

Rakesh Vs. State of Uttaranchal

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Court : Uttaranchal

Decided On : Aug-25-2004

Reported in : 2005CriLJ227

Judge : V.S. Sirpurkar, C.J. and; J.C.S. Rawat, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34 and 300

Appeal No. : Criminal Appeal No. 115, Cr. R. No. 4 and Cri. Jail A. No. 113 of 2004

Appellant : Rakesh

Respondent : State of Uttaranchal

Advocate for Def. : A. Rab, Addl. Govt. Adv.

Advocate for Pet/Ap. : Lok Pal Singh, Adv. assisted by; N.S. Pundir, Adv.

Judgement :

V.S. Sirpurkar, C.J.

1. This judgment shall dispose of the Criminal Appeal No. 115 of 2004 along with Criminal Reference No. 4 of 2004 and also the Criminal Jail Appeal No. 113 of 2004. Originally, four accused persons came to be tried for the offence of murder of one Sarwan alias Gullu. The present appellant, namely, Rakesh alone, was convicted and was sentenced to death. He has filed an appeal against his

conviction and sentence, while the Criminal Reference No. 4 of 2004 has been made for confirmation of the death sentence awarded to the accused-Rakesh-.

2. The prosecution's story, as revealed from the charge-sheet, is that one Surendra Singh (P.W. 3) made a report in Bhagwanpur Police Station that on 23-3-1999, he came to know that there was a dead body lying and, therefore, he reported the fact of the dead body lying near Sikroda Road in the field of one Bishamber R/o village Farakpur. He also mentioned therein that there was the letter 'Om' tattooed on the left forearm of the dead body. On that basis, it seems, that the investigation started. J. P. Juyal (P.W. 10), who was then the In-charge of the Police Station Bhagwanpur, went to the spot and he found that one dead body was lying without its head. He prepared the inquest report and then sent the dead body for postmortem. He also made the inspection of the place of occurrence and recorded the statements of some of the witnesses and tried to establish the identity of the deceased, but he did not succeed. It comes in his evidence that on 30-3-1999, a Chaukidar of village Dadapatti, namely, Salim came with few blood stained clothes, which were allegedly found in the jungle of Farakpur. He sealed them and sent them. He had also arranged for the photograph of the dead body taken. However, in the meantime, since he was transferred to some other place, he handed over the investigation to the S.H.O., namely, O. P. Sisodia (P.W. 11) on 28-7-1999. It seems that on 12-5-1999, one Kalu Ram (P.W. 1) R/o village Manjhol, Jabardastpur, Police Station Deoband, District Saharanpur came to the Police Station Bhagwanpur and recorded a F.I.R. that his son Sarwan alias Gullu was involved in the murder of the brother of Raj Kumar. He insisted that accused-Rakesh S/o Karam Singh and one Pappu S/o Natthan were the relations. He claimed that Rakesh and Pappu started coming to his son Sarwan alias Gullu and on 22-3-1999, accused-Rakesh and Pappu came to his house at about 10 O'clock in the morning and told his son Sarwan alias Gullu (deceased) that his maternal uncle Raj Singh was not well and took his son along with them, which was seen by Gyani (P.W. 4), Jagmal (P.W. 5) and other villagers. Kalu Ram (P.W. 1), then claimed that these three persons, namely, Sarwan alias Gullu (deceased), accused-Rakesh and Pappu were seen at 2 O'clock in Bhagwanpur and then at about 4 O'clock at Chora Dev, where they were seen by Raj Singh (the maternal uncle of the deceased). It was further claimed that when Raj Singh asked his

nephew i.e. the deceased-Sarwan alias Gullu to go home, they said that they would be coming in sometime, on which Raj Singh left for his house. Kalu Ram (P.W. 1) then contended that when Sarwan alias Gullu did not come back for three days, he and his son Arun asked accused-Rakesh and Pappu and they said that he would come in three or four days. He, then, expressed that he was suspicious of the two that these people must have killed his son and, therefore, he started enquiry from the Police Stations. So, he was told by some persons that one dead body was found in the jungle within the area of Bhagwanpur Police Station. He, then, pointed out that he would like to see the clothes and the photograph of the dead body. He, then, contended that there was letter 'Om' tattooed on the left forearm and that he had an operation mark below the armpit of the left hand. He also described the clothes on the body of the deceased that he was wearing a blue striped shirt, which was full-sleeves and was wearing a dark grey coloured pant. It seems that he, then, was shown the photograph and the clothes and he accepted them to be of his son Sarwan alias Gullu. On that basis, further investigation was commenced and on 14th May, 1999, the present accused-Rakesh came to be arrested.

3. It is the prosecution's case that on his arrest, accused-Rakesh confessed his guilt before the Investigating Officer and agreed to discover the weapon and other articles allegedly hidden by him near the dead body and accordingly, he took the police party, wherefrom, two articles came to be recovered, namely, the murder weapon Darati and a portion of the lower jaw along with the teeth. It seems that the arrests were made by the Investigating Officer and he sent the articles for chemical examination. He also completed the necessary formalities and presented a charge-sheet before the concerned Court. On these allegations, a charge was framed against four accused persons, they being Rakesh S/o Karam Singh (accused herein), Pappu S/o Natthan (accused No. 2 in the Sessions Trial), Ram Kumar S/o Rohan Lai (accused No. 3 in the Sessions Trial) and Lakhan S/o Daya Chand (accused No. 4 in the Sessions Trial). Out of these four accused persons, the Sessions Judge has convicted only the present appellant, namely, Rakesh, while he has acquitted the other three accused persons giving them the benefit of doubt.

4. Before the Sessions Court, the accused abjured their guilt. They were charged for the offence under Section 302 as also under Section 201, I.P.C. The charge is, however, with the aid of Section 34 against all the accused persons on both counts i.e. under Section 302 and under Section 201, I.P.C.

5. In support of their case, the prosecution examined Surendra Singh (P.W. 3), who is the witness, who gave the intimation regarding the finding of the dead body. Kalu Ram (P.W. 1) and Arun Kumar (P.W. 2) are the father and the brother respectively of the deceased-Sarwan alias Gullu. Raj Singh (P.W. 6) is the maternal uncle of the deceased-Sarwan alias Gullu. Vishnu (P.W. 7) and Rakesh (P.W. 8) S/o Phool Singh are the witnesses, who, more or less, spoke regarding the deceased being last seen together with the accused persons. There are other two witnesses, namely, Gyani (P.W. 4) and Jagmal (P.W. 5), however, they turned hostile. Dr. R. K. Pandey (P.W. 12) is the one, who conducted the post-mortem and had opined regarding the unnatural death of the deceased-Sarwan alias Gullu. J. P. Juyal (P.W. 10) and O.P. Sisodia (P.W. 11) as also Amarpal Singh (P.W. 13) are the police witnesses.

6. On behalf of the prosecution, seven incriminating circumstances were pressed into service. Those circumstances, as they appear from the judgment of the Sessions Judge, are as follows :

- i. Homicidal death of deceased-Sarwan alias Gullu.
- ii. Motive for the accused.
- iii. Presence of the accused at the house of the deceased on the relevant day.
- iv. Accused were last seen together with the deceased-Sarwan alias Gullu on the relevant day.
- v. Extra-judicial confession made by the accused before the Investigating Officer.
- vi. Recovery of incriminating articles at the instance of the accused,
- vii. Conclusion.

7. Out of these, it seems that the Sessions Judge has accepted the circumstances No. 1, 2, 3, 4 and 6. Before we proceed to appreciate, it would be difficult for us to hold the circumstance No. 7 as an incriminating circumstance. So also, we fail to follow as to how mere homicidal death of the deceased- Sarwan alias Gullu could be an incriminating circumstance against the accused unless the accused was connected with the homicidal death. The Sessions Judge has found this to be a murderous assault and has put it on the very high pedestal of the rarest of the rare case and has awarded the death sentence to the accused-Rakesh.

8. Mr. Lok Pal Singh, learned counsel, appearing on behalf of the accused, pressed into service his submissions. According to him, the evidence in this case was hopelessly short of any conclusion to reach even the guilt of the accused. The learned counsel points out that there was inordinate delay in recording the so-called F.I.R. dated 12-5-1999. In this behalf, the learned counsel says that though the father and the brother of the deceased had been confirmed about the fact that there was something foul on the disappearance of the deceased, they had chosen not to open their mouths till 12-5-1999 and there was no explanation for this delay. Learned counsel also very seriously challenges the identity of the corpus delicti. He says that it could not be said that the dead body, which was found, belonged to Sarwan alias Gullu and if that was so, then the whole basis of the prosecution's case would be knocked out. Learned counsel, then, very heavily assailed the so-called discoveries of the incriminating articles like darati i.e. the murder weapon and the lower jaw. He points out that there were number of circumstances to suggest that the so-called clothes of the deceased were never worn by the deceased as they were not even blood-stained. Learned counsel points out that the whole investigation in this matter was as if to decide the accused worst and then, to reach him by collecting the evidence against him. In short, the learned counsel points out that the objectivity of the investigation was conspicuously absent in this. The learned counsel further points out that it was not, at all, established that the accused had died in between the nights of 22nd and 23rd March, 1999 because the doctor had opined that the deceased could have died between 1 to 8 days prior to the postmortem. Lastly, the learned counsel pointed out that the evidence of the witnesses, which was relied upon by the Sessions Judge, was that of the interested witnesses and that there was no guarantee

against the false implication of the accused.

9. As against this, the learned Public Prosecutor came out with a theory that in this case, the fact that the deceased was seen with the accused persons, was well established and the evidence was sufficient to hold that it was this accused-Rakesh along with Pappu, who had taken away the deceased from his house at about 10 O'clock in the morning. Then, the deceased-Sarwan alias Gullu was in the instant company of the accused persons, where they were seen bringing liquor at Chora Dev and lastly, the deceased was found at about 9 O'clock or 10 O'clock at night near the river and they were all seen going towards the jungle, where ultimately, the dead body was found. As regards the identity of the corpus delicti, the public prosecutor suggested that the identity was almost complete because the father of the deceased had actually identified the clothes and the identity was further established by the tattooed mark of 'Om' and the operation mark on the body of the deceased, which were confirmed from the Inquest Panchanama and also from the post-mortem report.

10. On this backdrop, we have to see whether the Sessions Judge was right in convicting the accused-Rakesh and ultimately, awarding the death sentence to him.

11. We have the evidence of Kalu Ram (P.W. 1), who claimed that the accused Rakesh along with Pappu took away his son Sarwan alias Gullu saying that his maternal uncle was very seriously ill. On this, he is supported by the evidence of Arun Kumar (P.W. 2), who also had seen the deceased being taken by the accused-Rakesh and Pappu on their scooter. He, then, referred to his brother-in-law Raj Singh having seen these three persons in Chora Dev Village. He, then, claimed that he went to the Police Station after he was convinced that his son was murdered, but the police at the Police Station asked him to make further search of the missing son Sarwan alias Gullu and, therefore, he kept on searching in the jungle. In his evidence, Kalu Ram (P.W. 1) has identified the shirt, pant, banyan etc. He asserted that those clothes belonged to his son. In his evidence, he admitted that his son was on bail in the murder case of Mahipal. He also had to admit that accused-Rakesh, Pappu and Lakhan were not the accused

persons in that case. We do not see any serious cross-examination on the question of the identification of the dead body. He had asserted that the dead body belonged to his son Sarwan alias Gullu because the body had the letter 'Om' tattooed on the left forearm and there was also an operation mark. When we see the Inquest panchnama, it is apparent that in that Inquest panchnama, the tattoo mark is specifically mentioned. Very significantly, the fact of the tattoo mark is mentioned even in the report given by Surendra Singh (P.W. 3), who asserts that probably the body belongs to a Hindu person since there was a tottoo mark of 'Om' on the left hand. When we see the postmortem report, in the identification column, we can see a tattoo mark as also the mark of the operation. In the post-mortem report, it is specifically pointed out that there was an old scar of the operation on the body. This is apart from the fact that Arun Kumar (P.W. 2) had specifically referred to the clothes. He says that when his brother Sarwan alias Gullu had left his house, he was wearing the blue coloured striped shirt and a dark grey coloured pant. It is obvious that, at least, so far or till the trial took place, the deceased was never found anywhere. We, therefore, do not think that a father like Kalu Ram (P.W. 1) or a brother would unnecessarily claim, without any basis, that it was Sarwan alias Gullu, who was murdered and whose body was found without head. We are impressed by the fact that there was a tattoo mark on the left hand written 'Om' and there was an operation mark on the left side of the body under his left armpit. We, therefore, do not think that the defence would be justified in saying that the corpus delicti was not identified. We will come to the question of the clothes a little later.

12. This takes us to the evidence of Gyani (P.W. 4) and Jagmal (P.W. 5), who both, have turned hostile. We, therefore, ignore their evidence. Raj Singh (P.W. 6), who is the real maternal uncle of the deceased, claimed that on a particular day about 41/2 years back, he saw Sarwan alias Gullu (deceased), accused-Rakesh drinking in the school of the village. When he had invited them, they just claimed that they would follow. He then claimed that he went to Dhala village for taking medicine. He then asserted that Sarwan alias Gullu and Rakesh went towards the hills towards Dhala on a scooter. Raj Singh (P.W. 6), then asserts that he met Vishnu (P.W. 7) also, who had told him that Sarwan alias Gullu, Rakesh and Lakhan were drinking in the village and according to Raj Singh (P.W. 6), Vishnu

(P.W. 7) told him that they went towards forest and more particularly towards Kharakpur. At that time, it was about 10 O'clock in the night. He then asserted that his brother-in-law Kalu Ram (P.W. 1) had come along with his son Arun Kumar (P.W. 2). He asked him about his health and he also told the witness that accused-Rakesh and Lakhan had brought Sarwan alias Gullu. He, then, asserts that after number of days, the head of Sarwan alias Gullu was found in Solani river near Bhagwanpur. Now, this theory of the head being found is not supported even by the prosecution. In his cross-examination, Raj Singh (P.W. 6), admitted that the said head was not found in his presence. He also admitted that he did not know as to how many days after that the said head became available to the police. There is not much of cross-examination of this witness. However, his assertion that Vishnu (P.W. 7) told him about the deceased-Sarwan alias Gullu and accused-Rakesh going on scooter towards Kharakpur Forest, would obviously be inadmissible as Vishnu (P.W. 7), himself, has been examined and Vishnu (P.W. 7) did not state in his evidence that he ever told this fact to Raj Singh. This is apart from the fact that the witness has not even stated regarding the exact date, on which he found the deceased and the accused drinking together. The height of the whole affair is that he does not even say that it is immediately thereafter, that he has heard of any body having been found. Nothing of the sort was taken out from the evidence of the witness. Therefore, it cannot be said that this witness had actually seen the deceased-Sarwan alias Gullu and the accused drinking. Now, we also wonder as to how the two persons were drinking in the school of the village. We will revert back to this witness later on.

13. Vishnu (P.W. 7), however, asserted that the three persons, namely, Rakesh, Lakhan and Gullu were drinking at 7 O'clock or 8 O'clock at night in the country made liquor shop. Now, it is really unimaginable that Raj Singh (P.W. 6) should have seen them at 4 O'clock drinking near the school, while Vishnu (P.W. 7) should have seen them drinking at the liquor shop at 7 O'clock or 8 O'clock at night. Vishnu (P.W. 7) also asserts that he saw all the three persons going towards Kharakpur jungle. We are really not convinced with the evidence of Vishnu (P.W. 7) that he saw these three persons going towards Kharakpur jungle. A very significant question was asked to this witness and he had to admit that he could not say as to how many days thereafter, he saw Raj Singh (P.W. 6), which would

knock out the claim of Raj Singh (P.W. 6) that he was told by Vishnu (P.W. 7) that Vishnu had seen these persons going towards Kharakpur jungle. The whole tenure of the evidence appears to be extremely casual and we do not place any reliance on this witness.

14. The last witness in the whole affair is Rakesh S/o Phool Singh (P.W. 8). He has a very different story to tell. He claims that at about 9 O'clock or 10 O'clock at night, when he was coming from a place of worship called Mahari after putting some lights there, he met Gullu, Rakesh and Lakhan in the river. He claims that he called Gullu, but Gullu did not say anything. Even this witness has not stated the day on which this incident occurred nor has he said that Gullu was found dead or any dead body was found thereafter in Kharakpur jungle or otherwise. He had to admit that he had never stated in his statement under Section 161 that he had told about his coming back after lighting at Mahari. He is not even able to tell as to what is the distance between Mahari and the village. He then says that he was asked about this after 5 to 7 days, which is not possible because the real investigation started only after 12-5-1999. He also had to admit that he had not stated anything about his having called Gullu and that Gullu did not talk to him. He also could not describe the clothes worn by Gullu and very strangely, he claimed that only after two days after the body was found, he had seen Gullu, Rakesh and Lakhan together in Solani river. We are not impressed by this witness at all. He was a chance witness and his evidence does not inspire any confidence at all. Even if, it is to be believed that the deceased-Sarwan alias Gullu was accompanying the accused Rakesh at 10 O'clock, the things do not augur well for prosecution because all the subsequent events, given of their company together, do not appear to have been proved at all. It was tried to be suggested by the witness that the accused persons had some enmity with the deceased-Sarwan alias Gullu on account of the deceased's participation in the murder of Mahipal. We wonder, under these circumstances, how would Gullu be going along with the accused persons on their scooter merely on the ground that his maternal uncle Raj Singh (P.W. 6) was seriously ill. When we see the evidence of Rakesh (P.W. 8), there is no reference to any darati being there i.e. the murder weapon nor does he speak about any scooter about which Vishnu (P.W. 7) had asserted. It must be remembered that Vishnu (P.W. 7) had asserted that he had seen all these persons

together going on scooter towards Kharakpur jungle and they were all together. Now, there is no reference to either the scooter or even to the darati. We wonder as to where from has the darati come or where was it when it was used. All this puts as completely in suspicion in respect of the reliability of this witness.

15. In short, the claim of the prosecution that the accused-Rakesh and along with him, one other person were seen with the deceased (Sarwan alias Gullu) at 9 O'clock or 10 O'clock in the night, has no basis and cannot be said to have been established. There cannot be any dispute that on 22-3-1999, the deceased-Sarwan alias Gullu was alive and his body was ultimately found on 23-3-1999 during the day time. Even if it is to be believed that he went along with the accused-Rakesh to Chora Dev on 22-3-1999 at 10 O'clock, it cannot be forgotten that Chora Dev is the residential village of accused-Rakesh and it was quite natural for him to be in Chora Dev. The real question starts when the prosecution claims that he was seen at 9 O'clock or 10 O'clock going towards Kharakpur jungle along with the deceased-Sarwan alias Gullu. We are not prepared to accept that evidence, which rests on the evidence of Vishnu (P.W. 7) and Rakesh (P.W. 8). The evidence of both these persons appears to be extremely casual and untrustworthy. Once that claim of the prosecution is disbelieved, the wind is taken out of the shield of the prosecution.

16. We have already commented that a finding on the homicidal death of the deceased, by itself, cannot be a circumstance against the accused-Rakesh. We will now come on the other circumstance relied upon by the Sessions Judge i.e. the motive. Here also, unfortunately, the prosecution has drawn blank. The suggested motive appears to be that the deceased was accused in a trial, where one Mahipal was said to have been murdered and that he was released on bail only prior to 2 or 2 1/2 months. There is an attempt to suggest that there is a relationship of Raj Kumar, who is the brother of Mahipal and the accused-Rakesh. That is the assertion by Kalu Ram (P.W. 1) in his report dated 12-5-1999. Very strangely enough, however, in his evidence in the very first para, he says

^jkt dqekj xkWo diwjh dk jgus okyk gS tks viusHk kbZ eghiky ds dry esa vk;k FkkA
eq>s ugha irk Fkk fd jkt dqekj fdldkfj'rsnkj g SA ;g ckr esjs yM+ds dks Hkh ugha irk

Fkk fd jktdqekj fdlds fj'rsnkjg SA jkds'k o iliw dk Jo.k ds ikl vkuk tkuk Fkka**

If this suggested motive on the part of the accused-Rakesh was to take revenge of Mahipal's death, the prosecution had to put some evidence in that behalf before the Court. There is no attempt of any investigation in this direction. There is only one stray sentence in the evidence of Kalu Ram (P.W. 1) that Pappu, Rakesh, Lakhan and Ram Kumar started bearing grudge against his son Sarwan alias Gullu. That statement has neither basis nor any justification. Arun Kumar (P.W. 2), however, asserted that Raj Kumar, who was the brother of said Mahipal was related to accused-Rakesh and Pappu. There does not appear to be any basis for this claim. He, in one unguarded moment, agreed that Pappu and Rakesh had no relationship with Raj Kumar. Then he turned around and said (sic) meaning that there was a connection of paternal Aunt and Uncle. He admitted that he did not know the paternal Aunt of Rakesh nor did he know the paternal Aunt of Pappu. He did not know as to who was the husband of the paternal Aunt of either accused-Rakesh and Pappu. He had to accept that he had not told about this relationship in his statement and that he was saying it for the first time in the Court. This completely rules aside any possibility of there being any relationship between Raj Kumar, who is the brother of the said person Mahipal and this accused-Rakesh and if there was no relationship whatsoever, there would be no question of having any enmity between accused-Rakesh and the deceased-Sarwan alias Gullu. This is by far the only evidence tendered by the prosecution in support of the motive. We, therefore, do not agree with the Sessions Judge that there was any such enmity and on account of that, there was any motive. That circumstance would, therefore, have to be ruled aside.

17. Very strangely, one more circumstance by the Sessions Judge was the confession made by the accused-Rakesh before the Investigating Officer. We really wonder as to how that could even be mentioned in the judgment as an incriminating circumstance. Undoubtedly, the Sessions Judge has held that confession to be inadmissible and in our opinion, rightly so. However, he held about a statement made by the accused to the Investigating Officer regarding the recovery of blood stained chopper and two pieces of jaw. We, therefore, come to that circumstance now.

18. It was the claim of the police witnesses that the police witnesses like Amarpal Singh (P.W. 13) has stated that he had seized the darati or chopper and the lower jaw of the deceased-Sarwan alias Gullu at the instance of accused-Rakesh. The Sessions Judge has treated this to be a statement under Section 27 of Indian Evidence Act and has also acted upon the same. In the first place, a statement made only to the police officers like this, has to be ignored for the simple reason that the statement has to be made in presence of the independent witnesses. A memorandum thereof has to be prepared and then, the accused has to be taken to the earlier stated place in the statement and discover any other article or place or a fact. It is, then, alone that a statement made by the accused while he is in the police custody becomes admissible only to the extent that leads to a discovery of some article or a fact. This was never the case. There is no panchnama either before the Panchas nor any attempt on the part of the prosecution to prove any such panchnama through the witnesses. What we have is a document, wherein the said accused-Rakesh had accepted to discover the cut head of the deceased-Sarwan alias Gullu. This was done on 15-5-1999. In this, there is no reference to the weapon darati or patal (chopper). It is suggested that in pursuance of the said statement, the accused took them to the jungle nearby the place, where the body was found and he then discovered the two pieces of lower jaw along with teeth. There is another document in shape of Ex. Ka. 17, which is in the nature of a discovery memorandum, wherein, the accused-Rakesh has shown his readiness to discover the darati or patal (chopper), by which Sarwan was beheaded. This exhibit is also signed by one Ram Lal and Mange Ram. For the reasons best known, these so-called independent Panchas like Ram Lal and Mange Ram have not been examined at all. These panchnamas have also not been proved by examining those Panchas. It seems that only the recovery panchnamas were proved vide Exts. 16 and 17. The witness Amarpal Singh (P.W. 13) has not even referred to the presence of the witnesses. All that he says is that at the instance of the accused Rakesh, he recovered the said chopper and the lower jaw. The lower jaw was sent to the Chemical Analyser, where that jaw was found to be stained with blood. However, we do not understand as to how the said lower jaw Ext. 10 is connected with this crime. Same is the case with darati or patal (Chopper) i.e. Ext. 8 and there is no attempt to connect the same with the crime. No witness has seen

the same and the least that the prosecution could have done was to examine the Panchas before whom the accused had made the statements. Even if they had become hostile, they could have been cross-examined in that behalf by the prosecution. However, it seems that even they were not examined. We have seen the record ourselves. There is also no reason given by the public prosecutor before the trial Court for giving up these two witnesses. Therefore, it must be said that the prosecution had drawn blank again in the matter of the so-called blood stained articles like chopper and the said lower jaw. This is apart from the fact that these articles were found almost near to the place, where the body was found and it was expected of the Investigating Officer that he would closely examine the whole nearby area. Therefore, the possibility of his own finding these articles, also, cannot be ruled out as rightly suggested by the defence. If this is so, a very important circumstance has been allowed to be wasted by the prosecution, firstly, by not examining the two Panchas witnesses and secondly, not making any attempt to connect the lower jaw with the body of the deceased. That suddenly could have been done. On the other hand, we find that in chemical analyser's report, it is specifically mentioned that it cannot be said as to whether that jaw belong to a male or female. In our opinion, therefore, the said circumstance also could not have been relied upon by the prosecution. If this is the state of affairs, the main circumstances i.e. the accused being seen last together with the deceased and the recovery of incriminating articles would be of no consequence as not proved. It may, at the most, be said that the accused Rakesh was present at the house of the deceased Sarwan alias Gullu on 22-3-1999, but even if that circumstance is accepted to be proved, it takes the prosecution nowhere.

19. If this is so, we do not see any basis for convicting the accused Rakesh. The learned defence counsel also made some comments regarding the clothes of the deceased and the ring, which the deceased Sarwan alias Gullu was wearing. True it is that there is no attempt on the part of the prosecution, however, the clothes, which were produced by the Chaukidar Salim (who, again, was not examined for the reasons best known to the prosecution), could have always been identified by the father and the brother. That was, in fact, the reason why we have accepted that the headless body had, in fact, belonged to Sarwan alias Gullu. We believe the witnesses Kalu Ram (P.W. 1) and Surendra Singh (P.W. 3) only to the extent

of identification of the clothes of the deceased, which again were produced under very suspicious circumstances, thanks to the casual investigation. The Investigating Officer did not even bother to see the place, where these clothes were found by the said Salim nor did he execute any panchnama. However, since the clothes were identified in the Court by Kalu Ram (P.W. 1) and Arun Kumar (P.W. 2) and since, there is practically no cross-examination of these two witnesses on this aspect, we believe these two witnesses that the clothes did belong to the deceased Sarwan alias Gullu and therefore, we only confirm the finding that the headless body was of Sarwan alias Gullu. We have even earlier referred to this aspect. In short, all the prosecution has been able to establish is that the headless body of Sarwan alias Gullu was found. Obviously, it was a case of homicidal death, but beyond that the prosecution has not been able to put the case, even an inch further. Under the circumstances, it has to be held that the prosecution must fail on this count.

20. Lastly, it cannot be forgotten that the charge was with the aid of Section 34, IPC and all the other accused persons have been acquitted by the Sessions Court. There- fore also, there would be nothing to suggest us as to who was the actual assailant and whether it could be said that it was the accused Rakesh alone who had committed the murder by using the chopper. That is also one of the reasons why we are allowing the appeal of the accused Rakesh.

21. On the question of death sentence, we need not say anything since we are acquitting the accused Rakesh, but we wholly disapprove of the reasons given by the Sessions Judge for awarding the death sentence. We, however, need not say anything further in view of our verdict of acquittal on account of inability of the prosecution to prove the evidence beyond reasonable doubt.

22. In the result, the Criminal Appeal No. 115 of 2004 and Criminal Jail Appeal No. 113 of 2004 are allowed. Accused Rakesh is acquitted. His sentence is set aside. Fine, if already paid, shall be refunded to him.

23. Criminal Reference No. 4 of 2004 is answered against the State in view of the acquittal of the accused Rakesh.

