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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CRL. A. 878/2013

Date of Judgment: 26th September, 2017

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RUDAL @ JASAN

..... Petitioner

Through: Ms. Inderjeet Sidhu, Advocate

Versus

STATE

..... Respondent

Through: Mr. Rajat Katyal, APP with Inspector
Yashpal Singh, PS Naraina, Delhi

CORAM:

HON'BLE MR. JUSTICE G. S. SISTANI

HON'BLE MR. JUSTICE CHANDER SHEKHAR

G.S. SISTANI, J. (ORAL)

1. This is an appeal under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C') filed against the judgment dated 21.01.2013, by which the appellant stands convicted under Section 302 of the Indian Penal Code (hereinafter referred to as 'IPC') and the order on sentence dated 31.01.2013, by which the appellant has been sentenced to imprisonment for life and a fine of Rs.10,000/-, in default of payment of fine, to further undergo simple imprisonment for a period of six months.
2. The case of the prosecution, as noticed by the Trial Court is that a PCR call was received from mobile No. 9871186322, V97/3, Sonia Gandhi Camp, Naraina Vihar *Jhuggi* which was recorded vide DD No.14B dated

23.05.2011. The said DD No.14B was assigned to ASI Vijay Pal, who alongwith Const. Subhash went to *jhuggi* No.7/36, Sonia Gandhi Camp, Naraina and found one dead body having injuries on its left side of forehead and the bone of his left thumb was found to be protruding. There was also blue colour mark round the neck of the dead body. The crime team was summoned and the spot was photographed. No eye witness was found and an offence under Section 302 of IPC was found to have been committed. ASI Vijay Pal prepared the *rukka* and sent Const. Subhash for registration of FIR. Thereafter, investigation was handed over to Inspector Ram Niwas and the information regarding the incident was also sent to higher officers and the concerned *Ilaka* Magistrate. During investigation, Inspector Ram Niwas sent the dead body to the mortuary of DDU hospital. The exhibits were lifted from the *jhuggi* and sealed with the seal of 'RNI'. The statement of Amrej (neighbour of the deceased) was recorded as per which on 22.05.2011, he was present in his *jhuggi*, which is adjoining the *jhuggi* of Madan Ram (hereinafter referred to as 'the deceased'). The deceased and the appellant were seen together by him in the *jhuggi* of the deceased and both of them were under the influence of liquor and hurling abuses. Amrej further stated that in the morning of 23.05.2011, when he came to the *jhuggi* of the deceased after hearing noises of people and found people gathered outside the *jhuggi* of the deceased. At that time, the appellant was coming out of the *jhuggi* of the deceased. Amrej caught hold of the appellant but somehow he managed to get rid of the clutches of

Amrej and left the spot by saying that he was going to call police and fled away from the spot but never turned up. In the meantime, the daughter of Amrej held by him in his lap got dropped, and while picking his daughter, he could not manage to catch hold of the appellant and the appellant disappeared. Thereafter, the appellant was not seen near the *jhuggis* and he raised suspicion that the appellant had murdered the deceased. During investigation, the statement of son and nephew of the deceased namely Manoj Kumar and Jiwan Ram was recorded on 24.05.2011. Charge under Section 302 of IPC was framed against the appellant, to which he pleaded not guilty and claimed to be tried.

3. To bring home the guilt of the appellant, the prosecution examined 24 witnesses in all. The statement of the appellant was recorded under Section 313 of Cr.P.C whereby it was stated by the appellant that the deceased was a contractor and the appellant was working under him as a mason. On the fateful day of 22.05.2011, when the appellant returned to the *jhuggi* of the deceased after work, he found the deceased was sitting along with 4-5 persons in his *jhuggi* and were taking liquor. The deceased offered him to join. The appellant joined them and after having liquor, he fell unconscious. It was stated by the appellant that he regained consciousness when he woke up by a neighbourhood girl Reshma at about 7.00 in the morning. The appellant found that the deceased was sleeping besides him however, in the evening; the appellant had slept on the bed. All the articles were found scattered in the *jhuggi* and the door of the *jhuggi* was lying

open. The appellant claimed that he had locked the door of the *jhuggi* from inside in the evening. The other persons were also not found in the *jhuggi*. The appellant claimed to be falsely implicated in the present case. No evidence was led by the appellant in his defence.

4. Ms. Inderjeet Sidhu, learned counsel appearing on behalf of the appellant submits that the judgment and the order on sentence of the Trial Court are bad in law. The learned Trial Court has failed to appreciate the evidence in its correct perspective. Learned counsel contends that the prosecution has failed to seek an opinion of the fingerprint expert while collecting the bottles and glasses which were found lying near the body of the deceased. It was also contended that the empty bottles and glasses were sent to the CFSL on 17.11.2011 i.e. post the arrest of the appellant.
5. Learned counsel for the appellant submits that the Trial Court has placed strong reliance on the testimonies of Shivali (PW-9) and Amrej (PW-10) who are the witnesses of last seen. Ms. Sidhu contends that the evidence of last seen is a very weak form of evidence and it would be highly unsafe to convict the appellant solely on the basis of the last seen of PW-9 and PW-10. Learned counsel also contends that no doubt both the witnesses had seen the deceased and the appellant together, but the time gap between their having seen the deceased and the appellant was too large and on this ground alone, the appellant is liable to be acquitted. Ms. Sidhu has also contended that strong reliance has been placed by the Trial Court to the fact that soon after the crime the appellant had absconded. It is contended that the appellant was not

permanently residing with the deceased and he was not a permanent resident of Delhi and merely because he left the area in question, that should not be taken as an incriminating factor against him. Additionally, learned counsel contends that there is no evidence to show that any effort was made to search the appellant and thus, he cannot be termed as an absconder.

6. To substantiate her argument regarding the conviction of the appellant solely on the basis of last seen evidence, learned counsel for the appellant has relied upon the observations made by the Supreme Court of India in the case of *Anjan Kumar Sarma & Ors. v. State of Assam*, reported at *AIR 2017 SC 2617*, whereby it was held that circumstance of last seen together along with the absence of satisfactory explanation in his statement under Section 313 of Cr.P.C. are not sufficient for conviction of the accused under Section 302 of IPC. The relevant para 18, 19 and 21 read as under:

“18. The circumstance of last seen together cannot by itself form the basis of holding the Accused guilty of the offence. In *Kanhaiya Lal v. State of Rajasthan*, (2014) 4 SCC 715, this Court held that:

“12. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the Accused who committed the crime. There must be something more establishing connectivity between the Accused and the crime. Mere non-explanation on the part of the Appellant, in our considered opinion, by itself cannot lead to proof of guilt against the Appellant.

.....

15. The theory of last seen--the Appellant having gone with the deceased in the manner noticed hereinbefore, is the

singular piece of circumstantial evidence available against him. The conviction of the Appellant cannot be maintained merely on suspicion, however strong it may be, or on his conduct. These facts assume further importance on account of absence of proof of motive particularly when it is proved that there was cordial relationship between the Accused and the deceased for a long time. The fact situation bears great similarity to that in Madho Singh v. State of Rajasthan (2010) 15 SCC 588.”

In Arjun Marik v. State of Bihar, 1994 Supp (2) SCC 372, this Court held that:

“31. Thus the evidence that the Appellant had gone to Sitaram in the evening of 19-7-1985 and had stayed in the night at the house of deceased Sitaram is very shaky and inconclusive. Even if it is accepted that they were there it would at best amount to be the evidence of the Appellants having been seen last together with the deceased. But it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the Accused and, therefore, no conviction on that basis alone can be founded.”

19. This Court in Bharat v. State of M.P., (2003) 3 SCC 106, held that the failure of the accused to offer any explanation in his statement under Section 313, Cr.P.C. alone was not sufficient to establish the charge against the accused. In the facts of the present case, the High Court committed an error in holding that in the absence of any satisfactory explanation by the accused the presumption of guilt of the Accused stood un-rebutted and thus the Appellants were liable to be convicted.

.....

21. It is clear from the above that in a case where the other links have been satisfactorily made out and the circumstances point to the guilt of the accused, the circumstance of last seen together and absence of explanation would provide an additional link

which completes the chain. In the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction. The other judgments on this point that are cited by Mr. Venkataramani do not take a different view and, thus, need not be adverted to. He also relied upon the judgment of this Court in State of Goa v. Sanjay Thakran, (2007) 3 SCC 755 in support of his submission that the circumstance of last seen together would be a relevant circumstance in a case where there was no possibility of any other persons meeting or approaching the deceased at the place of incident or before the commission of crime in the intervening period....”

(Emphasis Supplied)

7. Reliance has been also placed by learned counsel for the appellant on the decisions in *Matru alias Girish Chandra v. The State of U.P.*, reported at *AIR 1971 SC 1050*, *Paramjeet Singh v. State of Uttarakhand*, reported at *(2010) 10 SCC 439* and *Kanhaiya Lal v. State of Rajasthan*, reported at *(2014) 4 SCC 715*.
8. *Per contra*, Mr. Rajat Katyal, learned counsel for the State, submits that the prosecution has been able to establish its case beyond any shadow of doubt. He has placed strong reliance on the testimonies of PW-9 and PW-10 who are witnesses of last seen. As per their evidence, not only the appellant was last seen *drinking* in the *jhuggi* of the deceased, but also when he was confronted by PW-10, the next morning, the appellant ran away from the spot. Thus, Mr. Katyal contends that there was no time gap between the deceased having been seen in the company of the appellant. The presence of the appellant stands established in the *jhuggi* of the deceased and thus onus would shift on the appellant to explain the cause of death of the deceased in

the *jhuggi*, where both of them were residing on the fateful night of 22/23.05.2011. Mr. Katyal relies on Section 106 of the Indian Evidence Act, 1872 (hereinafter referred to as 'Evidence Act') to canvass his argument that once PW-9 and PW-10 had categorically testified that they had seen the appellant residing with the deceased in his *jhuggi*, they were drinking together, they both slept together in the same *jhuggi* and in the morning of 23.05.2011, he loosened his grip and ran away from the spot, Section 106 of the Evidence Act would come into play which reads as under:

“106. Burden of proving fact especially within knowledge.—When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.”

The above provision of the Evidence Act becomes relevant in view of the fact that the presence of the appellant in the *jhuggi* of the deceased stands duly established and as per the evidence of PW-9 and PW-10, both the deceased and the appellant were consuming liquor in the intervening night of 22-23.05.2011. It was prayed by the counsel for the State that the burden would thus shift on the appellant to show the circumstances which led to the death of the deceased.

9. Mr. Katyal while relying upon the case diary submits that efforts were made to trace the appellant and thus the submission of counsel for the appellant that no steps were taken to find the appellant is without any force. Additionally, Mr. Katyal submits that no question was put to any of the official witnesses regarding the steps taken to secure the presence of the appellant.

10. Attention has been drawn by the learned counsel for the State to the statement made by the appellant under Section 313 of Cr.P.C. The relevant questions 19, 22, 24 and 28 read as under:

“Q.19. It is in evidence against you that you accused had come to the jhuggi of Madan about 15 days before his death Madan and you had been residing in Madan’s jhuggi till his death and Madan used to call you as Jasan. What have you to say?”

Ans. It is correct.

.....

Q.22. It is in evidence against you that on 23.05.2011 in the morning at about 6.00 AM, you accused came out of the jhuggi of Madan and a person named Amrej, who resided in the jhuggi adjacent to the jhuggi of Madan, grabbed you but you accused succeeded in freeing yourself and fled from the spot saying that you are going to call at telephone No. 100. What have you to say?”

Ans. It is correct.

.....

Q.24. It is in evidence against you that on 23.05.2011 in the morning at about 6.30 AM, when Amrej was returning to his jhuggi from the market, he saw many public persons gathered near the railway line and they were saying that Madan has been killed and at the same time, you accused came out of the jhuggi of Madan. What have you to say?”

Ans. It is correct.

.....

Q.28. It is in evidence against you that on 25.09.2011, on the basis of secret information, Inspector Ram Niwas along with two Constables and Manoj reached Kirti Nagar in the search of you accused and you were arrested vide arrest memo Ex.PW12/B from near a DMS Booth in C-Block, near Sanatan

Dharam Mandir, Mansarovar Garden, New Delhi, at the instance of Manoj. What have you to say?

Ans. It is correct.”

11. We have heard learned counsel for the parties, considered their rival submissions, carefully examined the testimonies of the witnesses on record and the impugned judgment rendered by the Trial Court. Learned Trial Court while convicting the appellant under Section 302 of IPC made the following observations. The relevant para 50 to 59 read as under:

“50. Therefore, the prosecution has proved on record that the accused was last seen together with the deceased and in the morning of 23.05.11 he was found present with the deceased in the jhuggi of the deceased and he was apprehended and anyhow, the accused succeeding in freeing himself and fled away from the jhuggi on the pretext of calling police. In his statements U/s 313 CrPC accused has admitted that he was present in the jhuggi of the deceased on 22.05.11 and consumed liquor and, in the morning, when he woke up he found the deceased having died earlier and he fled away from the scene of crime but the only defence put up by the accused is that he became unconscious after getting liquor and when he regained consciousness he found the deceased Madan dead and he has stated in his statement that other persons had also taken liquor in the jhuggi of the deceased alongwith him. But PW 9 & PW 5 have deposed that only the deceased and accused were present in the jhuggi of the deceased on 22.05.2011 and no other persons were present there. Otherwise also, the accused has not cross examined any witnesses regarding the fact that other persons except the deceased and the accused were present in the jhuggi and consuming liquor. As such, in the absence of any cross examination of last seen together witness regarding the presence of persons other than the accused and deceased, it

can be safely held that only accused was present with the deceased in the intervening night of 22/23.05.2011.

51. It is evident from the record that the deceased and the accused only were present in the jhuggi of the deceased on the date of murder i.e 22.05.2011. Why I say so is that accused has not denied his presence in the jhuggi on that day when the dead body of the deceased was first seen and discovered by the accused. So it was for the accused to explain the circumstances in which the deceased died, how was the dead body discovered by whom and in whose presence.

52. There is no escape for him from such explanation as he was the only person present in the jhuggi and witnessed the incident. In such cases, it is enough for the prosecution to establish the presence of the accused at the crime spot at the time of incident and the attending circumstances of the accused having admitted consuming liquor with the deceased in the intervening night of 22/23.05.2011. Then the burden shifts on the accused U/s 106 of Evidence Act to explain the death of deceased.....

53. The other inference circumstances appearing from the record from which inference regarding guilt of the accused can be drawn is that the accused fled away from the scene of crime i.e the jhuggi of the deceased. It is settled law that mere absconding by itself does not necessary lead to a conclusion of a guilty mind. The act of self preservation is such that an innocent man may feel paniky and try to evade arrest when wrongly suspected of a grave crime. The act of absconding is no doubt a relevant piece of evidence to be considered alongwith other evidence but its value would always depend on the circumstances of each case. For instance, the circumstance of abscondence can be extremely fatal, if the prosecution is able to prove that the victim was last seen in the company of the deceased and that the accused is absconding after the death of the victim. Normally, the courts are disinclined to attach much importance to the act of absconding, treating as a

very small much item in the evidence for recording conviction. It can scarcely be held as a determining link in the chain of circumstance evidence which must admit of no other reasonable hypothesis then that of the guilt of the accused. In this regard, I found support from Matru Vs State of U.P. AIR 1972 SC 1050.

54. In the present case the accused himself admitted to be present with the deceased before his death and in view of the facts that circumstances of abscondence of an accused person is considered a strong link in the chain of circumstances evidence for establishing the guilt of the accused and I consider it safe to rely upon the circumstances of abscondence of the accused after discovery of the dead body of the deceased to convict him.

55. Apart from that there was a golden opportunity for the accused to explain any they including circumstance during his examination U/s 313 CrPC. There also he choose to remain silent and did not offer any plausible explanation regarding his presence and how the deceased died of strangulation. Recording of statement of accused U/s 313 Crpc is not a mere formality. It is a statutory requirement which provides an opportunity to the accused to state his case and explain the exculpatory circumstances proved against him

56. It is for the accused to either remain silent or provides answer to the question put to him. However, keeping silent and not furnishing any explanation for incriminating circumstances would sustain the charges against him.

57. It is obligatory on the part of the accused while being examined U/s 313 CrPC to furnish some explanation with respect to the incriminating circumstances associated with him and the court must take note of such explanation, even, in case of circumstantial evidence, in order to decide as to whether or not the chain of circumstances is complete when the attention of the accused is drawn to the circumstances that inculpate him

in relation to the commission of crime and he fails to offer an appropriate explanation with respect to the same, the said act may be considered as providing a missing link for completing the chain of circumstance. In this regard & found support from State of Maharashtra Vs Suresh (2000) 1 SCC 471, Musheer Khan vs State of M.P.(2010) 2 SCC 748.

58. So far as the contradiction of the counsel for the accused that the prosecution has failed to prove any motive on the part of the accused to do away with the deceased is concerned, the said contention appears to be attractive but the same is fallacious and is hereby rejected as the motive is engrained in the mind of the accused and it is not necessary for the prosecution to prove motive in each and every case. Motive is a thing primarily known to the accused himself and it may not be possible for the prosecution in each and every case, to find out real motive behind the crime. Sometimes motives are clear and proved and sometime motive is surrounded in the mystery and it is very difficult to locate the same when the ocular evidence is very clear and convincing and the role of the accused in the crime stands clearly established, establishment of motive is not a sine qua non for proving the prosecution case. In this regard, I found support from Barikanoo vs. State of Uttar Pradesh 1997 1 crimes 500 (All) and Yunis @ Kariya vs. State of M.P. AIR 2003 SC 539. Apart from this, motive provides link in the chain of circumstantial evidence but in the absence of the motive, if the entire chain of circumstantial evidence is complete the absence of motive is not going to snap the links in the chain of circumstance evidence. In this regard, I found support from Amitava Banerjee @ Amit @ Bappa Banerjee Vs State of West Bengal (2012)1 SC Cri 624.

59. In the instant case, where there is no manner of doubt that the deceased died in the presence of the accused and only the accused knew how he died. He cannot get away by choosing to remain silent. It was necessary for him to disclose the circumstances in which the death of the deceased was caused

in order to exculpate himself. The silence of the accused herein is only proof of his guilt.”

12. The case in hand is based on circumstantial evidence. It is settled law that in a case based on circumstantial evidence, the chain of events must form a complete link to prove the sequence of events. In the present case, the case of prosecution is based on the evidence of last seen account of PW-9 Shivali and PW-10 Amrej who were the neighbours of the deceased. At the outset, we deem it appropriate to analyse the testimonies of PW-9 and PW-10.
13. PW-10 Amrej testified in his examination-in-chief that he knew the deceased who used to reside in a *jhuggi* adjacent to his *jhuggi* at Sonia Gandhi Camp, Naraina. PW-10 correctly identified the appellant in the Trial Court as Jasan who had been residing with the deceased in his *jhuggi* for about 15 days prior to the incident. On 22.05.2011, in the evening hours, PW-10 had gone to the *jhuggi* of the deceased to demand his labour charges as he had worked for him for about four days. The deceased was a contractor and was engaged in the cleaning of the printing press machines. After entering the *jhuggi* of the deceased, PW-10 found both the appellant and the deceased sitting in the *jhuggi*. They both seemed to be in a drunken state. PW-10 demanded money from the deceased and he paid Rs.100/- to him. Thereafter, PW-10 left the *jhuggi* of the deceased. On 23.05.2011, at about 6:30 in the morning, PW-10 had gone to nearby market across the railway line to fetch eatables. When PW-10 was returning to his *jhuggi*, he saw many public persons gathering near the railway line and heard them saying that Madan has

been killed. At the same time, the appellant came out from the *jhuggi* of the deceased. PW-10 grabbed the appellant by his hand; however, the appellant freed himself from the grip of PW-10 and left the spot while saying that he was going to make a call at 100 Number. Subsequently, a person named Vinay (PW-13) made a call at 100 Number. PCR reached the spot and after some time local police also reached the spot. The statement of PW-10 was recorded by the Police. On 25.09.2011, the appellant had been arrested by the Police and PW-10 was called at the police station where he identified the appellant.

14. During cross-examination of PW-10, it was stated by him that he had been residing in a *jhuggi* for about two to two and a half years along with his wife. PW-10 used to meet the deceased almost daily. PW-10 denied the suggestion that when he had gone to the *jhuggi* of the deceased on 22.05.2011; the deceased was sitting alone in his *jhuggi*. PW-10 admitted that the appellant did not have any *jhuggi* in the camp. It was denied by PW-10 that he had not seen the appellant coming out of the *jhuggi* on the date of the incident or that he had not grabbed him.
15. The next important witness is PW-9 Shivali who testified in his examination-in-chief that he knew the deceased as the deceased was a distant relative of PW-9. In the month of May of 2011, PW-9 and the deceased were residing in the *jhuggies* at Sonia Gandhi Camp, Naraina Vihar. The distance between his *jhuggi* and the *jhuggi* of the deceased was about 100 meters. PW-9 identified the appellant in Court as the person who had come to the *jhuggi* of the deceased about 15 days prior to his death and was residing with the deceased till his death. The

deceased used to call the appellant as Jashan. On 22.05.2011 at about 7.00 or 7.30 PM, PW-9 had gone to the *jhuggi* of the deceased where he found that both the deceased and the appellant were found present in the *jhuggi* and they were taking liquor. Thereafter, PW-9 left the *jhuggi* of the deceased immediately. On 23.05.2011, at about 6:00 in the morning, PW-9 had gone to the railway lines to defecate, where he saw a girl named Reshma sitting on the railway lines and was shouting that the deceased had been murdered. Public persons gathered at the spot on hearing the shouts of Reshma. In the meantime, the appellant came out of the *jhuggi* of the deceased. A person named Amrej who was residing in the *jhuggi* adjacent to the *jhuggi* of the deceased grabbed the appellant; however, the appellant succeeded in freeing himself and fled away from the spot by saying that he was going to call at 100 Number. Thereafter, another neighbour Vinay made a call at 100 Number. PCR reached the spot and inquiries were made by the police. The statement of PW-9 was recorded by the Police.

16. In his cross-examination, PW-9 stated that he had seen the appellant for the first time about six months prior to the incident, when he had come to see the deceased. PW-9 did not know as to where the appellant used to stay. PW-9 used to meet the deceased occasionally and during the period of 15 days prior to the death of the deceased. PW-9 repelled the suggestion that he had not seen the appellant residing with the deceased for 15 days prior to the death. PW-9 also repelled the suggestion that he was deposing falsely for the reason that the deceased was his relative. PW-9 denied the suggestion that he had

not seen the appellant coming out of the *jhuggi* of the deceased on the date of the incident.

17. The criminal machinery was set into motion after a call was made by an independent witness PW-13 (Vinay Kumar Pathak) who was neighbour of the deceased at Number 100. PW-13 testified in his examination-in-chief that he knew the deceased as the deceased used to live in his neighbourhood. On 23.05.2011, at about 7.00 in the morning, when PW-13 was strolling outside his *jhuggi*, he heard people saying that Madan was lying dead in his *jhuggi*. Subsequently, PW-13 immediately made a call at 100 Number from his Mobile No.9871186322.
18. Besides the above public witnesses, PW-5 Const. Nirmala (W) who was posted as Channel Operator in PCR on the fateful day of 23.05.2011 testified that at about 7.01 AM she received an information from mobile phone number 9871186322 to the effect that ‘a person is lying dead inside the *jhuggi*’. PW-5 further testified that the said information was filled by her in the PCR form which was proved by her as Ex.PW-5/A which reads as under:

“CALL IS TRUE. MADAN S/O U/K AGE 42 YEAR. HT 5’6”SAWLA RANG DHARIDAR BADAMI COLOUR SHIRT UNDERWEAR JIS KE GALE MAI HARA DHARIDAR ANGOCHHA LIPTA HUA HAI OR UPER KAMBAL DAL RAKHA HAI OR CHOT KA KOI NISHAN NAHI HAI. MOKA PAR DEAD HAI PAADOSI. VINAY S/O BALESWAR AGE 20 YEAR NE BATYAA HAI OR RAAT MAI DO SOYE THE. DUSRA NAHIMILA.”

19. HC Satish Kumar (PW-14) had brought the copy of the PCR Form regarding the PCR call and proved the same as Ex.PW-14/A. The

investigation of the instant case was assigned to PW-23 Insp. Ram Niwas who had lifted exhibits from the spot and seized them. The site plan was also prepared by PW-23. The appellant was apprehended by him at the instance of Manoj (PW-12) and was formally arrested. The personal search of the appellant was conducted by PW-23 and was proved by him as Ex.PW-23/B.

Medical Evidence:

20. PW-15 Dr. Subhajit Dhar, testified that on 23.05.2011, he was on emergency duty in Safdurjang Hospital and examined the deceased along with Dr. Ved Prakash. At 1.50 PM, the deceased was brought to the casualty Department by the Police and after the examination; he was declared as brought dead. The casualty note was proved by him as Ex. PW15/A. The MLC of the deceased was proved by him as Ex.PW-15/B which was prepared by Dr. Ved Prakash under his supervision.
21. PW-18 Dr. Sarvesh Tandon testified that on 24.05.2011, he was posted as Sr. Specialist, Department of Forensic Medicine, Safdurjang Hospital and conducted post-mortem examination of the deceased. His detailed report was proved as Ex.PW-18/A. The injuries sustained by the deceased read as under:

“External Examination:

- 1. Two abrasions, 1 x 1 cm size, around right eye, red in colour.*
- 2. Left side of face swollen, underlying tissues contused.*
- 3. Abrasion over left eyebrow, 2 x 2 cm, red in colour.*

4. Contusion over middle front of neck, 2 x 2 cm, moreover left side, red in colour.

5. Contusion over middle front of chest, 3 x 2 cm, more on right side, with depressed area underlying it, with fracture of 3rd and 4th ribs, at costo-sternal joint, contusion is red in colour.

6. Abrasion over left side of chest, 1 x 1 cm, red, 4 cm below left nipple.

7. Linear abrasion, 7 cm long, red in colour, over left arm, middle lower part, outer side.

Internal Examination:

1. Head - left side scalp tissues contused
- skull fractured left temporal bone.
- left temporal parital lobes contused.”

22. PW-18 opined the cause of death as asphyxia due to manual strangulation (throttling). Injuries No. 1 to 7 and the head injuries illustrated in post-mortem report were due to blunt force impact. It was further opined by PW-18 that the injuries found on the neck of the deceased were sufficient to cause death in the ordinary course of nature. All the injuries found on the body of the deceased were ante-mortem in nature. Time since death was opined as one and half to two days approximately from the post-mortem examination.
23. Before dealing with the case on hand, it would be useful to revisit the law relating to conviction of the accused on the basis of last seen theory in a case based on circumstantial evidence under Section 302 of IPC.
24. In the case of *Nizam v. State of Rajasthan*, reported at (2016) 1 SCC 550, the Hon'ble Supreme Court noted the importance of last seen

evidence as a vital link in the chain of circumstances that would point towards the guilt of the accused. In a case where the last seen evidence against the accused gets proved, the burden of proof shifts to the accused and it is for the accused to offer a reasonable explanation as to the cause of death of the deceased. The relevant para 14 reads as under:

“14. The courts below convicted the appellants on the evidence of PWs 1 and 2 that the deceased was last seen alive with the appellants on 23-1-2001. Undoubtedly, the “last seen theory” is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. The “last seen theory” holds the courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of death of the deceased. It is well settled by this Court that it is not prudent to base the conviction solely on “last seen theory”. “Last seen theory” should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.”

(Emphasis Supplied)

25. In the light of the above, it is to be seen whether in the facts and circumstances of the instant case, the Trial Court below was right in invoking the ‘last seen theory’. From the evidence of PW-9 and PW-10 extracted hereinabove, it has been proved that only the appellant was residing with the deceased in his *jhuggi* for about 15 days prior to the incident and the deceased was also last seen in the company of the appellant prior to his death. The death of the deceased came to light on the next morning. Be it noted, that the prosecution has succeeded in proving the fact by definite evidence that the deceased was last seen alive in the company of the appellant. Thus, a reasonable inference can be

drawn against the appellant and the onus stands shifted on the appellant under Section 106 of the Evidence Act.

26. In the case of ***State of Rajasthan v. Kashi Ram*** reported at (2006) 12 SCC 254, the Apex Court discussed the principle underlying under Section 106 of the Evidence Act. The relevant para 23 reads as under:

“23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in Naina Mohd., Re. [AIR 1960 Mad 218].”

(Emphasis Supplied)

27. The Supreme Court of India in the case of ***Babu v. Babu and Another*** reported at (2003) 7 SCC 37, held that where two persons have slept inside a bolted room on the night of the occurrence, it was for the accused

alone to explain as to what had happen and how the other person had died on account of strangulation. The relevant para 14 reads as under:

“14. The second important circumstantial evidence against the accused is that the accused and the deceased were last seen together. To put it tersely, both of them slept together by retiring to the room that night. Last seen together in legal parlance ordinarily refers to the last seen together in the street, at a public place, or at any place frequented by the public. But here, the last seen together is much more than that. The last seen together here is sleeping together inside the bolted room. It is in the evidence of PW 3 and PW 6 that they had dined together and the accused and the deceased were closeted in a room at about 8.30 p.m. Therefore, on the fateful day the accused and the deceased were closeted in a bedroom at about 8.30 p.m. is undisputed and it is for the accused alone to explain as to what happened and how his wife died and that too on account of strangulation.”

(Emphasis Supplied)

28. In the case of ***G. Parshwanath v. State of Karnataka***, reported at **(2010) 8 SCC 593**, the Apex Court discussed the relevance of motive in a case based on the circumstantial evidence. It was held that absence of motive put the Courts on its guard to scrutinise the circumstances more carefully to ensure that suspicion and conjecture do not take the place of legal proof. The relevant para 45 reads as under:

“45. The argument that in absence of motive on the part of the appellant to kill the deceased benefit of reasonable doubt should be given, cannot be accepted. First of all every suspicion is not a doubt. Only reasonable doubt gives benefit to the accused and not the doubt of a vacillating Judge. Very often a motive is alleged to indicate the high degree of probability that the offence was committed by the person who was prompted by the motive. In a case where the motive alleged against accused is fully established, it provides

foundational material to connect the chain of circumstances. It affords a key on a pointer to scan the evidence in the case in that perspective and as a satisfactory circumstance of corroboration. However, in a case based on circumstantial evidence where proved circumstances complete the chain of evidence, it cannot be said that in absence of motive, the other proved circumstances are of no consequence. The absence of motive, however, puts the court on its guard to scrutinise the circumstances more carefully to ensure that suspicion and conjecture do not take place of legal proof. There is no absolute legal proposition of law that in the absence of any motive an accused cannot be convicted under Section 302 IPC. Effect of absence of motive would depend on the facts of each case. Therefore, this Court proposes to examine the question of motive which prompted the appellant to commit the crime in question.”

(Emphasis Supplied)

29. In view of the above, in a case based on 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 of the accused on the basis of the circumstantial evidence, the circumstances must be firmly established and the chain of circumstances must be completed from the facts. In the case on hand, the following incriminating circumstances are clearly established against the appellant:

- i) On 24.05.2011, in the evening, at about 7.00 or 7.30 PM, the deceased was last seen in the company of the appellant and they both were sitting and taking liquor;
- ii) Next morning i.e. on 23.05.2011, when the death of Madan Ram came to light, the appellant ran away from the *jhuggi* of the

deceased on the pretext that he was going to make a call at 100 number;

- iii) The appellant evaded arrest for about 4 months after the incident;
- iv) Even after the arrest of the appellant, he did not offer any exculpatory explanation to discharge the burden under Section 106 of the Evidence Act and rather admitted his presence at the spot with the deceased on the day of incident.

30. All the incriminating circumstances mentioned in foregoing para in our view form a complete chain and are consistent with no other hypothesis except the guilt of the appellant. If the appellant was with the deceased from about 7.00-7.30 in the evening of 22.05.2011 to about 6.00 in the next morning, he neither have explained how the deceased had sustained injuries nor offered some plausible explanation exculpating him. The respondent has not even pleaded alibi, nor has he given an explanation which may support his innocence.
31. On a careful examination of the testimonies of PW-9 and PW-10, we find that their testimonies are consistent on all material aspects including the date of the incident, time of the incident and the manner in which Reshma had shouted that Madan had died. The testimonies of PW-9 and PW-10 were also consistent in the manner the appellant had come out of the *jhuggi* and the manner PCR call was made by PW-13. PW-9 has testified that PW-10 had tried to grab the appellant but he succeeded in freeing himself and fled from the spot, while saying that he was going to make a call at Number 100. Thereafter, the appellant absconded for about 4 months. Thus, the testimonies of PW-9 and PW-10 leave no room for

doubt that the appellant and the deceased were last seen together in the evening of 22.05.2011 till about 6.00 in the next morning, when the incident came to light.

32. The appellant has contended that the prosecution has failed to seek opinion with regard to the chance prints lifted from the spot do not affect the case of prosecution when we have other evidence which duly connect the appellant with the crime. Thus, it merely amounts to shoddy investigation and nothing turns on it.
33. Ms. Sindhu has also argued that merely because the appellant has absconded that by itself cannot be a ground to convict the appellant. She has further argued that it is evident from the records that no steps were taken by the State to search the appellant. She submits that this would get immense importance, for the reason that the appellant was not a permanent resident of *jhuggi*. In this regard, we find force in the argument raised by the counsel for the State that the efforts were made by the State to arrest the appellant. Attention of this Court has been drawn to the case diary showing the steps taken by the State to search the appellant. Additionally, we find that none of the official witnesses were cross-examined on this aspect and even there was no suggestion given by the defence in this regard, thus, we are of the view that in the given facts and circumstances, the abscondance of the appellant is a highly incriminating circumstance pointing toward his guilt.
34. The present appeal is to be decided on the touchstone of the law laid down by the Hon'ble Supreme Court and reiterated by this Court in the foregoing para. Applying the law as laid down in *Nizam's* case (*supra*)

the last seen evidence is one of the vital link in completing the chain of circumstantial evidence. Thus, the contention of the appellant that the evidence of last seen is a weak form of evidence and it would be highly unsafe to uphold the order of conviction solely on the last seen evidence of PW-9 & PW-10 holds no value in the given circumstances. We are of the view that the present case does not rest solely on the evidence of last seen; the Trial Court convicted the appellant keeping in view the other circumstances including factum of abscondence for a period of about 4 months to evade arrest. The judgments relied upon by the counsel for the appellant are distinguishable and are not applicable to the fact of the present case.

35. In light of the above discussions, we do not find any infirmity in the order of conviction and sentence passed by the learned Trial Court. Accordingly, the appeal stands dismissed.
36. The Trial Court record be sent back along with a copy of this judgment.
37. Copy of this judgment also be sent to the Superintendent-Central Jail, Tihar for updating the jail record.

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38. In view of the judgment passed, the bail application stands dismissed.

G. S. SISTANI, J.

CHANDER SHEKHAR, J.

SEPTEMBER 26, 2017//tp