
(2013) 11 SHI CK 0011
In the High Court Of Himachal Pradesh
Case No : Criminal A. No. 393 of 2008

Diwan Chand alias Chhotu

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 25-11-2013

Acts Referred:

Citation : (2013) 11 SHI CK 0011

Hon'ble Judges : Sanjay Karol, J;Rajiv Sharma, J

Bench : Division Bench

Advocate : Harish Behal, for the Appellant; D.C. Pathik, Additional Advocate General with Mr. Ramesh Thakur, Asstt. A.G., for the Respondent

Final Decision : Allowed

Judgement

Rajiv Sharma, J.—This appeal is directed against the judgment dated 25.3.2008 rendered by the learned Additional Sessions Judge, Shimla in Sessions Trial No. 9-R/7 of 2007, whereby the appellant, Diwan Chand alias Chhotu, who was charged with and tried for offences punishable under Sections 302 and 201 of the Indian Penal Code, has been convicted and sentenced to undergo rigorous imprisonment for life with a fine of Rs. 20,000/- and in default of payment of fine to further undergo simple imprisonment for a period of one year u/s 302 IPC and to undergo imprisonment for one year with a fine of Rs. 10,000/- and in default of payment of fine to further undergo simple imprisonment for a period of six months u/s 201 IPC. Both the sentences were ordered to run concurrently. The case of the prosecution, in a nutshell, is that on 29.10.2006, it was reported to the police that Kishan Bahadur, husband of PW2 Sita Devi, informant, was missing since 27.10.2006. Kishan Bahadur had left his Dera at about 8.00 P.M. saying that he was going to Dera of the appellant, Diwan Chand alias Chhotu and that he would come back in the morning. When Kishan Bahadur did not come back in the morning, PW2 Sita Devi went to the mother of the appellant. The mother of the appellant told her that she was not aware of whereabouts of her husband. When she came back to her Dera, she found that her husband had also

taken with him two jackets, two shirts and a sum of Rs. 2000/-. PW1 Kartar Singh on 19.11.2006, in whose orchard at Kauldhar, PW2 Sita Devi and her husband had been working for a quite some time, telephonically informed the police that dead body of a person was found in the jungle. The police visited the spot on 20.11.2006. The dead body was found buried in a pit. It was taken out. Photographs were taken. Statement of PW2 Sita Devi u/s 154 Cr.P.C. was recorded. According to PW2 Sita Devi, the appellant suspected her husband of having illicit relation with his wife and for that reason, he had killed her husband and buried his dead body in the jungle. The dead body was partly decomposed. Post mortem examination was conducted on the spot. On the basis of the statement of PW2 Sita Devi, a formal FIR was lodged. During investigation, statement of PW3, Man Kumari, was recorded u/s 164 Cr.P.C. before the Magistrate on 22.11.2006. The appellant was arrested on 25.11.2006. The appellant made disclosure statement that he could get recovered the danda with which he caused death of Kishan Bahadur and belcha, kudali and pants, jacket, shoes etc. of Kishan Bahadur. These articles were recovered. Thereafter, all the codal formalities were completed and the challan was put up against the appellant in the Court. On receipt of the FSL reports, supplementary challan was also put up against the appellant in the Court.

2. The prosecution examined as many as thirteen witnesses. Statement of the appellant was also recorded u/s 313 Cr.P.C. According to him, he was falsely implicated in the case. Learned trial court convicted and sentenced the appellant, as noticed hereinabove. Hence, this appeal.

3. Mr. Harish Behal, learned Advocate, has vehemently argued that the prosecution has failed to prove the case against the appellant. He then contended that on the basis of the material brought on record, the theory of "last seen together" cannot be believed. He also contended that the incident took place on 27.10.2006, but the dead body of Kishan Bahadur was discovered on 19.11.2006.

4. Mr. D.C. Pathik, learned Additional Advocate General has supported the impugned judgment dated 25.3.2008 and order of conviction dated 25.3.2008.

5. We have heard learned counsel for the parties and have also gone through the record minutely.

6. PW1, Kartar Singh, has testified that on 28.10.2006, PW2 Sita Devi telephonically informed him at Bhatwari that her husband was missing. They went to Police Station Chirgaon on 29.10.2006 and lodged a report about Kishan Bahadur having gone missing. On 19.11.2006, PW2 Sita Devi informed him that a dead body was found lying in Nesar jungle. He informed the police telephonically at Chirgaon. The police went to Nesar jungle through his village. He also went to the jungle on 20.11.2006. Parkash Chand, ward member, was also present. The police took photographs of the bag, removed the earth and took out the bag from the earth. The bag was torn and dead body of Kishan

Bahadur was found in it. Post mortem was conducted on the spot. According to him, on 27.11.2006 the appellant was brought by the police in their vehicle. He was also asked to come to Nesar Jungle. He reached there. In his presence, the appellant gave to the police a jacket, jhabal and shoes. The appellant also produced danda, belcha, kassi and torch. All these articles were taken into possession by the police vide recovery memo Ext.PW1/A. It was signed by him. He identified his signatures on the memo. The statement of the appellant was recorded vide Ext. PW1/B. He recognized Danda, Ext.P-1, Kassi Ext.P2, belcha Ext.P3, pair of shoes Ext.P4, jacket Ext.P5, pants Ext.P6 and torch Ext.P7.

7. PW2, Sita Devi, is the wife of deceased Kishan Bahadur. According to her, her husband had gone to the house of the appellant at about 7.00 P.M. Thereafter, he did not come back. Next day, she went to the house of the appellant to inquire about her husband. The appellant was not present at his house. His mother was present. She told that during the night, the appellant and her husband were present. She informed Kartar Singh telephonically about her husband having gone missing. Thereafter, matter was reported to the Police Station Chirgaon. After about one month, she noticed some heap of leaves in the jungle. When she removed the leaves, she found dead body of her husband in a gunny bag. She informed Kartar Singh telephonically at Bhatwari, who informed the Police. The police came at the spot. Dead body was taken out of the pit. The appellant was also brought by the police on the spot, where he got recovered shoes, pants and jackets of the appellant including danda, kassi and belcha concealed under a rock. The police prepared the memo. She had put her thumb impression on the same.

8. PW3, Man Kumari is the wife of the appellant. According to her, she and her husband had been working as Chowkidars in Hem Singh's orchard at Nesar. On the last kartik, Kishan Bahadur came at her dera at about 11.00 P.M.. At that time, her husband was not present. She and her children had gone to bed. He woke her up and brought her out by holding her hand. When she raised the alarm, one Man Bahadur came to her dera. On seeing him, Kishan Bahadur ran away. This witness was declared hostile and cross-examined by the learned Assistant Public Prosecutor. She denied that she had made statement before a Judge at Rohroo. According to her, the police took her to a Babu. She did not know the place, where she was taken. Babu made some inquiries from her. She did not know what was he asking and what he understood. She admitted that Kishan Bahadur came to her dera at 6.00 P.M.. She told him that her husband was not present. Then he left. He was excessively drunk. Kishan Bahadur again came to her dera at about 11.00 P.M.. She denied that at 11.00 P.M. when Kishan Bahadur came at her dera and he took her out of dera, the appellant came there and gave him beatings. She further denied that the appellant also slapped her. According to her, her husband was not present during that night because he had gone to the house of his sister at Tiuni about 4-5 days back. She denied that her husband continued beating Kishan Bahadur and took him towards jungle. She denied that thereafter, her husband did not come back to

dera. She denied the suggestion that her mother-in-law Tula Devi later on told her that her husband had killed Kishan Bahadur and buried his body in Nesar jungle. According to her, portions A to A, B to B and C to C of statement, Mark M are incorrect. She never made statement Mark M before the police. She also denied the suggestion that in order to save her husband, she resiled from her statement. She again reiterated that she never went to the court. The police gave her beatings for eight days in the Police Station. She was confronted with her statement recorded u/s 164 Cr.P.C. She denied that she was produced before a Magistrate at Rohroo. She denied portions A to A, B to B, C to C, D to D and E to E of statement Mark X. According to her, the person to whom she was taken by the police, did not record her statement. She was not able to understand what that man was asking her. A court question was put to her with regard to her thumb impression, to which she replied that her thumb impression was taken by the police in Police Station Chirgaon and not in the house of that person.

9. PW4, Mehar Chand, has testified that at the instance of police on 20.11.2006, he went to the spot and issued Khakha Dasti Ext.PW4/A and Jamabandi Ext.PW4/B.

10. PW5, HC Tanjen Chhering, has testified that on 20.11.2006 Constable Rameshwar produced before him statement Mark S recorded by ASI Tej Ram, on the basis of which, he recorded FIR Ext. PW5/A. On 21.11.2006, Constable Bhumi Chand No. 634 had deposited with him six parcels, sealed with seal CHC of Sandhasu. On 27.11.2006 ASI Tej Ram deposited with him a parcel, containing a danda and a bag, sealed with seal impression T. According to him, on 1.12.2006, he handed over all parcels to Constable Rajesh Kumar vide R.C. No. 79/2006 for being carried to FSL Junga. The case property was not tampered while it was in his custody.

11. PW6 Constable Bhumi Chand, has deposed that on 21.11.2006, Medical Officer CHC Sandhasu had handed over to him parcel and five jars, sealed with seal CHC, which he handed over to MHC Tenjen Cherring at Police Station the same day.

12. PW7, Constable Rajesh Kumar, has testified that on 1.12.2006, MHC Police Station had handed over to him nine parcels vide R.C. No. 79/2006, sealed with seal impression CHC and T. He handed over the parcels same day at FSL Junga.

13. PW8 Dr. Manoj Maitan, Medical Officer at CHC Chirgaon, has conducted post mortem examination of dead body of Kishan Bahadur on the basis of application Ext.PW8/A submitted by ASI Tej Ram, Police Station Chirgaon. According to him, dead body of Kishan Bahadur was found in a pit and as per information furnished by the police, the same was covered with the soil. The dead body of the deceased Kishan Bahadur was identified by Kartar Singh and Sita Devi. He had issued post mortem report, Ext.PW8/C. According to him, the internal head injury mentioned in the postmortem report could be caused with a "danda" blow.

14. PW9 Dr. Mahesh Jaswal, Medical Officer, CHC Chirgaon (Sandhasu) has

testified that the post mortem examination was conducted by him along with PW8 Dr. Manoj Maitan, who prepared report Ext. PW8/C. On the basis of application dated 21.5.2007, Ext.PW9/A, he had given his opinion vide Ext. PW9/B.

15. PW10, Tula Devi, has deposed that her husband Yudh Bahadur had another wife. The appellant was born from her womb. The appellant had been living for the last three years in village Jalari in the orchard of Hem Singh. According to her, about five days before the last Diwali, the appellant Diwan Chand and his wife Man Kumari left Hem Singh's orchard and went towards Tiuni. She stayed in the dera of Diwan Chand for two nights and looked after her children. On arrival of Man Kumari, she came to know that the appellant would return after 5-6 days. This witness was declared hostile.

16. PW11, Sub Inspector Pritam Singh has deposed that he moved an application Ext. PW11/A on 20.11.2006 to Tehsildar Chirgaon (Executive Magistrate) for getting the postmortem examination of the deceased done in Nesar jungle. He recorded statement of Man Kumari u/s 161 Cr.P.C. Ext.PW11/C. Thereafter, he moved an application Ext.PW11/D to Judicial Magistrate, 1st Class, Rohroo for recording statement of Man Kumari u/s 164 Cr.P.C. The Judicial Magistrate recorded the statement and supplied a copy to him. He also moved an application Ext. PW9/A to Medical Officer, CHC Chirgaon and produced the weapon of offence (danda) and intended to know if the injuries on the deceased could be caused with that danda. He obtained report Ext. PW9/B from the doctor. He also recorded statement of Tula Devi, Ext.PW11/E. FSL reports, Ext. PW11/F, PW11/G and Ext.PW11/H were received later on and he prepared supplementary challan.

17. PW12, ASI Tej Ram, has testified that on 19.11.2006 he received telephonic call from Kartar Singh that a dead body of some person was lying in Nesar jungle. On this information, DDR No. 12, Ext. PW5/C was recorded. He along with HC Mohar Singh proceeded towards the spot. On 20.11.2006, in the morning, they reached the spot. Sita Devi also arrived at the spot. He recorded her statement Ext. PW5/B. She put her thumb impression. He sent the statement through Constable Rameshwar to Police Station Chirgaon for lodging the FIR. Thereafter, FIR Ext. PW5/A was recorded. In the jungle he found that a dead body was buried, but its head was visible. He took the photographs Ext.PW12/6-12. The doctors examined the dead body and gave him the report Ext.PW8/C. The dead body was in a pit. He took into possession some earth from the pit. At that time, Kartar Singh and Parkash Chand were present and their signatures were obtained on memo Ext. PW12/B. The soil was put into a polythene bag and then wrapped in a piece of cloth and sealed. He prepared memo Ext. PW12/C. He prepared the site plan Ext. PW12/E. The appellant was arrested on 25.11.2006. He was produced before the Magistrate on 26.11.2006, from where he was remanded to police custody. On 27.11.2006, the appellant made a disclosure statement that danda, belcha kassi, and gunny bag used by

him for burying the dead body and the cloths of deceased were concealed by him in Nesar jungle and he could produce the same. The disclosure statement Ext.PW1/B was made in presence of Kartar Singh and Parkash Chand, which was signed by them and the appellant. Sita Devi identified shoes, jacket and pants of her husband on the spot. All articles were put in separate parcels and taken into possession vide memo Ext.PW1/A. He prepared the site plan of recovery Ext. PW12/G. The samples of seal T, which was used on 20.11.2006 and 27.11.2006 were taken vide Ext. PW12/H and Ext.PW12/J. He recorded the statements of some witnesses. In cross-examination, he admitted that in Ext.PW1/A, space between last 4-5 lines is less than the space between the earlier text of the memo. He volunteered that it happens so when one feels that he is running short of the paper. He also admitted that reverse of the paper can also be used for writing. He denied the suggestion that in Ext.PW1/A, he first obtained the signatures and thereafter recorded the statement.

18. PW13, Rajinder Kumar, has deposed that he had been working as Judicial Magistrate 1st Class, Court No. 2, Rohroo from December 2003 to April 2007. On 20.11.2006, SHO, Police Station Chirgaon moved an application Ext.PW11/D before him for recording the statement of Man Kumari. He recorded the statement of Man Kumari, Ext. PW13/A as per version given by her. According to him, when Man Kumari was produced before him, he called her to chamber and gave her time to think over. After some time, she was called again. She stated that she was willing to make statement. Thereafter, he recorded her statement. In this regard, he also passed order Ext.PW13/B. In cross-examination, he deposed that perhaps, police officials brought Man Kumari before him at 12 noon or 12.30 P.M.. At that time, he was sitting in his chamber. She was produced after a gap of 15-20 minutes. The lady, who was produced before him, was not known to him earlier. He volunteered that police officials told him that she was Man Kumari. He did not ask that lady to produce her identity card, voter card or ration card etc. He did not ask her with whom she was working. He did not get Man Kumari identified from Hem Singh, because he was not present in the Court at that time. He admitted that he did not inform Man Kumari that the statement, which she was going to make, could be used against her husband. He volunteered that he had informed her only that she should make a statement voluntarily and not under pressure. He denied the suggestion that Man Kumari did not make any such statement before him or that the statement was made before him only by police officials.

19. Now, the Court will advert to the manner in which recoveries have been effected on the basis of disclosure statement Ext.PW1/B made by the appellant.

20. According to PW1, Kartar Singh, on 27.11.2006, the appellant was brought by the police in their vehicle. The police proceeded towards Nesar jungle informing him to come there. When he reached there, he saw the appellant giving jacket, jhabal and shoes to the police. Then the appellant produced danda, belcha, kassi and torch. All these articles were recovered by the police vide

memo Ext. PW1/A. He identified his signatures on memo Ext.PW1/A. PW2 Sita Devi also deposed that when the police came, she was present on the spot. Thereafter, the police brought the appellant, who disclosed that he had kept concealed shoes, pants, jacket of her husband including danda, kassi and belcha under the rock. The same were taken into possession vide memo Ext.PW1/A. She put her thumb impression on the same. According to PW12, ASI Tej Ram, appellant made the disclosure statement at Police Station. The appellant also signed the disclosure statement. Thereafter, the witnesses signed the same. The appellant on the basis of disclosure statement got recovered all the articles in Nesar jungle. However, neither PW1 Kartar Singh nor PW2 Sita Devi deposed that they had visited the Police Station. Parkash Chand was not examined by the prosecution. It is evident from memo Ext.PW1/A that there is less space between lines towards end of the text. The only conclusion, which can be drawn, is that signatures of the appellant and the witnesses, PW1 Kartar Singh, PW2 Sita Devi and one Parkash Chand were already obtained on Ext.PW1/A. There is also a big gap where contents of Ext. PW1/B ends and signatures of the appellant, PW1 Kartar Singh and Parkash Chand are put. Prosecution has not examined Parkash Chand, who has signed disclosure statement, Ext.PW1/B. PW2 Sita Devi in her cross-examination has deposed that when she was at Babu's house at Bhatwari, the police showed her the shoes, pants, jacket, kassi, belcha etc. and told her that these articles were produced by the appellant before the police. According to her, when two police officials brought the appellant, she was at Babu's house at Bhatwari. Those two police officials took the appellant to Nesar Nallah and came back to Bhatwari with the articles. Thus, the prosecution version that the articles were produced by the appellant in her presence and she was present on the spot and identified shoes, pants and jacket of her husband is falsified. We are of the considered view that the prosecution has miserably failed to prove the disclosure statement and the recoveries effected on the basis of the same.

21. According to the prosecution, the appellant had hit the deceased with danda and he died due to internal head injury. Though, PW8 Dr. Manoj Maitan and PW9 Dr. Mahesh Jaswal have opined that the injury could be caused by danda, however, the recovery of danda was not in accordance with law, as noticed hereinabove. PW8 Dr. Manoj Maitan has admitted that report of Forensic Science Laboratory was not shown to him by the police.

22. Now, the court will advert to the theory of "last seen together". The prosecution has placed strong reliance on statement made by PW3 Man Kumari before the Judicial Magistrate u/s 164 Cr.P.C., Ext.PW13/A. Man Kumari has retracted from her statement recorded u/s 164 Cr.P.C. while appearing in the Court as PW3. In her examination-in-chief, she has deposed that her husband was not present on the spot when Kishan Bahadur came to her Dera at night. She was declared hostile. In cross-examination conducted by the Assistant Public Prosecutor, she denied that she had made statement before a Judge at Rohroo. She did not know the name of place, where she was taken by the police. According to her, Babu made some inquiries. She did not know what was he

asking and what he understood. She did not make any statement to Babu. The statement was made by the police to Babu. She had told Kishan Bahadur that her husband was not at dera and she and her children alone were present. Kishan Bahadur was excessively drunk. He left, however again came back at about 11.00 P.M. to her dera. She denied the suggestion that at about 11.00 P.M. when Kishan Bahadur came at her Dera and took her out of dera, her husband came there and gave him beatings. She also denied the suggestion that the appellant also slapped her. According to her, her husband was not present and at that time he was at her sister's house in Tiuni. She was also confronted with her statement recorded u/s 161 Cr.P.C.. According to her, portions A to A, B to B, C to C of her statement Mark M were incorrect. She was also confronted with her statement recorded u/s 164 Cr.P.C.. However, she deposed that portions A to A, B to B, C to C, D to D and E to E of her statement Mark X were incorrect. According to her, the person to whom she was taken by the police did not record her statement. She was not able to understand what that man was asking her. She did not know whether building in which she was taken by the police at Chirgaon was a residential house or an office. According to her, she was not able to understand what that man was talking to her. PW13 Rajinder Kumar has deposed that he had recorded the statement of PW3 Man Kumari u/s 164 Cr.P.C. on the basis of application Ext. PW11/D. He called her in his chamber and gave her time to think over. Thereafter, he recorded her statement, Ext.PW13/A. According to him, perhaps, police officials brought PW3 Man Kumari before him at about 12 noon or 12.30 P.M.. He did not ask PW3 Man Kumari to produce her identity card, voter card or ration card etc.. He did not ask her with whom she was working. He even did not get her identified from Hem Singh with whom she was working as Chowkidar. The police officials have told him that she was Man Kumari. He did not inform Man Kumari that the statement which she was going to make could be used against her husband. However, he volunteered that he had informed Man Kumari that she should make the statement voluntarily and not under pressure.

23. It is well settled law that statement u/s 164 Cr.P.C. is not a substantive evidence and it can be used only for the purpose of corroboration and contradiction. In the instant case, PW3 Man Kumari has retracted from her statement recorded u/s 164 Cr.P.C., Ext. PW13/A. It has also come in her statement that she was beaten up by the police for eight days. In the present case, the learned trial court has relied upon theory of "last seen together" to convict the appellant. There was no close proximity between the appellant being last seen together with the deceased and the recovery of the dead body. The deceased Kishan Bahadur went missing on 27.10.2006. The police was informed only on 29.10.2006. The dead body of the deceased Kishan Bahadur was seen by PW2 Sita Devi on 19.11.2006 when she informed PW1 Kartar Singh. The police reached the spot on 20.11.2006. The dead body of the deceased Kishan Bahadur was found after a period of about 23 days. The dead body was partly decomposed. Final opinion has not been given by PW8 Dr. Manoj Maitan and PW9

Dr. Mahesh Jaswal. They have given only primary opinion. The prosecution has never produced FSL reports, Ext. PW11/F, PW11/G and Ext. PW11/H before PW8 Dr. Manoj Maitan and PW9 Dr. Mahesh Jaswal. Statement of PW3 Man Kumari cannot be relied upon since there is no corroborative evidence produced by the prosecution. PW2 Sita Devi has only deposed that her husband, Kishan Bahadur had told her that he was going to the house of the appellant. He was carrying two jackets, two shirts and a sum of Rs. 2000/-. PW1 Kartar Singh has only deposed that he had visited the Police Station Chirgaon on 29.10.2006 to lodge the report about Kishan Bahadur having gone missing. Thereafter he informed the police telephonically on 19.11.2006 when dead body of Kishan Bahadur was seen by PW2 Sita Devi in Nesar Jungle. Now, as far as statements of PW1 Kartar Singh and PW2 Sita Devi with regard to disclosure statement made by the appellant are concerned, the same have been discarded by us, as noticed hereinabove.

24. Their Lordships of Hon"ble Supreme Court in State of Delhi Vs. Shri Ram Lohia, have held that statement recorded u/s 164 Cr.P.C. is not substantive evidence in a case and cannot be made use of except to corroborate or contradict the witness. Their Lordships have held as under:--

13. The Additional Sessions Judge observed in his judgment with reference to Aggarwal as follows:

He no doubt in his further cross-examination made certain damaging statements which would throw doubt on his previous statement but as the statement was made long after the first statement and at a time when Tara Chand accused had been discharged it seems to me that this witness was won over & he has intentionally prevaricated under the influence of the accused whose ex-employee he was. This inference finds support from the fact that in his statement under S. 164. Criminal Procedure Code made on 20th October, 1951, he stated that he was still in the employment of Messrs. Iron and Hardware (India) Company, while has now asserted in Court that he had been already dismissed by Sri Ram accused because of Sri Ram's differences with Tara Chand accused.

It is clear therefore that the learned Judge relied on some statement of Aggarwal recorded under S. 164 of Criminal Procedure Code. The Statement under S. 164 referred to was not specifically put to Aggarwal even to contradict him. Statements recorded under S. 164 of the Code are not substantive evidence in a case and cannot be made use of except to corroborate or contradict the witness. An admission by a witness that a statement of his was recorded under S. 164 of the Code and that what he had stated there was true would not make the entire statement admissible much less that any part of it could be used as substantive evidence in the case. The Additional Sessions Judge therefore erred in law in using the statement of Aggarwal under S. 164 to come to the conclusion that he had been won over. If that statement is excluded from consideration it is a matter of pure guess that Aggarwal had been won over after his examination-in-chief was over.

25. Their Lordships of Hon^{ble} Supreme Court in Ram Charan and Others Vs. State of U.P., have explained the evidentiary value of statement u/s 164 Cr.P.C. as under:--

10. These observations were dissented from by the Andhra Pradesh High Court in In re In Re: Gopisetti Chinna Venkata Subbaiah and Others, and Subba Rao, C.J., preferred the following observations of the Nagpur High Court in AIR 1940 340 (Nagpur)

We are of the opinion that if a statement of a witness is previously recorded u/s 164, Criminal Procedure Code, it leads to an inference that there was a time when the police thought the witness may change but if the witness sticks to the statement made by him throughout, the mere fact that his statement was previously recorded u/s 164 will not be sufficient to discard it. The Court, however, ought to receive it with caution and if there are other circumstances on record which lend support to the truth of the evidence of such witness, it can be acted upon.

11. We agree with Subba Rao, C.J., that the observations of the learned Judges of the Nagpur High Court lay down the law correctly.

26. Their Lordships of Hon^{ble} Supreme Court in Ram Kishan Singh Vs. Harmit Kaur and Another, have held that a statement u/s 164 Cr.P.C. is not a substantive evidence. It can be used only to corroborate the statement of the witness or to contradict him. Their Lordships have held as under:--

8. A statement u/s 164 of the Code of Criminal Procedure is not substantive evidence. It can be used to corroborate the statement of a witness. It can be used to contradict a witness. The first information report was considered by the Sessions Judge. Any special consideration of the statement of Hazura Singh u/s 164 of the Code of Criminal Procedure could not have produced a different result by reason of the conclusions of the Sessions Judge as to rejecting the oral evidence of Nihal Kaur, Harmit Kaur and Hazura Singh as unreliable, untruthful and unworthy of credence.

9. It is true that the High Court as an appellate Court can set aside an order of acquittal. In doing so, the High Court has to review the evidence upon which the order of acquittal is founded. The High Court is to consider the views of the trial Judge as to credibility of the witnesses. The High Court is also to keep in view the presumption of innocence in favour of the accused and the right of the accused to the benefit of doubt. Finally the High Court is to give reasons that the acquittal was not justified. The acquittal by the Sessions Judge cannot be said to be against the evidence or in disregard of evidence. Nor can the acquittal be said to be in violation of the principles of criminal jurisdiction.

10. The High Court in setting aside the acquittal said that the result would have been different if the Sessions Judge had taken into consideration the statement of Hazura Singh Exhibit P.4 with which Hazura Singh had been confronted. In

cross-examination Hazura Singh said that the statement before the Magistrate Exhibit P.4 was made under threat and was a wrong statement. The Sessions Judge found that Hazura Singh made the same statement disowning the first information report. Hazura Singh was torn in his conscience between emotion for his son the appellant on the one hand and his wife Nihal Kaur and the deceased son Bharpur Singh on the other.

27. Their Lordships of Hon"ble Supreme Court in Dhanabal and Another Vs. State of Tamil Nadu, have held that if the witness resiles from the statement given by him u/s 164 Cr.P.C. in the committal court, the witness can be cross-examined on his earlier statement. But, if he sticks to the statement given by him u/s 164 Cr.P.C. before committal enquiry and resiles from it in the Sessions Court, the procedure prescribed u/s 288 Cr.P.C. will have to be observed. It is for the court to consider taking into account all the circumstances including the fact that the witness had resiled, in coming to the conclusion as to whether the witness should be believed or not. The statement of witnesses u/s 164 Cr.P.C. can be relied upon as corroborating their subsequent evidence before the committal court. Their Lordships have held as under:--

13. The second legal contention raised by the learned counsel was that the High court was in error in taking into account the statements recorded from the witnesses under S. 164 of the Criminal P.C. in coming to the conclusion that the evidence given by them in the Committal Court could be relied upon. The High Court stated "we are satisfied having regard to 164 statements of P.Ws. 1 to 3 and 5 that the statements given by those witnesses before the Committing Court are true and could be relied on" and proceeded to observe that "as there are more statements admitted in evidence under S. 288 of the Criminal P.C. than one, the evidence of one witness before the Committing Court is corroborated by that given by others", Mr. Mulla, learned counsel, submitted that a statement recorded under S. 164 of the Criminal P.C. indicates that the Police thought that the witness could not be relied on as he was likely to change and therefore, resorted to securing a statement under S. 164 of the Criminal P.C. The statement thus recorded, cannot be used to corroborate a statement made by witness in the Committal Court. In support of this contention the learned counsel relied on certain observations of this Court in Ram Charan v. State of U.P., (1966) 3 SCR 354. In that case in a statement recorded from the witness under S. 164 of the Criminal P.C. the Magistrate appended a certificate in the following terms:--

Certified that the statement has been made voluntarily. The deponent was warned that he is making the statement before the 1st Class Magistrate and can be used against him. Recorded in my presence. There is no Police here. The witness did not go out until all the witnesses had given the statement.

The Court observed that the endorsement made is not proper but declined to infer from the endorsement that any threat was given to the witnesses or that it necessarily makes the evidence given by the witnesses in Court suspect or less believable. The view of the Patna High Court in Emperor Vs. Manu Chik and

Another, , where the observations made by the Calcutta High Court in *Queen-Empress Vs. Jadub Das*, that statements of the witnesses obtained under this Section always raises a suspicion that it has not been voluntarily made was referred to, was relied on by the learned counsel. This Court did not agree with the view expressed in the Patna case but agreed with the view of Subba Rao, J. (as he then was) in *In re In Re: Gopisetti Chinna Venkata Subbaiah and Others*, , where he preferred the view expressed by Nagpur High Court in AIR 1940 340 (Nagpur) It was observed that the mere fact that the witness's statement was previously recorded under S. 164 will not be sufficient to discard it. It was observed that the Court ought to receive it with caution and if there are other circumstances on record which lend support to the truth of the evidence of such witnesses. It can be acted upon. During the investigation the Police Officer, sometimes feels it expedient to have the statement of a witness recorded under S. 164, Cr.P.C. This happens when the witnesses to a crime are closely connected with the accused or where the accused are very influential which may, result in the witnesses being gained over. The 164 statement that is recorded has the endorsement of the Magistrate that the statement had been made by the witness. The mere fact that the police had reasons to suspect that the witnesses might be gained over and that it was expedient to have their statements recorded by the Magistrate, would not make the statements of the witnesses thus recorded, tainted. If the witness sticks to the statement given by him to the Magistrate under S. 164, Cr.P.C. no problem arises. If the witness resiles from the statement given by him under S. 164 in the Committal Court, the witness can be cross-examined on his earlier statement. But if he sticks to the statement given by him under S. 164 before committal enquiry and resiles from it in the Sessions Court, the procedure prescribed under S. 288, Cr.P.C., will have to be observed. It is for the Court to consider taking into account all the circumstances including the fact that the witness had resiled in coming to the conclusion as to whether the witness should be believed or not. The fact that the police had S. 164 statement recorded by the Magistrate, would not by itself make his evidence suspect.

14. Section 157 of the Evidence Act makes it clear that the statement recorded under S. 164 of the Cr.P.C. can be relied on for corroborating the statements made by the witnesses in the Committal Court. This Court has expressed its view that though the statements made under S. 164 of the Cr.P.C. is not evidence, it is corroborative of what has been stated earlier in the Committal Court vide (1971) 1 SCR 56. The High Court was right in relying on the statement of the witnesses under S. 164 as corroborating their subsequent evidence before the Committal Court, Equally unsustainable is the plea of the learned counsel that a statement recorded under S. 288 of the Cr.P.C. of one witness cannot corroborate the statement of another witness under S. 288. The statements are treated as substantive evidence in law and we do not see any flaw in treating the statement of one witness as corroborative of the other. The result is the questions of law raised by the learned counsel fail. The appeal of the first appellant is rejected

and his conviction and sentence confirmed. The appeal of the second appellant is allowed and his conviction and sentence set aside. He is directed to be set at liberty forthwith.

28. Their Lordships of Hon''ble Supreme Court in Ramprasad Vs. State of Maharashtra, have held that statement recorded by a magistrate u/s 164 Cr.P.C. becomes usable to corroborate the witness as provided in Section 157 of the Evidence Act or to contradict him as provided in Section 155 thereof.

15. Be that as it may, the question is whether the Court could treat it as an item of evidence for any purpose. Section 157 of the Evidence Act permits proof of any former statement made by a witness relating to the same fact before "any authority legally competent to investigate the fact" but its use is limited to corroboration of the testimony of such witness. Though a police officer is legally competent to investigate, any statement made to him during such investigation cannot be used to corroborate the testimony of a witness because of the clear interdict contained in Section 162 of the Code. But a statement made to a Magistrate is not affected by the prohibition contained in the said Section. A magistrate can record the statement of a person as provided in Section 164 of the Code and such statement would either be elevated to the status of Section 32 if the maker of the statement subsequently dies or it would remain within the realm of what it was originally. A statement recorded by a magistrate u/s 164 becomes usable to corroborate the witness as provided in Section 157 of the Evidence Act or to contradict him as provided in Section 155 thereof.

29. In Phool Chand Vs. State of U.P., a Division Bench of Allahabad High Court have held that where witnesses themselves did not support their version, their statements earlier recorded u/s 164 Cr.P.C. could not be available to the prosecution for their corroboration. Their Lordships have held as under:--

18. Learned Additional Public Prosecutor Sri Amarjeet Singh has tried to emphasise that Karan (P.W. 1) and his wife Smt. Makkhan (P.W. 2) were produced before the Magistrate for recording their statements u/s 164 Cr.P.C. in which they fully supported the facts/circumstances leading to the commission of multiple murders in this case. The learned counsel has contended that these statements should be given due weight and should be considered for proving the offences with which the appellants were charged. On thoughtful consideration on this legal aspect of the matter, we find that the aforesaid submission has no substance in it. The statement of a witness u/s 164 Cr.P.C. is one where the accused have hardly any occasion to cross examine him and if it is to be treated as substantive piece of evidence, it should be duly tendered before trial Court and then a witness should be produced by the prosecution for his cross examination. In this context the learned Senior Advocate appearing for the appellants has cited the case law of AIR 1946 38 (Privy Council) and Ram Kishan Singh Vs. Harmit Kaur and Another,

In these cases the Privy Council and the Hon''ble Supreme Court have

categorically held that the statements recorded u/s 164 Cr.P.C. are not substantive evidence. It can be used only to corroborate the statements of the witness or to contradict them. In the present case, when the witnesses (P.W. 1 and P.W.2) have themselves did not support their version, their statements earlier recorded u/s 164 Cr.P.C. could not be available to the prosecution for their corroboration. It could, to the maximum, be used by the prosecution for their contradiction, but that too has not been done in the present case. It is obvious that it would be a fallacy of a legal approach to have reliance upon the statement of a witness recorded u/s 164 Cr.P.C. and thereby to record conviction of the accused persons on that basis.

30. Their Lordships of Hon''ble Supreme Court in Baij Nath Sah Vs. State of Bihar, have held that statement u/s 164 Cr.P.C. is not substantive evidence. Their Lordships have held as under:--

6. We have heard the learned counsel for the parties and have gone through the record. We see from the judgments of the Courts below that the only material that has been used against the appellant is the statement under Sec. 164 of the Cr.P.C. This Court in Ram Kishan Singh Vs. Harmit Kaur and Another, has held that a statement of 164 Cr.P.C. is not substantive evidence and can be utilized only to corroborate or contradict the witness vis-?-vis. Statement made in Court. In other words, it can be only utilized only as a previous statement and nothing more.

7. We see from the record that Suman Kumari was not produced as a witness as she had since been married in Nepal and her husband had refused to let her return to India for the evidence. In this light her statement u/s 164 cannot be used against the appellant. Even otherwise, a look at her statement does not involve the appellant in any manner. The allegation against him is that after she had been kidnapped by the other accused she had been brought to their home, where the appellant was also present. In other words, when she had been brought to the appellant's home the kidnapping had already taken place. The appellant could therefore not be implicated in the offence under Sec. 363 or 366A of the IPC de hors other evidence to show his involvement in the events preceding the kidnapping.

8. We accordingly allow the appeal and set aside the judgment impugned. The appellant is acquitted.

31. Their Lordships of Hon''ble Supreme Court in George and Others Vs. State of Kerala and Another, have held that statement u/s 164 Cr.P.C. can be used only to contradict or corroborate the maker of the statement. Their Lordships have held as under:

36. We may now turn to the evidence of P.W. 50, detailed earlier. From the judgment of the trial Court we notice that the substantial parts of its comments, (quoted earlier) are based on his statement recorded under S. 164, Cr.P.C. and not his evidence in Court. The said statement was treated as substantive

evidence; as would be evident from the following, amongst other observations made by the learned trial Court:

If Ext. P. 42 (the statement recorded under S. 164, Cr.P.C.) is found to be a genuine statement it can be used as an important piece of evidence to connect the accused with the crime.

In making the above and similar comments the trial Court again ignored a fundamental rule of criminal jurisprudence that a statement of a witness recorded under S. 164, Cr.P.C. cannot be used as substantive evidence and can be used only for the purpose of contradicting or corroborating him. Instead of appreciating the evidence of P.W. 50 from that perspective the trial Court confined its attention mainly to his statement so recorded and discredited him. This legal infirmity apart, factually also the trial Court committed patent errors. As earlier noticed, one of the grounds for disbelieving him was that in the trip sheet the name of the person who performed the journey, namely, A1 was not shown. If the trial Court had cared to look into the other trip sheets which form part of Ext. P. 54 it would have found that in none of them the name of the person who hired the car is mentioned. The trial Court was, therefore, not at all justified in commenting upon such non-mentioning of the name of the hirer and concluding therefrom that the document was suspect. The comments of the trial Court that P.W. 50 made the statement before the Magistrate (Ext. P. 42) to oblige the police as his brother was arrested in connection with an excise case is also without any basis whatsoever. In drawing the above inference the trial Court was much influenced by the fact that the car in question, namely, KEK 3114 was seized by the police on May 31, 1990 and that it was released on June 28, 1990. According to the trial Court it was wrongfully detained by the police for such a long period to compel P.W. 50 to make a statement according to its dictate. Once a car is seized in connection with a case it can be returned pursuant to the order of a competent Court only and there is nothing on record to indicate that in spite of such an order the car was not returned so as to entitle the trial Court to comment that the long detention of the car was itself a suspicious circumstance. Having gone through the evidence of P.W. 50 we find that each of the reasons canvassed by the trial Court for disbelieving P.W. 50 is either legally unsustainable or factually incorrect.

32. Their Lordships of Hon"ble Supreme Court in Kishore Chand Vs. State of Himachal Pradesh, have held that in a case of circumstantial evidence, all the circumstances from which the conclusion of the guilt is to be drawn should be fully and cogently established and the proved circumstances must bring home the offences to the accused beyond all reasonable doubt. Their Lordships have further held that there is distinction between facts which may be called primary or basic facts on one hand and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts, the court has to judge the evidence in the ordinary way and in appreciation of the evidence in proof of those basic facts or primary facts, there is no scope for the application of the

doctrine of benefit of doubt. The Court has to consider the evidence and decide whether the evidence proves a particular fact or not. Whether that fact leads to the inference of the guilt of the accused or not is another aspect. In dealing with this aspect, the doctrine of benefit would apply and an inference of guilt can be drawn only if the proved facts are inconsistent with the innocence of the accused and are consistent only with his guilt. The prosecution has to travel all the way to establish fully all the chain or events which should be consistent only with hypothesis of the guilt of the accused and those circumstances should be of conclusive nature and tendency and they should be such as to exclude all hypothesis but the one proposed to be proved by the prosecution. Their Lordships have held as under:--

4. The question, therefore, is whether the prosecution proved guilt of the appellant beyond all reasonable doubt. In a case of Circumstantial evidence, all the "circumstances from which the conclusion of the guilt is to be drawn should be fully and cogently established. All the facts so established should be consistent only with the hypothesis of the guilt of the accused. The proved circumstances should be of a conclusive nature and definite tendency, unerringly pointing towards the guilt of the accused. They should be such as to exclude every hypothesis but the one. proposed to be proved. The circumstances must be satisfactorily established and the proved circumstances must bring home the offences to the accused beyond all reasonable doubt. It is not necessary that each circumstance by itself be conclusive but cumulatively must form unbroken chain of events leading to the proof of the guilt of the accused. If those circumstances or some of them can be explained by any of the reasonable hypothesis then the accused must have the benefit of that hypothesis.

5. In assessing the evidence imaginary possibilities have no role to play. What is to be considered are ordinary human probabilities. In other words when there is no direct witness to the commission of murder and the case rests entirely on circumstantial evidence, the Circumstances relied on must be fully established. The chain of events furnished by the circumstances would be so far complete as not to leave any reasonable ground for conclusion consistent with the innocence of the accused. If any of the circumstances proved in a case are consistent with the innocence of the accused for the chain of the continuity of the circumstances is broken, the accused is entitled to the benefit of the doubt.

6. In assessing the evidence to find these principles, it is necessary to distinguish between facts which may be called primary or basic facts on one hand and inference of facts to be drawn from them, on the other. In regard to the proof of basic or primary facts the court has to judge the evidence in the ordinary way and in appreciation of the evidence in proof of those basic facts or primary facts, there is no scope for the application of the doctrine of benefit of doubt. The court has to consider the evidence and decide whether the evidence proves a particular fact or not. Whether that fact leads to the inference of the guilt of the accused or not is another aspect and in dealing with this aspect of the problem, the doctrine

of benefit would apply and an inference of guilt can be drawn only if the proved facts are inconsistent with the innocence of the accused and are consistent only with his guilt. There is a long distance between may be true and must be true. The prosecution has to travel all the way to establish fully all the chain of events which should be consistent only with hypothesis of the guilt of the accused and those circumstances should be of conclusive nature and tendency and they should be such as to exclude all hypothesis but the one proposed to be proved by the prosecution. In other words, there must be a chain of evidence so far consistent and 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 probability the act must have been done by the accused and the accused alone.

33. Their Lordships of Hon^{ble} Supreme Court in Mohibur Rahman and Another Vs. State of Assam, have held that there must be a close proximity between the event of accused last seen together with deceased and the factum of death of the deceased. Where the event of last seen together did not bear close proximity with the death of the victim by reference to time or place, the conviction could not be held. Their Lordships have held as under:--

10. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. There may be cases where, on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide. In the present case there is no such proximity of time and place. As already noted the dead body has been recovered about 14 days after the date on which the deceased was last seen in the company of the accused. The distance between the two places is about 30-40 kms. The event of the two accused persons having departed with the deceased and thus last seen together (by Lilima Rajbongshi, PW6) does not bear such close proximity with the death of victim by reference to time or place. According to Dr. Ratan Ch. Das the death occurred 5 to 10 days before 9.2.1991. The medical evidence does not establish, and there is no other evidence available to hold, that the deceased had died on 24.1.1991 or soon thereafter. So far as the accused Mohibur Rahman is concerned this is the singular piece of circumstantial evidence available against him. We have already discussed evidence as to recovery and held that he cannot be connected with any recovery. Merely because he was last seen with the deceased, a few unascertainable number of days before his death, he cannot be held liable for the offence of having caused the death of the deceased. So far as the offence u/s 201 IPC is concerned there is no evidence worth the name available against him. He is entitled to an acquittal.

12. For the foregoing reasons, criminal appeal No. 550 of 2001 by the accused-appellant Mohibur Rahman is allowed. His conviction under sections 302/34 and 201/34 IPC along with the sentences passed thereon is set aside. He is acquitted. He shall be released forthwith unless required to be detained in connection with any other offence. So far as the accused Taijuddin is concerned, his conviction u/s 302/201/34 IPC is also set aside instead he is held guilty u/s 302 IPC. The sentence of imprisonment for life and a fine of Rs. 2000/-, in default of payment to suffer further R.I. for one year is maintained. Criminal appeal No. 551/2001 by Taijuddin thus stands partly allowed.

34. Their Lordships of Hon"ble Supreme Court in State of U.P. Vs. Satish, have held that in the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. Their Lordships have held as under:--

22. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses PWs 3 and 5, in addition to the evidence of PW2.

35. Their Lordships of Hon"ble Supreme Court in Hatti Singh Vs. State of Haryana, have held that evidence of last seen by itself is not of much significance. It may, however, provide for a link in the chain. However, unless the time gap between the accused of having been last seen in the company of the accused persons and the murder is proximate, it is difficult to prove the guilt of the accused only on that basis. Their Lordships have held as under:--

26. The evidence of last seen by itself apart from having not been proved in this case cannot be of much significance. It may provide for a link in the chain. But unless the time gap between the deceased of having been last seen in the company of the accused persons and the murder is proximate, it is difficult to prove the guilt of the accused only on that basis.

36. Their Lordships of Hon"ble Supreme Court in Keshav Vs. State of Maharashtra, have held that the circumstance would be relevant only when death takes place shortly after accused and deceased were last seen together.

8. A judgment of conviction cannot be recorded only on the basis of motive. The circumstance of last seen together becomes relevant only when the death is proved to have taken place within a short time of the accused and the deceased

being last seen. (See State of Goa Vs. Sanjay Thakran and Another, Matter might have different if a murder of wife is allegedly to have been committed by a husband within the four walls of a room which was occupied by them.

37. Their Lordships of Hon"ble Supreme Court in Niranjana Panja Vs. State of West Bengal, have held that to rely upon theory of "last seen together", it is always necessary that prosecution should establish time of death. Their Lordships have held as under:--

18. PW-3, Naryan Das Adhikari spoke about the deceased, himself and the accused being there and their consuming liquor at Bholanath Pal's liquor shop. He, however, claimed that at about 9 p.m. he parted way and proceeded towards left and Haripada and Niranjana proceeded towards right i.e. towards Sarberia. It means that he was also in the company of the deceased till 9 p.m. He had not stated about their taking liquor in his police statement which he had accepted. He admitted that he and Haripada got down from the bus at Mahisadal on return from Midnapore. He also admitted that nobody had witnessed that he had parted company from Haripada and Niranjana at 9 p.m. on 12.12.1988. He could not even tell as to how far Haripada and Niranjana went together. He admitted that he parted way at a spot in Ghagra Mouza. He further stated that the house of the deceased was barely five minutes walk away from that spot while the accused's house was about half a mile. It was also in the vicinity of the village itself. The evidence of this witness would be of no consequence, particularly, because the prosecution in this case has not fixed the time of death and there is no evidence led to that effect. Where the prosecution depends upon the theory of "last seen together", it is always necessary that the prosecution should establish the time of death, which the prosecution has failed to do in this case. The evidence of Ranjit Samanta (PW-4) also is of no consequence.

38. Their Lordships of Hon"ble Supreme Court in Sk. Yusuf Vs. State of West Bengal, have held that theory of last seen together comes into play where time gap between point of time when deceased was last seen alive with accused and when deceased was found dead is so small that possibility of any person other than accused being author of crime becomes impossible. Their Lordships have further held that in case a person is absconding after commission of offence, of which he may not even be the author, such a circumstance alone may not be enough to draw an adverse inference against him, as it would go against doctrine of presumption of innocence. It is quite possible that he may be running away merely on being suspected, out of fear of police arrest and harassment. Their Lordships have held as under:--

21. The last seen theory comes into play where the time gap between the point of time when the accused and deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. (Vide: Mohd. Azad @ Samin Vs. State of West Bengal, ; and State thr. State Vs. Mahender Singh Dahiya,

31. Both the courts below have considered the circumstance of abscondence of the appellant as a circumstance on the basis of which an adverse inference could be drawn against him. It is a settled legal proposition that in case a person is absconding after commission of offence of which he may not even be the author, such a circumstance alone may not be enough to draw an adverse inference against him as it would go against the doctrine of innocence. It is quite possible that he may be running away merely being suspected, out of fear of police arrest and harassment. (Vide: *Matru alias Girish Chandra Vs. The State of Uttar Pradesh*, ; *Paramjeet Singh @ Pamma Vs. State of Uttarakhand*, ; and *Rabindra Kumar Pal @ Dara Singh Vs. Republic of India*, Thus, in view of the law referred to hereinabove, mere abscondence of the appellant cannot be taken as a circumstance which give rise to draw an adverse inference against him.

39. Their Lordships of Hon''ble Supreme Court in *Manthuri Laxmi Narsaiah Vs. State of A.P.*, have held that even if one link is broken, accused must get benefit thereof.

40. Their Lordships of Hon''ble Supreme Court in *Sahadevan and another Vs. State of Tamil Nadu*, have held that the last seen theory although is an important event in chain of circumstances and/or could point to guilt of the accused with some certainty, but this theory should be applied while taking into consideration prosecution case in its entirety and keeping in mind circumstances that precede and follow the point of being so last seen. Time gap between when accused and deceased allegedly last seen together and when corpse of deceased recovered itself is an important factor. Their Lordships have held as under:--

27. The courts below, the Trial Court in particular, have laid some emphasis on the theory of last seen, while finding the accused guilty of the offence. As far as PW5 is concerned, he says that he only saw three persons going on the moped and he could not identify these persons. PW4 stated that he had seen the deceased going on a moped with Chandran at about 2.00 o'clock in the afternoon. The time lag between the time at which this witness saw the accused and the deceased together and when the body of the deceased was found on the next day is considerably long. According to PW4, he could identify Loganathan while, according to PW5, the face of the deceased was burnt and, therefore, he could not identify him. Moreover, according to the doctor, PW7, the deceased had died about 27 to 28 hours before the autopsy. The autopsy, was admittedly, performed upon the deceased on 10th of July, at about 2 o'clock. That implies that the deceased would have died sometime during the morning of 9th July, while according to PW4, he had seen the deceased along with Chandran after 2 p.m. on 9th July, 2002.

28. With the development of law, the theory of last seen has become a definite tool in the hands of the prosecution to establish the guilt of the accused. This concept is also accepted in various judgments of this Court. The Court has taken the consistent view that where the only circumstantial evidence taken resort to by the prosecution is that the accused and deceased were last seen together, it

may raise suspicion but it is not independently sufficient to lead to a finding of guilt.

29. In *Arjun Marik and Others Vs. State of Bihar*, this Court took the view that the where the appellant was alleged to have gone to the house of one Sitaram in the evening of 19th July, 1985 and had stayed in the night at the house of deceased Sitaram, the evidence was very shaky and inconclusive. Even if it was accepted that they were there, it would, at best, amount to be the evidence of the appellants having been last seen together with the deceased. The Court further observed that:

it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record a finding that it is consistent only with the hypothesis of guilt of the accused and, therefore, no conviction, on that basis alone, can be founded.

30. Even in the case of *State of Karnataka Vs. M.V. Mahesh*, this Court held that:

merely being last seen together is not enough. What has to be established in a case of this nature is definite evidence to indicate that the deceased had been done to death of which the respondent is or must be aware as also proximate to the time of being last seen together. No such clinching evidence is put forth. It is no doubt true that even in the absence corpus delicti it is possible to establish in an appropriate case commission of murder on appropriate material being made available to the Court.

31. In the case of *State of U.P. Vs. Satish*, this Court had stated that the principle of last seen comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible.

32. Undoubtedly, the last seen theory is an important event in the chain of circumstances that would completely establish and/or could point to the guilt of the accused with some certainty. But this theory should be applied while taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.

33. The statement of PW5 does not indicate the time as to when he had seen the deceased and with which of the accused. He expressed inability to even identify them. PW4 though claims to have seen them but has given a time which itself is doubtful. Even this cannot be stated with certainty that at that particular time the deceased was alive or dead.

34. In light of the abovementioned contradictions and the uncertainty of evidence, we are unable to sustain the view taken by the High Court that on the theory of last seen, the accused can be convicted. This fact is uncorroborated and suffers from apparent contradictions and discrepancies as well.

41. Their Lordships of Hon''ble Supreme Court in Balak Ram Vs. State of U.P., have held that the evidence of witnesses whose statements are recorded u/s 164 Cr.P.C. must be approached with caution. Their Lordships have further held that it is of course open to the court to accept the evidence of a witness whose statement was recorded u/s 164 Cr.P.C., but the salient rule of caution must always be borne in mind. Their Lordships have held as under:--

48. It cannot be overlooked that the statements of Jhilmili, Ram Prakash and Aryendra were recorded u/s 164, Criminal P.C., in June, 1971, soon after the incident. The Investigating Officer says that he got the statements recorded by way of prosecution. That could be true that it would be wrong to find fault with the Investigating Officer merely because he got the statements of these witnesses recorded under sec. 164. Nor can the evidence of a witness be discarded for the mere reasons that his statement was recorded u/s 164. But the High Court overlooked that the evidence of witnesses whose statements are recorded u/s 164 must be approached with caution. Ram Charan and Others Vs. State of U.P., . Such witnesses fell tied to their previous statements given on oath and have but a theoretical freedom to depart from the earlier version. A prosecution for perjury could be the price of that freedom. If it, of course, open to the Court to accept the evidence of a witness whose statement was recorded u/s 164, but the salient rule of caution must always be borne in mind. That is all the more necessary when almost all the eye-witnesses are subject to this tying-up process. Even Aryendra, the sister''s son of Dharam Pal, was not thought to be above suspicion.

42. The prosecution has failed to prove the case against the appellant. The trial court has convicted the appellant on a mere superfluous approach without in-depth analysis of the relevant facts.

43. Accordingly, in view of the discussions and analysis made hereinabove, the appeal is allowed and the impugned judgment dated 25.3.2008 rendered by the learned Additional Sessions Judge, Shimla in Sessions Trial No. 9-R/7 of 2007 is set aside. The appellant is acquitted of the charge under Sections 302 and 201 of the Indian Penal Code. The fine amount, if any deposited by the appellant is ordered to be refunded to him. The appellant, who is in jail, be released forthwith, if not required in connection with any other case. The Registry is directed to prepare the release warrant of the appellant and send it to the Superintendent of the Jail concerned in conformity with this judgment forthwith. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.