SANTOSH @ BHURE

v.

STATE (G.N.C.T.) OF DELHI

(Criminal Appeal No.575 of 2011)

APRIL 28, 2023

[SANJAY KISHAN KAUL, MANOJ MISRA AND ARAVIND KUMAR, JJ.]

Penal Code, 1860 – s. 302 r/w. s.34 – Acquittal under – Prosecution case that 'S' was tenant of an apartment on the second floor of a building owned by PW-3 – On 12.09.2000, at about 10.40 a.m., an information was given to the police that a dead body is lying in that apartment – As per prosecution, two disclosure/ confessional statements were made by each of the two accused ('S' and 'N') during police custody – Trial Court held that the proven circumstances constituted a chain which conclusively indicated that the accused 'S' in the company of co-accused 'N' committed the crime and to remove the evidence hid the dagger and the blood-stained clothes and further, to hoodwink the police, 'N' wrote and planted a suicide letter in a pocket of the trouser worn by the deceased – Both the accused were convicted u/ss. 302 r/w. s. 34 – High Court acquitted 'N', however, S's conviction was upheld – On appeal, held: Mere tenancy of the apartment being with 'S' by itself is not sufficient to hold him guilty as there is no general presumption against the owner/tenant of a property with regard to his/her guilt if a dead body with homicidal injuries is found in his/her property – Prosecution failed to lead any evidence that the two accused, or any one of them, were present there, or in the vicinity – There is no witness statement identifying the handwriting of accused 'N' or disclosing that accused wrote the suicide letter in his presence – There is also no evidence to explain the relevance of the contents of the suicide letter – Suicide letter indicts one person 'C'– As to why such indictment was made; whether it was with reference to some other event contemplated, the prosecution evidence is silent – Barring the expert report, there exists no internal or external evidence to lend assurance to the prosecution story that the suicide letter was written by accused 'N'– As regards recovery of clothes at the instance of 'S', PW4, a witness to that recovery, has been

declared hostile – There is thus no support to that recovery from any public witness – The circumstance that the clothes carried blood of same group as of the deceased is rendered meaningless because there is no admissible evidence to connect the clothes with the two accused – As regards recovery of knife at the instance of 'N', the same has been denied by 'N' and there appears no independent witness to support it – Its incriminating value is extremely limited because, firstly, there is no forensic evidence connecting the knife with the crime; secondly, the knife is a common knife which could easily be available; thirdly, the wounds found on the body of the deceased were of different dimensions giving rise to possibility of use of more weapon than one; and, fourthly, the entire exercise of recovery does not inspire confidence, particularly, because the first attempt to recover had failed – Thus, the prosecution failed to prove a chain of incriminating circumstances as to conclusively point out that in all human probability it was the two accused or any one of them, and no one else, who had committed the murder.

Evidence – Circumstantial Evidence – Conviction on strength of evidence which are circumstantial in nature – Settled legal position – The circumstances from which the conclusion of guilt is to be drawn should be fully established – Also, circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused – Further, the circumstances taken cumulatively should form a chain so far complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and the circumstances should be consistent only with the hypothesis regarding the guilt of the accused and they must exclude every possible hypothesis except the one to be proved – The circumstances from which the conclusion of guilt is to be drawn should be fully established meaning thereby that they 'must' or 'should' and not 'may be' established as the Court must not be oblivious of the most fundamental principle of criminal jurisprudence, which is, that the accused 'must be' and not merely 'may be' guilty before the Court proceeds to convict him.

Indian Evidence Act, 1872 – s. 106 – Burden of proof under it upon the accused – Legal position – It is settled that s. 106 of the Evidence Act does not absolve the prosecution of discharging its primary burden of proving the prosecution case beyond reasonable

doubt – It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a prima facie case, that the question arises of considering facts of which the burden of proof would lie upon the accused.

Code of Criminal Procedure, 1973 – s. 311-A – Law therein and its prospective application – By Act No.25 of 2005, with effect from 23.06.2006, Section 311-A has been inserted in the Code thereby empowering a Magistrate of the First Class to direct any person including an accused to give specimen signature or handwriting for the purposes of investigation but this provision would have no bearing on the case instant case as it is of the year 2000.

Indian Evidence Act, 1872 – s. 73 – Scope – The provisions of S. 73 apply when a proceeding such as an inquiry or trial is pending in a Court – In the instant case, since no proceedings were pending before any Court when the specimens in question were obtained, provisions of s.73 could not have been invoked.

Indian Evidence Act, 1872 – s. 45 – Handwriting Expert – Admissibility – Scope – It is not impermissible to base a finding with regard to authorship of a document solely on the opinion of a handwriting expert but, as a rule of prudence, because of imperfect nature of the science of identification of handwriting and its accepted fallibility, such opinion has to be relied with caution and may be accepted if, on its own assessment, the Court is satisfied that the internal and external evidence relating to the document in question supports the opinion of the expert and it is safe to accept his opinion.

Disposing of the appeals, the Court

HELD: <u>Circumstance – Apartment from where the dead body was found stood in the tenancy and possession of accused 'S'.</u>

1. Prosecution seeks to bring home the charge levelled on the accused by relying on certain circumstances. As to when on strength of evidence circumstantial in nature conviction can be lawfully sustained, the law is well settled — the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established; these circumstances should

be of a definite tendency unerringly pointing towards the guilt of the accused; the circumstances taken cumulatively should form a chain so far complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused; the circumstances should be consistent only with the hypothesis regarding the guilt of the accused; and they must exclude every possible hypothesis except the one to be proved. Further, the circumstances from which the conclusion of guilt is to be drawn should be fully established meaning thereby that they 'must' or 'should' and not 'may be' established. While dealing with a criminal trial, a Court must not be oblivious of the most fundamental principle of criminal jurisprudence, which is, that the accused 'must be' and not merely 'may be' guilty before the Court proceeds to convict him. In *Shivaji Sahabrao Bobade & Another v. State of Maharashtra,* this Court, elaborating upon the above principle, observed that the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions. [Paras 23, 24][739-G-H; 740-A-D]

2. In *Shivaji Chintappa Patil v. State of Maharashtra,* it was observed that Section 106 of the IEA, 1872 does not directly operate against either a husband or wife staying under the same roof and being the last person seen with the deceased. It was observed that Section 106 of the Evidence Act does not absolve the prosecution of discharging its primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a prima facie case, that the question arises of considering facts of which the burden of proof would lie upon the accused. [Para 32][744-C-D]

3. This Court is of the view that though the prosecution has succeeded in proving that the apartment where body of the deceased was found stood in the tenancy of 'S' but it failed to lead any evidence that the two accused, or any one of them, were present there, or in the vicinity, either on 11.09.2000 or any time thereafter, till recovery of the dead body. In other words, the prosecution miserably failed to show the presence of the accused around the probable time of murder. Further, the prosecution

led no evidence to establish that the concerned apartment was under lock and key or exclusive control of either 'S' or 'N'. Even the theory of exclusive possession of 'S' over that apartment is dented by the statement of PW4 that till a week before the incident one 'HR' used to live in that apartment with 'S'. There is also no evidence of the prosecution to show that the concerned apartment had a separate stair case accessible to 'S' and no one else. For all the reasons above, though this Court holds that tenancy of the concerned apartment was proved to be with 'S' but neither his nor N's presence in that apartment, around the relevant time, is proved by any evidence. It is also not proved that 'S' was in exclusive possession or control of that apartment. Rather, from the testimony of PW4 it appears that one 'HR' was residing there with 'S' though, he had left the place a week before the incident. As to whether the deceased came there after 'HO' had left or was residing there since before, is not clear from the prosecution evidence. In fact there is no evidence - (a) as to when the deceased came into that apartment and (b) in what capacity he was residing there. In light of the discussion above and in the facts of the case, in considered view of this Court, the mere presence of the dead body in the apartment let out to 'S' is not such a clinching circumstance which, on its own, could sustain S's conviction with the aid of section 106 of the IEA, 1872 by shifting the onus on him to explain as to under what circumstances the dead body with multiple injuries was found there. [Para 36][746-C-H]

Circumstance — Cause of death and place of murder

4. As regards death of victim being homicidal and a consequence of multiple injuries caused by a sharp edged weapon, no serious challenge is there to the findings returned by the courts below. There is no challenge to the finding that blood etc. was lifted from the apartment thereby confirming that murder took place there. However, in addition to blood or blood-stained cot/ linen there were whisky bottle, empty packets/ pouches of salted snacks, cigarette butts, etc. lifted from that apartment but there is no evidence to connect those articles with either of the two accused so as to confirm their presence and rule out the presence of some other person at the relevant time. [Para 37][747-A-C]

A **Circumstance — Recovered Suicide Letter being in the writing of 'N'**

5. In the instant case, N's specimens of handwriting and signature were obtained by the investigating agency during investigation when there existed no specific provision in the Code
B **regulating the procedure for obtaining such specimens and there existed no provision proscribing the investigating agency from obtaining specimens of handwriting/signature of an accused or a suspect. As far as the provisions of Section 73 of the IEA, 1872 are concerned, they apply when a proceeding such as an inquiry**
C **or trial is pending in a Court. Since no proceedings were pending before any Court when the specimens in question were obtained, provisions of section 73 of the IEA, 1872 could not have been invoked. In such a situation, as there existed no legal provision proscribing an investigating agency from obtaining specimens of handwriting/signature of a suspect or an accused, in view of this**
D **Court, the investigating agency had the power to collect such material including specimen handwriting/ signature as to assist the prosecution to introduce a relevant fact or corroborate any piece of evidence on a relevant fact/fact in issue. For the reasons, the expert report (i.e. FSL report) obtained during investigation**
E **by the investigating agency, predicated on specimens of handwriting/ signature of accused obtained during investigation, could not have been discarded merely because it was obtained during investigation and without an order/permission of the Court as contemplated under section 73 of the IEA, 1872.[Para 51][752-E-G; 753-A-B]**

F **6. In the instant case, according to the prosecution evidence, the specimen signatures and handwritings of 'N' were obtained during investigation. Memorandum/documents in connection therewith including the specimens were produced, proved and marked exhibits thereby proving that they were**
G **properly kept and dispatched to FSL along with the disputed suicide letter for obtaining expert opinion. Genuineness of those specimens have not been questioned by 'N'. The only defence taken is that the specimens of handwriting and signature were obtained by compulsion. As this Court has already found that such objection was unsustainable therefore, once genuineness of the**
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specimens was not disputed, the specimens were available for comparison and were rightfully used for obtaining expert report. In such a scenario, the net result would be that the FSL report, which was provided by a government scientific expert specified in Section 293 of the Code, was admissible regardless of the fact that the expert was not examined as a witness. More so, when the defence filed no application to summon the expert for cross-examination. Consequently, the finding of the High Court with regard to the FSL report being inadmissible is erroneous and is, accordingly, set aside. [Para 59][756-C-F]

Whether the FSL Report on its own was sufficient to hold that the suicide letter was written by 'N'.

7. Though it is not impermissible to base a finding with regard to authorship of a document solely on the opinion of a handwriting expert but, as a rule of prudence, because of imperfect nature of the science of identification of handwriting and its accepted fallibility, such opinion has to be relied with caution and may be accepted if, on its own assessment, the Court is satisfied that the internal and external evidence relating to the document in question supports the opinion of the expert and it is safe to accept his opinion. In the instant case, with regard to authorship of the suicide letter, the Trial Court though returned a finding in favour of the prosecution by relying solely on the expert report but did not record its satisfaction having regard to its own observations with respect to the admitted and disputed writings. It also did not examine whether in the proven facts and circumstances of the case it would be safe to rely on the expert report.It be noted that section 73 of the IEA, 1872 enables a Court to compare the words or figures written by a person present in Court with any words or figures alleged to have been written by such person. The Trial Court therefore could have undertaken such an exercise. But, in the instant case, there appears no such exercise undertaken by the Trial Court. What is important is that in the instant case there is no witness statement identifying the handwriting of accused 'N' or disclosing that accused wrote the suicide letter in his presence. There is also no evidence to explain the relevance of the contents of the suicide letter. Interestingly,

the suicide letter indicts one person 'C'. As to why such indictment was made; whether it was with reference to some other event contemplated, the prosecution evidence is silent. Besides that, there is no evidence to show that the investigating officer queried person(s) conversant with the handwriting of the deceased to rule out possibility of the suicide letter being in the writing of the deceased himself. Such an exercise was necessary to lend assurance to the prosecution story of the suicide letter being written by accused to mask the murder, because, firstly, the death on its face was not suicidal, and, secondly, it could have ruled out possibility of it being written in contemplation of some other event. Seen in that light, barring the expert report, there exists no internal or external evidence to lend assurance to the prosecution story that the suicide letter was written by accused 'N'. [Paras 65, 66][759-G-H; 760-A-G]

8. In addition to the above, it is difficult to accept as to why 'N' would leave a suicide letter written by him in a pocket of the trouser worn by the deceased, particularly, when the injuries even to a layman were homicidal. Notably, there were eight ante-mortem injuries found on the body of the deceased. [Para 67][760-G-H]

9. Taking into account that 'N' has denied the incriminating circumstance of writing the suicide letter and no internal or external evidence, save the expert report, supports the writing of suicide letter by 'N', this Court is of the considered view that though the expert evidence was admissible as an opinion on the writing in the suicide letter but, on overall assessment of the evidence led by the prosecution, solely on its basis, it would be extremely unsafe to hold that the suicide letter retrieved from the trouser of the deceased was written by 'N'. [Para 69][762-B-C]

Circumstance — The two accused were not traceable from 12.09.2000 till 23.09.2000

7. This Court does not find a good reason to draw an adverse inference against the two accused on account of few days delay in their act of surrender. [Para 70][763-E-F]

Circumstances — Disclosure statements, consequential discoveries and their connect with crime.

8. As regards recovery of clothes at the instance of 'S', PW4, a witness to that recovery, has been declared hostile. There is thus no support to that recovery from any public witness. And since this Court has already doubted the disclosure statements set up by the police witnesses, it would be unsafe to place reliance on their testimonies in respect of the recoveries pursuant thereto, particularly, when the place from where recovery of clothes is shown is none other than the rooftop of the building from where 13 days ago the body of the deceased was found. Because, in such a scenario, it would be logical to expect that the police would have left no nook and corner of that building unscanned. For all the reasons above, we doubt the recovery of clothes at the instance of 'S' and thereby discard the circumstance of recovery of clothes at his instance. The circumstance that the clothes carried blood of same group as of the deceased is rendered meaningless because there is no admissible evidence to connect the clothes with the two accused. As regards recovery of knife at the instance of 'N', the same has been denied by 'N' and there appears no independent witness to support it, inasmuch as PW-13, touted as a public witness, turned out to be a special police officer. Otherwise also, its incriminating value is extremely limited because, firstly, there is no forensic evidence connecting the knife with the crime; secondly, the knife is a common knife which could easily be available; thirdly, the wounds found on the body of the deceased were of different dimensions giving rise to possibility of use of more weapon than one; and, fourthly, the entire exercise of recovery does not inspire our confidence, particularly, because the first attempt to recover had failed. For all the reasons above, we hold that the circumstances with regard to making of disclosure statements and consequential discoveries/recoveries were not proved beyond reasonable doubt. [Paras 75, 76, 81, 82][766-B-E; 768-H; 769-A-C]

9. In light of the discussion above, there is no hesitation in holding that the prosecution has failed to prove a chain of incriminating circumstances as to conclusively point out that in all human probability it was the two accused or any one of them, and no one else, who had committed the murder. [Para 86][771-C-D]

A *Sukhvinder Singh & Others v. State of Punjab* **(1994) 5 SCC 152 : [1994] 3 SCR 1061;** *Devi Lal v. State of Rajasthan* **(2019) 19 SCC 447;** *Shambu Nath Mehra v. State of Ajmer* **AIR 1956 SC 404 : [1956] SCR 199;** *Nagendra Sah v. State of Bihar* **(2021) 10 SCC 725;** *Shivaji Chintappa Patil v. State of Maharashtra* **(2021) 5 SCC 626;** *State of Bombay v. Kathi Kalu Oghad* AIR **1961 SC 1808 : [1962] SCR 10;** *Selvi & Others v. State of Karnataka* **(2010) 7 SCC 263 : [2010] 5 SCR 381;** *State of Maharashtra v. Sukhdev Singh & Another* **(1992) 3 SCC 700 : [1992] 3 SCR 480;** *Ram Narain v. State of U.P.* **(1973) 2 SCC 86 : [1973] 3 SCR 91;** *Fakhruddin v. State of Madhya Pradesh* **AIR 1967 SC 1326;** *Lachhman Singh & Others v. State* **(1952) 1 SCC 362 : 1952 SCC OnLine SC 30 : AIR 1952 SC 167 : [1952] SCR 839;** *K. Chinnaswamy Reddy v. State of A.P. & Another* **AIR 1962 SC 1788 : [1963] SCR 412;** *Mohd. Inayatullah v. State of Maharashtra* **(1976) 1 SCC 828 : [1976] 1 SCR 715 – relied on.**

State of Uttar Pradesh v. Ram Babu Misra **(1980) 2 SCC 343 : AIR 1980 SC 791 : [1980] 2 SCR 1067;** *Malti Sahu v. Rahul & Another* **(2022) 10 SCC 226;** *Sharad Birdhichand Sarda v. State of Maharashtra* **(1984) 4 SCC 116 : [1985] 1 SCR 88;** *Shivaji Sahabrao Bobade & Another v. State of Maharashtra* **(1973) 2 SCC 793 : [1974] 1 SCR 489;** *Sukh Ram v. State of Himachal Pradesh* **(2016) 14 SCC 183 : [2016] 3 SCR 254;** *Ashish Jain v. Makrand Singh & Others* **(2019) 3 SCC 770 : [2019] 1 SCR 345;** *Sonvir alias Somvir v. State (NCT of Delhi)* **(2018) 8 SCC 24 : [2018] 7 SCR 830;** *State of U.P. v. Sunil* **(2017) 14 SCC 516;** *Ritesh Sinha v. State of U.P. & Another* **(2013) 2 SCC 357 : [2012] 11 SCR 683;** *State (NCT of Delhi) v. Navjot Sandhu* **(2005) 11 SCC 600 : [2005] 2 Suppl. SCR 79;** *Matru alias Girish Chandra v. State of U.P.* **(1971) 2 SCC 75 : [1971] 3 SCR 914;** *Pulukuri Kottaya & Others v. Emperor* **AIR 1947 PC 67 – referred to.**

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Case Law Reference

[1994] 3 SCR 1061	**relied on**	**Para 8**
[1980] 2 SCR 1067	**referred to**	**Para 8**
[1962] SCR 10	**relied on**	**Para 17**
[1985] 1 SCR 88	**referred to**	**Para 23**
[1974] 1 SCR 489	**referred to**	**Para 24**
[1956] SCR 199	**relied on**	**Para 30**
[2016] 3 SCR 254	**referred to**	**Para 49**
[2019] 1 SCR 345	**referred to**	**Para 49**
[2018] 7 SCR 830	**referred to**	**Para 49**
[2010] 5 SCR 381	**relied on**	**Para 55**
[2012] 11 SCR 683	**referred to**	**Para 56**
[2005] 2 Suppl. SCR 79	**referred to**	**Para 56**
[1992] 3 SCR 480	**relied on**	**Para 62**
[1973] 3 SCR 91	**relied on**	**Para 63**
[1971] 3 SCR 914	**referred to**	**Para 70**
[1952] SCR 839	**relied on**	**Para 73**
[1963] SCR 412	**relied on**	**Para 78**
[1976] 1 SCR 715	**relied on**	**Para 79**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.575 of 2011.

From the Judgment and Order dated 05.03.2009 of the High Court of Delhi at New Delhi in Criminal Appeal No.682 of 2008.

With

Criminal Appeal No.576 of 2011.

Jayant K Sud, ASG, Ranji Thomas, Sr. Adv., Shreekant Neelappa Terdal, Ms. Nidhi, Sarthak Arora, Mohit Girdhar, Pramod Dayal, Nikunj Dayal, Rakesh Kumar, Nishesh Sharma, Akshit Pradhan, Annirudh Sharma, Bhuvan Mishra, B. K. Satija, Ms. Kiran Suri, Kartik Jasra, G. S. Makker, Advs. for the appearing parties.

A The Judgment of the Court was delivered by

MANOJ MISRA, J.

1. These two appeals preferred against the judgment and order of the Delhi High Court (for short "the High Court") dated March 5, 2009 in two connected appeals i.e. Criminal Appeal Nos.682 of 2008 and 316 B of 2008 are being decided by a common judgment.

2. Two persons, namely, Santosh @ Bhure (appellant in Criminal Appeal No.575 of 2011) and Neeraj (respondent in Criminal Appeal No.576 of 2011) were tried for offences punishable under Sections 302 read with 34 and 120-B of the Indian Penal Code, 1860 (for short "IPC"). C The Court of Additional Sessions Judge, Rohini Courts, Delhi (for short "the Trial Court") vide order dated 27.02.2008 found them guilty for offence punishable under Section 302 read with Section 34 IPC and, vide order dated 29.02.2008, sentenced them to imprisonment for life. They were, however, found not guilty for offence of criminal conspiracy. D Aggrieved therewith, two separate appeals, namely, Criminal Appeal Nos.316 of 2008 and 682 of 2008, were filed before the High Court. The Criminal Appeal No.316 of 2008 filed by Neeraj was allowed thereby acquitting him of the charge of murder whereas Criminal Appeal No.682 of 2008 filed by Santosh @ Bhure was dismissed.

E 3. Aggrieved by acquittal of Neeraj, State of Delhi has preferred Criminal Appeal No.576 of 2011 whereas, aggrieved by dismissal of his appeal, Santosh @ Bhure has filed Criminal Appeal No.575 of 2011.

Introductory Facts

4. (i) The prosecution story in brief is that Santosh @ Bhure was F tenant of an apartment on the second floor of a building owned by Ramesh Chand (PW3). On 12.09.2000, at about 10.40 a.m., an information was given to the police that a dead body is lying in that apartment. On receiving the information police team visited the spot, found a person lying G dead on a folding cot and blood scattered all over the floor as also the cot/ bed linen. The bed linen, blood, burnt cigarette pieces, match box, empty packets of salted snacks mixture, whisky bottle, plate etc. found there were lifted and seized by the police. Besides that a suicide letter was found in a pocket of the trouser which the deceased was H wearing. The same was also seized. The body could not be

identified at the spot. However, later, Bhagwan Dass (PW26) identified it to be of Hari Shankar. On 13.09.2000, Shiv Shankar (PW23), brother of the deceased, Smt. Vandana (PW9), wife of the deceased, and Ajay Kumar (PW18), brother-in-law of the deceased, on information, arrived and confirmed that the body is of Hari Shankar. During investigation Ramesh Chand (PW3), owner of the building, disclosed that Santosh @ Bhure was his tenant and occupant of that apartment and at about 4.00 p.m., on 11.09.2000, Santosh was seen leaving the premises with a *Gathri* (a bag made of cloth) in his hand. Raj Kumar (PW4), a tenant of the first floor, during investigation, stated that Santosh @ Bhure resided in that apartment with one Hari Om who had left a week prior to the incident, and on 11.09.2000, at about 9.00 p.m., he saw the deceased playing cards and having liquor with Santosh and Neeraj in that apartment.

(ii) On 20.09.2000 police party visited Etawah, the native place of Santosh @ Bhure, but could not find him there. However, the accused persons surrendered before the concerned Court at Tis Hazari on 23.09.2000. On getting information of their surrender, the police moved an application for their custody and got three days' police custody of both the accused.

(iii) As per prosecution, two disclosure/confessional statements were made by each of the two accused during police custody; the first, dated 23.09.2000, resulted in no discovery, whereas the second, dated 25.09.2000, resulted in recovery of a knife/dagger at the instance of Neeraj and blood-stained clothes, carrying blood of same group as of the deceased, at the instance of Santosh @ Bhure.

(iv) On basis of the materials so collected, both the accused were charge-sheeted. After taking cognizance on the police report, the matter was committed to the Court of Session. The Court charged them for offences punishable under sections 302/34 and 120-B IPC.

(v) During the course of trial, 29 prosecution witnesses were examined and various documents in respect of seizure of

A articles, forensic reports, autopsy report, etc. were produced and exhibited.

(vi) As there existed no eye witness account of the murder, the prosecution sought to rely on circumstances, enumerated in paragraph 49 of the Trial Court's judgment, extracted below:

B "49. ……

i. tenancy and the residence of accused Santosh @ Bhure on the second floor of House No.D-156, JJ Colony, Khyala;

C ii. Hari Om residing with accused Santosh @ Bhure in the tenanted premises and leaving the premises about one week before the incident;

iii. presence of deceased Hari Shankar at the residence of accused Santosh @ Bhure;

D iv. recovery of dead body of Hari Shankar from the second floor of House No.D-156, JJ Colony, Khyala and its identification;

v. recovery of the letter, Ex.PW15/G from the pocket of the pant which the deceased was wearing and its seizure;

E vi. seizure of exhibits from the place of crime;

vii. post-mortem on the body of the deceased and the report;

F viii. arrest of accused Santosh @ Bhure and Neeraj;

ix. disclosure statements of the accused persons and the recovery of the exhibits at their instance;

x. specimen hand-writing and signature of accused Neeraj and sending of the letter, Ex.PW15/G and

G the specimen hand-writing and signature of the accused to the handwriting expert of FSL and its report;

xi. opinion of the autopsy surgeon about the use of the recovered knife and causing injuries on the person

H of deceased;

xii. deposit of the sealed parcels of the exhibits with the in-charge malkhana of PS Tilak Nagar and sending of the parcels to FSL;

xiii. reports of the FSL and their use in establishing the case."

Findings of the Trial Court

5. The Trial Court found—

(i) The testimonies of PW3 Ramesh Chand (owner of the building) and PW4 Raj Kumar (tenant of first floor of the building) proved that Santosh @ Bhure was tenant and resident of the apartment where the dead body of Hari Shankar, blood, etc. were found.

(ii) The testimony of PW4 proved that Hari Om, who had been residing with accused Santosh @ Bhure in that apartment, had left the premises about a week before the incident.

(iii) The testimony of PW4 proved that when he visited the apartment of Santosh @ Bhure on 11.09.2000, between noon and 1.00 p.m., to pay him money, Hari Shankar (the deceased) was noticed there alive and in an inebriated state.

(iv) The dead body was duly identified as that of Hari Shankar.

(v) The autopsy report prepared by Dr. M.M. Narnaware, which was proved by Dr. Lalit Kumar (PW27), established that death was homicidal.

(vi) The testimonies of police witnesses, documents prepared in respect of lifting/ seizure of blood, articles, etc. from the spot and the material exhibits proved that the murder was committed in that very apartment.

(vii) The testimonies of SI Rajesh Kumar (PW15) and Inspector J.L. Meena (PW28) and the documents exhibited proved that a suicide letter was found in a pocket of the trouser which the deceased was wearing at the time of his death.

(viii) The testimonies of police witnesses also proved that on 20.09.2000 the native place of accused (Santosh) in district Etawah (State of U.P.) was visited to effect his arrest but

A he could not be found. Thereafter, the two accused surrendered in court on 23.09.2000 and were remanded to police custody.

(ix) The testimonies of police witnesses PW28 and PW15 and the exhibited documents proved that the two accused had made two confessional disclosures. One, on 23.09.2000, which resulted in no discovery, and other, on 25.09.2000, which, at the pointing out of Santosh, resulted in discovery of blood-stained clothes and, at the pointing out of Neeraj, a knife/dagger.

C (x) The testimonies of PW15 and PW28 proved that specimen handwriting and signature of Neeraj was obtained and a memorandum to that effect was prepared and that the suicide letter, specimen handwriting and signature of accused Neeraj were sent to the Forensic Science Laboratory (FSL) for comparison/opinion.

D (xi) The Senior Scientific Officer (Documents), FSL-cum-Ex-Officio Chemical Examiner to Government of NCT of Delhi, whose report is admissible under section 293 of the Code of Criminal Procedure, 1973 (for short "the Code"), confirmed, vide report dated 29.12.2000, that the suicide letter and specimens were in the handwriting of one and the same person.

(xii) Ex.PW27/B prepared by autopsy surgeon Dr. M.M. Narnaware, proved by PW27, suggested that the knife/ dagger recovered at the instance of Neeraj could have caused such injuries as were found on the body of the deceased.

(xiii) The testimonies of police witness, etc. proved that the articles sent for forensic examination were duly sealed, properly kept and dispatched.

G (xiv) The serologist report proved that the clothes recovered at the instance of Santosh @ Bhure carried human blood of same group as found on the trouser and vest worn by the deceased at the time of his death.

H 6. On strength of the above findings, the Trial Court concluded that the proven circumstances constituted a chain which conclusively

indicated that the accused Santosh @ Bhure in the company of co-accused Neeraj committed the crime and to remove the evidence hid the dagger and the blood-stained clothes and further, to hoodwink the police, Neeraj wrote and planted a suicide letter in a pocket of the trouser worn by the deceased. The Trial Court noticed that the accused had offered no plausible explanation for the incriminating circumstances appearing against them hence they were liable to be convicted and sentenced under section 302 read with section 34 IPC. However, in absence of any evidence with regard to prior meeting of mind, the Trial Court acquitted them of the charge of criminal conspiracy.

7. Aggrieved with their conviction, Santosh @ Bhure and Neeraj filed separate appeals before the High Court. The High Court allowed the appeal of Neeraj whereas the appeal of Santosh @ Bhure was dismissed.

High Court Findings

8. The High Court by placing reliance on two decisions of this Court, namely, ***Sukhvinder Singh & Others*** *v.* ***State of Punjab***[1]; and ***State of Uttar Pradesh*** *v.* ***Ram Babu Misra***[2]**,**held that the expert opinion with regard to the suicide letter being in the handwriting of Neeraj would have to be eschewed, inasmuch as the specimens of handwriting and signature of Neeraj were obtained with neither his consent nor permission/ order of the Court. It held that once that piece of evidence is eschewed, hardly any incriminating circumstance is left to sustain Neeraj's conviction. Consequently, Neeraj's appeal was allowed.

9. With regard to co-accused Santosh @ Bhure, the High Court found the prosecution successful in proving — (a) that at about 11.00 a.m. on 12.09.2000 dead body of the deceased was found in the apartment under his tenancy and occupation; (b) that the deceased died a homicidal death; (c) that Santosh absconded and could be apprehended only on 23.09.2000; (d) that blood-stained clothes were recovered pursuant to his disclosure statement and at his pointing out; and (e) that those clothes carried blood of human origin and of same group as found on clothes worn by the deceased. The High Court concluded that the above circumstances constituted a chain so far complete as to conclusively indicate that in all human probability it was Santosh and no one else who

[1] (1994) 5 SCC 152
[2] (1980) 2 SCC 343 : AIR 1980 SC 791

committed the crime, therefore, in absence of a proper explanation of the incriminating circumstances appearing against him, Santosh's conviction and sentence was liable to be upheld. Consequently, his appeal was dismissed.

10. We have heard learned counsel for the parties at length.

Submissions in Criminal Appeal No.575 of 2011

11. In Criminal Appeal No.575 of 2011, on behalf of appellant Santosh @ Bhure, it was argued that, firstly, there is no documentary evidence that Santosh was tenant of the apartment; secondly, no motive for murder is proved; thirdly, presence of Santosh in that apartment at the relevant time is not proved; and, fourthly, when the police team visited the spot, a plate, glass, steel bowl, quarter bottle of whisky, packet of salted snacks mixtures were found, yet the FSL Report is silent whether fingerprints of the appellant was found on those articles, which suggests that someone else committed the crime.

12. In respect of disclosure statement leading to discovery/recovery of blood-stained clothes, it was argued that, firstly, as alleged by the prosecution, there were two disclosure statements, the first resulted in no discovery, therefore, in absence of evidence as to what transpired between the first and the second disclosure, the creditworthiness of the second disclosure as the basis of discovery of the place of concealment is seriously dented. More so, when that place is rooftop of the same building where the murder took place 13 days ago. Moreover, from the statement of police witnesses, it appears that identical disclosure statements were made by the two accused almost simultaneously, therefore, in absence of clear and satisfactory evidence as to whose disclosure was made first, not much value could be attached to such a disclosure and the consequential recovery.

13. It was next argued that assuming the blood-stained clothes were recovered on 25.09.2000, there existed no admissible evidence to prove that those clothes were of the accused. The statement of Santosh @ Bhure, one of the two accused, made to the police in respect thereof is not admissible in evidence.

14. In addition to the above, learned counsel for the appellant Santosh @ Bhure strenuously argued that mere presence of a dead body in the apartment of an accused, which is accessible to others and is not under lock and key or exclusive control of the accused, by itself is

not sufficient to infer that the accused has committed the crime, particularly, when there is no proven motive for the crime and there is no evidence of the deceased being last seen alive in the company of the accused. Moreover, there is no evidence in respect of presence of Santosh in the apartment or in the vicinity around the probable time of occurrence. Rather, PW4 stated that on 11.09.2000 when he visited the apartment between noon and 1 p.m., he saw the deceased there but could not notice Santosh @ Bhure there, rather, the deceased told him that Santosh @ Bhure was not at home. Further, the presence of whisky bottle, snacks pouches, etc. at the spot suggested that the deceased had some person to give him company. However, the prosecution evidence could not disclose as to whose finger prints were found on those articles. Thus, the prosecution evidence leaves a large gap in the chain of circumstances thereby failing to rule out third person's hand in the crime. Hence, the benefit of doubt must enure to the appellant.

15. Lastly, according to him, the High Court erred in observing that Santosh by secreting himself since the date of occurrence i.e. 11/12.09.2000 till 23.09.2000 reflected a guilty mind. It was submitted that the said observation has no basis, firstly, because the presence of appellant in the apartment or thereabout on 11.09.2000, or any time thereafter, till recovery of dead body is not proved and, secondly, there is an explanation of Santosh that when information about the crime was received at his native place, his parents requested him to go to Delhi to confirm the information. This explanation fits in with the circumstance that he surrendered in Court on 23.09.2000.

16. **Per contra**, on behalf of the State, it was argued that it is proved beyond doubt that theapartment where the body was found was in the tenancy of Santosh; that there was recovery of blood-stained clothes at the pointing out and on the basis of disclosure made by Santosh; the blood on the said clothes was of same group as on the clothes worn by the deceased at the time of his death; that Santosh, despite being tenant, gave no information to the police regarding the murder rather, remained absconding till 23.09.2000 even though the police had raided his native place on 20.09.2000; and there is no explanation from Santosh as to how dead body of the deceased was present in his apartment. Rather, a false case of denial was set up which is reflective of his guilty mind. Hence, the chain of incriminating circumstances is complete, conclusively pointing towards the guilt of the accused. Therefore, the appeal of Santosh be dismissed.

Submissions in Criminal Appeal No.576 of 2011

17. On behalf of State it was submitted that the High Court committed manifest error in discarding the expert report on the ground that the specimen handwriting and signature of Neeraj were not admissible for comparison because they were forcibly obtained without any order of the Court as contemplated under section 73 of the Indian Evidence Act, 1872 (for short "the IEA, 1872"). It was urged that the view taken by the High Court is in teeth of eleven-judge Constitution Bench decision of this Court in ***State of Bombay v. Kathi Kalu Oghad***[3]. Otherwise also, neither Article 20(3) of the Constitution of India nor Section 73 of the IEA, 1872 fetters the investigating agency's powers to obtain specimen signature of an accused or a suspect during investigation.

18. In light of the above, on behalf of State, it was contended that since Neeraj had not disputed the specimen signature and writing obtained from him and utilised for comparison, the expert report could not have been discarded. Thus, as it is proved that the suicide letter was recovered from a pocket of the trouser which the deceased was wearing at the time of his death, and there is recovery of knife/dagger at the instance of Neeraj, which, according to the doctor, could have caused injuries as were found on the body of the deceased, it stood proved beyond reasonable doubt that Neeraj had actively participated in the crime rendering himself liable to be convicted and sentenced under section 302 IPC with the aid of section 34 IPC. With regard to relevancy of the opinion of the doctor in respect of use of the weapon recovered in causing injuries found on the body of the deceased, decision of this Court in ***Malti Sahu v. Rahul& Another***[4] was cited.

19. **Per contra**, the learned counsel representing Neeraj submitted that the alleged recovery of knife/dagger is false and is liable to be discarded for the following reasons:- firstly, disclosure statement being the basis of recovery is not substantiated as, according to police witnesses, both the accused made identical disclosures and whose disclosure was made first, is not clear from the evidence; secondly, first attempt to recover failed; thirdly, PritpalSingh (PW13), the alleged public witness of recovery, turned out to be a Special Police Officer; fourthly, PW13 stated that his signature on the memorandum was obtained at the police

[3] AIR 1961 SC 1808
[4] (2022) 10 SCC 226

post; fifthly, the knife carried no blood and, therefore, could not be connected with the crime; sixthly, the autopsy report disclosed injuries of different dimensions suggesting use of multiple sharp-edged weapons; and, seventhly, the doctor who opined that recovered knife could have caused such injuries is not a scientific expert, specified in section 293 of the Code, therefore, in absence of production of that doctor as a witness, not much importance is to be attached to that report.

20. With regard to recovery of trousers, it was submitted that the said recovery is not at the instance of Neeraj therefore it has no evidentiary value qua him. And the statement of co-accused Santosh @ Bhure that one of the two trousers was of Neeraj is not admissible in evidence. Other than that, there is no evidence to prove that one of the two trousers, or shirt, was of Neeraj.

21. In respect of authorship of the suicide letter, it was submitted that, firstly, the FSL report is not admissible in evidence as rightly found by the High Court; and, secondly, there is no admissible evidence to prove that the writing in the suicide letter was of Neeraj. Besides that, a report of the expert is just an opinion and on its own it cannot form basis of a conclusion, particularly, when there is no internalor external evidence to support writing of the suicide letter.

22. It was also urged that no evidence was led to establish any connection between Neeraj and the deceased or the co-accused Santosh @ Bhure. Otherwise also, there was no evidence on record to establish that at any point in time, proximate or not to the probable time of occurrence, Neeraj was noticed in the vicinity. Thus, in absence of any link evidence, the chain of circumstances was not complete as to warrant conviction of Neeraj. Hence, the High Court's order acquitting Neeraj does not call for interference.

Discussion and Analysis

23. We have considered the rival submissions and perused the record. Before we proceed further, it would be apposite to remind ourselves that this is a case where there is no eyewitness account of the murder. Prosecution seeks to bring home the charge levelled on the accused by relying on certain circumstances. As to when on strength of evidence circumstantial in nature conviction can be lawfully sustained, the law is well settled — the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established; these circumstances should be of a definite tendency unerringly pointing

A towards the guilt of the accused; the circumstances taken cumulatively should form a chain so far complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused; the circumstances should be consistent only with the hypothesis regarding the guilt of the accused; and they must exclude every possible hypothesis except the one to be proved. Further, the
B circumstances from which the conclusion of guilt is to be drawn should be fully established meaning thereby that they 'must' or 'should' and not 'may be' established **(***See*:***Sharad Birdhichand Sarda v.State of Maharashtra***[5]**).**

24. In addition to the above, while dealing with a criminal trial, a
C Court must not be oblivious of the most fundamental principle of criminal jurisprudence, which is, that the accused 'must be' and not merely 'may be' guilty before the Court proceeds to convict him. In ***Shivaji Sahabrao Bobade & Another*** *v.* ***State of Maharashtra***[6]**,** this Court, elaborating upon the above principle, observed that the mental distance between
D 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

25. Adding on to the aforesaid legal principles, in ***Devi Lal*** *v.* ***State of Rajasthan***[7]**,** a three-judge Bench of this Court held that in a case based on circumstantial evidence where two views are possible, one pointing to the guilt and the other to his innocence, the accused is
E entitled to the benefit of one which is favourable to him. The relevant portion of the judgment is extracted below:-

> *"18. … Though the materials on record hold some suspicion towards them, but 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.*
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> F
>
> *19. ... in the case of circumstantial evidence, two views are possible on the case of record, one pointing to the guilt of the accused and the other his innocence. The accused is indeed entitled to have the benefit of one which is favourable to him."*
>
> G

[5] (1984) 4 SCC 116
[6] (1973) 2 SCC 793
H [7] (2019) 19 SCC 447

26. Bearing in mind the aforesaid legal principles, we would have to examine — (i) whether the circumstances relied by the prosecution have been proved beyond reasonable doubt; (ii) whether those circumstances are of a definite tendency unerringly pointing towards the guilt of the accused; (iii) whether those circumstances taken cumulatively form a chain so far complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused; (iv) whether they are consistent only with the hypothesis of the accused being guilty; and (v) whether they exclude every possible hypothesis except the one to be proved.

27. In the instant case, the key circumstances on basis whereof the prosecution seeks to bring home the charge against the two accused are:

(a) the apartment from where body of the deceased was recovered on 12.09.2000 stood in the tenancy and possession of Santosh @ Bhure;

(b) the autopsy report confirmed homicidal death of the deceased as a result of infliction of multiple wounds from a sharp-edged weapon;

(c) the spillage of blood on the floor of the apartment and on the cot from where the body was lifted confirmed that murder took place in that very apartment;

(d) the suicide letter found in a pocket of the trouser worn by the deceased at the time of his death was, as per FSL report, in the writing of co-accused Neeraj;

(e) from 12.09.2000 till 23.09.2000 accused Santosh and Neeraj were not traceable and could be apprehended only on 23.09.2000;

(f) the two accused, in police custody, on 23.09.2000 and 25.09.2000, made confessional disclosures assuring recovery of (a) the dagger used in the crime, and (b) blood-stained clothes worn by the accused on the date of the incident;

(g) pursuant to the disclosure made on 25.09.2000, at the instance of Santosh, blood-stained clothes were recovered from a garbage dump at the rooftop of the same building

A where the body of the deceased was found on 12.09.2000; and, at the instance of Neeraj, a dagger/knife was recovered from the bushes behind a hospital;

(h) though, the dagger carried no blood but the doctor opined that its use could have caused such injuries as were noticed
B on the body of the deceased;

(i) the FSL report confirmed presence of human blood of same blood group on the recovered clothes as was found on the clothes which the deceased was wearing at the time of death;

C (j) except bald denial, the accused person(s) failed to offer a cogent explanation of the incriminating circumstances appearing against them.

28. Having enumerated the incriminating circumstances relied by the prosecution, we shall now examine – (a) whether the above-mentioned
D circumstances have been proved beyond reasonable doubt; and (b) if so, whether they, individually or cumulatively, unerringly point towards the guilt of the two accused, or any one of the two accused, and rule out all other hypothesis except the one to be proved.

Circumstance (a) — Re: Apartment from where the dead
E **body was foundstood in the tenancy and possession of Santosh.**

29. Insofar as tenancy of the apartment being with Santosh is concerned, the same has been proved by the testimonies of PW3 and PW4. Nothing material could come out from their cross-examination, nor any such suggestion has been given to them, as may cast a doubt on
F their deposition in respect thereof. No doubt Santosh denied tenancy and claimed that there exists no documentary proof in respect thereof but as there could be an oral tenancy also, in our view, the finding returned by the courts below in respect thereof calls for no interference. However, mere tenancy of the apartment being with Santosh by itself is not sufficient to hold him guilty as there is no general presumption against the owner/
G tenant of a property with regard to his/her guilt if a dead body with homicidal injuries is found in his/her property. No doubt, if the prosecution succeeds in proving a chain of circumstances from which a reasonable inference can be drawn regarding one's guilt then, in absence of proper explanation, the Court can always draw an appropriate conclusion with
H respect to his/her guilt with the aid of section 106 of the IEA, 1872. But,

if the chain of circumstances is not established, mere failure of the accused to offer an explanation is not sufficient to hold him guilty.

30. Expounding the law on the scope and applicability of section 106 of the IEA, 1872, in ***Shambu Nath Mehra*** *v.* ***State of Ajmer***[8]**,** this Court observed:

> *"9. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried."*

31. In ***Nagendra Sah*** *v.* ***State of Bihar***[9]**,** following the decision in ***Shambu Nath Mehra's case (supra)***, the law with regard to applicability of Section 106 of the IEA, 1872 was crystallised as under:

> "*22. Thus, Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused. When the accused fails to offer proper explanation about the existence of said other facts, the court can always draw an appropriate inference.*
>
> *23. When a case is resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge*

[8] AIR 1956 SC 404
[9] (2021) 10 SCC 725

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

32. In ***Shivaji Chintappa Patil*** *v.* ***State of Maharashtra***[10]**,** it
C was observed that Section 106 of the IEA, 1872 does not directly operate against either a husband or wife staying under the same roof and being the last person seen with the deceased. It was observed that Section 106 of the Evidence Act does not absolve the prosecution of discharging its primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed,
D will sustain a conviction, or which makes out a prima facie case, that the question arises of considering facts of which the burden of proof would lie upon the accused. After expounding the legal principle, while rejecting the argument that failure of the accused to offer explanation under section 313 of the Code would complete the chain, it was observed:

E "25. …*By now it is well-settled principle of law, that false explanation or non-explanation can only be used as an additional circumstance, when the prosecution has proved the chain of circumstances leading to no other conclusion than the guilt of the accused. However, it cannot be used as a link to complete the chain."*
F

33. In the instant case, according to PW4, the deceased was seen alive in that apartment between noon and 1.00 p.m. on 11.09.2000. The information about presence of dead body in that apartment came at about 10.40 a.m. on 12.09.2000. Obviously, in absence of an eyewitness account of the murder, the prosecution cannot disclose the exact time of
G the murder but, from the above sequence of events, as per the prosecution case, the murder could have been committed any time between 1.00 p.m. of 11.09.2000 and 10.40 a.m. of 12.09.2000. What is interesting is that during investigation PW3 had disclosed to the police that he noticed Santosh @ Bhure leaving the building with a *Gathri* (a bag made of

H [10] (2021) 5 SCC 626

cloth) at about 4.00 p.m. on 11.09.2000, whereas PW4, during investigation, stated that he saw the deceased playing cards and having liquor with the two accused at or about 9.00 p.m. on 11.09.2000. However, during their deposition in court neither PW3 nor PW4 disclosed about the presence of Santosh @ Bhure in or around that apartment/building at any time on 11.09.2000 or after, till recovery of dead body of the deceased. Therefore, they were declared hostile. During cross examination, at the instance of the prosecution, PW3 denied having seen Santosh @ Bhure exiting the building with a *Gathri* on 11.09.2000. Not only that, PW3 resiled from his previous statement, made during investigation, that, at or about noon of 11.09.2000, Santosh @ Bhure had come to his grocery shop to purchase snacks etc. Thus, from the statement of PW3, it is not at all established that the appellant Santosh @ Bhure was present in the house on 11.09.2000 or any time thereafter till recovery of the body of the deceased.

34. Rather, from the deposition of PW3 an important circumstance emerges, which is, that the apartment from where the body was retrieved on 12.09.2000 was not found locked or shut. PW3's deposition is that on 12.09.2000 while he was at his grocery shop, located on the ground floor of that building, a washer woman informed him that blood was lying on the second floor of the building. On getting this information, he went upstairs to notice that a person is lying dead on a folding cot with blood on the floor. There is no statement of PW3 or of any other witness that door of that apartment was shut or locked and had to be broke open. This assumes importance in the context of PW4's deposition.

35. PW4 is a tenant of the first floor of that building. As per his testimony, on 11.09.2000, between noon and 1.00 p.m., when he visited the apartment of Santosh @ Bhure he found Hari Shankar (the deceased) present there in a drunken condition. PW4 does not state that Santosh was also present there. Rather, according to PW4, when he enquired from Hari Shankar the whereabouts of Santosh, he was informed that Santosh is not there. No doubt, PW4 was declared hostile and cross examined but, during cross examination, he denied making a statement that in the night of 11.09.2000, at about 9.00 p.m., he had noticed Hari Shankar playing cards with Neeraj and Santosh in that apartment. What emerges from PW4's testimony is that Hari Shankar was noticed alone in that apartment on 11.09.2000 between noon and 1.00 p.m. In short, the prosecution has failed to demonstrate (a) that the apartment was

A locked or in exclusive control of Santosh @ Bhure and (b) that the deceased was in the company of Santosh or Neeraj on 11.09.2000 or any time thereafter, till recovery of the body of the deceased. The prosecution has also not proved that on 11.09.2000 or any time thereafter, till recovery of the body of the deceased, the two accused were seen in the vicinity of that apartment or building from where the dead body was
B retrieved on 12.09.2000.

36. In light of the discussion above, we are of the view that though the prosecution has succeeded in proving that the apartment where body of the deceased was found stood in the tenancy of Santosh but it failed to lead any evidence that the two accused, or any one of them, were
C present there, or in the vicinity, either on 11.09.2000 or any time thereafter, till recovery of the dead body. In other words, the prosecution miserably failed to show the presence of the accused around the probable timeof murder. Further, the prosecution led no evidence to establish that the concerned apartment was under lock and key or exclusive control of
D either Santosh or Neeraj. Even the theory of exclusive possession of Santosh over that apartment is dented by the statement of PW4 that till a week before the incident one Hari Ram used to live in that apartment with Santosh @ Bhure. There is also no evidence of the prosecution to show that the concerned apartment had a separate stair case accessible
E to Santosh and no one else. For all the reasons above, though we hold that tenancy of the concerned apartment was proved to be with Santosh but neither his nor Neeraj's presence in that apartment, around the relevant time, is proved by any evidence. It is also not proved that Santosh was in exclusive possession or control of that apartment. Rather, from the testimony of PW4 it appears that one Hari Ram was residing there with
F Santosh though, he had left the place a week before the incident. As to whether the deceased Hari Shankar came there after Hari Om had left or was residing there since before, is not clear from the prosecution evidence. In fact there is no evidence - (a) as to when the deceased came into that apartment and (b) in what capacity he was residing there.
G In light of the discussion above and in the facts of the case, in our considered view, the mere presence of the dead body in the apartment let out to Santosh is not such a clinching circumstance which, on its own, could sustain Santosh's conviction with the aid of section 106 of the IEA, 1872 by shifting the onus on him to explain as to under what circumstances the dead body with multiple injuries was found there.

H

Circumstance (b) and (c) — Re: Cause of death and place of murder

37. As regards death of Hari Shanker being homicidal and a consequence of multiple injuries caused by a sharp edged weapon, no serious challenge is there to the findings returned by the courts below. Hence, we accept the finding that death was homicidal and a consequence of injuries caused by use of sharp-edged weapon. Likewise, there is no challenge to the finding that blood etc. was lifted from the apartment thereby confirming that murder took place there. However, in addition to blood or blood-stained cot/ linen there were whisky bottle, empty packets/ pouches of salted snacks, cigarette butts, etc. lifted from that apartment but there is no evidence to connect those articles with either of the two accused so as to confirm their presence and rule out the presence of some other person at the relevant time.

Circumstance (d) — Re: Recovered Suicide Letter being in the writing of Neeraj

38. Insofar as recovery of suicide letter from a pocket of the trouser which the deceased was wearing at the time of his death is concerned, the same has been proved by the testimonies of Investigating Officer J.L. Meena (PW28) and SI Rajesh (PW15) and in proof thereof, the seizure memorandum and the suicide letter were produced and exhibited. No doubt PW3, a public witness, signatory to the seizure memorandum, has denied seizure in his presence but the two courts below, relying on the testimony of police witnesses, have concurrently found recovery of the suicide letter proved. To us there appears no reason to interfere with the said finding. However, the real issue is whether it was duly proved that the suicide letter was written by Neeraj. If it were so, according to the prosecution, it was written to mask a homicidal death, which, coupled with recovery of knife/dagger at the instance of Neeraj, is reflective of his culpability in the crime.

39. Indisputably, except the FSL report there is no admissible evidence that the suicide letter is in the writing of Neeraj. Even admissibility of the FSL Report has been questioned by the defence contending (a) that it is predicated on specimen signature and handwriting forcibly obtained during investigation, without permission of the Court, therefore, using such specimens would violate the rule against self-incrimination, hence the report is to be treated inadmissible; and (b) that

A in absence of production of the expert as a witness, the report is not proved. The Trial Court did not accept the objections to its admissibility and, therefore, relied on the expert report to hold that Neeraj was the author of the suicide letter. The High Court, however, accepted the objection to its admissibility and held there is no admissible evidence to prove that the suicide letter was written by Neeraj.

B

40. Assailing the finding of the High Court, on behalf of the State, it has been contended that the High Court erred in holding — (a) that the specimen signature could not be obtained by the investigating agency without permission of the Court; and (b) that the FSL report carried no evidentiary value.

C

41. Per contra, on behalf of defence, it is contended - (a) that even if it is assumed that the expert report was admissible, it cannot be the sole basis to conclude that the suicide letter was written by Santosh, rather, the Court must look at all the evidences to find out whether the proven facts and circumstances support the said issue; and (b) the Trial

D Court ought to have undertaken an exercise to find for itself whether the writing on the suicide letter matched with that of Neeraj and whether the proven facts and circumstances support the proposition that the suicide letter was indeed written by Neeraj and no one else.

42. Before we dwell on the merit of the aforesaid submissions,

E we may put on record that we were neither shown nor could find any witness statement identifying the writing of Neeraj on that suicide letter or stating that the suicide letter was written by Neeraj in his or her presence. The prosecution relied on two pieces of evidence to prove that the suicide letter was written by Neeraj. First is the confessional

F disclosure of the two accused made before the police with regard to Neeraj writing the letter to hoodwink the police; and second is the FSL report.

43. As far as admissibility of the confessional statement of the two accused in respect of suicide letter being written by Neeraj is

G concerned, the same being made by an accused before the police would be hit not only by Sections 25 and 26 of the IEA, 1872 but also by Section 162 of the Code because only that much of the disclosure/ confessional statement is admissible as relates distinctly to the fact discovered. Since the suicide letter was discovered on 12.09.2000, that is, much before the disclosures allegedly made on 23.09.2000 and

H

25.09.2000, the disclosure qua the suicide letter, in our view, is not admissible in evidence.

Admissibility of the FSL Report

44. As regards admissibility of the FSL report, the High Court held it inadmissible for being based on comparison of specimens forcibly obtained during investigation by the investigating agency. The High Court was of the view that usage of such specimens by the investigating agency toobtain expert report would fall foul of the rule against self-incrimination as well as the provisions of Section 73 of the IEA, 1872. In holding so, the High Court relied on certain observations of this Court in the case of ***Sukhvinder Singh (supra)***.

45. In ***Sukhvinder Singh (supra)***, the issue that came for consideration before a two-judge Bench of this Court was whether the handwriting on the disputed ransom letter was proved to be that of the accused. In that case, according to the prosecution, the specimen writing of the accused was taken under direction of Tehsildar-Executive Magistrate and based on comparison of that specimen with the disputed ransom letter, the expert opined that writing on the ransom letter was of the accused. In that context it was held that though Section 73 of the IEA, 1872 does not specifically say so as to who could make such a comparison but reading Section 73 as a whole would make it obvious that it is the Court which has to form its opinion, either by comparing the disputed and the admitted writings or by seeking assistance of an expert. As regards the Court which can give a direction to the accused to provide specimens of handwriting and signature and the scope as well as purpose of the second paragraph of section 73 of the IEA, 1872, it was held:

> *"20. The second paragraph of Section 73 (supra) enables the court to direct any person present before it to give his specimen writing "for the purpose of enabling the court to compare" such writings with writings alleged to have been written by such person. The obvious implication of the words "for the purpose of enabling the court to compare" is that there is some proceeding pending before the court in which or as a consequence of which it is necessary for the court to compare such writings.* ***The direction is therefore required to be given for the purpose of "enabling the court to compare" and not for the purpose of enabling an investigating or a prosecuting agency to obtain and produce as evidence in the***

A ***case the specimen writings for their ultimate comparison with the disputed writings. Where the case is still under investigation and no proceedings are pending in any court in which it might be necessary to compare the two writings, the person (accused) cannot be compelled to give his specimen writings. The language of Section 73 does not permit any court to give a direction to an accused to give his specimen writing for comparison in a proceeding which may subsequently be instituted in some other competent court. Section 73 of the Evidence Act in our opinion cannot be made use of for collecting specimen writings during the investigation and recourse to it can be had only when the enquiry or the trial court before which proceedings are pending requires the writing for the purpose of 'enabling it to compare' the same.*** *A court holding an enquiry under the Code of Criminal Procedure is indeed entitled under Section 73 of the Evidence Act to direct an accused person appearing before it to give his specimen handwriting to enable the court by which he may be subsequently tried to compare it with the disputed writings.* ***Therefore, in our opinion the court which can issue a direction to the person to give his specimen writing can either by the court holding the enquiry under the Code of Criminal Procedure or the court trying the accused person with a view to enable it to compare the specimen writings with the writings alleged to have been written by such a person. A court which is not holding an enquiry under the Code of Criminal Procedure or conducting the trial is not permitted, on the plain language of Section 73 of the Evidence Act, to issue any direction of the nature contained in the second paragraph of Section 73 of the Evidence Act. The words "any person present in the court" in Section 73 has a reference only to such persons who are parties to a cause pending before the court and in a given case may even include the witnesses in the said cause but where there is no cause pending before the court for its determination, the question of obtaining for the purposes of comparison of the handwriting of a person may not arise at all and therefore, the provisions of Section 73 of the Evidence Act would have no application."***

H (Emphasis supplied)

Afterdealing with thescopeand object of Section 73 in terms extracted above and upon noticing that there was no inquiry or trial pending before the Court when the specimens were taken while bearing in mind that the prosecution did not disclose as to at what stage of investigation, inquiry or trial the accused was produced before the Executive Magistrate to take his specimen writings, and as to why the specimen writings were obtained under direction of the Executive Magistrate and not of the Designated Court, it was held that the manner in which the specimen writing of the accused was taken was totally objectionable and against the provisions of Section 73 of the IEA, 1872. Therefore, the specimen writing was found unacceptable for comparison and the resultant report was discarded. A B C

46. In our view, ***Sukhvinder Singh(supra)*** does not lay down as law that during investigation the investigating agency cannot obtain specimen writing or signature of a suspect or an accused for the purposes of obtaining an expert report in respect of the disputed writing or signature.Rather, ***Sukhvinder Singh(supra)*** is to be understood as a decision dealing with the scope and exercise of power vested in a Court under section 73 of the IEA, 1872 while conducting an inquiry or trial. D

47. As to what procedure an investigating agency has to follow during investigation for obtaining specimen handwriting or signature of an accused,there existed no specific provision in the Code, at least none shown to us, prior to insertion of Section 311-A in the Code by Act No.25 of 2005 w.e.f. 23.06.2006. E

48. In ***Ram Babu Misra (supra),***a decision rendered prior to insertion of Section 311-A in the Code, it was held that during the course of investigation a Magistrate is not empowered to direct the accused to give his specimen writing inasmuch as the provisions of the Identification of Prisoners Act, 1920 (for short "the 1920 Act") were silent with regard to issuance of directions by the Magistrate for taking specimen writing of prisoners. However, what is important is that the said decision is silent on the issue as to whether the specimen writing and signature of an accused obtained by the investigating agency during investigation could be used for obtaining an expert report on the disputed handwriting or signature. F G

49. No doubt, by Act No.25 of 2005, with effect from 23.06.2006, Section 311-A has been inserted in the Code thereby empowering a Magistrate of the First Class to direct any person including an accused H

A to give specimen signature or handwriting for the purposes of investigation but this provision would have no bearing on this case as it came into effect in the year 2006, whereas the instant case is of the year 2000. In ***Sukh Ram*** *v.* ***State of Himachal Pradesh***[11]**,** this Courtheld that the amended provisions of Section 311-A of the Code would apply prospectively. Otherwise also, the purpose of obtaining permission/order
B of the Magistrate is to maintain the sanctity of those specimens so as obviate fabrication. In ***Ashish Jain*** *v.* ***Makrand Singh &Others***[12]**,** it was held that the object of the provisions of Section 5 of the 1920 Act for obtaining an order from a Magistrate to take specimens is to eliminate possibility of fabrication of evidence. There it was also held that those
C provisions are directory and not mandatory. Similar view has been taken in ***Sonviralias Somvir*** *v.* ***State (NCT of Delhi)***[13]**.**

50. On scanning the provisions of the Code, prior to insertion of section 311-A in the Code, we could find no statutory provision proscribing an investigating agency from collecting specimen signature and
D handwriting of an accused or a suspect for the purposes of obtaining an expert report. As the provisions of Section 311-A of the Code prescribing the procedure for obtaining specimen signature/handwriting were inserted in the Code much after completion of investigation in this case, it would have no material bearing on this case.

E 51. In the instant case, Neeraj's specimens of handwriting and signature were obtained by the investigating agency during investigation when there existed no specific provision in the Code regulating the procedure for obtaining such specimens and there existed no provision proscribing the investigating agency from obtaining specimens of handwriting/signature of an accused or a suspect. As far as the provisions
F of Section 73 of the IEA, 1872 are concerned, they apply when a proceeding such as an inquiry or trial is pending in a Court. Since no proceedings were pending before any Court when the specimens in question were obtained, provisions of section 73 of the IEA, 1872 could not have been invoked. In such a situation, as there existed no legal
G provision proscribing an investigating agency from obtaining specimens of handwriting/signature of a suspect or an accused, in our view, the investigating agency had the power to collect such material including specimen handwriting/ signature as toassist the prosecution to introduce

[11] (2016) 14 SCC 183
[12] (2019) 3 SCC 770
H [13] (2018) 8 SCC 24

a relevant fact or corroborate any piece of evidence on a relevant fact/ fact in issue. For the reasons above, in our considered view, the expert report (i.e. FSL report) obtained during investigation by the investigating agency, predicated on specimens of handwriting/signature of Neeraj obtained during investigation, could not have been discarded merely because it was obtained during investigation and without an order/ permission of the Court as contemplated under section 73 of the IEA, 1872.

52. Now, we shall test another leg of the argument made on behalf of the defence to question the admissibility of the expert report, which is, that the specimen was forcibly obtained, therefore, its usage would infringe the fundamental right against self-incrimination enshrined in Article 20(3) of the Constitution of India.

53. In ***Kathi Kalu Oghad (supra)***, while interpreting the phrase *"to be a witness against himself",* as occurs in Article 20(3), a Constitution Bench of this Court, in paragraph 16, per majority view authored by B.P. Sinha, C.J., held as follows:

> "16. In view of these considerations, we have come to the following conclusions:
>
> (1) An accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody, without anything more. In other words, the mere fact of being in police custody at the time when the statement in question was made would not, by itself, as a proposition of law, lend itself to the inference that the accused was compelled to make the statement, though that fact, in conjunction with other circumstances disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not the accused person had been compelled to make the impugned statement.
>
> (2) The mere questioning of an accused person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not "compulsion".
>
> (3) **"To be a witness" is not equivalent to "furnishing evidence" in its widest significance; that is to say, as including not merely making of oral or written statements but also production of documents or giving materials which**

A **may be relevant at a trial to determine the guilt or innocence of the accused.**

(4) **Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression "to be a witness".**

B

(5) "To be a witness" means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in court or otherwise.

(6) "To be a witness" in its ordinary grammatical sense means giving oral testimony in court. Case law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in court or out of court by a person accused of an offence, orally or in writing.

C

(*7*) To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made."

D

(Emphasis Supplied)

54. In his separate opinion K.C. Das Gupta, J., expressing the minority view, while agreeing with the majority view on certain points, observed:

E

"33. We agree therefore with the conclusion reached by the majority of the Bench **that there is no infringement of Article 20(3) of the Constitution by compelling an accused person to give his specimen handwriting or signature; or impressions of his fingers, palm or foot to the investigating officer or under orders of a court for the purpose of comparison under the provisions of Section 73 of the Indian Evidence Act;** though we have not been able to agree with the view of our learned Brethren that "to be a witness" in Article 20(3) should be equated with the imparting of personal knowledge or that an accused does not become a witness when he produces some document not in his own handwriting even though it may tend to prove facts in issue or relevant facts against him."

F

G

(Emphasis Supplied)

H

55. In ***Selvi & Others*** *v.* ***State of Karnataka***[14]**,** following the above view, it was observed:

> "145. … For instance, even though acts such as **compulsorily obtaining specimen signatures and handwriting samples are testimonial in nature, they are not incriminating by themselves if they are used for the purpose of identification or corroboration with facts or materials that the investigators are already acquainted with.The relevant consideration for extending the protection of Article 20(3) is whether the materials are likely to lead to incrimination by themselves or "furnish a link in the chain of evidence" which could lead to the same result.** Hence, reliance on the contents of compelled testimony comes within the prohibition of Article 20(3) but **its use for the purpose of identification or corroboration with facts already known to the investigators is not barred**."
>
> (Emphasis supplied)

56. The above view has been consistently followed by this Court in several decisions i.e.***State of U.P.*** *v.* ***Sunil***[15]; ***Ritesh Sinha*** *v.* ***State of U.P. & Another***[16]*;* and,***State (NCT of Delhi)****v.****Navjot Sandhu***[17]."

57. A conspectus of the decisions above would indicate that since specimen signatures and handwriting samples are not incriminating by themselves as they are to be used for the purpose of identification of the handwriting on a material with which the investigators are already acquainted with, compulsorily obtaining such specimens would not infringe the rule against self-incrimination enshrined in Article 20(3) of the Constitution of India.

58. In the instant case, the suicide letter was already seized by the investigating agency and therefore obtaining specimen signatures and handwritings of Neeraj was with a view to enable a comparison for the purposes of identifying the signature/writing on the suicide letter. As such an exercise does not infringe the mandate of Article 20(3) of the Constitution of India, the defence argument that use of specimen signatures of Neeraj,forcibly obtained during investigation, would violate

[14] (2010) 7 SCC 263
[15] (2017) 14 SCC 516
[16] (2013) 2 SCC 357
[17] (2005) 11 SCC 600

A the rule against self-incrimination is worthy of rejection and is, accordingly, rejected. We therefore hold that the specimen signature/handwriting of Neeraj obtained by the investigating agency could not have been discarded merely because of allegations that they were forcibly obtained during investigation without permission of the Magistrate/ Court. The view to the contrary taken by the High Court is erroneous and is, accordingly, set aside.

59. We shall now examine whether the specimens used for comparison were duly proved to be that of Neeraj. In the instant case, according to the prosecution evidence, the specimen signatures and handwritings of Neeraj were obtained during investigation.Memorandum/ documents in connection therewith including the specimens were produced, proved and marked exhibits thereby proving that they were properly kept and dispatched to FSL along with the disputed suicide letter for obtaining expert opinion. Genuineness of those specimens have not been questioned by Neeraj. The only defence taken is that the specimens of handwriting and signature were obtained by compulsion. As we have already found that such objection was unsustainable therefore, once genuineness of the specimens was not disputed, the specimens were available for comparison and were rightfully used for obtaining expert report. In such a scenario, the net result would be that the FSL report, which was provided by a government scientific expert specified in Section 293 of the Code, was admissible regardless of the fact that the expert was not examined as a witness. More so, when the defence filed no application to summon the expert for cross-examination. Consequently, the finding of the High Court with regard to the FSL report being inadmissible is erroneous and is, accordingly, set aside.

Whether the FSL Report on its own was sufficient to hold that the suicide letter was written by Neeraj.

60. However, the mere fact that the expert report was admissible in evidence does not mean that it should on its own form the basis of conclusion that the suicide letter was written by Neeraj. Admissibility and reliability/credit worthiness of a piece of evidence are entirely different aspects. An inadmissible piece of evidence is to be eschewed. But when a piece of evidence is admissible, as to what weight it would carry for determining a fact in issue would depend on the proven facts and circumstances of the case.

61. In the instant case, the High Court discarded the expert report as not admissible therefore, it did not undertake an exercise to determine the fact in issue i.e. whether the suicide letter was written by Neeraj. The Trial Court considered it admissible and based its finding solely thereupon. The relevant observations of the Trial Court, found in paragraph 95 of its judgment, are extracted below:

> "95. I have gone through the report of the hand-writing expert, Mark Q1 (Ex.PW15/G) and the specimen hand-writing of accused Neeraj, S1 to S8 (Ex.PW15/F1 to F8), were examined with scientific instruments such as Stereo Microscope, Video Spectral Comparator-IV, Docucenter and Poliview System etc. under different lighting conditions. The expert has given various reasons in support of the report, that the letter in question and the hand-writing are of the same person. The expert has concluded that there is no divergence observed between the questioned and specimen writings and the aforesaid similarities in the writing habits are significant and sufficient and cannot be attributed to accidental coincidence and when considered collectively, they lead the expert to the opinion that both the writings are in the hand of the same person. I find no reason to form a different opinion than that of the hand-writing expert. I hold that the prosecution has been able to establish that the letter, Ex.PW15/G and the specimen hand-writing of accused Neeraj, Ex.PW15/F1 to F8, are in the same hand-writing of a person and he is accused Neeraj."

62. A bare reading of the above extract from trial court's judgment would indicate that the finding with regard to authorship of the suicide letter is completely based on the expert opinion. No doubt, an expert opinion is relevant under Section 45 of the IEA, 1872 but whether it could be the sole basis of determination of the fact in issue has been a subject matter of discussion in various judicial pronouncements. In ***State of Maharashtra*** *v.* ***Sukhdev Singh & Another***[18], this Court observed:

> "29. It is well settled that evidence regarding the identity of the author of any document can be tendered (*i*) by examining the person who is conversant and familiar with the handwriting of such person or (*ii*) through the testimony of an expert who is qualified and competent to make a comparison of the disputed

[18] (1992) 3 SCC 700

writing and the admitted writing on a scientific basis and (*iii*) by the court comparing the disputed document with the admitted one. … **But since the science of identification of handwriting by comparison is not an infallible one, prudence demands that before acting on such opinion the court should be fully satisfied about the authorship of the admitted writings which is made the sole basis for comparison and the court should also be fully satisfied about the competence and credibility of the hand writing expert.** It is indeed true that by nature and habit, over a period of time, each individual develops certain traits which give a distinct character to his writings making it possible to identify the author but it must at the same time be realised that since handwriting experts are generally engaged by one of the contesting parties they, consciously or unconsciously, tend to lean in favour of an opinion which is helpful to the party engaging him. That is why we come across cases of conflicting opinions given by two handwriting experts engaged by opposite parties. **It is, therefore, necessary to exercise extra care and caution in evaluating their opinion before accepting the same. So courts have as a rule of prudence refused to place implicit faith on the opinion evidence of a handwriting expert. Normally courts have considered it dangerous to base a conviction solely on the testimony of a handwriting expert because such evidence is not regarded as conclusive. Since such opinion evidence cannot take the place of substantive evidence, courts have, as a rule of prudence, looked for corroboration before acting on such evidence. True it is, there is no rule of law that the evidence of a handwriting expert cannot be acted upon unless substantially corroborated but courts have been slow in placing implicit reliance on such opinion evidence, without more, because of the imperfect nature of the science of identification of handwriting and its accepted fallibility. …"**

(Emphasis supplied)

63. In ***Ram Narain*** *v.* ***State of U.P.***[19], this Court observed:

"6. ... Now it is no doubt true that the opinion of a handwriting expert given in evidence is no less fallible than any other expert

[19] (1973) 2 SCC 86

opinion adduced in evidence with the result that such evidence has to be received with great caution. **But this opinion evidence, which is relevant, may be worthy of acceptance if there is internal or external evidence relating to the document in question supporting the view expressed by the expert. …**"

(Emphasis supplied)

64. In ***Fakhruddin*** *v.* ***State of Madhya Pradesh***[20], this Court observed:

"Both under Section 45 and Section 47 the evidence is an opinion, in the former by a scientific comparison and in the latter on the basis of familiarity resulting from frequent observations and experience. **In either case the Court must satisfy itself by such means as are open that the opinion may be acted upon. One such means open to the Court is to apply its own observation to the admitted or proved writings and to compare them with the disputed one, not to become a handwriting expert but to verify the premises of the expert in the one case and to appraise the value of the opinion in the other case.** This comparison depends on an analysis of the characteristics in the admitted or proved writings and in finding of the same characteristics in large measure in the disputed writing. In this way the opinion of the deponent whether expert or other is subjected to scrutiny and although relevant to start with becomes probative. **Where an expert's opinion is given, the court must see for itself and with the assistance of the expert come to its own conclusion whether it can safely be held that the two writings are by the same person. This is not to say that the court must play the role of an expert but to say that the court may accept the fact proved only when it has satisfied itself on its own observation that it is safe to accept the opinion whether of the expert or other witness.**"

(Emphasis supplied)

65. The underlying principle deducible from the observations extracted above is that though it is not impermissible to base a finding with regard to authorship of a document solely on the opinion of a handwriting expert but, as a rule of prudence, because of imperfect

[20] AIR 1967 SC 1326

A nature of the science of identification of handwriting and its accepted fallibility, such opinion has to be relied with caution and may be accepted if, on its own assessment, the Court is satisfied that the internal and external evidence relating to the document in question supports the opinion of the expert and it is safe to accept his opinion.

B 66. In the instant case, with regard to authorship of the suicide letter, the Trial Court though returned a finding in favour of the prosecution by relying solely on the expert report but did not record its satisfaction having regard to its own observations with respect to the admitted and disputed writings. It also did not examine whether in the proven facts and circumstances of the case it would be safe to rely on the expert C report. It be noted that section 73 of the IEA, 1872 enables a Court to compare the words or figures written by a person present in Court with any words or figures alleged to have been written by such person. The Trial Court therefore could have undertaken such an exercise. But, in the instant case, there appears no such exercise undertaken by the Trial D Court. What is important is that in the instant case there is no witness statement identifying the handwriting of Neeraj or disclosing that Neeraj wrote the suicide letter in his presence. There is also no evidence to explain the relevance of the contents of the suicide letter. Interestingly, the suicide letter indicts one *Chhote Porwal*. As to why such indictment was made; whether it was with reference to some other event E contemplated, the prosecution evidence is silent. Besides that, there is no evidence to show that the investigating officerqueried person(s) conversant with the handwriting of the deceased to rule out possibility of the suicide letter being in the writing of the deceased himself. In our view, such an exercise was necessary to lend assurance to the prosecution F story of the suicide letter being written by Neeraj to mask the murder, because, firstly, the death on its face was not suicidal, and, secondly, it could have ruled out possibility of it being written in contemplation of some other event. Seen in that light, barring the expert report, there exists no internal or external evidence to lend assurance to the prosecution story that the suicide letter was written by Neeraj.

G 67. In addition to the above, we find it quite difficult to accept as to why Neeraj would leave a suicide letter written by him in a pocket of the trouser worn by the deceased, particularly, when the injuries even to a layman were homicidal. Notably, there were eight ante-mortem injuries found on the body of the deceased. In paragraph 72 of Trial Court's H judgment the injuries have been extracted. The same is reproduced below:

"External Injuries:

i) One perforating injury on sternal region vertically placed, located at 10 cms left to right nipple and 9 cms below sternal, size 3 cms x 1.1 cms x cavity deep.

ii) Another penetrating injury on left side of chest, 6 cms left to injury No.1, placed vertically, located 1.5 cms above left nipple and 6.5 cms left to mid-sternal line, size 4 cms x 1.8 cms x cavity deep.

iii) Another penetrating injury on left side of abdomen horizontally placed, located at 14.4 cms below right nipple, 4 cms from mid-abdominal line, size 3.8 cms x 1.4 cms x cavity deep.

iv) Another penetrating injury on right abdomen 5.8 cms below injury No.3 horizontally placed, size 4.6 cms x 2.1 cms x cavity deep.

v) Another penetrating injury on left side of abdomen, horizontally placed, located at 4.5 cms left to umbilicus and 21 cms below left nipple, size 9 cms x 3.5 cms x cavity deep.

vi) One incised wound on sternum, .5 cms right to injury No.1, size 0.3 cms x 0.2 cms x skin deep.

vii) Another incised wound on abdomen 10 cms below injury No.4, size 1.6 cms x .8 cms x skin deep.

viii) Another incised wound on abdomen 2.4 cms medial to injury 0.3, size 0.7 cms x 0.4 cms x skin deep.

68. A glance at those injuries would reflect that five of them were perforating or penetrating wounds cavity deep. Out of those, two were on chest and three on abdomen. Such injuries are clearly homicidal therefore, masking this homicidal event as a suicide does not appeal to logic. Further, the injuries are not of same dimension. In these circumstances, a question would arise as to why would Neeraj who has no proven connection with the deceased or the co-accused Santosh, or for that matter the apartment where the dead body was found, make a futile effort to mask the event of murder and thereby leave a trace of his own culpability. To answer that, the prosecution has led no admissible

A evidence. Thus, even if we assume that a suicide letter was found, at what stage it was written — prior to, or post the murder, or in connection with some other event which the deceased contemplated — is anybody's guess.

69. In light of the discussion above, taking into account that Neeraj B has denied the incriminating circumstance of writing the suicide letter and no internal or external evidence, save the expert report, supports the writing of suicide letter by Neeraj, we are of the considered view that though the expert evidence was admissible as an opinion on the writing in the suicide letter but, on overall assessment of the evidence led by the C prosecution, solely on its basis, it would be extremely unsafe to hold that the suicide letter retrieved from the trouser of the deceased was written by Neeraj.

Circumstance (e) — Re: The two accused were not traceable from 12.09.2000 till 23.09.2000

D 70. The fact that the two accused could be apprehended on 23.09.2000 when they had appeared to surrender in connection with the case is proved by the police witnesses and there is no good reason to doubt their testimony. Moreover, the accused neither led evidence nor tendered explanation in respect of any other date or time or place of their arrest or surrender. In his statement, under Section 313 of the Code, E Santosh had disclosed that he was informed about some occurrence in Delhi, therefore, to ascertain the same, he came to Delhi. Insofar as Neeraj is concerned, the circumstance that he was arrested on 23.09.2000 has not even been put to him while recording his statement under Section 313 of the Code. Rather, the arrest of co-accused Santosh from court F premises was put to him. However, what is surprising is that while recording statement of the two accused under Section 313 of the Code, none of them was confronted with any incriminating circumstance suggestive of they having secreted themselves to evade arrest. Moreover, the only evidence led by the prosecution in that regard was that an effort was made to trace them out and in that connection, a visit to their native G place (i.e. at Etawah) was made on 20.09.2000 where they were not found. But, unfortunately, the statement that the police visited their native place on 20.09.2000 was not even put to any of the two accused while recording their statement under Section 313 of the Code. In these circumstances, it is difficult for us to hold with a degree of certainty that H they were guilty, therefore they secreted themselves. As regards

inference from non-reporting of the crime by Santosh, what goes in his favour is that there is no clear evidence to show that he was present in the apartment at the relevant time. Even if he had been a tenant of that apartment, he could always be present elsewhere for a few days. Here, it was just a matter of few hours, inasmuch as, murder took place between afternoon of 11.09.2000 and morning of 12.09.2000. Body was found at about 10.40 a.m. on 12.09.2000. Once the body was found and police entered the scene, after the first information report, even if Santosh had been away and innocent, his instinct of self-preservation would have got the better of him to evade arrest till better counsel prevailed upon him to surrender. Such conduct by itself is not reflective of a guilty mind. In ***Matrualias Girish Chandra*** *v.* ***State of U.P.***[21], this Court observed:

> "19. … mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime such is the instinct of self-preservation. The act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case. Normally the courts are disinclined to attach much importance to the act of absconding, treating it as a very small item in the evidence for sustaining conviction. It can scarcely be held as a determining link in completing the chain of circumstantial evidence which must admit of no other reasonable hypothesis than that of the guilt of the accused."

In these circumstances and for all the reasons above, we do not find a good reason to draw an adverse inference against the two accused on account of few days delay in their act of surrender.

Circumstances (f), (g) (h) and (i) — Re: Disclosure statements, consequential discoveries and their connect with crime.

71. With regard to the making of disclosure and the consequential discoveries/recoveries, according to the prosecution on 23.09.2000 the two accused made disclosures assuring recovery of weapon of assault and blood-stained clothes worn by them at the time of commission of murder. But, admittedly, no discovery could be effected pursuant thereto. Consequently, both the courts below discarded the disclosure statement

[21] (1971) 2 SCC 75

made on 23.09.2000. However, according to the prosecution, another set of disclosure statements were made on 25.09.2000. In pursuance thereof, a knife kept in the bushes behind a hospital was recovered at the instance of Neeraj and blood-stained clothes, kept at the rooftop of the same building, were recovered at the instance of Santosh @ Bhure. Importantly, both the accused have denied such disclosures and recovery at their instance. Notably, the disclosure statements of both Santosh @ Bhure and Neeraj have been signed by SI Rajesh Kumar (PW15) as a witness. The recovery memorandum in respect of knife/dagger is signed by Pritpal Singh (PW13) and SI Rajesh Kumar (PW15) as witnesses; whereas, recovery memorandum of blood-stained clothes is signed by Raj Kumar (PW4) and SI Rajesh Kumar (PW15) as witnesses.

72. In respect of disclosure made on 25.03.2000, statement of PW15 SI Rajesh Kumar has been placed on record as Annexure "P-1" in the paper book of Criminal Appeal No.576 of 2011. A perusal of it would indicate that on 25.09.2000, the two accused, namely, Santosh @ Bhure and Neeraj, were taken out from the lock-up of Police Station Tilak Nagar and were interrogated by Inspector J.L. Meena (PW28). At page 53 of the paper book, the statement of PW15 is to the effect that accused Neeraj had told that the clothes which he was wearing at the time of incident were kept by him on the roof of the room where the incident had taken place and he could get the same recovered. He also stated that Neeraj had disclosed that he could get the knife recovered with which the murder was committed. PW15 specifically stated that after that disclosure, disclosure statement of Santosh @ Bhure was recorded who also told the same thing which accused Neeraj had already disclosed in his disclosure statement. At another stage of his deposition[22], PW15 stated that the disclosure statements of accused persons were recorded on 25.09.2000 at about 10.30 a.m. Then he stated that the disclosure statements of both the accused persons were recorded separately but he does not remember as to whose statement was recorded first. At another stage of his deposition[23], PW15 stated that he had written the disclosure statements on the instructions of Inspector J.L. Meena (PW28) but could not explain the reason as to why said disclosure statements were not recorded by Inspector J.L. Meena (PW28).

[22]At page 59 of the paperbook
[23]At page 60 of the paperbook

73. In somewhat similar situation, in ***Lachhman Singh & Others v. State***[24]**,** the arguments on behalf of defence were as follows:

> "13. *The learned counsel for the appellants cited a number of rulings in which Section 27 has been construed to mean that it is only the information which is first given that is admissible and once a fact has been discovered in consequence of information received from a person accused of an offence, it cannot be said to be re-discovered in consequence of information received from another accused person. It was urged before us that the prosecution was bound to adduce evidence to prove as to which of the three accused gave the information first. The Head Constable, who recorded the statements of the three accused, has not stated which of them gave the information first to him, but Bahadur Singh, one of the witnesses who attested the recovery memos, was specifically asked in cross-examination about it and stated: "I cannot say from whom information was got first". In the circumstances, it was contended that since it cannot be ascertained which of the accused first gave the information, the alleged discoveries cannot be proved against any of the accused persons."*

In the context of the above arguments, this Court expressing a note of caution observed thus:

> ***"14.It seems to us that if the evidence adduced by the prosecution is found to be open to suspicion and it appears that the police have deliberately attributed similar confessional statements relating to facts discovered to different accused persons, in order to create evidence against all of them, the case undoubtedly demands a most cautious approach. …"***
>
> (Emphasis Supplied)

74. Seen in that light, a confusing picture emerges from the statement of PW15, that is, whether it was Neeraj who first disclosed the spot from where blood-stained clothes were recovered or it was Santosh who disclosed it first. What is most damaging to the prosecution is PW15's statement that he wrote the disclosure statements on instructions of Inspector J.L. Meena (PW28) and not on basis of what he heard the accused state. In our view, this creates a serious possibility

[24] (1952) 1 SCC 362 : 1952 SCC OnLine SC 30: AIR 1952 SC 167

of the disclosure evidence being fabricated for using it against both the accused which seriously dents its credibility thereby rendering it unworthy of acceptance. More so, when the first disclosure resulted in no discovery.

75. Insofar as recovery at the instance of the accused is concerned, both the accused have denied recovery of the concerned articles at their instance. As regards recovery of clothes at the instance of Santosh, PW4, a witness to that recovery, has been declared hostile. There is thus no support to that recovery from any public witness. And since we have already doubted the disclosure statements set up by the police witnesses, it would be unsafe to place reliance on their testimonies in respect of the recoveries pursuant thereto, particularly, when the place from where recovery of clothes is shown is none other than the rooftop of the building from where 13 days ago the body of the deceased was found. Because, in such a scenario, it would be logical to expect that the police would have left no nook and corner of that building unscanned. For all the reasons above, we doubt the recovery of clothes at the instance of Santosh and thereby discard the circumstance of recovery of clothes at his instance.

76. Having doubted the recovery of clothes at the instance of Santosh, the circumstance that the clothes carried blood of same group as of the deceased is rendered meaningless because there is no admissible evidence to connect the clothes with the two accused. The disclosure statement made to the police, even if not discarded, was not admissible for proving that the clothes recovered were the one which the accused were wearing at the time of murder. The reason being that only so much of the disclosure would be admissible under Section 27 of the IEA, 1872 as distinctly relates to the fact thereby discovered which, in the instant case, would be the place where the clothes were concealed.

77. In ***Pulukuri Kottaya & Others*** *v.* ***Emperor***[25]**,** the Privy Council, while discussing the extent to which the disclosure information provided by the accused to the police is admissible under Section 27 of the IEA, 1872, held:

> *"it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact.* ***Information as to past***

[25] AIR 1947 PC 67

user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. *Information supplied by a person in custody that ' I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A', these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."*

(Emphasis supplied)

78. In ***K. Chinnaswamy Reddy*** *v.* ***State of A.P. & Another***[26]**,** a three-judge Bench of this Court, while agreeing with the view expressed by Privy Council in ***Pulukuri Kottaya (supra)***, clarified the law in following terms:

"10. ... *It is only that part which distinctly relates to the discovery which is admissible; but if any part of the statement distinctly relates to the discovery it will be admissible wholly and the court cannot say that it will excise one part of the statement because it is of a confessional nature. Section 27 makes that part of the statement which is distinctly related to the discovery admissible as a whole, whether it be in the nature of confession or not…."*

79. In ***Mohd. Inayatullah v. State of Maharashtra***[27]**,** following the decision of the Privy Council in ***Pulukuri Kottaya (supra)***, this court elaborately laid down the law with regard to the extent to which a disclosure information provided by the accused to the police is admissible under Section 27 of the IEA, 1872. The relevant portion of the judgment is extracted below*:*

"12.… *only* "*so much of the information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word* "*distinctly" means* "*directly",*"*indubitably",* "*strictly",* "*unmistakably". The word has been advisedly used to limit and define the scope of the*

[26] AIR 1962 SC 1788
[27] (1976) 1 SCC 828

A *provable information. The phrase "distinctly relates to the fact thereby discovered" is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered."*

After laying down the extent to which the disclosure statement is admissible under Section 27, the Court proceeded to test the admissibility of the following statement:

D *"I will tell the place of deposit of the three chemical drums which I took out from the Haji Bunder on first August."*

The Court held:

" *…only the first part of the statement viz.* "*I will tell the place of deposit of the three chemical drums" was the immediate and direct cause of the fact discovered. Therefore, this portion only was admissible under Section 27. The rest of the statement, namely,* "*which I took out from the Haji Bunder on first August", constituted only the past history of the drums or their theft by the accused; it was not the distinct and proximate cause of the discovery and had to be ruled out of evidence altogether.*"

80. In light of the discussion above, even if the disclosure statements were accepted, the statement therein that one of the two trousers was of Santosh and the other was of co-accused Neeraj, which they were wearing at the time of the incident, is not one which distinctly G relates to the fact discovered, therefore, the same was not admissible under Section 27 of the IEA, 1872.

81. As regards recovery of knife at the instance of Neeraj, the same has been denied by Neeraj and there appears no independent witness to support it, inasmuch as PW13, touted as a public witness, turned out H to be a special police officer and insofar as the other police witnesses

are concerned, we have already doubted their conduct in setting up disclosure statements. Moreover, the place from where recovery is made is accessible to all and sundry. Otherwise also, its incriminating value is extremely limited because, firstly, there is no forensic evidence connecting the knife with the crime; secondly, the knife is a common knife which could easily be available; thirdly, the wounds found on the body of the deceased were of different dimensions giving rise to possibility of use of more weapon than one; and, fourthly, the entire exercise of recovery does not inspire our confidence, particularly, because the first attempt to recover had failed.

82. For all the reasons above, we hold that the circumstances with regard to making of disclosure statements and consequential discoveries/recoveries were not proved beyond reasonable doubt. In our view, the two courts below have not properly appreciated and scrutinised the evidences, particularly the testimony of PW15, as noticed and analysed above, to test whether the said circumstances were proved beyond reasonable doubt. Hence, findings to the contrary returned by the two courts below are set aside. As a resultthereof, the forensic report with regard to presence of human blood on the clothes recovered has no incriminating value qua the two accused. Likewise, the opinion that the knife recovered could have caused injuries as were found on the body of the deceased carries no incriminating value qua the accused.

Circumstance (j) — Re: failure to render plausible explanation

83. In a case based on circumstantial evidence, false explanation or non-explanation can only be used as an additional circumstance when the prosecution has proved the chain of circumstances leading to a definite conclusion with regard to the guilt of the accused. Therefore, before addressing circumstance (j), we would first examine whether the incriminating circumstances that stood proved constitute a chain so far complete as to infer that in all human probability it were the accused who had committed the crime.

84. As discussed above, the incriminating circumstance that stood proved beyond reasonable doubt as against Santosh was that the deceased had died a homicidal death in the flat/apartment which stood in his tenancy. Insofar as Neeraj is concerned there is no admissible evidence connecting him with either Santosh or the deceased. There is also no admissible evidence to show that Neeraj resided in that apartment either as a co-tenant or sub-tenant thereof. The allegation that the suicide letter was

written by Neeraj has already been held not proved beyond reasonable doubt, therefore, in our view, there is no worthwhile evidence against Neeraj. Hence, his acquittal by the High Court calls for no interference.

85. Insofar as Santosh is concerned barring the tenancy of that apartment being with him, rest of the circumstances relied by the prosecution have not been found proved beyond reasonable doubt. In our view, mere tenancy of that apartment being with Santosh, by itself,would not constitute a chain so far complete as to logically infer that in all human probability the deceased was killed by Santosh and no one else, because—

a) The accommodation from where body was recovered was found open. There is no evidence that it was under lock and key of Santosh or that its access was controlled and no one other than Santosh could have had access to the apartment. Thus, possibility of some third person entering the apartment and committing murder is not ruled out.

b) Mere presence of a dead body in an apartment is not enough to convict a tenant or owner of that apartment for murder, particularly when there is no admissible evidence to prove that around the plausible time of murder the accused was present there, or was last seen with the deceased, and had motive to finish off the deceased;

c) From the testimony of PW4 it is proved that the deceased was alone in that apartment between noon and 1.00 p.m. on 11.09.2000 and, at that time, Santosh was not present there.The body of the deceased was found in the morning of 12.09.2000.There is no evidence that in between noon of 11.09.2000 and discovery of the dead body next day morning, the appellant Santosh or co-accused Neeraj entered that apartment or were seen in the vicinity;

d) The prosecution led no evidence to prove any motive for the crime which, in a case based on circumstantial evidence, provides an important link to the chain of circumstances;

e) At the time of lifting the dead body from that apartment, number of articles present there including whisky bottle and plates etc. were lifted. Many of those articles could have carried fingerprints. Yet no evidence was brought on record to rule out presence of any other person than the accused

or to confirm the presence of fingerprints of any of the two accused on those articles;

f) The circumstance that the accused remained at large till 23.09.2000 by itself is not a conduct reflective of a guilty mind, particularly, when there existed no evidence to show physical presence of the appellant Santosh in that apartment, or in the vicinity, on 11.09.2000 or any time thereafter, till recovery of the dead body on 12.09.2000. Otherwise also, the incriminating circumstance in respect of abscondence, if any, has not been put to any of the two accused while recording their statement under Section 313 of the Code.

Conclusion:

86. In light of the discussion above, we have no hesitation in holding that the prosecution has failed to prove a chain of incriminating circumstances as to conclusively point out that in all human probability it was the two accused or any one of them, and no one else, who had committed the murder. In such circumstances, even if Santosh failed to explain as to how the dead body of the deceased was found in his apartment, an inference of his guilt cannot be drawn. In a nutshell, it is a case where the prosecution failed to elevate its case from the realm of "may be true" to the plane of "must be true" as is indispensably required for conviction on a criminal charge.

87. Consequently, Criminal Appeal No.575 of 2011 filed by the accused Santosh @ Bhure is allowed. The judgment and order of the Trial Court convicting and sentencing him and the judgment and order of the High Court upholding his conviction are set-aside. The appellant Santosh @ Bhure is acquitted of all the charges for which he has been tried and convicted. If he is in custody, he shall be released forthwith, unlesshis custody is required in connection with any other case. If he is already on bail, he need not surrender and his bail-bonds shall stand discharged.

Insofar as Criminal Appeal No.576 of 2011 filed by the State challenging acquittal of the accused Neeraj is concerned, the same has no merit and is, accordingly, dismissed.

88. Both the appeals stand disposed of in aforesaid terms.

Ankit Gyan Appeals disposed of.
(Assisted by : Manish Tomar and Mahendra Yadav, LCRAs)