

IN THE HIGH COURT AT CALCUTTA
Criminal Miscellaneous Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

CRR 4064 of 2022

The Hon'ble Court in Its Own Motion

Vs.

Raju Wilson @ Moni

In

CRA 502 of 2012

Raju Wilson @ Moni

Vs.

The State of West Bengal

With

CRA 243 of 2012

With

CRAN 5 of 2015 (Old No: CRAN 2082 of 2015)

With

CRAN 8 of 2021

Sarbar Hossain @ Sheru Ali & Ors

Vs.

The State of West Bengal

For the Appellant : Mr. Habibur Rahman, Adv.
In CRA 502 of 2012

Amicus Curia : Mr. Arnab Chatterjee, Adv.
In CRA 502 of 2012

For the Appellants : Mr. Fazlur Rahaman, Adv.
In CRA 243 of 2012 : Mr. Md. Babul Hussain, Adv.
: Ms. Debjani Roy Chowdhury, Adv.

For the State : Mr. Sanjay Banerjee, Adv.
Ms. Pushpita Saha, Adv.

Hearing Concluded on : December 14, 2022
Judgement on : January 11, 2023

DEBANGSU BASAK, J.:-

1. Two appeals were heard analogously as they emanated out of the same impugned judgement of conviction and the order of sentence. By the impugned judgement of conviction dated February 29, 2012 and the order of sentence dated March 1, 2012 the appellants were convicted under section 396 of the Indian Penal Code, 1860 and sentenced to life imprisonment.

2. The case of the prosecution was that on June 9, 2005, the duty officer of the jurisdictional police station received a telephonic message from one Deepak Verma who reported that when he visited flat number 18, third-floor, 6, Bishop Lefroy Road, Kolkata, he found the main door of the flat ajar and despite knocking he did not receive any response. The police responded to such telephonic information and reached the place of occurrence. Upon entering the flat through the main door which was open, it was found that the victim was lying on the floor of the dining room with her hands and feet tied with from bedsheets. She was identified. Upon inspection of

the flat, the almirahs were found ransacked and various articles like clothes, antique jewellery boxes and bundles of cash were found scattered. A cardboard box with the name of Mr. Sundaram written on it was found.

3. A First Information Report was registered on June 9, 2005 with regard to the incident. On completion of the investigations, the police submitted a charge sheet against the appellants and a juvenile. Charges were framed against the appellants for commission of offences punishable under section 396 read with section 120 B or alternatively section 302 read with section 120 B of the Indian Penal Code, 1860. The appellants pleaded not guilty and claimed to be tried.

4. At the trial, the prosecution examined 31 witnesses. On conclusion of the prosecution evidence, the appellants were examined under section 313 of the Criminal Procedure Code where they pleaded to be innocent.

5. CRA number 243 of 2012 was filed by Sarbar Hossain @ Sheru Ali, Sk. Zahid @ Bapi, and Suresh Nayak. For the sake of convenience, they are referred to as the first set of appellants wherever appropriate. CRA 502 of 2012 was filed by Raju Wilson. For the sake of convenience, he is referred to as the second appellant wherever appropriate.

6. The second appellant was found absent on various dates of hearing of the appeals. Consequently, a Rule was issued against him and amicus curia was appointed. The second appellant responded to the Rule and was represented by his advocate subsequently.

7. The first set of appellants and the second appellant were heard at length. Learned advocates appearing for them advanced elaborate arguments on their behalf. The amicus curia was also heard. They were heard on the alternative charges under Sections 396/120B and 302/120B of the Indian Penal Code, 1806.

8. Learned advocate appearing for the first set of appellants submitted that, section 396 of the Indian Penal Code, 1860 was not attracted in the facts and circumstances of the present case. He submitted that, in order to attract the provisions of section 396 of the Indian Penal Code, 1860, presence of five persons at the time of commission of the offence was required to be established. In the facts of the present case, the prosecution failed to establish presence of five persons at the place of occurrence and at the commission of the offence. The prosecution failed to establish involvement

of 5 or more persons in the charges alleged. Therefore, section 396 of the Indian Penal Code 1860 was not attracted.

9. That apart, learned advocate appearing for the first set of appellants contended that, the prosecution failed to establish the charges beyond reasonable doubt. The prosecution witnesses were either interested witnesses or pocket witnesses. No independent witness was examined on behalf of the prosecution. There was no eyewitness to the incident. Prosecution did not produce any witness claiming such witness to be an eyewitness to the incident. Therefore, no reliance should be placed on the evidence led by the prosecution at the trial.

10. Referring to the quality of the evidence led by the prosecution of the trial, learned advocate appearing for the first set of appellants submitted that, one of the prosecution witnesses allegedly saw four persons to go up on the lift and to exit the building through the lift. Such prosecution witnesses did not describe the distinguishing features of any of the first set of appellants. Therefore, the so-called identification of the first set of appellants at the test identification parade or in the Court was suspect.

11. Referring to the test identification parade of the first set of appellants, learned advocate appearing for them, submitted that, although, the date of the incident was of June 9, 2005, the test identification parade was held on July 22, 2005. The delay in holding the test identification parade vitiated the same.

12. Learned advocate appearing for the first set of appellant submitted that, when two views are possible, then, the view which favours the accused should be accepted. In the facts and circumstances of the present case, the Court should grant the benefit of doubt to the appellants as, none of the prosecution witnesses can say with certainty that, any of the first set of appellants were last seen with the victim.

13. Learned advocate appearing for the first set of appellant submitted that, there was a delay in discovery of the dead body. There was considerable time period lapsing between the time when the first set of appellants allegedly went to the flat of the victim and the discovery of the dead body of the victim at the flat. There was the possibility of others intervening between that time. Therefore, the trial Court erred in convicting the appellants.

14. Learned advocate appearing for the first set of appellant submitted that, the author of the First Information Report (FIR) was not examined. The Court should take adverse inference with regard to non-examination of the maker of the First Information Report. Moreover, the benefit of doubt should be granted to the first set of appellants.

15. Learned advocate appearing for the first set of appellants submitted that, the first set of appellants were in custody for 22 years. The period of detention of the first set of appellants should be taken into consideration also.

16. In support of his contentions, learned advocate appearing for the first side of appellants relied upon **1983 Volume 2 Supreme Court Cases 65 (Ram Lakhan Vs. State of U.P), 2008 Volume 11 Supreme Court Cases 709 (Raj Kumar @ Raju Vs. State of Uttaranchal), 2015 Volume 7 Supreme Court Cases 167 (Manmeet Singh @ Goldie Vs. State of Punjab), 1993 Supp (2) Supreme Court Cases 697 (Tahir Mohammad Kamad Girendra Singh & Anr. Vs. State of M.P.), 1995 Supp (4) Supreme Court Cases 448 (Satrughana @ Satrughana Parida Vs. State of Orissa), 1984 Supp Supreme Court Cases 625 (Bali Ahir & Ors. Vs. State of Bihar), 2003 SCC Online AP 1257 (Rapani**

Laxmi and Others Vs. State of A.P), 1995 SCC Online Cal 440 (Islam Molla Vs. State of West Bengal), 2019 Volume 4 SCC 522 (Digamber Vaishnav & Anr. Vs. State of Chattisgarh), 1977 Volume 2 Supreme Court Cases 210 (Magan Bihari Lal Vs. State of Punjab), 2001 Volume 3 Supreme Court Cases 451 (Kanhai Mishra @ Kanhaiya Misar Vs. State of Bihar) and 1973 Volume 2 Supreme Court Cases 808 (Kali Ram Vs. State of Himachal Pradesh).

17. According to the learned advocate appearing for the first set of appellants, the prosecution could not establish the charges beyond reasonable doubt. Therefore, the first set of appellants should be acquitted.

18. Learned amicus curiae for the second appellant submitted that, the prosecution witnesses disclosed presence of four persons at the place of occurrence. He referred to the definition of dacoity under section 391 of the Indian Penal Code, 1860. Since five persons were not established to be present at the place of occurrence, conviction under section 396 of the Indian Penal Code, 1860 was not tenable.

19. Learned amicus curia submitted that, the prosecution did not produce any eyewitness to the incident. He submitted

that, based on the evidence placed by the prosecution at the trial, the conviction of the appellants for either murder or robbery is untenable.

20. Learned amicus curia highlighted the various discrepancies and embellishments in the testimonies of the prosecution witnesses. He submitted that, the charges framed against the appellant suffer from absence of material particulars. In such circumstances, he submitted that, the appellants should be acquitted.

21. Learned amicus curia relied upon **1971 Volume 2 Supreme Court Cases 75 (Matru @ Girish Chandra Vs. State of Uttar Pradesh)** in support of his contentions.

22. Learned advocate appearing for the second appellant submitted that, the case of the prosecution was based upon circumstantial evidence. The prosecution failed to prove beyond reasonable doubt each and every chain of the events/circumstances leading to the guilt of the second appellant.

23. Learned advocate appearing for the second set of appellant relied upon **2012 Volume 7 Supreme Court Cases 45 (Brijesh Mavi Vs. State of NCT of Delhi), 2014 Volume 7 Supreme Court Cases 405 (Umakant & Another Vs. State**

of Chattisgarh) and ***2013 Volume 12 Supreme Court Cases 503 (Tejinder Singh Vs. State of Punjab)*** in support of his contentions.

24. Learned advocate appearing for the State submitted that, though the case was based on circumstantial evidence, the prosecution succeeded in proving the interaction of events. The prosecution was able to establish the presence of the four appellants at the time and place of occurrence along with the motive behind the murder and robbery. He submitted that, the recovery of various articles from each of the appellants which belonged to the victim and identified by the daughter of the victim, established beyond reasonable doubt, the guilt of the appellants. He referred to the testimonies of the various prosecution witnesses. He submitted that, none of the appellants during the examination under section 313 of the Criminal Procedure Code, provided any explanation as to how the articles belonging to the victim came to be recovered from their possession. He submitted that, five independent witnesses without any interest in the outcome of the case, identified the appellants either going to the apartment of the victim, were speaking to the victim or leaving the building. The second appellant was identified as the person who carried the

bag on the way out. Two witnesses identified the juvenile who was seen talking to the first set of appellants 2 to 3 days prior to the incident.

25. Learned advocate appearing for the State submitted that, the trial Court framed an alternative charge under section 302 read with section 120 B of the Indian Penal Code, 1860 against the appellants. Since, the appellants contended that, conviction under section 396 of the Indian Penal Code, 1860 was untenable, the appeals and the appellants should be heard on the alternative charge also. He submitted that, all the appellants were last seen with the victim. The victim was murdered. Therefore, the charge of murder as against the appellants stood established at the trial. The appellants at the basic minimum should be convicted on the charge of murder.

26. Learned advocate appearing for the first set of appellants in reply submitted that, recovery of stolen articles can raise an inference in view of illustration (a) to section 114 of the Evidence Act that, the appellants were the receivers of stolen property or were persons who committed the theft. He relied upon **2012 Volume 2 Supreme Court Cases 584 (Mohd. Hossain @ Zulfikar Vs. State), 2022 SCC Online SC 1558 (Giressan Nair Vs. State of Kerala), 1952 Volume 2**

Supreme Court Cases 641 (Sanwat Khan & Ors. Vs. State of Rajasthan), 2021 Volume 4 Supreme Court Cases 345 (Hari Om @ Hero Vs. State of Uttar Pradesh), 2018 SCC Online Cal 16830 (Sk. Shanawaz Vs. State of West Bengal), and the judgement and order dated February 28, 2022 passed in CRA 380 of 2017 (Iman Ali Mondal @ Tanmoy Halder Vs. State of West Bengal).

27. At the trial, the police personnel who visited the place of occurrence and took photographs of the place of occurrence, deposed as PW 1. He deposed as to the manner of the photographs being taken and tendered the photographs with the negatives as exhibits at the trial. He was cross-examined at length on behalf of the defence.

28. The police personnel who drew the sketch plan of the place of occurrence deposed as PW 2. He stated as to how he prepared the sketch map and the final map of the place of occurrence. He described the place of occurrence. He was cross-examined at length on behalf of the defence.

29. The security guard of the building deposed as PW 3. He described the nature of his duties. He stated that, on June 9, 2005, he was on duty from about 10:30 AM when, at about 12 noon, one person came to the building. He asked such

person where he wanted to go when such person replied that he wanted to go to the flat of the victim. He allowed such person to go forward. Such person came back after an interval of 5/6 minutes and went away. Thereafter, at about 1:30 PM, four persons came when again; he asked such four persons where they wanted to go. Out of the four persons, one person told him that, they were from a courier service and wanted to go to the flat of the victim. He allowed them to proceed. At about 2:30 PM when he was gossiping with the electrician of the building, who deposed as PW 6, and a motor mechanic, the four persons who went inside the building at about 1:30 PM, went out of the building. Out of such four persons, he found one person to be carrying a bag. At about 5:30 PM, another person came when he asked such person where he wanted to go, such person said that he wanted to visit the flat of the victim whereupon, he allowed such person to proceed. Such person returned hurriedly and told him that, such person used the calling bell of the flat of the victim and knocked on the door but no reply was received from inside although the door of the flat was open. Such person went away by saying that he wanted to inform the police.

30. PW 3 described the four persons who entered the building to be aged below 30 years, one of them being black in complexion while the complexions of the others were medium. They were in pant and shirt. He identified the four persons as Sarbar Hossain, Raju Wilson, Suresh Nayek and Sk. Zahid in Court. He also identified them in the test identification parade. He identified Sk. Zahid as the person who carried the bag while the four persons were leaving the building. He identified Raju Wilson as the person who talked to him at the time when the four persons were returning from the building.

31. PW 3 was cross-examined in great detail by the defence. They could not elicit anything favourable to them from such cross-examination of PW 3.

32. The lift man of the building deposed as PW 4. He stated that, on June 9, 2005, he was on duty from 10 AM to 8 PM. At about 11:30 A.M/12 noon, a person of about 30/32 years came to the building and told him that such person would go to the flat of the victim. He carried such person to the floor of the flat of the victim. After five minutes, such person went away. At about 1:30 PM, four persons came and told him that they would go to the flat of the victim for delivery of a courier letter. He found a packet in the hands of one of

the four persons. The carrying capacity of the lift of the building was four persons including the lift man. So he asked one of the persons to wait for the next trip. However, they claimed that they were not very heavy and can be accommodated in the same lift. He took all four persons on the lift on the same trip. The four persons alighted from the lift on the floor of the flat of the victim. They pressed the calling bell of the flat of the victim. At that point of time, he went down with the lift. He stated that about 2:30 PM, the four persons got down by using the staircase and went away. He noticed one of them was with a black complexion carrying a plastic carry bag. At about 5:30 PM, a person came in front of the lift gate and told him that he would go to the flat of the victim. He carried such person by lift, reached the floor of the flat of the victim and thereafter he got down. After some time, the security guard of the building told him that the person who went to the flat of the victim told him that he pressed the calling bell and knocked on the door of the flat but there was no response from inside. The door of the flat was open. The security guard asked him to go to the flat of the victim. As such, he along with the security guard went to the fourth floor and called Ranjan Mukherjee and Amar Bhakat. By this time,

the police came. He along with the security guard, Ranjan Mukherjee and Amar Bhakat entered the flat where they noticed that the household articles were ransacked and scattered in a disorderly fashion. The almirahs were open and the jewelry box was also open. They noticed that the body of the victim was lying on the floor with mouth, hands and legs tied by cloth. He stated that, the person who was carrying a packet was aged about 20 to 30 years. The complexions of the other persons were medium. They were wearing pant and shirt. He went to the correctional home wherein a test identification parade was held and he identified the five persons in connection with the case. Out of the five persons, he stated that, one of them was working with Super Fast Courier Service which was situated on the roof of the building. He identified four persons out of the five persons involved in Court. He identified Sarbar Hossain, Sk. Zahid, Suresh Naik and Raju Wilson in Court. He identified Sk. Zahid as the person who carried the packet to the flat of the victim. He identified Raju Wilson as the person who carried the black carry bag in his hand.

33. PW 4 was cross-examined at great length on behalf of the defence. They could not elicit anything favourable to them in such cross-examination.

34. The sweeper of the building was examined as PW 5 at the trial. He stated that, on June 9, 2005, at about 1/1:30 PM, his employer gave him Rs. 50 for bringing cold drinks. He got down from the fourth floor to the ground floor. When he got down, he found that four persons were standing in front of the gate of the flat belonging to the victim. Such four persons were talking to the victim. The victim talked with them by opening the main door of the flat to some extent. He asked them to give him passage when they looked at him and gave him passage. After purchasing the cold drinks, during his return to the fourth floor, 7/8 minutes after he got down from the fourth floor, he noticed that none of the four persons including the victim were present and that the door of the flat of the victim was closed. He subsequently received news from the lift man and the security guard at about 6:30 PM that the victim was murdered. He described that out of the four persons, one was black in complexion while the remaining three were medium in complexion. They were aged about 24 to 30 years and wearing pant and shirt. He identified the four

persons at the correctional home during the test identification parade. He identified Suresh Nayek, Raju Wilson, Sk. Zahid and Sarbar Hossain as the four persons involved who were standing in front of the flat of the victim and talking to the victim. He was cross-examined at great length on behalf of the defence. However, the defence could not elicit anything favourable to them during such cross-examination.

35. The electrician deposed as PW 6. He stated that, he resided at the same building. He worked as an electrician of such building. He was working there for about 12/15 years. On June 9, 2005, at about 9:30/10 A.M, he went to a different place for electric repairing work and returned from there at about 12:15 PM. Just after returning, he asked PW 3 as to whether there was any enquiry for electric work from the occupants of the building. The mechanic who was also residing in the same premises came before PW 3. PW 3 replied that no call in respect of electric work was made. While, he, the security guard and the mechanic who were talking in front of the main gate, they noticed that four persons left the building. He described one of such person to be of black complexion and carrying a black polythene bag in his hand. PW 3 enquired of the four persons as to whether, they met the

victim. The black complexion person replied in the affirmative. He identified the four persons involved to be Sk. Zahid, Raju Wilson, Suresh Nayek and Sarbar Hossain. He identified the person carrying the black polythene bag as Raju Wilson. He was also cross-examined at great length by the defence. However, they could not elicit anything favourable during such cross-examination. In fact, during cross-examination, he narrated as to how, the test identification parade was carried out. He denied talking to any of the other persons present during the test identification parade.

36. The brother of Sarbar Hossain deposed as PW 7. He identified his signature on Exhibit 2. He was declared hostile by the prosecution. He identified his signature on the label pasted on the envelope marked as Exhibit 3.

37. Another brother of Sarbar Hossain deposed as PW 8. He did not add any substance to the case either of the prosecution or the defence.

38. A witness to the seizure made on June 30, 2005 from the house of Sk. Zahid deposed as PW 9. He identified his signature on such seizure list which was marked as Exhibit 4/1. He stated that, Sk. Zahid was arrested on such date and that, the articles listed in Exhibit 4/1 were seized from the

arrested person. He identified the arrested person in Court. He identified his signature on the label of the seat cover which was marked as Exhibit 5/1. He also identified his signature on Exhibit 6/1, 7/1, 8/1, 9/1, 10/1 and 11/1. He stated that, the room of Raju Wilson was also raided. He identified Raju Wilson in Court.

39. PW 10 stated that, on June 25, 2005, Sarbar Hossain came to the shop to exchange US\$ 1200. PW 10 was asked by such accused to keep the money till he got appropriate papers for exchange. On June 30, 2005, at about 8 PM, police came along with the accused person whereupon; he produced the envelope containing the US\$ 1200. The US dollars were seized. He identified his signature on Exhibit 13/1 as also on Exhibit 14/1.

40. A jewellery shop owner deposed as PW 11. He stated that on June 11, 2005 at about 12 noon, Suresh Nayek came to the shop and kept the gold bangles at mortgage and obtained a sum of Rs. 10,000 from him. On June 13, 2005, Anup Jadav came to the shop and obtained Rs. 5000 on mortgage of one gold chain stating that Suresh Nayak sent him. Police seized the gold bangles and the gold chain. He

identified the same in court. He identified various exhibits also.

41. PW 12 witnessed the seizure made on July 3, 2005 and marked as Exhibit 23/1. He identified Albert Perier as the person who was with the police.

42. PW 13 witnessed the seizure made on July 13, 2005. He identified his signatures on the exhibits and also identified the articles seized. He identified the accused as Albert Perier.

43. PW 14 witnessed the seizure made on July 7, 2005. He identified his signature on the seizure list as Exhibit 26/1. He disclosed that, the seizure was made in presence of Suresh Nayek.

44. The judicial magistrate in whose presence, the test identification parade was held on July 14, 2005 deposed as PW 15. The judicial magistrate in presence of whom, the signature of the four appellants was taken on July 6, 2005 deposed as PW 16.

45. The shop owner from where, the victim purchased a mobile phone along with a sim card deposed as PW 17. A witness of the seizure made on July 7, 2005 deposed as PW 18. A person who looked after the victim at the request of his employer, deposed as PW 19. He stated that, he received a

phone call from his employer with regard to the mishap to the victim on June 9, 2005. Immediately on receipt of such phone call, he visited the residence of the victim and found the police personnel and neighbours to be present there at. He stated that, the victim used to wear gold ornaments which were missing on the body of the victim lying on the floor. The police made certain seizure which was witnessed by him. He stated that, the victim purchased a mobile phone from the shop in his presence. The victim also used a camera.

46. The daughter of the victim deposed as PW 20. She identified various articles that were seized by the police as those belonging to the victim. She was cross-examined in great detail on behalf of the defence. The defence could not elicit anything favourable to them on such cross-examination.

47. The handwriting expert deposed as PW 21. He tendered his report in evidence which was marked as Exhibit 33. He also attended various Material Exhibits.

48. The doctor who conducted the post-mortem on the body of the victim deposed as PW 22. He tendered the post-mortem report of the victim which was marked as Exhibit 34. He described the various injuries and the distinctive features that he found on the body of the victim. He opined that, the

death of the victim was due to combined effects of head injury and smothering. The death was ante-mortem and homicidal in nature. He stated that, the injuries that he found on the body of the victim were sufficient for instant death. According to him, the injury number six described in his report was caused by a heavy weighty blunt substance. The injury numbers one, seven and eight were caused due to smothering by the assailants. Such injuries on the body of the victim indicated that the assailants were more than one. The post-mortem of the body of the victim was held on June 10, 2005 at 1 PM. In all probabilities, the death occurred 24 to 30 hours before the post-mortem examination.

49. The person who was a witness to the seizure made on the July 19, 2005 deposed as PW 23. He tendered the signature on the seizure list as Exhibit 35. He also identified the cash memo book which was marked as Exhibit 36.

50. The doctor before whom, the victim was first produced at the hospital deposed as PW 24. She stated that, the victim was brought dead to the hospital. She stated that, on examination, she found the victim's both hands, both lower limbs were tied with tone bedsheet pieces. Expulsion of denture with injury overturns and lips with bleeding from

there were also found. She did not find any ligature mark over the neck. One loose scarf over the neck of the victim and part of the face, a few abrasion over face may be caused by nails were also found. She referred to the post-mortem report. She tendered the report which was marked as Exhibit 38.

51. The police personnel who held the inquest on the dead body of the victim deposed as PW 25. She tendered the inquest report which was marked as Exhibit 39. She stated that the inquest of the dead body of the victim was held at the morgue of the hospital in the presence of two witnesses who were the son and daughter of the victim.

52. The police personnel who removed the body of the victim to the hospital deposed as PW 26. He identified the body of the victim before the doctor. On recall, he stated that, he got the investigation power of the case on June 10, 2005. He recorded the statement of witnesses as the investigating officer and handed over the case diary to the officer in charge of the police station as investigating officer on June 28, 2005.

53. One of the police personnel who was present on June 9, 2005 at the flat of the victim deposed as PW 27. He stated that, he seized some articles from the flat of the victim in presence of witnesses on such date and prepared a seizure list

with regard to the same. He identified the seizure list and the articles seized.

54. The shop owner who sold a TV set to the victim deposed as PW 28. He identified the TV set as well as the cash memo which was issued in favour of Sk. Zahid.

55. A tenant of the victim deposed as PW 29. He stated that, 2/3 days before June 9, 2005 he noticed that one of his employees, a juvenile, gossiped with two persons on the top about 20 cubits away from his office. He called the juvenile and cautioned him that if the juvenile continued he would be sacked. He identified the two persons who met the juvenile. He stated that on June 9, 2005, he came to know that the victim was murdered. He identified the two persons with whom the juvenile was talking to be Raju Wilson and Albert Perier.

56. One of the police personnel who responded to the telephone call on June 9, 2005 deposed as PW 30. He was the investigating officer. He deposed as to the manner of the investigations carried out. He was cross-examined at length on behalf of the defence. The defence could not elicit anything favourable from him.

57. The second investigating officer who took over the investigation on June 28, 2005 deposed as PW 31. He narrated the conduct of the investigation under him. He spoke about the arrest and seizure made. He was also cross-examined at length on behalf of the defence. The defence could not elicit anything favourable to them.

58. At the trial, the prosecution established particularly through the evidence of PW 22 and Exhibit 34 that the victim was murdered. The victim suffered a number of injuries. The post-mortem doctor opined that, the injuries suffered were sufficient to cause death. The appellants could not draw the attention of the court to any material on record to suggest that the death of the victim was not homicidal in nature.

59. The prosecution did not produce any eyewitnesses to the murder. The prosecution relied on circumstantial evidence and the circumstance of last seen together in order to bring home the charges against the appellants. Moreover, articles stolen from the possession of the victim were found with the appellants.

60. On the aspect of the circumstance of last seen together the Supreme Court in ***Digamber Vaishnav & Anr. (supra)***, observed as follows:-

“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.”

61. On circumstantial evidence forming basis of an order of conviction, ***Kanhai Mishra @ Kanhaiya Misar (supra)*** observed as follows :-

“5. It is a well-established rule in criminal jurisprudence that circumstantial evidence can be reasonably made the basis of an accused person's conviction if it is of such a character that the same is wholly inconsistent with innocence of the accused and is consistent only with his guilt. The incriminating circumstances for being used against the accused must be such as to lead only to a hypothesis of guilt and reasonably exclude every possibility of innocence of the accused. In a case of circumstantial evidence the whole endeavour and effort of the court should be to find out whether the crime was committed by the accused and the circumstances proved form themselves into a complete chain unerringly pointing to the guilt of the accused. If the circumstances proved against the

accused in a case are consistent either with the innocence of the accused or with his guilt, he is entitled to the benefit of doubt. Reference in this connection may be made to a Constitution Bench judgment of this Court in the case of M.G. Agarwal v. State of Maharashtra [AIR 1963 SC 200 : (1963) 1 Cri LJ 235] and recent decisions of this Court in the cases of Ronny v. State of Maharashtra [(1998) 3 SCC 625 : 1998 SCC (Cri) 859] and Joseph v. State of Kerala [(2000) 5 SCC 197 : 2000 SCC (Cri) 926] .”

62. *Brijesh Mavi (supra)* observed that, in respect of establishing a criminal charge on circumstantial evidence, the prosecution must prove and establish incriminating circumstances against the accused beyond all reasonable doubt and such circumstance must give rise to only one conclusion to the exclusion of all others, namely, that it is the accused and nobody else who committed the crime.

63. In the facts of the case, in ***Tejinder Singh (supra)*** the Supreme Court found major discrepancies and contradictions between the statements of one witness and the other. In such circumstances, the conviction of the accused was not sustained.

64. The circumstance of last seen together cannot by itself form the basis of an order of conviction. In fact, if the last seen evidence does not inspire evidence or is not trustworthy, there

cannot be any conviction. In order to constitute the last seen together as an incriminating circumstance, there must be close proximity between the time of last seen and the recovery of the dead body. However, the last seen together circumstance must be coupled with something more to establish the connectivity between the accused and the crime. Non-explanation by the accused in the statement under Section 313 of the Criminal Procedure Code does not lead to proof of guilt. The circumstances proved must form themselves into a complete chain to unerringly point to the guilt of the accused. The incriminating circumstances must be such so as to lead to only one finding that is the guilt of the accused and exclude every possibility of innocence of the accused.

65. Keeping such parameters in mind, the evidence at the trial was evaluated for the purpose of analysing whether the appellants were guilty of murder of the victim or not.

66. The Security Guard of the building, deposed as PW 3. He stated that, he saw the appellants in the two appeals to enter into the building at about 1.30 P.M. He asked the appellants involved in the two appeals as to where they wanted to go when, they said that they wanted to go to the flat

of the victim. The lift man of the building deposed as PW 4. He stated that, at about 1.30 P.M, the appellants involved in the two appeals told him that they wanted to go to the flat of the victim for delivery of a courier letter. He found a packet in the hands of one of the appellants involved. He took the four persons on the lift. The four appellants alighted from the lift on the floor of the flat of the victim. PW 4 saw the four appellants pressing the calling bell of the flat of the victim. At that point of time he went down with the lift.

67. PW 5 who was the sweeper of the building saw the four appellants at the gate of the flat of the victim when he was climbing down the stairs to run an errand for the owner of the flat upstairs. He saw the four appellants to be talking with the victim. The main door of the flat of the victim was open to some extent when the four appellants were talking with the victim.

68. PW 3, 4 and 6 saw the appellants leave the building at about 2.30 P.M with a bag. The victim was discovered dead at around 5.30 P.M of the same day in her flat. No material on record was drawn to our attention to suggest that the victim met any other person subsequent to the appellants leaving the victim. The victim was at her residence.

69. In such circumstances, the prosecution was able to establish beyond reasonable doubt that, the four appellants were last seen together with the victim. None of the four appellants explained their conduct in their examination under Section 313 of the Criminal Procedure Code.

70. Establishing that the appellants last seen together by the victim by itself may not be sufficient so as to connect the appellant with the crime. The failure of the appellants in explaining their conduct, in their examination under Section 313 of the Criminal Procedure Code was of no consequence. In order to connect the appellants with the crime, the prosecution led evidence as to the recovery of stolen articles belonging to the victim from the possession of the appellants. According to the prosecution, the appellants murdered the victim and stole valuables belonging to her. Both the murder and the stealing by the appellants were established by the prosecution at the trial.

71. The appellant Sarbar Hossain was arrested from his residence on June 13, 2005. A mobile phone being Nokia 3310 of the victim was seized from Sarbar Hossain in presence of witnesses. The Nokia phone of the victim was

identified as belonging to the victim by the daughter of the victim.

72. The appellant Sarbar Hossain revealed the names of Sk. Zahid and Raju Wilson during his interrogation. Being accompanied by Sarbar Hossain, the Investigating Officer, PW 31, arrested Sk. Zahid and Raju Wilson. In terms of the leading statements of Sk. Zahid, PW 31 seized two cameras belonging to the victim from the house of Sk. Zahid. The cameras were identified to be belonging to the victim by the daughter of the victim.

73. Pursuant to the leading statement made by the appellant Raju Wilson, PW 31 seized a silver necklace, 2 coins, 5 pieces of U.S dollars, 5 pieces of coins, 3 pieces of Honkong coins, and one golden purse. These articles were identified by the daughter of the victim as belonginig to the victim. These items were recovered, as noted above, on the leading statement made by Raju Wilson.

74. Raju Wilson revealed the names of Suresh Nayek who was arrested on June 30, 2005. On interrogation of Suresh Nayek, the name of Albert Perier came to light. He made a leading statement being Exhibit 53 on July 3, 2005

whereupon, a Kodak Camera and a wrist watch was recovered from his room.

75. On July 7, 2005, Suresh Nayek disclosed the whereabouts of other stolen articles which were pledged for money. The leading statement was marked as Exhibit 56. Mortgage receipts were collected from the room of Suresh Nayek. On the same day Suresh led to PW 11 whereupon 4 pieces of bangles were seized.

76. On July 13, 2005, Albert Perier made a statement which led to the recovery of a red velvet pouch from his room. Such pouch contained ornaments like Mangalsutra, gold necklace, gold bracelet, one Laxmi idol of silver, 7 pieces of one rupee coins. One life member memento, one silver idol of Gopal and one memento containing the inscription of "Rotary Club of Calcutta, Midtown".

77. The articles that were recovered on the leading statements made by the appellants were identified by the daughter of the victim in Court as articles belonging to the victim.

78. *Sanwat Khan (supra)* dealt with a conviction based upon recovery of articles at the instance of the accused. It observed that, no hard and fast rule can be laid down as to

what interference should be drawn from a certain circumstance. Where, however, the only evidence against an accused person was the recovery of stolen property and although the circumstances may indicate that the theft and the murder were committed at the same time, it was not safe to draw the inference that the person in possession of the stolen property was the murderer. Suspicion cannot take place of proof.

79. In the facts and circumstances of the present case, not only articles belonging to the victim were recovered from the possession of the appellants but the appellants were also last seen together with the victim immediately before the victim was found murdered. The amalgam of the appellants being of the factual matrix of the last seen together with victim and the recovery of articles belonging to the victim their leading statements negates the hypothesis of the innocence.

80. In such circumstances, it can be safely inferred that, the appellants were last seen together with the victim and were involved in the murder of the victim and that they stole articles belonging to the victim.

81. A juvenile was also involved in the present police case along with the appellants. The juvenile was sent to the

Juvenile Justice Board to stand trial. Apparently, there was no progress at the Juvenile Justice Board with regard to the trial and therefore, the juvenile was discharged.

82. Another person who was charged along with the appellants as participants in the dacoity with murder was found to be the receiver of the stolen goods by the Trial Court. The State did not prefer any appeal from such findings. The prosecution failed to establish that, there were five persons involved in the dacoity and murder of the victim.

83. ***Ram Lakhan (supra), Raj Kumar @ Raju (supra) and Manmeet Singh @ Goldie (supra)***, related to police cases under Section 396 of the Indian Penal Code, 1860. In the facts and circumstances of the present case, since, the prosecution failed to establish the case at the trial that five persons were involved, the question of provisions of Section 396 of the Indian Penal Code, 1860 being attracted does not arise.

84. In ***Tahir Mohammad Kamad Girendra Singh & Anr. (supra)***, the accused were put on fetters on their legs connected with an iron rod and mixed up with unfettered undertrial prisoners. In such circumstances, the test identification parade and the evidence thereto was held to be unreliable.

85. In ***Satrughana @ Satrughana Parida (supra)*** there was unexplained delay in holding the test identification parade. In the facts and circumstances of that case, it was found that such unexplained delay adversely affected the value of the evidence of identification.

86. In ***Bali Ahir & Ors. (supra)*** the appellants belonged to the neighbouring village of the witnesses who came to identify the appellants. Moreover, the witness who knew one of the accused from before did not name such accused in the First Information Report and went to identify him. In such circumstances, the identification of the accused was found to be incorrect. The factual situation in the present case is different.

87. In ***Rapani Laxmi and Others (supra)*** the Andhra Pradesh High Court, in the facts of that case, found that the test identification parade was not conducted in accordance with Rule 34 of the Criminal Rules of Practice and Circular Orders, 1990.

88. ***Gireesan Nair and Others (supra)*** dealt with test identification parade. It observed that, the objective of conducting a test identification parade is threefold. Firstly, it is to enable the witnesses to satisfy themselves that the

accused whom they suspect was really the one who was seen by them in connection with the crime. Secondly, to satisfy the investigating authority that the suspect was the real person whom the witnesses saw in connection with the occurrence. Thirdly, to test the witnesses memory based on first impression and enable the prosecution to decide whether all or any of them could be cited as eyewitnesses to the crime.

89. In the facts and circumstances of the present case, the date of the incident was June 9, 2005. The appellants were arrested in two of tranches on June 30, 2005 and July 2, 2005. The test identification parade was held on July 22, 2005. In such circumstances, it cannot be said that, there was undue delay or unexplained delay in holding the test identification parade. The test identification parade was held within twenty days from the date of the last arrest which was affected on July 2, 2005. The accused were not put fetters at the time of the test identification parade or were identified to the witnesses prior to the test being held.

90. ***Mohd. Hussain (supra)*** dealt with right of under trials to speedy trial and effective opportunity to defend at such trial. It discussed the interplay of the two rights. It held that, right of an accused to proper legal assistance must be

substantial and meaningful. It also observed that, although speedy trial was desirable, it cannot be at the cost of the right of the accused to defend oneself properly. In the facts of the present case, all the accused were defended at the trial as also during the hearing of the appeal. A number of witnesses were examined at the trial. Cross examination of prosecution witnesses were deferred on the prayer made on behalf of the appellants. During the hearing of the appeals also, the appellants were found absent on several dates of hearing. Rule was issued as against the second appellant so as to ensure that the appeals were heard in presence of the appellants. It was after much ado that, the appeals were taken up for hearing. The appellants employed dilatory tactics in delaying the disposal of the appeals.

91. In *Islam Molla (supra)* the Division Bench found that the search and seizure was not made in accordance with the provisions laid down in the Code of Criminal Procedure. Consequently, the order of conviction and sentence imposed was set aside.

92. In *Magan Bihari Lal (supra)* the Supreme Court observed that handwriting expert opinion cannot be the sole basis for conviction, instead corroboration is necessary.

93. In ***Kali Ram (supra)*** the Supreme Court observed that in case of two alternative views the Court should accept the view favourable to the accused.

94. There was a dying declaration in ***Umakant & Another (supra)***. It dealt with the admissibility of a dying declaration in evidence. It noted the authorities of the Court on the issue of dying declaration.

95. In ***Hari Om @ Hero (supra)*** the Supreme Court noted various inconsistencies commissions and discrepancies in the testimonies of the prosecution witnesses and therefore found that the accused were entitled to benefit of doubt.

96. **Sk. Shanawaz (supra)** and ***Iman Ali Mondal @ Tanmoy Halder (supra)*** found several inconsistencies in the witnesses of the prosecution and therefore extended the benefit of the doubt to the appellants. In the facts and circumstances of the present case, the prosecution established the guilt of the appellants beyond reasonable doubt and therefore the question of extending the benefit of the doubt to the appellants or any of them does not arise.

97. As noted above, alternative charges were framed as against the appellants under Section 120B/396 and 120B/302 of the Indian Penal Code, 1860.

98. Since 5 persons were not involved at least the prosecution failed to establish the same the question of convicting the appellants under Section 396 of the Indian Penal Code, 1860 did not arise.

99. The learned Judge proceeded to convict the appellants under Section 396/120B of the Indian Penal Code, 1860 by the impugned order of conviction and proceeded to award sentence thereunder by the impugned order of sentence.

100. However, the charge of murder as against the appellants stood established at the trial in light of the discussions as noted above. The appellants were heard on the charge of murder in these appeals also.

101. In such circumstances, we find the appellants guilty of murder under Section 302/120B of the Indian Penal Code, 1860 and sentence the appellants to suffer life imprisonment and to pay a fine of Rs. 5,000/- each in default to undergo further rigorous imprisonment for a period of six months.

102. Period of detention suffered by the appellants during investigation, enquiry and trial shall be set off against the substantive sentence imposed upon them in terms of Section 428 of the Code of Criminal Procedure.

103. The appellants who are on bail during the pendency of the appeals will surrender within a fortnight from date to serve the remainder of the sentence. Failing the surrender, the jurisdictional Court will take appropriate steps.

104. CRR 4064 of 2022 in CRA 502 of 2012 with CRA 243 of 2012 are disposed of accordingly. All connected applications including CRAN 5 of 2015 (Old No: CRAN 2082 of 2015) and CRAN 8 of 2021 in CRA 243 of 2012 are also disposed of accordingly.

105. Trial Court records along with a copy of this judgement and order be sent down at once to the appropriate Court for necessary action.

106. Rule issued against Raju Wilson stands discharged.

107. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

[DEBANGSU BASAK, J.]

108. I agree.

[MD. SHABBAR RASHIDI, J]