SHYAMAL GHOSH

v.

STATE OF WEST BENGAL

(Criminal Appeal No. 507 of 2007 etc.)

JULY 11, 2012

[A.K. PATNAIK AND SWATANTER KUMAR, JJ.]

Penal Code, 1860:

ss. 302, 201, 379, 411 r/w. s. 34 – Prosecution under – Of eight accused – For killing one person and disposing of the body, after cutting it, in gunny bags – Accused absconding immediately after the incident – Circumstantial evidence as well as eye-witnesses to different events – Recovery of weapon of offence and the vehicle used for carrying the mutilated body – Trial court convicting all the accused and sentencing them to death – High Court affirming the conviction except u/s. 379 and sentencing the accused to life imprisonment – On appeal, held: Order of High Court affirmed – The prosecution case is supported by the evidence of eye-witnesses who are reliable and trustworthy – Background of the accused, their conduct in absconding immediately after the incident and their statement u/s. 313 Cr.P.C. also supports prosecution case – The evidence establishes last seen together theory – Prosecution has also proved the chain of events – Code of Criminal Procedure, 1973 – s. 313.

s. 34 – Common intention – Applicability and nature of – Held: For applicability of this provision, two factors must be established i.e. common intention and participation in crime – The provision involves vicarious liability for the act of others – On facts, ingredients of presence of more than two persons, existence of common intention and commission of an overt act stand established.

A *Code of Criminal Procedure, 1973 – s. 162 Explanation – Contradiction and omission – What amounts to – Held: Omission of fact or a circumstance in the statement u/s. 161 Cr.P.C. may amount to contradiction – However, the question whether the omission amounts to contradiction is a question* B *of fact in each case – The concept of contradiction in evidence cannot be stated in absolute terms and has to be construed liberally so as to leave desirable discretion with the court to determine whether it is contradiction or material contradiction – Criminal jurisprudence.*

C *Criminal trial – Contradictions and omissions in evidence – Effect on prosecution case – Held: Minor contradictions, inconsistencies or embellishments of trivial nature which do no affect the case of the prosecution cannot be a ground to reject the prosecution in its entirety – Serious contradictions* D *and omissions materially affecting the prosecution case to be understood in clear contra-distinction to marginal variations in the statements of witnesse.*

Witnesses:

E *Hostile witness – Held: Statement of hostile witness can also be relied upon, to the extent it supports prosecution case.*

Related witness – Mechanical rejection of the evidence of witness related to the deceased would relate to failure of F *justice – However, the court has to be careful in evaluating such evidence.*

Evidence – Onus to prove – Murder case – Circumstantial evidence – Last seen together – Held: Once the last seen G *together theory comes into play, the onus to explain as to what happened to the deceased after they were last seen, is on the accused.*

Test Identification Parade – Nature of – Failure to hold – Effect of – Held: Identification Parade is a tool of investigation

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– It is only a relevant consideration which may be examined by the court in view of other attendant circumstances and corroborative evidence – Its purpose is to test and strengthen the trustworthiness of the evidence – This rule of prudence is subject to exceptions – Failure to hold TI Parade, does not by itself render the evidence of identification in court inadmissible or unacceptable.

Investigation – Held: Defects in investigation, by itself cannot be a ground for acquittal.

Words and Phrases – ' Common Intention' – Meaning of, in the context of s. 34 IPC.

Appellants-accused along with other accused were prosecuted for causing death of one person. The prosecution case was that the deceased had constructed some shop on his land. The accused persons demanded Rs. 40,000/- from the deceased towards 'Tola Mastani Salami' for the construction of the shops. The deceased refused to succumb to the demand and therefore, the accused threatened to murder him.

On the day of the incident, at 9.00 P.M., the deceased had gone to one 'Ç' in respect of his business, on a bicycle. From there, he retuned to his house at 10.00P.M. On the way, he was restrained by the accused. The accused killed him by strangulation. Thereafter, they cut the body into pieces with a sharp cutting weapon and after putting the same in gunny bags, carried them in a van in the night of the following day and left the same at some place. PW 15 saw those gunny bags and reported the matter to the police. FIR was lodged and case was registered u/ss. 302/201/34IPC against unknown miscreants.

The wife and brother of the deceased, had lodged a Missing Diary Report. They were called to the police

A station to identify the dead body. Driver of the van was arrested. The van was recovered on the basis of his statement. All the accused were arrested on different dates. The cycle used by the deceased was recovered.

B The accused were charged u/ss. 302, 201, 379, 411 r/w. s. 34 IPC. Trial court found them guilty of all the charges and sentenced them to death. High Court maintained their conviction except u/s.379/34 IPC, answered the death reference in the negative and awarded R1 for life and fine of Rs. 5000/-. The present C appeals were filed by four of the accused.

The appellants *interalia* contended that the present case, being a case of circumstantial evidence, does not complete chain of events; that the prosecution case was D not reliable because PWs 13 and 23 turned hostile; that the crucial witnesses PWs 8, 17 and 19 did not name the appellant-accused 'SH'; that there was delay in recording evidence of the witnesses; that conviction could not be based on the evidence of related witnesses; that the E accused were not named in the FIR; that the appellant-accused was not identified in TI Parade; and therefore, conviction was not justified. They also contended that s. 34 IPC is not attracted as there was no common intention and participation by all the accused.

F Dismissing the appeals, the Court

HELD: 1.1. It is not correct to say that the complete chain of circumstantial evidence having not been established, the accused are entitled to acquittal. This is G not purely a case of circumstantial evidence. There are eye-witnesses who had seen the scuffling between the deceased and the accused and the strangulation of the deceased by the accused persons and also the loading of the mutilated body parts of the deceased contained in H gunny bags into Maruti Van. Evidence establishing the

'last seen together' theory and the fact that after altercation and strangulation of the deceased which was witnessed by PW8, PW17 and PW19, the body of the deceased was recovered in pieces in presence of the witnesses, have been fully established. To a very limited extent, it is a case of circumstantial evidence and the prosecution has proved the complete chain of events. The gap between the time when the accused persons were last seen with the deceased and the discovery of his mutilated body is quite small and the possible inference would be that the accused are responsible for commission of the murder of the deceased. Once the last seen theory comes into play, the onus was on the accused to explain as to what happened to the deceased after they were together seen alive. The accused persons have failed to render any reasonable/plausible explanation in this regard. [Para 42] [139-E-H; 140-A-C]

Mousam Singha Roy and Ors. v. State of W.B. **(2003) 12 SCC 377 – referred to.**

1.2. The statements of PWs 8, 17, 19, 7, 9 and 11 completely establish that the deceased was last seen with the accused and they were responsible for assaulting and strangulating him and they were also witnessed loading the parts of the human dead body into the Maruti van. Resultantly, as per the prosecution, both the vital circumstances i.e. commission of murder as well as disposal of the body of the deceased have been proved. [Para 25] [125-F-G]

1.3. The evidence of PWs 4, 6, 8, 17, 19, 7,9,11, 2, 1, PW 16 (doctor) and PW10 completes the chain of events and establishes the case of the prosecution beyond any reasonable doubt. The facts, right from the departure of the deceased from his house to recover money, upto the recovery of mutilated body of the deceased, have been

A proved by different witnesses, including some eye-witnesses. [Para 32] [131-A-B]

1.4. Application of the 'last seen theory' requires a possible link between the time when the person was last seen alive and the fact of the death of the deceased coming to light. There should be a reasonable proximity of time between these two events. This proposition of law does not admit of much excuse but what has to be seen is that this principle is to be applied depending upon the facts and circumstances of a given case. In the facts of the present case, the factor of time does not play such a significant role because it is a case where there were eye-witnesses to the strangulation of the deceased by the accused, and therefore, it may not be expected of the prosecution to show the time of last seen and death, by leading independent evidence. PW-17 is the witness to the altercation between the accused and the deceased. PW-8 is the witness to the strangulation of the deceased by the accused persons. Besides, PW-7, PW-9 and PW-11 are witnesses to the loading of the gunny bags containing human body parts in the Maruti Van by the accused. Thus, these facts have been established by independent witnesses. As far as the death of the deceased is concerned, there was hardly any time gap between the two incidents, i.e. the last seen alive and the fact of death of the deceased becoming known. All the events occurred between 11.00 p.m. to 12.00 a.m. at midnight of 29th September, 2003. [Paras 51, 53 and 54] [144-C; 145-B-D, G-H]

S.K. Yusuf vs. State of West Bengal (2011) 11 SCC 754: 2011 (8) SCR 83 – relied on.

Mohd. Azad @ Samin vs. State of West Bengal (2008) 15 SCC 449: 2008 (15) SCR 468; *State through Central Bureau of Investigation vs. Mahender Singh Dahiya* (2011) 3 SCC 109: 2011 (1) SCR 1104 – referred to.

1.5. The conduct of the accused persons i.e. absconding immediately after the date of the occurrence is important. They had left the village and were not available for days together. Absconding in such a manner and for such a long period is a relevant consideration. Even if it is assumed that absconding by itself may not be a positive circumstance consistent only with the hypothesis of guilt of the accused because it is not unknown that even innocent persons may run away for fear of being falsely involved in criminal cases, but in the present case, in view of the circumstances it is clear that absconding of the accused not only goes with the hypothesis of guilt of the accused but also points a definite finger towards them. [Para 41] [138-G-H; 139-A-B]

Rabindra Kumar Pal @ Dara Singh v. *Republic of India* **(2011) 2 SCC 44 – relied on.**

1.6. There are recoveries of the weapon of offence as well as the vehicle which was used by the accused persons for carrying the mutilated body parts of the deceased person. Further, the recovery of the cycle that was owned by the deceased provides a definite link as it was recovered in furtherance to the statement of three accused. The recoveries affected by the Investigating Officer, PW28 can hardly be questioned in fact and in law. [Para 28] [126-F-H]

1.7. The mere fact that the two witnesses viz. PW 13 and PW 23 had turned hostile would not affect the case of the prosecution adversely. Firstly, it is for the reason that the facts that these witnesses were to prove, stand already fully proved by other prosecution witnesses and those witnesses have not turned hostile, instead they have fully supported the case of the prosecution. As per the version of the prosecution, PW23 was witness to the

A recovery of the Maruti Van along with PW24, PW25 and PW26. All those witnesses have proved the said recovery in accordance with law. They have clearly stated that it was upon the statement of the driver of the van that the vehicle had been recovered. Other witnesses have B proved that the said vehicle was used for carrying the gunny bags containing the mutilated parts of the dead body of the deceased. PW13 is a witness who was at the railway station rickshaw stand along with other two witnesses namely PW9 and PW11 who have fully proved C the fact as eye-witnesses to the loading of the gunny bags into the Maruti van. Secondly, even the version given by PW13 and PW23 partially supports the case of the prosecution, though in bits and pieces. Their statements have partially supported the case of the prosecution. It D is a settled principle of law that statement of a hostile witness can also be relied upon by the Court to the extent it supports the case of the prosecution. [Para 33] [131-G-H; 132-A-C; E-F]

Govindaraju @ Govinda v. *State by Sriramapuram P.S. and Anr.* (2012) 4 SCC 722 – relied on. E

1.8. No doubt when the court has to appreciate evidence given by the witnesses who are closely related to the deceased, it has to be very careful in evaluating F such evidence but the mechanical rejection of the evidence on the sole ground that it is that of an interested witness would inevitably relate to failure of justice. In the present case, the examination of the interested witnesses was inevitable. They were the persons who had knowledge of the threat that was being extended to the G deceased by the accused persons. Unless their statements were recorded, the investigating officer could not have proceeded with the investigation any further, particularly keeping the facts of the present case in mind.

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Merely because three witnesses were related to the deceased, the other witnesses, not similarly placed, would not attract any suspicion of the court on the credibility and worthiness of their statements. [Paras 37 and 38] [135-C; 136-C-D]

Brathi alias Sukhdev Singh v. State of Punjab **(1991) 1 SCC 519: 1990 (2) Suppl. SCR 503 – relied on.**

State of Orissa v. Brahmananda Nanda **(1976) 4 SCC 288;** *Maruti Rama Naik v. State of Maharashtra* **(2003) 10 SCC 670 – referred to.**

1.9. Of course, there are certain discrepancies in the investigation inasmuch as the Investigating Officer failed to send the blood stained gunny bags and other recovered weapons to the FSL, to take photographs of the shops in question, prepare the site plan thereof, etc. Every discrepancy in investigation does not weigh with the court to an extent that it necessarily results in acquittal of the accused. These are the discrepancies/ lapses of immaterial consequence. In fact, there is no serious dispute in the present case to the fact that the deceased had constructed shops on his own land. These shops were not the site of occurrence, but merely constituted a relatable fact. Non-preparation of the site plan or not sending the gunny bags to the FSL cannot be said to be fatal to the case of prosecution in the circumstances of the present case. The defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. [Para 40] [137-D-G-H; 138-A]

C. Muniappan v. State of Tamil Nadu **(2010) 9 SCC 567: 2010 (10) SCR 262;** *Sheo Shankar Singh v. State of*

A *Jharkhand and Anr.* **(2011) 3 SCC 654: 2011 (4) SCR 312 – relied on.**

1.10. If the explanation offered for the delayed examination of a particular witness is plausible and acceptable and the court accepts the same as plausible, there is no reason to interfere with the conclusion arrived at by the courts. The explanation offered by Investigating Officer on being questioned on the aspect of delayed examination by the accused has to be tested by the court on the touchstone of credibility. It may not have any effect on the credibility of the prosecution evidence tendered by other witnesses. The delay in examination of witnesses is a variable factor. It would depend upon a number of circumstances. For example, non-availability of witnesses, the Investigating Officer being pre-occupied in serious matters, the Investigating Officer spending his time in arresting the accused who are absconding, being occupied in other spheres of investigation of the same case which may require his attention urgently and importantly, etc. In the present case, it has come in evidence that the accused persons were absconding and the Investigating Officer had to make serious effort and even go to various places for arresting the accused. He had ensured that the mutilated body parts of the deceased reached the hospital and also effected recovery of various items at the behest of the arrested accused. Furthermore, the witnesses whose statements were recorded themselves belonged to the poor strata, who must be moving from one place to another to earn their livelihood. Some delay was bound to occur in recording the statements of the witnesses whose names came to light after certain investigation had been carried out by the Investigating Officer. [Paras 37 and 38] [135-A-B-D-H; 136-A-C]

Banti alias Guddu v. State of M.P. **(2004) 1 SCC 414:**

2003 (5) Suppl. SCR 119; *State of U.P. v. Satish* (2005) 3 SCC 114: 2005 (2) SCR 1132 – relied on. A

1.11. The appellant-accused took the plea that he was not named in the FIR, was not identified in police custody and was also not named by PW8 in his statement, and that since none of the accused was named in the FIR, it was a case of blind murder at that stage and was so registered by the police. It is true that the appellant-accused was not named by PW8, had only named six accused persons. All the three eye-witnesses to altercation and strangulation viz. PW8, PW17 and PW19 named some of the accused persons while did not name others specifically. However, they identified all the accused persons in the court as the persons who were present at the time of the mischief, altercation and strangulation of the deceased. In the present case, the prosecution has been able to establish its case beyond reasonable doubt. [Paras 45 and 46] [141-A-D; 142-A] B C D

Tika Ram v. State of Madhya Pradesh **(2007) 15 SCC 760 – relied on.** E

1.12. From the content of Ext. 10 (FIR), *per se*, it is not evident as to by whom and how the offence was committed. It is a settled principle of law that FIR is not a substantive piece of evidence. However, during the course of investigation, the story leading to the commission of the crime got unfolded and pointed towards the guilt of the accused with certainty. [Para 14] [120-C-D] F

2.1. Every omission cannot take the place of a contradiction in law and therefore, be the foundation for doubting the case of the prosecution. Minor contradictions, inconsistencies or embellishments of trivial nature which do not affect the core of the prosecution case should not be taken to be a ground to G H

A reject the prosecution evidence in its entirety. It is only when such omissions amount to a contradiction creating a serious doubt about the truthfulness or creditworthiness of the witness and other witnesses also make material improvements or contradictions before the B court in order to render the evidence unacceptable, that the courts may not be in a position to safely rely upon such evidence. Serious contradictions and omissions which materially affect the case of the prosecution have to be understood in clear contra-distinction to mere C marginal variations in the statement of the witnesses. The prior may have effect in law upon the evidentiary value of the prosecution case; however, the latter would not adversely affect the case of the prosecution. Another settled rule of appreciation of evidence is that the court D should not draw any conclusion by picking up an isolated portion from the testimony of a witness without adverting to the statement as a whole. Sometimes it may be feasible that admission of a fact or circumstance by the witness is only to clarify his statement or what has been placed on record. Where it is a genuine attempt on E the part of a witness to bring correct facts by clarification on record, such statement must be seen in a different light to a situation where the contradiction is of such a nature that it impairs his evidence in its entirety. [Para 47] [142-B-G]

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2.2. In terms of the explanation to Section 162 Cr.P.C. which deals with an omission to state a fact or circumstance in the statement referred to in sub-section (1), such omission may amount to contradiction if the G same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether there is any omission which amounts to contradiction in particular context shall be a question of fact. A bare reading of this explanation H reveals that if a significant omission is made in a

statement of a witness under Section 161 Cr.P.C., the same may amount to contradiction and the question whether it so amounts is a question of fact in each case. [Para 48] [142-H; 143-A-C] A

Sunil Kumar Sambhudayal Gupta (Dr.) vs. State of Maharashtra **(2010) 13 SCC 657;** *Subhash vs. State of Haryana* **(2011) 2 SCC 715: 2010 (15) SCR 452 – relied on.** B

2.3. The basic element which is unambiguously clear from the explanation to Section 162 CrPC is use of the expression 'may'. It is not every omission or discrepancy that may amount to material contradiction so as to give the accused any advantage. If the legislative intent was to the contra, then the legislature would have used the expression 'shall' in place of the word 'may'. The word 'may' introduces an element of discretion which has to be exercised by the court of competent jurisdiction in accordance with law. Furthermore, whether such omission, variation or discrepancy is a material contradiction or not is again a question of fact which is to be determined with reference to the facts of a given case. The concept of contradiction in evidence under criminal jurisprudence, thus, cannot be stated in any absolute terms and has to be construed liberally so as to leave desirable discretion with the court to determine whether it is a contradiction or material contradiction which renders the entire evidence of the witness untrustworthy and affects the case of the prosecution materially. [Para 49] [143-D-G] C D E F

2.4. It is true that there is some variation in the timing given by the eye-witnesses. PW8, PW17 and PW19 as to when they had seen the scuffling and strangulation of the deceased by the accused. Similarly, there is some variation in the statement of PW7, PW9 and PW11. Certain variations are also pointed out in the statements of PW2, G H

A PW4 and PW6 as to the motive of the accused for commission of the crime. Every variation may not be enough to adversely affect the case of the prosecution. The variations pointed out as regards the time of commission of the crime are quite possible in the facts
B of the present case. It is a settled principle of law that the court should examine the statement of a witness in its entirety and read the said statement along with the statement of other witnesses in order to arrive at a rational conclusion. No statement of a witness can be read
C in part and/or in isolation. There is no material or serious contradiction in the statement of these witnesses which may give any advantage to the accused. [Para 34] [132-G-H; 133-A-B; 134-B-C]

3.1. CrPC does not oblige the investigating agency
D to necessarily hold the Test Identification Parade. Failure to hold the test identification parade while in police custody, does not by itself render the evidence of identification in court inadmissible or unacceptable. One of the views taken is that identification in court for the first
E time alone may not form the basis of conviction, but this is not an absolute rule. The purpose of the Test Identification Parade is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for
F corroboration of the sworn testimony of the witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence is, however subjected to exceptions. [Para 57] [146-E-H]

G *Munshi Singh Gautam v. State of M.P.* (2005) 9 SCC 631: 2004 (5) Suppl. SCR 1092; *Sheo Shankar Singh v State of Jharkhand and Anr.* (2011) 3 SCC 654: 2011 (4) SCR 312 – referred to.

H 3.2. Identification Parade is a tool of investigation and

is used primarily to strengthen the case of the prosecution on the one hand and to make doubly sure that persons named accused in the case are actually the culprits. The Identification Parade primarily belongs to the stage of investigation by the police. The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification in court. Thus, it is only a relevant consideration which may be examined by the court in view of other attendant circumstances and corroborative evidence with reference to the facts of a given case. [Para 58] [147-B-C]

3.3. Non-identification of the appellant-accused by the driver of the van is inconsequential in the present case. Firstly, for the reason that the driver of the van was never examined as a witness in the court and even his statement under Section 164 CrPC has not been relied upon by any court while convicting the accused. Secondly, not only one, but all the witnesses i.e. PW-7, PW-8, PW-9, PW-11, PW-17 and PW-19, duly identified the accused in Court and they did so without any demur or hesitation. The driver was a person who himself was under a threat and was asked to take the gunny bags for their disposal. [Para 59] [147-F-G]

4.1. Section 34 IPC applies where two or more accused are present and two factors must be established i.e. common intention and participation of the accused in the crime. Section 34 IPC moreover, involves vicarious liability and therefore, if the intention is proved but no overt act was committed, the Section can still be invoked. This provision carves out an exception from general law that a person is responsible for his own act, as it provides that a person can also be held vicariously responsible for the act of others, if he had the common intention to commit the act. The phrase 'common intention' means a pre-oriented plan and acting in pursuance to the plan,

A thus, common intention must exist prior to the commission of the act in a point of time. The common intention to give effect to a particular act may even develop at the spur of moment between a number of persons with reference to the facts of a given case. [Para
B 64] [155-D-G]

Nand Kishore v. State of Madhya Pradesh (2011) 12 SCC 120: 2011 (7) SCR 1152; *Lallan Rai and Ors. v. State of Bihar* (2003) 1 SCC 268: 2002 (4) Suppl. SCR 188; *Dharnidhar v. State of Uttar Pradesh and Ors.* (2010) 7 SCC
C 759: 2010 (8) SCR 173 – relied on.

4.2. The ingredients of more than two persons being present, existence of common intention and commission of an overt act stand established in the present case. The
D statements of the witnesses clearly show that all the eight accused were present at the scene of occurrence. They had demanded money and extended threat of dire consequences, if their demand was not satisfied. Thereafter, they had altercation with the deceased and
E the deceased was strangulated by the accused persons and then his body was disposed of by cutting it into pieces and packing the same in gunny bags and abandoning the same at a deserted place. Thus, all these acts obviously were in furtherance to the common
F intention of doing away with the deceased, if he failed to give them Rs. 40,000/- as demanded. The offence was committed with common intention and collective participation. The various acts were performed by different accused in presence of each one of them. In
G other words, each of the accused had common intention. [Para 65] [155-H; 156-A-D]

Case Law Reference:

(2012) 4 SCC 722	Relied on	Para 33
H (1976) 4 SCC 288	Referred to	Para 35

(2003) 10 SCC 670	**Referred to**	**Para 35**	A
1990 (2) Suppl. SCR 503	**Relied on**	**Para 36**	
2003 (5) Suppl. SCR 119	**Relied on**	**Para 36**	
2005 (2) SCR 1132	**Relied on**	**Para 36**	B
2010 (10) SCR 262	**Relied on**	**Para 40**	
2011 (4) SCR 312	**Relied on**	**Para 40**	
2010 (11) SCR 1064	**Referred to**	**Para 41**	
(2011) 2 SCC 44	**Relied on**	**Para 41**	C
(2003) 12 SCC 377	**Referred to**	**Para 43**	
(2007) 15 SCC 760	**Relied on**	**Para 46**	
(2010) 13 SCC 657	**Relied on**	**Para 48**	D
2010 (15) SCR 452	**Relied on**	**Para 48**	
2011 (8) SCR 83	**Relied on**	**Para 50**	
2008 (15) SCR 468	**Referred to**	**Para 51**	E
2011 (1) SCR 1104	**Referred to**	**Para 51**	
2004 (5) Suppl. SCR 1092	**Referred to**	**Para 57**	
2011 (4) SCR 312	**Referred to**	**Para 57**	F
2011 (12) SCC 120	**Relied on**	**Para 61**	
2002 (4) Suppl. SCR 188	**Relied on**	**Para 63**	
2010 (7) SCC 759	**Relied on**	**Para 64**	

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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 507 of 2007.

From the Judgment & Order dated 5.2.2007 of the High Court at Calcutta in C.R.A. No. 724 of 2005.

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A WITH

Crl. Appeal Nos. 1369 of 2007 & 539-540 of 2011.

Pradip Ghosh, J.K. Das, Yadunandan Bansal, Rauf Rahim, Subhasish Bhowick, Tanmay K. Ghosh, Swati Yadav, P.P. B Nayak, Sudarshan Rajan, Md. Qamar Ali, Jayashree Narasimhan, Abhijit Sengupta, B.P. Yadav, Prakash Kumar, Chanchal Kumar Ganguli, R.Bhuyan, Raja Chatterjee, Sampa Sengupta, H.K, Puri for the appearing parties.

C The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. Eight accused, namely, Panchanan Tarafdar @ Chotka, Uttam Das, Dipak Das @ Mou, Manoranjan Debnath @ Behari, Bishu Saha @ Chor Bishu, D Satyajit Das @ Sadhu, Ganesh Das and Shyamal Ghosh, were charged with offences under Sections 302, 201, 379, 411 read with Section 34 of the Indian Penal Code, 1860 (for short, the 'IPC'). All these accused were found to be guilty of the offences with which they were charged by the Trial Court vide its judgment dated 13th September, 2005. After hearing them on E the quantum of sentence, vide order dated 14th September, 2005, finding the offence to be that in the category of rarest of the rare cases, the Trial Court awarded sentence of death to all the accused persons for the offence under Section 302 IPC and directed that they be hanged by neck till they are dead, F subject to confirmation by the Calcutta High Court. For the offence under Section 201 IPC, they were sentenced to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs.5,000/- each, in default to further undergo simple imprisonment for one year and for the offence under G Section 379 IPC to undergo imprisonment of three years and fine of Rs.1,000/- each in default to undergo six months simple imprisonment.

2. Aggrieved by the judgment of conviction and order of H sentence passed by the Trial Court, all the accused preferred

five different appeals before the High Court and prayed for setting aside the judgment of the Trial Court and their consequential acquittal. The High Court, vide its judgment dated 5th February, 2007, while answering the death reference in the negative, acquitted all the accused persons of the offence under Section 379 read with Section 34 IPC. However, while sustaining their conviction under Section 302 read with Section 34 IPC, the Court awarded them rigorous imprisonment for life and to pay a fine of Rs.5,000/- each in default to undergo rigorous imprisonment for two years each. The High Court maintained the sentence imposed upon the accused by the Trial Court under Section 201 read with Section 34 IPC.

3. The legality and correctness of the judgment of the High Court dated 5th February, 2007 has been challenged before this Court by accused Shyamal Ghosh in Criminal Appeal No.507 of 2007, Manoranjan Debnath @ Behari in Criminal Appeal No.1369 of 2007 and Panchanan Tarafdar @ Chotka and Uttam Das in Criminal Appeal Nos.539-540 of 2011.

4. Since all these appeals arise from a common judgment of the High Court, it will be proper for this Court to deal with all these appeals in a common judgment. At the very outset, we may notice that even the contentions raised on behalf of different accused in their respective appeals are by and large the same. Therefore, it will be proper for this Court to deal with all the appeals collectively, more so, when they are based upon common questions of facts and law.

5. Now, we may refer to the case of the prosecution which has resulted in filing of the present appeals. In the present case, the First Information Report (FIR), Exhibit 12, was lodged at P.S. Khardah on 1st October, 2003 by one Apu @ Sukalyan Mukherjee, PW15, wherein he stated that on 30th September, 2003 at around 10.00 p.m., he had seen two gunny bags containing severed head and other mutilated body parts of a human body opposite Tapan Santra's garden near Dangadingla Electric Tower at Patulia Barabagan by the side of Barrakpore Dum Dum Highway. Since he suspected some

A foul play, he reported the matter and requested for investigation thereof in accordance with law. On the basis of this information, a case being case No.332/03 under Sections 302/201/34 IPC was registered against unknown miscreants and the Investigating Officer, S.I. Bholanath Dey, PW28 started the B investigation and rushed to the spot where the said gunny bags had been noticed. He completed the inquest over the mutilated dead body in presence of the witnesses. On 1st October, 2003 itself, wife of the deceased Smt. Lily Bhattarcharjee, PW4, and elder brother of the deceased, Arindam Bhattacharjee, PW6, C came to the police station and identified the mutilated dead body to be that of Archideb Bhattacharjee who was stated to have been missing since 29th September, 2003.

6. Further, the case of the prosecution reveals that on 29th September, 2003, at about 9.00 p.m. the victim Archideb D Bhattacharjee had started from his house on his Avon bicycle to visit one Chandan Dey of Ghola Gouranganagor for making tagada in connection with his business and he started back therefrom at about 11.00 p.m. for returning to his home but on his way back, he was restrained by the accused persons near E Goshala Field at about 11.30 p.m. and was assaulted by them. The accused persons strangulated him and ultimately he was murdered by them on the midnight of 29th/30th September, 2003. With the intention to cause disappearance of evidence of the said murder, the accused persons subsequently severed F the head, legs, hands and body of the corpse by a sharp cutting weapon and after putting the same in gunny bags, carried it in a Maruti Van at about 9.00 p.m. on the following day i.e. 30th September, 2003 and left the same at Pathulia Danga-dingla by the side of Barrackpore Dum Dum Highway near the G Electric Tower and in front of the garden of Tapan Santra. Subsequently, as already noticed, at about 10.00 p.m. on that day these two sacks containing the dismembered and beheaded corpse were noticed by PW15 who then reported the matter to the Police.

H 7. Since Archideb Bhattacharjee did not return to his home

after visiting Chandan Dey on the night of 29th September, 2003, his wife and elder brother had gone to the house of Chandan Dey at Ghola where they came to know that at about 11.00 p.m. he had left for his own home after collecting the money from him. Having come to know of that fact, the wife and brother of the deceased went to the Police Station and lodged a missing diary report being G.D. No.1163 dated 30th September, 2003 whereafter, as already noticed, they were called to the Police Station for identifying the dead body of Archideb Bhattarcharjee on 1st October, 2003. During the course of investigation, it was also revealed that before the date of occurrence, the eight accused persons led by Uttam Das, Panchanan and Mou @ Dipak had demanded Rs.40,000/- from Archideb Bhattarcharjee towards 'Tola Mastani Salami' in relation to construction of six shop rooms on his own land for letting the same. Archideb had refused to succumb to this illegal demand. The accused persons had then threatened him with dire consequences. Archideb Bhattarcharjee was once called to the premises of the local East Bengal Bayam Samiti Club also where he was threatened. The accused persons had also visited the house of Archideb several times for demanding money and, lastly, they had come to the house of Archideb on 27th September, 2003 and threatened that if their demand of Rs.40,000/- was not fulfilled within one day, they would murder him.

8. On 1st October, 2003, the driver of the Maruti Van, namely, Manik Das was arrested by the Police on the basis of a telephonic information that dead body of the deceased was carried in the said Maruti Van. Manik Das then made a statement to the Police and the Maruti Van was recovered on 13th October, 2003 from the car parking place of Sushil Chakraborty at Kalitala Ghosh Para. The said Manik Das also made a statement under Section 164 of the Code of Criminal Procedure, 1973 (for short, the 'CrPC) before the Court of competent jurisdiction. Accused Uttam Das, Dipak Das @ Mou and Manoranjan Debnath @ Behari, who were absconding

A were apprehended at Delhi with the help of the Police at Tilak Marg Police Station. These three accused persons were brought to Calcutta by the Investigating Officer and upon being produced before the Court on 16th October, 2003, they were remanded to police custody by the Court. During their custody
B and at their statement, the Avon Cycle which was driven by the deceased, was recovered from an abandoned place near Agarpara Railway Station. On 4th November, 2003, accused Bishu Saha was arrested by the police from Highland, Sodhpur and produced before the Court. He was taken into custody.
C Later on, even the other accused, namely, Shyamal Ghosh and Satyajit Das were arrested from Sodhpur. However, despite its best efforts, the Police was not able to arrest accused Ganesh Das and Panchanan Tarafdar @ Chotka and declared them absconders. Charge sheet against all other six accused was
D filed. However, at a subsequent stage, even the said two absconding accused were arrested by the Police and produced before the Court and they also were charged with the same offences.

9. Thus, all the accused were charged with the afore-
E stated offences and subjected to face trial before the Court of competent jurisdiction. After evidence of the prosecution was closed, the incriminating material was put to the accused and their statements under Section 313 of the Cr.P.C. were recorded. As already noticed, thereafter, the accused were
F convicted by the Trial Court and upon appeal before the High Court, they were acquitted of the offence under Section 379 IPC but sentenced to life imprisonment for the offence under Section 302 read with Section 34 IPC and were also sentenced for other offences, as indicated supra.

G

10. It will be appropriate to refer to the contentions raised before this Court by the learned counsel appearing for the respective accused persons. The contentions are:

i. The crucial witnesses of the prosecution, particularly

H

PW8, Binode Mallick, PW17, Amal Ray and PW19, Kali Das have not named accused Shyamal Ghosh. Besides, these witnesses are not reliable and their statements could not form the basis of conviction of the accused persons. In fact, PW17, Amal Ray is a tutored witness as he was in police custody for three days before his statement was recorded.

ii. The present case being a case of circumstantial evidence does not establish the complete chain of events so as to substantiate the conviction of the accused.

iii. PW9, Haru Das, has not named any of the accused and the disposal of the dead body which is a material circumstance has not been proved in accordance with law and, therefore, the conviction of the accused persons is ill-founded.

iv. Accused Shyamal Ghosh was not identified in the test identification parade and only accused Satyajit Das @ Sadhu's identity could be established. As such, Shyamal Ghosh is not even proved to be connected with the commission of the crime.

v. The driver of the Maruti Van, Manik Das was never produced before the Court for cross-examination and, therefore, statement under Section 164 of the CrPC of the said witness is inconsequential.

vi. The evidence against the accused is very weak and nothing has been recovered from the accused Shyamal Ghosh. Since no specific role is attributable to Shyamal and even to other accused persons, the conviction under Section 302 read with Section 34 IPC is not sustainable, particularly against accused Shyamal.

vii. There has been considerable delay, varying from

A 3 days to 20 days, in recording the statement of the prosecution witnesses and, as such, the possibility of the witnesses not speaking the truth cannot be ruled out. These witnesses were informed about what statement to make prior to recording of their B respective statements.

viii. PW8, Binode Mallick and PW19, Kali Das cannot be believed as they are chance witnesses. Statement of PW8 was recorded after a delay of 21 days. He did not disclose the name of anyone. C

ix. Conduct of the prosecution witnesses including the family members of the deceased is abnormal. No Police report was lodged despite a specific case of the prosecution that the accused persons had D come to the house of the deceased on a number of occasions for demanding money and had even threatened to murder the deceased.

x. The fact that the prosecution has failed to establish the time of death of the deceased would lead to one E irresistible conclusion that the prosecution has not been able to establish its case beyond reasonable doubt.

xi. The statement of the accused under Section 313 F of the CrPC cannot be used against the accused. Reliance by the courts below upon such statement is, therefore, improper and illegal.

xii. The recoveries effected from the accused persons, G if any, including even that from Manoranjan Debath @ Behari, are contrary to law and are, therefore, inadmissible. In fact, the seizure memos were got signed on blank papers.

xiii. There is no common intention and participation by H

all the accused persons. Resultantly, the ingredients of Section 34 IPC are not satisfied. A

11. While collectively responding to the above arguments raised on behalf of the different accused persons, the learned counsel appearing for the State contended that there existed a clear motive for committing the crime, i.e., demand of money. B

12. The present case is not a case of circumstantial evidence *simpliciter.* According to the case of the prosecution, there are eye-witnesses to different events that had taken place. These witnesses are reliable and trustworthy. They are neither C tutored nor stalked or interested witnesses. The background of the accused persons, their conduct in absconding immediately after the occurrence and statement of the accused under Section 313 CrPC fully support the case of the prosecution. Even if some witnesses had turned hostile or there existed D certain minor defects in the investigation, the accused persons cannot derive any advantage therefrom. According to the learned counsel, defective investigation normally would not prove fatal to the case of the prosecution and even delay in examination of witnesses *per se* would not render statement E of a witness unreliable. Once the entire prosecution evidence is cumulatively examined, the ingredients of Section 34 IPC are fully satisfied.

Prosecution Evidence F

13. Before we proceed to dwell upon the merits or otherwise of the contentions raised before us, it will be necessary for the Court to examine the entire prosecution evidence at a glance.

G

14. In the present case, the investigative machinery was set into motion by two different facts. Firstly, Exhibit 15, which is the missing diary report lodged by the wife of the deceased Lily Bhattacharjee PW4, and brother of the deceased Arindam Bhattacharjee, PW6 on 30th September, 2003 and secondly, H

A the FIR, Ext. 12, lodged by PW15, Apu @ Sukalyan Mukherjee on 1st October, 2003. No action appears to have been taken on the former while the Investigating Officer commenced his investigation on the basis of the latter.

B According to PW15, on 30th September, 2003 at about 10.00 p.m. when he went to the Electric Tower situated at Dangla Disla by the side of Barrackpore Dum Dum Express, Patulia Barabagan in front of garden of Tapan Santra he noticed two bags containing different parts of a human dead body upon which he informed the police and lodged a complaint C at Khardah Police Station. One Indrajit Sen had written the complaint, Exhibit 10, which bore the signatures of PW15 at Exhibit 10/1. If one looks at the content of Ext. 10, *per se,* it is not evident as to by whom and how the offence was committed. It is a settled principle of law that FIR is not a substantive piece D of evidence. However, during the course of investigation, the story leading to the commission of the crime got unfolded and pointed towards the guilt of the accused with certainty.

15. According to PW4 and PW6, the deceased used to E earn his livelihood through private tuitions and also used to deal in clothing. The elder brother of the deceased was employed in a private firm and both of them had built six shop rooms on their own land in front of the house where they were residing, for the purpose of letting out. Particularly according to PW4, F Uttam Das, Mou @ Dipak Das, Chhotka @ Panchanan Tarafdar had demanded Rs.40,000/- from her husband towards 'Mastani Salami'. The deceased had expressed his inability to pay the said amount. Thereafter, Uttam Das, Mou and Chotka had called the deceased to the club premises of West Bengal G Bayan Samiti. The deceased went there and agreed to pay a sum of Rs.2,000/- which was not accepted by the accused and they threatened the deceased with dire consequences, if their demand of Rs.40,000/- was not satisfied. Uttam Das, Panchanan @ Chotka, Ganesh Sadhu, Shyamal Ghosh, Dipak Das Chor Bishu, Manoranjan came to the house of the H

deceased two or three times and threatened even her mother-in-law, the deceased and his brother with dire consequences if the demand was not fulfilled. According to this witness, on 27th September, 2003, Uttam Das along with his associates had come to their house and extended a similar threat. They informed about this incident to political leaders, party officers and to the people and were assured of proper help by them. On 29th of September, 2003 at about 9.p.m., the deceased went to the house of Chandan Dey at Ghola Gouranganagar by an Avon cycle to collect money in connection with his business. He did not return at night. Therefore, they went to Chandan's house on the next morning and came to know that the deceased had come there in the night and after collecting money, he had returned therefrom on that very day. This resulted in lodging of the afore-noted missing diary report at the Ghola Police Station by PW6. On 1st October, 2003, PW4 and PW6 both were called to the Police Station to identify the dead body which, as noted above, had been recovered as per the statement of PW15. It may be noticed that according to PW4 the deceased was wearing four rings, HMT watch and was carrying cash and other papers with him on the night of 29th September, 2003. After identifying the body at the Police Station, it was clear that the accused persons had, after murdering the deceased, cut the body of the deceased into pieces and packed the same in gunny bags with an intention to destroy the evidence. PW4 and PW6 both identified the apparels of the deceased as well as the accused persons in Court. PW4 also stated that she had identified the accused persons even at the Police Station.

16. Now, we have to examine the prosecution evidence as to the manner in which the occurrence took place and the statements of the witnesses that are relevant for that purpose. PW8, Binode Mallick, is stated to be an eye-witness to the assault caused by the accused upon the deceased. This witness stated that at the relevant time he was running a tea stall near Sandhya Cinema Hall at Khardah and also supplied

A biscuits to the shops at Panchanantala Market and Bhanur More. On 29th September, 2003 at about 12.00 a.m in the night, he was returning to his home from Panchanan Tala, after making tagada. When he reached near Goshala Field he saw that Uttam, Chotka, Mou, Chorbisu, Sadhu and Ganesh were B assaulting a fat person, whom he knew as Archideb Bhattacharjee, by strangulating him with a *gumcha* and were taking the deceased towards Goshala Field. He asked them the reason for the same and they told him to leave the place as it was their internal matter. The deceased was saying 'save C me save me'. PW8 then left that place. After two days he came to know that the said person had been murdered and his body had been cut into pieces and was left near the Kalyani Road Highway. The witness identified the accused persons as the ones who were doing the mischief on that night. In his cross- D examination, he clearly denied the suggestion that he was deposing falsely or that he had any friendship or intimacy with the accused persons. The witness also stated that he did not know the name of the deceased prior to the date of occurrence and, in fact, he came to know of the same from the television after two days of the incident. In his cross-examination, he also E stated that about 10.45 p.m., he had reached Bhanur More and within 5-10 minutes, he reached Panchanan Tala Market and had spent nearly an hour at Panchanan Tala Market for collecting money from the said shop owners and after getting payment he started for his home.

F

17. PW 17, Amal Ray, is another witness to the altercation that took place between the deceased and Uttam Das and his associates including Shyamal, Sadhu, Bihari, Ganesh, Manoranjan, Mou. According to this witness, he had seen the G altercation between them. When he was watching the incident, he was asked to leave the place by the accused persons, which he did and thereafter on the next day, he heard about the death of Archideb Bhattacharjee. His statement was recorded by the Police three days after the incident. This witness also identified H the accused in the Court. In his cross-examination, he

specifically denied the suggestion that he had not witnessed the incident in question. A

18. The next witness whose statement has a direct bearing on this aspect is PW19, Kali Das, who is a resident of Nandan Kanan. This witness stated before the Court that on 29th September, 2003 at about 11.30 p.m. while he was returning from Rashmoni More, he found that a *Jhamela* was going on near Battalla of Nandan Kanan in between Archided and Uttam, Panchanan, Bisu, Bihari, Chotka, Mou and scuffling was going on between them. Uttam and Bishu threatened him, therefore, he left the place. Two days after the incident, he learnt about the recovery of body parts of Archideb Bhattacharjee. He also identified all the accused in the Court. It needs to be noticed that according to this witness, all the persons whom he had seen on that night were present in the Court and he identified them. B C D

19. In his statement, he had not specifically given the name of Shyamal Ghosh and Ganesh. In his cross-examination, he admitted that he was taken into police custody at about 10 a.m. on the next date and was released by the Police after four days. He admitted that he did not give the names of the accused persons' father to the police. He further stated that he had not gone to the Police Station on 29th September, 2003 to report about the *Jhamela*. Moreover, the Investigating Officer in his statement as PW28 had stated that on 1st October, 2003, he had examined Arindam Bhattacharjee at Police Station and he had also examined various relations of the deceased. He denied that Amal Ray, PW17 was in custody. In fact, according to him when he was going on his way to meet Amal Ray, he had the occasion to meet him and had examined him but did not bring him to the Police Station. E F G

20. This is the direct evidence in relation to the altercation (*Jhamela*) between the accused and the deceased and the subsequent strangulation of the deceased. The necessary inference that follows is that on the day of the incident, the H

A deceased was killed and his body was disposed of, as stated by the prosecution witness noted above, by cutting the same into pieces, putting it in gunny bags and abandoning these bags at a deserted place.

B 21. The next circumstance in the chain of events is the evidence relating to dismembering of the corpse and its disposal by the accused persons. Let us examine that evidence now.

22. PW7, Prakash Chowdhury, is a witness to this incident. C According to him, on 30th September, 2003, at about 9.00 p.m. he was returning along Goshala field Bhanur More after making tagada in connection with his business. While returning, he found Uttam and Mou standing by the side of a Maruti Van and then Sadhu, Chotka, Chorbisu, Shyamal and Manoranjan were D taking inside the said steel coloured Maruti Van, parts of human dead body contained in gunny bags. He identified the accused persons in the court. He further stated that his statement was recorded by the Police, 20 to 22 days after the date of the incident. In his cross examination, certain doubts were created E about the manner in which he was conducting his business, i.e., sale and distribution of electric bulbs.

23. PW9, Haru Das, is a rickshaw puller and he parks his rickshaw at the Rickshaw stand at Bhanuthakures More. According to him, two days prior to the day of Durga Pooja F nearly two years back, when he was sitting at the rickshaw stand, he saw that a steel coloured Maruti Van stopped near Goshala field and four-five bags containing parts of a human body were being loaded in the Maruti Van from the side of Goshala field by accused Uttam, Mou, Chotka, Bisu, Ganesh G and Bihari. All the accused persons who were present in the Court were identified by this witness. According to this witness, the accused persons used to travel in his rickshaw and paid the exact fair. After putting the body into the van, the van went away towards Rashmoni More. The witness specifically stated H that subsequently, he was threatened by Uttam Das and his

associates by saying that if he disclosed anything to anybody, his family would be destroyed. This witness was subjected to a lengthy cross-examination but nothing material came out in the cross examination.

24. PW-11, Someraw Orang is another rickshaw puller. He stated that he along with Tarapada Sahadeb and Haru was at the Rickshaw stand of Bhanuthakur More. According to him, a Maruti car had stopped there and Uttam and Mou were standing by the side of the car and Chotka, Bisu, Manoranjan and Ganesh, were loading the bags containing the bloody parts of human body into the said car from Goshala field. Thereafter, the car went towards Rashmoni More with the accused persons. He identified all the accused persons present in the Court. He stated that he knew the accused persons for long. He came to know of the murder 20-22 days after the date of incident. In his cross-examination, he stated that he could not tell the number of the Maruti car and he had not seen that car again. He denied that he had been tutored by the Police and he was making the statement under the influence of the police. He admitted that he carried liquor in his rickshaw, as a government liquor shop was situated at Sodhpur and he went there, and sometimes he also drank liquor.

25. According to the prosecution, the statements of these witnesses completely establish that the deceased was last seen with the accused and they were responsible for assaulting and strangulating him and they were also witnessed loading the parts of the human dead body into the Maruti van. Resultantly, as per the prosecution, both the vital circumstances i.e. commission of murder as well as disposal of the body of the deceased have been proved.

26. PW-2 Jhantu Dey, the brother-in-law of the deceased also appeared as a witness and stated that his brother-in-law had built six shop rooms on their land which was near to his house. On 15th August, 2003, Uttam, Manoranjan, Ganesh Dipak Das, Shyamal, Chotka, Bisu and Sadhu demanded Rs.

A 40,000/- from the deceased but the deceased refused. Then Uttam threatened that if the said money was not paid he would not allow Archideb to enjoy and use the said property. PW-2 is also a witness to the recovery of the chopper which was recovered on the statement of accused Bishu who brought out B the chopper from the bush in the field and admitted that they had cut the body of the deceased with the chopper. PW-2 proved his signatures on the Seizure List Ext. 1/1 and also identified in the Court the persons who had threatened the deceased.

C 27. PW1 Sunil Chakraborty and PW3 Mritunjoy Chanda were also witnesses to the recovery of the Chopper and the corresponding seizure memo, Exhibit 1/3. PW1 had signed the seizure memo and admitted his signatures as Exhibit 1. The signatures of PW3 were admitted by him at Exhibit 1/2. Both D these witnesses identified the accused persons present in the Court. The Maruti Van, Exhibit 13/2 was recovered in presence of PW23, PW24, PW25 and PW26. Further, the Avon cycle was recovered in presence of PW21 and PW22. PW21 stated that a cycle was seized from a place near Agarpara Railway E Station under the seizure list and it was recovered at the instance of three persons who led the police to the place of recovery. He admitted his signatures as Exhibit 4/1. The cycle was exhibited as Mat. Exhibit II. The signatures on the seizure memo attached to the cycle were exhibited as Exhibit 5/1.

F 28. These are the recoveries of the weapon of offence as well as the vehicle which was used by the accused persons for carrying the mutilated body parts of the deceased person. Further, the recovery of the cycle that was owned by the G deceased provides a definite link as it was recovered in furtherance to the statement of the accused, namely, Uttam Das, Dipak Das and Manoranjan Debnath. The recoveries affected by the Investigating Officer, PW28 can hardly be questioned in fact and in law.

H 29. Now, let us examine the evidence of the doctor who

conducted the post mortem on the body of the deceased. Dr. Jnanprokash Bandhopadhyay was examined as PW16. According to this witness, he was the medical officer attached to R.G. Kar Medical College and Hospital. On 1st October, 2003, he was posted at Barrackpore Police base hospital. He performed post mortem on the dead body of one Archideb Bhattacharjee, as identified by the Constable who had brought the body of the deceased. In fact, some parts of the human body had been sent for post mortem. He examined the injuries inflicted upon the deceased's body and connected each injury to the organ that had been severed from the body. He opined that all the body parts were of a single person. The injuries showed evidence of ante mortem vital reaction. The cause of death was due to effect of strangulation by ligature. He prepared the post-mortem report as Exhibit 11 with his signature as Exhibit 11/1. It will be useful to refer to certain part of the statement of this witness that reads as under :

> "On that date I held post-mortem on the dead body of one Archideb Bhattacharjee identified by constable No.4260 Brojogopal Ghosh in connection with Khardah P.S. U.D. Case No.89 dated 01.01.2003 and Khardah P.S. Case No.332 under Section 302/201/34 Indian Penal Code dated 01.10.2003. Actually following parts of the dead body were sent for post-mortem. 1. One decapitated head. 2. One beheaded body with P.M. amputation of both arms, left leg from hip and right leg from knew. 3. One left arm. 4. One right arm. 5. One left leg from knew. 6. One right leg from knew 7. One left thigh, all parts were arranged in anatomical order. The body parts were in state of moderate decompositions with bloating body feature. On examination I found flowing post-mortem injuries.
>
> 1. Incised chop would (I.C.W) placed transversely over neck adjacent to hiad. 2. Winch below symphysis menti and along with nape of the neck at the level between c.2 and c-3 vertebrae measuring 6.8" x 6.3" x through and

A through all the structure of the neck. 2. I.C.W., placed over neck adjacent to 4.4" above sterna notch placed transversely at the (torn) between C-2 and C-3 vertgorae measuring 6.8" x 6.3" x through and through all the structure of the neck.

B

Injury No.1 and 2 fitted anatomically and snugly. 3. I.C.W. 6.2" x 4.3" x 2.2 all the structures and shoulder joint cavity over right shoulder. 4. I.C.W. 6.2" X 4.7" X through and through all the structures and shoulder joint cavity over upper end of right arm.

C

Injury No. 3 and 4 fitted anatomically and snugly. 5. I.C.W., 5.9" X 4.7" through and through all the structures all the shoulder joint cavity over left shoulder. No.6 I.C.W. 5.8" X 4.6" X through and through all the structures and shoulder joint cavity over upper and of left arum.

D

Injury No.5 and 6 filled anatomically and snugly. No.7 I.C.W. over left hip 8.5 "8" X through and through all the structure and left hop joint cavity. 8. I.C.W. 8.4" X 8" X through and through all the structure and left hip joint cavity over upper and of left thigh. Injury No.7 an 8 fitted anatomically and snugly. 9. I.C.W. left knew joint towards thigh 5.8" X 5.5" X through and through all the structure and left knee joint cavity10. I.C.W. left knee joint towards leg 5.8" X 5.5" X through and through all the structure and left knee joint cavity. Injury No.9 and 10 fitted anatomically and snugly. 11. I.C.W. right knee towards thigh 5.6" X 5.5" X through and through all the structure and right knee joint cavity. 12. I.C.W. right knee towards leg 5.6" X 5.5" X through and through all the structure and right knee joint cavity. 12. Injury No.11 and 12 fitted anatomically and snugly. N 13. Incised wound 3" X 0.8" X muscle over right side of check and lower lip. No.14. I.C.W. 3.5" X 0.7" X muscle placed transversely over right side of back of knee at the level of tip of right mastoid process. 15. Lacerated wound 3." X 1.2" X muscle over left 4 and 5 intercostals space 5.6" from

E

F

G

H

interior midland. All the injuries mentioned should no evidence of Ante mortem vital reaction. All the body parts were of a single persons. Ante mortem injury No.1 one continuous ligature one (LM) 12" X 1.4" completely encircling the neck was placed transversely low down around the neck adjacent to the body 1.6" above sterna notch and 1.8" above tip of C-7 spinal process. The area over the LM was less decomposed then the rest of the body and skin over the L.M. was brownish. On dissection extensive extra vacation of blood is noted in the S.C. tissue and muscle of neck. Bruising was also noted in and around the trached cartilages with fracture and displacement of thyroid cartilages and tracheal rings. No.2. Abrasion 1.5" X 0.8" over left malar prominent No.4 Abrasion over right anterion superior iliac spine measuring 0.8" X 0.6". No.5 Bruise 4.8" X 2.5" over back of left arm 2.5" above left elbow joint. 6. Bruise 2.6" X 2" over ulnar aspect of righ wrist. 7. Haematoma scalp 3.5" X 2" X appromie 0.2" over left fronto parietal region the 1.6" from midline. The injures showed evidence of ante mortem vital reaction.

In my opinion death was due to the effects of strangulation by ligature, as noted above – ante mortem and homicidal in nature.

This is the report of post-mortem prepared by me with my handwriting. It bears my signature and seal. This report of post-mortem is marked as Ext.11 the signature is marked s Ext. 11/1.

The post-mortem injuries mentioned above may be caused by this type of moderately heavy sharp cutting."

30. The Investigating Officer was examined as PW28. Upon receiving the information from PW15, he was entrusted with the investigation of the case. According to this witness, when he reached the spot, he found that a beheaded dead body whose hands and legs were separated, was lying by the

A left side of the Barrackpore Dum Dum Highway. He conducted the inquest at the spot and prepared the Inquest Report Exhibit 3/4. He seized the gunny bags containing mutilated parts of the body of the deceased. He also recovered an empty blood stained *gumcha* and other articles vide Exhibit 16. On 1st B October, 2003, he conducted a raid in the area of Nandan Kanan in search of accused Uttam Das, Mou and Manoranjan Debnath but could not apprehend them. He recorded the statements of various witnesses. The mutilated body parts were sent to the Police hospital. On 11th October, 2003, he along C with the force started for Delhi with production warrant and thereupon he arrested three accused. He recovered the Avon bicycle, while the Maruti Van was recovered by SI, Anjan De, PW26, who had taken up investigation of the case under instructions of I.C. Khardah, during temporary absence of D PW28. Thereafter, according to this witness, he held raids in search of the associate accused but they could not be traced. PW28 prayed for issuance of WA and WPA against Chotka @ Panchanan Tarafdar, Chor Bisu @ Bisu Bisu @ Datta @ Das, Sadhu @ Satyajit Das, Shyamal Ghosh and Ganesh Das. The same were allowed. On 9th November, 2003, he held raid E at Nandan Kanan and surrounding area but could not trace the absconding accused. On 21st November, 2003, he apprehended accused Shyamal Ghosh and Sadhu @ Satyajit Das from Sodhpur. He also took into custody photographs along with negatives thereof from photographer Ashok Sen on F 7th October, 2003 and prepared seizure list marked as Exhibit 7/1. Thereafter he filed the charge sheet.

31. Another witness of some significance is PW10, Chota Orang who stated that about one and a half years back, a part G of a dead body severed from its head, hands and legs was left in front of his house near Kalyani Highway Road by someone. The Police had come to the place and prepared a report. He had put his signatures on the said report which he duly accepted in Court as Exhibit 3/1.

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32. This is the evidence that completes the chain of events and establishes the case of the prosecution beyond any reasonable doubt. The facts, right from the departure of the deceased from his house to the place of Chandan Dey to recover money upto the recovery of mutilated body of the deceased, have been proved by different witnesses, including some eye-witnesses.

33. It was contended that some of the witnesses had turned hostile and have not supported the case of the prosecution. In this regard, reference has been made to PW13 and PW23. PW13 admitted that he was a rickshaw puller of rickshaw No. 4. He also stated that he was not examined by the police. It was at that stage that the learned prosecutor sought permission of the Court to declare him hostile, which leave was granted by the Court. This witness stated that there were 10 rikshaw pullers at Nandan Kanan and he used to park his rikshaw from 7.00 a.m. to 10.00 a.m. at that stand, while in the afternoon, he used to park his rikshaw at the Sodhpur Railway Station. He denied having seen the accused persons loading the gunny bags into the Maruti Van and also receded completely from his statement made under Section 161 of the CrPC. The other witness is PW23 who was a witness to the recovery of the Maruti Van. According to this witness, the Maruti Van was parked in his parking lot. However, on 30th November, 2003 Manik Das had taken out the vehicle from the parking and again returned at mid night. With regard to his signature on the seizure memo which he accepted as Exhibit 13, he took up the plea that he was made to sign blank papers.

The mere fact that these two witnesses had turned hostile would not affect the case of the prosecution adversely. Firstly, it is for the reason that the facts that these witnesses were to prove already stand fully proved by other prosecution witnesses and those witnesses have not turned hostile, instead they have fully supported the case of the prosecution. As per the version of the prosecution, PW23 was witness to the recovery of the

A Maruti Van along with PW24, PW25 and PW26. All those witnesses have proved the said recovery in accordance with law. They have clearly stated that it was upon the statement of Manik Das that the vehicle had been recovered. Other witnesses have proved that the said vehicle was used for B carrying the gunny bags containing the mutilated parts of the dead body of the deceased. Firstly, PW13 is a witness who was at the railway station rickshaw stand along with other two witnesses namely PW9 and PW11 who have fully proved the fact as eye-witnesses to the loading of the gunny bags into the C Maruti van. Secondly, even the version given by PW13 and PW23 partially supports the case of the prosecution, though in bits and pieces. For example, PW23 has stated that the driver of the Maruti Van was Manik Das and also that he had taken out the vehicle from the parking lot at about 9.30 p.m. on the D day of the incident and had brought it back after mid-night. He also stated that this car was being driven by Manik Das. Similarly, PW13 also admitted that other rickshaws were standing at the stand. This was the place where PW9 and PW11 had seen the loading of the gunny bags into the Maruti Van. In other words, even the statements of witnesses PW13 E and PW23, who had turned hostile, have partially supported the case of the prosecution. It is a settled principle of law that statement of a hostile witness can also be relied upon by the Court to the extent it supports the case of the prosecution. Reference in this regard can be made to the case of F *Govindaraju @ Govinda* v. *State by Sriramapuram P.S. & Anr.* [(2012) 4 SCC 722].

34. Then, it was argued that there are certain discrepancies and contradictions in the statement of the prosecution witnesses G in as much as these witnesses have given different timing as to when they had seen the scuffling and strangulation of the deceased by the accused. It is true that there is some variation in the timing given by PW8, PW17 and PW19. Similarly, there is some variation in the statement of PW7, PW9 and PW11. H Certain variations are also pointed out in the statements of

PW2, PW4 and PW6 as to the motive of the accused for commission of the crime. Undoubtedly, some minor discrepancies or variations are traceable in the statements of these witnesses. But what the Court has to see is whether these variations are material and affect the case of the prosecution substantially. Every variation may not be enough to adversely affect the case of the prosecution. The variations pointed out as regards the time of commission of the crime are quite possible in the facts of the present case. Firstly, these witnesses are rickshaw pullers or illiterate or not highly educated persons whose statements had been recorded by the Police. Their statements in the Court were recorded after more than two years from the date of the incident. It will be unreasonable to attach motive to the witnesses or term the variations of 15-20 minutes in the timing of a particular event, as a material contradiction. It probably may not even be expected of these witnesses to state these events with the relevant timing with great exactitude, in view of the attendant circumstances and the manner in which the incident took place. To illustrate the irrelevancy of these so called variations or contradictions, one can deal with the statements of PW2, PW4 and PW6. PW4 and PW6 have stated that the deceased had constructed shops along with his brother for the purpose of letting out and it was thereupon that the accused persons started demanding a sum of Rs.40,000/- from the deceased and had threatened him of dire consequences, if their demand was not satisfied. PW2 has made a similar statement. However, he has stated that Uttam Das and the accused persons had threatened the deceased that if the said money was not paid, they would not allow the deceased to enjoy and use the said shops built by him. This can hardly be stated to be a contradiction much less a material contradiction. According to the witnesses, two kinds of dire consequences were stated to follow, if the demand for payment of money made by the accused was not satisfied. According to PW4 and PW6, they had threatened to kill the deceased while according to PW2, the accused had threatened that they would not permit the accused to enjoy the said property.

A Statements of all these witnesses clearly show one motive, i.e., illegal demand of money coupled with the warning of dire consequences to the deceased in case of default. In our view, this is not a contradiction but are statements made bona fide with reference to the conduct of the accused in relation to the B property built by the deceased and his brother. It is a settled principle of law that the Court should examine the statement of a witness in its entirety and read the said statement along with the statement of other witnesses in order to arrive at a rational conclusion. No statement of a witness can be read in part and/ C or in isolation. We are unable to see any material or serious contradiction in the statement of these witnesses which may give any advantage to the accused.

35. The learned counsel appearing for the appellants contended that PW2, PW4 and PW6 are interested witnesses D as they are close relations of the deceased person. Further it is contended that the statements of PW8, PW17 and PW19 had been recorded after considerable delay, varying from 3 to 22 days and for these reasons the case of the prosecution suffers from patent lacuna and defects. This evidence, E therefore, could not be taken into consideration by the Court to convict the accused. On the contrary, the accused are entitled to acquittal for these reasons. Reliance has been placed upon *State of Orissa v. Brahmananda Nanda* [(1976) 4 SCC 288] and *Maruti Rama Naik v. State of Maharashtra* [(2003) 10 F SCC 670].

36. On the contra, the submission on behalf of the State is that the delay has been explained and though the Investigating Officer was cross-examined at length, not even a G suggestion was put to him as to the reason for such delay and, thus, the accused cannot take any benefit thereof at this stage. Reliance in this regard on behalf of the State is placed on *Brathi alias Sukhdev Singh v. State of Punjab* [(1991) 1 SCC 519] *Banti alias Guddu v. State of M.P.* [(2004) 1 SCC 414] and *State of U.P. v. Satish* [(2005) 3 SCC 114].

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37. These are the issues which are no more *res integra*. The consistent view of this Court has been that if the explanation offered for the delayed examination of a particular witness is plausible and acceptable and the Court accepts the same as plausible, there is no reason to interfere with the conclusion arrived at by the Courts. This is the view expressed in the case of *Banti* (supra). Furthermore, this Court has also taken the view that no doubt when the Court has to appreciate evidence given by the witnesses who are closely related to the deceased, it has to be very careful in evaluating such evidence but the mechanical rejection of the evidence on the sole ground that it is that of an interested witness would inevitably relate to failure of justice [*Brathi* (supra)]. In the case of *Satish* (supra), this Court further held that the explanation offered by Investigating Officer on being questioned on the aspect of delayed examination by the accused has to be tested by the Court on the touchstone of credibility. It may not have any effect on the credibility of the prosecution evidence tendered by other witnesses.

38. The delay in examination of witnesses is a variable factor. It would depend upon a number of circumstances. For example, non-availability of witnesses, the Investigating Officer being pre-occupied in serious matters, the Investigating Officer spending his time in arresting the accused who are absconding, being occupied in other spheres of investigation of the same case which may require his attention urgently and importantly, etc. In the present case, it has come in evidence that the accused persons were absconding and the Investigating Officer had to make serious effort and even go to various places for arresting the accused, including coming from West Bengal to Delhi. The Investigating Officer has specifically stated, that too voluntarily, that he had attempted raiding the houses of the accused even after cornering the area, but of no avail. He had ensured that the mutilated body parts of the deceased reached the hospital and also effected recovery of various items at the behest of the arrested accused.

A Furthermore, the witnesses whose statements were recorded themselves belonged to the poor strata, who must be moving from one place to another to earn their livelihood. The statement of the available witnesses like PW2, PW4, PW6, and the doctor, PW16, another material witness, had been recorded at
B the earliest. The Investigating Officer recorded the statements of nearly 28 witnesses. Some delay was bound to occur in recording the statements of the witnesses whose names came to light after certain investigation had been carried out by the Investigating Officer. In the present case, the examination of the
C interested witnesses was inevitable. They were the persons who had knowledge of the threat that was being extended to the deceased by the accused persons. Unless their statements were recorded, the investigating officer could not have proceeded with the investigation any further, particularly keeping
D the facts of the present case in mind. Merely because three witnesses were related to the deceased, the other witnesses, not similarly placed, would not attract any suspicion of the court on the credibility and worthiness of their statements.

39. Some emphasis has been placed by the learned
E counsel appearing for the appellants upon some patent defects in the prosecution case and the abnormal conduct of the prosecution witnesses. According to the counsel, it is very unnatural that related witnesses like PW2, PW4 and PW6 had not informed the police when they lodged the missing diary
F report with the Police Station that there was demand for money by the accused and that they had threatened the deceased with dire consequences if that demand was not satisfied. Furthermore, it is pointed out that nothing was sent by the Investigating Officer to the Forensic Science Laboratory (FSL)
G to provide any scientific link to the commission of the offence or corroboration of the case of the prosecution. The contention is that these are material defects and should normally result in acquittal of the accused.

40. We are not impressed by this contention of the learned
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counsel appearing for the appellants. We have already noticed above that the question of disbelieving the interested witnesses (family members of the deceased) does not arise. Their statements are reliable and trustworthy. The fact that they did not inform the Police while lodging the missing diary report about the illegal demand for money by the accused persons and that the accused had also threatened the deceased with dire consequences, is not a material omission. All the family members must have been under great mental stress as their husband/brother had not returned home. It is also not factually correct to say that nothing of this kind was mentioned by these related witnesses to the police at any stage. The Investigating Officer, PW28, had specifically stated in his statement "Jhantu Dey stated to me that on 15.8.03 Uttam Das, Dipak Das, Manoranjan Debnath, Ganesh, Chotka, Chor Bisu, Shyamal, Sadhu, demanded Rs.40,000/- from Archideb Bhattacharjee in his presence". Of course, there are certain discrepancies in the investigation inasmuch as the Investigating Officer failed to send the blood stained gunny bags and other recovered weapons to the FSL, to take photographs of the shops in question, prepare the site plan thereof, etc. Every discrepancy in investigation does not weigh with the Court to an extent that it necessarily results in acquittal of the accused. These are the discrepancies/lapses of immaterial consequence. In fact, there is no serious dispute in the present case to the fact that the deceased had constructed shops on his own land. These shops were not the site of occurrence, but merely constituted a relatable fact. Non-preparation of the site plan or not sending the gunny bags to the FSL cannot be said to be fatal to the case of prosecution in the circumstances of the present case. Of course, it would certainly have been better for the prosecution case if such steps were taken by the Investigating Officer. In *C. Muniappan* v. *State of Tamil Nadu* [(2010) 9 SCC 567], this Court has clearly stated the principle that the law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by

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A perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Similar view was taken by this Court in the case of *Sheo Shankar Singh v. State of Jharkhand and Another* [(2011) 3 SCC 654] wherein the Court held that failure of the investigating agency B to hold a test identification parade does not, in that view, have the effect of weakening the evidence of identification in the Court. As to what should be the weight attached to such an identification is a matter which the court would determine in the peculiar facts and circumstances of each case. Similarly, failure C to make reference to the FSL in the circumstances of the case is no more than a deficiency in the investigation of the case and such deficiency does not necessarily lead to a conclusion that the prosecution case is totally unworthy of credit.

41. As we are discussing the conduct of the prosecution D witnesses, it is important for the Court to notice the conduct of the accused also. The accused persons were absconding immediately after the date of the occurrence and could not be arrested despite various raids by the police authorities. The Investigating Officer had to go to different places, i.e., Sodhpur E and Delhi to arrest the accused persons. It is true that merely being away from his residence having an apprehension of being apprehended by the police is not a very unnatural conduct of an accused, so as to be looked upon as absconding *per se* where the court would draw an adverse inference. *Paramjeet* F *Singh v. State of Uttarakhand* [(2010) 10 SCC 439] is the judgment relied upon by the learned counsel appearing for the appellant. But we cannot overlook the fact that the present case is not a case where the accused were innocent and had a reasonable excuse for being away from their normal place of G residence. In fact, they had left the village and were not available for days together. Absconding in such a manner and for such a long period is a relevant consideration. Even if we assume that absconding by itself may not be a positive circumstance consistent only with the hypothesis of guilt of the accused H because it is not unknown that even innocent persons may run

away for fear of being falsely involved in criminal cases, but in the present case, in view of the circumstances which we have discussed in this judgment and which have been established by the prosecution, it is clear that absconding of the accused not only goes with the hypothesis of guilt of the accused but also points a definite finger towards them. This Court in the case of *Rabindra Kumar Pal @ Dara Singh v. Republic of India* [(2011) 2 SCC 490], held as under :

> "**88.** The other circumstance urged by the prosecution was that A-3 absconded soon after the incident and avoided arrest and this abscondence being a conduct under Section 8 of the Evidence Act, 1872 should be taken into consideration along with other evidence to prove his guilt. The fact remains that he was not available for quite some time till he was arrested which fact has not been disputed by the defence counsel. We are satisfied that before accepting the contents of the two letters and the evidence of PW 23, the trial Judge afforded him the required opportunity and followed the procedure which was rightly accepted by the High Court."

42. Then it was also contended that circumstantial evidence is a very weak evidence and in the present case, the complete chain having not been established, the accused are entitled to acquittal. This argument again does not impress us. Firstly, we have discussed in some details that this is not purely a case of circumstantial evidence. There are eye-witnesses who had seen the scuffling between the deceased and the accused and the strangulation of the deceased by the accused persons and also the loading of the mutilated body parts of the deceased contained in gunny bags into Maruti Van. Evidence establishing the 'last seen together' theory and the fact that after altercation and strangulation of the deceased which was witnessed by PW8, PW17 and PW19, the body of the deceased was recovered in pieces in presence of the witnesses, have been fully established. To a very limited extent,

A it is a case of circumstantial evidence and the prosecution has proved the complete chain of events. The gap between the time when the accused persons were last seen with the deceased and the discovery of his mutilated body is quite small and the possible inference would be that the accused are responsible
B for commission of the murder of the deceased. Once the last seen theory comes into play, the onus was on the accused to explain as to what happened to the deceased after they were together seen alive. The accused persons have failed to render any reasonable/plausible explanation in this regard.

C 43. Even in the cases of circumstantial evidence, the Court has to take caution that it does not rely upon conjectures or suspicion and the same should not be permitted to take the place of legal proof. The circumstances from which the conclusion of guilt is to be drawn should in the first instance be
D fully established and all the facts so established should be consistent only with the hypothesis of guilt of the accused. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. {Ref. *Mousam Singha Roy and*
E *Others v. State of W.B.* [(2003) 12 SCC 377]].

44. Accused Ganesh, in his statement under Section 313 Cr.P.C., admitted the fact that he was absconding even till the charge-sheet was filed in the Court declaring him absconding
F and thereafter, he surrendered at the Police Station after charges were framed. On a specific question as to what he had to say in this regard, except saying that it was correct, he gave no further explanation. This piece of evidence points towards lack of bona fides on the part of this accused. It may also be
G noticed that all the accused only stated that they did not know anything. However, they did not dispute the period during which they were stated to be absconding. This again is a circumstance which, seen in the light of the prosecution evidence, points towards the guilt of the accused.

H 45. Another argument advanced on behalf of accused

Shyamal Ghosh is that he was not named in the FIR, was not identified in police custody and was also not named by PW8 in his statement. As far as naming Shyamal Ghosh in the FIR is concerned, none of the accused was named in the FIR, which was recorded on the statement of PW15. PW15 had only informed about the recovery of the gunny bags containing the human body parts. Thus, it was a case of blind murder at that stage and was so registered by the police. Coming to the fact that this accused was not specifically named by PW8 in his statement before the Court, we may notice that it is true that Shyamal Ghosh was not named by the said witness. PW8 had only named six accused persons but it is also to be noted that when he identified the accused persons present in the Court, he specifically stated "the persons who were doing the mischief in that night are present in Court today (identified)". PW17 had seen the altercation immediately preceding the strangulation of the deceased and he has clearly named Shyamal Ghosh in his statement. Of course, this witness also had named six persons and according to this witness, the accused persons had asked him to leave the place which he then did. PW19 had also similarly named six persons while not specifically naming the accused Shyamal but he also stated in his examination, "The persons whom I saw in that night all are present in Court today (identified)".

46. This clearly shows that all the three eye-witnesses to altercation and strangulation named some of the accused persons while did not name others specifically. However, they identified all the accused persons in the Court as the persons who were present at the time of the mischief, altercation and strangulation of the deceased. This Court in the case of *Tika Ram* v. *State of Madhya Pradesh* [(2007) 15 SCC 760), while rejecting the argument that the name of the accused is not mentioned in the FIR held that this would not by itself be sufficient to reject the prosecution case as against this accused. The court further held that where the prosecution is able to establish its case, such omission by itself would not be sufficient

A to give benefit of doubt to the accused. In the present case, as already discussed, the prosecution has been able to establish its case beyond reasonable doubt.

47. From the above discussion, it precipitates that the discrepancies or the omissions have to be material ones and then alone, they may amount to contradiction of some serious consequence. Every omission cannot take the place of a contradiction in law and therefore, be the foundation for doubting the case of the prosecution. Minor contradictions, inconsistencies or embellishments of trivial nature which do not affect the core of the prosecution case should not be taken to be a ground to reject the prosecution evidence in its entirety. It is only when such omissions amount to a contradiction creating a serious doubt about the truthfulness or creditworthiness of the witness and other witnesses also make material improvements or contradictions before the court in order to render the evidence unacceptable, that the courts may not be in a position to safely rely upon such evidence. Serious contradictions and omissions which materially affect the case of the prosecution have to be understood in clear contra-distinction to mere marginal variations in the statement of the witnesses. The prior may have effect in law upon the evidentiary value of the prosecution case; however, the latter would not adversely affect the case of the prosecution. Another settled rule of appreciation of evidence as already indicated is that the court should not draw any conclusion by picking up an isolated portion from the testimony of a witness without adverting to the statement as a whole. Sometimes it may be feasible that admission of a fact or circumstance by the witness is only to clarify his statement or what has been placed on record. Where it is a genuine attempt on the part of a witness to bring correct facts by clarification on record, such statement must be seen in a different light to a situation where the contradiction is of such a nature that it impairs his evidence in its entirety.

48. In terms of the explanation to Section 162 Cr.P.C.

which deals with an omission to state a fact or circumstance in the statement referred to in sub-section (1), such omission may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether there is any omission which amounts to contradiction in particular context shall be a question of fact. A bare reading of this explanation reveals that if a significant omission is made in a statement of a witness under Section 161 Cr.P.C., the same may amount to contradiction and the question whether it so amounts is a question of fact in each case. (*Sunil Kumar Sambhudayal Gupta (Dr.) Vs. State of Maharashtra* [(2010) 13 SCC 657] and *Subhash Vs. State of Haryana* [(2011) 2 SCC 715].

49. The basic element which is unambiguously clear from the explanation to Section 162 CrPC is use of the expression 'may'. To put it aptly, it is not every omission or discrepancy that may amount to material contradiction so as to give the accused any advantage. If the legislative intent was to the contra, then the legislature would have used the expression 'shall' in place of the word 'may'. The word 'may' introduces an element of discretion which has to be exercised by the court of competent jurisdiction in accordance with law. Furthermore, whether such omission, variation or discrepancy is a material contradiction or not is again a question of fact which is to be determined with reference to the facts of a given case. The concept of contradiction in evidence under criminal jurisprudence, thus, cannot be stated in any absolute terms and has to be construed liberally so as to leave desirable discretion with the court to determine whether it is a contradiction or material contradiction which renders the entire evidence of the witness untrustworthy and affects the case of the prosecution materially.

50. Then, it is also contended and of course with some vehemence that where the prosecution is relying upon the last seen theory, it must essentially establish the time when the

A accused and deceased were last seen together as well as the time of the death of the deceased. If these two aspects are not established, the very application of the 'last seen theory' would be impermissible and would create a major dent in the case of the prosecution. In support of this contention, reliance is B placed upon the judgment of this Court in the case of *S.K. Yusuf v. State of West Bengal* [(2011) 11 SCC 754].

51. Application of the 'last seen theory' requires a possible link between the time when the person was last seen alive and the fact of the death of the deceased coming to light. There C should be a reasonable proximity of time between these two events. This proposition of law does not admit of much excuse but what has to be seen is that this principle is to be applied depending upon the facts and circumstances of a given case. This Court in para 21 of *Yusuf's* case (supra) while referring to D the case of *Mohd. Azad @ Samin v. State of West Bengal* [(2008) 15 SCC 449] and *State through Central Bureau of Investigation Vs. Mahender Singh Dahiya* [(2011) 3 SCC 109], held as under:-

E **"21.** The last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime F becomes impossible. (Vide *Mohd. Azad* v. *State of W.B* and *State v. Mahender Singh Dahiya*)"

52. The reasonableness of the time gap is, therefore, of some significance. If the time gap is very large, then it is not only difficult but may even not be proper for the court to infer G that the accused had been last seen alive with the deceased and the former, thus, was responsible for commission of the offence. The purpose of applying these principles, while keeping the time factor in mind, is to enable the Court to examine that where the last seen together and the time when H the deceased was found dead is short, it inevitably leads to the

inference that the accused person was responsible for commission of the crime and the onus was on him to explain how the death occurred. A

53. In the facts of the present case, the factor of time does not play such a significant role because it is a case where there were eye-witnesses to the strangulation of the deceased by the accused, and therefore, it may not be expected of the prosecution to show the time of last seen and death, by leading independent evidence. PW-17 is the witness to the altercation between the accused and the deceased. PW-8 is the witness to the strangulation of the deceased by the accused persons. Besides, PW-7, PW-9 and PW-11 are witnesses to the loading of the gunny bags containing human body parts in the Maruti Van by the accused. Thus, these facts have been established by independent witnesses. None of these witnesses is a relation or a witness inimical towards the accused. It has come on record that the occurrence had taken place on 29th September, 2003 at midnight. There may be some variation (5 to 10 minutes) in the time stated by different witnesses as to when the occurrence took place. From their statements, it is clear that by and large, they have given approximately the same time with reasonable variation, which is primarily for the reason that the accused persons and deceased were seen by the witnesses at different places. We have already held that these discrepancies do not amount to any material contradiction. Thus, the time of death stands clearly established between 11.30 pm to 12.00 am on 29th/30th September, 2003. Thereafter, it was the act of disposal of the body of the deceased which attracts the offence under Section 201 IPC. B C D E F

54. As far as the death of the deceased is concerned, there was hardly any time gap between the two incidents, i.e. the last seen alive and the fact of death of the deceased becoming known. All the events occurred between 11.00 p.m. to 12.00 a.m. at midnight of 29th September, 2003. Thus, the contention raised on this ground is entirely without any merit. G H

A 55. On behalf of accused Shyamal, it was also contended that despite the identification parade being held, he was not identified by the witnesses and also that the identification parade had been held after undue delay and even when details about the incident had already been telecasted on the B television. Thus, the Court should not rely upon the identification of the accused persons as the persons involved in the commission of the crime and they should be given the benefit of doubt.

C 56. The whole idea of a Test Identification Parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to D test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime.

57. It is equally correct that the CrPC does not oblige the E investigating agency to necessarily hold the Test Identification Parade. Failure to hold the test identification parade while in police custody, does not by itself render the evidence of identification in court inadmissible or unacceptable. There have been numerous cases where the accused is identified by the F witnesses in the court for the first time. One of the views taken is that identification in court for the first time alone may not form the basis of conviction, but this is not an absolute rule. The purpose of the Test Identification Parade is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for G corroboration of the sworn testimony of the witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence is, however subjected to exceptions. Reference can be made to *Munshi Singh Gautam v. State of M.P.*[(2005) 9 H

SCC 631], *Sheo Shankar Singh v. State of Jharkhand and Anr.* [(2011) 3 SCC 654]. A

58. Identification Parade is a tool of investigation and is used primarily to strengthen the case of the prosecution on the one hand and to make doubly sure that persons named accused in the case are actually the culprits. The Identification Parade primarily belongs to the stage of investigation by the police. The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification in court. Thus, it is only a relevant consideration which may be examined by the court in view of other attendant circumstances and corroborative evidence with reference to the facts of a given case. B C

59. In the present case, certainly Shyamal Ghosh, accused was not identified at the time of Test Identification Parade held on 28th November, 2003. However, Sadhu @ Satyajit Das was identified. PW-14 is the learned Judicial Magistrate who had recorded the statement of Manik Das under Section 164 CrPC as well as held the Identification Parade on 28th November, 2003. Other accused were neither subjected to Identification Parade nor could the question of identifying them arise. The mere fact that Shyamal Ghosh accused was not identified by Manik Das is not of great relevancy in the present case. Firstly, for the reason that Manik Das was never examined as a witness in the court and even his statement under Section 164 CrPC has not been relied upon by any court while convicting the accused. Secondly, not only one, but all the witnesses i.e. PW-7, PW-8, PW-9, PW-11, PW-17 and PW-19, duly identified the accused in Court and they did so without any demur or hesitation. Manik Das was a person who himself was under a threat and was asked to take the gunny bags for their disposal near the Barrackpore Dum Dum Highway. Thus, we are of the considered view that non-identification of Shyamal Ghosh by Manik Das is inconsequential in the present case. D E F G

60. We may notice at this stage that having returned a H

finding that prosecution has been able to prove its case beyond reasonable doubt on the strength of the oral and documentary evidence produced by the prosecution, without taking into consideration the statement of Manik Das made under Section 164 CrPC., it is not necessary for us to examine whether the statement of Manik Das under Section 164 CrPC is admissible in evidence and what its evidentiary value is. The question of law is whether the statement recorded under Section 164 CrPC can be relied upon by the prosecution in a given case or not. We leave this question open.

61. Lastly, it was contended that the provisions of Section 34 IPC are not attracted in the present case as the prosecution has not been able to prove either common intention or participation of the accused persons in the commission of the crime. Resultantly, they could not have been held guilty of the offence under Section 302 read with Section 34 IPC. Before we discuss the evidence relevant to this aspect of the case, let us examine the law in relation to ingredients and application of Section 34 IPC.

62. In a very recent judgment of this court in the case *Nand Kishore v. State of Madhya Pradesh* [(2011) 12 SCC 120], this Court discussed the ambit and scope of Section 34 IPC as well as its applicability to a given case as under :

"**20.** A bare reading of this section shows that the section could be dissected as follows:

(*a*) Criminal act is done by several persons;

(*b*) Such act is done in furtherance of the common intention of all; and

(*c*) Each of such persons is liable for that act in the same manner as if it were done by him alone.

In other words, these three ingredients would guide the court in determining whether an accused is liable to be

convicted with the aid of Section 34. While first two are the acts which are attributable and have to be proved as actions of the accused, the third is the consequence. Once the criminal act and common intention are proved, then by fiction of law, criminal liability of having done that act by each person individually would arise. The criminal act, according to Section 34 IPC must be done by several persons. The emphasis in this part of the section is on the word "done". It only flows from this that before a person can be convicted by following the provisions of Section 34, that person must have done something along with other persons. Some individual participation in the commission of the criminal act would be the requirement. Every individual member of the entire group charged with the aid of Section 34 must, therefore, be a participant in the joint act which is the result of their combined activity.

21. Under Section 34, every individual offender is associated with the criminal act which constitutes the offence both physically as well as mentally i.e. he is a participant not only in what has been described as a common act but also what is termed as the common intention and, therefore, in both these respects his individual role is put into serious jeopardy although this individual role might be a part of a common scheme in which others have also joined him and played a role that is similar or different. But referring to the common intention, it needs to be clarified that the courts must keep in mind the fine distinction between "common intention" on the one hand and "mens rea" as understood in criminal jurisprudence on the other. Common intention is not alike or identical to mens rea. The latter may be coincidental with or collateral to the former but they are distinct and different.

22. Section 34 also deals with constructive criminal liability. It provides that where a criminal act is done by several

A persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it was done by him alone. If the common intention leads to the commission of the criminal offence charged, each one of the persons sharing the common intention is B constructively liable for the criminal act done by one of them. (Refer to *Brathi v. State of Punjab*.)

23. Another aspect which the court has to keep in mind while dealing with such cases is that the common intention or state of mind and the physical act, both may be arrived C at the spot and essentially may not be the result of any predetermined plan to commit such an offence. This will always depend on the facts and circumstances of the case, like in the present case Mahavir, all alone and unarmed went to demand money from Mahesh but Mahesh, Dinesh D and Nand Kishore got together outside their house and as is evident from the statements of the witnesses, they not only became aggressive but also committed a crime and went to the extent of stabbing him over and over again at most vital parts of the body puncturing both the heart and E the lung as well as pelting stones at him even when he fell on the ground. But for their participation and a clear frame of mind to kill the deceased, Dinesh probably would not have been able to kill Mahavir. The role attributable to each one of them, thus, clearly demonstrates common intention F and common participation to achieve the object of killing the deceased. In other words, the criminal act was done with the common intention to kill the deceased Mahavir. The trial court has rightly noticed in its judgment that all the accused persons coming together in the night time and G giving such serious blows and injuries with active participation shows a common intention to murder the deceased. In these circumstances, the conclusions arrived at by the trial court and the High Court would not call for any interference.

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24. The learned counsel appearing for the appellant had relied upon the judgment of this Court in *Shivalingappa Kallayanappa v. State of Karnataka* to contend that they could not be charged or convicted for an offence under Section 302 with the aid of Section 34 IPC. The said judgment has rightly been distinguished by the High Court in the judgment under appeal. In that case, the Supreme Court had considered the role of each individual and recorded a finding that there was no common object on the part of the accused to commit murder. In that case, the Court was primarily concerned with the common object falling within the ambit of Section 149 IPC. In fact, Section 34 IPC has not even been referred to in the aforereferred judgment of this Court.

25. Another case to which attention of this Court was invited is *Jai Bhagwan* v. *State of Haryana*. In that case also, the Court had discussed the scope of Section 34 IPC and held that common intention and participation of the accused in commission of the offence are the ingredients which should be satisfied before a person could be convicted with the aid of Section 34 IPC. The Court held as under: (SCC p. 107, para 10)

> "*10.* To apply Section 34 IPC apart from the fact that there should be two or more accused, two factors must be established: (*i*) common intention and (*ii*) participation of the accused in the commission of an offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and a common intention is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence of a common intention. It has to be inferred from the facts and circumstances of each case."

A **26.** The facts of the present case examined in the light of the above principles do not leave any doubt in our minds that all the three accused had a common intention in commission of this brutal crime. Each one of them participated though the vital blows were given by Dinesh
B Dhimar. But for Mahesh catching hold of the arms of the deceased, probably the death could have been avoided. Nand Kishore showed no mercy and continued pelting stones on the deceased even when he collapsed to the ground. The prosecution has been able to establish the
C charge beyond reasonable doubt."

63. In the case of *Lallan Rai and Others v. State of Bihar* [(2003) 1 SCC 268], this Court noticed the dominant feature for attracting the applicability of Section 34 IPC and dealt with the case where the contention was that several persons may
D have similar intention, yet they may not have common intention in furtherance to which they participated in an action. The court noticed as under:-

"**17.** In para 44 of the judgment in *Suresh* this Court (the
E majority view) stated: (SCC pp. 689-90)

> "*44.* Approving the judgments of the Privy Council in *Barendra Kumar Ghosh* and *Mahbub Shah cases* a three-Judge Bench of this Court in *Pandurang v. State of Hyderabad* held that to
F attract the applicability of Section 34 of the Code the prosecution is under an obligation to establish that there existed a common intention which requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of
G another, the act must have been done in furtherance of the common intention of all. This Court had in mind the ultimate act done in furtherance of the common intention. In the absence of a pre-arranged plan and thus a common intention even if
H several persons simultaneously attack a man and

each one of them by having his individual intention, namely, the intention to kill and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section. In a case like that each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any or the other. The Court emphasised the sharing of the common intention and not the individual acts of the persons constituting the crime. Even at the cost of repetition it has to be emphasised that for proving the common intention it is necessary either to have direct proof of prior concert or proof of circumstances which necessarily lead to that inference and 'incriminating facts must be incompatible with the innocence of the accused and incapable of explanation or any other reasonable hypothesis'. Common intention, arising at any time prior to the criminal act, as contemplated under Section 34 of the Code, can thus be proved by circumstantial evidence."

18. In *Suresh* this Court while recording the dominant feature for attracting Section 34 has the following to state: (SCC p. 686, para 39)

"39. The dominant feature for attracting Section 34 of the Indian Penal Code (hereinafter referred to as 'the Code') is the element of participation in absence resulting in the ultimate 'criminal act'. The 'act' referred to in the later part of Section 34 means the ultimate criminal act with which the accused is charged of sharing the common intention. The accused is, therefore, made responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all. The section does not envisage the

A separate act by all the accused persons for becoming responsible for the ultimate criminal act. If such an interpretation is accepted, the purpose of Section 34 shall be rendered infructuous."

B **19.** For true and correct appreciation of legislative intent in the matter of engrafting of Section 34 in the statute-book, one needs to have a look into the provision and as such Section 34 is set out as below:

"34. *Acts done by several persons in furtherance* C *of common intention*.—When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

D

20. A plain look at the statute reveals that the essence of Section 34 is simultaneous consensus of the mind of persons participating in the criminal action to bring about a particular result. It is trite to record that such consensus E can be developed at the spot. The observations above obtain support from the decision of this Court in *Ramaswami Ayyangar v. State of T.N.*

21. In a similar vein the Privy Council in *Barendra Kumar Ghosh v. King Emperor* stated the true purport of Section F 34 as below: (AIR p. 6)

"[T]he words of Section 34 are not to be eviscerated by reading them in this exceedingly limited sense. By Section 33 a criminal act in G Section 34 includes a series of acts and, further, 'act' includes omission to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes. By Section 37, when any offence is committed by means of several H acts whoever intentionally cooperates in the

commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence. Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things 'they also serve who only stand and wait'." A B

22. The above discussion in fine thus culminates to the effect that the requirement of statute is sharing the common intention upon being present at the place of occurrence. Mere distancing himself from the scene cannot absolve the accused — though the same however depends upon the fact situation of the matter under consideration and no rule steadfast can be laid down therefor." C

64. Upon analysis of the above judgments and in particular the judgment of this Court in the case of *Dharnidhar v. State of Uttar Pradesh and Others* [(2010) 7 SCC 759], it is clear that Section 34 IPC applies where two or more accused are present and two factors must be established i.e. common intention and participation of the accused in the crime. Section 34 IPC moreover, involves vicarious liability and therefore, if the intention is proved but no overt act was committed, the Section can still be invoked. This provision carves out an exception from general law that a person is responsible for his own act, as it provides that a person can also be held vicariously responsible for the act of others, if he had the common intention to commit the act. The phrase 'common intention' means a pre-oriented plan and acting in pursuance to the plan, thus, common intention must exist prior to the commission of the act in a point of time. The common intention to give effect to a particular act may even develop at the spur of moment between a number of persons with reference to the facts of a given case. D E F G

65. The ingredients of more than two persons being present, existence of common intention and commission of an overt act stand established in the present case. The statements of the witnesses clearly show that all the eight accused were H

present at the scene of occurrence. They had demanded money and extended threat of dire consequences, if their demand was not satisfied. Thereafter, they had altercation with the deceased and the deceased was strangulated by the accused persons and then his body was disposed of by cutting it into pieces and packing the same in gunny bags and abandoning the same at a deserted place near the Barrackpore Dum Dum Highway. Thus, all these acts obviously were in furtherance to the common intention of doing away with the deceased, if he failed to give them Rs. 40,000/- as demanded. The offence was committed with common intention and collective participation. The various acts were performed by different accused in presence of each one of them. In other words, each of the accused had common intention. Thus, we find that the argument on the application of Section 34 IPC advanced on behalf of the accused is without any substance.

66. For the reasons afore-stated, we see no reason to interfere with the judgment of the High Court either on merits or on the quantum of sentence. Therefore, the appeals are dismissed.

K.K.T. Appeals dismissed.