THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 29th MAY, 2019

DIVISION BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE
THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

Crl.A. No.28 of 2017

Appellant : Garja Bir Rai

versus

Respondent : State of Sikkim

Appeal under Section 374 of the
Code of Criminal Procedure, 1973

Appearance

Mr. N. Rai, Senior Advocate with Ms. Tamanna Chhetri and Ms. Malati Sharma, Advocates.

Mr. Karma Thinlay, Additional Public Prosecutor with Mr. Thinlay Dorjee, Additional Public Prosecutor and Mr. S. K. Chettri, Assistant Public Prosecutor for the State-Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. The Appellant was convicted under Section 302 of the Indian Penal Code, 1860 (hereinafter, IPC) by the impugned Judgment, dated 31-08-2017, of the Learned Sessions Judge, Special Division – I, Sikkim, at Gangtok, in Sessions Trial Case No.03 of 2016. By an Order on Sentence of the same date, the Appellant was to suffer simple imprisonment for life and to pay a fine of Rs.50,000/- (Rupees fifty thousand) only, with a default clause of imprisonment. Dissatisfied thereof, the Appellant is before this Court.

2. Shorn of details, the facts as per the Prosecution is that, on 14-02-2016, at around 2130 hours, one Hubkey Rai P.W.7, lodged a written Complaint to the effect that, at around 0600 hours, the same morning, he was telephonically informed by his elder brother, Mandhoj Rai P.W.3, of Machong, East Sikkim, that their sister Purnimaya Rai (married to the Appellant) was found dead in her home. On reaching the victim's house, P.W.7 found some marks over her neck. Suspecting foul play he reported the matter to the Pakyong Police Station seeking ascertainment of the cause of death.

(a) The Pakyong P.S. registered UD (Unnatural Death) Case No.03 of 2016, dated 14-02-2016, under Section 174 of the Code of Criminal Procedure, 1973 (hereinafter, Cr.P.C.), and endorsed it to ASI Nim Tenzing Bhutia P.W.20, for investigation. Following an autopsy over the dead body and based on the opinion of P.W.22 the Doctor who conducted the autopsy, P.W.7 submitted another Complaint, Exhibit 3, accusing the Appellant (his brother-in-law), of having strangulated the victim to death.

(b) Pursuant to Exhibit 3, the UD Case was converted into Pakyong P.S. Criminal Case No.04 of 2016, dated 14-02-2016, under Sections 302/201 of the IPC, formal FIR Exhibit 22, drawn up against the Appellant and investigation taken up.

3. The Prosecution narration is that the Appellant, aged about 60 years, a Government Primary School Teacher was married to the deceased, his second wife, for the last 25 years,

after the demise of his first wife from whom he had one son, aged about 31 years, employed in the Police Department. From the deceased he had another son, aged about 21 years, a student of Class XI. At the relevant time, both the sons were living elsewhere. The couple had also adopted a girl P.W.6, about 11 years ago, who was aged about 16 years at the time of the incident and shared their room. Her alleged illicit relations with the Appellant was the apple of discord between the couple and the motive for the crime. The Appellant and the deceased quarrelled on 13-02-2016 about the impending marriage of the elder son P.W.11. At 1900 hours, P.W.6 fell asleep but not before having witnessed both the Appellant and the deceased entering the room, bolting the door and confronting each other. The argument escalated into a scuffle during which the Appellant strangulated the deceased with a muffler. To conceal the offence he attempted to hang the body from the nearby "*Nebhara*" tree (Fig tree) and having failed in his effort he returned the dead body to their room. The following morning, i.e., on 14-02-2016, at about 4 a.m., he woke P.W.6 and on her enquiry into the whereabouts of her mother, he told her that she had passed away due to illness on the intervening night. The Appellant thereafter called his younger brother one Manoj Rai P.W.5, Panchayat of Riwa Machong, informing him of the death, who in turn informed Tula Bir Rai P.W.23 another brother, both of whom then arrived at the house of the Appellant. The Appellant informed them that the deceased had died due to

acute stomachache during the night. P.W.5 then called Ashok Kumar Rai P.W.24, their cousin, informing him of the death and requesting him to come to the house of the victim. Thereupon, P.W.5 telephonically informed P.W.3, the brother of the victim. Meanwhile, the Appellant is alleged to have tutored P.W.23 to concoct a false story that he had spent the night in the Appellant's house. The Prosecution case is also that in September, 2015, the victim had reported to her brother at Riwa Machong that the Appellant had assaulted her concerning his relations with P.W.6. The victim had requested the biological parents of P.W.6 to take her back, but the Appellant was in disagreement. Charge-Sheet was accordingly submitted against the Appellant under Sections 302/201 of the IPC.

4. The Learned Trial Court framed Charge under Section 302 of the IPC and on the plea of "not guilty" by the Appellant, the Prosecution examined twenty-seven witnesses to establish their case. On closure thereof, the Appellant was afforded an opportunity under Section 313 of the Cr.P.C. to explain the incriminating circumstances appearing in the evidence against him, to which, he *inter alia* responded that he had been falsely implicated by P.W.7, brothers and relatives of the deceased. The Learned Trial Court on considering the entire gamut of evidence on record concluded that the Appellant was guilty of the offence under Section 302 of the IPC and pronounced the impugned Judgment and Order on Sentence.

5. Claiming that the Prosecution case rests entirely on circumstantial evidence, Learned Counsel for the Appellant contended that the Prosecution ought to have proved that the circumstances were wholly and unerringly consistent with the theory of guilt of the Appellant and excluded any hypothesis of his innocence. The Prosecution has established no such chain of circumstances, consequently the benefit of doubt ought to be extended to the Appellant. On this count, support was garnered from the ratio in ***Jose alias Pappachan*** vs. ***Sub-Inspector of Police, Koyilandy and Another***[1]. That, the impugned Judgment of the Learned Trial Court is also based on the resiled Section 164 Cr.P.C. statement of P.W.23 a hostile Prosecution witness, which is not substantive and can only be utilized for corroborating or contradicting the witness. This aspect was fortified by reliance on ***Ram Kishan Singh*** vs. ***Harmit Kaur and Another***[2] and ***R. Shaji*** vs. ***State of Kerala***[3]. The Prosecution has failed to pinpoint the article of clothing used for strangulating the victim as the Investigating Officer (I.O.) himself has testified that the muffler was not used for the said purpose. That, it has emerged in the investigation that leaves, grass and weeds were found on the bed sheet, inside the house, clothes and person of the victim which remains unexplained. That, concerted efforts have been made by the Prosecution to conceal the fact that the death occurred due to suicide as she was found hanging from the "*Nebhara*" tree (Fig tree) outside the house. No written instructions were issued to

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[1] (2016) 10 SCC 519
[2] (1972) 3 SCC 280
[3] (2013) 14 SCC 266

P.W.20 by P.W.27 to conduct an enquiry into the UD Case under Section 174 of the Cr.P.C. and the inquiry was conducted on verbal instructions. Although P.W.20 was vested with the investigation of the UD Case only, he has encroached into the jurisdiction of P.W.27 by making seizures of articles but his report is devoid of such entries. His report was submitted before the Police Station and not before the Executive Magistrate in contravention of law. It is clear that the Prosecution attempt is to falsely implicate the Appellant as two brothers and a nephew of the deceased are Police personnel and as such are interested witnesses. That, the conviction of the Appellant was based to a large extent on the medical evidence of P.W.22, who conducted the post-mortem examination and opined that death was due to strangulation. The ocular evidence of P.W.6 which is contrary to that of P.W.22 and the Prosecution case was singularly ignored without declaring her hostile or cross-examining her to decimate her evidence, hence her account of the incident stands as credible and trustworthy. Relying on ***Mohar Singh and Others*** vs. ***State of Punjab***[4] Learned Senior Counsel submitted that where the ocular evidence and the medical evidence are in direct conflict with each other it would be unsafe and hazardous to maintain the conviction of the Appellant on such evidence. To buttress this point further, reliance was placed on ***State of U.P.*** vs. ***Krishna Gopal and Another***[5]. That, from the Prosecution case it can be culled out that two FIRs had been lodged in the matter

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[4] AIR 1981 SC 1578

[5] AIR 1988 SC 2154

one pertaining to the UD Case and the other after the post-mortem examination was carried out, however, only one FIR is found in the records of the case and the Prosecution did not deem it worthwhile to furnish reasons for the missing first FIR. Citing the ratio in ***Narayan Dutta*** vs. ***The State***[6] it was held that the importance of the FIR lies in it being the first recorded statement of the occurrence, when this is missing, the veracity of the Prosecution case is doubtful. On this aspect, strength was also drawn from ***Babubhai*** vs. ***State of Gujarat and Others***[7]. That, Exhibit 3 is hit by the provisions of Section 162 of the Cr.P.C. being information given after commencement of investigation pursuant to the lodging of the first FIR. That no motive was fixed on the Appellant for the offence when the FIR was lodged but efforts were made during the course of trial to foist a motive on him by insinuation of a relationship with his adopted daughter, when infact, she had been adopted from the age of five years. In this context reliance was placed on ***Sucha Singh*** vs. ***State of Punjab***[8]. The settled position of law that where two conclusions are possible one pointing to the guilt of the Appellant and the other to his innocence, the view which is favourable to the Appellant should be adopted to prevent miscarriage of justice was reiterated by Learned Senior Counsel, as held in ***State of UP*** vs. ***Jai Prakash***[9] and ***Upendra Pradhan*** vs. ***State of Orissa***[10]. That, suspicion however grave cannot take the place of proof

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[6] 1980 CRI.L.J. 264 (Calcutta)
[7] (2010) 12 SCC 254
[8] 2009 CRI.L.J. 3444 (SC)
[9] 2007 CRI.L.J. 3534 (SC)
[10] (2015) 11 SCC 124

which has been propounded in ***Raj Kumar Singh alias Raju alias Batya*** vs. ***State of Rajasthan***[11] and ***M. Nageshwar Rao*** vs. ***State of Andhra Pradesh***[12]. That, the Learned Trial Court was in error in convicting the Appellant as the Prosecution had failed to establish its case beyond a reasonable doubt, hence the impugned Judgment and Order on Sentence, both dated 31-08-2017, be set aside.

6. *Per contra*, Learned Additional Public Prosecutor would contend that P.W.22 who conducted the post-mortem examination has unwaveringly opined that there was a well-defined transverse ligature mark over the front of the neck of the deceased, coupled with multiple bruises under the ligature site, indicative of strangulation and struggle by the victim. In this context, Learned Additional Public Prosecutor placed reliance on ***Mandhari*** vs. ***State of Chattisgarh***[13]. That, the hyoid bone of the victim was fractured as occurs in instances of strangulation, thereby ruling out death by suicide in the instant matter, contrary to the contention of the Appellant. This submission was fortified with reliance on ***Mulakh Raj and Others*** vs. ***Satish Kumar and Others***[14]. An attempt was made to elucidate that in cases of hanging the ligature mark would usually be oblique and non-continuous, placed high up in the neck between the chin and the larynx, while in strangulation, as in the instant case, the ligature mark is transverse, continuous, round the neck, low down in the

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[11] (2013) 5 SCC 722
[12] (2011) 2 SCC 188
[13] (2002) 4 SCC 308
[14] (1992) 3 SCC 43

neck below the thyroid. On this count, Learned Additional Public Prosecutor drew support from the ratio in ***Ravirala Laxmaiah*** vs. ***State of Andhra Pradesh***[15]. Learned Additional Public Prosecutor also sought to draw support from the decision in ***Gangabhavani*** vs. ***Rayapati Venkat Reddy and Others***[16], with regard to the evidence of a medical witness. That, the medical opinion of P.W.22 that the cause of death of the victim was due to asphyxia as a result of strangulation, homicidal in nature, ought to be given priority over the ocular evidence of P.W.6, in view of the evidence of P.W.4 and P.W.10 who have stated that P.W.6 and the Appellant were in an incestuous relationship thereby rendering P.W.6 as an interested witness and her evidence suspect. This relationship was the motive for the Appellant to do away with the deceased. That, Exhibit 10 reveals that a Complaint was lodged initially by P.W.7 which resulted in the UD Case, while Exhibit 3 was the FIR pertaining to the offence, consequently Exhibit 3 is not hit by the provisions of Section 162 of the Cr.P.C. As per P.W.27 the I.O., P.W.22 has opined that the muffler and shawl seized by P.W.20 could cause the death of a person by strangulation, thereby establishing the Prosecution case on this aspect. That, an attempt was made by the Appellant to simulate the strangulation as a suicide for which purpose he attempted to unsuccessfully hang the body on a tree, resulting in leaves and grass being lodged in her hair and clothes. That, it is now settled law that evidence of a hostile

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[15] (2013) 9 SCC 283
[16] (2013) 15 SCC 298

witness can also be considered to the extent that it is relevant and undemolished, hence the evidence of P.W.23 Tulabir Rai cannot be ignored in totality. That, in view of the cogent and consistent evidence of the Prosecution witnesses the findings of the Learned Trial Court ought not to be disturbed.

7. The submissions made *in extenso* were heard and afforded careful consideration, in conjunction with meticulous examination of the evidence, documents and photographs placed before us. We have also perused the impugned Judgment and Order on Sentence.

8. The Learned Trial Court while convicting the Appellant relied on the medical evidence of P.W.22 and also found the evidence of P.Ws 4, 10 and 3 credible. However, the Learned Trial Court had difficulty in believing the version of P.W.6 as it observed that P.W.6 in her Section 164 Cr.P.C. statement was silent about having seen the victim hanging from the nearby tree, but deposed so, untruthfully, before the Court to aid the Appellant. That, both P.W.5 and P.W.23 younger brothers of the Appellant also narrated a false account before the Court, their statements being in contradiction to their Section 164 Cr.P.C. statements. The Learned Trial Court thus found the evidence of P.Ws 5, 6 and 23 which failed to support the Prosecution case, unworthy of credence. The Learned Trial Court reproved the conduct of the Appellant on his failure to raise a hue and cry on seeing his wife allegedly hanging from the

tree and therefore found this conduct improbable. The Learned Trial Court also concluded that the report initially lodged by P.W.7 was an information of the nature contemplated under Section 174 of the Cr.P.C. and cannot be categorized as one under Section 154 of the Cr.P.C., hence only Exhibit 3 can be treated as an FIR. That, there was substantial compliance of the provisions of Section 174 of the Cr.P.C. That, overwhelming medical and circumstantial evidence outweigh that of P.W.12 who had stated that his father treated his mother very well. The Learned Trial Court was also of the opinion that as a general rule hyoid bone does not sustain fracture by any means other than strangulation. That, even the study report/research article relied on by the Ld. Counsel for the accused suggests that throttling accounts for the highest incidence of ante mortem fractures of hyoid bones. That, as a general rule in cases of suicidal hanging the neck of the deceased would be stretched and elongated, particularly in fresh bodies but no such sign existed in the instant matter. That, fingernail abrasions were quite uncommon in cases of suicidal hanging, but abrasions were found in the instant matter, indicating death by strangulation. The Learned Trial Court was impressed with the Prosecution case of marital discord between the couple on account of P.W.6 as deposed by P.W.4 and P.W.10 and concluded that the circumstantial evidence left no manner of doubt that the Appellant alone was the author of the crime.

9. It is thus to be considered whether the conclusion of guilt of the Appellant, arrived at by the Learned Trial Court was a correct conclusion?

10. We propose to address the issue pertaining to the FIR in the first instance. According to P.W.7, he lodged an FIR before the Pakyong P.S. at 09.30 a.m. on 14-02-2016 seeking inquiry into the victim's death on suspicion of foul play. The Police personnel came to the victim's house and took the body to the STNM Hospital for post-mortem, which was then conducted by P.W.22 Dr. O. T. Lepcha. He opined that the death was due to strangulation and informed P.W.20, P.W.7 and other relatives of the victim accordingly. Pursuant thereto, P.W.7 lodged Exhibit 3, the second report before the Pakyong P.S., bearing his signature Exhibit 3(a). P.W.27 would by his evidence vouch for this deposition of P.W.7. From the above discussions, it emanates that two Complaints were lodged by P.W.7.

11. In ***Lalita Kumari*** vs. ***Government of Uttar Pradesh and Others***[17] it was *inter alia* held that if the information discloses commission of a cognizable offence the registration of an FIR is mandatory under Section 154 of the Cr.P.C. and no preliminary enquiry is permissible in such a situation. In ***Madhu Bala*** vs. ***Suresh Kumar and Others***[18] the Supreme Court would discuss what a cognizable offence entails as follows;

> **"6.** …… Under Section 2(*c*) "cognizable offence" means an offence for which, and

[17] (2014) 2 SCC 1
[18] (1997) 8 SCC 476

> "cognizable case" means a case in which a police officer may in accordance with the First Schedule (of the Code) or under any other law for the time being in force, arrest without a warrant. Under Section 2(*r*) "police report" means a report forwarded by a police officer to a Magistrate under sub-section (2) of Section 173 of the Code. Chapter XII of the Code comprising Sections 154 to 176 relates to information to the police and their powers to investigate. Section 154 provides, inter alia, that the officer in charge of a police station shall reduce into writing every information relating to the commission of a cognizable offence given to him orally and every such information if given in writing shall be signed by the person giving it and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf. ……."

Disclosure of a cognizable offence is therefore the *sine qua non* for registration of an FIR.

12. Bearing the afore-extracted ratiocination in mind, it may be noted that the first Complaint lodged by P.W.7 before the Pakyong Police Station was apparently a quest to ascertain the cause of death of the victim. It is also worth noting that the first Complaint is admittedly untraceable in the records of the case. That, there was a first Complaint can only be assumed from the evidence of P.W.7, P.W.20, P.W.27 and Exhibit 9 the final report pertaining to the unnatural death purportedly prepared by P.W.20 and from Exhibit 10, a requisition by P.W.20 to P.W.22 requesting autopsy of the dead body of the victim. Presuming candour in the evidence and documents *supra*, the report first filed by P.W.7 would tantamount to one under Section 174 of the Cr.P.C., devoid as it was of disclosure of a cognizable offence. Exhibit 3, the second Complaint lodged by P.W.7 after the autopsy was conducted discloses a cognizable

offence and indeed qualifies as an FIR under Section 154 of the Cr.P.C. Therefore, Exhibit 3 cannot be said to be hit by the provisions of Section 162 of the Cr.P.C. On this point, we are in agreement with the Learned Trial Court. Even if the absence of the first Complaint raises doubts on the veracity of the Prosecution case this conclusion would not differ since Exhibit 3 would be the only FIR pertaining to the case.

13. However, it is relevant to point out here that although the Learned Trial Court observed that the provisions of Section 174 of the Cr.P.C. had been substantially complied with we cannot bring ourselves to agree with this observation, since neither P.W.20 nor P.W.27 have stated that pursuant to receiving the Complaint they intimated the Executive Magistrate. It is also not in the evidence of the Prosecution that the report prepared by P.W.20 was forwarded to the District Magistrate or the Sub-Divisional Magistrate as required under Section 174(2) of the Cr.P.C. P.W.15 witness to the inquest could not enlighten the Court as to why he signed on Exhibit 5, although he identified Exhibit 5(a) as his signature on it. The other witness of Exhibit 5 is one Sangay Bhutia, Panchayat President, Machong and his signature appears to be Exhibit 5(b), but was not examined. That, having been said, it is essential to clarify that the Supreme Court while discussing the evidentiary value of a report under Section 174 of the Cr.P.C. in ***Yogesh Singh*** vs. vs. ***Mahabeer Singh and Others***[19] observed as follows;

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[19] (2017) 11 SCC 195

> **"41.** Further, the evidentiary value of the inquest report prepared under Section 174 CrPC has also been long settled through a series of judicial pronouncements of this Court. It is well established that inquest report is not a substantive piece of evidence and can only be looked into for testing the veracity of the witnesses of inquest. The object of preparing such report is merely to ascertain the apparent cause of death, namely, whether it is suicidal, homicidal, accidental or caused by animals or machinery, etc. and stating in what manner, or by what weapon or instrument, the injuries on the body appear to have been inflicted. ……..**"**

14. In ***Tehseen Poonawalla*** v. ***Union of India and Another***[20] the Supreme Court held as under;

> **"39.** The purpose of holding an inquest is limited. The inquest report does not constitute substantive evidence. Hence matters relating to how the deceased was assaulted or who assaulted him and under what circumstances are beyond the scope of the report. The report of inquest is primarily intended to ascertain the nature of the injuries and the apparent cause of death. On the other hand, it is the doctor who conducts a post-mortem examination who examines the body from a medico-legal perspective. Hence it is the post-mortem report that is expected to contain the details of the injuries through a scientific examination ……. .**"**

15. The next argument of Learned Counsel for the Appellant that P.W.20 proceeded to conduct the investigation under Section 174 of the Cr.P.C. as if he was the I.O. of the case is superfluous, in view of the provisions of Section 175 of the Cr.P.C. which provides that a Police Officer proceeding under Section 174, may, by order in writing, summon two or more persons as aforesaid for the purpose of the said investigation, and any other person who appears to be acquainted with the facts of the case. Every person so summoned shall be bound to

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[20] (2018) 6 SCC 72

attend and to answer truly all questions other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture. If the facts do not disclose a cognizable offence to which Section 170 of the Cr.P.C. applies, such persons shall not be required by the police officer to attend a Magistrate's Court. The Section requires the Officer concerned to prepare a report, which without ambiguity requires investigation.

16. Now, we turn to address the issue as to whether the death occurred by strangulation. The principle of circumstantial evidence is that the hypothesis of guilt must lead to the accused and none else by a chain of circumstances which are cogent, consistent and reliable. On this aspect, in ***Gambhir*** vs. ***State of Maharashtra***[21] the Supreme Court observed as follows;

> **"9.** It has already been pointed out that there is no direct evidence of eyewitness in this case and the case is based only on circumstantial evidence. The law regarding circumstantial evidence is well settled. When a case rests upon the circumstantial evidence, such evidence must satisfy three tests: (*1*) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (*2*) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (*3*) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. ……."

[21] (1982) 2 SCC 351

17. In ***Sharad Birdhichand Sarda*** vs. ***State of Maharashtra***[22] the Supreme Court held that graver the crime, greater should be the standard of proof. An accused may appear to be guilty on the basis of suspicion but that cannot amount to legal proof. When on evidence two possibilities are available or open, one which goes in the favour of the prosecution and the other benefits an accused, the accused is undoubtedly entitled to the benefit of doubt. The principle has special relevance where the guilt or the accused is sought to be established by circumstantial evidence.

18. That, there is no eye-witness to the alleged offence in the instant case requires no reiteration, the Prosecution case is indeed based entirely on circumstantial evidence. As per P.W.27 the I.O., the Doctor P.W.22, after post-mortem opined that the victim died due to strangulation with a "*gamcha"* like cloth. When M.O.III Muffler and M.O.V Shawl were forwarded to P.W.22 by P.W.27, he opined that death could be caused by the said articles. P.W.20 the I.O. of the UD Case had seized M.O. III Muffler and M.O. V Shawl. Where these articles were seized from or from whose possession is a question unanswered by P.W.20 or P.W.27. As per P.W.15 a witness to the seizure, M.O.III was on the bed with the two caps M.O.I and M.O.II and the bed sheet M.O.IV and navy blue shawl M.O.V, but M.O.III has not been identified by the Prosecution as the article of the crime or linked inextricably to the Appellant. This circumstance

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[22] (1984) 4 SCC 116

also leads us to ponder as to whether the Appellant alleged to have *mens rea* would have left the articles used by him in the crime in open view for all to detect. P.W.6 is the only ocular witness. Her testimony before the Court reveals that she and the Appellant saw the deceased hanging from a nearby tree in the early hours of 14-02-2016. The Appellant then carried the deceased into the house and kept her body on the cot, she was already dead. He instructed P.W.6 not to tell the Police that the victim had hanged herself. The Prosecution for reasons unknown did not declare the witness hostile or cross-examine her nor was she confronted with the statements made by her Section 164 Cr.P.C., where she had stated *inter alia* that, on the following morning her father woke her up and told her that her mother had passed away and she saw her father carrying the body of her mother on his shoulder. When she saw her father carrying her mother's body, he was inside the bedroom. No statement of having seen the victim hanging from the tree was made therein, but she has stated so before the Court. Her evidence before the Court in the aforementioned circumstances thus stood undecimated and her credibility unimpeached. In ***Laxmibai (Dead) through Lrs. and Another*** vs. ***Bhagwantibuva (Dead) through Lrs. and Others***[23] the Supreme Court examined the fact of non-cross-examination of witness on a particular fact and held as under;

> **"40.** Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any

[23] (2013) 4 SCC 97

doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination-in-chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter alia, in order to test his veracity. **Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses.** ……." **[emphasis supplied]**

19. In ***R. Shaji*** (*supra*) the Supreme Court held as follows;

"26. Evidence given in a court under oath has great sanctity, which is why the same is called substantive evidence. Statements under Section 161 CrPC can be used only for the purpose of contradiction and statements under Section 164 CrPC can be used for both corroboration and contradiction. …….

27. So far as the statement of witnesses recorded under Section 164 is concerned, the object is twofold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement; and secondly, to tide over immunity from prosecution by the witness under Section 164. A proposition to the effect that if a statement of a witness is recorded under Section 164, his evidence in court should be discarded, is not at all warranted. ……

28. Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 CrPC can be relied upon for the purpose of corroborating statements made by witnesses in the committal court or even to contradict the same. As the defence had no opportunity to cross-examine the witnesses whose statements are recorded

under Section 164 CrPC, such statements cannot be treated as substantive evidence.**"**

Hence the evidence of P.W.6 before the Court being substantive evidence, in contradistinction to her statement under Section 164 Cr.P.C., due weight has to be conferred to it.

20. The Prosecution laid great emphasis on the evidence of P.W.22 Dr. O. T. Lepcha, the Medicolegal Consultant who conducted post-mortem on the victim. Prolix arguments were advanced by both parties as to whether the fracture of the hyoid bone is indicative only of homicidal death or whether it could also be suggestive of suicide, with the Prosecution asserting that fracture unequivocally indicated strangulation.

21. Beneficial reference can be made to Page 456 of the ***Modi A Textbook of Medical Jurisprudence and Toxicology***, ***24th Edition 2013***, wherein the differences between hanging and strangulation have been tabulated as follows;

	Hanging		**Strangulation**
1	Mostly suicidal.	1	Mostly homicidal.
2	Face—Usually pale and petechiae rare.	2	Face—Congested, livid and marked with petechiae.
3	Saliva—Dribbling out of the mouth down on the chin and chest.	3	Saliva—No such dribbling.
4	Neck—Stretched and elongated in fresh bodies.	4	Neck—Not so.
5	External signs of asphyxia, usually not well marked.	5	External signs of asphyxia, very well marked (minimal if death due to vasovagal and carotid sinus effect).
6	Ligature mark—Oblique, non-continuous placed high up in the neck between the chin and the larynx, the base of the groove or furrow being hard, yellow and parchment-like.	6	Ligature mark—Horizontal or transverse continuous, round the neck, low down in the neck below the thyroid, the base of the groove or furrow being soft and reddish.

7	Abrasions and ecchymoses round about the edges of the ligature mark, rare.	7	Abrasions and ecchymoses round about the edges of the ligature mark, common.
8	Subcutaneous tissues under mark—White, hard and glistening.	8	Subcutaneous tissues under the mark—Ecchymosed
9	Injury to the muscles of the neck—Rare.	9	Injury to the muscles of the neck—Common.
10	Carotid arteries, internal coats ruptured in violent cases of a long drop.	10	Carotid arteries, internal coats ordinarily ruptured.
11	**Fracture of the larynx and trachea—Very rare and may be found that too in judicial hanging.**	11	**Fracture of the larynx trachea and hyoid bone.**
12	Fracture-dislocation of the cervical vertebrae—Common in judicial hanging.	12	Fracture-dislocation of the cervical vertebrae—Rare.
13	Scratches, abrasions and bruises on the face, neck and other parts of the body—Usually not present.	13	Scratches, abrasions fingernail marks and bruises on the face, neck and other parts of the body—Usually present.
14	No evidence of sexual assault.	14	Sometimes evidence of sexual assault.
15	Emphysematous bullae on the surface of the lungs—Not present.	15	Emphysematous bullae on the surface of the lungs—May be present.

[emphasis supplied]

22. At *ibid* Page 454 while describing death caused by strangulation it is elaborated *inter alia* as follows;

> ***"(i) Whether death was caused by strangulation***.—…… Irregularities in the fingernail marks may pinpoint a killer.
>
> ……
>
> Abrasions and fingernails marks may be produced on the neck by a person gasping for air in an intoxicated condition or in an epileptic or a hysterical fit.
>
> To arrive at a conclusion that death was due to strangulation, it is necessary, therefore, to note the effects of violence in the underlying tissues in addition to the ligature mark or bruise marks caused by the fingers or by the foot, knee and other appearances of death from asphyxia. At the same time, the possibility of other causes of suboxic or asphyxia death should be excluded.**"**

23. In a study conducted by Dr. Shrabana Kumar Naik, Associate Professor and Dr. D. Y. Patil, Departmental of Forensic Medicine, Medical College (Deemed University), Pimpri, Pune, Maharashtra, on ***Fracture of Hyoid Bone in cases of Asphyxial Deaths resulting from constricting force round the Neck***[24], it has been held as follows;

> **"**……..
>
> **DISCUSSION**
>
> Sometimes it becomes difficult to differentiate ligature strangulation from hanging especially in case of partial hanging where the ligature mark lies low in the neck, more or less in a horizontal manner. Therefore, it is only the internal tissue damage as well as damage to the laryngeal cartilages and hyoid bone decides the actual manner of death. Similarly, in case of grossly decomposed dead bodies where the neck skin are grossly discolored or lost, it is the internal damage to neck tissue and hyoid bone, which tells the actual cause of death even months and years after death. So importance given to hyoid bone fracture is justifiable and will remain there where mechanical asphyxia is the mode of deaths.
>
> Though percentage of hyoid bone fracture in manual or ligature strangulation cited by many authors are more or less equal and noncontroversial, *the percentage of hyoid bone fracture in hanging deaths vary greatly from 0% to 68% from author to author* ……
>
> ……
>
> Out of total 257 cases of different types of hanging including 4 cases of homicidal hanging, the present author did not found (sic) hyoid bone fracture in a single case. Though many authors claim that hyoid bone fracture increases with increasing age above 40 years, the present author did not get any hyoid bone fracture in the 18 cases of hanging victims over the age of 40 years. **So incidence of hyoid bone in hanging can be taken as rare or very few** as observed by authors like Smith, Sydney and Fiddes …, J.P.Modi … and J.B.Mukherjee …….
>
> On the other side, out of total 7 cases of ligature strangulation, the present author detected hyoid bone fracture in … (42%) cases where as out of total 5 cases of throttling, the present author

[24] Published in Journal of the Indian Academy of Forensic Medicine - 2005 : 27(3)

detected hyoid bone fracture in almost all i.e., 4 (80%) cases, which is more or less same as noticed by most of the previous authors …

CONCLUSION

Taking the present study of Hyoid bone fracture in cases of asphyxial deaths resulting from constricting force round the neck it is concluded that incidence of hyoid bone fracture is **almost nil or rare** in cases of hanging where the constricting force act on the neck in a sliding or tangential manner. **However, increasing incidence of hyoid bone fracture after the age of 40 years can be concluded only after taking larger numbers of such cases, which need further continuous study in this regard.**

....." **[empahsis supplied]**

24. In Page 361 of ***HWV Cox Medical Jurisprudence and Toxicology, Seventh Edition 2008***, differences between hanging and strangulation are enumerated as follows;

	Trait	***Hanging***	***Ligature Strangulation***
1.	Face	Pale and petechiae are not common	It is livid, congested and full of petechiae
2.	Ligature mark	Oblique usually seen high up in the neck above the thyroid cartilage and incomplete	Transverse, completely encircles the neck and usually below the thyroid cartilage
3.	Base	Pale, hard and parchment like	Soft and reddish
4.	Subcutaneous Tissue	It is white, hard and glistening below the mark	Ecchymoses present below the mark
5.	Neck	Stretched and elongated	Not so
6.	**Hyoid Bone**	**Fracture is common**	**Fracture is rare**
7.	Thyroid Cartilage	Fracture is rare	Fracture is common
8.	Tongue	Swelling and protrusion are not so common	Are well marked
9.	Saliva	Usually runs out of mouth	Absent
10.	Bleeding	From the nose, mouth and the ears are not so common	From the nose, mouth and ears are common
11.	Involuntary Discharge	Of the faeces and urine are not common	Are commonly seen
12.	Seminal Fluid	Usually seen at the glans penis	Rarely seen

[emphasis supplied]

25. As per ***Cox*** the external appearances in strangulation by ligature naturally vary greatly according to the object used and explains at Page 351 as follows;

> **"**…….
>
> Apart from the mark due to the ligature and any possible 'asphyxial' changes above, such as congestion, oedema, cyanosis, petechiae and nose bleeding, certain other marks may be discovered on the skin in cases of ligature strangulation. The most frequent ones are those inflicted by the victim in an attempt to tear away the ligature and are usually seen as scratches on the skin of the neck near the position of the ligature. They are often vertical in direction, as the nails of the victim try to pull away after constricting object. However, they are frequently so irregular so as not to show any vertical pattern. ……**"** **[emphasis supplied]**

At Page 352-353 it is stated as follows;

> **"**…….
>
> In strangulation by a ligature, the level of the ligature is often such that it is well below the hyoid bone and fractures are thus less frequent than in manual strangulation where the grip is usually higher. ……
>
> ……**"** **[emphasis supplied]**

26. In ***Taylor's Principles and Practice of Medical Jurisprudence, Thirteenth Edition 1984***, edited by *A. Keith Mant*, at Page 305, post-mortem appearances in strangulation are recorded as follows;

> **"***Post-mortem appearances in strangulation*
>
> …….
>
> *General internal appearances.* Internally the air passages contain fine froth, often blood stained. The lungs are congested with subpleural petechiae. Microscopically there is usually intense interalveolar congestion with haemorrhages of varying size, fluid in the alveoli, areas of collapse and intervening areas of ruptured alveoli. The air passages often contain large areas of desquamated respiratory

> type epithelium, red blood cells and fluid. The remaining organs show only congestive changes. Petechiae are usually more common in the brain than elsewhere.
>
> ……..**"** **[emphasis supplied]**

27. On the anvil of the authorative medical literature *supra* it emerges with clarity that there is no fool proof method to differentiate and distinguish ligature strangulation from hanging. It is also not established beyond all proof that hyoid bone fracture is completely devoid in all cases of hanging. Infact the literature in ***Modi*** and ***Cox*** referred to *supra* vary with regard to the breakage of the hyoid bone in cases of strangulation.

28. On this note we may now examine the evidence of P.W.22. He received the body at around 3.30 p.m. and started autopsy at the same time on 14-02-2016 and concluded the same by 04.30 p.m. He would depose as follows;

> **"**……. The body was brought with the history of having been found lying on the bed with injuries over the neck. On general examination of the body I came to the following category-wise findings:-
>
> (1) The hair was dishevelled with many dry leaves stuck on it. The wearing apparel worn by the deceased(*greenish woolen sweater*) also contained some vegetations and leaves. (sic)
>
> (2) Rigor mortis was present all over the body. Post-mortem staining was present over the back and fixed. There was generalized cyanosis over the lips and fingernails.
>
> Ante-Mortem injuries:-
>
> (1) There was a well-defined ligature mark 30 x 8.2 cms over the front of the neck with 03 nos. of linear marks over the said area. The upper border of the ligature mark extended from the base of the mandible upto 8 to 9 cms below the neck and was interrupted by an area of abrasion (*3.3 x 2 cms*)(*fingernail abrasion*) present over the right side of the neck with the abraded skin directed from upward to downwards. The ligature

moved posteriorly leaving a faint impression over the back of the neck and at no stage did it run upwards. The ligature mark was reddish blue in colour and was parchmentised.

(2) There were abraded contusion 12 x 3 cms placed vertically over the antero-medial aspect of the right lower leg(*medial to the shin bone*).

Head and Neck:-

There were multiple bruises under the ligature site and over the fascia and muscles (*that were detected on dissection of the skin*). There was fracture of the hyoid bone (*left side*) with fracture of outer periostium (*with normal inner side*) over the right side of the hyoid bone which was suggestive of manual strangulation. The brain was congested.

Lungs:-

Both the lungs were congested and oedematous.

Abdomen:-

The stomach contained around 300 to 400 ml of undigested food materials. The uterus was non-gravid.

Opinion:-

On the basis of my examination and the findings above I came to the following opinion:-

The approximate time since death was 12 to 24 hours and the cause of death was asphyxia as a result of strangulation, homicidal in nature."

29. The medical literature extracted hereinabove indicates that in cases of strangulation the eyes may be suffused and bulging with dilated pupils, the tongue protruding, frothy blood tinged fluid from nose and mouth, petechial haemorrhages usually seen in the skin of the eye lid, the face, the scalp and sometimes larger haemorrhage is present in the eyes, congestion, oedema, cyanosis and likelihood of nail marks of the victim near the position of the ligature. These symptoms are absent in Exhibit 11. The Doctor has also observed that the ligature moved posteriorly leaving a faint impression over the

back of the neck and at no stage did it run upwards. It is may pertinently be mentioned that the Prosecution having relied on Exhibit 24, these photographs cannot be overlooked. These do not reveal the back of the neck of the deceased. From Exhibit 11 it can be culled out that the ligature mark extended from the base of the mandible up to 8-9 cms below the neck and was interrupted by an area of abrasion present over the right side of the neck, but the Doctor has not opined as to whether the ligature mark itself was indicative of strangulation and why it was so. The argument of the Prosecution that it was transverse and placed low down in the neck below the thyroid is denuded of support by Exhibit 24 the photographs of the deceased, as the ligature mark is seen to be oblique on both sides of the neck and placed high in the neck. Neither P.W.20 nor P.W.27 have taken photographs of the back of the neck of the victim to enable the Court to assess as to whether the ligature was transverse. The Doctor has opined that there was an area of fingernail abrasion present over the right side of the neck with the abraded skin directed from upward to downwards but has not opined as to what the abrasion was indicative of, neither was investigation on this count taken up by P.W.27. Although multiple bruises in the ligature site and over the fascia and muscles were detected on dissection of bone, the Doctor has not explained whether the bruises over the muscles established strangulation and no other cause. The hyoid bone was found to have been fractured and suggestive of manual strangulation, but no opinion emerged as

to why this was conclusive proof of strangulation. In view of the diverse opinion with regard to fracture of the hyoid bone and its causes, we are indeed to carefully and cautiously absorb this evidence as it is not established by any expert studies or medical literature that fracture of the hyoid bone is foolproof conclusion of strangulation and no other cause. Although it was opined that there was abraded contusion 12 x 3 cms placed vertically over the antero-medial aspect of the right lower leg (medial to the shin bone), the Doctor has not opined as to why an injury over the right lower leg would be indicative of strangulation. The instant matter can be distinguished from that of ***Mandhari*** (*supra*), the post-mortem report prepared on autopsy conducted by the Doctor therein showed a ligature mark on the neck of the deceased which was ante-mortem. The opinion of the doctor was clear and definite that such ligature mark of 5 cm. width in horizontal portion cannot be caused by hanging, but could have been caused by strangulation, which completely demolished the case of the Appellant that he had found his wife hanging. No specific opinion of ruling out hanging has been given by P.W.22. P.W.22 has also detected well-defined ligature mark 30 x 12 cms over the front of the neck with three numbers of linear marks over the said area, but has not opined as to what the linear marks indicated and whether the linear marks were finger marks or nail marks. Besides the report does not mention that there was cyanosis of the face and merely states that there was generalized cyanosis over the lips and finger nails.

30. In ***Dayal Singh and Others*** vs. ***State of Uttaranchal***[25] the Supreme Court held as follows;

> **"39.** …… The skill and experience of an expert is the ethos of his opinion, which itself should be reasoned and convicting. Not to say that no other view would be possible, but if the view of the expert has to find due weightage in the mind of the court, it has to be well authored and convicting. Dr. C.N. Tewari was expected to prepare the prost-mortem report with appropriate reasoning and not leave everything to the imagination of the Court. He created a serious doubt as to the very cause of death of the deceased. His report apparently shows an absence of skill and experience and was, in fact, a deliberate attempt to disguise the investigation.**"**

31. The evidence of P.W.22 fails to inspire confidence in the absence of specific opinion pertaining to the injuries. Thus in the absence of any conclusive evidence and bearing in mind the evidence of P.W.6, it cannot be ruled out that the case of the victim who was above fifty years of age fell in the rare category where the hyoid bone is broken during hanging. Added to this is the admission of P.W.27 the I.O. under cross-examination that he did not have any evidence to show that any of the articles mentioned in Exhibit 12 had actually caused the death of the deceased. The Learned Trial Court was impressed by the Prosecution version that as a rule the hyoid bone is not fractured except by strangulation, but it has to be appreciated by the Courts that the said circumstance is not absolute, there can be exceptions to the rule as has been elucidated hereinabove.

32. The Learned Trial Court also observed that there was no sign of suicidal hanging as the neck of the deceased would be

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[25] (2012) 8 SCC 263

stretched and elongated which was not so in the instant matter. We deem it relevant to reiterate that P.W.22 has given no opinion on this aspect of the matter, therefore the opinion of the Learned Trial Court is sans any expert evidence furnished by the Prosecution.

33. The evidence of P.W.22 is to be juxtaposed with that of P.W.6 the ocular witness and in our considered opinion more weight attaches to the unscathed evidence of P.W.6. In ***Krishna Gopal*** (*supra*) the Supreme Court held as follows;

> **"13.** .....
>
> It is trite that where the eye-witnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bantham said, are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial process. Eye witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be credit-worthy; consistency with the undisputed facts the 'credit' of the witnesses; their performance in the witness-box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.
>
> ....."

34. In ***Mohar Singh*** (*supra*) the Supreme Court observed as follows;

> **"6.** In view of this glaring inconsistency between the ocular and medical evidence, it will be extremely unsafe and hazardous to maintain the conviction of the appellants on such evidence. For the reasons, therefore, we are clearly of the opinion that the prosecution case has not been proved beyond reasonable doubt. The appeals are

accordingly allowed and the appellants are acquitted of the charges framed against them. The accused-appellants will now be discharged from their bail bonds and need not surrender.**"**

35. In ***Abdul Sayeed*** vs. ***State of M.P.***[26] it was held as follows;

> **"34.** Drawing on *Bhagirath case* [(1999) 5 SCC 96], this Court has held that where the medical evidence is at variance with ocular evidence,
>
> > **"it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnesses' account which had to be tested independently and not treated as the 'variable' keeping the medical evidence as the 'constant' ".**
>
> **35.** Where the eyewitnesses' account is found credible and trustworthy, a medical opinion pointing to alternative possibilities cannot be accepted as conclusive. The eyewitnesses' account requires a careful independent assessment and evaluation for its credibility, which should not be adversely prejudged on the basis of any other evidence, including medical evidence, as the sole touchstone for the test of such credibility.
>
> ....."** **[emphasis supplied]**

36. The Prosecution had alleged that P.W.6 was an interested witness, if this be so the evidence of an interested witnesses requires careful scrutiny, however if tested and found credible nothing debars reliance on it. In ***Sachchey Lal Tiwari*** vs. ***State of U.P.***[27] the Supreme Court would conclude that;

> **"7.** ..... Murders are not committed with previous notice to witnesses — soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere "chance witnesses". The expression "chance witness" is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite

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[26] (1975) 4 SCC 497
[27] (2004) 11 SCC 410

> unsuitable an expression in a country where people are less formal and more casual, at any rate in the matter of explaining their presence. ……**"**

P.W.6 was the adopted daughter of the couple no proof of incestuous relation between her and the Appellant having been established, we find that she is a natural witness and cannot be said to be an interested witness. Her evidence as already discussed cannot be wished away by the Prosecution.

37. That, the Appellant failed to raise a hue and cry was the subject of criticism by the Learned Trial Court, but we find that the Prosecution evidence nowhere reveals that there were houses in the vicinity of the Appellant's house, prompting the Appellant to seek assistance.

38. Admittedly there were dry leaves, grass and weed on the bed of the deceased as testified by P.W.1, P.W.2 supports this statement and adds that grass was found on the floor of the room of the deceased. P.W.3 under cross-examination admitted that the Appellant on enquiry by the Police as to the origin of the dry leaves and grass told the Police that he found the deceased hanging on a tree due to which leaves were found stuck to her clothes. P.W.7 too testified that some dry leaves and wild flowers were stuck on the clothes of the deceased. The evidence of P.W.15 lends support to the evidence of the witnesses *supra* and according to him M.O.III and M.O.V contained dry grass even on the day of his evidence. P.W.17 would depose about grass on M.O.III and M.O.V and that these articles were piled on the bed at the time of seizure and grass was still attached to it.

P.W.22 the Doctor, found the hair of the deceased dishevelled with many dry leaves stuck on it as also on the sweater worn by the deceased. The I.O. P.W.27 admits that he visited the concerned tree and that there was grass around the tree. In the teeth of such evidence the Prosecution ought to have furnished substantial reasons as to how the grass, weed and leaves came about the person, the clothes and the bed sheet of the victim but has failed in their duty to do so leaving the circumstance open to speculation. In the absence of any explanation we are constrained to fall back and rely on the evidence of P.W.6 who has stated unfalteringly that she saw the victim hanging from the tree and her father carried the dead body inside.

39. Addressing the argument advanced by Learned Senior Counsel for the Appellant that the Learned Trial Court has based its decision also on the resiled Section 164 Cr.P.C. statement of P.W.23 a hostile Prosecution witness we may in this context refer to ***State of U.P.*** vs. ***Ramesh Prasad Misra and Another***[28] where the Supreme Court observed as follows;

> **"7.** ……. It is equally settled law that the evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused, but it can be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted. ……..**"**

40. In ***Mrinal Das and Others*** vs. ***State of Tripura***[29] the Supreme Court held as follows;

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[28] (1996) 10 SCC 360
[29] (2011) 9 SCC 479

> **"67.** It is settled law that corroborated part of evidence of hostile witness regarding commission of offence is admissible. The fact that the witness was declared hostile at the instance of the Public Prosecutor and he was allowed to cross-examine the witness furnishes no justification for rejecting en bloc the evidence of the witness. However, the court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The court should be slow to act on the testimony of such a witness, normally, it should look for corroboration with other witnesses. Merely because a witness deviates from his statement made in the FIR, his evidence cannot be held to be totally unreliable. To make it clear that evidence of hostile witness can be relied upon at least up to the extent, he supported the case of the prosecution. The evidence of a person does not become effaced from the record merely because he has turned hostile and his deposition must be examined more cautiously to find out as to what extent he has supported the case of the prosecution.**"**

41. Before the Learned Trial Court P.W.23 went on to depose that the Appellant told him and P.W.5 that the deceased had committed suicide by hanging on a banyan tree. The witness was declared hostile his deposition being in contradiction to his Section 164 Cr.P.C. statement. When confronted with his Section 164 Cr.P.C., Exhibit 14, he emphatically denied having stated before the Magistrate that the Appellant had told him that the victim died due to stomach ache. When cross-examined by the appellant he asserted that the Appellant had told him that the deceased had hanged herself and denied the version of the stomach ache. Now, merely because the evidence of P.W.23 does not corroborate the Prosecution story his evidence before the Court cannot be faulted and thrown out in its entirety. The Learned Trial Court in the impugned Judgment at Paragraph 30

has erroneously relied on the Section 164 Cr.P.C. statement of the witness, overlooking the settled proposition that the deposition before the Court is infact substantive evidence.

42. Next, dealing with the question of the article of clothing which was used for the alleged strangulation, the Prosecution has failed in its obligation to link any specific article to the alleged offence. P.W.22 had opined vide Exhibit 13 that M.O.III and M.O.V could have caused the death, nevertheless, no efforts at measurement of the articles with the ligature found on the victim's neck was initiated by the I.O. to establish this opinion. No evidence or details were furnished also to establish as to how the I.O. P.W.27 concluded that the Appellant had tried unsuccessfully to hang the body of the deceased from the tree.

43. Motive for the offence as per the Prosecution was the incestuous relations between P.W.6 and the Appellant, the Learned Trial court found credibility on this aspect, in the evidence of P.W.4 and P.W.10. P.W.4 stated that the victim had told her sometime in September, 2015, she had been physically assaulted by the Appellant when she had found him and P.W.6 in a compromising situation. P.W.10 also vouched for the evidence of P.W.4 and narrated the same facts. P.W.4 and P.W.10 both sister-in-laws of the deceased evidently did not discuss the matter either amongst themselves or together with the deceased, neither did they deem it essential to report the matter to the Police. The evidence of P.W.3 the victim's brother on this

aspect also remained unsubstantiated. All that they have stated is that the victim refused to lodge an FIR before the Police Station. This evidence, therefore, in our considered opinion, coming after the death of the victim, cannot in the absence of substantial proof be believed. P.W.21 the mother of P.W.6 contrary to the evidence of P.W.4, P.W.10 and P.W.3 would testify that in September, 2015, the deceased came to her house and asked her to call her father-in-law as well and in their presence asked them to take P.W.6 back as the child was in the habit of going out of the house most of the time and there was some problem due to P.W.6 staying in her house. Her cross-examination elicited that the deceased requested her to take P.W.6 back as she was reluctant to do household works and visited her friends' place while returning from school without permission. The deceased did not tell her about P.W.6 creating any problem in the family of the Appellant and his wife, the deceased. Consequently we are in disagreement on this count with the finding of the Learned Trial Court. Besides which we have also taken into consideration the evidence of P.W.11 and P.W.12 both sons of the deceased who have made no allegations of ill-treatment of their mother by the Appellant. In ***R. Shaji*** (*supra*) the Supreme Court held as follows;

> **"33.** Motive is primarily known to the accused himself and therefore, it may not be possible for the prosecution to explain what actually prompted or excited the accused to commit a particular crime. In a case of circumstantial evidence, motive may be considered as a circumstance, which is a relevant factor for the purpose of assessing evidence, in the event that there is no unambiguous evidence to prove the

> guilt of the accused. Motive loses all its significance in a case of direct evidence provided by the eyewitnesses, where the same is available for the reason that in such a case, the absence or inadequacy of motive cannot stand in the way of conviction. However, the absence of motive in a case depending entirely on circumstantial evidence, is a factor that weighs in favour of the accused as it "often forms the fulcrum of the prosecution story". ……..**"** **[emphasise supplied]**

44. Having examined and appreciated the entire evidence on record, we deem it necessary to extract the relevant portions of the ratio in ***Raj Kumar Singh*** (*supra*) wherein the Supreme Court would expound as follows;

> **"21.** Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that "may be" proved and "will be proved". In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between "may be" and "must be" is quite large and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between "may be" true and "must be" true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between "may be" true and "must be" true, the court must maintain the vital distance between conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure that miscarriage of justice is avoided and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense. ……**"**

45. At this juncture it would also be fitting to consider the Section 313 Cr.P.C. statement of the Appellant where he in

response to question No.6 has stated that he and the victim had gone to sleep together and when he woke up at around 3 a.m. he found her missing. When he started looking for her he found her hanging by a tree. He then brought her dead body inside the house. His adoptive daughter (P.W.6) was also there with him. In ***Nagaraj*** vs. ***State, Rep. by Inspector of Police, Salem Town, Tamil Nadu***[30] the Supreme Court held as follows;

> **"15.** In the context of this aspect of the law it is been held by this Court in *Parsuram Pandey* v. *State of Bihar* [(2004) 13 SCC 189] that Section 313 CrPC is imperative to enable an accused to explain away any incriminating circumstances proved by the prosecution. It is intended to benefit the accused, its corollary being to benefit the Court in reaching its final conclusion; its intention is not to nail the accused, but to comply with the most salutary and fundamental principle of natural justice i.e. audi alteram partem, as explained in Arsaf Ali v. State of Assam [(2008) 16 SCC 328]. ……. Having made this clarification, refusal to answer any question put to the accused by the Court in relation to any evidence that may have been presented against him by the prosecution or the accused giving an evasive or unsatisfactory answer, would not justify the Court to return a finding of guilt on this score. Even if it is assumed that his statements do not inspire acceptance, it must not be lost sight of that the burden is cast on the prosecution to prove its case beyond reasonable doubt. Once this burden is met, the statements under Section 313 assume significance to the extent that the accused may cast some incredulity on the prosecution version. It is not the other way around; in our legal system the accused is not required to establish his innocence. We say this because we are unable to subscribe to the conclusion of the High Court that the substance of his examination Under Section 313 was indicative of his guilt. If no explanation is forthcoming, or is unsatisfactory in quality, the effect will be that the conclusion that may reasonably be arrived at would not be dislodged, and would, therefore, subject to the quality of the defence evidence, seal his guilt. Article 20(3) of the Constitution declares that no person accused of any offence shall be compelled to be a witness against himself. In the case in

[30] 2015 CRI.L.J. 2377 (SC)

> hand, the High Court was not correct in drawing an adverse inference against the Accused because of what he has stated or what he has failed to state in his examination under Section 313, Cr PC.**"**
> **[emphasis supplied]**

46. In view of the entirety of the circumstances and on cautious appreciation of the evidence before us, we have no hesitation in holding that, the propositions pertaining to circumstantial evidence which requires an unbroken chain of links to conclusively connect the crime with the Appellant is wanting in the instant matter. The Prosecution story is founded on divergent evidence leading to an improbable circumstance. Resultant, the Prosecution has failed to prove its case beyond a reasonable doubt.

47. Consequently, the Appellant is entitled to the benefit of doubt.

48. Appeal allowed.

49. The conviction and sentence imposed on the Appellant vide the impugned Judgment and Order on Sentence of the Learned Trial Court are set aside and the Appellant acquitted of the Charge under Section 302 of the IPC.

50. The Appellant be released forthwith unless required in any other case.

51. Fine, if any, deposited by the Appellant in terms of the impugned Order on Sentence, be reimbursed to him.

52. No order as to costs.

53. Copy of this Judgment be forwarded to the Learned Trial Court for information, along with its records.

Sd/-
(Bhaskar Raj Pradhan)
Judge
29-05-2019

Sd/-
(Meenakshi Madan Rai)
Judge
29-05-2019

Approved for reporting : **Yes**

Internet : **Yes**

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