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STATE OF HIMACHAL PRADESH

v.

UTTAM KUMAR AND ORS.

APRIL 27, 2007

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[S.B. SINHA AND MARKANDEY KATJU, JJ.]

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*Penal Code, 1860—Sections 120-B, 302, 382, 404 and 201—Murder—Conviction under—Acquittal by High Court—Sustainability of—Held: Order of High Court not sustainable since the prosecution case based on circumstantial evidence, on last seen evidence and recoveries at the instance of accused—High Court disregarded the evidence—Order was based on conjectures and surmises—Thus, order of High Court set aside and matter remitted back to High Court.*

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According to the prosecution case, accused U approached VD to hire his taxi. However, VD expressed his inability and asked RK-his brother to carry the accused since RK was going towards that place for getting the servicing of his car. U informed that two more persons would also come along with him. On the way RK along with U picked up more persons and RK stopped near his house and informed his mother that he would be late.

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However, RK did not return home on the next day and his father asked VD to search for RK. VD enquired at the Police Station and was informed that the police had taken possession of a car found lying abandoned. VD recognized the car as owned by his brother and the number plate was found missing. Father of RK and VD lodged a missing report about RK. After few days on

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the basis of the information by resident of the village, U was identified by VD and one more person as the one who had accompanied RK in his car on the date of hiring taxi. U made a disclosure statement that he and accused SK and PS had hidden the body of RK and a badly defaced dead body was recovered. Thereafter, accused SK and PS and also RJ were also arrested and on basis of the disclosure statement recovery was made. Trial court found the accused

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guilty of commission of offence under sections 302, 201, 212, 404 and 120-B and convicted them. However, High Court set aside the conviction. Hence the present appeal.

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Allowing the appeal and remitting the matter to High Court, the Court

**HELD: 1.1. The judgment of the High Court cannot be sustained. No doubt, there is no direct evidence in the case and the prosecution case is based on circumstantial evidence. However, a perusal of the judgment of the High Court shows that High Court has not properly considered the evidence on record and based its findings an *ipse dixit*. The statements of the witnesses clearly identify U who travelled with the deceased. It seems that the High Court has disregarded the said evidence on flimsy grounds. It appears to be clearly established that U was the person who travelled with the deceased in his car on the date the taxi was hired. [Paras 13 and 15] [864-D, G, H; 865-A]**

**1.2. The prosecution case is of the last seen evidence and is also based on recoveries at the instance of the accused. [Para 16] [865-A-B]**

**1.3. V has clearly stated that it was U who travelled with the deceased in the latter's car on the date the taxi was hired. It has also come in the evidence of other witnesses that the deceased was also seen subsequently in the company of the other accused also. It is also the prosecution case that U while in police custody made disclosure statements leading to the recovery of the dead body of R under a culvert, and other disclosures were also said to have been made by the other accused. [Paras 17 and 18] [865-B-D]**

**1.4 The impugned judgment does not show a proper consideration of the evidence and seems to be based on conjectures and surmises, and hence it is not sustainable. In these circumstances, the impugned judgment of the High Court is set aside and the matter is remanded back to the High Court for a fresh consideration of the evidence and a fresh decision in accordance with law. [Para 19] [865-E-F]**

**CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 875-878 of 2000.**

**From the Final Judgment and Order dated 11.05.2000 of the High Court of Judicature of Himachal Pradesh at Shimla in CrI. A. Nos. 199, 25, 50 and 127 of 1998.**

**J.S. Attri and Vivek Singh for the Appellant.**

**Varinder Kumar Sharma, Indu Malhotra, Madhukar Pandey, Kunal Tandon, Shilpa Kaushik and Shashi M. Kapila for the Respondents.**

**The Judgment of the Court was delivered by**

**A** **MARKANDEY KATJU, J. 1.** These appeals have been filed by the State of Himachal Pradesh against the judgment of the Himachal High Court dated 11.5.2000 in Criminal Appeal Nos.199 of 1998, 25 of 1998, 50 of 1998 and 127 of 1998 by which the conviction of the accused by the trial court was set aside.

**B** 2. Heard learned counsel of the parties and perused the record.

**C** 3. The prosecution case is that Ramesh Kumar (deceased) resident of village Hat, Tehsil Theog, district Shimla, H.P, was owner of Car No.HP-09-1617. His brother Vasu Dev (PW-2) also owned a taxi (Maruti Van) No.HP-09-1214. Both of them were present at Chhaila on 1.4.1997. At about 4 p.m. accused Uttam Kumar approached Vasu Dev to hire his taxi for going to Kalka saying that his brother had met with an accident near Surajpur and was in a serious condition. Vasu Dev, however, expressed his inability to take his taxi to Kalka because his taxi was out of order. Accused Uttam Kumar implored him that keeping in view the situation in which the accused was, some arrangement might be made for taking him to Kalka. Since Ramesh Kumar was going to Solan for servicing of his car, Vasu Dev asked him to carry the accused upto Kalka. Uttam Kumar informed them that he wanted to carry two more persons in the vehicle from Mori Kyar road and two more from Fagu. Thereupon, Ramesh Kumar, deceased, along with accused Uttam Kumar took his car to Mori Kyar and from there, they started towards Kalka. On the way, **D** Ramesh Kumar stopped near his house in village Hat and informed his mother that he would be back late in the night or the next morning. Ramesh Kumar, however, did not return home even on the next day, and hence his father Sitaram asked PW-2 Vasu Dev to search for Ramesh Kumar. PW-2 telephonically contacted his relatives at Shimla and other places to find out the whereabouts of Ramesh Kumar and also went towards Kalka in his taxi. On his way to **E** Kalka, Vasu Dev on 5.4.1997, made enquiries at Police Station, Dharampur where he was informed that Spatu Police had taken in its possession a car under Section 102 Cr.P.C. as the same was found lying abandoned. Vasu Dev then went to Spatu and recognized the car owned by his brother Ramesh Kumar with the help of a sticker as its number place was found missing. In **F** the meanwhile, on the same day, Sita Ram (PW-1), father of Ramesh Kumar and Vasu Dev, lodged a report about the missing of Ramesh Kumar since 1.4.1997 at Police Station, Theog. In the evening on the same day, when Vasu Dev returned home, he informed his father about taking in possession of the abandoned car of Ramesh Kumar by Spatu Police. This made Sita Ram **G** apprehensive of the safety of his son Ramesh Kumar. On 6.4.1997, when a **H**

head constable had gone to the village of the deceased to make enquiries about the report lodged by his father, PW-1 Sita Ram informed him that car of the deceased had been found at Spatu. Thereupon, the said head constable, namely, Ram Singh (PW-15) recorded the statement of Sita Ram under Section 154 Cr.P.C. Ex.PB and as a consequence, FIR No.50 of 1997 under Sections 364/34 IPC was registered at Police Station, Theog. For almost a week, neither the police nor the relatives of Ramesh could secure any information about the whereabouts of Ramesh Kumar. On 12.4.1997, PW-2 Vasu Dev went to the temple of the local Diety in village Guthan to get the blessings of the Diety in helping tracing out his brother. When he came out of the temple, a resident of the village informed him that a young man and a young woman had been staying in the house of Mast Ram in village Guthan for 20 to 25 days prior to 1.4.1997. Thereafter, Vasu Dev contacted Mast Ram who confirmed the said information given by the villager and it was also found that son of Mast Ram, namely, accused Suresh Kumar had also left the village with the said young man and woman on 1.4.1997 but had not returned to the village. The villagers and Mast Ram further informed Vasu Dev that the said young man and woman had come to the village in Taxi No.HPY-1992 which remained parked outside the house of Mast Ram even after they had left, but for the last two or three days, the taxi was not there. On the request of Vasu Dev, Mast Ram agreed to send his own son Mohinder Singh to Vasu Dev the next day so that both of them could search for Ramesh Kumar and Suresh Kumar.

4. On the next day i.e. 13.4.1997, Mohinder Singh came to Chhaila and met Vasu Dev who was at that time accompanied by Inder Singh. He informed Vasu Dev that the young man and young girl who had been staying in his house in village Guthan had given their address to him and that they were residents of Jutogh cantonment. Thereafter, Vasu Dev, Inder Singh and Mohinder Singh came to Jutogh where Mohinder Singh went to the house whose address was available with him while Vasu Dev and Inder Singh remained at some distance. On the call of Mohinder Singh, accused Uttam Kumar came out of the house and was identified by Vasu Dev and Inder Singh as the person who had left Chhaila on 1.4.1997 in the car of Ramesh Kumar. Thereafter, Mohinder Singh, Inder Singh Vasu Dev went to the Police Station. Theog and narrated the aforesaid facts to the Officer-In-Charge of the said Police Station. On receipt of this information, the Officer-In-Charge, Police Station, Theog along with a few other police officials, Vasu Dev, Inder Singh, Mohinder Singh and a few other persons of the locality came to Jutogh where the house of accused Uttam Kumar was surrounded. At about 6 a.m. accused Uttam Kumar came out of his house and was identified by Vasu Dev and Inder

A Singh as the person who had accompanied the deceased in his car on 1.4.1997 from Chhaila. Thereupon, accused Uttam Kumar was taken into custody by the police and was taken to Police Station, Theog. During the course of interrogation, accused Uttam Kumar allegedly made a disclosure statement that he and accused Suresh Kumar and Praveen Sabarwal had hidden the dead body of Ramesh Kumar under a culvert near Ghana Hatti and he could get the same recovered. Pursuant to the said statement, accused Uttam Kumar got recovered a badly defaced dead body in the presence of Inder Singh and Shiv Dutt who identified the dead body so recovered to be that of deceased Ramesh Kumar. A rope was tied around its neck. The doctor who conducted the post mortem of the dead body noticed two ligature marks on the neck and opined that the cause of death of the deceased was asphyxia resulting from ante mortem strangulation by ligature. Some other external and internal injuries i.e. fracture, contusions and abrasions were also notice on the dead body. On the evening of 14.4.1997 accused Suresh Kumar and Parveen Sabarwal were also arrested by the police. On 16.4.1997 while in police custody, accused Suresh Kumar allegedly made a disclosure statement in the presence of PWs Om Prakash and Sita Ram that he could point out the spots by visiting the same where he along with Uttam Kumar and Parveen Sabarwal had murdered the driver of Maruti Car No.HP-09-1617, removed the number plate of the car, took off the wearing apparels etc. from the body of Ramesh Kumar and where the dead body was thrown and concealed. He further disclosed that he had hidden the stone and sythe used for preparation of 'kiltas' wherewith the face of the deceased was defaced by him and could get the same recovered. He further disclosed that he and accused Uttam Kumar knew the spots where the wearing apparels of the deceased, number plates of his vehicle and documents etc. had been burnt. Pursuant to this statement, a stone and a drati were recovered and taken in possession by the police at the instance of accused Suresh Kumar. Accused Suresh Kumar and Uttam Kumar also led the police party to a spot in a forest near Hira Nagar and pointed out a place where some ash, partly burnt pieces of wood and plastic articles were lying. Those were also taken in possession by the police.

G 5. On the same day i.e. 16.4.1997 it is alleged that accused Parveen Sabarwal also made a disclosure statement stating that she had kept hidden the wrist watch of the deceased in the house of the brother of her husband in Jutogh along with the clothes of the accused persons which they were wearing at the time of the commission of the offence and which she could get recovered. Pursuant to the said statement, accused Parveen Sabarwal got recovered the wrist watch of the deceased and also some clothes from the

residential house of accused Rajesh Kumar at Jutogh Cantt which were also taken in possession by the police. A

6. On 18.4.1997, Rajesh Kumar aforesaid who is brother of accused Uttam Kumar was also arrested by the police along with his Maruti Van No.HP-02-1111. A few tools were recovered from his said van which were identified as belonging to the deceased. On the same day, accused Rajesh Kumar made a disclosure statement that he had kept hidden four rims with tyres and some tools under a culvert near village Dhanda and some parts of a Maruti Car had been kept by him under a culvert near Kachi Ghati which he could get recovered. Pursuant to the said statement, accused Rajesh Kumar got four rims and tyres and some parts of Maruti Car recovered which rims and parts were identified by Vasu Dev as those of the car of his deceased brother Ramesh Kumar. On 20.4.1997, accused Uttam Kumar allegedly made yet another disclosure statement to the effect that he had kept hidden the number plate of Car No.HP-09-1617 in the house of his brother Rajesh Kumar. Pursuant to such statement, he led the police party to the house of his brother Rajesh Kumar and got the number plate recovered which was taken in possession by the police. B C D

7. On conclusion of the investigation, the Officer-In-Charge of the concerned police station submitted a charge-sheet against the accused persons under Sections 302, 201, 212, 404, 414 and 120-B IPC. E

8. The learned Sessions Judge framed a charge under Sections 120-B read with Sections 302 and 382 IPC, 302 IPC, 382 IPC, 404 IPC and Section 201 IPC read with Sections 302, 382, 404 and 120-B IPC against accused Uttam Kumar, Suresh Kumar and Parveen Sabarwal and a charge under Sections 120-B read with Sections 382 and 302 IPC, 404 IPC and Section 201 IPC read with Sections 302 and 382 IPC and 120-B IPC was framed against accused Rajesh Kumar. Accused pleaded not guilty to the said charges. F

9. To prove the charges against the accused, the prosecution examined as many as 19 witnesses. G

10. Statements of the accused under Section 313 Cr.P.C. were recorded wherein accused persons denied the prosecution case. Accused Rajesh Kumar further claimed that, at the relevant time, many dead bodies were found in Ghana Hatti area and the police could not apprehend the real culprits and falsely implicated the accused persons. Accused Uttam Kumar and Parveen Sabarwal further claimed that they were pressurized/tortured to make the H

A disclosure statements. Accused Suresh Kumar claimed that he had gone to the house of his maternal uncle in village Himri where he was informed that his brother was arrested. Then he went to Police Station, Theog to find out as to why his brother was arrested and when he reached there, the police arrested him too. The accused, however, did not lead any evidence in their defence.

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11. The learned Sessions Judge found the accused guilty of the commission of the offences for which they were convicted and sentenced as aforesaid.

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12. Against the judgment of the trial court four appeals were filed in the High Court which have been allowed by the impugned judgment dated 11.5.2000 and all the accused were acquitted. These appeals have been filed against the said judgment of the High Court.

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13. We have carefully gone through the judgment of the High Court and we are of the opinion that it cannot be sustained. No doubt, there is no direct evidence in the case and the prosecution case is based on circumstantial evidence. However, a perusal of the judgment of the High Court shows that High Court has not properly considered the evidence on record and based its findings an ipse dixit.

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14. For example, in para 49 of the impugned judgment it is mentioned that the identity of the accused Uttam Kumar as one of the persons who allegedly travelled with the deceased, is not established. However, in this connection, it seems to us that the identity of Uttam Kumar appears to be established by witness Vasu Dev-PW-2, who has stated in his statement that it was Uttam Kumar who had approached him to hire a taxi to go to Kalka.

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We see no good reason to disbelieve the evidence of Vasu Dev in this connection because there does not appear to be any enmity between Vasu Dev and Uttam Kumar. Similarly, PW-7 Inder Singh Chauhan has also identified Uttam Kumar as the person who went with the deceased Ramesh Kumar in the latter's car. PW-9 Inder Singh son of Mathu Ram has also deposed to the same effect and has identified Uttam Kumar as the person who went with

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Ramesh Kumar in the latter's car.

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15. All the above statements of the witnesses clearly identify who have identified Uttam Kumar who travelled with the deceased Ramesh Kumar. It seems to us that the High Court has disregarded the said evidence on flimsy grounds. In our opinion it appears is clearly established that Uttam Kumar

was the person who travelled with the deceased Ramesh Kumar in his car on 1.4.1997. A

16. The prosecution case is of last seen evidence and is also based on recoveries at the instance of the accused.

17. Vasu Dev has clearly stated that it was Uttam Kumar who travelled with the deceased Ramesh Kumar in the latter's car on 1.4.1997. It has also come in the evidence of other witnesses that the deceased was also seen subsequently in the company of the other accused also. For instance, PW-3 Nek Ram has stated in his evidence on 1.4.1997 that the deceased Ramesh Kumar was driving his car at Theog in the evening and at that time accused Uttam Kumar, Suresh Kumar and Parveen Sabarwal were in his car. Ramesh Kumar had a talk with the said Nek Ram for about five to seven minutes. B C

18. It is also the prosecution case that Uttam Kumar while in police custody made disclosure statements leading to the recovery of the dead body of Ramesh Kumar under a culvert, and other disclosures were also said to have been made by the other accused. D

19. We are not commenting in detail about the veracity or otherwise of the witnesses since we are remanding the case back to the High Court for reconsideration. Suffice it to say that the impugned judgment does not show a proper consideration of the evidence and seems to be based on conjectures and surmises, and hence it is not sustainable. In these circumstances we set aside the impugned judgment of the High Court and remand the case to the High Court for a fresh consideration of the evidence and a fresh decision in accordance with law. We make it clear that we have not expressed any final opinion on any factual issue, and it will be open to the High Court to give its fresh judgment uninfluenced by any observations made herein. E F

20. Since the incident is around 10 years old, the High Court may consider the feasibility of hearing the case expeditiously. The appeals are allowed. Impugned judgment is set aside. The matter is remanded to the High Court for a fresh decision. G

N.J.

Appeals allowed.