A JITENDER KUMAR

v.

STATE OF HARYANA

(Criminal Appeal No. 1763 of 2008)

MAY 8, 2012

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

Penal Code, 1860:

C *ss. 120-B and 302/34 IPC – Murder – Victim strangulated to death by father-in-law, brother-in-law and others – Evidence of the brother and the husband of the victim – Disclosure statement of one of the accused – Out of 5 accused, 4 convicted and sentenced by trial court u/ss 120-B and 302/ 34 and the fifth convicted u/s 120B and also sentenced to* D *imprisonment for life – Held: The prosecution has been able to establish its case beyond reasonable doubt by ocular, documentary and medical evidence – The judgment of the High Court under appeal does not call for any interference – Once the court finds an accused guilty of s.120B, where the* E *accused had conspired to commit an offence and actually committed the offence with other accused with whom he conspired, they all shall individually be punished for the offence for which such conspiracy was hatched – Thus, there is no error in the judgment of the trial court in convicting the* F *accused u/s 120B read with s.302.*

Evidence Act, 1872:

s.27 – Disclosure statement – Admissibility of – Held: The part of the disclosure statement cannot be taken to be G *confession of the accused in relation to commission of the crime, but the other part by which the motor cycle which was used by the accused in facilitating the crime was recovered, would be the portion admissible in evidence.*

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Criminal Law:

Accused not named in FIR – Conviction of – Held: An accused who has not been named in the FIR, but to whom a definite role is attributed in the commission of the crime and when such role is established by cogent and reliable evidence and the prosecution is also able to prove its case beyond reasonable doubt, such an accused can be punished in accordance with law, if found guilty – In the instant case, a definite role has been attributed to the accused concerned by two prosecution witnesses and it was on his disclosure statement that the motorcycle used by him to facilitate the crime was recovered.

Medical Jurisprudence:

Time of death and contents of stomach – Held: Judging the time of death from the contents of the stomach, may not always be the determinative test – It will require due corroboration from other evidence – If the prosecution is able to prove its case, including the time of death, beyond reasonable doubt and the same points towards the guilt of the accused, then it may not be appropriate for the court to wholly reject the case of the prosecution and to determine the time of death with reference to the stomach contents of the deceased.

Delay/Laches:

Delay in filing FIR – Held: Cannot be a ground by itself for throwing away the entire prosecution case – The court has to seek an explanation for delay and check the truthfulness of the version put forward – In the instant case, keeping in view the circumstances in which the witnesses informed police, some delay in registering the FIR was inevitable and it is not such inordinate delay which could be construed as a ground for acquittal of the accused, as the prosecution has been able to prove its case beyond reasonable doubt.

A *Code of Criminal Procedure, 1973:*

s.313 – Statement of the accused who died during pendency of proceedings – Held: The part of the statement that supports the case of the prosecution as well as statements of other witnesses can be relied upon by the B *prosecution to a limited extent – The statement may not be used against the other accused as such, but the fact that the statement supports the case of the prosecution cannot be wiped out from the record and would have its consequences in law.*

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The three appellants along with two others were prosecuted for the murder of the sister of PW-11. The prosecution case was that 'RR' (father-in-law of the deceased) was more inclined towards the children of his D **sister-in-law (Sali) than his own children and was helping them financially as also by parting with the household articles. This was objected to by the deceased and her husband (PW 10). Having come to know of this protest, 'SK' and 'S' (the accused appellants, in criminal appeal** E **no. 1092 of 2009) and 'PK', the brother-in-law of the deceased threatened to kill her. On 9.2.1999, PW-11 went to the house of his sister. At about 1.00 – 1.30 a.m. in the night, PW11 heard loud voices coming from the *'chobara'*. When he went upto the *'chobara'*, he saw that** F **'RR' and his son 'PK' had caught hold of the hands of the deceased while 'SK' and 'S' were pulling the rope that had been put around her neck. The deceased was struggling for life and was trying to free herself from their grip. PW11 tried to intervene, but when threatened by the** G **accused, he went to his house and informed his family members. Thereafter, he, along with some persons reached the house of the deceased and found her lying dead. On the statement of PW-11, the police registered an FIR. The trial court convicted accused 'JK' u/s 120-B IPC and sentenced him to imprisonment for life. The other four**

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accused were convicted u/ss 120-B and 302/34 IPC and sentenced to life imprisonment. The appeal filed by the accused was dismissed by the High Court. Accused 'RR' died during the pendency of the proceedings. SLP filed by accused 'PK' was dismissed by the Supreme Court.

Dismissing the appeals, the Court

HELD: 1.1. It is correct that the name of accused 'JK' (appellant in Crl. A. N0. 1763 of 2008) was not mentioned by PW-11 in the FIR. However, an accused who has not been named in the FIR, but to whom a definite role is attributed in the commission of the crime and when such role is established by cogent and reliable evidence and the prosecution is also able to prove its case beyond reasonable doubt, such an accused can be punished in accordance with law, if found guilty. [para 11] [427-C-E]

State of U.P. Vs. Krishna Master and Ors. 2010 (9) SCR 563 = (2010) 12 SCC 324; *Ranjit Singh and Ors. Vs. State of Madhya Pradesh* 2010 (14) SCR 133 = (2011) 4 SCC 336 – relied on.

1.2. In the instant case, a definite role has been attributed to accused 'JK' by PW-10. Further, it was on his disclosure statement that the motor cycle, Ext. P44, has been recovered. PW-10 has specifically stated in his statement before the court that after midnight at about 12.30 a.m., accused 'S' and 'JK' (his brother-in-law) while driving a motorcycle, had come to him in the fields. They gave him beating and insisted that he should ask his wife to open the door of the *'chobara'*. He was taken to his residence in the village and out of fear, he asked his wife to open the door which she did as earlier she had bolted the shutters from inside. After the door was opened, accused 'RR', 'PK', 'S' and 'SK' entered the *'chobara'*. 'JK' thereafter, is stated to have taken out a synthetic rope from the dicky of the motorcycle and handed over the

A same to 'S'. After handing over the rope, 'JK' declared that he would take PW-10 back to the fields and exhorted that the deceased be killed to solve all problems in the future. According to this witness, he was forced by 'JK' to drive the motorcycle back to the fields. Further, 'JK' is B stated to have been a party to illegally confining PW-10 after the commission of the crime. Moreover, in the cross-examination of this witness, not even a suggestion was put to him that 'JK' was not present and/or had not accompanied him on the motor cycle to the fields. [para C 12] [428-D-H; 429-A-B]

1.3. The fact that PW11 did not name accused 'JK' in the FIR adds to the credibility of this witness rather than creating a doubt in the case of the prosecution. PW-11 in his statement clearly stated that all the accused D except 'JK' were present in the *'chobara'* and had murdered his sister. This reflects the truthfulness of PW-11. When PW-11 came to the *'chobara'* and noticed the other accused persons trying to kill the deceased, 'JK' had already left along with PW-10 and as such, there was E no occasion for PW-11 to see 'JK' at the place of occurrence in the *'chobara'*. Therefore, he rightly did not name 'JK' in the FIR as one of the persons present in the *'chobara'* who committed the murder of his sister. [para 13] [429-C-F]

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1.4. The High Court also believed PW-10, although it observed that he behaved like a husband under fear and exhibited his paramount interest in the property. These observations do not in any way affect the case of the G prosecution because the incident, as narrated by the prosecution witnesses and particularly by PW-10 and PW-11, is also corroborated by other expert evidence on record. [para 14] [430-A-B]

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

1.5. The part of the disclosure statement of accused 'JK', Ext. P43, cannot be taken to be confession of the accused in relation to commission of the crime, but the other part by which the motor cycle was recovered, would be the portion admissible in evidence. The admissible part can very safely be segregated from the inadmissible part in this statement. There is no such infirmity which would vitiate the very recovery of the motor cycle in terms of s.27 of the Evidence Act, 1872. The fact that the motorcycle was used by accused 'JK' for the purpose of bringing PW-10 from the fields to his residence and after getting the door opened by the victim was again used for dropping PW-10 to the fields is fully corroborated. The recovery of motorcycle, Ext. P44, is a fact which provides a link between recovery of motorcycle and its use by the accused in commission of the crime. This fact is also proved by the statement of PW10. [para 17-18 and 21] [430-G; 431-A-B, H; 432-A-C]

Aloke Nath Dutta & Ors. V. State of West Bengal **2006 (10) Suppl. SCR 662 = (2007) 12 SCC 230;** *Anter Singh v. State of Rajasthan* **2004 (2) SCR 123 = (2004) 10 SCC 657 – referred to**

2. Accused 'JK' was charged with an offence punishable u/s 120B IPC for he and other co-accused had conspired to do an illegal act and commit the murder of the deceased. A bare reading of s.120B provides that whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in the IPC for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence. Once the court finds an accused guilty of s.120B, where the accused had conspired to commit an offence and actually committed the offence with other accused with whom he conspired, they all shall individually be

A punishable for the offence for which such conspiracy was hatched. Thus, there is no error in the judgment of the trial court in convicting the accused u/s 120B read with s.302 IPC. [para 23, 24 and 25] [432-F-G; 433-C-E]

3.1. It is a settled principle of criminal jurisprudence
B that mere delay in lodging the FIR may not prove fatal in all cases, but in the given circumstances of a case, delay in lodging the FIR can be one of the factors which corrode the credibility of the prosecution version. Delay in lodging the FIR cannot be a ground by itself for
C throwing away the entire prosecution case. The court has to seek an explanation for delay and check the truthfulness of the version put forward. If the court is satisfied, then the case of the prosecution cannot fail on this ground alone. [para 30] [435-E-G]

D *Yakub Ismailbhai Patel v. State of Gujarat* 2004 (3) Suppl. SCR 978 = (2004) 12 SCC 229; *State of Rajasthan v. Shubh Shanti Services Ltd. V. Manjula S. Agarwalla & Ors.* 2000 (2) SCR 818 = (2000) 5 SCC 30 – relied on.

E 3.2. Undoubtedly, it has come in the statement of PW-1 that the house in which the occurrence took place, was situated at a distance of 150 metres, from the police station. This piece of evidence does not advance the case of the accused favourably. According to the prosecution,
F the victim was killed by the family of her in-laws. Most unfortunately, her husband, PW10, partly because of fear and partly out of greed for property, became a mere spectator to the crime. PW11, lodged the FIR and PW10 corroborated the version given in the FIR about the murder of his wife. He claimed that he was illegally
G confined by accused 'JK' and 'SK' and, therefore, after the murder, he was unable to approach the police station. In these circumstances, of course, the conduct of PW-10 and PW-11 is somewhat strange, but their statements cannot be falsified on this ground. [para 28] [434-G-H;
H 435-A-B]

3.3. PW-11, who was the eye-witness to the occurrence, clearly stated in his statement that after having the dinner, deceased along with her child had gone to '*chobara*' to sleep and all of them were sleeping on the ground floor. At about 1.00 or 1.30 a.m., he heard voices from the '*chobara*'. He went upstairs and saw that accused 'RR' and 'PK' had caught hold of the deceased and accused 'SK' and 'S' were strangulating her with the help of a rope. Despite her struggle, she was not able to free herself from the grip of the accused persons and when he tried to intervene, he was also threatened with dire consequences. As a result, he went away to his village to inform his family members about the incident. At that time, PW-11 was not aware of the fact that the deceased had already died. It is only when he came back to the house of 'RR' along with his co-villagers that they all saw the victim lying dead. That is how they came to know that deceased had been strangulated and murdered by the accused. It was thereafter that PW11 went to the Police Station to report the incident and met ASI on the way, who recorded his statement and after making endorsement, sent it to the Police Station for registration of the case. Accordingly, the FIR Ext. P-2 was recorded at 4.40 p.m. on 10th February, 1999, in which the time of occurrence was recorded as 1.00 to 1.30 a.m. of the same date. In these circumstances, some delay in registering the FIR was inevitable and it is not such inordinate delay which could be construed as a ground for acquittal of the accused, as the prosecution has been able to prove its case beyond reasonable doubt. [para 27 and 29] [433-H; 434-A-F; 435-D]

4.1. Judging the time of death from the contents of the stomach, may not always be the determinative test. It will require due corroboration from other evidence. If the prosecution is able to prove its case beyond reasonable doubt and cumulatively, the evidence of the

A prosecution, including the time of death, is proved beyond reasonable doubt and the same points towards the guilt of the accused, then it may not be appropriate for the court to wholly reject the case of the prosecution and to determine the time of death with reference to the B stomach contents of the deceased. There is no absolute and definite standard that every human being would empty his stomach within two to three hours of taking the meals, irrespective of what kind of meals had been taken by the person concerned. [para 41, 42] [441-D-G]

C *Jabbar Singh v. State of Rajasthan* (1994) SCC (Cr.) 1745 – relied on.

Shivappa v. State of Karnataka 1994 (6) Suppl. SCR 171 = (1995) 2 SCC 76 – referred to.

D *Modi's Medical Jurisprudence and Taxicology (23rd) Edn.)* – referred to.

4.2. Neither PW-10 nor PW-11 has stated as to the exact time at which the victim had her dinner. It is a matter E of common knowledge that in the villages, ladies normally provide food to the guests and the other members of the family first and are last to have the food themselves. None of the witnesses have given the time when all the persons had their dinner. But, according to F both these witnesses, after having the dinner they had gone to sleep except PW-10 who had gone to the fields for irrigation purposes. This obviously means that they would have had dinner after 8 or 9 p.m., whereafter they went to sleep. The victim presumably had dinner G thereafter and went to sleep later. She was murdered between 1.00 to 1.30 a.m. which means between 4 to 5 hours of having her dinner. The evidence of PW-3 categorically states that it was possible that the deceased was murdered between 1.00 to 1.30 a.m. This was duly H corroborated by PW-11. The investigation conducted by

PW6, PW12 and PW13 also indicates that she was murdered during that period. It is significant to notice that after PW-3 stated in his further examination that the deceased might have been murdered between 1.00 to 1.30 a.m., no suggestion was put to this witness that the said witness was stating incorrectly or that it was not possible to reconcile the statement of PW-3 i.e. the expert evidence, with the version of the prosecution. Once, this statement of PW-3 remained unchallenged and there exists other prosecution evidence to support the said version, the Court would not be inclined to treat it as a significant doubt in the case of the prosecution. The time of death given by PW-3, thus, cannot be falsified only on the ground of an argument that there was some undigested food found in the stomach of the deceased. [para 35-36] [436-G-H; 437-A-F]

Shambhoo Missir & Anr. v. State of Bihar **(1990) 4 SCC 17 - distinguished**

Textbook of Gastroenterology, (Volume One), by Tadataka Yamada, David H. Alpers, Chung Owyang, Don W. Powell and Fred E. Silverstein **– referred to.**

5.1. In the instant case, both the trial court and the High Court have believed PW10 and PW11 and have returned a finding of guilt against the accused. The Courts have adversely commented upon the conduct of these witnesses but not with regard to the material events of the prosecution case. PW10 was under threat and confinement of his own family members as well as friends of the accused, who had conspired to kill his wife, that is how he obeyed the command of accused 'JK' and others in coming from the fields on the motorcycle and getting the door of *'chobara'* opened by his wife where she was sleeping with her child. He claims to have been under continuous threat and illegal confinement of accused 'JK' and the other accused. It was PW10's own

A house where the murder has taken place and, therefore, his presence in the house cannot be doubted in the normal course. PW11 is the brother of the deceased and he had come late in the evening to meet his sister and sort out the issues with regard to the return of the B properties which 'RR' had given to appellants 'S' and 'SK'. [para 49] [44-A-E]

5.2. The doctor (PW3) has stated that besides ligature marks on neck, the face of the deceased was swollen and congested. Six other injuries were found on the body of C the deceased. The post mortem report, Ext. P4 to P5, states the cause of the death, as per opinion of the Board, as asphyxia due to strangulation, which was ante mortem in nature and sufficient to cause death in the ordinary course of nature. It is a case where the ocular evidence D of PW11 is fully corroborated by medical evidence and is also partially supported by the statement of PW10, the husband of the deceased. Thus, in the considered view of this Court, the statements of PW10 and PW11 cannot be said to be doubtful. Their presence at the place of E occurrence was natural and what they have stated is not only plausible but completes the chain of events in the case of the prosecution. [para 50] [444-F-H; 445-A-C]

6.1. The plea of *alibi* taken in addition to the defence F that the accused 'SK' and 'S' were living in a village far away from the place of occurrence, was found to be without any substance by the trial court and was further concurrently found to be without any merit by the High Court also. In order to establish the plea of alibi these G accused had examined various witnesses. The trial court has held that none of the documents adduced by the defence in evidence reflected the presence of either of the two accused at the stated place. On the contrary the entire plea of alibi falls to the ground in view of the statements of PW-10 and PW-11. The statements of these H witnesses have been accepted by the courts below and

also the fact that they have no reason to falsely implicate the accused persons. Once, PW-10 and PW-11 are believed and their statements are found to be trustworthy, as rightly dealt with by the courts below, then the plea of abili raised by the accused loses its significance. The burden of establishing the plea of alibi lay upon the appellants and they have failed to bring on record any such evidence which would, even by reasonable probability, establish their plea of alibi. [para 51] [445-D-H]

Shaikh Sattar v. State of Maharashtra 2010 (10) SCR 503 = (2010) 8 SCC 430 – relied on

Rupchand Chindu Kathewar v. State of Maharashtra (2009) 17 SCC 37 – held inapplicable.

S.P. Bhatnagar v. State of Maharashtra 1979 (2) SCR 875 = (1979) 1 SCC 535

6.2. Accused 'RR', in his statement u/s 313 CrPC, had admitted material parts of the prosecution case including that he had parted away with a buffalo, some household articles and cash amount of Rs.50,000/- in favour of the family of accused 'S' and that his son PW-10 and the deceased had objected to it. He also admitted that the door was opened by deceased on the asking of PW-10 whom accused 'JK' had brought on motor cycle from the fields. However, he denied having committed the murder. The fact of the matter remains that the statement of accused 'RR' u/s 313 CrPC is part of the judicial record and could be used against him for convicting him, if the prosecution had proved its case in accordance with law. 'RR', however, died during the pendency of the proceedings. The part of his statement that supports the case of the prosecution as well as the statement of PW-10 and PW-11 can be relied upon by the prosecution to a limited extent. This statement may not be used against

A the other accused as such, but the fact that the statement of accused 'RR' u/s 313 CrPC supports the case of the prosecution cannot be wiped out from the record and would have its consequences in law. Without using the statement of 'RR' against the accused, the courts below B have correctly relied upon the statements of PW-10 and PW-11 and the medical evidence. This finding recorded by the courts below cannot, therefore, be faulted with. [para 52-53] [446-C-H]

C *Nachhatar Singh v. State of Punjab* (1976) 1 SCC 750 – held inapplicable.

7.1. The special leave petition filed by accused 'PK' was dismissed by this Court on the ground of delay as well as on merits by its order dated 14.10.2011. Of course, D dismissal of the SLP at the admission stage itself would not adversely affect the case of the appellants. [para 55] [447-C-D]

Jalpat Rai and Ors. v. State of Haryana 2011 E SCR 1037 = JT 2011 8 SC 55 – relied on.

7.2. The prosecution has been able to establish its case beyond reasonable doubt by ocular, documentary and medical evidence. The judgment of the High Court under appeal does not call for any interference. [para 54 F and 56] [447-F]

Case Law Reference:

2010 (9) SCR 563	relied on	para 11
G 2010 (14) SCR 133	relied on	para 11
2007 (15) SCC 760	referred to	para 15
2006 (10) Suppl. SCR 662	referred to	para 16
2004 (2) SCR 123	referred to	para 20

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2004 (3) Suppl. SCR 978	**relied on**	**para 30**
2000 (2) SCR 818	**relied on**	**para 30**
1990 (4) SCC 17	**distinguished**	**para 37**
1994 (6) Suppl. SCR 171	**referred to**	**para 45**
(1994) SCC (Cr.) 1745	**relied on**	**para 46**
2009 (17) SCC 37	**held inapplicable**	**para 48**
2010 (10) SCR 503	**relied on**	**para 51**
1979 (2) SCR 875	**para 52**	
(1976) 1 SCC 750	**held inapplicable**	**para 54**
2011 SCR 1037	**relied on**	**para 55**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1763 of 2007 etc.

From the Judgment & Order dated 30.05.2008 of the High Court Punjab & Haryana at Chandigarh in Criminal Appeal No. 930-DB of 2003.

WITH

Crl. Appeal No. 1092 of 2009.

Sushil Kumar, Sanjay Jain, Aditya Kumar for the Appellant.

Kamal Mohan Gupta, Gaurav Teotia, Sanjeev Kumar for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The Trial Court, vide its judgment of conviction dated 5th November, 2003 and order of sentence dated 10th November, 2003, held all the five accused, namely, Sunil Kumar, Satish, Pawan Kumar, Jitender Kumar and Ratti Ram guilty of the offence under Section 120-B of the Indian Penal Code, 1860 (IPC). The Trial Court further

held that except Jitender, remaining four accused were also guilty of the offence under Section 302 read with Section 34 IPC. The Trial Court acquitted all the four accused for the offence under Section 323 read with Sections 34 and 342 IPC and convicted them as follows:

> "Taking into consideration all the aspects of the case, I take a lenient view and sentence Sunil, Satish, Pawan and Ratti Ram accused to imprisonment for life under Section 302 read with Section 34 IPC and Section 120B IPC. Each of the accused is sentenced to a fine of Rs.1000/- under the said sections. In default of payment of fine, the defaulting accused shall suffer further rigorous imprisonment for six months.
>
> Jitender accused has been found guilty under Section 120-B IPC for conspiracy of murder with the other four-five persons and when we read the provisions of Section 120B and 109 IPC, Jitender is also punishable for the offence of murder as the act of murder has been committed in consequence of the conspiracy. I, therefore, sentence Jitender accused to imprisonment for life under Section 120-B IPC. He is also sentenced to a fine of Rs.1000/- under the said section. In default of payment of fine Jitender accused shall suffer further rigorous imprisonment for six months.
>
> As regards, the role of Surender @ Sunder son of Ratti Ram, the husband of Indra deceased, a copy of this judgment be sent to the Superintendent of Police, Hisar for taking appropriate action against him in view of the observations made by me in this judgment."

2. This judgment of the Trial Court was challenged by the accused persons in appeal before the High Court being Criminal Appeal No.930-DB of 2003. Surender @ Sunder, husband of the deceased, had also filed a criminal miscellaneous petition being Criminal Miscellaneous No.3337-M of 2004 against the judgment of the Trial Court wherein it had

directed action to be taken against him by the Superintendent of Police in view of the observations made by the Trial Court therein. Both the criminal appeal as well as the criminal miscellaneous petition were heard together and disposed of by a common judgment of the High Court dated 30th May, 2008 wherein the High Court upheld the judgment of the Trial Court in its entirety and dismissed the criminal appeal and the criminal miscellaneous petition.

3. Against this judgment of the High Court, two separate appeals have been filed before this Court, one by Jitender Kumar being Criminal Appeal No.1763 of 2008 and the other by Sunil Kumar and Satish Kumar being Criminal Appeal No.1092 of 2009. Surender has not challenged the judgment of the High Court.

4. At this stage itself, we may notice that accused Pawan Kumar had also filed a special leave petition against the judgment of the High Court being SLP (Crl.) No.7881 of 2011 which came to be dismissed by a Bench of this Court on 14th October, 2011 on the ground of delay as well as on merit. Ratti Ram died during the pendency of the proceedings. Thus, by this common judgment, we would dispose of both these criminal appeals preferred by the three accused persons.

5. The First Information Report (FIR) pertaining to the case in hand was registered by ASI Hans Raj of Police Station Narnaund on 10th February, 1999 on the statement of Ishwar Singh (PW11), brother of the deceased. Chadan Singh, resident of Bhartana had eight children, two sons and six daughters. The youngest of the daughters was Indra who was married to Surender @ Sunder, son of Ratti Ram of village Narnaund. Indra, the deceased, was having a son aged about two years from this marriage. Mother-in-law of Indra had died even before the marriage of Indra with Surender. Surender had two brothers, namely, Pawan Kumar and Anup. Allegedly, Ratti Ram, father-in-law of Indra, was interested in the children of his sister-in-law (sali) more than his own children. Ratti Ram had

A obtained a loan on his own land and purchased a tractor for the children of his sister-in-law. Due to this, there was annoyance in the family and particularly, Indra and Surender had raised protest. Having come to know of this protest, Satish and Sunil son of Shamsher Singh resident of Jamni and Pawan
B son of Ratti Ram had threatened Indra that they would kill her. Satish and Sunil, along with Pawan, had also taken the cattle and other household articles from the house of Ratti Ram with his permission. Ratti Ram had even started living in the house of Sunil and Satish. After being pressurized by his family
C members, Ratti Ram, along with his son, had come back to his house in Narnaund but the cattle and other household articles that he had taken while going to the house of Sunil were not brought back by Ratti Ram to his own house. Indra had protested against Ratti Ram not bringing the cattle and
D household articles to their house. This further annoyed Sunil, Satish, etc.

6. On 9th February, 1999, Ishwar Singh, PW-11 had gone to the house of his sister Indra. Satish, Sunil and Pawan had also come to Narnaund and all of them stayed in the house of
E Ratti Ram on that day. At night, after taking meals, all these guests slept on the ground floor, Surender went to irrigate the fields while Indra along with her son, went to sleep in the chobara. It is stated that at about 1.00 – 1.30 a.m. in the night, PW11 heard loud voices coming from the chobara as well as
F the indication of somebody falling down and rising. When he went up to the chobara, he saw that Ratti Ram and his son Pawan Kumar had caught hold of the hands of Indra while Satish and Sunil were pulling the rope that had been put around her neck. Indra was struggling for life and was trying to free
G herself from their grip. When PW11 tried to intervene and get Indra freed, they gave a lalkara that Ishwar Singh should first be taught a lesson for intervening in their affairs. For the fear of death and love for life, he left the place of occurrence and went to his house and told the story to his family members.
H Thereafter, Balwan, Rajender, Jagdish and Sultan, all residents

of Bhartana, came to the house of Indra and found her lying dead on the ground floor. There were marks of injuries on her neck and body. She had been strangulated and murdered. A

7. Having received the information and registered the FIR (Ex.P2), ASI Hans Raj proceeded to the place of occurrence along with PW11. The Investigating Officer conducted the spot inspection, got the place of occurrence photographed and collected pieces of bangles, which were lying in the chobara of the premises. After conclusion of the inquest proceedings, the body of the deceased was sent for post mortem on 11th February, 1999. The site plan of the place of occurrence was also prepared. Accused Satish was arrested on 17th February, 1999 from the bus stand at Rajthal. During the course of investigation, he made disclosure statement to the effect that the rope used in the crime had been kept concealed in the fields of wheat crop of accused Ratti Ram. Upon his disclosure statement, the said rope was recovered, made into parcel and sealed. On 8th March, 1999, the investigation was taken over by SI Jagir Singh. Accused Sunil and Pawan Kumar were arrested by him. During investigation, they got recovered the salwar, jhumper and chunni of Indra from the kotha of Turi. Similarly, Jitender was taken into custody on 12th March, 1999 and upon his disclosure statement, the motorcycle was recovered from the mechanic shop vide Exhibit P44. B C D E

8. After completion of investigation, a charge sheet was filed under Section 173 of the Code of Criminal Procedure, 1973 (CrPC) charging all the five accused persons for the offences under Sections 302, 342, 506, 120-B and 34 IPC in the Court of the Magistrate who committed the case to the Court of Sessions. The prosecution examined as many as 13 witnesses in support of its case and also produced documentary evidence including the report from the Forensic Science Laboratory (FSL). After putting up the evidence against the accused, their statements were recorded under Section 313 CrPC and then, as already noticed, they were convicted by the Trial Court and their conviction has been F G H

A upheld by the High Court also.

9. In the backdrop of the above prosecution case and the fact that the learned counsel appearing for the appellant in the respective appeals have addressed distinct arguments and referred to different evidence, we consider it appropriate to deal with both these appeals separately.

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Criminal Appeal No.1763 of 2008

10. While raising a challenge to the judgment of the High Court as well as that of the Trial Court, it is, inter alia, contended on behalf of accused Jitender Kumar that :

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(i) He has not been named in the FIR (Exhibit P2), which fact itself shows that he has been falsely implicated in the crime.

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(ii) The occurrence is alleged to have taken place between 1.00 to 1.30 a.m. on 10th February, 1999 but the FIR has been registered after undue and unexplained delay, i.e., at 4.30 p.m. on 10th February, 1999. The delay in lodging the FIR is fatal to the case of the prosecution in the facts and circumstances of the present case.

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(iii) The learned Trial Court as well as the High Court have misread and failed to appreciate the evidence in accordance with law.

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(iv) The alleged recovery of the motorcycle Exhibit P44 is in furtherance to the statement of Jitender (Exhibit P43). This statement, having been made to the police, is inadmissible in evidence and could not be relied upon by the Court for convicting the accused.

(v) Accused Jitender had no motive to be involved in the crime and no role has been attributed to him so as to warrant his conviction for an offence under

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Section 302 IPC.

(vi) Jitender has not been convicted independently for an offence under Section 302/34 IPC as recorded by the learned Trial Court. Consequently, he could not have been held guilty of the same offence with the aid of Section 120B IPC.

11. As already noticed, the FIR (Ext. P2) had been registered by ASI Hans Raj, PW-13 on the statement of Ishwar Singh, PW-11. It is correct that the name of accused Jitender, son of Sajjan Singh, was not mentioned by PW-11 in the FIR. However, the law is well-settled that merely because an accused has not been named in the FIR would not necessarily result in his acquittal. An accused who has not been named in the FIR, but to whom a definite role has been is attributed in the commission of the crime and when such role is established by cogent and reliable evidence and the prosecution is also able to prove its case beyond reasonable doubt, such an accused can be punished in accordance with law, if found guilty. Every omission in the FIR may not be so material so as to unexceptionally be fatal to the case of the prosecution. Various factors are required to be examined by the Court, including the physical and mental condition of the informant, the normal behavior of a man of reasonable prudence and possibility of an attempt on the part of the informant to falsely implicate an accused. The Court has to examine these aspects with caution. Further, the Court is required to examine such challenges in light of the settled principles while keeping in mind as to whether the name of the accused was brought to light as an afterthought or on the very first possible opportunity. The Court shall also examine the role that has been attributed to an accused by the prosecution. The informant might not have named a particular accused in the FIR, but such name might have been revealed at the earliest opportunity by some other witnesses and if the role of such an accused is established, then the balance may not tilt in favour of the accused owing to such omission in the FIR. The Court has also to consider the

A fact that the main purpose of the FIR is to satisfy the police officer as to the commission of a cognizable offence for him to conduct further investigation in accordance with law. The primary object is to set the criminal law into motion and it may not be possible to give every minute detail with unmistakable B precision in the FIR. The FIR itself is not the proof of a case, but is a piece of evidence which could be used for corroborating the case of the prosecution. The FIR need not be an encyclopedia of all the facts and circumstances on which the prosecution relies. It only has to state the basic case. The C attending circumstances of each case would further have considerable bearing on application of such principles to a given situation. Reference in this regard can be made to *State of U.P. Vs. Krishna Master and Ors.* [(2010) 12 SCC 324] and *Ranjit Singh and Ors. Vs. State of Madhya Pradesh* [(2011) D 4 SCC 336].

12. In the present case, despite the fact that the accused Jitender has not been named in the FIR, a definite role has been attributed to this accused by PW-10. Further, it was on his disclosure statement that the motor cycle, Ext. P44, has E been recovered. PW-10, Surender has specifically stated in his statement before the Court that Jitender was his brother-in-law. According to this witness, after midnight at about 12.30 a.m., accused Satish and Jitender, while driving a motorcycle, had come to him in the fields. They gave him beating and insisted F that he should ask his wife to open the door of the chobara. He was taken to his residence in the village and out of fear, he asked his wife to open the door which she did as earlier she had bolted the shutters from inside. After the door was opened, Ratti Ram, Pawan, Satish and Sunil entered the chobara. G Jitender thereafter, is stated to have taken out a synthetic rope from the dicky of the motorcycle and handed over the same to Satish. After handing over the rope, Jitender declared that he would take Sunder back to the fields and exhorted that Indra be killed to solve all problems in the future. According to this witness, he was forced by Jitender to drive the motorcycle back H

to the fields. Further, Jitender is stated to have been a party to illegally confining PW-10 after the commission of the crime. Moreover, in the cross-examination of this witness, not even a suggestion was put to him that Jitender was not present and/or had not accompanied him on the motor cycle to the fields. On the contrary, the matters in relation to the property, for which protest was raised by Indra have clearly been stated therein.

13. We must also notice that the fact that PW11 did not name the accused Jitender in the FIR adds to the credibility of this witness rather than creating a doubt in the case of the prosecution. PW-11 in his statement clearly stated that all the accused except Jitender were present in the Chobara and had murdered his sister Indra. This reflects the truthfulness of PW-11. The occurrence of the events as per the case projected by the prosecution is that PW-11 had not met Jitender in the Chobara because Jitender had gone to the fields to bring PW-10 forcibly and under threat to his house and after getting the door opened by Indra and handing over the rope to the other accused, Jitender had taken PW-10 back to the fields. When PW-11 came to the Chobara and noticed the other accused persons killing Indra, Jitender had already left along with PW-10 and as such, there was no occasion for PW-11 to see Jitender at the place of occurrence in the Chobara. Therefore, he rightly did not name Jitender in the FIR as one of the persons present in the chobara who committed the murder of his sister. There was no occasion or reason for PW-10 to implicate Jitender falsesly as Jitender was also known and related to him. This accused was duly identified in the Court by this witnesses. PW-10 and PW-11 both cannot be stated to be planted witnesses. They are natural and reliable witnesses. Of course, the learned Trial Court has expressed certain observations about the immature behavior of PW-10 and even directed action against him with regard to inflicting injury and illegal confinement, but the Trial Court did not cast any doubt on the material aspects of the occurrence in the crime committed by the accused.

A 14. The High Court also believed PW-10, although it observed that he behaved like a husband under fear and exhibited his paramount interest in the property. These observations do not in any way affect the case of the prosecution because the incident, as narrated by the B prosecution witnesses and particularly by PW-10 and PW-11, is also corroborated by other expert evidence on record.

15. In the case of *Tika Ram v. State of Madhya Pradesh* [(2007) 15 SCC 760], the Court was concerned with an argument that the name of the accused was not mentioned by C the witnesses in the FIR and it would not, by itself, be sufficient to reject the case of the prosecution against the accused. Rejecting such a contention, the Court noticed that brother of the deceased having come to know of the incident came to the place of occurrence and having seen only a part of the incident D informed the police. Therefore, in that process, if he failed to mention the name of the appellant, it was not a circumstance which would be sufficient to discard the evidence of such witness and non-mentioning of the name of the accused would not be a material lapse.

E 16. The learned counsel appearing for these accused/ appellant while relying upon the judgment of this Court in the case of *Aloke Nath Dutta & Ors. V. State of West Bengal* [(2007) 12 SCC 230], argued that the confessions in the present case have not been recorded in the manner F contemplated by law and the confession cannot be taken on record where it incorporates both admissible and inadmissible parts thereof together.

17. In the disclosure statement of accused Jitender, Ext. P43, it has been recorded, "after conspiring for murdering Indra, G wife of Sunder, we had used Hero Honda Motor Cycle bearing registration No. CHI/2088 of Satish in that murder, for going and coming. I have kept that motor cycle now in the shop of Sat Pal Mistry, r/o Jind. After pointing out, I can get the same recovered". On this disclosure, memo of recovery was prepared H and signed.

18. This contention of the learned counsel for the appellant need not detain us any further as the law in this regard has been settled by various pronouncements of this Court. What has been recorded in Ext.P43 cannot be taken to be confession of the accused in relation to commission of the crime, but the other part by which the motor cycle was recovered, would be the portion admissible in evidence. The admissible part can very safely be segregated from the inadmissible part in this statement.

19. It may be noted that in the very judgment of *Aloke Nath Dutta* (supra) relied upon by the counsel for the appellant, this Court has clearly stated as follows :

> "... We intend to point out that only that part of confession is admissible, which would be leading to the recovery of the dead body and/or recovery of the articles of Biswanath; the purported confession proceeded to state even the mode and manner in which Biswanath was allegedly killed. It should not have been done. It may influence the mind of the court."

20. In the case of *Anter Singh v. State of Rajasthan* [(2004) 10 SCC 657], this Court clearly stated the principle, "it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered."

21. Neither the trial Court nor the High Court has relied upon Ext. P43 for the purpose of holding the accused guilty of the offence. Both these authorities have only noticed the fact of recovery of the motor cycle in furtherance to the disclosure statement made by this accused. In our considered opinion, there is no such infirmity pointed out by the counsel appearing

A for the appellant which would vitiate the very recovery of the motor cycle in terms of Section 27 of the Indian Evidence Act, 1872 (hereafter the "Evidence Act"). The fact that motorcycle was used by the accused Jitender for the purpose of bringing PW-10 from the fields to his residence and after getting the door B opened by Indra, was again used for dropping PW-10 to the fields is fully corroborated. The recovery of motorcycle, Exhibit P44, is a fact which provides a link between recovery of motorcycle and its use by the accused in commission of the crime. This fact is also proved by the statement of PW10. This C statement of the accused has not been treated as a confession of the accused by the courts and rightly so because, it could not have been treated as a confession of the accused, firstly, because it was made to the police and secondly, such a statement would not be admissible in terms of Section 27 of D the Evidence Act.

22. We shall shortly proceed to discuss the argument of the learned counsel for the appellant that there was unexplained and inordinate delay in lodging the FIR and the courts have failed to appreciate the evidence in this prospective, when we E deal with the appeal of Satish, Sunil and the other two co-accused.

23. Coming to the last argument on behalf of accused Jitender that he had been acquitted by the trial court for an F offence under Section 302 read with Section 120B IPC, this argument is again devoid of any merit. The accused Jitender was charged with an offence punishable under Section 120B IPC for he and other co-accused had conspired to do an illegal act and commit the murder of Indra. It is thereby correct that no separate charge under Section 302 read with Section 34 G IPC had been framed against the accused Jitender. However, he was charged with an offence punishable under Section 323 read with Section 34 IPC for which he was acquitted. It is also correct that the learned trial Court has specifically noticed in its judgment that accused Jitender Kumar had not been H charged separately for an offence under Section 302 read with

Section 34 IPC and if he was also present, then the provisions of Section 149 IPC would be applicable and in the event, the charge ought to be framed under that provision. We are unable to find any error in this approach of the trial Court. But, equally true is that the trial Court, for valid reasoning and upon proper appreciation of evidence, convicted this accused for an offence under Section 120B of the IPC and, thus, for an offence under Section 302 IPC as well.

24. A bare reading of Section 120B provides that whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in the IPC for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

25. In other words, once the Court finds an accused guilty of Section 120B, where the accused had conspired to commit an offence and actually committed the offence with other accused with whom he conspired, they all shall individually be punishable for the offence for which such conspiracy was hatched. Thus, we do not find any error in the judgment of the trial court in convicting the accused for an offence under Section 120B read with Section 302 IPC.

Criminal Appeal No. 1092

26. In this appeal, the challenge to the findings recorded in the impugned judgment is on the ground that firstly there has been inordinate and unexplained delay in lodging the FIR, even though the police station was quite near to the place of occurrence and secondly, that the time of occurrence cannot be validly related to the expert medical evidence and on this count itself, the accused would be entitled to the benefit of doubt. This question, in fact, arises in both these appeals, and therefore, can conveniently be dealt with at this stage.

27. The FIR Ext. P-2 was recorded at 4.40 p.m. on 10th

A February, 1999, in which the time of occurrence was recorded as 1.00 to 1.30 a.m. of the same date. This FIR had been registered on the basis of the statement of Ishwar Singh, PW-11 who, as already noticed, was the eye-witness to the occurrence. He clearly stated in his statement that after having B the dinner, Indra along with her child had gone to chobara to sleep and all of them were sleeping on the ground floor. At about 1.00 or 1.30 a.m., he heard voices from the chobara. He went upstairs and saw that the accused Ratti Ram and Pawan Kumar had caught hold of the deceased Indra and the accused C Satish and Sunil were strangulating her with the help of a rope. Despite her struggle, she was not able to free herself from the grip of the accused persons and when he tried to intervene, he was also threatened with dire consequences. As a result, he went away to his village Bhartana to inform his family members D about the incident. At that time, PW-11 was not aware of the fact that Indra had already died. It is only when he came back to the house of Ratti Ram along with Mange Ram, Rajender, Jagdish and Sultan Singh, all resident of village Bhartana, that they all saw the deceased Indra lying dead. That is how they came to know that Indra had been strangulated and murdered E by the accused. It was thereafter that Ishwar Singh, PW11) went to the Police Station to report the incident and met ASI Hans Raj near Aasan Chowk, Narnaund who recorded his statement and after making endorsement, sent it to the Police Station for registration of the case.

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28. Undoubtedly, it has come in the statement of PW-1 that the house depicted in Ext. P-1 i.e. the place of occurrence, was situated in the township of Narnaund and was at a distance of 150 metres, from the police station. This piece of evidence G does not advance the case of the accused favourably. According to the prosecution, Indra was killed by the family of her in-laws. Most unfortunately, her husband, PW10, partly because of fear and partly out of greed for property, became a mere spectator to the crime. PW11, lodged the FIR and H PW10 corroborated the version given in the FIR about the

murder of his wife. He claimed that he was illegally confined by the accused Jitender and Sunil and therefore, after the murder, he was unable to approach the police station. In these circumstances, of course, the conduct of PW-10 and PW-11 is somewhat strange, but their statements cannot be falsified on this ground. A B

29. PW-11 could have gone to the police station straight away, but he instead preferred to go to his village first and came back with the others. His behavior at the time of occurrence might have been abnormal as he had been threatened with dire consequences by the accused persons. Thus, he went to his village and brought his relations and friends to see if the matter could be resolved. But by the time he reached the house of Ratti Ram, Indra had already been murdered. In these circumstances, some delay in registering the FIR was inevitable and it is not such inordinate delay which could be construed as a ground for acquittal of the accused, as the prosecution has been able to prove its case beyond reasonable doubt. C D

30. It is a settled principle of criminal jurisprudence that mere delay in lodging the FIR may not prove fatal in all cases, but in the given circumstances of a case, delay in lodging the FIR can be one of the factors which corrode the credibility of the prosecution version. Delay in lodging the FIR cannot be a ground by itself for throwing away the entire prosecution case. The Court has to seek an explanation for delay and check the truthfulness of the version put forward. If the Court is satisfied, then the case of the prosecution cannot fail on this ground alone. [Ref. *Yakub Ismailbhai Patel v. State of Gujarat* [(2004) 12 SCC 229], *State of Rajasthan v. Shubh Shanti Services Ltd. V. Manjula S. Agarwalla & Ors.* [(2000) 5 SCC 30]. E F G

31. Now, we shall deal with the other aspect of the argument advanced on behalf of the appellants, i.e. in relation to uncertainty in the time of occurrence as well as death of the deceased, with reference to expert evidence. The contention is that as per the statement of PW-10 and PW-11, they all had H

A their dinner together whereafter, PW-10 had gone to the fields for irrigating the fields and others had slept at the ground floor, except Indra and her child, who had gone to chobara to sleep. The occurrence is stated to have taken place between 1.00 to 1.30 a.m. However, according to the medical evidence, there B was semi-digested food found in the stomach of the deceased. Therefore, it was not possible to state that she was murdered, as alleged, between 1.00 to 1.30 a.m. as by that time more than four hours would have elapsed and undigested food could not have been found in the stomach of the deceased.

C 32. The body of the deceased was subjected to post mortem conducted by Dr. L.L. Bundela, PW-3, who, after describing the seven injuries on the body of the deceased, had stated, "the stomach contained semi-digested food small intestines contained chyme and the large intestines contained D faecal matter. The uterous was non-gravid."

33. In his further examination-in-chief, PW-3 had clearly stated, "it is possible that the death of Smt. Indra might have been caused at 1.30 a.m. on 10.2.99". In cross-examination, E he stated, "It takes 2 to 3 hours for the digested or undigested food to leave the stomach".

34. According to the accused, this causes a serious doubt in the very basis of the prosecution story. This argument appears to be of some significance at the first brush, but when F examined in depth in light of the entire evidence, it clearly lacks merit.

35. Neither PW-10 nor PW-11 has stated as to the exact time at which Indra had her dinner. It is a matter of common G knowledge that in the villages, ladies normally provide food to the guests and the other members of the family first and are last to have the food themselves. None of the witnesses have given the time when all the persons had their dinner. But, according to both these witnesses, after having the dinner they had gone to sleep except PW-10 who had gone to the fields H

for irrigation purposes. This obviously means that they would have had dinner after 8 or 9 p.m., whereafter they went to sleep. Indra presumably had dinner thereafter and went to sleep later. She was murdered between 1.00 to 1.30 a.m. which means between 4 to 5 hours of having her dinner. The evidence of PW-3 categorically states that it was possible that Indra was murdered between 1.00 to 1.30 a.m. This was duly corroborated by PW-11. The investigation conducted by PW6, PW12 and PW13 also indicates that she was murdered during that period. It is significant to notice that after PW-3 stated in his further examination that Indra might have been murdered between 1.00 to 1.30 a.m., no suggestion was put to this witness that the said witness was stating incorrectly or that it was not possible to reconcile the statement of PW-3 i.e. the expert evidence, with the version of the prosecution. Once, this statement of PW-3 remained unchallenged and there exist other prosecution evidence to support the said version, the Court would not be inclined to treat it as a significant doubt in the case of the prosecution.

36. According to PW-11, he had gone to the house of his sister Indra, at about 7 p.m. and had found the accused present there. This time given by the witness also indicates that all the accused as well as the informant had their dinner after 8 p.m. or so. The time of death given by PW-3, thus, cannot be falsified only on the ground of an argument that there was some undigested food found in the stomach of the deceased.

37. Further, it is contended on behalf of the accused that the time of death of the deceased cannot be stated with certainty with reference to the evidence on record and this being a very important factor, would lead to the acquittal of the accused. Reliance in this regard has been placed upon the judgment of this Court in the case of *Shambhoo Missir & Anr. v. State of Bihar* [(1990) 4 SCC 17]. In that case, this Court found that the allegations of the prosecution were that the death had occurred at 3.00 p.m. No such undigested food could have been found at that hour when the food was taken by the

A deceased at 8.00 a.m. and if this be so, then the whole case of the prosecution could crumble. It may be noticed that in that case, it had been established by definite and cogent evidence that the deceased had taken the meals before 8.00 a.m. and the death had occurred at 3.00 p.m. and the undigested food B particles were found in the stomach of the deceased. This observation of the Court cannot be treated as a statement of law but is a finding recorded with reference to the facts of that case.

38. The entire basis for this submission is the statement C of PW3, Dr. L.L. Bundela, who stated that the stomach of the deceased contained some semi-digested food. It is worthwhile to note that the statement of this very witness that the death of Indra could have taken place between 1.00 to 1.30 a.m. remained unchallenged. Furthermore, it cannot be stated as a D rule of universal application that after a lapse of two to three hours stomach of every individual, without exception, would become empty. It would depend upon a number of other factors like the caloric content and character of the solid food. Further, addition of fats, triglycerides and carbohydrates such as E glucose, fructose and xylose to a solid meal can delay its emptying from the stomach, presumably because of their effect on the initial lag phase of digestion of solids. Furthermore, the presence of liquids in the stomach prolongs this initial lag phase of solid emptying. In fact, ingestion of a liquid bolus 90 minutes F after a solid meal can induce a second lag phase of solid emptying from the stomach. Foods high in fat content are handled duly by the stomach and their emptying pattern should be considered separately from those of other liquids and solids. Many foods are solid or semi-solid prior to their ingestion. G However, after they are consumed and warmed to the body temperature in the stomach, they are converted into a liquid. Despite this, the liquid foods are emptied from the stomach much more slowly than are the aqueous liquids. This aspect has been dealt with by prominent authors on the subject with definite H emphasis on emptying of stomach. The gastric emptying of

indigestible solids have been appropriately dealt with in the Textbook of Gastroenterology, Volume One, by Tadataka Yamada, David H. Alpers, Chung Owyang, Don W. Powell and Fred E. Silverstein, as follows:

> *"Gastric Emptying of Indigestible Solids*
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> The final class of consumed components of a meal to be discussed are the indigestible solids, that nonnutritive fibrous debris remaining from a meal that is not emptied with the dispersible, calorie-containing digestible solids. In general, indigestible solids exist the stomach with initiation of the gastric phase III activity of the MMC after completion of the fed motor pattern. The main characteristic that distinguishes the phase III motor pattern from fed motor activity is the presence of an open pylorus during fasting, which permits intestinal delivery of large particles.
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> The major factor in determining when an indigestible solid is emptied from the stomach is its size. Indigestible spheres smaller than 1mm in diameter freely pass into the intestine during the fed period, often at rates faster than solid nutritive food. Larger spheres pass more slowly, usually after an initial lag period, with spheres up to 2.4 mm in diameter passing with the calorie-containing components of a solid meal. Spheres as large as 7 mm do not empty with solid food at all and are retained until gastric phase III activity resumes in the interdigestive period. It has been reported that undigested materials as large as 2 cm in diameter can pass into the intestine during the fasting period under normal conditions.
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> Other physical factors play a role in determining the gastric emptying of indigestible solid material....."

39. Besides the above, with regard to the external regulation of gastric emptying, it has been stated that in addition to being controlled by various characteristics of the ingested

A bolus within the stomach, there is extensive modulation of gastric emptying by external influences. Gastric motility and emptying is also subject to extensive modulation by the central nervous system. The nutritional properties of an ingested liquid modify the speed at which it exits the stomach. Because of this, B carbohydrate, protein or fat containing liquids can be digested and absorbed completely prior to reaching the distal small intestine. Certain physical characteristics of the ingested meal may alter the function of the stomach to selectively retain or expel the large particles. If the viscosity of the meal is increased C sufficiently, the ability of the stomach to discriminate between large and small particles is abolished and much larger particles may be delivered into the duodenum.

40. The above findings are based on medical studies and are well-established in the field of gastroenterology.

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41. It may be useful at this stage to refer to Modi's 'Medical Jurisprudence and Toxicology', Twenty Third Edition, which has specifically concluded that there is no absolute and definite standard that every human being would empty his stomach E within two to three hours of taking the meals, irrespective of what kind of meal had been taken by the concerned person.

42. Judging the time of death from the contents of the stomach, may not always be the determinative test. It will require due corroboration from other evidence. If the prosecution is able F to prove its case beyond reasonable doubt and cumulatively, the evidence of the prosecution, including the time of death, is proved beyond reasonable doubt and the same points towards the guilt of the accused, then it may not be appropriate for the Court to wholly reject the case of the prosecution and to G determine the time of death with reference to the stomach contents of the deceased.

43. While discussing various judgments of this Court, Modi in the aforesaid book at page 543 has recorded as under: -

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"....The state of the contents of the stomach found at the time of medical examination is not a safe guide for determining the time of the occurrence because that would be a matter of speculation, in the absence of reliable evidence on the question as to when the deceased had his last meal and what that meal consisted of [*Masjit Tato Rawool v. State of Maharashtra,* (1971) SCC (Cr.) 732; *Gopal Singh v. State of Uttar Pradesh,* AIR 1979 SC 1932; *Sheo Darshan v. State of Uttar Pradesh,* (1972) SCC (Cr) 394]. The presence of faecal matter in the intestines is not conclusive, as the deceased might be suffering from constipation. Where there is positive direct evidence about the time of occurrence, it is not open to the court to speculate about the time of occurrence by the presence of faecal matter in the intestines [*Sheo Dershan v. State of Uttar Pradesh* (1972) SCC (Cr.) 394]. The question of time of death of the victim should not be decided only by taking into consideration the state of food in the stomach. That may be a factor which should be considered along with other evidence, but that fact alone cannot be decisive[*R. Prakash v. State of Uttar Pradesh* (1969) 1 SCC 48, 50]

44. Such an approach would even otherwise be justifiable as in some cases the evidence may not be sufficient to establish as to what the last meal was and what article of food, if any, was taken by the deceased. So also, the 'sluggish chronometric sense of the countryside community of India is notorious' and even urban folk make mistakes about time, when there is no particular reason to observe and remember a minor event like taking of a morning meal. In such circumstances where semi-digested food was found in the stomach, the contention, that it must be inferred from it that the occurrence must have taken place after the deceased had taken his evening meal may not be accepted.

45. This Court in the case of *Shivappa v. State of*

A *Karnataka* [(1995) 2 SCC 76] stated the dictum that medical opinion is admissible in evidence like all other types of evidence and there is no hard-and-fast rule with regard to appreciation of medical evidence. It is not to be treated as sacrosanct in its absolute terms. Agreeing with the view
B expressed in Modi's book on Medical Jurisprudence and Toxicology, this Court recorded that so far as the food contents are concerned, they remain for long hours in the stomach and the duration thereof depends upon various other factors. Indisputably, a large number of factors are responsible for
C drawing an inference with regard to the digestion of food. It may be difficult, if not impossible, to state exactly the time which would be taken for the purpose of digestion.

46. Similarly, in the case of *Jabbar Singh v. State of Rajasthan* [(1994) SCC (Cr.) 1745], the Court while dealing
D with the evidence of DW-1 who had opined that since there was some semi-digested food, the occurrence must have taken place earlier and not at 3.00 a.m. The Court reiterated the principle that this was an opinion evidence and the possibility of the deceased having eaten late in the night could not be ruled
E out.

47. In view of the above medical references, the view expressed in *Modi's book* (supra) and the principles stated in the judgments of this Court, it can safely be predicated that
F determination of the time of death solely with reference to the stomach contents is not a very certain and determinative factor. It is one of the relevant considerations. The medical evidence has to be examined in light of the entire evidence produced by the parties. It is certainly a relevant factor and can be used as
G a significant tool by the Court for coming to the conclusion as to the time of death of the deceased but other factors and circumstances cannot be ignored. The Court should examine the collective or cumulative effect of the prosecution evidence along with the medical evidence to arrive at the correct conclusion. There is no evidence in the present case which
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establishes, with exactitude, the time at which the accused, the deceased and the eye-witness (PW11)had their dinner. The only evidence is that they had dinner and after having dinner they had gone to sleep. This necessarily would apply that they had dinner late and not in the early hours of the evening. As already noticed, according to PW11, he had come to his sister's house at about 7.00 p.m., whereafter all the events occurred. The evidence of PW3 also remained unchallenged that the death of Indra had taken place between 1.00 a.m. to 1.30 a.m. on 10th February, 1999. Therefore, we find no reason to accept this contention on behalf of the appellant.

48. The next contention raised on behalf of the appellant is that both the accused persons, Sunil and Satish, were residents of a village which was far away from the place of occurrence and they were not present at the place of occurrence. Furthermore, they also questioned the very presence of the eye-witness, PW11, on the fateful day at the scene of occurrence. The statement of the sole witness is not trustworthy, particularly when the said witness himself has not partially been believed by the trial Court. The mere fact that the accused were residents of a village at some distance would be inconsequential. As per the statement of the witnesses, both these accused were seen by them in the house of Ratti Ram where the deceased was murdered. We are also unable to accept the contention that presence of PW10 and PW11 at the place of occurrence was doubtful and the statements of these witnesses are not trustworthy. Reliance on behalf of the accused has been placed on the judgment of this Court in the case of *Rupchand Chindu Kathewar v. State of Maharashtra* [(2009) 17 SCC 37]. In that case the Court, as a matter of fact, found that the statement of PW2 was not qualitatively unimpeachable. Having disbelieved the sole witness, the Court had given benefit of doubt to the accused. However, the Court had found that the prosecution case was not even supported by medical evidence and the conduct of the said witness was very unnatural.

A 49. We are unable to understand as to what assistance the learned counsel for the appellant wishes to derive from the facts of this case. We are to deal with the present case on its own facts. Both the trial court and the High Court have believed PW10 and PW11 and have returned a finding of guilt against B the accused. The Courts have adversely commented upon the conduct of these witnesses but not with regard to the material events of the prosecution case. PW10 was under threat and confinement of his own family members as well as friends of the accused, who had conspired to kill Indra, that is how he C obeyed the command of Jitender and others in coming from the fields on the motorcycle and getting the door of Chobara opened by Indra where she was sleeping with her child. He claims to have been under continuous threat and illegal confinement of Jitender and the other accused. It was PW10's own house where the murder has taken place and, therefore, D his presence in the house cannot be doubted in the normal course. PW11 is the brother of the deceased and he had come late in the evening to meet his sister and sort out the issues with regard to the return of the properties which Ratti Ram had given to the appellants herein, Satish and Sunil.

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50. The statement of PW11 also finds corroboration from the medical evidence. PW3, Dr. L.L. Bundela, has stated that besides ligature marks on her neck, the face of the deceased was swollen and congested. Six other injuries were found on F the body of the deceased. There were abrasions on elbow and wrist of the deceased. She had also suffered abrasion injury on her left eyebrow and on dissection, infiltration of blood was found present in the subcutaneous tissues. The post mortem report, Ex.P4 to P5, states the cause of the death, as per G opinion of the Board, as asphyxia due to strangulation, which was ante mortem in nature and sufficient to cause death in the ordinary course of nature. This medical evidence fully corroborates what had been testified by PW11. According to that witness, Ratti Ram and Pawan had held the hands of Indra while Sunil and Satish were strangulating her by putting put a

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rope around her neck. She struggled to free herself from the grip of these persons but in vain. Later, it was found that she had been killed. It is a case where the ocular evidence of PW11 is corroborated by medical evidence and is also partially supported by the statement of PW10, the husband of the deceased. Thus, in our considered view, the statements of PW10 and PW11 cannot be said to be doubtful or which cannot be believed by the Court. Their presence at the place of occurrence was natural and what they have stated is not only plausible but completes the chain of events in the case of the prosecution.

51. The accused in the present appeal had also taken the plea of alibi in addition to the defence that they were living in a village far away from the place of occurrence. This plea of alibi was found to be without any substance by the Trial Court and was further concurrently found to be without any merit by the High Court also. In order to establish the plea of alibi these accused had examined various witnesses. Some documents had also been adduced to show that the accused Pawan Kumar and Sunil Kumar had gone to New Subzi Mandi near the booth of DW-1 and they had taken mushroom for sale and had paid the charges to the market committee, etc. Referring to all these documents, the trial court held that none of these documents reflected the presence of either of these accused at that place. On the contrary the entire plea of alibi falls to the ground in view of the statements of PW-10 and PW-11. The statements of these witnesses have been accepted by the Courts below and also the fact that they have no reason to falsely implicate the accused persons. Once, PW-10 and PW-11 are believed and their statements are found to be trustworthy, as rightly dealt with by the Courts below, then the plea of abili raised by the accused loses its significance. The burden of establishing the plea of alibi lay upon the appellants and the appellants have failed to bring on record any such evidence which would, even by reasonable probability, establish their plea of alibi. The plea of alibi in fact is required to be proved with certainty so as to

A completely exclude the possibility of the presence of the accused at the place of occurrence and in the house which was the home of their relatives. {Ref. *Shaikh Sattar v. State of Maharashtra* [(2010) 8 SCC 430]}.

B 52. It has been correctly contended on behalf of the appellants while relying upon the judgment of this Court in the case of *S.P. Bhatnagar v. State of Maharashtra* [(1979) 1 SCC 535], that statement of the co-accused recorded under Section 313 Cr.PC cannot be used against the other co-accused. Ratti Ram, in his statement under Section 313 CrPC, had admitted C material parts of the prosecution case including that he had parted away with a buffalo, some household articles and cash amount of Rs.50,000/- in favour of the family of Satish and Sunder and that Indra had objected to it. He also admitted that the door was opened by Indra on the asking of Surender, whom D Jitender had brought on motor cycle from the fields. However, he denied having committed the murder of Indra.

53. The proposition of law advanced by the counsel for the appellants cannot be disputed. The fact of the matter remains E that statement of Ratti Ram under Section 313 CrPC is part of the judicial record and could be used against Ratti Ram for convicting him, if the prosecution had proved its case in accordance with law. Ratti Ram, unfortunately, died during the pendency of the proceedings. The part of his statement that F supports the case of the prosecution as well as the statement of PW-10 and PW-11 can be relied upon by the prosecution to a limited extent. This statement may not be used against the present accused as such, but the fact that the statement of Ratti Ram under Section 313 CrPC supports the case of the prosecution cannot be wiped out from the record and would G have its consequences in law. Without using the statement of Ratti Ram against these accused, the courts below have correctly relied upon the statement of PW-10 and PW-11 and the medical evidence. This finding recorded by the Courts cannot, therefore, be faulted with.

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54. The present accused have not been convicted on the basis of a mere suspicion. The prosecution has been able to establish its case beyond reasonable doubt by ocular, documentary and medical evidence. The bangles which were recovered from the place of occurrence and the injuries that were inflicted upon the body of the deceased clearly show that she struggled for life and was murdered at the hands of accused. Thus, it is not a case of mere suspicion and the reliance placed by the counsel upon the judgment of this Court in *Nachhatar Singh v. State of Punjab* [(1976) 1 SCC 750], is entirely misplaced.

55. We have already noticed that Pawan Kumar had preferred a separate appeal which came to be dismissed by this Court on the ground of delay as well as on merits vide its order dated 14th October, 2011. Of course, dismissal of the SLP at the admission stage itself may not adversely affect the case of the present appellants. In the case of *Jalpat Rai and Ors. v. State of Haryana* [JT 2011 8 SC 55], this principle has been enunciated by stating that dismissal of SLP summarily does not mean affirmation of the judgment of the High Court on merits and does not even amount to acceptance of the correctness of the High Court decision. We do not intend to dwell on this issue any further.

56. We also do not propose to rely upon the dismissal of the SLP filed by Pawan Kumar since we have come to an independent conclusion on merits that the prosecution in the present case has been able to bring home the guilt of the appellants-accused and the judgment of the High Court under appeal does not call for any interference.

57. For the reasons afore-mentioned, both the above appeals are dismissed.

R.P. Appeals dismissed.