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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO. 809 OF 2015
WITH
INTERIM APPLICATION NO. 1431 OF 2021**

Mr. Radhe Zulidas Mandal,
Age: 23 Year, Occ. Labour,
Residing Post Rahina, Tehsil Thana,
Saharghat, Dist. Madhubani,
State – Bihar.

... Appellant
(Ori. Accused)

Versus

The State of Maharashtra,
(At the instance of Juhu Police Station)

... Respondent
(Ori. Complainant)

Mr. Murtaza N. Najmi, Appointed Advocate a/w. Ms. Davinder
Sabharwal, Advocate for Appellant.
Mr. H.J. Dedhia, APP for Respondent – State.

**CORAM : A.S. GADKARI &
MILIND N. JADHAV, JJ.**

**RESERVED ON : 19th September 2022.
PRONOUNCED ON : 20th October 2022.**

JUDGMENT (PER: MILIND N. JADHAV, J.)

. This Appeal challenges the Judgment and Order dated
23.09.2014 passed by the learned Additional Sessions Judge, Greater
Bombay in Sessions case No.34 of 2012 for offences punishable under:

- (i) Section 302 read with Section 34 of Indian Penal Code,
1860 (for short “**IPC**”) and sentencing him to suffer
imprisonment for life and pay fine of Rs.500/-, and in

default, to suffer further rigorous imprisonment for three months; and

- (ii) Section 392 IPC and sentencing him to suffer rigorous imprisonment for seven years, and pay fine of Rs.300/- and, in default, to suffer further rigorous imprisonment for two months; both sentences to run concurrently.

2. Shorn of unnecessary details, facts which emerge from the prosecution case are as follows:

2.1. First informant, Ila Kantilal Mehta, PW-1 is the sister of deceased Bharti Kapurchand Shah (for short "**Bharti**"). Bharti a widow living alone hired two servants namely, (Radhe i.e. Appellant and one Mukesh) eight days prior to the incident. On 08.09.2011, PW-1 visited Bharti, saw one servant, a dwarf with dark skin complexion and upon inquiry came to know that his name was Radhe (Appellant) and the name of the other servant was Mukesh. That their working hours in Bharti's flat were 9:30 to 11:30 am, 3:00 to 4:30 p.m. and again from 9:00 to 10:30 p.m.

2.2. On 11.09.2011 (Ganesh Visarjan day) at 10:00 a.m. husband of PW-1 spoke to Bharti on phone. On the same day PW-1 called Bharti on two occasions i.e. 9:30 p.m. and 12:30 a.m. (midnight), but she did not answer or reply. Hence on 12.09.2011 PW-1 called PW-6, Hansika Patel, neighbour of Bharti and told her that since Bharti was not

responding to her calls. She should check on her well being. PW-6 after checking on Bharati's door told PW-1 that the door bell was switched off and it was locked from inside.

2.3. PW-1 alongwith her husband reached Bharti's flat, opened the door with a duplicate key, entered inside and saw Bharti lying in the bedroom with her mouth tied with a nylon table cloth and her tongue protruding outside alongwith strangulation marks and slight bleeding injuries. That her gold chain and gold bangles were missing. PW-6 called and informed the police about the scene of offence. PW-1 lodged first information report (for short "**FIR**") and thereafter criminal law was set into the motion.

2.4. PW-20 - ASI Shashikant Padwal, Investigation Officer (for short "**IO**") reached the spot of incident with a photographer. He conducted Spot panchanama (Exh.21) in the presence of PW-4 Deepak Nanubhai Painter and recovered articles namely, a blue bedsheets (gown) (Article-A), Table Cloth (Article-C), Blue Bedsheet (Article-J), a knife (Article-L) from under the washing machine, sealed envelope containing bill/invoice (Article-H), diary with entry in it as "Radhe servant start" (Article-D), Gujarati Newspaper "Janmabhoomi" (Article-F) on which two mobile numbers were written. PW-20 carried out Inquest panchanama (Exh.15) in the presence of two pancha witnesses. He sent the dead body of Bharti to Cooper hospital, wherein

the after-examination Doctor declared her dead. Thereafter, it was sent for postmortem examination.

2.5. When PW-20 carried out further investigation it came to light that, from Bharti's cupboard in the bedroom, foreign currency i.e. one 50 Dollar and one Dollar currency note, a bundle of 100 notes of Rs.1/-, a bundle of 100 notes of Rs.20/- which were given to Bharti on 08.09.2011, two diamond golden rings, one brown pouch containing Indian currency coins are missing.

2.6. Further investigation in the case was carried out by PW-21, Vijay Appaji – Investigating Officer (IO). He recorded the statements of prosecution witnesses, and all seized articles were sent to Chemical Analyzer. He received C.A. Report (Exh.61) in due course of time.

2.7. On 20.09.2011, Appellant was arrested from District Madhubani, by Sadar Police Station, Bihar. On 22.09.2011, PSI Pawar brought Appellant to Bombay along with the stolen articles in a (bag) sack, along with one Nokia mobile model No.1200 and a sim card belonging to PW-2 Santosh Rajak. All articles from the bag were sealed and (Exh.52) which included one black pant, one black shirt, one railway ticket dated 12.09.2011 (Article 3). On 27.09.2011 PW-1 and PW-6 both identified the stolen property and PW-21 drew memorandum panchanama (Exh.34).

2.8. Appellant led police to his room at Samtanagar hutment area near Costa Cafe where one white color cloth from a black colored rexin bag in which there was a 50 dollar American currency note, 100 notes of Rs.1/- were seized (Article-1). On 29.09.2011, PW-1 and PW-6 identified the currency notes.

2.9. On 09.11.2011, PW-12 Vishwanath Gaurav, Naib Tahsildar, conducted Test Identification Parade (TIP) at Arthur Road Prison at about 01:15 p.m. in the presence of PW-1 and PW-6. Six dummies were asked to stand along with Appellant and PW-1 and PW-6 were asked to identify the Appellant/accused from the dummies on different occasions and both of them identified the Appellant. PW-12 then prepared TI panchanama (Exh.42).

2.10. After completion of investigation, chargesheet was filed in the Court of Metropolitan Magistrate, Andheri. As the offence under Section 302 IPC is exclusively triable by the Court of Sessions, the case was committed to the Sessions Court, Greater Bombay for trial.

3. Prosecution case is entirely based on circumstantial evidence. To bring home the guilt of Appellant prosecution examined in all 21 witnesses.

4. Prosecution case is heavily based on circumstantial evidence i.e. last seen together theory deposed by PW-6. According to PW-6, on 11.09.2011 at around 10:30 p.m. she had seen Appellant, Mashraf and

one other servant entering Bharti's flat with a red rexin bag carried by Appellant with "R" mark which was later recovered from Appellant after his arrest (Article-M). Even though their working time ended at 10:30 p.m. for the day, however she has stated that she saw them exiting Bharti's flat at 10:30 p.m. when she opened her door to put the milk bag. PW-6 identified the articles seized from Appellant as belonging to Bharti. She identified the Appellant in TIP conducted by PW-12.

5. PW-11 - Dr. Pankaj Gajare, conducted postmortem on the dead body of Bharti and prepared the PM Report (Exh.37). He has notified the following injuries in the PM notes:-

A) On External Examination:

1. *Ligature mark, seen as an abrasion over neck region, over thyroid cartilage, it is complete, horizontal, encircling the neck completely. It is soft with base pale reddish with ecchymoses, seen at edges of ligature. It is prominent posterolaterally on both sides and faint at neck region, size of 40 x 2.3 cm, it is 3 cm below left ear lobule, another ligature mark seen as an abrasion size of 15 x 2 cm running from left of mouth to left ear lobule, soft reddish, another ligature mark seen as an abrasion, size of 13 x 12 cm running from right angle of mouth to left to right ear lobule.*
2. *Contusion sign of 1 x 1 cm seen over right nostril is bluish in color.*
3. *Contusion size of 0.3 x 0.3 cm over right upper lip, mucosal surface, it is bluish.*
4. *Contusion size of 1.5 x 1.5 cm seen over right lip, mucosal surface is bluish.*
5. *Abrasion size of 3 x 2 cm is seen on the right side of the neck, 3 cm below from chin is reddish in color.*
6. *Abrasion size of 2.5 x 1.5 cm reddish seen over inferior right sternocleidomastoid, 4 cm above right sterno clavicular joint.*
7. *contusion no. 2 in no. seen over left arm postero medically, the above one is 2 x 1.5 cm, bluish on cut*

section extravasation of blood seen.

8. *Contusion size of 2 x 2 cm seen over left wrist, dorsally, bluish cut section extravasation of blood seen.*
9. *Contusion size of 4 x 3 cm bluish seen over left dorsum of hand, centrally cut extravasation of blood seen.*
10. *Contusion no.2 in no. see over right dorsum of hand, medial one is size of 4 x 4.25 cm, lateral one is size of 2 x 2 cm bluish cut section extravasation of blood seen.*

B) Internal Injuries:

1. *dissection of neck, I noticed the tissues under the ligature are dry, hard, parchment like, ecchymosed, laryngeal cartilage, upper tracheal rings, fracture, thyroid cartilage thyroid bones fracture bilaterally, neck muscle or ecchymosed.”*

5.1. PW-11 has stated that injuries mentioned in column no. 17 and 19 are on the vital parts of Bharti's body and were sufficient in the ordinary course to cause death. He has opined that death of Bharti was caused due to strangulation (Exh.37).

6. We have heard Mr. Murtaza N. Najmi, learned Advocate appearing on behalf of the Appellant and Mr. H. J. Dedhia, learned APP appearing on behalf of the State and with their able assistance perused the entire record.

7. Admittedly prosecution's case rests only on circumstantial evidence.

Before we allude any further, it would be apposite to reiterate the settled law on circumstantial evidence. While considering any case based on circumstantial evidence, it has been laid down that onus is on the prosecution to prove that the chain of circumstances is complete and the infirmity or lacunae in prosecution

cannot be cured by false defence or plea. The conditions precedent required for compliance in the case based on circumstantial evidence as announced by the Supreme Court in the case of ***Sharad Birdhichand Sarda v. State of Maharashtra***¹ are as follows:-

- “(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;*
- (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;*
- (3) the circumstances should be of a conclusive nature and tendency;*
- (4) they should exclude every possible hypothesis except the one to be proved; and*
- (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”*

7.1. In the case of ***G. Parshwanath vs. State of Karnataka***² the Supreme Court has held that 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.

Paragraph No.11 of the said decision reads as under:

“11. The evidence tendered in a court of law is either direct or circumstantial. Evidence is said to be direct if it consists of an eye-witness account of the facts in issue in a criminal case. On the other hand, circumstantial evidence is evidence of relevant facts from which, one can, by process of intuitive reasoning, infer about the existence of facts in issue or factum probandum. In dealing with circumstantial evidence there is always a danger that conjecture or suspicion lingering on mind may take

1 (1984) Cri L J 1738

2 (2010) 8 SCC 598

place of proof. Suspicion, however, strong cannot be allowed to take place of proof and, therefore, the Court has to be watchful and ensure that conjectures and suspicions do not take place of legal proof. However, it is not derogation of evidence to say that it is circumstantial. Human agency may be faulty in expressing picturisation of actual incident, but the circumstances cannot fail. Therefore, many a times it is aptly said that "men may tell lies, but circumstances do not". In cases where 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. Each fact sought to be relied upon must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case. The Court thereafter has to consider the effect of proved facts. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accused and should exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. 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, where various links in chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court."

7.2. In another case decided in 2021, ***Surajdeo Mahto Vs The***

*State of Bihar*³, in paragraph Nos.29 and 30 the Supreme Court while enunciating the law relating to circumstantial evidence has held as under:

*“29.The case of the prosecution in the present case heavily banks upon the principle of 'Last seen theory'. Briefly put, the last seen theory is applied where the time interval between the point of when the Accused and the deceased were last seen together, and when the victim is found dead, is so small that the possibility of any other person other than the Accused being the perpetrator of crime becomes impossible. Elaborating on the principle of 'last seen alive', a 3-judge bench of this Court in the case of **Satpal v. State of Haryana (2018) 6 SCC 610**, p. 6 has, however, cautioned that unless the fact of last seen is corroborated by some other evidence, the fact that the deceased was last seen in the vicinity of the Accused, would by itself, only be a weak kind of evidence. The Court further held:*

...Succinctly stated, it may be a weak kind of evidence by itself to found conviction upon the same singularly. But when it is coupled with other circumstances such as the time when the deceased was last seen with the Accused, and the recovery of the corpse being in very close proximity of time, the Accused owes an explanation Under Section 106 of the Evidence Act with regard to the circumstances under which death may have taken place. If the Accused offers no explanation, or furnishes a wrong explanation, absconds, motive is established, and there is corroborative evidence available inter alia in the form of recovery or otherwise forming a chain of circumstances leading to the only inference for guilt of the Accused, incompatible with any possible hypothesis of innocence, conviction can be based on the same. If there be any doubt or break in the link of chain of circumstances, the benefit of doubt must go to the Accused. Each case will therefore have to be examined on its own facts for invocation of the doctrine.

30. We may hasten to clarify that the fact of last seen should not be weighed in isolation or be segregated from the other evidence led by the prosecution. The last seen theory should rather be applied taking into account the case of the prosecution in its entirety. Hence, the Courts have to not only consider the factum of last seen, but also have to keep in mind the circumstances that preceded and followed from the point of the deceased being so last seen in the presence of the Accused.”

8. The principles propounded in the case of Sharad Sarda (*first supra*) and G. Parshwanath (*second supra*) are unwaveringly

reiterated in a catena of decisions of the Supreme Court wherein it is categorically held that while dealing with matters relating to circumstantial evidence, combination of facts of the case should be such that there is no escape for the accused because the facts taken in whole do not admit to any inference but that of his guilt. It is also coined as a “Complete Chain Link Theory” putting onus on the prosecution to prove its case not just by one circumstance but, chain of circumstances / events which lead to one and only one inference i.e., culpability of the Accused.

9. Mr. Najmi has placed reliance in the case of ***Tilakchand s/o Hanaslal Biranwar and Anr. Vs. The State of Maharashtra***⁴, in support of his submissions. He has drawn our attention to paragraph No.16 of the said Judgment which reads thus:-

“16. In our criminal jurisprudence, burden to prove a case beyond reasonable doubt rests on the shoulder of the prosecution. The accused is entitled to take many defences. He may prove or he may not prove his defence. However, the prosecution cannot take advantage of any weakness in a defence case and the burden rested on the shoulder of the prosecution never gets lightened.”

10. We have carefully perused the entire material and evidence on record. On a minute perusal of evidence, it is seen that the Appellant had started working with Bharti from 08.09.2011 and he had introduced himself to PW-1 when he met her on 08.09.2011. PW-1 in her deposition has stated that Appellant was a dwarf having dark

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complexion which is an unique identification feature of a person. PW-1 in her deposition has categorically stated that when she met Appellant, Appellant informed her that his name was Radhe. However, it is seen that when PW-1 lodged the report on 12.09.2011 i.e. just four days later she has stated that she did not remember the name of Appellant. It is further seen that in the report she has not described the Appellant with his characteristic feature i.e. he being a dwarf. All that PW-1 has stated in her report as also in her substantive evidence is that there were two unknown house servants employed by Bharti. Perusal of PW-1's deposition shows that she has admitted that after Bharti's erstwhile servant Lata had left the job, she was not aware as to who were employed by Bharti. This admission is contrary to her own deposition in her examination-in-chief. It is pertinent to note that PW-21 – IO in his deposition and in this very context has stated that he inquired with PW-1, her husband and PW-6 for 15 minutes but they did not disclose the name of Appellant. It is further pertinent to note that assuming Bharti had employed two house servants on 08.09.2011, there is no record whatsoever of these two house servants either in the society register/record and/or given to the local police station considering that Bharti was a senior citizen living alone. It has come in evidence that watchman were employed for security purposes in the building in which Bharti was murdered. However, prosecution has not examined any of the said watchmen, who were on duty on the date of

incident or lead evidence of the watchmen of the building who could reinforced the fact of Appellant with other worker had left the house of Bharti at about 10:30 p.m. on the date of alleged incident. However, prosecution chose not to do so.

11. With respect to recovery evidence, it is seen that currency notes and money went missing from Bharti's flat after she was murdered. PW-1 records in her supplementary statement on 14.09.2011 before PW-21 that two diamond rings and currency notes of Bharti were also found missing. PW-1 claims that when she visited the deceased on 08.09.2011 she had given to her 100 notes of Rs.20 and Rs.1/- denomination. This has all come in the supplementary statement recorded on 14.0.2011. There is no mention of these currency notes in the FIR. As per PW-1's claim if she had given the currency notes to Bharti on 08.09.2011 i.e. just 3 days before the incident, then there is no question of her forgetting the same and she could have stated that in the FIR. However, when these notes were allegedly recovered from the accused she has identified them and that identification is on the basis of serial number of the currency notes written in her diary, which is marked Article-P. She claims that she has written all numbers in her diary.

12. It is seen that in respect of the stolen dollars, PW-1 does not make any reference about them in the FIR, but maintaining that she

had written the number of the dollars in her diary as well. One important point here is that as far as the second recovery of property is concerned i.e. there is no identification by PW-1 of the dollars and 100 notes of Rs.1/- though she claims she has identified them. PW-15 pancha witness in his deposition states that the dollars and currency notes were produced from different packets, whereas the panchanama shows that they were put together in a single packet. This is clearly suggestive of tampering with the evidence.

PW-1 further in the FIR mentions only about one chain and two bangles worn by Bharti, but in her supplementary statement before PW-21 on 14.09.2011 she produces photographs of the ornaments i.e. the chain and two diamond rings. However, she has produced only photographs of these ornaments and Bharti is not seen wearing them on her.

13. Prosecution has heavily relied upon the last seen together theory in the present case. Prosecution has relied upon the deposition of PW-6 neighbour of Bharti in the chain of circumstances. It is pertinent to note that PW-6 has given the same time i.e. 10:30 p.m. for the Appellant and other servants entering the house of Bharti and leaving her house. This itself is an inherent fallacy on the face of record. In this context, it is pertinent to note that PW-1 had given a phone call to Bharti at 9:30 p.m. and when it went unanswered she

once again called at 12:30 a.m. in the midnight. This leads to the assumption that at both times Bharti was already dead. Hence, if Bharti was dead at 9:30 p.m., then the perpetrator of the crime would not remain at the scene of crime upto 10:30 p.m. i.e. when PW-6 had seen the three persons. It is pertinent to note that the spot panchanama reveals that dead body of Bharti was found in the sleeping position on her bed with quilt pulled over her body, which clearly suggests that she was fast asleep. Medical evidence in this regards to the time of death of Bharti assumes significance. PW-12 has stated that the time of her death is between 4 to 6 hours from the last meal taken by Bharti. There is no evidence on record to suggest whether Bharti had taken dinner and at what time. Hence, this could be related to the afternoon lunch which was taken by Bharti which possibility cannot be ruled out. This theory assumes importance because of the two specific phone calls made by PW-1 to Bharti on the date of incident in the evening at 9:30 p.m. and when she did not answer, at 12:30 a.m. This clearly reveals and suggests that Bharti was in all probability murdered much prior to 9:30 p.m. PW-6 in her deposition has stated that the duty time of the Appellant and other servants during night time was from 9:00 p.m. to 10:30 p.m. and she has stated that she saw them entering and leaving Bharti's flat at the same time i.e. 10:30 p.m. The fact that PW-6 saw Appellant entering and leaving at the same time gives rise to a situation whether they

must have found Bharti murdered when they entered her flat and thereafter immediately left from there. This theory or probability cannot be ruled out. Hence, if the evidence given by PW-6 that she saw the Appellant and other servants entering and leaving at the same time is to be believed, then this could be the only possible theory. In this context, the diary which was maintained, recovered and seized from the scene of crime shows that Bharti had registered the presence of Radhe i.e. the Appellant on the date on which he had attended work i.e. on 08.09.2011.

14. Perusal of Exhibit 21 clearly shows that Radhe's presence on work on 08.09.2011 was noted and written in English language by Bharti with a tick mark. Thereafter his name was written on 11.09.2011 with the tick mark. This Exhibit clearly documents to fact that Radhe i.e. Appellant attended and started work on 08.09.2011 but did not attend on 09.09.2011 and 10.09.2011 and the entry made on 11.09.2011 was written to indicate his absence and to keep a record of the same. This is so because PW-2 the employer of Appellant where he was working as a milk delivery boy has categorically stated in his evidence that he did not come on duty for delivery of milk on 11.09.2011. Hence, the deposition of PW-6 which states that she had last seen Appellant alongwith other servants on 11.09.2011 is not proved beyond all reasonable doubts. On careful reading of the

evidence and cross-examination of PW-6, it is seen that the same is inconsistent and there are several discrepancies and contradictions of material facts which are not supported or corroborated by the evidence of other witnesses on record.

15. It is seen that the statement of PW-6 was recorded on 13.09.2011 i.e. two days after the date of incident and it has come on record that she attended the police station on 12.09.2011 and had interacted closely with the police officers on that date.

16. It is further pertinent to note that Appellant was arrested in Bihar and in this respect the prosecution has led evidence of PW-5, the arrest pancha. Arrest panchanama clearly reveals that though Appellant was arrested in Bihar, the said arrest panchanama is prepared in Mumbai which appears to be a mere formality on the face on record. This clearly shows that the Appellant was not arrested in Bihar. If this be true, in that case it cannot be stated that on arresting the Appellant, the seized articles were found by the police and were seized from his custody. In this respect, Exh.54 which is the seizure panchanama therefore becomes relevant. PW-18 – API has claimed to have gone to Bihar to arrest Appellant and seized the articles from him. It is pertinent to note that Exh.54, the seizure panchanama has been written in Marathi language. There is no remark to indicate that the said seizure panchanama was read over and explained to the

Appellant in Hindi language as understood by him. Appellant has not signed this seizure panchanama nor the pancha witness who have signed it have been examined by the prosecution to identify the Appellant as the accused arrested by PW-12. The most pertinent aspect is that this arrest cum seizure panchanama does not bear the signature of any police officer from Bihar. Hence, this seizure cum arrest panchanama (Exh.54) becomes doubtful. Two senior police officers' signatures appears on the panchanama, viz; Mr. Dhivar and Mr. Bhagat and both are from Mumbai and significantly both these police officers never visited Bihar to apprehend the Appellant. This clearly shows that the arrest panchanama was in fact prepared in Mumbai and there is no explanation offered in re-examination by PW-18 – API when he was extensively cross-examined on the said arrest panchanama. As per the prosecution case when the Appellant was apprehended in Bihar he was found in possession of the alleged stolen property viz: 2 diamond rings, 100 notes of 20 denomination, brown pouch containing foreign and Indian coins. That is the first recovery. The second recovery is in Mumbai of Rs.50/- and 1 dollar note and 100 notes of Rs.1/- denomination. As far as the second recovery is concerned, one roommate was found to have been staying alongwith the Appellant which shows that the room was in their joint possession. The prosecution case is that Appellant had committed robbery and murder of the deceased. Further PW-1, PW-2 and PW-6 all knew

Appellant by his name and recognized him, then there was no reason for him to conceal his identity by killing Bharti. Further in the spot panchanama a knife was recovered from the scene of crime, but as per the prosecution case Bharti was strangled with a table cloth. Hence, if the knife belonged to Appellant, then there was no reason for him to have left it at the scene of crime, when he had not used it for killing Bharti.

17. In view of the above discussion and findings, it is clearly discernible that the investigation done by the police authorities on the basis of the entries made in Bharti's diary has not been made in its proper perspective. The entries made in the diary between 08.09.2011 and 11.09.2011 are produced on record and the absence of red marking or circles against those dates create a doubt on the existence of the name Radhe in the said diary. In this aspect it is pertinent to note that PW-6 had complete access to enter Bharti's flat as she had a duplicate key with her. Police have not investigated in this regard. They have also not effected the recovery of the duplicate key from PW-6. The fact that the dead body of Bharti was found lying on the bed in a straight sleeping position with quilt pulled over her is suggestive of the fact that someone might had entered the flat when she was fast asleep. This theory or possibility cannot be ruled out.

18. In view of the above reliability of the evidence of

prosecution witness PW-6 appears to be doubtful and ambiguous. Prosecution has not proved the entire chain of circumstances so as to link and suggest that the murder of Bharti was committed by the Appellant beyond all reasonable doubts. In that view of the matter, the case of prosecution fails and Appellant deserves to be given the benefit of doubt.

19. Prosecution has heavily relied on the evidence of PW-6 the neighbour who saw Appellant and two other persons entering in Bharti's flat at around 10:30 p.m., but thereafter she did not hear any screams. The Appellant was working as a servant in the house of Bharti, and PW-6 was the neighbour next door, so merely identifying Appellant in the T.I. conducted by PW-12 by itself cannot lead to any conclusion consistent with the hypotheses of guilt of the Appellant.

20. It is seen that there is no ocular witness to the incident and prosecution has only relied on the last seen together theory and recovery evidence of articles which were seized from Appellant by PW-21. It is well settled position in law that prosecution while relying upon the confessional statement given by the accused leading to the discovery of articles under Section 27 of the Evidence Act, has to prove through cogent evidence that the statement was made voluntarily and lead to the discovery of the relevant articles. The above circumstance of PW-6 seeing the Appellant and two others entering the premises of

Bharti coupled with the recovery of the stolen articles from Appellant's possession, at the most creates a highly suspicious situation; but beyond a strong suspicion nothing else would follow in the absence of any other strong circumstance which would suggest the involvement of Appellant in the alleged offence of murder of Bharti. Even with the aid of presumption under Section 114 of the Indian Evidence Act, the offence of murder cannot be proved against Appellant unless there is evidence to show that the murder happened at the same time i.e. while committing the robbery. However, no such evidence is forthcoming.

21. The question which confronts the Court is that whether on the basis of the single circumstance i.e. recovery evidence by PW-21 which was duly identified by PW-1 and PW-6, can the Court come to the conclusion that Appellant and no other person is the author of the crime and has committed the murder of the Bharti. As noted above the evidence of PW-6 is unreliable. After perusing the evidence on record we are of the considered opinion that, law is well settled that when prosecution relies on circumstantial evidence, all links in the chain of circumstances must be complete and proved through cogent evidence. In the present case prosecution has failed to prove its case beyond all reasonable doubts to prove the crime of murder and robbery against the Appellant. It would not be within the perview of law to arrive at

the presumption that Appellant is the only author of crime when the chain of circumstances is not complete and is doubtful.

22. In view of the above discussion and observations, we are of the considered opinion that offence under Section 302 IPC is not proved against the Appellant and Appellant is entitled to be given benefit of doubt.

23. Hence, the following Order:

- (i) Criminal Appeal is allowed.
- (ii) Judgment and Order 23.09.2014 passed by the learned Additional Sessions Judge, Greater Bombay in Sessions Case No.34 of 2012 is hereby quashed and set aside.
- (iii) The Appellant stands acquitted of the offence punishable under Sections 302 read with Section 34, Section 392 read with Section 397 read with Section 34 of IPC by extending benefit of doubt to him.
- (iv) The Appellant is ordered to be set at liberty forthwith if not required in any other case/cases. Fine, if any, paid by Appellant, shall be returned to Appellant.

24. In view of disposal of the Appeal, Interim Application does not survive and is accordingly disposed of.

25. Before parting with the Judgment, we would like to appreciate the efforts put in by Mr. Murtaza N. Najmi, Advocate appointed by High Court Legal Services Committee, Mumbai for espousing the cause of Appellant. He was thoroughly prepared in the matter and rendered proper and able assistance to the Court.

[MILIND N. JADHAV, J.]

[A.S. GADKARI, J.]

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