THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

DIVISION BENCH : THE HON'BLE MR. JUSTICE ARUP KUMAR GOSWAMI, CHIEF JUSTICE
THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

Crl.A. No.25 of 2017

Appellant : Bimal Subba alias Bijay Subba

versus

Respondent : State of Sikkim

Appeal under Section 374 of the
Code of Criminal Procedure, 1973

Appearance

Mr. N. Rai, Senior Advocate and Mr. Sushant Subba, Legal Aid Counsel for the Appellant.

Dr. (Ms.) Doma T. Bhutia, Public Prosecutor with Mr. S. K. Chettri, Additional Public Prosecutor and Ms. Mukun Dolma Tamang, Assistant Public Prosecutor for the State-Respondent.

Date of Hearing : 09-06-2020 and 11-06-2020

Date of Judgment : 24-06-2020

J U D G M E N T

Meenakshi Madan Rai, J.

1. The appellant was convicted of the offence under Section 302 of the Indian Penal Code, 1860 (for short, "the IPC") by the impugned Judgment dated 31-07-2017, in Sessions Trial Case No.01 of 2015. By an Order on Sentence of the same date, he was to undergo imprisonment for life and to pay a fine of Rs.25,000/- (Rupees twenty-five thousand) only, with a default clause of imprisonment. The period of imprisonment already undergone by him was set off against the ordered imprisonment. Aggrieved, the appellant is before this Court.

2(i). We may briefly advert to the facts of the case. On 05-12-2014, one Shiv Prakash Gupta (P.W.1) of Naya Bazar, West Sikkim, lodged a written report (Exhibit 1), before the Namchi Police Station, South Sikkim, informing therein that on 02-12-2014, Bimal Subba (the appellant), along with two of his friends (one male and one female) had hired the taxi of one Rohit Shah (the victim) of Naya Bazar. Thereafter, the victim went missing from his home. That, on receiving information from the Namchi District Hospital on 05-12-2014 around 3 p.m. that an unidentified body was lying therein, he reached the Hospital and identified the body as that of the victim. Suspecting that the appellant and his two friends had murdered the victim, he lodged the FIR, Exhibit 1.

(ii) Based on such information, Namchi Police Station Case No.149/14, dated 05-12-2014, under Sections 302/34 of the IPC was registered and investigation taken up. Investigation led to the discovery that the appellant after hiring the Alto vehicle went with the victim to South Sikkim to enable the appellant elope with P.W.13. *En route* to her house he did away with the victim with the help of M.O.XX. On completion of investigation, Charge-Sheet came to be submitted against the appellant under Sections 302/382 of the IPC. The learned trial Court framed Charge against the appellant under Section 302 of the IPC to which he entered a plea of "not guilty". To bring home the charge against the appellant, the Prosecution examined 49 witnesses including the Investigating Officer (I.O.), P.W.49 of the case. On closure of evidence, the appellant was

examined under Section 313 of the Code of Criminal Procedure, 1973 (for short, Cr.P.C.), his responses recorded, arguments heard and thereafter, the impugned Judgment and Order on Sentence pronounced.

3(i). Advancing a multipronged argument for the appellant before this Court, learned Senior Counsel contended that the alleged FIR, Exhibit 1, dated 05-12-2014, contains overwriting on various dates mentioned therein, rendering the document suspicious. That, Exhibit 1 makes a mention of a report having been lodged at the Naya Bazar Police Station informing of the missing victim, which however finds no place in the documents filed by the Prosecution, thereby raising doubts of its very existence. That, as Exhibit 46, report lodged by one Indra Lall Gurung on 03-12-2014, pertaining to the incident was first in point of time, hence Exhibit 1 lodged by P.W.1 is the second FIR and is thus hit by the provisions of Section 162 of the Cr.P.C. Exhibit 1 indicates that there were two other people along with the appellant and the victim in the vehicle when they left Jorethang, but no investigation transpired into the role of the other occupants.

(ii) That, the disclosure statement of the appellant (Exhibit 15) under Section 27 of the Indian Evidence Act, 1872 (for short, Evidence Act) on which the Prosecution is relying on is rife with defects, besides being inculpatory and involuntary rendering it inadmissible in evidence. That, P.W.14, the alleged witness to Exhibit 15, under cross-examination has admitted

that he only heard the appellant answering questions put to him, during which, he stated that he had killed the victim and could show the place where he had killed him, establishing the involuntary nature of the statement which ought to be rejected. On this aspect reliance was placed on ***Meghaji Godadji Thakore and Another*** vs. ***The State of Gujarat***[1]. That, the evidence of P.W.14 also leads to the conclusion that Exhibit 15 was recorded after the discovery of the alleged weapon of offence, iron rod, M.O.XX, while the cross-examination of P.W.42, another witness to Exhibit 15, indicates that it was recovered from an open and accessible area being near a village footpath, hence the alleged recovery deserves to be discarded. That, even assuming that the alleged statement of the appellant that he could show the I.O. the place where he had thrown the rod is admissible, the iron rod, M.O.XX, furnished before the Court was devoid of blood stains, which negates the prosecution allegation of the said object being the weapon of offence. Urging that Exhibit 15 is inadmissible in evidence, reliance was placed on ***Pulukuri Kottaya and Others*** vs. ***Emperor***[2], ***Anter Singh*** vs. ***State of Rajasthan***[3] and ***State*** vs. ***Zilla Singh***[4]. That, confession to a police officer is not to be proved as held in ***Narayan Rao*** vs. ***State of Andhra Pradesh***[5].

(iii) That, the request for Post-Mortem examination, Exhibit 43, dated 07-12-2014, records that on 03-12-2014, at about 1550 hours, an unidentified body was found lying with

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[1] 1993 CRI.L.J. 730 (Gujarat)
[2] AIR 1947 PC 67
[3] AIR 2004 SC 2865
[4] 1973 CRI.L.J. 1384 (J&K)
[5] AIR 1957 SC 737

multiple head injuries in the dry field of one Rudra Prasad Siwakoti. Contrarily, Exhibit 41 Inquest Form dated 04-12-2014 and Exhibit 45, the second Inquest Form dated 05-12-2014, both reveal that the dead body was found on 04-12-2014, at around 10.00 hours. That, the anomalies in the documents vitiate the Prosecution case which therefore should be construed in favour of the appellant. That, Exhibits 41 and 45 record that the body was lying in a prone position in a pool of blood oozing out from the head. Considering that the Prosecution case was that the dead body as per Exhibit 43 was recovered on 03-12-2014, i.e., more than twenty-four hours before, this circumstance is a medical impossibility and throws a spanner in the Prosecution case. Attention of this Court was also invited to the evidence of P.W.43, the Doctor who conducted the autopsy on 07-12-2014, at 12 p.m., and who opined in his Report, Exhibit 42, that the death had occurred in less than 24 hours, lending a fresh contradiction to the Prosecution allegation. That, even if the Prosecution case of recovery of the dead body being 03-12-2014 is to be believed, the Post-Mortem was conducted only on 07-12-2014 sans explanation for the delay. It was emphasized that the injuries reflected in Exhibits 41 and 45 do not corroborate the injuries reflected in Exhibit 42. Resultantly, the benefit of the anomalies must go to the appellant. That, P.W.42 was informed by one *Gurung daju* on 03-12-2014 that the dead body of an unknown person was lying in the paddy field, but the said informant was never examined by the Prosecution to establish this aspect of its case. These

contradictions are compounded by the evidence of the I.O., according to whom, the body was recovered from a small forest, while the other witnesses deposed that it was found in the dry field of one Rudra Prasad Siwakoti.

(iv) That, P.W.35, the Scientific Officer in the Biology Division of the Regional Forensic Science Laboratory, Saramsa, was present at the place of occurrence directing collection of samples for analysis. As a Scientific Officer she ought not to have visited the alleged place of occurrence, thus having actively participated in the investigation, she is an interested witness whose evidence cannot be considered. On this aspect, reliance was placed on ***Gholtu Modi and etc.*** vs. ***State of Bihar***[6] wherein it was held that entrustment of investigation to police officer who formed a part of the raiding party and lodged the FIR was improper. That, the hair strands which were collected from the Alto No.SK 01 PA 4083 did not match with that of either the appellant or P.W.13, his girlfriend. The learned Trial Court was in error in concluding that the blood stains found in the wearing apparels of the appellant matched the blood group of the victim, the RFSL report Exhibit 30 being devoid of such finding.

(v) That, the only circumstance that the Prosecution is relying on to link the crime to the appellant is the evidence of P.W.33, the mother of the victim, who claimed to have seen M.O.XX in his possession on 02-12-2014, but being an interested witness, her evidence is not trustworthy. Moreover, if the

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[6] 1986 CRI.L.J. 1031 (Patna)

appellant had the requisite *mens rea* he would likely have concealed the weapon of offence from her. Her evidence that the victim left with the appellant on 02-12-2014 is necessarily to be linked to the evidence of P.W.43 who in Exhibit 42 opined that the death had occurred less than 24 hours, meaning thereby on 06-12-2014. Consequently, the last seen theory is inapplicable, the gap between 02-12-2014, the date on which the victim and the appellant were allegedly seen together by P.W.33 and 06-12-2014, the date of occurrence of the death being too far apart to reach a conclusion that the appellant was the perpetrator of the crime. That, the last seen theory being unsubstantiated the evidence against the appellant is slender and he merits an acquittal. On this aspect, reliance was placed on ***Kora Ghasi*** vs. ***State of Orissa***[7]. Reliance was also placed on ***Kharga Bahadur Pradhan*** vs. ***State of Sikkim***[8] and ***Rambraksh alias Jalim*** vs. ***State of Chhattisgarh***[9] where the appellants were acquitted *inter alia* on this ground.

(vi) That, the delay in forwarding of the FIR to the Magistrate without reasons leads to an inference that the FIR could have been ante dated by the investigating officer. On this count, reliance was placed on ***Hari and Others*** vs. ***State of Rajasthan***[10]. It was further urged that Exhibit 10, purportedly a certified copy of the register showing the log entry of an Alto vehicle bearing registration No.SK 01 PA 4083 is a manufactured document, for the reason that in other entries the description of

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[7] AIR 1983 SC 360
[8] 2015 CRI.L.J. 2519 (Sikkim)
[9] (2016) 12 SCC 251
[10] 2010 CRI.L.J. 308 (Raj)

the vehicle as "Alto" is specific whereas in the entry pertaining to the vehicle in question, the entry is recorded as "A/car". The entries for other vehicles make no mention of the time of entry at the check post, contrary to that of the concerned vehicle M.O.XXVII. That, camera footage relied on by the Prosecution as proof of vehicle entry is inadmissible in evidence being violative of the provisions of Section 65B of the Evidence Act which mandates proper certification of electronic evidence. Assistance on this count was obtained from the ratio in ***Anvar P.V.*** vs. ***P. K. Basheer and Others***[11] where it was held that electronic record produced for inspection of the Court is documentary evidence under Section 3 of the Evidence Act and can be proved only in accordance with the procedure prescribed in Section 65B. That, this ratio was reiterated in ***Sonu alias Amar*** vs. ***State of Haryana***[12].

(vii) That, the Prosecution has also furnished Exhibit 5, which is a copy of the entry made in the register of "Sarita Hotel" where the appellant and his girlfriend P.W.13 allegedly spent some nights. However, the register indicates that they checked into the hotel on 03-12-2014 and checked out the same day at 4 p.m. thereby demolishing the Prosecution case.

(viii) That, as the provisions of Section 311A of the Cr.P.C. were not complied with when the specimen signature of the appellant was collected for the purposes of investigation, this suffices to reject the evidentiary value of the document Exhibit

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[11] (2014) 10 SCC 473
[12] (2017) 8 SCC 570

20. Reliance was placed on ***Hanuman Hariyana Brahmin*** vs. ***State of Rajasthan***[13]. That, no proof emanates in the Prosecution case to establish that the vehicle was driven by and taken to Sundong from Jorethang by the Appellant. In any event, in the absence of any Prosecution evidence to establish the last seen theory, the appellant at the most can be convicted for the offence of theft of the vehicle. Relying on the decision in ***Nagappa Dondiba Kalal*** vs. ***State of Karnataka***[14] wherein it was held that recovery of ornaments of deceased at the instance of the accused cannot be an inference that he had murdered her, it was concluded that similarly the sale of the Alto by the appellant cannot be linked to the victim's death. Hence, in view of the aforesaid circumstances, it is evident that the anomalies in the Prosecution case render nugatory the effort of the Prosecution to link the offence under Section 302 IPC to the appellant, which therefore entitles him to an acquittal.

4(i). *Per contra*, rebutting the contentions of the appellant, learned Public Prosecutor advanced the argument that four circumstances establish the guilt of the appellant, viz., his motive, the last seen together theory, the recovery of the weapon of offence M.O.XX, at his instance and his non-explanation about how he came to be in possession of the Alto vehicle, M.O.XXVII when it belonged to the victim. His lies to the wife (P.W.32) of the victim when she had called him, by telling her that the victim was already asleep and on the next

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[13] 2017 SCC OnLine Raj 3821
[14] AIR 1980 SC 1753

morning on another call made by her to the victim, told her that they were both in Hong Kong Bazaar at Siliguri. The appellant on seeing the police at his relative's house at Tingmoo, South Sikkim, fled from there, confirming thereby his complicity in the crime by his conduct.

(ii) Denying that two FIRs were filed in the instant case, learned Public Prosecutor sought to clarify that Exhibit 46, alleged to be the first FIR is infact merely a report informing the police of an unidentified dead body, found on 03-12-2014 by some villagers. Pursuant to Exhibit 46 the Namchi Police Station registered an Unnatural Death (UD) Case under Section 174 of the Cr.P.C. Canvassing the contention that an investigation under Section 174 of the Cr.P.C. is limited in scope it was submitted that the circumstances under what he was assaulted or witnesses thereof are foreign to the ambit and scope of the proceedings under Section 174 of the Cr.P.C. To drive home this point reliance was placed on ***Radha Mohan Singh alias Lal Saheb and Others*** vs. ***State of U.P.***[15]. That, no error emanates on the finding of the learned trial Court that investigation on the basis of Exhibit 46 was only with regard to an unnatural death case and not murder. That, it is settled law that any complaint which does not specify a cognizable offence cannot be treated as an FIR. Arguing that the mere fact that the information was the first in point of time does not by itself clothe it with the character of a first information report, reliance was placed on ***Tapinder***

[15] (2006) 2 SCC 450

Singh vs. ***State of Punjab and Another***[16]. That, P.W.47, SHO, Namchi Police Station admitted under cross-examination that Exhibit 46 is a report under Section 174 of the Cr.P.C. As a result Exhibit 1 is the FIR which reveals a cognizable offence and cannot be said to be hit by the provisions of Section 162 of the Cr.P.C. Strength in this context was garnered from ***Animireddy Venkata Ramana and Others*** vs. ***Public Prosecutor, High Court of Andhra Pradesh***[17], ***Babubhai*** vs. ***State of Gujarat and Others***[18] and ***Awadesh Kumar Jha alias Akhilesh Kumar Jha and Another*** vs. ***State of Bihar***[19].

(iii) It was next contended that the appellant cannot contend that Exhibit 41 is inadmissible in evidence as no questions were put to the concerned witness in cross-examination to demolish the document. This submission was fortified by the ratio in ***Rameshwar Dayal and Others*** vs. ***State of Uttar Pradesh***[20].

(iv) The argument that the informant of Exhibit 46 was not examined is not tenable since P.W.42 on receiving the information from him had duly visited the place of occurrence, seen the dead body and was examined as a witness. Hence, the argument that the non-examination of the informant vitiates the Prosecution case is mis-construed. That, in ***Krishna Mochi and Others*** vs. ***State of Bihar***[21] it was observed that even if the FIR is

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[16] (1970) 2 SCC 113
[17] (2008) 5 SCC 368
[18] (2010) 12 SCC 254
[19] (2016) 3 SCC 8
[20] (1978) 2 SCC 518
[21] (2002) 6 SCC 81

not proved it would not be a ground for acquittal but would depend on the evidence led by the prosecution. While referring to the ratio of ***State of U.P.*** vs. ***Harban Sahai and Others***[22] it was urged that picking out insignificant discrepancies in the Prosecution case does not vitiate it.

(v) That, the Prosecution case has clearly been established by an unbroken chain of events, as the extra-marital relationship between the appellant and P.W.13 has been admitted by her and fortified by the evidence of P.W.23, her brother and P.W.24, her mother. P.W.13 admits to having accompanied the appellant in M.O.XXVII on 02-12-2014. Exhibit 5 indicates that on 03-12-2014 both of them put up at "Sarita hotel" in Ravangla Bazaar, fortified by the evidence of P.W.16, the Hotel Manager and P.W.18, who took them to Tingmoo, South Sikkim, in his taxi from Ravangla Bazaar. The recovery of the dead body in South Sikkim near the house of P.W.13 provides another link to the guilt of the appellant, while the evidence of PWs 31, 32 and 33 have conclusively proved that on 02-12-2014 the appellant hired the Alto vehicle bearing No.SK 01 PA 4083 of the victim and both of them were seen together for the last time on that date at around 05.30 p.m. P.W.33, the mother of the victim had seen M.O.XX, the rod, in the possession of the appellant for which he has failed to furnish any reason even under his examination under Section 313 of the Cr.P.C.

(vi) That, Exhibit 15 is admissible in evidence as recovery of articles were made from the place as stated by him

[22] (1998) 6 SCC 50

and the provisions of Section 27 of the Evidence Act are to be construed along with the provisions of Section 8 of the same Act. On this count, reliance was placed on ***Prakash Chand*** vs. ***State (Delhi Admn.)***[23] and ***Sana alias Sanatan alias Dhaneswar Samal*** vs. ***State of Orissa***[24].

(vii) The evidence of P.W.43 leads to the conclusion that the death occurred on account of injuries to the brain of the victim, while the RFSL report reveals that the bark of the tree, M.O.VIIA (collectively), and the wearing apparels of the appellant contained the blood of the victim. The argument of inadmissibility of the expert's evidence holds no water sans prohibition by any legal provision. That, the absence of the blood group of the appellant cannot be fatal to the Prosecution case and on this aspect strength was drawn from ***Kishore Bhadke*** vs. ***State of Maharashtra***[25]. Financial constraints of the appellant at the time of his elopement was the reason for the occurrence of the incident which finds support in the evidence of P.W.28 and P.W.34. The sale of the Alto by the appellant is duly proved by P.W.17, the purchaser and corroborated by the evidence of PWs 45, 25, 30, 34 who identified the appellant in the Court room. The evidence of P.W.16 lends credence to the fact that the appellant had stayed at his hotel in Ravangla duly supported by the evidence of P.W.13 and Exhibit 5. That, defective investigation is not fatal to the Prosecution case for which reliance was placed on ***Dhanaj Singh alias Shera and Others*** vs.

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[23] AIR 1979 SC 400
[24] 2010 CRI.L.J. 299 (Orissa)
[25] AIR 2017 SC 279

State of Punjab[26]. It was submitted that the entire materials on record and the circumstances relied on by the Prosecution have been proved beyond a reasonable doubt and the findings of the learned Trial Court do not suffer from any infirmity and hence, the Appeal deserves a dismissal.

5. We have heard at length the rival contentions of both parties. We have also carefully perused and considered the entire evidence, all other documents on record and the impugned Judgment and Order on Sentence. We have seen the citations placed at the Bar.

6. The questions that fall for consideration before this Court are –

(i) *Whether there were two FIRs in the instant matter which would thus vitiate the Prosecution case?*

(ii) *Whether the statement given by the appellant under Section 27 of the Evidence Act stands the test of legality?*

(iii) *Whether the circumstantial evidence furnished before the Court irrefutably links the offence to the appellant?*

7(i). While addressing the first question flagged, it would be beneficial to refer to the provisions of Section 154 of the Cr.P.C. which requires that every information relating to the commission of a cognizable offence whether given orally or otherwise to the Officer-in-Charge of a Police Station has to be reduced to writing by or under his direction and is to be signed by the informant. The substance of the information is to be

[26] (2004) 3 SCC 654

entered in a book to be kept by such officer in the form prescribed by the State Government in this behalf. A copy of the information recorded under Section 154(1) Cr.P.C. is to be made over to the informant free of cost. If there is a refusal to record the information the complainant is necessarily to take steps as provided under Section 154(3) of the Cr.P.C. The principle object of the first information report from the point of view of the informant is to set the criminal law in motion and that of the investigating authorities is to obtain information about the alleged crime so as to enable them to take steps to trace and bring the guilty to book. The question as to whether a particular document, in the instant matter, Exhibit 46, constitutes a first information is to be determined on the relevant facts and circumstances of the case. If the information was cryptic, its main object being to enable the police officer to reach the place of occurrence immediately, such information cannot be considered to be an FIR.

(ii) The object of Section 154 of the Cr.P.C. having been established, we may consider the relevant portion of the provisions of Section 174 of the Cr.P.C. which is extracted hereinbelow;

> **"174. Police to enquire and report on suicide, etc.**—(1) When the officer in charge of a police station or some other police officer specially empowered by the State Government in that behalf receives information that a person has committed suicide, or has been killed by another or by an animal or by machinery or by an accident, or has died under circumstances raising a reasonable suspicion that some other person has committed an offence, he shall immediately give intimation thereof to the nearest Executive Magistrate empowered to hold inquests, and, unless otherwise

> directed by any rule prescribed by the State Government, or by any general or special order of the District or Sub-divisional Magistrate, shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation, and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises, and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted.
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> (2) The report shall be signed by such police officer and other persons, or by so many of them as concur therein, and shall be forthwith forwarded to the District Magistrate or the Sub-divisional Magistrate.
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> …….
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> (3) When—
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> …….
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> (iv) there is any doubt regarding the cause of death; or
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> (v) the police officer for any other reason considers it expedient so to do, he shall. subject to such rules as the State Government may prescribe in this behalf, forward the body, with a view to its being examined, to the nearest Civil Surgeon, or other qualified medical man appointed in this behalf by the State Government, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless.
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> (4) …….**"**

From a bare perusal of the afore-extracted provisions it emanates that an investigation under Section 174 of the Cr.P.C. is confined to the ascertainment of the apparent cause of death. It is concerned with discovering whether the death so caused was on account of an accident, was suicidal, homicidal or caused by an animal or in what manner or by what weapon or instrument the injuries on the body appear to be inflicted. In ***Radha Mohan Singh*** (*supra*), the Supreme Court while discussing the ambit and scope of Section 174 of the Cr.P.C. held as follows;

> **"15.** …… The object of the proceedings is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so, what is the apparent cause of the death. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope of the proceedings under Section 174. Neither in practice, nor in law, was it necessary for the police to mention those details in the inquest report. It is, therefore, not necessary to enter all the details of the overt acts in the inquest report. Their omission is not sufficient to put the prosecution out of Court. ….…**"**

In ***Superintendent of Police, CBI and Others*** vs. ***Tapan Kumar Singh***[27] the Supreme Court while deciding whether the GD entry could be treated as an FIR in an appropriate case where it discloses the commission of cognizable offence *inter alia* held that;

> **"16.** The parties before us did not dispute the legal position that a GD entry may be treated as a first information report in an appropriate case, where it discloses the commission of a cognizable offence. If the contention of the appellants is upheld, the order of the High Court must be set aside because if there was in law a first information report disclosing the commission of a cognizable offence, the police had the power and jurisdiction to investigate, and in the process of investigation to conduct search and seizure. ……...
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> …….
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> **20.** …….. An informant may lodge a report about the commission of an offence though he may not know the name of the victim or his assailant. He may not even know how the occurrence took place. A first informant need not necessarily be an eyewitness so as to be able to disclose in great detail all aspects of the offence committed. **What is of significance is that the information given must disclose the commission of a cognizable offence and the information so lodged must provide a basis for the police officer to suspect the commission of a cognizable offence.** ……..…..**"**
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> [emphasis supplied]

In the same thread, the Supreme Court in ***Lalita Kumari*** vs. ***Government of Uttar Pradesh and Others***[28] held as follows;

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[27] (2003) 6 SCC 175
[28] (2014) 2 SCC 1

> **"120.** ……..
> ……..
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> **120.2. If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.**
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> **120.3.** If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.
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> **120.4.** The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.
> ……..**"** [emphasis supplied]

(iii) On the anvil of the principles above, we may now examine whether Exhibit 46 gives information pertaining to a cognizable offence. The contents of Exhibit 46 essentially informs the police that a dead body had been sighted, soaked in blood, no other information or details are disclosed in Exhibit 46. On receipt of Exhibit 46, the place was visited and consequent thereto Exhibit 41, Inquest Report, dated 04-12-2014, was prepared, the body having been evacuated to Namchi District Hospital. Hue and cry notices was sent to various Police Stations and Police Out-Posts for identification of the body. Pursuant to such notice, P.W.1 along with P.W.2 and P.W.3 reached the Namchi Hospital and identified the body as that of the victim, Rohit Shah. On such identification, Exhibit 1 was lodged by P.W.1. It thus emerges with clarity that on the lodging of Exhibit 46 the police had merely started inquest under Section 174 of the Cr.P.C. As already discussed, the scope of proceedings under Section 174 of the Cr.P.C. is limited, the object of it being

merely to ascertain whether a person has died under the circumstances enumerated therein. Only on the lodging of Exhibit 1 did the incident pertaining to a cognizable offence come to light on the basis of which investigation commenced for an offence under Section 302 IPC. Exhibit 46 surely does not disclose a cognizable offence much less an offence under Section 302 of the IPC. Hence, the argument that Exhibit 1 is hit by the provisions of Section 162 of the Cr.P.C. having been made later in time than Exhibit 46 and thereby during the course of investigation cannot be countenanced. It may fittingly be pointed out that a second FIR in the same matter is not completely debarred by law but is to be considered in the facts and circumstance of each individual case. The Supreme Court in ***Nirmal Singh Kahlon*** vs. ***State of Punjab and Others***[29] considered a case where an FIR had been lodged on 14-06-2002 in respect of offences committed by individuals. Subsequently, the matter was handed over to the Central Bureau of Investigation (CBI), during the investigation of which huge amount of material was collected and statements of large number of persons recorded and the CBI came to the conclusion that a scam was involved in the selection process of Panchayat Secretaries. A second FIR was lodged by the CBI. The Supreme Court after appreciating the evidence, came to the conclusion that the matter investigated by CBI involved a larger conspiracy. Therefore, the investigation of the CBI had been made on a much wider canvass and the

[29] (2009) 1 SCC 441

second FIR was found permissible and required to be investigated.

(iv) Related to this discussion is also the argument of learned Senior Counsel that the complainant Indra Lall Gurung who lodged Exhibit 46 was not examined. In ***Krishna Mochi*** (*supra*) the Supreme Court has observed as follows;

> **"35.** It has been further submitted that **the informant, Satendra Kumar Sharma has not been examined as such, the first information report cannot be used as a substantive piece of evidence inasmuch as on this ground as well the appellants are entitled to an order of acquittal. The submission is totally misconceived. Even if the first information report is not proved, it would not be a ground for acquittal, but the case would depend upon the evidence led by the prosecution. Therefore, non-examination of the informant cannot in any manner affect the prosecution case."** [emphasis supplied]

The ratio clears the air on non-examination of an informant. Besides, the evidence of the informant of Exhibit 46 is not vital to the Prosecution case nor does it negate it as steps were taken pursuant to Exhibit 46 and P.W.42 vouched for its contents.

8(i). The second question flagged for consideration is taken up next. Before embarking on a discussion, it is apposite to extract the provisions of Section 27 of the Evidence Act;

> **"27. How much of information received from accused may be proved**.—Provided 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 by way of a proviso to Sections 25 and 26 of the Evidence Act, by which a statement made in police custody

which distinctly relates to the fact discovered is admissible in evidence against the accused. The conditions prescribed in Section 27 enabling admissibility of the statement of the accused made to the police are enumerated in ***Pulukuri Kottaya*** (*supra*) as follows;

> **"**[10]. 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 the 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 there upon 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. ……..**"**

In ***Anter Singh*** (*supra*) while referring to the decision of ***Pulukuri Kottaya*** (*supra*) it was summed up as follows;

> **"16.** 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 the 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 accused's 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.**"**

(ii) The phrase **"**distinctly relates to the fact discovered**"** in Section 27 of the Evidence Act is the pivotal aspect of the provision. This phrase refers to that part of the information supplied by the accused which is the driver and immediate cause of the discovery. If a fact is actually discovered in consequence of information given by the accused, its affords some guarantee of the truth of that part of the information which was the clear, immediate and proximate cause of the discovery. Bearing in mind the principles so enunciated, we now examine Exhibit 15 which is the disclosure statement of the appellant recorded under Section 27 of the Evidence Act by the I.O. of the case in the presence of two witnesses, P.W.14 and P.W.42. The appellant made several inculpatory statements and, *inter alia*, stated that **"***I can show you the place where I threw the rod***"**. Even if the evidence of P.W.14 fails to support the Prosecution case, P.W.42, also a witness to Exhibit 15, has stated that on 06-12-2014 the appellant in his presence made a disclosure statement before the Namchi Police confessing that he threw the iron rod with which he assaulted the deceased just above the place where the dead body was lying and that he could show the place where he had thrown the rod. His evidence remained undecimated in cross-examination. In our considered view, the

evidence of P.W.42 does not deserve to be discarded as untrustworthy merely for the reason that it is not corroborated by P.W.14 when M.O.XX was infact recovered by the police from the place disclosed by the appellant and seized vide Exhibit 16. So far as P.W.14 is concerned it would be in the appropriateness of things to cut him some slack considering the rural background and his perception of the disclosure statement. In this context, apposite reference may be made to ***Shivaji Sahabrao Bobade and Another*** vs. ***State of Maharashtra***[30] wherein the Supreme Court observed as follows;

> **"8.** Now to the facts. The scene of murder is rural, the witnesses to the case are rustics and so their behavioural pattern and perceptive habits have to be judged as such. The too sophisticated approaches familiar in courts based on unreal assumptions about human conduct cannot obviously be applied to those given to the lethargic ways of our villages. When scanning the evidence of the various witnesses we have to inform ourselves that variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate against the veracity of the core of the testimony provided there is the impress of truth and conformity to probability in the substantial fabric of testimony delivered. ……**"**

(iii) The I.O. who recorded Exhibit 15 has deposed that the appellant had disclosed the whereabouts of M.O.XX, the weapon of offence. Considering that the I.O. is often termed as an interested witness there is restraint exercised by Courts to rely on the testimony of the I.O. However, the ratiocination in ***Modan Singh*** vs. ***State of Rajasthan***[31] dispels all such perplexity. The Supreme Court therein observed as follows;

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[30] (1973) 2 SCC 793

[31] (1978) 4 SCC 435

> **"9.** The only other material on which the prosecution can connect the appellant with the crime is the recovery of the fired cartridge, Ex. 9 and the seizure of the pistol Ex. 8 and the deposition of the Ballistic expert, PW 9. It is found that the witnesses who have been examined for attesting the seizure have not supported the prosecution version. **On behalf of the defence it was submitted that the seizure witnesses were men of status in the village and their not supporting the recovery would be fatal to the prosecution. We would rather not place any reliance on the witnesses who attested the seizure memo. If the evidence of the investigating officer who recovered the material objects is convincing, the evidence as to recovery need not be rejected on the ground that seizure witnesses do not support the prosecution version."** [emphasis supplied]

Similarly, in ***Mohd. Aslam*** vs. ***State of Maharashtra***[32] the Supreme Court held as follows;

> **"7.** Regarding A-1 Mohmed Aslam (@ Sheru Mohd. Hasan) the only evidence for possession of the forbidden lethal weapon is the testimony of PW 34 (Nagesh Shivdas Lohar, Assistant Commissioner of Police, CID Intelligence, Mumbai). **Learned counsel contended that two panch witnesses who were cited to support the recovery turned hostile and therefore the evidence of PW 34 became unsupported. We cannot agree with the said contention. If panch witnesses turned hostile, which happens very often in criminal cases, the evidence of the person who effected the recovery would not stand vitiated. Nor do we agree with the contention that his testimony is unsupported or uncorroborated. The very fact that PW 34 produced in the court lethal weapons recovered is a very formidable circumstance to support his evidence."** [emphasis supplied]

More recently, in ***State of Maharashtra vs Ramlal Devappa Rathod and Others***[33] the Supreme Court concluded that;

> **"19.** It also requires to be noted that pursuant to the disclosure statements made by A-1 Ramlal, A-2 Ramchandra, A-3 Limbaji, A-29 Shivaji and A-30 Pandit, certain weapons with bloodstains were recovered immediately on the day after the incident. **The aforesaid recoveries have been doubted by the trial court inasmuch as the independent panchas had not supported the prosecution case. However, PW 18 Pratap Kisan Pawar in his testimony deposed that such recoveries were made pursuant to the disclosure**

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[32] (2001) 9 SCC 362
[33] (2015) 15 SCC 77

> **statements of the accused.** It has been laid down by this Court in *Mohd. Aslam* v. *State of Maharashtra* [(2001) 9 SCC 362 : 2002 SCC (Cri) 1024] and *Anter Singh* v. *State of Rajasthan* [(2004) 10 SCC 657 : 2005 SCC (Cri) 597] **that the recoveries need not always be proved through the deposition of the panchas and can be supported through the testimony of the investigating officer. The fact that the recoveries were made soon after the incident is again a relevant circumstance and we accept that the recoveries can be considered against the respondents as one more circumstance."**
>
> [emphasis supplied]

(iv) In the light of the aforestated pronouncements applied in the premise of the instant case, it is clear that the evidence of P.W.42 not only fortifies the stand of P.W.49, the I.O., but is vindicated by the recovery of M.O.XX from the place as disclosed by the appellant. Although learned Senior Counsel for the appellant relied on ***Damber Bahadur Chhetri*** vs. ***State of Sikkim***[34] wherein it was held that recovery of blood stained clothes from the house of the appellant and the shoes belonging to the deceased on the basis of confessional statement to the police was of no assistance to the Prosecution case as it did not link the crime to the appellant, the instant matter is clearly distinguishable from the ratio *supra*. In the instant case the place where recovery of M.O.XX was made was from a village thereby a rural setting, frequented only by cowherds grazing their cattle and M.O.XX was found inside the bushes not from an open space or the road side. It may relevantly be noticed that P.W.14 too admitted that on reaching the spot they searched for M.O.XX on the spot stated by the appellant and on such directions it was recovered by a police personnel. Besides, the statement of the appellant, **"***I can show you the place where I*

[34] 2010 CRI.L.J. 3076 (Sikkim)

*threw the rod***"** is undisputedly admissible in evidence. Hence, the contents of Exhibit 15 insofar as it relates to the discovery is admissible in evidence. This Court of course disregards and discards the inculpatory statements made in it.

9(i). The final question that requires determination is whether the circumstantial evidence furnished before the Court irrefutably links the offence to the appellant. Undisputedly, the entire case of the Prosecution is based on circumstantial evidence. The five golden principles that constitute proof of a case based on circumstantial evidence has been elucidated in ***Sharad Birdhichand Sarda*** vs. ***State of Maharashtra***[35] extracted hereinbelow;

> **"153.** A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:
>
> *(1)* the circumstances from which the conclusion of guilt is to be drawn should be fully established.
>
> It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade* v. *State of Maharashtra* [(1973) 2 SCC 793] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]
>
> > "Certainly, it is a primary principle that the accused *must* be and not merely *may* be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."
> >
> > (*2*) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

[35] (1984) 4 SCC 116

(*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.**"**

(ii) On the touchstone of these principles, we now proceed to examine whether the circumstances link the offence to the appellant with the chain of evidence being complete so as not to raise any doubts that the appellant was the perpetrator. Conversely we also seek to examine whether the evidence militates against the probability of the Prosecution case. In this context, the Prosecution had advanced the argument of last seen together theory which is invoked as a facet of circumstantial evidence. In ***Satpal*** vs. ***State of Haryana***[36], the Supreme Court observed as follows;

> **"6.** We have considered the respective submissions and the evidence on record. There is no eyewitness to the occurrence but only circumstances coupled with the fact of the deceased having been last seen with the appellant. **Criminal jurisprudence and the plethora of judicial precedents leave little room for reconsideration of the basic principles for invocation of the last seen theory as a facet of circumstantial evidence. Succinctly stated, it may be a weak kind of evidence by itself to found conviction upon the same singularly. But when it is coupled with other circumstances such as the time when the deceased was last seen with the accused, and the recovery of the corpse being in very close proximity of time, the accused owes an explanation under Section 106 of the Evidence Act with regard to the circumstances under which death may have taken place. If the accused offers no explanation, or furnishes a wrong explanation, absconds, motive is established, and there is corroborative evidence available inter alia in the**

[36] (2018) 6 SCC 610

> **form of recovery or otherwise forming a chain of circumstances leading to the only inference for guilt of the accused, incompatible with any possible hypothesis of innocence, conviction can be based on the same. If there be any doubt or break in the link of chain of circumstances, the benefit of doubt must go to the accused. Each case will therefore have to be examined on its own facts for invocation of the doctrine."** [emphasis supplied]

(iii) The worth and utility of the last seen together theory has therefore been expounded *supra*. The evidence of P.W.31 the father of the victim establishes that the appellant had come to his house on the relevant day looking for the victim. P.W.31 requested his wife P.W.33 to call the victim and later that evening the appellant and the victim left in his "Alto", bearing registration No.SK 01 PA 4083. The fact that the appellant and the victim had left together in the Alto stood the test of cross-examination and was duly corroborated by the evidence of P.W.33, the mother of the victim, who also stated that the victim left the place along with the appellant on the concerned evening. Thus, it obtains that P.W.31 and P.W.33 had both seen the appellant accompanying the victim in his Alto. As providence would have it, that night their son did not return. It was argued that the last seen theory is not tenable by learned Senior Counsel by placing reliance on ***Kharga Bahadur Pradhan*** (*supra*) but the facts in the instant matter are clearly distinguishable. The appellant was not only seen together with the victim for the last time by P.W.33 on 02-12-2014 but suddenly the appellant came to be in possession of the Alto vehicle which belonged to the deceased and he continued to be in its possession till he sold it at Ravangla as substantiated by the evidence of PWs 13, 17,

45, 15, 25, 30 and 34. Neither P.W.31 nor P.W.33 had any reason to falsely implicate the appellant nor was any shown by the appellant.

(iv) Another mysterious circumstance which emerges is why the appellant had informed P.W.32 that her husband was already asleep on 02-12-2014 when she had rung up the victim and why on 03-12-2014 he had again told her that the victim and himself were at Hong Kong market. When this circumstance is factored in with the other circumstances it is clear that the appellant after doing away with the victim was making unsuccessful attempts to cover his tracks. The Prosecution case also finds support from the fact that the house of P.W.13 is located near the place where the body of the victim was recovered.

(v) The possession of the vehicle with the appellant is conceivably the most important link in the chain that binds the appellant to the crime. P.W.13 stated that on 02-12-2014 the appellant came to her house in an Alto vehicle to pick her up. She took her infant son along. The appellant booked all of them into a hotel in Ravangla, South Sikkim, where they spent two days and two nights. While at Ravangla the appellant sold the Alto and brought her to a place called Tingley to the house of P.W.19, his relative. The police came in pursuit and brought them to the Namchi Police Station the next day. P.W.19 and P.W.22 corroborated the evidence of P.W.13 concerning their arrival in the house of the witnesses. Both witnesses added that

the same night police personnel came looking for the appellant who meanwhile on sighting them had fled from the witnesses' home. As per P.W.19, the victim was apprehended from Lamaten village the following day. The appellant's conduct of fleeing points an unflinching needle of suspicion towards him for obvious reasons.

(vi) P.W.17, a mechanic who was working in a garage at Ralang road, Ravangla corroborated the appellant's possession of the Alto, M.O.XXVII. According to him, the appellant approached and told him that his vehicle had broken down *en route* to Ravangla. P.W.17 accompanied the appellant to the spot of the breakdown and after partial repairs brought the vehicle to the workshop which was left there by the appellant, for the night. The following morning as the appellant had no money to pay for the repairing charges he sought to sell the vehicle, which P.W.17 agreed to purchase for a sum of Rs.50,000/- (Rupees fifty thousand) only, towards which he paid Rs.20,000/- (Rupees twenty thousand) only, vide Exhibit 20, the sale document prepared by P.W.45. This document was vehemently objected to by learned Senior Counsel contending that the signature of the appellant was obtained in violation to the provisions of Section 311A of the Cr.P.C. We have given due consideration to this argument and it is apparent that the I.O. has failed to abide by the mandate of the said Statute, hence this document is being disregarded as evidence. Notwithstanding non-consideration of this document, the fact of possession of the vehicle by the appellant cannot be wished away since the evidence of P.W.17 is

duly supported by the evidence of not only P.W.13 but also P.W.25 who stated that P.W.17 requested him to be a witness to the transaction of the sale of the Alto which was being sold to him by the appellant. P.W.45, the owner of the garage substantiated the agreement made between the appellant and P.W.17 with regard to the transaction, having identified the appellant as the person who had sold the vehicle. P.W.34 was called by the appellant to Ravangla to witness the transaction. P.W.30 also corroborated the evidence of the witnesses *supra* with regard to the transaction and that the vehicle reportedly belonged to the appellant present in the garage. The evidence of these witnesses established that the appellant was in possession of the vehicle M.O.XXVII which concededly did not belong to him, duly proved by its handing over to P.W.31 vide Exhibit 25. The appellant for his part has failed to throw light as to how he came to be in possession of the vehicle sans the victim.

(vii) Pertinently, we may now look at the provisions of Section 106 of the Evidence Act which provides as follows;

> **"106. Burden of proving fact especially within knowledge.**—When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.**"**

This provision is an exception to the general rule laid down in Section 101 of the Evidence Act which lays down that the burden of proving a fact rests on the party who asserts the affirmative of the issue. We hasten to add that Section 106 is of course not intended to relieve the Prosecution of the burden cast

on it by Section 101, it merely means that where the subject matter of the allegation lies peculiarly within the knowledge of the accused, he must prove it. It cannot apply when the fact is such as is capable of being known to any person other than the accused. It is apparent that the appellant has failed to discharge the burden cast on him by this provision with regard to the possession of the vehicle and M.O.XX and the disappearance of the victim.

(viii) The presence of the appellant in "Sarita hotel" is established by the oral evidence of P.W.16, the person who was running the hotel. It may be remarked that Exhibit 5 is a rather deficient documentary proof furnished by the Prosecution to establish the occupation of the hotel room by the appellant and P.W.13 and deserves to be discarded. In the same thread we deem it essential to disregard Exhibit 22, copy of the vehicle movement register, for the reasons pointed out by learned Senior Counsel for the appellant *supra*. The Pen Drive, M.O.XXIV and M.O.XI, the CD, relied on by the Prosecution meets the same fate as legal provisions mandated by Section 65B of the Evidence Act have been flouted. However, we reiterate with emphasis that it is now settled law that poor investigation ought not to be allowed to obliterate the Prosecution case when evidence points unerringly and cogently to the guilt of the accused. The Supreme Court in ***Jai Prakash*** vs. ***State of Uttar Pradesh***[37] in this context opined as follows;

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[37] 2019 SCC OnLine SC 1525

> **"23.** ……. It is well-settled that any omission on the part of the Investigating Officer cannot go against the prosecution case. If the Investigating Officer has deliberately omitted to do what he ought to have done in the interest of justice, it means that such acts or omissions of Investigating Officer should not be taken in favour of the accused. ……**"**

In ***Karnel Singh*** vs. ***State of M.P.***[38] the Supreme Court observed as follows;

> **"5.** Notwithstanding our unhappiness regarding the nature of investigation, we have to consider whether the evidence on record, even on strict scrutiny, establishes the guilt. In cases of defective investigation the court has to be circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. Any investigating officer, in fairness to the prosecutrix as well as the accused, would have recorded the statements of the two witnesses and would have drawn up a proper seizure-memo in regard to the 'chaddi'. That is the reason why we have said that the investigation was slipshod and defective.**"**

In ***State of Karnataka*** vs. ***Suvarnamma and Another***[39] the Supreme Court observed as follows;

> **"18.** …….
> (*ii*) Mere lapse of investigating agency could not be enough to throw out overwhelming evidence clearly establishing the case of the prosecution.
> ……..**"**

(ix) The presence of P.W.35 the Scientific Officer at the place of occurrence was decried vehemently by learned Senior Counsel for the appellant for reasons stated *supra*. In ***Modi, A Textbook of Medical Jurisprudence and Toxicology***, 24th Edition 2013, it is recorded as follows;

> **"CHAPTER 2**
> **LEGAL PROCEDURE IN CRIMINAL COURTS**

[38] (1995) 5 SCC 518
[39] (2015) 1 SCC 323

> ……
> DIFFICULTIES IN DETECTION OF CRIME
> ……
> Visiting the scene of crime might help the doctor doing the autopsy in getting a better idea of how the injuries could have occurred. Evidence of signs of struggle at the scene of a crime needs to be correlated with the injuries that might have occurred due to a struggle. ……..
> ……..
> The advantages of calling the medical expert in the same way as the police calls the forensic science personnel, need not be over emphasized. Visits to the scene should, as far as possible, be arranged before disturbing the scene. …….
> ……..”

This, in our considered opinion, ought to dispel any doubts harboured by the appellant with regard to the presence of the expert at the scene of crime. It goes without saying that no legal provision was set forth by the appellant to augment his contention, which in any event has no legs to stand.

(x) Another important circumstance which rears its head and points to the appellant as the perpetrator of the offence are the blood stains found on his clothings worn on the relevant day. Although denied by learned Senior Counsel for the appellant, while addressing this concern, we may relevantly look into Exhibit 30, the RFSL Report and the evidence of P.W.35. The appellant’s articles of clothing were seized and forwarded for scientific analysis. The clothes were identified as follows;

(i) One red coloured T-shirt marked as Exhibit BIO-112(B1) in the laboratory, i.e., M.O.XXI; and

(ii) One dark greenish blue jeans trousers marked as BIO-112(B2), i.e., M.O.XXII.

The said articles of clothing tested positive for the blood group ‘B’. M.O.XX, the weapon of offence, also contained blood of the group ‘B’. Blood group ‘B’ without a doubt was that of the

deceased as the sample of the victim's blood marked as BIO-112(D), i.e., M.O.XXIX, was examined by P.W.35 and stands sentinel to this aspect of the Prosecution case. The contention of learned Senior Counsel that the iron rod, M.O.XX bears no blood is evidently an erroneous submission made without considering the evidence of P.W.35 and the RFSL report, Exhibit 30. P.W.33, mother of the victim has stated that when the appellant had come to her shop-cum-tea stall at Naya Bazar, West Sikkim, on the morning of 02-12-2014, he had a rod with him which he took along with him when he left the shop. A Test Identification Parade for M.O.XX was conducted by the learned Judicial Magistrate, West District, at Gyalshing, wherein P.W.33 identified the iron rod M.O.XX as being the same one she had seen in the possession of the appellant. Despite incisive cross-examination, her evidence stood undemolished. Merely because P.W.33 is the mother of the victim her evidence cannot be discredited by labeling her as an interested witness when she is otherwise a trustworthy witness. Hence, the recovery of M.O.XX at the place of occurrence, the blood stains on it of the blood group 'B' identified as that of the victim and the identification of M.O.XX as the one in the appellant's possession by P.W.33 lends unqualified credence to the Prosecution case. The pieces of the bark of the tree M.O.VIIA (collectively) collected from the place of occurrence, examined by P.W.35 also revealed the presence of human blood of the blood group 'B'. On perusal of M.O.XXVI, 21 photographs of the dead body, it is clear that the victim was battered on his face with M.O.XX which evidently led to the

blood splattering on the nearby tree. In ***Kishore Bhadke*** (*supra*) it was held as follows;

> **"24.** It was then contended that the circumstance of bloodstained clothes recovered at the instance of accused No.3 was questionable because no evidence regarding the blood group or the fact that the blood stains belonged to the blood group of deceased Raman is forthcoming. Further, the recovery itself was doubtful. Even this aspect has been considered by both the courts below and negatived. The absence of evidence regarding blood group cannot be fatal to the prosecution. The finding recorded by the courts below about the presence of human blood on the clothes recovered at the instance of accused No.3 has not been questioned. The Courts have also found that no explanation was offered by the accused No.3 in respect of presence of human blood on his clothes. Accordingly, we affirm the concurrent finding recorded by the courts below in that behalf including about the legality of such recovery at the instance of accused No.3.**"**

In the case at hand the blood group of the victim has been identified as 'B' and were found on M.O.XX, M.O.XXI, M.O.XXII and M.O.VIIA (collectively) thereby clinching the Prosecution case against the appellant.

(xi) An extended argument had ensued between the parties with regard to the time of death of the victim in view of contradictory documentary evidence. The point that was sought to be driven home by the appellant was that the error in the Inquest Report was writ large and pales into insignificance in the light of the Doctor's expert opinion, which establishes that the death occurred around 06-12-2014. Consequently, the death of the victim could not be foisted on the appellant as it was too far in time when the victim was allegedly last seen together with the appellant. We have to differ with the submissions of the learned Senior Counsel on this point as all other evidence points

to the death of the victim somewhere between 02-12-2014 and before 9 a.m. on 03-12-2014, his body having been discovered on 03-12-2014 at 10 a.m. It may relevantly be noted that in cross-examination the confusion pertaining to the time of death of the victim as reflected in Exhibit 42 was never put to the witness and for this reason also it cannot be raised for the first time in Appeal.

(xii) We also notice that there are two requests for Post-Mortem examination, both marked Exhibit 43. One is dated 04-12-2014, under Namchi P.S. U.D. Case FIR No.23/14, dated 03-12-2014 and, the second one is dated 07-12-2014, in Namchi P.S. Case FIR No.149/14, dated 05-12-2014, for the same victim. The request for Post-Mortem in the two different cases were made on two separate dates, but the body however was forwarded for autopsy only on 07-12-2014. The Doctor, P.W.42 has recorded that the brief history as per inquest papers as follows;

> **"**As per inquest, the deceased was found lying death (*sic*) as Samdong village, South Sikkim on **5/12/14**.**"**

This is erroneous. Exhibit 41 and Exhibit 45, both Inquest Forms reflect that the body was found on **03-12-2014**. It thus culminates that Exhibit 42 is egregious to say the least, prepared without application of mind by P.W.43. The Report, Exhibit 42, thereby deserves no consideration whatsoever by this Court. While discussing expert evidence, the Supreme Court in ***Dayal Singh and Others*** vs. ***State of Uttaranchal***[40] observed as follows;

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[40] (2012) 8 SCC 263

> **"40.** We really need not reiterate various judgments which have taken the view that the purpose of an expert opinion is primarily to assist the court in arriving at a final conclusion. Such report is not binding upon the court. The court is expected to analyse the report, read it in conjunction with the other evidence on record and then form its final opinion as to whether such report is worthy of reliance or not. Just to illustrate this point of view, in a given case, there may be two diametrically contradictory opinions of handwriting experts and both the opinions may be well reasoned. In such case, the court has to critically examine the basis, reasoning, approach and experience of the expert to come to a conclusion as to which of the two reports can be safely relied upon by the court. The assistance and value of expert opinion is indisputable, but there can be reports which are, ex facie, incorrect or deliberately so distorted as to render the entire prosecution case unbelievable. But if such eyewitnesses and other prosecution evidence are trustworthy, have credence and are consistent with the eye-version given by the eyewitnesses, the court will be well within its jurisdiction to discard the expert opinion. An expert report, duly proved, has its evidentiary value but such appreciation has to be within the limitations prescribed and with careful examination by the court. A complete contradiction or inconsistency between the medical evidence and the ocular evidence on the one hand and the statement of the prosecution witnesses between themselves on the other, may result in seriously denting the case of the prosecution in its entirety but not otherwise.**"**

In the same vein, it may be stated that as far back as in 1960 the Supreme Court in ***Anant Chintaman Lagu*** vs. ***The State of Bombay***[41] held as follows;

> **"(68)** ..... To rely upon the findings of the medical man who conducted the post-mortem and of the chemical analyser as decisive of the matter is to render the other evidence entirely fruitless. While the circumstances often speak with unerring certainty, the autopsy and the chemical analysis taken by themselves may be most misleading. No doubt, due weight must be given to the negative findings at such examinations. But, bearing in mind the difficult task which the man of medicine performs and the limitations under which he works, his failure should not be taken as the end of the case, for on good and probative

[41] AIR 1960 SC 500

> circumstances, an irresistible inference of guilt can be drawn.**"**

In ***Solanki Chimanbhai Ukabhai*** vs. ***State of Gujarat***[42] the Supreme Court observed as follows;

> **"13.** Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye-witnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eye-witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence.**"**

In ***Ram Swaroop and Others*** vs. ***State of U.P.***[43] the Supreme Court *inter alia* observed that the doctor can never be absolutely certain on the point of time so far as duration of injuries is concerned where a deceased died due to gunshot injuries and PWs sustained injuries on being assaulted. It thus concludes that it is not necessary to accept Exhibit 42 as the gospel truth fraught as it is with anomalies as already discussed.

(xiii) The argument of the appellant that the existence of two Inquest Reports by itself vitiates the Prosecution case, does not stand to reason as Exhibit 41 the first Inquest Form is based on the report Exhibit 46 dated 03-12-2014 and bears "FIR/UD No.23/14" dated 04-12-2014. The second Inquest Form Exhibit 45 is based on Exhibit 1 registered as FIR No.149/14 dated 05-12-2014.

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[42] (1983) 2 SCC 174
[43] (2000) 2 SCC 461

(xiv) The argument that the injuries described in Exhibit 41 and Exhibit 45 bears no semblance to those in Exhibit 42 are not borne out by the documents. In the Inquest Report Exhibit 41 the injuries *inter alia* recorded are;

> *Head : Two cut injuries measuring 4" x 2" just above the left ear.*
>
> *Face : One punctured wound on the left temple region near the left eye, two cut injuries measuring 1½" each on the right temple region and above the left eyebrow.*
>
> *Right hand : Lacerated wound on right elbow.*

Exhibit 45 is a word to word copy of Exhibit 41 excluding the date which is shown as 04-12-2014 in Exhibit 41 and 05-12-2014 in Exhibit 45 as also different case numbers, which have been formerly explained *supra*. The Post-Mortem Report is Exhibit 42 which records the injuries as follows;

> *(1) Lacerated wound on the right parietal region of scalp - 4 x 3 cm in size bony deep.*
>
> *(2) Multiple puncture wound on the left and right temporal bone of skull measuring 0.1 x 0.1 cms muscle deep.*
>
> *(3) Fracture of left parietal bone of skull.*

It may be explained here that the parietal region is the region between the temple and the occipital scalp. On perusal of the wounds recorded on Exhibit 41, Exhibit 45 and Exhibit 42 no major differences emerge, the only difference being that the injury as recorded in Exhibit 41 and Exhibit 45 are a layman's version, having been recorded by a police personnel, while Exhibit 42 being that of P.W.43 contains medical jargon. Hence, this soundly addresses the apprehension raised by learned Senior Counsel for the appellant with regard to the discrepancies in the injuries mentioned in the Exhibits *supra*.

(xv) The alleged overwriting in Exhibit 1, the FIR, dated 05-12-2014, have been carefully examined by us and we find that the overwritings do not prejudice the Prosecution case at all as these are indications of human error and nothing else. The missing FIR of the Naya Bazar Police Station devoid in the records of this case is another instance of slipshod investigation, but can have no negative repercussions on the Prosecution case, which is based on Exhibit 1 the FIR. Another contentious point raised was the delay in forwarding of the FIR to the learned Magistrate. On perusal of the formal FIR, Exhibit 2, it is clearly recorded therein that the date of dispatch to the Court from the Police Station is 05-12-2014. The learned Magistrate has "seen" the document on 08-12-2014 and hence, the Prosecution cannot be held at ransom in this context. The non-matching of the hair samples collected from the vehicle with that of P.W.13 or the appellant is inconsequential to the Prosecution case. The role of the alleged two other occupants of M.O.XXVII have not been seriously contested by the appellant. During the cross-examination of the I.O. the response elicited in this context was that she had conducted investigation into their role. The evidence on record, reveals that the entire incident had its genesis in the appellant seeking to elope with P.W.13, sans material means, leading to the unfortunate death of the victim in order to fulfil the desires of the appellant.

10. It, therefore, concludes from the evidence on record and the discussions which have ensued hereinabove that the

chain of circumstantial evidence is complete and leaves no ground to conclude that the appellant is innocent. It is established beyond a reasonable doubt that in all human probability the act was done by the appellant, the circumstantial evidence being of a conclusive nature.

11. We find no reason to interfere with the findings of the learned Trial Court.

12. Consequently, the Appeal fails and is dismissed.

13. No order as to costs.

14. Copy of this Judgment be sent to the Learned Trial Court along with Records of the Court.

(Meenakshi Madan Rai)
Judge

(Arup Kumar Goswami)
Chief Justice

Approved for reporting : **Yes**

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