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

+ CRL.A. 1127/2013

% *Judgment dated: 30th May, 2016*

MOHAN RAI Appellant

Through : Mr.Murari Tiwari, Adv.

versus

STATE NCT OF DELHI Respondents

Through : Ms.Aashaa Tiwari, APP for the State.

+ CRL.A. 1148/2013

SUNESHWAR BAKSH Appellant

Through : Ms.Rakhi Dubey, Adv. (DHCLSC)

versus

STATE (GOVT. OF NCT) OF DELHI Respondent

Through : Ms.Aashaa Tiwari, APP for the State.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J (ORAL)

1. Present criminal appeals have been filed by the appellants under Section 374 of the Code of Criminal Procedure (in short 'Cr.P.C.') against the judgment dated 15.10.2012 and order on sentence dated 20.10.2012 passed by learned Additional Sessions Judge, (East) FTC, Karkardooma Courts, Delhi, in Sessions case No. 32/11, wherein FIR No. 10/2011 was registered under Sections 302/394/34 of the Indian Penal Code (in short

‘IPC’) at Police Station Ghazipur.

2. By the impugned judgment the appellants were held guilty and were convicted for the offence punishable under Sections 302/394/34 of the IPC and by the order on sentence dated 20.10.2012 the appellants were sentenced to undergo life imprisonment and also directed to pay a fine of Rs.10,000/-, each, for the offence punishable under Section 302/34 of the IPC and in default of payment of fine, they were directed to undergo rigorous imprisonment for one year, each. The appellants were also sentenced to undergo rigorous imprisonment for five years and directed to pay a fine of Rs.5,000/-, each, for the offence punishable under Section 394/34 of the IPC and in default of payment of fine, they were directed to undergo rigorous imprisonment for six months. It was directed that both the sentences would run concurrently.
3. The brief facts of the case, as noticed by the learned trial court, is as under:

“..... deceased Master Pritam Singh, a buffalo supplier came at Gazi Pur Dairy Farm of complainant Shahroz Alam and his brother Mazhar Alam on 11.01.2011 for collection of money. As and when Master Pritam Singh used to come at Gazi Pur Dairy Farm for collection, he used to stay in the dairy of the complainant. He slept in the dairy in the night of 11.01.2011. Mazhar Alam made payment of Rs. 1 lakh to Master Pritam Singh. Pritam Singh was also having a Nokia mobile phone with him. On 12.01.2011 till about 6.30 pm, Master Pritam Singh was present at the dairy when Mazhar Alam left from there. At about 10.30 pm, complainant came at the dairy and found that main gate of the dairy was locked. He called his servants Shankar, Mohan and Pehalwan who were working as milkmen at his dairy but there was no response. After opening the lock, he went inside the dairy and found that the cot of Master Pritam Singh was lying on the chabutra (platform), his chappal was lying near the cot and there were blood marks at many places. The body of Master Pritam Singh was lying in a pool of blood in the basement under the chabutra (platform). His feet were

tied with a plastic rope. All the three servants were missing. Complainant suspected that his servant Shankar, Mohan and Pehalwan had killed the deceased. FIR was registered under Section 302/34IPC. Postmortem of the deceased was conducted. On 14.01.2011, on secret information, police raided a room at Manak Pura near Karol Bagh where one Ved Kumar met the police party who during interrogation informed that on 13.01.2011 at about 7.30 pm, his elder brother Pehalwan @ Suneshwar Baksh @ Munshi Singh came to his room at Manak Pura and informed him that he and his two friends Shankar and Mohan had murdered Pritam Singh, buffaloes supplier on 12.01.2011 at about 9.00 pm for money and robbed the money from deceased. He informed the police that his brother had gone to Village Katva Nala. Accused Pehalwan @ Suneshwar Baksh @ Munshi Singh was arrested by the police on 16.01.2011 on the identification of the complainant Shahroz Alam from Village Mehsi, District Baharaich, U.P. On interrogation, accused Pehalwan gave disclosure statement. Out of the robbed cash, Rs. 7500/- and one paper were recovered from accused Pehalwan @ Suneshwar Baksh @ Munshi Singh. The paper contained some details about the money transactions was of Pritam Singh and was identified by his son Jagjeet. Section 394 IPC was added. The iron rod seized from the spot of murder was sent to doctor for subsequent opinion as to whether the injuries mentioned on the body of the deceased were possible from the seized iron rod. The doctor in his subsequent report gave the opinion that injuries No. 1 to 6 on the body of the deceased and the cuts on the clothings could be caused by the said weapon or some similar weapon. Co-accused Shankar and Mohan could not be arrested. Process under Section 82/83 Cr. PC was initiated against them. Charge sheet under Section 302/394/34 IPC was filed against accused Pehalwan @ Suneshwar Baksh @ Munshi Singh.

2. After compliance of Section 207 Cr. PC, the case was committed to Sessions Court. Charge under Section 394/302/34 IPC was framed against the accused Pehalwan @ Suneshwar Baksh @ Munshi Singh to which he pleaded not guilty. While the case was pending trial, co-accused Mohan Rai was arrested on 24.06.2011. His disclosure statement was recorded. He pointed out the place of occurrence. The third accused Shankar could not be arrested. Supplementary charge sheet was filed against accused Mohan Rai. After committal of the same, charge under Section 394/302/34IPC

was framed against accused Mohan Rai to which he pleaded not guilty.”

4. In order to prove its case, the prosecution has examined 22 witnesses. Statements of the appellants were recorded under Section 313 Cr.P.C. wherein they pleaded not guilty. No evidence was led by the defence.
5. Ms. Rakhi Dubey and Mr. Murari Tiwari, learned counsel for the appellants in both the appeals submit that the judgment and order on sentence passed by learned trial court is based on surmises and conjectures. It is further submitted that there is no evidence on record to convict the appellants. Counsel contend that PW-1 has not supported the case of the prosecution against the appellants. It is also submitted that the present case is based on the circumstantial evidence, however, the circumstances forming a link are not established beyond reasonable doubt. The trial court has failed to appreciate the testimonies of the witnesses in the correct perspective.
6. Learned counsel for both the appellants also submit that the prosecution has failed to prove that the appellants were employed with PW-1 and PW-2, dairy owners, as no evidence has been brought on record to show that any salary was paid to these appellants by PW-1 and PW-2. Learned counsel also submit that as per the testimony of PW-1 and PW-2 a dairy was being maintained by them, however, neither the dairy has been proved nor any evidence of any independent witness has been led to show that the appellants were employed by PW-1 and PW-2. Learned counsel also submit that the trial court was unjustified while holding that it was for the appellants to prove that they were not employed with PW-1 and PW-2.

7. Ms. Rakhi Dubey, learned counsel appearing on behalf of Suneshwar Baksh, the appellant in Criminal Appeal No.1148/2013, submits that recovery of Rs.7500/- from the possession of this appellant cannot be considered as a recovery under Section 27 of the Evidence Act and, thus, it cannot be treated as an incriminating factor against the appellant Suneshwar Baksh.
8. It is also contended by Ms. Dubey that the handwritten paper containing the details of payments/accounts was planted on the appellant Suneshwar Baksh and the same is evident from the fact that PW-11 had deposed during his cross-examination before the learned trial court that the handwritten paper of the deceased was recovered from the pocket of his father and it was shown to him by the Police in Lal Bahadur Shastri Hospital on 13.01.2011. Learned counsel also submits that this is a material contradiction regarding recovery of the handwritten paper as PW-1, namely, Shehroz Alam, had deposed before the Court that the said paper, Exhibit PW-1/H, was recovered from the possession of Suneshwar Baksh after his arrest on 16.01.2011.
9. Mr. Murari Tiwari, learned counsel appearing on behalf of Mohan Rai, the appellant in Crl.A.No.1127/2013, submits that there is no reasoning whatsoever in the entire judgment with respect to the role of this appellant except a bald statement of PW-1 and PW-2 that this appellant was employed by them and he was present when the deceased had collected Rs.1.00 lakh after selling buffaloes.
10. Per contra, Ms. Aashaa Tiwari, learned APP for the State, submits that the prosecution has been able to prove its case beyond reasonable doubt. It is further submitted that the testimonies of PW-1 and PW-2 would show that the appellants were working with PW-1 and PW-2 and the appellants were present at the time when the money was handed over to the

deceased. It is contended that after the incident, the appellants had absconded, which is another incriminating factor against them. Ms. Tiwari also contends that not only Rs.7500/- was recovered but also the piece of paper containing accounts was recovered from the possession of the appellant Suneshwar Baksh.

11. We have heard learned counsel for the parties, considered their rival submissions and also examined the trial court record, judgment and order on sentence rendered by the learned trial court. Both the appellants, in their statement recorded under Section 313 of Cr.P.C., have categorically stated that they were not employed with PW-1 and PW-2, owner of the dairy. In this backdrop, the arguments of learned counsel for the appellants can be summarised as under:

- (i) The appellants have been falsely implicated in this case;
- (ii) The appellants were not employed by PW-1 and PW-2, which fact has not been proved by the prosecution;
- (iii) No recovery was made from Mohan Rai, the appellant in Crl.A.1127/2013;
- (iv) Recovery of Rs.7500/- at the time of arrest from Suneshwar Baksh, the appellant in Crl.A.1148/2013, is not a recovery in terms of Section 27 of the Evidence Act;
- (v) Exhibit PW-1/H, containing the details of accounts was planted on the appellant, Suneshwar Baksh, which is evident upon reading of the cross-examination of PW-11, son of the deceased, who had deposed that this piece of paper was found from the pocket of his father;
- (vi) The link in the chain of circumstances is not established.

12. The case of the prosecution can be summarised as under:

- (i) Evidence of PW-1 and PW-2 would show that both the appellants were employed with PW-1 and PW-2;
- (ii) Rs.1.00 lakh was handed over to the deceased in the presence of the appellants;
- (iii) the abscondence of the appellants;
- (iv) Recovery of Rs.7500/- and a piece of paper containing accounts from the appellant Suneshwar Baksh.

13. The case of the prosecution is entirely based upon circumstantial evidence. The prosecution has also relied on the last seen theory. It is a settled law that in a case based on circumstantial evidence, 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 forming a chain and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent with the hypothesis of the guilt of the accused and is totally inconsistent with his innocence.

14. 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 Supreme 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:

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.”

15. In *Trimukh Maroti Kirkan v. State of Maharashtra* reported at (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.”

16. In a recent decision in the case of **Ram Sunder Sen v. Narender @ Bode Singh Patel**, reported at 2015 (10) SCALE 710, the Supreme Court has culled out the tests which must be clearly established when the prosecution relies on circumstantial evidence. In para 15, the Supreme Court held as under:

“15. The present case is, thus, based purely on circumstantial evidence. It is a settled law that when prosecution relies on circumstantial evidence, the following tests to be clearly established:

(i) The circumstances from which an inference of guilt is sought to be drawn, must be cogent and firm;

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

(iii) 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

(iv) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the 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.”

17. Again in the case of **Rajiv Singh v. State of Bihar and Anr.**, reported at 2015 (13) SCALE 901, in paras 65 to 68, it was held by the Supreme Court as under:

“65. In his treatise, “**The Law of Evidence**”, Professor Ian Dennis while dwelling on the theme of allocation of burden in criminal cases, elaborated on the significance and purport of presumption of innocence and the general rule of the burden of proof. While reiterating the fundamental notion of criminal jurisprudence, that a person is presumed to be innocent until proven guilty and that the burden of proof in a criminal case is on the prosecution to establish the guilt of accused beyond reasonable doubt, the author underlined that the acknowledged justification of such presumption is that the outcome of a wrong conviction is regarded as a significantly worse harm than wrongful acquittal.

66. Viewed from the moral and political perspectives, it has been observed that in liberal states, the rule about the burden of proof has been elevated to the status of fundamental human right encompassing the assurance of liberty, dignity and privacy of the individual and from this standpoint it is essential that the state should justify fully its invasion of the individual's interest by proving that he had committed an offence, thereby abusing the freedom of action accorded to him or her by the liberal state. The significance of such presumption finds insightful expression in the following extract of **State Vs. Coetzee** [1997] 2 L.R.C.593, South African Constitutional Court in the words of Sachs,J.:

“There is a paradox at the heart of all criminal procedure in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become. The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences massively outweighs the public interest in ensuring that a particular criminal is brought to book Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the

scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, housebreaking, drug-smuggling, corruption... the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases."

The quintessence of the philosophy embedded in the above extract is that the presumption of innocence serves not only to protect a particular individual on trial but to maintain public confidence in the enduring integrity and security of the legal system.

*67. The evidence adduced by the prosecution dominantly is circumstantial in nature with no direct proof of the perpetration of the alleged offence by the appellant. It is a trite proposition, judicially evolved, that circumstantial evidence if it is to form the basis of conviction must be such so as to rule out every possible hypothesis of innocence of the accused and must without any element of doubt unerringly point to such culpability. This enunciation has stood the test of time over the years and the five golden principles propounded by this Court in **Sharad Birdhichand Sarda vs. State of Maharashtra** (1984) 4 SCC 116 (paragraph 153) which still authoritatively govern the process of appreciation of the circumstantial evidence and constitute the acid test to determine the guilt or innocence of an accused person, are quoted hereunder:*

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

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

*It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in **Shivaji Sahabrao Bobade v. State of Maharashtra** where the following observations were made: (SCC p. 807, para 19)*

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

(emphasis in original)

(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.”

*The theory of “**last seen together**” as an incriminating factor qua the appellant is, thus of no avail to the prosecution having regard to the state of evidence on record.*

*68. The following extract from paragraph 1504 of **Corpus Juris Secundum**, Volume 23, in our comprehension synthesises the pronounced judicial opinion with regard to the quality of circumstantial evidence to decisively prove and establish the guilt of an accused person in a criminal case.*

“While in order to sustain a conviction on circumstantial evidence, all of the circumstances proved must be consistent with guilt, circumstantial evidence will not support a conviction if it is merely consistent with guilt or creates merely a suspicion of guilt. If the circumstantial facts proved can be reconciled either with the theory of innocence or with the theory of guilt, the theory of innocence must be adopted and any conviction must be reversed, even though the theory

of guilt is the more probable. In other words, in circumstantial evidence cases, if the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, then a reasonable jury must necessarily entertain a reasonable doubt.”

18. In view of the aforesaid dictum, it is a settled law that in a case of circumstantial evidence, the Court has to examine the evidence in its entirety and ensure that the only inference that can be drawn from the evidence is the guilt of the accused. For establishing the guilt on the basis of the circumstantial evidence, the circumstances must be firmly established and the chain of circumstances must be completed from the facts.
19. In this case, the trial court has considered the following circumstances while holding the appellants guilty:
- i) The deceased, Master Pritam Singh, was a buffalo supplier, who had gone to the dairy of the complainant, PW-1, Shehroz Alam, to make money from him for supply of buffaloes;
 - ii) The appellants and one Shanker were the servants/employees on the dairy of PW-1;
 - iii) Rs.1.00 lakh was paid by PW-2 to Master Pritam Singh in the presence of the appellants and Shanker;
 - iv) When PW-2 left the dairy at 6.30 p.m., Master Pritam Singh and both the appellants were present at the dairy. When PW-2 came to dairy at 10.30 p.m., Pritam Singh was lying dead and the appellants were missing with their belongings;
 - v) The motive for murder was robbery of Rs.1.00 lakh;

- vi) The connecting link in the chain of circumstances as per the trial court was the recovery of handwritten paper belonging to Master Pritam Singh containing the details of payments from the appellant Suneshwar Baksh.

20. Before the rival submissions of the counsel for the parties can be analysed, we deem it appropriate to discuss the testimonies of some of the material witnesses. The prosecution has primarily relied upon the testimonies of PW-1 and PW-2 to prove that the appellants were employed by them.
21. PW-1, Shahroz Alam, who is the complainant, has deposed that he and his elder brother Mazhar Alam were running a dairy at Ghazi Pur and they were having 30-35 buffaloes. PW-1 has further deposed that on 11.01.2011, Master Pritam Singh, from whom they used to purchase buffaloes, came at his dairy at about 3.00-4.00 p.m. to take money from him.
22. PW-2, Mazhar Alam, has also deposed that Master Pritam Singh came at their dairy on 11.01.2011 at about 3.00 p.m. to collect money from him and the other dairy owners. PW-2 has further deposed that as and when Master Pritam Singh used to visit Delhi, he used to stay at his dairy. It was also deposed by PW-2 that the deceased stayed at their dairy on 11.01.2011. PW-2, Mazhar Alam deposed that there were three servants on their dairy, namely, Shankar, the appellants Mohan and Pehalwan. PW-2 has also deposed that on 12.01.2011 at about 6.00 - 6.30 p.m. he paid Rs.1.00 lakh to Master Pritam Singh in the presence of both the appellants, Mohan and Pehalwan, and in the presence of his third employee, Shankar. During daytime, Master Pritam Singh had collected money from other dairy owners. This witness has further deposed that he

left the dairy at 6.30 p.m. Master Pritam Singh had to stay in the dairy in the night and would return on 13.01.2011. When he left the dairy, all the three servants including both the appellants and Master Pritam Singh were present at the dairy. PW-2 has further deposed that at about 10.35 pm, he received a call from Shahroz Alam that the dead body of Master Pritam Singh was lying at the basement and that all the three servants including both the appellants were missing from the dairy. On hearing this, PW-2 along with his relatives came at the dairy where he found the body of Master Pritam Singh in a pool of blood, with his feet tied with a plastic rope. An iron rod (Sambal) was also lying near the cot. Rs.1.00 lakh and other collection of Master Pritam Singh were missing. PW-2 informed the Police about Karol Bagh address of the appellant Suneshwar Baksh.

23. PW-11, Jagjit Singh, who is the son of the deceased, has also deposed that on 11.01.2011, he along with his father came to Ghazi Pur at the dairy of Shahroz Alam for taking money from the dairy owners to whom buffaloes were sold. On 12.01.2011, he returned to his village but his father stayed there. At about 12.00 midnight, on the intervening night of 12/13.01.2011, on receipt of call from the Police that his father had been murdered at the dairy of Shahroz Alam, he along with his uncle Vriddhban and other relatives came at the dairy of Shahroz Alam and from there they went to LBS Hospital where he identified the body of his father vide memo, Exhibit PW-11/A. He identified the handwriting of his father on papers which is Exhibit PW-1/H.
24. It would also be useful to refer the testimony of PW-6, ASI Bhagwat Dayal, who deposed that on 14.01.2011 he along with Ct.Dev Dutt, Ct.Surender Bhati, Ct.Neeraj and the complainant, Shahroz Alam, went to District Ghonda, Uttar Pradesh, where they learnt that the village of the appellant Suneshwar was situated at Chowki Dabua. Local Police was

also joined. The appellant Suneshwar Baksh was not present at his village Katva Nala. An information was received that the appellant Suneshwar Baksh had gone to the house of in-laws of his sister at Village Mehshi, District Baharaich, Uttar Pradesh. The appellant Suneshwar was arrested from Village Mehshi on pointing out of Shahroz Alam while standing on the roadside. His disclosure statement, Exhibit PW-1/F, was recorded. Rs.7500/- which were in the denomination of Rs.500/- and two papers were recovered vide memo, Exhibit PW-1/G.

25. Keeping in view the aforementioned testimonies, the prosecution has been able to establish that on the fateful day, deceased Master Pritam Singh, was present at the dairy of PW-1 and PW-2. There is no cross-examination of either PW-1, PW-2 or PW-11 disputing the fact that Master Pritam Singh came to the dairy of PW-1 and PW-2 at Ghazi Pur for taking money from dairy owners or that he used to stay at their dairy during the night. Therefore, the first circumstance is proved beyond doubt.
26. The next circumstance relied upon by the prosecution was that the evidence of PW-1 and PW-2 proves that both the appellants were employed by PW-1 and PW-2 and Rs.1.00 lakh was paid to Master Pritam Singh in the presence of the appellants. This incriminating factor has been considered by the trial court to convict the appellants but the employment of appellants with PW-1 and PW-2 does not stand established and proved on record. While, it is understandable that in a small dairy, the dairy owner may not be keeping a salary register or making payments by cheque but the prosecution in our view has fallen short to prove that the appellants were employees of PW-1 and PW-2 and has not led any evidence of any independent witness to show that the appellants were employed by PW-1 and PW-2.

27. Further, the prosecution has not proved the other incriminating factor that the payment having been made in the presence of the appellants, Hence, merely assuming that the appellants were employed by PW-1 and PW-2 and their presence when Rs.1.00 lakh were paid to the deceased could not establish that they have committed the crime. At best, it can only establish their presence on the spot. In the absence of any other evidence to show that the appellants were in any way connected with the murder of Master Pritam Singh, this would not form an incriminating form of evidence.
28. So far as the motive behind causing death of the deceased Master Pritam Singh is concerned, we have observed that although as per the trial court the motive of the murder was Rs.1.00 lakh but as no recovery in terms of Section 27 of the Evidence Act has been made. As per the prosecution, Rs.7500/- were found on the person of Suneshwar Baksh. We are of the considered view that simply because Rs.7500/- was recovered at the time of his arrest that by itself would not be a ground to convict the appellant Suneshwar Baksh. The alleged recovery cannot be termed as a recovery in terms of Section 27 of the Evidence Act. Furthermore, the alleged recovery of the handwritten piece of paper belonging to Master Pritam Singh containing details of payments having recovered from the appellant Suneshwar Baksh has neither been accepted by the trial court nor proved from the testimonies of any witness and having regard to the evidence of PW-11 being the son of the deceased would show that this paper was planted upon this appellant.
29. To say that the appellants should have led the evidence to show that they were not working with PW-1 and PW-2. In our view, is not the correct position of law, as the prosecution must stand on its own legs and the onus lies on the prosecution to prove that PW-1 and PW-2 were employed

there and then only burden of proof shifts on the appellants to controvert the same.

30. As far as the appellant Mohan Rai is concerned, we have observed that the trial court while dealing with the incriminating factors, has only referred to the appellant Mohan Rai in paragraph 18 and that too with respect to the manner of his arrest. No other discussion in the entire judgment with regard to the role of this appellant has been made. Neither any recovery has been associated with this appellant. Thus, there is no incriminating factor, which would point towards the guilt of this appellant. The disclosure statement made by this appellant cannot be read in evidence against him.
31. We find the judgment passed by the trial court to be erroneous. Accordingly, the present appeals are allowed and the impugned judgment and order on sentence are set aside. The appellants shall be released forthwith unless, wanted in any other case.
32. Appeals stand disposed of.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

MAY 30, 2016

msr