VIJENDER

*v.*

THE STATE OF DELHI

FEBRUARY 12, 1997

[M.K. MUKHERJEE AND B.N. KIRPAL]

*Criminal Law :*

*Evidence Act, 1872 : Sections 6, 60 and 157.*

*Hearsay evidence—Offence of kidnapping—Father of victim deposed that witness gave him the vehicle number in which his son was kidnapped and names of accused as kidnappers—However, such witness did not depose that he saw the accused kidnapping the victim nor did he give the vehicle number in which the victim was kidnapped—Held : Evidence of victim's father was hearsay and not admissible—But his testimony that witness told him that his son was kidnapped would be admissible as corroborative evidence under S.157—S.6 not applicable.*

*Section 27—Dead body already recovered by police—Accused stated the place where dead body was thrown—Held : such a statement not admissible.*

*Sections 64, 65 and 32—Best Evidence Rule—Murder—Homicidal death—Proof of—Post-mortem report (carbon copy) produced by record clerk of hospital—Doctor who conducted post-mortem not examined—Held : In such circumstances post-mortem report not admissible—Moreover, only original report and not a carbon copy thereof admissible.*

*Section 3—Result of investigation—Held : finding of guilt could not be based on result of investigation—It should be based solely on evidence produced during trial—Criminal Procedure Code, 1973—Ss. 173 and 190(1)(b).*

*Criminal Procedure Code, 1973 : Section 162.*

*Statement—Before police officer during investigation—Use of—Held : such a statement could not be used for any purpose except when it attracted Ss. 27 or 32(1) of the Evidence Act—However, it could be used to contradict maker thereof in accordance with S.145 of Evidence Act—Evidence Act,*

A *1872,—Ss. 27, 32(1) and 145.*

*Section 218—Joint Trial—Offences of kidnapping and murder under Penal Code along with offence under S.25 of Arms Act read with S.5 of TADA for illegal possession of country-made pistol and cartridge—No change that accused used the pistol for committing the said offences—Held : Joint*
B *trial was illegal and caused prejudice to accused—Hence, conviction for offence under S.25 of Arms Act read with S.5 of TADA set aside—Further, conviction under S.25 of Arms Act must also fail as there was no prior sanction under S.39 of Arms Act—Arms Act, 1959, Ss. 25,27 and 39—Terrorist and Disruptive Activities (Prevention) Act, 1987, S.5.*

C *Criminal Trial :*

*Circumstantial evidence—Abscondance—Held : a weak link in the chain of circumstantial evidence.*

D *Circumstantial evidence—Motive—Held : In absence of any other incriminating circumstances, it is of no moment.*

*Appreciation of evidence—Offences of kidnapping and murder—Prosecution proved that victim was kidnapped in a Maruti car—It failed to prove that accused were the kidnappers or that they were responsible for*
E *the death of the victim—Held : judgment of trial court convicting the accused was a preserve one for it was not only based on conclusions drawn from inadmissible evidence but suffered from the vice of non-consideration of evidence, which materially impaired the prosecution case—Accordingly, conviction set aside—Penal Code, 1860, Ss. 302 and 364.*

F **The appellants-accused were convicted by the Designated Court under Sections 364 and 302 read with Section 34 of the Indian Penal Code, 1860 and Section 25 of the Arms Act, 1959 read with Section 5 of the Terrorist and Disruptive Activities (Prevention) Act, 1987. Aggrieved thereby the appellants-accused preferred the present appeal.**

G **According to the prosecution, PW-4 went to the house of PW-5 and informed him that he had seen the accused kidnapping his son in a Maruti car. PW-5 reported to the police that his son was kidnapped. In the meantime some Police officers found the dead body of a young boy lying by the side of Railway Lines. The dead body was identified by PW-6 as that of her son. A**
H **country-made pistol with a cartridge was recovered from the accused per-**

sons. The information about the place where the dead body was thrown was obtained from the accused. The appellant absconded after commission of the crime. A First Information Report was lodged and a post-mortem was held.

On behalf of the appellants, it was contended that the father of the victim deposed that the witness gave him the number of the Maruti car in which his son was kidnapped and the names of the appellants as the kidnappers; however, the witness did not depose to these facts in the trial and hence the evidence of the father was inadmissible being hearsay; that the statement made by the witnesses before the police officer during investigation under Section 162 of the Criminal Procedure Code, 1973 could not be used for any purpose; that the statement of the appellants as to where they had thrown the dead body was not admissible under Section 27 of the Evidence Act, 1872; that the doctor who conducted the post-mortem was not examined and that the record clerk of the hospital produced a carbon copy and not the original post-mortem report; that the finding was based on the result of investigation by the police; that no charge under Section 27 of the Arms Act was framed against the appellant on the allegation that he used the pistol for committing the offences of kidnapping and murder, that the joint trial of the appellants for the offences of kidnapping and murder along with offences under Section 25 of the Arms Act read with Section 5 of TADA seriously prejudiced the appellant in his defence inasmuch as the trial Judge relied upon the evidence adduced by the prosecution for the offences; that the prosecution failed to establish that the appellants were the kidnappers; that there was no previous sanction under Section 39 of the Arms Act for the prosecution of the appellant; and that the judgment of the trial court convicting the appellants was a perverse one for it was based on inadmissible evidence.

Allowing the appeal, this Court

HELD : 1. The evidence of PW-5, the father of the victim, that PW-4 gave him the vehicle number and the names of the three appellants as the miscreants was not legally admissible for PW-4 did not state that he had seen the three appellants kidnapping the victim nor did he give the vehicle number in which the victim was taken away. In absence of such direct evidence of PW-4, the testimony of PW-5 to that extent would be hit by Section 60 of the Evidence Act, 1872. In the facts of the present case Section 6 of the Evidence Act also does not come in

A aid of the prosecution. [1190-H, 1191-C]

2. The trial Judge permitted the prosecution to let in statements made by a witness to the police officer in utter disregard of the provisions of Section 162 of the Criminal Procedure Code, 1973, which lays down an elementary but fundamental principle to be followed in criminal trial that B a statement made before the police officer during investigation cannot be used for any purpose whatsoever; except when it attracts the provisions of Section 27 or Section 32(1) of the Evidence Act. If, however, such a statement is made by a witness examined by the prosecution it may be used by the accused to contradict such a witness, and with the permission of the C Court, by the prosecution in accordance with Section 145 of the Evidence Act. [1192-F-G]

3. Since the dead body of the victim was already recovered by the police the question of discovery of the place where it was thrown thereafter could not arise. Under Section 27 of the Evidence Act if an information D given by the accused leads to the discovery of a fact which is the direct outcome of such information then only it would be evidence but when the fact has already been discovered, as in the instant case, evidence could not be led in respect thereof. [1193-D-E]

E 4. In view of Section 60 of the Evidence Act, 1872 the prosecution is bound to lead the best evidence available to prove a certain fact, and in the instant case, needless to say, it was that of the doctor who held that post-mortem examination, but who was not examined. The other reason for which the trial Judge ought not to have allowed the prosecution to prove the post- mortem report is that it was not the original report but F only a carbon copy thereof, and that too not certified. Under Section 64 of the Evidence Act document must be proved by primary evidence, that is to say, by producing the document itself except in the cases mentioned in Section 65 thereof. Since the copy of the post-mortem report did not come within the purview of any of the clauses of Section 65 it was not admissible G on this score also. [1194-D-F]

5. The reliance of the trial Judge on the result of investigation to base his findings is again patently wrong. If the observation of the trial Judge in this regard is taken to its logical conclusion it would mean that a finding of guilt can be recorded against an accused without a trial, H relying solely upon the police report submitted under Section 173 Cr.P.C.

which is the outcome of an investigation. [1199-B] A

6. Abscondance is a weak link in the chain of circumstantial evidence. Lastly, the question whether the motive stands proved or not in absence of any other incriminating circumstance, is of no moment. [1200-D]

7. No charge was framed against the appellant under Section 27 of B the Arms Act, 1959 on an allegation that he used the pistol for committing the offences of kidnapping or murder nor for illegal possession of country-made pistol and cartridge under Section 25 of the Arms Act read with Section 27 of the Terrorist and Disruptive Activities (Prevention) Act, 1987. In the absence of such accusation, the appellant could not have been C jointly tried for illegal possession of a firearm and ammunition with the offences of kidnapping and murder in view of Section 218(1) Cr.P.C. and in view of non-applicability of the sub- section thereof. The evidence led by the prosecution relating to kidnapping and murder has been utilised for convicting the appellant for unauthorised possession of firearm. Hence, joint trial of the appellant was illegal and caused prejudice to him. The D conviction under Section 25 of the Arms Act must also fail for the reason that no previous sanction for such prosecution as required under Section 39 of the Arms Act was produced during the trial. [1200-F-G, 1201-A]

8. The prosecution had only proved the fact that the victim was E kidnapped in a Maruti car. The prosecution also failed to prove that the appellants were the kidnappers or that they were responsible for the death of the victim. The judgment of the trial court for convicting the appellants is a perverse one for it is not only based on conclusions drawn from inadmissible evidence but also suffers from the vice of non-consideration of evidence, which materially impaired the prosecution case. Accordingly, F conviction of the appellants under Section 364 and 302 read with Section 34 of the Indian Penal Code, 1860 is set aside. [1197-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 769 of 1996 etc. G

From the Judgment and Order dated 22/24.5.96 of the Designated Court No. III Karkardooma Courts, Delhi in F.I.R. No. 218 of 1992.

Shrinath Singh, B.M. Sharma and T.N. Singh for the Appellant in Crl. A.No. 769/96. H

A K.R. Nagaraja and K.K. Tyagi for the Appellant In Crl. A. No. 2017 & 2022/96.

V.V. Vaze, Suvira Lal, D.S. Mehra and B.K. Prasad for the Respondent.

B The Judgment of the Court was delivered by

**M. K. MUKHERJEE, J.** Vijender, Devinder @ Bhinder and Mukesh Kumar, the appellants in these three appeals, were placed on trial before the Judge, Designated Court No. 111 (Karkardooma Courts), Delhi to C answer common charges under Sections 364/34, 302/34 and 201/34 IPC. The charges were based on the allegations that on June 26, 1992, at or about 11 A.M. they, in furtherance of their common intention, kidnapped Khurshid Ali from village Johripur, within the jurisdiction of Gokalpuri police station, in a Maruti car bearing registration No. DDB 5067 in order to put him in danger of being murdered; and after committing his murder D in the same night they concealed his dead body in village Banthala, within the jurisdiction of Loni police station, to escape from legal punishment. Against Vijender and Devinder separate charges under Section 25 of the Arms Act, 1959 read with Section 5 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 ('Tada') were also framed for illegal E possession of country made pistols and cartridges. The trial ended with an order of conviction and sentence recorded against all the appellants under Section 364 and 302 IPC and also under Section 25 of the Arms Act, 1959 read with Section 5 of Tada against appellant Vijender. Aggrieved thereby the three convicts have filed these appeals under Section 19 of TADA which have been heard together and this judgment will dispose of them.

F

2. Shorn of details, the prosecution case is as under :

(a) On June 26, 1992 at or about 11 A.M. Raj Kumar (P.W.4), a resident of Johripur, went to the house of Shaikh Rafuj Hassan (P.W.5) of their locality and informed him that he had just seen Vijender, Mukesh and G Devinder (the three appellants) taking away his son Khurshid in Maruti car No. DDB 5067. On getting that information P.W.5 called the police control room over telephone and reported the kidnapping of his son. Lady Const. Urmila, who was then on duty in the police control room, received that message and communicated it to Gokalpuri police station as village H Johripur fell under its jurisdiction. On receipt of that communication S.I.

Shivraj Singh, (P.W.8) recorded the same in the daily diary book under Entry No. 18-A (Ext. PW8/A) and proceeded to Johripur. There he met P.W.5 and assured him that his son would be traced out soon. Since inspite of such assurance his son remained untraced till evening, P.W.5 went to the Police Vigilance Cell and lodged a report there (Ext. PWJ5/A). On the following morning P.W.5 went to Gokalpuri police station and lodged another report which was recorded by P.W.8 (Ext. PW5/A). Treating this report as the F.I.R. P.W.8 registered a case and Shri R.S. Chauhan (P.W.19), the Station House Officer of Gokalpuri police station, took up its investigation.

(b) In the meantime some officers of Loni police station in the District of Ghaziabad (U.P.), while on patrol duty in the afternoon of June 27, 1992, found the dead body of a young boy aged about 17/18 years lying by the side of Railway Lines in village Banthala. Sub-Inspector Santosh Kumar (P.W.20) got photographs of the dead body taken (Ext. PW20/B) and, after holding inquest thereupon, sent it to Ghaziabad mortuary for post mortem examination;

(c) On getting that information Saddiqan, (P.W.6), mother of Khurshid, went to the mortuary on June 20, 1992 and identified the dead body as that of her son from the wearing apparels and an injury on his finger which he had sustained earlier;

(d) On the same day, i.e. June 28, 1992, Const. Meghraj Singh (P.W.17) of police station Khekhra in the District of Meerut (U.P.) found, while coming from patrol duty, a red colour Maruti car bearing No. DDB 5067 lying abandoned near a field in village Ahmadnagar with its front door glass broken and blood stains inside the car. He made necessary arrangement to take the car to the police station and deposited it there as unclaimed property;

(e) On getting information that car No. DDB 5067 was lying in Khekhra police station P.W.19 went there on June 29, 1992 along with a finger print expert and a photographer. The expert took impressions of the finger prints found on the car and P.W.19 seized sample of blood stains found inside the car after scratching.

(f) On the following day i.e. June 30, 1992 P.W.19 went in search of the accused persons and ultimately apprehended them from a house in

A Khajani Nagar behind Johripur. On search of their persons, a 315 bore country made pistol with a cartridge inside was recovered from the trousers' pocket of Vijender and b.12 bore broken country made pistol and a cartridge from underneath the bed of Devinder. Besides, a key of Maruti car was also recovered from Vijender. P.W.19 seized all those articles and B sealed them. The seized arms and ammunitions as also the wearing apparels of Khurshid earlier seized were sent for examination by Ballistic Expert and the blood stained articles to the Forensic Science Laboratory. After receipt of the reports of the post mortem examination (Ext. PW 21/A) and of the Experts (Ext. PW 19/J.K.L.) and completion of investigation P.W.19 submitted charge sheet against the appellants.

C

3. The motive that was ascribed by the prosecution for the kidnapping and murder of Khurshid was that he used to send love letters to the sister of Vijender who was the driver of the Maruti car in question and lived in the same locality. When Vijender learnt about the same he warned P.W.5 that if his son did not stop such undesirable activity he would be D compelled to take dire steps.

4. The appellants pleaded not guilty to the charges levelled against them and contended that they had been falsely implicated. Vijender took a plea of alibi also.

E

5. To prove its case the prosecution examined twenty two witnesses and the defence four.

6. The learned counsel for the appellants submitted that having discarded the testimony of Mirja Ali (P.W.9), who was examined by the F prosecution to prove the kidnapping of Khurshid by the three appellants, as wholly untrustworthy the trial Judge could not have held the three appellants guilty of the offences of kidnapping and murder as there was no other legal evidence on record to connect them with the above offences. In elaborating this contention the learned counsel submitted that in his anxiety to convict the appellants, the trial Judge permitted the prosecution G to adduce evidence which was not legally admissible and based his judgment primarily on such evidence. Once the inadmissible evidence was left out of consideration there was not an iota of evidence to connect the appellants with the alleged kidnapping and murder of Khurshid, argued the learned counsel. Besides, the learned counsel submitted that the trial H Judge failed to notice that there was no legal evidence to even prove that

Khurshid was murdered. As regards the conviction of Vijender for unlawful possession of country-made pistol and cartridge the submission of the learned counsel was that Vijender could not have been jointly tried for that offence along with the offences kidnapping and murder of Khurshid for, on the own showing of prosecution, the latter offence was not part of the former transaction. According to the learned counsel the joint trial seriously prejudiced Vijender in his defence inasmuch as the trial Judge relied upon the evidence adduced by the prosecution for the offences of kidnapping and murder to convict him for the other offences. It was lastly submitted that the evidence of the prosecution witnesses to prove the recovery of the pistol and cartridge from Vijender was unworthy of credit. The learned counsel for the State however fully supported the impugned judgment.

7. To appreciate the contentions raised before us we have carefully gone through the entire materials on record and the impugned judgment. Our such exercise persuades us to unhesitatingly hold that the trial Judge permitted the prosecution to lead evidence on some vital issues in utter breach of the rudimentary and fundamental principles of criminal jurisprudence and that the impugned judgment is a perversed one for it is not only based on conclusions drawn from such inadmissible evidence but suffers from the vice of non consideration of evidence which materially impaired the prosecution case. The impugned judgment cannot be sustained for other reasons also to which we will advert at the appropriate stage. Before, however, we proceed to consider the judgment it will be apposite to detail and discuss the evidence adduced during trial and point out the legal infirmities in reception of material parts of it.

8. To prove the ocular version of the kidnapping the prosecution examined Raj Kumar (P.W.4) and Mirza Ali (P.W.9). As earlier stated the trial Judge held - in our view rightly - that P.W.9 could not at all be believed. So far as P.W.4 is concerned we find that he was declared hostile by the prosecution as he did not fully support its case and was permitted to be cross examined with reference to his purported statement recorded under Section 161 Cr.P.C. wherein he detailed and described the manner in which Khurshid was kidnapped by the appellants in a red colour Maruti car. He however denied to have made any such statement to the police. Scanning the entire testimony of P.W.4 we gather that the only substantial piece of his evidence which the prosecution can fall back upon is that he

A saw Khurshid being pulled into a van of red colour and that he gave that information to his parents. On being questioned by the Public Prosecutor whether he knew the three accused persons present in Court (the appellants) he answered in the negative. In answer to another question as to whether he could note the number of the vehicle he stated that being illiterate he could not do so. There being no other eye witness to the B kidnapping and murder we may now advert our attention to the circumstantial evidence led by the prosecution in proof thereof.

9. To prove that Vijender was the driver of the car in question and it was in his custody at the material time the prosecution examined its C owner Bhim Singh (P.W.1). He however categorically stated that the appellant Vijender was not his driver and that his driver was living in Dayalpur in a rented house of Om Prakash. In view of his such assertion he was declared hostile and contradicted with reference to his statement recorded under Section 161 Cr.P.C. The other two witnesses examined by the prosecution to prove the above circumstance namely, Jitender (P.W.2) D and Om Pal (P.W.3) also turned hostile.

10. Rafuj Hassan (P.W.5), father of Khurshid, firstly stated that on June 25, 1992 Vijender came to their house in a red Maruti car and asked him why his son Khurshid was sending letters to his sister. He replied that E all his children were illiterate and his allegation was untrue. Vijender then went away threatening that if Khurshid did not stop such practice, he would have to suffer the consequence. He next stated that on June 26, 1992 at 11 A.M. Raju (P.W.4) came to his house and told him that Khurshid had been forcibly taken away by Vijender, Mukesh and Devinder (the three appel- F lants) in car No. DDB 5067. He lastly testified about his having given three reports to the police; one to the police control room immediately thereafter (Ext. PW8/A), to the police Vigilance Cell (Ext. PW15.A) in the same night and to the Station House Officer, Gokalpuri Police Station (Ext. PW5/A) next morning.

G

11. The evidence of P.W.5 that Raju gave him the number of the vehicle and the names of the three appellants as the miscreants was not legally admissible for Raju (P.W.4) did not state that he had seen the three appellants to kidnap Khurshid nor did he give the vehicle number in which Khurshid was taken away. In absence of such direct evidence of Raju H (P.W.4), the testimony of P.W.5 to that extent would be hit by Section 60

of the Evidence Act. The said Section, so far as it is relevant for our present purpose lays down that oral evidence must, in all cases whatever, be direct; that is to say *if it refers to a fact which could be seen it must be the evidence of a witness who says he saw it* (emphasis supplied). In the instant case the facts which could be seen were that Khurshid was kidnapped, that the appellants kidnapped him and that he was kidnapped in Car No. DDB 5067 and therefore P.W.4 was the only person (in absence of any other eye-witness) who was legally competent to testify about these facts. Since P.W.4 did not testify to two of the above facts, namely the car number and the persons who kidnapped him, the statement of P.W.5 that he was also told about the above two facts would not be admissible being, 'hearsay', but his testimony that P.W.4 told him that Khurshid was kidnapped would be admissible as corroborative evidence under Section 159 of the Evidence Act. While on this point it need be mentioned that in the facts of the present case Section 6 of the Evidence Act also does not come in aid of the prosecution.

12. Smt. Saddiqan (P.W.6), mother of Khurshid corroborated P.W.5 regarding the threat meted out by Vijender on June 25, 1992 and the information that Raju (P.W. 4) gave to them on June 26, 1992 regarding kidnapping of their son Khurshid by the appellants. It is her further evidence that three days after her son was kidnapped she was taken to the mortuary of Ghaziabad in order to identify a dead body and she identified it as that of her son from the wearing apparels and a scar he had on his finger owing to an injury he sustained earlier. On being shown a shirt and a pair of trousers, which were seized by the police during investigation from the person of the deceased, she identified them to be those of her son. To the extent she testified that Raju had told them that the three appellants kidnapped her son must be said to be inadmissible in view of our foregoing discussion. So far as the probative value of her evidence on the other points we will advert to the same at the appropriate stage.

13. Sequentially stated, the next circumstance related to the recovery of a dead body which was later on identified by P.W. 6 as that of her son Khurshid. Evidence on this point was furnished by S.I. Santosh Kumar (P.W.20), Constable Suresh Kumar (P.W. 18) and Ravinder Singh (P.W. 11), all of Loni Police Station. Their evidence proves that on June 27, 1992 they found the dead body of a young boy aged about 17/18 years lying near the Railway lines in village Banthala. There P.W. 20 got photograph of the

A dead body taken (Ext. PW20/B), held inquest thereupon and then sent it to Ghaziabad mortuary for post-mortem examination, through PW. 11 and P.W. 18. It is further evidence of PW.s 11 and 18 that on the following day, i.e. June 28, 1992, the relatives of the deceased reached the mortuary and identified the dead body.

B

14. As regards the recovery of the car No. DDB 5067 the prosecution relied upon the evidence of Const. Megh Raj Singh (P.W. 17) of Khekhra police station in the District of Meerut (U.P.). He stated that on June 28, 1992 when after his patrol duty he was returning from village Ahmadnagar he found a Maruti car bearing No. DDB 5067 lying abandoned. He found C the left side front door glass and rear right side triangular glass of the car broken and blood stains inside it. He brought the car to the police station and deposited it there. The next piece of evidence on this point is that of Ram Singh (P.W. 19), the Investigating Officer. He stated that on getting information that car No. DDB 5067 was lying at Khekhra police station he D went there on June 29, 1992 along with finger print expert and photographer and got finger print impressions found on the car photographed. Besides, he claimed to have seized the blood stains found on the body of the car after scratching and the seat covers which were also blood stained.

15. The next circumstance on which the prosecution relied to estab- E lish the complicity of three appellants relates to their arrest and their subsequent conduct. The witnesses to prove this circumstance were Inspector Ram Chander (P.W. 14) and S.H.O. Ram Singh (P.W.19). On perusal of their testimonies we are surprised to find that the trial Judge permitted the prosecution to let in statements made by Jitendra (P.W. 2) to them in F utter disregard of the provisions of Section 162 Cr.P.C., which lays down an elementary but fundamental principle to be followed in criminal trial that a statement made before a police officer during investigation cannot be used for any purpose whatsoever; except when it attracts the provisions of Section 27 of Section 32(i) of the Evidence Act. If, however, such a statement is made by a witness examined by the prosecution it may be used G by the accused to contradict such a witness, and with the permission of the Court, by the prosecution in accordance with Section 145 of the Evidence Act. To eschew prolixity, we quote below only the relative portion of the evidence of P.W. 13 in this regard :

H *"One boy named Jeetu @ Jitender met us at Johri Pur and told that*

*Gyanender was having one house at Khajani Nagar which was less known to the people. We then went to Khajani Nagar and reached there at 4.45 p.m. along with Jeetu. Jeetu pointed out to the house and then he went inside the premises and peeped into the room. After peeping inside the room he told the police party that Vijender. Davinder and Mukesh, the three boys, were present inside the room and they were the same persons who had kidnapped and killed the deceased."*

(emphasis supplied)

16. Incidentally, it may be mentioned - though not relevant for our present purpose that P.W. 2 did not at all support the prosecution case and he was declared hostile.

17. Another elementary statutory breach which we notice in recording the evidence of the above witnesses is that of Section 27 of the Evidence Act. Evidence was led through the above three police witnesses that in consequence of information received from the three appellants on June 30, 1992 they discovered the place where the dead body of Khurshid was thrown. As already noticed, the dead body of Khurshid was recovered on June 27, 1992 and therefore the question of discovery of the place where it was thrown thereafter could not arise. Under Section 27 of the Evidence Act if an information given by the accused leads to the discovery of a fact which is the direct outcome of such information then only it would be evidence but when the fact has already been discovered as in the instant case the evidence could not be led in respect thereof.

18. However, the most glaring infirmity appearing on the record relates to the evidence led by the prosecution to prove the homicidal death of Khurshid. The only witness examined by the prosecution in this regard was Satish Kumar (P.W. 21), a record clerk of the District Hospital, Ghaziabad. His testimony reads as follows :

"I have brought the post mortem report of an unknown male sent by PS Loni Ghaziabad on 28.6.1992. Post mortem was conducted on 28.6.92 by Dr. U.C. Gupta. The date of sending is not known to me and is not given on record. Dr. U.C. Gupta was transferred from Distt. Hospital earlier. He has been now transferred back. I

A identify his signature and handwriting, at Post Mortem Report. The copy of P/M report is Ex.21/A (objected to). I have seen Dr. U.C. Gupta writing and signing Cross Examination.

Original copy is not on record. The original copy is sent to SSP Ghaziabad. Second copy is sent to PS and third copy is maintained B in the record."

19. It passes our comprehension how the trial Judge entertained the post mortem report as a piece of documentary evidence on the basis of the above testimony of a clerk in spite of legitimate objection raised by the C defence. In view of Section 60 of the Evidence Act, referred to earlier, the prosecution is bound to lead the best evidence available to prove a certain fact; and in the instant case, needless to say, it was that of Dr. U.C. Gupta, who held the post mortem examination. It is of course true that in an exceptional case where any of the pre-requisites of Section 32 of the D Evidence Act is fulfilled a post mortem report can be admitted in evidence as a relevant fact under sub- section(2) thereof by proving the same through some other competent witness but this Section had no manner of application here for the evidence of P.W.21 clearly reveals that on the day he was deposing Dr. Gupta was in that hospital. The other reason for which E the trial Judge ought not to have allowed the prosecution to prove the post-mortem report is that it was not the original report but only a carbon copy thereof, and that too not certified. Under Section 64 of the Evidence Act document must be proved by primary evidence, that is to say, by producing the document itself except in the cases mentioned in Section 65 thereof. Since the copy of the post mortem report did not come within the F purview of any of the clauses of Section 65 it was not admissible on this score also.

20. After excluding the prosecution evidence, oral and documentary, to the extent its reception was legally impermissible, and culling the rest G we find that the prosecution has led evidence to prove the following facts and circumstances.

(i) On June 26, 1992 at or about 11 A.M. P.W.4 saw Khurshid being dragged into a red colour Maruti car and he gave that information to his H parents (P.Ws. 5 and 6);

(ii) Over the kidnapping of his son P.W.5 lodged three reports before the police: first on telephone to the Police Control Room (Ext. PW8/A) at or about 1.40 P.M., next in the same night in the Police Vigilance Cell (Ext. PW15/A), and lastly on the following morning at Gokalpuri Police Station (Ext. PW5/A) which was treated as the F.I.R.; A

(iii) On June 27, 1992 the dead body of a young boy was found lying by the side of Railway lines in village Banthala within the jurisdiction of Loni Police station in district of Ghaziabad (U.P.) which was photographed and later on identified by P.W. 6 at the mortuary as the dead body of her son Khurshid; B

(iv) On June 28, 1992 officers of Khekhra Police Station in the district of Meerut (U.P.) found a red colour Maruti car bearing No. DDB 5067 lying abandoned near a field with window glasses broken and blood stains inside the car; C

(v) After the car was brought to the Khekhra Police Station finger print impressions found on it were photographed and samples of blood stains found inside were seized after scratching; D

(vi) On June 30, 1992 the appellants were arrested from a house in Khajani Nagar behind Johripur and on search of the persons of Vijender and Davinder country made pistols were recovered. A key of a Maruti car was also recovered from Vijender and constable Suresh Chand (P.W. 22) found that the key could be used for ignition of the engine of the car bearing No. DDB 5067; E

(vii) The pistol and cartridge seized from Vijender were in working order and live respectively; F

(viii) The shirt, that the deceased was wearing had a hole/tear mark on it and it was caused by a fire-arm which was fired from a close range; G

(ix) The stains found in the seat covers of the car were of human blood; and

(x) Vijender was annoyed with Khurshid as he wrote love letters to his sister. H

A 21. Without going into the probative value of the evidence adduced by the prosecution witnesses and fully replying upon the same if we proceed on the assumption that the above facts and circumstances stand established, it can be said that the prosecution has succeeded in only proving that khurshid was kidnapped. As regards the proof of his B murder, the evidence relied upon by the prosecution is that of P.W. 6, who identified the dead body, found by the officers of Loni Police Station near the Railway lines and later on brought to the Ghaziabad mortuary, as that of his son and the report of the post mortem examination, (Ext. PW 21/A) which we have found to be legally inadmissible for C non-examination of the doctor who held the autopsy. Even if we accept the post mortem report as a valid piece of documentary evidence, we notice therefrom that it relates to an unknown male aged about 25/30 years, and not to a boy aged 17/18 years. We next get that on the person of the dead body the doctor found three external injuries : one large swelling on the right side of the head, another large swelling over the D right side of the jaw and fracture of right pariotal bone. The opinion given by the doctor therein is that death was caused by shock and haemorrhage as a result of the injuries. In absence of any medical opinion that the injuries were homicidal, accidental death of the victim cannot therefore be ruled out.

E

22. However, to prove that the death was homicidal the prosecution relied - and the trial Judge gave much emphasis upon the presence of a hole/tear mark upon the back of the shirt round on the dead body and the opinion of the Ballistic expert that it (hole/tear) was caused by F a firearm which was fired from a close range. The above opinion of the Ballistic expert shows that the post mortem report could not be related to Khurshid for there is no reference to any injury on the back, much less with blackening or charring which was expected in case of close range firing. The fact that the report relates to a person aged 25/30 years G and not a boy aged 17/18 years lends further assurance to our above inference. The only other inference that can be legitimately drawn from the preceding facts and circumstances is that the identification of the dead body by P.W. 6 as that of his son is incorrect. Even though photographs of the dead body were taken, she did not identify her son H from the photographs but from the wearing apparels, which included

the shirt referred to above. Since the injuries found on the dead body did not fit in with the hole/tear found on the shirt which could be caused by firing the shirt could not be that of her son. As, according to her, she saw the dead body after the post mortem examination which necessarily needed dissection, her identification on the basis of a cut mark on the finger also loses its importance. In any view of the evidence, therefore, it must be said that the prosecution failed to prove that Khurshid met with a homicidal death. Surprisingly enough, this aspect of the matter was completely overlooked by the trial Judge.

23. Another circumstance that was pressed into service by the prosecution to prove the murder - and found favour with the trial Judge was that the seat covers of the Maruti car bearing No. DDB 5067 were stained with human blood. In absence of any evidence that Khurshid was kidnapped in that car it does not come in aid of the prosecution case. It is pertinent to point out here that though prosecution led evidence to prove that photographs of finger prints found on the above car were taken by an expert, no attempt was made by the prosecution - as the record indicates - to prove that those finger prints were of the appellants before us. Needless to say, evidence of the finger print expert in proof thereof would have gone a long way to sustain the prosecution case.

24. For the foregoing discussions, and in absence of any reason to disbelieve P.W. 4, it can be said that the prosecution has been able to only prove the fact that Khurshid was kidnapped in a Maruti car. The next question is whether the prosecution has succeeded in proving that the appellants were the kidnappers. So far as appellants Mukesh and Devinder are concerned we find that there is not an iota of evidence to connect them with the above offence. Since, inspite thereof, the trial Judge convicted them we may now refer to the relevant portion of the impugned judgment wherein he has dealt with this aspect of the matter, while rejecting the contention of their learned counsel that there was no evidence to convict them. It reads as under :

> "In the statement recorded by Vigilance Cell which is Ex. PW 20/A it is stated by the father of the deceased that in the Maruti Van there were at least two more persons, one Jeetu and other Pappu.

A The very first information sent to the police also shows that there were four persons in the car. The identity of the three had come to the knowledge of the father of the deceased. They were namely Vijender, Jeetu and Pappu. From the investigation it is revealed that Jeetu was made to get down of the car before the boy was B kidnapped. Jeetu & Jitender has been examined in the court. He has turned hostile. He has admitted that he knew accused Vijender. He also stated that he was apprehended by the police of PS Gokal Puri and he was detained at the PS for about one week and he was interrogated by the police about the murder of C Khurshid. *This testimony of Jitender shows that Jitender was first person to be caught by the police and it was only through Jitender that police could lay hand on the other accused persons. It has come in the testimony of PW. 14 that it was Jeetu who had disclosed the place where the other accused persons were hiding themselves and* D *he lead the police party to the hiding place of Vijender, Mukesh and Devinder.* Similar is the statement of P.W. 19 Inspector Ram Singh, who stated that after he took up the investigation he recorded the statements of Raful Hasan Mirza, Miraz Ali and other witnesses, and he conducted raids at different places in Johri Pur and Dayal Pur. He learned about an unidentified deadbody having been E recovered in Ghaziabad and lying at Hindon Mortuary. *He stated that it was Jeetu who had disclosed hiding place of accused Vijender, Mukesh and Davinder, who were involved in the kidnapping.*"

(emphasis supplied)

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25. We are constrained to say that the above observations have been made by the trial Judge casting away the basic principles regarding reception and appreciation of evidence, misreading the evidence. So far as the report of P.W. 5 before the Vigilance Cell is concerned the trial Judge G failed to notice that it did not contain the names of the above two appellants, namely, Mukesh and Devinder & Bhinder; and on the contrary therein the names of two other persons, namely, Jeetu and Pappu find place as the miscreants. Indeed, in none of the three reports that P.W. 5 lodged with the police he mentioned the names of the above two appel- H lants. We hasten to add that even if he had so named it could not have

been treated as legal evidence for reasons earlier mentioned. Then again, the trial Judge could not have relied upon the knowledge of P.W. 5 that the appellants were the miscreants as he was not a witness to the kidnapping and P.W. 4 did not state that he saw the miscreants and, for that matter, that the appellants were the miscreants. The reliance of the trial Judge on the result of investigation to base his findings is again patently wrong. If the observation of the trial Judge in this regard is taken to its logical conclusion it would mean that a finding of guilt can be recorded against an accused without a trial, relying solely upon the police report submitted under Section 173 Cr.P.C, which is the outcome of an investigation. The result of investigation under Chapter XII of the Criminal Procedure Code is a conclusion that an investigating Officer draws on the basis of materials collected during investigation and such conclusion can only form the basis of a competent Court to take cognizance thereupon under Section 190(1)(b) Cr.P.C. and to proceed with the case for trial, where the materials collected during investigation are to be translated into legal evidence. The trial Court is then required to base its conclusion solely on the evidence adduced during the trial; and it cannot rely on the investigation or the result thereof. Since this is an elementary principle of criminal law, we need not dilate on this point any further. Equally unsustainable is the trial Judge's reliance upon the statement made by Jeetu (P.W. 2) before the police in view of the express bar of Section 162 Cr.P.C., which we have discussed earlier. Indeed, we find, the trial Judge placed strong reliance on the purported statement made by Jitender before the police that they (the appellants) *were hiding and that they were involved in kidnapping and murder of Khurshid to convict them* (emphasis supplied).

26. As regards the complicity of Vijender in the kidnapping the two circumstances on which the prosecution case now rests after the inadmissible part of the evidence is excluded are, that a key of a Maruti car which could be used for ignition of the engine of the seized car bearing No. DDB 5067 was recovered and he had a motive for the crime. These two circumstances, even taken together, do not prove the involvement of the appellant Vijender in absence of any evidence that Khurshid was kidnapped in the above car. In convicting Vijender the trial Judge however relied upon, apart from the evidence which we have found to be inadmissible, on the presence of hole/tear mark in the shirt

A of Khurshid and opinion of the expert that it could be caused by fire arms, the recovery of a pistol from him, the purported statement of Bhim Singh (P.W. 1), the owner of car No. DDB 5067 that Vijender (the appellant) was the driver of the car and that he was absconding till June 30, 1992 when he was arrested. So far the hole/tear mark is concerned, we have already found that it could not relate to the shirt of Khurshid; and as regards the B testimony of P.W. 1 the trial Judge has misread the same for he categorically stated that appellant Vijender was not his driver. As regards his abscondance, we find that in his examination under Section 313 Cr.P.C. the only question the trial Judge asked him in this regard (question No. 13) was that on June 27, 1992 P.W. 19 did not find him in his house. Even if C we accept the evidence of P.W. 19 to be true still from the absence on a day from the house the trial Judge was not justified in concluding that he had absconded. In any case, abscondance is a weak link in the chain of circumstantial evidence. Lastly, the question whether the motive stands proved or not need not detain us for in absence of any other incriminating D circumstance, it is of no moment.

27. That bring us to the conviction of Vijender under Section 25 of the Arms Act and Section 5 of TADA for illegal possession of the country made pistol and a cartridge. The charge that was framed against Vijender in this regard was to the effect that on June 30, 1992 he was E found in unlawful possession of a country made pistol and a live cartridge in his house in village Johripur - and not that he used that country made pistol for kidnapping and/or murder of Khurshid. In other words, no charge was framed against him under Section 27 of the Arms Act on an allegation that he used to for the above offences. If such an F allegation was made Vijender could have been tried for kidnapping and murder for using the fire arm under Section 27 of the Arms Act in the same trial as all the offences were part of the same transaction. In absence of such an accusation, he could not have been jointly tried for illegal possession of a fire-arm and ammunition on June 30, 1992 with the offences of kidnapping and murder that took place on June 26, 1992, G in view of sub-section (1) of Section 218 Cr.P.C. and non-applicability of sub-section (2) thereof. The question then arises is whether such procedural irregularity caused any failure of justice. In the facts of the instant case this question must be answered in the affirmative for the statement made by P.W. 2 before the Investigating Officer has also been H taken into consideration for this conviction also. To put it differently,

the evidence led by prosecution relating to kidnapping and murder has been utilised for convicting the appellant for unauthorised possession of fire-arm. The conviction under Section 25 of the Arms Act must also fail for the simple reason that no previous sanction for such prosecution as required under Section 39 of the Arms Act was produced during trial. This appeal was also totally overlooked by the trial Judge. Since the convictions of Vijender for illegal possession of pistol and cartridge cannot be sustained on the above grounds we need not go into the question whether on facts it can be sustained.

28. On the conclusions as above we allow these appeals and set aside the impugned judgment. The appellants, who are in jail, be released forthwith, unless wanted in any other case.

V.S.S. Appeals allowed.