

(2002) 12 DEL CK 0095

In the Delhi High Court

Case No : Criminal Appeal No. 169 of 1999

Dr. Mahender Singh Dhaiya

APPELLANT

Vs

State (CBI)

RESPONDENT

Date of Decision : 19-12-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 162, 164, 313, 342

Evidence Act, 1872 — Section 11, 145, 155, 157, 17

Penal Code, 1860 (IPC) — Section 201, 302

Citation : (2003) CriLJ 1908 : (2003) 102 DLT 592 : (2003) 66 DRJ 616

Hon'ble Judges : Ramesh Chand Jain, J;A.D. Singh, J

Bench : Division Bench

Advocate : Sidharth Aggarwal, for the Appellant; S.K. Saxena, Special Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

R.C. Jain, J.—The Appellant Dr. Mahender Singh Dahiya, an Indian Orthopedic Surgeon stands convicted for the offences punishable under Sections 302 and 201 of the Indian Penal Code for having committed the murder of his wife Namita, a British National of Indian origin on the intervening night of 27th and 28th May, 1979 (their honeymoon night itself) in room No. 415, hotel Arenberg, Brussels, Belgium for dismembering and extensively mutilating and disposing of her body parts at different places in the city of Brussels in order to cause disappearance of evidence relating to the commission of crime. He has been sentenced to imprisonment for life and to pay a fine of Rs. 5000/- for the offence u/s 302 of the Indian Penal Code and to undergo rigorous imprisonment for a period of seven years and a fine of Rs. 5000/- for the offence u/s 201 of the Indian Penal Code with the stipulation that both the substantive sentences of imprisonment will run concurrently. In this appeal, the appellant has challenged his said conviction and sentences.

2. This is an unusual case and perhaps the first of its kind. What makes this case

a rare one is not only the ghastly and brutal manner in which the offence is alleged to have been committed but the complexities which this case presents on account of various factors viz the accused being an Indian, victim of the crime Namita, though of Indian origin but having acquired British citizenship by long stay with her parents in London and the offence having been committed yet in a third country i.e. Belgium; the investigation of the case having been conducted by the agencies of three countries -- to begin with in Belgium and UK and concluding in India. Most of the material witnesses being foreign witnesses (there being 28 Belgium witnesses and 24 UK witnesses), the investigation in Belgium and UK having been conducted according to the law and procedure of those countries and most of the material witnesses relied upon by the prosecution being citizens of those two countries, their depositions have been recorded on commission issued by the Indian trial court to its counter parts in those countries. Yet another fact is that based on the investigation conducted in Belgium, initially the Belgium authorities had intended to hold the trial in Belgium and made a request for extradition of the appellant but ultimately after the arrest of the accused on 09-05-1979, after about four years of commission of the crime, the Belgium authorities abandoned the said request for extradition. The case was registered and ultimately investigated by the Indian investigators of CBI and a charge sheet dated 30-07-1985 came to be filed by the CBI against the appellant after more than six years of the commission of crime. Then the trial by the Indian court was also a protracted one, on account of large number of witnesses produced at the trial and most of the witnesses being foreign citizens. The trial culminated into conviction and sentence of the appellant only on 01-03-1999 that is after about 14 years of the filing of the charge sheet and 20 years of the commission of the crime. Added to these factors is yet another important fact that there is no direct evidence to link the appellant as perpetrator of the crime and the case of the prosecution solely rests on circumstantial evidence along. These are the factors which in our opinion have made this case an unusual or of complex nature presenting arduous task not only for the investigators in the three countries, the prosecution, the trial court and now for this Court. We have noted these facts at the outset not with a view to express our dismay at the time taken and consideration involved in the matter but simply with a view to have a glimpse of the case which we wish to keep in view while examining the merits of this appeal. However, these factors have not dissuaded us in any way from examining the merits of the appeal.

3. First the undisputed facts. The appellant hails from village Turkpur, District Sonapat, Haryana. He obtained his MBBS degree from Punjab University, Rohtak in 1973 and M.S. Degree in (Orthopaedic) from A.I.I.M.S., New Delhi in December 1978. He got himself registered with Punjab Medical Council and possessed an Indian Passport No. K005420 issued on 18-09-1974 by the Regional Passport Office, Chandigarh. Jagdish Singh Lochab (PW-48) a native of Punjab had gone to London in 1962 and was settled there with his family viz. wife Smt. Chadermukhi (PWUK-1), three daughters namely, Namita, Amita

Lochab (PWUK-2) and Shiela (PWUK 3) and two sons. Namita born in India in May 1956 and had acquired British citizenship. During 1978, Namita was working as accounts trainee with the British Broadcasting Corporation (BBC), London. In July August 1978, Jagdish Singh Lochab (PW-48) visited India in connection with the matrimonial alliance of his daughter Namita and zeroed his choice on the appellant and thereafter Namita was called from London and an engagement ceremony was held between the appellant and Namita on 31-08-1978 at village Turkpur followed by a marriage ceremony according to Hindu rites and customs at Delhi on 05-09-1978. However, as per the understanding of the parents of Namita, the said marriage was to be deemed an engagement only and a legal marriage was to be effected only after the registration of the marriage in London subsequently.

4. The marriage was not consummated and Namita along with her parents returned to London on the night of 05-09-1978. The appellant reached London on 27-02-1979 and started living with his in-laws at 22, Friars Way, Action, W3. London and he got himself registered as a post graduate student at Royal National Institute of Orthopedics, London on 12-03-1979. Jagdish Singh Lochab (PW-48) purchased a terrace house No. 312, Horn Lane Act, London for a sum of 20,000 UK Pounds in the joint name of the appellant and Namita. A joint bank account No. 91053278 was also opened in the name of Namita and the appellant at Midland Bank, London and two cheque books, one each in the name of Namita and the appellant were issued by the bank. A marriage was registered between the appellant and Namita at the Office of the Registrar of Marriage, London on 26-05-1979 and a reception was held on the same evening at Phoenix Restaurant, London. A honeymoon trip of five days commencing from 27-05-1979 to certain European countries was arranged through Cosmos Tours, London. The appellant and Namita left for the tour and were seen off by her parents at Victoria Railway Station, London in the morning of 27-5-1979. They carried two suits cases, one of red colour belonging to Namita and the other of brown colour belonging to the appellant having their clothes and other articles. The group of tourists including Namita and the appellant reached Brussels at about 6.30 P.M., the same evening and all the tourists of the group stayed at the fourth floor of hotel Arenberg, Brussels. The appellant and Namita checked in room No. 415 and after some time they went for a short sight seeing tour "Brussels by night", returned to hotel at about 11.00 P.M. and retired to their room.

5. Now come the facts and circumstances relied upon by the prosecution, which are not admitted/fully admitted by the appellant.

A) On 7-04-1979 a birthday party of Sheila, the youngest sister of Namita was arranged at their house and the appellant resented the nature and behavior of Namita in her freely mixing with male persons especially with Philip David Abbey (PWUK-21) and after the party, the appellant created a scene and rudely complained that Namita was not a woman of good morals. Thereupon Namita

was furious and threatened to withdraw from the marriage with the appellant and the appellant apologised and assured to mend his manners.

B) Namita was last seen alive in the company of the appellant on the night of 27-05-1979 at about 11.00 P.M. when they retired in their room No. 415, hotel Arenberg, Brussels.

C) The group was scheduled to leave hotel Arenberg, Brussels on the morning of 28-05-1979 and all the group members were expected to assemble in the hall by 7.30 A.M. All group members except Namita and the appellant assembled in the hall so the tour guide Richard Anthony Cushnie (PWUK-12) went up to room No.415 and knocked at the door of the room. The appellant opened the door half way and came into the corridor without allowing the guide to enter the room and told him that they (he and his wife) had decided to stay back. The guide suggested to the appellant that he had his wife could resume the group at Paris and wanted to give him the name of the hotel where the group was to stay in Paris but the appellant falsely told him that his wife knew the address. The tour resumed without the appellant and Namita.

D) In the morning of 28-05-1979 the hotel maid Ms. Mujinga Maudi (PWBG-22) went to room 415 for cleaning and saw the appellant alone in the room in an excited condition and also found the room was quite dark, curtains having been closed and the room was full with smoke and thereafter the appellant having asked her to clean the bathroom and she found the bathroom full of water and towels lying soaked on its floor and a strong smell of soap in the bathroom.

E) On the same morning the appellant did not permit Benselin Myriam (PWBG-24), the pantry clerk of the hotel, to enter his room for taking the reading of the mini bar and for replenishment of the consumed drinks in the refrigerator.

F) The appellant extended his stay in the hotel through the receptionist for an extra night and also filled up a form for this purpose and around noon time of 29-05-1979, the appellant checked out of the hotel by making payment in cash for the extended stay.

G) The appellant entered UK through Dover Port on 29-05-1979 and stayed there for the night in a hotel and went to London on 30-05-1979.

H) The appellant had withdrawn an amount of UK Pounds 200 from his and Namita's joint account No.91053728 from the Midland Bank, London on 30-05-1979.

I) The appellant reached the home of his in-laws in the afternoon of 30-05-1979 along with two suit cases and could not give any satisfactory Explanation to his in-laws about the whereabouts of his wife Namita and rather falsely stated to them that she had abandoned him at Brussels on the morning of 28.05.1979 carrying away her clothes and money. The appellant wanted to get away from the house as soon as possible without explaining as to what happened in

Brussels and the family members had to physically restrain him with the assistance of a neighbour.

J) Jagdish Singh Lochab (PW-48) took the appellant to police station to lodge a report about disappearance of Namita and the appellant having told constable Line foot (PWUK-18) that his wife had abandoned him in Brussels as she did not want to keep any relation with him and both of them could go their way. Thereupon a missing report was recorded by constable Line foot.

K) While coming back from the police station along with Jagdish Singh Lochab, the appellant escaped by jumping into a running bus and thereafter he stayed in YMCA, London without disclosing his identify/particulars and left for India via Frankfurt, West Germany and reached Delhi on 06-06-1979.

L) On the morning of 29-05-1979, at about 6.45 A.M. parts of human body wrapped in cloth lying in a container at Rue De Loxum were noticed by a rag picker and he informed the police constable on duty who on further search of the said container found a human head wrapped in various clothes, its hair having been shaved of and face lacerated with vertical cuts; a pair of legs in a black packet and four pieces of clothes and two pair of arms tied together and kept in a carton were recovered from the said container.

M) On 02-08-1979, a torso of a female human body was found floating in canal Vergote in Brussels and it was seized.

N) The postmortem examination on the body parts and other forensic tests conducted established that the parts of the body recovered from the said container and torso found from the said canal were that of Namita Lochab. The clothes recovered along with the parts of the body were also identified as belonging to Namita.

O) Certain blood stains were detected in the bathroom of room No. 415 hotel Arenberg, Brussels around 12-06-1979 and on Chemical examination of the same and the sample taken from the sample of blood group of Namita, it was found that the said blood stains were of the same blood group as that of Namita.

P) The doctor who conducted the postmortem examination opined that death was caused by strangulation and also concluded that the various cuts on the body parts were made after the death by an individual who apparently was experienced in disjointing and who knew the human anatomy.

Q) Blood spot was also detected on red suitcase which on examination also found to be of the same group as that of Namita. The palm prints lifted from the room of Namita also tallied with the palm prints of the palm prints of the body parts recovered from the container.

R) The appellants left for India via Frankurt, West Germany and reached Delhi on 06-06-1979 and remained underground absconding and could not be traced in spite of various efforts upto 09-05-1983. He was hiding in a village in district

Lalitpur U.P where he took up the practice of general medicine under the fake name of Dr. M. Singh.

6. On the strength of these facts and circumstances, the prosecution concluded that they are sufficient to establish that the appellant had strangled his wife Namita to death dismembered and mutilated parts of her body and disposed them of in the container and in a canal. Apart from the said circumstances, the prosecution has also relied upon certain other factors/circumstances in order to strengthen its case. The appellant did not divulge the fact of Namita having abandoned him on the morning of 28-05-1979 either to the tour guide, hotel management or staff, Belgium Police, Indian Embassy in UK or Belgium or to the parents of Namita for almost two days during his over stay at hotel Arenberg. Nor he took any action for searching Namita during this period for subsequently on his return to London on 30-05-1979 and after he having run away in a bus did not try to find out either from the parents of Namita or the Action police station if Namita had been traced out. Besides it is suggested that the appellant had a strong motive to commit the crime inasmuch as the appellant coming from a rural background having conservative outlook could not tolerate the liberal behavior of Namita in socializing with male persons as also her indifferent attitude towards him during his stay at her parents house and Therefore appellant was murdering a grudge too deep as to take revenge by doing away with Namita at the first available opportunity.

7. As against the above case of the prosecution, the defense plea put forth on behalf of the appellant is that Namita was not willing to marry him as she was carrying an affair with certain persons more particularly Phillip David Abbey and she had married to him (appellant) under the pressure of her parents. The appellant after having married Namita in the larger interest of his own career could not have even thought of murdering Namita because his stay in UK was dependent upon the continuance of his marriage with Namita at least for one year. It was vaguely suggested in the memorandum of appeal, though not pursued at the time of hearing, that in Belgium the victim was haunted by some suspicious persons who arrived separately and rented a room opposite to the room where the appellant and Namita had stayed and at about 11.30 P.M. after taking bath Namita dressed up and left the room and returned in the early morning hours of 28-05-1979 and requested the appellant to go with her tour along stating that she had already seen Europe and would join him later towards the end of the tour. The appellant considering it to be a routine habit of the victim stayed back believing that she would be back soon. It is suggested that the only motive of the said two persons who were staying in the room opposite to room No. 415 could be to murder the victim out of anger and revenge of her having married the appellant on the previous day. It is also vaguely suggested that once the involvement of white in the murder of an Asian came to fore, the Belgium Police made the appellant a scapegoat without pinning down the said two persons or the real culprit

8. To prove its case on the strength of the above referred circumstances, the prosecution has produced as many as 108 witnesses out of which 28 witnesses belong to Belgium and 24 witnesses to UK can be termed as material witnesses for the purpose of proving the material circumstances on or about 27th to 29th May, 2002. The witnesses from Belgium and UK were examined on commission. Besides this, expert witnesses and a large number of documents have been produced and relied upon. It is pertinent to note that most of the material exhibits seized/recovered during the course of investigation were not produced before the witnesses at the trial and an attempt was made to get the same identified by means of photographs of those material exhibits.

9. The learned trial court in its wisdom deemed it proper to deal with various facts and circumstances and discuss the relevant evidence under the following heads:-

"A. Native place of the accused and his educational qualifications;

B. Marriage of the accused, his departure for U.K. his stay at the house of his in-laws and registration of the marriage there;

C. Birthday party at the house of his in-laws; his conduct at the after the birthday party; his relation with Namita before and after the Birthday party, letters exchanged between the accused and Namita and the apology, if any, tendered by the accused with regard to his conduct;

D. Arrangement of conducted tour to Brussels; departure from London on the morning of 27.5.79 and reaching Brussels in the evening; sight-seeing tour of Brussels by the accused and Namita on the evening of 27.5.79 and return to the Hotel;

E. Visit to the tour guide in the morning of 28.5.79 when the accused told him about his decision to stay back; the manner in which the accused dealt with the pantry clerk who wanted to enter his room to check the refrigerator; visit to the maid servant for the purpose of cleaning the room and her observations about the condition of the accused at that time; the condition in which the room of the Hotel was found and request of the accused for his stay in the hotel for extra night; and what these point out to?

F. The arrival of the accused in London without Namita; his Explanation given to the parents of Namita regarding Namita's disappearance from Belgium; his conduct at the time of accompanying father of Namita to Ancon Police Station to report about Namita's disappearance and his alleged escape by jumping into a running bus; and of these circumstances are of any effect?

G. Recovery of parts of human body on the morning of 29.5.79 and subsequent recovery of torso from the lake on 2.8.79;

H. Collection of evidence pertaining to the crime from room No. 415 of Hotel Arenberg, Brussels and reports of the forensic tests connecting the recovery with

the murder.

I. Report of the postmortem in respect of the parts of the human body recovered on 29.5.79 and other evidence showing that the dismembered parts were that of Namita;

J. Evidence connecting from the suitcase allegedly brought by the accused to London establishing that the blood in the suitcase was of Namita;

K. Evidence collected from the suitcase allegedly brought by the accused to London establishing that the blood in the suitcase was of Namita;

L. Other evidence in the form of recovery of clothes and shoes of Namita along with the dismembered human body;

M. Absconding of the accused and the efforts made by the police in apprehending him vis-a-vis Explanation given by the accused in that regard;

N. Reference received from Belgium government for extradition of the accused and subsequent abandonment of the request and sanction granted by the Central Government for prosecution of the accused in India;

O. Other facts referred to on behalf of the accused breaking the chain in circumstantial evidence.

10. We have heard Shri Sidharth Aggarwal, learned counsel representing the appellant and Shri S.K. Saxena learned Special Public Prosecutor representing the State/CBI at great length. Learned counsel for the appellant has assailed various findings and conclusions drawn by the learned trial court on the ground that they are not borne out from the evidence and material brought on record and in any case the evidence led by the prosecution in order to prove different circumstances is un-cogent and inconclusive. As against this, the submission of the learned Special Public Prosecutor is that the findings and conclusions drawn by the learned trial court are un-assailable and there are many more circumstances established on record which should leave no doubt that the appellant alone had committed the murder of his wife on the alleged date, time and place. We, Therefore, consider it more appropriate to consider the evidence and material brought on record only so far as it pertains to the disputed circumstances.

11. Before proceedings to scrutinize the various circumstances heavily relied upon by the prosecution in support of its case, it seems desirable to comprehend the legal position as to when a conviction can be recorded in a case based entirely on circumstantial evidence as has been settled by a catena of Supreme Court and different high Court decisions. Where the case solely rests on circumstantial evidence, the evidence must satisfy the following three tests (1) the circumstances from which the inference of guilt is sought to be proved must be cogently and firmly established, secondly, the circumstances should be of a definite character and point towards the guilt of the accused and thirdly; the

circumstances must have a chain so complete that there is no escape from the conclusion that in all probability, the crime was committed by the accused and none else. That is to say the circumstances should be incapable of Explanation of any other hypothesis than that of the guilt of the accused. It is the fundamental principle of criminal jurisprudence that till such time he is proved guilty, an accused is to be presumed innocent and, Therefore, the burden lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. Where circumstantial evidence consists of a chain of circumstances to link up with one another, the Court has to take cumulative effect of the evidence led by the prosecution before convicting the accused. The Court cannot ignore the direct chain of circumstances and consider them separately or in isolation. The general burden never shifts and it always rests on the prosecution.

12. Motive behind commission of crime is a relevant fact on which evidence can be given. The absence of motive is also a circumstance which is relevant for assessing the evidence. Ordinarily, when there is sufficient directed evidence connecting the accused with the commission of the offence, proof of motive becomes unimportant. But where the entire prosecution case rests on circumstantial evidence, motive undoubtedly plays an important part in such cases.

13. In the case in hand, the prosecution has not attributed any direct motive to the appellant to commit the murder of his wife Namita but from the chain of conduct of the appellant and Namita, during the period the appellant stayed at his in-laws house between March 1979 to May 1979 and more particularly about the two incidents one relating to the episode which had taken place at the birthday party of Sheila Lochab, the younger sister of Namita and the other relating to locking out of Namita when she returned home late at night, the prosecution has indirectly and in a half heartedly hinted that the appellant had a motive to commit the crime. This part of the prosecution evidence has been more fully dealt with by the learned trial court under heading "C" and on a scrutiny of the evidence of PWUK-1, PWUK-2, PWUK-3, PWUK-23 and PWUK-48 and two letters i.e. Ext. CW/13 written by Namita to the appellant and its reply Ext. CW/14 given by the appellant, the learned trial court was unable to infer any motive on the part of the appellant to commit the heinous crime. Rather the trial court observed that the interest of the accused lay in the survival of the deceased and not in her death. Learned Special Public Prosecutor has made an attempt to dislodge this findings primarily on the ground that there was a wide gap between the culture and ethics practiced by the appellant, he coming from a very poor and rural family background with conservative outlook was diametrically opposed to the more liberal culture of the deceased Namita.

14. So far as the admissibility of two letters Ext. CW/13 and Ex. CW/14 is concerned, the learned counsel for the appellant has challenged their admissibility in evidence on the ground that the contents of letter Ext. CW/13 are not admissible as the same are not relevant to the cause of death of the victim

within the meaning of Section 32 of the Indian Evidence Act and Ext. CW/14 being only a copy of the letter written by the appellant to the victim in response to her letter Ext. CW/13. In this connection he has placed reliance on a decision of the Supreme Court in the case of Sital Das Vs. Sant Ram and Others, . As against this the contention of the learned Special Public Prosecutor is that the contents of letter Ext. CW/13 even if not admissible u/s 32 of the Evidence Acts the same are very much relevant under Sections 6 and 11 of the Evidence Act. We, however, see no force in the argument of the learned Special Public Prosecutor. Firstly because they did not fall within the domain of Section 32 of the Indian Evidence Act and secondly no inference can be drawn that the appellant was nurturing a grudge so deep as to eliminate his wife pursuant to the said behavior. On the other hand these letters would suggest that whatever misunderstanding had crept in between the appellant and the victim was in fact sorted out and thereafter nothing untoward had happened at least after middle of April 1979 till the registration of marriage on 26-05-1979. Even otherwise it is highly improbable to comprehend that the appellant had a pre-determined mind or motive to cause the death of Namita on the honeymoon night itself at the first available opportunity of being in the company of the deceased in a closed room as is suggested by the prosecution. Had the attitude of the parties been still so hard as is suggested by the prosecution, they would not have agreed to the marriage followed by a honeymoon trip outside London. There is nothing to suggest that Namita or her family members had apprehended any harm or threat to life of Namita at any stage till the couple left for tour on the morning of 27-05-1979. The trial court in our opinion had rightly observed that something had gone amiss on the night of 27/28-05-1979 when the appellant and Namita were alone. This in fact contradicts the theory of the appellant having any motive, what to talk of strong motive to commit the offence of murder.

15. It is almost impossible to accept the prosecution theory that the appellant had married the deceased only with a view to do away her in order to take his revenge for the appalling behavior of Namita at the birthday party of Sheila. In our opinion if the appellant had felt the behavior of Namita so offending, he would have rather preferred not to marry her instead of thinking of taking the extreme step of taking her life. The disparity in the outlook of the appellant and the deceased or her family members is not such a strong factor as would lead to the conclusion that the appellant must have made up his mind to kill Namita.

16. Absence of motive cannot be said to be fatal to the prosecution case but motive assumes pertinent significance in a case solely based on circumstances as existence of motive is an enlightening factor in the process of presumptive reasoning in such a case. The absence of motive, however, puts the court on its guard to scrutinise the circumstances more carefully to ensure that suspicion and conjecture do not take the place of legal proof. This has been so held by the Supreme Court in the case of Surinder Pal Jain Vs. Delhi Administration, In the case of Tarseem Kumar v. Delhi Administration 1994 (3) SCC 467, the Supreme Court held. About the importance of motive the Court observed as under:-

"Normally, there is a motive behind every criminal act and that is why investigating agency as well as the court while examining the complicity of an accused try to ascertain as to what was the motive on the part of the accused to commit the crime in question. Where the case of the prosecution has been proved beyond all reasonable doubt on basis of the materials produced before the court, the motive loses its importance. But in a case which is based on circumstantial evidence, motive for committing the crime on the part of the accused assume greater importance. Of course, if each of the circumstances proved on behalf of the prosecution is accepted by the court for purpose of recording a finding that it was the accused who committed the crime in question, even in absence of proof of a motive for commission of such a crime, the accused can be convicted. But the investigating agency as well as the court should ascertain as far as possible as to what was the immediate impelling motive on the part of the accused which led him to commit the crime in question".

17. As against this, the learned Special Public Prosecutor has relied upon two Supreme Court decisions one in the case of Subedar Tewari Vs. State of U.P. and Others, wherein it was held that the evidence regarding existence of motive which operates in the mind of an assassin is very often then not within the reach of others. The motive may not even be known to the victim of the crime. The motive may be known to the assassin and no one else may know what gave birth to the evil thought in the mind of the assassin. A crime can take place even without pre-meditation or pre-planning in the context of a particular situation and on the spur of moment. In the case of Suresh Chandra Bahri Vs. State of Bihar with Gurbachan Singh, it was held by the Apex Court that sometimes motive plays an important role and becomes a compelling force to commit a crime and Therefore motive behind the crime is a relevant factor for which evidence may be adduced. A motive is something which prompts a person to form an opinion or intention to do certain illegal act or even a legal act with illegal means with a view to achieve that intention. In a case where there is motive, it affords added support to the finding of the Court that the accused was guilty for the offence charged with. But the evidence bearing on the guilt of the accused nonetheless becomes untrustworthy or unreliable because most often it is only the perpetrator of the crime alone who knows as to what circumstances prompted him to adopt a certain course of action leading to the commission of the crime.

18. Bearing in mind the legal position emerging out of the said authorities and having regard to the totality of the facts and circumstances which can be said to have been established on record, it is not possible to infer any motive on the part of the appellant what to talk of a motive so strong to commit the crime.

19. As noticed earlier, the prosecution has placed reliance on a series of incidents/ circumstances to establish the guilt of the accused. The first incriminating circumstance relied upon by the prosecution in the case in hand is the evidence of last seen together that is the appellant and the deceased after their trip to

Brussels is by night on 27-5-1979 before they retired into the hotel room No. 415. The appellant has not disputed that Namita was with him in the room throughout the night but his defense is that she was alive until around 6.35 A.M. in the morning of 28.05.1979 when she left him and walked away and thereafter never returned. According to the appellant, the deceased was seen alive by the Manager of the hotel even in the morning on 28-5-1979 because that was the only time when the said witness could have seen her as he had left the hotel on the previous evening before the arrival of the group at the hotel. Even if we take the testimony of the hotel manager on its face value, it is not possible for us to hold that Namita was seen alive by anyone in the morning of 28-5-1979.

20. The most important circumstance relied upon by the prosecution relates to the state of affairs which existed in room No. 415 of hotel Arenberg and the behavioral pattern exhibited by the appellant on the morning of 28-05-1979 when the three witnesses, namely, PWUK 12 Richard Anthony cushnie, PWBG-22 Mujinga Maudi and PWBG-24 Benselin Myriam who visited the said room. This aspect has been dealt with by the learned trial court under heading (E) and on detailed examination of the testimony of these witnesses, the learned trial court has concluded that the appellant was highly upset and was not normal inasmuch as he stood in the doorway and seemed to be agitated and perspiring when PWUK-12 knocked at the door of his room. Further it was unusual on the part of the appellant to inform PWUK-12 that they were happy in Brussels and wanted to stay there are that he had a list of the hotel addresses of other cities where the tour was to stay which list, according to the prosecution the appellant could not possibly have as it was liable to change at the last moment. Besides the appellant wanted PWUK-12 to leave him as quickly as possible and did not confide in him that his wife had left him against this wishes or without his consent. Similarly the learned trial court concluded that the appellant, though allowed the entry of PWBG-22 but did not want her to open out the curtains and when she opened the bathroom door, and found that there was plenty of water in the bathroom and several wet towels on the ground and when she was cleaning the bathroom, the appellant remained standing throughout and did not leave for a second. Further the appellant did not like the entry of PWBG-24 in the room and a sign board "do not disturb" was hung outside the room. Learned trial court has concluded that the evidence of the above witnesses established that the appellant was disturbed on account of some untoward happening which was not simply the fact of his wife having left him in the morning of 28-05-1979 but something more serious which the appellant did not want to share with anyone and which he himself wanted to sort out. Further in the normal course, the appellant would have informed PWUK-12 and the other members of the group who were staying on the same floor about what happened and why he was unable to continue the tour. The trial court also found that the subsequent conduct of the accused was against the normal human behavior and weigh heavily against him because Namita, if had left the room in the early morning of 28-05-1979, following honeymoon night, he would have certainly made inquiries

or efforts to find her out. The learned trial court repelled the defense argument that the appellant did not know French language and, Therefore, was not able to make inquiries from the hotel staff because the court presumed that some English knowing person must be available at or outside the hotel with whom the appellant could communicate. The learned trial court also found that the appellant did not bother to lodge a report with the police about his missing wife, nor contacted the parents of Namita for seeking their help in locating Namita who is stated to have abandoned him without any reason.

21. Yet another factor which has weighed heavily with the learned trial court in this regard is that the appellant overstayed in the hotel for a day uptill the noon of 29-05-1979 and then he stayed overnight at Dover Port and reached London on 30-05-1979 without making any inquiries or efforts to trace out Namita. From these circumstances, the learned trial court raised an inference that the appellant knew for certain about the fate of Namita and in fact he had been preparing Explanation to cover up the same. The learned trial court negated the defense story about Namita having left the appellant in the morning of 28-05-1979 on the strength of the above said abnormal behavior which was in consonance with a person of guilty conscience rather than that of an innocent one who had been forced into a difficult situation by certain circumstance which was not of his own making. The court also held that merely because the appellant went back to his in-laws house at London on 30-05-1979 by itself cannot show that his version about Namita having left in the morning of 28-05-1979 was true since all other circumstances pointed out in the other direction. According to the learned trial court these circumstances and the behavior of the appellant raised an accusing finger towards him about he being a party to something which he alone knew.

22. Learned counsel for the appellant has assailed the above conclusion and findings of the learned trial court and submitted that the events of the morning of 28-05-1979 as is sought to be established from the evidence of the above named three witnesses are required to be analysed keeping in mind the prosecution case that the death of the victim Namita had taken place during the intervening night of 27/28-05-1979 and the dismemberment of her body parts took place through 28-05-1979. In other words the body or body parts of Namita, fully or partly dismembered, were still in room No. 415 in the morning of 28-05-1979 because as per the prosecution case the same were disposed of in a refuge container placed at Reo De Lexus at a distance of about 200 meters from the hotel between 4.00 P.M. of 28-05-1979 to 6.15 A.M. of 29-05-1979. We have been taken through the entire testimony of PWUK-12, the tour guide and our attention has been invited to the two reports Ext.CW42/A & CW 42/B prepared by this witness after the termination of the tour. On a careful consideration thereof, it appears to us that the witness has not been consistent in his version. On finding that the appellant and his wife had not assembled in the hall, he went up to room No. 415 and knocked at the door which was opened by the appellant and despite he having noticed that the appellant was perspiring but still assumed his behavior to be quite normal or non-exceptional.

None of the two reports prepared by this witness find any mention about abnormal behavior of the appellant which he might have noticed. These reports indicate that the witness had lost his objectivity and cannot be relied upon. The witness when visited the appellant in his room No. 415 must be in a hurry and could not have conversed with him for more than couple of minutes or so. One of the reports prepared by this witness mentions the fact that the father-in-law of the appellant had told him that Namita had abandoned the appellant on the morning of 28-05-1979 which would in turn support the defense plea.

23. So far as the testimony of PWBG-22 is concerned, this witness was examined by the police more than once but could not give correct room number. According to her she visited room No. 410 and if we consider her testimony in its entirety, it would rather show that the appellant had not put any safety latch or took any extra precaution to keep room closed because PWBG-22 could enter the room without knocking. Not only that this witness could enter the room but it is pertinent to note that the appellant had himself asked her to clean the bathroom. The witness did not find any incriminating articles like the body or body parts either in the room or bathroom nor found a trace of blood on the carpet or on the walls. According to the witness, the appellant had left the room unattended despite knowing that the witness could enter the room in his absence and the witness actually entered the room but found no incriminating material. In fact she found only one suitcase with clothes only.

24. PWBG-24 has attempted to show that he wanted to enter the room in order to take reading of the mini bar but was not allowed to do so by the appellant while according to PWBG-22 he had come inside the room and had talked to her. This witness co-relates this incident to 27-05-1979 and not to 28-05-1979 and was unable to denotify the person with whom he had inter-acted and rather stated that he had the impression that the said man was calm.

25. On a careful consideration of the evidence of these three witnesses, we are of the view that the finding of the learned trial court in regard to the state of affairs existing in room No. 415 and the behavioral pattern exhibited by the appellant cannot be said to be in consonance with the prosecution case and it is not possible to presume that the appellant had already killed Namita and her body or dismembered parts were still in the room. Learned Special Public Prosecutor could not throw any light as to where the body or dismembered body parts could have been kept/concealed by the appellant, because according to the prosecution case these were disposed of after the evening of 28-5-1979. According to him the body might have been kept either in a cupboard or under the bed. This submission of the appellant is clearly within the realm of surmises and conjectures as no evidence to fortify this contention has been brought on record. In any case PWBG-22 did not notice any body or body parts though she had the occasion to visit and inspect the room twice. We are unable to subscribe to the view of the learned trial court that the behavioral pattern of the appellant was in consonance with that of a guilty man. We, however endorse the

conclusion of the learned trial court that adverse presumption should be drawn against the appellant for his failure to inform the hotel staff, police and the parents of Namita about disappearance of Namita as also his failure to make any search for Namita over a period of one and a half days. The question however, remains to be considered as to whether this failure of the appellant in this regard is to be attributed to the fact of his wife leaving him or he having done away with her.

26. Another important circumstances relied upon by the prosecution with a view to connect the appellant with the crime is the recovery of body parts allegedly of Namita viz. Head, served upper and lower limbs minus thigh portion from a refuge container lying at Rue De Loxum in the morning of 25-05-1979 and that of torso from Vergote lake, Brussels on 2-8-1979. Along with body parts recovered on 29-05-1979 there were certain pieces of clothings and a show which the prosecution claims to be belonging to Namita.

27. Learned counsel for the appellant in his attempt to show that the prosecution has failed to establish the recovery of dismembered body parts and clothing etc. and the opinion of experts to connect them with Namita has taken us through the testimony of various witnesses and has assailed them on a variety of grounds. He has also pointed out certain inherent fallacies in this part of the prosecution story. PWBG-6 Verbeelen Marcel is a witness to the recovery of body parts and stated that he dug out a container to look out for some lead or copper and found a packet wrapped with a black pullover containing an arm in the shape of a hand without fingers, two arms cut into four pieces and on seeking them he became nervous and called the police and two policemen arrived. PWBG-13 Van Eesbeek Pierre, a police officer of Brussels on reaching the site looked into the waste container and found a pair of legs and the feet. These remnants were wrapped in a chiffon and inside a plastic bag. As against this, the testimony of PWBG-21 Vindevogel Rene is that he had accompanied PWBG-13 Van Eesbeek to Rue De Loxum and found in the container, inside a cardboard box, two pieces of arm and on further search found a red cloth wrapped packet with plastic and when he opened it, a head rolled down. According to him his colleague found one of the two legs and the feet in the other side of the container also packed in red fabric. From the testimony of these witnesses, it is apparent that the only piece of clothing found near the said body parts was a black pullover and some red fabric which might have been used for wrapping the body parts. These witnesses did not speak about the recovery of any other clothing or shoes as is sought to be proved through PWBG-8 Nelissen Urbain, PWBG-14 Martin Etienne, PWBG-25 Tavsi Ferman, PWBG-27 Pissort Jean and PWBG-28 Doms Jeannean. None of these witnesses, except PWBG-28 Doms Jeannean, speak about the recovery of any clothing or shoe from the site of recovery. Even PWBG-28 Doms Jeannean could not say with certainty as to what garments or shoes were discovered from the said container. The details of clothing and shoes etc. does not find mention in the report of the police dated 30-5-1979 and simply mentions that there were several pieces of ladies' clothing which were seized and would be described in a

special report. No contemporaneous report of recovery of these clothing etc., was admittedly prepared. A report dated 8-6-1979 which is in the form of an inventory of items found on 29-5-1979 specifying a pink brown cardigan covering the legs, a black pullover and red fabric are described by the witness. It is pertinent to note that the police had already collected and seized various articles and things from the house of PW-48 in London on 5-6-1979, 6-6-1979 and on 7-6-1979.

28. In the absence of any Explanation forthcoming from the prosecution as to why a contemporaneous recovery memo was not prepared on 29-5-1979 itself and omission of the details of the said clothings etc., in the statements of the witnesses and their mention only in the special report/inventory dated 8-6-1979, will not rule out the possibility of these garments and articles having been implanted by the police by obtaining the same from the house of Namita with the object of fixing the identity of body parts as belonging to Namita by means of these clothings etc. The prosecution version in this behalf otherwise appears to be improbable because ordinarily it is not expected that a woman would carry even her wedding dress (which the prosecution stated was found as part of the clothings) with her on her honeymoon trip. Moreover those clothings etc., were never produced during the course of trial for the purpose of identification by the witnesses and only the photographs of the clothings etc., which were allegedly taken on 12-6-1979 i.e. after 16 days were produced. The non-production of the said clothings etc., at the trial is sought to be explained on the premises that these clothes were torn, lacerated or blood stained and so must have withered away into waste beyond recognition. We are not satisfied with such an Explanation. The prosecution was under an imperative duty to produce the said clothings etc. at the trial because it was through these clothings and articles that it had sought to establish the identity of the deceased.

29. Thus having considered the relevant evidence of the witnesses and various documents obtaining on record, we are of the opinion that the prosecution has miserably failed to establish the recovery of the clothes or shoes etc., by means of cogent and reliable evidence. No recovery/seizure memo was prepared on 29-5-1979 and it was prepared only after nine days of the alleged seizure and the description contained therein is inconsistent with the testimony of ocular witnesses. The said evidence does not inspire confidence.

30. Coming to the identification of the said clothings and shoes as belonging to Namita, the prosecution has relied upon the testimony of PW-48 Jagdish Singh Lochab and PWUK-2 Amita Lochab who allegedly identified the same in the presence of the Magistrate at Brussels besides of course relying upon the testimony of PWUK 18 Christopher John Coombes and PWUK 21 Peter Norman Heath.

31. PW-48 Jagdish Singh Lochab in his testimony undoubtedly made an attempt to prove that he had identified the clothes and the shoe recovered on 29-5-1979 as that of the deceased Namita by deposing that 4/5 pairs of shoes of different

shoes were mixed up with the ones that were to be identified and similarly some clothing pieces numbering 20 to 30 were mixed up with the clothes but he could not remember if the police officer were present or not at the time of the identification. In the first instance he stated that the officer had recorded his statement and he had signed the same with regard to the identification of the clothes etc., but in the same breach, when confronted with his previous statement made to Belgium Investigating Authorities, he denied it. It may be noticed that there was no mention of any test identification of clothing etc., having been made by this witness, which in turn would show that the witness was not consistent so far as this part of the case is concerned.

32. We are then left with the testimony of PWUK-2 Amita Lochab, sister of the deceased Namita. She claims to have gone to Brussels on 19-6-1979 and having identified some of the clothes and shoes belonging to her sister by means of the photographs 3399, 3400, 3401, 3402 to 3415. She deposed that these photographs show the underclothing and shoes which Namita was wearing on her wedding day. Her night dress, the ribbon and the collar. The collar of another dress and underskirt of another dress. She claimed to have identified these articles in the court of the investigating magistrate at Belgium in presence of the Belgium police. She, however could not say if any other clothes were mixed up with these clothes. At one stage, she stated that her father was also present along with her but at the other she was not sure about his presence. Admittedly the identification was done only in respect of the inventory items and no record of identification proceedings in the form of identification memo was prepared.

33. PWUK-19 Colin Alexander Elphinstone stated that the garments of "Top Shop" were only available in UK but there was no restriction on tourists purchasing and taking the same to other countries. This witness was not even shown the clothes and had no occasion to look at the label containing the trade mark "Top Shop" for the purpose of identifying the clothings as belonging to the said manufacturer.

34. The testimony of PWUK-21 Peter Norman Heath, who was examined with a view to establish the identity of the shoe as manufactured and marketed only in UK is also of not much avail as it cannot possibly be said that no other person could have purchased a shoe of "Hannah" mark from London and take the same the other part of the world. In any case the shoe in question which was allegedly recovered was not shown to the witness and he was only asked to do the identification on the basis of the photographs.

35. The law with regard to test identification of persons and property is well settled through a catena of judgments of the Supreme Court and various High Courts. The test identification of property has to be done in accordance with certain well settled legal parameters and certain safeguards have to be observed so as to rule out the possibility of any doubt and confusion. In the case of Ishwari v. State the Allahabad High Court has held:-

"In identification of articles the requirements of law is that similar articles are to be mixed for identification. It is not required that identical articles should be mixed. Similarly for identification of a person similar persons are mixed. Two persons are never identical. No doubt in the case of property it is possible to have identical articles as some articles are prepared by using machine. But in that case it will not be possible even for the real owner to identify his lost article. The requirement of law is satisfied if similar articles are mixed which would only mean that if there are some prominent marks of dissimilarity they can be concealed. They are required to be similar in the same sense as similar persons are to be mixed up with the accused person in the test identification. There should not be such prominent marks on the articles about which an identifying witness could be informed and such witness might be able to identify that article even if it did not belong to him or her. The main evidence is of that witness. The court has only to be satisfied with the aid of evidence of identification that the article really belonged to that witness and he or she could identify simply because it belonged to her, without any outside aid."

36. In the case in hand, having regard to the testimony of the above referred witnesses compared with the fact that no identification memo was prepared on the date of identification itself and was in fact recorded only a day later without any Explanation forthcoming for the delayed recording and that the clothings and shoe being of general merchandise items available in UK and other parts of the world and that the same were not produced again during the course of trial and help of photographs was taken for the purposes of identification, we are of the considered view that the prosecution cannot be said to have established the identity of these articles belonging to Namita with certainty.

37. In order to establish the identity of the body parts recovered on 29-05-1979 and 20-08-1979 as that of Namita, the prosecution has relied upon the report of the postmortem examination conducted by Dr. Rilleret (since dead) and PWBG-4 who conducted the postmortem examination on the said body parts. Reliance is also placed on the report and testimony of PWBG-5 Wackens Stomatologist who had examined the dental specifics of the body and the report of finger/palm print expert. Similarly reliance has been placed on the testimony of PWUK-1 Smt. Chandermukhi Lochab and PW-48 Jagdish Singh Lochab, mother and father of Namita who gave description of certain identification/special marks which Namita had on her person. According to PW-48 Jagdish Singh Lochab, Namita was about 5"-4" of height, the hair of her head were black, she had 31 teeth instead of 32 as one of her tooth had been extracted at young age; she had a scar on her right knee and also had a fracture of her left wrist besides smallpox inoculation marks on her left upper arm. PWUK-1 however, gave discrepant description about these identification marks/special marks.

Learned trial court has dealt with this part of the evidence under heading "I" & "J". On a detailed examination of the body parts PWBG-4 has concluded as Under:-

- (i) The victim had been strangled.
- (ii) The hair of the victim were black.
- (iii) The victim was a young woman of non-white race of a height of 1 meter 60 cms.
- (iv) The victim had a special feature at the teeth level i.e. the existence of a single upper central incisor tooth.
- (v) An old Cutaneous triangular cicatrices mark of three centimeters was there on the surface of right knee cap.
- (vi) There were burns on the chin at the left retro articular region and also on the limbs, on the left and right arms and left forearm. These burns appeared to be caused after death.
- (vii) The dislocation of the body was work of a doctor/surgeon or a butcher.
- (viii) The autopsy was done on 29-5-79 and the death took place within 48 hrs.
- (ix) The autopsy was carried out on 29-5-79 but report submitted on 11-12-70.
- (x) The examining doctor could not say if there were vaccination marks on left arm and callosities in the front side of the feet.

The learned trial court referred to the testimony of PWBG-20 Wackens George, Stomatologist and concluded that his opinion could establish:

- (i) That the body belonged to a person having feminine sex.
- (ii) It was of a person between 20 and 30 years of age who was of African or Indian origin.
- (iii) Left upper incisor was not there which might have been lost since long time.
- (iv) The teeth were of a person who lived in an affluent social status.

38. Learned counsel for the appellant has assailed the evidence of these experts as also the finding of the learned trial court based thereon on a variety of grounds which we may discuss hereinafter. The postmortem examination on the body parts recovered in the morning of May 29, 1979 was conducted by Dr. R. Rillaert and Dr. G. Voordeeker on the 29th May, 1979 itself but the report was given by them only on December 11, 1979. The report noticed as under:-

"The hair has been close-cropped unequally, post mortem, for there are several superficial parcheminated abrasions, which do not show any life reactions.

From the aspect of the roots of the remaining rest, one can infer that (at the back) the hair was black. The head is round. Having a perimeter of 51 cms. The chin has an orthoagnate form.

Near the right of the under jaw bone we see a small noevus. The appeals of the

eyes are dark brown colored.

We see blood spots in the right and left eye conjunctive.

On the upper and under right and left eyelids there are cuttings showing no vital reactions.

The eyebrows are missing, they are cut away but not epilated.

The ear auricles are missing; they are cut away; near the external auditory meati, there is not vita reaction.

On the jaws, any deep cuts (opened), vertical and without vital reaction.

The lips and the nose point are cut away after death so that the nose holes are open.

There is nothing peculiar to the tongue. Traces of bringing are found at the chin and in the retro-auricular region.

Teeth are white and have a good appearance.

It is astonishing to see the existence of one upper central incisor. At this moment, we decide to ask for the assistance of a stomatologist to make a detailed description of each condition.

We find no trace of traumatic wound that might have caused death.

No peculiarities at the skull of the brain.

The head has been cut at the articulation C3/C4 by careful dissection, without damage to the bones, after death, without life reaction.

The cutting of the soft tissues is neat, but shows several notices of "taking up"

Arms

We have a parcel consisting of two arms and two legs, around which is a cotton tape.

The right arm

At the proximal end the cutting is neat, following a practically continuous line.

At the upper end a few axillary hairs remain.

The upper arm head and the capitulum's extremity of the elbow are disjointed without smudges, without deteriorations of the articular surfaces, which kept their "pole". At the inner front side that is superficially burned place.

The left arm

Is disjointed in the same way as the other arm, Also presence of a few axillary hairs.

A broad surface of superficial bruising with epidermis exfoliation at the inner front - and after region, without vital reaction.

The length of the humerus is 30 cms.

Forearms

Both are disjunct without smudges, without cuttings at the elbows.

Traces of superficial burning on the left forearm.

The hands are maintained, but the fingers are disjunct at the metacarpus-phalanx on the back of the left hand near the wrist fold a linear wound near the metacarpal-carpal region. When examining the palms, we notice the absence of horn indurations or professional stigmata such as found on manual workers.

We repeat that none of the described wounds shows a vital reaction.

We also stress that the hand palms are rather rosy, contrasting with the evident pigmentation of the arms and legs, as can be seen on a person who does not belong to the white race.

Legs This includes the legs, the feet and the toes

Left leg

It is disjunct at the femoral-tibia line, following a linear cut but presenting several indentations, which give a festooned aspect, especially in the posterior region.

Articular surfaces are complete-Hairs are shaven, No varices.

Nails are recovered with a red enamel and are recently cut.

On the sole plants, presence of horn indurations especially at the inner rim on the inner rim of the big toe.

The length from the border to the feet is 43 cms.

The right leg

Is disjunct above the patella, with the presence of the patella. On the patella face a small old scar from a triangular bruise, 3 cm X 0.5 Presence of horny planter indurations.

Red enamel on the nails.

The feet are 23 cms long.

They have the dimensions of the leather sole found on site.

With the agreement of the enquiring magistrate, we asked for the assistance of Dr. Wackens, who came on site at the Institute for Forensic Medicine and with whom we had a first interview. We handed him the useful samples.

Conclusions.

From all the findings we are entitled to admit that the consider human remains are of a young woman of about 160 cms, of coloured race.

The cuts were made after death by an individual who is apparently experienced and disjuncting and who respected the anatomic characteristics.

The presence of bloodstains in the eyes makes us think a murder by construction.

The remains were burned superficially

39. The torso/trunk portion recovered on 2nd August, 1979 was subjected to post-mortem examination on 3rd August, 1979 by Dr. R. Rillaert and Dr. G. Voordecker and their observations and conclusions are recorded as under:-

"The remains are covered with rags of stuff in which we identify; garment rests, in embroidered stuff, with colored decorations representing leaves, flowers, a bit of bust and of a white stuff dress, with lathes, which resembles of bribe garments, a bit of velvet stuff, formed by two fragments knotted together;

The trunk is directly, that means on the skin, warped in plastic.

The under belly wears a slip which is partly lowered so that the black public hairs can be seen, but according to the impressions on the skin it was in normal position, that means it covered the whole public region.

The slip is not torn and shows no apparent boll traces.

Breasts are very small. The trunk has a height of about 69 cms.

The width at the shoulders and at the iliac spine is 30 cms.

The beheading was done by disjuncting at the cervical spine, and the as three cervical vertebrae remained.

The cut was made immediately at the upper limit of the thyro-hyoidian group.

The shoulders were disjuncted with observance of the glenoid cavities. The same applies to the hips, where the cycloid cavities are untouched. The cutting of the tissue is net, sometimes broad.

The decay of the tissues is very advance, with saponification.

The larynx is present, the thyroid and yo id horns are in pieces, but the delay allows not to din and signs of blood effusion; there.

The chest is intact. The lungs are rotten.

Also the ear but we can see that is shown no microscopic peculiarities. The stomach is empty. Visceral conditions are normal.

The appendices is there. The kidneys are normal.

The uterus and the cervix uteri show no peculiarities; the ovaries are present. The advanced degree of decay and decomposition do not allow us, notwithstanding carefully and through investigations, to say anything about the condition of the external genitals namely as to the maidenhood, idem for the anus region.

Conclusion

The comparison between the evidence gathered respectively on May 29, 1979 and August 3, 1979 enables us to say that the human remains examined at the later date do correspond to the same body namely to the cops of Namita Lochab."

40. The learned trial court referred to the testimony of PWBG-20 Wackens George, Stomatologist and concluded that his opinion could establish:

- (i) That the body belonged to a person having feminine sex.
- (ii) It was of a person between 20 and 30 years of age who was of African or Indian origin.
- (iii) Left upper incisor was not there which might have been lost since long time.
- (iv) The teeth were of a person who lived in an affluent social status.

The learned counsel for the appellant has taken us through the testimony of PWBG-20 Wackens George, Stomatologist. This witness in the first instance stated that on examination of the dental specificities of the body parts on 30-05-1979 he recorded his report "X". However, on being questioned by the defense counsel, the witness stated that he had given another report marked "A" but tried to explain that it was a provisional report and that the report "X" shown to him by the Examining Magistrate is the final report. Surprisingly the first dental report (marked "A" at page 361 of Additional Volume-II) and dental report (marked "X") appearing at page 1049 of Paper Book Volume-III) are wholly inconsistent. In the alleged provisional report on the basis of the stomatological examination the expert witness concluded as under:-

"Female individual, at least thirty years old and of North African type. Lived for a long time in a civilized, upper middle-class environment. Good education. Taking much care for her teeth. Regularly visited her dentist, who looks tidy, experienced and serious.

The individual lacks one upper left central incisor and her left canine should have been rather conspicuous.

The individual had probably a tic, such as biting her fingernails.

This, and the other mentioned facts, suggest that the individual should be between 29 and 30 years old."

However, the final report contains the conclusions as under:-

"Individual belonging to the female sex whose age is presumed between 20 and 30 years and belonging to the North-African, Indian type.

Lived since long in a civilised society in a well off category. Had good education. Taking very good care of teeth and used to visit regularly her dentist. The latter used to take good care of them regularly and seriously.

The individual did not have a left upper Central incisive and had a prominently visible left canine.

It may not be overlooked that the individual have had a habit, such as nibbling her fingers".

The above conclusions would show that in the report prepared contemporaneously the expert had put the age of the deceased between 29-30 years and the origin of the deceased being relatable to North African race while in the final report he altered the age to 20-30 years and the origin of the victims as North African/Indian race. The difference in the two reports is so glaring that it compels us to hold that the second report is clearly an afterthought and improvement over the earlier report which must have been made to cover up the first report which did not connect the body parts with that of Namita inasmuch as the age of Namita was stated to be around 25 years.

41. According to PW-48 Namita had 31 teeth instead of 32 as one of her teeth had been extracted at young age she had a scar on her right knee and had a fracture of a left wrist besides having small pox inoculation marks on her left forearm and her height was about 5'-4". However, in his earlier statement, he had stated that another tooth had been fixed at the place of the tooth so extracted and no anomaly existed in her denture and could not say with certainty about she having a scar on her right knee. It is pertinent to note that these identification marks were not given by him while lodging the missing report and rather he stated that he was not aware of any visible marks or scars or other peculiarities of Namita. According to him, colour of her hair was dark brown. The missing report is Exhibit CW-31 and though it is signed by him, it has no mention of any such mark. On the other hand PWUK-1 stated that Namita had one front tooth missing, but there was no gap in between the incisors and she had a scar mark on her left knee and three inoculation marks on her left shoulder. When cross-examined, she could not give the identification marks of her other children. This would clearly show that neither PWUK-1, the mother nor PW-48, the father of Namita, were exactly aware/sure of any identification marks of Namita and, Therefore, the possibility of these witnesses having given these marks after the disclosures of such marks in the post mortem examination report cannot be ruled out. No vaccination/inoculation marks have been found by the doctors conducting the post mortem examination and the evidence with regard to the existence of callosity is also vague as the site for callosity is did not match. Besides existence of callosities on feet cannot be said to be a distinguishing feature or mark of identification because so many persons can have such marks.

42. According to the prosecution, the X-Ray examination showed that the wrist of the body had a fracture but neither the X-Ray report nor the X-ray films had been tendered in evidence by any witness and what has been placed on record and sought to be proved is stated to be a translation of the X-Ray examination report. Even this document has not been proved through any witness and the defense had no opportunity to test the veracity of the person/radiologist who took the X-Ray and prepared the report. On the face of this position, no reliance can be placed on this part of the report which seems to be extraneous and not supported by any primary and cogent evidence.

43. So far as the palm printing comparison report is concerned, it may be observed that according to the prosecution the need for identification of the body parts arose because the fingers of both the hands and toes had been chopped off. PWUK-18 - Christopher John Coombs is a finger print expert who was working as senior officer dealing with crime investigation and having received extensive training in finger print examination and comparison during the relevant period of 1979. On 7th June, 1979 he visited 22 Fairs Way, London and took into possession documents, papers, note books, purported to have been handled by the deceased Namita and took them to his finger print laboratory at New Scotland Yard and developed the finger and palm marks from those articles and got them photographed. He received the original document. On a comparison of the palm print appearing on the photograph CW-44 with the photograph palm prints submitted by the Belgium Police, he came to the conclusion that they were similar and tallied with the palm print mark of Namita Lochab. When cross-examined, the witness could show that there were more than 16 similar characteristics which were sufficient to conclude that the palm prints developed by him from the papers, documents note books etc. taken from the house of Namita were of the same person. According to him he had received palm prints from Belgium on 27th June, 1979.

44. Having considered the matter and the reports of PWBG-4 and PWBG-20 as also of PWBG-5, we are of the considered opinion that no implicit reliance can be placed on these reports because of the infirmities and discrepancies existing therein. These reports cannot be accepted on its face value, merely because these witnesses were foreigners having no motive to make a false report and to depose falsely so as to implicate the appellant. In our view the absence of motive on their part to manipulate a report is not material, if the report itself shows that there has in fact been some manipulation as in the report of PWBG-20 at a subsequent date. Merely because the reports emanate from a certain doctor or expert of foreign country by itself is no guarantee that the reports are meticulous and the court is bound to accept and rely upon them blindfolded. There exist a great deal of discrepancies in these reports vis-a-vis identification marks given by the witnesses which compel us to discard these reports or at least not to place implicit reliance upon them for the purpose of establishing the identity of these body parts as that of Namita.

45. Now we proceed to examine yet another important circumstance viz. seizure of certain blood spots and hair allegedly found from the bathroom of room No. 415 of hotel Arenberg on 12/13-6-1970. In this regard the prosecution case is that PWBG-7 Dodinval Pol, forensic pathologist, inspected room No. 415 under the orders of Examining Magistrate in order to collect samples and he collected some samples of skull hair which however later found not to be hair but synthetic textile. Besides he also took samples of red brown stains which were subjected to benzidine reaction of which some reacted in negative and some gave positive reaction. Further examination was carried out by Prof. Andre. The majority of the samples were taken from the bathroom door on the side of the room in presence PWBG-27 Pissort Jean. PWBG-17 Andre Armand, Honorary Professor at the University of Liege analysed and compared the blood samples collected at the time of autopsy with the traces collected from the suitcase. He found out the group of the victim, as OMSs Gm 1, 2, 10 on the muscle found PGM 1 and AK 1. The traces of the blood found on the door behind the bed and on the switch were of group "O".

46. On a consideration of report Ext. PWBG-17/TA and the testimony of PWBG-17, the learned trial court reached the conclusion that the blood group of the blood stains recovered from different places of the bathroom of room No. 415 favorably matched with the blood group of the body parts of Namita.

47. Learned counsel for the appellant assailed the report of PWBG-17 and his testimony in regard to the above examination and comparison of blood spots, and urged that in the first place the very recovery of such alleged blood stains etc. from the said bathroom itself is highly doubtful. In this regard he has referred to the testimony of PWBG-19, the manager of the hotel Arenberg in whose presence the blood stains were allegedly lifted. When cross-examined, the witness admitted that many tourists had occupied room No. 415 between 29-5-1979 and 12-6-1979 and that rooms are cleaned immediately on vacation by the guest. However, no tourist/guest ever complained of any blood spot though according to him a blood spot was present on the door lining. The first ever discovery of blood was stated to be on 12/13-6-1979 i.e. after about 14 days of the alleged incident. If the blood stains discovered and lifted from the bathroom were of a person who was killed on or around 28-5-1979, the same could not be of red or dark brown colour as stated by the witness rather its colour would turn to blackish brown. It has also been pointed out that there is great deal of doubt in regard to the date and time of lifting of these blood samples. In this regard learned counsel for the appellant has invited attention to the seizure memo Ext. PWBG-14/TA which find mention of seizure of only five samples though it is alleged that eleven samples had been lifted. This is in quite contrast to the testimony of PWBG-22 Musinga Maudi, hotel maid who had admittedly noticed no blood or blood stains after in the room or in the bathroom when she inspected the same on the morning of 28-5-1979. There is also discrepancies in the statement of PWBG-14 Martin Etienne as he claims to have visited the hotel on 12-6-1979 when the W.C. etc., were upset while

according to the other witness, it was done on the second visit on 13-6-1979.

48. The learned counsel for the appellant has also assailed the blood examination report and the opinion of Prof. A. Andr? on the ground that different values/ characteristics as are stated to have been found in those blood spots vis-a-vis the sample blood group do not reconcile. In this regard we may refer to the results which are given in the following table:-

Checkings Presence of Human Blood Groups

Samplings Blood Origin ABO MN GM

Method (S. appendix II) II-2 II-3 II-4 II-6 II-6

door casing yes yes Nihil

door yes yes O

behind bidet yes yes O M Nihil

at the foot of bidet yes yes Nihil Nihil 1.10

at the bidet base probable yes Nihil Nihil 1.10

siphon of the flush no

switch yes yes O

Red suitcase yes yes ? Nihil

Brown suitcase no

Reminder Namita LOCHAB O M 1.10

Comments to the table

The blood stains on the red suitcase reacted with the anti-A, anti-B and anti-H serums. But the samples; without blood stains also reacted, which can be due to the stuff of the suitcase (cardboard) or to sweat contaminations e.g. Very often, hands are placed on the edge of the suitcase at that spot.

The group PGM/I was also searched for in the blood stains, but without result, owing to the insufficient quantity of blood.

Conclusion

The human remains identified as being of Namita Lochab belong to the following blood groups:

O anti-A, anti-B M S+s= Gm (1,-2,10) PGM 1 AK 1"

49. The above report/observation and conclusion would show that the report uses the term "Nihil" or "No" and also the question marks, blank spaces at various places which clearly indicate that the blood report is merely a comparison of the favorable characteristics. No Explanation has been provided in regard to

these terms and use thereof. It is pertinent to note that the above blood group taken by ABO method, they by Gm method but the above report at places does not mention the ABO matching but mention the Gm group which is lacking in its details. This would show that the unfavorable characters/factors detected during the course of examination have been suppressed. Another important aspect is that the prosecution has failed to establish by means of cogent and reliable evidence as to what was the blood group of Namita. PW-48 undoubtedly stated that her blood group was "O" but he could not say if it was "O" positive or "O" negative. If we accept the testimony of PW-48 in regard to the blood group of Namita being "O", it may be observed that as per the examining experts more than 50% population of Belgium has "O" Blood group. We are, Therefore, of the considered opinion that even this limb of the prosecution case has not been established by means of cogent and reliable evidence and it cannot be said that any blood stains which might have been left in the bathroom on or around 28-5-1979 were in fact collected by the investigating agency of Belgium on those dates and the blood group of the said sample matched with the blood group of Namita. Merely because a detailed examination of the blood group of the samples was conducted by a certain expert by using different method do not lend credibility to its authenticity and correctness.

50. The prosecution has also relied upon the discovery of certain blood stains inside and outside of the suitcase Ext. CW26 which had been allegedly used for the carriage and disposal of the body parts. According to the prosecution case the appellant had returned to the house of the parents of Namita on 30-5-1979 along with two suitcases one of red card board Ext. CW26 and the other of brown colour suitcase Ext. CW 27 belonging to the appellant. The two sons of PWUK-1 and PW-48 were the persons who could have deposed in this regard but none of them has been examined. There is also a great deal of doubt as to the actual date when these suitcases were seized by the London Police because according to PW-48 the same were seized on 6-6-1979 but according to PWUK-1 and PWUK-2 they were recovered from the room of their house in June 1984. Surprisingly no seizure memo was prepared when these suitcases were seized by the police and it is sought to be explained that the factum of recovery of suitcases was reflected in the statement of PWUK-1 and a receipt was given to her which has not been produced on record. Similarly PWUK-2 in her examination-in-chief stated that the suitcase was recovered in June 1979 but in the cross-examination she could not maintain and stated that the same had been taken from the house in November 1984 without preparation of any seizure memo or documentation. PWUK-20 is the police officer who speaks about the various recoveries and seizures but is silent about the recovery of suitcases Ext. CW26 and CW27. According to the Investigating Officer PW-56 the suitcases were collected by him in unsealed condition from Belgium Investigating Authorities without a recovery memo. As against this the defense case is that the appellant had not carried back the red suitcase Ext. CW26 because Namita had carried away the same when she abandoned him in the morning of 28-05-1979. This, according to the learned

counsel for the appellant finds support from the missing persons report by Constable Line foot lodged at the instance of PW-48. To us also, it seems to be rather highly improbable that the appellant would carry back an incriminating article like a big empty suitcase which he had used for the disposal of the body parts. The prosecution is silent as to what were the contents of suit case Ext. CW26 because a number of garments of Namita are stated to have been recovered along with the body parts. Even if we believe the prosecution version about the seizure of this suitcase, the report of the Pathological expert in regard to the examination of blood cannot be relied and acted upon for the same reason as we have noted earlier.

51. Yet another circumstance heavily relied upon by the prosecution is the subsequent conduct of the appellant in running away from London after PW-48 had lodged a report at Ancon Police Station and thereafter his clandestine entry into India through Germany around 6-6-1979 and he having gone and remained underground almost for a period of four years upto 9-5-1983 when he was arrested by the CBI. In our opinion based on the evidence of various police officers as noticed by the trial court, the prosecution has successfully proved on record that the appellant was absconding and was hiding at a remote place at a village Bansi in District Bilaspur U.P. under the guise of an ordinary/general medical practitioner though he admittedly holds a Master's Degree in Orthopedic Surgery. The only Explanation which is put forth on behalf of the appellant is that the appellant had in fact been frequently visiting and was available at his native place village Turkpur and there was nothing unusual in his taking up general medical practice in a rural area. In any case it is pointed out that the appellant had been sending telegrams to the various authorities including the Prime Minister and Home Minister requesting for a thorough probe in the matter as he was being unnecessarily suspected of committing the murder of Namita and the police was after him. Whatever the case may be, we are not prepared to accept this Explanation of the appellant and we are of the firm view that the appellant was deliberately hiding at a remote place so as to avoid his arrest by the police. This points out to the guilty conscience of the appellant else he would have come out of his hiding to tell the truth if he had not done anything. There is also nothing to suggest that the appellant tried to trace out Namita or even make inquiries about her disappearance ever since 29-05-1979.

52. Learned counsel for the appellant has urged that the case of the prosecution mostly rests on certain admissions made by the appellants in his examination u/s 313 Criminal Procedure Code rather than standing on its own legs by producing cogent and reliable evidence to prove its case against the appellant. That prosecution cannot be allowed to use the statement of the accused u/s 313 Cr. Procedure Code for fortification of its evidence or for filling up the lacuna in its case. In this connection, he has placed reliance upon well known decision of the Supreme Court in the case of Sharad Birdhichand Sarda Vs. State of Maharashtra, . In that case, the Apex Court while restating the cardinal principles for recording conviction on the basis of circumstantial evidence also held that the

prosecution must stand or fall on its own legs and it cannot derive any support from the weaknesses of the defense. The Court emphasised that it is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defense or a plea which is not accepted by the Court. Further that there is a vital difference between an incomplete chain of circumstances and the circumstances of which, the chain is complete. The court also ruled that before a false Explanation or false plea taken by the accused can be used as an additional link to the chain of circumstantial evidence, the following essential conditions must be satisfied:-

1. Various links in the chain of evidence led by the prosecution have been satisfactorily proved,
2. The said circumstances point to the guilt of the accused with reasonable definiteness.
3. the circumstance is in proximity to the time and situation.

53. As against this, the learned Special Public Prosecutor for the CBI has submitted that the statement made by the accused u/s 313 Cr.P.C. can be used against him as admissions/confession and the false defense put forth by the accused is a circumstance against him. In this connection, he has referred to Sub-section 4 of Section 313 of the Cr.P.C. Which provides that the answers given by the accused may be taken into consideration in such inquiry or trial and put any evidence for and against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he had committed. In support of his contention he has placed reliance upon a Supreme Court decision in the case of Karnail Singh and Anr. v. State of Punjab AIR 1954 SC 204 where it has been held:-

"With reference to the statement of the accused u/s 342, Cr.P.C., it is true that if it is sought to be used as an admission it must be read as a whole; but where it consists of distinct and separate matters, there is no reason why an admission contained in one matter should not be relied on without reference to the statements relating to other matters."

54. The learned Special Public Prosecutor submitted that the simple denial of the accused in answer to certain questions relating to incriminating evidence by stating "it is incorrect," though he had full opportunity to explain the same on the basis of the facts which were within his special knowledge should be taken as his admission of those facts/incriminating evidence produced against him. Further that the false defense which he had intentionally put forth is a clear pointer of his guilt and is in confirmity with the hypothesis of commission of offence by him. On a consideration of the matter, we are of the view that the prosecution has to stand on its own legs and cannot take advantage or undue advantage of the defense put forth by the accused even if the same was found to be false or improbable. This is for the reason that the onus to prove the guilt of an accused lies on the prosecution and no onus is cast on the accused under law to prove his

innocence by producing cogent evidence. He can prove his defense plea by preponderance of probabilities.

55. It was next urged by the learned counsel for the appellant that these investigation has not been conducted and trial of the appellant has not been held in accordance with Indian Law as laid down in the Code of Criminal Procedure, 1973. In fact the submission of the appellant's counsel is that the same has been done more in breach of the said provisions than in observance thereof. The submissions cannot be said to be devoid of merits because even the learned Special Public Prosecutor conceded before us that the initial and material investigation of this case has been conducted by the investigating agencies of Belgium and U.K. in accordance with the law and procedure of those countries rather than in accordance with Indian Law, the deposition of various Belgium and U.K. witnesses recorded by the concerned judicial authorities of those countries pursuant to the Commission issued by the Indian Court, would also show that the examination of the said witnesses was done by those authorities in a manner which does not find the backing of the Indian Law i.e. the Indian Evidence Act and the Code of Criminal Procedure. Learned Special Public Prosecutor fairly conceded before us that the said Authorities made clear to him as well as the defense counsel that they could not follow the Indian Law so far as the examination of various witnesses before them was concerned. It is shocking to note that during the course of examination of the witnesses, most of the witnesses have affirmed/confirmed their earlier depositions made before the investigating agencies without deposing in regard to those facts before the said judicial authorities. The prosecution has in fact heavily relied upon even that part of the testimony of Belgium and U.K witnesses as substantive piece of evidence which they had made before the Investigating agencies. Therefore, the important question which arises for consideration is as to whether such a course is permissible and if not what is its consequence. Learned Special Public Prosecutor has made a fervent appeal before us and submitted that the statements made by the Belgium and U.K. witnesses before the investigating agencies are admissible in evidence because they can be treated as previous statements or akin to the statements of the witnesses made u/s 164 Cr.P.C and they are not hit by Section 162 Cr.P.C. In this connection he sought support from a decision of the Supreme Court in the case of Bhogilal Chunilal Pandya Vs. The State of Bombay, which lays down as under:-

"The word "statement" is not defined in the Act. Hence the dictionary meaning of the word should be looked into order to discover what it means. Assistance may also be taken from the use of the word "statement" in other parts of the Act to discover in what sense it has been used therein.

The word "statement" has been used in a number of sections of the Act, viz. Sections 17 to 21, 32, 39, 145 in its primary meaning of "something" that is stated and that meaning should be given to it u/s 157 also unless there is something that cuts down that meaning for the purpose of that section. Words

are generally used in the same sense throughout in a statute unless there is something repugnant in the context.

On a consideration, of the primary meaning of the word "statement" and the various sections of the Act, the conclusion is clear that a "statement" u/s 157 means only "something that is stated" and the element of communication to another person is not necessary before "something that is stated" become a statement under that section. Hence the notes of attendance prepared by a prosecution witness recording the conversation that took place between him and other prosecution witnesses in connection with the defalcation made by the accused would be statements within the meaning of Section 157 and would be admissible to corroborate his evidence u/s 157."

56. We are further surprised to note that salutary provisions of the Indian Evidence Act in regard to the order of examination of witnesses i.e. examination-in-chief, cross-examination and re-examination of the witnesses has not been adhered by the concerned Belgium and U.K. Judicial authorities at the time of examination of the witnesses on commission because most of the Belgium witnesses have been subjected to enemas and detailed examination by putting leading questions in examination-in-chief itself. It is also noticed that several witnesses have confirmed their deposition and exhibited certain documents even after the cross- examination of the witnesses was complete. Such a course is not only impermissible under Indian Law but runs contra to the very basic principles of criminal jurisprudence in India. In this regard reliance has been placed on Punjab and Haryana High Court decision in the case of State of Punjab Vs. Vishwajit Singh and Others, which lays down as under:-

"The submission that as the former statement of the witness was recorded by the order of the Court which had no jurisdiction, it could not be used even for the purpose of contradiction or corroboration or shaking his credit cannot be accepted. The statement of a person does not cease to be his statement merely because it was written in the aforementioned circumstances. Even if the Court had not passed the order for recording the statement and the statement would have been recorded, such a statement could be made use of for the purposes of Sections 145, 155 and 157."

57. Mr. Sidharth Aggarwal, learned counsel for the appellant has submitted before us that the statements made by the Belgium and U.K witnesses before the Investigating Agencies of those countries cannot be treated as or akin to the statement u/s 164 CrI. P.C. The same can only be used for the purpose provided u/s 157 of the Indian Evidence Act for corroboration and contradiction but they by themselves are not substantive piece of evidence. He places reliance on a decision of the Supreme Court in the case of M.O. Shamsudhin Vs. State of Kerala,

58. As noticed by us in the earlier part of this judgment, the initial or rather material investigation of this case was taken up by the Belgium and U.K.

Authorities as the offence was committed in Brussels, Belgium and even the assistance of Inter Pole agencies was taken. As a matter of fact, initially the Belgium authorities had decided to hold the trial of the accused in Belgium and to that end they had sought extradition of the accused which request remained under consideration of the Indian authorities and when the Indian Government decided for extradition of the accused, the Belgium authorities abruptly and without any apparent reason abandoned their request for extradition of the appellant. The result was that the Indian Authorities were left in a limbo as to what course they should adopt. It appears to us that at that stage faced with the above situation, a half hearted decision was taken by the Indian authorities to prosecute the accused in India in accordance with the Indian Law and sanction to that effect was accorded. It is thus apparent that the investigation which was conducted in accordance with the laws of the said countries and was meant for prosecuting and trying the accused in Belgium in accordance with the Belgium laws has been pressed in service for the trial of the appellant by an Indian Court in accordance with Indian law.

59. Code of Criminal Procedure, 1973 clearly states that all offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions contained in the said Code. Admittedly investigation in this case has not been carried out in accordance with the provisions of the said code. Learned Special Public Prosecutor had stated that after the case was registered in India in May, 1983, the Investigating Officer had taken up the investigation of the case in accordance with the Code of Criminal Procedure and he had collected the entire evidence and material which was available with the Belgium and U.K. Authorities and had made the same a part of his own investigation. This submission is unacceptable because we find that the investigating Officer PW-56, O.P. Chatwal Had more often simply lifted the said evidence as it is without doing any investigation of the case himself. Many of the witnesses examined on commission stated that the Indian investigator had never contacted them and never recorded their statements. Learned counsel for the appellant submitted that the trial of the accused based on such an investigation is vitiated more particularly because immense prejudice has been caused to the accused as the evidence collected in Belgium and U.K. Is tainted with the practice and procedure prevalent in those countries, which are contrary to the cardinal principals of Indian Criminal Jurisprudence. On the face of the factual matrix in this regard, we have no hesitation in holding that many glaring irregularities have crept in the investigation and trial of the appellant which had affected the fair trial and the appellant must have been prejudiced on that count. However, in our opinion, these irregularities are not such as to vitiate the trial in its entirety.

60. On a re-appraisal of the evidence and material brought on record and having considered the respective submissions but forward on behalf of the appellant and CBI, we are of the opinion that the prosecution has at best been able to establish the following circumstances:

1) A ritual of marriage ceremony according to Hindu Rites was performed between the appellant and Namita at Delhi on 5-9-1978 but as per the understanding it was not intended to be a real marriage. Namita with her parents left Delhi on the same evening and the marriage was not consummated.

2) The appellant reached London towards the end of February 1979 and started living at the house of the parents of Namita at 22, Friars Way London. The parents of Namita and purchased a terrace house in the joint name of the appellant and Namita for a sum of US Pounds 20,000 and paid for it. Appellant and Namita had opened a joint bank account in Midland Bank London and two cheque books- one each to them was issued.

3) On 7.4.1979, a birthday party of the younger sister Namita was arranged and in the said party the appellant had complained/rebuked Namita about her nature and behavior of freely mixing with male persons more particularly with Phillip David Abbey (PWUK-21) which is followed by a threat by Namita to break away the marriage and two letters Ext. CW13 and CW14 were exchanged between them and thereafter the misunderstanding, if any, was sorted out. On 26-05-1979 a marriage between Namita and appellant was registered at the office of the Registrar of Marriages, London and a marriage reception was held at Phoenix Restaurant, London was held.

4) Appellant and Namita proposed a honeymoon trip through Cosmos Tours, London of about five days duration of some European countries including Belgium commencing from 27-05-1979.

5) On the morning of 27-05-1979 Namita and appellant left for the tour along with their belonging in two suitcases. Namita having a red suitcase Ex.CW26 of Namita and brown suitcase Ext.CW 27 of appellant. They were seen off at Victoria Railway Station by the parents of Namita.

6) The cosmos tour comprised of about 26 persons reached Brussels (Belgium) in the evening at about 6.30 P.M. and all the members of the group checked in different rooms on the 4th floor of hotel Arenberg and the appellant and Namita checked in room No. 415 of the said hotel. After some time the group including Namita and appellant went for a trip of Brussels, "Brussels by Night" and returned to the hotel at about 11.30 P.M. Appellant and Namita retired in their room No. 415. This was the last time when Namita was seen in the company of the appellant.

7) The tours was to proceed to Paris on the morning of 28-05-1979 and all members of the group had instructions to re-assemble in the hall by 7.30 A.M. All the members of the group except the appellant and Namita had assembled in the hall by the appointed time and, Therefore, the tour guide Richard Anthony Cushine (PWUK012) went up and knocked at the door of room No. 415 to whom the appellant told that he and his wife were happy in Brussel and decided to stay back there and they did not want to continue with the tour. The tour guide did not notice any abnormal/exceptional behavior of the appellant though he noticed

that he was perspiring.

8) After some time in the morning hotel maid (PWBG-22) went to room No. 415 for cleaning and found the appellant present alone in the room in an excited condition and thinking that the appellant might be sick offered to call a doctor but the appellant declined. She found the room dark and curtains having been closed and was not allowed to open the curtains/windows by the appellant when she wanted to do so. The appellant asked her to clean the attached bathroom which was soaked with water and wet towels but no trace of any blood etc. or any other incriminating article was noticed by the witness. She found only one suitcase in the room which was having clothes.

9) The appellant did not like Pantry clerk (PWUK-24) to enter his room for taking the reading of the mini bar and for refilling the same against the consumed drinks in the refrigerator. The appellant extended his stay in the hotel for an extra night through the receptionist by filling up a form and checked out of the hotel alone in the non time at 29-05-1979.

10). On the morning of 29-05-1979 one rag picker noticed parts of a human body in container placed at Rue De Loxum and later the body parts viz. Head of which hair have been shaved, nose and lips had been cut, eye brows trimmed and with numerous vertical scars on the face, upper limbs in four pieces and lower limbs below knee level in two pieces of a human body were recovered by the Brussels Police but the recovery of any clothing and shoe etc., along with the body parts is doubtful.

11) A torso of a human body was recovered from Vergote lake on 2-8-1979. The postmortem examination report and the report of the Stomatologist do not inspire confidence because of the infirmities therein as noted by us and rather wholly insufficient to connect that the body parts could only belong to Namita.

12) Similarly the identification of clothing made by PW-48 and PWUK-2 also fails to cogently establish that the clothing and the shoe belong to Namita.

13) Though the defense plea of the appellant is that Namita had left him at about 6.30 A.M. with her belongings yet the appellant did not divulge this fact either to the Tour guide Richard Anthony Cushine, hotel management or staff. No he made any report with the police. He made no efforts to search Namita. He did not inform the parents of Namita even over a period of 36 hours. The Explanation of the appellant that he could not do so because of the language problem as he did not understand French is unacceptable.

14) The appellant stayed at a hotel at Dover Port on the night of 29-05-1979 and reached London in the morning of 30-05-1979 and withdrew a sum of U.K.Pounds 200 from the joint bank account of Midland Bank, London.

15) The appellant visited the house of his in-laws with a suitcase where he was confronted about the whereabouts of Namita and he informed them that Namita had abandoned him at Brussels on the morning of 28-05-1979 and he was taken

to Action Police Station where a missing persons report Ext.CW/31 was lodged in respect of missing of Namita which was signed by Jagdish Singh Lochab PW-48. Therefore the appellant left the company of Jagdish Singh Lochab PW-48 and boarded a running bus. He stayed at Y.M.C.A. London over night and thereafter sneaked into Germany and returned to India on 6-6-1979 and since then he remained underground and was absconding till 9-05-1983 when he was arrested by the police.

61. Now the important question is as to whether these circumstances can be said to be such as to unerringly pointing out to the guilt of the accused which cannot be explained on any other hypothesis consistent with the innocence of the accused. Namita was undoubtedly last seen in the company of the appellant when they retired to their room around mid night on 27-05-1979 and after that she was not seen alive till day even by those who are generally expected to know her whereabouts and Therefore a presumption can safely be drawn under the Indian Evidence Act that she is no more in this world. The onus Therefore lies on the appellant to show as to what has happened to Namita. Appellant has come up with a definite defense plea that Namita was alive upto the morning of 28-05-1979 when she abandoned him but this plea in our opinion is belied by the subsequent conduct of the appellant in not informing any one about the disappearance of his wife and absence on his part to make any search for her over a period of about two days. However, the question is as to whether this circumstance of last seen coupled with the false plea of the appellant is sufficient to establish the guilt of the accused. We have to consider the question in the light of the peculiar facts of this case that Namita was the wife of the appellant and, Therefore, they were naturally expected to retire in their room and nothing unusual can be inferred from this. Although an attempt has been made through the testimony of PWBG-19 and PWBG-26 on behalf of the appellant to show that Namita was seen by them as late as in the morning of 27-05-1979 but on a consideration of the testimony of these witnesses we do not find any substance in this submission. None of these witnesses have said that they had seen Namita on the morning of 28-05-1979 and the learned counsel for the appellant only wants us to infer this from their statement that they were on duty only upto the noon hours of the preceding day, so they could have seen Namita on the morning of 28-05-1979 only. According to the learned counsel the evidence of last seen is a weak type of evidence and cannot solely form the basis for conviction. In this regard he has placed reliance upon two decisions of Supreme Court.

62. In the case of Prem Thakur Vs. State of Punjab, the Supreme Court held that the circumstance that the appellant was last seen in the company of the deceased can be accepted as proved but no inference can arise there from that the appellant had committed their murder. The appellant in that case was working with the deceased and others and there was nothing unnatural in the appellant being in the company of his companions on the evening before the murders were committed.

63. On the face of the forgoing discussion, the ultimate question which arises for consideration is as to whether the chain of circumstances which can be said to have been cogently and firmly established and on the basis of which the inference of guilt is sought to be drawn is so complete and incapable of Explanation on any other hypothesis than that of the guilt of the accused and whether the same are totally inconsistent with the innocence of the accused? In this regard learned counsel representing the appellant has pressed a number of facts and circumstances or lacunae in the prosecution case which according to him have a great bearing on this case because they point out towards the innocence of the appellant and for which no Explanation is forthcoming from the prosecution side. In the first place, the learned counsel strongly contended that the prosecution has miserably failed to establish or even to indicate what weapon was used by the appellant in the commission of the crime, what to talk of recovering and producing such a weapon at the trial. The learned Special Public Prosecutor has not disputed this position, but submitted that it must be within the special knowledge of the appellant as to what weapon was used by him for dismembering and mutilating the body parts of the victim. He, however, vaguely suggested that keeping in view the opinion of the doctor conducting the post-mortem examination that the act of dismemberment of the body parts of the victim was committed by a professional doctor or a butcher, who respected the anatomy of the human body, the possibility of the appellant having used certain surgical implements which he might have carried with him being an Orthopedic surgeon cannot be ruled out. The other possibility floated on behalf of the prosecution is that as the body parts had been simply disjointed from various joints, it could be done by using a fork and butter knife which must be available to the appellant in his hotel room. We have given our thoughtful consideration to the submissions and are of the view that so far as the offence of murder is concerned, no weapon or implement was necessarily required because as per the postmortem report, the death of the person whose body parts were recovered, was the result of strangulation. However, a weapon, implement or object was certainly required for dismembering and mutilating the body parts. The postmortem report is silent as to the nature of possible weapon or implement which might have been used to dismember the body parts. Having regard to the fact that various limbs and bones of the human body are joined by means of muscles and heavy ligaments of tissues at various places it seems impossible to us that the dismemberment of the body parts, in the manner in which it is shown to have been done, could be achieved by using a small butter knife and a fork. In our view, certain heavy instrument(s) of cutting etc were required and must have been used for dismemberment of human body. The next question would arise as to where from the appellant could have procured such implement(s). The answer of the prosecution to this is that the appellant must have carried a direction box with him or in any case procured one from some place in Brussels during the day of 28.5.1979. As rightly pointed out by the learned counsel for the appellant, there is no evidence worth the name to show that the appellant had in fact carried such a dissection instruments with him either from India to U.K. or from

U.K. to Belgium, which otherwise seems to be highly improbable firstly because the appellant and Namita were on a honeymoon trip and Therefore were not expected to carry such instruments and secondly if the appellant was carrying one, the same would have been noticed at Dower Port and immigration could not have possibly allowed him to carry the same. It appears to us that the submission of the learned Special Public Prosecutor are mutually exclusive and essentially based on conjectures and surmises.

64. It was next pointed out on behalf of the appellant that according to the prosecution case, the murder of the victim had been committed during the intervening night of 27th and 28th May, 1979 in Room No. 415 i.e. 4th floor of the Hotel where many other guests of the same tour group were staying and, Therefore, at least some one from the group should have heard the screams of Namita or the noise relatable to the act of dismemberment of the body parts from room No. 415. It is also urged that the appellant must have suffered some scratches or marks of struggle on his body, had he really strangled Namita. We, however, see no merit in this contention because if strangulation is done in a jiffy by pouncing upon the victim thereby hardly leaving any opportunity for the victim to defend herself/himself or if the strangulation is caused on a person who is fast asleep, such a person would have no opportunity to put any resistance or struggle and there would hardly be any sign of struggle or injury marks on the body of the assailant.

65. The learned counsel for the appellant next pointed out that though according to the prosecution, the appellant had used red suitcase Ex.CW-26 for carrying the body parts of Namita, but not a single witness who might have seen the appellant carrying the said suitcase from his Hotel room to the container lying at a distance of about 200 meters from the Hotel or to Vergote Lake has been produced. It is also submitted that the prosecution version, in this regard, is highly improbable because admittedly length of the suitcase is 67.5 cm while the torso measured 69 cm thereby making it impossible to accommodate that body part in the said suit case. Besides, torso was recovered more than two months after the incident which would show that at least the torso had been disposed into the Lake by some one much later than May 28, 1979 or a few days prior to 2.8.1979. If the torso had been disposed on or around 28-05-1979, in Vergote lake, it could not have remained submerged for two months and would have appeared on the water surface within a few days of its disposal. The submission cannot be said to be devoid of force. It is also pertinent to notice here that other body parts namely thighs of the victim remained untraced and the prosecution has not been able to account for these big body parts.

66. Yet another circumstance relied upon from the defense side is that the appellant had withdrawn a sum of U.K. Pound Sterling 200 from Midland Bank, London where he had a joint account although a sum of U.K. Pound 800 approximately was available in the said account and if the appellant had any intention to run away or abscond, he would have withdrawn the entire amount of

UK pound 800 or at least a substantial portion thereof. This according to him goes against the prosecution theory that appellant was guilty and wanted to abscond. Learned Special Public Prosecutor submitted that the appellant had withdrawn Pounds 200 only because he must be aware that out of total deposit of Pound 800, Namita had already issued a cheque for pound 678 to meet the bill of Reception held at Phoenix restaurant, London on the evening of 26.5.1979. This possibility cannot be ruled but in our opinion nothing much turns on this. learned counsel for the appellant has invited our attention to the missing person's report Ex.CW/31 which is signed by PW-48 and contains the version of the appellant that Namita had left him with her luggage from the Hotel room in the morning of 28.5.1979. This would in turn show that PW-48 did not entertain any doubt in the version of the appellant and did not suspect any foul play on the part of the appellant in the disappearance of Namita.

67. The ultimate question which now needs to be answered is as to whether on the strength of the material circumstances as can be said to have been established by means of cogent and reliable evidence, was the learned trial court justified in recording the finding of guilty and convicting and sentencing the accused. According to the learned Special Public Prosecutor "yes". He has strongly urged that the cumulative effect of overwhelming circumstances established on record should not leave any doubt in the mind of the court that it was the appellant alone who is the perpetrator of the crime. In this connection, he has recounted the material circumstances about Namita having been last seen alive in the company of the appellant on the fateful night intervening 27th and 28th May, 1979; appellant having floated a false defense about Namita having left him in the morning of 28-05-1979 but having not disclosed this fact either to the tour guide PWUK-12 Cushine or any staff member of the hotel or the Belgium or Indian or UK Embassy; nor he made any effort to trace his newly wedded wife for two days, nor sought help from any other quarter in that behalf. His over stay at the hotel Arenberg, Brussels for a day and thereafter recovery of human body parts on 29-05-1979 from a garbage bin lying at a distance about 200 meters from hotel Arenberg, Brussels and the subsequent conduct of the appellant in running away from the company of his father-in-law Jagdish Singh Lochab in the evening of 30-05-1979, and his clandestine return to India via Germany and he having gone underground hiding in a remote village in UP for four years uptill 9-05-1983 when he was arrested by the police/CBI are bereft of any other circumstances are sufficient to establish the guilt of the accused. According to him certain discrepancies and inconsistencies or lacuna pointed out from the appellant side are insignificant and are not sufficient to shake the edifice of the prosecution case. Similarly the alleged irregularities in the investigation and trial are also stated to be of no consequence and in any case they are not sufficient to vitiate the whole trial or to acquit the accused.

68. Mr. S.K. Saxena, Special Public Prosecutor, CBI has vehemently urged before us that the evidence and the circumstances relied upon by the prosecution must be taken as a whole and the circumstances should not be scrutinized in isolation.

To fortify his submission he has placed reliance upon the decision of the Supreme Court in the case of Inder Singh and Another Vs. The State (Delhi Administration), Justice V.R. Krishna Iyer speaking for the Court observed as under:-

"Credibility of testimony, oral circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. While it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that it should be perfect. If a case is proved too perfectly, it is argued that it is artificial; if a case has some flaws, inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty men must be callously allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human processes. Judicial quest for perfect proof often accounts for police presentation of fool-proof concoction. Why fake up? Because the court asks for manufacture to make truth look true? No, we must be realistic".

69. He has also placed reliance upon another Supreme Court decision in the case of The State of Punjab Vs. Jagir Singh, Baljit Singh and Karam Singh, where in para 23 the Court observed as under:-

"A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving in the conclusion about the guilt of the accused charged with the commission of a crime, the court to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. 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".

70. Mr. Saxena also submitted that by the process of elimination of all other hypothesis, the circumstances proved on record lead to the only conclusion that within all human probabilities the appellant committed the murder of Namita and dismembered and mutilated her body parts. To support his contention, he has heavily relied upon a decision of the Supreme Court in the case of Laxmi Raj Shetty and Another Vs. State of Tamil Nadu, . In this case while reiterating the settled legal position the Apex Court held that in cases where the evidence is of circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts 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.

71. Learned counsel for the appellant, on the other hand has strongly urged before us that the undisputed circumstances and the circumstances which can be said to have been firmly established on record by means of cogent evidence would at best raise a suspicion that the appellant is perpetrator of the crime. He has pressed into service the cardinal principle of Criminal Jurisprudence that the suspicion, howsoever strong, it may be, cannot take the place of proof and it must be proved beyond reasonable doubt that the accused had committed the offence with which he was charged. Here we are also reminded of another well settled legal position that even when morally or consciously, the accused may appear to be guilty on the basis of suspicion, it cannot amount to legal proof and he cannot be convicted. It does not, justify a prior assumption and cannot warrant a finding of guilt. It is equally well settled that "graver the crime greater should be the standard of proof". Where the murder is cruel and revolting, it is necessary to examine the evidence with more than ordinary care, lest the shocking nature of crime induce a reaction against a dispassionate judicial scrutiny of the facts and law.

The accused must be and not merely may be guilty, before a court can convict him. The long distance between "may be" and "must be" has to be travelled by prosecution by legal, reliable and unimpeachable evidence before the accused can be convicted of grave offence like murder.

72. Learned counsel for the appellant relied on the decision of the Supreme Court in the case of Subash Chand v. State of Rajasthan (2002) SCC 702 wherein it was held as under:-

"The Court has to proceed to examine each of the piece of incriminating circumstantial evidence so as to find out if each one of the circumstantial evidence is proved individually and whether collectively it forges such a chain of incriminating circumstances as would fasten the guilt on the accused beyond any shadow of reasonable doubt. None of the pieces of evidence relied on as incriminating, by the trial court and the High Court, can be treated as incriminating piece of circumstantial evidence against the accused. Though the offence is gruesome and revolts the human conscience but an accused can be convicted only on legal evidence and if only a chain of circumstantial evidence has been so forged as to rule out the possibility of any other reasonable hypothesis excepting the guilt of the accused. "Human nature is too willing, when faced with brutal crimes, to spin stories out of strong suspicions". Between may be true and must be true there is a long distance to travel which must be covered by clear, cogent and unimpeachable evidence by the prosecution before an accused is condemned a convict".

73. On a consideration of the totality of the facts and circumstances of this case, evidence and the material obtaining on record and the rival contentions put forth on behalf of the prosecution and the defense, we are of the considered opinion that the chain of circumstances as relied upon and which can be said to have been established do not form a chain so complete as to draw an irresistible conclusion which is consistent only with the hypothesis of the guilt of the accused. As noticed in the earlier part of this judgment, the chain of circumstance relied upon by the prosecution has broken at various stages, thereby leaving a scope and reasonable ground for a conclusion consistent with the innocence of the accused. For the sake of repetition, we may notice here that the very fact that the appellant had returned to his in-law's house on 30-05-1979 is a pointer towards the innocence of the accused because it appears to be highly improbable to us that the appellant after having committed the murder of his wife Namita and having dismembering, mutilated and disposed of her body parts would ever think or take a risk so high of visiting the house of the parents of the victim. One question, however, stares at our face as to what happened to Namita. This is not in our realm to answer. What this Court is required to see is as to whether the prosecution has been able to bring the guilt home to the accused beyond reasonable doubt. Our answer would be in negative. We can at best express our sympathies to the family members of Namita but at the same time unable to uphold the finding of guilt recorded by the learned trial court.

74. In the result, we allow the present appeal and set aside the conviction and sentence of the appellant and acquit the appellant of the charges by giving him benefit of doubt. He shall be released forthwith, if not required to be detained in connection with any other case. Before parting with the case, we would like to put on record our appreciation for the valuable assistance received by us not only from the young defense counsel Mr. Sidharth Aggarwal but also from Mr. S.K. Saxena, Special Public Prosecutor representing the State/CBI.