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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO. 1623 OF 2019
WITH
INTERIM APPLICATION NO. 1494 OF 2022
IN
CRIMINAL APPEAL NO. 1623 OF 2019**

Kushal @ Akash Dattatray Prabhu

Age : 18 years, Occupation – Nil,
residing at Flat No.12, Shubharamabh
Society, General Arun Kumar Vaidya Nagar,
Dwarka, Nashik, Originally R/o Mangil Wada,
Tal. Javhar, Dist. Palghar.
(Presently at Nashik Central Jail)

Appellant/
.. Ori. Accused

Versus

The State of Maharashtra.

Through P.I. Sarkarwada Police Station, Nashik. .. Ori. Complainant.

Respondent/

Mr. Aniket Vagal, Advocate for Appellant.

Mr. S.S. Hulke, APP for Respondent – State.

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

**RESERVED ON : 01st August 2022.
PRONOUNCED ON : 06th September, 2022.**

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

. The present Appeal questions the legality of the Judgment dated 23.10.2019 passed by the Court of Sessions, Nashik in Sessions Case No.197 of 2017 convicting the Appellant for offence punishable under Section 302 read with 34 of the Indian Penal Code (for short “IPC”) and sentencing him to suffer imprisonment for life alongwith fine of Rs. 2,000/- and in default thereof to suffer simple

imprisonment for 7 days. Appellant is also convicted for offences punishable under Sections 201, 364-A and 384 IPC and sentenced to suffer rigorous imprisonment and fine of Rs.1,000/- and Rs.2,000/- on each count and in default thereof to suffer 7 days simple imprisonment; all sentences to run concurrently.

2. Prosecution case is based on circumstantial evidence and “last seen together” theory.

3. Facts which emerge from the present case for consideration are as under:

3.1. First informant, PW-1 Pralin Baviskar (father of deceased Mohitesh) received a phone call at about 12.00 noon on 15.10.2105 from his son’s mobile No.8888702770; some unknown person demanded Rs. 20 lakhs ransom and threaten to kill Mohitesh and asked him to keep the ransom amount ready by 10:00 p.m. and disconnected the phone; PW-1 attempted to contact Mohitesh but his phone was switched off; PW-1 reached Nashik and found Mohitesh was not traceable and hence lodged a missing report with Sakharwada Police Station, Nashik; offence was registered against unknown person under Section 364-A and 384 IPC and criminal law was set in to motion.

3.2. On the following day i.e. 16.10.2015, dead body of a young man was traced lying in the gutter below Tryambakeshwar - Javhar

road with injuries on his body; two blood stained stones were found lying near the incident spot; API, Tryambakeshwar Police Station lodged First Information Report (for short “**FIR**”) and registered offence vide C.R. No. 140 of 2015 under Sections 302 and 201 IPC.

3.3. Tryambakeshwar police conducted spot panchanama of the spot of incident from where the dead body of deceased was found. Similarly, inquest panchanama was done and dead body was sent to Civil Hospital, Nashik for autopsy. Post-mortem examination was conducted on the dead body as an unidentified body. Since parallel investigation was conducted by Sarkarwada Police Station and Crime Branch, Nashik, it was revealed that the dead body was of missing Mohitesh. Thereafter, investigation into the crime was conducted by API - Mohite, Crime Branch, Nashik.

3.4. During investigation Akash Prabhu (accused) and Juvenile in Conflict with Law (for short “**JCL**”) were taken into custody as suspects. According to prosecution, JCL made voluntary statements in respect of showing the place where clothes of accused persons which they had worn at the time of crime were thrown away. Similarly, he took the police to various places including the shop where phone of Mohitesh was recharged, the open place abutting JMCT college from where mobile handset and two sim cards in broken condition were recovered and seized. He also showed to the police the places from

where ransom phone calls were made to PW-1 by them and finally he has also showed the place where Mohitesh was killed and his dead body was thrown away.

3.5. Investigating Officer (I.O.) called for CDR and SDR of the relevant mobile phones from the concerned mobile service providers and same was exhibited in evidence Exhs. 66 & 67 which proved that PW-1 had indeed received the ransom phone call from the said phone number belonging to Mohitesh. Seizure panchanamas were effected and two motorcycles used by JCL and Appellant were seized, a black colour wallet with identity card, ICICI Bank card and yellow colour broken chain belonging to Mohitesh was seized from the residential flat of Appellant (Exh. 94); CCTV footages were recovered and photographs therefrom were marked in evidence (Exh. 63) identifying the motorcycle of accused; Post-mortem note (Exh. 50) and death certificate of Mohitesh (Exh. 51) were marked in evidence; CA Reports (Exh. 23) of seized articles namely clothes of accused recovered at the behest of the accused and deceased Mohitesh were recovered and marked in evidence; charge-sheet was filed against the Appellant before Judicial Magistrate First Class, Nashik whereas charge-sheet was filed against the co-accused JCL i.e. Saurabh Chaudhari before the Juvenile Justice Board. As the offence under Section 302 of IPC is exclusively triable by the Sessions Court, the learned Magistrate

committed the case to the Court of Sessions at Nashik.

3.6. Charge was framed vide Exhibit-4 for the offences punishable under Sections 302, 201, 364-A read with Section 34 IPC against Appellant for alleged commission of crime in furtherance of common intention with JCL. Charge was read out and explained in vernacular to Appellant. Appellant pleaded not guilty of the charge and claimed to be tried.

3.7. To bring home the guilt of accused prosecution examined 20 witnesses. PW- 1 is the first informant, father of deceased Mohitesh; PW-2 Aditya More and PW-3 Tejas Ghorpade are college friends of deceased; PW-4 Nitish Shinde is the cousin brother of Mohitesh and witness to the theory of last seen Mohitesh in the company of Appellant and Saurabh Chaudhari (JCL) at about 10:00 p.m. On 14.10.2015, outside Dairy Don Ice Cream Parlour on M. G. Road; that he informed PW-1 on 15.10.2015 that he had last seen Mohitesh in the company of Appellant and Saurabh; though, PW-4's statement was recorded in 04.11.2015 it is important to note that, it has come in PW-1's evidence that he was informed by PW-4 about the "last seen together" theory and he has deposed the same. PW-5 to PW-9 are pancha witnesses; PW-6 has witnessed recovery of a cloth bag containing clothes of Appellant and Saurabh at the instance of Saurabh from Nasardi *Nallah* situated behind his residential

apartment, inside the cloth bag blood stained clothes of Appellant and Saurabh have been recovered and seized and marked as Articles in evidence. That apart, PW-8 has been witness to recovery of articles of deceased Mohitesh namely wallet with ID card, ICICI bank card and broken chain from the residential premises of Appellant. PW-9 is the pancha witness who has extracted 4 CCTV footages of public places near Ashok Stambh, Mumbai Naka, Kannamwar Bridge and Tractor House wherein Appellant and Saurabh are seen at different times on motorcycle; one having 3 riders and once having 2 riders having been identified.

3.8. PW-10 Dr. Nikhil Saindane is Medical Officer who conducted the autopsy of deceased Mohitesh between 12:25 p.m and 1:25 p.m. on 16.10.2015. In the post-mortem notes marked in evidence he has noted the following injuries on his dead body.

- (i) Laceration of size 4 cm x 1.5 cm x bone deep was present over left temporal, 3 cm from Mastoid. Margins of the wound were contused;
- (ii) Laceration of size 2 cm x 1.5 cm x bone deep was present over left temporal, 0.5 cm below injury No.1 Margins of the wound were contused;
- (iii) Laceration of size 3.5 cm x 1 cm x bone deep was present over right temporal 2 cm outer and above Right Mastoid. Margins of the wound were contused;
- (iv) Laceration of size 2.5 cm x 2 cm x bone deep was

present over Right Temporal 4 cm outer side from injury no. 3. Margins of the wound were contused;

(v) Laceration of size 3.5 cm x 1.5 cm x bone deep was present on right temporal, 2.5 cm above injury no. 4. Margins of the wound were contused;

(vi) Reddish Contused abrasion of size 3 cm x 2.5 cm was present over left ear lobe on outer aspect;

(vii) Reddish Contused abrasion of size 3.5 cm x 2.5 cm was present on forehead, 2.5 cm above right eyebrow;

(viii) Reddish Contused abrasion of size 2 cm x 2 cm was present over outer aspect of left side of chest 14 cm from midline, 4.5cm below nipple line. (According to Medical Officer this injuries were ante-mortem in nature)

He has given the cause of death as cranio-cerebral damage due to blunt trauma to head (by blunt objects like stones).

In his evidence PW-10 has deposed that injuries have been caused by hard and blunt object and death of Mohitesh has occurred prior to 24 to 30 hours from the time of conducting autopsy; this expert opinion reveals that death of Mohitesh occurred on 15.10.2015 between 6:25 a.m. to 12:25 p.m.

4. PW-12 Milind Kulkarni is the flat owner where the Appellant resided; he has aided the I.O. in recovery of 4 articles belonging to Mohitesh from the said flat. PW-15 is the Forensic Expert

examined by prosecution to prove CCTV footages. PW-16 – Sanjaykumar Prajapati, Scientific Officer is examined by prosecution to establish presence of Appellant in CCTV footages on 14.10.2015 near Ashok Stambh and on 15.10.2015 near Kannamwar Bridge while on his return from the spot of incident. The identity of Appellant has been established in CCTV footage photograph of 15.10.2015 by PW-16. PW-17 – Nagesh Mohite is the I.O. and he has deposed to prove the chain of circumstances.

5. The chain of circumstances relied upon by the prosecution is based upon the following:

- (i) Last seen together theory;
- (ii) Identification of Appellant in CCTV footage while returning from incident spot on 15.10.2015;
- (iii) Recovery and seizure of clothes worn by Appellant and juvenile accused from the place near Nasardi *Nallah* at the instance of juvenile accused;
- (iv) Chemical report of blood stained clothes showing human blood;
- (v) Seizure of articles belonging to deceased from Appellant's residential premises (flat).

On the basis of aforesaid chain of circumstances, it is the prosecution case that alongwith juvenile accused who committed the offence the chain of circumstance is proven beyond all reasonable

doubts.

6. We have heard learned counsel for Appellant and learned APP for Respondent - State and perused the entire evidence on record.

7. Mr. Vagal, learned Advocate appearing for Appellant has taken us through the deposition of prosecution witnesses and contended that there is material discrepancy in the entire prosecution case, as the evidence given by witnesses cast doubt on collection of such evidence. He submitted that prosecution has failed to examine any witness on the issue of spot panchanama and nothing incriminating has been found from the incident spot to implicate or raise suspicion against Appellant; that it has not been established that the extortion and ransom calls received by PW-1 from the mobile phone of deceased Mohitesh were made by Appellant; that on 15.10.2015 Appellant himself along with his other friends was frantically searching for missing Mohitesh; that nothing incriminating has been proven in the deposition of PW-15 and PW-16 to implicate presence of Appellant near the incident spot and prove nexus of Appellant to the alleged crime; that recovery of personal articles of deceased Mohitesh from the residential flat of Appellant on 22.10.2015 i.e. 7 days after the incident shows that possibility of planting the said articles during this period, which cannot be ruled out; that if at all Appellant was involved in commission of offence,

Appellant would have attempted to dispose of the personal articles of Mohitesh or would have absconded, but Appellant did not choose to do so, therefore theory of framing the Appellant cannot be ruled out; that there is no cogent evidence of any eye witness having pointed out complicity of Appellant in the crime and the entire case is based on circumstantial evidence which are not proven; that possibility of vehicular accident cannot be ruled out in the present case as Mohitesh's dead body was found in a *Nallah* adjacent to Tryambakeshwar – Javhar road. Hence, he has prayed for setting aside the impugned Judgment passed by the learned Sessions Court, Nashik.

8. ***PER CONTRA***, Mr. Hulke, learned APP has submitted that prosecution has proved its case beyond reasonable doubt on the basis of circumstantial evidence wherein each of the circumstances are proved with cogent and material evidence. He submitted that deposition of PW-2 and PW-4 has proven the “last seen together” theory; their deposition has gone unchallenged and cannot be discarded; that prosecution has duly proved in evidence the CDR for ransom call received by PW-1 (father of deceased), he submitted that recovery and seizure of incriminating articles belonging to deceased from the residential premises of Appellant is an important circumstance connected with the crime so as to prove the indictment

of Appellant; that the entire chain of circumstance stands proved beyond reasonable doubt and therefore the present Appeal be dismissed.

9. We have heard the learned Advocates, perused the evidence and deposition of witnesses and seen the exhibits referred to and relied upon by the parties.

9.1. It is seen that deposition of PW-2 and PW-4 read together hints towards the “last seen together” theory. PW-2 has deposed that on 14.10.2015 at about 9:15 p.m. he met Mohitesh near Gole Colony and asked him to accompany him for a friend’s birthday party; thereupon Mohitesh told PW-2 that he planned to go to the home of the juvenile accused Saurabh for dinner. In this context, deposition of PW-4 assumes significance. PW-4 is the maternal cousin brother of Mohitesh, he met him on 14.10.2015 between 9:30 p.m. and 10:00 p.m. at M. G. Road. At that time Mohitesh was in the company of Appellant and the juvenile accused; Mohitesh informed PW-4 that they were proceeding for dinner to the home of juvenile accused Saurabh at Bhabha Nagar; PW-4 saw the three of them proceeding on bullet motorcycle which has been seized by the prosecution. This evidence shows that until 10:00 p.m. on 14.10.2015 deceased was alive and in the company of juvenile accused Saurabh. Another important circumstance is the fact that deceased had informed him that he was

going to the house of juvenile accused for dinner. Deposition of PW-4 having last seen the deceased together with Appellant and juvenile accused has gone completely unchallenged and in his cross-examination nothing has been brought on record to shake his credibility. Deposition of PW-4 on the “last seen together” theory therefore stands proved.

10. The next important circumstance proved by prosecution is of identification of Appellant and juvenile accused on the basis of the photographs extracted from the CCTV footages. It was entirely upto Appellant to give the explanation and explain his alibi between 10:00 p.m. and 6:00 a.m. in the morning on the intervening night between 14.10.2015 and 15.10.2015. Perusal of statement of Appellant under Section 313 of the Criminal Procedure Code, 1973 shows that no explanation whatsoever has been given by him nor there is denial on his part to admit that the person wearing the identified T-shirt and riding the motorcycle was not he himself but some other person. It appears from record that the Appellant has not at all seriously challenged the CCTV footage, rather has admitted it and this circumstance therefore stands proven. Admittedly, CCTV footage is not the sole circumstance to indict the Appellant but it raises grave suspicion against him and is an important link in the chain of circumstances.

11. The next important circumstance is recovery of bloodstained clothes of Appellant and the juvenile accused and the incriminating articles belonging to Mohitesh from the residential premises of Appellant. This recovery at the instance of the Appellant and juvenile accused and the memorandum panchanama and recovery panchanama marked as Exhs. 40, 42 and 43 is an incriminating piece of evidence which links the Appellant to the commission of crime; seizure of personal articles of Mohitesh from the residential premises of Appellant confirms involvement of Appellant in the crime. Appellant has not brought any positive evidence in this regard that the unexplained recovery of articles belong to Mohitesh and this therefore is an important circumstance against Appellant. It is pertinent to note that in the present case CCTV footages have undisputedly proved use of the bullet motorcycle by Appellant at three different places on 15.10.2015; the CDR and the SDR of the ransom phone call received by PW-1 proves and connects the presence of Appellant through the location tower near Laxmi Narayan Ghat i.e. the place from where the extortion call was made.

12. Another important circumstance is recovery of the cloth bag containing blood stained clothes of Appellant and juvenile accused from Nasardi *Nallah* at the instance of juvenile accused. The said *Nallah* is just behind the building of the juvenile accused and as per

prosecution, the juvenile accused had thrown their clothes in a bag in the Nallah. This piece of evidence is incriminating as there is no denial of the fact that these clothes belong to Appellant. The Chemical Analyzers Report marked in evidence as Exh. 95 clearly proves that the blood from the bloodstained clothes of Appellant and juvenile found and seized clearly matches the DNA profile of the blood group of Mohitesh. By leading scientific evidence beyond reasonable doubt, prosecution has proved that recovery and seizure of clothes of Appellant and juvenile accused had blood stains of the blood of deceased.

13. Another argument of Appellant pertained to identification of the body of deceased. It was argued on behalf of Appellant that recovery of dead body was of an unknown person and not of deceased Mohitesh. However PW-1 father of Mohitesh has identified the dead body of Mohitesh in Civil Hospital, Nashik.

14. In the case *G. Parshwanath Vs. State Of Karnataka*¹, in paragraph No.11, while enunciating the law relating to appreciation of evidence in a case based on circumstantial evidence, the Supreme Court has held 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

¹ (2010) 8 SCC 593

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 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 fact, 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."

15. In the case ***Sharad Birdhichand Sarda Vs. State of Maharashtra²***, in paragraph Nos.153 to 158, while enunciating the law relating to appreciation of evidence in a case based on circumstantial evidence, the Supreme Court has held as under:-

“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 Cri LJ 1783*** where the following observations were made:*

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.

154. 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

2 AIR 1984 SC 1622 :: (1984) 4 SCC 116

more Judges) in *The 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.

158.decision of this Court in *Deonandan Mishra v. State of Bihar* 1955 Cri LJ 1647, to supplement his argument that if the defence case is false it would constitute an additional link so as to fortify the prosecution case. With due respect to the learned Additional Solicitor-General we are unable to agree with the interpretation given by him of the aforesaid case, the relevant portion of which may be extracted thus:

But in a case like this where the various links as stated above have been satisfactorily made out and the circumstances point to the appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation... such absence of explanation or false explanation would itself be an additional link which completes the chain.”

16. In case of ***Hanumant and Ors. Vs. State of Madhya Pradesh***³, in paragraph Nos.11 and 12, the Apex Court while dealing with circumstantial evidence has given certain guidelines and rules applicable to such evidence and held as under:-

*“11. In dealing with circumstantial evidence the rules specially applicable to such evidence must be borne in mind. In such cases there is always the danger that conjecture or suspicion may take the place of legal proof and therefore it is right to recall the warning addressed by Baron Alderson, to the jury in *Reg v. Hodge* ((1838) 2 Lew. 227), where he said :-*

3 AIR 1952 SC 343 :: (1952) 1 SCR 1091

"The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."

12. *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."*

17. In the case ***Surajdeo Mahto Vs. The State of Bihar***⁴, paragraph Nos.29 and 30 the Apex Court while enunciating the "last seen theory" has propounded its principle and 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 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

4 AIR 2021 SC 2643

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.”

18. The Supreme Court in the case of ***Shankarlal Gyarsilal Dixit vs. State of Maharashtra***⁵ has laid down the fundamental principles to be kept in mind while adjudicating a criminal case founded on circumstantial evidence. Paragraphs 31 and 32 of aforementioned decision are relevant and read thus:

“31. It causes us some surprise that the learned Additional Sessions Judge, Akola, who tried the case, has not shown any awareness of the fundamental principle which governs cases dependent solely on circumstantial evidence. Nowhere in his judgment has the learned Judge alluded, directly or indirectly, to the principle that in a case of circumstantial evidence, the circumstances on which the prosecution relies must be consistent with the sole hypothesis of the guilt of the accused. It is not to be expected that in every case depending on circumstantial evidence, the whole of the law governing cases of circumstantial evidence should be set out in the judgment. Legal principles are not magic incantations and their importance lies more in their application to a given set of facts than in their recital in the judgment. The simple expectation is that the judgment must

5 1981 AIR 765 : 1981 (2) SCC 35

show that the finding of guilt, if any, has been reached after a proper and careful evaluation of circumstances in order to determine whether they are compatible with any other reasonable hypothesis.

32. The High Court, it must be said, has referred to the recent decisions of this Court in *Mahmood v. State of U.P.* [(1976) 1 SCC 542 : 1976 SCC (Cri) 72 : AIR 1976 SC 69] and *Chandmal v. State of Rajasthan* [(1976) 1 SCC 621 : 1976 SCC (Cri) 120 : AIR 1976 SC 917] in which the rule governing cases of circumstantial evidence is reiterated. But, while formulating its own view the High Court, with respect, fell into an error in stating the true legal position by saying that what the court has to consider is whether the cumulative effect of the circumstances establishes the guilt of the accused beyond the “shadow of doubt”. In the first place, “shadow of doubt”, even in cases which depend on direct evidence is shadow of “reasonable” doubt. Secondly, in its practical application, the test which requires the exclusion of other alternative hypotheses is far more rigorous than the test of proof beyond reasonable doubt.”

[emphasis supplied]

19. The prosecution has thus undoubtedly established that the deceased was last seen alive in the company of Appellant. Depositions of PW-2 and PW-4 clearly prove that Mohitesh was constantly in the company of Appellant Kaushal @ Aakash Prabhu and JCL - Saurabh Chaudhari before the incident. The proximity of time is very short as seen from the last seen account and the time of death opined by the post-mortem report. PW-2 and PW-4 are the persons who had last seen the deceased alive on 14.10.2015 at around 9:30 p.m. and they have categorically deposed that they had seen the deceased in the company of Appellant and the JCL. Through the depositions of PW-1, it is proved that Mohitesh had called him around 11:00 p.m. on 14.10.2015 and informed him that he was in the company of Appellant and JCL. Thereafter deceased was found dead. From these

depositions the “last seen together” theory stands proven and no other person other than Appellant and JCL can be the authors of crime in the present case. The last seen together theory is therefore completely established in the present case.

20. The medical evidence and recovery evidence as discussed hereinabove clearly prove and corroborate the evidence of prosecution witnesses. Recovery of incriminating articles belonging to Mohitesh from the residential premises of Appellant is a strong incriminating circumstance against Appellant. Memorandum and Recovery (Exh. 40 and Exh. 42) along with deposition of PW-6, the recovery pancha witness, duly prove the same. Thus unexplained recovery of articles belonging to Mohitesh is certainly an important circumstance against Appellant. Scientific evidence relied upon by prosecution extracted through CCTV footages by FSL, Gandhinagar, Gujrat by using Visual Enhancement System through and deposition by two expert witnesses, viz; PW-15 and PW-16 both working as Scientific Officers with Directorate of Forensic Science, Gandhinagar and FSL, Gandhinagar prove beyond reasonable doubt the presence of Appellant at three different places on 15.10.2015. Nexus between the seized motorcycle and use thereof by Appellant therefore stands established by prosecution. That apart, examination of blood stains found on the seized clothes of Appellant (Exh. 95) have been proved to be the blood

of Mohitesh and DNA profiling has been matched in this regard.

21. In view of the aforesaid discussions and findings, prosecution has proved the indictment of Appellant beyond reasonable doubt on the basis of circumstantial evidence as discussed.

22. Criminal Appeal No. 1623 of 2019 stands dismissed. Interim Application No. 1494 of 2022 is accordingly dismissed.

[MILIND N. JADHAV, J.]

[A.S. GADKARI, J.]

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