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

Judgment reserved on: December 16th, 2017
Judgment pronounced on: February 19th, 2018

+ **CRL.A. No. 254/2014**

VIVEKANAND BIHARI

.... Appellant

Through: Mr. Deepak Anand and Mr.
Aayushmaan Vatsayana, Advs.

Versus

STATE

.....Respondent

Through: Ms. Aasha Tiwari, APP for
State.

CORAM:-

HON'BLE MR. JUSTICE S. P. GARG

HON'BLE MR. JUSTICE C. HARI SHANKAR

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(JUDGMENT)

C. HARI SHANKAR, J.

1. The appellant Vivekanand Bihari seeks, by means of the present appeal, to challenge the judgment, dated 25th September 2013, and the consequent order, dated 26th September 2013, passed by the learned Additional Sessions Judge, Dwarka (hereinafter referred to as “the learned ASJ”), whereby the appellant has been found guilty of having committed the murder of Prabhash, and of having thrown his dead body in the “ganda nala” (drain), thereby committing offences

punishable under Sections 302 and 201 of the Indian Penal Code, 1860 (hereinafter referred to as “IPC”), and sentenced, accordingly, to suffer rigorous imprisonment for life, for the offence punishable under Section 302, and to rigorous imprisonment for 3 years, along with fine of Rs. 3000/-, for the offence punishable under section 201 of the IPC.

2. Case of the prosecution as per the Charge sheet:

The charge-sheet, which was filed, in the present case, on 23rd January, 2012, alleges as under:

(i) On 21st October 2011, at 6:40 AM, Ct. Mukesh Kumar (PW-1) received a call, stating that a dead body was lying near Indira Park Mother Dairy. The said information was noted down vide DD No 8A, which was sent to SI Krishan Kumar (PW-18) through Ct. Narender (PW-9).

(ii) The IO, Inspector Renu Sharma (PW-22), who was also informed about the incident arrived at Indira Park, Mother Dairy, near the “*ganda nala*”, along with Const Naval (PW-7). SI Krishan Kumar (PW-18) and Ct. Narender (PW-9) were already present there.

(iii) The team found a dead body of a 20 to 30-year-old male, lying in the middle of the “*ganda nala*”, towards the western side. The body was half naked. The upper part of the body was covered with a brown colour T-shirt. A white pant and a blue

underwear were on the body, below the ankle. Injury was seen on the forehead, above the left eye. The area between the nose and neck of the body was burnt. The teeth, as well as the bones of the face, were protruding. The left ear, and half of the right ear of the dead body were missing. There were cut marks on the chest. Burn injuries were present on the feet, and the private parts of the deceased were also burnt, using some chemical. The bone of the left arm was exposed, from elbow to shoulder, and fingers of both hands were burnt. It appeared, therefore, that, after murdering the deceased, the murderer had burnt his face, hands and private parts, using a chemical, in order to conceal his identity.

(iv) Accordingly, *rukka* (Ex PW-22/A) was prepared, by the IO (PW-22), at 7:55 AM, setting out the above facts and opining that an offence, under Sections 302 read with 201 of the Indian Penal Code, 1860 (hereinafter referred to as “IPC”), appeared to have been committed. The IO (PW-22) sent Ct. Narender (PW-9) to the police station (P.S. Sagarpur), and had the FIR lodged, whereafter further investigation was carried out by the IO.

(v) The District Crime Team was summoned to the spot, which was inspected and photographs taken. As the dead body could not be identified, it was preserved in the mortuary of the DDU Hospital for 72 hours.

(vi) On inspection, the IO found blood stains to be present in Gali No 33. These blood stains, when followed, were found to constitute a blood trail, ending near House No 25A, Gali No 33, Indira Park, which was found locked from outside.

(vii) On making enquiries, it was found that ownership of House No 25A, Gali No 33, Indira Park, vested with Mr. Prem Bharadwaj (PW-4). Accordingly, Prem Bharadwaj (PW-4) was summoned. The lock of the house was broken, whereupon a bloodstained mat, white and green in colour and a blood-stained blanket were found in the room, a blood-stained *karni* (a masonic tool) was found in the cupboard, a blood-stained vest was found lying on a wire, an unwashed mop was found lying near the kitchen and one blood-stained plastic bag was found lying on the slab in the room. Identity cards of the appellant and Prabhash @ Prabhu (who was later identified as the deceased) were found lying in the cupboard, and were also recovered. Blood stains were also found present on the left side wall of the room. Photographs of the spot were taken by the crime team. The line/trail of blood stains found in Gali No 33 was also photographed. Blood stained earth control samples were taken, seized and sealed, from near the wall of the “*ganda nala*”. The left wall of the room was wiped with wet cotton, which was dried, seized and sealed.

(viii) Prem Bharadwaj (PW-4) identified the identity cards as belonging to the appellant and the deceased, and stated that they were joint tenants of the said room, which had been rented out to them by him (Prem Bharadwaj). He also identified the dead body as that of Prabhash, in the Hospital.

(ix) En route from the room, rented by the accused and the deceased, to the “*ganda nala*”, was a shop, of M/s S. K. Jewellers, in which a CCTV camera was installed. Checking of the footage recorded in the said CCTV camera showed that, at about 2:50-2:57 AM on 21 October, 2011 (i.e. during the intervening night between 20th and 21 October, 2011), one person, carrying a dead body wrapped in a black bedsheet on his head, was walking towards the “*ganda nala*”. He was also seen returning, sometime thereafter, empty-handed. Accordingly, the memory box of the CCTV camera was seized.

(x) Enquiries, regarding the appellant, and his whereabouts, made from Prem Bharadwaj (PW-4), as well as other tenants and neighbours, failed to elicit any result. Prem Bharadwaj (PW-4) disclosed the mobile number of the appellant which was, also, however, switched off.

(xi) Enquiries from Prem Bhardwaj (PW-4) and neighbours of the appellant and the deceased revealed that the appellant and the deceased belonged to the same village, and were working as

masons and as construction labourers, and that they had jointly taken the room (in House No 25A, Gali No 33, Indira Park) from Prem Bharadwaj (PW-4) on rent. Apparently, about a month and a half prior to the date of the incident (resulting in the death of the deceased, and referred to, hereinafter, for the sake of convenience, as “the incident”), the wife and mother of the appellant had come to Delhi, and were staying with him, till two days prior to the date of incident, when they returned to their native village. It is further alleged, in the charge sheet, that the IO recorded the statements of the neighbours of the accused and deceased, Mohinder Singh Gill (PW-5) and Jai Kishan (PW-12), who had stated that the appellant, and the deceased, had been abusing each other, and quarrelling, for the past one and a half months, after the arrival of the mother and wife of the appellant and that, in the night of 20th October, 2011, too, a similar quarrel had taken place.

(xii) The charge sheet alleges that, during the course of investigation, it was also revealed that Baby Devi, the sister of the appellant, was residing at RZ-B-10/14, Gali No 2, Kailash Puri. On enquiries being made from her, it is alleged that the mobile number of the appellant was found to be the same as that disclosed by Prem Bharadwaj (PW-4), which was still switched off.

(xiii) It was further alleged that the appellant was missing since the date of the incident, and was not found to have reached his village, i.e. Lillatari, Bihar, on enquiries being made by Inspector Kamaljeet Singh (who is also, surprisingly, not arrayed as a witness).

(xiv) Post-mortem of the deceased Prabhash was conducted on 21st October, 2011 at DDU Hospital, and the dead body was handed over to his relatives. The blood sample, and the clothes of the deceased, with the sample seal of the autopsy surgeon, were taken into custody by the Police.

(xv) It is further alleged, in the charge sheet, that, during investigation, Subash Shah (PW-16) stated that the deceased Prabhash had been brought by the appellant to Delhi, to work along with him, and that the two used to reside together. He further stated that, from the time the wife of the appellant began to reside with them, the behaviour of the appellant, towards his brother, i.e. the deceased Prabhash, changed, which fact was intimated, to him, telephonically, by Prabhash. Prabhash, it was stated, had also told him, over the phone, that he could not continue to stay with the appellant, as, despite having paid half the rent, he had to sleep outside.

(xvi) On the basis of secret information, the appellant was arrested from Kailash Puri Chowk near the RTV Bus Stand, on

27th October 2011. His statement was recorded by the Police (PW-18/C), during which he stated that (a) he had come to Delhi in 2007-2008, looking for work, (b) on work progressing smoothly, he called Prabhash from the village and both of them started working together, (c) the two of them together started residing, on rent, in House No 25A, Gali No 33, Indira Park, (d) his marriage took place in 2011, whereafter he brought his wife Radha to Delhi, (e) Radha also started staying with them in the same room, (f) a few days later, Radha complained, to him, that Prabhash used to tease her and make obscene gestures towards her, (g) he, too, by keeping a careful watch, espied that, without any reason, Prabhash deliberately used to touch his wife Radha and try to goad her into conversation, (h) around two to three days prior to the incident, when he returned home from work early, he saw that Prabhash was standing next to Radha and trying to touch her repeatedly but, on seeing him, Prabhash left the spot, (i) he was enraged, thereby, but kept his cool, as his wife and mother were present; he, however, formulated a plan, mentally, to eliminate Prabhash, (j) in order to execute the said plan, he sent his wife and mother back to their village the next day and, on the way back from the station, purchased a “dao”, (k) in accordance with his plan, he hid the “dao” beneath his pillow, (l) after dinner, he questioned Prabhash regarding his behaviour towards his, i.e. the appellant’s wife, but Prabhash flatly denied everything and tried to avoid the discussion, (m) at this, he became furious and, taking out the “dao” from beneath

his pillow, he attacked Prabhash with the intention of killing him, (n) Prabhash, too, however, sought to defend himself by attacking the appellant with a “*karni*”, which was kept in the same room, as a result of which he suffered injuries on the finger of his right hand and the thumb of his left hand, (o) he, however, threw Prabhash on the ground and repeatedly struck at his neck and private parts, (p) after Prabhash had died, he tried to separate his body parts, using the “*dao*”, so as to render it impossible to recognize him, (q) thereafter, he poured acid on the body of Prabhash, so that it would not be possible to recognize him, (r) he then picked up the dead body of Prabhash and threw it in the “*ganda nala*” at Indira Park, and (s) he returned to the room, cleaned the blood stains on the floor of the room and threw the *dao* used in the murder, the blood-stained vest, the blood-stained pillow, the shawl used to throw the body and the bottle of acid, here and there.

(xvii) Thereafter, the appellant is stated to have voluntarily proceeded ahead and pointed out the room at House No RZ-25A, Gali 33, Indira Park, as well as the place where he had thrown the body. The “identification memos” of the room, the *dao* and the blood stained clothes and other items stand exhibited as Ex. PW-18/D, Ex. PW1-8/F and Ex. PW-18/G, and each of the said memo confess to his having murdered the deceased. The weapon of offence (the *dao*), and various bloodstained items are stated to have been recovered, at the

instance of the appellant. Thereafter, the appellant's walking style was alleged to have been video graphed and a CD prepared, which was taken into custody vide memo dated 28.10.2011 (Ex. PW-18/H), Ex. PW-18/D, Ex. PW-18/F, Ex. PW-18/G and Ex. PW-18/H were all signed by the appellant as well as by the IO (PW-22) and S1 Krishan Kumar (PW-18).

(xviii) During the Police Remand of the appellant, the opinion of the forensic expert at the DDU Hospital, regarding the injury suffered by the appellant, was obtained on 28th August 2012, (Ex PW-17/B), which read thus:

- “1. The injury No 1 could have been inflicted by semi-sharp weapon.
2. The injury No 2 could have been blunt edged weapon and injury No 3 could be caused by blunt sharp and heavy weapons.
3. The duration of injuries are appearing 8-10 days in duration.
4. The possibility of self inflicted in nature is not compatible based upon the nature and distinction of injury.”

(xix) The charge sheet next refers to the post-mortem report, dated 19th of December 2011 (Ex. PW-17/A), prepared by Dr. B.N. Mishra, Medical Officer, Dept of Forensic Medicine, DDU Hospital (PW-17). To the extent it is relevant, the post-mortem report read thus:

“General Examination

Rigor mortis: Passed off.

Post Mortem Staining: Present on the back aspect of the body.

Condition of eyes: Both eyes closed.

Mouth: Partially opened with partially excised covering tissue of the face, nose and cheek muscles and exposed underlying maxillary bones.

The covering tissue (Skin) of the face, neck, partly eroded by pouring of some unknown liquid.

The clothes and body of deceased smeared by mud and dirty water.

External Examination: External Injuries

1. Hold thickness of the soft tissue below nose, neck, right left ear and upper part of chest completely excised out with exposed underlying bones with adjacent area blackish discoloured, eroded and appearing like chemical burn.

2. Hold thickness of soft tissue completely excised from the right forearm including elbow joint with exposed lower 2/3rd part of right humerus board with surrounding skin and soft tissue found blackish in colour and eroded (appears like chemical burn).

3. Whole circumference of the neck horizontally cut down by multiple chopping wounds except spared cervical vertebra that is why neck lies on position. The all structures like muscles, facie, large blood vessels larynx and pharynx found cut down with sharp and bevelled margins of cut tissue.

4. The 3 fingers of left-hand i.e. ring, middle and index finger and middle finger of right hand cut down at the level of middle phalanx with adjacent area

blackish stained and eroded by some corrosive substance.

5. 1 lacerated wound of size 2.5 cm x 1 cmx bowl deep present on the left side of forehead with the regular, and braided and confused margins.

6. 23 incised wound present over the Palmer aspect of both hand appearing like defence wound with liquid and clotted blood in and around.

7. Multiple grails aberration present over the dog some of the both fought and hand with a whitish pale in colour appearing post-mortem in nature.

8. The penis partly excised with covered by black coloured erosive substance.

9. The left ear lobe you will completely excised and missing from the root of the year along with partly excision of right ear and raw area covered by blackish colour erosive substance.

Internal Examination

Head

A. Scalp/Skull: Sub Scalp Conclusion present under the scalp at forehead on left side.

B. Brain, Meninges and Vessels: Pale

Neck

Hyoid Bone/Thyroid Cartilage/Cricoid Cartilage/Track Kaile Rings and Mucosa/Any Foreign Body in Track year: The hyoid bone and thyroid cartilage cut down in full thickness along with other associated soft tissue.

Chest (Thorax)

2. Oesophagus: Cut down injury as mentioned in external injury.

4. Lungs: Both lungs pale.

6. Large blood vessels: Large blood vessels of neck cut down.

Genital Organ

3. Genital organs: the pennies and scrotum founded dark coloured with eroded skin appearing like chemical burn.

Opinion:

The cause of death is due to neurogenic shock subsequent upon cut throat injury by heavy and sharp edged weapon like chopper etc.

1. Post-mortem chemical burn injuries are suggestive of attempt being made by the accused to disfigure and mislead the identity of the victim.

2. Cut throat injury was sufficient to cause death in ordinary course of nature.

3. Manner of death is homicide.

4. TIME SINCE DEATH: Approx. 3 ½ days prior to post-mortem examination.”

(xx) Subsequently, on 21st of December 2011, an opinion, regarding the weapon of offence, and its possible usage in the infliction of the injuries found on the body of the deceased Prabhash, was obtained from Dr. B.N. Mishra (PW-17), which read thus:

“On dated 20.12.2011 Inspector Renu Sharma PS Sagarpur moved an application along with one parcel containing weapon of offence (sealed with seal of “RS” with seeking subsequent opinion regarding the consistency of injuries present on the body of deceased by weapon of offence produced.

Sealed parcel opened and one heavy knife (chopper) received. On examination it is observed that the blade part of the chopper made of iron and resembling quadrangular in shape having single edged with 23 cm in length and 6 cm in width. The edge of the blade is bluntly sharp. The whole blade is rusty and dark in colour. No obvious blood staining scene due to rust formation. The handle part made of wood cylindrical in shape with well accessible for gripping in hand.

After going through PM report vide external injuries and weapon of offence produced, I am in the opinion that the injury is observed on the body of deceased could have been caused by weapon of offence produced. After made opinion the weapon of offence again packed in *pullanda* (parcel) and sealed with seal of “DFMT, DDUH” and handed over to I/O concerned.”

(xxi) In view of the above evidence/circumstances, the appellant was charged under sections 302/201 IPC. The charge sheet was filed on 23rd January, 2012.

3. Copies of the charge-sheet were supplied to the appellant, and the case was committed to the court of Sessions. The appellant pleaded not guilty, and claimed trial.

4. Evidence of Prosecution Witnesses: The prosecution tendered 23 witnesses, to support its case, whose evidence, to the extent necessary, may be set out as under:

(i) PW-1, PCR Const. Mukesh Kumar, in his examination-in-chief, on 19th March 2012, stated that, at about 6:17 AM on 21st October, 2011, he received information from a caller that a dead body was lying in the drain at Indira Park near Mother Dairy, and that he recorded the said information and dispatched it online.

(ii) PW-2 HC Satpal, of the Crime Team stated, in examination-in-chief on 19th March 2012, that, on 21st October, 2011, he, along with the crime team, had gone to the “*ganda nala*”, and taken photographs of the dead body found in the “*ganda nala*”, whereafter they proceeded to House No. RZ 25, Gali No. 33, Indira Park, where he took photographs. In cross-examination, PW-2 stated that no statement, of any public witness, was recorded in his presence.

(iii) PW-3 Naresh Kumar acknowledged, in examination-in-chief on 19th March 2012, to have called the police, from his mobile, on seeing the crowd gathered at the “*ganda nala*”, and finding a dead body lying there.

(iv) PW-4, Prem Bharadwaj, in his examination-in-chief on 19th March 2012, stated that he had joined the investigation on

being called by the police on 21st October, 2011, and that the appellant (who was present in the court and was correctly identified by him) was residing, in House No. RZ-25A, Gali No. 33, Indira Park, as a tenant, with the deceased. He mentioned having found the house in the condition already described hereinabove, i.e. with blood stains etc. He further stated that, after the appellant had brought his mother and wife to stay with him, the deceased Prabhash had told him (i.e. PW-4) that, as the appellant used to abuse him in the presence of his wife, he would be leaving the room. He acknowledged having identified the dead body of the deceased at the DDU Hospital mortuary.

(v) In cross-examination, PW-4 clarified that he had reached his house at Indira Park before 10 AM on 21st October 2011 and remained there till 1 PM, and that his signature had been obtained, on a typed document, in the Police Station at about 8 PM. In further cross-examination on 21st August 2012, PW-4 stated that none of his tenants had never complained, to him, about any quarrel between the appellant and the deceased. Neither, he accepted, that Mohinder Singh Gill (PW-5), who resided opposite his house, ever made any such complaint, requesting him to evict the appellant from the house for that reason.

(vi) PW-5, Mohinder Singh Gill, who resided in the house opposite the room taken on rent by the appellant and the deceased, stated, in examination-in-chief on 27th April 2012, that, after the appellant's mother and wife had started residing with them, frequent quarrels took place, between the appellant and the deceased, in which he himself had interceded once or twice, and warned them. He further stated that, on 20th November 2011, at about 10:30 PM, a quarrel broke out between the appellant and the deceased, but that, as it was routine, he did not pay heed, and went to sleep. However, on the next day, in the morning, he came to know that the deceased had been murdered. He acknowledged that his statement had been recorded by the IO.

(vii) In cross-examination, PW-5 conceded that he had come to know of the names of the appellant and the deceased only when the police visited his premises on 21st October 2011 and that, in fact, he was unaware of the name, parentage and native state of any of the tenants residing in his neighbourhood. He stated that his statement had been recorded by the IO at about 8:30 AM on 21st October 2011 and that only two to three persons were present at that time. He also stated that he had not been aware of the fact that the ladies residing with the appellant were his wife and mother, and that he had come to know of the said fact only on being informed by the police on 21st October, 2011. In his further cross-examination, which took place on

23rd November 2012, PW-5 acknowledged that there was no window in the room in which the appellant used to stay, and that he had actually heard the noise of the quarrel between the appellant and the deceased. He also accepted that he had not seen them quarrelling at 10:30 PM and that, though he knew both of them, he had never spoken to them. In the very next breath, he stated that he had seen the appellant and the deceased quarrelling from the gallery of his house, as they were quarrelling outside the door of the house where they used to stay, whereafter they went inside. He also accepted that he had not told the police about the said quarrel. He then stated that he had made several complaints, in this regard, to Mr. Bharadwaj, asking him to induct proper tenants. In fact, he stated that his statement had been recorded, by the police, once, at about 5:30 to 6 PM on 21st October 2011.

(viii) PW-6 ASI Khajan Singh, who was in charge of the Crime Team bore out, in his examination-in-chief on 27th April, 2012, the facts stated hereinabove with respect to discovery of the body of the deceased Prabhash, and the finding of blood on the mat, blanket, *karni* and floor in the room which had been occupied by the deceased and the appellant. He also vouchsafed the trail of blood, between the spot where the dead body of the deceased Prabhash was found and the room occupied by him and the appellant, as well as the report

prepared by him in respect thereof, which was exhibited as Ex. PW-6/A.

(ix) In cross-examination by learned counsel appearing for the accused, PW-6 conceded that no fingerprints had been obtained from the room, and stated that the distance between the “*ganda nala*” and the spot would be around 100 metres. He also clarified that the place where the body was recovered was around 400 yards from the room.

(x) PW-7 Ct. Nawal Singh, who had accompanied the IO Inspector Renu Sharma (PW-22) to the spot of occurrence and, thereafter, to the premises at House No. 25A, Delhi No. 33, Indira Park, also deposed regarding the recovery of earth control, from the site where the body was recovered, by the IO, as well as the seizure of the blood-stained mat, blood-stained blanket, blood-stained *karni*, T-shirt, cloth wipe and the ID cards of the appellant and the deceased, from their room, *vide* Ex. PW-4/A. The ID cards were exhibited as Ex. PX 1 and Ex. PX 2. Nothing substantial emerged from his cross-examination.

(xi) PW-8, Dr Ganesh Adhikari, Emergency Medical Officer at the DDU Hospital deposed, in his examination-in-chief on 27th April 2012, that the appellant had been brought to the hospital, for medical examination, on 28th October 2011, and had been examined by Dr. Avdesh *vide* MLC No. 222405

(Ex.PW-8/A) and that, though Dr. Avdesh had since left the hospital, he recognized his handwriting and signature. He was not cross-examined.

(xii) PW-9 Ct. Narender Kumar, who had visited the “*ganda nala*”, along with DD No 8A, deposed, in his examination-in-chief on 5th June 2012, that he had met SI Krishan Kumar (PW-18) at Indira Park near the “*ganda nala*” on 21st October 2011, and had found the dead body of a male, lying in the “*ganda nala*”. He also testified about the arrival, thereafter, of the IO Inspector Renu Sharma (PW-22) and, subsequently, of the registration of the case and the FIR, which was handed over, by him, to the IO. He was not cross-examined.

(xiii) The deposition of PW-10 Ct. Bahadur Singh, of PS Sagarpur, who had accompanied SI Krishan Kumar (PW-18) to Indira Park at 7 AM on 21st October 2011, as recorded on 5th June 2012, was substantially similar to that of his predecessors in the witness box. He was not cross-examined.

(xiv) PW-11 Sanjeev Verma, who was running the jewellery shop M/s S.K. Jewellers, which was en route between the room in which the appellant and the deceased resided, and the “*ganda nala*”, deposed, in his examination-in-chief on 5th June 2012, that, in the recording on the CCTV camera located at his shop, it was seen that, from 2:57 AM to 2:59 AM on 21st

October 2011, one person was carrying a body on his shoulder and going towards the Indira Park Bridge from the side of Gali No. 33, and was seen returning some time later. He further deposed that, on the said date, i.e. 21 October, 2011, the IO Inspector Renu Sharma (PW-22) had come to his shop and checked the footage of the CCTV camera, and had also seized the CCTV memory box along with its accessories, vide seizure memo Ex. PW-11/A. He also stated that the IO had recorded his statement. He was not cross-examined.

(xv) PW-12 Jai Kishan, who was residing at RZ 25A/4, Gali No. 34, Indira Park, and was running a grocery shop, stated, in his examination-in-chief on 12th July 2012, that the appellant (who was present in the court and whom he correctly identified) was residing, in the house adjacent to his, with Prabhash, and that, after the arrival, in the said premises, of the mother and the wife of the appellant about a month and a half prior to the incident, frequent quarrels took place between the deceased and the appellant. He also testified that he had heard such a quarrel taking place on 20th October 2011 and that, on hearing the noise, he went towards the house and saw the appellant quarrelling with the deceased Prabhash. However, as this was considered routine, he returned to his house and slept.

(xvi) In his cross-examination, on 23rd November 2012, by learned counsel for the appellant, PW-12 stated that he had

never intervened in the quarrels between the appellant and the deceased, and had never talked to the landlord (though he knew him) about the said quarrels, as he did not have his mobile number. He also admitted that, though he had met Prem Bharadwaj (PW-4), the landlord, occasionally, he had never complained, to him, about the altercations between the appellant and the deceased. He further testified that, at the time of incident, all the rooms in the house were occupied, but he was not on visiting terms with any of the tenants. He also stated that the Police had recorded his statement, only once, at 5:30 to 6 PM on 21st October 2011. He stated that he had come to know, of the arrival of the mother and wife of the appellant, in the premises, from another tenant, namely Mr. Jha.

(xvii) PW-13 Ct. Sunil Yadav merely deposed, in his examination-in-chief on 12th July 2012, regarding his having taken the appellant (who was in court and whom he correctly identified) to the DDU Hospital for his medical examination, and of the doctor having handed over, to him, after the examination, once sealed parcel, which was given, by him, to the IO, who seized the same *vide* seizure memo exhibited as Ex. PW-13/K.

(xviii) PW-15 Ct. Hardeep Singh had taken the measurements of the site and prepared the site plan (Ex. PW-15/A), and

merely testified, in that regard, in his examination-in-chief, on 13th July 2012.

(xix) PW-16 Subhash Shah (the elder brother of the deceased Prabhash) deposed, in his examination-in-chief on 13th July 2012, that his brother, who had been staying with the appellant, made a telephonic call to him, stating that, as the appellant's mother and wife had also come there to stay with them, it was not possible for him to continue staying in the room. He also expressed his unhappiness at the fact that, though he was paying 50% of the rent for the room, he was forced to sleep outside. PW-16 further stated that his brother had informed him that the appellant used to quarrel with him and was abusive. He further testified that he had identified the dead body of the deceased Prabhash, *vide* Ex. PW-16/A.

(xx) In his cross-examination, on 16th October 2012, PW-16 Subhash Shah first said that he knew Jai Kishan (PW-12), Mohinder Singh Gill (PW-5) and Prem Bharadwaj (PW-4), that he had heard about them on telephone and, immediately thereafter, said that he knew their names only because he had come to know that they were witnesses to the incident. He reiterated that, since 15 days prior to his death, his brother Prabhash had been complaining, to him, telephonically, against the appellant. He further stated that the appellant's mother and wife had reached the village on 24th October 2011. He admitted

to identifying the dead body of the deceased Prabhash and stated that the body had also been identified by other persons.

(xxi) PW-17, Dr. B.N. Mishra, Medical Officer, Deptt. of Forensic Medicine, DDU Hospital acknowledged, in his examination-in-chief on 28th August 2012, having conducted the post-mortem on the body of the deceased Prabhash, *vide* report Ex. PW-17/A. He reiterated, as stated in the report, that, in his opinion, the deceased had died due to neurogenic shock consequent on cut throat injury by a heavy and sharp edged weapon like the chopper shown to him, which was sufficient to cause death in the ordinary course of nature. He asserted that the death was homicidal in nature, and had taken place approximately 3½ days prior to the post-mortem. He further stated that, on 29th October 2011, the IO (PW-22) had submitted the MLC of the appellant, and that, on examination thereof, three injuries were observed, of which the first could have been inflicted by a semi-sharp weapon, the second could have been inflicted by a blunt edged weapon and the third had been caused by a sharp, or semi-sharp and heavy weapon. The injuries, he opined, “were appearing 8-10 days”. They were not, in his opinion, self-inflicted. He stood by his observation, in this regard, on the MLC of the appellant (Ex.PW-17/B), which bore his signature. He further stood by his subsequent opinion (Ex. PW-17/C), after seeing the chopper produced before him in sealed condition by the IO on 21st December

2011, to the effect that the injuries on the body of the deceased could have been caused by the said weapon. He was not cross-examined.

(xxii) PW-18 SI Krishan Kumar, of PS Sagarpur testified, in his examination-in-chief on 29th August 2012, to all the facts already set out hereinabove, got exhibited the arrest memo of the appellant as Ex. PW-18/A, his own personal search memo as Ex. PW-18/B, and the disclosure statement of the appellant as Ex. PW-18/C, the “pointing out memo” relating to the spot and place where the appellant allegedly threw the dead body of the deceased as Ex. PW-18/D, the sketch of the chopper recovered at the instance of the appellant as Ex. PW-18/E, the seizure memo of the said chopper as Ex. PW-18/F, the seizure memo of the bloodstained clothes, pillow, pillow cover and polythene, sealed with the seal of “RS” in separate sealed parcel is, as Ex. PW-18/G and the CD, containing the digital recording of the style of walking (gait) of the appellant, as Ex. PW-18/H. He also stated that, later on, the IO had recorded his statement. Ten parcels, containing earth control and concrete material, were shown to PW-18, and identified, by him, as having been seized by the IO in his presence. They were duly exhibited as Ex. P-1 to P-10. PW-18 was also shown parcels, marked A to N, containing a mat having brown stains, a blanket with brown stains, a *karni* with brown stains, a T-shirt with brown stains, a *poucha* with brown stains, a plastic bag with brown stains,

Cotton wool having earthy material, a cotton wool swab, a chopper having brown stains, a cut/torn vest having brown stains, a pillow having brown stains, a pillow cover having brown stains and one polythene having brown stains, all of which were identified, by him, as having been seized by the IO in his presence, and were, therefore, exhibited as Ex. P-11 to P-23.

(xxiii) In cross-examination by learned counsel appearing for the appellant, PW-18 stated that, in the CCTV footage, “one person was appearing carrying some human being on his shoulder and that human being was looking like dead” and that “the said human being was appearing to be wrapped with some cloth”. He further clarified that no fingerprints had been taken by the crime team.

(xxiv) Consequent upon allowing of an application, moved by the prosecution under Section 311 of the Code of Criminal Procedure, 1973 (hereinafter referred to as “the Cr PC”), PW-18 was recalled for further examination on 29th October 2013, during the course of which he clarified that he had handed over the CD, containing the recording of the gait of the appellant, along with the requisite certificate under Section 65B of the Indian Evidence Act, 1872, but that the said certificate could not be placed on judicial record on account of inadvertence, as was apparent from the fact that it was available in the Police file,

which was therefore exhibited as Ex. PW-18/I. In cross-examination by learned counsel for the appellant, PW-18 confirmed that, though he had originally prepared the gait pattern of the appellant at the place of his arrest on 28th October 2011, it was re-prepared at the police station, in the presence of the appellant and the IO, owing to non-availability of USB cable at the site of arrest. He confirmed that the Government handycam constituted part of the kit of the bag of the IO. The certificate under Section 65B of the Evidence Act, it was confirmed, was prepared by him on 28th October 2011 in the Police Station. He denied the suggestion that there was any cutting in the date mentioned in the said certificate, or that the said certificate had not been prepared by him had been prepared on instructions of the defence counsel during final arguments. He admitted that, in his statement recorded under Section 161 of the Cr. PC, he had referred to the preparation of the CD, but not about the certificate under Section 65B of the Evidence Act.

(xxv) PW-19, HC Gurjeet Kaur, of PS Sagarpur confirmed, in her examination-in-chief on 30 August, 2012, the recording of a FIR No. 262/11, on the basis of the *rukka* received from Inspector Renu Sharma (PW-22). The FIR was, accordingly, exhibited as Ex PW-19/A. She was not cross-examined.

(xxvi) PW-20 HC Dashrath, of PS Sagarpur deposed, in his examination-in-chief on 16th October 2012, that Inspector Renu

Sharma (PW-18) and deposited, with him, fourteen sealed parcels, three sealed parcels and 7 sealed parcels on 21st October 2011, 24th October 2011 and 28th October 2011 respectively, which were entered in the register and sent, on 4th January 2012, to the FSL, Rohini, through Const Shekar, who deposited the same, returned to the Police Station and handed over, to him, the acknowledgement thereof, which was exhibited as Ex. PW-20/E. He further deposed that, as per record, one sealed parcel had been sent to DDU hospital on 21st December 2011 and, on 12th July 2012, the parcels containing the footage of the CCTV were sent to Truth Laboratory, the RC of which was exhibited as Ex. PW-20/F. He further stated that, so long as the parcels had remained in his custody, they were intact and had not been tampered with. His cross-examination did not elicit anything of importance.

(xxvii) PW-22, Inspector Renu Sharma, who was the IO in the case, vouchsafed, in her examination-in-chief on 17th December 2012 to the facts already stated hereinabove, regarding (a) the finding of the dead body of the deceased Prabhash in the “*ganda nala*” on 21st October 2011, and the condition in which the body was, (b) preparation of *rukka* by her and sending of constable Narender (PW-9) to the Police Station for registration of a FIR, (c) arrival of the crime team, taking of photographs and inspection of the spot by them, (d) finding of the blood stains leading up to House No. 25, which

was found locked, (e) sending of the dead body to the DDU Hospital through Const Bahadur, and preservation of the dead body, in the hospital, for 72 hours for want of identification, (f) summoning of the landlord Prem Bharadwaj (PW-4), breaking open of the lock of the room and what was found inside, as well as taking of samples and seizure thereof, (g) identification, by Prem Bharadwaj (PW-4), of the identity cards as belonging to the deceased Prabhash and the appellant, (h) identification, by Prem Bharadwaj, of the dead body of Prabhash at the hospital, (i) her returning to the spot of occurrence and recording the statements of witnesses including Mohinder Singh Gill (PW-5) and Jai Kishan (PW-12), (j) the finding of the CCTV installed at the shop of the jeweller, inspection of the video footage thereof – which, according to her, showed that “at about 2:57 AM, one person was appearing having one person on his shoulder wrapped in a black sheet” – and the seizure of the CCTV memory box and accessories by her, (k) recording, by her, of the statement of the witness who had called the police initially, as well as of the jeweller, the and the Police officials, (l) getting the post-mortem conducted on 24th October 2011 and handed over, to her, of sealed parcels by the doctor (m) apprehending of the appellant, on 27th October 2011, at Kailash Puri, consequent to receipt of secret information, and his subsequent interrogation and arrest, (n) the making of disclosure statement (Ex. PW-18/C) by the appellant and his subsequent medical examination at the DDU Hospital, (o) the

conducting, by the appellant, of the Police team, to the spot of occurrence, as recorded *vide* memo exhibited as Ex PW- 18/D, (p) the recovery of the *dao* (the weapon of offence), at the instance of the appellant, from the bushes near the garbage dump at Kailash Puri Chowk, the preparation of the sketch of the weapon (Ex. PW-18/E) and the seizure thereof *vide* memo exhibited as Ex. PW-18/F, (q) the recovery, at the instance of the appellant, of one blood stained vest, one pillow, one pillow cover, and one polythene, and their seizure by her, (r) the production of the appellant before the learned Magistrate and obtaining of the opinion of the doctor on his MLC (Ex. PW-8/A), (s) obtaining of the post-mortem report (Ex. PW-17/A) and the subsequent opinion of the autopsy surgeon regarding the weapon of offence (Ex. PW-17/C), (t) the sending of the exhibits, by her, to FSL Rohini and recording of statement of witnesses in this regard, (u) recording of the statement of Subash Shah (PW-16), by her, under Section 161 of the Cr. PC and (v) preparation of the charge-sheet by her and finding of the same in the court. She further testified that, during trial, she collected the FSL report, which was exhibited as Ex. PW-22/B. In her further examination-in-chief, on 30th April 2013 PW-22 Inspector Renu Sharma stated that she had collected the report of the CCTV footage from Truth Lab, Bangalore, and had it exhibited as Ex. PW-23/A. She further clarified that while, in her examination-in-chief on 17th of December 2012, she had stated that she had got the CD of the said video footage

prepared, she had, in fact, prepared the CD of the gait pattern of the appellant, at Kailash Puri Chowk.

(xxviii) In her cross examination on 15th July 2013, PW-22 deposed that the statements of ASI Khajan Singh (PW-6), Mohinder Singh Gill (PW-5), Jai Kishan (PW-12), Naresh (PW-3) and the jeweller Sanjeev Verma (PW-11) were recorded on the spot by her, without joining any public witness, as no public witness was available. She further stated that, though she had asked the public witnesses to join the investigation, no one was prepared to do so. She confessed, however, that she could not provide the name and description of the public witnesses whose assistance she had sought, and also that she had not written down the name and address of such public witnesses in the case diary. She submitted that the appellant was caught by SI Kishan Kumar (PW-18). She reiterated that he had been interrogated, and his disclosure statement recorded on the spot, i.e. at Kailash Puri Chowk. She denied the suggestion that the arrest memo and disclosure statements were in different handwritings. She further submitted that, after medical checkup, the appellant was taken to the Neelgagan guesthouse, situated at Sagarpur, albeit without any DD entry, but that she, along with SI Kishan Kumar, Ct. Suneel and Const Ramesh, had reached the spot of recovery, i.e. Kailash Puri Chowk at about 7-7:15 AM. She further stated that, during his interrogation on 28th October 2011, the appellant had not “told

about the place of recovery”. She also had accepted that, in the charge sheet, there was no reference to any guesthouse where the appellant was kept after his arrest. She further asserted that the CD (recording the gait of the appellant) was prepared at Kailash Puri Chowk, and categorically denied the suggestion that it was prepared in the compound at PS Sagarpur. She stated that she had not made any of the other tenants, who were occupying the premises where the deceased was killed, as witnesses, because they never “told about the incident”. During her further cross-examination on 16th July, 2013, the CD, produced in sealed parcel by the MHCM, was played before PW-22 Inspector Renu Sharma, and she identified the CD to be the one in which the specimen gait of the appellant was recorded, and which had been sent to Truth Lab for comparison. She backtracked on her assertion, as contained in cross-examination on 15th of July 2013, by stating that she now remembered that the CD had been prepared in the Police Station at PS Sagarpur, and not at Kailash Puri Chowk. She further stated that the CD had been prepared on 28th October, 2011 at about 1:30 PM and that she had remained present at the place of recovery till 12:30 PM. She further stated that the appellant had, in his disclosure statement, recorded by her on 27th October, 2011 at about 11:45 AM, disclosed the fact of having hidden the knife and other articles, which were subsequently recovered on 28th October 2011, but he had not disclosed the specific place of hiding. She stated that she had

recorded the statements of Mohinder Singh Gill (PW-5) and Jai Kishan (PW-12) at 5:30 PM and 6 PM respectively. In response to a question put by the court, she sought to explain the decision to keep the appellant in a private guest house, after arrest, on the ground that he had to be taken for the purpose of recovery and it was thought appropriate to allow him some rest during the proceedings, as there was no canteen or mess in the Police Station.

(xxix)PW-23, Ms. S. Neeru, Assistant Director, Truth Labs, Bangalore, deposed, in her examination-in-chief on 30th April 2013, that, on examination of the CCTV Memory Box and CD containing sample walking videos of the appellant, she, after face comparison examination and gait pattern analysis, was of the opinion “that the person in the question recording was similar to the person in the standard recordings submitted in the CD”. She accepted, in cross-examination by learned counsel for the appellant, that Truth Labs was a private organization, and that her report was based on face, forehead, hairstyle and gait pattern. She denied the suggestion that two persons could be exactly identical in all these parameters. She stated that she had taken the ratio of the length of the forehead to the length of the face and compared it with those of the standards, and asserted that, within a permissible range of 0.5%, it was highly unlikely for two different persons to have similar values for the above ratio. She accepted the fact that the face of the person

showed in the CCTV footage was not clear, but stated that, in order to carry out examination, the image was enhanced for clarity.

5. Section 313 statement of the accused-appellant:

The statement of the appellant, under Section 313 of the Cr.PC, was recorded on 22nd July 2013, followed by a supplementary statement on 7th November 2013. He denied the fact that he used to quarrel with the deceased, after his mother and wife had come to stay with them, and also denied the fact of any such quarrel having taken place on 20th October 2011 at about 10:30 PM. He further denied having carried anybody on his shoulder and proceeded towards the Indira Bridge and returned later, as was seen in the CCTV camera footage. He also denied having asked the deceased to sleep outside the room, despite his having paid 50% of the rent therefor. He asserted that he had not been arrested on 27th October 2011, but was brought by the police from his village on 23rd October 2011, and that they had reached Delhi on 24th October 2011, whereafter he was falsely implicated in the matter. He denied having pointed out the place of occurrence, *vide* memo Ex. PW-18/D or having got the weapon of offence recovered from the bushes. He asserted that nothing had been recovered at his instance, but accepted that his CD had been prepared in the Police Station. He emphasized that the report of Truth Labs was a false report, prepared at the instance of the IO, and that the entire case against him was a false case. He insisted that he was innocent and that, on 15th October 2011 he, along with his

wife, had gone to his village to attend the Chhath Festival. He attributed the injuries on his hands to have been sustained on 14th October 2011, at his workplace at Palam while working. He asserted that he had been brought to Delhi on 24th October 2011, by the Police, was falsely implicated and illegally detained in a private guesthouse, before his formal arrest on 28th October, 2011. In his supplementary statement, the appellant flatly denied any videography, of his gait pattern, having been done at any point of time, and stated that the deposition, of PW-18 SI Krishan Kumar, to the said effect, was incorrect.

6. Evidence of Defence Witnesses:

The appellant cited two witnesses in his favour, i.e. Murat Lal Poddar (DW-1) and Ms Baby (DW-2). Their evidence may be noted as under:

- (i) DW-1 Murat Lal Poddar deposed, in his examination-in-chief on 31st of August 2013, that he had last met the appellant on 16th October, 2011, at their village in Bihar, where he had stated that, as he had got injured during his work in Delhi, he had come back to the village with his wife and mother, and that he would return after having recovered from the injury. He stated that, thereafter, the appellant had met him twice or thrice between 16th and 22nd October, 2011. He further deposed that, on 22nd October, 2011, the appellant's father had visited him and complained that certain police officials had come from

Delhi to investigate the appellant. He stated that, on his enquiring, from the Police officials, they stated that the roommate of the appellant in Delhi had been murdered and that they were investigating the appellant in that regard. He asserted that, on the same day, the Police team from Delhi brought the appellant with them to Delhi and that, on the request of the father of the appellant, he, along with one Dinesh, had accompanied them. He stated that, on 24th October, 2011, they had reached the Anand Vihar Railway Station at Delhi, from where the Police team took them, in a private car, to a private guesthouse and that, in the evening of 24th October, 2011, a lady police officer at told him to leave the hotel, as they had arrested the appellant for the murder of Prabhash. He stated that, on his telling the said officer that the appellant was in Bihar at the time of murder, she threatened him with dire consequences. He, therefore, returned to Bihar, with Dinesh, on the next day.

(ii) In his cross-examination by learned APP, DW-1 accepted that he had not informed the Police, or made any complaint to them, regarding the manner in which the appellant had been brought to Delhi, or regarding the threats given by the IO. He denied the suggestion that his statement, in examination-in-chief, was false.

(iii) DW-2 Ms Baby, who was residing at RZ-26P/87, Gali No.39/2, Indira Park, deposed, in examination-in-chief, that she was the appellant's elder sister and had received a call, from him, on 14th October, 2011, that he had got injured during work. She further asserted that, on 15th October, 2011, in the morning, the appellant had left for his hometown in Bihar with his mother and wife and that, on 21st October 2011, some Police persons had visited her and inquired about the appellant, whereupon she informed them that he was in Bihar. She stated that the Police personnel had taken her, and her husband to PS Sagarpur and detained them, illegally, till 24th October, 2011. She asserted that her brother, i.e. the appellant, was innocent and was falsely implicated in the murder of Prabhash, as he was not even in Delhi from 15th October 2011 to 24th October 2011 when the Police had brought him to Delhi from Bihar. In cross-examination, she stated that no Railway Reservation had been done, for the travel of the appellant to Bihar. She denied the suggestion that the appellant had not come to her house on 14/15th October 2011 along with the deceased, as also the suggestion that he had not left to Delhi, for Bihar, on 15th October 2011.

7. Submissions made before the Learned ASJ:

The learned counsel who appeared for the state, before the learned ASJ, relied on the fact that (i) the person who had been seen last, in the company of the deceased Prabhash, was the appellant,

during the night between 20th and 21st October 2011, whereas the dead body of the deceased was found at 6:15 AM on 24th October 2011, (ii) the appellant had a grudge against the deceased as the deceased was trying to ensnare his wife, (iii) the appellant had been seen carrying a dead body on his head, during the said night, and returning empty handed after throwing the same in the “*ganda nala*”, (iv) CCTV footage, to the said effect, had been proved on record as per law, and (v) the appellant had tendered a disclosure statement, on the basis whereof the weapon of offence as well as the blood stained clothes worn by him at the time of commission of the offence were recovered. These factors, contended the learned counsel for the state, proved the case of the prosecution beyond reasonable doubt, and made out a case for conviction of the appellant.

8. As against this, learned counsel for the appellant contended, before the learned ASJ, that (i) the appellant was not in Delhi at the time of commission of the offence as he had gone to his village on 14/15th October 2011, and returned after the offence had been committed, (ii) he had been arrested by the police after his return from Bihar, (iii) there was no evidence on record to connect the appellant with the offence, (iv) no tenant, occupying in the room adjoining in which the appellant and deceased were staying, had been cited as a witness, (v) the ownership of PW-4 (Prem Bhardwaj), of the premises, had also not been proved, (vi) the “last seen theory” had no legs to stand on, as the appellant had been allegedly seen, in the company of the deceased, on the night of 20th October 2011, whereas

the dead body of the deceased was found in the morning of 21st October 2011 [for which purpose reliance was placed on ***Deepak Chand vs. State, 2012 (2) Crimes 243 (Del)***], (vii) the blood group of the deceased Prabhash was not found present on the blood stained weapons or on any of the other blood stained articles, which were articles of common usage [for which reliance was placed on ***Hardayal Singh vs. State of Rajasthan, (1991) 2 SCC 57***] and (viii) the weapon of offence (*dao*) had not been shown to the doctor who had conducted the post-mortem of the deceased to seek opinion that the injuries could have been inflicted by the said *dao*.

9. Findings of the learned ASJ:

The learned ASJ held thus:

- (i) There being no eye witness to the crime, it was a case of circumstantial evidence.
- (ii) The appellant had admitted, in his statement recorded under Section 313 of the Cr.P.C, that he was residing with the deceased Prabhash, in the premises at House No. RZ-25A, Gali No. 33, Indira Park, which was owned by PW-4 (Prem Bhardwaj).
- (iii) That the death of the deceased Prabhash was homicidal was clear from the fact that his body was found in the “*ganda*

nala”, and had been burnt with acid, coupled with the opinion of PW-17 (Dr. B.N. Mishra).

(iv) The evidence of PW-4 (Prem Bhardwaj), PW-12 (Jai Kishan) and PW-5 (Mohinder Singh Gill) made it clear that the appellant and the accused were residing as co-tenants in the premises owned by PW-4 (Prem Bhardwaj) and that, at about 11:00 PM, the appellant was seen in the company of the deceased and they were seen to have been quarrelling with each other. The post mortem report confirmed that the death of Prabhash had taken place between 12:00 midnight and 2:00 AM in the night between 20th and 21st October, 2011, which was clearly proximate to the time when they had been last seen together.

(v) The appellant was also possessed of the requisite motive to dispose of Prabhash, in view of the fact that, owing to the deceased Prabhash having apparently made overtures towards the wife of the appellant, the appellant nurtured a grudge against him. Reliance was placed, for this purpose, on the evidence of PW-5 (Mohender Singh Gill), PW-12 (Jai Kishan) and PW-16 (Subhash Shah). Even otherwise, the presence, or absence, of motive, was not determinative of guilt in the case of murder, for which purpose reliance was placed on the judgment of the Supreme Court in *Mulak Raj vs. Satish Kumar AIR 1992 SC 1175*.

(vi) The appellant had made a disclosure statement (Ex. PW-18/C), in which he had admitted having hidden blood stained clothes worn by him at the time of offence, as well as the chopper/*dao* with which the crime had been committed. Recovery of the said articles had taken place on the basis of the said statement, vide Ex. PW-18/C. Non association of any public witnesses, at the time of such recovery, did not diminish the evidentiary worth thereof, as the articles had been recovered from an open area, Kailash Puri Chowk (*kudedan*) and there was nothing, in Section 27 of the Indian Evidence Act, 1872 (hereinafter referred to as “the Evidence Act”), which rendered such recovery inadmissible. The provisions of Section 100 of the Cr.P.C were not applicable, *mutatis mutandis*, to Section 27 of the Evidence Act, for which reliance was placed on ***Mohan Singh vs. States, AIR 1976 SC 449, Suresh vs. State of Haryana, (2008) SCC 182 and Sumit vs. State, (2003) 11 SCC 367.*** Recoveries made at the instance of the accused were relevant under Section 8 of the Evidence Act, if they incriminated the accused as well, as held by this Court in ***Updesh @ Chintu vs. State, 2012 (II) AD (Del) 626.***

(vii) The FSL reports found that blood was detected in the concrete material, the mat, blanket, *karni*, T-shirt, shirts, *pouchas*, plastic bag, cotton wool, pant, underwear, gauze cloth piece, vest, pillow and pillow cover, apart from the weapon of

offence. All the said articles were found to have blood stains of human origin.

(viii) A blood trail had also been noticed, from Gali No. 33 near which the body of the deceased had been recovered, till the house where he resided with the appellant. Testing of the sample of the said blood stains revealed them to be of human origin.

(ix) The CCTV footage from the premises of M/s SK Jewellers had been proved by the prosecution in terms of Ex. PW-11/A, as well as the report of Ex. Pw-23/A of Ms. Neeru (PW-23). Ms. Neeru, had also stated that, as per her opinion, the person in the recording was similar to the person in the standard submitted in the CD. The CCTV footage clearly showed a person “carrying some goods/hard material covered in a bedsheet on his shoulder”, and returning, two minutes later, empty handed. Certificate under Section 65B of the Evidence Act had also been placed on record by the prosecution. The CD, wherein the gait pattern of the appellant was recorded, was also, therefore, admissible in evidence. That apart, the footage of the CCTV also supported the case of the prosecution that the appellant had done away with the deceased Prabhash and had disposed of his dead body at the “*ganda nala*” at around 2:57 AM.

(xii) Injuries had also been found on the hand of the appellant, which were opined by the doctor to be seven to eight days old. Apparently, the said injuries had been inflicted by the deceased, on the hand of the appellant, using the *karni*. The appellant had failed to explain the said injuries, which, therefore, also constituted another link in the chain of circumstances leading to the inference of his guilt.

(xiii) In such circumstances, it was obligatory, on the part of the accused, to explain the above circumstances, in his statement recorded under Section 313 of the Cr.P.C. Failure to do so could also be recorded as providing a link for completing the chain of circumstances, as held in *State of Maharashtra vs. Suresh (2000) 1 SCC 471* and *Mishra vs. State of MP 2010 2 SCC 748*.

10. Following on the above reasoning, the learned ASJ held that the prosecution had established that (i) the deceased was residing with the appellant in tenanted premises owned by PW-4 and was seen by other prosecution witnesses, in the company of the appellant, before he was murdered, (ii) the dead body was recovered in the morning at 6:00 AM, (iii) the IO, who came to the spot, found a blood trail from Gali No. 33 to the house/tenanted premises occupied by the appellant and the deceased, (iv) the police, after breaking upon the door of the said room recovered blood stained articles, having blood stains of human origin, (v) the disclosure statement given by the appellant resulted in

the recovery of the weapon of offence and blood stained clothes and, therefore, constituted a relevant piece of evidence under Section 27 as well as under Section 8 of the Evidence Act, (vi) the blood stains on the sample taken by the prosecution were also of human origin, (vii) the CCTV footage taken from the jeweller's shop also contained images of the appellant carrying a dead body like material over his shoulder/head and returning, sometime hereafter, empty handed, and (viii) his gait pattern was also proved on record to be the same as that recorded in the CCTV footage. On the basis thereof, the learned ASJ found the appellant guilty of having murdered of the deceased Prabhash and having thrown his dead body in the "*ganda nala*" and, therefore, convicted him under Section 302 read with 201 of the IPC.

11. In his subsequent order dated 26th September 2013, the learned ASJ held that the case did not warrant awarding of the extreme penalty of death. He, therefore, sentenced the appellant to rigorous imprisonment for life and fine of Rs. 10,000/- with six months simple imprisonment as default sentence, for the offence under Section 302 of the IPC, as well as rigorous imprisonment for three years and Rs. 3,000/- as fine with two months simple imprisonment as default sentence, for the offence under Section 201 of the IPC.

Rival Submissions

12. Before us, learned counsel appearing for the appellant essentially sought to contend that the "last seen" evidence, on which

substantial reliance has been placed by the learned ASJ, was doubtful. Emphasis was also placed on the fact that no attempt has been made, by the prosecution, to examine whether the blood group, of the blood found on the weapon of offence and various other articles, matched with that of the deceased Prabhash.

13. *Per contra*, learned APP for the State essentially reiterated the findings of the learned ASJ and emphasized the fact that the appellant had not provided any convincing proof regarding his alibi, i.e., that, at the time when the crime had taken place, he was in his native village in Bihar.

Analysis

14. Clearly, the present case rests entirely on circumstantial evidence, there being no eye-witness to the murder of the deceased Prabhash. The law, regarding appreciation of circumstantial evidence, and its sufficiency to bring home guilt, substantially owes its existence to the “*panchsheel*” formulated by S. Murtaza Fazal Ali, J., in *Sharad Birdhichand Sarda v State of Maharashtra*, (1984) 4 SCC 116. We can do no better than reproduce paras 152 to 154 of the report, as under:

“152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is *Hanumant v. State of Madhya Pradesh* [AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] .

This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of *Tufail (Alias) Simmi v. State of Uttar Pradesh* [(1969) 3 SCC 198 : 1970 SCC (Cri) 55] and *Ramgopal v. State of Maharashtra* [(1972) 4 SCC 625 : AIR 1972 SC 656] . It may be useful to extract what Mahajan, J. has laid down in *Hanumant case* [AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] :

“It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.”

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

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

It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established. There is not only a grammatical but a legal distinction between “may be proved” and “must be or should be proved” as was held by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra* [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Cri LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

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

(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.

154. These five golden principles, if we may say so, constitute the *panchsheel* of the proof of a case based on circumstantial evidence.”

15. The panchsheel principles enunciated in *Sharad Birdhichand Sarda (supra)* have, over the years, become *locus classicus*, and have guided many a decision penned thereafter, one of the most recent being *H.D. Sikand v C.B.I., (2017) 2 SCC 166*.

16. Essentially, therefore, the present case – as, indeed, all cases resting on circumstantial evidence – has to be examined from two perspectives, i.e. the nature of the circumstantial evidence available in the present case, and whether the said evidence is sufficient to bring guilt home to the accused, applying the aforementioned *panchsheel* principles.

17. A bare glance at the facts would reveal that, on certain aspects, there can really be no dispute. It is obvious, from the post-mortem report of the deceased (PW-17/A) that the death of the deceased was homicidal, caused by the “cut throat injury”, effected by a heavy and sharp edged weapon. The “blood trail”, from Gali No. 33 to House

No. RZ-25A, Indira Park stands proved, *inter alia*, by the evidence of PW-6 ASI Khajan Singh. The presence of several bloodstained items, in the room which had been occupied by the appellant and the deceased, has been established by several witnesses, and the seizure thereof *vide* seizure memo Ex. PW-4/A, stands proved by PW-4 (Prem Bharadwaj), PW-18 (SI Kishan Kumar) and the IO, PW-22 (Inspector Renu Sharma). The examination-in-chief, of these witnesses, on the issue of the recovery of the blood stained articles from the room, remained unshaken in cross-examination. There can also be no doubt about the fact that the identity cards of the appellant, and the deceased, were recovered from the said room. The fact that the deceased was murdered in the room, occupied by him along with the appellant, therefore, stands clearly established. The fact that the blood in the Gali, as well as on the various articles found in the room which had been occupied by the appellant and the deceased as well as, in fact, the *dao*, the blood-stained vest, pillow and pillow cover, allegedly recovered pursuant to the place where they had been thrown having been pointed out by the appellant, was human, was also established by the FSL report. The post-mortem report of the deceased Prabhash also clearly establishes that an attempt had been made to disfigure his body, by burning the same using some corrosive liquid. On these aspects, the findings of the learned ASJ are unexceptionable, and we entirely endorse the same.

18. It, therefore, stands established that the deceased Prabhash was murdered, by an injury to the throat, caused by a sharp edged weapon,

in the room which was occupied by him along with the appellant, his body disfigured subsequently using some corrosive liquid and, thereafter carried to the “*ganda nala*” and thrown there. The act was clearly dastardly, and gruesome in the extreme, as is clear from the post-mortem report of the deceased Prabhash.

19. Was it, however, the appellant, who had done Prabhash to death, in the fateful night between 20th and 21st October 2011? The prosecution would urge, and the learned ASJ holds, that an unbroken chain of circumstances exists, to show that it, indeed, is the appellant who did the dastardly deed. The case, however, remains one that hinges on circumstantial evidence and we have, therefore, while examining this appeal, to satisfy ourselves that there exists such an unbroken chain of circumstances, which points unerringly to the appellant as the perpetrator of the offence, and leaves no manner of doubt that there could be no other possible explanation for the facts. Anything short of this, it is clear, would entitle the appellant to acquittal, at the very least by granting him the benefit of doubt. At the same time, it is no part of the duty of this court – or, indeed, of any court examining the guilt, or innocence, of the accused, to strain the sinews of its imagination, or bend backwards, in order to acquit. The principles are, by now, trite, and we have, dispassionately, to decide whether, applying them, the case against the appellant stands proved beyond all reasonable doubt.

20. The circumstances, which allegedly incriminate the appellant, already stand delineated in the impugned judgement of the learned ASJ. We need not labour this judgement – which is already, probably, over-prolix - with the exercise of enumerating them. We proceed, therefore, to examine these circumstances, in the light of the facts available on record, and the evidence led by both sides.

21. The “last seen” circumstance:

21.1 One of the circumstances which is often pressed into service, in order to prove the guilt of an accused to a murder, is that of the accused having been the person who was “last seen” in the company of the deceased.

21.2 It is plainly obvious that the “last seen principle” has to be applied with a great deal of caution and circumspection. Applying the principle would result in fastening guilt, on a person, of a crime of murder, solely for the reason that he, or she, happened to have been the last person to be seen in the company of the person murdered. While applying this principle, one has to bear in mind the live possibility that the conjoint presence, of the accused and the deceased, at the same time and place, might have been entirely innocent and fortuitous – or, rather, “misfortuitous”. It is for this reason that certain clear-cut indicia have been involved, by judicial fiat, for the said principle to apply. Obviously, the most apparent prerequisite, for the “last seen principle” to be applicable, is that the intervening period,

between when the accused and deceased were last seen together, and the time when the deceased died, should not be too long. The logic behind this requirement is, equally obviously, that, if the time gap, between the time when the accused and deceased were last seen together, and the deceased met his end, is too long, there would be every possibility of some other person or persons having accosted the deceased in the interregnum. It is, therefore, in order to minimize the possibility of any other intervening circumstance having resulted in the death of the deceased, that primacy is accorded to the period of time that has elapsed between the accused and the deceased being seen together, and the deceased passing into oblivion.

21.3 At the same time, there may, quite possibly, be circumstances in which, despite substantial time having lapsed between the accused and deceased being seen in the company of each other, and the death of the deceased, the “last seen principle” would still be applicable. Such a situation may arise, for example, where the prosecution is able to demonstrate, by other evidence, that there was no chance of any other person having interacted with the deceased, between the time he was last seen in the company of the accused, and the time of his death. In each case, the matter would be one of evidence, and the conclusion that would emerge from the available facts, as proved.

21.4 It is important to note, when applying the “last seen theory”, that the circumstance, of the accused having been the last person to have been seen in the company of the deceased, can, at best, be used

as corroborative of other evidence, or as completing the link in the chain of circumstances which would bring home the guilt to the accused. It is not permissible to use the “last seen evidence” as the sole basis to convict an accused of a crime. In other words, even if the accused is found to have been the last person seen in the company of the deceased, the time period between the two having been seen together, and the death of the deceased is sufficiently short, and the accused is unable to afford an acceptable explanation in this regard, it would not be permissible to convict the accused solely on that ground.

21.5 This court has, in its recent decision in *Lalu Pasi v State*, *MANU/DE/3657/2017*, noted, as under, on the “last seen principle”:

“45. On the "last seen theory", the Supreme Court has this to say, in *Nizam (supra)*(in paras 12, 14, 15 and 18 of the report):

"12. Based on the evidence of PWs 1 and 2, the courts below expressed the view that the motive for murder of Manoj was the lust for the money which Manoj was carrying. The courts below based the conviction of the appellants on the circumstances "last seen theory" as stated by PWs 1 and 2 along with the recovery of bilty and receipt by PW 6 on which the name of the accused person (Nizam) was printed. The appellants are alleged to have committed the murder of Manoj for the amount which Manoj was carrying. But neither was the amount of Rs. 20,000 nor any part of it recovered from the appellants. If the prosecution is able to prove its case on motive, it will be a corroborative piece of evidence lending assurance to the prosecution case. But even if the prosecution has not been able to prove the motive, that will not be a ground to throw away the prosecution case. The absence of proof of motive only demands careful scrutiny and deeper analysis of evidence adduced by the prosecution.

14. The courts below convicted the appellants on the evidence of PWs 1 and 2 that the deceased was last seen alive with the appellants on 23-1-2001. Undoubtedly, the "last seen theory" is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. *The "last seen theory" holds the courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of death of the deceased. It is well settled by this Court that it is not prudent to base the conviction solely on "last seen theory". "Last seen theory" should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.*

15. Elaborating the principle of "last seen alive" in ***State of Rajasthan v. Kashi Ram***, (2006) 12 SCC 254, this Court held as under: (SCC p. 265, para 23)

"23. It is not necessary to multiply with authorities. The principle is well settled. *The provisions of Section 106 of the Evidence Act itself are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are*

especially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in *Naina Mohamed, In re., AIR 1960 Mad 218* "

The above judgment was relied upon and reiterated in *Kiriti Pal v. State of W.B., (2015) 11 SCC 178*.

18. *In view of the time gap between Manoj being left in the truck and the recovery of the body and also the place and circumstances in which the body was recovered, possibility of others intervening cannot be ruled out. In the absence of definite evidence that the appellants and the deceased were last seen together and when the time gap is long, it would be dangerous to come to the conclusion that the appellants are responsible for the murder of Manoj and are guilty of committing murder of Manoj. Where time gap is long it would be unsafe to base the conviction on the "last seen theory"; it is safer to look for corroboration from other circumstances and evidence adduced by the prosecution. From the facts and evidence, we find no other corroborative piece of evidence corroborating the last seen theory."*

(Emphasis supplied)

46. *Ganpat Singh (supra)*, too, is instructive on the parameters of the "last seen theory", and holds, after referring to a catena of earlier authorities, as under:

"Evidence that the accused was last seen in the company of the deceased assumes significance *when the lapse of time between the point when the Accused and the deceased were seen together and when the deceased is found dead is so minimal as to exclude the possibility of a supervening event involving the death at the hands of another. The settled formulation of law is as follows:*

'The last seen theory comes into play where the time gap between the point of time when the accused and deceased were seen last alive and when the deceased is

found dead is so small that possibility of any person other than the accused being the author of crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that accused and deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases.' "

(Emphasis supplied)

47. In another recent judgment, **Anjan Kumar Sarma v State of Assam**, MANU/SC/0656/2017, the Supreme Court, relying on its earlier decision in **State of Goa v Sanjay Thakran**, (2007) 3 SCC 775, expostulated thus, on the "last seen theory":

"22. It is clear from the above that in a case *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 explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction.* The other judgments on this point that are cited by Mr. Venkataramani do not take a different view and, thus, need not be adverted to. He also relied upon the judgment of this Court in **State of Goa v. Sanjay Thakran**, (2007) 3 SCC 755 in support of his submission that the circumstance of last seen together would be a relevant circumstance in a case where there was no possibility of any other persons meeting or approaching the deceased at the place of incident or before the commission of crime in the intervening period. It was held in the above judgment as under:-

"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 remove 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 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."

(Emphasis supplied)

21.6 One of the main grounds which the learned ASJ has held against the appellant, is that he was the person who had “last seen” the deceased Prabhash alive, or who was “last seen” in the company of the deceased Prabhash. He has also observed, in this regard, that, “as per the post-mortem report, deceased died between 12:00 to 2:00 a.m. in the intervening night of 20/21.10.2011 ...”

21.7 The post-mortem report, indicates that the death of the deceased Prabhash took place at around 2 AM on 21st October 2011. The fact that the call, to the PCR, took place at around 6:17 AM on 21st October, 2011 [as evidenced by the Delhi Police Control Room Form, exhibited as Ex.PW-1/A, as also the examination-in-chief of PW-1 Ct. Mukesh Kumar (who was not cross-examined, despite opportunity having been granted), recorded on 19th March 2012], also indicates that the death of Prabhash had necessarily to have taken place prior to 6:17 AM on 21st October 2011.

21.8 Given the fact that Prabhash was killed in the room which was being occupied by him along with the appellant, if the appellant was, in fact, the person to have been last seen in the company of Prabhash at 10:30 PM on 20th October 2011, the time gap between such sighting of the appellant, quarrelling with Prabhash, and the death of Prabhash, would be only about 3½ hours. The quarrel having, allegedly, taken place in and outside the room occupied by the appellant and Prabhash, and the death of Prabhash also having taken place in the same room,

the period of 3½ hours between the two events can be taken as reasonably short, and, consequently, the time of death reasonably proximate to the time of quarrel. It would be highly unlikely for a third person to have entered the room between 10:30 PM and 2:00 AM or even 6:00 A.M. when the call to the PCR was made, and murdered Prabhash. In case any such thing happened, it would have been for the appellant to clarify this, in his statement under Section 313 of the Cr.P.C. No such clarification being forthcoming, the reliance, by the prosecution, on the fact that the appellant was the person last seen in the company of Prabhash before his death, merits consideration.

21.9 Having said that, however, the applicability, of the “last seen principle”, in the present case, would necessarily depend on the acceptability of the evidence regarding the appellant actually having been seen, in the company of Prabhash, at or around 10:30 PM on 20th October 2011.

21.10 There are two eyewitnesses to the said “sighting”, namely PW-5 (Mohender Singh Gill) and PW-12 (Jai Kishan), both of whom were their neighbors, and both of whom are alleged, by the prosecution, and found, by the learned ASJ, to have seen the appellant quarreling with Prabhash at or around 10.30 PM on 20th October 2011. It would be necessary, therefore, to analyze, exactly, what the said witnesses stated regarding the quarrel.

21.11 Specifically with respect to the quarrel that is supposed to have taken place, between Prabhash and the appellant on 20th October 2011. PW-5 (Mohender Singh Gill) stated, in his examination-in-chief on 27th April 2012, as under:

“On 20.11.2011 at about 10:30 PM, a quarrel between Vivekanand and Prabhash took place. I did not pay any heed to their quarrel as it was a routine work and thereafter, I went for sleeping.”

(The reference to 20th November 2011 appears to be a clerical error; the date ought to be 20th October 2011).

21.12 In his cross examination, on the same day, PW-5 stated thus:

“I am having my house in adjacent of tenanted accommodation of Vivekanand which consisting two rooms on the ground floor and two rooms on the floor. *It is correct that when police came on 21.10.2011 to me, only then I came to know the name of tenants i.e. Vivekanand and Prabhash.* It was told to me by the police. It is correct that I never gave a telephonic call to 100 number. ... It is correct that I am not aware of name, parentage, native state any of the tenants residing in my neighbourhood.”

21.13 PW-5 was further cross examined on 23rd November 2012, during the course of which he testified as under:

“*There was no window in the room in which the accused was residing. I had heard the noise of quarrel. I did not see the quarrel at about 10:30 PM. I had seen both accused and deceased residing there but I had not talked to any of them, however I knew both of them. I have heard the voice of accused and deceased so many times because they used to quarrel with each other, so I have stated before the police the name of the accused and deceased. I had seen accused and deceased while quarrelling with each other from the ‘galary’ of my house. Accused and deceased were quarrelling outside the house at the door and when I objected, thereafter, they went inside the*

house. I did not tell the police that the accused and deceased were quarrelling at the door of the house.”

21.14 There is apparent contradiction in these two depositions, in chief and in cross-examination. In his examination-in-chief, PW-5 stated that a quarrel had taken place, between appellant and Prabhash (referring them by name) at 10:30 PM on 20th October 2011, but did not take any heed thereof “as it was a routine work”. In cross examination, however, PW-5 stated that, though he was living in the house next to the appellant and Prabhash, he did not even know their names and never called the police either, despite such frequent quarrels taking place. In his further cross examination, PW-5 stated that he knew both Prabhash and the appellant and was also aware of their names. Even as regards the quarrel, in his further cross-examination on 23rd November 2012, PW-5 first states that there was no window in the room in which the appellant and the deceased used to reside and goes on, categorically, to state that he had heard the noise of the quarrelling and had not seen the quarrel at 10:30 PM. Almost immediately, thereafter, however, PW-5 stated that he had seen the accused and deceased quarrelling with each other from the gallery of his house and that they were quarrelling outside the house and, on his objecting, they went inside the house. The deposition, in his cross examination, on 23rd November 2012, that he had objected to the quarrel between the appellant and the deceased, whereupon they went inside the house, is *ex facie* contrary to his deposition in chief, on 27th April 2012, to the effect that he had paid no heed to the quarrel as

it was a routine work and had gone to sleep. It is clear, from the above, that PW-5 is an extremely unreliable witness, that there are manifest and manifold inconsistencies, in his deposition in chief and while he was cross examined, which are irreconcilable in nature. We cannot, therefore, rely on PW-5's evidence as proof of quarrel having taken place between appellant and the deceased at around 10:30 PM on 20th October 2011. Conduct of this witness is unacceptable as he did not intervene in the quarrel, did not reach the spot and did not inform anyone. It was not informed as to for what duration the said quarrel continued.

21.15 Adverting, now, to the second "eye witness" to the quarrel, i.e. PW-12 (Jai Kishan), the said witness states, in respect of the quarrel that had taken place on 20th October 2011, as under:

"I had also heard the noise of quarrel on 20.10.2011. After hearing the noise, I went towards their house and saw the accused and said Prabhash were quarrelling with each other. Since it was routine work for them, I returned to my house and slept."

21.16 In his cross examination on 23rd November 2012, PW-12 states that, after hearing the noise of the quarrel, he came out of his house and saw that the accused and the deceased were quarrelling with each other and that, thereafter, he returned to his house. He also stated that he came to know, of the arrival of the mother and wife of the appellant, in the premises occupied by him along with the deceased, from another tenant namely Mr. Jha. Even as regards his association with PW-4 (Prem Bhardwaj), PW-12 first stated that he had never

talked to him regarding the supposed frequent quarrels between the appellant and the deceased, as he did not have his mobile number, and, in the very next breath, he admitted that he had met PW-4 (Prem Bhardwaj) occasionally, but had not complained, to him, about the altercations between the appellant and the deceased. This indicates prevarication, on the part of PW-12, in his deposition, which substantially erodes it of its evidentiary value.

21.17 We are hesitant to accept the evidence of PW-5 and PW-12, as proof of quarrel having taken place, between the appellant and the deceased at around 10:30 PM on 20th October 2011, or, secondly of the appellant having been seen in the company of the deceased at that time. We are conscious of the position, in law, that minor inconsistencies, in evidential depositions, do not erode such depositions of their evidentiary value, provided, in basic essentials, the depositions are cogent and coherent. However, where we are concerned with the *only two eyewitnesses* to the circumstance of the accused having been the person last seen in the company of the deceased, inconsistencies, in fundamental particulars, such as the place where the quarrel between the two persons occurred, the intercession, or non-intercession, of the said witnesses, in the quarrel, and the extent to which the witnesses identified, or/knew, the persons concerned, cannot be ignored.

21.18 PW-5 and PW-12 being the only eye witnesses to the appellant having been in the company of the deceased at 10.30 PM on 20th

October 2011, we are constrained to hold that the fact of the appellant having been the person who was last seen in the company of the deceased before his death, cannot be said to have been definitively proved, by such unimpeachable evidence as would meet the standard of absolute proof required in criminal proceedings. Their statements are bristling with inconsistencies and contradictions and cannot, therefore, be safely relied upon as the basis to sustain the conviction of the appellant.

21.19 In the absence of sufficient credible proof regarding the appellant being the person who was last seen in the company of the deceased before his death, it is clear that the emphasis, by the prosecution, on the “last seen theory”, as a basis to sustain the conviction of the appellant, is misconceived.

22 CCTV Footage

22.1 Much has been sought to be made, both in the charge sheet as well the impugned judgment of the learned ASJ, of the supposed “CCTV footage”, recovered from the CCTV located at the shop of M/s. S.K. Jewellers en route between the room occupied by the appellant and the deceased, and the “*ganda nala*” where the body of the deceased was found. There is no reason to doubt the recovery of the CCTV memory card, *vide* seizure memo Ex. PW 11/A, which bears the signature of PW-22 (the IO) and stands proved by the evidence of PW-11 (Sh. Sanjeev Verma) and PW-18 (SI Kishan

Kumar) apart from PW-22 herself. Neither is there any reason to doubt the fact that the gait of the appellant was recorded on the CD exhibited as Ex. PW 18/H, the seizure memo whereof was signed by the appellant, PW18 (SI Kishan Kumar) and PW-22 (IO). The CD was also admissible in evidence in view of certificate issued under Section 65B of the Evidence Act (Ex. PW18/I).

22.2 Having said that, there is a delay of nearly *nine months*, between recording of the gait pattern of the appellant on CD, which took place on 28th October 2011, and its dispatch to M/s. Truth Labs which took place on 12th July 2012, as is clear from the Road Certificate (Ex.PW-20/F) as well as the evidence of PW-20 (HC Dashrath) in the witness box. Despite the disclaimer, by PW-20, to the effect that, as long as the case property remained in his custody, it was intact and nobody had tampered with it, the delay of seven months, being not satisfactorily explained, must necessarily inform our reliance on the evidence obtained from M/s. Truth Labs, as a basis to convict the appellant.

22.3 Adverting now, to the evidence obtained from M/s. Truth Labs, we are not impressed by the arguments, advanced in the appeal, that the said evidence ought not to be relied upon, on account of its having been obtained from a private laboratory instead of the CFSL as there is material on record to indicate that the CFSL, expressed its inability to assist in this regard. Moreover, we find, from Ex. PW-23/A, that the analyst Ms. S. Neeru (PW23) was amply qualified in

this regard, and possessed the requisite expertise to opine on the issues referred to her. We note that, in her cross examination, PW-23 Ms. S. Neeru admitted that, in the image in the CCTV footage the face of the person was not clear, though she states that, in order to increase clarity, the image was enhanced. We have, before us, however, the actual images, in the report of M/s. Truth Labs. Prima facie, on a glance thereat, we feel that the images are extremely blurred, and that resting a conviction on the basis of such images, and even on expert opinion obtained in respect thereof may be hazardous, especially where the offence alleged is one of murder, entailing rigorous imprisonment for life.

22.4 When we come to the contents of the CCTV located in the premises of M/s. S. K. Jewellers, however, the picture is much more nebulous. The reference made to M/s. Truth Labs, vide letter dated 12th July 2012, issued by PS Sagarpur, is not on record; however, the report of M/s. Truth Labs sets out the “purpose of examination”, in the following words:

“PURPOSE OF EXAMINATION

- “1. To determine whether the image of the person marked ‘Q’ in the CCTV footage and the image of the suspect person contained in the CD marked ‘S1’ to ‘S3’ belong to one and the same person.
2. To provide a still photograph of the person present in the CCTV recording.”

22.5 Further, the “brief facts of the case”, as set out in the said report, reads thus:

“ As per the brief facts provided by the I/O, a CCTV camera of a jewellery shop was purported to have contained a video image *of a person carrying a dead body*. A suspect was identified by the police during the course of investigation and based on the comparison of suspects video clipping with that of the images of a person in the CCTV recording the opinion of the video forensic expert of Truth Labs was sought.”

22.6 The report of M/s. Truth Labs (Ex. PW23/A) concentrates on determining as to whether the person seen in the CCTV footage was the appellant, or not. On the basis of (i) face comparison applying facial form and fatness, height of forehead and hair style, (ii) anthropometric analysis based on length of forehead and total width of the face and percentage thereof, and (iii) gait pattern, which is stated to have revealed convex knee flexion, it was opined that the image of the person in the CCTV footage was similar to the image of the person contained in the CD in which the appellant's gait had been recorded.

22.7 While this court does not possess requisite expertise to opine on the scientific acceptability, or exactitude, of the manner in which M/s. Truth Labs carried out its analysis, it is clear that the ultimate opinion rendered by it was only that the facial features and gait pattern of the appellant were similar to those of the person in the CCTV footage. How far such an opinion can be relied upon, to base a finding that the person in CCTV footage *was*, in fact, the appellant, is highly questionable. That apart, the CD containing the gait pattern of the appellant had remained with PW-20 HC Dashrath for almost nine months. While the possibility of the CCTV footage being tampered

with, in the said period of nine months, may be remote, the retention, by PW-20, of the CD in which the gait pattern of the appellant had been recorded, with him for two weeks, substantially reduces its evidentiary value.

22.8 There is yet another aspect of the matter, so far as the CCTV footage is concerned. No opinion, of any forensic expert was taken, on the actual image contained in the CCTV footage. On the face of it, it is impossible to understand as to how a large object concealed under a black sheet, can be conclusively opined to be a dead body. In this regard it is worthwhile to note that PW-18 SI Krishan Kumar was of the view that the CCTV footage showed, “one person carrying some human being on his shoulder and that human being was looking like dead” and that “human being was appearing to be wrapped in some clothes” (how a “human being”, which was “appearing to be wrapped in some clothes”, could be “looking like dead”, defeats comprehension), the seizure memo, of the memory card of CCTV footage (Ex.PW11/A) stated that the CCTV footage showed that one person was walking, in front of the shop and towards the bridge carrying *a body* on his shoulder, and PW-22 in her examination in chief, stated that the CCTV footage showed that “at about 2.57 AM one person was *appearing having one person* on his shoulder wrapped in a black sheet”. Interestingly, it appears that learned ASJ in the judgment under appeal was more accurate, regarding what was actually seen on the CCTV footage about which para 67 of the judgment states thus:

“From the testimony of this witness, PW-23, it has proved on record that in the CCTV footage which were seized vide Ex PW-11/A, one person is seen *carrying some goods/hard material* covered in a bedsheet on his shoulder and within 2 minutes coming empty-handed.”

(Emphasis supplied)

22.9 It appears to us that, in actual fact, the observation of the learned ASJ regarding the image on the CCTV footage is more accurate than the evidence of PW-18 or PW-22. The learned ASJ appears to have correctly appreciated the fact that if a large object is concealed under a black sheet, it cannot be said, with any degree of certitude, that the object must have been a dead body. All that can be said is that some large object was being carried by the person shown in the CCTV footage, and the object was concealed behind a black sheet. Interestingly – and we reiterate this – no expert opinion, even from M/s. Truth Labs was requisitioned, regarding the actual image seen in the CCTV footage, the information being limited to identifying as to whether the person carrying the object was, or was not, the appellant. We are, therefore, of the considered view that the CCTV footage recovered from the CCTV outside the shop of M/s. S.K. Jewellers, on which grave reliance has been placed by the prosecution, does not really advance its case to any substantial extent. At worst, it may be said that, at a time shortly after the murder of the deceased took place, a person was probably seen carrying a heavy object, concealed behind the black sheet towards the “*ganda nala*”. Given the fact that the body of the deceased Prabhash had been seen in the “*ganda nala*” a mere four hours thereafter, and the fact that the

distance between the room where murder took place and the “*ganda nala*” was only 400m, it may also be reasonably presumed that, the object being carried was that the body of Prabhash. Even so, we are not prepared to return a categorical finding that the person carrying the said heavy object, was, in fact, the appellant. We concede the possibility that, given the circumstances and the opinion of M/s. Truth Labs, grave suspicion could arise to the effect that the CCTV footage did show the appellant carrying the body of Prabhash in order to dispose of it in the “*ganda nala*”; the case must, however, rest at that level, i.e. of grave suspicion, and no more.

23. Regarding recovery of weapon of offence:

23.1 Another circumstance, contended by the prosecution to be severely incriminating the appellant, is that the weapon (*dao*) by which the offence was committed was recovered at the appellant’s instance. It may be noted, in this regard, that, in the statement of the appellant, recorded on 27th October 2011, the only reference, to concealment of the incriminating articles, is to be found towards the end of the statement, wherein the appellant stated that he had disposed of the *dao*, the vest used by him to wipe the blood stains, the bottle of acid and the blood stained pillow, shawl and other items were disposed of, by him, “here and there”. However, the appellant goes on to state that he could identify the spots where the said articles could be found. Thereafter, the recovery/seizure memo dated 28th October 2011, of the weapon of offence (*dao*) (Ex PW-18/F) clearly states that

the appellant led the crime team to Kailashpuri Chowk and pointed out certain bushes near a dustbin, as the site where he had disposed of the *dao* after committing the murder of the deceased Prabhash. The *dao* was allegedly recovered from the said bushes. The recovery memo was signed by the appellant as well as by the IO Renu Sharma (PW-22) and SI Kishan Kumar (PW-18), who have proved the said documents in their evidence. Similarly, other blood stained items, were also recovered, at the instance of the appellant from the dustbin next to the bushes, with a memo exhibited as Ex. PW-18/G which was also signed by the appellant, the IO and SI Kishan Kumar and proved by the IO (PW-22) and SI Kishan Kumar (PW-18). The articles thus recovered were sent to the FSL for analysis, and the FSL reports (Ex. PW-22/D) and (Ex. PW-20/E) clearly indicated the said items to be blood stained and the blood present, thereon, to be human blood. That the *dao* recovered at the instance of the appellant was the weapon by which the offence was committed, according to the prosecution, would also stand proved by the opinion dated 21st December 2011 (Ex. PW17/C) of Dr. B.N. Mishra (PW-17) which states that “the injuries observed on the body of deceased could have been caused by weapon of offence produced.”

23.2 Recoveries of the articles pursuant to the appellant’s disclosure statement is suspect. It is clear that these items were recovered from a public open place, accessible to all after a gap of almost seven days and not from any concealed area which could only have been within the knowledge of appellant. No independent public witness including

victim's relatives were associated at the time and so called recovery, disquietingly, though the weapon and the other recovered articles were subjected to forensic and serological examination by the FSL, resulting in it being established that human blood was present thereon, the result of the serological analysis reveals that the blood group could not be analysed on the *dao*, the pillow, or the pillow over, and it was only on the vest (*banian*) that the blood group was detected as "B" (significantly, without any Rhesus Factor). It is well known that, *sans* Rhesus factor, blood grouping would be of no avail.

23.3 That apart, there has been no attempt to match the blood group, found on the vest, either with the blood group of the deceased or with that of the appellant. It is worthwhile to note, in this regard, that, as per the serology report of the FSL, the blood group of the appellant (the sample of which was marked 'N-1') could not be determined, as the sample had putrefied. In these circumstances, the obvious course of action, for the prosecution to have followed, would have been to obtain a fresh blood sample from the appellant. Yet, inexplicably, no such attempt was made, as a result of which the entire exercise of blood grouping, of the blood found on the various items recovered during the investigation, remained an impotent exercise.

23.4 Insofar as the opinion, dated 21st December 2011 (Ex.PW17/C) of Dr. BN Mishra (PW-17) is concerned, all it states is that "injuries observed on the body of the deceased could have been caused by the weapon of offence produced". Even during the recording of his

evidence before the learned ASJ on 28th August 2012, Dr. BN Mishra (PW-17) merely reiterated that “after going through postmortem report and examination of weapon produced, (he) was of the opinion that the injuries observed on the body of the deceased *could have been caused* by weapon of offence produced.” He was not cross examined, nor was any effort made to obtain a more definitive opinion from him.

23.5 The appellant in his statement recorded under Section 313 of the Cr.P.C., for his part, categorically denied having used the *dao* to commit any offence.

23.6 In view of the fact that there has been no serological blood matching found on the articles either of the deceased or the appellant, we cannot hold that there is conclusive proof that the *dao* stated to have been recovered at the appellant’s instance, was the weapon used in committing the offence of murder of Prabhash, or that the other articles were used by him to wipe out traces of evidence pursuant to committing of the said murder. Several aspects, of the investigation, in this regard, baffle. Despite the appellant having stated, in his disclosure statement, that he had purchased the *dao* on his way back home after leaving his mother and his wife at their place, no further investigation, regarding the place from where he had effected the said purchase, or to obtain any proof regarding such purchase having been made, was carried out. There has been no effort to recover the bottle of acid, stated in the disclosure statement of the appellant, to have been used by him, though the “disclosure statement” of the appellant

states that he could also point out where the said bottle was to be found. No question was to put, to PW-17, as to whether the *dao* recovered at the instance of the appellant was the only weapon by which the murder of Prabhash could have been committed. Most surprisingly, neither was the *dao*, nor was any of the other articles, subjected to finger print analysis, to link them with the appellant. We may refer, with advantage in this regard, to the judgment of the Supreme Court in *Majenderan Langeswaran Vs. State (2013) 7 SCC 192*. Though, in criminal cases, the value of precedent is limited, especially as each case would revolve around its own peculiar facts, it is worthy to mention the fact that, in *Majenderan Langeswaran (supra)*, too, the fact that no question was put, to the doctor, as to whether the recovered knife was the only weapon by which the offence could have been committed, and no finger printing of the weapon was done, were treated as factors which weighed in favour of the accused to reverse his conviction as ordered by the Courts below, including the High Court. In doing so, the Supreme Court reiterated the trite legal position relating to circumstantial evidence, in para 26 of the report, thus:

“26. As discussed hereinabove, there is no dispute with regard to the legal proposition that conviction can be based solely on circumstantial evidence but it should be tested on the touchstone of law relating to circumstantial evidence as laid down by this Court. In such a case, all circumstances must lead to the conclusion that the accused is the only one who has committed the crime and none else.”

23.7 It is also significant to note that the recovery of the said articles, at the instance of appellant, took place as many as seven days after the

murder. It is certainly questionable as to whether in an open place such as a dustbin, and the bushes next to it, such articles would remain untouched for seven days. The delay of seven days, between the incident and recovery also, therefore, operates as an additional factor against bringing the offence of the murder of Prabhash home to the appellant.

24 Regarding wounds suffered by the appellant

24.1 The MLC of the appellant (Ex.PW-8/A) read with the subsequent opinion obtained from Dr. B.N. Mishra (PW-17) indicated three injuries to be present on the body of the appellant. Of the three, PW-17 had opined, in writing, that while one of the injuries could have been inflicted by a blunt edged weapon, the other two injuries could have been inflicted by semi sharp and sharp weapons. However, it is significant that the opinion of PW-17 was never sought on the issue of whether the injuries of the appellant could have been caused by the *karni* recovered from the room where the appellant and the deceased used to reside. It is also significant to note that, as in the case of the articles allegedly recovered at the appellant's instance, the blood-stained articles recovered from the room (including the *karni*) were also subjected to forensic analysis and serological grouping, but, thereafter, no attempt was made to confirm as to whether the said articles matched the blood group of the appellant or the deceased. There is nothing, consequently, on the basis of which it can be said that the injuries caused by the appellant were attributable to the *karni* which was found in the room or that the blood which was found in the articles present in the room included the blood of the appellant. As a

result, in the absence of any blood matching exercise carried out, the contention, of learned counsel for the appellant, that it could not be held, in law, that the blood found on the said articles was that of either the appellant or the deceased, merits acceptance.

25 The frequent quarrels between the appellant and the deceased:

25.1 The prosecution has sought to urge that, after the arrival of the mother, and wife, of the appellant, to stay with them in the room which was being occupied by him along with the deceased Prabhash, tension developed between Prabhash and the appellant, owing to improper overtures, by Prabhash, towards the appellant's wife, regarding which she complained to the appellant. This, the prosecution would urge, and the learned ASJ would hold, resulted in frequent quarrels between them, culminating in the quarrel that took place on the night of 20th October 2011, and the gruesome murder, of Prabhash, by the appellant, followed thereupon.

25.2 The prosecution has only two witnesses to cite, to support this story of Prabhash having made "passes" towards the appellant's wife, resulting in frequent quarrels between the appellant and Prabhash. They are, as has already been mention hereinbefore, PW-5 Mohinder Singh Gill and PW-12, Jai Kishan.

25.3 While examining the evidence of the said two prosecution witnesses, we have to bear in mind the fact that the most obvious evidence, in this regard, i.e. the version of the mother and the wife of the appellant, was never obtained. No effort, apparently, was made even to trace out the mother and the wife of the appellant and ascertain the veracity of the allegation that the deceased Prabhash was harassing the appellant's wife, and that this had resulted in frequent quarrels between the appellant and Prabhash. No complaint whatsoever was made by any of them to the appellant or any other authority regarding the conduct and behaviour of the deceased towards them.

25.4 We are also required to bear in mind the fact that, though all rooms in the premises were occupied by tenants (as was acknowledged by PW-12 in cross-examination), apparently no effort was made to contact any of the tenants, or ascertain their version of the matter. Rather, the prosecution, for some inexplicable reason, obtained the version of two neighbours, instead of the co-tenants who were most proximately situated qua the appellant and the deceased, and thereafter sat back on its heels. This aspect of the matter acquires additional importance in the light of the admitted fact, vouchsafed by the landlord Prem Bharadwaj (PW-4) in his cross-examination, that none of the tenants had complained, to him, regarding any quarrel between the appellant and the deceased. *Prima facie*, it is difficult to believe that, where all the rooms in the premises were occupied by tenants, and quarrels between the appellant and the deceased were

“routine” – as per PW-5 and PW-12 – none of the tenants would even mention the fact to PW-4.

25.5 The versions of PW-5 and PW-12, regarding the quarrels that allegedly used to take place between the appellant and Prabhash, consequent upon the arrival, in their premises, of the appellant’s mother and wife, are reasonably consistent. Though there are certain minor aberrations, in the statements, they do not detract from the consistency thereof. Both the said witnesses have deposed that, after the arrival, in the premises being occupied by them, of the appellant’s mother and wife, frequent quarrels, between the appellant and Prabhash, had become a common affair. These versions may also be said to be supported, to some extent, by the statement of PW-16 Subash Shah, in examination-in-Chief on 13th July 2012, to the effect that he had received a telephonic call, from his brother, i.e. Prabhash, since deceased, informing him that he could not share the room with the appellant any further, as the appellant’s mother and wife had come to reside with them and, despite having paid 50% of the rent for the room, Prabhash was being forced to sleep outside. Though this evidence is merely in the nature of hearsay, it does corroborate the statements of PW-5 and PW-12, during the course of trial.

25.6 Having said that, no conclusive finding, regarding such quarrel having taken place, between the appellant and Prabhash, can be returned, in view of the fact that the appellant’s mother and wife were never questioned in this regard, and none of the other tenants never

complained, about such quarrels, nor was any of them examined by the prosecution.

25.7 In any event, even if it were to be assumed that quarrels took place between the appellant and Prabhash, consequent on the appellant's mother and wife coming to stay with them, it is difficult to believe that such quarrels would enrage the appellant, to such an extent, as would motivate him to eliminate Prabhash altogether. This is all the more so as, admittedly, the appellant had accompanied his mother and wife back to their village about 5 days prior to the incident, and left them there. No evidence is forthcoming, to explain why, five days after the appellant's mother and wife had returned to their village, the appellant and Prabhash entered into such a violent altercation. Surprisingly, PW-5 and PW-12, are supposedly eyewitnesses to the said altercation, did not provide any enlightenment, in this regard. Neither was any question put to them, regarding the cause, or the subject, of the quarrel that had taken place between the appellant and Prabhash, allegedly at 10:30 PM on 20th October 2011. The two main causes for the friction between the appellant and Prabhash, i.e. the harassment, of the appellant's wife, by Prabhash, and Prabhash's unhappiness at his having to sleep outside, would no longer survive, after the appellant's wife and mother had returned to their village. It appears somewhat strange, therefore, that, while the appellant tolerated Prabhash, venting his ire only by verbal spats, during the time his wife and mother were staying with him and while the embers were, so to speak, smouldering, he developed

murderous proclivities, against Prabhash, after his mother and wife had returned to the village, to the extent that he not only murdered him but also brutally mutilated his body.

25.8 Resultantly, while it may be true that there were quarrels between the appellant and Prabhash, during the time the appellant's wife and mother were staying with them, and that grudges were borne, against each other, on both sides, it is difficult to return a finding that these quarrels were sufficient to motivate and plan the appellant to eliminate Prabhash altogether.

25.9 We have to bear in mind the fact that, even as per the disclosure statement of the appellant, it was the appellant who had invited Prabhash, from the village to come to Delhi and work with him. Considerable time, apparently, had passed since they had started working, and staying together, without any ill-feeling on either side. In the normal course of human conduct-which, it is trite, must necessarily inform the appreciation of evidence in any criminal trial-it cannot be expected that the circumstances stated by PW-5 and PW-12 would result in murderous sentiments developing, on the part of the appellant, towards Prabhash, which would culminate in his committing the murder of Prabhash five days *after* his wife and mother had returned to their village.

25.10 In any event, as the learned ASJ correctly holds, the presence or absence, of motive, cannot be determinative of the guilt, or innocence, of an accused to a crime.

26. Murder is deadly serious business, and it would not be permissible for a court to readily infer existence of motive, on the part of any accused, sufficient to compel him to murder. That apart, even if motive were to be assumed to exist, it is not possible for us to hold the appellant guilty of committing the murder of Prabhash, on that sole ground.

26.1 We have also to take into consideration the alibi advanced by the appellant, who contended that, at the time of commission of offence of murder of Prabhash, he was not in Delhi, but was at his native village in Bihar. Two witnesses were produced by the appellant, namely, Murat Lal Podar (DW-1) and Ms. Baby (DW-2). DW-1 Murat Lal Podar clearly stated that, between 16th October 2011 and 22nd October 2011, he had met the appellant twice or thrice in the village. He further stated that on 22nd October 2011, the appellant's father had informed him that certain police official from Delhi had arrived to investigate the appellant and that, at his request, he had proceeded to the appellant's house and enquired, from the said police officials, the cause of investigation. He thereafter, on to say that, on the same day, the police officials took the appellant with them to Delhi and that, on the request of the appellant's father, he, too, accompanied

them along with one Dinesh. This deposition remained undisturbed in cross-examination.

26.2 DW-2 Ms. Baby, too, deposed, in her examination-in-chief on 31st August 2013, that the appellant and Prabhash had come to stay with her on the intervening night between 14th and 15th October 2011, from where, in the morning of 15th October 2011, the appellant left for his home town in Bihar along with his mother and wife. She further stated that, on 21st October 2011, certain police officials had enquired, from her, about the whereabouts of the appellant, to which she responded that he was in Bihar. She categorically denied any involvement, of the appellant, in the murder of Prabhash. This deposition of DW-2 also remained undisturbed in cross-examination, except to the extent of her clarifying that no railway reservation was made, for the appellant's travel to Bihar with his mother and wife.

26.3 If there was no reason for PW-5 and PW-12 to falsely depose against the appellant, there is, equally no reason, for DW-1, who was his neighbor in his village, to depose in his favour. The testimony of DW-1 during trial has remained undisturbed. Though DW-2 was the sister of the appellant and could, therefore, be categorized as an "interested witness", her testimony corroborates that of DW-1. In the absence of any evidence to the contrary, the testimony of DW-1, to the effect that the appellant had actually arrived at his village at Bihar on 15th October 2011, and that, between 15th October 2011, and 21st

October 2011, he had met the appellant twice or thrice, has to be accorded due respect.

26.4 The unbroken alibi of the appellant, therefore, also substantially weakens the case of the prosecution.

26.5 The charge sheet in the present case, names one Insp. Kamaljeet Singh as having made inquiries, at the appellant's village at Bihar, and having found that he had not reached his village. The said Kamaljeet Singh was never arrayed as a witness. As a result, the opportunity to produce the only witness, who could have been cited, by the prosecution, to support its stand that the appellant had not visited his native village at the time of the incident, was allowed to go abegging.

26.6 We are, therefore, constrained to observe that the alibi, furnished by the appellant, for the time when the alleged offence took place, also merits consideration, and that the learned ASJ has, erroneously, not accorded due weight thereto. The circumstances in which appellant's arrest has been shown in Delhi are suspect. Nothing was ascertained as to where the appellant remained in hiding for the last almost seven days. Arrest memo rather bears signature of DW-2 Baby, his sister. It is unclear when she was contacted to be a witness to the memos.

27. Summation

27.1. Consequent on the above discussion, this Court is compelled to hold that the charge against the appellant, of having committed the murder of Prabhash on during the intervening night between 21st and 22nd October 2011, and having sought to mutilate his body by burning the same using acid, cannot be said to have been conclusively proved, and that the appellant would, therefore, be entitled to be given the benefit of doubt. The case is clearly one which hinges on circumstantial evidence, there being no eye witness to the murder of Prabhash. We have examined the circumstances pressed into service by the prosecution, and relied upon by the learned ASJ to hold against the appellant, but are unable to convince ourselves that, even cumulatively seen, a conclusive case, of guilt, can be made out. The application of the “last seen” theory, by the prosecution, in our view, cannot sustain, as the only two witnesses in this regard, namely, PW-5 (Mahinder Singh Gill) and PW-12 (Jai Kishan), were extremely inconsistent in their statements and depositions, as has been highlighted in paras 21.10 to 21.18 (*supra*). The said inconsistencies cannot be brushed aside as minor contradictions, as they pertained to fundamental particulars, such as the place where the quarrel took place, the intersession, or non-intersession, of the witnesses therein and the extent to which the witnesses identified the persons. The reliance, by the prosecution, on the CCTV footage recovered from the premises of M/s. S.K. Jewellers, too, does not inspire confidence, for manifold reasons. A period of nearly 7½ months elapsed between

recording of the gait pattern of the appellant on CD, which took place on 28th October 2011, and the dispatch of the said CD to M/s. Truth Labs, on 12th July 2012. The possibility of the said CD having been tampered with the interregnum cannot be ruled out. Moreover, PW-23, Ms. S. Neeru who had actually conducted the analysis, admitted, in her cross-examination, that the face of the person in the image was not clear, and that the image had to be enhanced to increase clarity. Even after such enhancement, the face remains blurred, as is clear from the images which are present on the record. That apart, the opinion of M/s. Truth Labs was sought only with respect to the issue of the identity of the person shown in the CCTV footage, and not with respect to what was seen in the footage itself. The observation, that the CCTV footage showed a man carrying dead body, is clearly the *ipse dixit* of the investigating authorities. It is impossible to understand how a large object, concealed under a black sheet, can be assumed to be a dead body. No expert evidence, regarding the said object, was ever requisitioned as has been pointed out in para 22.8 (*supra*). There is various impressions, regarding the image in the CCTV footage, widely differ from each other. The impugned judgment of the learned ASJ, for its part, does not return any finding that the CCTV footage showed a person carrying a dead body on his shoulder but, rather, states that the footage showed “one person carrying some goods/hard material covered in a bed sheet on his shoulder”. Recovery of the weapon of offence and the blood stained pillow, pillow cover and shawl, at the instance of the appellant, is doubtful. It took place from an open area, with the ‘Dao’ lying in the bushes and the other items

found in a dustbin next to the bushes. The recovery took place seven days after the murder of Prabhash, and it is difficult to understand how, for a period of seven days, these items remained undisturbed in an open area such as the dustbin and the bushes next to it. Further, there has been no blood matching in the present case. Of the items recovered at the instance of the appellant, all that was found was that they were blood stained. The serological analysis of these items indicates that blood grouping was possible only of the pillow cover, and that it was not possible to find the blood group of the blood present either on the *dao*, the pillow or the shawl. The blood group of the blood found on the pillow cover was opined to be “B”, without any Rhesus factor mentioned. Further, there has been no attempt to match the found on any articles whether they were recovered at the instance of the appellant or found in the room where the appellant was staying with Prabhash, with the blood group either of the appellant or of Prabhash. We find, from the report of the serological analysis, that the sample of the appellant’s blood group, which had been sent for analysis, had putrified, as a result of which the group could not be ascertained. It appears that no attempt was made, by the investigating officers, to obtain another blood sample from the appellant, so that the serological analysis could take place. As a result, the determination of the blood group, on the few articles in respect whereof it could be determined, remained a still born exercise, which could not be carried to fruition. The entire evidence regarding the items recovered being blood-stained is, therefore, of no value whatsoever.

28. In these circumstances, the alleged recovery of the blood stained *dao*, pillow, pillow cover and shawl, at the instance of the appellant, cannot carry the case of the prosecution any further. The bottle of acid, which was allegedly partially used by the appellant, to burn the body of Prabhash, was never recovered. Even as regards the wounds suffered by the appellant, no opinion was ever sought as to whether they had been inflicted by the *karni* recovered from the room or not. As in the case of the blood on the other articles, the serological grouping of the blood on the *karni* could also not take place. Even as regards the weapons of offence i.e. *dao*, the only opinion, obtained from Dr. B.N. Mishra, who conducted the post mortem, was that the murder of Prabhash could have been committed by the said weapon. No question was ever put, to him, as to whether it was possible to commit the offence with any other weapon, or - which factor assumes importance in the light of the judgment in ***Majenderan Langeswaran Vs. Sate (2013) 7 SCC 192***. The allegation that there were frequent quarrels between the appellant and the deceased, too, rests on the evidence of PW-5 and PW-12. Though their evidence is somewhat consistent in this regard, no attempt was made to obtain the evidence of any of the other tenants, despite the admitted fact that all rooms were occupied at the time the offence was committed. None of the tenants, apparently, even came forward to object at the time of the alleged quarrel on the night of 21st October 2011. Neither was any effort made to trace out the wife and the mother of the appellant, or obtain their version as to the supposed quarrels between the appellant and Prabhash. In these circumstances, this Court is unable to return a

categorical finding that the appellant and Prabhash used to engage in frequent quarrels, in the absence of any evidence of the appellant's mother, the appellant's wife, or any of the other tenants. We are also unable to accept that, while the appellant only engaged in verbal spats with Prabhash during the time his wife and mother was sitting with them, he was so enraged, as to commit the murder of Prabhash and mutilate his body, five days after he had escorted his mother and wife back to village. Rather, it would be natural to assume that, once the appellant's mother and wife had returned back to their village, the cause of the tension between the appellant and Prabhash no longer survived. Even if the appellant bore a grudge against Prabhash regarding the past, it is difficult to expect that such grudge could goad the appellant into murder in Prabhash and mutilating his body by burning it with acid. Unfortunately, no question as ever put, to PW-5 or PW-12, the only person who, supposedly, witnessed the quarrel between the appellant and Prabhash, as to the nature of the quarrel, or as to what they were quarrelling about. As against these infirmities in the prosecution's evidence, the appellant furnished an alibi, which is supported by the evidence of DW-1, who is an uninterested witness, and whose evidence has remained undisturbed in cross-examination. DW-2 has also corroborated the evidence of DW-1. No attempt to obtain the version of Insp. K.S. Gill, who has stated to have ascertained that the appellant had not visited his village, was ever made.

Conclusion:

29. In the above circumstance, we are unable to sustain the conviction of the appellant, either under Section 302 or Section 201 of the IPC. At worst, the case may be regarded as one of suspicion, though we are hesitant even to categorize it as one of “grave suspicion”. The legal position, that suspicion, whatsoever grave, cannot take the place of proof, is trite. We need only reform in this connection to para 25 to 27 of the report in *Nathiya vs State*, (2016) 10 SCC 298, which read thus:

“**25.** On an analysis of the overall fact situation, we are of the considered opinion that the chain of circumstantial evidence relied upon by the prosecution to prove the charge is visibly incomplete and incoherent to permit conviction of the appellants on the basis thereof without any trace of doubt. Though the materials on record do raise a needle of suspicion towards them, the prosecution has failed to elevate its case from the realm of “may be true” to the plane of “must be true” as is indispensably required in law for conviction on a criminal charge. It is trite to state that in a criminal trial, suspicion, howsoever grave, cannot substitute proof.

26. The classic enunciation of the law pertaining to circumstantial evidence, its relevance and decisiveness, as a proof of charge of a criminal offence, is amongst others traceable to the decision of this Court in *Sharad Birdhichand Sarda v. State of Maharashtra* [*Sharad Birdhichand Sarda v. State of Maharashtra*, (1984) 4 SCC 116 : 1984 SCC (Cri) 487] . The relevant excerpts from para 153 of the decision is assuredly apposite: (SCC p. 185)

“153. ... (2) The facts so established should be consistent only with the hypothesis of the guilt of the accused ... 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,

(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.”

27. As recently as in *Sujit Biswas v. State of Assam* [*Sujit Biswas v. State of Assam*, (2013) 12 SCC 406 : (2014) 1 SCC (Cri) 677] and *Raja v. State of Haryana* [*Raja v. State of Haryana*, (2015) 11 SCC 43 : (2015) 4 SCC (Cri) 267] , it has been propounded that in scrutinising the circumstantial evidence, a court is required to evaluate it to ensure that the chain of events is established clearly and completely to rule out any reasonable likelihood of innocence of the accused. It was underlined that whether the chain is complete or not would depend on the facts of each case emanating from the evidence and no universal yardstick should ever be attempted. That in judging the culpability of the accused, the circumstances adduced when collectively considered, must lead only to the irresistible conclusion that the accused alone is the perpetrator of the crime alleged. That the circumstances established must be of a conclusive nature consistent only with the hypothesis of the guilt of the accused, was emphatically propounded.”

30. The appellant deserves benefit of doubt. Resultantly, we set aside the impugned judgment of the learned ASJ and acquit the appellant of the charges against him, of having committed offences under Sections 302 and 201 of the IPC. The appellant shall be released, forthwith, unless required to be detained in any other case.

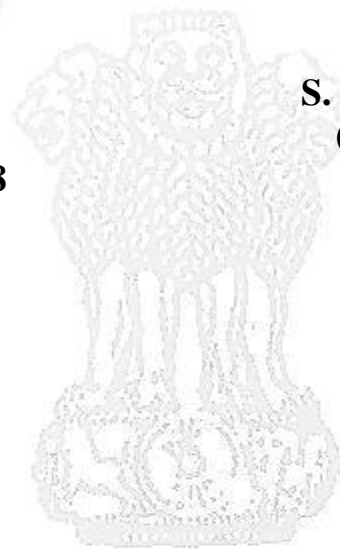
31. Trial Court record be sent back with copy of the judgment. Intimation be sent to Superintendent Jail.

32. Bail bonds of the Appellant, if any, stand discharged.

**C.HARI SHANKAR
(JUDGE)**

**S. P. GARG
(JUDGE)**

FEBRUARY 19th, 2018
neelam/gayatri



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