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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 872 OF 2015

Shivdatta @ Biltu Subhodchandra Sah

Age 29 years,

Residing At Sant Dnyaneshwar Nagar,
Galli No.46, Galli Near Vidhi Gold Shop,
Bandra (E), Mumbai – 400 051.

(At present in Taloja Central Jail)

.. Appellant

Versus

The State of Maharashtra

(At the instance of Kherwadi Police
Station vide C.R. No.179 of 2013)

.. Respondent

Mr. Mandar Soman, Appointed Advocate for Appellant.

Mr. H.J. Dedhia, APP for Respondent – State.

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

RESERVED ON : 14th September 2022.

PRONOUNCED ON : 21st October 2022.

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

. This Appeal questions the legality of Judgment and Order dated 04/08.04.2015 passed by the learned Additional Sessions Judge, Greater Bombay in Sessions Case No.968 of 2013 convicting Appellant under:

- (i) Section 302 of the Indian Penal Code, 1860 (for short “IPC”) and sentencing him to suffer rigorous imprisonment for life and pay fine of Rs.1,500/-, and in default, to suffer further rigorous imprisonment for 3 months;

- (ii) Section 449 IPC and sentencing him to suffer rigorous imprisonment for 5 years and to pay fine of Rs.500/-, and in default, to suffer further rigorous imprisonment for 1 month;
- (iii) Section 392 read with 397 IPC and sentencing him to suffer rigorous imprisonment for 8 years and pay fine of Rs.1,000/-, and in default, to suffer further rigorous imprisonment for 2 months;
- (iv) Section 436 IPC and sentencing him to suffer rigorous imprisonment for 10 years and pay fine of Rs.2,000/-, and in default, to suffer further rigorous imprisonment for 4 months; and
- (v) Section 201 IPC and sentencing him to suffer rigorous imprisonment for 7 years and pay fine of Rs.2,000/-, and in default, to suffer further rigorous imprisonment for 5 months; all sentences to run concurrently.

2. Appellant Shivdatta @ Biltu has been convicted for committing murder of victim Bharat Panjiyara (for short “**Bharat**”) on 15.07.2013 i.e. the date of incident.

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

3.1. Bharat and his brother PW-1 - Shrikant both resided in

rented room belonging to PW-2 - Ajay Saha (first informant) at Dnyaneshwar Galli, Bandra (East), Mumbai. The room was situated on the first floor and the ground floor was occupied by PW-2 and his family. Bharat carried on business of preparing and sale of burgers and pav (bread). He alongwith PW-3 – Kalu Modi and other residents of the vicinity were members of a Bhishi Scheme (private collection and circulation of money scheme among members). PW-3 was the head of the Bhishi. Appellant and Bharat were original residents of Jharkhand.

3.2. According to prosecution on 15.06.2013 the Bhishi came to an end upon which Bharat was to receive a lumpsum amount of Rs.51,000/- from PW-3. He received the amount on 09.07.2013.

3.3. Incident occurred during the intervening night of 14th & 15th July, 2013. Shrikant was at his native place at that time. One Bahadur Singh supplied bread to Bharat at his room as also to PW-2 for their business. On 13.07.2013, from 12:00 midnight to 7:00 a.m. (14.07.2013) Appellant was at the house of PW-2 preparing sandwiches for him. Thereafter he left. On 14.07.2013, at about 10:00 p.m. Bahadur Singh supplied bread to Bharat at his room. Thereafter on 14.07.2013, PW-2 met Bharat alive for the last time at around 10:30 p.m. and thereafter he went to sleep. On the following morning when Bahadur Singh came to deliver bread between 6:30

and 7:00 a.m. to Bharat, he noticed smoke coming out of his room. Bahadur Singh immediately informed PW-2. They both rushed inside the room and saw Bharat's clothes had caught fire. They saw that Bharat's throat was slit and blood was oozing out from the injury and one knife was lying next to him. PW-2 immediately informed Kherwadi Police Station about the incident. First Information Report (for short "**FIR**") (Exh.18) was lodged on the basis of the complaint by PW-2. Crime No.179 of 2013 was registered alongwith ADR and criminal law was set into motion.

3.4. PW-9 - PSI Kamble prepared the Inquest cum crime scene panchanama (Spot panchanama) i.e. Exh.22 in the presence of pancha witness PW-5 – Nitin Wagale and seized incriminating material i.e. half burnt baniyan and underwear of Bharat, half burnt Fanta bottle, one liter can of Dhara groundnut oil, one steel knife with wooden handle (weapon – Article -6) and two mobile phones from the scene of crime. Dead body of Bharat was sent to Sion Hospital for autopsy. Further investigation was carried out by PW-13 - PI Sanjay Gaikwad (Investigating Officer – IO). He arrested Appellant from his residence (room) under arrest panchanama (Exh.23) on 20.07.2013. On his personal search Appellant led the IO to Sulabh Sauchalaya, bathroom No.11 in the vicinity of his residence where Rs.10,300/- in cash, one receipt of Rs.3,000/- of a garment store and one bag containing

Rs.35,000/- in cash alongwith one wallet containing PAN card, Identity card, Railway pass with Identity card of Bharat was recovered and seized (Exh.28) from the cavity of the bathroom ceiling and rafter of pipes. Thereafter Appellant led IO to a readymade garment shop by the name Silver Plus Garments at Borivali (East) from where he had purchased three jeans and six shirts for Rs.3,000/- and PW-10 - Suresh Purohit (salesman) identified Appellant as the purchaser. Thereafter Appellant led IO to the bag shop of PW-11 – Sanjay Borana at Borivali (East) from where he had purchased the sack (bag) (Article-16) for Rs.200/- and PW-11 identified Appellant. On 24.07.2013, at the instance of Appellant and in the presence of pancha witness PW-8 recovery and seizure (Exh.29) of one rexin bag containing cash amount of Rs.20,000/-, one sky blue colour shirt, blue colour jeans was made from the house of one Smt. Gupta (friend of Appellant). Thus the total cash recovered from the Appellant was Rs.65,300/-. The cash amount of Rs.35,000/- was in the denomination of Rs.1,000/- and Rs.500/-.

4. According to prosecution's case, Appellant committed house trespass of Bharat's room, committed his murder by slitting his throat with the weapon (knife) and committed robbery of the cash amount of Rs.65,300/-. PW-13 sent the seized articles to the Chemical Analyzer for forensic analysis on 22.07.2013 (Exh.43). On 26.07.2013

(Exh.44) he collected the CA reports (Exhibits 9 to 13) about chemical analysis of the articles wherein the T-shirt and trouser of the Appellant was found to have human blood stains.

5. After completing investigation, chargesheet against Appellant was filed in the Court of Metropolitan Magistrate, Bandra, on 23.10.2013. Since offence under Section 302 IPC is exclusively triable by the Court of Sessions, the Metropolitan Magistrate committed the case to the Sessions Court for trial. On 03.12.2013, Charge (Exh.3) was framed against Appellant under Section 302 IPC. Its contents were read over and explained to him in vernacular to which he pleaded not guilty and claimed to be tried; his defence was of total denial. Appellant denied about seizure of any cash amount of Rs.10,300/- on his person and Rs.35,000/- from the sack (bag) alongwith other articles. He further denied taking the IO to the house of Smt. Gupta where recovery of Rs.20,000/- in cash and his blood stained clothes was made. He denied having led the police to the Sulabh Sauchalaya where the wallet and other articles belonging to Bharat were recovered. In support of his defence, Appellant filed written statement (Exh.47) contending that on the intervening night of 13.07.2013 and 14.07.2013 between 12:00 midnight and 7:00 a.m. he had visited the house of PW-2 who was his maternal uncle, prepared sandwiches, earned Rs.100/- and thereafter left.

6. Mr. Mandar Soman, learned Advocate appearing for Appellant, has vehemently argued that prosecution has failed to prove its case beyond all reasonable doubts, and there are discrepancies and inconsistencies in the prosecution case. That the chain of circumstances is not complete and the learned Trial Court has wrongly convicted the Appellant for the crime. He has argued that deposition of PW-2 is vague, incomplete and there is inconsistency in his deposition which the Trial Court has failed to consider. That there are no incriminating circumstances that prove the case of prosecution beyond all reasonable doubts against Appellant. That PW-11 has categorically deposed in favor of prosecution only because police had informed him that Appellant had bought the articles from his shop and it was difficult for him to even identify the Appellant. Hence, he has prayed for setting aside the conviction Judgment passed by the Trial Court.

7. ***PER CONTRA***, Mr. H. J. Dhedia, learned APP appearing for State in his reply has drawn our attention to the deposition of PW-1 who is the brother of Bharat. He has deposed that when he reached the spot of incident he found that the Bhishi amount of Rs.51,000/- were missing. Hence, there was a strong motive put forth and proved by prosecution in the present case. Therefore Appellant has been rightly convicted for the offence. He has therefore prayed for dismissal

of the Appeal.

8. We have heard both the learned Advocates appearing for the respective parties and with their able assistance perused the entire record of the case.

9. To bring home the guilt of Appellant and to substantiate the case of prosecution, 13 witnesses were examined.

9.1. PW-12 - Dr. Shashikant V. Dhoble, is the Medical Officer who conducted autopsy of deceased Bharat and found following injuries on his body:-

- (1) *Cut throat injury 15 cm x 10 x 8cm anterior aspect of neck at the level above thyroid cartilage with clean cut edges of wound, reddish on dissection, following structures of the neck were clean cut, sub cutaneous tissues, trachea laryens, right and left jugular vein, right and left internal carotide arteries, muscles of neck of both the sides.*
- (2) *Cut throat injuries of 10 x 8 x 6 cm deep over anterior aspect of left side of neck with clean cut edges of wound, reddish.*
- (3) *Cut throat injury of 11 x 8 x 7 cm deep over anterior aspect of right side of neck, with clean cut edges of wound, reddish.*
- (4) *Insize wound of 3 x 0.1 x 0.1cm deep over anterior aspect of upper 1/3rd of left arm with clean cut edges of wound, reddish.*
- (5) *Insize wound of 10 x 0.1 x 0.1 cm deep over anterior aspect of upper 1/3rd left arm with clean cut edges of wound, and 3 cm below, above mentioned injury no. 4, reddish.*
- (6) *Insize wound of 5 x 1 x 0.3 cm deep over anterior aspect of lower 1/3rd of left arm with clean cut edges of wound, reddish.*
- (7) *Insize wound of 3.5 x 2 x 0.5 cm deep over dorsal aspect of 2 cm above base of left thumb with clean cut edges of wound, reddish.*

- (8) *Insize wound of 3 x 2 x 0.4 cm deep over dorsal aspect of 1 cm below base of left thumb with clean cut edges of wound, reddish.*
- (9) *Post-mortem burn injuries present over body as follows:*
 - (a) *Abdomen 3 %*
 - (b) *Right upper Limb 4%*
 - (c) *Right Lower Limb 4%*
 - (d) *Left Lower Limb 5%*
 - (d) *Genitals 1%*

The above burn injuries do not show signs of redness and interrupters were present at right thigh areas.

Brain: Brian matter shows thin filn of sub arachnoid hemorrhage all over on cut sections which were pale.”

9.2. PW-12 opined that the cause of death was hemorrhagic shock followed by cut throat injuries and it was unnatural. PM notes are proved by PW-12 evidence (Exh.40).

10. PW-2 – Ajay Saha deposed that on 14.07.2013 he had last seen Bharat alive at around 10:30 p.m. That on 15.07.2013 in the morning at around 06:30 a.m., when Bahadur Singh alarmed him about the incident when he went to Bharat’s room to deliver bread, they both entered the room and saw him lying in a pool of blood with his throat slit. In his cross examination, he has stated that on 14.07.2013, Appellant and one Sapan were working in his house preparing sandwiches early in the morning and left at about 7:00 a.m.

11. PW-3 – Kalu Modi deposed that the Bhishi which he was conducting had 18 members including Bharat. That it came to an end on 15.02.2013 upon which Rs.51,000/- was paid to Bharat on

09.07.2013. PW-4 – Amitkumar V. Panjiyara, neighbour of Appellant noticed that Appellant was residing with PW-6 - Sameer Mandal in his room which belonged to Smt. Gupta (landlady). He inquired with Appellant about his new clothes and the new bag. Appellant replied that he had won a lottery and from the proceeds he had purchased new clothes and bag. PW-6 has deposed that Appellant had met him at noon on 13.07.2013 and thereafter on 15.07.2013 at his house alongwith the new bag. That he learnt on 20.07.2013 after Appellant was arrested that he had committed murder of Bharat. PW-7 and PW-8 are pancha witnesses to recovery and seizure of articles from Appellant. No defence witness has been examined by the Appellant, save and except Appellant having filed his written arguments before the Trial Court.

12. Prosecution's case is entirely based on the circumstantial evidence. According to prosecution, the incident occurred during the intervening night of 14 & 15.07.2013. The weapon (knife) was found lying next to the dead body of Bharat which was seized under panchanama (Exh.22). It is alleged that, it was used to commit murder of Bharat. According to prosecution, medial evidence supports and corroborates the chain of circumstances. PM report has opined that Bharat's death took place due to hemorrhagic shock followed by cut throat injury and it was homicidal.

13. According to prosecution, since Bharat had successfully completed the tenure of Bhishi in June 2013 and received the Bhishi amount of Rs.51,500/- from PW-3, Appellant to commit robbery of the said amount, murdered Bharat. Hence, according to prosecution Appellant had motive to rob Bharat and committed his murder. However, it is pertinent to note that the total Bhishi amount which Bharat received from PW-3 was Rs.51,500/- whereas prosecution recovered and seized an amount Rs.61,500/- in the present case. It is pertinent to note the Appellant however has denied that these amounts were recovered by prosecution either from his person or at his instance. In this respect evidence of the prosecution pancha witnesses become extremely relevant. PW-8 has deposed that when he was led to the Sulabh Sauchalaya at that time he was standing outside the said Sulabh Sauchalaya and 5 to 10 persons were present whereas the police officers investigating the crime went inside the Sulabh Sauchalaya and from bathroom No.11 recovered and seized various documents. PW-8 has further stated that when the recovery of the bag was made from Smt. Gupta's home, except her no other person was present in the room. Smt. Gupta is not examined by prosecution to believe and support its case of recovery against Appellant. It is clearly seen that the amount of Bhishi which was received by Bharat and the total amount recovered from Appellant do not tally and there is a complete mismatch. It is the prosecution case

that Appellant had spent certain monies in buying new clothes and bag. If the spent money is added to the amount/money recovered from the Appellant, then the Appellant was having an amount in excess of Rs.68,300/- or more with him. In view of the complete mismatch of the amount of Bhishi which was received by Bharat on 09.07.2013 i.e. almost 5 days prior to the date of incident and the recovered amount. It cannot be therefore stated that, the prosecution has been successful in proving the theory of motive on the basis of the aforesaid evidence.

14. Before we advert to our findings it would be apposite to reiterate the settled law on circumstantial evidence. The Supreme Court in paragraph Nos.5 and 6 in the case of ***Sanwat Khan and Ors. vs. State of Rajasthan***¹ has held as under:-

“5. The unexplained possession of stolen property is the only circumstance appearing in the evidence against the accused charged with murder and theft, and they could not be convicted of murder unless their possession of the property could not be explained on any other hypothesis except that of murder.

In the absence of any evidence whatsoever of the circumstances in which the murders or the robbery took place, it could easily be envisaged that the accused at some time or other seeing the Mahant and Ganpatia murdered, removed the articles produced by them from the temple or received them from the person or persons who had committed the murder.

The prosecution led evidence to prove that Mangu Khan, the father of these two persons, was planning to murder the Mahant since a long time. Madari, P.W. 7, who is an ex-convict, deposed that he was also being approached to join in the conspiracy to murder the Mahant. It is not improbable that any of these two or somebody else might have murdered the Mahant and some of the stolen property came into the possession of

1 AIR 1956 SC 54

these two brothers.

Be that as it may, in the absence of any direct or circumstantial evidence whatsoever, from the solitary circumstance of the unexplained recovery of the two articles from the houses of the two appellants the only inference that can be raised in view of illustration A to Section 114 of the Evidence Act is that they are either receivers of stolen property or were the persons who committed the theft, but it does not necessarily indicate that the theft and the murders took place at one and the same time.

The accused produced these articles about a fortnight after the theft and the maximum that can be said against them is that they, received these goods knowing them to be stolen or that they themselves stole them; but in the absence of any other evidence, it is not possible to hold that they are guilty of murder as well.

6. The learned counsel for the State in support of the view taken by the High Court, placed reliance on a decision of the Madras High Court in -- '**Queen-Empress v. Sami**', 13 Mad 426. The head-note of the report says that:

"recent and unexplained possession of stolen property which would be presumptive evidence against the prisoners on the charge of robbery would similarly be evidence against them on the charge of murder".

This head-note, however, does not accurately represent the decision given by the learned Judges. In the particular circumstances of that case it was observed that in cases in which murder and robbery are shown to form parts of one transaction, recent and unexplained possession of the stolen property while it would be presumptive evidence again a prisoner on the charge of robbery would similarly be evidence against him on the charge of murder.

Here, there is no evidence, direct or circumstantial, that the robbery and murder formed parts of one transaction. It is not even known at what time of the night these events took place. It was only late next morning that it was discovered that the Mahant and Ganpatia had been murdered and looted. In our judgment, Beaumont, C. J., and Sen J. in -- '**Bhikha Gobar v. Emperor**', AIR 1943 Bom 458 rightly held that the mere fact that an accused produced shortly after the murder ornaments which were on the murdered person is not enough to justify the inference that the accused must have committed the murder.

There must be some further material to connect the accused with the murder in order to hold him guilty of that offence. Our attention was drawn to a number of decisions which have been summed up in a Bench decision of the Allahabad High Court in -- '**State v. Shankar Prasad**',

AIR1952All776 , in some of which a presumption was drawn of guilt from the circumstance of possession of stolen articles soon after a murder. We have examined these cases and it appears to us that each one of these decisions was given on the evidence and circumstances established in that, particular case, and no general proposition of law can be deduced from them.

In our judgment no hard and fast rule can be laid down as to what inference should be drawn from a certain circumstance. Where, however, the only evidence against an accused person is the recovery of stolen property and although the circumstances may indicate that the theft and the murder must have been committed at the same time, it is not safe to draw the inference that the person in possession of the stolen property was the murderer. Suspicion cannot take the place of proof.”

14.1. The Supreme Court has held that even if the stolen property is recovered from the possession of the accused, it does not mean that he had also committed the murder and that the accused himself is the same person who has committed both the crimes. In the present case it is alleged that Appellant has stolen the amount of Bhishi money from Bharat's room and killed him for that reason. To substantiate its case for theft the prosecution has relied on seizure panchanama Exh.28 and 29.

15. However it is seen that admittedly the evidence given by the prosecution witness regarding the Bhishi amount does not match and is incoherent to the evidence pertaining to recovery and seizure of Rs.65,300/-. It is further seen that the prosecution has not proved the fact that the currency notes to the extent of Rs.65,300/- recovered are the same currency notes which allegedly went missing from Bharat. Admittedly there is no oral evidence about the denomination of the

cash amount which was possessed by Bharat and more importantly the denomination of the cash amount totaling to Rs.65,300/- which was seized from the Appellant subsequently. In the absence of material evidence it cannot be assumed that due to extreme poverty the Appellant was compelled to commit the crime and stole the money from Bharat when there is an apparent mismatch of the alleged money possessed by Bharat (proceedings of Bhishi) and the monies recovered from Appellant. This is a very strong circumstance which is not proved by prosecution. It is further seen that there is no evidence of any witness whatsoever of having seen the Appellant either in the company of Bharat or having committed house trespass of Bharat's room. Hence, if it is the case that Appellant committed the crime on the basis of circumstantial evidence, then all such circumstances should be strong enough so as to eliminate any improbability whatsoever.

16. It is further seen that conviction of Appellant is entirely based on the testimony of PW-8, the memorandum pancha who has witnessed the seizure of the wallet and Identity card alongwith jeans, trouser and black bag containing of Rs.20,000/- belonging to the Appellant from the Sulabh Sauchalaya. On reading of the PW-8's deposition it is seen that the theory of planting the material in the public toilet from where the seizure recovery was made cannot be

ruled out. It was the duty of the prosecution to record the statements of the persons present in the public toilet at the time when the police officers visited the same for the purpose of recovery at the behest of Appellant. Prosecution has not examined any such person / witnesses who were present there to identify the place of concealment of the articles in the public toilet. Even PW-8, the memorandum pancha himself states that when he was led by the police officers to the public toilet he stood outside the public toilet and the police officers went inside and brought the incriminating material which is noted in the memorandum pancha. The said witness therefore does not inspire confidence of this Court. Hence, the recovery is doubtful and cannot be accepted. It also does not help in establishing the chain of circumstances as having been proved beyond all reasonable doubts.

17. In the case of ***Hanumant and Ors. Vs. State of Madhya Pradesh²***, 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 :-

"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

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

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."*

18. The Supreme Court in the case of ***Shankarlal Gyarasilal Dixit vs. State of Maharashtra***³ 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 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.*

3 1981 AIR 765 : 1981 (2) SCC 35

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. In the case ***Sharad Birdhichand Sarda Vs. State of Maharashtra***⁴, 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 AIR 1984 SC 1622 :: (1984) 4 SCC 116

(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 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."

20. In the case *G. Parshwanath Vs. State Of Karnataka*⁵, in

⁵ (2010) 8 SCC 593

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 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.”

21. In the case ***Surajdeo Mahto Vs. The State of Bihar***⁶, 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 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.”

22. In view of the above settled law and in the peculiar facts and circumstances of the present case discussed above, we are of the opinion that, prosecution has completely failed to establish the circumstances to prove that Appellant is the author of the crime. Prosecution has failed to prove the charges against the Appellant beyond all reasonable doubts and thus Appellant deserves the benefit of doubt.

23. Hence the following order:-

- (i) Criminal Appeal is allowed;
- (ii) Judgment & Order dated 4th & 8th April 2015 passed by the learned Additional Sessions Judge, Greater Bombay in Sessions Case No. 968 of 2013 is hereby quashed and set aside;
- (iii) The Appellant stands acquitted of the offence punishable under Sections 302, 449, 392 r/w 397, 436 and 201 of IPC;

- (iv) The Appellant be released forthwith from prison, if not required in any other case/cases. Fine if any, paid by Appellant shall be returned to Appellant.

24. Before parting with the Judgment, we would like to place on record appreciation for the efforts put in by Mr. Mandar Soman, learned Advocate appointed by the 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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