

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Crl. A. No.381/2010**

+ **Date of Decision: 8th August, 2013**

DAYA SHANKAR @ LAXMAN **Appellant**
! **Through: Mr. S.K. Sethi, Advocate**

versus

\$ **STATE** **Respondent**
Through: Mr. Sanjay Lao, APP

CORAM:

* **HON'BLE MR. JUSTICE P.K. BHASIN**
HON'BLE MR. JUSTICE V.P. VAISH

JUDGMENT

P.K. BHASIN, J.

By way of this appeal the appellant-accused has questioned the correctness of the judgment dated 29th August, 2009 and order dated 11th September, 2009 passed by the learned Additional Sessions Judge whereby the appellant-accused has been found guilty of the commission of the offences punishable under Sections 302

and 201 of the Indian Penal Code(in short 'IPC') and sentenced to undergo life imprisonment and also to pay fine of Rs.3,000/-, in default of payment of fine to undergo six months simple imprisonment, for his conviction under Section 302 IPC and imprisonment for seven years and fine of Rs.2,000/-, in default of payment of fine to undergo three months further simple imprisonment under Section 201 IPC.

2. The appellant has been convicted for the murder of his father's younger brother(chacha) Heera Lal(hereinafter to be referred as 'the deceased) and causing disappearance of his dead body. The prosecution case was that the appellant had murdered the deceased as he(the deceased) was suspecting illicit relationship between his wife, PW-5 Smt. Ramwati, and the appellant and also because of some financial dealings between the two.

3. The deceased had left his house in the night of 19th February,2004 telling his wife that he was going to the house of the appellant as there some 'hissab'(settlement of financial dealings) to be done. As per the prosecution case the appellant and the deceased had drinks that night and the uncle(chacha) of the

deceased, PW-2 Moti Lal, was also present with them for sometime and had left while they were still drinking. However, the deceased did not return back to his house that night. When the deceased did not return home even after three days his wife lodged a missing report with the police on 23rd February, 2004. On 1st March, 2004 the appellant had allegedly confessed before his chacha, PW-2 Moti Lal, the wife of the deceased, PW-5 Ramwati and his neighbor PW-8 Dilshad Ahmed that he had murdered Heera Lal on 19th February, 2004 as there was some 'len den' with him and had thrown his dead body in a gutter in Machli Market, Sultan Puri. On being informed about that confession the police arrested the appellant on 1st March, 2004 and on the same day the dead body of the deceased was also recovered at the instance of the appellant. The appellant also got recovered one blood stained knife with which he had allegedly slit the neck of the deceased.

4. Thus, the prosecution sought to establish the guilt of the appellant-accused on circumstantial evidence alone. The circumstances which had been pressed into service before the trial Court and accepted also by the trial Court were: (i) the appellant-

accused and the deceased were last seen together on the night of 19th February, 2004, (ii) on 1st March, 2004 the appellant-accused made an extra judicial confession before his uncle PW-2 Moti Lal, Chachi PW-5 Ramwati and neighbour PW-8 Dilshad Ahmed and couple of other persons, (iii) recovery of dead body of the deceased at the instance of the appellant-accused, (iv) recovery of one blood stained knife also at the instance of the appellant-accused and (v) the appellant-accused had motive to kill the deceased as he was suspecting that the deceased was having illicit relationship with his wife and also because of some financial dealings with the deceased.

5. The appellant-accused felt that none of these circumstances had been established and he had been wrongly convicted by the learned Additional Sessions Judge and so he filed the present appeal questioning the correctness of the judgment of the trial Court.

6. We shall now straightaway go to the prosecution evidence to examine if the aforesaid circumstances relied upon by the prosecution have been rightly found by the trial Court to have been established beyond reasonable doubt or not. We shall start with the first circumstance of 'last seen'. PW-5 Ramvati, widow of the

deceased, is the first witness in respect of this circumstance. This is what she had deposed on 24/03/2005:

"I do not remember the month but it was 19th day of the month, about one year back. At about 10.00 PM my husband went out of the house saying that he was going to house of Daya Shanker for some "Hisaab" as Daya Shanker was going to the village. My husband did not return back at night. On the next morning I sent my younger son to house of Daya Shanker and my son returned back and told me that Daya Shanker had gone for his work. Daya Shanker had told him that my husband had gone for his work. I kept waiting for my husband till evening, but he did not return back home. Thereafter, I went to the P.S. and lodged a missing report in respect of my husband."

7. PW-2 Moti Lal, elder brother of the deceased, is the second witness of the 'last seen' circumstance. He deposed as under on 17/02/2005:

"..... I do not remember the exact date but it was about one year back when my brother had left the house for work. When I returned back from my work, I came to know on the next date that my brother had not returned back home. I asked his children as to where my brother had gone. I was informed that he had gone for work and did not return. I searched for my brother and also contacted the persons we knew, but could not find anything about whereabouts of my brother. Thereafter I lodged a report in the police station regarding my brother having gone missing....."

Since this witness had resiled from his police version he was cross-examined by the Additional Public Prosecutor. Then he stated that:

"It is correct that my brother had gone missing on 19.2.04. It is incorrect to suggest that on 19.2.04 at about 8:30 PM I had seen Daya Shankar and my brother Hira Lal drinking liquor at C-136 DDA Market, Sultan Puri. I had not mentioned any such fact to the police. (confronted with statement Mark P.2A portion X to X where it is so recorded). It is correct that on the next morning when I asked Daya Shankar, he told me that Hira Lal had stayed over night with him, but had left early morning....."

8. PW-9 Ram Shankar is the son of the deceased. He deposed that:

"On 19.2.04 when my father did not return till evening, I asked my mother who told me that he had gone for work. Thereafter I went upstairs in my room to study as my exams were approaching. My father did not return even by the next morning.....My father did not return back home for 2-3 days. I told my TAU Moti Lal that my father had not returned home since 2-3 days. My Tau went to the place of work of my father....."

9. PW-8 Dilshad Ahmed is the neighbour of the deceased. He deposed like this in respect of the circumstance of last seen:

"On 19.2.04 I came to know that my neighbour Sh Moti Lal had gone for his work but did not return at night. I accordingly enquired from wife of Sh Moti Lal. On enquiry Rama Shankar S/o Moti Lal told me that he had seen his father having liquor with his cusion Daya Shankar on the previous evening. Thereafter we all searched for Moti Lal. We got lodged missing report regarding Moti Lal in the police station.

..... Elder brother of Moti Lal came to my house. He told me that as Moti Lal had gone with Daya Shankar before he went missing,"(this witness after referring to Moti Lal as the deceased had clarified that it was actually Heera Lal who had gone missing and Moti Lal was his brother).

10. The reference to this evidence and conclusion of the learned trial Judge in respect of this circumstance are to be found in para no.38 of the impugned judgment which is re-produced below:

"38.Last seen together :- PW-2 Moti Lal has deposed that it is correct that on the next day morning when he asked Daya Shankar, he told him that Heera Lal had stayed over night with him but left early morning. PW 5-Ramwati has deposed that she does not remember the month but it was 19th day of the month about one year back. At about 10.00 pm her husband went out of the house saying that he was going to house of Daya Shankar for some Hisab as Daya Shankar was going to the village. Her husband did not return back at night. On the next morning she sent her younger son to house of Daya Shankar and her son returned back and told her that Daya Shankar, the accused herein had told her son that her husband had gone to his work. It is incorrect to suggest that her husband had never gone to the house of the accused Daya Shankar. PW-8 Dilshad Ahmed has deposed that on 19.02.2004 he came to know that his neighbour Moti Lal had gone for his work but did not returned at night, though, the witness has stated further that it was Heera Lal who has gone missing and not Moti Lal. He accordingly inquired from the wife of Heera Lal. On inquiry Rama Shankar S/O Heera Lal has told him that he has seen his father drinking liquor with his cousin Daya Shankar on previous evening. Sh. Moti Lal, brother of the deceased Heera Lal has come to his house and he told him that Heera Lal has gone with Daya Shankar before he went missing. Hence, on the aforesaid testimony of the public witnesses it is

fully established that the deceased Heera Lal was last seen together with the accused Daya Shankar.”

11. We are unable to agree with the conclusion of the trial Judge since none of the witnesses examined by the prosecution has claimed during evidence that the deceased was last seen alive in the company of the appellant-accused. PW-2 Moti Lal is the brother of the deceased who had claimed during investigation stage before the police that he had seen his brother having drinks with the appellant-accused on 19th February, 2004 but he has not maintained that statement in Court. He did not claim that even when he was cross-examined by the public prosecutor. PW-2 Moti Lal had also not claimed in evidence that he had told PW-8 Dilshad Ahmed that the deceased had gone with the appellant-accused before he went missing. PW-8 Dilshad Ahmed had claimed that the son of the deceased had told him that he had seen his father having drinks with the appellant-accused. Though the prosecution had examined son of the deceased, PW-9 Rama Shankar, but this witness did not state during his evidence that he had seen his father having drinks with the appellant-accused or that he had said so to PW-8 Dilshad Ahmed. And PW-5 Ramwati had simply claimed that when her

husband(the deceased) had left home at night he had told her that he was going to the house of the appellant. So, the conclusion of the trial Judge in respect of the first circumstance of 'last seen together' is based on no evidence at all and we have no hesitation in holding that this circumstance has not been established at all.

12. Now, we come to the circumstance of extra judicial confession made by the appellant-accused that he had murdered his real chacha, the deceased Heera Lal, and thereafter he had thrown the dead body in a gutter. This circumstance has also been found by the trial Judge to have been established by the prosecution. This circumstance was sought to be established by the prosecution through the evidence of PWs 2, 5, 8, 9, 10, 11 and 13.

13. The relevant part of the examination-in-chief of PW-2 Moti Lal regarding this circumstance is as under:

"We had planned to contact a Tantrik to know whereabouts of my brother. Raja Ram returned back to my house after sometime. He told me that Daya Shankar was telling that we should not spent any money to know whereabouts of my brother and that his whereabouts would be known within 2-3 days. I became suspicious as Daya Shankar had not said anything for the past so many days. I thought that Daya Shankar must be knowing something. I planned to go to the police station in this regard. I went to the police station."

This witness, as noticed already, was cross-examined by the additional public prosecutor and in that cross-examination also he did not admit that the appellant had made any confession before him and he stated that:

“.....It is incorrect to suggest that on 1.3.04 on being questioned by myself, other family members and neighbor Dilshad Ahmed the accused had claimed that on 19.2.04 he had killed Hira Lal by cutting his neck at C-136 DDA Market or that on the night of 20.2.04 he took the dead body in a rehri to Machli Market and threw the same in the gutter. I had not mentioned any such fact to the police.....”

14. PW-5, the widow of the deceased, was examined in support of this circumstance but she did not support the prosecution in her chief-examination. In her cross-examination by the additional public prosecutor she stated that:

“I had not mentioned in my statement to the police that the accused had admitted before the family members that on 19.2.04 he alongwith my husband had consumed liquor or that thereafter accused had killed my husband and thrown the dead body in a gutter.(Confronted with statement Mark P-5A portion Y - Y where it is so recorded) It is correct that accused had claimed before my family members that he had consumed liquor with my husband and then killed him.”

When cross-examined by the counsel for the accused she admitted that the accused had not admitted his guilt in her presence.

15. The next witness of extra judicial confession is PW-8 Dilshad Ahmed who is the neighbour of the deceased. He stated like this in his examination-in-chief:

“Thereafter I alongwith Moti Lal went to his house. Accused Daya Shankar was present there. Sh Ved Prakash, Hem Raj and other people also came there. We all enquired from accused Daya Shankar about Hira Lal. Accused Daya Shankar was evasive in his replies. Thereafter, we threatened to beat Daya Shankar. Out of fear the accused claimed that he would tell everything and he should not be beaten.

Daya Shakar told us that he had killed his Chacha Hira Lal on the night on 19.2.04 itself. On our asking he stated having killed his Chacha on account of some "len den". On our asking about dead body of Hira Lal accused claimed that he had thrown the dead body in gutter near pyaio and toilet main Machli Market near Bus Stand Sultanpuri.....”

16. The relevant of the examination-in-chief of PW-9 Ram Shankar, who is the son of the deceased, regarding this circumstance is as under:

“.....On 1-3-04 our neighbour Dilshad informed the police at No.100. Accused admitted his guilt before the police and stated that he had thrown the dead body of my father in a gutter at Macchi market. Thereafter I alongwith many other people including Hem Raj and Ved Prakash went to the Machhi Market where dead body of my father was taken out from the gutter. I identified the dead body of my father.....”

During his cross-examination on behalf of the accused this witness stated as under:-

“.....Accused had admitted his guilt in my presence in the morning at about 9.30 AM on 1-3-04 in my house. Police was also present there. He had been kept locked in our house during night by my Tau Moti Lal. The accused had not been threatened.....”

17. PW-10 Ved Parkash in his examination-in-chief did not say anything about extra judicial confession of the appellant-accused so he was cross-examined by the additional public prosecutor and in that examination he stated that:-

“It is correct that on 1.3.04 when I reached house of Hira Lal. I found Moti Lal and Hem Raj there alongwith some other persons who all were making enquiries from Daya Shanker. It is correct that accused Daya Shankar had admitted having killed Hira Lal in my presence. Telephone call to No.100 was made by Dilshad. My statement was recorded by the police.”

Then in cross-examination on behalf of the appellant-accused PW-10 stated as under:-

“On 1-3-04 I had gone to house of Hira Lal at about 9-30 AM. Accused had admitted his guilt at that time itself. Dilshad, Hem Raj, police officers and some neighbours were present when the accused had admitted his guilt.....”

18. PW-11 Hem Raj is the next witness of extra judicial confession. Since this witness had also not stated anything about the extra judicial confession of the appellant-accused he had to be cross-examined by the additional public prosecutor. In that cross-examination he stated in reply to the question of the prosecutor that:-

“.....It is incorrect to suggest that at that time accused had admitted having cut the throat of Hira Lal on 19.2.2004 and having thrown him in the gutter on 20.2.2004. I had not made any such statement to the police.....”

19. PW-13 Raja Ram was also cross-examined by the additional public prosecutor since he had also not said anything about extra judicial confession allegedly made by the appellant-accused in his examination-in-chief. In that cross-examination he denied the suggestion of the prosecutor that the accused had accepted his guilt in his presence. This is what this witness answered to the questions put to him by the prosecutor:-

“.....It is correct that when Moti Lal had given a telephone call at my house he had informed me that Daya Shankar had admitted having killed Heera Lai..... It is incorrect to suggest that Daya Shankar had admitted in my presence that he had killed Heera Lal on 19.2.04 or had thrown the dead body in the gutter on

20.2.04. I had not stated this fact in my statement to the police.....”

20. The discussion about the evidence of these witnesses of extra judicial confession and the conclusion arrived at by the trial Court in favour of the prosecution are to be found in para no. 39 of the impugned judgment which is reproduced below:-

“Extra-Judicial Confession:- PW-2 Sh. Moti Lal, who is the brother of the deceased Heera Lal has deposed on oath that they had planned to contact a Tantrik to know whereabouts of his brother. Raja Ram came to his house after some time and told him that Daya Shankar was telling that they should not spend any money to know the whereabouts of Heera Lal and his whereabouts will be known within 2-3 days. He became suspicious as Daya Shankar had not said anything for the past so many days. He has also deposed in his cross-examination by Ld. Addl. P.P. for the State that the accused Daya Shankar told us that he had already told everything to Raja Ram. PW-5 Ramvati has deposed in his cross-examination by Ld. Addl. P.P. for the State that it is correct that the accused has claimed before his family members that he had consumed liquor with her husband and then killed him, though she has also deposed in her cross-examination conducted on behalf of the accused that the accused has not admitted any fact regarding his consuming liquor and killing her husband in her presence. PW8-Dilshad Ahmed has also deposed that he along with Moti Lal went to his house and Daya Shankar was present there. Ved Parkash, Hem Raj and other people also came there. They all inquired from the accused Daya Shankar about Hira Lal. Accused Daya Shankar was evasive in his replies. Thereafter, they threatened to beat him. Out of the fear the accused claimed that he would tell everything and he should not be beaten. Daya Shankar told them that he has killed his Chacha Heera Lal on the night of 19.2.2004 itself. He has also deposed in his cross-examination that the accused Daya Shankar has been threatened that

he would be beaten. They have only threatened and have not beaten him. The accused has admitted his guilt before them at about 9.30-9.45 a.m. It is incorrect to suggest that the accused had not admitted his guilt in his presence. PW-9 Ram Shankar who is the son of the deceased Heera Lal has also deposed in his cross-examination on behalf of the accused that the accused had admitted his guilt in his presence in the morning at about 9.30 a.m. on 01.03.2004 in his house. The accused had not been threatened. It is incorrect to suggest that the accused had not admitted his guilt in his presence. PW10-Ved Parkash has also deposed in his cross-examination by Ld. Addl. P.P. for the State that it is correct that on 01.03.2004 when he reached the house of Heera Lal, he found Moti Lal and Hem Raj there along with the some other persons who all were making inquiries from Daya Shankar. It is correct that the accused has admitted killing of Hira Lal in his presence. Telephone call to 100 no. was made by Dilshad. He has also deposed in his cross-examination conducted on behalf of the accused that on 01.03.2004 at about 9.30 am he has gone to the house of the deceased Heera Lal and the accused Daya Shankar has admitted his guilt at that time itself. Dilshad, Hem Raj, police officials and some neighbours were also present there when the accused had admitted his guilt. It is incorrect to suggest that the accused had not admitted his guilt in his presence. PW-13 Raja Ram has also deposed in his cross-examination by Ld. Addl. P.P. for the State that it is incorrect that when Moti Lal had given a telephone call at his house he had informed him that accused Daya Shankar had admitted having killed Heera Lal.

Under the aforesaid discussion, it can safely be concluded that the accused has admitted his guilt before his family and relatives. The admission of guilt/confession before the family members is fully admissible against him. In the present case the confession is before the family members and the neighbourers and the confession has been made voluntarily. PW 8 Dilshad has called the police only after the accused Daya Shankar had confession his guilt before the family members, neighbours and relatives. It can not be said that the confession is before the police. Minor discrepancy, if any, is not fatal to the prosecution case. Even otherwise, there is nothing

contrary to show that the accused has not made an extra-judicial confession before the family members and the neighbours and even the accused has not led any evidence in his defence showing anything to the contrary. Hence, it can also be safely concluded that the accused has made an extra-judicial confession before the family members that he has killed his Chacha Heera Lal by cutting his throat by knife in his shop.”

21. Learned counsel(amicus curiae) for the appellant-accused had submitted that while examining the prosecution case about the alleged extra judicial confession this court should keep in mind the fact that the prosecution was alleging that the appellant-accused had illicit relationship with his chachi, PW-5 Ramwati, who is the widow of the deceased and she has not supported the prosecution case in respect of this circumstance.

22. From the evidence of the prosecution witnesses examined to establish the circumstance of extra judicial confession, which even otherwise is a very weak piece of evidence in a criminal trial as per various judgments of the Apex Court, it is quite clear that neither the widow of the deceased(PW-5) nor his son(PW-9) as well his brother(PW-2) and uncle(PW-13) have supported the prosecution case. None of them claimed that the appellant-accused had made any confession about murder in their presence. The learned trial

Judge totally ignored the fact that none of the relatives of the appellant-accused claimed that before them he had made any confession of guilt and came to hold that they did claim so. That conclusion certainly is without any evidence.

23. Now, we come to the evidence of the neighbours of the deceased(PWs 8, 10 and 11) who had claimed during investigation that the appellant-accused had made extra judicial confession in their presence. None of the relatives of the deceased (PWs 2, 5 and 13) having said anything about the making of extra judicial confession by the appellant-accused and his disclosing about the place of concealment of the dead body of the deceased it becomes improbable that he would have made any confession about the murder before the neighbours of the deceased. In any case, we would examine their evidence as the learned additional public prosecutor had read out their evidence during the course of hearing. PW-8 Dilshad Ahmed, claiming to be a neighbour of the deceased, had though claimed that the appellant-accused had admitted in his presence and also in the presence of PW-2 Moti Lal and others that he had killed the deceased and thrown his dead body in a gutter in

Fish Market of Sultanpuri but his evidence does not appear to be trustworthy and reliable for many reasons.

24. PW-8 had claimed that the appellant-accused had made the confessional statement around 9.30 a.m. on 1st March, 2004 and then he had informed the police on phone and PCR reached within 5 to 10 minutes but FIR was registered around 2.30 p.m. and that too not at his instance but on the statement of PW-2 Moti Lal who, as noticed already, had disowned that portion of his first information statement(Ex.PW-19/A) where it was recorded that the appellant-accused had made the confession about murder of the deceased and his having thrown the dead body in a gutter. That much delay in registration of FIR has remained unexplained and for this reason also the evidence of PW-8 loses credibility. The Supreme Court in one of its judgments(cited by the learned amicus curiae for the appellant-accused) in **“ State of Andhra Pradesh vs E. Satyanarayana”:** **(2009) 14 Supreme Court Cases 400** while considering the extra judicial confession made by the accused of that case had not accepted the evidence of the concerned witness in that regard since the confession was alleged to have been made at 8 a.m. while FIR

was registered around 11.30 a.m. and that much delay had remained unexplained by the prosecution. For the same reason the Supreme Court had rejected the evidence of extra judicial confession in an earlier judgment also which is reported in **AIR 1996 S.C. 607**, which was also cited by the learned amicus curiae. Here, even the accused was arrested at 7 p.m. even though he was all along present after the alleged confession made by him. That fact also makes the prosecution case regarding the extra judicial confession to be doubtful.

25. PW-10 Ved Parkash is another neighbour of the deceased. He did not speak anything about the extra judicial confession of the appellant-accused in his examination-in-chief and so he had to be cross-examined by the prosecutor. Then of course he admitted that the appellant-accused had confessed about having killed the deceased in his presence as also in the presence of PW-2 Moti Lal and PW-11 Hem Raj and others but when he was cross-examined by the counsel for the accused he stated that police was also present at the time of making of confession by the appellant-accused. Even PW-10 Ram Shankar, son of the deceased had stated in his cross-

examination by the accused that the accused had confessed having killed his father in the presence of the police. The presence of the police thus takes the so-called confession out of the category of 'extra judicial confessions' as any confession made by an accused in the presence of the police makes it inadmissible unless it falls within the ambit of Section 27 of the Evidence Act. The evidence of PWs 8 and 10 is discrepant also regarding the place of making of confession by the appellant-accused inasmuch as PW-8 had claimed that the confession was made by him at the house of PW-2 Moti Lal and he maintained that even when he was cross-examined by the prosecutor while according to PW-10 it was made at the house of the deceased. So, both these witnesses in any event do not corroborate each other on this material aspect i.e. place of making of the confessional statement by the appellant-accused. PW-8 had claimed that he had been requested by PW-2 Moti Lal on 1st March, 2004 to come to his house as something was to be asked from the accused about the deceased. However, Moti Lal did not claim that he had requested Dilshad Ahmed to come to his house. So, there was even otherwise no occasion for Dilshad Ahmed to be

present in the house of Moti Lal at the time of making of alleged confession by the accused, if at all it was made. Similarly PW-10 Ved Parkash had no occasion to go the house of deceased on 1st March,2004 when the accused had allegedly made the confessional statement.

26. PW-11 Hem Raj did not support the prosecution regarding making of extra judicial confession by the appellant-accused either in his examination-in-chief or cross-examination by the prosecutor.

27. There is another reason also for rejecting the prosecution case regarding the appellant-accused making extra judicial confession and giving information about the place where he had thrown the dead body of the deceased. That reason is that the confession even as per the prosecution witnesses was not made voluntarily. PW-8 Dilshad Ahmed, so called independent witness, had himself deposed that before the confession was made by the appellant-accused he was threatened by him and others that he shall be beaten and then out of fear he had confessed to having killed the deceased on account of some 'len-den'. PW-9 Ram Shankar, son of the deceased, had also stated in cross-examination on behalf of the accused that

the appellant-accused had been kept locked in their house from the night of 29th February,2004 till the morning of 1st March,2004 by PW-2 Moti Lal. So, the alleged extra judicial confession of the appellant-accused for this reason also becomes unreliable. Almost under similar circumstances extra judicial confession of an accused, who had been interrogated extensively by the witnesses before whom confession was made was not accepted by Punjab & Haryana High Court also in a double murder case which had come before it in appeal by the convicted accused, who had been awarded death penalty by the trial Court, on the ground that the confession was not voluntary one. That judgment is reported in **1996 Criminal Law Journal 2545** and when the matter reached Supreme Court it had also confirmed the rejection of the extra judicial confession by the High Court. The judgment of the Supreme Court is reported in **AIR 2003 Supreme Court 4377**, which was also cited by the learned amicus curiae for the appellant-accused. All the aforesaid serious infirmities in the prosecution evidence have been totally ignored by the trial Judge while holding that this circumstance had also been

established by the prosecution and, therefore, we cannot sustain that conclusion also.

28. Under similar circumstances, after rejecting the evidence of 'last seen' and 'extra judicial confession' the Hon'ble Supreme Court in its judgment reported in AIR 1996 S.C.607(supra) had observed that with the rejection of these two circumstance relied upon by the prosecution the entire chain of circumstances got snapped so badly that it was not necessary to go into the evidence of recovery of the dead body of the deceased at the instance of the accused. However, that evidence was also examined and rejected.

29. We would also examine the third circumstance of recovery of the dead body of the deceased at the instance of the deceased since the learned additional public prosecutor had strongly relied upon this circumstance also. The witnesses of this circumstance, other than the police officials, are once again PWs 2, 8, 10, 11 and 13 based on whose evidence we have already rejected the prosecution case that in their presence the appellant-accused had claimed that he had murdered the deceased and thrown his dead body in a gutter in Fish Market in Sultanpuri.

30. We have examined the prosecution evidence in respect of the recovery of dead body and we find that evidence adduced is doubtful and it cannot be said that this circumstance stands established beyond reasonable doubt. PW-2 Moti Lal had stated in his examination-in-chief that when he entertained suspicion against the appellant-accused on being informed by PW-13 Raja Ram, who, as noticed already, is also related to the deceased and obviously to PW-2 also, that the appellant-accused had told him that they should not spend money on tantriks to find out the whereabouts of the deceased as is whereabouts would become known within 2-3 days, he decided to go to the police and so he went to the police station. That was in the morning of 1st March, 2004. PW-11 Ved Parkash had deposed that when PW-2 Moti Lal had told him that he had suspicion against the appellant-accused he had told PW-2 to inform the police and then he was also requested by PW-2 to accompany him to the police station but he had not gone. Now what PW-2 had informed the police at the police station is not a part of the prosecution case and is a mystery and what has come on record is the statement of PW-2, which formed the basis of FIR, recorded late

afternoon that day after the recovery of the dead body of the deceased and part of which he had disowned also. PW-2 further deposed that:

“Police had reached my house before I returned back to my house from the police station. I came to know that police had reached my house on basis of telephone call made by one of my neighbor. PCR van had reached my house before I returned from the police station. Police had apprehended the accused in the house of my brother Hari Lal. Police took the accused in their vehicle while I alongwith my neighbours went on foot. We had gone to toilet of DDA Market near Machhi market, Sultan Puri. There was a big stone lying on the nalli. We were asked by the police to remove the said stone. We removed the stone and found dead body of my brother Hira Lal.....”

31. PW-8 Dilshad Ahmed is the other witness of recovery of the dead body. The relevant part of his examination-in-chief is as under:

“I called up number 100 from my mobile phone. PCR came there. Accused admitted his guilt even in front of PCR police. PCR people took the accused with them. I followed them. We went to the gutter near bus stand where dead body of Hira Lal was recovered from inside the gutter.....”

32. PW-19 ASI Azad. Mohd. is the initial investigating officer. As per the prosecution case he reached the house of the deceased after PCR had informed the area police station where he was posted, about the apprehension of the murderer of the deceased(appellant-accused). Relevant portion of his examination-in-chief is as under: -

“On 01.03.2004 I was posted as ASI at PS Sultan Puri. I was on emergency duty and was given DD No. 26B by duty officer. It was regarding the apprehension of the accused. I alongwith constable Jagdish went to house No. 833, Pocket P-4, Sultan Puri. There I met Moti Lal, Dilshad and other persons. They produced Daya Shanker accused present in court today, (correctly pointed out). I interrogated the accused.

Accused took the police alongwith public persons such Moti Lal Dilshad etc. to DDA Flats, Machli Market and pointed out a sewer. The lid of sewer was lifted with the help of public persons. I found one male dead body lying in the said sewer. I with the help of public persons lifted the dead body from the sewer and had taken it out. Moti Lal who was also with us identified the dead body as of his brother Hira Lal.....”

33. From the evidence of these three witnesses of recovery of the dead body of the deceased it is clear that they are not consistent and do not corroborate each other's version. PW-2 simply claimed that the police(PCR) took the appellant-accused to Machli Market and from there the dead body was recovered but did not say that it was the appellant-accused who had pointed out the place where the dead body was concealed. PW-8 had claimed that the appellant-accused had told PCR officials about three place where he had thrown the dead body and then PCR people had taken him to that place and the body was recovered. However, none of the PCR official has been examined by the prosecution. PW-19 ASI Azad

Mohd. did not even claim that PCR officials were present when he reached the house of the deceased or that they had left after his arrival there. PW-2 had deposed that the appellant-accused had been apprehended by the PCR officials when he had reached back from the police station while PW-19 deposed that the appellant-accused had been handed over to him by Moti Lal and other persons and then he had interrogated him. Moti Lal and Ved Parkash, however, did not claim so. PW-19 did not claim that when he interrogated the appellant-accused he had disclosed to him that he would get the dead body recovered. Admittedly no confessional/disclosure statement of the accused was recorded by PW-19 at that time. In fact, his disclosure statement was recorded by the subsequent investigating officer PW-22 Inspector Preet Singh after the dead body had been recovered. In these circumstances we are of the view and as was rightly submitted by the learned amicus curiae for the appellant-accused also, that the prosecution case that the dead body of the deceased was found pursuant to the information supplied by the appellant-accused is highly doubtful and benefit of that doubt has to go to the accused.

34. As far as motive part of the prosecution case is concerned, there is no evidence whatsoever led by the prosecution to show that the appellant-accused had either illicit relationship with the wife of the deceased(PW-5) or that there were any financial dealings(lenden) between the appellant-accused and the deceased which had led to the killing of the deceased by the appellant. Learned prosecutor could not point out any such evidence in support of the circumstance of motive which is a vital circumstance in criminal cases in which the guilt of the accused is sought to be established by circumstantial evidence.

35. There is evidence of recovery of weapon of offence also adduced by the prosecution and which was sought to established by the prosecution through police witnesses only but we need not go into that evidence since admittedly the group of human blood found on the recovered knife could not be ascertained and linked with the deceased. Learned prosecutor had very fairly submitted that this circumstance alone in any case cannot establish that the appellant-accused had murdered the deceased.

36. So, the final conclusion is that the judgment of conviction of the appellant-accused and the order on sentence passed by the Additional Sessions Judge cannot be sustained and are accordingly set aside. The appellant-accused is acquitted of both the charges for which he was tried. Presently he is lodged in jail to serve out the life imprisonment awarded to him by the trial Court and now he is ordered to be released from jail forthwith unless he is required to be detained in connection with any other case.

P.K.BHASIN, J

V.P.VAISH, J

August 8, 2013