Judgement Reserved on:02.08.2022
Judgement Delivered on:12.09.2022

A.F.R.

Court No. - 42

Case :- GOVERNMENT APPEAL No. - 316 of 2019

Appellant :- State of U.P.
Respondent :- Mahfooz Ansari And 6 Ors.
Counsel for Appellant :- G.A.
Counsel for Respondent :- Sadaful Islam Jafri,Sadaful Islam Jafri

Hon'ble Vivek Kumar Birla,J.
Hon'ble Vikas Budhwar,J.

(Per: Hon'ble Vikas Budhwar,J.)

1. The present appeal purports to be under Section 378(3) of Criminal Procedure Code, 1973 (in short 'Cr.P.C.'), seeking to challenge the judgment and order dated 2.4.2019 passed by IVth Additional District & Sessions Judge/Special Judge, E.C. Act, Pilibhit in S.T. No.297 of 2014, (State of U.P. Vs. Mahfooz Ansari and 4 others), S.T. No.16 of 2015 (State of U.P. Vs. Irshad) and S.T. No.96 of 2015, (State of U.P. Vs. Kalloo Mewati), in Case Crime No.801 of 2014, P.S. Sungarhi, District Pilibhit under Sections 148, 364, 342, 302 read with Sections 149, 201 IPC acquitting the accused respondents, who are 7 in number.

INTRODUCTORY FACTS

2. Essence of the fact which lies in narrow compass as wrapped in prosecution story are that one Jai Prakash s/o Shri Ram Charan Lal r/o Village Gauneri Dan, P.S. Jahanabad, District Pilibhit submitted a written report before Deputy Inspector General of Police Bareilly on 19.5.2004 at 16.30 a.m. with an allegation that he solemnized marriage with Smt. Tabbasum @ Munni d/o Mahmood, r/o Chiriyadeh, P.S. Sungarhi, District Pilibhit on 18.12.2013, as the same was interfaith marriage thus, the accused fraction got furrated as their daughter married the informant, who happens to be of different religion.

3. Occasioning threats to the life, the first informant/complainant claims that he had no option but to prefer proceedings before this Court on writ side being W.P. No.20156 of 2004, Smt. Tabbasum @ Munni and others Vs. State of U.P. seeking police protection.

4. As per the first informant on 16.4.2014 a positive order was passed in their favour granting civil protection. Prosecution further asserts that Jaiprakash being the informant and the deceased being Smt. Tabbasum @ Munni were living together, however, on the fateful day i.e. 25.4.2014 when the informant was travelling from Bareilly to Pilibhit then at 5.00 in the evening at a place being Laveda, Police Station Hafizganj Bareilly, the accused respondents Mahfooz, Abdul Mazid, Mustkeem, Ayub and Irshad who happened to be the relatives of Smt. Tabbasum @ Munni while exerting pressure forcibly abducted his wife being Smt. Tabbasum @ Munni.

5. According to first informant, he proceeded to police station Hafizganj in order to submit written report but neither the same was taken note of nor any proceedings were conducted in that regard. In fact he tried his level best to search the whereabouts of his missing wife Smt. Tabbasum @ Munni but she could not be traced. Thus, he apprehends that the life of his wife is in danger.

6. It was further alleged that on 17.5.2014, he received a phone call from his wife Smt. Tabbasum @ Munni apprising him that she has been illegally confined in the house of his maternal uncle Irshad Master and he along with others had committed bad act with her and they are planning to murder her. The said call is stated to have been made from the mobile phone no.8273025296.

7. On the basis of the written complaint so lodged by the first informant before the Deputy Inspector General of Police, Agra region Agra on 19.5.2014 at 4.30 in the morning, a first information report was lodged. Accordingly, the Circle Officer city by virtue of the order dated 19.5.2014 directed for conduction of investigation in the said matter against the accused herein. The FIR was registered as Case Crime No.801 of 2014 under Sections 364, 342 IPC.

8. Records further reveal that on 20.5.2014 one Tilakram s/o Sunder Lal, r/o Gram Gauhania, P.S. Sungarhi, District Pilibhit lodged a written complaint before the Station House Officer, Sungarhi, District Pilibhit reporting that near the drain in Village Gauhania a dead-body of woman was found and adjacent to her the accessories being slipper, dupatta etc.

was also noticed and the resident of village in question identified the girl to be the sister of Mahfooz Ansari being Smt. Tabbasum @ Munni.

9. Accordingly, Sections 302 and 201 IPC were also added in the Case Crime No.801 of 2014 which was proceeded to be investigated pursuant to the nomination of the Investigating Officer.

10. As per the prosecution Investigating Officer conducted the investigation prepared site plan, Panchnama sent the body for postmortem followed by recording the statement of the prosecution witnesses. Eventually, a charge-sheet was submitted under Sections 342, 364, 302, 148, 149, 201 IPC against the accused herein being Mahfooz Ansari, Mustakeem, Ayub, Abdul Mazid and Riyasat @ Mama Irshad and Kallu Mewati @ Daroga Khan.

11. Case was committed to trial to sessions by virtue of order dated 17.3.2005, 23.8.2014, 9.10.2014, 12.2.2015, 1.7.2015 and 12.11.2018. Charges were read over to the accused herein. Accused claimed to be tried and they pleaded innocence.

12. Learned Trial Court by virtue of the judgment and order under challenge has acquitted the accused herein.

13. Challenging the judgment and order of acquittal now the present appeal has been instituted at the behest of the State.

LEGAL POSITION

14. Before pondering into the niceties of the judgment of acquittal under challenge in the proceedings under Section 378(3) Cr.P.C. at the instance of the State, this Court has to re-memoirse itself the fact that the present proceedings are in a form of appellate jurisdiction occasioning scrutiny of a judgment of acquittal wherein there are certain limitations so provided therein which needs to be recognised before the delving in the issue.

15. Broadly speaking until and unless the judgment under challenge is perverse and there are substantial and compelling reasons followed by miscarriage of justice to be meted by the parties, this Court should not in routine manner interfere with the judgment of acquittal as the accused is possessed with double presumption of innocence.

16. To put it otherwise as a matter of right, this Court cannot at the instance of the appellant, who happens to be State exercise the jurisdiction while converting the judgment of acquittal into conviction.

17. The aforesaid principle of law has already been crystallized by Hon'ble Apex Court in plethora of decisions and just for the sake of illustration reference may be made to the judgment of **Rajesh Prasad Vs. State of Bihar (2022) 3 SCC (471)** wherein the Hon'ble Apex Court in paragraphs no.21, 22, 23, 24, 25 and 31.1.

21. Before proceeding further, it would be useful to review the approach to be adopted while deciding an appeal against acquittal by the trial court as well as by the High Court. Section 378 CrPC deals with appeals in case of acquittal. In one of the earliest cases on the powers of the High Court in dealing with an appeal against an order of acquittal the Judicial Committee of the Privy Council in Sheo Swarup v. King Emperor[2] considered the provisions relating to the power of an appellate court in dealing with an appeal against an order of a acquittal and observed as under: (SCC OnLine PC)

> *"16. It cannot, however, be forgotten that in case of acquittal, there is a double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person should be presumed to be innocent unless he is proved to be guilty by a competent court of law. Secondly, the accused having secured an acquittal, the presumption of his innocence is certainly not weakened but reinforced, reaffirmed and strengthened by the trial court.*
>
> *"..... But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as: (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance*

> *with rules and principles well known and recognised in the administration of justice."*

It was stated that the appellate court has full powers to review and to reverse the acquittal.

22. In Atley v. State of U.P.3, the approach of the appellate court while considering a judgment of acquittal was discussed and it was observed that unless the appellate court comes to the conclusion that the judgment of the acquittal was perverse, it could not set aside the same. To a similar effect are the following observations of this Court speaking through Subba Rao, J. (as his Lordship then was) in Sanwat Singh v. State of Rajasthant: (Sanwat Singh case4, AIR pp. 719-20, para 9)

> *"9. The foregoing discussion yields the following results: (1) an appellate court has full power to review the evidence upon which the order of acquittal is founded; (2) the principles laid down in Sheo Swarup² afford a correct guide for the appellate court's approach to a case in disposing of such an appeal; and (3) the different phraseology used in the judgments of this Court, such as, (i) "substantial and compelling reasons", (ii) "good and sufficiently cogent reasons", and (iii) "strong reasons" are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion; but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified."*

The need for the aforesaid observations arose on account of observations of the majority in Aher Raja Khima v. State of Saurashtra5 which stated that for

the High Court to take a different view on the evidence "there must also be substantial and compelling reasons for holding that the trial court was wrong".

23. M.G. Agarwal v. State of Maharashtra is the judgment of the Constitution Bench of this Court, speaking through Gajendragadkar, J. (as his Lordship then was). This Court observed that the approach of the High Court (appellate court) in dealing with an appeal against acquittal ought to be cautious because the presumption of innocence in favour of the accused "is not certainly weakened by the fact that he has been acquitted at his trial".

24. In Shivaji Sahabrao Bobade v. State of Maharashtra, Krishna Iyer, J., observed as follows: (SCC p. 799, para 6).

"6. ... In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents."

25. This Court in Ramesh Babulal Doshi v. State of Gujarats, spoke about the approach of the appellate court while considering an appeal against an order acquitting the accused and stated as follows: (SCC p. 229, para 7)

"7. ... While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can and then

only reappraise the evidence to arrive at its own conclusions."

The object and the purpose of the aforesaid approach is to ensure that there is no miscarriage of justice. In another words, there should not be an acquittal of the guilty or a conviction of an innocent person.

31.1. Ordinarily, this Court is cautious in interfering with an order of acquittal, especially when the order of acquittal has been confirmed up to the High Court. It is only in rarest of rare cases, where the High Court, on an absolutely wrong process of reasoning and a legally erroneous and perverse approach to the facts of the case, ignoring some of the most vital facts, has acquitted the accused, that the same may be reversed by this Court, exercising jurisdiction under Article 136 of the Constitution. [State of U.P. v. Sahai[13]] d Such fetters on the right to entertain an appeal are prompted by the reluctance to expose a person, who has been acquitted by a competent court of a criminal charge, to the anxiety and tension of a further examination of the case, even though it is held by a superior court. [Arunachalam v. P.S.R. Sadhanantham[14]] An appeal cannot be entertained against an order of acquittal which has, after recording valid and weighty reasons, has arrived at an unassailable, logical conclusion which justifies acquittal."

18. Bearing in mind the principles of law so laid down by the Hon'ble Apex Court as referred to above the present case is to be proceeded with while giving it a logical end.

19. Heard Ms. Nand Prabha Shukla learned AGA and Sri N.I. Jafri, learned Senior Counsel assisted by Ms. Ambreen Masroor, learned counsel for the accused-respondents.

CONTENTIONS OF STATE/APPELLANT

20. Ms. Nand Prabha Shukla learned AGA has made the manifold submissions namely:-

(a) The accused herein have committed offence which stood proved beyond doubt as the chain and sequence of events consistently points towards the commission of the offence beyond reasonable doubt.

(b) The accused was seen with the deceased lastly wherefrom she disappeared thus the last seen theory comes into play.

(c) The call details (CDR) itself points out that the deceased was with the accused which stood proved beyond doubt.

(d) There was a strong motive for commission of crime by the accused as the present case occasioned interfaith marriage.

(e) Mere contradictions in the statement of the PW4 Jai Prakash (first informant husband) coupled with other prosecution witnesses turning hostile will not be a factor to hold the accused non-guilty of commission of crime particularly when there was not only a strong motive but also the fact that circumstantial evidences consistently form the link of commission of crime by accused.

CONTENTIONS OF ACCUSED/RESPONDENTS

21. Sri N.I. Jafri, learned Senior Counsel assisted by Amreen Masroor, learned counsel for the accused respondents have made following submissions:-

A. The judgment of the learned trial court is well reasoned taking into account each and every aspect of the matter and does not warrant any interference by this Court while exercising appellate jurisdiction.

B. Once there the major contradictions and inconsistency and improvement have been made in the testimony of the PW4 (first informant) coupled with other prosecution witnesses turning hostile then this Court should not interfere in the present proceedings as view taken by the learned trial court is possible view.

C. The circumstantial evidence do not support the prosecution theory as the complete chain itself is missing while linking the accused to have committed crime.

D. In view of huge time gap of 24 days between the accused alleged to be lastly seen with the deceased and the date of death the last seen theory does not stand applied.

E. The entire prosecution case stands on suspicion which cannot be a ground to hold the accused guilty of commission of crime.

DETAILS & DESCRIPTION OF OCULAR TESTIMONY AND DOCUMENTS ADDUCED

22. At this stage, the court finds proper to give brief description and details of the prosecution witnesses namely:

1.	Qadir Khan	PW1
2.	Rafee Ahmad	PW2
3.	Tilakram	PW3
4.	Jai Prakash	PW4
5.	Omkar	PW5
6.	Ravi Sharma	PW6
7.	Dr. Mahabeer Singh	PW7
8.	Roshal Lal Retd. HCP	PW8
9	Bhuvnesh Kumar Gautam PRO S.P. Pilibhit	PW9
10	Atul Pradhan Inspector Crime Branch, Badaun	PW10
11	Mohd. Rijwan	PW11
12	Zakir Hussain	PW12
13	Retd. S.I. Phool Singh	PW13
14	Sumer Singh Siddhu	PW14
15	Ramesh Saxena	PW15
16	Brijesh Singh Inspector	PW16
17	Uday Shankar	PW17
18	Dalbir Singh Inspector	PW18
19	Siyaram	PW19
20	Babu Baksh	PW20
21	Nasir Ahmad	PW21
22	Nanhe Baksh	PW22
23	Gopal Chandra Gupta	PW23
24	Mohd. Fahim	PW24
25	Sanjiv Kumar Saxena	PW25

26	Triloki Nath Mishra	PW26
27	Manoj Kumar	PW27
28	Smt. Babli	PW28
29	Surendra Pratap Singhs PRO Badaun	PW29

23. Besides ocular testimony following documents were adduced to support the prosecution:-

1	**Panchayatnama**	**Ex.ka1**
2	**Written Complaint**	**Ex.ka2**
3	**Fard**	**Ex.ka3**
	Letter No.4/2, 4/3 A-1/A	**Ex.ka1/A**
	Postmortem report	**Ex.ka-3**
4	**Chik FIR**	**Ex.A4**
5	**G.D. Carbon copy**	**Ex.ka4**
6	**Samples Stamp**	**Ex.ka6**
7	**Challan Naash**	**Ex.ka7**
8	**Letter D.M.**	**Ex.ka8**
9	**Letter CMO**	**Ex.ka9**
10	**Letter RI**	**Ex.ka10**
11	**Site plan of recovery of dead body**	**Ex.ka11**
12	**GD Carbon**	**Ex.ka12**
13	**CDR**	**Ex.ka13**
63	**Lagayat**	**Ex.ka63**
64	**Site plan of the place**	**Ex.ka64**
65	**Copy of Register**	**Ex.ka65**
66	**Photograph of Jai Prakash**	**Ex.ka66**
67	**Photograph of Tabbasum**	**Ex.ka67**
71	**Charge sheet against Kallu Mewati @ Daroga Khan 40-B**	**Ex.ka71**

24. So far as the prosecution witnesses are concerned as PW1 Qadir Ahmad appeared in the witness box and deposed that he knows accused Irshad son of Nisar, however he does not know the deceased Smt. Tabbasum @ Munni and he is not aware as to whether the deceased visited the house of accused Irshad. He has further deposed that he is not conversant with the fact as to whether before 25.4.2014 the deceased has visited the house of Irshad. In fact according to him he does not know the relatives of the deceased.

25. Rafi Ahmad appeared as PW2 and in his cross-examination, deposed that he knows Irshad but he showed his ignorance regarding deceased and he is not aware of the fact as to whether the deceased had visited the house of Irshad or not and he is not knowing the relatives of the deceased.

26. As PW3 Tilak Ram entered into the witness box and in his examination-in-chief, he came up with a stand that he neither knows deceased nor Jaiprakash the first informant. He also showed his ignorance regarding the fact that the deceased was with Jai Prakash, however according to him he found the dead-body of woman and when he went near then he could not recognise or identify the dead-body and he specifically stated that he had not submitted application in police station and the dead-body of the deceased was not sealed in his presence and no photograph of the same was clicked.

27. As PW4 Jai Prakash entered into the witness box claiming himself to be the first informant and the husband of

the deceased wife casting allegations upon the accused that on the date of the occurrence, the accused who are 7 in number were present. He has stated that he got married with the deceased and due to the marriage being interfaith marriage the accused bore-grudge against him. According to PW4, Kallu and Riyasat are not related to the deceased but other five accused are related and he further deposed that in connection with their safety of life and they preferred appropriate proceedings before the High Court seeking interim protection and he on 25.4.2014 had gone from Bareilly to Pilibhit and at about 5.00 in the evening in Gram Labeda the accused Mahfooz, Abdul Mazid, Mustkeem, Ayub, Irshad and others while loaded with unauthorised weapons forcibly abducted his wife and he had proceeded to police station Hafizganj for lodging written complaint but no action was taken and after searching the whereabouts of the deceased, he could not locate her and he received a phone call on 17.5.2014 from his wife and she apprised that she was under death threat and she was forcibly detained in a maternal uncle Irshad master place in Barkheda and she was also subjected to bad act and threatened to be murdered. According to PW4 the said information was received through mobile no.8273025296. He accordingly contacted the D.I.G. of Police while submitting written complaint on 17.5.2014 under a signature and then on 19.5.2014, first information report had been lodged. According to him his statements had been received by the Investigating Officer and on 20.5.2014 he received information that his wife has been murdered and he also received a phone call from the accused Mahfooz from mobile no.9720493938 wherein he

was apprised that they have killed his wife. PW4 has further stated that he was running coaching in the house of Mahfooz wherein there are about 70 students whereat the deceased was also student and after being in close relationship they solemnized marriage on 18.12.2013.

28. PW5 Omkar also appeared as a prosecution witness. He claims to have witness the body of the deceased but he is ignorant about the name of the deceased. He further stated that he signed the Panchayatnama.

29. PW6 Ravi Sharma has stated on 20.5.2014 near the drain the body of the deceased was found along with slipper and Dupatta and the villagers identified her to be Smt. Tabbasum @ Munni.

30. Dr. Mahavir Singh appeared as PW7 and according to him he is Senior Consultant District Hospital, Pilibhit and he conducted postmortem of the deceased on 20.5.2014. According to him the deceased was possessed with certain marks with suggested that she had died on account of strangulation. According to PW7 the death occurred two days prior to conducting postmortem i.e. on18.5.2014.

31. As PW8 Roshan Lal retired HCP appeared as prosecution witness and he claims to have been posted in the police station concerned and he on the directions of SHO Sungarhi registered the FIR.

32. PW9 Bhuvenesh Kumar Gautam appeared as a witness and proved the Panchayatnama etc.

33. Atul Pradhan Inspector Crime Branch, Budaun appeared as PW10 according to him he was posted as Incharge Inspector and he conducted investigation prepared site plan and executed necessary proceedings.

34. Mohd. Rizwan appeared as PW11, he in his examination-in-chief has stated that he knows Irshad Ahmad son of Nisar Ahmad and the deceased also and she used to the come to the house of Irshad. He pleaded ignorance regarding the marriage of the first informant with the deceased.

35. PW12 Zakir Hussain has stated that he does not know the deceased and he is not aware as to whether the deceased had visited the house of Irshad between 25.4.2014 and 20.5.2014.

36. PW13 retired S.I. Phool Singh stated that he was present when the deceased was found in a drain in village Gauhania and he had witnessed the Panchyatnama.

37. PW14 Subeg Singh Siddhu stated that he was at that point of time Circle Officer, police station Pilibhit on the written report dated 17.5.2014 so received on 19.5.2014 for lodging FIR and directed for conducting investigation.

38. PW15 Ramesh Saxena claimed himself to be the Clerk in the police station, he proved the lodging of the first information report.

39. PW16 Inspector Brijesh Singh appeared as prosecution witness, he claims himself to prove call details (CDR).

40. PW17 Udai Shankar Singh claims to have being the successor to conduct investigation as according to him he took the investigation from the stage which was left by his predecessor.

41. PW18 S.I. Dalbir Singh in his statement claimed that he had gone to the house of Irshad to trace the deceased.

42. PW19 Siyaram in his cross-examination has stated that he is not aware about the parentage of deceased and in his presence no recovery was made and no statement has been taken by the police.

43. PW20 Babu Baksh claim to be doing masonry work and in his examination has stated that he is not remembering as to whether he had visited the place of Riyasat @ Mama for laying down linter. He does not know the deceased and he is not aware about the same. He also denied giving any statement under Section 161 Cr.P.C.

44. PW21 Nasir Ahmad in his cross-examination has stated that he does not know Riyasat and he is not aware whether plastering was done in his house. He does not know the description of the girl and he denies giving any statement under Section 161 Cr.P.C.

45. PW22 Nanhe Baksh appeared in the prosecution box and according to him he did not lay down linter with Babu Baksh in the house of Riyasat @ Mama.

46. One Gopal Chandra Gupta PW23 appeared as a prosecution witness and he stated that on 18.12.2013 the deceased got married with the first informant, thus he proved the marriage.

47. Mohd. Fahim PW24 also deposed as a prosecution witness that he does not know the deceased and he is not aware whether she had eloped or not. He pleaded ignorance regarding the recovery of the dead-body of the deceased as he was in his house at that point of time and further he stated that he has not given any statement as stated by the prosecution.

48. Sanjiv Kumar Saxena PW25 appeared as a prosecution witness and he also proved the marriage of the deceased with the PW4 Jai Prakash.

49. PW26 Triloki Nath Mishra appeared as prosecution witness and according to him he is the Manager of the Arya Samaz situate at Subhash Nagar and he proved the marriage of the PW4 Jai Prakash with the deceased.

50. PW27 Manoj Kumar appeared as a prosecution witness and according to him he is brother-in-law of the first informant and he has deposed that on 25.4.2014 Jai Prakash received call from Nand Gopal wherein the person who called Jai Prakash had uttered that Jai Prakash had taken a

wrong decision to marry with Tabbasum @ Munni. Thus, he has supported the prosecution case.

51. Smt. Babli PW28 appeared as prosecution witness and she stated that four years ago i.e. the date of the incident Rajpal and Meena Devi who happens to be their relative had come at 6-7 in the evening along with the first informant and she had cooked food but they did not eat and as they were in tension. However, she was not told about Tabbasum @ Munni.

52. As PW29 Surendra Pratap Singh appeared as a prosecution witness claiming to be the Investigating Officer and according to him he after conducting the investigation submitted the charge sheet.

DISCUSSION AND FINDING

53. Undisputedly, the entire genesis of the present case revolves around the fact that the deceased, who happens to the wife of the first informant, had gone with the first informant on 25.4.2014 from Bareilly to Pilibhit and about 5 p.m. in village Laboda, Police Station Hafizganj, the accused who were armed with unauthorised weapons while exerting pressure abducted his wife. According to the first informant he had reported the said matter before the police station Hafizganj, however no action whatsoever have been taken and he continuously kept on searching his wife and when his wife was not traceable, he approached the D.I.G. Police Bareilly region, Bareilly while lodging its complaint and then first information report has been lodged on 19.5.2014 at

16.30 hours. The said events find place in the first information report which had been lodged by the first informant who claims to be eye-witness of the said incident.

54. Notably, in the first information report it has been further narrated that PW4 Jai Prakash received a phone call on 17.5.2014 from his wife that she was suspecting danger to her life and she was further subjected to bad act and the deceased maternal uncle Irshad Master had kept her in illegal confinement and the other accused Mahfooz, Mustkeem, Abdul Mazid, Ayub Mohammad and Irshad committed bad act and specifically details of mobile number being 8273025296 was mentioned. So much so on 20.5.2014 the dead-body of the deceased was found and accordingly a written complaint was lodged by one Sri Tilak Ram as alleged by the prosecution wherein the nearby villagers identified the deceased to be Tabbasum @ Munni.

55. Record reveals that on 22.5.2014 the Investigating Officer recorded the statement of the first informant wherein the first informant deposed that on 25.4.2014, the first informant received a phone call from Nand Lal Gautam, District President of a political party in his mobile phone at about 11.00 in the morning saying that the phone caller belongs to the same community and he wants to extend help to the first informant. According to the statement of the PW4 Jai Prakash the girl fraction and the community to which she belonged were quiet angry and lots of pressure was being mounted upon and the Ex. M.L.A. Arshad Khan, wanted to

get the matter pacified so as to eliminate the chances of bloodshed in village Gauneri Dan.

56. According to PW4 he on the proposal of Nand Gopal Gautam agreed however he is not aware mobile phone number of Nand Gopal Gautam as the sim card is not with him and he does not remember the number. As per PW4 the day was a Friday and after (the religious prayer of the other community) he went to the Satelite Bus Stand at 3.00 p.m. and at that point of time Nand Gopal Gautam came in white Marshal (four wheeler) in which both Nand Gopal Gautam and Ex. M.L.A. was sitting.

57. Further as per PW4 behind the said four-wheeler, there was another four-wheeler being a white Maruti Car in which the accused Kallu Mewati and the brother of the deceased being Mahfooz, Kallu and 2-3 persons was sitting. Even according to PW4 behind the said four-wheeler, there was another four-wheeler of green colour (Scorpio) in which the brother of the deceased Mustakim, Ayub and Abdul Mazid was sitting along with Irshad and Riyasat @ Mama.

58. PW4 has also deposed that on the Bareilly road while coming from Pilibhit after crossing village Labeda in the four wheeler of Nand Gopal Gupta, wherein the first informant and the deceased were sitting the accused Mahfooz and Kallu had overtaken the four-wheeler and stationed it in front of the four-wheeler in which the first informant was sitting and then they came out and forcibly took away the deceased and put her in the their vehcile. Thereafter Nand Gopal Gautam along with the first

informant came to Satelite crossing. According to PW4 in the night of the fateful day at 8-9 p.m. he proceeded to police station Hafizganj for lodging FIR, some constables were standing for over there however no heed was made for lodging FIR. PW4 Jai Prakash has further stated that the accused did possess any weapon with them but normally they keep it in a concealed manner.

59. The Investigating Officer on 5.6.2014 again took the statement of the PW4 Jai Prakash wherein PW4 deposed that though he came to Satellite but before that he went along with Nand Gopal Gautam near Fun-city near one hospital where his brother-in-law Manoj Kumar s/o Ram Das r/o Nakatia, Police Station Cantt. Bareilly was present.

60. As per PW4 he did not meet his brother-in-law Manoj Kumar at an earlier point of time while coming to Pilibhit as he was accompanied with Nand Gopal Gautam and his wife. PW4 further stated that he had conversation with his brother-in-law for an half an hour and thereafter his brother Rajpal also came and subsequently he again went to Labeda along with his brother Rajpal who was riding motorcycle and in Labeda he left his brother-in-law and along with his brother Rajpal in a motorcycle proceeded to his in-laws place being Sri Baburam and stayed there for 3-4 days. However in his inner heart, he was missing his wife and that is why he did not give any statement earlier.

61. The aforesaid statement so made by the first informant if put to conjoint reading will show that the narration of facts so made in the deposition so sought to be made by the first

informant on 22.5.2014 and 5.6.2014 does not find place in the first information report which was lodged on 19.5.2004. It is not a case wherein the first informant is not an eye-witness as according to the first informant PW4 he claims to be the eye-witness and thus the things which had happened on 25.4.2014 ought to have been not only immediately reported before police station but also narrated in the first information report.

62. So much so the inconsistency and major contradictions so sought to be made in the deposition by the PW4 being star witness itself gets further highlighted from the fact that a different story had been narrated in the first information report so lodged on 19.5.2014 wherein there was no recital about the fact regarding receiving of telephonic call by Nand Gopal Gautam and with respect to role of Ex. MLA.

63. Even in a subsequent statement dated 5.6.2014 another story is being sought to be build up while coming up with a stand that he met his brother-in-law Manoj Kumar and Rajpal and further proceeded to the in-laws place of his brother whereat he stayed for 3-4 days.

64. The story so build up by the prosecution upon the base so erected by PW4 itself demolishes the entire prosecution case particularly when there are major contradictions and improvement sought to be made in this regard.

65. The inconsistency in the statement of PW4 Jai Prakash also marks its presence every where as on one hand, he in

his statement so recorded under Section 161 of the Cr.P.C. as well as in the first information report in question had come up with a stand that he had received only once a call from the deceased in his phone number on 17.5.2014 regarding the atrocities which she was occasioning as she was put in illegal confinement by his maternal uncle Ishan Master and the accused had committed rape with her and the said fact is stated to be communicated and apprised to the first informant PW4 Jai Prakash through mobile number 8273025296. However, PW4 Jai Prakash in his statement under Section 161 of the Cr.P.C. had deposed that he had spoken with the deceased for 4-5 times and the deceased used to call her often after getting an opportunity behind the back of the accused when she was in-confinement and further uttered that PW4 Jai Prakash if he truly loved the deceased then he should change his religion and return the jewellery.

66. It is also come on record that in the statement so recorded of PW4 Jai Prakash, he has deposed that he on 1.5.2014 and 15.5.2014 had returned belongings of the deceased and Rs.60,000/- to the accused Kallu Mewati and Mustakeem in a market place being Buttler Plaza and near the Mosque at Aala Hazrat in Bareilly. He had further deposed that he even wanted to convert himself while changing the religion so as to live with the deceased.

67. The aforesaid inconsistency in the statement of the PW4 Jai Prakash, who claims to be the eye-witness of the incident also assumes significance particularly when the

entire prosecution theory has been laid down on the foundation of the deposition of PW4.

68. In the case of **Padam Singh Vs. State of U.P. (2000) 1 SCC 621** the Hon'ble Apex Court in paragraph 6 had occasioned to deal with the aspect relating to omissions and contradictions in the statements made under Section 161 of the Cr.P.C. and before the Court under Sections 164 of the Cr.P.C.

> *6. Even, if we examine the intrinsic oath of the prosecution witnesses, who are admittedly inimical, the omissions and contradictions between the statement made under Section 161 and the statement made in Court, as brought out in the cross-examination, makes the witnesses unreliable and the two learned Judges, without noticing the same have just brushed aside on the ground that the omissions and contradictions are not material. The said conclusion in our opinion cannot be sustained. After going through the cross-examination of the aforesaid witnesses, in our opinion, the witnesses do not stand the test of stricter scrutiny, they being admittedly inimical towards the d accused persons. In this view of the matter, no reliance could have been placed on their testimony and as such the conviction of the appellant cannot be sustained.*

69. Another additional aspect of the matter needs to be considered at this stage is with regard to delay in lodging of the FIR. It has come on record that on 25.4.2014 the incident of abducting the deceased by the accused has been alleged that too in the back ground of the fact that the first informant being the husband of the deceased was the eye-witness of the same. However, the first information report in question has been lodged on 19.5.2014 before the concerned

police station at 16.30 hours. An explanation has been sought to be offered by the first informant that prior to it he had approached the police station Hafizganj reporting the occurrence of the incident on 25.4.2014 at 5.00 in the evening. Meaning thereby that the first informant was possessed with the information of forcefully taking away of his wife by the accused as he claimed to be eye-witness of the occurence dated 25.4.2014. The first informant at that stage did not lodge the first information report, however, according to him on 17.5.2014, he received phone call from his wife that she was kept in illegal confinement by the accused and she was subjected to outrage of modesty by the accused. Thereafter, the first informant claims to have possessed alertness and he on 19.5.2004 wrote a written complaint before the D.I.G. of Police, Bareilly region Bareilly and thereafter first information report was lodged on 19.5.2014 at 16.30 hours.

70. As per PW4 Jai Prakash he in his statement under Section 161 of the Cr.P.C. on 22.5.2014 came up with a story that he was contacted by one Nand Lal Gautam at 11.00 on 25.4.2014 and he on his assurance came in contact with Ex.MLA and proceeded to Pilibhit.

71. PW4 Jai Prakash in his subsequent statement dated 5.6.2014 further narrated the tale that he met his brother-in-law Manoj Kumar just before Fun-city at Satellite Bareilly near a hospital and at that point of time incidentally his brother Rajpal also came and he as a pillion rider sat in the motorcycle of his brother Rajpal and thereafter he went to

the in-laws of his younger brother. Essentially the incident according to the PW4 Jai Prakash took place on 25.4.2014 however addition and subtraction were made in the deposition regarding the development in the incidents and it was not disputed and rather accepted by PW4 Jai Prakash that his wife was abducted on 25.4.2014.

72. Obviously, there is a delay of more than 24 days in lodging of the FIR that too in a case wherein the first informant is an eye-witness and husband, who even in fact had done interfaith marriage. The reasons of the delay have been thoroughly unexplained being unbelievable and inconceivable in the light of the fact that normally where a loving husband is witnessed with the situation whereat the wife gets abducted coupled with the fact that in-laws of the husband are not happy with the marriage then no prudent person would wait for 24 days in lodging the first information report. So much so in the statement of the PW4 Jai Prakash (Husband) it has also come on record that he on 25.4.2014 proceeded to his younger brother's in-laws place and stayed thereat for 3-4 days and did not discuss the said fact with the wife of the younger brother. The explanation so offered by PW4 Jai Prakash that he inner heart wanted his wife to be safe is not an explanation worth consideration particularly when it is not a case where Jai Prakash PW4 is not conversant with law and law enforcing authorities as it is an admitted case that PW4 Jai Prakash himself had approached the Hon'ble High Court while seeking civil protection in connection with this marriage with the deceased anticipating threat of his life.

73. Hon'ble Apex Court on the question of delay in lodging the FIR and its impact upon the prosecution theory has observed in the case of **Apren Joseph Alias Current Kunjukunju and others Vs. The State of Kerala (1973) 3 SCC 114** wherein para 11 following was mandated:

> *11. Now first information report is a report relating to the commission of an offence given to the police and recorded by it under Section 154, Cr. P. C. As observed by the Privy Council in K. E. v. Khwaja, the receipt and recording of information report by the police is not a condition precedent to the setting in motion of a criminal investigation. Nor does the statute provide that such information report can only be made by an eye witness. First information report under Section 154 is not even considered a substantive piece of evidence. It can only be used to corroborate or contradict the informant's evidence in court. But this information when recorded is the basis of the case set up by the informant. It is very useful if recorded before there is time and opportunity to embellish or before the informant's memory fades. Undue unreasonable delay in lodging the F. I. R., therefore, inevitably gives rise to suspicion which puts the court on guard to look for the possible motive and the explanation for the delay and consider its effect on the trustworthiness or otherwise of the prosecution version. In our opinion, no duration of time in the abstract can be fixed as reasonable for giving information of a crime to the police, the question of reasonable time being a matter for determination by the court in each case. Mere delay in lodging the first information report with the police is, therefore, not necessarily, as a matter of law, fatal to the*

> *prosecution. The effect of delay in doing so in the light of the plausibility of the explanation forthcoming for such delay accordingly must fall for consideration on all the facts and circumstances of a given case.*

74. In the case of **Tara Singh and others Vs. State of Punjab 1991 Supp (1) SCC 536**, the Hon'ble Apex Court in paragraph 4 has observed as under:-

> *4. It is well settled that the delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. Knowing the Indian conditions as they are we cannot expect these villagers to rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all the promptitude in giving the report to the police. At times being grief-stricken because of the calamity it may not immediately occur to them that they should give a report. After all it is but natural in these circumstances for them to take some time to go to the police station for giving the report. Of course the Supreme Court as well as the High Courts have pointed out that in cases arising out of acute factions there is a tendency to implicate persons belonging to the opposite faction falsely. In order to avert the danger of convicting such innocent persons the courts are cautioned to scrutinise the evidence of such interested witnesses with greater care and caution and separate grain from the chaff after subjecting the evidence to a closer scrutiny and in doing so the contents of the FIR also will have to be scrutinised carefully. However, unless there are indications of fabrication, the court cannot reject the prosecution version as given in the FIR and*

> *later substantiated by the evidence merely on the ground of delay. These are all matters for appreciation and much depends on the facts and circumstances of each case.*

75. Yet, in the case of **P. Rajagopal and others Vs. State of Tamil Nadu (2019) 5 SCC 403**, the Hon'ble Apex Court in paragraph 12 has held as under:-

> *12. Normally, the Court may reject the case of the prosecution in case of inordinate delay in lodging the first information report because of the possibility of concoction of evidence by the prosecution. However, if the delay is satisfactorily explained, the Court will decide the matter on merits without giving much importance to such delay. The Court is duty-bound to determine whether the explanation afforded is plausible enough given the facts and circumstances of the case. The delay may be condoned if the complainant appears to be reliable and without any motive for implicating the accused falsely.*

76. Now another question arises as to whether the theory of last seen is to be applied and pressed into service against the accused. Notably the prosecution has sticked to its case that the deceased was abducted and abducted by the accused herein on 25.4.2014. More so the dead-body of the deceased was found on 20.5.2014 that means after a period of about 24 days.

77. The postmortem of the deceased was conducted by PW7 20.5.2014 at about 1.45 p.m. from 20.5.2014 at 11.45 p.m. to 21.5.2014 at 12.45 a.m. As per PW7 Dr. Mahavir Singh the deceased died two days prior to the conduction of

postmortem while strangulating her and in cross-examination he deposed that there might be difference of 6 to 8 hours. Meaning thereby that the death of the deceased occurred around 11.45 p.m. on 18.5.2014 and if the difference of 6 to 8 hours is accounted for then time of the death would be 5.00 p.m. on 18.5.2014 to 7.00 a.m. on 19.5.2014. Co-relating the date of abduction being 25.4.2014 it has been stated by the prosecution that the accused had forcibly taken her away and the date of the recovery of the dead-body of the deceased on 20.5.2014 coupled with the opinion so tendered by PW7, who conducted the postmortem itself shows that there is enormous time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found death.

78. In **Dharam Deo Yadav Vs. State of Uttar Pradesh (2014) 5 SCC 509**, the Hon'ble Apex Court in paragraph 19 has observed as under:-

> *19. It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other words, a conviction cannot be based on the only circumstance of last seen together. The conduct of the accused and the fact of last seen together plus other circumstances have to be looked into. Normally, last seen theory comes into play when the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that the possibility of any person other than the accused being the perpetrator of the crime becomes impossible. It will 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. However, if the prosecution, on the*

basis of reliable evidence, establishes that the missing person was seen in the company of the accused and was never seen thereafter, it is obligatory on the part of the accused to explain the circumstances in which the missing person and the accused parted company. In such a situation, the proximity of time between the event of last seen together and the recovery of the dead body or the skeleton, as the case may be, may not be of much consequence. PWs 1, 2, 3, 5, 9 and 10 have all deposed that the accused was last seen with Diana. But, as already indicated, to record a conviction, that itself would not be sufficient and the prosecution has to complete the chain of circumstances to h bring home the guilt of the accused.

79. In **Dhan Raj @ Dhand Vs. State of Haryana (2014) 6 SCC 745**, the Hon'ble Apex Court in paragraphs 15, 16 & 17 have observed as under:-

15. The above mentioned circumstantial evidence was supported with the statement of Raj Singh (PW 15), that when he was visiting his brother the deceased on 24-1-1997 after the deceased had left, the three accused came to the deceased's house and enquired about him after disclosing their names. Before discussing the admissibility of the said statement, we would refer to the landmark decision of this Court in Sharad Birdhichand Sarda v. State of Maharashtra regarding circumstantial evidence, where this Court held regarding the question of the accused last seen with the deceased, that where it is natural for the deceased to be with the accused at the material time, other possibilities must be excluded before an adverse inference can be drawn. It is evident from the above that this Court refrains from drawing adverse inferences in a factual matrix which points towards the guilt of the accused. Thus, we will consider the statement of Raj Singh also in the same light.

16. As per the statement of Raj Singh, the three accused had come asking for the deceased but in the absence of other corroborating evidence and

independent evidence, it is not established that the appellant-accused had abetted the co-accused Sanjay in the commission of the crime. Also it can be the defence case that the said statement has been added as an afterthought to strengthen the case of the prosecution. We have found no material on record which corroborated the statement of Raj Singh who is an interested witness. Furthermore, there is no other evidence which indicates or establishes the presence of the appellant-accused near the place of commission of crime. Also, as noted by the trial court in the trial of Badal, no footprints were found in the surrounding kutcha area where the body of the deceased was found.

17. We have noticed in Madhu v. State of Kerala, facts of which were discussed earlier, that this Court in spite of the factum that the accused were sighted close to the place of occurrence at around the time of occurrence reversed the conviction as guilt was not established. In the present factual matrix, it is only an interested witness stating that the accused had come asking for the deceased. This factum alone does not establish guilt as no other evidence is found that they were near the Bizdipur area where the crime was committed or had visited the house of the deceased.

80. In **Ashok Vs. State of Haryana (2015) 4 SCC 393**, the Hon'ble Apex Court in paragraphs 8, 9, 10 & 11 have observed as under:-

"8. The "last seen together" theory has been elucidated by this Court in 9 Trimukh Maroti Kirkan v. State of Maharashtra², in the following words:

"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. Thus, the doctrine of last seen together shifts the burden of proof onto the accused, requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard, would give rise to a very strong presumption against him.

9. In Ram Gulam Chaudhary v. State of Bihar[3], the accused after brutally assaulting a boy carried him away and thereafter the boy was not seen alive nor was his body found. The accused, however, offered no explanation as to what they did after they took away the boy. It was held that for absence of any explanation from the side of the accused about the boy, there was every c justification for drawing an inference that they had murdered the boy.

10. In Nika Ram v. State of H.P.4, it was observed that the fact that the accused alone was with his wife in the house when she was murdered with a "khukhri" and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt.

11. The latest judgment on the point is Kanhaiya Lal v. State of d Rajasthan5. In this case this Court has held that the circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing the connectivity between the accused and the crime. Mere non-explanation on the part of the accused by itself cannot lead to the proof of guilt against the accused.

81. In **Chandrapal Vs. State of Chhattisgarh AIR 2022 S.C. 2542**, the Hon'ble Apex Court in paragraphs 14, 15, 16 & 17 have observed as under:-

> *"14. In this regard it would be also relevant to regurgitate the law laid down by this court with regard to the theory of "Last seen together".*
>
> *15. In case of Bodhraj and Ors. v. State of Jammu and Kashmir', this court held in para 31 that:*
>
> > *"31. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible...."*
>
> *16. In Jaswant Gir v. State of Punjab', this court held that in absence of any other links in the chain of circumstantial evidence, the accused cannot be convicted solely on the basis of "Last seen together", even if version of the prosecution witness in this regard is believed.*
>
> *17. In Arjun Marik and Ors. v. State of Bihar ¹0, It was observed that the only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the accused, and therefore no conviction on that basis alone can be founded."*

82. There is also a big question mark regarding the presence of the deceased along with the accused herein from the point of angle that the deceased called the first informant through the mobile phone bearing number 8273025296.

83. PW16, who claims to be Brijesh Singh L.O. Cell incharge District Lucknow came forward as a prosecution

witness to prove the call details (CDR). According to him the mobile number of the accused Mahfooz being 93963971920 is stated to be owned by the accused, he is being shown to be with the deceased for the period from 16.5.2014 to 20.5.2014. PW16 produced Ex.ka13 and Ex.ka63 being the call details. The prosecution has further come up with a stand that the call detail list was submitted by PW16 to the Investigating Officer being Udai Shankar Singh.

84. On cross-examination the Investigating Officer Sri Udai Shankar Singh PW17 when asked about the call details, he deposed that the same may be available in is office but it has not been annexed. A specific statement has been made by PW17 that the mobile phone so sought to be recovered of the accused was not sealed and he had only taken the EMI number. He further deposed that he had not taken the EMI number of the other also.

85. The learned Trial Court has further gone into details and has recorded a finding that the call details with respect to the accused herein at the place of the occurrence was not proved.

86. CDR is also one of the important factors which along with the other factors if pressed into service can surface the position of the accused into order to determine as to whether he had committed crime or not. However, there is a complete procedure envisaged under Section 65-B(4) of the Indian Evidence Act wherein the production of the certificate has been held to be mandatory with certain exceptions.

87. Hon'ble Apex Court in the case of **Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal and others (2020) 7 SCC 1** paragraphs no. 47, 51, 52 & 61 have observed as under:-

> *47. However, caveat must be entered here. The facts of the present case show that despite all efforts made by the respondents, both through the High Court and otherwise, to get the requisite certificate under Section 65-B(4) of the Evidence Act from the authorities concerned, yet the authorities concerned wilfully refused, on some pretext or the other, to give such certificate. In a fact-circumstance where the requisite certificate has been applied for from the person or the authority concerned, and the person or authority either refuses to give such certificate, or does not reply to such demand, the party asking for such certificate can apply to the court for its production under the provisions aforementioned of the Evidence Act, CPC or CrPC. Once such application is made to the court, and the court then orders or directs that the requisite certificate be produced by a person to whom it sends a summons to produce such certificate, the party asking for the certificate has done all that he can possibly do to obtain the requisite certificate. Two Latin maxims become important at this stage. The first is lex non cogit ad impossibilia i.e. the law does not demand the impossible, and impotentia excusat legem i.e. when there is a disability that makes it impossible to obey the law, the alleged disobedience of the law is excused.This was well put by this Court in Presidential Poll, In re, (1974) 2 SCC 33, as follows: (SCC pp. 49-50, paras 14-15).*
>
> > *"14. If the completion of election before the expiration of the term is not possible because of the death of the prospective candidate it is apparent that the election has commenced before the expiration of the term but completion before the expiration of the term is rendered impossible by an act beyond the control of human agency. The necessity for completing the election before the*

expiration of the term is enjoined by the Constitution in public and State interest to see that the governance of the country is not paralysed by non-compliance with the provision that there shall be a President of India.

15. The impossibility of the completion of the election to fill the vacancy in the office of the President before the expiration of the term of office in the case of death of a candidate as may appear from Section 7 of the 1952 Act does not rob Article 62(1) of its mandatory character. The maxim of law impotentia excusat legem is intimately connected with another maxim of law lex non cogit ad impossibilia. Impotentia excusat legem is that when there is a necessary or invincible disability to perform the mandatory part of the law that impotentia excuses. The law does not compel one to do that which one cannot possibly perform. 'Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over it, there the law will in general excuse him.' Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like the act of God, the circumstances will be taken as a valid excuse. Where the act of God prevents the compliance with the words of a statute, the statutory provision is not denuded of its mandatory character because of supervening impossibility caused by the act of God. (See Broom's Legal Maxims, 10th Edn. at pp. 162-63 and Craies on Statute Law, 6th Edn. at p. 268.)"

It is important to note that the provision in question in Presidential Poll, In re24 was also mandatory, which could not be satisfied owing to an act of God, in the facts of that case.

51. On an application of the aforesaid maxims to the present case, it a is clear that though Section 65-B(4) is mandatory, yet, on the facts of this case, the respondents, having done

everything possible to obtain the necessary certificate, which was to be given by a third party over whom the respondents had no control, must be relieved of the mandatory obligation contained in the said sub-section.

52. We may hasten to add that Section 65-B does not speak of the stage at which such certificate must be furnished to the Court. In Anvar P.V.2, this Court did observe that such certificate must accompany the electronic record when the same is produced in evidence. We may only add that this is so in cases where such certificate could be procured by the person seeking to rely upon an electronic record. However, in cases where either a defective certificate is given, or in cases where such certificate has been demanded and is not given by the person concerned, the Judge conducting the trial must summon the person/ persons referred to in Section 65-B(4) of the Evidence Act, and require that such certificate be given by such person/persons. This, the trial Judge ought to do when the electronic record is produced in evidence before him without the requisite certificate in the circumstances aforementioned. This is, of course, subject to discretion being exercised in civil cases in accordance with law, and in accordance with the requirements of justice on the facts of each case. When it comes to criminal trials, it is important to keep in mind the general principle that the accused must be supplied all documents that the prosecution seeks to rely upon before commencement of the trial, under the relevant sections of the CrPC.

61. We may reiterate, therefore, that the certificate required under Section 65-B(4) is a condition precedent to the admissibility of evidence by way of electronic record, as correctly held in Anvar P.V.2, and incorrectly "clarified" a in Shafhi Mohammad[3]. Oral evidence in the place of such certificate cannot possibly suffice as Section 65-B(4) is a mandatory requirement of the law. Indeed, the hallowed principle in Taylor v. Taylor40, which has been followed in a number of the judgments of this Court, can also be applied. Section 65-B(4) of the Evidence Act clearly states that secondary evidence is admissible only if led in the manner stated and not otherwise. To hold otherwise would render Section 65-B(4) otiose.

88. Recently Hon'ble Apex Court in **Criminal Appeal No.1307 of 2019 Ravinder Singh @ Kaku Vs. State of Punjab** decided on 4.5.2022 had followed the judgement in the case of **Arjun Panditrao Khotkar (Supra)** and paragraph 21 has held as under:-

> *"21. In light of the above, the electronic evidence produced before the High Court should have been in accordance with the statute and should have complied with the certification requirement, for it to be admissible in the court of law. As rightly stated above, Oral evidence in the place of such certificate, as is the case in the present matter, cannot possibly suffice as Section 65B(4) is a mandatory requirement of the law".*

89. The learned Trial Court has further observed that the mandatory procedure so envisaged under Section 65-B (4) of the Evidence Act has not been followed and even in fact nobody appeared on behalf of the telecom company so as to prove the CDR.

90. The prosecution in order to prove its case beyond doubt had relied upon and refered to the statement of PW1 Qadir Khan, PW2 Rafi Ahmad, PW11 Mohd. Rizwan, PW12 Zakir Hussain, PW20 Babu Baksh, PW21 Nasir Ahmad and PW22 Nanhe Baksh.

91. The aforesaid prosecution witnesses claimed to be the resident of Village Badkheda. However, PW1 Qadir Khan, PW2 Rafi Ahmad, PW11 Mohd. Rizwan, PW12 Zakir Hussain have though deposed that they are resident of Badkheda but showed their ignorance that they had seen deceased in the house of Irshad and accordingly, they were

declared to be hostile. Similarly, so far as PW20 Babu Baksh, PW21 Nasir Ahmad and PW22 Nanhe Baksh are stated to be the prosecution witnesses who while doing masonry work in the maternal uncle's place of the deceased saw the deceased. However, the aforesaid witnesses have denied witnessing the deceased in her maternal uncle's house and they were also turned hostile.

92. Though merely because prosecution witnesses turned hostile may not ipso facto be a abstract principle of law that the prosecution theory stands disbelieved but the such situation is to be seen along with other factors.

93. Notably in the present case this Court finds that there are material contradictions and inconsistency in the statement of PW Jai Prakash, who happens to be an eye-witness, delay in lodging of the FIR, huge time gap between the deceased being last seen with the accused and with the deceased, followed by the fact that CDR details do not match or mark the presence of accused with the deceased and also the fact that the postmortem report though stands proved by PW7 discloses the fact that the death occurred between the intervening night of 18/19. 5. 2014.

94. Though it might be a strong case as per the prosecution that motive was behind the commission of the crime due to the interfaith marriage so solemnized herein but the same is not a necessary element in deciding culpability. Baring PW4 Jai Prakash none of the prosecution witnesses have supported the version of the prosecution though might be that the statements so recorded in a gap of one to two

years. This Court might have ignored or kept aside the statement of the prosecution witnesses who had turned hostile due to lapse of time relating to recording of statement of prosecution witnesses but neither the medical evidence in the form of postmortem report supports the case of the prosecution nor the statement of PW4 Jai Prakash the star eye-witness inspire confidence as there are not only material contradictions which go into the root of the matter but the statements itself shown that they have been tailored so as to put the prosecution case in such position for holding the accused guilty of commission of crime.

95. No doubt suspicion as it becomes pointing towards the commission of offence by the accused but it cannot be partake the character of the accused committing the crime until and unless there is chain or link between the accused and the commission of crime specifically pointing the accused nobody else. The said fact also is quiet relevant as the PW4 first informant in his cross-examination so conducted on 18.8.2017 has come up with a stand that he did not recognise the accused as they were wearing cloth on their face and he suspects that the same be accused Mahfooz and their brother.

96. In **Nathiya Vs. State represented by Inspector of Police, Bagayam Police Station Vellore (2016) 10 SCC 298**, the Hon'ble Apex Court in paragraph 25 has observed as under:-

> *"25. On an analysis of the overall fact situation, we are of the considered opinion that the chain of*

circumstantial evidence relied upon by the prosecution to prove the charge is visibly incomplete and incoherent to permit conviction of the appellants on the basis thereof without any trace of doubt. Though the materials on record do raise a needle of suspicion towards them, the prosecution has failed to elevate its case from the realm of "may be true" to the plane of "must be true" as is indispensably required in law for conviction on a criminal charge. It is trite to state that in a criminal trial, suspicion, howsoever grave, cannot substitute proof."

97. In Khekh Ram **Vs. State of Himachal Pradesh (2018) 1 SCC 202**, the Hon'ble Apex Court in paragraph 33 has observed as under:

33. It is a common place proposition that in a criminal trial, suspicion however grave, cannot take the place of proof and the prosecution to succeed has to prove its case and establish the charge by adducing convincing evidence to ward off any reasonable doubt about the complicity of the accused. For this. the prosecution case has to be in the category of "must be true" and not "may be true". This Court while dwelling on this postulation, in Rajiv Singh v. State of Bihar dilated thereon as hereunder: (Rajiv Singh case, SCC pp. 392-93. paras 66-69)

> *"66. It is well-entrenched principle of criminal jurisprudence that a charge can be said to be proved only when there is certain and explicit evidence to warrant legal conviction and that no person can be held guilty on pure moral conviction. Howsoever grave the alleged offence may be. otherwise stirring the conscience of any court, suspicion alone cannot take the place of legal proof. The well-established cannon of criminal justice is "fouler the crime higher the proof". In unmistakable terms, it is the mandate of law that the prosecution in order to succeed in a criminal trial, has to prove the charge(s) beyond all reasonable doubt.*

67. The above enunciations resonated umpteen times to be reiterated in Raj Kumar Singh v. State of Rajasthan [10] as succinctly summarised in para 21 as hereunder: (SCC pp. 731-32)

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

68. In supplementation, it was held in affirmation of the view taken in Kali Ram v. State of H.P.11 that if two views are possible on the evidence adduced in the case, one pointing

> *to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted.*
>
> *69. In terms of this judgment, suspicion, howsoever grave cannot take the place of proof and the prosecution case to succeed has to be in the category of "must be" and not "may be": a distance to be covered by way of clear, cogent and unimpeachable evidence to rule out any possibility of wrongful conviction of the accused and resultant miscarriage of justice. For this, the Court has to essentially undertake an exhaustive and analytical appraisal of the evidence on record and register findings as warranted by the same. The above proposition is so well established that it does not call for multiple citations to further consolidate the same."*

98. So far as the recovery of the dead-body of the deceased is concerned it has come on record that a written complaint was lodged by one Tilak Ram PW3 on 20.5.2014 as though he did not identify the deceased but the resident villagers identified the same being the sister of Mahfooz Ansari. PW3 in his statement has come up with a stand that he does not recognise the deceased. However, according to him he has stated that the FIR was written in the writing of one Ravi Sharma and he signed the same. He denied to have given any statement under Section 161 Cr.P.C. Eventually PW4 Tilak Ram got hostile. As PW6 Ravi Sharma deposed, that he wrote the complaint on the directions of his father Tilak Ram Sharma, who narrated the facts but he does not recognise the deceased. PW5 happens to be one Onkar, who is stated to have witnessed the Panchayatnama, he though deposed that he signed the Panchayatnama but he did not

recognise the dead-body itself. PW19 Siyaram also deposed that he did not recognise the body of the deceased and he also turned hostile. PW24 Mohd. Fahim completely denied in his deposition that any dead-body was found on 20.5.2014, thus he also became hostile.

99. Though it has been alleged by the prosecution that the deceased was subjected to an occasion whereby her modesty was to be outraged by the accused while committing bad act but neither the same could be surfaced in the postmortem nor there has been any evidence led by the prosecution so as to corroborate the same. The said aspect is also important as the same along with the other factors shows that the ocular testimony of PW4 also does not inspire confidence of the Court so as to support the prosecution case.

100. Net analysis of the background so painted by the prosecution goes to show that barring PW4 Jai Prakash nobody has supported the prosecution case entailing demolition of the entire prosecution theory.

101. Though learned AGA has sought to argue that the prosecution theory is erected upon solid foundation but we find that the case of the prosecution proceeds on weak foundation.

102. Cumulatively giving anxious consideration to the judgment and the order passed by the learned trial court acquitting the accused, this Court finds that the learned trial court has not committed any palpable illegality or perversity as the learned trial court has appreciated each and every

aspect of the matter from the four-corners of law while acquitting the accused. The view taken by the learned trial court is a possible and plausible view based upon not only the appreciation of the testimony of the prosecution witnesses and the documents so adduced therein but also upon the cardial principles of law which govern the subject in question.

103. Thus, this Court has no option but to concur that the judgement of the learned trial court whereby the accused herein has been acquitted.

104. Resultantly no ground is made so as to accord leave to appeal and accordingly the same is rejected.

105. As the leave to appeal stands rejected thus the present Government Appeal so instituted by the State-appellant under Section 378(3) of the Cr.P.C. stands dismissed.

106. The record and proceedings be sent back to the court-below.

(Vikas Budhwar, J.) *(Vivek Kumar Birla,J.)*

Order Date :- 12.09.2022
piyush