

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

Dated of decision: September 19, 2013

+ **CrI.A. No.591/2010**

SHAHNAWAJ @ SONU

..... Petitioner

Through: Thakur Virender Pratap Singh
Charak, Mr.Pushpender Singh
Charak, Mr.Shubhra Parashar,
Mr.R.P.S. Tomar, Advocates

versus

STATE (NCT) OF DELHI

..... Respondent

Through: Mr.Sunil Sharma, Additional
Public Prosecutor for the State

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

HON'BLE MS. JUSTICE INDERMEET KAUR

JUDGMENT

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KAILASH GAMBHIR, J.

1. By this appeal filed under Section 374(2) of Cr.P.C. the appellant – Shahnawaj @ Sonu seeks to challenge the judgment dated 3rd October 2009 and order on sentence dated 9th October 2009 passed by the Additional District Judge (North-East), Karkardooma Courts, Delhi, whereby the appellant was convicted for committing an offence punishable under Section 302 IPC and sentenced to undergo

imprisonment for life together with imposition of fine of Rs.30,000/- and in default thereof to undergo simple imprisonment for a period of one month.

2. The case in hand relates to the murder of a child named Mohd. Sami @ Nanhe aged about 10-11 years who as per the prosecution case was accompanying the appellant for going to the gym. The exact prosecution story as unfolded by the charge sheet filed by the prosecution is as under:-

- i) On 21.05.2004, at about 8.15 P.M, one passer-by told ASI Devi Ram that one child aged about 10-11 years was lying near Kacha rasta, Ganda Nala Patri, Delhi Jal Board, New Jaffrabad, Delhi. He also informed him that the dead body was having injury marks on his body. On this the duty officer recorded the report vide DD no. 17-A and S.I. Emadul Islam alongwith Ct. Deshraj were sent to the spot. Inspector Ran Singh, Additional SHO alongwith Ct. Rajinder also reached at the spot. Crime team also reached at the spot. Rukka was prepared by the Additional SHO, Ran Singh and it was sent to police

station through constable Rajinder for registration of the case. The SHO also reached at the spot and found the deceased wearing a brown coloured cotton half pant, round neck half sleeves T-shirt and 'hawai chappal'. The clothes of the deceased were blood stained. The deceased was having injury marks on his chest, stomach and other parts of the body and the said injury marks were caused by sharp edged knife. The blood was lying near the dead body. The dead body could not be identified nor any eye witness was present at the spot. FIR under section 302 IPC was registered. The clothes and the accessories were taken into possession. The dead body was sent to mortuary GTB hospital.

- ii) Smt. Farida, w/o late Mohd. Salim came along with her brother-in-law Sh. Hameed Raza at GTB hospital and identified the dead body of her son as Mohd. Sami @ Nanhe. The post mortem was conducted on 22.05.2004 at about 11 a.m. and as per the post mortem report, the time since death came to be 16 hours. The dead body was

noticed at 8.20 p.m., the cause of death was shock as a result of haemorrhage produced by ante-mortem injuries to internal organs. Injuries were produced by sharp edged weapon and injury Nos.1,2,3,5 and 9 were held to be sufficient to cause death independently as well as collectively. Regarding the sexual assault, if any, the post mortem report stated that the opinion would be given after obtaining the report of the anal swab. Smt. Farida i.e. the mother of the deceased disclosed during the investigation u/s 161 Cr.P.C. that her son was taken by accused Sonu @ Shahnawaj on the pretext of taking him to the gym. The elder brother namely Sunny also suspected the accused Sonu and Tahir. One Ahmed Ali, a resident of the same locality also gave a statement u/s 161 Cr.P.C. on 21.05.2004, that he had seen the deceased with the accused Sonu, Tahir and Wasim after crossing 66 feet road towards Jaffrabad pulia 65 feet road. On 24.05.04, accused Shahnawaj @ Sonu was apprehended at the instance of Farida i.e. the mother of the deceased.

Accused Shahnawaj @ Sonu confessed his crime and at his instance, accused Tahir @ Yamin was arrested, who also made the disclosure statement. Accused Tahir @ Yamin got recovered one knife and on the same day, at the instance of the accused Sonu, accused Wasim was also apprehended and he also confessed the crime. The medical examination of the accused Wasim @ Munna was also conducted at GTB Hospital and the doctor opined that there was nothing to suggest that the patient cannot have sexual intercourse. The exhibits were sent to FSL for opinion. However, accused Ajam could not be arrested and he was declared proclaimed offender. After completion of the investigation, the charge-sheet was filed. The persons accused were charged for the offence punishable under section 302 IPC. Prosecution in support of their case examined as many as 27 witnesses. Statements of the accused persons were recorded under Section 313 Cr.P.C. and all of them claimed innocence. The appellant Shahnawaj @ Sonu and the accused

Wasim chose not to lead defence evidence while accused

Tahir examined Ms. Nisha Yadav, DW-1 in his defence.

3. Addressing arguments on behalf of the appellant, Thakur Virendra Pratap Singh Charak, Advocate contended that the prosecution has failed to establish any motive on the part of the appellant behind the murder of the deceased Mohd. Sami @ Nanhe. As per the counsel, different theories were propounded by the prosecution to establish motive on the part of the appellant in carrying out the murder of the deceased and these theories have been rejected by the learned trial court. First theory propounded by the prosecution as per the counsel was the alleged illicit relationship of Sanjida and Mohd. Azam (Accused No.4, declared *proclaimed offender*) and threat of their illicit relationship getting exposed at the hands of deceased Mohd. Sami @ Nanhe which resulted in hiring of the killers by Azam to physically eliminate Mohd. Sami @ Nanhe. The other theory propounded by the prosecution is that about eight months prior to the date of incident, a quarrel had taken place between the deceased Mohd. Sami @ Nanhe and his brother Sunny on one side with the boy named Tahir resident of the neighbourhood on the other and during that squabble, Tahir had threatened that he would kill them, the same has been testified

by PW-1 and PW-3 in their evidence. Third theory propounded by the prosecution was that PW-3, Sunny had some quarrel with accused Shahnawaj @ Sonu on account of cassettes, about one and a half months prior to the occurrence of the incident, due to which accused Shahnawaj @ Sonu had harboured jealousy against him.

4. Discrediting all these theories, counsel for the appellant submitted that if any person who could have legitimate objection to the alleged illicit relationship between Sanjida and Mohd. Azam, the same could be the husband of Sanjida and none else and similarly the second and the third theory can nowhere connect the appellant with commission of crime as the alleged fight was between Tahir and the two sons of PW-1 and Shahnawaj and Sunny respectively. Learned counsel for the appellant also argued that in the absence of any motive proved on record by the prosecution, the appellant who was a friendly neighbour and frequent visitor to the house of the deceased could not have carried out the murder of the deceased.

5. Learned counsel for the appellant also laid strong emphasis on the apparent inconsistencies in the timings of the last seen alleged by PW-1 in her last meeting with the appellant and the deceased at about 7/7.30

PM on 21. 05. 2004; PW-2, Ahmed Ali came across the appellant and deceased alongwith Sonu, Tahir and Wasim at 8 PM; and the matter reported to the police vide first DD No. 17-A dated 21.05.2004 at 8 PM; *viz a viz* time between 7.30 and 8.30 P.M. was indicated by the crime investigating team in their report for inspection of the spot. The contention raised by learned counsel for the appellant was that the timings as mentioned in the Crime Team Report proved on record as Ex.PW-21/A was nowhere disputed or challenged at any stage of the trial and not even till the stage of arguments addressed by the prosecution and if the time mentioned in the said report is taken as correct, then the entire story of the prosecution gets ruttled. Counsel further contended that if the timings given in the crime team report is taken into account, then the murder of the victim had already taken place much before the alleged meeting of PW-1 and PW-2 with the appellant accompanying the deceased. Learned counsel for the appellant further argued that it is ludicrous that any person would hire the killers from the same vicinity where the family of the deceased was also residing, as such proposition does not go down with the rule of prudence. Learned counsel for the appellant further argued that there is incongruity in the version of PW-1

(mother of the deceased) as she failed to prove on record about lodging any missing report with the Police Station, Seelampur where she has allegedly visited at 1.30 AM in the night of 21.5.2004, along with her devar Aslam. Learned counsel for the appellant also argued that even for her alleged visit to the Police Station Seelampur on the morning of 22nd May 2004, she failed to indicate any time as to when she had visited there. Learned counsel for the appellant also submitted that even the persons Aslam and Raju, who were allegedly accompanying PW-1 were not produced and examined by the prosecution throwing enough doubts on the version of PW-1. Learned counsel for the appellant also argued that this court can take judicial notice of the fact that the Welcome Police Station, Jafrabad Police Station and Seelampur police station falls within the administrative control and jurisdiction of the same district and therefore, if the dead body of the minor boy was discovered on the evening of 21st May 2004, then why the appellant was not informed by the Police Station Seelampur where she had gone for lodging the missing report at about 1.30 AM. Learned counsel for the appellant further argued that the prosecution has failed to complete the chain of circumstances that only entailed hypothesis of guilt of the appellant in the commission of

crime being totally inconsistent of his innocence. Learned counsel for the appellant further argued that the testimonies of PW-1 and PW-2 run counter to each other and collectively destroy the prosecution case.

6. Throwing doubts on the testimony of PW-2, learned counsel for the appellant submitted that the conduct of PW-2 is shrouded in mystery as in his examination-in-chief, he stated that he has seen all the three accused taking the deceased to pulia but he had neither approached the police nor the mother of the deceased even after he came to know about the murder of the deceased on the morning of 21st May 2004 at about 9.30 AM. Learned counsel for the appellant further argued that learned trial court has grossly overlooked the evidence of PW-5, 6, 9, 10, 13, 16, and 26 who have not supported the prosecution theory with regard to the motive of crime. The last seen evidence of PW-2 was found untrustworthy and unreliable giving the other two accused person, Tahir and Wasim a benefit of doubt, discharging them under Section 302 IPC but his testimony was relied upon as against the appellant. Based on these submissions, learned counsel for the appellant urged that the prosecution has failed to prove its case against the appellant beyond any shadow of

doubt and therefore, this court may set aside the order of conviction and order sentence passed by the learned trial court.

7. Opposing the present appeal, Mr. Sunil Sharma, Additional Public Prosecutor for the State submits that the learned trial court has rightly convicted the appellant by holding that the prosecution has been able to prove the motive on the part of the appellant in carrying out the murder of deceased and based on the last seen evidence of PW-1 and PW-2. On motive, learned Additional Public Prosecutor for State submitted that the factum of illicit relationship between Azam and Sanjida was duly proved in the testimony of PW-1, 7, 8 and 9. Learned Additional Public Prosecutor for State further argued that the prosecution had also proved that it was the deceased alone who used to taunt and threaten Azam in exposing his illicit relationship with Sanjida. Learned Additional Public Prosecutor for State further submitted that there was a clear cut motive on the part of the accused Azam, who is a proclaimed offender in hiring the killers to eliminate the deceased Mohd. Sami @ Nanhe.

8. Learned Additional Public Prosecutor for State submitted that so far the last seen evidence is concerned, the prosecution has been successful in proving the same with the unrequited depositions of PW-1

and PW-2 and the time of incident as communicated to police vide DD No.17 which fully coincide with the time of last seen as disclosed by PW-1 and PW-2. Learned Additional Public Prosecutor for State further submitted that the appellant cannot derive any advantage of the timings indicated by the Crime Team in their report proved on record as Ex. PW-21/A as usually such a crime report is prepared after on the spot inspection is over and therefore, there may be some lapse on the part of the Crime Team in not correctly stating the time in the report.

9. Learned Additional Public Prosecutor for State further argued that under Section 106 of the Indian Evidence Act, the onus was on the appellant to have truthfully disclosed the facts which were within his special knowledge about the deceased when he was last seen in his company by PW-1 and PW-2. Based on the aforesaid submissions, learned Additional Public Prosecutor for State prayed for upholding of the impugned judgment and order on sentence.

10. We have heard learned counsel appearing for the appellant as well as learned Additional Public Prosecutor for State at considerable length and given our thoughtful consideration to the arguments advanced by

them. We also have the advantage of going through the trial court record and the judgments cited by both the counsels.

11. Murder of a young boy of 12 years namely Mohd. Sami @ Nanhe took place on the evening of 21st May, 2004. As per post-mortem report he had received 20 injuries on various parts of his body. As per opinion given by the doctor who had conducted the post-mortem, the cause of death was noted as shock and hemorrhage by ante-mortem injuries to internal organs. It was opined that all the injuries were produced by sharp edged weapon and injury Nos. 1,2,3,5 and 9 were found sufficient enough to cause death of the victim independently as well as collectively. The said post-mortem report was proved on record as Exhibit PW 19/A.

12. The deceased Mohd. Sami @ Nanhe was the son of Smt. Farida, who testified the last seen evidence and entered the witness box as PW-1. The prosecution in the present case in fact propounded different theories to establish motive on the part of the appellant and others to get rid of the boy. The first theory is alleged illicit relationship between Sanjida and Azam and threat of their relationship being exposed at the hands of the deceased who used to taunt them on various occasions. Second theory to attribute motive on the part of the appellant was a quarrel, which had

taken place between the deceased, his brother Sunny and a boy named Tahir, who was residing near the neighbourhood and the said Tahir had threatened that he would finish both of them. The third theory is a tiff between Sunny, the elder brother of the deceased and Shahnawaj @ Sonu over some cassettes.

13. Azam, who possibly could have some real motive to take the revenge was not arrested by the police and he was declared proclaimed offender. The present appellant was arrested by the police at the instance of PW-1, Farida and his disclosure statement led to the recovery of a sum of Rs. 2,800/-, one churi (meat cutter), blue colour blood stained shirt. Similarly the disclosure statement of accused Tahir lead to recovery of a knife and likewise the disclosure statement of another accused Wasim led to the recovery of Gupti and sum of Rs. 3,000/- from his possession. The learned Trial Court found that there was inconsistency between the testimony of these witnesses with regard to recovery and also failure of the prosecution to have joined PW-1 as witness of recovery, although she was present throughout at the time of these recoveries as per the prosecution case, therefore, the recoveries effected from the accused persons were doubtful. The FSL report in respect of blood stained

chunni, knife and gupti also did not match with the blood of the deceased as was found on his T shirt, half pant and blood stained gauge cloth and as per the finding of the learned Trial Court these evidences does not prove the complicity of the accused persons in the commission of the said crime.

14. Adverting back to the case of the prosecution on the alleged motive, the learned Trial Court although was convinced based on the testimonies of PW-1,5, 7, 8, 9 that there was illicit relationship between Azam and Sanjida, but did not believe the theory of conspiring as propounded by PW-6 Mohd. Nasir, who in his deposition stated that on 18.5.2004 at about 7.00 p.m. when he was going towards patlee gali No. 14, he had seen Azam near the house of the accused Tahir and accused Sonu and Azam were also standing at that place along with accused Tahir and Shahnawaj @ Sonu. Azam was telling to accused Sonu and Tahir in his presence that minor child namely Mohd. Sami @ Nanhe was a thorn in his plans and that they should remove him even by taking some more money from him. On this accused Tahir and Shahnawaj had told Ajam in his presence that they would do their work after the evening (maghrib) namaz on the coming Friday. The said testimony of PW-6 was rejected

by the learned Trial Court on the premise that it is highly unlikely that the persons conspiring together will speak at a public place in a street, which is used by the public as a thorough-fare to discuss the plan to get rid of a child that to in a normal voice audible to others. We fully concur with the view taken by the learned Trial Court that the testimony of PW-6 cannot be relied upon to hold that the witness had heard Ajam, Shahnawaj and Tahir conspiring together to finish the minor child Mohd. Sami @ Nanhe. The second theory of motive due to the alleged incident of quarrel having taken place between sons of PW-1 Farida and Tahir. The learned Trial Court found that there is inconsistency between the testimonies of PW-1 Farida and her son PW-3 Sunny regarding such fight with Tahir. The learned Trial Court also found that such a version was created by mother and son to give a color of motive on the part of accused Tahir. The learned Trial Court also found that Farida has not uttered anything to impute any motive on accused Shahnawaj @ Sonu. On the third theory of motive, learned Trial Court also held that if there was any ill-will on the part of Shahnawaj @ Sonu, it was against PW-3, Sunny and not against the deceased as is invincible from the deposition of PW-3 who deposed

about his quarrel with the accused on account of the cassettes about one and half months prior to the incident.

15. Based on the evidence produced on record by the prosecution, the learned Trial Court has let off the accused Tahir disbelieving the alleged motive on his part to execute any threat, which was allegedly given by him to the deceased and his brother about 8 months back from the date of incident. The learned Trial Court also took a view that mere fact that he was going with accused Shahnawaj @ Sonu cannot alone be treated as sufficient evidence to prove his guilt in the absence of any other circumstances to corroborate guilt on his part. Similarly, as regards the accused Wasim also, the learned Trial Court took a view that the only circumstance proved against him that he was going behind accused Sonu and Tahir on the date of occurrence and possibility cannot be ruled out that even if he was seen in their company, he might have left to some other destination. So far the present appellant is concerned, the learned Trial Court took a view that the prosecution has cogent and consistent evidence proved on record that deceased was last seen by PW-1 and PW-2 before his death with Sonu @ Shahnawaj near the place where the dead body was found and there was a close proximity between the time of

death as well as when the deceased was last seen alive in his company. The learned Trial Court also took a view that if he was last seen by PW-1 and PW-2, the onus shifted upon the accused under Section 106 of Evidence Act to explain as to where the deceased had gone or where he had left him and failure on the part of the accused to explain these circumstances fills the lacuna of the missing link to complete the chain of incriminating evidence which unerringly points the guilt of the accused.

16. Undoubtedly, PW-1 Farida in her first statement under Section 161 Cr.P.C. and in her Court deposition stated that at about 7-7.30 p.m. while she was coming from the house of Pappu Chacha after offering Namaz, she had seen in the gali near her house appellant-Sonu holding the hand of her son Mohd. Sami @ Nanhe and when she asked the accused as to where he was going. On this, accused told her that he was going to gym along with her son and that he would return back soon along with him. She also told her son Mohd. Sami @ Nanhe to return back early to the house. This witness further deposed that when her son did not return by 10.00 p.m. in the night, she got worried and went out in search for him. She inquired at the house of Mause of the accused Sonu but in vain. She had further deposed that at about 12 midnight, when she was present in

the gali outside her house, she saw accused Sonu coming towards her house and when she questioned as to where was her son Mohd. Sami @ Nanhe, the accused replied that he had not gone with him and had returned from the corner of the gali itself. The appellant in his statement recorded under Section 313 Cr.P.C. has denied the said incriminating evidence of being seen by PW-1 Farida holding the hands of her son Mohd. Sami @ Nanhe on 21st May, 2004 at about 7-7.30 p.m. for taking him to the gym. In the cross examination of PW-1, suggestion was given by the accused refuting her statement in examination-in-chief having lastly seen the accused with her son as incorrect. The learned trial court has placed strong reliance on the last seen evidence of PW-1. The learned trial court also placed strong reliance on the evidence of PW-2 Ahmed Ali who had also seen the accused holding the hands of the deceased and going to Pulia towards Janta Colony near the place where dead body was found. On the aspect of motive, the learned trial court clearly held that as regards the motive, the same was apparently with Ajam to finish Mohd. Sami @ Nanhe as he was apprehensive about Mohd. Sami @ Nanhe creating trouble for him by threatening to disclose his illicit relationship with Sanjida and such motive could not be attributed to accused Sonu,

Tahir and Wasim. The learned trial court further took a view that since the theory of conspiracy is rejected, therefore, the motive also becomes irrelevant. After taking the said view, the learned trial court found that the prosecution has succeeded in proving the involvement of the accused Sonu and the reasons given by the learned trial court to implicate him are as under:-

- i) That the dead body was found lying near kacha rasta at about 8.15 p.m.
- ii) That accused Sonu @ Shahnawaj was last seen by mother of the deceased i.e. PW-1 at about 7-7.30 PM with the deceased going along with him holding his hand.
- iii) PW-2 Ahmed Ali had seen Sonu @ Shahnawaj holding the hands of the deceased going to the pulia towards Janta Colony near the place where the dead body was found.
- iv) The distance between the pulia and the place of kacha rasta is very less and the time of death and the last seen is so proximate that it is unlikely that there can be any other intervention by any other person during the said period.

- v) When PW-1 Farida, the mother of the deceased, visits the house of accused Sonu @ Shahnawaj between 7.30 PM and 12.00 midnight, accused Sonu was also missing from his house.
- vi) Accused Sonu @ Shahnawaj is seen by PW-1, the mother of the deceased, at 12 midnight returning to his house near her house.
- vii) PW-1 questioned accused Sonu @ Shahnawaj as to where her son is. On this, accused Sonu @ Shahnawaj gave false reply and stated that her son had returned back from the corner of the gali and did not go with him.

17. There cannot be any dispute with regard to the finding of the learned trial court so far the fact of murder of the deceased Mohd. Sami @ Nanhe and his body being found near the kacha rasta, Ganda Nala Patlee, Delhi Jal Board, Jaffrabad was at about 8.15 p.m. on 24.05.2004 is concerned. However, we do not find ourselves in agreement with the other reasons given by the learned trial court to implicate the appellant in the commission of the said crime. The fundamental issue which is at the heart of the controversy in the facts of the present case is whether the

accused was last seen by the mother of the deceased PW-1 at about 7-7.30 p.m. and also by PW-2 Ahmed Ali at about 8.00 p.m. and if so whether the conviction of the appellant can sustain based on the last seen evidence of PW-1 and PW-2 in the absence of any corroborative evidence to support the guilt of the accused. It is worth mentioning here that the prosecution has failed to bring on surface any motive on the part of the appellant to carry out the murder of the deceased rather it has come in the cross examination of PW-1 that she never had any fight with the accused Sonu and also that accused Sonu had never threatened her son. Similarly, PW-3 in his deposition stated that the deceased Mohd. Sami @ Nanhe was having friendship with the accused Sonu and even used to take his brother deceased Mohd. Sami @ Nanhe along with him for dance etc. and sometimes he even used to come late at night along with the accused. None of the witnesses produced by the prosecution have spoken ill of the accused or the accused having any kind of acrimonious relationship with the deceased or his other family members and therefore, it looks highly improbable that the accused who was the resident of the same Mohalla and having very cordial relationship with the family of the deceased would kill the deceased.

18. We are also at loss to find that the learned Trial Court has not believed the testimony of PW-2 so far as the last seen evidence of seeing the accused Wasim is concerned on the premise that it was possible that Wasim might be going independently of the others or before the place of occurrence, he might have left for some other destination cannot be ruled out but relied upon the same testimony to nail the appellant,.

19. On the last seen evidence, there has been consistent view of the Apex Court as well as other various High Courts that even in the cases of last seen evidence the court should look for some corroboration. In ***State of U.P. v. Satish***, reported in 2005 (3) SCC 114, the Apex Court observed as under:-

“22. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses PWs 3 and 5, in addition to the evidence of PW 2.”

20. The case of ***Ramreddy Rajesh Khanna Reddy &Anr. v. State of A.P.***, reported in (2006) 10 SCC 172 also reiterated the same view. Para 27 of the said judgment are reproduced as under:-

“The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case courts should look for some corroboration.”

21. In ***Jaswant Gir v. State of Punjab***, (2005) 12 SCC 1438, the Apex Court observed as under:-

“5. Apart from the extra-judicial confession which we shall advert to a little later, the main incriminating fact relied upon is that the deceased was last seen by P.W. 14 in the company of the Appellant and the other accused and that he was given a lift in the vehicle belonging to the Appellant. In order to establish that the vehicle belonged to or was in de facto possession of the Appellant, some evidence has been let in. The "last-seen" evidence is sought to be established by the testimony of P.W. 14. At the outset, we must observe that there is a serious doubt cast on the version of P.W. 14 about the deceased going in the vehicle of the Appellant. The destination of the deceased was Pehowa whereas the vehicle had come from Pehowa and was proceeding towards Devigarh which is in a different direction. Prima facie there is no apparent reason why the deceased would have chosen to go in the vehicle which was proceeding to some other destination. The High Court resorted to a guess that the deceased would have been lured to consume liquor or his relatives might be there at Devigarh. Without probing further into the correctness of the "last-seen" version emanating from P.W. 14's evidence, even assuming that the deceased did

accompany the accused in their vehicle, this circumstance by itself does not lead to the irresistible conclusion that the Appellant and his companion had killed him and thrown the dead body in the culvert. It cannot be presumed that the Appellant and his companions were responsible for the murder, though grave suspicion arises against the accused. There is considerable time-gap between the deceased boarding the vehicle of the Appellant and the time when P.W. 11 found the dead body. In the absence of any other links in the chain of circumstantial evidence it is not possible to convict the Appellant solely on the basis of the "last-seen" evidence, even if the version of P.W. 14 in this regard is believed. In view of this, the evidence of P.W. 9 as regards the alleged confession made to him by the Appellant assumes importance."

22. In ***State of Goa v. Sanjay Thakran***, reported in 2012 (1) JCC 540,

the Supreme Court laid down the following principles on the issue of last seen together evidence as under:-

*"29. It is urged by Mr. Mahendra Anand, the learned senior counsel for the appellant(s), that the accused have not explained as to in what circumstances the victims suffered the death in their statements under Section 313 Cr.P.C. and thus would be held to be liable for homicide. The learned senior counsel for the appellant(s) placed reliance on the following observations of this Court made in **Amit alias Ammu v. State of Maharashtra** MANU/SC/0567/2003: 2003CriLJ3873 :*

*9. The learned Counsel for the appellant has placed reliance on the decision of this Court by a Bench of which one of us (Justice Brijesh Kumar) was a member in **Mohibur Rahman v. State of Assam** MANU/SC/0690/2002: AIR 2002 SC 3064 for the proposition that the circumstance of last seen does not by itself necessarily lead to the inference that it was the accused who committed the crime. It depends upon the facts*

of each case. In the decision relied upon it has been observed that there may be cases where, on account of close proximity of place and time the factum of death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide. The present is a case to which the observation as aforesaid and the principle laid squarely applies and the circumstances of the case cast a heavy responsibility on the appellant to explain and in absence thereof suffer the conviction. Those circumstances have already been noticed, in which case such an irresistible conclusion can be reached will depend on the facts of each case. Here it has been established that the death took place on 28th March between 3 and 4 p.m. It is just about that much time that the appellant and the deceased were last seen by PW 1 and PW 1.1. No explanation has been offered in the statement by the appellant recorded under Section 313 Cr.PC. His defence is of complete denial. In our view, the conviction for offence under Sections 302 and 376 has been rightly recorded by the Court of Session and affirmed by the High Court.

*30. We have noticed the decision. However, the circumstances in the present case are not similar to the case where the event of the last seen together has very close proximity with the time and place of the commission of the crime and other circumstances also favour the hypothesis of guilt and consequently the fact that no explanation or false explanation offered by the accused was taken as a link in the chain of circumstances. [See also: **Birbal v. State of M.P.**: (2000)10SCC212 ; **Raju v. State of Haryana** : 2001CriLJ2580; and **Babu S/o Raveendran v. Babu S/o Bahuleyan and Anr.** : (2003)7SCC37]. Thus, in the circumstances of the case, the accused persons not giving any explanation in their examination under Section 313, Cr.P.C. could not be taken to be a circumstance pointing towards irresistible conclusion that they are involved in the commission of the crime.”*

23. In ***Godabariksh Mishra v. Kuntala Mishra, reported in AIR 1997 SC 286***, the Apex Court took a view that the theory of last seen together evidence is not of universal application and may not always be sufficient to sustain a conviction unless supported by other links in the chain of circumstances. The germane portion of the judgment is reproduced below:

“11.

(g) The theory of last seen together is not of universal application and may not always be sufficient to sustain a conviction unless supported by other links in the chain of circumstances.

...

12. The High Court having held that from the facts and circumstances proved in the case, it was not possible to hold that the accused had committed the murder of the deceased. Hence, she was acquitted by giving her benefit of doubt.”

24. In ***Rishi Pal V. State of Uttarakhand, 2013 (2) ACR 1471***, reiterating the aforesaid legal position, the Hon’ble Apex Court while dealing with the principle of ‘last seen evidence’ has held as under:

“16. In Mohibur Rahman and Anr. v. State of Assam MANU/SC/0690/2002 : (2002) 6 SCC 715, this Court held that the circumstance of last seen does not by itself necessarily lead to the inference that it was the accused who committed the crime. It depends upon the facts of each case. There may however be cases where, on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of

death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide. Similarly in **Arjun Marik and Ors. v. State of Bihar**: 1994 Supp (2) SCC 372, this Court reiterated that the solitary circumstance of the accused and victim being last seen will not complete the chain of circumstances for the Court to record a finding that it is consistent only with the hypothesis of the guilt of the accused. No conviction on that basis alone can, therefore, be founded. So also in **Godabarish Mishra v. Kuntala Mishra and Anr.** : (1996) 11 SCC 264, this Court declared that the theory of last seen together is not of universal application and may not always be sufficient to sustain a conviction unless supported by other links in the chain of circumstances. In **Bharat v. State of M.P.** : (2003) 3 SCC 106; two circumstances on the basis whereof the Appellant had been convicted were (i) the Appellant having been last seen with the deceased and (ii) Recovery of ornaments made at his instance. This Court held:

... Mere non-explanation cannot lead to the proof of guilt against the Appellant. The prosecution has to prove its case against the Appellant beyond reasonable doubt The chain of circumstances, in our opinion, is not complete so as to sustain the conviction of the Appellant....

20. Suffice it to say that even if we take the most charitable liberal view in favour of the prosecution, all that we get is a suspicion against the Appellant and no more. The High Court was in that view justified in setting aside the order passed by the trial Court and acquitting the Appellant of the offence of murder under Section 302 Indian Penal Code. The order passed by the High Court deserves to be affirmed giving to the Appellant the benefit of doubt. We accordingly dismiss the appeal filed by the Appellant and discharge the notice of show-cause issued to him.”

25. The last seen evidence, undoubtedly, is a vital piece of circumstantial evidence and the absence of any truthful explanation given by the accused or if the explanation given by the accused turned out to be false, then the same forms an additional link in the chain of other circumstances proved against him.

26. It is also a settled legal position that Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond any reasonable doubt. It is only when such a burden is discharged the onus shifts on the accused to prove any fact within his special knowledge to establish that he was not guilty of the offence, we may usefully refer to the following para taken out from the judgment of the Apex court in ***Sucha Singh v. State of Punjab***, reported in ***AIR 2001 SC 1436*** as under:-

“We pointed out that Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases where prosecution has succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the court to draw different inference.”

27. It is well settled that with a view to base conviction on circumstantial evidence, the prosecution must establish all the pieces of incriminating circumstances by reliable and clinching evidence and the circumstances so proved must form such chain of events as would permit no conclusion other than one of guilt of the accused. It is also well settled that suspicion, however, grave it may be, cannot be a substitute for a proof and the courts shall take utmost precaution in finding an accused guilty only on the basis of the circumstantial evidence. (*Refer: Anil Kumar Singh v. State of Bihar, (2003) 9 SCC 67*).

28. In Canadian Law of Evidence, it has been observed in *Hodge's Case (1838), 168 E.R. 1135*: "In a case made up entirely of circumstantial evidence, before the accused could be found guilty, the jury must be satisfied, not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion, than that the prisoner was the guilty person." It has been held in the *Where the accused is the last person seen with the victim is circumstantial evidence of opportunity*. However, opportunity alone cannot be sufficient to make the case. Evidence of the accused frequented the area near where the

victim frequented and where victim's body was found (*Refer: R v Stevens (1984), 11 CCC (3d) 318*).

29. It would be thus seen that the legal position which emerges based on the legal position discussed above is that the last seen evidence even where the accused offers no explanation for the circumstances within his special knowledge or where he offers a false explanation then such a circumstance will constitute an additional link in the chain of circumstantial evidence but to say that an accused can be convicted solely based on his last seen together evidence without there being any other link of circumstances unerringly pointing out no other conclusion except the guilt of the accused will be quite hazardous to nail the accused person with the commission of the crime. The said additional link of last seen together evidence theory can be important link but depending upon the facts of the case the same cannot form the sole basis to prove the guilt of the accused in the absence of any positive corroborative evidence proved by the prosecution.

30. Applying the said principles to the facts of the present case even if we accept the last seen evidence of PW-1 and PW-2 having lastly seen the accused with the deceased on the fateful evening of 24.05.2004,

which is a proximate time of death and even proximate to the place of death of the victim and the non-explanation of the accused in relation to the exact facts within his special knowledge, yet the prosecution has failed to prove any other corroborative evidence unerringly pointing out to one conclusion other than the guilt of the accused. The prosecution in the present case was entirely floating as it had propounded various motive theories to inculcate the accused persons in the commission of the said crime but miserably failed to prove any of the said theory although in none of the said theories any specific role has been attributed against the appellant.

31. The learned trial court has not believed the conspiracy theory on the part of the accused persons to get rid of the deceased. The learned trial court also found that the recoveries affected on the accused persons were doubtful due to many inconsistencies between the testimonies of the three witnesses to such recoveries and also on account of non-joining of PW-1 as a witness to such recoveries although she remained present throughout during the course of such recoveries. The learned trial court also held that the blood could not be detected on the Shirt and T-shirt allegedly recovered from the accused persons, and similarly, no blood

grouping on the other weapon of offence could be found. The learned trial court also held that the scientific evidences also do not lead us anywhere as the blood on the recovered article did not match with the blood of the deceased.

32. In the background of these facts, there is no corroborative and clinching evidence proved on record by the prosecution which could satisfy the conscious of the court in drawing only one conclusion, i.e., guilt of the accused. On the contrary all the above circumstances clearly advance the innocence of the appellant. We may also observe that the appellant was the resident of the same Mohalla where the deceased and his family were residing. It has also been proved on record in the deposition of PW-1 and PW-3, that the family of the deceased was having friendly relationship with the appellant and they enjoyed all trusts in him as he used to take the deceased for dance and gym classes and another circumstance which is important and supports the case of the appellant is that he was throughout available to the police, as in the deposition of PW-1, she herself stated to have met him at about 12 midnight on 25.05.2004. With such cordial and neighboring relationship between the appellant and the family members of the deceased and in the absence of any motive or

other incriminating evidence having surfaced to inculcate the appellant in the commission of the said crime, we are not persuaded to accept the finding of the trial court holding the appellant guilty in the commission of the said crime merely because he was lastly seen in the company of deceased by PW-1 and PW-2 and had offered no explanation in terms of Section 106 of the Indian Evidence Act.

33. One can also not ignore settled principle of criminal jurisprudence **that unless otherwise proved, the person facing the criminal trial must be deemed to be innocent. The philosophy behind this cardinal principle of law is "It is better that ten guilty persons escape than that one innocent suffer" as expressed by the English jurist William Blackstone in his seminal work, *Commentaries on the Laws of England*, published in the 1760s.**

34. Taking overall view of the facts and circumstances of the present case, we are of the view that the prosecution has failed to prove its case against the appellant beyond reasonable doubt and therefore, we do not find ourselves in agreement with the judgment passed by the learned trial court holding the appellant guilty for committing an offence punishable under Section 302 IPC. The judgment dated 3rd October 2009 and order

on sentence dated 9th October 2009 passed by the learned trial court are accordingly *set aside* and the present appeal is allowed.

35. A copy of this order be sent to the concerned Jail Superintendent for intimation and necessary compliance.

KAILASH GAMBHIR, J.

INDERMEET KAUR, J.

SEPTEMBER 19 , 2013
pkb