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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved On : 04.09.2019
Judgment Pronounced On: 10.12.2019

CRL.A.52/2019

RAM BADAN YADAV

.....

Appellant

Versus

STATE

.....

Respondent

Advocates who appeared in this case:

For the Appellant : Ms. Inderjeet Sidhu, Advocate (DHCLSC) with Ms. Shefali Vats,
Advocate
For the Respondent : Mr. Ashish Dutta, APP with ACP Raj Singh, Inspector Anupam
Bhushan, PS- Bawana

A N D

CRL.A.925/2019

IRFAN

.....

Appellant

Versus

STATE

.....

Respondent

Advocates who appeared in this case:

For the Appellant : Mr. Sumeet Verma, Advocate with Mr. Mahinder Pratap Singh,
Advocate
For the Respondent : Mr. Ashish Dutta, APP with ACP Raj Singh, Inspector Anupam
Bhushan, PS- Bawana

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MR. JUSTICE I.S. MEHTA

J U D G M E N T

SIDDHARTH MRIDUL, J.

1. The present batch of criminal appeals, being Criminal Appeal Nos.52/2019 and 925/2019 instituted under the provisions of section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C'), assail the judgment of conviction dated 30.10.2018 and order on sentence dated 31.10.2018, rendered by the *Ld. Special Judge (NDPS), North District Rohini Courts, Delhi*, in Sessions Case no.57919/2016, emanating from FIR No.06/2011 registered u/s 302/201/34 Indian Penal Code, 1860(hereinafter referred to as 'IPC'), PS: Bawana, Delhi.

2. By way of the impugned judgment of conviction dated 30.10.2018 and order on sentence dated 31.10.2018 respectively, Ram Badan Yadav @ Madan (hereinafter referred to as '*Appellant No.1*'); and Irfan (hereinafter referred to as '*Appellant No.2*'), were convicted and sentenced under the provision of section 302/34 IPC to rigorous imprisonment for life along with a fine of Rs. 5,000/- each. In default of payment of fine, the Appellants have been sentenced to undergo simple imprisonment for a further period of one year. They were also sentenced to undergo rigorous

imprisonment for period of five years with a fine of Rs. 5,000/- each for the offence committed u/s 201/34 IPC. In default of payment of fine, they shall undergo simple imprisonment for a further period of one year. However, the benefit of the provision under section 428 Cr.P.C has been granted to the appellants. All the sentences have been directed to run concurrently.

3. Before going into the merits of the present appeal, it is relevant to recapitulate the brief facts of the present case, as elaborated by the learned trial court, which are as follows:

“On Reciept of DD no.: 11A dated 09.01.2011 PS Bawana at about 9 PM wireless operator informed to the DO room that at sector-2, Bawana, Near Cluster 0-135, Delhi one person was found lying burnt along with a motorcycle. The said information was received through Ct. Ajay. That PCR call had been lodged in the Rojnamcha. The said information was also communicated to concerned SHO. On receipt of DD no. 11A, Inspector Raj Singh along with Ct. Vinod reached at sector-2, Bawana, DSIDC Park, near O-135, where one dead body of unknown male was found in burnt condition without having his right leg and motorcycle bearing no. DL-4SZ-7541 Black Hero Honda Splender (Black) was found in burnt condition. Meanwhile SHO also reached at the spot. Crime team was called. Photographs of dead body and motorcycle were got clicked. Dead body was got preserved at BJRM hospital mortuary for identification. Rukka was prepared U/s 302/201 IPC and was handed over to Ct. Vinod for registration of the case.”

4. Upon completion of investigation, charge-sheet was filed for the offences punishable under section 302/201/34 IPC and charges were framed

against the appellants under the said sections. The appellants pleaded not guilty and claimed trial.

5. At the trial, the prosecution examined 33 witnesses in support of its case. The appellants in their defence did not lead any evidence. However, the appellants have denied the case of prosecution in-toto and in their statements under Section 313 of the Cr.P.C, have asseverated that they have been falsely implicated by the police in the present case.

6. The prosecution in order to prove the case beyond reasonable doubt placed reliance upon the following circumstances:

- I. The testimony of PW-5, Sh.Bharat Singh, father of the deceased, who identifies the ring and key-ring (challa) Ex.P-2 & P-3, respectively, allegedly worn by the deceased, found on the dead body by autopsy surgeon and seized vide seizure memo Ex.PW-15/B by PW-33 Insp.Raj Singh, IO of the case.
- II. The testimony of PW-6, Smt.Janki, wife of the deceased Amit, where she asserts that her husband was carrying Rs.5500/-, for the purpose of buying “shuttering material”, which amount was allegedly robbed from the deceased on

the fateful day, by the appellants, and ascribed as the motive behind the murder.

III. The last seen evidence was testified by PW-13, Sh. Pappu, who was assertedly introduced by the deceased to both the appellants, at the Government Liquor Shop situated at Sector-1, Bawana, Delhi on 08.01.11 at about 7:00 pm, i.e, few hours prior to the murder of deceased; both in his statement recorded u/s 161 Cr.P.C (Ex.PW13/A) as well as his deposition in court.

IV. The pointing out memo (Ex.PW-27/3) of the place of incident prepared at the instance of Appellant No.2, as well as, the recovery therefrom of two intertwined handkerchiefs (Ex.PW-27/5), which were allegedly used to strangle the deceased before setting him afire alongwith his motorcycle.

7. It is dismaying to note that, the learned trial court has convicted the appellants of the charges framed against them without due appraisal of the entire evidence and the testimony of witnesses on record; by arriving at an

unreasoned, unfounded, cryptic and non-speaking determination, whilst merely concluding, as follows:

“To prove its case against the accused, Prosecution has to prove the motive. PW-6 established that the deceased was carrying Rs.5500/- for shuttering material. In this case, the accused persons were seen last time by PW-13 with deceased. The accused persons were aware that deceased was carrying money. PW- 27 deposed regarding various articles which were got recovered by the accused persons, some of which belong to the deceased and some were used for commission of offence.

Last seen evidence coupled with fact of recovery of articles at the instance of accused persons, prove the guilt of the accused persons beyond reasonable doubt that both accused persons have committed the murder of Amit and after committing murder, burnt the body of Amit and his motorcycle Bearing No. DL-4SZ-7541 and caused evidence of murder to disappear with intention to screen themselves from legal punishment. Hence, they are held guilty for the offence U/s 302/201/34 IPC.”

8. Ms.Inderjeet Sidhu, learned counsel appearing on behalf of the Appellant No.1 submits that, the last seen evidence given by PW-13, Sh.Pappu, whereby the deceased was seen with appellants near the liquor shop is unreliable and in contradiction with the clear and unequivocal testimony of PW-28, who happens to be relative of the deceased.

9. Further, learned counsel would asseverate that, even if PW-13 is to be believed, the last seen together does not by itself and necessarily lead to unerring conclusion that, it was appellants alone who committed the murder. In this behalf, it would be urged that, it would therefore, not be legal or

prudent to base the conviction of the appellants solely upon the unconvincing and uncorroborated last seen testimony of PW-13.

10. Learned counsel appearing on behalf of the appellants would further urge that, the motive attributed for the commission of such a heinous crime was, to rob a meagre sum of Rs.5500/-, which the deceased was purportedly carrying at the time to buy “shuttering material”.

11. Learned counsel appearing on behalf of the appellants would also submit that the recovery of the identity card (Ex.Pw-27/4), at the instance of appellant no.1, alleged to be of the deceased, was admittedly in the name of “Bhimardan Singh” and not in the name of deceased “Amit”.

12. Moreover, Mr Sumeet Verma, learned counsel appearing on behalf of the Appellant No.2, Irfan, would humbly submit that the Last Seen Evidence, not only fails the proximity test of Time and Distance, since the deceased was last seen at 7:00 pm on 08.01.2011, whereas the dead body was found in burnt condition in the park around 9:00 am on 09.01.2011, a time gap of 14 hours; but the same also loses its significance on account of the alleged last seen being at a public place i.e., outside the government liquor shop, where several other persons were also present.

13. Learned counsel appearing on behalf of the Appellant No.2 would further invite our attention to the fact that, the said liquor shop was stated to

be at Sector-1, Bawana as per testimony of PW-13; whereas PW-33, ACP Raj Singh, I.O, stated that the subject liquor shop was situated in the market of DSIDC, Sector-3, Bawana. Further the testimonies are evidently contradictory since the dead body was admittedly recovered on the next day i.e., 09.01.2011 from inside the DSIDC Park near O-135, Sector-2, Bawana, which makes the case of prosecution paradoxical and unworthy of credibility.

14. Learned counsel appearing on behalf of the appellant would further propel his contention as to the doubtfulness of the recovery of the two-handkerchiefs intertwined together at the instance of Appellant No.2, allegedly used as weapon of offence for strangulating the deceased; by asserting that the same neither had any blood stains on them nor were they proved to be connected to the alleged incident. Moreover, the said handkerchiefs were purportedly recovered underneath some bricks in the park, which place was open and accessible to public.

15. *Per contra*, Mr. Ashish Dutta, Learned APP appearing on behalf of the State, whilst supporting the impugned judgment in its entirety, would urge that the findings of the Ld.Trial Court require no interference. It was further urged before us that deceased was last seen in the company of

appellants on 08.01.2011 at 07:00 pm at the liquor shop as per testimony of PW-13, which deposition stood firm despite the travail of cross-examination.

16. Mr.Dutta would further submit that the post mortem report dated 10.01.2011 conducted at 03.00 p.m, by PW-24-Dr.V.K.Jha, Medical Officer, BJRM Hospital, Delhi [Ex.Pw-24/1], opined that the time since death was approximately 42 hours, which establishes that incident took place around 09.00 p.m. on 08.01.2011; i.e, the night when the deceased was last seen in the company of appellants.

17. Learned APP would also submit that the two handkerchiefs tied together, which were allegedly used to strangle the deceased (Ex.Pw-27/5), were recovered at the instance of appellant no.2, underneath some bricks in the park. Further, it would be submitted that the case of the prosecution has been proved beyond reasonable doubt by way of cogent material on record and certain minor lapses on the part of the prosecution, while conducting the investigation, cannot absolve the appellants of their guilt.

18. We have heard the learned counsel appearing on behalf of the parties and perused the entire case record.

19. There is admittedly no eye witness to the murder of the deceased. No direct evidence has been brought to the notice of the Court in the present

case. The present is a case of circumstantial evidence and, therefore, it would be profitable to refer to the legal position with regard to establishing beyond the pale of any doubt, a case based on circumstantial evidence.

20. The Hon'ble Apex Court, in **Sharad Birdichand Sharda v. State of Maharashtra**, reported as **1984 AIR SC 1622**, whilst placing reliance on the five golden principles enunciated in its decision in *Hanumant v. State of Madhya Pradesh*, reported as AIR 1952 SC 343, elaborated the nature, character and essential proof required in criminal cases which rest on circumstantial evidence. It was held that is necessary that the chain of events proved by the prosecution must show that within all human probability the offence has been committed by the alleged perpetrator and nobody else, other than the accused. The relevant paragraphs of the decision have been extracted hereinbelow:

“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.

155. It may be interesting to note that as regards the mode of proof in a criminal case depending on circumstantial evidence, in the absence of a corpus delicti, the statement of law as to proof of the same was laid down by Gresson, J. (and concurred by 3 more Judges) in *King v. Horry* [1952 NZLR 111] thus:

“Before he can be convicted, the fact of death should be proved by such circumstances as render the commission of the crime morally certain and leave no ground for reasonable

doubt: the circumstantial evidence should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for.”

156. Lord Goddard slightly modified the expression “morally certain” by “such circumstances as render the commission of the crime certain”.

157. This indicates the cardinal principle of criminal jurisprudence that a case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction. Horry case [1952 NZLR 111] was approved by this Court in Anant Chintaman Lagu v. State of Bombay [AIR 1960 SC 500 : (1960) 2 SCR 460 : 1960 Cri LJ 682] . Lagu case [AIR 1960 SC 500 : (1960) 2 SCR 460 : 1960 Cri LJ 682] as also the principles enunciated by this Court in Hanumant case [AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] have been uniformly and consistently followed in all later decisions of this Court without any single exception. To quote a few cases — Tufail case [(1969) 3 SCC 198 : 1970 SCC (Cri) 55] , Ramgopal case [(1972) 4 SCC 625 : AIR 1972 SC 656] , Chandrakant Nyalchand Seth v. State of Bombay [Criminal Appeal No 120 of 1957, decided on February 19, 1958] , Dharambir Singh v. State of Punjab [Criminal Appeal No 98 of 1958, decided on November 4, 1958 printed on green papers in bound volumes] . There are a number of other cases where although Hanumant case [AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] has not been expressly noticed but the same principles have been expounded and reiterated, as in Naseem Ahmed v. Delhi Administration [(1974) 3 SCC 668, 670 : 1974 SCC (Cri) 198, 200 : (1974) 2 SCR 694, 696] , Mohan Lal Pangasa v. State of U.P. [(1974) 4 SCC 607, 609 : 1974 SCC (Cri) 643, 645 : AIR 1974 SC 1144, 1146] ,

Shankarlal Gyarasilal Dixit v. State of Maharashtra [(1981) 2 SCC 35, 39 : 1981 SCC (Cri) 315, 318-19 : (1981) 2 SCR 384, 390 : 1981 Cri LJ 325] and M.G. Agarwal v. State of Maharashtra [AIR 1963 SC 200 : (1963) 2 SCR 405, 419 : (1963) 1 Cri LJ 235] — a five-Judge Bench decision.”

(Emphasis supplied)

21. In view of the dictum of the Hon’ble Supreme Court in ***Sharad Birdhichand Sharda*** (*supra*), the important facts and circumstances which this Court has to take into consideration for the adjudication of the present appeal are as follows:

- (a) Is the “*Last Seen*” theory as propounded by PW-13, plausible and conclusive, and to what extent ?
- (b) Has the motive, as inferred and attributed to appellants by the prosecution, been conclusively established ?
- (c) Lastly, is the chain of circumstances incriminating the appellants complete, leaving no loose-ends in the case of prosecution ?

22. Before proceeding to examine the evidence on record, it would be pertinent to examine the legal position *qua* the evidentiary value of the “Last

Seen” evidence; as the Ld.Trial Court had heavily relied on testimony of PW-13, Pappu, who had allegedly last seen the deceased with appellants, in convicting the latter. It would be proper, appropriate and profitable to appreciate the testimony of said witness, as reproduced hereinbelow:

“23.07.2015

PW-13 : Statement of Shri.Pappu S/O Late Shri Bandi Lal

In the year 2011, I was working as a contractor in plot No.M-118, sector 3, Bawana, Delhi. Deceased Amit was my friend, who was also used to work as a contractor and on those days, he was working as a contractor in sector-5, Narela, Delhi. I also knew other contractor namely Vinod and Ajay. We all i.e. deceased Amit, Vinod and Ajay were used to take plot for construction being a contractor and used to talk with each other on our mobile phones.

I could only remember the last digit mobile number of deceased Amit i.e. ...6102 and mobile number of Vinod i.e.4893 and i.e of Ajay i.e.7753. there is a government liquor shop situated in sector-1, Bawana, Delhi. On 08.01.2011 I went to the said liquor shop and purchased a liquor bottle from the above said liquor shop. Deceased Amit alongwith his two friends came to said shop for purchasing liquor.

Further Examination in chief is deferred as accused states that they want to get the statement of this public witness recorded in the presence of their counsel and the lawyers are on strike today.

21.07.2016

PW-13 : Statement of Shri.Pappu S/O late Shri Bandi Lal, recalled for further examination in chief in continuation with his previous statement recorded on 23.07.15

I along with Ajay and my two friends went to the liquor shop for purchasing bottle of liquor on 08.01.11 about 7 PM where deceased Amit along with two friends met at the liquor shop. Amit introduced me two of his friends. One of the friend revealed his name as Madan and other friend irfan. Deceased Amit told me that he is going along with his above name two friends. Amit supplied the mobile no. of his friend Irfan last digit of his no.3305 to me for contact. I

along with my friend remained at liquor shop. Amit and his two above named friends left the liquor shop. I was using mobile no. 9289440820 at that time. At about 9:30/10 PM on the same night, Irfan made a telephone call on my mobile phone. On my asking Irfan as to they had not gone to their houses, on which he replied that he is just leaving for their houses. After 15-20 minutes I received call from mobile no. of irfan but I did not pick up the said cal. On the next day morning, Ajay made a call on my mobile phone and informed me that sister of deceased amit made a call to him and informed him that Amit has not returned to his house. I told Ajay that I met Amit in the last night at liquor shop. I informed Ajay that I would make a call to the friend of deceased Amit and informed accordingly to him. I made a call to Irfan on 09.01.11 on his mobile no. Irfan informed me that we had gone to their respective houses in the last night. I informed irfan that Amit has not reached at his home and asked him that he had gone with you in the last night and you should tell where he had gone. Thereafter Irfan disconnected the call. I again made a call to irfan but his mobile no. was found switched off. After about one hour I received telephone call of Ajay who informed me that he had received a telephone call of sister of Amit and she informed me that Amit has expired. After some time I received a telephone call from Vinod, who informed me that Amit has been set on fire and killed at Sector-2, DSIDC Bawana, Delhi. I identify Madan and Irfan. Both the accused are present in court today. Witness correctly identify both the accused persons

Further Examination in chief is deferred.

11.11.2016

PW-13 : Statement of Shri. Pappu S/O late Shri Bandi Lal, recalled for further examination in chief in continuation with his previous statement recorded on 21.07.2016.

On 16.01.2011 , I joined the investigation with police and went to sector-3, DSIDC, Bawana where I met police official. At about 6:40 PM, one boy informed police that madan would come at 100 foota road, J.J. colony, Bawana and police also informed me the same fact. I alongwith police staff and the said boy went to 100 foota road, J.J colony, Bawana and at about 7:00 PM one boy came from the side of metro Vihar and he was pointed out by the boy who accompanied us. Police caught accused Ram Badan Yadav. I also identified him as one of the same boy who was with Amit on 08.01.2011 at liquor shop with whom Amit (deceased) had gone for consuming liquor. Police interrogated the accused Ram Badan.

On 18.01.2011, I came to Rohini Court Complex where I identified one boy who had gone with the deceased Amit on 18.01.2011 for consuming liquor from the liquor shop. The police revealed the name of the said boy as Irfan. The accused irfan also gave his mobile number to me by making a miss call on my mobile when he alongwith Ram Badan left for consuming liquor on 08.01.2011. Accused Irfan is present in the court today (correctly identified).

XXXX by Sh. Sangram Singh, Ld. Counsel for both the accused.

On 08.01.2011, I alongwith my friend Kamles and Raju were already present at the liquor shop where Amit also reached with his friends. I told to the police in my statement that one boy gave his mobile number by making a call on my phone. I did not tell the police in my statement that Ajay informed me by making a call that Amit has expired. I informed to the police in my statement that the time when I received the miss call of a boy (witness is confronted his statement Ex. PW13/A where no time is mentioned). It is wrong to suggest that no miss call was made by any of the accused on my mobile phone. Amit made a miss call from his mobile number 9278-61002 but I do not recollect the complete number and one

another miss call was received by me on 08.01.2011. I informed to the police that Ajay made a call on my mobile phone and informed me that sister of Amit is searching for him (witness is confronted his statement Ex. PW13/A where it is not so recorded). I do not remember as to what was the motorcycle number on which Amit and his friends/accused persons left the liquor shop on 08.01.2011. Age of Amit might be 22-23 years at that time. I knew Amit 1 year prior to his death. I talked with the accused persons twice on the mobile with regard to the fact as to whether the deceased has left for his home or not. I do not remember the clothes worn by the accused persons on 08.01.2011. It is wrong to suggest that I do not remember the clothes worn by the accused persons as I had not seen the accused persons on 08.01.2011 with deceased. There is one park in front as well at the right side of the liquor shop. I informed to the police in my statement that Vinod informed me that Amit has been killed by setting him on fire (witness is confronted his statement Ex. PW13/A where it is not so recorded). The accused alongwith deceased left the liquor shop on splendor motorcycle of blue and black colour. I do not remember as if the arrest papers of accused Ram Badan were prepared at the place where he was arrested or not. Nothing was recovered from the possession of accused when he was arrested. It is wrong to suggest that police obtained my signatures on some blank papers. It is wrong to suggest that I had not seen the accused persons with deceased on 08.01.2011 or that the accused Ram Badan was not arrested in my presence or that I did not identify accused Irfan in the court. It is wrong to suggest that the mobile numbers of accused persons were provided to me by the IO. It is wrong to suggest that I am deposing falsely. “

23. There is no gainsaying the legal position that, last seen evidence does not by itself necessarily lead to an inference that the appellant committed the crime unless the same is duly supported by other links in the chain of circumstantial evidence, unerringly pointing towards the guilt of the appellant; since the last seen evidence is one of the species of circumstantial

evidence, wherein the chain of incriminating links should be complete, pointing indubitably towards the guilt of the accused and admitting of no other hypothesis. The theory of last seen together evidence is not to be construed of universal application, to bedrock the conviction of the appellants.

24. In *Sahadevan And Another v. State of Tamil Nadu*, reported as (2012) 6 SCC 403, the Hon'ble Supreme Court was pleased to discuss the relevance of last seen theory as follows:

“30. Even in the case of *State of Karnataka v. M.V. Mahesh* [(2003) 3 SCC 353], this Court held that:

“3.....merely being last seen together is not enough. What has to be established in a case of this nature is definite evidence to indicate that the deceased had been done to death of which the respondent is or must be aware as also proximate to the time of being last seen together. No such clinching evidence is put forth. It is no doubt true that even in the absence corpus delicti it is possible to establish in an appropriate case commission of murder on appropriate material being made available to the Court.”

31. In the case of *State of U.P. v. Satish* [(2005) 3 SCC 114], this Court had stated that the principle of last seen 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.”

32. Undoubtedly, the last seen theory is an important event in the chain of circumstances that would completely establish and/or could point to the guilt of the accused with some certainty. But this theory should be applied while 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.”

25. A plain reading of the above decision clearly postulates that the last seen theory comes into play where the time-gap between the point of time when the accused and the deceased are seen together and latter is found dead is so small that the possibility of any person other than the accused being the author of the crime becomes impossible. In the present case the deceased was last seen at 7:00 pm on 08.01.2011, whereas the dead body was found in burnt condition in the park around 9:00 am on 09.01.2011, being a time gap of 14 hours; and the place of Last Seen i.e, the liquor shop was situated in Sector 1, Bawana and the dead body of deceased was recovered from the park situated in Sector-2, Bawana, with considerable distance between the two locations.

26. Another issue that requires careful examination by us is qua the motive attributed to appellants, in causing death of the deceased, which according to the prosecution was to rob Rs.5500/-, that the deceased was stated to carrying on his person to buy “shuttering material”, as per PW-6, Smt.Janki, wife of the deceased. It would be proper, appropriate and

profitable to appreciate the testimony of said witness in order to appreciate its true import. The same is accordingly reproduced hereinbelow:

“21.05.2014

PW-6 : Statement of Smt. Janki, W/o Late Sh. Amit, Age -21 Years, working in a factory, R/o I-151 Sector-5, DSIDC Bawana, Delhi.

On SA

My husband deceased Amit was working as contractor/thekeedar in Sec. 5, DSIDC, Bawana, Delhi. Pappu and Vinod were friends of my husband and they dealt in the same business with my husband. My husband was having mobile No. 9278566102.

On 08/01/11, my husband Amit left the house for going to the house of Vinod. My husband was carrying Rs. 5500/- for the purpose of bringing shattering material. On that day, my husband did not return and in the night hours, I went to the house of my sister-in-law (nanad) Rachna who was residing in my neighborhood in I Block, H. No. 137. My nanad Rachna made a call on the mobile of Vinod, but the phone of Vinod was switched off. My nanad sent me to my house by saying that my husband would come on the next day as he was sleeping somewhere. My nanad Rachna made a call to my mother in law Smt. Chanda Devi who also made a call to Amit, but his phone was switched off. It was winter night. Thereafter did not go to any other place in search of my husband.

My husband Amit was handicapped from his right leg and he used to start his motorcycle with his left leg. He could properly drive his motorcycle of black colour. My husband had purchased a motorcycle from some person. I do not know the name of the person from whom he had purchased the motorcycle. I had not seen the papers of the motorcycle which was driven by my husband Amit Ram Khilawan is my brother in law (jeth) who is residing in the same locality where I am residing.

On 09.01.2011, in the afternoon hours, I came to know about the death of my husband.

At this stage, MHC(M) informed that he has brought motorcycle Hero Honda Splendour No. DL4SZ 7541 in the court premises. The witness, Ld defence counsel and Naib Court have gone to the parking area. They came back after seeing the said motorcycle. The number plate which was found detached, but part of case property motorcycle was brought in the court room by the MHC(M), in which, only the impressions of the numbers is visible. The witness correctly identified the motorcycle after visiting the parking area and states that the same belonged to her husband Amit. The motorcycle is already Ex. P-1

XXX by Sh. Raghav Kapoor, Advocate for accused Ram Badan Yadav.

At the time of incident, the age of my marriage with the deceased was three years. My late husband adopted the job of contractor ship only after my marriage, but I do not know as to whether he was having license for the same. My statement was recorded only once by the police after two day of the death of my husband. It was 9th of January 2011 at about 8.00-9.0 am at Chowki Sector 5, Bawana, Delhi. IO had read me overstatement today before deposing in the court. It is correct that I have deposed today as I have been taught by the IO. My husband Amit had taken Rs. 5500/- from me on 08.01.2011 when he left home but I do not remember the denomination. I did not make any complaint to the police when my husband did not turn up that day. It is incorrect to suggest that I am deposing falsely at the instance of the IO.

XXX by Ms. Sunita Tiwari, Advocate for accused Irfan.

I adopt the same cross examination as carried on by Ld. Counsel for accused Ram Badan Yadav.”

27. On analyzing the above testimony, which purportedly forms the basis and the foundation of the motive, attributed to the appellants by the

prosecution in committing the alleged offence, it necessary to delineate on, what constitutes motive?

28. In a case of circumstantial evidence, where the other circumstances have not been cogently and conclusively proved by the prosecution, the motive for the commission of crime is a critical link and it therefore becomes incumbent on the prosecution to prove the same without a shadow of doubt, if it has to show that the complete chain of circumstances points unmistakably to the guilt of the accused. In *Arjun Marik v. State of Bihar* reported as *1994 Supp (2) SCC 372*, The Hon'ble Supreme Court was pleased to hold as under:

“...mere absence of proof of motive for commission of a crime cannot be a ground to presume the innocence of an accused if the involvement of the accused is otherwise established. But it has to be remembered that in incidents in which the only evidence available is circumstantial evidence then in that event the motive does assume importance if it is established from the evidence on record that the accused had a strong motive and also an opportunity to commit the crime and the established circumstances along with the explanation of the accused, if any, exclude the reasonable possibility of anyone else being the perpetrator of the crime then the chain of evidence may be considered to show that within all human probability the crime must have been committed by the accused.”

29. In the present case, the motive of robbing Rs.5500/- from the deceased, cannot be said to be established at all by the prosecution, from the evidence on record, except to the exceedingly limited extent as deposed by

Pw-6, wife of the deceased, who herself however was unable to affirm the details of the denomination of the said currency. Further to strengthen their case, the prosecution relied upon the disclosure statement Ex.Pw-19/1 and Ex.Pw-27/2 of the *Appellant No.1* (Ram Badan Yadav) and *Appellant No.2* (Irfan), respectively, *qua* the recovery of amounts seized from their pockets, amounting to Rs.723/- and Rs.442/-, respectively, which was alleged to be the balance amounts money left with them, out of robbed booty. In view of the inadequate material in the first instance as observed from the lack of evidence regarding the denomination of the robbed currency; and the complete absence of any corroborating evidence to bolster the testimony of pw-6, it would be precarious to ascertain with any amount of certitude, whether the recovered and seized sum was the remnant of the robbed amount of Rs.5500/- or was from some other source.

30. Another limb of argument raised by learned counsel for the appellants is that the weapon of offence i.e. two intertwined handkerchiefs (Ex.PW-27/5), which were allegedly used to strangle the deceased before setting him afire along with his motorcycle, were recovered at the instance of Appellant no.2 namely, Irfan, allegedly hidden underneath some bricks inside DSIDC Park, situated at O-135, Sector-2, Bawana, Delhi. It is pertinent to observe in this behalf that the scene of crime (soc) is a public

park, which is an open space accessible to and by anyone. In this behalf the Hon'ble Court in the case titled as **Patel Manabhai Mavjibhai v. State of State of Gujrat** reported as **2013 CriLJ 1213** held as :

“25. The legal principle which emerges is that mere recovery of an object at the instance of the accused is a relevant fact only when it is established by other evidence that the object recovered is connected with the accused and the offence with which he is charged. To put it pithily, the connection between the object recovered, the accused and the offence with which the accused is charged must always be established by "evidence *aliunde*". The decision further bring out that mere recovery of blood-stained articles at the instance of an accused is not sufficient to convict him for the offence of murder.

At best, all that can one say is that the conduct of the appellant had been very suspicious, but suspicion, howsoever strong, cannot take place of legal proof. In our opinion, it was therefore, not a case where the appellant should have been convicted.”

30. In a criminal trial, the Court is to ascertain the truth from the material before it. It is well-settled law that the burden of proof is on the prosecution, to establish its case beyond reasonable doubt, especially in a case based on circumstantial evidence, by completing the chain of incriminating circumstances so completely that the needle of guilt is pointing only and conclusively towards the culpability of the appellant.

31. In the present case, the prosecution story is completely anchored on its reliance upon the testimony of Pappu (PW-13), who testified that he saw the deceased with the appellants lastly, few hours before the death of the

deceased; and the commission of offence; as well as also upon the circumstance of the recovery of handkerchief alleged to have used for strangulating the deceased, before searing the dead-body.

32. The law is well settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events so complete that from which the only irresistible conclusion that can unerringly be drawn is the guilt of the accused, by eschewing all other possible hypothesis. In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in the chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. When the important link goes, the chain of circumstances gets snapped and the other circumstances cannot, in any manner, establish the guilt of the accused beyond all reasonable doubt. The court has to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes; unconsciously it may happen to be a short step between moral certainty and legal proof. There is a long mental distance between “may be true” and “must be true” and the same divides conjectures from sure conclusions. The Court in mindful of caution by the settled principles of law

and the decisions rendered by this Court that, in a given case like this, where the prosecution rests on the circumstantial evidence, the prosecution must place and prove all the necessary circumstances, which would constitute a complete chain without a snap establishing the hypothesis that except the accused, no one had committed the offence; which in the present case, the prosecution has failed to prove.

33. In this regard, the Hon'ble Supreme Court of India, in **K. Anbazhagan v. State of Karnataka and Ors.**, reported as **(2015) 6 SCC 158**, a three-Judge Bench addressing the manner of exercise of jurisdiction by the appellate court while deciding an appeal has ruled that:

“ The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely, solely because there might not have been proper assistance by the counsel appearing for the parties. The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasonings in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind - sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test.”

34. In the instant appeal, it is at the outset itself doubtful whether appellants were last seen with the deceased; and further it is not prudent to base conviction solely on the basis of last seen evidence of PW-13, because last seen evidence does not necessarily lead to the inference that it was the appellants who had committed the crime.

35. It is a settled law that, in case of circumstantial evidence the paramount requirement is that, every possible link in the chain should be complete, alongwith with other incriminating circumstances including motive and recovery of weapon of offence, and not exclusively on basis of *last seen testimony* alone, as done by the Ld. Trial Court. As a consequence, we observe that Ld. Trial Court gravely erred in returning the finding that the chain of circumstances so complete so as to base the conviction of the appellants on testimony of last seen evidence PW -13, Sh.Pappu, wherein it was testified that at 7:00 p.m on 08.01.2011 he saw the appellants with the deceased and particularly when as above-mentioned there was long time gap of 14 hours between last seen together and the time of recovery of dead body around 09:00 am on next day i.e. 09.01.2011; which evidence fails the proximity test of both time and place.

36. We have given our anxious consideration to the submissions advanced on behalf of counsel for the parties at considerable length and also perused the material available on record. We are of the considered view that the prosecution has failed to prove its case beyond all reasonable doubt and it would be highly unsafe to convict the appellants on the appreciation of the evidence on record. Accordingly, the present appeals are allowed. The judgment of conviction dated 30.10.2018 and order on sentence dated 31.10.2018 rendered by the trial court are set aside. The appellants stand acquitted. They are directed therefore to be set at liberty forthwith, subject to their not being required in any other case.

37. The Trial Court record be sent back forthwith.

38. A copy of the judgment be supplied to the Appellants through the Superintendent, Central Jail, Tihar for necessary information and compliance, and also be sent for updation of the records.

**SIDDHARTH MRIDUL
(JUDGE)**

**I.S. MEHTA
(JUDGE)**

DECEMBER 10, 2019/dn/d