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

+ **CRL.A. 1191/2012**

% **Judgment dated 19th January, 2016**

MD SHAKEEL Appellant

Through : Mr.M.L. Yadav, Adv.

versus

THE STATE NCT OF DELHI 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 appeal has been filed by the appellant under Section 374 of the Code of Criminal Procedure (in short '*Cr.P.C.*') against the judgment dated 25.8.2012 and order on sentence dated 27.8.2012 passed by Additional Sessions Judge-03, Saket Courts, Delhi, whereby the appellant has been held guilty for the offence punishable under Section 302 of the Indian Penal Code (in short '*IPC*') and for the offence punishable under Sections 25 and 27 of the Arms Act. The appellant was sentenced to undergo imprisonment for life with fine of Rs.8000/- for the offence punishable under Section 302 of the IPC. No separate sentence under Sections 25 and 27 of the Arms Act was passed since the convict was already sentenced for imprisonment for life, however, a fine in the sum of Rs.1,000/-, each for the offence punishable under Section 25 and Section 27 of the Arms Act was imposed on the appellant.

2. Before the rival submissions of the counsel for the parties can be considered, the case of the prosecution as set out by the trial court is as under:

“1. The present case is a case based on circumstantial evidence where the accused Mohd. Shakeel has faced trial for murder of one Akeel. The motive of murder attributed to the accused is his relations with the wife of the deceased. The prosecution has relied upon ‘last seen evidence’ whereas the accused has raised the defence of ‘alibi’.

2. DD No.25A was recorded on the intervening night of 26/27.04.2009 in PS Hauz Khas about a bullet shot at Hauz Khas Pahari Basti Jungle to one person Akeel, who was missing. This information was passed on by telephone to HC Ram Niwas and Addl. SHO with SI Puran Singh and Constable Satish went to the spot in Govt. vehicle.

3. On receiving the above information, Inspector Yogesh Malhotra with SI Puran Singh, Ct. Satish and Ct. Pawan reached the Jungle near Jhuggi Basti, Pahari, Hauz Khas Village where in the middle of the Jungle, a dead body was lying near bushes. The dead body was identified as that of Akeel. Blood was oozing out from the mouth of the deceased. His vest had dampened behind the neck. Blood was lying on the ground. On checking, two holes joining each other were found behind the neck and from those holes, blood was oozing out. About 10 steps from the dead body, a blood stained towel was lying which too had holes. Blood was also lying on the ground near the dead body. Police met Shahid Khan at the spot whose statement was recorded. In his statement, he stated that the deceased Akeel was son of the elder brother of his father; yesterday, on 26.04.2009 at about 8:00 p.m, he was at his Jhuggi where Gulista, wife of the deceased Akeel was searching him; on inquiries, it was found that at about 7:00 p.m, Akeel had gone in the Jungle to bring leaves for the goats but had not returned back; Shahid, his younger brother Wahid,

Akeel's younger brother Jahil, his brother-in-law Usman and their other relatives Sarfaraz, Saleem, Sabir and Sonu went in search of Akeel; at around 12:00 mid night, when they were coming from the Jungle, Usman saw Akeel's dead body on the ground; he dialed 100 number from his mobile phone. On this statement, rukka was prepared and the FIR was got registered through Ct. Satish. Crime Team was called at the spot and the dead body was got photographed. Site-plan was prepared at the instance of the informant. The blood samples, earth-control and blood stained towel etc. were lifted from the spot. A wallet was recovered from the pocket of the deceased which was seized. The dead body was sent to AIIMS Mortuary for post-mortem. In the post-mortem report, cause of death was shock due to gun shot. The bullets and pallets recovered from the dead body of the deceased were seized.

4. During investigation, Police came to know that accused Shakeel was in love affair with Gulista, wife of the deceased and in order to do him away, the accused killed the deceased. He also got recovered the weapon of offence i.e Katta from the Jungle.

5. After completion of the investigation, charge-sheet was filed against the accused. However, since the offence under Section 302 IPC is exclusively triable by the court of Sessions, this matter was committed to this court for trial.

6. On 22.02.2010, accused was charged under Section 302 IPC and under Section 25/27 of the Arms Act to which he pleaded not guilty and claimed trial."

3. In order to prove its case, the prosecution has examined as many as 22 witnesses, which has been divided into three categories by the learned trial court i.e. (i) Medical and Scientific witnesses; (ii) Public witnesses and (iii) Police witnesses.
4. Statement of the accused was recorded under Section 313 of the Code

of Criminal Procedure. No evidence was led by the defence.

5. At the outset, Mr.Yadav, learned counsel for the appellant, submits that the judgment passed by learned trial court is not sustainable in the eyes of law, as the same is based on conjectures and surmises and there is no admissible evidence available on record, which can make out a case under Section 302 of the IPC against the appellant herein. Counsel further submits that the impugned judgment passed by the learned trial court suffers from various legal infirmities. Counsel contends that the trial court has failed to scrutinise the evidence of the witnesses in an objective manner. It is contended that there are material improvements in the testimonies of the witnesses.
6. Mr.Yadav further submits that at the time when the rukka was recorded, in the statement made by Shahid, brother of the deceased, he has stated that the wife of the deceased had told him that at about 7.00 p.m. the deceased had gone to the jungle to collect leaves and had not returned, however, this document does not mention the name of the appellant and, thus, the theory of last scene is an afterthought and the appellant has been falsely implicated in the matter. It is further submitted that there are contradictions in the testimonies of Gulista, Zahid, Wahid, Islam, Saleem and Shambhu Mukhia regarding the theory of last scene. Counsel contends that in the evidence of PW-6, it is clear that the appellant had called him and informed him that he is in Gurgaon and, thus, he could not have committed the crime.
7. Learned counsel for the appellant further submits that the prosecution has failed to produce the call records to show that the appellant was in the vicinity when the crime was being committed. Counsel further

submits that the prosecution has failed to establish the motive while on the other hand there is ample evidence to show that the deceased and the appellant were very good friends and there was no reason for the appellant to have murdered a good friend.

8. Mr.Yadav next contends that the trial court has wrongly reached a conclusion that the injury on the face of the appellant was a fresh injury and not considered the explanation of the appellant that the injury occurred as the door of Maruti Car had hit him on the face. Counsel further contends that the appellant cannot be connected with the offence based on the recovery of *Katta* as in the opinion of expert, the *Katta* was not used in the commission of offence. Counsel also contends that at the time of recovery of the *Katta*, no independent witness was associated and, thus, the recovery is not admissible against the appellant.
9. Ms.Tiwari, learned counsel for the State, submits that the prosecution has been able to establish its case beyond any shadow of doubt. It is further contended that as many as five witnesses, being PW-9 to 12 and 17 have supported the case of the prosecution that the deceased was last seen in the company of the appellant. Counsel contends that evidence of PW-9 to 12 and 17 is consistent, reliable and there was no motive for them to testify against the appellant.
10. It is further contended by counsel for the State that the law with regard to last seen is well-established and in the present case, according to the witnesses, the deceased was last seen in the company of appellant between 6.00 p.m. and 7.00 p.m. and as per the post-mortem report the time of death could have been any time between

7.15 p.m. to 11.15 p.m. Thus, the Court has rightly relied upon the theory of last seen and convicted the appellant.

11. Ms.Tiwari further submits that once the deceased was last seen in the company of the appellant, the onus would shift to the appellant to show that he was not with the deceased. In any case, no defence evidence has been led to show that the appellant was in Gurgaon and not present at the time of the incident in Delhi. It is further contended by Ms.Tiwari that as far as the injury on the appellant is concerned, the Doctor, PW-16, has opined that the injury could have been from the splinter of bullet/pistol or thorny bushes. It is next contended that this witness was not cross-examined, neither any question was put to this witness to the extent that as to whether the injury could have occurred from the door of a Maruti car or not. It is further submitted by Ms.Tiwari that *Katta* was recovered at the instance and on the pointing out of the appellant in the presence of an independent witness, Mr.Mohd. Zahid, PW-17, whose signatures are appended on the seizure memo (Exhibit PW-17/D). Counsel further contends that it is wrong to suggest that the *Katta* was not linked to the commission of the crime. Learned counsel for the respondent has drawn the attention of the Court to the testimony of PW-20, Sh.K.C. Varshney, Assistant Director, Ballistic Division, FSL, Rohini, Delhi, wherein he has stated that no specific opinion can be given due to insufficient data.
12. We have heard learned counsel for the parties, considered their rival submissions and carefully examined the evidence on record.
13. The Trial Court based on the evidence of the last seen of the appellant with the deceased has convicted the appellant. The Trial Court has

also considered the medical and scientific evidence.

14. The first submission of Mr.Yadav, learned counsel for the appellant, is that the evidence of last seen is a very weak form of evidence and the time gap between the time when the deceased was last seen alive and when the deceased was found dead was approximately seven hours. Thus, on this ground, the appellant cannot be held guilty. Mr.Yadav further submits that the testimonies of the witnesses wherein it has been testified that the deceased was last seen in the company of the appellant are unreliable and untrustworthy. To test this submission of learned counsel for the appellant, evidence of PW-9 to PW-12 and PW-17 are to be examined. The evidence of PW-9 to PW-12 and PW-17, as noticed by the trial court, read as under:

“7.B.6 PW-9 Wahid deposed that on 26.04.2009, his brother Zahid had come from Village. Nizam talked to Zahid on telephone. Zahid requested him to go to Madangir to return his motorcycle to the dealer. He changed his clothes outside his jhuggi. He saw Shakeel going from there and after him Akeel was going towards jungle and they both went inside the jungle. When they returned from Madangir, Gulista was searching for Akeel. He alongwith 4/5 more persons went in the jungle to search Akeel. When they were coming back, Usman saw Akeel lying dead there. He was wearing a baniyaan and a pant. He had a bullet wound on the back portion of his neck. Blood was lying there. One towel belonging to Akeel was also there. In his cross-examination, he stated that he had seen Shakeel going in the jungle and behind him, Akeel entered in the jungle. There was a distance of about 1-2 steps between them. They started to deposit motorcycle to Madangir at about 6/6.15pm.

7.B.7 PW-10 Gulista has deposed that her husband Akeel had developed friendship with Shakeel. Shakeel used to come at her

jhuggi very often. Her younger sister's marriage was fixed with Shakeel. After this, Shakeel started visiting his jhuggi more frequently. He used to come during the absence of her husband. Accused used to take liberty with her and also used to embrace her saying that now there is a rishta of Saali and Jija between them. She did not like it, but used to keep quiet considering her husband's friendship with him and also for the reason that marriage proposal of her sister may not break with the accused. Some people had come to know about frequent visit of Shakeel in her jhuggi and his activities with her. Her Chachiya Sasur Zahir had objected regarding the visit of Shakeel in her jhuggi but her husband did not object about his visit as he was very friendly with the accused. Javed s/o Sarfaraz had taken some photographs of Shakeel with her, which he had shown to some of her relatives. On 26.04.2009, at about 4.00 pm, Akeel and Salim went to jungle to take leaves. After ½ an hour, both returned. Akeel went to jhuggi of Shakeel to watch TV. After watching the cricket match, he went in the jhuggi of Shakeel. She sent her daughter at the jhuggi of Shakeel to bring some oil for cooking. Her daughter Gul Afshan told her that Akeel and Shakeel were talking in the jhuggi. In the meantime, her Devar came on his motorcycle. At about 6.00 pm, her husband came to her jhuggi and took a towel and went with Shakeel into the jungle again. Her husband told her that he would come in a short time after collecting leaves, but he did not return for a long time. She sent her daughter at the jhuggi of Shakeel to see if Shakeel had come back, but Shakeel was not present at his jhuggi. Then, she enquired from Salim and requested him to have a talk with Shakeel from his phone. Salim told her that he had received a call from Shakeel saying that he was in Gurgaon and to inform at his jhuggi that his food should not be prepared. After this, her Devar Jahid came back after returning his motorcycle. She told her Devar that Akeel has gone with Shakeel and had not returned so far. After some time, a telephonic call of Shakeel came on the mobile phone of Salim. She talked to Shakeel and enquired about Akeel, to which Shakeel replied that Akeel was not with him and told her that he had left Akeel in the Hauz Khas itself. After 10-15 minutes,

Shakeel also came back at our Jhuggi. She had noticed some injury on his face below right eye. She asked about the injury, to which he replied to be injury from the door of Maruti car. Her husband was found dead in the jungle. She has seen the photographs Mark 10/A-1 to A-11, which were of her and of accused Shakeel. In her cross-examination, she stated that she had no sexual relation with Shakeel. She does not know when Javed had clicked the photographs. About one month before the death of her husband, Javed and his father Sarfaraz had been saying that Shakeel should not come to our house. Akeel had never said that Shakeel should not come to house as he used to consider Shakeel as his good friend.

7.B.8 PW-11 Shambhu Mukhia deposed that on 26.04.2009, he had gone in the Jungle for collecting wood. At about 6:30-7:00 p.m, he met Akeel alongwith one Saleem Juicewala. When the witness was returning with wood, he met accused Shakeel in the Jungle. He heard some noise of some blasts after he met Shakeel. Next day, he came to know that Akeel had died.

7.B.9 PW-12 Islam deposed that about one year back, he met Shakeel on the way when the witness had come back after his Pheri, then both of them went in Islam's Jhuggi and slept there. At about 5:00-6:00 p.m, they got up at that time Akeel was sitting outside Islam's Jhuggi. Akeel's brother Jahid had come on a Motorcycle and Akeel had a talk with him. Shakeel, Jahid and Akeel left from there towards Jhuggi of Akeel. At about 8:00-9:00 p.m, he got a message through daughter of Juice-wala that Shakeel was in Gurgaon and his food should not be prepared. At about 10:00-11:00 p.m, he came to know that Akeel was shot dead in the Jungle. Witness was not cross-examined, although, opportunity was given.

7.B.11 PW-17 Mohd. Jahid deposed that on 26.04.2009, his elder brother Akeel and his wife Gulista were living in Jhuggies. He alongwith his brother Shahid and Imran came back to Delhi on his Motorcycle on 26.04.2009 as he had not paid installment of Motorcycle and he had to deposit his

Motorcycle. At about 5:00 p.m when he reached at the Jhuggi of Shakeel, he saw Pheriwala Islam, Shakeel, Gapucha @ Jaseen and his brother Akeel present there. In the meantime, phone call of his Mama Nizam came on the mobile phone of Wahid regarding deposit of Motorcycle and at his instance Wahid went to his Jhuggi for wearing pant. At about 6:00-6:15 p.m, he saw Shakeel was already present in the Jungle and his brother Akeel was going towards Jungle with him after having towel around his neck. Thereafter, he alongwith Wahid went to deposit the Motorcycle at Madangir from where they returned at about 8:45 p.m and he asked from Gulista about Akeel when she told him that he was not there and she also searched for him in nearby Jhuggies. Witness asked from her about Shakeel and she told that he had gone to Gurgaon. He telephoned his nephew Musthir and asked about Akeel and Shakeel when he was told that Shakeel was there. He inquired from Shakeel about Akeel but Shakeel told him that Akeel had not gone with him. After that Akeel was searched but his dead body was found in the Jungle. He told the police that he had seen his brother with Shakeel. He stated that after taking the dead body from the hospital, they went to their native village for burial and returned on 27.04.2009. On 02.05.2009, accused Shakeel was brought to Jungle but he improved his statement by saying that Shakeel took him and the police official to Jungle and after crossing the Nala, he got recovered one .12 bore Katta after digging from soil from 'V' shape Season tree. The barrel of the said Katta was separated in broken condition from the handle and the barrel was having a cartridge. He proved the seizure memo of Katta as Ex. PW17/D and the sketch of the Katta as Ex. PW17/E. The broken barrel of Katta, butt of Katta and the empty cartridge were identified by the witness in the court and the same were exhibited as Ex. P-1, P-2 and P-3 respectively. In his cross-examination, he denied the suggestion that he was not in Delhi on the relevant day and time. He also denied the suggestion that he had not seen the deceased with the accused at the relevant date and time. He denied the suggestion that no Motorcycle was supposed to be deposited on the relevant date by him. He stated that the Jungle is about 75 meters away from

the Jhuggi of accused Shakeel. He stated that there are other Jhuggies between the Jhugi of Shakeel and Jungle but he could not tell as to how many Jhuggies were there.”

15. PW-9, Wahid, has categorically deposed that he had seen the appellant and the deceased going inside the jungle.
16. PW-10, Gulista, wife of the deceased, has also testified that on 26.4.2009 at about 4.00 p.m., her deceased husband and the appellant went to the jungle to bring leaves and after one and a half hours, both returned. Her husband went to the jhuggi of the appellant to watch TV. She had sent her daughter to the jhuggi of the appellant to bring some oil for cooking. Her daughter had confirmed to her that the deceased and the appellant were talking in the jhuggi. Then the husband returned to her jhuggi, took a towel from the jhuggi and went with the appellant into the jungle again. This witness has further testified that since her husband had not returned, she enquired from one, Salim, and requested him to talk to the appellant from his phone. Salim informed her that he had received a call from the appellant, who informed him that he is in Gurgaon. After sometime, a telephonic call of Shakeel was received on the mobile phone of Salim. PW-10 has also testified that she had talked to the appellant on the mobile phone of Salim and enquired from him about her husband, to which the appellant had informed her that he had left her husband in Hauz Khas itself.
17. PW-11, Shambhu Mukhia, has also deposed that at about 6.37 p.m., he had met appellant with the deceased.
18. PW-12, Islam, has also deposed that he had seen the appellant with

the deceased.

19. PW-17, Mohd. Jahid, has also deposed that he had last seen the deceased and the appellant going to the jungle together.
20. On the aspect of last seen theory, it has been held by the Hon'ble Supreme Court in the case of ***Bodhraj v. State of Jammu & Kashmir, (2002) 8 SCC 45***, that:

31. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased, A-1 and A-2 were seen together by witnesses i.e. PWs 14, 15 and 18 in addition to the evidence of PWs 1 and 2."

21. Similar view was taken by the Hon'ble Supreme Court in the case of ***State of U.P. v. Satish, (2005) 3 SCC 114***.
22. The above stated view has been further corroborated in the case of ***Ramreddy Rajesh Khanna Reddy v. State of A.P., (2006) 10 SCC 172***, wherein it has been held by the Hon'ble Supreme Court that:

"27. The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible.

Even in such a case the courts should look for some corroboration.”

23. Applying the law laid down to the facts of the present case, the submission of the learned counsel for the appellant that the time gap between the appellant and the deceased having last seen together and discovery of the dead body of the deceased should be so small that the possibility of any other person other than the accused having committed the crime is established.
24. PW-10, Gulista has deposed that at about 6:00 p.m., her husband Aakil went in the jungle with Shakeel. PW-11, Shambu Mukhiya stated that on 26.04.2009 at about 6:30 or 7:00 p.m., he met Aakil with Salim and when he was returning with woods met Shakeel in the jungle. PW-17, Mohd. Zahid has also deposed that he had seen Shakeel in the jungle and Aakil was also going in the jungle with him. In view of the fact that at least four witnesses have seen the appellant with the deceased between 6-7 p.m. and the time gap in this case is very small between the point of time when the appellant and the deceased were last seen and thus, there is no possibility of any other person than the appellant herein being the perpetrator of the crime.
25. The post mortem report also gains importance. PW-1, Dr. Shiv Prasad, who conducted the post mortem on the body of the deceased on 27.04.2009 at 11:15 a.m. stated that the time of death of Aakil was about 12 to 16 hours which would translate between 7:15 to 8:15 p.m. on 26.04.2009. The dead body of the deceased Aakil was found at 12:00 a.m. on 27.04.2009. Thus, the argument with regard to the time gap being large is without any force.

26. The prosecution has relied heavily on the testimonies of PW-9, PW-10, PW-11, PW-12 and PW-17 to show that the deceased was last seen alive in the company of the appellant. On careful analysis of the testimonies of above witnesses, we find their testimonies to be reliable and trustworthy and firmly establish that the deceased was last seen in the company of the appellant.
27. A general submission was made before us that there are contradictions in the evidence of the witnesses, who claim to have seen the deceased with the appellant, but no specific contradiction has been pointed out. The contradictions, if any, in our view, are such which do not go to the root of the matter. Also having regard to the social background of the witnesses, we find the ground raised by the counsel for the appellant to be without any force.
28. Another factor which is to be taken into consideration is that the appellant has not rendered any explanation as to when he left the company of the deceased. Once the evidence of last seen was established, the appellant should have satisfied the Court as to when he left the company of the deceased.
29. In the case of *State of Rajasthan v. Kashi Ram*, reported at 2006 AIR SCW 5768, it was held that accused is duty bound to show as to when he left the company of the deceased as it was only in the knowledge of the accused and Section 106 of the Evidence Act applies in such circumstances. Same was held in the case of *Joseph v. State of Kerala*, reported at (2000) 5 SCC 197. In the case of *Ram Gulam Chaudhary and Ors. v. State of Bihar*, reported at (2001) 8 SCC 311 the facts proved at the trial were that 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. It was held:

"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".

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

"Therefore, it has become obligatory on the appellants to satisfy the court as to how, where and in what manner Vadivelu parted company with them. This is on the principle that a person who is last found in the company of another, if later found missing, then the person with whom he was last found has to explain the circumstances in which they parted company. In the instant case the appellants have failed to discharge this onus. In their statement under Section 313 CrPC 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. The principle has been succinctly stated in *Re. Naina Mohd.* AIR 1960 Madras 218. 24. There is considerable force in the argument of counsel for the State that in the facts of this case as well it should be held that the respondent having been seen last with the deceased, the burden was upon him to prove what happened thereafter, since those facts were within his special knowledge. Since, the respondent failed to do so, it must be held that he failed to discharge the burden cast upon him by Section 106 of the Evidence Act. This circumstance, therefore, provides the missing link in the chain of circumstances which prove his guilt beyond reasonable doubt.”

31. In the absence of any explanation rendered by the appellant, the prosecution has been able to establish an additional link in the chain of circumstances to prove the guilt of the appellant. We may,

however, hasten to add that Section 106 of the Evidence Act would in no way shift the proof of burden which rests solely on the prosecution. But, in terms of Section 106 of the Evidence Act, an accused must render an explanation on facts which are within the special knowledge.

32. A faint argument was also raised before us that the prosecution has failed to prove any motive in this case. The photographs of the appellant with Gulista, wife of the deceased were specifically put to the appellant as Q.No.9 in his examination under Section 313 Cr.P.C. The memory card of the mobile of which the photographs were shown was proved as Ex.P-11. The only explanation rendered by the appellant was that the photograph was manipulated. This argument of the appellant is also without any force.
33. Another submission made by Mr. Yadav was that the recovery of *katta* from the appellant is not reliable. In our view, PW-17, Mohd. Zahid, PW-18, SI Pooran Singh and PW-21, Inspector Yogesh Malhotra have testified that based on the disclosure statement, the appellant led them to the jungle from where he got recovered the *katta* in question. The recovery memo bears the signatures of the IO, SI Pooran Singh and Zahid. The submission that the recovery is unreliable as no public witness has been associated is also without any force as the recovery memo Ex.PW17/D bears the signatures of Zahid, who is a public person.
34. Interestingly, in this case the appellant herein had also suffered an injury under his eye. As per the prosecution, this injury was caused by the splinters of *katta*. The appellant was examined and his MLC

was prepared as Ex.PW16/A on 04.05.2009 at 11:30 a.m. As per the MLC, the patient was brought by Constable Jagdish for medical examination with alleged h/o getting injured while firing a pistol by the splinters of pistol(country made) on 26.04.2009. A black scabbed abrasion of size 0.6 cm x 0.5 cm was found present below the outer angle of right eye of the accused. The Doctor opined that the age of this injury was about one week and the same was produced by a blunt force impact. He further stated that possibility of injury caused by splinters of pistol or by thorny bushes cannot be ruled out. The explanation rendered by the appellant with regard to the injury was that he had sustained the same by the door of the car. This theory of the appellant is not supported by the medical opinion, as per which the injury could have been caused by splinters of pistol while firing or by thorny bushes. In any case, no evidence was led by the defence to explain the injury alleged to have been sustained by a door of the car.

35. The case of the prosecution is entirely based on circumstantial evidence. It is 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 only with the hypothesis of the guilt of the accused totally inconsistent with his innocence.
36. 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.”

37. 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.”

38. 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.
39. In 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 complete from the facts.
40. Based on the testimonies of the witnesses which clearly establish that the deceased was last seen in the company of the appellant; based on the post mortem report which established that the time of the death of

the deceased shows that the time gap can be between the point when the appellant and the deceased were last seen alive is rather small, the weapon of offence a *katta* having been recovered; based on the disclosure of the appellant no plausible explanation rendered by the appellant with regard to the injury under his eye, we are of the considered view that the prosecution has been able to fully prove the circumstances which form a complete chain which point towards the guilt of the appellant.

41. Accordingly, we find no merit in this appeal; the same is dismissed.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

JANUARY 19, 2016 msr