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

+ CRL.A. 939/2013

% *Judgment dated 15th May, 2015*

RAM NIWAS @ KALU Appellant
Through: Mr.Chetan Anand, Advocate

versus

STATE (GOVT OF NCT) OF DELHI Respondent
Through: Mr.Feroz Khan Ghazi, APP for State

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI
HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J.

1. The appellant has filed the present appeal under Section 374(2) of the Code of Criminal Procedure against the judgment dated 05.12.2012 by which the appellant has been convicted under Section 302/201/34 of the Indian Penal Code and the order on sentence dated 10.12.2012 by which the appellant has been sentenced to undergo imprisonment for life and pay fine of Rs.10,000/- for the offence punishable under Section 302 IPC, in default thereof further undergo simple imprisonment for six months. The appellant has also been sentenced to undergo simple imprisonment for a period of three years and pay fine of Rs.5,000/- for the offence under Section 201 IPC in default thereof further simple imprisonment for a period of three months.
2. The case of the prosecution as noticed by the trial court is as under:
 - “3. Brief facts of the prosecution case are that on 16.08.2008 complainant Rambir alongwith his brother Jagbir reached at Police Station Sultan Puri and they produced their neighbour Ram

Niwas @ Kalu S/o.Kewal Singh R/o.Jhuggi No.C-6/86, Sultan Puri before the SHO & informed about the incident. Ram Niwas was interrogated who disclosed that on the intervening night of 11/12.8.2008 he had killed Ramphool by hitting a 'lath' (wooden stick) on his head and had buried his dead body in his jhuggi. DD No.10A was recorded in this regard and Senior Officers were informed regarding the incident. Thereafter SHO alongwith complainant Rambir and other staff members reached the jhuggi of accused. Private Photographer Manoj Kumar, Photographer Kishore Kumar and crime team were also called at the spot. Jhuggi of accused was found locked which was opened after taking the key from the accused Ram Niwas. Foul smell was coming from the jhuggi. Digging work was carried out by the staff alongwith the help of Naresh & Bhagat Raj and the dead body of Ramphool was taken out which was in decomposed condition and there were injury marks on the head of the dead body. Thereafter Inspector Mahender Singh recorded the statement of Rambir which is Ex.PW-5/A, made his endorsement on the same and sent the same to police station for registration of the case. Inspector Mahender Singh conducted the inquest proceedings and recorded the statements of Jagbir and Rambir regarding the identification of the dead body. Dead body was later on sent to mortuary of SGM hospital for post-mortem examination and after the post-mortem examination, dead body was handed over to the legal heirs of deceased. Inspector Mahender Singh again interrogated the accused wherein he narrated the incident in detail and also disclosed that his wife Asha had assisted him in burying the dead body inside the jhuggi. Accused also got recovered the weapon of offence i.e. lath and screw driver from the jhuggi as well as other articles including the watch of deceased which were taken into possession separately. On 17.8.2008 wife of accused namely Smt.Asha was arrested in this case. Exhibits of the case were got deposited in FSL for analysis. Scaled site plan was got prepared from the draftsman. Subsequent opinion was obtained from the autopsy surgeon regarding the weapon of offence. After completion of investigation, charge-sheet was filed against the accused persons before the concerned court of Ld. M.M. Since the offence committed by accused persons was exclusively triable by the court of sessions, Ld. M.M. committed the case to the court of Ld. District Judge & Addl. Sessions Judge I/C North-West. Thereafter this case was assigned to this court for trial."

3. The prosecution has examined 19 witnesses, however, no evidence was led by the defence. Statement of the appellant under Section 313 Cr.P.C was recorded.
4. Counsel for the appellant submits that the impugned judgment is bad in law and is thus not sustainable. The trial court has based its judgment on conjectures and surmises and without any evidence. It is also contended that the basis on which the appellant has been convicted has not been conclusively proved. The case is not based on the evidence of the eye witnesses, however, the trial court has convicted the appellant purely on the basis of the circumstantial evidence and the well settled position of law has not been taken into consideration.
5. It is also contended that in a case based on circumstantial evidence, in order to convict a person, the evidence must be complete and incapable of explanation of any other hypothesis other than guilt of the accused, such evidence should not only be consistent with the guilt of the accused, but should also be inconsistent with his innocence. Counsel further contends that in cases of circumstantial evidence a very high standard of proof is required, to convict a person and assumptions and presumptions cannot take the place of evidence. Mr.Anand, contends that the prosecution has miserably failed to prove its case beyond reasonable doubt. The prosecution has failed to give reasons for the delay of not filing an FIR with regard to the deceased being missing. It has also been submitted that the motive which is sought to be canvassed is extremely weak as PW-11 (Smt.Rani) in her evidence has clearly stated that the fight over water was a routine affair and there was nothing unusual in the fight which took place between her and Aasha wife of the appellant on the fateful day.

6. Counsel further submits that since it is the case of the prosecution that Smt.Rani, daughter-in-law of the deceased and Aasha, wife of the appellant had entered into a quarrel during the course of the day, there is no explanation why statement of Smt.Rani was not recorded under Section 161 Cr.P.C. It has also been submitted that the motive which is sought to be established is an afterthought as in the FIR no reference of altercation or fight which had taken place between the deceased and the appellant in the evening of the incident, has been given.
7. Counsel also submits that there are material contradictions in the evidence of the material witnesses more particularly in the evidence of PW-12 (Bhagat Raj), who has testified that he started digging at around 8:30 a.m. in the morning, whereas PW-13 has deposed that digging was done between 12:00 and 1:00 in the afternoon. Counsel also submits that there is no reasonable explanation as to why PW-5 (Rambir) did not bother to make a missing complaint regarding his brother (deceased), between 12.8.2008 to 16.8.2008. Counsel further submits that as per the evidence of PW-18 (Baljeet) it was raining in Delhi on those days and thus it is impossible that the deceased and the appellant were sleeping outside in the open when it was raining. Counsel further submits that the case of the prosecution is highly improbable, as according to them the appellant had hit the deceased with a *Danda* on his head and thereafter dragged his body from where he was sleeping to his own *jhuggi* and thereafter in order to bury him dug the floor of his *jhuggi* with the help of screw driver and covered the body with stones. It is submitted that as per the case of the prosecution the appellant was residing in *jhuggi* with his wife and three children and the wife was in the 9th month of pregnancy. It is submitted that for the appellant to have pulled the dead body alone is impossible; and also to dig the ground of the *jhuggi* at least

by 6 ft and 2 ft. wide in length as the deceased was 5 ft. 8 inches in height in a short span of time is also impossible; moreover the site plan would show that the *jhuggi* of the brother of the deceased was adjoining to the *jhuggi* of the appellant and to say none of the persons staying in *jhuggi* heard the scream of the deceased or the sound when the appellant was digging the floor is also impossible, which makes the case of the prosecution highly improbable and to convict the appellant on the basis of circumstantial evidence would be highly unsafe.

8. It is submitted that under the influence of MLA the appellant was beaten and made to sign a disclosure statement. It is submitted that the trial court has failed to take into consideration that the appellant was not present at the spot of the incident, as he was with his wife in the hospital. Taking advantage of his absence, the appellant has been falsely implicated in the matter. Counsel further submits that there is utter confusion with regard to the address of *jhuggi*, as the appellant was residing at *jhuggi* No.C-6/86, whereas there is repeated cutting with regard to *jhuggi* whether it is C-6 or C-7, as is evident upon perusal of the evidence of PW-2, PW-3 and PW-5. Counsel also submits that even in the disclosure statement of the appellant, there is cutting showing C-6 and C-7, surely the appellant would know his address. It is submitted that the question of cutting in his own address would have not arisen unless the statement was in written form and the appellant was made to simply put his thumb impression on the same.
9. Counsel for the appellant also submits that there is nothing to connect the alleged weapon of offence with the appellant, although the *Danda* and screw driver, contained blood, but the FSL report is silent whether it contained the blood of the deceased; FSL report is also silent as to whether the blood contained on the clothes matched with the blood of

the deceased. In the absence thereof, the appellant cannot be linked either to the alleged weapon of offence or blood on his clothes.

10. It is also contended that as per the testimony of ACP Mahender Singh (PW-19) the screw driver was in a normal condition when it was seized, but in case the screw driver was used to dig the floor the same would not remain normal. It has also been contended that as per the report of the FSL the handle of the screw driver was broken, however, to the contrary PW-19 has testified that the screw driver was in normal condition.
11. Counsel for the appellant also submits that it is not the case of the prosecution that *danda*, screw driver and clothes were recovered at the instance of the appellant from the place within the special knowledge of the appellant, thus no benefit can accrue to the prosecution with respect to the recoveries as the same is inadmissible under Section 27 of the Evidence Act.
12. Learned counsel for the State submits that the prosecution has been able to prove its case beyond any shadow of doubt. It is further submitted that the dead body was recovered from the jhuggi of the appellant; the *danda* and screw driver were also recovered at the instance and pointing out of the appellant, which are admissible in the evidence recorded under Section 27 of the Evidence Act; *danda* and screw driver contained blood; the inconsistencies and contradictions pointed out in the statement of PW-12 and PW-13 are minor and do not go to the root of the matter; and the chain of circumstances are complete, which can only lead to one conclusion and that is towards the guilt of the appellant. Moreover, the medical evidence also pointed out towards the guilt of the appellant, which shows that the *danda* and the screw driver could have been used to cause the death of the appellant.
13. We have heard learned counsel for the parties, considered their rival

submissions. Before the rival submissions of counsel for the parties can be considered, we deem it appropriate to discuss in detail the testimonies of some of the material witnesses.

14. The prosecution has strongly relied on the evidence of PW-5 (Rambir), who is the brother of the deceased. As per the testimony of PW-5 on 10.8.2008, Rani wife of Roshan and Aasha wife of the present appellant had quarrelled on the supply of water from the tap. The same evening the appellant had come in a drunken condition and had abused Rani (daughter-in-law of the deceased) and had also threatened to kill her. Rani had informed her father-in-law (deceased, Ram Phool), who reached at Sultanpuri and he confronted Ram Niwas as to why he had abused his daughter-in-law, this resulted in heated exchange of words between them; and due to intervention of some persons, both Ram Niwas and Ram Phool went towards their respective *Jhuggis*; Ram Phool placed a folding cot in front of his *jhuggi* by borrowing the same from his tenant (Baljeet) similarly Ram Niwas also placed his cot in front of his *jhuggi* and both of them had slept. This witness has also testified that around 2:30 a.m. he had woken up to attend the call of nature and found that both the appellant and the deceased were sleeping on their respective cots in front of their respective *jhuggis*; in the morning this witness had found that his brother was not present, neither folding cot was at the spot, he was under the impression that his brother had gone for his duty. In the evening when he did not return, enquiries were made from the residence of deceased at Baljeet Nagar and they had informed that the deceased had not come to Baljeet Nagar for three days; efforts were made to trace him and calls were also made to the relatives.
15. PW-5 has also testified that on 15.8.2008 he made enquiries from Baljeet about the folding cot, who informed that his folding cot and bedding was

not traceable; at the night of 15.8.2008 this witness noticed the appellant was taking some luggage from his *jhuggi* in polythene and he suspected the accused as his *jhuggi* remained closed for 3-4 days. On the following day at about 8:00 a.m. the appellant came to his *jhuggi*, he was questioned and thereafter the appellant had informed them that four persons had kidnapped their brother; the appellant informed his relative MLA Jai Kishan through phone and the appellant was taken to the police station Sultan Puri. On interrogation of the police, the appellant had disclosed that he had killed Ram Phool and the dead body was buried in his *jhuggi*. The appellant was taken to his *jhuggi*, which was opened; two persons were employed by the police for digging *jhuggi*, and the dead body was taken out. The statement of this witness was recorded as *Ex.PW-5/A*; and the articles [one HMT watch, one pair of racksin chappal, one lining blanket, one pillow and folding cot] were recovered from *jhuggi* of the appellant and were seized by the police. The appellant also got effected recoveries of one *Danda*, one screw driver and his blood stained pant and shirt from his *jhuggi*.

16. PW-5 has also testified that he signed the personal search memo of the appellant. In the disclosure statement he has also testified that the *jhuggi* was opened with the key which was in possession of the appellant. He has also testified that local police lifted the earth control from the spot. This witness also identified the articles which were shown to him in court, which belong to his brother. During cross-examination this witness stated that he did not remember whether the screw driver was in one piece or broken. According to him the size of his brother's foot was 6 or 7 number, the chappal of the deceased found was of 8 number; he was unable to identify the colour of the shirt of his brother and testified that it could have been red or black, whereas the shirt which was brought

to court was of blue and white check. During cross-examination this witness has also testified that he did not remember whether the articles were seized by the police. He also testified during cross-examination that his working timings were between 6:30 a.m. to 3: 00 p.m. and Sunday was a weekly holiday.

17. PW-5 has further testified that the deceased used to leave his house at 7.00 a.m. for duty. He is the owner of jhuggi no.83 while the deceased was the owner of seven jhuggis, which were adjacent to each other. On a question being asked, he has deposed that the deceased and other residents were not using coolers on the day of occurrence of the incident. It has further been testified by PW-5 that he had attended his duty on 10th-11th August, 2008, but did not attend his duty from 12th to 18th August, 2008. He has also admitted that in the night intervening 10th and 11th August, it was raining and nobody was sleeping outside in the night of 10th August, 2008. He has also testified that he did not lodge any complaint, FIR or missing report with regard to his brother, deceased Ram Phool. This witness has admitted that MLA Jai Kishan was present at the Police Station. He has also admitted that the appellant was beaten up by the Police. It is also testified by this witness that after leaving Police Station he had reached the place of occurrence at 12.30 p.m. and remained outside the jhuggi till the dead body was taken out. The dead body was cremated at about 6.00 p.m. on 16th August, 2008.
18. PW-6, ASI Joginder Singh, has testified that on 16th August, 2008, at about 12.40 p.m. he received a Rukka, on the basis of which he lodged the FIR bearing No.533/2008 under Sections 302/201 of the Indian Penal Code.
19. PW-8, Dr.V.K. Jha, has testified that on 16.8.2008 he conducted post-mortem on the dead body of the deceased and the following external

injuries were observed by him on the dead body of the deceased:

- 1) Crush injury of left ear
- 2) Lacerated wound on left mastoid region 6 cms x 2 cms x bone deep
- 3) fracture deformity both mandibles
- 4) Lacerated wound on left temporal parietal region 12 cms x 4 cms x bone deep
- 5) Lacerated penetrated wound on abdomen just left lateral to midline 7 cms above umbilicus 1 cms x 1 cms x cavity deep, margins were not bruised.

On Internal examination of head, there was subscalp hematoma on left temporal parietal region, fracture of parietal bone left, brain was liquefied.

After postmortem examination, I opined cause of death to be come as a result of head injury consequent to blunt force diverted upon head by other party. All injuries were antemortem in nature and head injury was sufficient to cause death in ordinary cause of nature.”

20. PW-8 has further testified that on 26.8.2008, SHO Sultanpuri moved an application before him for subsequent opinion of weapon of offence recovered in respect of Ex.PW-8/A. He received two sealed packets with the seal of MS. On opening the packets it contained wooden stick and screw driver respectively. After examination, he opined that injuries no.1 to 4, mentioned in Ex.PW8/A, could have been caused by this wooden stick or similar such weapon. Injury no.5 is the postmortem in nature and could have been caused by this screw driver examined or similar such weapon.

21. PW-11, Smt.Rani, has testified that the appellant had threatened to kill her family. In her cross-examination, she has testified that it is correct that there used to be a quarrel amongst the residents as the bone of contention was the supply of water.
22. PW-12, Sh.Bhagat Raj, has testified that he was employed to dig the floor of a jhuggi. He has further testified that he dug up the floor of jhuggi by removing stone slabs, thereafter the earth was dug up and one dead body was taken out. During his cross-examination, PW-12 has testified that he was paid Rs.150/- by the Police for digging up work and the time was around 8.30 a.m.
23. PW-13, Sh.Naresh, has testified that he is a labourer and used to work as a sweeper. On 16th August, 2008, he was called by the Police Officials. He has further testified that it was revealed to him that one person was buried in the jhuggi and on instructions from the SHO he assisted in digging the jhuggi with phavda. Firstly, the bricks were removed, then stone slabs, thereafter the earth was removed and a dead body was taken out. During his cross-examination, he has also testified that the time was between 12.00 noon to 1.00 p.m.
24. PW-18, Sh.Baljeet, has testified that in the year 2008 he was residing as a tenant in the jhuggi of the deceased. He used to visit his jhuggi occasionally. On the 11th day of the month (which he did not remember) in the year 2008 when it was summer, the deceased had come at about 10.00 p.m. to his jhuggi and asked for a cot. He gave him a folding iron cot along with one blanket and a pillow. Ram Phool slept in the gali on the folding cot. Next morning Rambir, brother of Ram Phool, had made enquiries from him about the deceased. Jhuggi of Ram Phool was opened to check for the cot, blanket and pillow, which were not found. This witness has also testified that after 4-5 days of Raksha Bandhan, he

came to know that in the jhuggi of Ram Niwas (appellant herein) his folding cot, blanket and pillow were recovered. A wrist watch and a pair of chappal, belonging to the deceased, were identified by him and Rambir, brother of the deceased, and other articles were also recovered in his presence. During cross-examination, this witness has testified that his usual work time is between 9.00 a.m. to 5.00 p.m. He had also gone to work on the day of Raksha Bandhan. The proceedings with regard to the day of Raksha Bandhan, which he witnessed, were held in the evening at about 11.00 p.m. Police had taken him to the Police Station on the said day and made him sign on various documents. He has further testified during cross-examination that on the night when he gave cot and blanket to the deceased it rained in Delhi.

25. PW-19, ACP Mahinder Singh, has testified that on 16th August, 2008, he was posted at Police Station Sultan Puri as SHO. At about 8.00 a.m., a group had gathered at Police Station. The appellant was also present. He was informed that the deceased was missing for the past five days. Based on his disclosure statement, he reached the jhuggi of the appellant and upon digging a dead body was recovered. He conducted the proceedings at the spot. Pursuant to the disclosure statement, the appellant had got recovered a wrist watch, chappals of the deceased and other articles such as a folding cot, a blanket and a pillow.
26. During cross-examination PW-19 has testified that the appellant was brought to the Police Station in an injured condition. PW-19 was told that public had beaten him, which has caused the injuries. He has further testified that digging process was completed by 12.00 noon and the dead body was sent to SGM Hospital at about 1.30 p.m. He has also testified that screw driver was in a normal condition and was hanging on the wall.

The screw driver was produced and it is found that the plastic handle of the screw driver was broken.

27. The trial court has convicted the appellant as the prosecution was able to establish the motive, which was a quarrel between Smt.Rani, daughter-in-law of the deceased and Aasha, wife of the appellant, on account of filling of water. The trial court has also considered the testimony of PW-5, brother of the deceased, that he had seen the appellant and the deceased sleeping on their respective cots at about 2.30 a.m., when he had gone to attend the call of nature. But in the morning, he had found that neither the deceased nor his folding cot was there. The trial court has also considered the testimony of PW-18 that he had provided one folding cot, a pillow and a blanket to the deceased, which was recovered from the jhuggi of the appellant. The trial court has also relied upon the FSL report, as per which, blood was found on the *Danda*, screw driver and on the shirt of the appellant. Surprisingly, the trial court has relied upon the disclosure statement of the appellant as well.
28. PW-12 and PW-13 have also testified that upon digging the jhuggi a dead body was recovered. The trial court has also relied upon the recovery of the screw driver and the danda, which contained blood. Blood was also found on the shirt of the appellant and as per the medical evidence wherein Dr.Jha has testified that injuries no.1 to 4 could have been caused by a wooden stick or such similar weapon and injury no.5 is postmortem in nature and could have been caused by the screw driver or such similar weapon.
29. PW-5 is the star witness in this case being the brother of the deceased, who has testified that he had woken up at 2.30 a.m. to attend the call of nature. He had seen the deceased sleeping on his cot and the appellant sleeping on his cot. This witness has proved the presence of the appellant

and the deceased on the fateful night at the spot of the incident. As per this witness, his brother used to go for duty at 7.00 a.m. However, when he woke up in the morning and did not find his brother, he presumed that he had gone for duty.

30. For PW-5 to testify that since he did not find his brother in the morning he presumed that he had gone for work, seems to be an improbable explanation for not approaching the Police at the first opportunity available, for the reason that PW-5 has testified that his brother used to go for duty at 7:00 a.m. and his duty timings were from 6:30 a.m. to 3:00 p.m. which would lead to the only conclusion that he would be leaving the house before his brother. What makes this more improbable is that no report at all was lodged by PW-5 for the next three days and the only explanation rendered is that they were searching for the deceased.
31. PW-5 has also testified that on 15th August, 2011, he enquired from Baljit the tenant, about the folding cot. There is no explanation why PW-5 upon finding his brother missing did not enquire from the tenant as the tenant had lent the folding cot, blanket and pillow to the deceased though there is no explanation as to why the deceased would borrow a cot, blanket and a pillow from the tenant and either not use his own cot and blanket or borrow it from his own real brother. We find the statement of PW-5 unreliable.
32. The motive in this case as per the prosecution was a quarrel between Rani wife of Roshan and Aasha wife of appellant, on account of filling up water. We also find it unusual that PW-5 suspected the appellant when he saw him taking some luggage from his Jhuggi in a polythene. If motive was so strong, as has been urged in this case, the brother of the deceased would have approached the police on 11th August, 2008 itself or in his deposition he would have given the quarrel as the reason of his

suspicion. We are also of the view that if the element of motive being quarrel was so strong why PW-5 did not inform the police of the same.

33. As per the prosecution on 12.08.2008 after 2.30 a.m. the appellant had struck the deceased with a *danda* on his head and also with a screw driver and thereafter buried his body in his jhuggi. It is not in dispute that the dead body was recovered from the Jhuggi of the appellant. PW-1, Manoj Kumar has deposed that he is employed at photo studio and he had videographed the digging. PW-2, Kishore Kumar has deposed that he is running a photo studio; and he was called by the Police to the Jhuggi i.e. C 6-7, Jhuggis Sultanpuri with his camera to take photographs. He has testified that police officials and other persons dug the Jhuggi and one dead-body was taken out after digging; and he took 16 photographs.
34. PW-3 (Constable Hans Raj) has testified that in his presence “*a dead body of a man was dug out from a pitch (sic. ‘pit’) inside the jhuggi with the help of public and other staff of the police*”.
35. As per PW-5 the dead-body of his brother was recovered after digging inside the Jhuggi. PW-12, PW-13 are the two witnesses, who were assigned the job of digging in the jhuggi. PW-12 has testified that the floor of Jhuggi was dug up by removing stone slabs and thereafter earth was also dug up and one dead-body was taken out. PW-12 also testified that one Bijender was also present with them when they dug up the earth in the jhuggi; and thereafter the dead-body was shifted to the hospital. PW-13 has testified “I assisted the Police staff and other persons in digging the Jhuggi with *Phavda*. First of all, we removed the bricks then stone slabs and thereafter the earth was removed and a dead body was taken out”.

36. The aforesaid deposition of these witnesses being PW-1, PW-2, PW-3, PW-5, PW-12 and PW-13, would clearly establish that the dead-body was buried in the Jhuggi. In order to recover the dead-body as per the PW-12, the floor of the Jhuggi was dug up by removing stone slabs and then the earth was also dug up and then body was taken out. According to PW-13 bricks, stone slabs and thereafter the earth was removed to take out the dead-body.
37. Though there is no evidence to show that how deep the dead-body was buried in the earth, but the fact that the stone slabs were removed at first and then the bricks and thereafter the earth was removed can give a rough idea that at least dead-body was not on the bare surface of the Jhuggi. Coupled with the fact that two persons, PW-12 and PW-13, were employed by Police to dig out the dead body.
38. As per PW-5 when he woke up at about 2:30 a.m. in the morning to attend the call of nature he had seen his brother and the appellant sleeping on their respective cots in front of their respective jhuggis. PW-5 has also testified in cross-examination that his duty timings are between 6:30 a.m. to 3:00 p.m. PW-5 has also testified that when he got up the next morning he found his brother was not present neither his folding cot was at the spot. He thus thought that his brother had gone for his duty. As per the testimony of PW-5 he had seen the accused and the deceased sleeping in their respective cots at 2:30 a.m. and his duty timings as has been deposed by him are 6:30 a.m. in the morning, which means the murder of the deceased took place a little after 2:30 in the morning and latest by 6:00 a.m. as by 6:30 a.m. PW-5 would have had to attend his duty.
39. As per the testimony of PW-5 on record, the appellant woke up between 2:30 a.m. and 6:00 a.m., struck the deceased with *Danda* and a screw

driver and thereafter dragged the dead-body of the deceased from outside the *jhuggi* of the deceased to inside his *jhuggi*; dug a pit on the floor of at least 6 ft. in length and 3 ft. in width, by removing the stones slabs and the earth. It may, however, be noticed that when the dead body was dug up at the instance of the police, it took at least two hours for two persons and that too when the soil is loose.

40. The purpose of noticing this aspect is two fold: firstly in the absence of any phavda having been recovered it would be humanly impossible for a single man to dig a pit after removing bricks, floors slabs with bare hands, and that too in a short span of time, without making any sound, and secondly there is not a single deposition of any witness that sound of dragging the dead body or digging was heard, despite the fact that the site plans, PW-19/F and PW-4/A would show that *Jhuggis* are closely connected. *Jhuggies* are small in size and moreover *Jhuggis* are not constructed by bricks and mortar. We may also notice that PW-5 was asked as to whether any cooler was running on the fateful night, the answer given by PW-5 was in negative. We find it highly improbable that none of the *Jhuggi* dwellers including the tenant, Sh.Baljeet (PW-18) and brother of the deceased, PW-5, did hear any sound.
41. As far as the scientific evidence is concerned, the case of prosecution is that the blood was found on the screw driver, *Danda* and shirt of the appellant. The *Danda* and screw driver were recovered at the instance of the appellant. The scientific evidence has been relied upon by the trial court as another circumstance in the chain of circumstances to hold the appellant guilty for the offence of murder. However, we are unable to appreciate as to how the *Danda* and screw driver would link the appellant to the offence having been committed, as the FSL report does not show that the blood on the *Danda* and screw driver and the shirt of

the appellant matched with that of the deceased. We also find it unusual that despite the nature of injuries, no blood was found at the spot of the incident, neither there were blood stains on the cot where the deceased was sleeping or on the blanket and at the entrance of jhuggi, where the dead body would have been dragged by the appellant; nor there is any evidence to show that any neighbour had heard either the sound of digging or screams of the deceased, when he was hit with a *Danda* and the screw driver, leaving him with as many as 5 external injuries.

42. It has repeatedly been held that suspicion, however, strong, cannot take the place of proof. In the case of **State of Punjab Vs. Bhajan Singh & Ors.**, reported at AIR 1975 SC 258, wherein the Apex Court has observed it was held as under:

“..... The circumstances of this case undoubtedly create suspicion against the accused. Suspicion, by itself, however strong it may be, is not sufficient to take the place of proof and warrant a finding of guilt of the accused.....”

Also see [**Kali Ram Vs. State of Himachal Pradesh** reported at AIR 1973 SC 2773 as also AIR 1973 SC 2622 and 2003 (3) JCC 1358]

43. The law relating to circumstantial evidence has been a subject matter in a number of decisions. It will be useful to reproduce the observations of the Hon'ble Supreme Court in the case of **Kali Ram Vs. State of Himachal Pradesh**, AIR 1973 SC 2773 which are as follows :-

“Another Golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be

established by circumstantial evidence. Rule has accordingly been laid down that unless the evidence adduced in the case is consistent only with the hypothesis of the guilt of the accused and is inconsistent with that of his innocence, the court should refrain from recording a finding of guilt of the accused. It is also an accepted rule that in case the court entertains reasonable doubt regarding the guilt of the accused, the accused must have the benefit of that doubt. The rule regarding the benefit of doubt also does not warrant acquittal of the accused by resort to surmises, conjectures or fanciful considerations.

Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures.

The guilt of the accused has to be adjudged not by the fact that a vast number of people believe him to be guilty but whether his guilt has been established by the evidence brought on record. Indeed, the courts have hardly any other yardstick or material to adjudge the guilt of the person arraigned as accused. Reference is sometimes made to the clash of public interest and that of the individual accused. The conflict in this respect, however is more apparent than real.

It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilised society. All this highlights the importance of ensuring, as far as possible, that there should be no wrongful conviction of an innocent person. Some risk of the conviction of the innocent, of course, is always there in any system of the administration of criminal justice. Such a risk can be minimised but not ruled out altogether.”

44. The present case is to be decided on the touchstone of the law laid down.

The prosecution has to establish its case beyond any shadow of doubt and must be able to establish that every link in the chain of circumstances is complete, unequivocally giving proof of occurrence.

45. Having regard to the evidence placed on record, we are of the view that the prosecution has failed to prove its case beyond any shadow of doubt. The circumstantial evidence is not complete, nor it is incapable of explanation of any other hypothesis than the guilt of the appellant.
46. For the reasons stated above, we feel that it would be highly unsafe to convict the appellant. Accordingly, the present appeal is allowed. The judgment dated 05.12.2012 and the order on sentence dated 10.12.2012 of the trial court are set aside. The appellant stands acquitted and he shall be released forthwith, unless he is wanted in any other case.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

MAY 15th, 2015
ssn