THE HIGH COURT OF SIKKIM: GANGTOK

(Criminal Appeal Jurisdiction)

D.B.: THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, ACTING CHIEF JUSTICE
THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

Crl. Appeal No. 14 of 2016

Somnath Sharma,
S/o Indralall Sharma,
R/o Upper Aho Santi,
Pakyong,
East Sikkim.

At present: Rongyek Jail,
Gangtok, East Sikkim. ... Appellant

versus

State of Sikkim.

... Respondent

Appeal against conviction under Section 374(2) of the Code of Criminal Procedure, 1973.

Appearance:

Mr. N. Rai, Senior Advocate (Legal Aid Counsel) with Ms. Tamanna Chhetri and Ms. Malati Sharma Advocates for the Appellant.

Mr. Karma Thinlay, Additional Public Prosecutor.
Mr. Thinlay Dorjee Bhutia, Additional Public Prosecutor.
Mr. S. K. Chettri and Ms. Pollin Rai, Assistant Public Prosecutors for the State-Respondent.

J U D G M E N T

(11.10.2018)

Bhaskar Raj Pradhan, J

1. The process of justice dispensation in a criminal case mandates a thorough and sincere investigation by the investigating agency to place the absolute truth-the inflexible reality before the Court. The Investigating Officer is required to be professional,

ethical, unbiased and adept with the laws. The trial of criminal cases must have the paramount objective to establish the truth. The object of investigation would be to bring home the offence to the offender however, without out stepping from the path of truth. The sole objective of the trial would be to render justice, however harsh the outcome may be. The ultimate object of both investigation and trial is to arrive at the truth. The prosecution as well as the defence lawyers must play a crucial role in the adversarial proceeding. During trial the trial Judge has a fundamental duty to ensure fair play and the acceptance of oral as well as documentary evidence in the manner prescribed by law is fundamental. The understanding of the Indian Evidence Act, 1872, the procedural law as provided in the Code of Criminal Procedure, 1973 (Cr.P.C.) and the ingredients of the offence as defined in the substantive law is vital in the process of investigation as well as trial. The Judgment rendered by the Trial Judge must reflect the deep understanding of these laws and the appreciation of the facts that have unfolded during trial. There would be no room for conjectures and surmises or even presumptions save what is permitted. Cogent evidence must lead to precise answers. It is only when there is failure in investigation and prosecution that conjectures and surmises, most unfortunately, are resorted to. That however, would be not only an incorrect but also an illegal approach. Prejudging a case inevitably leads to disastrous consequences. Sound judicial principles must guide the Trial judge

while arriving at his conclusion. The adage *"innocent until proven guilty"* is the fundamental principle of criminal jurisprudence. Conviction must be secured by adducing cogent and conclusive evidence by due process of the laws.

2. In re: ***Ashish Batham v. State of M.P***[1] the Supreme Court would once again reiterate:

> ***"8.*** *Realities or truth apart, the fundamental and basic presumption in the administration of criminal law and justice delivery system is the innocence of the alleged accused and till the charges are proved beyond reasonable doubt on the basis of clear, cogent, credible or unimpeachable evidence, the question of indicting or punishing an accused does not arise, merely carried away by the heinous nature of the crime or the gruesome manner in which it was found to have been committed. Mere suspicion, however strong or probable it may be is no effective substitute for the legal proof required to substantiate the charge of commission of a crime and graver the charge is, greater should be the standard of proof required. Courts dealing with criminal cases at least should constantly remember that there is a long mental distance between "may be true" and "must be true" and this basic and golden rule only helps to maintain the vital distinction between "conjectures" and "sure conclusions" to be arrived at on the touchstone of a dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case as well as quality and credibility of the evidence brought on record.****"***

3. The indictment of the Appellant for the offence of murder of his wife (deceased) in criminal conspiracy with Chandra Kala Sharma and thereafter giving false information with the intention of screening himself from legal punishment would result in the impugned judgment of conviction dated 29.02.2016 by the learned

[1] **(2002) 7 SCC 317**

Sessions Judge, Special Division-II at Gangtok, East Sikkim. The conviction of the Appellant would be under Section 302 and 201 Indian Penal Code, 1860 (IPC). The impugned order on sentence dated 29.02.2016 would punish the Appellant to undergo rigorous imprisonment for life and to pay a fine of Rs.10,000/- (Rupees ten thousand) only under Section 302 IPC and in default of payment of fine to further undergo six months simple imprisonment. For the offence under Section 201 IPC the Appellant would be sentenced to undergo two years simple imprisonment and to pay a fine of Rs.5000/- (Rupees five thousand) only and in default to further undergo three months of simple imprisonment. The convictions as well as the sentences are questioned in the present appeal.

4. The learned Sessions Judge while convicting the Appellant as aforesaid would primarily rely upon:-

(i) Purported "extra judicial confession" made by the Appellant before Deepak Sharma (P.W.1), Netra Devi Sharma (P.W.2), Pema Chakki Bhutia (P.W.3) and "confession" made before Ganga Ram Pathak (P.W.9) and the Investigating Officer-Mahendra Subba (P.W.28).

(ii) Purported "confessional" statement of the Appellant recorded under Section 164 of the Code of Criminal Procedure, 1973 (Cr.P.C.) by the Chief Judicial Magistrate, Suraj Chettri (P.W.27).

(iii) The admission of an affair with Chandra Kala Sharma – the accused no.2 during the trial in the confession of the Appellant under Section 164 Cr.P.C.

(iv) Purported "confession" of Chandra Kala Sharma – the accused no.2 during the trial, made to Deepak Sharma (P.W.1) and Mahendra Poudyal (P.W.12) on the ground that when more persons than one are jointly tried for the same offence, the confession made

by one of them, if admissible in evidence, should be taken into consideration against the other accused.

(v) Last seen theory as per the evidence of Anand Munda (P.W.10) and the identification of the Appellant in the Test Identification Parade conducted.

(vi) The records of the vehicle movement register at Rangpo check post.

(vii) Purported Call Detail Record of the calls made by the Appellant and the deceased and the seizure of the mobile phone of the Appellant by which the calls were allegedly made showing the location.

(viii) The disclosure statement recorded under Section 27 of the Indian Evidence Act, 1872.

(ix) The filing of the false missing report by the Appellant, inconsistent and contradictory statement of the Appellant regarding the whereabouts of the deceased along with his conduct-tearing of the deceased face from her photographs, false plea of the Appellant having lost his wallet along with the key of the box belonging to the deceased.

(x) The making of calls to various relatives inquiring about the whereabouts of the deceased by the Appellant and misleading his parents, relatives and the police.

(xi) The failure of the Appellant to satisfactorily explain the circumstances appearing against him during his examination under Section 313 Cr.P.C.

(xii) The time of death being closely connected to the date of incident.

5. Heard, Mr. N. Rai, learned Senior Advocate and legal aid Counsel for the Appellant as well as Mr. Karma Thinlay, learned Additional Public Prosecutor for the State-Respondent.

6. Mr. N. Rai would submit that this was a case based on circumstantial evidence and the prosecution had failed to prove that the circumstances are wholly consistent with the guilt of the accused and excludes every other hypothesis of the innocence of the Appellant and that further the prosecution has also failed to prove the links in the chain of circumstances beyond reasonable doubt. He would also submit that the prosecution must stand on its own strength and it is not permissible to take advantage of the weakness of the defence. Mr. N. Rai would submit that the prosecution has failed to prove that the Appellant and the deceased were together at the time of the incident. He would also submit that the prosecution failed to prove any motive. He would submit that the alleged extra judicial confessions are untrustworthy and tutored. Delay in registering the First Information Report (FIR) and forwarding the same to the Magistrate is unexplained. He would contend that the very fact the dead body of the deceased was found in a cave in a sitting position contrary to the allegation of the prosecution that the Appellant had disclosed that he had pushed the deceased from *"Jalewa Bhir"* in the disclosure statement of the Appellant recorded under Section 27 of the Indian Evidence Act, 1872 would falsify the prosecution's story. Mr. N. Rai would submit suspicion however strong cannot substitute legal proof. Mr. N. Rai would question the impugned judgment as well as the order on sentence as being rendered on conjectures and surmises without any cogent evidence.

7. *Per contra* Mr. Karma Thinlay would submit that the conviction and sentence passed by the learned Sessions Judge was perfectly justified in the facts and circumstances of the present case and that the prosecution had been able to prove the case based on circumstantial evidence, beyond reasonable doubt. He would submit that the conduct of the Appellant during the period as proved by the evidence of Deepak Sharma (P.W.1), Hema Sharma (P.W.4), Indralall Sharma (P.W.5), Bindu Mati Adhikari (P.W.8), Pushpa Lal Kafley (P.W.11), Rajesh Prasad Gupta (P.W.14) and the Investigating Officer-Mahendra Subba (P.W.28) along with the vehicle movement register (Exhibit-36) would prove the guilt of the Appellant. He would submit that the deposition of Anand Munda (P.W.10) would show that in fact on 19.12.2013 the Appellant had been to the place of occurrence with the deceased. He would submit that the disclosure statement of the Appellant (Exhibit-3) recorded under Section 27 of the Indian Evidence Act, 1872 read with the confessional statement of the Appellant recorded under Section 164 Cr.P.C. would establish that it was the Appellant who had committed the crime alleged and none other.

8. There would be no eye witness to the occurrence. Admittedly, this would be a case based on circumstantial evidence. The method for proving a criminal case based on circumstantial evidence is well settled.

9. The prosecution story in short was that the Appellant had married the deceased in the year 2010. From June 2013 they shifted to a rented room in Ranipool. The deceased had joined a computer class at MIT, Ranipool. Chandra Kala Sharma (the cousin of the deceased and accused no.2 during trial who stands acquitted now) started living with the couple. Chandra Kala Sharma fell in love with the Appellant and developed physical relation with him. The deceased thus became a hindrance to their illicit love affair. The Appellant wanted to get rid of his pregnant wife and hatched a plan to eliminate her and shared it with Chandra Kala Sharma. On 19.12.2013 morning the Appellant dropped Chandra Kala Sharma to the tuition class at Gangtok in his vehicle SK-01P-6697 (Alto) and thereafter persuaded the deceased to go for a long drive with him to Melli. They left for Melli in the afternoon and on reaching there they had vegetable *"momos"* at a Hotel and thereafter proceeded further on, the Appellant looking for an opportune moment to commit her murder. They crossed the Rangpo check post towards the West Bengal side at around 1335 hours. The Appellant stopped the vehicle at *"Jalewa Bhir"* on the West Bengal side about 3 kilometres away from Sikkim on the pretext of feeding the monkeys there. The deceased unaware of the ill intention of the Appellant also got out of the vehicle and loitered around. At around 1710-1740 hours, the Appellant on the cover of darkness pushed the deceased towards a treacherous steep cliff of approximately 900/1000 feet

and left the spot immediately entering Rangpo check post around 1755 hours. After reaching home the Appellant disclosed the facts to Chandra Kala Sharma and both craftily decided to file false missing report at the Ranipool Police Station. The Appellant and Chandra Kala Sharma even visited the MIT Computer Centre at Ranipool and enquired as to whether the deceased had come there knowing that it was a Thursday and the centre would remain closed. The Appellant also lodged a missing First Information Report (FIR) on 20.12.2013 at the Ranipool Police Station. Call Detail Records of the mobile number of the deceased, the Appellant and the Appellant's mobile used by Chandra Kala Sharma were sought for from the service provider which confirmed that the Appellant had contacted his wife thrice on 19.12.2013 before 0930 hours on the other hand it was revealed that the Appellant had contacted Chandra Kala Sharma twice first at 14.44 hours and at 17:07:08 hours and the tower details indicated Melli and Turuk, South Sikkim. After his arrest the Appellant admitted to the crime. The Appellant made a disclosure statement in presence of witnesses. The vigorous search conducted with the assistance of the relatives and river rafters at the place of occurrence as per the disclosure statement yielded no result. On 24.12.2013 while proceeding for further extensive search verbal intimation was received from the Station House Officer, Melli Police Station, South Sikkim that one unidentified dead body had been recovered from the banks of river Teesta having similar features as

that of the deceased. On reaching the spot the Appellant as well as Deepak Sharma (P.W.1) recognised the body as that of the deceased. Magisterial inquest was conducted on the body and thereafter an autopsy which confirmed that the deceased was pregnant with 4-5 months old male foetus.

10. The present appeal is filed by the Appellant against his conviction and sentence. Chandra Kala Sharma the co-accused in the trial was acquitted by the learned Sessions Judge. The State has not preferred any appeal against the said acquittal.

11. Mr. N. Rai would illuminate on how a criminal case must be established on the basis of circumstantial evidence by citing the *locus classicus* on the subject rendered by the Supreme Court in re: ***Sharad Birdhichand Sarda v. State of Maharashtra***[2] in which it would be held:

> ***"152.*** *Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh [AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] . This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of Tufail (Alias) Simmi v. State of Uttar Pradesh [(1969) 3 SCC 198 : 1970 SCC (Cri) 55] and Ramgopal v. State of Maharashtra [(1972) 4 SCC 625 : AIR 1972 SC 656] . It may be useful to extract what Mahajan, J. has laid down in Hanumant case [AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] :*

[2] **(1984) 4 SCC 116**

> *"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."*

12. On the settled principles of examining a criminal case based on circumstantial evidence we venture to re-examine the circumstances which led the learned Sessions Judge to convict and sentence the Appellant for murder of his wife – the deceased as well as giving false information to screen himself. We are conscious that this is an appeal against conviction. We are also conscious while hearing an appeal against conviction we must consider the factual aspects of the case. The power of the Appellate Court dealing with an appeal from conviction is the same as the power of the Appellate Court while dealing with an appeal against acquittal. The appeal against conviction is as of right.

(i) Purported "extra judicial confession" made by the Appellant before Deepak Sharma (P.W.1), Netra Devi Sharma (P.W.2), Pema Chakki Bhutia (P.W.3) and "confession" made before Ganga Ram Pathak (P.W.9) and the Investigating Officer-Mahendra Subba (P.W.28).

13. Before we examine the evidence of Deepak Sharma (P.W.1), Netra Devi Sharma (P.W.2) and Pema Chakki Bhutia (P.W.3) it is

necessary to keep in mind the principles laid down by the Supreme Court, discussed hereinafter, while examining evidences of close relatives and friends of the deceased as admittedly Deepak Sharma (P.W.1) and Netra Devi Sharma (P.W.2) were closely related to the deceased and Pema Chakki Bhutia (P.W.3) was the staff of Netra Devi Sharma (P.W.2). Deepak Sharma (P.W.1) is the elder brother of the deceased and the Appellant is his brother-in-law. The Appellant is the brother-in-law married to Netra Devi Sharma's (P.W.2) sister-in-law. Chandra Kala Sharma-the co-accused during trial but acquitted by the learned Sessions Judge is Netra Devi Sharma's (P.W.2) younger paternal uncle's daughter. Pema Chakki Bhutia (P.W.3) as per the deposition of Netra Devi Sharma (P.W.2) was her staff who was present when the Appellant made the alleged confessional statement to the police. The learned Sessions Judge in spite of evidence to the contrary would hold that Deepak Sharma (P.W.1), Netra Devi Sharma (P.W.2) and Pema Chakki Bhutia (P.W.3) were independent witnesses. Independent witness means independent of sources which are likely to be tainted. The fact that the deceased who was murdered allegedly by the Appellant was the relative of Deepak Sharma (P.W.1) and Netra Devi Sharma (P.W.2) and that Pema Chakki Bhutia (P.W.3) was the staff of Netra Devi Sharma (P.W.2) who accompanied her to the Ranipool Police Station where the alleged extra judicial confession was made by the Appellant was a factor which ought to have been considered by the learned Sessions Judge while examining their

evidences. The mere fact that the said prosecution witnesses were relatives of the deceased would not lead to Trial Court throwing out their depositions but their evidence ought to have been carefully scrutinised.

14. In re: ***Sharad Birdhichand Sarda (supra)*** the Supreme Court would caution:

> ***"48.*** *Before discussing the evidence of the witnesses we might mention a few preliminary remarks against the background of which the oral statements are to be considered. All persons to whom the oral statements are said to have been made by Manju when she visited Beed for the last time, are close relatives and friends of the deceased. In view of the close relationship and affection any person in the position of the witness would naturally have a tendency to exaggerate or add facts which may not have been stated to them at all. Not that this is done consciously but even unconsciously the love and affection for the deceased would create a psychological hatred against the supposed murderer and, therefore, the Court has to examine such evidence with very great care and caution. Even if the witnesses were speaking a part of the truth or perhaps the whole of it, they would be guided by a spirit of revenge or nemesis against the accused person and in this process certain facts which may not or could not have been stated may be imagined to have been stated unconsciously by the witnesses in order to see that the offender is punished. This is human psychology and no one can help it."* *(emphasis supplied)*

15. Deepak Sharma (P.W.1) would state in his examination-in-chief:

> *"On 22.12.2013, myself, Mahendra Sharma and the accused no.2 came to Ranipool Police Station and we lured the accused No.2 with the promise of a job and asked her about the deceased. On such promise, the accused No.2 told us that on the evening of 19.12.2013, the accused No.1 told her that he had done away with the deceased. By the time we reached Ranipool Police Station on*

22.12.2013, the accused No.1 was already in Police Custody. At the Police Station, the accused No.1 told the Police that he had taken the deceased towards Rangpo and pushed her from a cliff into the River Teesta and lodged a false Police Report at the Ranipool Police Station on 19.12.2013 stating that the Victim was missing. He also informed the Police, that the Victim was pregnant at the time of the incident. On hearing such statements, I lodged the FIR at the Police Station. Exbt. 1 is the said FIR lodged by me on 22.12.2013 scribed by my brother Iswhar Prasad on my instructions. Exbt. 1 (a) is my full signature and Exbt. 1 (b) is my initial on Exbt. 1. My brother Ishwar Prasad had accompanied me on 22.12.2013 to the Ranipool Police Station.

*Exbt. 2 is the formal FIR drawn up by the Police at the Ranipool Police Station. Exbt. 2 (a) is my signature on Exbt.2.***"**

16. Netra Devi Sharma (P.W.2) would depose in her examination-in-chief that:

"*On 22.12.2013, I again came to Ranipool Thana to know about the details of Investigation. There the accused No.1 gave a statement in my presence stating that he had pushed his wife from one Jalewa Bhir at a distance of three kilometres beyond Rangpo, into the river Teesta, which was recorded by the Police. He also said that he had done the above act on 19.12.2013. Pema Chhiki Bhutia who is my staff, was also present when accused No.1 made the statement to the Police.***"**

17. Pema Chakki Bhutia (P.W.3) in her examination-in-chief would state:

"*..... I do not remember the date and the month but it was in the year 2013, accused Somnath Sharma disclosed to the police at Ranipool P.S. in my presence to the effect that he was having an affair with the sister-in-law, Chandra Kala Sharma. He also had physical relationship with the sister-in-law. That on the date of the incident, the accused took his wife for a drive to Melli. While returning back, on reaching between Melli and Rangpo popularly known as Jalewa Bhir, he stopped his car for a while and at that point of time, the wife also came out of the car and he pushed her*

*from the cliff towards Teesta River (objected as the same is not in her 161 statement).***"**

18. Ganga Ram Pathak (P.W.9) was posted in Ranipool Police Station. On 21.12.2013 he was on plain clothes duty when the Officer In-charge of Ranipool Police Station had directed him to keep surveillance of the Appellant. He was the one who brought the Appellant to the Ranipool Police Station and questioned the Appellant. As per the deposition of Ganga Ram Pathak (P.W.9):

> **"***At Ranipool P.S., on enquiry to the accused Somnath by me, the accused pleaded guilty before me stating that he was having affairs with his sister-in-law and further stated that in collusion with his sister-in-law, accused Somnath took his wife for a drive in their Alto car bearing registration No. SK-01-P-6697 towards Melli in order to kill his wife. While returning back, on reaching in between Rangpo and Melli, he pushed his wife from the cliff towards river Teesta.*
>
> *Thereafter, I handed over the accused to P.I. Sahab (objected).***"**

19. The Investigating Officer-Mahendra Subba (P.W.28) would also depose in his examination-in-chief that:

> **"***Further during interrogation the accused disclosed of the fact in presence of independent witnesses that he forcefully pushed his wife towards the cliff along Rangpo-Melli, 31 N.H. Road on 19.12.2013 around 1720 hours approximately while they were on their way back from Melli Bazar, South Sikkim. Accordingly I recorded the disclosure statement. Exbt.3 already marked is the said disclosure statement. Exbt.3(a) and Exbt.3(b) are the signatures of the witnesses Netra Devi Sharma and Pema Chhiki Bhutia respectively on the same which I identify. Exbt.3(c) is the signature of the accused.***"**

20. The deposition of Deepak Sharma (P.W.1) that on 22.12.2013 the Appellant made a confessional statement to the police in his

presence while the Appellant was in custody; The deposition of Netra Devi Sharma (P.W.2) that the Appellant confessed to his crime in her presence which was recorded by the police at the Police Station; The deposition of Pema Chakki Bhutia (P.W.3) that the Appellant confessed before the police which have been accepted by the learned Sessions Judge as extra judicial confession would be barred under Sections 25 and 26 of the Indian Evidence Act, 1872 as being confession made to a Police Officer as well as while in the custody of the Police Officer.

21. In a similar fact situation examined by the Supreme Court in re: ***Kishore Chand v. State of Himachal Pradesh***[3] it would hold:

> ***"8****.....Therefore, it would be legitimate to conclude that the appellant was taken into the police custody and while the accused was in the custody, the extra-judicial confession was obtained through PW 10 who accommodated the prosecution (sic appellant). Thereby we can safely reach an irresistible conclusion that the alleged extra-judicial confession statement was made while the appellant was in the police custody. It is well settled law that Sections 25 and 26 shall be construed strictly. Therefore, by operation of Section 26 of the Evidence Act, the confession made by the appellant to PW 10 while he was in the custody of the police officer (PW 27) shall not be proved against the appellant. In this view it is unnecessary to go into the voluntary nature of the confession etc.****"***

22. The deposition of Ganga Ram Pathak (P.W.9) that the Appellant confessed to his crime at the Police Station after he had brought the Appellant there while doing his surveillance as per the

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[3] **(1991) 1 SCC 286**

instructions of the Officer In-charge of the Ranipool Police Station and the deposition of the Investigating Officer-Mahendra Subba (P.W.28) regarding the confession made by the Appellant to him in front of independent witnesses would all be barred under Sections 25 and 26 of the Indian Evidence Act, 1872 as both of the said witnesses were Police Officers.

23. The learned Sessions Judge ought not to have relied upon the purported extra judicial confession and confession as circumstances against the Appellant.

(ii) Purported "confessional" statement of the Appellant recorded under Section 164 of the Code of Criminal Procedure, 1973 (Cr.P.C.) by the Chief Judicial Magistrate, Suraj Chettri (P.W.27).

(iii) The admission of an affair with Chandra Kala Sharma–the accused no.2 during the trial in the confession of the Appellant under Section 164 Cr.P.C.

24. A full Bench of this Court in Re: ***State of Sikkim v. Suren Rai***[4] would hold:

> ***"48.*** *"Confessions" are one species of the genus "admission" consisting of a direct acknowledgement of guilt by an accused in a criminal case. "Confessions" are thus "admissions" but all admissions are not confessions. A confession can be acted upon if the Court is satisfied that it is voluntary and true. Judgment of conviction can also be based on confession if it is found to be truthful, deliberate and voluntary and if clearly proved. An unambiguous confession, as held by the Supreme Court, if admissible in evidence, and free from suspicion suggesting its falsity, is a valuable piece of evidence which possess a high probative force because it emanates directly from the person committing the offence. To act on such confessions the Court must be extremely vigilant and scrutinize every relevant factor to ensure that the confession is truthful and voluntary. Although*

[4] **2018 SCC OnLine Sikk 12**

*the word confession has not been defined in the Evidence Act, 1872 the Privy Council in re: Pakala Narayanaswami v. King Emperor5 has clearly laid down that a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. As abundant caution the Courts have sought for corroboration of the confession though. As per Taylor's Treaties on the law of Evidence, Vol. I a confession is considered highly reliable because no rational person would make admission against his own interest prompted by his conscience to tell the truth. If the Court finds that the confession was voluntary, truthful and not caused by any inducement, threat or promise it gains a high degree of probability. To insulate such confession from any extraneous pressure affecting the voluntariness and truthfulness the laws have provided various safeguards and protections. A confession is made acceptable against the accused fundamental right of silence. A confession by hope or promise of gain or advantage is equally unacceptable as a confession by reward or immunity, by force or fear or by violence or threat. .....***"***

25. The purported *"confessional"* statement of the Appellant recorded under Section 164 Cr.P.C. by the learned Chief Judicial Magistrate on 27.10.2015 would state:

"*I am a permanent resident of Aho Santi, East Sikkim. Deceased Nevika Sharma is my wife. I along with my wife used to reside at Ranipool. In February 2010 I got married with my deceased wife. I also know Chandra Kala Sharma. She is my sister-in-law. She is the daughter of the uncle (Kaka) of the deceased wife. On 24.12.2013 police from Ranipool P.S. took me to Malli, South Sikkim to identify the dead body of my wife Nevika Sharma. My wife was pregnant at the relevant time.*

On 19.12.2013 my deceased wife told me that as she is pregnant and cannot go to visit any place, she wants to go for a drive. Accordingly, I drove her up to Malli via Singtam. Rangpo in my Alto car bearing No. SK01 P-6697. From Malli we came back towards Rangpo. I was having love affair with my sister-in-law Chandra Kala Sharma and I had told my deceased wife about my love affair and I want to marry my sister-in-law. While going to Malli and coming back, me and my deceased wife were discussing about my love affair with my sister-in-law. As my wife was pregnant I was driving slowly and we were halting and taking rest on the

[5] **66 IA 66**

way. When we reached 2-3 Kms away from Rangpo towards Malli I stopped my vehicle on the side of the Road. I got down from my vehicle, took my cigarette and Rajaniganda from my car and went for short toilet. At that time also we were discussing about my affair with my sister-in-law. While I was doing short toilet at the wall side of the road my wife suddenly jumped towards the river side of the road where there is stiff cliff. At the time it was about to be dark. I call my wife and looked down but there was no answer. For about half an hour I remained there as I was nervous. Thereafter, I came back to Ranipool directly. At that time I was nervous and was not in the position to think anything. Thereafter, I called my mother, Hema Devi Sharma. My mother asked for my wife to which I told her that she is not at home. Thereafter, I started receiving phone calls from my in-laws and later my uncles (Kaka) also called me up. Later at night my uncles and co-villagers from Aho came to my rented room at Ranipool and started asking about the whereabouts of my deceased wife. As I was afraid I could not tell anyone that my wife jumped from the road. Thereafter, everybody decided to make a search of my wife. My uncle lodged missing report at Ranipool P.S. The brother of my deceased wife was also asking me to lodge missing report immediately. My uncle L.P. Sharma was writing missing report and it was later lodged at Ranipool P.S.

*On 22.12.2013 I was arrested by Ranipool P.S. in connection with this case. It is true that I was having love affair with my sister-in-law Chandra Kala Sharma but I did not kill my wife.***"** *(emphasis supplied)*

26. The purported *"confessional"* statement recorded under section 164 Cr.P.C. is evidently not a confession. The fact that the Appellant states *"while I was doing short toilet at the wall side of the road my wife suddenly jumped towards the river side of the road where there is stiff cliff"* makes it exculpatory. Mr. Karma Thinlay would ignore the exculpatory statement and submit that the rest of the statement given by the Appellant under Section 164 Cr.P.C. would unflinchingly prove his guilt. In fact he would rely

upon various judgments of the Supreme Court on retracted confessions which we have perused and found them not to help the prosecution case any further. He would rely upon ***State of T.N. v. Kutty alias Lakshmi Narasimhan***[6]; ***K.I. Pavunny v. Assistant Collector (HQ), Central Excise Collectorate, Cochin***[7] ***and N. Somashekar (Dead) By LRS. v. State of Karnataka***[8]**.**

27. In re: ***N. Somashekar (supra)*** the Supreme Court would observe:

> ***"9.*** *It needs first to be noted that merely because the statement of witness is recorded under Section 164 of the Code, that does not automatically dilute the worth of his evidence. (See State of Assam v. Jilkadar Ali and Vishwanath v. State of U.P.)***"**

28. Mr. Karma Thinlay would draw the attention of this Court to the afore-quoted sentence from the judgment and submit that the statement made by an accused to the Magistrate under Section 164 Cr.P.C. would be relevant even if the same is not a confession. We are afraid the Supreme Court did not say so. In the said case the Supreme Court was dealing with a statement of a witness recorded under Section 164 Cr.P.C. and not a purported *"confession"* of an accused as in the present case. A perusal of the rest of the sentences in paragraph 9 of the judgment would reflect that the witnesses who had earlier given their statement under 164 Cr.P.C. had been examined by the prosecution as witnesses

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[6] **(2001) 6 SCC 550**
[7] **(1997) 3 SCC 721**
[8] **(2004) 11 SCC 334**

and their evidence recorded. It was in this context that the Supreme Court would make the above observation.

29. Section 164 Cr.P.C. permits the recording of the statement of a witness or a confession. Confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. The substantive offences alleged are murder and causing evidence of the commission of the offence to disappear with the intention of screening the offender from legal punishment knowing that the offence had been committed. The purported *"confessional"* statement of the Appellant recorded under Section 164 Cr.P.C., therefore, must admit said offences or at any rate all the facts which constitute the said offences. A perusal of the entire purported *"confessional"* statement recorded under Section 164 Cr.P.C. does not disclose that the Appellant had admitted having committed murder or at any rate all the facts which constitute the offence of murder. It also does not disclose any admission of causing any evidence of the commission of the offence to disappear with the intention of screening the offender from legal punishment knowing that the offence had been committed.

30. Section 164 Cr.P.C. does not prescribe any method to record admissions of an accused. Section 164 Cr.P.C. does not permit the recording of admission save confessions by an accused. Confessions recorder under Section 164 Cr.P.C. although *stricto*

sensu not evidence however, is considered highly reliable because no rational person would make admission against his own interest prompted by his conscience to tell the truth. If the Court finds that the confession was voluntary, truthful and not caused by any inducement, threat or promise it gains a high degree of probability. If a statement recorded under Section 164 Cr.P.C. of an accused is found not to be confessional, its reliability would lose the strength attached to a confessional statement. In such circumstances no reliance can be placed on the purported statements of the Appellant recorded under Section 164 Cr.P.C., quite incorrectly, as his confessional statement as it would not be substantial evidence.

31. The prosecution has placed no evidence at all except the purported *"confessional"* statement of the Appellant recorded under Section 164 Cr.P.C., the purported extra judicial confession made to Pema Chakki Bhutia (P.W.3) and the purported confession made to Ganga Ram Pathak (P.W.9) to prove the allegation of the Appellant's affair with Chandra Kala Sharma as a motive for the alleged murder. We deem it improper to rely upon such confessions. Consequently, there would be no evidence to establish the alleged extra marital affair between the Appellant and Chandra Kala Sharma. The close relatives of the deceased who were produced as prosecution witnesses are all silent about it.

(iv) Purported "confession" of Chandra Kala Sharma-the accused no.2 during the trial, made to Deepak Sharma (P.W.1) and Mahendra Poudyal (P.W.12) on the ground that when more persons than one are jointly tried for the same offence, the

confession made by one of them, if admissible in evidence, should be taken into consideration against the other accused.

32. The learned Sessions Judge would hold that Chandra Kala Sharma had confessed about the offence for committing the murder of the deceased to her brother Deepak Sharma (P.W.1) and her uncle Mahendra Poudyal (P.W.12) which fact could not be lost sight of. The learned Sessions Judge would hold that when more persons than one are jointly tried for the same offence, the confession made by one of them, if admissible in evidence, should be taken into consideration against the other accused. Deepak Sharma (P.W.1) would state that on 22.12.2013 he, Mahendra Sharma and Chandra Kala Sharma came to Ranipool Police Station when they lured Chandra Kala Sharma with the promise of a job and asked her about the deceased and on such promise, Chandra Kala Sharma told them that in the evening of 19.12.2013 the Appellant told her that he had done away with the deceased. It is apparent that Chandra Kala Sharma had not confessed to have committed the crime to Deepak Sharma (P.W.1). Mahendra Poudyal (P.W.12) did not state anything regarding Chandra Kala Sharma confessing to him. The deposition of Deepak Sharma (P.W.1) of what Chandra Kala Sharma had told him after they lured her with the promise of a job is merely a procured hearsay statement. It was purportedly heard from an accomplice. The oral evidence of what the accomplice said is narrated by Deepak Sharma (P.W.1) a relative of the deceased after she was admittedly

induced with a promise of a job. Thus this hearsay statement would have no evidentiary worth. Illustration (b) of Section 114 of the Indian Evidence Act, 1872 provides that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. There is no corroboration to the said statement of Chandra Kala Sharma purportedly given to Deepak Sharma (P.W.1) at the Ranipool Police Station.

33. Chandra Kala Sharma is said to have made a confessional statement under Section 164 Cr.P.C. The said purported *"confessional"* statement (exhibit-27) records:

> ***"****On 19.12.2013 I got up in the morning, prepared food and went tuition. My brother-in-law reached me to Rediant Institute. I reached back home at around 2.30 pm. The room of my brother-in-law was locked. After some time my sister, Nevika Sharma called me and told me the keys of the room are above the door. She also told me to prepare snacks and to have it. She also told me that her computer class will be over by 5 pm. At around 5 pm she again called me that her class will be over at 8 pm only.*
>
> *At around 7.30 pm by (sic) brother-in-law came home and asked my about my sister. I told him that she has not come back and she was telling me that her computer class will be over only at 8 pm. Thereafter, I along with my brother-in-law went to the computer Institute at Ranipool Bazar from where we came to know that it was a holiday and the institute was closed on the relevant day. Thereafter, my brother-in-law called his family members and asked about my sister. Later at night all the family members of my brother-in-law came in the rented room of my brother-in-law at Ranipool. Apart from above I do not know anything about the present case.****"***

34. Even the purported *"confessional"* statement of Chandra Kala Sharma recorded under Section 164 Cr.P.C. is not a confessional

statement and the entire statement is exculpatory. In the circumstances, we are unable to fathom as to how the learned Sessions Judge could come to the finding that Chandra Kala Sharma had confessed to Deepak Sharma (P.W.1) and Mahendra Poudyal (P.W.12) and used the same to convict the Appellant.

(v) Last seen theory as per the evidence of Anand Munda (P.W.10) and the identification of the Appellant in the Test Identification Parade conducted.

(vi) The records of the vehicle movement register at Rangpo check post.

(vii) Purported Call Detail Record of the calls made by the Appellant and the deceased and the seizure of the mobile phone of the Appellant by which the calls were allegedly made showing the location.

35. In re: ***Rambraksh v. State of Chhattisgarh***[9] the Supreme Court would explain the application of the last seen theory in a criminal case based on circumstantial evidence in this manner:

> ***"12.*** *It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other words, a conviction cannot be based on the only circumstance of last seen together. Normally, last seen theory comes into play where the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that possibility of any person other than the accused being the perpetrator of the crime becomes impossible. To record a conviction, the last seen together itself would not be sufficient and the prosecution has to complete the chain of circumstances to bring home the guilt of the accused."* *(emphasis supplied)*

36. A Division Bench of this Court in re: ***Shri Kharga Bahadur Pradhan v. State of Sikkim***[10] would hold:

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[9] **(2016) 12 SCC 251**

> ***"11.*** *Apart from the above, we note that the deceased was allegedly seen alive in the company of the Appellant on 03.08.2009 and her dead body was found in abandoned condition in Budang jungle on 06.08.2009. Thus, there was a long time gap between the deceased lastly seen alive and the dead body found and in such situation, a possibility of any third person coming in between cannot be fully ruled out. We are of the view in light of the above facts and circumstances, the Sessions Judge was not justified in holding that the circumstance of last seen was fully established against the Appellant. We hold that the said circumstance was not fully established.****"***

37. The learned Sessions Judge would examine the evidence of Anand Munda (P.W.10), entries made in vehicle movement register of Rangpo check post (Exhibit-36) reflecting the movement of the Appellant's Alto car bearing registration no. SK-01-P-6697 and hold that the Appellant and the deceased were seen and found together at Melli Bazar at Holiday Hotel where they had vegetable *"momos"* and that the place of occurrence also falls within the periphery from where the dead body of the deceased was recovered in between Rangpo and Melli establishing the guilt of the Appellant. The learned Sessions Judge would also opine that from the call details of the relevant day the Appellant and the deceased had made calls from their respective mobiles within the reach of Melli-Turuk-Turung tower and its adjoining area at National Highway. The evidence of Pushpa Lal Kafley (P.W.11) that when he went to Ranipool Police Station he received the call details of the Appellant as well as the deceased from the office of Vodafone, Gangtok by which it was found that the deceased was within the

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[10] **2015 SCC OnLine Sikk 53**

reach of Turuk tower would be accepted. The evidence of Mahendra Poudyal (P.W.12) stating that they had gone to Ranipool Police Station where they were handed over the call details and the location of the tower as per which the deceased had made her last call from her mobile at 5.07 p.m. as per the network supported by Turung tower would also be accepted. The seizure of mobile phones (M.O.I and M.O.II) belonging to the Appellant would be found proved by the evidence of Hem Raj Gurung (P.W.17), Dhan Singh Subba (P.W.19). The seizure of a Nokia phone (M.O.V) in the presence of Sancharaj Subba (P.W.26) from Mahendra Poudyal (P.W.12) who is said to have snatched it from Chandra Kala Subba is also accepted. The fact that the Alto car bearing registration no. SK-01-P-6697 belonged to the Appellant on which the Appellant and the deceased is said to have travelled to Melli on 19.12.2013 would also be found proved by the evidence of Dilip Shah (P.W.18), Bindu Mati Adhikari (P.W.8) and Pema Tshering Lepcha (P.W.21).

38. In view of the aforesaid findings it is necessary to revisit the aforesaid evidences and come to the conclusion whether the learned Sessions Judge was right in concluding that the last seen theory pressed by the prosecution stood proved.

39. Bindu Mati Adhikari (P.W.8) would depose that on 15.11.2013 she sold one Alto car bearing registration no.SK-01-P-6697 to the Appellant at a consideration value of Rs.1,45,000/- and executed a sale deed. She would also depose that later she

learnt that the vehicle had not been transferred in the name of the Appellant till date. Bindu Mati Adhikari (P.W.8) would depose before the Court on 18.06.2015. Although sale deed document (exhibit-40), application for intimation and transfer of ownership of the said Alto car bearing registration no. SK-01-P-6697 (exhibit-41), notice of transfer of ownership of motor vehicle (exhibit-42) have been exhibited the said documents were not even shown to Bindu Mati Adhikari (P.W.8) by the prosecution during her examination. The said documents were exhibited by the Investigating Officer-Mahendra Subba (P.W.28) as having been seized by him vide property seizure memo (exhibit-13) in the presence of two witnesses Vinod Mundra (P.W.25) and Dilip Shah (P.W.18) from one Bimal Neopaney who was not examined. Quite certainly the Investigating Officer-Mahendra Subba (P.W.28) was not the maker of the said documents. Vinod Mundra (P.W.25) would depose that on 20.03.2014 he was called by Investigating Officer-Mahendra Subba (P.W.28) to stand witness to the seizure but could not say from whom the documents and key were seized. He could not even identify the other witness. Dilip Shah (P.W.18) would state that the aforesaid seizure was effected in his presence from Bimal Neopaney at Ranipool Police Station. He stated that the contents of property seizure memo (exhibit-13) were not read to him nor were the documents seized shown to him. He admitted that the police told him they had in fact seized the Alto car and prepared property seizure memo (exhibit-13). The prosecution has

failed to prove the contents or the execution of sale deed document (exhibit-40), application for intimation and transfer of ownership of the said Alto car bearing registration no. SK-01-P-6697 (exhibit-41), notice of transfer of ownership of motor vehicle (exhibit-42). The *"best evidence rule"* has been completely given a go by the prosecution. The makers of the documents have not been examined. The person, from who the documents were allegedly seized, although his name is reflected in the property seizure memo (exhibit-3), has not being produced as a witness. The investigation has failed to disclose who Bimal Neopaney was, how the said documents were seized from him and what his connection to the present prosecution was. The prosecution has failed to connect the seizure of the said documents to the Appellant.

40. Through property seizure memo (exhibit-19) dated 24.12.2013 the Alto car bearing registration no. SK-01-P-6697, the RC book of the said vehicle in the name of Bindu Mati Adhikari (P.W.8), driving license bearing no. SK0120130021416 in the name of the Appellant, insurance certificate policy ignition key of the said vehicle and one leather hand bag (black in colour) would be seized by the Investigating Officer-Mahendra Subba (P.W.28) in the presence of one Saroj Lohar and Pema Tshering Lepcha (P.W.21) in front of the Police Station. The Investigating Officer-Mahendra Subba (P.W.28) in his deposition would state that he effected the seizure at the Ranipool Police Station in the presence of witnesses whose signatures he identified. Saroj Lohar would not

be examined. Pema Tshering Lepcha (P.W.21) would also state that the aforesaid seizures were effected at the Ranipool Police Station. Property seizure memo (exhibit-19) does not reflect from whom the seizures were effected. The Investigating Officer-Mahendra Subba (P.W.28) as well as Pema Tshering Lepcha (P.W.21) the sole seizure witness examined are both silent about this fact too. The prosecution has failed to establish from whom items purportedly seized vide property seizure memo (exhibit-19) were seized from. The prosecution has also failed to connect the seizures with the present prosecution against the Appellant.

41. The Investigating Officer-Mahendra Subba (P.W.28) would depose that the movement of the vehicle bearing registration no. SK-01-P-6697 was also found entered in the register maintained at Rangpo check post having passed at around 1335 hrs towards Bengal side and returned at around 1755 hrs on 19.12.2013 which matched with the time given by the Appellant in his disclosure statement. He also exhibited loose sheets of paper as the said entries made in the Rangpo check post in two pages and identified the signatures of second officer in-charge-Sub-Inspector Pema Rana as (exhibit-36). Section 35 of the Indian Evidence Act, 1872 provides that an entry in any public or other official book, register or record or an electronic record, stating a fact in issue or relevant fact, and made in performance of a duty especially enjoined by the law of the country in which such book, register, or record or an electronic record is kept, is itself a relevant fact. Sub-

Inspector Pema Rana was not examined. The purported entries from the purported vehicle movement register have not been seized through any seizure memo. The vehicle movement register has also not been placed before the Court. The maker of the entries has also not been examined. The Investigating Officer-Mahendra Subba (P.W.38) is definitely not the person who had any personal knowledge about the entries. The loose sheet of pages (exhibit-36) cannot be accepted as evidence. The prosecution has failed to prove the entries.

42. A perusal of the list of documents exhibited by the prosecution as reflected in the impugned judgment does not show that call detail records as adverted to by the learned Sessions Judge had been exhibited and proved.

43. Puspa Lal Kafley (P.W.11) a Government employee under the Energy and Power Department would depose that:

> ***"****... Thereafter on the next day, I came back to Ranipool at the rented room or accused No.1 and we received the call details of accused No.1 and Nebika Sharma from the office of Vodafone, Gangtok. On the basis of call details, it was found that missing Nebika was within the reach of Turuk tower. Accordingly, went to Turuk but we could not find Nebika and returned back to Ranipool.****"***

44. In cross-examination Puspa Lal Kafley (P.W.11) would admit:

> ***"****... It is true that as per the call details of Nebika, it was within the reach of Turuk tower but not of West Bengal side.****"***

45. Puspa Lal Kafley (P.W.11) would also admit in cross-examination that the deceased was his sister-in-law.

46. Mahendra Poudyal (P.W. 12) son of Kedarnath Sharma (P.W.15) is a Government servant who would state in his deposition that:

> ***"*** *On the following day, at around 9 a.m., SHO, Ranipool P.S. informed us stating that tower location and call details has been received by his office. Accordingly, we went to police station and there we were handed over the call details and the location of the tower. On going through the call details, it was found that missing Nebika Sharma had made a last call from her mobile phone at around 5:7 p.m. as per the network supported by Turung tower, On our enquiry to SHO, Ranipool, he told us that Turung tower provides network to areas in between Melli, Rangpo and surrounding areas including 31A National Highway.****"***

47. In cross-examination the said Mahendra Poudyal (P.W. 12) could admit:

> ***"****It is true that the information in connection with the call details of the mobile of Nebika Sharma supported by Turung tower was given to me by SHO, Ranipool. It is true that I do not remember to which company, said tower belong to.****"***

48. Thus as per Mahendra Poudyal (P.W. 12) the call detail records was handed over to him by the Station House Officer of Ranipool Police Station. Mahendra Poudyal (P.W. 12) however, also didn't produce it.

49. As per Deepak Sharma (P.W.1) the deceased's brother, Kedarnath Sharma (P.W.15) is his younger paternal uncle and that on 21.12.2013 he along with Kedarnath Sharma (P.W.15) and his son Mahendra Sharma had gone to the Ranipool Thana and

inquired about the call records of the mobile phone of the victim if so procured by the police. The police inspector informed them that the call detail records had shown the location of the deceased within reach of Turung tower at around 5.15 p.m. on 19.12.2013 from her mobile.

50. The Investigating Officer-Mahendra Subba (P.W.28) would state:

> ***"****I also received the call details from (sic) of phone Nos. 0974959259 of the accused Som Nath Sharma and 09593782036 of the deceased Nabika Sharma in seven pages from the office of Vodafone at Gangtok i.e. from 18.12.2013 to 20.12.2013 which showed the tower details of Melli, Turuk and Turung adjacent to 31A-National Highway (P.O).....*
> *It also shown in the call details that the accused had contacted deceased Nabika Sharma on 19.12.2013 thrice over her phone and as well the accused also contacted the accused Chandra Kala Sharma twice at around 14.44 hours and 17.07.08 hours which indicates the tower which covers between Melli and Taruk, adjoining National Highway.****"***

51. The Investigating Officer-Mahendra Subba (P.W.28) in cross-examination admitted that he had not cited the employees of Vodafone and Reliance Company as witness in the present case.

52. Section 61 of the Indian Evidence Act, 1872 provides that the contents of documents may be proved either by primary or secondary evidence. Section 62 of the Indian Evidence Act, 1872 provides that primary evidence means the document itself produced for the inspection of the Court. Section 62 of the Indian Evidence Act, 1872 states what secondary evidence means and

includes. Apparently the prosecution has not produced either the primary evidence or the secondary evidence of the purported call detail records. Section 64 of the Indian Evidence Act, 1872 provides that documents must be proved by primary evidence except in the cases mentioned in Section 65 thereof. No case to bring it within the exceptions enumerated in Section 65 of the Indian Evidence Act, 1872 has been made out by the prosecution. In such circumstances, no amount of oral evidence regarding the call detail records can be accepted since the prosecution failed to exhibit and prove the call detail records. This circumstance cannot also be taken against the Appellant.

53. The learned Sessions Judge would hold that the seizure of the two mobile phones i.e., Micromax (M.O.I) and Spice (M.O.II) as well as the fact that the said mobile phones were not of the Appellant could not be demolished by the defence. The learned Sessions Judge would also hold that the Appellant also could not demolish the fact that he had made calls within the reach of Melli Turuk and Turung tower and adjoining area of National Highway which has been corroborated by the call detail records vide exhibit-37 and 38.

54. In so far as the finding regarding the call detail records, as held above, there was no documentary evidence to establish the same. The learned Sessions Judge, unfortunately and in the most callous manner, without even perusing exhibits-37 and 38 would

hold that the said exhibits corroborated that the Appellant had made calls. Exhibit-38 is a communication dated 13.01.2014 forwarding the water discharge data w.e.f. 19.12.2013 to 25.12.2013 of Teesta-V Power Station from NHPC Limited and exhibit-37 is the said hourly water discharge data. We cannot but express our anguish on such reasoning.

55. Property seizure memo (exhibit-12) is dated 22.12.2013. It would reflect that one mobile phone (Micromax), black in colour, having red border with SIM no. 7407375856 (Vodafone) and SIM no.9749592159 (Reliance) and another mobile phone (Spice) white and black in colour without SIM card were seized from the Appellant at the Ranipool Police Station in the presence of Dhan Singh Subba (P.W.19) and Hem Raj Gurung (P.W.17).

56. Hem Raj Gurung (P.W.17) is the seizure witness of the said mobile phones and in his deposition he would state:

> **"***I know the accused No.1 present in the Court today. That on 22.12.2013, at around 1 p.m., SHO, Ranipool P.S. seized 2 Nos. of mobile of different make, i.e., Micromax mobile phone and Spice Mobile phone in my presence at Ranipool P.S. Thereafter, police prepared the seizure memo for the same wherein I signed as one of the attesting witnesses to the same. Exhibit-12 is the said seizure memo and Exhibit-12(a) is my signature. (At this stage, the sealed packet containing material exhibit has been opened by the prosecution in the presence of defence and the witness is confronted with the same) M.O.I is the said Micromax mobile phone and M.O.II is the said Spice mobile phone.***"**

57. In the cross-examination of Hem Raj Gurung (P.W.17) he would admit:

> ***"****.... It is true that when I reached Ranipool Thana, M.O. I and II were already kept at the table of P.O. Sahab. It is true that I do not know as to from whom, M.O.I and II were seized by the police. It is true that police did not pack and seal M.O.I and II in my presence. I is true that the seal cover of M.O.I and II does not bear my signature as well as any identification mark. It is true that police did not read over and explain the contents of Exhibit-12 to me. It is true that the other witness who signed on Exhibit-12 did not put his signature in my presence. It is not a fact that I am deposing falsely.****"***

58. Dhan Singh Subba (P.W.19) is the other seizure witness to the seizure of the said mobile phones. He would state:

> ***"****I know the accused No.1 as he is my co-villager. I do not remember the date and the month but it was in the year 2013, police seized two mobile phones in my presence from accused Somnath. Thereafter, police prepared seizure memo for the same wherein I signed as one of the attesting witnesses to the same. M.O.I and II already marked are the said mobile phones. Exhibit-12 (already marked) is the said seizure memo prepared in respect of M.O. I and II. Exhibit-12(b) is my signature on the same.****"***

59. In the cross-examination of Dhan Singh Subba (P.W.19) he would admit:

> ***"*** *It is true that on the relevant day, I had gone to Ranipool thana as I was called by P.I. Mahendra Subba. It is true that on the relevant day, I went to Ranipool Thana as I was approached by the uncle of the deceased Nebika Sharma. It is true that when I reached Ranipool Thana, I saw M.O.I and II on the table of P.I. Sahab. It is true that I do not know as to from where the police had seized or recovered the M.O. I and II which I saw lying on the table of P.I. Mahendra Subba. It is not a fact that M.O. I and II were not packed and sealed in my presence. It is true that when M.O. I and II were sealed, my signature was not put on it. It is true that contents of Exhibit-12 was not read over to me. I am not sure whether another witness signed on Exhibit-12 in my presence or not. It is true that police did not record my 161 statement in*

> *connection with this case. It is true that I cannot say for sure as to whether M.O.I and II shown to me in the Court are the same articles which I had seen at Ranipool Thana or not. It is not a fact that I am deposing falsely.*"

60. The Investigating Officer-Mahendra Subba (P.W.28) would depose about the seizure of the two mobile handsets in this manner:

> "*I seized two nos. of mobile handsets having duel SIM No.7407375856 (Vodafone) make Micromax and SIM No. 9749592159 (Reliance) and one Spiece (sic) phone without SIM card from the possession of the accused in presence of the witnesses. Thereafter I prepared a seizure memo for the same. M.O.I already marked is the said mobile handsets having duel SIM No.7407375856 (Vodafone) make Micromax and SIM No. 9749592159 (Reliance) and M.O. II already marked is the said mobile phone (spiece) (sic) without SIM. Exbt.12 already marked is the seizure memo prepared in respect of M.O.I and M.O.II Exbt.12(a) and Exbt.12(b) are the signatures of the seizure witnesses Hemraj Gurung and Dhan Singh Subba respectively on the same which I identity. Exbt.12(c) is my signature on the same.*"

61. The evidence brought forth by the prosecution does not convincingly establish the seizure of the said mobile phones from the Appellant. Both the seizure witnesses would depose that the mobile phones were already at the table of the Investigating Officer-Mahendra Subba (P.W.28) and therefore didn't know from whom they were seized. The prosecution has led no evidence to establish the said mobile phones belonged to the Appellant. The finding of the learned Sessions Judge that the Appellant could not demolish that the two mobile phones was his and that calls were made from the said mobiles by him within the reach of Melli Turuk

and Turung tower and adjoining area of National Highway is perverse. It is evident that the learned Sessions Judge has in blatant disregard to the fundamentals of criminal jurisprudence and the Indian Evidence Act, 1872 put the entire burden of proof to establish his innocence upon the Appellant.

62. Property seizure memo (exhibit-24) dated 23.12.2013 would reflect seizure of one Nokia mobile phone with battery bearing SIM no.8145153105 from Mahendra Poudyal (P.W.12) at the Ranipool Police Station in the presence of a solitary seizure witness Sancha Raj Subba (P.W.26).

63. Mahendra Poudyal (P.W.12) did not speak a word about the property seizure memo (exhibit-24) or the seizure.

64. The Investigating Officer-Mahendra Subba (P.W.28) would however state:

> **"***Further during investigation it is found that one Nokia Mobile phone bearing SIM No 8145153105 IMEI No.356930033143544 belonging to the accused Som Nath was given to Chandra Kala Sharma. The same was seized from the possession of Shri Mahendra Poudyal as it was snatched from the Chandra Kala Sharma by him. Accordingly I prepared a seizure memo for the same. M.O.V already marked is the said Nokia mobile phone. Exbt.24 already marked is the said seizure memo prepared in respect of M.O.V Exbt.24 (a) already marked is the signature of witness Sancha Raj Subba which I identify. Exbt.24(b) is my signature on the same. On checking the text message in M.O.V it was found that on 19.12.2013 at around 1600 hours Chandra Kala Sharma had sent text message "Amoi Lai ajai site lagako" to the accused.***"**

65. In cross-examination the Investigating Officer-Mahendra Subba (P.W.28) would admit:

> ***"****... It is true that one mobile phone of Nokia bearing SIM No. 8145153105, IMEI No.569300 33143544 was not seized from the possession of Chandra Kala Sharma. It is true that Mahendra Poudyal has not stated in his 161 statement that the aforesaid Nokia mobile had given to him by Chandra Kala Sharma.****"***

66. The evidence of the Investigating Officer-Mahendra Subba (P.W.28) that during investigation it was found that one Nokia mobile phone belonging to the accused Som Nath was given to Chandra Kala Sharma cannot be accepted as evidence as it is the result of investigation by him. The best evidence of what Investigating Officer-Mahendra Subba (P.W.28) stated regarding the seizure of the said Nokia mobile phone from Mahendra Poudyal (P.W.12) would have been the said Mahendra Poudyal (P.W.12). Admittedly, Mahendra Poudyal (P.W.12) said nothing about the seizure. The fact that the Investigating Officer-Mahendra Subba (P.W.28) admitted that Mahendra Poudyal (P.W.12) had not stated that the Nokia mobile phone was given to Chandra Kala Sharma by the Appellant even in his statement recorded under Section 161 Cr.P.C makes his evidence not only doubtful but also unbelievable.

67. The seizure witness Sancha Raj Subba (P.W.26) would state:

> ***"****That on 23.12.2013 police seized one Nokia mobile phone of accused Somnath Sharma from the possession of Mahendra Poudyal in my presence at Ranipool P.S. Thereafter police prepared the seizure memo for the same. (At this stage, the sealed packet containing material exhibits has been opened by the prosecution in*

*the presence of defence and the witness is confronted with the same) M.O.V is the said mobile phone. Exhibit-24 is the said seizure memo prepared in respect of M.O.V. and Exhibit-24(a) is my signature on the same.***"**

68. In the cross-examination of Sancha Raj Subba (P.W.26) he would admit:

> **"***It is true that on the relevant day I went to Ranipool Thana as I was called by the brother of the deceased Mahendra Poudyal. It is true that when I reached Ranipool Thana, M.O.V was already at the table of P.I. Mahendra Subba. It is true that I do not know from where the police had recovered and seized the said mobile phone which was lying at the table of P.I. Mahendra Subba. It is true that M.O.V. does not bear any identification mark not does it bear my signature. It is true that M.O.V was not packed and sealed in my presence. It is true that apart from me, no other person had signed in Exhibit-24 in my presence. It is true that contents of Exhibit-24 was not read over and explained to me by the police. It is true that police did not record my 161 statement in the present case. It is not a fact that I am deposing falsely.***"**

69. The solitary seizure witness has quite candidly admitted that he does not know from whom and where the police recovered the said Nokia mobile phone which was lying on the table of the Investigating Officer-Mahendra Subba (P.W.28). Evidently the prosecution had failed to establish that the said Nokia mobile phone was seized from Mahendra Poudyal (P.W. 12) leave alone the fact that the said mobile phone belonged to the Appellant and that it was snatched from Chandra Kala Sharma by him. The learned Sessions Judge would quite correctly disbelieve the evidence of the Investigating Officer-Mahendra Subba (P.W.28) regarding the text message sent from the said mobile phone but

would go on to hold that the evidence tendered by him against the Appellant had remained firm and could not be demolished despite lengthy cross-examination. The learned Sessions Judge failed to appreciate that the Investigating Officer-Mahendra Subba (P.W.28) was not a witness to the crime and he was in fact the Investigating Officer of the case. The learned Sessions Judge thus failed to appreciate that the result of investigation can never be accepted as substantive evidence. It would be trite to reiterate what the Supreme Court had held in re: ***Vijender v. State of Delhi***[11].

> ***"25****. We are constrained to say that the above observations have been made by the trial Judge casting away the basic principles regarding reception and appreciation of evidence, and misreading the evidence. ..... The reliance of the trial Judge on the result of investigation to base his findings is again patently wrong. If the observation of the trial Judge in this regard is taken to its logical conclusion it would mean that a finding of guilt can be recorded against an accused without a trial, relying solely upon the police report submitted under Section 173 CrPC, which is the outcome of an investigation. The result of investigation under Chapter XII of the Criminal Procedure Code is a conclusion that an Investigating Officer draws on the basis of materials collected during investigation and such conclusion can only form the basis of a competent court to take cognizance thereupon under Section 190(1)(b) CrPC and to proceed with the case for trial, where the materials collected during investigation are to be translated into legal evidence. The trial court is then required to base its conclusion solely on the evidence adduced during the trial; and it cannot rely on the investigation or the result thereof. Since this is an elementary principle of criminal law, we need not dilate on this point any further. Equally unsustainable is the trial Judge's reliance upon the statement made by Jeetu (PW 2) before the police in view of the express bar of Section 162 CrPC, which we have*

[11] **(1997) 6 SCC 171**

*discussed earlier. Indeed, we find, the trial Judge placed strong reliance on the purported statement made by Jitender before the police that they (the appellants) were hiding and that they were involved in kidnapping and murder of Khurshid to convict them.***"**

70. Anand Munda (P.W.10) would be the star witness of the prosecution. Great emphasis would be given to his evidence by Mr. Karma Thinlay during the course of the final arguments. Anand Munda (P.W.10) would depose:

"*I know the accused Somnath Sharma present in the Court today. That on 19.12.2013, accused Somnath Sharma and one girl came to our Hotel Holiday at Melli Bazar, Sikkim. The accused Somnath Sharma ordered two plates of vegetable momos. Accordingly, I served the momos. After having momo, they paid the money and left the Hotel.*

*Thereafter, I was called to Jail to identify the accused. At Jail, I identified accused Somnath Sharma. Before identifying the accused, I was examined by the officer there and signed one document. Exhibit-9 is the said document which I signed and Exhibit-9(a) is my signature on the same.***"**

71. In cross-examination the said Anand Munda (P.W.10) would admit:

"*.....It is true that accused No.2 Chandra Kala Sharma did not come to our Hotel on that relevant day. It is not a fact that the accused was not accompanied by a lady but I cannot remember her face as of now. .....***"**

72. Exhibit-9 identified by Anand Munda (P.W.10) was the questionnaire put by the learned Chief Judicial Magistrate (P.W.27) to him before conducting the Test Identification Parade on 03.02.2014. The then learned Chief Judicial Magistrate (P.W.27) who conducted the Test Identification Parade on 03.02.2014

pursuant to the application for the same on 01.02.2014 (exhibit-33) would exhibit and prove the memorandum of Test Identification Parade (exhibit-34). As per the said memorandum and the deposition of Suraj Chettri (P.W.27) the said Anand Munda (P.W.10) positively identified the Appellant on three occasions. The identification of the Appellant by Anand Munda (P.W.10) was after 1 month and 15 days.

73. The identification of the Appellant by Anand Munda (P.W.10) as the person who had on 19.12.2013 come to Hotel Holiday at Melli Bazar, Sikkim with one girl, ordered two plates of vegetable *"momos"* and after having the said *"momos"* paid and left the hotel cannot be doubted. However, the prosecution has failed to establish the identity of the girl who had accompanied the Appellant on 19.12.2013. The prosecution has also failed to establish whether after leaving the said hotel the Appellant along with the said girl proceeded towards the place of occurrence or otherwise. "*Suspicion, however grave, cannot be a satisfactory basis for convicting an accused person".* This is a settled principle.

74. In re: ***Datar Singh v. State of Punjab***[12] the Supreme Court would hold:

> ***"3.*** *It is often difficult for courts of law to arrive at the real truth in criminal cases. The judicial process can only operate on the firm foundations of actual and credible evidence on record. Mere suspicion or suspicious circumstances cannot relieve the*

[12] **(1975) 4 SCC 272**

prosecution of its primary duty of proving its case against an accused person beyond reasonable doubt. Courts of justice cannot be swayed by sentiment or prejudice against a person accused of the very reprehensible crime of patricide., They cannot even act on some conviction that an accused person has committed a crime unless his offence is proved by satisfactory evidence of it on record. If the pieces of evidence on which the prosecution chooses to rest its case are so brittle that they crumble when subjected to close and critical examination so that the whole superstructure built on such insecure foundations collapses, proof of some incriminating circumstances, which might have given support to merely defective evidence cannot avert a failure of the prosecution case.

4. *After having been taken through the evidence on record we have come to the conclusion that the superstructure of the prosecution case is based on the testimony of two alleged eyewitnesses whose evidence is not only of an inherently unreliable nature but the artificial and incredible versions of the shooting put forward by them are too unnatural to be accepted. It seems to us to be quite unsafe to convict the appellant on their testimony despite some circumstances which raise grave suspicion against the appellant. Suspicion, however grave, cannot be a satisfactory basis for convicting an accused person. We will, therefore, examine the evidence of these two witnesses and set out our reasons for finding them quite unreliable and deal with other questions mentioned above in the course of an examination of evidence the credibility of which is assailed.***"**

75. To apply the last seen theory it is necessary to establish that the Appellant was last seen with the deceased. The evidence put forth by the prosecution falls short of establishing the fact. The oral evidence of Anand Munda (P.W.10) corroborated by the Test Identification of the Appellant by him although establishes that the Appellant was seen with a girl at the Hotel Holiday, Melli on 19.12.2013 it is not established that he was seen with the

deceased. The Investigating Officer-Mahendra Subba (P.W.28) admits in cross-examination that:

> ***"****It is true that there is no witness to prove that the accused Som Nath Sharma and his wife deceased Nabika Sharma had proceeded beyond Rangpo Checkpost. It is true that witness Anand Munda had not stated in his 161 statement where the accused and his deceased wife Nabika Sharma had proceeded after having momos from his hotel.****"***

76. The learned Sessions Judge failed to appreciate that the prosecution had not been able to legally prove that the Appellant had in fact travelled through Rangpo check post towards the place of occurrence by producing legally tenable evidence. The learned Sessions Judge finding about call detail records showing the Appellant's location within the reach of Melli-Turuk-Turung tower was made solely on the oral evidence of the relatives of the deceased which was not permissible in law. The prosecution has not even been able to prove conclusively the seizure of the mobile phones or the said vehicle bearing registration no.SK-01-P-6697 from the Appellant leave alone prove that the said mobile phones and the said vehicle were used by the Appellant on the relevant day.

77. The alleged incident is of 19.12.2013. The learned Sessions Judge has due to the positive identification of the Appellant by Anand Munda (P.W.10) as the one who had eaten vegetable *"momos"* along with the girl at Hotel Holiday in Melli and the recovery of the dead body of the deceased invoked the last seen

theory and found the Appellant guilty. Contrarily, as held above, Anand Munda (P.W.10) did not identify the deceased as the same girl who was with the Appellant on 19.12.2013 at Melli. Normally, last seen theory comes into play where the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that possibility of any person other than the accused being the perpetrator of the crime becomes impossible. The time gap between 19.12.2013 and 24.12.2013 is five days. There is no explanation as to what transpired in the interregnum. Sajan Tamang who first saw the dead body and informed the police not being examined it cannot be safely concluded that in between the period there was no possibility of any person other than the Appellant being the perpetrator of the crime. The circumstance of last seen theory cannot therefore be pressed against the Appellant.

(viii) The disclosure statement recorded under Section 27 of the Indian Evidence Act, 1872.

78. In re: ***Pulukuri Kottaya and others v. The King Emperor***[13] the Privy Council would hold:

> ***"10.*** *Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the*

[13] **1946 SCC OnLine PC 47**

custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in conesquence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused. Mr. Megaw, for the Crown, has argued that in such a case the "fact discovered" is the physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity would all be admissible. If this be the effect of section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. On normal principles of construction their Lordships think that the proviso to section 26, added by section 27, should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered.

*Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.***"**

79. In re: ***Anter Singh v. State of Rajasthan***[14] and ***Salim Akhtar v. State of U.P.***[15] the Supreme Court would reiterate the same principle.

80. In re: ***Aslam Parwez v. Govt. of NCT of Delhi***[16] the Supreme Court would hold:

"11. *Aslam Parwez has been convicted under Section 5 of the TADA on the ground that he made a disclosure statement on 3-5-1988 to the effect that A-1 had given him a revolver on 8-9-1989 which he had concealed near the building which was being constructed opposite the factory and that the said revolver was recovered by him after digging out the earth. It may be stated at the very outset that the evidence on record does not show that any effort was made by the police party to have any public witness with them when A-4 took them to the spot on 3-5-1988, where the revolver is alleged to have been recovered. Only two witnesses, namely, PW 10 Ram Narain, Head Constable and PW 14 Surinder Kumar, SI, who are both police personnel, have deposed about the aforesaid recovery. The recovery has been made after 8 months and that too from an open place which was by the side of a building under construction. The recovery has not been made from any closed or concealed place but from an open place which is*

[14] **(2004) 10 SCC 657**
[15] **(2003) 5 SCC 499**
[16] **(2003) 9 SCC 141**

*accessible to all and everyone including those who were engaged in the construction of the building.***"**

81. In re: State ***(NCT of Delhi) v. Navjot Sandhu***[17] the Supreme Court would advert to all the previous decisions and restate the legal position thus:

> ***"121.*** *The first requisite condition for utilising Section 27 in support of the prosecution case is that the investigating police officer should depose that he discovered a fact in consequence of the information received from an accused person in police custody. Thus, there must be a discovery of fact not within the knowledge of police officer as a consequence of information received. Of course, it is axiomatic that the information or disclosure should be free from any element of compulsion. The next component of Section 27 relates to the nature and extent of information that can be proved. It is only so much of the information as relates distinctly to the fact thereby discovered that can be proved and nothing more. It is explicitly clarified in the section that there is no taboo against receiving such information in evidence merely because it amounts to a confession. At the same time, the last clause makes it clear that it is not the confessional part that is admissible but it is only such information or part of it, which relates distinctly to the fact discovered by means of the information furnished. Thus, the information conveyed in the statement to the police ought to be dissected if necessary so as to admit only the information of the nature mentioned in the section. The rationale behind this provision is that, if a fact is actually discovered in consequence of the information supplied, it affords some guarantee that the information is true and can therefore be safely allowed to be admitted in evidence as an incriminating factor against the accused. As pointed out by the Privy Council in Kottaya case [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] : (AIR p. 70, para 10)*
>
> *"clearly the extent of the information admissible must depend on the exact nature of the fact discovered"*
>
> *and the information must distinctly relate to that fact.*

[17] **(2005) 11 SCC 600**

Elucidating the scope of this section, the Privy Council speaking through Sir John Beaumont said: (AIR p. 70, para 10)

"Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused."

(emphasis supplied)

We have emphasised the word "normally" because the illustrations given by the learned Judge are not exhaustive. The next point to be noted is that the Privy Council rejected the argument of the counsel appearing for the Crown that the fact discovered is the physical object produced and that any and every information which relates distinctly to that object can be proved. Upon this view, the information given by a person that the weapon produced is the one used by him in the commission of the murder will be admissible in its entirety. Such contention of the Crown's counsel was emphatically rejected with the following words: (AIR p. 70, para 10)

"If this be the effect of Section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect."

Then, Their Lordships proceeded to give a lucid exposition of the expression "fact discovered" in the following passage, which is quoted time and again by this Court: (AIR p. 70, para 10)

"In Their Lordships' view it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a

knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A' these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

(emphasis supplied)

122. *The approach of the Privy Council in the light of the above exposition of law can best be understood by referring to the statement made by one of the accused to the police officer. It reads thus: (AIR p. 71, para 13)*

"… About 14 days ago, I, Kottaya and people of my party lay in wait for Sivayya and others at about sunset time at the corner of Pulipad tank. We, all beat Beddupati China Sivayya and Subayya, to death. The remaining persons, Pullayya, Kottaya and Narayana ran away. Dondapati Ramayya who was in our party received blows on his hands. He had a spear in his hands. He gave it to me then. I hid it and my stick in the rick of Venkatanarasu in the village. I will show if you come. We did all this at the instigation of Pulukuri Kottaya."

The Privy Council held that: (AIR p. 71, para 14)

"14. The whole of that statement except the passage 'I hid it (a spear) and my stick in the rick of Venkatanarasu in the village. I will show if you come' is inadmissible."

(emphasis supplied)

There is another important observation at para 11 which needs to be noticed. The Privy Council explained the probative force of the information made admissible under Section 27 in the following words: (AIR p. 71)

"<u>Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law</u>."

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125. *We are of the view that Kottaya case [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] is an authority for the proposition that "discovery of fact" cannot be equated to the object produced or found. It is more than that. The discovery of fact arises by reason of the fact that the information given by the accused exhibited the knowledge or the mental awareness of the informant as to its existence at a particular place.*

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127. *The crux of the ratio in Kottaya case [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] was explained by this Court in State of Maharashtra v. Damu [(2000) 6 SCC 269 : 2000 SCC (Cri) 1088] . Thomas J. observed that: (SCC p. 283, para 35)*

"The decision of the Privy Council in Pulukuri Kottaya v. Emperor [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] is the most quoted authority for supporting the interpretation that the 'fact discovered' envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect."

In Mohd. Inayatullah v. State of Maharashtra [(1976) 1 SCC 828 : 1976 SCC (Cri) 199] , Sarkaria, J. while clarifying that the expression "fact discovered" in Section 27 is not restricted to a physical or material fact which can be perceived by the senses, and that it does include a mental fact, explained the meaning by giving the gist of what was laid down in Pulukuri Kottaya case [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] . The learned Judge, speaking for the Bench observed thus: (SCC p. 832, para 13)

"Now it is fairly settled that the expression 'fact discovered' includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this (see Pulukuri Kottaya v. Emperor [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] ; Udai Bhan v. State of U.P. [1962 Supp (2) SCR 830 : AIR 1962 SC 1116 : (1962) 2 Cri LJ 251])."

128*. So also in Udai Bhan v. State of U.P. [1962 Supp (2) SCR 830 : AIR 1962 SC 1116 : (1962) 2 Cri LJ 251] J.L. Kapur, J. after referring to Kottaya case [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] stated the legal position as follows: (SCR p. 837)*

"A discovery of a fact includes the object found, the place from which it is produced and the knowledge of the accused as to its existence."

The above statement of law does not run counter to the contention of Mr Ram Jethmalani, that the factum of discovery combines both the physical object as well as the mental consciousness of the informant accused in relation thereto. However, what would be the position if the physical object was not recovered at the instance of the accused was not discussed in any of these cases.

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141. *We need not delve further into this aspect as we are of the view that another ingredient of the section, namely, that the information provable should relate distinctly to the fact thereby discovered is not satisfied, as we see later, when we refer to the circumstances against some of the accused.*

142. *There is one more point which we would like to discuss i.e. whether pointing out a material object by the accused furnishing the information is a necessary concomitant of Section 27. We think that the answer should be in the negative. Though in most of the cases the person who makes the disclosure himself leads the police officer to the place where an object is concealed and points out the same to him, however, it is not essential that there should be such pointing out in order to make the information admissible under Section 27. It could very well be that on the basis of information furnished by the accused, the investigating officer may go to the spot in the company of other witnesses and recover the material object. By doing so, the investigating officer will be discovering a fact viz. the concealment of an incriminating article and the knowledge of the accused furnishing the information about it. In other words, where the information furnished by the person in custody is verified by the police officer by going to the spot mentioned by the informant and finds it to be correct, that amounts to discovery of fact within the meaning of Section 27. Of course, it is subject to the rider that the information so furnished was the immediate and proximate cause of discovery. If the police officer chooses not to take the informant accused to the spot, it will have no bearing on the point of admissibility under Section 27, though it*

may be one of the aspects that goes into evaluation of that particular piece of evidence." *(emphasis supplied)*

82. In re: ***Charandas Swami v. State of Gujarat***[18] the Supreme Court would examine its various pronouncement on Section 27 of the Indian Evidence Act, 1872. In the said case the Courts below had held that the accused therein had been last seen with the deceased and that the deceased was not seen thereafter till his dead body was found. This finding of the Courts below would be upheld by the Supreme Court. The dead body of the deceased was found in a burnt condition in a ditch behind a house. This fact was revealed by the accused in his disclosure statement. Till the disclosure was made by the accused the dead body which was discovered was noted as that of an unknown person. The Supreme Court would hold that if the accused had not disclosed about the location of the dead body dumped by him to the Investigating Officer then the investigation would not have made any headway.

83. Exhibit-3 is the disclosure statement of the Appellant. It is recorded in Nepali. The date of the disclosure statement is 22.12.2013 and the time 1400 hours. It is recorded at the Ranipool Police Station. The said disclosure statement bears the signature of the Appellant as well as the signature of two witnesses to the disclosure i.e. Netra Devi Sharma (P.W.2) and Pema Chakki Bhutia (P.W.3). Netra Devi Sharma (P.W.2), as seen above, is related to the deceased and Pema Chakki Bhutia (P.W.3) is Netra

[18] **(2017) 7 SCC 177**

Devi Sharma's (P.W.2) staff and thereafter their evidence must be carefully examined although admissible. The confession of the Appellant recorded in the disclosure statement (exhibit-3) heavily relied upon by the learned Sessions Judge in the impugned judgment to hold the Appellant guilty of murder is not admissible. What is admissible is provided in Section 27 of the Indian Evidence Act, 1872. Section 27 of the Indian Evidence Act, 1872 provides that when any fact is deposed to as discovered in consequence of information received from a person 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. Thus, for the application of Section 27 the Indian Evidence Act, 1872 the disclosure statement (exhibit-3) must be split into its components to separate the admissible portion if duly proved. Only those components or portions which were the immediate cause of the discovery may be proved. The rest of the portions must be eliminated from consideration. In so doing the only portion of the disclosure statement (exhibit-3) which may be proved is, as translated *"I can show the place <u>I pushed my wife</u> and I can also show the body of my wife if it has not been carried away by the river"* after discarding the underlined portion. The words in the above disclosure statement *"I pushed my wife"* are inadmissible since they do not relate to the discovery of the body of the deceased. Now it would be relevant to examine whether the fact

was discovered pursuant to the purported disclosure statement dated 22.12.2013 made by the Appellant.

84. Both Netra Devi Sharma (P.W.2) and Pema Chakki Bhutia (P.W.3) would depose that the Appellant gave a statement to the police in their presence that he had pushed his wife from *"Jalewa Bhir".* This statement of the Appellant that he pushed his wife from *"Jalewa Bhir"* is not recorded in the disclosure statement (exhibit-3). Even the Investigating Officer-Mahendra Subba (P.W.28) would not depose about *"Jalewa Bhir".* Netra Devi Sharma (P.W.2) and the Investigating Officer-Mahendra Subba (P.W.28) would all depose that when, pursuant to the disclosure statement (exhibit-3), they went to *"Jalewa Bhir"* they could not discover the body there. Pema Chakki Bhutia (P.W.3) would admit that she did not visit the place of occurrence and had no idea as to where the police recovered the body from. Neither Netra Devi Sharma (P.W.2) nor the Investigating Officer-Mahendra Subba (P.W.28) deposed that the Appellant had in fact disclosed that he could show the place from where he had pushed the deceased.

85. The Investigating Officer-Mahendra Subba (P.W.28) would not depose that he discovered the dead body in consequence of the information received from the Appellant when he was in police custody which is the first ingredient of Section 27 of the Indian Evidence Act, 1872.

86. The dead body was recovered on 24.12.2013 two days after the recording of the disclosure statement (exhibit-3) on 22.12.2013. The Investigating Officer-Mahendra Subba (P.W.28) would also candidly state that on the basis of the disclosure statement of the Appellant they made a thorough search with constable man power and river rafters in the river Teesta but could not recover the dead body of the deceased. Mr. N. Rai would thus submit that the requirements of Section 27 of the Indian Evidence Act, 1872 had not been satisfied by the prosecution as no discovery of the dead body of the deceased was admittedly made on 22.12.2013 when pursuant to the purported disclosure statement the Investigating Officer-Mahendra Subba (P.W.28) proceeded to *"Jalewa Bhir"* at Melli.

87. The disclosure statement which is in *"Nepali"* does not mention *"Jalewa Bhir"* anywhere. The said disclosure statement does however disclose that the Appellant had proceeded from Melli Sikkim towards the West Bengal side where he pushed the deceased towards the Teesta river. The disclosure statement also records that the Appellant had stated that he could show the place as well as the body of the deceased if it had not been carried away by the river.

88. The dead body of the deceased would be stated to have been discovered on 24.12.2013 at 8.40 a.m. by one Sajan Tamang of Melli Bazar, South Sikkim. Two inquests would be conducted on

the dead body. One pursuant to the FIR and the other pursuant to a purported UD case registered. As per the inquest report (exhibit-21) dated 24.12.2013 conducted at 12.30 p.m. the dead body would be found in a *"cave at the river bank of Teesta river".* No further details regarding the exact location of the dead body are available in the said inquest report (exhibit-21). The second inquest report (Exhibit-4) would record that the dead body was found in *"cave on the river bank of river Teesta below power colony dara, South direction from the P.S."*. There would be two witnesses named in both the inquests i.e. Bishnu Neopaney and Lachuman Bhattarai. Both the said witnesses would not be examined. In fact they have not even been named in the final report. Both the inquest reports (exhibit-4 and exhibit-21) would record that the information regarding the finding of the dead body would be given by Sajan Tamang. Strangely again Sajan Tamang would not be examined. The inquest report (exhibit-4) would record that the dead body was inspected and identified by Deepak Sharma (P.W.1) and the Appellant. Deepak Sharma (P.W.1) would say nothing about it in his deposition. Neither the documents relating to UD Case no. 16/2013 except the inquest report (exhibit-4) nor Police Inspector-Karma Chedup Bhutia who is set to have registered the said UD case would be produced before the Court. Both the inquest reports (exhibit-4 and exhibit-21) would bear the same time and date although Sub-Inspector-Santosh Kumar Rai (P.W.7) who conducted the inquest (exhibit-21) would state in his

deposition that the Sub-Divisional Magistrate Jorethang, Tenzing Dorjee (P.W.24) who had conducted the inquest (exhibit-4) had come to the spot after he conducted the inquest.

89. Sub-Inspector-Santosh Kumar Rai (P.W.7) would state that when he reached the spot where he conducted the inquest and saw the dead body he realized that it matched the description of the deceased given in the hue and cry message dated 23.12.2013 from the Investigating Officer-Mahendra Subba (P.W.28). The hue and cry message dated 23.12.2013 has, however, not been exhibited neither by Sub-Inspector-Santosh Kumar Rai (P.W.7) nor by Investigating Officer-Mahendra Subba (P.W.28). He would admit that he did not know as to how the dead body was lying at the bank of river Teesta and that his entry in column of the inquest report (exhibit-4) stating: *"fall from a height"* was only on his assumption.

90. The dead body of the deceased would be found lying underneath a big boulder in sitting position, both legs half bent, hands lying straight, face towards right facing the Teesta river and both eyes closed. *Rigor mortis* would have developed. Two teeth would be missing. The left side of the skull would be cracked about two inches above left eye, the mouth would be semi open. There would be no injuries on the neck or the chest. The shoulder and right hand would have scratch marks. The skin layer, two inches below the left elbow would be removed. The right leg would be

fractured below the knee. The left leg would have fractured ankle and skin abrasion. There would be punctured injury one inch deep and seven inches in diameter on the back. There would also be injury on the left buttock. Some sand particles would be attached to the dead body which would be discovered in semi deteriorated condition.

91. Deepak Sharma (P.W.1) who has been named in the inquest report (exhibit-4) as one of the person who identified the dead body as that of the deceased spoke nothing about it in his deposition. The other person named therein is the Appellant-the accused.

92. Netra Devi Sharma (P.W.2) who was not named in either of the inquest reports (P.W.2) would state that on 24.12.2013 she was informed that the dead body of a girl was found on the river bank below Melli PHC and she went with her husband-Ishwar Prasad Sharma, Kedar Nath Sharma (P.W.15) (her younger paternal uncle) and Mahendra Sharma (her husband's elder brother). Ishwar Prasad Sharma has neither been named in the final report nor examined by the prosecution. Kedar Nath Sharma (P.W.15) also didn't throw any light on this aspect. One Mahendra Poudyal (P.W.12) son of Kedar Nath Sharma has been examined by the prosecution. There is no evidence that he is the same person named by Netra Devi Sharma (P.W.2) as Mahendra Sharma. In any case Mahendra Poudyal (P.W.12) also didn't say a word about the identification of the dead body.

93. Pema Chakki Bhutia (P.W.3), staff of Netra Devi Sharma would state in her deposition that the dead body was recovered from the bank of river Teesta. However, in cross-examination she would admit that she had not visited the place of occurrence personally and had no idea from where the police had recovered the dead body. She also admitted that she came to know that the dead body was of the deceased through the relatives.

94. The prosecution case that after completion of the post mortem examination the dead body was handed over to the relatives for disposal would sought to be proved by the handing and taking memo of dead body (exhibit-5). Sub-Inspector-Santosh Kumar Rai (P.W.7) would exhibit the said handing and taking memo (exhibit-5) and state that after the post mortem he along with the Investigating Officer-Mahendra Subba (P.W.28) had handed over the dead body of the deceased to Indralall Sharma (P.W.5) and their relatives. Indralall Sharma (P.W.5) would state nothing about the handing over of the body of the deceased to him. The said handing and taking memo would be purportedly signed by seven persons in token of having received the dead body. Four out of the seven would not be examined by the prosecution. The rest of the prosecution witnesses would not identify their signatures or prove the handing and taking memo (exhibit-5). Deepak Sharma (P.W.1), Puspa Lal Kafley (P.W.11) and Indralall Sharma (P.W.5) would not even speak about the handing and taking over of the dead body of the deceased.

95. Puspa Lal Kafley (P.W.11) would state that on 24.12.2013 he received a call from the police personnel of Ranipool Police Station stating that one dead body was found near the river bank near Yuksom Breweries, Melli and accordingly they rushed to the place and found the dead body lying near the river bank of the river Teesta below Yuksom Breweries and identified it to be of the deceased. As per his deposition the Appellant also identified the dead body. In cross-examination he would admit that he did not know as to how the dead body of the deceased was lying on the river bank of Teesta.

96. The Investigating Officer-Mahendra Subba (P.W.28) would depose that on 24.12.2013 at around 800 hours he received information from the Station House Officer, Melli Police Station informing about the unidentified female dead body recovered at the bank of river Teesta below Yuksom Breweries. He would also state that the brother of the deceased Deepak Sharma (P.W.1) and the relatives were informed and then he went to the place where he found the dead body. According to Investigating Officer-Mahendra Subba (P.W.28) it was the brother of the deceased-Deepak Sharma (P.W.1) who along with the Appellant identified the dead body as that of the deceased at the place of occurrence.

97. The evidence of a vital witness who is said to have seen the dead body first lying near the bank of river Teesta near Melli, South Sikkim has been withheld from the Court with no

explanation. Police Inspector-Karma Chedup Bhutia who is said to have registered the UD Case No. 16 of 2013 was also not examined. The fact that the investigation for the search of the dead body of the deceased was directed towards Melli after the disclosure statement would have been relevant. However, Sajan Tamang the most crucial witness who had admittedly discovered the dead body having not been examined how and under what circumstances the dead body was discovered by him remains unexplained. In such circumstances, it cannot be said that the dead body of the deceased was discovered in consequence of information received from the Appellant.

98. The evidence of the prosecution fall short of the quality of evidence required in a criminal case. The only person who identified the dead body found at bank of river Teesta was Puspa Lal Kafley (P.W.11). The inquest reports do not name him as the person who identified the dead body. The Investigating Officer (P.W.28) also throws no light upon this evidence. Even if this Court were to believe the evidence of Puspa Lal Kafley (P.W.11) to be true it is certain that there is no evidence to show that the discovery of the dead body at the bank of river Teesta near Yuksom Breweries, Melli on 24.12.2013 was in consequence of the information received from the Appellant in custody of a police officer as required under the mandate of Section 27 of the Indian Evidence Act, 1872 to make it provable and held against the Appellant.

(ix) The filing of the false missing report by the Appellant, inconsistent and contradictory statement of the Appellant regarding the whereabouts of the deceased along with his conduct-tearing of the deceased face from her photographs, false plea of the Appellant having lost his wallet along with the key of the box belonging to the deceased.

(x) The making of calls to various relatives inquiring about the whereabouts of the deceased by the Appellant and misleading his parents, relatives and the police.

(xi) The failure of the Appellant to satisfactorily explain the circumstances appearing against him during his examination under Section 313 Cr.P.C.

99. The learned Sessions Judge would hold that the Appellant was liable to be convicted for lodging false missing report despite the knowledge that he had committed the murder of his wife and mislead the police and relatives of the deceased with the intention of screening himself under Section 201 IPC and also sentenced him to undergo simple imprisonment and pay a fine of Rs.5000/- (Rupees five thousand) only and in default to further undergo three months of simple imprisonment.

100. Section 201 IPC provides:

> ***"201. Causing disappearance of evidence of offence, or giving false information to screen offender****. - whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the Commission of that offence to disappear, with the intension of screening the offender from legal punishment, or with the intention gives any information respecting the offence which he knows or believes to be false."*

101. The ingredient of the offence of giving false information would be the knowledge of commission of the offence and thereafter giving false information respecting the offence.

102. Exhibit-10 is the General Diary (G.D.) extract taken from Ranipool Police Station General Diary page no. 016 serial number 147 dated 19.12.2013 at 2100 hours. The entry records that:

> **"***At this noted hours, on missing diary report received from Som Nath Sharma of upper Aho A/P near Tendong Petrol Pump Ranipool E/Sikkim, mentioning that his wife Nebika Sharma, having falling description is missing since today on 19.12.2013 from his residence.*
>
> *D/R. Name Nebikak Sharma, age 25 years, height 5 ft, complexion fair. Accordingly same detailed has been informed to Rangpo checkpost and 32 no. police booth for N/A.*
>
> *Noted.*
>
> *Sd/- Kesar Bdr. Basnett*
>
> *NK 2128***"**

103. Exhibit-11 is the General Diary extract taken from Ranipool Police Station General Diary page no. 30 serial number 152 dated 20.12.2013 at 0850 hours. The entry records that:

> **"***A written missing report was received from one Som Nath Sharma of Aho Busty A/P Ranipool Bazar mentioning that her (sic) wife having following descriptions is missing since 19/12/2013 from home. D/R name Nebika Sharma age 25 years, height 5 ft, complexion fair, accordingly hue and cry msg. flashed to all S.H.O. and ICS, Talash system made and despatched.*
>
> *Noted in G.D.*
>
> *Sd/- H/C Tshering Topgay Bhutia.***"**

104. Keshar Bahadur Basnett (P.W.16) was examined. He would depose that on 19.12.2013 at around 9.00 p.m. the Appellant came to Ranipool P.S. and verbally informed him that his wife had been missing since morning. He deposed that he had asked the Appellant for a photograph of the missing person and as he did not have it he asked the Appellant to bring the photograph the next

day and accordingly he made the G.D. entry. Keshar Bahadur Basnett (P.W.16) would further depose that on the next day at around 8.30 p.m. the Appellant came to the police station with the details of the missing person and the photograph of the missing person and accordingly G.D. entry was made and thereafter hue and cry messages were sent. He exhibited the G.D. entry dated 19.12.2013 (exhibit-10) as well as G.D. entry dated 20.12.2013 (exhibit-11). Tshering Topgay Bhutia whose name is reflected as the one who made the G.D. entry dated 20.12.2013 (exhibit-11) was not examined. It must be noticed that the two G.D. entries (exhibit-10 and exhibit-11) are in the same handwriting although G.D. entry dated 20.12.2013 (exhibit-11) mentions the name of Tshering Topgay Bhutia as the signatory to the said entry. Keshar Bahadur Basnett (P.W.16) did not clarify anything about G.D. entry dated 20.12.2013 (exhibit-11) and about Tshering Topgay Bhutia. The purported written missing report made by the Appellant made to Tshering Topgay Bhutia on 20.12.2013 pursuant to which Tshering Topgay Bhutia is said to have made the General Diary entry is not placed before the Court. The failure of the prosecution to produce and prove the purported written missing report purportedly made by the Appellant would leave only the two G.D. extract of the entries (exhibit-10 and exhibit-11) for considering the correctness of the said extracts made by Police Officers in the General Diary which diary was also not produced. The person who is said to have made the entry (exhibit-11) was

also not examined. The prosecution has thus failed to cogently prove that the Appellant had lodged a false missing report intentionally to screen himself from legal punishment after commission of the alleged offence of murder. The prosecution has also failed to cogently prove that the Appellant had made inconsistent and contradictory statements.

105. Deepak Sharma (P.W.1) the brother of the deceased would depose that on 20.12.2013 he had visited the house of the Appellant after being informed that on 19.12.2013 the deceased had not returned home. He would also depose that when he inquired the Appellant had stated that the deceased had no misunderstanding with him. He would state that he went with his uncle Kedarnath to the Ranipool Police Station and when they returned they looked for photographs of the deceased for printing it in the newspaper to publish a missing report and had found 13-14 photographs of the deceased with her face torn off. As per his deposition they would ask the Appellant as to why the face was torn off from the photographs. The Appellant would feign ignorance. He would further depose that on the next day i.e. 21.12.2013 Deepak Sharma (P.W.1) along with Kedarnath Sharma (P.W.15) and his son Mahendra Sharma had first gone to the Ranipool Police Station after which they went to the Appellant's house and demanded the torn photographs from the Appellant. Deepak Sharma (P.W.1) would depose that the Appellant had

already concealed the same and refused to give it to them and even denied having seen the said photographs.

106. Kedarnath Sharma (P.W.15) would depose nothing about the torn photographs.

107. Mahendra Poudyal (P.W.12) would depose that on 20.12.2013 after receiving a call from Deepak Sharma (P.W.1) he had gone to the Appellant's house at Ranipool and while searching the house they found 7-8 numbers of single photographs of the deceased which were all torn in two pieces inside the photograph album. He would also depose that on the following day after returning from the Ranipool Police Station they had gone back to the room of the Appellant and had found to their utter surprise that the photographs of the deceased including the torn photographs were missing from the album. This fact was objected to by the defence as the said fact was not stated in the statement recorder under Section 161 Cr.P.C.

108. Whereas Deepak Sharma (P.W.1) would state that they had seen 13-14 photographs of the deceased with her face torn off Mahendra Poudyal (P.W.12) would state that they found 7-8 numbers of single photographs of the deceased which were all torn in two pieces. The investigation however, did not go beyond this and no attempt seems to have been made to recover the said photographs or to find the truth regarding the same. In such

circumstances the story of the photographs of the deceased with the face torn off would fail to be established by the prosecution.

109. Deepak Sharma (P.W.1) would also state that when they returned from Turung to the house of the Appellant he told them that he had broken open the box of the deceased on the night of 20.12.2013 and he had found that money was missing from there along with some clothes and a pair of sandals belonging to the deceased. Deepak Sharma (P.W.1) would further depose that when he asked the Appellant as to who kept the keys of the box the Appellant stated that both of them did but however, he had lost the wallet where he had kept the key. The prosecution has led no evidence to establish the falsity of the alleged statements said to have been made by the Appellant to the relative of the deceased. These statements if proved may have helped the prosecution to corroborate the other circumstances. However, the other circumstances not being proved as detailed above on its own, we are afraid, these oral evidences would not help the prosecution in establishing the guilt of the Appellant. More so when admittedly they are oral evidences from the mouth of the relatives of the deceased who attribute these admissions on the Appellant when the Court is kept in the dark about the truth and veracity of these statements of the Appellant. There is no evidence that the purported statements made by the Appellant to the prosecution witnesses were contradictory and inconsistent.

110. Deepak Sharma (P.W.1) would depose that the Appellant had told him that he had left the house at around 10.00 a.m. and therefore he did not know what time thereafter the deceased had left.

111. Hema Sharma (P.W.4) is the mother of the Appellant. According to her on 19.12.2013 at around 7.30 p.m. the Appellant phoned her and inquired about his wife (the deceased) as to whether she had come to the house or not to which she replied that she had not. The Appellant also told her that after going for her computer class at Ranipool she had not returned home.

112. Indralall Sharma (P.W.5) is the father of the Appellant. According to him on 19.12.2013 at around 7.30 p.m. while they were having dinner the Appellant phoned his wife Hema Sharma (P.W.4). Hema Sharma (P.W.4) told him that the Appellant was inquiring about whether his wife (the deceased) had come to the house. Hema Sharma (P.W.4) also told him that the Appellant had informed her that the deceased had not returned after her computer class at Ranipool.

113. Puspa Lal Kafley (P.W.11) would depose that in the evening of 19.12.2013 at around 8.30 or 9.30 p.m. he received a call from the Appellant asking whether the deceased had come to his house or not and he had replied that she had not. Puspa Lal Kafley (P.W.11) asked the Appellant as to where she had gone and in reply he told him that he had gone to attend a computer class at Ranipool.

114. The aforesaid oral evidences would reflect that the Appellant had made inquiries about the whereabouts of the deceased from the said prosecution witnesses.

115. Mahendra Poudyal (P.W.12) would depose that on 20.12.2013 at around 7.30 a.m. or 8.00 a.m. he received a call from Deepak Sharma (P.W.1) stating that the deceased had been missing since 19.12.2013. Hearing about it he went to the rented room of the Appellant and inquired about the deceased. The Appellant told them that the deceased had gone to attend a computer class on 19.12.2014 and thereafter she had not returned home.

116. Rajesh Prasad Gupta (P.W.14) is the sole witness examined by the prosecution regarding the computer class. He would depose that on 19.12.2013 at around 6.30 or 7.00 p.m. one person had come to the computer institute at Ranipool to inquire whether the deceased had come to attend her computer class or not and in reply to the same he had told that person that the computer class remains closed on Thursday and nobody had come to the institute. Rajesh Prasad Gupta (P.W.14) did not disclose who had come to inquire about the deceased. The evidence of Rajesh Prasad Gupta (P.W.14) would not assist the prosecution to establish the allegation that the Appellant and Chandra Kala Sharma had gone to the MIT Computer Centre inquiring about the deceased knowing fully well that the Appellant had already pushed the deceased into the river Teesta and murdered her.

117. In re: ***Sharad Birdhichand Sarda (supra)*** the Supreme Court would expound on how false defence may be called into aid in a case based on circumstantial evidence and hold:

> ***"150.*** *The High Court has referred to some decisions of this Court and tried to apply the ratio of those cases to the present case which, as we shall show, are clearly distinguishable. The High Court was greatly impressed by the view taken by some courts, including this Court, that a false defence or a false plea taken by an accused would be an additional link in the various chain of circumstantial evidence and seems to suggest that since the appellant had taken a false plea that would be conclusive, taken along with other circumstances, to prove the case. We might, however, mention at the outset that this is not what this Court has said. We shall elaborate this aspect of the matter a little later.*
>
> ***151.*** *It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this: where various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a court.***"**

118. In re: ***State of Karnataka v. Suvarnamma***[19] the Supreme Court would hold:

> ***"10.*** *The court dealing with a criminal trial is to perform the task of ascertaining the truth from the material before it. It has to punish the guilty and protect the innocent. Burden of proof is on the prosecution and the prosecution has to establish its case beyond reasonable doubt. Much weight cannot be given to minor discrepancies which are bound to occur on account of difference in*

[19] **(2015) 1 SCC 323**

> *perception, loss of memory and other invariable factors. In the absence of direct evidence, the circumstantial evidence can be the basis of conviction if the circumstances are of conclusive nature and rule out all reasonable possibilities of the accused being innocent. Once the prosecution probabilises the involvement of the accused but the accused takes a false plea, such false plea can be taken as an additional circumstance against the accused. Though Article 20(3) of the Constitution incorporates the rule against self-incrimination, the scope and the content of the said rule does not require the court to ignore the conduct of the accused in not correctly disclosing the facts within his knowledge. When the accused takes a false plea about the facts exclusively known to him, such circumstance is a vital additional circumstance against the accused.***"***

119. The learned Sessions Judge would hold that there was sufficient corroborative and clinching evidence against the Appellant and that while examining the Appellant under Section 313 Cr.P.C. he failed to explain the circumstances satisfactorily. He would further hold that simply answering *"I do not know"* was not sufficient to prove his innocence unless he properly explained the facts and circumstances as to how and under what circumstances the death of the deceased wife occurred or had been killed by someone else or committed suicide. The learned Sessions Judge would hold that the relevance and significance of sub-section (4) of Section 313 Cr.P.C. cannot be lost sight of and admissions and confessions made by an accused in the said statement can be given due weight age and considered along with other admissible evidence. The learned Sessions has however, not pointed out any such question or such answers for us to examine

its relevance. It may therefore, be significant to draw attention and appreciate the scope of Section 313 Cr.P.C.

120. In re: ***Raj Kumar Singh v. State of Rajasthan***[20] the Supreme Court would summarise the purpose of recording a statement of an accused under Section 313 Cr.P.C. as under:

> ***"41.*** *In view of the above, the law on the issue can be summarised to the effect that statement under Section 313 CrPC is recorded to meet the requirement of the principles of natural justice as it requires that an accused may be given an opportunity to furnish explanation of the incriminating material which had come against him in the trial. However, his statement cannot be made a basis for his conviction. His answers to the questions put to him under Section 313 CrPC cannot be used to fill up the gaps left by the prosecution witnesses in their depositions. Thus, the statement of the accused is not a substantive piece of evidence and therefore, it can be used only for appreciating the evidence led by the prosecution, though it cannot be a substitute for the evidence of the prosecution. In case the prosecution evidence is not found sufficient to sustain conviction of the accused, the inculpatory part of his statement cannot be made the sole basis of his conviction. The statement under Section 313 CrPC is not recorded after administering oath to the accused. Therefore, it cannot be treated as an evidence within the meaning of Section 3 of the Evidence Act, though the accused has a right if he chooses to be a witness, and once he makes that option, he can be administered oath and examined as a witness in defence as required under Section 315 CrPC. An adverse inference can be taken against the accused only and only if the incriminating material stood fully established and the accused is not able to furnish any explanation for the same. However, the accused has a right to remain silent as he cannot be forced to become a witness against himself."*

[20] **(2013) 5 SCC 722**

121. There is no evidence produced by the prosecution to establish that the filing of the missing report, even if it was true and the various calls made to various relatives by the Appellant inquiring about the deceased and her whereabouts or that his statement that the deceased had gone to attend her computer class was to screen himself from the offence committed by him.

(xii) The time of death being closely connected to the date of incident.

122. The evidence of Dr. O. T. Lepcha (P.W.23) the Medico Legal Specialist at the STNM Hospital who conducted the autopsy over the dead body of the deceased is an opinion. He approximates the time since death as more than 48 hours in his medical autopsy report (exhibit-20) in which he also opined that the cause of death, to the best of his knowledge and belief was due to fractured skull with intracranial haemorrhage as a result of blunt force injury. There is no approximation of any time beyond 48 hours. Although the learned Sessions Judge would reason that the evidence of the said Dr. O. T. Lepcha (P.W.23) would connect the time of death and the time of incident we are afraid the medical opinion alone cannot help the prosecution in establishing the fact beyond reasonable doubt.

123. The chain of circumstances required to be proved in a criminal prosecution establishing the guilt of the accused has not been cogently proved. In fact none of the circumstances stands proved save the fact that the Appellant had eaten vegetable

"momos" with an unknown girl on the date of the alleged incident i.e.19.12.2013 at Melli. This may create a serious doubt upon the Appellant. However, it is shockingly obvious that the prosecution did not deem it important to conduct the investigation in such a manner that would eliminate all possibility about the innocence of the Appellant. The prosecution seem to have rested its case on procuring statements of the Appellant and Chandra Kala Sharma under Section 164 Cr.P.C. without even realising that both had not confessed to their alleged crimes, a statement of the Appellant under Section 27 of the Indian Evidence Act, 1872 and evidence regarding some investigation done by the relatives of the deceased themselves. No effort has been made to prove vital documentary evidences. Material witnesses to the making of the said documents have been left out. Sajan Tamang the first informant about the recovery of the dead body has also been left out by the Investigating Officer-Mahendra Subba (P.W.28) without even an explanation. The offence of murder having not been proved the bare fact that the Appellant went and lodged a missing report after the deceased went missing or that he gave some statement under Section 313 Cr.P.C would not *ipso facto* lead to the conclusion that the said report was false. In the present case the alleged links, save one, in the chain are in themselves not proved and therefore incomplete. Even if the prosecution allegation of a false plea or a false defence is accepted it cannot be called into aid to saddle the Appellant with culpability. The charges have not been proved

beyond reasonable doubt on the basis of clear, cogent, credible or unimpeachable evidence. In such circumstances the question of indicting or punishing an accused does not arise, merely being carried away by the presumed heinous nature of the crime or the gruesome manner in which it was presumed to have been committed. Mere suspicion, however strong or probable it may be cannot substitute legal proof required substantiating the charge of commission of a crime and graver the charge greater ought to be the standard of proof required. The criminal Courts should etch the words of the Supreme Court, so often reiterated, in their memory that there is a long mental distance between *"may be true"* and *"must be true"* and this basic and golden rule only helps to maintain the vital distinction between *"conjectures"* and *"sure conclusions"* to be arrived at on the touchstone of a dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case as well as quality and credibility of the evidence brought on record.

124. Before parting, as a reminder, it may be useful to quote the words of the Supreme Court in re: ***Jose alias Pappachan v. Sub-Inspector of Police, Koyilandy & Anr.***[21] ***:***

> ***"58.*** *The inalienable interface of presumption of innocence and the burden of proof in a criminal case on the prosecution has been succinctly expounded in the following passage from the treatise The Law of Evidence, 5th Edn. by Ian Dennis at p. 445:*
>
> *"The presumption of innocence states that a person is presumed to be innocent until proven guilty. In one sense this*

[21] **(2016) 10 SCC 519**

simply restates in different language the rule that the burden of proof in a criminal case is on the prosecution to prove the defendant's guilt. As explained above, the burden of proof rule has a number of functions, one of which is to provide a rule of decision for the factfinder in a situation of uncertainty. Another function is to allocate the risk of misdecision in criminal trials. Because the outcome of wrongful conviction is regarded as a significantly worse harm than wrongful acquittal the rule is constructed so as to minimise the risk of the former. The burden of overcoming a presumption that the defendant is innocent therefore requires the state to prove the defendant's guilt."

(emphasis supplied)

59. *The above quote thus seemingly concedes a preference to wrongful acquittal compared to the risk of wrongful conviction. Such is the abiding jurisprudential concern to eschew even the remotest possibility of unmerited conviction.*

60. *This applies with full force particularly in fact situations where the charge is sought to be established by circumstantial evidence. These enunciations are so well entrenched that we do not wish to burden the present narration by referring to the decisions of this Court in this regard.*

61. *Addressing this aspect, however, is the following extract also from the same treatise The Law of Evidence, 5th Edn. by Ian Dennis at p. 483:*

> *"Where the case against the accused depends wholly or partly on inferences from circumstantial evidence, fact finders cannot logically convict unless they are sure that inferences of guilt are the only ones that can reasonably be drawn. If they think that there are possible innocent explanations for circumstantial evidence that are not "merely fanciful", it must follow that there is a reasonable doubt about guilt. There is no rule, however, that judges must direct juries in terms not to convict unless they are sure that the evidence bears no other explanation than guilt. It is sufficient to direct simply that the burden on the prosecution is to satisfy the jury beyond reasonable doubt, or so that they are sure.*
>
> *The very high standard of proof required in criminal cases minimises the risk of a wrongful conviction. It means*

> *that someone whom, on the evidence, the factfinder believes is "probably" guilty, or "likely" to be guilty will be acquitted, since these judgements of probability necessarily admit that the factfinder is not "sure". It is generally accepted that some at least of these acquittals will be of persons who are in fact guilty of the offences charged, and who would be convicted if the standard of proof were the lower civil standard of the balance of probabilities. Such acquittals are the price paid for the safeguard provided by the "beyond reasonable doubt" standard against wrongful conviction."*
>
> *(emphasis supplied)*

125. The investigation of the present case is unfortunately lethargic and the prosecution half hearted. The learned Sessions Judge in such circumstances has ventured to ignore settled principles of criminal jurisprudence and fastened the burden of proving his innocence upon the Appellant. Fanciful exposition of law to give an impression of studied scrutiny has been devised to convict the Appellant in a case where no cogent evidence had been brought forth by the investigation to prove a grave accusation of murder. We have no hesitation to express our displeasure on the quality of investigation and prosecution in the present case. In the circumstances we deem it proper to give the benefit of doubt to the Appellant.

126. The appeal is allowed. Resultantly, the impugned judgment as well as the order on sentence both dated 29.02.2016 rendered by the learned Sessions Judge in Sessions Trial Case No. 14 of 2014 are set aside and the Appellant is acquitted of the charges under Section 302 and 201 IPC. The fines of Rs.10,000/- (Rupees

ten thousand) only under Section 302 IPC and Rs.5000/- (Rupees five thousand) only under Section 201 IPC imposed by the learned Sessions Judge, if paid by the Appellant shall be consequently returned. The Appellant be set at liberty forthwith.

(Bhaskar Raj Pradhan)
Judge
11.10.2018

(Meenakshi M. Rai)
Acting Chief Justice
11.10.2018

to/
Approved for reporting: yes.
Internet: yes.