

**A.F.R.**

**Neutral Citation No. - 2025:AHC:28101-DB**

**Court No. - 39**

**Case :-** CRIMINAL APPEAL No. - 2348 of 2021

**Appellant :-** Akram And Another

**Respondent :-** State of U.P.

**Counsel for Appellant :-** Amrendra Pratap Singh, Desh Ratan Chaudhary, Harishchandra Yadav, Ishwar Chandra Tyagi, Masoom Alam, Praveen Kumar Singh, Syed Imran Ibrahim, Syed Shahnawaz Shah

**Counsel for Respondent :-** G.A.

**Hon'ble Siddhartha Varma, J.**

**Hon'ble Dinesh Pathak, J.**

1. Upon the disappearance of one Salman on 6.11.2011, a Gumshudgi/missing report was got reported by his father Shamim S/o Bundu Hasan. In the Gumshudgi report, it was stated that the younger son of Shamim had, from his telephone number 8126580512, rung up the missing son of Shamim at his phone number 8126573540 and the missing son- Salman had informed the son who had rung up that he was at Sidki, Saharanpur and he would be reaching in half an hour. However, when Salman did not reach his house, the Gumshudgi Report was got reported on 07.11.2011. This was exhibited as 'Exhibit Ka-2'. When, however, a search was made and Salman was not found then on 15.11.2011 a First Information Report was got lodged by the father of the missing son. It was categorically stated that the son of the first informant had left the house on his Tempo No.UP 11 T 5974 on 06.11.2011 in the morning and had gone to Saharanpur for the purpose of carrying passengers. It had further been stated that as

per the missing report at about 11.00 A.M. on 06.11.2011, the missing son Salman had stated that he was in Sidki, Saharanpur and would come back in about half an hour. But when he did not come back by that time then, the first informant along with his relatives and acquaintances tried to search him out. In the First Information Report itself, there was an averment that the first informant was doubting that certain miscreants had kidnapped his son Salman for the purposes of murdering him. The First Information Report was lodged u/s 364 I.P.C. which gave rise to Case Crime No. 363 of 2011. The scribe of first informant was one Mohd. Mehtab. Thereupon, the investigation commenced on 27.11.2011. Akram, one of the accused was arrested at around 11.30 AM, and, from his possession, a mobile phone was also recovered. However, on the arrest, the accused Akram had stated that he had kidnapped the son of the first informant Salman with the help of his Jija known by the name of Shameen on 06.11.2011 and they together had hidden the dead body in Village Korwal Alampur, Police Station- Bhabreda, District- Haridwar, Uttarakhand by the side of a canal in an agricultural field and the mobile phone had been retained by the accused. Thereafter on 27.11.2011 after the arrest of Akram, arrest memo was prepared and it was exhibited as 'Exhibit Ka-5'. Thereafter, on 02.12.2011, the accused Shameem was also arrested and from his possession also a mobile phone was recovered and was retained with the police and the recovery memo of it was prepared as 'Exhibit Ka-9'.

During the preparation of both the recovery memos vis-a-vis accused Akram and Shamim, no independent witness of the area was present.

2. On the information given by arrested persons- Akram and Shamim, the weapon by which the alleged murder had taken place i.e. the iron rod of around two Baalisht (around 18 inches) was also recovered. This recovery was also done without the presence of any independent witness. Thereafter, the Tempo No. UP 11 T 5974 was also recovered on 15.11.2011 and the recovery memo with regard to it was prepared as 'Exhibit Ka-18'. Thereafter, it appears that a search was made by the police of the dead body and after quite sometime on 27.11.2011, after its recovery, the inquest report was got prepared. The dead body was found in a sugarcane field. Here, it may be stated that the dead body which was found by the police was nothing else but a collection of bones. It was only a skeleton. There was no flesh found on it and the inquest report, which was prepared on 27.11.2011 in the presence of the Abdul Sattar, Riyasat, Abdul Rahman, Shamim and Mohd. Shahjad, clearly stated that the dead body was found in a state which was not recognizable and only loose bones were found. Thereafter, a *post mortem* was done on whatever was left of the dead body on 28.11.2011 at 12.00 noon and in *post mortem* report, in the column where the cause of death had to be given it was categorically stated that it could not be ascertained and the doctor desired a DNA Test for the identification of the dead body and for

the cause of the death. Upon investigation, having been completed, a charge-sheet was submitted by the police in the court under Sections 364/302/201/404/411 IPC. Here it may be mentioned, Akram was arrested on 27.11.2011 and Shamim was arrested on 2/3.12.2011 and Abdul Sattar was got arrested on 13.12.2011. The Court, thereafter, on 05.02.2013 framed charges against the three accused namely Akram, Shamim and Abdul Sattar. When they denied the charges and claimed trial, the trial commenced.

3. From the side of the prosecution, as many as nine prosecution witnesses appeared to prove the case of the prosecution. PW-1 Narendra Kumar was a Constable who had stated in his examination-in-chief that two years prior to the recording of the statement, he was posted in Saharanpur and that he was the person who had lodged the Gumshudgi Report. He also proved the Chik of the Gumshudgi. PW-2 Shamim (father of the deceased) had, in his examination-in-chief, chronologically narrated as to in what manner, his son had disappeared on 06.11.2011. Thereafter, he had stated as to how he had lodged the missing report initially and thereafter, how the relatives and the acquaintances had tried to search out the missing son- Salman. He had thereafter stated that on 21.11.2011, Shahjad and Liyaqat whom he had met in the village had informed him that his son Salman on 06.11.2011 in the morning at about 08.00 AM was seen taking Shamim and Akram on his Tempo at Saharanpur. Thereafter, the PW-2 had stated that how on 27.11.2011, the accused Akram

had taken the PW-2 and the other police personnel to the sugarcane field where the bones were discovered along with the blue pant which was smeared with blood and mud. He had also stated that a shirt with check print was also discovered. Similar was case of the baniyan. He had stated that the police had sealed all those clothes and thereafter, the dead body was taken for *post mortem*. In the examination-in-chief he had stated that the motive, as to why Akram had killed his son, was that he was in love with one Benazir and the same girl was also liked by Akram, the accused who wanted to marry her forcefully. In the cross-examination, he had stated that though in the First Information Report, he had stated that he had met Shahjad and Liyaqat for the first time on 21.11.2011 after the disappearance of his son, in the examination-in-chief he had stated that when he was searching for his son along with the other relatives and acquaintances, then Shahjad was also searching for him.

4. PW-3 is Shahjad who has stated that he had seen the deceased going with Akram and thereafter he had himself gone away to Delhi along with Liyaqat and he has stated in his statement-in-chief that on 20.11.2011 after he had come back from Delhi, he had informed the father of the deceased Shamim that he had seen Salman on the date when he had disappeared. In his cross examination when he was asked as to why he had gone to Delhi, he had stated that he had gone to Delhi along with his friend for an outing. Upon being asked, as to by which train he had gone he had

stated that he did not know the name of the train. Further upon being asked as to where he had stayed, he had stated that he did not know the name of the *Mohalla* where his friend had taken him. He has thereafter stated that he had only stayed in Delhi and he had not gone about site seeing. Thereafter, he stated that he came from Delhi along with Liyaqat. He has also stated that upon coming from Delhi, his statement under Section 161 Cr.P.C. was recorded by the police.

5. PW- 4 Liyaqat is again the witness who had seen the deceased going with the accused. He has stated that Shahjad the PW-3 was a friend of his and that he had accompanied him to Delhi in search of work.

6. PW-5 is the Sub-Inspector Kulveer Singh Tomar who was the Investigating Officer. He has stated that how he had arrested the accused persons and how they had also confessed about the crime. He has also stated how the accused had helped the police in recovering the dead body and how besides the dead body, they had helped the police in recovering the clothes of the deceased also. On page no. 63 of the Paper Book, he has stated that after the dead body was recovered along with clothes, he had prepared a "Shinakht Memo". In the cross-examination, this witness was asked as to how he was co-relating the blue pants and the brown shirt which was found by the side of the dead body with the clothes which the deceased was wearing on the date when he had

disappeared, he had stated that in the missing report itself the colour of the clothes had been given. However, when he was asked as to in whose handwriting this information was given in the missing report, he has stated that it was wrong to say that sentence showing the colour of the clothes was added subsequently. He has also very categorically stated that for the first time, the statement of Shahjad was recorded on 21.11.2011 and that of Liyaqat was recorded on 24.11.2011 under Section 161 Cr.P.C.

7. P.W.-6 is Dr. S.N. Singh, who had conducted the post mortem and has very categorically stated that for the correct identification of the deceased, DNA test of the bones was required and also he has stated that cause of death also could have been only known by the DNA test. He has also stated that he had given the bones to the police for a proper DNA test.

8. P.W.7 is Ajay Kumar Chauhan who was the second Investigating Officer and he had denied the fact that the F.I.R. was ante-dated or ante-timed. He has, however, stated in the case diary there were any number of over writings. He has also stated that there was no sample sent for DNA testing and there was also no report given of any expert.

9. P.W.8 is Ashok Kumar Tyagi who was a retired Head Constable in the Police and he had proved the chik as was prepared by the Constable Anil Kumar. He has stated that Anil Kumar was though alive, it was not known where he was at that time.

10. P.W.9 is Bhagwan Mahar, who has stated how on the pointing out of the accused persons the dead body (skeleton) of the deceased was found. He has also stated about the discovery of the clothes.

11. Thereafter, the statements of the three accused were recorded under Section 313 Cr.P.C. and they had all denied the commission of crime. Thereafter, when the court of the learned Additional Sessions Judge, Fast Track Court No.2, Saharanpur by his judgment and order dated 25.02.2021 in Sessions Trial No. 434 of 2012 convicted the two accused Akram and Shameem under Sections 364, 302, 201, 404 read with Section 34 I.P.C. and had sentenced them, the instant appeal was filed.

12. Learned counsel for the appellants has made the following submissions :

(i) The recovery of the mobile phone and of the weapon by which the alleged murder had taken place under Section 27 of the Evidence Act was bad in law. Learned counsel for the appellants relying upon a judgment of Supreme Court in the case of **Subramanya vs. State of Karnataka** reported in **(2023) 11 SCC 255** submitted that under Section 27 of the Evidence Act as per the judgment aforementioned, before the alleged recovery was to take place, a memo had to be prepared as to what was to be got recovered. This memo necessarily had to be prepared in the presence of two

independent witnesses. However, since that had not been done, the entire recovery under Section 27 of the Evidence Act became bad in law.

(ii) Learned counsel for the appellants further stated that it is settled law that circumstance of last seen together cannot by itself form the basis of holding the accused guilty of any offence. Though, the needle of suspicion would, to a large extent, point to the accused being the culprit, there had to be a strong backing of other circumstances to convict the accused with the alleged crime he was charged for. Learned counsel for the appellants further states that if the evidence of “last seen” does not inspire confidence or is not trustworthy, then there should not be any conviction. Learned counsel for the appellants relied upon paragraphs 40, 41 and 42 of the judgment reported in **2019 4 SCC 522; Digamber Vaishnav and Anr. vs. State of Chhatisgarh**, therefore the same are being reproduced here as under:

*"40. The prosecution has relied upon the evidence of PW 8 to show that the accused and victims were last seen together. It is settled that the circumstance of last seen together cannot by itself form the basis of holding accused guilty of offence. If there is any credible evidence that just before or immediately prior to the death of the victims, they were last seen along with the accused at or near about the place of occurrence, the needle of suspicion would certainly point to the accused being the culprits and this would*

*be one of the strong factors or circumstances inculcating them with the alleged crime purported on the victims. However, if the last seen evidence does not inspire the confidence or is not trustworthy, there can be no conviction. To constitute the last seen together factor as an incriminating circumstance, there must be close proximity between the time of seeing and recovery of dead body.*

**41.** *In Arjun Marik v. State of Bihar [Arjun Marik v. State of Bihar, 1994 Supp (2) SCC 372 : 1994 SCC (Cri) 1551] , it has been held as under: (SCC p. 385, para 31)*

*"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."*

**42.** *In Kanhaiya Lal v. State of Rajasthan [Kanhaiya Lal v. State of Rajasthan, (2014) 4 SCC 715 : (2014) 2 SCC (Cri) 413] , the Court has reiterated that the last seen together does not by itself lead to the inference that it was the accused who committed the crime. It is held thus: (SCC p. 719, para 12)*

*"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."*

Learned counsel for the appellants thereafter submitted that if the evidence is perused in its entirety, it becomes clear that Sahazad had seen the accused and the deceased together while the vehicle on which they were seated was moving. However, when Liyaqat was narrating how he had seen the two accused along with the deceased then the vehicle was stationary. There was contradiction despite the fact that both had seen the accused at the same point of time. Therefore learned counsel for the appellants states that the evidence of the two prosecution witnesses namely PW-3, Sahazad, and PW-4, Liyaqat, were not reliable at all.

(iii) Learned counsel for the appellants further states that the recovery of the skeleton was in no manner a reliable evidence. To top it all no recovery memo was prepared. No independent witness was present at the time of the recovery of the skeleton. Furthermore, the skeleton itself was such a piece of evidence which required a further investigation and this is what also the doctor who had conducted the post-mortem had very categorically stated that for the

identification of the deceased and for knowing the cause of death of the deceased, a DNA test was imperative. However, in the instant case no DNA test was done. Learned counsel for the appellants further relied upon a judgment of Supreme Court in **Daryao Singh v. State of M.P.** reported in **1991 2 SCC 588** and relied upon paragraphs 7, 8 and 9 and had stated that by merely looking at the bones, one could not by any stretch of imagination, make any expert whatsoever to come to the conclusion as to what was the age of the deceased and as to how many days prior to the recovery of the bones, the death had taken place. Since learned counsel for the appellants relied upon paragraphs 7, 8 and 9 the same are reproduced here as under:

*“7. Strong reliance was, however, placed by the learned counsel for the appellant on the evidence of PW 2 — Dr Sharma. This witness has after describing the various injuries stated that the body was cold, rigor mortis had passed off and the body was decomposed when he performed the post-mortem examination on the morning of September 27, 1970. He also noticed blisters containing reddish fluid all over the body. The abdomen was swollen and greenish discoloration was noticed. In his opinion death was caused on account of the brain injury. In paragraph 6 of his deposition he stated “the duration of injury since death was 36 to 48 hours”. In cross-examination he said:*

*“As the dead body was decomposed externally and internally blisters had formed all over the body, scrotum distended, marks of swelling on body, presence of maggots on body; all these symptoms do indicate that the duration of injury since death could be 14 to 20 days also.”*

*On the basis of these statements made by PW 2, counsel for the appellant strongly argued that death must have taken place long before September 25, 1970 since blisters had appeared on the body. In this connection he placed reliance on the table found at page 134 of Modi's Medical Jurisprudence and Toxicology (12th edn.). It reads as under:*

|    | <i>Putrefactive Changes</i>                                                                                                                    | <i>Time</i>                      |
|----|------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------|
| 1. | <i>Greenish coloration over the iliac fossae. The eyeballs, soft and yielding.</i>                                                             | <i>1 to 3 days after death</i>   |
| 2. | <i>Green coloration spreading over the whole abdomen, external genitals and other parts of the body. Frothy blood from mouth and nostrils.</i> | <i>3 to 5 days after death.</i>  |
| 3. | <i>Abdomen distended with gas. Cornea fallen in and concave. Purplish red streaks of veins prominent on the extremities,</i>                   | <i>8 to 10 days after death.</i> |

*sphincters relaxed, nails firm.*

4. *Body greenish-brown. Blisters 14 to 20  
forming all over the body. days  
Skin peels off. Features after  
unrecognizable. Scrotum death.  
distended. Body swollen up  
owing to distension. Maggots  
on the body. Nails and hair  
loose and easily detached.*
5. *Soft parts changed into a 2 to 5 months  
thick, semi-fluid, black mass. after death.  
Skull, abdomen and thorax  
burst. Bones exposed. Orbits  
empty.*

*It is indeed surprising that no such submission was made on behalf of defence before the trial court as well as the High Court. Even in the memo of appeal no such precise contention appears. However, we have thought it proper to examine the submission on merits rather than reject in on a technical ground.*

*8. Counsel for the appellant strongly relied on this statement of PW 2 — Dr Sharma and contended that the presence of blisters all over the body is a sure pointer to the fact that death had taken place 14 to 20 days before the post-mortem examination. It may be recalled that the deceased was 45 years of age and*

*was the victim of violent attack with lethal weapons in which he had suffered a fatal semi-circular wound on the scalp 6" × 4" extended by 2" to the left mid-line. In addition thereto he had received incised wounds on his left forearm resulting in fractures. His right leg was cut into two pieces 6" below the tibia, liquefied blood was oozing out, maggots were present, blisters were seen all over the body and the soft cuticle peeled off easily. There was another cut wound on the left leg exposing the tibia. A 5" wound was seen at the right side of the mouth. It was the scalp injury which caused the death.*

*9. It is common knowledge that after death the body starts to cool down to the surrounding temperature. The cooling of the body is the earliest phenomenon which is followed by post-mortem lividity resulting from discontinuance of blood circulation and collection of blood in certain parts under gravitational action, depending on the position of the dead body. The stoppage of blood circulation and the inaction of the natural defensive mechanism results in the bacteria present in the body as well as those that enter from outside getting scattered in every part of the body setting in the process of putrefaction, unless special care is taken to prevent the same. Decomposition is thus essentially the process of putrefaction which is dependent on environmental and climatic conditions. In the present case death had occurred on September 25 and the dead body lay in the police station with the wounds exposed till it was brought to the hospital at 5.20 p.m. on the next day. The body remained in the same condition in the hospital till 7 a.m. on the next day when the post-*

*mortem examination was undertaken. The body thus remained fully exposed to the heat and humidity of the month of September for over thirty hours and hence it is not surprising that the rigor mortis had passed off. Ordinarily after rigor mortis has passed off, the process of putrefaction sets in but it may set in even earlier during summer depending on the heat and humidity. Body changing colour and emitting foul smell, are the two special characteristics of the decomposition process. The first external evidence of putrefaction is the formation of greenish discoloration of the abdominal skin over the iliac fossae which occurs within six to twelve hours in summer and spreads all over the body within twelve to eighteen hours of death. As time passes they deepen in colour and become purple. With the spread of bacteria, there is gradual development of gases in the intestines within twelve to eighteen hours and liquefaction also takes place and soon spreads to other parts of the body. Putrefaction thus results in general disintegration of the tissues due to residual enzymatic activity in the cells causing widespread formation of gases emitting foul smell and if the body is exposed, as in the present case, flies lay eggs on exposed wounds forming maggots. The body gets bloated and liquefied, the skin loses coherence, the superficial layers peel off easily and blisters are formed. It is, therefore, not surprising that owing to the formation of gases the penis and the scrotum were swollen and there was the presence of maggots.”*

(iv) Learned counsel for the appellants therefore submitted that the recovery of the skeleton and the clothes was

absolutely doubtful and no reliance could be placed on it. Furthermore, while making this submission learned counsel for the appellants also drew the attention of the Court to the missing report which had mentioned about the colour of the clothes and it was pointed out that the handwriting in which the colour of the clothes and the description of the clothes was written was in an absolutely different handwriting. Learned counsel for the appellants had submitted that even if there was an assertion made in the statements given before the Court that there were recoveries of the clothes of the dead-body but at no place, any recovery memo of those clothes was prepared and, therefore, they were absolutely an in-admissible piece of evidence. Also the argument of the learned counsel seemed believable when he submitted that the insertion in the missing report of the colour of the clothes was done after the clothes were placed near the skeleton. He stated that when the dead-body had decomposed it was highly improbable that the clothes were intact

(v) Learned counsel for the appellants has hammered extensively on the issue that the case was of circumstantial evidence and the two prosecution witnesses namely PW-3, Sahazad, and PW-4, Liyaqat had got their statements recorded under Section 161 Cr.P.C. before the Police on 21.11.2011 and 24.11.2011 respectively and, therefore, the case brought forth by the prosecution vis-a-vis the

circumstantial evidence had no legs stand. Learned counsel for the appellants relied upon a judgment of Supreme Court in the case of **Sharad Birdhichand Sarda vs. State of Maharashtra** reported in **(1984) 4 SCC 116** and has relied upon paragraph **153** wherein the five golden principles which had to be followed for conviction on the basis of a circumstantial evidence had been laid down by the Supreme Court. The paragraph **153** of the judgment is being reproduced here as under:

*“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:*

*(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.*

*It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established. There is not only a grammatical but a legal distinction between “may be proved” and “must be or should be proved” as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 CrL LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]*

*“Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between ‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions.”*

*(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,*

*(3) the circumstances should be of a conclusive nature and tendency,*

*(4) they should exclude every possible hypothesis except the one to be proved, and*

*(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”*

(vi) Further, the learned counsel for the appellants stressed, that the question with regard to there being a motive was never put to the accused and therefore there was no answers/statements to motive under Section 313 of Cr.P.C. on record. He submitted that therefore there could be no finding arrived at on the basis of motive in the case at hand, and in this regard the paragraphs no. 143, 144 and 145 of the very same judgment i.e. **Sharad Birdhichand Sarda (Supra)** become important and the same are being reproduced hereunder:

*“143. Apart from the aforesaid comments there is one vital defect in some of the circumstances mentioned above and relied upon by the High Court viz. Circumstances 4, 5, 6, 8, 9, 11, 12, 13, 16 and 17. As these circumstances were not put to the appellant in*

his statement under Section 313 of the Criminal Procedure Code, 1973 they must be completely excluded from consideration because the appellant did not have any chance to explain them. This has been consistently held by this Court as far back as 1953 where in the case of *Hate Singh Bhagat Singh v. State of Madhya Pradesh* [1951 SCC 1060 : AIR 1953 SC 468 : 1953 Cri LJ 1933] this Court held that any circumstance in respect of which an accused was not examined under Section 342 of the Criminal Procedure Code cannot be used against him. Ever since this decision, there is a catena of authorities of this Court uniformly taking the view that unless the circumstance appearing against an accused is put to him in his examination under Section 342 of the old Code (corresponding to Section 313 of the Criminal Procedure Code, 1973), the same cannot be used against him. In *Shamu Balu Chaugule v. State of Maharashtra* [(1976) 1 SCC 438 : 1976 SCC (Cri) 56] this Court held thus: [SCC para 5, p. 440: SCC (Cri) p. 58]

“The fact that the appellant was said to be absconding, not having been put to him under Section 342, Criminal Procedure Code, could not be used against him.

**144.** To the same effect is another decision of this Court in *Harijan Megha Jesha v. State of Gujarat* [1979 SCC (Cri) 652: AIR 1979 SC 1566 : 1979 Cri LJ 1137] where the following observations were made: [SCC (Cri) p. 653, para 3]

“In the first place, he stated that on the personal search of the appellant a chedi was found which was

*blood stained and according to the report of the serologist, it contained human blood. Unfortunately, however, as this circumstance was not put to the accused in his statement under Section 342, the prosecution cannot be permitted to rely on this statement in order to convict the appellant....*

*145. It is not necessary for us to multiply authorities on this point as this question now stands concluded by several decisions of this Court. In this view of the matter, the circumstances which were not put to the appellant in his examination under Section 313 of the Criminal Procedure Code, 1973 have to be completely excluded from consideration.”*

(vii) Learned counsel for the appellants has further submitted that even though a motive had been carved out that the deceased was in love with one Benazeer and that very Benazeer was also liked by Akram, but Benazeer was never produced in the witness box.

**13.** Sri Amit Sinha, learned Additional Government Advocate, however, supported the judgment of the trial Court and very vehemently argued that if the statement of P.W.5-Kulveer Singh Tomar is perused it becomes clear that the recovery of the skeleton was done in the best possible manner. Sri Amit Sinha further states that no fault could be found with the discovery of the dead-body which was definitely done on the pointing of the accused.

**14.** Having heard Sri Mohd. Samiuzzaman Khan assisted by Sri Mohammad Wadood, learned counsel appearing for the appellant no.1, Akram; Sri Syed Imran Ibrahim, learned counsel appearing

for the appellant no. 2, Shameem, and Sri Amit Sinha, learned Additional Government Advocate, we are of the view that the Appeal deserves to be allowed. If the recovery as was done under Section 27 of the Evidence Act is perused, we find that it was definitely not done as per the law laid down by the Supreme Court in the case of **Subramanya (Supra)**. We also find that no independent witness was there at the time of the recovery. Furthermore, we find that when the recovery of the skeleton and the clothes which were worn by the deceased were recovered then also no independent witness accompanied the police party. In fact, as has been stated in the statement of the PW-5, even though the accused had accompanied the Police, no recovery memo etc. had been prepared and when that was missing, definitely, no case was there of the prosecution to be proved or disproved and therefore it could be said that the prosecution had absolutely no case. Still further we are of the view that the doctor who had conducted the post-mortem himself had stated that a DNA test was required for the identification of the deceased and for the finding out of the cause of death. However, neither the investigating agency nor the prosecution at any stage made any effort to get the DNA test done. Also we are of the view that the case was that of the circumstantial evidence. However, none of the evidence was such which would make the Court believe that there could be only one conclusion and that was that Akram and Shamim had done away with the deceased Salman. Further, we are definitely of the view that if the motive

had to be established then the accused had to be confronted with a definite question when they were giving their statement under Section 313 of Cr.P.C. Also we are of the view that a very important witness namely Benazeer who could have definitely been produced in the witness box, was never produced by the prosecution in the witness box. Thus having found that the recovery under Section 27 of the Evidence Act and the recovery of the skeleton were bad and also when we find that a DNA test which was essential and compulsory was not done then the Court can arrive at only one conclusion and i.e. that the accused had been wrongly implicated in the case and that the charges as were levelled against the appellants were never proved.

**15.** The appellants are acquitted of all the charges. The judgment and order dated 25.02.2021 is quashed and is set-aside.

**16.** The instant Criminal Appeal is accordingly, **allowed.**

**Order Date :-** 27.2.2025  
Ramakant/Karan/M.S. Ansari

(Siddhartha Varma,J.)

(Dinesh Pathak,J.)