

Form No. J(1)

**HIGH COURT AT CALCUTTA
IN THE CIRCUIT BENCH AT JALPAIGURI
CRIMINAL APPELLATE JURISDICTION**

Present :

The Hon'ble Justice Rajasekhar Mantha
And
The Hon'ble Justice Ajay Kumar Gupta

C.R.A. 2 of 2020

**Karuna Bhujel
-Versus-
The State of West Bengal**

For the Appellant: Mr. Nripen Das,
Mr. Debanjan Das.

For the State: Mr. Aditi Shankar Chakraborty, Ld. A.P.P,
Mr. Arjun Chowdhury.

Heard on: August 16, 2024 and August 21, 2024.

Judgment on: August 22, 2024.

Rajasekhar Mantha, J.:

1. This instant appeal is directed against the judgment and order of conviction dated 17th December, 2019 passed by the learned Sessions Judge, Kalimpong in Sessions Case No. 22 of 2019 in connection with Sessions Trial No. 13 of 2019 corresponding to G.R. Case No. 334 of 2018 arising out of Jaldhaka Police Station Case No. 25 of 2018 dated 23.10.2018. By the impugned judgment, the appellant was found guilty of offence under Section 302 of the Indian Penal Code.

2. The appellant also challenges the order of conviction dated 18th December, 2019 sentencing her to suffer Rigorous Imprisonment for life and pay fine of Rs.50,000/-. In default of the payment of fine, the appellant was to suffer two further years of Rigorous Imprisonment. The period of detention already undergone during enquiry under trial was set off.

FACTS OF THE CASE:

3. The facts of the case are that on 20th October, 2019 between 6:00 P.M. and 7:00 P.M. the victim, Mani Kumar Bhujel, husband of the appellant was found dead with several severe injuries on his body.
4. The first complaint dated 20th October 2018 to the Jaldhaka PS was made on the same day in the evening, by the son of the victim/accused, Samir Bhujel (PW-3). It was registered as a UD Case No.05 of 2018, by the PS on 21st October 2018. He stated that his father Mani Kumar Bhujel, 53 years old was lying with his face down under a Mango Tree near Chillouney Ban Busty Primary School at about 7:00 P.M. The victim took his father to Samsing Hospital where he died on the way. They brought him back to their residence in the same village called Chillouney Ban Busty.
5. FIR was not registered on the same day. On the 3rd day another complaint filed by one Ashok Bhujel (PW-2), the brother of the victim, FIR No. 25 of 2018 dated 23rd October, 2018 was written and registered by the Nilam Sanjib Kujur (PW-17), SI Jaldhaka Police

Station, Kalimpong under Section 302 of the Indian Penal Code. He entrusted the investigation to Chittaranjan Swarnakar, SI, (PW-18) and the appellant.

6. In the meantime, Inquest of the body was completed by SI Tika Ram Gurung (PW-11) on 21st October, 2018 in the presence of Dipendra Bujhel (PW-10) and the IO (PW-18).
7. The body was sent for post mortem which was conducted by Dr. Dibyakar Chettri, (PW-19), on 22nd October, 2018 at the North Bengal Medical Collage. The appellant/convict was arrested on the next day i.e. 24th October, 2018 as she was not found in the residence on 23rd October, 2018. On being questioned, the appellant is stated to have confessed to have killed her husband and recorded a statement before the IO (PW 18).
8. The appellant took the Investigating Officer of the case, Chittaranjan Swarnakar (PW-18) to the place of occurrence. She voluntarily showed PW-18 the place where she hid the weapon (namely iron rod with a big screw attached on one side). The said weapon along with wearing apparels of the deceased, a bed-sheet and a shawl of the victim were all shown by the appellant, kept in a plastic bag in a broom jungle behind her house.
9. Investigation was completed and charge-sheet was filed against the appellant. A custodial trial commenced thereafter.

WITNESSES FOR THE PROSECUTION:

10. **PW-1**, Mani Bhujel, brother of the accused deposed that, on 20th October, 2018 at about 8:30 P.M. on hearing a hue and cry from the house of the deceased, that was five minutes away from his own house, he rushed to the house where he saw the dead body of the deceased lying on the bed in his bedroom. He saw the body from a distance. In cross-examination, he stated that he came to know that the deceased suffered a fall on the road and had died. PW-1 had not seen how the victim died.
11. **PW-2** was Ashok Bhujel, brother of the deceased. He was watching television in his house at about 6:30 P.M. on 21st October, 2018. At 6:30 P.M. he came out of the house to attend nature's call and heard a hue and cry from the house of the accused. He rushed to the house and found the deceased on the bed in his bedroom. He felt a pulse of the dead body and asked the PW-3, Samir Bhujel what happened.
12. **PW-2** further deposed that Samir Bhujel told him that on not finding his father at home during dinner time, he had gone to search for him and found that his father is lying under a mango tree with bleeding injuries and brought his father home. As PW-2 found bleeding injuries on the thigh and chest of the body of the deceased, he lodged a complaint with the police. There is no explanation why he waited from 20th October, 2018 to 23rd October, 2018 to lodge the said complaint.

13. **PW-2** further deposed that the police seized the offending weapon and wearing apparels of the deceased in his presence and that he had signed a seizure list. He stated that the articles were seized from the house of the deceased by the police in his presence. The seized articles were, however, not produced before him for identification in the trial. He denied the suggestion of the prosecution that Samir Bhujel did not tell him that he found his father's body under a mango tree.
14. **PW-3** was Samir Bhujel, son of the appellant and the deceased. He deposed that on returning from his friend's house on 20th October, 2018 at about 6:00 P.M. to 7:00 P.M. he found his father lying unconscious in the bed making slight murmurs. He called his friends Sandeep and Arun, who took the body of the deceased to Samsing Hospital but his father died on the way. They brought back the body of the deceased to the house. He also said that he did not find any bleeding injury on the body of the deceased.
15. **PW-3** has stated in his cross-examination that his mother told him that the deceased is lying under a mango tree near Ban Busty Primary School. He brought his father's body back to the house and cleaned it. They hired a vehicle and took the deceased to a local Hospital along with his friends Sandeep and Arun. He said that his father expired on the way and thereafter his mother, the appellant

herein, told him to report the incident to the Police. He denied that his mother assaulted his father with an iron rod and killed him.

16. **PW-4** was Arun Bhujel, son of the deceased and PW-5 was Sandeep Bhujel, the nephew of the deceased. They were not aware as to how the deceased died.
17. **PW-6** was Lakpa Sherpa, a resident of the village. He took the photographs of the deceased in his house on the bed along with PW-18, the Investigating Officer of the case.
18. **PW-7** was Amir Bhujel, son of the deceased. PW-8 was Rojika Rai, daughter-in-law of the deceased. Neither of them was aware as to how their father died. They ordinarily reside outside the village in Delhi and Sikkim.
19. **PW-9** was Hemraj Bhujel, a resident of the village. He was the owner and driver of a Maruti Van that took the deceased along with Samir and his friends to the Hospital. The victim was grunting in pain in the vehicle but died on the way to Hospital. He saw bleeding on the right leg of the deceased. He was not aware as to how the deceased died.
20. **PW-10** was Dipendra Bhujel, a Teacher and a resident of the village. He visited the house of the deceased after coming to know of the death and stayed at the entire night. He was informed by Arun and Amrit Bhujel about the death of the deceased and did not know how the victim died.

21. **PW-11** was Tika Ram Gurung. He was the Assistant Sub-Inspector of Jaldhaka Police Station. He conducted the inquest and prepared a report. In course of inquest, he found two bleeding injuries on the right upper knee and below the left knee of the deceased. He also found that the left knee was dislocated. The wife and son of the deceased and one Dipendra Bhujel was present at the time of inquest. He was also stated that he signed on the seizure list and identified his signature. The seized articles were not shown or identified by this witness.
22. **PW-12** was Kumar Bhujel, a labourer. PW-13 was Prahallad Giri, another cultivator.
23. **PW-14** was Arun Dholi, Homeguard at Jaldhaka Police Station, who signed on the seizure list of the post mortem blood and identified his signature.
24. **PW-15** was Bishnu Kumar Roy, also posted in Jaldhaka Police Station. He signed on the seizure list of the PM blood and the wearing apparels of the victim. The said wearing apparels were not shown or identified by the said Bishnu Kumar Roy in the trial.
25. **PW-16** was Santosh Lepcha, who also signed on the seizure list of the post mortem blood and the wearing apparels of the victim. He identified his signature. He was not shown the said wearing apparel of the victim.

26. **PW-17** was Nilam Sanjib Kujur, Officer-in-charge, Jaldhaka Police Station. He wrote the formal FIR on 23rd October, 2018. He identified his signature.
27. **PW-18** was Chittaranjan Swarnakar, Investigating Officer of the case. He was assigned the present investigation by the Officer-in-charge, Jaldhaka Police Station. He visited the place of occurrence on 23rd October, 2018. He recorded the statements of the available witnesses. The accused was not found and after engaging a source, he arrested her on the next date i.e. 24th October, 2018 from the house of the deceased. The appellant was remanded to police custody.
28. In course of custody, the appellant is stated to have confessed that she murdered her husband with an iron rod and concealed the same. She offered to show where the iron rod was hidden. The statement of the victim was recorded by the Investigating Officer of the case and marked as Exhibit- "8" in the trial. The next day the Investigating Officer along with other persons and the accused went into a jungle behind the house of the accused. The iron rod, one bed-sheet, one jeans pant, one blanket, one T-shirt, one shawl and one full-pant were kept in the plastic bag in the jungle.
29. **PW-18** seized the articles and prepared a seizure list. None of the seized articles were labelled. He was the only person, who identified the seized articles including the alleged weapon. He stated that a

U.D. Case No. 5 of 2018 dated 21st October, 2018 was started on the complaint of Samir Bhujel by the Jaldhaka Police Station by **PW-11**, A.S.I. Tika Ram Gurung. He stated that **PW-11**, held the inquest of the body of the deceased and sent it for post mortem through a Constable. He identified the seizure list and submitted the FSL report.

30. In course of cross-examination, he admitted that the place of arrest is not mentioned in the Memo of Arrest. He also admitted that seizure list does not mention that the recovery was affected as per the instructions of the accused. The sketch map prepared by him, admittedly did not mention the number of rooms in the house. He also admitted that he did not see the dead body of the victim. He admitted that **PW-3** Samir Bhujel told him that he went to search for his father and found him lying with bleeding injuries under a mango tree.

31. **PW-19** was Dr. Dibyakar Chettri, the Post Mortem Doctor. He identified all the injuries in the post mortem report. He admitted that the report did not indicate as to whether the wounds were homicidal, suicidal or accidental. He only stated that the injuries may have been caused by heavy sharp cutting or blunt weapon. He admitted that viscera were not preserved. He also admitted that it is not possible for a lady to cause such type of injuries as mentioned in the post mortem report. He also stated that it is possible that the

injuries may have been caused due to fall from a considerable height.

32. The accused was examined under Section 313 of the Code of Criminal Procedure. She denied her signature on the seizure list. She admitted that she lived with the husband in the same house with her daughter, son, daughter-in-law and children. She denied all other suggestions.

FINDINGS OF THE COURT BELOW:

33. Based on the evidence, the Court below found that delay in lodging of the FIR was not fatal. The place of occurrence was proved. He also found serious lapses in the investigation which did not stand in the way of the conviction. He recorded the injuries on the victim mentioned in the post mortem report. The lapse found by the Court below in the post mortem report is non-preservation of viscera. He found that the non-production of the weapon before the Post Mortem Doctor did not stand on the way of the conclusion that the victim was murdered by a blunt weapon.

34. The Trial Judge disbelieved the evidence of PW-1 that the victim had suffered from fall on the road. He did not believe the statements of PW-2 and PW-3 that the victim was lying under a mango tree with bleeding injuries. He did not also believe the confession of the appellant. He disbelieved the

statement of PW-3 Samir Bhujel that the victim was making slight sound on the bed before he died. He also disbelieved the statement of PW-9, Hem Raj Bhujel, the owner and driver of the vehicle that the victim was making sound in the vehicle while being taken to a Hospital. The Trial Court, however, noted from the FSL report that the blood on the wearing apparels could not be identified with that of the deceased.

35. The Trial Court applied the last scene theory by reference to a judgment of the Hon'ble Supreme Court of India in the case of **State of Rajasthan – Vs. – Kashi Ram** reported in **(2006) 12 Supreme Court Cases 254**. Based on the said decision, he held that since the accused did not dispute that she was present at the scene of crime, the same is one link in the chain of circumstantial evidence. From the evidence of PW-1 and PW-3 he inferred the time of occurrence between 6:00 P.M. to 7:00 P.M. when the victim was murdered and the appellant was present in the house. He thereafter went straight to the evidence of the accused under Section 313 of the Code of Criminal Procedure.

36. The appellant being present in the house according to the Court below and no explanation being given by her as to how the victim died, he drew a straight inference based on Section 106 of the Indian Evidence Act, 1872 against the appellant

that she had murdered her husband. He disbelieved the statement of PW-19, Post Mortem Doctor that a lady could not have caused the injuries in question.

37. Despite finding defective and perfunctory investigation on the part of PW-18, he relied upon Section 27 of the Indian Evidence Act, 1872 against the appellant. He held that since the appellant herself showed the offending weapon and the wearing apparels of the deceased in the jungle, the same was conclusive evidence that the appellant has murdered her husband. He also found that the motive need not be proved in a case based on circumstantial evidence.

38. With the aforesaid two links, i.e. the presence of the appellant at the place and time of occurrence and discovery of the offending weapon and the wearing apparels of the deceased, the Court below found the chain of circumstantial evidence complete, to convict the appellant for murdering the victim under Section 302 of the Indian Penal Code and the answers of the appellant in cross-examination under Section 313 of the Code of Criminal Procedure.

ARGUMENTS OF THE APPELLANT:

39. Learned Counsel for the appellant would argue that the Court below has taken into consideration the vital evidence on record. He also submitted that in the absence of any eye-

witnesses account the chain of circumstantial evidence in the facts is not complete. The learned Trial Judge committed grave error in convicting the appellant under Section 302 of the Indian Penal Code based on incomplete and a seriously doubtful chain of circumstantial evidence. He relied upon two decisions of the Hon'ble Supreme Court of India. Firstly in the case of **Gambhir – Vs. – State of Maharashtra** reported in **(1982) 2 Supreme Court Cases 351** at paragraph 9 thereof and in the case of **Raghunatha & Ors. – Vs. – The State of Karnataka** reported in **2024 SCC OnLine SC 365** particularly at paragraph 7 thereof.

ARGUMENTS OF THE STATE:

40. The main thrust of the argument of the learned Counsel for the State is that since the defence did not raise any objection to the exhibits i.e. the weapons and apparel in the seizure list in course of trial. It must therefore deemed as if the wearing apparels was that of the victim and the weapon was actually used for the purpose of killing the victim by the accused. Reference in this regard is made to the decision of the Hon'ble Supreme Court of India in the case of **P.C. Purushothama Reddiar – Vs. – S. Perumal** reported in **(1972) 1 Supreme Court Cases 9**, particularly paragraphs 19 to 22 thereof. On the same proposition is the case of

R.v.e. Venkatachala Gounder - vs. - Arulmigu Viswesaraswami & V.p. temples & Anr. reported in **(2003) 8 Supreme Court Cases 752**, particularly paragraphs 20 to 23 thereof.

41. It appears to this court that the two decisions arise out of civil matters, one of which is a second appeal and the other one is an election petition. The ratio may not be applicable in the case at hand. The principles applied in a criminal trial impose a higher degree of proof and strict compliance of the provisions of the Evidence Act, 1872 and the Code of Criminal Procedure, 1973 to prove that the wearing apparels and murder weapons were exactly those which were used and present at the time of offence. Admittedly, none of the exhibits brought on record by the prosecution were labelled. They were not shown to any other of the seizure witnesses than the Investigating Officer of the case.

42. This Court is, therefore, of the view that merely because the defence did not object to the seized articles being marked as Exhibits does not establish the case of the prosecution.

43. The next argument of the Counsel for the State is that PW-3, Samir Bhujel has contradicted himself repeatedly. He has first said in the complaint dated 21st October, 2018 that he found the body of his father under a mango tree at a

village school, in the evening. In course of trial, Samir Bhujel does not mention the mango tree story. The argument of the learned Counsel for the State appears in fact to be borne out from the records and the evidence.

44. It was lastly argued by the learned Counsel for the State that merely because an investigation is perfunctory, as observed by the Trial Judge himself, should not ipso facto acquit an accused. If that be the case, there would be no accused, who can ever be convicted.

45. While this Court appreciates the submissions of Mr. Chowdhury, learned Counsel for the State, one cannot ignore the cardinal principle of Criminal Jurisprudence that it is for the prosecution to prove the guilt of the accused beyond reasonable doubt.

ANALYSIS OF THIS COURT:

46. This Court has carefully considered the entire evidence on record and the analysis of the same by the Court below. Admittedly the entire case of the prosecution is based on circumstantial evidence. This Court is of the view that the place of the occurrence of the crime and the place from where the alleged murder weapon and incriminating objects were recovered, have not been proved beyond reasonable doubt by the prosecution.

47. The learned Court below has not considered as to who made that alleged hue and cry, nor has the prosecution adduced any evidence in that regard. The hue and cry is clearly the trigger of the present case, which brought the witnesses to the bedroom where the body of the deceased was found lying according to one of the versions. The identification of the person/s who made the hue and cry was pivotal for the case of the prosecution, since as per the evidence of witnesses, Samir, the son of the deceased, standing beside the body of the deceased.

48. Therefore, there is no evidence whether the hue and cry was that of a woman or man or more than one person. No evidence is on record to show that the Hue and Cry is that of the appellant/accused. Whether the Hue and Cry was that of the deceased. The absence of evidence on who made the Hue and Cry bothers this Court since it is the first vital link, in the chain of circumstances.

49. The following serious infirmities are found in the analysis of the Court below. The Trial Judge has failed to notice the same.

(a) The Court below has committed serious error in holding the chain of circumstantial evidence is complete, in the present case. There are at best only two or three

facts that available in the evidence that have been termed as links in the chain. The Court below wholly failed to notice that:-

- (i) the co-relation between the wearing apparels seized and the victim has not been established through any of the prosecution witnesses;
- (ii) none of the witnesses deposed and even inquest report does not indicate that the body was with or without clothes;
- (iii) the reason how or why or by whom the wearing apparels of the victim was removed, if at all, and found in the seizure, is a very vital link that remains unexplained and unavailable.

(b) While PW-2, Ashok Bhujel, brother of the victim has said that the wearing apparels and the iron rod, the alleged weapon, were seized from the house of the victim, PW-18, IO of the case has stated that the wearing apparels of the victim and the offending weapon were seized from a broom field in a jungle behind the house of the victim. There is clear evidence on record that the distance between the house and the place where the articles were recovered is 100 meters. PW 18 has said so in his cross-examination. There is clear contradiction

between the PW2 and PW 18 as regards the place of recovery.

(c) The post mortem report does not indicate as to how the injuries have been sustained and whether they were homicidal in nature. The post mortem Doctor, PW-19, has stated that the injuries could have been sustained by a fall from a height. He has also stated that the injuries could not have been inflicted by a lady. The appellant was present in Court when the post mortem Doctor was being examined. The learned Judge could, therefore, not come to any independent conclusion or much less than any inference that the appellant was capable of and inflicting, the injuries on the body of the victim.

(d) The injuries on the body of the victim indicate seven several abrasions on the hands, legs and chest of the victim. Two laceration wounds on the left thigh and fracture on the right and left femur. The inquest Doctor found that the left knee was dislocated.

(e) It was, therefore, not possible to come to any conclusive opinion that the number of abrasions and laceration were all inflicted by a lady or with an iron rod. An abrasion is an injury i.e. sustained by the victim on

the skin upon being rubbed with a rough surface. It is unlikely that several abrasions on the body of the victim could have been inflicted by a rod. The evidence of the post mortem Doctor that the injuries could have been sustained from a fall from a height, clearly cannot be ruled out. Admittedly, the victim was a habitual drunkard.

(f) That the Trial Court itself found serious infirmities in the investigation conducted by the Investigating Officer of the case.

The Applicability of Section 106 of the Indian Evidence Act

To The Facts Of The Present Case

50. It is well-established that the underlying principle of Section 106 of the Indian Evidence Act, 1872 is not to dispense with the rule that the burden of proving the guilt is on the prosecution. A mere suspicion raised by a prosecution cannot shift the burden of proof to the appellant. Reference in this regard is made on a decision of the Hon'ble Supreme Court of India in the case of **Sambhu Nath Mehra -Vs. - State of Ajmer** reported in **AIR 1956 Supreme Court 404**. Section 106 of the Act of 1872 can seldom be used by a Court in a case under Section 302 of the Indian Penal Code to draw an adverse inference against

an accused of murdering her husband. The said principle can at best be one link in a case based entirely on circumstantial evidence.

51. The Supreme Court in the decision of **Anees versus The State Govt. Of NCT 2024 INSC 368** laid down, the circumstances where the Section 106 may come to aid of the Prosecution :-

44. Section 106 of the Evidence Act cannot be invoked to make up the inability of the prosecution to produce evidence of circumstances pointing to the guilt of the accused. This section cannot be used to support a conviction unless the prosecution has discharged the onus by proving all the elements necessary to establish the offence. It does not absolve the prosecution from the duty of proving that a crime was committed even though it is a matter specifically within the knowledge of the accused and it does not throw the burden on the accused to show that no crime was committed. To infer the guilt of the accused from absence of reasonable explanation in a case where the other circumstances are not by themselves enough to call for his explanation is to relieve the prosecution of its legitimate burden. **So, until a prima facie case is established by such evidence, the onus does not shift to the accused.**

46. To recapitulate the foregoing : What lies at the bottom of the various rules shifting the evidential burden or burden of introducing evidence in proof of one's case as opposed to the persuasive burden or burden of proof, i.e., of proving all the issues remaining with the prosecution and which never shift is the idea that it is impossible for the prosecution to give wholly convincing evidence on certain issues from its own hand and it is, therefore, for the accused to give evidence on them if he wishes to escape. Positive facts must always be proved by

the prosecution. But the same rule cannot always apply to negative facts. It is not for the prosecution to anticipate and eliminate all possible defences or circumstances which may exonerate an accused. Again, when a person does not act with some intention other than that which the character and circumstances of the act suggest, it is not for the prosecution to eliminate all the other possible intentions. If the accused Criminal Appeal No. 437 of 2015 Page 29 of 54 had a different intention that is a fact especially within his knowledge and which he must prove.

48. A manifest distinction exists between the burden of proof and the burden of going forward with the evidence. Generally, the burden of proof upon any affirmative proposition necessary to be established as the foundation of an issue does not shift, but the burden of evidence or the burden of explanation may shift from one side to the other according to the testimony. Thus, if the prosecution has offered evidence, which if believed Criminal Appeal No. 437 of 2015 Page 30 of 54 by the court, would convince them of the accused's guilt beyond a reasonable doubt, the accused, if in a position, should go forward with counter-vailing evidence, if he has such evidence. When facts are peculiarly within the knowledge of the accused, the burden is on him to present evidence of such facts, whether the proposition is an affirmative or negative one. He is not required to do so even though a prima facie case has been established, for the court must still find that he is guilty beyond a reasonable doubt before it can convict. However, the accused's failure to present evidence on his behalf may be regarded by the court as confirming the conclusion indicated by the evidence presented by the prosecution or as confirming presumptions which might arise therefrom. Although not legally required to produce evidence on his own behalf, the accused may, therefore, as a practical matter find it essential to go forward with proof. (Emphasis applied)

52. It follows from the above that a prima facie case of guilt needs to be established by the prosecution, first. Thereafter to translate the prima facie case to one “beyond reasonable doubt”, the prosecution may fill some blanks based on the information, within the special knowledge and only and only with the accused. The failure of the accused to explain or depose as regards the same could at best indicate a suggestion, but certainly not an admission of guilt much less conviction.
53. The prosecution has failed to prove the place of the occurrence of the crime. The place of occurrence of the crime assumes great significance, especially when the case of the prosecution is based on the Last Seen Theory. It is for the prosecution to establish a co-relation between the place of presence of the accused at the time of commission of crime and place of crime. Therefore, the prosecution has not been able to establish a prima facie case of guilt of the accused for invoking of Section 106 of the Evidence Act.
54. Neither of the two versions as regards the place of the occurrence of the crime namely the bedroom of the deceased and the mango tree under which the deceased was found lying, have been established by the prosecution. The distance between the mango tree and house has not been investigated or brought on record. The veracity of Samir’s statements cannot be assessed, in

the absence of a proper sketch map by the investigating officer, ie distance between the mango tree and the house and the number of rooms, in the house of the victim.

55. There is no evidence to ascertain or establish whether the deceased was alive when he was first seen with injuries by the witnesses. PW-3, Samir, the son of the victim, has said that he brought the victim, who was lying under the mango tree, to the bedroom and all along the victim was alive, and the victim was murmuring in pain. The driver of the vehicle PW-9 has also stated that he heard the victim murmuring in the car.

56. However at the same time, he said that the victim was unconscious. A seriously injured person, in high inebriation, can still murmur in pain, while being immobile due to his injuries. The expression unconscious must clearly be understood as immobile in the facts of the case. One cannot ignore the deficiencies in the translations made in Court at the District level. The prosecution or the Court below, should have asked Samir, why he did not take the victim directly to the hospital from the mango tree, and risked the life of the victim, by bringing him not only inside the house, but to the bedroom. This is therefore another serious deficiency in the prosecution case which the trial judge failed to notice.

The Applicability of The Last Seen Theory To The Present Facts Of The Case:-

57. Admittedly there is no positive oral testimony exists that the victim was last seen with the accused. The Learned Session Court has held, by a process of elimination, inferred that the accused had to be with the victim since no one was present in the house between 6-7 pm i.e. the time of death as per the post-mortem report.

58. The Supreme Court in **Krishan Kumar & Anr. Versus The State of Haryana 2023 INSC 679**, on the last seen theory has held thus:-

8..... As noticed hereinbefore the appellants were found guilty based on the circumstantial evidence and the first link in the chain of circumstantial evidence is the 'last seen' evidence. **'Last seen' as a link in the chain of circumstantial evidence, would suggest existence of oral testimony of at least one witness to establish that the deceased was last seen in the company of the accused....**

20. Before appreciating the oral testimonies of PW-10, PW-8 and PW-7 and the manner of their appreciation by the courts below we think it apposite to consider the question **whether the 'last seen theory', in its application, could brook presumption as to the presence of the deceased along with the accused just prior to the occurrence, as drawn by the trial Court, in the absence of positive ocular evidence of prosecution witnesses of having seen the deceased in the company of the accused together and alive at a time proximate to the occurrence.**

21. **We have absolutely no hesitation to answer it in the negative as otherwise the application of the theory of 'last seen' in the absence of any other positive evidence to conclude that the accused and the deceased were last seen together would be hazardous,**

as held in Satish' case (supra). Its indirect application is also CrI. A. Nos. 1076-1077 of 2015 Page 19 of 48 impermissible. In this context, the decision of this Court in Hatti Singh's case (supra) also has relevance. In that case it was held that unless the time gap between the deceased having been seen lastly in the company of the accused persons and the murder, is proximate it would be difficult to prove the guilt of the accused only on that basis. Furthermore, it was held that the last seen theory would come into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased was found dead is so small that a possibility of any person other than the accused being the author of the crime would become impossible. Above all, it was held that even in such a case Court should look for some corroboration. The same view was reiterated by this Court in the decision in Chattar Singh & Anr. v. State of Haryana. (Emphasis applied)

59. In **R. Sreenivasa versus State Of Karnataka 2023 SCC**

OnLine SC 1132 held as follows:-

15. The burden on the accused would, therefore, kick in, only when the last seen theory is established. In the instant case, at the cost of repetition, that itself is in doubt.

17. In the present case, given that there is no definitive evidence of last seen as also the fact that there is a long time-gap between the alleged last seen and the recovery of the body, and in the absence of other corroborative pieces of evidence, it cannot be said that the chain of circumstances is so complete that the only inference that could be drawn is the guilt of the appellant.

60. Given the absence of a positive ocular evidence that the accused was last seen with the victim, and therefore, or evidence of time gap between the accused last seen with the victim and the actual time of recovery of dead body of

the victim in the present case, the last seen theory could not have been applied by the Trial Court.

61. The failure of the appellant to explain how her husband died, does not therefore constitute any serious link in the chain of circumstantial evidence. This is more so when two other links as relied upon by the Court below are shaky and untenable. The infirmities in the evidence as indicated hereinabove, cannot sustain the conviction of the appellant much less on circumstantial evidence.

The Motive of the Accused:

62. In **G. Parshwanath v. State of Karnataka, (2010) 8**

SCC 593, it was held as follows:-

45 [Ed.: Para 45 corrected vide Official Corrigendum No. F.3/Ed.B.J./139/2010 dated 6-12-2010.] The argument that in absence of motive on the part of the appellant to kill the deceased benefit of reasonable doubt should be given, cannot be accepted. First of all every suspicion is not a doubt. Only reasonable doubt gives benefit to the accused and not the doubt of a vacillating Judge. Very often a motive is alleged to indicate the high degree of probability that the offence was committed by the person who was prompted by the motive. In a case where the motive alleged against accused is fully established, it provides foundational material to connect the chain of circumstances. It affords a key on a pointer to scan the evidence in the case in that perspective and as a satisfactory circumstance of corroboration. However, in a case based on circumstantial evidence where proved circumstances complete the chain of evidence, it cannot be said that in absence of motive, the other proved circumstances are of no consequence. **The absence**

of motive, however, puts the court on its guard to scrutinise the circumstances more carefully to ensure that suspicion and conjecture do not take place of legal proof. There is no absolute legal proposition of law that in the absence of any motive an accused cannot be convicted under Section 302 IPC. Effect of absence of motive would depend on the facts of each case. Therefore, this Court proposes to examine the question of motive which prompted the appellant to commit the crime in question. (Emphasis applied)

63. While proof of motive is not precondition for a case built on circumstantial evidence, motive could be the fundamental trigger for the establishment of the chain of circumstantial evidence. Absence or lack of evidence on the motive should make Court doubly cautious in such cases. Motive could definitely be one vital link in the chain of circumstantial evidence. It would depend on the facts of each case as to whether proof of motive is necessary. In appropriate cases the accused can be let off for want of proof of motive.

64. In the present case based on circumstantial evidence motive could have been a vital link in proof of the guilt of the accused. The Ld. Trial Judge therefore committed error in holding the motive was not at all necessary to have been gone into.

Circumstantial Evidence and Proof of Guilt:

65. In the **Gambhir decision (supra)**, it was held by the Supreme Court as follows:-

9. It has already been pointed out that there is no direct evidence of eyewitness in this case and the case is based only on circumstantial evidence. The law regarding circumstantial evidence is wellsettled. When a case rests upon the circumstantial evidence, such evidence must satisfy three tests: (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. In the light of the legal position about the circumstantial evidence, we have to examine whether the circumstantial evidence in the instant case satisfies the requirements of law. The circumstantial evidence in the instant case may be broadly classified into three parts: (1) oral evidence to prove that in the absence of Namdeo, the accused used to visit the house of Laxmi regularly and he was seen in the evening of February 26, 1975 in the company of Laxmi and her children. He was also seen at about 10.00 p.m. the same night in the company of Laxmi under a neem tree in the village. At midnight he was again seen going along the way near the house of Babulal, (2) the various recoveries most of them at the instance of the accused, and (3) medical evidence.

66. In the **Raghunatha decision (supra)**, it was held as follows:-

7. Undoubtedly, the prosecution case rests on circumstantial evidence. The law with regard to conviction on the basis of circumstantial evidence has very well been crystalized in the judgment of this Court in the case of Sharad Birdhichand Sarda v. State of Maharashtra¹, wherein this Court held thus:

“152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh [(1952) 2 SCC 71 : AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129]. This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of Tufail (Alias) Simmi v. State of Uttar Pradesh [(1969) 3 SCC 198 : 1970 SCC (Cri) 55] and Ramgopal v. State of Maharashtra [(1972) 4 SCC 625 : AIR 1972 SC 656]. It may be useful to extract what Mahajan, J. has laid down in Hanumant case [(1952) 2 SCC 71 : AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129]:

“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.”

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 Cri 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 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.”

67. It follows from the above that a conclusion of guilt must be established so clearly from the chain of circumstances that there can be no other conclusion/hypothetic explanation than the guilt of the accused. The circumstances must be conclusive in nature. The circumstances must exclude every possible hypothesis except the conclusion of guilt arrived at based on the evidence on record.

68. The chain of evidence must be so complete that cannot leave any reasonable doubt or ground as regards the likely innocence of the accused. The inference must not be a replica suspicion but reasonable deduction from the facts proved.

When motive is absent a Court has the bounden duty to scrutinize the evidence on record with much greater care and caution.

69. The Court cannot come to a conclusion based on a “may be” but only on a finding that there is no other conclusion based on the evidence on record, that the appellant must be found guilty. The conclusion must be established to the extent that only and only the appellant must have killed her husband and there was no other way that the appellant could have died. The trial judge has failed to apply the aforesaid test. The inference of the Trial Court is clearly based on conjecture and surmise.

The legality of the Seizure List in the light of Sec.27 of the Evidence Act.

70. Section 27 of the Evidence Act provides that, the information given to the Police by the accused while in the custody, which leads to the recovery of the incriminating materials may be proved against the accused. Therefore, the information needs to be proved, it does not ipso facto get proved.

71. The accused was arrested on October 24, 2018. The recovery of the alleged murder weapon and wearing apparel of the victim was made on October 25, 2018.

72. Firstly, there is a discrepancy as regards the place from where the alleged incriminating materials have been recovered. The seizure list shows that the alleged incriminating materials have been recovered from the jungle which is at the back side of the house of the victim. The PW-1, however, despite putting his signature on the seizure list, during the trial said that the alleged articles were recovered from the house of the victim.

73. The density of the Jungle from where the incriminating materials have been allegedly recovered has not come on evidence. Therefore the statement that the accused immediately identified the place of the Jungle where she has kept the alleged incriminating materials cannot be accepted. The density of the Jungle will be decisive in answering the question as to whether it was humanly possible for the accused to immediately trace the alleged incriminating materials on her arrival.

74. Secondly, P.W.18 the IO, deposed that the accused has confessed that she murdered her husband/victim. Despite the above he did not produce the accused before the magistrate to record her confessional statement under Section 164(1), CrPC.

75. Thirdly, there is no evidence to show that the iron rod was used to murder the victim. No forensic evidence is obtained as regards whether there are any fingerprints or blood of the accused on the iron rod. There is no FSL report on the blood found on the weapon or the apparel stated to be that of the victim.

76. The Learned Session judge himself noted, as many as 20 kinds of injuries on the body of the victim. Therefore to say that every injury to the victim's body was caused by the iron made is inherently improbable. To date, there is also no evidence on record to indicate the cause of death of the victim. The finding of the guilt of the accused and her conviction is based on baseless conjecture and surmise.

77. Fourthly, the recovered apparel consisted of one bed sheet, one Jeans pants, one blanket, one T. shirt, one shawl, and one full pant all in a plastic bag. There is no evidence on record to show that the said apparels belonged to the victim. The wearing apparel has also not been subjected to forensic test; therefore, whether the apparel belonged to the victim is not known.

78. Reference in this regard, is made to the observations of the Supreme Court in **2023 INSC 705 Manoj Kumar Soni ...Appellant Vs. The State Of Madhya Pradesh:-**

22. The law on the evidentiary value of disclosure statements under Section 27, Evidence Act made by the accused himself seems to be well-established. The decision of the Privy Council in Pulukuri Kotayya and others vs. King-Emperor holds the field even today wherein it was held **that the provided information must be directly relevant to the discovered fact, including details about the physical object, its place of origin, and the accused person's awareness of these aspects.**

The Privy Council observed:

The difficulty, however great, of proving that a fact discovered on information supplied by the accused is a relevant fact can afford no justification for reading into s. 27 something which is not there, and admitting in evidence a confession barred by s. 26. Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law.

79. The mandate of section 27 therefore is that the information given by the accused must be directly relevant to the fact discovered, which fact must be a fact in issue. In the present case, the prosecution has failed to provide an iota of evidence showing that the murder weapon namely the iron rod was used for killing the victim, and the wearing apparels belonged in fact to the victim. Merely because the accused has not denied that the wearing apparels belong to the victim does not absolve the prosecution from establishing the fact.

80. In the facts and circumstances and the discrepancies noted hereinabove, this Court is of the view that while the Trial Judge may have at best found one or two weak links in chain of circumstances. The guilt of the accused has not been proved beyond all reasonable doubts. In other words, the chain of circumstances is not so complete or so comprehensive and firm that one can conclude that the appellant must have murdered her husband and there is no other possibility of the husband dying, than by the hands of the appellant.

81. For the reasons stated hereinabove, the impugned judgment and the order of conviction and sentence are set aside. The appellant is set free with the benefit of doubt for insufficient evidence. The appeal is allowed and disposed. The bail bond stands discharged.

82. Let a copy of this judgment be sent down to the Court below, for information.

83. Urgent photostat certified copy of this order, if applied for, be supplied to the parties as early as possible.

I Agree.

(Ajay Kumar Gupta, J.)

(Rajasekhar Mantha, J.)