

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

THE HON'BLE JUSTICE HARISH TANDON

&

THE HON'BLE JUSTICE PRASENJIT BISWAS

**CRA 219 of 2013
In the matter of: Sandip Ghosh
With
CRA 320 of 2013
IA No. CRAN 3 of 2017 (Old No. CRAN 1334 of 2017)
IA No. CRAN 4 of 2020 (Old No. CRAN 3439 of 2020)
In the matter of : Saheb Das
With
CRA 338 of 2013
IA No. CRAN 3 of 2021
In the matter of : Sukumar Karmakar
Vs.
State of West Bengal**

Appearance:

For the Appellant (CRA 219 of 2013)	: Mr. Sekhar Kumar Basu, Adv. Mr. Antarikhya Basu, Adv.
For the Appellant (CRA 320 of 2013)	: Mr. Ayan Bhattacharjee, Adv. Mr. Apalak Basu, Adv. Ms. Pritha Bhaumik, Adv. Mr. Nazir Ahmed, Adv. Mr. Shounak Mondal, Adv.
For the Appellant (CRA 338 of 2013)	: Mr. Sudipto Maitra, Adv. Mr. Vijay Verma, Adv. Mr. Dwaipayan Biswas, Adv.
For the State	: Mr. Neguieve Ahmed, Adv. Mr. Sanjay Bardhan, Adv. Ms. Trina Maitra, Adv.
For the Defacto Complainant	: Mr. Ganesh Chandra Maity, Adv. Mr. Aslam Khan, Adv.

Mr. Abhradip Maity, Adv.

Judgment On : **14.9.2023**

Prasenjit Biswas, J.:

The captioned appeals, by lifers, are directed against the self-same judgment and order dated 12.08.2009 passed by the Additional Sessions Judge, Fast Track Court No.5, Barasat, North 24 Parganas in connection with Sessions Trial No. (01(07)/2007 arising out of Sessions Case No. 05(03)/2007.

In the Trial Court the appellants Saheb Das and Sandip Ghosh were convicted under Sections 302/201 read with Section 34 of the Indian Penal Code, 1860 (hereinafter, 'the IPC') for having committed murder of one Anindya Rudra (hereafter referred to as 'the victim') and the appellant Sukumar Karmakar was convicted under Sections 302/201 read with Section 34 of the Indian Penal Code. They were sentenced to suffer rigorous imprisonment for life besides imposing a fine of Rs.10,000/- under Section 302/34 IPC and in default of payment of fine they are to suffer rigorous imprisonment for one year each. The appellants Saheb Das and Sandip Ghosh were also sentenced to suffer rigorous imprisonment for seven years and with fine of Rs.5,000/- in default, to suffer the imprisonment for a term of six months for the offence punishable under section 201/34 IPC. Hence, these appeals.

The prosecution case, in nutshell, is as follows: -

One complaint was lodged on 24.09.2006 before the police station by one Amit Rudra, father of the victim stating that on 17.09.2006 the convict Sahadeb Das and another person took away his son by riding him on a scooter from his house. On that day at about 5-00 p.m. one phone call was received by his wife informing that the victim has fell down from cot and blood was oozing out from his ear. At first, he was taken to R.G. Kar Hospital and the name of the victim was stated therein as Bappa Das, resident of Green Park. The convict Sahadeb Das's mother's name was given in the place of the victim's mother's name. Subsequently, the victim was shifted to P.G. Hospital and thereafter to Chittaranjan Hospital and lastly shifted to CMRI Hospital. In every hospital the name of the victim was given as Bappa Das with the address as mentioned above. It is further stated before every hospital that the victim sustained injuries as he fell from the cot. Ultimately the victim succumbed to injuries.

The mother of the victim namely Minakshi Rudra lodged one complaint before the Lake Town P.S. on 22.09.2006 stating that on 17.09.2006 at about 11-30 p.m. the convict Saheb Das and his friend came to their house and took her son/victim with them by riding on a scooter. Since, 12-30 noon she repeatedly tried to contact with the victim of his mobile phone but it was going unanswered. On the same day at about 5-30 p.m. Sahadeb's mother called her over phone informing that the victim fell down from a cot in their house and sustained injury in his ear and was taken to hospital for treatment. This complainant again received a phone call from the maternal uncle of the convict Saheb Das informing that the victim fell down from the top of water tank to the lower terrace. She was

further informed that her son was taken to R.G. Kar Hospital. Before the hospital the name of the victim was stated as Bappa Das, resident of Green Park and the mother of the convict Saheb introduced herself as the mother of the victim. On enquiry by the hospital, it was stated that no diary has been lodged before any police station. As the hospital did not take admission of the victim, she was taken to P.G. Hospital and scan of the victim was done there. Thereafter, the victim was taken to Chiita Ranjan Hospital. In the meantime, this complainant received a phone call from the maternal uncle of the convict Saheb and sent one doctor Baral who was the resident of their house to P.G. Hospital and he accompanied the victim till to Chitta Ranjan Hospital. It is further stated in the complaint that Doctor Baral gave Rupees 5000/- to the mother of Saheb when the victim was taken to CMRI Hospital and the victim was admitted therein. After getting information her husband's elder brother Sajal Rudra and his son Dr. Argha Rudra went to CMRI Hospital. It is stated that the mother of the victim intended to lodge complaint against Saheb Das, his mother, his friends and Mithu Sarkar as they allegedly conspired to murder her son and this complaint is to be treated as FIR. She was further informed by the doctor that the victim did not take any liquor and was not in drunken condition on the fateful day and the injury sustained by him was not due to any fall from height. She was further informed that the victim was not wearing the full pant, ganjee which he was wearing when he left their house. Hospital handed over one bloodstained shirt and gold finger ring to her and subsequently the convict Saheb and his relatives returned the victim's pant, vest and handkerchief and as there was bloodstain on the vest it was

washed before returning with intention to disappear the evidence. She was further informed that on the date of incident V.K. Shaw, Sukumar Karmakar, Sandip Ghosh, Pallab, Arijit, Raju, Sanjib, Bappa accompanied them. The scan of the victim was done under the name and address of Bappa Das, Green Park. Dr. Baral asked why such name and address were given in the hospital when surname of the victim was not Das and he was the resident of Nagerbazar not of Green Park which indicates that the convict concealed the identity of the victim.

Thus, the criminal law was set in motion. Police investigated the case and submitted charge sheet under sections 302/201/34 I.P.C. against four accused persons showing one accused person namely Ranjana Das, mother of the accused Saheb Das absconder.

Charge was framed by the trial court u/s 302/201/34 I.P.C. against the accused Saheb Das and Sandip Ghosh and u/s 302/34 against the accused Sukumar Karmakar.

The appellants in the captioned appeals challenge the findings of conviction and consequential imposition of sentence raising various grounds. But, before considering the contentions against the findings raised by the appellants, we find it only appropriate to refer to the following decisions on the law relating circumstantial evidence.

It is settled law that circumstances play very important role in the appreciation of evidence. The conduct of witnesses is a very important facet to determine their creditworthiness.

In **Brijlal Prasad Sinha v. State of Bihar** reported in (1998) **Supreme Court Cases 699**, the Apex Court held at paragraph 9 as thus:

“In a case of circumstantial evidence, the prosecution is bound to establish the circumstances from which the conclusion is drawn must be fully proved; the circumstances should be conclusive in nature; all the circumstances so established should be consistent only with the hypothesis of guilt and inconsistent with the innocence; and lastly the circumstances should to a great certainty exclude the possibility of guilt of any person other than the accused. The law relating to circumstantial evidence no longer remains res integra and it has been held by catena of decisions of this Court that the circumstances proved should lead to no other inference except that of the guilt of the accused so that, the accused can be convicted of the offences charged. It may be stated as a rule of caution that before the court records conviction on the basis of circumstantial evidence, it must satisfy itself that the circumstances from which inference of guilt could be drawn have been established by unimpeachable evidence and the circumstances unerringly point to the guilt of the accused and further, all the circumstances taken together are incapable of any explanation on any reasonable hypothesis save the guilt of the accused.”

The Apex Court took note of the following principles laid down regarding the law relating circumstantial evidence in **Sharad Birdhichand Sarda v. State of Maharashtra** reported in **AIR 1984 SC 1622**: -

“152. 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 Shivaaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793] 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.”

At the time of hearing our attention is drawn by the learned counsel for the accused Sukumar Karmakar about the decision rendered by the Hon'ble Apex Court in case of **Dhan Raj @ Dhand vs State of Haryana** reported in **2014 (3) AICLR 353** where in at paragraph 2 it is held that-

“The High Court in the present matters convicted the accused appellants on the basis of circumstantial evidence by the impugned judgment. It has been well established by leading judicial precedents that where the prosecution's case is based on circumstantial evidence, only the circumstantial evidence of the highest order can satisfy the test of proof in a criminal prosecution. In order to base conviction on circumstantial evidence the circumstantial evidence put forth by the prosecution should establish a complete unbroken chain of events so that only one inference is drawn out from the same. If more than one inference can be drawn then the accused should be entitled to the benefit of doubt”.

In case of **Vinay D. Nagar v. State of Rajasthan** reported in **(2008) 5 SCC 597** at paragraph 9 it was held by the Apex Court as follows:

"The principle of law is well established that where the evidence is of a circumstantial nature, circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and the facts, so established, should be consistent only with the hypothesis of the guilt of the accused. The circumstances should be of a conclusive nature and they

should be such as to exclude hypothesis than the one proposed to be proved. In other words, there must be chain of evidence so 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."

The Hon'ble Apex Court made observation about the duty of court of appreciation of evidence in dealing with circumstantial evidence in case of **Hanuman Govind, Nargundkar and another v. State of M.P** reported in **AIR 1952 Supreme Court 343**.

In ***Hanuman Govind (supra)*** Hon'ble Apex Court observed that in dealing with circumstantial evidence the rules specially applicable to such evidence must to borne in mind. In such cases is always the danger that conjecture or suspicion may take the place of legal proof. 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.

A plethora of decisions have been referred by the learned counsels for the accused persons on the points of circumstantial evidence and last seen together theory. It is unnecessary to refer all of them.

One would notice that in all the decisions cited in connection with this case it had been held that the accused is entitled to benefit of doubt unless all the relevant circumstances are firmly established. Often it is said that the prosecution has to prove the case beyond reasonable doubt. The burden is on the prosecution to adduce such evidence to exclude any reasonable doubt of the accused. It is well settled that an accused cannot be convicted on the basis of conjectures and surmises. Where a reasonable doubt arises in the mind of the court after taking into consideration the entire materials before it regarding the complicity of the accused, the benefit must go to the accused. It has been held that the reasonable doubt must be a real and substantial one and well-founded actual doubt arising out of the doubt existing after consideration of all the evidence. But one must remember that he is entitled to only a reasonable doubt, that is a doubt which a rational thinking man will reasonably, honestly and conscientiously entertain. When the incident is not proved, then certainly the accused is entitled to benefit of doubt. When the evidence is probable and reasonable, and its consideration creates a doubt in the credibility of the prosecution case, then again, the accused is entitled to benefit of doubt.

It is profitable to quote the following observation of the Hon'ble Apex Court rendered in case of **Paramjeet Singh vs. State of Uttarakhand** reported in **(2010) SCC 1087** at paragraph 10 which runs as thus-

“A criminal trial is not a fairy tale wherein one is free to give flight to one's imagination and fantasy. Crime is an event in real life and is the product of interplay between different human emotions. In arriving at a conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case, in the final analysis, would have to depend upon its own facts. The court must bear in mind that "human nature is too willing, when faced with brutal crimes, to spin stories out of strong suspicions." Though an offence may be gruesome and revolt the human conscience, an accused can be convicted only on legal evidence and not on surmises and conjecture. The law does not permit the court to punish the accused on the basis of a moral conviction or suspicion alone. "The burden of proof in a criminal trial never shifts and it is always the burden of the prosecution to prove its case beyond reasonable doubt on the basis of acceptable evidence." In fact, it is a settled principle of criminal jurisprudence that the more serious the offence, the stricter the degree of proof required, since a higher degree of assurance is required to convict the accused. The fact that the offence was committed in a very cruel and revolting manner may in itself be a reason for scrutinizing the evidence more closely, lest the shocking nature of the crime induce an instinctive reaction against dispassionate judicial scrutiny of the facts and law”.

In view of the law relating circumstantial evidence exposited under the decisions referred hereinbefore we are of the considered view if doubt lingers with respect to the probability or conclusiveness of any circumstance relied on by the prosecution, forming a link in the chain of

circumstances pointing to the guilt of convict the evidence has to be scrutinized by this Court so as to ensure that the totality of the evidence and circumstances relied on, did constitute a complete chain and it points to the guilt of the convict and it did not brook any hypothesis other than the guilt of the convict. Upon hearing the learned counsel on both sides and on careful consideration of the evidence and materials on record, we are of the considered view that the case at hand is a befitting case where such an exercise is required.

Before doing such exercise, it is only proper to look into the questions whether the death of Anindya Rudra is homicidal in nature. As a matter of fact, there is not much dispute on this aspect.

Learned Counsels appearing on behalf of the accused persons submitted before us that, the case of prosecution has to be based upon clear, cogent and unimpeachable evidence produced by prosecution and in the case of circumstantial evidence, guilt of accused is to be proven on the basis of proof beyond reasonable doubt; that reasonable doubt is not an imaginary, trivial or merely a probable doubt, but a fair doubt that is based upon common sense.

The evidence of PW-9 with Exhibit-17 post-mortem report made the Court below to come to the conclusion that death of Anindya Rudra is homicidal in nature. The post-mortem report would reveal the presence of 10 ante-mortem injuries on the body of the deceased. In taking into account the nature of all those injuries PW-9 opined that the injury as

mentioned in the report may cause of death and if anybody is hit by a blunt substance and heavy substance it may cause death of the man.

We have absolutely no hesitation to hold in the said circumstances that the Court below has rightly arrived at the conclusion, in the light of the evidence that death of Anindya Rudra is homicidal in nature.

Paragraphs 33 and 34 of the impugned judgment would reveal that after referring to evidence based on 'last seen theory', that the following material circumstances would complete the requisite chain, namely: -

(a) On the day of incident, victim was taken away by the convict Saheb and Sukumar on their motorcycle and was admitted in hospital by the convict Sandip Ghosh under a completely different name and surname in injured condition.

(b) Evidence of PW14 and PW12 established that the victim was continuously in the company of the convicts till the incident occurred and as the convicts were the only persons having special knowledge of what happened it was their duty to disclose those circumstances before the court as per provision of section 106 of the Evidence Act.

While impugning the judgment under appeals, the contention raised before us is that the case being that of circumstantial evidence, the prosecution has not established complete chain of events and circumstances leading to the commission of the crime and involvement of the appellants. It was further contended that there was no motive as to why the appellants should have committed the crime and lastly, that it was a

clear case of accidental death and there was no material evidence on record to arrive at the conclusion stated in the judgment under appeals.

Opposing the above contention of the learned counsel for the State submits that even in the absence of motive, if there are other sufficient circumstances proving to the guilt of the accused, the conviction can safely be based upon such circumstances. He further submits that the last seen theory as spoken to by witnesses and the post mortem report clinchingly connect the accused with the crime without any missing link and therefore, the conviction and sentence are sustainable in law.

We heard and considered the submissions of both sides and perused the entire materials placed on record.

It would be appropriate for us to consider, briefly, statements of witnesses of prosecuting as well as the rival submissions advanced by learned counsels for the parties.

PW1 Amit Rudra, *defacto* complainant and father of the victim deposed that the incident happened on 17.09.2006 and at the time he was in Gangtok and he was informed by his wife (PW2) that about 11.30 a.m. the victim went out with the convict Saheb Das and another. Saheb and that other person were waiting at ground floor for about one hour as his son was reluctant to go with them. This witness further deposed that PW2 informed him that the mother of Saheb informed her over telephone that the victim fell down from the cot at the house of Saheb and blood was oozing out from his ear. The victim was shifted to R.G. Kar Hospital and thereafter was taken to P.G. Hospital and on advice of doctors of P.G.

Hospital victim was taken to Chitta Ranjan Hospital. As Chitta Ranjan Hospital did not admit the victim, he was taken to CMRI Hospital. This witness stated in cross-examination that after getting information from his relatives he returned from Gangtok on 19.09.2006 and reached CMRI Hospital in the evening. This PW1 stated that he does not know whether on the day of Viswakarma Puja the convicts Sukumar and Saheb and the victim consumed liquor heavily and were flying kites on the roof. This PW1 is not the witness of last seen who has seen the deceased in the company of the convicts.

PW2 Minakshi Rudra, the mother of the victim and PW14 Sk. Munna are the witnesses of last seen. PW2 deposed that on 17.09.2006 the convicts Saheb and Sukumar came to their house by a motorcycle bearing no. WB-26E-5700 and wanted to take the victim with them but the victim did not want to go with them but on their repeated requests the victim went with them telling that he would come back within 1-30 p.m.. This witness deposed that Saheb was driving the motor bike; the victim was sitting behind him and another accused Sukumar was sitting behind his son. On cross-examination this witness stated that she did not give any statement before the police from 17.09.2006 to 21.09.2006 and she gave statement on 22.09.2006.

PW14 is a carpenter who made sofa for house of PW1. He deposed that the convict Saheb once visited the house of the victim. This PW14 further stated that on 17.09.2006 he visited their house for taking payment for making sofa and at that time the victim was coming by a motorcycle by two persons on Gorakhbasi Road and they were about to Jessore Road. The

motorcycle was driven by the convict Saheb and by another person as pillion rider and the victim was middle in the motorcycle. He deposed that as the motorcycle was on running condition so he could not identify the man sitting behind the victim. This witness was declared hostile by the prosecution and cross examined him but nothing has come out from such cross-examination which can help the prosecution for making further improvement of the story. This Pw14 was also cross-examined by the side of the defence.

PW3 Sudipto Rudra is the brother of PW1 *de facto* complainant. This witness deposed that on receiving phone call from PW1 he went to the hospital where the victim was lastly admitted. He stated that he came to know from Sajal and PW4 that the convict Sandip Das admitted the victim in the hospital. This witness admitted that he did not tell to the I.O that Sajal and PW4 told him that the convict Sandip Das admitted the victim to hospital.

PW4 Dr. Argha Rudra deposed that after getting information over telephone from his uncle PW1 on 17.09.96 he went to CMRI Hospital to enquire whether the victim was admitted therein or not. On 24.09.06 at about 4 p.m. he received phone call from PW1 that the victim expired.

PW5 Dr. Saroj Boral, a tenant at the house of PW1 deposed that on 17.09.06 on the date of Biswakarma Puja PW2 came to him and stated that she received a phone call informing her that the victim fell down from the cot and blood was oozing out from his ear and he was taken to hospital. Thereafter this witness went to P/G. Hospital and made telephone call to the telephone Number from which PW2 got the information about the

incident. Thereafter one lady came to this witness and disclosed her identity as mother of the convict Saheb and took this witness to the emergency ward. In cross examination on behalf of the convict Sukumar Karmakar this witness stated that intake of alcohol was written in the outdoor ticket of the victim as written by the doctor at the discharge of his official duty. In cross-examination this witness stated that during his stay of hospital neither PW2 nor any other relations of the victim came there. In cross-examination on behalf of the convict Saheb Das this witness stated that she did not give any statement to the police between 17.09.2006 to 2.11.2006 as giving of his statement was not required and for that reason, he did not give his statement.

PW6 Ahibhushan Ghosh deposed that he had intimacy with the victim as he used to visit dog show. Virtually this witness stated nothing which may incriminate the accused persons with the alleged offence.

PW7 Dr. Tapas Chatterjee, a Neuro Surgeon of CMRI who attended the victim for treatment on 17.09.06 and operated him. He proved the medical documents which are marked as exhibits 14/1, 14/2 and 14/3 in this case. This witness stated in his deposition that the victim had history of head injury with massive left temporo parital I.C.H, pupils were pin point and sluggish reaction to light, right side hemi parish, E 2 V 1 M3 bleeding from left ear, CT scan findings were left temporo parital, urgent operative evacuation with high-risk consent. Suggested for brain operation, explaining the high-risk operation. This witness stated that he operated the patient and gave post operative advice.

In cross-examination on behalf of the convict Saheb Das this witness stated that if a person falls from the roof of the second-floor same nature of injury may cause. He further stated that he did not find any other injury apart from left ear injury and if he finds any other injury, he would write on it.

PW8 Dr. Indranil Adhya is another doctor attached to CMRI Hospital who proved the summary report and medical certificate of cause of death of the victim which is marked as exhibit 15/2 and 16 in the case.

PW9 Dr. D. K. Roy, the autopsy surgeon who held post mortem over the dead body of the victim. He opined that death was due to effect of head injury, ante-mortem and homicidal in nature. This witness proved post-mortem report which is marked as exhibit 17 in this case.

PW10 Dr. Anjan Kumar Pal deposed that on 17.09.2006 he examined the victim who attended emergency room at R.G. Kar Medical College with history of fall from cot followed by bleeding from left ear.

PW11 Dr. Ajoy Kumar Gupta, Professor and Head, Department of F.S.M. deposed that he submitted opinion to the D.I.G. of Police (operations) C.I.D. regarding opinion about cause and manner of death of the victim. As per his opinion the death of the victim was due to effects of head injury and ante-mortem and homicidal in nature and that said injury was sufficient to cause death in ordinary course of nature.

PW12 Raj Kumar Majumder who is the younger brother of the mother of the accused Saheb Das stated nothing and was declared hostile

by the prosecution and cross examined him but no material has come which may incriminate the accused persons with the alleged offence.

PW13 Samir Kumar Chanda, S.I. of Police who held inquest on the dead body of the deceased and he proved the inquest report which is marked as exhibit 22 in this case.

PW15 Constable Kartick Chandra who took the dead body of the deceased to morgue for post-mortem.

PW16 Dr. Kamal Krishna Biswas deposed that on 17.09.2006 he saw the victim at CMRI who was admitted therein under PW7.

PW16/A Dr. Banibrata Nath deposed that on 17.09.2006 he saw the victim at CMRI and put his signatures on the reports which are marked as exhibit 22 series in this case.

PW17 A.S.I of police and the recording officer of the *de facto* complainant and PW18 is S.I. of police who endorsed the case to PW19 for investigation.

PW19 Ashis Dolui. S.I of police and first investigating officer of this case.

PW20 Sk. Firoz Hossain of CID and second I.O of the case who took the charge of investigation on 03.01.2006 and after completion of investigation submitted charge sheet against the accused persons in this case.

In the case at hand there is no eye witness to the occurrence and case of prosecution rests on circumstantial evidence. There cannot be any dispute as to the well settled proposition of law that the circumstances from

which the conclusion of guilt is to be drawn "must or should be" and not merely "may be" fully established. The facts so established should be consistent only with the guilt of the accused, that is to say, they should not be explicable through any other hypothesis except that the accused was guilty. Moreover, the circumstances should be conclusive in nature. There must be a chain of evidence so complete so as to not leave any reasonable ground for a conclusion consistent with the innocence of the accused, and must show that in all human probability, the offence was committed by the accused.

In **Ashok Kumar Chatterjee v. State of Madhya Pradesh**, reported in **AIR 1989 SC 1890**, the Apex Court observed:

"...when a case rests upon circumstantial evidence such evidence must satisfy the following tests: -

(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively; should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and,

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of

the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

It may be noted here that the Apex 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. Certainly, 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. They should exclude every possible hypothesis should be excluded except the one to be proved. 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.

In the present case, according to PW2 that on 17.09.2006 the victim was taken away by the convicts Saheb and Sukumar Karmakar. PW14 also deposed that on 17.09.2006 he visited the house of the victim and at that time he found that the victim was coming by motorcycle and the motorcycle was driven by the convict Saheb and another person was the pillion rider. It could be seen that the trial court found the circumstance of the accused persons having been last seen in the company of the deceased on the basis of evidences of Pw2 and Pw14 and this is the main incriminating circumstance. The prosecution placed reliance before the court mainly on last seen during. The pivotal evidence in the given case

is the testimony of PW2 and PW14 who are believed to have last seen the appellants-accused Saheb and Sukumar with the deceased. PW2 in cross examination stated that she did not see the accused Sandip Ghosh earlier excepting in this court.

It is profitable to quote the observation of the Hon'ble Apex Court in case **Rambraksh vs State of Chhattisgarh** reported in **(2016) SCC 251** at paragraph 12 *inter alia* that-

"It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other words, a conviction cannot be based on the only circumstance of last seen together. Normally, last seen theory comes into play where the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that possibility of any person other than the accused being the perpetrator of the crime becomes impossible. To record a conviction, the last seen together itself would not be sufficient and the prosecution has to complete the chain of circumstances to bring home the guilt of the accused".

It has also been observed by the Hon'ble Apex Court in case of **Anjan Kumar Sarma and others vs. State of Assam** reported in **AIR 2017 Supreme Court 2617** at paragraph 21 that-

"It is clear from the above that in a case where the other links have been satisfactorily made out and the circumstances point to the guilt of the accused, the circumstance of last seen together and absence of explanation

would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction. The other judgments on this point that are cited by Mr. Venkataramani do not take a different view and, thus, need not be adverted to. He also relied upon the judgment of this Court in State of Goa v. Sanjay Thakran, (2007) 3 SCC 755 in support of his submission that the circumstance of last seen together would be a relevant circumstance in a case where there was no possibility of any other persons meeting or approaching the deceased at the place of incident or before the commission of crime in the intervening period”.

In view of observation of the Hon’ble Apex Court we find that the last seen theory is not sufficient to record conviction when the prosecution fails to complete the chain of circumstance to bring home the guilt of the accused persons. There is no other positive material on record to show that the deceased was last seen together with the accused persons and in the intervening period and there was nobody in contact with the deceased. There is nothing in the evidence on record to show that relationship between the accused persons and the deceased was strained. In a case based on circumstantial evidence motive assumes a great significance as its existence is an enlightening factor in a process of presumptive reasoning which is totally absent in this case.

In a case where there is no direct eye witness to the crime, the prosecution has to build its case on the circumstantial evidence. It is a very

heavy burden cast on the prosecution. The chain of circumstances collected by the prosecution must complete the chain, which should point to only one conclusion which is that it is the accused who had committed the crime, and none else. Each evidence which completes the chain of evidences must stand on firm grounds. In our considered opinion, the evidence placed by the prosecution in this case does not pass the standard required in a case of circumstantial evidence.

The trial court has lost sight of the vital aspect of the matter. The trial court has relied on Section 106 of the Evidence Act and has held that since the accused was last seen with the deceased and he has not been able to give any reasonable explanation of his presence with the deceased in his statement under Section 313 of the Cr.P.C., it has to be read against the accused and therefore it has to be counted as an additional link in the chain of circumstantial evidence. We think this is a complete misreading of Section 106 of the Evidence Act.

Section 101 of the Act places the burden of proof on the prosecution. It reads as under:

101. Burden of proof — Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. Section 106 of the Act creates an exception to Section 101 and reads as under:

106. Burden of proving fact especially within knowledge — When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Section 106 of the Act is an exception to the rule which is Section 101 of the Act, and it comes into play only in a limited sense where the evidence is of a nature which is especially within the knowledge of that person and then the burden of proving that fact shifts upon that person.

The burden of proof is always with the prosecution. It is the prosecution which has to prove its case beyond reasonable shadow of doubt. Section 106 of the Act does not alter that position. It only places burden for disclosure of a fact on the establishment of certain circumstances. In statement under Section 313 of the Code of Criminal Procedure, when the appellants were questioned about being in the company of the deceased no explanation was given by the appellants. It is for this reason that it has been held that the accused has not been able to discharge his burden under Section 106 of the Act and therefore this has to be read as an additional link in the chain of evidence against the appellant. To our mind, however, Section 106 of the Act would not even come to play here under the facts and circumstances of the present case.

We have to keep it in mind is that Section 106 of the Act, only comes into play when the other facts have been established by the prosecution. In this case when the evidence of last seen itself is on a weak footing, Section 106 of the Act would not be applicable under the peculiar facts and circumstances of the case.

Our attention is drawn by Mr. Basu, the learned senior counsel appearing on behalf of the accused Sandip Ghosh about the decision rendered by the Hon'ble Apex Court in case of **Raj Kumar Singh vs State of Rajasthan** reported in **(2013) 5 SCC 722** wherein Hon'ble Court observed at paragraph 41 *inter alia* that-

"In view of the above, the law on the issue can be summarised to the effect that statement under Section 313 Cr.P.C. is recorded to meet the requirement of the principles of natural justice as it requires that an accused may be given an opportunity to furnish explanation of the incriminating material which had come against him in the trial. However, his statement cannot be made a basis for his conviction. His answers to the questions put to him under Section 313 Cr.P.C. cannot be used to fill up the gaps left by the prosecution witnesses in their depositions. Thus, the statement of the accused is not a substantive piece of evidence and therefore, it can be used only for appreciating the evidence led by the prosecution, though it cannot be a substitute for the evidence of the prosecution. In case the prosecution's evidence is not found sufficient to sustain conviction of the accused, the inculpatory part of his statement cannot be made the sole basis of his conviction. The statement under Section 313 Cr.P.C. is not recorded after administering oath to the accused. Therefore, it cannot be treated as an evidence within the meaning of Section 3 of the Evidence Act, though the accused has a right if he chooses to be a witness, and once he makes that option, he can be administered oath and examined as a witness in defence as required under Section 315 Cr.P.C. An adverse inference can be taken against the accused only and only if the incriminating material stood fully

established and the accused is not able to furnish any explanation for the same. However, the accused has a right to remain silent as he cannot be forced to become witness against himself”.

Learned Counsel appearing for the State advanced argument on the point that reliance must be made upon the answers given by the accused persons at the time of examination under section 313 of Cr.P.C. In view of observation of Hon'ble Court referred above we find that the accused must be given opportunity to furnish explanation which had come against him in the trial and an adverse inference can be drawn against them if the incriminating material stands fully established and the accused is not able to furnish any explanation for the same.

We find that the place of occurrence is an open roof of building at 6/9 Green Park, Kolkata- 55 and the day was of Vishwakarma Puja and as per evidence of PW(s)19 and 20 the time of occurrence was afternoon but no person from the locality was cited by the prosecution. PW20 stated in his deposition that he did not examine any resident of that multi storied building. PW20 deposed that he consulted the complaint as well as statements of witnesses Chanchal Saha, Rajib Chowdhury, Partha Sanyal, Dilip Basak and Mira Basak but the prosecution did not examine them as witnesses in the trial. No reason has been assigned on behalf of the prosecution for not examining those charge sheeted witness during trial.

Our attention is drawn by the learned Counsel appearing on behalf of the convict Saheb Das about the decision rendered by the Hon'ble Apex Court in case of **Harjinder Singh alias Bhola vs State of Punjab**

reported in **(2004) 11 SCC 253** where in at Paragraph 11 it is held *inter alia* that-

“The evidence of the persons who gathered immediately after the occurrence on hearing the alleged cries of P.Ws. 3 & 4 would have been valuable piece of evidence to serve as corroboration of the account given by the direct witnesses, especially when the presence of the alleged eye witnesses at the spot was too much of a coincidence. No reason is forthcoming for not examining them. This is another serious lapse which casts a doubt on the prosecution case”.

In view of the above decision, we are of the view that evidence of such persons would have been valuable piece of evidence to serve as corroboration and non-examination of such persons without any reason is a serious lapse creating doubt about the prosecution story.

It appears from the evidences of prosecution that the appellants accused had taken the victim from one hospital to another for treatment. PW3 stated that Sajal and Argha Rudra told him that the accused Sandip Das admitted the victim in the hospital and three names were mentioned as witnesses including these accused. PW2 stated in his deposition that PW5 gave Rs.5,000/-to the mother of the accused Saheb Das as it was in need of operation of the victim.

Learned Counsel appearing for the accused Saheb das cited a decision rendered by the Apex Court in case of **Gamparai Hrudayaraju vs State of A.P.** reported in **(2009) 13 SCC 740**.

In case of **Gamparai (supra)** at Paragraph 11 the Apex Court held as thus–

“We find that the High Court has not referred to any circumstance which could fasten guilt on the accused. PWs 1 and 2 i.e. sisters of the deceased stated that the ill feelings prevailed in between the appellant and the deceased with regard to the children of the deceased born through her first husband (PW-6). PWs 4 and 5 stated that the deceased came to the house of PW-4 and just wished her and left the house. Ten minutes thereafter the appellant came to her and informed that he was going to Primary Health Centre to bring ambulance to attend to the deceased. Then she went to the house of the appellant and found that the deceased was all right and when the ambulance came the deceased sent the same back saying that she was doing well. After some time, ambulance came and the appellant and the deceased went in it. The evidence of PWs 5 and 6 cannot constitute sufficient evidence against the accused to fasten the alleged offences”.

We find that no circumstance establishes to fasten the guilt of the accused when strong motive to cause death is absent. PW4 stated in his deposition that the accused persons namely Saheb Das, Sandip Ghosh and another man who is found in the dock were also present at C.M.R.I. Hospital. Such conduct of the accused persons is relevant in this case and they had taken the victim from one hospital to another for medical attention. We are of the opinion that the prosecution has failed to prove strong motive to cause death of the victim.

No explanation has been given by the prosecution as to why PW2 after getting information of the incident did not go to the hospital. It is expected that after hearing of such incident any mother will rush to the hospital to see his children. It is evident from her deposition that despite getting information about the incident she immediately did not go the hospitals to see her son, rather the accused persons were present at the hospital at all time. PW4 stated that when on 24.09.2006 the victim died the accused Saheb Das and Sandip Ghosh and another man who is found in the dock were also present at CMRI Hospital. It is difficult to swallow that the persons who want to finish the life of another person in a pre-planned manner will make arrangement for his murder and choose the day which was the date of Sunday and Vishwakarma Puja.

In this case alleged weapon of offence was not seized and no suggestion was put to Pw9, Pw10 or Pw11 regarding offending weapon to suggest that the injury may have been caused by such category of weapons. It appears from the cross-examination of the prosecution witnesses that the appellants accused tried to say that the victim and the accused persons were all intoxicated on the date of incident. It is submitted on behalf of the accused Saheb Das that PW1 testified the medical documents of R.G. Kar Hospital and P.G. Hospital that the victim was in drunken condition. Our attention was drawn to the deposition of Pw10 wherein she stated that there is a history of alcohol intake. Pw16 who was on duty as medical officer at CMRI on 17.09.06 stated that at the time of examination of the victim he was not in a position to determine or conform that the patient was alcoholic. PW20 testified that no viscera of victim was sent for

examination for ascertaining whether any alcohol was consumed by the victim.

Pw9 who is an autopsy surgeon deposed that -

- (1) At the time of holding post mortem I.O of the case did not show him any iron rod or bamboo pole to take opinion.
- (2) It is not mentioned in the report the measuring scale which he used to measure the injury but is measured by a regular tape which is available in the market.
- (3) Injury depends in various factors- surface (hard or mud), muscularity of the body, height.
- (4) Head injury can be caused directly by applying force or by indirect force falling from a certain height.
- (5) An iatrogenic injury may be caused during the treatment like bruises when an unconscious patient is tied with bed railing.

PW11 stated in his deposition that death of the victim was due to effects of head injury- anti mortem in nature whereas Pw9 did not state that the injuries were sufficient in the ordinary course of nature to cause death of one person. PW11 deposed that there are many causes for bleeding from ear, the middle menegial uttery may damage by hit over the head overline this uttery and also in cases of fall from a height where the victim strikes the head on that area. PW7 stated in his cross examination that if a person falls from the roof of the second-floor same nature of injury may cause but he did not find any other injury apart from left ear injury. So, we find that injuries sustained by the victim may be on different causes when

no definite conclusion has been made by the surgeon. It is the duty of the prosecution to establish the death of the victim by cogent evidence which the prosecution has been failed to discharge.

PW2 stated in her deposition that at 8-30 p.m. PW5 returned to their house and told her that the condition of the victim was not good and needed immediate operation. PW3 stated that he talked with the PW7/Doctor who told this witness that immediate operation was needed. Thereafter this witness contacted with the de facto complainant/PW1, father of the victim at Gangtok who after hearing all the things gave consent of operation. PW2 deposed that at night 2-00 p.m. operation was done and it continued till 5 a.m. but after a week on 24.09.06 the victim expired at CMRI Hospital. It appears that PW2 did not give immediate consent for operation of her son. In this situation she might talk with her husband PW1 for taking immediate step but that has not been done. In fact the victim sustained injury on 17.09.2006 at about 2-30 p.m. and operation was done on 18.09.2006 at 2 a.m.. PW7 testified that after first operation when the condition of the patient was deteriorated the CT scan brain of the victim was done and the progress was poor but the party concerned did not give consent for further operation.

Learned trial court judge heavily relied upon the part testimony of Pw14 who declared hostile by the prosecution and faced cross-examination by it. This witness stated that the place of occurrence at 619 Green Park whereas as per prosecution story it was 242/1 of Green Park. PW19 stated in his deposition at the time of cross examination made on behalf of the

accused Saheb Das and Sukumar Karmakar that the formal FIR shows place of occurrence is at 619 Green Park but in fact place of occurrence is shown as 'A' which is described as roof of building at 242/1 Green Park. On cross examination this witness voluntarily stated that the victim and the accused Saheb were quarrelling with each other when he was making sofa at their house. This witness stated that he could not recollect whether he stated before the I.O. that at the time he went to the roof and found that the victim and Saheb were quarrelling and dashing each other for dogs. In cross-examination by the prosecution this witness stated that he could not say whether he stated that all on a sudden the accused persons and some other persons of their group were assaulting the victim by lathi, rod and fist. If the evidence of this witness is taken as a whole, it cannot be relied upon.

PW2 deposed that when the victim went out from their house with the accused Saheb and Sukumar he wore one green colour shirt, one gold ring fitted with pala and had two Nokia mobile phones. She further stated that Mithu brought all these articles from the house of the accused Saheb and handed over to her. That Mithu Sarkar was initially made an accused but he was exonerated in the charge sheet and no plausible explanation has been given by the prosecution in this regard.

The material evidence on record does not reveal anything which incriminates the appellants. Moreover, the depositions of PW2 and PW14 in no way implicate the appellants as offenders. Rest of the prosecution

witnesses have not supported the prosecution story on material facts to show that the appellants are involved in the crime as alleged against them.

In our considered view, in the present case the prosecution has not been able to prove its case beyond reasonable doubt. The evidence of last seen, only leads up to a point and no further. It fails to link it further to make a complete chain. All we have here is the evidence of last seen, which as we have seen loses much of its weight under the circumstances of the case.

These appeals therefore succeed. The order of the trial court dated 27.02.2013 is hereby set aside. Appellants namely Saheb Das, Sandip Ghosh and Sukumar Karmakar if they are in correctional home shall now be released forthwith unless their presence is required in any other case.

Let a copy of this judgement be sent to the Superintendent Correctional Home through the District Judge concerned for immediate compliance and for taking further necessary action.

I agree.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)