IN THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

D.B. : HON'BLE MR. JUSTICE NARENDRA KUMAR JAIN, CJ.
HON'BLE MR. JUSTICE SUNIL KUMAR SINHA, J.

Criminal Appeal No. 07/2013

APPELLANT Veena Devi Sharma,
W/o Lall Babu Sharma,
R/o Mohuwa, Bihar,
A/p Rangpo Bazar.
East Sikkim.

Versus

RESPONDENT State of Sikkim
through the Additional
Public Prosecutor.

(**Criminal Appeal under Section 374 (2) of the Code of Criminal Procedure, 1973**)

Appearance

Mr. K. T. Bhutia, Senior Advocate with Ms. Bandana Pradhan and Ms.Nisha Rajliwal for the appellant.

Mr. Karma Thinlay Namgyal, Additional Public Prosecutor,Mr.S.K. Chettri and Mrs. Pollin Rai, Assistant Public Prosecutors and Mr. D. K. Siwakoti, Advocate for the State/respondent.

JUDGMENT

(19th August, 2014)

Following Judgment of the Court was delivered by

SUNIL KUMAR SINHA, J.

1. This Appeal is directed against the judgment dated 15.04.2013 passed in S. T. Case No. 26 of 2010, by the Sessions Judge, Special Division-II (East & North) at Gangtok.

By the impugned judgment, the appellant has been convicted u/Ss. 302 and 364 of the Indian Penal Code, 1860 (in short '**IPC**') and sentenced to undergo imprisonment for life and to pay fine of Rs.2000/- and S.I. for 7 years and to pay fine of Rs.500/- respectively, with a direction to run the sentences concurrently.

2. The facts, briefly stated, are as under :-

2.1 Deceased, Arpit Sharma was aged about 7 years. He was studying in 1st standard at Chanatar School. On 02.11.2009, he left his house for school, however, he did not return. His uncle, Dinesh Sharma (PW-1), made enquiry from the school authorities who told him that on 02.11.2009 at about 1030 hours the boy was taken by his mother on the pretext that he was not well and she had to take him to the hospital for treatment. A search was made, but when the boy (deceased) could not be traced, Dinesh Sharma (PW-1), lodged First Information Report (Exbt.1) on 03.11.2009.

2.2 Dinesh Sharma (PW-1), then came to know that one Shanti Sharma, who was running a hotel, had seen the deceased boy in the company of the appellant who came to her hotel for water as he (deceased) was vomiting. According to her, at that time, the deceased was wearing school dress. This information was given by Dinesh Sharma (PW-1) to the police. Then the police took the appellant into custody and brought her before Shanti Sharma on 03.11.2009 who identified the appellant being the same lady who had visited her hotel on 02.11.2009.

2.3 Driver, Dhurba Gurung (PW-9), in whose taxi the appellant had allegedly travelled to the School, was also taken into custody. On further investigation,

discovery statement of the appellant (Exbt.5) was recorded u/S 27 of the Evidence Act on 05.11.2009 and the dead body of the deceased was allegedly recovered from a bamboo grove near Singtam hospital by recovery memo Exbt.6.

2.4 Mrs. Laxmi Sharma (PW-8), Dhurba Gurung (PW-9) and Meera Rai (PW-24) duly identified the appellant in the Test Identification Parade (TIP) conducted on 27.11.2009 in Rongyek State Jail. The TIP report is Exbt.18.

2.5 Dhurba Gurung (PW-9), then was excluded from the array of the accused and charge sheet was filed only against the appellant.

2.6 The prosecution came with the case that the appellant had stolen a sari, belonging to a customer, from the tailoring shop of the grandmother of the deceased, namely, Sarda Devi Sharma (PW-11), which was later on returned by the appellant to Sarda Devi Sharma when she was taken to a temple. Therefore, the appellant was unhappy with Sarda Devi Sharma and, while returning to her house, on the way she had threatened her saying that “you gave the sari to the lady and you see the consequences”. According to the prosecution, this was the motive for the appellant to commit murder of the deceased. On the said motive, on the fateful day, the appellant went to the School of the deceased by hiring the taxi of Dhurba Gurung (PW-9) and took the deceased in the taxi to Singtam, where he was murdered by her near the bamboo grove.

2.7 Admittedly, there was no eye witness to the incident and the case of the prosecution was based on circumstantial evidence. Following are the main circumstances set-forth by the prosecution : -

(1) The appellant was identified as the lady, who visited the school of the deceased, took him away and killed him ;

(2) the appellant had used vehicle of Dhurba Gurung (PW-9) as means of transportation to reach from Rangpo to Chanatar Jr. High School and then to Singtam with the deceased ;

(3) the appellant and the deceased were last seen together ;

(4) the appellant made discovery statement on which the dead body and other belongings of the deceased were recovered from the bamboo grove ; and

(5) there was a motive with the appellant to commit murder of the deceased on account of dispute between herself and the grandmother of the deceased.

2.8. The learned Sessions Judge, relying on the above circumstances, convicted and sentenced the appellant as above. Hence this Appeal.

3. Mr. K. T. Bhutia, learned Senior Advocate appearing on behalf of the appellant, has argued that the above circumstances were not fully established and they were not sufficient to hold the appellant guilty of the aforesaid offences; the appellant was not duly identified; therefore, the theory of last seen together will not come into play; the discovery statement appears to be suspicious, hence it cannot be held that the dead body of the deceased was

recovered at the instance of the appellant. He very much emphasized that when the appellant was duly identified by the hotel owner, Shanti Sharma, on 03.11.2009, why she was not arrested immediately and her arrest was made only on 05.11.2009 after the alleged discovery made through her. This also shows that the appellant was in illegal custody since 03.11.2009 till 05.11.2009.

4. On the other hand, Mr. Karma Thinlay Namgyal, learned Additional Public Prosecutor appearing on behalf of the State, has opposed those arguments and supported the judgment passed by the Sessions Court.

5. We have heard learned Counsel for the parties and have perused the records of the Sessions Court.

IDENTIFICATION OF THE APPELLANT :

6. According to the prosecution, three witnesses, namely, Mrs. Laxmi Sharma (PW-8), Dhurba Gurung (PW-9) and Meera Rai (PW-24), who had identified the appellant on the dock, had also identified her in the TI Parade conducted in Rongyek State Jail on 27.11.2009. Dhurba Gurung (PW-9) was the taxi driver. According to him, his taxi was hired by the appellant for going to the school from where the appellant took the deceased and went to Singtam. His evidence would reveal that he was also taken into custody by the police as one of the suspects. He admitted in the cross examination that he was produced before the Magistrate

along with the appellant in the court and they had gone to the court in the same vehicle of the police. He further admitted in the cross examination that he had seen the appellant in police custody in the police station and he also admitted that when the Judicial Magistrate, during the TIP, put the question to him that when he saw the appellant last, he had replied that he had seen her on the day of the incident only. Thus it is clear from his evidence that he had met the appellant in police station while she was in custody. He was also taken into custody by the same police and was produced before the Magistrate along with the appellant after her arrest. Thus he had ample opportunity to see the appellant in the above manner and, his statement to the Magistrate that he had seen the appellant only once when she allegedly hired his taxi was totally false.

7. Mrs. Laxmi Sharma (PW-8), was a teacher in Chanatar Jr. High School, Rangpo. On 02.11.2009, she was present in the school. According to her, the deceased was also present in the school on the said date. When school was going on, the appellant came to the classroom and took the deceased with her. She deposed that she had identified the appellant in the Test Identification Parade held on 27.11.2009. However, in cross examination, she clearly admitted that she had seen the appellant in Thana. She further admitted in her cross examination that the photograph of the appellant was published in the newspaper along with Arpit Sharma (deceased) with blood and injury and she had seen the photograph in the newspaper. Further, she categorically

admitted that it is true that she had seen the photograph of the appellant in newspaper before TIP was held on 27.11.2009. Mr. Bhutia has drawn our attention towards two judgments in this regard, namely, ***Vijayan alias Rajan*** *vs.* ***State of Kerala : 1999 Crl.L.J.1638*** *and* ***Ravindra alias Ravi Bansi Gohar*** *vs.* ***State of Maharashtra*** *and a connected matter* ***: AIR 1998 SC 3031***. These are cases in which the photographs of the accused were shown to the witnesses and were also published before the TIP was held. The Supreme Court held that when the photographs of the accused were shown to the witnesses before the TIP was held, it was a glaring fact which made the identification in TIP and, for that matter, identification in courts worthless and the witnesses were not relied for identification. The position of Mrs. Laxmi Sharma (PW-8) in this matter would not be different than the witnesses of the above two cases. Thus, her evidence relating to TIP as also the dock identification would be highly affected on account of seeing the photograph of the appellant before the TIP.

8. Meera Rai (PW-24), deposed that on the fateful day the appellant came to her house along with two children. One was a small boy and the other was a small female child. The appellant requested her to look after her daughter (female child) for sometime so that she can go and leave the boy to the school. Thereafter, she left their house along with the boy and after about half an hour she returned alone and took the baby girl and left their house. According to Meera Rai (PW-24), she had identified the

appellant in TIP in Rongyek State Jail. In cross examination, she also admitted that she had seen the photograph of the appellant in the newspaper before the TIP took place. She also admitted that if she would have met the appellant in the market, she would not have identified her and it is true that seeing her alone on the dock (on the date of evidence) she could identify her. In addition to her admission of seeing the photograph of the appellant before TIP, she also admitted that the appellant was the only Behari lady among the four persons put for identification, and for this reason, the appellant was identified. The dress-up and appearance of the Behari ladies and the ladies of Sikkim State are different and thus it cannot be said that the ladies of similar kind of appearance were mixed at the time of TIP. All this make the TIP as also the dock identification by Meera Rai (PW-24) doubtful and it cannot be said to be beyond the shadows.

9. The other witnesses of identification were Binod Pradhan (PW-10), Sonam Tharchen Bhutia (PW-14) and Dhan Kumar Rai (PW-13). Binod Pradhan (PW-10) has turned hostile and Sonam Tharchen Bhutia (PW-14) has not identified the appellant before the court. Dhan Kumar Rai (PW-13) was an inmate in the house of Meera Rai (PW-24) who claims that he had also seen the appellant when she visited their house for leaving her small baby. The appellant was not put for identification by this witness. He identified her for the first time on the dock. His evidence was recorded on 25.07.2012. He categorically admitted that it is true

that by seeing the appellant alone in the dock he had identified her and he also admitted that he cannot remember and state to the court about the face of the lady who came to their house and asked to look after her child.

10. The law in relation to Test Identification Parades (T.I.Ps.), their evidentiary value, the effect of not conducting the T.I.Ps. & delay in conducting the T.I.Ps. and the principles relating to dock-identification have been elaborately discussed by the Supreme Court in ***Mulla and Another -Vs- State of Uttar Pradesh, (2010) 3 SCC 508.*** We would like to quote the relevant paragraphs (Paras-41 to 55) of the above judgment to make it clear as to what are the principles on which the veracity of the evidence of Test Identification Parade (T.I.P.) as also the dock-identification has to be judged:

> "**41**. Now, let us consider the arguments of the learned amicus curiae on the delay in conducting the test identification parade. The evidence of test identification is admissible under Section 9 of the Evidence Act, 1872. The identification parade belongs to the stage of investigation by the police. The question whether a witness has or has not identified the accused during the investigation is not one which is in itself relevant at the trial. The actual evidence regarding identification is that which is given by witnesses in court. There is no provision in CrPC entitling the accused to demand that an identification parade should be held at or before the inquiry of the trial. The fact that a particular witness has been able to identify the

accused at an identification parade is only a circumstance corroborative of the identification in court.

42. Failure to hold test identification parade does not make the evidence of identification in court inadmissible, rather the same is very much admissible in law. Where identification of an accused by a witness is made for the first time in court, it should not form the basis of conviction.

43. As was observed by this Court in ***Matru-Vs-State of U.P., (1971) 2 SCC 75*** identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroboration of the statement in court. (Vide ***Santokh Singh-Vs-Izhar Hussain, (1973) 2 SCC 406.***

44. The necessity for holding an identification parade can arise only when the accused persons are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime.

45. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Code and the Evidence Act, 1872. It is desirable that a test identification parade should be conducted as soon as possible after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution.

46. In ***Subash-Vs-State of U.P., (1987) 3 SCC 331***, the parade was held about three weeks after the arrest of the accused. Therefore, there was some room for doubt if the delay was in order to enable the identifying witnesses to see him in jail premises or police lock-up and thus make a note of his features. Moreover, four months had elapsed between the date of occurrence and the date of holding of the test identification parade. The descriptive particulars of the appellant were not given when the report was lodged, but while deposing before the Sessions Judge, the witnesses said that the accused was a tall person with shallow (sic sallow) complexion. The Court noted that if on account of these features the witnesses were able to identify the appellant Shiv Shankar at the identification parade, they would have certainly mentioned about them at the earliest point of time when his face was fresh in their memory.

47. It is important to note that since the conviction of the accused was based only on the identification at the test identification parade, the Court in Subash case gave

him the benefit of doubt while upholding the conviction of the co-accused. This is also a case where the conviction of the appellant was based solely on the evidence of identification. There being a delay in holding the test identification parade and in the absence of corroborative evidence, this Court found it unsafe to uphold his conviction.

48. In ***State of A.P. - Vs- Dr. M.V. Ramana Reddy, (1991) 4 SCC 536*** the Court found a delay in holding the test parade for which there was no valid explanation. It held that in the absence of a valid explanation for the delay, the approach of the High Court could be said to be manifestly wrong calling for intervention.

49. In ***Brij Mohan -Vs- State of Rajasthan, (1994) 1 SCC 413*** the test identification parade was held after three months. The argument was that it was not possible for the witnesses to remember, after a lapse of such time, the facial expressions of the accused. It was held that generally with lapse of time memory of witnesses would get dimmer and therefore the earlier the test identification parade is held it inspires more faith. It was held that no time-limit could be fixed for holding a test identification parade. It was held that sometimes the crime itself is such that it would create a deep impression on the minds of the witnesses who had an occasion to see the culprits. It was held that this impression would include the facial impression of the culprits. It was held that such a deep impression would not be erased within a period of three months.

50. In ***Rajesh Govind Jagesha – Vs- State of Maharashtra, (1999) 8 SCC 428*** the accused was apprehended on 20-1-1993, while the identification parade was held on 13.-2-1993. It was also not disputed

that at the time of identification parade the appellant was not having a beard and long hair as mentioned at the time of lodging of the first information report. It was also not disputed that no person with a beard and long hair was included in the parade. The witnesses were alleged to have identified the accused at the first sight despite the fact that he had removed the long hair and beard. This Court held that the Magistrate should have associated 1-2 persons having resemblance with the persons described in the FIR and why it was not done was a mystery shrouded with doubts and not cleared by the prosecution. In these circumstances, the Court observed that the possibility of the witnesses having seen the accused between the date of arrest and the test identification parade cannot be ruled out. This case also rests on its own facts, and mere delay in holding the test identification parade was not the sole reason for rejecting the identification.

51. In ***Daya Singh – Vs- State of Haryana, (2001) 3 SCC 468*** the test identification parade was held after a period of almost eight years inasmuch as the accused could not be arrested for a period of 7 ½ years and after the arrest the test identification parade was held after a period of six months. It was pointed out that the purpose of test identification parade is to have the corroboration of the evidence of the eyewitnesses in the form of earlier identification. It was held that the substantive evidence is the evidence given by the witness in the court and if that evidence is found to be reliable then the absence of corroboration by the test identification is not material. It was further held that the fact that the injured witnesses had lost their son and daughter-in-law showed that there were reasons for an enduring impression of the identity on the mind and memory of the witnesses.

52. This Court in ***Lal Singh – Vs- State of U.P., (2003) 12 SCC 554*** while discussing all the cases germane to the question of identification parades and the effect of delay in conducting them held that (SCC p. 571, para 43):

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

53. In ***Anil Kumar – Vs- State of U.P., (2003) 3 SCC 569*** this Court observed as under (Para-9):

> "9. …..It is to be seen that apart from stating that delay throws a doubt on the genuineness of the identification parade and observing that after lapse of such a long time it would be difficult for the witnesses to remember the facial expressions, no other reasoning is given why such a small delay would be fatal".

A mere lapse of some days is not enough to erase the facial expressions of assailants from the memory of father and mother who have seen them killing their son.

54. In another case of ***Pramod Mandal -Vs- State of Bihar, (2004) 13 SCC 150*** placing reliance on *Anil Kumar* this Court observed that (Pramod case, Para-20):

"20. It is neither possible nor prudent to lay down any invariable rule as to the period within which a test identification parade must be held, or the number of witnesses who must correctly identify the accused, to sustain his conviction. These matters must be left to the courts of fact to decide in the facts and circumstances of each case. If a rule is laid down prescribing a period within which the test identification parade must be held, it would only benefit the professional criminals in whose cases the arrests are delayed as the police have no clear clue about their identity, they being persons unknown to the victims. They, therefore, have only to avoid their arrest for the prescribed period to avoid conviction. Similarly, there may be offences which by their very nature may be witnessed by a single witness, such as rape. The offender may be unknown to the victim and the case depends solely on the identification by the victim, who is otherwise found to be truthful and reliable. What justification can be pleaded to contend that such cases must necessarily result in acquittal because of there being only one identifying witness ? Prudence therefore demands that these matters must be left to the wisdom of the courts of fact which must consider all the aspects of the matter in the light of the evidence on record before pronouncing upon the acceptability or rejection of such identification".

55. The identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting a test identification parade is twofold. First is to enable the witnesses to satisfy themselves that the accused whom they suspect is

really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence. Therefore, the following principles regarding identification parade emerge:

(1) an identification parade ideally must be conducted as soon as possible to avoid any mistake on the part of witnesses;

(2) this condition can be revoked if proper explanation justifying the delay is provided; and

(3) the authorities must make sure that the delay does not result in exposure of the accused which may lead to mistakes on the part of the witnesses".

11. In the instant case, the appellant was taken into custody on 03.11.2009 and her arrest was made on 05.11.2009, but she was put for identification on 27.11.2009. Thus, there was a long time gap between the arrest and the TIP. In between this period, she was brought before the Court for at least two times. There is no material on record to show that she was kept *'beparda'* so as to avoid the instance of being seen by the witnesses. The prosecution has not given any explanation, much less plausible explanation, about the delay in conducting the TIP. That apart, in between this period, the photographs of the appellant and the deceased boy with all details were also published in newspapers and were admittedly seen by the witnesses of identification. Dhurba Gurung (PW-9), was also made an accused in the earlier stage of investigation. He

was also arrested by the police and was produced before the concerned Magistrate. According to his evidence, he and the appellant both were taken to the court in the same police vehicle and he had also seen the appellant in police lock-up. The other witnesses have clearly admitted in their cross-examinations that they were able to identify the appellant in the court because she alone was standing on the dock while their evidence was being recorded. None of the witnesses of identification were able to depose about the physique or the face-built or any other feature relating to the appellant on which they were able to identify her.

12. That apart, Shanti Sharma who allegedly identified the appellant on 03.11.2009 in her hotel, was not examined by the prosecution. Mr. Karma Thinlay Namgyal has very much emphasized that Dinesh Sharma (PW-1) has deposed that Shanti Sharma had identified the appellant in her hotel. If we look into the statement of the appellant recorded u/S. 313 Cr.P.C., it would appear that in answer to question no.5 (page 133 of the paper book), the appellant has stated that she was not identified by the lady. The above explanation given by the appellant in answer to question no.5 that she was not identified by the lady, appears to be reasonable and acceptable in the facts and circumstances of the case. If the appellant would have been identified by Shanti Sharma on 03.11.2009, the police must have arrested her on the same day. That apart, if Shanti Sharma would have been examined by the prosecution, the appellant would be having opportunity to cross-examine her and to test her veracity in light of

the above evidence of Dinesh Sharma (PW-1). The diary statement of Shanti Sharma is available at page no.54-A of the paper book. In the said statement, she had never mentioned that the appellant was brought before her on 03.11.2009 or on any other day and she had identified her on the said day.

13. In the light of above facts and circumstances of the case, we are of the view that the learned Sessions Judge fell into error while holding that the identity of the appellant was fully established and she had visited the school of the deceased boy and took him with her.

LAST SEEN TOGETHER :

14. The witnesses of last seen together were the same witnesses who were examined for proving the identity of the appellant. We have recorded the finding that on the evidence of these witnesses, the identity of the appellant was not established. It is a basic principle that, to put in motion the theory of last seen together, identity of the accused and the deceased, both must be established beyond all reasonable doubts. In the instant case, the prosecution has utterly failed to establish the identity of the appellant, so as to prove the circumstance that the appellant and the deceased were lastly seen together, and if the deceased had died homicidal death, it would be incriminating against the appellant. That apart, there was a long time gap between the deceased allegedly seen alive with the appellant and the dead body found. The last seen together is alleged on 02.11.2009 and the dead body was found on

05.11.2009. Thus, the said circumstance was also not established.

DISCOVERY OF THE DEAD BODY AT THE INSTANCE OF THE APPELLANT :

15. According to the prosecution, dead body of the deceased was recovered from a bamboo grove near Singtam hospital. This bamboo grove was adjacent to Sawney Busty. The discovery statement (Exbt.5) was recorded in the police station before Sanjay Agarwal (PW-5) and Bikash Kumar Prasad (PW-6). Mr. Bhutia has argued that they were the pocket witnesses of the police. Sanjay Agarwal (PW-5) was running a stationary shop just in front of the police station and Bikash Kumar Prasad (PW-6) was a resident of the locality in which the police station was situated. We find from the evidence that Sanjay Agarwal (PW-5) was also a witness in a Drugs case of the said police station, but according to him it was a later case. His phone number was already with the police officers on which he was called. Bikash Kumar Prasad (PW-6) has admitted that it takes 3-4 minutes from his house to reach the police station. But only on these accounts their evidence cannot be held to be unreliable. We have to examine as to whether the statement of the appellant fulfills the requirements of Section 27 of the Evidence Act and whether, in fact, it leads to the discovery of the dead body of the deceased boy from the bamboo grove.

16. Mr. Bhutia has placed reliance on a Privy Council judgment, namely, ***Pulukuri Kottaya and others –****vs-* ***Emperor : AIR(34) 1947 Privy Council 67***. Mr. Karma Thinlay Namgyal has also

cited a few judgments relating to principles of discovery, including the judgment in ***Amitsingh Bhikamsingh Thakur –****vs-* ***State of Maharashtra : (2007) 2 SCC 310*** and ***State of Maharashtra*** *v.* ***Suresh : (2000) 1 SCC 471***.

17. In *Pulukuri Kottaya (supra)* it was laid down that the condition necessary to bring Section 27 into operation, is that the discovery of a fact must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. It was further held that except in cases where possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law.

18. In *Suresh (supra)* it was held that when the recovery of the dead body was from a place pointed out by the accused, possibility also exist that accused would have seen someone else concealing the dead body at that place or he would have been told by somebody else that the dead body was concealed there. But if the accused does not tell the court about the happening of the two possibilities, the court can presume that the accused had himself concealed the dead body.

19. In *Amitsingh (supra)* various requirement of Section 27 were summed up as follows :-

(1) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with question of relevancy. The relevancy of the fact discovered must be established according to the prescription relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.

(2) The fact must have been discovered.

(3) The discovery must have been in consequence of some information received from the accused and not by the accused's own act.

(4) The persons giving the information must be accused of any offence.

(5) He must be in custody of a police officer.

(6) The discovery of a fact in consequence of information received from an accused in custody must be deposed to.

(7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible.

20. There can be hardly any conflict, so far as the principles relating to discoveries are concerned. What is important is that a fact must have been discovered and the discovery must have been in consequence of some information received from the accused while in police custody. If we examine the

evidence in the instant case, it would be clear that the dead body of the deceased was not in concealed condition. The witnesses of memorandum and seizure have admitted in their cross examination that the place where the dead body was lying was nearer to Sawney Busty. Sanjay Agarwal (PW-5) has admitted in his cross examination that a dwelling house was situated at a distance of more than 10 feet from the place of occurrence. That apart, it also comes in the evidence of these witnesses that the bamboo grove was nearer to the foot-path used by the busty people. Bikash Kumar Prasad (PW-6) very categorically admitted there were 3 – 4 houses on both sides of the foot-path near the place of occurrence.

21. Both the witnesses have also admitted that when they reached the place of occurrence along with the police party, there were some people who had gathered there. It was also admitted that the police were enquiring from the people who had gathered at the place of occurrence. Bikash Kumar Prasad (PW-6) has deposed in his examination-in-chief itself that about 5-6 feet below the foot-path, the dead body of Arpit Singh was found in a prone position in the bamboo grove. Thereafter, the inquest was prepared.

22. The above factual scenario would make it clear that it was not a case in which the dead body was concealed. Even according to the prosecution, the dead body was lying at an

open place in a bamboo grove near Sawney Busty, where many villagers had already gathered. This place was nearer to Singtam hospital. Even a dwelling house was situated at a distance of 10 feet where the dead body was found. In the above facts and circumstances, how it can be said that, in fact, the dead body was discovered/recovered at the instance of the appellant. It does not appear to be reasonable that a place which was nearer to the village area, a dead body would lye unnoticed by the villagers for such a long period, i.e., from 02.11.2009 to 05.11.2009. Thus, it cannot be said that either the fact of lying the dead body at the place of occurrence or the recovery thereof from that place, was at the instance of the appellant, as many facts relating to such discovery and recovery are capable of being explained. We are of the view that in the above facts and circumstances of the case, the alleged recovery and the discovery cannot be attributed to the appellant.

MOTIVE OF THE CRIME :

23. Deceased, Arpit Sharma, was residing with his uncle, Dinesh Sharma (PW-1) and grandmother, Sarda Devi Sharma (PW-11). Sarda Devi was running a tailoring shop. A sari was given to her by a customer for some work. The case of the prosecution is that the said sari was stolen by the appellant, however, after taking her to a temple she returned

the sari to Sarda Devi (PW-11) and while they were returning to their houses, the appellant on the way threatened Sarda Devi that she had given the sari to the lady (customer), now she would see the consequences. All this had happened one week prior to the incident. According to the prosecution, on the said dispute, the appellant made a plan and hired a taxi for gong to the school of the deceased, where she posed herself as the mother of the deceased and took the deceased with her to Singtam hospital and committed murder in the aforesaid locality. Does it appear to be a sufficient motive for commission of such a heinous offence like murder ? If the appellant had some grudge, it was against the grandmother of the deceased and not against the deceased. It does not appear to be reasonable to hold that the appellant would commit the murder of an innocent child for taking revenge from his grandmother for such a petty incident. Sarda Devi (PW-11) has deposed that she was threatened by the appellant. Mr. Bhutia has drawn our attention towards the diary statement of Sarda Devi (PW-11), in which the facts relating to the threat given by the appellant to her are omissions. This was a vital omission. The said facts were improvements in the evidence of Sarda Devi which she made before the court. The IO has also proved these omissions and the improvements in his evidence. Thus, the motive

suggested by the prosecution that a threat was given to the grandmother of the deceased was not fully established.

24. In ***Dhananjoy Chatterjee –vs- State of W.B. (1994) 2 SCC 22***, the Supreme Court held "In a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof."

25. In ***Bodh Raj alias Bodha and others –vs- State of Jammu and Kashmir, AIR 2002 SC 3164***, the Supreme Court laid down that there is no doubt that conviction can be based solely on circumstantial evidence but the conditions precedent before conviction could be based on circumstantial evidence, must be fully established. They are:

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

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

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

4) they should exclude every possible hypothesis except the one to be proved; and

5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

26. Almost similar view was taken by the Supreme Court in ***State of Goa –vs- Sanjay Thakran & anr.. 2007 (4) SBR 321*** by taking note of the decision of *Bodh Raj (supra).*

27. On due appreciation of the entire evidence on record, we find that the circumstances set forth by the prosecution were not fully established. They were not of conclusive nature and tendency. Almost all the circumstances were capable of being explained and the chain of circumstantial evidence was also not complete.

28. For the foregoing reasons, we are unable to sustain the conviction of the appellant on the above set of circumstantial evidence and the same deserves to be set aside.

29. Accordingly, the Appeal is allowed.

30. The conviction and sentences awarded to the appellant u/Ss. 302 and 364 I.P.C. are set aside. She is acquitted of the charges framed against her.

31. The appellant is on bail. Her bail bond shall continue for a period of 6 months in view of Section 437A Cr.P.C.

Sd/-

(Sunil Kumar Sinha)
Judge
19.08.2014

Sd/-

(Narendra Kumar Jain)
Chief Justice
19.08.2014

Approved for reporting : Yes / No

Internet : Yes / No

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