



F.R.
Subba

THE HIGH COURT OF SIKKIM : GANGTOK

GOVERNMENT APPEAL NO. 2 OF 2003

(Arising out of the judgment passed by Shri B. C. Sharma, Sessions Judge, South & West, Namchi in Criminal Case No.3 of 2000)

State of Sikkim **Appellant**

versus

1. Milan Kumar Diyali,
S/o Ranjit Singh Diyali,
R/o Near Food Preservation Factory,
Singtam,
East Sikkim.
2. Simon Biswakarma,
S/o Deepak Biswakarma,
R/o Sumsing Tea Garden,
Dist. Jalpaiguri,
West Bengal.

..... **Accused-Respondents**

For appellant : Mr. J. B. Pradhan, Public Prosecutor.

For respondent no.1 : Mr. A. Moulik, Senior Advocate assisted by Mr. N. G. Sherpa, Advocate.

For respondent no.2 : Mr. N. Rai, Advocate assisted by Ms. Jyoti Kharka, Advocate.

**PRESENT: THE HON'BLE MR. JUSTICE N. S. SINGH, CHIEF JUSTICE (ACTING).
THE HON'BLE MR. JUSTICE A. P. SUBBA, JUDGE.**

Last date of hearing : 8th June, 2005.

DATE OF JUDGMENT : 9th August, 2005.

J U D G M E N T

A. P. Subba, J.

This Government Appeal is directed against the judgment dated 30th July, 2002 passed by the learned Sessions Judge, South and West at Namchi in Criminal



Case no.3 of 2000 acquitting the accused, Milan Kumar Diyali and Simon Biswakarma of the charges under sections 302/201/34 IPC.

2. The case of the prosecution, in brief, is that in September, 1999 one Sonam Bhutia had taken seven Oxygen Cylinders from the firm "Tripti Steel Traders" located at 3rd Mile, Sevoke Road, Siliguri which deals in scrap business and is owned by one Sanjay Agarwal to Yuksom, West Sikkim. While taking the gas cylinders, the said Sonam Bhutia had also taken along with him one gas cutter boy who works for hire for the purpose of cutting scrap materials. Some days after they left, Sanjay Agarwal the proprietor of the firm got information that the said gas cutter boy was arrested by the police and had been detained in Yuksom Police out-post, West Sikkim. On receiving the information, the said Sanjay Agarwal deputed the deceased Binod Diyali who was employed as Manager in his firm to go to Yuksom to look into the matter. The deceased accordingly left for Yuksom and returned back to Siliguri on the very next day bringing along with him the gas cutter boy after securing his release from the police out-post. Some time thereafter Pintu Agarwal (P.W.7), brother of the proprietor Sanjay Agarwal again deputed the deceased Binod Diyali to go to

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Yuksom, West Sikkim for the purpose of securing release of gas cylinders which were seized by Yuksom Police and giving him an amount of Rs.10,000/- to meet necessary expenses for the purpose. The deceased accordingly left Siliguri for Yuksom on 16th November, 1999 in jeep bearing no.WB-73/5354 hired by him from one Promod Kamti of Siliguri. The said jeep was driven by one Simon Biswakarma, the accused no.2.

This time the deceased failed to return back to Siliguri for several days. When there was no news of him for a number of days his wife, Mrs. Monu Diyali (P.W.5) was apprehensive of his safety and started search for him. On 9th December, 1999, she lodged a missing report with Gyalshing Police Station. On receipt of the missing report, the concerned Officer-in-Charge of Gyalshing Police Station conducted a preliminary enquiry and registered P.S. Case no.76(12)99 dated 12th December, 1999 under section 365 IPC and took up investigation. Before he could make any headway in the investigation, the case was transferred to Crime Branch, CID, Gangtok for further investigation. Consequently, the Dy. S.P., CID, Gangtok took over charge of further investigation on 18th December, 1999.

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After taking over the charge of investigation, the Dy. S.P. CID conducted a thorough interrogation of Simon Biswakarma, accused no.2 and other available witnesses. The interrogation so conducted by him revealed that the deceased was shot dead by the accused no.1 with the revolver on the way to Sakbari on 17th November, 1999 and the accused no.2 had concealed the revolver, in the bed room of his friend Babloo Choudhury at Asram Para, Siliguri. On indiscreet interrogation the said Simon Biswakarma, accused no.2 stated that he will be able to show the place and recover the said weapon from the place where he had concealed. Accordingly, the I.O. proceeded to Siliguri taking along with him the accused Simon Biswakarma. With the help of local police at Siliguri, the I.O. conducted search of the bed room of the said Babloo Choudhury on 20th December, 1999. During the search operation, the accused Simon Biswakarma took out a revolver bearing no.-A 31673 Webly and Scot from inside a sound box kept in the bed room of one Babloo Choudhury. The I.O. then seized the revolver duly preparing a seizure memo.

The dead body of the deceased was later recovered from the bank of Teesta river at a place below Hanuman Mandir on 31A National Highway on 24th December, 1999.

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The dead body was identified by the relatives of the deceased from the wearing apparels. After the inquest was conducted by the police from Kalimpong Police Station, the dead body was sent to the Department of Forensic and State Medicine, North Bengal Medical Hospital where post-mortem examination was conducted by one Dr. Shyamal Lahiri (P.W.19).

On the basis of the materials collected in course of the investigation, the case which was originally registered under section 365 IPC. was converted into a case of murder and further investigation was carried on. The investigation revealed that on 16th November, 1999, the said jeep bearing no. WB-73/5354 had crossed Melli Check Post which is a border between Sikkim and West Bengal at 1320 hours and had proceeded towards Jorethang. The investigation further revealed that on the same day in the night, the deceased Binod Diyali reached Yuksom Check Post in the same jeep accompanied by one B. Tshering Bhutia (P.W.21), P. B. Rai (P.W.20), Saran Kr. Tamang, I/C Reshi out-post (P.W.25), Krishna Bdr. Chettri, I/C Legship out-post (P.W.11). The deceased had taken the persons accompanying him for assistance in securing release of the seized gas cylinders from the accused no.1 who was the I/C at Yuksom Police out-post at the relevant

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time. However, the deceased and his party failed to get the release of the gas cylinders that evening. The accused no.1 told the deceased to come on the next day saying that he will release the cylinders and will also avail of the same transport for going to his house as he was proceeding on leave. As told by the accused no.1, the deceased again reported at Yuksom Police out-post on the next day, i.e., 17th November, 1999. On that day, the accused no.1, Milan Kumar Diyali and the accused no.2 driver Simon Biswakarma were last seen together with the deceased Binod Diyali at Legship in a jeep proceeding towards Jorethang.

3. After completing the investigation, the I.O. filed charge-sheet against both the accused-respondents under sections 302/201/34 IPC for their trial. On committal of the case to the Court of Sessions, the learned Sessions Judge (South & West) having found sufficient material framed charges against both the accused-respondents under sections 302/201/34 IPC.

4. The accused-respondents did not plead guilty and claimed trial.

5. The learned trial Court on going through the materials on record and on hearing the submissions made by the Public Prosecutor as well as the defence counsel

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came to the conclusion that several links were missing from the chain of circumstances and as such, the circumstantial evidence fell short of proving the charge against the accused-respondents. It was observed that the theory of last seen together put forward by the prosecution was vague and there was no satisfactory explanation as to how the accused-respondents can be connected with the crime. Accordingly, the learned Court was of the view that the circumstantial evidence on which the prosecution case was based was too shaky, suspicious and fragile to furnish a sound foundation for conviction of the accused persons and acquitted both of them.

Aggrieved by this order of acquittal, the Government has come up in the present appeal.

6. Mr. J. B. Pradhan, learned Public Prosecutor for the appellant. Mr. A. Moulik, Senior counsel assisted by Mr. N. G. Sherpa, learned counsel for the respondent no.1 and Mr. N. Rai assisted by Ms. Jyoti Kharka, learned counsel for the respondent no.2 were heard.

7. Admittedly, there is no eye-witness to the occurrence and as such, the case of the prosecution is based on circumstantial evidence. It was the submission of the learned Public Prosecutor appearing before this Court in this appeal that the learned trial Court had failed

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to appreciate the prosecution evidence in the proper perspective and thereby arrived at wrong conclusion that the prosecution evidence is too shaky, suspicious and fragile to furnish the sound foundation for conviction of the accused-respondents. In support of his submission, the learned Public Prosecutor contended that if the learned trial Court had meticulously examined the depositions of P.Ws. 1, 7, 8, 9, 10, 11, 14, 17, 19, 32, 35 and 40 and also of the P.Ws. 4, 21, 22, 24 to 29 and 37 who had turned hostile, the learned trial Court would have found that the facts proved by these witnesses provides a complete chain for sustaining the charge against the accused-respondents. The learned counsel for the defence, on the other hand, supported the impugned judgment and order and submitted that the same did not suffer from any illegality and no interference of this Court was called for.

8. In order to appreciate the above contention raised by the learned Public Prosecutor it would be necessary to closely examine the depositions of the witnesses named by him.

P.W.1 is Tika Ram Gurung. He is a police constable who was on duty at Melli check post, South Sikkim on the relevant day. He has stated that on 16th November, 1999 he was on duty at Melli check post. At about 1320 hrs. a



commander jeep bearing registration no.WB-73/5354 passed through the said check post. According to him, there was only one passenger besides the driver and the vehicle was said to be coming from Kalimpong.

P.W.7 is one Pintu Agarwal, the brother of one Sanjay Agarwal who is the proprietor of the firm "Tripti Steel Traders" located at 3rd Mile, Sevoke Road, Siliguri. He stated that on 16th November, 1999 he deputed the deceased, Milan Kumar Diyali to go to Yuksom, West Sikkim to collect the gas cylinders which they had sent there earlier and also giving him Rs.10,000/- to meet necessary expenses for the purpose. However, the deceased failed to return in time. For about a week, they were not worried because it was a part of his duty to go out and remain out of station for days together in connection with his duties. When the deceased failed to return for a period exceeding one week they got worried and started making enquiries as to the means of transport he availed of at the time of departure. The enquiry so made by him revealed that the deceased had hired the vehicle bearing registration no.WB-73/5354 belonging to one Promod Kamti. The said vehicle was driven by Simon Biswakarma, accused no.2. On coming to know about such particulars, he deputed Suresh Verman (P.W.6) on

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26th and 27th November, 1999 to find out the whereabouts of the said vehicle and to get the driver of the vehicle to him. On 1st December, 1999, he filed a missing report in respect of the deceased with Bhakti Nagar Police Station at Siliguri and on 9th December, 1999 he also filed a similar missing report with Gyalshing Police Station, West Sikkim. Thereafter on 16th December, 1999 one Ashok Kumar Kamti (P.W.10), son of the owner of the vehicle Promod Kamti brought the accused no.2 to his place and informed him that he was the person who had driven the vehicle on the day when the deceased had left for Yuksom. When he asked the accused no.2 about the whereabouts of the deceased the accused no.2 told him that the deceased was no more as he was shot dead by the accused no.1 on 17th November, 1999 and his dead body was thrown into the river Teesta and he himself managed to escape with great difficulty. According to him one Anil Khati (P.W. 8) who is a relation of the deceased was present with him when the accused no.2 made the above statement to him. On hearing this, Anil Khati (P.W.8) volunteered to get some more relatives and to proceed to Gyalshing taking the accused no.2 with them.

The said Anil Khati was examined as P.W.8. He deposed that on 16th November, 1999 the accused no.2

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who had come to "Tripti Steel Traders" on being sent by the owner of the vehicle in question informed them that the accused no.1 shot dead the deceased on way to Sakbari and the dead body was thrown into river Teesta at Likhu Bhir. On such disclosure statement made by the accused no.2, they proceeded to Gyalshing on the same day and conducted search for the dead body of the deceased. Ultimately, on 24th December, 1999 they found the skeletal remains of the dead body of the deceased at the bank of river Teesta at a place near Hanuman Mandir between Teesta and Siliguri. They could recognise the skeletal remains to be that of the deceased from his wearing apparels. On finding the skeletal remains of the deceased, they informed Kalimpong and Gyalshing Police Stations in the same evening. On the next day, i.e., 25th December, 1999, the Kalimpong police came and conducted the inquest and prepared the inquest report on which his signature was obtained as a witness. Thereafter, the skeletal remains of the dead body was sent to the Department of Forensic and State Medicine, North Bengal Medical Hospital for post-mortem examination.

P.W. 10, Ashok Kumar Kamti is the owner of the jeep bearing registration no. WB-73/5354 standing recorded in the name of his father Promod Kamti. According to him,

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on 16th November, 1999 the deceased came to his shop and asked for his vehicle for two days on hire to go to Gyalshing, West Sikkim. Since his father was a-way in Bihar at that time and his driver Govind was also on leave due to ailment of his wife, he engaged Simon Biswakarma, accused no.2 to drive the vehicle for a period of two days. The fare was fixed @ Rs.800/- per day. Accordingly, on 16th November, 1999 the deceased left for Gyalshing in the said vehicle at about 11 a.m./12 noon. The vehicle returned on the next day, i.e., 17th November, 1999 at about 10/10.30 p.m. and the accused no.2 who was engaged to drive the vehicle handed over the vehicle along with a sum of Rs.1600/-. Thereafter, one Bed Babu from the office where the deceased was working came and enquired as to when the vehicle had returned from Sikkim. He informed that the vehicle which had left for Sikkim on 16th November, 1999 had returned back on 17th November, 1999 at about 10/10.30 p.m. The said person requested him to send the person who had driven the vehicle on that day to the office of the said Bed Babu. Accordingly, when he happened to meet the accused no.2 who had driven the vehicle after about 15 days he took him along with him to the office of Bed Babu. When Bed Babu asked the accused no.2 about the whereabouts of

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the deceased the accused no.2 informed him that the deceased died out of gun shot injury inflicted by one officer of Sikkim Police on their way back and the dead body was thrown into the river Teesta.

P.W. 11, ASI K. B. Chettri deposed that on 16th November, 1999 at about 8 p.m. one B. Tshering Bhutia (P.W. 21) and his friend P. B. Rai alias Gorkhey (P.W. 20) and ASI Saran Kumar Tamang (P.W.25), I/C Reshi out-post joined him in Bury hotel at Legship when he was having some beer. At that time, the said B. Tshering told him that some scrap materials belonging to the deceased were seized by I/C Yuksom out-post and they need his help for securing the release of the same. Accordingly, he accompanied them and reached Yuksom at about 10.15 p.m. in a white hard top commander jeep. After reaching Yuksom, he along with B. Tshering, ASI Saran Kumar Tamang, Gorkhey proceeded to the house of the accused no.1, Milan Kumar Diyali, the then I/C of Yuksom out-post while the deceased Binod Diyali and his driver stayed back in the jeep. At the residence of accused no.1 they had some whisky and beer which was carried by B. Tshering and at about 1/1.30 a.m. on the following day, i.e., 17th November, 1999 they all returned to Legship and dispersed to their respective houses. At about 2/3 p.m.

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the same afternoon he again went to the said Bury hotel for a cup of tea. When he was having his tea in the said hotel the deceased Binod Diyali and accused no.1 came into the room and had a glass of beer each. Thereafter they left the hotel. While leaving the accused no.1 told that he had taken 15 days leave and he was in a hurry and saying so they proceeded towards Jorethang side.

P.W. 14 is Writer Constable Deo Narayan Rai. According to him, the accused no.1 had taken leave for a period of 15 days with effect from 15th November, 1999. While proceeding on leave the accused no.1 handed over the charge to him duly making G.D. entry in the out-post, however, the accused no.1 being unwell stayed back at Yuksom till 17th November, 1999 and on that day he left in the white commander jeep bearing West Bengal registration number.

P.W.32 is one Damber Bdr. Khatiwara, a constable posted in the Ammunition branch at Pangthang S.A.P. Headquarter at the relevant time. His duties in the office were to receive and issue ammunitions on the direction of the Commanding Officer of the S.A.P. and Battalion Quarter Master of S.A.P. On 15th September, 1999 his in-charge Naik Sonam Tashi Subba attached to the said office issued 12 rounds .38" ammunitions to A.S.I. Milan Kumar

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Diyali, the accused no.1 who was then I/C of Yuksom out-post for his personal use under I.R. no.289 and the same was received by the accused no.1 himself.

P.W. 35, Rajdeep Darnal is an electrician by profession who lives near the house of Babloo Choudhury at Ashram Para, Siliguri and who was present there when the weapon of offence was seized. Accordingly to him, on 20th December, 1999 the accused no.2 who had come there along with Sikkim Police told the police that he can take out the revolver from the room of Babloo Choudhury. At the relevant time Babloo Choudhury and his elder brother Ashok Chowdury were not present in the residence. In the meantime, Punam Choudhury (P.W. 37), wife of Ashok Choudhury came down from upper floor and opened the room of Babloo Choudhury as required by the police. When the room was opened the accused no.2 went inside the room and took out the revolver from inside the sound box (speaker) and the same was seized by the police in his presence and in presence of one Philip Orchard (P.W.9) under seizure memo Exhibit P-5.

P.W. 40, N. P. Waghmare is the Senior Scientific Officer (Ballistics) C.F.S.L., Calcutta. He deposed that on 14th February, 2000 he had received one wooden box (sealed) per messenger from the Senior Superintendent of

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Police, Crime Branch, CID, Gangtok in connection with case no.76(12)99 dated 12th December, 1999, P.S. Gyalshing, West Sikkim under section 365 IPC. The said wooden box was sealed with the impression of a seal corresponding with seal impression forwarded to their office separately. The said sealed wooden box contained one regular hand gun (revolver) bearing serial no.A-31673 (Webly made in England). After conducting necessary examination, he found that the hand gun marked Exhibit No.A is a fire arm being a regular .380" caliber revolver and was in normal working condition and it was capable of chambering and firing .380" caliber regular cartridge. It was also found on a chemical examination of the barrel of the revolver that the said revolver was fired before it was received in the laboratory. However, it was not possible to ascertain the exact time of last firing.

P.W. 17 is Naik Santa Bir Darnal. He stated that he was posted in the Armed Section as in-charge at Pangthang Armed Police Headquarter. On 15th September, 1999, he issued one arm, namely, Revolver Webly and Scot of .38" caliber to the accused no.1 under the instruction of his superior officer.

P.W. 19 is Dr. Shyamal Kumar Lahiri who was posted as Associate Professor, Forensic and State Medicine

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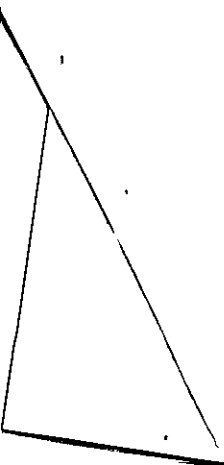
Department, North Bengal Medical College, District Darjeeling. At the relevant time on 25th December, 1999 a dead body was received at NBMC Morgue referred by Kalimpong Police Station vide their U.D. case no.84/99 dated 25th December, 1999 and he performed post-mortem examination over the said dead body. According to him, the dead body was a highly decomposed and was said to be of one Binod Diyali, male 27 years, brought and identified by HG J. Thapa and HG J. Bhutia of Kalimpong Police Station. On examination of the dead body he found the following injuries:-

- "1. Evidence of fracture of nasal bones with punched in appearance at the side of entry with short margins of the outer wall of bones of the nose and bevelling the margins of inner table - wound of entry of gun shot wound.
2. Evidence of sutural fracture of temporal bone on right side with red colour at margins. Both injuries show sings of vital reaction. No other injury either external or internal could be detected even on careful examination and dissection."

Further, the witness deposed that the dead body being highly decomposed was almost reduced to skeleton and he noted the following features in addition to the above injuries:-

"Scalp missing. Skull as noted. Vertebrae postmortem separation. Membrane missing. Brain and spinal cord missing. Chest was missing. Ribs cartilages present. Postmortem

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separation. Pleurae missing. Larynx and trachea missing hyonid bone intact. Right and left lungs small mass present. Pericardium, heart, vessels missing. Abdomen walls missing. Perteneum, mouth pharynx, oesophagus, stomach all missing. Intestines soft, fleshy mass. Lever, spleen, kidneys, bladder, organs of generation soft fleshy mass. Injury as noted. Fracture as noted. Sample of clotted blood, portion of soft tissues sent to Forensic Science Laboratory through local police."

On the basis of the above finding, the following opinion was given:-

"Death was due to the effects of gun shot injury described above antemortem and homicidal in nature. This postmortem report is prepared by me and it bears my signature. Exhibit P-8 is the postmortem report and exhibit P-8/a is my signature. Exhibit P-9 is the challan under which the dead body was sent by Kalimpong Police Station to the NBMC."

P.W. 9 is Philip Orchard who is a resident of Ashram Para, Siliguri where he lives in a rented house belonging to Babloo Chowdury. According to him, on 20th December, 1999 at about 8.30 p.m. Sikkim Police and Police personnel from Bhakti Nagar Police Station, Siliguri came to the residence of Ashok Choudhury, brother of Babloo Choudhury. At that time, the residence of Babloo Choudhury was locked up but in the meantime, Mrs. Punam Choudhury, wife of Ashok Choudhury came and opened the lock. Thereafter, the police made a search in the house and in course of the search the culprit himself took out the revolver from inside the sound box and



handed over the same to the police. The revolver was seized by the police in his presence and he signed the seizure memo as an eye-witness.

P.W. 39 is Kalidas Ghosh, the Officer-in-Charge of Mal Police Station, District Jalpaiguri. He stated that on 20th December, 1999 at about 1830 hrs. DSP Crime CID Sikkim Police came to Bhakti Nagar Police Station accompanied by some police officer and police personnel and Simon Biswakarma, accused no.2. They told him that they wanted to conduct a search of the house of one Babloo Choudhury of Ashram Para within the jurisdiction of Bhakti Nagar Police Station. Since most portion of Ashram Para falls under the jurisdiction of Siliguri Police Station he directed the police party to go to Siliguri Police Station. After necessary verification they came to him and told him that the house of said Babloo Choudhury falls under Bhakti Nagar Police Station. When he asked the accused no.2 he told him that he would be able to recover the weapon of offence from the house of Babloo Choudhury where he had kept himself in a small box. He made this disclosure statement in his presence and also in the presence of Sikkim Police personnel. Thereafter, they proceeded to Ashram Para taking with them the said accused no.2. On reaching Ashram Para, they found the house of Babloo

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Choudhury under lock and key. On their request one lady opened the door and they entered the room along with local persons. In their presence accused no.2 took out one Webly Scot revolver from a small box which was seized by DSP Crime, CID in presence of witnesses.

9. All the above witnesses have been subjected to cross-examination by the defence but no contradiction has been brought out in case of any of the witnesses which could make their testimony unworthy of credence. Hence, we find the evidence of all the P.Ws. as narrated above, taken together with other available materials on record, sufficient to prove the following facts:-

- (i) that the deceased who was an employee working as Manager in "Tripti Steel Traders" owned by one Sanjay Agarwal on being deputed by Pintu Agarwal (P.W.7), brother of Sanjay Agarwal left Siliguri for Yuksom on 16th November, 1999 for the purpose of securing the release of gas cylinders from the accused no.1 who was the in-charge of Police out-post Yuksom with the amount of Rs.10,000/- given to him to meet the expenses;
- (ii) that the deceased hired a white commander jeep bearing registration no.WB-73/5354 belonging to one Promod Kamti of Siliguri and left in the same jeep being driven by

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accused no.2 who was engaged by Pintu Agarwal (P.W.7);

- (iii) that the said vehicle on its way to Yuksom crossed Melli Check Post at 1320 hrs. on 16th November, 1999 and the deceased accompanied by one B. Tshering Bhutia (P.W.21), P. B. Rai (P.W.20), Saran Kr. Tamang, I/C Reshi out-post (P.W.25), Krishna Bdr. Chettri, I/C Legship out-post (P.W.11) reached Yuksom Police out-post in the night at about 10/10.30 p.m. on the same day;
- (iv) that on reaching Yuksom the deceased and his accompanying party met the accused no.1 who was the in-charge of Yuksom out-post at the relevant time in his residence and during the meeting they had some beer and some whisky till late night and the deceased and his party returned to Legship around 1/1.30 a.m. and dispersed to their respective places;
- (v) that on the next day, i.e., on 17th November, 1999 the deceased again reported at the Yuksom Police out-post and the accused no.1 along with the deceased left Yuksom in the forenoon and crossed Legship around 2/3 p.m. where they were seen together for the last time;
- (vi) that the deceased was not seen thereafter and his highly decomposed dead body in the form of skeletal remains was recovered from

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the bank of river Teesta after 38 days after a vigorous search following the statement made by the accused no.2;

- (vii) that the nasal bone of the dead body was fractured and showed gun shot injury;
- (viii) that the revolver which was issued to the accused no.1 by the department for his official use was recovered from the bed room of one Babloo Choudhury on the basis of disclosure statement made by the accused no.2.

10. The question is whether the above pieces of circumstances established by the evidence on record only point towards the guilt of the accused-respondents. The submission of the learned counsel for the accused-respondents is that the circumstances established by the prosecution do not form complete chain so as to implicate the accused-respondents in the alleged crime. It was further submitted that the circumstances proved by the prosecution only raise strong suspicion. Relying on several decisions of the Apex Court reported in Padala Veera Reddy vs. State of Andhra Pradesh and others AIR 1990 SC 79, Jaharlal Das vs. State of Orissa (1991) 3 SCC 27 and Ashish Batham vs. State of Madhya Pradesh 2002 CRI.L.J. 4676, the learned counsel submitted that

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according to the law laid down in these decisions suspicion however strong cannot take the place of proof.

11. The law regarding circumstantial evidence is well-established by a catena of decisions of the Apex Court.

In *Gambhir vs. State of Maharashtra* reported in AIR 1982 SC 1157, the Apex Court observed as follows:-

“..... The law regarding circumstantial evidence is well settled. When a case rests upon the circumstantial evidence, such evidence must satisfy three tests: (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (3) the circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.”

In *Padala Veera Reddy's case (supra)*, it has been laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

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



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

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of guilt of the accused but should be inconsistent with his innocence."

In the case of Kishore Chand vs. State of Himachal Pradesh AIR 1990 SC 2140, it has been observed as follows:-

"..... It is necessary to distinguish between facts which may be called primary or basic facts on one hand and inference of facts to be drawn from them, on the other. In regard to the proof of basic or primary facts, the Court has to judge the evidence in the ordinary way and in appreciation of the evidence in proof of those basic facts or primary facts, there is no scope for the application of the doctrine of benefit of doubt. The Court has to consider the evidence and decide whether the evidence proves a particular fact or not. Whether that facts leads to the inference of the guilt of the accused or not is another aspect and in dealing with this aspect of the problem, the doctrine of benefit would apply and an inference of guilt can be drawn only if the proved facts are inconsistent with the innocence of the accused and are consistent only with his guilt."

To the above catena of decisions, we may add with advantage one more decision of the Apex Court rendered in Mohibur Rahman and another vs. State of Assam



reported in (2002) 6 SCC 715. Paragraph 3 of the judgment which contains the relevant observation is as follows:-

"3. It is well settled by a catena of decisions of this Court that in order to find conviction on circumstantial evidence each of the incriminating pieces of circumstantial evidence should be proved by cogent and reliable evidence and the court should be satisfied that the proved pieces of circumstantial evidence taken together forge such a chain wherefrom no inference other than of guilt can be drawn against the accused person or, in other words, the proved pieces of circumstantial evidence should not be capable of being explained on any hypothesis other than the guilt of the accused. "

12. The above decisions make it clear that in order to base a conviction on circumstantial evidence the first requirement is the establishment of primary or basic facts and the second requirement is that the proved pieces of circumstances taken together must forge such a chain from which no inference other than the guilt of the accused can be drawn. The circumstances which stand proved by the evidence on record in this case have already been enumerated above. Having thus found that the circumstances noted above stand proved by the evidence on record the question, as already noted above, is whether the above established circumstances taken cumulatively form a complete chain and whether they are of definite

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tendency unerringly pointing towards the guilt of the accused-respondents.

13. Before considering the question as to whether the basic facts established by evidence on record lead to the only inference that the accused-respondents have committed the crime, it is desirable to consider as to how satisfactorily the accused-respondents have been able to explain the inculpatory circumstances appearing against them in the evidence. The record of examination of both the accused-respondents done under section 313 Cr.P.C. goes to show that both the accused-respondents have either denied or pleaded ignorance about the inculpatory circumstances in their answer to all the questions put to them. The denial or ignorance pleaded goes to such an extent that the accused no.1 has denied knowledge of the revolver that was issued to him by his department for his official use, the 15 days leave sanctioned on his application, the date and the time he travelled together with the deceased. Similarly, the accused no.2 has denied that he had driven the vehicle no.WB-73/5354 for which he was engaged. Further, he pleaded ignorance even to the fact of his taking out of the revolver by him from the bed room of one Babloo Choudhury where the police party

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had taken him on the basis of the disclosure statement made by him.

14. The answer given by both the accused-respondents to all the questions put to them therefore appear to be contrary to the materials on record and as such not correct. Hence, adverse inference against both the accused-respondents is warranted in the circumstances of the case for giving false answers to the questions regarding facts which are established on the basis of evidence on record.

15. In the case of Mani Kumar Thapa vs. State of Sikkim reported in (2002) 7 SCC 157 the Hon'ble Supreme Court has held that where the accused gives false answers to the questions under section 313 Cr.P.C, the Court will have to proceed on the basis that the accused has not explained the inculcating circumstances established by the prosecution against him and such failure to explain would form an additional link in the chain of circumstances. In State of Maharashtra vs. Suresh reported in (2000) 1 SCC 471, the Hon'ble Supreme Court has held that a false answer offered by the accused when his attention was drawn to any inculcating circumstance would render such circumstance as capable of inculcating him. In such a situation, it was further held, that a false answer can also

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be counted as providing "a missing link" in completing the chain. To the similar effect are the observations of the Apex Court in Mohibur Rahman's case (supra). It has been held in that case that accused's failure to offer any reasonable explanation of any of the inculpatory circumstances would be sufficient to conclusively point to the commission of the alleged offence by the accused.

16. In the present case, both the accused-respondents have failed to explain the inculpatory circumstances appearing against them and applying the above principle to the facts of the case such failure of accused-respondents to offer reasonable explanation of the incriminating circumstances must be taken as providing additional link in the chain of circumstances.

17. However, it has to be noted that the evidence on record does not stand on the same footing against both the accused-respondents. ASI K. B. Chettri (P.W.11) who had seen the accused no.1 and deceased together for the last time at Legship has not named the accused no.2. His relevant statement is as follows:-

"At about 2/3 p.m., I again went to the Bury hotel for a cup of tea. In the meantime, accused no.1 and the deceased Binod Diyali came into the room and had a glass of beer each. Thereafter accused no.1 said that he has taken 15 days leave and he was in a hurry to proceed and along with the deceased he left the

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hotel and to my knowledge they must have left towards Jorethang.”

Since the above statement makes no mention of the name of the accused no.2 the theory of last seen together would be applicable to the case of accused no.1 only.

The observation of the learned trial Court regarding the evidence of last seen together in paragraph 66 of the impugned judgment is as follows:-

“66.
..... I agree with the learned defence counsel that the theory of last seen together which was tried to demonstrate by the prosecution is vague. The place called Legship (West Sikkim is not less than 70 to 80 KMs. away from the place where the dead body (said to of the deceased) was recovered. Legship is in the State of Sikkim whereas place where the dead body was recovered is in the State of West Bengal. Thus there is no satisfactory explanation as to how the accused person can be connected with the crime as alleged.”


18. It is clear from the above that the learned trial Court has attached too great an importance to the fact of the recovery of the dead body. It is settled law that recovery of dead body is not mandatory to convict an accused where other evidence is clinching. It has been held by the Hon'ble Supreme Court in Bhagwan Singh and another vs. State of Punjab with Uttam Chand vs. State of Punjab reported in (1992) 3 SCC 249 that a case cannot be thrown out merely on the ground that the dead body is



not traced when the other evidence clinchingly establishes that the deceased met his death at the hands of the accused. The Hon'ble Supreme Court in Mani Kumar Thapa's case (supra) has observed as follows:-


"In a trial for murder, it is neither an absolute necessity nor an essential ingredient to establish corpus delicti. The fact of the death of the deceased must be established like any other fact. Corpus delicti in some cases may not be possible to be traced or recovered. There are a number of possibilities where a dead body could be disposed of without a trace. Therefore, if the recovery of the dead body is to be held to be mandatory to convict an accused, in many a case the accused would manage to see that the dead body is destroyed which would afford the accused complete immunity from being held guilty or from being punished. Therefore, to base a conviction for an offence of murder what is required in law is that there should be reliable and plausible evidence that the offence of murder like any other factum of death was committed and it must be proved by direct or circumstantial evidence albeit the dead body may not be traced."

19. Therefore, the settled law being that recovery of the dead body is not mandatory to convict an accused where other evidence is clinching, the conclusion arrived at by the learned trial Court that the circumstantial chain in the case is rendered incomplete mainly on account of the doubtful nature of the recovery and identification of the dead body cannot be accepted as legally sound.



20. No doubt, as per material on record the place where the accused no.1 and the deceased were last seen together falls in a place called 'Legship' in West Sikkim and whereas the place where the dead body was recovered falls in West Bengal and is about 70-80 kms. away as per the learned trial Court. There is, however, nothing in evidence to indicate that the dead body was immediately thrown into the river after the deceased died of gun shot injury on way to Sakbari which falls in Sikkim. On the contrary, the statement of accused no.2 which was made by him in presence of P.Ws. 7, 8 and 10 shows that the dead body was thrown into river Teesta from a place called Likhu Bhir in 31A National Highway. This shows that after the deceased died of gun shot injury inflicted by the accused no.1 the dead body was brought all along to river Teesta and thrown into it at Likhu Bhir at 31A National Highway. It is true that the place from where the dead body was recovered is located again away from Likhu Bhir but then notice must be taken of the fact that the dead body was thrown into a flowing river and it will be unreasonable to expect the dead body to be in the same place and spot where it was thrown after 38 long days.

Hence, we find ourselves unable to agree with the observation of the learned trial Court that the theory of





last seen together established by the evidence on record is vague on account of the above anomaly noticed by it. We thus accordingly hold that the theory of last seen together is established by the evidence on record in respect of the accused no.1.

21. Now, it is to be noted that once the fact of such last seen together is proved a duty is cast on the accused to explain the circumstances in which they parted company and where the accused fails to explain the circumstances the same would form an additional link in the chain of circumstances. This becomes clear from the law laid down by the Apex Court in Sahadevan alias Sagadevan vs. State represented by Inspector of Police, Chennai reported in (2003) 1 SCC 534 referred to and relied on by Mr. J. B. Pradhan, the learned Public Prosecutor. It has been held in that case that if the prosecution on the basis of reliable evidence establishes that the missing person was last seen in the company of the accused and was never seen thereafter it is obligatory on the accused to explain the circumstances in which the missing person and the accused parted company. This is on the principle that a person who is last found in the company of another, if later found missing then the person with whom he was last found has to explain the

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circumstances in which they parted company and if he fails to do so the same has to be taken as supplying missing link in the chain of circumstances.

Hence, if the failure of the accused no.1 to give reasonable explanation of the inculpatory circumstances during his examination under section 313 Cr.P.C. particularly his failure to explain the circumstances in which he parted company with the deceased are to be taken as supplying missing link in the chain of circumstances, which one must as per the decisions cited above, it can hardly be said in the present case that there is break in the chain of circumstances in so far as the case against the accused no.1 is concerned.

Consequently, if the basic facts which have been shown as established by the evidence on record coupled with failure of the accused no.1 to satisfactorily explain the inculpatory circumstances appearing against him are viewed in the light of the law laid down in the above decisions the irresistible conclusion that follows would be that in all human probability the deceased met his death at the hands of the accused no.1.

22. Of course, the submission made by Shri A. Moulik, the learned counsel for the accused-respondent no.1 is to the effect that on the facts established in the

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case two conclusions are possible thereby suggesting that the chain of circumstances in the case is not only suggestive and conclusive of the commission of the alleged offence by the accused-respondents but is also compatible with their innocence. In such a situation, it was submitted by the learned counsel that, the view which is favourable to the accused has to be taken as per the law laid down by the Apex Court in Shingara Singh vs. State of Haryana with Suba Singh vs. State of Haryana and others 2004 CRI.L.J. 828 and Ayodhya Singh vs. State of Bihar and others reported in AIR 2005 SC 1022. No doubt, these decisions lay down that where two views are reasonably possible on the basis of the evidence on record the one that favours the accused must be accepted. But as we have already noted above, the circumstances proved by direct evidence in the case at hand coupled with the failure of the accused no.1 to give reasonable explanation of the inculpatory circumstances completes the chain of circumstances from which there can be no escape from the conclusion that in all human probability it was the accused no.1 who put the deceased to death.

In view of the above, the circumstantial evidence on record has to be taken to be sufficient to substantiate the

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charge of murder under section 302 IPC with which the accused no.1 stands charged.

23. Now, so far as the case against the accused no.2 is concerned, the additional evidence against him on the record consist of the statement made by him expressing knowledge of the incident and also of concealing the weapon of offence. These statements have been duly proved by P.Ws. 7, 8, 9, 10, 35 and 39. While P.Ws. 7, 8 and 10 testified about the statement made by the accused no.2 regarding murder of the deceased the P.Ws. 9, 35 and 39 have deposed about the disclosure statement made by the same accused that led to recovery of the weapon of offence at his instance. The evidence of these witnesses is to the following effect:-

P.W.7 Pintu Agarwal stated that when he asked the accused no.2 about the whereabouts of the deceased he told him that the deceased was no more as he was shot dead by the accused no.1 on 17th November, 1999 and his dead body was thrown into river Teesta and he himself managed to escape with great difficulty. Anil Khati, P.W.8 stated that on 16th November, 1999 the accused no.2 who had come to "Tripti Steel Traders" on being sent by the owner of the vehicle informed them that the accused no.1 had shot dead the deceased on way to Sakbari and the



dead body was thrown at river Teesta at Likhu Bhir. P.W.10, Ashok Kumar Kamti stated that when he had taken the accused no.2 to Bed Babu as required by him the accused no.2 told the said Bed Babu that the deceased died out of gun shot injury inflicted by one officer of Sikkim Police on their way back and the dead body was thrown into the river Teesta.

24. The above statements relate to the fact of commission of murder of the deceased by the accused no.1. However, it is the submission of Shri N. Rai, the learned counsel for the accused-respondent no.2 that the statement of accused no.2 though duly proved cannot be taken as confessional statement in so far as the statement made is exculpatory and as such, it is not admissible. In support of the submission, the learned counsel referred to and relied on the decisions reported in Kunnummal Mohammed and another vs. State of Kerala AIR 1963 Kerala 54, Smt. Basanti vs. Prabhu and State of Himachal Pradesh vs. Assoo alias Aso Ram (1987) 3 SCC 227, Virender Kumar Yadav and Mukhtiar Yadav alias Mukho Yadav alias Raju vs. State 1996 CRI.L.J. 231, Maharaj Deen and another vs. State 1996 CRI.L.J. 506, Sukhvinder Singh vs. State of Punjab 1996 CRI.L.J. 632, Pralhad Dyanoba Gajbhiye vs. State 1996 CRI.L.J. 2558 and

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Bharat vs. State of M.P. AIR 2003 SC 1433. All these decisions relate to admissibility and reliability of confessional statements and lay down, *inter alia*, that extra-judicial confession of co-accused cannot be used so as to make it a basis of conviction in respect of another accused who has not made any confessional statement before any witness.

We thus find no fault with the observation of the learned trial Court in the impugned judgment that the statement of the accused no.2 can neither be termed as confessional statement nor can the same be categorized as the statement of the witness or an approver. Therefore, the statement of accused no.2 even if true can neither be taken against accused no.1 nor can the same be used against the maker of it, i.e., the accused no.2.

25. However, the statements of the other witnesses, namely, P.Ws. 9, 35 and 39 regarding the concealment of the revolver Exhibit P-1, i.e., the weapon of offence and its recovery at the instance of the accused no.2 stand on a different footing. The relevant statements are as follows:-

P.W.9 Philip Orchard who is one of the attesting witnesses deposed that on 20th December, 1999 when the police personnel from Bhakti Nagar Police Station, Siliguri



came to the residence of Ashok Choudhury, brother of Babloo Choudhury at about 8.30 p.m. and conducted search the culprit himself took out the revolver from inside the sound box and handed over the same to the police. The revolver Exhibit P-1 was seized by the police in his presence and he signed the seizure memo Exhibit P-5 as an attesting witness. P.W.35 Rajdeep Darnal another attesting witness who was present on the spot during the seizure of the weapon of offence stated that on 20th December, 1999 the accused no.2 had come to the residence of Babloo Choudhury along with the Sikkim Police. At that time the accused no.2 told the police that he can take out the revolver from the room of Babloo Choudhury. When the room was opened the accused no.2 went inside the room and took out the revolver Exhibit P-1 from inside the sound box (speaker) which was seized by the police in his presence and in presence of one Philip Orchard (P.W.9) under seizure memo Exhibit P-5. P.W. 39, Kalidas Ghosh who is Officer-in-Charge of Mal Police Station, District Jalpaiguri and who had accompanied Sikkim Police to the residence of Babloo Choudhury stated that when he asked the accused no.2 he told him that he would be able to recover the weapon of offence from the house of Babloo Choudhury where he had concealed in a

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small box. Thereafter when they proceeded to the house of the said Babloo Choudhury where the accused no.2 took out one Webley and Scot revolver Exhibit P-1 from a small box and the same was seized by the DSP Crime, CID.

26. The above evidence which is clearly admissible under section 27 of the Evidence Act makes it clear that the accused no.2 had concealed the weapon himself and it was on account of the information given by him that the police led him to that place and he himself recovered the weapon. On a perusal of the evidence of the above witnesses, we find no infirmity whatsoever with recovery of this weapon at the instance of accused no.2. We are at a loss to understand as to how the learned trial Court expressed doubt about the recovery of the weapon of offence. The reason as put forward by the learned trial Court is that Kalidas Ghosh (P.W.39) who is a police witness was the only witness who had deposed about the recovery of the weapon and no other person had come with a clear and cogent evidence about the identity of the accused no.2 and the identity of the revolver itself. We have gone through the evidence of relevant witnesses and find no basis for such observation and conclusion. It is clear from the evidence narrated above that P.W.39 Kalidas Ghosh is not the only witness who had deposed

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about the disclosure statement of the accused no.2 and the consequent recovery of the weapon by accused no.2. The two witnesses, namely, Philip Orchard (P.W.9) and Rajdeep Darnal (P.W.35) have very clearly stated that the accused no.2 made the disclosure statement and when he was taken to the place where he had concealed the weapon of offence he himself took out the same. Both of them as also P.W. 39 Kalidas Ghosh had been cross-examined by the defence but nothing has been extracted to discredit these witnesses. A perusal of the statement made in their cross-examination shows that all the witnesses stuck to their statement in examination-in-chief. Philip Orchard (P.W.9) confirmed his statement-in-chief by stating that "I only saw the culprit taking out one revolver from inside the sound box and taking the same". Similarly, the other witness Rajdeep Darnal (P.W.35) has denied the suggestion that the accused no.2 did not take out the revolver. He stated "it is not a fact that the accused no.2 did not take out revolver from inside the sound box". The stand taken by Kalidas Ghosh (P.W. 39) the police personnel is not different. He has not deviated from the statement that the accused no.2 made the disclosure statement before him and accordingly recovered the revolver when taken to the place where he had



concealed the same. He categorically denied the suggestion that the accused no.2 did not make the disclosure statement and stated that "it is not true that the accused no.2 did not make disclosure statement to me".

27. It, therefore, follows that the above evidence taken together with other proved circumstances on record is sufficient to substantiate that the accused no.2 knowing that an offence punishable with death had been committed concealed the weapon of offence in the residence of Babloo Choudhury and, therefore, the offence of causing disappearance of evidence of offence with which he has been charged must be held to have been proved against him by evidence on record.

28. In view of the above discussions, observations and the conclusions, we are not inclined to accept the impugned judgment and order of acquittal recorded by the learned Sessions Judge (South & West) acquitting both the accused-respondents. Accordingly, the appeal is allowed and the impugned judgment and order are set aside.

29. As a result, the accused no.1 is found guilty of the offence of murder under section 302 IPC and the accused no.2 is found guilty of the offence of causing disappearance of evidence of offence punishable with death under section 201 IPC.

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Accordingly, both of the accused-respondents stand convicted under the sections of law mentioned against each of them.

30. As regards sentence, we propose to hear both the accused-respondents before we pass any sentence. This appeal may accordingly be listed for hearing on the question of sentence on 11th August, 2005.


In the meantime, the bail bond of the accused-respondent no.1 is cancelled in view of his conviction. He be taken into custody.

Registry is directed to issue custody warrant.

Both the accused-respondents are to be produced before this Court on 11th August, 2005 for hearing on sentence.

Issue production warrant in respect of both the accused-respondents.

Announced in the Open Court.


(A. P. Subba)
Judge
09.08.2005

31. I agree.



(N. Surjamani Singh)
Chief Justice (Acting)
09.08.2005



ORDER ON SENTENCE

32. Heard the learned Public Prosecutor as well as learned defence counsel for both the accused-respondent nos.1 and 2.

33. Mr. A. Moulik learned senior counsel for accused-respondent no.1 submitted that the accused no.1 had committed the alleged crime without any mens rea and as such, he was entitled to some leniency in the matter of sentence. Mr. N. Rai, learned counsel for accused-respondent no.2 submitted that the accused no.2 did not take any active part in the commission of the main crime. He was a victim of circumstances and as such, leniency in the matter of sentence was called for. Mr. J. B. Pradhan, learned Public Prosecutor, on the other hand, submitted that since the case against the accused no.1 does not fall in the category of 'rarest of the rare cases' extreme sentence of death was not warranted in his case. In case of accused no.2 it was submitted by him, that there were no circumstances justifying leniency in the matter.

 On consideration of the submissions made by the learned Public Prosecutor as well as the defence counsel, we are of the view that so far as accused-respondent no.1



is concerned, the materials on record do not show that the offence of murder committed by him falls, as suggested by the learned Public Prosecutor, in the category of 'rarest of the rare cases'. In view of this and also in view of the fact that life imprisonment is the rule and death sentence is the exception, we are inclined to take the view that the ends of justice would be met by awarding the lesser sentence of life imprisonment.

As regards the accused no.2, it is clear from the materials of record that he was not a regular driver of the vehicle, in question, which was involved in the commission of the alleged crime. His services were availed of by the owner of the vehicle only to meet the exigency caused by his regular driver proceeding on leave. It is his misfortune that the heinous crime was committed during the short span of time when he was rendering his services as a driver on hire. This shows that he was more a victim of circumstances than an active participant in the perpetration of the main crime. Apart from that it is also clear from the evidence of P.W.7 that the accused no.2 had disclosed the occurrence to him without concealing anything. It is, however, to be noted that the accused-respondent no.2 did not disclose anything about the occurrence to the investigating officer. Had he disclosed

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the fact at that stage he would not have faced the present prosecution as an accused. Obviously he has failed in his duty to be truthful. There is no doubt that he concealed the evidence of the commission of a very heinous crime. However, having regard to the facts and circumstances under which he is found to have committed the offence of causing disappearance of the evidence of offence we are inclined to take lenient view in his case.

34. Accordingly, on consideration of all the relevant materials having bearing on the question of sentence, we make the following order:-

The accused no.1 is sentenced to undergo imprisonment for life and to pay a fine of Rs.10,000/- in default to undergo rigorous imprisonment for 6 months. If the fine is recovered, the amount will go to the dependants of the deceased.


The accused no.2 is sentenced to undergo imprisonment for 3 years and to pay a fine of Rs.5,000/- in default to undergo further imprisonment for 3 months. If the fine is recovered, the amount will go to the dependants of the deceased.

Needless to say, the period of imprisonment already undergone by the accused no.2 shall be set off against the


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terms of sentences passed against both the accused-respondents.


(A. P. Subba)
Judge
22.08.2005

35. I agree.


(N. Surjmani Singh)
Chief Justice (Acting)
22.08.2005