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2024 INSC 734

Reportable

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
Criminal Appeal Nos.1614-1618 of 2012

Manik & Ors.

...Appellant(s)

Versus

The State of Maharashtra.

...Respondent(s)

J U D G M E N T

C.T. RAVIKUMAR, J.

1. In these quintuplet appeals, the appellants-convicts who stood the trial in Sessions Trial No.21 of 1996 before the Court of Additional Sessions Judge, Gondia for the charge of commission of offences punishable under Section 302 and/or various other offences under the Indian Penal Code, 1860 (for short 'IPC') are challenging the common judgment dated 12.07.2011 in Criminal Appeal Nos. 64, 65, 71, 76, 77 and 88 of 1997 whereby and whereunder their conviction and consequential sentences, handed down by the trial Court except under Section 201 read with Section 34, IPC, were confirmed by the High Court of Bombay,

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Nagpur Bench. For the sake of convenience appellants are referred to hereafter in this judgment in accordance with the order of their rank as accused before the trial Court. Criminal Appeal No.1614/2018 stood abated as the sole appellant who was the first accused and the sole appellant before the Additional Sessions Judge in Criminal Appeal No.64/1997, died on 06.03.2022 and hence, the rest of the appellants in the appeals are, at times, commonly referred to as 'appellant-convicts'. The appellant-convicts stood the trial for offences punishable under Sections 302, 330, 331, 342, 343, 348, 354, 385, 387, 193, 201, 202, 203, and 218 read with Section 34, IPC, in connection with the death of one Shama @ Kaliya s/o Nanu Uke. Though accused No.8 (Sudhir s/o Rambhau Kayarkar) and accused No.9 (Ganesh s/o Raghuji Turkar) were acquitted of the twin offences charged against them under Sections 201 and 202, IPC, read with Section 34, IPC, the respondent State did not file an appeal against their acquittal before the High Court.

2. For the sake of convenience, the offence(s) for which each one of the appellant-convicts (accused Nos. 2 to 7) was convicted and the sentence(s) imposed therefor, by the trial Court, can be enumerated as under: -

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Accused Number	**IPC offence(s) for which conviction was entered and the consequential sentence(s) imposed**
A2 (Ravindra) & A4 (Hans Raj)	Section 304 part II read with Section 34, IPC – sentenced to undergo 7 years of rigorous imprisonment and a fine of Rs. 4,000/- each.
A2 (Ravindra), A3 (Manohar), A4 (Hans Raj) & A5 (Vishnu)	Section 331 read with Section 34, IPC – sentenced to undergo 3 years of rigorous imprisonment and a fine of Rs. 1,000/- each.
A2 (Ravindra), A3 (Manohar), A4 (Hans Raj) & A5 (Vishnu)	Sections 330, 348, & 387 read with Section 34, IPC and sentenced to undergo one year of rigorous imprisonment and a fine of Rs. 1,000/- each.
A3 (Manohar), A5 (Vishnu), A6 (Vishwanath) & A7 (Dilip)	Section 202 read with Section 34, IPC – sentenced to undergo 3 months of rigorous imprisonment and Rs. 500/- each.
A2 (Ravindra), A3 (Manohar), A4 (Hans Raj), A5 (Vishnu), A6 (Vishwanath) & A7 (Dilip)	Section 203, IPC. – No separate sentence was imposed.
A2 (Ravindra), A3 (Manohar), A4 (Hans Raj), A5 (Vishnu), A6 (Vishwanath) & A7 (Dilip)	Section 201 and 218 read with Section 34, IPC – sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs. 1,000/- each.

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3. All the corporeal punishments of rigorous imprisonment imposed on the appellant-convicts were directed to be run concurrently. Default sentences were also ordered in respect of sentences for payment of fine.

4. Against the judgment of conviction, accused Nos.6 and 7 jointly filed Criminal Appeal No.65/1997, accused Nos. 2 and 4 jointly filed Criminal Appeal No.76/1997, accused Nos. 3 and 5 separately filed Criminal Appeal No.77/1997 and 71/1997 respectively and the State filed Criminal Appeal No.88/1997 against all the convicts. Obviously, the State challenged acquittal of all the accused for the offences punishable under Sections 302 and 354 read with Section 34, IPC, while the aforesaid accused persons challenged their conviction under all the aforesaid sections for which they were convicted and sentenced.

5. As per the impugned common judgment, the High Court dismissed the appeal filed by the State and partly allowed the appeals filed by the appellant-convicts. According to the appellant-convicts, the High Court acquitted all of them of the offences punishable under Section 201 read with Section 34, IPC. In other words, in respect of all the other offences for which each of them was found guilty and consequently convicted and

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sentenced, their appeals were dismissed. It is to be noted that despite the dismissal of Criminal Appeal No.88/1997 filed by the State and acquittal of all the appellant-convicts of the offence under Section 201 read with Section 34, IPC assigning specific reasons the State of Maharashtra did not move this Court against the said common judgment dated 12.07.2011.

6. Heard learned senior counsel Sh. Nagamuthu appearing for the appellant-convicts and Sh. Shrirang B. Varma, learned counsel for the State.

7. The case of the prosecution, in succinct, is as follows: -

Deceased Shama @ Kalya, S/o Nanu Uke, a history sheeter, was taken into police custody for interrogation in connection with an incident of house-breaking at one Vijay Agrawal's residence in Gondia and stealing properties worth more than rupees one lakh on 07.12.1995 and without duly recording the arrest he was kept in custody. The suspect Shama @ Kalya was subjected to third degree methods during interrogation, resulting in his death on 22.12.1995. On 31.12.1995, an un-identified body, which was burnt and buried, was found in the forest within the jurisdiction of Tirodi police station in Balaghat district of the State of Madhya

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Pradesh. It is the further case of the prosecution that after committing heinous crime the appellant-convicts concocted a case and contrived false evidence to escape prosecution for custodial death by making one Dipak Lokhande disguised as Shama @ Kalya and taking him under cover to Bhanpur and Survai to Mulchand Radhelal and Tasanbai respectively on the night of 24.12.1995. It is also the case of the prosecution that the appellant-convicts made Dipak Lokhande to run away from the jeep to make it appear that Shama @ Kalya had escaped from custody. Thereupon, PW-38 Harne was informed about it and entry to that effect was made in the station-diary and consequently, false inquiry was made and documents were also prepared.

8. The facts narrated above would reveal that going by the case of the prosecution, it is a case of custodial torture leading to custodial death.

9. The Trial Court, after appreciating the evidence found that the prosecution had failed to establish the charge punishable under Section 302, IPC, and concluded that the prosecution had succeeded only in establishing charge under Section 304 -II read with Section 34 against accused numbers 1 to 3. True that they and the others, barring accused Nos. 8 and 9, were

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found guilty under certain other charged offences as well, and accordingly sentenced therefor, as mentioned hereinbefore. However, in the appeals by the appellant-convicts the High Court confirmed the conviction and sentences except under Section 201 read with Section 34 IPC. The acquittal of accused numbers 8 & 9 by the trial Court was not challenged by the State before the High Court. So also, the acquittal of the appellants under Section 201 read with Section 34, IPC by the High Court is not now under challenge. In short, the captioned appeals carry only the challenge of the convicts against their conviction under the different sections of the IPC and consequently imposed sentences therefor, as mentioned hereinbefore.

10. The learned senior counsel appearing for the appellants would submit that there is no serious challenge against the conviction of the appellants for custodial torture. Nonetheless, a feeble attempt was, indeed, made by the learned senior counsel to convince me that the appellants are entitled to a plain acquittal in respect of all the charges for which they were found guilty and were confirmed by the High Court under the impugned judgment. Then, serious contentions were advanced with respect to the conviction for the custodial

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death under Section 304-II read with Section 34 IPC and the consequential sentence imposed on the appellants. Having heard the rival contentions and bestowing anxious consideration I am of the considered view that even otherwise, contentions in respect of the finding on the charge of custodial torture warrant no serious consideration and the conviction and consequently imposed sentences, therefore, under different sections hereinafter to be mentioned specifically invite no interference.

11. The facts that deceased Shama @ Kalya was taken into police custody on the complaint of PW-6 Vijay Kumar Rameshwarlal Agrawal in crime No. 315 of 95 registered at Gondia City Police Station and that the appellants took him to Detective Branch Room of Gondia Police Station for interrogation and in that regard detained him for days together without adhering to the legal mandate for production of the arrestee within 24 hours, since his detention, before a Magistrate having jurisdiction in the case, remain irrefragable, rather, proved and unrebutted. While the appellant-convicts contend that he is an escapado, the prosecution contends that he was subjected to custodial torture which ultimately culminated in his custodial death (The

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defence also put forth a case that he was arrested later by the Railway Police in connection with traveling in a train ticketless and consequently prosecuted and sentenced to pay fine, to counter the case of the prosecution that escape of Shama from police custody was nothing but a staged drama). In the contextual situation it is apposite to refer to the decision of this Court in ***Central Bureau of Investigation v. Kishore Singh***[1] wherein it was held that when a person was brought to a police station and locked up, obviously, he would be under arrest.

12. The evidence of PW-1 (Amrutabai Ukey), PW-3 and PW-16 and others as also PWs 20 and 22 who are police officials, was relied on by the trial Court and also by the High Court to hold that the deceased was in the custody of the appellants and was in the Detective Branch Room of Gondia Police Station and was subjected to torture during such custody. PW-1 is the wife of deceased Shama. She would depose that she found him in the Detective Branch Room of Gondia Police Station on 18.12.1995 and he was then bleeding from his legs. According to her, Shama told that police have cut off

[1] (2011) 6 SCC 369

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veins of his legs and hence, he might not survive. She had also deposed that on 22.12.1995, she again found him there and on 24.12.1995, police told her that Shama had escaped from their custody. I will deal with her evidence, a little later, appropriately. PW-3 turned hostile. He was examined to prove that Shama was brought to police station for interrogation and he had suffered injuries on account of torture during the interrogation. Indisputably, while being examined-in-chief, he supported the prosecution and then, prevaricated during his cross-examination. Thereupon, he was cross-examined by the prosecution after getting him declared as hostile. The impugned judgment would reveal that to a Court question, he would admit that what he had stated before the Court in the morning session, during cross-examination on behalf of the accused, was false. The demeanor of the witness as recorded by the courts below and his oscillation during his examination before the Court thus revealed the danger in accepting his version, on any count, without corroboration. Since the maxim '*falsus in uno, falsus in omnibus*' (false in one thing, false in everything) has no application in India, his evidence was evidently taken into consideration to the extent of establishing the custody of Shama in the Station

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and also his sustaining injuries during such custody as they got corroboration from the oral testimonies of other witnesses. PW-4 Mulchand deposed that when he visited the police station concerned, he found swelling on the arms and legs of Shama besides bleeding from his legs. PW-16 was the mother-in-law of deceased Shama. She would depose that she was taken to the police station and was kept there for two days and simultaneously herself and deceased Shama were beaten by the police. PW-20 is a Police Officer who was on duty in the said police station between 05.11.1995 and 19.12.1995. He deposed that on 16.12.1995 at about 3 p.m. he visited the Detective Branch room of the Police Station and found Shama @ Kalya in the presence of accused numbers 1 to 6. It is to be noted that he would also depose that he found there an old woman and a girl aged about 16 years. He also deposed that a compounder by name Soni (PW-3) was called to the police station and he dressed the injuries of Shama. PW-20 would further depose that on 19.12.1995 he was shifted to other duties. PW-21 was a lady police constable. She would depose that she was called to the Detective Branch Room and was asked to remain present when search was being conducted. According to her, she found Shama @ Kalya limping

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when they went to Balaghat to search his house. PW-22 is another Police Officer by name Sumanbai Bharatram Madavi. She deposed that on 20.12.1995 she was deputed to duty there and she found two female suspects sitting in the front room of the police station. She also deposed that inside the room, she found a male suspect, said to be the husband of one of the ladies, sitting there. In view of the nature of the oral testimonies of the aforesaid witnesses and the concurrency in the appreciation of their evidence on the custody and torture of Shama from the detective branch room of Gondia Police Station, I do not find any reason whatsoever requiring a further consideration in regard to the confirmation of conviction for custodial torture. But at the same time, I may hasten to add that the sustainability of conviction and sentencing for some of the offences would depend on the sustainability of the conviction under Section 304 – Part II read with Section 34, IPC. I may also hasten to add that though I decline to interfere with the finding that Shama was subjected to torture while being in custody I shall not be understood of having given imprimatur to the finding that veins of legs of Shama were cut and that ultimately caused his death as according to me, this question is intrinsically

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intertwined with the challenge against the conviction under Section 304 – Part II, read with Section 34, IPC. One aspect with respect to the acquittal (or conviction) for the offence under Section 201 read with Section 34, IPC also requires consideration, which I will deal with a little later.

13. While considering the question of sustainability of the conviction under Section 304-II read with Section 34, IPC, in view of the position obtained in this case, I am of the considered view that the observation of this Court in ***Noor Aga v. State of Punjab and Anr.***[2]***,*** as also the principles enunciated by this Court in the decisions in ***V. Venkata Subbarao v. State***[3] and in ***Vishnu Dutt Sharma v. Daya Sapra***[4] cannot go in oblivion. In ***Noor Aga's*** case, this Court observed and held that superficially a case might have an ugly look and thereby, prima facie, shaking the conscious of any court. But it is well settled that suspicion, however high it might be, could under no circumstances be held to be substitute for legal evidence.

[2] (2008) 16 SCC 417
[3] (2006) 13 SCC 305
[4] (2009) 13 SCC 729

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14. There can be little doubt with respect to the position that a Court is bound to appreciate the defence evidence in the same manner as it is to appreciate the prosecution evidence, in a criminal case. In ***V. Venkata Subbarao's*** case, this Court held that the burden as an accused did not have to meet the same standards of proof as is required to be met by the prosecution. In ***Vishnu Dutt Sharma's*** case, this Court held that the prosecution is bound to prove the commission of the offence on the part of the accused beyond any reasonable doubt. Certainly, the requirement to establish its case beyond reasonable doubt does not mean that the degree of proof on the part of the prosecution must be one beyond a shadow of doubt (see the decision in ***Iqbal Moosa Patel v. State of Gujarat***[5]).

15. The principle as to what degree of proof is required, is stated by ***Lord Denning in Miller v. Minister of Pensions***[6]**,** thus: -

> *"…that degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the*

[5] (2011) 2 SCC 198
[6] (1947) 2 All ER 372

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> *community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with sentence, "of course it is possible, but not in the least probable" the case is proved beyond reasonable doubt, but nothing short of that will suffice."*

16. The reasons for my remarks, as above, would be unravelled by the following critical examination of the impugned common judgment and also appreciation of evidence, in that regard.

17. The judgment of the trial Court would reveal that the finger print test conducted for identification of the dead body was accepted and acted upon. The trial Court held in paragraph 59 of its judgment that the finger prints of Shama @ Kalya are identical with the finger prints of unknown dead body, is acceptable. *"Had Shama @ Kalya not been criminal, whose record slips would not have been available, there was no chance of identification of dead body"*, the trial Court further held thus in paragraph 101 of its judgment. However, a bare perusal of the impugned common judgment would disclose that even while confirming the conviction under Section 304 part-II read with Section 34, IPC and also the

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consequently imposed sentence therefor, the High Court had reversed the twin foundational findings of the trial Court for the conviction under Section 304 part-II read with Section 34, IPC. Furthermore, the High Court assigned its own reason for finding the appellants not guilty for the offence committed under Section 300, IPC, punishable under Section 302, IPC. It is to be noted that the Trial Court despite the absence of medical evidence as to the injury of cutting off veins on the legs took that the prosecution has succeeded in establishing that the deceased Shama @ Kalya had sustained such injuries and at the same time, held that the said injuries would not attract clause (3) of Section 300, IPC that speaks of causing bodily injury which is sufficient in the ordinary course of nature to cause death. Based on such opinion and holding that in the circumstances obtained accused Nos.1, 2 and 4 should be clothed with the knowledge that the injuries which Shama @ Kalya had so sustained were likely to cause death, found them guilty for having committed the offence falling squarely under Section 304 part-II with the aid of Section 34, IPC. As already noted, the trial Court did so after accepting the opinion on finger print test and the consequent identification of the dead body as that of Shama @ Kalya.

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18. The evidence on record would reveal that what was traced from Garra Chowky, within the jurisdiction of Tirodi Police Station, on 31.12.1995 was an unidentified, burnt body. Taking note of the said position, in paragraph 102 of the impugned common judgment the High Court held thus: -

> *"102. In view of the fact that the dead body was beyond identification and recognition, by patent identification marks, only sources of identification left to the prosecution were:*
>
> *[a] DNA test*
>
> *[b] Comparison of finger print marks."*

19. Upon finding that no DNA test was done and then holding that even if it was done it would not have the value of a conclusive proof as to the contents thereof, the High Court went on to consider the sustainability of the finding on the finger print test by the Trial Court. Contextually, it is worthy to refer to paragraphs 105 to 108 of the impugned common judgment. They read thus: -

> *"105. In so far as the aspect of finger prints is concerned, prosecution has made efforts to demonstrate that finger prints, subject-matter,*

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match with those of the dissected fingers of corpse, and do prove that those are of one and the same person.

106. Prosecution has proved that the finger prints of the dissected fingers, which were used, were of the dead body, subject-matter.

107. The evidence of PW 41 - Sharad Dayaram Girhepunje at pages 1471 onwards of the paper-book, however, fails to positively prove that the finger prints, which were used as a basic document to be the finger prints of Shyama, were not so proved to be that of Shyama taken by a particular person with maintenance of due record thereof, and the purpose for which those were taken by proving those to have been recorded in relation to a particular crime.

108. In the result, reliance of the prosecution to prove that the dead body, subject-matter, was that of Shyama is based on guess work than on positive evidence. Result is that unless it is proved that the dead body was that of Shyma, the evidence in relation to efforts made by the accused persons to mutilate the said body and thereby destroy the evidence are rendered like a hazy picture, and do not constitute proof of charge under Section 302 of Indian Penal Code, and, therefore, charge to destroy evidence of murder is not proved to that extent."

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20. A scanning of the afore-extracted paragraphs would show that the High Court had clearly arrived at the conclusion that even if it could take that the prosecution had succeeded in proving that the finger prints kept in the police station would match with the dissected fingers of the corpse, it had failed to establish that the finger prints, which were used as basic document to be the finger print of Shama and thereby, that the recovered dead body was that of deceased Shama. Evidently, the High Court held that the evidence of PW-41, Sharad Dayaram Girhepunje failed to prove positively that the finger prints that were used as a basic document to be the finger prints of Shama, taken by a particular person entrusted with the duty of maintenance of due record thereof. It is such cumulative consideration that constrained the High Court to reverse the conclusion of the Trial Court and ultimately to hold that the finding that the dead body was that of Shama was based on guess work than on positive evidence. The aforesaid paragraphs would show that after appreciating the evidence, the High Court held that unless it is proved that the dead body is that of Shama, the evidence in relation to efforts made by the accused persons to mutilate the said body and to destroy the evidence would not

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constitute the proof of charge under Section 302, IPC. In short, assigning specific reasons the High Court reversed the finding of the trial Court that the opinion on the fingerprint test is acceptable and the prosecution had thus succeeded in proving the identity of the recovered body as that of Shama. After holding thus, it was further held that unless it is proved that the dead body was that of Shama, the evidence in relation to efforts made by the accused persons to mutilate the said body could not be taken as proof for destruction of evidence of murder of Shama. At this juncture, I will refer to the other aspect of acquittal (or conviction) for the offence under Section 201 read with Section 34, IPC, referred to earlier by me as one that also requires consideration.

21. In paragraph 77 of the judgement of the trial Court it was observed thus: -

> *"Whatever be reason, but there is no direct evidence in this case, that all the accused No.1 to 9 had caused disappearance of the dead body of deceased Shama @ Kalya by nothing it to fire".*

22. After making such observation, the trial Court held that there was no other alternative except to hold the

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accused Nos.1, 2 and 4 guilty for causing the disappearance of the body by mutilating it and accordingly guilty of the offence under Section 201 read with Section 34, IPC. In the above circumstances, the observations and findings at paragraph 108 of the impugned judgment of the High Court can only be *qua* accused Nos.1, 2 and 4.

23. Now, it is to be noted that on another count, the Trial Court held accused Nos.3, 5, 6 and 7 guilty of the offence under Section 201, IPC. In paragraph 85 of the judgment of trial Court it was observed and held: -

> *".....A false record came to be prepared about escape of Shama @ Kalya. Apart from that even the arrest of Shama @ Kalya and taking him for the purpose of investigation itself was a false preparation of the record and thus false information. All the accused No. 1 to 7 seem to have been involved in this drama played in the night on 24.12.1995 right from showing of arrest of Shama @ Kalya. Therefore, so far as offence U/s. 201 of IPC is concerned I hold the accused No. 3,5 to 7 guilty for giving false information which they knew it to be false."*

24. The judgement of the trial Court would further reveal that on 17.02.1997 when it was brought to notice that while typing the final order, conviction in respect of

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the offences under Sections 201, 218 read with Section 34, IPC were not typed due to oversight and *bona fide* mistake, a corrigendum of the order of conviction was issued on 17.02.1997 on the following lines: -

> *"Accused No. 1 to 7 are convicted of the offence under Section 201, 218 R/w Section 34 of IPC and are sentenced to suffer R.I. for one year and to pay a fine of Rs. 1,000/- each in default to suffer further S.I. for four months on each count".*

25. Thus, it can be seen that though on different counts the trial Court held accused Nos.1 to 7 guilty under Section 201, IPC the High Court acquitted accused 1, 2 and 4 of the charge under Section 201 read with Section 34, IPC only in respect of causing disappearance of body by mutilating it. Therefore, the question is whether the acquittal of the accused Nos. 1, 2 and 4 under Section 201 read with Section 34, IPC by the High Court got any impact on accused Nos. 2 and 4 as also accused Nos.3 and 5 to 7 in relation to the other count, referred hereinbefore.

26. Now, in the impugned common judgment, the High Court after reversing the finding of the trial Court on the evidence based on fingerprint test held that the charge in relation to the screening of evidence by mutilating the

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dead body of Shama @ Kalya was not proved but failure of prosecution in identification of dead body of Shama would not exonerate the accused from the charge of the screening evidence and other charges. Thereafter, upon considering the evidence on the charge of offence under Section 201, IPC read with Section 34, IPC, the High Court held in paragraphs 111 – 113 of the impugned common judgment thus: -

> *"111. In the result, this Court concludes that based on facts proved by the prosecution, it has succeeded in proving all charges, except the proof of destruction of evidence as regards dead body.*
>
> *112. Prosecution has failed to prove offence punishable under Section 201 read with Section 34 of Indian Penal Code for causing disappearance of evidence by destroying the dead body of Shyama, incorporated in sixth part of charge framed against accused persons.*
>
> *113. Based on findings and conclusions recorded in para 112, the accused are acquitted of those charges."*

27. In view of the afore-extracted paragraphs from the impugned common judgment of the High Court as also what is referred from the judgment of the trial Court, it is

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evident that the contention of the appellant-convicts that there is wholesome acquittal of their conviction under Section 201, read with Section 34 IPC cannot be the correct position. As specifically made clear in paragraph 112 as extracted above, the acquittal under Section 201, IPC was with respect to causing disappearance of evidence by destroying the dead body of Shyama. Therefore, the question as to whether the appellant-convicts concerned still stand convicted on the other count.

28. In the light of the observations and findings in paragraphs 105 to 108 and 112 of the impugned common judgment, and the reversal thereunder of the aforesaid twin foundational findings of the trial Court, the main question to be considered is whether any evidence was available to hold the appellants guilty under Section 304 part-II read with Section 34, IPC. Certainly, the answer to the aforementioned question *qua* Section 201, IPC also would depend upon the outcome of its consideration. Before continuing with such consideration, it is relevant to note that despite such reversal of the findings and observations by the High Court which are fatal to the case of the prosecution regarding custodial death, neither the State nor any relative, who falls within the

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expression 'victim', did not prefer any appeal against the impugned common judgment.

29. There can be no doubt that it is imperative, firstly, to prove homicidal death of the very person whose death was allegedly caused by the accused concerned to hold the accused concerned guilty, either under Section 300, IPC punishable under Section 302, IPC or under Section 304, IPC. In the decision of ***Harendra Nath Mandal v. State of Bihar***[7]***,*** this Court held that before an accused is held guilty and punished under first part or second part of Section 304, IPC, a death must have been caused by the assailant under any of the circumstances mentioned in the five exceptions to Section 300, IPC. I shall not be understood to have held that recovery of the dead body of the particular person whose death was allegedly caused by the accused is always required to sustain a charge of murder or that of commission of offence under Section 304, IPC.

30. Contextually, it is only apposite to note that the expression '*corpus delicti*' got no reference to corpses. Virtually, it means that before seeking to prove that accused is the author of the crime concerned, it must be

[7] (1993) 2 SCC 435

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established that the crime charged has been committed. In fact, the said Latin expression is used with reference to the establishment of the fact that an offence has been committed, as opposed to the proof that a given person has committed it. I may hasten to add that, at times, the said expression is found to be used in the sense "dead body of the victim of alleged homicide". In the decision of ***Sevaka Perumal & Anr. v. State of Tamil Nadu***[8], it was laid down that it would not be essential to establish *corpus delicti,* but the factum of death of the deceased concerned must be established like any other fact. In the decision of ***Ram Chandra and Ram Bharosey v. State of Uttar Pradesh***[9], it was held that in law, a conviction for an offence did not necessarily depend upon the *corpus delicti*, i.e., the dead body, is being found. However, there must be reliable evidence, direct or circumstantial, of commission of murder, though *corpus delicti* is not traceable. In the decision of ***Mani Kumar Thapa v. State of Sikkim***[10], it was held that in a trial for murder it is neither an absolute necessity nor an essential ingredient to establish *corpus delicti,* but the

[8] (1991) 3 SCC 471
[9] AIR 1957 SC 381
[10] (2002) 7 SCC 157

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factum of death of the deceased concerned must be established like any other fact. Furthermore, it was held that in some cases it would not be possible to trace or recover *corpus delicti* owing to a number of possibilities such as dead body might have been disposed of without trace. Taking into account such possibilities it was furthermore held that if the recovery of dead body is to be held to be mandatory to convict an accused, in many cases, the accused would manage to see that the dead body is destroyed, which would have afforded the accused a complete immunity from being held guilty or from being punished. It was therefore held that what is required in law to base a conviction for an offence of murder is that there should be reliable and plausible evidence, like any other fact, that death was committed and it could be proved by direct or circumstantial evidence albeit the dead body could not be traced. Thus, the law laid down in the aforesaid decisions, which was consistently being followed, would reveal that conviction of an offence referred above did not depend upon whether the dead body is found, if reliable evidence, direct or circumstantial, of the commission of homicide is established despite the non-tracing of the dead body. Having held thus, I may hasten to add that

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the same cannot be the position, rather, the position would be different, when prosecution itself got a case that the dead body was recovered. Indisputably, it is one thing to say that the dead body is not traceable and another thing to say and claim that the dead body is traced and it is of that person allegedly murdered by the accused. Once the dead body is traced and subjected to autopsy and necrotomic and other evidences are adduced to bring out the cause of death, failure to prove that the dead body is of that very person allegedly done to death by the very accused, must have fatal and adverse consequence on the prosecution case. As noted earlier, a case that dead body is untraceable and a case where it is traced and evidence is adduced in a bid to prove the identity of the deceased are different and distinct. In the latter case, upon failure to prove, the prosecution cannot be permitted to advance a case that the dead body is untraceable. In the decision of ***State v. Sushil Sharma***[11], a Division Bench of the Delhi High Court held that there would be absolutely no room, in a criminal case, for conjectures and surmises and the prosecution is supposed to establish its case as is put

[11] 2007 SCC OnLine Del 255

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forth by it and if the case is disbelieved on any aspect by the Court, then the Court could not make out a new case on its own for the prosecution. I am in full agreement with the law thus laid.

31. In the case on hand, evidently the very case of the prosecution is that the body recovered from forest area within jurisdiction of Tirodi Police Station is that of the deceased Shama @ Kalya, and it is to prove the same that the fingerprint test was conducted and relied on. I have already found that though trial Court accepted and acted upon the opinion of the fingerprint test and that the said finding was reversed by the High Court. In categoric terms, the High Court held that the reliance of prosecution to prove that the dead body, subject matter, was that of Shama is based on guess work than on positive evidence. I have already taken note of the fact that the trial Court after accepting the opinion of the fingerprint test held that but for the availability of record slips, Shama @ Kalya being a criminal, there would not have been any chance of identification of the dead body. In such circumstances when once identification of the dead body as that of Shama @ Kalya based on fingerprint test is reversed by the High Court, in the absence of appeal by the State or the victim, it could not be said that

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the dead body is that of Shama @ Kalya, either for holding the appellant-convicts guilty of the offence under Section 300, IPC punishable under Section 302, IPC, or under Part -I / Part-II of Section 304, IPC.

32. Though, I have already held that upon failure to prove the case put forth that the recovered dead body is that of the person allegedly murdered by the accused, the prosecution cannot be permitted to raise a contention that the dead body is not traceable or that in such eventuality the Court also cannot make out a new case on its own for the prosecution, I think it only proper to proceed with further consideration of the present case.

33. In the contextual situation, it is also relevant to refer to the decision of this Court in ***State of Karnataka v. M.V. Mahesh***[12]. Even in the absence of *corpus delicti*, it is possible to establish in an appropriate case commission of murder on appropriate material being made available to the court, it was held therein. Therefore, the question is when the opinion on the fingerprint test is eschewed from the evidence, what survives to sustain the finding of

[12] (2003) 3 SCC 353

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guilt of appellant-convicts concerned under Section 304, Part-II, IPC, in the case on hand.

34. The case on hand allegedly, being a case of custodial death, as an abundant caution, I have taken pain to see whether any other material and acceptable evidence was adduced by the prosecution to establish homicide of Shama @ Kalya by the appellant-convicts during his illegal custody. It is a fact that none of the prosecution witnesses had deposed to the effect that he/she had seen the veins of legs of Shama @ Kalya in a cut off state or that he/she had seen his dead body anywhere in Gondia City Police Station including in any part of the Detective Branch Room. True that PW-1 and PW-16 have spoken to have seen Shama being beaten while in police custody. Hence, in the absence of any such specific statement from any of the prosecution witnesses while being examined and in the absence of any medical evidence in that regard, the question is how the Trial Court and the High Court arrived at the conclusion that veins of legs of Shama @ Kalya were cut off and such injuries, though not sufficient in the ordinary course of nature to cause death, ultimately caused his death while being in custody.

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35. In the contextual situation, it is relevant to deal further with the oral testimonies of the witnesses. PW-1, Amrutabai, the wife of Shama @ Kalya would depose that Shama was involved in several theft cases and used to be in jail frequently. She would also depose that he had plans to dispose of property at Kalamana. PW-16, who is the mother-in-law of Shama @ Kalya had also deposed in regard to his proposal to dispose of property at Kalamana. The relevance of their evidence in regard to disposal of Kalmana property will be looked into later, in another context. Evidence of PW-1, Amrutabai would reveal that while being examined-in-chief, she deposed that on 18.12.1995 she was tortured in a room by some of the accused and Shama was also brought to the said room later and then she saw him bleeding from his legs. She would further depose that on being enquired Shama would say that police had cut the veins of his leg and he might not survive and therefore, she would have to look after their children. She would further depose that on 22.12.1995, she found swelling on his feet and also bleeding from it. One Compounder, Soni was brought to treat them. According to her, Shama was treated for 5 days and though she had been there for 5 days since 17.12.1995, she was given treatment only for a day. She

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also deposed that when she went to speak to Shama she found his eyes and mouth were shut and he did not speak to her. According to her, she told the accused that the police had killed him to which they replied that he was only pretending. She would further depose that at about 5 or 6 pm she was released and, thereafter, on 25.12.1995 she, along with PW-16, her children, one Anil and her brother-in-law, went to Detective Branch Office of the police station and when enquired about Shama she was told that he had escaped from police custody.

36. It is to be noted that in the context of the oral testimony of PW-1, as above, she was confronted with her Ext. 130 statement as also Ext.131, which was her statement recorded under Section 164 of the Code of Criminal Procedure, 1973 (for short "Cr.PC.") for the purpose of contradicting her. In the light of the decision of this Court in ***Utpal Das & Anr. v. State of West Bengal***[13] there can be no doubt that a statement recorded under Section 164, Cr.PC., can also be used like a statement under Section 161, Cr.PC, to cross-examine the maker of it and to contradict him. Evidently, serious omissions were brought out by confronting PW-1 with such

[13] (2010) 6 SCC 493

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statements, with respect to the alleged disclosure of Shama that the accused had cut off veins of his leg and statement that he would not survive and, therefore, she should look after the children. Though in the chief examination she deposed to have been told as above by Shama while confronting with Ext. 131 they were brought as omissions which PW-1 could not explain. So also, it is evident on being confronted with Ext.130, her statement in Court that after being beaten Shama shut off his eyes and mouth and did not speak to her, was brought as omissions. A perusal of Section 145 of the Evidence Act, 1872 would reveal that a witness could be cross-examined as to previous statement in writing only in respect of a fact relevant to the matter(s) in question, for the purpose of contradicting him in the manner provided therein. Omissions amounting to contradiction that militate against the core of the prosecution case alone is material as in such circumstances it would have a bearing on the credibility of the witness concerned. In the decision in ***Shri Gopal & Anr. v. Subhash & Ors.***[14], this Court held that omission to state a fact amounts to contradiction. In the light of the matters in question the

[14] (2004) 13 SCC 174

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position that the aforementioned omissions are serious and amounting to contradictions cannot be disputed in view of the fact that they militate against the core of the prosecution case. In this context it is to be noted that they are crucial points of facts brought out by the prosecution through the testimony of PW-1 Amrutabai in Court. Injury due to cutting off the veins of the legs of Shama @ Kalya was taken as an injury that ultimately caused his death, though, it was held not sufficient in the ordinary course of nature to cause death. The judgment of the trial Court would further show that the statement said to have been made by Shama to PW-1, during the cross-examination, that owing to such cutting of vein he might not survive and she would have to take care of the children, was taken as dying declaration by the trial Court. Statement of PW-1 in the Court that on 22.12.1995 after they were beaten up, she went to speak to Shama and then, his eyes and mouth were shut and he did not speak, were also given due weight as a fact ignoring that they were brought as serious omissions. Thus, the circumstances reveal that in respect of matters in question involved in the case those omissions brought out during cross-examination of PW-1 are material and serious enough to tantamount to contradictions militating

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against the core of the prosecution case and, therefore, got a bearing on the credibility of the witness. Some of the other witnesses referred to hereinbefore mentioned only about the bleeding injuries seen on Shama, and at any rate none of them spoke about seeing injury of cutting off veins on his legs much less about seeing the accused persons cutting off the veins. I have already taken note of the fact that there is no medical evidence revealing that the veins of legs of Shama were cut off. That apart, it is to be noted that the postmortem report conducted on the un-identified body also would not reveal noting of any antemortem injuries much less cutting of veins on the legs.

37. In the said circumstances taking note of the facts that dead body traced out and subjected to postmortem was not identified to be that of Shama, that no antemortem injuries were found on the dead body coupled with the omissions amounting to contradiction that militates against the core of the prosecution case, there was no justification for the trial Court to arrive at a conclusion that the veins of legs of Shama were cut off and the said bleeding injury ultimately caused his death. These aspects were not at all considered by the High Court under the impugned common judgment.

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38. Paragraph 18 of the judgment, would reveal that it was the further case of the prosecution that accused persons hatched a plan and conspiracy and made PW-8 Dipak Lokhande disguised as Shama @ Kalya and made him to sit in a vehicle along with them. According to the prosecution after the vehicle had taken and turned near Agrasen Bhavan, Dipak Lokhande was asked to jump from vehicle and no sooner the vehicle was slowed down near the speed-breaker, Dipak Lokhande obliged to the request and then the accused persons started shouting that Shama @ Kalya escaped from the custody. It is also the case of the prosecution that to suit a case of escape of Shama @ Kalya from custody certain documents were created rather some entries were made in the station diary records. Thus, prosecution put forth such a case to establish that the accused persons had staged such a drama in a bid to create a belief that Shama @ Kalya escaped from their custody. Dipak Lokhande who was examined by the prosecution as PW-8, evidently did not support the case of the prosecution. It is to be noted that his evidence was appreciated by the Trial Court in paragraph 48 of its judgment and observed that it is not expected from such a stock panch and a regular informant who is on the parole of police to go against

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local police. It is also a fact that though a charge under Section 202, IPC was framed against accused Nos. 1, 2 and 4 as well they were not found guilty on the said charge. The High Court instead of taking into account the fact that it was a case put forth by the prosecution and to prove the same PW-8 was examined and he turned hostile, observed that a specific case of Shama's escape from custody was raised by the defence. The High Court went on to observe that having taken such a specific defence the appellants failed to establish the same and therefore, it must have its consequences. In other words, it was held that proving the same was the burden of the appellants. In the contextual situation, another incongruency occurred in the consideration of the evidence by the Trial Court and the High Court is also noteworthy. As noticed hereinbefore, it is the case of the prosecution that such a drama was staged by the accused to show that Shama had escaped from their custody. As noticed earlier, Dipak Lokhande who was examined by the prosecution to prove the same did not support the case of prosecution. It is in this context that an Order dated 07.01.1996 passed by Railway Court, JMFC, Railway, Raipur in C.No.12/96 of S.E. Railway under Section 137/174 of Railways Act, 1989, the

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certified copy of which was produced by the accused No. 1 assumes relevance. The appreciation of the same by the Trial Court in paragraph 54 of its judgment, is required be extracted, to know the nature of appreciation made by the Trial Court. It reads thus: -

> *"……It is defence of accused No. 1 that a person by name Shama was convicted by Railway Court. Raipur on 7.1.96 for traveling without ticket. He has produced the certified copy of the order of Railway Court. Raipur. This was an attempt to show that Shama was alive. Considering the circumstances and conduct of the policemen. It appears that the certified copy which is produced to show that Shama was convicted on 7.1.96 cannot be pertaining to Shama @ Kalya. It was an attempt to circumvent the case of prosecution. It was known to accused persons that offence was to be registered against them. The certified copy discloses that Shama was found while traveling between Gondia to Raipur without ticket. As per practices of Railway he was asked to pay Rs. 50/- but it is said that he denied and therefore, he was prosecuted. We have to see firstly Shama was dreadful criminal who will not be so easily caught by Railway police accordingly if he would have been by chance caught, he will choose to pay Rs. 50/- From the certified copy it appears that he was convicted on admission and*

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sentenced to pay a fine of Rs. 200/- Defence has not arranged to examine the railway employee who has charged sheeted the alleged Shama @ Kalya. This record produced by defence cannot be taken to be pertaining to Shama @ Kalya the record seems to have been prepared so that there should be some record about Shama @ Kalya. The record seems to have been prepared so that there should be some record about Shama @ Kalya being alive. It is difficult to believe that Shama would never meet his children wife and mother. There was no reasons for Shama to avoid his arrest, because he was convicted in 11 Criminal cases. For this reason, I have no hesitation to reject the theory of defence about Shama @ Kalya having fled away from the custody of Police."

39. Despite such consideration by the Trial Court on the aforesaid evidence based on suppositions and conjectures, the High Court in the impugned judgment observed that the defence, for reasons best known and best advice they must have been rendered chosen to be happy and satisfied with the defence of cross-examination and they did not deem it appropriate to take recourse to any defence whatsoever.

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40. The legally and factually incorrect approach of the High Court is evident from paragraphs 61 and 62 of the impugned common judgment. They read thus: -

> *"61. For the accused persons at least to create a doubt in the evidence brought by the prosecution in the mind of the Court, and some belief in favour of accused, that the accused have some defence and the prosecution story is debatable, defence could have chosen to lead any evidence including their own testimonies of denial, stating that on particular days and dates, on which the prosecution witnesses claim to have been brought to the Detective Branch Room of the Police Station, were not at all also called or detained or kept under the domain of police or were ill-treated.*
>
> *62. The defence has, for the reasons best known and best advice they must have been rendered, chosen to be happy and satisfied with the device of cross-examination. They did not deem it appropriate to take recourse to any defence evidence, whatsoever."*

41. Thus, it is evident that the High Court failed even to take note of the fact that such a document was available before the trial Court, but the trial Court appreciated the same only in the manner mentioned above. This assumes relevance in the context that the prosecution

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itself had put forth the case of escape from custody by Shama @ Kalya, but described it as a drama staged by the defence to create a belief that Shama @ Kalya was escaped from the custody. When the witness examined to prove the same turned hostile and the defence evidence suggesting probabilising such an escape was produced, it was incumbent on the part of the court(s) to consider the same, in accordance with law. In this context, it is to be noted that the very judgment of the trial Court itself would reveal that what was produced by the first accused was certified copy of an order in a summary trial whereunder a person by name Shama @ Kaloo s/o Nanu, shown to be a resident of Kalamana was convicted for travelling ticketless in a train between Gondia to Raipur. I have already noted earlier that PW-1 and PW-16 deposed that Shama @ Kalya wanted to dispose of property at Kalamana. The way in which it was appreciated by the trial Court, as extracted hereinbefore, would reveal that the said piece of evidence was brushed aside by the trial Court making its own suppositions and presumptions. There can be little doubt with respect to the position that a Court is not justified in deciding a case upon its own suspicions or suppositions after discarding the evidence adduced by

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the parties and that defence evidence is also to be appreciated in the same manner as it is to appreciate the prosecution evidence, but with the understanding that in the case of accused the standard of proof required is only preponderance of probabilities.

42. In the context of the reasoning of the High Court that the defence had failed to prove its specific plea of escape, it is only appropriate to consider the aforesaid factual and legal position. I have already noted that the prosecution has put forth a case that the accused had staged a drama to create evidence that Shama @ Kalya had escaped from police custody and to prove the same, prosecution got examined PWs, but he turned hostile and did not support the prosecution. Ignoring the evidence from the defence, which was discussed in detail though rejected by the Trial Court, the High Court held that the defence did not adduce any evidence, but had chosen to be happy and satisfied with the device of cross-examination and further held that for the failure to prove the specific plea the accused have to suffer the consequence. Before considering evidence adduced by defence, elaborately discussed by the Trial Court, I will consider certain established principles of criminal law. Indisputably, it is an established principle of criminal

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law that it is the burden of the prosecution to establish the guilt of the accused. This Court in the decision in ***Paramjeet Singh v. State of Uttarakhand***[15] held in unambiguous terms that the burden of proof squarely rests upon the prosecution and further that the more serious is the crime, the stricter is the proof required.

43. In view of the afore-mentioned reasoning given by the High Court it is also relevant to refer the decision of this Court in ***Sharad Birdhichand Sarda v. State of Maharashtra***[16]. This Court held that the prosecution must stand or fall on its own legs and it could not derive any strength from the weakness of the defence. Furthermore, it was held that the weakness of the defence could only be called as additional link to aid the prosecution and that it is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or plea which is not accepted by a court. It is also worthy to refer to the decision of this Court in ***V. Venkata Subharao's*** case (supra). The burden on accused did not have to meet the same standard of proof as is required to be made by the prosecution, it was held therein. There can

[15] (2010) 10 SCC 439
[16] [AIR 1984 SC 1622]

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be no doubt with the position that unlike the duty cast on the prosecution where proof has got to be beyond reasonable doubt, in the case of accused, he got to establish through a preponderance of probabilities that the evidence produced is acceptable to the court. I have already referred to and extracted the relevant paragraph in the judgment of the trial Court dealing with the certified copy of the order dated 07.01.1996 of the Railway Court, Raipur convicting one Shama, S/o Nanu residing at Kalamna Nagar for travelling in a train between Gondia to Raipur, ticketless. Evidently, the afore-extracted paragraph from the judgment of the trial Court would reveal that the said piece of evidence of defence was never put to test whether it satisfies the standard of preponderance of probabilities, but was declined on consideration based on suppositions, surmises and conjectures. Evidently, being a certified copy of an order passed by a Court viz., the Railway Court, Raipur the trial Court could not have declined to accept its existence in view of Section 43 of the Evidence Act.

44. In terms of the combined reading of Sections 43 and 79 of the Evidence Act, the trial Court could not have declined to accept the existence of the order dated

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07.01.1996 of Railway Court, Raipur. Since the existence of the said order dated 07.01.1996 cannot be said to be not a relevant fact or fact in issue, in view of the circumstances obtained in the case, upon its production, its evidentiary value should have been considered by applying degree of preponderance of probability. In this context, it is only relevant to refer to following relevant extract from paragraph 24 of the decision of this Court in ***Dr. N.G. Dastane v. Mrs. S. Dastane***[17]***:-***

> *"24… The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the Court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the Court has often a difficult choice to make but it is this choice which*

[17] [(1975) 2 SCC 326]

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ultimately determines where the preponderance of probabilities lies…"

45. While considering the identity of the accused who stood convicted under the said order dated 07.01.1996 it is relevant to note the initial observation of the trial Court at paragraph 54 of its judgment. At the risk of repetition, it is referred to hereunder thus: -

"The certified copy disclose that Shama was found while travelling between Gondia to Raipur without ticket."

46. In this context, it is to be noted that neither the trial Court nor the High Court arrived at a specific finding that the order dated 07.01.1996 of the Railway Court, Raipur, was not in existence or that it pertains to the conviction of a different person. How can such an order be ignored by stating that being a dreadful criminal he would not have been caught easily or even if caught he would have avoided arrest and conviction by depositing a fine of Rs. 50/-. It is in this context that the further case of the prosecution, that to create an impression that Shama @ Kalya had escaped from police custody and the accused had staged a drama, has to be looked into. According to the prosecution, in that regard one Dipak Lokhande was

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made to disguise as Shama @ Kalya and made to jump from a police vehicle by the accused. The evidence would reveal that though prosecution itself had examined the said Dipak Lokhande, a police official to prove the said case, but he turned hostile and did not support the prosecution case. It is in this context that the decision of this Court in ***Sharad Birdhichand Sarda's*** case (supra) holding that it is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or plea which is not accepted by a court, assumes relevance. In such circumstances, the order dated 07.01.1996 mentioned above only probabilise the case of defence. It is in the aforesaid context that the failure of the prosecution to prove that Shama's homicidal death had occurred in Detective Branch room of Gondia police station has to be viewed. It is relevant to note that the prosecution had examined one Gopal Dinaji Bansod as PW 11 to prove disposal of dead body by police. The impugned judgment itself would reveal that he was declared hostile and despite being cross-examined on behalf of the prosecution nothing relevant could be elicited. It is also to be noted that both the trial Court and the High Court failed to appreciate the evidence of PW-

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38, who was a superior officer of the accused and spoke about not only certain entries made in the case diary with respect to the escape of Kalya and a report on the said incident but also of the fact he came to know that one person by Shama was arrested at Raipur for travelling without ticket. These aspects also were not taken into account by the trial Court as also the High Court.

47. To sum up, it is not inappropriate to extract paragraph 110 of the impugned common judgment which reveal the principle adopted by the High Court in appreciating the evidence in the case on hand and it reads thus: -

> *"110. In so far as the aspect of burden of the prosecution and duty of defence in regard to these points is concerned, the prosecution evidence rises to the level as expected for proof of facts, and as discussed earlier in this Judgment, the accused persons have failed in discharge of their duty of rebuttal which rests on them in an unqualified manner and the degree.*

48. Thus, paragraphs 61, 62 and 110 of the impugned common judgment would reveal that it is the wrong application of the principle of appreciating the evidence in criminal cases that ultimately resulted in the conclusions and findings compelling the High Court to

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confirm the judgment of the trial Court except to the limit referred above. Therefore, the appeals except Crl. Appeal No. 1614/2012 which stood abated owing to the death of the sole appellant, must succeed to the following extent.

49. In the absence of evidence regarding homicidal death of Shama @ Kalya in Gondia City Police Station coupled with the defence evidence, which could stand the test of preponderance of probabilities and the other circumstances favourable to the accused emerging from the other circumstances and failure of the prosecution to establish the case put forth by it. Appellants in Crl. Appeal No.1617 of 2012 viz., Accused No. 2 (Ravindra) and Accused No. 4 (Hans Raj) are entitled to be acquitted for commission of offence under Section 304 Part II read with Section 34, IPC, granting the benefit of doubt. There is absolute absence of medical and oral evidence to find that the prosecution had succeeded in proving that Shama @ Kalya being in custody sustained any 'grievous hurt' or sustained a kind of hurt, falling in one or the other of the eight kinds of hurt (firstly to eighthly given under Section 320, IPC). This is because I have already declined the finding that Shama @ Kalya had sustained the injury of cutting of veins of his legs. In such

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circumstances, the conviction of accused Nos. 2 (Ravindra), No. 3 (Manohar), No. 4 (Hans Raj) and No. 5 (Vishnu) under Section 331 read with Section 34, IPC cannot be sustained.

50. In view of confirmation of the finding on custodial torture their conviction and consequential sentence under Section 330, 348 and 387 read with Section 34, IPC is to be confirmed. Since the conviction under Section 330 covers Section 323, IPC no separate sentence for voluntary causing hurt is to be imposed.

51. In view of the conclusions and finding in respect of the offence under Section 304-Part II read with Section 34, IPC, and the consequential acquittal of the convicts concerned granting benefit of doubt the convicts under the other offences are also entitled to get benefit of doubt, as those offences have relation with the main crime. Consequently, conviction based on finding guilt under Section 201, 202, 203 and 218 read with Section 34, on appellants-convicts concerned are also liable to be set aside.

52. The above discussion and conclusion would inevitably invite interference with the conviction of the appellant-convicts under Section 201, IPC read with Section 34, IPC, on all other grounds than for causing

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disappearance of evidence by destroying the dead body of Shama @ Kalya mentioned in paragraph 112 of the impugned common judgment of the High Court.

53. In the result, I dispose of all the appeals as under: -

I. Crl. Appeal No.1614 of 2012 stands abated.

II. Crl. Appeal Nos.1615, 1616, 1617 & 1618 of 2012 are partly allowed and the common judgment dated 12.07.2011 of the Nagpur Bench of the Bombay High Court stands set aside except to the extent whereunder appellants in Crl. Appeal No.1617 of 2012 viz., Ravindra (A2) and, Hans Raj (A4), appellant in Crl. Appeal No.1618 of 2012 viz., Manohar (A3) and, appellant in Crl. Appeal No. 1616 of 2012 viz., Vishnu (A5) are convicted under Sections 330, 348 and 387, IPC, and sentenced to undergo one year of rigorous imprisonment and a fine of Rs.1,000/- each and in default to suffer simple imprisonment for four months on each count. Accordingly, all the appellant-convicts are acquitted of all the other offences for which each of them was convicted and sentenced. In view of this judgment further action is required only in respect of A2 to A5 viz., appellants in Crl. Appeal Nos. 1617 of 2012, 1618

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of 2012 and, 1616 of 2012, that too in case any sentence remains unserved in view of confirmation of conviction and sentence under Sections 330, 348 and 387 read with Section 34, IPC.

....., J.
(C.T. Ravikumar)

New Delhi;
September 25, 2024

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Reportable

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL Nos. 1614-1618 of 2012

Manik and others **… Appellants**

Versus

The State of Maharashtra **… Respondents**

J U D G M E N T

SANJAY KUMAR, J

1. Having perused the erudite judgment authored by my learned brother, Justice C.T. Ravikumar, I find myself unable to subscribe to some of the views and conclusions noted therein. Hence, this differing opinion.

2. At the outset, though my learned brother has prefaced his verdict by stating that Criminal Appeal No. 1614 of 2012 filed by Manik, s/o Sitaram Jibhkate, stands abated as he died on 06.03.2022, I do not find anything on record to support and substantiate this statement. I, therefore, proceed on the assumption that this appeal also remains alive for active consideration, along with the other four appeals.

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3. A crucial aspect to be kept in mind while considering these cases is that all the appellants are members of the police force and the allegation against them is of misuse and abuse of their powers, in resorting to custodial torture of Shama @ Kalya, s/o Nanu Ukey, and tampering with evidence. This ultimately resulted in registration of Crime No. 315 of 1995 for offences punishable under Sections 302, 330, 331, 342, 343, 348, 354, 385, 387, 201, 202, 193 and 218, all read with Section 34, of the Indian Penal Code, 1860 (IPC). The appellants in these appeals are Accused Nos. 1 to 7. Sudhir, s/o Rambhan Kayarkar, and Ganesh, s/o Raghuji Turkar, Accused Nos. 8 and 9, were acquitted by the Trial Court of charges under Sections 201 and 202 IPC, read with Section 34 IPC, and the same attained finality.

4. Details of the conviction and sentencing of Accused Nos. 2 to 7 having been set out at length by my learned brother, there is no need to replicate the same except to the extent of adding that Accused No. 1, Manik, the appellant in Criminal Appeal No. 1614 of 2012, was also convicted by the Trial Court for offences punishable under Section 304 Part II, 330, 331, 348, 387, 201 and 218 IPC, all read with Section 34 IPC, and he stood acquitted, along with the other accused, of offences punishable under Sections 302 and 354 IPC, both read with Section 34

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IPC. Thereafter, in appeal, the High Court held that the prosecution had failed to prove the offence punishable under Section 201 IPC, read with Section 34 IPC, in so far as it related to causing disappearance of the body of Shama and all the appellants stood absolved of the same.

5. It may be noted that Vishwanath and Dilip, Accused Nos. 6 and 7, who jointly filed Criminal Appeal No. 1615 of 2012, already served out their sentence and were released from prison. This aspect was noted by this Court on 05.10.2012, while granting leave in these five cases. Further, it was noted that Manohar, Accused No. 3, had undergone imprisonment for about 1 year and 10 months out of the sentence of 3 years, while Vishnu, Accused No. 5, had completed about 1 year imprisonment out of a similar sentence of 3 years. As regards Manik, Ravindra and Hansraj, Accused Nos. 1, 2 and 4, it was noted that they had undergone only 2 years out of the sentence of 7 years imprisonment. In such circumstances, bail was granted only to Manohar and Vishnu, Accused Nos. 3 and 5, and not to the other three accused/appellants. It was only on 16.02.2015, that these three accused/appellants were also granted bail, taking note of the fact that they had completed approximately 5 years in jail.

6. *Ergo*, at this stage, we are concerned mainly with Manik, Accused No. 1; Ravindra, Accused No. 2; Manohar, Accused No. 3;

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Hansraj, Accused No. 4 and Vishnu, Accused No. 5. As the State has not chosen to approach this Court against the dismissal of its appeal by the High Court, which was filed in the context of the acquittal of the accused under Section 302 IPC, read with Section 34 IPC, that aspect stands settled. This failure on the part of the State is, in itself, a cause for concern as this was a case of police brutality and use of third-degree methods, which ought to have prompted the State to take a more rigorous stand so as to set an example and instill discipline in its police machinery. However, the State of Maharashtra did not deem it appropriate to do so. Be that as it may.

7. Sufficient evidence having been adduced before the Trial Court, which found favour with the High Court also, my learned brother has confirmed that custodial torture of Shama stands duly proved. As pointed out by this Court in ***State of U.P. vs. Ram Sagar Yadav and others***[1]: *"Police officers alone, and none else, can give evidence as regards the circumstances in which a person in their custody comes to receive injuries while in their custody. Bound by ties of a kind of brotherhood, they often prefer to remain silent in such situations and when they choose to speak, they put their own gloss upon facts and pervert the truth. The result is that, persons on whom atrocities are perpetuated by the police in the sanctum*

[1] (1985) 1 SCC 552

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sanctorum of the police station, are left without any evidence to prove who the offenders are".

8. In ***Bhagwan Singh and another vs. State of Punjab***[2], this Court observed: *"If a person is in police custody, then what has happened to him is peculiarly within the knowledge of the police officials who have taken him into custody. When the other evidence is convincing enough to establish that the deceased died because of the injuries inflicted by the accused, the circumstances would only lead to an irresistible inference that the police personnel who caused his death must also have caused disappearance of the body"*.

9. Given this settled legal position, it would suffice at this stage to note that several witnesses from within the police department, such as, Dilip Madhuprasad Sawwalakhe (PW-20), Shalikram Sarasram Nimkar (PW-23), Sumanbai (PW-22), and Dayaram Bakaram Sonkusare (PW-19), and independent witnesses, such as, Tejlal Karulal Pachbhaye (PW-10) and Kuwarlal Buddusao Dohare (PW-9), the staff from Hotel Anand at Balaghat, where the appellants kept Shama overnight, confirmed that Shama was injured and bleeding. His wife, Amrutabai (PW-1), stated that when she saw Shama in the police station on 18.12.1995, he was bleeding from both legs and he told her that the police had cut the veins in his legs.

[2] (1992) 3 SCC 249

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Sureshkumar Kharagchand Soni (PW-3), the compounder who treated Shama while he was in police custody, turned hostile but the fact remains that his testimony, for what it is worth, also confirms the injured state of Shama, consequent to the third-degree methods used on him by the appellants. In such circumstances, it can be safely surmised that Shama was in the illegal custody of the appellants since 16.12.1995, at the very least, and suffered prolonged third-degree treatment till 24.12.1995. That being so, it is very difficult to believe the story projected by the appellants that Shama escaped from their custody at about 11:00 PM on 24.12.1995. It is highly improbable that he would have been in a physical state of fitness to flee, by jumping from a moving jeep in a crowded residential area, and evade the police.

10. Significantly, Shalikram Nimkar (PW-23), being a member of the police force, confirmed in his deposition before the Trial Court that the entry in the police record about the escape of Shama was false. The facts narrated by him were recorded by the Trial Court in para 48 of its judgment. He stated that he was attending to the Station Diary on 24.12.1995 when Manik, Accused No. 1, approached and requested him to make an entry that Shama was reported to have been seen in the railway yard. PW-23 stated that he inquired with Manik as to why such an

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entry should be recorded when Shama was in police custody. PW-23 admitted that this entry was wrong but, as Manik was his superior, he had to oblige him.

11. *'Life is the art of drawing sufficient conclusions from insufficient premises'* [3]. This art would be all the more essential in the repertoire of a Judge, who may be presented with incomplete and, sometimes, incorrect information, while adjudicating a case. Appearances can be manipulated and may be completely deceptive, by deliberate design. It would be gullible for a Court to accept appearances at face value, however unconvincing they may be, and play into the hands of those who seek to dishonestly deceive it. In the present case, the appellants cleverly concocted the story of Shama escaping from their custody and created a record to buttress it. Not content therewith, the appellants also cooked up what is clearly a fabricated saga of Shama surfacing in Raipur and being convicted by the Railway Court there, on 07.01.1996, for travelling without a ticket. Even if it is assumed for a second that the police version of Shama's escape is true, it would require another huge leap of faith to believe that Shama, a fugitive from the law, would have willfully refused to pay ₹50/-, while caught travelling ticketless between Gondia and Raipur, and would have preferred to go before the Railway Court to suffer and

[3] Erewhon (1872), a satire by Samuel Butler.

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document a conviction, whereby he had to pay ₹200/- as fine. This convenient story was apparently devised for the purpose of creating a record of Shama being alive on that date.

12. Significantly, the prosecution did not gather any further evidence in relation to this conviction at Raipur. No witness from Raipur was examined to identify and prove that it was the very same Shama who had suffered the conviction there. In the absence of clinching proof of Shama being actually alive, the only possible inference that can be drawn from his established and prolonged torture by the appellants is that he would have died while in their custody. No doubt, the High Court, in its wisdom, chose to disbelieve the fingerprint evidence and did not sustain the Trial Court's finding that the body that was exhumed at the behest of the appellants was that of Shama. At best, the exclusion of this evidence would only mean that the dead body of Shama was not traceable. However, as rightly pointed out by my learned brother, production of a dead body to prove a murder is not necessary in the eye of law. *'Corpus Delicti'* is a Latin phrase that broadly means – 'body of the crime'. Generally, this principle has reference to the requirement of the prosecution proving that the crime has been committed, so as to charge the delinquent and secure a conviction.

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13. In ***Sevaka Perumal and another vs. State of Tamil Nadu***[4], this Court observed that it is not an absolute necessity or an essential ingredient to establish the *corpus delicti* in a trial for murder, as the factum of death must be established like any other fact. To base a conviction for murder, this Court held that there must be reliable and acceptable evidence that the offence of murder was committed and it must be proved, either by direct or circumstantial evidence, even if the dead body is not traceable.

14. Merely because the appellants were clever enough to trump up a story of Shama escaping from their custody and the happenstance of the exhumed body, recovered at their instance, no longer figuring in the picture due to rejection of the fingerprint evidence, it would be improper to proceed on the assumption that the law laid down in ***Sevaka Perumal*** *(supra)* would not be applicable. Doing so would impel the Court to fall into the trap of the ingenious and wily appellants, who have cunningly concocted and falsified records to escape their just deserts.

15. This is the major point of divergence between our views. My learned brother has acted upon the premise that once the dead body is said to have been traced and it is, then, not proved to be of that person, it would be fatal to the case of the prosecution. Permitting this premise to

[4] (1991) 3 SCC 471

gain acceptance would mean that those in the police organization, who resort to such nefarious methods, can take this easy way out to ward off a finding of guilt. When sufficient evidence is available to conclude that Shama was in no position to escape from the custody of the appellants, the inevitable corollary that follows is that he died due to their torture while in their custody.

16. It is high time that our legal system squarely faces the menace of police excesses and deals with it by putting in place an effective mechanism to obviate such inhuman practices. Long ago, Prof. Upendra Baxi had observed: *"What is truly striking about India is the lack of respect for rule of law, not just by the people but those who make and enforce them"* [5]. A few years later, Prof. Srikrishna Deva Rao pointed out that excessive use of force is a product of the police culture that rationalizes physical abuse as appropriate punishment for persons who are viewed as trouble-makers or deviants. He asserted that lack of proper legal restraint on police powers is one of the main reasons for continuous police abuse and that torture by the police is violative of the right to life and personal liberty under Article 21 of the Constitution[6].

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5 Crisis of Indian Legal System (1982)

6 Custodial Deaths by P. Srikrishna Deva Rao (National Law School Journal. Vol. 6, 1994)

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17. In the words of Mohammed Ghouse: *'Torture or killing of a person in police custody is, to put it mildly, illegal. But the real question is when gold rusts, what can iron do? Who can police the police? Because of the system of linkages, the accountability of police to the political process is purely notional. So, the question arises whether courts can police the police? It is unfortunate that the State has done little to reform the system to control such abuse of power by the police by institutionalizing a regime to detect, prosecute and punish wrongdoers within the police organization. The recommendation of the National Police Commission for a mandatory judicial inquiry by a District and Sessions Judge still remains on paper. Organizational accountability is perhaps the only means of ensuring that the rank and file within the police department respect and honour Constitutional values while discharging their functions and do not abuse the power that comes with it by resorting to third degree methods within the secrecy and safety of police lock-up'* [7]*.*

18. In fact, in ***Ram Sagar Yadav*** *(supra),* this Court had suggested amendment of the law relating to burden of proof in case of custodial deaths. In response thereto, the Law Commission of India, in its 113th Report (1985) on 'Injuries in Police Custody', recommended insertion of

[7] Mohammed Ghouse, "State lawlessness and Constitution of India: A study of custodial deaths", Comparative Constitutional Law 270 (Mahendra P. Singh ed., 1989).

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Section 114-B in the Indian Evidence Act, 1872, so as to reverse the burden of proof in cases of custodial death onto the police themselves. Despite decades having passed since then, this recommendation has not come to fruition.

19. Irrespective of that step being taken, the fact remains that when sufficient evidence is adduced to prove custodial torture by the police, it is then for the police themselves to prove their innocence, be it in a case of death in police custody or even if such a victim goes missing or vanishes. Notably, Section 29 of the Indian Police Act, 1861, makes willful breach of regulations by a policeman and causing of unwarrantable personal violence to any person in his custody, punishable with fine or imprisonment. Further, Police Manuals invariably hold those in charge of police stations responsible for the safe custody of all the prisoners housed therein.

20. Deepak Lokhande (PW-8) allegedly impersonated Shama on 24.12.1995 and staged a performance to support the police version that Shama had escaped from their custody on that night. Neither this parody nor the record of Shama suffering conviction before the Railway Court at Raipur can be allowed to dupe this Court, as intended by the guileful appellants. The appellants have been let off rather lightly by convicting

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them only under Section 304 Part-II IPC. Their careless disregard for the value of human life warranted a much more stringent punishment being visited upon them. In such circumstances, giving in to their duplicitous stories and permitting them to escape punishment would only add insult to injury.

21. I would, therefore, respectfully disagree with the conclusion drawn by my learned brother that, in the absence of evidence regarding the homicidal death of Shama @ Kalya, the appellants are entitled to be acquitted of the charge under Section 304 Part-II IPC read with Section 34 IPC, by granting them the benefit of doubt. On the contrary, I would maintain the convictions and sentences of the appellants, as confirmed by the High Court, and dismiss all the appeals.

……..,J
(Sanjay Kumar)

September 25, 2024;
New Delhi.