HIGH COURT OF MADHYA PRADESH
GWALIOR BENCH

DIVISION BENCH

G.S. AHLUWALIA

&

RAJEEV KUMAR SHRIVASTAVA J.J.

Cr.A. No. 15/2011

Omprakash Pateria (dead) through L.R.

Vs.

State of M.P. & Ors.

Cr.A. No. 80/2011

Vivek Kapil & Anr.

Vs.

State of M.P.

Shri Sanjay Gupta Counsel for the Appellant in Cr.A. No.15/2011 and Counsel for Complainant in Cr.A. No. 80/2011
Shri Sushil Goswami and Shri Ashok Jain Counsel for the Appellant Smt. Kiran Kapil in Cr.A. No. 80/2011 and Counsel for Respondent No 3 in Cr.A. No. 15/2011
Shri Vivek Kapil, Appellant No.1 in Cr.A. NO. 80/2011 and

Respondent no. 2 in Cr.A. No. 15 of 2011 brought from jail and argued in person as prayed by him by filing application. Shri C.P. Singh, Counsel for the State

Date of Hearing : 18-04-2022

Date of Judgment : 21st -April 2022

Approved for Reporting : Yes

Judgment

21st - April -2022

Per G.S. Ahluwalia J.

1. By this common Judgment, Cr.A. No. 15/2011 filed by the Victim and Cr.A. No. 80/2011 filed by accused/Appellants namely Vivek Kapil and Smt. Kiran Kapil shall be decided.

2. Cr.A.s No.15/2011 as well as 80/2011 have been filed against the Judgment and Sentence dated 30-11-2010 passed by Additional Judge to the Court of Additional Sessions Judge, Datia, in S.T. No. 78/2008 by which the Appellants Vivek Kapil and Smt. Kiran Kapil have been convicted as under :

Convicted under Section	Sentence
304-B of IPC	Life Imprisonment and fine of Rs. 25,000/- with default RI for 2 years
201 of IPC	3 years R.I. and fine of Rs. 5,000/- with default RI for 6 months

All the sentences to fun concurrently.

3. It is not out of place to mention here that the Appellants Vivek Kapil and Smt. Kiran Kapil were also tried for offence under Section

302 of IPC but they have been acquitted of the said offence, and Cr.A. No. 15/2011 has been filed against acquittal of Vivek Kapil and Smt. Kiran Kapil for offence under Section 302 of IPC.

4. The Appellant Vivek Kapil, had filed an application thereby disengaging his Counsel and prayed that he be heard personally. Therefore, Superintendent of Jail, Central Jail, Gwalior was directed to keep the Appellant Vivek Kapil, present before the Court, accordingly the Appellant Vivek Kapil was heard in person.

5. During the Course of the arguments, it was found that some of the arguments which were off the record may have some repercussion against the Appellant Vivek Kapil, therefore, he was told that he cannot be compelled to speak against himself and in case if any query is raised by the Court in the light of any argument advanced by him, then he may maintain silence. Accordingly, on several aspects, Shri Vivek Kapil requested that he would maintain silence in response to the query raised by the Court, and accordingly, he was not compelled to answer some of the queries.

6. The necessary facts for disposal of the present appeal in short are that on 13-5-2008, the dead body of an unknown lady was found near Chirulla Road Culvert, Datia. Accordingly merg no. 3/2008 was registered and spot map was prepared. Lash Panchnama was prepared in the presence of Tahsildar. Thereafter, the dead body was sent for post-mortem and as per post-mortem report, the cause of death was throttling. Accordingly, the articles recovered from the

dead body i.e., jewelry, cloths etc. were seized. On 13-5-2008, the dead body of the deceased was buried and FIR against unknown persons was lodged. On 15-5-2008, Omprakash Pateria, identified the body of his daughter Anuja on the basis of Photo of the dead body as well as the cloths, accordingly, the dead body was dug out of the earth and dead body was also identified by Omprakash Pateria. The dead body was handed over to Omprakash Pateria. On 26-5-2018, the Appellant Vivek Kapil was arrested from Itarsi Railway Station and on his memorandum, Maruti Alto Car no. UP 93-P-0596 was seized from Railway Station Taxi Stand, Itarsi. On 28-5-2008 the Appellant Smt. Kiran Kapil was arrested and on her memorandum, one Copper ring, telephone diary and one ladies bag of the deceased were recovered. The minor daughter of the deceased was also recovered from the possession of Smt. Kiran Kapil who was given in the custody of Omprakash Pateria. After completing the investigation, police filed the charge sheet for offence under Section 302,304-B, 201 of IPC.

7. The Appellants Vivek Kapil and Smt. Kiran Kapil, abjured their guilt and pleaded not guilty.

8. The prosecution, in order to prove its case, examined Omprakash (P.W.1), Smt. Asha Pateria (P.W.2), Mahesh Sudele (P.W.3), Matadeen (P.W.4), Dayanand Sharma (P.W. 5), Tanuja Pateria (P.W.6), Dr. S.K. Verma (P.W.7), Rajesh Kumar Malik (P.W.8), Ram Raja Tiwari (P.W. 9), Hukum Singh (P.W.10), Smt. Anita Shrivastava

(P.W.11), Anurag Sharma (P.W.12), Akhilesh Sharma (P.W.13), B.P. Parashar (P.W. 14), Swami Prasad (P.W.15), and Parmanand Sharma (P.W.16).

9. The Appellants Vivek Kapil and Smt. Kiran Kapil examined Guddi (D.W.1), Komal Singh (D.W.2), and Janki (D.W.3) in their defence.

10. The Trial Court by impugned judgment acquitted the Appellants Vivek Kapil and Smt. Kiran Kapil for offence under Section 302 of IPC but convicted them for offence under Section 304-B of IPC as well as under Section 201 of IPC and sentenced them as mentioned above.

11. Challenging the impugned judgment, it is submitted by the Counsel for the Appellant No. 2 Smt. Kiran Kapil that the case is based on circumstantial evidence. The deceased was residing with her parents. She went missing from her parental home, but thereafter, the prosecution story was twisted by her parents. The chain of circumstance is not complete. Human sperms were found in the private part of the deceased, whereas the Appellant Vivek Kapil had already undergone Vasectomy Operation in the past. The prosecution has failed to prove that the minor daughter of the deceased was recovered from the possession of Appellant Smt. Kiran Kapil. The prosecution has also failed to prove that the deceased was in the company of the Appellants for the last time.

12. It is submitted by the Appellant Vivek Kapil, that earlier, the

deceased was residing in her matrimonial house at Jhansi, but due to some differences with the family members of the Appellant Vivek Kapil, She went back to her parental house, therefore, he filed a petition under Section 9 of Hindu Marriage Act for restitution of conjugal rights. It was further submitted that although the deceased was residing in her parental home, but he was on talking terms with her. The birthday of his daughter was celebrated by the Appellant along with the deceased and his daughter on 8-3-2008 in a Park situated in Cantt. Area, Jhansi. When a specific question was put to the Appellant Vivek Kapil regarding the outcome of the petition filed under Section 9 of Hindu Marriage Act, then it was submitted by him that the petition was filed in the year 2006, but thereafter, he was transferred to Dabra, therefore, he started living along with his wife at Dabra. He was transferred to Mahoba in the month of September 2007**,** but he did not join at Mohaba, as he was trying his level best to get the transfer order cancelled. Accordingly, the transfer order was cancelled on 17-1-2008 but thereafter, he was again transferred to Mahoba in the month of March 2008 and he submitted his joining in the month of March 2008 itself. From the month of September, 2007, till his transfer order was cancelled in the month of January 2008, he was staying in Jhansi along with his family whereas Anuja was staying in her parental home. He conceded that at the time of death of his wife, he was on unauthorized leave and he had also remained on unauthorized leave during the period when he was trying to get his

transfer order cancelled. However, he submitted that he never informed Omprakash Pateria (P.W.1) that Anuja is missing from the evening of 12-8-2008. He submitted that in fact he was never informed about the death of Anuja. He further stated that he had summoned Time Keeper of Mahoba Distt. Hospital along with the register to prove that he had already undergone the Vasectomy Operation, but since, Dr. Pratap Singh had come along with the Record, therefore, he did not examine him. Once, he had already undergone Vasectomy Operation, therefore, the presence of sperms in the vaginal slide of the deceased clearly indicates the presence of foreign sperms. He further submitted that he had filed an application for conducting the DNA test, but the said application was rejected. He has also filed I.A. No 1910 of 2015 in this appeal, and this Court by order dated 15-4-2015 has held that the said application shall be considered and decided at the time of final hearing. He further stated that there are material variances in the evidence of Omprakash Pateria (P.W.1), Smt. Asha Pateria (P.W.2), Anurag Sharma (P.W.10) and Parmanand Sharma (P.W.16). He further submitted that his defence revolves around the presence of sperms and non holding of DNA test. He further submitted that Omprakash Pateria (P.W.1) never informed the Investigating Officer that he had taken an Insurance Policy of Anuja. He further stated that once, his wife was already having the Insurance Policy of Rs. 10 Lacs, then there was no need for the Appellants to demand Rs. 5 Lacs, but during the Course of

arguments, he fairly conceded that neither there is any thing on record to suggest that the Appellants were aware of the Insurance Policy, nor the Appellant Vivek Kapil ever paid even a single premium of the Insurance Policy. He also admitted that the Insurance Policy of Anuja was taken prior to her marriage. During the Course of arguments, he further stated that after the maturity of the Insurance Policy, he would not have received any amount, and only the deceased Anuja would have got the maturity value of the Insurance Policy. He further stated that there is a discrepancy in the evidence of Anurag Sharma (P.W.10), Swami Prasad (P.W.15) and Parmanand Sharma (P.W. 16) regarding the place of his arrest. Swami Prasad (P.W. 15) has stated that he was arrested from the Platform of Itarsi Railway Station, but Parmanand Sharma (P.W.16) has stated that he was arrested outside the Itarsi Railway Station. He further stated that the FSL report was received just 2 days after the filing of the charge sheet, therefore, it is clear that the charge sheet was filed without collecting entire evidence. He further stated that although his wife Anuja was residing in her parental home on account of differences with her in-laws, but the differences were not so deep, so as to break the relationships with her. He further submitted that why the police party went to Itarsi by a private vehicle in order to arrest him? However, it was not clarified by the Appellant as to why cremation of his wife was not done by him.

13. He was again and again informed that the Trial Court has found

that the deceased was in the Company of the Appellants for the last time, therefore the burden would be on them to explain as to how, the deceased Anuja met with a homicidal death, and under what circumstances, her dead body was thrown near the culvert, but the circumstance of Last Seen Together was not challenged by the Appellant Vivek Kapil. At the end, he submitted that he may be convicted either for offence under Section 302 or 304B of IPC but not for both the offences as he has already undergone the detention of more than 13 years.

14. Per contra, the Counsel for the State and complainant have submitted that in fact the guilt of the Appellants Vivek Kapil and Smt. Kiran Kapil for offence under Section 302 of IPC has been proved beyond reasonable doubt, therefore, they should be convicted for the same.

15. Heard the learned Counsel for the Parties.

16. I.A. No. 1910 of 2015 filed by the Appellant Vivek Kapil for conducting DNA test shall be considered after considering the evidence and arguments of the parties.

17. Before adverting to the merits of the case, this Court would like to consider as to whether the death of deceased Anuja was homicidal in nature or not?

18. Dr. S.K. Verma (P.W.7) has conducted the post-mortem of the dead body of Anuja and found following injuries on her body :

A dead body of unknown female aged about 22 years lying

on supine position (Illegible) for P.M. Rigormortis present over the limbs. Eyes are closed, pupil dilated. Conjunctiva are congested. Mouth semi open teeths are clinched. Cyanosis present on face and lips. Hairs are long black in colour.
External Injury – Two small abrasions ½ cm x ½ on right lower jaw and two small abrasion on left side of neck over the left angle of mandible size ½ cm x ½ cm. Abrasion 1 cm x ½ cm over the chin.

In our opinion, mode of death is Asphyxia due to throttling.
Duration within 24 hours since P.M. Examination
Hyoid bone and Viscera are preserved and send for chemical examination.

The Post-mortem report is Ex. P.7.

19. This witness was cross-examined and in cross-examination, he admitted that the abrasions had no depth and they were superficial in nature. No other injury was found. He did not find any mud on the cloths of the deceased. In case of throttling, abrasions are found on the neck and Cyanosis is found on face and lips. It is not necessary that there should be any effect on trachea. He further stated that throttling can be done without pressing trachea. By putting hand on mouth and nose, the inhaling of oxygen can be stopped. Cyanosis on face and mouth can also be due to poisoning, therefore, internal organs were sealed for chemical examination. It is not necessary that there should be some external marks of throttling. Whether there was any fracture of hyoid bone or not cannot be seen without microscopic examination, therefore, it was preserved. He denied that in case of throttling there will not be any Cyanosis on face and lips. In order to ascertain the time of death, rigormortis is examined and not the

colour of blood. Rigormortis starts within 6 hours of death. The colour of abrasion doesnot change after the death.

20. In F.S.L. report, Ex. P. 26, no poison was found in Viscera.

21. Similarly hyoid bone and thyroid cartilage were found healthy in chemical examination, Ex. P. 25.

22. In view of the specific evidence of Dr. S.K. Verma (P.W. 7) that the cause of death was throttling and there was Cyanosis on face and lips with abrasion marks on neck, this Court is of the considered opinion, that the death of Anuja was homicidal in nature.

23. Now, the next question for consideration is that whether the Appellants are the author of offence or not?

24. The Appellant Vivek Kapil is the husband and Smt. Kiran Kapil is the mother-in-law of the deceased Anuja.

25. Omprakash Pateria (P.W.1) is the father of the deceased Anuja. He has stated that on 5-6-2005, the marriage of the deceased was performed with Vivek Kapil in accordance with Hindu Rites and Rituals. After the marriage, Anuja had stayed in her matrimonial home for a month and thereafter stayed in her parental home for a week. Thereafter, the Appellants Kapil and Kiran came to take her back. When Anuja again came back to her parental home, She informed that Vivek has instructed her that She should bring Rs 5000/- from her father and also informed that the Appellant Kiran use to beat her and also scold her that the value of her son is Rs. 20 lacs whereas her father has given only Rs. 10 lacs therefore, She should

bring Rs. 5 lacs more. Thereafter, the Appellants Vivek and Kiran came to take her back and he had given Rs. 5,000 to his daughter. Thereafter, the deceased came to her parental home for 8-10 times. She used to inform that the Appellants are demanding money. In the month of September 2007, the deceased was left by the Appellants in her parental home. Anuja had informed that the Appellants are demanding money. He had sold one plot situated in front of Medical College Jhansi, and the Appellants were demanding ¼ share. Thereafter, Anuja stayed in the house of the witness. On 2-5-2008, the Appellants came and assured that now they would not repeat the mistake and requested that Anuja be sent along with them. Accordingly, he called his elder brother Harish Pateria and consulted him. He advised that since, the Appellants are tendering apology therefore, he may send his daughter. The Appellant Vivek is serving in Railway department. He took Anuja with him and also informed that now he has been posted in Mahoba and they would go to Mahoba. Thereafter on 10-5-2008, the Appellant Vivek again left Anuja in his house. On enquiry, Anuja informed that since, Vivek wanted to meet his mother, therefore, at the request of the deceased, She has been left in her parental home. On 12-5-2008, the Appellants came to his house on Alto Car and at about 7-8 in the morning they took Anuja with them. 2 years old daughter of Anuja was also with them.

26. On 13-5-2008, at about 12:30 P.M., he received a phone call

from Vivek that from 6 P.M., Anuja is not with him. When this witness responded that he had taken her with him, then he disconnected the phone. He immediately went to the house of the Appellants i.e., Quarter No. 652, Laxmi Bai Nagar and found that the house was locked. Thereafter, he came back and went to Mahoba along with his wife and found that the quarter of the Appellants was locked. He also enquired from XCN Guptaji about the whereabouts of the Appellants, then he informed that they had come at 3 in the afternoon along with minor girl and asked for water. Thereafter, they were saying for leave from service as they wanted to go to Chhatarpur. Thereafter, he went to Chhatarpur, which is 50-60 Kms away from Mahoba where the maternal aunt of the Appellant Vivek resides. She informed that the Appellants had come and were requesting her to keep the minor girl with her and had also informed that Anuja is in her parental home. Thereafter, they left along with minor girl. Since, she got suspicious as the mother of minor girl was not with them, therefore, She refused to keep the girl with her. Thereafter, this witness came back to Jhansi at about 2:30 A.M. in the night. On the next morning he called his brother-in-law Mahesh Sudele, who informed that while he was coming back from Datia he had seen the Appellants along with Anuja and minor girl. On 14-5-2008 at about 11 P.M. he along with his father-in-law and brother-in-law, went to *Sipari* Police Station for lodging the report and also gave a complaint, but they replied that since, the incident has taken place

within territorial jurisdiction of Premnagar Police Station, therefore, they should go there. Thereafter, they went to Add. S.P., for making complaint of non-lodging of FIR, then he too advised to go to Premnagar Police Station. Thereafter, he went to Premnagar Police Station, then S.H.O. informed that the dead body of a girl has been recovered, therefore, first of all he should see that. Then he went to Police Station Chirulla and identified his daughter from her photo. The other belongings of deceased Anuja like cloths etc. were also shown to this witness, which were identified by him. The identification memo is Ex. P. 1. Thereafter, the dead body was taken out which was buried near the police station premises itself, and the dead body was also identified and the identification memo is Ex. P.2. Thereafter, the dead body was handed over to him vide supurdaginama Ex. P.3. The cremation was done by him. Thereafter, the minor Girl Sona was recovered from the possession of accused persons. On 28-5-2008, She was handed over to this witness. The Supurdaginama is Ex. P.4.

27. After the examination-in-chief of this witness was over, the Appellant Vivek Kapil sought adjournment on the ground that he doesnot wish to continue with his Counsel Shri K.K. Shrivastava. Ritesh Agrawal, Advocate filed his memo and stated that Shri Arun Kumar Dixit would cross-examine the witness who is out of station in connection with some important work and sought for adjournment. Adjournment was granted and cross-examination was deferred.

Thereafter, this witness appeared on 4-12-2008, and again an application was filed for deferment of his cross-examination on the ground that his Counsel Arun Dixit has fallen sick. Again on 5-12-2008, this witness was not cross-examined on the ground of sickness of Counsel and accordingly, this witness was released. Again an application under Section 311 of Cr.P.C. was filed, which was dismissed by order dated 9-3-2009. Thereafter, the Appellant Vivek Kapil filed an application for grant of interim bail on health ground which was allowed by order dated 15-4-2009. On 29-4-2009, a copy of order dated 21-4-2009 passed by High Court in M.Cr.C. No. 2240/2009 was submitted by which the order dated 19-3-2009 was set aside and one more opportunity was granted to cross-examine Omprakash Pateria and Smt. Asha Pateria. Another application was filed for extension of period of interim bail on the ground of health sickness but it was found that after his release on temporary bail, the Appellant Kapil had filed an application for custody of child, and did not go for operation, therefore, the Trial Court came to conclusion that the Appellant Vivek Kapil is hale and hearty person and accordingly, his prayer for extension of bail was rejected. Thereafter, this witness was cross-examined on 12-5-2009.

28. In cross-examination, he stated that he has four daughters. Other three daughters are still spinsters. Matadeen is a milk vendor and supplies milk to the Appellants. *Athodana Sipari Bazar* is about 4 Km.s away from Jhansi. He has a milk shop in the name and style

B*anmali Milk Bhandar*. There was no mediator in the marriage. He had purchased one plot on 26-8-2006 in the name of Anuja. He further stated that in the year 2006, the Appellant Vivek had filed an application for restitution of conjugal rights. He denied that Anuja did not want to reside with Vivek. Vivek is serving in Indian Railways. He has one younger brother and sister apart from his father and mother. Father of Vivek is a Guard in Superfast train. The monthly income of father of Vivek is Approximately 40-50 thousand. He denied for want of knowledge that sister of Vivek is serving as Lieutenant and her husband is Major. He was present at the time, when the dead body of Anuja was dug out of the earth and he had identified her body. Tahsildar was also present. His statement was recorded on 17th in Chirulla Police Station. He himself had gone to get his statement recorded. On 14th he went to *Sipari* Police Station and thereafter he contacted Add. S.P., Jhansi and on 15th he went to Premnagar Police Station. He admitted that for the last 8 months prior to her death, Anuja was residing with him. He admitted that he had informed the police that Rs. 5000 were demanded by Vivek and her mother-in-law used to beat her, but could not explain the reason as to why such fact is not mentioned in her police statement, Ex. D.1. He also stated that in the month of September 2007, Anuja was left by the Appellant in his house after beating her, but could not explain as to why both the facts are not mentioned in his police statement, Ex. D.1. During last 8 months, he did not try to send Anuja back to

her matrimonial house. He did not lodge any report in this regard. He also could not explain as to why the fact of consulting his brother Harish prior to sending Anuja with the Appellants on 2-5-2008 is not mentioned in his police statement. On 10-5-2008, when the Appellant Vivek came to leave Anuja in his house, he had no talks with Vivek. On 12th when the Appellants came to take her back, then he had not scolded as to why they leave her frequently. He denied that Anuja had left his house without informing him. He denied that minor girl Sona is with this witness from the date when Anuja had come to her parental home. This witness stated that although he had disclosed to the police that he went to Mahoba with his wife, but could not explain as to why said fact was not mentioned in his police statement, Ex. D.1. However, this Court found that in his police statement, Ex. D.1 he had stated that after the phone call of Vivek was received, **they** went to railway quarter and thereafter **they went to Mahoba** but Vivek was not there. Therefore, in substance the allegation of going to Mahoba in search of deceased and Vivek is mentioned in Police Statement, Ex. D.1 and use of word **they** indicate that Omprakash Pateria (P.W.1) did not go all alone. He further stated that in his police statement, he had informed the police that XEN, Shri Gupta had informed that the Appellants had gone to Chhatarpur, but could not explain as to why this fact is not mentioned in his police statement, Ex. D.1. This Court has also considered the above mentioned omission and found that in his police statement, this

witness had stated that at Mahoba, they came to know that the Appellants have gone to Chhatarpur. Thus, the allegation that the Appellants went to Chhatarpur is mentioned in the police statement, Ex. D.1. He denied that he had never made any complaint to Police Station *Sipari* or Premnagar or to Add. S.P.. He denied that the minor girl Sona was not recovered from the possession of the Appellants. He stated that his house is situated quite nearer to his shop. On 2-5-2008, the food inspector had raided his shop at 11 A.M. and during this raid, he was in his shop. He denied that raid took place at 7-8 A.M. He further stated that his daughter knew how to drive car. He denied that his daughter used to demand maintenance amount with an intention to defame her in laws. He further stated that he had informed the police that at 12:30 he had received the phone call from Vivek, but could not explain as to why this fact is not mentioned in his police statement, Ex. D.1. This Court has once again verified from his police statement, Ex. D.1 and found that there is an allegation that Vivek had telephoned him to inform that Anuja is not with them since 6 P.M. He did not take any action in police station Premnagar after the dead body was recovered. He admitted that he had taken the Insurance Policy of Anuja and he is the nominee and he will receive the insurance amount being nominee. Alok Dubey is the brother of his friend Ashok Dubey. He denied that on 13-5-2008, he had informed Vivek that Anuja is missing. He denied that Vivek had advised him to lodge the report. He denied that Vivek was all the

time in Jhansi but specifically stated that he was absent from his duty.

29. Smt. Asha Pateria (P.W.2) is the mother of the deceased Anuja. She has also supported the prosecution story in the same words. She further stated that Photo Article A-1 was that of her daughter which was taken at the time of her marriage, whereas other photographs i.e., Article A-2 to A-13 are of her daughter Anuja. This witness also identified the purse of her daughter in the Court which was marked as Article A-14, the Copper ring was identified and was marked as Article A-15, and the telephone diary was identified and marked as Article A-16. These articles were also got identified in Tahsil Office, and identification memo is Ex. P.5. The seized articles are that of Anuja which She used to keep with her. The examination-in-chief of this witness was over on 5-12-2008 and the Counsel for the Appellant Vivek was directed to cross-examine her, but it was refused by him on the ground that Senior Counsel Shri R.K. Dixit is not available and accordingly this witness was released. On 29-4-2009, a copy of order dated 21-4-2009 passed by High Court in M.Cr.C. No. 2240/2009 was submitted by which the order dated 19-3-2009 was set aside and one more opportunity was granted to cross-examine Omprakash Pateria and Smt. Asha Pateria.

30. Accordingly, this witness was cross-examined on 12-5-2009. In cross-examination, She stated that they had spent 20 lakhs in marriage which they had withdrawn from their bank and income from agricultural fields. It was stated by this witness that She had

informed the police that the mother-in-law used to beat her but could not explain as to why this fact is not mentioned in her police statement, Ex. D.2. However, this Court after going through the Police Statement, Ex. D.2, found that the allegation of beating Anuja by the Appellant Kiran Kapil is mentioned. She denied that 10 lacs cash and goods worth Rs. 5 Lacs were not given. She admitted that in the year 2006, Vivek had filed a suit for restitution of conjugal rights, but stated that it was based on false averments. She denied that in the year 2006, Anuja was residing with her. She denied that Alto Car was not with the Appellants on 2-5-2008 and never remained with them, thereafter. She denied that on 2-5-2008, 10-5-2008 and 12-5-2008, the Appellants did not take Anuja with them. She further stated that she had identified the handwriting of Anuja in the seized Telephone diary. She denied that on 12-5-2008, Anuja had left her parental home with a boy namely Dubey and stayed in a Motel in Datia. The police was not with them at the time of identification of articles. Police had informed that they are required to identify the articles. On 12-5-2008 at about 7-8 A.M., her daughter had gone with Appellant. The Food Inspector had raided the shop at 11 A.M. She denied that Anuja was not doing any household work in her matrimonial house. She denied that Vivek had purchased a plot in the name of Anuja out of his income. She further stated that the sale deed of house and plot was jointly executed in favour of Anuja and her father. She admitted that earlier She had never gone to Mahoba.

Her daughter was in Mahoba from 2-5-2008 till 10-5-2008 whereas the Appellant Smt. Kiran Kapil was in her house in Railway Colony, Jhansi. She admitted that her daughter also used to drive the car.

31. Mahesh Sudele (P.W.3) has been disbelieved by the Trial Court, however, it is submitted by the Counsel for the complainant that since Anuja was known to this witness, therefore, if he had sen her at the toll booth along with the Appellants, then it cannot be said that he is a cocked up witness or unreliable witness.

32. Considered the submissions made by the Counsel for the Appellant/complainant.

33. If the evidence of Mahesh Sudele (P.W.3) is considered then it is clear that not only Mahesh Sudele is relative of Omprakash Pateria (P.W.1) but his evidence that he had seen the deceased Anuja along with Appellants at RTO barrier appears to be untrustworthy, because at about 12:00 in the night, it is difficult to see and identify the persons sitting in another car. Further he has stated that lot of trucks were parked at the RTO barrier and one Alto car was also parked and Anuja was sitting in the car. The evidence of Mahesh Sudele (P.W.3) is not very convincing, and accordingly, the Trial Court rightly disbelieved him.

34. Matadeen (P.W.5) has stated that he is a Milk Vendor and on 16-5-2008, at about 8:30 P.M., he was returning back to his house, when he met with the Appellants. He told them that since, their house was locked for 2-3 days, therefore, his milk is getting spoiled.

In reply the Appellants told him that they would not purchase milk for next 2-3 days as they are going out of station and they have killed Anuja by throttling and have thrown her dead body near Chirulla village. However, the Trial Court has disbelieved the circumstance of Extra Judicial Confession.

35. Dayanand Sharma (P.W. 5) has stated that he is the resident of same colony, in which the Appellants reside and on 12-5-2008, he had seen that the Appellants were going in Alto Car along with Anuja and her daughter. However, the Trial Court has disbelieved this witness on this issue. However, this witness has also stated that the Appellants used to harass Anuja, and this part of his evidence has been accepted by the Trial Court.

36. Tanuja Pateria (P.W.6) is the younger sister of Anuja and She has also stated in the similar words in which Omprakash Pateria (P.W.1), Smt. Asha Pateria (P.W.2) have spoken. This witness was cross-examined. In cross-examination, She stated that at the time of marriage, the deceased Anuja had studied upto class 12th and after her marriage, She had passed graduation. When Anuja had stayed in her parental home, none of her in-laws had come to talk to her. She admitted that prior to that Anuja was residing with Vivek in a separate house in K.K. Puri, Jhansi. However, clarified that the Appellant Smt. Kiran used to visit there. She also admitted that during the stay of Anuja in her parental home for 8 months, Vivek had filed one case, but was not in a position to state the nature of the said case. While

giving police statement, She was very upset and sad. She further stated that since She was very sad, therefore, did not disclose to police that her parents had gone to Mahoba. She did not go to the house of Anuja in between 2-5-2008 to 20-5-2008. Anuja did not have any mobile. She further stated that in her police statement, Ex. D.6, she had disclosed to the police, that Anjua had informed her that Appellants were demanding Rs. 5 Lacs but could not explain as to why this fact is not mentioned in her police statement. This Court has gone through the police statement of this witness, Ex. D.1 and it is found that this witness had stated that Vivek had told this witness that Rs. 5 lacs should be paid otherwise, he would take away his minor daughter. She denied that Matadeen is their servant. She denied for want of knowledge that food department had raided the shop of her father. On 10-5-2008, Vivek had left her after beating her. Anuja had told her that She was beaten by Vivek. She denied that her *Tau* Harish Kumar Pateria was out of station on 2-5-2008. On 12-5-2008, the Appellants had come at around 7-8 in the morning. They had not come with any prior information. Alok Dubey is not known to her. No dispute had taken place at the time of marriage of Anuja. She denied that Anuja was never beaten by the Appellants. She denied that the Appellants had not come on 12-5-2008. She denied that the Appellants did not take Anuja with them on 12-5-2008. In 2007, the Appellants had left Anuja after beating her. She had not seen any external injury on the body of Anuja on 10-5-2008. On 12-5-2008,

when the Appellants had come to take Anuja with them, then they were asked as to why they frequently beat Anuja. She denied that Anuja went missing on 12-5-2008 from the house of this witness. She denied that earlier the shop of her father was in a hut and only after the Insurance claim of Anuja was received, the shop was reconstructed. She denied that her father and brother were insisting that Anuja must take loan against Insurance Policy.

37. Rajesh Kumar Malik (P.W.8) has stated that Smt. Kiran Kapil was arrested on 28-5-2008 in his presence vide arrest memo Ex. P.8. Her memorandum , Ex. P.9 was recorded and accordingly, Smt. Kiran Kapil took the police party to her house which was locked from outside. Smt. Kiran Kapil unlocked the house and handed over purse Article A-14, one diary Article A-16 and one ring Article A-15 which were seized vide seizure memo Ex. P-10. At the time of arrest of Smt. Kiran Kapil, a minor girl was also with her who was the daughter of deceased Anuja. The said girl was handed over to Omprakash Pateria and Supurdaginama is Ex. P.4. This witness was cross-examined. In cross-examination, he stated that Smt. Kiran Kapil was arrested at about 4:45 A.M. and he was on morning walk. He resides in *Masiha ganj* which is approximately ½ Km.s away from Station. Smt. Kiran was going towards Railway Station by walking. The girl was with the Appellant. He denied that he has given multiple Insurance Policies to Omprakash Pateria. He denied that Anup Pateria is his friend. He denied that he has come with

Omprakash Pateria. He stayed on the spot for ½ hour. He denied that Smt. Kiran Kapil was not arrested and minor girl was not with her at the time of her arrest. He denied that the Appellant Kiran Kapil had not given any information regarding the articles. He denied that apart from Smt. Kiran Kapil, her husband and younger children also reside in the said house. He denied that at the time of seizure proceedings, Omprakash Pateria was also present in the house. The size of room was approximately 10x12 ft.

38. Ram Raja Tiwari (P.W. 9) has stated that on 13-5-2008, he was posted in Police Station Chirulla on the post of Head Constable. After the post-mortem of the dead body, the sealed packets and sealed bottle were handed over by him to S.H.O. Parmanand Sharma which were seized vide seizure memo Ex. P.10.

39. Hukum Singh (P.W. 11) has stated that he was working on the post of Chowkidar in village Chirulla. He came to know that the dead body of a woman is lying and therefore, he went there and sent information to the police. Tahsildar Datia also came there. Safina form, Ex. P.11 was issued by Tahsildar and Lash Panchnama, Ex. P.12 was prepared. He had seen the dead body and it appeared that some one had strangulated her. The police had seized Salwar Kurta, *Dupatta*, bones in bottle and two bangles in Hospital in his presence vide seizure memo Ex. P.10.

40. Anita Shrivastava (P.W. 11) has prepared the *Nazri Naksha* Ex. P.13.

41. Anurag Sharma (P.W. 12) is the witness of arrest of Appellant Vivek Kapil and seizure of Alto Car from Itarsi Railway Station. He stated that the Appellant Vivek Kapil was arrested from Itarsi Railway Station vide seizure memo Ex. P. 14. His memorandum, Ex. P. 15 was recorded in which he disclosed that the Alto Car UP- 93-P-0596 is parked in Itarsi Railway Station Taxi Stand and the bag of Anuja is with Kiran Kapil. On disclosure by Vivek Kapil, Alto Car No. UP-93-P-0596 was seized from Railway Station Taxi Stand along with Registration Card vide seizure memo Ex. P.16. (It is not out of place to mention her that Alto Car No. UP-93-P-0596 was registered in the name of deceased Anuja wife of Vivek Kapil). This witness was cross-examined and in cross-examination, he stated that Vivek Kapil and Anuja Kapil are not known to him. The parents of Anuja are also not known to him. He denied that he had attended the marriage of Anup Pateria, brother of the deceased and the said marriage was also attended by his sister. He admitted that in photographs Ex. D.7, his sister Anjali is also visible. He could not identify the other persons who are visible in the photograph, Ex. D.7. He denied that Omprakash Pateria is his relative. He denied that he has come to Court along with Omprakash Pateria. He is the owner of TATA 407 loading vehicle. On 26-5-2008, he had gone to Itarsi from Bhopal on his motor cycle as he had received an information that his TATA 407 has broken down near Itarsi bridge. He had received the telephonic information in the intervening night of 26 and 27th and

therefore, he came to Itarsi in the same night and started from Bhopal at 2 A.M. He parked his motor cycle in Parking area of Itarsi Railway Station. Thereafter, he was busy in getting his vehicle repaired and thereafter he got free. When he went to pick up his motor cycle, at that time, the Appellant Vivek was there in the custody of police. Then memorandum was recorded in his presence. Thereafter, he went back to Bhopal. Alto car was parked outside the parking area. He had seen Vivek in the custody of police at about 3-3:30 P.M. He expressed his ignorance about the fact that when and from which place, the Appellant Vivek was taken in custody by the police. He also denied that Vivek was taken into custody from Jhansi on 24-5-2009 and Vivek had sent a telegram to S.P. Jhansi in this regard. He admitted that Vivek was not arrested in his presence and only seizure was made. The seized car was of Silver colour. After the seizure proceedings, he stayed in Neelam Hotel for 1-2 hours.

42. From the entire evidence of Anurag Sharma (P.W.12), only one adverse thing which has been highlighted is that this witness has stated that he had come to Itarsi in the intervening night of 26th-27th whereas the car was seized on 26-5-2008 at 15:30. The only question for consideration would be whether this discrepancy in date of visiting Itarsi is fatal or not, but the same shall be considered while appreciating the evidence of Investigating Officer.

43. Akhilesh Sharma (P.W. 13) has stated that on 15-5-2008, an information was given by Police Station Premnagar, that the dead

body of a lady has been found within the territorial jurisdiction of Chirulla Police Station. Accordingly, he, Alok Dubey, Omprakash Pateria, and his son Anup Pateria went to Police Station Chirulla where they were shown the photographs of the dead body which are Ex. P.2 to P.13 and the same were identified. Those photographs were that of Anuja. Identification Panchnama, Ex. P.17 was prepared. Thereafter, the cloths of the deceased were shown to them, which were identified by Omprakash Pateria and the identification memo is Ex.P.18. The joint memo, Ex.P1 was prepared. Thereafter, the dead body of the deceased Anuja was dug out and the same was identified by the witnesses. The identification memo of dead body of Anuja is Ex. P. 3. In cross-examination, he admitted that the father of Anuja is present in the Court. He denied for want of knowledge that Alok Dubey is close relative of Omprakash Pateria. He admitted that Alok Dubey is on visiting terms with Omprakash Pateria. He denied that he had not identified the deceased. He admitted that the vehicle on which he and Omprakash Pateria have come was being driven by Alok Dubey.

44. B.P. Parashar (P.W.14) was posted as Tahsildar in Distt. Datia. He had prepared the Lash Panchnama, Ex. P.12 after issuing safina form, Ex. P.11. In his presence, the cloths of the deceased were identified by witnesses and identification memo Ex. P. 17 was prepared. The cloths were resealed and its memo is Ex. P.18. The cloths and other articles were also got identified and Omprakash

Pateria had identified as that of his daughter Anuja vide identification memo Ex. P.1. The dead body was dug out and was identified by Omprakash Pateria and the identification memo is Ex. P.2. The dead body was handed over to Omprakash Pateria vide supurdaginama, Ex. P.3. On 25-6-2008, he had conducted the identification of a white coloured ladies bag, one copper ring and telephone diary of the deceased from Smt. Asha Pateria and the identification memo is Ex. P.5. He was cross-examined. In cross-examination, he stated that on 15-5-2008, he was called from Police Station, but could not explain the mode of summoning. He was called at about 4 P.M.

45. Swami Prasad (P.W.15) has stated that on 13-5-2008, he was posted in Police Station Chirulla. He had taken the dead body of a lady for post-mortem and the post-mortem report is Ex. P.7. The sealed packet received from Distt. Hospital were handed over to A.S.I. Parmanand Sharma vide Ex. P.10. On 26-5-2008 at 15:30, Vivek was arrested in his presence vide arrest memo Ex. P.14. His memorandum is Ex. P.15 and on the basis of disclosure made by Vivek, Alto Car No. UP 93-P-0596 was seized vide seizure memo Ex. P.16. This witness was cross-examined. In cross-examination, he stated that on 13-5-2008, he was posted in Chirulla Police Station. The dead body of the deceased was received immediately after the post-mortem. He went to Itarsi directly from Chirulla Police Station. He, S.H.O. and Rajarama Tiwari had gone. They went to Itarsi by car. The S.H.O. had not disclosed the reason for going to Itarsi. Car

was a private one, but he was not in a position to disclose the name of driver. He had never met with Vivek prior to his arrest. Vivek was identified by S.H.O. The Appellant Vivek was not having any parking ticket with him. There was nothing inside the car. The signature of Anurag Sharma were obtained on seizure memo. The Appellant Vivek Kapil was arrested from the platform. Although this witness was not able to disclose the number of platform, but stated that it was the first platform towards the Itarsi city. He denied that Anurag Sharma had come to Itarsi along with this witness. He denied that Appellant Vivek was arrested in Jhansi on 24-5-2008.

46. Parmanand Sharma (P.W. 16) has stated that on 13-5-2008, he was posted on the post of ASI in Police Station Chirulla. On the said date, Constable Mahendra Singh Dangi informed that the dead body of one unknown lady is lying near culvert, Chirulla road. Accordingly, merg under Section 174 Cr.P.C., Ex. P. 19 was registered. Requisition for post-mortem is Ex. P.6. On the said day, the Head Constable Ramraja Tiwari brought Hyoid bone in a sealed bottle, viscera in another sealed bottle, one sealed packet containing cloths, in one packet the ornaments removed from the dead body of the deceased, bottles containing tips of fingers of both hand, pubic hair, vaginal smear in sealed condition were brought which were seized vide seizure memo Ex. P.10. On the very same day, he prepared spot map on the information of Mohan Singh Dangi, Ex. P.20. On 13-5-2008, the dead body of unknown woman was buried

near bridge situated near cremation ground in the presence of witnesses. The burial panchnama is Ex. P.21. After receipt of short PM, he registered FIR in Crime No. 22/2008 for offence under Sections 302,201 of IPC, Ex. P.22. On 15-5-2008, Omprakash Pateria had identified the dead body from its photo and cloths. On the very same day, the dead body was taken out and its panchnama is Ex. P.2. Thereafter the dead body was handed over to Omprakash Pateria vide supurdaginama Ex. P.3. The identification memo on the basis of cloths is Ex. P.17. The cloths were resealed and memo is Ex. P.18. During investigation, he recorded the statements of witnesses. On 26-5-2008, the Appellant Vivek Kapil was arrested from Itarsi Railway Station, vide arrest memo Ex. P. 14. On his disclosure, Alto Car bearing registration No. UP-93-P-0596 was seized. The memorandum is Ex. P.15 and seizure of Car is Ex. P.16. On 28-5-2008, the Appellant Kiran Kapil was arrested and he recorded her memorandum, Ex. P.9. On 28-5-2009, he seized white ladies bag, one copper ring, one diary of the deceased vide seizure memo P.10. On 28-5-2008, he had recovered one small girl from the possession of accused Smt. Kiran Kapil and handed over the same to the complainant Omprakash Pateria, vide supurdaginama Ex. P.4. On 13-6-2008, he had send sealed hyoid bone and salt solution to Forensic Medico-legal Institute Gandhi Medical College, Bhopal, which is Ex. P.23, and Viscera, cloths, salt solution pubic hairs, Vaginal slide of the deceased were sent to R.F.S.L., Gwalior vide

draft Ex. P.24. The report received from Medico-legal Institute Bhopal is Ex. P.25 and F.S.L. report is Ex. P.26. Ladies purse is Article A14, Copper ring is A15, Diary is A16, the photographs of dead body of deceased are Article A2 to A13. This witness was cross-examined. In cross-examination, he stated that he had recorded merg statements of Mahendra Dangi, Nathuram Kumhar and Hukum Singh. The Lash Panchnama of the deceased Ex. P.12 was already received prior to sending the dead body for post-mortem. He stated that medical of Vivek was not got done after his arrest. He denied that Omprakash Pateria remained in his constant touch and was instructing him. He denied that Omprakash Pateria had informed him about the Vasectomy Operation of Vivek and that is why, he did not go for DNA test of Vivek. The seized articles were kept in the Malkhana of Chirulla Police Station from 13-5-2008 till 13-6-2008. Entry with regard to deposit and taking out of the goods is made in the Malkhana Register. He had not prepared the spot map of the place where the dead body of the deceased was buried. The said place is a part of cremation ground and is 30 mt.s away from Police Station. Earlier he had got the photograph identified. He admitted that Alok Dubey and Ashok Dubey are brothers and had come to Police Station Chirulla on 15-5-2008. Certain omissions and contradictions in the evidence of the witnesses were got proved. He further stated that during the investigation, he had not received any information that Vivek had filed an application for restitution of

conjugal rights. He denied that Vivek was arrested on 24-5-2008 from Jhansi and accordingly on 24-5-2008, information was given by telegram to S.P. and Senior Police Officers. He had received an information from the informer that Vivek is in Itarsi. The information was received on 25-5-2008. In the evening of 25-5-2008 itself, he had left for Itarsi by private vehicle. At Itarsi, Vivek was got identified from another informer. Omprakash Pateria had not gone with him to Itarsi. He had arrested Vivek from Railway Station Itarsi at about 3.25 P.M. He had not given any information to local police. **He admitted that Hemant Sonia who is the contractor of Itarsi Station Taxi Stand had informed that Car is parked there from 15-5-2008.** The car was registered in the name of deceased Anuja. He denied that the car was recovered from Jhansi. He denied that he had not gone to Jhansi. He further stated that Appellant Kiran Kapil was not known to him. He had received an information that Kiran Kapil is likely to come and accordingly, he went from Police Station Chirulla. He had received the information about 3:30 A.M. from the informer. He had noted his departure in rojnamcha. He had gone on his official vehicle. Only police force had gone. They took about 35 minutes to reach Jhansi from Chirulla. He did not report his arrival in Kotwali, Jhansi. He had arrested Kiran Kapil outside the Jhansi Railway Station. She was not having any bag with her except the minor daughter of Anuja. She was also not having any railway ticket. He denied that the Appellant Kiran Kapil was not with minor

girl. He denied that he did not go to Railway Station. He had recorded the memorandum of Kiran Kapil at a place which is approximately 2 Kms away from Railway Colony. He had seized the articles from the house of Kiran Kapil at about 7:30 A.M. He had called Omprakash Pateria for handing over the custody of minor girl. He had called Omprakash Pateria by informing him on phone. He was already having mobile number of Omprakash Pateria. The house of Kiran Kapil was locked which was unlocked by her. He denied for want of knowledge as to whether the husband and other children of Kiran Kapil were also residing in the same house or not? He admitted that the territorial jurisdiction of Chirulla Police Station is upto border of Jhansi. He admitted that he had not seized the driving license of Vivek.

47. Guddi (D.W.1) has stated that She was intending to purchase the plot of Anuja. Akhilesh Sharma was the broker who had come along with Alok Dubey. However, there is nothing on record that this witness had purchased plot or had executed any document for purchasing the plot. No document has been filed to show that her husband who was working in Railway Department had also given any information to his department, with regard to his intention to purchase plot. Although She has stated that they had agreed to purchase the plot for a consideration amount of Rs. 4 Lac, but nothing has been placed on record, to show that this witness was having money for purchasing the plot, except her verbal submission.

48. Komal Singh (D.W.2) is Sub-Inspector posted in the office of Deputy Inspector General of Police, Jhansi and produced one telegram which was sent by one Rashid Khan mentioning that Vivek has been taken away by M.P. Police at 8:00 from Railway Station Jhansi, Ex. D.7.

49. Janaki (D.W.3) has stated that in the year 2008, She was sitting with Kiran Kapil. Vivek came to Kiran Kapil and informed that Anuja is not well therefore, he is going to her parental home. Vivek had come from Mahoba. Thereafter, Vivek came and informed that Anuja has expired. Thereafter, this witness and the Appellants went to Parental home of Anuja. Thereafter, for 11 days, puja was performed in the house and Vivek had also gone to Allahabad. Since, this witness was pregnant therefore, She went to her matrimonial home. It is not out of place to mention here that this witness was cleaning utensils in the house of various persons. In cross-examination, She denied that She is residing in the house of one Tiwari whose quarter no. is 217. She further stated that She was residing in a room with tin shed. She denied that She was not residing in the servant quarter constructed behind the house of Tiwari ji. She admitted that since She was working in the house of Tiwari ji therefore, She was residing in his house. She was not working in the house of the Appellants.

50. This case is based on Circumstantial Evidence and the Trial Court had framed following Circumstances against the Appellants :

(a) The dead body of one unknown lady was recovered on 13-5-2008 which was subsequently found to be that of Anuja?

(b) The death of the deceased Anuja was homicidal in nature.

(c) The death had taken place in otherwise than under normal circumstances within seven years of her marriage.

(d) The Appellants were demanding dowry

(e) The deceased was seen for the last time in the Company of the Appellants.

(f) The Appellants had made Extra Judicial Confession.

(g) The articles belonging to the deceased were recovered from the possession of the Appellants.

(h) The minor girl of the deceased was recovered from the Appellant Kiran Kapil.

(i) The Appellants absconded after the incident.

(j) False Explanation given by the Appellants.

51. Although the Trial Court has given a finding that for the last time, the deceased Anuja was in the company of the Appellants, but inspite of that finding, the Trial Court acquitted the Appellants for offence under Section 302 of IPC and convicted them under Section 304-B of IPC. The circumstance of Extra Judicial Confession was also disbelieved.

52. This Court shall now consider the circumstances which have been alleged by the Prosecution. However, before doing so, this Court would like to consider the law governing the field of

circumstantial evidence.

53. The Supreme Court in the case of **Sharad Birdhichand Sarda v. State of Maharashtra,** reported in **(1984) 4 SCC 116** has held as under :

> **153.** A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:
> (*1*) the circumstances from which the conclusion of guilt is to be drawn should be fully established.
> It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade* v. *State of Maharashtra* where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]
> "Certainly, it is a primary principle that the accused *must* be and not merely *may* be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."
> (*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,
> (*4*) they should exclude every possible hypothesis except the one to be proved, and
> (*5*) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

54. The Supreme Court in the case of **Pudhu Raja v. State,** reported in **(2012) 11 SCC 196** has held as under :

> **15.** In a case of circumstantial evidence, the prosecution must establish each instance of incriminating circumstance by way of reliable and clinching evidence, and the

> circumstances so proved, must form a complete chain of events, on the basis of which, no conclusion other than one of guilt of the accused can be reached. Undoubtedly, suspicion, however grave it may be, can never be treated as a substitute for proof. While dealing with a case of circumstantial evidence, the court must take utmost precaution whilst finding an accused guilty solely on the basis of the circumstances proved before it.

55. The Supreme Court in the case of **Ram Singh v. Sonia,** reported in **(2007) 3 SCC 1** has held as under :

> **39.** The principle for basing a conviction on the basis of circumstantial evidence has been indicated in a number of decisions of this Court and the law is well settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. This Court has clearly sounded a note of caution that in a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in the chain of events have been established clearly and such completed chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. It has also been indicated that when the important link goes, the chain of circumstances gets snapped and the other circumstances cannot in any manner, establish the guilt of the accused beyond all reasonable doubts. It has been held that the court has to be watchful and avoid the danger of allowing the suspicion to make the place of legal proof, for sometimes unconsciously it may happen to be a short step between moral certainty and legal proof. It has been indicated by this Court that there is a long mental distance between "may be true" and "must be true" and the same divides conjectures from sure conclusions.

56. The Supreme Court in the case of **Rumi Bora Dutta v. State of Assam,** reported in **(2013) 7 SCC 417** has held as under :

> **11.** More than six decades back this Court in *Hanumant*

Govind Nargundkar v. *State of M.P.* had laid down the principles as under: (AIR pp. 345-46, para 10)

> "*10.* … It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in 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, 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."

57. The Supreme Court in the case of **Inspector of Police v. John David, (2011) 5 SCC 509** has held as under :

> ***Case on circumstantial evidence***
>
> **33.** The principle for basing a conviction on the edifice of circumstantial evidence has also been indicated in a number of decisions of this Court and the law is well settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion that could be drawn is the guilt of the accused and that no other hypothesis against the guilt is possible.
>
> **34.** This Court has clearly sounded a note of caution that in a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in the chain of events have been established clearly and such completed chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. It has also been indicated that when the important link goes, the chain of circumstances gets snapped and the other circumstances cannot in any manner, establish the guilt of the accused beyond all reasonable doubts. It has been held that the court has to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof. It has been indicated by this

Court that there is a long mental distance between "may be true" and "must be true" and the same divides conjectures from sure conclusions.

35. This Court in *State of U.P.* v. *Ram Balak* had dealt with the whole law relating to circumstantial evidence in the following terms: (SCC pp. 555-57, para 11)

"*11*. '*9*. 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 incompatible with the innocence of the accused or the guilt of any other person. (See *Hukam Singh* v. *State of Rajasthan*, *Eradu* v. *State of Hyderabad*, *Earabhadrappa* v. *State of Karnataka*, *State of U.P.* v. *Sukhbasi*, *Balwinder Singh* v. *State of Punjab* and *Ashok Kumar Chatterjee* v. *State of M.P.*) 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* it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and [bring home the offences] beyond any reasonable doubt.

10. We may also make a reference to a decision of this Court in *C. Chenga Reddy* v. *State of A.P.* wherein it has been observed thus: (SCC pp. 206-07, para 21)

"*21*. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in 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."

11. In *Padala Veera Reddy* v. *State of A.P.* it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests: (SCC pp. 710-11, para 10)

"(*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 the 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."

* * *

16. A reference may be made to a later decision in *Sharad Birdhichand Sarda* v. *State of Maharashtra*. Therein, while dealing with circumstantial evidence, it has been held that the 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 this Court, before conviction could be based on circumstantial evidence, must be fully established. They are: (SCC p. 185, para 153)

(*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;

(*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;

(*4*) they should exclude every possible hypothesis except the one to be proved; and

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

These aspects were highlighted in *State of Rajasthan* v. *Raja Ram*, at SCC pp. 187-90, paras 9-16 and *State of Haryana* v. *Jagbir Singh*."

The dead body of one unknown lady was recovered on 13-5-2008 which was subsequently found to be that of Anuja?

58. The Appellants have not challenged the circumstance of recovery of dead body of an unknown lady on 13-5-2008 which was subsequently, found to that of deceased Anjua. The identification of the dead body by Omprakash Pateria, initially by photographs and her cloths, and subsequently after the dead body was dug out of the earth has not been challenged. Even the death of Anuja has not been disputed by the Appellants. Thus, the first circumstance of recovery of dead body of one unknown lady on 13-5-2008 and subsequently, the identification of the dead body is held to be proved.

The death of the deceased Anuja was homicidal in nature

59. The second circumstance is the homicidal nature of death of Anuja. Although the Appellants had tried to demolish the evidence of Dr. S.K. Verma (P.W.7) by cross-examining him on the question of nature of death but in view of abrasions on the neck, Cyanosis on lips and face as well as the FSL report, Ex. P. 26 that no poison was found in the viscera of the deceased. It is submitted by the Counsel for the Appellant Smt. Kiran Kapil, that hyoid bone was found intact, therefore, it is clear that the cause of death of the deceased was not throttling.

60. Considered the submissions made by the Counsel for the Appellants.

61. The Supreme Court in the case of **Ponnusamy v. State of T.N.,** reported in **(2008) 5 SCC 587** has held as under :

> **23.** It is true that the autopsy surgeon, PW 17, did not find

any fracture on the hyoid bone. Existence of such a fracture leads to a conclusive proof of strangulation but absence thereof does not prove contra. In *Taylor's Principles and Practice of Medical Jurisprudence*, 13th Edn., pp. 307-08, it is stated:

> "The hyoid bone is 'U' shaped and composed of five parts: the body, two greater and two lesser horns. It is relatively protected, lying at the root of the tongue where the body is difficult to feel. The greater horn, which can be felt more easily, lies behind the front part of the strip muscles (sternomastoid), 3 cm below the angle of the lower jaw and 1.5 cm from the midline. The bone ossifies from six centres, a pair for the body and one for each horn. The greater horns are, in early life, connected to the body by cartilage but after middle life they are usually united by bone. The lesser horns are situated close to the junction of the greater horns in the body. They are connected to the body of the bone by fibrous tissue and occasionally to the greater horns by synovial joints which usually persist throughout life but occasionally become ankylosed.
>
> Our own findings suggest that although the hardening of the bone is related to age there can be considerable variation and elderly people sometimes show only slight ossification.
>
> From the above consideration of the anatomy it will be appreciated that while injuries to the body are unlikely, a grip high up on the neck may readily produce fractures of the greater horns. Sometimes it would appear that the local pressure from the thumb causes a fracture on one side only.
>
> While the amount of force in manual strangulation would often appear to be greatly in excess of that required to cause death, the application of such force, as evidenced by extensive external and soft tissue injuries, make it unusual to find fractures of the hyoid bone in a person under the age of 40 years.
>
> As stated, even in older people in which ossification is incomplete, considerable violence may leave this bone intact. This view is confirmed by Green. He gives interesting figures: in 34 cases of manual strangulation the hyoid was fractured in 12 (35%) as compared with the classic paper of Gonzales who reported four fractures in 24 cases. The figures in strangulation by ligature show that the percentage of hyoid fractures was 13. Our own figures are similar to those of

Green."

24. In *Journal of Forensic Sciences*, Vol. 41 under the title — Fracture of the Hyoid Bone in Strangulation: Comparison of Fractured and Unfractured Hyoids from Victims of Strangulation, it is stated:

> "The hyoid is the U-shaped bone of the neck that is fractured in one-third of all homicides by strangulation. On this basis, post-mortem detection of hyoid fracture is relevant to the diagnosis of strangulation. However, since many cases lack a hyoid fracture, the absence of this finding does not exclude strangulation as a cause of death. The reasons why some hyoids fracture and others do not may relate to the nature and magnitude of force applied to the neck, age of the victim, nature of the instrument (ligature or hands) used to strangle, and intrinsic anatomic features of the hyoid bone. We compared the case profiles and xeroradiographic appearance of the hyoids of 20 victims of homicidal strangulation with and without hyoid fracture (n = 10, each). The fractured hyoids occurred in older victims of strangulation (39 ± 14 years) when compared to the victims with unfractured hyoids (30 ± 10 years). The age dependency of hyoid fracture correlated with the degree of ossification or fusion of the hyoid synchondroses. The hyoid was fused in older victims of strangulation (41 ± 12 years) whereas the unfused hyoids were found in the younger victims (28 ± 10 years). In addition, the hyoid bone was ossified or fused in 70% of all fractured hyoids, but, only 30% of the unfractured hyoids were fused. The shape of the hyoid bone was also found to differentiate fractured and unfractured hyoids. Fractured hyoids were longer in the anterior-posterior plane and were more steeply sloping when compared with unfractured hyoids. These data indicate that hyoids of strangulation victims, with and without fracture, are distinguished by various indices of shape and rigidity. On this basis, it may be possible to explain why some victims of strangulation do not have fractured hyoid bones."

62. Accordingly, this Court is of the considered opinion, that the prosecution has succeeded in proving the fact that the death of Anuja was homicidal in nature.

The death had taken place in otherwise than under normal circumstances within seven years of her marriage.

63. In view of the evidence of Dr. S.K. Verma (P.W.7) and the F.S.L. report, Ex. P.26, it is held that the death of the deceased Anuja was homicidal in nature and in fact She was killed.

The Appellants were demanding dowry

64. This Court has already come to a conclusion that the death of Anuja was homicidal, therefore, before considering this circumstance, this Court would like to consider other circumstance as to whether the deceased Anuja was killed by the Appellants or by anybody else. Therefore, this circumstance would be considered in detail only if this Court comes to a conclusion that the Appellants have not killed the deceased.

The deceased was seen for the last time in the Company of the Appellants.

65. Omprakash Pateria (P.W.1), Asha Pateria (P.W.2) and Tanuja Pateria (P.W.6) have stated that since, the deceased Anuja was being harassed by the Appellants, therefore, She was residing in her parental home for the last 8 months. On 2-5-2008, the Appellants came to their house to take Anuja with them. Accordingly, She was sent along with the Appellants. On 10-5-2008, the Appellant Vivek came to their house along with Anuja and her minor daughter and left her in her parental home as Vivek was inclined to see his mother, i.e., the Appellant Kiran Kapil. Thereafter, on 12-5-2008, the Appellants

took the deceased Anuja and her daughter with them and in the afternoon of 13-5-2008, Vivek informed Omprakash Pateria that Anuja is missing from the evening of 12-5-2008.

66. It is submitted by the Counsel for the Appellant Smt. Kiran Kapil that in fact Anuja was residing in her parental home for the last 8 months, and it is incorrect to say that the Appellants had taken the deceased Anuja with them on 2-5-2008 and thereafter left her on 10-5-2008 and again took her with them on 12-5-2008. It is submitted that all the witnesses are related and interested witnesses. In fact it appears that Anuja left her parental home on her own as She was having some affair with Alok Dubey and thereafter, her dead body was found. It is further submitted that a suggestion was also given to Asha Pateria (P.W.2) that the deceased Anuja after leaving her parental home, had stayed in a Motel in Datia, but fairly conceded that no evidence was led to prove that the deceased Anuja had stayed in a Motel in Datia. It is further submitted that since, the Appellant Vivek was posted in Mahoba therefore, he was not aware of the death of Anuja. However, during the course of arguments, it is submitted by Appellant Vivek that at the relevant time, he was not on his duty and was on sick Leave. During the course of arguments, it is submitted by the Appellant Vivek Kapil, that in the month of September 2007, he was transferred from Dabra to Mahoba, but he did not join at Mahoba and was all the time busy in getting his transfer order cancelled. Thereafter, his transfer order was cancelled but again in

the month of March 2008, he was transferred to Mahoba and accordingly in the same month itself, he joined at Mahoba. However, he submitted that since, he had not received the salary for the month of March and April 2008, therefore, he decided not to go on work, till his pay his paid and accordingly, he did not go to the office in the month of May 2008, and he was staying along with his parents in Jhansi. Although, the Appellant Vivek Kapil was warned again and again that he must think again and again before making submissions, because he should not submit the things which are not on record as certain submissions may go against him and no one can be compelled to be a witness against himself. However, instead of repeated warnings, on certain submissions he did not maintain silence.

67. Heard the learned Counsel for the Appellant Smt. Kiran Kapil and the Appellant Vivek Kapil.

68. It is true that Omprakash Pateria (P.W.1), Smt.Asha Pateria (P.W.2) and Tanuja Pateria (P.W.6) are parents and sister of the deceased, but these persons are the witnesses of internal family dispute as well as movements of the deceased Anuja along with Appellants. Under these circumstances, the presence of Independent Witnesses is remote. Even otherwise, the evidence of a witness cannot be discarded merely on the ground that he is "Related Witness" unless and until it is proved that he is "Interested Witness".

69. The Supreme Court in the case of **Raju Vs. State of T.N. Reported in (2012) 12 SCC 701** has held as under :

22. In light of the Constitution Bench decision in *State of Bihar* v. *Basawan Singh*, the view that a "natural witness" or "the only possible eyewitness" cannot be an interested witness may not be, with respect, correct. In *Basawan Singh*, a trap witness (who would be a natural eyewitness) was considered an interested witness since he was "concerned in the success of the trap". The Constitution Bench held: (AIR p. 506, para 15)

"*15.* … The correct rule is this: if any of the witnesses are accomplices who are *particeps criminis* in respect of the actual crime charged, their evidence must be treated as the evidence of accomplices is treated; if they are not accomplices but are partisan or interested witnesses, who are concerned in the success of the trap, their evidence must be tested in the same way as other interested evidence is tested by the application of diverse considerations which must vary from case to case, and in a proper case, the court may even look for independent corroboration before convicting the accused person."

23. The wife of a deceased (as in *Kalki*), undoubtedly related to the victim, would be interested in seeing the accused person punished—in fact, she would be the most interested in seeing the accused person punished. It can hardly be said that she is not an interested witness. The view expressed in *Kalki* is too narrow and generalised and needs a rethink.

24. For the time being, we are concerned with four categories of witnesses—a third party disinterested and unrelated witness (such as a bystander or passer-by); a third party interested witness (such as a trap witness); a related and therefore an interested witness (such as the wife of the victim) having an interest in seeing that the accused is punished; a related and therefore an interested witness (such as the wife or brother of the victim) having an interest in seeing the accused punished and also having some enmity with the accused. But, more than the categorisation of a witness, the issue really is one of appreciation of the evidence of a witness. A court should examine the evidence of a related and interested witness having an interest in seeing the accused punished and also having some enmity with the accused with greater care and caution than the evidence of a third party disinterested and unrelated witness. This is all that is expected and required.

25. In the present case, PW 5 Srinivasan is not only a related and interested witness, but also someone who has an enmity with the Appellants. His evidence, therefore,

needs to be scrutinised with great care and caution.

26. In *Dalip Singh* v. *State of Punjab*this Court observed, without any generalisation, that a related witness would ordinarily speak the truth, but in the case of an enmity there may be a tendency to drag in an innocent person as an accused—each case has to be considered on its own facts. This is what this Court had to say: (AIR p. 366, para 26)

"*26.* A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

27. How the evidence of such a witness should be looked at was again considered in *Darya Singh* v. *State of Punjab*. This Court was of the opinion that a related or interested witness may not be hostile to the assailant, but if he is, then his evidence must be examined very carefully and all the infirmities taken into account. It was observed that where the witness shares the hostility of the victim against the assailant, it would be unlikely that he would not name the real assailant but would substitute the real assailant with the "enemy" of the victim. This is what this Court said: (AIR p. 331, para 6)

"*6.* There can be no doubt that in a murder case when evidence is given by near relatives of the victim and the murder is alleged to have been committed by the enemy of the family, criminal courts must examine the evidence of the interested witnesses, like the relatives of the victim, very carefully. But a person may be interested in the victim, being his relation or otherwise, and may not necessarily be hostile to the accused. In that case, the fact that the witness was related to the victim or was his friend, may not necessarily introduce any infirmity in his evidence. But

where the witness is a close relation of the victim and is shown to share the victim's hostility to his assailant, that naturally makes it necessary for the criminal courts to examine the evidence given by such witness very carefully and scrutinise all the infirmities in that evidence before deciding to act upon it. … [I]t may be relevant to remember that though the witness is hostile to the assailant, it is not likely that he would deliberately omit to name the real assailant and substitute in his place the name of the enemy of the family out of malice. The desire to punish the victim would be so powerful in his mind that he would unhesitatingly name the real assailant and would not think of substituting in his place the enemy of the family though he was not concerned with the assault. It is not improbable that in giving evidence, such a witness may name the real assailant and may add other persons out of malice and enmity and that is a factor which has to be borne in mind in appreciating the evidence of interested witnesses. On principle, however, it is difficult to accept the plea that if a witness is shown to be a relative of the deceased and it is also shown that he shared the hostility of the victim towards the assailant, his evidence can never be accepted unless it is corroborated on material particulars."

28. More recently, in *Waman* v. *State of Maharashtra* this Court dealt with the case of a related witness (though not a witness inimical to the assailant) and while referring to and relying upon *Sarwan Singh* v. *State of Punjab*, *Balraje* v. *State of Maharashtra*, *Prahalad Patel* v. *State of M.P.*, *Israr* v. *State of U.P.*, *S. Sudershan Reddy* v. *State of A.P.*, *State of U.P.* v. *Naresh*, *Jarnail Singh* v. *State of Punjab* and *Vishnu* v. *State of Rajasthan* it was held: (*Waman case*, SCC p. 302, para 20)

"*20.* It is clear that merely because the witnesses are related to the complainant or the deceased, their evidence cannot be thrown out. If their evidence is found to be consistent and true, the fact of being a relative cannot by itself discredit their evidence. In other words, the relationship is not a factor to affect the credibility of a witness and the courts have to scrutinise their evidence meticulously with a little care."

29. The sum and substance is that the evidence of a related or interested witness should be meticulously and carefully examined. In a case where the related and interested witness may have some enmity with the assailant, the bar would need to be raised and the evidence of the witness would have to be examined by applying a standard of

discerning scrutiny. However, this is only a rule of prudence and not one of law, as held in *Dalip Singh* and pithily reiterated in *Sarwan Singh* in the following words: (*Sarwan Singh case*, SCC p. 376, para 10)

"*10.* … The evidence of an interested witness does not suffer from any infirmity as such, but the courts require as a rule of prudence, not as a rule of law, that the evidence of such witnesses should be scrutinised with a little care. Once that approach is made and the court is satisfied that the evidence of interested witnesses have a ring of truth such evidence could be relied upon even without corroboration."

70. The Supreme Court in the case of **Jodhan v. State of M.P., (2015) 11 SCC 52** has held as under :

24. First, we shall deal with the credibility of related witnesses. In *Dalip Singh* v. *State of Punjab*, it has been observed thus: (AIR p. 366, para 25)

"*25*. We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in *Rameshwar* v. *State of Rajasthan*."

In the said case, it has also been further observed: (AIR p. 366, para 26)

"*26*. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth."

25. In *Hari Obula Reddy* v. *State of A.P.*, the Court has ruled that evidence of interested witnesses per se cannot be said to be unreliable evidence. Partisanship by itself is not a

valid ground for discrediting or discarding sole testimony. We may fruitfully reproduce a passage from the said authority: (SCC pp. 683-84, para 13)

"*13*. … an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon."

26. The principles that have been stated in number of decisions are to the effect that evidence of an interested witness can be relied upon if it is found to be trustworthy and credible. Needless to say, a testimony, if after careful scrutiny is found as unreliable and improbable or suspicious it ought to be rejected. That apart, when a witness has a motive or makes false implication, the court before relying upon his testimony should seek corroboration in regard to material particulars.

71. The Supreme Court in the case of **Yogesh Singh v. Mahabeer Singh, (2017) 11 SCC 195** has held as under :

24. On the issue of appreciation of evidence of interested witnesses, *Dalip Singh* v. *State of Punjab* is one of the earliest cases on the point. In that case, it was held as follows: (AIR p. 366, para 26)

"*26*. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth."

25. Similarly, in *Piara Singh* v. *State of Punjab*, this Court held: (SCC p. 455, para 4)

"*4*. … It is well settled that the evidence of interested or

inimical witnesses is to be scrutinised with care but cannot be rejected merely on the ground of being a partisan evidence. If on a perusal of the evidence the Court is satisfied that the evidence is creditworthy there is no bar in the Court relying on the said evidence."

26. In *Hari Obula Reddy* v. *State of A.P.*, a three-Judge Bench of this Court observed: (SCC pp. 683-84, para 13)

"*13*. … it is well settled that interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon."

27. Again, in *Ramashish Rai* v. *Jagdish Singh*, the following observations were made by this Court: (SCC p. 501, para 7)

"*7*. … The requirement of law is that the testimony of inimical witnesses has to be considered with caution. If otherwise the witnesses are .true and reliable their testimony cannot be thrown out on the threshold by branding them as inimical witnesses. By now, it is well-settled principle of law that enmity is a double-edged sword. It can be a ground for false implication. It also can be a ground for assault. Therefore, a duty is cast upon the court to examine the testimony of inimical witnesses with due caution and diligence."

28. A survey of the judicial pronouncements of this Court on this point leads to the inescapable conclusion that the evidence of a closely related witness is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon. (See *Anil Rai* v. *State of Bihar*, *State of U.P.* v. *Jagdeo*, *Bhagaloo Lodh* v. *State of U.P.*, *Dahari* v. *State of U.P.*, *Raju* v. *State of T.N.*, *Gangabhavani* v. *Rayapati Venkat Reddy* and *Jodhan* v.

State of M.P.)

72. The Supreme Court in the case of **Rupinder Singh Sandhu v. State of Punjab**, reported in **(2018) 16 SCC 475** has held as under :

> 50. The fact that PWs 3 and 4 are related to the deceased Gurnam Singh is not in dispute. The existence of such relationship by itself does not render the evidence of PWs 3 and 4 untrustworthy. This Court has repeatedly held so and also held that the related witnesses are less likely to implicate innocent persons exonerating the real culprits.

73. The Supreme Court in the case of **Shamim Vs. State (NCT of Delhi)** reported in **(2018) 10 SCC 509** has held as under :

> 9. In a criminal trial, normally the evidence of the wife, husband, son or daughter of the deceased, is given great weightage on the principle that there is no reason for them not to speak the truth and shield the real culprit.....

74. The Supreme Court in the case of **Rizan v. State of Chhattisgarh**, reported in **(2003) 2 SCC 661** has held as under :

> **6.** We shall first deal with the contention regarding interestedness of the witnesses for furthering the prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.
>
> **7**. In Dalip Singh v. State of Punjab it has been laid down as under: (AIR p. 366, para 26)
>
> "26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge

along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

8. The above decision has since been followed in Guli Chand v. State of Rajasthan in which Vadivelu Thevar v. State of Madras was also relied upon.

9. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh case in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed: (AIR p. 366, para 25)

"25. We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in — 'Rameshwar v. State of Rajasthan' (AIR at p. 59). We find, however, that it unfortunately still persists, if not in the judgments of the courts, at any rate in the arguments of counsel."

10. Again in Masalti v. State of U.P. this Court observed: (AIR pp. 209-10, para 14)

"But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. … The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hardand-fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

> **11.** To the same effect is the decision in State of Punjab v. Jagir Singh and Lehna v. State of Haryana.

75. Why a "related witness" would spare the real culprit in order to falsely implicate some innocent person? There is a difference between "related witness" and "interested witness". "Interested witness" is a witness who is vitally interested in conviction of a person due to previous enmity. The "Interested witness" has been defined by the Supreme Court in the case of **Mohd. Rojali Ali v. State of Assam,** reported in **(2019) 19 SCC 567** as under :

> 13. As regards the contention that all the eyewitnesses are close relatives of the deceased, it is by now well-settled that a related witness cannot be said to be an "interested" witness merely by virtue of being a relative of the victim. This Court has elucidated the difference between "interested" and "related" witnesses in a plethora of cases, stating that a witness may be called interested only when he or she derives some benefit from the result of a litigation, which in the context of a criminal case would mean that the witness has a direct or indirect interest in seeing the accused punished due to prior enmity or other reasons, and thus has a motive to falsely implicate the accused (for instance, see State of Rajasthan v. Kalki; Amit v. State of U.P.; and Gangabhavani v. Rayapati Venkat Reddy). Recently, this difference was reiterated in Ganapathi v. State of T.N., in the following terms, by referring to the three-Judge Bench decision in State of Rajasthan v. Kalki: (Ganapathi case, SCC p. 555, para 14)
>
> "14. "Related" is not equivalent to "interested". A witness may be called "interested" only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eyewitness in the circumstances of a case cannot be said to be "interested"."
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> **14.** In criminal cases, it is often the case that the offence is witnessed by a close relative of the victim, whose presence on the scene of the offence would be natural. The evidence of such a witness cannot automatically be discarded by

> labelling the witness as interested. Indeed, one of the earliest statements with respect to interested witnesses in criminal cases was made by this Court in Dalip Singh v. State of Punjab, wherein this Court observed: (AIR p. 366, para 26)
>
> "26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relative would be the last to screen the real culprit and falsely implicate an innocent person."
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> 15. In case of a related witness, the Court may not treat his or her testimony as inherently tainted, and needs to ensure only that the evidence is inherently reliable, probable, cogent and consistent. We may refer to the observations of this Court in Jayabalan v. State (UT of Pondicherry): (SCC p. 213, para 23)
>
> "23. We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim."

76. If the evidence of Omprakash Pateria (P.W.1) is considered then he had specifically stated that on 10-5-2008, the Appellant Vivek came along with Anuja and her daughter on a two wheeler and dropped Anuja and her daughter in the house of this witness, as Vivek was going to Jhansi to see his mother. Janaki (D.W.3) has stated that in the year 2008, She was sitting with Appellant Kiran Kapil and Vivek came from Mahoba and informed Kiran Kapil that the health condition of his wife Anuja is not good, therefore, he is

going to his in-laws house and after one hour, he came back and informed Kiran Kapil, that Anuja has expired and accordingly, all the three persons i.e., this witness, Vivek Kapil and Kiran Kapil went to the house of in-laws of Vivek Kapil. However, this witness further claimed that while She was in the house of in-laws of Vivek Kapil, She had covered her face. Thus, if the evidence of Janaki (D.W.3) is read along with the evidence of Omprakash Pateria (P.W.1), then it is clear that the allegation of Omprakash Pateria (P.W.1) to the effect that on 10-5-2008, Vivek Kapil had dropped Anuja on the ground that he was going to see his mother in Jhansi, gets some support from the evidence of defence witness Janaki. Further more, the submission of the Counsel for the Appellants that since, Appellant Vivek was in Mahoba and was not aware of the death of Anuja gets demolished by the evidence of Janaki (D.W.1).

77. Further, if the conduct of Vivek Kapil and Kiran Kapil is considered in the light of the evidence of Janaki (D.W.1) then it is clear that if they had visited the house of Omprakash Pateria (P.W.1) after the death of Anuja, then they should have participated in police proceedings. Even otherwise, no such suggestion of visiting their' house after the death of Anuja was given to either Omprakash Pateria (P.W.1), Smt. Asha Pateria (P.W.2) and Tanuja Pateria (P.W.6). Under these circumstances, the absence of Vivek Kapil from his job clearly indicates towards his guilty mind. Thus, the evidence of Omprakash Pateria (P.W.1), Smt. Asha Pateria (P.W.2) and Tanuja Pateria (P.W.6)

that the Appellants had taken Anuja and her minor daughter with them in the morning of 12-5-2008 is reliable and trustworthy.

78. Further more, the Appellants have not claimed that cremation was done by the Appellant Vivek Kapil. Why the husband did not perform the last rites of his wife has not been explained by the Appellants.

79. Although it is submitted by the Counsel for the Appellant Smt. Kiran Kapil as well as by the Appellant Vivek Kapil that he had never called Omprakash Pateria (P.W.1) to inform that the deceased Anuja is not with him from the evening of 12-5-2008, but in the light of evidence of Janaki (D.W.3), this evidence cannot be accepted. The Appellants themselves have led evidence that Vivek had come to Jhansi from Mahoba and informed his mother that the condition of Anuja is not good. But, Vivek has not explained as to how he came to know that the condition of Anuja was not good.

80. Further, why Vivek Kapil was on leave for no good reason during the relevant time. If he had taken leave on account of death of his wife as well as for performing her last rites, then he could have summoned his leave application to show that he was not on unauthorized absence from duty. But the Appellant Vivek Kapil, during the course of arguments, has admitted that he was on unauthorized absence in the month of May 2008.

81. The Appellant Vivek Kapil, during his arguments, had submitted that on 8-3-2008, he had celebrated the birthday of his

daughter along with his wife and child but also admitted that even on the said date, his wife Anuja was residing in her parental home. He further admitted that the relationship of his wife with her in-laws were not cordial but submitted that the relationships were not so strained so as to break them. Thus, it is clear that after the transfer of the Appellant Vivek Kapil from Dabra to Mahoba in the month of September, 2007, he did not join at Mahoba and was busy in getting his transfer order cancelled, and during this period he was residing along with her parents whereas the deceased Anuja was residing in her parental home. Thereafter, according to the Appellant Vivek Kapil, he was again transferred to Mahoba in the month of March 2008 and he joined his services in Mahoba. It is the case of the prosecution also, that on 2-5-2008, the Appellants had come to the parental home of the deceased and took the deceased and her daughter with them on the pretext that now the Appellant Vivek Kapil has been transferred to Mahoba, therefore, now the Appellant Vivek Kapil would reside with the deceased at Mahoba. It is also the case of the prosecution that on 10-5-2008, since, the Appellant Vivek Kapil was intending to see his mother, therefore, he left Anuja in her parental home. During the course of argument, the Appellant Vivek Kapil has already admitted strained relationship between his family members and his wife Anuja. Therefore, it is clear that the deceased Anuja was not inclined to go to her matrimonial house, therefore, She came back to her parental home on 10-5-2008. Again on 12-5-2008,

the Appellants came to her parental home, and took her with them and thereafter, her dead body was found.

82. Further, it is the case of the prosecution that the deceased Anuja was residing in her parental home for the last 8 months. If the submissions made by the Appellant Vivek Kapil that he was transferred to Mahoba in the month of September 2007, but he did not join at Mahoba and was residing along with his parents at Jhansi is considered, then it is clear that the deceased Anuja came back to her parental home in the month of September 2007 and thus, the case of the prosecution that She was residing in her parental home for the last months gets corroborated by the submissions made by the Appellant Vivek Kapil.

83. During the course of arguments, although the Appellant Vivek Kapil tried to suggest that he was trying for restitution of conjugal rights and had also filed a petition for the said purpose, but admitted that during the life time of Anuja, the said petition was dismissed in default. Therefore, it is clear that the Appellant Vivek Kapil, all the time was trying to create evidence against his wife Anuja in a pre planned manner.

84. The Supreme Court in the case of **Shailendra Rajdev Pasvan v. State of Gujarat,** reported in **(2020) 14 SCC 750** has held as under :

> **15.** Another important aspect to be considered in a case resting on circumstantial evidence is the lapse of time between the point when the accused and deceased were

seen together and when the deceased is found dead. It ought to be so minimal so as to exclude the possibility of any intervening event involving the death at the hands of some other person. In *Bodhraj* v. *State of J&K*, *Rambraksh* v. *State of Chhattisgarh*, *Anjan Kumar Sarma* v. *State of Assam* following principle of law, in this regard, has been enunciated: (*Shailendra Rajdev Pasvan case*, SCC OnLine Guj para 16)

"*16*. …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."

85. The Supreme Court in the case of **Ashok v. State of Maharashtra,** reported in **(2015) 4 SCC 393** has held as under :

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

Here another judgment in *Harivadan Babubhai Patel* v. *State of Gujarat*, would be relevant. In this case, this Court found that the time-gap between the death of the deceased and the time when he was last seen with the accused may also be relevant.

86. The Supreme Court in the case of **Mahavir Singh (Supra)** has held as under :

> **12.** Undoubtedly, it is a settled legal proposition that the last seen theory comes into play only in a case where the time-gap between the point of time when the accused and the deceased were seen alive and when the deceased was found dead (*sic* is small). Since the gap is very small there may not be any possibility that any person other than the accused may be the author of the crime.....

87. The Supreme Court in the case of **Jagroop Singh (Supra)** has held as under :

> **27.** Quite apart from the above, what is argued is that there is a long gap between the last seen and recovery of the dead body of the deceased. As per the material on record, the informant searched for his son in the village in the late evening and next day in the morning he went to the fields and the dead body was found. The post-mortem report indicates that the death had occurred within 24 hours. Thus, the duration is not so long as to defeat or frustrate the version of the prosecution. Therefore, there can be no trace of doubt that the deceased was last seen in the company of the accused persons.

88. The Supreme Court in the case of **Ponnusamy (Supra)** has held as under :

> **21.** We have to consider the factual background of the present case in the light of the relationship between the parties. If his wife was found missing, ordinarily, the husband would search for her. If she has died in an unnatural situation when she was in his company, he is expected to offer an explanation therefor. Lack of such explanation on the part of the appellant itself would be a circumstantial evidence against him.
>
> **22.** In *Trimukh Maroti Kirkan* v. *State of Maharashtra* it was observed: (SCC p. 694, para 22)
>
> > "*22*. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the

> husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime."
> (See also *Raj Kumar Prasad Tamarkar* v. *State of Bihar.*)

89. If the evidence of the witnesses is considered in the light of the theory of Last Seen Together, then it is clear that the Appellants had taken away Anuja with them on 12-5-2008 in the morning hours at about 7-8 A.M.. The dead body of an unknown lady was noticed on 13-5-2008 at 7:30 A.M. The post-mortem, Ex. P.7 was conducted at 15:30 and the duration of death was found to be within 24 hours. Thus, it is clear that the death of Anuja must have taken place some time in the afternoon of 12-5-2008 or thereafter. Since, Anuja was taken by the Appellants on 12-5-2008 at 7-8:00 in the morning and She died on 12-5-2008 itself and her abandoned dead body was found in the morning of 13-5-2008, therefore, the time gap between the last seen together and time of death is very short, therefore, the burden is on the Appellants to explain as to how Anuja died a homicidal death. Section 106 of Evidence Act reads as under :

> **106. Burden of proving fact especially within knowledge.** —When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

90. The Supreme Court in the case of **Nagendra Sah v. State of Bihar,** reported in **(2021) 10 SCC 725** has held as under :

> **20.** Now we come to the argument of the prosecution based on Section 106 of the Evidence Act. Section 106 reads thus:
> "**106. Burden of proving fact especially within**

knowledge.—When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations

(*a*) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(*b*) *A* is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him."

21. Under Section 101 of the Evidence Act, whoever desires any court to give a judgment as to a liability dependent on the existence of facts, he must prove that those facts exist. Therefore, the burden is always on the prosecution to bring home the guilt of the accused beyond a reasonable doubt. Thus, Section 106 constitutes an exception to Section 101. On the issue of applicability of Section 106 of the Evidence Act, there is a classic decision of this Court in *Shambu Nath Mehra* v. *State of Ajmer* which has stood the test of time. The relevant part of the said decision reads thus : (AIR p. 406, paras 10-13)

"*10*. Section 106 is an exception to Section 101. Section 101 lays down the general rule about the burden of proof.

'**101. Burden of proof**.—Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist'.

Illustration (*a*) to Section 106 of the Evidence Act says—

(*a*) *A* desires a court to give judgment that *B* shall be punished for a crime which *A* says *B* has committed.

A must prove that *B* has committed the crime'.

11. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are **pre-eminently** or **exceptionally** *within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could*

know better than he whether he did or did not. It is evident that that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are *Attygalle* v. *R.* and *Seneviratne* v. *R.*

12. Illustration (*b*) to Section 106 has obvious reference to a very special type of case, namely, to offences under Sections 112 and 113 of the Indian Railways Act for travelling or attempting to travel without a pass or ticket or with an insufficient pass, etc. Now if a passenger is seen in a railway carriage, or at the ticket barrier, and is unable to produce a ticket or explain his presence, it would obviously be impossible in most cases for the railway to prove, or even with due diligence to find out, where he came from and where he is going and whether or not he purchased a ticket. On the other hand, it would be comparatively simple for the passenger either to produce his pass or ticket or, in the case of loss or of some other valid explanation, to set it out; and so far as proof is concerned, it would be easier for him to prove the substance of his explanation than for the State to establish its falsity.

13. We recognise that an illustration does not exhaust the full content of the section which it illustrates but equally it can neither curtail nor expand its ambit; and if knowledge of certain facts is as much available to the prosecution, should it choose to exercise due diligence, as to the accused, the facts cannot be said to be "especially" within the knowledge of the accused. This is a section which must be considered in a commonsense way; and the balance of convenience and the disproportion of the labour that would be involved in finding out and proving certain facts balanced against the triviality of the issue at stake and the ease with which the accused could prove them, are all matters that must be taken into consideration. The section cannot be used to undermine the well-established rule of law that, save in a very exceptional class of case, the burden is on the prosecution and never shifts."

(emphasis supplied)

22. Thus, Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused. When the accused fails to offer proper explanation about

the existence of said other facts, the court can always draw an appropriate inference.

23. When a case is resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of burden placed on him by virtue of Section 106 of the Evidence Act, such a failure may provide an additional link to the chain of circumstances. In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the failure of the accused to discharge the burden under Section 106 of the Evidence Act is not relevant at all. When the chain is not complete, falsity of the defence is no ground to convict the accused.

91. The Supreme Court in the case of **State of Rajasthan v. Thakur Singh,** reported in **(2014) 12 SCC 211** has held as under :

15. We find that the High Court has not at all considered the provisions of Section 106 of the Evidence Act, 1872. This section provides, inter alia, that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

16. Way back in *Shambhu Nath Mehra* v. *State of Ajmer* this Court dealt with the interpretation of Section 106 of the Evidence Act and held that the section is not intended to shift the burden of proof (in respect of a crime) on the accused but to take care of a situation where a fact is known only to the accused and it is well-nigh impossible or extremely difficult for the prosecution to prove that fact. It was said: (AIR p. 406, para 11)

"*11*. This [Section 101] lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are 'especially' within the knowledge of the accused and which he could prove without difficulty or inconvenience.

The word 'especially' stresses that. It means facts that are *pre-eminently* or *exceptionally* within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the

accused to prove that he did not commit the murder because who could know better than he whether he did or did not."

(emphasis supplied)

17. In a specific instance in *Trimukh Maroti Kirkan* v. *State of Maharashtra* this Court held that when the wife is injured in the dwelling home where the husband ordinarily resides, and the husband offers no explanation for the injuries to his wife, then the circumstances would indicate that the husband is responsible for the injuries. It was said: (SCC p. 694, para 22)

"*22*. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime."

18. Reliance was placed by this Court on *Ganeshlal* v. *State of Maharashtra* in which case the Appellant was prosecuted for the murder of his wife inside his house. Since the death had occurred in his custody, it was held that the Appellant was under an obligation to give an explanation for the cause of death in his statement under Section 313 of the Code of Criminal Procedure. A denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the Appellant was a prime accused in the commission of murder of his wife.

19. Similarly, in *Dnyaneshwar* v. *State of Maharashtra* this Court observed that since the deceased was murdered in her matrimonial home and the Appellant had not set up a case that the offence was committed by somebody else or that there was a possibility of an outsider committing the offence, it was for the husband to explain the grounds for the unnatural death of his wife.

20. In *Jagdish* v. *State of M.P.* this Court observed as follows: (SCC p. 503, para 22)

"*22*. … It bears repetition that the Appellant and the deceased family members were the only occupants of the room and it was therefore incumbent on the Appellant to have tendered some explanation in order

to avoid any suspicion as to his guilt."

21. More recently, in *Gian Chand* v. *State of Haryana* a large number of decisions of this Court were referred to and the interpretation given to Section 106 of the Evidence Act in *Shambhu Nath Mehra* was reiterated. One of the decisions cited in *Gian Chand* is that of *State of W.B.* v. *Mir Mohammad Omar* which gives a rather telling example explaining the principle behind Section 106 of the Evidence Act in the following words: (*Mir Mohammad Omar case*, SCC p. 393, para 35)

"*35*. During arguments we put a question to the learned Senior Counsel for the respondents based on a hypothetical illustration. If a boy is kidnapped from the lawful custody of his guardian in the sight of his people and the kidnappers disappeared with the prey, what would be the normal inference if the mangled dead body of the boy is recovered within a couple of hours from elsewhere. The query was made whether upon proof of the above facts an inference could be drawn that the kidnappers would have killed the boy. The learned Senior Counsel finally conceded that in such a case the inference is reasonably certain that the boy was killed by the kidnappers unless they explain otherwise."

22. The law, therefore, is quite well settled that the burden of proving the guilt of an accused is on the prosecution, but there may be certain facts pertaining to a crime that can be known only to the accused, or are virtually impossible for the prosecution to prove. These facts need to be explained by the accused and if he does not do so, then it is a strong circumstance pointing to his guilt based on those facts.

92. The Supreme Court in the case of **Kalu v. State of M.P.,** reported in **(2019) 10 SCC 211** has held as under :

11. The aforesaid factors leave us satisfied that the prosecution has been able to successfully establish a case for a homicidal death inside the house where the deceased resided with the Appellant alone. The conduct of the Appellant, in the aforesaid background, now becomes important. If the deceased had committed suicide, we find it strange that the Appellant laid her body on the floor after bringing her down but did not bother to inform anyone living near him much less the parents of the deceased. There is no evidence that the information was conveyed to

the family members of the deceased by the Appellant or at the behest of the Appellant. The Appellant was also not found to be at home when her family members came the next morning. The Appellant offered no defence whatsoever with regard to his absence the whole night and on the contrary PW 3 attempted to build up a case of alibi on behalf of the Appellant, when he himself had taken no such defence under Section 313 CrPC.

12. The occurrence had taken place in the rural environment in the middle of the month of October when it gets dark early. Normally in a rural environment people return home after dusk and life begins early with dawn. It is strange that the Appellant did not return home the whole night and was taken into custody on 21-10-1994.

13. In the circumstances, the onus clearly shifted on the Appellant to explain the circumstances and the manner in which the deceased met a homicidal death in the matrimonial home as it was a fact specifically and exclusive to his knowledge. It is not the case of the Appellant that there had been an intruder in the house at night. In *Hanumant* v. *State of M.P.*, it was observed: (AIR pp. 345-46, para 10)

> "*10*. … It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in 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, 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."

14. In *Tulshiram Sahadu Suryawanshi* v. *State of Maharashtra*, this Court observed: (SCC pp. 381-82, para 23)

> "*23*. It is settled law that presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable

position. The above position is strengthened in view of Section 114 of the Evidence Act, 1872. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process, the courts shall have regard to the common course of natural events, human conduct, etc. in addition to the facts of the case. In these circumstances, the principles embodied in Section 106 of the Evidence Act can also be utilised. We make it clear that this section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond 217reasonable doubt, but it would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. It is useful to quote the following observation in *State of W.B.* v. *Mir Mohammad Omar*: (SCC p. 393, para 38)

'*38*. Vivian Bose, J., had observed that Section 106 of the Evidence Act is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. In *Shambu Nath Mehra* v. *State of Ajmer* the learned Judge has stated the legal principle thus: (AIR p. 406, para 11)

"*11*. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience.

The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge."

15. In *Trimukh Maroti Kirkan* v. *State of Maharashtra*, this Court was considering a similar case of homicidal death in the confines of the house. The following observations are considered relevant in the facts of the present case: (SCC pp. 690-91 & 694, paras 14-15 & 22)

"*14*. If an offence takes place inside the privacy of a

house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties. (See *Stirland* v. *Director of Public Prosecutions* — quoted with approval by Arijit Pasayat, J. in *State of Punjab* v. *Karnail Singh*) The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (*b*) appended to this section throws some light on the content and scope of this provision and it reads:

'(*b*) *A* is charged with travelling on a railway without ticket. The burden of proving that he had a ticket is on him.'

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.

* * *

22. Where an accused is alleged to have committed

> the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime."

93. Thus, it is held that the prosecution has succeeded in establishing that Appellants had taken the deceased Anuja with them on 12-5-2008 along with her 2 years old daughter and She was seen alive for the last time in the company of the Appellants. The time gap between the time of Last Seen Together and time of death/recovery of dead body is so minimum that it rules out the possibility of any intervening event, and in absence of any explanation as to when they parted away with the company of deceased, this Court is of the considered opinion that the circumstance of Last Seen Together was proved by the prosecution beyond reasonable doubt. Therefore, in absence of any explanation as to how Anuja died much less homicidal death, this Court is of the considered opinion, that the prosecution has succeeded in establishing that the Appellants had thrown the dead body of the deceased Anuja after throttling her.

Whether the charges framed against the Appellants were vague, thereby causing prejudice to the Appellants?

94. It is submitted by the Appellant Vivek Kapil, that since, no blood was found on the spot, therefore, it is clear that the deceased

Anuja was not killed on the spot, and in the Charges which were framed against them, it was alleged that the deceased Anuja was killed on the spot.

95. Considered the submissions made by the Appellant Vivek Kapil.

96. Charge No. 1 which was framed against the Appellants read as under :

a. यह कि आपने दिनांक 12 एवं 13.5.2008 की मध्य रात्रि या उसके आसपास ग्राम चिरूला रोड या उसके आसपास अनुजा पटेरिया की मृत्यु कारित करने के आशय से एवं जानकारी रखते हुए, आशय पूर्वक अनुजा पटेरिया का गला दबाकर उसकी मृत्यु कारित करके हत्या की इस प्रकार आपने ऐसा अपराध किया जो धारा 302 भा दं सं के तहत् दण्डनीय हैं।

97. Thus, it is clear that the charge was that by killing the deceased Anuja either at the spot or at nearby place, they have committed the offence which is punishable under Section 302 of IPC. Thus, it was never alleged against the Appellants that they had killed the deceased Anuja at the spot, where her dead body was found. Thus, the charge was clear and no prejudice whatsoever was caused to the Appellants.

98.

Abscondence of the Appellants immediately after the incident

99. Omprakash Pateria (P.W.1) has stated that on 13-5-2008, when he went to the house of the Appellant at Jhansi, the same was found locked. Thereafter, they went to Mahoba, where the Appellant Vivek

was posted and the said house was also locked. The Appellant Vivek was arrested from Itarsi Railway Station on 26-5-2008 i.e., 14 days after Anuja was taken away from her parental home. During this period, it is not the case of Vivek Kapil that he was on duty or he was busy in observing last rites of his wife. It is true that abscondence after the incident is not a very conclusive circumstance to indicate towards the guilt of an accused, as even an innocent person may abscond under an apprehension, but if the entire circumstances are considered together, then the abscondence of the Appellants immediately after the incident assumes importance. The Supreme Court in the case of **Kundula Bala Subrahmanyam v. State of A.P.,** reported in **(1993) 2 SCC 684** has held as under :

> 23.....No explanation, worth the name, much less a satisfactory explanation has been furnished by the Appellants about their absence from the village till they surrendered in the court in the face of such a gruesome 'tragedy'. Indeed, absconding by itself may not be a positive circumstance consistent only with the hypothesis of guilt of the accused because it is not unknown that even innocent persons may run away for fear of being falsely involved in a criminal case and arrested by the police, but coupled with the other circumstances which we have discussed above, the absconding of the Appellants assumes importance and significance. The prosecution has successfully established this circumstance also to connect the Appellants with the crime.

100. The Supreme Court in the case of **Sujit Biswas Vs. State of Assam** reported in **(2013) 12 SCC 406** has held as under :

> **22.** Whether the abscondence of an accused can be taken as a circumstance against him has been considered by this Court in *Bipin Kumar Mondal* v. *State of W.B.* wherein the Court observed: (SCC pp. 98-99, paras 27-28)

"*27*. In *Matru* v. *State of U.P.* this Court repelled the submissions made by the State that as after commission of the offence the accused had been absconding, therefore, the inference can be drawn that he was a guilty person observing as under: (SCC p. 84, para 19)

'*19*. The Appellant's conduct in absconding was also relied upon. Now, mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime such is the instinct of self-preservation. The act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case. Normally the courts are disinclined to attach much importance to the act of absconding, treating it as a very small item in the evidence for sustaining conviction. It can scarcely be held as a determining link in completing the chain of circumstantial evidence which must admit of no other reasonable hypothesis than that of the guilt of the accused. In the present case the Appellant was with Ram Chandra till the FIR was lodged. If thereafter he felt that he was being wrongly suspected and he tried to keep out of the way we do not think this circumstance can be considered to be necessarily evidence of a guilty mind attempting to evade justice. It is not inconsistent with his innocence.'

* * *

28. Abscondence by a person against whom FIR has been lodged, having an apprehension of being apprehended by the police, cannot be said to be unnatural. Thus, in view of the above, we do not find any force in the submission made by Shri Bhattacharjee that mere absconding by the Appellant after commission of the crime and remaining untraceable for such a long time itself can establish his guilt. Absconding by itself is not conclusive either of guilt or of guilty conscience."

While deciding the said case, a large number of earlier judgments were also taken into consideration by the Court, including *Matru* and *State of M.P.* v. *Paltan Mallah*.

23. Thus, in a case of this nature, the mere abscondence of an accused does not lead to a firm conclusion of his guilty

> mind. An innocent man may also abscond in order to evade arrest, as in light of such a situation, such an action may be part of the natural conduct of the accused. Abscondence is in fact relevant evidence, but its evidentiary value depends upon the surrounding circumstances, and hence, the same must only be taken as a minor item in evidence for sustaining conviction. (See *Paramjeet Singh* v. *State of Uttarakhand* and *Sk. Yusuf* v. *State of W.B.*)

101. Thus, if the abscondence of the Appellants Vivek Kapil and Kiran Kapil immediately after the incident is considered in the light of other circumstances, then this circumstance also assumes importance.

Recovery of Alto Car Bearing Registration No. UP-93-P-0596 from Itarsi Railway Station on 26-5-2008.

102. The Appellant Vivek Kapil is a Railway Employee. He was knowing that a car can always be parked in a Railway Taxi Stand as no one would ask any question or no one would express any doubt. Anurag Sharma (P.W.12) and Swamiprasad (P.W.15) have proved the seizure of Maruti Alto Car bearing Registration No. U) 93-P-05696 from the Parking Area of Railway Taxi Stand. A specific suggestion was given by the Appellant to Parmanand Sharma (P.W.16) in para 58 of his cross-examination, that Hemant Sonia, the Taxi Stand Contractor of Itarsi Railway Station had informed that the said car was parked from 15-5-2008 and no body had come to pick that car from 15-5-2008 till 26-5-2008, and the said suggestion was admitted by Parmanand Sharma (P.W.16). Maruti Alto Car No. UP-93-P-0569 was given in dowry to the Appellant Vivek Kapil in his marriage and

the said car was in the name of Anuja. Thus, the Appellant Vivek Kapil was in possession of the said car. How Car of Anuja reached to Itarsi Railway Station on 15-5-2008 has not been explained by Vivek Kapil.

103. Although the Trial Court has disbelieved the fact of seizure of Car from the Taxi Stand of Railway Station, Itarsi, but has given a self contradictory finding that the recovery of car from the Appellant Vivek has been proved. For disbelieving the seizure of the Car from Taxi Stand of Railway Station, Itarsi, the Trial Court had given undue importance to the non-examination of Hemant Savita, the contractor of Taxi Stand of Railway Station Itarsi. The Trial Court lose sight of the fact that the Appellants themselves had given suggestion to Parmanant Sharma (P.W.16) that Hemant Savita had informed that the car is standing from 15-5-2008, which was admitted by this witness. Further, it is not the quantity of witness, but the quality of witness is important.

104. It is submitted by the Counsel for the Appellant Smt. Kiran Kapil, that why the Police party went to Itarsi in a private vehicle and did not inform the local police? However, the Counsel for the Appellant could not point out any provision of law to show that if the investigating officer conducts any part of investigation within the territorial jurisdiction of another police station without informing it, then such part of investigation would be a nullity or bad. Under these circumstances, it is held that statement of Anurag Sharma (P.W.

12) that he had gone to Itarsi in the intervening night of 26th and 27th is nothing but a slip of tongue and cannot be given much importance. Further it is well established principle of law that the entire evidence of a witness should be read and one stray line from here and there should not be picked up for discarding the entire evidence.

105. Therefore, it is held that Car No. UP-93-P-0569 was seized from Taxi Stand of Itarsi Railway Station on the disclosure made by the Appellant Vivek Kapil and such seizure assumes importance under the facts and circumstances of the case, because not only the car was registered in the name of the deceased Anuja but the Appellant was in possession of the same.

Recovery of White Coloured Ladies Bag, Copper ring and Telephone Diary of the deceased Anuja from the Appellant Kiran Kapil

106. Parmanand Sharma (P.W.16) has specifically stated that after the Appellant Kiran Kapil was arrested, She made a memorandum,and on her disclosure, he seized one white coloured ladies bag, copper ring and telephone diary of the deceased Anuja from the possession of Kiran Kapil vide seizure memo Ex. P. 10. These articles were identified by Smt. Asha Pateria (P.W.2) in the test identification conducted by the police as well as in the Court as Article A-14, 15 and 16. Although the Counsel for the Appellants tried to dislodge this evidence by suggesting that similar types of articles are available in the market, but it is not out of place to

mention here that the seized articles were used articles, and used articles are not easily available in the market. Further, these articles have been identified by Smt. Asha Pateria (P.W.2), the mother of the deceased, who had seen her daughter Anuja using the same.

107. Thus, it is held that the articles belonging to the Deceased Anuja were seized from the possession of Vivek Kapil and Smt. Kiran Kapil.

Minor Girl Sona was recovered from the possession of Kiran Kapil

108. On 28-5-2008, the Appellant Kiran Kapil was arrested and at the time of her arrest, the minor girl of the deceased Anuja was with her and accordingly, the custody of the minor Girl Sona was given by Parmanand Sharma (P.W.16) to Omprakash Sharma (P.W.1). It is not out of place to mention here that according to prosecution case, the Appellants had taken away the deceased Anuja from her parental home along with her minor girl, Sona. Thus, the recovery of Minor Girl Sona from the possession of Appellant Smt. Kiran Kapil is also an important circumstance against her.

Whether the Appellant Vivek Kapil was taken into custody by M.P. Police from Jhansi on 24-5-2008?

109. The Appellant has relied upon the evidence of Komal Singh (D.W.2) posted in the office DIG, Jhansi to prove that on an application filed by Ritesh Agrawal, Advocate, under the Right to Information Act, an information was given that on 24-5-2008, a

telegram was received from Rashid Khan, Advocate, to the effect that on 24-5-2008, the M.P. Police has taken away Vivek Kapil with it and there is an apprehension that he may be falsely implicated in a false case. It is submitted that thus, it is clear that the Appellant Vivek Kapil was taken into custody by the M.P. Police on 24-5-2008 from Jhansi and he has been falsely shown to have been arrested on 26-5-2008 from Itarsi Railway Station.

110. Considered the submissions made by the Counsel for the Appellants.

111. From the evidence of Komal Singh (D.W.2) it is clear that he has spoken about the reply to an application filed under Right to Information Act, regarding receipt of telegram sent by Rashid Khan, Advocate. Unfortunately, the evidence of Komal Singh (D.W.2) would not prove the contents of telegram. The Appellant did not examine Rashid Khan as his defence Counsel. Thus, in absence of evidence of Rashid Khan, this Court is unable to accept the contention, that the Appellant Vivek Kapil was taken into custody on 24-5-2008 from Jhansi. Only Rashid Khan, Advocate, could have proved the contents of Telegram and only he could have explained as to how he came to know that Vivek Kapil has been taken into custody by M.P. Police on 24-5-2008. Thus, the Telegram, Ex.D.7 doesnot prove that the Appellant Vivek Kapil was taken into custody on 24-5-2008 by M.P. Police.

112. The Trial Court has held that the prosecution has failed to

prove that the Appellant Vivek Kapil was arrested from Railway Station, Itarsi. However, in the considered opinion of this Court, the Trial Court has given undue importance to the variance in the evidence of Swamiprasad (P.W.15) and Parmanand Sharma (P.W.16). There is some discrepancy in the evidence of the witnesses with regard to the place from where the Appellant Vivek Kapil was arrested? Whether he was arrested from the platform of Itarsi Railway Station, or from just outside the Railway Station is a minor discrepancy as the Platforms are not situated far from the Taxi Stand. In all major Railway Stations, there is a porch immediately after the Platform. Porch can be described by one person as out side the Railway Station, whereas another person may include the porch as a part of Platform. Thus, this variance is of minor in nature and it is well established principle of law that the evidence of witnesses cannot be discarded on the basis of minor omissions and contradictions. The Supreme Court in the case of **State of H.P. Vs. Lekh Raj** reported in **(2000) 1 SCC 247** has held as under :

> **7.** In support of the impugned judgment the learned counsel appearing for the respondents vainly attempted to point out some discrepancies in the statement of the prosecutrix and other witnesses for discrediting the prosecution version. Discrepancy has to be distinguished from contradiction. Whereas contradiction in the statement of the witness is fatal for the case, minor discrepancy or variance in evidence will not make the prosecution's case doubtful. The normal course of the human conduct would be that while narrating a particular incident there may occur minor discrepancies, such discrepancies in law may render credential to the depositions. Parrot-like statements are disfavoured by the courts. In order to ascertain as to

whether the discrepancy pointed out was minor or not or the same amounted to contradiction, regard is required to be had to the circumstances of the case by keeping in view the social status of the witnesses and environment in which such witness was making the statement. This Court in *Ousu Varghese* v. *State of Kerala*[4] held that minor variations in the accounts of the witnesses are often the hallmark of the truth of their testimony. In *Jagdish* v. *State of M.P.* this Court held that when the discrepancies were comparatively of a minor character and did not go to the root of the prosecution story, they need not be given undue importance. Mere congruity or consistency is not the sole test of truth in the depositions. This Court again in *State of Rajasthan* v. *Kalki* held that in the depositions of witnesses there are always normal discrepancies, however, honest and truthful they may be. Such discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence, and the like. Material discrepancies are those which are not normal and not expected of a normal person.

8. Referring to and relying upon the earlier judgments of this Court in *State of U.P.* v. *M.K. Anthony*, *Tahsildar Singh* v. *State of U.P.*, *Appabhai* v. *State of Gujarat* and *Rammi* v. *State of M.P.*, this Court in a recent case *Leela Ram* v. *State of Haryana* held:

> "There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefor should not render the evidence of eyewitnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence….
>
> The court shall have to bear in mind that different witnesses react differently under different situations: whereas some become speechless, some start wailing while some others run away from the scene and yet there are some who may come forward with courage, conviction and belief that the wrong should be remedied. As a matter of fact it depends upon individuals and individuals. There cannot be any set pattern or uniform rule of human reaction and to

> discard a piece of evidence on the ground of his reaction not falling within a set pattern is unproductive and a pedantic exercise."

113. Thus, it is held that the prosecution has succeeded in establishing beyond reasonable doubt that the Appellant Vivek Kapil was arrested from Itarsi Railway Station and Car was also recovered on his disclosure.

Presence of Human Sperms on Vaginal Slide and cloths of deceased and Whether the Appellant Vivek had already undergone the Vasectomy Operation prior to that and its effect?

114. It is next contended by the Appellant Vivek Kapil that on the vaginal slide and cloths of the deceased, human sperms were found and since, he had already undergone Vasectomy Operation, therefore, it is clear that the deceased Anuja had physical relationship with some other person.

115. Considered the submissions made by the Counsel for the Appellant.

116. During the Course of Arguments, it was submitted by the Appellant Vivek Kapil, that since, one Alok Dubey was actively involved and was also coming to the Court, and the witnesses were trying to hide their relationship with Alok Dubey, therefore, there was some suspicious circumstances. However, he fairly conceded that he is not alleging that Alok Dubey was involved in murder of the deceased Anuja.

117. On the face of it, the arguments of the Counsel for the

Appellant appeared to be very convincing, but on deeper scrutiny, the same is found to be untrustworthy and misconceived.

118. From the order-sheet dated 30-08-2010, it is clear that the medical record of Vasectomy Operation of the Appellant Vivek Kapil was called. On the next date, i.e., 14-9-2010, Dr. Pratap Singh, posted in Distt. Hospital Mahoba appeared before the Trial Court along with the record, but the Appellant Vivek Kapil filed an application that the record was to be brought by Time Keeper, but Omprakash Pateria (P.W.1) took the process server with him in his car and has persuaded Dr. Pratap Singh to bring the said record, therefore, he doesnot wish to examine Dr. Pratap Singh as his defence witness as there is a possibility that Dr. Pratap Singh might be under the influence of prosecution.

119. The said objection was vehemently opposed by the prosecution, but since, the Appellants were not interested in examining Dr. Pratap Singh, therefore, the said witness was left unexamined.

120. The contents of the objections mentioned in the application which was signed by the Appellant Vivek Kapil, clearly indicates that the Appellant Vivek Kapil was having knowledge of entire working of prosecution. Although he was in jail, but he was keeping a vigil eye on the prosecution. Be that as it may.

121. Now the next question for consideration is as to why the Appellant Vivek Kapil was interested in getting the record of Mahoba

Hospital exhibited by examining Time Keeper only and not by examining the Doctor.

122. The answer lies in the Modi's Medical Jurisprudence.

123. Under the heading **Medico-Legal Aspects of Sterilisation,** it has been mentioned as under :

> **Vasectomy** – It is a permanent sterilisation operation performed in males, where segments of the *vas deferens* of both sides are resected, and the cut ends are ligated. The failure rate is about 0.15%. Additional Contraceptive protection is needed for about 2-3 months following vasectomy, that is, till the semen becomes free of sperms.

124. Thus, it is clear that in the case of Vasectomy, semen would become free of sperms in 2-3 months of the operation. According to the Appellant Vivek Kapil, he had undergone Vasectomy Operation on 31-3-2008 and the incident took place on 12-5-2008 within 3 months or just after 2 months. Thus, there was still possibility of presence of sperms of the Appellant Vivek Kapil in the vaginal slide of the deceased. Therefore, the solitary intention behind not examining a Doctor was to ensure that he may not speak about the medical complications and presence of sperms even after the Vasectomy Operation and thus, he was interested that only Timekeeper should prove the record of Mohaba District Hospital. Thus, he did not examine Dr. Pratap Singh.

125. Further, it is the case of the prosecution, that Vivek Kapil was having only one minor girl and his wife i.e., deceased Anuja was residing separately for the last 8 months. Then what was the need for

Vasectomy Operation? In the hand written application dated 9th March 2022 sent by Appellant Kapil to Registrar of this court, it is mentioned that **Doctor advice cautioning further pregnancy of victim to be life risky.** So far as this stand taken by the Appellant Kapil is concerned, it is sufficient to mention here that no such defence was taken by Kapil in his defence. This defence is completely missing in his statement under Section 313 of Cr.P.C. No document has been filed to show that any advise was given by the Doctors against the pregnancy of his wife Anuja. Thus, it is clear that the Appellant Vivek Kapil was making plans for the murder of his wife Anuja from the last several months and undergoing Vasectomy Operation was one of the part of said plan. Therefore, merely because the Appellant Vivek Kapil had undergone Vasectomy Operation, it cannot be said that semen and sperms found on the vaginal slide of the deceased Anuja were not that of Appellant Vivek Kapil.

126. Further during the course of arguments, when a specific question was put to the Appellant Vivek Kapil, that why a suggestion was given to Asha Pateria (P.W.2) that the deceased Anuja had left her house along with one persons namely Dubey and they had stayed in a Motel in Datia, then it was submitted by Vivek Kapil, that said question was not asked by his Counsel on his instruction but submitted that his Counsel might have done some private investigation on his own. He fairly conceded that even otherwise, he

neither summoned the Manager of the Motel along with Reception Register nor disclosed the name of Motel. Thus, it is clear that the Appellants were trying to give false explanation and they had tried to make a full proof plan, but unfortunately could not succeed.

D.N.A. Test

127. On 17-8-2010, the Appellant Vivek Kapil had filed an application for sending the seized article for DNA test as he has already undergone sterilisation test. The said application was rejected in the light of the fact that as per FSL report, the sperm found on cloths and slide of the deceased were not sufficient for serum examination and further even after sterilisation operation, the sperms remain present for a period of 3 months and it is not a case of rape with murder.

128. The Counsel for the Appellant could not point out as to how the said order passed by the Trial Court was bad in law.

129. I.A. No. 1910 of 2015 has also been filed before this Court for getting the DNA test done.

130. This Court has already come to a conclusion that there was no reason for the Appellant Vivek Kapil to undergo Vasectomy Operation and inspite of that he got the Vasectomy Operation performed. His contention that the Doctor had opined that the future pregnancy would be dangerous to the life of his wife Anuja cannot be accepted in absence of any document to support the said contention. The Appellant Vivek Kapil during the course of arguments, fairly

conceded that he did not examine any Doctor to prove his contention that future pregnancy of his wife Anuja was dangerous to her life. However, he submitted that since a camp was organized in Mahoba for doing Vasectomy Operations, therefore, he decided to undergo Vasectomy Operation. He has not claimed nor has filed any document to show that before undergoing Vasectomy Operation, he had ever consulted his wife Anuja. Thus, it is held that undergoing Vasectomy Operation without any necessity, specifically when he was not residing with his wife, is clear indicative of fact that undergoing Vasectomy Operation was a part of his pre plan to commit murder of his wife, and when he realized that as per medical science, his sperms can be still found in the semen, therefore, he did not examine Dr. Pratap Singh as his defence witness as he was not intending to examine any Doctor and was intending to prove the medical documents by examining a Time Keeper only, who would have expressed his ignorance about presence of sperms even after Vasectomy Operation. Further more, as per FSL report, Ex. 27, the semen stains were insufficient for serum examination. Therefore, this Court is of the considered opinion, that no case is made out for conducting DNA test. Accordingly, I.A. No. 1910 of 2015 is hereby **rejected.**

131. No other arguments were advanced by the Counsel for the parties.

132. Under the facts and circumstances of the case, this Court is of

the considered opinion, that the prosecution has succeeded in establishing beyond reasonable doubt that the Appellants have killed the deceased Anuja.

133. Under these circumstances, it is not necessary to consider and decide as to whether the Appellants are guilty of offence under Section 304-B of IPC or not?

134. Accordingly, the Appellants Vivek Kapil and Smt. Kiran Kapil are acquitted of the charge under Section 304-B/34 of IPC, **but they are convicted under Section 302/34 of IPC** and their conviction under Section 201 of IPC is **Upheld.**

135. Heard on the question of sentence. The Counsel for the State as well as complainant did not argue for award of death penalty. Even otherwise, at the most, it can be said that the Appellants have murdered the deceased Anuja in a well planned manner, but that by itself cannot be said to be a case in the nature of rarest of rare. **Accordingly, for offence under Section 302 of IPC, the Appellants Vivek Kapil and Smt. Kiran Kapil are awarded Life Imprisonment and a fine of Rs. 25,000/- with default imprisonment of R.I. for 2 years.** Similarly, the sentence of rigorous imprisonment of 3 years and fine of Rs. 5,000 with default rigorous imprisonment of 6 months awarded by Trial Court for offence under Section 201 of IPC is **upheld**. Both the sentences shall run concurrently.

136. Out of the total fine amount, an amount of Rs. 40,000/- be paid to Ku. Sona, the minor daughter of the deceased Sona. This amount shall be deposited in the form of FDR in some Nationalized bank and shall be payable to her on attaining her majority because at present she must be only 16 years of age as in the year 2008 She was only 2 years of age.

137. *Ex-Consequenti*, the judgment and sentence passed by the Additional Judge to the Court of Additional Sessions Judge, Datia in S.T. No. 78/2008 is hereby **affirmed with aforementioned modifications**.

138. The Appellants Vivek Kapil and Smt. Kiran Kapil are in jail. They shall undergo the remaining jail sentence.

139. Let a copy of this judgment be provided immediately to the Appellants, free of cost.

140. The Record of the Trial Court be immediately send back along with copy of this judgment for necessary information and compliance.

141. The Criminal Appeal No. 15/2011 filed by the complainant is hereby **Allowed** and Criminal Appeal No. 80/2011 filed by Appellants Vivek Kapil and Smt. Kiran Kapil are hereby **Dismissed.**

(G.S. Ahluwalia)
Judge

(Rajeev Kumar Shrivastava)
Judge