IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (DB) No.35 of 2017

Arising Out of PS. Case No.-448 Year-2013 Thana- ARA NAWADA District- Bhojpur

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CHANDAN KUMAR @ CHANDRAN KUMAR S/o Sri Dadan Sao, resident of Village- Gundi Saraiya, P.S.- Barhara, District- Bhojpur Bihar.

... ... Appellant/s

Versus

The State Of Bihar

... ... Respondent/s

==========

with

CRIMINAL APPEAL (DB) No. 10 of 2017

Arising Out of PS. Case No.-448 Year-2013 Thana- ARA NAWADA District- Bhojpur

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Sonu Kumar @ Prakash Kumar Son of Satendra Singh, Resident of Jai Hind Colony, Nala More, P.S. Ara Town, District - Bhojpur

... ... Appellant/s

Versus

The State Of Bihar

... ... Respondent/s

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Code of Criminal Procedure, 1973--- Sections 374(2), 389(1)--- Indian Penal Code--- Sections- 302, 364, 120(B), 392, 34---Indian Evidence Act---section 65-B--- circumstantial evidence---theory of last seen together---appeal against judgment of conviction on the allegation of committing murder of the deceased---argument on behalf of appellants that there is no eyewitness to the occurrence in question and the case of the prosecution rests on circumstantial evidence---further argument that prosecution has applied the theory of last seen together but has failed to complete the chain of circumstances.

Findings: case of the prosecution is on the basis of the theory of last seen together and it is alleged that the accused were lastly seen in the company of the deceased and after three days the dead body of deceased was found and, therefore, the present appellants/accused must have killed the deceased--- as per the case of prosecution accused have killed the deceased on 15.12.2013, whereas as per post mortem report, death must have been caused on 17.12.2013---there is a time gap of more than three days from the date when the appellants/accused were lastly seen in the company of the deceased--- prosecution failed to point out motive on the part of the accused to commit the alleged offences which is important in case of circumstantial evidence—prosecution implicated the appellants/accused on the basis of the C.D.R. of the mobile phones but mobile phone of the deceased was not recovered and certificate as per Section-65B of Evidence Act was also not produced--- prosecution failed to establish the case against appellants beyond reasonable doubt---appeals allowed. ***(Para- 4, 23-25)***

(2022) 8 SCC 536, (2017) 14 SCC 359, (2018) 16 SCC 102, (2019) 3 SCC 289, (1984) 4 SCC 116 ……...Relied Upon.

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... ... Appellant/s

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Appearance :

(In CRIMINAL APPEAL (DB) No. 35 of 2017)

For the Appellant/s : Mr.Dharmendra Kumar Singh, Advocate
Mr. Shashi Shekhar Singh, Advocate
Mr. Sadanand Roy, Advocate

For the Respondent/s : Mr. Sujit Kumar Singh, APP

(In CRIMINAL APPEAL (DB) No. 10 of 2017)

For the Appellant/s : Mr. Surendra Kumar Singh, Advocate
Mr. Prabhat Kumar Singh, Advocate
Ms. Priya, Advocate

For the Respondent/s : Mr. Sujit Kumar Singh, APP

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CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and
HONOURABLE MR. JUSTICE RUDRA PRAKASH MISHRA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)

Date : 12-12-2023

Both these appeals, filed under Sections- 374(2) and 389(1) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Code', arise out of the common judgment of conviction dated 15.11.2016 and order of sentence dated 18.11.2016 passed by Sri Yogesh Narayan Singh, learned Additional Sessions Judge, IV, Bhojpur, Arrah in S.T. No.150 of 2014, arising out of Arrah (Nawada) P.S. Case No.448 of 2013, whereby and whereunder the appellants have been held guilty for the offences punishable under Sections- 302, 364, 120(B), 392 and 34 of the Indian Penal Code (hereinafter referred to as 'I.P.C.') and appellant/accused Chandan Kumar has been sentenced to undergo rigorous imprisonment for life and a fine of Rs. 10,000/- for Sections- 302 and 120(B) of I.P.C., rigorous imprisonment for seven years and a fine of Rs. 5000/- for the offence under Section- 364 of I.P.C. and rigorous imprisonment for five years and a fine of Rs.5000/- for the offence under Section-392 of I.P.C. Appellant/accused Sonu Kumar has been sentenced to undergo rigorous imprisonment for life and fine of Rs. 10,000/- for Sections- 302 and 120(B) of I.P.C., rigorous imprisonment for seven years and a fine of Rs. 5000/- for the offence under Section- 364 read with 120(B) of I.P.C. and rigorous imprisonment for five years and a fine of

Rs.5000/- for the offence under Section-392 read with 120(B) of I.P.C. In default of payment of fine, they will undergo six months imprisonment each. All the sentences have been ordered to run concurrently and period spent under trial will be counted under sentences.

2. The prosecution story in brief is as under:

> "The informant is the owner of a Scorpio car bearing Reg. No.BR-03P-8205 which was driven by Gautam Kumar (deceased). On 14.12.2013 at about 3:30 p.m. the driver Gautam Kumar came to his residence and took permission to go for worship at Rajrappa temple in Jharkha with some of his relatives on the assurance that he will return till 15.12.2013. At 9:30 p.m. he made a call to the owner informing him that he was at Jehanabad and was on way to Rajrappa. On 15.12.2013, the informant tried to contact the driver Gautam Kumar which whose mobile phone was switched off. He tried again on the same number, but could not contact him. On 16.12.2013 he made contacts with the family members of Gautam Kumar who informed him that he will return till 16.12.2013, but he did not return. The informant has apprehension that his vehicle has met with some mishappening in collusion with the driver and his associates."

3. Heard learned advocate Mr. Dharmendra Kumar

Singh assisted by Mr. Shashi Sekhar Singh and Mr. Sadanand Roy for the appellant in Cr. Appeal (D.B.) No. 35 of 2017 and learned advocate Mr. Surendra Kumar Singh assisted by Mr. Prabhat Kumar Singh and Ms. Priya for the appellant in Cr. Appeal (D.B.) No.10 of 2017 and Mr. Sujit Kumar Singh, learned A.P.P. for the respondent State in both the appeals.

4. Learned counsels appearing for the appellants have mainly submitted that, in the present case, there is no eye-witness to the occurrence in question and the case of the prosecution rests on circumstantial evidence. The prosecution has applied the theory of last seen together and on the basis of the same, though the prosecution has failed to complete the chain of circumstances, the learned Trial Court has recorded the conviction of the appellants/accused and, therefore, the impugned order be quashed and set aside.

5. It is submitted that, as per the deposition of P.W. 1, namely Krishna Kumar, who is the brother of the deceased, accused Sonu Kumar @ Prakash Kumar and Santosh Verma went to the house of the deceased and requested him to go with them to Rajrappa in the Scorpio car. However, thereafter the said witness came to know that appellant Chandan Kumar was also present in the Scorpio car. Thus, there are contradictions in

the deposition of the prosecution-witnesses.

6. It is further submitted that the F.I.R. was filed by the owner of the car, i.e. P.W. 3 namely Manvendra Narain Singh against his driver Gautam Kumar @ Mithun (deceased) for the offences punishable under Sections-406, 420, 120B and 34 of I.P.C. The said F.I.R. was lodged on 17.12.2013 by alleging that the driver of the said witness, i.e. deceased Gautam Kumar, had gone with the Scorpio car for Rajrappa. However, he has not returned with the car and thereby he has committed the alleged offences. It is submitted that during the course of investigation it was revealed that the dead body of an unknown person was found in the forest and, therefore, one Chaukidar informed to Vishnu Garh Police Station. Therefore, the F.I.R. was registered with regard to the said dead body with the said police station. Thereafter, the *post mortem* of the dead body was conducted by the concerned Doctor, i.e. P.W. 7 on 18.12.2013.

7. It is further submitted that during the course of investigation of the said F.I.R., which was filed by P.W. 3 against his driver (deceased) for the offences punishable under Sections-406, 420, 120B of I.P.C., it was revealed that the said driver was killed by the present appellants and another accused

and, therefore, Section-302 of I.P.C. came to be added. However, there is no material connecting the appellants herein with the incident of killing of Gautam Kumar. Though the Investigating Officer has collected the C.D.R. of the mobile phones of the appellants and the deceased, the said C.D.R. was not duly proved as per Section-65B of the Indian Evidence Act. Even the I.O. was not authorized to take out the C.D.R.

8. Learned counsels for the appellants would further submit that even as per the case of the prosecution and that too on the confessional statement of accused Chandan Kumar that the appellants/accused killed the deceased Gautam Kumar @ Mithun on 15.12.2023. From the *post mortem* conducted by the doctor, P.W. 7 on 18.12.2013, time of death was shown 12 to 24 hours approximately from the date of conducting the said *post mortem.*

9. Thus, from the deposition of the doctor, it can be said that the story of the prosecution that the deceased was killed by the appellants on 15.12.2013 is not supported by the said evidence. Learned counsels, therefore, urged that as the prosecution has failed to prove the offences against the appellants/accused beyond reasonable doubt, the appellants/accused be acquitted by quashing and setting aside

the impugned judgment and order.

10. On the other hand, learned A.P.P. has opposed these appeals. It is mainly submitted that both these appellants were seen in the company of the deceased when they went to the house of the deceased and requested him to go with them to Rajrappa in the Scorpio car. The Scorpio car was hired and from the next day the deceased was missing and it was found that his mobile phone was switched off. The location of the mobile tower of the appellants and the deceased was the same. C.D.R. of the mobile phones were produced before the Court by the Investigating Officer. Therefore, there is sufficient material connecting them with the occurrence in question and, therefore, when the prosecution has proved the case against the appellants/accused beyond reasonable doubt, the learned Trial Court has not committed any error while passing the impugned judgment and order. He, therefore, urged that both these appeals be dismissed.

11. We have considered the submissions canvassed by the learned counsels for the parties.

12. We have also perused the materials placed on record and the evidence led by the prosecution. It is not in dispute that the present case is a case of circumstantial

evidence and the prosecution has mainly placed the theory of last seen together. It would emerge from the record that P.W. 3, who is the owner of the Scorpio car, filed the F.I.R. on 17.12.2013 against his driver Gautam Kumar @ Mithun (deceased) for the alleged offences punishable under Sections-406, 420, 120B and 34 of I.P.C. It is stated in the said F.I.R. that his driver, accused Gautam Kumar @ Mithun is missing since 14.12.2013 with the Car. The said driver Gautam Kumar @ Mithun informed P.W. 3 on telephone that he is going with his relatives to Rajrappa, Jharkhand for purposes of Darshan and he will return on 15.12.2013. Therefore, he gave permission on telephone. When he enquired at 9:30 p.m. of 14.12.2013 on the mobile phone of his driver Gautam Kumar, he informed that he is at Jehanabad. However, when he again tried to contact his driver in the morning of 15.12.2013, it was found that his mobile phone was switched off. Thereafter, he has personally visited the house of his driver Gautam Kumar on 16.12.2013. He has, therefore, lodged the said F.I.R.

13. After filing of the F.I.R., the investigating agency carried out the investigation and during the course of investigation, the Investigating Officer recorded the statement of the witnesses and collected the relevant documents and

thereafter initially filed the final report in favour of the accused. However, it is pointed out by the learned counsels that the Court directed the investigating agency to carry out further investigation and thereafter the investigating agency filed the charge-sheet against the accused. As the case was exclusively triable by the Court of Sessions, the case was committed to the Court of Sessions.

14. As observed hereinabove, during the course of investigation of the said F.I.R., it was revealed that the dead body of one unknown person was found in the forest and, therefore, one Chaukidar informed Vishnu Garh police station where the F.I.R. was registered for the death of unknown person. It would further reveal from the record that the said police station sent the dead body of the unknown person for *post mortem* and *post mortem* of the said dead body was conducted by the concerned Doctor. For the said purpose, P.W. 7 has been examined by the prosecution. It further transpires that thereafter accused Chandan Kumar @ Chandran Kumar was arrested on 9th of January, 2014 and thereafter his confessional statement was recorded by the police and it was revealed that both these appellants along with other accused have killed Gautam Kumar @ Mithun and, therefore, Section-

302 of I.P.C. was added.

15. With a view to prove the charges levelled against the appellants/accused, the prosecution had examined seven witnesses.

16. P.W. 1 Krishna Kumar, who is the brother of the deceased Gautam Kumar @ Mithun, has stated that Gautam Kumar was his brother who was a driver. On 14.12.2013 at about 1:30 to 2:00 p.m. when his brother Mithun came to house to take lunch**,** at that time accused Sonu Kumar and Santosh Sharma came to his house and both said that they want to go to Rajrappa and, therefore, his brother agreed for the same. Thereafter, his brother talked to the vehicle owner Manvendra Narayan Singh on mobile phone and after getting permission from him, his brother Mithun went with Chandan Kumar and Santosh Sharma in the Scorpio car. It is further stated that on the next day when he tried to contact to his brother on telephone, it was found that the mobile phone of the brother was switched off. The said witness also enquired from the owner of the vehicle and the owner told him that he had a talk with Mithun at about 9:00 p.m. At that time he was in Jehanabad. Thereafter on 10th January, 2014, the said witness came to know from Darogaji that his brother was killed.

Photograph and clothes of the deceased was shown to him and the said witness identified his brother. The said witness identified accused Sonu Kumar @ Prakash Kumar and Chandan Kumar @ Chandran Kumar who were present in Court.

16.1 During the cross-examination, the said witness has stated that the owner of the car has lodged the F.I.R. against his brother. In connection with the said F.I.R., statement was recorded. He has further stated that he had seen Chandan for the first time when his brother Mithun left the house. At that time his brother told him that Chandan is his friend and he is a Tempo driver.

17. P.W. 2 Kanhaiya Kumar Sah is also brother of Gautam Kumar @ Mithun. The said witness also stated that his brother used to drive Scorpio car of Manvendra Narayan Singh. On 14.12.2013, between 1:00 to 2:00 p.m. Sonu Kumar and Santosh Sharma came to his house and asked Gautam to go with them to Rajrappa for Darshan. Therefore, his brother informed the vehicle owner on mobile phone about the trip of Rajrappa and thereafter his brother went with the accused. However, on the next day when he tried to call Gautam, his phone was switched off. Therefore, he went to the house of

Sonu and asked about the whereabouts of his brother. At that time, accused Sonu informed that he does not know about his brother and the car. Therefore, they returned to the house. He has further stated that on 16.12.2013, the owner of the car came to his house and enquired about his brother Gautam @ Mithun. Thereafter, the said person filed the F.I.R. against Gautam Kumar and on 18.12.2013 his statement was recorded by the police. However, his brother was not found. Thereafter, the police came to his house and photograph of the dead body and clothes were shown to him.

17.1 During cross-examination, the said witness has admitted that they have not lodged any F.I.R. by saying that their brother is missing nor they have filed any F.I.R. with regard to the occurrence of death of his brother. They came to know on 09.01.2014 that their brother has been killed.

18. P.W. 3 Manvendra Narayan Singh is the owner of the Scorpio car and the said witness had lodged the F.I.R. against his driver Gautam Kumar for the alleged offences punishable under Sections- 406, 420, 120B and 34 of I.P.C. The said witness, in the examination-in-chief, has stated that on 14.12.2013 Gautam @ Mithun, the driver of his Scorpio car, came at about 2:00 to 3:00 p.m. and said that he would take

some relatives for Darshan in Rajrappa, Jharkhand and also told that they will return on the next day. On his insistence the said witness gave permission and thereafter when the said witness enquired at about 9:30 p.m., Mithun informed him that he was in Jehanabad and further going to Rajrappa. However, from 15.12.2013 there was no contact with Mithun on mobile phone and, therefore, on 16.12.2013 he went to the house of Mithun and asked about the whereabouts of Mithun and the car. Thereafter, he lodged the F.I.R. on 17.12.2013.

18.1 During cross-examination, he has stated that he gave information to the police and lodged the F.I.R. against Gautam Kumar.

19. P.W. 4 Satyendra Kumar was posted as Police Inspector in Ara (Nawada) police station. He took over the charge of investigation of the F.I.R. in question. However, after some time, the said investigation was handed over to another officer.

20. P.W. 5 Ram Chandra Yadav was also posted as Sub-Inspector of Police in Nawada police station. The said witness also carried out certain part of investigation and on the basis of the case diary and the other material collected by the other investigating officer, he filed the charge-sheet against

accused Sonu Kumar and Chandan Kumar.

21. P.W. 6 Kunwar Prasad Gupta was posted as Police Sub-Inspector at Ara (Nawada) on 17.12.2013. The said witness started the investigation and during the course of investigation he has collected the C.D.R. of missing driver Gautam Kumar and after getting the C.D.R. of Gautam, Sonu and Santosh it was revealed that one Chandan is also involved in the incident in question and, therefore, on the basis of the C.D.R., Chandan was apprehended on 9th of January, 2014. His confessional statement was recorded and thereafter the said accused was taken to the forest where the dead body of the deceased Gautam was thrown after killing him. Thereafter, it was revealed that F.I.R. No. 145 of 2013 was registered at Vishnu Garh police station and, therefore, copy of the said F.I.R. was obtained and photograph of the dead body was also obtained. Thereafter, the accused Chandan was taken to Corpus Welfare Committee from where the clothes of deceased Gautam Kumar were obtained. Thereafter, accused were taken to the hotel where some of the accused stayed from where the printed receipt and register was obtained from the Manager.

21.1 During cross-examination the said witness has stated that after 17.12.2013, none of the family members of

deceased Gautam had lodged any F.I.R. The said witness has further admitted that he is not having any authorization letter for taking out the call details nor he has taken any training for taking out the call details. He has also admitted in Para-82 of the case diary that there is overwriting in the date and time. The said witness has also admitted that he had not taken the statement of the person who has recorded the F.I.R. No. 145 of 2013 registered with Vishnu Garh police station nor he has prepared any *Panchnama* of the place from where the dead body was recovered in the forest. The said witness has also not taken the statement of the police officer who had supplied the photograph and the clothes of the deceased nor he had taken the statement of any person from Corpus Welfare Committee. The said witness further admitted that he has also not taken the statement of the hotel staff or the Manager who had given the register and the receipt.

22. P.W. 7 Dr. Angraj Subhash Chandra has stated that on 18.12.2013, he was posted as Medical Officer in Sadar Hospital, Hazaribagh. At that time, dead body of an unknown person was sent by one Chaukidar. Thereafter, he started conducting the *post mortem* at about 1:00 p.m. and he has observed as under:

"1. Rigor mortis was present in all four limbs.

2. Bleeding from nose both nostrils.

Injuries-

3. Injury No. (I) Multiple abrasion on right chest with variable sizes ranging from 1" x 3".

(ii) Finger marks present over left side of neck extending from Lt. side of neck to neck size of 2".

(iii) Fracture of hyoid bone present.

(iv) Fracture of ribs Rt. side lower 3 in number.

(v) Lacerated injury of lung Rt. Side, size 1" x 1" x 1/2" with Haemothorax present.

(vi) Lacerated injury of liver Rt. Side 1/1" x 1/2" x 1".

Cause of death- In my opinion due to throttling and haemorrhage and shock.

Time in death- 12 to 24 hrs. approx.

This report is written and signed by me.

4. This attested copy is produced by Binugarh Police Station which is attested copy of original postmortem report which is marked with objection ext.-16."

22.1 During cross-examination, the said witness has admitted that in *post mortem* report, Ext-16, there is no reference with regard to the F.I.R. number nor there is mention about the name of the corpus.

23. From the aforesaid evidence led by the prosecution, it is revealed that the case of the prosecution is on the basis of the theory of last seen together. It is alleged that the accused were lastly seen in the company of the deceased Gautam and after three days the dead body of Gautam was found and, therefore, the present appellants/accused must have killed the deceased. It is relevant to note that as per the case of

the prosecution on the basis of the confessional statement of Chandan Kumar @ Chandran Kumar that they killed the deceased Gautam and thereafter his dead body was thrown in forest on 15.12.2013, accused have been arrested. However, if the *post mortem* report produced by P.W. 7 doctor is carefully seen, it is revealed that the said Doctor has specifically observed in the *post mortem* that time of death is 12 to 24 hours approximately. It is pertinent to note that the said doctor has conducted the *post mortem* of the dead body on 18.12.2013 at 1:00 p.m. and, therefore, as per the case of the said expert, the person whose *post mortem* was conducted must have died before 12 to 24 hours. It is also relevant to note that, as per the case of the prosecution, the dead body was found on 17.12.2013 from the forest and, therefore, on the basis of the information given by one Chaukidar, F.I.R. No.145 of 2013 came to be lodged with Vishnu Garh Police Station. It is relevant to note that as per the case of prosecution accused have killed the deceased Gautam on 15.12.2013, whereas as per *post mortem* report, death must have been caused on 17.12.2013. Further, there is a time gap of more than three days from the date when the appellants/accused were lastly seen in the company of the deceased i.e. 14.12.2013 and the date on

which the dead body was found i.e. 17.12.2013.

24. It is also relevant to observe that the prosecution has failed to point out motive on the part of the accused to commit the alleged offences. In the case of circumstantial evidence, motive assumes importance. Even the Scorpio car is not recovered from the appellants/accused and during the course of investigation and even thereafter the said Scorpio car was not found.

25. It would emerge from the record that the Investigating Officer had implicated the appellants/accused on the basis of the C.D.R. of the mobile phones. However, it is relevant to note that mobile phone of the deceased was not recovered nor anything was found from the place of occurrence, i.e. the place from where the dead body was found in the forest. The Investigating Officer has not even recorded the statement of the person who lodged the F.I.R., the police officer who recorded the F.I.R. nor of the Manager and another employee of the hotel in which it is alleged that some of the accused have stayed. Even C.C.T.V. footage of the said hotel was not obtained. Further, certificate as per Section-65B of Evidence Act was also not produced. Investigating Officer was not authorised to produce C.D.R. and not trained officer for that

purpose.

26. On the point of motive assuming importance the Hon'ble Supreme Court in the case of **Ravi Sharma Vs. State (Government of NCT of Delhi) & Anr,** reported in **(2022) 8 SCC 536**, has observed in Para-14 as under:

> **14.** When we deal with a case of circumstantial evidence, as aforesaid, motive assumes significance. Though, the motive may pale into insignificance in a case involving eyewitnesses, it may not be so when an accused is implicated based upon the circumstantial evidence. This position of law has been dealt with by this Court in *Tarseem Kumar* v. *Delhi Admn.* [*Tarseem Kumar* v. *Delhi Admn.*, 1994 Supp (3) SCC 367 : 1994 SCC (Cri) 1735] in the following terms : (SCC p. 371, para 8)
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> > "*8*. Normally, there is a motive behind every criminal act and that is why investigating agency as well as the court while examining the complicity of an accused try to ascertain as to what was the motive on the part of the accused to commit the crime in question. It has been repeatedly pointed out by this Court that where the case of the prosecution has been proved beyond all reasonable doubts on basis of the materials produced before the court, the motive loses its importance. But in a case which is based on circumstantial evidence, motive for committing the crime on the part of the accused assumes greater importance. Of course, if each of the circumstances proved on behalf of the prosecution is accepted by the court for purpose of recording a finding that it was the accused who committed the crime in question, even in absence of proof of a motive for commission of such a crime, the accused can be convicted. But the

> investigating agency as well as the court should ascertain as far as possible as to what was the immediate impelling motive on the part of the accused which led him to commit the crime in question."

27. At this stage, we would like to refer the decision rendered by the Hon'ble Supreme Court in the case of **Anjan Kumar Sarma & Ors. Vs. State of Assam**, reported in **(2017) 14 SCC 359**, wherein the Hon'ble Supreme Court has observed in paragraph Nos.13, 16 and 21 as under:

> "**13.** Jit Kakati was acquitted for committing an offence under Section 366-A IPC and his acquittal was confirmed by the High Court. Jit Kakati died during the pendency of the criminal appeal before this Court and the appeal filed by him abated. The acquittal of the appellants under Section 376(2)(*g*) was confirmed by the High Court which remains unchallenged. The point that falls for our consideration is whether the conviction of the appellants by the High Court under Sections 302, 201 read with Section 34 IPC is justified. The High Court was conscious of the fact that interference with the judgment of an acquittal by the trial court is unwarranted except when it suffers from the vice of perversity (see *Brahm Swaroop* v. *State of U.P.* [*Brahm Swaroop* v. *State of U.P.*, (2011) 6 SCC 288 : (2011) 2 SCC (Cri) 923] , SCC para 38). There is neither a discussion nor finding recorded by the High Court about any perversity in the judgment of the trial court. The only ground on which the High Court reversed the judgment of the trial court is that the prosecution proved that the accused and the deceased were last seen together and there was no explanation which led to the presumption of guilt of the accused.

> 16. It is no more res integra that suspicion cannot take the place of legal proof for sometimes, unconsciously it may happen to be a short step between moral certainty and the legal proof. At times it can be a case of "may be true". But there is a long mental distance between "may be true" and "must be true" and the same divides conjectures from sure conclusions. (See *Jaharlal Das* v. *State of Orissa* [*Jaharlal Das* v. *State of Orissa*, (1991) 3 SCC 27 : 1991 SCC (Cri) 527] , SCC p. 37, para 11.)
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> 21. This Court in *Bharat* v. *State of M.P.* [*Bharat* v. *State of M.P.*, (2003) 3 SCC 106 : 2003 SCC (Cri) 738] held that the failure of the accused to offer any explanation in his statement under Section 313 CrPC alone was not sufficient to establish the charge against the accused. In the facts of the present case, the High Court committed an error in holding that in the absence of any satisfactory explanation by the accused the presumption of guilt of the accused stood unrebutted and thus the appellants were liable to be convicted."

28. In the case of **Ravi & Anr. Vs. State of Karnataka**, reported in **(2018) 16 SCC 102**, the Hon'ble Supreme Court has observed in Paragraph Nos. 3 and 4 as under:

> "3. The appellant-accused and the deceased along with Suma (PW 1) and Rama Nayak (PW 2) were together on 26-12-2004, the precise time being around 1.30 p.m. The dead body was recovered after a gap of four (4) days i.e. on 30-12-2004. The post-mortem report indicated that the death had occurred 30 hours prior to the time of post-mortem examination. The medical evidence, therefore, would be suggestive of the fact that the dead body was recovered after about two (2) days from 1.30

p.m. of 26-12-2004.

4. The question that confronts the Court is whether on the basis of the aforesaid evidence the conviction of the appellant-accused is sustainable in law."

29. In the case of **Reena Hazarika Vs. State of Assam**, reported in **(2019) 3 SCC 289**, the Hon'ble Supreme Court has observed in Paragraph No. 9 as under:

"9. The essentials of circumstantial evidence stand well established by precedents and we do not consider it necessary to reiterate the same and burden the order unnecessarily. Suffice it to observe that in a case of circumstantial evidence the prosecution is required to establish the continuity in the links of the chain of circumstances, so as to lead to the only and inescapable conclusion of the accused being the assailant, inconsistent or incompatible with the possibility of any other hypothesis compatible with the innocence of the accused. Mere invocation of the last-seen theory, sans the facts and evidence in a case, will not suffice to shift the onus upon the accused under Section 106 of the Evidence Act, 1872 unless the prosecution first establishes a prima facie case. If the links in the chain of circumstances itself are not complete, and the prosecution is unable to establish a prima facie case, leaving open the possibility that the occurrence may have taken place in some other manner, the onus will not shift to the accused, and

the benefit of doubt will have to be given."

30. In the case of **Sharad Birdhichand Sarda Vs. State of Maharashtra**, reported in **(1984) 4 SCC 116**, the Hon'ble Supreme Court has observed in paragraph 150 to 160 as under:

> "150. It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this: where various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a court.
>
> 151. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh 1952 SCR 1091 : (AIR 1952 SC 343) . This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of Tufail v. State of Uttar Pradesh, (1969) 3 SCC 198 and Ramgopal v. State of Maharashtra, AIR 1972 SC 656. It may be useful to extract what Mahajan, J. has laid down in Hanumant's case (at pp. 345-46 of AIR) (supra):
>
> "It is well to remember that in cases where the evidence is of a circumstantial nature, the

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

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

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

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793 : (AIR 1973 SC 2622) where the observations were made:

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on

any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

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

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

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

155. Lord Goddard slightly modified the expression ‘morally certain’ by ‘such circumstances as render the commission of the crime certain’.

156. This indicates the cardinal principle of criminal jurisprudence that a case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction. Horry’s case (supra) was approved by this Court in Anant Chintaman Lagu v. State of Bombay, (1960) 2 SCR 460 :

(AIR 1960 SC 500). Lagu's case as also the principles enunciated by this Court in Hanumant's case (supra) have been uniformly and consistently followed in all later decisions of this Court without any single exception. To quote a few cases — Tufail case (1969) 3 SCC 198 (supra), Ramgopal's case (AIR 1972 SC 656) (supra), Chandrakant Nyalchand Seth v. State of Bombay (Criminal Appeal No 120 of 1957 decided on 19-2-1958), Dharambir Singh v. State of Punjab (Criminal Appeal No 98 of 1958 decided on 4-11-1958). There are a number of other cases where although Hanumant's case has not been expressly noticed but the same principles have been expounded and reiterated, as in Naseem Ahmed v. Delhi Administration, (1974) 2 SCR 694 (696) : (AIR 1974 SC 691 at p. 693), Mohan Lal Pangasa v. State of U.P., AIR 1974 SC 1144 (1146), Shankarlal Gyarasilal Dixit v. State of Maharashtra, (1981) 2 SCR 384 (390) : (AIR 1981 SC 765 at p. 767) and M.G. Agarwal v. State of Maharashtra, (1963) 2 SCR 405 (419) : (AIR 1963 SC 200 at p. 206) a five-Judge Bench decision.

157. It may be necessary here to notice a very forceful argument submitted by the Additional Solicitor-General relying on a decision of this Court in Deonandan Mishra v. State of Bihar, (1955) 2 SCR 570 (582) : (AIR 1955 SC 801 at p. 806), to supplement his argument that if the defence case is false it would constitute an additional link so as to fortify the prosecution case. With due respect to the learned Additional Solicitor General we are unable to agree with the interpretation given by him of the aforesaid case, the relevant portion of which may be extracted thus:

"But in a case like this where the various links as stated above have been satisfactorily made out and the circumstances point to the appellant as the probable assailant, with reasonable definiteness and in proximity to

the deceased as regards time and situation. . . such absence of explanation or false explanation would itself be an additional link which completes the chain."

158. It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier, viz., before a false explanation can be used as additional link, the following essential conditions must be satisfied:

(1) various links in the chain of evidence led by the prosecution have been satisfactorily proved,

(2) the said circumstance point to the guilt of the accused with reasonable definiteness, and

(3) the circumstance is in proximity to the time and situation.

159. If these conditions are fulfilled only then a court can use a false explanation or a false defence as an additional link to lend an assurance to the court and not otherwise. On the facts and circumstances of the present case, this does not appear to be such a case. This aspect of the matter was examined in Shankarlal's case (AIR 1981 SC 765) (supra) where this Court observed thus:

"Besides, falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea can at best be considered as an additional circumstance, if other circumstances point unfailingly to the guilt of the accused."

160. This Court, therefore, has in no way departed from the five conditions laid down in Hanumant's case (AIR 1952 SC 343) (supra). Unfortunately, however, the high Court also seems to have misconstrued this decision and used the so-called false defence put up by the

> appellant as one of the additional circumstances connected with the chain. There is a vital difference between an incomplete chain of circumstances and a circumstance which, after the chain is complete, is added to it merely to reinforce the conclusion of the Court. When the prosecution is unable to prove any of the essential principles laid down in Hanumant's case, the High Court cannot supply the weakness or the lacuna by taking aid of or recourse to a false defence or a false plea. We are, therefore, unable to accept the argument of the Additional Solicitor-General."

31. Keeping in view the aforesaid decisions rendered by Hon'ble Supreme Court, if the evidence of the present case is appreciated, we are of the view that prosecution has failed to establish the case against appellants beyond reasonable doubt. Hence, trial court has committed grave error in passing the impugned order.

32. Accordingly, the impugned judgment of conviction dated 15.11.2016 and order of sentence dated 18.11.2016 passed by learned Additional Sessions Judge-IV, Bhojpur, Ara in connection with Sessions Trial No. 150 of 2014, arising out of Ara Nawada P.S. Case No. 448 of 2013 is quashed and set aside. The appellants, namely, Sonu Kumar @ Prakash Kumar and Chandan Kumar @ Chandran Kumar are acquitted of the charges levelled against them by the learned trial court.

32.1 Since the appellant namely, Sonu Kumar @ Prakash Kumar in Cr. Appeal (DB) No. 10/2017 is on bail. He is discharged of the liabilities of his bail bonds. Appellant namely, Chandan Kumar @ Chandran Kumar in Cr. Appeal (DB) No. 35/2017 is in jail, he is directed to be released forthwith, if his presence is not required in any other case.

33. Both the appeals stand allowed.

(Vipul M. Pancholi, J)

(Rudra Prakash Mishra, J)

K.C.Jha/-

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