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**(1994) 08 AHC CK 0061**  
**In the Allahabad High Court**  
**Case No : Criminal Appeal No. 2583 of 1977**

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| Fateh Singh | Vs | APPELLANT  |
| State       |    | RESPONDENT |

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**Date of Decision :** 16-08-1994

**Acts Referred:**

Evidence Act, 1872 — Section 120, 122  
Penal Code, 1860 (IPC) — Section 164, 201, 302

**Citation :** (1995) CriLJ 88

**Hon'ble Judges :** S.K. Phaujdar, J; Giridhar Malviya, J

**Bench :** Division Bench

**Advocate :** T. Rathore and M.D. Singh, for the Appellant; A.G.A., for the Respondent

**Final Decision :** Allowed

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## Judgement

S.K. Phaujdar, J.—This is an appeal by one Fateh Singh who was convicted by the Vth Additional Sessions Judge, Bulandshahr on 1-11-1977 under Sections 302 and 201 IPC in S. No. 207 of 1975 and has been sentenced to Life Imprisonment for his conviction u/s 302 IPC and to RI for one year for his conviction u/s 201 IPC. The sentences were to run concurrently. The appellant is on bail by an order of this Court dated 9-11 -1977.

2. According to the prosecution story, it is a case of murder of a teenaged brother-in-law by his sister's husband for absolute inheritance of the property of the in-laws. It is alleged that the appellant Fateh Singh had taken away his wife's minor-brother, Ganga Prasad, from village Peetubash, P. S. Sikandarabad on 1-10-1974, and he took him to Delhi and had committed murder of the boy by strangulating him and had thrown away the dead-body in a ditch.

3. On 4-10-1974 Ram Kali, the mother of the deceased lodged a report at Sikandarabad police station stating therein that her only son Ganga Prasad, aged about 12 years, had come home from his college at about 10 a.m. and after giving him the meals the mother went to the forest. On her return at about 1

p.m. she did not see the boy in the house. She made searches here and there and only thereafter the report (marked Ext. Ka. 2 during trial) was lodged. In this report, the mother of the boy indicated the description of the boy as also the description of the dress he wore on that day.

4. The details of the proceedings and the statements during investigation may not bother us at the present moment. It will suffice saying that the mother had lodged another report before the Chief Judicial Magistrate, Bulandshar on 20-11-1974 (marked Ext. Ka. 3 during trial) in which she made a definite allegation against Fateh Singh and others of having kidnapped her son for the purpose of murder. During investigation Fateh Singh was arrested and, it is stated, at his instance police had recovered bones and torn clothes from a ditch in village Malsua within P. S. Alipur in Delhi. On post-mortem examination of the bones those were identified to be that of a male aged between 12-14 years and the torn pieces of clothes were identified by the mother and others as those of the deceased Ganga Prasad. There were witnesses who had seen Ganga Prasad and Fateh Singh together on the fateful day and it is further alleged that Fateh Singh had made certain statements implicating himself in the crime. There is no eye-witness to the occurrence and, as rightly commented by. the learned Trial Judge, the case rests on circumstantial evidence alone.

5. In a criminal trial depending on circumstantial evidence it is well-settled principle that a conviction may be based on circumstantial evidence provided the chain of circumstances is so linked that it points only to the accused and none else as the perpetrator of the crime. In other words, the circumstances must be such from which the court would come to the irresistible conclusion that it was the accused and the accused alone who had committed the murder and the chain of circumstances must be incompatible with the theory of innocence of the accused. We would, accordingly, analyse the evidence in this light to see if the chain of circumstances is unbroken and leads us to the only hypothesis of the guilt of the present appellant. The circumstances alleged in this case may be categorised as follows:--

1. The appellant was last seen with the deceased on the fateful day.
2. At the instance of the appellant certain human bones and clothes were recovered.
3. The appellant had made certain statements to some witnesses including his wife.
4. The appellant had written certain letters and exhibited certain conduct allegedly relevant to the charge.
6. At the outset we must point out that the learned Sessions Judge has misdirected himself in accepting the statement of Kamlesh (P. W. 3. the wife of the accused, on the point of certain communications made by the accused to her. This was clearly inadmissible being hit by the provisions of Section 122 of the

Indian Evidence Act. This Section bars acceptance of communication made during marriage. The first part of the section speaks of a bar against compulsion of a wife or a husband to speak against the husband or the wife on communications made during marriage, except in a litigation between themselves. The second part of the section is very important so far as this case is concerned. It enunciates that no such husband or wife shall be permitted to disclose the communications received from the other spouse during marriage unless consented to by him or her. In the present trial neither in the ordersheet nor in the deposition or elsewhere there is any indication that Fateh Singh had ever consented to the disclosure of the communications allegedly made by him to his wife, Kamlesh. It is true that u/s 120 of the Indian Evidence Act, in a criminal Proceeding the wife would be a competent witness against the husband but this alone may not save the situation for the prosecution in this case. Kamlesh is certainly a competent witness to be examined in the trial against her husband. But the provisions of Section 122 of the Indian Evidence Act were absolute and the learned Sessions Judge should not have permitted Kamlesh to disclose the communications she received from Fateh Singh, such communications under the law may be of any nature and need not necessarily be confessions. In this connection the law has clearly been enunciated by the Supreme Court in the case of Ram Bharosey Vs. State of Uttar Pradesh, indicating that communications made to his wife by the accused were inadmissible while the evidence of the wife on other points excepting the communications may be admissible.

7. We must, therefore, at the outset exclude from the evidence of Kamlesh such portions as were communications from her husband as inadmissible pieces of evidence. We make it clear, however, that the statement of Kamlesh need not be thrown away altogether. It will be seen if other parts of her statement would bring in circumstances on record pointing to the guilt of Fateh Singh.

8. There was, in our opinion, admission of another inadmissible piece of evidence by the learned Sessions Judge. According to the prosecution story, the first report of missing of the boy was made on 4-10-1974. We may refer to the statement of PW 22, Kripal Singh, SI of police. His evidence discloses that in October 1974, the report of missing of Ganga Prasad entered as a general diary in police station Sikandarbad and on 7-10-1974 the statement of Ram Kali was recorded. A sketch map was prepared. The witnesses were examined and their statements were recorded and on 19-10-1974 a Cril.Case No.258 of 1974 u/s 364 IPC was registered. Papers concerning demand of ransom were seized on 12-11-1974, the house of the present accused was visited and from all these facts it is clear that an investigation was already on. Under this light the report of Ram Kali to the Chief Judicial Magistrate on 20-11-1974, which was forwarded to the police station concerned, can only be treated as a statement during investigation and it could not, therefore, be belied upon except for the purpose of contradicting the maker thereof under the provisions of law. The learned court below, however, had exhibited this report dated 20-11-74 as Ext. Ka. 3 and

admitted it in evidence which was contrary to law. We shall during our analysis make reference to this exhibit Ka-3 only as a "previous statement to see if attention thereto was drawn and if it can be used for contradicting Ram Kali in any manner and for no other purpose. The evidence on the point of last seen has come from PW 7 Kanchan, PW 4 Baljeet, PW 5 Bireka and PW 6 Deep Chandra. The evidence on the point of recovery of bones has come from the police witnesses only and the public witnesses on the point of recovery, namely, Gokal Chand and Bhoop Singh had turned hostile. The evidence on the point of statements, and conduct of Fateh Singh have come from witnesses, Ram Kali, Kamlesh, Mahendra and others.

9. We shall first take up the first circumstance of the "last seen". Evidence on this point has come from PW 4/ Baljeet, PW 5 Barekha, PW 6 Deep Chand, PW 7 Kanchan Singh, and to some extent from PW 8 Mahendra and PW 11 Ram Kali. PW 4 speaks that on the relevant day he had seen the deceased Ganga Prasad and Fateh Singh moving together and he made the first ever statement on this point after 3 months to the Investigating Officer. Although he gave the description of the dress of the boy no such statement was made to the police. He had asked "them" as to where were they going. "They" had stated to him that they were going on some business. This statement may not be admissible as it is not clear as to who made it. PW 5 saw Fateh Singh and the deceased Ganga Prasad moving in a bus in which this witness was also travelling and they had gone to Delhi. Fateh Singh told this witness that he was going to Samaipur. This witness is an uncle of the deceased Ganga Prasad and he made the first ever statement to police after 3 months, and that too, at the instance of another person only after the arrest of Fateh Singh, the appellant. PW 6 Deep Chand claimed to have seen Fateh Singh and a boy aged about 12 at Samaipur bus stand. Fateh Singh told him that he was going to a village and the boy accompanying him was his "sala" (wife's brother). They took the rail track and went away. He also made the first statement to police only after 3 months of the incident. PW 7 Kanchan Singh's evidence requires a bit more attention. He claims to have seen Fateh Singh and Ganga Prasad coming from the school at about 10-30 a.m. on the relevant date. He made the first statement to police only after the recovery of the bones. He claims to have told Ram Kali three days after this incident that he had seen Ganga Prasad going with Fateh Singh. The claim of this witness that he had told Ram Kali within 3 days of the incident may be judged against the statement of Ram Kali as also her first report dated 4-10-1974. In that report, she makes no whisper about Fateh Singh as having taken Ganga Prasad. In her statement Ram Kali stated that the boy had returned home from college at 10 a.m. on that date and there also there is no reference that Fateh Singh had come with him. That very day she had made searches and the school children told her that Fateh Singh had come to the school and had taken away Ganga Prasad. She was also told by Kanchan on the second day itself that Fateh Singh had taken away Ganga Prasad. She was told by Baljeet also about Ganga and Fateh Singh moving together. PW 8, Mahendra Singh, was informed by his

sister Ram Kali about the missing of Ganga Prasad and also about the fact that Fateh Singh had taken away the boy from the school. Mahendra had confronted Fateh Singh on the next day and he was told that boy was left at his residence. The first report was lodged after all these deliberations. Even then the first report dated 14-10-1974 is absolutely silent about Fateh Singh. To explain away this lapse a paragraph was written in the petition of Ram Kali dated 20-11-1974 that it was Fateh Singh at whose instance the initial report was wrongly recorded. This fact that Fateh Singh was behind this false report may not be accepted as the constable who received this statement does not speak a word that Fateh Singh was with Ram Kali at that time. Moreover, Mahendra Singh, brother of Ram Kali, had, by the time the report dated 14-10-1974 was written been told everything and there is no reason why he should have allowed Fateh Singh to accompany Ram Kali to the police station and why he himself should not have gone with her. The fact that Fateh Singh had taken away the boy was known to Ram Kali and others almost immediately on 1-10-1974 and the absence of any mention of Fateh Singh in the report dated 4-10-1974 casts a doubt on the veracity of this fact. The witnesses who had seen Fateh Singh moving to different places with Ganga Prasad were all examined after 3 months and there is no reason why they had not advanced any statement during this period. Thus, the evidence of "last seen" as brought out by the prosecution is not free from doubt. Moreover, we must not forget the relationship between Fateh Singh and the deceased Ganga Prasad, Fateh Singh being the "Jija" (Sister's husband) and Ganga Prasad being the "sala" (wife's brother), and it is very natural that they moved together. Even if the evidence would have been believed that Fateh Singh was last seen with Gdriya Prasad, such evidence by itself would not have pointed out to any criminal intention of Fateh Singh.

10. We may now come to the point of recovery of bones. The witness on the point of recovery of bones and pieces of clothes are PW 13 Inspector V. P. Tyagi, PW 14 Bhoop Singh, PW 17 Gokal Chand, PW 21 Badri Nath the Sub-Inspector of Police and PW 22 Kripal Singh. The prosecution case on this point is that Fateh Singh was arrested on 5-12-1974 and he made a statement to V. P. Tyagi that he could help recovery of dead body of Ganga Prasad along with his clothes. It is stated that Sri Tyagi along with Sub-Inspector Kripal Singh and the accused had gone to the place of recovery along with the Sub-Inspector Badri Nath and a constable of that area. Two witnesses, Gokal Chand and Bhoop Singh, had also gone there. At the instance of Fateh Singh some bones and some pieces of clothes were recovered from a ditch near the railway track. Sub-Inspector V.P. Tyagi admits in cross-examination that he had made no memo or document that the accused, after his arrest, had made a statement that he could help in the recovery of the dead body and clothes of the deceased. The two public witnesses on this point, namely, PW 14 Bhoop Singh and PW 17 Gokal Chand, have not supported the prosecution case. Bhoop Singh clearly stated that the accused had not taken the police to any place for recovery. No recovery of bones or pieces of clothes was made in his presence. Similar is the evidence of Gokal Chand.

According to him, Sub-Inspector Badri Nath told him to ask the accused whether at his instance bones etc. were recovered. On his asking the accused did not say anything. It is clear that no recovery was made in his presence, but certainly certain bones etc. were sealed in his presence by the police. We, therefore, are left with the police witnesses alone on the point of recovery of bones. It is true that there is no law debarring acceptance of statements of police witnesses, but the present case relates to a recovery at the instance of the accused, and we must, therefore, look to the evidence of police witnesses from the point of broad probabilities. The killing, if any, must have been done on 1-10-1974, according to the prosecution case. The ditch is by the side of the railway track and the sketch map indicates that it is not far away from the road. PW 6, Deep Chand, had made a statement that he had seen Fateh Singh moving along the railway track. This at least suggests that people do use the railway track for moving from one village to another. The dead body, according to the prosecution story, was not dug out. The bones were lying scattered and the recovery was made more than 2 months after the incident. It was only natural that after the death the dead-body will putrefy and would give out worst ever smell and this would attract the attention of the passers-by, at least vultures in flocks would have been attracted to it giving another indication. It is not impossible, therefore, that the bones were located from other information and the story of recovery of bones at the instance of the accused is an afterthought. This explains why Bhoop Singh and Gokal Chand denied to have seen any recovery although they said that certain bones were shown to them by police and those were sealed. Thus, the circumstance of recovery of bones at the instance of the accused is not free from doubt.

11. We are left with certain alleged statements and certain conduct of the accused and we will now take up those circumstances.

12. The first witness relating to this point is PW 2 Jai Kishan. It is said that 15 days after the boy was untraced. Fateh Singh had told this witness that the boy may be recovered if Rs. 7000/- could be arranged Fateh Singh offered to pay the rest of the sum if this witness could arrange Rs. 2000/-. This witness did not disclose, this fact to Ram Kali lest she may doubt his involvement in the matter. He disclosed this fact only after the fact of murder of the boy came to light. Admittedly, this witness had some property dispute with Ram Kali and there is no reason why Fateh Singh being the son-in-law of Ram Kali would ask this witness to pay money. His evidence further discloses that Ram Kali initially doubted his hands in the matter. It is natural that he would try to exculpate himself from any possible charge. He disclosed this fact to the police only in January.

13. The next witness concerning the conduct of Fateh Singh is his wife Kamlesh. On the concerned date Fateh Singh had left the house in the morning and came back the next evening and he was found visibly disturbed. The reason obviously, according to the evidence, was that he had " gone in search of a service and did not get order and from this conduct of uneasiness on his part, his involvement in

the crime would be a farfetched conclusion. PW 8 Mahendra is another witness on this aspect of the case. On 1-10-1974 Fateh Singh had gone to his house during night and Mahendra also found him in a disturbed state of mind. Even during sleep he was tuttering something "Hai Main Mar Gaya" (Alas: I am dying). This witness also says that Fateh Singh was in search of some service and could not get it, and that explains the uneasiness on the part of Fateh Singh. Then comes a letter through which a ransom was demanded. Mahendra Singh says that this letter was shown to him by Ram Kali. One witness has been examined on the point of this letter. He is PW 9, Liaquat. He says that Fateh Singh had given him a letter asking him that he may reach it to his in-laws, through one Misri Dudhiya. This witness gave the letter of Misri Dudhiya and he did not say anything more on this point. Misri Lal. PW 10, speaks that on being asked by Liaquat he made over the letter to Ram Kali and he identifies Ext. 2 which was already brought on record through Mahendra Singh. According to Liaquat, the letter was a closed one and Misri never says that he opened the letter and so the claim of Misri that Ext. 2 (a letter in a plain chit of paper) was a letter handed over to by him to Ram Kali. It does not appeal to reason. Moreover, this letter has not been proved to be in the handwriting of Fateh Singh. Prosecution rather examined one Sakhijan as PW 12 who claimed to have written this letter at the instance of another person but he could not categorically state that the accused Fateh Singh got it written through him. We may not, therefore, place any reliance on Ext. 2, the ransom letter, in connecting Fateh Singh with it. There are two more letters said to have written by Fateh Singh and those letters-said to have written by Fateh Singh and those are Ext. 7 and 8. These are two inland letters proved by Mahendra Singh to be in the handwriting of Fateh Singh. Those two letters were said to have been sent by Fateh Singh from jail, as per statement of Mahendra Singh. In Ext. 7 there is a threat that if the letter is not answered, then Fateh Singh would retort with gun "Jawab goli Se Diya Jayega". In Ext. 8 there is one line to the effect that "they would also meet the same fate as Ganga Prasad" ("Ganga Prasad Ke Saath Jo Hua Wahi Hoga"). This statement is also too vague to be taken as a confession and at best it could be read as a threat.

14. It is true that the circumstances placed on record by the Prosecution, as discussed above, casts a suspicion on Fateh Singh but in appreciating the evidence the court must not allow the suspicion, however strong, to take the place of proof. In our view, the circumstances placed on record by the prosecution concerning the last seen, the recovery of bones and the conduct of Fateh Singh do not lead us to the irresistible conclusion of guilt of Fateh Singh of having murdered the boy, Ganga Prasad, beyond shadow of doubt. If he was not the murderer he cannot as well be blamed for having the dead body disposed of in the ditch, and on that point also there is no evidence. We must, therefore, hold that the conviction and sentences of Fateh Singh cannot be upheld.

15. In the result, the appeal stands allowed. The accused is acquitted. He is already on bail. He is discharged from his bail bonds.