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

+ CRL.A. 809/2015

% *Judgment dated 28<sup>th</sup> January, 2016*

MOHD YUNUSH & ANR ..... Appellants  
Through : Mr.Jitender Tyagi and Ms.Sugandha  
Bhatia, Advs.

versus

STATE ..... Respondent  
Through : Ms.Aashaa Tiwari, APP for the State.  
Inspr.Youdh Bir Singh, Police Station  
Okhla Industrial Area.

**CORAM:**

**HON'BLE MR. JUSTICE G.S. SISTANI**

**HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL**

**G. S. SISTANI, J. (ORAL)**

1. Present appeal has been filed by the appellant against the judgment dated 28.5.2015 and order on sentence dated 3.6.2015 passed by learned Additional Sessions Judge, in Session Case No.24/15, whereby the appellants have been acquitted for the offence punishable under Sections 377/34 of the Indian Penal Code but convicted for the offence punishable under Sections 302/120-B of the Indian Penal Code and sentenced to undergo Rigorous Imprisonment for life with fine of Rs.5,000/-, each, and in default of payment of fine to undergo further Rigorous Imprisonment for a period of six months.
2. The facts of the case, as noticed by the learned trial court, are as under:

*“As per case of prosecution, on 11.04.2011, information was*

*received regarding a male dead body lying in DDA Jungle, opposite Giri Nagar Mosque towards Kalkaji Mandir, New Delhi. The said information as recorded vide DD No. 40A at police station Okhla Industrial Area (Ex.PW35/A).*

*2. On receipt of DD No. 40A Ex.PW35/A, PW-35 Insp. Mohinder Singh along with PW-26 Ct. Indraj reached at the spot. SI Nizamuddin, Ct. Kishan, Ct. Kamlesh and other police officials also reached at the spot. The police officials found a dead body of an unknown boy aged 16 years. The deceased was found naked and had injury marks on his face. The clothes of deceased and other articles were lying scattered in the DDA Park (jungle) where the dead body was found. Some blood stones were also found. Insp. MOhinder Singh made endorsement on DD No. 40A and prepared rukka and gave the same to Ct. Indraj for registration of FIR. He went to the police station, got the FIR registered, came back at the spot and handed over copy of FIR and asal tehreer to the Investigating Officer (IO). Crime team was called. Photographs of the spot and dead body of deceased were taken by the photographer of the spot and dead body of deceased were taken by the photographer of the crime team. The articles belonging to deceased were taken and seized.*

*3. Matter was investigated as per law. Five persons including two accused and three juveniles were found in the commission of offence in the case. In the course of investigation, disclosure statement of accused persons were recorded, incriminating material was seized, postmortem on the dead body of deceased was got conducted, accused persons were arrested and on completion of investigation in the case, Police Investigation Report (PIR) was filed before Juvenile Justice Board against juveniles Vikram, Hassan and Ashiq while charge sheet was filed in the court against accused Mukesh Kumar and Mohd. Yunus.*

*4. Accused persons, on their appearance in the court, were supplied copy of charge sheet and other documents and after making compliance of section 207 Cr.P.C., the case was committed to the Court of Session as the offence under Section 302/34 IPC is exclusively triable by the Court of Session.*

*5. Prima facie case for offence punishable under section 302/377/34 IPC was found against accused Mukesh Kumar and*

*Mohd. Yunus, therefore, charge for the said offences was framed against them on 30.09.2011 to which they pleaded not guilty and claimed trial.”*

3. In support of its case, the prosecution has examined 35 witnesses. One witness was produced by the defence. Statement of the appellant herein was recorded under Section 313 of the Code of Criminal Procedure.
4. Mr.Tyagi, learned counsel for the appellant, submits that the judgment and order on sentence passed by the learned trial court are bad in law as the same have been passed without any application of mind. Counsel further submits that the trial court has erred in convicting both the appellants under Sections 302/120-B of the IPC in the absence of any evidence on record. It is further submitted that no independent public witness was associated with the investigation. It is contended that the prosecution has only relied upon the family members of the deceased and being interested witnesses they have falsely implicated the present appellants.
5. Mr.Tyagi further submits that PW-1, Praveen Baidya @ Dabbu has deposed that on 10.4.2011, being a Sunday, he had seen the deceased with his two friends, namely, Vikram and Hasan. It is further contended that PW-1 has not named either of the two appellants i.e. Mohd.Yunus and Mukesh in his statement and, thus, it cannot be said that PW-1 is a witness, who had seen the deceased last in the company of the appellants.
6. Mr.Tyagi further submits that PW-3, Subhash, is a planted witness and his testimony is neither truthful nor reliable. It is further contended that PW-3 has testified that he had accompanied the appellants along with the deceased till the last point but being scared of the night he did not go inside the jungle and sat alone on the road, which is improbable as there was no reason for this witness to feel scared in the company of four other

persons, rather he would have felt unsafe alone on the road.

7. Mr.Tyagi contends that PW-3, Subhash, was introduced at a later stage to falsely implicate the appellant no.1 at the instance of his employer, one, Sh.Sunil, who had an old enmity with the father of appellant no.1. Learned counsel further contends that even as per the testimony of PW-3, he did not enter the jungle and, thus, he could not have seen the incident with his own eyes and in the absence of any eye-witness of the alleged incident, a role has been ascribed to the appellants purely on their disclosure statement and not on account of evidence of the eye-witness, which is not admissible.
8. Learned counsel for the appellants further submits that even as per the own theory of the prosecution, the objective of the accused persons was to commit unnatural sexual act with the deceased, which has not been proved and the appellants have been rightly acquitted of the charge under Sections 377/34 of the IPC. Counsel also submits that there are contradictions in the evidence of PW-3, Subhash, who has testified that Mohd.Yunus had expressed his desire to consume liquor, but as per the evidence of PW-1, Praveen Baidya, Mohd.Yunus was not found at the *daru theka*. It is further submitted by counsel for the appellants that although the appellant no.1 was carrying his mobile phone at the time of the incident but no effort was made to seize his mobile phone, further no effort was made to obtain the CDRs from the service provider to show the location of appellant no.1 at the time of the incident.
9. It is further contended by Mr.Tyagi that the appellants have been convicted on a very weak form of evidence. The appellants were arrested on the basis of disclosure statements made by the co-accused, Vikram and Hasan (the juveniles), which is a very weak form of evidence. In addition, there is nothing on record, which can connect the appellants to the

commission of the crime.

10. It is also submitted by Mr.Tyagi that although the cause of death was combined effect of head injury due to blunt external force and asphyxia due to strangulation but the blunt object was not connected to the crime. Counsel contends that although a big stone was found but it was also not connected with the crime, nor the stone was sent to FSL for examination to show that it contained blood of the deceased.
11. Ms.Tiwari, learned counsel for the respondent, submits that the prosecution has been able to prove its case beyond any shadow of doubt. As per PW-3, Subhash, who is the star witness, the deceased, Mahadev, was last seen in the company of the appellants on 10.4.2011. Thereafter the dead body of the deceased was found in the naked condition. Ms.Tiwari further submits that PW-6, Dr.Asit Kumar Sikary, has testified that the injuries were caused to the deceased by blunt force like brush, gravels and even in the scuffle.
12. We have heard learned counsel for the parties, considered their rival submissions and also examined the judgment and order on sentence passed by learned trial court. The trial court has convicted the appellants primarily on the basis of the testimony of PW-1, PW-3, PW-4 and PW-29. Since the trial court has laid strong emphasis on the testimonies of these witnesses, we deem it appropriate to discuss the evidence of these witnesses in detail.
13. PW-1, Praveen Vaidya, has testified that on 10.4.2011, being Sunday, he was going with his friend, Vikki, to purchase clothes from Madhya Market. At about 7.45 / 8.00 p.m., when they reached near the wine shop on the road near Madhya Market, which falls near BJ Block near Tughlakabad, they met Mahadev along with his two friends, Vikram and Hassan. Upon asking Mahadev as to what he was doing there, he told

PW-1 that he had come there to drink Royal Stag whiskey. Mahadev told him to leave from there, upon which they left. This witness has further testified that he knows Mahadev as he was residing in the same locality. It has further been deposed by this witness that he had seen Vikram and Hassan roaming with Mahadev.

14. In his testimony PW-3, Sh.Subhash, has testified that on 10.4.2011, in the afternoon, he along with Yunus and Mukesh was sitting under a Peepal tree in the gali. PW-3 has further deposed that Yunus expressed his desire to consume liquor, for which all agreed. They made a programme to consume liquor at 6.00 p.m. They all went to RZ Block Theka Sharab to bring liquor at 6.00 p.m. They all consumed liquor together and thereafter they returned to Gali No.3 together at 7.00 / 7.30 p.m. Thereafter this witness left for his house but Yunus and Mukesh remained in the gali. Thereafter at about 8.00 p.m. Yunus made a telephone call on the mobile of this witness. Upon asking, PW-3 was informed that it was Yunus. PW-3 has further testified that he did not remember the telephone number from which Yunus called him on that day. PW-3 has volunteered that Police had deleted the phone numbers on the day when he was taken away by the Police.
15. PW-3 has further deposed that when Yunus made telephonic call to him at 8.00 p.m., Yunus told him to accompany him to Kalkaji Mandir. Upon asking as to who else is going, Yunus told him that he, Mahadev, Hassan, Vikram, Ashiq and Mukesh would be going to Kalkaji Mandir. He agreed to accompany them to the Mandir. Thereafter, they boarded a bus route number 469 and alighted at Okhla Gol Chakar. Thereafter, they again boarded a DTC bus from Okhla Gol Chakar and got down at Kalakaji Depot in front of Masjid, as Yunus wanted to excrete. There was a jungle in front of the Masjid. Yunus, Mukesh, Mahadev, Hassan, Vikram and

Ashiq went towards the jungle. By that time, it was dark. The time might be about 9.30 / 9.45 p.m. PW-3 told them that he was afraid of darkness and, thus, did not accompany them to the jungle. PW-3 remained outside the jungle and sat under the Metro Station. He waited for them for 30/45 minutes. Thereafter, PW-3 called the name of Yunus twice. Yunus answered him that '*tereko tasalli nahi hai kya*'. PW-3 told them that they were getting late as they have to go to Mandir. Yunus told PW-3 that he should wait for 10-15 minutes more '*Tu 10-15 minutes baith ja*'. Thereafter, they did not come out from the jungle for another 45 minutes. This witness again called Yunus and thereafter only Yunus came. Yunus told him that '*mere kaam to ho chukka, tu apna kaam kar le*'. On this count, the trial court had put the following question to this witness:

*“Court Q. What do you mean by completing the work?”*

*Ans. Yunus told me that “Mahadev ke saath ganda kam kar lia hai”*

16. Upon asking what was the *ganda kaam*, Yunus told PW-3 that “*Mahadev ki maine gaand mar liya hai*”. PW-3 told Yunus that he has his wife and children and would not commit such an act. Yunus told PW-3 that “*tu na marad hai kya*”. Whereupon Yunus caught hold of collar of PW-3 and gave first blow on the mouth of PW-3. Blood started oozing out of the nose of PW-3.
17. PW-3, Subhash, has further deposed that he was standing near the gali and the broken boundary of the Jungle. Yunus told the other persons, who were inside the jungle, that '*Subhash ko bhi andar lo aur iske saath bhi aaisa hi karo jaisa Mahadev ke saath kiya hai*'. Then PW-3 pushed Yunus and ran away from the spot. PW-3 took an auto and returned to his

house. It was about 2.00 a.m. This witness has further testified that in the morning, father of Mahadev came to his house. PW-3 narrated the incident to the father of Mahadev, who told PW-3 that he would make a complaint to the Police. PW-3 accompanied him to Okhla Police Station. Father of Mahadev made a complaint to the Police and statement of PW-3 was recorded by the Police. PW-3 again said that Police had made enquiries from him, but he did not know whether his statement was recorded at that time or not. Thereafter PW-3 along with the Police visited the house of the appellants and other persons.

18. PW-3 has also testified that on 11.4.2011, in the night, he learnt that Mahadev had died and his dead body had been recovered from the jungle. PW-3 has further deposed that the Police had recorded his statement first after the recovery of the dead body and before the arrest of the appellants. Blood samples of PW-3 were also taken. This witness has further deposed that the Police had also checked the mobile phones of all the appellants including PW-3 and had obtained call detail records.
19. PW-4, Pradeep Baidya, father of the deceased, has deposed that he had two sons, Mahadev Baidya and Sukhdev Baidya. Mahadev is his elder son. PW-4 has testified that on 10.4.2011 at about 7.00 p.m. he returned to his house from the office. His son, deceased Mahadev, went to the park. Since the deceased Mahadev did not return to his house till 9.45 pm, PW-4 made a call on the mobile phone of Mahadev. Three-four times the mobile phone rang, but no response was received. When PW-4 again made a call on the mobile phone of his deceased son, he heard some voice on the mobile 'chod-do chod-do', but that was not the voice of his son. PW-4, along with his Bhanja Chintu, immediately went out from his house in search of his son. They searched Mahadev everywhere till 10.30 or 11.00 p.m. The appellant, Yunus, met PW-4 at about 10.30 / 11.00 p.m.

in front of his house. PW-4 asked Yunus about his son, Mahadev. Yunus told PW-4 that he had met Mahadev at about 8.00 p.m. but Yunus did not tell the place where he had met the deceased. Yunus further told PW-4 that his son might have gone to Kalkaji mandir, as Navratras were going on. At about 11.45 p.m., PW-4 again went to the appellant, Yunus, and enquired from him about his son, but Yunus did not disclose any new information regarding his son. Yunus had made a call from his mobile phone to the deceased son of PW-4 in the presence of PW-4, but the call was not responded to. At about 12.00 / 12.30 am PW-4 again made a call on the mobile phone of his son, Mahadev. It was responded only once, but no voice was heard except that '*phad-phad*'. Thereafter, the mobile phone of his son was switched off.

20. PW-4 has further testified that the next morning at about 6.30 am, he went to the second floor of the premises, where PW-4 was residing, to meet one, Hasan, who was residing there. PW-4 enquired about his son Mahadev. Hasan informed PW-4 that he had seen his son in the last night at about 8.00 p.m. but Hasan did not tell the place where he had seen Mahadev. Hasan also did not tell PW-4 with whom or where the son of PW-4 had gone. Thereafter PW-4 went to the house of appellant, Yunus, and enquired from him about his son. Yunus told PW-4 that his son might have gone to the house of his friend Vikram. Then PW-4 went to the house of Vikram at Gobind Puri. Vikram had informed PW-4 that he had seen his son Mahadev near PW-4's house at about 8.00 p.m. in the last night. Vikram had also informed PW-4 that he did not know as to where Mahadev had gone. Upon asking by PW-4, Vikram also told PW-4 that he is going to Goa. He also told PW-4 that he had to go to Goa last night but could not go because of certain work. Thereafter PW-4 went to Police Station Gobind Puri to lodge a complaint, but returned as Police advised

him to wait for one-two hours. Thereafter he went to the jhuggis of Base camp, where while searching for his son, PW-4 met two boys, namely, Tappu and Vicky, who were known to him. They told PW-4 that they had seen Mahadev at about 7.00 p.m. on 10.4.2011 near Daru Theka, RZ at Gobind Puri Extension along with Vikram and Hasan.

21. PW-4 has further testified that on 11.4.2011 at about 3.00 p.m. he went to Police Station Gobind Puri where he was informed that the Police had recovered a dead body last night. A photograph of the dead body was shown to him on the mobile phone, which he could not identify. Thereafter, PW-4 had gone to Police Station Okhla to identify the dead body. There PW-4 identified the belongings of his son such as Shirt, Pant, Chappal and Belt. PW-4 also identified the dead body of his son in the mortuary. PW-4 has also deposed that he informed the Police that his son was seen with Vikram and Hasan at Daru Theka by Tappu and Vicky. The PW-4 accompanied the Police to the house of Vikram on the night of 11.4.2011. Vikram was apprehended by the Police from his residence. Thereafter PW-4, Vikram and Police had gone to the house of Hasan, however, he met them on the way near Khata Khazana School. Hasan was apprehended by the Police. Thereafter PW-4 accompanied Police officials to the house of Yunus. Yunus was apprehended from outside of his house. Thereafter PW-4 remained in the Police Station throughout the night. The Police had also brought one accused with the name Dankus, who was residing in the jhuggis of base camp. PW-4 has testified that he did not know the real name of Dankus. The Police had apprehended five persons, namely, Vikram, Hasan, Yunus, Dankus and Aashiq.
22. Upon being asked by the learned Additional Public Prosecutor before the Trial Court as to from where the appellant, Mukesh, was apprehended to which PW-4 stated that he did not know from where Mukesh was arrested

but he was brought to the Police Station in the night, when he was present in the Police Station.

23. PW-29, Vicky Burman, has testified that on 10.4.2011, being Sunday, between 7.00 p.m.-8.00 p.m., he along with Dabbu was going to Madhya Market, near wine shop. This witness has further testified that he knew Mahadev, as he was his neighbour earlier. PW-29 enquired from Mahadev as to what he was doing there. Mahadev told him that he would consume liquor. Thereafter PW-29 along with Dabbu went away from the said place. On the next day i.e. 11.4.2011, father of Mahadev along with Hasan came to his jhuggi and inquired about Mahadev. PW-29 informed them that he had seen Mahadev yesterday night near Daaru theka along with Hasan and another boy. Police had taken PW-29 to the police station where he narrated to the Police whatever was seen by him. PW-29 has further testified that from the Police he learnt that Mahadev had expired.
24. We may notice that in the present case there is no eye-witness and the case of the prosecution is purely based on circumstantial evidence. We may also note, at this stage, that the prosecution has examined this case based on two theories i.e. (i) under Section 377 of the IPC, motive to have unnatural sex with the deceased and (ii) under Section 302 of the IPC, murder of the deceased.
25. We may also note at this stage that both the appellants stand acquitted for the offence committed under Sections 377/34 IPC. This aspect attains importance for the reason that no motive is established and the case of the prosecution rests purely on circumstantial evidence.
26. The case of the prosecution is entirely based on circumstantial evidence as well as on the last seen theory. It is settled law that in a case based on circumstantial evidence, 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, forming a chain 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 totally inconsistent with his innocence.

27. The principle of circumstantial evidence has been reiterated by the Hon'ble Apex Court in plethora of cases. In ***Bodhraj @ Bodha and Ors. v. State of Jammu & Kashmir: (2002) 8 SCC 45***, the Hon'ble Apex Court quoted number of judgments and held as under:

*“10. 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 : (1977) 2 SCC 99, Eradu v. State of Hyderabad : AIR 1956 SC 316, Earabhadrapa v. State of Karnataka : (1983) 2 SCC 330, State of U.P. v. Sukhbasi (1985) Suppl. SCC 79, Balwinder Singh v. State of Punjab : (1987) 1 SCC 1 and Ashok Kumar Chatterjee v. State of M.P. 1989 Suppl. (1) SCC 560). 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.*

*11. We may also make a reference to a decision of this Court in C. Chenga Reddy v. State of A.P. : (1996) 10 SCC 193, wherein it has been observed thus: (SCC pp. 206-07, para 21)*

*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.”*

28. In *Trimukh Maroti Kirkan v. State of Maharashtra* : (2006) 10 SCC 681, the Hon'ble Supreme Court held as under:

*“12. In the case in hand there is no eyewitness of the occurrence and the case of the prosecution rests on circumstantial evidence. The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that 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 they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with their innocence.”*

29. The same principles were reiterated in *Sunil Clifford Daniel v. State of Punjab*: (2012) 11 SCC 205, *Sampath Kumar v. Inspector of Police, Krishnagiri*: (2012) 4 SCC 124 and *Mohd. Arif @ Ashfaq v. State (NCT of Delhi)*: (2011) 13 SCC 621.
30. In case of circumstantial evidence, the Court has to examine the entire evidence in its entirety and ensure that the only inference that can be drawn from the evidence is the guilt of the accused. For establishing the guilt on the basis of the circumstantial evidence, the circumstances must be firmly established and the chain of circumstances must be completed from the facts.
31. Returning to the present case, the short question, which arises for consideration before this Court is that whether the testimony of PW-3 is truthful and reliable.
32. Upon examination of the entire testimony of PW-3, we find that PW-3 stayed outside the jungle, but he was at such a distance from where he could communicate with the appellants herein, which is evident from the testimony of PW-3 which shows that PW-3 had called Yunus, who answered him '*tereko tasalli nahi hai kya*'. Thereafter PW-3 was told by Yunus that '*Tu 10-15 minutes baith ja*'. PW-3 also heard Yunus telling other persons, who were inside the jungle, that '*Subhash ko bhi andar lo*

*aur iske saath bhi aaisa hi karo jaisa Mahadev ke saath kiya hai*'. The inference, which can safely be drawn, is that PW-3 was waiting at a place where voice of the persons inside the jungle could be heard. We find in the entire testimony of PW-3 that there is no mention that he heard either the cries of the deceased or his protest or any form of struggle by the deceased or the shouts of the deceased to show that he was resisting the unnatural act, which was being committed on him.

33. In our view, the testimony of PW-3 would become unreliable as in case as many as four persons were committing an unnatural act on the deceased, he would have certainly shouted or cried for help, which aspect would have certainly been mentioned by PW-3. We also find another reason to find the testimony of PW-3 to be unreliable as there was no occasion for PW-3 to wait outside the jungle for 45 minutes alone when according to PW-3 he did not enter the jungle as he was scared. PW-3 has also testified that Yunus had caught hold of him by his collar, he gave first blow on the mouth of PW-3 and blood started oozing out of the nose of PW-3. In case, such an incident had ever happened, surely in medical examination (MLC), an endorsement would have been made in the MLC of PW-3.
34. It may also be noticed that PW-3 has also testified that in the next morning father of Mahadev had come to his house and enquired about his son Mahadev. PW-3 has accompanied the father of Mahadev to the Police Station Okhla where a complaint was lodged by the father of Mahadev. In case, PW-3 was present outside the jungle, either he would have taken the father of the deceased to the jungle on the same night or when he had accompanied the father of the deceased to the Police Station Okhla to lodge the complaint he would have also led the Police party to the jungle where according to him he had seen the deceased last time with the accused persons and in the complaint it would have been mentioned that

the deceased was last seen in the company of Mohd. Yunus and Mukesh, appellants herein.

35. We also find that in the statement of PW-3, he has clearly testified that he remained outside the jungle and sat under the Metro Station. He waited for them for 30/45 minutes. Thereafter, PW-3 called the name of Yunus twice. Yunus answered him that '*tere ko tasalli nahi hai kya*'. PW-3 told them that they were getting late as they were to go to Mandir. Yunus told PW-3 that he should wait for 10-15 minutes more '*Tu 10-15 minutes baith ja*'. Thereafter, they did not come out from the jungle for another 45 minutes. This witness again called Yunus and thereafter only Yunus came. Yunus told him that '*mere kaam to ho chukka, tu apna kaam kar le*'. PW-3 refused to do so. Yunus told PW-3 that "*tu na marad hai kya*". Thereafter Yunus caught hold of collar of PW-3 and gave first blow on the mouth of PW-3.
36. We find that this vital piece of evidence, which PW-3 could have communicated to the father of the deceased or in the statement to the Police, is absent.
37. The trial court has also placed very strong reliance on the testimony of PW-1. We find that PW-1 has simply deposed that he had seen the deceased, Mahadev, in the company of Vikram and Hassan on 10.4.2011 between 7.00 p.m. to 8.00 p.m. near Wine shop on the road near Madhya Market, Tughlakabad, New Delhi. The testimony of PW-1 would show that he had not mentioned the name of either of the two appellants and, thus, the evidence of PW-1 can be of no help to the prosecution.
38. A perusal of the testimony of this witness would also show that there is no direct evidence that the deceased was last seen in the company of the appellants except that PW-4 had enquired from his friends, who did not give a proper response, but he came to know from Tappu and Vikki that

the deceased was seen lastly in the company of Vikram and Husain, who are not appellants in this case.

39. We may also note that the blood samples of the appellants herein did not match with the blood sample of the deceased although the blood samples were taken for the purposes of proving the offences under Section 377 of the IPC and the blood samples did not match but this would also gain importance for the reason that had the blood samples matched, it could have shown that the appellants were present at the place of the incident.
40. As held in the case of ***Bodhraj @ Bodha and Ors.*** (supra) “*where a case rests squarely of 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.*”
41. In the present case, it cannot be said that all the incriminating facts point towards the guilt of the appellants. The circumstances, from which an inference of guilt of the accused is drawn, have to be proved beyond reasonable doubt, which in our view, the prosecution has failed to prove. The circumstances, sought to be proved are not conclusive in nature. The circumstances are not consistent with the hypothesis of the guilt of the appellants herein.
42. It is settled law that an appellate court has full power to review, appreciate and reconsider the evidence at the time of hearing of appeal and there is no restriction on the appellate court while exercising such power in an appeal to reach its own conclusion both on questions of fact and of law while deciding an appeal. (See ***Chandrappa v. State of Karnataka***, (2007) 4 SCC 415; and ***Ganpat v. State of Haryana***, (2010) 12 SCC 59).
43. As we have found the testimony of PW-3 to be unreliable and not trustworthy it would be highly unsafe to convict the appellant purely on the basis of evidence of PW-3 alone when there is no other evidence to corroborate the testimony of PW-3. Resultantly, the appellant must succeed. The appeal is allowed. The appellants shall be released forthwith

unless they are wanted in any other case. Bail bonds be cancelled. Surety stands discharged.

**G.S. SISTANI, J**

**SANGITA DHINGRA SEHGAL, J**

**JANUARY 28, 2016**  
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