F.R.

THE HIGH COURT OF SIKKIM : GANGTOK

Crl. A. No.02 of 2007

In the matter of an application for appeal under Section 374 (2) read with Section 376 (b) and read with Section 380 of the Code of Criminal Procedure, 1973

and

in the matter of

1. Buddha Tamang,
S/o Late Karna Bahadur Tamang,
R/o Middle Sichey,
P.O. & P.S. Gangtok,
East Sikkim.

2. Sunder Chettri,
S/o Late Kumar Chettri,
R/o Middle Sichey,
P.O. & P.S. Gangtok,
East Sikkim.

3. Bijay Rai,
S/o Late Birdhoj Rai,
R/o Middle Sichey,
P.O. & P.S. Gangtok,
East Sikkim.

4. Manoj Gurung,
S/o Shri Y. B. Gurung,
R/o Middle Sichey,
P.O. & P.S. Gangtok,
East Sikkim.

5. Mohan Thatal,
S/o Shri Bhola Thatal,
R/o Lasho Busty,
Tashiding,
West Sikkim
(All are at present Rongyek Jail)

..... **Convicts/ Appellants**

versus

State of Sikkim ..... **Respondent**

For Convicts-Appellants: Mr. N. Rai, Legal Aid Counsel with Mr. K. B. Chettri and Ms. Jyoti Kharka, Advocates.

For Respondent : Mr. J. B. Pradhan, Public Prosecutor and Mr. Karma Thinlay, Additional Public Prosecutor.

PRESENT : THE HON'BLE MR. JUSTICE A. N. RAY, CHIEF JUSTICE.
THE HON'BLE MR. JUSTICE A. P. SUBBA, JUDGE.

Last date of hearing : 16th June, 2008

DATES OF JUDGMENT : 16, 17, 19th June, 2008 & 25th July, 2008

J U D G M E N T

The Court:

This is an appeal from a judgment and sentence passed by the learned District and Sessions Judge Dr. Lepcha of East and North Sikkim. There were 5 accused in the case and all have been sentenced on the basis of charges filed under Sections 304, 201 and Section 34 of the IPC. The deceased was one Rajen Tamang, who, according to prosecution case, was killed by the accused on the night of or about 24th November 2003 which was also the birthday of one of the accused, Mohan Thatal. He was born on 24.11.1978 and is now in jail pursuant to events that transpired exactly 25 years after his birth.

The learned Judge has dealt with the prosecution evidence in detail but the part of the prosecution evidence mainly relied upon by him, is as follows. His own birthday party was arranged by the accused Mohan Thatal to be held at his brother's flat at Sichey in the evening of the 24th of November 2003. All the five accused went there with the deceased in a jeep, a government vehicle, which was driven by Mohan Thatal. On the way to the flat the party had bought and consumed a case of beer and, along with them was also one Sabita Pradhan.

It is enough to remark that Sabita Pradhan had no problem or hesitation about being with five/seven men alone and she was not surprised by this circumstance. The seventh one was P.W. 9, mentioned later. After the deceased was 'removed', five were left.

The wife of the deceased Rajen Tamang, namely Leela Subba, who also gave evidence, said that in the morning of the 24th Rajen Tamang had gone out, telling her that he was going fishing.

However, Tamang not having returned on the 24th or in the early hours of the 25th, Leela went out in search for him and in the process met one Suman Gajmer. This Suman Gajmer did not give evidence, but according to Leela, Suman gave her the identity of the owner of the vehicle which was being driven by Thatal and also said that he had seen Rajen Tamang the day before with Thatal in the vehicle along with some other Sichey Busty boys.

The flat of Mohan Thatal is in Sichey.

When Leela went in search of the vehicle, it so happened that Thatal was also there and according to Leela she was informed by him that Tamang had gone away the night before, leaving Thatal, for the purpose of fishing.

The 25th also passed without the whereabouts of Tamang being found out.

Before we pass on to the 26th, we mention here, in regard to the important factor of "last seen together", that the 9th prosecution witness namely, Tashi Norbu Lepcha, has given positive evidence

that on night of the 24th of November, he had been with Rajen Tamang, the deceased, the Sichey Busty boys and Sabita Pradhan. It is his further evidence that they parted company near the building, which has in it the flat of Thatal's brother. He said that he had seen Sabita Pradhan go up the building with Mohan Thatal and that he (very fortunately for him) had an altercation with Bijay Rai, also one of the accused, and therefore had left the scene at that time.

On the 26th Rajen Tamang was still missing as on the day before. So Leela Subba went and filed a missing report in the Sadar Police Station in Gangtok.

According to the police they "raised a hue and cry" and also informed the other Police Stations. Although this was done, 26th November 2003 also passed without any discovery being made.

Then on the 27th, according to the prosecution, Mohan Thatal came to the Sadar Police Station around 2.45 in the afternoon, and led the Thanedar,

i.e., the O.C. to a place in Rani Khola where the dead body of Rajen Tamang was found.

This is the most important part of the prosecution case and therefore one has to dwell on it a little more than in regard to the other facts.

According to the O.C. Thatal went to the place where the dead body was lying along with the police photographer, who came to give evidence as PW 2 and also with the brother of Rajen Tamang. The recovery report (exhibit 10) was prepared and signed by two witnesses of the locality. Rajen Tamang's brother did not come to give evidence. None of the two witnesses who signed the recovery report came to give evidence. These were commented upon heavily by Mr. N. Rai, learned counsel appearing for the accused.

Although he made a lot of comments about non production of witnesses, and incidentally, Sabita Pradhan did not also give evidence, this was not an argument made at all in the lower Court. Neither is it said in the memorandum of appeal that the Sessions Judge should have considered it on his

own, although nobody on behalf of the accused emphasized it before him.

Be that as it may, the police version is that after recovery of the dead body the team returned to the police station around 7.30 p.m. and thereafter Mohan Thatal was arrested and also 1, 2, 3,4, ... the four other accused were also taken into custody on the same night; the last two were arrested late at night at 11.30 PM. Accused Nos. 1 and 3 were not in fact arrested but surrendered to the police. We can only say that after Mohan Thatal went to the P.S., everything became very easy for them.

The Thanedar proceeded in a way of his own. He did not photograph Mohan Thatal at any place. He did not, before proceeding to recover the body of Tamang, obtain any First Information Report of Mohan Thatal and naturally therefore he did not get anything signed by Mohan Thatal at that time. Thus he proceeded upon information received to commence what can only be termed as a police investigation on its own.

Consistently with this view, he came back and on recovery of the dead body of Tamang made a report to the C.J.M. under Section 157 of the Code of Criminal Procedure. However, in that report he put the heading "First Information Report". This has caused a lot of confusion and arguments were made about the investigation being tainted, but this is no real problem if the First Information Report, although so marked is treated as a wrong marking by the Thanedar and is treated simply as a step in the process of investigation.

The place where the body of Tamang was recovered is quite a few kilometre away from the place where the flat of Thatal's brother is situated. Thatal's brother incidentally is a Forest Officer and a Government Officer. The jeep was a Government vehicle not for use of Mohan Thatal himself but for use by Thatal's brother.

The place of recovery was thus sufficiently far away from where the deceased was last seen together with the accused. From the circumstances it cannot but be said that it is not as 'open' a place as all that like a table top, because on the 25th

nobody found Tamang there, nor on the 26th, even when the missing report was filed with the police, nor during the first half of the 27th before Thatal came to identify the body and the place where it was lying. It is true that the body was lying in the open under the sky, there are houses nearby and fishermen are also around, but none found the body for 3 days. The Teesta river stretches long to Sikkim, and in three or four kilometres of river stretch, a body might even come to rot in some places without anybody knowing, as is shown by this case itself. The identification of the body was also made by Tamang's brother, but Tamang's brother never came to the box himself.

In the investigation report sent to the Magistrate which is exhibit 1, and wrongly marked First Information Report, there are "fanciful" statements made by the Thanedar about what Mohan Thatal told him.

This word "fanciful" has to be used by a Judge in India, in these circumstances because we are now both Judge and Jury, or at least in the trial

Court we are. What was stated by Mohan Thatal would be called a confession and would be excluded by virtue of Section 24 of the Indian Evidence Act, which need not be set out here. If we are to act properly in accordance with law, we have to tell ourselves again and again that these writings which are inadmissible in evidence are fanciful writings by the police officer. It neither incriminates the accused nor does it falsify the police case. It is something fanciful written and because the police are more concerned with investigation and crime prevention, no Court can blame them for placing more importance upon these primary activities to be performed by them, instead of continually and at every stage thinking what the Evidence Act says or permits; that is basically a lawyer's job and if the police substantially know and follow it and do not misuse their power no blame can be attached to them. Of course, what is 'fanciful' might come to prove at trial in the whole or in part; that is neither here nor there. The writing is still fanciful, but the value of proof aliunde is in no manner diminished by it.

On the 28th of November, the autopsy was performed. On the basis thereof the Doctor, who gave evidence, reported that the death had taken place 2 to 3 days before the autopsy. Arguments were made that 2 to 3 days before the 28th would bring it to the 25th and not to the 24th when allegedly Rajan Tamang went missing. We do not think that this fine discussion of one day is significant in these circumstances, where the Doctor himself predicted roughness by indicating 2 to 3 days, and no exact timing.

On the 27th evening, before sending the 'F.I.R.' to the C.J.M., as per the seizure memo which is exhibit 2 the police also performed the important task at around 5.30 in the evening of recovering a quilt and a white quilt cover from Thatal's flat. These contained comparatively small marks suspected to be blood stains. The seizure memo is quite clear about the place of recovery i.e., from within Thatal's flat but two witnesses, who were P.W. 3 and P.W. 4, of the same building, said in their examination in chief or in their cross-

examination that the seizure took place "in front of the building" or "outside the building premises".

The police case is that the quilt and the quilt cover were seized and sent for forensic examination. No reasonable reading of the evidence can permit these two statements by P.W. 3 and P.W. 4 to mean or even suggest the abswedity that the police recovered from the street a quilt and a quilt cover and sent those away for forensic examination. P.W. 3 and P.W. 4 are not law graduates (although incidentally Mohan Thatal is). Nobody clearly asked them whether they meant by seizure the picking up of the articles from where those were lying, or whether they meant by seizure the carrying away of those articles finally in the police vehicle. These answers of P.W. 3 and P.W. 4 do not cause any reasonable doubt to be cast on the police case that the recovery was made from Thatal's flat itself.

For blood examination, three samples were sent; one was the blood sample of Sabita Pradhan which was found to be of Group B, the other was a blood sample of the law graduate Mohan Thatal, the test on which was found to be inconclusive; and the

third was the blood from the recovered dead body which was found to be of Group A. The stains on the quilt and on the quilt cover were blood stains of group A.

Manik Kumar Majumdar, who was the testing analyst stated in his report that the quilt cover blood stain is of human blood, but he said that he is unable to distinguish between human and animal blood, and that it is quite difficult to do so. He also said that the Rh factor was not tested. He deposed that the stains were over small areas. It is just that he found the blood stains to be of group A and the blood of the deceased to be also of group A and he found that his test on Mohan Thatal blood was inconclusive, and so inconclusive as not to give him any indication even about the blood group of it.

This is indeed unsatisfactory, but no emphasis was placed on this before the learned District and Sessions Judge. The circumstance of the deceased's blood being of group A, and the blood stains also being of group A was found to be a sufficiently strong link in the chain of circumstantial evidence. We cannot discount

arguments of counsel who proceeds on instructions. To do so would be to put abstract theory over actual practicalities, and to do this is never advisable in any Court of Law.

Several things might leave the Court of appeal a little surprised, but the Court of appeal should be used to suppressing surprise, as the long run of any trial is a practical affair, and there will always be gaps in the handling of the case on both sides. The appeal Court should rather go about the job of making the best of what it can, out of the usually large chunk of material available to it.

Two other important things have to be considered here. These also concern inadmissible evidence. In the investigating officers' report made under Section 173 of the Cr. P.C there is a detailed fanciful story of how exactly Rajen Tamang got killed. It is to be taken as a story only, because otherwise it will be inadmissible confession under Section 162 of that Code, and even the source of the fanciful writing is not very clearly specified there.

The investigating officer came as the last witness of the prosecution being PW 17.

The next interesting thing is about Sabita Pradhan. She gave her statement before the investigating officer which was duly recorded under Section 161, but it is not even included in the paper-book because she did not come into the box. Out of our own curiosity we asked what the fanciful statement of Sabita Pradhan was and we were told something. We do not wish to repeat in the judgment of the appellate Court any fanciful statements or mere stories.

What we do however wish to record is that prosecution never thought it fit to ask the last prosecution witness i.e., the investigating officer, whether he knew the whereabouts of Sabita Pradhan on the days he was giving his evidence. Equally remarkably, the defence did not poke him either in this regard. No point was raised, as we have already said, about Sabita's absence from the box in the lower Court, in the arguments made before it.

The autopsy report also makes it clear, and this is clear admissible evidence, that the death occurred due to head injury and the injury was ante-mortem. The appellants made a case before us that Tamang went fishing and might have fallen down and killed himself. A head injury could well result in that way and the dead body was found on the river bed at Rani Khola (Rani Khola is actually quite a large area spread over the kilometres and Khola means river) and the river bed almost everywhere in Sikkim has steep and quite high cliffs nearby.

The defence emphasize very heavily on the going for fishing story. They mention about the deceased's wife herself admitting that Rajan Tamang wanting to go for fishing and telling her so. They also said that P.W. 9 himself, who laid the main foundation of the last seen together evidence, clearly stated that at about 10.30 at night the deceased said that he wanted to go fishing and after he went inside the government jeep to recover his fishing tackle, he was not seen any more by P.W. 9

because by that time he had happily had his altercation and walked away from the problematic scene.

All this was added to somewhat by Mohan Thatal himself, which is quite unusual for an Indian accused, Mohan Thatal going to the box and giving evidence. When he was making the 313 answers and he was asked about Rajan Tamang he clearly said that he did not know but, from the witness box he made for the first time a case that Tamang had walked away from him at Sichey sometime at 10.30 at night for the purpose of fishing. He denied that the parting took place near the flat.

Mohan Thatal made a further case, but this time not for the first time from the box, because he had said this in his 313 examination also, that he had never gone to the police station to inform about the body at all on 27.11.2003. It is perhaps to emphasize this crucial point, that he had to go to the box.

The very foundation of the prosecution case is the information given by Mohan Thatal and the place where the body was found at his instance and not at the instance of anybody else. Of course fanciful statements in the so called first information report cannot be taken into account by us, but it has to be emphasized, and emphasized again, that Mohan Thatal's case was not that he had merely chanced upon the body at Rani Khola and thus he had come to the police station. What Mohan Thatal did, according to police was that he identified the location of the dead body of Rajan Tamang because he knew about it and would give no details about how or why he knew where the body was; he would give no clue to how he came to know the location of the body.

Once the inadmissible confession is ruled out the solid admissible evidence as per Section 27 is this, that Mohan Thatal knew about the missing person's dead body and 3 to 4 days after the death came, and led the until then searching police, to the exact location near the river bed where the missing

body was lying all this time. And he would say nothing about how he got to know all this.

On this basis the learned judge has found all the five accused guilty, but not of murder, as the learned judge has quite correctly opined that murder motive and premeditation were singularly absent in this case.

He has proceeded, as he had to, on the basis of circumstantial evidence. Five circumstances were considered by him which the learned PP also submitted as the foundation of the prosecution case. Those five circumstances are set out below: -

> "Ld. P.P. submitted that from the above stated Prosecution evidence following circumstances emerge pointing guilt of the accused persons:
>
> (i) That the deceased was last seen together with the accused persons;
> (ii) That on the basis of the information given by accused Mohan Thatal the dead body of deceased Rajen Tamang was recovered from Rani Khola;
> (iii) That the quilt containing blood stain matching the blood of deceased was recovered from the possession of accused Mohan Thatal;
> (iv) That Post Mortem report revealed that the deceased died due to ante-mortem head injuries;

(v) That the death of the deceased had occurred 2 to 3 days before the date of Post Mortem held on 28.11.2003."

The case of defence was primarily that Mohan Thatal never surrendered before the O.C. Sadar Police Station. Three other factors were also emphasized by the defence in the lower Court and in the words of Dr. Lepcha the defence submission was basically as follows:

"Ld. Counsel submitted that the accused Mohan Thatal never surrendered before the O/C Sadar P.S. and he did not inform the Police that he along with co-accused persons murdered deceased Pussay on the night of 24.11.2003 and disposed of the dead body at Rani Khola on the night of 25.11.2003. He submitted that on the night of 24.11.2003 the deceased after coming back to Sichey from Ranka got down from the vehicle in front of the residence of accused Mohan Thatal and then left the place collecting Fishing equipments saying that he is going for fishing.

Ld. Counsel next submitted that the prosecution has falsely implicated the accused persons in this case which can be seen from the following circumstances: -

(a) That investigation was apparently started prior to the recording and registration of the F.I.R. That the alleged recovery of the dead body of Pussay @ Rajen Tamang at Rani Khola and conducting inquest over the dead body ought to have formed part of investigation but the Police had not registered F.I.R. on the basis of alleged information allegedly given by accused Mohan Thatal.

(b) That no where in the charge sheet has it been stated that dead body of the deceased was recovered at the instance of the accused Mohan Thatal nor any witness stated so in the evidence. He also submitted that if the dead body was recovered at the instance of accused Mohan Thatal then why in the photograph the accused is not seen?

(c) That alleged statement of confession given by the accused Mohan Thatal to the Officer-in-charge, Sadar P.S., P.M. Rai is not admissible in view of Section 25 or even 26 of the Indian Evidence Act."

The learned Judge on a consideration of the five circumstances and the defence arguments has found the accused to be guilty. About Mohan Thatal, he has made one unfortunate erroneous statement in paragraph 21 in his judgment that the accused persons did not choose to examine anybody in their defence, but the inaccuracy is of no importance, because he has considered in paragraph 26 the evidence given by Mohan Thatal. This is what he said about the cumulative effect of the five circumstances and the case made by Mohan Thatal.

"26. Cumulatively considered the above stated facts and circumstances this Court finds that the deceased died due to ante mortem injuries inflicted by the accused

> persons on the intervening night of 24.11.2003 to 25.11.2003. Even after recording evidence of accused No.5 Mohan Thatal as Dw. 1 the case of the defence did not show any improvement. Nothing has been brought on evidence of Dw. 1 that would create doubt in the veracity of prosecution case. Defence witness merely stated that Pws. 1, 2 and 15 have given false evidence to implicate the innocent accused persons but the witness nowhere stated as to how or in what manner their evidences are false. Claim of the accused that defence evidence is not an after thought does not appear to be correct. As rightly pointed out by the prosecution that the accused No. 5 who is himself a Law Graduate despite being aware of incriminating evidence given by Pws. 1, 2, 9 and 15 as discussed earlier had not chosen to adduce defence evidence at the earliest opportunity and so the present attempt to rebut the said incriminating evidences by examining accused Mohan Thatal is only an after thought."

The most important sentence in the above summing up is that Mohan Thatal merely stated that PWs have given false evidence, but the witness nowhere stated as to how or in what manner their evidences was false.

We have also examined the entire evidence and naturally that of Mohan Thatal. The evidence of Mohan Thatal is singularly lacking in any detail, or in making out any clear bold case of his absence from the p.s. on 27/11 afternoon. Nowhere he says

anything positively to indicate his absence from the police station and his absence from the search party. He never says boldly, and in so many words, that I first saw the face of policemen in this regard at 7.30 PM when I was arrested at my house. There would be absolutely no difficulty in making this simple and straightforward case but he does not make this case.

We shall presently briefly state our findings on the legal points on the above facts, but one other statement made by the learned Judge is also to be marked as not appropriate; it is "Cause of death was fight that appears to have started on the spur of the moment". This is at paragraph 28 of the judgment but fortunately it is not used for finding guilt, but for finding absence of motive and premeditation; therefore this finding is in favour of the accused rather than against them.

Section 27 of the Indian Evidence Act

The Section is quoted below: -

> "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."

The Section is important because the evidence of the involvement of Mohan Thatal lets itself in through this Section.

The law in this regard is to be found basically from the root case decided by the Judicial Committee in *Pulukuri Kottaya v. Emperor,* AIR 1947 PC 67. Sustenance is drawn from this case even by the Supreme Court, see for example the case of *Anter Singh v. State of Rajasthan* reported at AIR 2004 SC p. 2865. If the Supreme Court can do so, so can all other Courts.

For our purpose, we have to deal with the argument made on behalf of the appellants that Section 27 is not applicable as there was no discovery of any type whatsoever made here, even assuming for the sake of argument that Mohan Thatal had gone to the police station. It was said that the openness of the location of the body and

the presence of nearby houses and fishermen rule out the elements of discovery in the case.

We quite agree that a discovery is a must before Section 27 can apply. What in law is discovery within the meaning of this Section? In our opinion, if in the given circumstances, an ordinary reasonably educated Indian who is fit to have been a juror in the concerned criminal case had jury trial been still the procedure in India, if he were given the information which is received from the person in question, would naturally and automatically react to it by saying, hey ! how come he knows that? Then and in that event there is an element of discovery present.

It is the same sort of test which is there in negligence matters and 'the reasonable man'. The judge has to put himself in the position of the ordinary person and project his mind to find out what the reaction of such an ordinary juror would be.

The Court below has applied Section 27. If we apply the above test we also have to apply Section

27 because Thatal solved a puzzle for the police which had been troubling them for at least a day and half and which had been troubling Tamang's (called Pussay also) wife for three and a half days. Whether the body was under the sky or in a closet is not important by itself for determining whether there has been a discovery or not. The entire circumstances have to be looked into. Any sort of formal or learned definition, or the enumeration of scholarly elements will not help the Court much. The more complicated the test, the more difficult it is to apply. The simple test which we have formulated above and apply ourselves might be taken as, at least, a safe first step.

The second element of Section 27 is contained in the word "distinctly" which occurs in the latter part of the Section. The surroundings of the discovery i.e. the location of the body, the timing of the discovery etc. are proved by the Thanedar himself, because he has himself gone and seen it, whoever might have led him to the spot, But not everything that the informant says can be given in evidence just because there has been a discovery

fair and square within the meaning of Section 27. The statement of the informant can be allowed in only if it relates 'distinctly' to the facts discovered as a consequence of information received from that person. These are the words of the Section itself, but in a different order than those occur there.

The Court has to cut out all statements which would not be essential to the discovery made even if those have been clearly stated (may be even written, doesn't matter in the least) by the informant. Of course such exclusion will have to be made only if it is a confession, or in some way inadmissible.

In finding out what relates distinctly to the discovered fact, we again suggest a very ordinary test, which in our opinion is quite helpful although it might sound a little ridiculous at first reading.

Assume that the informant is dumb and has not got use of paper and pencil. Assume that merely by signs he is leading to the discovery of the fact. Often this will be easy to imagine because the fact will often be the location of the dead body or a murder weapon or some blood stained clothes or

may be the location or the whereabouts of a person who has been absconding for sometime. The words that are necessary in this regard can easily be substituted by actions and actual accompaniment of the informant with the police. Then the words can be substituted for the actions, only those words, no more no less.

If this test is applied to the present circumstances, then everything that the learned Judge has included as evidence is seen as very properly included and in no manner objectionable. It is the information which Mohan Thatal had of the body which is the most important, and his being unable to give any satisfactory reason as to how he came to know about the location of the dead body. These are the basic elements relied upon by Dr. Lepcha and we can find nothing wrong with this.

Burden of proof in criminal cases.

It is well known that the burden lies on the prosecution. It is well known that the proof of guilt must be beyond reasonable doubt. In this regard reference might be made to Phipson 2005 Edition

paragraphs 6-49 and 6-50. The Courts have again and again warned against any change of the phrase, beyond reasonable doubt. It is to be repeated like a Mantra by all involved in criminal trials and it is to be seen whether this Mantra is properly satisfied. After hundreds of years of practical knowledge, the Courts have found only one other Mantra which is equally effective. This Mantra is the simple word "sure". If one feels sure about the committal of the crime or the guilt then one can convict. Again this word is not to be tampered with. It would be absolutely wrong to change this into pretty sure, or into pretty certain, or into reasonably sure. These all have lesser shades of meaning. One has to be sure and nothing else will do.

So far so good.

But the burden in criminal cases has not remained absolutely unchanged on the shoulders of the prosecution over past several decades. A trend is now clearly established that just like in civil cases their comes a time when the accused, if he is to get an acquittal, must tender some evidence himself.

This trend is seen quite clearly in several types of criminal cases and especially in the cases where the circumstantial evidence of last seen together plays an important role.

There are cases where the Courts have opined that the sole circumstance of the accused being last seen together with the deceased is not circumstance enough to found a conviction. Again there are other cases where this circumstance has been found to be so important that the Court has gone on to say that the accused had to explain this circumstance and since he had failed to explain it or come to the box he cannot escape conviction.

The cases in this and several other regard will be discussed, as my brother and I have agreed, by my brother in his separate judgment to be delivered hereafter.

Suffice it to point out that the judge made law in India has achieved what had to be achieved in

England by direct intervention of Parliament. Parliament had to intervene there, because the old law was extremely heavy on the prosecution. The classic case which demonstrated the old law is the case of *Woolmington v. DPP*, reported at [1935] A. C. 462. The facts in that case were very stark. The accused admitted to having shot his wife. The defence case was that the firing was purely accidental. Even in those days the accused came and gave evidence. The evidence he gave was so unsatisfactory that even a well seasoned English criminal Judge directed the Jury that once it was proved that the accused has shot his wife it was for him to disprove his malice aforethought. On that direction the jury convicted him. Nothing happened in the Court of Appeal. It is only in the House of Lords that the judgment was overturned and great emphasis was placed on the prosecution having to prove everything, positive and negative mental state and all, by whatever means it could, by direct evidence, by circumstantial evidence, by whatever it chose, but prove everything it must.

Lord Sankey L.C. said as follows in the said case: -

> "Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception ... No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained... It is not the law of England to say, as was said in the summing up in the present case: 'If the Crown satisfy you that this woman died at the prisoner's hands, then he has to show that there are circumstances to be found in the evidence which has been given from the witness box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing that it was a pure accident..."

One dare say, although one is aware with trepidation that the statement is courageous, the same case in the same circumstances might have been decided differently in England today. Because the burden on the prosecution has become a little lighter. A small but significant chunk of that burden has been placed by the law on the shoulders of the defence now. This has been achieved in

England by enactment of the Criminal Justice and Public Order, 1994. We need no more go into that herein except set out Section 35(2) of the said Act which is as follows: -

> "(2) Where this sub-section applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment, in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question."

The said sub-section does not apply, as sub-section (1) of the said Section clarifies, only if an accused's guilt is not an issue or it appears to the Court that the physical or the mental condition of the accused makes it undesirable to give evidence. What the English Act says in so many words the cases in India have now said by way of exposition of the same principle.

We venture to say that the law no longer is that criminal trial is to be conducted in such a way that 99 guilty persons might escape but one innocent person should not be punished. We venture to suggest, that is an outmoded formulation. The formulation is different now. We can do no better than quote a sentence from the Supreme Court judgment in the case of *Harisingh M. Vasava v. State of Gujarat* reported in AIR 2002 SC p. 1212. At paragraph 11 of the judgment it was said as follows: -

> "The paramount consideration of the Court should be to avoid miscarriage of justice. A miscarriage of justice which may arise from the acquittal of guilty is no less than from the conviction of an innocent."

This is the present law in India. The Court has no opportunity of erring on the safe side. The modern standard is more exact. The Court must try to find out whether the accused is guilty or not. Going wrong both ways is equally to be avoided by the Court. It cannot punish an innocent man; it cannot acquit a guilty person. Its conscience can be free only if it can say that the finding, whether of

acquittal or of guilt, was reached in good conscience and on good law, and though the Court might be wrong, it has no doubt left about it. Note that the benefit of doubt theory is not gone, but that the Court must feel doubtless about the judgment whether it is a judgment of acquittal or of conviction.

In our opinion, the law in England and in India is now the same in this regard. Although the paths of arrival have been different. The rules to follow in criminal cases are set out as follows in the said Edition of Phipson in paragraph 34-14 and we venture to suggest that on the basis of several Supreme Court decisions the rules in India are absolutely no different.

" (1) The burden of proof remains upon the prosecution throughout;
(2) the defendant is entitled to remain silent;
(3) an adverse inference alone cannot prove guilt;
(4) the prosecution must have established a case to answer before any inferences can be drawn;
(5) an adverse inference can be drawn only where the silence can be sensibly attributed to the

> defendant's having no answer or none that would stand up to cross-examination."

We have said so many things about the burden of proof and the changed laws in that regard because this law is crucially necessary for the correct decision in the instant case. Mohan Thatal had a duty to speak once he had found the body out for the police. He did not speak. The involvement of the four other accused is proved by the circumstance of last seen together and because of other incriminating circumstances. If any of them wanted to say that he was not in the crowd and he is to be differently treated then he had a duty to speak. If he does not speak the Court can justly infer it is because he has nothing to say, or fears that he will make his case even worse for himself by going into the box.

It is because a little burden has now shifted on to the accused that they cannot escape by mere silence. In the olden days they might have tried to get an escape by posing a riddle to the Court. Counsel for each of the accused might have said

that well, the death is quite accountable by the involvement of the other four. There is nothing to rope my client in particularly amongst the group also. And what could be said by counsel for one accused, could be said by counsel for all the five accused. They would then jointly submit that if you have no evidence to incriminate all five you cannot convict any one of them. In the days of *Woolmington v. DPP* it would have been a formidable argument. But it is not a formidable argument now as the accused has a distinct burden in appropriate circumstances.

The trial judge did not, in our opinion, therefore go wrong in placing emphasis on Mohan Thatal being unable to say anything as regards in what manner the prosecution witnesses were wrong; the trial judge was right in discarding Mohan Thatal's version because he never ventured to state any positive fact beyond mere denial. If he had something to say, the burden was on him to say it fully even though he was only an accused. If he did not say it, he has withheld information at his

own peril. The Court can justly infer he did not say anything because he had nothing to say, because he could only deny the prosecution case, because he could not say anything to raise any doubt about it.

Circumstantial Evidence

Since the entire case is based on circumstantial evidence, very briefly we indicate the law on it. The Court both has to remember what not to do, and also what to do with it. What not to do is best expressed in the words of Baron Alderson in the case of *Reg. v. Hodge* quoted by Justice Mahajan in the Supreme Court Case of *Hanumant Govind Nargundkar and another v. State of Madhya Pradesh* reported in AIR 1952 SC 343. The said quotation is set out below: -

> "The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."

What one should do with circumstantial evidence is formulated by the same Hon'ble Judge in an immediately succeeding passage in the very same case. What his Lordship said was quoted 32 years later again by the Supreme Court in the case of *Sharad Bridhichand Sarda v. State of Maharashtra* reported at AIR 1984 SC p. 1622 of the quotation in paragraph 151. It is set out below: -

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

We are to opine whether these two tests are correctly followed by the lower Court. Here the circumstances were that the accused were seen with the deceased on 24.11.2003 at 10.30 at night, having consumed a case of beer and being in the company of a woman of town. As soon as the

night passed the deceased was found to be missing that the police searched in vain for him; then three days later one of the accused came to the police station and led the police to the until then the mysteriously missing dead body. The deceased had blood group A and there were blood stains on a quilt and quilt cover lying in the flat to which the accused had access and near which they had been last seen along with the accused.

The autopsy showed the cause of death to be a head injury and the time of death was roughly when the deceased went missing.

As soon as the correct circumstances are clear in the mind, the answer suggests itself also very clearly, i.e., that the accused definitely had a lot to explain. According to the modern trend of the law of crimes there was no alternative to their coming to the box and saying all that they had to say, assuming they had something to say. That they practically stayed away from the box is discussed above. In these circumstances the Court was left

with no alternative to convicting on the chain of circumstances.

The duty of the Court of Appeal.

In the above discussion one of the most important elements is that the circumstances relied upon by the trial Court must be clearly established. Once the trial Court finds that the establishment of those circumstances is beyond all reasonable doubt, what does the Court of Appeal do? It cannot say that the trial Court has decided the matter by looking at the demeanour of the witnesses and by conducting the trial without any major lapse and therefore the Court of Appeal is relieved of the task of looking at the entirety of the evidence.

It can never treat the evidence in criminal appeals in a cursory manner. But after the evidence has been looked at by the appeal Court and gripped, it does not substitute its own finding for the trial Court's, without giving the matter the most serious thought. It never forgets that the trial Court saw the witnesses. Demeanour of witnesses is a factor which has been emphasized very often both

in civil and in criminal trials. The task of the Court of Appeal is very clearly appreciated by Sir John Beaumont speaking for the Judicial Committee in the case of *Thiagaraja Bhagavathar and another v. King-Emperor* reported at LXXIV Indian Appeals p. 132. What the Committee member did at page 140 of the Report was to quote a passage of Lord Russell from yet another opinion of the Judicial Committee. The said passage is as follows: -

> "But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1.) the views of the trial Judge as to the credibility of the witnesses; (2.) the presumption of innocence in favour of the accused,"
>
> ... ...
>
> "(3.) the right of the accused to the benefit of any doubt; and (4.) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses."

This aspect of the matter assumes the greatest importance when we consider Dr. Lepcha's finding that the evidence given by Mohan Thatal was not to be believed. The logical reason given was that Thatal did not say in what way the PW's gave false evidence but he came out with mere denials. We

must add to it, that it was this Judge who saw Thatal pleading lack of knowledge in 313 answers and again it was the same Judge who found Thatal going a little beyond and sticking to denials when he came to give evidence from the box. According to well settled judicial principles we should be slow to interfere with the lower Court's findings in this respect. As the finding appears to us to very reasonable also, we find it impossible in law to interfere in this regard.

In this respect we also wish to quote a passage from the Judicial Committee's opinion given by Lord Porter in the case of *Malak Khan v. The King-Emperor.* It is not strictly applicable to the Appellate Court alone but even to the trial Court. The case laid down that although searches are always desirable to be done in the presence of witnesses, the requirement is not of the essence. That for the purpose of proof of exhibit 10, i.e., the recovery report of the deceased's body, the police left out the two local witnesses who had signed the report from their list of witnesses is therefore not in

any manner fatal. The forgoing short passage is quoted in this regard:

> "In their Lordships' opinion the presence of witnesses at a search is always desirable and their absence will weaken, and may sometimes destroy, the acceptance of the evidence as to the finding of the articles, but their attendance at the search is not always essential in order to enable evidence as to the search to be given."

What applies for absence of witness is applies for non-calling of witnesses too. It might weaken the case, or it might not. Here we do not find any strong grounds to differ from the lower Court on facts found, regarding the discovery of the body on Thatal's guidance.

The wrong marking of the Thanedar's Report to the C.J.M. as an F.I.R.

We had said before that the investigation here started with the information given by Mohan Thatal and there is in fact no FIR which can be called such in law. The investigation does not become bad if it is starts without an FIR. It has been long so settled and one might, interestingly, refer to the case of *Khwaja Nazir Ahmad* reported at AIR 1945 Privy Council p. 18, although that the case is usually

cited for quite a different proposition. The passage in this respect would be found from Lord Porter's opinion at page 20 of the report and reads as follows: -

> "But, in any case, the receipt and recording of an information report is not a condition precedent to the setting in motion of a criminal investigation. No doubt in the great majority of cases, criminal prosecutions are undertaken as a result of information received and recorded in this way but their Lordships see no reason why the police, if in possession through their own knowledge or by means of credible though informal intelligence which genuinely leads them to the belief that a cognizable offence has been committed, should not of their own motion undertake an investigation into the truth of the matters alleged."

Conclusion.

The net upshot of all this discussion is that the appeal should be and is hereby dismissed.

Ajoy Nath Ray

(Ajoy Nath Ray)
Chief Justice
25-07-2008

A. P. Subba, J.

I have had the privilege of going through the erudite judgment prepared by Lord the Chief Justice. Having thus gone through the judgment, I find myself in full agreement with the reasoning

given, the views expressed and the conclusions arrived at on different points. However, as mutually agreed upon by us, I have prepared a separate judgment mainly to discuss the case law on the evidentiary value to be attached to evidence of "last seen together" and few other related issues as hereinafter dealt with.

2. In the present case, it is clear that all the accused persons have failed to account for the circumstances in which they parted company with the deceased in the fateful night of 24th November, 2003. Without disputing this position, Shri Rai, learned Counsel appearing for the appellants, relying on a two Judge Bench decision of the Supreme Court in ***Mohibur Rahman & Another*** vs. ***State of Assam*** reported in ***2002 SCC (Cri) 1496*** submitted that the mere fact of being last seen together does not itself lead to the inference that it was the accused who committed the crime. By way of supplementing the above decision, the learned Counsel also cited the following decisions:-

(i) ***Anant B. Kulkarni*** vs. ***State of Maharashtra*** reported in ***1993 SCC (Cri) 520***;

(ii) ***Shera Singh*** vs. ***State of Punjab*** reported in ***1996 SCC (Cri) 1271***;

(iii) ***State of Punjab*** vs. ***Sarup Singh*** reported in ***1998 SCC (Cri) 711***; and

(iv) ***State of Goa*** vs. ***Sanjay Thakran & Another*** reported in ***(2007) 3 SCC 755***.

3. We have gone through the above decisions. The principles of law applicable to the evidence of last seen together as laid down in these cases, in short, are that the only circumstance of last seen together and the discovery of the dead body of the deceased later on near the residence of the accused alone cannot always be said to be inconsistent with the innocence of the appellant [***1993 SCC (Cri) 520***]. The circumstantial evidence that the appellant was the person with whom the deceased was last seen together cannot be regarded as corroboration and no conviction can be based on such evidence of last seen together [***1996 SCC (Cri) 1271***]. The mere circumstance that the accused and the deceased left together alone would not be sufficient to establish the guilt of the accused and no inference can be drawn from such circumstance

alone that the accused had committed the murder of the deceased [***1998 SCC (Cri) 711***]. If there is a considerable time gap between last seen together and the proximate time of crime, the circumstance of last seen together, even if proved, cannot clinchingly fasten the guilt of the accused [***(2007) 3 SCC 755***].

4. We entertain no doubt in our minds that the above law laid down by the decisions cited and relied on by the learned Counsel governs the law on the point of last seen together. We would, however, hasten to add that the fact situation of the cases in which the above principles were laid down not being identical to the facts of the case on hand, the principles enunciated above would not apply to the present case with equal force.

5. So far as the question of evidentiary value to be attached to the evidence of "last seen together" is concerned, it may be observed, without any hesitation, that such evidence if unexplained by an accused person or for that matter, if the explanation offered is found to be unsatisfactory, can be taken

as supplying additional/missing link in the chain of circumstances. That such is the present position in law would be clear from the decisions rendered by the Apex Court in catena of cases of which it would be sufficient to notice the following few decisions for elucidation of the point :-

In ***Sahadevan alias Sagadevan*** vs. ***State*** reported in ***(2003) 1 SCC 534*** the Apex Court has held that if the prosecution on the basis of reliable evidence establishes that a 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 and if he fails to do so the same has to be taken as supplying missing link in the chain of circumstances.

In the earlier case of ***Mohibur Rahman (supra)*** where the circumstances established against the accused were that he was last seen in the company of the deceased, he had given false explanation about the whereabouts of the deceased and that he had knowledge of the dead body being cut into pieces and buried, a two Judge Bench of

the Apex Court held that these circumstances coupled with the fact of failure on the part of the accused to offer any reasonable explanation of any of the above said circumstances would be sufficient to fasten the liability of murder on the accused.

In the more recent case of ***State of Rajasthan*** vs. ***Kashi Ram*** reported in ***(2006) 12 SCC 254*** it has been held as follows:-

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

> could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain." **[emphasis supplied]**

6. The position of law as highlighted above makes it amply clear that if an accused is last seen in the company of the deceased who thereafter goes missing, a burden is cast on such accused to explain as to how he parted company with the deceased, and if he fails to satisfactorily discharge such burden, such failure has to be taken as providing additional/missing link in the chain of circumstances. It thus follows that the failure of the accused persons to give any satisfactory explanation in the present case has to be taken as supplying additional/missing link in the chain of circumstances. However, before doing so it is pertinent to note that the accused persons have not only failed to explain the circumstances of last seen together but have also equally failed to give reasonable explanation in relation to other evidence appearing against them.

7. The record of examination of all the accused persons under Section 313 Cr.P.C. goes to show that all of them have either denied or pleaded ignorance about the inculpatory circumstances appearing against them. In this regard, it would be pertinent to note that even such facts which have been established by evidence on record have been denied. It is now the settled law that such denials which are contrary to established facts on record should be taken as providing 'additional/missing link' in the chain of circumstances. The following recent decisions rendered by the Apex Court can be referred to with advantage on the point :-

In the case of ***Mani Kumar Thapa*** vs. ***State of Sikkim*** reported in ***(2002) 7 SCC 157***; ***AIR 2002 SC 2920*** the Hon'ble Supreme Court has held that where the accused gives false answer to the question under Section 313 Cr.P.C. the Court will have to proceed on the basis that the accused has not explained the inculpatory circumstances established by the prosecution against him and such failure to explain would form an additional link in the chain of circumstances. To the similar

effect are the observation made by the Apex Court in ***State of Maharashtra*** vs. ***Suresh*** reported in ***(2000) 1 SCC 471***. In that case it has been observed that a false answer offered by the accused when his attention is drawn to any inculpating circumstances would render such circumstance as capable of inculpating him *inasmuch* as a false answer can be counted as providing "a missing link" in completing the chain.

8. In view of the clear position of law as highlighted by the above decisions, we do not feel any necessity to multiply decisions on the point. Thus, if the failure of the accused persons to give reasonable explanation of the inculpatory circumstances appearing against them is to be taken as supplying missing link/additional link in the chain of circumstances a conclusion is inescapable that the proved circumstances in the present case unerringly point towards the guilt of the accused.

9. However, before applying the above principle of law to the facts of the present case, the

pertinent question that arises is whether the evidence adduced by the prosecution can be taken as sufficient to establish the five circumstances as relied on by the learned trial Court and if so whether the circumstances so established leads to only conclusion that the accused persons are responsible for causing the death of the deceased.

10. It may be noted that in course of the hearing, we were taken through all the relevant evidence on record relevant reference of which has already been made in the judgment of My Lord the Hon'ble Chief Justice. On a proper appreciation of such evidence on record, we have no hesitation to hold that five circumstances relied on by the learned trial Court as already reproduced at page 19 stand established by the evidence on record. Indeed, we are of the view that the following further circumstances, also stand established by the same evidence on record.

(i) That in the evening of 24th November, 2003 all the accused persons along with the deceased, P.W.9 and a girl by the name of Sabita Pradhan while proceeding to the flat of accused No.4 to attend his

birthday party took a detour to Ranka on a joy ride in a government jeep bearing No.SK-02/1028 carrying a case of beer purchased by the deceased from the shop of Sashi Nath Prasad (P.W.10) at the Development Area, Gangtok;

(ii) That the whole group took a round of Ranka enjoying themselves with the beer they were carrying and returned to Upper Sichey busty to the place where accused No.5 had rented a flat. After reaching there the accused No.5, the deceased and the girl Sabita Pradhan disembarked and proceeded to the flat of the accused No.5. In the meantime some heated argument took place between P.W.9 and accused No.3 as a result of which P.W.9 parted company with the accused persons and left for his house leaving all the accused persons, deceased and the girl Sabita Pradhan there.

(iii) That the deceased had gone missing from the evening of 24th November, 2003 the day he left his home along with the accused persons and was not traceable despite search being made;

(iv) That on the third day, i.e., 27th November, 2003 the dead body of the

deceased was recovered from Rani Khola at the instance of the accused No.5; and

(v) That according to the medical opinion the deceased had died 2-3 days prior to 28th November, 2003.

11. Having thus noticed the various circumstances that stand established on evidence on record the next question that falls for consideration of this Court is whether the above established circumstances taken cumulatively form a complete chain and whether such circumstances are of definite tendency unerringly pointing towards the guilt of the accused.

12. The proved circumstances already enumerated above clearly go to show that the deceased was seen in the company of the accused persons till late in the night of 24th November, 2003 after which he went missing and his dead body was recovered at the instance of one of the accused persons on 28th November, 2003 and according to the medical opinion the deceased had died about 2-3 days prior to 28th November, 2003. Such sequence of events, according to us, hardly leaves

any gap in the chain of circumstances. The chain of circumstances in the case must therefore be taken as complete without any break.

13. The law regarding circumstantial evidence is well-established by catena of decisions of the Apex Court. The must fundamental and basic decision on this point is ***Hanumant Govind Nargundkar and Another*** vs. ***State of Madhya Pradesh*** reported in ***AIR 1952 SC 343*** which has been uniformly followed and applied by the Apex Court in number of latter decisions. In this case, the pertinent observation made as well as the principle of law laid down by Mahajan J. has already been quoted in page 38 of the judgment of My Lord the Chief Justice

To make a reference to some of the latter decisions rendered by the Apex Court following the principle of law laid down in the above case of ***Hanumant Govind Nargundkar (supra)*** it may be noted that the three Judge Bench of the Apex Court in ***Sharad Birdhichand Sarda*** vs. ***State of Maharashtra*** reported in ***AIR 1984 SC 1622*** quoting the above observation of Mahajan J. with

approval laid down the following five conditions which have aptly been called the *five golden principles* which constitute the *panchseel* of the proof of a case based on circumstantial evidence:-

> **"152.** A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established :
>
> (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.
>
> .....
> .....
>
> (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,
>
> (3) the circumstances should be of a conclusive nature and tendency,
>
> (4) they should exclude every possible hypothesis except the one to be proved, and
>
> (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused." [emphasis supplied]

In ***Padala Veera Reddy*** vs. ***State of Andhra Pradesh and Others*** reported in ***1990 CRI.L.J. 605***, it has been observed as follows :-

"This Court in a series of decisions has consistently held that when a case rests upon

circumstantial evidence, such evidence must satisfy the following tests:-

> **10.** ..... (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation on any other hypothesis than that of guilt of the accused but should be inconsistent with his innocence." **[emphasis supplied]**

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

> **"6.** ..... 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 basis 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 fact 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. ....." [emphasis supplied]

In addition to the above, two more recent decisions of the Apex Court in which the above **Humant Govind's case** (supra) has been referred to and relied on may also be cited with advantage.

In ***Sattatiya @ Satish Rajanna Kartala*** vs. ***State of Maharashtra*** reported in ***2008 CRI.L.J. 1816*** it has been held as follows:-

> **"8.** ..... It is settled law that an offence can be proved not only by direct evidence but also by circumstantial evidence where there is no direct evidence. The Court can draw an inference of guilt when all the incriminating facts and circumstances are found to be totally incompatible with the innocence of the accused. Of course, the circumstances from which an inference as to the guilt is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances."
> [emphasis supplied]

In ***Arun Bhanudas Pawar*** vs. ***State of Maharashtra*** reported in ***2008 CRI.L.J. 1798*** the law on the point has been summed up as follows:-

> **"12.** ..... The Court in a series of decisions has consistently held that when a case rests upon

circumstantial evidence such evidence must satisfy the following tests:-

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

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

(iii) 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

(iv) the circumstantial evidence is order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

[See Gambhir v. State of Maharashtra (1982) 2 SCC 351 : (AIR 1982 SC 1157)]
....." **[emphasis supplied]**

14. It becomes clear from the above decisions 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 piece of circumstances taken together must forge such a chain from which no inference other than the guilt of the accused can be drawn.

15. We have already highlighted above the basic facts which stand established on the basis of evidence on record. The only question that remains to be considered is whether the basic facts only point towards the guilt of the accused. Taking into account the totality of the circumstance, we have no hesitation to hold that the only irresistible conclusion that can be drawn from the established circumstances in the present case would be that in all human probability the deceased met his death at the hands of the accused persons.

16. One further submission made by the learned Counsel for the appellant which needs to be adverted to before coming to the final conclusion is that, the evidence on record does not prove motive for the alleged crime, and such absence of motive negates the prosecution case. There is no doubt that motive, if proved, would be useful in deciding a

case in so far as where there is a clear proof of motive for crime that lends additional support to the finding of the court that the accused was guilty. At the same time there is ample authority for the proposition that the absence of proof of motive does not lead to contrary conclusion. Therefore, it is settled law that motive is not the integral part of the crime and as such no motive need either be alleged or proved in any criminal case whether based on direct or circumstantial evidence or a combination of both. Such being the position in law with regard to motive, the contention raised by the learned Counsel for the appellant on the ground of motive not being proved, does not advance the case of the defense any further.

17. In the above circumstances, it goes without saying that the conclusions arrived at by the learned trial Court do not suffer from any serious legal infirmity. We are thus of the view that no case is made out which call for any interference by this Court.

18. In the result, the impugned judgment and order passed by the learned trial Court is affirmed and the appeal is hereby dismissed.

(A. P. Subba)
Judge
25-07-2008