Shakuntala Vs. State

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SooperKanoon Citation : sooperkanoon.com/912443

Court : Delhi

Decided On : Mar-25-2011

Judge : Anil Kumar; S.L.Bhayana, Jj.

Acts : Indian Penal Code (IPC) - Sections 302 r/w 34, 201 r/w 34, 302 r/w 34, 506; Code of Criminal Procedure (CrPC) - Sections 313, 173, 464; Evidence Act - Sections 65 (c), 74

Appeal No. : Crl.A. No.836/2001

Appellant : Shakuntala

Respondent : State

Advocate for Def. : Mr. Lovkesh Sawhney, Adv.

Advocate for Pet/Ap. : Ms. Ritu Gauba, Adv.

Judgement :
1. Whether reporters of Local papers may be allowed to see the judgment? YES

2. To be referred to the reporter or not? YES

3. Whether the judgment should be reported in the Digest? YES

1. The appellant, Shakuntala, has challenged her conviction under Section 302 r/w Section 34 and Section 201 r/w Section-34 of IPC by judgment dated 11th September, 2001 and her sentence to rigorous imprisonment for life for the

offence under Section 302 r/w Section 34 of IPC and a fine of Rs. 5,000/- and in default, to further undergo simple imprisonment for six months and her sentence to rigorous imprisonment for five years and a fine of Rs.1000/- and in default to suffer rigorous imprisonment for a period of one month for the offence under Section 201 r/w Section 34 of IPC.

2. By the same judgment dated 11th September, 2001 in Sessions Case No. 125/2001 titled as State vs. Shakuntala, wife of Pritam Singh and Israr @ Bachan @ Bhura arising out of FIR No. 213/1996, PS Seelampur under Section 302/34 and 201/34 IPC, accused Israr was acquitted of offences under Section 302, r/w Section 34 of IPC and Section 201 r/w Section 34 of IPC on the ground that no efforts were made during the investigation of the supplementary challan to link accused Israr with the injuries which he had sustained when the offence was allegedly committed by him and there was only the disclosure statement of accused Shakuntala who had named accused Israr which was not sufficient to prove the guilt of the accused. Also the disclosure statement of Shakuntala had not been corroborated by any independent evidence in respect of accused Israr, nor did accused Israr himself make any disclosure statement. Furthermore his name did not figure in the alleged photocopy of the complaint Ex PY which was allegedly made by Joginder, the deceased and therefore, the prosecution had failed to link accused Israr with the commission of offence with which he was charged and thus the said accused was acquitted.

3. The prosecution case against the appellant Shakuntala was that the deceased Joginder Singh had married the appellant in a temple. According to the allegations of the prosecution, House No.- U-12, Gali No.-1, Arvind Mohalla, Ghonda, Delhi was purchased by Sh. Joginder Singh in the name of the appellant, but on account of the strained relations, he wanted to sell it off and was compelling her to dispose of the same and give 50% of the sale consideration to him to which the appellant was not agreeable.

4. It was alleged that in 1992, Joginder Singh, alleged husband of the appellant, was arrested in a TADA case by the police of Police Station Sarai Rohilla and he remained in jail for almost three years. After his release, in July, 1995, when he

came from the jail, he doubted the fidelity of the appellant and had started quarrelling with her. The appellant had even got a case FIR No. 75/96 registered against Joginder Singh under Section 506 of IPC at PS Seelampur on 7th February, 1996, for the threats made by the deceased. It was also alleged that the appellant had developed illicit relations with Nasiruddin and when this fact came to the notice of Joginder Singh, Nasiruddin had left the place. It was further alleged that one room was rented by the appellant to co- accused Israr @ Bachan @ Bhoora @ Rashid and he had been living for three years in the house of the appellant. According to the prosecution, on 18th April, 1996 information was received through a wireless message by Inspector Ramkishan that a dead body was lying at second Pushta Approach, old Usman Pur Village, near the pond. On reaching the place, the dead body of a man aged 27 years with a slit throat and scratches on the body, bound in a gunny bag was found. The dead body was wearing sport shoes and a black pant. The throat was wrapped with an `Angochha (Towel) and a maxi cloth around his neck and the gunny bag was wrapped with an electrical wire. The case under Section 302/201 of IPC was registered. On that date, the dead body was not unidentified, therefore, it was sent to the mortuary for preservation and for identification.

5. On 19th April, 1996, the next day, Sh. Rakesh Kumar and Rajesh Kumar, brothers of the deceased, identified the body. The prosecution had contended that after identification of the body on 19th April, 1996, Rakesh Kumar and Rajesh Kumar, brothers of the deceased, produced a photocopy of letter dated 25th November, 1995, Ex PY allegedly written by the deceased to the SHO stipulating that in case, the deceased does not return to his house for 4-5 days, then it should be presumed that Ms. Shakuntala, appellant, her mother Brahmi Devi, her sons Joshi and Bunty, Mahesh Kumar Sharma and Nasiruddin be held responsible. The original of the said letter was not recovered by the prosecution nor placed on record. The alleged handwriting of the deceased on the said letter had not been proved. On the basis of testimonies of Pw-8 and Pw-11 it could not be held that the photocopy of the alleged letter was in the handwriting of the deceased.

6. The prosecution also alleged that on 17th April, 1996, deceased had told his brother that he was asked by Shakuntala, appellant to come to her house, as a

buyer was expected to come on that date. The deceased, therefore, along with his brother, allegedly went to the house of the appellant. Brother of the deceased, Rakesh Kumar, stayed for 10-15 mins and then left from there, leaving behind his brother at the said place. Till 19th April, 1996, deceased did not returned to the house therefore the brother and father of the deceased made inquiries. Later on they identified his body in the mortuary along with the police officer SI M.A. Khan.

7. According to the prosecution, the appellant was arrested on 23rd April, 1996, at platform No. 38, Inter State Bus Terminus, Kashmiri Gate and was sent to judicial custody and was charged for murdering Joginder Singh along with Israr under Section 302/201 of IPC r/w Section 34 of IPC on 5th April, 1997. Accused Israr was arrested later on and a supplementary charge sheet was filed. On 5th April, 1997, charge was framed against the appellant that on or before 18th April, 1996 near a pond near Approach Road, 2nd Pushtah, Old Village, Usman Pur, she along with co-accused Israr @ Bachchan, Jaffar and Ashok (proclaimed offenders) committed the murder of Joginder Singh and also caused the evidence of the commission of offence to disappear with the intention of saving the offender from legal punishment and thus also committed the offence punishable under Section 201 r/w Section 34 of IPC.

8. After arrest of Israr, the charge against him was framed on 8th March, 2000 stipulating that he with appellant and Zaffar and Ashok, committed the murder of Joginder Singh @ Laloo and therefore committed offence under Section 302 of IPC r/w Section 34 and with the common intention caused the evidence of commission of offence to disappear with the intention to save the offenders from legal punishment, thereby committing an offence punishable under Section 201 r/w Section 34 of IPC.

9. The appellant and the co-accused Israr pleaded not guilty and claimed trial and during the trial, the prosecution produced 16 witnesses and on 9th August, 1999 examined the accused under Section 313 of the Crl. Procedure Code.

10. The Trial Court held that the deceased was last seen with the appellant, as his brother PW-11 had left him at the residence of the appellant. Reliance was also placed on the fact that House No. U-12, Gali No.-1, Arvind Mohalla, Ghonda was

opened by the appellant with her key, which was in her possession at the time when she was arrested and articles were recovered at her instance from her house pursuant to the disclosure statement made by her, i.e., a portion of maxi and a wire. The Trial Court also relied on the CFSL report Ex. PW-14/F G & H holding that it corroborated the case of the prosecution and linked the articles recovered from the house of the accused Shakuntala with the articles recovered from the dead body, stipulating that the human blood of B Group was detected on these articles which was the blood of the deceased and also as the prosecution was able to prove the motive of the accused for perpetration of crime against the deceased, in order to grab the property and to get rid of him, therefore, the crime of the appellant to murder her husband in furtherance of common intention with other persons, who were not yet arrested was made out. It was also held that she also caused the disappearance of the evidence of commission of murder and threw the dead body with the intention of screening the offenders from legal punishment, therefore, she was also convicted for offences under Section 302/201 r/w Section 34 of IPC.

11. Ms. Ritu Gauba, learned counsel for the appellant has contended that the prosecution has failed to establish its case and the inferences are drawn on the basis of assumptions and surmises. The case of the prosecution is based on the fact that the deceased got married to the appellant however, neither the marriage has been proved nor has it been established by any witness as to when the marriage took place between the appellant and the deceased, who attended the marriage ceremonies who witnessed the marriage, who performed the rites for marriage and whether they ever co-habited as husband and wife. According to her, it has also not been proved that the disputed property was purchased by the deceased in his name and later on transferred in the name of the appellant. She has further pointed out the change in the prosecution version. Initially it was alleged that the property was purchased by the father of the deceased from his money in the name of his son, deceased Joginder, which later on transferred in the name of the appellant, while later on it was contended that the property was infact purchased by the deceased himself. She submitted that no documents have been produced or proved to show that the property was purchased initially in the name of Joginder Singh, deceased, by his father. Father of the deceased has not

been examined nor has it been established that the money was paid by the father of the deceased for the purchase of said property raised from various sources nor such sources have been disclosed, which property was later on allegedly transferred by the deceased in the appellants name. It is also apparent that no documents have been produced and proved to show as to when the property was transferred by the seller in the name of the deceased and when the property was transferred in the name of appellant. Learned counsel contended that the bald oral allegations by the brothers of the deceased does not establish anything nor on the basis of such testimonies the appellant can be inculpated.

12. Assumptions that the property was purchased by the father of Joginder in the name of his son, which illegally got transferred by the appellant in her name and since she allegedly developed illicit relations with other persons, so, the deceased wanted to sell the said property and share 50% of the sale consideration, which prompted the appellant to kill him is just a theory merely based on surmises and none of the allegations have been established and can be inferred even on the basis of preponderance of probabilities, whereas the prosecution had to prove it beyond reasonable doubt.

13. According to learned counsel, the husband of the appellant is alive and in the circumstances, the allegations that she was married to deceased Joginder Singh, cannot be inferred especially in the absence of any evidence about the marriage between the deceased and the appellant. In any case, none of the prosecution witnesses have proved that the deceased and the appellant lived together as husband and wife. The entire prosecution version is based on assumptions. Even if it is presumed that the deceased and the appellant cohabited it would not mean that they got married and were husband and wife. There is no evidence at all that the property was ever in the name of deceased or was purchased from the consideration paid by the father of the deceased by raising it from various sources. In the circumstances the entire prosecution version has remained unproved and in the absence of all these essential and vital link it cannot be held that the prosecution has established the culpability of the appellant beyond reasonable doubt.

14. On behalf of the appellant, it is also contended that the alleged photocopy of the letter dated 25th November, 1995 has not been proved and cannot be relied on, as it is merely a photocopy and there is no evidence that it was in the hand writing of the deceased or that a copy of this letter was also delivered to the police authorities.

15. The learned counsel emphasized that the appellant has been shown as the wife of Pritam Singh in the challan submitted under Section 173 of the Crl. Procedure Code and even while framing the charges against the appellant. None of the witnesses including the brothers of the deceased have either deposed as to when and how the appellant got married to Joginder Singh or what is the basis of deposing that they got married, nor was any effort been made by the prosecution to establish that the appellant had been married to the deceased Joginder Singh. None of the witnesses could tell the location of the temple or the person/priest, who got them married or that they got married in their presence nor were any witness produced who had witnessed the alleged solemnization of the marriage. In the circumstances, the allegation of marriage between the appellant and the deceased is a mere speculation and is suspicious and the conviction of the appellant could not be based on mere suspicion.

16. The prosecution also failed to prove the alleged divorce between the appellant and her husband Pritam Singh and in the circumstances, there is no basis for alleging that the appellant got married to Joginder Singh. Even after alleged marriage between the deceased and the appellant, children were born to the appellant who were not fathered by the deceased as the brothers of the deceased in their testimonies had admitted that there were no children from the alleged marriage between the appellant and the deceased.

17. The prosecution had produced a photocopy of the ration card Ex PW 5/E and a warranty card of a godrej refrigerator, Ex PX which were produced and given to the police authorities by the brother of the deceased during investigation, contending that it allegedly proved that the deceased and appellant were co-habiting as husband and wife. Refuting the ration card, it is contended that it is only a photocopy which should not be considered, as the prosecution has failed to

prove the photocopy from the record of the ration card office. Photocopy of the ration card could not be considered which is a secondary evidence and no grounds had been made out for leading and accepting the secondary evidence in accordance with the provision of Indian Evidence Act. The alleged ration card was allegedly issued on 17th November, 1992 and bears the address 528/5B, Gali No. 6, Vishwas Nagar, Delhi which is not the address of Rajesh Kumar, Rakesh Kumar and Puran Chand, brothers and father of the deceased nor it is the address of appellant nor it is the address at which the deceased and the appellant allegedly lived as tenant. The testimonies of Rakesh Kumar, PW-11 that the deceased and the appellant had shifted to a house in Bhimgali in Vishwas Nagar as a tenant and started living as husband and wife has also not been corroborated as no evidence has been produced. Neither the owner of the house where the appellant and the deceased were living as husband and wife as tenant, has been examined nor any other witness has been examined from the said property or the vicinity to prove that they were living as husband and wife or that the appellant lived in Bhimgali in Vishwas Nagar. The learned counsel has also pointed out the contradictions in the testimonies of the witnesses inasmuch as the alleged ration card was allegedly issued on 17th November, 1992 at the address bearing No. 528/5B, Gali No. 6, Vishwas Nagar, Delhi whereas PW-11 had stated that they were living in their own house, which was purchased in 1991, i.e., House No. U-12, Arvind Mohalla, Gali No. 1, Ghonda, Delhi, the consideration of which was allegedly paid by the father of the deceased. Another version of the said witness was that the appellant and the deceased lived as husband and wife in their house at 518/1 Karkari Road, Vishwas Nagar which version has also not been established by the prosecution. Bald statement of the deceased that the deceased got married to the appellant and they lived as husband and wife cannot be accepted without something more as the husband of the appellant is living and there had not been divorce between them rather appellant had children from her husband even after alleged marriage between appellant and the deceased.

18. Refuting the ration card, it is also contended that the photocopy does not bear the photograph of the head of the family nor does it bear the name, fathers name, age and other particulars of the head of the family and in the circumstances, the photocopy is a fabricated document and could not be relied on. It was also

contended that the ration card does not even have the printed/embossed ration card number. It was also contended that it has not been explained as to how the ration card was got prepared by deceased as he was under detention in TADA case in 1992. Why names of all the children of the appellant have not been included and only one of the child has been included has not been explained especially in view of the fact that name of one of her children from her husband is included in the photocopy of the ration card.

19. The learned counsel also refuted the warranty of the refrigerator which, according to her, has not been proved and in any case does not establish the marriage between the appellant and the deceased or that they were living as husband and wife or that they were living together. It is further contended that the alleged refrigerator was not recovered from the house of the appellant and that the alleged warranty card does not bear the signature of the purchaser. On the basis of alleged warranty card it also cannot be established that the deceased had any rights in the property nor the warranty card can be construed as a document of title.

20. The learned counsel Ms. Gauba has also contended that the allegation regarding arrest of the appellant from the bus terminus is concocted and false and highly improbable. According to her, no independent witnesses were recorded regarding her arrest, though the bus terminus must have been full of other passengers. She has also pointed out and doubted the prosecution version as to how the accused could have been arrested without any photograph from a crowded place, where many people were present and as to how and who had identified her.

21. Even according to the case of the prosecution at the time of her arrest, she did not have any bag or luggage or bus ticket or enough money to abscond from the city or any other documents in her possession, which makes the version of the prosecution highly unreliable that she was trying to flee to Bareli. It has also been pointed out that the alleged search of the appellant was carried out at Platform No. 38 of ISBT allegedly before the lady officer ASI Veena Sharma. However, ASI Veena Sharma, PW-13 stated that she was only a duty officer, who recorded the

FIR on receipt of Rukka of PS Seelampur through Constable Sanjeev Kumar and after registration of the case returned the Rukka with the police file to the SHO. She has, therefore, not deposed about conducting the search of the appellant or recovery of any articles. According to the learned counsel, this completely falsifies the version of the prosecution.

22. The learned counsel has also pointed out about the keys, which were allegedly recovered at the time of her arrest from which the house was opened. However, ASI Veena Sharma is silent about this aspect rather she has not deposed that she had searched the accused and had recovered the keys from her. In any case recovery of keys of her own house from the appellant does not inculpate her in any manner.

23. According to the learned counsel even on the basis of testimonies of the prosecution, the brother of the deceased had last seen him with appellant when he allegedly left him at the residence of the appellant on 17th April, 1996. The testimony of the brother of the deceased is unreliable and so even the version that he had dropped him at the residence of the appellant is also unreliable. According to counsel for the appellant the last seen evidence is not reliable as there were disputes between the deceased and his brother which had led to a fight between them, for which reason the father had stood surety. In the circumstances on the basis of testimony of Rakesh Kumar (PW11) it cannot be held that deceased was last seen with the appellant at about 12.00 PM on 17.4.1996. In any case it is contended that in absence of any other links in the chain of circumstantial evidence, it is not possible to convict the appellant solely on the basis of the last seen evidence and reliance was placed on Jaswant Singh Vs State of Punjab, (2005) 12 SCC 438.

24. The learned counsel for the appellant has relied on AIR 2010 SC 3292, Main Pal v.State of Haryana to contend that error in framing of the charge which could mislead the accused and results in failure of justice would vitiate the trial.

25. Reliance has also been placed on 2010 (1) JCC (Narcotics) 28, Ajmer Singh v. State of Haryanato contend that on the principle of parity as another accused Israr on the same evidence has been acquitted and as the case of the appellant is

similar in that respect thus the benefit extended to one accused should have been extended to the appellant as well.

26. To buttress the point that it was for the prosecution to have established with the documentary evidence that the property House No.U-12, Gali No.12, Arvind Mohalla, Khonda was purchased by the father of the deceased from the consideration paid by him in the name of his son Joginder Singh, deceased, reliance has been placed on AIR 2008 SC 1541 Thiruvengada Pillai v. Navaneethammal and Anr. In this case it was held that the party who propounds the document will have to prove it. The plaintiff had come to the Court alleging that the first defendant had executed an agreement to sell in favour of plaintiff which was denied by the defendant. It was held that the burden was on the plaintiff to prove that the defendant had executed the agreement and it was not for the defendant to prove the negative. Reliance has been placed on (2007) 2 SCC (Cri.) 122, Subhash Harnarayanji Laddha v. State of Maharashtra to contend that if the relevant documents are not produced or the documents produced are not proved, the contents thereof would be wholly inadmissible in evidence. In this case the prosecution had not offered any explanation whatsoever as to why the original agreement to sell was not produced and only a Xerox copy of agreement to sell was taken from the Collectorate. Even as to at whose instance the Xerox copy was filed with the Collector of the district had not been established and in the circumstances the benefit of doubt was given to the accused and the Supreme Court had allowed the appeals and the conviction and sentence of the accused were set aside.

27. Reliance has also been placed on AIR 2007 SC 1721, Smt.J.Yashoda v. K.Shobha Rani holding that copy of a document can be received as evidence under the head of secondary evidence only when the copies made from or compared with the original are certified copies or such other documents as enumerated in Section 63 of the Indian Evidence Act. It was further held that secondary evidence as a general rule is admissible only in the absence of primary evidence. If the original itself is found to be inadmissible through failure of the party, who fails to prove it to be valid, the same party is not entitled to introduce secondary evidence of its contents. Secondary evidence of the contents of a

document cannot be admitted without non production of the original being first accounted for in such a manner as to bring it within one or other condition as provided for in this section. Reliance has also been placed on AIR 1999 Delhi 280, Ms.Arati Bhargava v. Shri Kavi Kumar Bhargava where it was held that genuineness of the photocopies cannot be guaranteed and unless there is evidence that someone had compared the photocopies with the original or had obtained the photocopies from the original, photocopies would be inadmissible in evidence in absence of the original. Regarding inadmissibility of photocopies reliance has also been placed on (2001) SCC (Cri) 1501, United India Insurance Co. Ltd v. Anbari and Ors where it was held that production of the photocopy of driving license was not sufficient to prove that the driver had a valid license when it was challenged and hence its genuineness was not admitted.

28. To substantiate her point that after the evidence was concluded by the prosecution and even the statement of the appellant was recorded along with other the co-accused under Section 313 of the Criminal Procedure Code, the charge was modified substantially which had caused prejudice to the appellant, reliance has been placed on AIR 2008 SC 3069, Dumpala Chandra Reddy v. Nimakayala Balireddy and Ors. Relying on Dalbir Singh v. State of U.P, (2004) 5 SCC 334 the learned counsel for the appellant has contended that having regard to Section 464 of the Criminal Procedure Code conviction would be possible if (i) the accused was aware of the basic ingredients of that offence; (ii) the main facts sought to be established against him were explained to him clearly and (iii) he got a fair chance to defend himself. It was held that in view of Section 464 of Criminal Procedure Code, it is possible for the appellate or revisional Court to convict the accused for an offence for which no charge was framed unless the Court is of the opinion that a failure of justice would in fact occasion. In order to judge whether a failure of justice has been occasioned, it will be relevant to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself.

29. According to the learned counsel the charge framed against the appellant was that on 18th April, 1996 she along with other co-accused persons committed the

murder of Joginder Singh @ Lallu near pond, near approach road, second pushta, old village Usmanpur. After the entire trial was concluded the charge was modified and it was alleged that she committed murder on 17th April, 2006 at noon time at House No.U-12, Gali No.1 Arvind Mohalla, Khonda. After the charge was completely modified regarding the time and place where it was committed the new circumstance was not even put to the appellant and in the circumstances it is apparent that the appellant could not give any explanation and consequently she had been extremely prejudiced.

30. To counter the plea of the prosecution that for modification of the charge the consent of the appellant and her counsel was taken reliance was placed on AIR 1956 SC 116, Willie (William) Slaney v. The State of Madhya Pradesh to contend that no serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of the advocate of the accused. In this case it was also held that in adjudging the question of prejudice, the fact that the absence of a charge, or a substantial mistake in it, is a serious lacuna will naturally operate to the benefit of the accused and if there is any reasonable and substantial doubt about whether he was, or was reasonably likely to have been misled in the circumstances of any particular case, he is as much entitled to the benefit of it here as elsewhere; but if, on a careful consideration of all the facts, prejudice, or a reasonable and substantial likelihood of it, is not disclosed the conviction must stand.

31. Regarding non examination of the appellant after the charge was modified by completely changing the time and place where the alleged murder was allegedly committed by her under Section 313 of the Criminal Procedure Code reliance was placed on Ranvir Yadav v. State of Bihar, (2009) 3 SCC (Cri) 92 holding that examination of an accused under Section 313 even in a trial involving the most gruesome and horrifying mass murder is not an empty formality. In this case neither any incriminating material nor any accusations were specifically put to the accused in his examination under Section 313. The Supreme Court while noting with concern, regretted the lapse on the part of the trial Court in not indicating incriminating material to the accused had held that in such circumstances the impugned judgment convicting accused is liable to be set aside. Similarly in (2008)

1 SCC (Cri) 371, Ajay Singh v. State of Maharashtra it was held that the object of examination under Section 313 of Criminal Procedure Code is to give the accused an opportunity to explain the case made against him. This statement can be taken into consideration in judging his innocence or guilt. It was further held that the questions must be put in such a way so as to enable the accused to know what he has to explain, what are the circumstances which are against him for which the explanation is needed. A conviction based on the accuseds failure to explain, what he was never asked to explain is bad in law. The whole object of enacting Section 313 of Criminal Procedure Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to give such explanation as he desires to give. In this case no question was put to the accused regarding the finding of kerosene on the accuseds dress in his examination under Section 313 of the Criminal Procedure Code and in the circumstances it was held that the prosecution had failed to establish the charge under Section 302 against the accused.

32. The learned counsel, Ms.Gauba has also relied on AIR 1989 SC 129, State of West Bengal v. Laisal Haque and Anr and AIR 1984 SC 1622, Sharad Birdhichand Sarda v. State of Maharashtra to contend that the statements of the brothers of the deceased in the present facts and circumstances could not be relied on as they have exaggerated and added facts and their testimony should be examined with great care and caution. Reliance has also been placed on this precedent regarding the circumstances not put to the accused under Section 313 of the Criminal Procedure Code as after the amendment of the charge after conclusion of the trial, the new charge that the murder was committed by the appellant at her house and not near the pond in Usmanpur was not even put to her which has caused grave prejudice to her. Regarding judging a question of prejudice, as of guilt, it is contended that courts must act with a broad vision and look to the substance and not to technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself.

33. The learned additional public prosecutor has strongly refuted the pleas and contentions raised on behalf of the appellant. According to the learned counsel the modification of charge on 18th August, 2001 did not prejudice the appellant in any manner, as only the time and place had undergone the modification and not as to who had committed the crime and with whose assistance. According to him the charge framed on 5th April, 1997 stipulated that the appellant on or before 18th April, 1996, near pond, near Approach Road, second Pushta, Old Village, Usman Pur along with co-accused Israr @ Bachan, Zafar and Ashok committed murder of Joginder Singh @ Laloo and caused the evidence of the commission of offence to disappear with the intention of screening the offender from legal punishment and thereby committed the offences under Sections 302,201 r/w Section 34 of IPC. Though the statement of the appellant had been recorded under Section 313 of the Crl. Procedure Code on 9th August, 1999, however, the charge was modified on 18th August, 2001 with the consent of the appellant and her counsel who admitted that there was error in the charge and that it needed amendment and that the appellant shall not be prejudiced by the same. Since, the prosecution did not want to re-examine any of the witnesses and the appellant did not want to lead any defence evidence, it was held that no prejudice or miscarriage of justice will be caused and consequently, the charge was amended on 18th August, 2001 stating that on 17th April, 1996, at about noon time at House No. 12, Gali No.-1, Arvind Mohalla, Ghonda, Delhi with the common intention along with Israr @ Bachan @ Bhure, Rashid (absconder) and Ashok (absconder) committed murder of Joginder @ Laloo and caused the evidence of offence to disappear with the intention to screen the offenders from legal punishment and thereby committed offences punishable under Section 302 and 201 of IPC r/w Section-34 of IPC.

34. The learned additional public prosecutor referred to Section 213 Explanation-(e) stating that if A is accused of the murder of B at a given time and place, the charge need not state the manner in which A murdered B. The learned counsel also referred to Section 215 of the Criminal Procedure Code contending that no error in stating either the offence or the particulars required to be stated in the charge shall be regarded at any stage of the case as material. It is asserted that in any case, the appellant was not misled by any such error or omission nor was there any failure of justice and consequently, on account of amendment in the

charge on 18th August, 2001, no benefit can be sought by the appellant on the ground that it has occasioned a failure of justice. The additional public prosecutor also relied on Section 216 and 217 of the Criminal Procedure Code to contend that there was total compliance of the provisions and since it has not been established that there is any prejudice caused to the appellant, no benefit can be sought by the appellant. Since, the consent of the accused and her counsel had been taken before amending the charge on 18th August, 2001, therefore, at the appellate stage, the appellant cannot raise this point of prejudice and it ought to have been raised before the Trial Court.

35. The learned additional public prosecutor stated that the motive for murder has been established as it has been proved that the appellant was known to the deceased. Referring to the statement of the appellant, it is contended that in reply to question No.9 that Joginder Singh, deceased, had spent some amount on making additional storey of the House U-12, Gali No. 1, Arvind Mohalla, Delhi though the appellant stated that it is incorrect and that she did not know Joginder Singh, however, FIR 75/96 dated 7th February, 1996, reveals that she had stated that the deceased Joginder Singh had been coming to her house for the last two-three years and had been threatening her and that she has a threat to her life from him. In the circumstances, the allegation by the appellant that she did not know Joginder is not correct.

36. The learned additional public prosecutor contended that the photocopy of the complaint dated 25th November, 1995 is also admissible and he relied on Section 65(c) of the Evidence Act. According to him, PW-8 Rajesh Kumar categorically deposed that on 25th November, 1995, the deceased came to his house at about 5-6 p.m. and wrote a complaint about the danger to his life and that in case anything happens, the appellant should be held responsible for it. He deposed that a photocopy was given to him and his brother Rakesh Kumar and the original was kept by the deceased Joginder Singh. In his cross-examination, he had deposed that the letter dated 25th November, 1995, was addressed to Ilaka Magistrate and other police officials, which was kept by him in his pocket, however one copy was given to him and another was given to his brother Rakesh Kumar. He admitted that there was no mention of Rajesh Kumar and Rakesh Kumar in the alleged

complaint.

37. The learned Addl. Public Prosecutor contended that the post mortem report, Ex. PW1/A established the time of murder is proximate to the time of last seen evidence by the brother of the deceased with the appellant. According to him recoveries from the house of the appellant shows that the deceased was murdered in the house of the appellant. Emphasis has been laid on the CFSL report, Ex.PW 14/ F,G & H showing the matching of blood, recovered from the house of the appellant with the blood of the deceased. Minor contradictions according to him are not material and since these are technical matters they have to be seen with broad vision. The learned counsel relied on AIR 1956 SC 116, Willie (William) Slancy V. State of Madhya Pradesh.

38. Reliance has also been placed on the statement of the appellant under section 313 of Criminal Procedure Code in which she had stated that she would produce the defense evidence, however, she did not produce any defense evidence, especially her children who could have deposed that she was picked up by the police in their presence from the residence of the appellant and not from the bus stand which is the version of the prosecuting agency. According to him there is sufficient evidence to inculpate the appellant and the ration card and warranty card are only to corroborate the other prosecution evidence. Even if the ration card and warranty card of the refrigerator are not accepted, the appellant cannot be exculpated as the other evidence is sufficient to prove the charge against her. He stated that from the complaint filed by the appellant it stands proved beyond reasonable doubt that the deceased had been coming to her for the last two or three years prior to his death. Therefore even if the ration card and warranty card are not proved, it cannot be held that the deceased was not known to the appellant. So long as the appellant knew the deceased the prosecution version is established. In the circumstances it is asserted that from the First Information Report registered at the instance of the appellant, the motive to commit crime by the appellant is established.

39. The learned counsel also emphasized that the photocopy of the complaint of the deceased which was produced by his brother is admissible under section 65

(c) of the Evidence Act and can be acted upon in view of the testimonies of PW 8 and PW 11. The learned counsel also contended that the statement of PW 15 SI M.A. Khan that angocha and maxi were recovered from the house of the appellant on 19th April, 1996 should be ignored as it is nothing but a slip of tongue as has been observed by the trial Court also. The learned Additional Public Prosecutor, Mr.Sawhney has relied on (2007) 7 SCC 625, Girja Prasad (Dead) by LRs v. State of M.P to contend that it is not the law that police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption that every person acts honestly applies as much in favour of a police official as any other person. Reliance has also been placed on (2001) 10 SCC 372, State (Delhi Administration) v. Dharampal holding that failure to draw accuseds attention to inculpatory material to enable him to explain it in examination of accused under Section 313 by itself does not vitiate the proceeding, as prejudice, if any caused to the accused must be established by him. Learned Additional Public Prosecutor has also relied on AIR 1992 SC 1175, Mulakh Raj etc v. Satish Kumar and Ors and AIR 1956 SC 116, Willie (William) Slaney v. The State of Madhya Pradesh.

40. This Court has heard the learned counsel for the appellant and the learned Additional Public Prosecutor, Mr.Sawhney at length. This is not disputed that there is no eye witness to the murder of Joginder Singh by the appellant Smt.Shakuntala, alleged wife of the deceased or any of the co-accused. The case of the prosecution is based on circumstantial evidence. While dealing with circumstantial evidence the onus is on the prosecution to prove that the chain is complete and any infirmity or lacunae in the prosecution case cannot be cured by a false defence or plea. The condition precedent which must be fully satisfied before conviction can be based on circumstantial evidence are as follows:-

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

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

hypothesis except that the accused is guilty;

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

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

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

41. The Supreme Court in a number of cases has observed that while appreciating circumstantial evidence, Court must adopt a very cautious approach and the conviction should be recorded or upheld only if all the links in the chain are complete pointing out to the guilt and every hypothesis of innocence is capable of being negated on evidence. This also cannot be disputed that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. The circumstance relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt. The Court must be satisfied of

a. That the circumstances from which the inference of guilt is to be drawn, have been fully established by

unimpeachable evidence beyond a shadow of doubt.

b. That the circumstances are of a determinative

tendency unerringly pointing towards the guilt of the accused, and

c. That the circumstances, taken collectively, are incapable of explanation on any reasonable hypotheses save that of the guilt sought to be proved against him.

42. The case of the prosecution is based on the theory propounded by the prosecution that the deceased and the appellant got married in 1980 after falling in love with each other and lived as husband and wife; the property No.U-12, Gali

No.1, Arvind Mohalla, Ghonda was purchased by the father of the deceased Joginder Singh in his name by raising the amounts from different persons and the consideration for the property was neither paid by the deceased nor by the appellant; somehow the property was transferred in the name of the appellant; the deceased wanted his half share in the property, hence the property had to be sold and the consideration was to be divided between the deceased and the appellant; the appellant had developed illicit relations with other persons including Israr who was living in the same house with the appellant and other persons namely Jaffar and Ashok and the appellant murdered the deceased in connivance with them so that she does not have to sell the house and share the sale proceed with the deceased.

43. The first charge was framed on 5th April, 1997 that the appellant on or before 18th April, 1996 had committed murder of deceased Joginder Singh, near pond, near approach road, second pushta, Old village Usmanpur.

44. After the supplementary charge sheet was filed against co- accused Israr, challan was filed against co-accused Israr @ Bachan @ Bhura @ Rashid son of Chotey and the charge framed on 8th March, 2000 was that Israr on 17th April, 1996 at noon time with Shakuntala, Jaffar and Ashok, committed murder of Joginder at House No.U-12, Gali No.1, Arvind Mohalla, Ghonda. Despite framing the charge on 8th March, 2000 against Israr that he murdered the deceased Joginder Singh @ Lallu with appellant not near pond, but near approach road, second Pushta, Old Village Usmanpur, the charge against the appellant was neither amended nor modified rather the statement of the appellant was recorded under Section 313 of Criminal Procedure Code and thereafter the statement of Israr was also recorded under Section 313 of Criminal Procedure Code on 30th January, 2001 and only after the evidence was concluded, the charge was modified against the appellant on 18th August, 2001 stating that the appellant had murdered Joginder on 17th April, 1996 at about noon time at House No. U-12, Gali No.1, Arvind Mohalla, Ghonda in furtherance of common intention with Israr; Zafar (absconder) and Ashok (absconder).

45. The first link in the prosecution version is that appellant and the deceased Sh.Joginder were married in 1980 in a temple and it was a love marriage and after marriage they lived as husband and wife. This is not disputed that the appellant prior to her alleged marriage with Joginder was married to Pritam Singh. This has also not been established that Pritam Singh had died before the alleged marriage of appellant with deceased Joginder. It has further not been established that the marriage between the deceased and the appellant had been dissolved, though a feeble attempt was made by some of the witnesses by deposing orally about the alleged dissolution of marriage between appellant and Sh. Pritam Singh took place. However, nothing has been produced to prove that the marriage between the appellant and her husband Pritam had been dissolved.

46. PW-8 Rajesh Kumar had deposed that the marriage between the deceased and the appellant was a love marriage and appellant and deceased Joginder Singh lived with the family of deceased for 2-3 years and thereafter he had rented a house at Bhim Gali, Vishwas Nagar. Besides the oral statement of PW-8 Rajesh Kumar and PW-11 Rakesh Kumar that the deceased got married to appellant and it was a love marriage and they lived together as husband and wife, there is no cogent reliable evidence produced by the prosecution about their love marriage and that they lived together as husband and wife. PW-8 and PW-11 Rajesh Kumar and Rakesh Kumar deposed that after marriage appellant and the deceased lived with them at 518/1, Karkari road, Delhi and thereafter they shifted to Bhim Gali in Vishwas Nagar. There is no evidence that the appellant lived with Joginder deceased at 518/1, Karkari road, Delhi or that an accommodation was taken on rent in Bhim Gali, Vishwas Nagar and they resided there or resided as husband and wife. If the appellant and the deceased had lived at Bhim Gali, Vishwas Nagar as husband and wife, the prosecution ought to have produced some evidence on the basis of which it could be inferred that they lived as husband and wife in a rented accommodation at Bhim Gali, Vishwas Nagar. Neither the landlord nor any person from Bhim Gali, Vishwas Nagar who had seen appellant and the deceased living as husband and wife had been examined by the prosecution to establish that they lived as husband and wife at Bhim Gali, Vishwas Nagar in a rented premises. In the opinion of this Court on the basis of evidence produced it cannot be inferred that the appellant had married the deceased and lived with him as his wife. The

prosecution has not established even the first link that the appellant and the deceased were married and lived as husband and wife. It has not been established that after marriage the deceased and the appellant lived with PW8 and PW 11 and the father of deceased and thereafter in a rented accommodation in Bhim Gali. Both the witnesses admitted that there was no child from the alleged marriage between the appellant and deceased after 1980. However, it is reflected from the evidence that the appellant got children after 1980. This is also not the case of prosecution that the children were illegitimate. These facts completely demolish the prosecution version that the deceased and the appellant were married in 1980 and lived thereafter as husband and wife.

47. The next factor in the chain to establish on the basis of circumstantial evidence by the prosecution is that the house No.U-12, Gali No.1, Arvind Mohalla, Ghonda was allegedly purchased by the father of the deceased by paying Rs.50,000 or Rs.52,000/- in his name. PW-8 Rajesh Kumar had parroted along with his brother Rakesh Kumar, PW11 that the said house was purchased by Sh.Joginder Singh, deceased from the money which was given by their father to the deceased. Surprisingly no document has been produced of any sort which will show in any manner that the house was purchased in the name of Joginder Singh in 1991 as has been deposed by PW-11 Rakesh Kumar. They have also not deposed that the transaction took place in their presence. If any consideration was paid then to whom the consideration for the said house was paid is also not established. Whether any documents were executed by the seller in favor of purchaser has not been deposed. In his examination PW-11 could not divulge the name of the seller from whom the house was purchased by his brother from the consideration paid by the father of the deceased. In absence of any document of any type, on bald statements of PW-8 and PW-11 it cannot be held that the property No.U-12, Gali No.1, Arvind Mohalla, Ghonda was purchased by the deceased Joginder Singh from the consideration paid by his father. Even the father who is alleged to have given the consideration for purchase of the property No.U-12, Gali No.1, Arvind Mohalla, Ghonda has not been examined. No evidence has been produced as to from where this amount of Rs.50,000/- to 52,000/- was taken by the father to be paid to the seller of the house in the name of deceased Joginder Singh. Perusing the evidence of PW-8 Rajesh Kumar, PW-11 Rakesh Kumar, it is apparent that

there is no ring of truth in their testimony in respect of purchase of house by their father in the name of deceased. It has not been disclosed as to how any rights were exercised by the deceased as the owner of said house. Whether the said property got mutated after purchase in the name of the deceased? Whether he was paying the house tax after purchasing the property? Whether the electric connection was in his name or continued in the name of previous owner? Not even a feeble attempt has been made by the prosecution to ascertain and establish these relevant facts. Bald testimonies of the brothers of the deceased in the facts and circumstances is just not sufficient to establish the facts alleged by the prosecution. Number of police officials had been examined but none of them had even attempted to address these questions. In these circumstances even this link that the house No. U-12, Gali No.1, Arvind Mohalla, Ghonda was purchased by the father of the deceased in the name of his deceased son Joginder has been established.

48. The next circumstance as propounded by the prosecution is that this House No. U-12, Gali No.1, Arvind Mohalla, Ghonda (hereinafter referred to as disputed house) was transferred by the deceased in the name of the appellant. Even for this proposition there is no documentary evidence of any type except the bald statements of Rajesh Kumar and Rakesh Kumar, PW-8 and PW-11 respectively. This is not the version of the prosecution that Joginder without executing any documents started claiming that the house would belong to appellant as appellant had got married to him and had been living as his wife, Rather PW-11 had accepted that he had not seen any document regarding the transfer of the house in favour of Shakuntala. If he had not seen any document then what was the basis of alleging that the house was purchased in the name of Joginder Singh and later transferred in the name of appellant has not been explained and established. Such testimonies are utterly unreliable and cannot be the basis of any conviction in the case of circumstantial evidence. The prosecution has not even attempted to ascertain as to when the property was mutated, if mutated, in the record of House Tax department in the name of appellant or what is the basis of alleging that from the deceased the property was got transferred by the appellant in her name. If the property is in the name of appellant or her mother, then it should have been established as to since when the property is in the name of the mother of the

appellant or appellant. If the property is in the name of appellant or his mother, as had been disclosed by the appellant in her complaint against deceased, on the basis of which an FIR was registered against the deceased under section 506 of IPC, then it should have been explained and established as to when the property was mutated or transferred in the name of appellant or her mother. This is not even the case of the prosecution that the property was got transferred from the deceased in the name of the mother of the appellant. This also has not been divulged as to in whose name are the electricity and water connections of the house. Rights in an immovable property cannot be held to be transferred on the basis of bald oral statements of brothers of the deceased. From the record of the trial court it appears that even no investigation has been made by the prosecution regarding these facts which would have established as to who has been the owner at the time of death of the deceased and who was the previous owner of the said property.

49. The other fact alleged by the prosecution to establish that the house was purchased in the name of deceased and was in his possession and that he had been exercising rights as an owner is regarding the construction of two rooms. However, when these two rooms were constructed and who had constructed has not been proved. The prosecution has not examined any independent witness who could depose and prove about the alleged construction of the rooms by Joginder @ Lalla except the bald statements of deceaseds two brothers who have also not deposed as to when these rooms were constructed; from where the money was arranged by the deceased; whether they have any knowledge as to from where the building material was purchased. This is not the version of the witnesses that the rooms were constructed in their presence. Rather the tenor of their testimonies is that they had not been visiting the house of the appellant very frequently. There is no cogent evidence that the rooms were constructed by the deceased Joginder in the disputed house. Consequently even this fact has not been established and the testimonies of PW-8 and PW-11 cannot be relied on to establish these allegations beyond reasonable doubt. It was for the prosecution to have produced the relevant documentary evidence which has not even been investigated and produced nor any cogent reasons given for not producing the same. In the circumstances it cannot be held that the prosecution has established that the

disputed house was purchased by the father of the deceased who was a tailor, in the name of his son which was transferred in the name of appellant and in the house two rooms were constructed by the deceased. The prosecution has not even tried to ascertain these relevant facts from any of the neighbors or any other person in the locality.

50. Two brothers in their statement had rather deposed that the consideration for the said house was paid by their father after collecting the money from different persons. If that was the fact then the prosecution should have endeavored either to examine the father or any of those persons who allegedly had lent the money to the father of the deceased for payment of consideration for purchasing the disputed property. The very basis of the prosecution version is missing and not just a few links in the theory of circumstantial evidence.

51. To substantiate the allegation that the deceased was living with the appellant as her husband, a photocopy of the ration card was produced by the prosecution, which was exhibited as Ex. PW-5/E. The said photocopy of the ration card was given by the one of the brothers of the deceased after his murder and it shows the appellant as the wife of Joginder Singh. In the details of the members besides the name of the deceased Joginder Singh, name of Bunty is also mentioned as son of Joginder Singh, aged 8 years. The alleged ration card was allegedly issued on 17th November, 1992 on the address of 528/5B, Gali No. 6 Vishwas Nagar, Shahdara. According to PW-8, Sh. Rajesh Kumar, the deceased and the appellant had shifted after living with them to a rented house at Bhim Gali, Vishwas Nagar and not to Gali No. 6, House No. 528/5B. Which is this house and how the ration card was obtained at this address, has not even been explained. The deposition of PW-11 Rakesh Kumar is also about the deceased and the appellant having shifted to Bhim Gali in Vishwas Nagar and not to Gali No. 6 as stipulated on the said photocopy of the ration card. The address of the brothers and father of the deceased is 518/1, Karkari Road, Delhi. From the testimonies of the witnesses it is apparent that a separate ration card was not made at the address of his father by the deceased. PW-11 Rakesh Kumar rather deposed that he could not tell about the ration card of his brother. He could not even tell whether the name of the appellant was added in their ration card or if his deceased brother was having a

separate ration card for his family. From the deposition of various witnesses, it has also emerged that the appellant has three children Bunty, Joshi, and Vandana. From their ages it is apparent that two of them were born after the alleged love marriage of appellant with deceased, still two of these children father was not the deceased. One of the logical conclusion from this is that the appellant did not live with the deceased as his wife. Appellant has a husband who is alive and she is not divorced. In the alleged photocopy of the ration card, the name of only child Bunty is shown, whose fathers name is shown as Joginder Singh, the deceased. Admittedly, it is the case of the prosecution that there were no children from the alleged marriage between Joginder Singh and the appellant. If in 1992 when the alleged ration card was made, Bunty was 8 years old, thus he would have been born in the year 1984 subsequent to the year 1980, when as alleged by the prosecution the appellant and deceased started living together as husband and wife, The prosecution witnesses are unable to explain as to why only the name of one of the child from the marriage between Shakuntala and Pritam Singh is shown in the alleged photocopy of the ration card and not of the other children despite appellant allegedly living with the deceased as his wife. This is also not the case of the prosecution that other two children were living somewhere else or with their natural father or with their maternal Grandmother. 52 Since the photocopy of the alleged ration card, is propounded by the prosecution, it was for the prosecution to prove it. Why the record from the ration card office could not be produced, has not been explained by the prosecution. In Subhash Harnarayanji Laddha (supra), a zerox copy of the agreement to sell taken from the Collectorate was produced and this was not established as to at whose instance the zerox copy was filed with the Collector of the District which fact had not been established and in the circumstances, the Supreme Court had given benefit of doubt to the accused and had allowed the appeal and the conviction and sentence were set aside. This also cannot be disputed that a document can be received as evidence under the head of secondary evidence only when the copies made from are compared with the originals or are certified copies or such other documents as enumerated under Section 63 of the Evidence Act. A photocopy of the ration card can be taken as secondary evidence only if it had been compared with the original or had there been any evidence so as to ascertain who had got the photocopy from the original

ration card. The photocopy of alleged ration card was produced by Rajesh Kumar, however, he has not deposed that he had got the photocopy from the original ration card. Police witnesses have also tried to depose that the copy of the ration card was seized from the disputed house of the appellant which is a false testimony by the prosecution as the copy of the alleged ration card was given by the brother Rajesh Kumar, PW 8, on 23rd April, 1996 as proved by Ex PW5/D.

53. The photocopy of the alleged ration card could be proved and would be admissible only in absence of primary evidence. If the original evidence is not produced on account of failure of the party to file the same and it is not proved to be valid the same party is not entitled to introduce secondary evidence of its contents. In Smt. J. Yashoda (supra), the Supreme Court had held that secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or the other of the conditions provided for in Section 65 of the Evidence Act. This is not the case of the prosecution that the original record of the ration department of the year 1992 has been destroyed nor any other ground has been made out for production of this secondary evidence. The argument advanced by the Learned Public Prosecutor that the photocopy is admissible under section 65 (c) of the Evidence Act is reflective of non comprehension of the said provision and ignorance of the record of the Ration Department. Primary evidence regarding the ration card is the record of the Ration Department on the basis of which the Ration Card is issued. Being a certified copy of record of the department, ration card is admissible under section 74 of the Evidence Act. However to prove the photocopy of the ration card, the record from the ration department should have been summoned. No effort was even made to call any official of the ration department regarding the alleged ration card. Perusal of the alleged photocopy also reveals that it does not bear a printed ration card number. Though, the registration number is given however, the printed/endorsed number is missing as also the photograph of the head of the family. In Arti Bhargava (supra), it was held by the Supreme Court that the genuineness of the photocopies cannot be guaranteed unless there is evidence that someone had compared the photocopies with the original or had obtained the photocopies from the original. In The United India Insurance Company Limited (supra), it was held that production of photocopy

of driving license was not sufficient to prove that the driver had a valid license and its genuineness was not admitted.

54. The brothers of the deceased on the one hand had shown their ignorance regarding whether their deceased brother had a separate ration card and whether the name of the appellant was incorporated in their ration card, however, on the other hand, Sh. Rajesh Kumar, PW 8, had produced the alleged photocopy of the ration card after the death of his brother which was also attempted to be projected as seized from the house of the appellant by the prosecution witness. In the circumstances for the foregoing reasons the said ration card Ex. PW- 5/E is not admissible and cannot be relied on to establish that the appellant was married to deceased Joginder Singh and had lived with him as his wife.

55. The prosecution cannot rely on the documents which have been exhibited but which have not been proved as per the requirements of the provisions of Indian Evidence Act by mere marking the photocopies as Exhibits in the absence of originals or any other comparison with the same. Reliance for this can be placed on AIR 1971 SC 1865, Sait Tarajee Khimchand & Others v. Yelamarti Satyam & Others; (2003) 8 SCC 745, Narbada Devi Gupta v. Birendra Kumar Jaiswal & Others and (1995) Rajdhani Law Report 286, Sudhir Engineering Co. v. Nitco Roadways Ltd. In Narbada Devi Gupta (supra), the Supreme Court had held that mere production and marking of a document as exhibit is not enough, as execution of a document has to be proved by admissible evidence. However, where documents produced are admitted by the signatories thereto and thereafter they are marked as exhibits, no further burden to lead additional evidence to prove the writing as its execution survives. In this case, the plaintiff-landlord had averred that signed blank stamp papers were given to the tenant to conduct pending litigation in his absence, however, no evidence was led in proof thereof. The tenant, however, had taken a specific plea of tenancy based on rent receipts signed by the landlord. The landlord had not disputed his signatures nor made any consequential amendment to the plaint nor had taken the plea of fraud and forgery and in such circumstances it was held by the Apex court that no further burden of proof was on defendant to lead evidence to prove writing about the rent receipt and their execution. However in the present case it was for the prosecution to lead

secondary evidence in accordance with the provisions of Evidence Act which has not been done and a photocopy of ration card in the facts and circumstances has not been proved and cannot be considered. In Sait Tarajee Khimchand & Others (supra), referring to Order XIII Rule 4 of the Code of Civil Procedure, it was held that mere marking of a document as an exhibit does not dispense with its proof. A single Judge of this Court in Sudhir Engineering Co. (supra) had held in reference to the Original Side Practice Direction 3/74 that when a document is produced in evidence and is marked as an exhibit, then it is only for identifying the documents and is not its proof, as proof of the contents of the documents must be proved and established by independent evidence.

56. Another factor which discredits the authenticity of the photocopy of the ration card is that the deceased was arrested in a TADA case and he remained incarcerated from 1992 to 1995. If the deceased remained incarcerated from 1992 to 1995, the prosecution has not been able to establish as to how he could have obtained a ration card in November, 1992. Consequently, on the basis of the photocopy of the ration card, it cannot be inferred conclusively that the appellant was married to the deceased Joginder Singh and that they lived as husband and wife.

57. The next document which is relied on by the prosecution is the alleged warranty card of Godrej Refrigerator which was exhibited as Ex. PX. The year of purchase is shown as 1st October, 1995. The said warranty booklet does not bear the signature of the purchaser. Though, it gives the address of the disputed house of the appellant, however, this document cannot be construed as a cogent and sufficient evidence to establish that Joginder Singh was married to the appellant and was living in the disputed house with her. This is not disputed that the deceased Joginder Singh was a TADA detenue from 1992-1995. The warranty card was not seized from the house of the appellant nor the refrigerator on which the said warranty card Ex. PX was issued was recovered or seized or was found in the house of the appellant. PW-5 in his examination on 7th July, 1999 had deposed that the photocopy of the ration card and papers relating to purchase of Godrej Fridge were seized from the house of the accused situated at Arvind Mohalla, Brahmpuri, Delhi and he had prepared a seizure memo Ex. PW 5/D

which was signed by him at Point A. The statement of the said witness is palpably incorrect as according to Ex. PW-5/D. These documents i.e., the photocopy of the ration card and the warranty card were given by Rajesh Kumar, which is also apparent from Ex. PW-5/D. The observation of the Sessions Judge that this was on account of a slip of tongue cannot be accepted in the facts and circumstances. This is rather reflective of the manipulation done by the prosecution authority in the facts and circumstances. This is not the case of the prosecution that the refrigerator was purchased by the deceased and kept in the house of the appellant and was disposed of by her. Merely because a document of a product reveals a particular address, does not mean that it shows the rights of the purchaser at the address because the address is not checked by the seller. In this case even this has not been established as to who had filled the warranty card and on what basis the address of the appellant was given for warranty of refrigerator. The least prosecution could have done was to examine seller who had issued the warranty card. In the opinion of this Court this warranty card does not establish any version of the prosecution case.

58. The prosecution version is that the appellant was arrested from the bus terminus, however, who had identified her in a crowded place and how she had been arrested has not been explained satisfactorily. It is also highly improbable that if she was trying to flee from Delhi after allegedly committing the murder of her husband she would not have any bag or luggage or bus ticket or any other document in her possession, which would reflect that she was trying to abscond. The prosecution version is also belied as according to prosecution the search of the appellant at the time of arrest was carried out by ASI Veena Sharma at platform No. 38. However, the testimony of PW-13 Veena Sharma is that on 18th April, 1996, she was working as duty officer at PS Seelampur and constable Sanjeev had brought a Rukka and on the basis of Rukka, an FIR was reflected which was Ex. PW- 13/A. She did not depose that she had carried out the search of the appellant and the articles, as alleged, were recovered from her. This creates a substantial doubt about the version of the prosecution which have not been clarified nor established. In the circumstances it cannot be inferred that the appellant was arrested from the Bus Stand on 23rd April, 1996. The house of the appellant was opened after her alleged arrest from the keys, which were in her

possession, will also not inculpate her in any manner nor will show that she was arrested from the Bus Stand. This is not disputed that the appellant was living in that disputed house. If she was living in the disputed house, it was natural for her to have the keys of the house and from the keys allegedly recovered from her if the house was opened nothing adverse can be inferred against her. The plea of the learned prosecutor that the appellant had stated in her statement that she will examine her children in defense that she was arrested on 19th April, 1996 and she did not examine them proves that she was arrested on 23rd April, 1996. This plea is devoid of any legal force. It was for the prosecution to establish that she was arrested from Bus Stand on 23rd April, 1996. The lady police official who had carried out her search at the Bus Stand and article were recovered from her denied the version of the prosecution. Rather other police witnesses and prosecution witnesses have deposed about the alleged recoveries made on 19th April, 1996 from the house of the deceased even before the disclosure statement was recorded on 23rd April, 1996. These testimonies which demolish the prosecution case could not be ignored on the premise that they were slip of tongue and not very material. This Court on consideration of the entirety of the evidence find the version of the prosecution about the arrest of the appellant from the Bus Stand unreliable and it cannot be held to be established on account of not examining her children by the appellant. Burden to prove was on the prosecution and the burden of the prosecution does not shift. The argument of the learned prosecutor cannot be accepted in the facts and circumstances.

59. Another link propounded by the prosecution is the alleged illicit relations between the different persons with Shakuntala when Joginder was in jail in a TADA case from 1992 to 1995. However, the testimony of PW-8 and PW-11 are contradictory in this regard, as PW-8 had deposed that he had visited his brother Joginder when he was in jail whereas PW-11 had deposed that he had never visited the brother in jail. This is not the case of the prosecution that brothers of the deceased came to know about the illicit relations of the appellant from his brother. What is the basis of knowledge of the two brothers of the deceased about the illicit relations of the appellant and with whom has not been divulged In any case, on the bald statements of PW-8 and PW- 11, it cannot be inferred that the appellant had developed illicit relations with Nasiruddin and other persons. PW 11 who is the

star witness of the prosecution has categorically alleged that the appellant was having illicit relationships with many persons including Israr the co-accused. However, the said witness has not even disclosed as to what is the basis of his deposition that the appellant had developed illicit relations with number of persons. This is not the version of the said witness that he had seen her in a compromising position with any of the person. If that be so, merely deposing that she had developed illicit relations with number of persons rather reflects the falsity of the deposition of the prosecutions star witness. Who are the other persons has not been even disclosed. Where they were living has not been disclosed. Who had seen appellant and other person in compromising position and doing such acts or indulging in such behavior which would give reasonable apprehension of illicit relations among them, has been left to the imagination and surmises and conjecture. This cannot be the case of the prosecution that whatever is deposed by the brothers of the deceased who was TADA detenue cannot be impeached and has to be accepted as truth without any corroboration. In this case even the facts have not been disclosed and deposed and what is divulged is the opinion and that too without any basis. Such testimonies cannot be held to be reliable for any purpose.

60. Also on the basis of disclosure statement of the appellant about these facts, it cannot be held that they have been established. The observations of the Session Court in this regard are based on no evidence hence it cannot be held that this link has been established. Similarly, the allegation that another co-accused Israr @ Bachchan @ Bhure and the appellant had developed illicit relations cannot be accepted merely on the basis of disclosure statement of the appellant. On the basis of the alleged disclosure statement, nothing was recovered by the prosecution, which could have established illicit relations between the appellant and Nasiruddin and Israr. Even this has not been established that Israr was staying in the disputed house as a tenant. Where Nasiruddin was staying has not been divulged and explained. This is no more res integra that a confession made by an accused person while he is in custody must be excluded from evidence and that it can be only admissible if it is conformity with the conditions prescribed by Section 27 of the Evidence Act. The various requirements of the Section can be summed up as follows:-

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

(2) The fact must have been discovered.

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

accuseds own act.

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

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

(6) The discovery of a fact in consequence of information received from an accused in custody must be deposed to. (7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible.

61. As observed in Pulukuri Kotayya and Ors. v. King-Emperor, AIR (34) 1947 PC 67 that it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law. Merely on the basis of disclosure statement of the appellant, it could not be held that there were illicit relations between the appellant and the accused Nasiruddin and accused Israr. In any case, accused Israr on the same evidence as in the case of the appellant has already been acquitted and even no petition seeking leave to appeal has been filed against the judgment acquitting Israr.

62. The learned prosecutor had relied on the photocopy of the complaint which was given by the brother of the deceased to the police authorities after identification of the body of the deceased implicating the appellant and other in case he does not come back after four or five days.

63. If the deceased was indeed living in the disputed house with the appellant, even after threatening her, he would not have left the house after telling her that he would come back after some time. This rather negates the version of the prosecution that the deceased was living in the house of the appellant as her husband. This is also not the case of the prosecution that the deceased was turned out by the appellant. The deposition of the star witness of the prosecution Pw 11 brother of the deceased about the frequent quarrels between the appellant and the deceased are also uncorroborated. Though relative witnesses are not to be treated as untruthful witnesses, however, if from their testimonies, it is apparent that they are trying to shift or camouflage the real fact then their testimonies need to be viewed with caution and corroboration of the same is required. No witness has been examined or the fact established in any manner to show that the appellant had been living with the deceased as his wife and that there had been quarrels between them. Though, this witness has deposed that after the quarrel with the appellant, the deceased used to live sometimes in the house of his aunt, however, which aunt, has not been disclosed nor any aunt of the deceased has been examined to establish the same. The said star witness of the prosecution PW-11 has also relied on the alleged photocopy of the written complaint by the deceased, Ex. PY addressed to PS Vivek Vihar, District Magistrate about the threat to his life from Appellant, Brahmodevi, Joshi, Bunty and Nasiruddin. Original of which was allegedly kept by him and photocopy of which were given by the deceased to his father and the brother. Photocopy of this alleged complaint has not been proved and reliance can be placed for the reasons which have been enumerated regarding proof of the alleged photocopy of the alleged ration card. In any case it has not been established that the writing on the alleged complaint is of the deceased. Though the brothers have orally stated that it was in the handwriting of the deceased, however, their testimonies are unreliable and in the circumstances, handwriting and signatures of the deceased ought to have been established by comparing them with the admitted handwriting and signature of the deceased. The deceased was a TADA detenue and his admitted signature and handwriting must be available in the record of the TADA case.

64. Even in the alleged complaint to the SHO Vivek Vihar, the deceased did not disclose that the disputed property was purchased by his father from the funds

raised by him and given to him in his name. the version given is that the appellant was living since 1985 at House B-20, Bramhpuri, Gali No.4 as his wife. The alleged complaint to the police stipulates that he did not know that his alleged wife Shakuntala Devi was already married. It was not disclosed that as to how the alleged disputed house was transferred by the deceased in her name. Rather the allegation was made against the mother of Shakuntala Devi, the appellant that she supplies the girl and the cases regarding supply of the girl are pending against his mother-in-law. Perusal of Ex. PY, the alleged photocopy does not have any date under the alleged signatures of Sh.Joginder Singh. On the left hand side, date is written in English and 25th November, 1995 is mentioned, underneath which the word Saturday is also written. The alleged signatures of Sh.Rakesh and Rajesh appear to be of 17th April, 1976. Why the brother had signed on 17th April, 1996 when the complaint had already been given on 25th November, 1995 goes without explanation. Though the alleged photocopy shows the endorsement of police station Seelampur, however, none of the police witness have identified or certified that the endorsement on the photocopy is that of the concerned police station. In the circumstances, on the basis of Ex. PY, the veracity and authenticity of which is doubtful, the inculpability of the appellant cannot be inferred.

65. In order to falsify the statement of the appellant under Section- 313 of the Crl. Procedure Code that she did not know Sh. Joginder Singh, the prosecution has relied on an FIR dated 7th February, 1996, recorded on the complaint of the appellant detailing that Joginder Singh had threatened her to give the property papers of the disputed property which was in the name of her mother by putting a revolver on her head leading to registration of FIR under Section 506 of IPC. Having relations with a person and living with him as his wife after marriage is substantially different than knowing a person. The entire case of the prosecution is that the appellant was the wife of the deceased and if a question has been put to her whether she knew him and if it has been answered by her in that context that she does not know him, it cannot be construed against her nor it can be held that her statement is not correct. In the circumstances on the basis of the FIR filed by the appellant, her statement u/s 313 of Cr.P.C cannot be impeached by the prosecution. The prosecution version is not established merely by demonstrating that the appellant knew the deceased. It was incumbent upon the prosecution to

establish that there was love marriage between the deceased and the appellant and they co-habited as husband and wife from 1980 till 1992 when the deceased was incarcerated in case of TADA.

66. PW-3 HC Sukhbir Singh in his deposition stated that on 18th April, 1996 that no lady maxi was deposited by SI M.A.Khan, but it was instead deposited on 19th April, 1996 along with printed angocha (towel) and two electrical wires. The said witness denied that whenever SHO needed the pulandas, they were handed over to him and that they were tampered with. PW-7 SI Mukesh Kumar the draftsman rather deposed that when he reached at the spot of disputed property of the appellant, main door was lying open and all the rooms and kitchen was open. At that time, he admitted that he had not shown Miani (Parchhatti) in the site plan prepared by him and had also not shown any point where any maxi piece or wires were recovered. Even PW-5 Constable, Sanjiv Kumar had deposed in his cross-examination that case property was seized in his absence and he did not know the total length of the electric wire, which was wrapped around the gunny bag having the dead body. He also admitted that he did not disclose that maxi piece was in torned condition or any portion was missing. Recoveries of a piece of maxi and wire also appears to be very doubtful. The piece of maxi was allegedly kept in the middle of interfloor room to be discovered by anyone without any effort. If the appellant had used the maxi to tie around the neck of the deceased, then why she had to tear a portion of it and to keep it in her room defy logic. It is not that the piece of maxi which was discovered allegedly pursuant to the disclosure statement did not have blood on it. But on comparison with the blood of the deceased the blood on the maxi did not match. In any case as already held by this Court it has not been established that the recovery was made pursuant to disclosure statement as the disclosure statement was made on 23rd April, 1996 whereas the witnesses Pw 11 and Pw 15 have deposed that the recoveries were made on 19th April, 1996. Date of recovery as given by these witness could not be ignored on the ground that it was slip of tongue. This in any case creates a substantial doubt about the version of the prosecution. The photograph taken by the prosecution regarding the piece of maxi when it was recovered speaks volume about the doubt in the prosecution version. The photograph which is as under shows that the torn maxi piece has been kept in the middle of interfloor which does not have any door

and no effort seems to have been made even to conceal and camouflage it in any manner. On the basis of entire testimonies and the facts and circumstances, it rather appears that the alleged piece has been planted.

67. The testimony of PW-11 that he had left the deceased at the house of the appellant on 17th April, 1996 despite knowing that there had been a quarrel and threats to his life is highly suspicious. Even after leaving him on 17th April, 1996 and the deceased categorically telling him that he would come back by the evening, not enquiring about him till 19th April, 1996 also casts a doubt about the credibility of the testimony of PW-11. The various inherent contradictions and the fact that PW-11 is the brother, in the present facts and circumstances and on account of various circumstances enumerated hereinabove, the testimony of the last seen witness appears to be unreliable so as to inculpate the appellant. The circumstances as propounded by the prosecution no doubt creates suspicion against the accused/appellant, but suspicion by itself, howsoever strong it may be is not sufficient to take the place of proof and warrants a finding of guilt of the accused. Reliance for these can be placed on State of Punjab v. Bhajan Singh, (1975) 4 SCC 472; Mousam Singha Roy v. State of West Bengal (2003) 12 SCC 377, relying on Sarvan Singh Ratan Singh v. State of Punjab, AIR 1957 SC 637 where it was held that there may be element of truth in the version of the prosecution against the accused and considering as whole the prosecution story may be true; but between "may be true" and "must be true" there is inevitably a long distance to travel and the whole of this distance must be covered by the prosecution by legal, reliable and unimpeachable evidence before the accused can be convicted. The Supreme Court had also held that a degree of agony and frustration may be caused to the families of the victim by the fact that a heinous crime may go unpunished, but then the law does not permit the courts to punish the accused on the basis of moral conviction or on suspicion alone. The burden of proof in criminal trial never shifts and it is always the burden of the prosecution to prove its case beyond reasonable doubt on the basis of the acceptable evidence.

68. The Sessions Court has dealt with the major discrepancies in the statement of PW-5 and PW-15 as a slip of tongue. Perusal of the testimonies of these witnesses where they have categorically made statements which are not

inconsonance with the version of the prosecution cannot be construed as a slip of tongue. In any case, if they were allegedly a slip of tongue leading to some ambiguity, it was for the prosecution to re-examine them and get it clarified. PW-5 categorically deposed that alleged photocopy of the ration card and the warrantee cards were seized from the appellants house which is contrary to the prosecution record. This cannot be construed as a slip of tongue rather it reflects the unreliability of the version of PW-5, similarly the deposition of PW-15 SI M.A.Khan deposing that the piece of maxi and electric wire were recovered on 18th April, 1996 and had been deposited in Malkhana cannot be justified on the ground of a slip of tongue. These discrepancies which have been ignored by the trial court as mere slip of tongue rather they go to the root of the matter and destroys very the basis of the version of the prosecution and cannot be permitted in the facts and circumstances. In any case such contradictions or discrepancies are sufficient to create a reasonable doubt in favour of the accused especially when the motive for murder and various important links that the deceased was married to the appellant and they lived as husband and wife and the house was purchased in the name of the deceased and later on transferred in the name of the appellant and that the appellant had developed illicit relations have not been established at all . The discrepancies in the prosecution version by its different witnesses in our opinion cannot be termed to be minor discrepancies of a trivial nature.

69. In the present facts and circumstances whether or not the appellant was prejudiced on account of amendment in the charge after the conclusion of evidence and recording of statement of the appellant under Section 313 of the Criminal Procedure Code. What is to be considered is whether the appellant was aware of the basic ingredients of that offence; the main facts sought to be established against her on account of the change/modification of the charge were explained to her clearly and she got a fair chance to defend herself. The charge as framed against the appellant was that she committed the murder of the deceased Joginder Singh on or before 18th April, 1996 near pond, near approach, road second pushta, Old Village Usmanpur along with Israr, Jaffar and Ashok out of whom Jaffar and Ashok were declared proclaimed offenders. After the statement of the appellant/accused was concluded and the trial was also over the charge was completely modified stipulating that on 17th April, 1996 at about noon time at

House No. U-12, Gali No.1, Arvind Mohalla, Ghonda she committed murder with Israr, Jaffar (absconder) and Ashok (absconder). The plea propounded on behalf of the defendant is that charge was modified with the consent of the counsel for the appellant and the appellant admitted that there was an error in the charge and it need to be amended and that she would not be prejudiced by the same. The order dated 18th August, 2001 passed regarding amendment of the charge and that no prejudice would be caused to her is as under:-

"Present: Addl.PP for the State.

Accused Shakuntala on bail with Shri

Tyagi, Adv.

Accused Israr in JC with Shri S.K.Raizada Adv.

Heard in respect of error in charge framed against the acc.Shakuntala. Both the Addl.PP & Defence counsel

submits that there is error & the error in the charge need to be amended but none of them are prejudiced by the error and none of them want to re-examine any of the witness and also accused do not wish to lead DE. I have also seen the case file. I agree with their submissions that neither the acc. Is prejudiced nor any miscarriage of justice is caused to her. Accordingly charge is amended & as per statement at bar as above regarding re-examination of any witnesses or examination of any DE, the case is fixed for final arguments on 1.9.2001."

70. Perusal of the said order reveals that it had been passed in a mere mechanical manner. The learned Judge has not even discussed as to what would be the impact of modification/amendment of the charge. Though under Section 464 of the Criminal Procedure Code, it is possible for the appellate or revisional Court to convict the accused for an offence for which even no charge is framed, but even in such an eventuality, the Court has to form an opinion that failure of justice would not occasion. In order to judge whether failure of justice would not occasion it would be relevant to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main

facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself. In Willie (William) Slaney (Supra) it was rather held by the Supreme Court that serious defect in the mode of conducting a criminal trial cannot be justified or cured by the consent of the advocate of the accused. In the circumstances, on the basis of the order dated 18th August, 2001 passed by the trial Court on the statement of the counsel for the appellant that no prejudice shall be caused to her, if there is prejudice caused the same could not be held to be that she would not suffer any prejudice. The case of the prosecution till the charge was amended was that she committed the murder on or before 18th April, 1996 near pond, near approach, road second pushta, Old Village Usmanpur. Surprisingly when the statement of the appellant was recorded under Section 313 of the Criminal Procedure Code on 9th August, 1999 on the basis of charge framed on 5th April, 1997 this aspect was not even put to her. After the charge was modified stipulating that she murdered the deceased at her house on 17th April, 1986 along with others the statement of the appellant under Section 313 of the Criminal Procedure Code was not even recorded. Even if it is accepted that no prejudice would have been caused to the appellant on account of amendment in the charge and the appellant had agreed not to lead the defence evidence and the prosecution had also agreed not to lead any further prosecution evidence, in our opinion in the present facts and circumstances it was incumbent upon the prosecution to put the changed circumstances and the allegation against the appellant to her in her statement under Section 313 of the Criminal Procedure Code. Though it had already been put to her that on 17th June, 1996 the deceased came to the house of the appellant with his brother Rakesh, PW-11, and appellant made them sit in front gate at about 12 or 12.30 whereafter Rakesh, however left but it has not been put to her categorically that, that was the last time the deceased was seen alive. It also ought to have been put to the appellant that according to the post mortem report,Ex. PW1/A deceased had died on 17th April, 1996 at about 2 or 2.30 PM which is proximate to the time the deceased was last seen with her. On account of modification of the charge the prosecution ought to have categorically put this to the appellant and not putting this, rather not examining the appellant under Section 313 of the Criminal Procedure Code after amendment of the charge would reflect that the appellant who is an illiterate

woman could not be aware of the basic ingredients of the offence alleged against her on the basis of circumstantial evidence that the deceased was last seen with her at about 12 or 12.30 PM and according to the post mortem report he had died at 2 or 2.30 PM on the same date and the last seen evidence of the deceased is proximate to his death. The law contemplates that main facts sought to be established must be explained to the accused clearly so that he could get a fair chance to defend himself. In the circumstances this Court is of the opinion that after the charge was amended the appellant could not be aware of the basic ingredients of the offence alleged against her and circumstantial evidence on the basis of which she was being convicted and she did not get a fair chance to defend herself. In Willie (William) Slaney (Supra) it was held that in judging the question of prejudice, the fact that absence of charge, or substantial mistake in it, is a serious lacunae which will naturally operate to the benefit of the accused and if there is any reasonable and substantial doubt that she was reasonably likely to have been, misled such an accused would be entitled for benefit. In Ranvir Yadav (Supra) the Supreme Court had held that even in a trial involving the most gruesome and horrifying mass murder examination of an accused under Section 313, is not an empty formality. In that case the accusations against the accused were not specifically put to the accused in his examination under Section 313 of the Criminal Procedure Code and the Supreme Court had set aside the conviction of the accused. In Ajay Singh (Supra) it was held that the questions must be put in such a way so as to enable the accused to know what he has to explain, what are the circumstances which are against him for which the explanation is needed. The whole object of enacting Section 313 of Criminal Procedure Code is that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to give such explanation as he desires to give. Till the charge was amended what was put to her was that she murdered the deceased in connivance with other on 18th April, 1996 near pond and after amendment the allegations against her became that since she was last seen with deceased in her house at 12-12.230 PM and as per the post mortem report he died at about 2-2.30 PM therefore she must have murdered him. In the circumstances, the inevitable inference in the opinion of this Court is that the

appellant was seriously prejudiced in not explaining to her the circumstances after the amendment of the charge of alleged murder allegedly committed by her in the statement under Section 313 of the Criminal Procedure Code. No statement was even recorded after the amendment of the charge after conclusion of the entire trial and in the circumstances it will not be appropriate to convict and sentence her.

71. There are reasons in the fact and circumstances that are weighty and formidable to reject the prosecution version. The arrest of the appellant from the bus station is doubtful. The Sub Inspector who is alleged to have searched her had denied the same as she was only concerned with receiving the rukka and for registering the FIR. Recovery of the alleged keys of her own house from which the house was opened pursuant to alleged disclosure statement will also not inculpate the appellant in any manner. There are contradictions regarding alleged recoveries pursuant to the disclosure statement, in any case mere recoveries are very week evidence specially in the present facts and circumstances so as to inculpate the appellant as basis or motive is completely missing and is based on the prosecutions surmises and conjectures which is without any evidence, alleging that property was purchased by father of the deceased by raising the money in his name. Neither the father, nor any person from whom the alleged money was taken for paying the consideration of the house has been produced nor any documents have been produced to show in any manner that the house was purchased in the name of the deceased. There is no evidence that the deceased married to the appellant in a temple and she lived with him as his wife despite having a husband and three children. The testimony of the brothers, relative witnesses cannot be accepted in the present facts and circumstances in the absence of any cogent deposition even by them as to how they formed an opinion that the appellant was married to the deceased. No documents were produced or even tried to be procured to show that property which was allegedly purchased in the name of the deceased was transferred in the name of the appellant. Rather the FIR 75/96 filed by the appellant against the deceased reveals that the property is not in the name of the appellant but in the name of her mother and if her statement is accepted on the basis of which FIR under Section 506 of the Indian Penal Code was registered against the deceased, it was he who had threatened the appellant to give him the papers of the property which was in the name of her mother. If the property was in

the name of the mother of the appellant, the prosecution should have made endeavours to ascertain the same. There is just no evidence as to in whose name the property was previously and in whose names the property was at the time of alleged murder. Merely on the basis of bald statements of the brothers of the deceased it cannot be inferred conclusively that the prosecution version has been established beyond any reasonable doubt. The motive of the crime, in the facts and circumstances, the prosecution has utterly failed to establish and even the CFSL report does not implicate the appellant as the recoveries are doubtful. Mere alleged recovery of the human blood of group-B without any further specification as blood group-B is very common, in the present facts and circumstances will not implicate the appellant beyond reasonable doubts. Also the alleged recoveries itself are doubted as the brother of the deceased categorically states that the police authorities had gone to the house of the appellant on 19th, April 1996 and made recoveries when she was not present which was also stated by PW-15 that he had deposited the recovered article on 18th April, 1996 in Malkhana. In light of these major contradiction no reliance can be placed on the recoveries as they are very suspicious in nature and cannot be construed to be a mere slip of the tongue. The last seen theory by the brother PW-11 is also unreliable, in the facts and circumstances and on the analysis of the evidence on record in any case merely on the basis of the last seen evidence, the appellant could not be implicated. The prosecution in the circumstances has utterly failed to establish the complete chain of events, as not to leave any reasonable ground being inconsistent with the innocence of the accused. In the totality of the facts and circumstances its not only that some of the important links in the chain of circumstantial evidence are missing but in our opinion the entire chain of events are missing. The trial Courts reliance on such weak evidence which in the present facts and circumstances appears to have been planted, is unsustainable and thus liable to be set aside.

72. Therefore, for the foregoing reasons the abovenoted appeal is allowed and the conviction and sentence of the appellant in the Sessions Case No.125/2000 State v. Shakuntala arising out of FIR No.213/1996 Police Station Seelampur under Section 302/34 and 201/34 IPC is set aside and the appellant is acquitted of the charges against her. The bail bond of the appellant pursuant to order dated 22nd May, 2009 in Crl.M No.919/2003 is discharged and sureties given on her behalf

are also released. Appellant shall be free unless required in some other case. Copy of this order be also sent to the concerned authorities.