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DHARAM DEO YADAV

v.

STATE OF U.P.

(Criminal Appeal No. 369 of 2006)

APRIL 11, 2014

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[K.S. RADHAKRISHNAN AND A.K. SIKRI, JJ.]

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Penal Code, 1860 – ss.302, 201, 364 and 394 – Prosecution under – Circumstantial evidence – Deceased last seen in the company of accused – Recovery of skeleton of the deceased u/s. 27 of Evidence Act – DNA test proved her identity – Conviction and death sentence by courts below – Held: Prosecution proved the guilt of the accused beyond reasonable doubt – However, death sentence reduced to life imprisonment without any remission as there is no evidence as to manner of commission of offence.

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Code of Criminal Procedure, 1973 – s.313 – Evidentiary value – False answers by accused may offer an additional link in the chain of circumstances to complete the chain in the case of circumstantial evidence.

Evidence – Circumstantial evidence – Last seen theory – Applicability of – Discussed.

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Partly allowing the appeal, the Court

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HELD:1.1. The trial Court as well as the High Court have correctly appreciated the oral and documentary evidence and correctly recorded the conviction. Even when there is no eye-witness to support the criminal charge, but prosecution has been able to establish the chain of circumstances which is complete leading to inference of guilt of accused and circumstances taken collectively are incapable of explanation on any

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reasonable hypothesis save of guilt sought to be proved, accused may be convicted on the basis of such circumstantial evidence. [Paras 35 and 14] [675-F-G; 661-C-D]

1.2 A conviction cannot be based on the only circumstance of last seen together. The conduct of the accused and the fact of last seen together plus other circumstances have to be looked into. Normally, last seen theory comes into play when the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that possibility of any person other than the accused being the perpetrator of the crime becomes impossible. In the present case, though PWs 1, 2, 3, 5, 9 and 10 have all deposed that the accused was last seen with the deceased, but to record a conviction, that itself would not be sufficient and the prosecution has to complete the chain of circumstances to bring home the guilt of the accused. [Para 18] [662-G-H; 663-A, D]

1.3 The expression "custody" which appears in Section 27 of Evidence Act did not mean formal custody, which includes any kind of surveillance, restriction or restraint by the police. Even if the accused was not formally arrested at the time when the accused gave the information, the accused was, for all practical purposes, in the custody of the police. Assuming that the recovery of skeleton was not in terms of Section 27 on the premise that the accused was not in the custody of the police by the time he made the statement, the statement so made by him would be admissible as "conduct" under Section 8 of the Evidence Act. In the instant case, there is absolutely no explanation by the accused as to how the skeleton of the deceased was concealed in his house, especially when the statement made by him to PW14 is admissible in evidence. No procedural error is seen committed in

A recovering the skeleton, packing it and forwarding the same.[Paras 20 and 27] [665-D-F; 664-G, H]

State of Andhra Pradesh vs. Gangula Satya Murthy (1997) 1 SCC 272: 1996 (8) Suppl. SCR 808; *A.N. Venkatesh vs. State of Karnataka* (2005) 7 SCC 714; *Sandeep vs. State of Uttar Pradesh* (2012) 6 SCC 107:2012 (5) SCR 952 – relied on.

C 1.4 In the present case, the DNA sample got from the skeleton matched with the blood sample of the father of the deceased and all the sampling and testing have been done by experts whose scientific knowledge and experience have not been doubted in these proceedings. Prosecution has, therefore, succeeded in showing that the skeleton recovered from the house of the accused was that of the deceased and it was none other than the accused, who had strangulated her to death and buried the dead body in his house. [Para 34] [675-D, E]

E *Daubert vs. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993) – referred to.

F 1.5 The accused, in his examination under Section 313 Cr.P.C., had denied the prosecution case completely, but the prosecution has succeeded in proving the guilt beyond reasonable doubt. Often, false answers given by the accused in the 313 Cr.P.C. statement may offer an additional link in the chain of circumstances to complete the chain. [Para 35] [675-E-F]

G *Anthony D'souza vs. State of Karnataka* (2003) 1 SCC 259: 2002 (3) Suppl. SCR 572 – relied on.

H 2. Both the Crime Test and Criminal Test have been satisfied as against the accused. The appellant had no previous criminal records and that apart from the circumstantial evidence, there is no eye-witness and hence, the manner in which the crime was committed is

not in evidence. Consequently, the Court cannot come to the conclusion that the crime was committed in a barbaric manner and, hence the case would not fall under the category of rarest of rare. Consequently, the death sentence is commuted to life and 20 years of rigorous imprisonment is awarded, over and above the period already undergone by the accused, without any remission. [Para 36] [676-A-D]

Shankar Kisanrao Khade vs. State of Maharashtra (2013) 5 SCC 546:2013 (6) SCR 949 – relied on.

Padala Veera Reddy vs. State of Andhra Pradesh and others 1989 Supp (2) SCC 706; *Mustkeem alias Sirajudeen vs. State of Rajasthan* (2011) 11 SCC 724: 2011 (9) SCR 101; *Lakhanpal vs. State of Madhya Pradesh* 1980 Supp (1) SCC 716; *Eradu vs. State of Hyderabad* AIR 1956 SC 316; *Sahadevan vs. State of Tamil Nadu* (2012) 6 SCC 403: 2012 (4) SCR 366; *State of U.P. vs. Satish* (2005) 3 SCC 114: 2005 (2) SCR 1132 ; *State of U.P. vs. Deoman Upadhyaya* (1961) 1 SCR 14; *State of Rajasthan vs. Daulat Ram* (2005) 7 SCC 36: 2005 (2) Suppl. SCR 880; *Sandeep vs. State of Uttar Pradesh* (2012) 6 SCC 107:2012 (5) SCR 952; *Hanumant, son of Govind Nargundkar vs. State of Madhya Pradesh* AIR 1952 SC 343: 1952 SCR 1091; *Sahadevan Alias Sagadeven vs. State represented by Inspector of Police, Chennai* (2003) 1 SCC 534 – referred to.

Case Law Reference:

1989 Supp (2) SCC 706	referred to	Para 8
2011 (9) SCR 101	referred to	Para 8
1980 Supp (1) SCC 716	referred to	Para 8
AIR 1956 SC 316	referred to	Para 8
2012 (4) SCR 366	referred to	Para 8
SCR 2005 (2) SCR 1132	referred to	Para 8

A	(1961) 1 SCR 14	referred to	Para 9
	2005 (2) Suppl. SCR 880	referred to	Para 9
	2012 (5) SCR 952	referred to	Para 12
	1952 SCR 1091	referred to	Para 14
B	(2003) 1 SCC 534	referred to	Para 18
	1996 (8) Suppl. SCR 808	relied on	Para 20
	(2005) 7 SCC 714	relied on	Para 20
C	1999 (5) Suppl. SCR 215	relied on	Para 20
	2002 (3) Suppl. SCR 572	relied on	Para 35
	2013 (6) SCR 949	relied on	Para 36
	509 U.S. 579 (1993)	referred to	Para 29

D CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
369 of 2006.

From the Judgment and Order dated 30.09.2005 of the High Court of Judicature at Allahabad in Criminal Appeal No. E 1000 of 2003.

Sunil Kr. Singh, Mukti Singh, Dr. Kailash Chand for the Appellant.

F Ratnakar Dash, M. R. Shamshad, Vikrant Yadav, Shashank Singh for the Respondent.

The Judgment of the Court was delivered by

G K.S. RADHAKRISHNAN, J. 1. We are, in this case, concerned with the gruesome murder of a 22 year old girl by name Diana Clare Routley (hereinafter referred to as "Diana"), a New Zealander, for which the trial Court awarded death sentence to the appellant, which was affirmed by the High Court.

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2. Diana came to India as a visitor in the year 1997. After visiting Agra, she reached Varanasi on 7.8.1997 and stayed in room no. 103 of the Old Vishnu Guest House, Varanasi. She left the guest house on 10.8.1997 at about 7.00 a.m. for Darjeeling by train from Varanasi Cantt. Railway Station. Later, she was found missing and her father Allan Jack Routley, having got no information about his daughter, informed the authorities about the missing of Diana. Raghvendra Singh, SHO, Police Station, Laksa, along with a team of police officials, made inquiries, but she could not be traced. Later, it was revealed that one Dharam Deo Yadav, a tourist guide, accused herein, had some contacts with Diana and the police team then submitted its report to the Superintendent of Police (City), Varanasi on 24.4.1998, which reads as follows:

"Dear Sir,

Re: Re Diana Clare Routley, aged 25 years

I write in connection with the disappearance of my daughter, Diana Clare Routley last seen in Varanasi on Aug. 10th, 1997. She had arrived in Varanasi on the morning of Aug. 7th, 1997. She was staying at Old Vishnu Guest House. She last had contact with her family on Aug. 8th, 1997 when I rang her at Old Vishnu Guest House and she wrote a letter to me. Since then her family and friends have had no contact.

The person we suspect that could be involved in her disappearance is Dharam Dev Yadav who is a local guide in Varanasi and work for Old Vishnu Guest House. If he is not involved in her disappearance he certainly knows something of her movements on the day she disappeared."

3. Allan Jack Routley later came to India and lodged a written first information report (Exh. Ka-34) naming the accused Dharam Deo Yadav as suspect on 28.07.1998 at about 4.45

A pm at P.S. Bhelupur, District Varanasi. Crime No. 254/98 was
then registered under Section 366 IPC. PW14, Anil Kumar Rai,
SHO, P.S. Shivapur, Varanasi got an information that the
B accused, on 19.8.1998, would reach Shivpur railway station at
Varanasi. PW14 found out the accused at the railway station
and interrogated him. Accused confessed that he had
committed the murder of Diana and also named the co-
associates Kali Charan Yadav, Sindhu Harijan and Ram Karan
C Chauhan. The accused, accompanied by PWs14 and 15, PS
Bahariyabad, Ghazipur (Indra Kumar Mandal, Sub-Inspector),
went to his house situated at Village Brindaban, District
Ghazipur and he, with his key, opened the lock of his house
and pointed out the place where the dead body of Diana was
buried after causing her death by way of strangulation. Accused
D was asked to dig the spot and excavate the dead body of
Diana, which he did by spade and the body remains (Skeleton)
was found. PW14 then arrested him on 19.08.1998 and, on his
disclosure, other three persons, said to have been involved in
the incident, were also arrested by PW14 on 19.08.1998.
E Inquest on the skeleton was prepared by PW15 on the direction
given by PW16 Rajendra Pratap Singh, SDM, Tehsil Jakhaniya,
District Ghazipur. After completing the investigation, police
arrested Kali Charan Yadav, Sindhu Harijan, Ram Karan
Chauhan, Kesar Yadav and Mahesh Chandra Mishra on
19.08.1998 and submitted charge-sheets Ex. Ka40 and Ka41
F for the offences under Sections 366, 302, 201, 394 of the Indian
Penal Code. Post-mortem examination of the skeleton was
done by a team of Doctors, consisting of Dr. R.B. Singh, Dr.
S.K. Tripathi and Dr.V.K. Gupta on 20.08.1998, the report of
which is Exh. Ka-18.

G 4. After committal of the case, the Court of Sessions
framed charge under Section 411 IPC against Kali Charan,
Kesar Yadav and Mahesh Chandra Mishra. Charges under
Sections 302/34, 201 and 394 IPC were framed against the
appellant, Kali Charan Yadav, Sindhu Harijan and Ram Karan

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Chauhan and the appellant was also further charged under Section 364 IPC. A

5. The prosecution, in order to bring home the charges, examined 27 witnesses. No person was examined as a witness on the said of the defence. B

6. The trial Court acquitted Kali Charan Yadav, Sindhu Harijan and Ram Karan Chauhan, but the appellant was found guilty for the commission of the offences punishable under Section 302 read with Section 34 IPC and Section 201 IPC, but was acquitted of the charges for the offences under Sections 364 and 394 IPC. The trial Court also found that the case falls under the category of rarest of rare case, since the accused had strangled a young girl of a foreign country who had visited India and awarded him death sentence. C

7. Aggrieved by the same, the accused filed Criminal Appeal No. 1000 of 2003 before the High Court of Judicature at Allahabad and the State filed Government Appeal No. 2726 of 2003 against the order of acquittal passed against rest of the accused persons. Both the appeals were heard along with Criminal Reference no. 21 of 2003. The High Court dismissed both the appeals and confirmed the death sentence awarded by the trial Court, holding that the case in question falls under the rarest of rare category, against which this appeal has been preferred. D E

8. Shri Sunil Kr. Singh, learned counsel appearing on behalf of the appellant, submitted that in a case which squarely rests on circumstantial evidence, 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. Circumstances pointed out by the prosecution, in this case, according to the counsel, are inconclusive and inconsistent and no reliance could be placed on those circumstances so as to draw a conclusion that the accused had committed the crime. F G H

A In support of his submissions, learned counsel placed reliance on various judgments of this Court, including *Padala Veera Reddy v. State of Andhra Pradesh and others* 1989 Supp (2) SCC 706 and *Mustkeem alias Sirajudeen v. State of Rajasthan* (2011) 11 SCC 724. Learned counsel also pointed
B out that oral evidence of PWs 1, 2, 3, 5, 9 and 10 are totally unreliable to hold that the deceased was last seen with the accused on 10.08.1997. Learned counsel pointed out that the witnesses had identified Diana only on the basis of the photograph (Exh.1), sans the negative. Learned counsel
C pointed out that, in any view, the mere fact that the appellant was seen with the deceased, would not lead to the irresistible conclusion that the appellant had committed the crime. In support of his contention, reliance was placed on the judgment of this Court in *Lakhanpal v. State of Madhya Pradesh* 1980 Supp (1) SCC 716, *Eradu v. State of Hyderabad* AIR 1956
D SC 316, *Sahadevan v. State of Tamil Nadu* (2012) 6 SCC 403, *State of U.P. v. Satish* (2005) 3 SCC 114.

9. Learned counsel also submitted that the alleged confession and recovery made at the instance of the accused
E under Section 27 of the Evidence Act, 1872 could not be taken as evidence, since the same was stated to have been made while in custody. Learned counsel placed reliance on the judgments of this Court in *State of U.P. v. Deoman Upadhyaya* (1961) 1 SCR 14 and *State of Rajasthan v. Daulat Ram* (2005) 7 SCC 36 in support of his contention.
F Learned counsel also submitted that the police had conducted the search and seizure qua the recovery without following the provisions of Sections 100(4) and (5) of the Code. Further, it was also pointed out that no independent witness was present
G during search and seizure. Learned counsel pointed out that, going by the evidence of PW16 itself, the theory that the skeleton was recovered in the house of the accused, is highly doubtful and possibility of planting the skeleton in the house of the accused cannot be ruled out. Learned counsel also
H submitted that the evidence of PW19, who conducted the post-

mortem, as such, cannot be accepted in evidence since he had not followed the well accepted procedures. Referring to the oral evidence of PW21, learned counsel pointed out that not much reliance could be placed on the DNA report, since the acceptance of DNA Profile evidence has raised considerable controversy and concerns even in countries from where it originated.

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10. Learned counsel also submitted that, in any view, this is not one of the rarest of rare case warranting award of death sentence. Learned counsel pointed out that the cases rested purely on circumstantial evidence and, at the time of the commission of the offence, he was only 34 years of age and he later married, having wife, children and father. Further, it was also pointed out that he was originally a rickshaw puller, coming from very poor circumstances and hence could be reformed and rehabilitated.

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11. Shri Ratnakar Dash, learned senior counsel appearing for the State, submitted that the case rests upon circumstantial evidence and that the trial Court as well as the High Court are justified in drawing the inference of guilt, since all incriminating circumstances are found to be incompatible with the innocence of the accused. Learned senior counsel, placing reliance on the oral evidence of PWs 1, 2, 3, 5, 9 and 10, submitted that their evidence would categorically show that the deceased was last seen with the accused. PW3 has categorically stated that both the accused and Diana were last seen together at the Varanasi Cantt. Railway Station. Learned counsel pointed out that the evidence of those eye-witnesses would clearly indicate that the accused, while acting as a guide to Diana, took her to his native village, lived there for few days and committed the murder and later buried the dead body in his own house. Learned senior counsel extensively referred to the evidence of PWs 14 and 15 read with the statement of admission of the appellant (Annexure P-5).

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12. Learned senior counsel, referring to Section 27 of the

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- A Evidence Act, submitted that so much of information given by the accused in “custody”, in consequence of which any fact is discovered, is admissible in evidence, whether such information amounts to a confession or not. Learned senior counsel submitted, assuming that the recovery was not in terms of
- B Section 27 of the Evidence Act and was not in custody of the police by the time statement was made, still it would as well be admissible as “conduct” under Section 8 of the Evidence Act. In support of his contention, reliance was placed on the judgment of this Court in **Sandeep v. State of Uttar Pradesh**
- C (2012) 6 SCC 107.

13. Learned senior counsel also referred to the evidence of PWs 19 and 20 and also explained the procedure followed by PW19, who conducted the post-mortem examination on the skeleton of Diana. PW20 examined the body parts of Diana and preserved one femur bone and one humerus bone for DNA test, which was conducted by PW21 adopting the test – Short Tandem Space Repeats (STR) analysis. Learned senior counsel pointed out that, on reading the evidence of PWs 13, 19, 20 and 21, it is proved beyond a shadow of doubt that the skeleton recovered from the house of the accused was that of Diana.

14. We have no eye-witness version in the instant case and the entire case rests upon the circumstantial evidence. Circumstantial evidence is evidence of relevant facts from which, one can, by process of reasoning, infer about the existence of facts in issue or factum probandum. In **Hanumant, son of Govind Nargundkar v. State of Madhya Pradesh** AIR 1952 SC 343, this Court held as follows:

G “It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance, be fully established and all the facts so established should be consistent only with the hypotheses

H of the guilt of the accused. Again, the circumstances would

be of a conclusive nature and tendency and they should A
be such as to exclude but the one proposed to be proved.
In other words, there must be a chain of evidence so far
complete as not to leave any reasonable ground for a
•conclusion consistent with the innocence of the accused
and it must be such as to show that within all human B
probability the act must have been done by the accused.”

Each and every incriminating circumstance must be clearly
established by reliable and clinching evidence and the
circumstances so proved must form a chain of events from C
which the only irresistible conclusion about the guilt of the
accused can be safely drawn and no other hypothesis against
the guilt is possible. Even when there is no eye-witness to
support the criminal charge, but prosecution has been able to
establish the chain of circumstances which is complete leading D
to inference of guilt of accused and circumstances taken
collectively are incapable of explanation on any reasonable
hypothesis save of guilt sought to be proved, accused may be
convicted on the basis of such circumstantial evidence.

15. Diana, the deceased, was a young girl of the age of E
22-24 years, hailing from New Zealand, visited India in the year
1997. On 07.08.1997, she arrived Varanasi and stayed at the
Old Vishnu Guest House and, on 10.08.1997 at 7.00 am, she
left the guest house and since then she was found missing.
PW4, the Manager of Old Vishnu Guest House, at the relevant F
point of time, deposed that from 07.08.1997 to 10.08.1997,
Diana had stayed in room no.103 of the guest house. Two other
girls who had come with Diana left the hotel on 08.08.1997 at
about 11.45 am. Further, it was stated that the accused and
one Naseem were engaged as guides for the persons staying G
in the guest house and that from 08.08.1997 to 10.08.1997, the
appellant was acting as the guide of Diana.

LAST SEEN:

16. PW2 was working in Old Vishnu Guest House at the

A relevant point of time and, from 07.08.1997 to 10.8.1997, he
was on duty at the guest house. PW2 deposed that the accused
used to come as a guide in the guest house and he had seen
Diana roaming around with the accused. PW1 has also
corroborated the evidence of PW2. PW1, who used to ply cycle
rickshaw in the Varanasi city, stated that the accused himself
was plying cycle rickshaw from 1993 to 1996, after that he left
that job and started to work as a guide. PW1 deposed that he
had seen the accused along with a foreign lady in a rickshaw
and, looking at the photograph, he recognized that it was the
deceased who was with the accused at the relevant point of
time. PW3 also used to hire rickshaw for plying and the
accused used to take rickshaw for plying from him. PW3
deposed that he had met the accused on 10.08.1997 at
platform no.1 at Varanasi Cantt. Railway Station with a foreign
lady and he had recognized the photograph of Diana, as that
lady. PW3 also stated that he had also boarded the train in
which the accused as well as Diana had boarded. PW3 further
stated that he had seen the accused and the lady alighting at
Hurmujpur station, while he continued his journey.

E 17. PW9 is an independent witness, who also deposed
that he had seen the accused with Diana when they came to
their village and that Diana had stayed in the house of the
accused. PW9 identified the photograph of Diana and stated
that it was the same lady who had stayed with the accused.

F 18. It is trite law that a conviction cannot be recorded
against the accused merely on the ground that the accused was
last seen with the deceased. In other words, a conviction cannot
be based on the only circumstance of last seen together. The
conduct of the accused and the fact of last seen together plus
other circumstances have to be looked into. Normally, last seen
theory comes into play when the time gap, between the point
of time when the accused and the deceased were seen last
alive and when the deceased is found dead, is so small that
possibility of any person other than the accused being the

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perpetrator of the crime becomes impossible. It will be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. However, if the prosecution, on the basis of reliable evidence, establishes that the missing person was seen in the company of the accused and was never seen thereafter, it is obligatory on the part of the accused to explain the circumstances in which the missing person and the accused parted company. Reference may be made to the judgment of this Court in *Sahadevan Alias Sagadeven v. State represented by Inspector of Police, Chennai* (2003) 1 SCC 534. In such a situation, the proximity of time between the event of last seen together and the recovery of the dead body or the skeleton, as the case may be, may not be of much consequence. PWs 1, 2, 3, 5, 9 and 10 have all deposed that the accused was last seen with Diana. But, as already indicated, to record a conviction, that itself would not be sufficient and the prosecution has to complete the chain of circumstances to bring home the guilt of the accused.

RECOVERY OF SKELETON

19. PW14 has categorically stated that he had got information that the appellant would reach the Shivpur railway station and, hence, he rushed to the railway station with the informant and found out the accused at the platform. PW14 interrogated him and he disclosed his name and address. He admitted that he was the guide of Diana and since Diana wished to go to his village, he went along with her on 10.08.1997. The accused had also confessed to have committed the murder of Diana and buried her dead body in his house. PW14 then, accompanied by PW15, took the accused to his village and the accused with the key in his possession, opened the lock of his house and pointed out the place where the dead body of Diana had been buried. Accused himself dug the place with a spade and the skeleton was recovered. PW14 then arrested the accused and, on his disclosure about the involvement of the other accused persons,

- A they were also arrested. Inquest on the skeleton was made in the presence of SDM, PW16. Contention was raised that the statement/admission of the accused (annexure Exh. P-5) was inadmissible under Section 27 of the Evidence Act, since the accused was not in the custody of PW14. The evidence of PWs
- B 14 and 15 would indicate that they could recover the skeleton of Diana only on the basis of the disclosure statement made by the accused that he had buried the dead body in his house. Recovery of a dead body or incriminating material from the place pointed out by the accused, points out to three
- C possibilities - (i) that the accused himself would have concealed; (ii) that he would have seen somebody else concealing it and (iii) he would have been told by another person that it was concealed there. Since the dead body was found in the house of the accused, it is for him to explain as to how the same was found concealed in his house.
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20. Section 27 of the Evidence Act explains how much of information received from the accused may be proved. Section 27 reads as follows:

- E **“27. How much of information received from accused may be proved.-** Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as
- F relates distinctly to the fact thereby discovered, may be proved.

- The expression “custody” which appears in Section 27 did not mean formal custody, which includes any kind of surveillance, restriction or restraint by the police. Even if the accused was not formally arrested at the time when the accused gave the information, the accused was, for all practical purposes, in the custody of the police. This Court in *State of Andhra Pradesh v. Gangula Satya Murthy* (1997) 1 SCC 272 held that if the
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- H accused is within the ken of surveillance of the police during

which his movements are restricted, then it can be regarded as custodial surveillance. Consequently, so much of information given by the accused in "custody", in consequence of which a fact is discovered, is admissible in evidence, whether such information amounts to a confession or not. Reference may also be made to the Judgment of this Court in *A.N. Venkatesh v. State of Karnataka* (2005) 7 SCC 714. In *Sandeep v. State of Uttar Pradesh* (2012) 6 SCC 107, this Court held that it is quite common that based on admissible portion of the statement of the accused, whenever and wherever recoveries are made, the same are admissible in evidence and it is for the accused in those situations to explain to the satisfaction of the Court as to nature of recoveries and as to how they came into the possession or for planting the same at the place from where they were recovered. Reference can also be made to the Judgment of this Court in *State of Maharashtra v. Suresh* (2000) 1 SCC 471, in support of the principle. Assuming that the recovery of skeleton was not in terms of Section 27 of the Evidence Act, on the premise that the accused was not in the custody of the police by the time he made the statement, the statement so made by him would be admissible as "conduct" under Section 8 of the Evidence Act. In the instant case, there is absolutely no explanation by the accused as to how the skeleton of Diana was concealed in his house, especially when the statement made by him to PW14 is admissible in evidence.

21. PW16, SDM, Tehsil Jakhaniya, District Ghazipur received an order on 19.8.1998 of the District Magistrate through Police Station Bahariyabad to prepare the inquest memo of the recovered dead body (skeleton) in the village Vrindaban. PW16, consequently, reached Vrindaban at 3.30 pm on 19.8.1998 and noticed the skeleton lying in a pit in the eastern-northern corner of the room in the house of accused. PW16 started inquest proceedings at 4.00 pm and, on his direction, PW15 prepared the inquest memo and the skeleton was taken out from the pit and kept outside the house. PW16 kept the skeleton in a wooden box and sealed. PW17 stated

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A that he had delivered the skeleton kept in a wooden box to Ghazipur headquarter mortuary. PW17 stated that the skeleton remained in the custody of Sunil Kumar Rai, bundled and sealed and nothing had cropped up, so as to dislodge creditworthiness of his testimony.

B 22. PW19, Dr. G. D. Tripathi, stated that on 20.8.1998 while he was posted as Senior Heart Specialist at District Hospital, Ghazipur, he, along with Dr. Ram Murti Singh and Dr. D.K. Gupta, had conducted the post-mortem examination of recovered remains of dead body (skeleton). PW19 stated that
C it was PW17, who had brought the skeleton sealed in a wooden box. PW19 noticed the following features in the external examination:

D "On opening the sealed box by appearance it is a body (remains) of young human female body of average built. Hairs of scalp are golden brown in colour attached with the scalp.

1. Scalp bones with hairs.
- E 2. Bones of the face, upper jaw and lower jaw.
3. Bones of the upper and lower extremities attached with muscles and soils.
- F 4. Few ribs of the chest wall.
5. Lower part of the lumber vertebra and thoracic vertebra and sacrum.
6. Both pelvic bones.
- G 7. Both scapula.

Bones are not decomposed, bones of upper and lower extremities are attached with following and muscles.

H Membranes, head, spinal cord, pleura, both lungs,

pericardium, heart, blood vessels were found absent.

A

All the bones of skeleton are prepared for chemical analysis.

Position of lower jaw was found as under:

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1. Central Incisor-Two
2. Lateral Incisor-Two
3. Canine – Two
4. Premolars – Four
5. Molar – Four

C

There is a space for IIIrd molar behind the IIInd molar in both upper and lower jaws.

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Cause of death could not be ascertained, hence bones with scalp, hair and soil were preserved for analysis.”

23. PW20, Dr. C. B. Tripathi, Professor and Head of the Department of Forensic Medicines Department, Kashi Hindu Vishwavidhalaya, Varanasi, had again conducted the post-mortem on the body remains (skeleton) on 10.8.1998 at 12.30 pm and prepared Exh. Ka-28 result. The operative portion of the report reads as follows:

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“Personal Identification or Uniqueness of Individual:- Superimposition Technique:- for personal identification sumporim position technique was done in this case, for which photograph of face of alleged individual Diana Clare Routley obtained from S.S.P. Varanasi (Ex.1) from which a black and white photograph (Ex.2) was made the skull and mandible was fixed in best position anatomical position and photograph of skull along with Mandible was taken (Ex.3) by minutely adjusting same angle and distance from which photograph of face (Ex.2) was taken.

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A The negative of photograph (Ex.2) and negative of skull (Ex.3) was precisely adjusted in stand in dark room for registration marks then sumporim posed photograph was taken first partially exposing negative of photograph on photograph paper then exposing negative of skull on the

B same photograph thus the superimposed photograph (Ex.4) was obtained and registration marks and lines were compared and was found that they matched and coincided exactly establishing that the skull belonged to the photograph of the individual. (Annexure Ex.1 to Ex. 4 for perusal). Personal Identification by comparison of Dental

C Records of alleged individual from Dental findings of bones;

D Dental records of Diana Clare Routley (Ex.5) the alleged individual was made available by S.S.P. Varanasi with the help of Interpol services (a) in the lower jaw there was evidence eruption of III Molar both sides, but the teeth were missing. The dental record shows that both the lower III Molar were extracted on 8.3.1993 (b) the upper III Molar both sides teeth was not present and no sign of eruption

E was seen. The X-ray (Dental) (Ex.6) of Diana Clare Routely shows that both upper III Molar were not erupted/impacted. (c) The examination of teeth and hair X-ray (taken in S.S.P.G. Hospital) (Report Ex.6) shows that there are cavities and filling in the upper left II Molar, upper right 1st

F Molar, lower left Molar and lower right II Molar, also small cavity in the 1st Molar lower both sides. The dental chart (Ex.5) and Dental X-ray (Ex.7) of Diana also show presence of cavity and fillings in these teeth. Thus comparison of teeth and their X-ray with the dental and their

G X-ray records from New Zealand of Diana completely establishes the identity of skull and mandible of being Diana Clare Routley. (d) Blood group was detected from bones and was found Group-A. Medical report shows Blood Group-A.

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24. PW20 has stated that one femur and one humerus bone were preserved for DNA analysis and composition with Diana's father blood sample. The examination report Exh. Ka-28 of PW20 also refers to the cause of death, which reads as follows:

"Cause of death:- (1) There is a hole nearly circular 1.2cm x 0.9 cm. in the sternum bone of lower part (from the chest) photograph of sternum taken Ex.8 enclosed.

(2) There were two holes on the T-shirt (one front and on back) and one on the Gamchha. These were sent for gun powder residue testing. The reports have been obtained (Ex.9) which is negative for present of gun powder residue. The negative report may be either due to the fact that the clothes were highly contaminated and soiled or due to beyond the range of gun powder affects.

(3) Head hairs, bones and soil samples were preserved and handed over to the Constable for chemical analysis of prisons. The report is still awaited. Hence opinion as to cause of death is deferred till report of chemical analyst."

PW20 then took out femur and humerus bones of skeleton for DNA fingerprinting test to establish the relations between the deceased and the blood donor, that is the sample of blood of Allan Jack Routley, which was taken in accordance with the setup precept and procedure for DNA isolation test and the same was sent along with taken out femur and humerus bones of recovered skeleton to the Centre for DNA Fingerprinting and Diagnostics (CDFD), Ministry of Science and Technology, Government of India, Uppal Road, Hyderabad.

CRIME SCENE MANAGEMENT

25. Crime scene has to be scientifically dealt with without any error. In criminal cases, especially based on circumstantial evidence, forensic science plays a pivotal role, which may

A assist in establishing the element of crime, identifying the suspect, ascertaining the guilt or innocence of the accused. One of the major activities of the Investigating officer at the crime scene is to make thorough search for potential evidence that have probative value in the crime. Investigating Officer may be guarded against potential contamination of physical evidence which can grow at the crime scene during collection, packing and forwarding. Proper precaution has to be taken to preserve evidence and also against any attempt to tamper with the material or causing any contamination or damage.

C 26. PW14 has stated that the accused led him and others to a room stating that he buried the dead body of Diana in that room. PW14 asked the accused to dig the spot he had pointed out and the accused started digging the floor of the room. After digging 6 feet wide, 3 feet long and 2 feet deep, a human skeleton was seen. The mud around the beach was cleared. The skeleton had teeth in mouth and hair at head. PW14 took the skeleton in his possession and, while doing so, he noticed that the bones were intact. There was no skin found on the skeleton and some tea red cloths were stuck on the skeleton and those cloths were sealed.

F 27. PW15, SHO, Ghazipur Police Station, started the procedure of Panchnama following the laid down procedure. Photograph of the skeleton was also taken. Later, the skeleton was sealed after following all procedures, which is reflected in Exts. A-14 and A-15, the skeleton of the dead body was then given to the custody of PW17, who had brought it for post-mortem and was entrusted to PW19. No procedural error is seen committed by the above-mentioned witnesses in recovering the skeleton, packing it and forwarding the same to PW19.

EXPERT SCIENTIFIC EVIDENCE

H 28. Criminal Judicial System in this country is at cross-roads, many a times, reliable, trustworthy, credible witnesses

to the crime seldom come forward to depose before the court and even the hardened criminals get away from the clutches of law. Even the reliable witnesses for the prosecution turn hostile due to intimidation, fear and host of other reasons. Investigating agency has, therefore, to look for other ways and means to improve the quality of investigation, which can only be through the collection of scientific evidence. In this age of science, we have to build legal foundations that are sound in science as well as in law. Practices and principles that served in the past, now people think, must give way to innovative and creative methods, if we want to save our criminal justice system. Emerging new types of crimes and their level of sophistication, the traditional methods and tools have become outdated, hence the necessity to strengthen the forensic science for crime detection. Oral evidence depends on several facts, like power of observation, humiliation, external influence, forgetfulness etc., whereas forensic evidence is free from those infirmities. Judiciary should also be equipped to understand and deal with such scientific materials. Constant interaction of Judges with scientists, engineers would promote and widen their knowledge to deal with such scientific evidence and to effectively deal with criminal cases based on scientific evidence. We are not advocating that, in all cases, the scientific evidence is the sure test, but only emphasizing the necessity of promoting scientific evidence also to detect and prove crimes over and above the other evidence.

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29. Scientific evidence encompasses the so-called hard science, such as physics, chemistry, mathematics, biology and soft science, such as economics, psychology and sociology. Opinions are gathered from persons with scientific, technical or other specialized knowledge, whose skill, experience, training or education may assist the Court to understand the evidence or determine the fact in issue. Many a times, the Court has to deal with circumstantial evidence and scientific and technical evidence often plays a pivotal role. Sir Francis Bacon,

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- A Lord Chancellor of England, in his *Magnum Opus* put forth the first theory of scientific method. Bacon's view was that a scientist should be disinterested observer of nature, collecting observations with a mind cleansed of harmful preconceptions, that might cause error to creep into the scientific record.
- B Distancing themselves from the theory of Bacon, the US Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993) held as follows:-

C "Science is not an encyclopedic body of knowledge about the universe. Instead, it represents a process for proposing and refining theoretical explanations about the world that are subject to further testing and refinement."

30. *Daubert* gives much emphasis on Sir Karl Popper (an Austrian philosopher), who unlike Bacon believed that all science begins with a prejudice, theory or hypothesis and formulating the theory is the creative part of science, which cannot be analyzed within the realm of philosophy. Later, Thomas Kunh, a Physicist, who popularized the word 'paradigm' expressed the view that scientific work comprises an agreed upon set of assumptions, methods, language, etc. Neither Bacon, Popper nor Kunh, it is generally believed, gave a perfect description of what science is and how it works, but the US Supreme Court in *Daubert* identified four non-definitive factors that were thought to be illustrative of characteristics of scientific knowledge, testability or falsifiability, peer review, a known or potential error rate and general acceptance within the scientific community. Few additional factors were also subsequently noticed that if the relationship of the technique to methods that have been established to be reliable, the qualifications of the expert witness testifying based on the methodology, the non-judicial uses of the method, logical or internal consistency of the hypothesis, consistency of the hypothesis with accepted authorities and presumption of the hypothesis or theory.

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DNA AND IDENTITY OF SKELETON

31. We have already referred to the evidence of PW20, who conducted the post-mortem examination. PW 21, Dr. G.V. Rao, Chief of the DNA Fingerprinting Laboratory, conducted the DNA isolation on the basis of samples of blood of Allan Jack Routley and femur and humerus bones of skeleton. PW21 deposed that he was satisfied regarding authenticity of the seal and its intactness. PW21 adopted the test known as Short Tandem Space Repeats (S.T.R.) analysis, which is stated to be a conclusive test, produces results even on degraded biological samples. Fingerprinting analysis was carried out by STR analysis and on perusal of STR profile of the source (Allan Jack Routley) with the sources of femur and humerus bones of Diana, it was concluded that the source of Allan Jack Routely is biologically related to the sources of femur and humerus bones.

32. Counsel appearing for the appellant, as already indicated, questioned the reliability of DNA report and its admissibility in criminal investigation. It was pointed out that DNA is known for being susceptible to damage from moisture, heat, infrared radiation etc. and that may degrade the sample of DNA. Further, it was pointed out that during carriage, during its storage at police stations or laboratories, it is prone to contamination and, therefore, the extent of absoluteness can never be attributed to DNA results.

33. We are in this case concerned with the acceptability of the DNA report, the author of which (PW21) was the Chief of DNA Printing Lab, CDFD, Hyderabad. The qualifications or expertise of PW21 was never in doubt. The method he adopted for DNA testing was STR analysis. Post-mortem examination of the body remains (skeleton) of Diana was conducted by Dr. C.B. Tripathi, Professor and Head of Department of Forensic Medical I.M.S., B.H.U., Varanasi. For DNA analysis, one femur and one humerus bones were

A preserved so as to compare with blood samples of Allen Jack
Routley. In cases where skeleton is left, the bones and teeth
make a very important source of DNA. Teeth, as often noticed
is an excellent source of DNA, as it forms a natural barrier
B against exogenous DNA contamination and are resistant to
environmental assaults. The blood sample of the father of Diana
was taken in accordance with the set up precept and procedure
for DNA isolation test and the same was sent along with taken
out femur and humerus bones of recovered skeleton to the
C Centre for D.N.A. Fingerprinting and Diagnostics (CDFD),
Ministry of Science and Technology, Government of India,
Hyderabad. PW21, as already indicated, conducted the DNA
isolation test on the basis of samples of blood of Routley and
femur and humerus bones of skeleton and submitted his report
dated 28.10.1998. DNA Fingerprinting analysis was carried out
D by STR analysis and on comparison of STR profile of Routley.
When DNA profile of sample found at the scene of crime
matches with DNA profile of the father, it can be concluded that
both the samples are biologically the same.

34. The DNA stands for deoxyribonucleic acid, which is
E the biological blueprint of every life. DNA is made-up of a
double standard structure consisting of a deoxyribose sugar
and phosphate backbone, cross-linked with two types of nucleic
acids referred to as adenine and guanine, purines and thymine
and cytosine pyrimidines. The most important role of DNA
F profile is in the identification, such as an individual and his blood
relations such as mother, father, brother, and so on. Successful
identification of skeleton remains can also be performed by
DNA profiling. DNA usually can be obtained from any biological
material such as blood, semen, saliva, hair, skin, bones, etc.
G The question as to whether DNA tests are virtually infallible may
be a moot question, but the fact remains that such test has
come to stay and is being used extensively in the investigation
of crimes and the Court often accepts the views of the experts,
especially when cases rest on circumstantial evidence. More
H than half a century, samples of human DNA began to be used

in the criminal justice system. Of course, debate lingers over the safeguards that should be required in testing samples and in presenting the evidence in Court. DNA profile, however, is consistently held to be valid and reliable, but of course, it depends on the quality control and quality assurance procedures in the laboratory. Close relatives have more genes in common than individuals and various procedures have been proposed for dealing with a possibility that true source of forensic DNA is of close relative. So far as this case is concerned, the DNA sample got from the skeleton matched with the blood sample of the father of the deceased and all the sampling and testing have been done by experts whose scientific knowledge and experience have not been doubted in these proceedings. We have, therefore, no reason to discard the evidence of PW19, PW20 and PW21. Prosecution has, therefore, succeeded in showing that the skeleton recovered from the house of the accused was that of Diana daughter of Allen Jack Routley and it was none other than the accused, who had strangulated Diana to death and buried the dead body in his house.

35. The accused, in his examination under Section 313 Cr.P.C., had denied the prosecution case completely, but the prosecution has succeeded in proving the guilt beyond reasonable doubt. Often, false answers given by the accused in the 313 Cr.P.C. statement may offer an additional link in the chain of circumstances to complete the chain. See *Anthony D'souza v. State of Karnataka* (2003) 1 SCC 259. We are, therefore, of the considered view that both the trial Court as well as the High Court have correctly appreciated the oral and documentary evidence in this case and correctly recorded the conviction and we are now on sentence

36. We may now consider whether the case falls under the category of rarest of the rare case so as to award death sentence for which, as already held, in *Shankar Kisanrao Khade v. State of Maharashtra* (2013) 5 SCC 546 this Court

- A laid down three tests, namely, Crime Test, Criminal Test and RR Test. So far as the present case is concerned, both the Crime Test and Criminal Test have been satisfied as against the accused. Learned counsel appearing for the accused, however, submitted that he had no previous criminal records
- B and that apart from the circumstantial evidence, there is no eye-witness in the above case, and hence, the manner in which the crime was committed is not in evidence. Consequently, it was pointed out that it would not be possible for this Court to come to the conclusion that the crime was committed in a barbaric
- C manner and, hence the instant case would not fall under the category of rarest of rare. We find some force in that contention. Taking in consideration all aspects of the matter, we are of the view that, due to lack of any evidence with regard to the manner in which the crime was committed, the case will not fall under
- D the category of rarest of rare case. Consequently, we are inclined to commute the death sentence to life and award 20 years of rigorous imprisonment, over and above the period already undergone by the accused, without any remission, which, in our view, would meet the ends of justice.
- E 37. The Appeal is disposed of as above, altering the death sentence to that of life for the term mentioned above.

Kalpana K. Tripathy

Appeal partly allowed.