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

+ CRL.A. 1550/2011

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Judgment dated 22.01.2015

RAM SHAKAL @ PAPPU Appellant
Through: Ms.Anu Narula, Advocate

Versus

STATE GOVT. OF NCT OF DELHI Respondent
Through: Mr.Mukesh Gupta, APP for State

CORAM:

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

G.S.SISTANI, J.

1. Present appeal has been filed against the impugned judgment dated 30.4.2011 and order on sentence dated 3.5.2011, by which the appellant has been convicted under Section 302 Indian Penal Code and sentenced to undergo rigorous imprisonment for life and further sentenced to pay a fine of Rs.1000/- and in default of payment of fine the appellant has been sentenced for simple imprisonment for one month.
2. The case of the prosecution as noticed by learned trial court is as under:

On 10.03.2008, vide DD No.19A, an information was received that one dead body of a child was lying behind T.N. Public School, Sukhi Nehar Ke Pass. The said DD entry was marked to SI Prabhanshu for action, who along with Ct. Surender and Ct. Dalbir went to the spot.

2. Thereafter, on visiting the said spot, SI Prabhanshu found that many public persons had gathered in a field of wheat and on the edge of the field, one dead body of a child, aged around 10 years was lying in naked condition, and on inspection of the body, injury

marks were found on his right cheek and neck, and his right hand was also broken. SHO also came to the spot. The dead body could not be identified, and it was observed that the child had been strangled to death. On the said facts, a rukka was written by SI Prabhanshu and he got lodged an FIR U/s 302 IPC at PS Aman Vihar, and the further investigation(s) were handed over to Inspector Dinesh Kumar.

3. Crime team and the photographer was also called to the spot. Senior officers were also informed, regarding the incident. The crime team prepared report and photographs were also taken and the dead body was also removed to the SGM Hospital, and on inspection of the spot, one pant was found near the dead body, which was seized and one voter I-card was also found in one corner of the field on which Ram Shakal S/o Arjun was mentioned, which was also seized.

4. Thereafter, I.O met one Sheetal Singh and his wife Tanuja at the spot, who was sent with SI Prabhanshu to SGM Hospital for the identification of the dead body, which was identified by them, as their son Mahabali, aged 10 years, and thereafter I.O recorded the following statement of Smt. Tanuja W/o Sheetal Singh.

“That she was residing with her family and her children at Prem Nagar, and her husband Sheetal Singh was a rickshaw puller, and before that he was working in a factory and during the said process he had developed friendship with one Pappu, who was brought to their house sometimes, and they used to drink together and in the absence of her husband, said Pappu also started visiting their house, and on more acquaintance he started residing in their room at a rent of Rs. 800/- per month and her husband used to ply rickshaw in the night and slowly slowly they developed intimate relations with each other.

On suspicion, her husband started quarrelling with her and one month ago, her husband turned away Pappu from his house and she also realized her mistake and supported her husband, in the process of eviction of Pappu. Pappu started living on rent in adjacent place and he tried to establish physical relation with her in the absence of her husband, to which she refused, due to which he became inimical to their

family, whenever earlier Pappu used to visit her room, he used to turn out Mahabali out of the room and on her refusal, he used to slap him.

Around 1 week ago, in the morning when her husband had left with his rickshaw and when she was coming back, after fetching milk, the said Pappu forcibly took her inside his room and tried to establish physical relations with her, to which she refused, at this he started abusing her and he also proposed that she should start residing with her after leaving her husband and children, otherwise, he would kill them. At that time, suddenly her husband was also coming back to his house, due to the puncture of his rickshaw and he also stopped, on seeing her standing near the house of Pappu and due to which there was exchange of hot words between them and physical altercation. After that Pappu stated that he would see my husband.

On 09.03.2008, at around 4:00 p.m, she along with her daughter Radhika had gone for hair cut in the nearby gali and at that time her son Mahabali was playing marbles in the gali and when they were returning, at that time, they saw that Pappu was taking Mahabali towards Itwar Bazaar. In the night, when Mahabali did not return, she along with her husband started searching for him, and they also went to the room of Pappu, but the same was closed in the night. In the morning she along with her daughter Radhika went to the room of Pappu and he opened the door, he was heavily drunk and she asked about the whereabouts of her son Mahabali. At this, Pappu twisted her hand and ran away, and they started searching for her son and when they reached near Aman Vihar PS, they were taken to mortuary of SGM Hospital, where they identified the dead body of their son, who had been killed by Pappu, due to previous enmity.”

5. Thereafter, the accused Pappu was searched, but he was not found in his room. The postmortem of the deceased child was got conducted at the mortuary of SGM Hospital, and after the postmortem, the autopsy surgeon handed over the relevant exhibits, which were seized.

6. Thereafter, on 12.03.2008, the accused Ram Shakal was

arrested. He also pointed out the place of occurrence and also made a disclosure statement and pursuant to his disclosure statement, got recovered one blue and yellow T-shirt and one old hawai chapple, which were also seized, which belonged to the deceased child.

7. The result, regarding the cause of death was obtained from the autopsy surgeon, which was given as asphyxia, as a result of pressure over throat structures, produced by throttling by other party.”

3. In support of its case, the prosecution has examined 14 witnesses. The statement of the accused was recorded under Section 313 of the Code of Criminal Procedure. The defence also led evidence of the employer of the appellant (DW-1).
4. Learned counsel for the appellant submits that the trial court has failed to appreciate that the prosecution has not been able to prove its case against the appellant beyond shadow of doubt. It is also the case of the appellant that since the case is based on circumstantial evidence it was incumbent upon for the prosecution to prove the case against the appellant beyond all reasonable doubts and on the touchstone of law relating to cases of circumstantial evidence. The prosecution has failed to make a complete chain of circumstantial evidence without breaking the chain against the appellant. As per the settled law on circumstantial evidence all the links must be so connected to form a complete chain and all the links must lead to the only hypothesis of the guilt of the accused, whereas in the present case the essential requirements of law have not been fulfilled.
5. It is strongly urged before this court that the testimony of child witness (PW-9, Radhika) was not reliable as she had been tutored by her family members. Counsel also contends that the prosecution has failed to prove the illicit relationship between PW-2, Tanuja and the appellant, as no credible evidence has been produced in this regard, except for the

statements of PW-1 and PW-2, which are self-contradictory in this regard.

6. Ms.Narula, counsel for the appellant submits that the trial court has failed to appreciate that the prosecution has been unable to prove that a prior quarrel had taken place between the appellant and the husband of PW-2, outside the room of appellant, where the appellant had allegedly threatened to eliminate the husband and children of PW-2, and thus the alleged motive and genesis of the incident does not stand proved; and further there is no independent evidence regarding any animosity or quarrel which took place between the appellant and PW-1 and PW-2.
7. It is also the case of the appellant that the trial court has erred in not appreciating the inconsistencies, discrepancies and contradictions in the statements of the witnesses and the said contradictions are vital in nature which go to the root of the matter.
8. It is also the case of the appellant that although the trial court has rightly concluded that Chappals, pants and I.D. cards have been planted and are embellishments, but erred in concluding that the same is not vital to the case of the prosecution.
9. Counsel for the appellant submits that the trial court in paragraph 20 of the judgment has noticed the circumstances, which were relied upon by the prosecution in support of its case. Paragraph 20 of the judgment reads as under:

“20. The following circumstances were pressed into service by the prosecution in support of its case.

- a. That the accused & PW1 Sheetal Singh developed friendship.
- b. That the accused started residing in the house of PW1, as Paying Guest.
- c. That the accused developed intimate relations with the wife of PW1, namely, PW2 Tanuja.

- d. That the PW1 came to know about the same and evicted him (accused) from his house and thereby accused developed ill will against the family of PW1.
- e. That accused started living nearby in a separate room and kept on asking PW2 to continue with intimate relations.
- f. That one day when PW2 was returning to her home, accused pulled her inside his room, and asked her to have illicit relations with him, which was refused by her.
- g. That husband of PW2 also reached there in the meanwhile, and there was exchange of hot words and altercation, where accused threatened to wipe out the family of PW2.
- h. That on 09.03.2008, PW2 along with her daughter PW9 Radhika went for hair cut to a barber shop, at that time deceased was playing marbles in front of gali of PW2.
- i. That when PW2 & PW9 were returning from barber shop, they saw deceased going with the accused towards Sunday Bazar.
- j. That the deceased did not return back that night to his house. Therefore, was searched by PW1 & PW2 at various places, including the house of deceased, which was found locked.
- k. That PW2 along with PW9 went to the house of accused in the morning, where she inquired from accused about her son. Accused ran away from his house, after twisting the arm of PW2, which shows his strange conduct, after the incident.
- l. That the dead body of the deceased was recovered from the fields, from where the Voters I-card of accused was also found.
- m. That the accused was arrested and he got recovered the T-shirt and chapples of the deceased from the same fields, pursuant to his disclosure statement.”

10. Ms.Narula counsel for the appellant has contended that the prosecution has failed to prove that the appellant and PW-1 (Sheetal Singh) mother of the deceased had developed friendship and intimate relationship, and in the absence thereof this cannot be considered as a circumstance in favour of the prosecution and thus the trial court has erred in treating this factor as a circumstance. Similar argument has been raised by counsel for the appellant with regard to the circumstance (d) as in case intimate

relationship between the appellant and the mother of the deceased was not established, this cannot be a ground for the appellant having been evicted from the house of the father of the deceased. It is also the case of the appellant that the evidence of PW-1, PW-2 and PW-9 cannot be relied upon for the circumstance (f) that the appellant had pulled PW-2 inside his room and asked her to have illicit relations with him; nor circumstance (g) has been proved that hot words were exchanged between the appellant and the PW-1, husband, as there is no evidence of any independent witness nor of any neighbour, who had witnessed the quarrel.

11. Counsel for the appellant submits that in the absence of any independent witness to support the case of the prosecution, it would be extremely unsafe to convict the appellant on the basis of the evidence of relations i.e. PW-1 (father), PW-2 (mother) and PW-9 (Sister). Counsel also submits that being a case of circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn should be fully established. In the present case, the prosecution has failed to make a complete chain of circumstantial evidence. It is also submitted by counsel for the appellant that the evidence of PW-9, the child witness is unreliable and cannot be the basis of conviction of the appellant.
12. Another argument which is raised by counsel for the appellant is that there are material contradictions in the evidence of PW-1, PW-2 and PW-9. Counsel submits that PW-1 has testified that the appellant used to work with him in the factory, whereas DW-1, who is the factory owner has stated to the contrary. Another contradiction which is pointed out is that PW-1 has not stated that on the date when the child went missing, he visited the house of the appellant, while PW-9 has testified that she along with her mother and father had gone to the house of the appellant, but he did not open the door of the house. Counsel had also pointed out that

PW-2 has testified that she had gone to the barber shop for getting hair cut of his son Raj, whereas PW-9 has testified that she had gone to the shop of barber along with her mother for her hair cut. It is also pointed out that PW-1 has testified that on the morning of 10.3.2008 he went to lodge a report at the Police Station Aman Vihar. Similarly PW-2 has testified to the same effect, but in fact no report was actually lodged with the police. It is also submitted that the evidence of PW-1, 2 and 9 would show that the appellant is innocent as he did not make any attempt to run away, in case he had committed the crime. It is submitted that in fact the appellant was found in his room and the evidence on record would also show that he had gone to his work even after the alleged incident.

13. Counsel submits that there is also discrepancy in the evidence as to whether the body of the child was found in the field or the body was shown to PW-1 and PW-2 in the hospital. In view of the discrepancies, it is contended that the witnesses are unreliable.
14. Learned APP for the State submits that the prosecution has been able to prove its case beyond any shadow of doubt. The evidence of PW-2 and 9 would show that the child was last seen in the company of the appellant. The evidence of PW-1, PW-2 and PW-9 would clearly establish the motive and further in the statement under Section 313 Cr.P.C. the appellant has not denied that he was staying as a tenant with the father of the deceased and after sometime he had left the room.
15. Mr.Gupta, learned APP for the State also contends that the evidence of the father (PW-1), mother (PW-2) and sister (PW-9) are trustworthy and reliable, there are no material contradictions and the minor contradictions, which have been pointed out do not go to the root of the matter. Counsel also submits that the motive stands duly established.
16. Before the rival contentions of both the counsel can be considered, we

deem it appropriate to discuss the evidence of the material witnesses. PW-1 (Sheetal Singh), is the father of the deceased. He has testified that he knew the appellant, who used to work with him before he started doing the job of Rikshaw puller. The acquaintance between the PW-1 and the appellant turned into friendship and the appellant started visiting his house and thereafter became the tenant/ paying guest of PW-1 for Rs.800/- per month. After three months, the appellant developed intimacy with the wife of PW-1. After confronting the appellant, PW-1 asked appellant to leave his house, as he was having illicit relations with his wife. The appellant thus developed grudges against him. PW-1 has also testified that one day when he came back to his house, as his Rikshaw got punctured he noticed that his wife was present in the room of the appellant, which was situated in the same gali. He objected to the same and took his wife with him. The appellant whom he identified in court had grappled with him and threatened him that he would kill him and his children before Holi festival. PW-1 has further testified that on 9.3.2008 in the evening his wife told him that their son (Mahabali) was missing. Both husband and wife started searching for their son; and his wife informed him that she had seen the appellant along with their son in the evening. The next morning both PW-1 and his wife went to the Police Station, to lodge a report from where they were taken to SGM Hospital where they identified the dead-body of their son. This witness has also testified that the police searched for the appellant, who was apprehended at his instance. He identified his signatures on the arrest memo, Ex. PW-1/C at point "A". He also identified his signatures on Jamatalashi, Ex.PW-1/D and the disclosure statement Ex.PW-1/E.

17. PW-1 has also testified that the appellant led the police party to the place of occurrence, where he had killed his son. A T-shirt, pair of chappals

were got recorded from the field, which he identified. During cross-examination, PW-1 has denied the suggestion that the appellant was residing with his wife and three children. He denied the suggestion that the appellant was not residing as a tenant near his house. He also denied the suggestion that the appellant never resided as a tenant in his house. He further stated during cross-examination that he had not lodged any complaint to the police regarding commotion between him and the appellant. He also admitted that when he had objected to his wife's presence in the room of the appellant, no one from the neighbouring houses had gathered nor he had lodged any complaint to the police when the appellant had grappled with him and threatened to kill him and his children. Various other suggestions were put to PW-1, including whether there was no illicit relationship between the wife of PW-1 and the appellant, which he disputed. He also disputed that it was incorrect that the appellant had not threatened him.

18. PW-2, Tanuja, mother of the deceased and wife of PW-1 has also deposed on the lines of her husband (PW-1). PW-2 has testified that the appellant was working with her husband and thereafter he started visiting their house and subsequently he started living as their tenant / paying guest. She admitted that she had become intimate with him and when her husband came to know of the same, he objected to it and the appellant was directed to leave the house. The appellant thereafter started living in the same gali in another room. PW-2 deposed that she realized her mistake, but the appellant continued to pressurize her to continue with the illicit relationship. One day when she was passing through the gali to fetch milk, the appellant had taken her to his room and asked her to continue with the illicit relation, which she refused. The appellant even asked her to leave her husband and start living with him and on her

refusal, he threatened that he would not spare her children and husband in case she did not go with him. PW-2 also deposed that she was present with him in the room, when her husband entered and there was a quarrel between her husband and the appellant; the appellant had abused her husband and also threatened that he would kill him and their children. She testified that one evening she had gone with her daughter (Radhika, PW-9) to the barber shop, at that time her son was playing in the gali and she saw that appellant and her son were going together towards Sunday Bazar. The same night her son did not return; she had gone to the room of the appellant, but the same was found locked. The next morning she again went to the room of the appellant, the appellant was sleeping inside, the door was repeatedly knocked and on opening of the door she found that the appellant was in drunken state. She asked him the whereabouts of his son as he had gone with him, she informed that her son could not be traced. Thereafter the appellant pushed her aside and ran away.

19. Another important witness is PW-9 (Radhika), minor sister of the deceased. The trial court after satisfying itself that the child witness was capable of giving rationale answers, found her to be a competent witness. PW-9, has testified that in the evening of 9.3.2008 at about 4:00 p.m. she along with her mother had gone for her hair cut, at that time her brother was playing kanchas in gali of Sunday Market Bazar. While pointing out to the appellant she deposed that she had seen Pappu uncle taking away her brother on his cycle towards the side of Sunday Market; and her brother did not return home. She along with her mother and father went to the house of the appellant in search of her brother, but he did not open the door of the house. The next morning she accompanied her mother to the room of the appellant. After sometime the door was opened her mother enquired about the whereabouts of her brother, the appellant

twisted her hand and ran away. Thereafter her parents had gone to the Police Station to lodge the report. This witness was cross-examined in detail. During cross-examination PW-9 *inter alia* stated that no police uncle had come to court, who had recorded her statement. She denied the suggestion that she was tutored outside the court. She was also cross-examined with regard to the time taken to reach the Sunday Bazar from her house. She was also cross-examined with regard to the name of the barber shop or the name of the barber, which she could not answer. On a direct question being asked “Is it correct that the Sunday Bazar is so crowded that one cannot see anything” Answer to this question was “No it is not so crowded”. She also repelled the suggestion that it was not possible for anyone to recognize a person at a distance of 10 yds. in the Sunday Market because of heavy crowd. She stated that her statement was recorded only once; she had not read the statement but the statement was recorded on her dictation. She further testified that she had stated to the police that she had seen the appellant taking away her deceased brother on his bicycle towards the side of Sunday Market. She was confronted with statement Ex.PW-9/DA, where the words “on his bicycle” were not recorded.

20. We have heard counsel for the parties and given our thoughtful consideration to the matter. The arguments of counsel for the appellant can be summarized as under:

- (i) The evidence of PW-1, PW-2 and PW-9 are not trustworthy, as they are the interested witnesses.
- (ii) The evidence of PW-9 is not reliable as she is a child witness.
- (iii) There are discrepancies in the evidence of the material witnesses.
- (iv) The motive is not established.
- (v) The gap between the last seen and the death of the child is wide.

(vi) Prosecution has failed to make a complete chain of evidence.

21. The first submission of counsel for the appellant is that the evidence of PW-9, child witness is not reliable.
22. The law with regard to testimony of a child witness is well settled. It would be useful to refer *Ratansingh Dalsukhbhai Nayak Vs. State of Gujarat* 2004 SCC (CrL) 7. Relevant portion of the judgment reads as under:

“6. Pivotal submission of the appellant is regarding acceptability of PW 11's evidence. The age of the witness during examination was taken to be about 10 years. The Indian Evidence Act, 1872 (in short “the Evidence Act”) does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the court considers that they are prevented from questions, because of tender years, extreme old age, disease -- whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and given rational answers thereto. This position was concisely stated by Brewer, J. in *Wheeler v. United States*. The evidence of a child witness is not required to be rejected per se, but the court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. (See *Suryanarayana v. State of Karnataka*).

7. In *Dattu Ramrao Sakhare v. State of Maharashtra* it was held as follows: (SCC p. 343, para 5)

“A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear

in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored.

The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. The precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.”

23. This question was also the subject matter of another judgment of the Supreme Court in *Acharaparambath Pradeepan & Anr. Vs. State of Kerana* 2007 [1] JCC 828. Relevant portion of the judgment reads as under:

“48. Section 118 of the Indian Evidence Act seeks to exclude evidence of those who may suffer from intellectual weaknesses. It reads as under:

“Who may testify. -- All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.”

49. In terms of the said provision therefore, all persons shall be competent to testify unless by reason of tender years, the court considers that they are incapable of understanding the questions put to them and of giving rational answers. It is for the Judge to satisfy

himself as regards fulfillment of the requirement of the said provision. The opinion of the learned Judge had been recorded and, thus, it satisfies the test laid down by this Court in ***Rameshwar S/o. Kalyan Singh v. The State of Rajasthan*** [AIR 1952 SC 54].

50. It is not the case of the appellants that the court had failed to comply with the statutory obligations in this behalf. It is also not the case of the appellants that their testimonies otherwise should not have been accepted.

51. A child indisputably is competent to testify if he understands the question(s) put to him and gives rational answer thereto. None of the witnesses have been found to be suffering from any intellectual incapacity to understand the questions and give rational answers thereto.

53. Indisputably, certain factors are required to be considered as regards reliability of the testimony of the child witnesses but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of child witnesses.”

24. It has been consistently held by the Apex Court that a child witness is competent to testify, if he understands questions put to him and gives rational answers. No doubt while accepting the testimony of a child witness, it is the duty of the Court to be cautious and should carefully scrutinize the testimony. However, in case the evidence of the child witness has a ring of truth in it, the evidence cannot be rejected *per se* and there is no obstacle in accepting such evidence.
25. Applying the law laid down to the facts of this case, it may be seen that prior to the recording of the evidence of PW-9 (the child witness) the court had satisfied itself that the child was capable of understanding the questions and giving rationale answers. The evidence of the child witness has been discussed in detail in paragraph 19 foregoing. We find her evidence to be trustworthy and reliable. PW-9 has withstood the cross-examination and she has testified on the lines of the evidence of

PW-1 and PW-2. The evidence of PW-9 also stands corroborated by the evidence of PW-1 and PW-2. Thus the submission of counsel for the appellant that the evidence of PW-9 being a child witness is unreliable is without any force.

26. With regard to the evidence of last seen, PW-9 has categorically stated that she had seen her brother along with the appellant on his cycle. During cross-examination she deposed that the Sunday Bazar was not so crowded that a person could not be seen. She has also stated during cross-examination that her statement was recorded on her dictation. PW-2 has also deposed that she had seen her son going along with the appellant towards the Sunday Bazar. Thus the argument of counsel for the appellant that the evidence of PW-9 is to be discarded as she is a child witness is without any force and deserves to be rejected. We have also carefully analyzed the evidence of PW-2 (mother) and PW-9 (sister) and find the evidence to be truthful and reliable and thus it stands established that the deceased was seen last in the company of the appellant.
27. We have examined the post mortem report. As per the testimony of the witnesses, PW-2 and PW-9, the child was last seen in the company of the appellant around 4:00 pm and as per the report of the post mortem, the time of death of the child was approximately 7:00 p.m. Thus it cannot be said that there was a large gap of time when the child was last seen in the company of the appellant and his death.
28. We have carefully examined the evidence of PW-1, PW-2 and PW-9. PW-1 has testified that he and the appellant became friends and the appellant started living in his house as a tenant/ paying guest for Rs.800/- per month. PW-1 has also deposed that appellant had developed intimacy with his wife and after confronting him appellant was directed to leave his house and for this reason the appellant developed grudges against him.

He also testified that he found his wife in the room of the appellant and when he objected to the same, the appellant had threatened to kill him and his children. These material facts have also been testified by PW-2 and there is no material discrepancy in the same.

29. Counsel for the appellant had also pointed out discrepancies in the evidence of PW-2 that during cross-examination PW-2 had made a contradiction that she had no relation with the accused.
30. No doubt during the cross-examination PW-2 has stated “I had not relations with the accused, but there was a quarrel between my husband and myself over the accused. It is wrong to suggest that there was no quarrel between my husband and myself over the accused.”, but in the examination-in-chief PW-2 has categorically stated that she and the appellant had got intimate with each other and her husband had objected to the same. PW-2 has further testified in her examination-in-chief that she realized her fault and broke the relationship with the appellant. But the appellant continuously pressurized her to continue with the relationship.
31. Reading the entire evidence would show that the cause of the quarrel was the accused and his relationship with the PW-2. In addition thereto we are of the view that discrepancies which have been pointed out by the counsel for the appellant are not material and do not touch the core issue. There is no material contradiction besides that the evidence was recorded after more than one year of the date of incident and the court can also not lose track of the fact that the witnesses are uneducated.
32. In the case of **Shaymal Ghosh v. State of West Bengal**, reported at (2012) 7 SCC 646, it was held that every variation may not be enough to adversely affect the case of the prosecution and the Court must ascertain whether the variations are material and would affect the case

substantially.

33. In a recent decision *Mritunjoy Biswas Vs. Pranab @ Kuti Biswas and anr.* reported at 2013, Vol. 12 SCC 796, the Apex Court has held as under:

“As is evincible, the High Court has also taken note of certain omissions and discrepancies treating them to be material omissions and irreconcilable discrepancies. It is worthy to note that the High Court has referred to the some discrepancies which we find are absolutely in the realm of minor discrepancies. It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission (See *Leela Ram vs. State of Haryana and another, Rammi alias Rameshwar v. State of M.P. and Shyamal Ghosh v. State of West Bengal.*”

34. Law with regard to the conviction on the basis of circumstantial evidence has been discussed in detail by the Supreme Court in the case of *Harishchandra Ladaku Thange Vs. State of Maharashtra*, reported at AIR 2007 Supreme Court 2957. It would be useful to reproduce the relevant paras:-

8. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence,

the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See *Hukam Singh V. State of Rajasthan* (AIR 1977 SC 1063), *Eradu V. State of Hyderabad* (AIR 1956 SC 31), *Earaohadrappa V. State of Karnataka* (AIR 1983 SC 446), *State of U.P. V. Sukhbasi & Ors.* (AIR 1985 SC 1224), *Balwinder Singh alias Dalbir Singh V. State of Punjab* (AIR 1987 SC 350) and *Ashok Kumar Chatterjee V. State of M.P.* (AIR 1989 SC 1890)). The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In *Bhagat Ram V. State of Punjab* (AIR 1954 SC 621) it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt.

9. We may also make a reference to a decision of this Court in *C. Chenga Reddy & Ors. V. State of A.P.* (1996 (10) SCC 193), wherein it has been observed thus:-

“21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.”

10. In *Padala Veera Reddy V. State of A.P.* (AIR 1990 SC 79) it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

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

11. In State of *U.P. v. Ashok Kumar Srivastava* (1992 CrL LJ 1104) it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

12. Sir Alfred Wills in his admirable book 'Wills' Circumstantial Evidence' (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence: (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the *factum probandum*; (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability; (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order

to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt; and (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.

13. There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touchstone of law relating to circumstantial evidence laid down by this Court as far back as in 1952.

14. In *Hanuman Govind Nargundkar and another V. State of M.P.*, (AIR 1952 SC 343) it was observed thus:-

“It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established, and all the fact so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.”

15. A reference may be made to a later decision in *Sharad Birdhichand Sarda v. State of Maharashtra* (AIR 1984 SC 1622). Therein, while dealing with circumstantial evidence, it has been held that the onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in the prosecution cannot be cured by a false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are:-

- (1)the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;
- (2)the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
- (3)the circumstances should be of a conclusive nature and tendency;
- (4)they should exclude every possible hypothesis except the one to be proved; and
- (5)there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

35. We find that the trial court has considered the circumstances, as detailed in paragraph 20 of the judgment, which has been reproduced above, and have discussed each circumstance to hold that the prosecution has been able to prove beyond any shadow of doubt by unimpeachable conclusion that the appellant had committed the murder of the deceased, Mahabali.
36. The argument of counsel for the appellant that the appellant has been falsely implicated in the matter is without any force, as at the first opportunity available, the parents of the deceased had pointed their finger of suspicion towards the appellant and had also specifically named the appellant.
37. The mother and father of the deceased have also narrated the entire incident with regard to the mother (PW-2) having intimate relations with the appellant. Both PW-1 and PW-2 have also testified with regard to

quarrel with the appellant and the incident of one week before the date of occurrence when the appellant had forcibly pulled PW-2 into his room; and PW-1 having reached the room as his Rikshaw had got punctured on the said date. The version of PW-2 in the cross-examination that she had no relations with the accused, but there was a quarrel between her husband and her over the accused, is sufficient indication of relationship between appellant and PW-2. No woman, much less an Indian woman would ever put a stigma on her character, just to falsely implicate a person and moreover there is nothing on record to establish that PW-1 and PW-2 had any reason to falsely implicate the appellant and they would let go the actual culprit scot free.

38. For the reasons stated above, we find no ground to interfere in the judgment of the trial court. The appeal is without any merit and the same is dismissed.

**G.S.SISTANI
(JUDGE)**

**SANGITA DHINGRA SEHGAL
(JUDGE)**

JANUARY 22, 2015
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