REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1617 OF 2011

Asar Mohammad and Ors. .....Appellant(s)

:Versus:

The State of U.P. ....Respondent(s)

J U D G M E N T

A.M. Khanwilkar, J.

1. This appeal emanates from the judgment and order passed by the High Court of Judicature at Allahabad dated 30th July, 2009 in Criminal Appeal No.1631 of 2008, whereby the High Court upheld the conviction recorded against the appellants for an offence punishable under Section 302 of the Indian Penal Code (IPC) but converted the sentence of death into imprisonment for life with fine, and confirmed the conviction under Section 201 of the IPC and sentence of 2 years' imprisonment and fine, as awarded by the Additional Sessions Judge/Special Judge, J.P. Nagar in Sessions Trial No.155/2004.

2. Briefly stated, one Shababul (PW-7) gave information to the Police Station, Dedoli on 24th January, 2004 about one Zahida Begum, the second wife of appellant No.3, Akhtar Mohammad, son of Munshi, and their son Ishlam (aged about 11 years) who

had gone missing from the village for the last two months, despite which their family members had not reported the matter to the police. The appellant Nos.1 and 2, Asar Mohammad and Asraf Mohammad respectively, are the two sons of appellant No.3 Akhtar Mohammad, from his first wife. Thus, deceased Zahida Begum is the step mother of appellant Nos.1 & 2, Asar Mohammad and Asraf Mohammad. On the basis of the aforementioned report, the Head Constable Surendra Singh (PW-10), who was posted as Head Moharrar, made an entry in GD No.32 (Ext. Ka-17). Acting on that report, PW-9 Virendra Kumar Tyagi, Station House Officer of Police Station, Dedoli, visited the village along with SI Doonger Singh Verma (PW-6), Mangey Ram Tomar, Nath Prakash Gupta, Constable Asqar Ali and SSI Harendra Singh (PW-4). On enquiries with Asar Mohammad (appellant No.1/accused No.1), he disclosed that Zahida was his step mother and her son Ishlam was his step brother. He confessed that he, along with the other two appellants committed the murder of both Zahida and Ishlam and thereafter, dumped their dead bodies into the septic tank in the backyard of their house. He then led the police party to the septic tank and removed the lid with the help of Mangat and Jagadish Valmiki (PW-8), wherefrom the dead bodies were taken out. The dead

bodies were highly decomposed and virtually reduced to skeletons. The body of Zahida Begum was found tied with nylon cord (Ext. Ka-18). Thereafter, the memo of recovery of the dead bodies was prepared by Harendra Singh (PW-4). SI Doongar Singh Verma (PW-6) conducted the inquest and gave the inquest report. He also prepared the necessary papers concerning the dead bodies and drew a site plan of the place of recovery (Ext.Ka-19). The dead bodies were then dispatched for post-mortem examination on the next day, i.e. 25th January, 2004. The Investigating Officer then recorded the statement of the inquest witnesses and proceeded to arrest Asraf Mohammad (appellant No.2/accused No.2), whose statement was recorded on the same day. The statements of Begum Banu (PW-1) and Akram were recorded on 26th January, 2004. The appellant No.3 Akhtar came to be arrested on 10th February, 2004. The post-mortem of the dead bodies was conducted by Dr. Kuldeep Singh (PW-5) who noted that the body of Zahida Begum *inter alia* had fracture of Hyoid bone and Hyoid Cartilage which, in his opinion, was the cause of death due to asphyxia (fracture of Hyoid bone and Thyroid Cartilage) and that the death had occurred more than one month back. With regard to the dead body of Ishlam, he *inter alia* noted that the cause of death was due to asphyxia

(fracture of Hyoid bone). After completion of the investigation, charge-sheet (Ext. Ka-21) was submitted before the jurisdictional Court on 11th February, 2004. The said Court committed the case to the Sessions Court at J.P. Nagar where it was registered as Sessions Trial No.155/2004. The Sessions Court on 5th August, 2004 framed charges against the appellants as under:

> "Charges
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> I, Mushaffey Ahmad, Addl. Sess. Judge, hereby charge you, Asar Mohammad, Asraf and Akhtar as follows:-
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> That you on two months ago from 24.1.2004 (date of information to the PS) at 1 am in the village of Panyati within the limits of PS Didopli Distt. J.P. Nagar committed murder by intentionally or knowingly causing the death of Smt. Zahida and Ishlam and thereby committed an offence punishable under Section-302 IPC and within the cognizance of this court of session.
>
> That you on above date, time and place having the reason to believe that certain offence to with murder punishable with death has been committed, did cause certain evidence of, the said offence, to disappear, to with threw the dead bodies of victims, into gutter with the intention of screening the said Asar Mohammad, Asraf and Akhtar from legal punishment, and thereby committed an offence punishable u/s 201 of the Indian Penal Code and within the cognizance of this court of Sessions.
>
> And I hereby direct that you be tried on the said charge of this court of session."

3. The prosecution examined 10 witnesses, namely, PW-1 Begum Bano, PW-2 Haji Iqbal, PW-3 Nawab Jan, PW-4 Harendra Singh, PW-5 Dr. Kuldeep Singh, PW-6 Doonger Singh Verma, PW-7 Shababul, PW-8 Jagdish, PW-9 V.K. Tyagi and PW-10 Surendra Singh. The defence of the accused was of total denial. They did not produce any evidence. The Sessions Court, after evaluating the entire evidence on record, eventually found that

even though it was a case of circumstantial evidence, the prosecution had succeeded in establishing the guilt of the accused beyond all reasonable doubt and found them guilty of offences under Sections 302 and 201 of the IPC. As aforesaid, the Sessions Court *vide* judgment and order dated 1st March, 2008 awarded the death sentence with fine, for having committed the offence under Section 302 of IPC, and 2 years of imprisonment with fine in respect of offence under Section 201 of IPC to each of the appellants.

4. All the three appellants carried the matter in appeal before the High Court, being Criminal Appeal No.1631 of 2008, which was heard along with the death reference received by the High Court, being Reference No.3 of 2008. The High Court reappreciated the evidence on record and affirmed the view taken by the Trial Court, after referring to the relevant decisions cited before it. In conclusion, the High Court observed as follows:-

> "27. We have scrutinized the submission of learned Counsel for the appellants and also decision of the Apex Court in the case of Aloke Nath Dutta (supra) in all its ramifications. Having gone through the decision, we must say that the said decision has been rendered in different facts and circumstances and flows from different perspective. In the said case, the Apex Court had rendered verdict acquitting other accused persons holding quintessentially that there was no direct evidence from which it could be deduced that other appellants also were part of the said conspiracy and that their presence had not been noticed by any of the witnesses and further that nobody saw them together in the house and also that no body saw Mrinal Dutta coming to the house even once. In the said decision accused were acquitted under section 120B I.P.C. **In the present case the accused persons were residing in the same house and they**

> **were very proximate relation of the deceased.** Therefore, the facts of the said case cannot be imported for application to the facts of the present case.
> 28. We have carefully scanned the evidence on record. **In the facts and circumstances and evidence on record, it brooks no dispute that the prosecution has proved beyond reasonable doubt that the deceased died homicidal death. The doctor has clearly held that cause of death of Zahida Begum was due to Asphyxia (fracture of Hyoid bone and Thyroid cartilage) and the death of Islam was also due to Asphyxia (fracture of Hyoid bone). The prosecution has proved its case beyond reasonable doubt. Another circumstance unerringly pointing to the guilt of the accused is that, the dead bodies were recovered from the septic tank situated inside the house of appellant that too, on the pointing out of Asar Mohammad. PW-3 Nawab Jan and PW-8 Jagdish minced no words to say that dead bodies were recovered on the pointing of Asar Mohammad from septic tank, There is no dispute about the identity of the deceased. Yet another circumstance pointing accused finger at the appellants is that the appellants did not lodge any report about the missing of the deceased for about two months nor offered any explanation about their death in their statement under section 313 Cr.P.C**....”
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> (emphasis supplied)

The High Court, however, noted that the facts and circumstances of the present case would not come within the purview of a rarest of rare case, for which reason it did not confirm the sentence of death awarded to the appellants. The High Court, instead, commuted the sentence to life imprisonment for offence under Section 302 of the IPC. Thus, the appeal filed by the appellants was partly allowed to that extent and the reference came to be rejected *vide* the impugned judgment and order dated 30th July, 2009.

5. Feeling aggrieved, the appellants have filed the present

appeal. The principal argument of the appellants is that although it is a case of concurrent finding of facts recorded by the two Courts below, the same is replete with manifest errors and cannot stand the test of judicial scrutiny. It is submitted that the evidence produced by the prosecution falls short of the quality evidence required for recording a finding of guilt against the accused in a case of circumstantial evidence. In that, the motive behind the commission of crime has not been established at all. No evidence is forthcoming in respect of identification of the two dead bodies, much less to establish the fact that it was of none other than the second wife of appellant No.3 and son of appellant No.3 respectively. It is vehemently contended that the police has set up PW-7 as the informant, who was an obliging informant of the police. If his evidence is to be discarded, the genesis of the prosecution case must collapse and, in which case, the rest of the circumstances or the evidence would be of no avail. It is submitted that even the other reports prepared by the police purportedly during the investigation of the crime, were tailored to suit the prosecution case. That ought to be discarded. It is submitted that the evidence produced by the prosecution, taken as a whole or even in part, by no stretch of imagination establishes the complicity of the appellants in the commission of

crime. The hypothesis on which the prosecution case rests is unsubstantiated. Further, the statement of the accused allegedly made to the police, which is the fulcrum of the prosecution case, is inadmissible in evidence and, at any rate, cannot be used against the co-accused. For all these reasons, the finding of guilt recorded against the appellants cannot be sustained either on facts or in law.

6. The learned counsel for the State, however, supported the judgment under appeal and would submit that no interference is warranted against the concurrent findings of fact. He submits that the prosecution has established the circumstances and the chain is complete in all respects, pointing towards the involvement of the appellants in commission of the crime and ruling out any other possibility. He submits that the appeals deserve to be dismissed.

7. We have heard Mr. S. K. Bhattacharya, learned counsel for the appellants and Mr. Rajesh K. Singh, learned counsel for the respondent. We have perused the entire record, including the original record.

8. Before proceeding to consider the rival submissions, be it noted that in the present case, no direct evidence has been produced by the prosecution regarding the involvement of the

appellants in the commission of the crime. The prosecution rests its case solely on circumstantial evidence. The legal position as to how such matter should be examined has been expounded in ***Padala Veera Reddy Vs. State of Andhra Pradesh and Ors.***[1] in the following words:-

> "10. ..... This Court in a series of decisions has consistently held that when a case rests upon circumstantial evidence such evidence must satisfy the following tests:
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> (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
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> (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
>
> (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
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> (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. (See *Gambhir* v. *State of Maharashtra*[2].)
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> 11. See also *Rama Nand* v. *State of Himachal Pradesh*[3], *Prem Thakur* v. *State of Punjab*[4], *Earabhadrapa alias Krishnappa* v. *State of Karnataka*[5], *Gian Singh* v. *State of Punjab*[6], *Balwinder Singh* v. *State of Punjab.*[7]"

9. In ***Mulakh Raj & Ors. Vs. Satish Kumar & Ors.***[8], the Court succinctly restated the legal position in paragraph 4 as

[1] (1989) Supp. (2) SCC 706
[2] (1982) 2 SCC 351 ; AIR 1982 SC 1157
[3] (1981) 1 SCC 511 ; AIR 1981 SC 738
[4] (1982) 3 SCC 462 ; (1983) 1 SCR 822 ; AIR 1983 SC 61
[5] (1983)Cri LJ 846 ; (1983) 2 SCC 330
[6] 1986 Supp (1) SCC 676 ; AIR 1987 SC 1921
[7] (1987) 1 SCC 1 ; AIR 1987 SC 350
[8] (1992) 3 SCC 43

under:

> "4. .....**Undoubtedly this case hinges upon circumstantial evidence. It is trite to reiterate that in a case founded on circumstantial evidence, the prosecution must prove all the circumstances connecting unbroken chain of links leading to only one inference that the accused committed the crime. If any other reasonable hypothesis of the innocence of the accused can be inferred from the proved circumstances, the accused would be entitled to the benefit. What is required is not the quantitative but qualitative, reliable and probable circumstances to complete the chain connecting the accused with the crime. If the conduct of the accused in relation to the crime comes into question the previous and subsequent conduct are also relevant facts. Therefore, the absence of ordinary course of conduct of the accused and human probabilities of the case also would be relevant. The court must weigh the evidence of the cumulative effect of the circumstances and if it reaches the conclusion that the accused committed the crime, the charge must be held proved and the conviction and sentence would follow."**
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> (emphasis supplied)

10. Let us revert to the circumstances which commended to the trial court and also the High Court to take the view that the chain of proved circumstances left no manner of doubt that the accused alone were involved in the commission of the offence in question. Those proved circumstances can be delineated as follows :

(i) Information regarding the missing persons (Zahida and Ishlam) was given by the village watchman, viz., Shababul (P.W.7).

(ii) The fact that the two named persons had gone missing for about two months was reinforced after the police visited the village to verify the same and in particular

the "admission of accused - Asar Mohammed (appellant No.1)" that the two missing persons have been murdered by him and the other two accused, viz., Asraf Mohammed and Akhtar (appellant Nos.2 and 3 respectively) and "their dead bodies were dumped by him in the septic tank in the backyard of their house."

(iii) No 'missing report' was lodged by the appellants in respect of Zahida and Ishlam, for reasons best known to them.

(iv) Appellant No.1 told the police that he would show the place where the dead bodies were dumped and he led the police party to that spot in the backyard of the house of the appellants, which was within his exclusive knowledge and opened the lid of the septic tank himself to facilitate taking out the two dead bodies which he admitted as that of Zahida and Ishlam.

(v) One of the two dead bodies recovered from the septic tank in the backyard of the house of the appellants was of a full grown-up female around 32 years of age and another of a male child of about 11 years of age which corresponded with the age of Zahida and Ishlam respectively.

(vi) The dead bodies were dumped more than one month

before the same were removed from the septic tank in a highly decomposed condition.

(vii) Ante-mortem injuries were noticed on the vital part of the neck on both the dead bodies which, according to the medical evidence, was the cause of death due to asphyxia and a case of homicidal death.

(viii) The accused neither disputed the identity of the two dead bodies being that of Zahida and Ishlam nor offered any explanation, even though they were confronted with the incriminatory evidence.

(ix) No evidence has been produced nor any explanation has been offered by the accused regarding the reason as to why they did not lodge a 'missing complaint/report' in respect of Zahida and Ishlam, who were closely related to them and were staying in the same house; nor have they produced any evidence that both of them were still alive and were residing elsewhere. Similarly, no explanation has been offered by them regarding the cause of death of Zahida and Ishlam, or for that matter, the circumstances in which their dead bodies were found in the septic tank in the backyard of their house and also about the ante-mortem injuries noticed on the vital part of the dead bodies which, as per the medical evidence, was the

cause of death due to asphyxia.

11. The trial court as well as the High Court, after analysing the evidence on record including the evidence of PWs 4 to 10, had discerned the above circumstances pointing towards the involvement of the accused in the commission of the crime. Both the courts have taken note of the fact that Begum Bano (PW-1); Haji Iqbal (PW-2); and Nawab Jan (PW-3) were declared hostile, as a result of which the factum of motive behind the murder of Zahida and Ishlam could not be established by the prosecution. Notably, even these hostile witnesses (PWs 1 to 3) have not disputed the relationship of Zahida and Ishlam with the accused and the fact that they were residing with the accused in the same house before they went missing. Be that as it may, both the courts have ruled that other proved circumstances emanating from the evidence produced by the prosecution, coupled with the abject silence of the accused including having failed to offer any explanation with regard to the incriminatory circumstances referred to above, was sufficient to bring home the guilt against them and no other conclusion could be deduced except that the accused were responsible for the murder of Zahida and Ishlam. They were closely related to the deceased (as Zahida was the second wife of accused Akhtar (appellant No.3) and Ishlam was

the son born in wedlock between them; and appellant nos.1 and 2 were the step sons of Zahida and step brothers of Ishlam). All of them were residing in the same house before Zahida and Ishlam went missing for about two months. That fact was reported by Shababul (PW-7) to the police. The fact that Shababul is on the payroll of the police cannot be the basis to disregard the proved fact that Zahida and Ishlam had gone missing for about two months before it was so reported to the police. None of the appellants have either disowned their relationship with Zahida and Ishlam or bothered to produce any tittle of evidence in defence to show that Zahida and Ashlam were still alive and residing elsewhere. This Court in ***Nika Ram Vs. State of Himachal Pradesh***[9], noted that the accused and deceased (his wife) resided together and as the accused failed to offer any cogent explanation about the circumstances in which his wife died, it pointed towards his guilt and thus, the Court deduced such inference. Suffice it to observe that the fact that PW-1, PW-2 and PW-3 became hostile and the prosecution could not establish the factum of motive cannot be the basis to doubt the correctness of the finding of guilt recorded by the two courts against the accused on the basis of other proved circumstances

[9] (1972) 2 SCC 80

including the confession of the accused No.1 about the murder of Zahida Begum and Ishlam and more importantly, having dumped the dead bodies in the septic tank in the backyard of their house and to have led the police to that place from where the two dead bodies, whose identity also has not been disputed, came to be recovered, coupled with the medical evidence that the cause of death of the two dead persons was due to the ante-mortem injury caused on the neck resulting in their death due to asphyxia and is a homicidal death.

12. After perusing the entire evidence and taking the totality of the proved circumstances into account, we are in agreement with the conclusion reached by the trial court, which came to be affirmed by the High Court, regarding finding of guilt against appellant No.1 – Asar Mohammed, who had confessed to the police and also led the police party to the place where the dead bodies were dumped. In ***Trimukh Moroti Kirkan Vs. State of Maharashtra***[10], the Court explicated that if an offence takes place inside the privacy of a house where the accused have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the

[10] (2006) 10 SCC 681

accused if the strict principle of circumstantial evidence, is insisted upon. The Court expounded thus:

> "14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. **A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. (See *Stirland v. Director of Public Prosecution*[11] - quoted with approval by *Arijit Pasayat, J. in State of Punjab v. Karnail Singh*[12]). The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:**
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> **'(b) A is charged with traveling on a railway without ticket. The burden of proving that he had a ticket is on him.'**
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> 15. **Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.**

[11] 1994 AC 315 ; (1994) 2 AII ER 13 (HL)
[12] (2003) 11 SCC 271

xxx xxx xxx

21. **In a case based on circumstantial evidence where no eye- witness account is available, there is another principle of law which must be kept in mind. The principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete.** This view has been taken in a catena of decisions of this Court. [See *State of Tamil Nadu v. Rajendran*[13] (SCC para 6); *State of U.P. v. Dr. Ravindra Prakash Mittal*[14] *(SCC para 39 : AIR para 40)*; *State of Maharashtra v. Suresh*[15] (SCC para 27); *Ganesh Lal v. State of Rajasthan*[16] *(SCC para 15)* and *Gulab Chand v. State of M.P.*[17] *(SCC para 4).*]

22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes placed in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. In *Nika Ram v. State of Himachal Pradesh*[18] it was observed that the fact that the accused alone was with his wife in the house when she was murdered there with 'khokhri' and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt. In *Ganeshlal v. State of Maharashtra*[19] the appellant was prosecuted for the murder of his wife which took place inside his house. It was observed that when the death had occurred in his custody, the appellant is under an obligation to give a plausible explanation for the cause of her death in his statement under Section 313 Cr.P.C. **The mere denial of the prosecution case coupled with absence of any explanation were held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the**

[13] (1999) 8 SCC 679
[14] (1992) 3 SCC 300 ; AIR 1992 SC 2045
[15] (2000) 1 SCC 471
[16] (2002) 1 SCC 731
[17] (1995) 3 SCC 574
[18] Supra @ Footnote 9
[19] (1992) 3 SCC 106

commission of murder of his wife. In *State of U.P. v. Dr. Ravindra Prakash Mittal*[20] the medical evidence disclosed that the wife died of strangulation during late night hours or early morning and her body was set on fire after sprinkling kerosene. The defence of the husband was that wife had committed suicide by burning herself and that he was not at home at that time. The letters written by the wife to her relatives showed that the husband ill-treated her and their relations were strained and further the evidence showed that both of them were in one room in the night. It was held that the chain of circumstances was complete and it was the husband who committed the murder of his wife by strangulation and accordingly this Court reversed the judgment of the High Court acquitting the accused and convicted him under Section 302 IPC. In *State of Tamil Nadu v. Rajendran*[21] the wife was found dead in a hut which had caught fire. The evidence showed that the accused and his wife were seen together in the hut at about 9.00 p.m. and the accused came out in the morning through the roof when the hut had caught fire. His explanation was that it was a case of accidental fire which resulted in the death of his wife and a daughter. The medical evidence showed that the wife died due to asphyxia as a result of strangulation and not on account of burn injuries. It was held that there cannot be any hesitation to come to the conclusion that it was the accused (husband) who was the perpetrator of the crime."

(emphasis supplied)

13. It is a settled legal position that the facts need not be self-probatory and the word "fact" as contemplated in Section 27 of the Evidence Act is not limited to "actual physical material object". The discovery of fact arises by reason of the fact that the information given by the accused exhibited the knowledge or the mental awareness of the informant as to its existence at a particular place. It includes a discovery of an object, the place from which it is produced and the knowledge of the accused as to its existence. It will be useful to advert to the exposition in the

[20] Supra @ Footnote 14
[21] Supra @ Footnote 13

case of ***Vasanta Sampat Dupare v. State of Maharashtra***[22]**,** in particular, paragraphs 23 to 29 thereof. The same read thus :

> "23. While accepting or rejecting the factors of discovery, certain principles are to be kept in mind. The Privy Council in *Pulukuri Kotayya* v. *King Emperor*[23] has held thus: (IA p. 77)
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> "… **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. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. **It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant.** But if to the statement the words be added 'with which *I* stabbed *A*', these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."
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> 24. In *Mohd. Inayatullah* v. *State of Maharashtra*[24], while dealing with the ambit and scope of Section 27 of the Evidence Act, the Court held that: (SCC pp. 831-32, paras 11-13)
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> "*11.* Although the interpretation and scope of Section 27 has been the subject of several authoritative pronouncements, its application to concrete cases is not always free from difficulty. It will therefore be worthwhile at the outset, to have a short and swift glance at the section and be reminded of its requirements. The section says:
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> '27. ***How much of information received from accused may be proved***.—Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.'
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> *12.* The expression 'provided that' together with the phrase 'whether it amounts to a confession or not' show that the section is in the nature of an exception to the preceding provisions particularly Sections 25 and 26. It is not necessary in this case to consider if this section qualifies, to

[22] (2015) 1 SCC 253
[23] AIR 1947 PC 67
[24] (1976) 1 SCC 828 ; (1976) 1 SCR 715

any extent, Section 24, also. **It will be seen that the *first* condition necessary for bringing this section into operation is the *discovery of a fact*, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The *second* is that the discovery of such fact must be deposed to. The *third* is that at the time of the receipt of the information the accused must be in police custody. The *last* but the most important condition is that only 'so much of the information' as relates *distinctly* to the fact *thereby* discovered is admissible. The rest of the information has to be excluded.** The word '*distinctly*' means '*directly*', 'indubitably', 'strictly', 'unmistakably'. The word has been advisedly used to limit and define the scope of the provable information. The phrase 'distinctly relates to the fact thereby discovered' is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the *direct* and *immediate* cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered.

13. At one time it was held that the expression 'fact discovered' in the section is restricted to a physical or material fact which can be perceived by the senses, and that it does not include a mental fact (see *Sukhan* v. *Emperor*[25]; *Ganu Chandra Kashid* v. *Emperor*[26]). **Now it is fairly settled that the expression 'fact discovered' includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this** (see *Pulukuri Kotayya* v. *King Emperor*[27]; *Udai Bhan* v. *State of U.P.*[28])."

(emphasis in original)

25. In *Aftab Ahmad Anasari* v. *State of Uttaranchal*[29] after referring to the decision in *Pulukuri Kotayya*[30], the Court adverted to seizure of clothes of the deceased which were concealed by the accused. In that context, the Court opined that (Aftab Ahmad Anasari case, SCC p. 596, para 40)

[25] AIR 1929 Lah 344
[26] AIR 1932 Bom 286
[27] Supra @ Footnote 23
[28] AIR 1962 SC 1116 ; (1962) 2 Cri LJ 251 ; 1962 Supp (2) SCR 830
[29] (2010) 2 SCC 583
[30] Supra @ Footnote 23

"*40*. … the part of the disclosure statement, namely, that the appellant was ready to show the place where he had concealed the clothes of the deceased is clearly admissible under Section 27 of the Evidence Act because the same relates distinctly to the discovery of the clothes of the deceased from that very place. The contention that even if it is assumed for the sake of argument that the clothes of the deceased were recovered from the house of the sister of the appellant pursuant to the voluntary disclosure statement made by the appellant, the prosecution has failed to prove that the clothes so recovered belonged to the deceased and therefore, the recovery of the clothes should not be treated as an incriminating circumstance, is devoid of merits."

26. In *State of Maharashtra* v. *Damu*[31] it has been held as follows: (SCC p.283, para 35)

"*35*. … It is now well settled that recovery of an object is not discovery of a fact as envisaged in [Section 27 of the Evidence Act, 1872]. The decision of the Privy Council in *Pulukuri Kotayya* v. *King Emperor*[32] is the most quoted authority for supporting the interpretation that the 'fact discovered' envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect."

The similar principle has been laid down in *State of Maharashtra* v. *Suresh*[33], *State of Punjab* v. *Gurnam Kaur*[34], *Aftab Ahmad Anasari* v. *State of Uttaranchal*[35], *Bhagwan Dass* v. *State (NCT of Delhi)*[36], *Manu Sharma* v. *State (NCT of Delhi)*[37] and *Rumi Bora Dutta* v. *State of Assam*[38].

27. **In the case at hand, as is perceptible, the recovery had taken place when the appellant was accused of an offence, he was in custody of a police officer, the recovery had taken place in consequence of information furnished by him and the panch witnesses have supported the seizure and nothing has been brought on record to discredit their testimony.**

28. Additionally, another aspect can also be taken note of. The fact that the appellant had led the police officer to find out the spot where the crime was committed, and the tap where he washed the clothes eloquently speak of his conduct as the same is admissible in evidence to establish his conduct. In this context we may refer with profit to the authority in *Prakash*

[31] (2000) 6 SCC 269
[32] Supra @ Footnote 23
[33] (2000) 1 SCC 471
[34] (2009) 11 SCC 225
[35] (2010) 2 SCC 583
[36] (2011) 6 SCC 396
[37] (2010) 6 SCC 1
[38] (2013) 7 SCC 417

Chand v. *State (Delhi Admn.)*[39] wherein the Court after referring to the decision in *H.P. Admn.* v. *Om Prakash*[40] held thus: (Prakash Chand case, SCC p.95, para 8)

> "*8.* … **There is a clear distinction between the conduct of a person against whom an offence is alleged, which is admissible under Section 8 of the Evidence Act, if such conduct is influenced by any fact in issue or relevant fact and the statement made to a police officer in the course of an investigation which is hit by Section 162 of the Criminal Procedure Code.** What is excluded by Section 162 of the Criminal Procedure Code is the statement made to a police officer in the course of investigation and not the evidence relating to the conduct of an accused person (not amounting to a statement) when confronted or questioned by a police officer during the course of an investigation. For example, the evidence of the circumstance, simpliciter, that an accused person led a police officer and pointed out the place where stolen articles or weapons which might have been used in the commission of the offence were found hidden, would be admissible as conduct, under Section 8 of the Evidence Act, irrespective of whether any statement by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act."

29. In *A.N. Venkatesh* v. *State of Karnataka*[41] it has been ruled that: (SCC p.721, para9)

> "*9.* By virtue of Section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. **The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer, the place where the dead body of the kidnapped boy was found and on their pointing out the body was exhumed, would be admissible as conduct under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 or not as held by this Court in *Prakash Chand* v. *State (Delhi Admn.)*. Even if we hold that the disclosure statement made by the appellants-accused (Exts. P-15 and P-16) is not admissible under Section 27 of the Evidence Act, still it is relevant under Section 8.** The evidence of the investigating officer and PWs 1, 2, 7 and PW 4 the spot mahazar witness that the accused had taken them to the spot and pointed out the place where the dead body was buried, is an admissible piece of evidence under Section 8 as

[39] (1979) 3 SCC 90
[40] (1972) 1 SCC 249
[41] (2005) 7 SCC 714

the conduct of the accused. **Presence of A-1 and A-2 at a place where ransom demand was to be fulfilled and their action of fleeing on spotting the police party is a relevant circumstance and are admissible under Section 8 of the Evidence Act.**"

(emphasis supplied)

14. Applying the principle expounded by this Court, we have no hesitation in affirming the finding of guilt recorded against appellant No.1 – Asar Mohammed.

15. The question is whether the same evidence or proved circumstances can be used against the other two appellants, namely, Asraf Mohammed and Akhtar Mohammad. Indisputably, except the confession of the co-accused – Asar Mohammed (appellant No.1), the prosecution has not produced any independent substantive evidence to even remotely suggest that appellant Nos.2 and 3 were involved in committing the murder of Zahida and Ishlam. By now, it is well settled that confession of the co-accused by itself cannot be the basis to proceed against the other accused unless something more is produced to indicate their involvement in the commission of the crime. This Court in ***Kashmira Singh v. State of Madhya Pradesh***[42]***,*** relying upon the decision of the Privy Council in ***Bhuboni Sahu v. R.***[43], ***Periaswami Moopan, In re***[44] as well as

[42] 1952 SCR 526
[43] (1948-49) 76 IA 147
[44] ILR (1931) 54 Mad 75

in ***Emperor v. Lalit Mohan Chuckerbutty***[45]**,** has explicated the efficacy of confession of an accused person and whether it can be used against the co-accused. The exposition in ***Kashmira Singh*** has been approved by the Constitution Bench of this Court in ***Haricharan Kurmi v. State of Bihar***[46]**,** in particular paragraph 12 which reads thus :

> "12. As we have already indicated, this question has been considered on several occasions by judicial decisions and it has been consistently held that a confession cannot be treated as evidence which is substantive evidence against a co-accused person. **In dealing with a criminal case where the prosecution relies upon the confession of one accused person against another accused person, the proper approach to adopt is to consider the other evidence against such an accused person, and if the said evidence appears to be satisfactory and the court is inclined to hold that the said evidence may sustain the charge framed against the said accused person, the court turns to the confession with a view to assure itself that the conclusion which it is inclined to draw from the other evidence is right.** As was observed by Sir Lawrence Jenkins in *Emperor v. Lalit Mohan Chuckerbutty* a confession can only be used to 'lend assurance to other evidence against a co-accused'. In *Periaswami Moopan, In re* Reilly, J., observed that the provision of Section 30 goes not further than this :
>
> '...**where there is evidence against the co-accused sufficient, if believed, to support his conviction, then the kind of confession described in Section 30 may be thrown into the scale as an additional reason for believing that evidence.**'
>
> In *Bhuboni Sahu v. R.* the Privy Council has expressed the same view. Sir John Beaumont who spoke for the Board, observed that:
>
> '...A confession of a co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of 'evidence' contained in Section 3 of the Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is

[45] ILR (1911) 38 Cal 559
[46] (1964) 6 SCR 623 ; AIR 1964 SC 1184

> a much weaker type of evidence than the evidence of an approver, which is not subject to any of those infirmities. **Section 30, however, provides that the court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence.**'
>
> It would be noticed that as a result of the provisions contained in Section 30, the confession has no doubt to be regarded as amounting to evidence in a general way, because whatever is considered by the court is evidence; circumstances which are considered by the court as well as probabilities do amount to evidence in that generic sense. Thus, though confession may be regarded as evidence in that generic sense because of the provisions of Section 30, the fact remains that it is not evidence as defined by Section 3 of the Act. **The result, therefore, is that in dealing with a case against an accused person, the court cannot start with the confession of a co-accused after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence.** That, briefly stated, is the effect of the provisions contained in Section 30. The same view has been expressed by this Court in *Kashmira Singh v. State of M.P.* where the decision of the Privy Council in *Bhuboni Sahu case* has been cited with approval."

(emphasis supplied)

16. In view of the above, it is not permissible to proceed against appellant nos.2 and 3 solely on the basis of the confession of appellant No.1 made before the police, even if the relevant part of the confession is admissible and has been duly proved. As no substantive evidence is forthcoming to show the involvement of appellant nos.2 and 3 for having caused the murder of Zahida and Ishlam, it is not open to convict them for offence punishable under Section 302, IPC. This is also because the charge, as has

been framed, is simpliciter for offence under Section 302 and not for offence punishable under Section 302 read with Section 34 of IPC or Section 302 read with Section 120-B of IPC. No evidence has been produced by the prosecution in this regard. Resultantly, the finding of guilt albeit concurrently recorded by the two courts against appellant nos.2 and 3 for offence punishable under Section 302 IPC cannot be sustained on facts or in law. These appellants, therefore, will have to be acquitted in connection with offence punishable under Section 302 IPC.

17. The next question is whether appellant Nos.2 and 3 can be held guilty for offence punishable under Section 201 IPC. The fact that appellant nos.2 and 3 cannot be convicted for offence punishable under Section 302 IPC does not extricate them from the offence under Section 201 IPC. We say so because the proved circumstances discerned from the record leave no manner of doubt that Zahida and Ishlam were residing along with the appellants in the same house. Further, Zahida was the second wife of appellant No.3 and Ishlam was none other than the son of appellant No.3 born in wedlock with Zahida. Zahida was the step mother of appellant Nos.1 and 2 and Ishlam was their step brother. This relationship has not been disputed. It is also an established fact that Zahida and Ishlam had suddenly gone

missing for over two months. Obviously, no efforts were made by appellant nos.2 and 3 to trace Zahida and Ishlam nor did they think it necessary to report that fact to the local police. This indeed cannot be a natural behavior or conduct of appellant No.3, the husband of Zahida and father of minor son Ishlam. Further, appellant nos.2 and 3 have not challenged the identity of two dead bodies found from the septic tank in the backyard of their house at the instance of appellant No.1 – Asar Mohammed. No explanation whatsoever has been offered by them as to why they did not report about the sudden disappearance of Zahida and Ishlam (until their bodies were recovered from the septic tank in the backyard of their house after two months). The concomitant is that appellant Nos.2 and 3 had knowledge that Zahida and Ishlam had been murdered and their dead bodies were dumped in the septic tank in the backyard of their house and yet, they did not disclose that fact with an intention to screen appellant No.1 – Asar Mohammed, the offender, from legal punishment. In other words, even though they cannot be made liable for the murder of Zahida and Ishlam for want of legal evidence in that regard, they would certainly be guilty of having committed offence under Section 201 IPC as established from the proved circumstances coupled with their abject failure to offer

any explanation, much less cogent explanation, about their conduct. The inevitable and legitimate conclusion to be deduced is that they are guilty of offence punishable under Section 201 IPC for which they have been rightly convicted and sentenced by the trial court and which opinion of the trial court has been affirmed by the High Court. As a result, the appeal filed by appellant nos.2 and 3 would partly succeed only to the extent of acquitting them for offence punishable under Section 302 IPC.

18. In view of the above, the appeal filed by appellant No.1 – Asar Mohammed is dismissed. Whereas, the appeal filed by appellant Nos.2 and 3 – Asraf Mohammed and Akhtar, respectively, is partly allowed by setting aside the conviction and sentence recorded against them for offence punishable under Section 302 IPC but the conviction and sentence for offence punishable under Section 201 IPC against them is upheld. Ordered accordingly.

.....J.
(A.M. Khanwilkar)

.....J.
(L. Nageswara Rao)

New Delhi;
October 24, 2018.