

(2008) 02 DEL CK 0307

In the Delhi High Court

Case No : Criminal Appeal No. 343 of 2004

Staila Sayyed

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 04-02-2008

Acts Referred:

Arms Act, 1959 — Section 25, 27
Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 106, 114, 27
Penal Code, 1860 (IPC) — Section 120B, 201, 302, 34, 342
Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 5

Citation : (2008) 02 DEL CK 0307

Hon'ble Judges : Reva Khetrapal, J; Mukul Mudgal, J

Bench : Division Bench

Advocate : Bhupesh Narula, for the Appellant; M.P. Singh, APP in Crl. Appeal Nos. 342, 343, 345 and 592/2004 and M.P. Singh in Crl. Appeal Nos. 368 and 674/2004, for the Respondent

Final Decision : Allowed

Judgement

Mukul Mudgal, J.—These appeals challenge the judgment of the learned Additional Sessions Judge (hereinafter referred to as the "trial court") dated 13th February 2004 and 19th February 2004 in Session Case No. 54/2001 arising out of the FIR No. 174/2000 registered at Police Station Vasant Vihar in respect of offences under Sections 395/396/376/411/402 read with Section 120-B of the Indian Penal Code (hereinafter referred to as "IPC") and Section 25/54/59 of the Arms Act. By the impugned judgment the trial court convicted all the six accused to undergo imprisonment for life and fine. The case of the prosecution is as follows:

(a) On 5th June 2000, one Anjali Ghatge made a report to the police that her maid servant Chanda Paswan has been murdered. The said Anjali Ghatge had only complained about the disarray in the house and had reported that she did not think that anything was taken away. However, on the next day, the said

complainant Anjali Ghate reported about the missing of her passport, cheque book, some watches, one wrist watch, one pocket watch, one chain, one calculator, one necklace and one purse containing some cash.

(b) Sixteen witnesses were examined by the prosecution. The murder was committed on 5th June 2000 and the police went to recover the missing articles upon disclosure statements of the accused persons on 7th June 2000. The entire prosecution case is founded on the recovery pursuant to the disclosure statements of the accused person. The case set up by the prosecution was that the disclosure statements revealed that the accused persons entered into a conspiracy to commit robbery and after committing rape and murder of the deceased Chanda, the accused persons robbed the house and took away valuable items from the said house.

In the written submission on behalf of the prosecution/respondent, the learned Additional Public Prosecutor, Dr. M. P. Singh submitted that the present case is based on circumstantial evidence. The basic premise that he dwelt upon was:

(i) The appellant had failed to give any explanation, either at the time of the recovery of the articles or during the trial with regard to her possession of the stolen properties.

(ii) The stolen articles were recovered by the police from the house of the appellants within a short span of the said murder and dacoity.

In order to support the above submissions, the learned Additional Public Prosecutor has cited the judgment of the Hon"ble Supreme Court in the case of Sanjay @ Kaka Vs. The State (NCC.T. of Delhi), , applying the principle that the accused from whom recoveries were made consequent upon their disclosure statement did not offer an explanation regarding their possession of the stolen property and therefore, they were rightly convicted for the offences of murder and dacoity. Dr. M. P. Singh also submitted that the non joining of independent witnesses does not vitiate the recoveries and dismissed it as a minor irregularity. He, however, did not cite any judgment in support of this submission.

The depositions of the prosecution witnesses are found in the trial court judgment. In support of its case, prosecution has examined as many as 16 witnesses as follows.

(i) PW1 Dr. Joginder Kumar is the Chief Medical Officer of Safdarjung Hospital. He had deposed before the court that on 8th June 2000 he medically examined accused Bhupinder Nath, Yuvraj @ Raja, Ajay Singh and these accused persons were brought by SI Rajesh Kumar. In his opinion all the three accused persons were capable of performing the sexual act. He has further deposed that during his examination he found that Yuvraj had an abrasion of 3 mm x 2 mm on his left hand ring finger. He proved his report as Ex.PW1/A.

(ii) PW-2 is HC Sukhbir Singh. He deposed before the court that on 5th June 2000 he was working as Malkhana Moharir. Inspector Suresh Daggar, SHO of PS

Vasant Vihar, on the said date deposited nine sealed pulandas and an entry was made in register no 19 at serial no. 736 by him that these pulandas related to case FIR No. 174/2000. He further deposed that on 7.6.2000 Inspector Mahinder Pal Singh, the then Additional SHO, PS Vasant Vihar, deposited eight sealed pulandas and Inspector Mahinder Pal Singh also deposited one motor cycle bearing No. DL8SCG-1789, make Hero Honda, and the personal search articles of the accused Yuvraj, Sayeed Salim and Sayed Miraj. PW 2 further deposed that he deposited the above said pulandas and the above mentioned case property in the Malkhana after making an entry in register No. 19 at serial No. 739. Again on 14th June 2000, SI Rajesh Maurya of PS Vasant Vihar deposited five sealed pulandas duly sealed with seals intact along with a sample seal of Safdarjung Hospital in the Malkhana after making an entry in register no 19 at serial No. 745. Again on 13th June 2000 vide Road Certificate No.135/21 one sealed pulanda alleged to contain knife was handed over to Inspector Mahinder Pal Singh for obtaining opinion from the Safdarjung Hospital by him. On 14th June 2000 the abovesaid knife in sealed parcel with the seal of the Safdarjung Hospital along with sample seal was again deposited back by SI Rajesh Maurya on 14th June 2000. He further deposed that on 18th July 2000 one sealed pulanda alleged to contain cushion with cover was handed over to HC Satbir Singh by him vide road certificate no.147/21 for depositing the same in FSL Malviya Nagar. On 18th July 2000 he also handed over one sealed earth control pulanda to HC Satbir Singh vide road certificate no.147/21 for depositing in FSL Malviya Nagar and on the same day another sealed parcel was given to HC Satbir Singh vide road certificate No.147/21 for depositing in FSL Malviya Nagar. On 13th June 2000 he handed over one sealed pulanda alleged to contain one dagger duly sealed with the seal of MS to Inspector Mahinder Pal vide road certificate no.135/21 for obtaining opinion by him from the Safdarjung hospital and on 14th June 2000 SI Rajesh Maurya deposited the said dagger back duly sealed with the seal of Safdarjung hospital along with sample seal and on 18th July 2000 he handed over one sealed parcel alleged to contain one katta and two rounds duly sealed with the seal of MS to HC Satbir Singh vide road certificate no.146/21 for sending to the FSL Malviya Nagar and on the same day another sealed pulanda alleged to contain underwear duly sealed was also handed over by him to HC Satbir Singh for depositing in FSL Malviya Nagar. PW 2 further deposed that on 18th July 2000 he also handed over one sealed parcel of this case to HC Satbir Singh for depositing with the FSL, Malviya Nagar. On the same day he made the relevant entry in register no.19 and on 11th September 2000 Exhibits bearing serial no.1 to 10 which were sent to the FSL Malviya Nagar were again deposited in the Malkhana by HC Satbir Singh duly sealed with the seal of DS FSL Delhi along with report. He also made an entry in register no.19 in this regard and proved his copy of register no.19 as Ex.PW2/A.

(iii) PW 3 is Dr. Alexander. He has deposed before the Court that on 9th June 2000 he had conducted the post mortem examination on the body of Chanda Paswan. He found three injuries in the abdomen and according to him death in

this case was due to shock and hemorrhage caused by multiple injuries and he proved his report as Ex.PW3/A. PW3 further deposed that on 13th June 2000 he had received an application from the IO for subsequent opinion in connection with the weapon of offence and the injuries caused on the person of the deceased with the said weapon. He further deposed that he received two parcels, one containing a kitchen knife and the other containing a dagger. According to him injury No.1 might be caused by the knife and injury no.2 might be caused by the dagger. The witness has identified the kitchen knife and dagger before the court as Ex.P2 and P3. His report is Ex.PW3/A.

(iv) PW 4 is Anjali Ghatge. She has deposed before the court that she was living at the H.No.D-1/25, Second Floor, Vasant Vihar, New Delhi, since 1995 and on 5th June 2000 as usual she had left her house at about 8.10 am for her job in J.R. Narang Deepalia School at B-64, Panchsheel Vihar, New Delhi. She has further deposed that she had one maid servant and in her absence she used to remain in the house and there was no other family member living with her in that house. She further deposed that she returned back to her house on 5th June 2000 at about 8.15. pm, and on reaching she rang the door bell, but the door was not opened by her maid servant. However, she opened the door with the duplicate key of her house, and after entering the house, she saw lot of broken glasses inside the kitchen and in the bathroom also, and she also saw one chappal lying in the lobby and one chappal in the bathroom. PW4 further deposed that after entering the house she had switched on the light and when she entered inside the kitchen, she saw that the electric press had fallen on the floor. She saw her maid servant Chanda lying on the floor of the kitchen and at that time she was not wearing salwar. Her face was covered with a cushion. She also noticed some blood on the middle part of her body. Her bra was also lying on her thighs. PW 4 further deposed that she removed the cushion from her face thinking that she might breathe and she then touched her face and cheek and found that she was cold. Then PW 3 realised that she had expired and thereafter she called Swaminath, a mali who told her that around 1.00 am. he had rung the door bell but at that time nobody had opened the door from inside. PW 4 further deposed that she then called the police. Police came to her house and recorded her report Ex.PW4/A. She also got the spot photographed. She further deposed that she had entered her house and found the book shelf disturbed from its actual position and she also found that some articles were missing from her house and she had given a list of those articles to the police. She further deposed that she signed all the memos at the spot. The witness identified all the articles which were shown to her before the court which were stolen from the house.

(v) PW 5 is Ram Ashish Paswan. He has identified the dead body of Chanda Paswan who was the wife of his brother-in-law Jaswant Paswan.

(vi) PW 6 is Constable Arvind Kumar. He has deposed that on 5th June 2000 he took the dead body of Chanda to the Mortuary of Safdarjung Hospital. He is a

formal witness.

(vii) PW 7 is HC Md. Rashid. He is too formal witness.

(viii) PW 8 is Ankruz. He has also identified the dead body of Chanda Paswan. He is a formal witness.

(ix) PW 9 is ASI Chet Ram. He has deposed before the court that on 5th June 2000 he visited the spot and lifted the chance prints and proved his report as Ex.PW9/A.

(x) PW10 is ASI Lala Ram. He has deposed before the court that on 5th June 2000 he was posted as duty officer in PS Vasant Vihar and on that day he recorded FIR No.174/2000 on the basis of the rukka brought by Constable Narain Pati and proved the copy of the same as Ex.PW10/A.

(xi) PW 11 is HC Satbir Singh. He has deposed that on 18.7.2000 he was posted in PS Vasant Vihar and on that day he took one sealed pulanda from the malkhana and deposited the same with FSL Malviya Nagar vide RC and deposited back the acknowledgment with the malkhana. He is a formal witness.

(xii) PW 12 is SI Madan Pal. He is a formal witness.

(xiii) PW 13 is SI Rajesh Dogra. He has joined the investigation alongwith the Inspector Mahinder Pal and supported the prosecution case.

(xiv) PW-14 is Inspt. Suresh Daggar. He has deposed before the court that on 5.6.2000 he was posted as SHO with the Police Station Vasant Vihar and on receipt on DD No. 34A, he along with SI Rajesh and Constable Narain Pati reached D-1/25 Vasant Vihar, where he found the dead body of the maid servant Chanda lying on the second floor. He recorded the statements of Miss Anjali Ghate Ex. PW4-A and made endorsement Ex.PW14/A thereon and got the FIR lodged through Ct. Narain Pati. He also prepared the site plan Ex.PW14/B and summoned the crime team which inspected the spot. The dog squad was also called. PW-14 further deposed that he had also seized one kitchen knife vide memo Ex. PW-D, earth control vide memo Ex PW4/E, one cushion cover with cushion vide memo Ex PW4/F, a glass vide memo Ex PW14/G, broken glasses vide memo Ex PW4/H, a liquor bottle vide memo Ex. PW4/J, a pair of chappels vide memo Ex PW4/K and clothes vide memo Ex. PW4/ and he had also seized a mangalsutra and koka of the deceased vide memo Ex PW4/C. PW-14 also recorded the statements of the relevant witnesses at that time and he further deposed that further investigation was taken over by Inspector Mahinder Pal Singh.

(xv) PW-15 is Ct. Ashok. He has deposed before the court that on 5.6.2000 he was posted with police Station Vasant Vihar and upon the call of the IO he visited the second floor of the house no . D-1/25 Vasant Vihar, where he took the photographs of the spot, including the dead body lying there, and proved the same photographs as Ex. PW15/1 to 16 and negatives as Ex PW15/17 (colly.).

(xvi) PW-16 is Insp. Mahinder Pal. He has deposed before court that on 7.6.2000 he was posted as Addl. SHO police station Vasant Vihar and he received the investigation of this case. On that day he arrested accused Salimuddin and Miraj from near the Vasant Vihar Club, their mother Steila from her house, Ajay Singh and Yuvraj from their respective homes and accused Bhupinder was arrested from India Gate and the arrest memos of these accused persons prepared by him are on the record as Ex. PW16/A, B, C, D, E, and F, which their personal search memos are Ex. PW16/G, H, I, J, K and L respectively. PW-16 also recorded their disclosures vide memos Ex. PW13/A, B, E, G, N and C respectively. In pursuance of the disclosure of statement Steila one passport, wrist watch and locket were recovered vide memo Ex PW13/F as stolen property. He has further deposed that in pursuance of disclosure statement of accused Salim one laisel Ex PWP-24 was recovered from a box lying at his house vide memo Ex PW13/C, and in pursuance of disclosure made by Miraj cheque Ex P-19 was recovered from an iron almirah lying in his room vide memo Ex PW13/D, and in pursuance of the disclosure made by accused Ajay one dagger and a pocket watch were recovered from an iron box lying in his room and a memo to this effect Ex PW13/M was prepared. He further deposed that articles which were recovered by him were sealed with the seal of "MS" and that recovery memo pertaining to dagger and pocket watch is Ex PW13/M, and he also prepared the sketch of the dagger, which is Ex PW16/N, the dagger is Ex. PZ while the pocket watch is Ex. P-25. PW-16 further deposed that in pursuance of the disclosure made by Bhupinder, one pocket watch was recovered vide memo Ex. PW13/O which is Ex P-23 from accused Bhupinder, one kitchen knife was also recovered again said it was recovered by the previous Investigating Officer from the spot, and in pursuance of disclosure made by accused Yuvraj one katta and two cartridges were recovered from his house and 5 pieces of hand gloves and blood stained clothes were recovered vide separate memos Ex PW13/H and 13/U. PW-16 further deposed that accused Yuvraj also got recovered one calculator Ex P-18 and cigarette packet Ex P-16 and P-17 vide recovery memos Ex PW13/J from accused Salimuddin, motor cycle Ex A-8 was recovered vide memo Ex PW13/Q at the time of his arrest and one underwear of accused Bhupinder Singh was also seized vide memo Ex PW13/P and the same is Ex A7. All the five male accused persons were also sent for medical examination and all were found competent to perform sexual intercourse. PW-16 also collected subsequent opinion of the doctor on the weapon of offence i.e. the dagger. The exhibits were also sent to the FSL and he collected the relevant FSL reports which are Ex PW16/P, and also prepared inquest documents Ex PW16/Q, Ex PW16/R and request for post mortem which is Ex PW16/S. After the post mortem the dead body was handed over to Anuj Kumar, vide receipt Ex PW16/T and after collection of the relevant documents and recording of the statements of witnesses, the charge sheet was filed through the SHO.

(c) The counsel for the appellants have preferred the appeal on the following grounds:

(i) It was submitted by the counsel for the appellants that neither the fingerprints taken from the spot were ever matched with the fingerprints of the appellants nor was the blood on the knife and dagger found to match with that of the appellants. Besides, according to PW3 Dr. Alexander, he could not detect the presence of any material such as blood on the two weapons examined by him. Although semen was found on the genital swab taken from the deceased, but no comparison was done with the semen of the accused persons though such semen samples were taken from the five male accused persons.

The prosecution story regarding the school teacher having lakhs of dollars at home is also disbelievable according to the learned Counsel for the appellant.

(ii) The alleged recoveries made allegedly at the instance of the appellants, are doubtful since the police did not join independent public witnesses at the time of recovery. There is no other evidence at all against the appellants. It is extremely strange that the recoveries were witnessed only by the policemen and it was not deposed that police witnesses were necessitated due to the non-cooperation of the nearby members of public. The learned Counsel for the appellant submitted that since no public person was joined at the time of arrest of the accused persons and the recovery of the incriminating articles from them took place only before police witnesses no reliance can be placed on them as they are bound to be interested in the conviction of accused persons.

(iii) The learned Counsel for the appellants also submitted at the time of lodging of the FIR the complaint was given in writing, in which the complainant stated that: "One room has been ransacked but I do not think anything was taken." However, on the next day she reported to the police that several items including passport, cheque book, some watches including one wrist watch, some watches, one pocket watch, one chain, one calculator, one necklace and cash of Rs. 1000/- were missing from her house and handed over a list of these items to the police.

(iv) The learned Counsel for the appellants further submitted that since the investigation was being carried out by the SHO Suresh Daggar from 5th June 2000 and the same was transferred to Inspector Mahender Pal on 7th June 2000, it is not clear as to which police official was the abovementioned list handed over to. According to PW 4 Anjali Ghate, she handed over the list Ex.PW4/B to the police on the next day of the incident in the late afternoon but she did not remember the designation and name of the police official. PW 14 Inspector Suresh Daggar on the contrary stated ".... We collected the list of stolen articles on the next day from complainant at about early morning but I cannot give the exact time." Therefore, there are glaring contradictions between the statements of the two PWs.

(v) The learned Counsel for the appellant also submitted that there are serious doubts regarding the veracity of the testimonies of PW4 Anjali Ghate, PW14 Inspector Suresh Daggar and PW 16 Inspector Mahender Pal Singh, which are contradictory with regard to the timings of arrest and the recovery of articles.

Further, according to ExPW13/F the recovered articles were seized and sealed with the seal of "MS" and the seal was handed over to SI Rajesh Dogra. But PW 4 Anjali Ghate stated that after the recovery of various articles the police called her at the police station, where she was shown those recovered articles by the police. However, PW 13 SI Rajesh Dogra stated that these articles were never shown to the complainant. PW 16 Inspector Mahender Pal Singh also stated that no TIP of the articles was conducted and that they had not shown the recovered articles to the complainant.

Therefore, according to the counsel for the appellants the recovery itself is rendered doubtful, particularly because according to the prosecution the alleged articles were sealed and deposited in the malkhana, and there was no entry in the malkhana register of the release of the articles thereafter from the malkhana for showing them to the complainant.

(d) The learned Counsel for the accused had argued before the trial court that no finger prints of the accused persons were found on glass tumbler, on the floor and on the pieces of glass and the door which were lifted by the police from the spot and accordingly, the accused were entitled to be acquitted. The aforesaid argument has been rejected by the learned Sessions Judge by relying upon the statement of the PW 9 ASI Chet Ram, whose testimony was, however, only to the effect that he visited the spot and lifted the chance prints. According to the testimony of the PW 9, the said finger prints were forwarded to the Bureau for further comparison. The aforesaid plea was rejected by the trial court on the ground that finger prints of none of the accused persons were taken for comparison with the chance prints lifted by PW 9. The trial court accordingly held that the finger prints of the accused were not taken for comparison with the chance prints taken by PW 9 and therefore this fact cannot help the accused.

2. In our view, the above reasoning of the trial court, to say the least, is unsatisfactory. The learned Counsel for the accused having made a significant plea that the chance prints were not compared with the accused's finger prints, such a plea has been rejected in an absolutely inexplicable manner while holding that this plea could not succeed as the finger prints of the accused were not taken for comparison, to show whether the prints were those of the deceased. The trial court judgment on this ground alone deserves to be set aside because if the prosecution on whom the burden of proof lay, had chosen not to take finger prints of the accused, it is evident that the non-taking of the finger prints of the accused and non comparing of the finger prints of the accused with the chance prints lifted from the spot leaves this Court with no option but to conclude that the prosecution was wary of comparison of finger prints lifted from the spot of this incident with those of the accused. The obvious reason is that the prints may not have matched. We cannot also not lose sight of the fact that the entire case is based on the circumstantial evidence of the recovery resulting from the disclosure statements of the accused persons. In light of this, this scientific evidence attains crucial importance and the prosecution has been wholly unable

to explain why the fingerprints of the accused were not taken and compared with the prints lifted from the spot of the incident.

Similarly, the prosecution's own case was that the deceased was raped and semen sample lifted from her body by taking a vaginal swab. Even though the semen samples of the accused were taken, they were not compared with the vaginal swab. This vital discrepancy which goes to the root of the prosecution case has been totally ignored by the trial court and vitiates the judgment.

In our view, these two basic lacunae based on non utilization of scientific evidence to establish the presence and participation of the accused goes to the root of the prosecution case and leaves this Court with no other option but to conclude that the prosecution was conscious that the finger prints on the spot and vaginal swab of the deceased if compared to the finger prints and semen of the accused would not have matched. The trial court has unfortunately glossed over these two circumstances, resulting in a gross miscarriage of justice.

3. The next plea raised by the learned Counsel for the accused was that no public person was joined at the time of arrest of the accused and all the witnesses to the recovery are police officials. The reasoning of the trial court even on this issue indeed shows little regard to objective assessment of the prosecution evidence led before it. The plea that the police witnesses could not be relied upon is indeed based on the position of law laid down by the Hon'ble Supreme Court in the judgment discussed hereinafter. The Apex Court is of the view that such recoveries "do not inspire confidence" and had ordered for acquittal in the case of *Sans Pal Singh Vs. State of Delhi*, . It was observed by the Hon'ble Supreme Court in this case that:

3. Inter alia, it has been urged by the learned Counsel for the appellant that it would not be safe to maintain the conviction because the recovery of the illicit arms did not inspire confidence, supported as it is, by the evidence of two police officials alone, unassociated by the testimony of any independent witness. It has also been urged that witnesses of the public were available and neither were they associated nor was any explanation given at the trial as to why they were not associated. From the evidence of PW 5 Head Constable Sat Pal Singh, it is clear that the police party did not ask any public witness to be witness at the time of search of the accused. Likewise, PW 6 Sub-Inspector Mahipal Singh has also stated that no public witness was joined at the time of the search of the accused even though a number of persons were passing through at the time when the recovery was being effected. It is thus evident that public witnesses were available and could have been associated to witness the recovery. It would have been a different matter altogether had there been no public witness available or none was willing to associate. Here, as said before, public witnesses were available but no explanation on these lines is forthcoming. Thus, we got to the view that it would be unsafe to maintain the conviction of the appellant for the offences charged. We, therefore, order his acquittal. He is in jail. He be set at liberty forthwith.

The Hon''ble Supreme Court has in a number of judgments asserted that in the absence of independent witnesses the evidence of disclosure statement and consequent recovery do not inspire confidence. The learned court has also observed that neither is it safe to rely upon the testimony of police witnesses specially where it is not supported by independent witnesses on the material particulars, nor should reliance be placed upon evidence where witnesses sign the document at the instance of the police officer. The relevant parts of the said judgments are extracted as under:

(i) Harjit Singh and Others Vs. State of Punjab, :

50. Apart from the versions of eyewitnesses discussed above, the trial court attached importance to the fact that on a disclosure statement of accused Satinderpal Singh, pistol alleged to have been used by Inderjit Singh was recovered under memorandum Ext. P-19. We have referred to the statement of Investigating Officer Puran Singh (PW9). He is unable to explain the reason for not procuring the attendance and signature of independent witnesses on the disclosure statement Ex.PV and memorandum of recovery Ext. PU 1. We have noted that these memoranda have been signed only by two police officers Faqir Chand and Virsa Singh. It is unbelievable that all the accused persons who have alleged to use their firearms/weapons kept all the arms concealed in an open field in a gunny bag under the heap of straw. In the absence of independent witnesses and the alleged place of concealment being accessible to the public, the evidence of disclosure statement and the consequent recovery of arms and weapons do not at all inspire confidence. In any case, it is not a piece of evidence which could be relied on by the trial court to convict the accused by treating it as eyewitness account.

(ii) Sukhpal Vs. State of Haryana, :

4. ...As a rule of prudence it is desirable that the evidence of police personnel should be corroborated preferably by a reliable witness. But in all cases, such corroboration cannot be insisted as a matter of course because it may not be possible in all cases to get corroboration from an independent witness.-----

(iii) Bharat Vs. State of M.P., :

11. ...Relying on the case of State Govt. of NCT of Delhi v. Sunil the learned Counsel contends that there is no reason to disbelieve the evidence of the police to doubt the recovery. The submission is that seizure memo need not be attested by any independent witness and that the evidence of the police officer regarding recovery at the instance of the accused should ordinarily be believed. The case, relied upon has no relevance to the facts of the present case. In the instant case, learned Counsel for the appellant is right in her submission that the evidence of the police officer is unreliable in view of ample material on record that the witnesses were signing at the instance of the police officer on the dotted lines.-----

(iv) Aslam Parwez etc. Vs. Govt. of NCT of Delhi, :

10. ...In view of these features of the case, we are of the opinion that the testimony of three police personnel, namely, PWs 10, 11 and 1 does not inspire confidence and it will be highly unsafe to place reliance upon the same in order to convict the accused specially when the public and independent witnesses did not at all support the prosecution case on any material particular.

The trial court has rejected the above plea of the accused by holding that there was nothing to suggest that these witnesses were not present at the time of recovery. In our view, this was not even the plea of the accused. The accused only pleaded that when the recovery was made by the police officials (which naturally presumed their presence), no independent witness was present. In our view, the trial court in spite of noticing the plea has in fact avoided to deal with the issue by making a cursory observation that the police witnesses were present at the time of recovery and thus failed to apply the well settled position of law laid down in the above judgments of the Hon'ble Supreme Court.

4. In fact, the substratum of the prosecution case is to be found in the testimony of PW13. The said version indeed makes a curious reading that secret information had been received in the morning of 7th June 2000 and the accused were caught on a motor cycle on the said day. All the six accused are said to be arrested between 6:00 pm to 9:45 pm on the same day. Arrest memos were signed by the police witnesses. All the offending articles had been recovered only by recording recovery memos witnessed by the police witnesses. The removed articles seized pursuant to the disclosure are the sole basis of the conviction of the appellants. We are of the view that the absence of any other evidence against the accused except that given only by the police witnesses makes it extremely unsafe to sustain the conviction of the appellants. This finding is further strengthened by the non-comparing of the finger prints lifted from the spot with the finger prints of the accused and the vaginal swab taken from the deceased with the semen of the accused which not only provides with unsatisfactory explanation but it actually makes the judgment of the trial court wholly unsustainable.

The trial court while dealing with the case law cited by the accused had only the following observation to make:

However, counsel for the accused has relied upon the following citations:

1. Sahibe Alam Vs. State,
2. 2000 (52) DRJ Des Raj @ Dass v. State.
3. 1994 (3) DRJ Ashok Kumar v. State.
4. Mohd. Abdul Hafeez Vs. State of Andhra Pradesh,
5. Rajinder Kumar Vs. State,

6. Sheonath Vs. The State of Uttar Pradesh,
7. Lakshman Prasad Vs. State of Bihar,
8. Wakil Singh and Others Vs. State of Bihar,

I have gone through the aforesaid citations but the fact of the aforesaid citations are different from the present case and they are not applicable to the facts of the present case, however, there is no dispute about the position laid by aforesaid the Hon''ble Judges.

While the trial court noted that it had perused the given cases but only held that the facts of the given cases are different from the present case and thus not applicable to the present case, without showing how the judgments were inapplicable. In our view the above method of dealing with the judgments cited by the appellant shows a wholly erroneous approach by the trial Court. The trial court did not seem at all concerned about the case set up by the appellants. In our view this is no manner and method of dealing with the cases relied upon by an accused and discloses a miscarriage of justice. The entire discussion of the evidence of the trial court also makes an equally interesting reading and reads as follows:

This case is based on the circumstantial evidence. The accused persons after their arrest made disclosure statement before the police. It has come on the evidence of PW-13 SI Rajesh Dogra that he (PW-13) alongwith Inspt. Mahinder Pal Singh and other police officials formed a raiding party and went in the search of accused persons. They got a secret information that a boy involved in the incident relating to House no.D-125 Vasant Vihar who was sitting on motor cycle might be involved and will pass from Paschim marg and will go towards Vasant Vihar Club. Upon this information PW-16 formed a raiding party and a trap was laid near Vasant Vihar Club and at about 5 p.m. two boys were noticed on Hero Honda Motor Cycle of green colour and name of those boys were revealed as Sayed Salimuddin and Sayed Miraz and on their interrogation they admitted their guilt and their disclosures were recorded vide memos Ex.PW13/A and ex PW13/B. Thereafter these accused persons led them to their home and from there at the instance and in pursuance of the disclosure of accused Sayed Salimuddin got recovered one lisel upon which figure of 96 was written and at the instance of accuse Miraz one cheque book was seized vide memo Ex.PW13/D. Thereafter accused at the instance of Sayeed Salimuddin, Smt. Stelia was arrested and in pursuance disclosure of accused Steila one pass port, one silver like chain and a wrist watch were recovered. Thereafter at the instance of accused Salimuddin accused Yuvraj was arrested and in pursuance of his disclosure one calculator, one katta, two cartridges, five gloves and a piece of T-Shirt carrying some stains were recovered. Thereafter accused Ajay Singh was arrested and in pursuance of disclosure one pocket watch and dagger were recovered from his house and thereafter accused Bhupinder was arrested and in pursuance of his disclosure one pocket watch of Rolex was recovered.

All these articles recovered from the accused persons were identified by the complainant Anjali Ghate and she also stated that these articles were the same which were looted by the accused persons at the time of robbery committed at her house. She confirmed that she was the owner of these articles. One passport belonging to her mother, one cheque book of her bank and one lisel were recovered from these accused persons. The police was also able to recover one blood stained cloth from accused Ajay Singh which was used in the commission of crime and one kitchen/knife was recovered from the house of the complt which was used by the accused persons at the time of commission of crime. Similarly the hand gloves used by the accused persons at the time of commission of robbery were also recovered from accused Yuvraj. All these articles which were robbed by the accused persons and were recovered from them has sufficiently proved the complicity of the accused in the commission of crime and all these articles were properly identified by the owner Anjali Ghate. This is a very important circumstances proved by the prosecution against the accused persons.

In this case the murder was committed on 5.6.2000 whereas the recoveries of the robbed articles was made from the accused on 7.6.2000 that is immediately after the commission of murder. Since the incriminating articles were recovered immediately after the commission of crime so the presumption u/s 106 of the Evidence Act is attracted and charge of murder stand proved against the accused persons. This view also finds support from the decision reported in 2002 II AD SC 613 wherein it has been held as under:

Indian Penal Code, 1860 - Section 302, 392 r/w 34, 120B-201-Murder etc. - Recovery of personal belongings of deceased with blood stains - No explanation - Body of deceased also found later on - Proximity of time between recovery of articles and the body of the deceased-Presumption u/s 106 of Evidence Act attracted - Charge of murder also stands proved - conviction proper.

This view also finds support from the decision reported in 2001 I AD S.C. 361 Supreme Court where it has been held as under:

Indian Penal Code, 1860-Sections 302, 394, 397, 342, 120-B and 41-Arms Act - Sections 25, 27, 54, 59 - TADA Act - Section 5- Robbery with murder - Accused is nephew of deceased with friends-Circumstantial evidence - Extra-judicial confession-Statement to police leading to recoveries of weapons-stained clothes - stolen articles - offence made out.

Evidence Act, 1872- Section 27- Confessional statement - leading to recovery- words used in statement "after commission of the offence" and "looted property"- Whether made the statement inadmissible?-(n0)- Hypertechnical approach would defeat justice.

Indian Penal Code, 1860 - Section 302, 394 - Robbery and murder - Recovery of robbed articles from possession - Robbery and murder part of same transaction - Recent and unexplained possession of stolen articles - Presumption to be drawn

u/s 114 of Evidence Act for murder also.

Keeping in view the law laid down by Hon''ble Supreme Court in the above said cases and the fact in the present case also the confessional statement made by the accused persons leading to the recovery of the incriminating articles immediately after the commission of crime and the looted property recovered from the possession of accused person makes confessional statement admissible under the law and the implication of the accused persons stand proved in the commission of murder and robbery in the present case.

Some of the articles which have been recovered from the possession of the accused persons are pass port which belongs to the mother of the complt. One cheque book which belongs to the complt., one liasel which is a rare article which was also robbed from the house of the complt. was recovered from the accused Sayeed Salimuddin and one wrist watch recovered from the accused Ajay, one pocket watch recovered from accused Bhupinder while the pass port has been recovered from accused Steila and cheque book was recovered from accused Miraj and calculator and cigarette packet were recovered from the accused Yuvraj besides blood stained gloves which were used in the commission of crime were also recovered from the accused Yuvraj. The entire prosecution evidence was put to the accused persons u/s 313 Cr.P.C. But the accused persons have failed to explain as to how these articles which were robbed from the house of the complt. were found in their possession. I, therefore, hold that it is the accused persons and none else who committed the crime of murder of Chanda Paswan and thereafter committed robbery at the house of the complainant.

Thus while the learned trial Judge extracted in detail the relevant head notes of the judgments relied upon by the prosecution and applied them, yet it dealt with the judgments relied upon by the accused in two lines by observing that the facts were different. In fact it is not desirable for the trial court to extract head notes of a judgment without adverting to the text. Furthermore, vastly differing approach in dealing with the case law cited by the prosecution and the accused does not commend itself to approval by this Court.

The trial court has also held that the medical evidence supported that the dagger concerned was used in the commission of the crime as deposed by PW3, Dr. Alexander of the Safdarjung Hospital. The dagger was sent to the FSL for examination but it was reported that it did not reveal the blood group, although it was human blood that was found on the dagger. The blood was found to be too small for chemical analysis. The failure to compare the blood group found on the dagger with that of the deceased has been met by the trial court by stating that no explanation has come from the side of the prosecution as to whose blood was found on the dagger. This is in stark contrast to the testimony of PW3, Dr. Alexander who stated that any naked eye examination could not detect the presence of any material such as blood on the weapon i.e. dagger.

The trial court has again fallen into grave error by holding that no explanation

has come from the side of the accused as to how the blood was found on the dagger. Without comparing the blood group and indeed without even finding positively by appropriate evidence, the existence of the blood on the dagger and the blood group found on the dagger, the trial court had transferred the burden of proof on the accused. The blood group of the blood as contained on the kitchen knife which was recovered from the spot, was not even compared with any of the blood samples of the accused persons. This aspect has not even been adverted to let alone dealt with by the trial court.

Furthermore, the pair of gloves said to have been recovered at the instance of the accused Yuvraj were blood-stained. However, the FSL report clearly discloses that the blood group could not be determined from the blood sample found on the gloves. The plea of the blood samples not having been matched with either those of the accused or the deceased is met by holding that the accused Yuvraj failed to explain as to how the blood stained gloves were found in the house immediately after the crime. The further reasoning that the trial court has given is as follows:

Since the accused persons have failed to explained as to how the robbed articles were found in their possession and they also failed to explain about the recovery of dagger which was used in the commission of crime. I, therefore, hold that the prosecution has successfully proved its case beyond reasonable doubt against all the accused persons. It is the accused persons and none else who have committed murder of Chanda Paswan and also committed robbery, therefore, I hold all the accused persons guilty for the offences punishable u/s 395/302/396/412 I.P.C.

Case is now to come up on 19.2.04 for order on sentence.

This again amounts to placing the burden of proof on the accused. In fact, the entire judgment is largely unreasoned, based on impermissible presumptions and totally unworthy of being upheld and we have no other option except to set aside the said judgment.

Accordingly, the appeals are allowed and the impugned judgment of the learned Additional Sessions Judge dated 13th February 2004 and 19th February 2004 in Sessions Case No.54/2001 arising out of FIR No.174/2000, Police Station Vasant Vihar, is set aside and all the accused persons are directed to be released forthwith. If the accused are on bail the bail bonds shall be cancelled.