

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

+ **CRL.A. 831/2015**

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Judgment reserved on: 20th January, 2016
Judgment pronounced on: 10th February, 2016

RAKESH KUMAR @ DALU

...Appellant

Through : Mr. S. K. Sethi and Ms. Dolly Sharma, Adv.

Versus

STATE

...Respondent

Through : Ms. Aashaa Tiwari, APP for the State with
Inspector Pramod Kumar, Police Station –
Shahdara.

+ **CRL.A 135/2016**

Judgment reserved on: 8th February, 2016
Judgment pronounced on: 10th February, 2016

STATE

...Appellant

Through : Ms. Aashaa Tiwari, APP for the State with
Inspector Pramod Kumar, Police Station -
Shahdara and SI Abodh Kumar, Police
Station - Karawal Nagar.

Versus

RAKESH KUMAR @ DALU

...Respondent

Through : Mr. S. K. Sethi and Ms. Dolly Sharma,
Advocates.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J.

1. Present appeals arise out of a common judgment dated 23.05.2015 and order of sentence dated 29.05.2015 passed by learned Additional Sessions Judge, Delhi in Sessions Case No. 62/14 whereby the

appellant had been sentenced to undergo imprisonment for life and a fine of Rs. 25,000/- for the offence under Section 302 of the Indian Penal Code and in default of payment of fine, the amount shall be recovered as per Section 421 of the Code of Criminal Procedure. The appeals have been heard and are disposed of by a common judgment..

2. Brief facts of the case, as noted by the Learned Trial Court are:

“1) Deceased Sonu and Rakesh were good friends, who were residing in the same locality. Rakesh was working as driver and he along with his family, was residing in the house of Ms. Nandi Devi as her tenant. Ms. Samta was the daughter of landlady of Rakesh. Deceased Sonu was having close relationship with wife of accused Rakesh, which was not liked by accused Rakesh. On 08.03.2009 accused Rakesh took Sonu along with him during night, out of a pre-plan to eliminate him. They had taken drinks along with accused Ravi. Rakesh had taken a Toyota Qualis vehicle from his cousin Manoj and both accused took deceased in that vehicle for outing. Sonu had become too much intoxicated under the influence of liquor and then in pursuance of the plan, Ravi fired on the chest of Sonu from close range while sitting in the same vehicle. Thereafter, accused Rakesh took country made pistol from Ravi and fired on head of Sonu, due to which Sonu died in the vehicle itself. Sonu was thrown out of the vehicle on the road going towards Khurja, near Maharam Pur, U.P. thereafter, accused

persons came back to Delhi. On next day i.e. 09.03.2009 accused Rakesh took away his family from the house of Ms. Nandi and left Delhi. The family members of Sonu were making inquiry about Sonu and Sh. Madan Singh (father of Sonu) finally lodged a missing report on 12.03.2009 Sh. Madan Singh had been making inquiry about the accused Rakesh from Ms. Samta and her mother on 15.03.2009 during evening time, he was informed by Ms. Samta that accused Rakesh had made telephonic call to her. He asked Samta to politely extract information from accused Rakesh about his son Sonu. Ms. Samta was talking to Rakesh on her mobile phone, which was not having recording facility, however some parts of the talk between accused Rakesh and Ms. Samta were recorded in the mobile phone of Sh. Madan Singh, while keeping speaker on of the phone used by Ms. Samta. In that talk, accused Rakesh confessed of eliminating deceased Sonu and thereafter, Sh. Madan Singh again visited police station and disclosed all facts to the SHO. His statement was recorded and FIR was registered by police under Section 365 IPC against accused Rakesh.

2) On 04.07.2009 on the basis of secret information, accused Rakesh was arrested by officials of Special Cell, Delhi Police and thereafter, he was formally arrested in this case after interrogation. Accused Rakesh gave his

disclosure statement thereby disclosing involvement of co-accused Ravi and the use of Toyota Qualis vehicle in the murder of Sonu. Police recovered Toyota Qualis vehicle from Sh. Nafees Ahmad. The vehicle was examined by experts of CFSL, Lodhi Road, who found blood stains on the seat of vehicle and the same was seized for the purpose of FSL examination.

3) The dead body of Sonu was found near village Gangthalla, Khurja in the early morning of 09.03.2009 and local police sent the dead body for postmortem examination in District Hospital, Bullandshahar. They also lodged a case on 12.03.2009, however, on the basis of pamphlets and publication of photographs of the dead body, Sh. Madan Singh visited PS Khurja City and identified the clothes and photographs of deceased Sonu. Thereafter, the further investigation of the case was transferred from Khurja City to Delhi for investigation of offence under Section 302 IPC.

4) After completion of investigation, police chargesheeted accused Rakesh and Ravi for offence under Section 364/302/201/34 IPC.

5) On 04.03.2010, charges were framed for offences under Sections 364/302/201/34 IPC against both accused persons, to which they pleaded not guilty and claimed trial.

6) Both accused persons were charged with allegations that on 08.03.2009, at about 09:00 PM, they both formed common intention to abduct and commit murder of Sonu and in furtherance of their common intention, they abducted him with intent to cause his death and thus, they committed offence punishable under Section 364/34 IPC.

7) They were also charged with allegations that on or before the above said date, time and place, they formed common intention and in furtherance of such common intention, they committed murder of Sonu and thereby, they committed offence punishable under Section 302/34 IPC.

8) They were also charged with allegations that on the same date, time and place in furtherance of their common intention, they caused evidence of commission of the offence to disappear i.e. disappearance of the fire arm used and cleaning the evidence of the brain material on the seat of the vehicle and with intention to screen themselves with legal punishment and thereby, they committed offence punishable under Section 201/34 IPC.”

3. To bring home the guilt against the appellant, prosecution examined 40 witnesses in all. The statement of the appellant under Section 313 of

the Code of Criminal Procedure was recorded wherein he denied all the accusation against him.

4. Mr. S. K. Sethi, learned counsel (appearing for appellant in Criminal Appeal No. 831/2015 and respondent in Criminal Appeal No. 135/2016) has advanced the following arguments while impugning the judgment under appeals:

- (i) The case of the prosecution is solely based upon the extra-judicial confession, which confession is neither reliable nor in accordance with law. This extra-judicial confession is inadmissible as per Section 24 of the Evidence Act and cannot form the basis of conviction of the appellant since it has no corroboration and when examined in the light of the settled principles of law, it is inconsequential, thus, the appellant is entitled to the benefit of doubt. The counsel for the appellant further submits that an extra-judicial confession is also a very weak piece of evidence and in a case of circumstantial evidence like the present, one cannot form a valid basis for proving the guilt of the appellant.
- (ii) In the present case, there is neither any eyewitness nor the prosecution has proved the complete chain of circumstances to bring home the guilt of the appellant. The trial court has erred in applying the theory of 'last seen together' to reach the conviction of the appellant. There being no direct evidence of involvement of the appellant in the commission of the crime, the theory of 'last seen together' is not of any assistance to the case of the

prosecution besides there material contradictions in the testimonies of the witnesses.

- (iii) Learned counsel for the appellant submits that the prosecution has failed to prove the motive behind the alleged crime.
- (iv) The trial court has failed to appreciate the medical and other evidence placed on record in its correct perspective. There are serious contradictions in the medical evidence, as regards the time of the death of the deceased. Once the time of death of deceased is not established, the whole story of the prosecution falls to the ground. The counsel further pointed that there are contradictions with respect to the height of the dead body recovered. It is also contended by the counsel that as per the post mortem report the height of the dead body was 5'4" however, PW-5 Sh. Malkhan Khan and PW-23 Inspector Vijay Prakash Singh in their testimonies deposed that the height of the dead body was about 5'9" and 5'5" respectively. The counsel next submitted that the factum of intoxication of the deceased Sonu was not supported by the post mortem report.
- (v) The recovery of vehicle alleged to have been made in furtherance to the disclosure statement of the appellant is disputed and in any case, it is highly improbable that the blood sample matched with the blood of the deceased lifted from seat of the alleged vehicle after four months of the incident and has no link with the commission of the crime and as such, it would be impermissible in law to use the recovered vehicle against the appellant for sustaining his conviction. The counsel for the

appellant further submits that there is no recovery of weapon of offence used in the commission of crime.

5. On the contrary, Ms. Aashaa Tiwari, learned APP for the State, strongly refuted the submissions made by the counsel for the appellant and lent support to the judgment on conviction and order of sentence passed by the learned Sessions Judge. Counsel argued that the prosecution has been able to prove their case beyond any shadow of doubt. The counsel argued that the extra-judicial confession in the present case is admissible as it is duly corroborated, and thus, the trial court is fully justified in convicting the appellant. It is further argued that if extra judicial confession is reliable and made voluntary, it can be made the sole basis for conviction.
6. It is also contended by the counsel for the State that on the basis of evidence produced on record as well as the circumstances proved by the prosecution has formed a complete chain pointing unequivocally towards the guilt of the appellant.
7. Based on these submissions counsel for the State urged that this Court may not interfere with the well reasoned order passed by the learned Sessions Judge convicting the appellant for committing an offence under Section 302 of the Indian Penal Code.
8. We heard learned counsel for the parties and perused the entire record placed before us.
9. What, therefore, needs to be seen is whether the prosecution has established the incriminating circumstances upon which it places reliance and whether those circumstances constitute a chain so complete as not to leave any reasonable ground for the appellant to be

found innocent. The prosecution primarily based its case on the circumstances: (i) extra-judicial confession; (ii) last seen theory; (iii) recovery of Qualis used in commission of crime; (iv) motive (v) medical evidence;

10. **Extra judicial confession**

Where the prosecution relies upon an extra judicial confession, the court has to examine the same with a greater degree of care and caution. It is a settled principle of criminal jurisprudence that extra-judicial confession is a weak piece of evidence. Wherever the Court, upon due appreciation of the entire prosecution evidence, intends to base a conviction on an extra-judicial confession, it must ensure that the same inspires confidence and is corroborated by other prosecution evidence. If, however, the extra judicial confession suffers from material discrepancies or inherent improbabilities and does not appear to be cogent, it may be difficult for the court to base a conviction on such a confession. In such circumstances, the court would be fully justified in ruling such evidence out of consideration.

11. Before examining the submissions made by the parties it would be necessary to extract the excerpts from the transcript Ex.PW-2/A of the telephonic conversation between the appellant and PW-2 Samta which is reproduced as under:

“Rakesh : Itna bata raha hun ki Sonu tumhare raste me kabhi nahi ayega. Hai to bhi, na hai to bhi.

PW-2 : Bas tumhara ye ehshan kabhi nahi bhulungi.

.....

Rakesh : *Kahin tum baat leak to nahi kar rahi meri kasam.*

PW-2 : *Tumhari kasam aur meri kasam kisi ko bhi tumhara phone nahi sunaya kasam se yakin nahi aa raha to phone kaat do.*

.....
Rakesh : ***Jaise main abhi patta saaf kiya hai waise koi bhi ho, koi aadmi bhi uska patta saaf kar dunga.***

PW-2 : *Aaram se aaram se lekin tumne meri bahut badi pareshaani ko hal kar diya.*

Rakesh : *Lekin darling Sonu aaj ki date me is duniya me nahi hai.*

PW-2 : *Nahi raha Sonu duniya me aaj ki date me tum pakka confirm ho kar keh sakte ho. Tum bhi jail jaoge.*

Rakesh : *Jaunga darling aur agar tumne baat leak kari na aur tum dono mere sath jail jaoge dhyan rakhna.*

.....
PW-2 : *Tum mujhe ek baat batao Sonu ke papa ne to gumshuda ki complaint lagai thi.*

Rakesh : *Aisa hai Sonu ke baap ko janta hu wo kuchh nahi karega.*

PW-2 : ***Kal ko tum par baat aa jaegi ki Sonu Rakesh ke sath gaya tha to phir.***

Rakesh : *Main kya karu, mere sath gaya tha to bhag gaya sala main kya karun.*

PW-2 : *Haan ye bhi hai.*

Rakesh : *Main keh dunga mere sath nahi hai. Mere piche das jane hai aur paisa hai aur wo mera kuchh nahi ukhar sakte. Maine back history ka pehle hi bataya tha tumhe.*

.....
PW-2 : *Abhi kahaan ja rahe ho tum.*

Rakesh : *Abhi accha Faridabad ja raha hu.*

PW-2 : *Accha ghar jaa rahe ho. Faridabad me ho tum. Kaha par ho tum.*

Rakesh : Nahi yaar Haridwar paar kar raha hun.

.....

Rakesh : Suno ye baat kisi ko mat batana.

PW-2 : Vishwas nahi tutega.

Rakesh : Ye phone tracing ya phir phone ki baat leak hogi to dhyan rakhna.

PW-2 : Phone ki baat kisi ko leak nahi hogi.”

12. PW-2 Samta deposed that on 09.03.2009 Madan Singh (father of the deceased) enquired as to the whereabouts of appellant Rakesh from PW-26 Smt. Nandi Devi (mother of PW-2) and also informed her that his son Sonu was missing. PW-2 Samta deposed that on 15.03.2009 accused Rakesh had called on her mobile phone. On answering the call, she informed accused that the father of deceased Sonu was searching for him to which he retorted that he had got a job for Sonu in Chandigarh and later on changed his version and said that he got rid of him (*thikane laga diya hai*). PW-2 further deposed that she elicited this information in a very polite and affectionate manner and it was recorded by father of the deceased while the same was on speaker mode. The extract of the conversation is Ex.PW-2/A which was seized by the police and her voice sample was taken by the FSL.
13. PW-26 Nandi Devi (mother of PW-2 Samta) also supported the testimonies of PW-2 and PW-10 Kamal Gupta (neighbour) on aspect of extra-judicial confession stating that on 15.03.2009, her daughter Samta received a call on their Tata mobile phone. The call was made by accused Rakesh and at that time PW-27 Madan Singh (father of the deceased) was present at her house and recorded the conversation.

She deposed that the call was repeatedly disconnected. She further deposed that there was no recording facility in the phone. PW-26 further deposed that she heard Rakesh saying that Sonu had been sent to Chandigarh and also heard that “*Maine Sonu Ko Thikane Laga Diya Hai*”. She heard the conversation as Madan (father of the deceased) had put their Tata Mobile Phone on speaker mode. She deposed that there was a gap of 15 minutes between first and second call and the talk on the mobile took place 4 to 5 times.

14. PW-27 Madan Singh (father of the deceased) deposed that on 15.03.2009 he went to the house of Samta and found that she was talking with the accused Rakesh and identified his voice and put her phone on speaker mode. PW-27 further deposed that accused Rakesh had stated on the mobile phone that “*Maine Sonu ko thikane laga diya hai ab woh tumhare raste main kabhi nahi ayega*”.
15. We deem it appropriate to revisit the law with regard to extra-judicial confession. In ***Kishore Chand v. State of H.P., 1990 Cri LJ 2289***, the Apex Court made the following observations:

"An unambiguous extrajudicial confession possesses high probative value force as it emanates from the person who committed the crime and is admissible in evidence provided it is free from suspicion, and suggestion of any falsity. However, before relying on the alleged confession, the court has to be satisfied that it is voluntary and is not the result of inducement, threat or promise envisaged under Section 24 of the Evidence Act or was brought about

in suspicious circumstances to circumvent Sections 25 and 26. The Court is retired to look into the surrounding circumstances to find out as to whether such confession is not inspired by any improper or collateral consideration or circumvention of law suggesting that it may not be true. All relevant circumstances such as the person to whom the confession is made, the time and place of making it, the circumstances in which it was made have to be scrutinised."

16. The Hon'ble Supreme Court in ***Madan Gopal Kakkad v. Naval Dubey***, reported in (1992) 2 SCR 921 held as under:

"The extra judicial confession which is not obtained by coercion, promise of favour or false hope and is plenary in character and voluntary in nature can be made the basis for conviction even without corroboration."

17. Accepting the admissibility of the extra-judicial confession, the Hon'ble Supreme Court in ***Sansar Chand v. State of Rajasthan*** reported in (2010) 10 SCC 604 held as under:

"29. There is no absolute rule that an extra - judicial confession can never be the basis of a conviction, although ordinarily an extra - judicial confession should be corroborated by some other material."

30. *In the present case, the extra - judicial confession by Balwan has been referred to in the judgments of the learned Magistrate and the Special Judge, and it has been corroborated by the other material on record. We are satisfied that the confession was voluntary and was not the result of inducement, threat or promise as contemplated by Section 24 of the Evidence Act, 1872."*

18. In ***Sahadevan and Anr. v. State of Tamil Nadu (2012) 6 SCC 403***, the Hon'ble Supreme Court laid down the principles in respect of evidentiary value and reliability of extra judicial confession which read as under:

- i) *The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution;*
- ii) *It should be made voluntarily and should be truthful;*
- iii) *It should inspire confidence;*
- iv) *An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence;*

- v) *For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities;*
- vi) *Such statement essentially has to be proved like any other fact and in accordance with law.*

19. In ***Radhey Shyam Vs. State*** reported in **2013 (4) JCC 2894**, this Court laid down that an extra-judicial confession in all cases need not be necessarily corroborated and held as under:

"29. Thus what emanates from the aforementioned proposition of law is that an extra-judicial confession may be relied upon if properly proved. The Supreme Court has in fact gone on to enunciate that the law does not require that the evidence of an extra-judicial confession in all cases must be necessarily corroborated. In fact corroboration of an extra-judicial confession is required only as a matter of abundant caution."

20. In ***Vijay Shankar Vs State of Haryana*** reported in **AIR 2015 SC 3686**, the Hon'ble Supreme Court has discussed whether court can rely on an extra-judicial confession and to what extent, which is reproduced as under:

"...For an extra-judicial confession to form the basis of conviction, it should not suffer from any

material discrepancies and inherent improbabilities.”

21. On examining the evidence against the appellant and after perusal of the above judgments, it emerges that the extra-judicial confession can be accepted and can be the basis of conviction, if it passes the test of credibility. The extra-judicial confession should inspire confidence and the court should find out whether there are other cogent circumstances on record to support it.

In the present case, it is not in dispute that on 15.03.2009, the appellant called PW-2 Samta on her mobile phone. It is revealed from the extract of the transcript that the appellant was at Haridwar and made a call to PW-2 Samta. It is pertinent to note that though the call got disconnected numerous times, the appellant repeatedly made calls to PW-2 Samta which only shows that he wanted to inform her that he had done away with Rakesh and the repeated calls show that it was voluntary and he reposed confidence in PW-2 Samta. There was no pressure on the appellant to disclose what he had done and the confession made by the accused Rakesh to PW-2 Samta on telephone only leads to one conclusion that the confession was made voluntarily. The confession is equally supported by the testimonies of PW-10, PW-26 and PW-27 and appears to be cogent.

22. **Last Seen Together Theory**

So far as the deceased having been last seen with the appellant is concerned, it will be useful to peruse the testimonies of PW-2 Samta, PW-26 Smt. Nandi Devi and PW-9 Raj Rani.

PW-2 Samta in her examination in chief deposed that accused Rakesh was a tenant @ Rs.1,100/- p.m. in their house and deceased Sonu who lived in the same street were good friends. According to her, on 08.03.2009 around 7:30 p.m. while she was studying, she saw the accused Rakesh and deceased Sonu moving towards the house of Sonu which fact she brought to the notice of her mother and she along with her mother after coming out of their house saw Sonu going inside the house and they waited for him. In her cross examination, she admitted that when she saw accused Rakesh and Sonu together, it could be 10:30 p.m. She further admitted that she saw the accused Rakesh and deceased Sonu going together and the accused Rakesh did not return that night and returned on 09.03.2009 and left along with his family.

23. The second prosecution witness, PW-26 Smt. Nandi Devi, mother of PW-2 Samta deposed on similar lines.
24. According to the third witness, PW-9 Raj Rani (mother of deceased Sonu), Sonu was a good friend of accused Rakesh and on 08.03.2009 at about 10:40 p.m. accused Rakesh and her son Sonu came home in an inebriated condition and left together and went inside the house of PW-2 Samta.
25. The settled law with respect to '*last seen theory*' has been reiterated in various cases and has been succinctly elucidated in ***State of Karnataka Vs. Chand Basha*** reported in **2015 (9) SCALE 809**, wherein the Hon'ble Apex Court has observed as under:

"This Court has time and again laid down the ingredients to be made out by the prosecution to prove the 'last seen together' theory. The Court for

the purpose of arriving at a finding as to whether the said offence has been committed or not, may take into consideration the circumstantial evidence. However, while doing so, it must be borne in mind that close proximity between the last seen evidence and death should be clearly established."

26. In ***Mahavir Singh Vs. State of Haryana : 2015 (4) SCJ 161***, the Hon'ble Apex Court has observed :

"Undoubtedly, it is a settled legal proposition that last seen theory comes into play only in a case where the time gap between the point of time when the accused and the deceased were seen alive and when the deceased was found dead. Since the gap is very small there may not be any possibility that any person other than the accused may be the author of the crime."

27. On perusal of the above mentioned testimonies, the contention of the counsel for the appellant with respect to the contradictions in the testimonies of material witnesses, does not hold good. The alleged contradictions, if any, are minor discrepancies which do not affect the core of the prosecution case, and therefore, should not be made a ground to reject the evidence in its entirety. Moreover, it is pertinent to note herein that the telephonic conversation as already discussed above, strongly supports and corroborates the case of the prosecution with regard to '*last seen together*' theory. The accused has voluntarily and at

his own discretion admitted before PW-2 Samta that Sonu had accompanied him and he had done away with him. Thus, it is clear from the evidence which has emerged on the record that the deceased was last seen alive in the company of the appellant on the night of 08.03.2009.

28. **Recovery of Qualis used in commission of offence:**

The testimonies of PW-31 Nafis and PW-32 Inspector Virender Punj need to be examined in connection with the recovery of Qualis bearing No. DL-IV-7598, the seats of which were blood stained and was matched with the blood of the deceased.

PW-31 in his testimony deposed in the following words:

“It is incorrect that I was present at my shop namely India Motors at Bhajanpura Market, where, IO alongwith one boy came there. IO narrated me about the facts of this case and the boy who was with the IO pointed towards my above-said vehicle and stated that they had committed the murder in the said vehicle. It is correct that on interrogation, I came to know the name of that boy as Rakesh @ Dattu.”

According to PW-32, he interrogated accused Rakesh and recorded his disclosure Ex.PW18/C which led to the recovery of vehicle used in the alleged offence. In his testimony, he deposed that on 04.07.2009 with the permission of the Court he interrogated accused Rakesh who confessed his involvement in the crime. Pursuant to his confession,

accused Rakesh was arrested vide arrest memo Ex. PW-18/A. Thereafter, disclosure statement Ex. PW-18/C of accused Rakesh was recorded which led to the recovery of Qualis from the shop of PW-31 Nafis Khan which was identified by accused Rakesh and seized vide memo Ex. PW-31/A.

Hence, it stands established from the testimonies of PW-31 and PW-32 that the accused Rakesh used the Qualis vehicle bearing No. DL-IV-7598 for commission of this offence and the same was recovered at his instance.

29. **Motive and Statement under Section 313 of Code of Criminal Procedure**

It is settled legal proposition that even if the absence of motive as alleged is accepted that is of no consequence and pales into insignificance when direct evidence establishes the crime. Therefore, in case there is trustworthy evidence of witnesses as to commission of an offence, the motive part loses its significance. However, if the genesis of the motive of the occurrence is not proved but if otherwise the evidence is worthy of reliance, the testimony of the witnesses as to the occurrence could not be discarded only by the reason of the absence of motive.

30. There is no such principle or rule of law that where the prosecution fails to prove the motive for commission of the crime, it must necessarily result in acquittal of the accused. Our view is fortified by the law laid down by the Apex Court in *Sardul Singh v. State of Haryana* reported in *AIR 2002 SC 3462* wherein the Hon'ble Supreme

Court held that the motive which is not always capable of precise proof, if proved, may only lend additional support to strengthen the probability of commission of the offence by the person accused but the absence of proof does not ipso facto warrant an acquittal.

31. While dealing with a similar issue, the Hon'ble Supreme Court in ***State of U.P. v. Kishanpal and Ors.*** (2008) 16 SCC 73 held as under:

“.....The motive may be considered as a circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one. It is also settled law that the motive loses all its importance in a case where direct evidence of eyewitnesses is available, because even if there may be a very strong motive for the accused persons to commit a particular crime, they cannot be convicted if the evidence of eyewitnesses is not convincing. In the same way, even if there may not be an apparent motive but if the evidence of the eyewitnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction...”

32. As far as motive is concerned the testimony of PW-2 has imputed motive to kill Sonu by deposing that deceased Sonu was friendly with the wife of appellant Rakesh and she used to visit Sonu in the absence

of Rakesh and that Sonu had provided a mobile phone to the wife of appellant Rakesh. On the other hand the appellant in his statement recorded under Section 313 Cr.P.C in one of the questions reproduced below:

“Q15. It has further come in evidence against you and has come in the testimony of PW-9 that his son Sonu was in love with PW-2 Samta and wanted to marry her, but Samta’s mother was against the marriage, on account of caste difference and therefore, Smt.Nandi had given money to you to get Sonu murdered. What do you have to say?”

Ans.: It is correct. ”

In response to the above said question the appellant admitted that Sonu was in love with PW-2 Samta and wished to marry her and PW-26 Nandi Devi (mother of Samta) gave him money to get Sonu murdered.

33. In ***Mohan Singh Vs. Prem Singh and Anr.*** reported in (2002) 10 SCC 236, the Hon'ble Supreme Court held that the statement made by the accused under Section 313 of the Code of Criminal Procedure can certainly be taken aid of to lend credence to the evidence led by the prosecution, but only a part of such statement under Section 313 Code of Criminal Procedure cannot be made the sole basis of his conviction. In this connection, reference may also be made to ***Devender Kumar Singla v. Baldev Krishan Singla*** (2004) 9 SCC 15 and ***Bishnu Prasad Sinha and Anr. v. State of Assam*** (2007) 11 SCC 467 in which it was observed that the statement of the accused under Section 313 Code of

Criminal Procedure for the admission of his guilt or confession as such cannot be made the sole basis for finding the accused guilty, the reason being he is not making the statement on oath, but all the same the confession or admission of guilt can be taken as a piece of evidence since the same lends credence to the evidence led by the prosecution.

34. In ***Ashok Debbarma @ Achak Debbarma vs State of Tripura*** reported in (2014) 4 SCC 747, the Hon'ble Supreme Court observed that the admission of guilt under Section 313 cannot be brushed aside and held as under:

*"21. We are of the view that, under Section 313 statement, if the accused admits that, from the evidence of various witnesses, four persons sustained severe bullet injuries by the firing by the accused and his associates, that admission of guilt in Section 313 statement cannot be brushed aside. This Court in **State of Maharashtra v. Sukhdev Singh and Anr.** (1992) 3 SCC 700 held that since no oath is administered to the accused, the statement made by the accused under Section 313 Code of Criminal Procedure will not be evidence stricto sensu and the accused, of course, shall not render himself liable to punishment merely on the basis of answers given while he was being examined under Section 313 Code of Criminal Procedure. But, Sub-section (4) says that the answers given by the*

accused in response to his examination under Section 313 Code of Criminal Procedure can be taken into consideration in such an inquiry or trial. This Court in Hate Singh Bhagat Singh (supra) held that the answers given by the accused under Section 313 examination can be used for proving his guilt as much as the evidence given by the prosecution witness. In Narain Singh v. State of Punjab (1963) 3 SCR 678, this Court held that when the accused confesses to the commission of the offence with which he is charged, the Court may rely upon the confession and proceed to convict him."

35. Keeping in mind the testimony of PW-2 that Sonu was friendly with the wife of the appellant and that he had motive to kill Sonu coupled with the statement under Section 313 of the Code of Criminal Procedure by way of which he admitted killing Sonu, case law pertaining to motive and Section 313 of the Code of Criminal Procedure the admission of the appellant that he killed Sonu can be relied upon as a corroborative piece of evidence.

36. **Medical evidence**

The prosecution has led medical evidence through the testimony of PW-8 Dr. Raj Kumar who conducted the post mortem on the dead body of the deceased vide detailed report Ex. PW-8/A. The relevant portion is as under:

"Internal Examination:

1. Occipital bone was fractured, brain membranes and brain was lacerated about 30 ml blood was present inside the head.

2. On left side chest, fifth and sixth ribs were fractured on front and on back eight ribs were fractured. Left side lung was lacerated about 300 ml of blood was present on left side chest cavity.

.....

Opinion

In my opinion, the death was due to shock and haemorrhage as a result of ante mortem injuries No. 1 and 2 were sufficient to cause death in ordinary cause of nature."

PW-8 opined that the cause of death was due to shock and haemorrhage as a result of firearm injuries on the head and chest of the deceased and was sufficient to cause death.

37. **Scientific Evidence:**

PW-17 B. K. Mohapatra, Senior Scientific Officer, CFSL, CBI, New Delhi examined the vehicle bearing no. DL-IV-7598 (Toyota Qualis) for presence of forensic biological clue material and suspected blood stains on the middle seat cover which were collected and handed over to the police for further necessary action. PW-17 gave his report dated 23.11.2009, Ex.PW-17/A on sealed parcel No. 1 and 5 which are blood stained clothes of the deceased and piece of seat cover retrieved from the vehicle.

38. Serological examination of the exhibits vide report Ex. 17/A dated 28.3.1990 of B. K. Mohapatra revealed that the blood group "O" which was detected on the clothes of the deceased matched with the blood group found on the piece of seat cover.
39. The above mentioned testimony of PW-17 establishes that the Toyota Qualis is associated with the crime and corroborates the case of the prosecution that deceased Sonu was killed in this vehicle._

40. **Conduct:**

On the aspect of factum of abscondence, it would be relevant to peruse the settled position of law. In ***State of Karnataka Vs. Lakshmanaiah, AIR 1993 SC 100***, the Hon'ble Supreme Court held that the conduct of accused's abscondence from the date of occurrence till his arrest was considered to be a vital circumstance and observed in the following words:

".....The High Court has also not discussed the circumstance that the respondent was absconding till the night of January 16, 1979 when he was arrested which is surely a link in the chain of circumstances to establish that the respondent alone had committed the offence of murder of his wife."

41. In ***Rukia Begum Vs. State of Karnataka AIR 2011SC 1585***, the Hon'ble Supreme Court in para 10 held as under:

"10. No doubt it is true that for bringing home the guilt on the basis of the circumstantial evidence the

prosecution has to establish that the circumstances proved lead to one and the only conclusion towards the guilt of the accused. In a case based on circumstantial evidence the circumstances from which an inference of guilt is sought to be drawn are to be cogently and firmly established. The circumstances so proved must unerringly point towards the guilt of the accused. It should form a chain so complete that there is no escape from the conclusion that the crime was committed by the accused and none else. It has to be considered within all human probability and not in fanciful manner. In order to sustain conviction circumstantial evidence must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. Such evidence should not only be consistent with the guilt of the accused but inconsistent with his innocence. No hard and fast rule can be laid to say that particular circumstances are conclusive to establish guilt. It is basically a question of appreciation of evidence which exercise is to be done in the facts and circumstances of each case. Here in the present case the motive, the recoveries and abscondence of these Appellants immediately after the occurrence point out towards their guilt. In our opinion, the

trial court as also the High Court on the basis of the circumstantial evidence rightly came to the conclusion that the prosecution has been able to prove its case beyond all reasonable doubt so far as these Appellants are concerned.

42. In ***Kaushal Singh Vs. State NCT of Delhi, 194 (2012) DLT 342***, has made following observations:

“35 The circumstance of abscondence after the occurrence points an accusing finger against the accused. Abscondence being a conduct under Section 8 of the Evidence Act can be taken into consideration to prove his guilt”

Applying the law to the facts of the present case, it is established that appellant Rakesh was evading arrest to save himself from the clutches of law and got arrested after four months of incident. The conduct of abscondence of the appellant clearly shows his involvement in the commission of crime.

43. While deciding the present appeals the aforestated principles culled out by the Apex Court are to be kept in view. After perusing the evidence on record, we are of the considered view that minor inconsistencies and discrepancies on trivial matters not touching the core of the case or not going to the root of the matter does not permit rejection of the evidence as a whole. All the above mentioned circumstances clearly establish that it was the appellant who had

committed the crime i.e. murder of the deceased Sonu the cumulative evidence which has been gathered i.e. the extra-judicial confession of the appellant, testimony of the eye-witnesses PW-2, PW-26 and PW-27; coupled with the medical evidence including the post-mortem report and the CFSL report which is corroborative of the guilt of the appellant, further fortified by the scientific evidence clearly point fingers of guilt towards the appellant; he has no escape route. The conviction of the appellant calls for no interference under Section 302 of the Indian Penal Code.

44. Additionally, the appellant was charged under Section 364 of the Indian Penal Code and also convicted vide judgment dated 23.05.2015.
45. An offence under Section 364 of the Indian Penal Code has the following essential ingredients.
 - i) that the accused kidnapped or abducted any person;
 - ii) that such kidnapping or abduction was committed so that
 - a) such person may be committed or
 - b) to put him in danger of being murdered.
46. In order to prove kidnapping or abduction for the purpose of murder, the prosecution is required to prove any of the two essential ingredient i.e. element of force or enticement. It is well settled that 'taking' would include causing to go or getting into possession whereas 'enticement' involves an idea of inducement, by igniting hopes or desire in the other. One does not entice other unless the latter attempted to do a thing which he or she would not otherwise have done.

47. In the given facts and circumstances, it is on record that the deceased Sonu and appellant were major, good friends and on the day of occurrence the deceased Sonu had voluntarily accompanied the appellant. In the absence of any definite evidence to show any of the two aforesaid ingredients, the prosecution has failed to prove that there was any enticement or taking away the deceased Sonu forcibly.
48. Thus, we are of the view that the trial court has convicted the appellant under Section 364 of the Indian Penal Code without evidence on record. After scrutiny of the order impugned before us we conclude that no case has been made out against the appellant for the offence under section 364 of Indian Penal Code
49. In our view the appeals are without any merit and the same are dismissed.

SANGITA DHINGRA SEHGAL, J.

G. S. SISTANI, J

February 10, 2016

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