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**IN THE HIGH COURT OF DELHI AT NEW DELHI****Reserved on: 6<sup>th</sup> August, 2024****Pronounced on: 3<sup>rd</sup> October, 2024**

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**CRL.A. 378/2022****TAPAS HALDAR**

..... Appellant

Through: Mr. Shivek Trehan (DHCLSC), and Ms.  
Rishika Goyal, Advocates (M:  
9311611900).

Versus

**STATE (G.N.C.T. OF DELHI)**

..... Respondent

Through: Mr. Ritesh Kumar Bahri, APP for the State  
with Mr. Lalit Luthra and Mr. Antariksh  
Pal, Advocates (M: 9910645959).  
Insp. Darpan Singh & Insp. Rajesh Jha,  
P.S. New Ashok Nagar.

**CORAM:****JUSTICE PRATHIBA M. SINGH****JUSTICE AMIT SHARMA****JUDGMENT****AMIT SHARMA, J.**

1. The present appeal under Section 374(2) of the Code of Criminal Procedure, 1973, (for short, 'CrPC') has been filed assailing the judgment of conviction dated 24.11.2021 and order on sentence dated 24.12.2021, passed by Sh. Arun Sukhija, learned Additional Sessions Judge-03, East District, Karkardooma Courts, Delhi, in Sessions Case No. 1231/2019, arising out of FIR No. 617/2018, under Sections 302/201 of the Indian Penal Code, 1860, (for short, 'IPC'), registered at PS New Ashok Nagar.



2. *Vide* the impugned judgment of conviction and order on sentence, the Appellant has been convicted for the offences punishable under Sections 302, 201, 203, 404 of the IPC. The Appellant has been sentenced to undergo life imprisonment alongwith fine of Rs. 5,000/- and in default of payment of fine, to further undergo simple imprisonment for 1 month for the offence punishable under Section 302 of the IPC. The Appellant was also sentenced to the period already undergone i.e., 3 years and 24 days as on 23.12.2021, alongwith fine of Rs. 2,500/- and in default of payment of fine, to further undergo simple imprisonment for 15 days for the offence punishable under Section 201 of the IPC. The Appellant has also been sentenced to undergo simple imprisonment for 1 year for the offence punishable under Section 203 of the IPC. The Appellant has also been sentenced to undergo simple imprisonment for a period of 2 years alongwith fine of Rs. 2,500/- and in default of payment of fine, to further undergo simple imprisonment for 15 days for the offence punishable under Section 404 of the IPC. Benefit of Section 428 of the CrPC was also granted to the Appellant and all the sentences for substantive offences were directed to run concurrently; however, sentences to be undergone in default of payment of fine were directed to run consecutively.

### **BRIEF BACKGROUND**

3. Brief facts which are necessary for the disposal of the present appeal are as follows: -

i) On 25.11.2018, *vide* DD No. 14A (Ex. PW-11/A), a PCR call was received at PS New Ashok Nagar from Satish Kumar (PW-2), who is the landlord, regarding his tenant residing at Room No. 46, K-313, Pratap Chowk, Dallupura,



Delhi, whereby it was informed that gate of latter's room is locked for last 2 days and it was anticipated that he might have committed suicide.

ii) The said information was given to ASI Arvind Kumar/PW-26 (hereinafter, referred to as 'PW-26') who alongwith other senior police personnel went to the aforesaid address. Locks of the house were broken in the presence of other persons including PW-2 and one male dead body in decomposed state was found lying on bed.

iii) Thereafter, the crime team arrived there, and they were informed that the room was opened by breaking the lock in the presence of house owner, PW-2, and Head Constable Sultan and the said broken lock was taken into custody *vide* seizure memo Ex. PW-2/B dated 25.11.2018. Efforts were made to identify the dead body; however, no credible information was received from neighbours. It was noted that by this point in time, neither any eye-witness nor any other relevant information was available with PW-26 regarding this incident.

iv) *Vide* MLC No. 016195 dated 25.11.2018, medical examination of the deceased was conducted on the same day wherein he was declared brought dead. The corpse of the deceased was sent to LBS Hospital Mortuary for preservation for the next 72 hours.

v) On 26.11.2018, FSL team was constituted to inspect the crime scene. The said team collected 3 exhibits from the said room, *viz* were blood stains taken from bed and floor, and cutting of pillow, and handed them over to PW-26. Seizure memos of said exhibits were prepared in the presence of Head Constable Baleram. The receipt of one mobile phone allegedly purchased by the deceased-Bappi Pal, on 18.11.2018 from a shop named SOPNO Communication, Malda, West Bengal,



alongwith box of said mobile phone was also taken into police custody and kept in *maalkhana*.

**vi)** IMEI numbers of said mobile phone were put on surveillance and, it was found that the same were being operated from West Bengal and thus, a team constituted and headed by PW-26 was sent to Malda, West Bengal.

**vii)** In the meanwhile, on 26.11.2018, one neighbour namely, Ms. Seema Haldar (PW-1), who was residing in the 4th floor of the same building from where the corpse of the deceased was found, came forward and identified the deceased through the photographs available with the police, and also, with the enquiry from the brother of deceased (PW-7) as Bappi Pal. PW-1 also informed the police that she, Appellant and deceased hail from the same village. PW-1 further informed the police that initially the Appellant used to reside with his mother in his rented premises but after some time, he had returned to his native village alongwith his mother.

**viii)** Thereafter, *rukka* was prepared by SI Neeraj Kumar for DD No. 14A dated 25.11.2018 and FIR No. 617/2018 (Ex. PW-10/B), under Sections 304/201 of the IPC, was registered at PS New Ashok Nagar on 28.11.2018 at 15:19 hrs. After the registration of the FIR in the present case, further investigation was entrusted to the main Investigating Officer, IO/PW-29.

**ix)** Statement of PW-2, under Section 161 of the CrPC was recorded, whereby it was stated that the Appellant had gone back to his native village six months ago and had returned to Delhi on 20.11.2018 and stayed in Delhi for 2 days. It was also stated that he was accompanied by one boy, who was also from his village, and later, the identity of the said boy was revealed as Bappi Pal. He further stated



that on 25.11.2018, when the neighbours complained of foul smell from the room of the Appellant, the said PCR call was made by him.

x) In between, the team led by PW-26 arrested the Appellant from village Chhityan Gachi, Malda, West Bengal, *vide* arrest memo Ex. PW-7/A dated 30.11.2018 and after obtaining a transit remand from the learned Chief Judicial Magistrate, Malda, West Bengal, the Appellant was brought to Delhi on 02.12.2018. Arrival entry regarding the same was made *vide* DD No. 39A on 02.12.2018. Medical examination of the Appellant was conducted. Disclosure statement dated 30.11.2018, Ex. PW-22/A, of the Appellant was recorded by PW-26.

xi) Thereafter, on 03.12.2018, as per the case of the prosecution, the Appellant had confessed, *vide* supplementary disclosure statement, Ex. PW-26/B, that he had murdered his village friend, Bappi Pal, by strangulating latter's neck with the help of a cloth rope (Ex.P-2 (colly)); the same has been referred to as improvised rope in the impugned judgment of conviction) and the same can be recovered from his room in Delhi. One Airtel Mobile SIM card, which later identified as bearing No. 8670884224, was also seized by PW-26 from the Appellant, *vide* seizure memo Ex. PW-7/D, during the personal search of the latter at the time of his arrest. The reason given for killing Bappi Pal by the Appellant was that they had an altercation and quarrel as the former had refused to give Rs. 6,000/- to him and after the murder, latter had taken the said sum and newly purchased mobile phone of Bappi Pal with him. He also stated that, later on, he handed over the said mobile phone of the deceased to his brother, PW-7. It was also stated in the said confessional statement that on the night of 21.11.2018, he consumed liquor in the room of Mr.



Roshan Kumar Jha (PW-3) with other boys namely, Gopal Vishwas (PW-4) and Sunny Kumar Mandal (PW-5) and returned to Malda by train in the morning of 22.11.2018.

**xii)** Then, on 03.12.2018, one bag (Ex. P-1(colly)) was recovered from the room of the Appellant at latter's instance and from this bag, the said rope (Ex. P-2 (colly)) of mixed golden, white and maroon colour measuring about 3 meters, which was allegedly used to strangle the deceased by the Appellant, was seized and taken into custody in the presence of PW-26, PW-29 and PW-2/landlord *vide* seizure memo Ex. PW-2/C.

**xiii)** On arrival of relatives of Bappi Pal, identification of the corpse was done at LBS Hospital Mortuary and dead body identification memo (Ex. PW-7/B dated 03.12.2018) was prepared in the presence of Sameeran Pal/PW-7, brother of Bappi Pal, and Hardhan Pal (maternal uncle) and post-mortem of the deceased was conducted *vide* P.M. No. 603/18 (Ex. PW-14/A). Thereafter, the corpse of the Bappi Pal was handed over to his relatives alongwith the death certificate *vide* dead body delivery memo Ex. PW-7/C.

**xiv)** PW-7, brother of the deceased, informed the IO regarding the clothes of his brother-Bappi Pal which were also recovered from the room of the Appellant at latter's instance in the presence of IO/PW-29, PW-26, Sameeran/PW-7 and Seema Haldar/PW-1 and were taken into custody *vide* seizure memo Ex. PW-1/A which comprised six clothes.

**xv)** All the exhibits and evidence collected during the investigation were sent for examination to FSL. On 05.12.2012, a scaled site plan of the site of occurrence



was prepared and the DPCR Form regarding the PCR call was also appended with the file.

**xvi)** During the investigation, after analysing the activity of the IMEI numbers of the newly purchased mobile phone of the deceased and the mobile number of the Appellant, it was revealed that the aforesaid mobile number, i.e., 8670884224, which is originally the number of the Appellant, was used by the latter in the said purchased mobile phone of the deceased on 21.11.2018 from 07:33:06 hrs to 19.32.22 hrs, and thereafter, from 24.11.2018 till 26.11.2018. It was also noted that the location of the said SIM number and IMEI number of the mobile phone of the deceased was in Delhi till 22:00:42 hours on 21.11.2018, and thereafter, location was shown in West Bengal, from where the Appellant was arrested, from 24.11.2018 onwards.

**xvii)** The said mobile phone purchased by the deceased was taken into custody from his brother/PW-7 *vide* seizure memo Ex. PW-7/D on 04.02.2019 from his village in Malda, West Bengal. Statement under Section 161 of the CrPC of the seller of the mobile phone was also recorded.

**xviii)** After obtaining a subsequent opinion from the Autopsy Surgeon at LBS Hospital Mortuary regarding Ligature Mark at the neck of the deceased, on 26.02.2019, chargesheet in the present case was filed before the Court of competent jurisdiction for the offences punishable under Sections 302, 201 of the IPC naming the Appellant as the main accused in the present case.

**xix)** FSL reports, which were kept awaited, were filed by way of supplementary chargesheet.



4. Prosecution had cited 32 witnesses in the chargesheet and out of them, 29 were examined before the learned Trial Court to prove the guilt of the Appellant. The material prosecution witnesses were PW-1 Smt. Seema Haldhar; PW-2 Satish Kumar; PW-3 Roshan Kumar Jha; PW-4 Gopal Vishwas; PW-5 Sunny Kumar Mandai; PW-7 Sameeran Pal; PW-9 Hardan Pal; PW-12 Joynata Das; PW-14 Dr. S. Lal and PW-19 Sunil Kumar. The prosecution evidence commenced on 18.02.2020, statement of the Appellant under Section 313 of the CrPC was recorded on 16.03.2020, final arguments were heard from 01.03.2021 to 29.10.2021. It is pertinent to note that after the judgment was reserved for pronouncement by the learned Trial Court, the same was listed for clarification thrice on 15.11.2021, 20.11.2021 and 24.11.2021. The statement of the Appellant under Section 165 of the Indian Evidence Act, 1872 (for short, 'IEA') was recorded on 24.11.2021.

5. The learned Trial Court after conducting trial found the Appellant guilty for the commission of murder of Bappi Pal, the deceased, on 21.11.2018 at around 03:00 P.M., based on the circumstantial evidence brought forth by the prosecution. Hence, the present appeal has been filed by the Appellant assailing the impugned judgment.

#### **SUBMISSIONS ON BEHALF OF THE APPELLANT**

6. Learned Counsel for the Appellant has raised the following contentions in support of the present appeals which are: -

i) It is submitted that the learned Trial Court *vide* the impugned judgment has not correctly appreciated the evidence led by the prosecution as there were many lacunae in the chain of circumstantial evidence and the Appellant has been



convicted on the basis of conjectures and surmises. It is also submitted that, as per the admitted case of prosecution, that no one had seen the Appellant killing or strangulating the deceased.

ii) It is also submitted that even though there were many contradictions in the testimonies of PW-1 and PW-7, still the learned Trial Court has erred in placing reliance on their testimonies while convicting the Appellant for the commission of murder of Bappi Pal, the deceased. It is further submitted that the alleged chain of events, as per the case of prosecution, is neither consistent with the hypothesis of the guilt of the Appellant nor conclusive in nature.

### **Delay in Registration of FIR**

iii) It is the case of the Appellant that, admittedly, the PCR call which forms the basis of registration of FIR in the present case was made on 25.11.2018; however, FIR (Ex. PW-10/B) was registered on 28.11.2018. This inordinate delay of 3 days in registration of FIR, after the preparation of *rukka*, casts aspersions over the case of prosecution and its version on the alleged chain of events sought to be proved by them. Moreover, this delay has not been explained by the prosecution or PW-26, who was the initial Investigating Officer in the present case, or, Main Investigating Officer, (hereinafter referred to as 'PW-29'). It is the case of the Appellant that delay in registration of FIR assumes much more importance because the Appellant in the present case was arrested on 28.11.2018 and was illegally detained for those 3 days and this custody period has not been shown by the prosecution or IO anywhere in the records.

iv) Attention of this Court has been drawn towards the testimony of PW-7, to show that the Appellant was apprehended by PW-7 and not by the Officials of



Delhi Police as the same is contrary to the arrest memo which shows the date of arrest as 30.11.2018. The case of the Appellant is that the latter was detained by PW-7 and his family members much before Delhi Police team headed by PW-26 had arrived in village Chityan Gachi, Malda, West Bengal. Therefore, it is submitted that this illegal detention of the Appellant by the private persons is sufficient to acquit him as the same demolishes the case of the prosecution.

v) Reliance has been placed on **Meharaj Singh v. State of U.P., (1994) 5 SCC 188**, to contend that FIR in a criminal case, and particularly in a murder case, is a vital and valuable piece of evidence. Delay in lodging the FIR often results in embellishment, which is a creature of afterthought.

**Delay in Conducting Post-Mortem/Autopsy**

vi) Attention of this Court has been drawn towards the testimony of PW-1, who had stated that she had identified the corpse of the deceased on 26.11.2018 and it is argued that since the identity of the deceased was ascertained as early as on 26.11.2018 then, why was the corpse not sent for conducting post-mortem, and instead, sent to LBS Hospital Mortuary for preservation for next 72 hours. It is pointed out that, as noted above, the post-mortem in the present case was conducted on 03.12.2018. Therefore, it is the case of the Appellant that since the corpse was initially in a decomposed state, which has also been mentioned in the MLC of the deceased conducted on 25.11.2018, then, the said post-mortem report cannot be accepted in its entirety with respect to the time and date of death of the deceased.

vii) Reliance has also been placed on **Naveen Kumar Ahuja v. State (NCT of Delhi), 2012 SCC OnLine Del 37**, to contend that delay in lodging FIR, absence



of motive and delay in conducting post-mortem are factors that cast doubt on the case of the prosecution.

### **Arrest of the Appellant**

**viii)** It is pointed out that the learned Trial Court in the impugned judgment has given conclusive finding at para 51(i) and recorded that the Appellant in the present case was arrested on 28.11.2018, which itself is contrary to the case of the prosecution because, per the arrest memo (Ex. PW-7/A), the date of arrest of the Appellant is 30.11.2018.

**ix)** The case of the Appellant is that the latter was illegally detained by PW-7 alongwith his family members, local villagers, and local Police for 3 days from 28.11.2018 till the time Delhi Police Team arrived there to arrest him. To support this contention, reliance has been placed on the testimony of PW-7, who had stated that he alongwith his family members and 2-3 other villagers had apprehended the Appellant from village Ganga Rampur and handed over the Appellant to the local police in their native village (Chityan Gachi) till the time Delhi Police had arrived in their village to arrest the Appellant. Attention of this Court has also been drawn to the answer given to question No. 24 by the Appellant in his statement under Section 313 of the CrPC and it is submitted that the Appellant had also stated that he was illegally detained for 3 days at his native village in Malda.

**x)** It is also submitted that the learned Trial Court has relied on the selective portions of the testimonies recorded before it instead of analysing such testimonies as whole. It is the case of the Appellant that had it been a case of legal arrest the police officials from Delhi Police Team would have been able to recover the



mobile phone of the deceased, which was recovered from PW-7 on 04.02.2019 after 2 months from the arrest of the Appellant.

**Recovery of Alleged Weapon of Offence & Other Articles**

**xi)** It is submitted that learned Trial Court had erroneously concluded in the impugned judgment that the recovery of the alleged weapon of offence was made at the instance of the Appellant in pursuance of the disclosure and supplementary disclosure statement made by him. As per the case of the prosecution, on 02.12.2019, the Appellant led the police party to his rented premises, place where the corpse of the deceased was found, and the alleged weapon of offence i.e., multicolour improvised rope, was recovered from the *pithu* bag. Thereafter, on the same day, when PW-29 was recording the statement of PW-7, the latter informed PW-29 regarding the clothes of his brother, the deceased, which he had brought to Delhi with him. Those clothes were also recovered from the *pithu* bag from the rented premises of the Appellant *vide* Ex. PW-1/A seizure memo dated 03.12.2019.

**xii)** It is the case of the Appellant that since the prosecution has not been able to render any plausible and satisfactory explanation regarding the illegal detention of the Appellant, it cannot be ruled out that the recoveries which were made pursuant to the disclosure statement made by the Appellant were planted by the police personnels to implicate the former in the present case. It is also pointed out that the bag from which the alleged recoveries were made can be seen lying in the photos of the room taken by the crime team on 25.11.2018. It is further submitted that since the said *pithu* bag was lying there, then, why was the same not taken into custody by the initial IO, PW-26, or Main IO/PW-29. Therefore, the



recoveries made by the IO based on the disclosure statement of the Appellant are doubtful and cannot be read in evidence.

**xiii)** Reliance has been placed on **Mani v. State of Tamil Nadu, (2009) 17 SCC 273**, to contend that discovery is a weak evidence and reliance cannot be placed on discovery of articles which were lying near the dead body but recovered after undue delay.

**xiv)** Attention of this Court is drawn towards the seizure memo of clothes of the deceased (Ex. PW-1/A) and seizure memo of the alleged murder weapon i.e., improvised rope (Ex. PW-2/C) and it is submitted that, in the seizure of clothes dated 03.12.2018, it was mentioned that improvised rope had already been recovered the day before, i.e., on 02.12.2018, a day prior to the recovery of those clothes; however, Ex. PW-2/C, the seizure memo of improvised rope records the date of its recovery as 03.12.2018. It is further pointed out that initial IO, PW-26, and Main IO, PW-29, both had stated that the said improvised rope was recovered on 03.12.2018. It is also submitted that, as per the testimony of PW-2, none of the family members of the deceased was present in the room of the Appellant when the recovery of the alleged improvised rope was made. Additionally, the case of the Appellant is that despite the glaring contradictory statements given by PW-7 in his testimony, the latter was not declared hostile by the prosecution. The statements of PW-1 and PW-2 also contradict each other in so far as the presence of PW-7 at the time of recovery of the bag of clothes is concerned. It is further the case of the Appellant that the report regarding whether the death of a person by strangulation can be caused with the help of the said improvised rope is inconclusive and reads as, “could be possible.”



xv) Attention of this Court has further been drawn towards the testimonies of PW-1 and PW-7 and submitted that the aforesaid seizure memos and recoveries of clothes and improvised rope has been supported by PW-1; however, PW-7 has stated that the bag containing the clothes of his brother, deceased, was lying in the Police Station and was shown to him there only. In view of these contradictions, it is submitted that reliance placed by the learned Trial Court on these alleged recoveries in convicting the Appellant is misplaced and the impugned judgment is to be set aside.

xvi) Reliance has been placed on **Jose Alias Pappachan v. Sub-Inspector of Police, Koyilandy and Anr., (2016) 10 SCC 519**, to contend that suspicion and conjectures cannot take the place of legal proof.

**Recovery of Mobile Phone of the Deceased**

xvii) It is submitted that the learned Trial Court in the impugned judgment has also given finding to the effect that the Appellant was seen holding the mobile phone of the deceased in the evening on 21.11.2018; however, the said mobile phone was not recovered from the personal search of the Appellant when he was arrested by PW-26. It is pointed out that the said mobile phone was taken into custody *vide* seizure memo Ex. PW-7/D dated 04.02.2019, i.e., after around 2 months from the date of arrest of the Appellant in the present case, from PW-7, brother of the deceased.

xviii) Reliance has been placed on **P. Mani v. State of T.N., (2006) 3 SCC 161**, to contend that burden of proof only shifts upon the accused once the prosecution proves the guilt of the accused beyond doubt and it is pointed out that in present



case, the prosecution has not been able to prove the foundational facts required to shift evidential burden of proof on the Appellant.

**xix)** It is the case of the Appellant that if the said mobile phone was with PW-7 then, why did he not hand it over to PW-26 when the Appellant was arrested on 30.11.2018. Moreover, no explanation, whatsoever, has been given by the IO/PW-29 or PW-26 or PW-7 regarding the delayed recovery of the mobile phone after 2 months from arrest of the Appellant. It is further submitted that the testimonies of PW-4 and PW-19 to the effect that they had seen the mobile phone of the deceased in the hands of the Appellant in evening of 21.11.2018 cannot be relied on as they were never shown the case property and, in any case, nor they had identified the same during trial.

### **Recovery of SIM Card & Section 165 of the IEA**

**xx)** As per the case of the prosecution, the said SIM card was recovered from the Appellant during his personal search and it is the same SIM card which the Appellant was using in the mobile phone of the deceased after killing the latter. Later on, it was discovered that the said SIM card was registered in the name of Ms. Menka Mahto, sister of the deceased. It is the case of the Appellant that the manner in which the latter has been arrested cannot rule out the possibility that the said SIM card can be plotted by the Police to implicate him. It is also submitted that said Menka Mahto has not been examined by the prosecution nor her name was cited as witness in the chargesheet.

**xxi)** Regarding the statement recorded by the learned Trial Court on 24.11.2021, it was submitted that the said statement under Section 165 of IEA was recorded by the learned Trial Court after the culmination of the final arguments in the



present case, when the judgment was reserved for pronouncement. It is the case of the Appellant that the learned Trial Court by such conduct had tried to fill up the missing links in the chain of circumstantial evidence led by the prosecution and had acted in a prejudicial and biased manner.

**xxii)** Reliance has been placed on **Omprakash Shankarlal Sharma v. State of Maharashtra, 1992 SCC OnLine Bom 413**, to contend that Section 165 of the IEA cannot be used to fill gaps in the prosecution case.

### **Last Seen Theory**

**xxiii)** As per the case of the prosecution, the Appellant was the person who was lastly seen in the company of the deceased-Bappi Pal on 21.11.2018 at around 11:00 A.M. and the same is corroborated by the testimony of PW-1. It is pointed out that PW-1 had stated that she had met the deceased in the company of the Appellant for the first time on 20.11.2018 which demonstrates that she had never met him before. It is further pointed out that PW-1 was able to identify the corpse of the deceased on 26.11.2018 only after seeing the pictures sent by PW-7 to her. It is also submitted that, regarding the factum of last seen theory, there are many inconsistencies and contradictions in the testimonies of PW-1 and PW-2. It is also the case of the Appellant that the incriminating evidence as stated by PW-1 regarding the fact that she had seen the Appellant in the company of the deceased-Bappi Pal on 21.11.2018 at around 11:00 AM has not been put to the Appellant when his statement under Section 313 of the CrPC was recorded. Therefore, testimony of PW-1 so far as it relates to the identification of the deceased and last seen evidence cannot be relied on.



xxiv) Reliance has been placed on **Anjan Kumar Sarma v. State of Assam, (2017) 14 SCC 359**, to contend that in absence of a clinching chain of circumstances, conviction cannot be solely based on last seen evidence and lack of explanation of incriminating circumstances under Section 313 of the CrPC.

xxv) Reliance has also been placed on **Surender Prashad v. State, 2014 SCC OnLine Del 234**, to contend that last seen evidence does not by itself necessarily leads to an inference that the accused committed the crime unless the same is duly supported by other links in the chain of circumstantial evidence unerringly pointing out the guilt of the accused. In a case based on circumstantial evidence, all the incriminating circumstances must be supported by reliable and clinching evidence.

xxvi) Without prejudice to the aforesaid argument, it is further submitted that, in any case, even if the testimony of PW-1 is taken on its face value, last seen theory can be invoked only in cases where the time gap between the death of the deceased and the person who was lastly seen in the company of the deceased is so small which rules out the possibility that deceased might have met some other person other than the person who was lastly seen with him. However, in the present case, as per the case of the prosecution, the Appellant was lastly seen in the company of the deceased on 21.11.2018 at around 11:00 AM and corpse of the deceased was found on 25.11.2018. It is further submitted that as per the story of the prosecution there is a gap of 4 days between the last seen evidence and the day on which the corpse of the deceased was recovered.



xxvii) It is further the case of the Appellant that, as per the post-mortem report which was conducted on 03.12.2018, the probable time of death was reported to be 1½ weeks prior to the said date, which comes out nearly to be around 23.11.2018, and that still leaves a gap of 2 days from day when the deceased was lastly seen with the Appellant and the day when the corpse of the deceased was found. Thus, it was submitted that the last seen theory cannot be invoked in the present case to prove the guilt of the Appellant and reliance placed on the same by the learned Trial Court is misplaced.

xxviii) Reliance has also been placed on **Nizam v. State of Rajasthan, (2016) 1 SCC 550**, to contend that it is not prudent to base conviction on last seen theory when time gap is long. Circumstances from which the conclusion of guilt is drawn must be fully proved and must be consistent only with the hypothesis of guilt of the accused and totally inconsistent with his innocence.

**Culpable Homicide Not Amounting to Murder**

xxix) Without prejudice to the aforesaid arguments, it is submitted that the present case is entirely based on circumstantial evidence and the prosecution has not been able to establish any motive against the Appellant for killing the deceased-Bappi Pal. The prosecution has also not been able to establish the complete chain of circumstantial evidence before the learned Trial Court which can lead to the hypothesis consistent with the guilt of the Appellant. Therefore, in absence of any cogent and satisfactory incriminating evidence against the Appellant, it cannot be said that the present case falls within the purview of Section 300 of the IPC.

xxx) It is not the case of the prosecution that the act of the Appellant was premeditated. The prosecution has also not been able to attribute any substantial



motive to the Appellant whereby it can be safely concluded that the latter had murdered the deceased to accomplish the said motive. The recovery of the alleged mobile phone was not affected from personal search of the Appellant and the said sum of Rs. 6,000/- was also not recovered from the Appellant. The delay in registration of FIR, conducting autopsy, recovery of clothes and mobile phone of the deceased have not been explained satisfactorily by the Appellant. Hence, it was submitted that, in case, the judgment of conviction passed by the learned Trial Court cannot be overturned then, the same is to be altered to under Section 304 of the IPC which is culpable homicide not amounting to murder.

### **SUBMISSIONS ON BEHALF OF THE STATE**

7. Learned APP for the State, refuting the contentions made by learned Counsel for the Appellant, has made the following submissions: -

- i) The learned Trial Court had convicted the Appellant after due appreciation of the entire circumstantial evidence led and proved by the prosecution during the trial. Entire chain of circumstances has been proved beyond reasonable doubt and there are no missing or broken links therein. The chain of these circumstances leads to hypothesis which is consistent only with guilt of the Appellant.
- ii) He further submitted that the Appellant has not been able to point out any contradictions and inconsistencies in the evidence led by prosecution before the learned Trial Court neither by way of cross-examination nor was he able to give any cogent explanation regarding the incriminating circumstances put to him in his statement under Section 313 of the CrPC.



### **Last Seen Theory**

iii) As per the case of the prosecution, the Appellant was lastly seen in the company of the deceased on 21.11.2018 at 11:00 AM and the same has been duly corroborated by the testimony of the PW-1 as she had seen both the Appellant and deceased on 20.11.2018 and 21.11.2018. It is also the case of the prosecution that the corpse of the deceased was found lying on the bed inside the rented premises of the Appellant on 25.11.2018 in a decomposed state. Attention of this Court has been drawn towards the answer given by the Appellant to the Question No. 4 in the statement under Section 313 of the CrPC and submitted that the Appellant had instead of rendering any explanation or rationale regarding his last seen evidence stated that, "I did not met with the deceased."

iv) It is further submitted that, as per the testimony of PW-1, deceased and the Appellant had met her in the stairs of the building in which they reside on 21.11.2018 and the said fact has also been denied by the Appellant with the same answer as noted in the aforesaid paragraph.

v) As per the post-mortem report conducted on 03.12.2018, it has been concluded that the corpse of the deceased was found in a decomposed state. It is submitted that the time of death as per the said report was stated to be 1½ week prior to the date of report. Hence, 10 days were taken as threshold as the same is best in case of a body found in decomposed state. Reliance has been placed on the following text of Medical Jurisprudence and Toxicology by H.W.V. Cox, 6<sup>th</sup> Edition published in 1997, which read as under: -

"8. Time Since Death—In this context, we are discussing only the estimation of time since death of skeletal material, as the fresh and



partly decomposed body has been dealt with in another chapter. The estimation of time since death of bones is extremely difficult because the rate of decay is more dependent upon the environmental conditions than upon the time factor. As an example, the author has seen complete disappearance of the body, including the bones, after only ten to fifteen years burial in water logged, peaty ground where the acidity of the soil water due to rotting vegetation caused complete decalcification. In contrast, bones of Roman date, almost 2000 years old, buried in dry sand were as well preserved as a medical student's demonstration skeleton."

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15. Important Facts about Post-Mortem Changes

1. The estimation of time since death is highly inaccurate, whether this is done soon after death or after a considerable period.
2. One should never give a single estimate of the time since death, but use a range of times, between which the death was presumed to have taken place.
3. Post-mortem hypostasis, even when visible through skin pigmentation is of no use in timing death.
4. Rigor mortis is of very limited used in estimating the time since death and must only be used in conjunction with other factors.
5. It is a fallacy to believe that post-mortem hypostasis remains fixed after a certain time—this is not so.
6. The chemical methods for estimating the time since death are themselves temperature dependent.
7. The use of the condition of the stomach contents as a method of estimating time since death is fraught with dangers. Unless death was sudden and unexpected, no reliance whatsoever can be placed upon the state of digestion or the volume of stomach contents.
8. The interpretation of the insect infestation of a dead body as a measure of the time since death is a matter for an expert entymologist.
9. No time scale can be laid down for the onset of the various putrefactive changes, within a very wide margin of error.



**16. Indian Case-law (State of digestion, presence of faecal matter in intestines, how far determine time of death)** –As observed by the Supreme Court in *P.Venkaiah v. State of A.P.* [AIR 1985 SC 1715;1985 (2) Crimes 746]; 1985 Cr LJ 2012] medical science is not yet so perfect as to determine the exact time of death nor can the same be determined in a computerized or mathematical fashion so as to be accurate to the last second.

The state of the contents of the stomach found at the time of medical examination is not a safe guide for determining the time of the occurrence because that would be a matter of speculation, in the absence of reliable evidence on the question as to when the deceased had his last meal and what that meal consisted of. [*Masjit Tato Rawool v. State of Maharashtra*, AIR 1971 S.C. 2119; 1971 Cr LJ 1463;1971 SCC (Cri) 73; *Gopal Singh v. State of U.P.*, AIR 1979 SC 398.]”

**vi)** It is pointed out that the last seen evidence as has emerged, based on testimonies of PW-1, PW-3, PW-4, PW-5 and PW-19 was that the Appellant and deceased were last seen together on 21.11.2018 i.e., 12 days prior to the date of post-mortem report and there is only a gap of 2 days in the estimated time of death and last seen evidence in the present case. Therefore, since the burden of proof has been discharged by the prosecution, it was incumbent on the Appellant to explain before the learned Trial Court that in what circumstances he had parted away from the company of the deceased that day.

**vii)** Attention of this Court has been drawn towards the cross-examination of PW-1 to PW-5 and statement under Section 313 of the CrPC of the Appellant and submitted that no suggestion has been given to these witnesses with respect to the fact that the Appellant was not seen in the company of the deceased on 21.11.2018 nor the Appellant has given any explanation regarding the said fact except the answer as quoted hereinabove.



viii) Attention of this Court has further been drawn towards answer to Question No. 11 in the statement, under Section 313 of the CrPC, of the Appellant and it is submitted that regarding the stay of the deceased with the Appellant and last seen evidence, the latter had stated that, “It is matter of record.” It is further submitted that answers given to Question nos. 29, 30, 38 and 39 suggest that the Appellant had sought to establish a false plea of alibi; however, he was not able to do so. The Appellant *vide* order dated 17.02.2021 was provided opportunity to lead defence evidence however, he had not led any defence evidence to dispel the case of the prosecution. Thus, it is the case of the prosecution that the plea of alibi sought to be established by the Appellant has been falsified in the present case.

**Burden to Prove Special Circumstance is on Appellant**

ix) It is further submitted that corpse of the deceased has been recovered from the rented premises of the Appellant i.e., Room No. 46, and the same has not been denied by the Appellant that the said room was not his rented premises at that point in time. Police verification of the same by PW-29 also verifies that the said room was tenanted premises of the Appellant. The Appellant has also stated that the same is a matter of record in his statement under Section 313 of the CrPC. The Appellant has also not rebutted the incriminating facts from the testimony of PW-1 with any plausible explanation, apart from the fact that, the same were denied by him.

x) Attention of this Court has been drawn towards Section 106 of the IEA and it is submitted that once the prosecution has discharged its legal burden of proof then, evidential burden to prove any special circumstance within the knowledge of the Appellant was on him. However, the Appellant in the instant case has not



provided any explanation either by way of cross-examination or in his statement under Section 313 of the CrPC. Reliance has placed on **Ranjit Kumar Haldar v. State of Sikkim, (2019) 7 SCC 684**, to contend that Section 106 of the IEA was introduced not to relieve prosecution of their duty, but it is designed to meet situation, in which it would be impossible or difficult for prosecution to establish facts which are especially within the knowledge of the accused.

### **Recovery of Murder Weapon and Other Articles**

**xi)** It is further submitted that the recoveries in the present case were affected pursuant to the disclosure statement made by the Appellant. It is pointed out that the Appellant was arrested on 30.11.2018, his disclosure statement was recorded by PW-26 on 30.11.2018, Appellant was brought to Delhi on 02.11.2018 and the said recoveries were made on 03.12.2018. Therefore, there is no undue delay in conducting investigation in the present case by PW-26 or PW-29 nor there was any occasion for PW-29 to implant the incriminating objects in the rented premises of the Appellant if the timeline of events is seen carefully.

**xii)** He has further submitted that PW-26 had arrived in Delhi on 02.12.2018 and the recovery of the murder weapon was affected on 03.12.2018. Regarding the discrepancy in the contents of Ex. PW-1/A and the date of recovery of Ex. P-2 (colly) i.e., murder weapon (improvised rope), it is submitted that no question has been put to IO/PW-29 which could suggest that improvised rope was recovered the day before i.e., on 02.12.2018. It is further pointed out that the improvised rope was taken into custody separately by seizure memo Ex. PW-2/C, wherein the date of seizure is mentioned as 03.12.2018 and the same has not been



disputed by the Appellant. The witnesses to both these exhibits have also stated on the similar lines and their credibility stands unrebutted by the Appellant.

xiii) Moreover, the said discrepancy arises from the testimony of PW-7, who himself was not witness to the recovery of the seizure memo Ex. PW-2/C *vide* which the murder weapon was taken into custody.

xiv) Reliance has been placed on **Pattipati Venkaiah v. State of A.P., (1985) 4 SCC 80: AIR 1985 SC 1715**, (para 11), to contend that the medical evidence of time of death should not be viewed with mathematical precision. Reliance has also been placed on **Rohtas v. State of Haryana, (2019) 10 SCC 554**, to contend that it is the duty of the Court to separate the grain from the chaff and then, to arrive at a finding of guilt of an accused or otherwise. It is also submitted that maxim *falsus in uno, falsus in omnibus* has not received general acceptance in India nor has this maxim come to occupy the status of rule of law.

#### **Relevancy of Subsequent Conduct of the Appellant: Section 8 of IEA**

xv) It is also the case of prosecution that since there is no direct evidence in the present case, the subsequent conduct of the Appellant is also relevant under Section 8 of IEA. Reliance has been placed on illustrations (h) and (i) to Section 8 of the IEA, to contend that the conduct of the Appellant in the evening of 21.11.2018, the day when the Appellant was last seen with the deceased, does not inspire confidence as PW-3, PW-4, and PW-5, all have stated that he was looking anxious and was in a perplexed state of mind. It is pointed out that the said fact has not been rebutted by the Appellant in the cross-examination of the said witnesses. However, in his statement under Section 313 of the CrPC, the Appellant



has stated that the incriminating facts as per the testimonies of the said witnesses are incorrect.

**Absence of Motive Not Fatal to the Case of the Prosecution**

xvi) It is the case of the prosecution that the motive as established before the learned Trial Court against the Appellant is that the deceased during an altercation with the former had refused to give him Rs. 6,000/-. It is also pointed out that basis of the said motive is the disclosure statement made by the Appellant and the same has not been rebutted by the latter. Reliance has been placed on **Ranganayaki v. State by Inspector of Police, AIR 2005 SC 418**, to contend that merely because the prosecution failed to translate the mental disposition of accused into evidence, it cannot be concluded that no such mental condition existed in the mind of the assailants.

xvii) It is further submitted that non-existence of motive is not fatal to the case of the prosecution as the entire chain of circumstantial evidence points towards and is consistent with the hypothesis of the guilt of the Appellant. Reliance has also been placed on **State of Madhya Pradesh v. Chhaakki Lal, (2019) 12 SCC 326: AIR 2019 SC 381**, to contend that when evidence of witness contains ring of truth, then, their evidence cannot be doubt and minor discrepancies which do not shake the credibility of witness and basic version of prosecution case are to be discarded.

**Call Detail Records & Location**

xviii) It is pointed out that as per the CDR, Ex. PW-28/B-1, the mobile phone of the deceased was active in Delhi on 21.11.2018 and last call made from the said phone was at 22:00:42 hrs on 21.11.2018 and location of the said mobile phone at that time was also in Delhi. However, thereafter, the said phone was switched off



and was again, activated on 24.11.2018 at 17:33:17 hrs and the location of the said phone at that time was in the native village of the Appellant from where he was arrested.

**xix)** It is also the case of the prosecution that the presence of the Appellant in Delhi till 22.11.2018 morning has been proved as per the testimonies of PW-3 to PW-5. Therefore, in view of the aforesaid facts, it cannot be negated that the Appellant was not in Delhi till 22.11.2018 morning and his presence in Delhi cannot be ruled out. In view of the aforesaid incriminating facts, the presence of the Appellant in Delhi on the probable date of the death of deceased, as per the post-mortem report, cannot be ruled out.

**Statement Under Section 165 of the IEA**

**xx)** Reliance has been placed on **Chhotey Badri Prasad v. State of U.P. & Anr., 2006 CRI. L. J. 711**, to contend that the Court has unrestricted power to re-examine or to recall any witness including the accused at any stage for just decision of the case. Even if judgment is reserved and while writing judgment, Court finds that any material point is omitted consideration of which is necessary, the Court can pass order for examination or re-examination of witnesses and there is no restriction on power of the Court.

**xxi)** Therefore, the statement of the Appellant under Section 165 of the IEA recorded by the learned Trial Court does not suffer from any legal infirmity and the Court was well within its powers while the said statement of the Appellant was recorded.

**8.** Learned APP for the State, to support the impugned judgment of conviction and his contentions, has also placed reliance upon the following judgments: -



- a. **Ramesh Chandra R. Daga v. Rameshwari R.C. Daga, AIR 2005 SC 422;**
- b. **Mohammed Ashif Gulamkadar Shaikh v. State of Gujarat & Anr., 2009 CRI. L. J. 3582;**
- c. **S Balaraman v. State, 2009 CRI. L. J. 3603;**
- d. **State of Rajasthan v. Ani @ Hanif and Ors., AIR 1997 SC 1023;**
- e. **In re Bandi Murugulu, AIR 1963 Andhra Pradesh 87 (V 50 C 34);**
- f. **Palur Pullamma V. N. Venkata Subbaiah, AIR 1963, Andra Pradesh 93 (V 50 C 35);**
- g. **Swamy Shraddananda @ Murali Manohar Mishra v. State of Karnataka, AIR 2007 SC 2531;**
- h. **Rajender v. State (NCT of Delhi), (2019) 10 SCC 623;**
- i. **Nawab v. State of Uttarakhand, (2020) 2 SCC 736;**
- j. **State of Himanchal Pradesh v. Raj Kumar, 2018 [1] JCC 174;**
- k. **Smt. Jaya Tiwari & Anr. V. The State & Ors., 2018 [1] JCC 179;**
- l. **Mulakh Raj Etc. v. Satish Kumar & Ors., (1992) 3 SCC 43.**

### **REJOINDER BY THE APPELLANT**

9. Learned counsel for the Appellant has submitted that the prosecution has not given explanation regarding the delay in conducting the post-mortem of the deceased on 03.12.2018. It is pointed out that PW-14 in his cross-examination has stated that he cannot give a probable date of death given the state of the corpse of the deceased. It is further submitted that the last seen evidence must be seen not only in respect of the person who was last seen with the deceased but also in connection with location where they were last seen. It has also been argued that



the prosecution has not been able to ascribe any motive towards the Appellant and that the act done by the Appellant was premeditated which was done in pursuance of the any motive.

## **ANALYSIS AND FINDINGS**

### **Last Seen Theory**

**10.** The case of the prosecution is that the Appellant was seen in the company of the deceased on 21.11.2018 at around 11:00 A.M. The said fact has been sought to be proved through the testimony of PW-1, Seema Haldar. PW-1 has stated in her testimony that the Appellant belonged to her native village and used to reside in the same building alongwith his mother but after some time he returned back to his village with his mother. She has stated that on 20.11.2018, the Appellant alongwith the deceased met her and informed her that the deceased was a resident of their native village. She had a conversation with the deceased wherein, the latter told her that he had come to Delhi with the Appellant from his village and was residing in his room, i.e., Room No. 46, Third Floor, House of Sunil, Village, Dallupura. She further stated that, on 21.11.2018 at around 11:00 A.M., she met the deceased and Appellant and on the same day, at around 08:00 P.M., she met the Appellant near the stairs of the building. She enquired from the Appellant regarding the deceased, however, the latter replied that the deceased had gone somewhere after locking the room. She further stated that thereafter, she had neither met the Appellant nor the deceased.

**11.** She further stated that on 25.11.2018, the landlord, Satish/PW-2, had informed the Police regarding the foul smell coming from the room of the



Appellant and subsequently; after breaking the lock of the room of the Appellant, one body was found in the decomposed condition. It is pertinent to note that after PW-1 met the deceased in the company of the Appellant, at around 11:00 A.M., on 21.11.2018, nobody saw the deceased alive. It is further pertinent to note that it was also stated by the Appellant to PW-1 that the deceased had locked the door and left.

12. The aforesaid witness, PW-1, was cross-examined, however, the same could not affect the credibility of her testimony. Learned counsel for the Appellant has contended that PW-1 was able to identify the deceased on 26.11.2018 only after seeing the pictures of the deceased sent by PW-7(brother of the deceased) to her. It is further contended that this fact demonstrates that PW-1 had never met the deceased because if she would have met the deceased earlier, as testified by her, then, she would not have required the photographs to identify the deceased. Similarly, it was also contended that the fact of last seen evidence was not put to the Appellant when his statement under Section 313 of the CrPC was recorded. It is further argued that even if it is assumed that PW-1 had seen the deceased and the Appellant together on 21.11.2018 at around 11:00 A.M., even then, there is a gap of four days between the said day and the day on which the body was recovered. It is further submitted that as per the post mortem report, which was conducted on 03.12.2018, the probable time of death was reported to be 1½ week prior to the said date, which would be around 23.11.2018 and that still leaves a gap of two days when the deceased was last seen in the company of the Appellant and the day on which the corpse of the deceased was found.



**13.** Another relevant witness pertaining to this issue is the landlord of the building, Satish Kumar/PW-2, where the Appellant was residing in Room No. 46 in rented premises and from where the corpse of the deceased was found. PW-2 in his testimony has stated that he saw the Appellant alongwith the deceased on 20.11.2018. However, on 21.11.2018, he had only seen the Appellant and the deceased was not accompanying the Appellant on that day and thereafter, he had never seen the deceased till his corpse was found on 25.11.2018 from the rented premises of the Appellant. PW-2 had, in fact, informed the Police *via* PCR call regarding the foul smell coming from the Room No. 46 of which the Appellant was a tenant.

**14.** Similarly, other witnesses, namely, PW-3, PW-4, PW-5, and PW-19, who were neighbours of the Appellant and resident of the same building, have categorically deposed that the present Appellant was a tenant of the Room No. 46 in the same building where they all were residing. The stand of the Appellant in his statement under Section 313 of the CrPC to the aforesaid incriminating evidences is as under: -

“Q.11 It is also in evidence against you that PW-2 Satish Kumar identified you being residing as a tenant in third floor in room no. 46 from the last two years from the date of incident. Initially, you were living there along with your mother, but prior to 6 months of the incident, one boy Bappi Pal also accompanied you in the said room. He also identified Seema, who residing as a tenant on the fourth floor, belong to your village. He had seen you in the company of deceased in the said room on 20.11.2018, however, on 21.11.2018, you were alone and Bappi Pal was not accompanying you and thereafter, he never saw the Bappi Pal in the building no. A-313. What have you to say?

Ans.: It is matter of record.”



**15.** Thus, two facts which stand proved after analyzing the aforesaid evidence are that, firstly, the deceased was last seen in the company of the Appellant on 21.11.2018 at around 11:00 A.M., and secondly, the corpse of the deceased was recovered from the room which was under the power and possession of the Appellant. In his defence, the Appellant has not been able to show any intervening circumstance or any other event to establish that after 21.11.2018, the deceased had gone somewhere else or seen with some other person(s) or where he himself was.

**16.** The contention of the learned counsel for the Appellant that the last seen evidence was not put to the latter, under Section 313 of the CrPC, is also not factually correct in view of the Question No. 3 put to him, which has been reproduced as under: -

“Q. 3 It is also in evidence against you that on 20.11.2018 you - accused along with Bappi Pal met said Seema Haldhar (PW-1) and Seema Haldhar also knew Bappi and asked him how he came to Delhi on which he replied that he had come to Delhi with you - accused and also residing in the same room with you i.e. Room No. 46, Third floor of above mentioned house. What have you to say?

Ans.: I do not know.”

**17.** So far as the contention with regard to the time of the death shown in the post-mortem report is concerned, suffice to say that the same cannot be 100% accurate, and since, the corpse of the deceased was found in a decomposed state, it is not possible to determine the exact time of death. In any case, it is not the stand of the Appellant that he had left the company of the deceased on 21.11.2018 after 11:00 A.M. and the latter had gone somewhere else. The corpse of the deceased was recovered from the rented premises of the Appellant. Thus, it was



incumbent on the Appellant to explain the circumstances and the manner in which he left the company of the deceased. Nothing has been brought on record by the Appellant to dispel the case of the prosecution against him. The fact that PW-1 had sought help from photograph of the deceased for identification cannot create a doubt on her testimony regarding the fact that the Appellant was last seen with the deceased as it was a brief meeting and since the body was found in a decomposed state, therefore, use of photograph cannot create doubt on her identification on 21.11.2018.

**18.** It has also come on record through the testimonies of PW-3, PW-4 and PW-5 that they had met the Appellant on 21.11.2018 at around 05:00 P.M. It has also come on record through the testimony of PW-19 that he had met the Appellant on 21.11.2018 at around 08:00 P.M. Thereafter, the present Appellant was not seen and was finally arrested in West Bengal. No explanation has been brought on record by the Appellant regarding his movement from Delhi to West Bengal on 22.11.2018. The case of the prosecution is that the Appellant had travelled from Delhi to Malda, West Bengal, on the morning of 22.11.2018. All the aforesaid circumstances clearly establish that the deceased was last seen in the company of the Appellant.

**19.** Learned counsel for the Appellant, to dispel the last seen theory, has placed reliance on some precedents which are distinguishable from the facts of the present case as follows: -

- a) In **Anjan Kumar Sharma** (*supra*), the Appellant therein was initially acquitted by the learned Trial Court, however, his acquittal was overturned by the Hon'ble High Court which was subsequently, set aside



by the Hon'ble Supreme Court and the findings of the learned Trial Court were affirmed. The foundational facts on the basis of which last seen theory was purportedly sought to be proved by the prosecution against the said Appellant were not satisfactorily proved on record. There was no conclusive evidence placed on record against the said Appellant whereby it could be said that he had stayed overnight with the deceased therein at her bungalow and his presence with the deceased during the probable time of death, as per the post-mortem report in the said case, was doubtful. However, in the present case, it has come on record that the Appellant was last seen in the company of the deceased on the probable date when his death was caused i.e., 21.11.2018.

b) In **Nizam (supra)**, the body of the deceased therein was found in a field in a village and his private part was tied with rope and blood was oozing out from his nostrils. The village, where the corpse of the deceased in this case was found, was a notable place for prostitution where people from different areas used to come for enjoyment. The Appellant therein was acquitted on the basis of the time gap between the deceased being left in the truck and recovery of his body, and also, the place and circumstances in which the body of the deceased was recovered. Therefore, in the said circumstances, the possibility of others intervening could not be ruled out. However, in complete contrast to these facts, in the instant appeal, the corpse of the deceased herein was found in a room which was rented by the Appellant and was under his possession.



c) In **Surender Prasad** (*supra*), the deceased child therein had gone to watch *Jagran*, in the locality where he used to reside, in night and *Jagran* was taking place where the presence of many people was quite usual. The Appellant therein knew the family of the deceased child, and therefore, it was not unusual for the deceased child to be seen in the company of the Appellant. Learned Division Bench of this Court in this case had not attached much credibility to the last seen evidence since there was a wide gap between the last seen evidence and the time of death of the said child in view of the fact that Appellant therein was last seen in the company of the deceased child near a shop where the *Jagran* was taking place. However, in the present case, both the Appellant and deceased hail from same village and were seen together on 21.11.2018 in the vicinity of the building where the Appellant's rented premises were situated. The corpse of the deceased in the present case was also found in the room of the Appellant which was locked from outside.

### **Arrest of the Appellant**

20. Learned counsel for the Appellant has submitted that the latter was illegally detained by the relatives of the deceased in Malda on 28.11.2018, and was subsequently arrested by the initial Investigating Officer (PW-26) in the present case on 30.11.2018. It is further submitted that the learned Trial Court in the impugned judgment has incorrectly recorded the date of arrest of the Appellant as 28.11.2018 as the same is contrary to the case of the prosecution itself. It is a matter of record that PW-7 in his testimony stated that when he was informed regarding the recovery of the corpse of his brother, the deceased, he went to the



house of the Appellant in his native village to enquire about the latter, where he was not found. He stated that subsequently, he independently alongwith other persons kept a watch on the Appellant and when he was apprehended, they took him to the local police station and was subsequently handed over to the Delhi Police team headed by PW-26 on their arrival.

21. It is the case of the Appellant that he was illegally detained from 28.11.2018, however, there is nothing on record to show that he was detained from the said date. It is also a matter of record that the Appellant was arrested by the Delhi Police team on 30.11.2018 after they had arrived in West Bengal. It is not the case of the Appellant that during the said period of his alleged illegal detention he was made to sign any document or anything which has now been used against him in the present case/trial. In fact, during cross-examination of PW-26 (Arresting Officer) this fact of alleged illegal detention has not been put to him and further suggestion was given that all the documents were prepared in Delhi after their arrival from Malda, West Bengal. The Appellant has taken this plea in his statement under Section 313 of the CrPC in response to Question No. 24 by claiming that he was illegally detained and was made to sign all the documents. Thus, the stands taken are contradictory. Be that as it may, the alleged illegal detention cannot be a ground to discard the entire evidence collected by the prosecution which is otherwise independent of it.

### **Recovery of Mobile Phone of the Deceased**

22. It is the case of the prosecution that after the recovery of the corpse of the deceased on 25.11.2018, PW-26 again, visited the crime scene, i.e., Room No. 46 belonging to the Appellant on 26.11.2018, and during investigation, found one



new mobile box of Intel company and on opening the same found a bill/invoice of the said mobile phone in the name of “*Bapi Paul*” mentioning the address of Malda, West Bengal. The name of the shop on the bill was mentioned as Sopno Communication. The said mobile box (Ex. P3A) and invoice/bill (Ex. P4) were seized *vide* seizure memo Ex. PW-18/B dated 26.11.2018. The bill/invoice was also taken into possession after affixing it on a blank paper (Ex. PW-12/A). Thereafter, PW-26 after taking the IMEI number mentioned in the said bill/invoice sought the CDRs through the appropriate authorities and on 27.11.2018, received information about activation of the said mobile phone from a location in the area of Malda, West Bengal. On the basis of the said information, PW-26 proceeded towards Malda on 28.11.2018 and it is the case of the prosecution that, thereafter, the Appellant was arrested in Malda on 30.11.2018.

**23.** The prosecution has examined, PW-12, Joynata Das, who was running the shop in the name and style of Sopno Communication. The said witness testified that the said invoice/bill (Ex. PW-12/A) was issued by him to customer namely Bappi Pal, who paid Rs. 6,100/- in cash for purchasing the said mobile phone, which was make of Intel and had a gold and black colour and also mentioned its IMEI number. He had brought the original bill book which was compared with Ex. PW-12/A. The witness further identified the mobile phone (Ex. P3B) in the Court as to be the same which was sold to Bappi Pal on 18.11.2018 and also compared the IMEI number printed in the mobile phone as well as in the aforesaid invoice/bill.

**24.** The prosecution has also examined PW-4 in the present case who had stated that, on 21.11.2018 when the Appellant met him at about 05.00 PM, he was



carrying a golden colour touch screen mobile phone and when he enquired from the Appellant regarding the said mobile phone, the latter replied that it was a new mobile phone which he had purchased for Rs. 6,000/-. It is pertinent to note that this witness was not shown the said mobile phone for its identification at the time when his testimony was recorded before the learned Trial Court, and therefore, in the opinion of this Court, his testimony is not of much relevance for the present issue.

**25.** PW-19, Sunil Kumar, has also stated before the learned Trial Court, that on 21.11.2018 at about 08.00 PM, he had seen the Appellant near the shop outside the building where they reside and during enquiry from the Appellant, the latter told him that one person, namely, Bappi Pal, had also come with him from his village and was residing with him and is in search of work. He stated that at that time, the Appellant was carrying new mobile phone, however, the said mobile phone was not shown to the said witness at the time of his examination, therefore, his testimony, also, would not be relevant for the present issue.

**26.** PW-5 has also deposed, on the similar lines as PW-4, had stated that, on 21.11.2018 at about 05.00 PM, he met the Appellant who was carrying a golden colour touch screen phone. This witness was shown the mobile phone (Ex. P3B) which he had correctly identified the phone as the same that was carried by the Appellant on 21.11.2018. In the cross-examination, a suggestion was put to the said witness that he never saw the Appellant carrying the mobile phone which he had denied.

**27.** PW-7/Sameeran Pal, brother of the deceased, has stated that before the arrest of Appellant by the Delhi Police, the latter on being confronted by the family



members of the deceased admitted the fact that he had taken the mobile phone which was purchased by deceased and was carrying at the time when he was apprehended by them. The said witness also stated that he had taken the said mobile phone from the Appellant. This witness further stated that the said mobile phone which was seized from him *vide* seizure memo Ex. PW-7/D and he further identified the said mobile phone in Court as Ex. P3B.

**28.** The CDRs (Ex. PW-28/B1) further shows that the said mobile phone of the deceased was last operated in Delhi on 21.11.2018 from 07:33:06 hrs to 19:32:22 hrs and finally, at around 22:00:42 hrs before it was switched off on the same day, and thereafter, it was again reactivated on 24.11.2018 till 26.11.2018 in Malda, West Bengal. Ld. Counsel for the Appellant has vehemently argued that the seizure memo of the said mobile, Ex. PW-7/D is dated 04.02.2019, i.e., after two months of the Appellant's arrest, i.e., on 30.11.2018. It is submitted that there is no explanation with regard to the said delay, when PW-7 himself stated that at the time of Appellant's apprehension the mobile was with him and he had taken the same in his possession. There is no explanation on record as to why the said mobile phone was not seized by the initial Investigating Officer, PW-26, at the same time when the Appellant was arrested.

**29.** It is the case of the prosecution that when the Appellant was arrested in Malda on 30.11.2018, from the personal search Ex. PW-7/A, one SIM card of Airtel company bearing No. 8991510903-0911886398 was recovered, which was then, found to be in the name of one Ms. Menka Mahto. Learned Counsel for the Appellant submits that aforesaid Ms. Menka Mahto was never examined by the prosecution, however, learned Trial Court on 24.11.2021, after reserving the



judgment for pronouncement in the present case, recorded statement of the Appellant under Section 165 of the IEA, wherein, the Appellant stated that the Ms. Menka Mahto was the sister of the deceased and the learned Trial Court used this statement as another circumstance to convict the Appellant. It is further submitted that there was no occasion for the learned Trial Court for recording such a statement after culmination of arguments and reserving the judgment for pronouncement. It is further submitted that no fresh statement under Section 313 of the Cr.P.C. was recorded in order to put the said incriminating statement to the Appellant for explanation. Reliance is placed upon **Omprakash Shankarlal Sharma (*supra*)** to show that Section 165 of the Indian Evidence Act cannot be used to fill in the gaps/lacunae in the case of the prosecution.

**30.** On the other hand, Id. APP for the State submitted that sequence of events with regard to the recovery of mobile phone and its connection with the Appellant has been adequately proved on record and the learned Trial Court has not committed any irregularity while recording the statement under Section 165 of the IEA. Reliance has been placed on **Chhotey Badri Prasad (*supra*)**, to contend that the Court has unrestricted power to re-examine or to recall any witness including the accused at any stage for just decision of the case.

**31.** As pointed out hereinabove, the prosecution has been able to establish beyond reasonable doubt that mobile phone (Ex. P-3B) was purchased from PW-12 on 18.11.2018 in the name of one Bappi Pal. The mobile phone box (Ex. P3A) and invoice/bill (Ex. P-4) of said mobile phone were recovered from the room, where the corpse of the deceased-Bappi Pal was found, on 26.11.2018. The Appellant does not claim that the said mobile phone belonged to him. The



Appellant was seen, carrying the said mobile phone on 21.11.2018 at around 05:00 P.M., by PW-5 (as the said case property i.e., mobile phone (Ex. P-3B) was shown to only PW-5 while his testimony was recorded before the learned Trial Court). The location of the said mobile phone is shown in Delhi as per CDRs (Ex. PW-28/B1) on 21.11.2018 and the last seen call is shown to be made at 22:00:42 hrs. Thereafter, the said mobile phone was switched off and again reactivated on 24.11.2018 and then, the location was shown in the native village of the Appellant from where he was arrested. It is no doubt true that formal seizure memo (Ex. PW-7/D) of the said mobile phone was made by PW-26 from PW-7 on 04.02.2019, i.e., nearly 2 months after the arrest of the Appellant in the present case. However, no questions were put to PW-26 in his cross-examination regarding the same in order to elicit any explanation with regard to delay in the seizure of the said mobile phone.

**32.** This Court has perused the supplementary disclosure statement of the Appellant, Ex. PW-26/B, wherein he has stated that the said mobile phone of the deceased was taken by PW-7 (brother of the deceased) from him. Similarly, statement under Section 161 of the CrPC made by PW-7 (Sameeran Pal) to the IO/PW-29 on 03.12.2019 also records that he had taken the mobile phone of his deceased brother (Bappi Pal) from the Appellant and the same was lying in his village, which he can bring and hand over to the IO/PW-29. The aforesaid contemporaneous document on record reflects that the factum regarding the possession of the said mobile phone being with PW-7 was well within the knowledge of the IO/PW-29. It is also not the case of the prosecution that the said mobile phone was recovered by the IO/PW-29 at the instance of the Appellant.



The case of the prosecution has always been that the said mobile phone was taken away by PW-7 from the Appellant and was subsequently handed over to PW-26.

**33.** So far as the statement of the Appellant recorded by the learned Trial Court under Section 165 of the IEA is concerned, in the considered opinion of this Court, the same was not justified at the time when the matter was reserved for pronouncement of the judgment and any information elicited out of the same cannot be used for the purpose of convicting the Appellant especially when the same was not put to him by way of subsequent or supplementary statement under Section 313 of the CrPC.

**34.** The aforesaid facts, namely, that the said mobile phone was purchased in the name of the deceased in Malda on 18.11.2018; the possession of the same with the Appellant on 21.11.2018; the movement of the mobile phone from Delhi on 21.11.2018, and; thereafter, getting reactivated in Malda on 24.11.2018, and; finally, being seized from PW-7 on 04.02.2019, are circumstances which clearly point towards the guilt of the Appellant in the chain of the circumstances for which no explanation has come on record.

### **Recovery of the Murder Weapon and Other Articles**

**35.** It is the case of the prosecution that when the Appellant was arrested in Malda, West Bengal on 30.11.2018, he was taken on transit remand and was brought to Delhi on 02.12.2018. It is also the case of the prosecution that on 03.12.2018, the Appellant was interrogated and he gave his supplementary disclosure statement (Ex. PW-26/B) and in pursuance of the same, the Appellant took the Police party to the place of the incident and got recovered one string made of multi-coloured cloth/improvised rope from a multi-coloured printed *pithu* bag



with 'HP' monogram on it and the same was seized *vide* seizure memo Ex. PW-2/C in the presence of PW-2/landlord, PW-29 and PW-26. It is also the case of the prosecution that on further interrogation of the Appellant, he disclosed that the clothes of the deceased were also kept in the said multi-coloured *pithu* bag lying in Room No. 46, his rented premises, and, the same were also recovered and seized *vide* seizure memo Ex. PW-1/A.

**36.** Learned counsel for the Appellant has submitted that the said recoveries cannot be relied upon as the bag from which the alleged recoveries were made can be seen in the pictures taken by the crime team on 25.11.2018 and the said bag can be seen lying there as the same was not taken into custody by initial IO/PW-26. It is further submitted that since the bag was already present at the crime scene, which can be seen from the said pictures, there was no discovery of any new fact in pursuance of the disclosure statement made by the Appellant and therefore, the same cannot be read against him. It is further argued that in the seizure memo of the clothes (Ex. PW-1/A) dated 03.12.2018, it has been mentioned that an improvised rope/multi-coloured string was recovered a day before, i.e., on 02.12.2018, a day prior to the recovery of those clothes. However, the seizure memo of the improvised rope, Ex. PW-2/C, records the date of its recovery as 03.12.2018. It is further submitted that both initial IO/PW-26 as well as the main IO/PW-29 have stated before the learned Trial Court that the improvised rope was recovered on 03.12.2018. The other contradiction, as pointed out, is that PW-7, who was present at the time of the recovery of the clothes, has stated in his testimony that the bag containing the clothes of his brother and the said improvised rope was lying in the Police Station and was shown to him there only. In view of



the same, it is submitted that the recoveries made in the present case are suspicious and cannot be relied upon. Reliance has been placed on **Jose Alias Pappachan** (*supra*), to contend that suspicion and conjectures cannot take the place of legal proof.

37. Learned APP for the State, on the other hand, has submitted that the discrepancies, as pointed out hereinabove by the learned counsel for the Appellant, in the recoveries of Ex. PW-1/A and Ex. PW-2/C were not put to either of the Investigating Officers in order to elicit any explanation regarding the same. Witnesses to both the exhibits have been examined and despite their cross-examination by the Appellant, the credibility of their testimonies stand unrebutted.

38. The incriminating evidence discovered pursuant to the supplementary disclosure statement of the Appellant is the improvised rope (Ex. P-2(colly)) which was seized *vide* seizure memo Ex. PW-2/C dated 03.12.2019. The contention of the learned counsel for the Appellant that the said *pithu* bag was already there at the crime scene, and therefore, there is no discovery of any new fact which was not within the knowledge of the Investigating Officers, either PW-26 or PW-29, is not tenable as the fact that the said improvised rope was inside that *pithu* bag was something which was earlier not within the knowledge of the IO and was only discovered pursuant to the disclosure statement given by the present Appellant.

39. PW-7 in his testimony has stated that he had seen the said *pithu* bag and the murder weapon (improvised rope) at the Police Station. It is a matter of record that PW-7 is a witness to the seizure memo of recovery of the clothes of the deceased from the bag (Ex. PW-1/A) and not the murder weapon (Ex. PW-2/C). It is also



noted that in the seizure memo of the recovery of the clothes from the bag (Ex. PW-1/A) it has been mentioned that murder weapon (Ex. P-2(colly)) i.e., the improvised rope, had already been seized a day before i.e., 02.11.2018. The fact that it has been stated that the improvised rope had been seized the day before could be a human error and the same was not put to either of the Investigating Officers (PW-26 or PW-29) in order to elicit any explanation from them. The consistent case of the prosecution has been that the said recoveries were affected on 03.12.2018 from the rented premises of the Appellant in pursuance of the supplementary disclosure statement made by the Appellant herein.

**40.** The improvised rope (Ex. P-2(colly)) was sent for obtaining further opinion from an expert and the same was given *vide* Ex. PW-14/B wherein, it has been stated that it cannot be ruled out that the said improvised rope was used to murder the deceased. Contention of the learned for the Appellant is that it is not a definite opinion and therefore, cannot be used to convict the present Appellant. The expert was cross-examined by the learned counsel for the Appellant before the learned Trial Court which has been reproduced as under: -

“As per the ligature mark on the body of deceased, assailant might have used the improvised ligature material jointly together. The assailant might have taken 2-3 rounds of string while strangulating the deceased. The deceased was drunk 69.1 mg of liquor (ethyl alcohol) as found in his blood as per viscera report.

**Q.** As per your experioecne, what is the percentage of ethyl alcohol in one litre of liquor?

**Ans.** It has to be depend upon the quantity of liquor consumed by the person and duration. The percentage of ethyl alcohol also depends upon the brand of liquor. I cannot say what brand of liquor has been consumed by the deceased prior to his death. I cannot tell the probable date of death of deceased.



The ligature mark around the neck is incomplete as per postmortem report, it was on left, front and right side but it was not over the back side of neck. The ligature mark does not found on the back side of neck of deceased as it was merged in the back hairs of skull.”

As seen from above, PW-14 has sufficiently explained the grounds for his opinion regarding the use of improvised rope at the time of the strangulation of the deceased.

### **Delay in Registration of FIR**

41. The learned counsel for the Appellant has submitted that there was an inordinate delay in registration of the FIR as the corpse of the deceased was found on 25.11.2018 and the FIR was registered on 28.11.2018. There is no explanation with regard to the delay of 3 days in registration of the FIR. It is further submitted that delay in registration of FIR assumes importance as the Appellant in the present case was apprehended on 28.11.2018 in Malda, West Bengal and was illegally detained for 3 days, which period has not been shown by the IO or prosecution in any of the records; however, the same has come in the testimony of PW-7. Reliance has been placed on **Meharaj Singh (supra)**, to contend that delay in registration of FIR in a murder case can result in embellishment and the same can be a result of an afterthought.

42. Learned APP for the State, on the other hand, submits that there is no delay in the registration of the FIR in the present case, and in any case, after the recovery of the corpse of the deceased, the crime team was called at the spot on the next day, i.e., 26.11.2018, and thereafter, local enquiry was made by the Investigating Officer, and after examining PW-1, present FIR was registered.



43. FIR (Ex. PW-10/B) was registered on 28.11.2018, however, a perusal of the same would reflect that it is based on the enquiries from the PW-1, who had stated that the Appellant and the deceased, Bappi Pal, were seen together by her and thereafter, only the present Appellant was seen and not the deceased and on the basis on the same, FIR was registered for the offence punishable under Sections 304 and 201 of the IPC.

44. The delay in registration of the FIR, no doubt, can be fatal to the case of the prosecution. The said principle of law is applicable to the cases where the FIR has been registered on the statement of an eye-witness or any other witness giving the detailed account of a certain incident, who on account of delay can get an opportunity to introduce new facts resulting in false implication of any accused named in the said FIR.

45. In the present case, FIR was not registered on account of statement given by any eye-witness but was registered only on account of the fact that a decomposed dead body was found in the room (rented premises) of the present Appellant, who was missing and not traceable at the relevant point in time. In these circumstances, the delay in registration of FIR, if any, shall not be fatal to the case of the prosecution.

#### **Delay in Post-Mortem Report**

46. Learned counsel for the Appellant submitted that since the corpse of the deceased was already identified on 26.11.2018 by PW-1 then, why was the same not sent for conducting the post-mortem of the deceased and instead sent to LBS Hospital Mortuary for preservation for next 72 hours. It is pointed out that post-mortem in the present case was conducted on 03.12.2018, and since, the corpse



was already in a decomposed state, the said report cannot be accepted in its entirety with respect to the time and date of death of the deceased.

47. Post-mortem report (Ex. PW-14/A) have been proved on record through the testimony of PW-14, Dr. S. Lal, HOD, Specialist Grade-I, LBS Hospital, Delhi. However, none of aforesaid facts were put to the said witness or either of the Investigating Officers during the course of the trial. Therefore, the delay in conducting the post-mortem of the deceased, in the opinion of this Court is also not fatal to the case of the prosecution.

48. The Hon'ble Supreme Court in **State of U.P. v. Babu Ram, (2000) 4 SCC 515**, while convicting the Respondent/Accused therein based on circumstantial evidence, has observed and held as under: -

“19. The High Court in reaching a conclusion in favour of the accused took into account the post-mortem findings regarding the condition of the stomach of the three deceased. “According to the prosecution, murder took place in the night before 11 p.m. The post-mortem reports indicated that the stomachs of the three deceased were empty, large and small intestines contained faecal matter and gases.” According to the High Court, these facts would go to indicate that “murder must have taken place in the very early morning and not in the night”.

20. We bear in mind that the prosecution has fixed up the time of murder as 11 p.m. on surmises. Perhaps the actual time of murder would have been later in the night or the last meals would have been consumed by the deceased much earlier. By any stretch of imagination, on the facts of this case, absence of any food materials in the stomach cannot be counted as a circumstance in favour of the assailant.”

### **Motive Qua the Appellant to cause death of the Deceased**

49. Learned counsel for the Appellant has argued that the motive is an important incriminating circumstance that has to be proved by the prosecution in a case of



circumstantial evidence. It is submitted that the prosecution has been unable to prove the motive for causing the murder of the deceased by the Appellant. It is pointed out that, as per the case of the prosecution, the motive has been deduced from the supplementary disclosure statement (Ex. PW-26/B) made by the Appellant wherein he has stated that he has committed the murder of deceased and took away a sum of Rs. 6,000/- and a mobile phone which was recently purchased. It is submitted that no recovery of Rs. 6,000/- has taken place and the said mobile phone was also not recovered at the instance of the Appellant; however, it was subsequently seized from PW-7.

**50.** *Per contra*, learned APP for the State submitted that failure to prove motive will not be fatal to the case of the prosecution in the case of circumstantial evidence. Reliance has been placed on **Ranganayaki (supra)** to contend that failure to translate the mental disposition of the accused into evidence cannot be concluded as non-existence of such mental condition in the mind of the assailants. Reliance has also been placed on **Chhaakki Lal (supra)** to contend that minor discrepancies in the testimonies of the witnesses cannot be a reason to discard the case of prosecution.

**51.** It is pointed out that although motive has been substantially proved on record by the prosecution, however, even in the absence of the same, prosecution's case has been proved beyond reasonable doubt in view of the circumstances enumerated hereinabove.

**52.** It is no doubt that the motive is an important piece of evidence which would be an important circumstance in cases involving circumstantial evidence, however, the same cannot be stated to be mandatory in such cases. The Hon'ble



Supreme Court in **Rama Nand and Others v. State of Himachal Pradesh, (1981) 1 SCC 511**, while dealing with the case of circumstantial evidence where the *corpus delicti*, i.e., the dead body of the victim, in the said case was not found, has observed and held as under: -

“27. Although the High Court has held that the body recovered was that of Sumitra deceased and that the bones sent to the medical experts were not parts of the decomposed body found, but appeared to have been fraudulently replaced with the bones of a child during transmission to the medical experts, we would assume that the identity of the body found in the river was not established beyond reasonable doubt. In other words, we would take it that the *corpus delicti* i.e. the dead body of the victim was not found in this case. But even on that assumption, the question remains whether the other circumstances established on record were sufficient to lead to the conclusion that within all human probability, she had been murdered by Rama Nand appellant? It is true that one of the essential ingredients of the offence of culpable homicide required to be proved by the prosecution is that the accused “*caused the death*” of the person alleged to have been killed.

28. This means that before seeking to prove that the accused is the perpetrator of the murder, it must be established that homicidal death has been caused. Ordinarily, the “recovery of the dead body of the victim or a vital part of it, bearing marks of violence, is sufficient proof of homicidal death of the victim. There was a time when under the old English law, the finding of the body of the deceased was held to be essential before a person was convicted of committing his culpable homicide. “I would never convict,” said Sir Mathew Hale, “a person of murder or manslaughter unless the fact were proved to be done, or at least the body was found dead.” This was merely a rule of caution, and not of law. But in those times when execution was the only punishment for murder, the need for adhering to this cautionary rule was greater. Discovery of the dead body of the victim bearing physical evidence of violence, has never been considered as the only mode of proving the *corpus delicti* in murder. Indeed, very many cases are of such a nature where the discovery of the dead body is impossible. A blind adherence to this old “body” doctrine would open the door wide open for many a heinous murderer to escape with impunity simply because they were cunning and clever enough to destroy the body of their victim. In the context of our law, Sir Hale's enunciation has to be interpreted no more than emphasising that where the



dead body of the victim in a murder case is not found, other cogent and satisfactory proof of the homicidal death of the victim must be adduced by the prosecution. Such proof may be by the direct ocular account of an eyewitness, or by circumstantial evidence, or by both. **But where the fact of corpus delicti i.e. “homicidal death” is sought to be established by circumstantial evidence alone, the circumstances must be of a clinching and definitive character unerringly leading to the inference that the victim concerned has met a homicidal death. Even so, this principle of caution cannot be pushed too far as requiring absolute proof. Perfect proof is seldom to be had in this imperfect world, and absolute certainty is a myth. That is why under Section 3 of the Evidence Act, a fact is said to be “proved”, if the court considering the matters before it, considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The corpus delicti or the fact of homicidal death, therefore, can be proved by telling and inculcating circumstances which definitely lead to the conclusion that within all human probability, the victim has been murdered by the accused concerned.** In the instant case, Circumstances (1) to (5), in their cumulative effect, are not only inconsistent with the innocence of Rama Nand appellant, but ineluctably and rationally compel the conclusion that Sumitra has died and it is Rama Nand appellant who has intentionally caused her death. Circumstance (3) involves an admission by Rama Nand and Shish Ram accused that Sumitra has met an unnatural death. The only difference between the prosecution version and the defence version is as to whether Sumitra committed suicide or had been killed by Rama Nand appellant. It has been found that the story of the suicide set up by the accused is false. The articles salwar (Ex. P-14) and the shoes (Ex. P-15) do not belong to her. They were planted by the accused to lay a false trail and to misdirect the investigation. This circumstance taken in conjunction with the others, irresistably and rationally leads to the conclusion that she has been murdered by Rama Nand appellant and her dead body has been disposed of by the appellants Shish Ram and Kali Datt.”

(emphasis supplied)

Similarly, absence of motive in case(s) of circumstantial evidence will not be fatal to the case of prosecution as the same is also based on the principle of rule of caution.



**53.** The Hon'ble Supreme Court in **Babu Ram (*supra*)**, has also observed and held as under: -

**“10.** The Sessions Judge found that the said items of evidence were reliable but the Division Bench of the High Court expressed reservation in acting on the evidence of the same persons. The premier reason advanced by the Division Bench against the prosecution was the failure of the prosecution to make out a strong motive. Learned Judges have stated thus on that aspect:

“Existence of motive may not be very much material in a case which is based on direct evidence as it may be argued that motive is hidden in the heart and mind of the accused, and it would be difficult for the prosecution in every case to extract the said motive and to bring the same on record. However, in a case which is based on circumstantial evidence, motive plays an important role and absence of motive would go a long way to weaken the prosecution case.... In this case the accused has been charged for committing murders of his parents and younger brother. The only whisper made in this case on behalf of the prosecution was that the accused wanted his father to give his share in the property but his father had told him that he would do so after marriage of his daughters and the younger son. There is, however, no convincing evidence on this point to hold that the accused wanted partition to which his father did not agree.”

**11.** We are unable to concur with the legal proposition adumbrated in the impugned judgment that motive may not be very much material in cases depending on direct evidence whereas motive is material only when the case depends upon circumstantial evidence. There is no legal warrant for making such a hiatus in criminal cases as for the motive for committing the crime. Motive is a relevant factor in all criminal cases whether based on the testimony of eyewitnesses or circumstantial evidence. The question in this regard is whether the prosecution must fail because it failed to prove the motive or even whether inability to prove motive would weaken the prosecution to any perceptible limit. No doubt, if the prosecution proves the existence of a motive it would be well and good for it, particularly in a case depending on circumstantial evidence, for such motive could then be counted as one of the circumstances. However, it cannot be forgotten that it is generally a difficult area for any prosecution to bring on record what was in the mind of the respondent. Even if the investigating officer would have succeeded in knowing it through interrogations that cannot be put in evidence by them due to the ban imposed by law.



12. In this context we would reiterate what this Court has said about the value of motive evidence and the consequences of the prosecution failing to prove it, in *Nathuni Yadav v. State of Bihar* [(1998) 9 SCC 238 : 1998 SCC (Cri) 992] and *State of H.P. v. Jeet Singh* [(1999) 4 SCC 370 : 1999 SCC (Cri) 539]. The following passage can be quoted from the latter decision: (SCC p. 380, para 33)

“33. No doubt it is a sound principle to remember that every criminal act was done with a motive but its corollary is not that no criminal offence would have been committed if the prosecution has failed to prove the precise motive of the accused to commit it. When the prosecution succeeded in showing the possibility of some ire for the accused towards the victim, the inability to further put on record the manner in which such ire would have swelled up in the mind of the offender to such a degree as to impel him to commit the offence cannot be construed as a fatal weakness of the prosecution. It is almost an impossibility for the prosecution to unravel the full dimension of the mental disposition of an offender towards the person whom he offended.””

54. The Hon’ble Supreme Court in **State of Karnataka v. M. N. Ramdas, (2002) 7 SCC 639**, while restoring the judgment of conviction passed by the learned Trial Court in a case where the prosecution was not able to adduce any cogent and satisfactory evidence regarding the motive attributed towards the Respondent/Accused therein, has observed and held as under: -

“17. As regards the motive, it is true, as vehemently contended by the learned amicus curiae that the accused evidence is not quite satisfactory. A bald statement that there was a land dispute between the deceased and the accused was made by PW 1, the wife of the deceased. She gave a somewhat detailed version insofar as the enmity between Ranga Raju who is a relation of the accused and the deceased, but that is really not material. The fact that the prosecution did not adduce satisfactory evidence on the motive aspect, in our view, is not sufficient to throw out the prosecution case as unreliable. When there is abundant evidence to show that the accused and the accused alone would have committed the murder, the absence of proof of motive does not vitiate the prosecution case.”



**55.** Therefore, in view of the aforesaid discussion and in the considered opinion of this Court, the evidence sought to be deduced by the prosecution in order to prove motive on the part of the Appellant is the supplementary disclosure statement (Ex. PW-26/B) which may not be sufficient evidence to prove the motive. But, in view of the above discussion, absence of motive would not be determinative in the present case as the chain of circumstances pointing towards the guilt of the Appellant is otherwise complete and the absence of motive could be a ground for considering the nature of offence for which the Appellant can be convicted and the same has been dealt with in the later part of the judgment.

### **CONCLUSION**

**56.** In view of the aforesaid discussion following circumstances have emerged which unequivocally points towards the guilt of the Appellant/Accused which are as under: -

- a)** The Appellant and the deceased-Bappi Pal had come to Delhi together (PW-1, PW-2 and PW-7);
- b)** The Appellant and the deceased-Bappi Pal were last seen residing together at the rented premises of the Appellant i.e., Room No. 46, Third Floor, Village Dhallupura, Delhi (PW-1, PW-2 and PW-19);
- c)** The Appellant was last seen together with the deceased on 21.11.2018 at 11:00 A.M. (PW-1);
- d)** The Appellant was seen in the vicinity of his residential building till the evening of 21.11.2018 (PW-1, PW-3, PW-4, PW-5 and PW-19);



- e) Mobile phone (Ex. P3B) was purchased in the name of the deceased-Bappi Pal (“Bapi Paul” as mentioned in the invoice of the said mobile phone) from the shop run by PW-12;
- f) The said mobile phone was seen in the possession of the Appellant on 21.11.2018 (PW-5);
- g) CDRs (Ex. PW-28/B1) shows the mobile phone of the deceased to be active in Delhi on 21.11.2018 till 22:00:42 hrs and thereafter, its reactivation in Malda, West Bengal on 24.11.2018, even before the discovery of the corpse of the deceased on 25.11.2018;
- h) Discovery of the corpse of the deceased on 25.11.2018 from Room No. 46 which was the rented premises of the Appellant;
- i) Recovery of the improvised rope (Ex. P-2(colly)) *vide* seizure memo Ex. PW-2/C at the instance of the present Appellant on 03.12.2018;
- j) Seizure of the mobile phone of the deceased from PW-7, *vide* seizure memo Ex. PW-7/D, on 04.02.2019 from Malda, West Bengal.

The aforesaid incriminating circumstances when put to the Appellant during the trial including his statement given to the Court under Section 313 of the CrPC no explanation has come forth from the Appellant with regard to any of these circumstances.

**57.** In fact, in his statement under Section 313 of the CrPC, the Appellant has even denied his association with the deceased and has taken a plea that he had to gone to his village on receiving an emergency message regarding the serious illness of his mother, however, despite of choosing to lead defence evidence, the Appellant did not bring anything on record to support the said plea. The aforesaid



incriminating circumstances appearing against the Appellant when examined in proper perspective leads only to one conclusion that the Appellant was with the deceased on 21.11.2018 and that something transpired between the Appellant and the deceased leading to the death of the latter by strangulation. The other compelling circumstance which could not be explained by the Appellant was the mobile phone which purchased in the name of the deceased in Malda, West Bengal, and the said mobile phone was last activated in Delhi on 21.11.2018 till 22:00:42 hrs, and thereafter, it was reactivated in Malda, West Bengal on 24.11.2018 till 26.11.2018, whereas the corpus of the deceased was recovered on 25.11.2018 from the rented premises of the Appellant. The Appellant admits that the fact that he had gone to his village and from where he was apprehended; however, he has provided no explanation regarding the status of the deceased when he left for his village. In fact, as pointed out hereinabove, the Appellant did not even admit to his association with the deceased. The recovery of the mobile phone which was in the possession of the deceased in Delhi, subsequently surfacing in West Bengal when the Appellant reached there is also a circumstance which incriminate the Appellant and has not been explained.

**58.** The Hon'ble Supreme Court in **Trimukh Maroti Kirkan v. State of Maharashtra, (2006) 10 SCC 681**, while dealing with a case, wherein, the Appellant was accused for commission of murder of his wife and both were seen together shortly before the commission of crime, has observed and held as under:

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**“14.** If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and



commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties. (See *Stirland v. Director of Public Prosecutions* [1944 AC 315 : (1944) 2 All ER 13 (HL)] — quoted with approval by Arijit Pasayat, J. in *State of Punjab v. Karnail Singh* [(2003) 11 SCC 271 : 2004 SCC (Cri) 135] .) The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

“(b) A is charged with travelling on a railway without ticket. The burden of proving that he had a ticket is on him.”

**15.** Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.

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**18.** The question of burden of proof where some facts are within the personal knowledge of the accused was examined in *State of W.B. v. Mir Mohd. Omar* [(2000) 8 SCC 382 : 2000 SCC (Cri) 1516] . In this case the assailants forcibly dragged the deceased, Mahesh from the house where he was taking shelter on account of the fear of the accused and took him away at about 2.30 in the



night. Next day in the morning his mangled body was found lying in the hospital. The trial court convicted the accused under Section 364 read with Section 34 IPC and sentenced them to 10 years' RI. The accused preferred an appeal against their conviction before the High Court and the State also filed an appeal challenging the acquittal of the accused for murder charge. The accused had not given any explanation as to what happened to Mahesh after he was abducted by them. The learned Sessions Judge after referring to the law on circumstantial evidence had observed that there was a missing link in the chain of evidence after the deceased was last seen together with the accused persons and the discovery of the dead body in the hospital and had concluded that the prosecution had failed to establish the charge of murder against the accused persons beyond any reasonable doubt. This Court took note of the provisions of Section 106 of the Evidence Act and laid down the following principle in paras 31 to 34 of the reports: (SCC p. 392)

“31. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof on the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty.

32. In this case, when the prosecution succeeded in establishing the afore-narrated circumstances, the court has to presume the existence of certain facts. Presumption is a course recognised by the law for the court to rely on in conditions such as this.

33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process the court shall have regard to the



common course of natural events, human conduct, etc. in relation to the facts of the case.

34. When it is proved to the satisfaction of the Court that Mahesh was abducted by the accused and they took him out of that area, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning process would enable the Court to draw the presumption that the accused have murdered him. Such inference can be disrupted if the accused would tell the Court what else happened to Mahesh at least until he was in their custody.”

**19.** Applying the aforesaid principle, this Court while maintaining the conviction under Section 364 read with Section 34 IPC reversed the order of acquittal under Section 302 read with Section 34 IPC and convicted the accused under the said provision and sentenced them to imprisonment for life.

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**21.** In a case based on circumstantial evidence where no eyewitness account is available, there is another principle of law which must be kept in mind. The principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. This view has been taken in a catena of decisions of this Court. [See *State of T.N. v. Rajendran* [(1999) 8 SCC 679 : 2000 SCC (Cri) 40] (SCC para 6); *State of U.P. v. Dr. Ravindra Prakash Mittal* [(1992) 3 SCC 300 : 1992 SCC (Cri) 642 : AIR 1992 SC 2045] (SCC para 39 : AIR para 40); *State of Maharashtra v. Suresh* [(2000) 1 SCC 471 : 2000 SCC (Cri) 263] (SCC para 27); *Ganesh Lal v. State of Rajasthan* [(2002) 1 SCC 731 : 2002 SCC (Cri) 247] (SCC para 15) and *Gulab Chand v. State of M.P.* [(1995) 3 SCC 574 : 1995 SCC (Cri) 552] (SCC para 4).]

**22.** Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. In *Nika Ram v. State of H.P.* [(1972) 2 SCC 80 : 1972 SCC (Cri) 635 : AIR 1972 SC 2077] it was observed that the fact that the accused alone



was with his wife in the house when she was murdered there with “khukhri” and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt. In *Ganeshlal v. State of Maharashtra* [(1992) 3 SCC 106 : 1993 SCC (Cri) 435] the appellant was prosecuted for the murder of his wife which took place inside his house. It was observed that when the death had occurred in his custody, the appellant is under an obligation to give a plausible explanation for the cause of her death in his statement under Section 313 CrPC. The mere denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the commission of murder of his wife. In *State of U.P. v. Dr. Ravindra Prakash Mittal* [(1992) 3 SCC 300 : 1992 SCC (Cri) 642 : AIR 1992 SC 2045] the medical evidence disclosed that the wife died of strangulation during late night hours or early morning and her body was set on fire after sprinkling kerosene. The defence of the husband was that the wife had committed suicide by burning herself and that he was not at home at that time. The letters written by the wife to her relatives showed that the husband ill-treated her and their relations were strained and further the evidence showed that both of them were in one room in the night. It was held that the chain of circumstances was complete and it was the husband who committed the murder of his wife by strangulation and accordingly this Court reversed the judgment of the High Court acquitting the accused and convicted him under Section 302 IPC. In *State of T.N. v. Rajendran* [(1999) 8 SCC 679 : 2000 SCC (Cri) 40] the wife was found dead in a hut which had caught fire. The evidence showed that the accused and his wife were seen together in the hut at about 9.00 p.m. and the accused came out in the morning through the roof when the hut had caught fire. His explanation was that it was a case of accidental fire which resulted in the death of his wife and a daughter. The medical evidence showed that the wife died due to asphyxia as a result of strangulation and not on account of burn injuries. It was held that there cannot be any hesitation to come to the conclusion that it was the accused (husband) who was the perpetrator of the crime.”

Applying the aforesaid principle of law, the chain of circumstances in the present case was complete, and in the absence of any cogent explanation, undoubtedly point towards the guilt of the Appellant.



59. Alternatively, learned counsel for the Appellant has submitted that the conviction of the latter for the offence punishable under Section 302 of the IPC can be converted to the offence punishable under Section 304 of the IPC on account of the fact that there is nothing on record to show that the Appellant had harboured an intention to kill the deceased.

60. The Hon'ble Supreme Court in **N. Ramkumar v. State Rep. by Inspector of Police, 2023 SCC OnLine SC 1129**, while dealing with a case of circumstantial evidence, where the Appellant were last seen fleeing from the scene of offence and after analysing the law on converting the conviction and sentence from the offence punishable under Section 302 of the IPC to Section 304 of the IPC, has observed and held as under: -

“14. The cause of death assigned in the post-mortem report as already noticed is “died of head injury”. It is a trite law that “culpable homicide” is a genus and “murder” is its species and all “murders” are “culpable homicides, but all “culpable homicides” are not “murders” as held by this court in *Rampal Singh v. State of Uttar Pradesh*, (2012) 8 SCC 289. The intention of the accused must be judged not in the light of actual circumstances, but in the light of what is supposed to be the circumstances.

15. In the case of *Basdev v. State of Pepsu*, AIR 1956 SC 488 at page 490 the following observations have been made:

“Of course, we have to distinguish between motive, intention and knowledge. Motive is something which prompts a man to form an intention and knowledge is an awareness of the consequences of the act. In many cases intention and knowledge merge into each other and mean the same thing more or less and intention can be presumed from knowledge. The demarcating line between knowledge and intention is no doubt thin but it is not difficult to perceive that they connote different things. Even in some English decisions, the three ideas are used interchangeably and this has led to a certain amount of confusion.”

16. It requires to be borne in mind that the test suggested in the aforesaid decision and the fact that the legislature has used two different terminologies,



‘intent’ and ‘knowledge’ and separate punishments are provided for an act committed with an intent to cause bodily injury which is likely to cause death and for an act committed with a knowledge that his act is likely to cause death without intent to cause such bodily injury as is likely to cause death, it would be unsafe to treat ‘intent’ and ‘knowledge’ in equal terms. They are not different things. Knowledge would be one of the circumstances to be taken into consideration while determining or inferring the requisite intent. **Where the evidence would not disclose that there was any intention to cause death of the deceased but it was clear that the accused had knowledge that his acts were likely to cause death, the accused can be held guilty under second part of Section 304 IPC.** It is in this background that the expression used in Penal Code, 1860 namely “intention” and “knowledge” has to be seen as there being a thin line of distinction between these two expressions. The act to constitute murder, if in given facts and circumstances, would disclose that the ingredients of Section 300 are not satisfied and such act is one of extreme recklessness, it would not attract the said Section. In order to bring a case within Part 3 of Section 300 IPC, it must be proved that there was an intention to inflict that particular bodily injury which in the ordinary course of nature was sufficient to cause death. In other words, that the injury found to be present was the injury that was intended to be inflicted. This Court in the case of *Pulicherla Nagaraju @ Nagaraja Reddy v. State of Andhra Pradesh*, (2006) 11 SCC 444 : AIR 2006 SC 3010 has observed: “Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters — plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under Section 302. **The intention to cause death can be gathered generally from a combination of a few or several of the following, among other,**



circumstances : (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention. Be that as it may.

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19. This Court in a recent judgment in the case of *Anbazhagan v. The State represented by the Inspector of Police* in Criminal Appeal No. 2043 of 2023 disposed of on 20.07.2023 has defined the context of the true test to be adopted to find out the intention or knowledge of the accused in doing the act as under:

“60. Few important principles of law discernible from the aforesaid discussion may be summed up thus:

(1) When the court is confronted with the question, what offence the accused could be said to have committed, the true test is to find out the intention or knowledge of the accused in doing the act. If the intention or knowledge was such as is described in Clauses (1) to (4) of Section 300 of the IPC, the act will be murder even though only a single injury was caused. To illustrate: ‘A’ is bound hand and foot. ‘B’ comes and placing his revolver against the head of ‘A’, shoots ‘A’ in his head killing him instantaneously. Here, there will be no difficulty in holding that the intention of ‘B’ in shooting ‘A’ was to kill him, though only single injury was caused. The case would, therefore, be of murder falling within Clause (1) of Section 300 of the IPC. Taking another instance, ‘B’ sneaks into the bedroom of his enemy ‘A’ while the latter is asleep on his bed. Taking aim at the left chest of ‘A’, ‘B’ forcibly plunges a sword in the left chest of ‘A’ and runs away. ‘A’ dies shortly thereafter. The injury to ‘A’ was found to be sufficient in ordinary course of nature to cause death. There may be no



difficulty in holding that 'B' intentionally inflicted the particular injury found to be caused and that the said injury was objectively sufficient in the ordinary course of nature to cause death. This would bring the act of 'B' within Clause (3) of Section 300 of the IPC and render him guilty of the offence of murder although only single injury was caused.

(2) Even when the intention or knowledge of the accused may fall within Clauses (1) to (4) of Section 300 of the IPC, the act of the accused which would otherwise be murder, will be taken out of the purview of murder, if the accused's case attracts any one of the five exceptions enumerated in that section. In the event of the case falling within any of those exceptions, the offence would be culpable homicide not amounting to murder, falling within Part I of Section 304 of the IPC, if the case of the accused is such as to fall within Clauses (1) to (3) of Section 300 of the IPC. It would be offence under Part II of Section 304 if the case is such as to fall within Clause (4) of Section 300 of the IPC. Again, the intention or knowledge of the accused may be such that only 2<sup>nd</sup> or 3<sup>rd</sup> part of Section 299 of the IPC, may be attracted but not any of the clauses of Section 300 of the IPC. In that situation also, the offence would be culpable homicide not amounting to murder under Section 304 of the IPC. It would be an offence under Part I of that section, if the case fall within 2<sup>nd</sup> part of Section 299, while it would be an offence under Part II of Section 304 if the case fall within 3<sup>rd</sup> part of Section 299 of the IPC.

(3) To put it in other words, if the act of an accused person falls within the first two clauses of cases of culpable homicide as described in Section 299 of the IPC it is punishable under the first part of Section 304. If, however, it falls within the third clause, it is punishable under the second part of Section 304. In effect, therefore, the first part of this section would apply when there is 'guilty intention,' whereas the second part would apply when there is no such intention, but there is 'guilty knowledge'.

(4) Even if single injury is inflicted, if that particular injury was intended, and objectively that injury was sufficient in the ordinary course of nature to cause death, the requirements of Clause 3rdly to Section 300 of the IPC, are fulfilled and the offence would be murder.

**(5) Section 304 of the IPC will apply to the following classes of cases :**  
**(i) when the case falls under one or the other of the clauses of Section 300, but it is covered by one of the exceptions to that Section, (ii) when the injury caused is not of the higher degree of likelihood which is covered by the expression 'sufficient in the ordinary course of nature**



to cause death' but is of a lower degree of likelihood which is generally spoken of as an injury 'likely to cause death' and the case does not fall under Clause (2) of Section 300 of the IPC, (iii) when the act is done with the knowledge that death is likely to ensue but without intention to cause death or an injury likely to cause death.

To put it more succinctly, the difference between the two parts of Section 304 of the IPC is that under the first part, the crime of murder is first established and the accused is then given the benefit of one of the exceptions to Section 300 of the IPC, while under the second part, the crime of murder is never established at all. Therefore, for the purpose of holding an accused guilty of the offence punishable under the second part of Section 304 of the IPC, the accused need not bring his case within one of the exceptions to Section 300 of the IPC.

(6) The word 'likely' means probably and it is distinguished from more 'possibly'. When chances of happening are even or greater than its not happening, we may say that the thing will 'probably happen'. In reaching the conclusion, the court has to place itself in the situation of the accused and then judge whether the accused had the knowledge that by the act he was likely to cause death.

(7) The distinction between culpable homicide (Section 299 of the IPC) and murder (Section 300 of the IPC) has always to be carefully borne in mind while dealing with a charge under Section 302 of the IPC. Under the category of unlawful homicides, both, the cases of culpable homicide amounting to murder and those not amounting to murder would fall. Culpable homicide is not murder when the case is brought within the five exceptions to Section 300 of the IPC. **But, even though none of the said five exceptions are pleaded or prima facie established on the evidence on record, the prosecution must still be required under the law to bring the case under any of the four clauses of Section 300 of the IPC to sustain the charge of murder. If the prosecution fails to discharge this onus in establishing any one of the four clauses of Section 300 of the IPC, namely, 1stly to 4thly, the charge of murder would not be made out and the case may be one of culpable homicide not amounting to murder as described under Section 299 of the IPC.**

(8) The court must address itself to the question of mens rea. If Clause thirdly of Section 300 is to be applied, the assailant must intend the particular injury inflicted on the deceased. This ingredient could rarely be proved by direct evidence. Inevitably, it is a matter of inference to be drawn



from the proved circumstances of the case. The court must necessarily have regard to the nature of the weapon used, part of the body injured, extent of the injury, degree of force used in causing the injury, the manner of attack, the circumstances preceding and attendant on the attack.

**(9) Intention to kill is not the only intention that makes a culpable homicide a murder. The intention to cause injury or injuries sufficient in the ordinary course of nature to cause death also makes a culpable homicide a murder if death has actually been caused and intention to cause such injury or injuries is to be inferred from the act or acts resulting in the injury or injuries.**

(10) When single injury inflicted by the accused results in the death of the victim, no inference, as a general principle, can be drawn that the accused did not have the intention to cause the death or that particular injury which resulted in the death of the victim. Whether an accused had the required guilty intention or not, is a question of fact which has to be determined on the facts of each case.

(11) Where the prosecution proves that the accused had the intention to cause death of any person or to cause bodily injury to him and the intended injury is sufficient in the ordinary course of nature to cause death, then, even if he inflicts a single injury which results in the death of the victim, the offence squarely falls under Clause thirdly of Section 300 of the IPC unless one of the exceptions applies.

**(12) In determining the question, whether an accused had guilty intention or guilty knowledge in a case where only a single injury is inflicted by him and that injury is sufficient in the ordinary course of nature to cause death, the fact that the act is done without premeditation in a sudden fight or quarrel, or that the circumstances justify that the injury was accidental or unintentional, or that he only intended a simple injury, would lead to the inference of guilty knowledge, and the offence would be one under Section 304 Part II of the IPC.”**

**20. Thus, it emerges from the case law analysed herein-above for converting the sentence imposed under Section 302 to Section 304 Part II the facts unravelled during trial will have to be seen.** In the facts of the case on hand, it is discernible that there was no premeditation to cause death or the genesis of occurrence and the single assault by the accused and duration of entire episode, were factors to adjudge the intention. The offence can be brought clearly within the ambit of Section 304 Part-II IPC. In the instant case



it can be noticed that appellant and the deceased were in love with each other. The fact that deceased had stopped talking to the appellant and she was talking to her neighbour Mr. Sudhakar had ignited the mind of the appellant to be furious about the conduct of the deceased and he was upset about this change of attitude of the deceased. Even according to the testimony of PW-1, who is none other than mother of the deceased there was altercation between the appellant and the deceased and exchange of words between appellant and deceased with regard to their love affair. On being confronted by the appellant as to why the accused had stopped talking to him and as to why she was trying to develop friendship with Sudhakar and the answer given by the deceased had resulted in appellant's getting infuriated and in that spur of the moment he caught hold of her hair and banged her head to the wall which resulted in blood oozing out and on seeing this he ran away from the scene of the incident. Thus, the single assault by the appellant coupled with the duration of the entire period having occurred for about 2-3 minutes would not be sufficient to infer that he had the intention to kill the deceased. Had there been any intention to do away with the life of the deceased, obviously the appellant would have come prepared and would have assaulted the deceased with pre-meditation. Yet another factor which cannot go unnoticed, the appellant had obviously approached the deceased and intended to confront her as to why she was not talking to him though they were in love and also to clear the doubts about she being friendly with Mr. Sudhakar (neighbour) and in this factual scenario, heated exchange of words have taken place and enraged by her reply the appellant has banged her head on the wall in a fit of fury, which cannot be inferred that he had any intention to take away her life, particularly when he was in love with her.”

(emphasis supplied)

**61.** The Hon’ble Supreme Court in **Balu Sudam Khalde and Another v. State of Maharashtra, 2023 SCC OnLine SC 355**, while discussing the scope of Sections 299 and 300 of the IPC, has observed as under: -

“**54.** At this stage, it will also be profitable to refer to the following observations of this Court in the case of *State of Andhra Pradesh v. Rayavarapu Punnayya* reported in (1976) 4 SCC 382 where this Court laid down the distinction between murder and the culpable homicide not amounting to murder in the following way:



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....21. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is “murder” or “culpable homicide not amounting to murder”, on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to “culpable homicide” as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of “murder” contained in Section 300. If the answer to this question is in the negative the offence would be “culpable homicide not amounting to murder”, punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be “culpable homicide not amounting to murder”, punishable under the first part of Section 304 of the Penal Code.”

**62.** This Court is conscious of the fact that the Appellant has not taken any defence or brought anything on record to show that the death of the deceased was caused on account of any dispute between the deceased and him at the spur of the moment. However, it was incumbent on the prosecution to prove the case under the provisions of Section 300 of the IPC as held in the aforesaid decisions. From the evidence, as noted hereinabove, the prosecution has not been able to prove that the Appellant had any intention on account of any motive, or otherwise, to kill the deceased. Brother of the deceased (PW-7) also does not say that there was any previous enmity between the deceased and the Appellant. Nothing has been



brought on record to show that there was any pre-meditated plan in pursuance of which the Appellant had caused the death of the deceased. PW-14, who conducted post-mortem of the deceased, has stated that there was presence of the alcohol in the body of the deceased and it has also come on record that the Appellant had also consumed liquor on the said day, i.e., on 21.11.2018, as the same has been proved through the testimonies of PW-3, PW-4, and PW-5. The alleged weapon of offence (improvised *nylon* rope (Ex. P-2(colly))) was produced before this Court and this Court, on examination of the said rope, takes notice of the fact that it was in the nature of a string (rope) normally used to dry clothes. The said improvised rope was tied *via* other narrower ropes (small pieces of three different cloth materials) by knotting them together.

**63.** It is, therefore, clear that the aforesaid improvised rope was not something which the Appellant had procured in order to cause the death of the deceased. It was an object lying in the room of the Appellant which was used for drying clothes. Thus, from the circumstances proved on record, it cannot be inferred that the Appellant intended to cause death of the deceased in the manner provided under Clauses 1 to 4 of the Section 300 of the IPC.

**64.** In view of the aforesaid discussion and evidence on record, the conviction of the Appellant for the offence punishable under Section 302 of the IPC is converted to the offence punishable under Part I of Section 304 of the IPC.



## **QUANTUM OF SENTENCE**

**65.** Nominal roll dated 29.07.2024 shows that the Appellant has undergone incarceration for approximately 6 ½ years including the remissions earned by him during his custody period. Appellant is a young man of 27 years of age and has remained in judicial custody since the date of his arrest i.e., 30.11.2018. He was 21 years of age when he was arrayed as an accused in the present case. In the order on sentence, it is recorded that he is the sole bread earner in his family and has to look after his old and ailing parents.

**66.** Therefore, in totality of facts and circumstances of the case, the Appellant is sentenced to rigorous imprisonment for a period of 10 years alongwith a fine of Rs. 5,000/- and in default of payment of fine, to undergo simple imprisonment for a period of 1 month for the offence punishable under Part I of Section 304 of the IPC. Benefit of Section 428 of the CrPC be provided to the Appellant.

**67.** So far as the conviction of the Appellant for the offences punishable under Sections 201, 203 and 404 of the IPC passed by learned ASJ are concerned, the same are upheld and the sentence awarded to the Appellant in respect of these offences are maintained.

**68.** The impugned judgment of conviction dated 24.11.2021 and impugned order on sentence dated 24.12.2021 stand modified in the aforesaid terms.

**69.** The present appeal is partly allowed and disposed of accordingly.

**70.** Pending application(s), if any, also stand disposed of accordingly.

**71.** Copy of this judgment be sent to concerned Jail Superintendent for necessary information and compliance.



2024:DHC:7594-DB



**72.** Judgment be uploaded on the website of this Court *forthwith*.

**AMIT SHARMA, J.**

**PRATHIBA M. SINGH, J.**

**OCTOBER 03<sup>rd</sup>, 2024/nk/bsr/sn**

Signature Not Verified

Digitally Signed By BHASKAR  
SINGH RAWAT  
Signing Date: 04.10.2024  
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**CRL.A. 378/2022**