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

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Judgment dated 3rd May, 2016

+ **CRL.A.1448/2014**

RAJEEV OHLAN

..... Appellant

Through : Mr. R.N. Mittal, Senior Advocate and Mr.
Sandeep Agarwal, Advocate with Mr.
Manoj Kumar and Ms. Suman Rani,
Advocates

versus

STATE(NCT OF DELHI)

..... Respondent

Through : Ms.Aashaa Tiwari, APP for the State with
Inspector C.L. Meena, P.S. Punjabi Bagh.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J (ORAL)

1. Present appeal is directed against the judgment dated 12.08.2014 and order on sentence dated 25.08.2014 passed by learned Additional Sessions Judge, in case FIR No.814/2000 registered at Police Station Punjabi Bagh, whereby the appellant has been convicted for the offences punishable under Sections 302/201 of the Indian Penal Code and directed him to undergo imprisonment for life for the offence punishable under Section 302 of the Indian Penal Code with a fine of Rs.40,000/- and in default of payment of fine to undergo Simple Imprisonment for one year. The appellant was further sentenced to undergo Rigorous Imprisonment of three years for the offence punishable under Section 201 of the Indian Penal Code with a fine of Rs.10,000/- and in default of payment of fine to undergo Simple Imprisonment for two months.
2. Mr. Mittal, learned Senior Counsel for the appellant submits that the impugned judgment and order on sentence are against the facts and law, is

based on surmises and conjectures and, thus liable to be set aside. Mr. Mittal, learned Senior Counsel submits that being a case of circumstantial circumstance, the Trial Court has taken into account the factors of last seen, recoveries, and pointing out of the place where the deceased was murdered, the Trial Court has also relied upon the scientific evidence to prove the guilt of the appellant, whereas the witnesses have failed to support the case of the prosecution.

Mr. Mittal contends that out of the five witnesses of last seen, three independent witnesses have turned hostile, barring two witnesses being PW-5 Constable Chidda Singh and PW-11, Constable Pradeep Kumar, who are police witnesses. It is contended that the testimonies of PWs-5 and 11 are not reliable or trustworthy. Mr. Mittal contends that the statement under Section 161 of the Code of Criminal Procedure of PWs-5 and 11 are stated to be recorded on 12.09.2000, whereas there is serious doubt on the actual date when the statements were recorded. Mr. Mittal contends that introduction and preparation of case diary with no.4A is the first ground of suspicion with regard to the testimonies of PWs-5 and 11 as case diary no.4A contains the statements of SPWs-5 and 11 dated 12.09.2000.

Elaborating his argument further, Mr. Mittal learned Senior Counsel submits that as per the case diary no.4, it is dated 12.09.2000, this case diary was produced before the MM has been initialed by the MM on 13.12.2000 and in case the case diary no.4A containing the statements of the witnesses last seen was also purported to be dated 12.09.2000 was in existence on 12.09.2000, the same would also have been produced before the MM and initialed by the MM.

Counsel submits that it is highly unusual that the IO of the case would authorize a person junior in rank to record statement with regard to

most important aspect of the case, *i.e.*, evidence of last seen, the IO, being PW-41 Inspector R.K. Ojha authorized PW-40 SI Balihar Singh to record the statement of the most important and crucial witnesses under Section 161 of the Code of Criminal Procedure.

3. The second ground urged by the learned Senior Counsel is that evidence of PWs-5 and 11 who claimed to be witnesses of last seen is not beyond suspicion for the reason that in case both PWs-5 and 11 had seen the deceased last in the company of the appellant on the fateful day which was 06.09.2000, they would not have waited till 12.09.2000 to bring this important fact to the notice of the SHO concerned.
4. The judgment of the Trial Court is also assailed on the ground that the other three witnesses of last seen being PW-7, Aneesh Kumar, PW-8, Hari Ram and PW-9, Mohd. Naim Ul-Islam have turned hostile. PW-10, Ramesh Garg has supported the prosecution in part with respect to Maruti Esteem car, but PW-10 has categorically stated that he does not identify the appellant, thus the prosecution could not have gained any advantage based on the testimony of PW-10.
5. Mr. Mittal submits that it is a strange coincidence that even with regard to the recovery of articles, two case diaries being no.7 and 7A entries were maintained. Case diary no.7A was filled up by Inspector Dinesh Kumar(PW-32). Mr. Mittal submits that the IO again did not record the statement with regard to the recoveries but authorized Dinesh Kumar(PW-32).
6. Mr. Mittal, learned Senior Counsel contends that all the recoveries which are the basis of convicting the appellant are planted. It is contended that according to the prosecution, the mobile phone of the deceased was recovered from the room of the appellant. Counsel submits that this mobile phone which is alleged to have been recovered from the room of the

appellant has not been connected to the deceased. There is no evidence on record to show that the deceased was either the owner or he was provided this mobile phone by the State or ever he used this mobile phone. No evidence regarding ownership or of the service provider was produced to link the mobile phone with the deceased. It is thus, contended that firstly, the recovery is doubtful and, secondly, the mobile phone could not have been recovered from the appellant or linked to the deceased because as per the disclosure statement, the mobile phone was broken on the road after the incident.

7. Counsel further contends that the second recovery which has been relied upon by the prosecution is the pant of the deceased. It may be noticed, at this stage, that the dead body was found in an underwear and thus, it is contended that the pant was recorded at the instance of the appellant. Counsel submits that it is highly improbable that after the murder was committed, the pant of the deceased would be kept by the appellant with him in the bushes, while neither the shirt nor any other articles belonging to the deceased were kept along with that. Learned Senior Counsel for the appellant contends that the pant did not contain any blood. Further, there is no evidence that the pant so recorded was worn by the deceased at the time of the murder.
8. The third recovery, according to the prosecution, is the identity card of the deceased. Mr. Mittal submits that this identity card was planted which is evident from the testimony of the wife of the deceased, PW-2, Jayantri Devi who has testified that after the demise of her husband, she was asked for an old identity card of the deceased which was handed over. Mr. Mittal submits that this identity card was issued to the deceased in the year 1990 and also there was no reason for the appellant to keep the old identity card.
9. The counsel further submits that as far as the recovery of Maruti Esteem is

concerned, the testimony of PW-39, Ashok Tyagi would show that the father of the appellant had driven the Maruti car to the office of PW-39 and it cannot be said that the same was recovered at the instance of the appellant.

10. It is next contended by Mr. Mittal, learned Senior Counsel appearing for the appellant that the pointing out of the spot by the appellant is of no legal consequence and is not admissible in evidence under Section 27 of the Evidence Act as the place of the incidence was already in the knowledge of the police which is evident upon the reading of the testimony of PW-41, R.K. Ojha IO of this case.
11. It is also contended that the reliance placed by the learned Trial Court on the scientific evidence is highly misplaced. It is submitted that as per the prosecution, hair of the deceased were recovered from the Maruti Esteem car where he was last seen along with the accused persons. Counsel contends that the prosecution has relied upon the blood found on the shocker of the car, but no specific evidence with regard to blood grouping was obtained which would connect the deceased with the blood on the car. It is submitted that the hair and blood were sent to FSL in Delhi and Kolkatta. It is contended that as per the prosecution, PW-12, SI Yashpal, PW-26, A.K. Srivastava, had come to the spot and had collected the hair samples, whereas in the testimony of PW-26, A.K. Srivastava, there is no mention that he had come to the spot and collected the samples. Thus, the lifting of the hair samples is highly doubtful. It is also contended that the seizure memo Ex.PW12/A does not contain the signatures of PW-26, A.K.Srivastava.
12. Mr. Mittal, learned Senior Counsel while drawing the attention of the Court to the FSL report Ex. PW-26/B submits that the only opinion which has been given is that the hair was human hair and human blood, but no

grouping has been given and it is highly unbelievable that the hair so collected did match with the hair collected from the room of the deceased which was admittedly occupied by two persons. In the absence of positive conclusive source of the link of the hair, no reliance can be placed on the report of the FSL. Counsel for the appellant has placed reliance on the following judgments:

- (i) ***Pulukuri Kottaya v. King Emperor***, decided on 19th December, 1946;
- (ii) ***State of Bombay v. Kathi Kalu Oghad***, AIR 1961 SC 1808;
- (iii) ***Madhu v. State of Kerala***, (2012) 2 SCC 399;
- (iv) ***Jaffer Husain Dastagir v. The State of Maharashtra***, AIR 1970 SC 1934;
- (v) ***Mohd.Aman and Another v. State of Rajasthan***, AIR 1997 SC 2960;
- (vi) ***Mahavir Singh v. State***, (CrI.A.688/2007) decided on 30th July, 2009;
- (vii) ***Surinder Pal Jain v. Delhi Administration***, AIR 1993 SC 1723;
- (viii) ***Anjlus Dungdung v. State of Jharkhand***, AIR 2005 SC 1394;
and
- (ix) ***Balwinder Singh v. State of Punjab***, AIR 1996 SC 607.

13. Ms. Aashaa Tiwari, learned APP for the State submits that the prosecution has been able to prove its case beyond all reasonable shadow of doubt. Five witnesses were examined who had last seen the deceased with the appellant. No doubt three of the witnesses have turned hostile. She submits that if the testimonies of the police witnesses is consistent and cogent, there is no reason to doubt the evidence of police witnesses. She submits that there is no evidence that PWs-5 and 11 were enmical to the appellant and nothing has been placed on record which would suggest why

the appellant would be falsely implicated in this case. She contends that PWs-5 and 11 have categorically stated that they had last seen the deceased in the company of the appellant on 06.09.2000, after which he disappeared. She submits that the appellant has not been able to dent the testimonies of PWs-5 and 11. Ms. Tiwari further submits that the preparation of the case diaries no.4A and 7A have unnecessarily been highlighted. Ms. Tiwari submits that it is not unusual that during the course of the investigation, in case investigation is marked to another officer in the ordinary course of business as in the present case additional diary is prepared and numbered as 'A' (4A and 7A as in this case) and there is nothing unusual in the same. She further submits that the mobile phone, pant, identity card were recovered at the instance of the appellant and based on the recoveries, the learned Trial Court has passed a reasoned order which should not be varied. Counsel further submits that it is only on the pointing out of the appellant that the place of the incident was discovered. It was only within his special knowledge and, thus it is admissible in evidence. She has relied upon the reports of the FSL from Kolkatta as per which the hair which was found in the car had matched with the hair of the deceased. Ms. Tiwari submits that the DNA test was conducted and the blood which was found on the *rori* matched with the blood of the deceased. Counsel contends that the recoveries are duly corroborated by the evidence of PWs-4, 17 and 32 and based on the recoveries the appellant has been rightly convicted. Counsel further submits that the post mortem report confirms the date and time of death and the submission made by Mr. Mittal, learned Senior Counsel for the appellant, that the dead body was decomposed as the existence of the dead body would suggest that it was discovered only after two-three days, is not correct while it is the case of the prosecution that the post mortem report was conducted within 12 hours of the recovery of the dead body.

14. We have heard the learned counsel for the parties and considered their rival submissions. The counsels have also taken us through the judgment of the Trial Court and the entire record of the Trial Court.
15. The case of the prosecution is based on circumstantial evidence. The prosecution has relied on the following circumstances to prove the guilt of the appellant:
- (i) Circumstance of last seen;
 - (ii) Recovery of pant, identity card and mobile phone of the deceased;
 - (iii) Pointing out of the place of incident;
 - (iv) Recovery of Maruti Esteem car; and
 - (v) Hair of the deceased from the Maruti Esteem car belonging to the appellant.
16. Before we consider each circumstance, it would be useful to revisit the law which is well settled relating to 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.
17. 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.”

18. 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.”

19. 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.
20. In a recent decision in the case of ***Ram Sunder Sen v. Narender @ Bode Singh Patel***, reported at 2015(10) SCALE, 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.

.....”
21. Again in the case of ***Rajiv Singh v. State of Bihar***, reported at 2015(13)

SCALE, 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 synopsis 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[1], circumstantial evidence will not support a conviction if it is merely consistent with guilt[2] or creates merely a suspicion of guilt[3]. 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[4], even though the theory of guilt is the more probable[5]. 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[6].”

22. In case of circumstantial evidence, the Court has to examine the entire 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.

(i) **LAST SEEN:**

23. PW-5, Constable Chidda Singh, PW-11, Constable Pardeep Kumar, PW-7,

Aneesh Kumar, PW-9, Mohd. Naim Ul-Islam and PW-10, Ramesh Garg were examined by the prosecution to prove that the deceased was last seen in the company of the accused, appellant herein.

24. We may notice that PW-7 and PW-9 have turned hostile and they did not support the case of the prosecution.
25. As far as PW-10 is concerned, he has testified that on 06.09.2000 at about 5:30 p.m., he had gone to Police Station Punjabi Bagh to meet the deceased with whom he remained for almost 2½ hours. At about 8:00 p.m., he was standing at the gate of the Police Station with the deceased when one person had come in a Maruti Esteem car, but he could not identify the person who had come in the Esteem car. The witness was asked to take a round in the court room and state as to whether the said person was present or not, but he could not identify the person. The testimony of PW-10, in our view, is of no value to the case of the prosecution.
26. PW-5 and PW-11 have supported the case of the prosecution. The Trial Court has relied upon the testimonies of these two witnesses and also relied upon the testimony of PW-10. After discussing the law in the matter that testimony of a hostile witness cannot be discarded and that portion of the testimony which inspires confidence can be relied upon, the Trial Court relied upon the testimony of PW-10 as far as it related to the fact that, PW-10, when he was standing with the deceased one person had come in a Maruti Esteem car.
27. PW-5 has testified that he was posted at Police Station Punjabi Bagh. On 06.09.2000, he was on Beat duty at Punjabi Bagh. At about 9:00 p.m., after taking a round in his Beat, he came in front of Alkakaauri Restaurant. He

saw one golden coloured Esteem car parked in front of the Restaurant. Accused was present, who he identified in court, was sitting on the driver's seat and the deceased was sitting besides him. Both were eating their meal. He further deposed that he knew the appellant as he used to come to the Police Station. He further testified that the deceased was in police uniform when he saw him in the car with the accused. He also testified that his statement was recorded on 12.09.2000. During cross-examination, he testified that he had seen the accused and the deceased eating and drinking, but he did tell this fact to anybody.

28. PW-11 is another witness of last seen. PW-11, Constable Pardeep Kumar testified that on 06.09.2000, he was posted at Police Station Punjabi Bagh and was working as a Munshi from 5:00 p.m. to 1:00 a.m. at night. At about 8:00-8:15 p.m., the deceased had gone with the accused in his golden coloured Esteem Car. Deceased was sitting at the front seat. He was in his uniform. He had last seen the deceased with the accused on 06.09.2000 between 8:00-8:15 p.m. During cross-examination, this witness testified that his statement was recorded by the IO in this case on 14.09.2000. He stated that it was correct that before 14.09.2000, neither he told about the facts of 06.09.2000 to anybody nor any statement was recorded.
29. To test the credibility and truthfulness of the statement of these two witnesses, it must be borne in mind that PW-5, Chidda Singh was serving as a Constable in the same Police Station where the deceased was serving as a Sub Inspector. PW-11, Pardeep Kumar was also serving as a Constable. Keeping this background in mind, we find it highly unusual that both the Constables being aware that deceased SI Ram Phal was missing from 06.09.2000 onwards and was lastly seen in the company of the appellant, but these two trained persons of the police force did not think it necessary to bring this fact to the notice of the higher authorities. We also

find it unusual that the IO in the case did not record statements of PW-5 and PW-11 under Section 161 Cr.P.C but authorized SI Balihar Singh to record the statements. It has not been denied before us that the case diary no.4 has been initialed by the MM on 13.09.2000. In case the statements of these two witnesses were also recorded on 12.09.2000 as testified by PW-5 and is testified by PW-40, SI Balihar Singh, who recorded the statements of these two witnesses, diary no.4A which has been introduced would have been produced before the MM and initialled by the MM. No explanation was rendered by the learned counsel for the State as to why case diary no.4 was initialled by the MM which contained entries upto 12.09.2000 and why case diary no.4A which also contained the statements of these two prime witnesses of last seen was not produced before the MM. This casts a serious suspicion as to whether the statements of PW-5 and PW-11 were recorded on 12.09.2000 or not. PW-11 has stated in his cross-examination that his statement was recorded on 14.09.2000. Thus, in our view, case diary no.4A apparently seems to have been introduced only to introduce statements of PW-5 and PW-11 showing the date of 12.09.2000 and also casts a doubt regarding the truthfulness of the evidence.

30. PW-40, SI Balihar Singh, in his cross-examination, states that when the main Investigating officer joins another officer and instructs him for conducting part investigation in that very case, then the said main Investigating Officer makes a reference of the same in his case diary and the instructing police officer when conducts investigation at the asking of the main IO he prepares his case diary and hands over the said case diary to the main IO. The main Investigating Officer then gives the case diary number to that case diary of the said instructed officer submitted to the IO in the shape of A,B etc. with regard to the running case diary of that day. He further states that he was instructed to interrogate Constable Chhidha

Singh, Constable Pradeep and Anish @ Pinto on 12.09.2000. He testified that the names of the specific witnesses were not given but he was asked to collect evidence regarding the last seen or any other clue. He also testified that he had conducted the investigation and recorded the statements of above stated three witnesses. He clarified that he did not remember the time when he commenced with the investigation and at what time he concluded the investigation. He testified that he had handed over his case diary to main IO, Inspector R.K. Ojha on that very day, i.e., 12.09.2000 itself and Inspector R.K. Ojha told him to record the number of the case diary as 4A which he had written himself on his case diary. We find his explanation to be unsatisfactory in this case.

31. The law with regard to the evidence of last seen has been discussed in detail by the Supreme Court, wherein it has been held that the evidence of last seen is a weak form of evidence and should not be the sole basis of conviction unless it is trustworthy, credible and the courts must look for corroboration. In the case of ***Bodhraj v. State of Jammu & Kashmir, (2002) 8 SCC 45***, the Supreme Court held as under:

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."

32. Similar view was taken by the Hon'ble Supreme Court in the case of ***State***

of U.P. v. Satish, (2005) 3 SCC 114.

33. 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.”

34. The Trial Court, in our view, while relying upon the testimony of last seen failed to consider and take into account the above mentioned important factors which, in our view, cast a serious doubt and raises suspicion on the testimonies of PW-5 and PW-11. As far as the testimony of PW-10, Ramesh Garg is concerned, merely stating that he had seen an Esteem car coming to the Police Station when he was with the deceased that, by itself, cannot connect the appellant to the crime. PW-10 did not identify the golden coloured Esteem car as the one which he was referring to in his testimony. Simply to say that when he was standing at the gate of the Police Station along with deceased Ram Phal one person had come in a Maruti Esteem car, can be of no benefit to the case of the prosecution.

(ii)RECOVERY OF PANT, IDENTITY CARD AND MOBILE PHONE:

35. Learned Senior Counsel for the appellant has argued that the recoveries sought to be relied upon are planted. Mr. Mittal submits that the prosecution has relied upon the recovery of identity card, pant and mobile phone belonging to the deceased which were recovered at the instance of the appellant. We may note that that to prove the recoveries, the prosecution relied upon the testimonies of PW-4, Constable Yesh Pal, PW-10, Ramesh Garg, PW-17, SI Subhash Kumar and PW-32, Inspector Dinesh Kumar. These recoveries were based on the disclosure statements

Exs.PW-17/A and PW-17/B. It is also the case of the prosecution that on 12.09.2000, Maruti Esteem car bearing No.HR-26G-9531 was seized by the IO vide seizure memo Ex.PW-17/G and the appellant had got the car recovered. As far as the recovery of mobile phone is concerned, as per the prosecution the mobile phone contained sim card no.9811130570 which was used by the deceased SI Ram Phal. Khaki pant was also got recovered by the appellant from the bushes at Rohtak Road and also the identity card. The Trial Court held that the recoveries were made at the instance of the appellant on 15.09.2000 and, thus the involvement of the appellant stood clearly proved. Mobile phone was got recovered from the residence of the appellant and there was no explanation as to how the sim came in his possession. We may note that PW-10, Ramesh Garg has not supported the case of the prosecution with regard to the recoveries. It may also be noted that two witnesses, PW-32, Inspector Dinesh Kumar and PW-4, Constable Yesh Pal fully corroborated the statement of each other. Both these witnesses are witnesses to the recovery. The only public witness to the recovery of khaki pant and identity card retracted from his statement. Holding that the police witnesses had no enmity against the accused, the Trial Court reached a conclusion that it was within the special knowledge of this appellant as to where he had thrown the articles, thus the recovery of articles stand duly established.

36. We find the view of the Trial Court to be absolutely erroneous. As far as the identity card is concerned, we may notice that the identity card was an old identity card of the deceased. In her testimony PW-2, Jayantri Devi, the wife of the deceased, stated during cross-examination as under:

“...It is correct that one old identity card of my husband was taken from my house from me by the police. Again said I do not remember when it was given...”

37. Reading of the testimony of PW-2 leaves little room for doubt that the identity card was planted by the prosecution. No explanation has been rendered as to why the deceased would carry an old identity card of the year 1990. The testimony of PW-2 makes it clear that she had handed over the old identity card to the police. As far as recovery of the mobile phone is concerned, there is no evidence which links the mobile phone to the deceased. Evidence of PW-21, Rajeev Pandit, who was General Manager (Admn) at the Essr Cellphone Company, testified that the mobile phone no.9811130570 had a cash card and as such there is no name of its owner. During cross-examination, he stated that he could not say if the office maintained any record to know the name and address of the owner of the mobile number. Accordingly, in the absence of the prosecution having been able to connect the mobile phone to the deceased, which recovery if believed, is of no consequence. We may also notice that in the disclosure statement, the appellant had stated that the mobile phone was broken and destroyed by him. Of course, this statement cannot be relied upon.
38. Another recovery is of a pant which, according to the prosecution, belonged to the deceased. Admittedly, there was no blood on this pant and again there is nothing to connect this pant to the deceased. In our view, accordingly for the reasons stated above the recoveries do not stand proved.

(iv) **RECOVERY OF MARUTI ESTEEM CAR:**

39. It was also argued on behalf of the State that the appellant had got recovered the Maruti Esteem car. This, in our view, is not borne out from the evidence on record. Evidence of PW-39, Inspector Ashok Tyagi, SHO, P.S. Sarai Rohilla, reads as under:

“.....From the hospital, accused was taken to his home by his father with our oral permission and the father of accused and accused were directed by me to come to our office at about 11.00

a.m. Accused Rajiv Ohlan reached my office at about 12.00 noon and after some time his father also reached in the office in Esteem car, whose number I do not remember now. Then I gave message on wireless set to IO of this case Inspector R.K. Ojha, the then SHO P.S. Punjabi Bagh to come to our office and also told them the facts disclosed by the accused. Inspector R.K. Ojha alongwith his staff reached our office at about 4.00 p.m. I briefed him about the above mentioned facts and he also interrogated the accused Rajiv Ohlan and I handed over the accused/suspect at that time to Inspector R.K. Ojha. IO recorded my statement in this case...”

40. Reading of the testimony of PW-39, SHO Ashok Tyagi would show that the Maruti Esteem car was brought by the father of the appellant to his office. Thus, it cannot be said that this car was recovered at the instance of the appellant herein.

(iii) POINTING OUT OF THE PLACE OF INCIDENT:

41. Another incriminating circumstance is the pointing out of place of incident by the appellant herein. According to the prosecution, the accused, appellant herein on 14.09.2000 pointed out to the place of incident where the dead body was thrown. Reliance is placed on the testimony of PW-40, SI Balihar Singh. Evidence on record would show that the prosecution was already aware of the place where the dead body was found which is evident upon reading the testimony of PW-41, Inspector R.K. Ojha, wherein it was stated as under:

“From PGI Rohtak I came back at the spot where the dead body of the deceased was recovered by PP Asoda. ASI Kaptan Singh was with me at that time as he joined the investigation with me at that time. I found one broken bottle of beer on which “Tiger Hill” was written from the spot. I also found blood stains at the spot. I took blood stained earth (rodi) from the spot and also the *rodi* without blood and but(*sic* put) the same in small plastic dibbis separately and both the dibbis were sealed in a pullanda

with the seal of US and were taken into possession by me vide memo Ex.PW-40/A which bears my signatures at point A. ASI Kaptan Singh signed the same at point A.”

42. Thus, since the police was already aware of the spot where the dead body was found, it cannot be said that the place of occurrence was pointed out by the appellant herein.

(v) **RECOVERY OF HAIR OF THE DECEASED FROM THE MARUTI ESTEEM CAR:**

43. Recovery of hair of the deceased from the Maruti Esteem car of the appellant is another incriminating factor which was considered by the Trial Court to convict the appellant. As per the case of the prosecution, the Maruti car bearing No.HR-26G-9531 was seized from the possession of the appellant which was used in the commission of the offence. Reliance is placed on the testimony of PW-17, SI Subhash Kumar, as per which based on disclosure statement, appellant got recovered Maruti Esteem car. From this car nine exhibits, *i.e.*, hair samples were collected by the expert A.K. Srivastava, examined as PW-26 in the presence of SI Yashpal(PW-12) and Inspector Dinesh Kumar(PW-32). The hair samples of the deceased were also taken. They were collected from the room used by him in the Police Station. The hair samples of the appellant were taken by combing. The samples were sent for analysis. The first report Ex.PW-26/A shows that the hair is of human origin. However, as per the second report Ex.PW-41/X1, Ex.7, the hair samples collected from the rear seat of Maruti Esteem car and Ex.9 collected from the dicky of Maruti Esteem car and another hair samples collected were found to be consistent with the hair sample of the deceased.

44. Before the reports can be considered, it may be noticed that as per

prosecution, the Maruti car was seized from the possession of the appellant. There is no explanation to the testimony of PW-39 which has been reproduced above. As per this witness, the father of the appellant reached his office while driving the Maruti Esteem car. We find it highly unsafe to rely on the testimony with regard to the recovery of the Maruti Esteem car from the appellant. As per PW-12, SI Yashpal and PW-32, Inspector Dinesh Kumar, the hair samples were collected by A.K. Srivastava(PW-26). But PW-26, nowhere states that he had collected the samples although he has proved the Exs.PW-26/A and PW-26/B. We find it highly unsafe to convict the appellant based on the recoveries sought to be relied upon by the prosecution. It was also brought to our notice that blood was found on the tyre of the car, but the blood grouping does not match. Thus, no benefit can accrue in favour of the prosecution.

45. For the detailed reasons foregoing, we find that the judgment of the Trial Court cannot be sustained. The same is accordingly set aside.
46. The appeal is allowed. The appellant shall be released forthwith, if not wanted in any other case.
47. The Trial Court record be sent back.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

MAY 03, 2016

pst