

(2013) 01 SHI CK 0087

In the High Court Of Himachal Pradesh

Case No : Criminal Appeal No's. 136 and 374 of 2006

Kuldeep Kumar

APPELLANT

Vs

State of Himachal Pradesh
 Manoj Kumar Vs State of
Himachal Pradesh

RESPONDENT

Date of Decision : 09-01-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Evidence Act, 1872 — Section 114, 133
Penal Code, 1860 (IPC) — Section 201, 302, 34, 382

Citation : (2013) 2 ShimLC 669 : (2013) 1 ShimLC 517

Hon'ble Judges : Kuldeep Singh, J;Deepak Gupta, J

Bench : Division Bench

Advocate : M.S. Chandel, with Mr. N.S. Chandel and Mr. Dinesh Thakur, in Cr. Appeal No. 136 of 2006, Mr. Jagdish Vats in Cr. Appeal No. 143 of 2006 and Mr. Anup Chitkara and Ms. Divya Sood, in Cr. Appeal No. 374 of 2006 and Cr. Appeal No. 312 of 2008, for the Appellant; Ramesh Thakur, Assistant Advocate General, for the Respondent

Final Decision : Allowed

Judgement

Deepak Gupta, J.—These four appeals are being disposed of by a common judgment since they arise out of the same incident and judgment whereby all the four accused were convicted of having committed offences punishable under Sections 302, 382, 201 read with Section 34 IPC and sentenced as follows:-

Accordingly, all the four accused are sentenced to life imprisonment and to pay fine of Rs. 25,000/- each for offence u/s 302 IPC and in default of payment of fine they shall further undergo simple imprisonment for one year each.

The accused are further sentenced to R.I. for five years each and to pay fine of Rs. 10,000/- each for offence u/s 382 IPC and in default of payment of fine they shall further undergo simple imprisonment for one year. At the same time all the accused are sentenced to R.I. for three years each and to pay fine of Rs.

10,000/- each for offence u/s 201 IPC and in default of payment of fine they shall further undergo simple imprisonment for six months each. All the sentences shall run concurrently. All the fine amount imposed on its realization shall be paid to the LRs of deceased Rakesh Gautam and Vijay Kumar in equal amount.

The four appellants along with fifth accused Arun Kumar alias Vicky, who turned approver and was granted pardon, were charged with having committed the murder of one Sh. Rakesh Gautam and his driver Vijay Kumar and also of having committed theft of the money belonging to Rakesh Gautam in furtherance of their common intention.

2. Briefly stated the facts of the case which are really not in dispute are that Usha Guleria ran a public call office (PCO) at Rasoo Chowk near Ranital. She also used to run a taxi and the approver Arun Kumar was employed by her as a driver. Accused Kuldip Kumar used to assist Usha Guleria in her shop. Manoj Kumar and Ashok Kumar were residents of Rasoo Chowk.

3. Rakesh Gautam (deceased) and his brother PW-6 were whole sale dealers running business under the name and style of M/s. Sidharth traders. They used to supply Karyana articles at various places in Kangra District and Rakesh Gautam used to go every Thursday to collect money from the shopkeepers. He on 9.10.2003 had left Damtal about 7 a.m. in the morning in his Maruti car No. HP-38A-3917. The car was being driven by Vijay Kumar.

4. On 10th October, 2003 at about 9.15 a.m. a journalist Jitender Sharma, who was correspondent of Divya Himachal, made a telephonic call to PW-34 Inspector Sanjiv Chauhan, SHO Police Station Kangra to the effect that a burnt Maruti car alongwith two dead bodies was lying near Bharari Khad. On receipt of this information PW-34 alongwith S.I. Surestha and other police officials proceeded to the spot after recording daily diary report Ext.PW-29/A. When the police officials reached the spot, PW-34 noticed that the burnt car was lying below the Dhank (steep cliff) around 80 yards below the road. Two dead bodies were found lying between the road and the car. The first body which was that of Vijay Kumar (driver) was found at a distance of 50 yards from the road. The second body was of Rakesh Gautam and was lying 59 yards below the road. Other burnt items were found scattered all over the hill side. Some burnt currency notes were also found near the dead body of Vijay Kumar. One plastic Can (marked Ginni) was found near the car and from it kerosene oil could be smelt.

5. Since Rakesh Gautam had not reached home his brother Naresh Gautam PW-6 had made inquiries about the whereabouts of his brother. When his brother did not return the next morning also, he alongwith some persons went in search of Rakesh Gautam in Kangra area. They came to know that some car had met with an accident in Sarotri area. They reached the spot and here the witness identified the bodies of his brother Rakesh Gautam and his driver Vijay Kumar. Naresh Gautam suspected that his brother had been murdered.

6. The prosecution case as initially set up in the challan was that accused Usha

Guleria had illicit relations with deceased Rakesh Gautam. She thereafter developed illicit relations with co-accused Kuldeep Kumar who used to work in the STD booth with her. Both of them conspired to kill Rakesh Gautam with the intention to grab the money which he used to collect from the various traders and was carrying with him back to Damtal. The prosecution story also was that Usha Guleria owed a huge amount of money to Rakesh Gautam. Therefore, the motive ascribed to get rid of Rakesh was to avoid paying her debt, steal the money which Rakesh Gautam was carrying and carry on her illicit relations with Kuldeep Kumar.

7. The prosecution also alleged that in furtherance of their common intention Kuldeep Kumar, Manoj Kumar and Ashok Kumar alongwith approver Arun Kumar went in the van owned by Usha Guleria to the place of the crime near village Farna. Thereafter Usha Guleria managed to take deceased Rakesh Gautam in his car to the same place. When the two reached village Farna the other accused i.e. Kuldeep Kumar, Manoj Kumar and Ashok Kumar and approver Arun Kumar were hiding there. As soon as Usha Guleria and the deceased Rakesh Gautam alighted from his car and started walking towards the jungle Kuldeep Kumar attacked deceased Rakesh Gautam and pushed him to the ground and thereafter stabbed him with a dagger/Khukri. All the four accused attacked Rakesh Gautam and finished him off with knives and daggers. After Rakesh Gautam died his body was put in his Maruti car No. HP-38A-3917. Approver Arun Kumar was made to stand near the car. Thereafter, the other four accused Manoj Kumar, Kuldeep Kumar, Ashok Kumar and Usha Guleria returned to Rasoo Chowk in the van. They returned after about 20 minutes to village Farna. According to the prosecution, Vijay Kumar, driver of Rakesh Gautam, was sitting in the residential quarter of Usha Guleria and the four accused went to get him from there. They told Vijay Kumar that his car had got spoilt and he had been called by Rakesh Gautam. Then Vijay Kumar accompanied the four accused in the van. After the van had moved for some distance Manoj Kumar and Kuldeep Kumar, who were sitting in the dickey of the van started beating the driver Vijay Kumar and by the time they reached Farna Vijay Kumar was half dead. After the van reached Farna then approver Arun Kumar drove the car of Rakesh Gautam and went towards Baroh. Ashok Kumar drove the van whereas Arun Kumar drove the car. When they reached near Kallar (Thandapani) Vijay Kumar, who was seriously injured, started thrashing around in agony. The van was stopped and Kuldeep Kumar got down from the van and said that the driver Vijay Kumar was still alive. Upon this Arun Kumar got down from the car which he was driving and gave a blow on the head of the driver and the driver also died. Thereafter, the body of Vijay Kumar was also put in the car belonging to Rakesh Gautam. At this point, the five accused alongwith the two cars were seen by witness Paramjit. Thereafter, both the cars were driven on the road going from Baroh to Suni and when they reached near a big curve the vehicles were stopped. Petrol was taken out from the van and was put on the dead bodies of Rakesh Gautam and Vijay Kumar and then they were burnt. The money which Rakesh Gautam had collected was taken

out by Usha Guleria and as per the plan the five accused pushed the car belonging to Rakesh Gautam down the cliff near Kharota jungle at Sarotri. They then returned to Rasoo Chowk. The seat covers of the van were burnt in the Khud and the weapons were washed with soap. According to the prosecution at Kharota when the accused was taking the petrol out of the van they were seen by witnesses Ashwani Kumar and Anup Kumar. At this stage, it would be pertinent to mention that these facts were stated in the challan which was filed in Court on 2.1.2004 and thereafter Arun Kumar turned approver and the complexion of the case changed considerably. After investigation, the accused were charged with having committed the offences aforesaid. They pleaded not guilty and claimed trial. After trial they have been convicted. Hence, these appeals by the accused.

Medical Evidence:

8. On behalf of the appellants it is firstly urged that the prosecution has failed to prove that the death was homicidal in nature. It would be pertinent to refer to the statement of the doctor at this stage.

9. PW-1 Dr. Aditya Kumar Sharma, carried out the post-mortem on the bodies of Rakesh Gautam as well as driver Vijay Kumar. He could smell some petroleum product from the bodies and burnt clothes. He found the following 11 injuries on the body of Rakesh Gautam:-

1. Red abraded contusion of size 8x5 cms present on the midforehead.
2. Red abraded contusion of size 3x3 cms present on the right side of the face.
3. Red contusion of size 4x3 cms present over left sided parietotemporal region of scalp.
4. Red contusion of size 5x4 cms present over right sided frontotemporal region of scalp.
5. Whole of upper and lower lip contused.
6. Lacerated wound of size 1x1x.5 cms present in the inner aspect of upper lip.
7. Red contusion of size 8x4 cms present over midsternal region of chest.
8. Red contusion of size 4x4 cms present over frontomedial aspect of right knee.
9. Red contusion of size 4x4 cms present over frontal aspect of left knee.
10. Lower 1/5th of left leg and whole left foot found missing with bones. Fractured ends of left tibia and left fibula bone exposed.
11. Red contusion of size 3x3 cms present in mid occipital region of scalp.

Injury No. 1 to 11 were ante mortem in nature and caused by blunt trauma. No foreign body present in injury No. 1 to 11.

10. All these injuries were ante mortem in nature and caused by blunt weapon. He also found that most of the body of Rakesh Gautam was charred. He was of the view that the burns were ante mortem in nature. According to his opinion, Rakesh Gautam, died due to combined effect of cardiac tamponade and ante mortem burns. According to him except injury No. 10 all other injuries could be caused by fist and kick blows. He also opined that injuries No. 1 to 11 were possible if a live man was closeted in a vehicle, set on fire, and the vehicle was rolled down a hill. In cross-examination he accepted to be correct the suggestion that the burn injuries found on the person of Rakesh Gautam were possible if he was in a vehicle which caught fire due to an accident. According to this witness the probable time between injury and death was few hours.

11. This witness also carried out the post mortem on the body of Vijay Kumar and found the following injuries on his person:-

1. Red abraded contusion of size 8x6 cms present over midforehead.
2. Incised looking lacerated wound of size 3x1x1 cm present over right side of forehead, clotted blood oozing from the wound.
3. Red contusion of size 4x4 cms present over right temporal region of scalp.
4. Red abrasion of size 2x2 cms present over right cheek.
5. Upper and lower lip contused.
6. Lacerated wound of size 3x1x1 cms present over mid-occipital region of scalp.
7. Lacerated wound of size 3x1x1 cms present over right occipital region of scalp. Clotted blood present in injury No. 6 & 7.
8. Red abrasion of size 3x1 cms present over the nose.
9. Incised looking lacerated wound of size 22x6 cms present over anterior aspect of neck passing deep through skin, subcutaneous tissue, infrahyoid muscles, further extending through thyrohyoid membrane and ligament, above the level of thyroid cartilage extending further deep through mid-thyropharyngeal part of inferior constrictor muscles of pharynx communicating through the lumen of pharynx, cut end of pharynx were separated. Underlying blood vessels and nerves were cut.
10. Red contusion of size 5x5 cms present over left anterior aspect of thorax at the level of 1st and second intercostals space.
11. Incised looking lacerated wound of size 2x1 cm X muscle deep present 3 cms lateral to injury No. 10.
12. Red abrasion of size 4x3 cms present under the chin.
13. Red contusion of size 20x8 cm present over the right anterolateral aspect of thorax.

14. Red contusion of size 6x5 cms present over sternal region (upper) of the chest.

15. Red contusion of size 8x4 cms present over right elbow.

16. Red contusion of size 4x4 cms present over ante remedial aspect of right lower leg with fracture of underlying right tibia and fibula bones.

17. Incised looking lacerated wound of size 3x2 cms communicating with the abdominal cavity present in the anterior aspect of the abdomen in mid-line 4 cm below the umbilicus.

18. Incised looking lacerated wound of size 3x2 cms communicating with abdominal cavity present 5 cms lateral to injury No. 17.

19. Incised looking lacerated wound of size 3x2 cms communicating with abdominal cavity present 4 cm above the injury No. 18. The margins of injury No. 17, 18 & 19 are contused, loops of small intestines were seen protruding out through the injury No. 17, 18, 19 from the abdominal cavity. No foreign body present in injury No. 1 to 19.

Injury No. 1, 3, 4, 5, 6, 7, 8, 10, 12, 13, 14, 15, 16 were caused by blunt trauma and were ante mortem in nature. Injury No. 2, 9, 11, 17, 18, 19 were caused by relatively sharp object and were ante mortem in nature.

12. Soot particles were also present in the mucosa of larynx and trachea, which was also found inflamed. The body of Vijay Kumar was also found burnt and there were patches of superficial to deep ante mortem burns present over the face, scalp, right and left ear, etc. There were patches of post mortem burns over the anterior aspect of abdomen, right and left upper extremities, etc. According to doctor the cause of death in respect of Vijay Kumar was hemorrhagic shock and ante mortem burns and the probable time between injuries and death was few hours. The doctor opined that injuries No. 2, 9, 11, 17, 18 and 19 found on the body of deceased Vijay Kumar were possible with weapon like Khukri i.e. Ext.P-1. The witness, however, stated that knife Ext.P-2 could not have been used to cause any of the injuries.

13. The submission made on behalf of the appellants is that the medical evidence does not prove that the death was homicidal. It is urged that both the deceased could have rolled down in the car which caught fire and in the process they got burnt. It is also urged that they could have suffered the injuries when the car rolled down into the Khud. Soot particles were found in the mucosa of larynx and trachea and in the oral cavity. The doctor also found ante mortem burns. Similarly, soot particles were also found in the mucosa of larynx and trachea and in the oral cavity of Vijay Kumar. As far as Vijay Kumar is concerned, according to the doctor he not only died due to ante mortem burns but also died due to hemorrhagic shock. The presence of soot in the trachea and in the oral cavity clearly indicates that the deceased were alive when they caught fire. However, what is not explained by the counsel for the accused is the presence of an empty

Can being the words Ginni in the car in which traces of kerosene oil were found by the forensic laboratory. It is urged that the deceased could have been carrying kerosene oil as fuel for distribution in the village. This explanation is too far fetched to be believed and cannot be accepted.

14. The doctor has in no uncertain terms stated that the injuries are ante mortem in nature. It is obvious that the deceased were alive when they were burnt. It may have happened that the persons who committed the crime thought that two persons were dead and burnt them but the fact remains that according to the medical evidence the time elapsed between injury and death was few hours. One of the causes of death in the case of Rakesh Gautam is cardiac temponade, which means that the heart is full of blood. This happens when a person is burnt alive and not when a dead body is set on fire. It is, therefore, more than apparent that when these two persons were set on fire they were alive though it cannot be said with certainty whether the other injuries are prior to the burning or thereafter. The stand of the accused is that both the mechanical and burn injuries, could have been received by the deceased when the vehicle fell down from a height of 200 to 250 feet. This cannot be accepted. As noted above, almost the entire body of Rakesh Gautam was charred except for his head, face, neck, etc. Similarly, the body of Vijay Kumar was also extensively burnt. We have also seen the photographs Ext.P-7 to P-13, Ext.P16 to Ext.P-18, which show the extensive burns on the body of the deceased persons. The car on the other hand is not burnt so badly as is apparent from the photographs Ext.P-20 to Ext.P-23. Another important factor is that the body of Vijay Kumar was found only at a distance of 50 yards from the road and the body of Rakesh Gautam was found at a distance of 59 yards from the road. The car was found at a distance of 80 yards from the road. This clearly indicates that when the car rolled down the two persons were thrown out of the car. If the car had accidentally rolled down, assuming the car had caught fire and the occupants had been thrown out within seconds they could not have received such extensive burns. Another aspect is that the petrol tank of the car is intact. There is no explanation as to how the car caught fire. As already stated above we are not inclined to believe the explanation of the accused that Rakesh Gautam was carrying some kerosene in the car which caught fire. Therefore, we are of the considered opinion that the deceased were beaten up and then set on fire when they were still alive and thereafter their bodies were put in the car and the car pushed down the khud to make it appear like an accident. We, therefore, reject the first plea raised on behalf of the accused.

Statement of Approver:

15. The second argument on behalf of the accused is that the statement of the approver does not inspire confidence. It is full of loopholes and is not corroborated by the other evidence and in fact is in direct conflict with the medical evidence. The entire case revolves around the statement of the approver and therefore, before appreciating his evidence it would be appropriate to refer

to the law as to how the statement of an approver should be appreciated.

16. Section 133 of the Indian Evidence Act reads as follows:-

Accomplice - An accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

17. A bare reading of the Section clearly shows that an accomplice is a competent witness. However, at the same time we cannot lose sight of Section 114 which reads as follows:-

Court may presume existence of certain facts. - The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to a common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

In the examples given u/s 114, the 2nd illustration reads as follows:-

(a) xxx... xxx... xxx...

(b) that an accomplice is unworthy of credit, unless he is corroborated in material particulars

18. Therefore, though the statement of the accomplice who turned approver is admissible in evidence, the Court while appreciating the evidence must be satisfied that the statement of the accomplice is corroborated in material particulars.

19. The Apex Court in *Sarwan Singh Vs. The State of Punjab*, held as follows:-

8. Every person who is competent witness is not a reliable witness and the test of reliability has to be satisfied by an approver all the more before the question of corroboration of his evidence is considered by criminal courts.

The Apex Court made very pertinent observation as to how the statement of an approver is to be recorded. It would be pertinent to refer to the following observations of the Apex Court.

10. There can be no doubt that, when an accused person is produced before the Magistrate by the investigating officer, it is of utmost importance that the mind of the accused person should be completely freed from any possible influence of the police and the effective way of securing such freedom from fear to the accused person is to send him to jail custody and give him adequate time to consider whether he should make a confession at all. It would naturally be difficult to lay down any hard and fast rule as to the time which should be allowed to an accused person in any given case. However, speaking generally, it would, we think, be reasonable to insist upon giving an accused person at least 24 hours to decide whether or not he should make a confession. Where there may be reason to suspect that the accused has been persuaded or coerced to make a confession, even longer period may have to be

given to him before his statement is recorded.

20. In Rampal Pithwa Rahidas and others vs. State of Maharashtra, 1994 Supp (2) Supreme Court Cases 73, the Apex Court held as follows:-

34. Once, we have found that the approver is a planted witness and his testimony is not worthy of credence and is uninspiring and unacceptable justifying its rejection outright, it will be futile and wholly unnecessary to look for corroboration of his testimony. It is only when the approver's evidence is considered otherwise acceptable that the court applies its mind to the rule that his testimony needs corroboration in material particulars connecting or tending to connect each one of the accused with the crime charged.

21. In Dagdu and Others Vs. State of Maharashtra, the Apex Court held as follows:-

21. There is no antithesis between Section 133 and illustration (b) to Section 114 of the Evidence Act, because the illustration only says that the Court "may" presume a certain state of affairs. It does not seek to raise a conclusive and irrebuttable presumption. Reading the two together the position which emerges is that though an accomplice is a competent witness and though a conviction may lawfully rest upon his uncorroborated testimony, yet the Court is entitled to presume and may indeed be justified in presuming in the generality of cases that no reliance can be placed on the evidence of an accomplice unless that evidence is corroborated in material particulars, by which is meant that there has to be some independent evidence tending to incriminate the particular accused in the commission of the crime. It is hazardous, as a matter of prudence, to proceed upon the evidence of a self-confessed criminal, who, in so far as an approver is concerned has to testify in terms of the pardon tendered to him. The risk involved in convicting an accused on the testimony of an accomplice, unless it is corroborated in material particulars, is so real and potent that what during the early development of law was felt to be matter of prudence has been elevated by judicial experience into a requirement or rule of law. All the same, it is necessary to understand that what has hardened into a rule of law is not that the conviction is illegal if it proceeds upon the uncorroborated testimony of an accomplice but that the rule of corroboration must be present to the mind of the Judge and that corroboration may be dispensed with only if the peculiar circumstances of a case make it safe to dispense with it.

22. Keeping in view the aforesaid principles in mind we have to appreciate the evidence of the approver. Before appreciating his evidence it would be pertinent to mention that the material on record shows that the approver Arun Kumar is totally illiterate. He has admitted so in his evidence himself. The application filed by the approver before the Court whereby he prayed that he wants to tell the truth and his statement may be recorded is Ext.PW-2/B. The letter is scribed in the Devnagri script and the approver signed it by writing the words ARUN in capital letters like an illiterate person. The letter is, however, couched in

language which is totally legal. It contains words in Hindi, which any ordinary person who does not deal with legal matters would not be aware of. Nothing has come on record to prove who wrote this application which was signed by the approver Arun Kumar. This application is dated 24.2.2004 and appears to have been handed over to Superintendent, District Jail, Dharamshala, who forwarded it in original to the learned Sessions Judge, Kangra alongwith the details of the case and it was mentioned that the case was fixed for 1.3.2004. On 25.2.2004 there is a noting by the Criminal Ahlmad that the application be put up for orders before the learned Court. The matter was put up before the learned Sessions Judge after commitment on 1.3.2004 when the application was probably not brought to his notice.

23. Be that as it may, from the evidence of PW-35 i.e. Shri T.N. Vaidya, the learned Sessions Judge, who recorded the statement of the approver, it is apparent that the application was taken up on 15.3.2004 and the learned Sessions Judge did not feel it necessary to ask from Arun Kumar, who had written the application in question. He, however, satisfied himself that the approver was making the statement voluntarily and then recorded the statement regarding his willingness on 15.3.2004 itself in the forenoon. The statement is Ext.PW-35/A. The order-sheet does not disclose that the approver was asked who wrote the application on his behalf. Then the matter was adjourned to after lunch when again the approver was told that he was not bound to make any statement but thereafter the accused was pardoned and his statement recorded which is Ext.PW-2/A and Ext.PW-35/C (hereinafter referred to as Ext.PW-35/C). It would have been better if the learned Sessions Judge adjourned the matter for a day or two and should have also verified who recorded the letter for recording his statement. We are saying this because by this time the accused had been behind bars for almost 5 months and as laid down by the Apex Court in Sarwan Singh's case (supra) it would be reasonable to give an accused at least 24 hours to decide whether or not he should make such a statement.

24. We, however, for the purpose of this case are not discarding the evidence of the approver on this ground alone and we proceed to discuss his statement since the entire case revolves around his statement. The same has to be discussed in detail.

25. According to the approver Arun Kumar, he was working as a driver with accused Usha Guleria and used to drive her van No. HP-01-0787. He knew all the accused persons. According to him on 9.9.2003 in the evening he was at Jawalamukhi-Road bus stand and received a call from Usha Guleria asking him to come to her STD booth. When he went there, Usha Guleria asked him to call accused Kuldeep. The approver then went to the house of Kuldeep where he found that Kuldeep was drinking liquor. He told Kuldeep that he had been sent by Usha Guleria for some work. Thereupon Kuldeep told this witness that they had to go to Farna village to collect money. Kuldeep asked the approver to wait in the van. When the approver went to the van which was parked near the shop of an

electrician accused Manoj Kumar and Ashok Kumar were standing near the van. According to the approver, he asked both of them to accompany him to Farna. Thereafter, Kuldip came and they all proceeded in the van towards Farna. When they were about 20-25 feet short of the village the van was stopped since there was no motorable road thereafter. Kuldip Kumar alighted from the van and told the approver and the other two accused to stay there. In the meantime a car came from the side of Ranital which stopped about 20 feet behind the van. From this car Rakesh Gautam (deceased) and Usha Guleria alighted. They started walking towards jungle. Accused Usha Guleria was walking ahead and Rakesh Gautam was following her. Suddenly, accused Kuldip Kumar appeared and pushed Rakesh Gautam who fell down. Thereafter, Kuldip started hitting Rakesh Gautam with a Khukri. Rakesh Gautam started crying out loudly "Bhabhi Mujhe Bachao". On seeing this, approver Arun Kumar and the other two accused went to the spot. At that time accused Kuldip was giving kick blows to Rakesh Gautam. Approver asked Kuldip why he was hitting Rakesh Gautam. On this Rakesh Gautam kept the Khukari on the throat of Arun and told the approver that he should do what he was told. Thereafter, Kuldip removed the wrist watch and purse of Rakesh Gautam. He took out the keys of the car and handed over the same to the approver. He then asked the approver to bring the car to the place where Rakesh Gautam was lying. The approver brought the car there. Thereafter, accused Usha Guleria and Kuldip lifted Rakesh Gautam and put him in the car. Thereafter, the keys of the van were taken from the approver and handed over to Ashok who took charge of the van. Thereafter all the four persons sat in the van. They told the approver to stay at the spot until they brought the driver of Rakesh Gautam. Then all the four accused went towards Ranital side. They threatened the approver that if he went away he would be blamed for the offence. The approver stayed at the spot for about 20 minutes along with the car and Rakesh Gautam. Thereafter, the van came back. Ashok Kumar was driving the van and Usha Guleria was occupying the front passenger seat. Accused Manoj Kumar and driver of Rakesh Gautam were occupying the rear seat. Accused Kuldip was sitting in the dicky of the van and was holding the hair of the driver of Rakesh Gautam whose neck was already cut. Thereafter, Kuldip asked the approver to follow the car in the van. The approver drove the car with Rakesh Gautam lying in it and followed the van. When the two vehicles reached Thandapani the van was stopped. Therefore, the approver stopped the car. Usha Guleria and Kuldip Kumar came out of the van and the driver of Rakesh Gautam who was having some injury in the abdomen was shifted to the car by accused Usha Guleria and Kuldip Kumar. Again they asked him to follow the van. When they had just crossed Sarotri they saw a Khud there. The accused persons stopped the van and the approver stopped the car. Usha Guleria and Kuldip got down from the van and asked the approver to get out of the car. When the approver got out of the car Kuldip put a stone against the front tyre of the car and the car was stopped by the accused persons towards the cliff. The approver sat in the van and in the meanwhile someone put some oil in the car. Thereafter, accused Kuldip brought the gear of the car to neutral position and removed the stone from the front tyre

of the car. The car was set on fire and then rolled down the cliff. Thereafter, the four accused and the approver returned to Ranital in the van. Usha Guleria asked the approver to remove the seat covers, which were spoiled with blood. Thereafter, the approver alongwith Ashok and Manoj removed the seat covers. Usha Guleria and Kuldeep went to their residences. After some time they came back. Then accused Kuldeep and Usha Guleria threatened the approver and the other two accused that they should not disclose about the incident to anyone otherwise the consequences would be bad. After saying this Usha Guleria again went to her residence. When Kuldeep returned from his residence his clothes were soiled with blood so he also brought a new set of clothes. Then Kuldeep Kumar, Manoj Kumar and approver Arun Kumar went to the bank of the Khud. Accused Ashok Kumar went to his house. The seat covers and blood soiled clothes were taken to the Khud and were set on fire by Kuldeep Kumar. According to the approver his pants were also soiled with blood near the bottom. Kuldeep asked him to remove the pants and the same was also set on fire. Thereafter, accused Kuldeep took a bath in the Khud and then they returned to Ranital. Then Kuldeep went to the residence of Usha Guleria and Manoj Kumar went away to his own house. Approver Arun Kumar slept in the van. Next morning the approver went to the STD booth of Usha Guleria at 7/7.15 am. She gave him Rs. 200/- and asked him to get the van washed since it was blood stained. The witness took the van to Bankhandi and got it washed at a service station. Thereafter, he returned to Ranital. At about 6.30 p.m. Usha Guleria again telephoned and asked him to come to her STD booth. When the approver reached the booth, Usha Guleria asked him to sit there and she went to her residence. She came back carrying a polythene bag. She then asked him to keep the polythene bag on the rear seat of the van while she went inside the STD booth. Thereafter she came out and sat in the van and asked the approver to take her to her sister's house at Dehra, where she went into the house carrying the polythene bag while the approver stayed in the van. After 20 minutes Usha Guleria returned from the house and sat in the van. This witness also identified the Khukri Ext.P-1 and stated that it was the same Khukri which was placed on his throat by accused Kuldeep.

26. The approver was cross examined at length. A suggestion was put to him that he turned approver at the behest of the police. He could not give any explanation as to who wrote the application which was signed by him and filed on his behalf. In cross-examination this witness has made certain statements which do not help the prosecution at all. Relevant portion of his statement is as follows:-

When I was called by Usha Guleria for the first time, I was not aware of anything except what she told me that money was to be collected from village Farna. She used to depute me for such like jobs. Ashok Kumar and Manoj Kumar were also not aware of anything. Till Rakesh Gautam was brought there, myself, Ashok Kumar and Manoj Kumar were not aware of anything. When I asked accused Kuldeep Kumar as to why he was hitting Rakesh Gautam, Kuldeep Kumar placed the Khukhri on my throat. Kuldeep threatened me, as well as to Ashok Kumar and Manoj Kumar that in case we objected, we would also meet the same fate.

We were frightened due to this reason and could not help. It is correct to suggest that till that stage we were innocent. Accused Kuldeep gave repeated blows with Khukhri Ext.P-1 on the abdomen of Rakesh Gautam. I cannot say if the Khukhri was quite sharp. I cannot give the dimension of the Khukhri. It is correct that Rakesh Gautam had died due to Khukhri stabs.

27. This witness also stated that he was terrified when the Khukhri was placed on his throat and Ashok Kumar and Manoj Kumar were also in the same position and they were totally terrified. He also went on to state that driver Vijay Kumar was dead by the time when he was put in the Maruti car. It is also important to note that in his statement which is recorded as approver Ext.PW-35/C there is no mention of the kick blows being given by Kuldeep Kumar to deceased Rakesh Gautam. He also stated that he had only seen Rakesh Gautam once earlier and according to him Usha Guleria and Kuldeep had gone to the house of Usha Guleria to bring the driver from there. When asked to explain what he did after his pants were burnt in the Khud he stated that accused Kuldeep Kumar had brought spare pants to the Khud which he wore after his pants were burnt. He also clearly stated that he did not know whether Rakesh Gautam was on visiting terms with Usha Guleria. He also admits the suggestion that Usha Guleria had not told him that he was required to go to Farna village to collect money.

28. Since it is the statement of the approver which is the sheet anchor of the case of the prosecution this statement has to be analysed very carefully. The statement of this approver is totally self exculpatory. He does not attribute any offence to himself. Though initially the case of the police was that it was this witness who had hit driver Vijay Kumar on the head but the approver has not put any blame on himself for any act. Not only this, according to the approver he was threatened by Kuldeep Kumar and also by Usha Guleria. His version is that Kuldeep Kumar threatened him with a Khukhri and therefore, he got scared. According to him even Ashok Kumar and Manoj Kumar were totally innocent and were not aware of any prior plan. This witness does not ascribe any specific act or offence to Ashok and Manoj. If we were to believe him then till Rakesh Gautam was beaten-up, neither the approver nor Ashok Kumar and Manoj Kumar were aware of anything. This would mean that only Usha Guleria and Kuldeep Kumar had planned the entire offence.

29. This story does not fit in with the statement of this witness himself. In his examination-in-chief he has stated that after Usha Guleria sent him to meet Kuldeep Kumar, Kuldeep told him that they had to go to Farna village to collect money. He then went to the van and it was he i.e. approver Arun Kumar who asked Manoj Kumar and Ashok Kumar to accompany him to Farna village. If Kuldeep and Usha Guleria had planned to murder or cause injuries to Rakesh Gautam and Ashok Kumar and Manoj were not part of the conspiracy then why would Kuldeep have permitted these two persons to join them. No criminal would associate witnesses with his crime.

30. Another reason to doubt the statement of this witness is that according to

him at Farna village the motor able road ended just 20-25 feet from the village. The statement of the witness is that Kuldip after pushing down Rakesh Gautam started hitting him with a Khukri. This is totally inconsistent with the medical evidence in which none of the injuries found on the person of Rakesh Gautam has been caused with any Khukri or any other sharp edged weapon. The doctor has clearly stated that all the injuries on the body of Rakesh Gautam were caused with the blunt weapon and he in cross-examination has clearly stated that these injuries could not be caused by the Khukri.

31. Whereas the case of the prosecution was that Rakesh Gautam had illicit relations with Usha Guleria, according to the approver when Rakesh Gautam was being hit with a Khukri by Kuldip he cried "Bhabhi Mujhe Bachao". This would indicate that he treated Usha Guleria as his Bhabhi and this would also indicate that there were no illicit relations between them. In fact, none of the witnesses who have appeared for the prosecution have whispered a word that there were any illicit relations between Usha Guleria and Rakesh Gautam.

32. The conduct of the approver is not above suspicion. According to him after he was threatened he remained at the spot for 20 minutes with the car of Rakesh Gautam and body of Rakesh Gautam had been put in the car because according to this witness Rakesh Gautam was dead. If the approver was not a part of the conspiracy then why did he not walk 20-30 feet to the village and raise a hue and cry. He could have easily collected the villagers of village Farna. This clearly indicates that he is not telling the truth. The police has also not made any effort to associate any person from Farna village in the investigation. It cannot be believed that at about 9 p.m. all the villagers would be asleep and would have not noticed that two vehicles had come to the village and thereafter some commotion took place.

33. The statement of the approver does not also inspire confidence because in his initial statement Ext.PW-35/C he had stated that the neck of the driver was cut but in his statement in Court he made an improvement by saying that the neck was cut to some extent. Initially he had stated that the driver and Rakesh Gautam were dead by this time. It appears that this improvement had been made with a view to get over the medical evidence according to which the burns were ante mortem and further the time between injury and death was a few hours.

34. Though this witness very specifically states that Kuldip accused removed the wrist watch and purse of Rakesh Gautam and also took the keys of Maruti car which were handed over to the approver but he is totally silent with regard to the money which was allegedly collected by Rakesh Gautam. He has not stated a word that any person picked up any other item.

35. Another surprising aspect of the statement of the approver is that when near the point where the car was pushed down he stopped the car and sat in the van. He virtually stops noticing anything thereafter. He noticed that Kuldip put a stone

in front of the car and the car was stopped towards a cliff. He then says that someone put oil in the car but that person is not named by him. He then states that Kuldip put the car in the neutral position, removed the stone and then the car was set on fire and rolled down the cliff. He is also silent as to who set the car on fire. This also shows that he is trying to hide something and is not telling the entire truth.

36. According to this witness after they all returned to Ranital they took the van to the Khud where the clothes of Kuldip and seat covers of the van which were soiled with blood were burnt. He also states that his own pants which was soiled with blood near the feet was also burnt. Neither in his statement Ext.PW-35/C nor in his examination-in-chief he stated that he had kept spare pants and it was only in cross-examination that he stated that Kuldip had got spare pants for him. This also cannot be accepted to be a truth.

37. The statement of the approver also cannot be accepted to be correct because he gives no explanation as to from where kerosene oil was arranged. There is not a word stated by the approver or any other witness that from where the kerosene oil was arranged. If it had been arranged earlier then it should have been lying in the van but the statement of the approver is totally silent in this regard.

38. In view of the fact that the statement of this witness is not corroborated but in fact the medical evidence contradicts his statement with regard to the death of Rakesh Gautam, it is difficult to believe his statement. His conduct of not going to village Farna and keeping silent after such a gruesome incident is totally unbelievable. If, as this witness would have the Court believe, he was innocent and only helped the accused in destroying the evidence under fear of death, we see no reason why he had not immediately after the incident reported the matter to somebody. Assuming, that he was scared of Kuldip and Usha Guleria, once all the persons were arrested on 13.10.2003 there is no explanation why he kept silent till the end of February, 2004 and in fact made the statement only on 15th March, 2004. In case he had nothing to do with the incident he would have told this fact to the police at the first stage itself. Furthermore, as discussed above accused Manoj Kumar and Ashok Kumar even as per the statement of the approver were not accomplices at the beginning. They were joined by the approver and not by the other two accused. Therefore, also we cannot rely upon this statement which is totally self-exculpatory and puts the entire blame on Kuldip and Usha Guleria.

Last seen:

39. The prosecution also relies upon the theory of last seen in connecting the accused especially Usha Guleria and Kuldip. The witnesses examined in this behalf are PW-9 Praveen Kumar and PW-12 Roshan Lal. PW-9 runs a Dhabha at Rasoo Chowk where accused Usha Guleria had an STD booth. According to this witness he knew Rakesh Gautam, who used to come to Rasoo Chowk to collect

money. One Milap Chand, who runs a Karyana shop adjacent to his Dhabha, some times used to leave cash with this witness for payment to Rakesh Gautam because Milap Chand used to close his shop by 7/7.30 p.m. and Rakesh Gautam on certain occasions came later. According to this witness on 9.10.2003 at about 8 or 8.30 p.m. Rakesh Gautam came in his vehicle and went to the shop of PW-12 Roshan Lal and parked his vehicle there. Thereafter, Rakesh Gautam went to the booth of Usha Guleria. After 5-7 minutes Rakesh Gautam came to the Dhabha of this witness and asked whether Milap Chand had left any amount for him. The witness told Rakesh Gautam that no money had been left. Thereafter, Rakesh Gautam went back to the PCO of Usha Guleria. After some time the PCO was closed and the car was still parked in front of the PCO. At this stage this witness was declared hostile and cross-examined by the public prosecutor. The witness denied that he had made any statement to the police that after some time the car of Rakesh Gautam was taken on the Lunj road and then accused Usha Guleria boarded the car alongwith Rakesh Gautam and was seen going on Baroh road. He, however, accepted the suggestion that car was seen going on Baroh road. In cross-examination the witness clearly admitted that from his Dhabha the road which bifurcates and goes towards Baroh is at a distance of 500-600 meters and is not visible. Therefore, if a person stands at his Dhabha it cannot be said whether the vehicle was going towards Baroh or towards Ranital. This witness admits that all the accused persons were arrested on 13/14.10.2003 and the police had been coming to Rasooch Chowk to make inquiries. However, from 13/14.10.2003 till 21.10.2003 neither the police inquired anything from him nor he volunteered to make any statement to the police.

40. The statement of PW-12 totally contradicts the statement of PW-9. According to PW-12 on 9.10.2003 one Lalaji came from Pathankot in a van. A driver was driving the van and the Lalaji went to the PCO of Usha Guleria who served them tea. After some time the driver came out followed by Lalaji and Usha Guleria. Usha Guleria closed the PCO. She then crossed the road and went to her residence which is across the road. He does not even say that Usha Guleria went with Lalaji. He also admits that the police visited Rasooch Chowk many times upto 21.10.2003 but did not make any statement to the police nor the police made any inquiry from him. Thus the story of last seen is not proved at all.

Corroboration of the statement of the approver:

41. The prosecution submits that the statement of the approver is corroborated by the statement of PW-8 Ashwani Kumar and PW-10 Paramjit. PW-8 Ashwani Kumar runs a Dhabha at Dramman, which is far away from the area in question. According to this witness he alongwith one Anup had gone to Baroh in his vehicle No. HP-01-9005. When they were returning from Baroh at the big curve near Sarotri they saw two vehicles parked. One was a Maruti car and the other was a Maruti van. This was about 11/12 o'clock mid night. According to him accused Usha Guleria, Kuldip Kumar and two-three other boys were present and he had identified two of them as the accused persons present in the Court. He also

states that he knew Usha Guleria and therefore, asked them whether they were in need of some help. Usha Guleria declined any help and therefore, this witness went away. In cross-examination, he states that the police inquired from him why he had gone to village Baroh and he had told that he had gone to meet Mr. Bhatt at Baroh but this fact does not find mention in his statement recorded u/s 161 Cr.P.C. Ext.DB. The witness admits that he came to know about the incident on 10.10.2003 itself and he has a telephone facility at his house but he did not inform the police or any other person about his having seen the Maruti car and van. He admits that he had read about the accident in the newspaper on the next day but still did not make any effort to make a report to the police. He tried to explain his conduct by saying that he was out of station but this fact is also not recorded in Ext.DB. According to him he knew only Kuldip and Usha Guleria and no identification parade was carried out with regard to other accused. The person who was accompanying him i.e. Anup was not examined. This witness admitted that Usha Guleria was neither his class fellow nor his relative. He had no business dealings with her. He also admitted that prior to the incident he never had any talk with Usha Guleria. He admits that distance between Ranital and Dramman is 50 kilometers. It is thus apparent that he did not know Usha Guleria also. If he had never talked to her earlier how could he have known her especially when his village is at a distance of 50 kilometers from Rasoo Chowk.

42. As far as PW-10 Paramjit is concerned this witness states that he sells milk in poly-packs at various places in Kangra district. He has a Maruti car having a Punjab number. He also states that he knew Usha Guleria. On 9.10.2003 at about 10.30 p.m. when he was returning from Baroh to Kangra via Daulatpur near the big curve he saw two vehicles i.e. HP-38A-3917 and HP-01-787 respectively parked there. These vehicles were facing towards Baroh. When he crossed the place Usha Guleria, Manoj and Kuldip were standing on the road side near the van. Since he knew them he stopped the vehicle. He saw two persons lying on the back seat of the car and when he inquired who these persons were, she told him that they were her relatives who were sick and were being taken to Baroh hospital for check up. Then this witness went to Kangra. According to this witness he had gone to his village in district Amritsar due to illness of his wife and therefore, did not come to know about the incident nor he read about the same in the newspaper and therefore, did not make any statement to the police. The witness was confronted with his statement recorded u/s 161 Cr.P.C. Ext. DC wherein there is no mention of these facts that he had gone to village Patti and therefore, could not inform the police. This witness admits that he resides at Tanda-Kholi near medical college Tanda and his wife also normally resides with him there.

43. According to the inquest report Ext.PW-1/B, which also contains a map, the accident occurred between Daulatpur and Sarotri. Similar is the position in inquest report Ext.PW-1/G. In the site map Ext.PW-13/A prepared by the Investigating Officer it has been reflected that the accident took place between Suni and Sarotri. From the map it is apparent that Suni is towards Daulatpur side.

Therefore, the vehicles if they were coming from Sarotri side would have been directed towards Daulatpur and Suni and not towards Baroh, which is in the opposite direction. This is also apparent from the statement of the approver that after the car was rolled down they returned back to Ranital. Initially, the case set up by the prosecution was that Paramjit saw Usha Guleria and the other accused near Thandapani. However, in evidence Paramjit stated that he saw them near the curve where the car was rolled down. Moreover, these witnesses have not given any explanation as to what they were doing at that time in the area in question. Their story cannot also be believed because for a week they kept silent and did not inform anybody that they had seen the accused near the scene of incident. To us, it appears that they are planted witnesses.

Recovery of the currency notes at the instance of Usha Guleria

44. As mentioned above, according to the approver on the day after the murder Usha Guleria called him. She then asked him to place a polythene bag on the rear seat of the van. Later she took the van to her sister's house in Dehra. She went into the house with the polythene bag and returned after 20 minutes without the bag. The story of the prosecution is that after Usha Guleria was arrested she made a disclosure statement that she had stolen the money which the deceased Rakesh Gautam had collected and had kept the same in the house of her sister. In support of this allegation, the prosecution has examined two witnesses. PW-3 Ved Prakash states that on 17.10.2003 he had gone to the police station Kangra in connection with his personal work and accused Usha Guleria was already there and in his presence she made a statement Ext.PW-3/A that on 9.10.2003 during the night she had taken the money from the car belonging to Rakesh Gautam and put the same in the plastic bag of yellow colour which she had concealed in the house of her sister Nirmala Devi in the bed under the mattress. According to this witness when he reached the police station PW-6 Naresh Gautam, brother of Rakesh Gautam, was already there. He could not give the reason why he was present in the police station but states that he was there by chance. He has given a very evasive answer that he had some labour problem due to which he had gone to the police station but no report in writing was lodged by him. The presence of this witness at the police station is not free from doubt. He has virtually not given any reason why he was present in the police station. He also states that the police did not try to associate any lady witness.

45. The version of PW-6 Naresh Gautam is different. According to him he alongwith one Nitin Mahajan went to the police station Kangra on 17.10.2003. All the accused persons and the approver were present in the police station. According to him PW-3 Ved Prakash was also present in the police station. This is contrary to the statement of PW-3, who has stated that when he reached the police station PW-6 was already in the police station. Whereas according to PW-3, Usha Guleria was present when he reached, according to PW-6, Usha Guleria was brought to the room where they were sitting and then she made the statement Ext.PW-3/A.

46. Regarding recovery of the money the relevant statement is of PW-4 Piar Singh. He is Pradhan of Gram Panchayat Khaballi. According to him he was called by Dehra police on 17.10.2003 from his residence to the house of Nirmala Devi, sister of Usha Guleria. He reached there at about 9/10 p.m. A number of police officials were present alongwith a photographer. Usha Guleria was in the custody of the police. PW-6 and Nitin Mahajan were also present. Usha Guleria pointed out the bed in the room where the money had been concealed. Photographs of the same were clicked. Then a yellow coloured polythene bag was found concealed under the mattress. On opening this polythene bag a sum of Rs. 69,115/- was recovered, which was taken into possession. In cross-examination the witness stated that he does not know when the police reached the house of Nirmala Devi alongwith Usha Guleria. He also states that he did not know Naresh Gautam and Nitin Mahajan earlier. He also admits that he did not know Usha Guleria earlier. As far as PW-6 is concerned he states that from the police station Kangra he accompanied the police to village Barwala and when he reached there PW-4 was already present but this is again contrary to the statement of PW-4. According to him when he arrived at the house of sister of Usha Guleria the police officials from Kangra and Dehra were present alongwith Naresh Gautam and Nitin Mahajan. Naresh Gautam also states that when they reached the house of Nirmala Devi after PW-4 Piar Chand arrived accused Usha Guleria led them to the house of her sister where they first went to the Verandah of the house. Then Usha Guleria was asked by the police where she had kept the money. She then went inside the room and indicated where the cash was kept. Usha Guleria lifted the bed sheet and mattress under which money was found inside a plastic bag which on counting was Rs. 69,115/-. The statement of this witness is contrary to that of PW-4 who has stated that when he reached the spot the police officials told him that they had to recover the amount which was lying under the mattress. According to Piar Chand when he reached they were already in the room where the money was hidden. Therefore, there is material discrepancy in these two statements also.

47. For the sake of argument, if we are to accept that the recovery of the money has been proved then also the prosecution has miserably failed to prove that this money is connected to the crime in question. Approver Arun Kumar has not said a word as to who took the money out of the car of Rakesh Gautam. Furthermore, another very important aspect is that as per the police itself near the wreckage of the car partly burnt currency notes were found. The police did not deem it fit to investigate and find out what was the value of the currency notes which were burnt. If the intention of the accused was to steal the money lying in the car which was being carried by Rakesh Gautam, why would they have left some currency notes in the car itself. In any event, the police should have made an effort to find out the value of the currency notes. Even PW-34 the Investigating Officer has clearly stated that burnt currency notes were found near the dead body of Vijay Kumar. There is no explanation why these notes were not counted.

48. At this stage it would be pertinent to mention that according to the

prosecution Ext.P-2 knife was also used as a weapon of offence. Rakesh Gautam received no injury from knife or Khukri. PW-1 Dr. Aditya Kumar Sharma has clearly stated that the injuries on both the deceased could not have been caused by weapon Ext.P-2. It is thus apparent that the investigation was also not fair.

49. At this stage, we would like to note that as far as Manoj Kumar and Ashok Kumar accused are concerned there was no evidence worth the name against them. Nothing has been ascribed to Manoj Kumar at all. He was a silent spectator to the entire incident. Therefore, it cannot be believed that he was a part of the conspiracy. Even from the statement of the approver it is apparent that neither the approver nor accused Ashok Kumar or Manoj Kumar were part of the initial conspiracy. Why would Kuldip and Usha Guleria behave so stupidly as to involve other people in the crime when nothing is attributed to the other accused? If the story of the accused is to be believed then all that approver and these two accused did was to help the main accused in the crime. It is thus more than obvious that the story of the approver cannot be believed. It is also contradicted by the medical evidence and there is no corroboration of the same by the other material on record.

50. The prosecution has only been able to prove that the deceased were burnt when they were still alive. It also stands proved that the time which elapsed between injury and death was couple of hours. It appears to us that the death was homicidal in nature. There is virtually no evidence against the accused. As already stated by us above, the statement of PW-8 Ashwani Kumar and PW-10 Paramjit does not inspire confidence. The recovery of the notes is also doubtful but even if it is believed, the currency notes are not connected with the crime and there is no explanation as to why the partly burnt notes which were found at the site were not counted. The learned trial Court convicted the accused mainly on the basis of the statement of the approver. Even before the learned trial Court there was virtually no evidence against Ashok Kumar and Manoj Kumar who have been convicted only on the basis of surmises and conjectures.

51. The investigation in the case has also not been fair. As pointed out above, the police has planted a knife Ext.P-2, which has no connection with the crime. There is a witness to the recovery of knife who has made a parrot like statement. Therefore, the probability of the other recoveries being false cannot be ruled out.

52. We may also make reference to the statement of Dr. Atul Fulzele, IPS, who was at that time posted as Assistant Superintendent of Police, Kangra at Dharamshala. He moved an application Ext.PW-1/M alongwith questionnaire Ext.PW-33/A to PW-1 Dr. A.K. Sharma to clarify certain issues. The questions are so detailed that they could not have been prepared without seeing the weapon of offence. Question No. 3 in Ext.PW-1/M makes special reference to a knife. How did this witness know that a knife was used if he was not aware of the weapon of offence? The most depressing part of this case is the manner in which the police has carried out the investigation of the case. Initially, the police could have not suspected murder. They were informed by a journalist that an accident had taken

place. It was only later in the day that PW-6 Naresh Gautam, brother of the deceased, came to the spot and told the police that he suspected that his brother had been murdered. Even if only a case of accident was being investigated by the police party some site map should have been prepared at the spot and in the case of an accident one looks for skid marks, etc. No such plan has been produced on record. Once the police was informed that murder was suspected and the car had been pushed down the road then they should have carried out better investigation to pin point the place where the car had been kept standing before being pushed down the road. Other than a plan showing the various places where the bodies of the two victims, wreckage of the car and various other items were found, no other investigation worth the name was done at the spot. The investigating officer did not even deem it fit to find out whether, if at all, the van was washed at Bankhandi and no witnesses were associated in this regard.

53. We are in the 21st century but PW-34, who was the investigating officer, has investigated the case in a totally unscientific manner. No effort was made to lift any finger prints, hair or any other items from the Maruti car, which could link the accused including the approver (who had not turned approver at that stage) with the car in question. When Usha Guleria and Kuldeep Kumar put the body of Rakesh Gautam in the car and later when they shifted the body of driver Vijay Kumar from the van to the car they would have left tell tale signs in the form of finger prints, hair, sweat, pieces from the clothes, etc. If the investigation had been done scientifically then such tell tale signs marks could have been linked with the perpetrators of the crime. Similarly, no forensic examination of the van has been done.

54. As noted above no effort was made to find out the value of the partly burnt currency notes found at the spot. The car was got mechanically examined whereas in fact it should have been forensically examined before being sent for mechanical examination. According to PW-34, the van was recovered from Rasoo Chowk on 16.10.2003. This van was also not got forensically examined. No effort was made to lift any finger prints, hair, etc. from the van, which could have easily proved whether the driver Vijay was carried in the van or not. The van was recovered on 16.10.2003 but the lab assistant PW-31 from the State Forensic Lab only went on 2.11.2003 to inspect the van. He only found slight brown stains on the door of driver seat and on the rear right door, which on test was found to be positive for blood. If as claimed by the prosecution, driver Vijay Kumar was killed inside the van or at least he was bleeding in the van not only the seat covers of the van but even the seats & cushions of the van would have become blood stained. However, no blood was found on the seats. Blood was only found on the small seat between the two front seats. As per the forensic report no traces of kerosene oil were found on the clothes of the deceased person.

55. This is a case which should have been investigated scientifically. The

scientific evidence is totally lacking. The only thing which is proved is that human blood is found in the Maruti van owned by Usha Guleria, which was being driven by approver Arun Kumar as driver. However, the prosecution has failed to link by grouping, etc. this blood to the blood of any of the deceased. Similarly, the blood found at the spot near Farna has not been linked to the deceased.

56. In view of the above discussion, we are of the view that though the finger of suspicion may point against the accused but the prosecution has failed to prove beyond reasonable doubt that the offence was committed by the accused. We are constrained to observe that the learned trial Court did not properly appreciate the statement of the approver or the other evidence. Recently, the Supreme Court of India in Sampath Kumar vs. Inspector of Police, AIR 2012 SC 1249, held as follows:-

6. The legal position regarding the standard of proof and the test which the circumstantial evidence must satisfy is well settled by a long line of decisions of this Court. It is unnecessary to burden this judgment by making reference to all such decisions. We are content with reference to some of those decisions. In Sharad Birdhichand Sarda Vs. State of Maharashtra, this Court laid down the following five tests to be satisfied in a case based on circumstantial evidence:-

1. The circumstances from which the conclusion of guilt is to be drawn should be fully established.

2. The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

3. The circumstances should be of a conclusive nature and tendency.

4. They should exclude every possible hypothesis except the one to be proved, and

5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

15. One could even say that the presence of motive in the facts and circumstances of the case creates a strong suspicion against the appellant but suspicion, however strong, also cannot be a substitute for proof of the guilt of the accused beyond a reasonable doubt.

57. Applying the aforesaid principles laid down in Sampath Kumar's case, we are of the considered view that at best the prosecution has proved that a sum of Rs. 69,115/- was recovered from Usha Guleria. As held by us above, this money has not been proved to be linked to Rakesh Gautam nor is it proved that this amount was removed by Usha Guleria or any of the other accused from the car of Rakesh Gautam. As far as the statement of the approver is concerned for the reasons given hereinabove we are clearly of the view that the same does not inspire

confidence and cannot be relied upon to convict the accused. No other circumstance has been proved. In view of the above discussion, we are clearly of the view that the benefit of doubt should be given to the accused. Therefore, we allow the appeals, set-aside the judgment of conviction and sentence passed by the learned trial Court. The accused be released forthwith unless they are required in any other case.