
(2008) 10 DEL CK 0123

In the Delhi High Court

Case No : Criminal Appeal No. 128 of 2003

Liyakat Hussain

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 17-10-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 201, 302

Citation : (2009) 2 ILR Delhi 599

Hon'ble Judges : P.K. Bhasin, J;Mukul Mudgal, J

Bench : Division Bench

Advocate : K.B. Andley and M.L. Yadav, for the Appellant; Sunil Sharma, APP, for the Respondent

Judgement

P.K. Bhasin, J.—The appellant has challenged his conviction and sentences awarded to him under Sections 302/201 of Indian Penal Code ("IPC" for short) vide judgment and order dated 15-2-2003 passed by learned Additional Sessions Judge, Delhi in Sessions Case No. 70/02.

2. The case of the prosecution, in substance, is that on 2.9.99 an information was received from an unknown person on telephone by the Mahipal Pur Police station at about 8.10 a.m. that a dead body was lying in jungle on Shahbad Bharthal Road and was being eaten up by the animals. That information was recorded as DD No. 3-A (Ex. PW-22/1) and its copy was handed over to the SHO Insp. Bishan Mohan (PW-22) who accompanied by one Sub-Inspector and one Constable went to the jungle on Shahbad Bharthal Road where on search Insp. Bishan Mohan found one headless and partially burnt dead body of a male. One pocket diary, one driving licence in the name of Ibrahim Khan, one watch and two keys were found lying near the dead body. Since it appeared to be a case of murder a rukka was prepared and sent to the police station by PW-22 for registration of a case under Sections 302/201 IPC and accordingly FIR No. 52/99 (Ex. PW-13/1) was registered. Intimation of recovery of the dead body reached

PW-2 Yusuf Ahmed, brother of the Ibrahim Khan whose driving licence was found lying near the corpse and he then came to the place of recovery of the corpse and identified the same to be of his brother Ibrahim from the shirt on the dead body as well as the watch which was found lying nearby and some marks on the dead body. The police seized the driving licence, diary and the watch. Yusuf Ahmed informed the police that his brother Ibrahim was having illicit relations with the wife of one Liyakat (the appellant herein) who was earlier living in their locality. The police then went to the house of Liyakat (hereinafter to be referred as "the accused") in Nangloi where his wife Razia told them that Liyakat had gone to Baroda on 1.9.99 alongwith one Nagender on a tanker owned by Mr. Ramesh Gupta (PW-5) and with whom the accused was employed as a driver. When Mr. Ramesh Gupta (PW-5) was contacted he informed the police that Liyakat was his permanent driver on tanker No. HR 38A-0481 and had gone to Asian Paints Factory at Ankleshwar in Gujarat on 1.9.99. The police team then left for Ankleshwar and reached there on 5.9.99 where they found the tanker lying parked outside the Asian Paints factory but the accused and the cleaner were not found. Blood stains were noticed on the headlight, bonnet and seat in the driver's cabin of the tanker. The police waited there for someone to come to take the tanker but nobody came there and the police officials came to know on 06/09/99 that the accused had been arrested in Delhi and then the tanker was taken into police possession on 06/09/99 and brought to Delhi and kept at Mahipalpur police station.

3. It is the further case of the prosecution that on 6.9.99 the accused made a disclosure statement, Ex. PW1/1, pursuant to which he got recovered one blood stained axe (Ex. P-12) and the head of the deceased. Later on one Nagender, who was the cleaner on duty on tanker No. 0481, was also arrested on 11.9.99 pursuant to the disclosure statement of accused Liyakat Husain.

4. The decapitated body and the head of the deceased were sent for post-mortem examination on 9.9.99. The autopsy surgeon, Dr. Alaxender (PW-8) had found the following external and internal injuries which he had described in his post-mortem report (Ex. PW-8/1):

(A) External injuries:

Rigor mortis had passed off from all over the body. P.M. staining was fixed and discoloured on the back. Maggots infestation was present. Epidermal, dermoepidermal and deep burns (post mortem) were present on the anterior abdomen, pelvis, whole of right lower limb except right foot left thigh, knee and upper leg anteriorly, left thigh with gluteal region posteriorly whole of the lower limb except foot posteriorly including gluteal region. Line of redness inflammation were not present blackening and charring were present, intestines on the right side anterior abdomen and both femurs were exposed. Penis was circumcised.

Decapitated head - cornea was hazy on both sides, conjunctiva were pale on both sides. There was no bleeding from the nose, ears and mouth. Facial skin

whitish, faded, bleached and sodden. Scalp hair, eye-brows and eye-lashes were intact. Third molars were present on the lower jaws bilaterally on both sides.

The autopsy surgeon opined that death was due to shock and hemorrhage caused by ante-mortem decapitation done with a sharp-edged heavy weapon/object and he further opined that the injuries noticed on the dead body were sufficient to cause death in the ordinary course of nature and that the burn injuries were post-mortem in nature. The time since death was opined to be approximately 7 1/2 days. The axe (Ex. P-1) got recovered by the accused was also shown to the autopsy surgeon for his opinion whether the injuries found on the body and the head of the deceased could have been caused with that axe. He gave his opinion (Ex. PW-8/3) that multiple chopped wounds on the end stumps of the head and neck could be caused with that axe or any other similar weapon.

5. After completion of investigation the police charge-sheeted accused-appellant Liyakat Husain and the cleaner Nagender. On the case being committed to the Court of Sessions accused Nagender was discharged while accused Liyakat Husain was charged and tried under Sections 302/201 IPC. In the absence of any direct evidence to prove the commission of murder by the appellant the prosecution had sought to establish its case on the basis of circumstantial evidence.

6. After the completion of prosecution evidence the appellant-accused was examined u/s 313 Cr.P.C. He denied that he was employed by PW-6 Bhushan Gupta as a driver for his tanker No. HR 38-A 0481. It was his defence that he used to purchase cotton from Ibrahim (the deceased) who overcharged him because of which he stopped going to his shop. Ibrahim insisted him to purchase cotton from his shop and for this reason he might have been implicated falsely. He adduced three witnesses in his defence, namely, DW-1 Rajia Khatoon and DW-2 Shabudin to prove that he was living in Gajrola and not in the locality in Delhi where the deceased was residing as was being claimed by the prosecution witnesses examined to establish illicit relationship between his wife and the deceased. DW-3 Devi Lal was examined to prove that the accused was doing the cotton spinning work in Nabi Karim in Delhi and was not a driver.

7. On examining the evidence on record, the learned trial Court found that the circumstances relied upon by the prosecution for establishing the guilt of accused Liyakat Husain had been proved beyond any doubt and the same established that the deceased was killed by Liyakat Husain and with the intention of saving himself from punishment for the offence of murder he had chopped off the head of the deceased and thrown the headless body in a jungle and the decapitated head in a drain. Feeling aggrieved by his conviction under Sections 302/201 IPC and the sentences awarded to him by the trial Court this appeal was preferred by the convicted accused.

8. The circumstances relied upon by the prosecution to prove the guilt of the accused as noticed by the learned trial Court in the impugned judgment are as

under:

- a) The deceased Ibrahim was having illicit relationship with the wife of the accused and therefore the accused had a grudge against the deceased.
- b) The head of the deceased Ibrahim was recovered by the police pursuant to the disclosure statement by the accused to police.
- c) The weapon used for committing the murder of deceased Ibrahim was recovered by the police pursuant to a disclosure statement made by the accused.
- d) Blood stains were found on the tanker driven by the accused.

9. After examining the evidence adduced during the trial by the prosecution as well as the defence the learned trial Judge came to the following conclusions in para No. 41 of his judgment in respect of the aforesaid circumstances relied upon by the prosecution:

41. Thus the prosecution has successfully proved that:

- 1. The accused suspected that deceased Ibrahim was having illicit relationship with his wife.
- 2. Blood stains were found on the tanker driven by him while in the employment of Mr. Bhushan Gupta.
- 3. The axe EX. P1, which had come into possession of the accused before it was thrown by him in bushes near Dharuheda, had blood stains of the group of deceased and could have been used for committing murder of the deceased.
- 4. The head of the deceased had come into possession of the accused before it was thrown by him in a drain near Chittorgarh.

These are the circumstances which were pressed into service before us also by the learned Addl. Public Prosecutor while supporting the judgment of the trial Court.

10. Regarding the circumstance of motive learned trial Judge relied upon the evidence of PW-2 Yusuf Ahmed, the brother of the deceased. This witness had deposed that the accused was suspecting that the deceased had illicit relations with his wife the learned trial Judge observed in his judgment that there was no reason to disbelieve this statement of PW-2 that the accused suspected that the deceased Ibrahim was having illicit relationship with his wife. As to whether or not the prosecution had succeeded in proving that in fact there was illicit relationship between the deceased and the wife of the accused the learned trial Judge observed that:

It is immaterial as to whether Ibrahim was actually having illicit relationship with the wife of the accused or not. The relevant fact is as to whether the accused suspected such a relationship or not.

The learned trial judge also noticed that it was the prosecution case that the landlord of the accused had got his house vacated from the accused because of the relationship between the deceased and the wife of the accused. After noticing this aspect of the prosecution case the learned trial Judge further observed in his judgment that:

The very fact that the accused was asked to vacate the house in Hari Enclave where he was residing at that time leaves no doubt that not only the accused but also family of Ibrahim suspected that there was some kind of relationship between Ibrahim and Razia, wife of the accused.

From these observations of the learned trial Judge it is clear that the trial Judge was of the view that whether, in fact, there was any illicit relationship between the deceased and the wife of the accused had not been clearly established from the prosecution evidence. We have also examined the evidence of the two prosecution witnesses examined on the motive aspect of the prosecution case, namely, PW-1 Iftikhar, who claimed to have let out the house to the accused in the same locality where the deceased was also living i.e. Hari Enclave, PW-2 Yusuf Ahmed, the brother of the deceased and we also find that from their evidence nothing has come on record from which it could be said that there was illicit relationship between the deceased and the wife of the accused. PW-1 had claimed that he was suspecting that Ibrahim had illicit relations with the wife of the accused and other people also used to complain about their relationship and therefore he had got the house which he had let out to the accused vacated. In cross-examination this witness claimed that he had stated before the police that people used to complain about the illicit relationship between the deceased and the wife of the accused but when he was confronted with his police statement Ex. PW-1/D1 this fact was not found to be recorded therein. That shows that this statement of PW-1 that locality people were also suspecting illicit relationship between the deceased and the wife of the accused was an exaggeration made by the witness and in any case in because of non examination of anyone of the locality person who might have suspected such a relationship between the deceased and the wife of the accused this statement of PW-1 becomes inadmissible being hearsay. PW-1 had also deposed that the deceased used to visit the house of the accused during his presence as well as in his (accused's) absence and, therefore, he (PW-1) had suspected illicit relationship between the deceased and the wife of the accused. This witness, however, did not claim that the accused was aware that the deceased used to come to his house even in his absence when his wife was alone in the house. It is not the case of the prosecution that the accused had expressed his suspicion regarding such a relationship before anyone. So, just because PW-1 was having some kind of suspicion in his mind regarding the relationship between the deceased and the wife of the accused that would not establish that the accused was also harbouring same suspicion in his mind. Similarly, mere ipse-dixit of PW-2 Yusuf Ahmed deposed that his brother had developed illicit relations with the wife of the accused is not sufficient to come to the conclusion that in fact there was any

such relationship between the deceased and the wife of the accused and that accused was aware of that relationship and for that reason he had a motive to kill the deceased. Such kind of allegations are very easy to make but quite difficult to be established and in our view in the present case the prosecution has not succeeded in establishing the illicit relationship between the deceased and the wife of the accused. In fact, it also does not stand established that the accused was suspecting that the deceased had such a relationship with his wife, as has been concluded by the trial Court.

11. The next circumstance which the learned trial Court has found to have been established and relied upon also while convicting the accused is that the accused was a driver employed by PW-6 Bhushan Gupta for his tanker. On 1.9.99 the accused had gone with the tanker to Ankleshwar in Gujarat alongwith the acquitted accused Nagender who was the cleaner. After the police had started suspecting the involvement of accused Liyakat Husain in the murder of the deceased because of his having a suspicion about illicit relationship between his wife and the deceased (which circumstance we have already found to have not been established) a team of police officials went to Ankleshwar in search of accused Liyakat Husain. As per the prosecution case this accused was supposed to deliver some goods at the factory of Asian Paints in Ankleshwar. When the police team reached the premises of Asian Paints (India) Ltd. in Ankleshwar tanker No. HR-38-A 0481 which according to the prosecution had been taken by accused Liyakat Husain and the cleaner Nagender (since discharged by the trial Court) was found parked on the road outside the premises of Asian Paints (India) Ltd. However, accused Liyakat Husain and the discharged accused Nagender were not available there on 5.9.99 when the policemen reached there. So, a vigil was kept by the policemen till 6.9.99 so that the two accused could be apprehended whenever they would come there to take the tanker which, as per PW-6 Bhushan Gupta, was to be taken from Ankleshwar to Bombay. However, neither accused Liyakat nor the cleaner Nagender came to the tanker even till 6.9.99 on which date accused Liyakat Hussain was arrested in Delhi and then that tanker was taken into police possession and brought to Delhi. As per the further prosecution case blood was noticed on the bonnet, headlight and the seat in the driver's cabin. Blood stained head light was sealed in a separate parcel. The blood on the bonnet and the seat in the driver's cabin on being examined at the Central Forensic Science Laboratory (CFSL), New Delhi was found to be human blood while origin of blood on the seized head light of the tanker could not be ascertained. The find of human blood on the tanker which was in the custody of accused Liyakat Husain has been considered to be an incriminating circumstance against him by the learned trial Court.

12. In order to establish that accused Liyakat Husain had been employed as a driver for the aforesaid tanker No. 0481 the prosecution had examined PW-5 Ramesh Gupta and PW-6 Bhushan Gupta, both of whom are brothers. As far as PW-5 Ramesh Gupta is concerned his examination-in-chief was recorded partly on 1.8.2001 when he claimed that tanker No. 0481 was owned by his brother

Bhushan Gupta (PW-6) and that Liyakat Hussain was employed as a driver for that tanker. However, thereafter he was not produced for the completion of his unfinished statement. Therefore, his statement cannot be read. Then his brother Bhushan Gupta was examined as PW-6. Bhushan Gupta deposed that he was the registered owner of tanker No. HR-38-A-6481 and that accused Liyakat was his driver and he had taken the said tanker to Ankleshwar alongwith cleaner Nagender Singh (discharged accused) on 1.9.99. As far as the stand of accused is concerned he denied being an employee of PW-6 and a suggestion to that effect was put to PW-6 in his cross-examination. When asked whether he had any documentary proof to show that the accused was his driver the witness stated that he was not having any documentary proof to show that accused Liyakat was ever employed by him as a driver. The defence of the accused was that he was doing the work of spinning cotton and in support of that plea he had examined one witness (DW-3 Devi Lal). DW-3 Devi Lal who had deposed that the accused was doing the work of spinning cotton in Nabi Karim for about 4-5 years till 2.9.99 in a tenanted premises which was in front of the house where he (DW-3) himself was residing. The learned trial Judge has accepted the statement on oath of PW-6 Bhushan Gupta in this regard in preference to the statement made on oath by DW-3 only on the ground that since there was no enmity between him and the accused he (PW-6) had no reason to depose falsely against the accused and also because even the accused had not imputed any motive to him for falsely deposing against him. If that was the only consideration for placing reliance on the statement on oath made by PW-6 then the evidence of defence witness should also have been examined keeping in mind the same consideration that he too had no apparent reason to depose falsely to help the accused and to DW-3 the prosecutor also had not suggested any motive in his cross-examination for falsely claiming that the accused was doing the work of cotton spinning and was not employed as a driver anywhere. The defence witnesses are entitled to equal treatment and respect as the prosecution witnesses get. Another reason given by the trial Judge for rejecting the defence plea was on the ground that the accused had not examined the landlady of the house where he was doing the work of cotton spinning and that the accused had not obtained registration under The Shops and Establishments Act. In our view, the evidence of DW-3 has been rejected on flippant grounds. If the learned trial Judge was expecting a documentary proof from the accused to substantiate his defence, although the concept of proof beyond reasonable doubt applies only in case of prosecution evidence and not in respect of the evidence adduced by an accused in support of his defence plea which has only to be probabalised, then the same proof should have been expected from the prosecution side also. We have already noticed that PW-6 Bhushan Gupta had claimed that he was not having any documentary proof to show that the accused was employed by him as a driver. The prosecution had not produced on record even the documentary proof of ownership of the tanker in question. Because of non-production of documentary proof in that regard by PW-6 his evidence, in fact, should have been rejected. The burden of proving the fact that the accused was employed as

a driver with PW-6 was on the prosecution which, in our view, cannot be said to have been discharged. That burden could have been discharged by producing some documentary evidence but no such evidence had been produced. This apart to expect a person doing cotton spinning to have a registration under the Shops and Establishments Act is bordering on absurd. Lakhs of small artisans work in India who are not attached to establishments which have a Shops and Establishments Registration. In particular to use this circumstance as a factor for recording conviction for murder is inexplicable and wholly uncalled for. From the reasons given by the learned trial Judge for not accepting the defence evidence we are of the view that the learned trial Judge had put the burden of proof on this aspect of the prosecution case on the shoulders of the accused. It is the basic principle of criminal jurisprudence that if prosecution is making any allegation against an accused it is for the prosecution to establish the same and just because the accused does not produce strong evidence to establish his defence plea the prosecution allegation cannot not be presumed to have been established for that reason. The conclusion of the learned Trial Judge in para No. 31 of the impugned judgment to the effect that "Thus, there is no credible proof of the accused being a cotton spinner and not a driver. In these circumstances, the conclusion is that the accused was working as a driver with PW-6 and was driving his tanker No. HR 38-A 0481" can be said to have been arrived at in total disregard to the legal position regarding burden of proof in a criminal trial and so it cannot be accepted by us.

13. We also find from the impugned judgment that the learned trial Judge while coming to the conclusion that the accused was employed as a driver with PW-6 Bhushan Gupta appears to have been influenced by the statement of the Investigating Officer PW-22 Inspector Bishan Mohan to the effect that accused Liyakat Husain was arrested from the house of PW-5 Ramesh Gupta, who happens to be the brother of PW-6 Bhushan Gupta. It appears that the learned trial Judge had in mind this fact that accused having been arrested from the house of Ramesh Gupta must have had some connection with the Gupta brothers and that connection could be his being the driver of Bhushan Gupta only. In our view, the learned trial Judge might have been justified in raising this kind of an inference from the aforesaid statement of the investigating officer if actually the correctness of the statement of the investigating officer had been tested by going through the cross-examination also of the investigating officer and the evidence of other witness of the arrest of the accused, namely, PW-11 Sub-Inspector Mahabir Kaushik. That was, however, not done by the learned trial Judge. If that had been done the learned Judge would have found that the statement of the investigating officer that accused Liyakat Husain was arrested from the house of Ramesh Gupta was not correct. Both the Gupta brothers were residents of Paschim Vihar, New Delhi. The investigating officer who had in chief-examination claimed that the accused was arrested from the house of PW-5 Ramesh Gupta, however, in his cross-examination on behalf of the accused had contrary to his statement in examination-in-chief stated that the accused was arrested at the

instance of Ramesh Gupta (PW-5) from some place which was near village Kiradi. This conflicting statement of the investigating officer during cross-examination falsified his statement in chief-examination to the effect that accused Liyakat Husain was arrested from the house of Ramesh Gupta. Not only that, the evidence of PW-22 in that regard stood belied also from the evidence of his associate in the investigation team, namely, PW-11 SI Mahabir Kaushik who categorically deposed in his examination-in-chief that accused Liyakat was arrested on 06.09.99 from his own house. Since this was the statement made by the prosecution witness and which had not been considered to be a wrong statement by the prosecutor it became the prosecution case itself that accused Liyakat Husain was, in fact, arrested from his house and not from the house of Ramesh Gupta as had been observed by the learned trial Judge. The arrest memo of the accused shows that it was signed by the wife of the accused also as a witness which also shows that the accused must have been arrested from his own house.

14. There is another significant infirmity in the prosecution evidence regarding this aspect of the matter which has also not been noticed by the learned trial Judge. PW-6 Bhushan Gupta had deposed that he was the owner of tanker No. HR 38 A-6481 while the tanker which the police seized from Ankleshwar was having the registration number HR 38-A 0481. Learned APP had in this regard submitted that the number "6481" appeared to have been inadvertently typed in place of "0481" in the statement of PW-6. We would have been inclined to accept this submission of the learned APP but cannot accept it since during the cross-examination of DW-1 Razia Khatoon it was suggested to her by the prosecutor himself that her husband was the driver of tanker No. HR 38-A 6481 which shows that even as per the prosecution case accused Liyakat Husain was not the driver of the tanker which the police had recovered from Ankleshwar. This suggestion put to DW-1 on behalf of the prosecution has obviously gone unnoticed since the learned trial Judge did not discuss at all the evidence of this defence witness while examining this aspect of the prosecution case. The prosecution, as noticed already, had not even proved on record the ownership/registration document of vehicle No. "0481" to show that PW-6 was its owner. Thus, on an independent marshalling of the evidence of the prosecution witnesses we have no doubt that the prosecution has failed to establish that accused Liyakat Husain was employed to drive the tanker which the police seized from Ankleshwar.

15. Having reached this conclusion regarding the prosecution case that accused Liyakat Husain was employed by PW-6 Bhushan Gupta as a driver the other part of the second circumstance which the trial Court has found to have been established i.e. the find of human blood on tanker No. 0481 seized by the police from Ankleshwar loses all its relevance. In any event, we are also of the view that even if we were to ignore the infirmities which we have found in the evidence adduced to show that the accused was employed as a driver by PW-6 and also that the tanker number mentioned in his evidence as also in the cross-

examination of DW-1 as "6481" was an inadvertent error and the reference was to tanker No. 0481 only and it is also accepted that the accused was employed as a driver by PW-6 for tanker No. 0481 the circumstance of find of blood on that tanker even then cannot be said to be of any help to the prosecution as it cannot be said have been established beyond reasonable doubt. There are many loopholes in the evidence in that regard and the learned trial Judge has not noticed the same because he did not examine and analyze the entire evidence in proper perspective as is expected in a criminal trial, particularly of a heinous crime.

16. The prosecution case is that tanker No. 0481 was found lying abandoned in Ankleshwar on 05.09.99 and the same was seized on 06.09.99 by PW-21 SI Anand Parkash. PW-21 as well as PW-4 Mehendi Hussain, an acquaintance of the deceased, who was also with the police team which had gone to Ankleshwar in search of the accused Liyakat Husain have both deposed that they had noticed blood stains on the bonnet and the headlight of the said tanker. It is also the prosecution case that the said tanker was brought to Delhi on 10.9.99 and thereafter it was kept at the Mahipalpur Police Station. PW-11 SI Mahabir Kaushik had stated in his cross-examination that the tanker was kept in an open place after it had been brought to Delhi from Ankleshwar. It was allegedly kept there till 14.09.99 when it was taken to FSL for being examined by an expert there for confirmation of presence of blood on it. There is no explanation coming forth from the side of the prosecution as to why the tanker was parked at the police station till 14.9.99 when blood on the tanker had already been noticed before its seizure in Ankleshwar. In these circumstances the possibility of blood having been sprinkled on the tanker while in police custody cannot be said to have been ruled out by the prosecution. There is another infirmity also in the prosecution evidence in respect of this circumstance. PW-11 SI Mahavir Kaushik had deposed that the tanker was taken to FSL on 14.9.99 The statement of PW-21 SI Mahavir Kaushik that he had taken the tanker to CFSL on 14.9.99 becomes doubtful in view of the statement of PW-6 Bhushan Gupta, who claimed himself to be the owner of the said tanker, to the effect that he had taken the delivery of his tanker from Mahipalpur police station on 13.9.99 on superdari and that he had not seen any blood on the tanker. Now, if PW-6 had taken the delivery of the tanker on 13.9.99 PW-11 could not have taken the same to FSL on 14.9.99 as claimed by him. PW-15 Sh. S.K. Singhla, Senior Scientific Assistant in Forensic Science Laboratory, New Delhi, had deposed that tanker No. HR 38-A 0481 was brought to FSL on 22.09.99 and on that day he had examined the tanker and had detected blood near the right headlight and also on the seat in driver's cabin and after lifting blood stains from these two places he had handed them over to the Investigating Officer. There is thus discrepancy even regarding the actual date of arrival of the tanker in FSL inasmuch as PW-11 SI Mahavir Kaushik claimed that he had taken the said vehicle to FSL on 14.09.99 while according to PW-15 the vehicle was brought to FSL on 22.09.99. The tanker, in any case, was not even produced in court during the trial and that is

also an infirmity in the prosecution case as far as this particular circumstance under consideration is concerned. PW-15 had also deposed that he had lifted the blood stains from the tanker and handed over the same to the investigating officer SI Mahavir Kaushik (PW-11) for being taken to FSL for further examination by the Serological Division. He however, did not claim to have sealed the blood stains nor did the investigating officer claimed that blood stains lifted from the tanker were sealed. Absence of evidence regarding sealing of blood lifted from the tanker also makes the expert's report to the effect that that blood was human blood unreliable piece of evidence. The origin of blood on the head light of the tanker could not be ascertained as per the CFSL report (EX. P-B). In view of these infirmities in the prosecution evidence a serious doubt regarding the find of human blood on the tanker does enter into the mind of the Court and benefit thereof has to go to the accused . So, the second circumstance found to have been established and relied upon by the trial Court also cannot be said to have been established beyond reasonable doubt.

17. The learned Additional Public Prosecutor had contended that even if the circumstances of motive and find of blood on the tanker in the custody of accused Liyakat Husain are not accepted by this Court to have been established the accused would still not be entitled to be acquitted. It was submitted that even in the absence of motive for some crime an accused can be convicted if there is other reliable evidence adduced by the prosecution to prove the guilt of the accused and in the present case, learned prosecutor submitted, the prosecution had adduced other sufficient circumstantial evidence also to establish the guilt of the accused which even in the absence of proof of motive was good enough to sustain the conviction of the accused-appellant. There is no doubt that to establish the commission of an offence it is not necessary to establish that the accused had a motive for committing the crime. Even in cases based on circumstantial evidence absence of motive for the crime is not fatal. We shall now proceed further to examine as to whether the guilt of the accused stands established from the remaining two circumstances relied upon by the prosecution and also by the trial court. Those circumstances are the recovery of one blood stained axe (Ex. P-1) and the recovery of the head of the deceased pursuant to the disclosure statement (Ex. PW-1/1) made by the accused after his arrest to the investigating officer. It was submitted by learned Additional Public Prosecutor that the prosecution had adduced evidence to show that the decapitated head of the deceased as well as one axe having which was stained with blood of the deceased were got recovered by the accused after his arrest and those recoveries were sufficient to come to a conclusion that only accused Liyakat Husain had committed the murder of the deceased since he had not come out with any explanation as to how he knew that the severed head of the deceased was lying in the drain from where it was actually recovered and about the presence of the axe at the place from where it was recovered and in the absence of explanation in that regard the only conclusion which could be arrived at was that the accused himself had thrown the head of the deceased in the drain after

chopping it off from the body of the deceased and the axe in the bushes after using the same for committing that crime. On the circumstance of the recovery of the severed head of the deceased Ibrahim and the blood stained axe pursuant to the disclosure statement made by the accused after his arrest the submission of Mr. K.B. Andley, learned senior Counsel for the appellant was that the evidence adduced by the prosecution for establishing this circumstance was not reliable at all and in any event from the recoveries of the head of the deceased and the axe it could not be inferred that the deceased was murdered by accused Liyakat Husain. In support of this submission regarding the effect of the alleged recoveries being relied upon by the prosecution two judgments of the Hon''ble Supreme Court were also relied upon and the same are reported as Dudh Nath Pandey Vs. State of Uttar Pradesh, and Bakhshish Singh Vs. State of Punjab, In the first case the prosecution had sought to establish its case on the basis of recovery of pistol at the instance of the accused. The Hon''ble Supreme Court held that mere evidence of recovery of pistol at the instance of the accused cannot by itself prove that he had committed the murder. In the second case the circumstance relied upon by the prosecution was the recovery of dead body pursuant to the information supplied by the accused. It was held by the Supreme Court that mere recovery of the dead body on the pointing out of the accused is not a conclusive piece of evidence to hold the accused guilty for the commission of murder.

18. In order to appreciate the rival submissions regarding the recovery of blood stained axe and the head of the deceased the relevant portions of the testimonies of PW-1 Iftikhar, PW-2 Yusuf Ahmed and the Investigating Officer PW-22 Bishan Mohan, who have been examined as witnesses of the making of the disclosure statement by the accused and recoveries of the head and the axe pursuant thereto need to be noticed. PW-1, Iftikhar deposed regarding the recovery of the head of the deceased and the axe as under:

...On 7.9.99 I had gone with the police party to Dharuheda in TATA SUMO. The accused was with us at that time. Yusuf, brother of the deceased Ibrahim was also with us in the vehicle. At some place before Sabi river, the vehicle was got stopped by the accused. The accused took us to the bushes. One Axe was found in the bushes at the place pointed out by the accused. The police took photograph of the axe. Sketch of the axe was also prepared by the police and thereafter it was kept in piece of cloth and was sealed.... On the morning of 8th September we reached a village just before Chitorgarh. The accused got the vehicle stopped at drain. He told that the head of Ibrahim had been thrown by him in the drain. One police official entered the drain. One blue color polythene bag was taken out. It was found to contain bag, severed head of Ibrahim was found. One stone, one blanket were also found in the bag. The stone, blanket and cloth were wrapped by the police and sealed. One ice box was obtained and severed head of Ibrahim was kept in that Ice box.

19. PW-2 Yusuf Ahmed deposed to the following effect in respect of the

recoveries of the axe and the head of the deceased:

...On 7.9.99, I accompanied the police in a Tata Sumo car. PW-1 and the accused was also there with the police party. When we reached near Dharuheda, the accused got the vehicle stopped and took us to the bushes. The bushes were just before a river. The accused pointed out one axe lying in the bushes. That axe was sealed by the police. I do not remember what seal was used by the police. No earth was lifted from that place by the police. However, some soil/mud was there on the axe. The axe was seized by the police vide memo Ex. PW-1/2) which bears my signature at point B. Before the recovery of the axe, the accused had told the police that the axe had been thrown by him in the bushes and he can get it recovered. At that time, the accused had also disclosed that the severed head of my brother, had been thrown by him in a drain near Chittorgarh. The disclosure statement of the accused Ex. PW 1/1 bears my signature at point B. I have seen the axe Ex. P1. This is the same axe which was recovered by the police from the bushes. On 08.09.99, at about 10 a.m. or 11 a.m., we reached the drain near Chitorgarh. The vehicle was got stopped by the accused. One police official entered the drain and took out one blue color polythene. The polythene had been tied on the top. It was found to contain one bag, one stone, one blanket and severe head of my brother. The bag, polythene bag and blanket were sealed by the police and were seized vide memo Ex. PW-1/3....

20. PW-22 Inspector Bishan Mohan, the investigating officer, deposed as under regarding the recoveries at the instance of the accused:

...On 6.9.99 I received an information from Mr. Ramesh Gupta that liyakat would be visiting his office as well as hosue then I can interrogate him. One team went to the house of Mr. Ramesh Gupta, alongwith Yusuf Ahmed, brother of the deceased. When Liyakat came there at about 4 p.m. he was identified with Yusuf Ahmed. He was interrogated and arrested. His personal search was conducted vide memo Ex. PW-8/12. He was interrogated and made disclosure statement Ex. PW 1/1. He told the police that the axe had been thrown by him near Dharuheda and the head of the deceased had been thrown by him near Chittorgarh and he could get the same recovered....

On 7.9.99 we hired a Tata Sumo and I accompanied by the accused Yusuf Ahmed, Ifftikar, HC Kalyan and Const. Surinder Pal proceeded towards Chitorgarh. Just after Dharuheda and before Sahibi river the accused got the vehicle stopped he took out one axe from the bushes from the left side of the road. After preparation of the sketch (Ex. PW 22/4, the axe was wrapped in a cloth and sealed with the seal of BM. Ex. PW22/5 is the site plan of the place from where the axe was brought out by the accused. The axe was seized vide memo Ex Pw1/2 and is Ex. P1. Thereafter we proceeded further towards Chittorgarh. Thereafter just before Chitorgarh the accused got the vehicle stopped near a drain where one Majar and one small Temple had been built. The accused had told us that the head of the deceased had been thrown by him in the drain in a gunny bag along with a stone, after wrapping it in a blanket.

Kalyan knew swimming and therefore was sent inside the water. He took out one white bag. The bag was found tied with a rope. On opening and checking the bag, one plastic bag was found in it. That plastic bag contained one stone and one blanket. Head of the deceased was found wrapped in the blanket. Yusuf Khan identified the head of the deceased Ibrahim....

21. There is no doubt that these three recovery witnesses have deposed in their respective examination-in-chief about the recoveries of the axe and the head of the deceased at the instance of the accused. We shall now consider the infirmities in the evidence of the prosecution witnesses of recoveries pointed out by the learned Counsel for the appellant. During cross examination of these three witnesses certain facts stated by them, which have not been noticed by the learned trial Judge, have made the recoveries quite doubtful. As far as the arrest of the accused is concerned the evidence of the police officials, as has been noticed already, is contradictory. PW-22 Insp Bishan Mohan had deposed in his examination in chief that the accused was arrested from the house of PW-5 Ramesh Gupta but then in cross examination he had claimed that the accused was arrested from some place near village kirari at the instance of PW-5 Ramesh Gupta. PW-11 SI Mahavir Kaushik, however, had deposed that the accused was arrested from his own house on 6.9.99. PW-22 had also claimed in his cross examination that the arrest memo prepared by him in respect of accused Liyakat Husain was not got witnessed by any family member of the accused at the time of his arrest though he was arrested from a place which was near his residence. However, the arrest memo (Ex. PW-8/11) shows that the wife of accused had also signed the same as a witness. Not only that even the personal search memo (Ex. PW-8/12) was also signed by the wife of the accused as a witness. That shows that the investigating officer himself was not present at the time of the arrest of the accused and if that be so the making of disclosure statement by the accused, pursuant to which the aforesaid recoveries were allegedly made, becomes highly doubtful since the investigating officer had claimed that he had recorded the disclosure statement of the accused at the place of his arrest. PW-1 Iftikhar and PW-2 Yusuf Ahmed are the witnesses to the disclosure statement (Ex. PW-1/1) of the accused. Both of them did not even utter a word regarding the arrest of the accused although the prosecution case is that he was arrested in their presence. As far as the disclosure statement of the accused is concerned both these witnesses simply claim that the same had been signed by them. PW-1 had claimed in his cross-examination that he had signed the disclosure statement in the police station and further that he did not know what was written therein. PW-2 in his cross-examination stated that the accused had made his disclosure statement at the police station on 7.9.99 which he (PW-2) had also signed. PW-11 SI Mahabir Kaushik in his cross-examination had stated that the accused was arrested from his house but signatures of none of the family members of the accused were obtained on the arrest memo. The evidence of this police official also becomes doubtful and unreliable since the arrest memo of the accused as well as his personal search memo bear the signatures of the wife of

the accused and that makes the presence of this witness also at the time of arrest doubtful. This witness had also stated in cross-examination that the accused had made disclosure statement soon after his arrest. Since his very presence at the time of arrest of the accused is doubtful his statement regarding the making of disclosure statement by the accused also becomes unreliable. If this witness was rightly claiming the arrest of the accused from his house as well as the making of disclosure statement immediately after his arrest then the signature of the wife of the accused would have been there on his disclosure statement also. However, the disclosure statement (Ex. PW-1/1) does not have the signature of the wife of the accused.

22. All the aforesaid infirmities have not been noticed by the trial Judge and that is evident from the fact that the trial Judge did not bother to go through the cross-examination of the witnesses examined by the prosecution and has based his conclusion regarding the alleged recoveries only on the basis of whatever had been stated by the witnesses in their examination-in-chief. There is not even a whisper about what the witnesses had stated in cross-examination. Cross-examination of a witness is as much a part of the evidence as the examination-in-chief and a criminal Court cannot simply base its decision only on the basis of what prosecution witnesses depose in their examination-in-chief totally ignoring the cross-examination which is a valuable weapon in the armoury of an accused to shatter the credibility of a prosecution witness. It is the duty of a judge trying a criminal case to read the examination-in-chief as well as cross-examination of a prosecution witness and to examine how the witness had fared in cross-examination and then to arrive at some conclusion about the trustworthiness of the testimony of the witness. If only examination-in-chief of the prosecution witnesses who support the prosecution case is to be considered and not their cross-examination then conviction would follow almost in every case even if an accused has been able to elicit from the witnesses certain answers in cross-examination which demolish the prosecution case and convicting an accused in that manner would be totally unfair.

23. In the present case the learned trial Judge has given his findings on these recoveries against the accused not only by totally ignoring the cross-examination of the material prosecution witnesses of recoveries but quite strangely also considered certain photographs taken at the places from where the head of the deceased and the axe were allegedly recovered as substantive evidence establishing the recoveries. This is what was observed in para No. 33 of the impugned judgment:

...the photographs produced by the prosecution leave no doubt about recovery of axe and dead body of the deceased. The axe can be clearly seen lying in the bushes, in some of these photographs. The head of the deceased can also be seen in the photograph. In one photograph, police official can be seen in the drain under the bridge. These photographs are a very strong and authentic proof of recovery of axe Ex. P-1 and head of the deceased pursuant to the disclosure

statement of the accused.

We fail to understand as to how the trial Judge arrived at the aforesaid conclusion that the photographs placed on record by the prosecution were strong and authentic proof of recovery of the axe and the head of the deceased. The findings of the learned trial Judge in this regard have no backing of law at all.

24. The recoveries of the head of the deceased and the weapon of offence pursuant to the disclosure statement of the accused become doubtful for another reason also. The investigating officer (PW-22) had stated in his chief examination itself that accused Liyakat Husain was arrested on 6.9.99 at about 4.00 p.m. and then he was interrogated and he had made a disclosure statement (Ex. PW-1/1) claiming that he had thrown the axe near Dharuheda and the head of the deceased near Chittorgarh. In cross examination he admitted that on 6.9.99 he had come to know that about the place where the axe and the head of the deceased had been thrown. As per the prosecution case the head of the deceased was recovered at the instance of the accused on 8.9.99. There is no explanation forthcoming from the prosecution side as to why the accused was not taken on 6.9.99 itself for the recovery of the head and the axe and why the recovery of the head of the deceased was made on 8.9.99. In the absence of any explanation in that regard it becomes doubtful that the recoveries were actually made at the instance and on pointing out of the accused. In this regard we may make a reference to one judgment of the Hon'ble Supreme Court reported as Himachal Pradesh Administration Vs. Om Prakash, In that case the accused was arrested on 1.2.67 and on the same day he had made a disclosure statement and had volunteered to get certain incriminating articles recovered including the weapon of offence and pursuant to that disclosure statement some of the incriminating articles were recovered on 1.2.67 itself while some incriminating articles were recovered on 2.2.67. The Hon'ble Supreme Court did not accept the recoveries made on 2.2.67 because of the delay in getting the recoveries effected. It was observed by the Hon'ble Supreme Court that the accused had already given the information to the police on 1.2.67 about the place where he had hidden certain articles and since the police knew the place from where the articles were recovered on 2.2.67 it could not be said that the same had been discovered as a consequence of the information furnished by the accused and observing so the recoveries made on 2.2.67 were excluded from consideration. This is what was observed by the Hon'ble Supreme Court in para No. 14 of the judgment regarding the recoveries made on 2.2.67.

We then come to the recovery on the second February of Pant, the Account Books and the vouchers, These however, cannot in our view be relied upon because P.W. 28 had information relating to them which had been furnished by the accused more than 24 hours before and the description given by him was such that they could have been discovered. At any rate the long delay does not lend assurance to the discovery....

In the present case also the investigating officer was aware of the places of

concealment of the axe and the head of the deceased on 6.9.99 and so the delay in recovering the same makes the recoveries unreliable. As far as the recovery of the head of the deceased is concerned the prosecution has not examined the police man who had actually brought out the gunny bag containing the head of the deceased after diving into the drain where the accused had allegedly thrown it. His non-examination is yet another reason for suspecting the prosecution case regarding the recovery of the head of the deceased at the instance of the accused.

25. Having not found the prosecution evidence in respect of the recovery of the head of the deceased and the alleged weapon of offence pursuant to the disclosure statement of the accused to be credible and reliable we need not go into the submission advanced by Mr. Andley that even if these recoveries were to be accepted as having been established beyond reasonable doubt the same would have still not been sufficient to hold the accused guilty for the offence of murder

26. We are, therefore, of the view that none of the circumstances relied upon by the prosecution for establishing the guilt of the accused-appellant can be said to have been established beyond reasonable doubt and so the impugned judgment whereby the appellant stands convicted for the offences punishable under Sections 302 and 201 IPC cannot be sustained and needs to be set aside. The accused-appellant deserves to be acquitted by extending to him the benefit of doubt.

27. In the result, this appeal succeeds and the judgment and order dated 15.2.2003 passed by the learned Additional Sessions Judge, Delhi in Sessions Case No. 70/02 are set aside. Consequently, the appellant stands acquitted of both the charges for which he was tried and convicted. Presently he is lodged in jail and now that he stands acquitted he shall be set at liberty forthwith, if not required to be detained for any other case.