

**(2009) 04 DEL CK 0483**  
**In the Delhi High Court**  
**Case No : Criminal A. 742 of 2002**

Dharmender Kumar

APPELLANT

Vs

State (NCT of Delhi)

RESPONDENT

**Date of Decision :** 15-04-2009

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 428  
Penal Code, 1860 (IPC) — Section 302, 397

**Citation :** (2009) 7 ILR Delhi 142

**Hon'ble Judges :** G.S. Sistani, J; B.N. Chaturvedi, J

**Bench :** Division Bench

**Advocate :** Sudarshan Rajan, for the Appellant; Fizani Hussain, for the Respondent

**Final Decision :** Allowed

## **Judgement**

G.S. Sistani, J.—This appeal has been filed against the Judgment dated 19.03.2002 and the Order on Sentence dated 26.03.2002, passed by the learned Additional Sessions Judge, Delhi in the Session's case No. 62/99, FIR No. 715/98 of Police Station RK Puram. The Trial Court had held the appellant, Dharmender Kumar, s/o Sh. Ram Manorath Yadav, r/o village RZ-385/315, Gali No. 6, Geetanjali Park, Sagarpur, New Delhi, guilty of the offence u/s 397 and Section 302 of the Indian Penal Code, 1860 (hereinafter, IPC). The appellant was sentenced to Rigorous Imprisonment (hereinafter, RI) for 10 years and a fine of Rs. 10,000/- and in default whereof to a further RI for one (1) year u/s 397 of the IPC. The appellant was also sentenced to Imprisonment for Life with a fine of Rs. 20,000/- u/s 302 of the IPC and in default of the payment of fine he was directed to undergo RI for a further period of two years. The sentences were to run concurrently and the appellant was also given the benefit of Section 428 of the Code of Criminal Procedure, 1973 (hereinafter, CrPC).

2. The facts of the case as noticed by the learned Trial Court, briefly stated are. The appellant was working as an employee in the capacity of a Petrol Pump

Operator for filling petrol into the vehicles at one of the petrol pumps, "Saran Motors Private Limited" at Bhikaji Cama Place. On the morning of 21.09.1998 at about 6:50 AM, Ashok Saran, PW 11 (Managing Director of the said Petrol Pump) received a phone call from his employee Ram Achebar, who was the morning shift-in charge, that the cash kept inside the safe and drawer was missing and that the same had been removed during the preceding night. PW 11 immediately rushed to the spot and found that the safe and the drawer had been opened by their keys and had not been broken open. PW 11 telephoned the police and the police reached the spot. It was found that the rear window pane of the bathroom attached to the office was broken. A report of theft was lodged with the police by PW 1, Mrs. Madhulika Saran, w/o of PW 11. On the basis of this report and the endorsement made by SI J.P. Singh, FIR was registered about the theft. It was reported in the complaint that an amount of Rs. 3,09,600/- had been missing. Since Phuman Ram was the night duty cashier, persons were sent at Phuman Ram's house and it was reported that he had not reached home and that his relatives had also been searching for him. The relatives of Phuman Ram lodged a report with the police about his missing on 21.09.2008. Since Phuman Ram had not returned home, the theft at the said petrol pump and the missing of Phuman Ram appeared to be interconnected.

3. On 22.09.1998 the body of Phuman Ram was found lying among the dense bushes and grass growing behind the petrol pump. The police was informed and a case regarding the murder of Phuman Ram was registered. After the recovery of the body of Phuman Ram, all the employees at the petrol pump were interrogated and it is stated that during the interrogation one of the employees at the said petrol pump i.e. appellant Dharmender confessed to have committed the murder of Phuman Ram and the theft at the said petrol pump. It is further stated that at the instance of the said appellant, Dharmender cash was recovered from two polythene bags dug out from the ground behind the petrol pump and a part of the cash was also recovered from the house of the appellant. The spanner used for opening drums and a torch were also recovered at the instance of appellant, Dharmender from the drum filled with water. The crime team had also lifted chance prints from the bathroom glasses i.e. the place wherefrom the entry was allegedly gained inside the premises and which matched with the thumb impression of the appellant, Dharmender. Furthermore, the post mortem report of Phuman Ram revealed that he had died due to violent traumatic asphyxia associated with suffocation from strangulation and a handkerchief was found stuffed inside his mouth. Post trial, appellant, Dharmender was held guilty of the offence u/s 302 and 397 of the IPC.

4. The prosecution has examined a total of nineteen (19) witnesses. However, no witness has been examined from the side of the appellant. This Court considers it necessary to analyse the evidence of material witnesses.

5. PW 1, Madhulika Saran, w/o Sh. Ashok Saran (PW 11 and Director of the Petrol Pump) stated that on the morning of 21.09.1998, she received information

that robbery had been committed at the petrol pump, M/s Saran Motors Private Limited and accordingly she lodged a written complaint with the police.

6. PW 3, Jag Mohan Ram, an employee at the said Petrol Pump deposed that on 20.09.1998, he was on duty at the petrol Pump from 6 PM to 8 AM of the next morning. At about 11 PM he went to sleep after locking the room of the petrol pump and kept the sale proceeds of the day amounting to Rs. 29,100/- in the drawer of the table of that room. PW 3 stated that he slept outside the room along with one Rajender Prasad and when in the morning he went to the store situated at the back side of the petrol pump to keep his bedding, he found that denture of Phuman Ram was lying over there. He picked up the denture and kept it on the table of the drawer. Thereafter he found that the windowpane of the toilet, which was adjoining the room, was broken. Then PW 3 deposed that he and other employees went inside the room and found that the cash which had been kept inside the drawer of the table was missing. PW 3 thereafter deposed that since he did not have the keys of the almirah so it could not be verified whether the amount from the almirah had been missing or not. PW 3 further deposed that he opened the almirah without the keys and found that the cash was missing from the almirah/cash box. At that time Ram Achebar, another employee at the petrol pump informed the owner of the petrol pump about the robbery committed at the petrol pump. PW 3 deposed to have informed the local police about the said robbery. On 23.09.1998, PW 3 produced the denture before the police and the same was seized vide memo EX. PW 3/A. SI J.P. Singh also seized a bag from the back side of the petrol pump and the same was seized vide memo Ex. PW 3/B, however PW 3 after seeing the bag stated that he could not say if the said bag is the same as which was seized by the police or not.

7. PW 3 in his cross-examination stated that his statement before the police was recorded on 21.09.1998 and 23.09.1998. On the night of 20.09.1998, besides him Rajender Prasad was on duty at the petrol pump. PW-3 further deposed in his cross-examination that he had told the police that the key of the almirah/cash box was not with him and that he had opened the cash box without the keys and found that the cash was missing from there. PW 3 was confronted with statement Ex.PW 3/DA where it is not so recorded that the keys of the almirah were not available with him or that thereafter PW 3 opened the almirah without the keys. PW3 deposed that he did not know what cash was lying in the almirah and that he was also not aware if any cash had been kept inside the almirah on that day or the bundles of money had been kept in the drawer or not. PW-3 further stated to have told the police about the denture on 21.09.1998 but which was not seized by the police.

8. PW 4, Hira Lal, s/o Sh. Madho Ram Yadav deposed that he had been working at the said petrol pump and used to fill petrol in the vehicles, collect money from the customers and hand over the same to Phuman, who was the cashier at the said petrol pump. The other persons also used to handover the cash to Phuman. PW4 stated that after all the cash was collected, he used to prepare the bundles

of the cash, keep them inside the cash box and handover the keys to Phuman. And further that he used to paste the slips of Vijaya Bank and also used to sign the slips. PW 4 deposed that on 20.09.1998 he prepared the bundles of cash, kept them inside the cash box, handed over the keys to Phuman and went to his home. PW 4 further deposed that on 22.09.1998 he found the dead body of Phuman lying in the bushes at the back side of the petrol pump. PW 4 after seeing Ex. PW 4/A1 to A 2B, stated to have identified the slips pasted by him on the bundles of currency notes and his signatures thereon.

9. PW 4 in his cross-examination by counsel for the appellant deposed that he had given a statement before the police on 21.09.1998. And that he had not given any statement to the police after the said date. PW 4 could not apprise about the sale proceeds of 20.09.1998. He stated that he had prepared 8 to 10 bundles of currency notes on 20.09.1998 and the said bundles were of the denomination of Rs. 500/-, Rs. 100/- and Rs. 50/-, and that he had also pasted the slips on the bundle of currency notes of Rs. 500/-. PW-4 thereafter deposed that it was correct that there was no slip on the currency notes of Rs. 500/- and that there were no bundles of Rs. 500/-. He further said that it was incorrect to say that he had signed the slips Ex. PW4/A.21 to A.28, later on at the instance of the police after the said bundles had been brought back from Bank. PW 4 also said that it was correct to say that the bank slip of Vijaya Bank is put by the Bank itself. And thereafter voluntarily stated that he had brought the said slips from the Bank for pasting them on the bundles but stated to not remember as to when the said slips were brought by him from the bank. He deposed that he along with Thakur Ram Lal had identified the dead body of Phuman. And that he had jumped the wall and seen the dead body of Phuman lying in the bushes near the wall of the petrol pump.

10. PW 5, Thakur Ram Lal s/o Sh. Mahajan Ram stated that he was the Manager at the said petrol pump and on receiving information about the alleged theft at the petrol pump, he reached the petrol pump and where the police had already arrived. PW 5 deposed that Jagmohan and Ram Chebbar were the cashiers at the petrol pump and that cash used to be kept inside a box which had two keys. One of the keys was with Phuman Ram and the other key was with him. PW 5 also stated to have brought before the police, the attendance register and copy of the cash register. PW 5 thereafter deposed that on 22.09.1998 at about 1:30 PM, the dead body of Phuman Ram was found lying at the back side of the petrol pump. PW 5 deposed that the appellant, Dharmender was also working as a helper at the petrol pump and he also saw the dead body of Phuman Ram. Again said that the appellant, Dharmender came there on 23.09.1998 and not on 22.09.1998 and the appellant, Dharmender pointed out the place where the dead body was lying. Thereafter, the appellant took out two bags from the earth and got recovered a sum of Rs. 2,41,100/-. PW 5 deposed that some of the currency notes which were recovered vide memo Ex.PW-5/A, also bear his signature. There were slips of Vijaya Bank on the said currency notes and which had been signed by Jagmohan and Hira Lal. PW 5 also stated that one torch and a bunch of

keys were also recovered from the water drum at the instance of appellant, Dharmender.

11. PW 5 in his cross-examination deposed that 20.09.1998, which was a Sunday, he had not gone to his duty. PW-5 deposed that he maintained the attendance and the cash register and that he does not remember as to when did he hand over the two registers and to which of the police officer. PW 5 further deposed that entries in the cash register used to be made at one time after the time of one shift was over. And that he had prepared the entries dated 19th, 20th, and 21st in the register and that he handed over them to the police. The register was prepared by him after 23.09.1998. PW 5 stated that he had made the entries in the register on the basis of meter readings produced before him but this witness could not tell as to what was the meter reading. The Attendance Register by this witness was also completed after 23.09.1998. He deposed that the cash of sale proceeds used to be maintained by him and he also used to count them. And he also used to deposit them in the Bank. PW 5 deposed that Ram Achebar informed him on telephone at his house on the night intervening 20/21.09.1998 that theft had been committed at the petrol pump. He received telephone at about 7.00 AM in the morning of 21.09.1998. It is further stated by him that the duty hours of Ram Achebar were from 6.00 AM to 2.00 PM and that he (PW-5) reached at the petrol pump at about 9.30 AM. This witness deposed that the son of a Kabadi told him at about 1.00 pm that a dead body was lying in the bushes. Hira Lal and Gopal Singh were also present at that time. However, he did not go to inspect the dead body. On 22.9.1998 at 1:30 pm the police came, however, he did not inform the police about the dead body.

12. PW-5 further deposed in his cross that the police came there when the dead body was lying. From the bushes where the dead body was lying, the police came at the petrol pump. One SI was J.P. Singh but he did not remember the name and designation of other police officials. PW-5 stated that he, Hira Lal and some other employees of the petrol pump had gone with the police to the place where the dead body was lying. It is stated that Gopal Singh, Hira Lal and PW-5 identified the dead body. On 23.09.1998, the police came at the petrol pump at about 4.00 PM and the appellant Dharmender was brought by the police. The other employees of the petrol pump were called by the police in the Police Station on 22.09.1998 and 23.09.1998 except S.K. Sehgal and Satish. PW 5 also deposed that he did not remember whether he had gone to the police station on 22.09.1998 and 23.09.1998 and that he and Heera Lal had joined the investigation with the police on 23.09.1998 and from the petrol pump that they went to the bushes from the back side of the petrol pump.

13. PW 5 stated that the distance between the petrol pump and the bushes was about 140 yards. The appellant Dharmender was ahead of the police officials and it was correct to say that mud was sticking to the polythene bags. The polythene bags were taken by the appellant from the left side of the place where the dead body was lying. The said place was visible from a distance of 6/7 yds, and there

is a thoroughfare at about a distance of 8/10 yds. from the bushes. The appellant had dig the earth with his hands. It is further stated that this witness, PW 5 "after seeing the bundles of currency notes said that none of the bundle bearing the signature of Jagmohan and on 3 bundles of Rs. 50/- there was no signature of any one." PW 5 further deposed that it was correct that when they take money to the bank, they fix the slip of Saran Motors on the bundles of notes. PW 5 however could not tell as to from which particular person were the slips collected.

14. PW 9, ASI Subash Chand deposed that on 21.09.1998, at the call of SI J.P. Singh, he reached Saran Motors Ltd., and he was accompanied by other members of the crime team. PW-9 deposed that from the scene of the crime, he was able to lift two chance finger prints from the broken glass stand of the back side of the window. HE prepared report and got sent the same to finger print bureau.

15. PW 11, Ashok Saran, s/o Sh. Raghunandan Saran, r/o Flats No. 9/40-42, Janpath, New Delhi, is the managing director of the petrol pump, Saran Motors Private Limited. PW 11 testified about the information given to him on the morning of 21.09.1998 regarding the theft at the petrol pump. He deposed that the appellant, Dharmender was employed by him at the said petrol pump, and further that Phuman Ram was the senior shift cashier at the petrol pump. PW 11 stated that there were two sets of keys of the safe and the drawer where cash used to be kept, one set of which was with manager Thakur Ram Lal and the other was with the Shift Cashier Phuman Ram. PW 11 deposed that on 23.09.1998, he was told by the police personnel that Dharmender has been arrested for theft and murder. The police brought Dharmender to the petrol pump at 5 PM on 23.09.1998. The appellant Dharmender took police persons to the spot where dead body was found and told that he had thrown the dead body of Phuman Ram at that place after murdering him and taken out the keys of the safe and drawer. The appellant also told to the police that he had hid the stolen amount under the earth nearby. The appellant thereafter took the police to the place where he had buried the amount and he removed the earth from a place and took out two plastic bags containing bundles of notes and gave then to the police. PW-11 further deposed that "In one plastic bag there were 15 bundle of 100 rupee currency note each bundle of 100 notes. Each bundle was having a stamp marked on it bearing our account number and the name of the bank in which PW 11 had his account, i.e. the Vijaya bank. The bank slip was found stapled on each bundle. The date and signature of the preparation of bundle were also there on each bundle. This was the practice which was adopted by our company for preparing the cash for depositing with our bank and the bundles so prepared were kept in the safe as they were to be deposited in the bank on the next date.... After getting the money recovered the appellant took the police to the rear side of our store room and told that he had thrown torch and the metal key used for opening the caps of oil drums into a barrel of water which was kept there. The police emptied the barrel and took pout the metal cap and torch. The torch was GEEP SHAKTI which was being used by the petrol pump.... Police

sealed the key and the torch in separate parcels and made seizure memo, which is Ex.11/B, which bears my signature."

16. PW 11 further deposed that thereafter the appellant told the police that he had hid part of the money in his house in Sagar Pur. PW-11 went along with the police to the house of the appellant, where the appellant went to the first floor room and took a set of keys from the slab and opened an iron trunk lying in the corner of the room. The appellant took out two bundles of notes from the iron box/trunk and handed them over to the police. All the bundles recovered at the instance of the appellant had bank slips and the seal of the account number with the date of 28.09.1998. The keys which the appellant had taken from Phuman Ram were also found in the trunk and the appellant handed over these keys to the police. These were 5 in number, two were of the safe, one was of the drawer and the other keys were of two rooms of the petrol pump. Police sealed the keys in a parcel and also sealed the money recovered in a separate parcel. Seized Memo of the keys and notes were also prepared as Ex.PW-11/C. A false denture of 14 teeth was also found by the employee Jagmohan Singh from the staff dressing room and the same was handed over to the police. This false denture was of Phuman Ram and the entire staff knew this fact. At this juncture of the examination-in-chief of PW 11, the lower Court has observed that the bundle of 100 currency notes of either Rs. 100/- or Rs. 50/- denomination has the stamp of Saran Motors Pvt. Ltd. and the date of 29.09.1998 and the signature on the Bank slip is of Vijaya Bank.

17. PW 11 deposed in his cross-examination by learned Counsel for the appellant that he learnt about the dead body of Phuman Ram being found behind the petrol pump in bushes around 2.00 PM when he reached the petrol pump at the time of change of shift. PW 11 thereafter voluntarily stated that the Bank slips of Vijaya Bank on the bundle of notes used to be pasted not by the officials of the bank but by him and his employees. He stated that they always had a supply of slips from the Bank for this purpose and the same was a common trade practice. The Bank slips used to be picked up by the staff from the stack lying in the Bank and this procedure had also been explained to the police.

18. PW 11 further deposed that the body was found around 10 to 12 feet behind the rear boundary wall of the petrol pump. There is no thoroughfare near the place of recovery of the dead body and there is a dense growth of shrubs and grass there, such that the place where the dead body was lying was not visible from the main road. PW 11 however, could not tell as to what proceedings were conducted by the police personnel standing there at the time of recovery of the dead body. He deposed that the polythene bags had soil which was removed and no soil was sticking to the bag nor the police persons had taken any sample of the soil from the polythene bag or the place from where polythene bags had been recovered. PW 11 stated to have not told the police in his statement that appellant Dharmender had stated that he had kept a part of the money at his home. After the proceedings were over at the petrol pump PW 11 accompanied

the police to the house of Ram Achebar where the appellant used to stay. However, PW 11 stated to not remember the date on which the appellant had joined the service at the petrol pump. Thereafter PW 11 deposed that he followed the gypsy of the police in his car and it took about 20-25 minutes to reach the house of Ram Achebar in Geetanjali Park, Sagarpur Area. PW 11 further deposed that the police had not joined any person from the adjoining house in the investigation at that time. He stated to not remember the number of stories of the house but stated that the place where he went was at first floor in that house. PW 11 could not tell the total number of rooms on the first floor and stated to remember a terrace and one room. There were some people inside the house of Ram Achebar but PW 11 could not tell whether they were the family members or not. However, Ram Achebar was not there. The box in which the money was kept was around 2 x 3 feet and it was kept on the left hand side, rear corner of the room and the box was locked. The appellant took the key and opened the box. PW 11 deposed that the keys which the appellant had taken from Phuman Ram were also found in the trunk and the appellant handed over these keys to the police. These were five in number, two were of the safe, one was of the drawer and the two keys of the rooms of the petrol pump.

19. PW 12, Dr. Chandra Kant had conducted post-mortem examination on the body of Phuman Ram. According to him the cause of death was "violent, traumatic ex asphyxia associated with suffocation from strangulation and handkerchief." He stated that the approximate time since death was about 40 hours with a variation of 4-6 hours on either side of the approximate time determined.

20. PW 13, Constable Narender deposed that on 22.09.1998, he was posted at PS RK Puram and was on his beat duty in the area of Bhicaji Cama Place, when at around 1:20 PM he was informed by a rag picker that a dead body was lying behind the petrol pump. PW 13 deposed that he went with the rag picker and saw that a dead body had been lying. Thereafter PW 13 came to Saran Motors petrol pump, made a telephonic call to the police station, informed the duty officer about the discovery of a dead body and after some time Sub Inspector J.P. Singh and Constable Mukesh Kumar came to the spot.

21. PW 16, SI J.P. Singh, deposed that on 20.09.1998 he was posted at PS RK Puram and was on night duty from 8 PM to 8 AM of the next day. On receiving a complaint about an alleged theft at the petrol pump, Saran Motors Private Limited, he immediately rushed to the spot and where he was informed that the entire cash kept inside the safe and the almirah had been missing. PW 16 deposed that he found out that the glass pane of the window to the room had been broken open, safe had been unlocked and drawer of the table was also unlocked. PW 16 also stated that chance prints were lifted from the broken window glass pane. Further PW 16 deposed that he seized one hand bag lying on the back side of the gallery of the drum barrels, and which was given to him by Jagmohan Bishst stating that this bag was lying inside the room during the night

and the bag was used to carry cash to the bank. The said bag was seized vide seizure memo Ex.PW-3/B. PW 16 also deposed that the appellant, Dharmender took the police personnel to the first floor of a house; there was no lock in the room and there was a slab made on the wall, the appellant took the key from the slab, opened the box which was lying on the floor and got recovered the money which was seized by the police personnel.

22. PW 18, Inspector Harish Kumar deposed that on 20.09.1998 he was working as the SHO at PS RK Puram and that on 22.09.1998, at about 1:30 PM he received information from constable, Narender that a dead body had been lying near a petrol pump in Bhicaji Cama Place. PW 18 deposed that he inspected the dead body and found it to be of a man around the age of 50 years. Thereafter PW 18 enquired from the surrounding area and found that the body was of Phuman Ram, an employee at the abovesaid petrol pump. PW 18 deposed that on his interrogation of the employees (which continued till the next day) at the petrol pump, he felt suspicious about the answers of Dharmender as to his whereabouts and activities on the date of 19th and 20th September and thus he deputed his staff to verify whether the appellant was telling the truth or not. Thereafter PW 18 stated that he went for the post mortem of the body and where he received a telephone in the hospital that Dharmender has confessed about the commission of the crime. PW 18 returned to the police station and where the appellant disclosed to PW 18 that he could get the money recovered which he had robbed and also the spanner used by him in the commission of the crime. The appellant thereafter led to a place behind the petrol pump and pointed out the place where the money had been concealed by him and which place was near the place from where the dead body was found. The appellant then took out two polythene bags containing money from under the earth after removing loose soil from above them. The money was counted and it was found that one bag contained Rs. 1.5 lakh and the other bag contained Rs. 93,100/- and "the packs of the currency notes containing 100 notes of either 100 or Rs. 50/- were having slips of Vijaya Bank with stamp of Saran Motors with signature and date." All the notes which the appellant had got recovered by digging out the soil were seized by PW 18. Thereafter the appellant led the police party to the store room behind the petrol pump and pointed towards the drum filled with water, stating that the torch and the drum opening spanner had been thrown inside the drum. The water inside the drum was thrown out and the torch and spanner were recovered from there. The employee of the petrol pump, Mr. Jagmohan Ram handed over one denture set of Phuman Ram which he told that he had found in the changing room on 21.09.1998 and which was seized vide memo Ex.PW-3/A. The appellant then disclosed that the rest of the money was in the house at Getanjali Park, Sagar Pur in Gali No. 6. The appellant took them to his house at the first floor and in his room he pointed out towards a trunk which was locked. The appellant took keys from the shelf and opened the trunk. It had clothes in the upper layers and the appellant took out one pack of Rs. 500 denomination note and one pack of Rs. 100 denomination and one bunch of key

containing five keys. The notes were having slips of Vijaya Bank and the stamp of Saran Motors. The notes and the bunch of keys were seized. These keys were of the safe of the petrol pump.

23. PW 18 deposed in his cross-examination by learned Counsel for the appellant that when he was in the mortuary he received information on the telephone that the appellant Dharmender had confessed. PW 18 deposed that this fact is even mentioned in the Case Diary and further that the confessional statement of the appellant was recorded by him. Thereafter PW 18 deposed that he did not call any public witness at the time of the recording of the disclosure statement. Ex. PW 3/A was written by J.P. Singh under his instructions. PW 18 also stated that Bhikaji Cama Place is a shopping complex and there are several shops there and that no person was made a witness from any of the shops.

24. PW 18 further deposed that it was wrong to say that it was raining on 23.09.1998. PW-18 deposed that the money which was recovered from the appellant was taken out by him from "under the just adjoining rear wall of the petrol pump. There was no mud [that] had stuck to the polythene bag. The loose earth left the polythene bag, the moment they were shaken. I did not seize the loose earth removed by the appellant or the loose earth fallen from the polythene bag. The size of the polythene bag may be around 12 inches to 10 inches." PW 18 stated that the distance between Bhikaji Cama Place and Sagar Pur may be around 25 kms, and that he along with J.P. Singh and one Constable and a driver had gone with the appellant to Sagar Pur. He deposed that he did not remember whether there were any other rooms on the first floor of the house. He did not associate any one from that area or that house in the seizure. The iron trunk may be around 2 x 3 feet. The shelf from where the keys of the trunk were taken was easily visible. PW 18, however, did not send the keys recovered from the house of the appellant to the forensic expert. PW 18 also stated that the appellant had during interrogation told them that the appellant had slept in his brother-in-laws house on the night of 20.09.1998 and when PW 18 asked his Sub-Inspector to take the appellant to the said house of the brother-in-law then while on the way towards the brother-in-laws house, the appellant confessed to have committed the crime and requested that he should not be taken to his brother-in-laws house.

25. PW 19, ASI Avdhesh Kumar, Finger Print Expert deposed that he received two chance prints mark lifted from the scene of the crime and also specimen finger print slip of the appellant, Dharmender. On comparison, it was found that the chance prints were identical with the right thumb impression of the appellant, Dharmender.

26. The appellant, Dharmender was arrested by the police on 23.09.1998 for theft at the petrol pump and the murder of Phuman Ram.

27. Learned Counsel for the appellant submits that the case of the prosecution is baseless and is nothing short of a fictional story and that the entire case of the

prosecution is based on surmises and conjectures. There are several discrepancies in the case of the prosecution and the appellant has been unnecessarily dragged into the picture and further that he has been falsely implicated.

28. It is next contended by counsel for the appellant that as per the case of the prosecution the appellant committed murder of Phuman Ram in the evening of 20.09.1998. However as per the evidence of PW 12, doctor, the time of his death was about 40 hours from the time of post mortem with a maximum variation of 4-6 hours. According to the material placed on record, the post mortem commenced at about 2:30 PM on 23.09.1998 and thus this would mean that the time of death was around 10:30 PM on 21.09.1998 whereas in fact the prosecution claims that the death took place on 20.09.1998. Thus there is a discrepancy of more than 26 hours and which anomaly has not been explained by the prosecution and is fatal to the case of the prosecution. In support of his argument the learned defence counsel has relied upon the case of Thangavelu Vs. State of Tamil Nadu, ; Moti etc. Vs. State of U.P., and the case of Bharat Vs. State of M.P., .

29. Learned Counsel for the appellant further submits that the alleged recovery of money from the spot where the dead body was lying, is doubtful, firstly because the same defies human conduct, as no person of ordinary prudence would ever bury the money in the vicinity of the dead body. Secondly, there is a discrepancy between the actual number of bundles prepared on 20.09.1998 by the employees of the petrol pump station and the actual number of bundles allegedly recovered. According to PW 4 Hira Lal the number of bundles prepared on 20.09.1998 were 8-10, however, the number of bundles alleged to have been recovered from the spot were as many as twenty eight (28). Thirdly, the bundles had the slips of Vijaya Bank and which is a strong indication that they were withdrawn from the bank and planted. Furthermore nobody was examined from the Vijaya Bank to prove that the slips were actually of Vijaya Bank or that it was a practice at Vijaya Bank where they allowed their clients to paste their slips on their own. Fourthly, tampering of the case property cannot be ruled out in view of the fact that in as much as a bundle of Rs. 500/- was missing from the case property when PW 4, Hira Lal was examined and that PW 5 has admitted that there were no signatures on some bundles and which proves that there was tampering. Fifthly, there is a discrepancy in ocular evidence. PW 5 has stated that both Jagmohan Singh and Hira Lal had signed the bank slips but the slips did not have the sign of Jagmohan Singh. Even the bundles had not been put to Jagmohan Singh to prove that the bundles were the same which were signed by both of them. Sixthly, since it had been raining on the day of recovery of money, mud ought to have stuck to the polythene bag allegedly recovered from the earth as contrary to the evidence of PW 11 that no mud was sticking to the polythene bag. Thus all the above factors show that the prosecution had planted the money.

30. The learned Counsel for the appellant further argues that mere recovery of money or articles is not sufficient to connect the appellant to the murder. In support of this argument the counsel has relied upon the case of Gautam Maroit Umale v. State of Maharashtra, (1994) Supp 3 SCC 326 ; U.T. of Goa v. Bea Ventura D'souza 1993 (Supp) 3 SCC 305; and Surjit Singh and another Vs. State of Punjab, .

31. The learned Counsel also argues that there is no medical evidence which connects the appellant with the injury to the deceased. Also that there is no medical or expert evidence to connect the injury on the person of the deceased and the weapon of offence. In support the counsel relies on the case of Mohinder Singh Vs. The State, and Dwarkadas Gehanmal Vs. State of Gujarat, .

32. The learned Counsel for the appellant also submits that the alleged recovery of money from the house of the appellant cannot be relied upon in the light of the fact that the house from where the recovery was effected was not locked. Further as per the prosecution, the box in which the money had been kept, though locked, yet the keys were placed next to the door, and which implies that the same was accessible to all. The counsel submits that the IO had stated that the shelf from where the keys of the trunk were taken, was easily visible. The counsel for the appellant argues that the above conduct of the appellant as described by the prosecution defies human logic. The counsel further argues that there were two sets of keys and one set of key was admittedly with PW 5, Thakur Ram Lal and the other set of key was with Jagmohan Singh (with reference to deposition of PW 4 and 11.) This implies that Phuman Ram never had the keys of the safe on the relevant date and thus, the appellant could not have taken the keys from Phuman Ram as alleged by the prosecution. Also no independent witness was attached to the recovery. And that Ram Achebar was not examined although as per the prosecution case he was the first person to inform the petrol pump owners about the theft and was also the person in whose house recoveries were made. Thus, the prosecution has failed to examine a material witness who could also have been an accused.

33. The learned Counsel for the appellant further submits that there is no reason for the fact that chance prints were not taken of the safe and the drawer and which were the most important places. Further since the appellant was an employee of the petrol pump, there was every possibility that the prints of the appellant were available on the glass window. The counsel has in support relied upon the case of Kuldip Singh Vs. State of Delhi, . The learned Counsel argues that there are no details as to how and when the specimen prints of the appellant were taken and has in this regard relied upon the case of Sanjay Thakur v. State of NCT of Delhi 2007 (4) JCC 2709 . The counsel also argues that not using scientific methods in lifting the chance prints goes to discredit the case of the prosecution and in support where of reliance has been placed by him on the case of Ayyappan Vs. State of Kerala, . Thus learned Counsel contends that no legal significance can be attached to the alleged recovery of the chance prints.

34. The learned Counsel for the appellant has also argued that there are material alterations in the Employment and Remuneration Register wherein the time of work of Phuman Ram has been changed from 22 hours to 20 hours so as to suit the prosecution's story. And further that Phuman Ram was never the cashier at the petrol pump whereas the PW's have stated him to be a cashier. As per PW 5, Jagmohan and Ram Achebar were the cashiers as the seizure memo also says that Jagmohan was the Cashier.

35. The learned Counsel argues that a suspicion is cast on the case of the prosecution as the denture of Phuman Ram was not seized on the date of the incident but on 23.09.1998 which is after the recovery of the dead body. And also that the recovery of torch is unbelievable as it is inconceivable that instead of using the torch in the night to locate the route, the appellant threw it away in the petrol pump itself.

36. The learned Counsel has submitted that the case of the prosecution is based on circumstantial evidence and the circumstances of "last seen" are conspicuously missing in the present case and that the prosecution has failed to link the chain of events and further failed to show any link between the alleged theft and the murder on one side and the appellant, Dharmender on the other side. The learned Counsel has argued that no case is proved against the appellant, Dharmender and that his appeal is liable to succeed.

37. Per contra, the learned Counsel for the State has supported the judgment of the Trial Court indicting the appellant, and has argued that the prosecution has been able to prove its case beyond any shadow of doubt. The learned Counsel for the State has submitted before this Court that the reason for not showing the spanner (used for strangulation) to the doctor was that the spanner had been sent for forensic examination.

38. We have heard learned Counsel for the parties; scrutinized the evidence on record as well as the impugned judgment.

39. In this case, it is not in dispute that a theft took place at the petrol pump, Saran Motors Private Limited at Bhikaji Cama Place and that a body was found behind the said petrol pump and was identified to be that of Phuman Ram (an employee at the said petrol pump). The learned Additional Sessions Judge has come to the conclusion that the appellant (Dharmender, who is also an employee at the said petrol pump) committed theft and murder of Phuman Ram at the petrol pump, and the learned Judge has based his conclusion on the entire chain of events; the disclosure statement made by the appellant which led to the alleged recovery of stolen amount buried in the soil; recovery of keys from the house of the appellant which he is alleged to have removed from the pocket of Phuman Ram, recovery of part of money from his house; and also recovery of a spanner and a torch which according to the prosecution was used as a weapon of offence.

40. In a case, based on circumstantial evidence, in order to sustain the

conviction, the evidence must be complete and form a complete chain incapable of any explanation. The Court must satisfy itself that the chain of circumstances are complete and the surrounding circumstances fully establish the guilt of the accused/appellant. The law with regard to conviction on the basis of circumstantial evidence has been discussed in detail by the Supreme Court of India in the case of *Harishchandra Ladaku Thange Vs. State of Maharashtra*, . It would be useful to reproduce the relevant paras:

10. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. See *Hukam Singh Vs. State of Rajasthan*, , *Eradu v. State of Hyderabad* AIR 1956 SC 31, *Earaohadrappa v. State of Karnataka* : AIR 1983 SC 446, *State of U.P. Vs. Sukhbasi and Others*, , *Balwinder Singh alias Dalbir Singh Vs. State of Punjab*, and *Ashok Kumar Chatterjee Vs. State of M.P.*, . The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In *Bhagat Ram Vs. State of Punjab*, it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt.

11. We may also make a reference to a decision of this Court in *C. Chenga Reddy and Others Vs. State of Andhra Pradesh*, , wherein it has been observed thus:

21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.

12. In *Padala Veera Reddy Vs. State of Andhra Pradesh and others*, it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

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

the circumstantial evidence in order to sustain conviction must be complete and

incapable of explanation of any other hypothesis than that of 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.

13. In *State of U.P. v. Ashok Kumar Srivastava* 1992 Cri LJ 1104 it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

14. Sir Alfred Wills in his admirable book "Wills" Circumstantial Evidence" (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence: (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the *factum probandum*; (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability; (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt; and (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.

15. There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touchstone of law relating to circumstantial evidence laid down by this Court as far back as in 1952.

16. In *Hanumant Vs. The State of Madhya Pradesh*, it was observed thus:

It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established, and all the fact so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

17. A reference may be made to a later decision in *Sharad Birdhichand Sarda Vs. State of Maharashtra*, . Therein, while dealing with circumstantial evidence, it has been held that the onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in the prosecution cannot be cured by a false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established.

They are:

1. the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;
2. the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
3. the circumstances should be of a conclusive nature and tendency;
4. they should exclude every possible hypothesis except the one to be proved; and
5. there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

41. In the case before us, learned Counsel for the appellant has submitted that there is a serious discrepancy with respect to the time of death of Phuman Ram. A careful analysis of the material on record would show that as per the version of PW-12, Dr. Chandra Kant, Forensic Evidence, Safdarjung Hospital, Delhi, the death of Phuman Ram took place approx. 40 (forty) hours before conducting the post mortem examination. He deposed, "On 23.9.98 I conducted the post-mortem examination on the body of Sh. Phuman Ram.... I gave approximate time since death about 40 hours.... My report is Ex. PW12/A which is in my handwriting and bears my signature.... There is always a variation of 4-6 hours on both sides in the approximate time determined.... The variation error cannot be more than 4 to 6 hours on both sides." It is pertinent to note that the application (Ex. PW 10/A) by Sh. Harish Kumar, Inspector, for post mortem examination of Phuman Ram was received by one Sh. Padam Singh on 23.09.1998 at 2:30 pm. Taking this time of 2:30 pm as the base period when post mortem was conducted, it is observed that if the opinion of PW-12, Doctor is taken into account, it would emerge that the death of Phuman Ram occurred at around 10:30 pm on 21.09.1998. And if the error variant of 6 hrs. is added, then it would mean that the death took place at around 4:30 pm on 21.09.1998. Where as, per the prosecution, the death of Phuman Ram took place in the evening of 20.09.1998. Clearly, the version of PW-12 totally negatives the stand taken by the prosecution. And thus points a gaping hole in the case of the prosecution. Reliance be placed herein upon the case of Thangavelu Vs. State of Tamil Nadu, , wherein it was held:

5. ...From the evidence of PW 5, the doctor, we find that there is a possibility that the incident in question might have occurred about 39 hours prior to the post-mortem. Though in the examination-in-chief, PW 5 has stated that the time between the death and post-mortem could be 16 to 24 hours, which fits in with the prosecution case, in the cross-examination he has very clearly stated that in

this case death would have been caused about 39 hours before the post-mortem, which would be sometime after 5.30 p.m. on 15-12-1990. This the doctor has stated by taking into consideration the time and month of the incident as also the time required for the setting of rigor mortis and passing off of the same. According to the doctor, in the month of December in a place like Erode the rigor mortis may set in after about 2 to 3 hours after the death. He has stated that for the rigor mortis to reach from the leg to the head, it would take 12 hours and the same would remain in existence for about another 12 hours. Thereafter, it would gradually diminish in the reverse direction i.e. from head to leg taking about another 12 hours and on this basis when he examined the body of the deceased, he found the rigor mortis had reversed almost to the end of the legs. By this process he came to the conclusion that the death in question must have occurred about 39 hours before postmortem. Though the prosecution has re-examined this witness on other points, not a single question is put to this witness in regard to this part of his evidence. Since there is no cross-examination on this point and there being no other material to hold that the evidence of the doctor is either not scientific or contrary to known medical information, we have to conclude that there is a strong possibility that the death of D-1 and D-2 could have occurred much prior to 1.30 p.m. on 16-12-1990. If this doubt of ours is reasonable then the prosecution case should fall to the ground straight away....

42. Since the Medical evidence completely belies the case set by the prosecution, in order to satisfy ourselves further, we deem it appropriate to analyse other material aspects of the case as well and verify whether they point out against the appellant or confirm his innocence.

43. PW-3 in his examination-in-chief deposed that at about 11 pm, he went to sleep after locking the room of the petrol pump and kept the sale proceeds of the day amounting to Rs. 29,100/- in the drawer of the table of that room. However, in his cross-examination PW-3 deposed that he did not know and was not aware if the bundles of money had been kept in the drawer or not. No explanation has been given by the prosecution for this sudden u-turn by PW-3. Further as per the evidence of PW-5, Thakur Ram Lal, cashiers at the said petrol pump were Jagmohan and Ram Achebar. However if the version of PW-11, Ashok Saran is to be believed then Phuman Ram was the shift cashier. Thus there are several contradictions in the evidence of prosecution witnesses.

44. Further, as per the evidence of PW-5, Thakur Ram Lal, on 22.09.98 at about 1:30 pm, the dead body of Phuman was found lying on the back side of the petrol pump. He further deposed that the appellant, Dharmender also came there and saw the dead body of Phuman. After saying this, PW-5 corrected and improved his version and stated that the appellant came there on 23.09.98 and not on 22.09.98, and the appellant pointed out the place where the dead body was lying. Thereafter, the appellant took out two polythene bags after digging out earth and the said polythene bags were found to contain Rs. 2,41,100/-.

45. As per the evidence of PW-11, Ashok Saran, the appellant took the police

persons to the spot and stated that he had thrown the dead body of Phuman Ram at the pointed place after murdering him and also that he had stolen the amount and buried it nearby. He took the police to the place where he had buried the amount, removed the earth from the place and took out two plastic bags containing bundles of notes and gave them to the police. PW-11 has also deposed that the appellant had led the police to the rear side of the store room where he had thrown the spanner and torch into the barrel of water kept there, which were seized in his presence. PW-11 also accompanied the police to the house of the appellant at First Floor, Sagar Pur and took the set of keys from the mantelpiece/slab and opened the iron trunk lying at the corner of the room and took out bundles of notes and handed them over to the police. PW-11 further deposed that the keys which the appellant had taken from Phuman Ram were also found in the trunk.

46. According to PW-16, SI J.P. Singh, he had received information about theft at the petrol pump at about 7.40 am on 21.09.1998. On the next day i.e. 22.09.1998, he was handed over DD Entry 18-A about the recovery of a dead body from behind the petrol pump. According to PW-16, the appellant led the police behind the petrol pump near the place where the dead body was found and informed about the place where the money was hidden under the earth and by removing the soil, got recovered two polythene bags containing currency notes. According to this witness, the appellant then led the police party to his house at first floor in Sagarpur, and took the keys from the slab on the wall, opened the box lying on the floor and took out the currency notes. The currency notes and bunch of keys were seized by the police. Similar evidence has been given by PW-18, Inspector Harish Kumar.

47. In the facts and circumstances of this case, we find the recoveries, sought to have been made at the instance of the appellant, are highly improbable and doubtful. In case, the money was buried by the appellant under the earth behind the petrol pump, it completely defies the logic as to why would he throw the dead body in the vicinity where the money was buried. Sooner or later, the dead body would have been recovered and upon such recovery, the money would also have been recovered. Furthermore, the room on the first floor in Sagarpur, from where the part of the money was recovered, was admittedly open. If the version of the prosecutions is to be believed, not only was the room open but the keys of the trunk in which the money had been allegedly kept, were also placed on a mantelpiece/slab in full visibility of one and all. There would absolutely be no reason for the appellant to leave his room open and then to keep the keys of his trunk on the slab, in his absence. And also, there was no reason for him to store the keys of the safe of the petrol pump, alleged to have been taken from Phuman Ram, after murdering him, in the same very trunk where the stolen money had been kept. In any case, the bunch of keys was of no use once the offence had been committed. Thus in our considered opinion the recovery of money is highly doubtful. Other facts which also create a doubt about the veracity of the recoveries is that, PW-5 deposed in his examination-in-chief that slips of Vijaya

bank had been pasted on the currency notes that were recovered from near the body of Phuman Ram and they had been signed by Jagmohan and Hira Lal. However, during his cross-examination by learned Counsel for the appellant, the said bundles of currency were brought in Court and PW-5 was proven wrong as the stated bundles did not bear the signatures of Jagmohan and on three bundles of Rs. 50/- there was no signature of anyone. Furthermore, as per the evidence of PW-11, all the bundles recovered at the instance of the appellant from the house at Sagarpur, had been prepared with bank slips and seal of the account number, and were having the date of 28.09.1998. We cannot comprehend as to how do the currency notes recovered from the house at Sagarpur, bear the date of 28.09.1998, when allegedly they were stolen on the night of 20/21.09.1998. In our considered opinion, this fact goes to the root of the matter and creates a serious doubt in our mind as to the trustworthiness of the recoveries.

48. According to PW-4, Hira Lal, the number of bundles prepared on 20.09.1998 were 8 to 10, however, the number of bundles alleged to have been recovered from the spot were 28. It has been strongly urged before us by counsel for the appellant that the bundles which had the slips of Vijaya Bank on them, were withdrawn from the bank. We do not wish to comment on the same, however, the prosecution has not examined any witness from the Vijaya Bank to prove that the slips on these bundles were actually of Vijaya Bank and that there was a practice that the Bank could hand over the official bank slips to their clients, who would paste them on their own before depositing them in the Bank. Even otherwise the currency notes are signed by the officials of the Bank, in support of the fact that the currency has been counted and the official slip and seal of the bank and signatures are appended in token of a certificate with respect to the correctness of the amount. On the contrary, to say that the slips were signed by the persons working in the petrol pump, seems to be only a device adopted to enable the witnesses to identify the money. In view of several material discrepancies in the alleged recovery of money effected at the behest of the appellant, we do not find the same to connect the appellant to the murder. Thus, to convict the appellant solely on the basis of the alleged recoveries made upon his disclosure statement, would not be possible in the circumstances of this case.

49. Further it has also been alleged that a spanner and a torch had been recovered at the instance of the appellant. It would be of considerable effect to note that a spanner is a tool that is normally used for tightening of nuts and bolts. Where as, in this case, as per the medical reports, the death of Phuman Ram occurred because of "ex-physia associated with suffocation from strangulation and handkerchief." In the case of Dwarkadas Gehanmal Vs. State of Gujarat, , it was held:

As regards the axe and the hoe which were recovered at the instance of the appellant, those could not be connected with the crime in question. In these circumstances, we are unable to hold that the prosecution has conclusively established any nexus of these recovered articles with the present crime.

50. Thus, herein also the prosecution having failed to prove and there is no medical evidence which connects the appellant with the injury on the person of the deceased (Phuman Ram). Neither is there any medical or expert evidence to connect the injury on the deceased with the alleged weapon of offence.

51. It may further be noticed that PW-5 in his cross-examination by learned Counsel for the appellant, deposed that he used to maintain the attendance and the cash register. The entries in the said registers were taken down after the timing of one shift was over. PW-5 deposed, "[the entries in the cash register used to make at one time after the timing of one shift was over. I have prepared the entries of register dt. 19.20 and 21.09.98 which I handed over to the police." It was further stated by PW-5 that "[the register was prepared by me after 23.09.98.... The attendance register was also completed by me after 23.09.98." In our considered opinion, there is a serious anomaly in this, inasmuch as PW-5 is contradicting his own statements. On the one hand he states that the register used to be updated as soon as the shifts were over, on the other hand he has deposed that the entries dated 19/20/21.09.98 were prepared by him after 23.09.1998. Even otherwise also, there is no justification for the fact that admittedly, the registers were prepared post 23.09.1998.

52. It is also of significance to note that amendments have been found to be made in the "Register of Employment and Remuneration" for the month of September, 1998 with respect to Phuman Ram. As per the said register, the normal working hours for Phuman Ram were 2 pm to 10 pm. However, for the date of 20.09.1998, it seems that a deliberate attempt has been made to show his working hours from 2 pm to 8 pm only, in as much as, the timings originally written have been over run by pen once again. The prosecution has been unable to show that there was no deliberate attempt to change the timings so as to suit their case.

53. The prosecution has also failed to bring forth any explanation for not arraying Ram Achebar as a prosecution witness in view of the fact that it was Ram Achebar who had informed both PW-5 (Thakur Ram Lal, the Manager of the petrol pump) and PW-11 (Ashok Saran, the MD of the petrol pump), about the alleged theft having taken place. Non-arraying of Ram Achebar who was a material witness, certainly defies logic more so in view of the fact that the alleged recovery of money, at the instance of the appellant, was made from a house in Sagarpur which as per PW 11, Ashok Saran, was the house of Ram Achebar.

54. Furthermore, it is not mandatory but only a rule of prudence that a public witness should be associated at the time of recovery. However, in the facts and circumstances of this case wherein a complaint regarding robbery and murder of the employee of a petrol pump had been lodged with the police, it should have been expedient on the part of the investigating authorities to associate independent public witnesses at the time of alleged recoveries made upon the disclosure statement of the appellant. However, we find that in this case, no

public witness was associated at any point of time. In the case of Mohan Singh Vs. State of Haryana, it was observed by the Apex Court that:

From the evidence of PW 6 and PW 7 it does not appear that they made any effort whatsoever to call any public witness or railway officials working in the booking office while taking the search of the appellant and recovery of pistol in that process. No explanation is forthcoming for not joining any independent witness. Baljit Singh, PW 7, however, preferred to pick up Hira Lal, PW 5 who is nobody but a mobile sweet vendor. According to the prosecution Hira Lal happened to be there when the appellant was apprehended at that particular time when search of his person was made and the country-made pistol is said to have been recovered. In these facts and circumstances when the police officials deliberately avoided to join any public witness or railway officials though available at the time when the appellant was apprehended the evidence of Hira Lal who is nobody but a chance witness and the evidence of police officials PW 6 and PW 7 has to be closely scrutinised with certain amount of care and caution.

55. In this case, PW-11 has deposed in his cross-examination that the police had not joined any person from the adjoining house in the investigation at that time. He further stated to not remember the number of stories of the house or the total number of rooms on the first floor. PW-11 further deposed that there were some people inside the house of Ram Achebar but PW 11 could not tell whether they were the family members or not. In spite of the fact that admittedly, a large number of people were present at the time of alleged recovery of money from the house, no effort was made by the investigating authorities to join any person as a public witness. Similarly, Bhicaji Cama Place being a highly populated area, still no effort was made nor any public witness asked to join at the time of recovery of money found buried near the dead body of Phuman Ram nor at the time of recovery of spanner and torch.

56. It would also be useful to take into consideration the observations made by the Hon'ble Supreme Court of India as far back as in the year 1957 in the case of Sarwan Singh Vs. The State of Punjab, that in criminal cases mere suspicion, however, strong, cannot take place of proof. The court must also take into consideration that an accused is presumed to be innocent till charges against him are proved beyond reasonable doubt. Mere suspicion, however, strong it may be, cannot take the place of legal proof.

57. Further, as a final court of facts, the High Court is entitled to reappraise the evidence and arrive at its own independent conclusion as to the guilt or innocence of the accused. This Court must thus be satisfied that the case of the prosecution is substantially true and that the guilt of the appellant has been established beyond reasonable doubt. It is only when the prosecution has proved its case beyond reasonable doubt that conviction cannot be disturbed in appeal. It will be useful to reproduce the observations of the Hon'ble Supreme Court in the case of Kali Ram Vs. State of Himachal Pradesh, which are as follows:

Another Golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence. Rule has accordingly been laid down that unless the evidence adduced in the case is consistent only with the hypothesis of the guilt of the accused and is inconsistent with that of his innocence, the court should refrain from recording a finding of guilt of the accused. It is also an accepted rule that in case the court entertains reasonable doubt regarding the guilt of the accused, the accused must have the benefit of that doubt. The rule regarding the benefit of doubt also does not warrant acquittal of the accused by resort to surmises, conjectures or fanciful considerations.

Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is *ex facie* trustworthy on grounds which are fanciful or in the nature of conjectures.

The guilt of the accused has to be adjudged not by the fact that a vast number of people believe him to be guilty but whether his guilt has been established by the evidence brought on record. Indeed, the courts have hardly any other yardstick or material to adjudge the guilt of the person arraigned as accused. Reference is sometimes made to the clash of public interest and that of the individual accused. The conflict in this respect, however is more apparent than real.

It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilised society. All this highlights the importance of ensuring, as far as possible, that there should be no wrongful conviction of an innocent person. Some risk of the conviction of the innocent, of course, is always there in any system of the administration of criminal justice. Such a risk can be minimised but not ruled out altogether.

58. In the facts and circumstance of this case, wherein the Medical evidence negatives the case set up by the prosecution in so far as the time of death of Phuman Ram is concerned; the recovery of money at the behest of the appellant is doubtful; no independent public witness was joined at the time of the recovery of money; no official from Vijaya Bank has been examined so as to prove that it was a routine practice wherein the Bank used to give away their official slips to their clients so that they could paste them themselves; material contradictions in the evidence of prosecution witnesses; amendments in the Employment Register has not been explained to this Court; the alleged weapon of offence (spanner) has not been linked to the cause of injury of the deceased (Phuman Ram); Ram Achebar, a material witness has not been arrayed as a witness, thus, we find the

case not being proved beyond doubt against the appellant, Dharmender. Consequently, the Judgment dated 19.03.2002 and the Order on Sentence dated 26.03.2002, passed by the learned Additional Sessions Judge, Delhi in the Session's case No. 62/99, FIR No. 715/98 of Police Station RK Puram, are liable to be set aside.

59. The present appeal is thus allowed. The impugned judgment of conviction and sentence are set aside. The appellant is, as a result, acquitted of the charges u/s 397 and 302 IPC. He is accordingly directed to be released from custody if not required to be detained in connection with any other case.