

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.27 of 1996

Binod Kumar Jayaswal, son of Sri Ram Lagan Choudhary, Resident of village Bachhauta, P.S. Khagaria, District-Khagaria.

... .. Appellant/s

Versus

The State of Bihar.

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Vikram Deo Singh, Advocate Mr. Shankar Kumar, Advocate
For the Respondent/s	:	Mr. Dilip Kumar Sinha, APP

CORAM: HONOURABLE MR. JUSTICE A. M. BADAR
and
HONOURABLE MR. JUSTICE RAJESH KUMAR VERMA
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE A. M. BADAR)

Date : 07-07-2022

By this appeal, appellant/accused, Binod Kumar Jayaswal is challenging the Judgment and order dated 30.11.1995 and 01.12.1995 passed by the learned 2nd Additional Sessions Judge, Khagaria in Sessions Case No. 161 of 1994, thereby convicting him of the offences punishable under Section 302 of the Indian Penal Code and Section 27 of the Arms Act. For the offence punishable under Section 302 of the Indian Penal Code, the appellant is sentenced to suffer rigorous imprisonment for life. For the offence punishable under Section 27 of the Arms Act, he is sentenced to suffer rigorous



imprisonment for five years. It is directed that the substantive sentences shall run concurrently. For the sake of convenience, the appellant shall be referred to in his original capacity as “an accused”.

2. Facts in brief leading to the prosecution of the accused can be summarized thus:-

a. P.W. 6, First Informant Vijay Prasad is father of Poonam Jayaswal (since deceased) who was wife of appellant/accused Binod Kumar Jayaswal. Even another daughter of P.W. 6 Vijay Prasad namely Anju was married to Raj Kumar Jayaswal- brother of accused Binod Kumar Jayaswal. Marriage of accused Binod Kumar Jayaswal was solemnized with Poonam, six years prior to the incident of her murder. Out of this wedlock, the couple was having a daughter named Komal aged about three years and a son named Chhotu aged about one year. The couple used to reside in the tenanted block situated at the first floor of the house of P.W. 2 Damodar Mahto situated at Ward No. 3, Hajipur Mohallah, Khagaria along with their children. Accused Bonod Kumar Jayaswal was running a shoe shop at the Khagaria Thana Road, Khagaria for earning his livelihood. P.W. 1 Parmeshwar Prasad is maternal cousin of Poonam Jayaswal (since deceased). P.W. 1



Parmeshwar Prasad along with his wife used to reside in the another tenanted block situated at the house of P.W. 2 Damodar Mahto. The tenanted block where the accused along with Poonam Jayaswal was residing was adjacent to the tenanted block occupied by P.W.1 Parmeshwar Prasad at the first floor of house of P.W. 2 Damodar Mahto.

b. The incident took place allegedly in the night intervening 3/4.01.1994. According to the prosecution case, in that night at about 3 to 4 A.M. at about 3 A.M., the accused fired a bullet from the firearm at head of his wife Poonam Jayaswal (since deceased) which resulted in blowing off the left portion of her head, while she was fast asleep on the bed. Thereafter the accused flee from his house leaving behind his son Chhotu in the house. Poonam Jayaswal died instantaneously on the spot itself.

c. The First Information Report of the subject crime came to be lodged at about 6.30 A.M. of 04.01.1994 by P.W. 6 Vijay Prasad – father of deceased Poonam Kumar Jayaswal. He reported that when he was at his house at Bachhauta, he received information that the accused committed murder of his daughter Poonam at about 3 A.M. and therefore, he went to the tenanted block of his daughter Poonam Jayaswal



(since deceased) situated in the house belonging to P.W. 2 Damodar Mahto. It is further reported by the First Informant that he notice dead body of his daughter Poonam Jayaswal lying on the cot in that hosue with half of her head blown off. P.W. 6 Vijay Prasad further reported that P.W. 1 Parmeshwar Prasad informed him that in the evening hours of the earlier day there was blast in the room of the accused and the accused told him that he had bursted the cracker. The First Informant further reported that P.W. 1 Parmeshwar Prasad further informed him that at 3 A.M. of 04.01.1994, he heard sound from the tenanted block of accused Binod and when he woke up, his wife made him to sleep by stating that accused Binod might have bursted the cracker. P.W. 6 Vijay Prasad has stated in his FIR that one Baleshwar Verma had seen the accused leaving the spot of the incident immediately after the incident. The First Informant has stated that the incident of murder of his daughter took place because character of his son-in-law deteriorated since last few days. He had not opened the shop since last ten days. When Poonam (since deceased) insisted the accused to open it, there was quarrel between her and the accused. The accused then opened the shop the day before Yesterday i.e., on 3.01.1994 on insistence of his brother-in-law Arbind but again closed it at 1



P.M. of that day. The First Informant also reported that on 01.09.1994, the accused reached his daughter Komal at the place of her maternal grandparents. This is the case set out by the First Informant in his FIR which has resulted in registration of the subject Crime No. 403 of 1994 against the accused at the Police Station Khagaria.

d. Routine Investigation followed. P.W. 7 Manegar Ram, Police Station Officer of P.S. Khagaria prepared the inquest *Panchnama* and then the dead body of Poonam was sent for postmortem examination. P.W. 4 Dr. Nawal Kishor Ojha conducted the postmortem examination at the Sadar Hospital Khagaria. During the course of investigation, sample of the blood lying on the spot came to be seized by preparing the seizure memo. Statement of the witnesses came to be recorded and on completion of investigation, the accused came to be charge sheeted.

e. The learned trial court framed the charges against the accused. He pleaded not guilty and claimed trial. In order to bring home the guilt to the accused, the prosecution has examined in all nine witnesses. Parmeshwar Prasad, neighbour of the deceased who also happens to be her maternal cousin is examined as P.W.1. Landlord of deceased Poonam namely



Damodar Mahto is examined as P.W. 2. Mother of deceased Poonam namely Veena Devi is examined as P.W. 3. Autopsy Surgeon Dr. Nawal Kishore Ojha is examined as P.W. 4. Another neighbour of the deceased Poonam Jayaswal namely Anand Kumar who also acted as *Punch* witness to the seizure is examined as P.W. 5. First Informant Vijay Prasad- father of the deceased is examined as P.W. 6. Manegar Ram, the Investigator is examined as P.W. 7. Another Investigating Officer, Narayan Singh is examined as P.W. 8. He had filed the charge sheet in the matter. Suresh Kumar Sinha an employee of the Legal Section of the prosecution wing is examined as P.W. 9 for identifying the handwriting and signature on the sanction order.

f. Defence of the accused was that of total denial. As per the defence version, the accused was not present at his house when the incident in question took place. The defence has examined three witnesses namely, Jafar Alam, owner of footwear shop at Patna as D.W.1., Raj Kumar Jayaswal – cousin of the accused as D.W.2 and Md. Ali resident of Patna as D.W.3.

3. After hearing the parties, the learned trial court was pleased to acquit the accused of the offences punishable under Section 304(B) of the Indian Penal Code as well as Sections 3 and 3 of the Dowry Prohibition Act. He was however



convicted convicted and sentenced for the offences punishable under Section 302 of the Indian Penal code and Section 27 of the Arms Act as indicted in the opening para of this Judgment.

4. We heard the learned counsel for the appellant at sufficient length of time. He argued that the case is based on the circumstantial evidence and the evidence adduced by the prosecution is discrepant and insufficient to record conviction. Evidence of the accused being seen in the company of the deceased is coming on record by way of omission. There is no evidence on record to show that the accused was present in the tenanted block which used to be occupied by him along with the deceased, in the night of the incident. It is further argued that P.W. 1 Parmeshwar Prasad who has spoken about presence of the accused with the deceased in that night was also acted as a witness to the First Information Report lodged by P.W. 6 Vijay Prasad. He is related to the First Informant. However the First Information Report is conspicuously silent about presence of the accused in the night of the incident. The First Information Report also does not mention the fact that P.W. 1 Parmeshwar Prasad hurriedly left the spot of the occurrence soon after the incident. Therefore, according to the learned counsel for the appellant, the appeal deserves to be allowed.



5. The learned Additional Public Prosecutor supported the impugned Judgment and order of conviction and resultant sentence.

6. We have considered the submission so advanced and we have also perused the record and proceedings including the oral as well as documentary evidence.

7. It is case of the prosecution that the incident of commission of murder of Poonam Jayaswal who happens to be wife of the accused took place in tenanted premises of the accused where he used to cohabit with deceased Poonam along with their two children. The incident in question, according to the prosecution case took place at about 3 A.M. of 04.01.1994. Indisputably P.W. 1 Parmeshwar Prasad who happens to be maternal cousin of the deceased Poonam was her next door neighbour. Those residential blocks located on the first floor of house of P.W. 2 Damodar Mahto were adjacent to each other. It is also not in dispute that P.W. 2 Damodar Mahto used to reside in the ground floor of the very same house. With this position which had emerged on record as undisputed, let us examined whether the prosecution is successful in proving that the accused had committed murder of deceased Poonam Jayaswal in the night intervening 3/4.1.1994.



8. In order to prove homicidal death of Poonam Jayaswal, the prosecution has adduced medical evidence on record. P.W. 7 Manegar Ram, Police Station Officer of Police Station Khagaria has deposed that dead body of Poonam Jayaswal was sent for autopsy. Evidence of P.W. 4 Dr. Nawal Kishore Ojha, Medical Officer of Sadar Hospital, Khagaria shows that on 04.01.1994, he had performed the postmortem examination the dead body of Poonam Jayaswal, wife of Binod Kumar Jayaswal at about 10.15 A.M. of that day. Evidence of this Autopsy Surgeon shows that he has noted the following injuries on dead body of Poonam Jayaswal;

I. 1"x1" wound with lacerated and charred margin on the scalp, 4" above the right ear. There was extra vascesation of blood and clots around the said wound which was the wound of entry.

II. Wound of 4"X3"X4" with lacerated margin on the left side of the face. Left eye ball absent with lid. Left maxillary absent. Left side of the nose absent. Upper and lower jaw teeth absent leaving behind the hollow space. Brain matter was going down. Whole wound and surrounding area was spoiled with blood Extravesation. This was the



wound of exit.

It is in evidence of the Autopsy Surgeon that upon dissection, he found that both the wounds were communicating and the underlying bone was broken into pieces. The brain matter was damaged and the skull cavity was full of blood clots. It is further stated by the Autopsy Surgeon that all facial bone on the left side of the face were broken and blown off. As per his version, the death was because of shock and haemorrhage due to these antemortem injuries caused due to the firearm. Evidence of this Medical Officer is further gaining corroboration from the contemporaneous report of postmortem examination of the dead body prepared by him which is as Ext. 2. He stated that the injuries so found were sufficient to cause death of a human being. With this evidence, the prosecution has proved that Poonam Jayaswal died homicidal death in the night intervening 3/4.01.1994. Now let us examine whether the accused is found to be author of the fatal wound of the deceased.

9. The accused is indisputably the husband of deceased Poonam Jayaswal and he was also residing at the tenanted block with his wife Poonam. However as the incident took place within four walls of the tenanted premises of the



accused at the night hours, there was no eye witnesses to the incident in question. Case of the prosecution as such rest on the circumstantial evidence. The accused has raised a plea of alibi and it is well settled that the burden on the accused to establish this plea is not as stringent as that on the prosecution to prove his guilt. The accused is entitled to prove the plea of alibi by preponderance of probabilities. At this juncture we may put on record the reasoning given by the learned trial court for recording the conviction and sentencing the accused. This reasoning part is found in paragraph 22 of the impugned Judgment and the relevant portion thereof is extracted thus:-

“ 22..... Now the prosecution evidence on record rests on the circumstantial links propounded in the statement of two P.Ws. namely P.W.1 and 2. P.W. 1 claims to have seen the deceased in the company of the accused sitting on the Varamdah of the house having gossip at 10.00 P.M. in the night of 3rd Jan. 94. and P.W.2. claimed to have seen the accused on trial at the tubewell on the ground floor at 12 P.M. in the night after his return to the house after his duty was over. The other circumstance is that the accused on trial cracked fire toys in the evening to ward off the attention of the people living in the vicinity on unusual sound which he intended to make in unusual hours in



the night. The prosecution rests or verges on the circumstantial evidence introduced in the prosecution evidence through P.W. 1 and 2. It is a fact that he saw accused in the company of the deceased at 10.00 P.M. in the night and P.W. 2 saw the accused at the tubewell at 12 P.M. in the night. It appears from the statement of P.W. 7 that P.W.1 and 2 made this statement in the court for the first time. These two links propounded by P.W.1 and 2 are missing in the statement of P.W.1 and 2 made by them U/s 161 Cr.P.C.There are some huge circumstances which are eloquent and tell of the guilt of accused. To avoid repetition, suffice it to say that the accused on trial does not dispute the manner of occurrence and the situs of the occurrence as well. Admittedly the deceased met her death inside the room while in sleep on a palang. The deceased, as evidenced by inquest report, and by the statement of P.W.7 was lying on the palang with one of her palm below her check on the pillow. Had it been a case of entry of unknown miscreants in the house, the miscreants would have broken the open the door to force entry into the house but there is no such evidence that the doors of the house were broken open rather P.W. 7 found the same open. Had Poonam opened the door from within of course she would have received firearm injury on that position. It does not appear to reason that



solitary woman would have slept in the room with 1½ years aged boy without bolting the door from within. It appears from the evidence on record that deceased met her death while she was lying in balmy lap of slumber on the palang in the company of her husband who taking advantage of her slumber blew off her head and caused her instantaneous death. The other evidence available on record shows that the accused left his three years daughter Komal at her maternal parent's house on 1st Jan.94 with intention to commit Diabolic and Ghastly offence on the future day. The accused has been found missing from the house when P.Ws. Including P.W.7 rushed to the house. This absence of the accused on trial from the PO also speaks a volume about his participation in the alleged murder of his wife on 4th Jan.94. It does not appear to reason the accused rush to the P.O. to have a look at his deceased wife and did not care even to perform her funeral. The accused as evidenced on record appeared in the Court at belated stage of investigation and the accused surrender in the court on 1.2.94. This conduct of the accused, if taken judicial care of suggests, the inference of his participation in the alleged occurrence.....”

10. It is thus clear from the impugned Judgment



that the learned trial court has given a categorical finding regarding improvement on material aspect made by P.W. 1 Parmeshwar Prasad and P.W. 2 Damodar Mahto who are star witnesses for the prosecution in this case based on the circumstantial evidence. The learned trial court came to the conclusion that version of P.W. 1 Parmeshwar Prasad to the effect that he had seen accused Binod Kumar Jayaswal in company of deceased at 10 P.M. of 03.01.1994 and version of P.W. 2 Damodar Mahto that he saw accused Bonod Kumar Jayaswal at the tubewell in the front yard of that house at 12 midnight of the night intervening 3/4.01.1994, is coming on record by way of improvements as these two witnesses have not stated these important facts to the police while recording the statement under Section 161 of the Cr.P.C. In fact in order to make out the use of the last seen theory, this evidence was of vital importance. Be that as it may, let us put on record the requirements for proof of the case purely based on the circumstantial evidence.

11. The case in hand, is based on circumstantial evidence. No person has seen the accused committing murder of Poonam Jayaswal. Therefore, it is necessary to put on record the standard of proof required for holding the accused guilty in



such cases where there is no direct evidence of commission of crime. The court is required to adopt the cautious approach while basing its conviction purely on the circumstantial evidence. It is settled that in order to base conviction, the circumstantial evidence must satisfy the following tests:

- 1.the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.
- 2.Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused :
- 3.the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
4. the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation on any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

In such cases, the prosecution has to establish each circumstance by independent evidence and the circumstances so established should form a complete chain without giving a room to any other hypothesis than the guilt of the accused. The court is bound to make strict scrutiny of each of the fact placed by circumstantial evidence and their cumulative effect is required to be taken into consideration.



Only if the proved circumstances are of such nature as to be incompatible with the innocence of the accused and consistent with his guilt then only the conviction follows. Keeping in mind these principles of case based on circumstantial evidence, let us examine evidence adduced by the prosecution in the instant case.

12. P.W. 1, Parmeshwar Prasad cousin of deceased Poonam Jayaswal has stated that this tenanted block and the tenanted block which used to be in occupation of the accused and deceased Poonam Jayaswal were separated by a common wall and both these residential blocks were located on the first floor of the house of P.W. 2 Damodar Mahto. As testified by P.W.1 Parmeshwar Prasad, he is the owner of a watch repair shop and he goes to attend that shop at 7 to 7.30 A.M. in the morning. He then returns for lunch at about 2.30 to 3 P.M. and again goes back to his shop. Then in the night, he returns to his house at 9 to 10 P.M. With this, P.W. 1 Parmeshwar Prasad further deposed that on 03.01.1994, as usual he returned his home at 10 P.M. and found the accused and Poonam Jayaswal sitting at the Varamdah of the house. He further testified that in that night at about 3 to 4 A.M. he heard sound of a blast and opened window of his house. At that time,



he saw the accused going out speedily. Then as per his version, P.W. 2 Damodar Mahto saw the blood in the drain in the morning and therefore, P.W. 2 Damodar came up stair. Then it was found that Poonam was lying dead in her room with the left side of his head blown off. P.W. 1 Parmeshwar Prasad also clarified that P.W. 6 Vijay Prasad had then lodged the First Information Report in his presence and he signed that First Information Report Ext.1 as a witness thereof. He also acted as a *Panch* witness to the inquest and for seizures effected from the spot of the incident. At the end of his chief examination, P.W. 1 Parmeshwar Prasad made a cryptic statement that when he came to the house in the evening, he found the accused bursting crackers.

13. It is not clarified by P.W. 1 Parmeshwar Prasad that, when as per his version, on 03.01.1994 he returned to his house at 10 P.M., how he was in a position to see that in the evening hours, the accused was bursting crackers. Even usual time of his return to the house, as stated by this witness is 9 to 10 P.M. of the day. Deceased Poonam Jayaswal was shot dead in the room adjacent to room of P.W. 1 Parmeshwar Prasad in the night hours of about 3 A.M. It being a gunshot, the sound of the blast must be of high intensity. That gun was fired in the



next room separated by the common wall and P.W. 1 Parmeshwar Prasad was staying in just the adjacent room of the room where the occurrence took place. According to the prosecution case as reflected in the FIR, this witness P.W. 1 Parmeshwar Prasad wake up on hearing the sound of the blast occurring in the next room but his wife had made him to slip by saying that accused must have bursted crackers. As against this, it is in the evidence of P.W. 1 Parmeshwar Prasad that upon hearing the sound of gunshot, he opened his window and saw the accused going out speedily. If that is so, it was expected of a prudent person and particularly from a relative to inquire about such sound of high Intensity from his brother-in-law i.e. the accused. Ultimately, P.W. 1 Parmeshwar Prasad was maternal cousin of Poonam. The gunshot was at the odd hours of the night from the next room occupied by his cousin. In such situation we doubt the conduct as deposed by P.W. 1 Parmeshwar Prasad in only opening the window without doing anything further in that matter and by remaining a mute spectator. As observed by the learned trial court, this witness has even improved his version on material aspect for favouring the prosecution case. Even this witness had no reason to be in the room in the evening hours to see the accused bursting crackers,



when as per his own version, he regularly returns from his shop after 9 P.M. This witness though expected in the normal course of human nature, had not woke up the landlord or other neighbours, had not even entered in the room of his cousin Poonam Jayaswal upon allegedly seeing her husband leaving the spot hurriedly at such unusual time after the sound of blast, had not even questioned the accused or made hue and cry. No doubt, there is no straight jacket formula of judging a human behavior but in the case in hand, huge sound of gunshot occurring in the room of his cousin Poonam must have, in normal course activated P.W. 1 Parmeshwar Prasad to exhibit such type of active conduct instead of exhibition in different attitude. His version shows that though he heard the sound of the blast, he opened his window and thereafter meekly slept again to go in the blissful slumber. He was residing at the very same house since last four years and as such must be acquainted with all neighbourers in that thickly populous locality. The conduct reflected by P.W. 1 Parmeshwaar Prasad, as seen from his evidence, makes his testimony highly artificial and doubtful. The taint of falsehood in the version of this witness is also reflected from his statement that when in the evening hours the accused was bursting the cracker, his landlord questioned the



accused as to how the cracker is being bursted and thereupon the accused uttered that without any reason he is bursting the crackers. If this version of P.W. 1 Parmeshwar Prasad is compared with that of his landlord P.W. 2 Damodar Mahto, then it is seen that the same is far from truth. P.W. 2 Damodar, has deposed that he was having the night duty during that period and he used to return to the house after completing that night duty after 12 A.M. in the midnight. P.W. Damodar has stated that in that night also he returned at about 12 O' clock. Therefore, P.W. 2 Damodar Mahto had no occasion to remain present in the house in the evening hours of 03.01.1994 to question the accused regarding alleged bursting of the crackers. We, therefore, are not in a position to place explicit reliance on the version of P.W. 1 Parmeshwar Prasad for arriving at the conclusion that the accused was seen in the company of his wife from evening hours of 03.01.1994 and was with her till her death caused by the gunshot.

14. One more aspect which makes version of P.W. 1 Parmeshwar Prasad unreliable is the case of the prosecution as set out in the FIR lodged by his uncle P.W. 6 Vijay Prasad. No doubt the FIR can be used only to corroborate or contradict the maker thereof but the prosecution case set out



by such initial report of cognizable offence can be compared with the version of the prosecution witnesses in order to test the conduct and version of such witnesses. P.W. 1 Parmeshwar Prasad has claimed that he was present with P.W. 6 Vijay Prasad when P.W. 6 Vijay Prasad lodged the FIR. He has also sign the FIR as witness. If really P.W. 1 Parmeshwar Prasad, upon hearing the sound of blast in the night hours from the adjoining room, had opened the window of his house and saw the accused leaving the spot hurriedly, he would have certainly disclosed such fact to his uncle, i.e, First Informant Vijay Prasad, in order to see that it gets reflatd in the FIR. The conduct of not disclosing this fact to his uncle by P.W. 1 Parmeshwar Prasad, though he had an ample opportunity to do so, also makes the version of P.W. 1 Parmeshwar unreliable and untrustworthy and doubtful.

15. P.W. 2 Damodar Mahto, the landlord of the accused and deceased Poonam Jayaswal had stated that on 03.01.1994, he returned from his duty at about 12 A.M. in the midnight and saw the accused at the hand pump. The accused, as stated by this witness took the water to his home. However, this witness has candidly admitted in his cross-examination that he has not disclosed this fact to police while recording his



statement under Section 161 of the Cr.P.C. Thus this witness has also made improvements on material aspect in his evidence, for supporting the prosecution case. As this portion of his evidence is by way of improvements on material part for establishing the last seen theory, the same needs to be ignored from consideration. Upon seeing the blood drained at the ground floor, this witness went up, called the accused and wife. Thereupon he saw dead body of Poonam lying on her bed with the blown off face. Thus evidence of this witness P.W. 2 Damodar as such is not of any help to infer presence of the accused on the scene of the occurrence at the time of the incident.

16. Application of the last seen theory can be seen from the Judgment in **Shivaji @ Dadya Shankar Alhat Vs. State of Maharashtra** reported in **AIR 2009 Supreme Court 56**. Paragraphs 12, 13 and 15 of that Judgment reads thus:

“12. So far as last seen aspect is concerned it is necessary to take note of two decisions of this court. In *State of U.P. v. Satish* [2005 (3) SCC 114] it was noted as follows: “22. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the



author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses P. Ws.-3 and 5, in addition to the evidence of P. W. 2”.

13.In Ramreddy Rajeshkhanna Reddy v. State of A. P.[2006(10) SCC 722] it was noted as follows: “27. The last seen theory, furthermore, comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and 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. Even in such a case the courts should look for some corroboration”.”

“15. Before analyzing factual aspects it may be stated that for a crime to be proved it is not necessary that the crime must be seen to have been committed and must, in all circumstances be proved by direct ocular evidence by examining before the Court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The principal fact or factum probandum may be proved indirectly by means of certain inferences drawn from factum probans, that is, the evidentiary facts. To put it differently circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue



that taken together they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed.”

We have already noted that for making out the case based on the circumstantial evidence, each circumstance is required to be firmly established by the prosecution by adducing independent evidence which must be trustworthy and reliable. Though normally a husband is expected to be in the house in the night hours, such proposition cannot be laid as rule of general application. No positive evidence is coming on record from version of the cousin (P.W.1 Parmeshwar Prasad) and the landlord (P.W. 2 Damodar Mahto) of deceased Poonam showing presence of her husband i.e. the accused in the house in the night of the incident. One may argue that under the mandate of Section 106 of the Evidence Act, it becomes the duty of the accused to disclose and explain his whereabouts relating to the night of the occurrence. However it will have to be kept in mind that for applicability of Section 106, the prosecution is required to discharge the initial burden of establishing prima facie the guilt of the accused beyond all reasonable doubt. It is not attracted unless the initial burden of the prosecution is discharge by prima faice establishing the guilt of the accused. The burden on the accused in such circumstances can even be discharged by



preponderance of probability. To discharge his burden the accused has examined defence witness and it is well settled that the defence witnesses are also entitled to the same treatment as is given to the prosecution witnesses.

17. D.W. 1 Jafar Alam is owner of the shoe shop at Patna. The accused was having a shoe shop at Khagaria. As per version of D.W. 1 Jafar Alam, at about 6.30 P.M. of 03.01.1994, the accused came to his shop for purchasing footwears but as this witness was not having the stock, he called the accused on the next day. D.W. 1 Jafar Alam deposed that on the next day the accused came at 10 A.M., placed his order and asked delivery by 2 P.M. At the time of packing the goods, the accused was informed that his wife has been killed. Even cross-examination of this defence witness shows that he was knowing the accused from the year 1990.

18. D.W. 3 Md. Ali is resident of Patna. His agricultural land is at village Bachhauta. He is knowing the accused since last 15 years and as per his version, the accused used to come to his house at Patna regularly. This witness deposed that the accused stayed at his house in the night intervening 3/4.1.1994 because he could not get the delivery of the goods. His cross-examination reveals that earlier D.W. 3 Md.



Ali was having shoe shop at Khagaria, in front of the shoe shop belonging to the uncle of the appellant/accused. There is nothing in cross-examination of both these defence witnesses to doubt their version. Their evidence gives an inference that the accused might not be present in his residential house in the night of the incident and he might be at Patna for effecting purchases for his house. Element of doubt as such creeps in the prosecution case by their evidence. Even otherwise, the prosecution case as reflected from the FIR is to the effect that the accused has closed his shop at about 1 P.M. of 03.01.1994 and D.W. 1 Jafar Alam has deposed that the accused had been to him at Patna for effecting purchases in the evening hours of 03.01.1994. This defence version of the accused casts a shadow of doubt on the prosecution case particularly in absence of any positive evidence coming from the side of the prosecution regarding presence of the accused at his own residential house in the night hours of 3/4.01.1994.

19. Because of a gunshot, left portion of head of deceased Poonam Jayaswal was blown off. The spot of the incident was inspected by P.W. 7 Manegar Ram soon after the incident. Even the dead body of Poonam was lying on the spot when P.W. 7 Manegar Ram reached the spot in the morning



hours of 04.01.1994. The FIR was recorded by him on the spot of the incident itself. However despite inspection of the spot of the incident, this witness had not found the empty as well as the fired bullet from the spot of the incident.

20. Evidence of P.W. 3 Veena Devi and P.W. 6 Vijay Prasad, who are parents of the deceased is of no assistance to infer presence of the accused on the spot of the incident at the time of the incident as these witnesses were not residing at the place where the incident took place. Their evidence regarding demand of dowry or consequent harassment to deceased Poonam Jayaswal soon before her death was not accepted by the learned trial court. The charge for the offence punishable under Section 304B of the Indian Penal Code is held to be not proved against the accused and that finding is not even challenged by the State. P.W. 5 Anand Kumar is neighbourer who acted a *Panch* witness to the seizure of the blood from the spot of the incident. His evidence is also of no assistance to the prosecution for inferring the guilt of the accused.

21. Thus the prosecution has not established the circumstances which may lead us to infer that it was the accused alone who had committed murder of his wife Poonam at their residential house by adducing clear cogent and trustworthy



evidence on this aspect. The approach of the learned trial court is apparently perverse and is based on the surmises and conjectures. The appellant/accused as such is certainly entitled for benefit of doubt and, therefore, the order:

a. The appeal is allowed.

b. The impugned Judgment and order passed by the learned trial court convicting the appellant/accused for the offences punishable under Section 302 of the Indian Penal Code and Section 27 of the Arms Act so also the order of imposing sentence on him is quashed and set aside.

c. The appellant/accused is acquitted of the offences held to be proved against him and he be set at liberty if not required in any case.

(A. M. Badar, J)

Bhardwaj/-

(Rajesh Kumar Verma, J)

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