

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.398 OF 2012

Mohammad Javed s/o Mohammad Quddus,
Age-40 years, Occu:Labourer,
Residing at H. No.262, HUDCO Colony,
Parbhani, At present Naregaon, Aurangabad.

...APPELLANT
(Orig. Accused)

VERSUS

The State of Maharashtra,
(at the instance of MIDC CIDCO
Police Station, Aurangabad)

...RESPONDENT

...
Mr. Abhaysinh K. Bhosale Advocate for Appellant.
Mr. B.L. Dhus A.P.P. for Respondent - State.
...

CORAM: A.B. CHAUDHARI AND
INDIRA K. JAIN, JJ.

DATE OF RESERVING JUDGMENT : 1ST OCTOBER, 2015

DATE OF PRONOUNCING JUDGMENT: 20TH OCTOBER, 2015

JUDGMENT [PER A.B. CHAUDHARI, J]:-

1. Being aggrieved by the Judgment and order dated 8th July 2011 passed by the Sessions Judge-7, Aurangabad in Sessions Case No.161 of 2010, by which the Appellant was convicted for the offence punishable under Section 302 of the Indian Penal Code and was sentenced to suffer Rigorous Imprisonment for life and to pay fine of Rs.1000/- and in default to suffer further Rigorous Imprisonment for six months, and for offence under Section 376 of Indian Penal Code and was sentenced to suffer Rigorous Imprisonment for life and to pay fine of Rs.1000/- and in default to suffer further Rigorous Imprisonment for six months, and for offence under Section 377 of the Indian Penal Code and sentenced to suffer Rigorous Imprisonment for 10 years and to pay fine of Rs.1000/- and in default to suffer further Rigorous Imprisonment for six months, and under Section 366-A & 363 of the Indian Penal Code and sentenced to suffer

Rigorous Imprisonment for 5 years and to pay fine of Rs.500/- and in default to suffer further Rigorous Imprisonment for three months, and under Section 201 of the Indian Penal Code and sentenced to suffer Rigorous Imprisonment for 3 years and to pay fine of Rs.500/- and in default to suffer further Rigorous Imprisonment for three months, the present Appeal was preferred by the Appellant in this Court.

FACTS:-

2. In brief, the prosecution case is as under:-

. Syed Dilawar Syed Abbas, a labourer residing in Bismilla Colony, Naregaon, Aurangabad was residing with his wife Najma, two daughters and one son. They had a daughter- R about 8 years who was studying in IVth standard in Primary School at Naregaon. After attending the school, in

the evening from 5.00 p.m. to 5.30 p.m. she used to go to Masjid for learning Arabi. On 10th March 2010 at 10.00 a.m. as usual Dilawar and his wife left for work and came back at 2.00 p.m. for lunch when the victim was playing in the lane. At about 3.00 p.m. Dilawar and his wife again left for work and returned at about 5.00 p.m. But at that time the victim was not in the house. Presuming that she might have gone to Masjid for learning Arabi, they waited till 6.00 p.m. But still the victim did not come back to the house and therefore they went to Masjid and started making inquiries, when Maulana in the Masjid told that victim had not come to Masjid. Then Dilawar made announcement from the loud speaker of the Masjid about the missing of victim and search was undertaken in Naregaon and adjacent area till late night but the girl was not traced out. Dilawar then went to police station and lodged complaint. On 11th March 2010 at about 6.00 a.m. Najma started searching her daughter. She noticed naked dead body of her

daughter on the back side of country liquor shop in an open plot in thorny bushes. She thereafter lifted the dead body of victim and brought to her house and saw injury marks on the body of victim including private parts. Dilawar rushed to the police station, MIDC, CIDCO, Aurangabad City and lodged report and Crime No. I - 16 of 2010 was registered against the unknown persons. Investigation was undertaken. Spot Panchnama was prepared. Inquest was conducted, so also the postmortem by team of six doctors, who confirmed rape as well as murder, so also the sodomy. Statements of witnesses were recorded. Statement of Shaikh Hasan Shaikh Bakshu, PW-5 was recorded, who told that he saw victim at about 4.00 p.m. going with the Appellant/accused Syed Javed and thereafter she was not seen. At about 3.15 p.m. Investigating Officer arrested the Appellant/accused under Arrest Panchnama Exhibit 39 and was medically examined to find abrasions on both knees of the accused and thereafter discovery

of concealed burnt clothes of victim in front of his house and his own clothes concealed in the back side of house beneath the earth was made. The ash of the burnt clothes of victim which was lying, was seized. His pant and underwear were also seized from the earth. Spot Panchnama of the house of the accused was conducted. Two quilts were seized. Pieces of stone consisting of cement and pieces of burnt shirt were attached. Thereafter the investigation was completed. Charge-sheet was filed. The accused was sent to jail. Trial was held. Appellant/accused pleaded not guilty and stated that he was severely assaulted by the police. Trial Judge heard the evidence and thereafter convicted the Appellant for various offences as above stated. Hence, this Appeal.

ARGUMENTS:-

3. In support of the Appeal, Mr. A.K.

Bhosale, learned counsel for the Appellant vehemently argued that no doubt the offences for which the Appellant was convicted are very very serious and grave. But then the prosecution failed to prove that it was the Appellant who had committed the said offences. The learned counsel for the Appellant submitted that the prosecution has the evidence of only PW-5 Shaikh Hasan Shaikh Bakshu for propagating theory of 'last seen' against the Appellant. Witness PW-5 is closely related to the complainant. The counsel submitted that except said evidence, there is no other evidence which is incriminating against the Appellant. The other evidence discussed by the trial Judge held to be incriminating against the Appellant, if carefully examined, it will be seen that the same is worthless and is not at all incriminating against the Appellant. The counsel submitted that clothes of deceased were not seized and what was seized was ash in front of the house of the Appellant as alleged, leading the

prosecution nowhere. The clothes of the Appellant were seized but nothing was seen incriminating on the said clothes like blood stains or semen stains. Stone seized did not have any blood stains or any other stains nor house of the Appellant had blood stains anywhere, because the allegation was that offence was committed inside the house of the Appellant, by the Appellant. The learned counsel for the Appellant submitted that semen stains found on the quilt of the Appellant could not be said to be abnormal feature to hold the same to be as incriminating evidence against the Appellant. The Appellant was immediately arrested as he had not fled from his house but was doing his regular work. The Appellant was severely assaulted by the police, which is clear from the medical evidence on record, that he had received large number of contusions on the back side of his legs. The trial Judge convicted the Appellant on the basis of two injuries on the knees of the Appellant in the nature of abrasions. Looking to the business of

the Appellant of collecting the scrap and selling it, and his status as labourer, and looking to the fact that he was severely assaulted by the police, the trial Judge could not have convicted him. The counsel then contended that there is evidence on record to show that other two persons were residing with Appellant in the same room and there is no investigation whatsoever about those two persons, as to whether they were involved in the offence or not. The learned counsel for the Appellant submitted that thus the only evidence which could be said to be against the Appellant is that of PW-5 Shaikh Hasan Shaikh Bakshu on the 'last seen' theory, and that too the said evidence is infirm in view of the time gap, namely the girl missing from 4.00 p.m and dead body found on next day morning at 6.00 a.m. in the thorny bushes, which is a long time gap. Learned counsel for the Appellant relied on the following decisions:

(i) Inderjit Singh and another vs. State of

Punjab, A.I.R. 1991 S.C. 1674,

(ii) Niranjana Panja vs. State of West Bengal, [2010 (4) Mh.L.J. (Cri.) 102],

(iii) Sahadevan and another vs. State of T.N., A.I.R. 2012 S.C. 2435,

(iv) Shivaji Vasang Bagale vs. The State of Maharashtra, 2012 ALL M.R. (Cri.) 747,

(v) State through C.B.I. vs. Mahender Singh Dahiya, 2011 ALL M.R. (Cri.) 1295 (S.C.),

(vi) State of Uttar Pradesh vs. Ram Balak, AIR 2008 S.C. 1128,

(vii) Hukam Singh vs. State of Rajasthan, 2011 ALL S.C.R. (O.C.C.) 44,

(viii) Samadhan Dhudaka Koli vs. State of Maharashtra, 2009ALL M.R. (Cri.) 229 (S.C.).

4. Per contra, the learned A.P.P. for the State supported the impugned Judgment and order

and submitted that the circumstantial evidence against the Appellant is very strong and the trial Judge was not wrong in convicting the Appellant. The Appellant committed heinous offence of rape, sodomy and murder by abducting the girl aged about 8 years. He, therefore, prayed for dismissal of the Appeal.

CONSIDERATION:-

5. Looking to the facts of the case, we are fully aware that the case at hand is a serious case of rape, sodomy and murder of a small girl aged about 8 years and therefore we have seen the entire evidence minutely, carefully and cautiously for examining the instant Appeal. We have heard learned counsel for the rival parties at length. We have seen the entire record carefully. We have seen the reasons recorded by the learned trial Judge for recording the order of the conviction.

6. PW-6 Dr. Kailash Zine found the following injuries on the body of the victim, which he has stated in Para 3 of his evidence. We quote Paras 3, 4 and 5 as under:

"3. On examination, we found that the body was moderately nourished aged about 8 years female body. Her face was swollen and congested. Her right eye was black-injured. We noted the following injuries on her body.

1) There was multiple contused abrasion over right and left cheek, size varying from 2 cm. X 0.5 cm. to 0.5 X 0.5 cm. irregular in shape and reddish in colour.

2) Caecentric abrasion over the right cheek vertically placed size 1 cm. X 0.5 cm. reddish in colour.

3) Contused abrasion over the back on right side, size 3 cm. X 1 cm. irregular in shape and reddish in colour;

4) Linear abrasion over right buttock, size 3 cm. X 0.3 cm. reddish in colour,

5) Multiple contused abrasion over neck of

sizes varying from 2 cm. X 0.5 cm. to 0.5 cm. X 0.5 cm. irregular in shape and reddish in colour,

6) Lacerated wound over upper lip in middle line extending to pendulum, size 1 cm. X 0.3 cm., margins irregular, reddish in colour,

7) Contused abrasion over chin, size 3 cm. X 3 cm. irregular in shape, reddish in colour,

8) Bruising around anus, tearing of sphincter present. It was triangular in nature and extending vertically inward into the rectum.

9) Contusion over labia majora and minora, reddish in colour.

All the above injuries were anti mortem and fresh in nature and reddish in colour.

4. On internal examination, there was under scalp contusion over left frontal region of head, size 5 cm. X 3 cm. and occipital region of head left side size 3 cm. X 2 cm. reddish in colour. Brain was congested and petechial hemorrhage present. Petechial hemorrhage were also present on the surface of both lungs and over epicardium.

5. On internal examination of genital labia major and minora found contused along with whole length. Evidence of contusion over vaginal wall of anterior side. The hymen was ruptured at 6 O'clock position. We preserved viscera and other than viscera for C.A. analysis."

7. It is clear from the above evidence that there are number of injuries caused to the girl of 8 years when the offence of rape, sodomy was committed and insofar as murder is concerned, the frontal portion of the head was crashed resulting into her death, might be with a stone. Undoubtedly, the prosecution has proved from its evidence that there was rape, sodomy and murder of the girl. Insofar as the Appellant/accused is concerned, he was medically examined by the doctor. PW-7 Dr. Sayed Muddatsein s/o Syed Muzaffar stated in his evidence that Appellant was brought for his physical examination under Section 376 of the Indian Penal Code and there were 13 injuries on his person recorded by Dr. S.A.

Ghoderao. Dr. Ghoderao was out of India and therefore this witness was examined. About injuries on the person of the accused, PW-7 stated thus in his evidence:

"There were 13 injuries on his person and those were noted in MLC register by Dr. S.A. Ghoderao, the then medical officer examined him and noted it in MLC register. At present Dr. Ghoderao is out of India. The injuries noted in MLC register are as follows:

1. Contusion of left buttock reddish in colour size 7 X 4 cm.
2. Contusion of right buttock reddish in colour size 4 X 3 cm.
3. Contusion on left thigh, posteriorly oblique in shape reddish size 6 X 2 cm.
4. Contusion on left thigh posteriorly oblique in shape size 6 X 2 cm. reddish in colour,
5. Contusion on left leg posteriorly reddish in colour size 2 X 1 cm.
6. Contusion oblique in shape on right thigh,

size 7 X 1.5 cm. reddish in colour,

7. Contusion oblique in shape on right thigh, size 7 X 1.5 cm. reddish in colour parallel to above contusion,

8. Contusion posteriorly on right thigh size 2 X 1 cm. reddish in colour,

9. Contusion on right thigh medio posterior size 2 X 2 cm. blackish in brown colour,

10. Contusion on right thigh medio posterior size 2 X 2 cm. blackish in brown colour,

11. Contusion on right knee brownish black size 1 X 1 cm.

12. Contusion on left knee size .5 X .5 cm. brownish black in colour,

13. Contusion on left shoulder size 2 X 1 cm. brownish black in colour."

8. The Appellant/accused was arrested on 11th March 2010 at about 3.00 p.m. and was immediately sent for medical examination. The prosecution did not bring Dr. Ghoderao for

tendering evidence at any point of time. The requisition that was given for medical examination of the Appellant/accused clearly shows that Police Officer wanted examination inter-alia of the penis of the Appellant as well. Perusal of the entire medical evidence and the original papers of the record does not show a single paper or evidence about the medical examination of the Appellant/accused aged about 40 years on the day of commission of offence. In other words, the prosecution did not bring any evidence before the Court as to whether the examination of private part of the Appellant was made and whether any injuries were seen on his private part anywhere, particularly, when the allegation was that girl of 8 years was subjected to rape and sodomy by the Appellant/accused of the age of 40 years. There is no explanation from the Investigating Officer or from anybody as to why such examination of the Accused was not done. On the contrary, "Proforma For Examination of "Rape" Cases, Medical College

Hospital, Aurangabad, at Page No.91 of the Paper Book shows at Item Nos. 6 and 7 as under:

6. Examination of the evidence and violence on the body.

7. Examination of private parts development of general organs.

. Answer given to Item No.6 is - injuries noted on MLC Book i.e. injuries about which we have already stated and answer given to Item No.7 is - "Normal", which means the private part of the Appellant was examined but then there is no record of any injury on his private part, if it is really examined by the doctor. The prosecution is not giving any explanation for this lapse. We do not think that the Appellant/accused who was immediately arrested and sent for medical examination would have no injury on his private part, whose age is 40 years as against the age of 8 years of the girl who said to have been raped and sodomized.

9. Having thus discussed about the nature of medical evidence as above, we proceed to look into the other evidence carefully. PW-5 Shaikh Hasan Shaikh Bakshu is the star witness examined by the prosecution. In Para 2 and 3 he stated thus:-

"2. Incident occurred one year back. On that day I had gone for the work of lifting of bricks. I returned home at around 3 p.m. and at 4 p.m. I left my house. While leaving my house at around 4 p.m. I saw Reshma was going towards the house of accused. I thought that she was going along with him to Arabi School. So, I did not feel any doubt about him because Reshma was also knew accused. When I returned home at 6 p.m., I heard that Reshma is missing. So, I went with PW 1 for searching his daughter Reshma till 11 p.m. Later on, call was given from Masjid about missing of Reshma. Thereafter, I went to my house and her parents continued their search.

3. On the next day, I heard that Reshma died and she was taken to Ghati Hospital, Aurangabad. I went to Ghati Hospital, Aurangabad and saw her dead body and there

were many injuries on her person and I also heard that she was raped. Later on I came to my house and told Najama that I saw her daughter was going along with accused. I doubt that Javed did mischief with her. Accused Javed was residing alone."

10. Admittedly, PW-5 is close relative of the complainant and his wife PW-3 Najama, residing in the same colony. He stated that he saw at about 4.00 p.m. Reshma was going towards the house of the accused and he thought that she was going with him to learn Arabi, because Reshma also knew the accused. At 6.00 p.m. on the same day, he heard about her missing and he searched the girl up-to 11.00 p.m. To emphasize, PW-5 stated that he saw Reshma going towards house of the accused/ what is recorded in his English deposition. We have checked up the Marathi deposition, in which we find that what is written is that, "Reshma was going along with accused". We would, however, accept the version written in Marathi language and thus his evidence is that Reshma was going along

with accused at 4.00 p.m. This witness then stated that he searched the girl along with others till 11.00 p.m. and thereafter went home. He then stated that on the next day he went to the Ghati Hospital and was in the Ghati Hospital. But in para 5 of the cross-examination PW-5 stated that he did not tell the parents of the deceased on the first and second day that he had seen deceased Reshma with accused. He also stated that his statement was not recorded by police on 11th March 2010.

11. Now, coming to the evidence of PW-3 Najama in the context of evidence of PW-5 Shaikh Hasan Shaikh Bakshu, she stated thus in Para 6, in examination in chief itself:

"6. I know Sk. Hasan Sk. Bakshu. He did not tell anything in front of me. He told me that he had a doubt upon Sk. Javed. He had seen my daughter with Sk. Javed who was my neighbourer at around 4 p.m." (She does not say that he told her that he had seen her daughter with Sk.

Javed.)

12. It is clear from the above evidence that the claim made by PW-5 of 'last seen' theory that he had told this witness PW-3 about it, is not correct. On the contrary PW-3 Najama has stated that PW-5 did not tell her anything but had expressed doubts upon Shaikh Javed i.e. accused. But she does not claim that he told PW-3 that he had seen her daughter with Shaikh Javed who was their neighbourer, at around 4 p.m.

. We then quote the evidence of this lady PW-3 Najama, in Para 5, which reads thus:-

"5. On the next day morning at about 6.30 a.m. I started searching my daughter. On the next Galli of my house I found my daughter in thorny bushes and surrounding area was opened. I saw my daughter was in naked condition in thorny bushes. I lifted my daughter and brought her to my house. She was not alive. I saw a violence of marks over her neck and thighs and on her private part etc. Thereafter

the police had reached to my house. Dr. did her post mortem and told me that the girl was dead. The girl was raped and murdered."

. The above evidence shows that dead body was found at about 6.30 a.m. on the next day. It is important to note evidence of PW-3 in cross-examination and in particular in Para 8 which reads thus:-

"8. The house is belongs to my brother in law in which we are residing. In that area many people of our community are residing. Accused was residing in one rented room. He was residing along with 2 persons. They are residing just near to my house. He was doing labour work. He used to go for his work in the morning and returned in the evening. The accused and two persons who resided along with him were not my relatives. We never called them for any dinner. It is true that there was no time for us to talk among themselves."

13. It is clear from above evidence of PW-3 Najama that accused was not only person residing in the room but he was residing along with other

two persons, just near her house. It is surprising that the Investigating Officer did not make any investigation about these two persons, nor recorded their statements, if it is the case of the prosecution that the rape, sodomy and murder was committed in the said house where the other two persons were living. In Para 9 of her evidence PW-3 Najama stated that PW-5, her husband and she herself were searching her daughter entire night and nobody told her anything about her daughter i.e. including PW-5. The conduct of PW-5 in not disclosing his last seen theory when he was continuously searching girl till 11.00 p.m. and thereafter in the hospital, is very significant.

14. Next is the evidence of PW-1 complainant, father of the girl, Syed Dilawar s/o Syed Abbas. He stated thus, in Para 5 in his evidence:-

"5. I went along with police while carrying the dead body of my daughter to the hospital. Hasan Bakshu is the son of my sister who accompanied

was while carrying the dead body of my daughter to the hospital. Hasan Bakshu told me that on the day of incident he saw my daughter Reshma while going from the alleged Galli. He told me that at about 6 p.m. he saw my daughter was going towards the house of accused Javed who is present before the Court. Hasan told me that he saw that my daughter was going towards the house of accused. Hasan also told me that the accused told my daughter that he will teach her in his house and took her in his house. I narrated this fact to the police. Later on the accused was arrested by the police."

15. It is clear from the evidence of PW-1 that PW-5 Shaikh Hasan told him that he saw his daughter Reshma while going from the alleged Galli at about 6.00 p.m. towards the house of accused Javed and further that the accused had told his daughter that he would teach her in his house and took her in his house. The above evidence fully contradicts the evidence of star witness PW-5. This witness does not say that PW-5 told him that he last saw her daughter at 4.00 p.m. but at 6.00 p.m. or that he saw her going with the accused.

What is stated is that he had seen her going towards house of the accused, where three persons were residing.

16. The conduct of PW-5 Shaikh Hasan in not disclosing about he having seen the girl with the Appellant, till 11.00 p.m. on the same night and thereafter on the next day in the Ghati Hospital when he was moving with all the witnesses and the complainant throughout, is most unnatural. PW-5 is close relative and in fact when the parents of girl were searching the girl up to 11.00 p.m. in the night along with PW-5, he would have definitely disclosed about his 'last seen' theory till 11.00 p.m. and even on next day when he was in the hospital with the complainant and other relatives.

17. Thus taking stock of the entire evidence as above, we find that the sole testimony of PW-5 about last seen, in our opinion, would be too

risky to be accepted.

18. In this connection, we quote the settled legal position propounded by the Apex Court. We quote Para Nos. 31, 32, 33, 34 from the Judgment of the Apex Court in the case of **Sahadevan and another vs. State of T.N., A.I.R. 2012 S.C. 2435**, cited supra, as under:-

"31. With the development of law, the theory of last seen has become a definite tool in the hands of the prosecution to establish the guilt of the accused. This concept is also accepted in various judgments of this Court. The Court has taken the consistent view that where the only circumstantial evidence taken resort to by the prosecution is that the accused and deceased were last seen together, it may raise suspicion but it is not independently sufficient to lead to a finding of guilt. In *Arjum Marik v. State of Bihar* [1994 Supp.(2) SCC 372] this Court took the view that where the appellant was alleged to have gone to the house of one Sitaram in the evening of 19th July, 1985 and had stayed in the night at the house of deceased Sitaram,

the evidence was very shaky and inconclusive. Even if it was accepted that they were there, it would, at best, amount to be the evidence of the appellants having been last seen together with the deceased. The Court further observed that it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record a finding that it is consistent only with the hypothesis of guilt of the accused and, therefore, no conviction, on that basis alone, can be founded.

32. Even in the case of State of Karnataka v. M.V. Mahesh (2003) 3 SCC 353], this Court held that merely being last seen together is not enough. What has to be established in a case of this nature is definite evidence to indicate that the deceased had been done to death of which the respondent is or must be aware as also proximate to the time of being last seen together. No such clinching evidence is put forth. It is no doubt true that even in the absence corpus delicti it is possible to establish in an appropriate case commission of murder on appropriate material being made available to the Court.

33. In the case of State of U.P. v. Satish [(2005) 3 SCC 114: (AIR 2005 SC 1000),

this Court had stated the principle of last seen comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible.

34. Undoubtedly, the last seen theory is an important event in the chain of circumstances that would completely establish and/or could point to the guilt of the accused with some certainty. But this theory should be applied while 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."

. We also quote the Para Nos.5, 6 and 7 from the Judgment in the case of **State of Uttar Pradesh vs. Ram Balak**, AIR 2008 S.C. 1128, cited supra, as under:-

"5. In Hanumant Govind Nargundkar and anr. v. State of Madhya Pradesh, (AIR 1952 SC 343), wherein it was observed thus:

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

6. A reference may be made to a later decision in *Sharad Birdhichand Sarda v. State of Maharashtra*, (AIR 1984 SC 1633). Therein, while dealing with circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are:

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

These aspects were highlighted in State of Rajasthan v. Rajaram [jt 2003(7) SC 399; 2003(8) SCC 180], State of Haryana v. Jagbir Singh and Anr. [jt 2003(Suppl. 2) SC 393; 2003 (11) SCC 261].

So far as the last seen aspect is concerned it is necessary to take note of two decisions of this Court. In State of U.P. v. Satish [jt

2005(2) SC 153; 2005(3) SCC 114] it was noted as follows:

"22. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses PWs. 3 and 5, in addition to the evidence of PW-2."

7. In Ramreddy Rajesh Khanna Reddy v. State of A.P. [jt 2006(4) SC 16; 2006 (10) SCC 172] it was noted as follows:

"27. The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were

last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case the courts should look for some corroboration."

(See also Bodhraj v. State of J and K. (2002 (8) SCC 45).)

A similar view was also taken in Jaswant Gir v. State of Punjab [2005 (12) SCC 438]. Factual position in the present case is almost similar, so far as time gap is concerned."

. We further quote the following from the decision in the case of **Hukam Singh vs. State of Rajasthan, 2011 ALL S.C.R. (O.C.C.) 44**, cited supra:-

"7. It is now settled law that in case of circumstantial evidence, all the incriminating facts and circumstances should be fully established by cogent and reliable evidence and the facts so established must be consistent with the guilt of the accused and should not be capable of being explained away on any other reasonable hypothesis than that

of his guilt. In short, the circumstantial evidence should unmistakably point to one and one conclusion only that the accused person and none other perpetrated the alleged crime. If the circumstances proved in a particular case are not inconsistent with the innocence of the accused and if they are susceptible of any rational explanation, no conviction can lie. Judged from this standpoint, it is not possible to affirm the conviction of the appellant for the offence of murder of any one or more of Bhanwar Singh, Roop Singh, Lad Kanwar and Inder Kanwar. The three circumstances relied upon by the prosecution are not incompatible with the innocence of the appellant in so far as the murders of these four persons are concerned. They are capable of being explained away on a hypothesis other than that of guilt of the appellant. We may point out that in any event the view taken by the Sessions Court that the circumstances were not sufficient to found the conviction of the appellant was a reasonable view and the High Court was not justified in reversing it."

19. Keeping in mind the above legal principles and the time gap and the infirmities kept by the prosecution in the evidence discussed

by us above, we have a serious doubt about the complicity of the Appellant being caught by the police as the offender after the ghastly crime was committed. The prosecution failed to explain 13 contused wound on the Appellant and in that context drawing some inference for contusions on the knee is absurd.

20. The trial Judge placed reliance on the other evidence, namely semen stains on the quilt found in the house of the Appellant, but no blood stains anywhere found in the house or quilt or clothes. The trial Judge then found that no semen stains were found on the person of clothes of the accused and the victim. The trial Judge then relied upon the alleged discovery of the clothes of victim in the form of ash. We are unable to understand as to how the ash could be the incriminating evidence against the Appellant. The trial Judge then relied upon the clothes of the accused discovered from the earth. Admittedly,

clothes discovered had no any blood stains, semens stains. Therefore, seizure of clothes makes no sense as the C.A. Reports are otherwise.

21. The up-shot of the above discussion is that the circumstances have not been proved by the prosecution beyond reasonable doubt that the Appellant should be held guilty of the above serious offences. In the result we make the following order:-

O R D E R

(I) Criminal Appeal No.398 of 2012 is allowed.

(II) The impugned Judgment and Order dated 8th July 2011 passed by the Sessions Judge-7, Aurangabad in Sessions Case No.161 of 2010, convicting the Appellant - Mohammad Javed s/o Mohammad Quddus, for the offence punishable under Section 302 of the

Indian Penal Code and sentencing him to suffer Rigorous Imprisonment for life and to pay fine of Rs.1000/- and in default to suffer further Rigorous Imprisonment for six months, and for offence punishable under Section 376 of Indian Penal Code and sentencing him to suffer Rigorous Imprisonment for life and to pay fine of Rs.1000/- and in default to suffer further Rigorous Imprisonment for six months, and for offence punishable under Section 377 of the Indian Penal Code and sentencing him to suffer Rigorous Imprisonment for 10 years and to pay fine of Rs.1000/- and in default to suffer further Rigorous Imprisonment for six months, and for offence punishable under Section 366-A & 363 of the Indian Penal Code and sentencing him to suffer Rigorous Imprisonment for 5 years and to pay fine of Rs.500/- and in default to suffer further Rigorous Imprisonment for

three months, and for offence punishable under Section 201 of the Indian Penal Code and sentencing him to suffer Rigorous Imprisonment for 3 years and to pay fine of Rs.500/- and in default to suffer further Rigorous Imprisonment for three months, is set aside.

(III) The Appellant - Mohammad Javed s/o Mohammad Quddus is held not guilty of the offences punishable under Sections 302, 376, 377, 366-A & 363, 201 of the Indian Penal Code, for which he was charged and he is acquitted of all the said charges.

(IV) The Appellant - Mohammad Javed s/o Mohammad Quddus be released forthwith, if not required in any other crime.

[INDIRA K. JAIN, J.]

asb/OCT15

[A.B. CHAUDHARI, J.]