

(2007) 03 SC CK 0013

Supreme Court of India

Case No: Criminal Appeal No. 873 of 2004

State of Goa

APPELLANT

Vs

Sanjay Thakran and Another

RESPONDENT

Date of Decision: March 2, 2007

Acts Referred:

- Constitution of India, 1950 - Article 136
- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 120B, 302, 34, 364, 376

Citation: (2007) 2 ACR 1194 : (2007) 2 ALD(Cri) 949 : (2007) 2 ALT(Cri) 170 : (2007) 5 JT 146 : (2007) 3 SCALE 740 : (2007) 3 SCC 755 : (2007) 3 SCR 507

Hon'ble Judges: P. P. Naolekar, J; B. N. Agrawal, J

Bench: Division Bench

Advocate: Mahendra Anand, Dhruv Mehta, Harshvardhan Jha, Yashraj Singh Deora, Manoj Mehta, for K.L. Mehta and Co, for the Appellant; R.K. Jain and Rajiv Dutta, B.S. Chahar, Jyoti Chahar and Vinay Garg, for the Respondent

Final Decision: Disposed Of

Judgement

P.P. Naolekar, J.

Aggrieved by the judgment and final order dated 30-09-2003 of the High Court of Bombay at Goa whereby the accused persons/respondents, namely, Sanjay Thakran (respondent No. 1/A-1) and his wife Anjali Thakran (respondent No. 2/A-2) were acquitted of the offences charged under Sections 120B, 364, 302 and 392 read with Section 34 of the Indian Penal Code, 1860, these criminal appeals have been preferred by the State of Goa and father of one of the deceased persons. Earlier, by the judgment delivered on 09-01-2002, the Court of IInd Additional Sessions Judge, Panaji has acquitted both the accused persons of all the abovementioned charges leveled against them.

2. The relevant facts, as per the evidence adduced and the First Information Report, are that on 26-02-1999, the deceased couple, namely, Vikas Nanda (D-1, age 26 years) and Kavita Nanda @ Priya Nanda (D-2, age 23 years), arrived in Goa from Mumbai for their honeymoon and stayed in Hotel Seema at Ribandar. On 27-02-1999, the deceased couple went for sight-seeing at Ozran, Vagator with P.W.13-Vincent, who was the car driver and had also taken them for the sight-seeing trip a day earlier as well. At about 2.30 p.m., D-1 told P.W.-13 that they had met some friends from Delhi and hence "P.W.-13 returned from there. P.W.30-Suhasini Govekar, who operated a shack at Anjuna beach with her husband, mentioned that on 27-02-1999, the accused couple and their children came to her place in between 1.00-2.00 p.m. and then went to take bath. When they returned back, the deceased couple accompanied them. The accused couple was running a bar and the restaurant Iguana Miraj and hotel Lalita Beach Resort in Goa. P.W.11-Dinesh Adhikari, who was servant of the respondents, saw the deceased couple at respondents' hotel 2 or 3 days preceding the festival of Holi in the year 1999 at approximately 6.00-7.00 p.m. According to this prosecution witness, A-1-Sanjay Thakran, D-1-Vikas Nanda and P.W.14-Calvert were sitting outside the hotel and A-2-Anjali Thakran was sitting with D-2-Priya Nanda inside a room in the hotel. He saw A-1-Sanjay Thakran and D-1-Vikas Nanda walking towards the beach sometime after 9.00-9.30 p.m. and that was the last time when D-1 was seen alive. After sometime P.W.11 saw A-1-Sanjay Thakran, A-2-Anjali Thakran and D-2-Priya Nanda as they were walking away from Iguana Miraj. Another prosecution witness, P.W.14-Calvert Gonsalves also saw the deceased couple at the hotel of the accused couple. As per P.W.6-Amit Banerjee, who was working as a receptionist at Hotel Seema, D-2-Priya Nanda returned to Hotel Seema without D-1 and along with A-1-Sanjay Thakran at about 11.30 p.m. She asked for the key of their room from P.W. 6. A-1-Sanjay Thakran helped her to carry the luggage from the Hotel room as she checked out about 11.40 p.m. A-2 did not come to the hotel and remained seated in the white colour Maruti Car that had a Delhi registration number on it. D-2-Priya Nanda, A-1-Sanjay Thakran and A-2-Anjali Thakran went away in that car and thus, D-2 was also last seen alive in the company of the accused couple.

3. On 28-02-1999, P.W.2-Charles Mills lodged a report at Anjuna Police Station that a dead body of unknown female foreigner (later identified as D-2) was found at the Vagator Beach. According to this witness, who was staying near the beach, at around 7.30 a.m., he was told by someone that a female body was floating in the seawater. The deceased was wearing a blue skirt and a top. On the same day, P.W.17-Fausto Afonso lodged report with Clove Police Station that a dead body of unknown male foreigner (later identified as D-1) was found at about 00.30 hours at the Benaulim Beach. The distance between the Vagator Beach and Benaulim Beach is around 60 kilometers.

4. As the deceased couple neither returned to Delhi as expected by 01-03-1999 nor contacted P.W.33-Subhash Nanda i.e., father of D-1, he called up P.W.4-A.C. Duggal

to inquire about them. Accordingly, P.W. 4-A.C. Duggal, who was uncle of D-1 and lived in Mumbai, called up N. Murari, who was posted in Goa and worked in the Union Bank of India with P.W.-4, to know about their whereabouts on 01-03-1999. N. Murari told P.W.-4 that they had already checked out of the Hotel Seema. Since the deceased couple did not reach Mumbai as stipulated by P.W.-4 on 02-03-1999, he again called up N. Murari. On 03-03-1999 at about 7.15 p.m., N. Murari informed P.W.-4 that a dead body of male person with similar description to that of Vikas had been found and asked him to come to Goa. P.W.-4 rushed to Goa and identified the dead body of D-1-Vikas Nanda on 04-03-1999. On the same day, N. Murari lodged a missing report [Exhibit No. 20] at Old Goa Police Station. After identifying the body of D-1-Vikas Nanda at morgue, P.W.-4 went to Seema Guest House and made inquiries about the couple. The dead body of D-2 was also identified on 05-03-1999. P.W.-4 lodged a complaint [Exhibit No. 21] on 05-03-1999 at Anjuna Police Station with P.W. 38-Sub-Inspector Sandesh Chodankar. According to this complaint, on 04-03-1999, P.W.-4 was informed by Hotel Manager that D-2 checked out from hotel on 27-03-1999 at about 11.40 p.m. and another person having short built, bald from front and having fair complexion accompanied her. The complainant believed that since the dead bodies of the couple had been found at places nearly 60 kilometers away from each other, the newly married couple must have been lured by some disgruntled mischievous element, who had killed them for their ornaments, as all the gold ornaments of the deceased couple were found missing.

5. P.W.26-Dr. Silvano Dias Sapeco, who conducted the postmortem [Exhibit No. 80] on the body of D-2 on 01-03-1999, found the following ante-mortem injuries:

1. Red bruise 20 cms. Diameter on left mid upper arm.
2. Red bruise 1.5 cms. Diameter on right inner aspect of upper third region of thigh.
3. Red bruise 1.5 cms diameter on left mid thigh in inner aspect.
4. Red bruise 1.25 cms. Diameter on right mid lower leg at calf region.
5. Red bruise 1.25 cms. Diameter on left mid lower leg at calf region.

and it was opined that these were caused by blunt weapons. Due to the fact that the doctor, who initially conducted postmortem on body of D-1-Vikas Nanda on 01-03-1999, had not preserved any viscera or material, on 05-03-1999 a second postmortem [Exhibit No. 95] was conducted by P.W.32-Dr. E.J. Rodrigues, which exposed the following ante-mortem injuries:

1. Abrasion reddish and fresh of 6 x 4.5 cms. Present on upper outer part on right side face between outer orbital margin, 2 cms. in front of right tragus of ear and extending on outer part of right cheek bone. No bruising underneath.
2. Abrasion reddish and fresh of 2.5 x 1 cms. Placed vertically on the ridge of nose. No bruising underneath. No injuries to alae of nose.

3. Abrasion reddish and fresh of 5 x 3 cms. on left side upper part of face 2 cms. in front of left tragus of ear extending upto outer orbital margin and also on outer part of left cheek bone. No bruising underneath.
4. Abrasion reddish and fresh of 0.5 x 0.5 cms., 1 cm. above outer end of right eyebrow.
5. Abrasion reddish and fresh of 0.5 x 0.5 cms., 1.5 cms. above outer end of left eyebrow.
6. Abrasion reddish and fresh of 3 x 2 cms., upper middle back of right shoulder.
7. Abrasion reddish and fresh of 2 x 1.5 cms., upper back of left shoulder at acromioclavicular process region.

and it was opined that they were caused with blunt surface. The postmortem reports of both the deceased persons have concluded that death had occurred as a result of asphyxia due to drowning in shallow beach water.

6. From their initial investigation, the Goa police found out about the description of the accused couple and their children. The flat belonging to the accused persons was sealed under the orders of a Civil Court. P.W.-38, therefore, applied to the Judicial Magistrate, 1st Class, Margao for issuance of search warrant. The Judicial Magistrate, 1st Class, Margao directed that the bailiff of the Court would accompany P.W.-38 and in the presence of two respectable panchas from the locality, the seal of the court would be opened and inventory of the movable articles and fixtures found in the flat should be made. After the search, the flat should be resealed/locked and the bailiff would file a report to the Court. Accordingly on 17-12-1999, the police conducted search of the flat of accused, which was located at Sapna Residency, Clove. During this search, P.W.-38 attached the passports of the accused-respondents and their two children, two visiting cards of P.W. 19-Subrato Padhi, a visiting card of Iguana Restaurant and one laminated photograph. [House Search Panchnama as Exhibit No. 13 and Report regarding Search Warrant which was submitted to Judicial Magistrate, 1st Class, Margao as Exhibit No. 108]. The Court bailiff, who accompanied with P.W.-38 and other panch witnesses, prepared a list of movable articles of the flat [Exhibit No. 112]. The flat was resealed after the search was over.

7. On 30-01-2000, the accused persons were arrested in Agra by P.W. 15- Police Inspector Navrang Singh, who was posted at police station of Sadar Bazar, Agra. P.W.-38 accompanied with Dy. Superintendent of Police P.W.29-Arvind Gawas, arrived at Agra on the same day. P.W.-15 informed them that A-1-Sanjay Thakran handed over a double barrel gun and A-2-Anjali Thakran took out and handed over a single barrel 12-bore gun from the cupboard. During the house search of the accused persons, police recovered a churidhar set, a ladies purse and some newspapers containing reports that were connected with investigation of the

present case. According to the prosecution story, the recovered materials were identified by P.W.33-Subhash Nanda, father of Vikas and P.W.5-Kishen Valecha, brother of Priya as belonging to the deceased couple. P.W.38-Sandesh Chodankar, Sub-Inspector interrogated the accused persons and satisfied himself of their complicity in the crime. On 31-01-2000, he further obtained transit remand and custody of the accused couple. The accused were brought back to Goa on 01-02-2000 and formally arrested in connection with the present case.

8. On 08-02-2000, as alleged by prosecution, during the interrogation A-1-Sanjay Thakran disclosed to P.W. 38-Sandesh Chodankar about the fact that murder of the deceased couple was committed by his wife and him and that the belongings of the deceased couple were present in his flat. On 11-02-2000, in presence of Court bailiff-Peter Fernandes and other panch witnesses, A-1 handed over jewellery from his flat B-2 F-3 at Sapna Residency, Clove. The jewellery, which was handed over to police, consisted of eight yellow metal bangles, one pair of ear-rings and one finger ring. As has been alleged by the prosecution side, he also produced clothes such as a white full-sleeves shirt, a saffron-coloured women's kameez with a cream-coloured salwar, a green-coloured saree with blouse,, a light cream-coloured silken kurta pyjama and a designer black full-sleeves shirt, which belonged to the deceased couple.

9. During interrogation, on 13-02-2000, A-2-Anjali Thakran allegedly disclosed [Exhibit No. 77] that she would point out the goldsmith to whom she had sold the gold ornaments. As per the directions of A-2-Anjali Thakran, a police party and panch witnesses reached the jewellery shop of P.W. 12-Ulhas Lotlikar at Khareband Margao. P.W. 12-Ulhas Lotlikar produced two bangles bearing the identification mark "RK 22 KL", weighing 23.5 grams. According to the prosecution case, the said bangles bearing the identification mark "RK 22 KL" were gifted to the newly wed couple on their marriage by P.W.-33. The prosecution has alleged that A-2-Anjali Thakran sold these bangles along with a necklace and a ring to the jewellery shop run by P.W.-12. It has also been alleged by the prosecution that A-2-Anjali Thakran sold these jewellery on the pretext that as their restaurant was not running well, they were in urgent need of money. The learned Sessions Judge, Panaji, as well as the High Court on evaluation of the circumstantial evidence, came to the conclusion that the prosecution has failed to prove involvement of accused respondents in commission of the crime and acquitted them of all charges.

10. Admittedly, the case of the prosecution is based on circumstantial evidence as there is no evidence on record that any of the witnesses, examined by the prosecution, have seen actual commission of the crime. Mr. Mahendra Anand, the learned senior counsel for the appellant(s), to prove the case against A-1-Sanjay Thakran, has placed reliance on the following circumstances: the recovery of ladies purse and salwar suit by police at Agra on 30.01.2000 and the recovery of jewellery and clothes made from the flat of the accused persons in Goa on 11.02.2000 and the

evidence of seen together with the deceased couple before the actual incident by P.W.30-Suhasini Govekar and evidence of P.W.11-Dinesh Adhikari, P.W. 14-Calvert Gonsalves and P.W.6-Amit Banerjee to the effect that A-1 was accompanied with the deceased couple on 27.02.1999 and that the deceased couple was last seen alive in his company. As far as the evidence against the respondent A-2-Anjali Thakran is concerned, the learned senior counsel for the appellant(s) has relied upon the aspect of recovery of ladies purse and salwar suit; the recovery of two bangles bearing the identification mark "RK 22 KL" at her instance from the jewellery shop of P.W.12-Ulhas Lotlikar; and the evidence of P.W.11- Dinesh Adhikari, P.W.14-Calvert Gonsalves and P.W.6-Amit Banerjee, that Anjali was last seen in the company of her husband with the deceased couple before the commission of the crime. The learned senior counsel for the appellant(s) has further submitted that no explanation is forthcoming from the accused respondents in the statement recorded u/s 313 of the Code of Criminal Procedure, 1973 (Cr.P.C.) as to what has happened after they were seen in the company of the deceased couple, would indicate involvement of accused respondents in commission of the crime. The learned senior counsel for the appellant(s) has then pointed out that the chain of circumstances highlighted in the present case clearly establishes the fact that the accused couple did not only meet the deceased couple in Goa but they were the ones with whom the deceased persons were last seen alive. It has also been contended that the recovery of ladies purse and salwar suit from the house of accused couple at the time of their arrest in Agra on 30.01.2000; recovery of jewellery and clothes at the instance of A-1-Sanjay Thakran from the flat of accused persons in Goa on 11-02-2000 and recovery of two bangles belonging to D-2-Priya Nanda bearing the identification mark "RK 22 KL1 at the instance of A-2-Anjali Thakran from the jewellery shop of P.W.12-Ulhas Lotlikar on 13-02-2000, further substantiate that the accused couple, in order to carve away the belongings of the newly married couple, committed the offence of murder. It has also been pointed out that the High Court and the lower court have erred in (i) rejecting the evidence regarding the recovery of incriminating materials and (ii) not appreciating the key prosecution witnesses.

11. On the other hand, late Shri R.K. Jain, the learned senior counsel for the respondents, urged that the present matter before us, is an appeal arising out of SLP under Article 136 of the Constitution against concurrent orders of acquittal by the Sessions Court and the High Court and, thus, merely because on reappraisal of the evidence, the other view of the matter than taken by the courts can be legitimately arrived at, would not be a sufficient ground to interfere with an order of acquittal, unless this Court reaches the conclusion that the entire approach of the courts below in appreciating the evidence was patently illegal, erroneous or unsustainable and that if, on reappraisal of the evidence, only one view is possible, then alone the Court will exercise the jurisdiction in appeal and will convict the acquitted accused persons. It is submitted that on consideration of the evidence on record, the courts below have rightly reached the conclusion that the prosecution

has failed to prove the case beyond reasonable doubt of involvement of accused respondents in commission of the crime of murder of the deceased couple.

12. The prosecution case is based on the circumstantial evidence and it is a well-settled proposition of law that when the case rests upon circumstantial evidence, such evidence must satisfy the following tests:

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

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

[See : 276152 , 273091 , 278324 , 283400 and 280733].

13. By a series of decisions, this Court has laid down the parameters of appreciation of evidence on record and jurisdiction and limitations of the appellate court, and while dealing with appeal against order of acquittal this Court observed in 290262 as under:

6. ...The jurisdiction of the appellate court in dealing with an appeal against an order of acquittal is circumscribed by the limitation that no interference is to be made with the order of acquittal unless the approach made by the lower court to the consideration of the evidence in the case is vitiated by some manifest illegality or the conclusion recorded by the court below is such which could not have been possibly arrived at by any court acting reasonably and judiciously and is, therefore, liable to be characterised as perverse. Where two views are possible on an appraisal of the evidence adduced in the case and the court below has taken a view which is a plausible one, the appellate court cannot legally interfere with an order of acquittal even if it is of the opinion that the view taken by the court below on its consideration of the evidence is erroneous.

14. Further, this Court has observed in 292763 :

7. ...This Court has repeatedly laid down that the mere fact that a view other than the one taken by the trial court can be legitimately arrived at by the appellate court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial court in dealing with the evidence was patently illegal or the

conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then - and then only - reappraise the evidence to arrive at its own conclusions....

and in 269311 :

7. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. {See 288181 }. The principle to be followed by appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference. These aspects were highlighted by this Court in 286328 , 292763 and 288570 .

15. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the court of appeal would not take the view which would upset the judgment delivered by the court below. However, the appellate court has a power to review the evidence if it is of the view that the view arrived at by the court below is perverse and the court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate court, in such circumstances, to re-appreciate the evidence to arrive at a just decision on the basis of material placed on record to find out whether any of the accused is connected with commission of the crime he is charged with.

In the light of the aforesaid principles laid down, we shall consider the evidence placed on record to find out whether the courts below have committed any error in dealing with the evidence, which can be said to be patently illegal, or that the conclusion arrived at is wholly untenable, calling for interference by us.

16. Even before the arrest of the accused couple, the flat of the accused persons situated at Goa was searched on 17.12.1999 in the presence of P.W.39-Mariono Pereira, who was the court bailiff. The court bailiff accompanied this search party as the flat was sealed under the orders of the civil court. The Judicial Magistrate, 1st Class, Margao, had passed an order that the bailiff of the court would accompany P.W.-38, police officer, and in the presence of two panch witnesses, the seal of the court on the lock of the flat would be opened and inventory of movable articles and fixtures found in the flat should be made. The Judicial Magistrate, Margao also directed that after the search, the flat should be re-sealed/locked and the bailiff would file a report in the court. In his cross-examination, P.W.-39 admitted that the court had asked to prepare a list of all movable items of the flat and not only valuables, and he committed a mistake as he did not mention all articles found in the flat in the inventory and, therefore, there was no mention of any jewellery in the list prepared by him. As per this witness, when the search was made on 17.12.1999, there were no gold ornaments in the said flat and that there were various articles, which appeared like that of gold. A box full of such articles was kept in the suitcase. According to P.W.1-Erecko Fernandez, a panch witness, the door of the flat was locked, with three locks and there was also a metal chain around the lock. The locks were required to be cut with the help of a hacksaw blade. But since the door also was latched from inside, it could not be opened. They noticed a small window with a broken glass pane and one of the police personnel who accompanied them, with the help of a screw driver, removed the screws of the grill of the window. One of the police personnel went inside the flat and opened the latch and thereafter all of them entered into the flat. They noticed some suitcases in the flat and on opening the same some clothes were found and jewellery was found inside the cupboard, In his cross-examination, this witness very specifically stated that the said window was wide enough to allow a person to gain entry in the flat. P.W.38-Sandesh Chodankar, who led the police party for the search conducted on 17.12.1999, had found lot of clothes and jewellery of yellow metal, lot of belongings of shack, electronic items and household items in the flat. He has explained that he did not attach any valuable or other articles as he was not sure to whom those things belonged and also as there was a civil dispute pending in the court. The panchnama of the search made on 17.12.1999 (Exhibit No. 13) mentioned that after conducting the search, the door was closed and one old and two new locks were put on the door and they were sealed by a one-rupee coin as the court seal was not available. The court bailiff mentioned that he sealed three locks after the search was conducted by P.W.-38 on 17.12.1999.

17. After the arrest of A-1, this flat was once again searched on 11.2.2000 in the presence of another court bailiff Peter Fernandez and other panch witnesses as A1 allegedly confessed about the crime on 08.02.2000. According to the prosecution version, he agreed to handover the incriminating articles to the police. P.W.8-Sanjay Naik, a witness to the confession of A-1, was also present as panch witness when A-1 had allegedly handed over jewellery items, i.e., eight yellow metal bangles, one pair of ear-rings and one finger ring and clothes such as a white full-sleeves shirt, a saffron-coloured women's kameez with cream-coloured salwar, a green-coloured saree with blouses, a light cream-coloured silken kurta pyjama and a designer black full-sleeves shirt, on the search of the flat of the accused persons in Goa on 11.02.2000. This witness further said that the flat was locked and when the bailiff of the court tried to open the lock after breaking the seal it did not open and the key got damaged in the process of opening of the lock and the lock was opened by using a wire. P.W.-38 mentioned that on 11.02.2000 the flat was found sealed and was opened in the presence of the bailiff and panch witnesses. The panchnama of recovery made on 11.02.2000 (Exhibit No. 34) mentioned that the bailiff of the court removed the seals and tried to open the locks with keys. According to this panchnama, one iron rod was used to open up the locks but instead of the locks, the latch of the door got broken. When the chain of latch was removed, it was found that the door was locked due to body lock. Since the door was locked, the grills of the window were removed and after removing the broken glasses, one person was lowered and finally entry was made in the flat. The courts below have rejected the evidence of recovery made on 11.02.2000 and they have found that the first list of the articles found in the flat as prepared on 17.12.1999 did not mention any box or gold-like materials/artificial jewellery or any other gold article or any clothes in the list of movable articles of the flat (Exhibit No. 112). How is it that the articles were found in the subsequent search from the same flat which was locked and sealed? The panchnama of the flat searched on 17.12.1999 though mentioned about three big suitcases full of clothes and artificial jewellery, no details, whatsoever, regarding those articles were made and without any reference as to the quality of golden colour ornaments, P.W.-38 considered them as artificial jewellery. On both occasions when the search was made in the flat, it was not sealed properly with the court seal and, instead thereof, one- rupee and five-rupee coins were used. The entry in the flat on both occasions, i.e. on 17.12.1999 and 11.02.2000, was made through the window which shows that this flat was easily accessible although the seat of the court was put on it, without interfering with the seal after removing the grill of the window. There was material contradiction in the panchnama of flat search made on 11.02.2000 and evidence of P.W.-8 and P.W.-38 with respect to the way in which the entry was made to the flat of the accused persons on 11.02.2000. When at the first instance no jewellery was found inside the flat, how it was recovered on the subsequent search? The search and recovery of articles by the police on 11.02.2000 does not inspire confidence as the flat was easily accessible, without disturbing the lock and planting of the articles by the police cannot totally be ruled out. We have

carefully gone through the evidence of the witnesses and the panchnamas and list of seized articles and have found that reasoning adopted by the courts below in discarding the evidence of seizure of articles from the flat of the accused persons cannot be said to be without any basis.

18. On the information received by the police, the accused persons were arrested at Agra and at the time of arrest on 30.01.2000, as per the prosecution, certain incriminating articles were seized from the accused couple at Agra. The police recovered the ladies purse and salwar suit from A-2-Anjali Thakran. These articles were put for Test Identification which was conducted in the presence of P.W.24-Vinayak S.N. Alornekar, Special Judicial Magistrate on 10.02.2000. During this T.I. Parade, P.W.5-Kishen Valecha, brother of deceased Priya Nanda, was unable to identify the salwar suit, but he had identified the ladies purse belonged to his sister and the reason given for identifying it was that she was carrying the same purse while leaving for Vaishnodevi after marriage. Another witness P.W.33-Subhash Nanda, identified both purse and salwar kameez as belonging to his daughter-in-law, Priya Nanda. In his cross-examination, P.W.-33 has mentioned that he identified the salwar kameez only from the colour and design and not from any other identification mark. He has admitted that same salwar suit and purse are available in the market. P.W.-5 has also admitted in his cross-examination that there was no distinctive mark on the purse. Identification of these articles have been disbelieved by the courts below and, in our opinion, rightly so. When the persons identified it, they did not have sufficient opportunity to see these articles used by the deceased for a long duration, and when the articles do not carry any distinctive marks, on the basis of which the articles can be distinguished from the similar articles which are easily accessible and available in the market, identification of the articles by the witnesses would be difficult to be believed. The recovery of these articles from the accused in the absence of their identification as belonging to the deceased, does not take the prosecution case any further.

19. The learned senior counsel for the appellant(s), Mr. Mahendra Anand has placed reliance on the recovery of two bangles which had the identification mark "RK 22 KL", weighing approximately 23.5. grams, from the shop of P.W.12-Ulhas Lotlikar at the instance of A-2. On 13.02.2000, during interrogation she disclosed that she would point out the goldsmith to whom the gold ornaments were sold. Accordingly, as per her directions, police party and panch witnesses approached the jewellery shop of P.W.-12 at Khareband, Margao. In presence of panchas, P.W.-12 produced the two bangles bearing identification mark "RK 22 KL" , weighing 23.5. grams, before the police party. As per this witness, the accused came to his shop and sold two bangles, a necklace and a gold finger ring. When he asked for the reason as to why she was selling these ornaments, A-2 told him that their restaurant was not running well and hence, they were in urgent need of money. He paid Rs. 12,400/-, Rs. 3,200/- and Rs. 1,200/- respectively, for two bangles, a necklace and a gold finger ring. He did not melt the bangles since they were in good condition. As per the

prosecution, these gold ornaments belonged to deceased Priya Nanda. During cross-examination, P.W.-12 volunteered to produce the book where he maintained the record of sale of these ornaments. However, inspite of ample opportunity given to him to produce the book, he did not do so. In his cross-examination, he admitted that a day before recovery, A-2 was shown to him in the office of Dy. Superintendent of Police, Mapusa. That apart, the police had not recovered the other ornaments alleged to have been sold by the accused to P.W.-12 as it is said that he had melted those ornaments. It is highly improbable that P.W.-12 would have retained the bangles, which have the distinctive mark over them and would have melted other ornaments with no distinctive marks on them. The whole purpose and authenticity of the recovery of these ornaments have been lost when the witness has admitted that a day ahead of the recovery the accused was shown to him in the police station.

20. Another piece of evidence, on which the prosecution strongly relied, is of identification of the accused persons in the Test Identification parade on 07.02.2000. P.W.24-VSN Alomekar, Special Judicial Magistrate, Tiswadi and Bardez Talukas, conducted Test Identification parade, wherein P.W.6-Amit Banerjee, P.W.30-Suhasini Govekar and P.W.7- Ganpat, were the identifying witnesses. P.W.-6 had identified both the accused persons as the persons who came with D-2-Priya Nanda to Hotel Seema on the night of 27.02.1999. The trial court as well as the High Court have found certain irregularities in the manner of conducting the identification parade. A-1 and A-2 were placed in the same identification parade with 6 dummies each, which was contrary to Paragraph 16(2)(h) of the Criminal Manual issued by the High Court of Bombay, which mentioned that:

If two suspects were not similar in appearance or where there were more than two suspects, separate parade should be held using different person on each parade.

We have gone through the original record of the memorandum of identification parade (Exhibit No. 70) and have found that P.W.-24 has mentioned as follows in this memorandum:

The dummy accused who are put in the parade I.e., 6 ladies and 6 gents are more or less of the same features and age groups as that of the accused couple to be put in the parade.

They are also more or less the same height and status in appearance as that of the accused.

As far as case of A-1 is concerned, who was around 38 years old at that time, 5 of the dummy persons belonged to age-group of 23-27 and another dummy was of 40 years old. Hence, there is a serious doubt regarding the fairness of the test identification.

21. We have now to consider the veracity and authenticity of the evidence led by the prosecution to show that the accused persons were seen with the deceased couple

in Goa moving around together and that they were the same persons who had been last seen together by the witnesses with the deceased couple, and if so, what shall be the resultant inference which can be drawn from the facts proved in the surrounding circumstances. P.W.-30 was examined to prove the acquaintance of the accused persons with the deceased couple prior to the date of incident. As per P.W.-30, on 26.02.1999 the accused couple and their children came to her shack which was located at Anjuna Beach. A-1 approached P.W.-30 and told her that she was looking pretty and that he would give her work and would take her on ship and would give her whatever she wanted. He had also made enquiries whether the ornaments which she was wearing were real or artificial and that what was her bank balance. On 27.02.1999, the accused couple and their children came to her shack between 1 and 2 p.m. and went to take bath on the beach. When they returned from the beach, they were accompanied by a newly married couple. P.W.-30 had a talk with D-2-Priya Nanda, who was wearing the Reddish-coloured bangles and, accordingly, she assumed that they were newly married couple. The newly married lady, who had come with the accused lady, changed her clothes and wore a blue-coloured skirt and blouse. After having lunch at her shack, the two couples and the children went away. About a month later, the police showed her two or three photographs and asked her to identify the persons in the photographs. She identified D-1-Vikas Nanda and D-2-Priya Nanda, as the newly married couple, who had come to her shack on 27.02.1999 along with the accused couple. She also identified articles, blue skirt and blouse, to be belongings of deceased Priya Nanda. The evidence of this witness of remembering the persons after a month when no particular incident was mentioned by her for remembering them, after a lapse of time, appears to be unnatural, particularly so, when she was running a shack at a beach where hundreds of persons were visiting. The evidence of this witness of the accused approaching her and making enquiries about the value of the ornaments and her bank balance in the first meeting, does not inspire confidence. Apart from this, the witness has failed to identify any of the accused persons in the identification parade conducted on 07.02.2000. That apart, in the cross-examination, this witness said that the children accompanying the accused were in the age group of 20-21 years whereas it has come in evidence that children of the accused couple were a boy and a girl, aged about 12 years and 6 years respectively.

22. The prosecution examined P.W.14-Calvert Gonsalves to prove that he had seen the deceased couple and accused couple at Iguana Miraj Restaurant. As per this witness, he used to meet the accused persons at Iguana Restaurant as also at Lalita Beach Resort. The accused's children were a boy and a girl. The boy was about 12 years of age and the girl was about 6 years of age. He was introduced by A-1 to one Vikas Nanda (D-1) on the evening of 27.02.1999, while D-1 was sitting beside A-1 outside Iguana Restaurant. He was also told by A-1 that D-1 was his friend from Delhi and had come to Goa for his honeymoon. It was also informed to him by A-1 that the wife of D-1 was inside Iguana Restaurant. The witness deposed that there

was one AC room in the Restaurant, containing bedroom, TV, etc. which was used by A-1. D-1 told him that his wife was in the AC room alongwith A-2. The name of the wife of D-1 was told to him as Priya. D-1 told him that his wife was in the company of A-2. D-1, A-1 and he talked for about one-and-a-half hours. After that, A-1 told him that he and D-1 were going to disco and he left for his home. The time was at about 9.30 p.m. From the statement of this witness, it is apparent that at the night of 27.02.1999, he himself had not seen A-2 and D-2 sitting in the room at Iguana Restaurant. This witness further proved the fact that till 9.30 p.m. on 27.02.1999, A-1 was seen in the company of D-1 when he left them at Iguana Restaurant.

23. P.W.11-Dinesh Adhikari, who was working as a domestic help in the bar and restaurant of Iguana Miraj and Lalita Beach Resort, deposed that the accused were running a hotel at Sernabhati Clove known as Iguana Miraj which was a bar and restaurant and they were also running a hotel besides the said restaurant and the name of that hotel was Lalita Beach Resort. He knew the accused persons right from the days he used to work for them in Haryana (Gurgaon) and thereafter he joined them in Goa. Some time in June 1999, the police had shown the photograph of a lady and a gent and asked him whether he could identify anyone of them. He told the police that he could identify the persons in the photograph. He identified the persons from the photographs and said that he had seen those persons 2 to 3 days prior to Holi of the year 1999 in the hotel of the accused. They came to the hotel at about 6.00 to 7.00 p.m. He saw that A-1, the gentleman in the photograph, and one person named Calvert were sitting outside the hotel while A-2 and the lady in the photograph were sitting inside the hotel. He was asked to bring a bag from a white colour Maruti car when they had come to the hotel in the evening. After some time, A-1 and the man from the photograph started walking in the direction of the beach and after about 30 to 45 minutes he saw A-1 alone while A-2 was sitting with the lady in the photograph. He further deposed that although he did not enter the room but he saw A-2 and D-2 sitting in the bedroom through the glass fixed to the bedroom door. In his cross- examination, this witness deposed that the beach is at a distance of about 200 to 300 metres from Iguana Miraj Hotel. A-1 and D-1 went to the beach at around 9.30 to 10.00 p.m. and thereafter he went to his living quarter. When he came back, he saw only A-1 in the hotel. He was not sure at what time the accused couple left with the lady in the photograph from Iguana Miraj Hotel. From the statement of this witness, it is apparent that A-2 and D-2 were sitting in the hotel room and it was only A-1 and D-1 who left towards the beach and after 30 to 45 minutes only A-1 returned and thereafter A-1 and A-2 along with D-2 left the hotel.

24. P.W.6-Amit Banerjee, who was working as the Receptionist of Hotel Seema where the deceased couple stayed when they came to Goa, deposed that on 26.02.1999, D-1 and his wife D-2 had come to the hotel. They were provided a room which was reserved for the Union Bank of India as its holiday home. Mr. A.C. Duggal, General Manager of the Union Bank of India had informed him on phone that these guests were coming to the hotel and he should take care of them. On 27.02.1999 at

about 2330 hours, D-2 came alone and asked for the room key and told him that she was checking out of the hotel. D-1-Vikas Nanda, the husband of D-2-Priya Nanda, was not along with her. He asked her why she was checking out at that odd time. At that, she informed that she had met some friends from Delhi and that she was going to join them. D-2 went to her room and he went to the reception area where the security guard was on duty. He asked the security guard as to how she had come to the hotel. The guard informed him that the guest had come in a car along with a man who had followed her to the room. He had noticed a white colour 800CC Maruti car parked outside the gate of the hotel and one lady with short hair was sitting on the rear seat. He noticed her for a minute or two. D-2 returned to the reception from her room within 15 minutes and A-1 was carrying the luggage. She settled the bill and thereafter left the hotel. In his cross-examination, this witness mentioned that when at reception counter D-2 was making the payment, he saw A-1 who passed along with the luggage putting his head down. In the Test Identification Parade on 07.02.2000, this witness identified A-1 as the person who came along with D-2 on 27.02.1999 when she checked out of the hotel and identified A-2 as the same lady who was sitting in the Maruti car on 27.02.1999. He stated that he did not find anything abnormal about the departure of D-2 and behavior of D-2 at that time was normal. From the statement of this witness, it appears that he had merely a fleeting glance of A-2 sitting in the parked car and thus he had described her as the lady with a short hair. Although in the test identification parade conducted after more than 11 months he identified both the accused, but when the police recorded his statement on 07.03.1999 in Hotel Seema he had not given the description of the accused persons to the police to be the persons who came to his hotel along with D-2. The witness admitted that in the hotel register the check-out timing column was blank. Therefore, the record produced does not indicate the timing of departure of D-2 from Hotel Seema. The prosecution has also not examined the guard of the hotel to identify A-2 to be the person who was sitting in the car.

25. Before we analyse the evidence of P.W.11-Dinesh Adhikari, who was working as a domestic help in the bar and restaurant Iguana Miraj, P.W.14-Calvert Gonsalves, who was said to be in the company of A-1 and D-1 on the evening of 27.02.1999 outside the lounge of the restaurant and P.W.6-Amit Banerjee, who was working as Receptionist of Hotel Seema, we would refer to certain decisions of this Court on the point of last seen together". It is a settled rule of criminal jurisprudence that suspicion, however grave, cannot be substituted for a proof and the courts shall take utmost precaution in finding an accused guilty only on the basis of circumstantial evidence. This Court has applied the above-mentioned general principle with reference to the principle of last seen together in 295898 as under:

31. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in

some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases....

[See also : 276152 (para 22) and 260231 .

In *Ramreddy Rajeshkhanna Reddy* (supra), this Court further opined that even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.

26. In *Jaswant Gir v. State of Punjab* (2005) 12 SCC 438, it was observed that:

5. ...In the absence of any other links in the chain of circumstantial evidence, it is not possible to convict the appellant solely on the basis of the "last-seen" evidence, even if the version of PW 14 in this regard is believed....

From the principle laid down by this Court, the circumstance of last-seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is after a considerable long duration. There can be no fixed or straight jacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of

the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case.

27. We will first consider the applicability of the last seen together doctrine with respect to the murder of D-1-Vikas Nanda. According to P.W.14-Calvert Gonsalves, A-1 and D-1 were present outside the Hotel Iguana Miraj at around 9.30 p.m. and as told to him by D-1, A-2 and D-2 were sitting inside one of the rooms of the hotel. P.W.11-Dinesh Adhikari has also stated that after serving drinks to A-1, P.W.-14 and D-1, he went away. He returned to the hotel at around 9.00-9.30 p.m. and found that only A-1 and D-1 were sitting outside the hotel and P.W.-14 had gone away. He has also mentioned that A-2 and D-2 were sitting inside a room of the hotel. According to P.W.-11, A-1 and D-1 started walking towards the beach after some time when he saw them sitting together at around 9.00-9.30 p.m. After about 30 to 45 minutes, he saw A-1 alone in the hotel. According to the prosecution version, A-1 murdered D-1 by drowning him in the shallow beach water. However, it is highly improbable that A-1, who at the relevant time was in his late 30s, was able to overpower D-1 who was not only well-built but also about 10 years younger and taller than him. We have also noticed that when the dead body of D-1 was recovered, it had no clothes except an undergarment. It is highly unlikely that a single person not only forcefully drowned the deceased D-1 in the shallow beach water but also forced him to take out all the clothes and ornaments which he was wearing at that time. The postmortem report also does not mention any serious injury on any of the vital parts of D-1 to support the prosecution version. It is clear from the deposition of P.W.-11 that A-1 went along with D-1. P.W.-14 has also stated that A-2 and D-2 were sitting inside a room of the hotel. From this evidence; it is clear that A-2 had no role whatsoever to play with reference to the murder of D-1-Vikas Nanda, especially when the prosecution has not been able to produce any material or evidence to establish the fact that they either pre-planned a plot or conspired with each other to murder the deceased couple to carve away their valuable materials. We have also not found any other link in the chain of circumstances to conclusively establish that A-1 murdered D-1 or A-2 played any role in assisting him to murder D-1. Even if we believe the evidence of P.W.-11 that he saw D-1 in the company of A-1 walking towards the beach and thereafter saw A-1 returning alone after 30 to 45 minutes, there has been a time gap of about 2 1/4 hours when A-1 and D-1 were last seen together and when the dead body of D-1 was found at around 00.30 a.m. at the Benaullim Beach. No evidence was led by the prosecution to prove the fact that there was no possibility of any other person approaching D-1 on the beach which is a public place, during the intervening period when A-1 was last seen with the deceased and when the crime was detected.

28. We shall now weigh the last seen doctrine with respect to D-2-Priya Nanda. According to P.W.-11, after about 30 to 45 minutes when he saw A-1 and D-1 walking towards the beach, he had seen" A-1 alone while A-2 was sitting with D-2 in the

hotel. After some time, he saw the accused persons and D-2 walking away from Iguana Miraj Hotel. We can safely assume that P.W.-11 saw both the accused persons along with D-2 latest by around 10.30 -11.00 p.m. P.W.-6 Amit Banerjee had only a momentary glance of the lady sitting in the Maruti car who, according to the prosecution, came to Hotel Seema on 27.02.1999 with D-2 with a male person allegedly A-1. P.W.-6 has mentioned that the guard of the hotel had an opportunity to see the persons who came along with D-2. However, the prosecution chose not to examine the guard to identify either A-1 or A-2. It is difficult to believe P.W.-6 that he had seen A-2 sitting in the car when he had got an opportunity to look at her for merely one to two minutes. In his statement, he has described her as a lady with short hair. He has not given any description indicating that he had seen somebody sitting in the car whose face was visible from one side. Even when he was examined by the police, he had not described the features of A-2. In the absence of any other supporting material on record, it will not be possible to believe the statement of P.W.-6 that he had seen A-2 sitting in the car on the night of 27.02.1999 to establish the fact that when D-2 left the hotel she accompanied A-2. Similarly, with respect to A-1, P.W.-6 who had an opportunity to see A-1 for the first time for a very short duration to recognize him to be a person who accompanied D-2 to Hotel Seema on the night of 27.2.1999, he had only a fleeting glance of male person who came with D-2 as he was busy in settling the account with her. That apart, the dead body of D-2 was found at around 7.30 a.m. on 28.02.1999 at Vagator Beach, around 60 kms. from the beach where the dead body of D-1 was recovered and quite a long distance from Hotel Seema. Hence, there has been a considerable time gap of approximately 8 1/2 hours when D-2 was last seen alive with the accused couple. There being a considerable time gap between the persons seen together and the proximate time of crime, the circumstance of last seen together, even if proved, cannot clinchingly fasten the guilt on the accused.

29. It is urged by Mr. Mahendra Anand, the learned senior counsel for the appellant(s), that the accused have not explained as to in what circumstances the victims suffered the death in their statements u/s 313 Cr.P.C. and thus would be held to be liable for homicide. The learned senior counsel for the appellant(s) placed reliance on the following observations of this Court made in 293818 :

9. The learned Counsel for the appellant has placed reliance on the decision of this Court by a Bench of which one of us (Justice Brijesh Kumar) was a member in 267788 for the proposition that the circumstance of last seen does not by itself necessarily lead to the inference that it was the accused who committed the crime. It depends upon the facts of each case. In the decision relied upon it has been observed that there may be cases where, on account of close proximity of place and time the factum of death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide. The present is a case to which the observation as aforesaid and the principle laid

squarely applies and the circumstances of the case cast a heavy responsibility on the appellant to explain and in absence thereof suffer the conviction. Those circumstances have already been noticed, in which case such an irresistible conclusion can be reached will depend on the facts of each case. Here it has been established that the death took place on 28th March between 3 and 4 p.m. It is just about that much time that the appellant and the deceased were last seen by PW 1 and PW 1.1. No explanation has been offered in the statement by the appellant recorded u/s 313 Cr.PC. His defence is of complete denial. In our view, the conviction for offence under Sections 302 and 376 has been rightly recorded by the Court of Session and affirmed by the High Court.

30. We have noticed the decision. However, the circumstances in the present case are not similar to the case where the event of the last seen together has very close proximity with the time and place of the commission of the crime and other circumstances also favour the hypothesis of guilt and consequently the fact that no explanation or false explanation offered by the accused was taken as a link in the chain of circumstances. [See also : Birbal vs. State of M.P., (2000) 10 SCC 212; 274034 ; and 293831]. Thus, in the circumstances of the case, the accused persons not giving any explanation in their examination u/s 313, Cr.P.C. could not be taken to be a circumstance pointing towards irresistible conclusion that they are involved in the commission of the crime.

31. In the light of the factors that evidence regarding the recovery of the incriminating materials from the accused persons has been discarded; that there has been sufficient time gap between the instances when the accused persons were last seen together with the deceased persons; and in the absence of any other corroborative piece of evidence to complete the chain of circumstances to fasten the guilt on the accused couple, we are of the opinion that the accused have been rightly given the benefit of doubt by the courts below. We have found that the finding of the High Court that the chain of circumstances is not complete to conclusively establish that either A-1 or A-2 alone or with the common intention of each other have committed the dreadful crime of murder of newly married couple, is correct and merely suspicion, however grave, cannot replace the weight attached to the evidence. Accordingly, we order for dismissal of the appeals.