

MD. SAJJAD @ RAJU @ SALIM

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v.

STATE OF WEST BENGAL

(Criminal Appeal No. 1953 of 2010)

JANUARY 06, 2017

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**[PINAKI CHANDRA GHOSE AND  
UDAY UMESH LALIT, JJ.]**

*Penal Code, 1860: s.302 r/w s.34 – Conviction under – Delay in holding Test Identification Parade – Effect of – Dead body of husband of PW-8 found lying on the road – Death was due to strangulation and head injuries – Entire prosecution case rested on the identification by prosecution witnesses and on the suspicion expressed by PW-8 which arose out of dispute in connection with business – Prosecution witnesses stated that they saw four persons in the company of the deceased on previous night of murder and recognized appellant and co-accused in the Test Identification Parade – Conviction by courts below – On appeal, held: None of the prosecution witnesses had given any identification marks or disclosed special features or attributes of any of the four persons in general and the accused in particular – No incident or crime had actually taken place in presence of these prosecution witnesses – Identification parade itself was held two months after the incident of murder – Their chance meeting was also in the night without there being any special occasion for them to notice the features of any of the accused which would then register in their minds so as to enable them to identify them on a future date – In the circumstances, such identification simplicitor cannot form the basis or be taken as the fulcrum for the entire case of prosecution – The suspicion expressed by PW-8 was also not enough to record the finding of guilt against the appellant – Prosecution having failed to establish its case against the appellant, benefit of doubt granted to the appellant and he is acquitted of all charges.*

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*Criminal law: Acquittal of accused-appellant – Entitlement of non-appealing accused to claim acquittal – Held: If on evaluation of case, a conclusion is reached that no conviction of any accused was possible the benefit of that decision must be extended to the*

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A *similarly situated co-accused even though he had not challenged the order by way of appeal.*

Allowing the appeal, the Court

B HELD: 1. In the present case, apart from the identification by PWs 3, 5 and 16 and their version that they had seen the deceased in the company of four persons on the night intervening 11.7.1993 and 12.7.1993, there is nothing which could point in the direction of the guilt of the appellant and non-appealing accused. The confessional statement having been discarded, there is no other material to lend any corroboration. The matter thus stands and rests purely on the identification by PWs 3, 5 and 16 apart from the suspicion expressed by PW 8. Apart from the fact that there was delay in holding the Test Identification Parade, one striking feature is that none of the concerned prosecution witnesses had given any identification marks or disclosed special features or attributes of any of those four persons in general and the accused in particular. Further, no incident or crime had actually taken place in the presence of those prosecution witnesses nor any special circumstances had occurred which would invite their attention so as to register the features or special attributes of the concerned accused. Their chance meeting, as alleged, was in the night and was only for some fleeting moments. [Paras 13, 15] [273-B-C; 274-E-F]

*Lal Singh and others v. State of U.P.* (2003) 12 SCC 554; *Subash v. State of U.P.* (1987) 3 SCC 331 : [1987] 2 SCR 962 ; *Musheer Khan v. State of M.P.* (2010) 2 SCC 748 : [2010] 2 SCR 119 – relied on.

F 2. It is true that in certain cases this Court had granted benefit even to a non-appealing accused. In *\*Bijoy Singh case*, this Court observed that if on evaluation of case, a conclusion is reached that no conviction of any accused was possible the benefit of that decision must be extended to the similarly situated co-accused even though he had not challenged the order by way of appeal. In the circumstances, the judgments of conviction recorded by the courts below against the appellant is set aside and he is acquitted of all the charges leveled against him. The benefit of this acquittal will also enure to the advantage of the non-appealing accused. [Paras 19, 20] [276-F-G; 277-B]

*Bijoy Singh v. State of Bihar* (2002) 8 SCC 147; *Suresh Chaudhary v. State of Bihar* (2003) 4 SCC 128; *Pawan Kumar v. State of Haryana* (2003) 11 SCC 241: [2003] 1 Suppl. SCR 710; *Mohinder Singh and Anr. v. State of Punjab and Others* (2004) 12 SCC 311 – relied on. A

Case Law Reference B.

(2003) 12 SCC 554	relied on	Para 14	
[1987] 2 SCR 962	relied on	Para 16	
[2010] 2 SCR 119	relied on	Para 17	
(2002) 8 SCC 147	relied on	Para 19	C
(2003) 4 SCC 128	relied on	Para 19	
[2003] 1 Suppl. SCR 710	relied on	Para 19	
(2004) 12 SCC 311	relied on	Para 19	

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 1953 of 2010. D

From the Judgment and Order dated 20.04.2010 of the High Court at Calcutta in C.R.A. No. 53 of 1997.

Anand Dey, Ms. Rajeshri N. Reddy, A. N. Singh, Merusagar Samantaray, Advs. for the Appellant. E

Mrinal Kanti Mandal, Parijat Sinha, Advs. for the Respondent.

The Judgment of the Court was delivered by

**UDAY UMESH LALIT, J.** 1. This appeal by special leave challenges the Judgment and Order dated 20.04.2010 passed by the High Court at Calcutta dismissing Criminal Appeal No.53 of 1997 preferred by the appellant herein and thereby affirming his conviction and sentence under Section 302 read with Section 34 of the Indian Penal Code (for short "IPC"). F

2. According to the prosecution, on 12.07.1993 at about 6.00 AM PW6 Gautam Kheto found a dead body lying on the road in front of his house with a handkerchief tied around the neck. He reported the incident which was recorded in G.D. Book of Muchipara Police Station dated 12.07.1993, whereafter the police conducted inquest on the dead body and sent it for autopsy. The dead body was having a tattoo on the right H

A fore-arm with "Ramchandra Singh" written in Hindi. Post-mortem examination was conducted by PW18 Dr. Rabindra Basu who opined that the death was due to strangulation and the ligature mark and head injuries were ante-mortem in nature.

3. At about 10.10 PM on the same day i.e. 12.07.1993 PW4 Jai Kishore Guin came to Muchipara Police Station and made a statement that he had heard conversation between PW3 Kailash Srivastava and PW16 Shyamlal Jadav which suggested that they had knowledge about the incident. The investigating officer could then find both PW16 Kailash Srivastava and PW6 Shyamlal Yadav on 13.07.1993. According to both these witnesses they had seen an old man and four other persons alighting from a taxi near a sweetmeat shop in Akrur Dutta Lane and that the old man, who was in drunken condition was taken away by the other persons. According to these witnesses, the number of taxi was 3157. The investigating officer then located the taxi driver, i.e. PW5 Laxminarayan Dey, who stated that in the intervening night of 11.07.1993 and 12.07.1993 five persons had boarded his taxi, four persons were younger in age, while one was an old man. According to this witness there was some altercation amongst them; that near a sweetmeat shop all of them alighted and that when they came back only four of them had returned. He thereafter dropped them at Rajabazar.

4. PW8 Saraswati Singh lodged a report on 16.07.1993 that her husband named Ramchandra Singh was missing since 11.07.1993. Two days later she was called to the police station and shown certain photographs but she could not identify the picture. After few days, she again went to the police station with her nephew who could identify the picture to be that of Ramchandra Singh, the husband of said PW8 Saraswati Singh.

5. On the strength of suspicion expressed by said PW8 Saraswati Singh the appellant Mohd. Sajjad and one Sk. Sahid @ Bablu were arrested on 09.09.1993 and 11.09.1993 respectively. Both these persons were subjected to test identification parade on 06.10.1993 in which PWs 3, 5 and 16 identified them. After completion of investigation charge-sheet was filed against the appellant and said Sk. Sahid @ Bablu for the offences punishable under Section 302 read with Section 34 IPC while three persons, namely, Mohd. Sehzada, Sheikh Kaloo and Sheikh Panchu were stated to have been absconding and declared as proclaimed offenders.

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6. The prosecution principally relied upon the testimony of PWs 3, 5, 8 and 16. PW3 Kailash Srivastava in his deposition stated as under:

"I live at No.8, Gopi Lane, Bowbazar, Calcutta. I am a plumber. I know Haripada Das. He was my previous employer. I sleep at Premises No.8, Gopi Bose Lane, Calcutta. In the night of 11.07.1993 an incident took place. That night there was pain in the stomach of Haripada Das. Haripada Das lives in No.3, New Bowbazar Lane, which is close to my residence. At about 12/12:15 in that night a man came from Haripada and awoke me from sleep. I went to Haripada's place with that man. Haripada told me that he should be immediately hospitalized for the pain in his stomach. Then myself went to search out a taxi to take Haripada to Hospital. Shyamlal Yadav is a driver. Haripada Das is a plumber contractor. We went towards Nirmal Ch. Street for a taxi. We saw a taxi entering Akroor Dutta Lane from Nirmal Ch. Street. We also entered Akroor Dutta Lane to catch the taxi. We saw the taxi to stop near sweetmeat shop in Akroor Dutta Lane. We saw about 5 persons getting down from the taxi. We approached the taxi driver to hire the taxi for taking the patient to hospital. The taxi driver refused to take the patient to the hospital. The other persons who got down from the taxi also got annoyed with us and told us to go away because they would take the taxi for return journey. There was an old man in the taxi. And other 4 persons scolded us by saying us to away. We found the old man to be in drunken condition. The old man was taken out of the taxi, the other persons present there. Then we came away from the place after noting the number of that taxi. The number of the taxi was 3157. We noted the number of that taxi because the driver refused to take the patient to hospital with the idea that we should lodge diary against the driver. We saw those persons by the electric light that was burning on the road. If I now see any of those persons I may recognize those persons who got down from the taxi that night."

PW16 Shyamlal Yadav supported the version of PW3 Kailash Srivastava and deposed on similar lines. PW5 Laxminarayan Dey deposed that on the night intervening 11.07.1993 and 12.07.1993 five persons had boarded his taxi. He also deposed to the fact that while the taxi had stopped near a sweetmeat shop two persons had come to hire his taxi and that there was some altercation with those persons.

A. 7. PW8 Saraswati Singh in her examination stated as under:

B. "My husband's income out of salary was not sufficient to maintain  
our family. To make up the income to meet the family expenses,  
I used to buy kerosene oil from Scott Lane Market and sale it at  
higher price at my residence. I used to earn profit of Rs.30/40  
per day. In course of my business in kerosene oil, I picked  
acquaintance with a boy who used to sell kerosene oil on that  
market. His name is Raju which I gathered from him. Raju with  
other boys used to visit our house in connection with my business  
in kerosene. I enquired the name of those persons accompanying  
C. Raju and learnt from him that one of them was Sahajad, another  
was Bablu, the other one was Panchu and another was Kaloo. I  
used to purchase kerosene oil from Raju as he used to sell me oil  
at cheaper price than others."

D. She further stated that there were some disputes with Raju in  
connection with the aforesaid business. As regards disappearance of  
her husband and the steps taken by her thereafter she stated as under:

E. "My husband did not die in our home. In the night of 11<sup>th</sup> July  
1993, my husband did not return home. Sometimes my husband  
used to pass night outside home but he used to come back home  
regularly. Next day I went to the police station to lodge a diary.  
When I met a police officer there with dress who was going out  
of P.S. I told him that my husband did not return home that night  
and I wanted to make a diary. He asked me whether my husband  
used to drink or not and I told him tht my husband used to drink.  
He advised to me to search in the police station and in the hospital  
F. for my husband. Thereafter, I went to Entally Police Station but  
did not find my husband there. I then again went to Bowbazar  
P.S. but I did not find my husband there. Then I went to Amherest  
Street P.S. and therefrom I went to Jorasanko P.S. but I did not  
find my husband anywhere there. On the next day I went to my  
relation's house. I went to Bhawanipore at the house of my  
G. husband's sister. They informed me that my husband did not go  
to their place and asked me to diarize the matter. Then I went to  
Chandernagore there from my husband's co-villagers used to live  
but I did not find my husband there also. I also went to Medical  
College Hospital, then to Compbel Hospital. I also searched in  
H. P.G. Hospital for my husband but I did not find my husband

anywhere. On 16<sup>th</sup> of that month my husband's sister son came to our house and scolded me for not diarizing the matter. Then I went to Muchipara P.S. and lodged a diary. After 2 days I was called from the P.S., I was shown some photographs in the P.S. As I could not distantly recognized the person from the photograph I told the police to call my husband's sister's son who could identify that person from the picture as I have defect in eye-sight. My husband's sister's son then came to us on 24<sup>th</sup> of that month. I went to the police station with him and he saw the photographs and identified the picture of the photograph as that of his Mama i.e. my husband. Then myself with Shib Kumar Singh, my husband's sister's son went to N.R.S. Hospital (Campbel). Then I identified the body by comparing with the photograph in that hospital to be the dead body of my husband.....”

8. The prosecution also pressed into service confessional statement given by Sk. Sahid @ Bablu under Section 164 Cr.P.C. which was recorded by PW19, the then Chief Metropolitan Magistrate, Calcutta on 27.09.93. Insofar as test identification is concerned, the prosecution relied upon the testimony of PW17, Metropolitan Magistrate Calcutta who testified that in the test identification parade PW5 Laxmi Narayan Dey and PW3 Kailash Srivastava could identify both the accused while PW16 Shyamlal Yadav could identify only the appellant.

9. After considering the material on record the trial court found that the prosecution was successful in bringing home its case against both the accused. Though the evidence regarding confession was discarded by the trial court, it found the evidence of three witnesses, namely, PWs 3, 5 and 16 regarding identification of the accused to be trustworthy. It observed as under:

“It is true that the Test Identification Parade was held two months after the incident of murder but the accused were absconded and they were arrested on 9<sup>th</sup> September and 11<sup>th</sup> September and the Test Identification Parade was held on 6<sup>th</sup> October, 1993. It is also true that the witnesses did not disclose or give any description of the accused in their statement before the police. But the fact that the accused were identified by the witnesses in Court which is substantive evidence and the proceedings of Test Identification Parade are used to corroborative evidence. But, it should be remembered here also that this is not only evidence on the

A prosecution side as the prosecution case hinges on circumstantial  
evidence and besides the evidence of identification of the accused  
of three PWs which is merely a link of the chain of circumstances  
while there are other names which have completed the chain. I  
reiterate here that the names of the accused came out from the  
statement of the widow who has given a vivid description of the  
B incident as to how they (accused) came colder to her family while  
dealing in kerosene oil and the motive of the accused as ascribed  
by her to commit the murder of her husband was to grab her  
money and for committing some other heinous crimes of which  
the PW10 has stated in her evidence. So, when the entire chain  
C of circumstantial evidence is complete, it is futile to challenge any  
link separately unless there is glaring instance of disbelief.”

10. The circumstances that the deceased was last seen in the  
company of four persons including the appellant and said Sk. Sahid @  
Bablu and that the appellant had disputes with PW8, wife of the deceased,  
D weighed with the trial court in accepting the case of the prosecution.  
The Trial Court did not find it safe to rely on the confessional statement  
of Sk. Shahid @ Bablu. The Trial Court by its judgment dated 19.12.1996  
convicted the appellant and said Sk. Sahid @ Bablu for the offences  
punishable under Section 302 read with Section 34 IPC. After hearing  
the parties, the trial court by its order dated 23.12.96 sentenced both the  
E accused to suffer imprisonment for life and to pay fine of Rs.5,000/-  
each, in default whereof to suffer rigorous imprisonment for six months.

11. It appears that Sk. Sahid @ Bablu did not prefer any appeal  
against his conviction and sentence while the appellant carried the matter  
by filing Criminal Appeal No.53 of 1997 challenging his conviction and  
F sentence. The High Court affirmed the view taken by the trial court and  
dismissed the said criminal appeal vide its judgment dated 20.04.2010  
which is presently under appeal.

12. Appearing for the appellant, Mr. Anand Dey, learned Advocate  
submitted that the entire case rests on the suspicion expressed by PW 8  
G Saraswati Singh arising from some disputes in connection with the business  
and the identification by PWs 3, 5 and 16. It was submitted that the Test  
Identification Parade was held more than two and half months after the  
incident and in any case 25 days after the arrest of the accused. In his  
submission, such Test Identification Parade was completely flawed. To

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a pointed question that if the appellant deserved acquittal whether such acquittal would enure to the advantage of the other accused who had not even preferred an appeal, Mr. Mrinal Kanti Mandal learned Advocate appearing for the Respondent-State submitted in the affirmative. A

13. In the present case, apart from the identification by PWs 3, 5 and 16 and their version that they had seen the deceased in the company of four persons on the night intervening 11.7.1993 and 12.7.1993, there is nothing which could point in the direction of the guilt of the appellant and said Sk. Sahid @ Bablu. The confessional statement having been discarded, there is no other material to lend any corroboration. The matter thus stands and rests purely on the identification by PWs 3, 5 and 16 apart from the suspicion expressed by PW 8 Saraswati Singh. B C

14. In *Lal Singh and others Vs. State of U.P.*<sup>1</sup>, this court in Paragraphs 28 and 43 dealt with the value or weightage to be attached to Test Identification Parade and the effect of delay in holding such Test Identification Parade. Said paragraphs are as under:- D

“28. The next question is whether the prosecution has proved beyond reasonable doubt that the appellants are the real culprits. The value to be attached to a test identification parade depends on the facts and circumstances of each case and no hard-and-fast rule can be laid down. The court has to examine the facts of the case to find out whether there was sufficient opportunity for the witnesses to identify the accused. The court has also to rule out the possibility of their having been shown to the witnesses before holding a test identification parade. Where there is an inordinate delay in holding a test identification parade, the court must adopt a cautious approach so as to prevent miscarriage of justice. In cases of inordinate delay, it may be that the witnesses may forget the features of the accused put up for identification in the test identification parade. This, however, is not an absolute rule because it depends upon the facts of each case and the opportunity which the witnesses had to notice the features of the accused and the circumstances in which they had seen the accused committing the offence. Where the witness had only a fleeting glimpse of the accused at the time of occurrence, delay in holding a test identification parade has to be viewed seriously. Where, however, the court is satisfied that the witnesses had ample E F G

<sup>1</sup> 2003 (12) SCC 554

A opportunity of seeing the accused at the time of the commission of the offence and there is no chance of mistaken identity, delay in holding the test identification parade may not be held to be fatal. It all depends upon the facts and circumstances of each case.

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 43. It will thus be seen that the evidence of identification has to be considered in the peculiar facts and circumstances of each case. Though it is desirable to hold the test identification parade at the earliest-possible opportunity, no hard-and-fast rule can be laid down in this regard. If the delay is inordinate and there is evidence probalising the possibility of the accused having been shown to the witnesses, the court may not act on the basis of such evidence. Moreover, cases where the conviction is based not solely on the basis of identification in court, but on the basis of other corroborative evidence, such as recovery of looted articles, stand on a different footing and the court has to consider the evidence in its entirety.”

15. In the case in hand, apart from the fact that there was delay in holding the Test Identification Parade, one striking feature is that none of the concerned prosecution witnesses had given any identification marks or disclosed special features or attributes of any of those four persons in general and the accused in particular. Further, no incident or crime had actually taken place in the presence of those prosecution witnesses nor any special circumstances had occurred which would invite their attention so as to register the features or special attributes of the concerned accused. Their chance meeting, as alleged, was in the night and was only for some fleeting moments.

16. In *Subash Vs. State of U.P.*<sup>2</sup>, the aspects of delay as well as absence of any special features for identification and the effect thereof were considered by this court in paragraphs 8 and 9 as under:-

G “8. Apart from this infirmity we further find that Shiv Shankar was not put up for test identification parade promptly. The identification parade has been held three weeks after his arrest and no explanation has been offered for the delay in holding the test identification parade. There is, therefore, room for doubt as

H <sup>2</sup> 1987 (2) SCC 331

to whether the delay in holding the identification parade was in order to enable the identifying witnesses to see him in the police lock-up or in the jail premises and make a note of his features. A

9. Over and above all these things there remains the fact that a sufficiently long interval of time had elapsed between the date of occurrence when the witnesses had seen Shiv Shankar for a few minutes and the date of the test identification parade. It is, no doubt, true that all the three witnesses had correctly identified Shiv Shankar at the identification parade but it has to be borne in mind that nearly 4 months had elapsed during the interval. It is relevant to mention here that neither in Exhibit Kha-1 nor in their statements during investigation, the eyewitnesses have given any descriptive particulars of Shiv Shankar. While deposing before the Sessions Judge they have stated that Shiv Shankar was a tall person and had "sallow" complexion. If it is on account of these features the witnesses were able to identify Shiv Shankar at the identification parade, they would have certainly mentioned about them at the earliest point of time because their memory would have been fresh then. Thus in the absence of any descriptive particulars of Shiv Shankar in Ex. Kha-1 or in the statements of witnesses during investigation, it will not be safe and proper to act upon the identification of Shiv Shankar by the three witnesses at the identification parade and hold that he was one of the assailants of Ram Babu. As pointed out in *Muthuswami v. State of Madras*<sup>3</sup> where an identification parade was held about 2½ months after the occurrence it would not be safe to place reliance on the identification of the accused by the eyewitnesses. In another case *Mohd. Abdul Hafeez v. State of A.P.*<sup>4</sup> It was held that where the witnesses had not given any description of the accused in the first information report, their identification of the accused at the sessions trial cannot be safely accepted by the court for awarding conviction to the accused. In the present case there was a long interval of nearly 4 months before the test identification parade was held and it is difficult to accept that in spite of this interval of time the witnesses were able to have a clear image of the accused in their minds and identify him correctly at the identification parade." B  
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<sup>3</sup> AIR 1954 SC 4=1954 Cri LJ 236

<sup>4</sup> AIR 1983 SC 367=(1983) 1 SCC 143

A 17. Similarly the issue of delay weighed with this court in *Musheer Khan vs. State of M.P.*<sup>5</sup> in discarding the evidence regarding test identification as under:

B “8. Insofar as the identification of A-5 is concerned that has taken place at a very delayed stage, namely, his identification took place on 24-1-2001 and the incident is of 29-11-2000, even though A-5 was arrested on 22-12-2000. There is no explanation why his identification parade was held on 24-1-2001 which is after a gap of over a month from the date of arrest and after about 3 months from the date of the incident. No reliance ought to have been placed by the courts below or the High Court on such delayed TI parade for which there is no explanation by the prosecution.”

D 18. In the instant case none of the witnesses had disclosed any features for identification which would lend some corroboration. The identification parade itself was held 25 days after the arrest. Their chance meeting was also in the night without there being any special occasion for them to notice the features of any of the accused which would then register in their minds so as to enable them to identify them on a future date. The chance meeting was also for few minutes. In the circumstances, in our considered view such identification simplicitor cannot form the basis or be taken as the fulcrum for the entire case of prosecution. The suspicion expressed by PW 8 Saraswati Singh was also not enough to record the finding of guilt against the appellant. We therefore grant benefit of doubt to the appellant and hold that the prosecution has failed to establish its case against the appellant.

F 19. Mr. Mrinal Kanti Mandal, learned Advocate is right in submitting that in certain cases this Court had granted benefit even to a non-appealing accused. In *Bijoy Singh v. State of Bihar*<sup>6</sup>, this court observed that if on evaluation of the case, a conclusion is reached that no conviction of any accused was possible the benefit of that decision must be extended to the similarly situated co-accused even though he had not challenged the order by way of the appeal. To similar effect was the dictum of this court in *Suresh Chaudhary v. State of Bihar*<sup>7</sup>

<sup>5</sup> 2010 (2) SCC 748

<sup>6</sup> 2002 (8) SCC 147

<sup>7</sup> 2003 (4) SCC 128

and in *Pawan Kumar . State of Haryana*<sup>8</sup> and in *Mohinder Singh and Anr. v. State of Punjab and Others.*<sup>9</sup> A

20. In the circumstances we allow the present appeal, set aside the judgments of conviction recorded by the courts below against the appellant and acquit him of all the charges leveled against him. We further direct that the benefit of this acquittal and our decision will also enure to the advantage of the non-appealing accused namely Sk. Sahid @ Bablu. B

21. The appeal is thus allowed in aforesaid terms. The appellant was released on bail during the pendency of this appeal. His Bail bonds stand discharged.

Devika Gujral

Appeal allowed. C

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<sup>8</sup> 2003 (11) SCC 241

<sup>9</sup> 2004 (12) SCC 311