

Neeraj Vs. State of M.P.

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Court : Madhya Pradesh

Decided On : Apr-18-1991

Reported in : 1991CriLJ2549

Judge : V.D. Gyani and ;V.S. Kokje, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1974 - Sections 161, 162, 172, 172(2), 293, 293(4), 311, 313, 313(3), 342, 354(3) and 366(1); [Evidence Act, 1872](#) - Sections 25, 26 and 27; [Indian Penal Code \(IPC\), 1860](#) - Sections 302; Madhya Pradesh Police Regulations - Regulations 633, 642 and 741 to 746

Appeal No. : Cr. A. No. 90/91

Appellant : Neeraj

Respondent : State of M.P.

Advocate for Def. : G.S. Chouhan, Govt. Adv.

Advocate for Pet/Ap. : J.P. Gupta and ;S.K. Vyas, Advs.

Judgement :

V.D. Gyani, J.

1. This death reference Under Section 366(1), Cr. P.C. by IXth Additional Sessions Judge, Indore is heard along with Criminal Appeal No. 90/91, preferred by

accused Neeraj against his conviction and sentence of death Under Section 302, I.P.C. as recorded by the trial Court vide its judgment dated 26th February, 1991 passed in S.T. No. 65/89. It's a case of double murder. The place of occurrence is House No. 46, New Dewas Road, Indore; time night intervening 21st and 22nd of December, 1988. A couple Prakash s/o Dwarkadas Agarwal aged about 36 years and his wife Smt. Premlata Agarwal aged about 33 years were done to death. Deceased Prakash was found to be having apart from two minor abrasions, as many as ten incised wounds on his head allegedly inflicted with an axe, while his wife Premlata as throttled to death. Thumb pressure marks on her neck with nail scratches were observed on lower part of the neck.

2. First Information Report, Ex. P/1 was lodged at 8-40 a.m. on 22-12-1988 at Police Station Tukoganj, Indore where Crime No. 847/88 (as it appears in Ex. P/1) was registered Under Section 302, IPC and investigations proceeded.

3. The situation and occupants of the house has some bearing on the case. It is also therefore noted. House No. 46, New Dewas Road, Indore is a single storeyed house. The incident is said to have taken place on the first floor. As per inmates, of the house, apart from the deceased their two sons P.W. 2 Ghanshyam and P.W. 8 Naresh, accused Neeraj who happens to be the nephew (sister's son 'Bhanja') of the deceased, also lived in the same house along with his mother Shakun.

These family members apart, one Shreesh, a student of Local Engineering College also resided as a tenant, on the first floor in the same house. Dr. Surendra Agarwal has his Clinic, just adjoining this house. Ex. P/2 is the sketch map of the house in question.

4. Deceased Prakash was running a fair price grain shop just adjacent to the house. On the date of incident having closed the shop around 8.00 in the night, he returned home, had his meals and thereafter, had drinks in the company of his servants one Ganesh and Rajesh, a cycle shop owner. His son P.W. 2 Ghanshyam after taking meals was sitting at the shop of his uncle Prahlad just adjoining the house. Around 10-30 when Rajesh and Ganesh had left the deceased asked his son to get him packet of cigarettes which he brought and supplied and again came to his uncle's shop. After some time he came home and

went to bed along with his brother Naresh and cousin Sanjay who were on the ground floor.

5. As per FIR Ex. P-1 Ghanshyam having gone to bed after giving cigarettes to his father, accused Neeraj came and went to sleep, in his room on the first floor. It was around 6-30, when Ghanshyam who was sleeping on the ground floor, went to awake his parents, who were sleeping on the first floor, but as it was still dark they did not awake so he returned. Around 8-15 a.m. it is said, his younger brother Naresh went to awake their mother, but only to return and report that their mother was bleeding from the mouth and was not speaking at all. On being informed neighbours also collected. It was Radhakishan, who declared to the brothers son that their parents were dead. Dr. Dube was sent for immediately, who also rushed in only to find the couple dead. It was after his visit that FIR Ex. P-1 came to be lodged by P.W. 2 Ghanshyam at 8-40 a.m.

6. This report Ex. P/1 led to registration of crime No. 847/88 (as it seemingly appears in the FIR Ex-P. 1) Under Section 302, IPC an investigation proceeded. The I.O. (P.W. 16) visited the spot and prepared spot map Ex. P/2. The blood stained bed sheets, pillow covers, quilts and blood stained soil were seized. It is also claimed that a bunch of hair found in the right hand fist of deceased Premlata was also seized and recovered as per seizure memo Ex. P-5. Inquest Ex. P. 13 and P. 14 were also prepared followed by requisitions for post mortem examinations. The accused was rounded up along with others namely Sanjay, Naresh, Suresh and Ganesh as also Ganshyam. The appellant was arrested at 10 p.m. on 23-12-88 as per arrest memo Ex. P-7.A Certain recoveries such as clothes and axe were made at his instance as per Ex. P-8, 9 and 10. These articles were sent for chemical examination, whose report Ex. P-6 is on record. On completion of investigation the appellant was charged and tried for the above offence Under Section 302, IPC. Rejecting his defence of false implication, the trial court found him guilty and sentenced to death as stated above. Hence this reference and appeal.

7. It may be noted at the very out set, that this case wholly hinges on circumstantial evidence. There is no eye witness to the incident, but before

proceeding to deal with the pieces of circumstantial evidence as found by the trial Court, Shri Gupta, learned counsel appearing for the appellant pointed out and catalogues certain important facts and features having a material bearing on the prosecution case :

(a) P.W. 1 Dr. Dubey has in his evidence categorically stated that police had arrived on the spot when he visited the house to examine the deceased in response to a call. Indisputably it was prior to the lodging of the FIR Ex. P/1.

(b) It may also be noted before dealing with pieces of circumstantial evidence relied upon by the trial Court, that police had, apart from the appellant, rounded up Sanjay, Ganesh, Ghanshyam, Naresh and Shreesh. While others were allowed to leave around 12-00 in the after-noon Ganesh, the servant of the deceased, Rajesh, the cyclewala and Shreesh, an engineering college student and tenant, were detained at the police station. The accused had attended funeral of his Mama and Mami. It was around 8-30 in that night police again came escorted Sanjay (P.W. 9) and the accused to the police station, where they found that Ganesh, Rajesh and Shreesh were still there.

(c) I.O. P.W. 16 has admitted in his evidence, that it is during the course of investigation it, turned out, that deceased Prakash had illicit intimacy and relations with other women. His son P.W. 2 Ghanshyam when confronted with this fact, pleaded ignorance about any such illicit relationship between his father and one Shakuntalabai w/o Kashinath Maratha. But he has admitted that her husband was a tenant in their house and lived as such, for a couple of months, but even after leaving the house Shakuntalabai sometimes paid visits. Shukuntalabai was seen by him, in the Police Station along with Ganesh.

(d) Ganesh P.W. 4 has testified about the strained relationship between wife and husband, so much so that deceased Prakash would not take meals at home, and used to get the same from hotel (see para-6) or from his (Ganesh) house. On the fateful night, as admitted by Genesh, it was he who had brought meals (See para 16).

(e) Another important fact, relating to investigation also needs to be noted at this stage. A glass-panel attached to Almirah, had finger prints and was seized and sent for examination. Similarly a bottle of liquor, glass, cigarette packets, match box were also seized. The investigating Officer has admitted in his statement (See para 21) that the report of finger print Expert was not produced in the Court, because it was stated, that the articles did not bear finger prints. He further added that it was orally so reported.

(f) I.O. P.W. 16 admits that in the course of investigation he found it as a fact that Shreesh was present in the house on the night of incident. Shri Gupta, learned counsel appearing for the appellant, urged that the circumstances relied upon by the trial Court, need to be appreciated and assessed in the back ground of the aforesaid important facts and features of prosecution evidence. He also added that the trial Judge has unfortunately overlooked these aspects of the matter while dealing with the incriminating circumstances.

8. Following are the circumstances relied upon by the trial Court for basing its order of conviction.

(1) Motive -- Motive as suggested and assigned by the court on prosecution evidence for murder is that the accused had stolen Rs. 10000/- from maternal uncle's cash box and purchased moter-cycle which was got sold by the deceased. The appellant thus, had a grudge against him.

(2) The hair recovered in the fists of deceased Premlata Found as similar to that of the accused.

(3) An abrasion found on the middle finger of right hand of the accused.

(4) Nail clipping evidence.

(5) Recovery of incriminating articles at the instance of the accused made Under Section 27 of the Evidence Act.

9. Before proceeding to deal with these circumstances, I think it necessary to recapitulate the law governing circumstantial evidence, as many fallacies or some

truisms are found in writing a judgment based on circumstantial evidence. It is said, 'man may lie, but circumstances will not. 'That circumstances are inflexible proof, they do not bend to the interaction of parties' and 'witnesses may be mistaken may be corrupted while circumstances cannot'. But, in order to guard against such fallacies and truisms, one should bear in mind, as what has been very rightly pointed out by the Supreme Court, as back as 1952 in Hanumant Govind Nargundkar v. State of M.P. (AIR 1952 SC 343) : (1953 Cri LJ 129) (at pages SC 345 and 346; AIR 1952) :

'It is well to remember that in case 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 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.'

10. Considering seriousness of the offence charged, and the extreme penalty of death imposed on the appellant, Shri J.P. Gupta, learned counsel appearing for him, referring to case law on circumstantial evidence as developed during the course of years, urged that further reference to comparatively recent pronouncement of the Supreme Court in Sharad Sarda's case (AIR 1984 SC 1622) : (1984 Cri LJ 1738) appears to be necessary, as greatly conducive to the formation of clear and correct notion on the subject of circumstantial evidence. In this case their Lordships, while referring to Hanumant's case (supra) observed that the Supreme Court had in no way departed from the five conditions laid down in Hanumant's case, and reviewing the whole case law upto date, on a close analysis of several decisions, of the Supreme Court concluded as follows :--

'That the following conditions must be fulfilled before a case against the accused can be said to be fully established,'

1) The circumstances from which the conclusion of the guilt is to be drawn should be fully established. It may be noted here that this Court indicated that the circumstances concerned 'must' or 'should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must' be, or 'should' be proved, as was held by the Supreme Court in Shivaji Sahebrao Bobade v. State of Maharashtra (AIR 1973 SC 2622) : (1973 Cri LJ 1783) where the following observations were made (at page SC 2634; AIR 1973 :

'Certainly, it is a primary principle that the accused 'must' be and not merely 'may' be guilty before a Court can convict and the mental distance between 'may' be and 'must' be is long and divides vague conjectures from sure conclusions.'

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

3) The circumstances should be of a conclusive nature and tendency,

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

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

These five principles governing appreciation of circumstantial evidence have been very aptly described as 'Panchsheel' of the proof of a case based on circumstantial evidence. It is in the light of these five principles, as they substantially cover the whole gamut of circumstantial evidence, that the above noted incriminating circumstances, as found by the trial Court, against the accused, are to be tested assessed and dealt with.

11. Taking up the first circumstance, namely 'Motive' the Trial Court in paragraphs 36 and 97 of its judgment (at page 152 and 180 of the paper book) has noted that the accused had stolen Rs. 16000/- from the shop of the deceased, as deposed to by P.W. 2 Ghanshyam and had purchased motor cycle. The Court had further,

noted that at some later stage, as testified by Ghanshyam, the accused had again stolen Rs. 5000/- although no proof is coming forth. Deceased Prakash got the motor cycle sold since then the accused was bearing grudge against him. More or less to the same effect, is the evidence of his brother P.W. 8 Naresh and P.W. 9 Sanjay, as has been observed by the trial Court. It is on this basis, that following inference, has been drawn which if rendered into English reads as follows :--

'Naturally, therefore, it was possible for Naresh to have borne ill will against Prakash Agarwal (the deceased)'.

It was for this motive, that it was possible for the accused to have killed Prakash. In para 97 the trial Court concludes '.....as discussed in para 36 the accused had grudge against deceased on account of the incident of theft and this possibly could be the motive for murder.' It would be evident from the above excerpts from trial court's judgment that the trial Court has gone by mere possibilities. The conclusion is not even that of probability, but one of mere possibility. As is well known, what law requires is not mere possibility, but probability.

12. Coming to the evidence on the question of motive, the first thing that strikes is that, although the FIR Ex. P/1 was lodged by none else than the son of the deceased, there is not even a whisper about the alleged motive, when viewed in the light of the fact that this FIR was lodged after police had already reached the scene of occurrence, as testified by Dr. Dubey P.W. 1, the omission assumes importance. The Trial Court has very conveniently omitted to consider this aspect of the matter and has not critically examined the evidence of P.W. 2. The evidence of Sanjay P.W. 9 on this crucial point has not even been adverted to by the learned Judge. What he has deposed is that the accused had purchased a motor-cycle out of his own funds which was got sold at the instance of his 'Mama' the deceased. The reason for selling the motor bike, as assigned by him, was that his Mummy (mother of the accused) had complained to the deceased her brother, that Neeraj used to loiter here and there on the motor-cycle doing nothing, so it would be better to sell the same. Accordingly the motor-cycle was sold. Kishore to whom it was sold, has also been examined by the prosecution as P.W. 7. This witness in examination-in-chief has stated that he had purchased the motor-cycle for Rs.

13,200/- sometimes in the year 1986 from the deceased, Prakash Agarwal, who had told him that as Neeraj, the accused was to be settled in business and the motor-cycle was being sold. The learned Judge while dealing with the question of motive, has not even touched the evidence of these witnesses. It was open to the court to accept or reject their testimony on appreciation, but to ignore the same altogether is no appreciation at all. Shri Chouhan, learned Dy. Govt. Advocate suggested that Sanjay is the brother of the accused would therefore naturally side him. What about Kishore, the purchaser? Even if that be so it was for the trial Court to consider his evidence for whatever worth it was and not to altogether ignore it. It is also significant to note that none of these witnesses has been declared hostile.

As has been pointed out by the Supreme Court when such a course is not adopted by the prosecution the accused is led to believe that evidence of such a witness is not challenged by the prosecution. Not at the appellate stage, prosecution cannot argue that a particular statement made by its own witness is not binding on it. 1982 SC 829 : AIR 1989 SC 772. Their evidence, therefore, could not be ignored at any rate in the manner the trial Court has very conveniently done.

13. Learned Judge of the trial Court has also failed in not considering a very material vital omission in the FIR. It is not a case where the person reporting omitted to have mentioned a particular fact. P.W. 2 Ghanshyam in his evidence (para 24) stated that he had, while lodging the FIR Ex. P/1, disclosed the fact that Rs. 16000/- had been stolen by the accused, to the police officer recording it. Surprisingly enough, this fact is totally missing from the FIR and what is more surprising is that learned trial Judge does not advert to this aspect of the matter while considering the question of motive.

The evidence of Naresh (P.W. 8) has been referred to by the trial Court. In his cross-examination this witness has admitted that a year prior to the incident, the accused had started running 'Control Shop' (licensed food grain fair price shop). In his statement, Ex. D/4, recorded by the police during investigation, the fact that Naresh has committed theft and had confessed to it is itself missing. The trial Court does not bother to consider of this omission which is undoubtedly material in

nature. Sanjay (P.W. 9) in para 16 deposed that motor-cycle was purchased by the accused out of his own funds and that it was sold with a view to settle him in some other business. Without adverting to the aforesaid omissions and contradictions on the point, the trial Court very conveniently reaches a conclusion and suggests a possible motive for the crime which even the prosecution had not chosen to come forward with.

14. Motive, according to Murray's Dictionary is that which moves or induces a person to act in a certain way, a desire, fear or without means or consideration on the reason which influences or tends to influence a person's also often applied to contemplated result or object, the desire of which tends to influence volition.

15. One cannot see into the mind of another, but even before we make any attempt to deduce motive either from words 'gesture' or conduct of any person in whom we are seeking any motive, it is of prime importance that such words 'gesture' or 'conduct' must be fully and completely established. It was, therefore, the primary duty of the trial Court to first scan the evidence, in order to determine whether there was a clear motive for the accused to kill his 'Mama' and 'Mami'. There is neither any scanning worth its name, of evidence, nor a clear determination of motive. A mere possibility has been expressed by the trial Court that this (stealing of money and sale of motor-bike) could be the possible reason for committing murder. Suffice it to note that this casual approach does not stand the test as laid down by the Supreme Court in Sharad Sarda's case (Supra).

16. Taking the motive as suggested on its face value, the trial Court over looks as to how does it operate so far as Mami Premlata is concerned, it is certainly not for both the deceased. It is not to suggest for a while that the Court can not in a given case, based on circumstantial evidence, consider 'motive' emerging from evidence on record, though not suggested by the prosecution, the Court can and may take into account such a 'motive' but before taking it into consideration the Court must see to it, that the 'motive' emerges from circumstances fully established and it is this basic lapses on the part of the trial Court, which vitiates its consideration on motive. As has been pointed out by the Supreme Court in Ramgopal v. State of Maharashtra, (AIR 1972 SC 656) : 1972 Cri LJ 473 that in any criminal case,

motive is to be forwarded as a circumstance it must be fully established like any other incriminating circumstance.

17. Shri Gupta, learned counsel for the appellant, strenuously urged that the learned Judge in his zeal to eke out an otherwise weak case, suggested a possible motive, which itself is not established nor is it deducible from any of the circumstances, Suggesting any such possible motive, tending towards a possible crime is a very unsatisfactory and dangerous process. Further more, such supposed motive, too readily excites suspicion by its mere appearance, such a course is incompatible with that even and unprejudiced state of mind which is indispensable to the formation of correct and sober judgment. It is this faulty unsatisfactory and dangerous process which pervades throughout the trial Court's judgment.

18. In the instant case, the motive as noticed by the trial Court is expressed as mere possibility which again stands on quick-stand. There are no such firmly established circumstances to warrant such a motive even as a possibility by process of deductive reasoning. The inference, thus, recorded by the trial Court, as regards motive, cannot be sustained, and deserves to be set aside.

19. The point raised by Shri Gupta as regards faulty and dangerous process of reasoning, can only be simultaneously dealt with in relation to other circumstances, as already noted above, which the trial Court has found to be incriminating. Coming to the next circumstance regarding presence of the accused in the house, at the material time, the trial Court in paras 38, 39 and 40 of its judgment has dealt with this aspect of the matter, and has recorded its conclusion in para 97 of the judgment that the accused was in the house in his room on the first floor at the time of incident (See para 97 of the judgment). In order to have full appreciation of this circumstance, it would not be out of place to refer to the location; and situation of the house along with its occupants. Ex. P-2 is the map of the house in question. The incident took place on the first floor where there are five rooms, as shown in the map, room No. 1 was occupied by deceased couple while room No. 3 was occupied by the appellant and room No. 4 by tenant Shreesh, a student of local Engineering College. It has come in evidence that

room No. 2 on the first floor was being used as a store-room for storing some machine-parts. Other family members were sleeping on the ground floor. Placing this situation as it emerges from evidence on record before us, learned counsel for the appellant, argued that deliberate calculated attempt was made by the prosecution witness to eliminate presence of Shreesh from his room, on that fateful night. He argues that it was intentionally done so as to exclude his presence in the houses on the night of incident. Witnesses have made convenient departure, and modulated their evidence to suit exigency. The reason is apparent. If Shreesh presence is established, the blaming finger could as well point to him. It was precisely for this reason that to both P.W. 2 and P.W. 8 deliberately avoided his presence in the house. The evidence on the point is both positive and negative. It is negative so far as Shreesh is concerned.

20. The Trial Court on the basis of evidence of P.W. 2 Ghanshyam and his brother P.W. 8 Naresh has come to the conclusion that Shreesh was not present in the house on the night of incident. Naresh in para 11 of his statement has no doubt stated that Shreesh was not present that night, but he has also admitted that after he went to sleep he could not say as to who had come to the house, (See para 12 of his statement). Going through his evidence on the point one cannot escape noticing the inconsistent stand that this witness has taken. Sanjay P.W. 9 in his evidence has categorically stated that Shreesh was present in his room that night and he was studying (See paragraphs 11 and 12 of his statement). The Investigating Officer P.W. 16 has also very categorically stated that shreesh was present that night in the same house. Now, the trial Court without considering these statements made by P.W. 9 Sanjay and P.W. 16 I.O. and without considering inconsistency in the evidence of P.W. 8 Naresh, merely confining to bare statement made in examination-in-chief and without even adverting to their cross-examination has concluded that the accused was present in the house. Probing the evidence a little more, it would be seen that P.W. 2 Ghanshyam in para 3 of his statement stated that the appellant came home around 10.45 p.m. and went up to sleep. On being cross-examined and confronted with, he admitted many contradictions in his earlier version as contained in the FIR Ex. P/1. As per FIR Ex. P/1 he had stated that the appellant had come after he had gone to sleep, but he makes an improvement in his evidence before the Court. The trial Court

does not take into account all these apparent improvements made by the witness contradicting his earlier statements.

21. The trial Court has merely confined its consideration to the statement of Ghanshyam P.W. 2 and Naresh P.W. 8 that too, to their examination-in-chief alone. As if the cross-examination is to be totally excluded from consideration. To say the least, this is no mode of appreciation of evidence. It was open to the trial Court to have considered these contradictions and omissions and reached a finding one way or the other or even brushed them aside as insignificant, but instead doing so, what the learned-Judge had done is, to ignore all these infirmities altogether. The investigating officer in his evidence says that Shreesh was present in the house. P.W. 9 Sanjay also stated that Shreesh was present in the house. There are other material omissions and contradictions on this point in the evidence of other witnesses (See para 12, 14 of P.W. 2 and para 14 of P.W. 8) but nothing of the sort is considered by the learned Judge and the circumstances that the accused was present in the house at the time of incident is held to have been established against him. This finding arrived at by the learned Judge on an erroneous reasoning and on exclusion of material evidence from consideration cannot be supported.

22. Placing reliance on a decision of the Supreme Court as reported in AIR 1979 SC 1620 : 1979 Cri LJ 1217 (Lakhanpal v. State of M.P.) learned counsel for the appellant going a step ahead as submitted that even assuming for the sake of argument that the appellant was present in the house, on the fateful night yet it would not be an incriminating circumstance. Admittedly he and his mother were living in the said house along with the deceased for years prior to the incident, has mere presence in the house per se, without there being any other incriminating circumstance, could not be said to be incriminating.

23. As seen above there is ample evidence on record to show that Shreesh was present in the house that night. He was admittedly taken into custody as a suspect, by the police who later let him off. It was not only Shreesh, there were other five members of the family who were also present in the same house. The accused at best, was one amongst them. Shri Gupta, learned counsel appearing

for the appellant placing reliance on Raghav Prasanna v. State of U.P. (AIR 1963 SC 74) : 1963 (1) Cri LJ 70 argued that mere presence of the appellant in the house would not be such a circumstance as to warrant an explanation from him. A similar situation arose before the Supreme Court in Raghav Prasanna's case. It was also a case of double murder. Accused Raghav was charged with having shot dead his wife Kamla and their son Madhusudan. One of the circumstance relied upon by the prosecution was that accused Raghav was in the house at the time of murder. Dealing with this circumstance the Supreme Court in para 19 of its judgment said :

'.....his presence in the house does not put him in such a position that his omission to furnish information about the whereabouts of Kamla and Madhusudan or as to what happened to them should point to his committing their murder. He was not the only person in the house to know of what happened to them. There were other persons in the house.'

It is a cardinal rule that the incriminating circumstance relied upon must unfailingly point to the complicity of the accused excluding every possible hypothesis of his innocence. In the instant case firstly the circumstance was not fully established, and secondly it does not point to the accused and the accused alone, as the perpetrator of the crime. In fact an attempt was made by the prosecution witnesses to eliminate presence of Shreesh a suspect who was taken in to custody by the police and later let off. The appellant being in the house, where he was living for years prior to the incident, with his Mama, the deceased, cannot be construed as an incriminating circumstance. The trial Court, however, following a decision of the Supreme Court as reported in Deonandan Mishra v. State of Bihar (AIR 1955 SC 801 : 1955 Cri LJ 1647 has construed it as yet another circumstance which could be used against him for want of an explanation. The learned Judge has ignored a later Bench decision of the Supreme Court in Sharad Sharda's case (Supra) which has considered Devnandan Mishra's case (supra) as well.

24. Before this legal question is dealt with, let us first see if the learned Judge has put this incriminating circumstance to the accused in the manner that it is sought to

be used against him. Out of the 237 questions the only relevant question on the point is question No. 62, by which the accused was asked with reference to statement of P.W. 8 Naresh was that he (the accused) was sleeping alone in the room on the first floor. The appellant in his answer stated that he was not the only person sleeping on the first floor, there were Shreesh and Ghanshyam as well. It has been admitted by the I.O. P.W. 16 that during his investigation he found it as a fact that Shreesh was there in the house on the night of incident. Ghanshyam was also there along with his brother Naresh and Sanjay, although as stated by him on the ground floor. The answer given by the accused substantiated by the evidence of I.O. himself, so far as presence of Shreesh on the first floor is concerned, the presence of others is also admitted on the ground floor.

25. The learned Judge does not at all consider this aspect of the evidence and erroneously holds it to be an incriminating circumstance and very surprisingly in face of the above answer still threats it as if the accused had no explanation to offer. He has gone wrong even on facts. Firstly the circumstance is not established secondly it is not incriminating therefore no question of explanation.

26. Dealing with Deonandan Mishra's case in Sharad Sharda case (Supra), Supreme Court while reiterating the cardinal principal of criminal jurisprudence, that a case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction-imposed 'the following riders :

(i) various links in the chain of evidence led by the prosecution have been satisfactorily proved;

(ii) the said circumstances point to the guilt of the accused with reasonable definiteness; and

(iii) the circumstance is in proximity to the time and situation.

Before the absence of explanation or false explanation offered by the accused can be construed as an Addl. circumstance to be used against him. The trial Court has completely overlooked above riders.

27. Considered in this light, the circumstance of mere presence of the accused in the house at the time of incident by itself could not and does not provide an addl. link as erroneously assumed by the trial Court.

28. There are three other circumstances which the trial Court has relied upon for connecting the accused with the alleged crime :

(i) an abrasion mark on the right middle finger of the accused;

(ii) the evidence regarding bunch of hair found in the fist of the deceased Premlata; and

(iii) nail clippings of the accused.

29. Let us first examine if the above circumstances have been satisfactorily proved. Para 41 of the judgment deals with evidence of Dr. Sanjay Bhatnagar P.W. 18 and the Chemical examiner report Ex. P-6 while para 91 is the conclusion based there on. Admittedly the nail clippings have not been proved to be stained with human blood, let alone tracing of its origin, yet the trial Court again overlooking the riders imposed by the Supreme Court in Sharad Sharda's case construed it as an Addl. link to be used against the accused for want of his explanation.

30. Referring to question No. 214 composit question, asking the accused that Ex. P-6, P-6A and P-7 were reports from FSL and what had he to say there on, the accused answered that he did not know 'Pata Nahi'. This is the total questioning on the point. The contents of the report have not been put to the accused and yet it is expected of him to offer explanation how strange? It is vital that any circumstance adverse to the accused must be put to him Under Section 313 otherwise it must be completely excluded from consideration for the simple reason that accused had no chance to explain. (See Sharad Sharda's case (Supra). The Court should have put to accused what was against him in Ex. P-6, P-6A or P-7. Merely asking that they were the reports from the F.S.L. would not mean that contents of such reports were also put to the accused and his failure to explain such facts would enable or entitle the Court to draw and adverse inference, it

would be contrary to law on such premises to draw an adverse inference against the accused as it is specifically prohibited under Sub-section (3) of Section 313, Cr. P.C. The Supreme Court in Harijan Megha Jasia v. State of Gujarat (1979 SC 1566) : (1979 Cri LJ 1137) refused to consider very incriminating circumstance like accused's Underwear being found stained with human blood, as per Serologist's report on the short ground that this fact was not put to the accused in his examination Under Section 342, Cr. P.C. and the Court further held that prosecution cannot be permitted to rely on this statement in order to seek conviction of the appellant.

31. Taking up the report Ex. P-6 as it is, it does not even say that nail clippings were stained with human blood, what is then its evidentiary value? As back as 1956 the Supreme Court in Prabhu Babaji v. State (AIR 1956 SC 5) : 1956 Cri LJ 147 pointed out as under :--

'Merely to say that blood was detected on an exhibit as this report states, is not enough'.

32. 45 years after Prabhu Babaji's case things have not changed or improved. The Supreme Court in its later decision Yashwant v. State of M.P. (AIR 1973 SC 337) : 1972 Cri LJ 1254 held that in order to show the connection with the actual occurrence the blood group must be established. The trend of judicial decisions show that origin of the blood must be traced. In absence of any cogent and convincing evidence it is of no avail to the prosecution.

33. The next connecting link which has been used by the trial Court against the accused is seizure of hair. Apart from the legal objection about admissibility of Ex. P-7, the report submitted by Dr. Shrivastava is of no avail to the prosecution. No human blood was found, the prosecution can not therefore take any advantage. It was also not specifically put to the accused in his examination Under Section 313, Cr. P.C. Purely legal objection apart, it suffers from numerous other infirmities. The report Ex. P-7 merely states that hair seized from the hand of the deceased Premlata on microscopical examination found to be similar in their morphological and microscopical examination. No definite opinion could, therefore, be given regarding their origin from one and the same person. Even in fact of this opinion

the learned Judge without any thought or application of mind has held it to be an incriminating circumstance.

34. The circumstances in which this piece of evidence came to be placed before the Court are also worth nothing. The prosecution evidence was declared 'closed' on 26-12-1990 and the case was posted for recording of statement of the accused on 3-1-91. For want of time the statement could not be recorded, it was, therefore, again fixed on 7-1-91 on which date the statement of the accused was recorded and he was called upon to enter defence. The case was, thereafter, posted for final arguments on 17-1-91. It was 17-1-91 that an application Under Section 311, Cr. P.C. was made by the Public Prosecutor. By order dated 18-11-91 learned Judge allowed these applications and permitted examination of witnesses Radheshyam, Suresh Agarwal, Pundlikrao and Dr. Sanjay Bhatnagar. That is how the evidence about hair has come on record.

35. The evidence regarding hair is equally discrepant. Naresh P.W. 8 has stated that when he went to awake his mother in the morning, he saw a bunch of hair in her hand. He has not specified whether it was in her right or left hand. The fact that he found hair in his mother's hand is itself missing from his case diary statement Ex. D/4, apparently he had made an improvement in his evidence. Suresh P.W. 3, brother of deceased Prakash saw hair in Premlata's left hand. The I.O. P.W. 16 deposed in his examination-in-chief that he saw hair in Premlata's right hand. There is an apparent contradiction between his statement and that of Suresh. In his cross-examination P.W. 16 admitted that he left hand fist was open. On being confronted with photographs of Premlata he admitted that her right hand fist was closed and it was in this fist that he saw a bunch of hair. It is also an admitted position that the seizure memo relating to seizure of hair was not filed along with the charge sheet before the committal court. It was because the learned Judge of the trial Court noticed something in the case diary that its production was ordered. Going through the case diary as it was produced before us, less said the better about its maintenance. It does not stand the bare minimum scrutiny of law and regulations of the police manual regarding the manner of writing and maintenance of the case diary.

36. Adverting to the evidence, what is sought to be proved by the prosecution is that deceased Premlata while scuffling with the assailant caught hold of his hair, which got plucked and remained in her hand. If that be so, one would legitimately expect noticing such plucking of hair at the time when the accused was arrested as per arrest memo Ex. P-7-A prepared at 2-20 a.m., Exactly seven hours before the preparation of inquest report at 9-20 a.m. Ex. P7-A does not indicate or mention any such plucking of hair of the accused. Had it really been so, the police officer P.W. 16 who arrested him would not have omitted to mention this fact in the arrest memo. More so when the fact that deceased was holding hair in her right hand had already come to light and his knowledge. This plucking of hair must be quite demonstrably noticable. No witness has deposed to this fact in his evidence.

37. It is R.S. Rathor P.W. 16 who claims to have seized the bunch of hair from Premlata's hand at 8-55 a.m. vide memo Ex. P/5 prepared on 22-2-88. What is more surprising is that even after the seizure of hair as per memo Ex. P/5 Pundlikrao, another Sub-Inspector who prepared the inquest report Ex. P/15 at 9-20 a.m., almost half an hour after the seizure of hair vide Ex. P/5 has mentioned in the inquest that Premlata was still holding a bunch of hair in her right hand. It does not stand to reason. How come it that the bunch of hair already seized and sealed by Inspector Rathor, was still available, to be seen by Sub Inspector Pundlikrao P.W. 13, to be mentioned in the inquest report Ex. P/14, a subsequent document in point of time.

The FIR Ex. P/1 is totally silent on this point. Ghanshyam, who lodged the report had undoubtedly seen his parents before lodging the report and would not have omitted to mention this fact in the FIR. Dr. Gopal Dube, who had admittedly seen the couple does not say a word in his evidence that he had noticed a bunch of hair in the hand of Premlata. Naresh P.W. 8 in his evidence has deposed about it, but did not disclose this fact in his previous statement recorded Under Section 161, Cr. P.C. Similarly, Ganesh, who according to FIR had gone to see the injured along with other neighbours, does not say about having seen bunch of hair in the hands of deceased Premlata.

38. Ignoring the above glaring infirmities in prosecution evidence, the learned Judge placing reliance on Ex. P/7, and following a decision of the Supreme Court as reported in *Kanbi Karsan v. State of Gujrat* (AIR 1966 SC 821) : 1966 Cri LJ 605; has held this seizure of hair as an important link to connect the accused with the crime.

39. Keeping aside the admissibility of Ex. P/7 and the infirmities attached to the seizure of hair, the finding recorded by the trial Court, based as it is on misreading of *Kanbi Karasn's* case (Supra) cannot be supported in face of the opinion given by Dr. Shrivastava in Ex. P/7. 'No definite opinion can be given regarding their origin from one and the same person.'

The finding recorded by the trial Court that hair in the hand of the deceased were that of the accused is not only wholly erroneous and baseless, but also singularly unfortunate. It is an erroneous assumption as if Dr. Shrivastava had given a definite opinion. What has been missed by the learned Judge is the identity of hair. It is not similarity, but identity which is important. *Kanbi's* case (Supra) propounds establishment of identity of hair on comparison and not merely similarity thereof. A little probe further, would reveal that this report Ex. P/7 notwithstanding the objection regarding its admissibility is of no consequence. As what has been stated by Dr. Shrivastava is that two sets of hair on being subjected to microscopic Examination were found to be similar in characteristics. There is absolutely no indication whatsoever as to what those characteristics were, in which such similarities were found. Even if his opinion would have been positive (which it is in fact not) in absence of any date on which such opinion could be formed at its best it would still have remained an opinion evidence, for whatever worth it was, and indeed it was the duty of the Court to evaluate it and not to accept it as an oracular truth. This is what Taylor says, quoting from the same edition referred to by the Supreme Court in *Kanbi Karsan's* case :

'The above examination may enable the observer to diagnose the origin of a hair, or at least the group of animals from which a hair has been derived, but it is never possible to state that a hair belongs to a particular individual or animal. No one is entitled to say more than that the hair appears to be identical in all aspects with

the hair from a particular source.'

40. The learned Judge has palpably gone wrong in basing his conclusion on such an invalid indefinite opinion, ignoring the circumstances in which the evidence on this point came to be produced before the Court, the displorable state in which the case diary was maintained and the evidence of an extremely discrepant nature.

41. The finding recorded by the trial Court regarding hair in para 92 of its judgment is indicative of non-application of mind to report Ex. P-7 on which the finding itself is based. In this connection 1971 CAR 349 can be referred to with advantage.

42. Now coming to the question of admissibility of Ex. P/7 in evidence, Shri Chauhan, learned Dy. Government Advocate submitted that it is admissible in evidence Under Section 293, Cr. P.C. How could such a document be admitted in evidence. A mere glance at Sub-section (4) of Section 293, would show the experts whose reports are admissible in evidence. Ex. P/7 does not purport to be a report submitted by any of the experts or authorities enumerated under Sub-section (4) of Section 293, Cr. P.C. How could its contents be read in evidence without examining the person who gave his opinion in Ex. P. 7. All these questions did not bother the trial court. What perturbs us most is the lack of seriousness of approach on the part of the trial Court even in such a case where he chose to impose the extreme penalty of death. Although having examined Ex. P/7 on its face value, it has been found to be worth less. The trial Court, however, has attached undue importance to such a piece of paper and arrived at a conclusion, which even Dr. Shrivastava did not suggest or support. According to the trial Court Ex. P/7 established an important link between the accused and crime, but on a close examination of Ex. P/7, the futility of this conclusion and the wrothlessness, of the document, has already been discussed above, but just see what importance the trial Court has attached to Ex. P/7, a document wholly inadmissible in evidence.

42A. It is precisely for this reason that the judicial committee of the Privy Council as back as 1936 in Vidianathan Pillai v. Emperor (AIR 1936 Madras 501) (Sic) cautioned the Court against the harm done by reception of inadmissible evidence or the injustice its use may lead to, as it has in fact led to in the instant case. Had

the trial Court at the very outset rejected this document Ex. P/7 as inadmissible where was the occasion for considering the bunch of hair as allegedly found in the right hand fist of deceased Premlata, and tracing its origin to the accused. Call it the keenness or anxiety or vigilant eye of the trial judge, who during his rambles in the case diary after the closure of prosecution case, examination of accused and conclusion of final argument; spotted a seizure memo Ex. P/24, (regarding seizure of accused's hair) a document admittedly not filed with the charge-sheet which led to the reopening of the prosecution case. We are not at the moment disputing Court's power under Section 311 Cr.P.C. nor has the learned counsel for the accused has challenged it before us, while the keenness shown by the learned Judge, may be something to be appreciated, but what he has failed to notice is the slipshod manner in which the case diary is maintained. It does not stand the barest scrutiny of law, it was for this reason that we directed the State to produce case diary. It was accordingly produced and the least we can say is, that at every stage it is nothing, but violation of law and regulations contained in the M.P. Police Manual, which we shall discuss at a later stage.

43. Ex. P/24, relating to seizure of hair of the accused has been proved by PW13, Sub-Inspector Pundlik Rao. This witness was for the first time in the witness box on 12-2-90 when he did not say a word about such seizure of hair. Almost a year thereafter on 29-1-91 he has again deposed that he had called a barber and got cut accused's hair. The same was seized vide seizure memo Ex. P-24 was not in existence, when he was first examined as a witness in the Court on 12-2-90, and that was the reason that he did not at all refer to the fact at all. This witness refuting the suggestion maintained that Ex. P-24, was very much there at page No. 13 of the case diary. When it was brought to his notice that Ex. P/14 which had been proved earlier also bore the same page No. the witness had no explanation to offer and the trial Court very conveniently excludes all this from its consideration. A document not filed along with charge-sheet, concerned witness not referring to it, in his evidence, trial Court noticing the same, in a very haphazardly maintained case diary, the page number on the document not tallying, witness subsequently examined under Court's order having no explanation to offer, and the trial Court not at all considering all these aspects of the matter, what a quaint and curious approach to evidence.

There is absolutely no evidence about sealing and then sending this bunch of hair to the chemical examiner. Pundlikrao merely states about its seizure. He does not say about preservation and despatch of hair. Inspector Rathore is equally silent in his evidence on this point; so much so even Ex. P/7 does not indicate as to when this bunch of hair was received although normally such reference is to be found in such reports. It bears the date 29-3-89, underneath the signature of Dr. Shrivastava. Charge was framed in this case on 11-3-89 and case was fixed for evidence on 30-3-89, and 1-4-89. So much so PW1 and 2 were examined on 30-3-89. It was on 13-9-89, as can be gathered from the ordersheet of the same day that this document Ex. P-7 was produced by the Public Prosecutor. There is not even an application on record to show as to why this delay and when was it received. The trial Court does not even ask for it. In this State of affairs where there is not mere irregularity at every stage right from the investigation to its production and proof in the Court, Ex. P. 24 is born in suspicion shadowed and surrounded by suspicion. Neither P.W. 13 Pundlikrao nor PW. 16 Inspector Rathore has any explanation to offer to remove the clouds of suspicion. It is a dubious piece of evidence which is not even borne out from the case diary. There is no link between this seizure memo and the wholly inadmissible document Ex. P7. Report of Mr. Shrivastava which even otherwise suffers from inherent infirmities as already noted above, it defies one's comprehension as to how a Judge functioning judiciously could act upon it ignoring the irregularities and infirmities associated with it.

44. As a result of Court's order dated 18-1-91, passed Under Section 311, Cr.P.C, that PW 17, Ashok the barber, who had cut hair from the head of the accused and PW18 Dr. Sanjay Bhatnagar, who had examined the accused for his injury, were examined in the Court. Ashok has his hair cutting Saloon situated just opposite the police chowki, at one stage of his evidence he denied his signature on the seizure memo Ex. P/24 while admitting his signature on the summons. On being confronted with Seizure Memo Ex. P/24 he pleaded ignorance about the signature on Ex. P/24. His evidence on the point is extremely shaky. He did not state that the hair cut by him were sealed in a packet or envelope. The evidence of Pundlikrao, PW 13 is also equally silent on the point. He could not explain as to why there was delay in despatching the articles for examination. Rather, I.O., PW

16 has also not desposed about the sealing and preservation of articles seized including hair and the delay caused in their despatch to the chemical examiner. The other attesting witness to Ex. P/24 Radheshyam has not been examined by the prosecution. Although, Pundlikrao has stated that the envelope was sealed, his statement is not borne out from record. There is absolutely no other evidence to support him on this point. This aspect would again be dealt with at some greater length while dealing with the recoveries in general.

45. The last in the series of incriminating circumstances enumerated by the Supreme Court is an abrasion found on the right middle finger of the accused. It has been described as tooth mark. Learned trial Judge had made use of this circumstance as the accused failed to offer any explanation when examined Under Section 313, Cr.P.C. The question of non furnishing of an explanation by an accused has already been dealt with in the foregoing paragraphs. The learned Judge has completely overlooked conditions imposed by the Supreme Court in Sharad Sharda's case, while making use of such a circumstance as non furnishing of an explanation by the accused to be construed as an addl. circumstance against him.

46. However, assuming for a while that the accused has not offered any explanation even then what is established is that an abrasion was caused to the accused within 24 Hours of his examination by Dr. Bhatnagar, PW 18, as opined by the doctor. As per injury report Ex. P/25, accused was examined at 12.25 p.m. on 23-12-88. The incident is said to have taken place on the night intervening 21 & 22 December '88 while the accused was arrested at 2.20 in the same night and he was examined next day at 12.15 on 23-12-88. It is, thus, clear that the injury sustained by the accused was far beyond the time of incident. It can not therefore, be linked with the incident nor it can be suggested that there was a scuffle between the accused and deceased, as is sought to be made out. It is the prosecution evidence that the injury was caused within 24 hours of the examination. If for some reason the accused does not choose to offer any explanation for such an injury which even according to prosecution was sustained far beyond the time of incident, how can an adverse inference be drawn against him for not explaining such an injury? There is ample evidence available on record

that it was not only the accused, but others as well who were hauled up by the police on 22nd itself. They remained in custody on 22nd and 23rd night and were subjected to physical torture, as has been deposed to by Sanjay PW9, who was one of the victims of such torture. The possibility of having sustained such an injury in the circumstances cannot be ruled out. The I.O. PW 16, has also admitted that he had taken into custody number of persons including the accused and they had been interrogated by him.

47. The trial Court has relied upon a 'Khulasa' report Ex. P/26A, submitted by PW 18, stating that the abrasion as sustained by the appellant may be caused by the incisor teeth PW 18 in his evidence has nowhere stated that the injury as found, could be caused by an incisor teeth. The so called 'Khulasa' report submitted by him on 23-1-89 was in pursuance to a written query Ex. P/26, made by the Investigating officer. The learned Judge while acting on this report Ex. P/26A little realised that it was wholly inadmissible in evidence, it was nothing but a statement made to an Investigating Officer during the course of investigation, as such hit by Section 162, Cr.P.C. Going through the evidence of PW 18 he does not say anywhere that the injury as found could be caused by in incisor. Injury report Ex. P/25 is full of interpolations and overwritings at very crucial points. PW18 has admitted these overwritings, in Ex.P/25 in his evidence, but has not explained them. With this inadmissible, shaky and suspicious evidence brought on record, after completion of trial under orders of the Court is inherently unreliable, even if the evidence is taken on its face value, it does not associate the injury with the alleged incident. Even according to the prosecution case it was sustained far beyond the time of incident. Therefore, no question of construing an addl. link for want of explanation being offered by the accused would arise, the circumstance itself is not established.

48. Coming now to the question of recoveries allegedly made at the instance of the accused, Shri Gupta, learned counsel for the appellant criticised a very cursory approach on the part of the trial Court in appreciating the evidence. The prosecution has tried to put the cart before the horse. Ex. P/8, 9& 10 are the recovery memos shown to have been prepared much prior to the actual arrest of the accused. Vide arrest memo Ex. P/7A the accused was taken into custody at

2.20 hours after, mid night on 22-12-88, whereas the recovery memos are prepared hours before taking him into custody, as can be gathered from Ex. P/8, 9 and 10. These recoveries are not supported by any independent witness. The only attesting witness examined is Ramesh, P.W. 12, who is undeniably a stock witness of the police, when asked about his associations with the police in attesting in similar such panchnamas and seizure memos he blatantly denied having any such association, but later on being confronted with scores of summons and notices running into hundreds issued against him he had to admit that he was closely associated with the police in preparation of such seizure memos in almost 400 to 500 cases, while the anxiety on the part of the witness to deny such association can well be understood, unfortunately even Inspector Rathor, when asked about this witness, blatantly denied that Ramesh was not known to him. Adding further he stated that he had seen him for the first time on that day. It is unbelievable that a witness of the character of Ramesh associating himself in preparation of seizure memos in hundreds of cases and having figures as witness in scores of such cases would not be known to the incharge of the police station. No reliance can be placed on the testimony of such a witness. It reflects on the seizures and the recovery with which he is associated and knowingly associated by the police, notwithstanding the denial made by Inspector Rathor.

Prosecution has not chosen to examine the other attesting witness to all these seizure memos instead of Suresh PW 3, the brother of the deceased has been made to depose to these recoveries. Going through his evidence, it is significant to note that he has not at any stage subscribed to any of the seizure memos or imparting of the information by the accused, even the prosecution did not project him as an attesting witness to the recoveries. May be, that he was one amongst many others following the police in their seizure spree, but to be an attesting witness to such seizures involves certain amount of responsibility and not merely being a spectator.

49. None of the articles said to have been recovered at the instance of the accused are found to have been stained with human blood, their origin has not been traced. As per serologist report Ex. P/6A the blade of Axe, trousers, hair and

'Rassi' alleged used for throttling were not found to be stained with human blood. The Supreme Court in *Kanta Behra v. State of Orissa* (AIR 1987 SC 1507) : 1987 Cri LJ 1852 has propounded the necessity and importance of blood grouping, which is the only conclusive piece of evidence to connect the accused with the crime and in absence of such evidence, of conclusive nature, it cannot be used as circumstance against the accused.

50. There is yet another aspect of these recoveries. None of these witnesses neither the I.O.P.W. 16 nor the attesting witnesses nor Suresh nor Pundlikrao P.W. 13 has deposed about the fact that the articles seized were duly sealed on the spot and that the seals so remained in tact till they were actually despatched to the chemical examiner. The Supreme Court has, in fact, pointed out the necessity of handing over the seal to the panchas so as to avoid any tampering with the seal and the articles seized. (See AIR 1976 SC 69 : 1976 Cri LJ 10 (para 15) *Mohammad v. State of U.P.*) It was also incumbent on the prosecution to have proved by examining the incharge of Malkhana, atleast in such a serious case that the seals remained in tact till the articles were actually despatched. More so, in view of the delay that has been caused, which remained unexplained in the instant case. The following authorities were relied upon by the Id. counsel in support of his submission : *Santa Singh v. State of Punjab* (AIR 1956 SC 526) : 1955 Cri LJ 930, *Modansingh v. State of Rajasthan* (AIR 1978 SC 1511): 1978 Cri LJ 1531 and *State of Rajasthan v. Daulatram* (AIR 1980 SC 1314) : 1980 Cri LJ 929.

51. In the instant case none of the safe guards, as pointed out by the Supreme Court, in the above mentioned decisions, has been followed. Shri Chauhan, learned Dy. Government Advocate however submitted that the panchamas too contained a statement that the articles seized thereby were sealed. This cannot be treated as substantive evidence. Such seizure memos are not substantive evidence of the facts mentioned therein. If any authority is needed for the preposition (AIR 1976 SC 2256) may be referred to with advantage. Following the above precaution is not a mere formality. The Supreme Court has cautioned the Courts against possible misuse and abuse of the Section 27 of the Evidence Act, in *Himachal Pradesh Administration v. Omprakash* (AIR 1972 SC 975) : 1972 Cri LJ 606. For this reason great caution has to be exercised in resisting any attempt

to circumvent, by manipulation or ingenuity of the Investigating Officer, the protection afforded by Section 25 and Section 26 of the Evidence Act. While considering the evidence relating to the recovery the court shall have to exercise that caution and care which is necessary to lend assurance that the information furnished and the fact, discovered is credible. In view of the foregoing discussion, the recoveries as alleged by the prosecution, failed to connect the accused with the crime. The bushshirt on which the trial Court has placed reliance has not been connected with the accused although, it was stained with blood group 'B', but there is no evidence to suggest that it was whose blood group. The unnaturality of the recovery, cannot be lost sight of in the whole context of evidence. For the foregoing reason, these recoveries as per Ex. P/8, 9 and 10, are hardly of any consequence to connect the accused with the crime. They have not even been satisfactorily proved, and must therefore be rejected.

52. Apart from seizure, discussed above, there is yet another set of seizures which is notable and is of far reaching consequences.

The I.O. Inspector Rathor P.W. 16 has in para 20 of his statement admitted that he had seized a glass Panel with visible finger marks fixed in an almirah, a liquor bottle, a glass, a match box and a cigarette packet, from the scene of occurrence the room on the first floor. All these articles were sent to the Finger Print Expert as well, but the prosecution in its wisdom did not choose to place finger print expert's report before the Court. The I.O. when specifically questioned about this omission answered that the finger print expert when approached did not give his report saying that there were no finger prints thereon. What is more important to note, testified by the I.O. is that he was orally so informed by the expert. Was it so simple as that. A heinous crime was under investigation, articles visibly bearing finger marks were seized and sent for examination by the expert. The expert's report is not produced and the I.O. wants the Court to believe that he was orally told by the expert that the articles did not bear any finger mark. Was it their personal affair? No investigation worth the name would have remained satisfied with such oral dialogue between him and the expert, nor such an answer is inspiring of confidence what even be the result of examination, finger print expert's report, be it positive or negative in nature must have been placed before the Court.

The value of finger prints evidence cannot be over-stated. The first rule of dactyloscopy holds that there are no two identical finger prints. Similarity of patterns shape and position of characteristic points, would have gone a long way in establishing the identity of the criminal. A very valuable piece of evidence has been deliberately kept back from the Court, by the investigating agency. It is for such cases that the Supreme Court had to remind the investigator that his duty is not to bolster up a case but to place plain unvarnished facts (See AIR 1974 SC 1822).

53. Having considered each one of the incriminating circumstances relied upon by the trial Court, in the light of those five principles laid down by the Supreme Court in Sharad Sarda's case, the inevitable conclusion that follows is that none of the circumstance relied upon by the trial Court stands the above test either cumulatively or severally.

54. We had reserved our comments on the case diary as produced before us. It is required to be maintained in accordance with Section 172, Cr. P.C. Regulations 741 to 746 of M.P. Police Regulations also lay down very specific rules in accord with Section 172, Cr. P.C., but it seems they are meant to be followed in their breach, as is evident from the case diary produced before us. Regulation 746 provides that each leaf of the case diary must be perforated and numbered so that its duplicate copy may be sent to the Superintendent of Police. Regulation 633 provides for maintenance of various types of registers, such as general diary, FIR book, crime register etc. at the Police Station and one such register provided under Regulation 633 is the case diary register. Regulation 642 lays down the particulars of information led must be recorded in the case diary immediately after the entry and time at which the information was received. These regulations have a purpose behind them. They are not empty formalities. Although, it is a privileged document, but as provided by Sub-section (2) of Section 172, any Criminal Court can send for it. It must be maintained in accordance with law and Regulations. It was because of the trial Court had made use of it, we were required to look into it. The pages as noted above it is nothing, but collection of loose sheets tagged together. They do not form serially numbered pages of the case diary register as required to be maintained at the Police Station under Regulation 633. The case

diary as produced before us opens with page No. 3 containing a brief narration of events. At the top of it is an application form for judicial remand. Page Nos. 2, 3, 4 and 5 are again to be found in the same case diary after page No. 4 of Parcha No. 1. The following pages, pinned together, are not numbered again followed by another sheet which is not numbered. It is also a copy of a bail petition. Page Nos. 2, 3 & 4 are repeated and in between one finds a carbon copy of application made by the Public Prosecutor, a typed copy of a bail petition and photo copy of seizure memo. To regulations have been violated with impunity. One has merely to see to realise the diabolical state of affairs in which the case diary is maintained even in such a serious case like double murder. We, therefore, direct that the case diary be kept in safe custody by the Addl. Registrar, unless otherwise directed by this Court.

55. In the result the reference made by the learned Additional Sessions Judge under Section 366(1), Cr. P.C. is rejected and the conviction as recorded by him is annulled. Appeal preferred by the accused stands allowed. The accused/appellant is acquitted of the charge as framed against him. His conviction and sentence, on both the courts, as recorded by the trial Court is set-aside. He be released forthwith.

A parting thought; we cannot help observing that the learned Judge of the trial Court, even on the question of imposing the extreme penalty of death, has failed to consider the case with the seriousness it requires. Section 354(3) lays down assigning of special reasons in awarding sentence of death. A very cursory approach has been adopted by the trial Court in this behalf. The only ground that has been assigned, is the manner in which the accused caused death of his Mama and Mami who provided him shelter. It may also be noted that it was urged before the trial Court that the accused was below 18 years of age, but the trial Court rejected this plea by referring to his age as mentioned in the arrest memo, as if it was the conclusive proof of his age. There is absolutely no reference, much less consideration of the guidelines indicated by the Supreme Court in Bachansingh's case (AIR 1980 SC 898). It is in the rarest of rare case that death sentence is to be awarded. The same principle was reiterated by the Supreme Court in Machhisingh's case (AIR 1983 SC 957). The learned trial Judge would have done

well to go through these judgments before awarding such an extreme penalty of death. It is this lack of seriousness of approach on his part which needs to be deprecated.

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