

Jaffar @ Raju Vs. State

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Court : Delhi

Decided On : May-08-2013

Judge : Sunita Gupta

Appellant : Jaffar @ Raju

Respondent : State

Advocate for Pet/Ap. : Mr. S.B. Dandapani, Ms. Ritu Gauba, Mr. K.M.Khan

Judgement :

\$~ * IN THE HIGH COURT OF DELHI AT NEW DELHI + CRL.A.1057/2010 JAFFAR @ RAJU Through: Appellant Mr. S.B. Dandapani, Advocate along with the appellant (in custody) versus STATE Through: Respondent Ms. Ritu Gauba, APP Ct. Mahesh, 2379 AND + CRL.A.736/2010 SAJID ALI @ MONI Through: Appellant Mr. K.M.Khan, Advocate along with the appellant (in custody) versus STATE Through: % Respondent Ms. Ritu Gauba, APP Ct. Ashok, 2531 Date of Decision : May 08, 2013 CORAM: HON'BLE MS. JUSTICE REVA KHETRAPAL HONBLE MS. JUSTICE SUNITA GUPTA JUDGMENT : SUNITA GUPTA, J.

1. These appeals have been preferred under Section 374(2) of Criminal Procedure Code, 1973 against the judgment and order of conviction dated 9th March, 2010, vide which the appellant Jaffar @ Raju and Sajid Ali @ Moni were convicted while co-accused Shahnawaz was acquitted. Vide order dated 11th March, 2010 both the appellants were sentenced to undergo rigorous imprisonment for life for

offence under Section 302 r/w Section 120-B of Indian Penal Code, 1860 and fine of Rs.3000/- in default of payment of fine to undergo simple imprisonment for a period of three months.

2. Background facts in nutshell are as follows:- 3. On the intervening night of 28/29th January, 2004, HC Bhagwat Prasad (PW

28) posted at PCR Control Room received a call at 10 p.m. that one lady was murdered near Kabari Market, Dilshad Colony. He reduced the same in writing and flashed the same to NE Control Room. On receipt of this information through wireless operator, ASI Badloo Singh (PW

15) recorded the information vide DD No.30A Ex.PW15/A which was assigned to SI Sanjay Kumar (PW27) for necessary action. SI Sanjay Kumar along with Constable Ved Pal (PW

14) reached at the place of occurrence and found blood spilled in quite a volume near Kabristan. Public persons informed them that injured had been removed to GTB Hospital by PCR. As such after leaving Constable Ved Pal at the spot, SI Sanjay Kumar proceeded to GTB Hospital. He collected the MLC of victim on which there was mention of cut throat injury and brought dead. Duty constable Mukesh(PW10) of GTB Hospital handed over a sealed pullanda sealed with the seal of GTB Hospital along with MLC No. C208/2004 to SI Sanjay Kumar. No eye witness was available at the hospital. As such SI Sanjay Kumar went to place of occurrence. No eye witness met him at the spot. He came to know the name of deceased as Mumtaz @ Mamta, W/o Mohd. Jaffar. A rukka was prepared and after making endorsement Ex. PW 27/B on DD No. 30A, he got the case registered through Constable Ved Pal. Investigation of the case was assigned to Inspector Bakshi Ram (PW

29) who also reached the spot. Crime team along with photographer reached at the spot. After getting the case registered, Constable Vedpal came back to the spot and handed over the original rukka and copy of FIR to the Investigating Officer. Photographs of the place of occurrence were taken by PW 13. Constable Padam Singh. IO lifted some blood from near the kuredan, some blood stained

earth and earth control which were kept in plastic container and sealed in separate pullandas and were taken into possession. Five slips on which telephone numbers were written were recovered from the dead body which were also taken into possession. Investigating Officer contacted on the telephone numbers written on the slip and out of which one was traced as Ashok Kumar. Call was made to Ashok Kumar from the spot and he was asked to come to GTB Hospital. Ashok Kumar came to the Hospital and identified the deceased as one Mamta @ Mumtaz, resident of New Seemapuri. He further informed that he met the lady Mumtaz in the house of one Shravini at her residence bearing Flat No. 805, Shantideep Apartments, Shalimar Garden, Shahibabad, Distt. UP adjoining Seema Puri. Thereafter, a police official along with Constable Ashok went to the house of Shravini who gave the whereabouts of Mamta @ Mumtaz that she was the wife of one Jaffar, resident of E-44/A-116 Jhuggi, New Seemapuri. She further informed him that Mamta was her friend and she used to tell her that one three storied constructed house at New Seema Puri bearing No. E-352 was in her name and her husband Jaffar @ Raju wanted that house to be transferred in his name. Shrawani took to the residence of Mumtaz where Shahida, mother of Mumtaz and Monohara, sister of Mumtaz met them. Husband of Mumtaz was not present in the house. Shahida and Monohara informed that they had been waiting for Mumtaz since morning and there was quarrel between Mumtaz and her husband and her husband had also left the house. Shahida and Monohara were taken to GTB Hospital where they identified the dead body of Mumtaz.

4. During the course of the investigation, it was revealed that Mumtaz was already married having two children from her first husband and after leaving her first husband, due to certain differences, she married accused Jaffar and had been living with him for the last six - seven years. It was further revealed that Jaffar was also having affair with one lady Kajal. Jaffar was harassing Mumtaz on two counts. First that property should be transferred in his name and second his relationship with Kajal. Search was made for Jaffar but he could not be found. Post mortem on the dead body was conducted by Dr. N.K. Aggarwal (PW

16) who gave his report Ex.PW 16/A. After getting the post mortem conducted, the dead body was handed over to her mother.

5. It is further the case of the prosecution that during investigation, it was revealed that accused Jaffar was found sitting at STD Booth, R.K. Telecoms, J-20, New Seema Puri on the day of incident making telephone calls from the telephone booth. As such, inquiries were made from owner of the STD booth, namely, Rajan (PW

20) who verified that Jaffar @ Raju had made telephone calls from his STD Booth on 28th January, 2004 between 2:00 pm to 6:00 pm and collected call details. On verification of the call details, it was revealed that the accused Jaffar had made telephone calls to his sister at Meerut at Phone No. 951212525550 on the day of incident. Efforts were made to trace Jaffar but he could not be made available.

6. On 31st January, 2004, on the basis of secret information regarding presence of accused Jaffar in New Seemapuri, a raiding party comprising of Inspector Bakshi Ram, SI Sanjay Kumar, SI Kiran Pal, ASI Shahid Khan, Const. Rajiv, Const. Rohtash, Const. Sukhbir and Const. Virender was organised. Sister of deceased Monohara was also called and accused Jaffar was found present in a gali at a little distance from his residence. He was arrested on the identification of Monohara vide arrest memo Ex. PW 19/C. On interrogation, the accused confessed the guilt and made a disclosure statement Ex. PW 19/E which revealed that there were some disputes between accused with his wife on account of transfer of property bearing No. 352, New Seema Puri, Delhi. At the instance of accused Jaffar, documents of the said property, Ex. P2 along with currency notes of Rs.5,000/- Ex.P1 were recovered from almirah in the house of the accused which were seized vide memo Ex.PW 19/F. It was revealed that on 27th January, 2004, accused Jaffar had hatched a conspiracy with Sajid @ Moni and Shahnawaz at F-45, Old Seema Puri and also made a plan to commit murder of deceased Mumtaz. Accused also disclosed that it was agreed between them that one floor of the house shall be given to Sajid @ Moni and Rs.2500/- cash would be given to Shahnawaz with assurance to provide him some regular business in the same vicinity. He also disclosed that Rs.5000/- which were recovered at his instance were arranged by his sister living in Meerut to execute the said conspiracy. On the day of incident, i.e., on 28th January, 2004 he had telephoned his sister from R.K. Telecom from STD Booth asking her to make arrangement of Rs.5000/- as Id was

approaching and he needed money. Thereafter his sister arranged Rs.5,000/- and sent to him. Accused Jaffar led Inspector Bakshi Ram and other police officials to the house of the sister of Sajid @ Moni at Pilakua Village, U.P where Sajid @ Moni was found and arrested at the pointing out of accused Jaffar vide arrest memo Ex.PW 19/G1. Accused Sajid made a disclosure statement Ex. PW 19/H and at his instance one ladies purse of deceased Mumtaz was recovered from the house of sister of Sajid which contained a mobile phone, cosmetic items and one mini album of photographs related to the family of the deceased which were seized vide recovery memo Ex.PW 19/J collectively Ex.P3 and mobile phone of deceased Ex.P4. Thereafter, in pursuance to the disclosure statement of accused Jaffar and Sajid, police party went to village Hazipur of the accused Shahnawaz, who was found present in the house. He was apprehended at the pointing out of accused Mohd. Jaffar. He was arrested vide memo Ex. PW 19/K1. He was interrogated. During interrogation accused Shahnawaz made a disclosure statement Ex.PW 19/L that the weapon of offence, i.e., Hathora (hammer) has been thrown by him near the spot in Seema Puri, Delhi and he could get the same recovered. Accused Sajid Ali took police officials to Shahid Nagar, Ghaziabad, UP to the house of his friend Imran from where he got one chhuri Ex. P5 recovered which was seized vide seizure memo Ex. PW19/M2. Thereafter, accused Sajid Ali took them to F-45, Old Seema Puri and got recovered bloodstained clothes, i.e., Pant Ex. P6, Shirt Ex. P7 and Jacket Ex. P8 and said clothes were taken into possession vide seizure memo Ex.PW-19/M3. All the three accused pointed out the room at Old Seema Puri where they hatched a conspiracy to kill Mumtaz. Pointing out Memo Ex.PW 19/N1 was prepared. Thereafter, they reached Kabristan near the place of occurrence from where hammer was recovered at the instance of accused Shahnawaz from under the garbage. The hammer, Ex. P9 was taken into possession vide seizure memo PW-19/P. Subsequently, all the exhibits duly sealed were sent to FSL, Rohini, Delhi from where report Ex. PW 29/A and serological report Ex. PW 29/B were received. Test Identification Parade of lady purse was conducted by PW-30 Shri Pratap S. Malik, MM, Delhi. After completing investigation, charge sheet was submitted against all the accused persons for offences under Section 302/120B/34 IPC.

7. After hearing arguments on charge, charges for offence under Section 120B IPC was framed against all the accused. Charge for offence u/s 302 IPC with the aid of Section 120B IPC was framed against accused Jaffar whereas charge for offence u/s 302/34 IPC was framed against accused Sajid Ali @ Moni and Shehnawaz. A separate charge for the offence under Section 27 of the Arms Act was framed against the accused Sajid @ Moni. All the accused pleaded not guilty to the charges and claimed trial.

8. In order to substantiate its case, prosecution examined 30 witnesses, viz, Sh. Ashok Kumar, S/o Sh. Patmal (PW1), Ms. Sahida, W/o Abdul Hakim (mother of the deceased)(PW2), Monohara (sister of deceased)(PW3), Ms. Shravini @ Seema Mukherji (PW4), Nasir Sheikh S/o Abushadikh Sheikh (PW5), Ms. Babbo, W/o Uttam Kumar (PW6), Mr. Uttam Kumar, S/o Mahavir Singh (PW7), Mustaq, S/o Sheikh Nizam @ Ramu (PW8), H.C. Yashbir Singh (PW9), Const. Mukesh (PW10), Const. Dinesh (PW11), Const. Virender Singh (PW12), Const. Padam Singh (PW13), H.C.Ved Pal Singh (PW14), ASI Badloo Singh(PW15), Dr. N.K.Aggarwal Professor and Head, Department of Forensic Medicine, UCMS, GTB Hospital (PW16), SI Udey Kumar (PW17), Ms. Anwara w/o Sahid Ali (PW18), SI Kiran Pal (PW19), Rajan S/o Satya Prakash (PW20), H.C.Rohtash (PW21), H.C.Naresh Pal (PW22), H.C.Kirender Singh (PW23), Dr. Parmeshwar Ram, CMO GTB Hospital (PW24), SI Mukesh Jain (PW25), Inspector Y.K.Tyal (PW26), SI Sanjay Kumar (PW27), H.C.Bhagwat Prasad (PW28), Inspector Bakshi Ram (PW29) and Sh. Pratap S.Malik, POLC, KKD (PW30).

9. All the incriminating evidence was put to all the accused while recording their statement under Section 313 Cr.P.C. Accused Jaffar in his statement admitted that Mumtaz @ Mamta was married to one Nizam and out of the said wed lock she had two children. She was left by her husband and thereafter she got married with him. He, however, denied that he was having any extra marital relation with girl, namely, Kajal with whom he was living at Old Seema Puri or that he used to quarrel with his wife on account of this extra marital relationship and used to threaten her to kill. He admitted that prior to death of Mumtaz, she had purchased a house bearing No. 352, New Seema Puri in her name. However, according to him the said property was purchased by him. He denied that he wanted to get the

said property transferred in her name and that on that account, he used to quarrel with her. He has denied the rest of the prosecution case. According to him, on 28th January, 2004, he had sent Mumtaz to Laxmi Nagar to purchase clothes on the eve of Id but she did not return till 3:00 am. Thereafter, two police officials came to his house and took him to police station. On reaching police station, he was informed by the SHO regarding the factum of committing murder of his wife Mumtaz. He admitted that on 28 th January, 2004, between 2:00 pm to 6:30 pm, he made telephone calls from STD Booth, R.K. Telecom run by PW-20 Rajan and that he made a telephone call to his sister at Meerut. He denied having asked his sister to arrange the amount of Rs.5000/-. He also denied making any disclosure statement or getting recovery effected. According to him, he was detained in the police station on 28th January, 2004 and had been kept there till 1st February, 2004. His signatures were obtained on many blank papers at police station. He pleaded his innocence and alleged false implication in the case. Accused Sajid Ali and Shahnawaz also denied the case of prosecution. They also pleaded innocence and claimed that they have been falsely implicated in the case. None of the accused preferred to lead defence evidence.

10. The Trial Court on considering all the evidence on record found the appellant Jaffar and Sajid Ali guilty, however, co-accused Shahnawaz was given benefit of doubt and order of acquittal was recorded.

11. We have heard Mr. S.B. Dandapani, counsel for the appellant Jaffar @ Raju, Mr. K.M.M Khan, counsel for the appellant Sajid Ali and Ms. Ritu Gauba, Addl. Public Prosecutor for State at great length and have perused the record.

12. Learned counsel for the appellant Jaffar has raised the following contentions:a) The learned trial Judge has not appreciated the evidence brought on record in proper perspective. Keeping in view the parameters laid down by this Court and Apex Court in various authorities relating to restriction of conviction on circumstantial evidence the judgment is unsustainable in law. b) Accused has been convicted under Section 302 IPC with the aid of Section 120B IPC but conspiracy has to be proved as a substantive evidence. No evidence has been led by the prosecution to prove that the appellant was present at the spot or that he

entered into any conspiracy with co-accused to kill Mumtaz. Reliance was placed on Sherimon Vs. State of Kerala, (2011) 10 SCC 768.S. Arul Raja Vs. State of Tamilnadu, (2010) 8 SCC 233.c) According to the prosecution, the appellant had a motive to do away with the deceased inasmuch as the appellant wanted to get property transferred in his name. However the deceased had no financial capacity to purchase the property. The prosecution witnesses could not give any cogent evidence regarding source of income of the deceased. In fact the property was purchased in the name of deceased but consideration was paid by the appellant. PW-7 Uttam Kumar himself admitted that at the time of registration of the document, the appellant had accompanied the deceased and if he at all wanted to get the property in his name, same would have been done at that juncture itself. The other motive alleged by the prosecution is that the appellant had extra-marital relation with a lady Kajal. However, Kajal was never contacted during the entire investigation of the case nor examined as a witness. No evidence has come on record to prove even this fact. As such, motive to commit crime is not proved. When a case is based on circumstantial evidence, prosecution is duty bound to prove motive to commit crime which it has failed to prove. Reliance was placed on Surinder Pal Jain Vs. Delhi Administration, 1993 Supp (3) SCC 681. Moreover material witnesses are only the relatives of the deceased and for that reason they have implicated the appellant falsely in this case. d) The circumstances pertaining to recovery of documents of the property or Rs.5,000/- is not to be given any credence inasmuch as the deceased was residing in the same house along with the appellant. The documents pertaining to the property were lying in the house, that being so, if the recovery was effected from the house of the accused that is not an incriminating piece of evidence against him. Similarly recovery of Rs.5,000/- does not connect him with the crime.

13. Learned counsel for the appellant Sajid Ali raised following submissions:a) The appellant was arrested on the basis of disclosure statement of co-accused Jaffar. However the appellant cannot be implicated on the basis of disclosure statement of co-accused unless there is other incriminating evidence against him. Reliance was placed on Harichand Kurmi Vs. State of Bihar, AIR 196.SCC 1184.b) There is a doubt about the place from where the appellant was arrested inasmuch as, in the arrest memo, in column (5), the appellant was shown to be arrested from P.S.

Seemapuri. However later on white fluid was put and Pilakua, U.P was shown as the place of arrest. c) Some recovery is alleged to have been effected at the instance of this appellant. However, the material witnesses i.e. sister of the appellant and Imran were not examined by the prosecution. Moreover the recovery is in contravention of the provisions of Section 166 of the Code of Criminal Procedure. There is no independent witness of recovery despite the fact that there was no dearth of independent witnesses.

14. Learned counsel for the respondent combated the aforesaid proponents. Learned counsel has advanced the following submissions: a) There is no manipulation in the arrest memo. By inadvertence, in column No.(4) P.S. Seemapuri was written. However necessary correction was made. The mere fact that the material witnesses are relatives of the deceased is no ground to discard their testimony inasmuch as the relation witnesses have no motive to falsely implicate the appellants in this case and to let the real accused go scot free. Reliance was placed on Mookkoiah & Anr. Vs. State, (2013) 1 SCC (Cri) 848. b) There is no reason to doubt the discovery statement leading to recovery. The independent witnesses were reluctant to join the proceedings. Moreover there is no rule of law that testimony of police officials cannot be relied upon. In fact they have to be given same credence as that of the testimony of the public witnesses. Reference was made to Karamjit Singh Vs. State (Delhi Administration), (2003) 5 SCC 29. and C.Ronald and Another Vs. Union Territory of Andaman & Nicobar Islands, (2012) 1 SCC(Crl) 596. As regards compliance of Section 166 Cr.P.C., reliance was placed on Ronny @ Ronald James Alwaris Etc. vs. State of Maharashtra, 1998 Cri LJ 1638. c) The report of serological department opining the same blood group on the weapon of offence and the clothes of the deceased as that of accused are strong piece of incriminating evidence to connect the appellant with the crime. d) Mere fact that sister of accused Sajid Ali or Imran were not examined by Prosecution is of no consequence as it is the prerogative of Prosecution to examine any witness. Reliance was placed on Banti @ Guddu Vs. State of M.P, 2004 SCC (Crl.) 294; State of Uttar Pradesh Vs. Krishna Master and Others, (2011) 1 SCC (Crl.) 381. e) The appellant Jaffar had strong motive to enter into a conspiracy with co-accused to commit murder of deceased inasmuch as he wanted to get the property transferred in his name. Moreover he was having extra

marital relation with Kajal. Furthermore, motive is such a factor which is known to the assassin and no one else knows what gave birth to such evil thoughts in his mind. Reliance was placed on *Munish Mubani vs. State of Haryana*, (2013) 1 SCC (Cri.) 52. f) The trial court has kept itself alive to the parameters of circumstances and there can be no trace of doubt that all the circumstances cumulatively prove the guilt of the accused beyond reasonable doubt.

15. There is no dispute that deceased Mumtaz met a homicidal death inasmuch as, post mortem on the dead body of Mumtaz was conducted by Dr. N.K. Aggarwal who on examination found following injuries on her person: a) Cut throat wound of 10x4 cm present over the middle front of neck exposing the structures of neck. Wound was 4.5 cm below the chin in the middle and 7.5 cm above the supra sternal notch on the right side. It was 4.5 cm below the left angle of mandible and left angle of the wound is 3.5 cm downwards and inwards to left angle of mandible. The wound has cut the major vessels of the neck and muscles both sides. The wound has also cut the trachea in the middle front. b) Lacerated stab wound of 2x2.2 x 6 cm present 2.5 cm above the suprasternal notch. The wound has gone downwards, outwards and backwards for a distance of 6cm and ended into the muscles of neck. The margins of wound was partially lacerated. c) Abrasion of 1x 0.5 cm present above outer angle of right eye-brow. d) Abrasion of 1.2x0.6 cm just below and outer to outer angle of right eye. Doctor gave his post-mortem report Ex. PW16/A opining that the cause of death in the instant case was cut throat injury. Injury No. 1 was sufficient to cause death in ordinary course of nature.

16. The crucial question for consideration was who was responsible for this homicidal death. There is no eye witness to the incident. The entire case of prosecution revolves around the evidence which is circumstantial in nature. The circumstances relied upon by the prosecution as regards accused Jaffar is: a) Conspiracy hatched by him with co-accused Sajid Ali and Shahnawaz to commit murder of Mumtaz; b) Motive to commit murder of Mumtaz as he wanted property purchased by Mamta to be transferred in his name and also because he was having relation with a lady named Kajal; c) Recovery of Rs.5,000/- and papers pertaining to property at his instance.

17. As regards accused Sajid Ali, the circumstances relied upon by the prosecution are: a) Disclosure statement made by the co-accused Jaffar b) Recovery of knife at his instance. c) Recovery of his blood stained clothes and d) Recovery of purse containing mobile and other articles belonging to the deceased.

18. As is evincible, the entire case rests on circumstantial evidence. Before we analyse and appreciate the circumstances that have weighed with the trial Court, we think it apposite to refer to certain authorities pertaining to delineation of cases that hinge on circumstantial evidence.

19. In *Sharad Birdhichand Sarda v. State of Maharashtra*, AIR 198.SC 1622, a three-Judge Bench has laid down five golden principles which constitute the "panchsheel" in respect of a case based on circumstantial evidence. Referring to the decision in *Shivaji Sahebrao Bobade v. State of Maharashtra*, AIR 197.SC 2622.(1973) 2 SCC 793, it was opined that it is a primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions. Thereafter, the Bench proceeded to lay down that 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; that the circumstances should be of a conclusive nature and tendency; that they should exclude every possible hypothesis except the one to be proved; and that 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.

20. In *Padala Veera Reddy v. State of Andhra Pradesh and Ors.*, 1989 Supp (2) SCC 70.:

1991. SCC (Cri) 407, Honble Supreme Court held that when a case rests upon circumstantial evidence, the following tests must be satisfied: a) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; b) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; c) the circumstances, taken cumulatively,

should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and d) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. The similar view has been reiterated in *Ramreddy Rajesh Khanna Reddy and Anr. v. State of A.P.*, (2006) 10 SCC 172.

21. In *Balwinder Singh v. State of Punjab*, AIR 199.SC 607, it has been laid down that the circumstances from which the conclusion of guilt is to be drawn should be fully proved and those circumstances must be conclusive in nature to connect the accused with the crime. All the links in the chain of events must be established beyond reasonable doubt and the established circumstances should be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. In a case based on circumstantial evidence, the Court has to be on its guard to avoid the danger of allowing suspicion to take the place of legal proof and has to be watchful to avoid the danger of being swayed by emotional considerations, however strong they may be, to take the place of proof.

22. In *Harishchandra Ladaku Thange v. State of Maharashtra*, AIR 200.SC 2957, while dealing with the validity of inferences to be drawn from circumstantial evidence, it has been emphasised that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person and further the circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances.

23. In *State of U.P. v. Ashok Kumar Srivastava*, AIR 199.SCW 64.: AIR 199.SC 840, emphasis has been laid that it is the duty of the Court to take care while evaluating circumstantial evidence. If the evidence adduced by the prosecution is reasonably capable of two inferences, the one in favour of the accused must be

accepted. That apart, the circumstances relied upon must be established and the cumulative effect of the established facts must lead to a singular hypothesis that the accused is guilty.

24. In *Ram Singh v. Sonia and Ors.*, AIR 2000 SC 1218, while referring to the settled proof pertaining to circumstantial evidence, Supreme Court reiterated the principles about the caution to be kept in mind by Court. It has been stated therein that in a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The Court must satisfy itself that various circumstances in the chain of events have been established clearly and such completed chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. It has also been indicated that when the important link goes, the chain of circumstances gets snapped and the other circumstances cannot in any manner, establish the guilt of the accused beyond all reasonable doubts.

25. In *Ujagar Singh v. State of Punjab*, (2007) 13 SCC 90, after referring to the aforesaid principles pertaining to the evaluation of circumstantial evidence, Supreme Court stated that it must nonetheless be emphasised that whether a chain is complete or not would depend on the facts of each case emanating from the evidence and no universal yardstick should ever be attempted.

26. Adverting to the case in hand, it is the submission of the learned counsel for the appellant that since the case rests on circumstantial evidence, as such motive assumes significance. Reliance was placed on *Surinder Pal Jain* (supra) where it was held that in a case based on circumstantial evidence, motive assumes pertinent significance as existence of the motive is an enlightening factor in the process of presumptive reasoning in such a case. The absence of motive, however, puts the court on its guard to scrutinize the circumstances more carefully to ensure that suspicion and conjecture do not take place of legal proof.

27. On the other hand, learned Additional Public Prosecutor relied upon *Manish Kumar* (supra), where also it was held by the Supreme Court that in a case of circumstantial evidence motive assumes great significance and importance. Absence of motive would put the court on its guard and cause it to scrutinize each

piece of evidence very closely in order to ensure that suspicion, emotion or conjecture do not take place of proof. However, evidence regarding existence of motive which operates in the mind of an assassin is very often not within reach of others. Motive may not even be known to victim. Motive may be known to assassin and no one else may know what gave birth to such evil thought in his mind. If evidence on record suggests sufficient/necessary motive to commit a crime, it may be conceived that accused has committed the same.

28. In the instant case, according to the prosecution, motive to eliminate the deceased on the part of accused Jaffar was two fold: a) She was having property bearing No. E-352, New Seemapuri, Delhi in her name which accused Jaffar wanted to get transferred in his name. b) 29. He was having extra marital relation with one Kajal. In order to prove these facts, the prosecution has basically relied upon the testimony of PW-2 Shahida, mother of deceased, PW-3 Monohara, sister of deceased, PW-4, Shrawani, friend of deceased, PW-5, Nasir Sheikh, brother in law of deceased, PW-6 Babbo, neighbour and wife of PW-7 Uttam Kumar, PW-7 Uttam Kumar, property dealer, PW-8 Mushtiaq, son of the deceased and PW-18 Anwara, sister of deceased.

30. It is the submission of the learned counsel for the appellant that all the witnesses are closely related to the deceased and as such no reliance can be placed on their testimony. Per contra, learned Additional Public Prosecutor relied upon Mukkiah (supra), where it was held by the Supreme Court that merely because a witness is related, his evidence cannot be eschewed. It is the duty of court to analyse evidence of such witness cautiously and scrutinise the same with other corroborative evidence.

31. It is true that relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the Court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

32. In Dalip Singh and others v. The State of Punjab, AIR 195.SC 364. it has been laid down as under : A witness is normally to be considered independent unless he

or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.

33. The above decision has since been followed in *Guli Chand and others v. State of Rajasthan*, 1974 (3) SCC 69. in which *Vadivelu Thevar v. State of Madras*, AIR 195.SC 61. was also relied upon.

34. Hon'ble Supreme Court also observed that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by the Hon'ble Supreme Court in *Dalip Singh (supra)* in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J, it was observed : We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of Hon'ble Supreme Court endeavoured to dispel in *Rameshwar v. State of Rajasthan*, AIR 195.SC 54. We find, however, that it unfortunately still persists, if not in the judgements of the Courts, at any rate in the arguments of counsel.

35. In *Masalti and others v. State of U.P.*, AIR 196.SC 202.Hon'ble Supreme Court observed : But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses... The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much (such?) evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.

36. In *Jayabalan vs. U.T of Pondicherry*, (2010) 1 SCC 199.Hon'ble Apex Court had occasion to consider whether the evidence of interested witnesses can be relied upon. The Court took the view that a pedantic approach cannot be applied while dealing with the evidence of an interested witness. Such evidence cannot be ignored or thrown out solely because it comes from a person closely related to the victim. The Court held as under :23. We are of the considered view that in cases where the Court is called upon to deal with the evidence of the interested witnesses, the approach of the Court, while appreciating the evidence of such witnesses must not be pedantic. The Court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the Court must not be suspicious of such evidence. The primary endeavour of the Court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim.

37. Similar view was taken by the Hon'ble Apex Court in *Ram Bharosey vs. State of U.P.*, AIR 201.SC 917.where the Court stated the dictum of law that a close relative of the deceased does not, per se, become an interested witness. An interested witness is one who is interested in securing the conviction of a person out of vengeance or enmity or due to disputes and deposes before the Court only with that intention and not to further the cause of justice. The law relating to appreciation of evidence of an interested witness is well settled, according to which, the version of an interested witness cannot be thrown overboard, but has to be examined carefully before accepting the same. In the light of the above

judgements, it is clear that the statements of the alleged interested witnesses can be safely relied upon by the Court in support of the prosecution's story. But this needs to be done with care and to ensure that the administration of criminal justice is not undermined by the persons, who are closely related to the deceased. When their statements find corroboration by other witnesses, expert evidence and the circumstances of the case clearly depict completion of the chain of evidence pointing out to the guilt of the accused, then we see no reason why the statement of so called interested witnesses cannot be relied upon by the Court.

38. Substantially similar view was taken in Dharnidhar and others Vs. State of UP, 2010 VIII AD(SC) 50, where it was observed that there is no hard and fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the Court, it will always depend upon the facts and circumstances of a given case.

39. Adverting to the facts of the case in hand, at the outset, the appellants have challenged the capacity of the deceased to purchase the property from her source and it is the case of appellant Jaffar that although the property was purchased in the name of Mumtaz, but he got the same purchased. Therefore, it is to be seen whether the deceased was financially sound to purchase the property in her name. PW-2 Shahida is the mother of the deceased and according to her, deceased used to do the work of export at Tilak Nagar. PW-3 Monohara, sister of the deceased did not know as to what work Mamta was doing. According to PW-4 Shrawani, deceased was a housewife. PW-5 Nasir Sheikh deposed that Mamta was doing stitching work. PW-6 Babbo also deposed that Mamta told her that she was doing work of export although she herself was not aware what she was doing. PW-7 Uttam Kumar could not say as to what was the source of income of Mumtaz. The testimony of PW-18 Anwara is also silent regarding the source of income of deceased. Furthermore, according to PW-5 Nasir Sheikh and PW-18 Anwara, the property was purchased by Mumtaz out of her own money and contribution made by her mother, however, mother of Shahida has nowhere deposed that she made any contribution for purchase of the property by her. In fact, she could not even say when the property was purchased by her daughter and from whom and for what consideration. Under the circumstances, no cogent evidence has come on

record to prove the source of income of the deceased by which the property was purchased in her name.

40. It is further the case of prosecution that the appellant Jaffar wanted to get the property transferred in his name and, therefore, he entered into conspiracy with his co-accused to eliminate deceased so that property could be transferred in his name.

41. PW-2 Shahida has deposed that Jaffar used to beat her daughter as he wanted to get the property transferred in his name. PW-4 Shrawani has deposed that she was informed by Mumtaz that she was having two-three properties in her name, i.e., two residential houses and one shop and that the appellant wanted to get the property transferred in his name. According to PW-18 Anwara, one month prior to her murder, deceased purchased a house and when appellant came to know about this fact, he started quarrelling with her and he wanted to get the house transferred in his name. Testimony of this witness reflects that till the time property was purchased by the deceased, he was not aware as to in whose name it was purchased and it was only later on when he came to know that the property was purchased by the deceased in her own name that he started quarrelling with her. However, testimony of this witness does not find corroboration from PW-7 Uttam Kumar, who deposed that about three four months before the incident, deceased purchased a three storied house bearing E-352, New Seema Puri. After 1 months of registration of said property Mumtaz told him that she wanted the house to be transferred in the name of her mother and her children. However, he could not say as to why she wanted the house in the name of her mother and children. Since the witness did not supported the case of prosecution he was cross-examined by learned Additional Public Prosecutor and in cross-examination, he denied the suggestion that husband of deceased Mumtaz, namely, Jaffar wanted the house to be transferred in his name or that Mumtaz refused to transfer the house in his name. Although, he deposed that once he came to know that there had been a quarrel between the deceased and Jaffar, however, he could not give reasons of that quarrel. In cross- examination by the counsel for the accused Jaffar, he deposed that at the time of purchase of the property, her husband had accompanied her to the office of Sub-Registrar at Seelampur. The total sale

consideration in respect of the property was paid by the deceased Mumtaz in the company of her husband. If that is so, then question of Jaffar coming to know about the registration of property in the name of Mumtaz does not arise. Moreover, if he wanted the property to be purchased in his name, at least he could have done it jointly with Mumtaz even at that time. As regards, PW-8 Mushtiaq, son of the deceased from her first marriage, he was aged about 12 years and although he deposed that Jaffar used to beat and harass his mother since the time she purchased the house as he wanted the same to be transferred in his name, however, in cross-examination, he deposed that he used to reside with his grandmother and father Nizam whereas deceased used to reside with accused Jaffar. That being so, since the witness was not residing with the deceased how could he say that the appellant was beating and harassing the deceased on account of getting the property transferred in his name. The result of the aforesaid discussion is that no cogent evidence has come on record either to prove the source of income of the deceased or to prove that she was harassed or that the appellant wanted the house to be transferred in his name or used to harass the deceased on that account or in order to achieve that goal, he entered into conspiracy to get the deceased murdered.

42. The other motive alleged by the prosecution is that appellant was having extra marital relation with one Kajal. Here, it may be mentioned that testimony of PW-3 Shrawani, PW-4 Monohara, PW-6 Babbo, PW-7 Uttam Kumar is completely silent regarding appellant having any extra-marital relation with another woman. Although PW-5 Nasir Sheikh deposed that a lady Kajal used to stay along with Jaffar, however, there are no allegations of harassment to the deceased on that account. In fact, according to this witness, Kajal was residing with the accused Jaffar in the same house where deceased was residing and all the daily expenses were being borne by Mumtaz and Kajal and there are no allegations that there was any ill will between the deceased and the appellant on that score. According to PW-18 Anwara, appellant was having extra-marital relation with Kajal and used to reside at Old Seema Puri. There used to be quarrel between the deceased and the appellant on that account. Keeping in view, the fact that testimony of most of the witnesses is completely silent regarding appellant having any relation with any other woman and according to Nasir Sheikh, she was living in the same house

with the deceased but there was no quarrel on that account and during entire investigation, prosecution did not try to contact Kajal to ascertain whether she was having any relationship with appellant, it is not proved beyond reasonable doubt that the appellant was having extra marital relation with other women or that relations between the husband and wife were strained to such an extent that on this account he would get her killed.

43. The result of the aforesaid discussion is that the prosecution has failed to prove either that the appellant wanted to get the property bearing No. E-352, New Seemapuri, Delhi transferred in his name or that he was having any relation with another woman, namely, Kajal or that there used to be any quarrel on that account. It has come on record that no complaint was ever made either by the deceased or any of her relations to any authority on that account. As such motive to commit crime is not proved.

44. Another incriminating piece of evidence alleged by the prosecution against accused Jaffar is the recovery of property papers and Rs.5000/- from his house. It is not in dispute that the deceased was residing in the same house with the accused. PW-2 Shahida, mother of the deceased has deposed that papers pertaining to the plot were kept in the almirah of the house where the accused was residing with deceased. That being so, if the papers pertaining to the house were recovered from the almirah of the same house where the deceased and the accused were living together, it cannot be said that it is an incriminating piece of evidence against the accused because the papers ought to be lying at the house of the deceased and accused where they were living together. Same is the case with recovery of Rs.5,000/-. As such the recovery of property papers and the money does not connect the appellant with the crime.

45. The next piece of evidence relied upon by the prosecution against the appellant is the conspiracy hatched by him with coaccused to commit murder of deceased. As held in Sherimon (supra), to prove charge of conspiracy, Prosecution has to establish that there was an agreement between accused to do or cause to be done an illegal act or an act which is not illegal by illegal means. There must be meeting of minds resulting in an ultimate decision taken by the

conspirators regarding the commission of crime. Further as observed in John Pandian (supra) gist of offence of conspiracy is an agreement to break the law. Conspiracy can be inferred even by circumstances giving rise to a conclusive or irresistible inference of an agreement between two or more persons to commit an offence. The circumstances in a case, when taken together on the face value should indicate the meeting of minds between the conspirators for an intended object of committing an illegal act or an act which is not illegal by illegal means. It has to be shown that all means adopted and illegal acts done were in furtherance of object of conspiracy hatched. A systematic role played by each accused should be highlighted. Each circumstance should be proved beyond reasonable doubt and such circumstances proved, must form a chain of events from which the only irresistible conclusion of guilt of accused can be safely drawn and no other hypothesis is possible.

46. In State Vs. Nalini, (1999) 5 SCC 253.it was held:583(1)- Offence of criminal conspiracy is an exception to the general law where intention alone does not constitute crime. It is intention to commit crime and joining hands with persons having the same intention. Not only the intention but there has to be agreement to carry out the object of the intention, which is an offence. The question for consideration in a case is did all the accused have the intention and did they agree that the crime be committed. It would not be enough for the offence to conspiracy when some of the accused merely entertained a wish, howsoever, horrendous it may be, that offence be committed.

47. Conspiracy has to be proved by leading substantive evidence. In the instant case, no substantive evidence has come on record to prove that any conspiracy was hatched between the accused Jaffar and the co-accused except the disclosure statement made by him. There is no substantive evidence to show meeting of minds to form criminal conspiracy. Although, the prosecution tried to prove that in pursuance to the conspiracy the accused made telephone call from the STD booth of PW-20 Rajan on 28th January, 2004 between 2:00 pm to 6:30 pm to his sister and at that time, Jaffar had demanded a sum of Rs.5,000/- from her for the purpose of Id. Although PW-20 admitted that Jaffar had made a telephone call from his booth on 28 th January, 2004 and appellant himself

admitted in his statement recorded under Section 313 Cr.P.C having made a telephone call to his sister but he denied that he demanded any money from his sister and PW-20 Rajan also did not support the case of prosecution and as such was cross-examined by learned Public Prosecutor and in his cross-examination, he denied that Jaffar had talked to his sister and demanded Rs.5,000/- from her for festival of Id. Sister of the appellant Jaffar has not been examined by prosecution in order to substantiate the fact that Rs.5,000/- was demanded from her or was paid by her to the accused. Similarly, no other evidence has come on record as to whom house not F-45, Old Seema Puri belongs where the alleged conspiracy was entered into or any meeting took place, whether in pursuance to that conspiracy any knife was purchased by Shahid Ali or hammer by Shahnawaz. Under the circumstances, Prosecution has failed to prove factum of conspiracy. A perusal of trial court judgment goes to show that both the appellants were convicted for offence under Section 302 IPC with the aid of Section 120B IPC but there is nothing to show on what basis this finding was arrived at.

48. Under the circumstances, prosecution has failed to prove the guilt of appellant Jaffar @ Raju by clinching evidence beyond shadow of doubt, as such appellant is entitled to benefit of doubt.

49. As regards appellant-Sajid Ali @ Moni, the first piece of incriminating evidence relied upon by prosecution is the disclosure statement of co-accused Jaffar regarding conspiracy as between him, Shahnawaj and this appellant.

50. The question about the part which a confession made by a co-accused person can play in a criminal trial has been determined in the light of provisions of Section 30 of Evidence Act, 1872. Section 30 provides that when more persons than one are being tried jointly for the same offence, and a confession made by one of such person affecting himself and some other of such person is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession. The basis on which this provision is founded is that if a person makes a confession implicating himself that may suggest that maker of the confession is speaking the truth. Normally, if a statement made by an accused person is found to be voluntary and it amounts to

a confession in the sense it implicates the maker, it is not likely that the maker would implicate himself untruly and so, Section 30 provides that such a confession may be taken into consideration against a coaccused who is being tried along with the maker of the confession. There is no doubt that a confession made voluntarily by an accused person can be used against the maker of the confession though, as a matter of prudence courts generally require some corroboration to the said confession. It has been consistently held by judicial decisions that a confession cannot be treated as evidence which is substantive evidence against a co-accused person. In dealing with a criminal case where the prosecution relies upon the confession of one accused person against another accused person, the proper approach to adopt is to consider the other evidence against such an accused person and if the said evidence appears to be satisfactory and the court is inclined to hold that the said evidence may sustain the charge framed against the said accused person, the Court turns to the confession with a view to assure itself that the conclusion which it is inclined to draw from other evidence is right.

51. In *Haricharan Kurmi* (supra), it was observed that as a result of the provisions contained in Section 30, the confession has no doubt to be regarded as amounting to evidence in a general way, because whatever is considered by the Court is evidence; circumstances which are considered by the Court as well as probabilities do amount to evidence in that generic sense. Thus, though confession may be regarded as evidence in that generic sense because of the provisions of Section 30, the fact remains that it is not evidence as defined by Section 3 of Act. The result, therefore, is that in dealing with a case against an accused person, the Court cannot start with the confession of co-accused persons; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on such other evidence. The same view has been expressed in *Kasmira Singh versus State of M.P.* 1952 SCR 526. where the decision of the Privy Council in *Bhuboni Sahu Vs. The King*, AIR 194.PC 25. has been cited with approval.

52. Considering the evidence from this point of view, we must first decide whether the evidence other than the disclosure statement of coaccused-Zaffar is satisfactory and tends to prove the prosecution case. It is only if the said evidence is treated as sufficient to hold the charge proved against the appellant that an occasion may arise to seek for an assurance for our conclusion from the said disclosure statement. Thus considered, it is to be seen whether the recovery of bloodstained clothes, weapon of offence and the bag belonging to the deceased has been duly proved by the prosecution or not.

53. As per prosecution case, after appellant-Jaffar was arrested he made a disclosure statement and led the police party to Pilaqua, UP. Sajid @ Moni was apprehended from the house of his sister on pointing out of accused Jaffar. He was arrested vide arrest memo Exhibit PW19/G1 and he made a disclosure statement Exhibit PW19/H and disclosed that he had kept the knife used in the offence at the house of his friend and he had kept the bloodstained clothes at Old Seema Puri and that he can get recovered purse of deceased from the house of his sister. Thereupon accused Sajid @ Moni got recovered a hand bag (purse) containing one mobile phone and some cosmetic items, which were taken into possession vide memo Exhibit PW19/J.

Thereafter accused took them to Shahid Nagar at the house of his friend and got recovered the knife which was used in the commission of offence. Then, he took the police party to Old Seema Puri at his rented room at first floor and got recovered bloodstained clothes i.e. pant, shirt and jacket. The admissibility of the statement made by the accused to the police is challenged on twin grounds i.e. (i) factually no statement was made, (ii) the statement made was inadmissible in evidence.

54. Section 25 of the Evidence Act mandates that no confession made to a police officer shall be proved as against a person accused of an offence. Similarly Section 26 of the Evidence Act provides that confession by the accused person while in custody of police cannot be proved against him. However, to the aforesaid rule of Sections 25 to 26 of the Evidence Act, there is an exception carved out by Section 27 the Evidence Act providing that when any fact is deposed to as

discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. Section 27 is a proviso to Sections 25 and 26. Such statements are generally termed as disclosure statements leading to the discovery of facts which are presumably in the exclusive knowledge of the maker. Section 27 appears to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and accordingly it can be safely allowed to be given in evidence.

55. As the Section is alleged to be frequently misused by the police, the courts are required to be vigilant about its application. The court must ensure the credibility of evidence by police because this provision is vulnerable to abuse. It does not, however, mean that any statement made in terms of the aforesaid section should be seen with suspicion and it can be discarded only on the ground that it was made to a police officer during investigation. The court has to be cautious that no effort is made by the prosecution to make out a statement of accused with a simple case of recovery as a case of discovery of fact in order to attract the provisions of Section 27 the Evidence Act.

56. The position of law in relation to Section 27 of the Evidence Act was elaborately made clear by Sir John Beaumont in *Pulukuri Kottaya and Ors. v. Emperor*, AIR (1947) PC 87. wherein it was held as under: Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police Officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information

admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused. Mr. Megaw, for the Crown has argued that in such a case the 'fact discovered' is the physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity would all be admissible. If this be the effect of section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the Legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. On normal principles of construction their Lordships think that the proviso to S.26, added by S.27, should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A' these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.

57. Recovery of bag containing mobile and other articles and weapon of offence has been challenged by the learned counsel for the appellant to be in violation of the provisions of Section 100(4), Sections 166(3) and 166(4) Cr.P.C.

58. It will be useful to read both sub-sections (4) and (5) of Section 100 Cr.P.C here:

100. (4) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.(5) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the court as a witness of the search unless specially summoned by it.

59. These provisions require the officer making the search under Chapter VII to call two or more respectable inhabitants of the locality in which the place to be searched is situate and if no such inhabitant of that locality is willing to be a witness to the search, then to call persons of any other locality to attend and witness the search and for that purpose, the officer making the search is empowered to issue an order in writing to them or any of them so to do. The search has to be made in their presence and a list of things seized in the course of such search and of the places in which the things are found, is required to be prepared by the said officer and signed by such witnesses. It further provides that unless specially summoned by the court, such persons/witness in the search need not attend the court. In the present cases, purse containing mobile and other articles belonging to the deceased is alleged to be recovered from the house of sister of accused Sajid Ali. It is admitted by almost all the police officials that the house of sister of the accused was situated in a residential area. Public persons were available on road and in their houses. PW12 Constable Virender Singh and

PW19 SI Kiran Pal admitted that no respectable of the area was asked to join the raid. PW21 HC Rohtash also admitted that neither Pradhan of the village nor mohalla persons were asked to join proceedings. PW 2. Inspector Bakshi Ram, however, tried to improve by deposing that public persons were asked to join but none agreed. Fact remains that there is no independent witness either to the apprehension of arrest or at the time of recovery. So much so, that although recovery is alleged to be effected from the house of sister of accused, sister of accused and one more person were present at the house, however, they are not witness either to arrest of the accused or to the recovery of bag. Learned APP, however, relied upon Karamjit Singh(supra) and C. Ronald (supra) for contending that there is no reason to disbelieve the testimony of police official and testimony of police officials should be treated in the same manner as testimony of any other witness. Their testimony can be relied upon without being corroborated by the testimony of independent witnesses. There is no quarrel with this proposition of law. However, it will all depend upon the facts and circumstances of each case and no principle of general application can be laid down. A perusal of arrest and seizure memo goes to show that although the police party comprised of many police officials but witnesses to the recovery are only SI Sanjay Kumar and SI Kiranpal and it was prepared by Insp. Bakshi Ram. It was admitted by Insp. Bakshi Ram that the number of the house of the sister of the accused was not mentioned and as such he could not tell the particulars of the house from where the accused was arrested. This fact assumes significance because in column 5 of arrest memo Exhibit PW-19/G1 the place of arrest of accused Sajid Ali has been shown as PS Seemapuri and later on white fluid was applied over there and Pilaqua Ghaziabad was written. This fact has been admitted by Inspector Bakshi Ram and he also admitted that while making this correction he did not put his initial on the same. No explanation has been given. The witness also could not tell the name of the sister of the accused. Moreover, according to him the place where bag was recovered was visible from the gate where he was standing. Under the circumstances keeping in view the fact that there was no dearth of independent witnesses despite that no effort was made to join them in the proceedings, furthermore the house was not in exclusive possession of the accused, but as per version of the prosecution itself it belonged to the sister of the accused, however, neither the

name of the sister nor the number of the house is forthcoming nor she was made a witness of recovery, as such the recovery becomes doubtful.

60. Recovery is also challenged to be in violation of Section 166 of the Code. Section 166 of the Code of Criminal Procedure, 1973 deals with searches made outside limits of the police station concerned. Sub-section (1) thereof enables the officer-in-charge of the police station to require the services of the officer-in-charge of another police station. It is optional on the former to do so. Sub-Section 2 enjoins a duty on the latter to conduct the search on being so requisitioned by the former. Sub-Section (3) & (4) are relevant. These two sub-sections read as thus:(3) Whenever there is reason to believe that the delay occasioned by requiring an officer in charge of another police station to cause a search to be made under subsection (1) might result in evidence of the commission of an offence being concealed or destroyed, it shall be lawful for an officer in charge of a police station or a police officer making any investigation under this Chapter to search, or cause to be searched, any place in the limits of another police station in accordance with the provisions of section 165, as if such place were within the limits of his own police station. (4) Any officer conducting a search under subsection (3) shall forthwith send notice of the search to the officer in charge of the police station within the limits of which such place is situate, and shall also send with such notice a copy of the list (if any) prepared under section 100, and shall also send to the nearest Magistrate empowered to take cognizance of the offence, copies of the records referred to in sub-sections (1) and (3) of section 165.

61. It is evident from Sub-Section (3) that it permits an investigating officer belonging to one police station to search any place falling within the limits of another police station in certain exigencies. One such exigency is when there is possibility of delay in requisitioning the services of police personnel of another police station and such delay could defeat the purpose of the search, then the Investigating Officer can proceed to that place and conduct the raid or search by himself. However, when he does so he is obliged to conform to certain requirements as prescribed in sub-Section (4). One is that he shall inform the officer-in-charge of the other police station and send him a copy of list prepared by him in the search. Second is that he should send the copies of the search

documents to the nearest Magistrate who has the competence to take cognizance of the offence. The aforesaid requirements have not been complied with in respect of the search made by the investigating officers in the instant case. It has been admitted by the police officials that before going to the house of sister of the accused Sajid Ali at Pilaqua, UP neither local police was contacted nor even after recovery of bag any information was given to concerned police station. Ronny @ Ronald (supra) relied upon by learned APP is quite distinguishable inasmuch as in that case, it had come on record that Investigating Officer had written two letters to the police station in which articles were seized. Mere non-production of those letters was held not to be fatal as presumption under Section 114 of Evidence Act would arise that official acts would be deemed to have been performed regularly. However, in the instant case, it is not even the case of prosecution that either information was given to local police station before raiding the house of sister of accused or after seizure of bag containing various articles. As such, there is noncompliance of provisions of Section 166 Cr. P.C. The failure to comply with the directions regulating searches casts doubt upon bona fides of the alleged recovery on the basis of the disclosure, though its failure to comply with the directions of Section 166 Cr.P.C. does not vitiate the trial. Similar view was taken in Narender, Usha, Satish and Navin vs. State, 2009 Cri LJ 361. and Ramesh vs. State of the NCT of Delhi, Crl.A.No.177/2011 decided by this Court on 09.10.2012.

62. Moreover, it was admitted by the prosecution witnesses that such purses are easily available in the market. Test identification proceeding of the purse was got conducted and as proceedings conducted by PW-30 Shri per TIP P.S.Malik, learned Metropolitan Magistrate, sister of deceased Smt. Monohara had identified the purse correctly as belonging to the deceased. It is however pertinent to note that Monohara was examined as PW-3 but the testimony of this witness is confined to identification of dead body of deceased in GTB hospital. She nowhere deposed that she ever came to the Court or was asked to join any TIP proceedings or that she identified the purse belonging to her deceased sister. In fact, even the purse was not shown to her during her deposition. Furthermore, the purse was allegedly containing mobile phone belonging to the deceased however no attempt was made by the prosecution to connect the mobile phone with the deceased. Under the circumstances, the recovery of the bag belonging to the

deceased containing mobile phone and other items is not duly proved.

63. Coming to the recovery of weapon of offence, it is the case of the prosecution that weapon of offence was recovered from the house of Imran, friend of Sajid from Shahid Nagar, U.P.

64. Here again, there is no independent witness of recovery. PW- 19 SI Karan Pal and PW-27 SI Sanjay Kumar are alleged to be witnesses of recovery of weapon of offence at the instance of accused Sajid. However, PW-27 SI Sanjay Kumar could not say from which place of the house accused got knife recovered. In fact he went on stating that he himself did not see accused taking out churi. In pursuance to a question put to him as how he knows that churi was recovered. He replied that when accused was brought in that house at that time he was not having any churi and when he came out he was having churi. In regard to this recovery also the seizure memo does not mention the house number from where recovery is alleged to have been effected. The house is not in exclusive possession of the accused but it belongs to his friend Imran, however, Imran was not joined in the proceedings and is not a witness to the seizure memo. Under the circumstances, at best the accused can be imputed with the knowledge that the knife was lying in that house and not that the knife was used by him in the commission of offence. Banti @ Guddu (supra) and Krishna Master (supra) are not applicable to the facts of the case in hand inasmuch as in both these cases, it was held that Prosecutor is to produce evidence which is in support of prosecution, not against it. If there are many witnesses, Prosecutor may not produce a witness, who according to his information, would not support the prosecution case. Both these authorities do not lay down that prosecution can omit to examine material witnesses during the course of investigation. Sister of Sajid Ali from whose house purse containing various articles allegedly belonging to deceased and Imran from whose house weapon of offence is alleged to have been recovered were very material witnesses but no attempt was made to join them in the investigation.

65. Furthermore, post mortem on the dead body of deceased was conducted by Dr. N.K.Aggarwal. Doctor gave his post-mortem report Exhibit PW16/A opining that the cause of death in the instant case was cut-throat injury. Injury No.1 was

sufficient to cause death in ordinary course of nature. After seizure of the weapon of offence, it was sent to FSL. As per FSL report Exhibit PW29/A all metallic weapon of offence having rusty brownish stains was received. The FSL result nowhere speaks that this metallic weapon of offence was chhuri. Subsequent opinion of doctor was not obtained for confirming whether the injuries were possible by the weapon of offence which was alleged to have been recovered at the instance of this appellant.

66. The other incriminating piece of evidence against accused Sajid is the recovery of bloodstained clothes from house not F-45, Old Seema Puri, U.P. No concrete evidence has come on record as to whom this house belongs. Some shaky evidence has come that this house was taken on rent by co-accused - Zaffar, however, the landlord of the house was not examined to prove this fact. Moreover, according to PW-19 Inspector Bakshi Ram, the room was found locked. It was opened by accused Sajid Ali after taking key kept under a brick and he got recovered a rexin bag containing bloodstained clothes from the room. After recovery the room was again locked and the key was again kept under brick. Key of the room was not taken into possession by the Police. Further in cross-examination, he contradicted himself by deposing that pant, shirt worn by accused could be easily seen from the door of the room which were hanged by the accused on the hanger affixed in the wall. It seems highly improbable that clothes having blood stains would be retained by the accused and would be hanged on the hanger affixed in the wall.

67. Much emphasis was laid by learned APP for contending that clothes of deceased, weapon of offence, clothes of accused Sajid were sent to FSL. As per report Ex. PW29/A given by Sh. V. Shankar Narayan, Sr. Scientific Assistant (Biology), FSL, blood was detected on the clothes of deceased, weapon of offence and clothes of Sajid Ali. As per report of biology division PW 29/B, gauze cloth piece, blood stained gauze cloth, jacket, salwar, brassier and underwear of deceased were opined to be of human origin and blood group was B. Same opinion was given in regard to weapon of offence and jacket and pant of accused Sajid Ali. Prosecution, however, did not establish what was the blood group of the accused. This blood group B may belong to others as well. In the aforesaid

circumstances, the recovery of bloodstained clothes or the weapon of offence on its own is a circumstance too fragile to bear the burden of appellants conviction for murder.

68. That being so, the disclosure statement of appellant Jaffar may raise a suspicion against accused but it is well settled that suspicion, howsoever grave, must not be allowed to take the place of proof. As held in Haricharan Kurmi (supra), it has been a recognized principle of administration of criminal law in this country for over half a century that the confession of a co-accused cannot be treated as substantive evidence and can be pressed into service only when the court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence. In criminal trial, there is no scope for applying the principle of moral conviction or grave suspicion. In criminal cases where the oral evidence adduced against an accused person is fully unsatisfactory and prosecution seeks to rely on the confession of a coaccused, the presumption of innocence which is the basis of criminal jurisprudence assist the accused and compels the court to render the verdict that the charge is not proved against him and so, he is entitled to benefit of doubt. That is precisely what has happened in these appeals.

69. On the basis of the above discussion, we hold that the prosecution has failed to establish the chain of circumstances which could link the appellant with the crime. In the result, the appeals are allowed and the orders of conviction and sentence passed against the two appellants Jaffar and Sajid Ali are set aside and the accused are ordered to be acquitted giving them benefit of doubt. The appellants shall be released forthwith, if not required to be detained in any other case.

70. The trial court record be sent back forthwith. SUNITA GUPTA, J REVA KHETRAPAL, J May 08, 2013 rs/as/aks

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