

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

+ CRL.A. 407/2004

Reserved on: 26.11.2018

Date of decision: 18.12.2018

IN THE MATTER OF:

VIJAY SHAH

..... Appellant

Through: Mr. Sumeet Verma, Advocate
(DHCLSC)

versus

STATE (NCT OF DELHI)

..... Respondent

Through: Ms. Aashaa Tiwari, APP for State

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

HIMA KOHLI, J.

1. The appellant (A-1) along with Ashok Kumar (A-2) has faced trial in Session Case No.49/2000 in the court of learned ASJ, Delhi for the offences punishable under Sections 302/364/120-B read with Section 34 of the Indian Penal Code, 1860 (in short '**IPC**'), arising out of FIR No. 169/2000, PS Prasad Nagar. Vide judgment dated 12.01.2004, Ashok Kumar has been acquitted of all the charges framed against him and the appellant has been convicted for the offences punishable under Sections 302/364 of the IPC. He has however been acquitted of the charge punishable under Section 120-B IPC. Vide order on sentence dated 27.01.2004, the appellant has been sentenced to undergo imprisonment

for life and pay fine of Rs.2,000/-. In default of payment of fine, he has been directed to undergo rigorous imprisonment for six months. The appellant has also been sentenced to undergo imprisonment for a period of six years and pay a fine of Rs.2,000/- for the offence punishable under Section 364 IPC and in default of payment of fine, directed to undergo rigorous imprisonment for six months with a stipulation that both the sentences shall run concurrently.

2. Aggrieved by the aforesaid conviction and order on sentence, the appellant has preferred the present appeal.

3. Shorn of irrelevant details, the case set up by the prosecution is that the deceased, Smt. Brijesh, wife of Sh. Niranjana Singh had a liaison with the appellant and he wanted her to leave her husband and three children and live with him. When Smt. Brijesh refused to break her marriage with Sh. Niranjana Singh, the appellant plotted to take her away. This opportunity came his way on 04.4.2000, when he knew that Smt. Brijesh, who lived in Bapa Nagar, Karol Bagh, would be visiting a government dispensary at Patel Nagar, for obtaining medicines. On 04.4.2000, when Smt. Brijesh left her house at 10.30AM along with her 2½ year child, Kanchan, the appellant driving a blue coloured Maruti Van bearing registration No. DL-4CE-0940, met her on the way and made her and her daughter board the Van, which he drove towards Dharuhera, Haryana. When the deceased expressed her unwillingness to live with the appellant, he took her to the bed of river Shabi and murdered her. On the very same day, i.e., on 04.04.2000 at 4.45 PM, Jaan Mohd. a public witness found the minor daughter of Smt. Brijesh

abandoned on the national highway leading to Gurgaon, Haryana and he took her to his house and informed Police Post Khandsa, Gurgaon.

4. When Smt. Brijesh and her daughter, Kanchan did not return home on 04.04.2000, her husband, Sh. Niranjana Singh lodged a missing report with P.S. Prasad Nagar. When the criminal law was set into motion, the police examined some witnesses including, Kamlesh, the sister of Niranjana Singh and sister-in-law of the deceased, who was residing with her mother on the first floor portion of the same house where Sh. Niranjana Singh and his family members were residing on the ground floor, i.e. House No. 16/483-I, Military Road, Bapa Nagar, Karol Bagh, Delhi. On 17.4.2000, Kamlesh, told her brother that she had seen her *Bhabhi*, Smt. Brijesh accompanied by baby Kanchan going with Vijay Shah in his Maruti Van on 04.4.2000. Niranjana Singh lodged a report with the police on the very same day and a FIR was registered.

5. After three days of registration of the FIR, on 20.4.2000, the appellant was arrested. Based on his disclosure statement (Ex.PW12/A) made on 23.4.2000, the appellant led the police party, duly accompanied by Niranjana Singh to the bank of river Shabi near Dharuhera, Haryana and on his pointing out to a place at the river bed from the bridge above, blood was found on the stones and the police party recovered a chopped head and a highly decomposed body along with clothes. Niranjana Singh identified the dead body as that of his wife from the skull and her clothes found lying there.

6. The pointing out memo (Ex.PW20/A) was prepared in respect of dry blood on the stones, duly witnessed by the police party and Niranjana

Singh. Besides lifting the blood stained stones (Ex.PW6/A), blood stained earth (Ex.PW13/E) and earth control samples from the spot (Ex.PW13/F), the clothes of the deceased were also lifted (Ex.P-2 to Ex.P-5). The local police from the police lines Gurgaon, Haryana, were associated by the police party from Delhi and they had accompanied the latter to the spot where the dead body of the deceased was found lying on the bed of river Shabi.

7. Proceedings under Section 174 Cr.P.C. were conducted by the police from Haryana, an inquest report (Ex.PW13/A) was prepared and the dead body was sent for postmortem to PHC Bawal. From there, the dead body was transferred to Rohtak Medical College, where the postmortem was conducted (Ex.PW38/A).

8. On conclusion of the investigation, charges were framed against the accused persons under Sections 120-B/364/302 IPC, to which they pleaded not guilty. To bring home the guilt of the accused, the prosecution examined 38 witnesses and exhibited documents and material objects. When questioned under Section 313 Cr.P.C., both the accused denied the incriminating evidence and circumstances and claimed trial. The defence has examined only one witness.

9. DD No.9-A regarding missing of a woman and her daughter was proved by HC Jai Dayal (PW-1) as Ex.PW1/A, the FIR, Ex.PW9/A was proved by HC Jagmal Singh, PS Prasad Nagar (PW-9), the registration certificate of the Maruti Van bearing registration No. DL-4CE-0940 was proved by Prabhu Dayal (PW-3), the registered owner, as Ex.PW3/A and

the seizure memo of the Maruti Van, borrowed by the accused from Prabhu Dayal on 04.4.2000 at 10.30AM, was marked as Ex.PW3/B.

10. The statement of the public witness Sh. Jaan Mohd. (PW-5), who found baby Kanchan on 04.4.2000, at 9.45 PM, abandoned on the National Highway near the Mazar of Peer Baba and had taken her to his home after informing the police post Khandsa, P.S. City Gurgaon, Haryana, was recorded. He proved the recovery of Kanchan and of her being handed over to PW-6 on 26.4.2000, vide memo, Ex.PW5/A; ASI Inderjit (PW-8), In-Charge, Police Post Khandsa Road, recorded DD No.21 on Jaan Mohd. reporting to him about finding baby Kanchan roaming on the National Highway, as Ex.PW8/A.

11. HC(W) Geeta, P.S. Prasad Nagar (PW-10), who recorded DD No.15-A on 05.04.2000 on the complaint of Niranjn Singh, proved the same as Ex.PW10/A. HC Rajender Singh (PW-11), Malkhana (Moharar) of P.S. Prasad Nagar, testified that on 25.4.2000, 27.4.2000 and 01.5.2000, SI Arvind Kumar (PW-35) had deposited sealed parcels in the Malkhana in his custody and on 04.5.2000, the Maruti Van was also deposited in the Malkhana. On 13.6.2000, the sealed parcels and sample seal, etc., were sent to FSL, Malviya Nagar in an untampered and intact condition. Ex.PW11/A, Ex.PW11/B and Ex.PW11/C were proved through the relevant entries made in Register No.19, of the year 2000. The disclosure statement of the appellant was proved by Ct. Raj Kumar (PW-12), as Ex.PW12/A. The inquest proceedings of the dead body were proved by ASI Mohan Singh (PW-13), police line Gurgaon, Haryana (Ex.PW13/A). He had also proved the statements of Niranjn Singh and

SI Arvind Kumar as Ex.PW13/C and Ex.PW13/D respectively, the blood stained earth as Ex.PW13/E, the earth control samples lifted from the spot as Ex.PW13/F and the handing over of the dead body of the deceased, Brijesh on 25.4.2000, as Ex.PW13/G.

12. Ct. Jeet Singh (PW-15), who joined the investigation of the case on 20.4.2000, deposed about apprehending the appellant and recording his disclosure statement (Ex.PW15/A). HC Daya Nand (PW-17) P.S. Dharuhera, District Rewari, Haryana, proved DD No.18-A dated 23.4.2000, the date on which SI Arvind Kumar of Delhi Police came to P.S. Dharuhera (Ex.PW17/A). Ct. Kashi Nath (PW-19) proved the disclosure statement of the accused No.2, Ashok Kumar (Ex.PW19/A) and testified that he along with Ct. Sita Ram (PW-28) and other officers had accompanied the appellant to his house bearing No.16/938-I, Bapa Nagar, Karol Bagh, Delhi from where they had taken his shirt in their possession vide memo Ex.PW19/B. He also proved the pointing out memo, Ex.PW19/C.

13. Ct. Sunder Singh (PW-20) joined the investigation on 23.4.2000 and testified that when he was posted at P.S. Prasad Nagar, he along with Inspector Umrao Singh and other police officers went to Dharuhera, duly accompanied by the appellant and the complainant, Niranjana Singh. He deposed about the preparation of the pointing out memo by him (Ex.PW20/A). Ct.Chainpal (PW-21) joined the investigation on 26.4.2000 and deposed how they recovered baby Kanchan from the possession of Jaan Mohd. (PW-5) from House No.409/20, Shanti Nagar, Gurgaon and handed her over to the complainant, vide memo

(Ex.PW5/A). The recovery of the minor girl was also proved through HC Davinder Singh (PW-24), who had accompanied PW-23 to Gurgaon.

14. Ct. Jatinder Singh (PW-23) narrated the facts about accompanying the police team on 23.4.2000 with the complainant and the appellant to Dharuhera, from where the dead body and clothes of the deceased were recovered on pointing out by the appellant. Inspector Devender Singh (PW-29) proved the scaled site plan as Ex.PW29/A. Inspector Umrao Singh, SHO P.S. Parsad Nagar, who had led the police team on 23.4.2000 to Dharuhera and recovered the dead body of the deceased, testified that he had signed the pointing out memo Ex.PW20/A. Ct. Lakhmi Chand (PW-32) had taken eight sealed parcels on 13.6.2000 from HC Rajender Singh (PW-35), the Malkhana Moharar and had deposited the same at the FSL Malviya Nagar.

15. Mr. Pawan Kumar (PW-33), the photographer, who was called to the site to take the photographs of the dead body, clothes, etc., on 23.4.2000, proved the negatives and positives of the photographs as Ex.PW-33/A1-5 to Ex.PW33/A6-10. Mr. Anil Wadhawan (PW-34), Record In-Charge, R.T.O., Janak Puri (PW-34) brought the registration file of the Maruti Van in question and proved the photograph of the registration certificate as Ex.PW34/A.

16. SI Arvind Kumar (PW-35) joined the investigation on 17.4.2000 and deposed about discovering the body of the deceased on 23.4.2000, at the instance of the appellant. He testified having signed the inquest report (Ex.PW13/B), his statement recorded in the inquest proceedings (Ex.PW13/D) and about the lifting of the blood stained stones

(Ex.PW6/A), blood stained earth (Ex.PW13/E) and earth control samples from the spot (Ex.PW13/F).

17. Dr. Deepa Verma, Sr. Scientific Officer-cum-Chemical Examiner, FSL Malviya Nagar (PW-36) examined the pieces of paper described as an OPD slip of the Department of Health Services, Govt. of NCT of Delhi (Mark X-1 to X-4) and proved her report as Ex.PW36/A.

18. Dr. A.K. Srivastava, Sr. Scientific Officer-cum-Chemical Examiner (PW-37) examined the documents and testified about the case property received by him and blood detected on two stone pieces, a piece of cotton wool swab one lady suit, one brassiere, one underwear and the prescription slip marked as Ex.1,2, 5-A, 5-C 5-D and 6 respectively. The report of the serological analysis wherein human blood of Group-‘A’ was found on the stone pieces, cotton wool swab and the prescription slip bearing blood stains of Group-‘A’, was marked as Ex.PW37/B.

19. Dr. Luv Sharma (PW-38), Department of Forensic Medicines, PGI M.S. Rohtak, Haryana proved the autopsy report of the dead body (Ex.PW38/A) and opined that it was that of a young adult female in a partially skeletonized state, whose death had been caused by a cut throat wound, which was sufficient to cause death in ordinary course of nature. He also testified that the aforesaid injury was anti-mortem in nature and the time between the occurrence of the death and the postmortem was between 3 to 4 weeks.

20. The complainant, Niranjn Singh (PW-6) and his sister, Kamlesh (PW-26) were examined to prove the facts of the case. These witnesses

narrated how the accused used to meet the deceased in their house in the absence of Niranjana Singh. PW-6 stated that a month before the incident, he had asked the appellant not to visit his house in his absence; that on 04.4.2000, he had left his house at 9.00AM and on returning in the evening, he came to know that his wife and daughter, Kanchan were missing; that he had lodged a missing report on 05.4.2000 and on his subsequent report to the police on 17.04.2000, the FIR was registered; that it was on his identification that the appellant was apprehended on 20.4.2000 and his disclosure statement was recorded, which he had duly signed.

21. Kamlesh (PW-26) testified that the appellant used to visit her brother's house frequently and she had seen her *bhabhi* alongwith him many times. On 04.4.2000, at about 10.30AM when she was returning from the market, she had seen the appellant driving a blue coloured Maruti Van, in which her *bhabhi*, Smt. Brijesh and her daughter, Kanchan were also sitting; that she did not disclose this to her brother till 17.4.2000. Only after she narrated this incident to her brother that he had approached the police and the FIR was registered on 17.04.2000. Prabhu Dayal (PW-3) deposed that on some urgency expressed by the appellant on 04.04.2000, he had handed over his Maruti Van to him. PW-3's ownership of the said van was proved by PW-34.

22. Based on the above evidence, the trial court has convicted the appellant under Sections 364 and 302 of the IPC on the ground that the circumstantial evidence brought on record was conclusive of his guilt and inconsistent with his innocence. For establishing an unbroken chain

of the circumstantial evidence brought on record, the learned ASJ relied on the deposition of PW-26/Kamlesh, who had stated that in the morning of 04.04.2000, she had seen the deceased along with her daughter going in a navy blue Maruti Van driven by the appellant, which got support from PW-3.

23. The plea of the defence that the testimony of PW-26 was unreliable since the prosecution could not satisfactorily explained as to why did the said witness not reveal the factum of the deceased and her daughter accompanying the appellant in his car on 04.04.2000, at the earliest and instead, had waited till 17.04.2000 to inform her brother about it, was rejected by the trial court holding that Kamlesh (PW-26) was a credible witness and her testimony was corroborated by the deposition of PW-3 and PW-34. For accepting the testimony of PW-26, the trial court relied on the contents of DD No.19A lodged by the appellant on 06.04.2000, wherein it was recorded that Niranjana Singh and his sister had an altercation with him; they had accused him of abducting the deceased and the complainant had injured him in the said altercation.

24. The fact that it was on the pointing out of the appellant that the police party was able to recover the chopped head and skeletonized body parts of the deceased from the bed of river Shabi at Dharuhera, Haryana, combined with the circumstance of baby Kanchan having been found abandoned by a public witness, PW-5 on 04.04.2000 at 09:45 PM near Peer Baba's Mazar on the National Highway, Gurgaon, which was duly

corroborated by PW-5, PW-8 and PW-30, also weighed with the trial court to indict the appellant.

25. Mr. Sumit Verma, learned counsel for the appellant has assailed the impugned judgment on the ground that the present case being based upon circumstantial evidence, the prosecution has failed to lead evidence to complete the chain of circumstances to bring home the guilt of the appellant; that the testimony of PW-6 as a last seen witness does not inspire confidence and ought to be disbelieved; that the undue delay in lodging the FIR on 17.04.2000, in respect of an incident that had taken place on 04.04.2000, belies the case of the prosecution; that it is highly improbable that the complainant (PW-6) could have identified the highly decomposed body as that of his wife; that there was no seizure memo prepared in respect of the garments of the deceased and nor was there any corresponding deposit of the articles seized from the bed of river Shabi on 23.04.2000 and placed in the malakhana and lastly, that there was no recovery of the weapon by the prosecution.

26. In support of his submission, learned counsel for the appellant had cited Chhotu Sigh vs. State of Rajasthan, **1999 SCC (Crl.) 461** and Rambraksh @ Jalim vs. State of Chhattisgarh, **2016 (12) SCC 251**.

27. We have carefully examined the impugned judgment in the light of the evidence brought on record and have given our thoughtful consideration to the submissions advanced by learned counsel for the

appellant and Ms. Aashaa Tiwari, learned APP, who has supported the impugned judgment and submitted that the prosecution had satisfactorily established the circumstantial evidence through the last seen witness and other corroborative evidence available in the form of recovery and otherwise that completes the chain of circumstances conclusively leading to the guilt of the appellant. To fortify her stand, she has cited Harivadan Babubhai Patel vs. State of Gujarat, (2013) 7 SCC 45; Ranjeet Kumar Ram @ Ranjeet Kumar Das vs. Pandit @ Sanjay Mahto, etc., 2015 (3) JCC 2065 and Satpal (Supra).

28. The present case is one of circumstantial evidence. Before discussing the evidence brought on record and the arguments addressed by both sides, we may first recapitulate the settled legal possession with regard to the circumstantial evidence. The law is fairly well settled that in a case of circumstantial evidence, the cumulative effect of all the circumstances proved, must be such as to negative the innocence of the accused and to bring home the charge beyond reasonable doubt. It has been held in a catena of decisions by the Supreme Court and the High Courts that the circumstances proved must lead to no other inference except that of the guilt of the accused. [Ref.: M.G. Agarwal vs. State of Maharashtra, AIR 1963 SC 200; Prem Thakur vs. State of Punjab, (1982) 3 SCC 462; Sharad Birdhichand Sarda vs. State of maharashtra, (1984) 4 SCC 116; Ram Avtar vs. State (Delhi Admn.), AIR 1985 (SC) 1692; State of Tamil Nadu vs. Rajendran, (1999) 8 SCC 679; Trimukh

Maroti Kirkan vs. State of Maharashtra, 2006 (10) SCC 681]

29. In the landmark case of Sharad Birdhichand Sarda (supra), the Supreme Court has laid down the following factors to be taken into account while adjudicating cases of substantial evidence : -

"Admittedly, this is a case of circumstantial evidence. Factors to be taken into account in adjudication of cases of circumstantial evidence laid down by this Court are:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must" or "should" and 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."

30. In Padala Veera Reddy vs. State of Andhra Pradesh and Ors. reported as **(1989) Supp. (2) SCC 706**, the Supreme Court had the

following to state in respect of cases of circumstantial evidence:-

“10. when a case rests upon circumstantial evidence such evidence must satisfy the following tests:-

(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

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

(3) 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

(4) 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.”

31. On the application of the last seen together theory, which is a facet of circumstantial evidence, we may add a word of caution. When there is a time gap between the accused and the deceased seen together and the detection of the crime, the last seen together theory cannot by itself form the basis of holding the accused guilty of the offence. This view finds expression in several decisions of the Supreme Court. In the case of Deonandan Mishra vs. State of Bihar, (1955) 2 SCR 570, the Supreme Court held as under :-

".....It is true that in a case of circumstantial evidence not only should the various links in the chain of evidence be clearly established, but the completed chain must be such as to rule out

a reasonable likelihood of the innocence of the accused. But in a case like this where the various links as stated above have been satisfactorily made out and the circumstances point to the Appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation, and he offers no explanation, which if accepted, though not proved, would afford a reasonable basis for a conclusion on the entire case consistent with his innocence, such absence of explanation or false explanation would itself be an additional link which completes the chain. We are, therefore, of the opinion that this is a case which satisfies the standards requisite for conviction on the basis of circumstantial evidence."

32. In the case of Arjun Marik vs. State of Bihar, **1994 Supp. (2) SCC 372**, the Supreme Court observed that :-

*"31. Thus the evidence that the appellant had gone to Sitaram in the evening of 19-7-1985 and had stayed in the night at the house of deceased Sitaram is very shaky and inconclusive. Even if it is accepted that they were there it would at best amount to be the evidence of the appellants having been seen last together with the deceased. **But it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the accused and, therefore, no conviction on that basis alone can be founded.**" (emphasis added)*

33. In the case of State of Goa vs. Sanjay Thakran, **(2007) 3 SCC 755**, the Supreme Court held that the circumstance of last seen together would be a relevant circumstance in a case where there was no possibility of

any other person being with the deceased and had opined as below:-

"34. From the principle laid down by this Court, the circumstance of last seen together would normally be taken into consideration for finding the Accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the Accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the Accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the Accused persons and the deceased last seen together and the crime coming to light is after (sic of) a considerable long duration. There can be no fixed or straitjacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to removed the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author of the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is a long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such Accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the Accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that

place by any third party, then a relatively wider time gap would not affect the prosecution case."

34. In the case of Kanhiya Lal vs. State of Rajasthan, (2014) 4 SCC 715, the Supreme Court observed as under :-

"12. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the Accused who committed the crime. There must be something more establishing connectivity between the Accused and the crime. Mere non-explanation on the part of the Appellant, in our considered opinion, by itself cannot lead to proof of guilt against the Appellant."

35. In the case of Anjan Kumar Sarma & Ors. vs. State of Assam, (2017) 14 SCC 359, the Supreme Court cited its earlier decision in the case of Jaharlal Das vs. State of Orissa, (1991) 3 SCO (sic) 27 and observed as follows :-

"It is no more res integra that suspicion cannot take the place of legal proof for sometimes, unconsciously it may happen to be a short step between moral certainty and the legal proof. At times it can be a case of "may be true". But there is a long mental distance between "may be true" and "must be true" and the same divides conjunctures from sure conclusions."

36. In the case of Satpal vs. State of Haryana decided as recently as on 01.05.2018, the Supreme Court has highlighted the above factors in a case based on the last seen together theory, as a facet of circumstantial evidence in the following words:-

"6.We have considered the respective submissions and the evidence on record. There is no eye witness to the

occurrence but only circumstances coupled with the fact of the deceased having been last seen with the appellant. Criminal jurisprudence and the plethora of judicial precedents leave little room for reconsideration of the basic principles for invocation of the last seen theory as a facet of circumstantial evidence. Succinctly stated, it may be a weak kind of evidence by itself to found conviction upon the same singularly. But when it is coupled with other circumstances such as the time when the deceased was last seen with the accused, and the recovery of the corpse being in very close proximity of time, the accused owes an explanation under Section 106 of the Evidence Act with regard to the circumstances under which death may have taken place. If the accused offers no explanation, or furnishes a wrong explanation, absconds, motive is established, and there is corroborative evidence available inter alia in the form of recovery or otherwise forming a chain of circumstances leading to the only inference for guilt of the accused, incompatible with any possible hypothesis of innocence, conviction can be based on the same. If there be any doubt or break in the link of chain of circumstances, the benefit of doubt must go to the accused. Each case will therefore have to be examined on its own facts for invocation of the doctrine." (emphasis added)

37. We may also profitably refer to a recent decision in Anjan Kumar Sarma (supra), where the Supreme Court held that where the other links have been satisfactorily made out and the circumstances point to the guilt of the accused, the circumstance of last seen together and absence of any explanation by the accused would provide an additional link which completes the chain. However, in the absence of proof of other circumstances, only the circumstance of last seen together coupled with the absence of a satisfactory explanation, cannot be made the basis of conviction.

38. Coming first to the doubt raised about the identification of the body, we are unable to accept the argument advanced by learned counsel for appellant that in the absence of any pointing out-cum-seizure memo in respect of the parts of the body, i.e., the skull and skeletonized remains and the clothes of the deceased, the trial court should have disbelieved the prosecution story about the discovery of the dead body based on the disclosure statement of the appellant. PW-6 being the husband of the deceased, had recognized his wife from the skull and the clothes that she was wearing. Dr. Luv Sharma (PW-38), who has conducted the post mortem has also opined that the *“dead body parts belonged to a young adult female in partially skeletonized state”*. One of the samples handed over to the police by PW-38 included a sealed packet containing a piece of skin and soft tissues of the dead body for analysis. Additionally, the FSL report proved by Dr. A.K. Srivastava (PW-37) confirms that the blood sample collected from the site was of Group ‘A’ and it had matched with the blood sample of the deceased sent to the FSL for analysis. We therefore accept the findings returned by the trial court insofar as the identification of the body of the deceased is concerned.

39. However, scrutinized on the anvil of the law set out above, we have serious reservations about accepting the last seen together theory proffered by the prosecution, that has heavily relied on the version of Kanchan (PW-26), who informed the complainant after almost two weeks from the date when the deceased and her daughter had gone missing, that in the morning of 04.04.2000, she had seen her *Bhabhi* and niece going in a Maruti Van driven by the appellant. Considering the seriousness of the matter and the fact that both, the wife and daughter of

the complainant had gone missing on 04.04.2000 and could not be traced, the natural reaction of a sister-in-law, on seeing her brother running from pillar to post, trying to trace his wife and daughter would have been to immediately inform him about the above fact. Instead, PW-26 elected to remain a silent spectator for a period spanning over almost two weeks on the plea that the family would have been shamed, which is quite unnatural and out of the ordinary. The apprehension and anxiety caused on two family members going missing on the same day would in ordinary circumstances, far outweigh any embarrassment or shame that the family was likely to suffer on account of the deceased going missing.

40. We are also skeptical about last seen together theory canvassed by the prosecution in the light of the fact that they have kept mum about DD No.19A (Ex.DW1/A) recorded on the complaint of the appellant at P.S. Prasad Nagar on 06.04.2000, wherein he had categorically stated that the complainant (PW-6) and his sister (PW-26) had an altercation with him and had accused him of abducting the deceased. DW-1, HC Manbir Singh has deposed that the appellant had demanded that he be medically examined. He was sent with HC Davinder to Lady Harding Hospital and a MLC was conducted on him, which stated that the injuries suffered by him were simple in nature, caused by a blunt object. The appellant was brought back to the Police Station on the same day at about 7.00 P.M., as recorded in DD No.23/A (Ex.DW1/B). Contrary to the deduction drawn by the trial court that the aforesaid factor would go in favour of the prosecution and lend support to the testimony of PW-26 that she had seen the appellant taking the deceased in his Van on 04.04.2000, we are of the view that it would tilt the case in favour of the defence and

demolish the stand of the prosecution that though PW-26 had seen the appellant driving away with the deceased and her daughter in the morning of the fateful day, she had chosen to remain silent and failed to share this vital piece of information with her brother only to avoid an embarrassment to the family.

41. The above incident shows that PW-6 and his sister, PW-26 had confronted the appellant on the very next day of lodging a missing complaint in respect of the deceased and baby Kanchan and had stated that he had a hand in this episode. This being the position, the statement of PW-26 that she had remained silent in the interest of family honour, falls to the ground. Had the fear of ignominy been so pre-dominant in the mind of PW-6 and PW-26, there would have been no question of their confronting the appellant on 6.4.2000 and accusing him of abducting the deceased and baby Kanchan. Surprisingly, no steps were taken by the prosecution to investigate the above angle. Thus, the last seen evidence to connect the accused with the crime is found to be a very weak circumstance due to an unconvincing explanation offered by PW-26 to explain the lapse on her part in informing her brother that she had seen the deceased and her daughter in the company of the accused on 4.4.2000 and that he had forcibly taken them away.

42. This is not even a case where there is a close proximity between the place and the time of the crime. The place from where the dead body of the deceased was found, was at Daruhera, which would be at a distance of about 70 km from her home situated in Karol Bagh. The dead body was recovered on 23.04.2000 after 19 days from 4.4.2000, the

date on which the deceased and her daughter were allegedly last seen by PW-26 in the company of the accused. The two events do not bear close proximity with the death of the victim, with reference to the time and place, for this Court to arrive at a definite conclusion that no other person except for the appellant could have approached the deceased at the place of the incident or before the commission of the crime.

43. Another relevant factor that goes in favour of the defence is the opinion of PW-38 in the postmortem report, which states that the death had taken place between 3-4 weeks anterior to the date of preparation of the report. The deceased had gone missing with her daughter on 04.04.2000. Her body was discovered on 23.4.2000 and the postmortem report was prepared on 25.04.2000. Thus, the version of the prosecution that the appellant had killed Smt. Brijesh on 04.04.2000, is not substantiated by the medical evidence and it is well nigh impossible to ascertain with reasonable certainty, as to the period that might have elapsed between the death and the postmortem. There is no other evidence on record to establish the date of death of Smt. Brijesh.

44. The other circumstance of PW-5 finding Baby Kanchan roaming in the vicinity of the site, where the dead body of the victim was found, on the pointing out of the appellant, cannot strengthen the chain of circumstances or be treated as one of the circumstances in the chain of circumstances to prove the guilt against the appellant. Even if the last seen evidence is accepted as true and correct and it is assumed that the deceased and her daughter were made to accompany the accused in his Maruti Van to some unknown place on 04.04.2000, at best, the deduction

drawn would be that at some point in time, either while driving from Delhi to Haryana or on the way back, the child was dropped off on the highway. But that by itself cannot throw any light either on the time of the crime, or point to the appellant as a probable assailant.

45. Moreover, the prosecution has not been able to prove the motive for the murder of the deceased. Not a scrap of evidence has been placed on record to ratify the story that the appellant wanted the deceased to leave her husband and children and live with him and when she had refused to break her marriage, he had plotted to take her away and kill her. The disclosure statement of the appellant cannot be looked at for corroboration of this version. The weapon of offence has not been produced in the present case, nor has anything incriminating been found against the appellant to connect him to the crime except for the fact that it was at his instance that the dead body was recovered from Dharuhera. Even if the dead body was recovered from a place which was within the special knowledge of the accused, and a part of his confession, as admissible under Section 27 of the Indian Evidence Act, in the absence of other corroborative evidence to complete the chain of circumstances, it cannot conclusively prove that he had committed the murder. Again, merely because the appellant knew the complainant and his wife and he used to visit their house frequently and the complainant had asked him to refrain from visiting his house when he was not present, would also not be an incriminating circumstance qua the appellant. Further, no blood was detected on the appellant's shirt seized by the police from his house and sent to the FSL for an analysis.

46. There are other loose ends in the investigation conducted. Though an OPD prescription slip/card was found at the site where the chopped head and skeletonized body of the deceased was found lying and the same was handed over by PW-38 to the police after conducting the post mortem of the dead body and the FSL report mentions that the original writing on the torn pieces of the OPD slip were completely obliterated and could not be deciphered, but blood was detected on the said prescription slip. Surprisingly, no effort was made by the prosecution to summon the relevant records from the Department of Health Services, Government of Delhi to connect the said OPD slip to the deceased.

47. In the light of the above discussion, we are of the opinion that the circumstance of last seen together is not credible as PW-26 is not a dependable witness and recovery of the dead body at the instance of the appellant by itself cannot necessarily lead to an inference that it was he who had committed the crime. There had to be some additional chain of circumstances to establish an unbroken link between the accused and the crime. The circumstances brought on record by the prosecution and taken cumulatively, have not been cogently and firmly established and nor do they unerringly point towards the accused as the assailant. Once the chain of circumstances is found to be broken, incomplete and inconsistent with the hypothesis of the guilt of the appellant alone, to the exclusion of all others, it is not possible to arrive at a conclusion that he is responsible for the murder of the deceased. We are thus of the opinion that the prosecution has failed to prove its case beyond reasonable doubt on the basis of acceptable evidence. The distance between “*may be true*”

and “*must be true*” has not been bridged satisfactory to inculcate the accused.

48. For all the aforementioned reasons, the appellant is entitled to benefit of doubt. The impugned judgment and the order on sentence are accordingly quashed and set aside. The appellant is acquitted for the offences for which he has been charged. Unless he is wanted in some other case, the appellant shall be released forthwith and he shall fulfill the requirements of Section 437(A) of the Cr.P.C. to the satisfaction of the trial court at the earliest.

(HIMA KOHLI)
JUDGE

(MANOJ KUMAR OHRI)
JUDGE

DECEMBER 18, 2018
ap/sk/rkb