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IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON: 29.05.2012
PRONOUNCED ON: 02.07.2012

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CRL.A. 828/2011
CRL.M. (BAIL) 286/2012

SAT NARAIN Appellant
Through: Mr. R.P. Luthra, Advocate.

versus

STATE (GOVT OF NCT) OF DELHI Respondent
Through: Mr. Sanjay Lao, APP.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE S.P. GARG

MR. JUSTICE S.RAVINDRA BHAT

%1. The appellant (referred to hereafter as such or as Sat Narain) impugns a judgment and order of the learned Additional Sessions Judge in SC. No. 75/2012 by which he was convicted for the offence punishable under Section 302/34 IPC, and sentenced to undergo rigorous imprisonment for life, besides other sentences.

2. The prosecution case in brief is that on 13.01.2004 P.S. Punjabi Bagh received intimation, DD No. 8A about a missing person. ASI Beer Singh along with Constable Jabbar Singh went to Transport

Centre Road Carrier of India, Punjabi Bagh and inquired about Truck No HR 38A-2940. During search of the missing truck, intimation was given to the PCR and information was received that the said truck was found in Malviya Nagar. The police party went to Malviya Nagar and found one Sh. Kapil Rastogi near the truck. His statement was recorded in which he said that the said truck belongs to his transport company. On 11.01.2004, his driver Nagender Kumar Dubey and helper, the appellant Sat Narain went on this truck to “the Road Carrier of India”, 23 Transport Centre, Punjabi Bagh further to his instructions to load Brook Bond Taj Mahal tea. The loaded truck started for Ghaziabad at 9.00 PM but did not reach there even by 12.00 AM. The truck was searched for unsuccessfully; information was given to PCR and he was intimated at about 6.00 PM on 13.01.2004 that the said truck was lying parked at Malviya Nagar, DESU office. The driver Nagender Kumar Dubey was not found in the truck but the helper Sat Narain was in the truck but could not give any satisfactory answer regarding the whereabouts of driver Nagender Kumar Dubey. He also stated that he suspects that the helper Sat Narain in collusion with some other person have abducted the driver to misappropriate the goods in the truck. On the statement of Kapil Rastogi, an endorsement was made and *rukka* sent to the police station for registration of FIR. Sat Narain was arrested and his disclosure statement was recorded. At his pointing out, the dead body of Nagender Kumar Dubey was recovered from the jungle at Mehrauli Badarpur Road near Tuglakabad Fort. The crime team was called there. The site plan was prepared. The inquest proceedings were

conducted under Section 174 Cr.PC. The dead body was sent to mortuary for postmortem examination. Another individual, co-accused Shiv Ram was arrested and clothes of the deceased were recovered from him. Further investigation was conducted by Inspector/SHO Rajender Singh, who after getting the postmortem on the dead body of the deceased handed it over to the relatives of the deceased. The doctor's opinion was that death was on account of strangulation. Another co-accused Bhupinder Singh too was arrested and a carton of the tea was recovered. The statements of witnesses were recorded under Section 161 Cr.PC. The viscera was sent for chemical analysis to CFSL, Kolkata and on completion of investigation, the accused persons were charged with committing various offences. Sat Narain was accused of having committed offences punishable under Sections 302/34/364/201/408 IPC. All accused claimed innocence, and were tried. No *prima facie* case for any offence was made out against Bhupinder; he was therefore discharged. According to the order dated 12.11.2010, proceedings against accused Shiv Ram were closed as he had expired.

3. In support of its case the prosecution has examined 25 witnesses in all. The prosecution also relied on several documents and exhibits. After considering all these, and the arguments on behalf of the parties, the Trial Court held that the accused was guilty for the offences he was charged with and convicted him, and sentenced to undergo the imprisonment term mentioned previously.

4. The Trial Court held that the prosecution had proved its case beyond reasonable doubt. It largely depended on the last seen theory,

deposed to by the prosecution witnesses, and the testimonies of the truck owner as well as his son; the recovery of the dead body of Nagendra Dubey, at the instance of the accused, and the seizure of the truck laden with tea, as well as recovery of some incriminating articles at the instance of the accused.

5. Shri R.P. Luthra, learned counsel for the appellant, urged that the Trial Court fell into grave error in convicting Sat Narain. It was submitted that the entire prosecution story about Sat Narain being “last seen” in the company of the deceased is unsubstantiated by the evidence on record. It was urged that neither the truck owner, nor his son, nor employee had seen Sat Narain actually boarding the truck with Nagendra Dubey, at the time, when the prosecution alleged that **he did so**. If none of the witnesses had in fact seen this circumstance, the court could not have inferred, much less found, that the “last seen” circumstance applied in this case.

6. Learned counsel emphasized the fact that the prosecution did not prove any motive on the part of the accused. Submitting that proof of motive was a vital pre-requisite for the success of every prosecution in cases of circumstantial evidence, it was highlighted that the entire version about the appellant killing Nagendra Dubey, and then prominently being near the missing truck, is suspicious and strongly smacks of a set up to frame him. It was highlighted that in fact, if the accused were the killer, there was no reason for him to linger; the easiest thing for him would have been to flee, with the goods, and sell them. The circumstance of his being near the missing truck not only is improbable, but contrary to ordinary human conduct.

7. It was argued that neither PW-5 nor his father, PW-7 had seen Sat Narain leave in the truck, when it went for loading tea. Furthermore, importantly, the first intimation (Ex. PW-2/A recorded at 12:10 noon) did not name the accused. His alleged involvement as fellow traveler in the truck surfaced only much later, on 13th January, 2004, after it went missing, and more importantly, after it was allegedly discovered in Malviya Nagar. The first intimation (Ex. PW-2/A) very crucially mentioned that the truck went missing on Sunday night. Counsel also submitted that according to the prosecution the accused had been hired a few days before the incident, and it was his first trip as helper. Counsel highlighted that PW-7 could not even identify the appellant in court.

8. It was argued that the testimony of PW-12 Ram Shakal, who proved the disclosure statement, and recovery of the body at the instance of the appellant (Ex. PW-12/A) brings out the inherent contradictions and falsities in the prosecution story. The witness stated that the truck and the appellant were found on 14th January, 2004 – a fact which he clearly reiterated during cross examination. His explanation as to who went with the police, to Tughlakabad when the deceased's body was found, starkly contradicted the testimony of PW-5 and PW-11, who disclaimed their presence. Both those witnesses had stated that the appellant and the truck were traced on 13th January, 2004; this witness deposed to the contrary. He also mentioned that the truck was searched randomly, and that no one informed the police who apparently went to Malviya Nagar on their own, and arrested the accused. These contradictions were vital and had the effect of

undermining the prosecution story altogether.

9. Counsel for the appellant argued that none of the witnesses who had actually seen the loading of the truck, made any mention of the accused, as the helper who boarded the truck with the deceased, or even identify him. This showed that apart from the interested testimony of PW-5, PW-7 and PW-11 (none of whom had seen the accused with the driver) there was no evidence of the appellant being “last seen” with the deceased.

10. Learned counsel stressed the fact that the post mortem report Ex. PW-16/A revealed that Nagendra Dubey the deceased had died 3-4 days before the post mortem proceedings began (i.e on 15-1-2004 at 2-15 PM). Thus, even if the prosecution version about the last seen circumstance were assumed to be correct, the time gap between the said fact (late evening of 11-1-2004 and 12-1-2004 afternoon) was too much, to permit applicability of the doctrine.

11. It was urged that the prosecution story is improbable, because according to it, the truck went missing on 11th January, 2004; yet no intimation was given to the police for two days. Counsel urged that if indeed this was correct, there is no explanation why the truck owner or his relatives reported the incident late. This delay, coupled with the material on record – which revealed that the first intimation was given on 13-1-20004, and the FIR recorded much later, is unexplained. Seen together with the testimonies of witnesses, some of whom deposed that the truck was recovered on 14-1-2004, and others, who reported that it was recovered the previous day, the prosecution story was entirely suspicious.

12. It was highlighted by learned counsel for the appellant that the strongest circumstance relied on by the prosecution, i.e recovery of the deceased's body from the jungles of Tughlakabad, was not supported by credible evidence. It was submitted that the evidence of PW-11 and PW-12 was that the appellant accompanied the police party and led them to the jungles, where the body was discovered. However, the evidence of PW-14, PW-23 and PW-24 established that the accused did not go with the police party. In fact, the deceased's relative, PW-14 mentioned that when he went to the police station in the morning of 14-1-2004, he was told that the body was lying in the jungles of Tughlakabad. He did not say that the accused accompanied him; he went along with the police party only at 4:00 PM in the evening. Similarly, PW-13's deposition established that the accused did not accompany the police party when the latter went to the jungles to recover the body. His deposition also showed that the police had suspected him initially, and had even detained him.

13. Learned counsel submitted that the Trial Court fell into error in not applying the golden rule which every court has to, in circumstantial evidence cases, i.e. to prove every circumstance conclusively, and also prove each link equally convincingly and at the same time establish that the accused, and none else could have committed the offence and that every hypothesis of his innocence had been ruled out. Applying those criterion, the prosecution had woefully failed to prove its case, much less beyond reasonable doubt. The conviction and sentence handed down by the Trial Court therefore, called for interference.

14. The learned APP argued that there is no error or infirmity in the prosecution case, or with the findings of the Trial Court, requiring interference. Recalling the role of an appellate court, it was highlighted that unless the conviction and sentence disclosed substantial or compelling reasons, in the appreciation of evidence or the law, the High Court would be slow in overturning a judgment of the Trial Court.

15. The learned APP elaborated the submissions, by stating that the evidence of PW-7, PW-11 and PW-12 conclusively showed that the accused had left the Transport Company in order to load goods and then proceed to Ghaziabad. There could be no doubt that he was last seen in the company of the deceased – a fact also established by PW-15, the *dhaba* owner, who had sold bread and omlette to him. He positively identified the accused, as did PW-13. The latter was talking to the accused, when he was nabbed by the police, at Malviya Nagar.

16. It was submitted that contradictions as to time, place or date, and which witness had accompanied the police, cannot be considered serious enough to undermine the prosecution story, which was credible, and trustworthy. Counsel highlighted that if witnesses are too consistent, and echo each other's experiences, or what they see, the court would have to be instantly on its guard, as that would be indicating a concocted or tutored version. On the other hand, minor variations in the testimonies tend to point to the veracity of witnesses, who are not expected to corroborate each other in all minor details.

17. The prosecution argued that the single most incriminating evidence in this case, was the knowledge of the accused, about the

place where the body had been hidden. It was emphasized that unlike in the case of recovery of other articles, the recovery (upon the disclosure statement of an accused) of the *corpus delecti* almost always points to guilt of the accused. In the case of such knowledge about the body – which cannot be equated with the recovery of common objects – the onus is on the accused, to explain how he became aware of the location. The failure to provide a reasonable explanation can result in a conviction. This recovery had to be seen along with the recovery of the rope which had been used to strangle the deceased. That too was recovered – as well as other personal articles of the deceased – pursuant to the disclosure statement of the accused.

Analysis and Findings

18. PW-3 ASI Sultan Singh deposed that on 13.01.2004 he was posted as duty officer P.S Punjabi Bagh, and that at about 9.20 pm a *rukka* was produced before him by Constable Jaber Singh which was sent by ASI Bir Singh, based on which he registered FIR No.63/2004. He proved the copy of the same as Ex.PW-3/A. He also made his endorsement on the *rukka* (Ex.PW3/B). PW-4 HC Surender Kumar deposed to, on 14.01.2004, being posted with mobile crime team, West District as photographer and to receiving a message in the office from SHO P.S. Punjabi Bagh, to reach the crime scene. They went to a jungle near a *Qilla* on Mehrauli Badarpur Road, Tuglakabad. About 15 feet inside the jungle, a dead body was found. According to directions of SHO and SI Sheesh Ram, he took 15 photographs of the dead body and the spot which were proved by him as Ex.PW-4/A-1 to

A-15 and Ex. PW4/B.

19. PW-5 Mahim Rastogi deposed that he was working as transporter and working under the name of Ishan Carrier and that he was registered owner of truck No.HR 38A-2940. On 08.01.2004 he had sent his truck from Ghaziabad to Delhi. On 10.01.2004 he had loaded goods in his truck which were cartons of Brook Bond Taj Mahal Tea. The goods had been loaded through the concern, "Road Carrier of India", with its office at Punjabi Bagh and had been received from Vapi. The goods were booked in the name of Hindustan Livers Ltd, at night. The truck did not reach Ghaziabad the next morning. On 11.01.2004, as the truck did not reach Ghaziabad, they checked all the barriers from UP Ghaziabad to Delhi but did not find it. Thereafter his father sent a telegram to PS Punjabi Bagh since the police refused to lodge FIR on a complaint. He searched for the truck on his own; during course of the search, one of the employees of the concern and his brother Kapil found the truck in Malviya Nagar area. His brother telephonically informed him about it and then he and his father took the police force from Punjabi Bagh and reached the spot where the truck was parked. PS. Punjabi Bagh had called up PCR Malviya Nagar and had also reached the spot. Sat Narain was apprehended along with the truck. One or two cartons of tea were missing; the truck driver was untraceable. The truck was brought by the police to P.S Punjabi Bagh.

20. PW-7 Yoginder Rastogi deposed that the truck was in the name of his son PW-5. In January 2004 it was loaded with tea boxes for being delivered at Ghaziabad from Punjabi Bagh. On 14.01.2004 he had

gone to P.S Punjabi Bagh where the truck was found lying parked. The truck conductor Sat Narain was in police custody and was brought to the truck; he took out a bundle of plastic rope from under the driver's seat. It was measured as 30 ft and was put in a plastic bag and sealed by the police. The Police had prepared some documents and obtained his signatures on them. PW-8 Rajesh stated that on 11.01.2004 he was in service with Road Carrier of India at 23 Transport Centre, Punjabi Bagh. On that day the Truck no HR-38A-2940 was loaded from their office with tea leaf. Ajeet got the same loaded for Ghaziabad. He handed over a copy of aforesaid entry to the IO on 06.04.2004 vide seizure memo Ex PW 8/A. Photocopy of the entry is proved as Ex PW 8/B. PW-9 Ajeet Singh deposed that on 11.01.2004 he was working as Freight incharge of Road Carrier of India Punjabi Bagh. On that day, he got loaded tea leaf in Truck no.HR-38A-2940 for Ghaziabad. A challan No.111507 was prepared for it, copy of which is proved as Ex PW 8/B. ₹ 1400/- were given as advance to driver Nagender. Neither the goods reached the destination nor the driver returned. Both PW-8 and PW-9 did not mention anything about the accused, or that he boarded the truck, with Nagendra Dubey.

21. PW-11 Kapil Rastogi stated that he was running a transport company called "Ishan Carrier". On 11.01.2004, Truck No. HR-38A-2940 was sent by him to Road Carrier of India situated at 23 Transport Centre, Punjabi Bagh. The truck driver was Nagender Kumar Dubey and accused was the helper. The witness said later that the truck was sent by him on 10.01.2004 to Punjabi Bagh for loading tea. Driver

Nagender Kumar told him on telephone at about 8.00 p.m that he had loaded the tea leaf cartons in the said truck for Ghaziabad. Nagender Kumar also told him that he would leave the Transport Centre after 9.00 p.m, after the expiry of the traffic “no entry” timing. The truck was to reach Ghaziabad within 2-3 hours. Till 11.00 A.M on 12.01.2004 the truck did not reach their godown. They waited till 3-4 P.M for arrival of the truck. Then they checked the truck from the police station as well as the route but were unable to find it. On 13.01.2004, they informed the PCR on phone at about 11.00-12.00 AM about the missing truck along with driver. At about 6.00 PM, in the evening they received the information that the truck was parked in Malviya Nagar, Delhi. This witness corroborated the statement of PW-5 about the nabbing of Sat Narain. He deposed about lodging a report at P.S Punjabi Bagh regarding the missing driver Nagender. He proved his statement as Ex PW 11/A. He checked the cartons of tea leaf after removing the tarapoulin and later on they found that one carton of tea was missing from the truck; and half the truck cover was open. The witness deposed that on 14.01.2004 he was with the IO during investigation of the case and the accused was interrogated. The accused made disclosure statement Ex PW 11/B regarding his involvement in the case along with his associates. He also disclosed that he had thrown the dead body of Nagender in the jungles of Tuglakabad Fort. The accused had said that he intoxicated the deceased by giving him certain drugs and later strangled him with the help of his associate, who lived in Malviya Nagar. He also stated about hiding a rope, (used for strangulation), under the truck driver’s

seat; he offered to get body of the Nagender and rope recovered. The Police recorded his statement in this regard on that day. Sat Narain was employed as helper 6-7 days prior to the incident and Nagender was employed on the truck 4-5 days prior to the incident. The truck's registered owner was PW-5 Mahim Rastogi.

22. PW-12 Ram Sakal Singh deposed that he was working as Supervisor in Road King Roadways, 393, Patel Marg, Ghaziabad and that the deceased worked as driver in their truck No. HR 38A 2940. On 14.01.2004 they received information that Nagender was missing. The witness corroborated the statement of PW-11 about interrogation of the accused and recovery of the deceased's body. He identified the body. The Police recorded his statement at the spot. PW-13 Babu Lal stated that he was working as private driver for 15 years and used to work at a tempo stand in the Malviya Nagar market. He knew the accused since he was working as a tempo driver and also used to park his tempo at the same stand. The accused left the job about 4-5 years prior to 2004. PW-13 further stated that on 13.01.2004 he was present at Begum Pur Road and was talking with the accused, when the police reached there and arrested him. When he was talking with the accused at that time, a covered and loaded truck was parked there. He saw the truck one day earlier to that. Upon inquiring, the accused said that at present he was on duty on that truck. The IO recorded his statement. The Prosecution, with permission of court, put leading questions to which he could not remember the truck number. The witness also stated that he had been detained by the police, but later released.

23. PW-14 Vijay Kant was related to the deceased, a cousin of his

father; on 14.01.2004, he and his uncle Shiv Prasad Dubey went to the bushes (jungle) in Tuglakabad Fort, Delhi and found the body of deceased Nagender Dubey lying in the bushes. They correctly identified the dead body. The IO recorded his statement in this regard. PW-15, Baldev Bhatia testified to running a *dhaba* at Punjabi Bagh Transport Centre and that he served tea and omelette in the evening. On 11.01.04, the accused went to his *dhaba* at about 07.00-07.30 PM and asked for two plates of bread omelettes. He had asked for two extra slices. After payment, the accused ran away. After about 3-4 days, the accused came with the police to his *dhaba*. He identified the accused before the police and told that was the same man who had taken bread omelettes from his *dhaba* on 11.01.2004. His statement was recorded by the police on 14.01.2004.

24. According to PW-16 Dr. Sunil Kumar Sharma the postmortem examination of Nagender's body revealed that Rigor Mortis was present over the lower limbs; postmortem staining was present over the back and dependent parts. There was slight greenish discoloration over the right lower abdomen. The antemortem injuries were:

1. Reddish Brown colour ligature marks over the upper part of the neck measuring 31 cms in length and 3 cms in width. On deeper neck dissection there was mild extravasation of blood in the subcutaneous and muscular tissues.
2. Superficial scratched abrasions over the right maxillary area of the face measuring 5 cms x 3 cms.
3. Superficial scratched abrasions over the right anterior chest wall size 8 cms x 4 cms.

4. Superficial scratched abrasions over the back right side size 10 cms x 5 cms. 5. Postmortem lacerated wound over the left Iliac fossa opening abdominal cavity measuring 20 cms x 5 cms, margins of the wound irregular without any extravasation of the blood.

Internal Examination revealed that both lungs were congested, voluminous with sub pleural petechial haemorrhages. The rest of the organs were normal. Both the testes and penis were absent without any associated haematoma. The organs were preserved for chemical analysis. All the above mentioned were sealed and handed over to IO. Time since death about 3 to 4 days. The witness said that the cause of death was asphyxia due to ligature strangulation which was sufficient to cause death in the ordinary course of nature. The opinion regarding the ligature material submitted by the IO with seal SR was that it was a 30 feet long plastic rope red – green in colour.

25. PW-16 also deposed that injury No.1 could have been the result of the plastic rope. The plastic rope was resealed and was handed over to IO. The postmortem report was proved by this witness as Ex.PW 16/A; and it also stated that he preserved the viscera. PW-18 H.C Jabar Singh stated that on 14.01.2004, he was posted at PS Punjabi Bagh; he joined the investigation with SI Sheesh Ram that day; the accused was arrested in his presence by arrest memo, Ex. PW-18/A. His personal search was carried out by memo, EX.PW-18/B. His statement was recorded by the IO.

26. PW-19 A.S. Datta, Junior Scientific Officer at CFSL, deposed to having received, on 19.02.2004, a sealed jute box and a sealed paper packet from the Additional Deputy Commissioner of police,

West District, New Delhi in connection with the case No. 63/04 dated 13.01.2004, PS Punjabi Bagh under Section 365/328/408/302/201/411/34 IPC. The jute box was marked 105/1 and paper packet was marked as 105/2; it contained two sealed big glass jars and two sealed small glass bottles containing viscera and blood of Nagender Dubey. The exhibits were analyzed by chemical methods and chromatographic techniques and the result was no common poison was detected in the said exhibits. The detailed report in this respect was proved by him as Ex.PW 19/A.

27. PW-22 Constable Virender Kumar deposed that on 15.01.2004 he was posted at PS Punjabi Bagh and joined investigation with SI Sheesh Ram. The accused Shiv Ram was arrested by SI Sheesh Ram from Panchsheel Park *jhuggis*. Pursuant to his disclosure statement, Shiv Ram took the police party to the jungle near Tughlakabad Fort, at M.B. Road through pointing out memo Ex.PW-22/ D. He had assisted in recovery of a brown color purse, a blue color pant and a pair of black colored shoes from his *jhuggi*. These were seized by memo, Ex. PW 22/E. The purse contained some documents and Rs.200/- which were the belongings of the deceased. On being put leading question, he admitted that the purse also contained a photograph of the deceased. The witness also identified the blue colored pant containing the label “Deep Tailor, Janak Puri S.Bad”, a pair of black shoes with label “LG” in the front, and a purse containing some documents, Rs.200/- and photographs as Ex.PW22/P1 to Ex. PW22/P3.

28. PW-23 ASI Beer Singh deposed that on 13.01.2004 he was posted at PS Punjabi Bagh; on receipt of DD No. 8A, (Ex.PW2/A), he

and Constable Jabbar Singh reached 23, Transport Centre, Punjabi Bagh. He made inquiries about the missing truck no. HR-38A-2940, and came to know that it was parked at Malviya Nagar. Thereafter he and Constable Jabbar Singh reached at Malviya Nagar near DESU Office where the truck was parked. The accused and the complainant Kapil Rastogi too met him. On questioning about the driver and about the presence of truck at Malviya Nagar, the accused did not give any satisfactory reply. He recorded the statement of Kapil Rastogi and prepared a *rukka* which is Ex. PW 23/A, and sent it to the police station through Constable Jabbar Singh. After registration of FIR, the investigation was entrusted to SI Sheesh Ram, who came to the spot and further investigation was taken over by him. SI Sheesh Ram seized the truck by memo Ex. PW 5/B. The truck was brought at the police station and deposited in Malkhana. PW-23 also deposed that on 14.01.2004 on interrogation of accused Sat Narain by SI Sheesh Ram, he gave disclosure statement which is proved as Ex. PW 11/B. The accused confessed that he had committed the murder of truck driver Nagender Dubey with the help of Shiv Ram and had thrown the body in the jungle near Tuglakabad Fort. On 15.01.2004 SI Sheesh Ram interrogated the accused Shiv Ram who gave disclosure statement Ex. PW 22/C. The witness was permitted to be cross-examined by the Additional Public Prosecutor during which he deposed the truck number and that it was loaded with 257 cartons of Brook Bond Taj Mahal Tea which were seized and that the accused, in his disclosure stated that the pant, shoes and purse of deceased driver Nagender were with the co-accused Shiv Ram and also offered to get the dead body

recovered from jungle near Tuglakabad Fort. He also deposed, during that cross examination by the prosecution, about recovery of articles from the premises of Shiv Ram, and that Sat Narain, on 14.01.2004 voluntarily led the police party to Transport Centre, Punjabi Bagh and pointed out to a dhaba. This witness stated that the accused Shiv Ram had pointed out the place where the dead body was thrown by pointing out memo Ex.PW-22/D.

29. PW-24 is SI Sheesh Ram deposed to being posted at PS Punjabi Bagh on 13.01.2004 and investigation of the case being marked to him. He and Constable Jabar Singh went at Lal Gumbad where ASI Beer Singh met them. The witness corroborated the statement of PW-23 ASI Beer Singh with regard to interrogation of accused Sat Narain, arrest and interrogation of accused Shiv Ram as well as recovery of case property. This witness further deposed that on 15.01.2004 he handed over the file to SHO PS Punjabi Bagh who took over the investigation of the case. He took the sealed parcel containing the rope from MHCM and went to AIIMS with SHO. PW-25 Retired ACP Rajender Singh deposed that on 13.01.2004 he was posted as an SHO at PS Punjabi Bagh. On 14.01.2004 on receipt of information from SI Sheesh Ram, he and other police staff reached Mehrauli Badarpur Road, near Tughlakabad Fort from where the dead body of Nagender Dubey, driver was recovered. After inspection and giving instructions to Sheesh Ram, he left the spot. On the next day, i.e. 15.01.2004, he took over the investigation of this case at 9 a.m. and sent the accused Sat Narain with SI Sanjay Sharma for identification of the shop of chemist from where the sleeping pills were purchased and also for

recording the statement of said chemist. This witness also deposed to directing SI Sheesh Ram to deposit the pulandas in Malkhana and that he went in search of the accused Bhupinder Singh @ Gullu and for the recovery of the missing tea carton.

30. It is evident that this case is based entirely on circumstantial evidence. In *Padala Veera Reddy v. State of A.P.* AIR 1990 SC 79 it was held that when a case rests on circumstantial evidence, the material led or proved must satisfy the following tests:

- (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else and
- (4) circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

Last Seen Evidence

31. One of the important circumstances which the prosecution relied on heavily, was the “last seen” one; it was alleged that the appellant was cleaner of the truck driven by the deceased. PW-5

Mahim Rastogi, the truck owner stated that the cartons of Brook Bond Taj Mahal tea had been loaded on the truck through Road Carrier of India. He has also stated that accused Sat Narain was employed as cleaner in the said truck and was apprehended along with the truck. PW-7 Yogender Rastogi, the father of PW-6 Mahim Rastogi too stated before the court that the truck conductor, the accused was in custody of police and was brought to the truck and he took out a bundle of plastic rope from under driver seat of the truck. PW-11 Kapil Rastogi, the brother of PW-6 Mahim Rastogi has also stated that on 11.01.2004, the driver of the said truck was Nagender Kumar Dubey and helper was Satya Narain. The copy of the *challan* Ex.PW 8/B issued by Road Carrier of India showed that on 11.01.2004, the truck was loaded with Brook Bond Taj Mahal Carton boxes destined for Ghaziabad. These testimonies and the documents were held sufficient to prove the last seen circumstance.

32. The curious aspect about the last seen circumstance is that neither PW-5, nor PW-7, or for that matter PW-11 actually saw the truck being loaded with tea, and the deceased leaving with it, and the accused. On the other hand, PW-8, PW-9 and PW-10, who saw that circumstance, are silent about whether the appellant left with the deceased driver. The prosecution witnesses are unanimous about the fact that the appellant was hired few days – i.e 6 or 7 days before the truck went missing. However, none of the family members (PW-5, PW-7 or PW-11) or even the employees PW-8, PW-9 or PW-10 deposed that he was actually employed in that manner. No documentary evidence is forthcoming; on the other hand, PW-13

deposed that he had known the accused 3-4 years prior to his arrest and that he was working as a tempo driver then. Although PW-5 stated that he had checked the accused's license, he admitted that he was in the dark, and could not furnish details, or the particulars of the licensing authority.

33. Another significant aspect is that when the truck was reported missing – by DD Ex. PW-8/A, on 13-1-2004, at 12:00 AM, neither the name of the driver, nor of the accompany helper (i.e the accused) were given. All these contradictions, in this Court's opinion, cast serious doubts about the "last seen circumstance". The other aspect is that according to PW-5, the truck was loaded in the night of 8-1-2004; it returned on 10-1-2004. He was cross examined on this aspect, by leave of court, and during that testimony, he said that the truck was loaded on 11-1-2004. Being the first prosecution witness, this was an important aspect. The recovery of the *challan* -evidencing the loading of 258 cartons of tea- was made much later, on 19-2-2004, as is evident from Ex. PW-8/A and Ex. PW-8/B. One of the witnesses also stated that the day the truck was loaded was a Sunday – it so happened that 10-1-2004 was a Sunday. The other prosecution witnesses, however, stated that the truck was loaded on 11-1-2004 and was missing the next day. The earliest account of the disappearance of the truck was 12-00 noon on 13-1-2004, through the said DD entry.

34. On this aspect, it would be relevant to notice that PW-11 deposed that he became aware about the spotting of the truck at 6:00 PM in the evening of 13-1-2004; however, in cross examination, he stated that the truck was spotted at 12-00 noon, and the police was

immediately informed. PW-23, the police officer, on the other hand, took credit for spotting the truck, stating that he found it out on making enquiries. PW-12 stated that after roaming around for quite some time, the truck was traced, and the accused was found sitting inside it. All the witnesses, however, are consistent that the truck was seen with the accused; the further story is that this was at noon time, on 13-1-2004. Yet the FIR in the case was registered after 9-00 PM. At that stage, the driver was missing. This delay in recording the first information report has not been explained at all. Furthermore, the prosecution version is that the accused was in the truck, and was immediately suspected. Yet, according to the evidence led, he was arrested one day later, i.e on 14-1-2004 at 1-20 PM (Ex PW-18/A).

35. The 'last seen circumstance' constitutes a *sub-species* of circumstantial evidence based case in order to prove that the accused is guilty, the prosecution should be able to prove conclusively and beyond reasonable doubt that the accused was last seen with the deceased and that the gap - in point of time - between when such last seen circumstance occurred and the time of death should be so narrow as to rule out the possibility of involvement of any other individual. Further, the circumstance should categorically rule out the probability of access to the deceased by any individual other than the accused. In the present case, even if the Court were to ignore the contradiction with regard to the date when the truck left the premises of PW-5 i.e. 10.01.2004 or 11.01.2004 and proceed on the basis that it was the latter date, the witness uniformly deposed that the truck left around 09:00 PM. Although, the testimony of the three persons who actually

saw the truck leaving the premises i.e. PWs-8, 9 & 10 do not inspire confidence that they actually saw the accused with the deceased, yet even assuming that circumstance to have been proved, the time lag in this case is far too much. The postmortem report recorded that the death occurred between 3 and 4 days prior to 12:20 noon on 15.01.2004. This meant that the farthest in point of time, the time of death was around 12:30 noon on 12.01.2004. This means that at least the time lag between when the appellant was seen with the deceased and the time of his death was around 15½ hours if not more. There is no iota of evidence suggesting that no individual other than the accused had access to the deceased during this period. The prosecution had alleged that according to the appellant's disclosure statement, the deceased had been drugged and, therefore, it was easy for him to be killed by the accused. However, the FSL report Ex.PW-19/A points to the contrary. No non-toxic or poisonous substance was found in the viscera remains of the deceased. Having regard to the totality of all the circumstances mentioned above, this Court is of the opinion that the Trial Court fell into error in accepting the prosecution's version and convicting the appellant on the basis of the "last seen circumstance".

36. By far the single most important circumstance put against the accused was that his disclosure statement Ex.PW-11/B led to the recovery of the body. Unlike recoveries, typical or common or household articles which are by themselves deemed insignificant, unless a special link is proved by the prosecution with the accused, the recovery of body at the instance of a suspect is viewed differently.

Several judgments have ruled that if this circumstance is proved by the prosecution during the course of the trial beyond reasonable doubt, the Court can proceed to rely on it as a strong incriminating circumstance and convict the accused. In this case, the prosecution had alleged, as observed earlier, that the truck went missing on 11.01.2004. This was, however, reported only on 13.01.2004 at 12:00 PM. As noticed previously, there is no explanation for this delay; PW-5 had deposed that his father sent a telegram to the authorities since the concerned Police Station did not record the complaint. However, that telegram has not been proved or brought on record. Therefore, the prosecution was under a duty to explain the inordinate delay of a day and a half in registering the missing and stolen property i.e. the truck loaded with 258 cartons of tea. This Court notices that there is a variation in testimonies of several prosecution witnesses - including the police witnesses - about how the truck itself was recovered. PW-12 stated that they all set about in search of the truck - even before the police was notified - and while at it came across the truck parked at Malviya Nagar sometime in the afternoon of 13.01.2004. He clearly stated that PW-5 had accompanied at the time. PW-5 corroborated this but stated in his examination-in-chief that the truck was spotted at 06:00 PM. In the cross-examination, he, however, gave a different time i.e. 12:00 PM and also stated that police was informed within 10-15 minutes and arrived there. PW-23, however, appropriated the entire credit for discovery of the truck by saying that after receiving information he made enquiries and was able to find it. However, all the prosecution witnesses are clear that when the truck was discovered, the appellant

was in it and did not make any attempt to evade queries. One of the witnesses PW-12 suggested that he tried to flee. However, no other witness mentioned such an event. The prosecution's case concededly was that the truck was found sometime in the late afternoon or evening of 13.01.2004 and that the Sat Narain, the appellant was in it. The FIR was recorded at 09:20 PM that night; it merely mentions Section-365 as the probable offence. It is not the prosecution's case that the appellant made disclosure statement on 13.01.2004. At this stage, it would be relevant to notice that there is a complete gap in the prosecution's evidence as to whether reference to the other offences i.e. under Sections 302 and 201 IPC were added. The problem is compounded because the special report under Section-157 Cr.P.C. to the Magistrate has not been proved. In this background, if one were to see the other documentary evidence, such as the death report Ex.PW-24/B, it would be clear that the FIR number itself has not been mentioned on the document even though it was prepared on 14.01.2004. Similarly, the disclosure statement alleged to have been made in this case (Ex.PW-11/B) only mentions commission of the offence punishable under Section-365, IPC and was dated 13.01.2004. However, the date has been overwritten as 14.01.2004. These aspects by themselves are of not much significance, yet, if they are taken together with, the prosecution's version that the appellant was arrested on 14.01.2004 at 01:20 PM (Ex.PW-18/A), the entire matter assumes seriousness. The prosecution did not also sent the deceased's body for postmortem examination even though its identification took place on 14.01.2004 - as the death report testifies - but did so only on

15.01.2004 at 12:50 PM.

37. As if the doubts and omissions highlighted earlier are not sufficient, the testimony of PW-14, the deceased's relative, deposed to having gone on 14.01.2004 along with his uncle Shiv Prasad Dubey to the Tughalakbad Fort and found the dead body of the Nagendra Dubey in the bushes. He categorically deposed that information in this regard was given to the police on 14.01.2004 in the morning and that he identified the body. However, the prosecution's case is that the body was recovered in the presence of PW-12 and the accused - a fact deposed to by PW-12. This is not at all supported by any other witness. PW-14 is silent as to whether the accused was present when the body was recovered; PW-25 too is silent as to whether the accused was present when the body was discovered. One could have been put down these omissions to lapse of memory of the witnesses which is reasonable under the circumstances. However, this omission is also important because nowhere in the questions put to the accused under Section-313 Cr.P.C. (specifically question nos.41, 42, 43 & 44) did the Trial Court direct its attention to the fact that his disclosure statement actually led to the recovery of the body through memo Ex.PW-12/A. These omissions coupled with the delay in lodging of the FIR and the complete lack of explanation as to where the accused was between the evening of 13.01.2004 and 14.01.2004 afternoon as well as the lack of proof of furnishing the special report lend credence to the accused's argument that he was just caught hold of and made to stand trial in the offence. The prosecution is entirely vague as to when the reference to Sections-302/201, IPC were added; none of the

witnesses deposed to having delivered the special report to the Magistrate and if so, when? The prosecution also apparently sought to implicate the co-accused Shiv Ram, who died during the pendency of the proceedings, on the ground that he was in possession of articles owned by the deceased. The prosecution's story also was that his disclosure statement too pointed to knowledge regarding the whereabouts of Nagendra Dubey's dead body. In view of these facts, the omissions and contradictions between the versions given by various prosecution witnesses as to the entire surrounding circumstances leading to the discovery of the body cast grave suspicion on the version presented during the trial. Consequently, it would be unsafe to hold that the prosecution had proved that the body of the deceased was recovered pursuant to the disclosure statement of the present appellant. The Trial Court clearly fell into error in overlooking all these vital omissions which fatally undermined the prosecution charge against the appellant.

38. In view of the above discussion, this Court is of the opinion that the character and quality of evidence led before the Trial Court during the proceedings before it were not such as to conclusively prove that the appellant alone and no one else was responsible for the crime. No doubt, some evidence by way of testimonies can be said to raise suspicion - may be even grave suspicion - however, they fall far short of proof beyond reasonable doubt, the only standard known to law. For these reasons, this Court is satisfied that the Trial Court fell into error in convicting the accused for the offences he was charged with. The impugned judgment is, therefore, set aside. The appellant is

directed to be released forthwith unless required in any other case.

39. The Appeal is allowed in the above terms.

**S. RAVINDRA BHAT
(JUDGE)**

**S.P. GARG
(JUDGE)**

JULY 02, 2012