

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRA No.D-327-DB of 2010 (O&M)
Date of decision: 31.01.2017.

Parmeshwari and anotherAppellants.

Versus

State of Haryana ...Respondent.

CORAM: HON'BLE MR. JUSTICE S.S.SARON
HON'BLE MR. JUSTICE GURMIT RAM

Present: Mr. Anmol Rattan Sidhu, Senior Advocate, with
Mr. Pratham Sethi, Advocate, for the appellants.

Mr. Raj Kumar Makkad, DAG, Haryana,
for the State.

S.S.SARON,J.

This appeal has been filed by the appellants-Parmeshwari, who is the widow of deceased in the case namely Makhan Singh, and Om Parkash son of Mani Ram against the judgment of conviction dated 04.03.2010 and order of sentence dated 05.03.2010 passed by the learned Sessions Judge, Sirsa. The appellants have been convicted by the learned Sessions Judge, Sirsa for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code ('IPC' - for short) and sentenced to undergo imprisonment for life; besides, pay a fine of Rs.10,000/- each and in default thereof, to undergo further simple imprisonment for two months for the said offence.

The prosecution case is based on statement (Ex.P21) of
Birbal complainant (who died during trial) recorded by SI Ajmer Singh

(PW-18), In-charge, Police Post J.J. Colony, Sirsa on 21.11.2006. The complainant Birbal stated that he was resident of village Bhamboor, Police Station Sadar Sirsa. He did labour work. He had a daughter and two sons. The eldest of his children was his daughter and younger to her was his son Makhan Singh (deceased in the case) and the youngest son was Mahinder Singh. His son Makhan Singh (deceased) was married to Parmeshwari (appellant No.1) resident of Ahmadpur Mandi about 19-20 years earlier. She had three daughters and a son. The son of the complainant, namely, Makhan Singh (deceased), was residing in his own house in Shamshabad Patti, Sirsa, for the last four-five years.

The complainant on 20.11.2006, at about 9:00 p.m., came to know that Makhan Singh had died. In the morning of 21.11.2006, the complainant along with his family members and the villagers reached Government Hospital, Sirsa, and made enquiries regarding the death of his son Makhan Singh. He suspected that since Parmeshwari (appellant No.1) wife of his son had illicit relationship with Om Parkash (appellant No.2), Sarpanch of village Mehna Khera, for the last many days, they might have administered some poisonous substance to his son - Makhan Singh due to which he died. He requested for proceedings against the accused. He had heard his statement and admitted it as correct.

Police proceedings (Ex.P-22) were recorded by SI Ajmer Singh (PW-18) to the effect that during the night on 20.11.2006 a 'ruqa' (memo) was received at Police Post J.J. Colony from General Hospital, Sirsa, regarding the death of Makhan son of complainant - Birbal, resident of Shamshabad Patti, Sirsa, through SHO, City Sirsa.

The legal heirs of Makhan Singh were informed after getting their address of village Bhamboor. They reached General Hospital, Sirsa, and statement (Ex.P-21) of Birbal, father of the deceased, was recorded. The same was read over and explained to him in verbatim. He (complainant) after admitting his statement to be correct, put his left thumb impressions on it, which was attested by SI Ajmer Singh (PW-18). The said statement disclosed suspicion of administering of some poisonous substance.

The initial investigation in the case was conducted by SI Ajmer Singh (PW-18), who on 20.11.2006 was posted as In-charge, Police Post J.J. Colony, Sirsa. According to him (PW-18), on 20.11.2006, he received a 'ruqa' (memo) (Ex.P-20) that the dead body of Makhan Singh was received at Civil Hospital Sirsa. He proceeded to the hospital and he met the wife of Makhan Singh, namely, Parmeshwari (appellant No.1) at Civil Hospital, Sirsa. He (PW-18) inquired from her about the occurrence and she said that she would depose after her parents-in-law reached there. The father and mother of the deceased Makhan Singh and some other persons of village Bhamboor came to the hospital on 21.11.2006 where he (PW-18 SI Ajmer Singh I.O.) had also gone. Birbal (complainant) made his statement (Ex.P-21), which was read over to him and he put his thumb impressions on it after admitting the same to be correct. SI Ajmer Singh (PW-18) made his endorsement (Ex.P-22) and sent the same to Police Station City Sirsa for making an entry in the 'roznamcha' (Daily Diary Register). Initiation of action was deferred for want of viscera report. Inquest report (Ex.P-4) was prepared by him (PW-18) and on the basis of 'ruqa' (memo), DDR No.11 was

entered in the 'roznamcha' (Daily Diary Register) on 21.11.2006. He (PW-18) scribed an application (Ex.P-3) for conducting the post-mortem examination on the dead body.

Therefore, to await the viscera report and also the post-mortem report, further investigation in the case was deferred and whatever was to be the position after receipt of the said reports, further proceedings were to be carried out. At the said stage, no cognizable offence was found to be made out. The statement of the complainant was, however, sent to the police station through Constable Chander Pal for recording a 'rapat' (Daily Diary Report) in the 'roznamcha' (Daily Diary Register) of the police station. SI Ajmer Singh (PW-18) remained busy at General Hospital, Sirsa as he was to conduct the inquest proceedings under Section 174 of the Code of Criminal Procedure ('Cr.P.C.' - for short).

After the incident that occurred on 20.11.2006 and the police proceedings recorded on 21.11.2006, the case remained dormant and nothing further happened. The report of the Chemical Examiner (Ex.P-5) dated 22.08.2007 was received. The said report is to the effect that a packet containing the following contents was received:-

1. One sealed bottle said to contains sample of stomach, small and large intestine.
2. One sealed bottle said to contains sample of lungs, liver, spleen and kidney.
3. One sealed bottle said to contains sample of brain.
4. One sealed bottle said to contains sample of blood from heart.

5. One sealed bottle said to contains sample of preservative.

The result of chemical examination of the Chemical Examiner to Government of Haryana, Karnal, it has been mentioned that the contents Exhibits No.1, 2 and 3 gave positive test for aluminium phosphide and ethyl alcohol. The contents of Exhibit No.4 gave positive test for phosphide and ethyl alcohol. The ethyl alcohol was estimated as 80.5 mg%. The contents of Exhibit No.5 gave positive test for saline only.

The Medical Officer, General Hospital, Sirsa, on the basis of the Chemical Examiner's tests that were conducted, gave his opinion (Ex.P-6) addressed to SHO, Police Station Sirsa by stating;

“Returned in original with the remarks that cause of death in this case is due to aluminum phosphide poisoning as per result of report of Chemical Examiner, Karnal”.

On the receipt of the said report, FIR No.425 dated 19.06.2008 (Ex.P-9) was registered at Police Station City Sirsa for the offence under Section 302 read with Section 34 IPC. The date of occurrence in the case is 20.11.2006 at 9:00 p.m. Information received at Police Station it is recorded was received on 19.06.2008 at 6:30 p.m. The special report was received by the learned Chief Judicial Magistrate, Sirsa, at 8:40 p.m. on 19.06.2008.

After registration of FIR on 19.06.2008, the investigation in the case was conducted by Inspector/SHO Dalip Singh (PW-19), who was then posted as Inspector/SHO Police Station City Sirsa. He on receipt of Chemical Examiner's Report (Ex.P-5) and the opinion

(Ex.P-6) of the Medical Officer regarding cause of death of Makhan Singh, i.e. due to consumption of aluminium phosphide, directed ASI Shish Pal (PW-17) to prepare copy of Rapat No.11 dated 21.11.2006 already recorded in the police station. ASI Shish Pal (PW-17) prepared copy of the same Mark-19 on which he (PW-19) made his endorsement (Ex.P-23) and registered the present FIR (Ex.P-9).

Inspector/SHO Dalip Singh (PW-9) went to village Bhamboor on 23.06.2008 and recorded statement of Birbal (complainant) (since deceased) and statement (Ex.P-15) of Mithu Singh, Member Panchayat (PW-12), statement (Ex.P-14) of Beant Singh (PW-11) and statement (Ex.P-13) of Smt. Reshma (PW-10) correctly without any addition or omission from his side. From there, he along with complainant - Birbal and Om Parkash son of Birkha Ram went to village Shamshabad Patti at the house of deceased Makhan Singh. He (PW-19) prepared rough site plan (Ex.P-24) on the demarcation of Birbal and Balwinder Singh (PW-15) with correct marginal notes. He recorded statement of Balwinder Singh (PW-15) and statement (Ex.PA) of Raghav (PW-1) correctly without any addition or omission from his side. He searched for the accused.

Inspector/SHO Dalip Singh (PW-19) collected photostat copy of 'calendra' Mark P-7, copy of 'Rapat' No.52 dated 29.03.2007 and personal search memo Mark P-8 from MHC Des Raj on 01.08.2008. These were taken in possession vide memo Ex.P-18. These documents relate to proceedings under Section 109 Cr.P.C. against the appellants which were recorded by Madan Lal Inspector (PW-3) in order to show that the appellants had an illicit relationship. Besides, the statement of MHC Des Raj (PW-16) was recorded. He (PW-19)

searched for Parmeshwari (appellant No.1), but he could not find her. She was arrested by ASI Rattan Singh on 05.07.2008.

Inspector/SHO Ajay Kumar, Police Station City Sirsa (PW-8) was posted as such on 23.09.2008. On the said day, he recorded statements of HC Het Ram (PW-6), EHC Jangi Ram (PW-7), Hari Ram (PW-13) and Khyali Ram (PW-14) correctly without any addition or omission from his side. After completing the investigation, he prepared police report ('challan') under Section 173 Cr.P.C. on 25.09.2008. The report was prepared against both the accused (appellants) which bears his signatures. The police report was filed in the Court of learned Chief Judicial Magistrate, Sirsa, on 01.10.2008.

The learned Chief Judicial Magistrate, Sirsa, in terms of his order dated 13.10.2008, observed that the offence punishable under Section 302 IPC, for which the accused (appellants) had been 'challaned', was exclusively triable by the Court of Session. Accordingly, the case was committed to the Court of learned Sessions Judge, Sirsa, for 24.10.2008. The Jail Authorities were directed to produce the accused (appellants) on 24.10.2008 at 10:00 a.m. sharp in the Court of learned Sessions Judge, Sirsa.

The case was assigned to the Court of learned Additional Sessions Judge, Sirsa, which was received by him on 24.10.2008. The learned Additional Sessions Judge, Sirsa, on 06.11.2008, charged the appellants on the allegations that they on 20.11.2006, in the area of village Shamshabad Patti, District Sirsa, in furtherance of their common intention committed the murder of Makhan Singh by intentionally causing his death by administering some poisonous substance to him and that they both thereby committed an offence

punishable under Section 302 read with Section 34 IPC within the cognizance of the Court. Both the accused (appellants) were directed to be tried by the Court of said charge.

The contents of the charge-sheet were read over and explained to the accused (appellants) in simple Hindi. They pleaded not guilty and claimed trial. Their statements were recorded accordingly.

The prosecution, in order to establish its case, examined as many as nineteen witnesses; besides, tendered documents in evidence. The statements of the accused (appellants) were recorded in terms of Section 313 Cr.P.C. The evidence appearing against the appellants was put to them. Parmeshwari (appellant No.1), in her statement, took the defence that the deceased Makhan Singh used to consume heavy liquor and on the day of occurrence (i.e. 20.11.2006), he had gone to the house of his mother and when he returned, he was drunk and was seen lying in the street by the neighbours, who informed her and she came out and found her husband (Makhan Singh) unconscious. She shifted him to General Hospital, Sirsa, but he died there. She had been falsely implicated in the case due to suspicion. She did not have illicit relations with Om Parkash (appellant No.2) nor was he known to her.

Om Parkash (appellant No.2) in his statement under Section 313 Cr.P.C took the defence that he was Sarpanch during those days and supporter of the Congress Party. During those days, the Indian National Lok Dal was the ruling party in Haryana and under political pressure, he had been falsely implicated in the case.

The appellants did not lead any evidence in their defence.

The learned Sessions Judge, Sirsa, as already noticed, has convicted the appellants for the offence under Section 302 read with Section 34 IPC and sentenced them to undergo life imprisonment; besides, pay a fine of Rs.10,000/- each and in default thereof undergo simple imprisonment for two months for the offence under Section 302 read with Section 34 IPC.

The appellants, aggrieved against the said order of conviction and sentence, have filed the present appeal.

Mr. Anmol Rattan Sidhu, Senior Advocate appearing with Mr. Pratham Sethi, Advocate has contended that the entire case of the prosecution is based on circumstantial evidence which requires that the parameters as laid down in **Sharad Birdhichand Sarda v. State of Maharashtra**, AIR 1984 SC 1622, are complied with; besides, it is submitted that there is no evidence to show that Makhan Singh died due to poison which was administered by the appellants and it is also not shown that the appellants were in possession of the poisonous substance. Even the motive to administer the poison to the deceased Makhan Singh, it is submitted, is unclear. It is further submitted that the learned trial Court improperly invoked and applied the provisions of Section 106 of the Evidence Act as the same cannot be used by the prosecution to fill up a lacuna. It is submitted that the fact of consumption of liquor by Om Parkash (appellant No.2) with Makhan Singh (deceased) is also not proved because Gurmit Singh, who was the third person, who was also stated to be consuming liquor was never associated during investigation or examined as a witness during trial of the case. It is further submitted that all witnesses, except Balwinder Singh (PW-15) with whom there was enmity with the

appellants and which is established, did not support the prosecution case and turned hostile. Learned Senior Counsel for the appellants, also submitted that the 'ruqa' (memo) Ex.P-20 regarding intimation of Makhan Singh being brought dead in the hospital is inadmissible in evidence as the doctor, who sent the 'ruqa' (memo), was not examined; besides, it is submitted that there is considerable delay in lodging the FIR inasmuch as the incident that had occurred on 20.11.2006, the FIR was registered on 19.06.2008, which make the prosecution case highly doubtful. Therefore, the appellants are liable to be acquitted.

In response, Mr. Raj Kumar Makkad, DAG, Haryana, for the State submits that the prosecution has proved its case against the appellants beyond shadow of reasonable doubt. It is submitted that the appellants had an illicit relations amongst themselves. They had the opportunity to administer poison to Makhan Singh (deceased) when they were having drinks at his house. The death of Makhan Singh, it is established, is to be aluminium phosphide poisoning which the appellants only administered at the time when they were drinking together. Besides, there is clear motive for the appellants to commit the murder of Makhan Singh as Parmeshwari (appellant No.1) had undesirable and illicit relations with Om Parkash (appellant No.2) and, therefore, they both wanted Makhan Singh to be out of the way. The 'ruqa' (memo) (Ex.P-20) sent by the doctor of the General Hospital, Sirsa, to the SHO, Police Station City Sirsa, on 20.11.2006, mentions that it is to inform that the patient Makhan son of Birbal, resident of Shamshabad Patti was brought dead by Om Parkash and Parmeshwari (wife) complaining of consuming alcohol. Therefore, the name of Om

Parkash (appellant No.2) is mentioned as one of the persons, who had brought Makhan Singh (deceased) to the hospital. It is also submitted that the undesirable relationship between the appellants is also established from the deposition of Inspector Madan Lal (PW-3), who arrested the accused (appellants) on 29.03.2007 from near the canal bridge in J.J. Colony, Sirsa. He (PW-3) produced both the appellants before the Executive Magistrate on 30.03.2007 along with 'calendra' (calendar of events) in terms of Section 109 Cr.P.C. It is also submitted that Makhan Singh (deceased) died in his house only when the appellants were in the house and by virtue of their special knowledge, they were to offer an explanation as to how he died and the exception to the general rule that the prosecution has to prove its case in terms of Section 106 of the Evidence Act would apply. Therefore, it is submitted that the case of the prosecution is clearly made out and no interference with the well reasoned judgment and order passed by the learned trial Court is warranted.

We have given our thoughtful consideration to the contentions raised by learned counsel for the parties and with their assistance gone through the evidence and material on record.

The prosecution case is that the appellants, who had an undesirable and illicit relationship, had committed the murder of Makhan Singh son of the complainant Birbal on 20.11.2006. Birbal complainant made a statement (Ex. P-21) before SI Ajmer Singh that he suspected that the appellants administered poison to Makhan Singh (deceased). FIR in the case was, however, not immediately registered and it was deferred to await the report of the Chemical Examiner. The Chemical Examiner to Government Haryana, Karnal,

made his report (Ex.P-5). It bears endorsement dated 18.07.2007. The Medical Officer, General Hospital, Sirsa, gave his opinion (Ex.P-6) dated 22.08.2007 to the effect that cause of death of Makhan Singh was due to aluminium phosphide poisoning.

Inspector/SHO Dalip Singh (PW-19) was posted as Inspector/SHO, Police Station City Sirsa on 19.06.2008. SI Ajmer Singh (PW-18) had conducted inquest proceedings (Ex.P-4) on the dead body of Makhan Singh on 21.11.2006. Viscera etc. was sent to the FSL. On receipt of report (Ex.P-5) of the Chemical Examiner and the opinion (Ex.P-6) of the Medical Officer regarding cause of death, i.e. due to consumption of aluminium phosphide, he (PW-19) directed Shishpal, Assistant MHC (PW-17) to prepare copy of rapat No.11 dated 21.11.2006 which had already been recorded at the police station. Accordingly, Shishpal, Assistant MHC (PW-17), prepared the same (Mark-19) on which he (PW-19) made his endorsement (Ex.P-23) and registered the present FIR dated 19.06.2008 (Ex.P-9), which bears his signature.

The prosecution has alleged that Makhan Singh used to reside opposite the house of Balwinder Singh (PW-15) in Jan Kalyan Colony, Shamshabad Patti, Sirsa. Parmeshwari (appellant No.1) and her children started residing with Makhan Singh (deceased) there in the year 2002. Many persons including Om Parkash (appellant No.2) used to visit her house for improper purposes. Makhan Singh was a driver and used to go out for his work and return after intervals of ten-twelve days. This gave room to Parmeshwari (appellant No.1) to indulge in undesirable and improper activities. Makhan Singh had a thin body while Parmeshwari (appellant No.1) had a strong body and

she used to beat him. Parmeshwari (appellant No.1) after a quarrel with her husband also resided in 'Ther Mohalla' for 20-25 days. Makhan Singh with the intervention of the Panchayat had brought her back. However, after her departure Makhan Singh had started drinking.

Makhan Singh, Gurmeet Singh, resident of Bhamboor and Om Parkash (appellant No.1) on 20.11.2006 from 02:00 p.m. onwards started drinking, at the house of Parmeshwari (appellant No.1) and Makhan Singh (deceased). At about 04:00 p.m. Gurmit Singh left the house. Thereafter, Balwinder Singh (PW-15) and others from the house of Parmeshwari (appellant No.1) and Makhan Singh (deceased) at about 08:00-08:30 p.m. heard cries of weeping from their house. On this, Balwinder Singh (PW-15), his wife and also Raghav (PW-1), who were neighbours, went to their house. There they saw that Makhan Singh was lying on the ground in front of the door of the room while Parmeshwari (appellant No.1) and Om Parkash (appellant No.2) were there. They both asked them as to why they had come there, as it was their family dispute. Then, they came out and were standing in the street. Thereafter, Om Parkash (appellant No.2) arranged a three-wheeler and took Makhan Singh to General Hospital, Sirsa. However, at that time, it was noticed by Balwinder Singh (PW-15) that Makhan Singh was no more and he had died. SI Ajmer Singh (PW-18) on receiving a 'ruqa' (memo) mentioning that the dead body of Makhan Singh was in the hospital went there to inquire into the matter. At that time, Parmeshwari (appellant No.1) stated that she would make her statement after her parents-in-law came there. The parents of Makhan Singh (deceased) came to

General Hospital, Sirsa, on 21.11.2006. Birbal, father of Makhan Singh, made a statement (Ex.P-21) on which SI Ajmer Singh (PW-18) recorded his endorsement (Ex.P-22). The same were despatched to the police post on the basis of which an entry was made in the Daily Diary Register.

The inquest proceedings (Ex.P-4) were conducted by SI Ajmer Singh (PW-18); besides, postmortem (Ex.P-2) on the dead body of Makhan Singh was conducted. However, further proceedings were deferred to await the viscera report. It is on receipt of the Chemical Examiner's report (Ex.P-5) and the opinion (Ex.P-6) of the Medical Officer that FIR (Ex.P-9) was registered on 19.06.2008.

It is to be noticed that the prosecution witness namely Raghav (PW-1), who resides just opposite the house of Makhan Singh (deceased) and his wife Parmeshwari (appellant No.1), did not support the prosecution case and was declared hostile. He stated that he knew nothing about the case and nothing had happened in his presence. He never saw Om Parkash (appellant No.2) visiting the house of Parmeshwari (appellant No.1). He knew Parmeshwari (appellant No.1) and she has a good moral character. He was got declared hostile by the learned Public Prosecutor and permitted to be cross-examined. He was cross-examined by the learned Public Prosecutor. He stated as correct that the house of Makhan Singh (deceased) and his wife Parmeshwari (appellant No.1), was just opposite to his house in Jan Kalyan Colony. It is stated as incorrect to suggest that whenever Makhan Singh (deceased) went out of station, then in his absence Om Parkash (appellant No.1) used to visit the house of Parmeshwari (appellant No.1) or that he had developed illicit

relations with Parmeshwari (appellant No.1). Other suggestions were put to Raghav (PW-1) which he denied. Nothing favourable for the prosecution, however, could be brought out.

Smt. Reshma (PW-10) is the wife of the younger brother of Makhan Singh (deceased). In other words Parmeshwari (appellant No.1) is the wife of Reshma's husband's elder brother (i.e. 'jethani' of Reshma). Smt. Reshma (PW-10) also did not support the prosecution case. She (PW-10) stated that Parmeshwari (appellant No.1) never indulged in any illegal activity nor did she have any connection with Om Parkash accused (appellant No.2). It is stated by her that they, i.e. the appellants, did not commit the murder of Makhan Singh. It is further stated that her 'jeth' (i.e. her husband's elder brother Makhan Singh) was a drunkard and he died outside the house. She (PW-10) did not suspect anybody as a culprit for his murder. She (PW-10) heard her statement (Ex.P-13) and she denied having made such a statement to the police. She further stated that she did not state before the police that the character of Parmeshwari (appellant No.1) was not good and outsiders used to visit her house and her parents-in-law used to object, but to no effect; besides, on account of their objections, there were quarrels on many occasions. It was further denied that on this account they felt ashamed and her husband's elder brother ('jeth') purchased a residential house at Sirsa and there Om Parkash (appellant No.2) developed illicit relations with Parmeshwari (appellant No.1). It is also denied that on one occasion, Parmeshwari (appellant No.1) had gone out with Om Parkash (appellant No.2) and, thereafter, a panchayat was convened and she was brought back. She (PW-10) was confronted with the portion 'A'

to 'A' of her statement (Ex.P-13) where the said fact was so recorded. It is also stated by her (PW-10) that she did not state before the police that whenever her husband's elder brother ('jeth') used to object then both the accused (appellants) used to give a beating to Makhan Singh and both used to threaten him with dire consequences. Smt. Reshma (PW-10) denied her statement before the police and despite being cross-examined, nothing favourable for the prosecution could be brought on record.

Beant Singh (PW-11) before whom Parmeshwari (appellant No.1) is stated to have made an extra judicial confession also did not support the prosecution case. It is stated by him (PW-11) that Parmeshwari (appellant No.1) did not make any extra judicial confession before him regarding her involvement in committing the murder of Makhan Singh, her husband along with accused Om Parkash (appellant No.2). He (PW-11) had never been associated in any panchayat convened by the parties. He was got declared hostile by the learned Public Prosecutor and cross-examined. He (PW-11) heard his statement (Ex.P-14) that he had made before the police, but he denied having made such a statement before the police. He stated that he (PW-11) did not state before the police that Parmeshwari (appellant No.1) was of easy virtue and outsiders frequently visited her house in the absence of her husband and that she (Parmeshwari) also used to leave her matrimonial home and was brought back with the intervention of panchayat. He (PW-11) was confronted with portion 'A' to 'A' of his statement (Ex.P-14) wherein it was so recorded. He also did not state before the police that Om Parkash (appellant No.2) and Parmeshwari (appellant No.1) used to

beat Makhan Singh and Makhan Singh used to complain about her conduct to his parents, besides, she had also elope with Om Parkash (appellant No.2) and was brought back by the panchayat. He (PW-11) was confronted with portion 'B' to 'B' of his statement (Ex.P-14) wherein it was so recorded. He also did not state before the police that on 20.11.2006, on the information of death of Makhan Singh, he also visited General Hospital, Sirsa. He also did not state that after cremating the dead body of Makhan Singh, Parmeshwari (appellant No.1) informed him in the presence of Mithu Singh, Member Panchayat (PW-12), that she had committed a crime and she along with Om Parkash (appellant No.2) had committed the murder of Makhan Singh. He (PW-11) was confronted with portion 'C' to 'C' of his statement (Ex.P-14) wherein this fact was so recorded. He also denied the other suggestions and despite cross-examination, nothing favourable for the prosecution could be brought out on record. He denied that the appellants committed the murder of Makhan Singh.

Mithu Singh (PW-12) stated that he did not know Makhan Singh (deceased). He (PW-12) knew Birbal (complainant) but he did not know anything about this case. He (PW-12) also stated that Parmeshwari (appellant No.1), present in the Court, was also not known to him. Besides, she did not confess anything about this case in his presence or in the presence of Beant Singh (PW-11). He was got declared hostile by the learned Public Prosecutor. He denied having made a statement (Ex.P-15) before the police. He stated that he did not make any such statement before the police. He also stated that he did not state before the police that Makhan Singh was a driver and he died on account of forcible administration of poison. He also

did not state that after postmortem examination of Makhan Singh, his dead body was brought at village Bhamboor and after cremation, Parmeshwari (appellant No.1) approached Beant Singh (PW-11) at his house and before them, she confessed her guilt regarding committing the murder of Makhan Singh, besides, had requested them for pressurizing the parents of Makhan Singh not to take any action against her. He (PW-12) was confronted with his statement (Ex.P-15) wherein such a version is mentioned. It is also stated as incorrect to suggest that he had been won over by the accused (appellants) and for the said reason, he has resided from his earlier statement made before the police.

Hari Ram (PW-13) also did not support the prosecution case. He (PW-13) stated that he knew Makhan Singh (deceased) but he did not know how he died. He (PW-13) had only identified his dead body at the time of inquest proceedings and also at the time of postmortem examination. His (PW-13's) father did not suspect anybody in his presence. He (PW13) was got declared hostile by the learned Public Prosecutor. In cross-examination, he denied having made statement (Ex.P-16) before the police. It is stated by him that he did not make any such statement before the police. He did not state before the police that his father Birbal had suspected both the accused (appellants) at the time of inquest and he (PW-13) informed that both the accused (appellants) had administered some poisonous substance to his son Makhan Singh resulting in his death. He (PW-13) was confronted with his statement (Ex.P-16) wherein it was so recorded. It is stated as incorrect to suggest that he had been won over by the accused (appellant) and due to that reason he had deposed falsely.

Khiali Ram (PW-14) also did not support the prosecution case. It is submitted by him (PW-14) that in the month of November 2006, he had identified the dead body of Makhan Singh at the time of postmortem examination. His (PW-14's) statement was recorded by the police. Nothing was stated by his father before the police in his presence. He was got declared hostile by the learned Public Prosecutor. He denied having made his statement (Ex.P-17) before the police. He did not state before the police that Birbal, father of Makhan Singh, had suspected both the accused (appellants) at the time of inquest and informed the police that both the accused (appellant) had administered some poisonous substance to his son Makhan Singh resulting in his death and his suspicion became true as some insecticide was found in the viscera of the deceased. He was confronted with his statement (Ex.P-17) wherein it was so recorded. It is stated as incorrect to suggest that he had been won over by the accused (appellants).

Balwinder Singh (PW-15) is the only prosecution witness who supported the prosecution case.

He stated that Makhan Singh (deceased) used to reside in front of their house. Children of the deceased (Makhan Singh) and accused Parmeshwari (appellant No.1) used to reside with him in that house. It is stated that Parmeshwari accused (appellant No.1), in the year 2002, started residing there. She, it was stated, was a lady of loose character. Many persons used to visit her house for illegal purpose. Makhan Singh (deceased), it is stated, was a driver by profession and he used to return to his house after an interval of 10-20 days. He had a thin body and Parmeshwari (appellant No.1) had a

strong body. In his (Makhan Singh's) absence, some persons including Om Parkash accused (appellant No.2) used to visit her (Parmeshwari's) house. Parmeshwari (appellant No.1) used to beat her husband. After she had quarrelled with her husband, she was residing at 'Ther Mohalla' for 20-25 days and was brought back by the panchayat. After her departure, Makhan Singh started consuming more liquor. It is further stated that on 20.11.2006, Makhan Singh, Gurmit Singh resident of village Bhamboor and Om Parkash (appellant No.2) started consuming liquor at the house of Makhan Singh since 02:00 p.m. Gurmit Singh went away in his 'Sumo' jeep at around 4:30 p.m. He (Balwinder Singh PW-15) heard a noise of weeping from the house of Makhan Singh at around 8:00-8:30 p.m. on which he (PW-15) and his wife and one Raghav (PW-1) went there. There they saw that Makhan Singh was lying on the ground in front of the door of the house. Om Parkash and Parmeshwari (appellants) both were also present there. Both the accused (appellants) asked him (PW-15) as to why had he come there, as it was their family dispute. Then they came outside and kept on standing in the street in front of their own house. Om Parkash (appellant No.2) arranged a three-wheeler in which both the accused (appellants) shifted Makhan Singh to General Hospital, Sirsa. At the time of taking Makhan Singh, they noticed that he was no more. His statement was recorded by the police.

In cross-examination by both the accused, it is stated as correct by Balwinder Singh (PW-15) that the employees of FCI had to be in their office from 9:00 a.m. to 5:00 p.m. He (PW-15) voluntarily stated that he was a casual labourer and not their employee. He went

there as and when needed. It is stated as correct that whosoever visited the premises of the FCI had to record his entry in the register. He voluntarily stated that temporary employees were not required to record their entry. It is stated as incorrect to suggest that every employee was required to record his entry in the register. It is stated as incorrect to suggest that he had made a false statement. The temporary employees, it is stated, were not required to sign any register in the FCI godown. It is stated as incorrect to suggest that employees/visitors were to record their entry in the register maintained at the gate. It is stated that his neighbours were Babu Ram Fauji and Raghu Bhaiyya. One new resident had come about 15-20 back, but he did not know his name. It is stated that one plot was lying vacant. There were houses of other residents also on both sides of his house and there were about 4-5 vacant plots on each side of his house. The eldest daughter Suman of Makhan Singh was aged 19/20 years and next to her was Kali aged 17/18 years and next was Dholi aged 12/13 years and the eldest son was aged about 20/22 years. None of the children of Makhan Singh were married. He (PW-15) had gone to Police Post J.J. Colony, Sirsa, two-three times to report against the conduct of Parmeshwari (appellant No.1). It was self stated that the police used to come there. Both the accused (appellants) were 'challaned' in one case. He, however, could not tell the date, month and year of reporting the matter by him to the police. It is stated as incorrect to suggest that he never made a report to the police against the accused (appellants) and that is why he had not disclosed the date, month and year of making the report. It is stated that about 70 residents of the 'Mohalla' had met S.P. Sirsa and

filed a written complainant against the accused (appellants), but he could not tell the month and year of meeting the S.P.

It is stated that Parmeshwari (appellant No.1) got a rape case registered against him (PW-15) 4-5 days after her release on bail in this case, but he could not tell the month and year. He was taken to the police station by the police and then 70-80 persons reached the police station in his support. Then he was let off by the police on the same day after 3-4 hours. It is stated as incorrect to suggest that he took advantage of the absence of the accused Parmeshwari (appellant No.1) and committed rape upon Suman, the daughter of accused Parmeshwari. He voluntarily stated that he treated Suman as his own daughter. FIR was registered against him (PW-15) in the rape case and then he met the S.P. and informed him that he was being falsely framed to pressurize him for not making a statement as a witness against the accused. He did not make any report to the police on 20.11.2006 against the accused about taking liquor etc. It is stated as incorrect to suggest that he did not see anything and that he had deposed falsely. It is stated that he had not gone to the FCI godown on 20.11.2006 for labour. Height of the boundary wall of the house of Makhan Singh, it is stated, was around 3 feet/3.5 feet at the time of incident. He did not make any report to the police about the beating of Makhan Singh by Parmeshwari (appellant No.1). It is stated that no person other than him (PW-15), his wife and Raghu reached the house of accused Parmeshwari on the fateful day. He did not make any report to the police or any other authority on 20.11.2006 regarding the incident. Police visited his (PW-15's) house in connection with investigation of this case at least one year after the

incident. His wife and Raghu Bhaiyya were also present there and police recorded his statement as well as that of his wife and Raghu Bhaiyya. The police never came to him thereafter for recording their statements. It is stated as incorrect to suggest that his statement was not recorded by the police after one year. He voluntarily stated that his statement was recorded by Inspector Dalip Singh (PW-19). It is further stated as incorrect to suggest that he did not see anything and that he had deposed falsely. It is stated as correct that one complaint was made to the police by accused Parmeshwari (appellant No.1) against him before 20.11.2006. It is stated as incorrect to suggest that he was called by the police to the police station and was beaten there. It is stated as incorrect to suggest that he had been nursing a grudge against accused Parmeshwari (appellant No.1) and due to that reason, he had made a false statement against accused Parmeshwari.

Inspector Madan Lal (PW-3) was posted as Inspector/SHO, P.S. City Sirsa, on 29.03.2007. On the said date, he arrested the appellants from near the canal bridge in J.J. Colony, Sirsa. He (PW-3) produced both of them before the learned Executive Magistrate on the next day in the proceedings under Section 109 Cr.P.C. Photocopy of the same was Mark P-7 which was also accompanied by personal search memo., copy of which was Mark P-8. In cross-examination, it is stated that he (PW-3) was posted three months prior to the date of occurrence in Police Station City Sirsa. He did not know if on 21.11.2006, a 'rapat' (report) was entered in the 'roznamcha' against both the accused regarding committing the murder of Makhan Lal (sic. Makhan Singh). However, he came to know about the same on the day of arrest of both the accused. It is stated as incorrect to suggest

that he was already knowing about the said 'rapat' (report) and he intentionally lodged a false case under Section 109 Cr.P.C. in order to strengthen this case after arresting both of them separately from their houses. It is stated as incorrect to suggest that he had deposed falsely.

Uggar Sain HC (PW-4) was posted at Police Station City Sirsa on 19.06.2008. On that day, he had been detailed by Inspector Dalip Singh (PW-19) for delivering the copies of special report to higher authorities and accordingly, he delivered the same to the higher authorities and to the learned 'Illaq' Magistrate. The copy of FIR, it is stated, was Ex. P9. In cross-examination, it is stated that the special report was given to him at 8:00 p.m. and he reached the house of the learned 'Illaq' Magistrate at 8:40 p.m. and handed over the same to the Magistrate himself. His statement was recorded by the investigating officer in which he had stated the time of delivering by him the special report and further delivering it to the concerned officers. He was confronted with his statement (Ex.D-1) wherein the timings were not mentioned. It is stated as incorrect to suggest that he had deposed falsely.

Radhey Shyam, Draftsman (PW-5) visited the place of occurrence at Shamshabad Patti, Sirsa, on 30.09.2008. He prepared the scaled site plan (Ex.P-10) on the demarcation given by Birbal Singh (complainant). In cross-examination, it is stated that the signatures of Birbal Singh were not obtained on the site plan by him.

ASI Het Ram (PW-6) was posted as MHC at Police Station City Sirsa in the month of November, 2006. He tendered in evidence his affidavit (Ex.P-11), which is to the effect that on 21.11.2006, SI

Ajmer Singh (PW-18) through Constable Chander Pal deposited the case property of the present case, i.e. a viscera sealed with the seal of mortuary along with one envelope sealed with the seal of mortuary with him in the 'malkhana' of the Police Station. The case property, i.e. viscera along with envelope sealed with the seal of mortuary, after taking it out from the 'malkhana' on 26.12.2006 was handed over to EHC Jangi Ram (PW-7) for depositing the same with Chemical Examiner, Karnal. EHC Jangi Ram (PW-7) deposited the viscera and on return, the receipt was handed over to him (PW-6). It is deposed that so long as the case property remained in his (PW-6's) custody neither he tampered with it nor anybody else was allowed to tamper it.

EHC Jangi Ram (PW-7) tendered in evidence his affidavit (Ex.P-12), which is to the effect that he was posted at Police Station City Sirsa on 26.12.2006. On that day, Moharir Malkhana Het Ram ASI (PW-6) handed over to him (PW-7) a parcel containing viscera and an envelope sealed with the seal of mortuary in respect of Makhan Singh (deceased). The same was handed over to him (PW-7) after it was taken out from the 'malkhana' in an intact condition vide RC No.1429 dated 26.12.2006. He (PW-7), on 27.12.2006, after reaching the Chemical Examiner, Karnal, deposited the viscera and on return, receipt regarding deposit was handed over to Moharir Malkhana of the police station. It is stated that so long as the parcel of viscera remained in his custody, neither he tampered with it nor was anyone else allowed to tamper it.

Inspector/SHO Ajay Kumar (PW-8) recorded the statements of HC Het Ram (PW-6), EHC Jangi Ram (PW-7), Hari Ram (PW-13)

and Khiali Ram (PW-14); besides, he filed the police report. In cross-examination, it is stated that the investigation of the case was taken over by him on 23.09.2008. He (PW-8) had gone through the entire file on that date. He came to know that 'rapat' No.11 dated 21.11.2006 had been entered in the 'roznamcha'. FIR in the case was registered on 19.06.2008. During the intervening period, there was no other information about the murder on the record of this case. It is stated as incorrect to suggest that he had 'challaned' the accused (appellants) without verifying the facts.

The nature of the above evidence and material on record goes to show that the prosecution witnesses, namely, Raghav (PW-1), Smt. Reshma (PW-10), Beant Singh (PW-11), Mithu Singh (PW-12), Het Ram (PW-13) and Khiali Ram (PW-14) did not support the prosecution case and were got declared hostile.

Balwinder Singh (PW-15), however, supported the prosecution case. The allegation against him for supporting the prosecution case is that a case was got registered against him by Parmeshwari (appellant No.1) that he had committed rape on her elder daughter and, therefore, he nursed a grudge against her. It is to be noticed that when his evidence is considered being a neighbour of Parmeshwari (appellant No.1) in the context of the other witnesses who have resiled from their previous statements, it does give an impression that Parmeshwari (appellant No.1) was not leading a normal life and keeping in view that her husband Makhan Singh (deceased) was a driver and when he went out at intervals of various days keeping in view nature of his duties, other undesirable persons including Om Parkash (appellant No.2) used to visit her house.

Besides, Makhan Singh (deceased) had a thin framed body and was often beaten by Parmeshwari (appellant No.1). However, the sole testimony of Balwinder Singh (PW-15) by itself may not be sufficient to establish the guilt of the appellants and it is to be considered and appreciated along with other evidence on record.

Dr. C.P. Dadhich, M.O, General Hospital, Sirsa (PW-2) along with Dr. Mrs. Archana Aggarwal conducted the postmortem examination on the dead body of Makhan Singh son of Birbal, aged 40 years. It is stated that the dead body was brought by Amar Singh and it was identified by Khiali Ram (PW-14) and Hari Ram (PW-13), both residents of village Bhamboor. It was dead body of an averagely built male wearing white 'kurta-pyjama'. Blood sample was taken from the heart and was sent to Chemical Examiner. The cause of death was deferred till the receipt of the report of the Chemical Examiner. On receipt of Chemical Examiner's report (Ex.P-5), they declared the cause of death due to aluminium phosphide poisoning vide their opinion (Ex.P-6).

In cross-examination, it is stated by Dr. C.P. Dadhich (PW-2) that he could not tell who was Amar Singh as his father's name or address was not written in the record. As per postmortem report, the information about death was received by the police on 20.11.2006 at 09:20 p.m. The dead body was examined by them on 21.11.2006 at 03:00 p.m. The blood sample gave positive test for ethyl alcohol which meant that the deceased had consumed alcohol. It is stated as correct that the exact time between injury and death could not be ascertained so they gave it as variable. Death in this case could have occurred after 03:00 p.m. on 20.11.2006. It is stated as correct that

it was not possible for them to give cause of death without the report of the Chemical Examiner. Police sought their opinion regarding cause of death on 22.08.2007 on producing the report itself. No separate application was moved as per his record. It is stated as incorrect to suggest that he had given a wrong opinion.

The presence of ethyl alcohol in the dead body of Makhan Singh according to Dr. C.P. Dadhich (PW-2) meant that the deceased had consumed alcohol. This, in fact, is the prosecution case that on the date of incident, Makhan Singh had taken drinks. In fact, Parmeshwari (appellant No.1) had taken the stand that Makhan Singh used to consume heavy amount of liquor and on the day of occurrence, he had gone to his mother's house and had returned drunk. He was seen lying in the street by the neighbours, who informed her and she came out and found her husband in an unconscious state. She shifted him to General Hospital, Sirsa, where he died.

Mr. Anmol Rattan Sidhu, Senior Advocate, has laid emphasis on the fact that it is a case based on circumstantial evidence and the parameters as laid down in *Sharad Birdhichand Sarda v. State of Maharashtra* (supra) relating to appreciation of circumstantial evidence and also relating to cases of murder by administration of poison are to be followed. In the said case, it has *inter alia* been held that in cases of murder by administration of poison, the Court must carefully scan the evidence and determine the four important circumstances which alone can justify a conviction, i.e. :-

- (1) There is a clear motive for an accused to administer poison to the deceased;

- (2) That the deceased died of poison said to have been administered;
- (3) That the accused had the poison in his possession;
- (4) That he had an opportunity to administer the poison to the accused.

Reliance was placed in the said case on an earlier decision of the Supreme Court in **Ramgopal v. State of Maharashtra**, AIR 1972 SC 656, wherein it was held that dealing with a case of poisoning where the evidence is circumstantial the fact that the accused had motive to cause death of the deceased, though relevant, is not enough to dispense with proof of certain facts which are essential to prove in such cases. Three questions arise in such cases, namely, (firstly), did the deceased die of poison in question? (secondly), had the accused the poison in his possession? and (thirdly), had the accused an opportunity to administer the poison in question to the deceased? It is only when the motive is there and these facts are all proved that the Court may be able to draw the inference, that poison was administered by the accused to the deceased resulting in his death.

It was further held that the following conditions must be fulfilled before a case against an accused based on circumstantial evidence can be said to be fully established:-

1. The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' not 'may be' established.

2. The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.
3. The circumstances should be of a conclusive nature and tendency.
4. They should exclude every possible hypothesis except the one to be proved, and
5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

In the said case, a newly married bride was found dead. The cause of death was poisoning due to a strong dose of potassium cyanide. The prosecution case was that in a short span of four months of married life, the newly married bride was ill-treated by her husband and his parents, and that poison was administered by her husband. The defence plea, however, was that while there was a strong possibility of her having been ill-treated being highly sensitive and impressible woman she might have committed suicide out of sheer depression and frustration arising from an emotional upsurge. The case depended solely on circumstantial evidence. It was held that the circumstantial evidence did not lead to the only conclusion that the husband committed murder by administering poison. On the other hand, two views were possible, one pointing to his guilt and another that the wife might have committed suicide. Consequently, the

accused was held entitled to benefit of doubt. It was also observed that while two ingredients had been proved in the said case, but two were not so proved. In the first place, it had no doubt been proved that Manju in the said case died of potassium cyanide and, secondly, it was also proved that there was an opportunity to administer the poison. However, it had not been proved by any evidence that the appellant in the said case had poison in his possession. On the other hand, there was clear evidence of PW-2 in the said case that potassium cyanide could have been available to Manju from the plastic factory of her mother, but there was no evidence to show that the accused could have procured potassium cyanide from any available source. The High Court in the said case had held that there was no direct evidence on these two points because the prosecution was not able to lead evidence that the accused had procured potassium cyanide from a particular source. Similarly, there was no direct evidence to prove that he had administered poison to Manju. However, it was not necessary to prove each and every fact by a direct evidence. Circumstantial evidence, it was held by the High Court, could be basis for proving this fact. The Supreme Court observed that the comment made by the High Court appeared to be frightfully vague and absolutely unintelligible. While holding in the clearest possible terms that there was no evidence in this case to show that the appellant was in possession of poison, the High Court observed that this fact may be proved either by direct or indirect (circumstantial) evidence. But it failed to indicate the nature of the circumstantial or indirect evidence to show that the appellant was in possession of poison. It was further observed that if the Court

seemed to suggest that merely because the appellant had the opportunity to administer poison and the same was found in the body of the deceased, it should be presumed that the appellant was in possession of the poison. Then it had committed a serious and gross error of law and had blatantly violated the principles laid down by the Supreme Court. The High Court, it was observed, had not indicated as to what was the basis for coming to a finding that the accused could have procured the cyanide. On the other hand, in view of the decision in Ramgopal's case (supra), failure to prove possession of the cyanide poison with the accused by itself would result in failure of the prosecution to prove its case.

In the present case, the prosecution has led no evidence to prove the possession of the poison, i.e. aluminium phosphide, by the appellants. It is to be noticed that initial investigation was conducted by SI Ajmer Singh (PW-18) who was posted as In-charge Police Post J.J. Colony, Sirsa. He conducted inquest proceedings and prepared the report (Ex.P4). A perusal of the inquest report (Ex.P4) mentions that the death of Makhan Singh is stated to have occurred by consuming poisonous substance. The dead body was in the mortuary of the Civil Hospital and an inquest proceedings were conducted there. SI Ajmer Singh (PW-18) recorded the statement (Ex.P21) of Birbal, complainant – father of the deceased. Besides, he (PW-18) made his endorsement Ex.P22 and sent the same to Police Station City Sirsa for making an entry in the Roznamcha (Daily Diary Report). He also scribed an application (Annexure P3) for conducting post mortem examination. However, he (PW-18) is not shown to have visited the spot where the incident had occurred to find any poisonous

substance from there. It is to be noticed that though the incident had occurred on 20.11.2006 but it is only after the receipt of Chemical Examiner's report (Ex.P5) and the Medical Officers' opinion (Ex.P6) that the FIR (Ex.P9) was registered on 19.6.2008, that is, almost after one and a half year of the incident. It is then that investigation was conducted by Inspector/SHO Dalip Singh (PW-19) who went to village Bhamboor and recorded the statement of Balbir, complainant (since deceased) and statement (Ex.P15) of Mithu Singh, Member Panchayat (PW-12) as also statement Ex.P14 of Beant Singh (PW-11) and statement (Ex.P13) of Smt. Reshma (PW-10). The said witnesses, as has already been noticed, did not support the prosecution case while deposing during trial and they resiled from their statements made before the Police. Inspector/SHO Dalip Singh (PW-19) also prepared rough site plan on the demarcation of Birbal, complainant and Balwinder Singh (PW-15) with correct marginal notes. Inspector/SHO Dalip Singh (PW-19) though had stated that he prepared the site plan (Ex.P24), however, the same in fact is a crime detail form which also contains the site plan that was prepared. A perusal of the crime detail form (Ex.P24) as also the site plan prepared on it. The site plan does not make any mention of poison lying anywhere in the room. In fact there could be none as the crime detection form (Ex.P24) was prepared on 23.6.2008, while the incident had occurred on 20.11.2006.

A scaled site plan (Ex.P10) was also prepared in the case by Radhey Shyam, Draftsman (PW-5) on 30.09.2008. In the said scaled site plan (Ex.P10), there is no mention of any poison being depicted anywhere near the place where the incident had occurred.

Parmeshwari (appellant No.1) was arrested by ASI Rattan Singh on 05.07.2008. Om Parkash (appellant No.2) was arrested in the case by SI Ranbir Singh (PW-9) on 22.09.2008 i.e. almost after one and a half year of the incident. It is also to be noticed that in the statements of the appellants recorded under Section 313 Cr.P.C., no question regarding poison being in possession of any of the appellants was put to them, which would mean that there is no evidence on record of the appellants being in possession of poison and that of administering it to Makhan Singh.

Therefore, the ratio of the judgments of the Supreme Court in Sharad Birdhichand Sarda's case (supra) and Ramgopal's case (supra), as referred to above, would apply in the case inasmuch as out of the four requirements that alone can justify conviction in a case of murder by administration of poison, two of them i.e. the deceased died of poison said to have been administered and the accused (appellants) had the poison in their possession have not been established. The other two conditions i.e. there was a clear motive for the accused (appellants) to administer poison to the deceased and they had an opportunity to administer the poison to the deceased may have been there. In fact, the motive that has been given by the prosecution is that the appellants had illicit relations amongst themselves and therefore, Parmeshwari (appellant No.1) in collusion with Om Parkash (appellant No.2) had the motive to murder her husband Makhan Singh; besides, they were taking drinks together on the day of occurrence i.e. on 20.11.2006 and, therefore, they had an opportunity to administer the poison to the deceased. However, the other two ingredients have not been established.

Even otherwise, the motive to commit the murder though has been alleged but no concrete evidence except for the deposition of Balwinder Singh (PW-15) is there who also merely stated that Makhan Singh was a driver by profession and he used to return to his house after ten-twenty days. In his absence some persons including Om Parkash (appellant No.2) used to visit the house of Parmeshwari (appellant No.1). It has also been stated that Parmeshwari was a lady of loose character and many persons used to visit her house for illegal purposes. He also states that when he heard noise of weeping from the house of Makhan Singh (deceased) at around 8.00/8.30 p.m. on 20.11.2006 then he, his wife and one Raghav (PW-1) went there. There they saw Makhan Singh was lying on the ground in front of the door of the house. Om Parkash (appellant No.2) and Parmeshwari (appellant No.1) both were also present there and they asked him (PW-15) as to why had he come as it was their family dispute. He also states that Om Parkash (appellant No.2) arranged a three-wheeler in which both the accused (appellants) shifted to Makhan Singh Civil Hospital, Sirsa. However, it is to be noticed that Balwinder Singh (PW-15) makes no mention of there being any affair or illicit relations there between the appellants. Therefore, allegation of motive though is there but there is nothing to substantiate the same. This is more so for the reasons that the other prosecution witnesses namely Raghav (PW-1), Smt. Reshma (PW-10), Beant Singh (PW-11), Mithu Singh (PW-12), Hari Ram (PW-13) and Khiali Ram (PW-15) have not supported the prosecution case.

The evidence of illicit relations between the appellants is also sought to be established from the deposition of Madan Lal (PW-3) who

was posted as Inspector/SHO Police Station Sirsa on 29.03.2007 and on that day he had arrested both the appellants from near canal bridge in J.J. Colony Sirsa. He (PW-3) produced them before the Executive Magistrate on the next day along with 'calendra' (calendar of events) in proceedings under Section 109 Cr.P.C. which was also accompanied by personal search memo, copy of which was Mark P-8. Therefore, the prosecution seeks to establish that there was illicit relations between the appellants as they were proceeded against under Section 109 Cr.P.C. while loitering in J.J. Colony, Sirsa, on 29.03.2007. However, this by itself would not establish illicit relationship as the final outcome of the proceedings under Section 109 Cr.P.C. have not been brought on record, for which an adverse inference is to be drawn against the prosecution. Therefore, taking the entirety of evidence on record even the motive in the case is not shown to be established.

Another aspect which requires consideration is that the prosecution has led evidence that on the date of occurrence i.e. 20.11.2006 the appellants and Makhan Singh as also one Gurmit Singh started drinking together, however, Gurmit Singh is stated to have left the house of Makhan Singh (deceased) and Parmeshwari (appellant No.1) at 4:30 p.m. Gurmit Singh has, however, not been examined in the case. Gurmit Singh could have and was in a position to disclose regarding the involvement of the appellants in the administration of poison to him. Besides, he was an important witness of last seen together but for reasons best known, he has not been examined and even no explanation as to why he has not been examined has been given.

Another aspect that requires consideration is that the doctor at Civil Hospital, Sirsa, sent a 'ruqa' (memo) (Ex.P-20) to the SHO, Police Station City Sirsa on 20.11.2006 informing that Makhan son of Birbal, resident of Shamshabad Patti, had been brought dead by Om Parkash (appellant No.2) and Parmeshwari (appellant No.1) as a case of consuming alcohol. The memo (Ex.P-20) is signed Sarwan Singh son of Birbal. However, the said doctor has not been examined and in the deposition of Dr. C.P. Dadhich (PW-2) it is stated that the dead body was brought by Amar Singh and it was identified by Khiali Ram (PW-14). There is no mention of Om Parkash (appellant No.2) bringing the dead body to the hospital. Even in the inquest report (Ex.P-4), the persons, who identified the dead body are mentioned as Khiali Ram (PW-14) and Hari Ram (PW-13) and there is no mention of Om Parkash (appellant No.2). Both the witnesses did not support the prosecution case and were declared hostile. They were cross-examined by the learned Public Prosecutor, however, no question was put to them that they had identified the dead body of Makhan Singh at the time of inquest proceedings. In fact, the prosecution ought to have put so much of its case as it concerned the said two witnesses and if no question are put, the Court is to presume that the witnesses' account has been accepted. The attention of the said two witnesses was liable to be drawn to the fact that they had identified the dead body of Makhan Singh during inquest proceedings. This has indeed not been done. Therefore, merely on the basis of the 'ruqa' (memo) (Ex.P-20) addressed by the doctor to the SHO, Police Station City Sirsa, that Om Parkash (appellant No.2) was one of the persons, who had brought Makhan Singh to the hospital, cannot be said to be

established. The learned trial Court erred in holding that the fact that Makhan Singh was taken to the hospital by Parmeshwari (appellant No.1) and Om Parkash (appellant No.2) is established by 'ruqa' (memo) (Ex.P-20) sent by the Medical Officer to the SHO, Police Station City Sirsa, on 20.11.2006.

The 'ruqa' (memo) (Ex.P-20) has been exhibited on record in the deposition of SI Ajmer Singh (PW-18). However, the said 'ruqa' (memo) (Ex.P-20) is not shown to be having any endorsement or receipt of SI Ajmer Singh (PW-18) and it is merely initialled by the doctor which itself is not legible and signed by Sarwan son of Birbal and both of them have not been examined. Therefore, the 'ruqa' (memo) has merely been marked as exhibit.

In **Sait Tarajee Khimchand and others v. Yelamarti Satyam and others**, AIR 1971 SC 1865, it has been held that mere marking of an exhibit does not dispense with the proof of the documents. It is common place to say that the negative cannot be proved. Besides, in **Narbada Devi Gupta v. Birendra Kumar Jaiswal**, (2003) 8 SCC 745, it has been held that it is undisputed that mere production and marking of document as exhibit by the Court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the "evidence of those persons who can vouchsafe for the truth of the facts in issue". This rule in fact would apply rigorously in criminal cases where the guilt of the accused is to be established beyond reasonable doubt.

The contention of learned State counsel as regards the applicability of Section 106 of the Evidence Act may be considered.

The rule provides that when any fact is especially within the

knowledge of any person, the burden of proving that fact is on him. It is indeed an exception to the general rule that the prosecution has to prove its case and it is designed to meet certain exceptional cases.

According to learned counsel for the State, it is the appellants only who were in the house when Makhan Singh died and by virtue of their special knowledge, they were to offer an explanation. In this regard, it is to be noticed that the initial burden is on the prosecution to establish its case and it cannot invoke the principle enshrined under Section 106 of the Evidence Act of discharging its burden of proving the prosecution case beyond reasonable doubt.

In **Sawal Das v. State of Bihar**, (1974) 4 SCC 193, it was held that neither an application of Section 103 nor of Section 106 of the Evidence Act could absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or, which makes out a *prima facie* case, that the question arises of considering facts of which the burden of proof may lie upon the accused. Therefore, the crucial question to be considered is whether the prosecution had discharged its initial or general and primary burden of proving the guilt of the accused beyond reasonable doubt.

In **Shambhu Nath Mehra v. The State of Ajmer**, AIR 1956 SC 404, it was held that Section 106 is an exception to Section 101. The latter with its illustration (a) lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the

contrary, it is designed to meet certain exceptional cases in which proportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge.

The initial burden to prove the prosecution case is on the prosecution itself and the burden of that proof does not shift from the prosecution to the accused. The guilt of an accused is to be proved beyond all reasonable doubts and the defence of the accused can be looked into only to lend credence to it. It does not in any manner discharge the prosecution of its initial proof. Besides, Section 106 of the Evidence Act cannot be utilized where the prosecution fails to discharge even its initial burden of proof.

In the present case, the prosecution has not discharged its initial burden inasmuch as all the witnesses except for Balwinder Singh (PW-15) had turned hostile and did not support the prosecution case. The deposition of Balwinder Singh (PW-15) by itself would not establish the guilt of the appellants as there are allegations against him that he may be inimical in view of the false criminal case of rape stated to have been lodged by Parmeshwari (appellant No.1) alleging that he had committed rape on her elder daughter after she had been released on bail in the present case. The same could have been ignored if there was other evidence, but there is no other evidence to substantiate the case of the prosecution. Besides, the parameters laid down by the Supreme Court for establishing a case of death by poisoning have not been met inasmuch as it has not been shown that

the death of Makhan Singh was due to poison said to have been administered by the appellants and that the appellants were in possession of the poison. Also, the motive for the administration of the poison has been faintly established and not clearly and beyond shadow of reasonable doubt. In the circumstances, it is to be held that the prosecution has failed to establish its case beyond shadow of all reasonable doubt.

Therefore, the circumstances from which the conclusion of guilt is to be drawn have not been fully established and benefit of doubt in the facts and circumstances of the case is liable to be given to the appellants. The circumstances of the case are not conclusive in nature so as to establish the guilt of the appellants. The chain of evidence is incomplete and leaves sufficient ground for the conclusion of the innocence of the appellants. There is nothing to show that in all human probability the act in question must have been done by the appellants.

For the foregoing reasons, the appeal is allowed. The judgment of conviction dated 04.03.2010 and the order of sentence dated 05.03.2010 passed by the learned Sessions Judge, Sirsa, are set aside and the appellants are acquitted of the offence for which they were charged.

(S.S. SARON)
JUDGE

(GURMIT RAM)
JUDGE

January 31, 2017
A.Kaundal

Note: 1. Whether reasoned/speaking : Yes
2. Whether reportable : Yes