither the photographer nor bills relating thereto were produced. The learned Trial Judge has noted that Ex. DW-14/A and the photographs marked Ex. DW-4/B (later Ex. DW-14/D) are one and the same. The net result is that Vikas Yadav features in only a single photograph of the ring ceremony.

1494. There is also a contradiction with regard to the photographs being given to the police. As per DW-4, when the police visited his house, the album had not been received and photographs were brought from the photographer. On the contrary, his son Manuj Diwan (DW-14) who met the police, stated that the album was with him when the police came to their house and he had procured copies of Ex. DW-14/C and D prepared by the photographer from the negatives, which were taken by the police.

1495. As per DW-14, the photographs were taken by Dhingras Heena Digital Color Lab, 1st Floor, Mahavir Dal Mandir Market, Karnal. The witness was unable to produce the negatives of the photographs produced by him and rendered the convenient explanation that the negatives were misplaced by the photographer since he had shifted his shop. The camera man who would have taken the video recording has not been examined as a witness. The CD and the photographs have therefore not been proved on record in accordance with law.

1496. No suggestion was put by the defence to any of the prosecution witnesses especially PW-28 Ct. Inderjeet Singh; PW-32 Ct. Satender Pal Singh; PW-34 SI J.K. Gangwar and PW-35 SI Anil Somania or PW-33 Ajay Katara that Vikas Yadav had gone to attend function at Karnal in the early hours of the morning of 17th of February, 2002 and was not at the spot when they were cited. No suggestion was put to the police officials that the Ghaziabad police had visited the house of DW-4 and DW-14 and collected the photographs. It is clearly evident that till that time, neither the alibi nor had explanation been conceived by the defence.

1497. In (2000) 4 SCC 484 Jaswant Singh v. State of Haryana, for the first time in the statement recorded under Section 313 of the Cr.P.C., the accused persons had set up a plea of defence. In para 52, the court held that the High Court had rightly rejected this plea as a after-thought for the reason that no such plea was put in cross-examination to any of the prosecution witnesses).

1498. In the instant case as well, a suggestion of a possible alibi is set up for the first time in the cross-examination of PW 42 Bhawna Yadav.

1499. In the statement of Vikas Yadav recorded under Section 313 Cr.P.C., Vikas Yadav had stated that he had to attend a _hawan' in the morning of 17th February, 2002 and thereafter a ring ceremony at Karnal. No disclosure was made by the Vikas Yadav of the name of the person whose place he was to visit in connection with these functions obviously as the accused persons had not by then crystallized their defence. Also neither DW 4 nor DW 14 refer to any havan.

1500. It is in evidence that DW-4 Mr. Pawan Kumar Diwan was Shri D.P. Yadav's business partner as well as close friend. The prosecution thus contends that DW-4 and his family made a false deposition to provide a defence to the accused because of this relationship with Shri D.P. Yadav, father of Vikas Yadav. The above narration would show that there is substance in this plea.

1501. Most noticeable is the fact that this witness also knew that Vikas Yadav was arrested 6-7 days after 17th February, 2002. Even though DW - 4 Mr. Pawan Kumar Diwan was a business partner of Vikas Yadav's father and had family relations, he did not even bother to inform the police about the matters which he has deposed in court to help secure Vikas Yadav's release or discharge.

1502. DW-4 states that Shri D.P. Yadav attended his son's wedding. Yet DW-4 Pawan Kumar Diwan did not discuss his son's alibi in the early hours of the morning of 17 th February, 2002. He has maintained a stoic and inexplicable silence of five years, till he gave his evidence in court.

1503. We have noted above the authority of the Supreme Court in (2003) 12 SCC 516, Gyasuddin Khan v. State of Bihar wherein in similar circumstances, the defence evidence was held to be not trustworthy. The principle laid down squarely applies also to the evidence of DW-4 Pawan Kumar Diwan and DW-14 Manuj Diwan.

1504. As per Section 106 of the Indian Evidence Act, the burden of proving the fact which is especially within the knowledge of any person, lies upon him. The accused persons having taken the plea of alibi, have to discharge the burden of proving the same after the prosecution has discharged its burden.

1505. In 1997 Cri LJ 2853, Ambika Prasad v. State, this Court has observed that ―burden of proof for such plea lies on the person who raises it‖. An argument is raised on behalf of the appellants before us that there is a lesser burden of proof on the accused to prove their defence and the evidence requires to be believed. On this aspect, reference has been made to the observations of the Delhi High Court in 1997 Crl. L J 2853 Ambika Prasad and Anr. v. the State wherein it was held that burden of proving the plea of alibi lies on the person who raises it. The relevant paragraph has been extracted below:

> ―37. ...Accused Rajinder was a member of the accused party. He is said to be wielding a ballam in his hands. The plea of alibi has been raised on his behalf. The burden of proof for such a plea lies on the person who raises it.

Accused Rajinder has not led any evidence worth the name in support of his said plea. On the other hand, the presence of Rajinder along with the other accused has been consistently mentioned by all the prosecution witnesses. xxx xxx xxx

38. The plea of alibi raised on behalf of accused Ram Chander and Rajinder Singh does not inspire any credibility. About accused Rajinder Singh we have already made reference about this. Similar is the situation about accused Ram Chander. His presence at the scene of occurrence has been established by overwhelming evidence which we have no reason whatsoever to doubt. These accused have failed to lead any reliable evidence regarding this plea when the onus was squarely upon them in this behalf.‖ (Emphasis by us) This submission therefore, also has no legal basis. The defence were bound to prove their pleas of alibi with certitude in order to displace the prosecution case of their being guilty for the commission of the offence.

1506. It has been urged by Mr. Dayan Krishnan, learned Additional Standing Counsel for the State that given the location where the accused persons and the deceased were last seen together, it is not impossible that after commission of the crime, the accused went to Karnal. The evidence led by Vikas and Vishal Yadav about their visit to the Gandhi residence and Karnal has been disbelieved. However, in the instant case, even if these pleas were accepted, the defence evidence does not exclude the possibility of the presence of the appellants at the Hapur Chungi at 12/12:30 a.m. and proceeding to Karnal as claimed.

1507. The Trial Court has held that the evidence led by Vikas and Vishal Yadav does not inspire any credibility and that such defence is purely an afterthought. We see no reason to disagree and hold that the Vikas and Vishal Yadav have failed to discharge the onus placed on them through reliable evidence to establish their plea of alibi.

1508. A question was put to DW-14 with regard to the date of his son's marriage. He could not recollect the same. This clearly casts a serious doubt over his clarity about lesser events as a havan or a ring ceremony, their date and timings.

The testimony of DW-4 and DW-14 is therefore not trustworthy and has been rightly rejected by the trial court.

(iii) Vikas Yadav‟s visit to sugar factory at Mukeria at 7:10 pm on 17th February, 2002 1509. Vikas Yadav has examined Shri Ombir as DW-11, a Director with the Indian Sucrose Ltd. (earlier Oswal Sugars Ltd.) to establish that Vikas Yadav had visited the sugar factory at Mukeria in Punjab on 17th February, 2002 at 1910 hours (i.e., 7:10 p.m.) as per an entry in an entry register for senior officers and left the factory at 19:40 hours.

1510. Interestingly, the witness also affirmed that as per an entry No.6 in the register (Exh.DW-11/D) made on 17th February, 2002. DW-11 Om Bir himself had left the factory at about 04.45 p.m. and thereafter entered the factory that day only at 09.20 p.m., remaining there till 10.00 p.m. He therefore would have no knowledge about what transpired in the factory between 4:45 pm and 9:20 pm. 1511. In cross-examination, Shri Ombir further improved on his testimony and stated that on 18th February, 2002, the accused Vikas Yadav had again visited the factory at about 11.00 a.m. for a meeting which started at about 11.30 a.m. and lasted for about two hours. Nothing to this effect was said in his examination-in-chief.

1512. It is in evidence that SO Anil Somania, the Investigating Officer, visited the residence of both Vikas and Vishal Yadav on the 17th and 18th of February, 2002. He was not informed that Vikas Yadav was at the sugar factory. No suggestion to the effect that Vikas Yadav had visited his factory on 17th or 18th February, 2002 was also made in his cross-examination by the accused persons.

1513. This register was neither prepared by the witness nor certified by him as an officer of the company. It did not have the stamp of the company or the signature of any officer of the company. It was claimed to have been maintained at one of the multiple gates of the factory. DW- 11 himself doubts the correctness of the register which shows that DW-11 had left the factory at 04.45 p.m. (and

entered again at 09.20 p.m.) when he denies the suggestion that he was not present in the factory between this timing.

1514. In answer to a court question, Shri Ombir stated that Vikas Yadav was the Managing Director of the sugar factory and that there was no other entry in the register produced by him recording any other visit of the accused Vikas Yadav to the factory prior to 17th February, 2002. Nothing can be more suspect than the fact that the register which contains a single entry relating to the accused Vikas Yadav and that too on 17th February, 2002.

1515. The register was not paginated. as noticed by the trial court.

The witness confirmed that the endorsement of Vikas's entry was also the last entry in the register. It is, therefore, clearly evident that a false document in the nature of the entry in the register had been created in a dishonest attempt to establish the presence of Vikas Yadav in the factory on 17 th February, 2002. The evidence of DW 11 is unrealiable and certainly does not deserve the credence which the defence seeks to place on it.

(iv) Alibi of Vikas Yadav with regard to the visit on 18th of February 2002 1516. So far as the 18th of February 2002 is concerned, other than the isolated statement made by DW-11 Om Bir in hind sight, that too while under cross-examination, that Vikas Yadav had visited the factory on 18th February, 2002 as well, there is no other evidence.

1517. The police personnel who appeared in the witness box established the concerted efforts from the 17th of February, 2002 to search out the accused persons at all their known addresses including business premises including at the factory in Mukeria. No suggestion was made to these witnesses that the accused had actually visited the factory on the dates in question or was available at any other place.

1518. The isolated statement of Ombir with regard to the movement of Vikas Yadav on the 18th of February, 2002, when examined against the other proven facts on record, is unbelievable.

(v) Visit of Vikas Yadav to Bisauli on the 19th and 20th of February 2002 1519. We may now examine the defence evidence with regard to the movement of Vikas Yadav on the 19th February, 2002.

1520. The defence has attempted to prove that Vikas Yadav was in his constituency at Bisauli on 19th February, 2002.

1521. The defence has examined DW-9, Bhairav Prasad Maurya and DW-17, Sandeep Mishra to prove that on 19th and 20th February, 2002 Vikas Yadav was at his constituency Bisauli.

1522. As per Bhairav Prasad Maurya (DW-9) he was related to one of the contestants of BSP party whom he was supporting and at the same time, taking care of the election process. Vikas Yadav had also contested election from the Bisauli constituency in District Budaun voting for which had taken place on 14th February, 2002 and counting was scheduled on 24th February, 2002.

1523. As per DW - 9, the then SDM Mahender had invited the candidates on 19th February, 2002 to the SDM office complex to furnish the list of their respective agents to be present at the time of counting. DW-9 had visited the said complex for the purpose when Arvind, a dummy candidate of Vikas Yadav was also present. An altercation had taken place between the supporters of Vikas Yadav and Gaindalal Maurya whom the witness was supporting, because they had objected to the provision of an agent to Arvind (Vikas's dummy candidate) even though he had withdrawn in favour). Vikas Yadav was stated to be present there at that time with some others. The dispute was resolved around 02.00 p.m. 1524. In cross-examination, the witness confirmed that a form was required to be filled in by the candidate, which was handed over to the SDM for appointing of the counting agent and that Vikas Yadav had not filled any form in his presence. No report was lodged with the police nor message was

sent to the Election Commission by the witness or any other person about the incident. No documentary evidence of the altercation or the compromise which is claimed to have been reached has been produced.

1525. Interestingly, DW - 9 states that though he reads newspapers but he did not read the newspaper or watched television from 17th to 19th February, 2002 since he was busy in elections.

The witness knew Shri D.P. Yadav, father of the accused and could identify him.

1526. It is in evidence that prior information had already been sent by P.S. Kavi Nagar, Ghaziabad to the P.S. Bisauli that the accused Vikas Yadav was involved in the commission of the offences in the present case for which he was wanted and that on 19th February, 2002, and that the Bisauli police was already searching for Vikas Yadav. Therefore, if Vikas Yadav had actually visited Bisauli on the 19th, he would have been arrested by the P.S. Bisauli.

1527. The defence further examined DW-17, Sandeep Mishra, an advocate from village Sirtaul, district Badaun who stated that during the elections in 2002 he was Vikas Yadav's legal advisor; that Vikas Yadav met him at about 09.00 a.m. on 19th February, 2002 in the election office at Bisauli as counting agents were to be appointed. The meeting in the SDM's office for this purpose was scheduled at 1.00 p.m. on that date. The witness stated that at around 10.45 a.m., Vikas Yadav had told him that he had lost the bag which contained photographs of his agent etc. and that he had accompanied Vikas Yadav for lodging a complaint with the P.S. Faizganj Behata in this regard. A written complaint (Ex. DW-17/A) in this regard written by somebody else but signed by Vikas Yadav, was also given.

1528. In cross-examination, the witness stated that there was a police station at Bisauli also known as PS Bisauli. The complaint Ex. DW 17/A contains signatures in hindi. The witness denied the suggestion that Vikas Yadav signed only in English or that DW-17/A was not signed by him. No FIR was registered based on the complaint.

1529. DW-17 further admitted that he was associated with Sh.A.K.

Sharma, Senior Advocate in the year 2004 during the Lok Sabha elections when Shri D.P. Yadav was involved in 1 or 2 criminal cases and had represented Shri D.P. Yadav in the criminal proceedings. DW-17 denied the suggestion that he has given false deposition in favour of the accused as he was a lawyer for his father.

1530. DW-17 Sandeep Misra has admitted that there was over-

> writing in the date in Ex.DW-17/A. There was also over- writing as regards the ―month‖ of the receipt of the complaint. The court has noted that initially the number _1' for the month of January was mentioned which has been converted into _2' for the month of February. The complaint is not diarized. DW-17 also admitted that in the complaint Ex.DW-17/A, there was no date below the signature purporting to be that of Vikas Yadav. He had also not given any residential address.

1531. The complaint Ex. DW-17/A bears only a date and does not bear any kind of registration number or time. This document also sees the light of the day for the first time in the testimony of DW-17 recorded on 20th August 2007. It was not put to any authority or before any court.

1532. This witness did not give any application in writing to the SDM on 19th February, 2002. No attendance of the persons who attended the office of the SDM was marked.

1533. The prosecution witnesses including the investigating officer have not been cross-examined on this aspect at all and no suggestion in terms of the testimony of DW-17 has been put to them.

1534. To support his plea of ignorance about the present crime, the witness stated that he had not read the newspaper or watched the television since 17th February, 2002 nor had knowledge about the information given on 19th February, 2002 by PS Kavi Nagar to PS Bisauli that Vikas Yadav and Vishal Yadav are wanted in a case.

1535. If the complaint had been given to the police, Vikas Yadav would have been arrested in Bisauli. Both DW 9 and DW 17 are known to the father of Vikas Yadav.There is thus substance in the challenge to the authenticity of the seal appearing on Ex.DW-17/A as well as the presence of Vikas Yadav and DW-17 on the 19th either in Bisauli or at the SDM's office.

1536. In his statement under Section 313, Vikas Yadav does not explain where he spent the night of 17th/18th February, 2002 or the 18th and 19th of February 2002. Vikas Yadav has made no disclosure in his statement recorded under Section 313 of the Cr.P.C. in terms of the testimony of DW 9 and 17.

1537. Ex.DW17/A did not see the light of the day since 19th February, 2002 till the examination of DW 17 on 20th August, 2007 in the court. The complaint does not disclose any address of Vikas Yadav where the bag, if actually lost and recovered could be delivered.

1538. The alleged police complaint has also rightly not been found credible by the learned Trial Judge. All these circumstances support the prosecution submission that the testimony of DW-17 is also an afterthought and not to be relied.

(vi) Defence plea that Vikas Yadav reached Allahabad on the 20th where Vishal joined him on the 21st of February 2002 to take legal advice 1539. DW-12 Shri Arvind Mishra and DW-19, Shri Jai Singh have been examined to establish that on 21st February, 2002 Vikas and Vishal Yadav were in Allahabad. The defence has thereafter sought to establish a case that Vikas Yadav met Shri Arvind Mishra, Advocate DW - 12 on 20th February, 2002 at Allahabad. On 21st of February, 2002, he took Vikas and Vishal Yadav to the house of Shri A.D. Giri Senior Advocate. He advised them to surrender before the court. DW 19 Shri Jai Singh, Advocate deposes on the same lines with regard to the advice of Shri Giri, Senior Advocate. As per the defence, Vikas and Vishal Yadav were returning by train to Ghaziabad when they were arrested at the Dabra Railway Station, Distt. Gwalior at 04:30 a.m. on the 23rd of February 2002.

1540. The evidence of DW-12, Sh.Arvind Mishra, an Advocate practicing at the High Court of Judicature at Allahabad was recorded on 31st July, 2007. DW-12 stated that he already knew Vikas Yadav as he had met him in connection with a case pending against him in that court. He met the accused on the 20th of February 2002 between 8:00 and 9:00 am for about 10-20 minutes when leaving for his office in relation to the present case. Thereafter on 21st February, 2002 both Vikas Yadav and Vishal Yadav met him and told him about the case which had been fabricated against them. DW-12 testified that he had advised them to surrender before the concerned court and also to meet Sh. A.D. Giri, Senior Advocate of the High Court at Allahabad.

In the cross-examination, the witness denied any acquaintance with Vikas Yadav prior to February, 2002. He stated that he knew Shri D.P. Yadav, that since on TV he had seen the news that Vikas Yadav was his son; he recognized him. DW-12 also submitted that he had learnt about the present case before 20th February, 2002 through the media. He also stated that he had not charged any consultation fee. The witness had no record of the visit.

1541. On the 21st February, 2002, DW-12 Shri Arvind Mishra stated that, Vikas Yadav and Vishal Yadav had come to his residence for 10-12 minutes at about 08.00 a.m. where they stayed for about 10-12 minutes. They had proceeded to the house of Sh.A.D. Giri between 08.30 to 08.40 a.m. when Sh.Jai Singh, Advocate had met them on the way. Sh.A.D. Giri had met them on 21st February, 2002 who

also advised them to surrender before the concerned court. The witness has also stated that Sh.Jai Singh, Advocate was with him at that time.

1542. It is stated that Sh. A. D. Giri also did not charge any consultation fee for meeting of about 15-20 minutes. No record of this meeting with Sh.A.D. Giri, senior advocate has been produced.

1543. We also find reference to proceedings filed by the appellants under Section 482 of the Cr.P.C. in the High Court and a bail application. It is in the cross-examination of DW-12 Shri Arvind Mishra that Sh.Prem Prakash, Advocate, practising in Allahabad High Court, was his senior. The witness also claimed to be an associate of Sh.J.S. Senger.

1544. DW 12 has stated that his Senior Shri Prem Prakash, Advocate had moved proceedings under Section 482 of the Cr.P.C. on behalf of the accused persons in the present case before the High Court. The bail application of the accused persons and the same was moved on their behalf by Sh.J.S. Senger, Advocate which was later argued by late Sh.A.D. Giri, Senior Advocate. DW 12 was therefore working with Shri Prem Prakash, counsel for Vikas and Vishal Yadav. He named only counsel conducting their cases. He denied the prosecution suggestion that the accused persons did not meet him for which reason he was unable to produce any record with regard to the meetings.

1545. We may now examine the testimony of DW-19, Jai Singh also an advocate practicing at Allahabad. He does not disclose as to how he knows Vikas Yadav and Vishal Yadav. So far as the 21st of February, 2002 is concerned, he refers to it as a chance meeting with them while they were going to the house of Sh.A.D. Giri, senior advocate when he was coming out of it who had advised them that they would not get any relief from the Allahabad High Court and that they should surrender before the concerned court.

In his cross-examination, the witness admits that he was a member of the Legislative Assembly in the year 1989 during which period Shri D.P. Yadav, father of Vikas Yadav was also a member of the Legislative Assembly. As per DW-19, the accused persons were introduced to him by DW-12 Sh.Arvind Kumar Mishra. The witness denied the suggestion that he had given false testimony being a friend of Shri D.P. Yadav to save the accused persons.

1546. From their testimony, it is established that DW-12 Shri Arvind Kumar Mishra, Advocate and DW-19 Shri Jai Singh, Advocate are associated with or known to Shri D.P. Yadav and have therefore testified in court.

1547. The appellants Vikas and Vishal Yadav have claimed that they were returning to Ghaziabad by train. There would be some documentary evidence of their travel to and fro, board and lodgings at Allahabad and related documents which ought to be in their power and possession. The two appellants do not even disclose the names of the train(s) by which they travelled, let alone any proof of their having undertaken the journeys at all or of their hotel stay and related expenditure. Neither of the accused persons disclose the mode of their travel from Ghaziabad to Allahabad. No documentary proof in the nature of tickets etc. have been placed.

1548. The oral testimony of DW-12 Shri Arvind Mishra and DW-

> 19 Shri Jai Singh is pitched against the documentary evidence of two applications filed by the two accused persons Vikas and Vishal Yadav before the CJM, Ghaziabad during the same period. Our attention is drawn to an application dated 21st February, 2002 (Ex. DW-6/1) moved by Shri Neeraj Gautam, Advocate (DW 6) in the court of the Chief Judicial Magistrate, Ghaziabad. This application was filed under the signatures of Vishal Yadav as well as Vikas Yadav. A plea was taken therein that the police station Kavi Nagar was harassing the two applicants even though they had not committed any offence. A prayer

was made that a report be called by the court as to whether any case had been registered against the two applicants. On this application, the learned CJM directed that a report be called from the SO, Kavi Nagar on 22nd February, 2002. A report dated 22nd February, 2002 was submitted by PS Kavi Nagar to the effect that the applicants were wanted in Crime No.192/2002 under Section 364, IPC (Ex. DW-6/3).

1549. Fully aware of the police case against them, on 22nd February, 2002, Vishal Yadav and Vikas Yadav moved a second application before the CJM, Ghaziabad (Ex. DW-6/7) stating that the applicants were ill for which reason they were unable to remain present in the court. In these circumstances, the applicants prayed for an adjournment of three days.

1550. The above applications were filed jointly by Vikas Yadav and Vishal Yadav manifesting that they were together in Ghaziabad and unwell. They were certainly not in Allahabad.

1551. The defence also examined Sh.Neeraj Gautam as DW-6, an advocate practicing in the Ghaziabad courts. He has claimed to have moved the applications (DW-6/1) at the instance of Shri Rajinder Yadav (a cousin of Vikas Yadav) without telling Vikas or Vishal Yadav before moving this application.

1552. It is pointed out that the applications are not in the handwriting of DW-6 but in the handwriting of one Shailesh Sharma, Advocate. The witness admitted that the application dated 22nd February, 2002 did not mention any intention on the part of the accused persons to surrender.

1553. We find that the applications are signed by Vikas and Vishal Yadav who do not deny their signatures on the application (DW-6/1 and 6/7).

1554. DW-6 - a practicing advocate was oblivious of the fact that by then the proceedings under Section 82/83 of the Cr.P.C. stood initiated by the same court against the accused persons. Warrants of arrest were pending against them. He could give neither the date when the accused persons were arrested nor when they were produced in court. He never met the accused persons before 24th February, 2002.

1555. In his cross-examination, he categorically admitted that he could not say where were the accused persons during the period between 17th and 24th February, 2002.

1556. Our attention has been drawn to the fact that no suggestion was put to the investigating officer that the accused persons were not absconding and were in their residences or undertaking their regular work or that they were at Allahabad. Further the evidence of the investigating officer about his repeated visits to the residences of the accused persons and other places which they frequently visited and their non-availability at these places is unchallenged.

1557. We are informed that Allahabad and Ghaziabad are separated by more than 600 kms. It is also impossible for one person to be in these two places at the same time. The applicants filed two applications under their signatures at Ghaziabad on the 21st and 22nd of February 2002. These appellants therefore could not have been at Allahabad during this period. In the light of the above discussion, we have no hesitation in rejecting the case of Vikas and Vishal Yadav that they had gone to Allahabad.

(vii) Train journey from Allahabad 1558. We may also examine the evidence with regard to the travel of the appellants from Allahabad.

1559. So far as the exact geographical positioning of Dabra is concerned, as per the rail line map placed by Mr. P.K. Dey, learned counsel for the complainant, coming north from Bina Jn. towards Agra Cantt. (then on to Delhi), Dabra falls between the Jhansi Jn. and Gwalior Jn.

1560. Mr. Dey points out that Gomati Express runs between Lucknow and Delhi and not between Allahabad and Delhi. It is also pointed out that Allahabad falls on the Delhi- Howrah rail route. Dabra however is located between Jhansi and Gwalior on the train line between Delhi-Chennai. Therefore, Allahabad and Dabra are in completely opposite directions in the context of Delhi.

1561. With regard to their movement from Allahabad in his statement under Section 313 Cr.P.C. in answer to the question No. 217, Vishal Yadav has stated as follows: -

> ".....from Allahabad we took the next available train to Delhi to reach Ghaziabad, on the way alighted at Dabra for refreshment but were falsely implicated as state above.‖ —...we were travelling by Gomti from Allahbad to Ghaziabad....."

1562. As against this claim made by Vishal Yadav, Vikas Yadav makes a completely different claim. At the end of the recording of the statement under Section 313 of the Cr.P.C., the court asked Vikas Yadav as to whether he wanted to say anything else. With regard to their movement from Allahabad is concerned, at point 238, Vikas Yadav has stated as follows: -

> —From Allahabad we started for Delhi by changing trains i.e. Allahabad to Kanpur, Kanpur to Jhansi and Jhansi to Delhi. On the way we got down at Dabra Station for some refreshments but were apprehended and confronted unnecessarily by the Dabra police on being recognized due to that our photographs were flashed everywhere i.e. print media and electronic media.‖ 1563. It would appear from the Vishal's statement that the accused persons did not change trains anywhere. While as per Vikas's statement, the accused persons changed trains thrice.

1564. In answer to the court question No.238, Vikas Yadav further stated that they had left Allahabad on 22nd February, 2002 in the night for Kanpur. When questioned as to what time they left from Kanpur to Jhansi, the accused Vikas Yadav stated that they reached Kanpur in the early hours of 23rd February, 2002; waited in the waiting room and then on the same day they took a train to Jhansi and from Jhansi took a train to Delhi.

1565. Though Vikas Yadav in his statement under Section 313 states that he informed Shri Rajender Choudhary, Advocate about wanting to surrender; appearing as DW-3, Rajender Choudhary, Advocate does not say so.

1566. It has been urged at some length by Mr. Dayan Krishnan, learned Additional Standing Counsel for the State that Vikas and Vishal Yadav were aware of their status in the present case and were bound in law to have surrendered. Instead of so surrendering, the accused absconded and they stage managed an arrest by choice and manipulation in Dabra, Madhya Pradesh.

1567. We find that in the testimony of Bharti Yadav, during the cross-examination by the Special Public Prosecutor of Bharti Yadav as PW-38 in Vikas Yadav's trial, it was put to her that whether from the night intervening 16th/17th February, 2002 her brothers, Vikas Yadav and Vishal Yadav remained absconding till 23rd February, 2002 from home and did not visit the same. In reply, Bharti Yadav stated that it was correct that she did not meet them during this period but she could not say that they never visited home.

XIV Arrest of Vikas and Vishal Yadav at Dabra, District Gwalior on the 23rd of February, 2002 1568. So far as arrest of the accused is concerned, it has been shown as having been effected on 23rd February, 2002 at 04.30 a.m. at Dabra.

1569. The prosecution has examined PW-29, Constable Brij Mohan Mishra from Police Line, Gwalior, MP who stated that in February, 2002 he was posted at PS Dabra. On 23rd February, 2002 while on patrolling duty at 03.00 a.m., he was asked by Inspector Ashok Singh Bhadoria the town Inspector in

PS Dabra, to accompany the police team for checking at the railway station. While checking near the maalgodam adjoining the railway station, the two accused persons (Vikas Yadav and Vishal Yadav) present in court were apprehended by this police team. Initially these two persons gave their names as Raj Kumar and Sushil Kumar to the police. In answer to the court question as to why these persons were arrested, the witness stated that they were arrested because the two persons ran away from the maalgodam and the police had suspicion on them. On their personal search, six cartridges of .38 bore were recovered from the accused Vikas Yadav and four cartridges from the accused Vishal Yadav. The accused persons gave their correct names whey they were interrogated before recovery. The accused persons were apprehended at about 04.20 a.m. in the presence of two public witnesses, Lallu @ Hoshiar and Shehzad.

1570. Mr. Dey has argued that as per Vishal Yadav, they got down from the train to have refreshments. The accused persons were not arrested from the railway station but from the maalgodam. It is unbelievable that anybody would get down at a small railway station as Dabra, that too at 04.00 a.m., for refreshments. It is even more improbable that anybody would get down for refreshments from the train and move towards maalgodam which, as per the arresting police, was beyond the railway station, if they were to continue on any train towards Delhi.

1571. Our attention has been drawn by Mr. Dey to the rail route which shows that if the accused persons had really boarded the train at Kanpur, the train would have first stopped at Jhansi before moving to Dabra. It is pointed out that Jhansi is a big junction and any prudent person would take refreshment at Jhansi and not wait to reach Dabra, a small station.

1572. We find that a suggestion was put to PW-29, Constable Brij Mohan Mishra (Dabra) on behalf of the accused persons that the Maha Kaushal Express train had reached the railway station, which he admitted. Mr. P.K. Dey, learned counsel for the complainant has pointed out that Maha Kaushal Express runs between Delhi and Jabalpur via Jhansi and Gwalior. It is submitted that there was no train running between Kanpur and Delhi at the station and that this fact goes a long way in demolishing the plea that they were arrested when they were returning from Allahabad in the manner stated.

1573. Learned counsel has placed before us the Indian Railway time table for the year 2001-2002. Anticipating an objection with regard to the permissibility of this court looking at the railway time table for the relevant period in 2002, Mr. P.K. Dey has drawn our attention to Sections 56 and 57 of the Indian Evidence Act, 1872. Section 56 mandates that no fact on which the court will take judicial notice needs to be proved. Section 57 of the Act set out the facts of which the court must take judicial notice. As sub-section (1), the court is permitted to take judicial notice of "all laws in force in the territory of India‖. By virtue of sub-section (13) of Section 57, the court is enabled to take judicial notice of ―the rule of the road of land or at sea‖. The statute further stipulates that in all these cases, the court may resort for its aid to appropriate books or documents of reference. It is further stipulated that if the court is called upon by any person to take judicial notice of any fact, it may refuse to do so, unless and until such fact is produced in such book or document as it may consider necessary to enable it to do so.

1574. Mr. P.K. Dey has also drawn strength from the 7th Schedule of List I of the Constitution of India. It is pointed out that under Item 22 of the List I of the Constitution of India, the subject of railways has been placed in the Union List. Therefore, by virtue of Article 246 (1) of the Constitution of India, only the Parliament has exclusive legislative power over the railways. It is urged that Article 13 of the Constitution renders void all such laws which are inconsistent with or in derogation of the fundamental rights and that under sub-clause (3a) the expression ―law‖ in Article 13 includes any ordinance, order, by-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.

1575. So far as the Indian Railways are concerned, it is pointed out that the Indian Railways Act, 1890 was the first legislation of the kind to govern the law relating to railways which was amended from time to time to give effect to the several changes in the railway system. As a need was felt by the Government of India to replace this Act by a new legislation, the Railways Bill was introduced in the Lok Sabha on 25th April, 1986 and the motion for reference to the Joint Committee Report was made on 5th November, 1986. The Railway Bill was passed by both the Houses of the Parliament and received the assent of the President of India on 3rd June, 1989. It came into force on 1st July, 1990 as the Railways Act, 1989 Act (24 of 1989).

1576. Under Section 49 of the Railways Act, 1989, there is a statutory mandate to cause to be pasted in a conspicuous and accessible place at every railway station in Hindi and English and also in the regional language commonly in use in the area where the station situated, the table of times of arrival and departure of trains which carry passengers and staff at that station. It is further required that at every station where tickets are issued to passengers, a copy of the time table in force shall be kept in the office of the station master.

1577. Mr. P.K. Dey, learned counsel for the complainant has contended that given the mandate of Section 49 of the Railways Act, 1989, the railway time table issued by the railway authorities is statutory in nature. It is contended that this being the position, this court would take judicial notice under Section 57(1) and (13), of the train timings, as are contained in the railway time table for the year 2002 which was issued by the railway administration and has been placed on behalf of the complainant before us.

1578. We may point out that the railway time table has been placed before this court in support of the submission that the plea of alibi set up by the appellants deserve to be disbelieved. It is established therefrom that the Gomti Express runs between Lucknow and Delhi and not between Allahabad and Delhi. Vishal Yadav has therefore made a false statement under Section 313 of the Cr.P.C. that they were travelling on the Gomti Express.

1579. The time table also discloses that there was a direct main line train route being Delh-Allahabad-Howrah (Kolkata). Dabra was on the Delhi-Bhopal-Chennai train route. The contention of the appellants, Vishal Yadav and Vikas Yadav that they reached Dabra by train from Allahabad in the early hours of 23rd February, 2002 is completely falsified in view of the schedule of trains which pass through Dabra.

1580. PW-35 SI Anil Somania stated that on 23rd February, 2002 while he was in PS Kavi Nagar, that he learnt from the TV news footage that Vikas and Vishal have been arrested in Dabra, MP. He talked to the concerned SSP informing him about the news. The SSP telephonically confirmed the news of the arrest of the accused persons at Dabra and directed PW-35 to proceed to Dabra. PW-35 made DD Entry No.20 (Exh.PW-35/10) which was signed by him in the General Diary dated 23rd February, 2002 at 12.25 p.m. In the police party, which proceeded to Dabra, PW-35 had joined SI J.K. Gangwar and a few constables. The police party proceeded to Dabra by a private vehicle, reaching PS Dabra (District Gwalior) at 11 p.m. 1581. We have noted the manipulation by Vikas and Vishal Yadav even thereafter and how they successfully delayed their being produced before the court after their arrest in the early morning. It is in evidence that though arrested in the early hourse of 23rd of February, 2002, they were produced only at 11:00 pm. The proceedings before the court in Dabra noted by us above also show how they delayed their custody being handed over to the Ghaziabad police. There can be no doubt at all that Vikas and Vishal Yadav effectively utilized the shield of the Dabra proceedings to cause impediment and delay investigation in the present case. All these point to only one inference which is that they wielded influence in Dabra and therefore chose Dabra for their arrest. The appellants were not arrested from the railway station.

We therefore find substance in the submission of the State that the accused persons did not travel to Dabra from Allahabad and that they stage managed their arrests from outside the maalgodown at Dabra.

In the light of the above discussion, we see no reason to differ with the findings of the learned trial judges that the accused persons were actually absconding.

XV Abscondance of Sukhdev Yadav @ Pehalwan and his arrest on 23rd February, 2005 1582. We may now examine the case of abscondance by the appellant Sukhdev Yadav @ Pehalwan. Mr. Kapoor, ld. counsel for Sukhdev @ Pehalwan has contended that the prosecution case that Sukhdev @ Pehalwan had abscondeded after the commission of murder, is false and that this appellant has adequately established that he was peacefully living in his village and discharging normal functions at the time of the crime and thereafter.

1583. The name of Sukhdev Yadav @ Pehalwan as being involved in the crime first surfaced in the statements of Vikas Yadav and Vishal Yadav recorded under Section 161 of the Cr.P.C. recorded on 25th February, 2002 by the Investigating Officer Anil Somania. However, they referred to him merely as _Pehalwan'.

1584. As per Anil Somania, IO, PS Ghaziabad (who testified as PW-22 in Sukhdev Pehalwan's trial), the statement of Bharti Yadav (Exh.PW-35/AB) was recorded under Section 161 on 2nd March, 2002 in the presence of her father as well as lady officer Anju Bhaduria. In this statement, Bharti Yadav thus revealed the real name of Pehalwan (referred to by Vikas and Vishal Yadav) who was present with her brothers in the wedding on the night intervening 16th / 17th February, 2002.

Bharti Yadav explained that she knew Sukhdev @ Pehalwan as he had worked in their liquor business at Bulandshahr ("humare Bulandsheher sharab karyalaya mein kaam karata hai").

1585. Sukhdev @ Pehalwan was also referred to by Ajay Kumar (PW-14 in Sukhdev Yadav's trial) in his statement dated 18th March, 2002 recorded under Section 161 of the Cr.P.C. by IO Anil Somania.

1586. Consequently a trap was laid on 3rd March, 2002 by Investigating Officer Anil Somania to apprehend Sukhdev @ Pehalwan in Bulandshahr. The police were unable to apprehend him physically but were able to lay their hands on a guarantee card, which bore his photograph as well as complete address (Ex. PW-22/A1). This is how the police could get the complete particulars of this appellant.

1587. It is in evidence that despite several efforts which include formation of a separate police team for apprehension and arrest of Sukhdev Pehalwan, the police were unsuccessful. Several places including his native village were raided despite arrest warrants obtained from the concerned court but he could not be apprehended.

1588. The SSP, Ghaziabad on 25th March, 2002 declared a reward of Rs.5,000/- for the arrest of Sukhdev @ Pehalwan . The reward was enhanced to Rs. 25,000/- by IG/DG, Meerut for information about the arrest of Sukhdev Yadav @ Pehalwan.

1589. The proclamation of the reward was published in the newspaper with photographs of Sukhdev @ Pehalwan and television telecasts were also taken out. All efforts were to no avail.

1590. On 4th March, 2002, non-bailable warrants for the arrest of Sukhdev @ Pehalwan were issued by the concerned court and SI Mukesh Tomar went to his native village to execute the same. Yet Sukhdev @ Pehalwan successfully avoided arrest.

1591. On 31st March, 2002, the police got Sukhdev @ Pehalwan declared a proclaimed offender. He did not surface for three years thereafter.

1592. In the year 2002, Anil Somania got Sukhdev Pehalwan's double barrel gun licence cancelled. Even this did not secure his custody.

1593. The next chronological reference in the record of Sukhdev @ Pehalwan is to be found in the evidence of PW-20, SI Ajit Kumar Mishra who testified that on 23rd February, 2005 while posted as SI in PS Patcherawa, District Kushi Nagar, UP, he was on patrol duty along with five constables leading towards village Vanvera from the side of village Karjaha. At about 1.30 am, when the police party was near Rudelpur Tiraha, Village Sarai Patti, it spotted a person in the headlights of the jeep. The police party stopped him and enquired about his particulars but this person suddenly shot at the police party and started running towards the west side of the tiraha. Despite the police party disclosing its identity and calling upon him to surrender, this person did not stop. In the meantime, he fired another shot upon the police. The police party chased him for about 40-45 paces and could overpower him only when this person was trying to re-load his pistol. It was after apprehending this person that his identity was revealed to the police party as Sukhdev Yadav @ Pehalwan, son of Shri Vishawnath Yadav, resident of Tarnbagla, Kumeha, PS Patherwa, District Kushi Nagar, UP.

1594. Upon his search, the police recovered from Sukhdev Yadav @ Pehalwan one country made pistol of .315 bore from his right hand and two live cartridges from the pocket of his pants. One unused cartridge was recovered from the country made pistol while one used cartridge was found from the spot.

1595. PW-20 refers to the disclosure made by this person about his implication in the abduction and murder of Nitish Katara in the night intervening 16th / 17th February, 2002. It appears that with regard to this incident on the 11 th of February 2005, FIR No. 56/2005 was registered under Section 307 IPC / 7 of the Criminal Law (Amendment) Act and FIR No. 57/2005 was also registered under the Arms Act in which cases Sukhdev @ Pehalwan was arrested. As on 21st April, 2008 when the testimony of this witness was recorded, the cases arising out of these FIR were pending in the concerned court at Kushi Nagar, UP.

1596. PW-20 SI Ajit Kumar Mishra identified Sukhdev Yadav @ Pehalwan present in court as the person whom and the police party arrested on 23rd February, 2005 in the above circumstances. The witness denied all suggestions that the accused person had met him physically several times in the village between 2002 and 11th February, 2005.

1597. The prosecution also examined SI Umakant Pandey as PW-

> 21 in Sukhdev Yadav's trial who has investigated the above cases being Crime No.56/2005 and 57/2005. He stated that during the course of the investigation he learnt that Sukhdev @ Pehalwan was a proclaimed offender of PS Kavi Nagar, Ghaziabad and the Ghaziabad police was accordingly informed about the accused. This witness denied the suggestion that Sukhdev @ Pehalwan was not arrested in the manner stated but picked up from his residence in the village or that he was available at his residence at all material time.

1598. Inspector Anil Somania, PW-22 corroborates the testimony of PW-21 and testified that he had received a FAX message (Exh.PW-22/A2) as well as a telephone call from the Devariya SO's office that Sukhdev Yadav had been arrested. Anil Somania, therefore, took steps to produce him before the CJM, Ghaziabad for obtaining the production warrant (Exh.PW-22/A3). This witness also denied the suggestion that he had not made any effort on 2nd or 3rd March, 2002 to arrest Sukhdev Pehalwan. He also categorically denied that Sukhdev Pehalwan, since 2002 and until his arrest in 2005, was residing in his village in District Devariya.

1599. In his statement under Section 313 of the Cr.P.C., Sukhdev @ Pehalwan has stated that on the night intervening 16th / 17th February, 2002 and thereafter he was in his native village and that this

fact was known to the police. He simply denied all other facts relating to his having absconded. In answer to question No.1 relating to whether he was working in the liquor vend of Shri D.P. Yadav on or before 16 th February, 2002 at Bulandshahr, UP, Sukhdev Yadav admitted that it was correct that he was earlier working in a liquor vend in Bulandshahr.

1600. We may also note the defence evidence led by Sukhdev Pehalwan. He has examined one Shri Keshwar Singh, Pradhan of village Tamuwa as DW-1 who has tried to make out a case that Sukhdev Yadav @ Pehalwan was a wrestler by profession and that from 2002-2005 used to be there in the village. In cross-examination, he stated that prior to 2002, Sukhdev @ Pehalwan was a wrestler in the area and not engaged in any avocation. This stand of the witness is clearly contrary to the statement of Sukhdev Yadav under Section 313 Cr.P.C. noted above who has stated that he was working in a liquor vend prior to 16th February, 2002.

1601. DW-1 Keshwar Singh further contradicts himself in his cross-examination when he admits that attachment warrants in respect of Sukhdev @ Pehalwan were executed in the village in 2002-2003 and he had learnt that they were concerning a case from Ghaziabad. The witness also submitted that on the day of execution of attachment warrant, Sukhdev @ Pehalwan was not present in the house. The witness also admitted that on the day of execution of the attachment warrants, he came to know that Sukhdev @ Pehalwan was allegedly involved in the murder of a person and that Vikas and Vishal Yadav were the other accused involved in the same offence. This witness stated that even after the attachment warrant, he never came to Ghaziabad or Delhi to contact Sukhdev Yadav nor made any effort to inform the SSP, Kushi Nagar or the concerned court in the area, that Sukhdev Yadav was available or had been in the village. These admissions by DW-1 in his cross-examination completely demolish his testimony to the effect that Sukhdev @ Pehalwan was residing in the native village between 2002-2005.

1602. The prosecution on the other hand has established the concerted effort made by the police to trace out Sukhdev @ Pehalwan who was not traceable at all his known addresses and despite the wide publicity given to the same. Issuance of non-bailable warrants, warrants of attachment, announcement of rewards for information about him did not result in apprehension of Sukhdev Yadav @ Pehalwan and he was finally was declared a proclaimed offender by the trial court on 31st March, 2002. For all these reasons, we are satisfied that the trial court has rightly concluded that Sukhdev @ Pehalwan was absconding till he was arrested.

1603. We also find that this abscondance is part of a design.

Having compelled the court to proceed with the trial of Vikas and Vishal Yadav in the absence of their accomplice, by the 23rd of February 2005 when Sukhdev Yadav was arrested, evidence of thirty seven prosecution witnesses (out of a total of forty three) stood completed in that trial. Many of the witnesses who had been already examined, had to be recalled in Sukhdev's trial. It appears that the calculated attempt was to pressurise and exhaust witnesses; take advantage of memory fading by passage of time and resultant omissions and contradictions; orchestrated deviations; loss of evidence by non-availability of witnesses at the second trial. By his conduct, the appellant has not only violated statutory provisions but has obstructed the due course of justice and expedition in the trial.

1604. It is trite that mere abscondance per se after commission of an offence of which such person may not be the author, may not by itself be sufficient to draw an adverse inference against him as it would go against the presumption of innocence of all persons. It is accepted that people may run away upon being suspected of involvement in a crime out of fear of police arrest. However, if other incriminating circumstances are present, then abscondance would be considered, as relevant conduct or circumstance to draw an inference of guilt. we shall now consider the legal effect of this abscondance in the facts of the present case.

XVI What is the legal impact of this abscondance?

1605. Learned counsels for the defence have submitted that the appellants were not absconding and that, in any case, abscondance is not a relevant circumstance while considering as to whether the prosecution had established an unbroken chain of evidence which unerringly points towards the guilt of the appellants.

1606. Placing reliance on the pronouncement of the Supreme Court in (2010) 6 SCC 1, Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi), it has been argued by Mr. Dayan Krishnan, additional standing counsel that it is a settled legal position that abscondance is not merely relevant conduct but is also a circumstance which cannot be ignored. In this regard, in Siddhartha Vashisht (supra), the Supreme Court had observed as follows:-

> —230. From the testimonies of PW 20 and PW 24, it is proved beyond reasonable doubt that accused Sidhartha Vashisht @ Manu Sharma after committing the murder of Jessica Lal fled away from the scene of occurrence. It is further proved from the testimonies of PW 100, PW 101, PW 87 Raman Lamba, PW 85 and PW 80 that from afternoon of 30-4-1999 search was made for the black Tata Safari bearing Registration No. CH 01 W 6535 and for Sidhartha Vashisht @ Manu Sharma, Director of Piccadilly Agro Industries at Bhadson, Kurukshetra, Chandigarh, his farmhouse at Samalkha and Okhla, Delhi.‖ xxx xxx xxx
>
> 232. A criminal trial is not an enquiry into the conduct of an accused for any purpose other than to determine whether he is guilty of the offence charged. In this connection, that piece of conduct can be held to be incriminatory which has no reasonable explanation except on the hypothesis that he is guilty. Conduct which destroys the presumption of innocence can alone be considered as material. In this regard, it is useful to refer Anant Chintaman Lagu v. State of Bombay, AIR 1960 SC 500 : 1960 Cri LJ 682 (AIR pp. 523 and 526-527, paras 68 and
>
> 76) —68. Circumstantial evidence in this context means a combination of facts creating a network through which there is no escape for the accused, because the facts taken as a whole do not admit of any inference but of his guilt.
>
> * * * *
>
> 76. ... This conduct of the accused was so knit together as to make a network of circumstances pointing only to his guilt. ...His method was his own undoing;

because even the long arm of coincidence could not explain the multitude of circumstances against him, and they destroy the presumption of innocence with which law clothed him.‖

233. Thus, it has been proved beyond reasonable doubt that accused Manu Sharma absconded after the incident which is a very relevant conduct under Section 8 of the Evidence Act.‖ (Emphasis by us) 1607. Our attention has also been drawn to a judgment relied upon on behalf of Vishal Yadav reported at (2011) 11 SCC 754, S.K. Yusuf v. State of West Bengal where in para 31 it has been held as follows: -

> —31. Both the courts below have considered the circumstance of abscondance of the appellant as a circumstance on the basis of which an adverse inference could be drawn against him. It is a settled legal proposition that in case a person is absconding after commission of offence of which he may not even be the author, such a circumstance alone may not be enough to draw an adverse inference against him as it would go against the doctrine of innocence. It is quite possible that he may be running away merely on being suspected, out of fear of police arrest and harassment. (Vide Matru v. State of U.P. [(1971) 2 SCC 75 : 1971 SCC (Cri) 391 : AIR 1971 SC 1050], Paramjeet Singh v. State of

Uttarakhand [(2010) 10 SCC 439 : (2011) 1 SCC (Cri) 98 : AIR 2011 SC 200] and Dara Singh v. Republic of India [(2011) 2 SCC 490 : (2011) 2 SCC (Cri) 706]) Thus, in view of the law referred to hereinabove, mere abscondance of the appellant cannot be taken as a circumstance which gives rise to draw an adverse inference against him.‖ (Underlining by us) 1608. It therefore cannot be disputed that mere abscondance may not be of significance. However, abscondance by accused persons has to be read in confirmation with the other established circumstances. It cannot be disputed that the same would be relevant conduct under Section 8 of the Evidence Act. Furthermore such conduct for which there is no reasonable explanation except the hypothesis that he is guilty, can be held to be incriminatory.

1609. The discussion by the Supreme Court and the principles laid down in the judgment reported at AIR 2012 Supreme Court 3539 , Shyamal Ghosh v. State of West Bengal are extremely topical and apply with full force to the present case. In para 41 of the report, the court held as follows: -

―41. As we are discussing the conduct of the prosecution witnesses, it is important for the Court to notice the conduct of the accused also. The accused persons were absconding immediately after the date of the occurrence and could not be arrested despite various raids by the police authorities. The investigating officer had to go to different places i.e. Sodhpur and Delhi to arrest the accused persons. It is true that merely being away from his residence having an apprehension of being apprehended by the police is not a very unnatural conduct of an accused, so as to be looked upon as absconding per se where the court would draw an adverse inference. Paramjeet Singh v. State of Uttarakhand [(2010) 10 SCC 439 : (2011) 1 SCC (Cri) 98] is the judgment relied upon by the learned counsel appearing for the appellant. But we cannot overlook the fact that the present case is not a case where the accused were innocent and had a reasonable excuse for being away from their normal place of residence. In fact, they had left the village and were not available for days together. Absconding in such a manner and for such a long period is a relevant consideration. Even if we assume that absconding by itself may not be a positive circumstance consistent only with the hypothesis of guilt of the accused because it is not unknown that even innocent persons may run away for fear of being falsely involved in criminal cases, but in the present case, in view of the circumstances which we have discussed in this judgment and which have been established by the prosecution, it is clear that absconding of the accused not only goes with the hypothesis of guilt of the accused but also points a definite finger towards them. This court in the case of Rabindra Kumar Pal alias Dara Singh v. Republic of India [(2011 2 SCC 490)]: (AIR 2011 SC 1436: 2011 AIR SCW 606)], held as under:

―88. The other circumstance urged by the prosecution was that A-3 absconded soon after the incident and avoided arrest and this abscondance being a conduct under Section 8 of the Evidence Act,1872 should be taken into consideration along with other evidence to prove his guilt.

The fact remains that he was not available for quite some time till he was arrested which fact has not been disputed by the defence counsel. We are satished that before accepting the contents of the two letters and the evidence of PW 23, the trial Judge afforded him the required opportunity and followed the procedure which was rightly accepted by the High Court.‖ (Emphasis by us) 1610. Abscondance by the accused persons has to be construed in the facts and circumstances of each case. We have agreed with the finding of the learned trial judges that the appellants were absconding after the occurrence. The conduct of abscondance of the three appellants in the present case is relevant under Section 8 of the Evidence Act and has to be read in conjunction with the other evidence proved on record

by the prosecution. The appellants were away from their normal place of residence as well as business.

1611. The extensive evidence of the police efforts including coercive process made to trace out Vikas and Vishal Yadav from the 17th to 23rd February, 2002 at an interstate level stands established. Similar efforts with regard to Sukhdev Yadav which proved unsuccessful stand established. Given the depth and range of these efforts, it is impossible that the three appellants were not aware that they were wanted in the case registered by the UP police at Ghaziabad. They made no voluntary efforts to join the investigation.

1612. Sukhdev Yadav actually opened fire on the police party when he was challenged by it. Even though the party was not searching for him, recoveries of unauthorized arms and ammunitions was effected from his person.

1613. The reason for their absence has been held to be false by us.

Given the well settled principles of law, this conduct of the appellants is relevant and has to be considered an important link in the chain of circumstantial evidence against the appellants. It can be utilized as the missing link to complete the chain of circumstances proved against the appellants.

XVII Falsity of the defence plea - effect 1614. The appellants before us not only set up denials of invovement in the crimes but set up a case that the did not know the deceased, that he was not in their company and they were not at the alleged places at the time of the crime. The appellants led defence evidence to explain their whereabouts at the time of the commission of the crime and thereafter till they were arrested, in both trials. We have discussed above as to why these witnesses are not believable.

1615. What is the impact of the defence plea which is held to be false on the case against the accused?

1616. Mr. Dayan Krishnan has vehemently contended that such false plea alibi is an additional link in the chain of circumstances established by the prosecution. In support of this submission, reliance is placed on pronouncement reported at (2003) 9 SCC 86, Babudas v. State of M.P. (para 9 at pg 91), wherein the court held as follows:

> —4. ...We agree with the learned counsel for the respondent State that in a case of circumstantial evidence, a false alibi set up by the accused would be a link in the chain of circumstances as held by this Court in the case of Mani Kumar Thapa v. State of U.P., (2002) 7 SCC 157 :

2002 SCC (Cri) 1637, but then it cannot be the sole link or the sole circumstance based on which a conviction could be passed...‖ 1617. Mr. P.K. Dey, learned counsel for the complainant has also urged at some length before us that the chain of incriminating circumstances which have been proved by the prosecution coupled with the falsity of the defence plea provides an additional link to conclusively establishes the commission of the offences by the appellants.

In this regard, reliance is placed on the pronouncement of the Supreme Court reported at (2004) 10 SCC 786, Usman Mia and Ors. V. State of Bihar wherein the court had ruled as follows: -

> —23. ...Though falsity of the defence plea is not enough to bring the home accusations, it provides additional link to substantiate prosecution's accusations. In "State of Karnataka v. Lakshmanaiah", 1992 Supp (2) SCC 420 conduct of accused's abscondance from the date of occurrence till his arrest was considered to be a vital circumstance.‖ (Underlining by us) 1618. On the impact of false evidence being created by the accused persons to screen or absolve themselves from the liability for commission of an offence, reference may be made

to the pronouncement of the Supreme Court reported at (2012) 1 SCC 10, Prithipal Singh v. State of Punjab in para 78 of this judgment, the Supreme Court held as follows: -

—78. Most of the Appellants had taken alibi for screening themselves from the offences.

However, none of them could establish the same. The courts below have considered this issue elaborately and in order to avoid repetition, we do not want to re-examine the same. However, we would like to clarify that the conduct of accused subsequent to the commission of crime in such a case, may be very relevant. If there is sufficient evidence to show that the accused fabricated some evidence to screen/absolve himself from the offence, such circumstance may point towards his guilt. Such a view stand fortified by judgment of this Court in —Anant Chintaman Lagu v. The State of Bombay", AIR 1960 SC

500.‖ (Emphasis by us) 1619. We have also concluded above that the explanation tendered by the appellants in their statements under Section 313 of the Cr.P.C. with regard to the commission of the offence and thereafter is false. On the issue of an accused of giving a false answer as an explanation to an incriminating circumstance in his statement recorded under Section 313 of the Cr.P.C., in (2003) 1 SCC 359, Anthony D"souza v. State of Karnataka, the court observed that —by now it is a well established principle of law that in a case of circumstantial evidence where an accused offers false answer in his examination under Section 313 against the established facts, that can be counted as providing a missing link for completing the chain‖.

1620. It has also been urged before us that the appellants have failed to render any reasonable explanation with regard to the incriminating circumstances which were established in the evidence against them. In this regard, Mr. P.K. Dey, learned counsel for the complainant has placed reliance on the pronouncement of the Supreme Court reported at (2010) 1 SCC 199, Jayabalan v. UT of Pondicherry, wherein the failure of the appellant to afford a reasonable explanation for the presence of several burnt match sticks in the middle of the bathroom was held to _fortify' the court"s conviction that —the match stick was used for the purpose of burning the deceased‖.

1621. On the other hand, placing reliance on the judgment reported at (2010) 11 SCC 423 Nanhar and Ors. v. State of Haryana, learned counsel for the appellant has urged that a false defence is not a circumstance which can be used by the prosecution. This case did raise any question of evaluation of defence or the impact of defence found false on a prosecution case. The judgment is concerned with the principles governing circumstancial evidence and its evaluation. There can be no dispute with the principles discussed and laid down. We shall assess the proven circumstances in light thereof.

1622. The prosecution in the present case rests its case on circumstantial evidence. The accused persons have offered false answers and explanations in their examination under Section 313 of the Cr.P.C. as against established facts. In the light of the above noted well settled legal principle, these facts have also to be taken into consideration as a linkage for evaluation of the chain of circumstances established by the prosecution.

1623. The accused persons have also failed to render any reasonable explanation with regard to some of the incriminating circumstances which stood established against them. Vishal Yadav has not even ventured an explanation for his whereabouts between 17th of February, 2002 till 21st of February, 2002. This omission would also give strength to the case of the prosecution.

XVIII Vikas Yadav's interview with the press - whether admissible in evidence?

1624. The prosecution also led evidence in the trial of Vikas and Vishal Yadav of an interview given by Vikas Yadav to the media at Ghaziabad on 25th of February, 2002 in which there is evidence that he had a quarrel outside the gate at the wedding venue. The prosecution examined Ms. Rewati Lao, reporter correspondent of NDTV as PW-36 who had been working with NDTV since the 9th of September, 1996.

1625. The witness testified that on the 25 th of February, 2002, she had gone to the Ghaziabad court to cover the present case accompanied by the NDTV cameraman. Several press reporters were also present, one of whom asked questions of Vikas Yadav which were recorded by the NDTV cameraman in her presence. The tape recording was proved in her testimony on record as Ex.PW36/1. The witness testified that she was present on the spot when the questions were being asked and answers recorded in Exh PW 36/1 were given by Vikas Yadav and she had herself heard the conversation. The video tape was played in the court and the witness confirmed that it was a recording of the said conversation on the 25th of February 2002. The portion of her deposition setting out the exact questions put to Vikas Yadav and his answer may be extracted in extenso and read as follows:

> —Q. It is told that you have admitted to the police and confessed before police that you had a quarrel with them (Un se) Ans. By Vikas : I had a slight quarrel but I was not knowing who he is.
>
> The mike of the reporter was before Vikas Yadav accd. in the tape and the answer was given by Vikas.

Ans. I never knew who he is and what was his name. My quarrel had taken place outside the gate and thereafter I had no talk with him. He had not accompanied me or sat in my car nor any such thing else. No such thing had happened and I do not know from where such things are being invented. I learnt it later that there was a boy of such one with which I had a alteracation (TU TU MEIN MEIN) and there is nothing beyond it.‖ 1626. Revati Lau has testified that, while working on the tape, she had not changed the interview given by the accused person. Along with interview, she had only fixed stills of Nitish Katara and Bharti and other stills which were available with them and also put the „voice of the words‟ of the person who knew Hindi better.

1627. Vishal Yadav did not cross-examine the witness despite grant of opportunity. On behalf of Vikas Yadav, the counsel stated that he could not cross-examine the witness unless a copy of the tape was given to them.

1628. Before discussing the admissibility of this evidence, it is necessary to see the response of the two accused persons to this interview when its evidence was put to them in their statement under Section 313 Cr.P.C. So far as Vishal Yadav is concerned, his statement was recorded on 26th of April, 2007. Questions at serial nos. 213 and 214 and his answers thereto are important and read as follows:-

> —213. Ques. It is further in evidence against you that your co-accused Vikas Yadav was interviewed by reporter PW 36 Rewati Lal vide cassette Ex.PW36/1, what you have to say?
>
> Ans. I cannot reply the question without seeing the cassette.
>
> (At this stage, cassette Ex.C1 as contained in the sealed envelope with court seal is taken out and played).
>
> I have seen the cassette played today in the court for the first time. And as per the cassette he had given an interview to NDTV reporter.
>
> 214. Ques. It is further in evidence against you that you are also appearing in the cassette Ex.PW36/1, what you have to say?

A. It is correct that I am appearing in cassette Ex.PW36/1 while I was being taken to lock up.‖

(Underlining by us)

1629. Vikas Yadav's statement under Section 313 Cr.P.C. was recorded on the 14th of May, 2007. Question no. 222 and answer thereto deserves to be considered in extenso and reads as follows:-

―222. Ques. It is further in evidence against you that you were interviewed in connection with this case by reporter PW 36 Rewati Lal vide cassette Ex.PW36/1, what you have to say?

(question is objected to by the counsels as an application is pending on behalf of the accused in this regard and the accused has also sought that the cassette be played in the court, as such a sealed envelope with court seal is opened and cassette Ex.PW36/1 is taken out and played and accused is asked to give the answer to the question and the defence counsel has requested that judicial notice be taken of the fact that in the cassette played in the court the accused is being shown in PS of Madhya Pradesh. This will be taken care of at the time of final arguments. The defence counsel has further drawn my attention towards the application dtd.

24/4/07 whereby it is objected to the admissibility of the cassette in evidence being recorded in the presence of the police officials while the accused was in police custody and for taking necessary action against the media. So far the objection to the admissibility of the cassette in the evidence is concerned the accused being interviewed during the police custody, the same will be taken care of during final arguments. The request of the defence counsel vide this application that the interview taken by media person while accused was in police custody constitute a civil offence and an action be taken against media and that the application be decided before further recording his statement is of no consequence as for this reason the present case cannot be delayed further. The application will be decided in due course. The accused is asked to give answer to the question and is told that in case he refuses the observation will be made accordingly.) Ans. I have seen myself in the video cassette played in the court. I was tortured badly over there before I was interviewed. The inspector in the lockup had stubbed the cigarette buds. I have not made any incriminating statement of the media. The cassette played in the court is tampered as it is edited and I want that that original cassette containing the complete recording is obtained from the concerned person and played in the court. If the whole cassette is seen in original the things would be amply clear. I was never interviewed by Rewati Lal at all and it is a matter of record that due to non availability of the cassette at that time the witness could not be cross-examined. It does not from part of any seizure memo or of the list of documents to be relied upon by the prosecution.‖ (Underlining by us) 1630. As objection is raised on behalf of the appellant to the effect that the statement of Vikas Yadav in Exh PW36/1 was inadmissible as it is falls within the bar under Section 24 of the Indian Evidence Act. This is countered by Mr. Dayan Krishnan, learned Additional Standing Counsel for the State who points out that the statement recorded on the video tape was not in the nature of confession of a crime with which the appellants were charged, but was in the nature of

admission of certain facts admissibility whereof was not barred under Section 24 of the Evidence Act.

1631. We may usefully advert to the pronouncement of the Supreme Court report at (1976) 2 SCC 302 Veera Ibrahim v. State of Maharashtra at this stage. In this case, the appellant was arrested on suspicion of having committed an offence under Section 124 of the Bombay Police Act. The police dropped proceedings but informed the Customs Authority who opened the packages, inspected the goods and on finding them contraband goods, seized them under a panchnama. The Customs Authorities called the appellant and his companion to the customs house, took them into custody, and after due compliance with the requirements of law, the Inspector of Customs questioned the appellant and recorded his statement under Section 108 of the Customs Act. Subsequently, he was charged and tried for commission of offences under Section 135 A and B of the Customs Act, etc. The appellant objected to the admissibility of the said statement on the ground that it was hit by clause 3 of Article 20 of the Constitution of India and Section 24 of the Evidence Act. The discussion by the court sheds valuable light on the same objection which has been pressed before this court. In para 14, the court had summarized the facts which required to be established to attract the prohibition under Section 24 of the Evidence Act and in para 15 stated the legal position which paras read as follows:-

> —14. To attract the prohibition enacted in Section 24 of the Evidence Act, these facts must be established:
>
> —(i) that the statement in question is a confession;
>
> (ii) that such confession has been made by an accused person;
>
> (iii) that it has been made to a person in authority;
>
> (iv) that the confession has been obtained by reason of any inducement, threat or promise proceeding from a person in authority;
>
> (v)such inducement, threat or promise, must have reference to the charge against the accused person;
>
> (vi) the inducement, threat or promise must in the opinion of the court be sufficient to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him‖.
>
> 15. In the present case, Facts (i), (iv) and (vi) have not been established. Firstly, the statement in question is not a —confession‖ within the contemplation of Section 24. It is now well settled that a statement in order to amount to a —confession‖ must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of an incriminating fact, howsoever grave, is not by itself a confession. A statement which contains an exculpatory assertion of some fact, which if true, would negative the offence alleged cannot amount to a confession (see Pakala Narayana v. R. [AIR 1939 PC 47 : 66 IA 66 : 40 Cri LJ 364] ; Palvinder Kaur v. State of Punjab [AIR 1952 SC 354 : 1953 SCR 94 : 1953 Cri LJ 154] ; Om Prakash v. State [AIR 1960 SC 409 : 1960 Cri LJ 514])‖.

1632. Thus in Veera Ibrahim (supra), the court had found that the statement recorded by the Inspector of Customs was not a confession and that it was admissible in evidence under Section 21 of the Evidence Act as admission of incriminating facts.

1633. We have also adverted to in detail to the answers given by the two accused persons to questions put to them under Section 313 of the Cr.P.C. with regard to the video cassette and set out the answers given. Vikas Yadav does not dispute the recording and only makes unsubstantiated allegations of torture in custody. The interview is dated 25th of February 2002. The two brothers were brought to Ghaziabad early that morning, producted in the court of the CJM, Ghaziabad and lodged in judicial custody in the Ghaziabad jail. The accused were subjected to medical examination. They were produced before the CJM on the 27th of February 2002 when the IO, application for remand was considered. On 28 th February, 2002 after police remand they were again medically examined. Despite multiple application through counsels before the courts in Dabra and Ghaziabad, there is not a whisper of a grievance of torture.

1634. On the issue of non-availability of a copy of the tape, it has been pointed out that the videotape was played in court on a TV set during the testimony of PW-36 Revati Lao and was exhibited thereafter. It is pointed out that both the accused as well as counsel saw it and could have very well cross- examined the witness.

1635. It is apparent from the above that the cassette was played three times in the presence of the accused persons, i.e., firstly on the 11th of August, 2003 at the time of recording of testimony of PW-36 Revati Lau; secondly on 26th April, 2007 and thirdly on 14th May, 2007 when statements of Vishal and Vikas Yadav under Section 313 Cr.P.C. were respectively recorded. So far as the allegation that their having been tortured in the police custody at the PS Dabra is concerned, neither of the applicants made any complaint to any person or authority even though they had access to the best of legal assistance throughout, even before they were arrested.

1636. Interestingly, Vikas Yadav in his statement under Section 313 of the Cr.P.C. admits that he had seen the cassette Ex PW 36/1. He submitted that he was tortured by the police before the interview by cigarette buds. The learned trial judge has observed that no such injury marks were found on the body of the accused in the MLC dated 25th of February 2002. Vikas Yadav's allegations of torture in the lock up before the interview are also not corroborated by Vishal Yadav in his statement under Section 313 of the Cr.P.C. wherein he unequivocally admitted that the interview was given by Vikas Yadav. Admittedly, the CD features Vishal Yadav as well. Vishal Yadav makes no complaints of any torture by the police.

1637. Mr. Sumeet Verma, learned counsel appearing for Vikas Yadav has vehemently urged that the video cassette contains only an edited version and not the original recording. It is noteworthy that PW - 36 Revati Lau while explaining the nature of the editing, reiterated that she has not deleted the portion of the tape wherein the interview of the Vikas Yadav was recorded. As per Ravati Lau, while editing she has not deleted any part of the interview but has only added still photographs. Neither Vikas Yadav nor Vishal Yadav challenged this testimony in cross-examination. Therefore so far as the interview of Vikas Yadav is concerned, it stands proved in evidence.

1638. In the press interview, Vikas Yadav had made a statement of a skirmish outside the gate which statement was not confessional, but a mere admission and is therefore admissible in evidence. The interview and questions were with regard to the case in hand involving the murder of Nitish Katara. He has also suggested the identity of the person as Nitish Katara with whom there was a skirmish, when he refers to his not having accompanied him (Vikas) in the car.

1639. Mr. Dayan Krishnan learned Additional Standing Counsel has also urged that the statement under Section 313 of the Criminal Procedure Code is of value and utility even if it contains inculpatory statements. The principles in this regard were laid down in the pronouncement of the Supreme Court reported at (1998) 4 SCC 336 State of U.P. v. Lakhmi in paras 8 to 11 which read as follows:-

—8. As a legal proposition we cannot agree with the High Court that statement of an accused recorded under Section 313 of the Code does not deserve any value or utility if it contains inculpatory admissions. The need of law for examining the accused with reference to incriminating circumstances appearing against him in prosecution evidence is not for observance of a ritual in a trial, nor is it a mere formality. It has a salutary purpose. It enables the Court to be apprised of what the indicted person has to say about the circumstances pitted against him by the prosecution. Answers to the questions may sometimes be flat denial or outright repudiation of those circumstances. In certain cases accused would offer some explanations to incriminating circumstances. In very rare instances accused may even admit or own incriminating circumstances adduced against him, perhaps for the purpose of adopting legally ecognized defences. In all such cases the Court gets the advantage of knowing his version about those aspects and it helps the Court to effectively appreciate and evaluate the evidence in the case. If an accused admits any incriminating circumstance appearing in evidence against him there is no warrant that those admissions should altogether be ignored merely on the ground that such admissions were advanced as a defence strategy.

9. Sub-Section (4) of Section 313 of the Code contains necessary support to the legal position that answers given by the accused during such examination are intended to be considered by the Court. The words ―may be taken into consideration in such enquiry or trial‖ in sub- Section (4) would amount to a legislative guideline for the Court to give due weight to such answers, though it does not mean that such answers could be made the sole basis of any finding.

10. Time and again, this Court has pointed out that such answers of the accused can well be taken into consideration in deciding whether the prosecution evidence can be relied on, and whether the accused is liable to be convicted of the offences charged against him; vide: Sampath Singh v. The State of Rajasthan, (1969) 1 SCC 367 : 1969CriLJ1430 ; Jethamal Pithaji v. The Assistant Collector of Customs. Bombay and another (1974) 3 SCC 393 : 1974CriLJ621 and Rattan Singh v. State of Himachal Pradesh, (1997) 4 SCC 161 : 1997CriLJ833.

11. We make it clear that answers of the accused, when they contain admission of circumstances against him are not by themselves, delinked from the evidence be used for arriving at a finding that the accused had committed the offence.‖ (emphasis by us) 1640. Mr. Sumeet Verma, Advocate has urged that the video recording was in the teeth of the case of the prosecution as the prosecution was relying on the statement of PW 19 Jai Prakash and PW - 31 Umesh Kumar with regard to the presence of the deceased outside the Diamond Palace banquet hall. We have noted above that these witnesses turned hostile and their testimony has been completely disregarded by the learned trial judge with which we have agreed. But even if the altercation outside the venue was to be ignored, the admission by Vikas Yadav with regard to the presence of the appellant outside the venue as well as Nitish Katara at the same time is certainly undisputed.

1641. There can be no dispute with the criticism by the Supreme Court to interviews to the media in para 176 of 2005(11) SCC 600, State of (NCT of Delhi) v. Navjot Sandhu in the following circumstances:

―176. We may also refer to the contention advanced by Shri Ram Jethmalani, learned Senior Counsel appearing for S.A.R. Gilani with reference to the confession of Afzal. Shri Jethmalani contended that Afzal in the course of his interview with the TV and other media representatives, a day prior to the recording of a confession before the DCP, while confessing to the crime, absolved Gilani of his complicity in the conspiracy. A cassette

(Ext. DW-4/A) was produced as the evidence of his talk. DW-4, a reporter of Aaj Tak TV channel was examined. It shows that Afzal was pressurised to implicate Gilani in the confessional statement, according to the learned counsel. It is further contended by Shri Jethmalani that the statement of Afzal in the course of media interview is relevant and admissible under Section 11 of the Evidence Act. Learned counsel for Afzal, Shri Sushil Kumar did not sail with Shri Jethmalani on this point, realising the implications of admission of the statements of Afzal before the TV and press on his culpability. However, at one stage he did argue that the implication of Gilani in the confessional statement conflicts with the statement made by him to the media and therefore the confession is not true. We are of the view that the talk which Afzal had with the TV and press reporters admittedly in the immediate presence of the police and while he was in police custody, should not be relied upon irrespective of the fact whether the statement was made to a police officer within the meaning of Section 162 Cr.P.C. or not. We are not prepared to attach any weight or credibility to the statements made in the course of such interview prearranged by the police. The police officials in their over-zealousness arranged for a media interview which has evoked serious comments from the counsel about the manner in which publicity was sought to be given thereby.

Incidentally, we may mention that PW 60 the DCP, who was supervising the investigation, surprisingly expressed his ignorance about the media interview. We think that the wrong step taken by the police should not enure to the benefit or detriment of either the prosecution or the accused.‖ 1642. The Supreme Court had found that the interview had been prearranged by the police which action stands deprecated. In the present case, there was no prearrangement. In fact the NDTV cameraman team recorded the question being put to Vikas Yadav by some other member of the press and his response thereto incidentally. The criticism by the Supreme Court therefore does not apply to the instant case.

1643. Furthermore, in his statement recorded under Section 313 of the Cr.P.C. Vikas Yadav has not disputed the statement on the video tape. In the statement, he has explained his presence outside the venue. Vishal Yadav has admitted the fact that an interview was given by Vikas Yadav in his statement recorded on 26th April, 2007 under Section 313 Cr.P.C. It cannot be disputed that the admission of the accused Vikas Yadav about his presence immediately outside the venue as well as the altercation (_tu tu me me') with the person Nitish Katara is relevant under Section 17 of the Indian Evidence Act, 1872, admissible in evidence and along with the other evidence established on record goes a long way in corroboration their presence together outside the wedding venue.

XIX Abduction and defect in framing charge 1644. Mr. Ram Jethmalani, learned senior counsel appearing for Vishal Yadav has contended that the trial court proceeded on the basis that the case was one of kidnapping and not of abduction, which is evident from the framing of the charge. It has been further submitted that there has been no amendment of the charge which was framed and therefore benefit has to enure in favour of the appellant.

1645. It is urged that the prosecution case of abduction was also not part of the charge laid against Vishal Yadav. The contention is that deceit cannot be assumed without there being any evidence thereof.

1646. It has been objected that the learned judge has found Vishal Yadav guilty for commission of an offence under section 364 of the IPC after considering the ingredients laid down under Section 362 of the IPC. It is urged that the appellants having not been charged with kidnapping, could not have been charged for abduction of Nitish Katara. The submission is that abduction is not a lesser offence to a charge of kidnapping. Learned senior counsel has contended that it is in evidence that phone contact was established with Nitish Katara at about 12.58 a.m. on 17th February, 2002 when Nitish Katara told his friend that he was at IMT, Ghaziabad, which shows that he had no fear or apprehension for his life

at that time. Even if it could be held that Nitish was in the company of the accused persons, there is no evidence at all of use of force or any deceitful means.

It is, therefore, urged that the learned trial judge has completely fallen into error in finding the appellant guilty of having committed the offence under Section 362 of the IPC.

1647. Mr. Ram Jethmalani has drawn our attention to Section 359 of the Indian Penal Code to urge that the accused persons have been wrongly charged with kidnapping Nitish Katara. It is urged that the offence under Section 359 is not made out at all. Even if the prosecution was to urge that Nitish Katara had been abducted by the accused persons, it was necessary for the prosecution to bring home the charge under Section 362 of the IPC to lead evidence of force or use of deceitful means by the accused persons while they were at the Diamond Palace.

1648. Learned counsel has drawn our attention to the questions put to Vishal Yadav in his examination under Section 313 of the Cr.P.C. In particular, reference has been made to question no.25, 40 and 168. It has been pointed out that while question nos. 25 and 40 referred to abduction, in question 168, reference has been made to kidnapping.

1649. Mr. U.R. Lalit, learned senior counsel appearing for Vikas Yadav has also submitted that there is no evidence to show that the person who came to call Nitish while he was taking dinner was the accused Vishal Yadav. The reasoning of the trial judge is based on the assumption that Vishal Yadav stood identified and hence this should be disbelieved. Bharat Diwakar did not identify Vishal Yadav. No Test Identification Parade (TIP) was conducted. There was a gathering of 600-700 persons, none of those persons have been examined as a witness to prove that the said person was Vishal Yadav. If there is no identification then there is a basic flaw in the case of abduction. The burden is therefore on the prosecution to show that Nitish Katara was taken by the accused by deceitful means.

1650. The charge framed by the Addl. Sessions Judge, New Delhi has already been extracted by us. It refers to Nitish Katara being kidnapped from Diamond Place, Shastri Nagar on the night of 16th and 17th February, 2002 at about 12:30 (midnight) with the intention to murder him and thereby the accused Vikas and Vishal Yadav along with Sukhdev @ Pehalwan committed the offence punishable under Section 364 read with Section 34 of the IPC.

1651. It is argued by ld. counsel for the appellants that the evidence collected by the prosecution shows that Nitish Katara was not forcibily taken into the car by the accused persons and that he had gone willingly with the accused persons in the car. It was vehemently submitted by the defence that since the element of force was missing, no offence under Section 364 of the IPC is made out.

1652. Reliance is placed on behalf of Vikas Yadav on the pronouncement of the Supreme Court reported at (1975) 3 SCC 822, Kundan Singh v. Delhi Administration. This judgment was rendered on the facts of the case and does not lay down any absolute binding legal principle.

1653. On behalf of the appellant Sukhdev Yadav, Mr. Kapoor also submits that there is also no evidence to prove involvement of the appellant Sukhdev in the abduction of Nitish Katara. It is contended that the prosecution has failed to prove any use of force or use of deceitful means made by Sukhdev which are the essential ingredients to bring home the charge under Section 362 or Section 364 of the IPC.

1654. So far as the reference to kidnapping in the charge framed against the accused persons is concerned, it is necessary to note that the prosecution had attempted to prove the offence of abduction against the accused persons. A reading of the order on charge dated 23rd November 2002, which was framed after hearing arguments of the parties on charge though uses the expression ―kidnap‖, but it

unequivocally refers to commission of offences punishable under Section 364 of the IPC which describes kidnapping or abducting in order to murder.

1655. The defence's understanding of the prosecution case against the accused persons is evident from their arguments on charge which have been noticed in para 4 of the order dated 23rd November 2002 of the trial court which recorded its finding as follows: -

> —4. ...It is argued by counsel for accused persons that the evidence collected by the prosecution shows that Nitish Katara was not forcibly taken into the car by the accused persons and he had willingly gone with the accused persons in the car. Therefore, it was not a case of Sec.364 IPC. It is vehemently submitted that since the element of force was missing, no charge u/s 364 IPC is made-out. A perusal of sc.364 IPC shows that the element of force at the time of abduction or taking away a person is not an essential ingredient of the offence. A person may be kidnapped by deceitful means. It is not necessary that kidnapping is done by applying force - a person may be told that his brother or mother is ill or has met with an accident and then may be taken along and later on, on the way, he is told that he has been kidnapped. xxx xxx.
>
> 5. xxx I consider that evidence of last-seen together coupled with the evidence of absconding of accused persons, their so-called arrest by MP Police, thereafter, recoveries at the instance of accused persons of the belongings of deceased Nitish Katara, recovery of hammer allegedly used in the crime, recovery of vehicle used in the crime and other incriminating evidence, coupled with the fact that dead body of deceased was found on the road, completely naked and burnt by pouring inflammable substance on it, so that it may not be identified, sufficiently make-out a prima facie case against the accused persons u/s 364, 302 and 201 IPC r/w sec. 34 IPC.

I, therefore, direct that charges u/s 364, 302 and 201 IPC r/w sec. 34 IPC be framed against both these accused persons....‖ 1656. The learned trial judge has referred to removal by deceitful means which is to be found only in Section 362 which defines _abduction' as:

> —Abduction. - Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.‖ It is apparent from the above that the use of the expression _kidnapping' is clearly erroneous because reference is clearly made to the ingredients of the offence of _abduction'.

1657. So far as the compulsion or inducement of any person to go from any place is concerned, the same is clarified by Illustration (b) to Section 364 of the IPC, which is to the following effect: -

> —364. Kidnapping or abducting in order to murder.
>
> xxx xxx xxx
>
> Illustrations
>
> (a) xxx xxx xxx
>
> (b) A forcibly carries or entices B away from his home in order that B may be murdered. A has committed the offence defined in this section.‖ 1658. It is thus evident that abduction can either be by force or by inducement. The word —induce‖ means —to lead into‖ and —deceit‖ signifies being —misled‖. In this regard reference has been made to the judgment

of the Supreme Court reported at (2004) 8 SCC 95, Malleshi v. State of Karnataka wherein the Supreme Court held as follows: -

—9. Abduction is defined in Section 362. The provision envisages two types of abduction i.e.:

(1) by force or by compulsion; and/or (2) inducement by deceitful means. The object of such compulsion or inducement must be the going of the victim from any place. The case at hand falls in the second category.‖ (Underlining by us) 1659. The basis of the order dated 23rd November, 2002 on the charge appears to be relatable to the illustration (b) of Section 364 of the IPC. It is clearly evident that the accused persons had no manner of doubt that they were facing a case of abduction for murder and not kidnapping. At the end of the discussion in the order the judge has clearly directed framing of a charge against the accused persons, inter alia under Section 364 of the IPC. The ingredients of the charge which was framed by the trial court also indicate that the abduction was within the territory of India. No case of kidnapping was alleged against the accused persons. It would, therefore, appear that erroneously the judge has used the expression —kidnapping‖ as synonymous with the expression —abduction‖.

There is, therefore, substance in the submission of the State that the use of the expression —kidnapping‖ in the charge is, at the highest, merely an error. However use of the correct statutory provision for the offence in the charge itself clearly indicates the reference to abduction, and not kidnapping.

1660. So far as the effect of errors in the statement of charge are concerned, Section 215 of the Cr.P.C. would guide our consideration. It is clearly stated in Section 215 of the Cr.P.C. that -

—Effect of errors. - No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused as in fact misled by such error or omission, and it has occasioned a failure of justice.‖ 1661. It is settled legal position that a defect in the frame of the charge is a mere irregularity and does not affect the conviction unless the accused shows that he has suffered substantial prejudice. The observations of the Supreme Court in (1955) 2 SCR 1140, Willie (William) Slaney v. The State of Madhya Pradesh in this regard may be adverted to-

—First of all, sections 221 to 223 of the Code, which undoubtedly envisage a formal written charge, set out what a charge must contain. A perusal of them reveals the reasons why a charge is required. It must set out the offence with which the accused is charged and if the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated —as to give the accused notice of the matter with which he is charged‖. The charge must also contain such particulars of date, time, place and person "as are reasonably sufficient to give the accused notice of the matter with which he is charged‖; and section 223 says-

—When the nature of the case is such that the particulars mentioned in sections 221 and 222 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.‖ It is clear to us that the object of the charge is not to introduce a provision that goes to the root of jurisdiction as, for example, the requirement of previous sanction under section 197, but to enable the accused to have a clear idea of what he is being tried for and of the essential facts that he has to meet. But there are other ways of conveying this information. For example, in summons cases no

formal charge is required: all that is necessary is to tell the accused the substance of the accusation made against him (section 242). The whole question is whether, in warrant cases and in sessions trials, the necessary information must be conveyed in one way and one way only, namely in a formal charge in order that the entire trial may not be ipso facto vitiated because of an incurable illegality, or whether that can be done in other and less formal ways, provided always that it is in fact conveyed in a clear and unambiguous manner and in circumstances that the court will regard as fair and in substantial, as opposed to purely technical, compliance with the requirements of the Code. The law could have provided one way as easily as another, but what it has chosen to do is set out in the following sections.

The marginal note to section 225 is headed "Effect of errors" and the section states that -

"No error in stating either the offence or the particulars require to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice".

Therefore, when there is a charge and there is either error or omission in it or both, and whatever its nature, it is not to be regarded as material unless two conditions are fulfilled both of which are matters of fact : (1) the accused has in fact been misled by it and (2) it has occasioned a failure of justice. That, in our opinion, is reasonably plain language.

Next, sections 226 and 227 show that errors in a charge, and even the total absence of a charge, do not vitiate a trial from the start so as to render it no trial at all as would the absence of sanction under section 197. This is evident because these errors and omissions can be remedied at any time during the course of the trial in the sessions Court (section 225) or even at the very end of the trial (section 227), and when this is done the trial need not proceed de novo but can go on from the stage at which the alteration was made provided neither side is prejudiced (section 228). That is conclusive to show that no error or omission in the charge, and not even a total absence of a charge, cuts at the root of the trial. The proceedings up to the stage of the alteration, which, as we have seen, can be at the very end of the trial, are not vitiated unless there is prejudice; they are good despite these imperfections. That is impossible when the error is so vital as to cut at the root of the trial. It follows that errors in the charge, and even a total absence of a charge, are not placed in the non-curable class. ‖ 1662. On the same issue in 2012 (8) SCALE 457 Bhimanna v.

State of Karnataka reliance was placed on authoritative precedents and principles reiterated observing as follows: -

—18. In such a fact-situation, a question also arises as to whether a conviction under any other provision, for which a charge has not been framed, is sustainable in law. The issue is no longer res integra and has been considered by the Court time and again. The accused must always be made aware of the case against them so as to enable them to understand the defence that they can lead. An accused can be convicted for an offence which is minor than the one, he has been charged with, unless the accused satisfies the Court that there has been a failure of justice by the non-framing of a charge under a particular penal provision, and some prejudice has been caused to the accused. (Vide: Amar Singh v. State of Haryana, AIR 1973 SC 2221).

Further the defect must be so serious that it cannot be covered under Sections 464/ 465 Cr.P.C., which provide that an order of sentence or conviction shall not be deemed to be

invalid only on the ground that no charge was framed, or that there was some irregularity or omission or misjoinder of charges, unless the court comes to the conclusion that there was also, as a consequence, a failure of justice. In determining whether any error, omission or irregularity in framing the charges, has led to a failure of justice, this Court must have regard to whether an objection could have been raised at an earlier stage, during the proceedings or not. While judging the question of prejudice or guilt, the court must bear in mind that every accused has a right to a fair trial, where he is aware of what he is being tried for and where the facts sought to be established against him, are explained to him fairly and clearly, and further, where he is given a full and fair chance to defend himself against the said charge (s).

19. This Court in Sanichar Sahni v. State of Bihar, AIR 2010 SC 3786, while considering the issue placed reliance upon various judgments of this Court particularly in Topandas v. State of Bombay, AIR 1956 SC 33; Willie (William) Slaney v. State of M.P., AIR 1956 SC 116; Fakhruddin v. State of Madhya Pradesh, AIR 1967 SC 1326; State of A.P. v. Thakkidiram Reddy, AIR 1998 SC 2702; Ramji Singh and Anr. v. State of Bihar, AIR 2001 SC 3853; and Gurpreet Singh v. State of Punjab, AIR 2006 SC 191, and came to the following conclusion:

―Therefore,.... unless the convict is able to establish that defect in framing the charges has caused real prejudice to him and that he was not informed as to what was the real case against him and that he could not defend himself properly, no interference is required on mere technicalities. Conviction order in fact is to be tested on the touchstone of prejudice theory.‖ A similar view has been reiterated in Abdul Sayeed v. State of Madhya Pradesh, (2010) 10 SCC 259.‖ 1663. This position of law was followed by the Supreme Court also in (2009) 12 SCC 546, Annareddy Sambasiva Reddy and others v. State of Andhra Pradesh stating thus:

―55. In unmistakable terms, Section 464 specifies that a finding or sentence of a court shall not be set aside merely on the ground that a charge was not framed or that charge was defective unless it has occasioned in prejudice. Because of a mere defect in language or in the narration or in form of the charge, the conviction would not be rendered bad if accused has not been adversely affected thereby. If the ingredients of the section are obvious or implicit, conviction in regard thereto can be sustained irrespective of the fact that the said section has not been mentioned.

56. A fair trial to the accused is a sine qua non in our criminal justice system but at the same time procedural law contained in the Code of Criminal Procedure is designed to further the ends of justice and not to frustrate them by introduction of hyper-technicalities. Every case must depend on its own merits and no straightjacket formula can be applied; the essential and important aspect to be kept in mind is: has omission to frame a specific charge resulted in prejudice to the accused.‖ 1664. In view of the objection urged by Mr. Jethmalani, learned senior counsel on behalf of Vishal Yadav, it is necessary to notice the manner in which questions were put to the accused persons and their respective answers. Question Nos.

15, 25, 33, 34, 40 and 45 along with their answers read as follows: -

―15. Ques: It is further in evidence against you that the marriage of Ms.Shivani Gaur was attended by you alongwith your co accused Vikas Yadav and Sukhdev Yadav. What have you say?

A: Myself and accused Vikas Yadav had attended the marriage but accused Sukhdev Yadav was not with us.

25. Ques: It is further in evidence against you that you and your co accused Vikas Yadav as well as your uncle DP Yadav were against the relationship of Nitish Katara with Bharti Yadav due to which you alongwith your co accused persons abducted Nitish Katara on the intervening night of 16/17.2.2002 from outside the Diamond Palace Kavi Nagar, Ghaziabad and thereafter murdered him and burnt his body so that same could not be identified and tried to destroy the evidence. What have you to say? A. It is incorrect. I did not even know Nitish Katara.

33. Ques: It is further in evidence against you that on 17/02/02 complainant Nilam Katara from her cell phone No.9810206299 and landline Nos.3747555 and 3366629 called several times to your cousin sister Bharti Yadav on her cell Phone No.9810038469 to ascertain the whereabouts of Nitish Katara upon which Bharti Yadav replied that she was also trying to contact Nitish on his cell phone, but there was no response. What have you to say?

A: I do not know.

34. Ques: It is further in evidence against you that your cousin sister Bharti Yadav called from her cell phone No.9810038469 to Bharat Diwakar on his mobile phone No.9810154964 at 4.06 am. What have you to say?

A: I do not know.

40. Ques: It is further in evidence against you that on 17/02/02 complainant lodged a complaint Ex.PW 1/1 in the PS Kavi Nagar Ghaziabad, UP, against you and your co accused persons regarding the abduction of Nitish Katara, from Diamond Place. What have you to say?

A: I came to know later on that a false report had been lodged against me and my cousin Vikas Yadav.

45. Ques: It is further in evidence against you that the police searched you and your co accused persons Vikas Yadav and Sukhdev Pehlwan but you were found missing at the given addresses despite efforts made by the IO to search you. IO also prepared search memos Ex.PW 35/2 and Ex.PW 35/3 respectively. You were not found present even at 15, Balwant Rai Mehta Lane in Delhi Government accommodation allotted to your uncle Mr.DP Yadav being an MP. What have you to say?

A: It is incorrect.‖ 1665. So far as the examination of Vishal Yadav under Section 313 of the Cr.P.C. is concerned, Question Nos. 18, 20, 23 to 25 and 40 also deserve to be noticed and read as follows: -

―18. Ques Do you know Nitish Katara? Ans. I do not know Nitish Katara the deceased.

20. Ques: It is further in evidence against you that Nitish Katara (now deceased) was present at Diamond Palace on the intervening night of 16/17.2.02 in the marriage function of Shivani Gaur and was wearing a red coloured kurta and while coloured churidar pajama with a white shawl on his shoulder. What have you to say?

A: I do not know since I do not know any Nitish Katara.

23. Ques: It is further in evidence against you that outside the Diamond Palace banquet hall your co accused Vikas Yadav had a quarrel with deceased Nitish Katara (now deceased), what do you say?

A. It is incorrect.

24. Ques: It is further in evidence against you that thereafter you alongwith your co accused persons Vikas Yadav and Sukhdev Yadav took the deceased Nitish Katara in Tata Safari bearing No.PB 07 H 0085 towards Hapur Chungi. What have you to say?

A: It is incorrect.

25. Ques: It is further in evidence against you that you and your co accused Vikas Yadav as well as your uncle DP Yadav were against the relationship of Nitish Katara with Bharti Yadav due to which you alongwith your co accused persons abducted Nitish Katara on the intervening night of 16/17.2.2002 from outside the Diamond Palace Kavi Nagar, Ghaziabad and thereafter murdered him and burnt his body so that same could not be identified and tried to destroy the evidence. What have you to say?

A: It is incorrect. I did not even know Nitish Katara.

40. Ques: It is further in evidence against you that on 17/02/02 complainant lodged a complaint Ex.PW 1/1 in the PS Kavi Nagar Ghaziabad, UP, against you and your co accused persons regarding the abduction of Nitish Katara, from Diamond Palace. What have you to say?

A: I came to know later on that a false report had been lodged against me and my cousin Vikas Yadav.‖ 1666. In the instant case, the accused persons were fully put to notice on the charge against them and the allegations which they had to meet. The accused persons understood the same rightly and clearly. No argument at all was laid on any prejudice resulting to them.

1667. The case of abduction and murder was clearly put to both the accused persons under Section 313 of the Cr.P.C., as detailed hereinabove. There was no misunderstanding or prejudice caused to the accused persons on account of the use of the expression ―kidnapping‖ in the charge.

The objection on behalf of the appellants premised on defect in framing the charge therefore has to be rejected.

1668. It is noteworthy that the evidence on record would show that the prosecution had attempted to prove the offence of abduction and not kidnapping against the accused persons. PW-25, Bharat Diwakar has testified that Nitish Katara was taken away from Shivani Gaur's wedding by a young person. In his statement, he has stated that he later came to know that the person was named Vishal.

1669. PW-36 Revati Lau of NDTV has produced a recording wherein Vikas Yadav refers to an altercation ostensibly with Nitish Katara immediately outside the marriage venue. PW- 32, Constable Satender Pal Singh (who was examined as PW-10/A in Sukhdev Yadav's trial) establishes that the accused persons and a person in a red kurta were together in the Tata Safari vehicle around 12.30 a.m. on the night intervening 16/17th February, 2002. PW-33 Ajay Katara (PW-14 in Sukhdev Yadav's trial) has also testified that the accused and Nitish Katara were seen together in a Tata Safari vehicle at the Hapur Chungi. When this evidence was put to Vishal Yadav in the Section 313 examination as Question Nos. 16 to 20, 22 to 26 and to Vikas Yadav as Questions Nos. 22 to 28, 30, 32 to 36, they took up a stand that they did not even know Nitish Katara and merely denied the entire evidence.

1670. In order to displace the prosecution story of Nitish having been abducted by the appellants, Mr. Ram Jethmalani has heavily relied on a statement attributed to Nitish Katara in a phone call on the fateful night. Mr. Jethmalani has emphasized that Gaurav Gupta has claimed that at about 12.58 am, he had established mobile contact with Nitish who had informed him that he was at the IMT, Ghaziabad. The submission is that this statement falsifies not only the last seen evidence of Ajay Katara but also the prosecution case that Nitish had been abducted.

1671. It is further urged by Mr. Jethmalani, learned senior counsel that the testimony of PW-26 Gaurav Gupta establishes that Nitish was alive at 12:58 am at the IMT; that Nitish was suffering from no tension at all and was entertaining an expectation of soon meeting his friends to whom he had not said goodbye. It is further urged that the testimony shows that Nitish was nurturing no suspicion or doubt that he would be killed by his then companions and his state of mind was inconsistent with the murder. Learned senior counsel would contend that even if the inadmissible evidence led on record was accepted, still there is nothing to support the conviction of Vishal Yadav.

1672. It is contended that evidence of the witness who says that he heard Nitish's phone call is a relevant fact within the meaning of Section 3 of the Evidence Act. In this regard, reliance is placed on the pronouncement of the Calcutta High Court reported at AIR 1942 Cal 498 Smt. Bibhabati Devi W/o Kumar Ramindra Narayan Roy v. Kumar Ramindra Narayan Roy and the Privy Council decision rejecting the appeal therefrom reported at AIR 1947 P.C. 19 Smt. Bibhabati Devi v. R.N. Roy (Paras 16, 17 and 18).

1673. Learned senior counsel has contended that the statement of Gaurav Gupta that the deceased told him on the phone that he was at the IMT was admissible in evidence as a circumstance of making the statement, but it was not proof of its contents or truth.

1674. Our attention has been drawn to the evidence of Gaurav Gupta (recorded as PW-26 in Vikas and Vishal's trial) recorded on 4th of April, 2003 who had also been invited to attend the marriage of Shivani Gaur, a batchmate and had come for this purpose from Faizabad. This witness states that he had arrived on the same night when the marriage was to take place. Gaurav Gupta's cell phone did not have roaming facility. Accompanied by his friends Bharat Diwakar and Nitish Katara, Gaurav Gupta had gone for taking the meal around 12/12.15 on that night.

1675. While having dinner together, he had gone to replenish his plate and when he returned, Nitish was gone and only Bharat was there. The witness further states that at that time, they had not finished their meal. We have already noticed in detail the prosecution evidence with regard to Nitish Katara abruptly leaving the company of his friends at dinner.

1676. The witness also stated that as he did not have roaming facility on his mobile phone, he had given the phone number of Bharat or Nitish to his friend Yashoman Tomar who had informed vide a message about 10/15 minutes after he had replenished his plate that he (Yashoman) was waiting for him outside the Banquet Hall. Yashoman was using mobile phone having no. 9811220691.

1677. Gaurav Gupta has testified that he left the marriage pandal around 12.45 a.m. or 1 a.m. in the night with Yashoman Tomar. As Nitish had not returned, before leaving Gaurav had tried to call Nitish Katara on his mobile from the marriage venue. The witness was unable to recollect as to whether he had used the cell phone of Yashoman Tomar or that of Bharat Diwakar to bid farewell to him.

1678. Before considering the truth of the testimony of Gaurav Gupta, it is necessary to consider a few essential facts about his evidence. Gaurav Gupta testified that he was able to connect with Nitish's cell phone at that time and that he had asked Nitish where he was and also told him that he was leaving. As per Gaurav Gupta's testimony, Nitish told him that he was at the IMT and that he would contact him. This was an improvement over his previous statement made under Section 161 of the Cr.P.C.

1679. The witness was consequently confronted by the ld. Special PP with portion _A' to _A' of his statement to the police recorded on 26th March, 2002, (Exh.PW-26/1) wherein Gaurav Gupta had stated that ―maine Yashoman ke mobile phone no.981122691 se Nitish Katara ke mobile par baat ki aur maine kaha ki tum to bina bataye hi chale gaye to Nitish koi sahi jawab nahin de paya tha aur tab tak telephone cut gaya thaǁ (which translates as: ―he had told Nitish that he (Nitish) had left the marriage pandal without informing; that Nitish could not give any correct answer and by that time the telephone got disconnected"). Exh.PW-26/1 clearly indicates that Nitish Katara was under pressure and unable to respond to calls received on his cell phone.

1680. After going through the statement, the witness stated that Ex.PW26/1 was the statement made by him to the police except that he had contact with Nitish Katara on the cell phone.

1681. On the 10th of July, 2003 while recording the evidence of the Investigating Officer SI J.K. Gangwar (PW 34), the ld. Trial Judge had put court questions to him. In answer to one court question, SI J.K. Gangwar has disclosed that Gaurav Gupta was the son of a retired High Court Judge who had called him to their Gomti Nagar in Lucknow for recording his son's statement.

SI J.K. Gangwar has stated that Gaurav Gupta's father was sitting along his side at the time of recording Exh.PW26/1 and that the Investigating Officer had correctly recorded whatever Gaurav Gupta had told him.

1682. SI J.K. Gangwar has also testified that after Gaurav Gupta's statement was recorded, he had read it over to Gaurav Gupta in the presence of his father (including the portion _A to A' with which Gaurav Gupta was confronted in court) and neither Gaurav Gupta nor his father told him that he had recorded his statement incorrectly. SI J.K. Gangwar also testified that nothing was added to or deleted in the statement. SI J.K. Gangwar was not cross-examined on this testimony.

1683. The statement of Bharat Diwakar under Section 161 of the Cr.P.C. was recorded by the investigating officer in the presence of his father who was ADG Spl. Operations and was at that time posted at Bhopal. In this statement, Bharat Diwakar had stated that they were unable to make contact with Nitish Katara on his mobile. However, while testifying as PW-25 in the first trial on 3rd April, 2003, Bharat Diwakar had also attributed a cell phone contact between Gaurav Gupta and Nitish.

1684. It is in the evidence of Investigating Officer that the statements under Section 161 of the Cr.P.C. were recorded in the case diary as per the requirement in U.P. They were not on any loose paper. We have noted that investigation in the present case was throughout subjected to judicial scrutiny.

1685. As against this improved testimony, we have the evidence of Ajay Katara who testified that he had seen the accused persons with the deceased between 12:20 and 12:30 a.m. near Hapur Chungi, Ghaziabad. They were moving in the Tata Safari vehicle driven by Vikas Yadav.

1686. In this regard, our attention has been drawn to the call record details proved by the prosecution which shows that at around 12:58 am, Nitish was in the Raj Nagar area.

1687. Though no site plan has been placed on the trial court record showing the location of Diamond Palace, Banquet Hall; Hapur Chungi and the IMT, all counsels appearing in the matter have placed reliance on maps of the area which are in the public domain. It is evident from these that Diamond Palace, Hapur Chungi and IMT are in the same area and in close proximity.

The location of Nitish's phone as per the tower details when the call at 12.58 a.m. was received on it, thus proves that the deceased was present in the Hapur Chungi area at that time. Rather than contradicting the testimony of Ajay Katara, this call in fact fortifies the testimony of the witness.

1688. Even if we were to accept that Nitish told Gaurav Gupta at 00:58 hours that he was IMT, this statement does not establish that Nitish was comfortably ensconsced in pleasant company. IMT is not a hotel or restaurant or a public place open to the public all night. It is an educational institute which would be opening and closing during regular day light hours. It is common experience that colleges and school simply empty out gradually after the last bell rings. The appellants do not say that the IMT was any different. In the middle of the night, there would be little possibility of presence of any people.

So if he was actually there, what were the appellants and Nitish Katara doing in an empty educational institute in the middle of the night? If Nitin actually spoke to Gaurav Gupta, it was the last conversation anybody had with Nitish. In our view, this by itself is an extremely suspicious circumstance which points to the culpability of the appellants who having abducted Nitish took him to a lonely educational institution in the middle of the night. The statement attributed to Nitish by Gaurav Gupta therefore nowhere suggests the innocence of the appellants.

1689. So far as attempts to reach Nitish on the cell phone are concerned, reference also deserves to be made also to the testimony of Bharat Diwakar (PW-25 in the first trial) who stated that at about 12:00 - 12:15 a.m. (night of 16th /17th February, 2002) he had noted that Nitish had not re-joined them at dinner and that he was also not at the wedding venue. He states that ―we‖ (Gaurav Gupta and Bharat Diwakar) called up Nitish around 12:00 - 12:15 a.m. on his cell phone but could not get through.

1690. Interestingly, contrary to the evidence of the call records as well as his statement under Section 161 of the Cr.P.C., Bharat Diwakar has also attempted to introduce contact between Gaurav Gupta and Nitish Katara. He made no disclosure of any such information about Nitish_s location to Nilam Katara after he returned alone to her home despite her worried queries to him.

1691. It is intriguing that Gaurav Gupta does not even recollect whose phone he used to call Nitish, i.e., whether it was Yashoman Tomar's cell phone or Bharat Diwakar's cell phone. Yet he attributes a definite statement to Nitish. Despite being Nitish's friends, Bharat Diwakar and Gaurav Gupta did not attend his funeral or visit the family to pay their condolences.

1692. It is Gaurav Gupta's evidence that only after he received a message from Yashoman Tomar that he had arrived to pick Gaurav up, that he made efforts to track Nitish. It is therefore evident that Yashoman Tomar would have been present when Gaurav Gupta was trying to phone Nitish from his (Yashoman's) cell. Yashoman Tomar as PW 20 does not refer to any disclosure by Nitish of his whereabouts.

1693. If Gaurav Gupta had actually made contact with the deceased, reasonable conduct would have been for Nitish Katara to apologize for leaving so suddenly; explain the reason for his abrupt departure as well as inform his friend about when he was returning to join them. Instead a crude statement of a location is attributed as having been made by Nitish Katara at that early an hour on the 17th of February, 2002. This is certainly neither natural nor normal. If Nitish had actually told Gaurav Gupta that he was at the IMT, would these two, again educated, well connected friends of Nitish, have overlooked telling the police of this crucial fact? If true, it was a vital fact which required to be investigated.

1694. The ld. trial judge has righlty held that the fact that they made improvements in their previous statement over identical facts and tried to introduce a conversation with Nitish at 00:58 hours is a telling circumstance by itself. So far as Bharat Diwakar is concerned, he has not only made this improvement but has attempted to conceal the identity of Vishal Yadav as the person who had called away Nitish Katara clearly manifesting the correctness of the observations made by the ld. trial court.

1695. The ld. Trial Judge has rightly held that Gaurav Gupta had been influenced by the accused persons and that Bharat Diwakar had been won over.

1696. As per Ex.PW21/1, call records relating to Nitish Katara's cell phone, after 23:24:28 hrs. (11:24 pm), Nitish's cell phone reflects that he also received three phone calls from cell phone no.9811009998 (cell number not tracked by the police), each lasting 00:01 seconds. In addition, he has received two calls from Bharti's identified cell phone (no.9811034829), one at 00:35:40 hrs. (00:35 am) lasting 00:20 seconds and a second call at 00:40:44 lasting 00:21 seconds. These corroborate Bharti's disclosure to Nilam Katara that she also had unsuccessfully tried to contact Nitish after she had learnt that he had been taken away by her brothers.

1697. Thereafter there are two calls from Yashoman Tomar's cell phone to Nitish Katara in close succession. The first call is at 00:43:14 hrs which lasted 00:25 seconds while the second call at 00:46:27 hrs was for 00:07 seconds. These two calls from Gaurav Gupta were followed by a call from Bharat Diwakar's cell phone at 00:58:26 hrs which lasted 00:17 seconds. The last call received from Nitish Katara's cell phone was at 01:11:18 hrs which again is from Yashoman Tomar's cell phone which lasted 00:20 seconds. The frequency of all these calls and the shortness of their duration establishes that Nitish was, in fact, prevented from using his phone by his abductors. Gaurav Gupta had therefore given a truthful account in Exh.PW-26/1 that he was unable to speak. The testimony to the contrary in court is false.

1698. It is therefore clearly evident that the attribution of the statement to Nitish Katara in the call at 12:58 a.m. by Gaurav Gupta as well as Bharat Diwakar was an embellishment and improvement in material particulars and cannot be believed. Clearly Bharat Diwakar and Gaurav Gupta have made an unfortunate attempt to dilute the prosecution case against their friend Bharti Yadav's brothers.

1699. While Gaurav Gupta had been influenced, Bharat Diwakar had been won over. So for this reason it appears that their examination in Sukhdev's trial was deemed unnecessary.

1700. We do not know what was said to Nitish to take him away from his friends. Was it something related to his relationship with Bharti? Or was it a matter concerning Bharti which would have been of extreme concern? Or relating to their alliance? Whatever be it, it was of such imminence and urgency that he left his dinner as well as his friends without even disclosing where he was going for how long, with whom or why! So was he positioned thereafter that he could not even inform these friends, or family for that matter, as to where he was or what was he doing. This is not conduct that is natural, especially when Nitish knew he had to return home with Bharat Diwakar in the taxi hired by him which was waiting for him at the Diamond Palace Banquet Hall. He was not able to take any calls after he left the company of his friends.

1701. Let us see if there is any evidence which could enable assessment of Nitish's circumstances after he got into the Tata Safari vehicle with the appellants. We have discussed above that Nitish does not appear to be able to respond to incoming calls on his phone after the time he left the Banquet Hall.

1702. It is extremely important to note that as per the call record, Exh.PW21/1, there is no outgoing call or text message from Nitish Katara's cell phone after 11.33 p.m. Even if he left in a hurry, Nitish would have certainly wanted to have informed about his schedule to his friends whom he had so precipitately abandoned midway through dinner. Especially Bharat Diwakar with whom he had to return in the hired taxi to his home in Delhi.

1703. Nitish Katara was not a friend or associate of the appellants who have been found to have aversion to his relationship with the sister of two of them. The abrupt manner in which he moved away from his friends and left the Shivani Gaur's wedding to accompany the appellants and was found murdered after being seen in their company required the appellants to disclose why Nitish was with them and what happened to him. The appellants have given no explanation either in the statements under Section 313 of the Cr.P.C. or otherwise led evidence to show in this regard.

1704. The defence led no evidence and rendered no explanation at all, either in the statements recorded under Section 313 of the Cr.P.C. or by discharge of their burden of proof under Section 106 of the Indian Evidence Act to explain as to why or how a person, identified as Nitish Katara, who they claim that they did not even know was found in their company in their Tata Safari vehicle on the fateful night.

1705. Mr. Kapoor has urged at length that evidence of last seen cannot be turned into evidence of abduction. This argument in the facts and circumstances of the given case is completely misconceived. The prosecution has led substantial evidence of motive; recoveries pursuant to disclosures; abscondance; forensic and medical evidence which cannot be disbelieved.

1706. Certainly Nitish Katara would not have accompanied the appellants if he was aware of their intentions to inflict the violence which they did upon him.

1707. Section 362 of the IPC uses the expressions ―by force compels‖ or ―by any deceitful means induces‖ any person to go from any place. It is not the prosecution case that force was used to compel Nitish to leave the wedding venue. The appellants certainly would not have disclosed their real reason for making Nitish accompany them in the Tata Safari from the wedding venue. He would also not have known about their intent to murder him, else Nitish would not have accompanied the appellants in the vehicle or been sitting without protesting especially when the Tata Safari was stopped by the police patrol and then at the Hapur Chungi when Ajay Katara came up to it. We have also discussed the common intention shared by the appellants in this judgment. The established facts prove that the appellants induced Nitish Katara by use of deceitful means to go with them from the wedding venue and therefore committed the offence of abduction.

1708. We have noticed above Bharti's utterances to Nilam Katara and Nitish Katara on the17th February, 2002 that Vikas and Vishal Yadav had taken away the deceased. We have also detailed her conduct and anxiety about his safety at their hands. This is a material fact which establishes the abduction by the appellants.

XX Failure to put incriminating circumstances under Section 313 1709. According to Mr. Ram Jethmalani, learned senior counsel, the trial court failed to perform its most important yet elementary duty under Section 313 of the Cr.P.C. and that a large number of circumstances relied upon against the accused from pages 1051 to 1074 were never put to the accused persons. As such, the accused never had chance to explain the circumstances by cross-examination or by leading defence.

1710. Mr. Jethmalani, learned senior counsel has placed reliance on the pronouncement of the Supreme Court reported at AIR 1953 SC 468 Hate Singh Bhagat Singh v. State of Madhya Bharat (A2/31) and urged that a statement of the accused persons under Section 313 of the Cr.P.C. is the most important matter to be considered at the trial. In this case, the court was concerned with statements of the accused persons recorded under Sections 202, 203, 204 of the Criminal Procedure Code. In this regard, the court has observed as follows :-

> ―8. Now the statements of an accused person recorded under Sections 208, 209 and 342, Criminal P. C. are among the most important matters to be considered at the trial. It has to be remembered that in this country an accused, person is not allowed to enter the box and speak on oath in his own defence. This may operate for the protection of the accused in some cases but experience elsewhere has shown that it can also be a powerful and impressive weapon of defence in the hands of an innocent man. The statements of the accused recorded by the Committing Magistrate and the Sessions Judge are intended in India to take the place of what in England and in America he would be free to state in his own way in the witness-box. They have to be received in evidence and treated as evidence and be duly considered at the trial (Sections 287 and 342).

This means that they must be treated like any other piece of evidence coming from the mouth of a witness and matters in favour of the accused must be viewed with as much deference and given as much weight as matters which tell against him. Nay more. Because of the presumption of innocence in his favour even when he is not in a position to prove the truth of his story, his version should be accepted if it is reasonable and accords with probabilities unless the prosecution can prove beyond reasonable doubt that it is false. We feel that this fundamental approach has been ignored in this case.‖ There can be no dispute with the proposition laid down by the Supreme Court. However, the same has to be examined in the peculiar facts of the present case.

1711. On the impact of evidence not being put to the accused persons at the time of recording his statement under Section 313 of the Cr.P.C., Mr. Ram Jethmalani, learned senior counsel places reliance on the pronouncement of the Supreme Court reported at (1984) 4 SCC 116 Sharad Birdhichand Sarda v. State of Maharashtra. In para 143 of this pronouncement, the Supreme Court had held thus :-

> ―143. Apart from the aforesaid comments there is one vital defect in some of the circumstances mentioned above and relied upon by the High Court viz. Circumstances 4, 5, 6, 8, 9, 11, 12, 13, 16 and 17. As these circumstances were not put to the appellant in his statement under Section 313 of the Criminal Procedure Code, 1973 they must be completely excluded from consideration because the appellant did not have any chance to explain them. This has been consistently held by this Court as far back as 1953 where in the case of Hate Singh Bhagat Singh v. State of Madhya Pradesh [AIR 1953 SC 468 : 1953 Cri LJ 1933] this Court held that any circumstance in respect of which an accused was not examined under Section 342 of the Criminal Procedure Code cannot be used against him. Ever since this decision, there is a catena of authorities of this Court uniformly taking the view that unless the circumstance appearing against an accused is put to him in his examination under Section 342 of the old Code (corresponding to Section 313 of the Criminal Procedure Code, 1973), the same cannot be used against him. In Shamu Balu Chaugule v. State of Maharashtra [(1976) 1 SCC 438 : 1976 SCC (Cri) 56] this Court held thus: [SCC para 5, p. 440: SCC (Cri) p. 58] ―The fact that the appellant was said to be absconding, not having been put to him under Section 342, Criminal Procedure Code, could not be used against him.‖ (Underlining supplied) 1712. This issue has been raised before the Supreme Court even thereafter and the applicable principle which binds the consideration in later judgments must be noted.

1713. In AIR 2011 SC 200 Paramjeet Singh alias Pamma v. State of Uttarakhand, the Supreme Court has authoritatively set down the legal position in the following terms:-

> ―31. Thus, it is evident from the above that the provisions of Section 313 Cr.P.C make it obligatory for the court to question the accused on the evidence and circumstances against him so as to offer the accused an opportunity to explain the same. But, it would not be enough for the accused to show that he has not been questioned or examined on a particular circumstance, instead he must show that such non- examination has actually and materially prejudiced him and has resulted in the failure of justice. In other words, in the event of an inadvertent omission on the part of the court to question the accused on any incriminating circumstance cannot ipso facto vitiate the trial unless it is shown that some material prejudice was caused to the accused by the omission of the court.‖ (Emphasis supplied) Therefore a mere omission to put an incriminating circumstance to an accused person under Section 313 of the Cr.P.C. would by itself not bar the prosecution from using such circumstance. The defence has to show something more.

1714. The prosecution led its evidence in support of the charges.

This evidence included the evidence of the deceased having been taken away from his friends having been last seen alive in the company of the appellants. We have noted some of the questions put to the appellants who were provided full opportuinity to explain this circumstance. They denied the prosecution case completely. Instead they set up pleas of alibi and also led defence evidence in support.

1715. An objection has been raised that the trial court has wrongly applied Section 106 of the Indian Evidence Act and drawn an inference against the accused persons without putting the same to the accused persons in the statement u/s 313 of the Cr.P.C.

1716. The prosecution has led evidence of the deceased having been last seen in the company of the appellants. No explanation has been given by the appellants as to what happended to the deceased thereafter or when they parted company, if at all they did. In view of the presumption under Section 106 of the Evidence Act, the defence has failed to discharge the onus on it by reversal of burden of proof as to what happened to the deceased thereafter arises for the court's consideration. An inference based on evaluation of the prosecution evidence and the defence explanation by the court is not an incriminating circumstance within the meaning of the expression in Section 313 Cr.P.C.

1717. Conclusions arrived at by the court on evaluation of the evidence are also not incriminating circumstances to which Section 313 of the Cr.P.C. could apply.

1718. The alibi set up by Vikas Yadav and Vishal Yadav of their having been at the Gandhis' function at the time at which Ajay Kumar/Katara has stated that he saw the appellants at the Hapur Chungi, was for the first time set up before the trial court in the defence of the accused. Vikas Yadav claims to have attended functions in Karnal thereafter. No question or suggestion to this effect was put to any witnesses of last seen or the investigating officers to this effect. The same was the position with regard to the claim of the accused persons that they had gone to Allahabad and were returning to Ghaziabad when they were arrested at Dabra. Defence evidence is recorded after the statements of the appellants stood recorded under Section 313 of the Cr.P.C. There can be no question of putting such defence to the accused under Section 313 of the Cr.P.C.

1719. It is pressed by Mr. Jethmalani that the addresses where the police searched the appellants were not put to the accused persons under Section 313 Cr.P.C. This submission has to be tested against the above factual background. Applying the principles laid down by the Supreme Court in AIR 2011 SC 200 Paramjeet Singh alias Pamma v. State of Uttarakhand (para 31), we find that omission to put such questions would not ipso facto vitiate the trial. The appellants have to show that material prejudice resulted to them by such omission. No such prejudice has been suggested before this court.

1720. Our attention has been drawn by learned senior counsel to question no. 45 put to the accused. We find that the fact that the police searched Ghaziabd, Delhi, Udyog Vihar, Gurgaon, Mukeria, Hoshiarpur, Punjab, Dhari, Bedkui, U.P. for the accused persons and also the proceedings under Section 82/83 have been specifically put to Vishal Yadav as question no.45, question no.92 and question no.94. Vishal Yadav has stated that he did not know if the police had gone in his search at those addresses and that he was present at his residence on 19th February, 2002. In question 94, the court had put it to Vishal Yadav that he was not available at his known address and proceedings under Section 82/83 Cr.P.C. were started against him and his co-accused on the application of the investigating officer. It was further put to Vishal Yadav that copy of the same was pasted at his house as well as the house of his co-accused at Raj Nagar, Ghaziabad, U.P. In answer Vishal Yadav had merely stated that he did not know.

Similar questions have been put to the other co-accused as well.

1721. The tenet that no one should be condemned unheard is an important facet of Article 21 of the Constitution of India. It is an essential concomitant of principles of natural justice also. In order to

afford an opportunity to the accused persons to explain any incriminating circumstance against them in the evidence adduced by the prosecution, the legislature has incorporated Section 313 of the Cr.P.C.

1722. In Paramjeet Singh v. State of Uttarakhand (supra), it has been held that the accused must show that non-examination on any particular circumstance has actually and materially prejudiced him and consequently failure of justice has resulted. Therefore every failure to put a circumstance to the accused person under Section 313 of the Cr.P.C. will not vitiate the trial. We may note that additionally observations of the court on the demeanour of witnesses; incidents taking place during the trial as well as conduct of the accused persons during the trial though relevant, are not evidence which is led by the prosecution. As such, they would not be covered within the description of _evidence' against the accused persons which has to be put to the accused persons under Section 313 of the Cr.P.C.

1723. So far as orders of the court and observation made by the trial courts during trial are concerned, these are part of the court record made in the presence of the appellants and their counsel. They are also not _evidence' produced by any party. Challenge to this point of the record must abide by procedure prescribed by law, which could be either by appropriate application to the same court or by petitioning higher courts as provided by law. On this aspect we may usefully refer to the pronouncements of the Supreme Court reported at AIR 1964 SC 377 (para 5), Bank of Bihar v. Mahabir Lal and 1982 (2) SCC 463 (para 4), State of Maharashtra v. Ramdas Shrinivas Nayak and Anr. in this regard.

1724. In AIR 1964 SC 377 (para 5), Bank of Bihar v. Mahabir Lal, the Supreme Court observed as under:

> —5. ...In our opinion where a statement appears in the judgment of a court that a particular thing happened or did not happen before it, it ought not ordinarily to be permitted to be challenged by a party unless of course both the parties to the litigation agree that the statement is wrong, or the court itself admits that the statement is erroneous. ...‖ 1725. In 1982 (2) SCC 463 (para 4), State of Maharashtra v.

Ramdas Shrinivas Nayak and Anr., a special leave petition was filed which involved the complainant under the Prevention of Corruption Act, 1947 against the Chief Minister. The High Court relied on a concession made by the counsel for the Chief Minister before it in favour of the Governer's individual decision on the basis of the advice of the Counsel of Ministers. Before the Supreme Court, it was disputed that any such concession was made and the Supreme Court was invited to peruse the written submissions made in the High Court. In para 4 of the judgment, the Supreme Court had rejected this submission holding as follows:

> —4. ...The principle is well-settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. [Per Lord Buckmaster in Madhu Sudan Chowdhri v. Chandrabati Chowdhrain, AIR 1917 PC 30 : 42 IC 527] That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an appellate court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment.

5. In R v. Mellor [(1858) 7 Cox CC 454 : 6 WR 322 : 169 ER 1084] Martin, B. was reported to have said:

—We must consider the statement of the learned Judge as absolute verity and we ought to take his statement precisely as a record and act on it in the same manner as on a record of Court which of itself implies an absolute verity.‖

6. In King-Emperor v. Barendra Kumar Ghose [AIR 1924 Cal 257 : 28 Cal WN 170 : 38 Cal LJ 411 : 25 Cri LJ 817] Page, J. said:

—... these proceedings emphasise the importance of rigidly maintaining the rule that a statement by a learned Judge as to what took place during the course of a trial before him is final and decisive : It is not to be criticized or circumvented;

much less is it to be exposed to animadversion.‖

7. In Sarat Chandra Maiti v. Bibhabati Debi [AIR 1921 Cal 584 : 34 Cal LJ 302 : 66 IC 433] Sir Asutosh Mookerjee explained what had to be done:

—... It is plain that in cases of this character where a litigant feels aggrieved by the statement in a judgment that an admission has been made, the most convenient and satisfactory course to follow, wherever practicable, is to apply to the Judge without delay and ask for rectification or review of the judgment...‖

8. So the Judges' record is conclusive. Neither lawyer nor litigant may claim to contradict it, except before the Judge himself, but nowhere else.‖ 1726. The court observations during trial and orders of the court are therefore conclusive of the matter. There is no requirement in law mandating that observations recorded by the court during trial, say on witness demeanour or conduct of accused, to be put to the accused person under Section 313 of the Cr.P.C.

1727. We find that in the circumstances put to the accused under Section 313 of the Cr.P.C. questions have been put to Vikas Yadav and Vishal Yadav in this regard. So far as Vikas Yadav is concerned, question nos.150, 152 and 153 were put in this regard whereas to Vishal Yadav question nos.144, 145 and 146 are relevant. Therefore the objection of the appellants in this regard is without basis.

1728. In this background, the submission of learned senior counsel with regard to the evidence on this aspect not being put to the accused persons to seek their clarification under Section 313 of the Cr.P.C. is not supported by the record.

XXI The Prosecution Failed to Produce Unimpeachable Evidence of the Innocence of Vishal Yadav-Failure to Examine Kamal Kishore - Effect The discussion on this subject is being considered under the following sub-headings:

(i) Standards of professional conduct mandated upon the public prosecutor

(ii) Whether Kamal Kishore could have been examined as a defence witness?

(iii) The appellants' stand on Kamal Kishore before the trial court

(iv) Whether prosecution had performed its duty and discharged its burden?

(v) Putting of exhibit mark on the statement -

effect thereof

(vi) Contents of Exh.PW-35/4 disproved by contemporaneous documentary evidence 1729. Mr. Ram Jethmalani, learned senior counsel for Vishal Yadav has argued that a statement attributed to one Kamal Kishore (a guard at the house of Shri D.P. Yadav at 15 Balwant Rai Mehta Lane, New Delhi) as having been recorded by the investigating officer Shri Anil Somania under Section 161 of the Cr.P.C. on 18th February, 2002 has been exhibited on record as Exh.PW-35/4.

As per this statement, Vikas Yadav, driver Anil and another man had come to the house of Shri D.P. Yadav in Balwant Rai Mehta Lane at 1.00/1:30 am in the night intervening 16 th / 17th February, 2002. Anil was driving the vehicle which was long with the back portion raised; the colour of the vehicle was perhaps green; the third person was fair; clean shaved and wearing a red kurta. It is vehemently urged that as per this statement, Vishal Yadav had parted company from Vikas Yadav and that the deceased was last seen alive by Kamal Kishore in the company of Vikas Yadav.

1730. It is urged that Kamal Kishore was cited as a witness at serial no.4 in the charge sheet; that the police, therefore, had unimpeachable evidence of the innocence of Vishal Yadav which they deliberately did not produce.

1731. Mr. Jethmalani contends that in the present case the failure to examine Kamal Kishore and the failure of the court to exercise its statutory powers to call this person as a witness has resulted in failure of justice which is a serious infirmity in the trial so far as Vishal Yadav is concerned. Learned senior counsel has urged that there was a constitutional and professional duty on the prosecution to examine this witness failing which it was the duty of the court to have directed his examination. However, the trial court was prejudiced against the accused rendering the trial a mockery of justice.

1732. Learned senior counsel has placed reliance on the pronouncements reported at 1936 P.C. 169 (para 16) Stephen Seneviratne v. The King; AIR 1965 SC 328 Darya Singh and Ors. v. State of Punjab, (Headnote B); AIR 1933 Oudh 265 Ghirrao v. Emperor (Headnote B) AIR 2010 SC 2352 Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi) (para 74 (2399 pg 2403); Rule 16 of Bar Council of India Rules (para 82 pg 2404) to elucidate the duty and standards of a public prosecutor in a criminal. Learned senior counsel has also placed reliance on the guidelines no. 242 and 243 of the Guidelines framed by the Attorney General of the United Kingdom titled as Attorney General's Guidelines to buttress his submission that the failure to examine Kamal Kishore was a breach of his professional duty by the prosecutor.

1733. Mr.R.K. Kapoor, learned counsel appearing for the appellant Sukhdev @ Pehalwan has also urged that the prosecution has withheld material evidence of Kamal Kishore which supported the innocence of this appellant.

(i) Standards of professional conduct mandated upon the public prosecutor 1734. Mr. Jethmalani has placed the judgment reported at AIR 1933 Oudh 265 Ghirrao v. Emperor before us. In this case it it was observed that the duty of a public prosecutor is not merely to secure the conviction of the accused at all costs but to place before the court whatever evidence is in the possession of the prosecution whether it be in favour of or against the accused, and to leave it to the court to decide upon all such evidence, whether the accused had or had not committed the offence with which he stood charged. There can be no dispute at all with this sound principle which ensures fairness in trial.

In this precedent, the report of the chemical examiner and the imperial serologist had not been placed before the court. In the present case, it is an admitted position that all documents including the

statement attributed to Kamal Kishore had been filed by the prosecution. The defence had also received copies of all statements recorded by the police. We shall elaborate on this aspect a little later.

1735. On a similar submission raised before the Supreme Court in Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi) (supra), the Supreme Court placed reliance on earlier pronouncements in (1999) 7 SCC 467 Shiv Kumar v. Hukam Chand and Anr.; (1994) 4 SCC 602 Hitendra Vishnu Thakur and Others v. State of Maharashtra and Others and (2004) 4 SCC 158 Zahira Habibulla H. Sheikh and Anr. v. State of Gujarat and Ors. and ruled as follows:

> —Therefore, a public prosecutor has wider set of duties than to merely ensure that the accused is punished, the duties of ensuring fair play in the proceedings, all relevant facts are brought before the Court in order for the determination of truth and justice for all the parties including the victims. It must be noted that these duties do not allow the prosecutor to be lax in any of his duties as against the accused.‖ 1736. The Supreme Court also emphasized the statutory mandate upon a court conducting a criminal trial to take a participatory role and reiterated the following principles laid down in (2004) 4 SCC 158, Zahira Habibulla H. Sheikh and Anr. v. State of Gujarat and Ors.. Placing reliance on Section 165 of the Indian Evidence Act, the court ruled thus:
>
> —The Court cannot afford to be wishful or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and Courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.‖ 1737. Mr. Jethmalani also drew our attention to the observations of the Supreme Court in para 82 of Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi) (supra) wherein the court emphasized the constitutional requirement of a fair and true investigation as well as a fair trial and the role of the prosecution in the following terms:-
>
> —82. In the Indian Criminal jurisprudence, the accused is placed in a somewhat advantageous position than under different jurisprudence of some of the countries in the world. The criminal justice administration system in India places human rights and dignity for human life at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime.‖ 1738. The Supreme Court also deliberated on the expression —due process of law‖ and the rights of a person when leading his defence in the following terms :-
>
> —91. .....Where Section 91 read with Section 243 says that if the accused is called upon to enter his defence and produce his evidence there he has also been given the right to apply to the Court for issuance of process for compelling the attendance of any witness for the purpose of examination, cross-examination or the production of any document or other thing for which the Court has to pass a reasoned order. The liberty of an accused cannot be interfered with except under due process of law. The expression `due process of law' shall deem to include fairness in trial. The Court gives a right to the accused to receive all documents and statements as well as to move an application for production of any record or witness in support of his case. This constitutional mandate and statutory rights given to the accused places an implied obligation upon the prosecution (prosecution and the prosecutor) to make fair disclosure.

The concept of fair disclosure would take in its ambit furnishing of a document which the prosecution relies upon whether filed in Court or not. That document should essentially be furnished to the accused

and even in the cases where during investigation a document is bona fide obtained by the investigating agency and in the opinion of the prosecutor is relevant and would help in arriving at the truth, that document should also be disclosed to the accused.‖ (Emphasis by us) 1739. Mr. Jethmalani has extensively relied upon Standard 16 of the Standards of Professional Conduct and Etiquette framed by the Bar Council of India which reads as follows:

> ―Standard 16. An advocate appearing for the prosecution of a criminal trial shall so conduct the prosecution that it does not lead to conviction of the innocent. The suppression of material capable of establishing the innocence of the accused shall be scrupulously avoided.‖ 1740. This standard was placed before the Supreme Court of India in Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi) (supra) wherein the court was construing the statutory obligation of the public prosecutor to disclose certain evidence to the defence. It was considered by the Supreme Court in para 79 at pg 2403 of the report.

1741. We may usefully refer to the pronouncement of the Supreme Court reported at AIR 1965 SC 328 Darya Singh and Ors. v. State of Punjab wherein the court considered the scope of discretion of a prosecutor to decide which witnesses as he would examine in order to unfold the case of the prosecution. The following observations of the Supreme Court in this case relied upon by learned senior counsel shed light on the issues arising in the present case and deserve to be considered in extenso. The relevant extract reads as follows :-

> ―In a murder case, it is primarily for the prosecutor to decide which witnesses he should examine in order to unfold his story. It is obvious that a prosecutor must act fairly and honestly and must never adopt the device of keeping back from the Court eye-witnesses only because their evidence is likely to go against the prosecution case. The duty of the prosecutor is to assist the Court in reaching a proper conclusion in regard to the case which is brought before it for trial. It is no doubt open to the prosecutor not to examine witnesses who, in his opinion, have not witnessed the incident, but, normally he ought to examine all the eye-

witnesses in support of his case. It may be that if a large number of persons have witnessed the incident, it would be open to the prosecutor to make a selection of those witnesses, but the selection must be made fairly and honestly and not with a view to suppress inconvenient witnesses from the witness-box. If at the trial it is shown that persons who had witnessed the incident have been deliberately kept back, the Court may draw an inference against the prosecution and may, in a proper case, regard the failure of the prosecutor to examine the said witnesses as constituting a serious infirmity in the proof of the prosecution case. In such a case, if the ends of justice require, the Court may even examine such witnesses by exercising its powers under s. 540; but to say that in every murder case, the Court must scrutinise the police diary and make a list of witnesses whom the prosecutor must examine, is virtually to suggest that the Court should itself take the role of a prosecutor. The powers of the Court under s. 540 can and ought to be exercised in the interests of justice whenever the Court feels that the interests of justice so require, but that does not justify Mr. Bhasin's contention that the failure of the Court to have exercised its powers under s. 540 has introduced a serious infirmity in the trial itself.‖ (Emphasis supplied) 1742. On the other hand, it has been urged by Mr. Dayan Krishnan, learned Additional Standing Counsel that the charge sheet filed before the court did not rely upon Kamal Kishore as an eye witness to the case or a witness of the deceased having been last seen alive in the company of the accused persons. As per the charge sheet, it was not the case of the prosecution that the accused persons went to Delhi or met Kamal Kishore.

The submission of learned Additional Standing Counsel is that the witness of the prosecution namely Ajay Kumar in respect of last seen evidence has not turned hostile but has proved the case of the prosecution.

1743. So far as Kamal Kishore is concerned, the investigating officer Anil Somania PW-35 has stated that, in the efforts to trace the accused persons as well as the deceased Nitish Katara, on 18th February, 2002, he had gone to Kothi No. 15, Balwant Rai Mehta Lane, New Delhi which stood allotted to Shri D.P. Yadav, father of Vikas Yadav. He was unable to trace the accused persons or the deceased at this place. PW- 35 stated that he met one Kamal Kishore at these premises, he was brought to the police station and his statement was recorded. The statement Exh.PW-35/4 was recorded at the police station. PW-35 Anil Somania further testified that Kamal Kishore was working as a security guard of Shri D.P. Yadav, M.P. at Delhi. Anil Somania was cross-examined on this statement by the learned counsel on behalf of Vikas Yadav when the witness stated that he had recorded Exh.PW-35/4 at the police station Tilak Marg on 18 th February, 2002 at 1 a.m. 1744. The trial record shows that PW-35 Anil Somania, the investigating officer has clearly testified that efforts were made to produce Kamal Kishore in court. The efforts by the prosecution to produce Kamal Kishore in court were adequate and therefore, no benefit can be taken by the accused persons. It is urged that in the facts and circumstances of the case, no adverse inference is liable to be drawn under Section 114(g) of the Indian Evidence Act on account of non-appearance of Kamal Kishore.

1745. It has further been contended that Kamal Kishore was an employee of Shri D.P. Yadav, father of the accused Vikas Yadav. He could have been summoned as a court witness or even by the defence witness and for this reason as well no adverse inference can be drawn against the prosecution.

1746. The record of the lower court reveals that on 3 rd July, 2003, the court ordered as follows:

> —3.7.2003 Present: Both the accused persons in JC with S/Sh. S.K. Sharma, K.N.
>
> Balgopal, G.K. Bharti, Adv.
>
> Sh. S.K. Saxena, Spl.PP for the state with Sh. Parveen Sharma, Adv.
>
> No witness is present today.
>
> Witness Nitin Katara was to be examined but a letter has been received stating that his father was critically ill and was admitted in Appollo Hospital. He, therefore, could not come. The other witness to be examined today was Kamal Kishore. He has not been served. SI J.K. Gangwar from UP Police states that at the address of Kamal Kishore he is not available. He was working with Sh. D.P. Yadav, father of accused Vikas Yadav and SI Gangwar states that as per his inquiry he has left service of Sh.D.P. Yadav. He has given address of Village Kharpara PS Ahahar, Distt.

Bulandshahr. A constable was sent there and the report is that he is not living there. SI Gangwar is given the responsibility of finding out the whereabouts. To come up tomorrow, date already fixed i.e. 4.7.2003.‖ Thus on 3rd July, 2003, the court noted that Kamal Kishore remained unserved as he was not found at his given address.

1747. Thereafter in the order dated 2nd August, 2003, the learned trial judge has clearly recorded that Kamal Kishore was evading the service of the summons.

1748. On 7th August, 2003, the trial court has recorded that though Kamal Kishore was summoned for that day, but he was not present. In this background, non-bailable warrants returnable for 11th August, 2003 for his appearance were issued by the court.

1749. It appears that a fax message purportedly sent by Kamal Kishore to the investigating officer Sub-Inspector Gangwar. The order dated 7th January, 2004 records a direction by the trial judge to SI Gangwar to file the fax message sent by Kamal Kishore.

1750. Our attention has also been drawn to the pronouncement of this court in a case where efforts were made by the police to produce the witness who was untraceable and the effect thereof. The judgment of this court has been reported at 1983 23 DLT 338, Paramjit Singh and Anr. v. State held as follows: -

> —12. xxx The learned counsel for the appellants laid great stress on the non-

production of Anil who, according to the prosecution, was an eye witness. The learned counsel contended that an adverse presumption should be drawn against the prosecution to the effect that had that witness been produced, he would have either not supported the prosecution version or would have given a different version altogether. But we find that non-production of Anil was not without any reason. As mentioned in the judgment of the learned Session Judge, lots of efforts were made to serve that witness with the summons but he was untraceable with the inevitable result that he had to be given up.‖ 1751. It also needs no elaboration that the case of the prosecution is the chargesheet filed by it and not a statement of a person recorded under Section 161 of the Cr.P.C.

1752. The record of the trial court, therefore, clearly manifests the serious efforts, including issuance of coercive process, made to secure the attendance of Kamal Kishore and for recording of his testimony which were unsuccessful.

1753. The pronouncement of the Privy Council in 1936 P.C. 169 Stephen Seneviratne v. The King aptly sums up the binding legal position thus:

> —Witnesses essential to the unfolding of the narrative on which the prosecution is based, must, "of course, be called by the prosecution, whether in the result the effect of their testimony is for or against its case. But the notion that there is an obligation on the prosecution to call all available witnesses irrespective of considerations of number and of reliability, or in other words, that a prosecution ought to discharge the functions both of prosecution and defence is erroneous. If it does so, confusion is very apt to result, and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross- examination. This does not mean either that the discretion on a matter such as this which is so dependent on the particular circumstances of each case should be fettered, or that the utmost candour and fairness on the part of those conducting the prosecution should be discouraged.‖ Law thus confers a discretion on the prosecution to carefully assess the credibility of the witness; nature, quality and sufficiency of the evidence. the discretion has to be exercised candidly and fairly. We see no reason in the given facts and circumstances to hold that the prosecutors breached any standard of professional conduct or were unfair to the accused.

(ii) Whether Kamal Kishore could have been examined as a defence witness?

1754. It was put to Mr. Jethmalani that the accused had been put to notice about such statement inasmuch as the same was part of the record made available to the appellants, and therefore what precluded them, especially Vishal Yadav from examining Kamal Kishore as a witness in defence? Mr. Jethmalani could not dispute the legal position that it was open to the appellants to summon Kamal Kishore as a witness on their behalf in case his deposition was favourable to the defence. A submission was, however, made that in case this person was called as a defence witness and he resiled from the statement which was allegedly made to the police under Section 161 of the Cr.P.C., it was not open to the defence to confront him with the previous statement made under Section 161 of the Cr.P.C. in view of the prohibition contained under Section 162 of the Code of Criminal Procedure. Learned senior counsel placed reliance on the judicial pronouncement reported at AIR 1968 SC 1390, Laxman Kalu Nikalje v. The State of Maharashtra and Ors. v. State (NCT of Delhi) in support of this submission.

1755. In Laxman Kalu Nikalje (supra), an issue of permissibility of cross-examination of a prosecution witness in respect of statement before the police arose. The witness Kamla Bai had named her husband as the assailant in court, whereas she had never named him in the statement which she had made to the police.

In para 7 of the pronouncement, the Supreme Court observed that our law does not permit cross-examination of such a witness in respect of statement made before the trial. It is noteworthy that this decision does not prohibit the summoning of such a person as a court witness under Section 311 of the Evidence Act.

1756. Under Section 162 of the Cr.P.C., the statement made by any person to police officer in course of investigation, if reduced to writing shall not be signed by the person making it. Section 162 further interdicts use of such statement or part thereof for any purpose at any inquiry or trial in respect of any offence under investigation at the time when the statement was made, except that the same may be used by the accused, and, that with the permission of the court, by the prosecution to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act. It is permissible to use such statement also in the re-examination of such witnesses for the limited purpose of explaining any matter referred to in his cross-examination.

1757. Under Section 157 of the Evidence Act, any former statement made by the witness relating to the fact about which he is testifies in court, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved in order to corroborate testimony of witness. Such statement cannot be put to any other use. (Ref: (1999) 5 SCC 30 Ramprasad v. State of Maharashtra. (para 15) 1758. It is noteworthy that Section 154 of the Indian Evidence Act, 1872, which permits the court to declare a witness hostile, does not even remotely restrict its applicability only to a prosecution witness. The statute contains no prohibition that a witness called by the accused in support of its defence, cannot be confronted with his previous statement under Section 161 of the Cr.P.C. if he resiles therefrom. No such prohibition is also to be found under Section 145 of the Indian Evidence Act. There is, therefore, no statutory prohibition to confronting defence witness by means of a previous statement made to the police.

1759. Mr. Jethmalani has submitted that the defence cannot confront a defence witness that the statement made under Section 161 of the Cr.P.C. For this reason, Kamal Kishore was not summoned by the appellant. There was however available a third option to the appellants. The trial courts could have been requested to examine Kamal Kishore. No decision has been placed which, in any manner, prohibits the accused persons from making an application to the court for summoning this person as a court witness.

1760. In support of this option, our attention has been drawn by Mr.Krishnan to the judicial pronouncement reported at (1975) 3 SCC 851, para 14, Shanker v. State of UP. In this case, two persons who were originally cited as eye-witnesses by the prosecution were not examined. Before the Supreme Court, it was argued that these eye-witnesses were withheld without any reason and secondly, an adverse inference should be drawn that these independent witnesses, if produced before the court, would have falsified the account given by other eye-witnesses before the court. The court made a reference to Section 540 of the Cr.P.C. (now Section 311 of the Cr.P.C.) in its discussion. The findings of the court on this issue shed valuable light on submissions made before this court and read as follows:

> —14. This contention also does not appear to be well-founded. It is on record that on 16-9-1972, the Public Prosecutor submitted an application to the trial court, for discharge of these witnesses on the ground that they had been won over by the defence, and consequently the prosecution did not went to examine them as their witnesses. The defence

> Counsel disputed this assertion of the Prosecutor. But he did not make any request for their examination as court witnesses under Section 540, Criminal Procedure Code so that the defence might get an opportunity to cross-

examine them, although it seems that the witnesses were then in attendance. On the contrary, the court's order recorded on that application gives the impression that the defence informed the court that it did not want to examine them. It is thus too late in the day to argue that these witnesses were withheld by the prosecution for any ulterior motive. This contention was not raised before the High Court. It was no doubt agitated in the trial court and was rightly rejected.‖ (Underlining by us) 1761. In the present case as well no such application was made by any of the accused persons. It is noteworthy that the defence did not even deem it proper to orally inform the trial courts in both trials that a material witness, though cited, was not being examined. The attention of the court was also not drawn to the fact that the prosecution had made serious efforts to summon the witness. It was not the case of the defence that the prosecution was deliberately not serving this witness or summoning him.

1762. It is noteworthy that the instant case is not one where the defence has been unaware of its rights guided by the best of legal brains. Evidence of 26 persons has been led as defence witnesses. Several applications stand filed under Section 311 of the Cr.P.C. Vikas and Vishal Yadav appear to have filed applications and proceedings in higher courts even during investigation and have aggressively pursued the matters, under legal guidance.

1763. The defence explanation set up before us for non-

> examination of Kamal Kishore as a defence witness is also controverted by the manner in which they have proceeded with regard to non-examination of Sh. Satpal Yadav, Advocate who was also cited as a prosecution witness in support of the recoveries was abandoned by the prosecution as having been won over. Vikas and Vishal Yadav examined Shri Satyapal Yadav, Advocate as defence witness.

1764. We are compelled to observe that this was part of a calculated strategy and careful design on the part of the appellants merely to raise such an objection.

(iii) The appellants‟ stand on Kamal Kishore before the trial court 1765. The contention before us that Kamal Kishore was a vital witness and that he was not examined with malafide intention has also to be scrutinised in the light of the stand of the accused persons before the trial courts. There is no dispute at all that Kamal Kishore was an employee of Shri D.P. Yadav, the father of Vikas Yadav. In the cross-examination on behalf of Vikas Yadav, a suggestion has been put to PW-35 Anil Somania that he had taken Kamal Kishore along with him to the Police Station Ghaziabad and he was discharged from the Police Station Ghaziabad only at 3 a.m. on 18th February, 2002. It has further been suggested to PW-35 that he had falsely recorded the statement of Kamal Kishore Sharma under threat and coercion.

1766. Our attention is drawn to the further suggestion by counsel for Vikas Yadav to PW-35 Anil Somania in court that Kamal Kishore was not intentionally produced in the court because PW-35 had wrongly recorded his statement and that he had not taken written permission from the SHO of the Police Station Tilak Marg for interrogating Kamal Kishore. Vikas Yadav thus disputed the very making of the statement.

1767. Let us examine the stand taken by Vishal Yadav on this statement before the trial court. We have noted above that Vishal Yadav had filed an application dated 11th October, 2002 under the signatures of his counsel before the learned trial judge seeking production of certain documents by the police and admission/denial. The assertion made in this application on behalf of the applicant so far as the alleged statement of Kamal Kishore was concerned, also deserves to be noticed and reads as follows:-

—13. That the applicant/accused further prefers to seek indulgence of this Hon'ble Court for issuance of direction to produce documents by the aforesaid I.O./Inspector Shri Anil Samania, which were sent by way of telegrams and letters by the witnesses, Ms. Bharti Yadav and the witness Kamal Kishore, the Watchman whose statements is alleged to have been recorded at P.S. Tilak Marg. The relevance of these telegrams and representation clearly suggest that police of U.P. (Ghaziabad) fabricated and introduced false information and false contents, though the witnesses never depose about these facts before the police. The applicant/accused has come to know about these telegrams, letters and the version of the witnesses from the various newspapers, some of news clippings are annexed as Annexure. So the applicant seeks the indulgence of this Hon'ble Court for issuing directions to the concerned authorities for producing the said documents for the purpose of admission and denial, so that the applicant/accused may highlight the unfair investigation and false evidence created against the applicant/accused.‖ (Underlining by us) 1768. The prosecution has urged that the documents filed with the charge sheet were furnished to the accused persons and therefore, the alleged statement of Kamal Kishore was filed on record with the charge sheet and had duly been furnished to the accused persons. It was Vishal Yadav's stand as back as on 11th October, 2002 that the statements were fabricated, introduced false information and its contents were false. As noted above, Vishal Yadav had categorically stated that the witness had never testified about these facts before the police.

1769. The above-noticed suggestions to the investigating officer in his cross-examination as well as the application dated 11th October, 2002 show that the arguments before this court to the effect that Kamal Kishore was a witness to last seen are contrary to the defence set up by Vikas Yadav and Vishal Yadav before the trial court. They have set up pleas of alibi and led common defence completely denying any interaction with the deceased Nitish Katara. Certainly a visit to the residence of Shri D.P. Yadav in the Balwant Rai Mehta Lane, New Delhi accompanied by Nitish Katara does not feature as any part thereof.

1770. We find that not a single question has been put on behalf of Vishal Yadav to any of the prosecution witnesses in this regard. The investigating officers had also not been cross- examined in this regard. No suggestion in terms of Kamal Kishore's statement was put to them or to any of the other witnesses including Ajay Kumar. It is evident that even the accused persons also did not accept the truth or the version noted in Exh. PW-35/4 attributed to Kamal Kishore.

1771. In Sukhdev Pehalwan's trial, the prosecution has explained that Kamal Kishore could not be joined as a witness as no such person was either available or traceable. Several efforts were made to summon him in the trial of Vikas and Vishal Yadav.

1772. In the judgment against Sukhdev @ Pehalwan dated 6.7.2011, the learned Trial Judge has carefully noted that Vikas Yadav himself did not accept the correctness of the statement attributed to Kamal Kishore. He also did not accept that he was with Nitish Katara and seen in his company around 1 or 1.30 am and, therefore, the statement Ex. PW-35/4 attributed to Kamal Kishore becomes inconsequential and defence cannot be permitted to take its advantage.

(iv) Whether prosecution had performed its duty and discharged its burden?

1773. The several efforts including coercive process made to cause the appearance of Kamal Kishore for recording his statement would show that the prosecution had discharged its burden by taking steps for his production.

1774. Mr. P.K. Dey, learned counsel for the complainant, has argued that the statement purported to have been given by Sh.Kamal Kishore to the investigating officer was filed along with the chargesheet. It is admitted that copies thereof were received by the accused persons. The submission is that

prosecution has, therefore, made a complete disclosure of the entire material in its possession as regards the case, to the court as well as to the accused persons. We agree with the learned counsel that the prosecution has discharged its duty of fair disclosure to the accused as noticed in para 91, 191 and elsewhere of Sidharth Vashisth @ Manu Sharma (supra). Mr. Dey has placed reliance also on the extract from Archbold, First Supplement to the 2003 Edition, relied upon by Mr. Ram Jethmalani, senior counsel for this purpose.

(v) Putting of exhibit mark on the statement - effect thereof 1775. Strong objection has been laid by Mr. Dayan Krishnan on behalf of the State with regard to the exhibition of the statement attributed to Kamal Kishore. It is also urged that the statement was attributed to a third person and could not have been exhibited by the investigating officer. There is substance in this submission.

1776. Placing reliance on Section 114(g) of the Indian Evidence Act, Mr. Dayan Krishnan has also urged that in the given facts such exception would not invite any adverse inference against the prosecution for non-production of Kamal Kishore.

1777. Section 162 of the Cr.P.C. specifically puts a bar on using as evidence any statement recorded by the police under Section 161 of the Cr.P.C. Unfortunately, the trial court in the instant case has marked as an exhibit the entire statements recorded during investigation under Section 161 of the Cr.P.C.. The same is contrary to the mandate of the law and legally impermissible. In any case a statement under Section 161 of the Cr.P.C. of a person who does not appear as a witness before the court is not substantive evidence. Merely marking on the statement as an exhibit would in any case not render the statement as substantive evidence.

1778. On this issue, Navjot Sandhu (supra), the Supreme Court observed as follows: -

> —We have noticed above that the confessions made to a police officer and a confession made by any person while he or she is in police custody cannot be proved against that person accused of an offence. Of course, a confession made in the immediate presence of a Magistrate can be proved against him. So also Section 162 Cr.P.C. bars the reception of any statements made to a police officer in the course of an investigation as evidence against the accused person at any enquiry or trial except to the extent that such statements can be made use of by the accused to contradict the witnesses.
>
> xxx xxx xxx‖
>
> (Underlining by us)

1779. In the judicial pronouncement reported at (2003) 8 SCC 745, Narbada Devi Gupta v. Birendra Kumar Jaiswal it was held that mere marking of an exhibit mark on the document cannot serve as a proof of its contents. In view of the above, putting the exhibit mark on the statement was illegal. It was an error on part of the prosecution as well as that of the trial court. The statement so marked cannot be read in evidence.

(vi) Contents of Exh.PW-35/4 disproved by contemporaneous documentary evidence 1780. Even if the statement Exh.PW-35/4 was read in evidence, there is yet another important aspect of the matter. The statement attributed to Kamal Kishore under Section 161 of the Cr.P.C. (Exh.PW-35/4) is falsified by established and proven documentary evidence of Nitish Katara's mobile phone electronic records (Exh.PW21/1). This documentary evidence disproves that Nitish Katara was at Balwant Rai Mehta Lane, New Delhi at 1:00 am the stated time. As per the call records (Exh.PW-21/1), at 0111 hours (1.11

a.m.) on 17th February, 2002, Nitish Katara was in the Ghaziabad area between 22:24:05 to 01:11:18 in the night of 16th/17th February, 2002.

1781. As per Ex.PW21/1, Nitish Katara received a call at his cell phone at 22:24:05 hrs from the phone of Yashoman Tomar which lasted 1:08 seconds when it was in the Ghaziabad area. The next call was received by him at 00:35:40 hrs when his phone was being covered by the Raj Nagar, Ghaziabad cell tower. The five calls thereafter received by him up to the last call being at 01:11:18 hrs was received by this cell phone when it was being covered by the Raj Nagar, Ghaziabad cell tower only. The several calls to his cell phone establish that Nitish Katara was within the reach of cell towers in Ghaziabad and had not moved to Delhi. This documentary evidence shows that the statement attributed to Kamal Kishore under Section 161 of the Cr.P.C. to the effect that Nitish Katara was in New Delhi at around 1:00 am of 17th February, 2002 was thus factually incorrect. We may note that before us Mr. Jethmalani has extensively relied upon the call at 1:11:18 hrs and statement attributed by Gaurav Gupta to Nitish that he was at the IMT, Ghaziabad at that time.

1782. The contents of Exh.PW-35/4 are also in contradiction to the testimony of Shivani Gaur, Bharti Yadav as well as Bhawna Gupta as they stated that Nitish Katara was at Shivani's wedding till 1:30 am.

1783. Clearly Kamal Kishore was not a reliable witness. It was suggested that he was really a plant, perhaps intended to name somebody else, but erroneously named Vikas Yadav. This would be falling in the realm of speculation and our consideration must confine itself to record.

1784. As per the principles laid down in (2000) 7 SCC 490, Hukum Singh v. State of Rajasthan (para 14) it was open to the prosecutor not to examine a person as a prosecution witness who is unreliable and may not support the prosecution version. The Supreme Court has stated that it is open to the defence to request his examination as a court witness. The appellants have examined as a defence witness, another cited prosecution witness who was not examined as a prosecution witness. Nothing precluded the appellants from so examining Kamal Kishore as well. In view of the above discussion, the prosecution cannot be faulted for the non-examination of Kamal Kishore as a prosecution witness. Additionally, no benefit enures in favour of the appellants from his non-examination inasmuch as the presence of the deceased in the Ghaziabad area at that time stands established by proven documentary evidence and testimony of witnesses noted above.

XXII Did the appellants share common intention of committing the offences?

1785. In the instant case, the prosecution has led evidence that while Vikas and Vishal Yadav had a strong motive against the deceased Nitish Katara which stands proved and established against them in their trial, the appellant Sukhdev @ Pehalwan shared in the motive as he was in the employment in the liquor shop business of the family of Vikas Yadav.

1786. It is urged by Mr. Ram Jethmalani, learned Senior Counsel that the case of the prosecution is that the accused persons came to attend the wedding, saw Nitish Katara and immediately decided to kill him. The prosecution has not alleged planning, pre-meditation or forethought to their actions. It is urged that no charge was framed against the accused persons under Section 120-B but a charge under Section 34 of the IPC has been framed. It has also been contended that common intention, necessary to bring home the charge must be a result of prior concert. It was essential also for the prosecution to establish previous concert and a physical presence when the act/transaction takes place. The submission that these elements were hopelessly missing in the instant case.

1787. Mr. Jethmalani has further urged that existence of motive to kill requires evidence of conspicuous and visible conduct on the part of the accused persons. Mere disapproval of a particular action does not lead to the inevitable conclusion that you will kill any person whose conduct you do not approve of. It is urged that the totality of evidence led by the prosecution on this aspect, even if

accepted as admissible, merely showed that Bharti Singh was contemplating opposition to her matrimonial alliance only from her father and no one else. It is submitted that there is total absence of evidence of any motive on the part of Vishal Yadav. Learned senior counsel has contended that the trial court has completely misguided itself when it observed that ―motive plays an important role in order to tilt the scale against the accused‖ 1788. Learned senior counsel has contended that the evidence of motive, even if established, does not supply a link in the chain of circumstantial evidence. It is urged that motive is often a misleading circumstance and assurance of guilt must arise from other evidence. The chain of circumstantial evidence in order to bring home a finding of culpability of an accused person, must be complete and unbroken independent of evidence of the motive.

1789. It is urged that the prosecution had set up a case that the accused persons entered into a conspiracy when they saw the deceased at the wedding and thought it was a good opportunity to get rid of him. The submission is, that as per the prosecution case, Vishal's only role was to bring Nitish out of the wedding venue.

1790. In the present case, death was by infliction of a blow of the hammer and therefore the prosecution must prove by unimpeachable evidence that Vishal Yadav was in the car at the time when Nitish Katara was hit with the hammer.

1791. Learned senior counsel has urged that in the instant case, the prosecution is using only the disclosure statement attributed to Vishal Yadav, and other than that, there is no evidence of his presence at the time of the crime or his participation therein.

1792. Ld. Senior Counsel has placed the pronouncement reported at (1999) 8 SCC 555 Ramashish Yadav and Ors. v. State of Bihar. In this case, the Supreme Court had laid down the principles governing Section 34 and had held as follows :-

> ―3. ...Section 34 lays down a principle of joint liability in the doing of a criminal act. The absence of that liability is to be found in the existence of common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. The distinct feature of Section 34 is the element of participation in action. The common intention implies acting in concert, existence of a pre-

arranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts. It requires a prearranged plan and it presupposes prior concert. therefore, there must be prior meeting of minds. The prior concert or meeting of mind may be determined from the conduct of the offenders unfolding itself during the course of action and the declaration made by them just before mounting the attack. It can also be developed at the spur of the moment but there must be pre-arrangement or premeditated concert.‖ (Emphasis by us) 1793. Mr. Ram Jethmalani, learned senior counsel for the appellant Vishal Yadav has urged at length that Section 34 of the Indian Penal Code has no application to the case against Vishal Yadav as the prosecutuion has been unable to establish any participation in the offence by him. Placing reliance on the pronouncement reported at AIR 1925 PC 1 Barender Kumar Ghosh v. King Emperor; (1999) 8 SCC 555 Ramashish Yadav and Ors. v. State of Bihar and (2000) 4 SCC 110 Surender Chauhan v. State of M.P., it has been submitted that Section 34 read with Section 114 of the Indian Penal Code requires abetment plus presence of the accused person at the place of offence.

1794. Our attention is drawn to Section 114 of the Indian Penal Code is a provision which is only brought into operation when circumstances amounting to abetment of a particular crime have first been proved and then the presence of the accused at the commission of that crime is proved in addition thereto. Mr. Jethmalani submits that abetment does not in itself involve the actual commission of the crime abetted. It is a crime apart. It is the presumption raised by Section 114 brings the case within the ambit of Section 34.

1795. Mr. R.K. Kapur, learned counsel appearing for Sukhdev @ Pehalwan contends that the sole basis of conviction of Sukhdev @ Pehalwan rested on roping in Section 34 of the Indian Penal Code even though there was no evidence of common intention or of prior concert or meeting of minds of the accused persons and that none of the witnesses have attributed any motive to him. It is also argued on behalf of Sukhdev @ Pehalwan that it is not the case of the prosecution that any monetary benefit was received by him.

1796. It is contended by Mr. Kapoor that Sukhdev @ Pehalwan was not even named in the FIR lodged at the instance of Nilam Katara and that there is neither any evidence to prove any abduction by Sukhdev nor is any disclosure statement or recovery attributed to Sukhdev @ Pehalwan . It is also not the case of the prosecution that any monetary benefit were received by him. Learned counsel would contend that Sukhdev @ Pehalwan has been convicted by taking the help of Section 34 of the IPC but there is no evidence of common intention, prior concert or meeting of minds between the three appellants. The submission is that Sukhdev @ Pehalwan was not related to Vikas Yadav and Vishal Yadav. In the year 2001-2002, he was employed at the factory of Shri D.P. Yadav at Bulandshahr. This connection with Shri D.P. Yadav as an employer was too remote to establish any closeness or meeting of minds with the other co-accused.

1797. Mr. Dayan Krishnan, ld. Additional Standing Counsel for the State, has submitted at some length that this proposition argued on behalf of Vishal Yadav and Sukhdev @ Pehalwan are completely untenable in a case of circumstantial evidence. It is contended that for application of Section 34 of the IPC, an overt act is not required.

1798. In the pronouncement of the Supreme Court reported at (2000) 4 SCC 110 Surendra Chauhan v. State of M.P. relied upon by the appellants the following principles were laid down.

—11. Under Section 34 a person must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design is itself tantamount to actual participation in the criminal act. The essence of Section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them. (Ramaswami Ayyangar v.State of T.N. [(1976) 3 SCC 779 : 1976 SCC (Cri) 518]) The existence of a common intention can be inferred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common intention is necessary. For the purpose of common intention even the participation in the commission of the offence need not be proved in all cases. The common intention can develop even during the course of an occurrence. (Rajesh Govind Jagesha v. State of Maharashtra[(1999) 8 SCC 428 : 1999 SCC (Cri) 1452] .) To apply Section 34 IPC apart from the fact that there should be two or more accused, two factors must be established: (i) common intention, and (ii) participation of the accused in the commission of an offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and a common intention is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence of a common intention. It has to be inferred from the facts and circumstances of each case.‖ (Underlining by us) 1799. Our attention is drawn to the pronouncement reported at (2009) 17 SCC 221 Akhlaq v. State of Uttar Pradesh. In para 30 of the report, the court held as follows :-

> —30. To apply Section 34 IPC, two factors must be established - (i) common intention, and
>
> (ii) participation of the accused in the commission of an offence. If common intention is proved but if no overt act is attributed to the individual accused, Section 34 will be attracted as it involves vicarious liability. It is not possible to have direct evidence of

common intention in every matter. It has to be inferred in appropriate cases from the facts and circumstances of each case [See: Jai Bhagwan and Ors. v. State of Haryana : (1999) 3 SCC 102: 1999 SCC (Cri) 388: AIR 1999 SC 1083].‖ 1800. It is, trite that direct proof of common intention is seldom available and as such intention therefore has to be inferred from the circumstances appearing from the facts of the case.

In the judgment reported at (2004) 4 SCC 371 Raju Pandurang Mahale v. State of Maharashtra and Anr., it has been held as follows:

—16. Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of the moment; but it must necessarily be before the commission of the crime. The true concept of the section is that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in Ashok Kumar v. State of Punjab [(1977) 1 SCC 746 : 1977 SCC (Cri) 177 : AIR 1977 SC 109] the existence of a common intention amongst the participants in a crime is the essential element for application of this section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision.

17. The section does not say —the common intentions of all‖, nor does it say —an intention common to all‖. Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in Chinta Pulla Reddy v. State of A.P. [1993 Supp (3) SCC 134 : 1993 SCC (Cri) 875 : AIR 1993 SC 1899] , Section 34 is applicable even if no injury has been caused by the particular accused himself. For applying Section 34 it is not necessary to show some overt act on the part of the accused.‖ (Emphasis by us) 1801. In (1974) 4 SCC 544, Tuka Ram Ganpat Pandare v. State of Maharashtra, Justice Krishna Iyer writing for the Bench had observed thus:

—10. Mere distance from the scene of crime cannot exclude culpability under Section 34 which lays down the rule of joint responsibility for a criminal act performed by a plurality of persons. In Barendra Kumar Ghosh v. King Emperor [(1924) 52 IA 40 : AIR 1925 PC 1 : ILR 52 Cal 197] the Judicial Committee drew into the criminal not those _who only stand and wait'. This does not mean that some form of presence, near or remote, is not necessary, or that mere presence, without more, at the spot of crime, spells culpability. Criminal sharing, overt or covert, by active presence or by distant direction, making out a certain

measure of jointness in the commission of the Act is the essence of Section 34. Even assuming that presence at the scene is a prerequisite to attract Section 34 and that such propinquity is absent. Section 107, which is different in one sense, still comes into play to rope in the accused. The act here is not the picking of the godown lock but house-breaking and criminal house trespass.

This crime is participated in by those operating by remote control as by those doing physical removal. Together operating in concert, the criminal project is executed. Those who supply the duplicate key, wait at the weigh bridge for the break-in and bringing of the booty and later secrete the keys arcparticipes criminis.‖ 1802. We may also usefully refer to the pronouncement of the Supreme Court reported at (2001) 3 SCC 673, Suresh and Another v. State of U.P. wherein the court dealt on the ambit of Section 34 of the IPC while considering which of the accused shared the common intention with the other accused and held as follows:

―23. Thus to attract Section 34 IPC two postulates are indispensable: (1) The criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person. (2) Doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons.

24. Looking at the first postulate pointed out above, the accused who is to be fastened with liability on the strength of Section 34 IPC should have done some act which has nexus with the offence. Such an act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessarily be overt, even if it is only a covert act it is enough, provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. Even an omission can, in certain circumstances, amount to an act. This is the purport of Section 32 IPC. So the act mentioned in Section 34 IPC need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act, e.g. a co- accused, standing near the victim face to face saw an armed assailant nearing the victim from behind with a weapon to inflict a blow. The co- accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim. Such omission can also be termed as an act in a given situation. Hence an act, whether overt or covert, is indispensable to be done by a co-

accused to be fastened with the liability under the section. But if no such act is done by a person, even if he has common intention with the others for the accomplishment of the crime, Section 34 IPC cannot be invoked for convicting that person. In other words, the accused who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of Section 34 IPC.‖ (Emphasis by us) The Supreme Court has thus categorically held that Section 34 of the IPC would be attracted even if no overt act is attributed to or proved against the individual concerned. Even an omission to do something may in a given case amounts to an act to attract Section 34 of the IPC. It is also trite that there is seldom direct evidence of common intention which would have to be inferred from the facts and circumstances of the case.

The submission on behalf of the appellants that the prosecution must prove overt acts on their part to apply Section 34 of the IPC is not supported by the law on the subject.

1803. We may also consider the nuances of the expression ―common intention‖ and how it has been developed. In para 62 of the judgment reported at (2011) 6 SCC 1 Satyavir Singh v. The State through CBI, the Supreme Court had observed as follows :-

―62. In Abdul Sayeed v. State of M.P. 2010 (10) SCC 259, it has been held as under:

—49. Section 34 IPC carves out an exception from general law that a person is responsible for his own act, as it provides that a person can also be held vicariously responsible for the act of others if he has the "common intention"

to commit the offence. The phrase "common intention" implies a prearranged plan and acting in concert pursuant to the plan. Thus, the common intention must be there prior to the commission of the offence in point of time. The common intention to bring about a particular result may also well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances existing thereto. The common intention under Section 34 IPC is to be understood in a different sense from the "same intention"

or "similar intention" or "common object". The persons having similar intention which is not the result of the prearranged plan cannot be held guilty of the criminal act with the aid of Section 34 IPC. (See Mohan Singh v. State of Punjab.)

50. The establishment of an overt act is not a requirement of law to allow Section 34 to operate inasmuch this section gets attracted when a criminal act is done by several persons in furtherance of the common intention of all. What has, therefore, to be established by the prosecution is that all the persons concerned had shared a common intention. (Vide Krishnan v. State of Kerala and Harbans Kaur v. State of Haryana".)‖ (Emphasis supplied)
1804. In this regard, reference may also usefully be made to a judicial pronouncement placed by Mr. Dayan Krishnan, learned Additional Standing Counsel before this court. In the pronouncement of the Supreme Court repoted at (1969) 3 SCC 717 Harwant Singh and Ors. v. State of Haryana, wherein the court held as follows:

—11. Injuries 7 and 8 on the abdomen and injury no. 3 on the head were dangerous to life and could prove individually fatal. They were sufficient to cause death in the ordinary course of nature. Injury No. 3 was an incised would and could be caused by a kripan. Injury No.7 a penetrating would and injury no. 8 a penetrating incised wound could be caused by a spear. Injuries 6 and 12 were incised wounds on the chest. The consistent evidence of the prosecution witnesses is that accused Harwant and Jagjit with their spears struck arur on his abdomen and chest. On receipt of the injuries Arur fell down. Accused Joginder and Kulwant then gave Kripan blows to Arur while he was lying on the ground. Now accused Jagjit has been acquired. It cannot be said with certainty whether he or Harwant caused the fatal injuries on the abdomen. We shall give the appellants the benefit of the doubt that Harwant did not cause the fatal injuries on the abdomen. But the fatal injury no. 3 on the head was caused by kripan blow after Arur fell to the ground.

Kulwant and Joginder wielded the kripans and were responsible for this injury. Harwant, Kulwant, Joginder made a concerted attack on Arur. Harwant attacked him with spear, Kulwant and Joginder attacked him with kripans. The concerted attack and the number of injuries sustained by Arur show that Harwant, Kulwant and Joginder had the common intention to kill Arur. To prove common intention it is not necessary to establish a pre-concesrted plan. The common intention may develop on the spot. We are satisfied that at the time of striking Arur all of them had developed the common intention of killing him and each is responsible for the acts of the others. In our opi nion, Harwant, Kulwant and Joginder are liable to be convicted under Section 302 read with section 34 of the Indian Penal Code.‖ (underlining by us) It is settled law therefore that to prove common intention, it is not necessary to establish a pre-concerted plan.

In relation to time, thus, common intention may develop at the spot, that is immediately before the crime.

The above extract would also show that the Supreme Court has also held that to attract the applicability of Section 34 of the IPC, it is not necessary to assign a specific role to each individual. The objections of the appellants to the contrary thus have to be rejected.

1805. Applying the principles laid down by the Supreme Court so far as the present case is concerned, the prosecution has sought to establish common intention as well as the presence of all the accused together through the evidence of last seen as well as other evidence. The submission of the State is that once presence together at the time of the offence is established, Section 114 of the IPC would come into play which provides that even when a person is an abettor and present when the act or offence is committed, he shall be deemed to have committed such an act.

1806. On the same issue, reference may usefully made to the Privy Council pronouncement reported at AIR 1925 Privy Council 1924 Barendra Kumar Ghosh v. King Emperor. The relevant extract thereof reads as follows:

> —As to Section 114, it is a provision which is only brought into operation when circumstances amounting abetment of a particular crime have first been proved, and then the presence of the accused at the commission of that crime is proved in addition; Abhi Misser v. Lachmi Narain (10). Abetment does not in itself involve the actual commission of the crime abetted. It is a crime apart Section 114 deals with the case where there has been crime of abetment, but where also there has been actual commission of the crime abetted and the abettor has been present thereat, and the way in which it deals with such a case is this. Instead of the crime being still abetment with circumstances of aggravation, the crime becomes the very crime abetted. The section is evidentiary not punitory. Because participation de facto (as this case shows) may sometimes be obscure in detail, it is established by the presumption juris et de jure that actual presdence plus p[rior abetment can mean nothing else but participation. The presumption raised by Section 114 brings the case within the ambit of Section 34.‖ (Emphasis supplied) 1807. In this case, the Privy Council was considering a linkage between Section 34 and 114 of the IPC. The Privy Council laid down the principle that presence coupled with abetment could mean nothing else but participation. Section 114 of the IPC reads that if the abettor is present when an offence is committed, he is deemed to have committed such act or offence.

The pronouncement of the Privy Council does not support the appellant but supports the prosecution.

1808. Mr. Ram Jethmalani, learned senior counsel appearing for Vishal Yadav submits that presence and participation are sine qua non to bring home a charge under section 34. This proposition has also been canvassed by the prosecution in the instant case as it has sought to establish not only the presence at the spot but participation of all the appellants in the crime. In Barender Kumar Ghosh (supra), the Privy Council has laid down that the presence itself coupled with abetment can mean nothing but participation.

On application of the principles laid down by the Privy Council and the Supreme Court, the prosecution in the present case has thus to prove existence of common intention and presence at the spot when the crime was committed.

1809. So far as the judgment in Ramashish Yadav and Ors. v.

State of Bihar(supra) is concerned, the same would have no application in the instant case inasmuch as the case before the Supreme Court was one of direct evidence where the role of each of the accused was clearly defined. We are here concerned with the chain of circumstantial evidence.

1810. The prosecution evidence in the present case has to be examined in the light of the above principles. Vikas Yadav is the brother of Bharti Yadav. Vishal Yadav is their counsin. It is in evidence that Sukhdev @ Pehlwan was an employee of the father of the Vikas Yadav who was known to all of them. It is in prosecution evidence that they used to roam together.

1811. The prosecution has established that Vikas and Vishal Yadav were opposed to their sister's closeness with the deceased which was the motive for the crime.

1812. The accused persons had gone together to Shivani Gaur's wedding. The deceased was already present there. It is plausible that the intention to get rid of the deceased developed when the accused saw him at the wedding.

1813. It is in the testimony of Shivani Gaur PW-11 that in the end of March, 2001 her wedding was fixed with Shri Amit Arora. Her engagement ceremony on 4th June, 2001 in Le Meridian Hotel was attended by Nitish Katara, Bharti Yadav/Singh and Bharat Diwakar. There is categorical evidence with regard to distribution of the invitation cards for the wedding. As per Shivani Gaur (PW 11), she along with her fiancé Amit Arora had gone to the house of Nitish Katara for giving the invitation card for the wedding which was to be solemnized on the night of 16th February, 2002. Nilam Katara corroborates this testimony.

1814. Shivani Gaur (PW - 11) also states that either her brother or her father had gone to the house of Vikas Yadav for giving the invitation to them.

1815. Shivani Gaur stated that she knew Vikas Yadav for quite a long time as Bharti and her were classmates since school. Shivani Gaur has also testified that she knew Vishal Yadav merely as Bharti's cousin.

1816. The above narration of facts would show that there is no evidence at all that Vishal Yadav was invited to Shivani Gaur's wedding. Even Vishal Yadav does not state that he was invited to the wedding.

1817. Vishal Yadav's stand on the contrary is that he did not know Shivani Gaur at all. In the statements made under Section 313 of the Cr.P.C. by both Vishal and Vikas Yadav, they have stated that they were not aware of the fact that Shivani Gaur was a student of IMT College, Ghaziabad alongwith Bharti Singh.

1818. Where was the occasion for him to attend a stranger's wedding? Yet he not only accompanied Vikas Yadav to the venue but also proceeded to the dias and got himself photographed with a bridal couple whom he did not even know. It is important to note that Vikas Yadav did not go to the wedding with his family members. Instead he goes to the wedding in the company of Vishal Yadav and Sukhdev Pehlwan neither of whom had been invited to the wedding.

1819. There is evidence on record which would also suggest that the two brothers do not appear to have gone to the venue as guests at a function. The photographs on record depict the guests at the wedding as attired in formal business suits. Nitish Katara was dressed in a traditional red kurta with a churidar and a shawl. Bharat Diwakar was also dressed in a business suit and a tie. (Ex PW 6/2). Ex PW 6/3 and Ex PW 6/4 depict the bride and groom with four other people, namely Sunil (Shivani's brother's friend), Vishal Yadav, Vikas Yadav and Rohit Gaur, from left to right. While Sunil and Rohit are dressed in business suits with ties, the appellants appear to have a style of their own, which is at variance with what one would expect guests to be attired in at a wedding. It is certainly not the attire of persons who claim to be using high-end cars such as a Mercedes, living on large estates, owning farm houses, having involvement in multiple business, would wear to a formal function such as a wedding.

1820. It is the case of the defence that Vikas and Vishal Yadav left Shivani Gaur's wedding together and that they had to attend some function. The defence has claimed that the two together attended a function at the Gandhi residence at Raj Nagar, Ghaziabad after attending Shivani Gaur's wedding. DW-25 Bharat Diwakar has testified that he received a wedding invitation in January, 2002 while PW-26 Gaurav Gupta stated that he was living at Faizabad where he had received the marriage invitation of his batchmate Shivani.

1821. There is no evidence that Vishal Yadav was invited to attend this function. DW - 1 has referred to the Vij's having invited the family of Shri D.P. Yadav. It is obvious that the two of them were so close that they would accompany each other to functions where only one or the other may have been invited. They did things together. In order to be close, it is not essential that two persons have to be members of the same family.

1822. Let us now examine the prosecution case about the involvement and implication of Sukhdev @ Pehalwan . The police was groping in the dark as to what exactly had happened to Nitish Katara till the arrest of Vikas and Vishal Yadav in the present case and had no clue of the manner in which he had been abducted and murdered. On 25 th February, 2002, these two accused persons made disclosures revealing the involvement of a third accomplice described by them only as _Pehalwan'. According to the Investigating Officer Anil Somania (PW-35 in Vikas and Vishal Yadav's trial and PW-22 in Sukhdev Pehalwan's trial) he also recorded the statement under Section 161 of the Cr.P.C. of Bharti Yadav on the 2nd of March, 2002 (Exh PW 35/AB) in the presence of her father Shri D.P. Yadav as well as a lady police officer Anju Bhaduria. In this statement Bharti Yadav confirmed the involvement of a third person revealing his full name as _Sukhdev Pehalwan' also present with her brothers in the wedding on the night of the incident. Bharti Yadav also disclosed the fact that she knew Sukhdev @ Pehalwan for the reason that he worked in the liquor shop run by her father in Bulandshahr, UP.

1823. The fact that this statement was actually given is manifested from the evidence of the action taken by the police immediately thereafter to trace Sukhdev @ Pehalwan . It is necessary to notice the police action premised on information revealed in these statements under Section 161 Cr.P.C. in some detail as Bharti Yadav resiled therefrom in the witness box and had to be cross examined by the prosecution.

1824. Therefore, we find unbelievable the subsequent statement by Bharti Yadav that she had not made the statement on the lines recorded on Ex. PW-35/AB. We may note that the learned Trial Judge has noted that Bharti Yadav turned hostile in court to assist the defence of her brothers.

1825. Till 2nd March, 2002, no other person had given the particulars of _Pehalwan' named on 25th February, 2002 by Vikas and Vishal Yadav in their disclosure statements. The police had no idea who he was or that he was employed in the liquor shop of the family of Vikas Yadav in Bulandshahr. This information was gathered by the police from the statement (Exh PW 35/AB) given by Bharti Yadav.

1826. No reason or motive is suggested by any of the appellants as to why Vikas and Vishal Yadav would make disclosure of fact that Sukhdev @ Pehalwan was involved in the commission of the offence or why Bharti Yadav or Ajay Kumar would take his name in their statements under Section 161 of the Cr.P.C.

1827. Anil Somania has revealed that a trap was accordingly laid for arrest of Sukhdev @ Pehalwan in Bulandshahr on 3rd March, 2002 but he could not be arrested. However the police was able to seize a guarantee card (Ex. PW-22/A1) bearing the photograph of Sukhdev @ Pehalwan with his complete address.

1828. On the next date, i.e., 4th March, 2002 Anil Somania recorded the statement under Section 161 of Ct. Satender Pal Singh (PW-10 in Sukhdev @ Pehalwan 's trial) wherefrom the presence and

identity of Sukhdev @ Pehalwan in the Tata Safari vehicle with Vikas and Vishal Yadav as well as presence of the fourth person (whom in court he identified as a person wearing red kurta) on the night of 16/17 th February, 2002 coming from Diamond Palace Banquet Hall was revealed.

1829. Further confirmation of the presence of Sukhdev @ Pehalwan in the Tata Safari with Vikas and Vishal Yadav as well as deceased Nitish Katara on the fateful night is found in the evidence of Ajay Kumar Katara (examined as PW-33 in Vikas and Vishal Yadav's trial and as PW-14 in Sukhdev Pehalwan's trial). In his testimony, Ajay Kumar/Katara stated that he could identify Sukhdev @ Pehalwan for the reasons that he had found Sukhdev @ Pehalwan conducting business in the liquor shop run by Shri D.P. Yadav and the accused persons in Bulandshahr area and that he was also seen in the company of Vikas and Vishal Yadav in the Ghaziabad area.

1830. Just as Vishal Yadav, Sukhdev @ Pehalwan was again a person not invited to the wedding. He gives no explanation for what he was doing with the two brothers at the Diamond Palace, Banquet Hall or for why he was there.

1831. The prosecution had led evidence of the spontaneous utterance early in the morning of the 17th of February 2002 of Bharti Yadav to Nilam Katara. The evidence to this effect has been held to be admissible by us. The appellants were seen in the company of a person wearing red kurta in a Tata Safari vehicle coming from the Diamond Palace Banquet Hall on the night of 16th/17th February, 2002 at about 12:00/12:30 a.m. by the police constables who were on patrol duty in police gypsy Chetak 13. It is in evidence that Nitish Katara had worn a red Kurta to the wedding. There is categorical evidence of Ajay Kumar Katara that it was the deceased who he had seen in the company of the three appellants in the Tata Safari vehicle around the same time at the Hapur Chungi.

1832. The deceased was found murdered shortly thereafter and his body discovered within a few hours. It has then been proved that pursuant to a disclosure statement made by Vishal Yadav, he got effected recovery of inter alia, the wrist watch of the deceased from the bushes where he had concealed it. To support this evidence, the prosecution has lastly relied upon forensic and other evidence to prove the case.

1833. Given the evidence on record and application of the principle laid down in State of West Bengal v. Mir Mohd. Omar (supra), the appellants and Sukhdev @ Pehalwan had to explain what happened to Nitish Katara or, if they parted ways, how or when they did so. There is no such explanation on the record. The only possible inference therefore is the appellants were involved in the crime.

1834. In the instant case, the prosecution has led evidence of specific acts attributed to Vishal Yadav rendering him culpable under Section 34 of the IPC.

1835. The prosecution has firstly led evidence to establish that he is the one who took Nitish Katara away from his companions at the wedding. It has thereafter led evidence to prove that the deceased was last seen alive in the company of the appellants.

1836. The established facts and circumstances show that the accused persons shared a common intention to commit the offences which were committed in furtherance thereof.

1837. In the instant case which rests on circumstantial evidence alone, the existence of motive, actual presence of the appellants at the time of commission of the offence stand established. Therefore, by application of the principles laid down by the Privy Council in Barender Kumar Ghosh (supra), participation has to be presumed. The essential requirements of intention and in the present case participation as well thus stand established negating the challenge by the appellants. These findings stand fortified by the subsequent conduct of the appellants of abscondance and leading false evidence of alibis, which we have separately discussed in detail.

1838. On application of the principles laid down in the above judgment, to the proved facts and circumstances noted by us hereinabove, it has to be held that the appellants were jointly responsible for commission of all criminal acts with which they were charged.

XXIII Ajay Kumar Katara stands discredited in a sting operation conducted on him 1839. Mr. Sumeet Verma has further submitted that PW-33 Ajay Kumar stands discredited in a sting operation conducted on him on 25th March, 2008 and 23rd April, 2008 by the Metro Now and broadcast on a television channel. He has urged that the Metro newspaper in its 12th May, 2008 edition carried a report of such a sting operation. It is urged that an application was filed by the appellant Vikas Yadav on 12th of May, 2008 under Section 311 of the Cr.P.C. In this application, the applicant submitted that the witness had stated that he had planted evidence on the accused persons in order to rope them in the case and that he wanted to also rope in Shri D.P. Yadav in a false case at the instance of the complainant, some police officials and other political rivals. The applicant prayed that ―disk along with other relevant witnesses be called as witness or otherwise for just decision of the case". This undated application did not state that on whose behalf it was being filed. No particulars or details of any witnesses were mentioned.

1840. The application was contested by the prosecution which filed a reply dated 22nd May, 2008 inter alia contending that the case was required to be decided on the basis of evidence recorded during the trial and not on the basis of evidence created through the media as the same lacked genuineness and authenticity and was not reliable. It was also objected that the applicant had failed to specify any particulars of the witness or the purpose of the same. No prayer for recall of Ajay Kumar was made in the application. The prosecution contended that the CD was false, fake and fabricated and liable to be discarded. The prosecution has submitted that Ajay Kumar had been examined, cross-examined at length in both the trials and discharged twice in the case without his testimony being shaken in his cross-examination. Detailed submissions about the harassment of the witness from the date when his statement was recorded on 18th March, 2002 were pointed out which included pressure, intimidation, attempts to win him over, attempts at his life and attempts to rope him in false cases were also made. The prosecution pointed out that while recording his testimony in the Sukhdev trial, Ajay Kumar had stated that the family members of the accused persons were putting pressure upon him to secure an affidavit in their favour. Reference was made to his repeated applications to the court. The allegations in the applications were denied as false and the application was stated as motive to malign the complainant as well as Ajay Kumar.

1841. The court heard arguments on this application and posted the matter on 24th May, 2008 for orders on the application. In the meantime, Ajay Kumar filed an affidavit on the 23rd of May, 2008 that he had learnt about the alleged sting operation conducted on him as being claimed by a newspaper. He rushed to the court to file an affidavit with regard to sting operation conducted by the accused persons/ Shri D.P. Yadav in collusion with Subhash Yadav but he reached the court a little late and the affidavit was not accepted by the court reader. On the next date, the reader refused to accept the same on the ground that the court was on leave and he was asked to return at 3:00 p.m. The court had dispersed and the reader expressed inability to accept the affidavit and the application. The witness stated that when he came out of the court room, two or three persons connected with Shri D.P. Yadav stopped him and threatened him with dire consequences and told him to leave the court failing which his son and family would be liquidated. The witness stated that he got scared and left the court premises.

1842. On 17th May, 2008 and 19th May, 2008, the witness claimed that he received threats on his cell phones from Subhash Yadav who warned him against going to court. A complaint was lodged with the Shahibabad Police Station in this regard. Because of threats which he was receiving, the applicant stated that he could not come to the court as he was being threatened that his son, who is in the custody of Shri D.P. Yadav, would be killed. The witness referred to the several applications and documents made before the court about the prevailing threat to him to make him change his previous statement in

the court. Reference was made to his statement on oath on the 27th of July, 2007 in the trial of Sukhdev trial wherein the witness had stated that close relative and goons of Shri D.P. Yadav were pressurizing and threatening him to change his statement. The witness also referred to the following police reports filed by him:-

- FIR No.129 of 2007 under Section 307, 147 IPC dated 01.06.07 against Dinesh Singh Gurjar, Virendra Singh Laur and others. Accused are henchmen of Shri D.P. Yadav.

- FIR No.639 of 2007 under Section 147, 307, 328, 120B/506 IPC, dated 18.07.07. that Shri D.P. Yadav through his accomplices administered poison to Ajay Kumar.

- FIR No.938 of 2007 under Section 467/468/471 IPC dated 15.09.07 against Shri D.P. Yadav and Ors. that they falsely tried to prove that Ajay Katara and Ajay Prashad/Sharma are the same person.

- FIR No.115 of 2008 under Section 307/120-B IPC dated 25.01.08 against Shri D.P. Yadav and Ors. that they at the instance of Shri D.P. Yadav, attacked him with deadly weapon.

- Several other complaints and FIR were registered against Shri D.P. Yadav and his henchmen.

1843. So far as the alleged sting operation is concerned, the witness referred to an incident on 25th March, 2008 when he claims that he was with Subhash Yadav with whom he consumed liquor. As Subhash Yadav was asking him inquisitive questions related to the case, in a bid to confuse him, Ajay Kumar claims that he made certain absurd, false and unnecessary statements as he knew that Subhash had connections with Shri D.P. Yadav and that whatever was stated, would reach him. On 23rd April, 2008, Ajay Kumar claimed that Subhash again called him as he was interested in getting into the property dealing business. The witness says that when he reached Subhash Yadav he was offered drinks . Under the total influence of liquor, Subhash Yadav again asked the witness about the case. In drunken bravado and to misguide him, the witness stated that he again made some unwarranted, unnecessary and absurd remarks which were not true. So far as reasons for doing so is concerned, the witness stated that he made these remarks keeping in view the welfare and safety of his son as he was being threatened that in case he did not help them, his son would be killed. The witness submitted that he had not seen his wife and son for more than eight months and was terrified about his son's safety. The witness stated that Subhash Yadav had laced the drink. The witness denied all contents of the conversation which was part of the sting operation. Ajay Kumar testified that statements were made in extreme fear and in an inebriated condition. The witness categorically stated that he stood by his previous statements in court made on 31st May, 2003 and 27th May, 2007.

1844. The application came up for orders on 24 th May, 2008. The trial court noted that from the affidavit dated 23rd May, 2008 of Ajay Kumar, it was clear that he was admitting the contents of the CD. In these circumstances, on the 24th of May, 2008, Shri G.K. Bharti, counsel for the appellant submits that he did not want to press the application filed under Section 311 of the Cr.P.C. as the same had become infructuous.

1845. The application was dismissed as such on the 24th of May, 2008. The main case was thereafter posted for hearing on behalf of the prosecution and defence on the 26 th of May, 2008. The order dated the 24th of May, 2008 of course was not challenged before any court.

1846. Thereafter a second application was filed on the 26th of May, 2008 by Shri G.K. Bharti, Advocate on behalf of Shri Vikas Yadav contending that the CD having been admitted by Ajay Kumar, the issue arose as to whether he had been given threats or administered drinks by Subhash Yadav. To establish this fact, the applicant sought examination and cross-examination of ―Shri Subhash Yadav and Shri Sharma and Ajay Kumar with security guard and other relevant witnesses like Smt. Tanu wife of Ajay Kumar and her parents‖ Vikas Yadav consequently prayed for summoning of Mr. Subhash; Mr.

Sharma, Mr. Ajay Kumar with security guards and other relevant witnesses and prayed for an opportunity to examine and cross-examine the witness.

1847. This application was considered and dismissed by the court and by its order dated 27th May, 2008, it was observed that the trial stood concluded and that the judgment was to be pronounced on the next date. It was further observed that the earlier application under Section 311 of the Cr.P.C. was dismissed as not pressed on 24th May, 2008 and that the second application (which was under consideration) was only an attempt to revive the earlier application.

1848. The judgment in the case was pronounced on 28th May, 2008 finding the appellants guilty for commission of the offences with which they were charged and the court further proceeded to hear the appellants on the issue of sentence on 30th May, 2008.

1849. Mr. Dayan Krishnan, learned counsel appearing for the state has pointed out that so far as an application seeking examination of Tanu Chaudhary as a witness is concerned, the same stood already dismissed by an order passed on 14 th November, 2007.

1850. The orders dated 24th May, 2008 and 27th May, 2008 were not challenged before any court and attained finality.

1851. Before us, Mr. Sumeet Verma, learned counsel for the appellants has contended that without giving the appellants an opportunity to prove the falsity of the contents of the affidavit filed by Ajay Kumar, the trial court has placed reliance on the affidavit in the impugned judgment 1852. On the other hand, it is urged by Mr. Dayan Krishnan, learned additional counsel for the State that a statement made by a witness after the completion of his deposition in court is irrelevant and cannot be taken into consideration. Reliance is placed on the pronouncements of the Supreme Court reported at (2006) 9 SCC 368 Nissar Khan v. State of Uttarakhand and (2004) 12 SCC 229 Yaqub Ismail Patel v. State of Gujarat.

1853. In (2006) 9 SCC 386 Nissar Khan v. State of Uttaranchal, two eye witnesses PW-1 and PW-2 stood cross-examined and discharged on 4th January, 2001. They were recalled on 7th January, 2002 and re-examined by the defence on which date all of them turned hostile and resiled from their previous statement. Another eye witness PW-4 had filed an application before the trial court that he had been threatened and intimidated by the accused not to depose against them. The court observed that it clearly appeared that the eye witnesses were won over by threat or intimidation after more than one year of their cross-examination and ultimately when the eye witnesses were won over by the accused, they were recalled and re-examined on 7th January, 2002. It was, however found that even on re-examination they supported the genesis of the incident and resiled from their previous statements only with regard to the identity of the accused. The court observed that the evidence on record showed that the accused and prosecution parties were at loggerheads because of business rivalry and were known to each other from before. By the time the witnesses were recalled, they were won over either by money, by muscle, pressure or threat or intimidation. With regard to the application for recall, the court observed as follows:-

> —9. ...We are of the view that no reasonable person properly instructed in law shall allow an application filed by the accused to recall the eye witnesses after lapse of more than one year that too after the witnesses were cross-examined and discharged.‖ 1854. This judgment has been followed by this court in a decision dated 12th May, 2011 passed in Crl.App.No.128/1998 Jitender Kumar v. State of Delhi wherein the court commented on the practice of taking adjournment in criminal cases to tire the witness and observed thus:-
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> —27. We subscribe to the reasoning given by the Trial Court. PW-2 reached the spot on hearing an alarm and whatever was stated by PW-1 immediately after the incident i.e.

"Bharat Ko Maar Diya Chaku, Churi Se Maar Diya" is admissible res gestae under Section 9 of the Indian Evidence Act. Immediately, the deceased was seen lying on the road unconscious and bleeding from the mouth. The Supreme Court in Swaran Singh v. State of Punjab, (2000) 5 SCC 668, commented about the practice of seeking adjournments in the criminal cases to tire the witnesses. The Supreme Court held as under:-

"...It has become more or less a fashion to have a criminal case adjourned again and again till the witness tires and gives up. It is the game of unscrupulous lawyers to get adjournments for one excuse or the other till a witness is won over or is tired..."

28. In Khujji v. State of M.P., (1991) 3 SCC 627, a witness changed his stand on the identity of the accused. The Supreme Court held that the statement in cross-examination on the question of identity of the Appellant was a clear attempt to wriggle out what the witness had stated earlier in his examination- in-chief.

29. In Nisar Khan v. State of Uttaranchal, (2006) 9 SCC 386, the eye witnesses supported the prosecution case consistently. Their cross- examination was recorded after about one year of the recording of their examination-in-chief. In cross-examination, the witnesses turned hostile as PW-1 has turned hostile in this case.

The Supreme Court observed that the accused and the prosecution witnesses were at loggerheads and known to each other earlier. It was held that by that time the eye witnesses were recalled, they were won over either by money or by muscle power or by threats or intimidation. The testimony of the witnesses in examination-in-chief was thus relied upon for conviction of the accused.‖ 1855. On the same aspect, reference has been made to (2004) 12 SCC 229 Yaqub Ismail Bhai Patel v. State of Gujarat. In this case, PW-1 Munna @ Gheti had testified and corroborated the presence of the eye witness PW-2 at the spot. He also threw light on the conduct of the accused around the time of the incident. His testimony together with the testimony of the investigating officer corroborated the presence of PW-2 at the spot. PW-1 however subsequently filed an affidavit wherein he had sworn to the effect that whatever he had deposed before the court as PW-1 was not true and it was so done at the instance of the police.

1856. The observations of the court with regard to this affidavit in Para 39 of the report are relevant and read as follows:-

―39. The averments in the affidavit are rightly rejected by the High Court and also the Sessions Court. Once the witness is examined as a prosecution witness, he cannot be allowed to perjure himself by resiling from the testimony given in Court on oath. It is pertinent to note that during the intervening period between giving of evidence as PW 1 and filing of affidavit in court later, he was in jail in a narcotic case and that the accused persons were also fellow inmates there.‖ (Emphasis by us) 1857. It is noteworthy that in the joint trial of Vikas and Vishal Yadav, the evidence of PW-33 Ajay Kumar was recorded as back as on 31st May, 2003 and he was extensively cross-

examined separately by counsels for both Vikas and Vishal Yadav. The statement of Ajay Kumar/Katara as PW-14 in Sukhdev's trial was also recorded as back as on 27th July, 2007.

1858. The defence evidence stood concluded and by an order passed on 28th September, 2007 in Vikas and Vishal Yadav, the trial court had posted for arguments the cases on 6, 8, 9 and 10th October, 2007. Arguments in this case had also thus commenced as back as on 6th October, 2007.

1859. The statements attributed to the witness in an alleged sting operation on 25th March, 2008 would be akin to the witness being recalled and testifying against his earlier testimonies in, not one, but two trials.

1860. The sting operation was allegedly conducted on 25th March, 2008 and 23rd April, 2008, i.e, five years after recording of his statement in the trial of Vikas Yadav and Vishal Yadav on 31st May, 2003 and more than eight months after recording of his testimony in the trial of Sukhdev on 27 th July, 2007.

1861. The witness has explained that it was because of such threats, in his earlier statement made on 31st May, 2003 in the trial of Vikas and Vishal Yadav he had stated that during his stay in Delhi, neither Shri D.P. Yadav nor any of his person harassed him or has done anything to him. The witness explained the reasons for making such statement was that on that day (31st of May, 2003), Shri D.P. Yadav with his goons were present outside the court room, though within the court premises, and he made such statement out of fear. In his evidence, the witness volunteered that on 7th August, 2007, he was asked by Sh. Jitender Yadav, the real nephew of Shri D.P. Yadav to give an affidavit in court that he had made a false statement in court and they would spare his life and asked him to take as much money as he want but he refused to take the same.

1862. The witness has been granted police security since 25 th April, 2002 under court orders after he made a complaint to the court and senior police officers. There is reference in the court record to the several cases in which the witness has been implicated before or after his statement had been recorded.

1863. In his cross-examination, the witness has further stated that his wife Tanu Chaudhary had complained against him at the instigation of Shri D.P. Yadav. He further stated that Shri D.P. Yadav had also made a complaint against him (Ajay Kumar) at the police post North Avenue, Delhi and at Mukeria in Punjab on 21st April, 2007. The witness stated that on 27th August, 2003, Smt. Saroj Yadav W/o Mahesh Yadav (a sister-in-law of Shri D.P. Yadav) also filed a complaint against him in respect of alleged offences under Sections 323/354/452 of the IPC. The witness further stated that he had recently made a complaint to the police that some persons at the instance of Shri D.P. Yadav had administered poison to him. He denied the suggestion that he, in connivance with rival politicians of Shri D.P. Yadav, was trying to ruin Shri Yadav's political career.

1864. The learned Trial Judge has noted several prior complaints by Ajay Kumar with regard to the apprehension to the life of his own and his son at the instance of Shri D.P. Yadav. Such complaints were made even as late as in March, 2008. The learned trial judge has noted that the stand of the witness in his affidavit dated 23rd May, 2008 was not being taken for the first time and was not an after thought. The trial court has held that the statement in the sting operation is actually misleading. In the sting operation, the witness has allegedly stated that the blood on the hammer was that of the mother of the deceased and the hammer had been planted. The learned Trial Judge has noted that in the entire conversation on the CD (i.e., the sting operation), the witness does not say that on the night of 16th/17th February, 2002, he was busy in election and that he had not seen Nitish Katara in the company of the appellants in the Tata Safari bearing no.DB- 07H-0085 at the Hapur Chungi at midnight.

1865. In his testimony on 27th July, 2007 in Sukhdev's trial, Ajay Kumar has deposed that so long as he lived in Delhi, he was getting threats from the side of Shri D.P. Yadav that he was a false witness and would be killed for making the complaint to the SSP Ghaziabad on 19th April, 2002.

1866. It is well settled that the testimony given by the witness during the trial which has to stand. In the instant case, the witness had testified not once, but has given identical testimony in two trials, the first on 31 st May, 2003 (In Vikas and Vishal Yadav's trial) and thereafter more than four years later, on 27th July, 2007 in Sukhdev's trial. Despite passage of four years and extensive cross examination, the witness remained unshaken. No contradictions between his two statements could be pointed out by the

appellants. The vehement reliance on the sting operation on behalf of the appellants is, therefore, misconceived and has to be rejected.

1867. In this background, even if the affidavit dated 25th May, 2008 filed by Ajay Kumar/Katara to explain his position in the sting operation were to be ignored, the sting operation allegedly conducted on him is of no legal consequence and effect and deserves to be discarded.

1868. Sukhdev @ Pehalwan also filed an application dated 12th May, 2008 to re-examine PW-14 Ajay Katara after the sting operation. The trial court passed an order dated 19th February, 2009 dismissing this application. Sukhdev @ Pehalwan assailed the trial court order by way of Crl.M.C. No.670/2009 in this court. Crl.M.C. No.670/2009 was dismissed by an order dated 6th April, 2009 passed by this court. This order has attained finality. So far as Sukhdev @ Pehalwan is concerned, this issue also has received a quietus. In any event, for the very reasons noted above, the sting operation cannot be looked at for any purpose.

1869. In this background, we agree with the learned trial judges that it is a testimony of the witness in court recorded on 31 st May, 2003 and 27th July, 2007 respectively which has to be Crl.A.Nos.741, 910/2008 & 145/2012 1000 accepted. The sting operation carried out in 2008 is unreliable and does not any evidentiary value.

XXIV Defects in investigation if any and impact thereof?

Role of courts where investigation is tardy 1870. The learned trial judge in her judgment dated 28th of May, 2008 has recorded that the IO was under the influence of the family of the accused persons. It is pointed out that even though Nilam Katara, mother of Nitish Katara has shown 85 greeting cards, album, etc. to the IO which showed that Bharti and Nitish were in a deeply romantic relationship, he had taken the two most innocuous cards which too were suggestive of a mere casual friendship. The investigating officer PW-35 Anil Somania admits that Nilam Katara had shown him the cards and the bed sheet. It is observed that the intent of the IO clearly being to avoid evidence of motive coming on record.

1871. The IO has stated that he did not visit the spot where the dead body until 28th of February, 2002 which he visited at the instance of the accused. It is submitted that valuable evidence may have been destroyed and/or lost as a result.

1872. The investigating officer did not get a report with regard to the presence of any inflammable circumstance on the body of the deceased. He neither sent any soil lifted from the spot where the burnt body was recovered nor black ash which Crl.A.Nos.741, 910/2008 & 145/2012 1001 was recovered on 17th February, 2002 for a chemical examination.

1873. The testimony of Nilam Katara and other witnesses reflect several important facts which have not been recorded by the police in the statements under Section 161 of the Cr.P.C. made to it.

1874. The lapse of the investigating agency to seek the opinion of the doctor with regard to the recovered hammer during investigation has also been pressed in arguments.

1875. Mr. P.K. Dey, learned counsel for the complainant has submitted that the above omissions by the investigating officer were on important facets of the case. He points out that the prosecution committed some important mistakes. It is firstly urged that the prosecution abruptly dropped Bharti Yadav as a witness on 30th March 2005 and closed the evidence. It was the complainant who was compelled to challenge this order of the court permitting dropping of Bharti Yadav by filing Crl.Rev.P.No.315/2005 entitled Nilam Katara v. State and Ors. in this court. It was the learned Single Judge of this Court who had allowed the revision petition by the order dated 3rd October, 2005 holding that Bharti Yadav was a material witness.

1876. We find that in this revision even the State had contended that she was necessary and material witness and asserted that Crl.A.Nos.741, 910/2008 & 145/2012 1002 she should be examined as the court witness under Section 311 of the Cr.P.C. and that her testimony would have an important bearing on the outcome of the trial. The learned Single Judge has observed that the prosecution wanting to drop this witness on account of its not being able to secure her presence was an _act of despair' knowing fully well that its case would suffer and that such act of despair cannot be one which advances the ends of justice.

1877. Mr.Dey has pointed out that the revision petition was vehemently opposed on behalf of Vikas Yadav and Vishal Yadav, who were separately represented by Senior Counsel who had contested even the maintainability of the revision.

1878. Another mistake which has been pointed out by Mr. P.K.

Dey is the action of the prosecution in exhibiting the statement of Kamal Kishore under Section 161 of the Cr.P.C. It is contended that the same was exhibited despite the prohibition under Section 162 of the Cr.P.C. The statement was given an exhibit mark in the testimony of PW- 35 Anil Somania, an investigating officer, even though it could not have been proved by him. It is contended that the same is completely inadmissible and cannot be looked at for any purpose.

1879. Futhermore, on perusal of the call record of Nitish Katara's cell number 9811283641 (Exh PW 21/1), it appears that Crl.A.Nos.741, 910/2008 & 145/2012 1003 between 1st January, 2002 till 16th February, 2002 around 1041 calls have been made to the cell phone number 9811009998. Even on the 16th February, 2002, Nitish Katara had made six calls to the number 9811009998 between the period starting from 20:42:52 to 23:.33:38 hours (i.e, between 8:42 pm to 11:33 pm.) 1880. Similary, the call record of Bharti Yadav's cell number 9810038469 (Exh PW 22/2), between 1st to 19th February, 2002 reflects that 204 (two hundred and four) messages have been sent to one cell phone number 9810051914. Even on 17th February, 2002, eleven messages have been sent from cell 9810038469 number 9810051914 between 7:32:58 to 15:19:49 (i.e. from approx 7:33 am to 3:20 pm). Were Bharti and Nitish Katara using cell phones other than those whose call records stand proved in evidence? Perhaps the details of the persons in whose names cell phone number 9811009998 and 9810051914 stood registered as well as locations from where calls made and received may have been relevant to the present case. Having obtained the call records, the investigating agency has unfortunately failed to analyze the documents.

1881. As per Nitin Katara he received five e-mails from Bharti Yadav marked Exh.PW-9/ Mark A-1 to A-5 to Nitin Katara between 19th and 24th of February 2002 which reflect her state of mind hence the contents of these emails were Crl.A.Nos.741, 910/2008 & 145/2012 1004 extremely relevant. Bharti Yadav denied having sent these mails. In the given circumstances, she could not be expected to do anything else. Establishing the correctness of Nitin's statement and verification of the e-mails was not a difficult matter, advancements in technology rendering it impossible to lie about these matters. However, the investigating officer completely failed to investigate into the matter to establish that these mails were actually sent by Bharti Yadav. These mails would manifest that till the 24th of February, 2002, Bharti was not aware that Nitish stood murdered on the night of the 17th of February, 2002! The e-mails declare her fear of her father and family. It is a shocking state of affairs that an educated 23 years young lady could be so terrorized and physically confined by her immediate family on the borders of Delhi, the capital of India and brow beaten into submission. The e-mails declare the involvement of Bharti's brothers in his abduction.

1882. It has been urged by Mr. P.K. Dey, learned counsel for the complainant that so far as the accused are concerned the investigation was fair, not tainted. The above omissions are important from the perspective of the prosecution. It is urged that the lapses in the investigation by themselves would not

result in vitiating the trial as the rest of the evidence must be scrutinized independently. Learned Crl.A.Nos.741, 910/2008 & 145/2012 1005 counsel has urged that criminal justice cannot be a casualty on account of lapses committed by the investigating officer.

1883. This issue arose before the Supreme Court in 2000 SCC (Crl.) 61 State of Karnataka v. K. Yarappa Reddy where the court was called upon to consider the question of defective investigation as to whether any manipulation in the station house diary by the investigating officer could be put against the prosecution. In para 19 of the pronouncement, the court held thus:-

> —19. But can the above finding (that the station house diary is not genuine) have any inevitable bearing on the other evidence in this case? If the other evidence, on scrutiny, is found credible and acceptable, should the Court be influenced by the machinations demonstrated by the Investigating Officer in conducting investigation or in preparing the records so unscrupulously? It can be a guiding principle that as investigation is not the solitary area for judicial scrutiny in a criminal trial, the conclusion of the Court in the case cannot be allowed to depend solely on the probity of investigation. It is well-nigh settled that even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinised independently of the impact of it. Otherwise the criminal trial will plummet to the level of the investigating officers ruling the roost. The court must have predominance and pre-

eminence in criminal trials over the action taken by the investigation officers. Criminal Justice should not be made a casualty for the wrongs Crl.A.Nos.741, 910/2008 & 145/2012 1006 committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it albeit the investigating officer's suspicious role in the case.‖ (Emphasis by us) 1884. On the same issue, our attention has been drawn to the pronouncement of the Supreme Court reported at (2010) 5 SCC 91, Abu Jhakir v. State of Tamil Nadu. Placing reliance on para 19 of K. Yarappareddy (supra), the Supreme Court rejected the arguments on behalf of the appellant that the investigation was not fair as there were many missing links in the process of investigation.

1885. The appellants have strongly assailed the failure of the investigating agency to send the hammer for opinion of the doctor who conducted the post-mortem. Based on this objection, it has been pressed before us that the very recovery of the hammer must be disbelieved. A similar objection arose for consideration before the Supreme Court also in (2004) 10 SCC 598 Ram Bali v. State of U.P. (Paras 12-14). We may usefully extract the relevant portion of the judgment, which reads thus:

> —12. The investigation was also stated to be defective since the gun was not sent for forensic test. In the case of a defective investigation the Crl.A.Nos.741, 910/2008 & 145/2012 1007 court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. (See Karnel Singh v. State of M.P. [(1995) 5 SCC 518 : 1995 SCC (Cri) 977])
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> 13. In Paras Yadav v. State of Bihar [(1999) 2 SCC 126 : 1999 SCC (Cri) 104] it was held that if the lapse or omission is committed by the investigating agency or because of negligence there had been defective investigation the prosecution evidence is required to be examined dehors such omissions carefully to find out whether the said evidence is reliable or not and to what extent, such lapse affected the object of finding out the truth. The contaminated conduct of officials alone should not stand in the way of evaluating the evidence by the courts in finding out the truth, if the materials on record are otherwise

credible and truthful; otherwise the designed mischief at the instance of biased or interested investigator would be perpetuated and justice would be denied to the complainant party, and in the process to the community at large.

14. As was observed in Ram Bihari Yadav v. State of Bihar [(1998) 4 SCC 517 :

1998 SCC (Cri) 1085] if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the law-enforcing agency but also in the administration of justice. The view was Crl.A.Nos.741, 910/2008 & 145/2012 1008 again reiterated in Amar Singh v.Balwinder Singh [(2003) 2 SCC 518 : 2003 SCC (Cri) 641] . As noted in Amar Singh case [(2003) 2 SCC 518 : 2003 SCC (Cri) 641] it would have been certainly better if the firearms were sent to the Forensic Test Laboratory for comparison. But the report of the ballistic expert would merely be in the nature of an expert opinion without any conclusiveness attached to it. When the direct testimony of the eyewitnesses corroborated by the medical evidence fully establishes the prosecution version, failure or omission or negligence on the part of the IO cannot affect the credibility of the prosecution version.‖ (Emphasis by us) 1886. Where reliable and cogent statements, consistent with the story of prosecution, are on record, merely because the police officers have failed to perform their duties in accordance with the requirements of law, and there has been some defect in the investigation, it will not enure to the benefit of the accused persons to the extent that they would be entitled to an order of acquittal on this ground. (Ref.: (2010) 9 SCC 567 C. Muniappan v. State of Tamil Nadu).

1887. Before this court, the appellants have contended that the investigating officer failed to make sketch of the hammer which was recovered. The investigating officer also failed to send the hammer for opinion of the doctor who conducted the port-mortem. The appellants have also challenged the Crl.A.Nos.741, 910/2008 & 145/2012 1009 testimony of witnesses of last seen together, on the ground that no TIP of the appellants was conducted.

1888. In Shyamal Ghosh (supra), these very objections were raised. In para 40, the Supreme Court observed that every discrepancy in investigation does not weigh with the court to the extent that it necessarily results in acquittal of the accused. The Supreme Court noted that the discrepancies pointed out in the case were lapses of immaterial consequence. The failure to prepare a site plan or to send gunny bags in which the body was recovered to the FSL was held not to be fatal to the case of the prosecution in the circumstances of the case. The Supreme Court adverted to judicial precedents observing as follows:-

―40. In C. Muniappan v. State of T.N. [(2010) 9 SCC 567 : (2010) 3 SCC (Cri) 1402] this Court has clearly stated the principle that the law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded.‖Similar view was taken by this Court in Sheo Shankar Singh v. State of Jharkhand [(2011) 3 SCC 654 : (2011) 2 SCC (Cri) 25] wherein the Court held that the failure of the investigating agency to hold a test identification parade does not, in that view, have the effect of weakening the evidence of Crl.A.Nos.741, 910/2008 & 145/2012 1010 identification in the court. As to what should be the weight attached to such an identification is a matter which the court [would] determine in the peculiar facts and circumstances of each case.‖Similarly, failure to make reference to the FSL in the circumstances of the case is no more than a deficiency in the investigation of the case and such deficiency does not necessarily lead to a conclusion that the prosecution case is totally unworthy of credit.‖ (Emphasis by us) 1889. In (2012) 8 SCC 263, Dayal Singh and Ors. v. State of Uttaranchal, the Supreme Court dealt with the question of defective or improper

investigation resulting from the acts of omission and/or commission, deliberate or otherwise, of the Investigating Officer or other material witnesses, who are obliged to perform certain duties in discharge of their functions and then to examine its effects. In para 19, the Supreme Court articulated the following issues, which arose in such eventuality:-

―19. Now, we will deal with the question of defective or improper investigation resulting from the acts of omission and/or commission, deliberate or otherwise, of the investigating officer or other material witnesses, who are obliged to perform certain duties in discharge of their functions and then to examine its effects.

In order to examine this aspect in conformity with the rule of law and keeping in mind the Crl.A.Nos.741, 910/2008 & 145/2012 1011 basic principles of criminal jurisprudence, and the questions framed by us at the very outset of this judgment, the following points need consideration:

(i) Whether there have been acts of omission and commission which have resulted in improper or defective investigation.

(ii) Whether such default and/or acts of omission and commission have adversely affected the case of the prosecution.

(iii) Whether such default and acts were deliberate, unintentional or resulted from unavoidable circumstances of a given case.

(iv) If the dereliction of duty and omission to perform was deliberate, then is it obligatory upon the court to pass appropriate directions including directions in regard to taking of penal or other civil action against such officer/witness.‖ 1890. The Supreme Court observed that in finding an answer to these questions, the Courts would have to examine the prosecution evidence in its entirety, especially when a specific reference to defective or irresponsible investigation is noticed in the light of the facts and circumstances of a given case. On the role of the investigating officer, in para 21 of Dayal Singh and Ors. v. State of Uttaranchal (supra), the court observed as follows:-

―21. ...An Investigating Officer is completely responsible and answerable for the manner and Crl.A.Nos.741, 910/2008 & 145/2012 1012 methodology adopted in completing his investigation. Where the default and omission is so flagrant that it speaks volumes of a deliberate act or such irresponsible attitude of investigation, no court can afford to overlook it, whether it did or did not cause prejudice to the case of the prosecution. It is possible that despite such default/omission, the prosecution may still prove its case beyond reasonable doubt and the court can so return its finding. But, at the same time, the default and omission would have a reasonable chance of defeating the case of the prosecution in some events and the guilty could go scot-free. ...‖ 1891. Irresponsible investigation may smack of intentional mischief to misdirect the investigation as well as to withhold material evidence from the Court. It cannot be considered either as a case of bona fide or unintentional omission or commission. Such conduct is not a case of faulty investigation simplicitor but the case of is an investigation coloured with motivation or an attempt to ensure that the suspect can go scot-free. On this aspect, in para 26 of Dayal Singh and Ors. v. State of Uttaranchal (supra), the Supreme Court has ruled thus:-

―26. ...Dereliction of duty or carelessness is an abuse of discretion under a definite law and misconduct is a violation of indefinite law.

Misconduct is a forbidden act whereas dereliction of duty is the forbidden quality of an act and is necessarily indefinite. One is a Crl.A.Nos.741, 910/2008 & 145/2012 1013 transgression of some

established and definite rule of action, with least element of discretion, while the other is primarily an abuse of discretion. This Court in the case of State of Punjab and Ors. v. Ram Singh Ex. Constable [(1992) 4 SCC 54] stated that the ambit of these expressions had to be construed with reference to the subject matter and the context where the term occurs, regard being given to the scope of the statute and the public purpose it seeks to serve. The police service is a disciplined service and it requires maintenance of strict discipline. The consequences of these defaults should normally be attributable to negligence.

Police officers and doctors, by their profession, are required to maintain duty decorum of high standards. The standards of investigation and the prestige of the profession are dependent upon the action of such specialized persons. The police manual and even the provisions of the Cr.P.C. require the investigation to be conducted in a particular manner and method which, in our opinion, stands clearly violated in the present case. Dr. C.N. Tewari, not only breached the requirement of adherence to professional standards but also became instrumental in preparing a document which, ex facie, was incorrect and stood falsified by the unimpeachable evidence of eye witnesses placed by the prosecution on record. Also, in the same case, the Court, while referring to the decision in Ram Bihari Yadav and Others v.

State of Bihar and Ors. [(1995) 6 SCC 31] noticed that if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and Crl.A.Nos.741, 910/2008 & 145/2012 1014 confidence of the people would be shaken not only in the law enforcement agency but also in the administration of justice.‖ —34. ... Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the Court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not sub-served. For truly attaining this object of a „fair trial‟, the Court should leave no stone unturned to do justice and protect the interest of the society as well.‖ (Emphasis by us) 1892. There are several pronouncements of the Supreme Court laying down the duty of the court in cases involving faulty investigations which must be referred to. In (1972) 3 SCC 613 Sathi Prasad v. The State of U.P., the Supreme Court held that if the police records become suspect and investigation perfunctory, it becomes the duty of the court to see if the evidence given in court should be relied upon and such lapses ignored.

1893. In (2004) 3 SCC 654 Dhanaj Singh @ Shera and Ors. v.

State of Punjab, the Supreme Court noticed the possibility of the investigation being designedly defective and held thus:

—In the case of a defective investigation the Court has to be circumspect in evaluating the Crl.A.Nos.741, 910/2008 & 145/2012 1015 evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective.‖ 1894. The Supreme Court enunciated the principles with regard to the case of omission and commission on the part of the investigating agency in AIR 1999 SC 644 Paras Yadav v. State of Bihar holding that if the lapse or omission is committed by the investigating agency, negligently or otherwise, the prosecution evidence is required to be examined, de hors such omissions, by the court to find out whether the said evidence is reliable or not. The contaminated conduct of officials should not stand in the way of evaluating the evidence by the courts, otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party.

1895. The Supreme Court has thus categorically ruled that there is no absolute proposition that defective investigation would necessarily lead to acquittal of the accused person. Reiterating the principles laid down in (1995) 5 SCC 518 Karnel Singh v. State of M.P. and latter pronouncement in

(2004) 10 SCC 598 Ram Bali v. State of Uttar Pradesh, the Supreme Court observed that ―in case of defective Crl.A.Nos.741, 910/2008 & 145/2012 1016 investigation the court has to be circumspect while evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigation officer if the investigation is designedly defective‖.

1896. In Dayal Singh and Ors. v. State of Uttaranchal (supra), the Supreme Court in para 30, observed as follows:-

> ―30. With the passage of time, the law also developed and the dictum of the Court emphasized that in a criminal case, the fate of proceedings cannot always be left entirely in the hands of the parties. Crime is a public wrong, in breach and violation of public rights and duties, which affects the community as a whole and is harmful to the society in general.‖ 1897. Thus, the objective evaluation of the evidence placed before the court in every case so as to ensure a fair trial, has to be effected and a conclusion arrived at with regard to the guilt of the person charged, which may not necessarily be effected by defective investigation. In the present case we have noted the several omissions on the part of the investigating agency which would have shed light on some key issues of the prosecution. Failing assistance on these aspects, this court Crl.A.Nos.741, 910/2008 & 145/2012 1017 has undertaken an evaluation of the proven facts and circumstances on record in accordance with law.

(i) Investigation was not inclined against the appellants:

conducted under close judicial scrutiny 1898. During the course of hearing, we find the parties have made a reference to multiple litigations, applications and orders passed thereon. We have undertaken an examination of such of these which have been placed by the parties. We find that it is not possible to doubt the investigation in the present case for the reason that it has undergone judicial scrutiny by the court of the Chief Judicial Magistrate, Ghaziabad as well as by a Division Bench of this court in Crl.Writ No.247/2002. The judicial scrutiny of the investigation is apparent from the following:

(i) The Chief Judicial Magistrate has recorded an order dated 27th February, 2002 while considering the remand application filed by the police for effecting recoveries pursuant to the disclosure statements on the 25th of February 2002. The order dated 27th February, 2002 passed by the Chief Judicial Magistrate, Ghaziabad records the presence of Vikas Yadav and Vishal Yadav pursuant to the previous order of the court. It is also recorded that the report of the investigating officer as well as the CD (case diary) has been perused. This order contains the signatures of both Vikas Crl.A.Nos.741, 910/2008 & 145/2012 1018 Yadav and Vishal Yadav. They were also represented by counsels in all proceedings.

(ii) On 1st of March, 2002, the Chief Judicial Magistrate directed his Reader that as a matter of abundant caution, photocopy of the case diary be kept in a sealed cover on the record. Thus the investigation till 1st of March 2002 (which included the disclosure statements dated 25th February, 2002 and recoveries effected on 28th March, 2002) was on the record of the Chief Judicial Magistrate.

(iii) A criminal revision was filed by the police before the Sessions Judge, Ghaziabad against rejection of their application for remand by the order of 1st of March, 2002 of the Chief Judicial Magistrate. This revision was dismissed on the 6th of March, 2002.

(iv) The complainant Nilam Katara filed a W.P.(Crl.) No.22/2002, Nilam Katara v. Union of India which was listed before the Supreme Court on 26th February, 2002.

(v) Crl.Writ No.247/2002, Nilam Katara v. Union of India and Others was filed on 27th February, 2002 in the High Court of Delhi seeking inter alia issuance of a writ of habeas corpus directing the

respondents to produce Nitish Katara forthwith; writ of mandamus to establish with certainty and expedition, the identity of the charred human body recovered by the police.

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(vi) Vikas Yadav and Vishal Yadav challenged the order dated 8th March, 2002 passed by the Chief Judicial Magistrate, Ghaziabad granting police custody remand w.e.f. 2:00 pm on 9th March, 2002 till 2:00 pm on 11th March, 2002 before the Allahabad High Court. Despite our queries, the appellants have not placed either the pleadings or the proceedings thereon before us.

(vii) The appellants filed a writ petition before the High Court of Judicature at Allahabad. Though we asked parties for details of this case, nothing is forthcoming.

(viii) The chargesheet was filed on 6th April, 2002 in the court of Chief Judicial Magistrate, Ghaziabad. After completion of proceedings under Section 207 of the Cr.P.C., on 16 th April, 2002, the case was committed to the court of Sessions Judge. Thereafter, the case was fixed for 3rd May, 2002 for appearance of the accused persons.

(ix) Transfer Petition No.449/2002 and Crl.Misc.No.5184/2002 were filed by Nilam Katara before the Supreme Court praying for transfer of the proceedings from the Ghaziabad. By an order dated 22nd May, 2002, the Supreme Court stayed the proceedings in the Trial Court and finally by an order dated 23rd August, 2002 directed transfer of the trial to Delhi.

1899. It is also in evidence that S.K. J.K. Gangwar joined investigation as early as on 19th February, 2002 and was Crl.A.Nos.741, 910/2008 & 145/2012 1020 closely associated with S.I. Anil Kumar Somania throughout the investigation. Keeping in view the intricacies of the case on the 7th of March, 2002, S.I. J.K. Gangwar and S.I. Rakam Singh were appointed co-investigating officers. S.I. J.K. Gangwar was examined as PW34 in the trial of Vikas Yadav and Vishal Yadav and as PW19 in Sukhdev Pehlwan's trial wherein Anil Kumar Somania was examined as PW 35 in the trial of Vikas Yadav and Vishal Yadav and as PW22 in Sukhdev Pehlwan's trial.

1900. Learned senior counsel for the appellants as well as Mr. Sumeet Verma, Advocate have made extensive submissions that S.I. Anil Somania conducted the investigation dishonestly. It was contended that he had prior animosity and malice against Shri D.P. Yadav, father of Vikas Yadav and has therefore, falsely implicated the appellants in the present case.

1901. Learned counsels for the appellants have submitted that the testimony of Anil Somania has to be doubted for the reason that there are court orders against him with regard to the mala fide investigation. Reference has been made to a court order wherein adverse comments have been made with regard to the conduct of investigation by this police official in some other case. This fact by itself would not taint every official duty and investigation conducted by Shri Anil Somania.

Crl.A.Nos.741, 910/2008 & 145/2012 1021 1902. In this regard, the defence had examined DW21 Advocate Samar Singh who adverted to tussles with the Investigating Officer when he was posted in District Sambhal which was Mr. Yadav's constituency because Shri Yadav had refused to supply liquor free of cost to the police. We find that the learned Trial Judge has considered the testimony of the defence witnesses at length and also carefully scrutinized the record with regard to this allegation of mala fide. DW21 had produced a certified copy of the judgment in Crl.Writ No.21955/2004 (Ex.DW21/A) entitled D.P. Yadav v. State of U.P. and Others in this regard. The witness had opined that Anil Somania had not investigated the matter fairly for the reason that he was not carrying a good reputation in P.S. Kavi Nagar which statement was based on no facts.

1903. The testimony of DW25 Jamshed Khan has also found unworthy of reliance by the learned Trial Judge.

1904. Before the learned trial court, the accused persons also asserted that they had been falsely implicated in the case by political rivals. In the given facts and circumstances, it is not possible to believe that the complainant, Nilam Katara could be influenced by political opponents of Vikas Yadav to falsely implicate accused persons for the gruesome murder of her elder son.

Crl.A.Nos.741, 910/2008 & 145/2012 1022 1905. Nothing has been pointed out to us to enable us to take a contrary view. We have also noticed heretofore the fact that Anil Somania was not the sole investigating officer in the present case; that his work was being conducted under the supervision of Shri Prashant Kumar, Senior Superintendent of Police, Ghaziabad and that the investigation was being conducted under strict judicial scrutiny in several proceedings initiated not only at the instance of the accused persons but the complainant as well.

1906. The other ground urged in support of the challenge to the fairness of the investigation conducted by Anil Somania is the allegation by the appellants that he was under the influence of the complainant whose father was a senior police officer for which reason he had manipulated the case against the accused persons. In this regard, we find that the complainant Nilam Katara has stated that her father had retired more than 16 years back from the police. The learned Trial Judge has also noted the testimony of S.I. J.K. Gangwar who had stated that the complainant's father Shri A.N. Kaul was the S.S.P., Moradabad as back as in the year 1971. The witness had stated that he learnt of Shri Kaul's relationship to Nilam Katara only in the witness box. No suggestions to the contrary have been given to the witness. There could thus be no question of influence of Nilam Katara's father over either the investigating officer or the Crl.A.Nos.741, 910/2008 & 145/2012 1023 investigation. Even if Shri A.N. Kaul wielded influence when in service, passage of seventeen years of retirement would have ensured that the same has dissipated.

1907. On a deep consideration of the matter, we are unable to find ourselves persuaded that the investigation in this case was a result of malicious intent against the accused on the part of the Ghaziabad police officials. First and foremost, Inspector Anil Somania was not the only Investigating Officer. In every step taken during the investigation, right from recording of statements of persons under Section 161 of the Cr.P.C. (including the examination of the appellants under Section 161 of the Cr.P.C.); arrests of the appellant, conducting raids, recording of statements, effecting searches and recoveries; pursuing the several petitions and cases filed by the complainant as well as the appellants in the Supreme Court of India, High Court of Delhi; High Court of Judicature of Allahabad; the court of the Chief Judicial Magistrate, Ghaziabad and court at Dabra, Distt. Gwalior, Inspector Anil Somania was assisted by other police officials, and was under scrutiny of higher officials as well.

(ii) Submission that actions of the police officer investigating the case should not be believed 1908. The above discussion would show that the appellants have premised their challenge to the impugned judgments primarily on objections to the various steps taken by the Crl.A.Nos.741, 910/2008 & 145/2012 1024 investigating agency. Long arguments have been addressed with regard to the working of the IO Anil Somania and the various steps taken by him. It would appear that the entire case of the prosecution was to be rejected on the sole ground that the steps taken by the investigating agency as well as the testimony of the investigating officer was rendered suspect because they were part of the police force and therefore must be completely disbelieved. This submission is not warranted and the manner in which such suspicion must be treated is best stated in the words of the Supreme Court in the judgment rendered in (2001) 1 SCC 652 State v. Sunil. The court has also dealt with the commonly held perspective on the actions of the police officer investigating the case that they should be approached with distrust. Rejecting this notion, the Supreme Court has observed as follows: -

> —21. We feel that it is an archaic notion that actions of the police officer should be approached with initial distrust. We are aware that such a notion was lavishly entertained during the British period and policemen also knew about it. Its hangover persisted during

> post-independent years but it is time now to start placing at least initial trust on the actions and the documents made by the police. At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law the presumption should be the other way around. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even Crl.A.Nos.741, 910/2008 & 145/2012 1025 by the legislature. Hence when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the court to believe the version to be correct if it is not otherwise shown to be unreliable.

It is for the accused, through cross-examination of witnesses or through any other materials, to show that the evidence of the police officer is either unreliable or at least unsafe to be acted upon in a particular case. If the court has any good reason to suspect the truthfulness of such records of the police the court could certainly take into account the fact that no other independent person was present at the time of recovery. But it is not a legally approvable procedure to presume the police action as unreliable to start with, nor to jettison such action merely for the reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions.‖ (Emphasis by us) 1909. We have noted above the unchallenged and unrebutted testimony of the prosecution witnesses including the investigating officers. No contradiction or omission could be brought out by the appellants in the actions of these officers. It is in evidence that more than one police personnel was joined in the investigation. In fact the testimony of one investigating officer PW-35 Anil Somania corroborated the evidence of the other officer PW-34 J.K.

Crl.A.Nos.741, 910/2008 & 145/2012 1026 Gangwar in all material particulars. The same was subjected to judicial scrutiny at different levels.

1910. In fact, we have noted certain actions and omissions during investigation which would prejudice the prosecution. No such aspect could be pointed out by the defence.

1911. In these circumstances, it would be most unfair to disbelieve the investigating officers and to discard the steps taken by the investigating officers in the instant case. To so treat the police force with total suspicion and disdain would be unfair to the organization to say the least.

XXV W.P.(Crl.)No.247/2002 decided on 14th October, [(2003) ILR 2 Delhi 377] 1912. During the course of hearing, our attention was drawn to the filing of Crl.(W)No.247/2002 on 27th of February, 2002 by Smt. Nilam Katara disposed of by the judgment dated 14th October, 2003 reported at (2003) ILR 2 Delhi 377.

1913. The writ petition came to be before the court on the 28th of February, 2002 when the following order was passed.

> "28.2.2002 Present : Ms. Kamini Jaiswal with Mr. Arvind Nigam and Mr. Abhijat for the petitioner.

Crl.A.Nos.741, 910/2008 & 145/2012 1027 Mr. K.K. Sud, ASG with Mr. Navin Chawla for respondent no.1.

Mr. Prakash Kumar for Mr. Ashok Srivastava for respondents Nos.2 to 4.

Ms.Mukta Gupta for respondent No.5 Crl.W.No.247/2002 Notice to respondents. Notice is accepted by Mr. Navin Chawla for respondent No.1 and Ms. Mukta Gupta for respondent No.5. Notice through Mr. Prakash Kumar Singh for Mr. Ashok Srivastava, Standing Counsel for U.P. Government in Supreme Court. Additionally notice shall be served on all these respondents by Registry through fax. Dasti notice to respondent No.6. Status report by all official respondents by 1st March, 2002.

Registry to convey these orders by fax or by all available modes to seek compliance of this order.

Meanwhile respondent No.5 is directed to take all requisite steps to extent police protection to petitioner and her immediate family members and report compliance.

List on 01st March, 2002 at 2:00 PM Order be given dasti to all parties.

(B.A. Khan) Judge (V.S. Aggarwal) Judge February 28, 2002"

Crl.A.Nos.741, 910/2008 & 145/2012 1028 1914. On 14th March, 2002, this court passed the following order in the presence of counsel for the appellants and the SSP Prashant Kumar, Ghaziabad:

"14.3.2002 Present : Ms. Kamini Jaiswal with Mr. Arvind Nigam for the petitioner.

Mr. K.K. Sud, ASG with Mr. Navin Chawla for respondent no.1/ UOI Mr. Ashok Shrivastav, standing counsel for UP with Mr. Prakash Kumar Singh for Respondents no. 2 to 4 SSP Prashant Kumar Ghaziabad SI Anil Kumar PS Kavi Nagar Inspector V K Dham, SHO Paharganj Ms Mukta Gupta for Respondent Mr. K N Balgopal with MR G N Bharti for respondent no. 6 to 8 Crl.W.No.247/2002 SSP Ghaziabad, present in person, has submitted the investigation status report which shows the steps taken on day to day basis by the investigating agency in the matter so far. The report also discloses that DNA and fingerprint tests stand submitted to the Learned Magistrate at Ghaziabad. Also recovery of one wrist Crl.A.Nos.741, 910/2008 & 145/2012 1029 watch, one hammer and one Tata Safari car was also made allegedly at the instance of accused and statements of 14 witnesses recorded till date including that of Km Bharti. A hunt was on for locating the other accused Sukhdev Yadav @ Pehalwan who was absconding and against whom proceedings were initiated for declaring him proclaimed offendor.

At this stage UP State Counsel Mr Shrivastava complained that pursuant to 48 hour police remand order passed by Judicial Magistrate at Ghaziabad, about 19 hours time was lost by the investigating agency due to the alleged casual and dilly dallying approach adopted by the Judicial Magistrate, Dabra (Gwalior). Shri R K Gondly who had passed several orders on one plea or the other without implementing any one of these and resulting in delay of 19 hours in handing over of accused from Dabra jail to investigating officer which had hampered and slowed down the investigation and that is why full recovery could not be made. He invited our attention to the orders passed by this Magistrate to show the casual manner in which he had proceeded in the matter. It was also pointed out by him that at one stage a wrong information was furnished to him that Hon‟ble Chief Justice of Allahabad High Court was seized of some petition by the accused which was only intended to delay the handing over of the accused to Ghaziabad police.

It is not for us at this stage to comment on this aspect of the matter and the manner and method of the conduct of the proceedings by the concerned Magistrate. Suffice it to say that it Crl.A.Nos.741, 910/2008 & 145/2012 1030 would be for the investigating agency to approach and bring the matter to the notice of Hon‟ble Chief Justice of MP High Court or to seek some other available remedy against it. It shall also be open to the investigating agency to approach the competent forum for further extension in police remand to make up for the time lost in the facts and circumstances of the case and it shall be, in turn, for the Magistrate concerned to pass appropriate orders under law.

SSP, Ghaziabad, who is seized of the investigation in the case, had prayed for two weeks further time for completion of investigation as far as practicable and for taking appropriate follow up action in the matter including presentation of charge sheet before the competent court.

Time prayed for is granted. SSP is directed to file second status report on the next date showing the progress of the investigation. List on 3rd April 2002."

1915. The police filed the status reports pursuant to the order of the court. Before the Division Bench hearing Crl.Writ No.247/2002, Vikas and Vishal Yadav were jointly represented.

1916. The appellants Vikas and Vishal Yadav thus at no point of time stated that the accused have not made any disclosure. No reference was made to any communication or application dated 26th of February, 2002 sent by them to the CJM, Crl.A.Nos.741, 910/2008 & 145/2012 1031 Ghaziabad. No dispute was laid to the fact that the recoveries were effected by the police at the pointing out of the accused.

XXVI Conduct of accused persons 1917. A perusal of the impugned judgment would show that after considering the case in its entirety, the learned trial judge has examined the prosecution submission that in the present case of circumstantial evidence, the conduct of the accused persons is equally important and admissible in evidence. The consideration by the learned trial judge can be divided into the following headings:

(A) The accused had set-up a false plea of alibi that at the time when Ajay Kumar/Katara had spotted the deceased in the company of appellants, Vikas Yadav and Vishal Yadav were at the house of DW-1 Ashok Gandhi and subsequently their alibi from 17th to 23rd February, 2002; while Sukhdev Yadav set up an alibi that he was in his native village.

(B) Vikas Yadav and Vishal Yadav led false evidence to the effect that they had gone to attend the marriage of Shivani Gaur on 16th February, 2002 in a Mercedes car and not in Tata Safari bearing no.PB 07H-0085.

(C) The appellants Vikas Yadav and Vishal Yadav made every possible effort to avoid appearance of Bharti Yadav, a Crl.A.Nos.741, 910/2008 & 145/2012 1032 material witness before the trial court resulting in substantial delay in trial as well as pressurised her into withholding material evidence and giving testimony which was prevaricatory and false.

(D) Intimidation of witness : Ajay Kumar/Katara, the public witness of the deceased having been last seen alive in the company of the three appellants has been threatened and pressurized by and at the instance of the appellants and their family members.

(E) Witnesses deposed either out of fear, pressure, threat or because of the influence of their relationship with the accused persons.

(F) Vikas and Vishal Yadav deliberately misled the police with regard to the recovery of the Tata Safari vehicle.

(G) Every effort was made to intimidate the Special Public Prosecutors to prevent them from discharging functions and obligations freely and fairly.

(H) Manipulation of court record - Applications dated 26th February, 2002 falsely claimed to have been filed by Vikas and Vishal Yadav before the CJM, Ghaziabad.

1918. We now take up each of these above headings hereafter in seriatim:

Crl.A.Nos.741, 910/2008 & 145/2012 1033 (A) The accused had set-up a false plea of alibi that at the time when Ajay Kumar/Katara had spotted the deceased in the company of appellants, Vikas Yadav and Vishal Yadav were at the house of DW-1 Ashok Gandhi and subsequently their alibi from 17th to 23rd February, 2002; while Sukhdev Yadav set up an alibi that he was in his native village.

and (B) Vikas Yadav and Vishal Yadav led false evidence to the effect that they had gone to attend the marriage of Shivani Gaur on 16th February, 2002 in a Mercedes car and not in Tata Safari bearing no.PB 07H-0085.

These points have been discussed at length earlier in this judgment and it is therefore unnecessary to repeat the same. We have only noted these here pointing out the conduct of the appellant in one place.

(C) The appellants Vikas Yadav and Vishal Yadav made every possible effort to avoid appearance of Bharti Yadav, a material witness before the trial court resulting in substantial delay in trial as well as pressurised her into withholding material evidence and giving testimony which was prevaricatory and false.

(i) The learned trial judge in the judgment dated 28th May, 2008 notes the efforts made to avoid the appearance of Bharti Yadav, who finally appeared as PW 38 before the Court. The learned Trial Judge has referred to several orders wherein the court had noticed the conduct of Bharti Yadav and her non - appearance before the Court despite repeated summons and coercive process. The Court also noticed the intimidation of the witness during the trial.

Crl.A.Nos.741, 910/2008 & 145/2012 1034 We may note that Bharti Yadav was not examined in Sukhdev Yadav's trial.

(ii) At this stage, reference requires to be made to certain incidents and proceedings which have been highlighted by learned counsel for the complainant. It is in evidence that soon after Nitish Katara went missing in the night intervening 16th/17th February, 2002, Bharti was sent to Faridabad in Haryana, i.e., out of Ghaziabad, U.P. jurisdiction. Thereafter to avoid her testifying in court, in end of September/October, 2002, she was sent to U.K.

(iii) The instant case is a prime example of the tyranny of well placed accused persons over the criminal justice system and how they treat the complainant, the investigation agency, the prosecution as well as the trial court. To appreciate the complete disrespect with which these two educated as well as well to do appellants treated the orders of the court and executed their malicious design to prevent Bharti Yadav from testifying in court as well as to protract the trial, it is essential to set down a summary of some of the court proceedings which we do so hereafter.

(iv) In the instant case, the appellants Vikas and Vishal Yadav are brother and first cousin of Bharti Yadav - the prosecution witness who was to provide the evidence of motive. They are similarly related to Bharti's sister Bhawna Yadav. Shivani Arora was her best friend from childhood and obviously close of Bharti's family. If their testimony was true, then they would have ensured that such evidence, which belies the case of the prosecution, was brought out at the earliest, instead conscious efforts were made so that the witness stayed away from the trial for the period of almost three and a half years. During much of this period the trial came to a halt - while the Vikas and Vishal Yadav kept the prosecution entangled in applications before the trial court and petitions before this court.

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(v) On 29th April, 2003 (C/414), the trial court has noticed that the summons issued to witness Bharti Yadav had come back with the report that she has gone to England and her mother refused to disclose her address. The court had noted that it intended to send summons for the appearance of the mother and father of Bharti Yadav for disclosing her address, at which the counsel for the accused persons stated that the address of Bharti Yadav will be informed by them in court. Yet the address was not furnished. However, counsel promised the court that they would furnish the address the very next day.

(vi) In her testimony recorded on 3rd March, 2003, Nilam Katara as PW-30 had tendered several cards album and bed sheet in evidence. These cards were written by Bharti Yadav to Nitish Katara as noted above. The counsels for Vikas and Vishal Yadav had objected to their production on the ground that the witness was not the author of the cards and could not accept these cards. The trial court noted that Nilam Katara had stated that produced cards had been shown by her to the IO which he unfortunately

did not seize. The trial court also observed that the author of the cards was another witness Bharti Singh who was a sister of the accused persons and had been cited as a witness. It was further observed that the summons had come back with a report that she had been sent to London for studies. So far as appearance of Bharti Yadav was concerned, the court noted that ―page 161 (A)"

> Though before us, an effort has been made to suggest that the parents cannot be faulted for the delay in appearance of Bharti Yadav as she was an adult and acting in her own right. However, the record of the trial court suggests to the contrary. Her relative Shri Bharat Singh and her father Shri D.P. Yadav appeared on her behalf in court clearly points towards influence which her family including the accused persons had over her. The order dated 30th April, 2003 records that the counsel for the accused persons had supplied the address of Bharti Yadav Crl.A.Nos.741, 910/2008 & 145/2012 1036 in Nottingham, UK by way of a slip which was taken on record.

(vii) On 6th May, 2003 the court observed that PW-30 Nilam Katara had identified the handwriting and signature of Bharti Yadav and proved about 74 greeting cards, two letters and an album on record. The defence had made a suggestion that the letters and greeting cards were not written or sent by Bharti Yadav to Nitish Katara. The court noted that Bharti Yadav was cited as a witness by the prosecution and a direction was given to the accused persons to help in producing her in court as she was their sister, and had been sent to England.

(viii) Notice was also issued to Bharti Yadav through the High Commissioner in London at the address furnished by the counsel for the accused persons. No report was received from the High Commissioner or the Ministry of External Affairs on these summons on 31st May, 2003 and fresh summons were directed to be issued for 4th July, 2003.

(ix) On 17th July, 2003 it was observed that Bharti Yadav had not appeared despite the summons which had been sent by post and she had also not been produced in the case by the accused persons despite specific directions. The court again noticed that she was the sister of one of the accused and in these circumstances issued bailable warrants for her appearance to the tune of Rs.25,000/- through the Ministry of External Affairs returnable on 29th August, 2003.

(x) Mr. P.K. Dey, learned counsel for the complainant has placed before us an application dated 28th August, 2003 purporting to have been filed by one Shri Bharat Singh, the maternal uncle of Bharti Yadav through Sh.C.K. Sharma, Adv. for placing on record the facsimile message sent by Bharti Yadav. In this application, it was stated that Bharti Yadav expressed her willingness to appear before the court though she had not received summons for today and had learnt about the date from her family members. It was Crl.A.Nos.741, 910/2008 & 145/2012 1037 further averred that Bharti Yadav had sent a letter of request to her parents that the court send a request to her University authorities so that she may take permission from the University authority to appear in the court sometime in September, 2003. A request was also made for a direction to the prosecution to make arrangements for her travelling expense. Necessary orders were accordingly sought.

(xi) Thereafter, on 8th October, 2003 Sh.C.K. Sharma, Advocate for uncle of the witness Bharti Yadav produced the letter wherein the witness had stated that the time was too short and she should be given two months to appear before the court. The court directed handing over of the necessary process for appearance of the witness Bharti Yadav on 15th November, 2003 to Sh.C.K. Sharma, Advocate.

(xii) It appears that in the meantime Crl.M.No.1503/2003 Vishal Yadav v. State of U.P. and Crl.M.No.1506/2003 Vikas Yadav v. State of U.P. under Section 439 of the Cr.P.C. were filed before this Court by these appellants seeking their enlargement on bail premised on the plea that many of the witnesses had turned hostile and were not supporting the prosecution case. It was further urged that the matter was at the stage when the appearance of Bharti Yadav was being awaited and a prayer was made

before the Court that appellants be granted interim bail till the time she is examined by the learned Trial Court and that they may apply for regular bail again after her statement is recorded on the ground that prosecution was delaying the trial. This was opposed by the State. It was pointed out that Bharti Yadav being the sister of the accused persons could have Crl.A.Nos.741, 910/2008 & 145/2012 1038 voluntarily come to the Court and made her statement as she was in the knowledge of the proceedings before the learned trial court.

(xiii) In the order dated 14th October, 2003 passed by R.C. Chopra, J. on the bail application, the Court had observed as follows:-

> ―After hearing learned counsel for the parties, this Court is of the considered view that the allegations against the petitioners are very serious. The prosecution witness Ms. Bharti Yadav, who has gone to U.K. for pursuing her studies appears to be under the control of the petitioners and their family. If the petitioners had been keen to have her statement recorded, they could have easily persuaded her to come to India and go back after making statement. Possibility cannot be ruled out that in case the petitioners are enlarged on interim bail at this stage, they may influence Ms. Bharti Yadav and exert more pressure on her to make a statement in their favour.

This Court, therefore, finds no good grounds for releasing the petitioners on interim bail at this stage.‖

(xiv) Bharti Yadav still did not appear even on 15th November, 2003. Mr.C.K. Sharma, Advocate appeared on her behalf and stated that she was unable to attend the court. A request was made that the case should be fixed in the month of January, 2004! An application dated 15th November, 2003 was also moved under the signature of her maternal uncle, Crl.A.Nos.741, 910/2008 & 145/2012 1039 Shri Bharat Singh for recording of her evidence through video conferencing.

(xv) In this application Bharti Yadav was stated to be a student in London School of Marketing, London. It is evident that the accused persons had deliberately handed over a slip with a false address of Beaston, Nottingham, UK in the court proceedings held on 30th April, 2003.

(xvi) The application on behalf of Bharti Yadav dated 15th November, 2003 for video recording of her testimony was rejected by the trial court by an order dated 23rd December, 2003 and she was directed to appear in the court on 27th February, 2004, which was the last opportunity for this purpose. Sh.C.K. Sharma, Advocate was directed to inform the witness through her maternal uncle Shri Bharat Singh and fresh summons were also directed against her for 27 th February, 2004.

(xvii) The order dated 23rd December, 2003 of the learned Additional Sessions Judge was also assailed before the learned Single Judge of this Court by way of Crl.Rev.Pet.No.43/2004 titled Bharti Yadav v. State of U.P. In the hearing on 21st January, 2004 in this revision, the learned Single Judge had asked Shri C.K. Sharma, counsel of Bharti Yadav, to ascertain from her as to when she can come to India to depose before the Court. Time was sought on her behalf to inform the position and, therefore, the matter was adjourned to 30th January, 2004. On that date, no information was provided to this Court when the learned Single Judge was pleased to observe as under:-

Crl.A.Nos.741, 910/2008 & 145/2012 1040 ―Counsel for the petitioner has not yet been able to tell me the date when the petitioner will be coming to India to depose. He is dilly-dallying and insisted upon video conferencing.

Obviously there is more than meets and eye. Counsel is given one final opportunity to comply with the earlier order, failing which action in accordance with law will be initiated‖ (xviii)Thereafter on 9th February, 2004, Shri C.K. Sharma, counsel for Bharti Yadav stated that he did not want to argue the

matter and only wanted to withdraw the revision petition. The same was accordingly dismissed as withdrawn. The matter, however, did not stop here.

(xix) In the meantime, the trial court granted last opportunity again to the witness Bharti Yadav to appear in the Court on 27th February, 2004. Shri C.K. Sharma, who was representing the witness was directed to inform the witness through her maternal uncle Shri Bharat Singh, who had filed the application on her behalf about the order and directed fresh summon as well.

(xx) In the proceedings on the 27th of February, 2004, Bharti Yadav still did not appear. Her counsel put forth the excuse that she required permission from her university to remain absent for the duration of the recording of evidence. The learned Single Judge categorically noticed that it was crystal clear that the witness wanted to delay the case unnecessarily on one pretext or the other. The court observed that despite sufficiency of time having been granted and date chosen by her counsel, she had not appeared. Shri C.K. Sharma was not specifying another date. On submission of learned counsel for the State that holidays of Bharti Yadav would commence from 5th to 25th April, 2004, the court fixed the date as 15th April, 2004. At that stage, counsel for Bharti Yadav stated that the date should be towards the end of April. The court directed that Bharti Yadav should appear Crl.A.Nos.741, 910/2008 & 145/2012 1041 on 21st April, 2004 failing which the court would have to issue non-bailable warrants for her appearance.

(xxi) On the 21st of April, 2004, Shri C.K. Sharma, counsel for Bharti Yadav stated that the Court approach her university. The Court noticed that the university had no role with her appearance as a witness and she was delaying the case unnecessarily on one pretext or the other.

(xxii) The court also observed that no reply was being received from the Ministry of External Affairs and that there was no assistance from the Ministry in this regard. In this background, on 21st of April 2004, bailable warrants in the sum of Rs.25,000/- were directed to be issued against Bharti Yadav. Notice was also ordered to be issued to her under Section 350 of the Cr.P.C. At this stage, it was brought to the court's notice that Shri Bharat Singh, maternal uncle of Bharti Yadav was present in court and informed the court that she was likely to come in the third week of May. Shri Bharat Singh undertook to produce the witness in court on 24th May, 2004. In view of this undertaking, though the court deferred issuance of the warrants, however, the summons were directed to be issued to her through the Secretary, Ministry of External Affairs and failing service, the Under Secretary (Legal) of the Ministry of External Affairs was directed to report presence in the court and to explain the delay. The court also directed Shri Bharat Singh to furnish the written undertaking till 4 p.m. of the same date.

(xxiii) On 24th May, 2004, Bharti Yadav still did not appear despite the undertaking by her maternal uncle. An application with a copy of her medical certificate was made by Mr.Bharat Singh stating that Bharti Yadav had a fall from stairs and received injuries on her back and leg. Bharat Singh was directed by the trial court to appear on the 27th of May, 2004 and to furnish the correct address of Bharti's hospital and her residence.

Crl.A.Nos.741, 910/2008 & 145/2012 1042 (xxiv) In the hearing on 27th May, 2004, Shri Bharat Singh, maternal uncle of Bharti Yadav moved an application furnishing ―communication address‖ of Bharti Yadav, not her residential address. A direction was issued to him to furnish her residential address and to file the same in court within 48 hours. As the doctor in the medical certificate filed on behalf of Bharti Yadav, had advised four weeks rest, the court directed Shri Bharat Singh to produce her on 21st July, 2004. Summons for next date was also given to the officers of the Ministry of External Affairs. Shri Bharat Singh was also directed to give an undertaking to produce her on 21st July, 2004. Despite the clear directions, address of Bharti Yadav was furnished by Shri Bharat Singh only on 5th June, 2004.

(xxv) Neither Bharti Yadav nor Shri Bharat Singh appeared before the court on 21st July, 2004. The court directed that if Bharti Yadav does not appear on 27th September, 2004, non bailable warrants would be issued against her on 27th October, 2004 but not be executed till 27th September, 2004. The court directed Bharti Yadav to contact the Additional Public Prosecutor on his phone to show evidence of her availability.

(xxvi) In yet another attempt to avoid Bharti's appearance and despite the rejection of the prayer at Bharti's instance up to this court, Vikas Yadav and Vishal Yadav filed a Crl.Misc.Case No. 2159/2004 under Section 482 of the Cr.P.C. praying for recording the evidence of Bharti Yadav through video conferencing or by commission. This petition was dismissed by a judgment dated 25th September, 2004 by the court, noticing that Bharti Yadav, the real sister of the accused, a material prosecution witness, who had gone abroad for pursing her studies, was under the control of Crl.A.Nos.741, 910/2008 & 145/2012 1043 petitioners (Vikas Yadav and Vishal Yadav) as well as their family members; and that the recording of her evidence through video conferencing or by commission would be highly prejudicial to the prosecution case. The court also noticed that such application filed by Bharti Yadav stood declined by the trial court by the order dated 23 rd December, 2003 as well as by this court.

The court also observed that despite withdrawing her Crl.Rev.Pet. No.43/2004, the witness still did not appear before the trial court on 27th February, 2004 on the pretext that she had suffered some spinal and foot injuries by fall. It is observed by the court that in support of her claim she had submitted a medical certificate from a _Gynaecologist' practicing in UK! The witness had not appeared despite undertakings before the trial court and consequently the court had additionally directed warrants to be executed only in case she did not appear in the hearing on 27th September, 2004.

This Court observed that the witness has not refused to come to India, but it appeared that she was evading her appearance before the Court for some reason or the other. The petition was consequently dismissed.

(xxvii)Before the trial court, at this stage, Bharti Yadav filed two applications dated 22nd September, 2004 - one seeking exemption from personal appearance on the ground that she Crl.A.Nos.741, 910/2008 & 145/2012 1044 had been medically examined on 17th September, 2004 and advised further rest of four weeks; and the second being application for stay of the non-bailable warrants, which was directed by the court as back as on 27th July, 2004.

(xxviii)Bharti Yadav filed Crl.Misc.Case No.2158/2004 in this court against issuance of the non-bailable warrants, which was dismissed by this court by an order dated 25th September, 2004 (xxix) On 11th October, 2004, the accused persons now filed an application for examining Bharti Yadav on commission on the ground that the prosecution had not been able to effect service upon her. The applicants submitted that they had given an undertaking before this court that they were ready to bear the expenses of the commission. It was complained that the accused persons were ―languishing in jail to the lethargy of the prosecution which is causing delay in the examination of the said witness through Cr.P.C.‖. Interestingly, an application was also filed on behalf of Bharti Yadav stating that she had suffered spinal injuries and was not permitted to go for a long walk or to take a long journey and that she was undergoing treatment through a doctor of Harley Street, London; that no official summon had been served on the applicant nor communication made with the University; that the ―prosecution agency is more interested in the harassment and humiliation of the applicant/witness and the complainant is harassing the witness socially as well as morally through the learned prosecutor‖; that she had showed her willingness in the month of September, 2003 when no interest was shown by the then prosecutor and no steps were taken by the court. A prayer was made that she should be examined through commission and the warrants issued against her be stayed or cancelled.

(xxx) Both the applications dated 11th October, 2004 were rejected by an order dated 25th October, 2004 by the learned trial judge. It was directed that the NBWs already issued be Crl.A.Nos.741, 910/2008 & 145/2012 1045 executed. Shri Bharat Singh also furnished an undertaking to produce Bharti Yadav.

(xxxi) No intimation with regard to appearance of Bharti Yadav was received by the court for the hearing on 18 th January, 2005.

(xxxii) It appears that Vikas Yadav moved yet another application for bail which was rejected by an order passed on 25th October, 2004.

(xxxiii) While on the one hand, Bharti Yadav was kept away from the trial court, yet another application was filed by the Vikas Yadav being Bail Application No.2070/2004 in this court as well, which was decided by B.N. Chaturvedi, J by an order passed on 4 th January, 2005. Vikas Yadav pressed this application urging that the prosecution had to take effective steps for procuring presence of Bharti Yadav to record her statement. In this regard, the observations of the Court in the order dated 4th January, 2005 may usefully be considered in extenso and read as follows:

> ―5. On this account, perusal of trial court record, however, indicates that the prosecution is not to be blamed for delay in examination of Ms. Bharti Yadav before the trial court. She is stated to be pursuing her studies in University of Nottingham, UK. The record shows that it is, in fact, Ms. Bharti Yadav, who appears to be evading appearance to make her statement before the learned trial court in spite of being aware of pendency of proceedings and different dates being fixed requiring her attendance to record her statement.‖ Crl.A.Nos.741, 910/2008 & 145/2012 1046 In para 6, the learned Single Judge noted the several applications and petitions in the interregnum. It was further observed as follows:
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> ―7. Finding that the witness was not appearing in spite of information about various dates fixed for the purpose, a bailable warrant of arrest was directed to be issued against her.
>
> Later, however, on maternal uncle of Ms. Bharti Yadav appearing and undertaking to produce her on 24th of May, 2004, issuance of bailable warrant of arrest was dropped. Ms. Bharti Yadav was, however, not to appear even on 24th of May, 2004 in spite of an undertaking by her maternal uncle. Consequently, a non-bailable warrant of arrest was directed to be issued in addition to initiating proceedings against the maternal uncle for acting in breach of undertaking furnished by him to produce Ms. Bharti Yadav on the date fixed. Against issuance of non-bailable warrant of arrest, Ms. Bharti Yadav moved this Court being CRL.M.C.2158/04. The same was, however, dismissed by an order dated 25.9.2004.‖ (Underlining by us) (xxxiv)On 27th January, 2005, the learned Public Prosecutor submitted a letter dated 7th January, 2005 addressed to the Court from the Ministry of Home Affairs in response to the pending warrants which were issued on 20th December, 2004 to bring Bharti Singh @ Bharti Yadav through non bailable warrants. It was stated that the Indian High Commission required at least eight weeks to effectively execute any process through the UK Home office. The learned Public Prosecutor had informed the court that he had talked to Crl.A.Nos.741, 910/2008 & 145/2012 1047 Bharti Yadav and she had told him that she was not interested in coming and deposing as a witness in the Court.

(xxxv)On 27th January, 2005, the learned counsel for the accused persons made a plea that the prosecution evidence may be closed by the order of the court. The court examined the matter and observed that there was no unjustified delay and that interests of justice demand that further time be granted to the prosecution for executing the NBWs for the appearance of the witness.

At the same time, an application was moved by Shri Bharat Singh on the same date to produce Bharti Yadav in view of the submission of the learned Public Prosecutor that the witness has stated that she had given her statement to the SSP, Ghaziabad and to the media and that she did not want to say anything more. The court granted 9 weeks time to execute the warrants already issued and adjourned the matter to 30th March, 2005. It was observed by the court that Vishal Yadav was admitted in Batra Hospital since January, 2005.

(xxxvi)On 30th March, 2005, the learned trial court noticed the receipt of the letter from the Government of India which recorded that the non-bailable warrants against Bharti Yadav could not be executed. The learned Public Prosecutor further stated that by reason of her being the real sister of accused Vikas Yadav and cousin sister of accused Vishal Yadav, she was not likely to support the prosecution case. In view of the fact that the Government of UK had refused to execute the non bailable warrants and he had no other means to procure her attendance under these circumstances, and therefore he had no other alternative but to drop her and proceed with the trial. In this background, the learned Public Prosecutor closed the prosecution evidence.

(xxxvii)On 21st April, 2005, at the stage when the matter was fixed for recording the statement of accused under Section 313 of the Cr.P.C., the complainant Nilam Katara moved an Crl.A.Nos.741, 910/2008 & 145/2012 1048 application under Section 311 of the Cr.P.C. on which the order dated 21st April, 2005 was passed.

(xxxviii) The complainant Nilam Katara also filed Crl. Rev. P.

No.315/2005 titled Nilam Katara v. State in this court assailing the order of the learned Trial Judge dated 30th March, 2005 permitting the prosecution to drop Bharti Yadav. Crl.Rev.Pet.No.315/2005 was heard and allowed by this court by an order passed on 3rd October, 2005 observing as follows:-

> —6. I have heard counsel for the parties at length who have also filed written submissions and have carefully examined the case in hand. It appears to me that the order under challenge is of a nature that would finally put an end to the examination of Ms.Bharati Yadav as a witness of the prosecution and would put an end to the prosecution's ability to prove the motive of the crime. In that manner, the order can be attributed to be of a nature that is conclusive and would have far reaching effects on the outcome of the trial. xxx xxx
>
> 7. It appears to me that the trial court as also the High Court has repeatedly held in various orders that this witness, Ms.Bharati Yadav, is material and an essential witness for the prosecution. Her depiction will have an important bearing on the outcome of the trial.

In that view of the matter, the prosecution wanting to drop this witness on account of the prosecution not being able to secure her presence, is an act of despair knowing fully well that its case would suffer. Surely, an act of despair cannot be one which advances the ends of justice. The prosecution itself is claiming that this witness is necessary and material but should be examined as court Crl.A.Nos.741, 910/2008 & 145/2012 1049 witness under Section 311 of the Code of Criminal procedure since the prosecution is unable to secure the presence of this witness. This suggestion/argument of the State is best noticed and rejected. For if the court is finding it difficult to execute its summons and warrants on the witness at the instance of the prosecution, how will it be any easier for the court to summon this witness on its own. The procedure of summoning the witness, namely, that she is the sister of the accused, is neither here nor there as this was known to the prosecution at the time when this witness was cited in the first instance. The next ground that the witness will not support the prosecution's case is also not borne out from the record which it appears that the witness has made it known to the Public Prosecutor that all she had to say has already been disclosed to the Investigating Officer which is her statement under Section 161 of the Code of Criminal Procedure. Surely this cannot be said to be not supporting the prosecution's case. And as regards securing the presence of the witness, the court is not

without powers and can resort to any means available to it in law.‖ (Emphasis by us) (xxxix)Three years had passed and sister of the accused persons had still not appeared. Before the trial court, Bharti Yadav still did not appear on 27th April, 2006. No report on the non-bailable warrants issued by the court was furnished by the Ministry of Home/External Affairs compelling the court to issue notice to the officer in the Ministry of Home who was dealing with the matter. Mr.B.S. Joon, Spl. PP placed on record a copy of the order dated 7 th March, 2006 whereby the High Commission of India had revoked the passport of Bharti Yadav.

Crl.A.Nos.741, 910/2008 & 145/2012 1050 (xl) On 15th July, 2006, the file was taken on an application of Vikas Yadav, on which a report was called from the Jail Superintendent for 17th July, 2006.

At 11.30 a.m., Shri D.P. Yadav, father of the witness Bharti Yadav appeared before the court and made a request to take up the case again. Sh.B.S. Joon, Spl. PP for the State was called. The court records that:

> ―Shri D.P. Yadav had submitted that he had he had gone abroad and had met his daughter at London in a function arranged by one of his friend and he discussed the matter with her at length. He further submits that the witness Bharti Yadav told him that since she is being humiliated every day due to the media reports in the press against her. As such she is not in a position to appear before the Court. At this, Sh. DP Yadav has been directed to disclose the present address of Bharti Yadav but he has submitted that he is not aware of the same as she was called to attend the function by his friend. He has been asked to disclose the address of his friend which he has refused on the pretext that he does not remember. He is further directed to give the details of all these facts by moving an appropriate application to which against he has refused. He has submitted that on 17/7/06 he would not be able to appear before the Court since his wife is admitted in some hospital at Kerala, as such he is leaving immediately for Kerala.‖.

(xli) It is urged by Mr. P.K. Dey, learned counsel for the complainant before us that the above conduct of the father of Bharti Yadav, who was also father of the accused Vikas Yadav and maternal uncle of Vishal Yadav, reflects the consort between them to avoid her appearance as a witness. It is impossible that Shri D.P. Yadav did not know the Crl.A.Nos.741, 910/2008 & 145/2012 1051 address of his daughter (whom he must be supporting) or of his friend who he claimed had met her and non-disclosure of her address was deliberate and malafide.

(xlii) Our attention is then drawn to the order dated 28th September, 2006 which records the presence of Sh.S.K. Bhuttan, Advocate for Shri Bharat Singh, an attorney of Bharti Yadav. The order notices that the proclamation under Section 82 of Cr.P.C. was issued against Bharti Yadav on the last date of hearing and that as per the report dated 5th September, 2006 from the Ministry of Home Affairs, the order had been duly served upon her on 3rd August, 2006. Despite service of the proclamation at her address, 33, Sutton Way Heston, Middlesex TW-501, UK, she has not appeared for recording of evidence. Sh.Bhuttan, Advocate submitted that Shri Bharat Singh would produce Bharti Yadav before the court during the first week of November and he would confirm the date from Bharti Yadav personally with the assistance of his client about her visit to India on a specific date. A week's adjournment for arranging the exact date when Bharti Yadav would be coming to India was sought, if all arrangements of her travel, to and fro UK, were made by the State and the media was kept away from the witness. Upon receipt of an assurance on all counts from the Special PP, the case was adjourned to 6th October, 2006 for Sh.Bhuttan to provide the information of the date when the witness was travelling. In the meanwhile, the order under Section 82 of the Cr.P.C. was kept in abeyance. The State's application dated 23rd September, 2006 under Section 83 of the Cr.P.C. for attachment of the

properties of the witness on account of non-appearance in response to Section 82, Cr.P.C. proclamation was also kept pending for the next date of hearing.

(xliii) On 6th October, 2006 Sh.Bhuttan filed an application intimating the court the intention of Bharti Yadav of appearing in court and that she would be in India from 25 th to 28th November, 2006. The court consequently fixed the matter for her appearance and recording of her evidence on Crl.A.Nos.741, 910/2008 & 145/2012 1052 25th November, 2006 keeping the process under Section 83 of the Cr.P.C. in abeyance.

(xliv) Finally, on 29th November, 2006 (almost three and a half years after her appearance was first required on 29th April, 2003), Bharti Yadav appeared before the court with her counsels and her statement was partly recorded as PW-38 till 1.30 p.m. The matter was deferred after lunch at which stage she requested for an adjournment on the ground that she is not feeling well and her statement was deferred to 10.30 a.m. on 30th November, 2006. The evidence of this witness was recorded in camera and directions were issued by the trial court to the court staff from giving any interview to the electronic or print media with regard to the court proceedings.

Vikas Yadav did not attend the court proceedings even though he was present in the lock up on 29th and 30th November, 2006, when Bharti Yadav was examined as witness.

We are appalled at the indulgence given to the accused persons and this witness and pained at the manner in which these accused persons have treated the orders directing production of their sister for a period of three and a half years.

1919. Bharti Yadav was a highly educated and empowered adult as per the material on record. She had travelled to and was studying in the UK. It is reasonably expected that she was aware of her responsibilities as a citizen of this country, more so, when she was in admitted knowledge of the court processes against her. Yet she was under the total control of her family. Not only were her movements after the night of Crl.A.Nos.741, 910/2008 & 145/2012 1053 16th February, 2002 under their control but she was also deprived of any means of communication. She was shifted out of Ghaziabad on the 17th of February 2002 and then sent to U.K. towards the end of September/October, 2002. Her statement under Section 161 of the Cr.P.C. was permitted to be recorded only in the presence of her father Shri D.P. Yadav.

1920. From the records of the case, it appears that Bharti Yadav was first summoned as a witness on 29th April, 2003. Despite repeated assurances as well as undertakings to the court she deliberately did not appear for this considerable period. Undertakings were given on her behalf as well as several assurances that she would appear and give her testimony. However, the matter reached such an impasse that the court had to issue NBWs, which were duly served; commence proceedings in accordance with Section 82 of the Cr.P.C. issuing a proclamation which was also served on her and an application for attachment of properties in accordance with Section 83 of the Cr.P.C. had been filed by the State to secure her presence. Even these court proceedings did not persuade Bharti Yadav to appear in the court. The brazenness of the accused was to the extent that even though she was studying in London, the accused disclosed an address in Nottingham, U.K for her. The court thereby was compelled to keep issuing process for appearance at this Crl.A.Nos.741, 910/2008 & 145/2012 1054 address. No change of address of the witness was informed. Even her father who appeared before the court to avoid issuance and execution of NBWs, feigned ignorance of the address of his daughter. This statement, to say the least, is completely unbelievable and reflects a deliberate attempt to keep the witness away from the court. The record of the Trial Court shows that she appeared in court only after steps for revocation of her passport stood taken.

1921. We may be accused of presuming that the appellants contributed in any manner to the efforts of the Bharti Yadav to stay away from the court and that there is no basis for this presumption. Realities

cannot be ignored and we would fail in our duty if we were to close our eyes to the hard fact that Bharti Yadav was the sister of Vikas Yadav and the first cousin of Vishal Yadav. Her father and uncle Shri Bharat Singh actively engaged on her behalf and appeared several times before the court. Most of the defence witnesses including witnesses who were advocates, are closely associated with Vikas Yadav's father. It is established that the Tata Safari vehicle stood registered in the name of M/s Oswal Sugar Ltd. and Shri D.P. Yadav, father of Vikas Yadav was one of its Directors. The vehicle was recovered at the instance of the accused persons at the premises of A.B. Coltex, Karnal, a firm in whose management Shri D.P. Yadav had interest.

Crl.A.Nos.741, 910/2008 & 145/2012 1055 1922. Before us, it was suggested that the appellants have nothing to do with Bharti Yadav's conduct. An unfortunate stand, given the identity of the objective pursued by all of them as well as the aim sought to be achieved. Closely related, assisted by father and maternal uncle Mr. Bharat Singh (from whose phone lines, Nitish Katara had also received phone calls), the above narration is a prime example of what literate, well to do and politically connected individuals are able to do to prevent justice in a criminal trial, and then bemoan mistrial and delay.

1923. The influence, reach and sheer arrogance of the accused persons is writ large on the face of the record. The impunity with which court orders have been flouted and undertakings to produce the witness have been repeatedly violated, reflect the mindset of the accused persons. Brazenly the parent of the witness has avoided providing contact details of his own daughter. The court was deliberately misled by providing an address in Nottingham when Bharti was studying in London. They have acted with the misplaced confidence that nothing, even the court, can touch them, an attitude confident that their wealth and position places them above other citizens who are duty bound to abide by constitutional values, the law, and court orders.

1924. The above narration manifests that for the appearance of one witness closely related to Vikas and Vishal Yadav, the trial Crl.A.Nos.741, 910/2008 & 145/2012 1056 court had to wait for three and a half years. The appellants were in custody. It can reasonably be expected that if innocent, they would have wanted to get acquitted of the charges and be released from prison at the earliest. This conduct of and on behalf of the accused points towards guilt of these appellants.

(D) Intimidation of witness : Ajay Kumar/Katara (a public witness to the deceased having been last seen alive in the company of the three appellants) has been threatened and pressurized by and at the instance of the appellants and their family members.

1925. It has been argued before us that in order to pressurize him into not giving a statement and, thereafter, withdrawing it, the only public witness Ajay Kumar / Katara with regard to the deceased having been last seen alive in the company of the appellants, was threatened with dire consequences by and at the instance of Shri D.P. Yadav father of Vikas Yadav. He was also roped into false and frivolous complaints and criminal cases initiated at the behest of persons who were allegedly either stooges of or related to Shri D.P. Yadav in Ghaziabad and elsewhere.

1926. We propose to consider the material on this aspect in detail as it is this aspect which is one major cause for the reluctuance of members of the public in coming forward to give evidence. We summarize the position qua Ajay Kumar Katara hereafter:

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(i) Appearing as PW-33, Ajay Kumar in Vikas and Vishal Yadav's trial has stated that he did not tell any police vehicle passing the road on 16th February, 2002 about the registration number of the Tata Safari as the accused was the son of an M.P. of the area and there was terror of the M.P. in the area which is well known. So far as not making a complaint to any officers is concerned, the witness stated that as he was a small person, he did not have the courage to go to the Superintendent Police. The

witness has also explained that he learnt of the identity of the investigating officer from the information on the television that Anil Somania was investigating the case.

(ii) It is in the evidence given by Ajay Kumar as PW-14 in Sukhdev's trial that he left the address of D-50/1, Gali No. 10, Brahmpur, Delhi in April, 2002 for the reason that this address was available with the police and the witness was apprehending an attack from Shri D.P. Yadav.

(iii) It appears that Ajay Kumar/Katara expressed grave apprehensions to his life and security in view of threats received by him at the instance of the accused persons.

(iv) Since 25th April, 2002, Ajay Kumar was provided with the security of one gunner as he felt danger to his life because he was a witness in the case. A court question was put to the witness as to when he felt endangered. The witness answered that he felt endagered because of his being a witness against the sons of the M.P. who are involved in the case.

(v) On 30th of May, 2003, Ajay Katara made a request to the Inspector General, Meerut Zone for his safe escort to court. According to Ajay Kumar, the IG gave direction to the SSP, Ghaziabad in his presence to provide security to Ajay Kumar for going to court.

(vi) Even on the 31st of May, 2003, the day the witness Ajay Kumar was examined as PW-33, he had moved an application before the trial court that he was being Crl.A.Nos.741, 910/2008 & 145/2012 1058 pressurized by the accused persons not to appear as witness and that there was a threat to his life and property and that he was unsecure. It was stated that he has one gunner since April, 2002 provided by the UP Police but at least two gunners be granted to him; stating that there was tremendous pressure on him for not deposing in court. Ajay Katara stated that he felt danger to his life and was feeling insecure and that the security of one gunner already granted to him was insufficient. On this application, the court had observed that the fear expressed by the witness Ajay Katara did not seem to be unfounded and consequently had directed the Director General of Police, Lucknow, UP to do the needful for the security of the witness and to see that no harm is caused to him. The court specifically directed that if the witness suffered physical harm, the court would hold the Director General responsible for the same.

(vii) The matters did not end with Ajay Kumar's deposition. On the 22nd of July, 2003 - another application was made by Ajay Katara stating that a conspiracy was being hatched against him and that the police of Ghaziabad was trying to implicate him in a false case; that some Daroga and Inspector of PS Vijay Nagar, Ghaziabad were threatening him day and night. The witness stated that on 20 th July, 2003 he was taken to PS Vijay Nagar and made to sit there by the SO of Vijay Nagar; that there he was physically tortured and told that he had taken cudgels with a powerful man and he would get his face displayed in the TV and newspaper so that he could be identified by the goons of that powerful man and done away with. The witness also stated that a case of eve-teasing would be made against him and he would be shown on TV and implicated in this case. It is also stated by the witness that he has informed the DIG, Meerut Zone of the entire matter and then only the SO, Vijay Nagar allowed him to go out of the station. The SO made him sign on some blank papers and that SO, Vijay Nagar and mahila SI Praveen Saxena have threatened him and, therefore, he had come to the court.

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(viii) By the order dated 22nd of July, 2003, the learned Additional Sessions Judge, Patiala House, New Delhi had issued the following directions:-

> —I consider that this is a serious matter that the only witness who had not turned hostile, is receiving threats from the police officials. A letter be written to DIG to see to it that witness Ajay Kumar should not be harassed by other police officials. Issue notice to SO

and Lady SI Parveen Saxena of Vijay Nagar, Ghaziabad to appear in person to show cause as to why action should not be taken against them for giving threats to the witness. Issue summons against SO Vijay Nagar and Lady SI Parveen Saxena for 30-7-2003.‖

(ix) The order recorded by the court thereafter on 30th July, 2003 speaks for itself and also deserves to be noted in extenso and the same reads as follows:-

―On notice given by this court both police officials from Vijay Nagar, Gh'bad appeared. Copy of complaint made by witness Ajay Katara was supplied to them. They had filed written reply to the complaint which has been taken on record. Witness has made specific allegations against these two police officers.

Witness has also appeared today. Even in the court he stated that he was beaten at police station. SO and SI along with the reply have filed photocopies of news cuttings and photocopy of an application made by one Smt. Saroj Yadav who is stated to be President of Mahila Morcha of Congress and in the complaint Saroj Yadav has written to SO Vijay Ngr, that one person who tells himself Ajay Katara, on the morning of 20th July, 2003 gave beatings to Davesh Kumar, Pancham Crl.A.Nos.741, 910/2008 & 145/2012 1060 Silvas and tailor Kishan Singh and also abused and gave threat of killing them. He also misbehaved with her and torn of her clothes and abused her. Mr. Ajay Katara states that Saroj Yadav is a relative of R.P. Yadav.

SO states that about 800 persons had gathered at his police station when he picked up three persons against whom Mr. Ajay Katara had made a telephonic complaint. The very fact that 800 persons had gathered and merely picking up of three persons shows that it was a pre-organized show. The complaint of Smt. Saroj Yadav also smells of malafide. I consider that it is a matter in which the DIG should hold an enquiry as to why the witness is being subjected to this kind of police action. The complaint of Ajay Katara, the reply given by SO along with complaint of Saroj Yadav are sent to DIG Meerut Zone. Mr. Ajay Katara is directed not to enter into the jurisdiction of PS Vijay Ngr and Gh'bad for next six months to ensure his safety. It is made clear to both the police officers that any harassment to the witness in the garb of complaints lodged by relative of DP Yadav or well wishers of accd.

persons shall be taken seriously by this court.‖ (Underlining by us)

(x) On the 11th of August, 2003, the court sent the copy of the application of the witness Ajay Katara as well as reply received by the two police officers, afore-named, to the DIG, Meerut Zone, UP requesting him to conduct an enquiry and sent a report to the court. The learned trial judge again emphasized that the witness Ajay Katara should be given adequate protection.

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(xi) The matters did not end even with all these orders and the police protection. On the 15th of October, 2007, the case was taken by the court on yet another application moved by the witness Ajay Katara about harassment being meted out to him at the hands of Shri D.P. Yadav, father of the accused Vikas Yadav. It was alleged in the application that the witness had been implicated in various false cases by or at the instance of Shri D.P. Yadav and now was being threatened with being killed along with his family members. By the order dated 15th October, 2007 this application of the witness was also sent in original to the DIG, Meerut Zone for making the necessary investigation of the allegations leveled by the witness Ajay Katara against Shri D.P. Yadav and to take action as warranted.

(xiv) The impugned judgment notices that in the application, Ajay Katara had also stated that he was being threatened of being crushed under a truck and to be burnt with his family in a brick kiln. He

alleged that on 1st July, 2007, the goons of Shri D.P. Yadav had fired at him with the intention to kill him. Thereafter on 11th July, 2007 he was administered poison in snack food by the goons of Shri D.P. Yadav regarding which a case was registered with PS Sahibabad, District Ghaziabad and that three persons were also arrested in the case. The witness complained that Shri D.P. Yadav was looking for an opportunity to kill his wife, son and his parents-in-law and then falsely implicate him in the case. The witness alleged that on 10th October, 2007 he had learnt that Shri D.P. Yadav had levelled false allegations against him in a press conference and that further he was informed about the threats to his life from Shri D.P. Yadav by the President of Rashtriya Parivartan Dal.

(xv) On 29th October, 2007 the file was again taken up by the trial judge on yet another application of the witness Ajay Katara about the threats to his life and to the members of his family at the hands of Shri D.P. Yadav, the father of the accused Vikas Yadav. This application was also sent by the trial court to the DIG, Meerut Zone with the directions to Crl.A.Nos.741, 910/2008 & 145/2012 1062 investigate the matter and to provide him additional security.

(xvi) The witness alleged that 8 times attempts have been made on his life at the instance of Shri D.P. Yadav. The witness alleged that his wife Tanu Chaudhary and son Priyanshu Katara were under the influence of Shri D.P. Yadav who had threatened to kill them as well as her family members. This application was also sent by the trial court to the DIG, Meerut zone for investigation and to provide additional security to the witness.

(xvii) It appears that the matter was investigated and a reply dated 18th November, 2007 was submitted by the DIG, Meerut zone to the Additional Sesions Judge, Patiala House, New Delhi reporting that Shri D.P. Yadav was involved in 29 criminal cases out of which 9 cases were under Section 302 IPC. It was reported that keeping in view the above, provisions had been made for the security of the witness.

The ld. trial court has considered this deeply distressing aspect of the case. Matters did not end even with the above. The appellants have referred to an alleged sting operation conducted on this witness when the case of Vikas and Vishal Yadav was at the stage of hearing of final arguments. The trial court has noted the explanation of the witness and doubted the operation. We have agreed with the ld. Trial Judge. It would seem that despite his testimony having been recorded as back as on the 31st of May 2003, Ajay Kumar Katara was subjected to threats, continues to be under pressure and threat for having appeared as a witness.

Crl.A.Nos.741, 910/2008 & 145/2012 1063 (E) Witnesses deposed either out of fear, pressure, threat or because of the influence of their relationship with the accused persons.

1927. The record reflects that the accused persons in the present case wielded political influence as well as economic and physical power. Vikas Yadav and Vishal Yadav stood implicated in another major offence. The variations in the evidence of the witnesses between the statements recorded by the investigating officers under Section 161 of the Cr.P.C. shortly after the incident and the court testimony establishes the pressure which has been borne by the witnesses which included private guards as well as constables of the Ghaziabad police. It has been pointed out by Mr. P.K. Dey, learned counsel for the complainant that the testimonies of the witnesses lead to an irresistible conclusion that they have not deposed freely which is glaring from the face of their testimonies.

1928. The trial court records also show that Anil Somania was not the sole investigating agency. He was assisted by S.I. J.K. Gangwar. Different witnesses have given narrations of different aspects of the matter. The facts told to the police in the statements under Section 161 of the Cr.P.C. contain details which would be within the knowledge of a person who had made the statements alone and nobody else. It is also noteworthy that the statements under Section 161 of the Crl.A.Nos.741, 910/2008 & 145/2012 1064 Cr.P.C. have been recorded in the case diary as per the police. The testimony of the investigating officers with regard to the statements under Section 161 Cr.P.C. recorded by them has not

been challenged by any of the accused persons. Taken as a whole, it is not possible to accept that the witnesses did not give statements under Section 161 of the Cr.P.C. with which they were confronted.

1929. Interestingly, the witnesses have faltered over the same aspects of the case. For instance, Shivani Arora nee Gaur, Bhawna Yadav and Bharti Yadav have tried to establish that Vikas and Vishal Yadav left the wedding venue on the night of 16th February, 2002 at 11:30 pm and that the deceased Nitish Katara was still at the wedding at 1:00/1:30 am on 17th February, 2002 i.e. long after the accused persons had departed from the function.

1930. Ct. Inderjeet Singh (PW-28 and PW-12 in Vikas and Vishal Yadav's and Sukhdev Yadav's trial respectively) attempted to put the accused persons and the deceased into separate vehicles in court - Vikas and Vishal in a long car, while Nitish with one more person were in a Tata Safari. He refused to identify the occupants in the Tata Safari in which he claimed the deceased was sitting.

1931. The testimony in court was in total contradiction to his statement under Section 161 Cr.P.C. (Exh.PW-28/A) Crl.A.Nos.741, 910/2008 & 145/2012 1065 recorded on 4th March, 2002. He was confronted with the portions of Exh.PW28/A in translations whereof read as follows:

Portion A to A.

_At about 12 o'clock in the night, Vikas Yadav son of Shri D.P. Yadav had come in a Tata Safari car from the direction of Diamond Palace. Vikas Yadav stopped when he saw our policewalla and then took the vehicle towards Hapur Chungi.' Portion B to B _The window panes of the vehicle were open and I saw that in the vehicle, apart from Vikas Yadav, three more persons were sitting. Out of them, one person wearing a red coloured kurta, who had a round face, was sitting in the front seat next to the driver. On the rear seat, one more man was sitting next to Vishal Yadav.' 1932. On the 4th of March 2002 when Exh.PW-28/A was recorded in the case diary by the Investigating Officer, he had no clue about the existence of Ajay Kumar, a person who sited the Tata Safari at the Hapur Chungi. In his testimony in court recorded on 25th April, 2003 he resiled from the above statement.

1933. The position of Ct. Satender Pal Singh (PW-32 in the first and PW-10 in the second trial) who was with Ct. Inderjeet Crl.A.Nos.741, 910/2008 & 145/2012 1066 Singh is a little better as he maintained his statement (Exh.PW-32/A) under Section 161 of Cr.P.C. also recorded on 4th March, 2002 except with regard to identification of the person in the red kurta. He was confronted with the following portions of Exh.PW-32/A:

Portion A toA _The window panes of the vehicle were open.

So I saw that in the vehicle, apart from Vikas Yadav, three more persons were sitting out of which one boy having a round (_gol') face wearing a red kurta was sitting next to the driver seat in the front.' Portion B to B _On the night of 16th/17th February 2002, the person wearing the lal kurta who had been seen in the Tata Safari with Vishal, Vikas Yadav and one more person, the same person was abducted (_apaharan') and murdered by these people, I learnt about the name of this person was Nitish Katara subsequently.' 1934. Thus though in his statement under Section 161 of the Cr.P.C., Ct. Satender Pal Singh had identified the deceased being the fourth passenger in the Tata Safari apart from three accused persons on the night of 16th/17th February, 2002, in his testimony in court, he expressed inability to identify the fourth person.

Crl.A.Nos.741, 910/2008 & 145/2012 1067 1935. Rohit Gaur was a witness of the fact that Vishal Yadav had called away Nitish Katara while the three friends were eating dinner at Shivani Gaur (his sister)'s wedding. The investigating officer had recorded his statement under Section 161 of the Cr.P.C. on the 20th February, 2002. Unfortunately on the 3rd of April 2003, he had to be dropped as a witness

on the instructions of the IO who was present in the court on the ground that the witness seemed to be won over.

1936. Despite this position, Rohit Gaur was examined on 13th September, 2006 as PW-8 in Sukhdev @ Pehalwan 's trial wherein he completely resiled from his statement under Section 161 of the Cr.P.C. (Ex.PW8/PA). He was confronted with the following portions of his statement:

> Portion A to A —Bhawna Yadav, sister of Bharti Yadav; brother Vikas Yadav; Vishal Yadav, maternal brother (fufera) had also come there. After the barat, many people were eating dinner in the garden of the Diamond Palace. Bharat Diwakar, Nitish Katara and Gaurav Gupta being friends were eating dinner together in the garden At about 12:00 in the night, Vishal Yadav reached near Nitish Katara and started talking to him. Vishal took Nitish Katara outside the Diamond Palace. Vikas Yadav son of Shri D.P. Yadav was standing outside with his vehicle.

On reaching outside, Nitish Katara talked to Crl.A.Nos.741, 910/2008 & 145/2012 1068 Vikas Yadav and thereafter Vikas Yadav and Vishal Yadav seated Nitish Katara in the vehicle and after shaking hands with their friends, took him towards the west. Vikas Yadav was driving the car. Nitish Katara did not return thereafter. His friends Bharat Diwakar and Gaurav Gupta kept waiting for him for quite some time.

Portion B to B —Bharti Yadav, sister of Vikas Yadav had a deep friendship with Nitish Katara. This friendship was not liked by her relatives. I therefore, suspect that after abducting Nitish Katara, Vikas and Vishal Yadav may have murdered him. Vikas Yadav had come to my sister's wedding in a Tata Safari. Nitish Katara had a mobile phone in his hand and he had been wearing a watch.‖ 1937. In his court testimony, Rohit Gaur went to the extent of saying that he could not even recognize that who accompanied Vikas Yadav to the wedding. This witness further went to the extent of denying that he had made any statement to the police.

1938. Bharat Diwakar (PW-25 in Vikas Yadav's trial) and Gaurav Gupta (PW-26 in Vikas Yadav's trial) make the same material improvement in their court testimony over their previous statements! In court, they attribute a statement as having been made by Nitish Katara in Gaurav Gupta's cell phone conversation with him at 1:11:18 hrs on 17th February, Crl.A.Nos.741, 910/2008 & 145/2012 1069 2002. Both of them for the first time testified in court that Nitish said that he was at the IMT, whereas they mention no such thing in their statements recorded under Section 161 of the Cr.P.C.

1939. Bharat Diwakar and Gaurav Gupta also did not give the complete truth with regard to their efforts to contact Nitish Katara over the telephone. Bharat Diwakar had gone silent when questioned on a material aspect of the case for a long time before giving a reply which was intended to assist the accused persons. He certainly suppressed information given by him to the police. This was information with regard to Nitish Katara having been taken away from his company. Bharti Yadav had reacted about this as well when talking to Nilam Katara on the morning of the 17th of February 2002, therefore, in the most critical area of identification.

1940. Bharat Diwakar again an educated and well to do person, a friend of the deceased failed to do justice to his deceased friend and in the witness box, gave wishy washy evidence, setting up loss of memory at the critical juncture. The son of a police officer of U.P., we find substance in the submission of learned Additional Standing Counsel that he had succumbed to influence and pressure.

1941. PW-23 Virender Singh has been held to be completely under the influence of the accused persons. Moreover, the order Crl.A.Nos.741, 910/2008 & 145/2012 1070 dated 23rd December, 2003 of the trial court records that Raghu and Aslam were won over.

1942. The trial court record reveals several incidents of interference with the recording of evidence of the witnesses. These instances include instances of blatant tutoring; giving answers to questions; shouting in the court; preventing proper recording of testimony. While the evidence of PW- 20 Yashoman Tomar was being recorded on the 7th of March 2002, the trial court has made the following observations:

> ―Three advocates for accused person are not allowing the testimony of witness to be recorded properly and Sh. G.K. Bharti is unnecessarily shouting in the court, the moment the witness states something or the chart is shown to refresh his memory, all the three advocates start murmuring and started interfering and making it difficult for the witness to depose in the court.‖ Such over bearing conduct is certainly not conducive to instilling confidence in the witness.

1943. We have noted the court proceedings on 25th April, 2003, when Ct. Inderjeet Singh (PW-28) was under examination in Vikas and Vishal Yadav's case. Counsel for the defence indulged in blatant tutoring of the witness while he was in the witness box. Such is the pernicious conduct of the defence during trial even inside the court room! There is no respect for court directions or the process of law. It does not Crl.A.Nos.741, 910/2008 & 145/2012 1071 need much imagination as to what would have gone on outside the court room while the trial remained pending.

1944. The judgment dated 28th May, 2008 records the conduct of the counsel for the accused persons during the examination of defence witnesses on 11th July, 2007. On the 11th July 2007, when Shri Rajender Choudhary was being examined as DW-3 and gave an answer not acceptable to the defence, counsel for Vikas Yadav suggested to him that the witness had been chosen with the consent of lawyers of the accused persons to accompany them. The witness promptly gave the desired answer. The court has also noted that counsel for the accused persons kept suggesting answers to the questions which he had put to the witness in a low tone. For instance, when DW-3 merely stated that Vikas Yadav had told him about obtaining his signatures on blank papers, counsel suggested to him the name of Vishal Yadav as well and thereafter, a suggestive question was put to the witness pointedly referring to Vishal Yadav. The witness repeated the tutored information.

1945. The judgment dated 28th May, 2002 makes substantive observations on the condition of Bharat Diwakar and the fact that he was under the influence of the accused persons. The ld. Trial judge has noted that Bharat Diwakar went to the extent of his denying that his statement was recorded by the police on 17th February, 2002 and subsequently, admitted at Crl.A.Nos.741, 910/2008 & 145/2012 1072 the time inquiries were made from Nilam Katara by the police at PS Kavi Nagar. On 17th February, 2002, he too was called and interrogated and that he had narrated the entire episode. Bharat Diwakar was examined as PW-25 in Vikas and Vishal Yadav's trial and was declared hostile and had to be cross-examined.

1946. The ld. Trial judge has also noted that after DW-3 Rajender Chaudhary testified that he had been verbally directed by the court to accompany the accused persons during the police custody remand, the counsel for the accused persons put questions to the witness which were suggestive of the answers and he agreed to the suggestion by counsel that he was chosen to accompany the accused persons with the consent of lawyers of Vishal as well as Vikas Yadav.

1947. It is in evidence that the defence counsel has also told the answers to the questions put to the witness.

1948. We find that that while DW-1 Shri Ashok Gandhi was being examined by the court, there was interference by defence counsels and the court notes that ―at every question there is interruption by the defence counsels. They are warned to be careful in future‖.

1949. PW-15 Vikram Garg was examined by the defence on the 8th of August 2007 in an attempt to establish that the photograph ExPW6/D3 is an original photograph while photograph Crl.A.Nos.741, 910/2008 & 145/2012 1073 Ex.PW6/D2 has been prepared after making amendments in Ex.PW6/D3. The court records that during his cross- examination, it was observed that counsel for Vikas Yadav ―whispered something in the ear of the witness and the witness immediately took a somersault‖. The above narration would show that the trial court had to struggle to elicit evidence from the witnesses and that the appellants left no stone unturned to obstruct the trial.

1950. We have been at pain to notice the fact that in the instant case, police investigation was under judicial scrutiny in one court or another right from the beginning. In the presence of the two brothers, the Chief Judicial Magistrate had called upon the police by the order dated 1st March, 2002 to file the copy of the case diary in a sealed cover. The case diary had been perused by the Chief Judicial Magistrate.

1951. The accused persons were guided by the best of legal brains in Allahabad, Ghaziabad and Delhi including respectable senior advocates as well as Shri Satpal Singh Yadav, the then President of the Bar Association at Ghaziabad.

1952. The proceedings in Crl.Writ No.247/2002 remained pending even after the filing of the chargesheet by the police. As per the court order noticed above, the investigating agency was filing status report therein.

Crl.A.Nos.741, 910/2008 & 145/2012 1074 1953. Yet in the witness box some of the witnesses, including police personnel, brazenly denied having made any statement to the Investigating Officer while others disputed the correctness of the police record. In a case which was investigated under so much judicial scrutiny, pressure from the accused as well as the untiring vigilance of the mother of the deceased to seek justice; it would be impossible for the police to concoct statements of witnesses.

1954. We find that the learned trial judge has also noted the fact that the complainant, Nilam Katara filed. Transfer Petition no.449/2002 in the Supreme Court of India alleging that she would not get fair trial in Ghaziabad due to the money and muscle power of Shri D.P. Yadav and sought transfer of the case therefrom. The Supreme Court accepted the submissions made by the complainant. Firstly further proceedings in the Ghaziabad Court were stayed. Thereafter, by the order dated 23rd August, 2002, the Supreme Court transferred the case from the Court of District and Sessions Judge, Ghaziabad to the Sessions Court in Delhi. The Supreme Court while transferring the matter as back as on 23rd August, 2002 also express the reservations of the Supreme Court:

> ―from the narration of facts as well as the materials on record we are of the considered opinion that atmosphere at Ghaziabad is not congenial for continuance of the criminal Crl.A.Nos.741, 910/2008 & 145/2012 1075 proceedings and the apprehension of the mother cannot be said to be fanciful one nor can it be said to be unfounded.‖ (Emphasis supplied) 1955. Very seldom will a witness state that he was under pressure, threat or influence. The same has to be discerned from the testimony in the witness box and sometimes from the demeanour of the witness. Ct. Satender Pal Singh while giving his testimony as PW 32 in the trial of Vikas and Vishal Yadav expressed that he was feeling _hopeless' and had to be calmed by the trial judge as noted above.

1956. In the Queens Division Bench judgment reported at 1993 (2) All E.R. 154 R. v. Ashford Magistrate‟s Court, Ex.P. Hildon, it was observed that whether a witness was refusing to give oral evidence _through fear' did not have to be explicitly stated by the witness but could be determined by the court forming its own opinion from the witness's demeanour that it was sure that the witness was being prevented by fear from giving evidence.

1957. So far as fear, pressure and undue influence on witnesses is concerned, the same is writ large from their testimonies itself. It needs no elaboration that statements recorded by the police during investigation under Section 161 Cr.P.C. are not substantive evidence. It is too much of a coincidence Crl.A.Nos.741, 910/2008 & 145/2012 1076 that multiple witnesses contradict the same aspects of the prosecution case. That these contradictions were not truthful stands established from proven documentary evidence noticed above; oral testimony of other unshaken witnesses and the recoveries effected on the pointing out of the two brothers. The variations in the statements of the same person from the prior statement given to the IO and his testimony in Court, manifests that the testimony in court was influenced and changed to defeat the prosecution and assist the accused persons. The same could be for any reason - unfair, undue influence, pressure and threat.

1958. The above narration amply illustrates that the apprehensions of Nilam Katara expressed before the Supreme Court even before the commencement of the trial, certainly, were not unjustified given the unfolding of the events noticed by us hereinabove. Unfortunately most of the witnesses on critical issues hailed from Ghaziabad or U.P. Many were associated to the business of the father of Vikas Yadav. The appellants do not dispute his authority, the power wielded by him or their resources. Thus even the transfer of the case did not prevent pressure and influence being brought on witnesses.

1959. The design in these improvements, contradictions as well as facts resiled from, is established from the reality that the witnesses have done so with respect to the same aspect. For instance, Shivani Gaur, Bharti Yadav and Bhawna Yadav Crl.A.Nos.741, 910/2008 & 145/2012 1077 have introduced into their testimonies that Nitish Katara was at the Diamond Palace Banquet Hall at 1/1:30 a.m. on 17 th February, 2002. Both Gaurav Gupta and Bharat Diwakar have tried to prove that Nitish Katara told Gaurav Gupta that he was at IMT. The witnesses outside the wedding venue have resiled from their previous statements either to separate the appellants and Nitish Katara or by refusing to describe the fourth occupant in the Tata Safari vehicle as a person in a red kurta who was identified as Nitish Katara from his photograph which they had done in their previous statements or by putting them in separate vehicles.

The foregoing discussion illustrates how, armed with the complete prosecution case, the appellants have set about to systematically and as part of a design to work on the witnesses. Giving false evidence renders a witness liable for criminal action in law. However, due to passage of time we are refraining from making any direction in this regard.

1960. The documentary evidence of the call records as well as the previous statements; the unchallenged evidence of the investigating officers and other witnesses have demolished these deliberate and orchestrated improvements and embellishments.

1961. Public interest in proper administration of justice deserves as much importance if not more as in the interest of the Crl.A.Nos.741, 910/2008 & 145/2012 1078 individual accused. In this regard, reference can usefully be made to the pronouncement of the Supreme Court in (2006) 3 SCC 374 Zahira Habibullah Sheikh and Anr. v. State of Gujarat and Ors. wherein the court noticed the importance of the role of witnesses in a criminal trial. Citing Bentham who had stated that the witnesses are the eyes and ears of the justice, the Supreme Court held thus:-

―Legislative measures to emphasise prohibition against tampering of witness, victim or informant, have become imminent and inevitable need of the day. Conducts which illegitimately effect the presentation of evidence in proceedings before the court has to be seriously and sternly dealt with. The Supreme Court observed that there should not be any undue anxiety to only protect the interest of the accused. That would be unfair to the needs of the society. On the contrary, efforts should be made to ensure fair trial where the accused and the prosecution both get a fair deal. Public interest in proper administration of justice must be given as much importance if not more, as the interest of the

individual accused. The Supreme Court held that the courts have a vital role to play.‖ (Emphasis by us)

1962. The instant case is a classic example of the extreme need for witness protection in the criminal justice system and empowerment of witnesses, especially those pitched against Crl.A.Nos.741, 910/2008 & 145/2012 1079 high profile and well connected influential accused persons. What chance does a lowly constable or a common citizen stand against not only the wealth, but the political might of the accused persons as well?

1963. This case also amply illustrate the helplessness of the trial judge who is empowered only able to reassure the witness or direct the police to give protection to him or her. Certainly that is small solace for the witness who has to coexist in the community within the reach and the terror of the accused persons.

1964. We feel compelled to note the trauma of the complainant in the present case. Nilam Katara got not a moment to grieve her uncompensable loss. From seeking a proper DNA examination to confirm the identity of her son's body to ensuring police investigation and then seeking transfer of the trial from the court at Ghaziabad, UP to Delhi, this mother has moved heaven and earth to keep the wheels of justice rolling. Sitting alone in the courtroom, crowded with relatives and well wishers of the accused persons as well as their teams of experts, she has made no grievance against the pressure she must have faced and influence to which witnesses have been subjected. Truly a crusader, she has kept her eyes trained on a fair completion of the trial.

Crl.A.Nos.741, 910/2008 & 145/2012 1080 (F) Vikas and Vishal Yadav deliberately misled the police with regard to the recovery of the Tata Safari vehicle.

1965. We have considered the conduct of the appellants with regard to the recovery of Tata Safari at length earlier in this judgment, especially the manner in which they did their utmost to frustrate the police remand for effecting the recovery of the vehicle and also the manner in which they misled the Investigating Officers and the police team with regard to the location of Tata Safari.

1966. Vikas and Vishal Yadav deliberately misled the police on the 28th of February, 2002 when they took the police to three places in Alwar for recovery of Tata Safari even though they were aware of the fact that the vehicle was not there, only with the intention of wasting the limited 24 hour police remand granted by the court for effecting the recovery. They thereafter successfully obstructed the Investigating Officer in obtaining their custody from Dabra on 23rd February, 2002 and again manipulated delay in their committal into the police remand at 2:00 pm on 9th March, 2002, (when the police custody remand was to start) till about 10:30 am on 10th March, 2002. Thereafter again to waste time, they first took the police to a taxi stand behind a cremation ground, Panipat and only thereafter led the police party to the A.B. Coltex premises in Karnal and got the Tata Safari recovered.

Crl.A.Nos.741, 910/2008 & 145/2012 1081 (G) Every effort was made to intimidate the Special Public Prosecutors to prevent them from discharging functions and obligations freely and fairly.

1967. The extent of the reach of the accused persons comes to the fore from the intimidation of S.K. Saxena, Public Prosecutor and Mr. B.S. Joon, Special Public Prosecutor. Shri S.K. Saxena was appointed by the U.P. Government as a Special Prosecutor when the case was originally pending before the Sessions Court at Ghaziabad. He continued with the trial even after the transfer of the case to the Sessions Court in Delhi. At this stage, when the sessions trial was almost complete, an order dated 28th January, 2004 was passed whereby Shri Saxena was removed from the post of the Special Prosecutor. This would have certainly adversely impacted the prosecution and obviously assisted the defence.

1968. Nilam Katara challenged this order by way of a writ petition being W.P.(Crl.)No.25/2004 before the Supreme Court of India contending that the removal of the Special Prosecutor at the advanced stage of the trial would seriously impact fair and proper trial of the case. On the 26th of March, 2004,

the Supreme Court observed that it seemed that Shri Saxena was not willing to continue as Special Prosecutor.

1969. The Delhi Government submitted before the court that as the case was being tried by the Sessions Judge at Patiala House, New Delhi, a Special Prosecutor could be appointed by the Crl.A.Nos.741, 910/2008 & 145/2012 1082 Delhi Government and that the name of Shri K.K. Singh, a senior prosecutor was available for conducting the case. The accused persons appeared as intervenors before the Supreme Court and stated that they would have no objection to such an appointment. The Supreme Court directed fixation of the remuneration payable to Shri K.K. Singh and directed that the same shall be paid by the State of U.P. It was further directed that the trial be expedited and completed at the earliest.

1970. It appears that after the case was transferred, the complainant filed a W.P.(Crl.)No.25/2004 before the Supreme Court which was disposed of with the following observations:

> ―The counsel for the Delhi Government submitted that that as per Sessions Case is being trial by the Session Judge at Patiala House, Special Prosecutor could be appointed by the Delhi Government. The Government of Delhi is having a panel of names, and among these one Shri K.K. Singh, Senior Prosecutor is available for conducting the case as a Special Prosecutor. The counsel for the accused submitted that accused may not have any objection if Shri K.K.

Singh being appointed as a Special Prosecutor.‖ 1971. It appears that the matter did not end here and a further application being Crl.M.P. No.6186/2005 was necessitated in this writ petition before the Supreme Court. In this application, on the 19th January, 2006, it was stated on behalf of the Delhi Government that for conducting further Crl.A.Nos.741, 910/2008 & 145/2012 1083 prosecution in the case, the name of Shri B.S. Joon, Chief Prosecutor was being considered by the Government of Delhi. The Supreme Court directed that if Shri B.S. Joon is appointed as Chief Prosecutor for conducting the trial, the court may proceed with the matter and complete the trial as early as possible.

1972. It is submitted that the accused did their utmost to browbeat the Special Public Prosecutors during the trial as well to prevent them from discharging their duties which conduct deserves to be noted. In this regard, the undisputed facts are brought to our attention:

(i) So far as Mr. S.K. Saxena, the Public Prosecutor is concerned, Vikas Yadav filed a complaint dated 9th March, 2004 under Section 200 of the Cr.P.C. against him and others including employees of the Indian Express and Chronicle Press, Printers and Publishers. The complaint stated that Shri S.K. Saxena had been appointed as Special Public Prosecutor by the State of U.P before the learned Trial Court and was removed from the said position in January, 2004. When Shri Sharma was questioned by the journalist of the Indian Express Newspaper with regard to his removal from the case remarked that ―he could only say that he was not convenient to the accused‖. The complaint further stated that it was a matter of record that on most occasions, whenever the case was listed, the newspaper would specify the name of the petitioner/complainant as the accused and that as soon as the news with regard to the removal of the Special Public Prosecutor featured in different newspaper, the readers of the newspaper understood the use of expression ―accused‖ in the statement as referring to the petitioner. It was contended that the Crl.A.Nos.741, 910/2008 & 145/2012 1084 aforesaid news, which had been published, was a defamatory statement. It is noteworthy that the complaint refers to a legal notice dated 11th February, 2004.

This complaint sought issuance of summon to respondents no.1 to 4 including Shri S.K. Saxena in accordance with Section 499/500 IPC.

(ii) It appears that a Civil Suit No.255/2004 was also filed by Vikas Yadav against Shri S.K. Saxena before the Court of Civil Judge (SD) Ghaziabad.

(iii) Shri S.K. Saxena filed two transfer petitions before the Supreme Court; one being Transfer Petition (C) No.355/2004 (seeking transfer of the civil case) and Transfer Petition (Crl.)No.137/2004 [seeking the transfer of the criminal complaint (Complaint No.3823/2004)]. The Supreme Court passed an order dated 5th May, 2004 issuing notice to the respondent and in the meantime stayed the further proceedings in both the cases.

(iv) We may notice the manner in which Shir B.S. Joon was treated. A legal notice dated 16th November, 2006 was sent on behalf of both Vikas Yadav as well as Vishal Yadav by Shri Rajender Chaudhary, Advocate to Mr. B.S. Joon alleging that he had given misleading interview to the various TV channels and print media and made defamatory allegations against the said appellants and required the learned Special Public Prosecutor to pay a sum of Rs.20 crores as damages within three days and publish in print/electronic media an unconditional apology failing which, action for damages and criminal action could be initiated.

(v) On the very date of receipt of this notice, Mr. Joon, Special Public Prosecutor was compelled to file an application dated 18th November, 2006, complaining that the notice was an attempt on part of the accused persons to overawe and intimidate the Prosecutor so as to hinder and obstruct him from conducting the case properly and in a fair Crl.A.Nos.741, 910/2008 & 145/2012 1085 manner. He also asserted that the issuance of the notice requires appropriate action against the accused person under the Contempt of Court Act.

(vi) It appears that the complainant Nilam Katara filed Crl.M.C.No.7756/2006 in this court as regards the service of the said notice. Notice was issued by this Court in the petition and by an order dated 4th December, 2006, the Court posted the matter for addressing this issue on the next date.

(vii) On 18th December, 2006 in Crl.M.C.No.7756/2006, the learned senior counsel for Vishal Yadav stated that they shall withdraw the notice dated 16th November, 2006 served on Shri. B.S. Joon, Special Public Prosecutor and shall not take any legal action pursuant thereto. The learned Single Judge noticed that as a result, the application filed on 18 th November, 2006 by the Special Public Prosecutor and Crl.M.C.No.7756/2006 would become infructuous which was accordingly dismissed.

(viii) We were informed that pursuant to the statement made before this Court in Crl.M.C.No.7756/2006, Shri Rajender Chaudhary issued a notice dated 20th December, 2006 to Shri B.S. Joon, learned Special Public Prosecutor stating that he was withdrawing the said notice dated 16th November, 2006 and that his client would not initiate any legal action or proceedings pursuant thereto (Ex.DW3/P2). It is noteworthy that Vikas and Vishal - the accused persons were both being represented by Shri Rajender Chaudhary (DW - 3) and he had issued the legal notice dated 16th November, 2006 on their behalf to the Special Public Prosecutor . The letter dated 20th November, 2006 withdrawing the same was also issued by him on their behalf.

1973. The learned trial judge has noted this conduct and commented that the accused Vikas Yadav and Vishal Yadav did not even spare the Special Public Prosecutors. Their Crl.A.Nos.741, 910/2008 & 145/2012 1086 actions have required the intervention of the Supreme Court and this court as noted above.

1974. The learned trial judge has relied upon the pronouncement of this court reported in 2007 Crl. LJ 2626 (Delhi High Court) entitled H. Syama Sundara Rao v. Union of India and Ors. wherein this court pronounced on the issue of casting of aspersions and extending threats by issuing notices to the counsel for other side and the duty of the court in the following terms:-

―Casting aspersions and extending threats by issuing notices to the Advocate for the opposite side in pending litigation containing disparaging and derogatory remarks has the effect of deterring an Advocate from conducting his duties towards his client and embarrassing him in the discharge of his duties and thus amounts of contempt of Court on the very same principles which are applicable with regard to the criticism of a Judge or a judgment as in each such instance, the tendency is to poison the fountain of justice sully the stream of judicial administration, by creating dustrust, and pressurizing the advocates as officers of the Court from discharging their professional duties as enjoined upon them towards their clients for protecting their rights and liberties. It is the duty of the Courts to protect the advocate from being cowed down into submission and under pressure of threat of menace from any quarter and thus abandon their clients by withdrawing pleas taken on their behalf or by withdrawing Crl.A.Nos.741, 910/2008 & 145/2012 1087 pleas taken on their behalf or by withdrawing from the brief itself, which may prove fatal not only to the legal proceeding in question but also permit an impression to gain ground that adoption of such tactics are permissible or even acceptable. Failure to deal with such conduct and nip it in the bud shall result in the justice system itself taking a severe knocking, which tendency must be put down as it amounts to direct interference with the administration of justice and is, therefore, a contempt of a serioius nature.‖ (Emphasis by us) 1975. We may note that the appellants do not challenge the factual narration noted by us with regard to the issuance of legal notice to the Special Public Prosecutors or the initiation of legal proceedings against two Public Prosecutors. During the arguments on behalf of the appellants, they also did not assail the findings of the trial court that this conduct amounted to interference with the due course of justice and it was an attempt made by the accused persons to pressurize the Public Prosecutors from discharging their professional duties enjoined upon them towards the State.

1976. The only submission in these proceedings on behalf of the appellant is that these findings were not put to the accused persons under Section 313 of the Cr.P.C. The above findings have been arrived at by the ld. Trial Judge on Crl.A.Nos.741, 910/2008 & 145/2012 1088 evaluation of the acts by and on behalf of the appellants during the pendency of the trial.

We find substance in the submission put forth by the learned counsel for the complainant that the above facts with regard to issuance of the notice and the orders passed in Crl.M.C.No.7756/2006 were not in the nature of incriminating evidence relating to commission of the charged offences proved by the prosecution but related to acts and conduct of the accused persons during the pendency of the trial. There was no legal requirement to put these to the accused persons under Section 313 of the Cr.P.C.

(H) Manipulation of court record - Applications dated 26th February, 2002 falsely claimed to have been filed by Vikas and Vishal Yadav before the CJM Ghaziabad 1977. It is now necessary to examine an extremely distressing event which reflects the manipulation which the appellants are able to do as well as their reach so far as investigation and even court records are concerned. Long after arguments of the appellants in the present appeals, the State and the complainant were complete and the appellants were being heard in rejoinder, Mr. Sumeet Verma, ld. counsel appearing for Vikas Yadav on instructions submitted that Vikas and Vishal Yadav had sent separate applications to the Chief Judicial Magistrate, Ghaziabad through the Jail Superintendent on 26th of February, 2002 informing the court Crl.A.Nos.741, 910/2008 & 145/2012 1089 that they are being falsely implicated and that they had not made any statement to the Investigating Officer, PS Kavi Nagar. It is further submitted that this was also submitted before the court of Chief Judicial Magistrate, Ghaziabad and an order was passed on 27th of February, 2002 thereon which takes note of this contention of the defence counsel.

1978. Mr. P.K. Dey, learned counsel appearing for the complainant has strongly disputed the filing of any such application as well as the authenticity of the record relied upon.

1979. It is noteworthy that on the 26th of February, 2002 the Investigating Officer filed the application for a 3 day police remand of Vikas and Vishal Yadav on which the CJM, Ghaziabad had directed that these appellants be summoned for the 27th of February, 2002. As noted above, twenty four hours police remand was actually granted. Four separate sets of advocates filed two applications - one on behalf of Vikas Yadav and the second on behalf of Vishal Yadav wanting to accompany the accused persons during the police investigation while they were on police remand. There was not a single word in either the applications or proceedings recorded on 27th of February, 2002, either on the order passed on the remand application or in the orders passed on the applications by the appellants, of any protest to the effect that they were being falsely implicated or that they had not made any statement to the IO. No reference therein was Crl.A.Nos.741, 910/2008 & 145/2012 1090 made to any previous application filed on 26th of February 2002 by the accused.

Thus at no point of time did the appellants oppose the applications of the police for remand on the ground that no disclosure statements were made by them. On the contrary, they, with alacrity, only sought permission of the CJM Ghaziabad that their counsel be permitted to accompany them while they were on police remand.

1980. Another pertinent question which arises is that, but for the disclosure of the Tata Safari by the accused persons, the police had no idea about the details of the vehicle which was used by them for the commission of the offence or its location on the 25th of February, 2002 till 6th of March, 2002 when the order extending the police remand was passed.

1981. The order of the Sessions Court dated 6th of March, 2002 extracted by us notices the recoveries pursuant to the disclosures and that the Tata Safari vehicle was yet to be recovered. But for the appellants taking the police to three places in Alwar on 28th February, 2002 and thereafter on 10th/11th March, 2002 to different places till finally the vehicle was recovered on the pointing out of the appellants at Karnal, the police would have been groping in the dark with regard to the location of the vehicle.

Crl.A.Nos.741, 910/2008 & 145/2012 1091 1982. Even while arguing the application for police remand, the accused persons make no reference to these two applications as would be evident from the order dated 6th March, 2002 of the Sessions Judge and 8th March, 2002 of the CJM, Ghaziabad.

1983. We find that on all applications, filed before it, the CJM has called in report from the police and also endorsed orders thereon. These two applications came to be addressed to the court. No order is endorsed thereon.

1984. On the contrary based on the disclosure statement, the applications by the police for remand for effecting recoveries of the disclosed articles were accepted by the court as well as by the accused persons who merely sought leave that they may be accompanied by counsel.

1985. Where is the question of any court permitting police remand if allegations of false implication and fabrication of statements were received by it? If such applications were actually made by the appellants on 26th of February, 2002, the accused persons would have objected against the police action before not only the CJM but the Sessions Court and the High Court as well, which the appellants did approach to challenge the second order of police remand. Notice stood issued on 28th February, 2002 in Crl.Writ No.247/2002 filed Crl.A.Nos.741, 910/2008 & 145/2012 1092 by Nilam Katara in which the two brothers were a party. No protest was lodged by the accused.

1986. These applications dated 26th February, 2002 have not been placed before the learned Trial Judge in the opening statement by the Senior Counsels who have argued at length before this court. We find substance in the submissions made by learned Additional Standing Counsel for the State as well as learned counsel for the complainant to the effect that no such application was made. There was also no

occasion to record a fourth order on 27th of February, 2002 which, for the first time, is being placed before the court in the appellants arguments in rejoinder and is not known to either the State or the counsel for the complainant.

1987. The original record shows that while the file is maintained in chronological order, inexplicably the above two applications have been inserted between the documents dated 10 th March, 2002 and 15th March, 2002.

1988. Perusal of the trial court proceedings would shows that at no point of time have the appellants informed the court about the alleged application dated 26th February, 2002. No reference was made to it even during the arguments before the learned trial judge and no reference thereto is found in the impugned judgment dated 28th May, 2008. This suggests Crl.A.Nos.741, 910/2008 & 145/2012 1093 that the documents may have been introduced on the record of the trial court after the passing of the judgment.

1989. The appellants have rendered themselves liable for appropriate proceedings for such actions. However passage of time has intervened and the record has been transmitted from the lower court to the High Court for hearing in the present appeals which has been subjected to preparation of paperbooks by photocopying the record as well as scanning in the scanning department for the purposes of its digitalization. Even if an inquiry was directed, it may not be possible to pin point exactly who is responsible for the insertion of these documents. However the fact that only the respondents would gain therefrom who have relied upon these documents even before this court would show that none other but one or all of the appellants are responsible for this.

1990. To conclude the above discussion on the conduct of the accused persons, therefore, without diluting the settled principle of criminal law that the burden of proof rests wholly on the prosecution, a time has come for courts to evaluate the conduct of the accused in obstructing the truth being brought out, especially in respect of witnesses over whom they have control, or influence, of any kind - mental, emotional or physical - be it because of relationship, authority, political clout, wealth, or otherwise.

Crl.A.Nos.741, 910/2008 & 145/2012 1094 1991. The accused has a constitutional protection to remain silent.

The cardinal principle of criminal jurisprudence that the accused person is presumed innocent till proven guilty beyond doubt applies with all force to the criminal trial. However neither of these dictates, mitigates from constitutional duty and public law obligation including those implicated in criminal offences not to obstruct the investigating agency as well as to assist expeditious trial and adjudication by the court in arriving at the truth and delivering justice. It is the solemn responsibility of every person including accused persons in criminal trials to ensure that witness are not suborned, influenced or pressurized in any manner; that vital evidence is not destroyed. Thus while the burden of proof with regard to commission of an offence rests on the prosecution, however, there is a fundamental duty upon the defence to ensure that the trials are not protracted or fair trial prevented by any action which could be attributed to them.

1992. The above principle stands reiterated by the Supreme Court in the pronouncement reported at (2009) 6 SCC 767 National Human Rights Commission v. State of Gujarat when the court ruled thus:-

> —The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and Crl.A.Nos.741, 910/2008 & 145/2012 1095 prosecuting agencies. Interest of society is not to be treated completely with disdain and as persona non grata. The courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice--

often referred to as the duty to vindicate and uphold the ‗majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. The courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.‖ (Underlining by us) 1993. In the present case the prosecution has supplied copies of the statements under Section 161 of Cr.P.C. to the appellants.

Crl.A.Nos.741, 910/2008 & 145/2012 1096 1994. The conduct noted by us is attributable only to Vikas and Vishal Yadav. Their third accomplice Sukhdev @ Pehalwan, once he was arrested, appears to have permitted law to take its own course. In the first trial, the most crucial witnesses were either completely won over or influenced by or on behalf of the two accused persons. They had to be either dropped (Rohit Gaur for instance) or had to be declared hostile and cross examined by the prosecution. Because of the influence of these appellants, it took three and half years for their sister to enter the witness box while they mocked at every direction passed by the trial judge ordering her appearance. Not only these two brothers but their family members who appeared on her behalf facilitated the delay in her appearance. Does this conduct by itself not unerringly point towards the fact that the appellants were aware that the true testimony of these witnesses supported the prosecution and hence to prevent the truth being brought out, they systematically influenced and manipulated the witnesses resulting in denials, prevarications, concealments and lies by the witnesses from the truth being brought out. The evidence of Dr. Anil Singhal, Ct. Inderjeet Singh, Ct. Satender Pal Singh; Shivani Gaur; Bharti Yadav; Bhawna Yadav; Sultan Singh; Bharat Diwakar; Gaurav Gupta and amongst others exemplifies the manner in which the influence of these appellants has prevented the complete truth being revealed. Instead, false evidence has been Crl.A.Nos.741, 910/2008 & 145/2012 1097 introduced through related witnesses. While Ct. Satender Pal Singh told the trial court he was feeling ―hopeless‖ in the witness box, Bharat Diwakar went silent for a long time when asked by the prosecutor to name the persons suspected by the mother of the deceased.

1995. The only public witness Ajay Kumar who could not be influenced and stood by his statement has needed court orders for police protection and is being subjected to multiple criminal complaints by relatives of the appellants or persons associated to them. The fact that all these complaints and cases arose only after he surfaced before the police speaks for itself.

1996. The accused persons also misled the police during investigation and deliberately led it on an inter state chase for recovery of the Tata Safari vehicle, causing wastage of valuable human resources, unwarranted expenditure from public funds and diverted course of investigation.

1997. We have tried to answer the question raised by Mr. U.R.

Lalit, learned senior counsel appearing for Vikas Yadav as to how could the appellants, accused of commission of such a heinous crime who are alleged to have calculatedly absconded, thereafter, rattle off disclosure statements. We have pointed out that the appellants have conducted themselves with an ingrained belief that they are above law Crl.A.Nos.741, 910/2008 & 145/2012 1098 and no matter what they do, nothing can touch them. This attitude and belief is best elucidated from the manner in which these two appellants have misused public resources in befooling the Ghaziabad police and led it to places where they knew that the Tata Safari vehicle was not available. Not only did they led the police to Alwar in the State of Rajasthan, but in Alwar itself, they mischievously led the police to three

different premises knowing full well that the vehicle was not there. They then claimed that the vehicle was either in Chandigarh or Mukeria (Punjab) or in Hoshiarpur (Punjab). For effecting these recoveries, the Ghaziabad police had to strenuously endeavour to get custody of the appellants from Dabra jail where they were lodged. Instead of getting the vehicle recovered right away, again Vikas and Vishal Yadav willfully led the police to a taxi stand behind a cremation ground at Panipat, fully knowing that the vehicle was not there. The appellants have not challenged either before the trial court or before us either they took the police on a wild goose chase for Tata Safari vehicle or the fact that it was recovered at their instance.

1998. More than five years after the vehicle was recovered on the 11th of March 2002, they have attempted to introduce a Mercedes into the case through the clearly influenced testimony on the 28th of March, 2007 during the cross Crl.A.Nos.741, 910/2008 & 145/2012 1099 examination of Bhawna Yadav (sister of appellant Vikas Yadav) 1999. There could be no better example of the cunning of these appellants. This conduct also explains the reason why the appellants have actually made the disclosure statements attributed to them, as they have no respect at all for the law. One glaring fact must be noted is that this certainly is not a conduct of innocent persons who have been falsely implicated for commission of heinous crimes but that of persons who after committing the crimes, systematically set about destroying evidence and misleading the investigating officers as well as creating false defence pleas to defeat their prosecution.

2000. One aspect of this conduct of accused persons seldom talked about is the huge demand it makes on the investigation agency and the criminal justice system both in terms of manpower but also from the point of view of public funds which are compelled to be expended. Just to visualize the expenditure incurred on the 28th February, 10th/11th March is mind boggling. The public exchequer has had to provide for the Ghaziabad police personnel required to escort two accused persons - first to go to Dabra to secure custody; proceed with them to Alwar and then again to Panipat - both places where nothing was to be recovered - and then to Karnal. Not to say the incidental costs of transportation Crl.A.Nos.741, 910/2008 & 145/2012 1100 boarding, etc. The already stretched police force can ill afford such fruit less exercises. No provision of our Constitution of India or the law entitles accused persons to abuse the protections afforded to them in this manner and to deliberately misguide investigations and the courts.

2001. The prosecution can ensure a fair trial and constitutional rights of the accused only if the accused do not impede it from discharging its duty. The victim, and when not the same person, the complainant as well, have the same constitutional and legal rights.

2002. The time has come that an inference needs to be drawn against the accused persons who deliberately mislead investigators; suborn witnesses; destroy evidence; win over crucial witnesses; protract the trial so that crucial evidence is lost or forgotten by witnesses.

2003. This case also highlights the unfortunate reality that trial courts are faced with. The education, economic status, position occupied by the witness is immaterial when accused persons go about exercising influence - it is only the nature of the influence which may vary - so as to succeed in their dishonest designs.

2004. This case has distressed judicial conscience not only because of the manner of commission of the crime, but also because of the staunch efforts made to obstruct the process of Crl.A.Nos.741, 910/2008 & 145/2012 1101 dispensation of justice. What is also of grave concern is the manner in which related witnesses are pressurized and prevented from rising above their relationships and speak the truth to further the cause of justice.

2005. In these circumstances, undoubtedly the learned Trial Judge has proceeded undaunted to overcome every hurdle put in its way in ensuring the constitutional mandate to it. With securing the

ends of justice as its only objective, the learned Trial Judge has ably and efficiently discharged its statutory duty of completion of the trial.

XXVII Principles governing probative value of circumstantial evidence 2006. Before this court, the challenge by the appellants rests on elaborate submissions on examination of individual circumstances which have been proved by the prosecution on matters of minute details during the two trials.

2007. The principles on which circumstantial evidence and its probative value has to be tested, stand authoritatively laid down by the Supreme Court in the judgment reported at (2010) 8 SCC 593, G. Parshwanath v. State of Karnataka wherein the Supreme Court laid down as follows:-

> ―22. The evidence tendered in a court of law is either direct or circumstantial. Evidence is said to be direct if it consists of an eyewitness account of the facts in issue in a criminal case.

Crl.A.Nos.741, 910/2008 & 145/2012 1102 On the other hand, circumstantial evidence is evidence of relevant facts from which, one can, by process of intuitive reasoning, infer about the existence of facts in issue or factum probandum. In dealing with circumstantial evidence there is always a danger that conjecture or suspicion lingering on mind may take place of proof.

Suspicion, however, strong cannot be allowed to take place of proof and, therefore, the court has to be watchful and ensure that conjectures and suspicions do not take place of legal proof. However, it is not derogation of evidence to say that it is circumstantial. Human agency may be faulty in expressing picturisation of actual incident, but the circumstances cannot fail. Therefore, many a times it is aptly said that ―men may tell lies, but circumstances do not‖.

23. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact sought to be relied upon must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the Crl.A.Nos.741, 910/2008 & 145/2012 1103 proved facts. In drawing these inferences, the court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case. The court thereafter has to consider the effect of proved facts.

24. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accused and should exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused, where various links in chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court.‖ (Underlining by us) Crl.A.Nos.741, 910/2008 &

145/2012 1104 2008. Mr. Ram Jethmalani has objected at length that the learned Trial Judge has referred to proof by _preponderance of evidence'. We find that even though the learned Trial Judge in the judgment dated 28th May, 2008 has referred to preponderance of evidence however, further discussion is clearly referring to proof beyond reasonable doubt. The learned Trial Judge has in fact evaluated the cumulative effect of all the circumstances proved beyond reasonable doubt during the trial while arriving at the finding that the circumstances lead to no other hypothesis except establishing the guilt of the accused persons.

2009. Mr. R.K. Kapoor, ld. counsel appearing for Sukhdev @ Pehalwan has placed reliance on the pronouncement of the Supreme Court reported at (2006) 10 SCC 172 (paras 27-28) Ramreddy Rajesh Khanna Reddy v. State of A.P. in support of his submission that in the instant case the prosecution had failed to prove an unbroken chain of circumstances which leads to only the conclusion of guilt of his client Sukhdev.

2010. In Ram Reddy Rajesh Khanna Reddy (supra), the court has reiterated the well settled legal position that with a view to base a conviction on circumstantial evidence, the prosecution must establish all the incriminating circumstances by reliable and clinching evidence and the circumstances so proved must form a chain of events as would permit no conclusion other than one of the guilt of the Crl.A.Nos.741, 910/2008 & 145/2012 1105 accused; that suspicion, however grave it may be; cannot be a substitute for proof and the court shall take utmost care in finding an accused guilty only on the basis of circumstantial evidence. The court also reiterated that the last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead, is so small that the possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case, the court should look for some corroboration.

2011. It is trite that the court has to consider if the facts and circumstances stand proved beyond reasonable doubt and the cumulative effect of such circumstances. The evidence led by the prosecution in the instant case has been examined on these legal principles.

XXVIII Nitish Katara's murder - an ―honour‖ killing?

2012. The present case again brings to the fore a malaise which still afflicts Indian society that finds its roots in entrenched social structures based on religion, caste and economic standing. What is of special concern is that such divisive forces exist even on the borders of Delhi - the nation's Capital, which is also a cosmopolitan city.

Crl.A.Nos.741, 910/2008 & 145/2012 1106 2013. It is in evidence that Bharti's family was opposed to her association or any kind of alliance with Nitish Katara on the ground that he was not from the same caste and that he belonged to a service class family. While she was a Yadav, Nitish was a Katara. Bharti came from a well placed business class family with her father also being a member of Parliament. Nitish Katara's father was in government service and they lived in official accommodation. Nitish Katara was certainly not in the same income bracket of Bharti's family.

2014. On behalf of the appellants submissions have been made before us as if these stated reasons for the opposition are trivial would not incite such violence so as to lead to murder of a person. Not only is this submission completely misplaced but is contrary to the existing realities in India. Several instances of murder on account of opposition of a family member or members to an association or alliance with a person of a different caste, sub-caste, religion or economic strata leading to murder have been documented. Already there is a valuable pool of judicial precedents involving adjudication in such killings (including those of the Supreme Court) which is growing! Such offences motivated by abhorrence to inter-caste association or alliances arise from a totally misplaced sense of _honour'

linked with caste Crl.A.Nos.741, 910/2008 & 145/2012 1107 structures and have been labelled as _honour killing' - truly a misnomer.

The case of the prosecution squarely brings the murder of the Nitish Katara within the meaning of the expression honour killing.

2015. In a judgment of this court reported at 176 (2011) DLT 630 Abdus Sabur Khan v. Union of India & Ors., the petitioner sought exemption from her deportation to Bangladesh on the ground that she feared for her life if she returned as she had got married by her choice to an Indian citizen. While accepting this plea, the court had made the following comment:-

> —...Honour killing cannot be countenanced in a civilized society and more so in a body polity governed by rule of law, for right to life is sacred and sacrosanct. One may treat that it is an affair of honour and he would go to any extent for the cause of his honour but by such an idea he cannot have the feeling of a victor and the sufferer at his hand a vanquished one. ...‖ (Emphasis supplied) 2016. The issue of witnesses turning hostile so far as cases involving the honour killing is concerned has arisen in the pronouncement reported at (2011) 4 RCR (Cri) 57 Sanjay v.

State of Haryana wherein a boy of a backward class Crl.A.Nos.741, 910/2008 & 145/2012 1108 community had enticed a girl of another community. The observations of the court with regard to the difficulties faced by the investigating agency as well as the court on account of witness turning hostile and the duties of the court have been succinctly stated in para 37 of the judgment which reads as follows:-

> —37. Recently, there has been a spate of honour killing in this part of the country.

Haryana is one of the worst hit as far as honour killing is concerned. Such killings result from the perception that the defense of honour justifies killing a person whose behavior dishonours their own clan or family. The usual remedy to such murders is to suggest that society must be prevailed upon to be more gender-sensitive and shed prejudices of caste and class. But equally, it should be made clear that there is no escape for those who take justice into their own hands. So far, there is no specific law to deal with honour killings. The murders come under the general categories of homicide or manslaughter. Generally in such type of killings eyewitnesses are not forthcoming to support the case of the prosecution. This is a biggest problem before the investigating agency and the court while dealing with such type of cases. In such cases where the witnesses of honour killing become hostile, a heavy duty is cast on the Court to closely scrutinize the evidence in order to reach to the truth. It is the duty of the Court to separate the grain from the chaff. The Court is to ensure that no innocent person be punished. The Court is also equally has to take care that no guilty person escaped the Crl.A.Nos.741, 910/2008 & 145/2012 1109 punishment. It is further the duty of the Court to ensure fair trial. The witnesses may not depose in favour or against the prosecution under threats or they are being forced to give false evidence.‖ 2017. We may note that the court extensively relied on the pronouncement of the Supreme Court in (2004) 4 SCC 158, Zahira Habibulla H. Sheikh v. State of Gujarat, wherein the Supreme Court has observed as under:-

> —41. ...Time has become ripe to act on account of numerous experiences faced by courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clout and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice to become ultimate casualties.

Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for Crl.A.Nos.741, 910/2008 & 145/2012 1110 protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the court and justice triumphs and that the trial is not reduced to a mockery. ...‖ It was further held in that case that:

> —55... The trial/first appellate courts cannot get swayed by abstract technicalities and close their eyes to factors which need to be positively probed and noticed. The court is not merely to act as a tape recorder recording evidence, overlooking the object of trial i.e. to get at the truth. It cannot be oblivious to the active role to be played for which there is not only ample scope, but sufficient powers conferred under the Code. It has a greater duty and responsibility i.e. to render justice, in a case where the role of the prosecuting agency itself is put in issue and is said to be hand in glove with the accused, parading a mock fight and making a mockery of the criminal justice administration itself.
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> 56. As pithily stated in Jennison v. Baker (1972) 1 All E.R. 1006), —The law should not be seen to sit by limply, while those who defy it go free, and those who seek its protection lose hope.‖ Courts have to ensure that accused persons are punished and that the might or authority of the State are not used to shield themselves or their men. It should be ensured that they do not wield such powers which under the Constitution has to be held only in trust for the public and society at large.‖ Crl.A.Nos.741, 910/2008 & 145/2012 1111 2018. In its pronouncement reported at (2011) 6 SCC 396 Bhagwan Dass v. State (NCT of Delhi), the Supreme Court was concerned with the offence of an _honour killing and observed as follows:-
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> —28. ...Before parting with this case we would like to state that —honour‖ killings have become commonplace in many parts of the country, particularly in Haryana, western Uttar Pradesh and Rajasthan. Often young couples who fall in love have to seek shelter in the police lines or protection homes, to avoid the wrath of kangaroo courts. We have held in Lata Singh case[(2006) 5 SCC 475 : (2006) 2 SCC (Cri) 478] that there is nothing —honourable‖ in —honour‖ killings, and they are nothing but barbaric and brutal murders by bigoted persons with feudal minds...‖ 2019. _Honour killing' is a class of offences by itself. Its motivation stemming from a deeply entrenched belief in the caste system, it is completely unacceptable. It needs serious examination as to why such murders are not categorized as separate offences in the penal provision.
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> 2020. Several experts have noted that perpetrators are mostly eminent and extended members of the family and community of the victim resulting in many cases of honour killing going unreported and these unreported cases are never brought to justice. Banking on the importance of caste structures and religious divides which still permeates Crl.A.Nos.741, 910/2008 & 145/2012 1112 society, it has been found that the perpetrators use social, political and economic influence as well intimidation to obstruct investigation and to delay proceedings so as to escape prosecution.

2021. In honour killings, the murdered person is the victim of extreme physical violence, perhaps prior emotional torture as well, resulting in his/her death. However society seems to have overlooked the plight of the murdered person's partner. Say if the boy, in an inter-caste alliance is murdered, what

happens to the girl? The right to choose your life partner or whom you associate with is a fundamental right, it is an integral part of the right to life. Even though marriage as a right has not received statutory recognition in any legislation in India, judicial pronouncement has, however, held that the individual's privacy of marriage and dignity are essential concomitants of the right to life and liberty guaranteed under Article 21 of the Constitution of India which are to be afforded protection.

2022. Though it may not be of much bearing but interestingly in the present case Bhawna Yadav (another sister of Vikas Yadav and Bharti) is married to a person of the same community. The evidence discloses that Sukhdev @ Pehalwan is Sukhdev Yadav. Many of the defence witnesses are of the same caste as well. This only reinforces the prosecution's case that the family of Bharti was caste Crl.A.Nos.741, 910/2008 & 145/2012 1113 conscious, and appears to be making matrimonial alliances only with members of the same caste.

2023. The instant case manifests that even in a household belonging to the highest class in society, (one in which you can make day trips with friends from Ghaziabad to Mumbai just to celebrate a birthday; owns multiple businesses and properties, luxury vehicle etc.) what can happen to even a young, educated, articulate daughter if she attempted to break away from the conventional caste confines and explored a lifetime alliance with a member of another caste. Especially one who was also perceived to be of a lesser economic status.

2024. We have found that immediately after Shivani Gaur's wedding, Bharti was completely segregated and confined by her family. On the 17th of February 2002 itself, she was spirited away from her residence in Ghaziabad to Faridabad. The police could record her statement under Section 161 of the Cr.P.C. only on the 2nd of March 2002 that too under the eagle eye of her father, a seasoned politician. Shortly thereafter, she was sent out of India to U.K. and kept out of court for over three and a half years. Her testimony is evidence of the influence of her brothers and family as she prevaricates over trivial matters and denies established facts borne out by documentary evidence. Finally, when she must Crl.A.Nos.741, 910/2008 & 145/2012 1114 have been stretched to the utmost, she succumbs to their pressures when she concedes a deviously put suggestion.

2025. Undoubtedly the family of Nitish Katara has suffered at his demise and thereafter. Having given our thought to this issue, we are of the view that apart from the deceased and his family, there is one more victim in an _honour killing'.

2026. What ought to have been of concern also is what happened to Bharti after the crime as well as after she gave her testimony? Was she able to settle down in life after the trauma she has undergone? Perhaps being highly educated and coming from an affluent family, it was possible for her to do so. The control exercised over the girl child in the Indian family is proverbial. Of course, today it is increasingly being challenged. But we are still compelled to ask this question. Going back to the course of events in the present case which unfolded in 2002, would it not be permissible to treat Bharti Yadav as also a traumatized victim of the crime committed by the appellants? Or for that matter, should not every woman, or girl, whose freedom to choose her partner is so taken away by any person, be treated as a victim of the crime of honour killing as well? Such a woman is left to face the criticism and ill treatment of her family and caste, completely defenceless and alone. It is high time that such women are afforded similar protections as are being provided to victims of other kinds of violence Crl.A.Nos.741, 910/2008 & 145/2012 1115 (including sexual violence) so that they are able to live life with dignity and self respect on their terms, in the manner they choose. Certainly not in a manner where critical choices regarding their lives are taken by others and thrust upon them.

Conclusions 2027. The challenge on behalf of the appellants rests largely on assailing the actions of the investigating officer and labelling the investigation as tainted. The appellants have asserted that they have been dishonestly implicated in the case. We find that not a single objection was raised by the

appellants at any point of time during investigation or thereafter to any stage of the investigation. The court of the CJM was closely concerned in the matter inasmuch as its permission was necessary, be it for recording the statements under Section 161 of the Cr.P.C. of the appellants or their police remand necessary for effecting recoveries pursuant thereto. The complainant had approached the Supreme Court of India within days of identification of the dead body which had been recovered as that of her son and thereafter filed a writ petition (W.P.(Crl.)No.247/2002) in this court which remained pending even after the chargesheet was filed before the trial court in Ghaziabad. The investigation was thus under close judicial scrutiny by the courts Crl.A.Nos.741, 910/2008 & 145/2012 1116 2028. From the above discussion, as also held by the learned trial judges, the following chain of circumstances therefore, stand proved beyond reasonable doubt against the appellants:

(i) The deceased Nitish Katara and Bharti Yadav (sister of Vikas Yadav; first cousin sister of Vishal Yadav and; daughter of Shri D.P. Yadav who was also the employer of Sukhdev @ Pehalwan) were in an intimate relationship aiming towards permanency. The family members of Bharti Yadav, including Vikas and Vishal Yadav, were opposed to this relationship. The aversion stemmed from the reason that Nitish Katara did not belong to the same caste as Bharti Yadav and because his family belonged to the service class, therefore, was not in the same economic stratification as them. This provided the motive for the brothers to commit the offence and Sukhdev @ Pehalwan shared in this motive.

(ii) Nitish Katara and the appellants were present at the Diamond Palace Banquet Hall which was the wedding venue of Shivani Gaur (friend of Bharti Yadav) at the same time on the night of 16/17th February, 2002.

(iii) Vishal Yadav and Sukhdev @ Pehalwan had not been invited to the wedding and had no reason for being there, other than perpetration of the crime.

Crl.A.Nos.741, 910/2008 & 145/2012 1117

(iv) Nitish Katara was abducted from the wedding venue by the appellants with the common intention to murder him.

(v) At around midnight, Nitish Katara was seen with the appellants in a Tata Safari vehicle at a short distance from the Diamond Palace Banquet Hall (15-20 steps at a turn where a police patrol gypsy Chetak 13 was parked) where the wedding was being held.

(vi) The deceased was last seen alive at around 12:20/12:30 am at the Hapur Chungi by prosecution witness Ajay Kumar Katara in the company of the three appellants in the Tata Safari vehicle which was being driven by Vikas Yadav. Nitish was seated in the front passenger seat next to the driver while the other two appellants sat in the rear seat.

(vii) In furtherance of their common intention Nitish Katara was thereafter murdered by the appellants.

(viii) After murdering Nitish Katara, the appellants removed his clothes, wrist watch and mobile from his person and set aflame his dead body with the intention of preventing identification of the body and destroying evidence of the commission of the offence.

(ix) Immediately after the incident, the three appellants absconded.

Crl.A.Nos.741, 910/2008 & 145/2012 1118

(x) The dead body of Nitish Katara was found at 9:30 a.m. in the morning of 17th February, 2002 in a completely burnt, naked and unidentifiable condition on the Shikharpur Road which was recovered by the Khurja Police.

(xi) The time at which the deceased was last seen alive in the company of the appellants was proximate to the time when he was murdered as well as the subsequent discovery of his body.

(xii) As Nitish Katara did not reach his residence after the wedding, Nilam Katara lodged a police complaint of her son being missing with the police station Kavi Nagar, Ghaziabad at about 11:30 a.m. on the 17th of February, 2002 which was registered as FIR No.192/02 under Section 364 of the IPC.

(xiii) The post-mortem had been conducted on the recovered dead body at 3:30 p.m. on the 18 th of February, 2002 by Dr. Anil Singhal, Orthopaedics Surgeon at the District Hospital, Bulandshehr. As per the post-mortem (Exh.PW3/3) the cause of death was death due to coma as a result of ante-mortem head injury with post mortem burns.

(xiv) The body was having a lacerated wound on the head, a fracture in the skull, laceration and hematoma in the brain immediately below the fracture. The doctor had Crl.A.Nos.741, 910/2008 & 145/2012 1119 opined the head injury to be sufficient to cause death in ordinary course of nature.

(xv) The intimation of the recovery of the dead body was given by the Khurja Police to the Ghaziabad Police on the 19th February, 2002. The body was identified by Nilam Katara on 21st of February 2002 as that of her missing son Nitish Katara from his unburnt left hand. The report dated 7th of March, 2002 of the DNA examination confirmed the identity of the dead body as that of Nitish Katara.

(xvi) Vikas and Vishal Yadav stage-managed their arrest at Dabra, Madhya Pradesh at 4:00 a.m. on the 23rd of February, 2002. They were brought to Ghaziabad police under orders of transit remand by the Judicial Magistrate, Dabra and produced before the CJM, Ghaziabad on the morning of 25th of February 2002. (xvii) The investigating officer recorded the statements under Section 161 of the Cr.P.C. of these appellants in the Ghaziabad jail on the night of 25th February, 2002 in which Vikas and Vishal Yadav made separately disclosure statements about knowledge of the place where the crime was committed as well as the place where the dead body was burnt and the fact that one _Pehalwan' was their accomplice. Both of them also stated that the Tata Safari vehicle which had been used on the fateful night could be pointed out by them.

Crl.A.Nos.741, 910/2008 & 145/2012 1120 Vikas Yadav additionally disclosed that he could point out the place where the hammer used in the offence had been hidden by him.

Vishal Yadav also additionally disclosed in his statement that he could get recovered the wrist watch and mobile of the deceased which had been hidden by him.

(xviii) On the 28th February, 2002, Vikas and Vishal Yadav accompanied by their counsel Shri Satpal Singh Yadav, Advocate pointed out to the police the spot near Aughwar Railway Crossing where the crime was committed and then the spot where the body was burnt and the site plans were prepared. Thereafter after searching for the same amongst the clump of _pattel' bushes, which were two to three feet high, Vikas Yadav got recovered an iron hammer with blood stains on its narrow end. Vishal Yadav searched in another clump of _pattel‟ bushes and got recovered therefrom a wrist watch of the make Espirit. A joint recovery memo of the articles was recorded on the spot itself which was signed by Vikas and Vishal Yadav and given to the counsel Shri Satpal Singh Yadav there and then who acknowledged its receipt on the document.

(xix) On the 28th of February 2002, Vikas and Vishal Yadav thereafter deliberately misled the police and took them Crl.A.Nos.741, 910/2008 & 145/2012 1121 to three places in Alwar (Rajasthan) to search for Tata Safari vehicle which was obviously not there. (xx) On the 11th March, 2002, Vikas and Vishal Yadav jointly misled the police to the taxi stand behind Shamshan Ghat (cremation ground) in Panipat to search for the Tata Safari which was again not there, and, enroute to Chandigarh for the same purpose, got recovered the Tata Safari vehicle bearing registration no.PB-07H 0085 recovered

from the burnt down factory premises of M/s A.B. Coltex Limited. The management of this firm was controlled by Oswal Sugar Limited, a company in which Shri D.P. Yadav, father of Vikas Yadav was a Director. The recovered Tata Safari Vehicle was also owned by the same company.

(xxi) The serologist report dated 6th March, 2002 confirmed that the blood on the narrow end of the hammer head was human blood.

(xxii) A Test Identification Pararde of the recovered wrist watch of ESPIRIT make was conducted on 2nd April, 2002. This wrist watch was identified by Nilam Katara, mother of the deceased as the watch worn by the deceased Nitish Katara on 16th February, 2002 to the wedding.

(xxiii) The appellant Sukhdev @ Pehalwan remained absconding for over three and half years despite Crl.A.Nos.741, 910/2008 & 145/2012 1122 extensive searches, raids; issuance of coercive process; attachment even at his native village. He could be arrested only on the 23rd of February, 2005 after he fired at police patrol party.

2029. We have noted above the submissions of ld. Additional Standing Counsel for the State premised on the presumption under Section 106 of the Evidence Act and the reversal of burden of proof. We have also discussed the explanation of the appellants and the evidence led by the defence and that the appellants miserably failed to discharge the burden of proof upon them to show as to what happened to the deceased after he was last seen alive in their company. The appellants were required to establish that they parted company with each other and/or the deceased, and the circumstances in which they had done so as well. The appellant have failed to discharge this burden. Applying the principles laid down by the Supreme Court in State of West Bengal v. Omar Mir Mohd. (supra), presumption would follow that the appellants are responsible for commission of the crimes.

2030. The appellants set up false defences which have been disbelieved by us which provides additional linkage to the chain of proven circumstances against the appellants.

Crl.A.Nos.741, 910/2008 & 145/2012 1123 2031. In (2000) 1 SCC 225, C.K.Raveendran v. State of Kerala the Supreme Court stated that —the prosecution must prove each of the circumstances having a definite tendency pointing towards the guilt of the accused and though each of the circumstances by itself may not be conclusive but the cumulative effect of proved circumstances must be so complete that it would exclude every other hypothesis and unequivocally point to the guilt of the accused".

2032. We find that there is a growing sense of public accountability of the criminal justice delivery system. The public concerns are best articulated, again in the words of V.R. Krishna Iyer, J. when he wrote for the Bench in the judgment reported at (1973) 2 SCC 793, Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra as follows:

> —6. Even at this stage we may remind ourselves of a necessary social perspective in criminal cases which suffers from insufficient forensic appreciation. The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The Crl.A.Nos.741, 910/2008 & 145/2012 1124 excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused.

Otherwise any practical system of justice will then break down and lose credibility with the community. The evil of acquitting a guilty person light heartedly as a learned Author [Glanville Williams in _Proof of Guilt'.] has sapiently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicted ―persons‖ and more severe punishment of those who are found guilty. Thus, too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. For all these reasons it is true to say, with Viscount Simon, that ―a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent ....‖ In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents...‖ 2033. The contradictions in evidence which have been pointed out are orchestrated and contrived. No contradictions or improvements or omissions in material particulars effecting the core of the prosecution case are pointed out. Witnesses Crl.A.Nos.741, 910/2008 & 145/2012 1125 stand influenced or in fear, resulting in the weaknesses which are also not in matters of importance. Such weaknesses cannot be permitted to defeat the prosecution.

2034. The evidence led by the prosecution; the conduct of the accused persons in taking a false defence; the failure to discharge the burden of proof on them has to be read conjointly. We are satisfied that the broad features of the case established by the prosecution, the testimony of the witnesses, the documentary evidence proved on record, the convincing array of facts which are indisputable as well as the conduct of the appellants, unerringly converge to only one conclusion that may be reasonably drawn, namely that the appellants are guilty. It therefore has to be held that the appellants shared a common intention to abduct the deceased Nitish Katara and commit his murder as well as to set aflame his dead body to cause disappearance of the evidence in order to screen themselves of the legal punishment of the said offences attached to the heinous crimes.

2035. We have discussed individually the grounds on which the impugned judgments dated 28th May, 2008 and 6th July, 2011 have been challenged by the appellants in some detail. We have also discussed the case of the prosecution and the evidence led by it as well as findings returned by the learned Trial Judges. The challenge by the appellants has been rejected for reasons detailed above.

Crl.A.Nos.741, 910/2008 & 145/2012 1126 2036. For all the foregoing reasons, we find no infirmity in the impugned judgments dated 28th May, 2008 and 6th July, 2011 passed by the learned Trial Judges. The present appeals being devoid of merits are hereby dismissed.

GITA MITTAL, J.

J.R. MIDHA, J.

APRIL 02, 2014 aj/mk/kapil/kr Crl.A.Nos.741, 910/2008 & 145/2012 1127 J.R. MIDHA, J. (supplementing)

1. I have had the advantage of going through the judgment proposed by my esteemed colleague Gita Mittal, J. While entirely agreeing that the conviction of the appellants must be upheld, I feel it necessary to draw attention to the principles relating to the duty of the Court to discover the truth and Sections 3, 114 and 167 of the Indian Evidence Act, 1872.

2. The question as to whether the prosecution has proved the case beyond reasonable doubt has to be considered by applying Sections 3, 114 and 167 of the Indian Evidence Act. I would, therefore, first discuss the relevant principles and then apply the same to the present case.

3. The object of a trial is first to ascertain the truth and then do justice on the basis of truth. It is the fundamental duty of the Court to ascertain the truth. The Indian Evidence Act, 1872 does not define truth. In Ved Parkash Kharbanda v. Vimal Bindal, 2013 (198) DLT 555, I had the occasion to discuss the meaning of truth and principles relating to the discovery of truth. Relevant portion of the said judgment is reproduced hereinbelow:

> —11. Truth should be the Guiding Star in the Entire Judicial Process 11.1 Truth is the foundation of justice. Dispensation of justice, based on truth, is an essential feature in the justice delivery system. People would have faith in Courts when truth alone triumphs. The justice based on truth would establish peace in the society.

Crl.A.Nos.741, 910/2008 & 145/2012 1128 11.2 Krishna Iyer J. in Jasraj Inder Singh v. Hemraj Multanchand, (1977) 2 SCC 155 described truth and justice as under:

—8. ...Truth, like song, is whole, and half-truth can be noise! Justice is truth, is beauty and the strategy of healing injustice is discovery of the whole truth and harmonising human relations. Law's finest hour is not in meditating on abstractions but in being the delivery agent of full fairness. This divagation is justified by the need to remind ourselves that the grammar of justice according to law is not little litigative solution of isolated problems but resolving the conflict in its wider bearings.‖ 11.3 In Union Carbide Corporation v. Union of India, (1989) 3 SCC 38, the Supreme Court described justice and truth to mean the same. The observations of the Supreme Court are as under:

—30. ...when one speaks of justice and truth, these words mean the same thing to all men whose judgment is uncommitted. Of Truth and Justice, Anatole France said :

—Truth passes within herself a penetrating force unknown alike to error and falsehood. I say truth and you must understand my meaning. For the beautiful words Truth and Justice need not be defined in order to be understood in their true sense. They bear within them a shining beauty and a heavenly light. I firmly believe in the triumph of truth and justice. That is what upholds me in times of trial....‖ 11.4 In Mohanlal Shamji Soni v. Union of India, 1991 Supp (1) SCC 271, the Supreme Court observed that the presiding officer of a Court should not simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost and that there is a legal duty of his Crl.A.Nos.741, 910/2008 & 145/2012 1129 own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice.

11.5 In Chandra Shashi v. Anil Kumar Verma, (1995) 1 SCC 421, the Supreme Court observed that to enable the Courts to ward off unjustified interference in their working, those who indulge in immoral acts like perjury, pre-variation and motivated falsehoods have to be appropriately dealt with, without which it would not be possible for any Court to administer justice in the true sense and to the satisfaction of those who approach it in the hope that truth would ultimately prevail. People would have faith in Courts when they would find that truth alone triumphs in Courts.

11.6 In A.S. Narayana Deekshitulu v. State of A.P., (1996) 9 SCC 548, the Supreme Court observed that from the ancient times, the constitutional system depends on the foundation of truth. The Supreme Court referred to Upanishads, Valmiki Ramayana and Rig Veda.

11.7 In Mohan Singh v. State of M.P., (1999) 2 SCC 428 the Supreme Court held that effort should be made to find the truth; this is the very object for which Courts are created. To search it out, the Court has to remove chaff from the grain. It has to disperse the suspicious, cloud and dust out the smear of dust as all these things clog the very truth. So long chaff, cloud and dust remains, the criminals are clothed with this protective layer to receive the benefit of doubt. So it is a solemn duty of the Courts, not to merely conclude and leave the case the moment suspicions are created. It is onerous duty of the Court, within permissible limit to find out the truth. It means, on one hand no innocent man should be

punished but on the other hand to see no person committing an offence should get scot free. There is no Crl.A.Nos.741, 910/2008 & 145/2012 1130 mathematical formula through which the truthfulness of a prosecution or a defence case could be concretised. It would depend on the evidence of each case including the manner of deposition and his demeans, clarity, corroboration of witnesses and overall, the conscience of a judge evoked by the evidence on record. So Courts have to proceed further and make genuine efforts within judicial sphere to search out the truth and not stop at the threshold of creation of doubt to confer benefit of doubt.

11.8 In Zahira Habibullah Sheikh v. State of Gujarat, (2006) 3 SCC 374, the Supreme Court observed that right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of Courts of justice. 11.9 In Himanshu Singh Sabharwal v. State of Madhya Pradesh, (2008) 3 SCC 602, the Supreme Court held that the trial should be a search for the truth and not a bout over technicalities. The Supreme Court's observation are as under:

—5. ... 31. In 1846, in a judgment which Lord Chancellor Selborne would later describe as _one of the ablest judgments of one of the ablest judges who ever sat in this Court', Vice-Chancellor Knight Bruce said [Pearse v. Pearse, (1846) 1 De G&Sm. 12 : 16 LJ Ch 153 : 63 ER 950 : 18 Digest (Repl.) 91, 748] : (De G&Sm. pp. 28-29):

—31. The discovery and vindication and establishment of truth are main purposes certainly of the existence of courts of justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I Crl.A.Nos.741, 910/2008 & 145/2012 1131 suppose, the most weighty objection to that mode of examination,... Truth, like all other good things, may be loved unwisely--may be pursued too keenly-- may cost too much.

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35. Courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice--often referred to as the duty to vindicate and uphold the _majesty of the law'.

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38. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty.‖ (Emphasis Supplied) 11.10 In Ritesh Tewari v. State of U.P., (2010) 10 SCC 677, the Supreme Court reproduced often quoted quotation: _Every trial is voyage of discovery in which truth is the quest' 11.11 In Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria, (2012) 5 SCC 370, the Supreme Court again highlighted the significance of truth and observed that the truth should be the guiding star in the entire legal process and it is the duty of the Judge to discover truth to do complete justice. The Supreme Court stressed that Judge has to play an active role to discover the truth and he should explore all avenues open to him in order to discover the truth. The Supreme Court observed as under: —32. In this unfortunate litigation, the Court's serious endeavour has to be to find out where in fact the truth lies.

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33. The truth should be the guiding star in the entire judicial process.Truth alone has to be the foundation of justice. The entire judicial system has been created only to discern and find out the real truth. Judges at all levels have to seriously engage themselves in the journey of discovering the truth.

That is their mandate, obligation and bounden duty. Justice system will acquire credibility only when people will be convinced that justice is based on the foundation of the truth.

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35. What people expect is that the Court should discharge its obligation to find out where in fact the truth lies. Right from inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice.

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52. Truth is the foundation of justice. It must be the endeavour of all the judicial officers and judges to ascertain truth in every matter and no stone should be left unturned in achieving this object. Courts must give greater emphasis on the veracity of pleadings and documents in order to ascertain the truth.‖ (Emphasis supplied) 11.12 In A. Shanmugam v. Ariya Kshatriya, (2012) 6 SCC 430, the Supreme Court held that the entire journey of a judge is to discern the truth from the pleadings, documents and arguments of the parties. Truth is the basis of justice delivery system. The Supreme Court laid down the following principles:

―43. On the facts of the present case, following principles emerge:

43.1. It is the bounden duty of the Court to Crl.A.Nos.741, 910/2008 & 145/2012 1133 uphold the truth and do justice.

43.2. Every litigant is expected to state truth before the law court whether it is pleadings, affidavits or evidence. Dishonest and unscrupulous litigants have no place in law courts.

43.3. The ultimate object of the judicial proceedings is to discern the truth and do justice. It is imperative that pleadings and all other presentations before the court should be truthful. 43.4. Once the court discovers falsehood, concealment, distortion, obstruction or confusion in pleadings and documents, the court should in addition to full restitution impose appropriate costs. The court must ensure that there is no incentive for wrong doer in the temple of justice. Truth is the foundation of justice and it has to be the common endeavour of all to uphold the truth and no one should be permitted to pollute the stream of justice.

43.5. It is the bounden obligation of the Court to neutralize any unjust and/or undeserved benefit or advantage obtained by abusing the judicial process.‖ (Emphasis supplied) 11.13 In Ramesh Harijan v. State of Uttar Pradesh, (2012) 5 SCC 777, the Supreme Court emphasized that it is the duty of the Court to unravel the truth under all circumstances.

11.14 In Bhimanna v. State of Karnataka, (2012) 9 SCC 650, the Supreme Court again stressed that the Court must endeavour to find the truth. The observations of the Supreme Court are as under: "28. The court must endeavour to find the truth. There would be "failure of justice" not only by unjust conviction but also by acquittal of the guilty, as a result of unjust failure to produce requisite evidence. Of course, the rights of the accused have Crl.A.Nos.741, 910/2008 & 145/2012 1134 to be kept in mind and safeguarded but they should not be overemphasised to the extent of forgetting that the victims also have rights."

11.15 In the recent pronouncement in Kishore Samrite v.

State of U.P., MANU/SC/0892/2012, the Supreme Court observed that truth should become the ideal to inspire the Courts to pursue. This can be achieved by statutorily mandating the Courts to become active seekers of truth. The observations of Supreme Court are as under:

"31. It has been consistently stated by this Court that the entire journey of a Judge is to discern the truth from the pleadings, documents and arguments of the parties, as truth is the basis of the Justice Delivery System.

32. With the passage of time, it has been realised that people used to feel proud to tell the truth in the Courts, irrespective of the consequences but that practice no longer proves true, in all cases. The Court does not sit simply as an umpire in a contest between two parties and declare at the end of the combat as to who has won and who has lost but it has a legal duty of its own, independent of parties, to take active role in the proceedings and reach at the truth, which is the foundation of administration of justice. Therefore, the truth should become the ideal to inspire the courts to pursue. This can be achieved by statutorily mandating the Courts to become active seekers of truth. To enable the courts to ward off unjustified interference in their working, those who indulge in immoral acts like perjury, prevarication and motivated falsehood, must be appropriately dealt with. The parties must state forthwith sufficient factual details to the extent that it reduces the ability to put forward false and exaggerated claims and a litigant must approach the Court with clean hands. It is the bounden duty of the Crl.A.Nos.741, 910/2008 & 145/2012 1135 Court to ensure that dishonesty and any attempt to surpass the legal process must be effectively curbed and the Court must ensure that there is no wrongful, unauthorised or unjust gain to anyone as a result of abuse of the process of the Court. One way to curb this tendency is to impose realistic or punitive costs.‖ (Emphasis supplied) 11.16 Malimath Committee on Judicial Reforms discussed the paramount duty of Courts to search for truth. The relevant observations of the Committee are as under:-

- The Indian ethos accords the highest importance to truth. The motto Satyameva Jayate (Truth alone succeeds) is inscribed in our National Emblem ―Ashoka Sthambha‖. Our epics extol the virtue of truth.

-For the common man truth and justice are synonymous. So when truth fails, justice fails. Those who know that the acquitted accused was in fact the offender, lose faith in the system.

-In practice however we find that the Judge, in his anxiety to demonstrate his neutrality opts to remain passive and truth often becomes a casualty.

-Truth being the cherished ideal and ethos of India, pursuit of truth should be the guiding star of the Justice System. For justice to be done truth must prevail. It is truth that must protect the innocent and it is truth that must be the basis to punish the guilty. Truth is the very soul of justice. Therefore truth should become the ideal to inspire the courts to pursue.

-Many countries which have Inquisitorial model have inscribed in their Parliamentary Acts a duty to find the truth in the case. In Germany Section 139 of the so called _Majna Charta', a breach of the Judges' duty to actively discover truth would Crl.A.Nos.741, 910/2008 & 145/2012 1136 promulgate a procedural error which may provide grounds for an appeal.

-For Courts of justice there cannot be any better or higher ideal than quest for truth.

12. What is _Truth' and how to discover it 12.1 The next question which arises for consideration is, what is the meaning of Truth and how to discover it. The judgments referred to hereinabove do not contain the answer to these twin questions. 12.2 Eminent scholar Prof. G. Mohan Gopal, former Director, National Judicial Academy, has done remarkable work on the approach of law to truth. He has defined the Law's Truth and has also explained the method of discovering Law's Truth. He has described Law's truth as synonymous with facts established in accordance with the procedure prescribed by law. The existence of facts have to be established strictly on the basis of relevant and admissible evidence, judicial notice and legally permitted presumptions based on reason, rationality and justification. The views of Prof. G. Mohan Gopal in his unpublished article -―Courts and Truth‖

contain summary of discussions at National Judicial Academy which are reproduced hereunder:- ―Justice Gajendragadkar, one of India's greatest jurists, says in the 69th Report of the Law Commission of India on the Evidence Act (1977) that [―the judge's] object, above all, is to find out the truth...‖ (para 100.21). The Report adds, ―Rules of evidence are intended ultimately to ensure that truth shall come before the Court in a manner which secures justice and which is in conformity with the general principles of jurisprudence and the content and spirit of the legal system.‖(para 100.15). These sentiments are widely echoed in a large number of Crl.A.Nos.741, 910/2008 & 145/2012 1137 judgments and also in academic literature on the law.

In the same Report, Justice Gajendragadkar underscores the limitation of the ability of the judicial process in finding the truth. He says, ―Rules of evidence, however perfect they may be, cannot guarantee that truth will be known at the end of the trial.‖ He says, ―The [Evidence] Act recognizes that the truth need not be pursued at too high a cost.‖ The caveat that courts cannot guarantee that their decisions will be based on truth is widely shared by judges and academicians.

It should be a matter of concern that, while giving such central importance to the idea of truth, judges have not yet articulated clearly their concept of ―truth‖ in their judgments. Nor do statutes give us a definition of truth to be used in the judicial process. In fact, the word ―truth‖ is barely used in statutes. For example, the Evidence Act and the IPC refer to ―truth‖ only in three or four sections, mainly in the context of the obligation of parties/witnesses to say the truth, and as a defence against defamation. Another source of concern is that judgments erroneously refer to ―truth‖ as if it were an axiomatic, well-understood and commonly accepted concept, whereas ―truth‖ is a highly contested and controversial idea with multiple and diverse definitions that are often mutually opposed. It is therefore most important to clarify the meaning of ―truth‖ and the method of finding it in the context of judicial proceedings. This is necessary to preserve and strengthen the confidence of people in the judicial system especially because courts are quite explicitly saying (as referred to earlier) that they cannot guarantee that their decisions would be based on the ―truth‖.

Crl.A.Nos.741, 910/2008 & 145/2012 1138 What is ―truth‖? Literally, truth is a quality of trustworthiness/faithfulness and consistency with fact. The contentious part of the concept of truth is the quality of trustworthiness. How is it defined? What is the source of trustworthiness? How is it determined? How is it verified? Clarity on these questions is necessary for any claim based on truth to be accepted.

The issue of ―truth‖ comes up in the judicial process in the following manner. Every law sets out a hypothetical fact pattern, which it may prohibit or permit. It also prescribes consequences should the hypothetical fact pattern occur in real life. For example, the law on murder sets out a prohibited fact pattern: a person (a hypothetical fact) intentionally (a hypothetical fact) kills (a hypothetical fact) another person (a hypothetical fact). It also sets out the consequence of conduct that falls within a prohibited fact pattern -in this case life imprisonment or, in the rarest of rare cases, the death penalty.

The purpose of the judicial process is to determine whether, in truth, the prohibited fact pattern actually occurred in real life, and if so, to assign consequences. In ancient times, evidence could be extracted‖ in virtually any manner: ritual, religion, ordeal, torture, or confession. Whatever was believed to be true by the judge (or "panchs") was the truth. Law's truth was traditionally ―subjective truth‖, a concept that arbitrarily varied from judge to judge and jury to jury, and was fraught with uncertainty and unpredictability.

A number of factors resulted in the development of a new, more objective approach to the judicial idea of truth. As industrialization, colonialism and a global economy spread in the 19th century, a new goal of the judicial system became predictability, Crl.A.Nos.741, 910/2008 & 145/2012 1139 consistency and certainty, irrespective of the judge. This new goal was articulated some 180 years ago by Thomas

Macaulay when he told the British House of Commons on 10 July, 1833 that ―the objective of codification [of criminal law in India] is to secure ―uniformity where you can have it, diversity where you must have it, but in all cases, certainty‖.

There was another important factor that favoured a more objective and less arbitrary approach to the concept of truth - the growth, starting in Europe and the US in the late 18th/19th century, of a jurisprudence of individual rights. Criminal punishment consists of the deprivation of liberty. Therefore limiting criminal punishment is one of the most essential pre-requisites for broadening individual rights and liberty. A system that provides for arbitrary criminal punishment based on unguided and subjective belief in undefined concepts of ―truth‖ is a great threat to individual human liberty.

Therefore, a new, more objective concept of ―truth‖ emerged in Indian legislation starting in the 19th century, distinct from the ―divine‖ and ―subjective‖ concepts that had dominated the justice system until then.

The ―new‖ concept was derived from scientific approaches to the discovery of truth. Under this ―new‖ concept, truth was to be discovered by individual judges not from holy books or an inner voice, but from ―things‖ observable and observed by the senses whose existence would be ―proved‖ in an objective and verifiable manner (using approaches borrowed from science). Under this approach, ―fact‖, proved or established in accordance with the law, became ―truth‖.

Through this new approach, ―truth‖ acquired an Crl.A.Nos.741, 910/2008 & 145/2012 1140 objective and empirical character that it did not have before. This was a revolutionary and democratic change in the approach of the legal system.

The ―new approach‖ is set out in the Evidence Act as follows. Section 3 of the Evidence Act says that "fact" means and includes (1) any thing, state of things, or relation of things, capable of being perceived by the senses; and (2) any mental condition of which any person is conscious. In turn, a ―thing‖ may be understood as any occurrence/entity, material or non-material, that exists in human cognition, which is capable of being perceived by human senses (directly or by deduction, for example, when taking cognition of the mental condition of any person).

A fact is said to be proved under the Evidence Act (Section 3) ―when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought under the circumstances of the particular case, to act upon the supposition that it exists‖. The existence of a fact (the ―truth‖) is based on the belief of a jury or a judge (now in India, only the judge) in its existence. ―Belief‖ means the ―mental acceptance of something as true"(i.e., has the quality of trustworthiness).Belief may be of two kinds: evidence-based or faith-based. Science uses evidence-based belief systems. These systems seek to nullify bias that arises from faith-based and subjective beliefs by following strict procedures of demonstration and verification of evidence. On the other hand, faith-based belief systems do not rely on evidence. They tend to be highly subjective. The Evidence Act brought in a radical change to the concept of ―belief‖ as the basis of truth applied by Crl.A.Nos.741, 910/2008 & 145/2012 1141 Indian courts from faith-based belief (as was the case in traditional judicial systems in India) to evidence-based (scientific) belief. This change was essential to achieve the then ―new‖ goal of the legal system of consistency, uniformity and certainty, and to reduce arbitrariness. The plain language of the statute clearly supports the view that the nature of belief required by law had been radically changed. The Act requires that the belief of the judge must be based on objective material (―after considering the matters before it‖).

This very important change has, unfortunately however, received very little attention in judgments or academic discourse. As a consequence, many judges and academics appear to still labour under the misunderstanding that the truth to be determined by courts continues to be the subjective belief of each

judge based on his/her individual conscience and ―trained instinct‖, inevitably influenced by religious doctrine or traditional belief and varying from one judge to another.

To satisfy the standard of belief required under the Evidence Act, a Court should come to evidence-based belief through reasoning and rationality. Reasoning is a process of structured thinking. Rationality provides a clear objective for reasoned thought. The belief must be justified. Justification is a process of ensuring that the process and content of reasoning meets an adequate standard, which is objective and not subjective.

Reasoning should be based on common principles and methods by which the Court considers the matters before it. The use of common methods and principles for determining the existence of facts is required, across all fact-finders. Examples of such common approaches are found for example in Crl.A.Nos.741, 910/2008 & 145/2012 1142 model instructions given to juries (see, for example, model instructions to be given to juries by Massachusetts judges).

―Law's Truth‖ is derived from developments in scientific reasoning. It is a unique and distinct idea of truth, entirely different from ―God's Truth‖ (the ―absolute‖ truth), or ―Subjective Truth‖. It is anchored in the concept of ―fact‖. It is to be derived through well-defined processes of reasoning. Its purpose is to establish the existence, non-existence, nature or extent of right, liability or disability under law, not to establish either ―God's Truth‖ (the absolute truth) or ―Subjective Truth‖.

This approach of law of equating truth with fact established through law is consistent with some of the most widely accepted philosophical definitions of truth. For example, under the ―correspondence theory‖ of truth a proposition is true if it corresponds to facts. The identity theory of truth says that a true proposition is identical to a fact. It has been pointed out that under the correspondence theory, ―truth is a content-to-world or word-to- world relation: what we say or think is true or false depending on the way the world turns out to be‖. Another theory of truth that links the idea of truth to facts is the ―coherence‖ theory. Aristotle's Metaphysics says, ―to say of what is that it is, or of what is not that it is not, is true‖. _What is' and _what is not' is a fact.

The advantage of the reasoned and rational approach to fact finding (as against subjective approaches) is that ―judicial error‖ will be limited to use and application of accepted methodologies and standards (which can be debated and discussed objectively). Reversals of finding of fact by superior courts can and must be justified on the basis of lack of objectivity in the courts below and their failure to Crl.A.Nos.741, 910/2008 & 145/2012 1143 follow required methods of reasoning and rationality, rather than by the substitution of the subjective judgment of judges of lower courts by the subjective judgment of judges of higher courts. The following conclusions emerge from the above:

(1) The law's approach to truth is to be distinguished form the approach of religion, spirituality and subjective ideas of truth. (2) For the judicial system, truth is nothing more than fact established in accordance with procedures prescribed by law.

(3) The purpose of judicial inquiry is to establish the existence of facts through reasoning and rationality and in accordance with law, not to establish the truth in the absolute, divine or subjective sense.

(4) Facts are proved through lawfully prescribed methods and standards.

(5) The belief of Courts that facts exist must be based on reason, rationality and justification, strictly on the basis of relevant and admissible evidence, judicial notice or legally permitted presumptions. It must be based on a prescribed methodology of proof. It must be objective and verifiable.‖ (Emphasis Supplied)"

Sections 3 and 114 of the Indian Evidence Act, 1872

4. Sections 3, 114 and 165 of the Indian Evidence Act lay down important principles to aid the Court in its quest for discovery of truth. In Ved Parkash Kharbanda (supra), I had the occasion to deal with the scope of Sections 3, 114 and 165 of Crl.A.Nos.741, 910/2008 & 145/2012 1144 the Indian Evidence Act. Relevant portion of the said judgment is reproduced below:

> —13. Section 3 of the Indian Evidence Act, 1872 13.1 Proof : A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. —Evidence‖ of a fact and —proof‖ of a fact are not synonymous terms. —Proof‖, in the strict sense, means the effect of evidence. 13.2 Section 3 defines the expressions _proved', _disproved', and _not proved' as under:- —Proved‖ - A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. —Disproved‖ - A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.
>
> —Not proved‖ - A fact is said not to be proved when it is neither proved nor disproved.

13.3 Meaning of term —the matters before it‖ The expression —the matters before it‖ in the definition of —proof‖ are wide enough to cover matters which are not —evidence‖ as defined in the Act. For instance, a fact may be orally admitted in the Court. The admission would not come within the definition of the word _evidence' as given in this Act, but still it is a matter which the Court would have to take into consideration in order to determine whether the particular fact was proved or not. The Court is thus entitled Crl.A.Nos.741, 910/2008 & 145/2012 1145 to take into consideration all the matters before it which shall include the statement of the witnesses, admissions of the parties, confession of the accused, documents proved in evidence, judicial notice, demeanour of witnesses, local inspections and presumptions.

13.4 Meaning of term —believes it to exist‖ The expression —believes‖ in the definition of —proof‖ is a —judicial belief‖ of the Judge based on logical/rational thinking and power of reason, and the Court is required to give reasons for the belief. The reasons are live links between the mind of the decision maker and the belief formed. Reasons convey judicial idea in words and sentences. Reasons are rational explanation of the conclusion. Reasons are the very life of law. It is the heart beat of every belief and without it, law becomes lifeless. Reasons also ensure transparency and fairness in the decision making process. The reasons substitute subjectivity by objectivity. Recording of reasons also acts as a vital restraint on possible arbitrary use of the judicial power. The recording of reasons serve the following four purposes:-

- To clarify the thought process.

- To explain the decision to the parties.

- To communicate the reasons to the public.

- To provide the reasons for an appellate Court to consider.

Non-recording of reasons would cause prejudice to the litigant who would be unable to know the ground which weighed with the Court and also cause impediment in his taking adequate grounds before the appellate Court in the event of challenge.

13.5 Nothing can be said to be ―proved‖, however much material there may be available, until the Court believes the fact to exist or considers its existence so probable that a prudent man will act under the supposition that it exists. For example, ten witnesses may say that they saw the sun rising from the West and all the witnesses may withstand the cross-examination, the Court Crl.A.Nos.741, 910/2008 & 145/2012 1146 would not believe it to be true being against the law of nature and, therefore, the fact is _disproved'. In mathematical terms, the entire evidence is multiplied with zero and, therefore, it is not required to be put on judicial scales. Where the Court believes the case of both the parties, their respective case is to be put on judicial scales to apply the test of preponderance. 13.6 Section 3 of the Indian Evidence Act refers to the degree of certainty which is required to treat fact as proved and is so worded to provide for two conditions of mind; first, that in which a man feels absolutely certain of a fact, in other words, ―believes it to exist‖, and second, that in which, though he may not feel absolutely certain of a fact, he thinks it so extremely probable that a prudent man would, under the circumstances, act on assumption of its existence. 13.7 The test of whether a fact is proved is such degree of probability as would satisfy the mind of a reasonable man as to its existence. The standard of certainty required is that of a prudent man. Except where artificial probative value is assigned to certain facts by presumptions, the Act affords no guidance on the question whether one fact is or is not sufficient to prove another fact. On this point, the Judge like a prudent man has to use its own judgment and experience and cannot be bound by any rule except his own judicial discretion. No hard and fast rule can be laid down as to what inference can be drawn from certain circumstances. The cumulative effect of all the circumstances established by evidence and the nature of these circumstances has to be taken into consideration.

13.8 The rules of evidence may provide tests, the value of which has been proved by long experience, by which Judges may be satisfied that the quality of the material upon which their judgments are to proceed is not open to certain obvious objections; but they do not profess to enable the Judges to know whether or not a particular witness tells the truth or what inference is to be drawn from a particular fact. The correctness with which this is done must depend upon the natural sagacity, the logical power, and the practical Crl.A.Nos.741, 910/2008 & 145/2012 1147 experience of the Judge and not only upon his acquaintance with the law of evidence.

13.9 Cross-examination supplies a test to a certain extent, but those who have seen most of its application will be disposed to trust at least as a proof that a man is not shaken by it, ought to be believed. A cool, steady liar who happens not to be open to contradiction will baffle the most skilful cross-examiner in the absence of accidents, which are not so common in practice as persons who take their notions on the subject from anecdotes or fiction would suppose. 13.10 The grounds for believing or disbelieving statements made by people can be brought under following three heads; namely those which affect the power of the witness to speak the truth; those which affect his will to do so ; and those which arise from the nature of the statement itself and from surrounding circumstances:- 13.10.1 Power - A man's power to speak the truth depends upon his knowledge and his power of expression. His knowledge depends partly on his accuracy in observation, partly on his memory, partly on his presence of mind; his power of expression depends upon an infinite number of circumstances, and varies in relation to the subject on which he has to speak.

13.10.2 Will - A man's will to speak the truth depends upon his education, his character, his courage, his sense of duty, his relation to the particular facts as to which he is to testify and a thousand other circumstances, as to the presence or absence of which in any particular case it is often difficult to form a true opinion.

13.10.3 Probability of Statement - The third set of reasons is those which depend upon the probability of the statement.

13.11 All events are connected to each other as cause and effect. The connection may be traced in either direction, from effect to cause or from cause to effect; and if these two words were taken in their widest acceptation it would be correct to say that when any theory has been formed which Crl.A.Nos.741, 910/2008 & 145/2012 1148 alleges the existence of any fact, all facts are relevant which, if that theory was true, would stand to the fact alleged to exist either in the relation of cause or in the relation of effect. 13.12 M. Monir, J. in his commentary Principles and Digest of the Law of Evidence, 13th Edition, opined that no rule of evidence can guide a judge on the fundamental question whether the evidence as to the relevant facts should be believed or not. He observed that the best guide of a judge is to ascertain the truth by his own common sense and experience of human nature. The observations of the author are reproduced hereunder:

—...There is in almost every trial the question whether evidence as to a fact should be believed or not, and if believed what is its effect on the main question. Does this elaborately framed Code of the Law of Evidence give any assistance to the Judge on this question? The answer, of course, must be in the negative. First, however carefully and with whatever detail the rules of relevancy may be framed, no rule of evidence can guide the Judge on the fundamental question whether evidence as to a relevant fact should be believed or not. Secondly, assuming that the Judge believes very few cases, guide him on the question what inference he should draw from it as to assist a Judge in the very smallest degree in determining the master question of the whole subject - whether and how far he ought to believe what the witnesses say? Again, rules of evidence are not, and do not profess to be, rules of logic. They throw no inference ought the Judge to draw from the facts in which, after considering the statements made to him, he believes. In every judicial proceeding whatever these two questions - Is this true, and, if it is true what then? - ought to be constantly present to the mind of the Judge, and it must be admitted, both that the rules of evidence do not throw the smallest portion of light upon them and that persons who are absolutely ignorant of those rules may give a much better answer to each of these questions than men to whom every rule of evidence is perfectly familiar. The Crl.A.Nos.741, 910/2008 & 145/2012 1149 best shoes in the world will not make a man walk, nor will the best glasses make him see; and in just the same way, the best rules of evidence will not supply the place of natural sagacity or of a taste for and training in logic.

The first of these questions, viz., whether a witness should or should not be believed is one peculiar difficulty owing to the perjury that pervades the atmosphere of law Courts in this country. What is the Judge to do where, as it came to the experience of the writer, in answer to true charge of murder the accused is able to support a plea of alibi by proof of an actual conviction of an offence of cattle-lifting alleged to have been committed by him at the time of murder at a place not connected by rail, fifty miles away from the place of murder, and witnesses are prepared to swear to the arrest of the accused and his detention in custody at and since the alleged time of the murder? In another case of murder, the writer again speaks from experience, a conviction of an offence under the Motor Vehicles Act said to have been committed at a place some 200 miles away from the place of murder, where it was physically impossible for the accused to be after committing the murder, was given in evidence, and though the murder resulted in conviction, the difficulty of the Court in coming to a decision to convict can well be judged. Questions of this nature can never be solved by any artificial rules of evidence, and the best guide of the Judge on such questions is his own common sense and experience of human nature. Again, though the law may declare that a certain fact may be given in evidence to prove another fact, it is impossible for the law to say, except in very rare cases, that the Judge should consider the latter fact to be proved on proof of the former fact. No rules of law can impart to the Judge a knowledge of the ordinary rules of ratiocination, and here again the accuracy of his decision will depend upon his general education, on the development of his intellectual faculties, and his experience of men and the world.‖ (Emphasis supplied) Crl.A.Nos.741, 910/2008 & 145/2012 1150 13.13 The relevant judgments relating to Section 3 are as under:-

13.13.1 In Garib Singh v. State of Punjab, 1972 (3) SCC 418, the Supreme Court approved the following tests laid down by the Himachal Pradesh High Court in Chet Ram v. State, (1971) 1 Sim LJ 153, 157:

—8. ...Courts, in search of the core of truth, have to beware of being misled by half truths or individually defective pieces of evidence. Firstly, undeniable facts and circumstances should be examined. Secondly, the pattern of the case thus revealed, in the context of a whole sequence of proved facts, must be scrutinized to determine whether a natural, or probable and, therefore, a credible course of events is disclosed. Thirdly, the minutes of evidence, including established discrepancies, should be put in the crucible of the whole context of an alleged crime or occurrence and tested, particularly with reference to the proved circumstances which generally provide a more reliable indication of truth than the faulty human testimony, so that the process of separating the grain from the chaff may take place. Fourthly, in arriving at an assessment of credibility of individual witnesses, regard must be had to the possible motives for either deliberate mendacity or subconscious bias. Lastly, the demeanour and bearing of a witness in Court should be carefully noticed and an appellate Court should remember that a trial Court has had, in this respect, an advantage which it does not possess.‖ (Emphasis supplied) 13.13.2 In M. Narsinga Rao v. State of Andhra Pradesh, (2001) 1 SCC 691, the Supreme Court held as under:

—15. The word —proof‖ need be understood in the sense in which it is defined in the Evidence Act because proof depends upon the admissibility of evidence. A fact is said to be proved when, after considering the matters before it, Crl.A.Nos.741, 910/2008 & 145/2012 1151 the court either believes it to exist, or consider its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. This is the definition given for the word "proved" in the Evidence Act. What is required is production of such materials on which the court can reasonably act to reach the supposition that a fact exists. Proof of the fact depends upon the degree of probability of its having existed. The standard required for reaching the supposition is that of a prudent man acting in any important matter concerning him. Fletcher Moulton L.J. in Hawkins v. Powells Tillery Steam Coal Co.Ltd., (1911) 1 K.B. 988 observed like this:

_Proof does not mean proof to rigid mathematical demonstration, because that is impossible; it must mean such evidence as would induce a reasonable man to come to a particular conclusion.'

16. The said observation has stood the test of time and can now be followed as the standard of proof. In reaching the conclusion the court can use the process of inferences to be drawn from facts produced or proved. Such inferences are akin to presumptions in law. Law gives absolute discretion to the court to presume the existence of any fact which it thinks likely to have happened. In that process the court may have regard to common course of natural events, human conduct, public or private business vis-a-vis the facts of the particular case. The discretion is clearly envisaged in Section 114 of the Evidence Act.‖ (Emphasis supplied) 13.13.3 In R. Puthunainar Alhithan v. P.H. Pandian, (1996) 3 SCC 624, the Supreme Court held that an inference from the proved facts must be so probable that if the Court believes, from the proved facts, that the facts do exist, it must be held that the fact has been proved. The inference of proof Crl.A.Nos.741, 910/2008 & 145/2012 1152 of that fact could be drawn from the given objective facts, direct or circumstantial.

13.13.4 In Vijayee Singh v. State of U.P, (1990) 3 SCC 190, the Supreme Court explained the principle of Section 3 as under:

—28. ...Section 3 while explaining the meaning of the words "proved", "disproved" and "not proved" lays down the standard of proof, namely, about the existence or non- existence of the circumstances from the point of view of a prudent man. The Section is so worded as to provide for two conditions of mind, first, that in which a man feels absolutely certain of a fact, in other words, "believe it to exist"

and secondly in which though he may not feel absolutely certain of a fact, he thinks it so extremely probable that a prudent man would under the circumstances act on the assumption of its existence. The Act while adopting the requirement of the prudent man as an appropriate concrete standard by which to measure proof at the same time contemplates of giving full effect to be given to circumstances or condition of probability or improbability. It is this degree of certainty to be arrived where the circumstances before a fact can be said to be proved. A fact is said to be disproved when the Court believes that it does not exist or considers its non-existence so probable in the view of a prudent man and now we come to the third stage where in the view of a prudent man the fact is not proved i.e. neither proved nor disproved. It is this doubt which occurs to a reasonable man, has legal recognition in the field of criminal disputes. It is something different from moral conviction and it is also different from a suspicion. It is the result of a process of keen examination of the entire material on record by a prudent man.‖ (Emphasis supplied) 13.13.5 In State of U.P. v. M.K. Anthony, (1985) 1 SCC 505, the Supreme Court held that the approach of the Court should be to find out whether the Crl.A.Nos.741, 910/2008 & 145/2012 1153 evidence of a witness has a ring of truth. The Supreme Court held as under:-

―10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief...‖ (Emphasis supplied) 13.13.6 In Bundhoo Lall v. Joy Coomar, MANU/WB/ 0198/1882, the Calcutta High Court explained the intention of the Legislature in using the words ―matters before it‖ instead of ―evidence‖ in Section 3 as under: ―12. It would appear, therefore, that the Legislature intentionally refrained from using the word ―evidence‖ in this definition, but used instead the words, ―matters before it.‖ For instance, a fact may be orally admitted in Court. The admission would not come within the definition of the word evidence as given in this Act, but still it is a matter which the Court before whom the admission was made would have to take into consideration in order to determine whether the particular fact was proved or not.‖ 13.13.7 In Johnson Scaria v. State of Kerala, MANU/KE /0367/2006, the Kerala High Court held that the use of presumptions and the doctrine of burden of proof are certainly of crucial assistance in the adjudication of guilt. Who will fail if a fact is not established? Who will fail if the presumption is not drawn? Who will suffer if the presumption once drawn is not rebutted? These questions will certainly have to be considered in the factual scenario in each case. The Court summarised the law on this aspect as under:

Crl.A.Nos.741, 910/2008 & 145/2012 1154 ―27. ...The expression 'proved' is defined Under Section 3 of the Indian Evidence Act and that definition applies to civil and criminal cases. Any 'prudent man' whose standards the courts are under Section 3 of the Evidence Act directed to follow, shall and the court must hence, insist on a higher degree of probability, in a criminal case (where the consequence of deprivation of life, liberty and property ensues) before the prosecutor's burden is held to be discharged. This and this alone is directed by law by the axiomatic insistence on proof beyond doubt - which is at times romanticised and called proof beyond reasonable doubt and proof beyond the shadow of a reasonable doubt. The purpose of such insistence is only to caution courts that they must be able to enter a conclusion of guilt "without hesitation" on the materials available.‖ 13.13.8 In Bipin Kumar Mondal v. State of West Bengal, (2010) 12 SCC 91, the Supreme Court observed as under:

―31. ...In fact, it is not the number, the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy, or otherwise.‖ 13.14 The Model Civil Jury instructions in USA and Canada contain important guidelines for appreciation of evidence by the Jury.

The same are reproduced as under:- 13.14.1 Civil Jury Instructions for the District Courts of Philadelphia, United States (2010).

―1.5 Preliminary Instructions -- Evidence You should use your common sense in weighing the evidence. Consider it in light of your everyday experience with people and events, and give it whatever weight you believe it deserves. If your experience tells you that certain evidence reasonably leads to a conclusion, you are free to reach that conclusion.‖ Crl.A.Nos.741, 910/2008 & 145/2012 1155 xxx xxx xxx ―1.11 Preliminary Instructions -- Clear and Convincing Evidence Clear and convincing evidence is evidence that produces in your mind a firm belief or conviction that the allegations sought to be proved by the evidence are true. Clear and convincing evidence involves a higher degree of persuasion than is necessary to meet the preponderance of the evidence standard. But it does not require proof beyond a reasonable doubt, the standard applied in criminal cases.‖ 13.14.2 Federal Civil Jury Instructions, State of Chicago, United States (2013).

―1.11 Weighing the Evidence You should use common sense in weighing the evidence and consider the evidence in light of your own observations in life.

In our lives, we often look at one fact and conclude from it that another fact exists. In law we call this ―inference.‖ A jury is allowed to make reasonable inferences. Any inference you make must be reasonable and must be based on the evidence in the case.‖ xxx xxx xxx ―1.13 Testimony of Witnesses (Deciding What to Believe) You must decide whether the testimony of each of the witnesses is truthful and accurate, in part, in whole, or not at all. You also must decide what weight, if any, you give to the testimony of each witness. In evaluating the testimony of any witness, [including any party to the case,] you may consider, among other things:

- the ability and opportunity the witness had to see, hear, or know the things that the witness testified about;

- the witness's memory;

- any interest, bias, or prejudice the witness may have;

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- the witness's intelligence;

- the manner of the witness while testifying;

- [the witness's age];

- the reasonableness of the witness's testimony in light of all the evidence in the case.‖ 13.14.3 Civil Jury Instructions, State of Connecticut, United States (2008).

―2.5-1 Credibility of Witnesses The credibility of witnesses and the weight to be given to their testimony are matters for you as jurors to determine. However, there are some principles that you should keep in mind. No fact is, of course, to be determined merely by the number of witnesses who testify for or against it; it is the quality and not the quantity of testimony that controls. In weighing the testimony of each witness you should consider the witness's appearance on the stand and whether the witness has an interest of whatever sort in the outcome of the trial. You should consider a witness's opportunity and ability to observe facts correctly and to remember them truly and accurately, and you should test the evidence each witness gives you by your own knowledge of human nature and the motives that influence and control human actions. You may consider the reasonableness of what the witness says and the consistency or inconsistency of (his/her) testimony. You may consider (his/her) testimony in relation to facts that you find to have been otherwise proven. You may believe all of what

a witness tells you, some of what a witness tells you, or none of what a particular witness tells you. You need not believe any particular number of witnesses and you may reject uncontradicted testimony if you find it reasonable to do so. In short, you are to apply the same considerations and use the same sound judgment and common sense that you use for questions of truth and veracity in your daily life.‖ 13.14.4 Civil Jury Instructions, Canadian Judicial Council (2012).

Crl.A.Nos.741, 910/2008 & 145/2012 1157 —9.4 Assessment of Evidence [1] To make your decision, you should consider carefully, and with an open mind, all the evidence presented during the trial. It will be up to you to decide how much or little of the testimony of any witness you will believe or rely on. You may believe some, none or all of the evidence given by a witness.

[2] When you go to the jury room to consider the case, use your collective common sense to decide whether the witnesses know what they are talking about and whether they are telling the truth. There is no magic formula for deciding how much or how little to believe of a witness's testimony or how much to rely on it in deciding this case. But here are a few questions you might keep in mind during your discussions.

[3] Did the witness seem honest? Is there any reason why the witness would not be telling the truth?

[4] Does the witness have any reason to give evidence that is more favourable to one side than to the other? [5] Was the witness in a position to make accurate and complete observations about the event? Did s/he have a good opportunity to do so? What were the circumstances in which the observation was made? What was the condition of the witness? Was the event itself unusual or routine? [6] Did the witness seem to have a good memory? Does the witness have any reason to remember the things about which s/he testified? Did any inability or difficulty that the witness had in remembering events seem genuine, or did it seem made up as an excuse to avoid answering questions? [7] Did the witness seem to be reporting to you what he or she saw or heard, or simply putting together an account based on information obtained from other sources, rather than personal observation?

[8] Did the witness's testimony seem reasonable and consistent? Is it similar to or different from what other Crl.A.Nos.741, 910/2008 & 145/2012 1158 witnesses said about the same events? Did the witness say or do something different on an earlier occasion? [9] Do any inconsistencies in the witness's evidence make the main points of the testimony more or less believable and reliable? Is the inconsistency about something important, or a minor detail? Does it seem like an honest mistake? Is it a deliberate lie? Is the inconsistency because the witness said something different, or because s/he failed to mention something? Is there any explanation for it? Does the explanation make sense?

[10] What was the witness's manner when he or she testified? Do not jump to conclusions, however, based entirely on how a witness has testified. Looks can be deceiving. Giving evidence in a trial is not a common experience for many witnesses. People react and appear differently. Witnesses come from different backgrounds. They have different abilities, values and life experiences. There are simply too many variables to make the manner in which a witness testifies the only or most important factor in your decision.

[11] These are only some of the factors that you might keep in mind when you go to your jury-room to make your decision. These factors might help you decide how much or little of a witness's evidence you will believe or rely on. You may consider other factors as well.

[12] In making your decision, do not consider only the testimony of the witnesses. Take into account, as well, any exhibits that have been filed and decide how much or little you will rely on them to help you decide this case. I will be telling (or, have already told) you about how you use admissions in making your decision.‖

14. Section 114 of the Indian Evidence Act, 1872 14.1 Section 114 of the Indian Evidence Act deals with the rebuttable presumptions. Section 114 recognizes the general power of the Court to raise inferences as to the Crl.A.Nos.741, 910/2008 & 145/2012 1159 existence or non-existence of unknown facts on proof or admission of other facts. The source of such presumptions is the common course of natural events, human conduct and public or private business, and the Section proceeds on the assumption that just as in nature, there prevails a fixed order of things, so the volitional acts of men placed in similar circumstances exhibits, on the whole, a distinct uniformity which is traceable to the impulses of human nature, customs and habits of society.

14.2 Section 114 of the Indian Evidence Act is reproduced hereunder:

―Section 114. Court may presume existence of certain facts.-

The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.‖ 14.3 The Section merely states the principle, and the several illustrations appended to it are taken from the important presumptions relating to innocence, regularity and continuity, which were recognized at common law. The illustrations are by no means exhaustive; nor are the presumptions illustrated therein obligatory in the sense that the Court must raise them or conclusive in the sense that no evidence in rebuttal is admissible. The illustrations to Section 114 provide that the Court ―may presume‖ the following facts:-

―(a) That a man who is in possession of stolen goods after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;

(b) That an accomplice is unworthy of credit, unless he is corroborated in material particular;

(c) That a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration;

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(d) That a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or state of things usually cease to exist, is still in existence;

(e) That judicial and official acts have been regularly performed;

(f) That the common course of business had been followed in particular cases;

(g) That evidence which could be and is not produced would, if produced be unfavourable to the person who withholds it;

(h) That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;

(i) That when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.‖ 14.4 The above illustrations are followed by the following caveat:-

―The Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it.‖ The above caveat is illustrated by following explanatory comments which can be conveniently called ―counter illustrations‖:-

―As to illustration (a)--A shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business;‖ ―As to illustration (b)--A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character,

who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself;‖ Crl.A.Nos.741, 910/2008 & 145/2012 1161 —As to illustration (b)--A crime is committed by several persons. A, B and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable;‖ —As to illustration (c)--A, the drawer of a bill of exchange, was a man of business. B, the acceptor, was young and ignorant person, completely under A's influence;‖ —As to illustration (d)--It is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course;‖ —As to illustration (e)--A judicial act, the regularity of which is in question, was performed under exceptional circumstances;‖ —As to illustration (f)--The question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances;‖ —As to illustration (g)--A man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family;‖ —As to illustration (h)--A man refuses to answer a question which he is not by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked;‖ —As to illustration (i)--A bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.‖ 14.5 Sir James Fitzjames Stephen, while introducing the Bill relating to the Indian Evidence Act, stated, in regard to Section 114 as follows:- —The effect of this provision is to make it perfectly clear that Courts of Justice are to use their own common sense and experience in judging the effect of particular facts, and Crl.A.Nos.741, 910/2008 & 145/2012 1162 that they are to be subject to no particular rules whatever on the subject.‖ (Emphasis supplied) 14.6 Section 114 uses the words _may presume'. Thus, it is for the Court to raise the presumption or not. The presumption, even if drawn, is rebuttable. Once a presumption is satisfactorily rebutted, it simply vanishes. It cannot come back once again. In Mackowik v. Kansas City St. James & CBR Co., 94. S.W. 256, 262 = 196 MO. 550, Lamm, J. observed that —presumptions are like bats, flitting in the twilight but disappearing in the sunshine of facts‖ 14.7 The word _common course' in Section 114 qualifies not only natural events but also the words _human conduct' and _public and private businesses'. As to what is _common course of natural events, human conduct and public and private business' depends upon the common sense of the Judge acquired from experience of worldly and human affairs.

14.8 The subject of presumptions is closely allied to the subject of burden of proof. All rules relating to burden of proof may be stated in terms of presumptions, and all presumptions may be stated in terms of rules of burden of proof. When the burden of proof of a fact is on a party, it may be said that there is a presumption as to the non- existence of that fact and where there is a presumption as to the existence of a fact, the burden of proving the non- existence of that fact is on the party who asserts its non-existence. When a presumption operates in favour of a party, the burden of proof is on the opponent, and when the burden of proof is on a party, there is a presumption operating in favour of the opponent. In other systems of evidence, several rules which occur in the Act as rules of burden of proof are stated in the form of presumptions, whereas several other rules which are stated in the Act in the form of presumptions occur in other systems as rules of burden of proof.

Crl.A.Nos.741, 910/2008 & 145/2012 1163 14.9 The grounds of sources of presumptions of fact are obviously innumerable, they are co-extensive with the facts, both physical and psychological, which may under any circumstances whatever becomes evidentiary in Courts; but, in a general view, such presumptions may be said to relate to things, persons, and the acts and thoughts of intelligent agents. With respect to the first of these it is an established principle that conformity with the ordinary course of nature ought always to be presumed. Thus, the order and changes of the seasons, the rising setting and course of the heavenly bodies, and the known properties of matter, give rise to very important presumptions relative to physical facts or things. The same rule extends to persons. Thus, the absence of those natural qualities, power and faculties which are incident to the human race in general will

never be presumed in any individual; such as the impossibility of living long without food, the possession of the reasoning faculties, the common and ordinary understanding of man etc. To this head are reducible the presumptions relating to the duration of human life, the time of gestation, etc. Under the third class - namely, the acts and thought of intelligent agents - come among others, all psychological facts; and the most important inference are drawn from the ordinary conduct of mankind, and the natural feelings or impulses of human nature. Thus, no man will ever be presumed to throw away his property, as for instance, by paying money not due; and so it is a maxim that everyone must be taken to love his own offspring more than that of another person. 14.10 Presumptions of fact are always rebuttable. In other words, the party against which a presumption may operate can and must lead evidence to show why the presumption should not be given effect to. If, for example, the party which initiates a proceeding or comes with a case to Court offers no evidence to support it, the presumption is that such evidence does not exist. And if some evidence is shown to exist on a question in issue, but the party which has it within its power, does not produce it, despite notice to it to do so, the natural presumption is that it would, if produced, Crl.A.Nos.741, 910/2008 & 145/2012 1164 have gone against it. Similarly, a presumption arises from failure to discharge a special or particular onus. 14.11 The Judge has to call in aid not only his training and wisdom but also the experience of life to adjudge which set of evidence is more probable and which evidence is to be believed. The Judge decides who is to be believed and how much and if not, why so. He also visualises what, in ordinary course, should have been the evidence but was not produced, wherefore an adverse inference ought to be drawn. 14.12 The presentation of evidence and the inferences that flow from it are placed by the Judge in his (judicial) scales. The task of a Judge is to first assess the weight of the evidence including presumptions, and then place it into the respective pan (scale) hanging from the two ends of the equal arm of judicial balance.

14.13 The relevant judgments relating to Section 114 of the Indian Evidence Act are as under:

14.13.1 In Izhar Ahmad Khan v. Union of India, AIR 1962 SC 1052, the Supreme Court defined presumptions to be an inference, affirmative or disaffirmative of the truth of falsehood of a doubtful fact or proposition drawn by a process of probable reasoning from something proved or taken for granted.

14.13.2 In Garib Singh v. State of Punjab, (1972) 3 SCC 418, the Supreme Court held that the standards employed in judging each version are those of a reasonable and prudent man.

14.13.3 In Kali Ram v. State of Himachal Pradesh, (1973) 2 SCC 808, the Supreme Court held that the illustrations to Section 114, though taken from different spheres of human activity, are not exhaustive. They are based upon human experience and have to be applied in the context of the facts of each case. The illustrations are merely examples of circumstances in which certain presumptions may be made. Other presumptions of a similar kind in similar circumstances can be made under the provisions of the section itself. Whether or not a Crl.A.Nos.741, 910/2008 & 145/2012 1165 presumption can be drawn under the section in a particular case depends ultimately upon the facts and circumstances of each case. No hard and fast rule can be laid down. Human behaviour is so complex that room must be left for play in the joints. It is not possible to formulate a series of exact propositions and con-flue human behaviour within straitjackets. The raw material here is far too complex to be susceptible of precise and exact propositions for exactness here is a fake.

14.13.4 Krishna Iyer, J. in Tukaram Ganpat Pandare v. State of Maharashtra, (1974) 4 SCC 544 held that Section 114 of the Evidence Act enables the Court to use common sense as judicial tool. Section 114 thus is a useful device to aid the Court in its quest for truth. While care and caution need to be exercised in drawing any presumption under Section 114, its scope is wide and it has the potential to lend a helping hand in myriad situations. 14.13.5 In Narayan Govind Gavate v. State of Maharashtra, (1977) 1 SCC 133, the Supreme Court held that function of a presumption is to fill a gap in evidence.

Section 114 of the Evidence Act covers a wide range of presumptions of fact which can be used by Courts in the course of administration of justice to remove lacunae in the chain of direct evidence before it.

14.13.6 In Syad Akbar v. State of Karnataka, (1980) 1 SCC 30, the Supreme Court held that presumptions are inferences of certain fact patterns drawn from the experience and observation of the common course of nature, the constitution of the human mind, the springs of human action, the usages and habits of society and ordinary course of human affairs.

14.13.7 In Sodhi Transport Co. v. State of U.P., (1986) 2 SCC 486, the Supreme Court held that the rules of presumption are deduced from enlightened human knowledge and experience and are drawn from the connection, relation and coincidence of facts, and circumstances.

Crl.A.Nos.741, 910/2008 & 145/2012 1166 14.13.8 In State of W.B. v. Mir Mohammad Omar, (2000) 8 SCC 382, the Supreme Court held that presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the Court exercises a process of reasoning and reaches a logical conclusion as the most probable position. Section 114 empowers the Court to presume the existence of any fact which it thinks likely to have happened. In that process, the Court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case.

14.13.9 In M. Narsinga Rao v. State of Andhra Pradesh, (2001) 1 SCC 691, the Supreme Court held that presumption is an inference of a certain fact drawn from other proved facts. While inferring the existence of a fact from another, the Court is only applying a process of intelligent reasoning which the mind of a prudent man would do under similar circumstances. Presumption is not the final conclusion to be drawn from other facts. But it could as well be final if it remains undisturbed later. Presumption in Law of Evidence is a rule indicating the stage of shifting the burden of proof. From a certain fact or facts the Court can draw an inference and that would remain until such inference is either disproved or dispelled. 14.13.10 In Limbaji v. State of Maharashtra, (2001) 10 SCC 340, the Supreme Court held that a presumption of fact is a type of circumstantial evidence which in the absence of direct evidence becomes a valuable tool in the hands of the Court to reach the truth without unduly diluting the presumption in favour of the innocence of the accused which is the foundation of our criminal law. It is an inference of fact drawn from another proved fact taking due note of common experience and common course of events. Section 114 of the Evidence Act shows Crl.A.Nos.741, 910/2008 & 145/2012 1167 the way to the Court in its endeavour to discern the truth and to arrive at a finding with reasonable certainty. The Supreme Court further held that having due regard to the germane considerations set out in the section, certain presumptions which the Court can draw are illustratively set out. They are not exhaustive or comprehensive. The presumption under Section 114 is, of course, rebuttable. When once the presumption is drawn, the duty of producing evidence to the contra so as to rebut the presumption is cast on the party who is subjected to the rigour of that presumption. Before drawing the presumption as to the existence of a fact on which there is no direct evidence, the facts of the particular case should remain uppermost in the mind of the Judge. These facts should be looked into from the angle of common sense, common experience of men and matters and then a conscious decision has to be arrived at whether to draw the presumption or not.

14.13.11 In Hiten P. Dalal v. Bratindranath Banerjee, (2001) 6 SCC 16, the Supreme Court held as under: —22....Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the

reasonable possibility of the non-existence of the presumed fact.‖ (Emphasis supplied) 14.13.12 In Bhoora Singh v. State of U.P., 1992 Cri LJ 2294, the Division Bench of the Allahabad High Court held as under:

―42. The term 'presumption' in its largest and most comprehensive signification may be defined, where in the absence of actual certainty of the truth of a fact or proposition, an inference affirmative of that truth is Crl.A.Nos.741, 910/2008 & 145/2012 1168 drawn by a process of probable reasoning from something which is taken for granted...‖ (Emphasis supplied) 14.13.13 In Ramachandran v. State of Kerala, 2009 Cri LJ 168, the Kerala High Court held as under: ―10. ...A 'presumption' is a probable consequence drawn from facts as to the truth of a fact alleged. 'Presumption of fact' is an inference as to existence of one fact drawn from facts (either certain, or proved by direct testimony) as to the truth of a fact alleged...‖ 14.14 Charles C. Moore's book titled A Treatise on Facts or the Weight of the Value of Evidence, 1908 contains a very exhaustive discussion on the presumptions of fact. Some of the presumptions mentioned in the said book are as under:-

14.14.1 Testimony contrary to natural laws - There are well-settled and accepted natural laws, a recognition of which is justified by the long experience of men, the knowledge of everyday life, as well as by the studies and experiments of ages. The natural laws that Courts take cognizance of are the laws of gravitation, cohesion, optics, electricity, etc. Testimony which is directly contrary and in opposition to such laws should be ignored even without contradiction. For example, a fire which was observed in the grass at a specified place adjoining a railroad right of way could not have originated a quarter of a mile distant if the intervening space showed no traces whatever of fire. Courts are not so deaf to the voice of nature, or so blind to the law of physics, that every utterance of a witness in derogation of those laws will be treated as testimony of probative value simply because of its utterance.

14.14.2 Mathematical impossibilities - A verdict cannot be sustained if it involves a finding that a part is equal to the whole; for example, where the jury evidently believed testimony that it would cost as much to clear a tract of land after the trees were felled and the logs removed as it would Crl.A.Nos.741, 910/2008 & 145/2012 1169 when the trees were standing. Testimony of a so-called expert that while an ordinary man can lift two hundred pounds, it would take sixteen section hands to lift a six- hundred-pound rail was struck out by the Court as manifestly absurd.

14.14.3 Improbable stories - The Court is not bound to give credit to a witness who is interested in the result of the action, and whose evidence is improbable and discredited by circumstances, or is against common experience and observation.

14.14.4 Payment without taking receipt - The average man would not pay and take no receipt or memorandum to insure himself against loss in case of the death of the other party, or his forgetfulness, or something even worse. No person of ordinary prudence, making payments of principal from time to time on a bond and mortgage, would omit to take receipts, if the papers were not at hand so that the payments could be entered thereon.

14.14.5 Improbable testimony contradicted by circumstances - In a case of conviction for murdering a woman by cutting her throat with a razor, the theory that the killing was the result of an accident, occasioned by the defendant supposing that he was drawing the back of the razor across the throat of his victim, was so utterly preposterous that there could be no rational expectation that any Judge would give it the least consideration. 14.14.6 Numerical equality or preponderance of witness testimony to improbabilities -Suppose that a small child tells that he saw a large wolf run away with an unusually small lamb. As against this, ten adults testified that this was not the case at all, but that the real fact was that this very small lamb was actually running away with the large wolf. It would not take a Judge very long to determine where the truth lies, notwithstanding ten against one. 14.14.7 Relative value of direct and circumstantial evidence - In the Webster case, Chief Justice Shaw, speaking of direct or positive

evidence and circumstantial evidence, Crl.A.Nos.741, 910/2008 & 145/2012 1170 said: ―Each of these modes of proof has its advantages and disadvantages; it is not easy to compare their relative value. The advantage of positive evidence is that it is the direct testimony of a witness to the fact to be proved, who, if he speaks the truth, saw it done; and the only question is whether he is entitled to belief. The disadvantage is that the witness may be false and corrupt, and that the case may not afford the means of detecting his falsehood. But, in a case of circumstantial evidence where no witness can testify directly to the fact to be proved, it is arrived at by a series of other facts, which by experience have been found so associated with the fact in question, that in the relation of cause and effect they lead to a satisfactory and certain conclusion; as when footprints are discovered after a recent snow, it is certain that some animated being has passed over the snow since it fell ; and, from the form and number of the footprints, it can be determined with equal certainty, whether they are those of a man, a bird, or a quadruped. Circumstantial evidence, therefore, is founded on experience and observed facts and coincidences, establishing a connection between the known and proved facts and the fact sought to be proved.‖

5. In Ved Parkash Kharbanda (supra), the principles relating to the discovery of truth and Sections 3 and 114 of the Indian Evidence Act, 1872 have been summarized as under:

> ―21. Summary of Principles 21.1 Truth should be the Guiding Star in the Entire Judicial Process Truth is foundation of Justice. Dispensation of justice, based on truth, is an essential and inevitable feature in the justice delivery system. Justice is truth in action.

Crl.A.Nos.741, 910/2008 & 145/2012 1171 It is the duty of the Judge to discover truth to do complete justice. The entire judicial system has been created only to discern and find out the real truth.

 The justice based on truth would establish peace in the society. For the common man truth and justice are synonymous. So when truth fails, justice fails. People would have faith in Courts when truth alone triumphs. Every trial is voyage of discovery in which truth is the quest. Truth should be reigning objective of every trial. Judge has to play an active role to discover the truth and he should explore all avenues open to him in order to discover the truth. The Trial Judge is the key-man in the judicial system and he is in a unique position to strongly impact the quality of a trial to affect system's capacity to produce and assimilate truth. The Trial Judge should explore all avenues open to him in order to discover the truth. Trial Judge has the advantage of looking at the demeanour of the witnesses. In spite of the right of appeal, there are many cases in which appeals are not filed. It is mostly with the Trial Judge rather than with the appellate Judge that the members of the general public come in contact, whether as parties or as witnesses.

21.2 What is _Truth' and how to discover it Law's Truth is synonymous with facts established in accordance with the procedure prescribed by law. The purpose of judicial inquiry is to establish the existence of facts in accordance with law.

 Facts are proved through lawfully prescribed methods and standards.

 The belief of Courts about existence of facts must be based on reason, rationality and justification, strictly on the basis of relevant and admissible evidence, judicial notice or legally permitted presumptions. It must be based on a prescribed methodology of proof. It must be objective and verifiable.

Crl.A.Nos.741, 910/2008 & 145/2012 1172 21.3 Section 3 of Indian Evidence Act, 1872 ―Evidence‖ of a fact and ―proof‖ of a fact are not synonymous terms. ―Proof‖ in the strict sense means the effect of evidence.

 A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

 The term ―after considering the matters before it‖ in Section 3 of the Evidence Act means that for judging whether a fact is or not proved, the Court is entitled to take into consideration all matters before it which shall include the statement of the witnesses, admissions of the parties, confession of the accused, documents proved in evidence, judicial notice, demeanour of witnesses, local inspections and presumptions.

 The term ―believes it to exist‖ in the definition of ―proof‖ is a ―judicial belief‖ of the Judge based on logical/rational thinking and the power of reason, and the Court is required to give reasons for the belief. The reasons are live links between the mind of the decision maker and the belief formed. Reasons convey judicial idea in words and sentences. Reasons are rational explanation of the conclusion. Reason is the very life of law. It is the heart beat of every belief and without it, law becomes lifeless. Reasons also ensure transparency and fairness in the decision making process. The reasons substitute subjectivity by objectivity. Recording of reasons also play as a vital restraint on possible arbitrary use of the judicial power. The recording of reasons serve the following four purposes:-

- To clarify the thought process.

- To explain the decision to the parties.

- To communicate the reasons to the public.

- To provide the reasons for an appellate Court to consider.

Crl.A.Nos.741, 910/2008 & 145/2012 1173 Non-recording of reasons would cause prejudice to the litigant who would be unable to know the ground which weighed with the Court and also cause impediment in his taking adequate grounds before the appellate Court in the event of challenge.

 Nothing can be said to be ―proved‖, however much material there may be available, until the Court believes the fact to exist or considers its existence so probable that a prudent man will act under the supposition that it exists. For example, ten witnesses may say that they saw the sun rising from the West and all the witnesses may withstand the cross- examination, the Court would not believe it to be true being against the law of nature and, therefore, the fact is _disproved'. In mathematical terms, the entire evidence is multiplied with zero and, therefore, it is not required to be put on judicial scales. Where the Court believes the case of both the parties, their respective case is to be put on judicial scales to apply the test of preponderance.

 The approach of the Trial Court has to be as under:-

> If on consideration of all the matters before it, the Court believes a fact to exist or considers its existence probable, the fact is said to be _proved'. On the other hand, if the Court does not believe a fact either to exist or probable, such fact is said to be _disproved'. A fact is said to be _not proved' if it is neither proved nor disproved.

 The test whether a fact is proved is such degree of probability as would satisfy the mind of a reasonable man as to its existence. The standard of certainty required is of a prudent man. The Judge like a prudent man has to use its own judgment and experience and is not bound by any rule except his own judicial discretion, human experience, and judicial sense.

21.4 Section 114 of the Indian Evidence Act, 1872 Section 114 is a useful device to aid the Court in its quest for truth by using common sense as a judicial tool. Section 114 Crl.A.Nos.741, 910/2008 & 145/2012 1174 recognizes the general power of the Court to raise inferences as to the existence or non-existence of unknown facts on proof or admission of other facts.

 Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts.

 The source of presumptions is the common course of natural events, human conduct and public or private business, and the Section proceeds on the assumption that just as in nature there prevails a fixed order of things, so the volitional acts of men placed in similar circumstances exhibits, on the whole, a distinct uniformity which is traceable to the impulses of human nature, customs and habits of society. The illustrations though taken from different spheres of human activity, are not exhaustive. They are based upon human experience and have to be applied in the context of the facts of each case. The illustrations are merely examples of circumstances in which certain presumptions may be made. Other presumptions of a similar kind in similar circumstances can be made under the provisions of the section itself.

 Presumption in law of evidence is a rule indicating the stage of shifting the burden of proof. From a certain fact or facts the Court can draw an inference and that would remain until such inference is either disproved or dispelled. Presumptions of fact can be used by the Courts in the course of administration of justice to remove lacunae in the chain of direct evidence before it. The function of a presumption is to fill a gap in evidence.

 Section 114 of the Indian Evidence Act applies to both civil and criminal proceedings.

 Whether or not a presumption can be drawn under the section in a particular case depends ultimately upon the facts and circumstances of each case. No hard and fast rule can be laid down. Human behaviour is so complex and room must be Crl.A.Nos.741, 910/2008 & 145/2012 1175 left for play in the joints. It is not possible to formulate a series of exact propositions and con-flue human behaviour within straitjackets.

 No rule of evidence can guide the Judge on the fundamental question whether evidence as to a relevant fact should be believed or not. Secondly, assuming that the Judge believes very few cases, guide him on the question what inference he should draw from it as to assist a Judge in the very smallest degree in determining the master question of the whole subject - whether and how far he ought to believe what the witnesses say? The rules of evidence do not guide what inference the Judge ought to draw from the facts in which, after considering the statements made to him, he believes. In every judicial proceeding whatever these two questions - Is this true, and, if it is true what then? - ought to be constantly present in the mind of the Judge, and the rules of evidence do not throw the smallest portion of light upon them.

Section 167 of the Indian Evidence Act, 1872

6. Section 167 of the Indian Evidence Act provides that improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision. An objection to the proper admission of evidence is material only if it can be shown that the exclusion of evidence improperly admitted is fatal to the decision. A finding will not, therefore, be disturbed if, throwing aside the evidence which ought not to have been admitted, there, still remains sufficient evidence to support the finding. Although, my

esteemed colleague Crl.A.Nos.741, 910/2008 & 145/2012 1176 has discussed Section 167 in paras 1280 to 1283, I would like to add three more relevant judgments.

7. In Abdul Rahim v. The King Emperor, AIR 1946 PC 82, the Privy Council examined the scope of Section 167 and held as under:

> —13. The first question submitted relates to the effect of the misreception of evidence. It has been found by the High Court that in the present case material evidence was improperly admitted. What are the powers and what is the duty of the High Court in such circumstances? It was contended for the appellant that the evidence improperly admitted might have so seriously prejudiced the minds of the jury as to have brought about a failure of justice and that he was entitled on a new trial to have the verdict of a jury on proper evidence. To this submission Section 167 of the Indian Evidence Act in their Lordship's opinion affords a complete and conclusive answer. The improper admission of evidence is thereby expressly declared not to be a ground of itself for a new trial. The appellate Court must apply its own mind to the evidence and after discarding what has been improperly admitted decide whether what is left is sufficient to justify the verdict. If the appellate Court does not think that the admissible evidence in the case is sufficient to justify the verdict, then it will not affirm the verdict and may adopt the course of ordering a new trial or take whatever other course is open to it. But the appellate Court, if satisfied that there is sufficient admissible evidence to justify the verdict, is plainly entitled to uphold it.‖

8. In John v. Sherthalai Municipality, AIR 1959 Ker 323, the learned Magistrate examined the accused as a court witness, despite his protest and elicited information belonging to him. The conviction Crl.A.Nos.741, 910/2008 & 145/2012 1177 was challenged on the ground that the accused had an immunity against being called as a witness. The Kerala High Court held that the learned Magistrate committed a grave error in examining the accused despite his protest to prove a fact but confirmed the conviction by invoking Section 167 of the Indian Evidence Act as there was sufficient evidence to justify the conviction after discarding the statement recorded by the Magistrate. The relevant portion of the said judgment is reproduced hereunder:

> —3...It is therefore clear that the learned Magistrate committed a grave error in examining the accused person without his request and against his protest, to prove a fact which the prosecution should have established by other evidence.
>
> That, however, is in my opinion, no ground to quash the entire proceedings, Section 167, Indian Evidence Act, 1872 provides inter alia that improper admission of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision. The question whether the prosecution was sustainable or the conviction was rightly made has therefore to be examined eschewing altogether the evidence furnished by the accused while under examination as a court witness...‖

9. In National Insurance Company Ltd. v. Seems Ramdas Telhande, (2013) 6 Mah LJ 890, the Bombay High Court examined the scope of Section 167 of the Indian Evidence Act as under:

Crl.A.Nos.741, 910/2008 & 145/2012 1178 —6...Improper admission or rejection of evidence is not by itself a ground for reversal of a decision, if there is other evidence to support it. Where admissible evidence has been improperly rejected or inadmissible evidence has been admitted by the Judge, such improper reception or rejection of evidence shall not of itself be a ground for new trial or reversal of any decision in any case, unless substantial wrong or miscarriage of justice has been thereby occasioned; or, in other words, if the Court considers that after leaving aside the evidence that has been

improperly admitted, there was enough evidence on the record to justify the decision of the lower Court, or that if the rejected evidence were admitted the decision ought not have been affected thereby, no Court of appeal should set it aside. The Appellate Court can effectively decide the appeal following Section 167 of the Indian Evidence Act...‖ Conclusion

10. To summarise, the Court is required to take into consideration all „the matters before it‟ (Section 3 of the Indian Evidence Act) which shall include the statements of the witnesses, disclosures, recoveries, circumstances, documents proved in evidence, judicial notice, demeanour of witnesses and presumptions and then apply the judicial mind (based on logical/rationale thinking and power of reason). If on such consideration, the Court believes the prosecution case to exist or considers it existence probable beyond reasonable doubt, the prosecution case is said to be „proved‟. On the other hand, if the Court does not believe the prosecution case either to exist or probable, it is said to be „disproved‟.

11. Applying the aforesaid principles of law to the facts of the present case and on careful consideration of all „the matters before the Crl.A.Nos.741, 910/2008 & 145/2012 1179 Court‟ including the statements of the witnesses, disclosures, recoveries, circumstances, documents proved in evidence, judicial notice, demeanour of witnesses and presumptions, I believe the prosecution case, more particularly the facts mentioned in para 2028 of the judgment of my esteemed colleague, to be true and therefore, the same are „proved‟ beyond reasonable doubt and are sufficient to uphold the conviction of the appellants whereas the entire defence set up by the appellants is not believed to be true and, therefore, „disproved‟. With respect to the reasons for such belief, I adopt the detailed reasons given by my esteemed colleague in this regard.

12. With these observations, I agree with the judgment proposed by my esteemed colleague that the conviction of the appellants should be upheld. The appeals are accordingly dismissed.

(J.R. MIDHA) JUDGE APRIL 02, 2014 dk Crl.A.Nos.741, 910/2008 & 145/2012 1180 * IN THE HIGH COURT OF DELHI AT NEW DELHI % Date of Decision: 2nd April, 2014 Crl.M.A.Nos.2258/2013, 2266/2013, 20078/2012, 13408/2008 & 5000/2010 in + CRL.A. 741/2008 VISHAL YADAV ..... Appellant Through : Mr. Ram Jethmalani, Sr. Adv. with Mr. Sanjay Jain, Mr. Vinay Arora, Ms. P.R. Mala, Ms. Ruchika Bhan, Mr. Pranav Diesh, Mr. Karan Kalia and Mr. Ashish Dixit, Advs.

versus

STATE OF U.P. ..... Respondent
Through : Mr. Dayan Krishnan,
ASC with Ms.Ritu Gauba, APP,
Ms.Swati Goswami, Mr. Nikhil
A.Menon and Ms. Manvi Priya,
Advs.
Mr. P.K. Dey, Adv. with
Mr.Kaushik Dey, Adv. for the
complainant.

AND

Crl.M.A.No.12795/2008 & 12534/2011 in + CRL.A. 910/2008 VIKAS YADAV ..... Appellant Through : Mr.U.R. Lalit, Sr. Adv.

with Mr. Sumeet Verma and Ms. Charu Verma, Advs.

Crl.A.Nos.741, 910/2008 & 145/2012 1181 versus STATE OF U.P. ..... Respondent Through : Mr. Dayan Krishnan, ASC with Ms. Ritu Gauba, APP, Ms.Swati Goswami, , Mr. Nikhil A.Menon and Ms. Manvi Priya, Advs.

Mr. P.K. Dey, Adv. with Mr. Kaushik Dey, Adv. for the complainant.

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL HON'BLE MR. JUSTICE J.R. MIDHA GITA MITTAL, J.

Crl.M.A.No.2258/2012 in Crl.App.No.741/2008

1. This application was filed on behalf of the appellant Vishal Yadav through his brother contending that on 12th February, 2013, he had suffered from facial paralysis complaining that insufficient facilities were available in the Deen Dayal Upadhyay Hospital when he was being given treatment. Directions were sought to the State to provide details of the disease as well as treatment to the family of the applicant as proper treatment as may be required to the applicant. This application came up for hearing on the 25th of February 2013 when Mr.Dayan Krishnan, learned Additional Standing Counsel sought time to take instructions. In the meantime we had issued directions for production of the medical record of Crl.A.Nos.741, 910/2008 & 145/2012 1182 the appellant as well as details of his treatment from the Jail Superintendent, Tihar Jail, Delhi.

2. Pursuant to our orders, a report dated 25 th February, 2013 of the Senior Medical Officer of the Central Jail, Tihar as well as the Superintendent of Central Jail No.5, Tihar Jail was placed before us. By our orders dated 28th February, 2013, we had directed that a more detailed report with regard to the treatment administered to the appellant as well as requirements for treatment of the conditions noted in the report submitted be also brought on record. Pursuant to the said order, a report dated 6th March, 2013 was received from Superintendent, Central Jail No.5 to the effect that the patient had already recovered 80% and that his general condition was satisfactory. The application has thereafter not been pressed before us.

3. No other complaint has been made before us with regard to either the health of the appellant or the treatment which he may be requiring. No further orders in this application are called for. This application is therefore disposed of.

4. Needless to say it is open for the applicant to seek court intervention and assistance at any stage by way of appropriate proceedings if he is denied medical treatment any time.

Crl.A.Nos.741, 910/2008 & 145/2012 1183 Crl.M.A.No.2266/2013 in Crl.App.No.741/2008

5. This application has been filed by Vishal Yadav seeking permission to lead additional evidence and summoning Kamal Kishore as a court witness in Crl.A.No.741/2008. This application dated 18th February, 2013 has been filed for summoning a person to testify about the events which took place in the night intervening 16th/17th February, 2002 i.e. eleven years ago. The application was filed at a stage when arguments on behalf of all the three appellants; the learned Additional Standing Counsel for the State as well as Shri P.K. Dey, the learned counsel for the complainant, stood concluded. By the order dated 5th February, 2013, the appeal was posted for arguments in rejoinder of the appellants on the 28th of February 2013.

6. The trial court record shows that Kamal Kishore was cited as a prosecution witness and extensive steps were taken to summon him. During the course of arguments in the appeal, it has been argued on behalf of the present applicant that the case against Vishal Yadav deserves to be rejected for the reason that a material witness who established his defence namely Kamal Kishore has not been examined by the prosecution. The prayer in the application rests on a statement under Section 161 of the Cr.P.C.

dated 18th February, 2002 attributed to Kamal Kishore. The prosecution and the complainant have answered the appellant's case on the non-

Crl.A.Nos.741, 910/2008 & 145/2012 1184 production of Kamal Kishore. Several serious anomalies in the statement attributed to him have been pointed out.

7. During arguments on the appeal, when this submission was pressed before us, we had queried learned senior counsel for the applicant as to why Kamal Kishore could not have been examined as a defence witness. The applicant opposed the same placing judicial precedents in support before us which we have considered. The applicant had argued that it was legally impermissible for the appellant to summon Kamal Kishore as a defence witness.

8. Eleven years since February, 2002 when the crime was committed is a long period of time. Human memory fades with every passing day. Given the conduct of the appellants with regard to influencing witnesses, the present application at this stage of the proceedings, is certainly motivated.

9. One more important factor comes in the way of grant of this application. Kamal Kishore was an employee of the applicant's uncle who did not deliberately respond to court process. Given the circumstance that entire prosecution case has been examined thread bare, we find that the application is neither bonafide nor an attempt to bring such evidence on record which would enable the court to arrive at the truth. It is also an attempt to delay adjudication further.

Crl.A.Nos.741, 910/2008 & 145/2012 1185

10. We have recorded detailed observations about the statement attributed to Kamal Kishore in the main appeal. The reasons apply to this application as well. In the judgment on the main appeal, we have also opined on the illegality of exhibition of the statement under Section 161 of the Cr.P.C. (Exh.PW-35/4) attributed to Kamal Kishore and also on the falsity of the contents of the statement.

For the reasons noted above as well as the detailed reasons recorded in the judgment on the main appeal, we find no merit in the application which is hereby dismissed.

Crl.M.A.No.20078/2012 in Crl.App.No.741/2008

11. By this application, the applicant has prayed for directions to search for photographs which were exhibited on trial court record as Exh.DW-1/1 to Exh.DW-1/3 as these photographs were not found in the envelope on the record of the trial court which was placed to be containing these photographs. The applicant has urged that these are photographs in support of Vishal Yadav's stand that after attending Shivani Gaur's wedding, Vikas and Vishal Yadav had gone to attend the ceremony at the residence of DW-1 Shri Ashok Gandhi. The applicant prays that in case the photographs cannot be traced out, the CD of the ceremony be taken on record.

12. During the course of hearing on the 3rd of October 2012, Mr.Dayan Krishnan, learned Additional Standing Counsel for Crl.A.Nos.741, 910/2008 & 145/2012 1186 the State had drawn our attention to the testimony of DW-1 Shri Ashok Gandhi who had produced the photographs Exh.DW-1/2 to Exh.DW-1/3 as well as negatives on record. Our attention was drawn to an envelope which was placed at page 531 of Vol.13 of LCR on which it was noted as follows:-

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—Ex DW 1 to DW 3              - Photographs
Ex 01 to 03                   - Negatives
Ex DW 1/D 5-5 to D 5-5        - Mrg Card
Ex. DW 1/D 6                  - (Mrg Card Covering
                                letter)‖
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On the cover page (table) of Vol.13, it was indicated as follows:

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–pages 1 to 529       (+531 DW1 to DW1/D6)
                      + 11A envelop (empty)
                      of Ex DW2
                      +103A‖
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13. We had directed that the tape on the envelope be opened.

However the envelope was found to be empty.

14. We had passed an order dated 18th December, 2012 on the present application directing Ms. R. Kiran Nath, Registrar (Vigilance) to take steps to trace out the photographs Exh.DW-1/D1 to Exh.DW-1/D3 as well as the negatives Exh.01 to 03. Pursuant to our order, the Registrar (Vigilance) has filed a detailed report dated 19th January, 2013 after recording statements of four persons which included the Ahlmad of the learned trial court; concerned Senior Judicial Crl.A.Nos.741, 910/2008 & 145/2012 1187 Assistant from this court as well as Project Manager and Supervisor in the Scanning Branch of this court where the lower court record was digitalized. The operative part of the report reads as follows:

> ―CONCLUSION:
>
> Thus, from the statement of all these witnesses, it emerges on record that the Ahlmad of the learned trial court examined as IW-1 had apparently put the documents, the marriage card and envelope Ex.DW1/5-1 to DW1/5-5 as also the missing documents i.e. photographs Ex.DW-1/D1 to DW- 1/D-3 and negatives Ex.01 to 03 in the said Government stationery envelope, a copy of which is Ex.IW-1/1. The said Government envelope was folded into four folds sealed and cello tape affixed and then tagged at the end of this file. The holes made by the said tagging through the said four folds can also be seen clearly. The marks _A' to _A' and _B' to _B' in green on the said envelope government stationery envelope numbered 531 in the file also show that the seals had been put in the fashion as explained by the Ahlmad. The loose ends of the cello taps and their tearing marks left on the envelope also fortify the statement of the Ahlmad IW-1.

Ex.IW-1/1 is the photocopy of the scanning of the Government stationery envelope having the printed matter ―On India Government Service‖ written on top of the said envelope. As per the statement of IW-1 this envelope had been folded into four and then the Court seal was affixed on it. The very fact that IW-1/1 shows the entire page and printing ―On India Government Service‖ of the said envelope shows that the four folds of the said envelope were Crl.A.Nos.741, 910/2008 & 145/2012 1188 opened by the scanning branch and in the process obviously the court seal and the tapes would have been broken. Thus there arises a possibility of their having taken out the documents lying inside this envelope as a result of which the documents Ex.IW- 1/2 came to be scanned on record.

It thus appears that the documents were there in the said sealed envelope Ex.IW-1/1 when the same was sent to the scanning branch; the seals were opened there and the contents of the documents contained inside the envelope Ex.IW-1/1 were apparently mishandled in the scanning branch.‖

15. We may note that the Scanning Branch had attempted to state that the sealed documents have not been opened. The digitalized record of a card which was also lying in the above sealed cover is available on the file. This shows that in the scanning branch the sealed envelope was opened and the photographs have been mishandled there at that point.

16. The photographs were produced before the learned court and had been exhibited by the trial court. In the judgment dated 28th May, 2008, the learned trial judge has commented on the photographs. The learned trial judge has found that the photographs neither prove the date nor the nature of the event which was photographed and therefore arrived at a conclusion of the falsity of the defence set up by the applicant.

Crl.A.Nos.741, 910/2008 & 145/2012 1189

17. After a detailed consideration of the entire evidence on record, we have also recorded our findings on these photographs in paras 1453 to 1460 of the main judgment in the appeal.

18. A CD if actually existed ought to have been produced before the learned trial judge in the first instance. It was not done. The learned Trial Judge has commented on the same. With advancement of technology, as disclosed by defence witnesses, it is possible to fabricate CDs and photographs. In fact highly specialized technology which was not available in 2002, is now in existence. We have found that the appellants produced morphed photographs in the defence evidence before the trial judge.

19. The loss of documents from court record is undoubtedly a serious matter and we propose to refer a report of the Registrar (Vigilance) to the Registrar General for placing the report before concerned Committee of this court for examining the matter and taking action. However, the absence of the photographs does not impact the present adjudication.

For all these reasons including the view taken by us on the photographs, it is completely unnecessary to permit the appellant to lead further evidence by way of a CD on record.

This application is therefore dismissed.

Crl.A.Nos.741, 910/2008 & 145/2012 1190 The Registry is directed to forward the above report of the Registrar (Vigilance) before the Registrar General of this court who shall place the same before the Concerned Committee of this court for consideration.

Crl.M.A.No.13408/2008 in Crl.App.No.741/2008

20. This application was filed by the applicant on 14 th November, 2008 seeking permission that the medical certificate enclosed with the application be considered at the time of hearing his bail application being Crl.M.(Bail)no.1155/2008 which was rejected by the order passed on 7th August, 2009.

This application is therefore rendered infructuous and is dismissed as such.

Crl.M.A.No.5000/2010 in Crl.App.No.741/2008

21. By way of this application, Vishal Yadav has sought exemption from filing certified copy of court orders. Inasmuch as the main application with which the present application was filed has been rendered infructuous by disposal of the main appeal, no orders are required to be passed on this application as well.

This application is dismissed.

Crl.A.Nos.741, 910/2008 & 145/2012 1191 Crl.M.A.No.12795/2008 in Crl.App.No.910/2008

22. This application has been filed on 28th July, 2008 under Section 311 and 482 of the Cr.P.C. by the appellant, seeking permission to lead additional evidence by examining/re- examining/cross-examining the following witnesses; (i) Shri Subhash Yadav (ii) Shri P.L. Sharma, allegedly present at the time of the alleged sting operation conducted upon a prosecution witness; Ajay Katara and his security guards

(i) Sanjay Kumar (ii) Shiv Kumar (iii) Pankaj Kumar (iv) Tanu wife of Ajay Katara and her parents Radhey Shyam and Smt. Urmila.

23. We have considered the evidentiary value of the sting operation in detail in the judgment passed by us on the main appeal and have found the same to be irrelevant. In that view thereof, no fruitful purpose would be served by grant of prayer made in the application.

For the reasons recorded in the main appeal on the aspect of the sting operation, this application is dismissed.

Crl.M.A.No.12534/2011 in Crl.App.No.910/2008

24. This application was filed on 17th October, 2011 by Nilam Katara praying for permission to the complainant to assist this court in the bail applications. There is no bail application Crl.A.Nos.741, 910/2008 & 145/2012 1192 which is pending. The main appeal itself has been decided by a separate judgment.

This application is therefore dismissed.

GITA MITTAL, J.

J.R. MIDHA, J.

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