

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CRL.A. 524/2014

Judgment reserved on 18.03.2015
Judgment delivered on 13.04.2015

SALIM HUSSAIN

...Appellant

Through: Mr. K. Singhal and Mr. Anupam
Singh Yadav, Advocates.

Versus

STATE

...Respondent

Through: Mr. Feroz Khan Ghazi, APP for
State

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI
HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J.

1. Present appeal filed by the appellant under Section 374 (2) of the Code of Criminal Procedure, is directed against the impugned judgment dated 30.10.2013 and order of sentence dated 12.12.2013 passed by the Learned Additional Sessions Judge in Sessions Case No. 61/2012 imposing sentence of imprisonment for life and a fine of Rs. 5,00,000/- for the offence punishable under Section 302 read with Section 120-B of Indian Penal Code and in default of payment of fine, to further undergo simple imprisonment for three years. The appellant was also sentenced to undergo rigorous imprisonment for two years for the offence punishable under Section 203 of Indian Penal Code.

2. Brief facts of the case, as noticed by the learned Trial Court, are as under:

- “(i) *Accused in this case has been tried for commission of murder of his accountant Kailash Chand Sethi. Case of the prosecution, as set out in the chargesheet is that, on 06.10.2007 on receipt of DD no. 25-A, at 08:30pm, police officials namely, Inspector Ganga Singh along with SI R. D Pandey, ASI Ikramuddin, HC Devender, Constable Satpal, Constable Ram Gopal and Constable Brij Lal of Police Station Greater Kailash, New Delhi reached at the house of accused situated at N-115, IInd floor, GK-I, New Delhi. Police found place of occurrence i.e. house no. N-115, IInd floor, GK-I, locked from inside. Police broke open the door and found accused Salim Hussain in an injured condition and there seemed a gunshot wound on the right side of his chest. Another person namely, Kailash Chand Sethi was lying dead and his throat had a deep injury. Chance prints and other exhibits were lifted and photographs of the spot were taken. Videography was conducted and accused Salim Hussain, the injured was shifted to AIIMS hospital.*
- (ii) *On 09.10.2007, injured Salim Hussain (accused herein) was declared fit for statement by the doctor but he chose not to make any statement to the police. He gave his statement after consultation with his counsel and in his presence only on 11.10.2007. Salim Hussain in his statement, stated, that on 06.10.2007 at about 06:45 pm, Ms. Nagma and some other persons namely, Liyakat Ali, Irshad Ahmed, Sadiq, Matloob Ahmed and Firasat came to his house. He had a dispute with Irshad and thereafter, he was hit by Irshad and then, started discussing business matter. When they were discussing the business transaction, his accountant-Kailash Chand Sethi was making call to his mobile from*

his mobile but he did not pick up his call as Kailash Chand Sethi was called in the morning and wanted to come to collect tax money but Sadiq saw at the screen of the phone that Kailash Chand Sethi was calling. Sadiq and other persons insisted to call Kailash Chand Sethi and one of three unknown persons took out gun and put it on his neck. On this threatening, he called his accountant Kailash Chand Sethi to come to his house. Thereafter, according to accused (who lodged the complaint) those persons ransacked his house. In the meantime, the doorbell rang. When he got up to open the door thinking that Kailash Chand Sethi would have reached, those persons allegedly put him under threat of gun and came with him to the door. Accused Salim Hussain further stated that Kailash Chand Sethi was drunk. He went to the balcony of his flat overlooking the main street and called his wife Parul, who told him that she was near the flat. Accused asked her not to come as 8-9 persons had come to his house. He threw the keys after tying them in a handkerchief, which were picked up by his wife-Parul and she left. Salim Hussain further stated that when he was making call from balcony, he saw Matloob Ahmed, Aizaj Ahmed-his son in a black colour Quails. There was another Santro car behind Quails car and Usman came out of this car and walked to the stairs to his flat where Babboo was already standing. On seeing these persons, he immediately went inside and saw that Nagma was talking to Abbas Bhai. Thereafter, Nagma and her father left from his flat. According to the accused, on gun point, he was asked by Irshad to sign 15 cheques, which he signed. One of the three persons asked him to switch on the TV and then asked to increase it to full volume which he did. Then, third person brought a mutton chopper from kitchen and put it on Sethi's neck. Salim Hussain stated that he tried to hold the

hand of third person, who tried to stab him in the stomach but as he tried to save himself, the knife was stabbed in his thigh. In the scuffle, knife dropped from the hand of third person, which was picked up by him. He tried to hit back the third person. On which, he fell down and became unconscious. He came to senses on hearing ring of his mobile phone and noticed that his accountant-Kailash Chand Sethi was lying over him and an almirah was lying over both of them. He called police at 100 number from his phone.

- (iii) Accused Salim Hussain further stated that during incident, door bell was pressed by his aunty and when he opened the door a little, at that time, one person had placed knife on his back. Aunty asked him to slow down the volume. Case of the prosecution is that initially, police believed the story of Salim Hussain. During investigation, suspects named by accused were thoroughly questioned and their minute to minute movement was verified w.e.f 06.10.2007. Mobile call details and locations of mobile phone of Liyakat and Firasat were collected and it was established that all suspects named by accused were present at their native places i.e. out of Delhi in Bareilly at UP at the time of incident except suspect Irshad Ahmed.*
- (iv) During investigation, it was found that accused Salim Hussain named aforesaid persons falsely as he had to make payment of Rs. 60-70lacs to those persons and in order to avoid the said payment, he intentionally falsely named those persons in his statement to implicate them in the false case. During investigation, it was revealed that accused Salim Hussain had a business dealings with the persons against whom, he made allegations in his statement and accused Salim Hussain owed a substantial amount of money towards all these persons and also owed Rs. 70,000/- to Kailash Chand Sethi.*

- (v) *A medical board was constituted to opine about the nature of injuries sustained by accused Salim Hussain. Medical Board opined that injuries found on the body of accused Salim Hussain could be self-inflicted. Apart from this, FSL report confirmed that blood found on the clothes of Kailash Chand Sethi (deceased) also matched with blood found on the clothes of accused Salim Hussain. As per FSL report, injuries on the body of Kailash Chand Sethi (deceased) could be produced by the recovered knife.*
- (vi) *It is alleged that initially, accused Salim Hussain tried to mislead the investigation and made efforts to falsely implicate some persons. It was revealed that at about 09:30 am on 06.10.2007, accused Salim Hussain called Kailash Chand Sethi (deceased) and asked him to come to his flat in the evening. This fact is corroborated by the statement of Smt. Kiran Sethi, wife of Kailash Chand Sethi. It is further the case of prosecution that the analysis of call details of accused Salim Hussain showed that he was using his mobile phone to make and receive calls, whereas, as per his version of incident, he was under threat of gun and many persons were present, some were waiting downstairs and at the same time, he was being allowed to use his mobile phone from his balcony. Version of Salim Hussain that Nagma was calling him on his mobile was not established. The version of accused Salim Hussain that he threw the key bunch to Parul Singh-his wife from the balcony was found not true. Cell ID chart showed that Parul Singh did not come to Greater Kailash.*
- (vii) *Case of prosecution is that accused Salim Hussain along with one Rashid planned and conspired to kill Kailash Chand Sethi. They cut the throat of Kailash Chand Sethi and then accused Salim Hussain managed the knife and gunshot injuries on his body. He implicated Nagma and other persons with whom he had*

enmity and owed them money. The fact that he planned to kill Kailash Chand Sethi is proved by his conduct on 06.10.2007 as he called SI Santosh Kumar, Investigation officer of Police Station Anand Parbat during the day and tried to create evidence in his favour by telling him that Nagma was calling him and wanted to come to his house to settle the case. Accused Salim Hussain called his lawyer, so that he could also become a witness that Nagma was planning to come to his client's house. It is the case of prosecution that all the persons against whom accused Salim Hussain made allegations in his statement, had no opportunity to be present at the scene of crime at the time of commission of murder of Kailash Chand Sethi and it was he, who committed murder of Kailash Chand Sethi. Presence of Salim Hussain at House no. N-115, IInd Floor, Greater Kailash-I on 06.10.2007 along with his accomplice Rashid was proved. It is stated that accused Salim Hussain along with his accomplices Rashid and Irshad Ahmed conspired to kill Kailash Chand Sethi (deceased).

(viii) On conclusion of investigation, charge sheet was filed in the Court of Metropolitan Magistrate on 07.06.2008. Case was committed to the Court of sessions by Learned Metropolitan Magistrate on 25.07.2008. On 08.10.2009, charges u/s 120- B IPC, 302 r/w 120-B IPC and 301/203 IPC were framed against accused to which he pleaded not guilty and claimed trial."

3. While arguing the appeal, Mr. K. Singhal learned counsel for the appellant contended that the impugned judgment passed by the learned trial court is bad in law as it is based on conjectures and surmises and not on cogent, clear, credible or unimpeachable evidence; that the learned counsel for the appellant further

contended that the Learned Trial Court has overlooked the material evidence available on record; that the learned trial court has passed the judgment and order of sentence without properly appreciating the facts of the case; that the appellant who is the complainant in the instant case has been falsely implicated by the police due to faulty investigation; that the case of the prosecution is solely based on the statement of the appellant recorded under Section 313 of the Code of Criminal Procedure; that the learned counsel for the appellant has relied upon the case of ***State of Maharashtra vs. Sukhdev Singh AIR 1992 SC 2100***, wherein it has been held that :

“49.XXX....“if there is no evidence or circumstance appearing in the prosecution evidence implicating the accused with the commission of the crime with which he is charged, there is nothing for the accused to explain and hence his examination under Section 313 of the Code would be wholly unnecessary and improper. In such a situation the accused cannot be questioned and his answers cannot be used to supply the gaps left by witnesses in their evidence. In such a situation counsel for accused No. 5 Jinda strongly submitted that his examination under Section 313 should be totally discarded and his admissions, if any, wholly ignored for otherwise it may appear as if he was trapped by the court. According to him the rules of fairness demand that such examination should be left out of consideration and the admissions made in the course of such examination cannot form the basis of conviction”.

4. Learned counsel for the appellant further submitted that the Learned Trial Court has failed to appreciate that there is no evidence on record to prove the alleged conspiracy between the appellant and one Rashid (who is absconding) to commit the

offence, thus the conviction of single accused under Section 120-B of Indian Penal Code is wholly invalid and erroneous. To support his contention, the learned counsel for the appellant relied upon the case of ***M.G. Aggarwal vs. State of Maharashtra AIR 1963 SC 200***, wherein it was held that:

“18. There is another point of law which must be considered before dealing with the evidence in this case. The prosecution case against accused No. 1 rests on circumstantial evidence. The main charge of conspiracy under section 120-B is sought to be established by the alleged conduct of the conspirators and so far as accused No. 1 is concerned, that rests on circumstantial evidence alone. It is a well established rule in criminal jurisprudence that circumstantial evidence can be reasonably made the basis of an accused person's conviction if it is of such a character that it is wholly inconsistent with the innocence of the accused and is consistent only with his guilt. If the circumstances proved in the case are consistent either with the innocence of the accused or with his guilt, then the accused is entitled to the benefit of doubt. There is no doubt or dispute about this position. But in applying this principle, it is necessary to distinguish between facts which may be called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts the Court has to judge the evidence in the ordinary way, and in the appreciation of evidence in respect of the proof of these basic or primary facts there is no scope for the application of the doctrine of benefit of doubt. The Court considers the evidence and decides whether that evidences proves a particular fact or not. When it is held that a certain fact is proved, the question arises whether that fact leads to the inference of guilt of the accused person or not, and in dealing with this aspect of the problem, the doctrine of

benefit of doubt would apply and an inference of guilt can be drawn only if the proved fact is wholly inconsistent with the innocence of the accused and is consistent only with his guilt. It is in the light of this legal position that the evidence in the present case has to be appreciated.”

5. Learned counsel for the appellant submitted that the prosecution has failed to link the appellant with the weapon of offence and also failed to prove that the said weapon was used to cause injuries on the body of deceased; that the prosecution has also failed to prove the injuries on the body of appellant; that the Learned Trial Court relied upon the second version of the case, wherein the Plea of Alibi was taken by the persons named by the appellant but no evidence was adduced by the defence to prove the alibi; that the Learned Trial Court erred in assuming that the appellant failed to join the investigation intentionally by extending his stay in AIIMS; that the appellant remained admitted in AIIMS as he had received injuries during the scuffle; that the prosecution failed to prove the gun shot on the chest of the appellant and the gun shot resulted into Pneumothorax, a condition also known as collapsed lung and that the injuries were self inflicted by the appellant.
6. Per contra, Mr. Feroz Khan Ghazi, APP for State argued that it has been established that Nagma (PW-22), Liyakat Ali (PW-4), Irshad Ali (PW-7), Sadiq (PW-5), Firasat (PW-25), Matloob Ali, Ijaz Ali and three other unknown persons, named by appellant in his statement as accused were in Bareilly on the day of incident i.e. 06.10.2007; that PW Nagma, resident of Delhi was not present at the spot on the day and time of incident; that the appellant intentionally refused to make his statement to the Investigating

Officer (PW-63) on 09.10.2007 despite being fit and stated that he would give his statement only after consultation with his counsel; that the appellant had minor injuries but stayed in AIIMS for 29 days to delay the investigation; that the appellant concocted an unconvincing story; that according to the appellant he was shot at in his house but no neighbour or public witness was examined to corroborate it; that the appellant also failed to lead any defence evidence to prove that there was a gunshot in the house; that the conduct of the appellant was unnatural as he called his wife despite the threat extended by Nagma (PW-22), Liyakat Ali (PW-4), Irshad Ali (PW-7), Sadiq (PW-5), Firasat (PW-25), Matloob Ali, Ijaz Ali and three other unknown persons but failed to inform the police; that in furtherance of his concocted story he scattered papers in an unusual manner in the room in which the crime took place with a design to save himself.

7. We have heard learned counsel for both the parties and considered their rival submissions.
8. The case presented by the prosecution is that the appellant and one Rashid (absconding) conspired to kill the deceased Kailash Chand Sethi with the motive to falsely implicate Nagma (PW-22), Liyakat Ali (PW-4), Irshad Ali (PW-7), Sadiq (PW-5), Firasat (PW-25), Matloob Ali, Ijaz Ali and three other unknown persons.. In pursuance of the same, the appellant invited the deceased to his house, got him drunk and cut his throat with a knife after which the appellant managed to self inflict the gun shot and knife injuries. The prosecution puts forth that in order to cultivate the evidence in his favour, the appellant called SI Santosh Kumar and his lawyer

on 06.10.2007 and informed them that Nagma wanted to come to his house to settle the accounts. An extract from the testimony of SI Santosh (PW-37) is given as under :

“In the month of October, 2007 I was posted as SI at P. S. Anand Parvat. During those days I was investigating the case, FIR No. 141/07, under Section 307, P. S. Anand Parvat in which accused Salim, present in court and his brother whose names I do not remember were accused. One Naseem was injured in this case.

On 06/10/2007 at noon time accused Salim Hussain had called me on my mobile phone having no. 9868554889 from his mobile phone and told me that Nagma, wife of injured Naseem was making call to him frequently to comprise the matter and demanding money on that account. Accused Salim further told me that the said Nagma would be coming to him in the evening of same day. I told accused Salim that it was his personal matter and I have nothing to do with the same. I was interrogated by the IO of this case in respect of the said facts. My statement was recorded by the IO of this case on 10.05.2008”.

9. In order to bring home the guilt of appellant it would be appropriate to examine the evidence of some of the prosecution witnesses and the documents placed on record.

Smt. Madhushree Sen Gupta (PW-27) and Ranjan Das (PW-28) did not see anybody coming or going into the house and unnatural conduct of the appellant who did not inform police or raised any alarm despite having an opportunity to do so.

10. Smt. Madhushree Sen Gupta (PW-27) did not see any outsider coming or going to the flat of the appellant or passing through the staircase and the appellant did not seek her help or came out or raised noise or alarm, when he opened the gate at the time when

she had come and requested him to reduce the volume of the T.V.
PW-27 deposed that :

“I am resident in aforesaid premises since 1983. On 6.10.07, at about 7.45 p.m., my husband Sh. Amitabh Sen Gupta was going out for evening walk. Lot of noise was coming from the opposite flat i.e. N-115, IInd Floor, right side, Greater Kailash, Part-I. My husband asked me to tell the occupants of the opposite flat to stop the noise. I rang the door bell of the opposite flat and Mr. Saleem whom I knew as Mr. Hussain as then I was not knowing his first name, to stop the noise of music. Mr. Saleem had opened the door and agreed to stop the music and he closed the door of the opposite flat immediately. The music was not stopped. After 10/15 minutes, the police came knocking at my door and said, “idhar khoon hua hai”. I was taken aback and I opened the door of my flat for them to see. Then they said, “Saleem Saleem”. I told them I do not know Saleem but I know someone by name of Hussain who stays opposite my flat. The police asked me to close the door. They were three police persons. I closed my door. I could hear them bang open the door of the opposite flat. Nothing more I know. The accused present in JC is that person whom I know as Mr. Hussain and later on I came to know that he is Saleem Hussain.

During the time, I had knocked at the door of the opposite flat, I had not seen any outside coming or going to the opposite flat or passing through the staircase. On 08.10.07, police inquired and recorded my statement”.

11. Ranjan Das (PW-28), a servant working in the Ground Floor of the said building, deposed that the wife of the appellant had called him twice and requested him to check whether anybody is beating her husband and further deposed that he did not see anybody coming

or going to the second floor of the said building. An extract of his deposition is produced below :

“On 06.10.07, I was working as a servant at the guest house being run by Sh. Virender Chopra at premises no. N-115, Ground Floor, GK-I, New Delhi. On that day, a party was going on. It was started at about 6-6.30 pm. At about 7.30 – 8.00 pm, I received a call from the wife of the accused, present in the court that somebody was beating her husband/accused at IInd Floor whereon she alongwith her husband was residing. I was further asked to go to IInd Floor and see what was happening. When I reached Ist floor, I heard loud sound of TV which was coming from IInd floor. I did not go to IInd floor and came back to ground floor. Again I received call of the wife of accused on my mobile phone. I told the aforesaid facts to her. I had not seen any person going or coming back from IInd floor of the building no. N-115, GK-I. I had not heard or seen any quarrel taking place that evening. The wife of accused was having number of my mobile phone as she used to call me to inquire about maid Munni who used to work in our guest house as well as in the house of the accused”.

12. Testimony of both these witnesses proves that Nagma (PW-22), Liyakat Ali (PW-4), Irshad Ali (PW-7), Sadiq (PW-5), Firasat (PW-25), Matloob Ali, Ijaz Ali and three other unknown persons were not present at the place of occurrence and despite having ample opportunity to raise alarm or call the police, the appellant did not do so which shows the unnatural conduct of the appellant.

Last Seen

13. Regarding last seen evidence it would be useful to peruse the depositions of Smt. Kiran Sethi (PW-2), the wife of the deceased Smt. Kiran Sethi (PW-2) and the Investigating Officer (PW-63).

Smt. Kiran Sethi (PW-2) in her testimony deposed that the deceased received a call on his mobile from the appellant asking to meet him up at 7 pm. The appellant admitted in his statement that the deceased came to his residence at around 7:30 pm.

14. The Investigating Officer (PW-63) deposed that on 06.10.2007, pursuant to registration of DD no. 25-A and DD no. 24-A (Ex.PW-63/A) he reached the place of incident i.e. N-115, Second Floor, G.K.-I, New Delhi and found the gate of the floor closed and it appeared that the door was locked from inside and TV was on high volume or somewhat similar object was being heard from inside and that the door of the second floor was broke opened and two persons were lying in an injured condition on the floor in front of the sofa. He further deposed that he picked up the person who was lying over the other one whose name was revealed as Salim and he turned the second person who was lying with his face downwards. Neck of that person was cut and a blood stained knife was also found lying on the floor under the body of that person. Some documents were also found scattered over the sofa set. PW-63 also deposed that he found one bullet lying on the floor, which had hit the wall before falling on the floor.
15. Evidence on record shows that the Investigating Officer (PW-63) along with other police officials on reaching the place of incident found the appellant in an injured condition and Kailash Chand Sethi was found dead at the place of incident hence establishing a fact beyond reasonable doubt that the deceased and appellant were together alive at the time of alleged incident and that the deceased was found dead in the house of the appellant. It has been held by

the Hon'ble Supreme Court in the case of ***Bodhraj v. State of Jammu & Kashmir, (2002) 8 SCC 45***, that:

31. The last-seen theory 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. 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, A-1 and A-2 were seen together by witnesses i.e. PWs 14, 15 and 18; in addition to the evidence of PWs 1 and 2.

Similarly in the case of ***State of U.P. v. Satish, (2005) 3 SCC 114***, the Apex Court observed that:

“22. The last-seen theory 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. 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.”

The above stated view has been further corroborated in the case of ***Ramreddy Rajesh Khanna Reddy v. State of A.P., (2006) 10 SCC 172***, wherein it has been held by the Hon'ble Supreme Court that:

“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.”

Plea of Alibi

16. As per the version of the appellant, 8-9 persons namely, Nagma (PW-22), Liyakat Ali (PW-4), Irshad Ali (PW-7), Sadiq (PW-5), Firasat (PW-25), Matloob Ali, Ijaz Ali and three other unknown persons came to his house and on being threatened by Sadiq (PW-5) and other persons by putting gun on his neck, the appellant called up his accountant i.e. deceased Kailash Chand Sethi to come to his house. Appellant further stated that Nagma (PW-22) and her father came to his house and on gunpoint forced him to sign 15 cheques, which he signed at the instance of Irshad Ali (PW-7) and appellant also stated that one of three other unknown persons placed chopper on the neck of the deceased and when the deceased tried to get hold of hand of that person, the person tried to stab him in his stomach. Further the appellant stated that a scuffle took place and a knife was pushed in his right thigh and then got dropped from the hand of that unknown person who inflicted the knife blow and when the appellant picked up the knife to save himself and

tried to hit the said person, the appellant fell down and became unconscious. The appellant further stated that he came to senses on the vibration of his phone and found Kailash Chand Sethi lying dead over him.

17. To establish the guilt on the part of persons implicated by the appellant in his statement, brief outline of testimonies of Prosecution Witnesses are as under:-

First of all, Nagma (PW-22) in her testimony deposed that on 06.10.2007 she was present at her house for the whole day. On that day the appellant had not made any call to her. Munna (her nephew) along with his friend had come to her house at about 5 pm. They prayed 'Namaz' and left at about 9 p.m. after 'Roza Iftar'. PW-22 further deposed that she had not gone to the house of appellant on 06.10.2007 and also deposed that she had not called the appellant for 20-25 days before the date of incident which was proved by the call detail records of her phone number.

As per Liyakat (PW-4) on 06.10.2007 he was present in Bareilly and on that day Bareilly police had called him to the police station in connection with a cheating case and he went to the police station at about 5 p.m. where SI obtained his signatures on some documents and thereafter he came back to his house for Roza Iftar at about 6 p.m. He further deposed that thereafter he performed prayer in Masjid with his brother and relatives and performed Tarabi in the Masjid upto 9:30 p.m. and smentioned that he also met Badrul Islam Imam, Saddik Beg and Yamin Beg at Masjid.

As per Firasat (PW-25) on 06.10.2007, he was present at his house since morning to evening and was doing job of alteration of sarees and after completion of alteration job he had taken the sarees to the shop of one Panditji in Bada Bazar, Bareilly for delivery at around 6:00 p.m. or 6:15 p.m. He further stated that he was present at the shop of the said Panditji and had opened his fast at the shop of Panditji by eating Samosa and drinking tea and returned home at around 8:00 p.m. or 8:30 p.m.

Irshad Ali (PW-7) deposed that on 06.10.2007, Babbu, Usman, Nawab Ali and Shamshad were with him. It was the month of Ramzan and he prayed Namaz at 4:00 p.m., 4:30 p.m. and 8:30 p.m. and they had not left Bareilly. Further Shamshad (PW-8), Babbu (PW-10) and Usman (PW-9) also deposed on the same lines of Irshad Ali (PW-7).

Badrul Islam (PW-31) deposed that on 06.10.2007, Liyakat (PW-4) invited all the namazees for biryani after Maghrib Namaz as it was the first death anniversary of his grandfather and he also made an arrangement for Iftar on that day as it was the month of ramzan. He further deposed that about 100 people including Liyakat (PW-4) broke their fast together at Masjid and thereafter, they all had dinner after Maghrib Namaz and also deposed that Liyakat (PW-4) remained with him in the Masjid from 5:00 p.m. to 9:00 p.m.

18. The prosecution witnesses namely, Naeem (PW-6), Irshad Ali (PW-7), Shamshad (PW-8), Usman (PW-9), Babbu (PW-10), Nawab Ali (PW-11), Mohd. Nafees (PW-12), Parvez Khan (PW-14) and Kumar (PW-15) have deposed that the persons named by

the appellant i.e. Nagma (PW-22), Liyakat Ali (PW-4), Irshad Ali (PW-7), Sadiq (PW-5), Firasat (PW-25), Matloob Ali, Ijaz Ali and three other unknown persons were present in Bareilly on the day of incident i.e. 06.10.2007.

19. Hence, on scrutiny of evidence, it stands established that Liyakat Ali (PW-4), Irshad Ali (PW-7), Sadiq (PW-5), Firasat (PW-25), Matloob Ali, Ijaz Ali and three other unknown persons were not present in Delhi on the date of incident and had not visited the residence of the appellant on the said day in the evening hours and further it cannot be said that Nagma (PW-22) could be the perpetrator of the crime even though she was present in Delhi on the day of the incident but her CDR shows that she was located far from the scene of the crime on that day. In ***Dudh Nath Pandey vs State of UP 1981 AIR SC 911***, it has been held that :

“The plea of alibi postulates the physical impossibility of presence of accused at the scene of offence by reason of his presence at another place. The plea can therefore succeed only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed”.

20. Therefore applying the principle laid down in the above case, we are of the view that the above named persons could not have been present at the scene of the crime, as they were present elsewhere.

Medical Evidence

21. HC Sita Ram (PW-51) Incharge of PCR Van Eagle-41 along with Ct. Satbir and driver Surender reached the spot around 8:26 p.m. on receipt of a call at 08:23 p.m. from PCR to the effect that “8/9 ladke mujhe goli mar ke bhaag gaye”. Door of the flat was found

locked and the SHO got it forcibly opened with the help of staff wherein two injured persons were found. He took injured Salim Hussain to the AIIMS hospital.

22. Dr. Raghvendra Kumar (PW-29) conducted the post-mortem of the deceased and noted the following injuries in the postmortem report (Ex.PW-29/A) :-

Injury No.1 - Cut throat wound present over the neck in front measuring 13 cm in length, 2 cm in breadth, organ deep, 10 cm below chin and 4 cm above the sternal angle, clotted blood present around the wound.

Injury No.2 - Incised wound measuring 2.5 cm X 0.4 cm X skin deep present over right side of neck, 1 c.m. above injury no. 1, PW-29 opined that the cause of death as *“shock as result of hemorrhage”* and opined that injury no.1 was sufficient to cause death in ordinary course of nature.

23. Dr. Imtiakum (PW-30), SR Surgery, AIIMS, New Delhi noted the following injuries on Salim Hussain as per MLC:-

Injury No. 1 - Tattooed dirty in injury 1cm X 1cm X 1 cm at the sixth inter costal space between mid clavicular line and anterior axillary line.

Injury No. 2 -Small injury 1cm X 1 cm X 1cm at the seventh inter costal space at anterior axillary line.

Injury No. 3 -Incised wound at inner right thigh, 2 cm X 2 cm X 2 cm. It was made clear from his statement that injuries no. 1 and 2 could be gunshot injuries while the

injury no. 3 could not be a gunshot injury and was likely to be caused by sharp edged weapon.

24. Dr. Sudhir Gupta (PW-58) opined vide his report Ex.PW58/C about the possible use of knife seized from the spot in causing the injuries to the deceased which resulted in death.
25. Medical Board was constituted to opine about the injuries sustained by the appellant. The report of the medical board has been proved as Ex.PW34/A.
26. Dr. N. K. Aggarwal (PW-34) stated that he headed the Medical Board as Chairman and the Members of the board given the following opinion :-

(i) The patient was admitted on 06.10.2007 and ICD (inter costal drainage tube) was inserted on the same day and ICD was removed on 11.10.2007 at 4:00 pm, X-Ray of chest done post ICD, removal was not showing Haemo - Pneumothorax. So the patient's stay in the hospital after X-Ray chest i.e. from 12.10.2007 to 30.10.2007 was not justified.

(ii) On admission ICD tube was inserted without any X-Ray chest done. IT was opined that the reason for putting an ICD tube without an X-ray chest and normal vital signs was not justified. Thus no definite opinion regarding nature of injuries no. 1 and 2 can be given. Injury no. 3 was simple in nature.

(iii) The injuries could be self-inflicted and there were only two superficial wounds over the right side of the chest.

The injuries found on the body of the appellant could be self-inflicted.

27. Dr. N. K. Aggarwal (PW-34), Member of Board deposed that injuries could be self inflicted and there were only two superficial wounds over the right side of the chest. Wound No. 1 was stated to be having tattooing but it was nowhere mentioned whether these wounds entered the chest cavity or not. Injury No. 3 was on the right side of the thigh. Dr. Gulshan Jeet Singh (PW-41) and Dr. Sone Lal (PW-53) other members of board corroborated the testimony of PW-34.
28. Medical evidence on record shows that the injuries on the person of the appellant were superficial in nature and could be self inflicted and his extended stay w.e.f. 12.10.2007 to 30.10.2007 was not justified.
29. In view of the above, we are of the opinion that the appellant was under influence of sedatives or pain killers and was not in a position to give statement, is not tenable. It needs to be noticed that the appellant despite being declared fit for statement refused to make his statement to the Investigating Officer (PW-63) on 09.10.2007 without consulting his legal counsel and also did not join the investigation.
30. As a matter of fact, the appellant knew that he was the culprit and wanted to give his statement after consulting a legal person in order to manipulate his statement and save himself.

Circumstantial Evidence

31. As per the statement of the appellant, the persons named by him visited his house on the day and time of incident. However there are no witnesses from the neighbourhood of the appellant who

have come forward to depose that the said persons visited the flat of the appellant. Smt. Madhushree Sen Gupta, neighbour of the appellant (PW-27) and Ranjan Das, servant at the ground floor (PW-28) clearly deposed in their testimony that they did not see any person / outsider coming or going to the flat of the appellant or passing through the staircase of the flat. Hence this proves that the statement made by the appellant is false and cannot be relied upon.

32. The other plea of the appellant that he was under the threat of gun has no force as it has emerged on record that during the said period, he was receiving and making calls from his mobile. The other plea of the appellant is that his wife had come to take the keys of the house and he threw the bunch of keys to his wife from the IIInd Floor of the house which is lie as the Cell ID Chart of his wife's mobile suggests her location outside Greater Kailash at the relevant time.
33. Law with regard to the conviction on the basis of circumstantial evidence has been discussed in detail by the Supreme Court in the case of ***Harishchandra Ladaku Thange Vs. State of Maharashtra, reported at AIR 2007 Supreme Court 2957***. It would be useful to reproduce the relevant paras:-

*“8. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See **Hukam Singh V. State of Rajasthan** (AIR 1977 SC 1063), **Eradu V. State of Hyderabad** (AIR 1956 SC 31), **Earaohadrappa V. State of Karnataka** (AIR 1983 SC 446), **State of U.P. V. Sukhbasi & Ors.** (AIR 1985 SC 1224), **Balwinder Singh alias Dalbir***

Singh V. State of Punjab (AIR 1987 SC 350) and *Ashok Kumar Chatterjee V. State of M.P.* (AIR 1989 SC 1890)). The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In *Bhagat Ram V. State of Punjab* (AIR 1954 SC 621) it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt.

9. We may also make a reference to a decision of this Court in *C. Chenga Reddy & Ors. V. State of A.P.* (1996 (10) SCC 193), wherein it has been observed thus:-

“21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.”

10. In *Padala Veera Reddy V. State of A.P.* (AIR 1990 SC 79) it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3)the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4)the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.”

11. In State of U.P. v. Ashok Kumar Srivastava (1992 Crl. LJ 1104) it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

12. Sir Alfred Wills in his admirable book 'Wills' Circumstantial Evidence' (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence: (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum; (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability; (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt; and (5) if there be any

reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.

13. There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touchstone of law relating to circumstantial evidence laid down by this Court as far back as in 1952.

*14. In **Hanuman Govind Nargundkar and another V. State of M.P.**, (AIR 1952 SC 343) 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 fact 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.”

*15. A reference may be made to a later decision in **Sharad Birdhichand Sarda v. State of Maharashtra** (AIR 1984 SC 1622). Therein, while dealing with circumstantial evidence, it has been held that the onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in the prosecution cannot be cured by a 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.”

Burden of Proof

34. The prosecution witnesses i.e. Nagma (PW-22), Liyakat Ali (PW-4), Irshad Ali (PW-7) Sadiq (PW-5) and Firasat (PW-25) have proved that they were not in Delhi on the day of incident nor present at the spot of incident.
35. Regarding burden of proof it will be useful to peruse the testimony of Smt. Kiran Sethi, wife of the deceased (PW-2) who clearly deposed that on the day of incident, her husband i.e. the deceased had gone to meet the appellant after receiving his call. Smt. Kiran Sethi, wife of the deceased (PW-2) deposed that :

“On 06.10.2007, my husband had come home at about 2-3 pm. After taking meals he took rest for quite

sometime. Then between 5/6 pm he called Saleem bhai on his phone telling him that he is not coming to his office. Saleem told him that he had called him at 7 pm. My husband started getting ready to visit the office of Saleem Hussain. He left the home at about 5.30/6 pm. When I asked him why he is going at 6 pm when he had been called at 7 pm, he told that he would first go to Defence Colony, then a Paan shop, then board a bus and by the time he would reach Saleem's office it would be 7 pm. When he left home he told me that he would be back by 9 pm. My husband did not come home at 9 pm. I kept on waiting for him. Then I called him on his mobile phone. The phone was picked up by some police officer who told that my husband had a quarrel with someone and he has been injured on his head and he asked me to come".

36. Since it stands established that the deceased was last seen with the appellant in his house and which fact has not been disputed by the appellant himself, according to Section 106 of the Indian Evidence Act the onus of proving facts especially within the knowledge of someone who has it, is upon him.
37. The presumption under Section 106 of the Indian Evidence Act, is explained in *Hasmuddin vs State of Delhi (2008) ILR 2 Delhi 701*, wherein it has been held by the Delhi High Court that :

*"20. As per settled law it is not as if the conviction can only be based on the sole ground of last seen as last seen together may not by itself necessarily lead to the inference that it was the accused who committed the crime. We consider it necessary at this stage to refer to a decision of the Supreme Court of India reported in **State of Rajasthan v. Kashi Ram** AIR 2007 SC 145, where the law on this subject has been discussed*

in detail. Relevant portion of the same reads as under:

“18. Learned counsel for the State strenuously urged before us that the High Court committed an apparent error in ignoring the evidence on record which disclosed that the respondent was last seen with deceased Kalawati in his house on February 3, 1998 late in the afternoon. Thereafter, he was not seen by anyone and his house was found locked in the morning. The evidence of PW-5, mother of the deceased Kalawati, and her brother Manraj, PW-2, clearly prove the fact that the house was found locked on February 4, 1998. The evidence also establishes beyond doubt that the doors were removed and dead bodies of the deceased Kalawati and her daughters were found inside the house on February 6, 1998. In these circumstances, the disappearance of the respondent was rather suspicious because if at all only he could explain what happened thereafter. He, therefore, submitted that in the facts of the case, in the absence of any explanation offered by the respondent, an inference must be drawn against the respondent which itself is a serious incriminating circumstance against him. He has supported his argument relying upon several decisions of this Court.

19. Before advertng to the decisions relied upon by the counsel for the State, we may observe that whether an inference ought to be drawn under Section 106 IPC is a question which must be determined by reference to proved. It is ultimately a matter of appreciation of evidence and, therefore, each case must rest on its own facts.

*20. In **Joseph s/o Kooveli Poulo v. State of Kerala** (2000) 5 SCC 197; the facts were that the deceased was an employee of a school. The appellant representing himself to be the husband*

of one of the sisters of Gracy, the deceased, went to the St. Mary's convent where she was employed and on a false pretext that her mother was ill and had been admitted to a hospital took her away with the permission of the Sister in charge of the Convent, PW-5. The case of the prosecution was that later the appellant not only raped her and robbed her of her ornaments, but also laid her on the rail track to be run over by a passing train. It was also found as a fact that the deceased was last seen alive only in his company, and that on information furnished by the appellant in the course of investigation, the jewels of the deceased, which were sold to PW-11 by the appellant, were seized. There was clear evidence to prove that those jewels were worn by the deceased at the time when she left the Convent with the appellant. When question under Section 313Cr.P.C, the appellant did not even attempt to explain or clarify the incriminating circumstances inculcating and connecting him with the crime by his adamant attitude of total denial of everything. In the background of such facts, the Court held:

*Such incriminating links of facts could, if at all, have been only explained by the appellant, and by nobody else, they being personally and exclusively within his knowledge. Of late, courts have, from the falsity of the defence plea and false answers given to court, when questioned, found the missing links to be supplied by such answers for completing the chain of incriminating circumstances necessary to connect the person concerned with the crime committed (see **State of Maharashtra v. Suresh**, (2000) 1, SCC 471). That missing link to connect the accused-appellant, we find in this case provided by the blunt and outright denial of every one and all the incriminating circumstances pointed out which, in our view, with sufficient and reasonable certainty on the facts proved, connect the accused with the death and cause for the death of Gracy.*

21. In **Ram Gulam Chaudhary and Ors. v. State of Bihar**, (2001) 8 SCC 311; the facts proved at the trial were that the deceased boy was brutally assaulted by the appellants. When one of them declared that the boy was still alive and he should be killed, a chhura blow was inflicted on his chest. Thereafter, the appellants carried away the boy who was not seen alive thereafter. The appellants gave no explanation as to what they did after they took away the boy. The question arose whether in such facts Section 106 of the Evidence Act applied. This Court held: In the absence of an explanation, considering the fact that the appellants were suspecting the boy to have kidnapped and killed the child of the family of the appellants, it was for the appellants to have explained what they did with him after they took him away. When the abductors withheld that information from the court, there is every justification for drawing the inference that they had murdered the boy. Even though Section 106 of the Evidence Act may not be intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases like the present, where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding death. The appellants by virtue of their special knowledge must offer an explanation which might lead the Court to draw a different inference.

22. In **Sahadevan alias Sagadevan v. State**, represented by Inspector of Police, Chennai (2003) Vol. 1 SCC 534, the prosecution established the fact that the deceased was seen in the company of the appellants from the morning of March 5, 1985 till at least 5 p.m. on that day when he was brought to his house, and thereafter his dead body was found in the morning of March 6, 1985. In the background of such facts the Court observed:

Therefore, it has become obligatory on the appellants to satisfy the court as to how, where and in what manner Vadivelu parted company with them. This is on the principle that a person who is last found in the company of another, if later found missing, then the person with whom he was last found has to explain the circumstances in which they parted company. In the instant case the appellants have failed to discharge this onus. In their statement under Section 313 Cr.P.C. they have not taken any specific stand whatsoever.

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 categorical 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."

Hon'ble Supreme Court in another case of ***State of Rajasthan v. Thakur Singh, 2014 (8) SCALE 82*** has held that :

“22. The law, therefore, is quite well settled that the burden of proving the guilt of an accused is on the prosecution, but there may be certain facts pertaining to a crime that can be known only to the accused, or are virtually impossible for the prosecution to prove. These facts need to be explained by the accused and if he does not do so, then it is a strong circumstance pointing to his guilt based on those facts”.

38. The appellant did not give any plausible explanation to prove that he did not murder the deceased although he was present at the spot of the incident and the persons named by him who according to him visited his house are the persons who murdered the deceased. On the basis of medical evidence on record it stands proved that the injuries on the body of the appellant were self-inflicted so as to free himself from the doubt of murder of the deceased.

Motive

39. It is not necessary for the prosecution to prove the motive for the crime as held in case of ***State of U.P. v. Hari Prasad (1974) 3 SCC 673***, it has been observed that:

“This is not to say that even if the witnesses are truthful, the prosecution must fail for the reason that the motive of the crime is difficult to find. For the matter of fact, it is never incumbent on the prosecution to prove the motive for the crime. And often times, a motive is indicated to heighten the probability that the offence was committed by the person who was impelled by that motive. But, if the crime is alleged to have been committed for a particular motive, it is relevant to

inquire whether the pattern of the crime fits in with the alleged motive.”

40. In the present case, the prosecution examined Liyakat Ali (PW-4), Sadiq (PW-5), Irshad Ali (PW-7), Nagma (PW-22) and Firasat (PW-25) to prove that they had business dealings with the appellant and the appellant owed them money. The appellant in his statement admitted that he had an Export – Import Business in the name of M/s. J. Brothers Zari Exports, which was a proprietorship firm and the deceased was accountant of his firm. The above named witnesses examined by the prosecution have deposed that the appellant owed money to them and in order to get rid of the debts he planned to implicate them in a false case and named them for the murder of his own accountant whereas they were not even present at the place of occurrence.
41. Relying on the above, we find that the circumstances and pattern of the crime are congruent with the motive as alleged by the prosecution.

Conviction under Section 120-B of the Indian Penal Code

42. Learned counsel for the appellant argued that conviction of a single accused under Section 120-B is wholly invalid and erroneous and prosecution has failed to prove the conspiracy between appellant and Rashid (absconding).
43. In our view, to prove the conspiracy between the appellant the Rashid (absconding), it will be useful to peruse the testimony of Raj Kumar Bhatia (PW-3) who deposed that :

“I went upto his second floor. His servant Rashid had opened the door. We sat on the sofa. Rashid

brought the juice. I know Rashid as he used to come at Vinobha Puri to meet accused Saleem and I met him there”.

44. From the testimony of Raj Kumar (PW-3) it is clear that Rashid, servant of the appellant was present in his house at 05:00/06:00 pm on 06.10.2007. Raj Kumar (PW-3) categorically deposed that he knew Rashid servant of the appellant and it was he who had served juice to him and opened the door. It is therefore established that Rashid was also present around the time of incident in the house and the appellant failed to throw any light on the disappearance of Rashid. The investigating officer had deposed that when he broke open the door of the second floor he found the appellant lying over the deceased and one Almirah was also lying fallen on the appellant. Admittedly the gun with which the appellant was injured could also not be found/traced. The entire material on record shows that the appellant was not alone and the only inference which could be drawn from the circumstances is that he had taken the help of someone else. There is evidence to establish that Rashid was present at the spot of incident and the effect of all the circumstances is that it was he who helped the appellant in the commission of crime and took away the gun with which the injuries were inflicted by the appellant.

Defective Investigation

45. As far as the argument of the learned counsel for the appellant with regard to the failure on the part of the prosecution to link the appellant with the gun, it has come on record from the statement of the appellant that one person attacked him on his thigh with a chopper and the other person shot him by taking the gun from

Liyakat (PW-4) and he was hit on the chest on the right side. ASI Veer Sain (PW-21) also deposed in his statement that on 06.10.2007 when he reached the spot he found two persons lying there in injured condition and one of them was the appellant who was having a bullet like injury on his right side of the chest. Dr. Imtiakum (PW-30) who conducted the MLC corroborated the fact of gunshot on the appellant and opined that there were three injuries on his body and injury no. 1 & 2 were gunshot injuries. SI Mahesh Kumar (PW-17) prepared scaled site plan Ex.PW17/A and mentioned at point G&H Lead Mark on wall at height 0.70 and Lead of used bullet but no gun was recovered by the IO/Investigating Officer Ganga Singh (PW-63) nor any effort has been put in by the investigating agency to prove the fact that there was a gunshot on the date of the incident. In the case of **C. Muniappan v. State of T.N., (2010) 9 SCC 567**, wherein it has been held by the Hon'ble Supreme Court that:

“55. There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the IO and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as

to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation.

Similar view was taken by the Apex Court in the case of ***Sunil Kundu v. State of Jharkhand, (2013) 4 SCC 422: (2013) 2 SCC (Cri) 427: 2013 SCC On Line SC 316***, wherein it was held:

“29...It is true that acquitting the accused merely on the ground of lapses or irregularities in the investigation of a case would amount to putting premium on the depreciable conduct of an incompetent investigating agency at the cost of the victims which may lead to encouraging perpetrators of crimes. This Court has laid down that the lapses or irregularities in the investigation could be ignored subject to a rider. They can be ignored only if despite their existence, the evidence on record bears out the case of the prosecution and the evidence is of sterling quality. If the lapses or irregularities do not go to the root of the matter, if they do not dislodge the substratum of the prosecution case, they can be ignored....”

In another case of ***Hema v. State, (2013) 10 SCC 192***, it was observed by the Apex Court that:

“18. It is clear that merely because of some defect in the investigation, lapse on the part of the investigating officer, it cannot be a ground for acquittal. Further, even if there had been negligence on the part of the investigating agency or omissions, etc. it is the obligation on the part of the court to scrutinise the prosecution evidence dehors such lapses to find out whether the said evidence is reliable or not and whether such lapses affect the object of finding out the truth.”

46. On the basis of the law discussed above, we are of the opinion that benefit cannot be given to the appellant for the lapse in investigation and despite the gun having not been recovered the prosecution was able to complete the chain of circumstances.
47. From the evidence adduced by the prosecution we are of the view that the appellant made a false complaint against Nagma (PW-22), Liyakt Ali (PW-4), Irshad Ali (PW-7), Sadiq (PW-5), Firasat (PW-25), Matloob Ali, Ijaz Ali and three other unknown persons and had concocted a story to falsely implicate all the above named persons to whom he owed payments for his business dealings. The prosecution was able to prove its case against the appellant as the above named persons took the *plea of alibi* which stands proved. Further from the testimony of Smt. Kiran Sethi, the wife of the deceased (PW-2), it stands proved that it was the appellant who had called the deceased to his house before his death and the deceased and appellant were present in the house of the appellant before the death of the deceased. The Appellant also failed to explain the circumstances in which the death of the deceased took place. The unnatural conduct of the appellant and the medical evidence on record show that there was every possibility that the injuries were self inflicted and all these circumstances prove the case of the prosecution. The plea taken by the learned counsel for the appellant that the examination of the appellant under Section 313 was wholly unnecessary and improper does not hold ground.
48. For the reasons stated above and on the basis of the testimonies of the witnesses and in congruence with the last seen theory it stands

established that none else but the appellant is the author of the crime.

49. It is also worthwhile to mention that we have also gone through the CD prepared by the prosecution reiterating the actual crime scene but nothing constructive was found.
50. Hence, in view of the above we do not find any infirmity in the impugned judgment. Accordingly, the judgment dated 30.10.2013 and order on sentence dated 12.12.2013 passed by the Learned Trial Court against the appellant are upheld. The present appeal is dismissed.
51. Appellant is reported to be in jail. He shall serve the remaining period of sentence.
52. Copy of the judgment be sent to Superintendent Jail and trial court for compliance.
53. The Registry shall transmit the Trial Court records forthwith.

SANGITA DHINGRA SEHGAL, J.

G. S. SISTANI, J.

APRIL 13, 2015

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