BODH RAJ @ BODHA AND ORS. A

v.

STATE OF JAMMU AND KASHMIR

SEPTEMBER 3, 2002

[RUMA PAL AND ARIJIT PASAYAT, JJ.] B

Penal Code, 1860—Section 302 read with Section 120-B—Accused allegedly entering into conspiracy to murder one person—Trial court relying on testimony of the witnesses, recovery of weapons and motive convicting three of the accused and acquitting others—High court maintaining conviction of the three accused but setting aside acquittal of four accused on the basis of evidence leaving the other two accused—On appeal held in the facts and circumstances of the case order of High Court justified and no interference called for. C

D

Evidence Act, 1872:

Possibility of two views on basis of evidence—View favourable to the accused to be preferred—But when trial court fails to consider relevant materials to arrive at the view, High court is duty bound to arrive at a correct conclusion taking a different view—On facts High Court adopted a proper approach convicting the four accused acquitted by trial court. E

Section 27—Evidence relating to recovery of weapons—Use of to fasten guilt on accused—Discussed.

Last seen theory—Applicability of—Discussed. F

Code of Criminal Procedure, 1973 :

Section 154—FIR—Delay of one day in dispatch—Effect of—Such delay is not unusual when proper explanation for delay is given.

G

Section 161—Witnesses—Delay in examination—Effect of—If there are valid reasons for delay and court accepts the same then conclusions arrived at not to be interfered with.

It is alleged that accused conspired to kill one S as they had taken

H

A huge loan from him and were under pressure to return the loan amount. On the fateful day A1 and A2 persuaded S to accompany them for selection of the site. PW 1 and 2-property dealer were also picked up. On their way back deceased was attacked by some persons. A1 and A2 remained silent spectators. On the contrary they left the scene of occurrence leaving behind the deceased and PW 1 and 2. Weapons used by the accused were B recovered pursuant to the disclosures made by them, in the presence of other witnesses. Prosecution witnesses identified accused persons. Different eye-witnesses saw the occurrence either in full or partially. Trial Court convicted accused A1, A2 and A6 under section 302 read with section 120B IPC and acquitted A3, A4, A5, A7, A8 and A9. High Court upheld the C conviction of A1, A2 and A6. It set aside the acquittal of A3, A4, A5 and A7 and convicted them under section 302 read with section 120B IPC. However it upheld the acquittal of A8 and A9. Hence the present appeals by the accused as well as the State.

Appellant contended that there was no conspiracy between the D accused persons; that there are no independent witnesses and the so called identification of the witnesses was highly improbable; that having discarded the evidence of PW7 courts erred in believing the evidence of PW8 and 9; that the weapons recovered pursuant to the disclosure made by the accused was highly improbable and requisite safeguards have not E been adopted while making alleged recoveries; that the examination of eye-witnesses PW1 and 2 was belated and should not have been accepted; that there was unexplained delay in sending the FIR; that the evidence of prosecution witnesses vis-a-vis accused persons was improbable; that the High Court should not have disturbed the findings of innocence of four accused persons without any plausible reasoning and that where two views F are possible on evidence, the one in favour of the accused was to be accepted.

Respondent contended that there is no reason as to why the witnesses would depose falsely against A1 and A2 who are known to them and there is nothing irregular or illegal in the procedure adopted while effecting G recovery pursuant to the disclosure made by the accused persons. Dismissing the appeal, the Court

HELD: 1. There is some evidence to establish the motive that is indebtedness of the accused to the deceased and also evidence of PW1 and H 2 substantiates the accusations. Both PW1 and PW2 stated that in their

presence deceased was attacked by four-five persons armed with weapons, the deceased started running and assailants followed him and assaulted him. The presence of PW1 and 2 at the place of occurrence is fortified as they were witnesses to the seizure memo recorded by police immediately after the incident. Trial court and High Court has rightly accepted the evidence of PW 1 and 2 and there is no reason to discard their evidence. PWs 8, 9 and 18 also substantiate the accusations. PW 18 stated to have seen a white car passing in front of the shop carrying 7 to 8 persons out of which he identified one of them who was dead. He further stated about having seen the deceased in the company of A1 and A2 and also about the statement of A1 and A2 that there was some scuffle between some boys and the deceased at the land, which they had gone to see, and in that scuffle killing took place. The reason for this was stated to be pressure on A1 and A2 to return the money. PW9 also stated to have seen the deceased being chased and he claimed to have seen the deceased firing. He stated about A1 and A2 giving 'lalkara' that the deceased should be killed and should not escape and also that A1 had fired some shots in the air and a white car was standing there. He identified A3, A4, A7, A8 and A9. Even PW8 stated about the occurrence. The deceased's employee also saw both A1 and A2 in the company of deceased. Also the land which was to be seen by the deceased for setting up the flour mill by A1 and A2, was only known to A1 and A2. Further the white car which was used in the incident was found discarded after it had met with an accident and is stated to be a get away car. [80-E-H; 81-D-F; 83-H]

Hukam Singh v. *State of Rajasthan,* AIR (1977) SC 1063; *Eradu and Ors.* v. *State of Hyderabad,* AIR (1956) SC 316; *Earabhadrappa* v. *State of Karnataka,* AIR (1983) SC 446; *State of U.P.* v. *Sukhbasi and Ors.,* AIR (1985) SC 1224; *Balwinder Singh* v. *State of Punjab,* AIR (1987) SC 350; *Ashok Kumar Chatterjee* v. *State of M.P.,* AIR (1989) SC 1890; *Bhagat Ram* v. *State of Punjab,* AIR (1954) SC 621; *C. Chenga Reddy and Ors.* v. *State of A.P.,* [1996] 10 SCC 193; *Padala Veera Reddy* v. *State of A.P. and Ors.* AIR (1990) SC 79; *State of U.P.* v. *Ashok Kumar Srivastava,* (1992) Crl.LJ 1104; *Hanumant Govind Nargundkar and Anr.* v. *State of Madhya Pradesh* AIR (1952) SC 343 and *Sharad Birdhichand Sarda* v. *State of Maharashtra* AIR (1984) SC 1622, referred to.

'Wills' by Sir Alfred Wills- referred to.

2. There can be no dispute with the proposition that when two views

A are possible on the evidence, the one in favour of the accused has to be preferred. But where the relevant materials have not been considered to arrive at a view by trial court, certainly High Court has a duty to arrive at a correct conclusion taking a view different from the one adopted by trial court. In the instant case, the course adopted by High Court is proper. For the purpose of convicting four appellants-A3, A4, A5 and A7 acquitted B by trial court but convicted by High Court, trial court held the evidence of PW 18 not reliable but did not give any cogent reason for the same. Recoveries were made pursuant to the disclosure made by them. In view of the evidence of the witnesses examined by the prosecution in that regard, the submission that due procedure was not followed, there is nothing illegal C ruling out its acceptance. Furthermore a pant was recovered from the house of A5 which had holes indicating passage of bullet. PW 22-chemist stated that A5 had gone to purchase medicine to be applied to the injury. Further even if it is accepted that evidence of PW7 is not reliable, thus identification of A-5 by PW 7 is no consequence, the evidence relating to recovery established by the evidence of PW18 cannot be lost sight of. Trial D Court held the evidence of PW8 and 9 unreliable. High Court analyzed their evidence in detail and held it to be reliable. It is of significance that practically there was no cross-examination on the recovery aspect. Thus there is no reason to differ with High Court in that regard. [84-B-G; 85-A]

E *Delhi Admn.* v. *Balakrishan,* AIR (1972) SC 3; *Md. Inayatullah* v. *State of Maharashtra,* AIR (1976) SC 483; *Palukuri Kotayya* v. *Emperor,* AIR (1947) PC 67 and *State of Maharashtra* v. *Danu Gopinath Shirde and Ors.,* (2000) Crl.L.J 2301, referred to.

3. The last seen theory comes into play where the time gap between F the point of time when the accused and deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive G evidence to conclude that accused and deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In the instant case there is positive evidence that deceased, A-1 and A-2 were seen together by prosecution witnesses. [85-B-D]

4. A day's delay in sending the FIR cannot be said to be unusual H when proper explanation has been offered for the delay. Thus the plea of

delayed dispatch of FIR is without any substance. [85-F] A

5. It cannot be laid down as a rule of universal application that if there is any delay in examination of a particular witness the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for the delayed examination is plausible and acceptable and the court accepts the same as plausible, there is no reason to interfere B **with the conclusion. In the instant case, it has been recorded that there was valid reason for the subsequent and/or delayed examination and such conclusion was arrived at after analyzing the explanation offered.**

[85-H; 86-A, B]

Ranbir and Ors. **v.** *State of Punjab,* **AIR (1973) SC 1409, referred to.** C

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 921 of 2000.

From the Judgment and Order dated 31.7.2000 of the Jammu and Kashmir High Court in Crl. Acq. A. No. 5 of 1999. D

WITH

Crl. A.Nos. 791, 792 and 837 of 2001.

Sushil Kumar, U.R. Lalit, M. Aslam Gooni, Adv. Genl. for J & K, E Rajiv K. Garg, A.D.N. Rao, R.K. Joshi, P.N. Puri and Anis Suhrawardy for the appearing parties.

The Judgment of the Court was delivered by

ARIJIT PASAYAT, J. These four appeals relate to a Division Bench F judgment of the Jammu and Kashmir High Court dated 31.7.2000. While Criminal Appeal Nos. 921/2000, 791/2001, 792/2001 have been filed by the accused, Criminal Appeal No. 837/2001 has been filed by the State.

Ravinder Kumar (accused No. 1), Ashok Kumar (accused No. 2) and G Rajesh Kumar (accused No. 6) were convicted by the Trial Court while Bodhraj (accused No. 3), Bhupinder (accused No. 4), Subhash Kumar (accused No. 5) and Rakesh Kumar (accused No. 7) were acquitted by the Trial Court, but the High Court set aside their acquittal and convicted them. Rohit Kumar (accused No. 8) and Kewal Krishan (accused No. 9) were acquitted by the Trial Court and their acquittal has been upheld by the High Court. Another H

A accused i.e. Kishore Kumar was acquitted by the Trial Court. He having died during the pendency of the appeal before the High Court, the appeal against him was held to have abated. Accused Rajesh Kumar has not preferred any appeal against the conviction as upheld by the High Court.

B Accused No. 1 and accused No. 2 and accused No. 2 having been convicted under Section 302 read with Section 120-B of the Indian Penal Code. 1860 (in short the 'IPC') were sentenced to suffer imprisonment for life and pay a fine of Rs. 20,000 each. It was stipulated that for default in paying the fine, each had to suffer another year of imprisonment. Similar was the case with accused No. 6. So far as the accused Nos. 3, 4, 5 and 7 are C concerned, the High Court convicted and sentenced them at par with the other three accused.

Factual scenario as highlighted by the prosecution is as follows:

Swaran Singh @ Pappi (hereinafter referred to as the 'deceased') was D running a finance company. Accused No. 2 (Ashok Kumar) and accused No. 1 (Ravinder Kumar) had taken huge amounts as loan from the deceased. They suggested to the deceased to enter into a financial arrangement. On the fateful day i.e. 3rd August, 1994, deceased went to his business premises. After about 10 minutes of his arrival accused -Ravinder Kumar also reached E his office. As the deceased had brought some money from his house which was to be deposited in a bank, Darshan Singh (PW 15) an employee was asked to make the deposit. Since no vehicle was available, Ravinder Kumar gave the key of his car to Darshan Singh. The registration number of the car is CH01 5408. Darshan Singh left the office around 11.30 a.m. and returned around 1.30 p.m. On his return, Darshan found the deceased in the company F of accused Ravinder Kumar and Ashok Kumar. He returned the key of the car to Ravinder Kumar. After about 10/15 minutes, deceased and accused-Ashok Kumara left the office. At the time of his departure, deceased told Darshan to take the food which was to come from his house, as they were going out to have food. Accused-Ashok Kumar and the deceased went to G Hotel Asia for taking their food. Later on, accused -Ravinder Kumar joined them. All the three after taking food went to the business premises of Gian Singh (PW-1) who was a property dealer and broker. He was informed that they were interested in purchasing some land for setting up a flour mill. Ravinder and Ashok Kumar persuaded the deceased to accompany them for the selection of the site. Along with Gian Singh (PW-1), another property H dealer was also picked up. This was done as PW-1 wanted to go to the site

in question along with Pratap Singh (PW-2) who was his business partner. A
All of them went to village Dhiansar where the land was situated. They went by car No. JK-02B 566. As accused-Ravinder Kumar appeared to be in extreme haste, he told that site has been approved and PWs. 1 and 2 were told that they would settle the matter at their business premises. When they were returning, the deceased was attacked by some persons (later on identified as accused No. 3 to 10). The accused 1 and 2 remained silent spectators and B
even did not pay any heed to the pitiful plea of the deceased to bring the car so that he can escape the attacks. On the contrary, they left the scene of occurrence leaving behind the deceased and PWs. 1 and 2. They did not report the matter to the police and even though they claimed to be friends of the deceased, did not even inform family members of the deceased. They C
owed huge amounts and issued cheques for which they had made no provision. Ashok Kumar made use of the cheque book of his wife and issued a cheque in respect of her bank account, thought, the same was not operated for quite some time. Accused —Rajesh Kumar's presence was established as later on, a licensed revolver belonging to accused-Ravinder Kumar was recovered at the instance of Ravinder Kumar. The license of the revolver was seized from D
the house of Ravinder Kumar and father of the said accused produced the same before the police in the presence of witnesses. Pistol of the deceased was also recovered at his instance. The license in respect of the pistol was seized on personal search of the deceased at the spot of occurrence. One Hari Kumar (PW-18) stated that accused Ravinder Kumar and Ashok Kumar made E
a statement before him that they had got the deceased killed because he was demanding money from them. From the fact that the land was to be selected was only known to accused Ravinder Kumar and Ashok Kumar, an inference was drawn that it was these two accused who had hired the assailants and planted them well in advance for the ultimate elimination of deceased. The F
fact that accused Ravinder Kumar left the office of the deceased earlier and joined them at the Hotel was considered significant, as the intervening period was utilized by him to inform the assailants as to where they would be taking the deceased for the assaults being carried out. Accused Rajesh Kumar and Subhash Kumar had also suffered bullet injury which was on account of the firing done by the deceased while he was trying to save his life. G

Recoveries of various weapons used by assailants were made pursuant to the disclosures made by the accused Bodhraj, Bhupinder, Subhash Kumar Rajesh Kumar and Rakesh Kumar. Recoveries were witnessed by several witnesses. Bodhraj was identified by Jhuggar Singh (PW 6) and Santokh Singh (PW 7). Bhupinder Singh was identified by Hari Kumar (PW 18) and H

A Gurmit Singh. Similar was the case with accused Subhash Kumar. Rajesh Kumar was identified by Ranjit Sharma (PW 23) and Hari Kumar (PW 18). Accused Rakesh Kumar was identified by Ranjit Sharma (PW 23) and Gurmit Singh, was not examined in Court. Accused Bodhraj, Bhupinder, Rakesh Kumar, Rohit and Kewal Krishan were identified by Nainu Singh (PW 9) while Subhash Kumar and Rajesh Kumar were identified by Santokh Singh B (PW 7) and Surjit Singh (PW 8). The identification was done on two dates i.e. 11.8.1994 and 16.8.1994. Different eye-witnesses claimed to have seen the occurrence either in full or partially. PWs. 1, 2, 7, 8 and 9 were really the crucial witnesses. Santokh Singh (PW 7) was disbelieved by Trial Court as well as by the High Court.

C

In order to establish the pleg that conspiracy was hatched, reliance was placed on the plea of Kapur Chand who was not examined in Court. Several other circumstances were highlighted by the prosecution, to establish the plea of conspiracy. It was submitted that nobody knew except PW-2 where the land was. If he was the person who had hired the assailants, they (meaning D PW 1 and deceased) would not have gone empty handed. But, knowing particularly well that the deceased was always armed, accused Ravinder purchased a car which was used as a get away car but never transferred it to his name. It was, however, conceded by the learned Advocate General appearing before the Trial Court that there was no direct evidence of E conspiracy. Police seems to have proceeded to reach the spot on getting some reliable information.

In order to attach vulnerability to the judgment of the High Court, several points were urged by the learned counsel for the accused persons. It was pointed out that there was no evidence of any conspiracy. The only F witness Kapur Chand who is alleged to have stated before the police about the conspiracy was not examined. Even the Investigating Officer has admitted that there was no direct evidence of conspiracy. There was no evidence collected against the accused persons to link them with the crime till 11.8.1994 when suddenly material supposed to have come like a flood-gate. Initiation of action by the police is also shrouded in mystery. It has not been disclosed G in either Trial Court or High Court as to how the police received information about the killing and arrived at the spot. Though it was claimed at some point of time that a telephone call was supposedly made, but the FIR was registered on the bias of reliable sources. There are no independent witnesses. It is surprising as alleged killing took place in the evening time at a highly populated H place. The so called identification of the witnesses is highly improbable.

Additionally, having discarded the evidence of PW-7 the Courts erred in believing the evidence of PWs. 8 and 9 who stand on the same footing. The presence of these witnesses is highly doubtful. Their behaviour was un-natural and there is no corroborative evidence. They are persons with criminal records. Since their presence is doubtful, identification, if any, done by them becomes *ipso facto* doubtful. The recoveries purported to have done pursuant to the disclosure made by the accused persons is highly improbable and requisite safeguards have not been adopted while making alleged recoveries. The case against four of the accused persons who were acquitted by the Trial Court rests on circumstantial evidence. The approach to be adopted by the Court while dealing with circumstantial evidence was kept in view by the Trial Court. Unfortunately, the High Court did not do so. It was further submitted that there was no complete chain of circumstances established which ruled out even any remote possibility of anybody else than the accused persons being the authors of the crime. The examination of so-called eye-witnesses PWs 1 and 2 was belated and, therefore, should not have been accepted. The evidence of PWs vis-a-vis accused persons is so improbable that no credence should be put on it. The High Court should not have disturbed the findings of innocence of four accused persons without any plausible reasoning.

On the contrary, learned counsel for the prosecution submitted that the background facts and the evidence on record has to be tested with a pragmatic approach. The situation which prevailed in the area at the relevant time cannot be lost sight of. Accused 1 and 2 are very influential persons. The witnesses were naturally terrified. It has come on record that witnesses PWs 1 and 2 were too terrified even to depose and had asked for police protection. There is no reason as to why the witnesses would depose falsely against accused 1 and 2 who are known to them. There is nothing irregular or illegal in the procedure adopted while effecting recovery pursuant to the disclosure made by the accused persons.

Before analyzing factual aspects it may be stated that for a crime to be proved it is not necessary that the crime must be seen to have been committed and must, in all circumstances be proved by direct ocular evidence by examining before the Court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The principal fact or factum probandum may be proved indirectly by means of certain inferences drawn from factum probans, that is, the evidentiary facts. To put it differently circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact

A in issue that taken together they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed.

It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be B incompatible with the innocence of the accused or the guilt of any other persons. (See *Hukam Singh* v. *State of Rajasthan,* AIR (1977) SC 1063), *Eradu and Ors.* v. *State of Hyderabad,* AIR (1956) SC 316, *Earabhadrappa* v. *State of Karnataka,* AIR (1983) SC 446, *State of U.P.* v. *Sukhbasi and Ors.,* AIR (1985) SC 1224, *Balwinder Singh* v. *State of Punjab,* AIR (1987) C SC 350, *Ashok Kumar Chatterjee* v. *State of M.P.,* AIR (1989) SC 1890. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In *Bhagat Ram* v. *State of Punjab,* AIR (1954) SC 621), it was laid down that where the case depends upon the conclusion drawn from D circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt.

We may also make a reference to a decision of this Court in *C. Chenga Reddy and Ors.* v. *State of A.P.,* [1996] 10 SCC 193, wherein it has been E observed thus:

> "In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn would be fully proved and such circumstances must be conclusive in F nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence....."

In *Padala Veera Reddy* v. *State of A.P. and Ors.,* AIR (1990) SC 79, G it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests;

> (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,

H (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, and

(4) 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 and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

In *State of U.P.* v. *Ashok Kumar Srivastava*, (1992) Crl.L.J.1104, it was pointed out that great case must be taken in evaluating circumstantially evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

Sir Alfred Wills in his admirable book "Wills' Circumstantial Evidence" (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence: (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum, (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability, (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt, (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted"

There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touch-stone of law relating to circumstantial evidence laid down by the this Court as far back as in 1952.

In *Hanumant Govind Nargundkar and Anr.* v. *State of Madhya Pradesh*, AIR (1952) SC 343, wherein it was observed thus:

"It is well to remember that in cases where the evidence is of a

A circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, B there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

C A reference may be made to alter decision in *Sharad Birdhichand Sarda* v. *State of Maharashtra,* AIR (1984) SC 1622. Therein, while dealing with circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of the this Court, before conviction could be based on circumstantial D evidence, must be fully established. They are:

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

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

(3) the circumstances should be of a conclusive nature and tendency,

F

(4) they should excludee very possible hypothesis except the one to be proved, and

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

Emphasis was laid as a circumstance on recovery of weapon of assault, on the basis of informations given by the accused while in custody. The question is whether the evidence relating to recovery is sufficient to fasten H guilt on the accused. Section 27 of the Indian Evidence Act, 1872 (in short

'the Evidence Act') is by way of proviso to Sections 25 to 26 and a statement even by way of confession made in police custody which distinctly relates to the fact discovered is admissible in evidence against the accused. This position was succuinctly dealt with by the this Court in *Delhi Admn.* v. *Balakrishan,* AIR (1972) SC 3 and *Md. Inayatullah* v. *State of Maharashtra,* AIR (1976) SC 483. The words "so much of such information" as relates distinctly to the fact thereby discovered, are very important and the whole force of the section concentrates on them. Clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate, The ban as imposed by the preceding sections was presumably inspired by the fear of the Legislature that a person under police influence might be induced to confess by the exercise of undue pressure. If all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. The object of the provision i.e. Section 27 was to provide for the admission of evidence which but for the existence of the section could not in consequences of the preceding sections, be admitted in evidence. It would appear that under Section 27 as it stands in order to render the evidence leading to discovery of any fact admissible, the information must come from any accused in custody of the police. The requirement of police custody is productive of extremely anomalous results and may lead to the exclusion of much valuable evidence in cases where a person, who is subsequently taken in to custody and becomes an accused, after committing a crime meets a police officer or voluntarily goes to him or to the police station and states the circumstances of the crime which lead to the discovery of the dead body, weapon or any other material fact, in consequence of the information thus received from him. This information which is otherwise admissible becomes inadmissible under Section 27 if the information did come from a person not in the custody of a police officer or did come from a person not in the custody of a police officer. The statement which is admissible under Section 27 is the one which is the information leading to discovery. Thus, what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. In other words, the exact information given by the accused while in custody which led to recovery of the articles has to be proved. It is, therefore, necessary for the benefit of both the accused and prosecution that information given should be recorded and proved and if not so recorded, the exact information must be adduced through evidence. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent

A events. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non- inculpatory in nature but if it results in discovery of a fact, it becomes a reliable information. It is now well settled that recovery of an object is not discovery of fact envisaged B in the section. Decision of Privy Council in *Palukuri Kotayya* v. *Emperor,* AIR (1947) PC 67, is the most quoted authority of supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect. [see *State of Maharashtra* C v. *Danu Gopinath Shirde and Ors.,* (2000) Crl.L.J 2301. No doubt, the information permitted to be admitted in evidence is confined to that portion of the information which "distinctly relates to the fact thereby discovered." But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability. Mere statement that the accused led the D police and the witnesses to the place where he had concealed the articles is not indicative of the information given.

Coming to evidence brought on record to substantiate the accusations, it is at least clear that accused Nos. 1 and 2 left in the company of the E deceased. Some evidence has also been brought to establish the motive i.e. the indebtedness of the accused to the deceased. In addition to this is the evidence of PWs 1 and 2. So far as accused No. 2 is concerned, he almost stands on the same footing as accused No. 1. Additionally, Hari Kumar (PW-18) has stated that accused No. 2 came to his shop and took sweets and left in car No. 566 JK02B belonging to accused No. 1. He has also stated about F the return of accused No.2 to the shop and a demand for a scooter. This witness has also stated to have seen car No. 5408-CH01 passing in front of the shop carrying seven to eight persons out of which he identified accused Kishore Kumar (since dead). PW-9 also has stated to have seen the deceased running being chased and he claimed to have seen the deceased firing. He G stated about the accused Nos. 1 and 2 giving 'Lalkara' that the deceased shall be Killed and should not escape. Accused No. 1 had fired some shots in the air. Another white car No. 5408 CH01 was also standing there. He had identified accused Bodhraj, Bhupinder, Rakesh Kumar and the two acquitted accused Rohit and Kewal Krishan. It has to be noted that Car No. 5408 CH01 was found discarded after it had met with an accident. This car is stated to H be the get away car.

As the evidence of PWs. 1 and 2 are very material it is desirable to note as to what their evidence was. On 3 August, 1994 PW-1 was in his shop. At about 4.30 p.m., A-1 accompanied by the deceased and A-2 came to meet him in car. A-1 informed that he and his colleagues in the car were interested in setting up a flour mill. A-2 was in a hurry to proceed towards the site. On their way, PW-1 asked A-1 to stop the car to pick up PW-2. A-2 was reluctant to stop the car and only on PW-1' s insistence PW-2 was picked up. When the deceased was attacked by the assailants and was pursued by the assailants he had started running towards the national highway. A-2 also ran after the deceased whereas A-1 kept standing near PW-1. The deceased asked A-1 to bring the car immediately but A-1 only shouted to one Short that the deceased should not escape. PW-1 identified A-1 and A-2 who were present in the Court.

PW-2 stated that on 3 August, 1994, he was sitting at his house when at about 4 to 4.30 to 5.00 p.m. PW-1 accompanied by A-1 and A-2 came to his residence and asked him to show some land to the persons accompanying them for the installation if rice-cum-flour mill. They all went to Dhiansar by car. When they were still seeing the land A-2 told them that he approved of the land and led them to the shop. While returning the deceased was attacked by 4-5 persons who were armed with tokas, daggers etc. The deceased started running away towards the canal and the assailants followed him and assaulted him. Then PW-1 Immediately told him to inform the police, by which time the deceased had started bleeding, and that he ran to ring up the police. PW-2 however noticed that while the deceased was running, he asked accused A-1 to bring the car but the latter did not move. Meanwhile, PW-2 went to the house of a contractor which was at a distance of 200 fts. from the place of occurrence to make the telephone call. When he came back, he found the dead body of the deceased lying on the road and heard accused A-2 telling accused A-1 "Kam ho gaya let us go to Jammu." The presence of PWs1 and 2 at the place of occurrence is fortified from the fact that they were witnesses to the seizure memos Ex. PW-GS,PW-GS/1, PW-GS/2 recorded by the police immediately after incident.

Evidence of PWs. 8, 9 and 18 are also relevant and their evidence is to the following effect. PW-8 (Surjit Singh) *inter alia*, stated as follows :

On 3rd August, 1994 he had gone for repair of his vehicle to Dhiansar. He was at a tea stall near the garage when he saw vehicle Nos. 556 and 5408 parked on the other side of the road. He saw Kishore was armed with a

A revolver. Shots fired by the deceased caused injuries to two assailants. Rajesh shot the deceased. The deceased was then surrounded by the assailants and attacked by tokas, swords, etc. Accused Kishore fired in the air and the assailants ran towards vehicle No. 5408. He had noticed accused A-1 and A-2 standing near their vehicle. The assailants reversed the other car and drove towards the deceased and accused Rajesh came out of the vehicle, picked up
B the weapon lying near the deceased and they mounted on the vehicle and drove off. A-1 and A-2 also drove off.

PW-9 (Nainu Singh) inter alia stated as follows.:

On 3rd August, 1994, he was getting a vehicle repaired in a workshop
C at Dhiansar. He along with Surjit Singh went towards a tea shop. They heard sound of fire arms being used. They saw the deceased bleeding profusely and running towards Jammu Pathankot road. Six-seven assailants were chasing him. They were armed with tokas, churas and revolver. The deceased while running had fired at the assailants. Kishore Kumar who was armed with a
D pistol was running after the deceased. The shots fired by the deceased were fired in his presence. Two of the accused were identified by him as Subhash Kumar and Rajesh Kumar. When the deceased reached near the road, Rajesh Kumar fired at him and hit on his arm. Thereafter, six to seven persons surrounded the deceased. They were said to be armed with Chakus (knives) and Churas (bigger knives) and were stabbing the deceased. Near the work
E shop gate car No. 566 was standing. This was of grey (slaty) colour. A-2 and A-1 had given a lalkara that the deceased should be killed and should not escape. A-1 had fired some shots in the air. Another white car bearing No. CH01 5408 was also parked there. He noticed the accused sitting in the car. He had identified Krishan Kumar, A-2 and A-1. The driver reversed the car.
F It was stopped near the dead body of the deceased. The revolver lying near the deceased was picked up. After the car had left, A-1 and A-2 also left in another car. He knew the names of the accused Bhupinder, Rohit and Rakesh Kumar because he had identified them in the police station in the presence of Tehsildar. He deposed that accused Bhupinder, Rakesh, Subhash and Rajesh were holding Toka, Kirch, Sword and Revolver respectively. The witness
G identified the revolver, sword, kirch and toka and stated that these were the weapons with which the accused were armed.

Evidence of PW-18 (Hari Kumar) inter alia stated is as follows:

He was the owner of a Halwai shop in Parade Ground, Jammu. On 3rd
H August, 1994, at about 11.00 a.m. accused Ravi Kumar came to the shop of

Hari Kumar in his car No. 5408-CH01 and left for Moti Bazar. At 1 or 1.30 p.m., accused Ashok and the deceased came to his shop and told them that they were going to Hotel Asia for taking meals. They took some sweets from his shop and left in car No. 566 JK02B which belonged to A-1. After 10 or 15 minutes, A-2 also came to the shop and demanded a scooter for him for going to Hotel Asia, telling him that he needs the scooter since he had given his car to some friend. He did not give a scooter to A-2. Half an hour thereafter, he found car No. CH01 5408 passing in front of his office shop carrying 7-8 boys out of which he identified Kishore Kumar (who is now dead). Car was being driven by a dark complexioned boy.

Some factors which weighed with the High Court in upholding conviction of the three accused as was done by the Trial Court are the evidence of eye-witnesses, PWs 1 and 2. Evidence of these witnesses have been analysed in detail by both the Trial Court and the High Court. Before both the said courts, it was urged that they cannot be termed to be truthful witnesses. By elaborate reasoning the stand was negatived. Additionally, it was noticed that both accused nos. 1 and 2 were seen in the company of the deceased by employees of the deceased i.e. Darshan Singh (PW 15) and Rajinder Kumar (PW 14). Additionally, Hari Kumar (PW 18) has also spoken about having seen deceased in the company of accused nos. 1 and 2. For some time accused No. 1 was not in the company of the deceased and accused No. 2. At that period of time he wanted PW 18 to take him to Hotel Asia. He has also stated that accused No. 2 and the deceased had taken some sweets from his shop and were travelling in a car No. JK02B 566. He has also stated about the statement of accused 1 and 2 that there was some scuffle between some boys and the deceased at the land which they had gone to see and in that scuffle the killing took place. The reason for this was stated to be a pressure on accused 1 and 2 to return the money. One of the important circumstances noticed by the Trial Court as well as the High Court is that the land which was to be seen by the deceased was only known to accused 1 and 2. Another circumstance noted was the use of a car 5408 CH01. There was some amount of controversy raised about the owner of the car, as it was evident from the lengthy cross examination made so far as the original owner, that is, L.B. Gupta, Advocate (PW 31).

The evidence of PWs 1 and 2 has rightly been accepted by the Trial court and the High Court and we find no reason to discard their evidence. So far as accused Rajesh Kumar is concerned as has been found by the Trial Court and the High Court, live pistol belonging to accused No. 1 was recovered

A from his house. He has sustained bullet injuries on account of firing done by the deceased while trying to protect his life.

In view of the circumstances noticed and highlighted by the Trial court and the High Court and in our considered opinion rightly the appeals filed by accused Ravinder Kumar and Ashok Kumar are devoid of merit and
B deserve dismissal, which we direct.

Coming to the appeal filed by four appellants who were acquitted by the Trial Court but convicted by the High Court, it has been argued with emphasis that even if it is accepted the two views are possible on the evidence,
C the one in favour of the accused was to be accepted and their acquittal should not have been rightly interfered with. It is to be noticed that the Trial Court placed reliance on the evidence of Hari Kumar (PW 18) for the purpose of convicting accused Rajesh Kumar, but so far as the other four accused are concerned, it was not held to be reliable. There was no cogent reason indicated as to why the same was termed to be unreliable. Additionally, recoveries
D were made pursuant to the disclosure made by them. Though, arguments were advanced that due procedure was not followed, in view of the evidence of the witnesses examined by the prosecution in that regard, we find nothing illegal ruling out its acceptance. There are certain additional features also. A pant was recovered from the house of Subhash kumar which had holes
E indicating passage of bullet. However, a chemist (PW 22) was examined to show when he had gone to purchase the medicine to be applied to the injury. It was submitted that so far as Santokh Singh (PW 7) is concerned, his evidence was held to be not reliable. Therefore, the identification of accused No. 5, Subhash Kumar by Santokh Singh was not of any consequence. Even if it is accepted, the evidence relating to recovery established by the evidence
F of PW 18 cannot be lost sight of.

The evidence of Nainu (PW 9) was also described to be un-reliable and it was said that he stood at par with Santokh Singh. Similar was the criticism in respect of Surjit Singh. Their evidence has been analysed in great detail
G by the High Court and has been held to be reliable. It is of significance that practically there was no cross-examination on the recovery aspect. We do not find any reason to differ with the High Court in that regard. There can be no dispute with the proposition as urged by learned counsel for the appellants that two views are possible, the one in favour of the accused has to be preferred. But where the relevant materials have not been considered to arrive
H at a view by the Trial Court, certainly High Court has a duty to arrive at

correct conclusion a taking view different from the one adopted by the Trial Court. In the case at hand, the course adopted by the High Court is proper. A

Judged in the aforesaid background, conviction by the High Court that those four who were acquitted by the Trial Court does not warrant any interference.

B

The last seen theory comes into play where the time gap between the point of time when the accused and deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that accused and deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that deceased, A-1 and A-2 were seen together by witnesses, i.e. PWs 14, 15 and 18; in addition to the evidence of PWs 1 and 2. C D

It was submitted that there was unexplained delay in sending the FIR. This point was urged before the Trial Court and also the High Court. It was noticed by the High Court that Showkat Khan (PW 38) was an investigating officer on 3rd August, 1994 for a day only. He had taken steps from 5.30 evening onwards to 9.00 p.m. on the spot. Thereafter, Gian Chand Sharma (PW 42) was asked to investigate into the matter. It was also noticed that the road between Bari Brahamana and Samba where the court was located was closed due to traffic on account of heavy rains. Though, the road was open from Jammu to Bari Brahamana but it was closed from Bari Brahamana to Samba. The day's delay for the aforesaid purpose (the FIR has reached the Magistrate on 5.8.1994) cannot be said to be un-usual when proper explanation has been offered for the delay. The plea of delayed dispatch has been rightly held to be without any substance. E F

Another point which was urged was the alleged delayed examination of the witnesses. Here again, it was explained as to why there was delay. Important witnesses were examined immediately. Further statements were recorded subsequently. Reasons necessitating such examination were indicated. It was urged that the same was to rope in accused persons. This aspect has also been considered by the Trial Court and the High Court. It has been recorded that there was valid reason for the subsequent and/or delayed G H

A examination. Such conclusion has been arrived at after analyzing the explanation offered. It cannot be laid down as a rule of universal application that if there is any delay in examination of a particular witness the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for the delayed examination is plausible and acceptable and the court accepts the same as plausible, there is no reason to interfere with the conclusion.

As was observed by this Court in *Ranbir and Ors.* v. *State of Punjab,* AIR (1973) SC 1409 the investigating officer has to be specifically asked as to the reasons for the delayed examination where the accused raised a plea that there was unusual delay in the examination of the witnesses. In the instant case however the situation does not to arise.

Therefore, in the aforesaid background, the appeals filed by the four appellants who were acquitted by the Trial Court but convicted by the High Court also deserve dismissal which we direct.

Coming to the appeal filed by the State in respect of whom both the Trial Court and High Court recorded acquittal, it is seen that there was no acceptable material. This aspect has been analysed in great detail by the Trial Court and the High Court and we do not find any reason to interfere with the conclusions. The appeal filed by the State is accordingly dismissed. In the ultimate result, all the four appeals are dismissed.

N.J. Appeals dismissed.