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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment dated 10th February, 2016*

+ **CRL.A. 201/2015**

PRAVEEN KHARI

..... Appellant

Through : Mr. Prag Chawla with Ms. Ruchi Kapur,
Advocates

versus

THE STATE(GOVT OF NCT) DELHI

..... Respondent

Through : Ms. Aashaa Tiwari, APP

+ **CRL.A. 57/2015**

ANKIT GAUR

..... Appellant

Through : Mr. Mukesh Kalia, Advocate

versus

THE STATE

..... Respondent

Through : Ms. Aashaa Tiwari, APP

+ **CRL.A. 221/2015**

PRINCE MAGGO

..... Appellant

Through : Mr. Samrat K. Nigam with Ms. Ankita
Mahajan, Mr. Abhimanyu Walia and Ms.
Ayshwarya, Advocates

versus

STATE

..... Respondent

Through : Ms. Aashaa Tiwari, APP

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J (ORAL)

1. Present appeals are directed against the judgment dated 20.12.2014 and order on sentence dated 24.12.2014 passed by the learned Additional

Sessions Judge in case FIR No.30/2009 registered at Police Station Roop Nagar, whereby all the three appellants have been convicted to undergo rigorous imprisonment of life for the offence punishable under Section 120-B read with Section 302 IPC. Appellants Ankit Gaur and Praveen Khari have also been sentenced to undergo rigorous imprisonment for the offence punishable under Section 302/34 IPC. They were directed to pay fine of Rs.20,000/- each for the offence punishable under Section 120-B read with Section 302/34 IPC and in default of payment of fine to further undergo simple imprisonment for a period of six months.

2. All the three appeals arise out of a common judgment and have been heard together and are being disposed of by a common judgment.
3. The case of the prosecution as noticed by the Trial Court is as under:

“2.....Vide DD no.21-A dated 23.02.2009 at about 18:02 hours the police was informed about stabbing took place in front of gate no.1 House no.17UA Malka Ganj Chowk, Delhi. The said information was assigned to SI Prabhanshu. SI Prabhanshu alongwith Ct. Prem Chand went to Hindu Rao Hospital as he was informed by the complainant when contact on mobile phone number given in the PCR form. SI Prabhanshu collected the MLC bearing no.1260/06 of Akshay S/o unknown R/O unknown aged 20 years. Doctor declared the injured unfit for statement. During enquiry, he came to know that two boys had got admitted the injured in the hospital from Jawahar Nagar Malka Ganj. No eye witness was found at the spot. The above said circumstance was endorsed by the IO and got registered a case under Section 307 IPC. Thereafter, the police was informed from the hospital on the same night that injured was expired. Thereafter Section 302 IPC was added. During the course of investigation, the police had collected evidence, recorded the statement of witnesses and arrested the accused persons, namely, Ankit Gaur and Praveen Khari. After completion of the investigation, the police filed charge sheet in the court against the accused Ankit Gaur and Praveen Khari. Thereafter, the supplementary charge sheet had been filed against the accused Prince Maggo. Accused Karan Maggo was summoned by this court by resorting the power U/S 319 of Cr.P.C. Being juvenile this case was referred to Juvenile Justice Board.

3. After being heard vide order dated 18.9.2009, accused persons, namely, Ankit Gaur, Praveen Khari and Prince Maggo were charged for the offence punishable under Section 302/34 IPC. Thereafter, vide order dated 17.5.2010, all the three accused persons were also charged for the offence punishable U/S 302 read with Section 120-B IPC. All the accused persons pleaded not guilty and claimed trial.”

4. The prosecution has relied upon 58 witnesses. The statements of all the appellants were recorded under Section 313 of the Cr.P.C. No evidence was led by the defence.
5. Mr. Samrat Nigam, learned counsel for appellant Prince Maggo in Crl.A.221/2015 submits that the judgment of the Trial Court is based on conjectures and surmises. The name of the appellant did not figure in the first charge sheet dated 30.05.2009. In the supplementary charge sheet dated 30.09.2009, name of the appellant was included, but it was stated that there was no requirement to arrest the appellant and in the second supplementary charge sheet dated 25.03.2010 while adding the element of motive, the appellant was arrested. It is, thus contended by Mr. Nigam that the prosecution has failed to prove the motive, hence no case is made out against appellant Prince Maggo.
6. It is also contended by the learned counsel for the appellant Prince Maggo that even as per the case of the prosecution, the appellant was not present at the place of the incident which took place on 23.02.2009, nor he was named by the two star witnesses of the prosecution, being the father of the deceased, PW-2, Rishi Kumar and grand-father of the deceased, PW-3 Durga Prasad as having seen him last in the company of the deceased. Counsel contends that his name figured in the disclosure statement made by Praveen Khari in Crl.A.201/2015 and this, by itself, cannot be a ground for conviction.
7. Mr. Nigam has also brought to the notice of the Court that there are

material improvements in the testimonies of PW-2 and PW-3, as according to PW-3, four persons were seen along with the deceased while all along in his statement recorded he had only referred to three persons. The grandfather had mentioned the name of Ankit Gaur, appellant in CrI.A.57/2015 and one more person, whereas in his testimony recorded in Court, the number has been increased to four persons. This improvement, the learned counsel for the appellant, submits is material in nature and goes to the root of the matter and is the only evidence on the basis of which this appellant has been convicted.

8. Additionally, it is submitted by Mr.Nigam that in the second supplementary charge sheet, it was stated that the deceased used to tease one Priyanka Maggo (PW-16) and thus, the motive for eliminating the deceased by Appellant Praveen and appellant Ankit Gaur on the basis of a conspiracy with the appellant Prince Maggo is sought to be established. Mr. Nigam has drawn the attention of the Court to the testimony of PW-16, Priyanka Maggo to show that Priyanka Maggo was not related in any manner to the appellant except that she shared a common surname(Maggo) and no suggestion was put to PW-16, Priyanka Maggo either with respect to her relationship with the appellant or the victim or of her having been teased by the deceased.
9. Mr.Nigam has also contended that there was immense pressure on the police which is evident from the fact that five Investigating Officers were changed and since the police was unable to nab the real culprits, with a view to show results the appellants were roped in while all the appellants are absolutely innocent. In support of this submission, Mr. Nigam submits that the fourth Investigating Officer was introduced in the case on 16.04.2009 and thereafter he again recorded the second statement of PW-3 and first statement of PW-2 which is 01 month and 22 days after his son

had been murdered. Counsel for the appellant further submits that the statement of PW-2, father, having been recorded after 01 month and 22 days of the incident would show that the father was neither present at the spot and further even PW-3, the grand-father in his statement made to the police has stated that his son had gone out for work. The statement of PW-2 is unreliable and cannot be trusted for the reason that the grand-father, PW-3, had stated that he was not present and had gone out for work and it is for this reason that the Investigating Officer concerned did not deem it necessary to record the statement of the father of the deceased under Section 161 Cr.P.C. at the first instance. Thus, the statement of PW-2 in Court by which this appellant was named is a very weak form of evidence and on this ground alone, the appellant should be acquitted.

10. Mr. Prag Chawla, learned counsel appearing for appellant Praveen Khari in Crl.A.201/2015 submits that in the present case admittedly there was no eye witness and the case of the prosecution is based on circumstantial evidence. The prosecution has relied upon the theory of last seen, call details and motive to bring home the guilt of the appellants. It is contended that the prosecution has relied upon PW-2 and PW-3, being father and grand-father of the deceased as the two witnesses of last seen. Mr. Chawla points out to the following material improvements and contradictions in the testimonies of PW-2 and PW-3:

PW2	Last Seen Evidence	Contradictions
1.	On 23.02.2008 at about 4.00 or 4.15 pm, I was present in the gali which leads to my house. I saw accused persons Karan, Price, Praveen, Ankit. All accused except Karan are present in the Court today, coming from the side of my	The presence of this witness is disputed by the grandfather of the deceased PW3. He state in his testimony that “only my Daughter-in-law and Akshay were present at house. My son Rishi was not present at that time in the house as he had gone

	house.	out in connection with his duties. My son Rishi came back to the house at 6:00 PM”
2.	PW2 stated that “I had told the police that they were coming from the side of my house with my son”.	The witness was duly confronted with ExPW2/A on this point where it is not so recorded. (and the witness states that he did not state this fact to the police.)
3.	As per PW2 they were on foot and he saw them going together for about 90 feet or so towards Malka Ganj.”	In his supplementary statement, ExPW2/A, he stated “that accused Karan made my son sit on motorcycle, besides Ankit, Karan, Praveen and Prince. He was confronted with this fact, where it is so recorded and he stated that he did not state this fact to police.
4.	Accused was arrested on 2/4/09	
PW3	Last Seen Evidence	Contradictions
1.	At 3:45 or 4 PM “I opened the door and found Karan standing outside the door along with one Ankit and Mangal Pandey and two others namely Praveen and one another person whose name I cannot pronounce easily. They all took Akshay with them”	In Supplementary statement dated 24/02/2009 and 16/04/2009 ExPW3/DA and Ex PW3/DB the witness had not mentioned the name of the accused Praveen. The witness was duly confronted with statements <i>i.e</i> Ex PW /DA and DB where it was not so recorded.
2.	The second supplementary statement of PW3 dated 16/04/09 was recorded after the arrest of Appellant/accused Praveen Khari but still the witness has not been named as accused in his statement.	Accused was arrested on 02.04.2009.
3.	Both PW3 and PW 2 were at home, when a boy came at	PW3 states that “at about 8 pm, one boy who was residing in

	their house with the news of Akshay. Both the witnesses went to the house of Karan at around 8-8:30 pm and talked to Karan, but both the witnesses did not talk about the presence of each other with them.	front of our house informed him that 8-10 persons were quarrelling with Akshay near Chandrawal. He took me to the house of Karan, who met me at his house and he looked quite frightened at that time. I asked Karan about my grandson Akshay but he did not reply. PW2 states that at 8.30 pm, Rohit, friend of my son Akshay came to my house and told me that Akshay has been stabbed behind Mc Donald at Bunglow Road in Gali..... He replied, he had received telephonic call from Angad in this regard and Angad told him that Akshay had been stabbed..... Angad told that he had received telephonic call from Karan. Then we all reached the house of accused Karan. Karan was present there and there were 7-8 persons more..... Karan denied having made any call to Angad and this led to an altercation between Karan and Angad besides Rohit. PW 3 further states in his cross that "I went to the house of Karan at about 8:30 pm along with the boy who came to inform me. No third person was with us when we visited the house of Karan.
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11. Mr. Chawla submits that PW-2 deposed that when he was standing in the gali, he saw the three appellants, cannot be relied in view of the testimony

of PW-3, grand-father, who has clearly testified that his son was not at home and he had gone out in connection with his duty and came back at the home at 6:00 p.m., and in view of the contradictions, it would be highly unsafe to convict this appellant on the testimony of PW-2. As far as the testimony of PW-3 is concerned, it is submitted that he had named the appellant in the testimony before Court, whereas in the statement made under Section 161 Cr.P.C., the appellant was not named.

12. Counsel submits that PW-9, Ankit brother of the deceased was also relied upon by the prosecution to prove its case, but he is not the witness of last seen. This witness in his examination-in-chief talked about an incident, which took place two days before *i.e.* 21.02.2009. He also made major improvements in his deposition before the Court and was also duly confronted with his statement recorded under Section 161 Cr.P.C.(Ex.PW9/DA). As per his statement he did not know the four boys standing there. This statement of this witness was recorded after more than two months, *i.e.*, on 06.05.2009.
13. Mr.Chawla further submits that the prosecution has also linked this appellant on the basis of washed clothes of the appellant having been recovered to connect him with the crime. However, these washed clothes, which were recovered after three months of the incident, were not sent to the FSL and there was no blood on the said clothes. Thus, the Trial Court could not have returned a finding of conviction on the basis of clothes having been recovered at the instance of the appellant.
14. Counsel also contends that the prosecution has placed heavy reliance on the call details to show that the appellants were present near the place of the incident at the time when the offence was committed. Counsel submits that all the appellants as also the deceased were admittedly residing in the same locality and there was every possibility of their having been present in the

area where the crime was committed, and thus, this by itself, cannot be a ground to convict the appellants.

15. Additionally, Mr. Chawla submits that the handsets of none of the appellants were seized. The prosecution has not been able to establish that the appellant was the subscriber to the mobile number on which reliance was placed. As per PW-48, Inspector Ram Kishan, the mobile phone used by the appellant was in the name of one Babu, which mobile is sought to be linked to the appellants, but the said Babu was not produced as a witness, neither there is any record that this number was purchased by the appellant from Babu and thus, the call details would become meaningless. Reliance is also placed on the testimony of PW-19, M.N. Vijyan and also the testimony of PW-48, who admitted that the Mobile no.9211276938 belonged to Babu.
16. With regard to motive, Mr. Chawla submits that it was the case of the prosecution that, Akshay, the deceased, used to tease the sister of Karan and in order to teach Akshay a lesson, all the accused conspired to eliminate Akshay. However, neither PW-16, Priyanka nor PW-17, Jyoti, supported the case of the prosecution and had stated about a very casual incident, which was sorted out very peacefully. As per their statements, they had never encountered any such incident thereafter and they even do not know the deceased. More particularly, at the stage of re-examination, no suggestion was put by the learned Public Prosecutor, to the witnesses that Akshay used to tease her and therefore, all the accused conspired to eliminate Akshay.
17. Mr. Chawla also contends that the learned Trial Court has failed to appreciate the testimony of DW-1, Shankar Prasad, Medical Record Technician, All India Institute of Medical Sciences, Delhi, who had brought the record of the date of incident i.e. 23.02.2009 at about 6:40 p.m.

of four months old child Mohan Dass son of the appellant who was admitted in Casualty. He submits that PW-5, Ved Prakash and PW-10, Hukam Singh have also supported the defence of this appellant. PW-5 stated that *“on 23.02.2009, the son of Praveen got seriously ill and I along with Praveen and my daughter took their son to AIIMS and got him admitted there at about 4 pm. He remained in hospital and about 9 pm, I came back.”* and PW-10 stated that *“on 23.02.2009, Mohan my grandson, son of Praveen was admitted in AIIMS for his tretement.....My son Praveen and his wife were in AIIMS on 23.02.2009 till morning of 24.02.2009. Mohan ultimately died on 10.05.2009.”*

18. It is, thus, submitted before us that the appellant, Praveen Khari, has been wrongly convicted by the Trial Court.
19. Mr. Mukesh Kalia, learned counsel for the appellant Ankit Gaur in Crl.A.57/2015 submits that he adopts the submission made by Mr. Nigam and Mr. Chawla.
20. Additionally regarding motive, he submits that the initial case of the prosecution was that Karan Maggo's cousin was teased by deceased Akshay but after the conclusion of the trial, the prosecution has miserably failed to prove any motive as the two witnesses PW-16, Priyanka and PW-17, Jyoti examined by the prosecution have not supported the case of the prosecution. He submits that appellant, Ankit Gaur was neither related to the co-accused or to the deceased and as such the appellant had no reasons to participate in the alleged offence nor the appellant has any concern with any of the girls whose names find mention during the investigation. He submits that the evidence which has been placed on record is not only inconsistent but relates to a trivial issue which even as per the case of the prosecution took place many months prior to the incident and the same was resolved. Therefore, it cannot be even remotely considered as a motive.

Referring to the statements of father and grand-father of the deceased examined as PW-2 and PW-3, he submits that it reveals that there is not even a whisper of any motive alleged by the prosecution and it only weakens the case of the prosecution.

21. Mr. Kalia submits that regarding last seen evidence, the prosecution has relied upon the statements of PW-2, Rishi Kumar, father of the deceased and PW-3 Durga Prasad grand-father of the deceased to the effect that the appellant was seen with the deceased Akshay two hours prior to the present incident. He submits that it is settled legal position that the evidence of last seen, even if it stands proved, is considered as a weak type of evidence as it is being presumptive in nature. Drawing the attention of this Court to the statement of PW-2, Rishi Kumar and PW-3, Durga Prasad, the counsel submits that it would be clear that no reliance can be placed upon the statement of these witnesses for the reasons that the statement of these witnesses PW-2 Rishi Kumar came into existence and was recorded only on 16.04.2009, *i.e.*, after a period of one month and 22 days and no explanation has come on record for such an inordinate delay in making the statement to the Police. He further submits that the alleged incident has taken place at about 6:00 p.m. and the evidence of last seen is of 4:00 p.m. and there is a gap of two hours whereas all the persons including the accused and the deceased were living in the same locality. Thus, no adverse inference can be drawn in the absence of any other evidence that they remained together for these two hours. He submits that the witnesses are interested witnesses being the close relatives and they have made deliberate improvements in their testimonies before the Court when being confronted.
22. Mr. Kalia submits that regarding recovery of weapon, as per the case of the prosecution the appellant was arrested on 05.03.2009, the disclosure

statement was allegedly made on 05.03.2009 and the recovery of the weapon is claimed to have been made on 08.03.2009. He submits that no reliance can be made on this recovery for the reasons that the alleged recovery has been made from a public place visible and accessible to general public and was not alleged to be in exclusive possession of the appellant in question, the disclosure statement was made on 05.03.2009 but the efforts to get the weapon recovered were made on 08.03.2009 and no explanation has been given for the delay of three days in recovering the weapon of offence, no efforts have been made to associate any independent witness to the recovery proceedings, the FSL Report Ex.58/A further belies the claim of the prosecution as no blood was found on this weapon to connect it as a weapon of offence, neither the alleged weapon of offence has been shown to Dr.C.B. Dabas (PW-21) to take his opinion with regard to the possibility of this weapon being used for commission of offence nor finger prints have been lifted from the alleged weapon, no photography or videography was done at the time of recovery and the physical condition of the knife contradicts and belies the testimony of the recovery witnesses who deposed that the knife was stained with mud and its sketch was prepared after putting it on a piece of paper, whereas in the Court, it was found that there was no mud either on the knife or on the piece of paper, *i.e.*, the sketch of knife Ex.25/A.

23. Mr. Kalia submits that regarding evidence of telephone/CDRs, the prosecution has failed to establish that the accused and the deceased were in touch as the prosecution failed to connect the appellant with any of the phones. He submits that no telephonic conversation was recorded of any of the phones mentioned in the CDRs relied upon by the prosecution, none of the phones was shown to be in the name of the appellant, no recovery of any phone has been claimed to be made at the instance of the appellant and

no witness has been examined to suggest that the appellant was using any particular phone. Mr.Kalia further submits that no evidence has been placed on record to support the case of the prosecution with regard to any particular telephone connection or number being used by the appellant. Counsel submits that even for the sake of arguments, if this evidence is accepted, it cannot be considered as an incriminating piece of evidence as it is the case of the prosecution that all the accused persons and the deceased were living in the same vicinity, thus the location of any of the number so shown in the same locality cannot be termed as an incriminate evidence against anyone.

24. Mr. Kalia, thus submits that in view of the above submissions, it is clear that the prosecution has miserably failed to complete the chain of circumstances and prove its case.
25. Ms. Aashaa Tiwari, learned counsel for the State submits that the prosecution has been able to prove the guilt of the appellants beyond any shadow of doubt. PW-3, Durga Prasad grand-father, and PW-2, father of the deceased, have clearly named appellant, Ankit, who was lastly seen in the company of the deceased as mentioned in the statement dated 24.02.2009 of PW-3. Additionally, she submits that the call records would show that all the three appellants were present in close vicinity of the commission of the crime. It is also submitted that the motive also stands proved.
26. At the outset, it may be noticed that the present case is based on circumstantial evidence. Law is well settled that all the circumstances from which inference of guilt is sought to be drawn must be firmly established. The prosecution must establish a complete chain of evidence which is conclusive in nature and consistent with the hypothesis of guilt of the accused and inconsistent with the innocence of the accused persons.

27. The principle of circumstantial evidence has been reiterated by the Hon'ble Apex Court in plethora of cases. In ***Bodhraj @ Bodha and Ors. v. State of Jammu & Kashmir***, (2002) 8 SCC 45, the Hon'ble Apex Court quoted number of judgments and held as under:

“10. 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 : (1977) 2 SCC 99, Eradu v. State of Hyderabad : AIR 1956 SC 316, Earabhadrapa v. State of Karnataka : (1983) 2 SCC 330, State of U.P. v. Sukhbasi (1985) Suppl. SCC 79, Balwinder Singh v. State of Punjab : (1987) 1 SCC 1 and Ashok Kumar Chatterjee v. State of M.P. 1989 Suppl. (1) SCC 560). 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.

11. We may also make a reference to a decision of this Court in C. Chenga Reddy v. State of A.P.,: (1996) 10 SCC 193, wherein it has been observed thus: (SCC pp. 206-07, para 21)

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.”

28. In ***Trimukh Maroti Kirkan v. State of Maharashtra***, (2006) 10 SCC 681,

the Hon'ble Supreme Court held as under:

“12. In the case in hand there is no eyewitness of the occurrence and the case of the prosecution rests on circumstantial evidence. The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that 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 they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with their innocence.”

29. The same principles were reiterated in *Sunil Clifford Daniel v. State of Punjab*, (2012) 11 SCC 205, *Sampath Kumar v. Inspector of Police, Krishnagiri*, (2012) 4 SCC 124 and *Mohd. Arif @ Ashfaq v. State (NCT of Delhi)*: (2011) 13 SCC 621.
30. The Trial Court has convicted the present appellants based on the evidence of PW-2, father of the deceased and PW-3, grand-father of the deceased, motive to commit the crime, call details which according to the prosecution established the presence of all the appellants in the area where the crime was committed.
31. All the three appellants have raised common arguments. The arguments of counsel for the appellants can be summarised as under:-
 - (i) Counsel for the appellant Prince Magoo has submitted that the name of appellant Prince Magoo did not appear in the first charge sheet dated 30.5.2009. In the supplementary charge sheet dated 30.9.2009, his name was included but it was stated that there was no requirement of his arrest. In the second supplementary charge sheet dated 25.3.2010,

element of motive was added and the appellant was arrested. Motive not having been proved, appellant prays that he should be acquitted.

- (ii) Counsel submits that even as per prosecution, appellant Prince Magoo was not present at the spot. He was not named by the two star witnesses PW-2 and PW-3 being father and grand-father of the deceased as having been seen last by them in the company of the deceased. His name figured in the disclosure statement, which cannot be relied upon. As per statement of PW-3, only three persons were present and in his testimony before the court, the number increased to four.
- (iii) Motive not proved as PW-16 Priyanka Magoo did not depose that she was being teased.
- (iv) Except surname, no relationship between Priyanka Magoo and Prince Magoo.
- (v) Mr.Chawla submits that there are material improvements in the testimony of PW-2 and PW-3 and both PW-2 and PW-3 are not reliable witnesses.
- (vi) Appellant Praveen Khari cannot be convicted on the basis of washed clothes recovered from his house after a gap of three months. Clothes not sent to FSL and therefore clothes cannot be linked to appellant Praveen Khari.
- (vii) Call details cannot come to the aid of the prosecution as appellants and deceased were residing in the same locality. Moreover purchase of mobile phone not proved. Motive not proved.
- (viii) Defence witnesses should be given equal weightage.

Evidence of DW-1 in support of appellant Praveen Khari not considered.

- (ix) Mr.Kalia, learned counsel appearing on behalf of the appellant, Ankit Gaur, has submitted that the evidence of last seen is a very weak form of evidence.
- (x) PW-2 and PW-3 are not reliable witnesses.
- (xi) based on the disclosure statement, the weapon was recovered after three days.
- (xii) as per the FSL report the weapon did not contain blood stains, hence the weapon was not connected to the commission of the crime.
- (xiii) telephone and CDRs cannot be relied upon as the ownership of the phone was not proved and not connected to the accused persons.

32. The arguments of the State can be summarised as under:-

- i) The case is based on circumstantial evidence;
- ii) PW-2 & PW-3 are witnesses of last seen.
- iii) Motive stands fully established.
- iv) All the respondents were talking to each other on the mobile phones during 2nd February, 2009 to 23rd February, 2009.
- v) FSL report as per which blood was not found on the shirt and pant and FSL report of knife and nail clipping of Ankit not containing blood would not affect the case of the prosecution.

33. As noticed by the trial court, in the present case there were no eye witnesses. The case of the prosecution is purely based on circumstantial evidence. According to the trial court, the chain of circumstances is

complete and there is no escape from the conclusion that crime was committed by the appellants herein. Para 46 of the judgment of the trial court reads as under:-

“The motive, last seen evidence and conversation between the accused persons proved the fact that they all had hatched the conspiracy to eliminate the deceased and for this, all the three accused persons had taken the accused from his house on 23.2.2009 and killed him. Chain of circumstantial evidence are complete and have not been broken at any point.”

34. The trial court has also held that in the case based on circumstantial evidence, motive assumes importance. According to the trial court, the motive stands proved.
35. Although common arguments have been raised that prosecution has not been able to prove the motive, Mr.Nigam, learned counsel appearing for the appellant Prince Magoo has submitted that his name was included in the second supplementary charge sheet when element of motive was added. He has contended that motive has not been proved and thus on this ground alone, he is required to be acquitted. Additionally, Mr.Nigam has submitted that according to the prosecution, deceased used to tease one Priyanka Magoo and for this reason, deceased was eliminated. However, except common surname of Magoo, appellant Prince Magoo is not related in any way to Priyanka Magoo or Jyoti Magoo. In order to establish motive, the prosecution has relied upon testimony of PW-16 Priyanka Magoo. The testimony of Priyanka Magoo reads as under:-

“I am doing Post Graduation in Hindi (Hons) from Delhi University, Delhi. I do not remember the exact date but it might be month of September-October, 2008 at about 6.00 p.m. I was present at shop of Sondhi adjacent to my house. Meanwhile I heard a voice “Priya”. I turned back to see as who is calling me but no one was seen there. After sometime I again heard the said call and

I turned back and saw that one boy who was standing at the distance of 20 ft. That boy asked me about the house of boy Love, brother of Jyoti. I took that boy to the house of Love, Smt. Rekha, mother of Love opened the door and I told her that this is (sic.) asking for Love and I also told her that I am not acquainted with this boy. Chachi Smt. Rekha asked me to return back. I returned back to my house and told the above facts to my parents. After sometime, father of Jyoti called a boy Angad who was also residing in our neighbourhood and then my father was also called at their house. Thereafter my father and uncle Bittoo(father of Jyoti) told Angad objecting that the above boy had called me by my name without any acquaintance. My father and uncle Bittoo had talked with Angad and advised him to advise his friend above boy not indulge in such activities. I do not know the name of that boy. After sometime, Angad brought that boy to the house of uncle Bittoo and thereafter Love took my father and me to his house. My father also ... understood that boy that Priya (myself) is like his elder sister. That boy sorry to me and promised that he will not repeat this thing again.

At this stage, Ld. APP for the State requests permission to ask leading question to the witness. Heard. Allowed.

It is correct that I came to know the name of that boy as Akshay and has been murdered. Vol. I came to know the name of that boy Akshay through news on television.

XXXX by Mr. Y.S. Mathur, counsel for accused Prince Maggo and Ankit Gaur

I had never seen that boy who made call to me before that day when he called me I had not seen that boy thereafter when Angad and that boy called by my father and uncle Bittoo. No quarrel ever took place in my between that boy whose name was Akshay and anybody else or my father. It is wrong to suggest that I am deposing at the instance of IO.

XXXXXX by counsel for accused Praveen Khatri.

NIL”

36. Reading of testimony of PW-16, Priyanka Magoo would show that an

unknown person had called out her name who was standing at a distance of about 20 ft. He had asked her about a boy named Love, brother of Jyoti. She took that boy to the house of Love and mother of Love opened the door and she informed her that boy was asking for Love although she was not acquainted with this boy. She then returned back to her house and told this to her parents. The father of Jyoti had called Angad who was also residing in the neighbourhood. Father of Priyanka was also called to that house and Angad was told that the boy had called Priyanka by her name without knowing her. Angad was asked to advise his friend who had agreed not to repeat this act in future. This witness was cross-examined by public prosecutor. In his cross-examination this witness has stated that she came to know that Akshay had been murdered through news channels. In cross-examination on behalf of appellants, this witness had deposed that she had never met the boy who had called out to her before that date or thereafter. Neither any quarrel had taken place between that boy, Akshay and anybody else. In our view, reading of the entire evidence of Priyanka does not establish that deceased was teasing her or there was any reason for the appellants to have murdered him on this ground that he had called her by name on one occasion. We are unable to endorse the view of the trial court that motive has been established in the present case.

37. Mr.Nigam, counsel for the appellant Prince Magoo has submitted that his name had figured only in the second supplementary charge sheet dated 25th March, 2010 while adding the element of motive. In our view, it is clear that name of Prince Magoo was added in the second supplementary charge sheet when element of motive was added, his name did not figure in the first charge sheet of 30th May, 2009. In the first supplementary charge sheet his name was included but it was stated that there was no requirement of his arrest.

38. The prosecution has argued that all the three appellants were identified by PW-2 & PW-3 being the father and grand father of the deceased as deceased having been last seen in the company of the three appellants.
39. In the case of ***State of U.P. v. Satish***, reported at 2005 (3) SCC 114, it was held by the Apex Court as under:

“47.Last seen theory comes into play where the time gap between the point of time when the accused and the deceased was 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...”

40. In the case of ***Godabariksh Mishra v. Kuntala Mishra***, reported at AIR 1997 SC 286, the Apex Court took a view that the theory of last seen together evidence is not of universal application and may not always be sufficient to sustain a conviction unless supported by other links in the chain of circumstances:
41. Since the two witnesses of last seen are PW-2 & PW-3, we deem it appropriate to discuss their testimony in detail. While discussing the testimony of PW-2, father of the deceased, it must be kept in mind that the statement of this witness was recorded on 16th April, 2009 after a gap of about two months from the date of incident.
42. We find it rather strange that the prosecution would neglect recording statement of a witness who is not only the father of the deceased but also claims to be an important eye-witness. On the point of last seen, this witness has deposed as under:-

“I have been working as a private servant. On 23.2.08,(sic) at about 4.00 or 4.15 p.m. I was present in the gali which leads to my house. I saw accused persons Karan, Prince, Parveen, Ankit @ Mangal Pandey, all accused except Karan are present in the court today coming from the side of my house along with my son Akshey. I asked my Son Akshey as to where he was going and Karan replied that they are going together to celebrate Shivratri and all of them left the gali towards Malkaganj Road.”

43. We find this testimony of PW-2 is unreliable and not trustworthy. Not only for the reason that his statement was not recorded by the IO for two months after the incident but also for the fact that his own father, PW-3 Durga Prasad during cross-examination has stated that *“my daughter along with her husband is residing on the first floor of the house. Only my daughter-in-law and Akshey were present at the house when there was a knock at the doors. My son Rishi was not present at that time at the house and he had gone out in connection with his duties. My son Rishi came back at the house at about 6 p.m.”* Cross-examination of this witness squarely answers the question as to why statement of PW-2 was not recorded by the police for two months as PW-2 was not present at the house. PW-3 has categorically testified and given the names of persons who were present in the house. He goes on to state as to when his son Rishi came back to the house at 6 pm. Thus for the above reasons, we find that the testimony of PW-2 cannot be relied upon. With regard to testimony of PW-3, we may note as far as appellant Prince Magoo is concerned, in the testimony before the court he has referred to four persons seen along with the deceased while in his statement before the police, he has referred only to three persons. Although we are conscious of the fact that minor contradictions which do not go to the root of the matter should be ignored but in our view number of persons gains immense importance in this case and thus PW-3 had made

material improvements in his testimony with respect to the number of persons who were last seen along with the deceased.

44. Praveen Khari, appellant in CrI.A.201/2015, has also been connected to the crime on the basis of clothes having been recovered at his instance. We find it highly unusual that a person would keep clothes soaked in blood in his house for a period of three months after the incident even otherwise no blood was noticed on the clothes and thus on the basis of clothes, this appellant cannot be connected to the crime.
45. With regard to the appellant, Praveen Khari, we are also of the view that the trial court has failed to take into account the testimony of DW-1, Shankar Prasad, Medical Record Technician, All India Institute of Medical Sciences, Delhi, who brought the record of 23rd February, 2009 (date of incident) to show that at about 6.40 pm, a four months old child Mohan Dass son of the appellant was admitted in the casualty. The testimony of DW-1 who is an independent witness also finds support in the testimony of PW-5 who deposed as under:-

“In the month of October, 2008 the newly born baby of accused Praveen was having some heart problem and he was referred to AIIMS and I had taken my daughter Anju to my home at Khanpur, Delhi as it was near to AIIMS where the treatment of son of my daughter was going on. During that period, accused Praveen was also called by me at my house and he was looking for the treatment of his son and was residing with me there.

On 23.02.2009, the son of Praveen got seriously ill and I along with Praveen and my daughter took their son to AIIMS and got him admitted there at about 4.00 pm. Since the admission of the son of Praveen, he along with Ms.Anju remained in the hospital and at about 9.00 pm I came to my home. I do not want to say anything else about this case.”

46. It is settled law that equal weightage must be given to defence witnesses. In

the case of *State of Haryana v. Ram Singh*, (2002) 2 SCC 426, it was held as under:

“20....Incidentally be it noted that the evidence tendered by defence witnesses cannot always be termed to be a tainted one - the defence witnesses are entitled to equal treatment and equal respect as that of the prosecution. The issue of credibility and the trustworthiness ought also to be attributed to the defence witnesses at par with that of the prosecution. Rejection of the defence case on the basis of the evidence tendered by defence witness has been effected rather casually by the High Court.....”

47. Similar view has been expressed by the Apex Court in a recent judgment in the case of *Jumni and Others v. State of Haryana*, 2014(3) Scale 588, whereby it was held that the plea of *alibi* should be held at an equal footing to the evidence provided by the prosecution. In para 27 of the judgment, it was held as under:

“27. On the standard of proof, it was held in Mohinder Singh v. State, 1950 SCR 821 that the standard of proof required in regard to a plea of alibi must be the same as the standard applied to the prosecution evidence and in both cases it should be a reasonable standard. Dudh Nath Pandey goes a step further and seeks to bury the ghost of disbelief that shadows alibi witnesses, in the following words:

“Defence witnesses are entitled to equal treatment with those of the prosecution. And, courts ought to overcome their traditional, instinctive disbelief in defence witnesses. Quite often, they tell lies but so do the prosecution witnesses.”

48. Although PW-10 was declared hostile but PW-10 in his cross-examination on behalf of the appellant has testified as under:-

“Parveen Khari is married and his in-laws belong to village Khanpur, New Delhi. Parveen was blessed with a son on 24.10.2008. The child was having a hole in the heart and was not

keeping well. The treatment was being taken from AIIMS. On 23.2.2009 Mohan my grandson, son of Parveen was admitted in AIIMS for his treatment. Parveen and his wife took Mohan to village Khanpur in December, 2008 for his treatment in AIIMS as AIIMS is nearer to Village Khanpur. Mohan was discharged from AIIMS on 24.2.2009. My son Parveen and his wife were in AIIMS Hospital on 23.2.2009 till morning of 24.2.2009. Mohan ultimately died on 10.5.2009 in Safdarjung Hospital, Delhi.

XXXX by remaining accused persons.

NIL.”

49. Based on the testimonies of DW-1 and PW-10, we are of the view that the appellant, Praveen Khari, could not have been last seen in the company of the deceased.
50. With regard to appellant Ankit Gaur, Mr.Kalia while relying on the arguments of Mr.Nigam and Mr.Chawla, has submitted that the evidence of last seen is a very weak form of evidence. It is contended that the alleged incident had taken place at about 6 pm and the evidence of last seen was 4 pm leaving a gap of two hours and in the absence of any other evidence to support the evidence of last seen particularly when there is no other evidence to show that the deceased and accused persons had remained together for two hours, the evidence of PW 2 & PW-3 cannot be relied upon when there are material improvements and various contradictions. Mr.Kalia also submits that recovery of weapon cannot be connected to the appellant Ankit Gaur for commission of crime for the reason that as per prosecution, the appellant was arrested on 5.3.2009, disclosure statement was made on 5.3.2009 but the recovery is claimed to have been made on 8.3.2009. Moreover, recovery was made from a public place visible and accessible to general public and there is no explanation for the delay of three days in recovering the weapon of offence, no efforts were made to

associate any independent witness to the recovery proceedings. Moreover, as per FSL report, Ex.58/A, no blood was found on the weapon and thus weapon cannot be connected to the offence nor the alleged weapon of offence was shown to Dr.C.B.Dabas (PW-21) to take his opinion with regard to the possibility of this weapon being used for commission of the offence nor finger prints were lifted therefrom.

51. There is force in the submission made by Mr.Kalia as prosecution has failed to show as to why after the disclosure statement was made on 5.3.2009, no recovery was made for three days. We also find it highly improbable that weapon of offence would be lying in a public place visible and accessible to passersby. Additionally no blood was found on the weapon as per FSL report Ex.58/A nor the weapon was shown to Dr.C.B. Dabas, PW-21, for his opinion with regard to possibility of this weapon being used for the commission of the offence. We also find that as per testimony of witness of recovery, knife was stained with mud and its sketch was prepared after putting it on a piece of paper whereas in court it was found that there was no mud either on the knife or on the piece of paper i.e., the sketch of knife Ex.25/A.
52. The only other circumstantial evidence which remains to be examined is that all the appellants and the deceased were in touch on the fateful day. Although CDRs have been relied upon but in our view CDRs have not been connected to the appellants as there is no evidence to show that phones were in the name of the appellants or any particular telephone connection or number was being used by the appellants. Moreover as per evidence of PW-3, he knew all the four appellants as they were residents of the locality. Thus simply because appellants were found in the area cannot be an incriminating circumstance against them. As per Criminal Jurisprudence, suspicion however strong and grave, cannot take the place of proof.

53. For the reasons stated above, we are of the view that the prosecution has not been able to prove its case beyond any shadow of doubt.
54. In the case of ***Swaran Singh Ratan Singh Vs. State of Punjab***, reported at AIR 1957 S.C. 637, it was held that in criminal cases mere suspicion, however, strong, cannot take the place of proof.
55. Further in the case of ***Ramreddy Rajesh Khanna Reddy and Another v. State of A.P.*** [(2006) 10 SCC 172], it has been observed by the Apex Court as under:

“..... It is also well settled that suspicion, however grave it may be, cannot be a substitute for a proof and the courts shall take utmost precaution in finding an accused guilty only on the basis of the circumstantial evidence.....”

56. Resultantly, all the appeals are allowed. Appellants be released forthwith, if not required in any other case.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

FEBRUARY 10, 2016
pst/ssb