

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CRIMINAL APPEAL No.615/2012

%

Judgment reserved on: 4th March 2015
Judgment delivered on: 13th April 2015

VIRENDER @ DILLU

..... Appellant

Through : Mr. N. Hariharan, Senior Advocate
with Mr Varun Deswal, Advocate,
Mr. Amit Singh Chauhan,
Advocate, Mr. Vaibhav Sharma,
Advocate, Mr. Siddharth S Yadav,
Advocate and Mr. Sahil Paul,
Advocate

versus

STATE

.....Respondent

Through : Mr. Sunil Sharma, APP for the State

CORAM :

HON'BLE MR. JUSTICE G. S. SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J.

1. This is an appeal filed under Section 374 of the Code of Criminal Procedure, 1973 (hereinafter referred to as, Cr.P.C.) and is directed against the judgment dated 7.4.2012 and order on sentence dated 18.4.2012 passed by the learned Additional Sessions Judge in Session's Case No. 729/2007, by virtue of which the appellant has been convicted under Sections 302/201 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC"), and sentenced to undergo Rigorous Imprisonment for life and to pay a fine of Rs. 1,00,000/- for the offence punishable under Section 302 of IPC, and in default of the payment of fine to further undergo Simple Imprisonment for a period of six months. The appellant was further sentenced to

undergo Rigorous Imprisonment for five years and to pay a fine of Rs. 2,000/- for the offence punishable under Section 201 of IPC and in default of payment of fine to further undergo Simple Imprisonment for five `1days. Both the sentences were ordered to run concurrently.

2. The brief facts of the case as noticed by the trial court are that :

“On 2.9.2006 DD No. 22 was lodged after which SI Ganesh Chand Maurya along with Ct. Mehak Singh reached the place of incident and found a dead body lying in the field with a cut neck. On formal search of the dead body a purse containing one currency note of Rs. 500/- and Rs. 2/- each and four currency notes of Re 1/-, some coins, photographs and some phone numbers on the visiting cards were recovered. SI Ganesh Chand Maurya tried to contact few numbers and also informed the relatives of the deceased. Mukhtiar Singh (father of the deceased Joginder) gave his statement to the police that on the previous night i.e on 01.09.2006 at about 9:00PM Virender @ Dillu the co-brother/Sandu of the deceased Joginder took him on the pretext of some work. On 02.09.2006 at about 11:30AM he received an information from his relative that a dead body was located at Bagpat, U. P. and had been identified as that of his son Joginder. On the basis of the information FIR was registered.

3. During investigation on 05.09.2006 the appellant was apprehended from his village Bharthal and during interrogation he admitted having murdered Joginder along with his two associates. Pursuant to the disclosure statement of the appellant/accused Virender, an Ambassador Car bearing No. DL 2CH 3983, two seats of the car from the roof of his hardware shop, clothes (Pant and shirt) worn by him at the time of incident, weapon of offence i.e Ustra handle

of which was broken and one gold chain and a wrist watch belonging to deceased Joginder were recovered and appellant also got his two associates arrested.

4. After completion of investigation, charge sheet for the offence under section 364/302/201/34 of IPC was filed. All the accused entered the plea of not guilty and claimed trial. The prosecution relied on the testimonies of 28 witnesses, besides the exhibits produced during the trial. The Trial Court, after considering them, convicted appellant/accused for offences under section 302/201 of IPC and acquitted the accused Rohtash and Narender for the reason that the prosecution failed to connect them with the crime.
5. Challenging the finding of the learned Trial Court, Mr. N. Hariharan, Sr. Advocate appearing for the appellant contended that judgment of learned trial court is liable to be set aside on the ground that FIR in the instant case was not recorded on the basis of the first information received in relation to the commission of offence but on the basis of a subsequent statement of PW-2 Mukhtiar Singh, father of the deceased, which was laced with embellishments. In this regard, learned counsel pointed out an extract from the cross examination of PW-5 Ajit Singh which is produced below:

“I had gone to PP Tikri Kalan with Vijay who made a complaint at PP Tikri Kalan. Before going to PP a telephone call had been received by PW-2 Mukhtiar Singh from a relation in UP regarding discovery of a body which had a amputated finger and suspected to be of Joginder. Thereafter we went to PP at the instance of Mukhtiar Singh. My statement of complaint was not recorded at that time. Vijay had informed the officials at PP Tikri

about the contents of phone call also. Delhi police did not go with us to UP to get the dead body.”

6. Elaborating his arguments further the learned counsel for the appellant submits that a bare reading of the above signifies that the first information of the offence was the one recorded vide missing report Ex.PW6/F which was lodged by PW-5 and PW-6 at the instance of PW-2. A perusal of the FIR Ex.PW2/A reflects that instead of being based on the first information i.e. the missing report Ex.PW6/F, it carves out a totally different version. Had Virender come to the house of the deceased and taken the deceased along, the same would have been incorporated in the missing report Ex.PW6/F.
7. Learned counsel for the appellant further contended that the four star witnesses produced by the prosecution have given different versions on the ‘last seen’ evidence. PW-1 Devender stated in his Examination-in-Chief that on 01.09.2006 at about 08:30/9:00 pm, the appellant came to his shop and from there appellant along with the deceased left for Haridwar. PW-2 Mukhtiar Singh deposed that on 01.09.2006 at about 9:00 p.m. the appellant had come to his house and took the deceased who was present there along with him on the pretext of some work. It is argued that PW-1 Devender and PW-2 Mukhtiar Singh have made contradictory statements and it is not clear whether the appellant picked the deceased from the house of PW-2 Mukhtiar Singh with him on the pretext of some work or whether the appellant went to the shop of PW-1 Devender and picked the deceased from the shop and went to Haridwar.

8. PW-5 Ajit Singh and PW-8 Sat Pal giving a third version stated that on 01.09.2006 when they were standing in the Gali at about 9:00 pm, the appellant came in a white Ambassador Car and picked the deceased and took him along in the car. It is argued that these two witnesses have failed to specify the Gali where they were standing and whether the same was in front of the house of the deceased or the shop.
9. The learned counsel for the appellant further argued that the recovery of alleged weapon (Ustra) of offence is doubtful as PW-9 Manoj Kumar deposed in the cross examination that he saw an ustra lying besides the dead body which was recovered on 02.09.2006. No explanation has come forth why the ustra was recovered on 06.09.2006 when PW-9 Manoj Kumar saw the same lying by the dead body. More so no blood was found on the recovered ustra and therefore it cannot be determined that the weapon of offence (ustra) which was recovered was the one which was used to commit the crime. It is further argued that the gold chain and wrist watch were planted upon the appellant to connect him with the commission of the offence and introduced in the FIR as the two articles have nowhere been mentioned in the missing report Ex.PW6/F.
10. On the basis of the aforesaid submissions, learned counsel for the appellant urged that the prosecution has failed to establish the guilt of the appellant beyond reasonable doubt, as such, he is entitled to be acquitted.

11. Per Contra, Mr. Sunil Sharma, APP for State submits that the prosecution case, although rests on circumstantial evidence but same has been proved beyond reasonable doubt.
12. The learned APP for State further contended that a combined reading of the depositions of the ocular witnesses PW-1 Devender, PW-2 Mukhtiar Singh, PW-5 Ajit Singh and PW-8 Sat Pal clearly proves that the deceased was last seen alive in the company of the appellant.
13. The prosecution heavily relied upon the evidence of last seen and the testimonies of PW-1 Devender, PW-2 Mukhtiar Singh, PW-5 Ajit Singh and PW-8 Sat Pal and onus of proof shifted on the appellant to explain the whereabouts of the deceased but he chose to remain silent.
14. The prosecution submitted that the conviction of the appellant was also justified as it was supported by the evidence of PW-20 Meena and PW-21 Babli who in their depositions clearly deposed that the appellant used to make false allegations regarding illicit relationship between PW-21 Babli and the deceased and this proves he had a strong motive to do away with the deceased. Under the circumstances, it was submitted that the impugned judgment does not suffer from any infirmity which calls for interference and appeal is liable to be dismissed.
15. We have heard the learned counsel for the appellant as well as the State. We have also perused the impugned judgment and have gone through the record.
16. The present case is one of circumstantial evidence. It is well settled law that where there is no direct evidence against the accused and

the prosecution rests its case on circumstantial evidence; the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be in compatible with the innocence of the accused or the guilt of other person. 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. In the case of ***Sanatan Naskar and Anr. v. State of West Bengal***, (2010) 8 SCC 249, it was observed as follows:-

27. There cannot be any dispute to the fact that it is a case of circumstantial evidence as there was no eyewitness to the occurrence. It is a settled principle of law that an accused can be punished if he is found guilty even in cases of circumstantial evidence provided, the prosecution is able to prove beyond reasonable doubt complete chain of events and circumstances which definitely points towards the involvement and guilt of the suspect or accused, as the case may be. The accused will not be entitled to acquittal merely because there is no eyewitness in the case. It is also equally true that an accused can be convicted on the basis of circumstantial evidence subject to satisfaction of the accepted principles in that regard."

17. In the case of ***Sharad Birdhichand Sarda vs State of Maharashtra*** AIR 1984 SC 1622, Apex Court laid down conditions which must be fulfilled before a case against an accused can be said to be fully established:

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

18. The approach to be adopted by the courts while appreciating circumstantial evidence was succinctly stated by Supreme Court+ in the decision reported as ***M.G. Agarwal v. State of Maharashtra AIR 1963 SC 200*** in following terms:

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 evidence 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.

19. The case of the prosecution rests on the testimonies of last seen witnesses, i.e. PW-1 Devender, PW-2 Mukhtiyar Singh, PW-5 Ajit Singh and PW-8 Sat Pal.
20. PW-1 Devender, the brother of the deceased in his statement, mentioned that he was running a General store at village Hiran Kudna and on 01.09.2006 at about 8:30/9:00PM the appellant who is the *saddu* of his brother Joginder came to his shop in a white colour Ambassador Car and told him that he would be going to Haridwar along with his brother Joginder in his car. PW1 further deposed that when his brother left the house to go with the appellant Virender @ Dillu, he was having two mobiles of make Nokia and Tata Haier and was wearing one wrist watch and golden chain. PW1 also deposed that on the next day he made a call to his brother on his mobile but the same was switched off.
21. The second eyewitness, PW-2 Mukhtiar Singh, the father of the deceased deposed that on 01.09.2006 at about 9PM, appellant Virender, co-brother of his son Joginder came and told him that he was taking Joginder along with him for some work and the

appellant and the deceased left together in a white colour Ambassador Car which was brought by the appellant. PW-2 Mukhtiar Singh further deposed that on 02.09.2006, PW-21 Babli told him that a dead body had been found in Baraut and on receiving this information, he sent his neighbours and nephews to Police Station Baraut to identify the body. PW2 deposed that on 02.09.2006 he went to the police station and made a complaint on the basis of which FIR Ex.PW2/A was registered.

22. According to the third and fourth witnesses of the last seen i.e. PW-5 Ajit Singh and PW-8 Sat Pal on 01.09.2006 at about 9:00 p.m. when they were standing in the Gali, appellant came in a car and took the deceased along with him. PW-5 Ajit Singh also deposed that he along with PW-6 Vijay Singh and Joginder (S/o Hukan Singh) went to Bagpat and identified the dead body of the deceased in the Mortuary and signed the body identification memo Ex.PW5/A of the dead body.
23. The legal position pertaining to appreciation of circumstantial evidence of 'last seen' has been summarised in a Division Bench decision titled as *Arvind @ Chhotu vs. State, ILR (2009) Supp. (Del) 704*, in the following words:-

(i) Last-seen is a specie of circumstantial evidence and the principles of law applicable to circumstantial evidence are fully applicable while deciding the guilt or otherwise of an accused where the last seen theory has to be applied.

(ii) It is not necessary that in each and every case corroboration by further evidence is required.

(iii) The single circumstance of last-seen, if of a kind, where a rational mind is persuaded to reach an irresistible conclusion that either the accused should explain, how and in what circumstances the deceased suffered death, it would be permissible to sustain a conviction on the solitary circumstance of last seen.

(iv) Proximity of time between the deceased being last seen in the company of the accused and the death of the deceased is important and if the time gap is so small that the possibility of a third person being the offender is reasonably ruled out, on the solitary circumstance of last-seen, a conviction can be sustained.

(v) Proximity of place i.e. the place where the deceased and the accused were last seen alive with the place where the dead body of the deceased was found is an important circumstance and even where the proximity of time of the deceased being last seen with the accused and the dead body being found is broken, depending upon the attendant circumstances, it would be permissible to sustain a conviction on said evidence.

(vi) Circumstances relating to the time and the place have to be kept in mind and play a very important role in evaluation of the weightage to be given to the circumstance of proximity of time and proximity of place while applying the last-seen theory.

(vii) The relationship of the accused and the deceased, the place where they were last seen together and the time when they were last seen together are also important circumstances to be kept in mind while applying the last seen theory. For example, the relationship is that of husband and wife and the place of the crime is the matrimonial house and the time the husband and wife were last seen was the early hours of the night would require said three factors to be kept in mind while applying the last-seen theory.

24. In ***State of U.P. vs. Satish*** reported at AIR 2005 SC 1000 it was held as under:

“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-PW3 and PW5, in addition to the evidence of PW2”

25. In view of the aforesaid principles governing the case it stands established that the deceased was last seen alive in the company of the appellant. This unhesitatingly points the finger of guilt towards the appellant. In our view, the prosecution was able to establish the 'last seen' theory as far as the appellant is concerned.
26. The contention of the learned counsel for the appellant that the testimony of the star witnesses are not worthy of being relied upon and that PW-1 Devender and PW-2 Mukhtiar Singh are interested witnesses being the brother and father of the deceased does not hold ground as the question of credit worthiness of the evidence of relative of victim is concerned, it is well settled that though the Court has to scrutinize such evidence with great care and caution but such evidence cannot be discarded on the sole ground of their interest in the prosecution. The relationship *per se* does not affect the credibility of a witness. Merely because the witness happens to be a relative of the victim of the crime, he/she cannot be characterized as an interested witness. It is trite that the term 'interested' postulates that the person concerned have some direct or indirect interest in seeing that the appellant/accused is somehow or the other connected either because he had some animosity with the accused or for some other motive. It is more often than not a relation would not conceal the actual culprit and make allegations against an innocent person. The Supreme Court in *Namdeo vs. State of Maharashtra (2007) 14 SCC 150* observed as follows:-

“37. Recently, in *HarbansKaur v. State of Haryana : (2005) 9 SCC 195* the conviction of the accused was challenged in this Court, inter alia, on the ground that the prosecution version was based on testimony of relatives and hence it did not inspire

confidence. Negating the contention this Court said: (SCC p. 198, para 7)

7. There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield the actual culprit and falsely implicate the accused.

38. From the above case law, it is clear that a close relative cannot be characterised as an "interested" witness. He is a "natural" witness. His evidence, however, must be scrutinised carefully. If on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the "sole" testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one."

27. In our opinion, the statements of last seen witnesses i.e. PW-1 Devender, PW-2 Mukhtiar Singh, PW-5 Ajit Singh and PW-8 Sat Pal as discussed above are consistent and we agree with the view taken by the learned trial court that PW-1 Devender and PW-2 Mukhtiar Singh cannot be termed as interested witnesses as they are the family members of the deceased thus it is quite possible for them to have seen the deceased going with the appellant.
28. Further, the prosecution has also relied upon the testimonies of other two last seen witnesses PW-5 Ajit Singh and PW-8 Sat Pal who are independent witnesses and residents of the same village of the deceased. Both PW5 and PW8 corroborated the testimonies of each other and supported the case of the prosecution. There is no

reason why their testimonies cannot be relied upon as they are the most natural witnesses whose presence at the spot cannot be doubted being residents of the area and having no animosity so as to falsely implicate the appellant.

29. In the present case, nothing material has been put forth by the appellant to show that these witnesses are trying to falsely implicate him out of some personal grudge or animosity. From the testimonies of PW-1 Devender, PW-2 Mukhtiar Singh, PW-5 Ajit Singh and PW-8 Sat Pal, it is evident that they had seen the deceased alive with the appellant who had taken him out in the Ambassador Car on the pretext of going to Haridwar and there is no reason to discard their testimonies.
30. Further, there exists a proximity between the last seen and the time of death of the deceased as he was last seen in the company of the appellant at 9:00PM and died on the intervening night of 01.09.2006/02.09.2006 at about 11 or 12PM as per the post mortem report. Also the place of murder is Baraut which is on the way of Haridwar and at a distance of 2-3 hours from Delhi. The deceased was last seen in the company of the appellant. So the onus of proving the same is shifted to the appellant. By virtue of Section 106 of the Evidence Act and having regard to the testimonies of PW-1 Devender, PW-2 Mukhtiar Singh, PW-5 Ajit Singh and PW-8 Sat Pal, the appellant ought to have explained the incriminating circumstances. The presumption under Section 106 of the Indian Evidence Act is explained in *Hasmuddinvs 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 adverting 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 313 Cr.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 313Cr.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.”

31. Applying the above discussed principles of law, we agree with the observation made by the learned trial court that the deceased was last seen alive in the company of the appellant and since appellant failed to offer an explanation as to where he took the deceased with him and when he parted ways with the deceased, 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 and the Court can consider his failure to adduce any explanation, as an additional link which completes the chain.

32. With regard to the disclosure statement of the appellant and the consequent recovery of Gold Chain and wrist watch from the pant and t-shirt worn by the appellant at the time of commission of crime, mobile phones of the deceased, seat cover of the Ambassador Car and the weapon of offence i.e Ustra, we are of the view that discovery can only be of pant and not what was in the pocket and there is no evidence on record to identify that the pant and shirt was worn by the appellant. Further no blood was found on these clothes. Therefore, what is found from inside the pant cannot be attributed to the appellant. Regarding recovery of seat covers, from the statement and report of the Mechanical Inspector PW7 J.S Pawar, front seat covers did not match the back seat covers. Though the IO had cut out samples from both front and back seat covers but no blood grouping was done. The FSL report only says it human blood belonging to AB group but no blood sample of the deceased or the appellant was matched to the blood on the seat cover. Also as per disclosure statement dated 05.09.2006, an Ustra was used to cut the neck of the deceased but the Ustra was recovered on 06.09.2006 i.e four days after the recovery of the dead body and it seems impossible that the IO missed seeing the weapon of offence on the day the body of the deceased was recovered. Further, no blood was found on the Ustra.

It needs to be observed that as per the evidence of PW25 Inspector R.S Malik in whose presence the Ustra was recovered, the field from where it was recovered belongs to Sansar Pal PW26 at whose instance the site plan was prepared but when recovery was made PW 26 Sansar Pal was not present, therefore how can the site plan be made at the pointing out of Sansar Pal gives no benefit to the prosecution regarding the recovery of articles.

33. With respect to motive, the case of the prosecution is that the appellant had suspected the illicit relationship of his co-brother Joginder (deceased) with his wife and being aggrieved by the same he committed the murder of the deceased. To support its case, prosecution relied upon the testimonies of PW-20 Meena, wife of the deceased and PW-21 Babli, wife of the appellant.
34. PW-20 Meena in her testimony deposed that her sister Babli (PW-21) was married to the appellant Virender @ Dillu and on the same day she married deceased Joginder and the relations between the family members were cordial. PW-20 Meena further deposed that her husband (deceased Joginder) and the appellant Virender used to take liquor on occasions. PW-20 also deposed that the appellant used to taunt his wife Babli (PW-21) that she had illicit relations with the deceased. PW-21 Babli in her testimony deposed that her husband used to taunt her and make false allegations against her of having illicit relations with the deceased. PW-21 further deposed that she had gone to her parental house about 20 days prior to the death of the deceased and since then she is residing with her parents. PW-21 deposed that her husband i.e. the appellant used to

beat her after consuming liquor and make allegations on her character.

35. From the perusal of the testimonies of PW-20 Meena and PW-21 Babli, it is evident that the appellant used to taunt his wife Babli (PW-21) with regard to her illicit relationship with the deceased and there is no other specific dispute between them. Further, the testimony of PW-20 Babli is duly corroborated by the testimony of PW-21 Meena who in her deposition clearly deposed that the appellant used to beat her and made false allegations of her having an illicit relationship with the deceased. This establishes that appellant was so much convinced of his wife's (Babli-PW-21) relationship with the deceased that he even physically abused and beat up his wife Babli PW-21. Thus, there is no reason to disbelieve the testimonies of PW-20 Meena and PW-21 Babli and they can be relied upon. Further, it has been established that at the time of incident PW-21 Babli had gone to her parental house and had refused to come back which might have agitated the appellant. Thus there is ample evidence available on record to show that appellant used to suspect the chastity of his wife. There used to be frequent quarrels between them and this establishes that appellant had a strong motive to eliminate the deceased.
36. In the present case, the prosecution has established beyond reasonable doubt the motive of the appellant. In the case of *Udaipal Singh v. The State of Uttar Pradesh* AIR 1972 SC 54, it was held that :

“In cases where only circumstantial evidence is available at the outset one has to normally start looking for the motive and the opportunity to

commit the crime. If the evidence shows that the accused having a strong motive had the opportunity of committing the crime and the established circumstances on record considered along with the explanation, if any, of the accused, excluded a reasonable possibility of any one else being the real culprit, then the chain of evidence can be considered to be so complete, as to show that within all human probability, the crime must have been committed by the accused. He may, in that event, safely be held guilty on such circumstantial evidence. It was further held that if the explanation of the accused is found to be absurd, it should be held to be inconsistent with the innocence of the accused and incapable of any other hypothesis than that of the guilt of the accused.”

37. In view of the aforesaid dictum, it is to be seen whether the prosecution has succeeded in establishing the sequence of circumstances which can be called conclusive in nature and there is no unbroken chain leaving a gap of missing links and such circumstances are consistent with the hypothesis of the guilt of the appellant. As per the case set up by the prosecution, the circumstances which conclusively establishes the involvement of the appellant in the commission of the said murder mainly are that (1) deceased Joginder was last seen alive in the company of the appellant as per the testimonies of PW1, PW2, PW5 and PW8 (2) the place of murder i.e Baraut which is on the way to Haridwar and that as per the testimony of PW1 and PW2, appellant took deceased with him on the pretext of going to Haridwar (3) the appellant had a strong motive to do away with the deceased as established by the testimony of PW20 and PW21 (4) Non

explanation of the circumstances by the appellant in which he was last seen in the company of the deceased and when he parted with the company of the deceased (5)The recovery of weapon of offence 'Ustra' and recovery of Ambassador Car and other articles like wrist watch, gold chain and mobile phones belonging to the deceased on his disclosure of the same after his arrest.

38. PW14 Dr Pradeep Kapoor conducted the post-mortem examination of the deceased Joginder. As per the postmortem report Ex.PW14/A, the deceased had received the following anti mortem injuries:

1. *Incised wound on front of the neck of size 16cms x 6cms x bone deep margins of the wound was clean cut. On dissection, all the intervening tissues, muscles, arteries, trachea, oesophagus cut at level of this wound. The level of incised wound was 3.5 cm below right ear lobe; 3.0 cm below chin in front and 4.0 cm below left ear lobe.*
2. *Abrasion of size 1.5 cms length x 0.5 cms over left first knuckle.*
3. *Abrasion of size 1.2 cms length x 0.5 cms over left second knuckle.*

39. PW14 further opined that the cause of death was due to shock and haemorrhage due to above ante mortem injuries and also opined vide report EX.PW14/B that the injuries mentioned in post-mortem report can be caused by the weapon (Ustra) produced.

40. In the background of such a scenario, we find that the said circumstantial evidence conclusively establishes the guilt of the appellant.

41. After considering the entire evidence and re-appreciating the same in the light of arguments and the reasons given by the Trial Court, we are of the view that the identity of the appellant and that the deceased was last seen alive in the company of the appellant has been established beyond reasonable doubt.
42. In the light of the preceding discussion and the fact that the learned Additional Sessions Judge has minutely scrutinized entire evidence led by the prosecution, we find no infirmity in the judgment passed by the learned trial court and we see no reason to interfere with the same. The conviction of the appellant under Section 302 of IPC is upheld.
43. The appeal therefore fails and is dismissed.
44. The copy of this order be sent to the Superintendent Jail.
45. The lower court record be sent back.

SANGITA DHINGRA SEHGAL, J.

G. S. SISTANI, J.

APRIL 13, 2015

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