

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 206 of 2010

With

CRAN No.1 of 2010 (Old No.CRAN 2317 of 2010)

Md. Ajumuddin @ Aju & Ors.

-Vs-

The State of West Bengal

For the Appellants : Mr. Arindam Jana
Mr. Jakir Hossain

For the State : Mr. Avishek Sinha

Heard on : 21.03.2024, 21.05.2024, 04.10.2024

Judgment on : 13.12.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against the judgment and order of conviction dated 16.03.2010 and 17.03.2010 passed by the Learned Additional Sessions Judge, Fast Track Court, Malda in Sessions Trial No.11(6)2009 arising out of the Sessions Case No.145/2009 convicting the appellants under Sections 304 Part-II of the Indian Penal Code read with Section 34 of the Indian Penal Code and sentenced them 4 years rigorous imprisonment and to pay a fine of Rs.2,000/- each in default to suffer further rigorous imprisonment for 6 months each.

2. The prosecution case precisely stated on 10.01.2006 at about 05:00 p.m., accused persons namely Md. Aju, Md. Idul, Md. Serajul, Md. Sadek, Md. Mahabul and many others called one Sabdul, brother of the de-facto complainant from their house and took him to the house of Md. Idul. On 11.01.2006 at about 08:00 a.m., the said accused persons and other miscreants being armed with lathi, knife etc. assaulted his brother, cut off the vein of his wrists and legs with the knife. The victim became unconscious on the spot. The accused persons escaped subsequently. The villagers accompanied the victim to hospital. At about 04:00 p.m., the victim expired at Araidanga Hospital. Due to such unnatural death of the victim, Ratua P.S. U.D. Case No.2 of 2006 dated 11.01.2006 under Section 174 of the Code of Criminal Procedure was started initially.
3. On the basis of the aforesaid complaint, the Police initiated Ratua P.S. Case No.08/2006 dated 11.01.2006 under Sections 342/304/34 of Indian Penal Code was instituted against the accused persons namely Md. Aju, Md. Idul, Md. Serajul, Md. Sadek and Md. Mahabul.
4. Charges were framed against the appellants under Sections 342/304/34 of Indian Penal Code to which they pleaded not guilty and claimed to be tried.
5. In order to prove its case, the prosecution examined as many as 13 witnesses and exhibited certain documents.
6. Learned Advocate representing the appellants submitted as follows:–
 - i. In absence of eye witnesses to the murder the Trial Court relied upon the circumstantial evidence. However, the chain of relation

between the fact in issue and other material facts whether occurred before or after the incident was not linked.

- ii. The prosecution case set forth the cause of such murder to be cutting off the victim's veins of wrists and legs and several other injuries inflicted on different parts of his body. However, in cross-examination PW-7, Dr. Debnath Sarkar, who conducted the post-mortem examination of the victim's body, said that the injuries that appeared on the body of the victim was with the blunt and hard substance. The prosecution failed to prove the victim's legs and wrists vein were cut off with knife, which was a sharp edged weapon.
- iii. The evidence of PW-2, PW-3 and PW-4 being the testimony of hostile witnesses should not have been relied and deposed before the Court for the first time.
- iv. The evidence of PW-1 and PW-5 was contradictory.
- v. PW-1 stated in his testimony, on the date of death of the victim he was in the hospital till 08:30 p.m., thereafter he returned. However, subsequently he stated to have gone to the Ratua P.S. from the hospital to lodge a complaint. The concerned Police Officer i.e., PW-9 deposed to have received a written complaint at about 11:05 p.m., from PW-1.
- vi. These contradictions were disregarded.

7. The Learned Advocate representing the appellants further submitted as follows:-

- i. According to the prosecution appellant nos. 1 to 4 called Sabdul, since deceased as 5 p.m. and took the deceased to the house of appellant no.2. The further case of the prosecution was that Sabdul, since deceased was confined at the house of appellant no.2. The prosecution further claimed that on 11.01.2006 at around 8 a.m., Sabdul, since deceased was assaulted at a place adjacent to the house of appellant no.2 and cut off the veins of the wrists and legs. The villagers removed the victim to the hospital where at 4 p.m. the victim succumbed to his injuries.
- ii. In the instant case the first investigating officer namely Gopal Sen died. One Dipak Sen being the second investigating officer submitted the charge-sheet. Interestingly, the second investigating officer was not examined by the prosecution. Now, analyzing the evidences of the prosecution witnesses, it could be seen that PW-1 claimed that Sabdul, since deceased, was assaulted with knife, spar and bhojali. The victim tried to resist the assailants. Further PW-1 found injury all over the body of the victim. Whereas, being the wife of the deceased claimed that the victim was assaulted by the appellant no.5. PW-5 further deposed that she found injuries on veins of the wrists and the legs of the victim at the hospital. In her deposition, she implicated all the appellants except appellant nos.1 and 2. PW-8 being the wife of the brother of the victim also

went to the hospital and found bleeding injury in the person of the victim.

- iii. In the instant case, the Learned Trial Judge, while convicting the appellants, gave credence to the statements recorded under Section 161 of the Criminal Procedure Code without considering the essential fact that the first investigating officer of the instant case could not be examined because of his unfortunate death and the second investigating officer was not examined by the prosecution. Even the medical evidences did not come in rescue of the prosecution as the medical evidences relied on was contrary to the ocular of the prosecution witnesses.
8. The Learned Advocate representing the State submitted that the prosecution case was able to prove its case based on corroborative evidence of the prosecution witnesses supported by the medical evidence and the appeal shall be dismissed.
 9. A circumspection of the prosecution witnesses revealed as follows:-
 - i. PW-1 deposed that on 10.01.2006, i.e. tuesday at about 05:00 p.m., one Sabdul (victim) was called by accused Md. Idul and Md. Ajul at the house of Idul. On the next morning at about 08:00 a.m., they got the information that the victim was murdered. He went near the house of Idul and found Serajul, Sadek, Mohibul, Mannan, Idul and Aju assaulting his said brother, Sabdul (victim) with knife, spear and bhojali at the garden of Hakim Master near the house of Idul. He tried to resist them who threatened him with

dire consequences. The said accused persons cut the veins of the wrists and the leg of the victim with knife. He also found cut injury all over the body of the victim caused by a knife. The victim was shifted to Araidanga Hospital. He did not accompany the victim to the hospital. Subsequently, they went to hospital where his brother expired at about 03:45 p.m.

- ii. PW-2, PW-3 and PW-4 were declared hostile by the prosecution.
- iii. PW-5 deposed that on the date of incident accused Md. Aju and Md. Idul called her husband from her house to their house at about 05:00 p.m. Thereafter, her husband did not return on that night. After "*namaj*" she got the information that her husband was being assaulted and he was confined. She rushed to the house of Idul and found her husband was dragged to the garden of Hakim master from the house of Idul, assaulted by Mohobul. Her husband was medically treated at Ariadanga Hospital. She went to the hospital to see her husband where her husband told her that he was assaulted by Serajul, Mohobul, Sadek, Mannan. Aju and Idul called him from her house. She found the veins of the wrist and legs of her husband were cut off. At about 4:00 p.m. her husband expired at the hospital.
- iv. PW-6 scribed the complaint.
- v. PW-7 deposed on 12.01.2006 he was attached to the Malda Sadar Hospital as a medical officer. On that day he held post mortem

examination over the dead body of the victim in connection with Rotua P.S. U.D. Case No.2/2006, dated 11.01.2006.

On examination he found the following injuries:-

- a) *"Rigor mortise was present.*
- b) *Multiple abrasions with Hemorrhage and bruises livid red in colour over various parts of body.*
- c) *Lacerated wound with Hemorrhage measuring 2" X ¼" X ¼" (stitch) over right hand dorsally near little finger.*
- d) *Fracture of third metacarpal bone.*
- e) *Lacerated wound with Hemorrhage measuring ¼" X 1/6" X 1/6" behind right Ear.*
- f) *Lacerated wound with Hemorrhage measuring */2" X 1/6" X 1/6" (stitched) over left ankle medially.*
- g) *Lacerated wound with Hemorrhage measuring 1" X ¼" X ¼" (stitched) over left heel with fracture of left heel bone.*
- h) *Lacerated wound with Hemorrhage measuring ¼" X 1/6" X 1/6" (stitched) over right ankle laterally.*

No other external injury was found on that time. Blood was found dark red in colour in the above noted injuries.

On dissection:- Bruises over back side of scalp, back side of neck, chest wall, abdominal wall, Meningeal and brain Hemorrhage present. Stomach contains semi digested food time within 48 hours of examination. Cause of death in his opinion due to the effect of the ante-mortem injuries and homicidal in

nature. All injuries were ante-mortem, caused by hard and blunt object and sufficient to cause death. He prepared post-mortem report under his hand writing and signature, marked as Exbt.-2.”

- vi. PW-7 in his cross-examination stated that he had not mentioned in his report as to whether the injuries appeared to be suicidal or homicidal or accidental. Injuries as appeared might have been caused by hard and blunt substance.
- vii. The evidence of PW-8 was based on hearsay.
- viii. PW-9 deposed on 11.01.2006 he was the officer-in-charge of Rotua P.S. On that day at about 11:05 p.m., he received a written complaint from one Md. Ali of Radhanagar and he treated the same as F.I.R., and he initiated Rotua P.S. Case No.08/06, dated 11.01.06 under Sections 342/304/34 of the Indian Penal Code. He made an endorsement to that effect with his seal and signature, marked as Exbt.-1/1. Accordingly, he filled in the formal F.I.R., marked as Exbt.-3. The case was endorsed to S.I. Gopal Ch. Paul. He was the first I.O. and on his transfer S.I. Dipak Kd. Sen took up the investigation and concluded the investigation.
- ix. PW-11 deposed to know the victim. Police held inquest over the dead body of the victim at Araidanga hospital and prepared inquest report. He put his L.T.I. on the inquest report.
- x. PW-12 deposed to know the victim. He went to Araidanga hospital and found the victim with several injuries on his person. On that

time he was still alive. He personally asked him as to who caused the injuries. Then, he replied that Md. Aju, Idul, Serajul, Mohobul, Sadek and Mannan caused those injuries. Police prepared inquest report and he put his signature on the inquest report, marked as Exbt.-5.

10. The Hon'ble Supreme Court held the following in **Vadivelu Thevar v. State of Madras**¹:-

“10. ...On a consideration of the relevant authorities and the provisions of the Evidence Act, the following propositions maybe safely stated as firmly established:

(1) As a general rule, a court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of indifferent character.

(2) Unless corroboration is insisted upon by statute, courts should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon, for example in the case of a child witness, or of a witness whose evidence is that of an accomplice or of an analogous character.

(3) Whether corroboration of the testimony of a single witness is or is not necessary, must depend upon facts and circumstances of each case and no general rule can be laid down in a matter like this and much depends upon the judicial discretion of the Judge before whom the case comes.

11. In view of these considerations, we have no hesitation in holding that the contention that in a murder case, the court should insist

¹AIR 1957 SC 614

upon plurality of witnesses, is much too broadly stated. Section 134 of the Indian Evidence Act, has categorically laid it down that “no particular number of witnesses shall, in any case, be required for the proof of any fact”. The legislature determined, as long ago as 1872, presumably after due consideration of the pros and cons, that it shall not be necessary for proof or disproof of a fact, to call any particular number of witnesses. In England, both before and after the passing of the Indian Evidence Act, 1872, there have been a number of statutes as set out in Sarkar's Law of Evidence — 9th Edn., at pp. 1100 and 1101, forbidding convictions on the testimony of a single witness. The Indian Legislature has not insisted on laying down any such exceptions to the general rule recognized in Section 134 quoted above. The section enshrines the well recognized maxim that “Evidence has to be weighed and not counted”. Our Legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to be insisted upon. It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence, where determination of guilt depends entirely on circumstantial evidence. If the legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished. It is here that the discretion of the presiding judge comes into play. The matter thus must depend upon the circumstances of each case and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single

witness, even though a considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution. Hence, in our opinion, it is a sound and well-established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

- (1) Wholly reliable.
- (2) Wholly unreliable.
- (3) Neither wholly reliable nor wholly unreliable.

12. In the first category of proof, the court should have no difficulty in coming to its conclusion either way — it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony. The law reports contain many precedents where the court had to depend and act upon the testimony of a single witness in support of the prosecution. There are exceptions to this rule, for example, in cases of sexual offences

or of the testimony of an approver; both these are cases in which the oral testimony is, by its very nature, suspect, being that of a participator in crime. But, where there are no such exceptional reasons operating, it becomes the duty of the court to convict, if it is satisfied that the testimony of a single witness is entirely reliable...

11. In **Sharad Birdhichand Sarda v. State of Maharashtra**² the following was held by the Hon'ble Supreme Court:-

“153. *A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:*

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established. There is not only a grammatical but a legal distinction between “may be proved” and “must be or should be proved” as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 CrL LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

“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

²(1984) 4 SCC 116

of the accused and must show that in all human probability the act must have been done by the accused.

154. *These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.*

155. *It may be interesting to note that as regards the mode of proof in a criminal case depending on circumstantial evidence, in the absence of a corpus delicti, the statement of law as to proof of the same was laid down by Gresson, J. (and concurred by 3 more Judges) in King v. Horry [1952 NZLR 111] thus:*

“Before he can be convicted, the fact of death should be proved by such circumstances as render the commission of the crime morally certain and leave no ground for reasonable doubt: the circumstantial evidence should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for.”

12. In **Bodhraj v. State of J&K³**, the Hon’ble Supreme Court held the following:-

“9. *Before analysing factual aspects it may be stated that for a crime to be proved it is not necessary that the crime must be seen to have been committed and must, in all circumstances be proved by direct ocular evidence by examining before the court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The principal fact or factum probandum may be proved indirectly by means of certain inferences drawn from factum probans, that is, the evidentiary facts. To put it differently, circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed.*

10. *It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and*

³(2002) 8 SCC 45

circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See Hukam Singh v. State of Rajasthan [(1977) 2 SCC 99 : 1977 SCC (Cri) 250 : AIR 1977 SC 1063] , Eradu v. State of Hyderabad [AIR 1956 SC 316 : 1956 Cri LJ 559] , Earabhadrapa v. State of Karnataka [(1983) 2 SCC 330 : 1983 SCC (Cri) 447 : AIR 1983 SC 446] , State of U.P. v. Sukhbasi [1985 Supp SCC 79 : 1985 SCC (Cri) 387 : AIR 1985 SC 1224] , Balwinder Singh v. State of Punjab [(1987) 1 SCC 1 : 1987 SCC (Cri) 27 : AIR 1987 SC 350] and Ashok Kumar Chatterjee v. State of M.P. [1989 Supp (1) SCC 560 : 1989 SCC (Cri) 566 : AIR 1989 SC 1890]) The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In Bhagat Ram v. State of Punjab [AIR 1954 SC 621 : 1954 Cri LJ 1645] it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt.

11. *We may also make a reference to a decision of this Court in C. Chenga Reddy v. State of A.P. [(1996) 10 SCC 193 : 1996 SCC (Cri) 1205] wherein it has been observed thus : (SCC pp. 206-07, para 21)*

“21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.”

12. *In Padala Veera Reddy v. State of A.P. [1989 Supp (2) SCC 706 : 1991 SCC (Cri) 407 : AIR 1990 SC 79] it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests : (SCC pp. 710-11, para 10)*

“10. (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 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.”

13. *In State of U.P. v. Ashok Kumar Srivastava [(1992) 2 SCC 86 : 1992 SCC (Cri) 241 : 1992 Cri LJ 1104] it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.*

14. *Sir Alfred Wills in his admirable book Wills' Circumstantial Evidence (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence : (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum; (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability; (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt; and (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.*

15. *There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested on the touchstone of law relating to circumstantial evidence laid down by this Court as far back as in 1952.*

16. *In Hanumant Govind Nargundkar v. State of M.P. [(1952) 2 SCC 71 : AIR 1952 SC 343 : 1953 Cri LJ 129] it was observed thus : (AIR pp. 345-46, para 10)*

“10. ... It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.”

13. The Hon'ble Supreme Court held the following in **Hanumant v. State of M.P.**⁴:-

11. *...In dealing with circumstantial evidence the rules specially applicable to such evidence must be borne in mind. In such cases there is always the danger that conjecture or suspicion may take the place of legal proof and therefore it is right to recall the warning addressed by Baron Alderson to the jury in R. v. Hodge [R. v. Hodge, (1838) 2 Lew 227 : 168 ER 1136] where he said:*

“The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link

⁴ (1952) 2 SCC 71

that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete.”

12. *It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.*

14. The Hon’ble Supreme Court held the following in **Sahadevan v. State of**

T.N.⁵:-

“The principles

16. *Upon a proper analysis of the abovereferred judgments of this Court, it will be appropriate to state the principles which would make an extra-judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused:*

- (i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.*
- (ii) It should be made voluntarily and should be truthful.*
- (iii) It should inspire confidence.*
- (iv) An extra-judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.*

⁵(2012) 6 SCC 403

(v) *For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.*

(vi) *Such statement essentially has to be proved like any other fact and in accordance with law.”*

15. The Hon’ble Apex Court in the case of **State of Rajasthan v. Major Singh**⁶ observed the following:-

“4. ...In our view, considering the medical evidence which corroborates the prosecution version, particularly, of the injured witness, PW 1 Jeet Kaur, there is no reason to disbelieve the evidence of the aforesaid two witnesses....”

16. The Hon’ble Supreme Court in the case of **Malkiat Singh v. State of Punjab**⁷ held the following:-

“6. ...On the contrary, we find that the evidence of Mit Singh gets ample corroboration from the fact that within almost an hour of the incident he lodged the FIR wherein he not only detailed the prosecution case as to how Darbara Singh and Uttam Singh were assaulted by the appellant but also stated that the appellant had sustained minor injuries at the hands of Uttam Singh when he tried to rescue Darbara Singh. The medical evidence corroborates the ocular version of PWs 4 and 5 and the recovery of the kassi pursuant to the statement of the appellant which was found to contain human blood, when examined by the Forensic Science Laboratory, also lends credence to the prosecution story.”

⁶(1999) 9 SCC 106

⁷ (1996) 10 SCC 274

17. The Hon'ble Apex Court in **Jai Karan v. State of U.P.**⁸ held the following:-

“12. Great emphasis was led on the approximate time of injury. That in no way affects the credibility of PW 2's evidence. Though the evidence of PW 1 does not specifically indicate the injury on PW 2, that is but natural. Before a young person two murders were committed and it is quite natural to create a sense of shock and minor variations in his evidence do not affect his testimony which is otherwise credible. Unless the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eyewitnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence. (See Solanki Chimanbhai Ukabhai v. State of Gujarat [(1983) 2 SCC 174 : 1983 SCC (Cri) 379 : AIR 1983 SC 484] .) To similar effect is the decision in State of U.P. v. Krishna Gopal [(1988) 4 SCC 302 : 1988 SCC (Cri) 928 : AIR 1988 SC 2154] .”

18. The Hon'ble Supreme Court held the following in **Thathanna v. State of A.P.**⁹:-

“10. ...The evidence of A-3, A-8 and A-9 though is not accepted in respect of their own assailants but the fact that the occurrence has taken place is accepted and that in respect of these appellants the other witnesses have also consistently spoken regarding the parts played by the three appellants. The nature of the injuries inflicted by these three accused to that extent is corroborated by medical evidence and also spoken to by the other eyewitnesses consistently and the same has been accepted. For all these reasons we see no ground to interfere.”

⁸ (2003) 12 SCC 655

⁹1994 Cri LJ 632

19. The following was held by the Hon'ble Supreme Court in **Surajdeo Mahto v. State of Bihar**¹⁰:-

“(i) Last seen theory

30. *The case of the prosecution in the present case heavily banks upon the principle of “last seen theory”. Briefly put, the last seen theory is applied where the time interval between the point of when the accused and the deceased were last seen together, and when the victim is found dead, is so small that the possibility of any other person other than the accused being the perpetrator of crime becomes impossible. Elaborating on the principle of “last seen alive”, a three-Judge Bench of this Court in Satpal v. State of Haryana [Satpal v. State of Haryana, (2018) 6 SCC 610, para 6] has, however, cautioned that unless the fact of last seen is corroborated by some other evidence, the fact that the deceased was last seen in the vicinity of the accused, would by itself, only be a weak kind of evidence. The Court further held : (SCC pp. 612-13, para 6)*

“6. ... Succinctly stated, it may be a weak kind of evidence by itself to found conviction upon the same singularly. But when it is coupled with other circumstances such as the time when the deceased was last seen with the accused, and the recovery of the corpse being in very close proximity of time, the accused owes an explanation under Section 106 of the Evidence Act with regard to the circumstances under which death may have taken place. If the accused offers no explanation, or furnishes a wrong explanation, absconds, motive is established, and there is corroborative evidence available inter alia in the form of recovery or otherwise forming a chain of circumstances leading to the only inference for guilt of the accused, incompatible with any possible hypothesis of innocence, conviction can be based

¹⁰(2022) 11 SCC 800

on the same. If there be any doubt or break in the link of chain of circumstances, the benefit of doubt must go to the accused. Each case will therefore have to be examined on its own facts for invocation of the doctrine.

31. *We may hasten to clarify that the fact of last seen should not be weighed in isolation or be segregated from the other evidence led by the prosecution. The last seen theory should rather be applied taking into account the case of the prosecution in its entirety. Hence, the courts have to not only consider the factum of last seen, but also have to keep in mind the circumstances that preceded and followed from the point of the deceased being so last seen in the presence of the accused.”*

20. The Hon’ble Supreme Court held the following in **Siju Kurian v. State of Karnataka**¹¹:-

“35. *Section 106 of the Evidence Act clearly lays down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him, namely, on such person. This Court in State of Rajasthan v. Kashi Ram [State of Rajasthan v. Kashi Ram, (2006) 12 SCC 254 : (2007) 1 SCC (Cri) 688] has held : (SCC pp. 262 & 265, paras 16 & 23)*

“16. The most important circumstance that the respondent was last seen with the deceased on 3-2-1998 whereafter he had disappeared and his house was found locked and that he had offered no explanation whatsoever, was disposed [Kashi Ram v. State of Rajasthan, 1999 SCC OnLine Raj 834] of by the High Court in one short paragraph observing that there was nothing unusual if the accused was seen in the company of his own family members in his house. On such reasoning, the High Court held that the

¹¹(2023) 14 SCC 63

circumstantial evidence relied upon by the prosecution was not strong enough to sustain the conviction of the respondent. Accordingly, the High Court allowed the appeals preferred by the respondent and declined the death reference made by the trial court for confirmation of the sentence of death.

23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in Naina Mohamed, In re [Naina Mohamed, In re, 1959 SCC OnLine Mad 173 : AIR 1960 Mad 218 : 1960 Cri LJ 620] ”

36. *Thus, when PW 10 and PW 14 have in clear terms deposed to have last seen the accused with the deceased, necessarily the accused must offer an explanation as to how and when he started living separately and there being no explanation offered necessarily in the chain of circumstances, the last seen theory propounded by the prosecution to drive home the guilt of the accused requires to be accepted.”*

21. The Hon’ble Supreme Court held the following in **Paras Yadav v. State of Bihar**¹²:-

“8. *It is true that there is negligence on the part of the investigating officer. On occasions, such negligence or omission may give rise to reasonable doubt which would obviously go in favour of the accused. But in the present case, the evidence of the prosecution witnesses clearly establishes beyond reasonable doubt that the deceased was conscious and he was removed to hospital by bus. All the witnesses deposed that the deceased was in a fit state of health to make the statements on the date of the incident. He expired only after more than 24 hours. No justifiable reason is pointed out to disbelieve the evidence of the number of witnesses who rushed to the scene of offence at Ghogha Chowk. Their evidence does not suffer from any infirmity which would render the dying declarations as doubtful or unworthy of the evidence. In such a situation, the lapse on the part of the investigating officer should not be taken in favour of the accused. It may be that such lapse is committed designedly or because of negligence. Hence, the prosecution evidence is required to be examined dehors such omissions to find out whether the said evidence is reliable or not...”*

¹²(1999) 2 SCC 126

22. In **Suresh Chandra Jana v. State of W.B.**¹³the following was held by the Hon'ble Supreme Court:-

“15. ... In our opinion, merely for the said lapse of not producing the envelope on the part of the investigating agency is not sufficient in the present case to create reasonable doubt in the prosecution story. In our opinion, it is almost impossible to come across a single case where the investigation was completely flawless or absolutely foolproof. The function of the criminal court is to find out the truth and it is not the correct approach to simply pick up the minor lapses of the investigation and acquit the accused, particularly when the ring of truth is undisturbed.”

23. The Hon'ble Supreme Court observed the following in **Munna Lal v. State of U.P.**¹⁴:-

“43. Although, mere defects in the investigative process by itself cannot constitute ground for acquittal, it is the legal obligation of the Court to examine carefully in each case the prosecution evidence dehors the lapses committed by the investigating officer to find out whether the evidence brought on record is at all reliable and whether such lapses affect the object of finding out the truth.

44. Being conscious of the above position in law and to avoid erosion of the faith and confidence of the people in the administration of criminal justice, this Court has examined the evidence led by the prosecution threadbare and refrained from giving primacy to the negligence of the investigating officer as well as to the omission or lapses resulting from the perfunctory investigation undertaken by him. The endeavour of this Court has been to reach the root of the matter by analysing and assessing the

¹³(2017) 16 SCC 466

¹⁴(2023) 18 SCC 661

evidence on record and to ascertain whether the appellants were duly found to be guilty as well as to ensure that the guilty does not escape the rigours of law.”

24. The following was held by the Hon’ble Supreme Court in **C. Muniappan v.**

State of T.N.¹⁵:-

“55. There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the IO and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation. (Vide Chandrakant Luxman v. State of Maharashtra [(1974) 3 SCC 626 : 1974 SCC (Cri) 116 : AIR 1974 SC 220], Karnel Singh v. State of M.P. [(1995) 5 SCC 518 : 1995 SCC (Cri) 977] , Ram Bihari Yadav v. State of Bihar [(1998) 4 SCC 517 : 1998 SCC (Cri) 1085 : AIR 1998 SC 1850] , Paras Yadav v. State of Bihar [(1999) 2 SCC 126 : 1999 SCC (Cri) 104] , State of Karnataka v. K. Yarappa Reddy [(1999) 8 SCC 715 : 2000 SCC (Cri)

¹⁵(2010) 9 SCC 567

61 : AIR 2000 SC 185] , Amar Singh v. Balwinder Singh [(2003) 2 SCC 518 : 2003 SCC (Cri) 641] , Allarakha K. Mansuri v. State of Gujarat [(2002) 3 SCC 57 : 2002 SCC (Cri) 519] and Ram Bali v. State of U.P. [(2004) 10 SCC 598 : 2004 SCC (Cri) 2045])”

25. PW-5 the wife of the victim recounted that appellant Aju and Idul called her husband from their house to the house of the appellants at about 5 P.M. The victim did not return on that night, i.e., Tuesday night. On the next morning, PW-5 was informed of her husband being assaulted and confined. She immediately went to the house of appellant Idul and saw her husband being dragged to the garden of Hakim Master from the house of Idul being assaulted by Mahabul. The victim was admitted at Araidanga Hospital. The victim disclosed to PW-5 of being assaulted by Serajul, Mahabul, Sadek and Mannan. PW-5 could visibly recount the injuries inflicted on the body of her husband. The statement of PW-5 was corroborated by that of PW-8, PW-11 and PW-12.
26. The medical report mentioned the injuries to have been inflicted on the person of the deceased victim. The main Investigating Officer due to his demise did not appear before the Court to depose. Nonetheless the inquest report and the medical report categorically stated the nature of the injuries sustained by the deceased victim which could have been by virtue of a single blow. The defence could not rebut the presumption that the victim was not called from his house by Idul and Mahabul. The victim himself prior to his death had mentioned the name of the appellants assaulted him

severely which was not controverted by the defence evidence in cross-examination.

27. The concept of last seen together theory is applicable in this case. There might be variations in the deposition of PW-5. Nonetheless it cannot be denied that Idul and Mahabul did not call him from his house at the material point of time. PW-5 and other witnesses namely PW-8, PW-11 had seen the victim being dragged from the house of Idul to a vacant place further corroborated by the evidence of PW-1.
28. The evidences of the eye witness, the doctor who conducted the post mortem examination are reliable and trustworthy. The circumstantial evidence establishes the fact that appellant Idul and Mahabul had called the victim from his house, confined him at his house throughout the night and thereafter dragged him to the vacant field and assaulted him along with Mahabul, Serajul, Sadek. The victim's statement to the witness evinced the fact that he was brutally assaulted by the appellants.
29. Under such circumstances, the order of conviction is not interfered with. However, appellant no.5 Md. Meherul @ Mahabul has already expired and the instant appeal gets abated. The other appellants aged 80-90 years are still alive.
30. In view of the above discussions, the Criminal Appeal being CRA 206 of 2010 along with connected application is accordingly dismissed. However, the sentence is modified to the extent already undergone.
31. There is no order as to costs.

32. Trial Court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
33. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)