

TOMASO BRUNO & ANR.

v.

STATE OF U.P.

(Criminal Appeal No.142 of 2015)

JANUARY 20, 2015

**[ANIL R. DAVE, KURIAN JOSEPH AND
R. BANUMATHI, JJ.]**

Penal Code, 1860 – s. 302/34 – Murder – Prosecution case that two foreign nationals committed murder of another foreign national on their trip to India as tourists – Offence took place inside the privacy of the hotel room in which the appellant and the deceased were staying together and only the appellants had the opportunity to commit the offence – Appellants' case is that at the relevant time they had gone out and on returning back to the hotel room found the condition of their friend very serious and immediately informed the hotel manager about the same and with the assistance of the hotel staff, took him to the hospital – On basis of the evidence, conviction and sentence u/s. 302/34 by courts below – On appeal, held: On facts, CCTV footage being a crucial piece of evidence, it is for the prosecution to have produced the best evidence which is missing – Non-production of CCTV footage being best evidence casts doubt on the prosecution case – Courts below did not notice the faulty investigation as also the absence of symptoms of strangulation in the medical reports – Circumstances and the evidence adduced by the prosecution do not form a complete chain pointing to the guilt of the accused – Appellants given benefit of doubt and the order of conviction set aside – Evidence.

Evidence Act, 1872 – s. 65B – Admissibility of electronic records – Murder case – CCTV cameras installed in the prominent places – CCTV footage – Effect of non-production – Held: CCTV footage is a strong piece of evidence to prove

A *whether the accused remained inside the room and whether they were responsible for the commission of a crime – Omission to produce CCTV footage by the prosecution, which is the best evidence, raises serious doubts about the prosecution case.*

B **Allowing the appeal, the Court**

C **HELD: 1.1. In the instant case, the courts below did not properly appreciate the evidence and the gap in the chain of circumstances sought to be established by the prosecution. The courts below ignored the importance of best evidence i.e. CCTV camera and also did not notice the absence of symptoms of strangulation in the medical reports. Upon consideration of the facts and circumstances of the case, the circumstances and the evidence adduced by the prosecution do not form a complete chain pointing to the guilt of the appellants-foreign national and the benefit of doubt is to be given to the appellants. Thus, the conviction of the appellants u/s.302/34 IPC is set aside. [Para 42] [747-C-E]**

E **1.2. With the increasing impact of technology in everyday life and as a result, the production of electronic evidence in cases has become relevant to establish the guilt of the accused or the liability of the defendant. Electronic documents *strictu sensu* are admitted as material evidence. With the amendment to the Evidence Act in 2000, Sections 65A and 65B were introduced into Chapter V relating to documentary evidence. [Para 25] [737-E-F]**

G **1.3. The appellants being foreign nationals who visited India as tourists, it would not have been possible for them to examine any witness either from the hotel or from the place which they are said to have visited as they were tourists in India. On facts of the case, to invoke H Section 106 of the Evidence Act, the burden was for the**

prosecution to establish that the appellants remained inside the hotel room at the relevant time. PW-1-Hotel Manager stated that CCTV cameras are installed in the boundaries, near the reception, in the kitchen, in the restaurant and all three floors. Since CCTV cameras were installed in the prominent places, CCTV footage would have been best evidence to prove whether the accused remained inside the room and whether or not they have gone out and whether they were responsible for the commission of a crime. CCTV footage being a crucial piece of evidence, it is for the prosecution to have produced the best evidence which is missing. Omission to produce CCTV footage which is the best evidence, raises serious doubts about the prosecution case. [Para 21, 22] [736-B-G]

1.4. PW 1-hotel manager stated that he saw the CCTV footage at the relevant time and on the fateful night no person was having ingress or egress to the said room. PW-13-investigating officer stated that he saw the full video recording of the fateful night in the CCTV camera, but he did not record the same in the case diary as nothing substantial to be adduced as evidence was present in it. Non-production of CCTV footage, non-collection of call records (details) and sim details of mobile phones seized from the accused cannot be said to be mere instances of faulty investigation but amount to withholding of best evidence. It is not the case of the prosecution that CCTV footage could not be lifted or a CD copy could not be made. [Para 25, 27] 736-G-H; 737-A; 738-E-F]

1.5. As per Section 114 (g) of the Evidence Act, if a party in possession of best evidence which will throw light in controversy withholds it, the court can draw an adverse inference against him notwithstanding that the onus of proving does not lie on him. *Notwithstanding the fact that the burden lies upon the accused to establish*

A the defence plea of *alibi* in the facts and circumstances
of the case, prosecution in possession of the best
evidence—CCTV footage ought to have produced the
same. It is a fit case to draw an adverse inference against
the prosecution under Section 114 (g) that the
B prosecution withheld the same as it would be
unfavourable to them had it been produced. [Para 28]
[738-G-H; 739-E-F]

C 1.6. The submission that there was nothing like a
love triangle between them and the deceased and they
are foreigners and their social values are substantially
different from the Indians; and that the prosecution failed
to establish the motive propounded against the accused
persons is accepted. The evidence adduced by the
prosecution suggesting motive is only by way of
D improvement at the stage of trial which does not inspire
confidence of the court. Prosecution tried to establish the
case against the accused by making improvements at
various stages. The version of PW-3 that he saw A-1 and
A-2 hugging, kissing and cuddling each other and that
E 'FM' was sitting on the other side of the table appearing
depressed was not stated to the investigating officer PW-
13 when he recorded PW-3's statement u/s. 161 Cr.P.C.
as also the version of PW-2 that on the night of 3.2.2010,
the second accused asked him 'not to disturb till
F tomorrow morning'. [Para 32, 33, 34] [740-H; 741-A-B-F-
G; 741-C-E]

G 1.7. Prosecution neither examined the doctor nor
produced the report that was prepared in the emergency
ward of the hospital. Likewise, the death intimation sent
to the police was also not produced. The prosecution
relied upon another circumstance that the death is
homicidal i.e. death is due to asphyxia as a result of
strangulation as stated in the post-mortem reports.
H Considering postmortem reports and the evidence of

PWs 10 and 11, reasonable doubts arise as to the cause of death due to asphyxia as a result of strangulation. The conspicuous absence of symptoms of strangulation coupled with other circumstances militates against the case of the prosecution. Even if it is accepted that the death was due to strangulation which was caused by an object, the non-recovery of alleged object weakens the prosecution case. The deceased being a strongly built man, the absence of struggle and the corresponding external injuries is yet another vital aspect which went unnoticed by the courts below. [Paras 30, 35, 37, 38, 41] [740-C; 741-H; 743-D; 745-H; 746-A, F-H]

C. Chenga Reddy & Ors. vs. State of A.P. 1996 (3) Suppl. SCR 479: (1996) 10 SCC 193; *Shivu and Anr. vs. Registrar General, High Court of Karnataka & Anr.* 2007 (2) SCR 555: (2007) 4 SCC 713; *Padala Veera Reddy v. State of A.P. and Ors.* 1989 Supp. (2) SCC 706; *Gosu Jayarami Reddy and Anr. vs. State of Andhra Pradesh* 2011 (9) SCR 503 : (2011) 11 SCC 766; *Munshi Prasad & Ors. vs. State of Bihar* 2001 (4) Suppl. SCR 25: (2002) 1 SCC 351; *Mohd. Ajmal Mohammad Amir Kasab vs. State of Maharashtra* 2012 (8) SCR 295: (2012) 9 SCC 1; *State (NCT of Delhi) vs. Navjot Sandhu @ Afsan Guru* 2005 (2) Suppl. SCR 79: (2005) 11 SCC 600; *Dayal Singh And Ors. vs. State of Uttaranchal* (2012) 7 SCALE 165, *Radhakrishna Nagesh vs. State of Andhra Pradesh* 2012 (11) SCR 1114 : (2013) 11 SCC 688, *Umesh Singh vs. State of Bihar* 2013 (4) SCR 797: (2013) 4 SCC 360 – referred to.

Modi's Medical Jurisprudence And Toxicology 24th Edn. 2011, p 453 – referred to.

Case Law Reference :

1996 (3) Suppl. SCR 479	Referred to	Para 14	
2007 (2) SCR 555	Referred to	Para 15	
1989 Supp. (2) SCC 706	Referred to	Para 16	H

A	2011 (9) SCR 503	Referred to	Para 20
	2001 (4) Suppl. SCR 25	Referred to	Para 20
	2012 (8) SCR 295	Referred to	Para 26
	2005 (2) Suppl. SCR 79	Referred to	Para 26
B	(2012) 7 SCALE 165	Referred to	Para 39
	2012 (11) SCR 1114	Referred to	Para 39
	2013 (4) SCR 797	Referred to	Para 39

C CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 142 of 2015.

From the Judgment and Order dated 04.10.2012 of the High Court of Judicature at Allahabad in Criminal Appeal No. 5043 of 2011.

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Harin P. Raval, Ranjeeta Rohatgi, Nikhil Rohatgi, Anando Mukherjee, Anirush Sharma, Divya Anand, Nipun Saxena, Jaya khanna for the Appellants.

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Irshad Ahmad, AAG, M. R. Shamshad, Shashank Singh, Aditya Samaddar, Anurag Rawat for the Respondent.

The Judgment of the Court was delivered by

R. BANUMATHI, J. 1. Leave granted.

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2. This appeal is directed against the judgment dated 4.10.2012 passed by Allahabad High Court in Criminal Appeal No.5043 of 2011 in which the High Court confirmed the conviction of the appellants under Section 302 read with Section 34 IPC and the sentence of life imprisonment and fine of Rs. 25,000/- imposed on each of them.

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3. Briefly stated, case of the prosecution is that three Italian nationals namely Tomaso Bruno (Accused No.1), Elisa Betta Bon Compagni (Accused No. 2) and Francesco Montis (Deceased) came as tourists to India from London and reached

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Mumbai on 28.12.2009. After visiting several places of interest together, these persons arrived at Varanasi on 31.1.2010 and they checked in at Hotel Buddha, Ram Katora, Varanasi. The hotel management, after checking all the relevant identity proofs, allotted Room No. 459 in the hotel to them at about 5.00 p.m. For two days the accused and deceased went around the city. On 3.2.2010, the deceased complained of a mild headache on account of which, they went out late and returned early and thereafter; stayed in the room for the entire evening as they had planned to see the 'Subahe Banaras' the next morning. On 4.2.2010 at about 8.00 a.m. A-2 informed Ram Singh (PW-1), the Manager of hotel Buddha, Varanasi, that the condition of the deceased was not fine, after which the accused, PW-1 and others took the deceased to S.S.P.G. Hospital, Varanasi for treatment, where the doctors declared the ailing tourist as 'brought dead'.

4. Ram Singh (PW-1) filed a complaint regarding death of deceased Francesco Montis in the police station. Additionally, Awadhesh Kumar Choubey, Home Guard also submitted a memo informing death of Francesco Montis which was transmitted to P.S. Chetganj, Varanasi. An inquest was conducted by Sagir Ahmad-SI (PW-12) regarding death of deceased Francesco Montis and Ex. P12 is the inquest report. After inquest, the body was handed over for conducting post mortem. Dr. R.K. Singh (PW-10) conducted autopsy and issued Ex. Ka-10, opining that the cause of death was asphyxia due to strangulation. In pursuance of order of District Magistrate, by an order of Chief Medical Officer, a second post mortem was conducted on 6.02.2010 by the panel of doctors headed by Dr. A.K. Pradhan (PW-11) which is marked as Ex. Ka-11 wherein the doctors reaffirmed the cause of death of deceased Francesco Montis.

5. On the basis of the postmortem report and other materials, First Information Report in Case No. 34 of 2010 was registered on 5.2.2010. PW-12-Sagir Ahmad (SI) had taken up the investigation and proceeded to the place of occurrence i.e.

A hotel Buddha. During the spot-investigation, PW-12 collected bed-sheet, pillow, a towel and other material objects. The bed-sheet contained marks of urine and stools and a black brown stain of the size of lip was found on the pillow cover. PW-12 also collected other articles from the room and also prepared Ex. P18-site plan at the place of occurrence. On 5.2.2010, further investigation was taken over by Shri Dharambir Singh (PW-13) who recorded the statement of the waiters in the hotel and also recorded the statement of the accused persons. The accused stated that on 4.2.2010 morning they went out at 4.00 a.m. for 'Subhae Banaras', but deceased was not well, so he was left sleeping in the room and when they came back they found Francesco in a serious condition. On the basis of material collected during investigation, PW-13 arrested the accused persons after appraising them with the grounds of arrest. After completion of investigation, chargesheet under Section 302 read with Section 34 IPC was filed by the police in the court against accused Nos. 1 and 2.

6. To substantiate the charges against the accused, prosecution has examined thirteen witnesses and exhibited material documents and objects. The accused were questioned under Section 313 Cr.P.C. about the incriminating evidence and the accused denied all of them. The accused reiterated whatever was earlier stated before I.O., that on the fateful night of 3.2.2010, they ordered two plates of fried rice and all three of them dined together. Next day morning they went out at 4.00 a.m. for 'Subhae Banaras', but deceased was not well and so he was left sleeping in the room. When they returned to the hotel at 8.00 a.m., Francesco Montis was lying on the bed in an unconscious condition. The second accused stated that she had informed the hotel manager that Francesco Montis was very serious and all the staff, PW-1 manager and accused persons took Montis to the hospital where he was declared 'brought dead'. The second accused clarified that the marks of lip on the cover were not hers.

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7. Upon consideration of evidence, trial court convicted the accused persons under Section 302 read with Section 34 IPC and sentenced them to undergo life imprisonment, imposed a fine of Rs.25,000/- each with a default clause. Aggrieved by the same, the appellants preferred appeal before the High Court wherein by the impugned judgment, High Court confirmed the conviction and the sentence. Assailing the verdict of conviction and sentence of life imprisonment, the appellants have preferred this appeal by way of special leave.

8. Mr. Harin P. Raval, learned senior counsel appearing for the appellants contended that all the circumstances relied upon by the prosecution ought to be firmly established by evidence and the circumstances must be of such nature as to form a complete chain pointing to the guilt of the accused and the courts below ignored the conditions that are required to be satisfied in a case based on circumstantial evidence. Learned counsel contended that non-production of CCTV footage being an important piece of evidence casts a serious doubt in the prosecution case and non-production of such best possible evidence is fatal to the prosecution case. It was further submitted that the courts below ought to have noticed the faulty investigation and non-collection of CCTV footage, sim details and lapses in the investigation. It was urged that the opinion of the doctors that the cause of death was asphyxia due to strangulation is not supported by materials and this vital aspect has been ignored by the courts below.

9. Mr. Irshad Ahmad, learned Additional Advocate General appearing for the respondent-State submitted that without evidence of their complicity in the crime, there is no reason as to why PW-1 Ram Singh, the hotel manager or the police personnel would implicate two foreign nationals who came to India as tourists. It was further contended that inside the hotel room, the appellants were admittedly with the deceased and the appellants failed to account for the manner and time of death of the deceased inside the room. It was held that the

- A defence set up by the accused persons that they had gone on sight seeing and 'Subahe Banaras' at the wee hours on 4.2.2010 and returned to hotel room at about 8.00 A.M. cannot be subscribed or relied upon. The learned counsel vehemently contended that the medical evidence, inquest report and the presence of stool, urine stain on the bed sheet and black brown discharge from the mouth narrated in the inquest and brown black lip mark on pillow cover clearly lead to the inference of the guilt of the accused persons and upon appreciation of circumstances and the evidence adduced by the prosecution, courts below rightly convicted the appellants and the concurrent findings recorded by the courts below cannot be interfered with.

10. We have carefully considered the evidence, materials on record and the rival contentions and gone through the judgments of the courts below.

11. Admittedly, there is no eye-witness and the prosecution case is based on circumstantial evidence. The circumstances as can be culled out from the judgment of the courts below relied upon by the prosecution and accepted by the courts below to convict the appellants are:-

(i) from the fateful night of 3.2.2010 till the morning of 4.2.2010, when the incident is alleged to have taken place inside the privacy of the hotel room and in such circumstances the accused had all the opportunity to commit the offence;

(ii) the accused had no plausible explanation to offer as to the injuries on the deceased and the death of the deceased;

(iii) the accused failed to prove the defence plea of *alibi* that in the wee hours of 4.2.2010, they had gone outside the hotel for sight seeing and after returning to the hotel room, they saw the deceased unconscious;

(iv) the intimacy developed between the accused alienated them from the deceased and as a love triangle was formed and prompted by this motive, the accused eliminated Francesco Montis on the fateful day; and A

(v) medical evidence supports prosecution version that the death was homicidal and deceased was strangled to death. B

12. Upon consideration of evidence adduced by the prosecution on the above circumstances and after referring to various judgments on circumstantial evidence, the trial court as affirmed by the High Court, found that all the circumstances suggested by the prosecution against the appellants are proved beyond reasonable doubt and form a complete chain pointing to the guilt of the accused beyond any reasonable doubt and on those findings, convicted the appellants for the charge under Section 302 IPC read with Section 34 IPC. C D

13. In every case based upon circumstantial evidence, in this case as well, the question that needs to be determined is whether the circumstances relied upon by the prosecution are proved by reliable and cogent evidence and whether all the links in the chain of circumstance are complete so as to rule out the possibility of innocence of the accused. E

14. There is no doubt that conviction can be based solely on the circumstantial evidence. But it should be tested on the touchstone of the law relating to circumstantial evidence. This Court in *C. Chenga Reddy & Ors. vs. State of A.P.*, (1996) 10 SCC 193, para (21) held as under :- F

“21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved G H

A circumstances must be consistent only with the hypothesis
of the guilt of the accused and totally inconsistent with his
innocence. In the present case the courts below have
overlooked these settled principles and allowed suspicion
to take the place of proof besides relying upon some
B inadmissible evidence.”

15. After referring to a catena of cases based on
circumstantial evidence in *Shivu and Anr. vs. Registrar
General, High Court of Karnataka & Anr.*, (2007) 4 SCC 713,
this Court held as under:-

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“12. It has been consistently laid down by this Court that
where a case rests squarely on circumstantial evidence,
the inference of guilt can be justified only when all the
incriminating facts and circumstances are found to be
D incompatible with the innocence of the accused or the guilt
of any other person. {See *Hukam Singh v. State of
Rajasthan*, (1977) 2 SCC 99; *Eradu v. State of
Hyderabad* (AIR 1956 SC 316), *Earabhadrappa v. State
of Karnataka* (1983) 2 SCC 330, *State of U.P. v. Sukhbasi*
E (1985 (Supp.) SCC 79), *Balwinder Singh v. State of
Punjab* (1987) 1 SCC 16 and *Ashok Kumar Chatterjee
v. State of M.P* (1989 Supp. (1) SCC 560) The
circumstances from which an inference as to the guilt of
the accused is drawn have to be proved beyond
F reasonable doubt and have to be shown to be closely
connected with the principal fact sought to be inferred from
those circumstances. In *Bhagat Ram v. State of Punjab*,
AIR 1954 SC 621, it was laid down that where the case
depends upon the conclusion drawn from circumstances,
G the cumulative effect of the circumstances must be such
as to negative the innocence of the accused and bring
home the offences beyond any reasonable doubt.”

16. In *Padala Veera Reddy v. State of A.P. and Ors.*,
1989 Supp. (2) SCC 706, it was laid down that in a case of

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circumstantial evidence such evidence must satisfy the following test:- A

- (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; B
- (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 C
- (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the 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 *Gambhir v. State of Maharashtra (1982) 2 SCC 351*)." D
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17. Adverting to the case in hand, it emerges from the evidence that the accused and deceased reached Varanasi on 31.1.2010 and checked in at hotel Buddha. On 1.2.2010 and 2.2.2010, the tourists went around to explore the city and visited important places. On 3.2.2010, since the deceased complained of mild headache, the accused and the deceased went out late at 11.00 A.M. and returned back to the hotel at 2.30 P.M. as they planned to see famous 'Subahe Bararas' the next morning. In his evidence, PW-2 Ajit Kumar stated that on the night of 3.2.2010, on order from the tourists, PW-2 served two plates of vegetable fried rice in the room. PW-2 further stated that after serving two plates of vegetable fried rice, while F
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A he was getting out of the room, second appellant Elisa Betta
B Bon asked him 'not to disturb till next morning' and thereafter
the second appellant bolted the door from inside and thereafter
no person ever visited their room. The trial court and the High
C Court have taken this as one of the important links of evidence
to conclude that from the night of 3.2.2010, till next day morning
8.00 A.M., the accused-appellants remained inside the hotel
room. Be it noted, this vital evidence that the second appellant
asked PW-2 Ajit Kumar-Waiter, 'not to disturb them till next day
morning' was not stated by PW-2 before the Investigating
D Officer, when the Investigating Officer recorded PW-2's
statement under Section 161 Cr.P.C., which in our view,
seriously affects the credibility of PW-2. The courts below
ignored this vital aspect observing that it is only an explanation
or introduction to the testimony of PW-2.

D 18. Be that as it may, an important circumstance relied
upon by the prosecution and accepted by the courts below is
that the offence had taken place inside the privacy of the hotel
room in which the accused and the deceased were staying
together and only the accused had the opportunity to commit
E the offence. Prosecution mainly relied upon Section 106 of
Indian Evidence Act which says that when any fact is especially
within the knowledge of any person, the burden of proving that
fact is upon him. Prosecution mainly relied upon the
circumstance that the occurrence was inside the hotel room and
F that death had occurred in the privacy of the hotel room and
that the appellants have no plausible explanation for the death
of Francesco Montis and the absence of explanation or untrue
explanation offered by the accused point to their guilt.

G 19. The principle underlying Section 106 of the Evidence
Act is that the burden to establish those facts, which are within
his personal knowledge is cast on the person concerned, and
if he fails to establish or explain those facts, an adverse
inference may be drawn against him. Explaining the death of
deceased Francesco Montis, the appellants have stated that
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in the wee hours of 4.2.2010 at 4.00 A.M., they had gone to see the famous 'Subahe Banaras' and returned back to the hotel room at 8.00 A.M. and found the condition of Francesco Montis very serious and immediately informed PW-1 about the condition of their friend and then with the assistance of the hotel staff, Francesco Montis was taken to the hospital.

20. Learned counsel for the respondent-State contended that when the appellants have pleaded that they had gone out of the hotel room in the wee hours of 4.2.2010 and having taken plea of *alibi*, the burden is cast upon the accused to prove the defence plea of *alibi* and the accused had not adduced any evidence to show that they had gone out and visited 'Subahe Banaras' in the early hours of 4.2.2010. Learned counsel submitted that the plea of *alibi* was rejected by the concurrent findings of the courts below and the same cannot lightly be interfered with by this Court. In support of his contention, learned counsel for the respondent-State relied upon the judgment of this Court in *Gosu Jayarami Reddy and Anr. vs. State of Andhra Pradesh*, (2011) 11 SCC 766 wherein it was observed as under:-

"52. We may at the threshold say that a finding of fact concurrently recorded on the question of alibi is not disturbed by this Court in an appeal by special leave. The legal position in this regard is settled by the decision of this Court in *Thakur Prasad v. State of M.P.* (AIR 1954 SC 30 at p. 31, para 2)

"2. The plea of alibi involves a question of fact and both the courts below have concurrently found that fact against the appellant Thakur Prasad. This Court, therefore, cannot, on an appeal by special leave, go behind that concurrent finding of fact."

For the same proposition, reliance was also placed upon the judgment of this Court in *Munshi Prasad & Ors. vs. State of Bihar*, (2002) 1 SCC 351.

A 21. The defence plea offered by the appellants was that
in the wee hours of 4.2.2010, they had gone out and returned
to the hotel only to find out the serious condition of Francesco
Montis. The appellants being foreign nationals who visited India
as tourists, it would not have been possible for them to examine
B any witness either from the hotel or from the place which they
are said to have visited as they were tourists in India. In the facts
and circumstances of the case and in the light of the statement-
C explanation offered by the accused that in the wee hours of
4.2.2010 they had gone out to see 'Subahe Banaras', in our
considered view, the burden was for the prosecution to
establish that they remained inside the hotel room from
3.2.2010 till the next day morning 8.00 A.M. in the hotel.

22. To invoke Section 106 of the Evidence Act, the main
D point to be established by the prosecution is that the accused
persons were present in the hotel room at the relevant time.
PW-1 Ram Singh-Hotel Manager stated that CCTV cameras
are installed in the boundaries, near the reception, in the
kitchen, in the restaurant and all three floors. Since CCTV
E cameras were installed in the prominent places, CCTV footage
would have been best evidence to prove whether the accused
remained inside the room and whether or not they have gone
out. CCTV footage is a strong piece of evidence which would
F have indicated whether the accused remained inside the hotel
and whether they were responsible for the commission of a
crime. It would have also shown whether or not the accused had
gone out of the hotel. CCTV footage being a crucial piece of
evidence, it is for the prosecution to have produced the best
G evidence which is missing. Omission to produce CCTV
footage, in our view, which is the best evidence, raises serious
doubts about the prosecution case.

23. In his evidence, PW-1 has stated that he monitors the
affairs of the hotel on CCTV while sitting in reception. PW-1
H further stated that he saw the CCTV footage at the relevant time
and on the fateful night no person was having ingress or egress
to the said room. PW-13-Dharambir Singh, investigating officer,

also stated that he saw the full video recording of the fateful night on CCTV but he has not recorded the same in his case diary as nothing substantial emerged from the same.

24. The trial court as well as the High Court ignored this crucial aspect of non-production of CCTV footage. The trial court as well as the High Court relied on the oral testimony of PW-1-Ram Singh, hotel manager, that no one entered Room No. 459 between the relevant period on the intervening night of 3.2.2010 and 4.2.2010 which is based on the CCTV footage. Courts below accepted the version of PW-1 and PW-13 to hold that there was no relevant material in the CCTV footage to suggest that a third person entered the hotel room. The trial court and the High Court, in our view, erred in relying upon the oral evidence of PW-1 and PW-13 who claim to have seen the CCTV footage and they did not find anything which may be of relevance in the case.

25. With the advancement of information technology, scientific temper in the individual and at the institutional level is to pervade the methods of investigation. With the increasing impact of technology in everyday life and as a result, the production of electronic evidence in cases has become relevant to establish the guilt of the accused or the liability of the defendant. Electronic documents *strictu sensu* are admitted as material evidence. With the amendment to the Indian Evidence Act in 2000, Sections 65A and 65B were introduced into Chapter V relating to documentary evidence. Section 65A provides that contents of electronic records may be admitted as evidence if the criteria provided in Section 65B is complied with. The computer generated electronic records in evidence are admissible at a trial if proved in the manner specified by Section 65B of the Evidence Act. Sub-section (1) of Section 65B makes admissible as a document, paper print out of electronic records stored in optical or magnetic media produced by a computer, subject to the fulfilment of the conditions specified in sub-section (2) of Section 65B. Secondary

A evidence of contents of document can also be led under Section 65 of the Evidence Act. PW-13 stated that he saw the full video recording of the fateful night in the CCTV camera, but he has not recorded the same in the case diary as nothing substantial to be adduced as evidence was present in it.

B 26. Production of scientific and electronic evidence in court as contemplated under Section 65B of the Evidence Act is of great help to the investigating agency and also to the prosecution. The relevance of electronic evidence is also evident in the light of *Mohd. Ajmal Mohammad Amir Kasab vs. State of Maharashtra*, (2012) 9 SCC 1, wherein production of transcripts of internet transactions helped the prosecution case a great deal in proving the guilt of the accused. Similarly, in the case of *State (NCT of Delhi) vs. Navjot Sandhu @ Afsan Guru*, (2005) 11 SCC 600, the links between the slain terrorists and the masterminds of the attack were established only through phone call transcripts obtained from the mobile service providers.

E 27. The trial court in its judgment held that non-collection of CCTV footage, incomplete site plan, non-inclusion of all records and sim details of mobile phones seized from the accused are instances of faulty investigation and the same would not affect the prosecution case. Non-production of CCTV footage, non-collection of call records (details) and sim details of mobile phones seized from the accused cannot be said to be mere instances of faulty investigation but amount to withholding of best evidence. It is not the case of the prosecution that CCTV footage could not be lifted or a CD copy could not be made.

G 28. As per Section 114 (g) of the Evidence Act, if a party in possession of best evidence which will throw light in controversy withholds it, the court can draw an adverse inference against him notwithstanding that the onus of proving does not lie on him. The presumption under Section 114 (g) of the Evidence Act is only a permissible inference and not a

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necessary inference. Unlike presumption under Section 139 of Negotiable Instruments Act, where the court has no option but to draw statutory presumption under Section 114 of the Evidence Act. Under Section 114 of the Evidence Act, the Court has the option; the court may or may not raise presumption on the proof of certain facts. Drawing of presumption under Section 114 (g) of Evidence Act depends upon the nature of fact required to be proved and its importance in the controversy, the usual mode of proving it; the nature, quality and cogency of the evidence which has not been produced and its accessibility to the party concerned, all of which have to be taken into account. It is only when all these matters are duly considered that an adverse inference can be drawn against the party.

29. The High Court held that even though the appellants alleged that the footage of CCTV is being concealed by the prosecution for the reasons best known to the prosecution, the accused did not invoke Section 233 Cr.P.C. and they did not make any application for production of CCTV camera footage. The High Court further observed that the accused were not able to discredit the testimony of PW-1, PW-12 and PW-13 qua there being no relevant material in the CCTV camera footage. *Notwithstanding the fact that the burden lies upon the accused to establish the defence plea of alibi in the facts and circumstances of the case, in our view, prosecution in possession of the best evidence—CCTV footage ought to have produced the same. In our considered view, it is a fit case to draw an adverse inference against the prosecution under Section 114 (g) of the Evidence Act that the prosecution withheld the same as it would be unfavourable to them had it been produced.*

30. Yet another important piece of evidence which was not produced by the prosecution is relevant to be noted. On 4.2.2010, second appellant-Elisa Betta Bon informed PW-1 Ram Singh, hotel Manager that the condition of Francesco

- A Montis is very serious. On hearing this, PW-1 immediately went to room No. 459 where he saw the appellants were sitting and the deceased was lying unconscious. Thereafter, he immediately came down to the reception and along with hotel staff went back to the room and then they lifted Francesco
- B Montis by wrapping him in a blanket and took him to the hospital. PW-6-Uma Shankar had driven the car and Francesco Montis was taken to the emergency ward. PW-1 and other witnesses have stated that on examination of Francesco
- C Montis, doctor declared him 'dead'. Prosecution has neither examined the doctor nor produced the report that was prepared in the emergency ward of the hospital. Likewise, the death intimation sent to the police was also not produced. The report prepared by the doctor who examined Francesco Montis and declared him dead would have been yet another important
- D piece of evidence which would have contained earliest version of the accused and other relevant details.

31. Motive for the crime suggested by the prosecution is that physical intimacy and expression of love between the appellants had caused depression in the mind of Francesco
- E Montis which led to the animosity which prompted the appellants to commit the murder of deceased Francesco Montis. In this regard, reliance is placed upon statement of PW-3 Sunder (Waiter) who stated that on 3.2.2010, tourists of Room No. 459 ordered two cups of tea in the restaurant. He served two cups
- F of tea to the occupants of Room No. 459 at the hotel restaurant and he noticed A-1 and A-2 were sitting on one side of the table hugging, kissing and cuddling each other whereas the deceased who was sitting on the other side of the table looked gloomy and depressed. Reliance is also placed on evidence
- G of PW-2 Ajit Kumar (Waiter) who stated that on the night of 3 2 2010, when PW-2 served vegetable fried rice, A-2 told him 'not to disturb them till tomorrow morning'.

32. On behalf of the appellants, it was submitted that there was nothing like a love triangle between them and the deceased
- H and they are foreigners and their social values are substantially

different from the Indians. It was submitted that merely because Francesco Montis and Tomaso Bruno (first appellant) were accompanied by Elisa Betta Bon (second appellant) and all three were staying in the room, it cannot be inferred that intimacy developed between appellants to the annoyance of the deceased which created a motive in the long run for commission of the alleged crime by the appellants. It was submitted that prosecution has failed to establish the motive propounded against the accused persons which is an important circumstance in a criminal case based on circumstantial evidence.

33. There is, in our view, merit in the submission of the learned senior counsel for the appellants. Prosecution tried to establish the case against the accused by making improvements at various stages. The version of PW-3 that he saw A-1 and A-2 hugging, kissing and cuddling each other and that Francesco Montis was sitting on the other side of the table appearing depressed was not stated to the investigating officer PW-13 when he recorded PW-3's statement under Section 161 Cr.P.C. Likewise, version of PW-2-Ajit Kumar that on the night of 3.2.2010, the second accused asked him 'not to disturb till tomorrow morning' was also not mentioned in his statement recorded by the investigating officer under Section 161 Cr.P.C.

34. Where the case is based on circumstantial evidence, proof of motive will be an important corroborative piece of evidence. If motive is indicated and proved, it strengthens the probability of the commission of the offence. In the case at hand, evidence adduced by the prosecution suggesting motive is only by way of improvement at the stage of trial which, in our view, does not inspire confidence of the court.

35. Yet another circumstance relied upon by the prosecution is that the death is homicidal i.e. death is due to asphyxia as a result of strangulation as stated in Exs. Ka-10 and Ka-11 post-mortem reports. The first post-mortem on the

- A body of Francesco Montis was done on 5.2.2010 by PW-10-Dr. R.K. Singh. Then in pursuance to the direction issued by the District Magistrate as per the order of Chief Medical Officer, second post-mortem was performed on 6.2.2010 by a panel of doctors and the second post-mortem report is Ext. Ka-11.
- B The first post-mortem report discloses the following injuries:-

“Ante-Mortem Injury:

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1. On opening scalp, contusions 2 cm x 2 cm on the mid of forehead 3 cm above root of nose.
 2. On opening scalp, contusion 4 cm x 3 cm on left side head 2 cm above left ear.
 3. Abraded contusion (multiple) in area of 5 cm x 3 cm on right side neck 5 cm outer of mid line 8 cm below right ear.
 4. Multiple abraded contusion an area of 5 cm x 4 cm on left side neck 6 cm outer to mid line & 7 cm below left ear.
 5. Lacerated wound 2 cm x 1 cm x muscle deep on front of mid line of lower lip.
 6. Abraded contusion 2 cm x 2 cm on outer aspect of left knee joint.

F Internal Examination:

G Membranes of head congested. Sub arachnoid Haematoma present, Spinal cord not opened, Pleura congested, Trachea contused, no abnormality detected in larynx, both the lungs congested, Pericardium congested.

H Chambers of heart full, peritoneum congested, 100 Gms digested food was found in stomach, small intestine contained digested food and gas and large intestine contained faecal matter and gas, pancreas, spleen,

kidneys congested, bladder was empty. In the opinion of the doctor, cause of death was asphyxia as result of strangulation. However, viscera preserved for chemical analysis to exclude poisoning.” A

In the second post-mortem Ext. Ka-11, substantially there were no changes except signs of decomposition. Second post-mortem reiterates that cause of death is “asphyxia as a result of strangulation”. According to the medical opinion, a hard blunt substance appears to have been used to cause strangulation leading to the death on account of asphyxia. However, no such hard or blunt substance was found or seized from the room. Doctors have not found any physical signs of internal injuries viz. any extravasation of blood in the tissue or any laceration in the underlying muscles. Considering postmortem reports Exts Ka-10 and Ka-11 and the evidence of PWs 10 and 11, in our view, reasonable doubts arise as to the cause of death due to asphyxia as a result of strangulation. B
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36. Let us consider the injuries found on the body of deceased Francesco Montis vis-à-vis symptoms of strangulation. As per Modi’s Medical Jurisprudence And Toxicology 24th Edition. 2011, page No.453 the symptoms of strangulation are stated as under:- E

“(b) *Appearances due to Asphyxia*.-The face is puffy and cyanosed, and marked with petechiae. The eyes are prominent and open. In some cases, they may be closed. The conjunctivae are congested and the pupils are dilated. Petechiae are seen in the eyelids and the conjunctivae. The lips are blue. Bloody foam escapes from the mouth and nostrils, and sometimes, pure blood issues from the mouth, nose and ears, especially if great violence has been used. The tongue is often swollen, bruised, protruding and dark in colour, showing patches of extravasation and occasionally bitten by the teeth. There may be evidence of bruising at the back of the neck. The hands are usually clenched. The genital organs may be congested and there F
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A may be discharge of urine, faeces and seminal fluid.

(ii) **Internal Appearance.**- The neck and its structures should be examined after removing the brain and the chest organs, thus allowing blood to drain from the neck to the blood vessels. There is extravasation of blood into the subcutaneous tissues under the ligature mark or finger marks, as well as in the adjacent muscles of the neck, which are usually lacerated. Sometimes, there is laceration of the sheath of the carotid arteries, as also their internal coats with effusion of blood into their walls. The cornua of the hyoid bone may be fractured also the superior cornua of thyroid cartilage but fracture of the cervical vertebrae is extremely rare. These should be carefully dissected in situ as they are difficult to distinguish from *dissection artefacts* in the neck.....”

D 37. PW-10 Dr. R.K. Singh was subjected to lengthy cross-examination in the trial court which appears to have spread over a number of days. When PW-10 was confronted with the injuries found on the body of Francesco, he has stated that there was no injury found in the Superior Cornua of Thyroid bone and no frothy mucous was found in the larynx and trachea. By going through the evidence of PW-10, it is seen that it was elicited from PW-10 that the prominent symptoms of strangulation were conspicuously absent. It is apposite to refer to two questions and answers elicited from PW-10 which are extracted hereunder:-

G **QUESTION:** Is it correct that in the present case that none of the external appearances in cases of death by strangulation viz. the petechiae in the eye, the puffiness and swollen face and protruding out of tongue and petechiae in tongue and bloody foam from the mouth and bulging out of eyes, swelling in tongue, bruising and the base of the neck, nails and finger marks on the neck and hands are clenched were present in this case?

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ANSWER: As I said earlier all these signs depend on mode of death and it varies from person to person and time of the post mortem, time of death and how death was caused. I agree that all the above signs mentioned in this question were not present in present case. It may be present in death by asphyxia due to strangulation. But it is not necessary that all these signs must be present in every case of asphyxial death by strangulation.

QUESTION: Is it correct that all the internal appearances in death by strangulation were not present in this case viz. (i) subcutaneous tissues and————muscles are lacerated, (ii) extravasation of blood into subcutaneous tissues, (iii) fracture of cornia of hyoid bone, (iv) non fracture of superior cornia of hyoid bone, (v) non fracture or rupture in cartilage rings (vi) non rupture or fracture of trachea (vii) edema in the brain, (viii) petechial haemorrhage, (ix) petechiae in the lungs, (x) laceration in sheath of carotid arteries (xi) compression in the arteries and bones (xii) larynx and trachea containing frothy mucous were absent in present case?

ANSWER As per ecchymosis around injury 3-4, it was present at the time of Post-Mortem, hence I have written injury No. 3 and 4 as ante mortem injuries. Rest of findings depend on mode of death and timing of Post Mortem since death and manner of causing injuries. The aforesaid symptoms suggested in the question were not present in this case. It is not necessary that these symptoms must be present in every case of death by strangulation."

38. Of course PW-10 has explained that by and large the above symptoms of strangulation as put up to him in the questions would be present in cases of strangulation. PW-10 further stated that those symptoms need not necessarily be so in all cases of strangulation. In our considered view, the conspicuous absence of symptoms of strangulation coupled

A with other circumstances militates against the case of the prosecution.

B 39. It is a settled proposition of law recently reiterated in the following cases viz. *Dayal Singh And Ors. vs. State of Uttaranchal* (2012) 7 SCALE 165, *Radhakrishna Nagesh vs. State of Andhra Pradesh*, (2013) 11 SCC 688, *Umesh Singh vs. State of Bihar* (2013) 4 SCC 360 that there is possibility of some variations in the exhibits, medical and ocular evidence and it cannot be ruled out. But it is not that every minor variation or inconsistency would tilt the balance of justice in favour of the accused. Where contradictions and variations are of a serious nature, which apparently or impliedly are destructive of the substantive case sought to be proved by the prosecution, they may provide an advantage to the accused.

D 40. The courts, normally would look at expert evidence with a greater sense of acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory and unsustainable. We agree that the purpose of an expert opinion is primarily to assist the court in arriving at a final conclusion but such report is not a conclusive one. This Court is expected to analyse the report, read it in conjunction with the other evidence on record and then form its final opinion as to whether such report is worthy of reliance or not. As discussed earlier, serious doubts arise about the cause of death stated in the post-mortem reports.

G 41. Even if we were to accept that the death was due to strangulation which was caused by an object, the non-recovery of alleged object weakens the prosecution case. Furthermore, it has to be pointed out that it has come in evidence that the deceased was a strongly built man and in the circumstances, it is rather strange that no external marks were found on the body which could demonstrate that there had been a struggle. The absence of struggle and the corresponding external injuries is yet another vital aspect which had gone unnoticed by the courts below.

42. By and large, this Court will not interfere with the concurrent findings recorded by the courts below. But where the evidence has not been properly appreciated, material aspects have been ignored and the findings are perverse under Article 136 of the Constitution, this Court would certainly interfere with the findings of the courts below though concurrent. In a case based on circumstantial evidence, circumstances from which inference of guilt is sought to be drawn should be fully proved and such circumstances must be of conclusive nature pointing to the guilt of accused. There shall be no gap in such chain of circumstances. In the present case, the courts below have not properly appreciated the evidence and the gap in the chain of circumstances sought to be established by the prosecution. The courts below have ignored the importance of best evidence i.e. CCTV camera in the instant case and also have not noticed the absence of symptoms of strangulation in the medical reports. Upon consideration of the facts and circumstances of the case, we are of the view that the circumstances and the evidence adduced by the prosecution do not form a complete chain pointing to the guilt of the accused and the benefit of doubt is to be given to the accused and the conviction of the appellants is liable to be set aside.

43. In the result, conviction of the appellants under Section 302/34 IPC is set aside and the appeal is allowed. Appellants be released forthwith.

Nidhi Jain

Appeal allowed.