Khim Ram Vs. State

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Court : Uttaranchal

Decided On : Oct-24-2007

Reported in : 2008CriLJ2579

Judge : Rajeev Gupta, C.J. and; J.C.S. Rawat, J.

Appellant : Khim Ram

Respondent : State

Disposition : Appeal dismissed

Judgement :

J.C.S. Rawat, J.

1. This criminal appeal has been filed against the judgment & order dated 23-6-1989 passed by Sri M. L. Singhal, the then Sessions Judge, Pithoragarh in S.T. No. 16 of 1989 whereby the appellant Khim Ram was convicted and sentenced to undergo imprisonment for life under Section 302, IPC. The appellant Khim Ram was also convicted and sentenced to undergo for a period of four years and to pay fine of Rs. 1000/- under Section 394, IPC. He was also convicted and sentenced to undergo for a period of two years and to pay fine of Rs. 1000/- under Section 201, IPC. In default of payment of fine under Sections 394, IPC and 201, IPC, the appellant was to undergo for further six months and four months R.I. respectively. All the sentences were to run concurrently. However, co-accused Chandra Ram

was not found guilty of the charges under Sections 302, 394 & 201, IPC and he was acquitted accordingly. Co-accused Ratan Ram was not found guilty of the charge under Section 411, IPC and he was acquitted.

2. The facts, in nutshell, are that in the morning of 31-8-1988 Smt. Kituna alias Kamli Devi (deceased) went to cut wood from the forest, but she did not return till evening. Her husband Hari Ram P.W. 2 thought that her wife might have gone to her relations. When she did not return the next day also, her husband made contact with Harish Chandra Pathak P.W. 1, Pradhan of the village on 2-9-1988. Thereafter, a thorough search of Smt. Kituna alias Kamli Devi was made and ultimately, the dead body of Smt. Kituna alias Kamli Devi was found lying in the 'Water Nala' in the jungle of Ban Panchayat. Her dead body had been covered by leaves and branches of trees and the ornaments i.e. 'Guloband' (like a gold necklace) Ex, 8 and two 'Munaras' (Ear Tops) Exs. 155 & 13 were found missing from the person of the deceased. Thereafter. Hari Ram P.W. 3. husband of the deceased, lodged an FIR with the Patti Patwari, Sagour on 2-8-1988 at 5 p.m. alleging therein that he had positive suspicion about the involvement of accused Khim Ram in the murder of his wife as he was indulged in similar activities in past. It was further alleged in the FIR that after committing the murder accused Khim Ram had removed the aforesaid ornaments from the dead body of his wife Smt. Kituna alias Kamli Devi. On the basis of report, a Chick FIR was prepared and necessary entries were made in the general diary. On 4-9-1988, accused Khim Ram was arrested and on his pointing out a 'Guloband' of the deceased, 'Bariath' - weapon of assault (a big sickle), blood stained 'baniyan' (undershirt), shirt and pant, which the accused had on his person at the time of commission of murder, were recovered from the house of the accused. On the pointing out, one 'Munara' of the deceased which she was wearing at the time of the incident was recovered from the house of Ratan Singh and the other 'Munara' was got recovered from Johar Singh. After completing the investigation, the Investigating Officer submitted the charge-sheet before the Court against the appellant-Khim Ram and two other accused persons, namely Chandra Ram and Ratan Ram.

3. After submission of charge-sheet, they were committed to the Court of Sessions for trial and the trial Court framed charges against the accused persons. They

denied the charges levelled against them and claimed their trial.

4. The prosecution in support of its case examined seven witnesses. Harish Chandra Pathak P.W. 1 is the Pradhan of village Kerala Mehar before whom Hari Ram P.W. 2, husband of the deceased informed about the missing of his wife since 31-8-1988. Harish Chandra Pathak P.W. 1 then called the villagers and a thorough search was made and eventually, the dead body of the deceased was found in the 'water nala'. Hari Ram P.W. 2, informant, is the husband of the deceased. Diwan Singh P.W. 3 is the Sabhapatl of village Slyoli. He is the witness of recovery of one Munara recovered from the house of Ratan Ram, 'Bariath', 'Guloband' and bloodstained clothes from the house of the appellant, The prosecution has also adduced the evidence of Johar Singh P.W. 4 - goldsmith, who stated in his evidence that on 31-8-1988 Khim Ram came to him and impersonated himself as 'Bishan Ram' and gave a 'Munara' Ex. 13, Dr. P.S. Kuwarbi P.W. 8 is the medical officer who conducted the postmortem of the dead body of the deceased. The prosecution has also adduced the evidence of Shiv Raj Singh P.W. 6, who has a grocery shop in the village. On 31-8-1988 at about 11 a.m., when he was standing in the courtyard of his house, he saw the appellant coming from his house having 'Bariath' (the weapon of assault i.e. a big sickle) in his hand. Dinesh Chandra Pant, Patwari (P.W. 7) is the Investigating Officer of this case and he proved the documents prepared during investigation and the charge-sheet.

5. The accused persons were examined Under Section 313, Cr. P.C. and they have pleaded not guilty of the offence. They have stated that they have been falsely implicated in this case.

6. The appellant-Khim Ram in the trial eventually was convicted and sentenced by the trial Court as mentioned above. However, the trial Court has acquitted the co-accused Ratan Ram and Chandra Ram from the charge leveled against them.

7. It is pertinent to mention here that the appellant Khim Ram had preferred a Criminal Appeal No. 2051 of 2001 before, this Court against the impugned judgment. After hearing the parties, the Division Bench of this Court was of the opinion that an inquiry should be made by the trial Court regarding the age of the

appellant at the time of offence. Vide judgment & order dated 3-3-2005, the Division Bench of this Court while maintaining the conviction of the appellant under Sections 302, 394 & 201, IPC remitted the case to the trial Court for holding an inquiry for verification of the age of the appellant at the time of offence. In compliance of order dated 3-3-2005, the trial Court conducted an inquiry and on appreciation of the evidence has held that the appellant was not Juvenile at the time of offence. Thereafter, the Division Bench of this Court vide order dated 2-8-2006 has passed the following order:

Heard Sri. R.S. Sammal, learned Counsel for the appellant, learned A.G.A. and perused the record.

The records shows that the report of the Sessions Judge has been received in compliance of the order dated 3-3-2005 which reveals that Khim Ram was found to be more than 18 years of age on the date of the incident.

As per the judgment and order dated 3-3-2005, he has to serve out the sentence, thus suspension of the sentence is hereby vacated. The Court concerned shall take the appellant - Khim Ram into custody to make him to serve out the sentence.

8. Feeling aggrieved by the judgment and order, the appellant preferred a Criminal Appeal before the Hon'ble Apex Court and the matter was remitted to this Court for consideration of the matter afresh vide order-dated 10-7-2007. The Hon'ble Apex Court has observed as follows:

Having heard the learned Counsel for the parties we are of the opinion that the impugned judgment being not supported by any reason, cannot be sustained which is set aside accordingly and the matter is remitted to the High Court for consideration of the matter afresh. We request the High Court to consider the merit of the matter and pass a reasoned judgment. We would also request the High Court to consider the desirability of disposing of the appeal as ex-peditiously as possible and preferably within a period of three months from the date of communication of this order.

9. In view of above, we have heard learned Counsel for the parties afresh. Perused the record carefully.

10. At the outset, it needs to be mentioned here that it is not disputed that the deceased died on account of ante-mortem injuries sustained by her on the date of occurrence. Dr. P.S. Kuwarbi (P.W. 5), Medical Officer conducted the post-mortem of deceased on 4-9-1988 at 10.20 a.m. and found following ante-mortem injuries on the person of the deceased:

(i) Lacerated wound size 8 cm x 4 cm over forehead, transversely placed, bone deep and margins irregular.

(ii) Incised wound size 3 cm x 1.5 cm. bone deep. Transversely placed over left cheek 2.5 cm before left eye and 2 cm lateral to nose. Direction is transverse.

(iii) Incised wound 5 cm x 1 cm transversely placed over upper and lateral part of right side of neck. Muscle deep 2 cm and situated 4 cm below right ear. Direction transverse.

(iv) Incised wound 6 cm x 1.5 cm bone deep situated over chin and right mandible direction obliquely upwards to right side over line of mandible. Right mandible fractured.

(v) Dislocation of left temporal mandibular joint with swelling of surrounding area of joint.

(vi) Lacerated wound 3 cm x 2 cm muscle deep over right forearm on dorsal aspect 3 cm. Upwards from wrist joint (right). Direction is longitudinal.

(vii) Incised wound 3 cm x 0.5 cm muscle deep over left palm 1 cm below metacar-pophalangial joint of left thumb. Direction is oblique.

(viii) Incised wound 1.5 cm x 0.5 cm muscle deep over dorsal surface of left thumb. Direction is longitudinal.

(ix) Incised wound size 1.5 cm x 0.5 cm. muscle deep over tip of left middle finger. Direction is transverse.

In the opinion of Medical Officer, the death of the deceased was caused due to shock and haemorrhage resulting from the ante-mortem injuries. The Medical Officer has proved the post-mortem report Ex. Ka. 13. He further opined that the deceased might have sustained the aforesaid injuries on 31-8-1988. Thus, it is amply established that deceased met a homicidal death on account of ante-mortem injuries sustained by her.

11. It is pertinent to mention here that there is no dispute that the deceased Smt. Kituna alias Kamli Devi left her house in the morning of 31-8-1988 in order to collect wood from the jungle. It is not disputed that on 3-9-1988 the dead body of the deceased was recovered from a 'water nala' (Gadhera) which is about 1 1/2 kilometer away from the village. The dead body was also covered with leaves and branches of trees. There is no dispute that the Investigating Officer recovered glasses of the garlands, a piece of cloth and a sickle lying near the dead body.

12. Now, we have to consider as to whether the appellant was responsible for causing the death of the deceased. There was no eye-witness of the incident and the prosecution case rests upon circumstantial evidence. The law which is fairly settled about circumstantial evidence is that it should be such as to point out only to the guilt of the accused. The evidence should exclude all other hypothesis except the guilt of the accused. It is often said that though witnesses may lie, circumstances will not but at the same time it must cautiously be scrutinized to see that the incriminating circumstances are such as to lead only to a hypothesis of guilt and reasonably exclude every possibility of innocence of the accused. In order to sustain conviction on circumstantial evidence, each of the incriminating piece of circumstantial evidence should be proved by cogent and reliable evidence and the Court should be satisfied that the pieces of evidence taken together forge such a chain wherefrom no inference other than the guilt can be drawn.

13. The Hon'ble Apex Court in Sharad Birdhichand Sarda v. State of Maharashtra MANU/SC/0111/1984 : 1984 CriLJ1738 while dealing with circumstantial evidence, has held that onus is always on the prosecution to prove that the chain is complete. The condition precedent before conviction could be based on circumstantial evidence were enumerated as under:

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

(ii) 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;

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

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

(v) 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.

The above decision was also followed in the decisions of the Hon'ble Apex Court in State of Rajasthan v. Rajaram 2003 Cri LJ 3901, State of U. P. v. Satish 2005 SCC (Cri) 642 : 2005 Cri LJ 1428 and Ram Singh v. Sonia MANU/SC/7109/2007 : 2007 CriLJ1642 .

14. In light of the law enumerated above, we have to discuss the circumstances projected by the prosecution. The first circumstance projected by the prosecution is that a 'Bariath' (a big sickle) by which the appellant committed the murder of the deceased was recovered at the instance of accused-appellant Khim Ram on 4-9-1988 from his house. The prosecution, in order to prove this discovery, has adduced the evidence of Dinesh Chandra Pant P.W. 7, the Investigating Officer and two public witnesses namely, Harish Chandra Pathak P.W. 1, who is Gram Pradhan of Village Karala Mehar and Diwan Singh P.W. 3, who is Sabhapati of Village Siyoli. All these witnesses have stated in their deposition that the accused-appellant was arrested on 4-9-1988 and on interrogation of the accused-appellant by the Investigating Officer Dinesh Chandra Pant (Patwari) P.W. 7, he made a disclosure statement that he could discover the weapon of assault i.e. 'Bariath'. On the basis of the said disclosure statement, all these witnesses along with accused-

appellant Khim Ram went to his house and the accused-appellant took out the 'Bariath' (weapon of assault) from the 'Bharpati' (roof) of his house and handed over to the Investigating Officer in presence of Harish Chandra Pathak P.W. 1 and Diwan Singh P.W. 3. Dinesh Chandra Pant P.W. 7, the Investigating Officer prepared the recovery memo Ex. Ka.5 and these two witnesses also put their signatures on the recovery memo. The evidence of Harish Chandra Pathak P.W. 1, Diwan Singh P.W. 3 and Dinesh Chandra Pant P.W. 7 corroborates each other on the material particulars of the discovery. All the witnesses have given vivid details of the discovery of 'Bariath' made at the instance of accused-appellant Khim Ram. It is also pertinent to mention here that Harish Chandra Pathak P.W. 1, the Gram Pradhan of village Karala Mehar and Diwan Singh P.W. 3, the Sabhapati of village Siyoli are respectable persons and their evidence cannot be said to be unreliable, and it cannot be said that these witnesses are got-up witnesses. Thus, the evidence of recovery of the 'Bariath' is an incriminating circumstance against accused-appellant Khim Ram. There is a ring of truth in the evidence adduced by the prosecution to prove the above circumstance.

15. The next circumstance projected by the prosecution against accused-appellant Khim Ram is that Diwan Singh P.W. 3 had deposed in his evidence that deceased Smt. Kituna alias Kamli Devi left her house in the morning of 31-8-1988 for collecting wood from the jungle and she did not return till night after collecting wood. He has further deposed that the deceased was wearing 'Guloband' on her neck and two 'Munaras' (one each on her ear). In the First Information Report, it has been mentioned that Hari Ram P.W. 2, the informer had suspicion on Khim Ram that he had committed the murder to take the ornaments of the deceased. The evidence of Diwan Singh P.W. 3 reveals that the deceased always used to wear 'Guloband' and 'Munaras'. The prosecution has also adduced the evidence to the effect that the said 'Guloband' and 'Munaras' were not present on the person of the deceased at the time of recovery of dead body. The accused-appellant was apprehended by Dinesh Chandra Pant P.W. 7. On his interrogation, he also made a disclosure that he could also discover the 'Guloband' from his house. The prosecution also adduced the evidence of Harish Chandra Pathak P.W. 1, Diwan Singh P.W. 3 and Dinesh Chandra Pant P.W. 7, the Investigating Officer who had deposed in their evidence and they have proved the discovery of 'Guloband' from

the house of the appellant at his instance. They have stated that after arresting the accused-appellant, he was taken to his house from where he took out the 'Guloband' and handed over it to the Investigating Officer. The said discovery was made in presence of the above named witnesses. The Investigating Officer prepared the discovery memo Ex. Ka. 6 at the spot and the witnesses signed on the recovery memo. All these witnesses have corroborated each other on the material particulars and there is no discrepancy in the evidence of these witnesses with regard to the discovery. They have correctly narrated the genesis of the disclosure in their statements. As we have noticed earlier, both the witnesses i.e. Harish Chandra Pathak P.W. 1 and Diwan Singh P.W. 3 are respectable witnesses of their villages. Thus, it is amply established that the 'Guloband' was recovered from the house of accused-appellant Khim Ram.

16. The next circumstance projected by the prosecution is that the recovery of 'Banyan' (under shirt), shirt and pant which the accused-appellant was wearing at the time of commission of offence. The clothes were also recovered at the instance of accused-appellant Khim Ram from a box kept in his house and this discovery was also made after making the disclosure statement to the prosecution witnesses. The Investigating Officer also prepared the recovery memo Ex. Ka. 7 at the spot. The said recovery was also made in presence of Harish Chandra Pathak P.W. 1 and Diwan Singh P.W. 3. The accused-appellant has stated to Harish Chandra Pathak P.W. 1 and Dinesh Singh P.W. 3 that he had washed the bloodstain from these clothes immediately after the commission of the offence. In spite of the washing of the clothes, the Investigating Officer found slight marks of bloodstain on the clothes. Thus, the discovery of the clothes is further established from the above prosecution evidence.

17. The next circumstance projected by the prosecution is that the accused-appellant also made a disclosure statement before Dinesh Chandra Pant P.W. 7 the Investigating Officer, Harish Chandra Pathak P.W. 1 and Diwan Singh P.W. 3 that he has kept one of the 'Munaras' with Johar Singh, the goldsmith of Village Karala Mehar. The I.O. along with Harish Chandra Pathak P.W. 1, and the accused-appellant went to the house of Johar Singh P.W. 4 and recovered one 'Munara'. The prosecution has also adduced the evidence of Johar Singh P.W. 4

who has stated in his deposition that he has a shop of jewellery and on 31-8-1988 the accused-appellant came to him and impersonated himself as Bishan Ram and gave a 'Munara' to him. On inquiry, the appellant informed him that his father has died and his mother is blind. He further stated to him that the pandits of his village were not allowing to cut the crops, as such, he wanted to sell the 'Munara'. Johar Singh P.W. 4 has further stated in his evidence that being not convinced with the appellant he asked him to come with his mother and then he would purchase the said 'Munara'. He kept it with him and gave a receipt Ex. Ka. 11 of the said 'Munara' and the appellant made a thumb impression of Bishan Ram. We, therefore, hold that the prosecution evidence with regard to this fact is consistent and nothing has been elicited during the cross-examination of the witnesses by the defence to discredit their evidence.

18. The next circumstance projected by the prosecution is that the recovery of another 'Munara' which was taken by the appellant from the person of the deceased after the commission of the offence was made at the instance of the appellant from the possession of co-accused Ratan Ram. The appellant made a disclosure statement before Harish Chandra Pathak P.W. 1, Diwan Singh P.W. 3 and Dinesh Chandra Pant P.W. 7 that he had sold one of the 'Munaras' to Ratan Ram @ Rs. 600/-, out of which Rs. 100/- only had been paid by Ratan Ram. These witnesses reached in the house of Ratan Ram who took out the said 'Munara' and gave it to the I.O. The I.O. prepared the recovery memo Ex. Ka. 12 at the spot. All the witnesses have categorically corroborated the evidence of each other on the material particulars. The evidence of the prosecution is consistent, credible and cogent. This circumstance also leads to take an inference that one of the 'Munaras' was recovered from Ratan Ram at the instance of the appellant and it is an incriminating circumstance against the appellant.

19. The prosecution has also adduced the evidence of Shiv Raj Singh P.W. 6 who has stated in his evidence that on 31-8-1988 at about 11 a.m. the appellant Khan Ram was going with 'Bariath' (weapon of assault) Ex. Ka.5 on the day when the murder of the deceased was committed. The testimony of the said witness was cross-examined at length, but nothing could be elicited to discredit his evidence.

20. Learned Amicus Curiae for the appellant contended that no identification proceeding of the property so recovered at the instance of the appellant was conducted by the prosecution. It was further contended that the identification proceedings of the property could have shown the veracity of the evidence of Hari Ram P.W. 2 about the fact that that 'Guloband' and 'Munaras' belonged to the deceased. Learned Addl. G. A. refuted the contention and contended that the identification proceeding of the property is not sine-quo-non in every case. It is pertinent to mention here that the appellant had not claimed to be the owner of the said 'Guloband' and 'Munaras' recovered at his instance. Hari Ram P.W. 2 has clearly stated in his evidence that he purchased the 'Guloband' and 'Munaras' for his wife. He also indicated that each 'Munaras' which his wife was wearing at the time of incident was of half tola of gold; the 'Guloband' was of 1.75 tola of gold; and the said 'Guloband' had eight ticks on it. He purchased the said gold @ Rs. 160/- per tola about 35 years ago from the date of recording the statement. He has also lodged the report to the Patwari and he had categorically mentioned in the FIR that the deceased was wearing 'Guloband' and 'Munaras' at the time of her death and these ornaments belonged to the deceased. Hari Ram P.W. 2 had categorically stated before the Court that the 'Guloband' and two 'Munaras' Exs. 8, 12 & 13 respectively belonged to his wife. He had identified these items before the Court and there is no effective cross-examination on behalf of the defence on this point. Learned Amicus Curiae for the appellant tried to emphasize that such ornaments are common with the ladies and these articles are easily available with other ladies also, as such, it cannot be said that it belongs to Hari Ram P.W. 2-informant. As we have noticed that the appellant or any of the co-accused had not claimed to be the owner of the said ornaments, therefore, we do not find any force in the contention of the learned Amicus Curiae for the appellant. It is well settled position of law that the identification of the property during investigation by mixing other similar articles in the proceeding is not sin-quo-non in every case if it is established by other circumstances of the case that it belongs to the complainant. The evidence is required to be appreciated in the background of the entire case and not in-isolation. The evidence of identification proceeding of articles during investigation is not a substantive piece of evidence and it is a corroborative piece of evidence. The evidence of identification of the property during the trial by the

complainant is a substantive piece of evidence. If it is established by the cogent evidence of the complainant that the recovered property belongs to him, the Courts are not required to look for corroboration of the testimony of the complainant. It is also settled position of law that if the Courts are impressed by the evidence of the prosecution witnesses on whose testimony it can safely rely without such corroboration and the Courts in absence of test identification proceeding can convict the accused. There is no hard and fast rule for the same. It depends upon the facts and circumstances of each case. The identification proceedings of the property could be held during the stage of investigation and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold or confer a right upon the accused to claim a test identification of the property. Mere failure to hold the proceeding of identification of the recovered property during investigation would not make inadmissible the evidence of identification in Court. What weight is to be attached to such identification made before the Court is a matter of fact to examine In appropriate cases, it may accept the evidence of identification even without insisting on corroboration. In the instant case, the evidence of Hari Ram P.W. 2 is credible and cogent with regard to the identification of the property before the Court. There is no effective cross-examination on behalf of the defence to discredit the testimony of the complainant. It is a well settled position of law that the substantive evidence of a witness is the evidence before Court but as a rule of prudence, earber identification proceedings are held in order to corroborate the testimony of witnesses given in the Court as regards the identification of the property. The purpose of test identification of the recovered property, therefore, is to test and strengthen the trustworthiness of that evidence. The evidence of Hari Ram P.W. 2 is also cogent and credible particularly in the background that the FIR and the evidence of Hari Ram P.W. 2 mention that the deceased went to the jungle to collect the wood and she was wearing the ornaments; when her dead body was recovered these ornaments were found missing on her person and the fact that the ornaments have not been claimed by the accused. We have noticed as indicated above that the evidence of the prosecution Is credible and cogent.

21. Learned Amicus Curiae for the appellant further contended that there was no direct evidence to prove that the appellant committed the murder of the deceased

and the offence of robbery. It was further contended that the trial Court has committed the manifest error in relying upon the evidence of the recoveries as pointed out by the prosecution. It was further contended that assuming there was satisfactory evidence to prove that the appellant committed theft of the ornaments which was recovered at his instance that could not justify the conclusion that the murder was also committed by him. Learned Addl. G. A. refuted the contention. We have no doubt that there was ample justification for reaching the inevitable conclusion that it was the appellant and no-one-else who committed the murder and the theft. In the face of the overwhelming evidence on which the prosecution has placed the reliance it would be impossible to draw an inference other than that the appellant had committed the murder of the deceased. It is also pertinent to mention here that the appellant had failed to explain the recent possession of the stolen property recovered at his instance from different places. This fact also leads to take a presumptive evidence of the charge of murder as well. In the case of Baiju v. State of M.P. MANU/SC/0060/1978 : [1978]2SCR594 deceased Ramdayal married twice as he did not have a child and his family was keenly interested in having a child somehow. The accused Baiju introduced himself to the family of the deceased as a sorcerer or wizard who could bring about the birth of a child in the family with his extraordinary powers. The accused visited the family several times. The accused asked the second wife of the deceased to go to her parental house without ornaments and money. He also asked her that he would reach her parental house and perform some ritual to drive away the evil spirit from her. The appellant also persuaded Ramdayal deceased to go with him to an adjoining 'nala' for performing some religious rites. The accused also performed a 'pooja' and dig out a piece of bone which, according to him, was an evil omen and prevented the birth of a child. The appellant gained the confidence of the entire family and started to live with Ramdayal's house. The accused took Ramdayal (deceased) with him to the adjoining 'nala' for performing some ritual where he killed him there and threw his dead body in the 'nala'. He then went back to Ramdayal's house, took his wife to another place, killed her there and threw her dead body also in the 'nala'. The accused also killed his mother and his nephew while they were sleeping. He ransacked the house, broke open the boxes and took away a transistor, a watch, a bicycle, torch, ornaments etc. The said articles were

recovered from the house of the accused immediately after his arrest within a short span of time. While convicting the appellant only on the basis of the discoveries made by the accused, the Hon'ble Apex Court has held as follows:

13. We find that the High Court has made a mention of the circumstantial evidence which led it to conclude that the murders were committed by the appellant, including the evidence bearing on his repeated visits to the house of the deceased, his promise to beget a child to the family, by sorcery, his winning their confidence to the extent of persuading them to do whatever he liked, his ruse to get rid of Smt. Lakhpatiya by sending her to her parents' house at Naralnpur after leaving her husband and her ornaments behind on promise of meeting her there on January 21, 1975, his failure to fulfil that promise, the death of Smt. Lakhpatiya's husband Ramdayal and his and his other wife Smt. Fulkunwar at the 'nala' where the appellant used to take them and Smt. Lakhpatiya on the pretext of practising sorcery, the death of Ramdayal's mother Smt. Bhagwanti and his nephew Rambakas in the house the same night, the ransacking of the house and the commission of theft of several articles of Ramdayal including the transistor, the watch, the gold 'addhis', the torch and ornaments etc., and the recovery of those articles either from the house of the appellant or at his instance. His counsel have not been able to point out how it could be said that any part of this circumstantial evidence has been misread or that any error of law has been committed in taking the view that it was quite sufficient to prove the guilt of the appellant. As has been held by this Court in Wasim Khan v. The State of Uttar Pradesh MANU/SC/0022/1956 : 1956 CriLJ790 recent and unexplained possession of stolen articles can well be taken to be presumptive evidence of the charge of murder as well. A similar view has been taken in Alisher v. State of Uttar Pradesh MANU/SC/0077/1973 : 1974 CriLJ897 .

14. As has been stated, the prosecution has succeeded in proving beyond any doubt that the commission of the murders and the robbery formed part of one transaction, and the recent and unexplained possession of the stolen property by the appellant justified the presumption that it was he, and no one else, who had committed the murders and the robbery. It will be recalled that the offences were committed on the night intervening January 20 and 21, 1975, and the stolen

property was recovered from the house of the appellant or at his instance on January 28, 1975. The appellant was given an opportunity to explain his possession, as well as his conduct in decoying Smt. Lakhpatiya and the other persons who died at his hand, but he was unable to do so. The question whether a presumption should be drawn under illustration (a) of Section 114 of the Evidence Act is a matter which depends on the evidence and the circumstances of each case. Thus the nature of the stolen article, the manner of its acquisition by the owner, the nature of the evidence about its identification, the manner in which it was dealt with by the appellant, the place and the circumstances of its recovery, the length of the intervening period, the ability or otherwise of the appellant to explain his possession, are factors which have to be taken into consideration in arriving at a decision. We have made a mention of the facts and circumstances bearing on these points and we have no doubt that there was ample justification for reaching the inevitable conclusion that it was the appellant and no one else who had committed the four murders and the robbery. In the face of the overwhelming evidence on which reliance has been placed by the High Court it is futile to argue that the murders could not have been committed by a single person. As has been stated there is satisfactory evidence on the record to show that the dead bodies of Ramdayal and Smt. Fulkunwar were found at two different places near the 'nala' so that it cannot be said that they were murdered together. As regards Smt. Bhagwanti and Rambakas, the evidence on the record shows that they were murdered while they were asleep in the house, and there is no reason why a single person could not have committed their murders also.

In view of the foregoing discussion, we do not find any force in the contention of the learned Amicus Curiae for the appellant.

22. Learned Amicus Curiae for the appellant further contended that Diwan Singh P.W. 3 has stated in his evidence that when the appellant entered into his house and took out a 'Bariath' and 'Guloband', he along with Harish Chandra Pathak P.W. 1 was present outside the house of appellant. Learned Amicus Curiae for the appellant tried to emphasize that the discovery of 'Guloband' and 'Bariath' was not made in presence of Harish Chandra Pathak P.W. 1 and Diwan Singh P.W. 3 as they were not inside the house of the appellant. Thus, the evidence of discovery of

'Guloband' and 'Bariath' becomes doubtful. Learned Addl. G. A. for the State refuted the contention and supported the findings recorded by the trial Court. We have gone through the entire evidence of Diwan Singh P.W. 3. It is apparent from his evidence that he along with Harish Chandra Pathak P.W. 1 remained outside the room of the appellant and other villagers were also present at the spot. The witnesses were standing outside at such a place from where the place of discovery was visible. Thus, if the evidence of the witnesses would be read in entirety, the contention raised on behalf of the appellant becomes insignificant. We do not find any force in the contention raised by the learned Amicus Curiae for the appellant.

23. When the evidence on record is analyzed in the background of the principles highlighted above, the inevitable conclusion is that the circumstances projected by the prosecution against appellant are consistent with the hypothesis of the guilt of the accused. After perusal of the entire evidence and the circumstances projected by the prosecution, we are of the view that the prosecution has established the case against the appellant.

24. It is also pertinent to mention here that before the Sessions Judge while recording the statement under Section 313 of the Code of Criminal Procedure, a purported statement was made by the appellant that he was aged 16 years, whereas the trial Court did not assess his age independently. The appellant indisputedly did not claim at the time of the trial any benefit of the provisions of the Juvenile Justice Act, 1986 (hereinafter referred as 'the Act') which was applicable at the relevant time. For the first time, a contention was raised before this Court that as the appellant was juvenile on the date of commission of offence, he was entitled to the benefit thereof in terms of the provisions of the Act. The Division Bench of this Court vide order dated 3-3-2005 thought it proper to remit the case to the trial Court for determination of the age of the appellant at the time of commission of offence. The Division Bench of this Court further directed the parties to appear before the trial Court. It was further directed that after recording the findings with regard to the determination of age of the appellant, the trial Court shall remit case to this Court for further orders. The learned Sessions Judge, Pithoragarh in pursuance of the said direction has allowed the parties to adduce

evidence. The learned trial Court had to determine the age of the appellant as on 31-8-1988 when the offence was committed.

25. The appellant did not adduce any oral evidence with regard to the determination of his age. He filed three documents in support of his age. The appellant filed his affidavit alleging therein that his age was 32 years on 2-5-2005 when the affidavit was filed before the trial Court and he further stated in the affidavit that his date of birth is 21st December, 1972. He also filed a copy of the extract of Pariwar Register (paper No. 60 Ka) issued by the Gram Pradhan on 21-4-2005. He also filed a copy of the Horoscope.

26. The learned Sessions Judge after going through the entire evidence had come to the conclusion that the appellant was not juvenile on 31-8-1988 and his age was assessed as 18 years on the date of commission of the offence. In pursuance of the said report, the Division Bench of this Court affirmed the conviction of the appellant vide order dated 2-8-2006. Feeling aggrieved by this, the appellant preferred a criminal appeal before the Hon'ble Apex Court and the Apex Court remitted the matter to this Court.

27. The learned Amicus Curiae appearing on behalf of the appellant submitted that the report of the learned Sessions Judge is not correct and the appellant was entitled to get the benefit of the provisions of the Act and in that view of the matter no sentence of imprisonment for life could have been imposed upon him. Learned Amicus Curiae for the appellant further contended that the age of the appellant was recorded as 16 years in his statement recorded under Section 313, Cr. P.C. He further contended that the date of birth of the appellant was 21-12-1972 and as such, he was juvenile at the time of offence. Hence, he is entitled to get the benefit of the Juvenile Justice Act, 1986. The appellant has filed the affidavit before the Court stating therein that he was juvenile on the date of the commission of offence and his date of birth is 21-12-1972. Learned Addl. G. A. refuted the contention. Section 2(h) of the Juvenile Justice Act, 1986 provides that 'Juvenile means a boy who has not attained the age of 16 years or a girl who has not attained the age of 18 years.' The appellant has filed an affidavit before the Court in which he has stated that he was juvenile on the date of the commission of the offence and

wherein he stated his date of birth as 21-12-1972. It is well settled position of law that the affidavit cannot be taken into consideration as evidence under the provisions of the Code of Criminal Procedure. It is specifically provided under Section 296, Cr.P.C. that the evidence of any person whose evidence is of a formal character may be given by affidavit and may, subject to all just exceptions, be read in evidence in any inquiry, trial or other proceeding under the Cr.P.C. The usual mode of the evidence is to summon the witness before the Court. Therefore, the learned Sessions Judge was justified in holding that the affidavit cannot be taken into consideration.

28. The appellant has also filed a copy of the Pariwar Register issued on 21-4-2005 and a horoscope prepared by the Pandit, but no oral evidence has been filed to prove these documents. Learned Amicus Curiae for the appellant contended that since the Pariwar Register is maintained by the Gram Pradhan and its entries must have been taken into account by the trial Court. Even assuming that the contention of the learned Amicus Curiae is correct in characterizing the Pariwar Register as a public document within the provisions of the Indian Evidence Act, it cannot be held that the fact which has been stated in the Pariwar Register had been proved. The contents of the Pariwar Register cannot be accepted unless it is proved by cogent and reliable evidence of the person who supplied the information. We cannot accept all the contents stated in the Pariwar Register as having been proved. It has been held by the Hon'ble Apex Court in Standard Chartered Bank v. Andhra Bank Financial Services Ltd. reported in MANU/SC/2534/2006 : AIR 2006 SC3626 that:

63...The first time this part of the case appears is in the copy of the charge-sheet filed by CBI against certain employees of SCB and HPD for several criminal offences. Mr. Jethmalani contended that since this charge-sheet was produced on record at the instance of CMF, the averments in the charge-sheet must be taken to have been proved before the Court. Even assuming Mr. Jethmalani is right in characterizing the charge-sheet as a public document within the meaning of Section 35 of the Evidence Act, 1872, we cannot accept all that is stated in the charge-sheet as having been proved. All that we can say is that it is proved that the police had laid a charge-sheet in which such allegations have been made

against the accused. We need not delve further into it since the criminal proceedings against HPD and others are still pending and it will be up to the appropriate Court to decide the correctness or otherwise of the charges in the charge-sheet. All that can be said at this stage is that there were serious allegations that the original LOA went out of the possession of SCB by some nefarious means.

29. The appellant has not adduced the evidence of his father or mother in support of his contention that he was juvenile at the time of commission of offence. The father and mother were the best persons to tell about the age and date of birth of the appellant. They could have also stated on oath before the Court that they had given the information to the village Pradhan which was entered in the Pariwar Register. The date of birth of the appellant in the Pariwar Register has to be determined on the basis of the materials on record and it would be a matter of appreciation of evidence adduced by the parties. The extract of the Pariwar Register filed before the learned Sessions Judge reveals that there are 12 members in the family of Sher Ram, the father of the appellant. The date of birth of the appellant has been shown as 21-12-1972 and the date of birth of his wife is 1-5-1975 according to the Pariwar Register. The appellant has eight children, out of which, first child born on 5-11-1992 and the last child born on 26-11-2004. The extract of the Pariwar Register was issued by the Gram Pradhan on 24-4-2005. It is also pertinent that the appellant has not produced the Gram Pradhan or his parents to support the contents of Pariwar Register. No evidence of the Gram Pradhan has been adduced that either of the parents of the appellant who reported the date of birth of the appellant to the Gram Pradhan. There is no oral evidence of any of the witnesses produced on behalf of the appellant that the Gram Pradhan had made the entries in his presence and no evidence was led to verify the age of the appellant. The appellant has not summoned the original Pariwar Register before the trial Court. In absence of any such positive evidence that who has given the date of birth of the appellant to the Gram Pradhan, the entries itself does not prove the date of birth of the appellant. The Hon'ble Apex Court has held in Ravinder Singh Gorkhi v. State of U.P. reported in MANU/SC/8161/2006 : 2006 CriLJ2791 that:

21. Determination of the date of birth of a person before a Court of law, whether in a civil proceeding or a criminal proceeding, would depend upon the facts and circumstances of each case. Such a date of birth has to be determined on the basis of the materials on records. It will be a matter of appreciation of evidence adduced by the parties. Different standards having regard to the provision of Section 35 of the Evidence Act cannot be applied in a civil case or a criminal case.

23. Section 35 of the Evidence Act would be attracted both in civil and criminal proceedings. The Evidence Act does not make any distinction between a civil proceeding and a criminal proceeding. Unless specifically provided for, in terms of Section 35 of the Evidence Act, the register maintained in the ordinary course of business by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which, inter alia, such register is kept would be a relevant fact. Section 35, thus, requires the following conditions to be fulfilled before a document is held to be admissible thereunder : (i) it should be in the nature of the entry in any public or official register; (ii) it must state a fact in issue or relevant fact; (iii) entry roust be made either by a public servant in the discharge of his official duty, or by any person in performance of a duty specially enjoined by the law of the country; and (iv) all persons concerned in-disputably must have an access thereto.

25. In terms of the aforementioned decision of the Constitution Bench such determination is required to be made even if at the relevant time, the juvenile crossed the age of eighteen years. In the absence of any other statute operating in the field, Section 35 will have application and the Court, while determining such age would depend upon the materials brought on record by the parties which would be admissible in evidence in terms of Section 35 of the Act.

26. In Birad Mal Singhvi v. Anand Purohit MANU/SC/0052/1988 : AIR 1988 SC1796 this Court held:

To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record; secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official

duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded.27. In Sushil Kumar v. Rakesh Kumar MANU/SC/0826/2003 : AIR 2004 SC230 this Court as regards determination of age of a candidate in terms of Section 36(2) of the Representation of the People Act, 1951 observed:

32. The age of a person in an election petition has to be determined not only on the basis of the materials placed on record but also upon taking into consideration the circumstances attending thereto. The initial burden to prove the allegations made in the election petition although was upon the election petitioner but for proving the facts which were within the special knowledge of the respondent, the burden was upon him in terms of Section 106 of the Evidence Act. It is also trite that when both parties have adduced evidence, the question of the onus of proof becomes academic (see Union of India v. Sugauli Sugar Works (P) Ltd. MANU/SC/0056/1976 : [1976]3SCR614 and Cox and Kings (Agents) Ltd. v. Workmen MANU/SC/0224/1977 : (1977)ILLJ471SC . Furthermore, an admission on the part of a party to the Us shall be binding on him and in any event a presumption must be made that the same is taken to be established.This Court therein followed, inter alia, Birad Mal Singhvi MANU/SC/0052/1988 : AIR 1988 SC1796 (supra) and several other decisions.

28. In Updesh Kumar v. Prithvi Singh MANU/SC/0040/2001 : [2001]1SCR454 this Court having regard to the overwhelming evidence came to the opinion that Respondent 1 had attained the age of 21 years as on the date of his application for the allotment of the retail outlet. In that case also reliance was placed on the matriculation certificate holding that the correction of the date of the birth in the certificate was an official act and it must be presumed to have been done in accordance with law.

29. We, however, notice that in Ramdeo Chauhan v. State of Assam MANU/SC/0297/2001 : 2001 CriLJ2902 as regards applicability of the provision of

Section 35 of the Evidence Act, 1872 vis-a-vis a school register, it was stated:

19. It is not disputed that the register of admission of students relied upon by the defence is not maintained under any statutory requirement. The author of the register has also not been examined. The register is not paged (sic) at all. Column 12 of the register deals with 'age at the time of admission'. Entries 1 to 45 mention the age of the students in terms of years, months and days. Entry 1 is dated 25-1-1988 whereas Entry 45 is dated 31-3-1989. Thereafter except for Entry 45, the page is totally blank and fresh entries are made w.e.f. 5-1-1990, apparently by one person up to Entry 32. All entries are dated 5-1-1990. The other entries made on various dates appear to have been made by one person though in different inks. Entries for the year 1990 are up to Entry 64 whereafter entries of 1991 are made again apparently by the same person. Entry 36 relates to Rajnath Chauhan, son of Firato Chauhan. In all the entries except Entry 32, after 5-1-1990 in column 12 instead of age some date is mentioned which, according to the defence is the date of birth of the student concerned. In Entry 32 the age of the student concerned has been recorded. In column 12 again in the entries with effect from 9-1-1992, the age of the students are mentioned and not their dates of birth. The manner in which the register has been maintained does not inspire confidence of the Court to put any reliance on it. Learned defence counsel has also not referred to any provision of law for accepting its authenticity in terms of Section 35 of the Evidence Act. The entries made in such a register cannot be taken as a proof of age of the accused for any purpose.38. The age of a person as recorded in the school register or otherwise may be used for various purposes, namely, for obtaining admission; for obtaining an appointment; for contesting election; registration of marriage; obtaining a separate unit under the ceiling laws; and even for the purpose of litigating before a civil forum e.g. necessity of being represented in a Court of law by a guardian or where a suit is filed on the ground that the plaintiff being a minor he was not appropriately represented therein or any transaction made on his behalf was void as he was a minor. A Court of law for the purpose of determining the age of a party to the Us, having regard to the provisions of Section 35 of the Evidence Act will have to apply the same standard. No different standard can be applied in case of an accused as in a case of abduction or rape, or similar offence where the victim or the prosecutrix although

might have consented with the accused, if on the basis of the entries made in the register maintained by the school, a judgment of conviction is recorded, the accused would be deprived of his constitutional right under Article 21 of the Constitution, as in that case the accused may unjustly be convicted.

39. We are, therefore, of the opinion that until the age of a person is required to be determined in a manner laid down under a statute, different standard of proof should not be adopted. It is no doubt true that the Court must strike a balance. In case of a dispute, the Court may appreciate the evidence having regard to the facts and circumstances of the case. It would be a duty of the Court of law to accord the benefit to a juvenile, provided he is one. To give the same benefit to a person who in fact is not a juvenile may cause injustice to the victim. In this case, the appellant had never been serious in projecting his plea that he on the date of commission of the offence was a minor. He made such statement for the first time while he was examined under Section 313 of the Code of Criminal Procedure.

30. Our attention has been drawn by the learned Amicus Curiae on the statement of the accused recorded under Section 313, Cr. P.C. wherein his age has been mentioned as 16 years. Perusal of the records reveal that the age of the appellant was initially written as 18 years and thereafter it has been made as 16 years. There is no initial of the learned Judge on the said correction. It is also apparent from the record that the said plea of the appellant being juvenile was not raised before the learned Sessions Judge. Merely incorporating the age of 16 years by the learned Sessions Judge on the basis of the statement given by the appellant that cannot be taken as a conclusive proof that the appellant was of 16 years of age at the time of recording the statement under Section 313, Cr. P.C. The learned Sessions Judge has not given any assessment of age in the said statement. Merely the age of the appellant has been recorded as 16 years that cannot be a ground to treat the appellant as juvenile. It has been held by the Hon'ble Apex Court in the State of Haryana v. Balwant Singh 1993 SCC (Cri) 251 in which the accused was convicted and sentenced for imprisonment for life by the trial Court under Section 302, I.P.C. and further sentence of two months R. I. under Section 323, I.P.C. In appeal, the Punjab and Haryana High Court had drawn an inference only on the basis of statement made by the accused recorded

under Section 313, Cr. P.C. wherein the age of the accused was mentioned as 17 years. The Hon'ble Apex Court while the appeal observed as follows:

2. We have gone through the records carefully. It appears that the respondent took his trial before the trial Court only on being committed by the Magistrate. It may be noticed that the age of the respondent before the trial Court even at the stage of framing the charge was given as 17 years. Evidently, the Magistrate before whom the respondent was brought, was not satisfied that the respondent was a child within the definition of the word 'child' under the Haryana Children Act. Admittedly, neither before the committal Court nor before the trial Court, no plea was raised on behalf of the respondent that he was a child and that he should not have been committed by the Magistrate and thereafter tried by the Sessions Court and that he ought to have been dealt With only by the Court of Juveniles. When it is not the case of the respondent that he was a child both before the committal Court as well as before the trial Court, it is very surprising that the High Court, based merely on the entry made in Section 313 statement mentioning the age of the respondent as 17 has concluded that the respondent was a 'child' within the definition of the Act on the date of the occurrence though there was no other material for that conclusion. This observation of the High Court, in our considered view, cannot be sustained either in law or on facts. Hence, we set aside that finding of the High Court that the respondent was a 'child'.

31. The Hon'ble Apex Court further observed in Bali Singh and Anr. v. State of U.P. 2006 (1) SCC (Cri) 566 that:

6. At the time of hearing of the present appeal, learned Counsel for the appellants made a feeble attempt to urge that the said two persons were minors at the time of the incident and, therefore, the entire proceedings against them are vitiated. Strangely, no material has been placed on record in support of this plea. The records show that neither in the trial Court, nor before the High Court nor before this Court has any material other than the order referred to above been placed in support of this plea. The learned Counsel fairly conceded that this point was never urged in any proceedings earlier.

7. We put it to the learned Counsel for the appellant that could he produce any school leaving certificate or birth certificate or any other cogent proof which could show that these two accused persons were minors at the time of the incident? He, however, showed his inability to do so.

8. On the other hand, our attention has been drawn by the learned Counsel for the respondent to several pages in the proceedings of the Courts below which militate against the plea that the said two accused persons were minors at the time of incident. Particularly, our attention has been drawn to the statements of the accused persons recorded under Section 313 of the Code of Criminal Procedure where their ages are mentioned and that does not suggest that they were minors at the time of the incident. This plea raised for the first time at this stage is totally without any basis and has to be rejected.

32. It is well settled position of law that the entries in the Pariwar Register are not conclusive evidence of the fact which is in issue. The defence must lead the other substantive evidence to prove this fact. The appellant has also filed the copy of the horoscope in which his date of birth has been shown as 21-12-1972 and there are cuttings on the entries of the horoscope. The learned Sessions Judge has not relied upon the said horoscope. The appellant has not adduced any oral evidence to prove this horoscope. It is not revealed on record that how it was prepared and who gave instructions to the maker of the horoscope about the date of birth. In absence of such evidence, this document cannot be read in evidence and it is not an admissible document without any proof under the provisions of the Indian Evidence Act. We have gone through the entire record of the trial Court. We are completely in agreement with the findings recorded by the learned Sessions Judge on the question of age of the appellant on the date of the incident.

33. We, therefore, hold that the prosecution has proved the guilt, beyond reasonable doubt, against the appellant. We find that the learned trial Court has rightly convicted and sentenced the appellant and there is no infirmity in the judgment of the trial Court.

34. Hence, the appeal is dismissed and the conviction and sentences awarded by the trial Court against the appellant are confirmed. Let the lower Court record be

sent back to the Court concerned for compliance. Compliance report be submitted within two months.