
(2015) 07 SHI CK 0075
In the High Court Of Himachal Pradesh
Case No : Criminal A. No. 373 of 2012

Surinder Singh and Others

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 24-07-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 162, 313
Evidence Act, 1872 — Section 106, 9
Penal Code, 1860 (IPC) — Section 201, 302, 34, 364

Citation : (2015) 07 SHI CK 0075

Hon'ble Judges : Rajiv Sharma, J; Sureshwar Thakur, J

Bench : Division Bench

Advocate : Seema K. Guleria, for the Appellant; M.A. Khan, A.A.G, Advocates for the Respondent

Final Decision : Allowed

Judgement

Rajiv Sharma, J—This appeal is directed against the judgment dated 15.5.2012 rendered by the learned Sessions Judge, Solan, District Solan, H.P.(Camp at Nalagarh), in Sessions Case No. 10-NL/7 of 2010, whereby the appellants-accused (hereinafter referred to as the accused) who were charged with and tried for offence punishable under Sections 364, 302, 201 read with Section 34 IPC, have been convicted and sentenced under Section 302 read with 34 IPC, with rigorous imprisonment for life and a fine of Rs. 25,000/- each and in default of payment of fine to further undergo rigorous imprisonment for two years. Both the accused were also convicted and sentenced for an offence under Section 364 IPC read with Section 34 IPC with rigorous imprisonment for ten years and a fine of Rs. 10,000/- each and in default of payment thereof to further undergo rigorous imprisonment for one year. They were also convicted and sentenced for an offence under Section 201 IPC read with Section 34 IPC with rigorous imprisonment for seven years and a fine of Rs. 5,000/- each and in default of payment they were further sentenced to undergo rigorous imprisonment for six months. All the sentences were ordered to run concurrently.

2. The case of the prosecution, in a nutshell, is that on 15.6.2010, a written complaint was filed by complainant Sanjay Kumar son of Sh. Devi Ram, resident of village Brahman Majra, Tehsil Nalagarh, Distt. Solan, H.P. According to the contents of the complaint, on 5.6.2010, one Rajinder Kumar son of Devi Ram, had gone with his taxi bearing regn. No. DL-3C-AC-4353 towards Gadshankar, Distt. Hoshiarpur alongwith passengers and thereafter he was supposed to come back after leaving the passengers, but he did not come back and his mobile phone was switched off. On 6.6.2010, a complaint was made of his missing in the Police Station, Nalagarh. The complainant further disclosed in his complaint that on 9.6.2010, the taxi of Rajinder Kumar was found lying unattended at Malpur Police Station and on 10.6.2010, a dead body was found in village Mojewal. The complainant further disclosed that the persons who had hired the taxi of Rajinder Kumar had committed murder of Rajinder Kumar and it was found that such persons had already been involved in the same occurrence as the sketches of such persons have been shown to taxi drivers Bagga Ram and Goldy, who identified the sketch of such persons who had hired the taxi of Rajinder Kumar. The police arrested the accused persons and they were identified by the prosecution witnesses. The recoveries were made from the accused by the police on the basis of disclosure statements made by the accused. The matter was investigated and the challan in the Court was filed after completing all the codal formalities.

3. The prosecution examined as many as 46 witnesses. The accused were also examined under Section 313 Cr.P.C. According to them, they were falsely implicated. The accused were convicted and sentenced by the learned trial Court, as noticed hereinabove. Hence, this appeal.

4. Ms. Seema K. Guleria, Advocate, for the accused has vehemently argued that the prosecution has failed to prove the case against the accused. On the other hand, Mr. M.A. Khan, learned Addl. Advocate General for the State, has supported the judgment dated 15.5.2012 of the learned trial Court.

5. We have heard learned counsel for both the sides and have gone through the judgment and records of the case minutely.

6. PW1, ASI Balbinder Singh, deposed that on 9.6.2010, an information was received in PS that an abandoned car was found near village Hawali, at a secluded place. Thereafter, he went to the spot alongwith ASI Shiv Kumar. The vehicle was taken into possession alongwith RC, driving licence and insurance copy.

7. PW-2 Sanjay Kumar is the brother of deceased. According to him, his brother alongwith the taxi had gone to Nalagarh on 5.6.2010. When he did not come back on 6.6.2010, he reported the matter to the Police Station. He alongwith his elder brother and other relations went to Nalagarh taxi stand, from where they went in search of taxi of his brother towards Punjab. On 9.6.2010, an information was received from Police Station Mehalpur (Hoshiarpur) to the effect

that a vehicle was found in abandoned condition bearing No. DL-3C-AC-4353. It was taken into possession by the Punjab police. On 10.6.2010, the dead body was found in Pojewala forest which had been brought for post mortem in the hospital. Thereafter, they went to the hospital at Balachaur which was identified to be of his brother Rajinder Kumar. They identified the blue jean pant and T-shirt as well as belt of the deceased to be of Rajinder Kumar (deceased) having mark of "Bram Sutli" on his body. His brother left the house on 5.6.2010 from Nalagarh and was carrying Rs. 5000/- in purse for purchase of fertilizer. He was wearing black chappal and one wrist watch which were not found with his dead body. On 15.6.2010, he came to Nalagarh and filed a written complaint. He was told by taxi drivers Bagga Ram and Goldy that the taxi of Rajinder Kumar was hired by three persons by proclaiming that an ailing person was to be taken from Garshanker for his treatment. Goldy and Bagga Ram had identified the sketches of the persons at Police Station Mehalpur, Hoshiarpur where the taxi of Rajinder Kumar was recovered as the same persons who had hired the taxi of Rajinder Kumar from Nalagarh. He could not register the case after the recovery of the dead body of Rajinder Kumar since he remained busy in performing the last rites of Rajinder Kumar after the dead body was handed over to them after completion of the post mortem. In his cross-examination, he admitted categorically that when the accused were brought to Nalagarh Police Station from Hoshiarpur then Bagga Ram and Goldy, taxi drivers alongwith other taxi drivers had gone to Police Station Nalagarh alongwith their relations to identify them at Police Station Nalagarh. The accused were not muffled when they were brought to PS Nalagarh from Hoshiarpur. The dead body was partially decomposed. He identified the dead body of his brother Rajinder Kumar in hospital at Balachaur, Punjab.

8. PW-3 Bagga Ram son of Joginder Singh deposed that on 5.6.2010, three persons came to taxi stand Nalagarh to hire a taxi. He demanded Rs. 2000/- as fare from these persons but these persons sought some rebate so it was settled for Rs. 1800/-. All the persons disclosed that they have come from Baddi and were going to their homes to bring the ailing person to hospital. He dissuaded Rajinder Kumar not to take them in their taxi, however, Rajinder Kumar did not listen to him. He tried to contact Rajinder Kumar on the same day at about 7/8 PM but his mobile was found switched off. They had gone to Police Station Garshanker on 8.6.2010 to identify the suspects through sketches prepared by Punjab Police. They identified the sketches of two persons who had engaged the taxi of Rajinder Kumar from Nalagarh on 5.6.2010 and they returned from PS Garshanker to Nalagarh. On 25.6.2010, he alongwith Goldy taxi driver, identified the accused. The identification parade was held in Sub-Jail, Solan. They identified the accused persons who were mixed with other persons in the jail premises. Firstly, he identified the accused and thereafter Goldy also identified the accused persons to be the same persons who had engaged the taxi of Rajinder Kumar from Nalagarh on 5.6.2010.

9. PW-4 Bagga Ram has categorically deposed in his cross-examination that PW Bagga Ram son of Joginder Singh and Chaman Lal alias Goldy were not

summoned in the Police Station by Nalagarh police to identify the accused as these persons were called at Solan for identification of the accused. The accused were brought to Nalagarh police station with muffled faces.

10. PW-5 Chaman Lal alias Goldy also deposed the manner in which the taxi of Rajinder Kumar was hired. In his cross-examination, he deposed that many persons from taxi union used to go to Police Station to see the accused persons who had been arrested by the police. He had gone once to the Police Station to see the accused on the next day of their arrest. The police had shown them the persons who had been arrested. He was called to the Police Station and thereafter he was told by the police to be present at Solan for identification of the accused on the next day. The accused were shown by the police in the lockup. Voluntarily said that their faces were muffled.

11. PW-7 Hans Raj deposed that on 9.6.2010, when he was patrolling in village Moothgarh, he came to know that a dead body was lying in the Malewal forest. It was located by Member of Gram Panchayat. The dead body was found on the spot in decomposed condition. The dead body was identified by the relations of the deceased. It was referred to Amritsar hospital and thereafter it was sent to Balachaur hospital for conducting post mortem. The post mortem of the dead body was conducted at Balachaur hospital and dead body was handed over to the relations. Viscera of deceased, including belongings was handed over to MHC in a sealed parcel. In his cross-examination, he admitted that the dead body was decomposed and it was very difficult to identify the same. The dead body was in the shape of semi-skelton.

12. PW-10 Madan Lal is the brother of deceased. On 5.6.2010, Rajinder Kumar left the house alongwith taxi and Rs. 5000/- was given to him to purchase fertilizer. He was wearing a T-shirt and blue jean pant. He was also having a black belt and chappal alongwith the mobile phone. His taxi was hired by three persons from Nalagarh. On 6.6.2010, his younger brother Sanjay Kumar reported the matter in the Police Station Nalagarh about the missing of Rajinder Kumar and they tried to locate him. As they engaged many vehicles to find out Rajinder Kumar but he could not be located. On 9.6.2010, they were informed that the taxi of Rajinder Kumar was lying abandoned near Mehilpur and it was brought to Mehilpur (Hoshiarpur). They tried to locate Rajinder Kumar nearby where his vehicle was found but he could not be located. On 10.6.2010, they came to know that a dead body was lying in Balachaur hospital which was recovered by the police to be identified and when they went to Balachaur hospital they identified the dead body of deceased Rajinder Kumar lying at Balachaur hospital. The wife of deceased also accompanied them to identify the dead body. The clothes of deceased were also identified. In his cross-examination, he deposed that the dead body was partially decomposed as part of muscles were not present. However, the dead body was in a position to be recognized. According to him, there were signs of "Bram Sutli" over the dead body of deceased and the shape and feature of the dead body were the signs to

be recognized to be of his brother deceased Rajinder Kumar.

13. PW-11 Saravjeet Singh deposed that on 29.6.2010, he accompanied the police alongwith the accused and one Yash Pal, Madan Lal, Randeep Singh and the accused led the police party towards village Chhungia next to Pojewal on link road where the vehicle was stopped at the instance of accused. The accused further led them towards the forest where the accused claimed that the dead body had been thrown and the purse was recovered at the instance of Taranjeet Singh having photo of deceased Rajinder Kumar, including receipt of toll tax of vehicle DL-3C-AC-4353 and visiting card and copy of RC which were taken into possession vide seizure memo Ext. PW-11/A.

14. PW-12 Ram Singh deposed that he had gone to PS Nalagarh on 24.6.2011 when a team of experts had come to examine Indigo car. It was parked in the Police Station. There were three glasses and one packet of cigarette having three cigarette and some hair were also lying. There were blood stains over the rear seat of the car and some mud was also lying in the Car which was observed by the expert. The blood stains lying on the rear seat were taken alongwith the piece of seat cover and put into a sealed packet as per memo Ext. PW-12/A. He signed the same. He identified comb Ext. P-32 and cigarette packet containing three cigarettes Ext. P-33. He proved soil Ext. P-35 and Ext. P-36 polythene which were lifted from the vehicle lying in the police station. He identified hair Ext. P-38. He identified the glasses Ext. P-40, P-41 and Ext. P-42 to be the same, which were taken into possession by the team of experts. He identified cloth packet Ext. P-43, seat cover of car Ext. P-44 and foam of seat Ext. P-45 to be the same which were taken into possession by the expert team. He also identified hair Ext. P-47 which were lifted from the dash board of the vehicle.

15. PW-13 Baldev Krishan Chaudhary has proved seizure memo Ext. PW-13/A qua which mobile Nokia was taken into possession. This mobile was found in the bag by accused Taranjeet.

16. PW-14 Dabinder Singh deposed that when Taranjeet Singh was arrested by the police, he left one mobile phone Nokia black in colour which was handed over by him to the police vide seizure memo Ext. PW-14/A.

17. PW-15 Gurmeet Kaur, deposed that she was Sarpanch Gram Panchayat Hawali. On 9.6.2010, she came to know that an abandoned car DL-3C-AC-4353 was lying on the road side near their village. She informed the police. The police came on the spot from Mehalpur. The vehicle was found locked, therefore, assistance of the local mechanic was sought to open the same. On 29.6.2010, when Himachal Police came alongwith the Punjab Police accompanied by one Sardar, she joined them. There were three persons with the police, including the sardar who identified the spot where the vehicle was found abandoned and Sardar had pointed out the place where the key of the car was found below a tree after lifting the brick lying on the ground. It was taken into possession vide memo Ext. P-24.

18. PW-16 Yash Pal, deposed that on 28.6.2010, accused Taranjeet Singh disclosed that he had concealed one purse and the key of the car and he further undertook to get it recovered as per disclosure statement Ext. PW-16/A. Accused Surinder Singh alias Chhinda also disclosed during custody that he had concealed one wrist watch and piece of cloth (parna) and undertook to get it recovered vide his disclosure statement Ext. PW-16/B. Accused Taranjeet, Jitender and Surinder Singh on 29.6.2010 identified the place at Taxi stand Nalagarh where taxi of deceased Rajinder Kumar was hired vide memo Ext. PW-16/C. The accused while in police custody on 29.6.2010 had proceeded in a vehicle in Punjab area near Pojewal on a link road where accused Jitender Kumar had shown a house in the village of a lady and then lady identified accused Jitender who had come over to her when the taxi of the deceased had been taken by these persons. Thereafter, they came in the same vehicle alongwith the accused and in a forest at a secluded place accused Taranjeet stopped the vehicle and identified the place where the taxi of the deceased was stopped and the deceased was strangled with parna. That place was identified vide memo Ext. PW-16/D by all the accused. He signed the same. The police had taken soil from the spot vide memo Ext. PW-16/E. The accused also led to the place where the dead body of the deceased was thrown in the forest at a secluded place which was identified vide memo Ext. PW-16/F. Accused Taranjeet also got the purse of the deceased recovered vide memo Ext. PW-11/A to the place which was identified where the dead body was thrown. The purse is Ext. P-12. The accused further identified the place where the taxi of deceased was parked vide memo Ext. PW-16/H. He identified the key Ext. P-24. The sample of soil was also lifted from the place where the accused identified the abandoned vehicle of the deceased vide memo Ext. PW-16/K. Accused Surinder alias Chhinda got the wrist watch with golden chain (Titan make) and one piece of cloth recovered from his house from village Manga, Punjab which was taken into possession vide seizure memo Ext. PW-16/L. In his cross-examination, he admitted that the police had already visited the places which were identified by the accused persons where he accompanied the police alongwith the accused.

19. PW-17 Randeep Singh deposed that accused Surinder Singh alias Chhinda brought a wrist watch and parna from his house as the watch was with golden chain. He identified the wrist watch Ext. P-10. It was taken into possession vide memo Ext. PW-16/L. The piece of cloth (parna) Ext. P-25 was taken into possession vide memo Ext. PW-17/A.

20. PW-18 Karam Singh deposed that Himachal Pradesh Police had visited in his shop and had shown a piece of cloth (Rumal). They purchased the similar piece of cloth (patka) Ext P-29 from his shop against the receipt Ext. PW-18/A, after making payment. The piece of cloth was taken in possession vide seizure memo Ext. PW-17/A.

21. PW-19 Dilawar Singh deposed that he was running a Dhaba at Bharvai Road, Hoshiarpur. On 6.6.2010, three persons, out of which one person was sardar and

two were monas, came in a car to his shop and purchased cigarette from his shop and thereafter remained sitting in the Dhaba of Raju adjoining to his shop. After some time, he was told by the servant of Raju that the glasses of a Dhaba and his mobile had also been taken away by those persons.

22. PW-20 Jitender Saini deposed that on 6.6.2010, three boys, one sardar and two munas had come to the Dhaba. They asked him to prepare three cups of tea. His mobile was lying on the table for charging. He prepared the tea and served to these persons. He also served them with a Paranthas. When he was busy in preparing parantha, these persons after taking tea had gone towards their car parked nearby alongwith the tea and ultimately ran away. They also took away his mobile lying on the table for charging. In his cross-examination, he admitted that when he came to the PS Nalagarh, he was told by the police that these accused persons had taken away the glasses and mobile from his Dhaba.

23. PW-21 Tajender Singh has proved report Ext. PW-21/A. He identified the key Ext. P-24.

24. PW-22 Gagandeep deposed that he was coming back to his house at about 8:30 PM on his bicycle. He was busy with his mobile when a vehicle came from behind and his mobile was snatched and he could not identify the vehicle or the persons.

25. PW-23 Avtar Singh deposed that he used to deal with sim cards of mobiles. He brought the register pertaining to sim car No. 90415-14251. It was sold to Surinder Singh. He also brought the identity proof of his brother on the basis of which sim card was issued to Surinder alias Chhinda. He proved extract of register vide Ext. PW-23/A. In his cross-examination, he admitted that there is cutting in the original register Ext. PW-23/A which had taken place subsequently after issue of extract Ext. PW-23/A.

26. PW-24 Inderjeet Singh deposed that Taranjeet Singh used to work in milk plant Ludhiana where he used to drive the vehicle. He left the job. When Taranjeet Singh left the job his bag and mobile remained there where he used to reside. He handed over the mobile and bag to his maternal uncle who in turn deposited these articles in the PS Nalagarh.

27. PW-25 Tej Mohammad deposed that the accused Jitender alias Jyoti had taken them to Anandpur Bazar where a shop was identified from where he claimed to had purchased one piece of cloth Patka and the police purchased similar cloth for Rs. 20/-, which was taken into possession vide memo Ext. PW-17/A.

28. PW-26 Surinder Singh deposed that one pair of chappal Ext. P-9 was taken into possession from the house of Jitender by the police vide memo Ext. PW-10/B. The piece of cloth (patka) and one wrist watch were taken into possession from the house of Surinder Singh alias Chhinda vide seizure memo Ext. PW-16/L.

29. PW-27 Surjeet Bhumla deposed that he was informed on 9.6.2010 by village

boy who used to graze cattle that a dead body was lying near his village at Chandyani Kalan and the same was being eaten up by the dogs. The police sought assistance of the photographer and taken the photographs of the dead body lying over the spot. There was a piece of cloth around the neck of the body and the dead body had been taken away by the police for the post mortem.

30. PW-29 HC Ved Prakash deposed that the case property was deposited with him and he made entries in the malkhana register. The case property was sent to SFSL. This case property was sent to SFSL through Constable Chanchal Kumar, HHC Shyam Lal and Const. Sunil Kumar.

31. PW-30 HHC Shyam Lal deposed that he has taken the case property to SFSL vide RC No. 57/2010.

32. PW-33 Roshni Devi is the mother of the deceased. She deposed that on 1.12.2010, her blood sample was taken by the doctor for DNA in Civil Hospital, Nalagarh.

33. PW-34 Dr. Manohar Lal deposed that on 11.6.2010, an application was moved by the police for conducting post mortem examination. On external appearance, the dead body was found decomposed and partially skeltonised. The dead body was of adult male, moderately built, wearing light blue jean pant and light mongia colour shirt. The body was in a stage of putrefaction, foul smelling gases were emitting and maggots were present. There was softening and greenish discoloration of tissues/skin and liquification of tissues had started at places. Bony rib cage was exposed from front of neck, clavicles in upper part to sides of chest and up to upper part of abdomen below. Bones of left arm and forearm were exposed and left hand was missing and wrist joint was open. Right arm and forearm bones were exposed, left leg bones were also exposed and left foot was separated at ankle joint and attached only by soft tissue. Left knee joint was opened up, left foot toes were missing, except little toe. Scalp and eye brow hair were absent, right orbit was empty and left eyeball collapsed. On the sides of neck, shallow discolored grooves were present which were about 2 cm wide. This groove faded towards back of neck, grooves were present below the level of thyroid cartilage. The cause of death was asphyxia due to strangulation. In his cross-examination, he admitted that the dead body was decomposed and it was difficult to identify the dead body at the time of post mortem.

34. PW-35 Amit Chauhan, has proved call details of mobile No. 90415-14251 vide mail Ext. PW-35/A, PW-35/B and PW-35/C.

35. PW-36 Devender Verma has supplied the call details of mobile Nos. 98162-45450, 99159-52502 and 99154-37701 vide Ext. PW-36/C, PW-36/D, PW-36/E and PW-36/F.

36. PW-37 Surjit Singh has supplied call details of phone Nos. 99145 10036 and 95922-21470.

37. PW-38 Sunil Kumar has taken the case property to SFSL vide RC No. 131/10.

38. PW-40 Nasib Singh Patial, has proved report Ext. PW-40/A. In his cross-examination, he admitted that the period for which the blood stains were dried could not be opined. The blood stains were lifted from seat cover and foam of the car.

39. PW-41 Dr. Gagan Jain, deposed that he took the blood sample of Roshni Devi for DNA profiling.

40. PW-44 Rachh Pal Singh had taken the photographs of the dead body lying at forest Chanyani Kalan vide Ext. PW-7/Q-1 to Ext. PW-7/Q-5 and also prepared CD of the photographs vide memo Ext. PW-44/A. He also took the photographs of the places from where the dead body was recovered. One purse Ext. P-12, photograph Ext. P-13, identity card Ext. P-14 and Ext. P-15, receipts of toll tax Ext. P-16 and Ext. P-17 and receipts Ext. P-18, P-19, photocopy of RC Ext. PW-20 and photo Ext. P-21 were recovered lying on the spot, which were taken into possession vide seizure memo Ext. PW-11/A.

41. PW-45 Const. Chanchal Kumar has deposited the case property vide RC No. 56/10 alongwith the copy.

42. PW-46 Insp. Prem Lal has conducted the investigation in the matter. On 16.6.2010, he investigated the spot and prepared the spot map of Taxi union Nalagarh. He went to village Chandyani Kalan in PS Pojewala District Nawanshahar. He also inspected the spot from where the dead body of the deceased was recovered. He collected the soil. He also took the photographs of the spot. The sim cards were recovered from the accused. He deposited the case property with MHC in the malkhana. The accused were arrested on 18.6.2010. Accused Taranjit Singh was also arrested subsequently. An application was moved on 22.6.2010 before the JMIC, Solan, for holding test identification parade. The test identification parade proceedings were conducted by JMIC, Solan vide memo Ext. PW-46/F. The prosecution witnesses identified accused Jitender, Surinder alias Chhinda and Taranjit Singh. The remaining case property was also recovered. He recorded the statements of the witnesses. He proved the post mortem report. These recoveries were made on the basis of disclosure statements made by the accused. In his cross-examination, he admitted that it had emerged during investigation that the dead body was decomposed but he could not say that it was not in a position to be recognized. He denied the suggestion that accused had been shown to Bagga Ram taxi driver and Chaman Lal alias Goldy before the test identification parade.

43. PW-2 Sanjay Kumar has specifically testified that they came to know that accused had been arrested at Hoshiarpur and when the accused were brought to Nalagarh Police Station from Hoshiarpur then Bagga Ram son of Joginder Singh(PW-3) and Chaman Lal alias Goldy (PW-5), taxi drivers alongwith other taxi drivers had gone to Police Station Nalagarh alongwith their relations to identify them at Police Station Nalagarh. The faces of the accused were not muffled when they were brought to PS Nalagarh from Hoshiarpur. He also

admitted that the dead body was partially decomposed. They identified blue jean pant and T-shirt as well as belt of the deceased, including body structure to be of Rajinder Kumar, having mark of "Bram Sutli" on his body. PW-3 Bagga Ram son of Joginder Singh deposed that the identification parade was held in sub jail Solan. They identified the accused persons who were mixed with other persons in the jail premises. Firstly, he identified the accused and thereafter PW-5 Chaman Lal alias Goldy also identified the accused. He admitted that the sketches were shown by the police at Police Station Garshankar which were identified by him to be of accused persons. PW-4 Bagga Ram son of Rattan Lal has deposed that PW-3 Bagga Ram son of Joginder Singh and PW-5 Chaman Lal alias Goldy were not summoned in the Police Station by Nalagarh police to identify the accused as these persons were called at Solan for identification of the accused. Now, as per the version of PW-2 Sanjay Kumar, PW-3 Bagga Ram and PW-5 Chaman Lal alias Goldy, taxi drivers visited the Police Station Nalagarh to identify the accused. The faces of accused were not muffled when they were brought to PS Nalagarh from Hoshiarpur. PW-5 Chaman Lal has admitted in his cross-examination that many persons from taxi union used to visit the Police Station to see accused persons who had been arrested by the police. He had also gone once to the Police Station to see the accused on the next date of their arrest. The police had shown them the persons who had been arrested. He was called in the Police Station and thereafter told by the police to be present at Solan for identification of the accused on the next day. He also deposed that PW-3 Bagga Ram son of Joginder Singh also went to the Police Station. The police had shown the accused in the lock up.

44. What emerges from the statements of these witnesses is that the faces of the accused were already shown to PW-3 Bagga Ram son of Joginder Singh and PW-5 Chaman Lal. The very purpose of test identification parade was defeated since the faces of the accused persons were already shown to PW-3 Bagga Ram son of Joginder Singh and PW-5 Chaman Lal.

45. Their lordships of the Hon"ble Supreme Court in the case of Laxmipat Choraria and Others Vs. State of Maharashtra, AIR 1968 SC 938 : (1968) CriLJ 1124 : (1968) 2 SCR 624 , have held that the ability of the witness to identify should be tested without showing him the suspect, or his photograph, or furnishing him data for identification. Their lordships have held as follows:

"21. The next question is whether Ethyl Wong's identification of Laxmipat and Balchand, whose photographs were shown to her at the Air Terminal at Bombay should be accepted.--Reference in this connection has been made to English cases in which it has been laid down that the showing of a large number of photographs to a witness and asking him to pick out that of the suspect is a proper procedure but showing a photograph and asking the witness whether it is of the offender is improper. We need not refer to these cases because we entirely agree with the proposition. There can be no doubt that if the intention is to rely on the identification of the suspect by a witness, his ability to identify should be

tested without showing him the suspect or his photograph, or furnishing him the data for identification. Showing a photograph prior to the identification makes the identification worthless."

46. In the case in hand, the accused had been shown in the Police Station to the witnesses and their sketches were also shown to the witnesses.

47. Their lordships of the Hon^{ble} Supreme Court in the case of Wakil Singh and Others Vs. State of Bihar, AIR 1981 SC 1392 : (1981) CriLJ 1014 : (1981) 1 SCALE 925 : (1981) SCC 28 Supp : (1981) SCC(Cri) 634 , have held that when none of the witnesses gave any description of dacoits in their statements or in oral evidence nor gave any identification marks, such as stature of accused or whether they were fat or thin or of fair colour or black colour, the accused could not be convicted. It has been held as follows:

"2. In the instant case we may mention that none of the witnesses in their earlier statements or in oral evidence gave any description of the dacoits whom they have alleged to have identified in the dacoity, nor did the witnesses give any identification marks viz., stature of the accused or whether they were fat or thin or of a fair colour or of black colour. In absence of any such description, it will be impossible for us to convict any accused on the basis of a single identification, in which case the reasonable possibility of mistake in identification cannot be excluded. For these reasons, therefore, the trial court was right in not relying on the evidence of witnesses and not convicting the accused who are identified by only one witness, apart from the reasons that were given by the trial court. The High Court, however has chosen to rely on the evidence of a single witness, completely over-looking the facts and circumstances mentioned above. The High Court also ignored the fact that the identification was made at the T.I. parade about 3| months after the dacoity and in view of such a long lapse of time it is not possible for any human being to remember, the features of the accused and he is, therefore, very likely to commit mistakes. In these circumstances unless the evidence is absolutely clear, it would be unsafe to convict an accused for such a serious offence on the testimony of a single witness."

48. In the instant case, PW-3 Bagga Ram son of Joginder Singh also admitted that accused were not shown with muffled faces. PW-5 Chaman Lal alias Goldy has only deposed that three persons had come at about 1:30 PM to the taxi stand, one was sardar and two monas. He also did not give the description of these persons including any identification mark, stature of the accused, whether they were fat or thin or tall or fair colour or black colour.

49. In the case of Mohanlal Gangaram Gehani Vs. State of Maharashtra, AIR 1982 SC 839 : (1983) 1 Crimes 83 : (1982) 1 SCALE 143 : (1982) 1 SCC 700 : (1982) 3 SCR 277 , their lordships of the Hon^{ble} Supreme Court have held that when the accused was shown to victim by police before trial, his identification in Court by victim is valueless and cannot be relied upon. Their lordships have held as follows:

"20. Thus, as Shetty did not know the appellant before the occurrence and no Test Identification parade was held to test his power of identification and he was also shown by the police before he identified the appellant in court, his evidence becomes absolutely valueless on the question of identification. On this ground alone, the appellant is entitled to be acquitted. It is rather surprising that this important circumstance escaped the attention of the High Court while it laid very great stress in criticising the evidence of Dr. Heena when her evidence was true and straight forward.

25. The only other evidence against the appellant is that of P.Ws. 3 and 4. So far as P.W. 3 is concerned his evidence also suffers from the same infirmity as that of Shetty. P.W. 3 (Shaikh) admits at page 22 of the Paperbook that he had not seen the accused or any of the three accused before the date of the incident and that he had seen all the three for the first time at the time of the incident. He further admits that the names of the accused were given to him by the police. In these circumstances, therefore, if the appellant was not known to him before the incident and was identified for the first time in the court, in the absence of a test identification parade the evidence of P.W. 3 was valueless and could not be relied upon as held by this court in V.C. Shukla v. State (Delhi Administration)(1) Where this Court made the following observations:

"Moreover, the identification of Tripathi by the witness for the first time in the court without being tested by a prior test identification parade was valueless."

50. In the case of State of Madhya Pradesh Vs. Chamru @ Bhagwandas etc. etc., AIR 2007 SC 2400 : (2007) CriLJ 3509 : (2007) 8 JT 598 : (2007) 8 SCALE 587 : (2007) 14 SCC 423 : (2007) 7 SCR 1055 : (2007) AIRSCW 4260 : (2007) 5 Supreme 575 , their lordships of the Hon"ble Supreme Court have held that showing photograph of accused to the witness before the parade would take away the effect of TI parade. Their lordships have held as follows:

"10. We find that it is not merely a case of non-mention of the names. Undisputedly, the photographs of accused Chamru were shown to two of the child witnesses before the test identification parade. That took away the effect of the test identification parade. Learned counsel for the appellant has referred to the evidence of PW 3 to contend that she was not shown the photographs. Even a bare perusal of her evidence in court shows that she was not a credible witness and was tutored. She has categorically stated that she knew the accused by name. As noted above, her evidence also shows that she was tutored. For example, the voltage of the bulb which was supposed to be lighted at a distance of about 200 yards was stated to have been seen by her. Most of her statements in court were exaggerations and embellishments. Secondly, most of the vital facts were not stated during investigation."

51. In the instant case, the faces of the accused persons have been shown to PW-3 Bagga Ram son of Joginder Singh and PW-5 Chaman Lal alias Goldy and their sketches were also circulated.

52. In the case of Mahabir Vs. The State of Delhi, AIR 2008 SC 2343 : (2008) CriLJ 3036 : (2008) 5 JT 308 : (2008) 6 SCALE 52 : (2008) AIRSCW 3869 : (2008) 3 Supreme 111 , their lordships of the Hon'ble Supreme Court have held that test identification parade do not constitute substantive evidence and the same could be used as corroboration. The main object, during investigation stage, is to test memory of witness based upon first impression and also to enable prosecution to decide whether all or any of them could be cited as eye-witnesses of crime. Test identification parade should be conducted as soon as possible after arrest of accused. This is necessary to eliminate possibility of accused being shown to witnesses prior to parade. Their lordships have held as follows:

"11. As was observed by this Court in Matru alias Girish Chandra Vs. The State of Uttar Pradesh, AIR 1972 SC 1050 : (1971) CriLJ 913 : (1971) 2 SCC 75 : (1971) SCC(Cri) 391 : (1971) 3 SCR 914 identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement in court. (See Santokh Singh Vs. Izhar Hussain and Another, AIR 1973 SC 2190 : (1973) CriLJ 1176 : (1973) 2 SCC 406 : (1973) SCC(Cri) 828 : (1974) 1 SCR 78 . The necessity for holding an identification parade can arise only when the accused are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Code and the Indian Evidence Act, 1872 (in short the "Evidence Act"). It is desirable that a test identification parade should be conducted as soon as possible after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution.

12. It is trite to say that the substantive evidence is the evidence of identification in Court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in Court. The evidence of mere identification of the accused

person at the trial for the first time is from its very nature inherently of a weak character. The purpose of prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the Court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code. Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be a matter for the Courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See *Kanta Prashad Vs. Delhi Administration*, AIR 1958 SC 350 : (1958) CriLJ 698 : (1958) 1 SCR 1218 , *Vaikuntam Chandrappa and Others Vs. State of Andhra Pradesh*, AIR 1960 SC 1340 , *Budhsen and Another Vs. State of U.P.*, AIR 1970 SC 1321 : (1970) CriLJ 1149 : (1970) 2 SCC 128 : (1970) 1 SCC(Cri) 343 : (1971) 1 SCR 564 and *Rameshwar Singh Vs. State of Jammu and Kashmir*, AIR 1972 SC 102 : (1972) CriLJ 15 : (1971) 2 SCC 715 : (1971) SCC(Cri) 638 : (1972) 1 SCR 627 : (1972) 4 UJ 31 ."

53. The Division Bench of the High Court of Allahabad in the case of *Bachau and Another (in Jail) Vs. State of U.P.*, (2003) CriLJ 2060 , has held that when the accused was seen by witnesses during transit, the evidence of such witnesses cannot be relied upon. The identification of an accused suspect should and must not be procured by means decried by Courts. Showing of the suspect at any stage from the time of their arrest till their lodging in police lock-up, their withdrawal from here and production for remand order in Court and thereafter their journey from here to Jail provide sufficient opportunity to investigating agency to do it is most unfair mode of investigation. It has been held as follows:

"8. It is further contended by learned Counsel for the appellants that most of the witnesses during the trial were sent to Jail for identifying those accused persons who surrendered in court. They completely failed to identify any surrendered accused person. In the above circumstances the identification of this appellant by these witnesses is rendered highly doubtful and it was not possible without any outside aid. We find force in the contention raised by learned Counsel for the appellants. Scrutinising the evidence of P.W. 14 who is also the arresting officer of this appellant it is apparent that this appellant was taken to the village of the dacoity i.e. Balua immediately after his arrest. He offered an explanation that a dacoity was to be committed in that village and members of his gang were likely to collect there therefore he took him there for this purpose. This fact was not transcribed in the case diary nor in the G.D. on his return. Therefore, in our

opinion, the explanation does not merit any consideration by us. Once this fact is established that the appellant was taken by the Sub Inspector after his arrest to the village of dacoity the probability of his being shown to the witnesses is strongly favoured. Apart from it the belated lodging of the appellant at the Police Station is yet another circumstance that strengthens our suspicion. This appellant is earlier stated was arrested at 4.00 P.M. on 27-7-79. He was lodged in the lockup of Police Station Balua by the same Sub-Inspector on 28-7-79 at 6.05 P.M. Admittedly as per deposition of P.W. 13 three hours are normally taken for coming to Police Station Balua from Varanasi. The enormous delay in lodging this appellant in the police lock-up remains wholly unexplained in the circumstances of the case. There is yet another circumstance that adversely stresses on the identification of this appellant by the witnesses. Most of the witnesses who identified this appellant went to Jail to identify other accused on 2-3 occasions in the past. They failed completely to identify a solitary suspect lodged in the Jail. All these suspects were those who surrendered in Court. These two accused Bachau (now dead) and the appellant were arrested and brought to the Police Station. Their complete failure to identify any suspect in their different sojourns to Jail create serious doubt in our mind about the authenticity of the identification proceedings conducted in Jail against this appellant. It clearly exhibits an outside aid to these witnesses undoubtedly. Before being lodged in the lock-up of the concerned police station they were taken to the village of dacoity further fortifies our above conclusion. Identification of an accused suspect should and must not be procured by means decried by Courts. Showing of the suspect at any stage from the time, of their arrest till their lodging in police lockup, their withdrawal from here and production for remand order in Court and thereafter their journey from here to Jail provide sufficient opportunity to investigating agency to do it is most unfair mode of investigation. As identification procured in this manner is most unconvincing and illegal in character. If the accused successfully establishes this possibility from his own evidence or from the evidence adduced by prosecution his success is immediately ensured. Accused succeeds once he created a reasonable probability of the use of such an outside aid or dubious means. Investigation is meant to work out offences and not to rope in innocent persons by such dubious methods. It smudges the investigation as dishonest and unfair. The appellant had to remain in Jail for a considerably long period. Who would compensate him for this illegal incarceration, agony, and loss of face if the society stares at our face. Though right now we do not propose to undertake any remedial measure but it has to be considered one day."

54. The prosecution has not examined the JMIC, Solan, who has conducted the test identification parade. It was a serious lacunae. Their lordships of the Hon'ble Supreme Court in the case of Mayakaur Baldevsingh Sardar and Another Vs. The State of Maharashtra, (2007) 2 DMC 649 : (2007) 11 SCALE 714 : (2007) 10 SCR 752 , have held that when the Magistrate, who conducted the TI parade, was not produced as a witness, participation of the suspect accused in the crime

was doubtful. Their lordships have held as follows:

"20. It has been pleaded by Mr. Kotwal that accused No. 5 Kawaljit Singh was apparently not a member of the Rajvinder Kaur's parental family as he was a servant employed in Nasik in the Dhaba of accused Bakhtawar Singh and that as Rajvinder Kaur's statement with regard to his identity and presence was also ambivalent his involvement was in doubt. It has also been argued that the identification parade with respect to Kawaljit Singh had been held after his photograph has been shown to Rajvinder Kaur. It has however been pointed out by the learned State counsel that the Rajvinder Kaur had admitted that she had not known Kawaljit Singh's actual name and that he was known to her as Rana but she was categorical in that he had been one of the assailants and that she had identified him on two occasions in the police station some time after the incident.

21. We have considered this argument as well. We find some doubt as to Kawaljit Singh's participation. Rajvinder Kaur's evidence with regard to his relationship with her family appears to be somewhat uncertain. She also admitted that his photograph had been shown to her on the 29th June 1999 and that she had been called to identify him in the parade thereafter though she had not known his name at that point of time. Our opinion is further fortified by the fact that even the Panchnama with respect to the proceedings of the identification parade is not on record and the Executive Magistrate who conducted the parade has not been produced as a witness."

55. The deceased had gone missing on 5.6.2010. The missing report was filed on 6.6.2010. The Punjab police has recovered the car on 9.6.2010. The dead body was recovered on 10.6.2010. However, the fact of the matter is that the FIR was registered only on 15.6.2010. It is settled law that FIR must be registered promptly but in case there is delay in registration of the FIR, the same has to be explained. The only explanation given for not lodging the FIR promptly by PW-2 Sanjay Kumar is that he remained busy in performing the last rites of Rajinder Kumar (deceased) after receipt of the dead body.

56. The next issue involved in this appeal is whether the body of deceased was identifiable or not. PW-2 Sanjay Kumar deposed that they identified the blue jean pant and T-shirt as well as belt of the deceased to be of Rajinder Kumar including the body structure of the deceased and having mark of "Braham Sutli" on his body. In his cross-examination, he has admitted that the body was partially decomposed.

57. PW-10 Madan Lal deposed that they came to know that the dead body was lying in Balachaur hospital which was recovered by the police to be identified. They went to Balachaur hospital and identified the dead body of deceased Rajinder Kumar lying at Balachaur hospital. The wife of deceased also accompanied them to identify the dead body. The clothes of deceased were also identified. In his cross-examination, he admitted that when he saw the dead

body at Balachaur hospital, there were only a T-shirt and underwear over the dead body. The dead body was partially decomposed as part of muscles were not present. Though, according to him, the dead body was in a position to be recognized. PW-7 Hans Raj deposed that when he was patrolling in village Moothgarh, he came to know that a dead body was lying in the Malewal forest. The dead body was found on the spot in a decomposed condition. The dead body was identified by the relations of the deceased. In his cross-examination, he specifically admitted that the dead body was decomposed and it was very difficult to identify the same. The dead body was in the shape of semi skelton.

58. PW-27 Surjeet Bhumla has stated that on 9.6.2010, he was informed by village boy, who used to graze cattle that a dead body was lying near his village at Chandyani Kalan and the same was being eaten up by the dogs. He verified the facts by going to the spot and thereafter he informed the Police Station Pojewala telephonically. According to him, there was a piece of cloth around the neck of the dead body. PW-34 Dr. Manohar Lal has stated that on external appearance, the dead body was found decomposing and partially skeltonised. The dead body was of adult male, moderately built, wearing light blue jean pant and light mongia colour shirt. The body was in a stage of putrefaction, foul smelling gases were emitting, maggots were present. There was softening and greenish discoloration of tissues/skin and liquification of tissues had started at places. Bony rib cage was exposed from front of neck, clavicles in upper part to sides of chest and up to upper part of abdomen below. Bones of left arm and forearm were exposed and left hand was missing and wrist joint was open. Right arm and forearm bones were exposed, left leg bones were also exposed and left foot was separated at ankle joint and attached only by soft tissue. Left knee joint was opened up, left foot toes were missing, except little toe. Scalp and eye brow hair were absent, right orbit was empty and left eyeball collapsed. He has specifically deposed that the dead body was decomposed and it was difficult to identify the same at the time of post mortem.

59. It has come in the statement of PW-2 Sanjay Kumar that the body was partially decomposed. PW-7 Hans Raj deposed that the dead body was decomposed. It was difficult to identify the same and it was in the shape of semi-skelton. PW-10 Madan Lal has also deposed that the dead body was partially decomposed as part of muscles were not present. PW-27 Surjeet Bhumla has also admitted that he was informed that the dead body was eaten up by dogs. PW-34 Dr. Manohar Lal has also deposed that the dead body was decomposed and it was difficult to identify the same at the time of post mortem. The photographs of the dead body were taken. According to the prosecution case, the blue jean pant was recovered alongwith the belt. We have seen the photographs minutely. These were taken immediately after the dead body was recovered. There is only T-shirt and it was without pant. PW-10 Madan Lal in his cross-examination has also admitted that when he saw the dead body at Balachaur hospital, there were only a T-shirt and underwear over the same.

60. According to PW-27 Surjeet Bhumla, the piece of cloth was found around the neck of the dead body, however, PW 34, Dr. Manohar Lal has not seen any parna around the neck while carrying out the post mortem examination. Now, as far as the "Bhram Sutli" mark is concerned, the impressions of "Bhram Sutli" could not last since the body was decomposed or putrefied. The rib cage was visible. PW-10 Madan Lal has deposed that they went to Balachaur hospital and identified the body and thereafter the post mortem examination was conducted.

61. Mr. M.A. Khan, learned Addl. Advocate General has vehemently argued that the DNA profiling was conducted by taking sample of blood of PW-33 Roshani Devi, mother of the deceased. The blood was also lifted from the rear seat of the Car. PW-40 Nasib Singh Patial, Scientific Officer, SFSL, Junga, has admitted in his cross-examination that the blood was collected from the vehicle inspected but the period for which the blood stains had been dried could not be opined. The police should have taken the DNA sample from the dead body of the deceased instead of relying upon dry blood stains which were lifted from the car. PW-34 Dr. Manohar Lal has admitted that no DNA sample was taken from the dead body of the deceased at the time of conducting post mortem examination. Thus, it is doubtful as to whether it was the body of the deceased Rajinder Kumar which was recovered at Pajewala or it was the body of some other person.

62. According to the post mortem report and statement of PW-34 Dr. Manohar Lal, who has conducted the post mortem examination, the cause of death was asphyxia due to strangulation. In his examination-in-chief, he has deposed that on the sides of neck, shallow discolored grooves were present which were about 2 cm wide. These groove faded towards back of neck and grooves were present below the level of thyroid cartilage. Bony rib cage was exposed from front of neck, clavicles in upper part to sides of chest and up to upper part of abdomen below. The deceased had gone missing on 5.6.2010. The dead body was recovered on 10.6.2010. The post mortem was conducted on 11.6.2010. The dead body was recovered from the State of Punjab. The body was decomposed and partially skeltonized. Thus, there is no possibility of the grooves being present on the side of the neck and also below the thyroid cartilage. The grooves and ligature marks could be possible if the body was recovered in winter season. The Court can take judicial notice of the fact that the place from where the dead body was recovered i.e. under the jurisdiction of Garshankar Police Station, was bound to be very hot and humid in the month of June. The medical opinion has to be given weightage but it must conform to basic principles of medical jurisprudence. It is reiterated that there was no possibility of the grooves or ligature marks on the neck taking into consideration the decomposed and putrefied body and summer season.

63. According to Modi's Medical Jurisprudence & Toxicology, 22nd Edition, in cases of strangulation and hanging, the ligature mark would be apparent, even if the epidermis had peeled off, as the skin on and round about the mark persists for some time. In the instant case, the deceased went on missing on 5.6.2010

and the post mortem was conducted on 11.6.2010 when the body had decomposed and putrified. Thus, in this eventuality, the ligature marks could not be seen by PW-34 Dr. Manohar Lal.

64. In Parikh's Text Book of Medical Jurisprudence and Toxicology, the author has made an observation that no inference can usually be drawn from the presence or absence of a ligature mark alone. The decomposed bodies commonly received for autopsy present a swollen neck and exaggerated folds of skin. Unless, dissection of the neck reveals ante mortem evidence of violence in the underlying tissues, no importance should be attached to the mere finding of the above appearances which could be only postmortem decomposition changes.

65. The car was taken into possession alongwith other documents vide seizure memo Ext. PW-1/A. According to PW-16 Yash Pal, the accused Surinder Singh alias Chhinda had made disclosure statement vide Ext. PW-16/B to the effect that he had concealed one wrist watch and piece of cloth (parna) and undertook to get it recovered. The accused on 29.6.2010 identified the place at taxi stand Nalagarh from where the taxi of Rajinder Kumar was hired. According to PW-16 Yash Pal, Taranjeet Singh identified the place where the taxi of the deceased was stopped and deceased was strangulated with parna. The accused also led the police to the place where the dead body of deceased was thrown in the forest. It was identified vide memo Ext. PW-16/F. The accused also identified the place where the taxi of deceased was parked vide memo Ext. PW-16/H. However, the fact of the matter is that PW-16 Yash Pal in his cross-examination has admitted specifically that the police had already visited the places which were identified by the accused persons when he accompanied the police alongwith the accused. Since the police had already visited the places, which were to be identified by the accused, the subsequent recoveries also become doubtful.

66. Mr. M.A. Khan, learned Addl. Advocate General for the State has also argued that the deceased was last seen alive with the accused at Nalagarh. He has referred to the statements of PW-3 Bagga Ram son of Joginder Singh and PW-5 Chaman Lal alias Goldy. The deceased has disappeared on 5.6.2010 and the dead body was recovered on 10.6.2010. Their lordships of the Hon'ble Supreme Court in the case of Ajitsingh Harnamsingh Gujral Vs. State of Maharashtra, (2011) 10 JT 465 : (2011) 4 RCR(Criminal) 169 : (2011) 10 SCALE 394 : (2011) 5 UJ 3409 : (2011) AIRSCW 5448 : (2011) 6 Supreme 289 , have held that when the victim was last seen alive with accused and subsequently found dead, the duration of time between events ought to be so small that possibility of any other person being author of crime can be ruled out. Their lordships have held as follows:

"27. The last seen theory comes into play where the time gap between the point of time when the accused and deceased were last seen alive and when the deceased is found dead is so small that the possibility of any person other than the accused being the author of the crime becomes impossible, vide Mohd. Azad @ Samin Vs. State of West Bengal, AIR 2009 SC 1307 : (2008) 11 JT 658 :

(2008) 15 SCC 449 : (2009) AIRSCW 752 : (2008) 8 Supreme 41 and State Vs. Mahender Singh Dahiya, AIR 2011 SC 1017 : (2011) CriLJ 2177 : (2011) 1 Crimes 319 : (2011) 3 JT 109 : (2011) 1 RCR(Criminal) 706 : (2011) 2 SCALE 7 : (2011) 3 SCC 109 : (2011) 1 SCC(Cri) 821 : (2011) 1 SCR 1104 : (2011) AIRSCW 1916 : (2011) 1 Supreme 582 , Sk. Yusuf Vs. State of West Bengal, AIR 2011 SC 2283 : (2011) 3 Crimes 1 : (2011) 6 JT 640 : (2011) 6 SCALE 511 : (2011) 11 SCC 754 : (2011) 8 SCR 83 : (2011) AIRSCW 3748 : (2011) 4 Supreme 331 .

28. In our opinion, since the accused was last seen with his wife and the fire broke out about 4 hours thereafter it was for him to properly explain how this incident happened, which he has not done. Hence this is one of the strong links in the chain connecting the accused with the crime.

29. The victims died in the house of the accused, and he was there according to the testimony of the above witnesses. The incident took place at a time when there was no outsider or stranger who would have ordinarily entered the house of the accused without resistance and moreover it was most natural for the accused to be present in his own house during the night."

67. Their lordships of the Hon"ble Supreme Court in the case of Sahadevan and another Vs. State of Tamil Nadu, AIR 2012 SC 2435 : (2012) CriLJ 3014 : (2012) 3 JCC 1756 : (2012) 2 RCR(Criminal) 899 : (2012) 5 SCALE 415 : (2012) 6 SCC 403 : (2012) AIRSCW 3206 , have held that last seen theory although an important event in chain of circumstances and/or could point to guilt of accused with some certainty, but this theory should be applied while taking into consideration prosecution case in its entirety and keeping in mind circumstances that precede and follow the point of being so last seen. Their lordships have held as follows:

"27. The courts below, the Trial Court in particular, have laid some emphasis on the theory of last seen, while finding the accused guilty of the offence. As far as PW5 is concerned, he says that he only saw three persons going on the moped and he could not identify these persons. PW4 stated that he had seen the deceased going on a moped with Chandran at about 2.00 o'clock in the afternoon. The time lag between the time at which this witness saw the accused and the deceased together and when the body of the deceased was found on the next day is considerably long. According to PW4, he could identify Loganathan while, according to PW5, the face of the deceased was burnt and, therefore, he could not identify him. Moreover, according to the doctor, PW7, the deceased had died about 27 to 28 hours before the autopsy. The autopsy, was admittedly, performed upon the deceased on 10th of July, at about 2 o'clock. That implies that the deceased would have died sometime during the morning of 9th July, while according to PW4, he had seen the deceased along with Chandran after 2 p.m. on 9th July, 2002.

28. With the development of law, the theory of last seen has become a definite

tool in the hands of the prosecution to establish the guilt of the accused. This concept is also accepted in various judgments of this Court. The Court has taken the consistent view that where the only circumstantial evidence taken resort to by the prosecution is that the accused and deceased were last seen together, it may raise suspicion but it is not independently sufficient to lead to a finding of guilt."

68. In the case of Kanhaiya Lal Vs. State of Rajasthan, (2014) AIRSCW 1828 : (2014) CriLJ 1950 : (2014) 4 JT 165 : (2014) 2 RCR(Criminal) 180 : (2014) 3 SCALE 598 : (2014) 4 SCC 715 , their lordships of the Hon"ble Supreme Court have held that circumstance of last seen together does not by itself necessarily lead to inference that it was accused who committed the crime. It has been held as follows:

"12. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant."

69. Their lordships of the Hon"ble Supreme Court in the case of Sultan Singh Vs. State of Haryana, (2014) 4 CCR 315 : (2015) 1 Crimes 59 : (2014) 3 DMC 626 : (2015) 1 JCC 506 : (2014) 4 RCR(Criminal) 757 , have held that the opinion of expert witness on technical aspects has relevance but the opinion has to be based upon specialized knowledge and the date on which it is based has to be found acceptable by the Court. It has been held as follows:

"13. Thus, taking of plea by the accused to save himself/herself is not enough. The contention in the present case that PW 2-Dr. S.K. Gupta mentioned the history of burn due to bursting of stove was given by the patient and one Amar Nath who accompanied her is without any merit. In the same statement the said witness states that the victim was unfit to make a statement. Amar Nath, who is said to have given this information, has not been examined by the defence. Statement of Dr. S.K. Gupta that Amar Nath gave this information is hearsay. Moreover, PW 2-Dr. S.K. Gupta has been examined as an expert witness to give his opinion about the health condition of the patient based on his expertise. He is not a witness of fact. Similarly, contention that PW 3-Dr. Gajinder Yadav who conducted the post mortem made a statement in cross examination that there was more probability of death being caused by accidental fire as there was no smell of kerosene oil from the body of the deceased and that the fire had started from the lower parts of the body towards upper parts is equally without any merit. Such statement of an expert witness without being based on any specialized knowledge cannot be accepted. The opinion of expert witness on technical aspects has relevance but the opinion has to be based upon specialized knowledge and the data on which it is based has to be found acceptable by the Court. In Madan Gopal Kakkad versus Naval Dubey, it was observed as under :

"34. A medical witness called in as an expert to assist the Court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of the symptoms found on examination. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the Court.

35. Nariman, J. in Queen v. Ahmed Ally. 2, while expressing his view on medical evidence has observed as follows: "The evidence of a medical man or other skilled witnesses, however, eminent, as to what he thinks may or may not have taken place under particular combination of circumstances, however, confidently, he may speak, is ordinarily a matter of mere opinion."

70. In the case of Ashok Vs. State of Maharashtra(2015) CriLJ 2036 : (2015) 1 DMC 751 : (2015) 2 JCC 1280 : (2015) 2 RCR(Criminal) 253 : (2015) 3 SCALE 530 : (2015) 4 SCC 393 : (2015) 4 SCJ 393 , their lordships of the Hon"ble Supreme Court have held that "last seen together" by itself is not conclusive proof but alongwith other circumstances surrounding the incident, like relations between accused and deceased, enmity between them, previous history of hostility, recovery of weapon from accused, etc. are to be looked into. It has been held as follows:

"8. The "last seen together" theory has been elucidated by this Court in Trimukh Maroti Kirkan Vs. State of Maharashtra, (2007) CLT 471 Supp : (2007) CriLJ 20 : (2006) 2 DMC 757 : (2006) 9 JT 50 : (2006) 10 SCALE 190 : (2006) 10 SCC 681 : (2006) 8 SCR 156 Supp : (2006) 148 STC 638 , in the following words:

"Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. Thus, the doctrine of last seen together shifts the burden of proof on the accused, requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard, would give rise to a very strong presumption against him."

9. In Ram Gulam Chaudhury and Others Vs. State of Bihar , the accused after brutally assaulting a boy carried him away and thereafter the boy was not seen alive nor his body was found. The accused, however, offered no explanation as to what they did after they took away the boy. It was held that for absence of any explanation from the side of the accused about the boy, there was every

justification for drawing an inference that they had murdered the boy.

10. In *Nika Ram Vs. State of Himachal Pradesh*, AIR 1972 SC 2077 : (1972) CriLJ 1317 : (1972) 2 SCC 80 : (1972) SCC(Cri) 635 : (1973) 1 SCR 428 : (1972) 4 UJ 932 , it was observed that the fact that the accused alone was with his wife in the house when she was murdered with a "Khukhri" and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt.

11. The latest judgment on the point is *Kanhaiya Lal Vs. State of Rajasthan*, (2014) AIRSCW 1828 : (2014) CriLJ 1950 : (2014) 4 JT 165 : (2014) 2 RCR(Criminal) 180 : (2014) 3 SCALE 598 : (2014) 4 SCC 715 . In this case this Court has held that the circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing the connectivity between the accused and the crime. Mere non-explanation on the part of the accused by itself cannot lead to the proof of guilt against the accused.

12. From the study of above stated judgments and many others delivered by this Court over a period of years, the rule can be summarized as that the initial burden of proof is on the prosecution to bring sufficient evidence pointing towards guilt of accused. However, in case of last seen together, the prosecution is exempted to prove exact happening of the incident as the accused himself would have special knowledge of the incident and thus, would have burden of proof as per Section 106 of Indian Evidence Act. Therefore, last seen together itself is not a conclusive proof but along with other circumstances surrounding the incident, like relations between the accused and the deceased, enmity between them, previous history of hostility, recovery of weapon from the accused etc., non-explanation of death of the deceased, may lead to a presumption of guilt.

20. From the above discussion, we conclude that the prosecution has not brought any clinching evidence in support of last seen together theory so as to shift the burden of proof on the accused-appellant. In light of this, the prosecution has evidently failed to prove the guilt of the accused-appellant beyond doubt. Therefore, the appeal is allowed and the judgment and order passed by the High Court as also by the Trial Court are set aside. The appellant is directed to be released forthwith if not required in connection with any other case."

71. Their lordships of the Hon"ble Supreme Court in the case of *Bhim Singh and Others Vs. State of Uttarakhand*(2015) 2 AD 610 : (2015) CriLJ 1428 : (2015) 2 JCC 1011 : (2015) 2 RCR(Criminal) 22 : (2015) 2 SCALE 280 : (2015) 4 SCC 281 : (2015) 2 SCJ 589 , have held that there should not be any snap in the chain of circumstances and if there is a snap in the chain, the accused is entitled to benefit of doubt. Their lordships have held as under:

"22. In the present case, the guilt or innocence of the accused has to be adduced from the circumstantial evidence. The law regarding circumstantial evidence is

more or less well settled. This Court in a plethora of judgments has held that when the conviction is based on circumstantial evidence solely, then there should not be any snap in the chain of circumstances. If there is a snap in the chain, the accused is entitled to benefit of doubt. Gurpreet Singh Vs. State of Haryana, AIR 2002 SC 3217 : (2002) CriLJ 4688 : (2002) 4 Crimes 254 : (2002) 2 DMC 505 : (2002) 7 JT 58 : (2002) 6 SCALE 363 : (2002) 8 SCC 18 : (2002) 2 SCR 337 Supp : (2002) 2 UJ 1367 is one of such cases. On the question of any reasonable hypothesis, this Court has held that if some of the circumstances in the chain can be explained by any other reasonable hypothesis, then the accused is entitled to benefit of doubt. But in assessing the evidence, imaginary possibilities have no place. The Court considers ordinary human probabilities.

23. On circumstantial evidence, this Court has laid down the following principles in Sharad Birdhichand Sarda Vs. State of Maharashtra, AIR 1984 SC 1622 : (1984) CriLJ 1738 : (1984) 2 SCALE 445 : (1984) 4 SCC 116 : (1985) 1 SCR 88 :

"(1) The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely "may be" fully established.

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

(3) The circumstances should be of conclusive nature and tendency.

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

(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. Whenever there is a break in the chain of circumstances, the accused is entitled to the benefit of doubt; State of Maharashtra Vs. Annappa Bandu Kavatage, AIR 1979 SC 1410 : (1979) CriLJ 1089 : (1979) 4 SCC 715 : (1980) SCC(Cri) 155 : (1979) 11 UJ 323 ."

72. The case of the prosecution, precisely, is that the accused were working at Baddi and they had gone to Nalagarh to hire the taxi to take patient at Garshankar. In case the accused intended to hire the taxi to take patient to Garshankar or Ropar hospital, they could have hired it from Baddi itself instead of going to Nalagarh which is at a distance of 15-20 kms. from Baddi. It also casts doubt on the version of the prosecution story. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt.

73. Accordingly, the appeal is allowed. Judgment of conviction and sentence dated 15.5.2012, rendered by the learned Sessions Judge, Solan, H.P., (Camp at Nalagarh) in Sessions case No. 10-NL/7 of 2010, is set aside. The accused are acquitted of the charges framed under Sections 302, 364 and 201 read with Section 34 IPC, by giving them benefit of doubt. Fine amount, if any, already

deposited by the accused is ordered to be refunded to them. Since the accused are in jail, they be released forthwith, if not required in any other case.

74. The Registry is directed to prepare the release warrants of the accused and send the same to the Superintendent of Jail concerned, in conformity with this judgment forthwith.