

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

Judgment reserved on: 27.11.2017
Judgment delivered on: 03.05.2018
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+ **CRL.A. 557/2017**

SACHIN Appellant

Through: Mr.M.N. Dudeja and Mr.Anuj
Chauhan, Advocates.

versus

STATE OF NCT OF DELHI Respondent

Through: Mr.Rajat Katyal, APP along with
Mr.Suresh Chand, SHO, PS-Gokul
Puri, for the State.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE P.S.TEJI

JUDGMENT OF THE COURT

1. The present appeal has been filed by the convict/ appellant-Sachin against the judgment of conviction dated 03.01.2017, whereby the appellant has been convicted under Section 302, 364 and 201 of the IPC, and against the order on sentence dated 18.01.2017 whereby the appellant has been sentenced to imprisonment for life along with fine of Rs.5,000/- and in default of payment of fine to further undergo three months simple imprisonment for the offence punishable under Section 302 IPC; to undergo rigorous imprisonment for ten years with fine of Rs.1,000/- and in default of payment of fine to further undergo simple imprisonment for 15 days for the

offence punishable under Section 364 IPC; and to undergo rigorous imprisonment for three years with fine of Rs.1,000/- and in default of payment of fine to further undergo simple imprisonment for 15 days for the offence punishable under Section 201 IPC.

2. The factual matrix emerging from the record is that on 31.08.2013, the complainant Sana came to the police station and reported to SI Gaurav regarding missing of her son Sahil aged about 7 years. Her statement was recorded in which she stated that on 31.08.2013 at about 11 a.m., her son Sahil was playing in the temple situated in front of her house. At about 12 noon when she went to the temple to look for her son, she could not find him. She tried to search for her son but he could not be found and she raised suspicion that someone had taken her son. She gave the description of her child and the clothes he was wearing. She disclosed that he was wearing blue colored slippers in his feet. On the basis of statement of the complainant, FIR was registered under Section 363 IPC.

3. During investigation, on 02.09.2013 at about 11.25 hours, a PCR call vide DD No.23A was received with regard to recovery of a dead body lying in a cooler of Shiv Durga Mandir which turned out to be that of Sahil. SI Gaurav reached the spot. Crime team was called and the spot was got inspected. Photographs of the spot were taken. The dead body of the boy was sent to the mortuary. The cooler was seized and after conducting postmortem, the dead body was handed over to his parents. Thereafter, penal sections 302/201 IPC were added in the present case.

4. The priest of the temple-Rajender Kumar and his son Kapil were interrogated. On the basis of their interrogation accused Sachin Kumar was apprehended on 03.09.2013 and he confessed to the crime. Allegedly, he planned to kill the boy Sahil for which he purchased one *nada* (rope) and a blade from a shop. On 31.08.2013 at about 11-11.15 a.m., Sahil was playing on the stairs of main gate of the temple. The accused was studying in the temple at the first floor. At the time of closing the temple, the priest asked the accused whether he wanted to study more. The priest left the keys of the temple with the accused and went to his residence. The accused called Sahil, took him to the first floor, hit his head to the wall and when the deceased fell on the bed, accused firstly pressed his neck, then strangled him with the help of *nada*, put his body in the cooler, cut the throat of the boy with a blade and then cut his cheek. Then the accused closed the door of the temple and kicked the slippers of the deceased in the drain.

5. On 03.09.2013 the accused pointed out the place of occurrence. On the same day he got recovered the Topaz blade from under the bed; got recovered one slipper of the deceased from the drain; pointed out the shop from where he purchased the *nada*; one piece of *nada* was seized from the bundle of the *nada* from the shopkeeper, and; got recovered one Capri which he was wearing at the time of occurrence. The accused was medically examined and thereafter, his blood in gauge and semen were obtained and seized. The exhibits handed over by the doctor were also seized. The exhibits were sent to FSL for examination. The statements of PW2 and PW5 were got recorded under Section 164 Cr.Pc on 16.09.2013. The charge sheet dated 25.11.2013 was filed on 30.11.2013.

6. A supplementary charge sheet was filed by the prosecution to include the name of Rajesh Kumar as a witness. He had searched the slippers of the deceased in the drain and one slipper was recovered from the drain in front of the house of the accused. It was submitted that earlier Rajesh Kumar could not be named as a witness, though in the original charge sheet his identity and the role played by him during investigation was disclosed. His presence was also disclosed in the recovery memo of the chappal Ex P-2.

7. Charge under Section 364, 302 and 201 of the IPC was framed against the appellant to which he pleaded not guilty and claimed trial. To prove its case, the prosecution had examined 29 witnesses, namely, Jitender Singh (PW1), Rajender Prasad (PW2), Sana (PW3), Javed (PW4), Master Kapil Sharma (PW5), Dr.Vishwajeet (PW6), Dr.Anshu Mudgal (PW7), SI E.S. Yadav (PW8), HC Shyam Lal (PW9), Ct.Jai Kumar (PW10), HC Ashok Pal (PW11), Ct.Hazari Lal (PW12), Ct.Krishan Kumar (PW13), SI Arvind Kumar (PW14), ASI R.P. Pandey (PW15), Yunus (PW16), Ct.Sandeep Kumar (PW17), HC Ashok Pal (PW18), L/Ct.Poonam (PW19), Dr.Sober Chaturvedi (PW20), Vipul (PW21), Rajesh Kumar (PW22), SI Gaurav Kumar (PW23), Sh.Parshuram Singh (PW24), Insp.Jaipal Singh (PW25), Insp.Mukesh Kumar Jain (PW26), Sh.Dharmender Rana (PW27), Insp.Rambir Singh (PW28) and Ms.Sunita Gupta (PW29).

8. After completion of prosecution evidence, statement of the accused under Section 313 Cr.P.C. was recorded in which he claimed innocence. To prove his defence, the accused examined three defence witnesses, namely, Rajan Kumar (DW1), Dhyan Singh (DW2) and HC Anil Kumar (DW3).

9. On appreciation of evidence and material brought on record, the trial court convicted the appellant for the offence punishable under Section 364, 302 and 201 of the IPC. Feeling aggrieved by the judgment of conviction and order on sentence, the instant criminal appeal has been preferred by the appellant.

10. We have heard the submissions advanced by the learned counsel for the appellant and the learned APP for the State. We have also gone through the evidence led by both the sides.

11. Argument advanced by the counsel for the appellant is that there is no evidence of enticement to the deceased to convict the appellant under Section 364 and 201 IPC. It is submitted that the recovery of chappal of the deceased from an open drain and that too of ordinary make, is not sufficient to connect the accused with the crime in the present case. The testimony of PW22-Rajesh Kumar is not convincing inasmuch, as, Ex.DW3/A shows that no such person with the name Rajesh Kumar was posted as Safai Karamchari in the said area. It was further submitted that PW2 and PW5 have not supported the case of the prosecution on the aspect of the deceased being lastly seen with the accused in the temple. There is a substantial time lag between the last seen evidence, and the recovery of the dead body of the deceased. Reliance has been placed on *Anjan Kumar Sharma v. State of Assam*, CrI.A. No.560/2014; *State of Goa v. Sanjay Thankran*, 2007 (3) SCALE 740; *State of Karnataka v. Chand Basha*, 2015 (1) SCC (Cri) 368; *Keshav v. State of Maharashtra*, 2007 (13) SCC 284; and *Narender Singh v. State*, 2013 (4) AD (Delhi) 853; to submit that last seen evidence alone is not sufficient to convict the accused, and that the time gap between the last

seen and detection of the dead body must be so small, as to rule out the possibility of any other person being with the deceased. It is further argued that both PW2 and PW5 turned hostile and did not support the case of the prosecution in toto, which casts a doubt about the prosecution story. Reliance has been placed on ***Ram Lakhan Sheo Charan and Ors v. State of U.P.***, 1991 Cri.L.J. 2790; and ***Ram Kishan Singh v. Harmit Kaur and Anr.***, AIR 1972 SC 468 to submit that statement made under Section 164 Cr.P.C. is not a substantive evidence. It is further submitted that the prosecution has miserably failed to prove the motive. The motive put forth by the prosecution was that the accused was having illicit relations with the mother of the deceased child and to smoothen those relations, he committed the murder of the deceased. This motive is weak and improbable. It was not established. Sana PW3 did not support the case of the prosecution on this aspect. Reliance has been placed on ***Ashok Kumar v. State of NCT of Delhi***, 2012 (1) JCC 59; ***Daulat Ram alias Daulti v. State of Haryana***, 2015 Cri.L.J. 2639; ***C.K. Raveendran v. State of Kerala***, AIR 2000 SC 369; and ***Dinesh Borthakur v. State of Assam***, AIR 2008 SC 2205; to submit that in cases based on circumstantial evidence, the prosecution is bound to prove the motive behind the commission of murder. It is further submitted that the recovery of slipper and blade was allegedly made from open general places and the same could not be circumstances good enough to convict the appellant. Reliance has been placed on ***Trimbak v. State of Madhra Pradesh***, AIR 1954 SC 39; ***Khora Ghasi v. State of Orissa***, AIR 1983 SC 360; and ***Aslam Parwez v. Govt. of NCT of Delhi***, AIR 2003 SC 3547. It is argued that Section 106 of the Evidence Act cannot be invoked by the prosecution. The present case is based on the circumstantial evidence and

there are several missing links and thus, the prosecution has failed to prove its case against the appellant beyond reasonable doubt. Reliance has been placed on *Paramjeet Singh v. State of Uttarakhand*, AIR 2011 SC 200, to submit that the prosecution has to stand on its legs to prove the guilt of the accused. Further reliance has been placed on *Ganpat Singh v. State of Madhya Pradesh*, 2017 (11) SCALE 595, to submit that, however strong, suspicion cannot take the place of proof and the prosecution has to prove its case beyond reasonable doubt to the hilt.

12. Per contra, learned APP for the State argued that there is sufficient material on record to convict the appellant. The prosecution has successfully established all the circumstances on record and completed the chain, which only points to the guilt of the accused in the commission of crime. It is submitted that though motive plays an important part in the cases based on circumstantial evidence, but the absence of the same cannot be said to be fatal to the case of the prosecution. However, in the present case, there was motive for commission of the crime. It is further submitted that the priest (PW2) and his son (PW5) have deposed that the keys of the temple remained with the accused at the relevant time and as per the postmortem report, the death of the deceased had taken place during the time when the keys of the temple remained with the accused. The presence of the deceased in the temple at the relevant time is established by the testimony of Sana PW3 and her conduct in searching for the deceased in the temple and disclosing the same in her complaint. Thus, the accused was duty bound to discharge the burden cast on him under Section 106 of the Evidence Act. It is further submitted that one slipper Ex P-2 of the deceased was recovered,

at the instance of the accused, with dirt from a muddy drain and the said fact has duly been proved from the testimony of the independent public witness PW22 Rajesh Kumar, and the testimony of PW-3 Sana. Mr. Katyal has placed reliance on *Khujji @ Surendra Tiwari v. State of M.P.*, (1991) 3 SCC 627; *Sanatan Naskar v. State of West Bengal*, (2010) 8 SCC 249; *Sunil Clifford Daniel v. State of Punjab*, (2012) 11 SCC 205; *State of Maharashtra v. Suresh*, (2000) 1 SCC 471; *Kulvinder Singh and Anr. v. State of Haryana*, (2011) 5 SCC 258; *Mohd. Shahid Khan Alias Raja v. State*, 2014 (4) High Court Case (Del) 768; and *Khurshid Ahmed @ Takloo v. State*, 2009 SCC Del 2842; in support of his submissions.

13. In support of his submission that in a case based on circumstantial evidence, it is essential to prove the motive for commission of crime, the appellant had relied upon several decisions taken note of hereinabove. On examination of these decisions, what emerges is that the case of the prosecution in those cases did not fail merely on account of failure of the prosecution to establish the motive. In all these cases, the prosecution failed to establish other relevant circumstances. Thus, failure to prove the motive acted as the last straw. In *Ashok Kumar* (supra), firstly, we may notice that the evidence of “last seen” circumstance was not believed by the Court. In this background, the Supreme Court observed that “*It has been held in some judgments that normally in circumstantial evidence based cases, the prosecution has to prove motive. The absence of motive becomes material in such cases; correspondingly motive is not important in the case of direct or ocular evidence*”.

14. On the same aspect, the appellant has placed reliance on ***Daulat Ram alias Daulti*** (supra). In ***Daulat Ram alias Daulti*** (supra) – which was also a case based on circumstantial evidence, the Supreme Court observed that: ***“No doubt, motive is not required to be proved for commission of a crime but in a case of circumstantial evidence, it cannot be altogether ignored where the other accused with similar role have been acquitted, from the charges of murder”*** (emphasis supplied). In this case, the Supreme Court disbelieved the testimony of PW-2 Mangal, who had led evidence of the deceased lastly being seen with the appellant/ accused. The Supreme Court also disbelieved testimony of PW-9 Jugal Kishore – the brother of the informant Himmat Singh (PW-1) – that he had seen the accused and other three persons drag some dead body and throwing the same into the well. PW-11 Brahm Dutt – nephew of PW-1 informant, was also disbelieved. It is in this background that the Supreme Court also considered the aspect that the prosecution had failed to establish the motive.

15. Reliance placed by the appellant on ***C.K. Raveendran*** (supra) is misplaced for the reason that in this case the Supreme Court did not agree with the finding returned by the High Court that the death of the deceased was established to be homicidal. The Supreme Court also agreed with the view of the High Court that the extra-judicial confession made by the accused to PW-15 was not reliable. The evidence of the deceased being lastly seen with the accused on 03.03.1998 was also not believed, since PW-7 and PW-8 contradicted each other. In this background, the failure of the prosecution to establish any motive on the part of the accused for committing the crime, became significant. For the same reasons, we are of

the view that the reliance placed by the appellant on ***Dinesh Borthakur*** (supra) is not apposite.

16. So far as the contention of the appellant with regard to non-proving of motive by the prosecution is concerned, we are of the view that though motive plays a part in proving the cases based on circumstantial evidence, but it is not that the non-proving of the same should invariably result in rejection of the prosecution case. Lack of proof of motive is not a deal breaker for the prosecution. The Supreme Court in ***Paramjeet Singh v. State of Uttarakhand***, 2010 (10) SCC 439 has observed that if motive is proved, that would supply a link in the chain of circumstantial evidence, but the absence thereof cannot be a ground to reject the prosecution case. In cases based on circumstantial evidence all that can be said is that the motive cannot be altogether ignored. However, as observed by a Division Bench of this Court in ***Mohd. Shahid Khan Alias Raja Vs. State***, 2014 (4) High Court Cases (Del) 768, *“it is generally a difficult area for prosecution to bring on record as to what was in the mind of the accused/appellant and why he chose to act in a particular manner because it is not easy to read the human nature being what it is. A man's passion may arouse at any time even on a very trifling issue. The motive of a man is often so deep seated as to be almost unfathomable. He alone is having the knowledge of the feelings which he may be having against a particular person. On the other hand, there are persons who are so indolent and tolerant that they do not even react on much more serious incidents. Man's behaviour and reaction differ from person to person and by no scale is measurable. In today's time when patience run low and anger is aroused over a very trifling matter, it*

cannot be said with utmost certainty that the act such as hurling abuses could not have been sufficient enough to form a motive for commission of an offence". (emphasis supplied)

17. So, there is no force in the contention of the counsel for the appellant that non-proving of motive by the prosecution would be fatal to its case in all circumstances. It would need examination whether all circumstances—which complete the chain and point only to the guilt of the accused, has been completed. If so, the lack of proof of motive would not result in rejection of the case of the prosecution.

18. To prove the circumstance of accused being lastly seen in the company of the deceased, the prosecution has examined PW2-Rajender Prasad – the priest of the temple and his son Kapil Sharma (PW5). Learned counsel for the accused has submitted that the prosecution case is mainly based on the testimony of PW2 and PW5, but they have not supported the case of the prosecution and turned hostile. They have not stated that they had seen the accused in the company of the deceased, or that the deceased was playing in the temple when the accused was given the key of the temple.

19. PW2-Rajender Prasad had deposed that he was working as a priest in Shri Shiv Durga Mandir situated at F-212, Gali No.4, Ganga Vihar, Delhi from last 13 years. He used to reach at the Mandir at about 6-6.30 a.m. and left the Mandir at about 7.00 a.m. or, sometimes, at about 10 a.m. He used to come to the Mandir in the evening at about 5 p.m. and again left the Mandir at about 8.30-9 p.m. after closing the Mandir. On 31.08.2013, he along with his son Kapil Sharma were in the temple till 11.30 a.m. At that

time, the accused Sachin was sitting there and reading a book. Sachin had asked for key of the temple and stated that he wanted to study there. PW2 asked him to study at home, but he insisted that he could not study at home and asked for the key. At about 11-11.30 a.m., he had given the keys of the temple to Sachin and left the temple along with his son. At that time, Sahil was not there and Sachin was alone. At about 5.30 p.m., PW2 returned to the temple and found some ladies and gents standing outside the temple. He heard that the boy-Sahil went missing, and could not be found despite search. In the night, police arrived at the temple and made search for Sahil, but he was not found. On 01.09.2013 at about 5.30 a.m., he came to the temple and left at about 11.30 a.m. He handed over the key of the temple to Rajan, elder brother of Sachin and left the temple. He further stated that he used to give the key to Rajan from last one month. On 02.09.2013 at about 11-11.30 a.m., he found a crowd in the temple and a foul smell was there. He had gone to the first floor along with public persons. A dead body of a child was found in a cooler which was of Sahil. Police came at the spot and PW2 was taken to the police station. He had stated that his statement under Section 164 Cr.P.C. Ex.PW2/A bearing his signatures was recorded by the police.

20. PW2 was declared hostile and during his cross-examination by the learned APP, he admitted having stated in his statement Ex.PW2/A that Sachin told him on telephone at about 12.15 p.m. that Sahil was missing and that he had asked him that they had left Sahil with him. However, he voluntarily stated that he had given the statement before the Magistrate as per the convenience of the police under threat.

21. PW5-Master Kapil Sharma had deposed that on the day Sahil went missing, he and his father did cleaning of the temple and at that time Sachin was studying in the temple. At about 11.30 a.m., when he and his father were returning home, Sachin demanded key of the temple and stated that he would close the temple after finishing his work and open the temple before the return of father of PW5. His father handed over keys of the temple to Sachin and they went to their home. At that time, Sahil was not present there. In the evening when he visited the temple, he heard that Sahil was missing. His statement Ex.PW5/A was recorded before the Magistrate which bore his signatures. He stated that the statement – that Sahil was playing in the temple with Sachin, was made under threat and influence of the police and rest of his statement was correct. Though this witness had also turned hostile, but he had stated that, on that day, when his father reached the temple in the evening, it was already open. He also stated that Sachin demanded keys on several occasions and his brother Rajan used to study in the temple. Brother of Sachin used to sleep in the hall and for that purposes, he used to demand keys of the temple regularly. Some times Sachin used to take the keys of the temple in night also. During cross-examination by the learned defence counsel also, PW5 admitted that Sachin and his brother used to take keys of the temple for studying since there was not enough space in their house for the purpose of studying.

22. From the testimony of PW2 and PW5, it is proved that on 31.08.2013 at about 11.30 a.m. i.e. at the time of closing the temple by PW5, accused Sachin was present there and studying. It has also been established that accused had asked for the keys of the temple from PW2 – who was the priest

in the temple, on the pretext that his work was not complete, and he would open the temple in the evening before the arrival of PW2. It has also been established that the accused had insisted for the handing over of the keys of the temple to him. It has also come in evidence that accused Sachin and his brother Rajan had asked for the keys of the temple earlier as well. It has also been established that on that day at about 11.30 a.m., PW2 handed over the keys of the temple to the accused. Since both PW2 and PW5 turned hostile on the aspect regarding the presence of Sahil in the temple/ on the steps of the temple, and about his playing there when they left the temple after handing over the keys to the accused, the testimonies of these witnesses may be kept aside on these aspects— to be tested in the face of other evidence brought on record on the said aspects.

23. The mother of the deceased, namely, Smt.Sana (PW3) testified that on 31.08.2013, at about 11 a.m., her son Sahil aged about 7 years was playing in Shiv Mandir situated in front of their house. Around 12 noon after preparing food, she had gone to the Mandir to call her son Sahil, but he was not found there. At about 4 p.m., she had gone to PS Gokal Puri and made a complaint Ex.PW3/A about missing of her son.

24. The complaint Ex.PW3/A made by PW3-Smt.Sana led to the registration of the FIR Ex.PW14/B initially under Section 363 IPC. The complaint Ex.PW3/A shows that the time of missing of the child was from 11AM to 12 noon. The tehrir regarding registration of FIR was made at 4.40 p.m. The complaint Ex.PW3/A and the FIR Ex.PW14/B corroborates the version of the complainant (PW3) that her son went missing, which led to lodging of complaint by her which, in turn, led to registration of FIR.

Pertinently, in her earliest complaint PW3 stated that Sahil was playing in the temple. She also stated that she went to the temple to look for him around 12.00 noon. Thus, from the testimony of PW3 it stands established that Sahil was playing on the steps of, or inside the temple at the time when the appellant was standing there. Sahil was lastly seen playing in the temple by his mother around 11.00 AM.

25. It is settled law that testimony of a hostile witness:

“cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. (vide Bhagwan Singh v. The State of Haryana, AIR 1976 SC 202; Rabindra Kumar Dey v. State of Orissa, AIR 1977 SC 170; Syad Akbar v. State of Karnataka, AIR 1979 SC 1848 and Khujji @ Surendra Tiwari v. State of Madhya Pradesh, AIR 1991 SC 1853).

17. *In State of U.P. v. Ramesh Prasad Misra and Anr., AIR 1996 SC 2766, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra, (2002) 7 SCC 543; Gagan Kanojia and Anr. v. State of Punjab, (2006) 13 SCC 516; Radha Mohan Singh @ Lal Saheb and Ors. v. State of U.P., AIR 2006 SC 951; Sarvesh Naraian Shukla v. Daroga Singh and Ors., AIR 2008 SC 320 and Subbu Singh v. State, (2009) 6 SCC 462.*

18. *In C. Muniappan & Ors. vs. State of Tamil Nadu, JT 2010 (9) SC 95, this Court, after considering all the earlier decisions on this point, summarized the law applicable to the case of hostile witnesses as under:*

“83 ... the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence.”” (emphasis supplied)

[See ***Rameshbhai Mohanbhai Koli Vs. State of Gujarat***, (2011) 11 SCC 111].

26. Though PW2 and PW5 have stated that part of their statement recorded under Section 164 Cr.P.C regarding Sahil playing with the accused inside the temple, had been made under the pressure and threat of the police, but the fact remains that they never made any complaint to any authority, neither the higher police officers, nor to the Court with regard to threats extended to them at the time of recording of their statements under Section 164 Cr.P.C. Apparently, their statements under Section 164 Cr.P.C. were recorded on 16.09.2013, whereas their statements before the trial court were recorded on 13.05.2014 and 31.05.2014 i.e. after about 8 months and during this entire period, they did not make any complaint to any authority with regard to the threats allegedly extended to them by the police officers, which creates doubt about their hostility. Even otherwise, from the testimony of PW3-Smt.Sana, mother of the deceased child, it has been established that at the time when her son Sahil went missing, he was playing inside the temple. Her testimony has duly been corroborated by her complaint Ex.PW3/A and FIR Ex.PW14/B. Pertinently, when the complaint Ex.PW3/A was made, Smt. Sana PW3 had no idea of her son having been taken by Sachin, and killed, much less by the appellant. There was no occasion for her to have falsely claimed that her son was playing in the temple at the relevant time. Since her son had gone missing and she had

lodged her complaint with the police with a view to locate him, she would have truthfully stated to the police about where he was lastly seen by her, and at what time. There was no reason for her to mislead the police. Her conduct, as narrated by her in her complaint also demonstrates that Sahil– to her personal knowledge, was playing in the temple opposite her house. She went to look for him in the temple at around 12.00 noon but did not find him there. Thus, we are not impressed by the submission of the appellants that it is not established that the deceased Sahil and the accused were together at the temple after 11.00 AM on the fateful day.

27. Learned counsel for the appellant has placed reliance on **Narender Singh** (supra) to submit that the prosecution has failed to establish that the deceased was lastly seen in the company of the appellant. In **Narender Singh** (supra), on the question of last seen, the prosecution relied on statements of PW-2 and PW-8. PW-2 had deposed that he had seen the deceased going in the bullock cart of the accused with his sister-in-law and sister. The three of them got down from the bullock cart for cutting fodder. The appellant was also seen getting down and he went into the fields of Rattan Singh. The sister-in-law and sister of the accused, and the accused, returned to the bullock cart (baggi) after about 30-45 minutes. The deceased did not return. Thereafter the appellant/ accused along with his sister-in-law and sister went away. In this background, the Division Bench took the view that it could not be said that the appellant/ accused was lastly seen with the deceased since the appellant, the deceased and the sister-in-law and sister of the appellant/ accused had all got into the fields for the purpose of cutting fodder. There were other very strong and cogent reasons for the Court to

reject the case of the prosecution. The blood stained clothes of the accused were allegedly recovered after three days. The Court doubted the said recovery after 3 days of the occurrence, by observing that the sister-in-law and sister of the accused would have seen the blood stains on the clothes if the accused had committed the crime. Moreover, it did not stand to reason that he would have kept the blood stained clothes for three days in the house and not washed them. The weapon of offence was not recovered on the same day on which the blood stained clothes were allegedly recovered. The same was recovered two days later after police remand of the accused was taken for one day. The weapon of offence did not bear any blood stains. Thus, it was in this background that the Court did not accept the theory of last seen in **Narender Singh** (supra). The position in the present case is, however, materially different. The keys of the temple were left with the appellant/ accused at the time when the same was to be closed, with him inside. The deceased was also playing in the temple at that time. As opposed to an open field, the premises in question is a closed place i.e. a temple. It is not even the defence of the accused— and none of the other witnesses, including PW2 and PW5 have spoken of the presence of any other person in the temple when PW2 and PW5 left the temple after handing over the keys with the accused. Thus, in our view, no support can be drawn by the appellant from **Narender Singh** (supra).

28. Reference may be made to **Kulvinder Singh** (supra). In this case as well, the accused and the deceased were not lastly seen together. Not a single witness had deposed to that effect. However, the Court found that the prosecution case had been very close to the circumstances of the appellant

and the deceased being last seen together. It was argued before the Supreme Court that there was no evidence of last seen together. The Supreme Court rejected the said submission in the following words:

“21. Not a single witness has deposed that the appellant-accused were last seen with the deceased. However, the courts below have found that the prosecution case has been very close to the circumstances of the appellants and the deceased being last seen together. Ishwar Singh (PW 2) has deposed that the tubewell of Singh Ram is on the passage connecting his fields with the abadi of the village, where he saw both the appellants at about 7.00 p.m. Immediately thereafter, his son, Amardeep started for the village between 7.30 and 7.45 p.m. Ranbir Singh (PW 3) who heard the cries from the place of occurrence and saw the appellants running towards the village and the deceased was found to have an empty stomach at the time of occurrence as per the post-mortem report had indicated that Amardeep had been murdered before he could take his evening meal.

22. The trial court has examined the statement of Ranbir Singh (PW 3) minutely and rejected the defence version that in such a circumstance it was unnatural on the part of this witness not to go to the source of shrieks, giving explanation that after hearing the shrieks he stopped on his way to the village and immediately thereafter he saw both the accused running fast and crossing him. On being stopped and asked by Ranbir Singh (PW 3), the appellants told him that they were running without any specific purpose. Immediately thereafter, he could not hear any cry. Therefore, he did not inspect the place from where the cries seem to be coming. Thus, the trial court reached the conclusion that though it was not a case where the accused had been last seen together with the deceased, however, in a case when the accused had the opportunity to commit the crime and they had the motive on their part to do so, such a circumstance can also be taken note of.

23. In *State of U.P. v. Satish* [(2005) 3 SCC 114 : 2005 SCC (Cri) 642], this Court held that: (SCC p. 123, para 22)

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

Similar view has been reiterated in Mohd. Azad v. State of W.B. [(2008) 15 SCC 449 : (2009) 3 SCC (Cri) 1082]”(emphasis supplied)

29. In our view, the ratio laid down in this decision is squarely applicable to the facts of the present case. In the present case, the PW-2 and PW-5 had left the appellant/ accused in the temple at around 11:00 a.m; PW-3 had seen her child i.e. the deceased playing in the temple after 11:00 a.m; the child had gone missing by noon time; and he had been strangled to death by about 2.30p.m. Thus, the transaction in which the deceased was done to death started before the time PW-3 went to the temple to look for him, and as per the postmortem report, he was done to death in the afternoon on the same day.

30. Learned counsel for the appellant has submitted that the possibility of the dead body being hidden in the cooler after the commission of the homicide, and sometime after the appellant had left the temple on 31.08.2013, cannot be ruled out. He submits that the recovery of the dead body from the cooler does not imply that the homicide was committed within the precincts of the temple. He submits that a search was conducted for the deceased on 31.08.2013 itself and neither he nor his body was found.

In support of his submission, he has placed reliance on *Sanjay Thankran* (supra). In our view, the judgment in *Sanjay Thankran* (supra) cannot be employed by the appellant. Firstly, when the search of temple was conducted on 31.08.2013, it is not the body of the deceased, but the deceased, who was being searched for. There was no question for searching the body of the deceased at that point of time, since it was not even known that he was dead. Obviously, there was no question of searching for the deceased inside the cooler which was kept on the first floor of the temple premises. It has come on record that the non-recovery of the dead body in the first instance was because the said search was cursory. Pertinently, the dead body was lying concealed inside the body of the cooler and not in the open. It was only on 02.09.2013, when public persons gathered at the temple, the witness PW2 was informed that some pungent smell was coming from the temple and it was only then, that the recovery of the dead body of Sahil from the cooler was affected.

31. Thus, unlike in the case of *Sanjay Thankran* (supra), where the search was conducted in respect of the jewellery of the deceased couple – on the first occasion before the arrest of the accused couple, and after their arrest on another occasion when the same was allegedly found, in the present case it is the search of the deceased – who was assumed to be alive and not of his body, in the first occasion.

32. PW21-Vipul had stated that on 02.09.2013 at about 11-11.15 a.m., he found a crowd in front of the temple and thereafter he went to the first floor and found a dead body of a child in a cooler kept in the corner of the room. He informed the police. The PCR Form regarding receiving of the

information by the police of the recovery of dead body of Sahil had been proved on record as Ex.PW19/A by PW19-Lady Ct.Poonam. The said information was recorded in the police station vide DD No.23A Ex.PW15/A. There is no dispute with regard to recovery of the dead body of Sahil from the cooler lying on the first floor of the temple on 02.09.2013.

33. The postmortem on the dead body of the deceased was conducted by PW6-Dr.Vishwajeet Singh. He had deposed that on 02.09.2013 at about 2.30 p.m., he had conducted the postmortem on the dead body of Sahil. He found ligature mark around the neck below thyroid. At places the skin of the neck was peeled off due to putrefaction. The places where the skin was present, the ligature mark was hard and reddish brown in colour and where the skin was absent, the mark was reddish in colour. On dissection, the underlying soft tissues and muscles were having extravasation. There was bruising of bilateral carotid sheath. One incised wound of size 7.5 cm X 2 cm X 1.5 cm was found present obliquely over midline neck, 1 cm below injury no.1 cutting underlying subcutaneous tissue, muscles and a nick over trachea. Another incised wound with tailing on right later side of size 9.5 cm X 2.5 cm X 0.6 cm was present over right face. Ligature material i.e. whitish brown nada encircling neck thrice was cut, sealed and handed over to the IO. As per the opinion of the doctor, cause of death was asphyxia as a result of antemortem compression of neck by ligature strangulation. All the injuries were opined to be antemortem in nature. Injury no.1 was opined to be produced by ligature and was sufficient to cause death in ordinary course of nature. Injury no.2 and 3 were caused by sharp edged weapon. Time since death was opined to be 2 to 3 days. Postmortem report was proved as

Ex.PW6/A. During the course of cross-examination, Dr. Vishwajeet (PW6) had stated that the meaning of expression that 2-3 regarding the time of death means 2 days was certain, and 3 days would be approximate and the time of death could be between 2 to 3 days.

34. From the testimony of the doctor (PW6), it has duly been established that the deceased died at about 2.30 p.m. on 31.08.2013 – the day when he went missing. It has already been established on the record that the accused was handed over the key of the temple at about 11.30 a.m. on 31.08.2013 and it remained with him till the evening, when at about 5.30 p.m PW2 returned to temple. Thus, the prosecution has established the circumstance that the accused was lastly seen in the company of the deceased; the time of his death is proximate to the time at which the accused was present in the temple with the deceased; the place of incident was inside the temple – as his dead body was recovered from the cooler lying on the first floor of the temple, and; the accused was exclusively having possession of the temple – i.e. the place of occurrence, when the occurrence took place.

35. Section 106 of the Indian Evidence Act casts a duty upon the person to explain the circumstances which are exclusively in his knowledge. Section 106 of the Evidence Act reads as under :

*“106. Burden of proving fact especially within knowledge.—
When any fact is especially within the knowledge of any person,
the burden of proving that fact is upon him. Illustrations*

*(a)When a person does an act with some intention other than
that which the character and circumstances of the act suggest,
the burden of proving that intention is upon him.*

*(b)A is charged with travelling on a railway without a ticket.
The burden of proving that he had a ticket is on him.”*

36. As per Section 106 of the Act, the burden of proving a fact especially within knowledge of any person is upon him. In the present case, it was alleged against the appellant that on the day of the incident, from 11.30 a.m. to 05.30 p.m., the key of the temple remained with him and he was alone in the temple along with the deceased Sahil during the said period. Admittedly, the dead body of the deceased was recovered from the temple on 02.09.2013, but he had died in the afternoon of 31.08.2013. Thus the burden to explain the death of the deceased was upon the appellant, which he failed to discharge. The appellant along with deceased were the only persons present inside the temple from 11.30 a.m. till the time PW2 came to the temple visited on the same day in the evening at about 5.30 p.m. The deceased had already gone missing by that time and his going missing had been reported to the police. The dead body of the deceased was recovered on 02.09.2013, though the death had taken place on the afternoon of 31.08.2013.

37. It was alleged against the appellant that he got recovered a slipper of the deceased from a drain, and a blade from under the bed lying in the temple – with which he had caused incised wounds on the deceased. After his apprehension, it was disclosed by the appellant that he had strangled the neck of the deceased with a nada, and then also cut the cheek of the deceased so that the flow of the blood would positively result into death of the deceased. The slipper Ex.P2, Topaz blade Ex.P3 and cotton nada Ex.P1

and Ex.P6 were recovered and seized. Blood was detected on the ligature material Ex.P6 and blade Ex.P3.

38. Learned counsel for the appellant had argued that the author of the documents i.e. disclosure statement of the appellant, seizure memos of blade, nada, slipper and Capri have not been produced on record. Therefore, there is a doubt about the manner of preparation of these documents. Before proceeding further, we may deal with this submission at this stage itself. PW25 Inspector Jaipal Singh was examined by the prosecution. He was the Investigating Officer in this case. He stated that the documents, except the Site Plan ExPW23/Disciplinary Authority were prepared by his subordinate under his dictation. He did not remember the name of the subordinate. Learned counsel for the appellant has failed to point out any procedural requirement that the prosecution documents prepared during investigation have necessarily to be prepared in the hand writing of the I.O. Since they were prepared under his dictation that, to our mind, is sufficient. It was not necessary for the prosecution to examine the scribe of the said documents.

39. It was further submitted that PW22-Rajesh did not sign the seizure memo of the slipper. Even PW3-Smt.Sana had stated that the slipper was shown to her in the police station. It was further submitted that defence witness DW3-HC Anil Kumar had produced a document Ex.DW3/A which proves that no person with the name of Rajesh (PW22) was posted as safai karamchari in the police station Gokul Puri. So his testimony is unreliable with regard to recovery of slipper. It was further contended that there are several contradictions in the testimony of witnesses which corrodes their testimony. It was further submitted that there are material contradictions in

the statements of the witnesses regarding recovery of slipper. PW17-Ct.Sandeep Kumar stated that Rajesh searched the slipper at about 3.30 p.m., whereas PW22-Rajesh had stated that he was called by the IO at about 6.30-6.45 p.m. PW3-Smt.Sana stated that the police reached the place of recovery of the slipper at about 10-11 a.m. It was further submitted that PW10-Ct.Jai Kumar had stated that search of the temple had taken place on 31.08.2013. Similarly, PW2 had stated that the search of the temple had taken place on 31.08.2013.

40. To prove the recovery of slipper of the deceased, prosecution had examined PW22-Rajesh Kumar. PW22 had deposed that he was a safai karamchari. On 03.09.2013, he reached in front of Shiv Durga Mandir, Gali No.4, Ganga Vihar, Delhi on the call of Insp.Jai Pal Singh. Insp.Jai Pal Singh, Ct.Sandeep and HC Jeevan along with accused Sachin were present at that time. On the instruction of Insp.Jai Pal Singh, PW22 made search in the drain with the help of trowel and during the search, one blue coloured small slipper was found. There was sewage material on the slipper. One lady identified the slipper as belonging to her deceased son. PW22 handed over the slipper to Insp.Jai Pal Singh. Slipper was kept in a polythene and thereafter it was converted into a pullanda, sealed and seized. He identified the said slipper as Ex.P2. During cross-examination, PW22 stated that he was a free lance sweeper and sometime used to work outside the police station also.

41. It is apparent from the testimony of PW22 that he was working as free lance sweeper and on 03.09.2013, he recovered one slipper Ex.P2 from the drain which was seized vide seizure memo Ex.PW3/E. It is apparent from

the seizure memo that it does not bear the signature of PW22, but non-signing of the same is not fatal to the case of the prosecution when the witness himself had stated that he had recovered the said slipper on the asking of the IO of the case. He had even identified the said slipper. So far as the contention of the appellant that Ex.DW3/A proves that PW22-Rajesh was not working as Safai karamchari in the police station, is concerned, it is apparent from the testimony of PW22, himself that he was not posted as safai karamchari in the police station. He had clarified that he was working as a free lance safai karamchari and used to do the work on the asking of the police officials. It has never been the case of the prosecution that PW22 was posted as safai karamchari in the police station.

42. It is apparent that there are contradictions in the testimony of PW17 and PW22 regarding the time of search of the slipper. PW17 had stated that the slipper was searched at about 3.30 p.m., whereas the recovery witness PW22 had stated that he was called by the IO at about 6.30-6.45 p.m. to search the slipper from the drain. In our view, these are minor contradictions and the same cannot be said to go to the root of the matter. So far as the testimony of PW3-Smt.Sana is concerned— that the police reached the drain at about 10-11 a.m., the said statement is immaterial insofar as she had not stated anything about the search or recovery of slipper at that time. In our view, the said contradictions are minor in nature and do not go to the root of the matter and in no way affect the case of the prosecution. On the said minor contradictions, the entire case of the prosecution cannot be washed away. The search of the slipper may have

started earlier, but PW22 has been called later. The statements of the witnesses are not irreconcilable or contradicting.

43. No doubt, the slipper was recovered from an open drain which was a public place. However, the drain was sullied and the slipper was not visible to the naked eye in the drain. It is for this reason that the Sweeper/ Safai Karamchari PW-22 Rajesh Kumar was called, and on the pointing out of the accused as to where he had thrown the slipper, the same was retrieved from the drain. It has come in evidence that when taken out from the drain, the slipper was recovered with muck/ sewage material. Thus, it cannot be accepted that the recovery was made from an open general space which was accessible to all. Even within the open general space, the slipper lay hidden inside the sullied drain as it was not visible to the naked eye. Reliance placed on *Trimbak* (supra) to submit that recovery was made from the general open place is not reliable, is misplaced in view of the aforesaid discussion.

44. A Division Bench of this Court, in similar circumstances, rejected the argument about recovery of the weapon from an open public place accessible to all. We may reproduce paragraphs 25 to 27 of the judgment rendered in *Khurshid Ahmed @ Takloo* (supra), which read as follows:

“25. Learned defence counsel has further submitted that the place of recovery is a public place which is accessible to all and the deshi katta was not any special weapon having any special mark of identification; it is a weapon easily available in the market and as such there is every possibility that the same has been planted.

26. The witnesses to the recovery, besides PW-31 are PW-24 and PW-29. PW-24 has on oath deposed that accused had in their presence pointed out the place where he had thrown the weapon i.e. deshi katta in the nala; PW-29 and PW-24 had entered inside the nala and after about 5-7 minutes they found a yellow coloured polythene inside the nala and on opening it they found a country made pistol. In his cross-examination PW-24 had deposed that there was mud inside the nala wherefrom it was retrieved.

27. From this evidence adduced by the witnesses to the recovery it has emerged that the weapon of offence was lying inside the mud in the ganda nala and after cleaning the mud which took more than 5 to 7 minutes, they retrieved this weapon of offence; it was not recovered from an open area. Inspector Ravinder Kumar PW-31 has categorically deposed to this effect; he was joined by Const. Rameshshwar PW-29 and Const. Virender Singh PW-24. All the said witnesses have corroborated one another on this score. Recovery stands established.”

45. Similarly, the blade had not been recovered from an open general place which was accessible to all. It was lying hidden under the mattress on a bed lying on the first floor of the temple. Reliance may be placed on **Mohd. Shahid Khan Alias Raja** (supra) and **Khurshid Ahmed @ Takloo** (supra) relied upon by the learned APP.

46. It was also contended by the learned counsel for the appellant that there is a time gap between the time when the accused was lastly seen in the company of the deceased on 31.08.2013, and the discovery of the dead body i.e. on 02.09.2013. There is no force in this contention of the appellant for the reason that as per the post-mortem report, the deceased had been done to death on the afternoon of 31.08.2013 itself. Merely because the dead body of the deceased was found in the cooler lying on the first floor of the temple

on 02.09.2013 – when a foul pungent smell was noticed, does not mean that there was a significant time gap between the time the appellant was lastly seen with the deceased, and the time when he was murdered.

47. Reliance placed on ***Chand Basha*** (supra) is misplaced, since, in the present case there is close proximity of last seen and the death of the deceased. We also find that in ***Chand Basha*** (supra) the postmortem report failed to specify any approximate time of death. The recovery of the dead body was four days after the last seen together of the deceased and the accused. The position is very different from the present case as taken note of herein above.

48. To prove the recovery of piece of nada, PW25-Insp.Jai Pal Singh had deposed that accused led the police team to a shop, namely, Ekta General Store, situated on the T-point of temple wali gali, and pointed out the said shop from where he had purchased the nada and topaz blade. The shopkeeper-Jitender Singh (PW1) produced one piece of nada from the bundle, from which he sold a piece of nada to the accused. The said piece of nada Ex.P1 was seized vide memo Ex.PW1/A. PW1-Jitender Singh has deposed that he had handed over a piece of nada Ex.P1 to the police officials which was seized vide memo Ex.PW1/A, which bears his signatures. Though, PW1 admitted the seizure of said nada Ex.P1 by the police vide memo Ex.PW1/A having his signatures, but he turned hostile and he denied that accused Sachin was with the police at the time of seizure, or that accused had purchased the nada, or that Sachin was already known to him.

49. From the testimony of the IO (PW25) and PW1-Jitender Singh, it has been proved that the nada Ex.P1 was seized, but it is strange to note that PW1 had denied that he knew the accused. It is an admitted fact that the shop of the witness-PW1 was located in the same street in which the accused was residing and then too, he had denied that he knew the accused. This raises doubts about the correctness of the statement of PW-1, insofar as he turned hostile. Pertinently, it has come in evidence that after the postmortem on the dead body of the deceased, the doctor handed over ligature material i.e. the nada Ex.P6 to the IO. The said ligature material Ex.P6, and the piece of nada Ex.P1 were examined in the FSL vide report Ex.PW24/A. The FSL report Ex.PW24/A shows that both the said pieces of nada, when examined, they were found to be similar in respect of their texture, weaving pattern, number of piles, twist of piles, appearance under U.V. Light, microscopic appearance, solubility and burning behavior. This shows that the I.O. had taken the sample of the nada from PW-1, upon the disclosure of the accused that he had purchased the same from PW-1. Else, PW-25 would not have imagined – or taken a chance by procuring a sample Ex. P-1 from PW-1, and got it compared with Ex.P-6. If the accused and PW-1 were to be believed, it would mean that PW-25 took a shot in the dark which hit the target. We cannot accept this argument. Thus, in view of the FSL report that piece of nada Ex.P1 and ligature material Ex.P6 were similar, there is no doubt about the recovery of nada Ex.P1.

50. It is alleged against the accused that he got recovered topaz blade Ex.3 from under the double-bed lying in the temple. The IO (PW25) and SI Gaurav (PW23) have deposed about the disclosure of the accused, and his

leading of the police party to the place from where the topaz blade Ex.P3 was recovered. The said blade was sent to FSL for examination, and as per FSL reports Ex.PW25/D and Ex.PW29/A, human blood was detected on the blade Ex.P3. PW6-Dr.Vishwajeet Singh had also deposed that on 29.11.2013, Insp.Jai Pal Singh gave him request for subsequent opinion. He gave his opinion Ex.PW6/B to the effect that the injury no.2 i.e. on the neck and injury no.3 i.e. on the right face of the deceased were produced by a sharp edged weapon, which could also be a topaz blade.

51. In view of the totality of the evidence discussed above, we are of the view that the appellant has failed to make out any ground in support of the present appeal. On the other hand, the prosecution has successfully established all the circumstances on the record which only point towards the guilt of the appellant, i.e. that it was only he who had committed the murder of the deceased. All the chain of the circumstances brought on record by the prosecution have duly been established, and there is no missing link to raise any doubt about the case of the prosecution. We do not find any merit in the present appeal. Consequently, the judgment of conviction and order on sentence are hereby upheld.

52. The present appeal is accordingly dismissed.

VIPIN SANGHI, J

P.S. TEJI, J

MAY 03, 2018