

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

%

Reserved on : 17th October, 2022
Pronounced on: 31st October, 2022

+ **CRL.A. 455/2020**

SH YASHU

..... Appellant

Represented by: Mr. Pardeep Khatri, Mr. Nasir Ahmed, Ms. Mehreen Kanwal, Advocates.

versus

THE STATE

..... Respondent

Represented by: Mr. Prithu Garg, APP for the State with SI Harender Singh, P.S. Nangloi.

+ **CRL.A. 439/2020**

VINEET@KALA

..... Appellant

Represented by: Mr. Neeraj Kumar, Advocate.

versus

THE STATE OF DELHI

..... Respondent

Represented by: Mr. Prithu Garg, APP for the State with SI Harender Singh, P.S. Nangloi.

+ **CRL.A. 498/2020**

CRL.M.B. 1318/2021

SUNIL KUMAR

..... Appellant

Represented by: Mr. Pramod Kumar Dubey, Senior Advocate with Ms. Aanchal Budhreja, Dr. Alok, Mr. Kaustubh Chauhan, Mr. Siddharth Narang, and Mr. Prince Kumar, Advocate.

versus

THE STATE NCT OF DELHI

..... Respondent

Represented by: Mr. Prithu Garg, APP for the
State with SI Harender Singh,
P.S. Nangloi.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MR. JUSTICE ANISH DAYAL

JUDGMENT

ANISH DAYAL, J.

1. These appeals have been filed assailing the impugned judgment dated 30th July, 2020 passed by the learned Trial Court convicting the appellants for offence punishable under Section 302/120B IPC and additionally convicting appellant Yashu for offence punishable under Section 25 of Arms Act. The appellant Sunil was acquitted of the offence punishable under Section 25 of the Arms Act. The appeals also assail order on sentence dated 11th August, 2020 sentencing the appellants to life imprisonment for offence punishable under Section 302/120B IPC and fine of Rs. 20,000/- (SI for one year in default of payment of fine) and appellant Yashu to three years for offence punishable under Section 25 Arms Act and fine of Rs. 10,000/- (SI of six months in default of payment of fine).

The Incident

2. As per the case of the prosecution, the deceased girl Nitika, aged about 21 years, student of B.A. final year, stepped out of her home Mundka for her college in Bawana at about 9:00 a.m. As per her father PW-3 Vijender Singh, when he went to close the door of the

house, he saw that appellant Yashu and Sunil were standing in front of *parchun* (grocery) shop of Sunil. In the meantime, Vineet also came in a white Swift car bearing no. 3335 and all three were talking with each other when PW-3 went inside the house. Since, his daughter Nitika did not return by 3-4:00 p.m. from her college, he became worried, and started searching for her but could not trace her. His brother PW-14 Kuldeep Singh got a missing report lodged in Bawana Police Station. At about 2:30 p.m. on 15th September, 2009, PW-3 received a telephone call on his mobile no. 9810535131, and an unknown caller informed him that appellant Yashu Son of Rajbir had shot his daughter and further informed that the body has been disposed of accordingly. Upon asking the caller about his identity, he initially refused to disclose but on PW-3's insistence, mentioned he was one Vikram speaking from Kurukshetra. PW-3 then called PCR and stated these facts to police. When the PCR came after about 20-25 minutes, they went to what was stated as being Yashu's house in the neighborhood of PW-3's house. Since the main gate of the premises was locked with an iron chain, the police broke it open and entered where they saw a pistol in the courtyard with a magazine, a white/cream car color standing there. In another locked room inside, they found a black *polythene* bag which had the dead body of Nitika, who seemed to have been shot in the temple near the eye. FIR No. 375/2019 was registered at 6:28 p.m. on 15th September, 2009 at P.S. Nangloi and an investigation pursued. The appellants were arrested on different dates and chargesheet was filed for offences under Section 302/120B/34 of IPC and Section 25 of Arms Act. Charges were framed against all the appellants for committing murder of Nitika in pursuance of criminal conspiracy. The accused pleaded not guilty and claimed trial. The

prosecution examined 29 witnesses in support of their case, statements of the appellants were recorded under Section 313 Cr.P.C. and no evidence was led in defence.

Submissions on behalf of the Appellant

3. Learned Senior Counsel appearing for Sunil Kumar in CRL.A. 498/2020 led the arguments and submissions were predominantly adopted by the counsels of the other two appellants. It was essentially submitted that the prosecution had been unable to prove the guilt of the appellants beyond reasonable doubt, since there was no incriminating evidence found against the appellants and the conviction by the learned Trial Court had been handed down based on conjecture and surmises. It was highlighted that even the testimony of PW-3 father of the deceased, could not be treated as last seen evidence, since what he alleged as having seen was that the three appellants met near his house on the day when his daughter had left for college, but had not seen them accompanying or pursuing his daughter. Moreover, it was apparent from a bare reading of his testimony before the Court that substantial portion of his deposition was an improvement from his earlier statements and therefore, his testimony could not be relied upon. Moreover, the prosecution had not presented any evidence whatsoever of the caller who had identified himself as 'Vikram from Kurukshetra' and had called from an unidentified number 9255785505 nor was the various critical elements of the recovery of body from the farmhouse made available including *inter alia* the evidence of the broken lock of the farmhouse, the chance prints, any tyre marks in front of the farmhouse and most importantly evidence relating to the ownership of house by Yashu or his occupancy thereof. The learned

Trial Court had proceeded on the basis that since it was the Yashu's farmhouse and the dead body was found there, it was appellant Yashu's burden to provide cogent explanation in view of the Section 106 of the Indian Evidence Act. The counsel for the appellant, therefore, submitted that in the absence of any last seen evidence, lack of investigation regarding the caller who had informed PW-3 of the death, no details of where his daughter had allegedly been shot as stated in the *rukka* Ex. PW-17/A or any CDR records, the prosecution has been unable to prove their case beyond reasonable doubt. As regards the ID-card and admission ticket of the deceased, recovered from the appellant Sunil, in FIR No. 234/2009 P.S. Phase-VIII Mohali, Punjab under Section 25/54/59 of the Arms Act along with three live cartridges of the pistol allegedly used in the commission of murder, the counsel for the appellant pointed out that the learned Trial Court itself in para 49(b) of the impugned judgment had observed that the weapon seems to have been planted upon him. Also, there was no investigation in relation to the recovery of the car or the motorcycle at the said farmhouse to establish the ownership. Also, the ballistic report from the FSL had returned no opinion of whether the weapon recovered from appellant Sunil was the weapon used in the commission of the crime.

Submission on behalf of the Prosecution

4. Learned Additional Public Prosecutor (APP) on behalf of the prosecution countered the submissions of the appellants by contending that the testimony of PW-3 father and PW-14 uncle of the deceased was quite clear and cogent, and that they had identified the farmhouse from where dead body was discovered as belonging to appellant

Yashu and that appellant Yashu or other appellants had not given any proof in either of their statements recorded under Section 313 Cr.P.C. or otherwise to state that this house did not belong to or was occupied by either of them. In support of this contention, the learned APP relied on the judgment of the Hon'ble Supreme Court in ***Ranjit Kumar Haldar v. State of Sikkim*** (2019) 7 SCC 684 where the Apex Court reiterated the view that recovery of the dead body from the house that is in possession of the accused is sufficient to shift the onus on the accused to explain circumstances against him by virtue of the Section 106 of the Indian Evidence Act. As per learned APP, the premises where the body was discovered was locked from outside, the room where the body was discovered was also locked from outside, the corpse of the victim was found wrapped in black *polythene*, and the gun was recovered from the courtyard. The burden would, therefore, shift on appellants Yashu and Sunil to bring material on record to suggest that the premises were not under their ownership or possession. Further, it was contended that the presence of the appellants close to the victim's house and spot where the corpse was discovered, was proven by the deposition of PW-3 and PW-14. The fact that the appellants were seen in the vicinity, and acting suspiciously within the window of time when the deceased could have been murdered, is dispositive of their guilt. As regards the recoveries affected from the appellants, the learned APP contended that the deceased ID-card and college Admission Card were recovered from appellant Sunil which was identified by PW-3 as that of the deceased. As per the disclosure of the appellant Vineet, the car bearing no. DL 8CNB3355 was recovered and was identified by PW-3 as the one driven by appellant Vineet on 14th September, 2009 when he saw him

at Sunil's shop. The learned APP further contended that since PW-3 had a land dispute with appellant Sunil and his family, it could have been the basis or the motive to kill his daughter.

The Evidence

5. The evidence on record, relevant and necessary for assessment of this case, is *inter alia*, as under:

5.1 PW-3, Vijender Singh, father of the deceased, deposed that his daughter left for her college at about 9:00 a.m. on 14th September, 2009 and when he was closing the door of his house as she left, he saw that appellant Yashu and Sunil were standing in front of the *parchun* (grocery) shop of Sunil. He identified both the appellants in Court. In the meantime, appellant Vineet, whom he also identified in Court, came there in white Swift car bearing no. 3335 and all three were talking to each other. PW-3 went inside the house but since his daughter did not return till 4:00 p.m. in the evening, which was the usual time for return, he started searching for her and sent his younger brother PW-14 Kuldeep to Bawana to trace her. PW-14 got a missing report recorded at P.S. Bawana but there was still no trace of the daughter of PW-3. On 15th September, 2009 at about 2:30 p.m., he received a telephonic call from phone no. 9255785505 from an unknown caller informing him that Yashu Son of Rajbir had shot his daughter (*terilarki ko goli maar di hai*) and further stated that her dead body had been disposed of accordingly (*uski dead body Yashu dost or uskegharwalo ne thikanelaga di hai*). When PW-3 asked the caller who he was, he refused to divulge his identity, but later on his insistence, he mentioned that he was one 'Vikram speaking from Kurukshetra'. PW-3 called the PCR and when the PCR came, they

went to 'Yashu ka makan' in his neighborhood. The house was locked with the iron chain and when the police broke it and went inside, they found pistol, white/cream color car standing and a motorcycle. The premises basically had a tin shed for keeping buffaloes and some animal fodder was also lying there. Inside one of the rooms which was locked which was broken by the police, they found black *polythene* bag with the dead body of his daughter. He deposed that he had a land dispute with the appellant Sunil and his family and had called the PCR when they tried to lay the foundation on the disputed land, and he alleged that this could have been the motive for killing his daughter. He identified the body of his daughter and the bag, wristwatch, and clothes that she was wearing when she left home on 14th September, 2009. In his cross-examination by the counsel for the appellants, he was confronted with his statement PW-3/DA recorded under Section 161 Cr.P.C. where on various points he had improved his testimony. In his cross-examination, he resiled from various testimonies including that he had seen appellant Vineet present near his house in Swift car bearing no. 3335 or that he saw all three people talking before he entered his home or that he had been suspicious upon the appellants, since they were seen standing together or that the PCR came to his house within 20-25 minutes or that he had made call to the PCR and other various aspects.

5.2 PW-14 Kuldeep, the uncle of the deceased, deposed that on 14th September, 2009 at about 2.30-3.00 p.m., when he was coming back towards his house from his plot, he passed by the plot of appellant Yashu (whom he identified in Court) and the gate of the plot was lying open and three appellants (whom he identified) were standing near Ikon car of white colour and talking to each other. On seeing him they

turned their faces towards the opposite direction and thereafter, PW-14 went to his house. Since his niece did not return till 4:00 p.m., and at about 6:00 p.m., his brother told him that Nitika had not returned home from the college, both tried to trace her, though unsuccessfully. He then lodged a missing report at P.S. Bawana at 9:00 p.m. and came back at about 10:00 p.m. and noticed that the gate of Yashu's plot which usually remained open was locked. The next day his brother told him about the telephone call from the caller which led to the discovery of the dead body from Yashu's plot. On 21st September, 2009, he was asked to join the investigation with the police party who arrested appellant Yashu. In his cross-examination, he stated that he had not raised any suspicion against anyone in the missing report. He had not made any enquires from her college after when she could not be traced, though he did contact relatives and friends. In his cross-examination, he stated that the house of Yashu was situated in a separate *gali* from the *gali* of his house and there were 2-3 houses lying vacant in that *gali*. As per PW-14, in the house of Yashu, there were about 5 to 6 rooms out of which 3-4 rooms were in the possession of appellant Sunil and 2-3 rooms were in the possession of appellant Yashu. He stated that appellant Yashu was not his near relative and that according to him appellant Yashu had not left that house in the year 2006 or that it was lying vacant since 2006. He denied the suggestion that the deceased was having love affair with one boy Anu and that he and his brother PW-3 were against that affair.

5.3 PW-8 Dr. Manoj Dhingra of Sanjay Gandhi Memorial Hospital deposed that on 16th September, 2009, he conducted the *post mortem* on the body of the deceased and noted one fire arm entry wound 3x2 cm oval in shape present in the temporal region of the head which had

caused fracture of the temporal bone, puncture of the dura under it with brain matter coming out and blackening and soot particle present with the brain matter. There was a fracture of the anterior cranial fossa present from left to right side and fracture of the roof of the left eye present with left eye protruding out. Besides this there was scratch abrasion on the abdomen. As per his opinion, the death was due to craniocerebral damage consequent to firearm injury and the *post mortem* report was exhibited as PW-8/A. As per PW-8, *rigor mortis* was slightly present all over the body and his estimate was that the death had occurred in the last 24-36 hours. The FSL report was exhibited as Ex. PW-28/O and PW-28/P to which PW-8 ACP Rajbir Malik had deposed. As per the report the live cartridges were successfully test fired through improvised pistol Ex. F3, but no further opinion was given. As per the Ballistic Report No. FSL 2009/F-4555 dated 03.08.2010, the empty cartridge Ex. P5 (recovered from the spot) was fired from the pistol 9 mm calibre Ex. P6 (recovered from the spot). However, the lead piece of discharged bullet Ex. P4, recovered from the spot, was found deformed & no ballistic opinion could be given on it.

5.4 PW-9 Constable Resham Singh deposed that on 15th September, 2009, he went along with ASI Rampal and Constable Rajesh to the house of the Yashu at Gugga Johar, Mundka which was found locked. He saw magazine and pistol lying in the courtyard visible from outside the gate, but they could enter only after breaking the locks of the gate. The lock of the gate was broken, and they entered inside the house. The other rooms were found locked and foul smell was coming out from the room.

5.5 PW-28 ACP Rajbir Malik, the Investigating Officer, stated that on 15th September, 2009, he was posted at P.S. Nangloi when he got the PCR call regarding the dead body lying in the house of Yashu. At the spot, he met PW-3 and PW-14, and an iron gate was found locked with chain. From the grill of the gate, he could see one pistol and magazine lying in the courtyard. They had to break open the chain to enter and inside they found a motorcycle bearing registration No. HR 12L 4031. There was a room attached to the *veranda* which was found locked, and it was opened. A foul smell was emanating from the other room, and they found a dead body in supine condition. PW-3 identified the dead body as that of his daughter. The crime team also reached the spot and inspected it and tried to take chance prints, however, they could not be developed. The pistol and magazine were seized and secured, and a site plan was prepared. The broken lock with the chain was taken into possession, so also the blood-stained earth and earth control, the plastic sheet which was wrapped on the dead body and two blood-stained bedsheets. The articles found on the dead body including the bag was also seized. PW-17 endorsed the *rukka* and PW-11 was sent to register the FIR. On the same evening, PW-3 and PW-14 did not give their statement since they were shocked, so their statements were recorded on the next day. On 17th September, 2009, he received secret information in respect of appellant Vineet, and on that basis appellant Vineet was apprehended. Pursuant to his disclosure, the car No. DL 8C NB 3335 was taken into possession from near the house of appellant Vineet. On 21st September, 2009, on the basis of secret information regarding appellant Yashu, a raiding party was prepared, and he was arrested. Upon his disclosure, the police went to Bahadurgarh and other places, but appellant Sunil could

not be found and ultimately after persistent efforts on 23rd November, 2009, he received information that appellant Sunil was apprehended by the staff of Punjab Police. Upon making inquiries from P.S. Mohali, he moved an application before the Court for issuance of production warrants which was allowed for 04th December, 2009 and when appellant Sunil was produced in Tis Hazari Court, Delhi, he was arrested. In his disclosure statement, he stated that he was using the property of appellant Yashu on rent. On his further disclosure, three live cartridges were recovered from his house at Mundka. Later, based on the secret information, some documents of deceased were recovered from the possession of the appellant Sunil when he had been apprehended by the staff of Punjab Police and therefore, PW-28 sent his staff to verify the articles and get photocopies of the same. In his cross-examination, he stated that PW-3 had not made any statement or hinted at the involvement of appellant Vineet on 15th September, 2009 and had not given any statement prior to 16th September, 2009 regarding his involvement. He stated that neither chance prints could have been developed from the spot nor were there any tyre marks, nor he found any eyewitness. There were no public persons who had seen the accused locking the gate and no one was found to have knowledge or have seen the appellants there. In his cross-examination, he further stated that at the time of his visit to the farmhouse from where the dead body was recovered, there was complete darkness. They had also not verified the visit of the deceased to the college on the date of incident. As regards the caller who called PW-3, on verification it was revealed that it was a telephone number of the PCO. He stated that he had also not verified the receipt of the call on PW-3's mobile from that number. He stated that no public

person had given any statement that the house, from which the body was recovered, belonged to Yashu or was taken on rent by the appellant Sunil. He stated that the call details and the call tower locations of the appellant were not made part of the chargesheet. He also stated that the ballistic expert was not called to the spot, and he could not remember whether a dog squad was called. He also confirmed that no opinion was taken from the doctor who conducted the *post mortem* regarding any possibility of self-inflicted injury or any finger impressions of the hands of the deceased were taken to rule out the possibility of self-inflicted injury.

Analysis

6. Upon an assessment of the evidence on record and appreciation of the contentions by counsels of the parties, this Court is of the considered view that the prosecution has been unable to prove the guilt of the appellants beyond reasonable doubt, for *inter alia* the following reasons:

6.1 The reliance on the last seen evidence of PW-3 that on 14th September, 2009 at about 9:00a.m., when he was closing the door of his house as his daughter (the deceased) left for college, he saw appellants Yashu and Sunil standing in front of the *parchun* shop of Sunil, later joined by appellant Vineet who came in a white Swift car, is not credible or complete to serve as last seen testimony. There is no evidence or statement of any kind whatsoever by any witness for the prosecution that PW-3 had seen the deceased in the company of any of the appellants on that morning, or that the appellants pursued the deceased after she left her home, or even showed any visible body language that they would do so. It is axiomatic that last seen evidence

must relate to the combination of seeing the victim with the accused departing from the site of the place of incidence in a time span which is proximate to the commission of the crime. The reference in this regard may be made to the following paras of decision of the Hon'ble Supreme Court in *Nizam & Anr. V. State of Rajasthan* (2016) 1 SCC 550:

“14. The courts below convicted the appellants on the evidence of PWs 1 and 2 that the deceased was last seen alive with the appellants on 23-1-2001. Undoubtedly, the “last seen theory” is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. The “last seen theory” holds the courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of death of the deceased. It is well settled by this Court that it is not prudent to base the conviction solely on “last seen theory”. “Last seen theory” should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.

15. Elaborating the principle of “last seen alive” in State of Rajasthan v. Kashi Ram [(2006) 12 SCC 254; (2007) 1 SCC (Cri) 688], this Court held as under: (SCC p. 265, para 23)

“23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the

burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in Naina Mohamed, In re. [1959 SCC OnLine Mad 173 : AIR 1960 Mad 218] ”

(emphasis supplied)

Reference is also made to **Digamber Vaishnav & Anr. Vs. State of Chhattisgarh** (2019) 4 SCC 522, where the Hon'ble Supreme Court held *inter alia*, as under:

“40. The prosecution has relied upon the evidence of PW 8 to show that the accused and victims were last seen together. It is settled that the circumstance of last seen together cannot by itself form the basis of holding accused guilty of offence. If there is any credible evidence that just before or immediately prior to the death of the victims, they were last seen along with the accused at or near about the place of occurrence, the needle of suspicion would certainly point to the accused being the culprits and this would be one of the strong factors or circumstances inculcating them with the alleged crime purported on the victims. However, if the last seen evidence does not inspire the confidence or is not trustworthy, there can be no conviction. To constitute the last seen together factor as an incriminating circumstance, there must be close proximity between the time of seeing and recovery of dead body.

41. In Arjun Marik v. State of Bihar [Arjun Marik v. State of Bihar, 1994 Supp (2) SCC 372: 1994 SCC (Cri) 1551], it has been held as under: (SCC p. 385, para 31)

“31. Thus the evidence that the appellant had gone to Sitaram in the evening of 19-7-1985 and had stayed in the night at the house of deceased Sitaram is very shaky

and inconclusive. Even if it is accepted that they were there it would at best amount to be the evidence of the appellants having been seen last together with the deceased. But it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the accused and, therefore, no conviction on that basis alone can be founded.”

42. In *Kanhaiya Lal v. State of Rajasthan* [*Kanhaiya Lal v. State of Rajasthan*, (2014) 4 SCC 715: (2014) 2 SCC (Cri) 413], the Court has reiterated that the last seen together does not by itself lead to the inference that it was the accused who committed the crime. It is held thus : (SCC p. 719, para 12)

“12. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant.”

(emphasis supplied)

6.2 The prosecution did not examine anybody from the college which the deceased was attending, to confirm, corroborate or even supply any information regarding the entry of the deceased into the college, her presence in the college, her attendance in any particular class, having met any friends in the college, her exit from the college. The prosecution has been unable to furnish any evidence regarding the facts and circumstances relating to the movement of the deceased from the point when she left her home at 9:00 a.m. till her dead body was recovered at the neighboring premises. There is nothing to implicate the appellants regarding their presence with the deceased in this time span. No call records have been presented by the prosecution nor any other corroborative evidence.

6.3 The testimony of PW-14 that he saw the appellants standing near the premises where the dead body was found, and that they were talking to each other in the evening also does not help the case of the prosecution. For the reason that neither did he see them inside the premises where the body was found nor much can be conclusively determined from his testimony (even if true) that they turned their faces away when PW-14 saw them. The nature of PW-14's testimony in this regard cannot be considered sufficient or cogent enough to sustain a conviction of the appellants.

6.4 The primary issue which has been argued by the prosecution is regarding the discovery of the dead body in the premises of Yashu part of it being allegedly rented out to Sunil. However, there is not an iota of evidence led by the prosecution to confirm the fact that this premises was actually owned or was in exclusive and continuous possession of Yashu or Sunil. Neither any property documents have been presented by the prosecution nor any member of the family of Yashu been examined in this regard. The reliance of the prosecution in this regard is on two pieces of evidence. *Firstly*, the disclosure statement by appellant Sunil (Ex.PW-15/B) stating that he was using Yashu's property as a place where animals are tied, on rent; and *secondly*, testimony of PW-14 stating in his cross-examination that it was Yashu's house where there are 5-6 rooms out of which 3-4 rooms were in the possession of appellant Sunil and 2-3 rooms were in the possession of appellant Yashu. As regards the first reliance on the disclosure of Sunil, it would be a statement in custody relating to a mental fact which would be inadmissible under Section 27 of the Indian Evidence Act. As regards the testimony of PW-14, it would require corroboration of a substantial nature to accept the statement of

PW-14, who was an interested witness not only as relative of the deceased but that of PW-3, who had a prior dispute with appellant Sunil and his family. This Court finds that PW-14's testimony in this regard is unreliable and unsupported. A mere statement of the witness for the prosecution stating that a particular premises is owned/rented by an accused is clearly not enough for the prosecution to rely and rest a case of conviction on it. Moreover, there was no article found in the premises belonging to either of the appellants and which could have given a chance to the prosecution to prove that these premises were indeed owned/occupied/rented by any of the appellants. There was no confirmation led by the prosecution regarding the ownership of the car which was recovered from the premises. The reliance on the disclosure of appellant Vineet that this car was used in taking away the deceased is again inadmissible under Section 27 of the Indian Evidence Act as a mere piece of information not leading to any discovery of a hitherto undiscovered fact. As regards the motorcycle, which was recovered from the premises, no evidence was led by the prosecution regarding its ownership. In these circumstances, it would be sufficient to state that the prosecution case had no legs to stand on regarding proof that this premises where the body was found was either in the ownership/possession/tenancy or even exclusive and continuous possession of any of the appellants in order to shift the burden on the appellants under Section 106 of the Indian Evidence Act. The law on Section 106 of the Indian Evidence Act is categorical, in that once the place where the dead body is found is proved to be used and in exclusive possession of the accused, then the onus can be said to shift, in order to elicit facts which are exceptionally in knowledge of the accused.

6.5 In the decision by the Hon'ble Supreme Court in **Satye Singh & Anr. V. State of Uttarakhand** (2022) 5 SCC 438 it has been held:

“19. Applying the said principles to the facts of the present case, the Court is of the opinion that the prosecution had miserably failed to prove the entire chain of circumstances which would unerringly conclude that alleged act was committed by the accused only and none else. Reliance placed by learned advocate Mr. Mishra for the State on Section 106 of the Evidence Act is also misplaced, inasmuch as Section 106 is not intended to relieve the prosecution from discharging its duty to prove the guilt of the accused.

20. In *Shambu Nath Mehra v. State of Ajmer* [Shambu Nath Mehra v. State of Ajmer, AIR 1956 SC 404], this Court had aptly explained the scope of Section 106 of the Evidence Act in criminal trial. It was held in para 11: (AIR p. 406)

“11. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are “especially” within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word “especially” stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are Attygalle v. Emperor [Attygalle v. Emperor, 1936 SCC OnLine PC 20 : AIR 1936 PC 169] and Seneviratne v. R. [Seneviratne v. R., (1936) 3 All ER 36] , All ER at p. 49.””

(emphasis supplied)

6.6 Short of this evidence, it could easily be contended that an abandoned premises like the one where the body was discovered could have been possibly used by anybody for dumping the body of the deceased or committing any other crime relating thereto. It may be noted that no chance prints were recovered as well and there was no evidence relating to the key to the locks which was found to secure the gate and the room, none of which was discovered in the possession of the appellants or disclosed by the appellants as being recoverable from some place.

6.7 It is also extremely important to note that there was no investigation regarding the identity of the caller from Kurukshetra who had called PW-3 to suggest that the daughter had been killed by the appellants and that the body had been disposed of. There was no investigation also of whether PW-3 had indeed received that call by analyzing the CDRs of PW-3. Further, careful examination of PW-3's testimony would show that while the so-called caller from Kurukshetra informed him only that Yashu son of Rajbir had shot his daughter and that his family and friends had disposed of the body, PW-3 was able to identify the spot i.e. *Yashu ka makan* in his neighborhood as the house which the caller had mentioned. There is a discrepancy in this aspect since PW-3 does not state in his testimony that the caller had also indicated that the body had been disposed of for the crime committed in Yashu's house in his own neighborhood. Even though this may seem like a minor discrepancy, it is important to take it into account considering that there is no other evidence to corroborate the existence of the call to PW-3 or the identity or location of the caller.

6.8 Attention had been drawn to the finding of the learned Trial Court at para 49(b) of the impugned judgment, where the learned Additional Sessions Judge had observed that the weapon found with the appellant Sunil by P.S. Mohali seem to have been planted upon him. While this Court need not comment on the investigation under FIR 234/2009 by PS. Mohali, Punjab, in a charge under Section 25/54/59 of the Arms Act against appellant Sunil, it is important only to the extent that three live cartridges recovered from appellant Sunil were not matched with the weapon recovered in the commission of the crime from the premises. As per the ballistic report only the three live cartridges could be fired from an improvised pistol and no further opinion was given. Besides in answer to question No. 71 in his statement recorded under Section 313 Cr. PC., the appellant Sunil, states that the document of the deceased were planted on him as he had obtained a copy of the Register No. 19 through RTI to show the same. It is further evident from the ballistics report that there was no opinion returned to whether the weapon recovered from the premises was indeed the weapon used in the commission of the crime.

6.9 Moreover, there is no proof regarding the motive and the foundational facts regarding the same. A mere statement by PW-3 that there was a family dispute with Sunil regarding property, without any further corroboration, cannot be taken as credible. Also, even if PW-3 does mention regarding the property dispute there is nothing in his statement to indicate that the dispute was simmering and had precipitated in any manner in the recent past to trigger murder of his daughter. Neither the deceased nor PW-3 had received any threat which was in the knowledge of PW-3, or even PW-14. Even the Trial

Court observes in para 50(b) of the impugned judgement that the exact motive was hazy and unclear.

Conclusion

7. On the basis of the above discussion and analysis, this Court finds that there is no evidence available on record, on the basis of which the appellants can be proven guilty beyond reasonable doubt for the murder of the deceased and therefore, the conviction and the order on sentence thereon passed by the learned Trial Court cannot be sustained and is set aside.

8. The appellants are therefore acquitted and be released from custody forthwith.

9. Appeals are accordingly disposed of.

10. Copy of this judgment be uploaded on website and be also sent to Superintendent, Tihar Jail for intimation to the appellants and updation of records.

CRL.M.B. 1318/2021 in CRL.A. 498/2020

Application is disposed of as infructuous.

**(ANISH DAYAL)
JUDGE**

**(MUKTA GUPTA)
JUDGE**

OCTOBER 31, 2022/rk