

IN THE HIGH COURT OF MADHYA PRADESH

AT INDORE

BEFORE

HON'BLE SHRI JUSTICE SUBODH ABHYANKAR

&

HON'BLE SHRI JUSTICE SATYENDRA KUMAR SINGH

ON THE 24th OF JUNE, 2022

CRIMINAL APPEAL NO.712 OF 2007

Between:-

**SANJAY S/O VISHNU PRASAD KUSHWAHA
AGED ABOUT 26 YEARS
OCCUPATION: CYCLE SHOP
R/O SHOP 51, SABNIS BAG
INDORE (MADHYA PRADESH)**

.....APPELLANT

(BY SHRI LOKESH BHATNAGAR, ADVOCATE)

AND

**STATE OF M.P.
THROUGH P.S. AERODROME
INDORE (MADHYA PRADESH)**

.....RESPONDENT

***(BY SHRI A. S. SISODIA, GOVERNMENT ADVOCATE FOR
STATE)***

Reserved on : 11.02.2022

Delivered on : 24 .06.2022

This appeal coming on for judgment this day, Hon'ble Shri Justice Satyendra Kumar Singh passed the following:

J U D G M E N T

The appellant has preferred this criminal appeal under Section 374(2) of the Code of Criminal Procedure, 1973 (2 of 1974) [in short "Cr.P.C."] against the judgment dated 25.03.2007 passed by the 13th Additional Sessions Judge, Indore (M.P.) in S.T. No.50/2006, whereby the appellant has been convicted under Sections 364, 302 and 201 read with 34 of the Indian Penal Code, 1860 (in short "IPC") and sentenced as under :-

S. No.	Conviction	Sentence		
		Imprisonment	Fine amount	Additional imprisonment in default of payment of fine

1	302 of IPC	Life imprisonment	Rs.10,000/-	6 months RI
2	364 of IPC	10 years RI	Rs.2,000/-	3 months RI
3	201 of IPC	3 years RI	Rs.1,000/-	1 month RI

2. Prosecution story, in brief is as follows :-

(i) That on 03.10.2005, at about 10.00 PM, while complainant Satyanarayan was standing at square near his residence 38/2, Jaibhawani Nagar, Indore alongwith his friends Balli Kushwah, Pappu Ghatge, Pappu Sharma, Manoj Solanki and brother deceased Kamal making collection for preparations of Nav Durga puja, appellant Sanjay and co-accused Mukesh came there and took the deceased Kamal with them on the motorcycle, which appellant Sanjay was driving whom deceased referred as his brother-in-law. Deceased Kamal thereafter did not return home. Next day, on being enquired about the whereabouts of the deceased, appellant Sanjay informed that he dropped Kamal outside his house on the same night. When deceased did not return till late night,

then at about 23.55 hours, missing person's report (Exhibit-P/11) was lodged by Rakesh at police station Aerodrome, Indore. Thereafter, on 05.10.2005, Satynarayan made a written complaint (Exhibit-P/1) to SHO Police Station Aerodrome, Indore against the appellant and co-accused Mukesh on the basis of suspicion as deceased had a fight with the appellant some 7-8 days prior to the date of incident and co-accused Mukesh on being inquired about the whereabouts of the deceased told different version than that of appellant that he dropped the deceased outside his in-law's house. S.I. Ashok Rangshahi, on the basis of aforesaid written complaint, lodged FIR (Exhibit-P/2) against the appellant as well as co-accused Mukesh for the offences punishable under Section 364 read with 34 of IPC.

(ii) During investigation, on 06.10.2005, ASI P. S. Chouhan went to the place of incident, prepared spot map (Exhibit-P/3), recorded the statements of prosecution witnesses and made a search for the dead-body of the deceased Kamal.

On 08.10.2005, S.I. Ashok Rangshahi arrested the appellant Sanjay, as per arrest memo (Exhibit-P/7) and co-accused Mukesh, as per arrest memo (Exhibit-P/8). He recorded their memorandum statements Exhibit-P/11 and P/10 respectively and thereafter, seized a clutch wire, a broken silver chain, a pearl necklace, a leather purse containing photographs of appellant Sanjay and deceased's wife Babitabai alongwith appellant's license and an amount of Rs.170/- cash on their instance from Gajarghas near Ralamandal Hills, Indore as per seizure memo (Exhibit-P/6). On the same day, he also seized a black coloured rubber sandal on the instance of appellant from a place near Talainaka, Mhow Phata as per seizure memo (Exhibit-P/5) and a nylon rope from his house as per seizure memo (Exhibit-P/4). Identification proceeding was conducted as per identification memo (Exhibit-P/10) wherein deceased's brother Ritesh identified the seized broken silver chain and pearl necklace as the articles of deceased alongwith deceased's wife photographs. Search of the body of the deceased was

conducted in Narmada river near Mortakka bridge and also at Ralamandal Bawdi but the same was not found. After completion of investigation, charge-sheet was filed before the Judicial Magistrate First Class, Indore who committed the same to the Court of Sessions Judge, Indore.

(iii) During trial, co-accused Mukesh filed an application dated 21.02.2006 under Section 307 of Cr.P.C. through jail for tendering pardon. Learned Trial Court vide order dated 08.03.2006, excluded his trial and directed to record his statements under Section 307 of Cr.P.C. Thereafter, statements of co-accused Mukesh were recorded under Section 307 of Cr.P.C. alongwith statements of other prosecution witnesses.

3. Learned Trial Court considering the material *prima-facie* available on record, framed the charges under Sections 364 r/w 34, 302 r/w 34 and 201 r/w 34 of IPC against the appellant, who abjured his guilt and prayed for trial. In his statement recorded under Section 313 of Cr.P.C., the appellant pleaded his false implication in the matter but he did not

examine any witness in his defense.

4. Learned Trial Court after appreciating the oral as well as documentary evidence available on record, recorded the findings that prosecution proved its case beyond reasonable doubt against the appellant for the offences punishable under Sections 364, 302 and 201 read with 34 of IPC and sentenced him, as mentioned in para-1 of this judgment. Being aggrieved with the said judgment of conviction and order of sentence, appellant has preferred the instant appeal for setting aside the impugned judgment and discharging him from the charges framed against him.

5. Learned counsel for the appellant submits that the impugned judgment passed by the learned Trial Court is erroneous on both facts and in law and based on surmises and conjectures. The prosecution has failed to prove the fact that deceased was subjected to homicidal death as neither his dead body has been recovered nor anything else is on record to prove the fact that he had been murdered. Prosecution has also failed to prove the fact that appellant had been carrying any motive to commit the murder of the deceased. Complainant Satyanarayan (PW-2), Balli @ Mahesh (PW-3), Manoj (PW-4), Rajesh (PW-7) and Rakesh (P-11) all are

interested witnesses and none of them have stated anything material about the incident except that on the date of incident, appellant alongwith co-accused took the deceased on his motorcycle and deceased was last seen in the company of the appellant and co-accused. There are so many material omissions and contradictions in their testimony. Mukesh (PW-1) himself is an accused in the case and his statements recorded under 307 of Cr.P.C. are inconsistent on material issues and has not supported the prosecution case therefore, without any corroborative evidence, only on the basis of inconsistent last seen evidence, findings with regard to the involvement of the appellant in the crime is not sustainable thus, by setting aside the impugned judgment of conviction and order of sentence, the appellant may be acquitted from the charges framed against him. Learned counsel for the appellant has placed reliance on the judgments passed by Hon'ble the Apex Court in the cases of *[Mohd Younus Ali Tarafdar Vs. State of West Bengal[(2020) 3 SCC 747]*, *Malaichamy and Another Vs. State of Tamil Nadu [(2019) 17 SCC 568]*, *Basheer Begum Vs. Mohammad Ibrahim And Others [(2020) 11 SCC 174]*

6. Per contra, learned Public Prosecutor for the respondent-State,

while supporting the impugned judgment of conviction and order of sentence submits that the judgment was passed by the Trial Court after proper appreciation of evidence available on record. Appellant wanted to marry deceased's wife and was having motive to commit the murder of the deceased. Prosecution witnesses very well proved that appellant alongwith co-accused took the deceased last time and Mukesh (PW-1) in his statement recorded under 307 of Cr.P.C. specifically deposed that appellant had told him that he threw the deceased into Narmada river from *Mortakka bridge* and committed his murder. Therefore, confirming the impugned judgment of conviction and order of sentence, the appeal filed by the appellant may be dismissed. Learned counsel for the respondent has placed reliance on the judgments passed by Hon'ble The Apex Court in the case of State of *Rajasthan Vs. Kashi Ram [(2006) 12 SCC 254]*, *Ranjit Kumar Haldav Vs. State of Sikkim [(2019) 4 SCC 684]*, *Sanatan Naskar And Another Vs. State of West Bengal [(2010) 8 SCC 249]* and *Sanjay Rajak Vs. The State of Bihar (Cr. A. No. 1070 of 2017 decided on 22.07.2019)*.

7. We have heard learned counsel for the parties and perused the record.

8. In the present case, there is no direct evidence regarding the involvement of the appellant in the crime. Prosecution case is based on circumstantial evidence. Factors to be taken into account in adjudication of cases of circumstantial evidence as laid down by the Hon'ble Supreme Court in the case of *Anjan Kumar Sarma vs. State of Assam 2017 (4) SCC 359* are as follows :-

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' not and 'may be' established;

(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 provided; 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 shown that in all human probability the act must have been done by the accused.

9. The circumstance relied upon by the prosecution in this case are
- (i) motive for the commission of offence,
 - (ii) the last seen circumstance and
 - (iii) the recovery of seized articles.
10. Deceased's wife Babitabai (PW-6) deposed that her marriage with the deceased was solemnized on 23.05.2005 i.e. about four-five months before the date of incident. She further deposed that her parents are residents of Sabnis Bag where appellant also resides near her aunt (Bua) Laxmibai's house. She deposed that she used to go to her Bua's house where appellant met her occasionally and at that period of moment, he had told her that he likes her and wanted to marry with her. She further deposed that after her marriage, appellant used to come to her in-law's locality Jaibhawani Nagar as the deceased's uncle Tikam Verma's marriage was solemnized with Sundersingh's daughter who is a resident of Sabnis Bag and appellant called his daughter as his sister. She deposed that appellant tried to talk with her at Jaibhawani Nagar also and had told her

that he still likes her and wanted to marry with her which she refused straightaway, as she was already married.

11. Laxmimbai (PW-5) has deposed that Babita Bai is her niece, while appellant is her neighbour and both used to come at her house. Sundersingh (PW-9) deposed that appellant resides near his house in Sabnis Bag and called his daughter as sister. He also deposed that his daughter is married to Tikam Verma (who is uncle of deceased Kamal and resident of Jaibhawani Nagar) and appellant used to visit his house as well as his son-in-law Tikam Verma's house. Appellant has not challenged the aforesaid statements of both the above witnesses therefore, there is no reason to disbelieve deceased's wife Babitabai's statement that appellant met with her prior and after her marriage at her Bua Laxmibai's house and deceased's uncle Tikam Verma's house and had shown her inclination towards her saying that he likes her and wanted to marry with her. As Babitabai was married to deceased therefore, learned Trial Court has not committed any error in finding this fact as proved that appellant was having motive to commit murder of the deceased so that he can marry with his wife Babitabai.

12. Complainant Satyanarayan (PW-2) deposed that on the date of incident, at about 9.00-10.00 PM, when he alongwith his brother deceased Kamal was standing at square near his residence making collections for preparation of Nav Durga puja, appellant alongwith one more accused came there and called his brother deceased Kamal and thereafter, Kamal went with them saying that he will return within 1-2 hours. Balli @ Mahesh (P-3), Manoj (PW-4), Rajesh (PW-7), Shyam Sharma (PW-8), Rakesh (PW-11) and Pappu @ Kailash (PW-12) all have supported his aforesaid statement and deposed that at the time of incident, they were present on the spot and appellant alongwith one more accused took the deceased on his motorcycle in front of them.

13. Complainant Satyanarayan (PW-2) deposed that when his brother deceased did not return home, next day morning, he asked the appellant about his whereabouts, then appellant told him that he left the deceased in front of his house on the same night. He further deposed that he waited for the deceased till night and thereafter, got his missing person's report registered through his brother Rakesh at Police Station Aerodrome, Indore. Rakesh (PW-11) deposed that when his brother deceased did not

return home, he alongwith his friends and relatives made search for him and thereafter, in the same night at about 11.00-11.30 PM, lodged missing person's report (Exhibit-P/11-A) at Police Station Aerodrome, Indore.

14. Complainant Satyanarayan (PW-2) deposed that when his brother deceased did not return home on the next day also, then on third day i.e. on 05.10.2005, he made a written complaint (Exhibit-P/1) stating therein suspicion on the appellant and co-accused Mukesh who took the deceased with them. SHO Ashok Rangshahi (PW-15) deposed that he, on the basis of above report (Exhibit-P/1) lodged the FIR (Exhibit-P/2) bearing Crime No.532/2005 at Police Station Aerodrome, Indore against the appellant and co-accused Mukesh. During trial of the case, co-accused Mukesh moved an application under Section 307 of Cr.P.C. through jail authorities for tendering pardon. In pursuance of which, vide order dated 08.03.2006, his trial was excluded and he was directed to record his statements under Section 307 of Cr.P.C. thereafter, his statements were recorded.

15. Mukesh (PW-1) in his statements recorded under Section 307 of Cr.P.C. has deposed that he and appellant both are residents of same locality Sabnis Bag and on the date of incident i.e. on 03.10.2005, at about

8.00-8.30 PM, appellant came to his house and took him on his motorcycle saying that they have to visit Jaibhawani Nagar. He further deposed that he alongwith appellant went to Jaibhawani Nagar from where appellant took the deceased also on his motorcycle and all of them went towards Kaalaghoda. In this way, statements of the complainant Satyanarayan (PW-2) with regard to the fact that on the date of incident, appellant alongwith co-accused took the deceased on his motorcycle, thereafter deceased did not return home are supported by not only the statements of prosecution witnesses Balli @ Mahesh (PW-3), Manoj (PW-4), Rajesh (PW-7), Shyam Sharma (PW-8), Rakesh (P-11), Kailash @ Pappu (PW-12), but also from the statements of accomplice witness Mukesh (PW-1) who himself moved an application under Section 307 of Cr.P.C. for tendering pardon and also by the missing person's report (Exhibit-P/11-A), written complaint (Exhibit-P/1) and FIR (Exhibit-P/2) therefore, there is no reason to disbelieve the aforesaid evidence of last seen circumstance produced by the prosecution. Hence, it is established that on the date of incident, at about 9.30-10.30 PM, appellant along with one more accused took the deceased on his motorcycle whereafter, deceased did not return

home.

16. It has vehemently been argued on behalf of the appellant that Mukesh (PW-1) in para 22,23 and 24 of his cross-examination specifically stated that appellant and he himself had not taken the deceased and all the earlier statements made by him with regard to the incident were given under pressure. It is further argued that Mukesh has not been granted pardon also therefore his statements cannot be treated as evidence of an accomplice and should not be taken into consideration.

17. It is true that in the instant case Mukesh (PW-1) has not been granted pardon as he after stating the incident in his statement recorded on 08.03.2006 under Section 307 of Cr.P.C. stated in para 22 of his cross-examination recorded on 15.02.2007 i.e. after about a year that earlier he had made statements under pressure. In the case of *Somasundaram Vs. State [(2016)16 SCC 355]*, Hon'ble the Apex Court referring decision passed in *Laxmipat Chorariya Vs. State of Maharashtra[AIR 1968 SC 938]* has held that the mere fact that pardon has not been granted by a Court of law does not make an accomplice cease being an accomplice. Relevant paras are as follows:

64. From a perusal of the evidence of PW-10 and PW-11, it becomes clear that they are accomplice witnesses. It is also clear that the case of the prosecution heavily rests on their evidence. Before we proceed to examine the culpability of A-3 and A-4, it is important for us to examine the reliability of the evidence of the above accomplices. [Section 133](#) of the Indian Evidence Act, 1872, which deals with the testimony of accomplice witness, reads as under:

“133. an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.”

65. The High Court, in the impugned judgment and order also considered this aspect at some length. After adverting to judgments of both the Privy Council as well as this Court, the High Court concluded as under:

“29. A deep study on the above approach in law as to the evidentiary value of the deposition of an accomplice, the following settled principles culminate; that an evidence of an accomplice need not necessarily be rejected, that the evidence requires corroboration in material particulars as well as the corroboration of the evidence connecting or tend to connect the accused with the crime, that such accomplice witness is reliable. If the above tests are satisfied, the evidence of an accomplice can be safely relied upon to hold the accused guilty of the offence. Keeping the above principle in mind,

the evidence of PW-10 and PW-11 should be considered.”

66. In the instant case, PW-10 and PW-11 have not been granted pardon by any Court and have been arrayed as prosecution witnesses. This Court has held that the mere fact that pardon has not been tendered by a court of law does not make an accomplice cease being an accomplice. The learned senior counsel Mr. Basant R. has aptly placed reliance upon the case of *Laxmipat Choraria v. State of Maharashtra*[9], this Court held as under:

“ 7.....The word accomplice is ordinarily used in connection with the law of evidence and rarely under the substantive law of crimes. Accomplice evidence denotes evidence of a participant in crime with others. Section 133 of the Evidence Act makes the accomplice a competent witness against an accused person.”

*13....The witness was, of course, treated as an accomplice. The evidence of such an accomplice was received with necessary caution in those cases. These cases have all been mentioned in *In re Kandaswami Gounder AIR1957Mad727*, and it is not necessary to refer to them in detail here. The leading cases are : *Queen Emperor v. Mona Puna I.L.R. 16 Bom. 661*, *Banu Singh v. Emperor I.L.R. 33 Cal. 1353*, *Keshav Vasudeo Kortikar v. Emperor I.L.R. 59 Bom. 355*, *Empress v. Durant I.L.R. 23 Bom. 213*, *Akhoy Kumar Mookerjee v. Emperor I.L.R. 45 Cal. 720*, *A.V. Joseph v. Emperor I.L.R. 3 Rang. 11*, *Amdumiyam and others v. Crown I.L.R. 1937 Nag. 315*, *Gallagher v. Emperor I.L.R. 54 Cal. 52*, and *Emperor v. Har Prasad, Bhargava I.L.R. 45 All. 226*. In these cases*

(and several others cited and relied upon in them) it has been consistently held that the evidence of an accomplice may be read although he could have been tried jointly with the accused. In some of these cases the evidence was received although the procedure of s. 337, Criminal Procedure Code was applicable but was not followed. It is not necessary to deal with this question any further because the consensus of opinion in India is that the competency of an accomplice is not destroyed because he could have been tried jointly with the accused but was not and was instead made to give evidence in the case.” (emphasis laid by this Court)

18. In view of the aforesaid legal position, it is clear that statements of Mukesh (PW-1) can be relied upon subject to the same test of reliability of the evidence of an accomplice. Mukesh (PW-1) in para 23 of his cross-examination has admitted his signatures on the application dated 29.12.2005 filed by him through jail authorities for making him approvar in the case. He also admitted that he again filed second application dated 21.02.2006 through his counsel for the aforesaid purposes. He in his statements recorded on 08.03.2006 u/S 307 of Cr.P.C. stated about the incident thereafter on 15.02.2007 i.e. after about a year, all of sudden during cross-examination, he deposed that his earlier statements were given by him under pressure , appellant and he himself had not taken the

deceased on the date of incident. From his aforesaid evidence, it is apparent that he himself filed applications for making him approvar in the case and made statements about the incident u/S 307 of Cr.P.C. His inconsistent statements and silence during examination by the court in itself sufficient to draw an inference that he changed his earlier version and was probably win over by the appellant. In these circumstances, his earlier whole statements made u/S 307 of Cr.P.C. cannot be said to be washed off and can very well be taken into consideration as corroborative piece of evidence.

19. Mukesh (PW-1) in his statement recorded u/S 307 of Cr.P.C. deposed that on the date of incident appellant took him as well as decesed near *Kala ghoda* where appellant and deceased consumed liquor thereafter, appellant took him and deceased near *Moretaka bridge*, sent him for bringing *prashad* and when he returned back, he found deceased missing. On being asked, appellant told him that he threw the deceased into the river. As he himself deposed that on the date of incident, he was with the appellant when he took the deceased on his motorcycle and it has already been found established from the statements of complainant Satyanarayan

(PW-1) supported by the statements of not only prosecution witnesses Bali alias Mahesh (PW-3), Manoj (PW-4), Rajesh(PW-7), Shyam Sharma(PW-8), Rakesh (PW-11), Kaliash alias Pappu(PW-12) , but also by the statements of accomplice witness Mukesh (PW-1) and also by the missing person's report (Ex. P-11) lodged on the date of incident and written complaint (Ex. P-1) and FIR (Ex. P-2) lodged on next day of the incident that on the date of incident at about 9:30 -10:30 p.m., appellant alongwith co-accused took the deceased on his motorcycle whereafter deceased did not return. In aforesaid circumstances, there is no reasons to disbelieve the statement made by Mukesh (PW-1) that on the date of incident, he saw the appellant with the deceased alive together near *Mortaka Bridge* and appellant and deceased were seen together alive there also.

20. Complainant Satyanarayan (PW-2) deposed that on the date of incident, when his brother deceased did not return home next day morning, he asked appellant about the whereabouts of the deceased then appellant told him that he had dropped the deceased outside his house on the same night. Appellant neither in his statement recorded u/S 313 of Cr.P.C. nor anywhere has given any explanation as to when, where and how he parted

the company of the deceased. As he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In this regard observations made by Hon'ble the Apex Court in the case of ***State of Rajasthan Vs. Kashiram*** (supra) can be relied upon which are as follows:

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

succinctly stated in Re. Naina Mohd. AIR 1960 Madras, 218.

21. In *State of Rajasthan Vs. Thakur Singh (2014) 12 SCC 211* , Hon'ble the Apex Court reiterated the principle that burden of proving guilt of the accused is on the prosecution, but there may be certain facts pertaining to a crime that can be known only to an accused, the Court held as under:

22. The law, therefore, is quite well settled that the burden of proving the guilt of an accused is on the prosecution, but there may be certain facts pertaining to a crime that can be known only to the accused, or are virtually impossible for the prosecution to prove. These facts need to be explained by the accused and if he does not do so, then it is a strong circumstance pointing to his guilt based on those facts.

22. In the instant case, since on the date of incident, deceased was last seen together alive with the appellant at Jai Bhawani Nagar Square and also near *Mortaka bridge* constructed over Narmada River and thereafter deceased was not seen. Therefore, the facts relevant to the missing of the deceased being known only to the appellant yet he did not give any explanation and chose not to disclose anything. Hence, a very strong presumption is made out against the appellant that deceased was

murdered by him.

23. Facts of the case Malaichamy & Another (supra) cited by the learned counsel for the appellant are entirely different from the facts of the instant case as in the above case witnesses of last seen circumstance gave their statements after about a week and they even did not depose that they saw the victim in the company of the accused persons. In the instant case appellant's name was mentioned in the missing persons report (Ex. P-11A) lodged on the next day of the incident and also in written complaint dated 05.10.2005 (Ex. P-1) and in the FIR (Ex. P-2) lodged on the basis of above written complaint. Statements of almost all the last seen witnesses u/S 161 of Cr.P.C. were recorded on fourth day i.e. on 06.10.2005 hence aforesaid judgment cited by the learned counsel for the appellant is of no assistance.

24. It has been argued on behalf of the appellant as the dead body of the deceased has not been recovered, therefore it cannot be said that deceased was subjected to homicidal death and was murdered. From the statements of ASI P.S. Chouhan(PW-14) and S.I. Ashok Rangshahi(PW-15), it is true that in the instant case inspite of repeated searches made by

them as per search memo (Ex.P-9, 14,17 & 18), deceased's dead body could not be recovered. But as held by Hon'ble the Apex Court in the case of ***Sanjay Rajak Vs. The State of Bihar***(Supra) and also in the case of ***Ramanand & ors Vs. State of Himachal Pradesh*** [1981 AIR 738] that in a murder case, it is not necessary that body of the victim should be found and identified i.e. conviction for offence of murder does not necessarily depend upon *corpus delicti* being found. Relevant paras are as follows:

27.....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.

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, 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 homicidal death of the victim must be adduced by the prosecution. Such proof may be by the direct ocular account of an eye-witness, 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, 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, irresistibly 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.

25. In the present case, in order to prove deceased's homicidal death, prosecution has recovered a silver chain and a pearl necklace said to be worn by the deceased at the time of incident on the instance of appellant . As the aforesaid articles were seized from an open place and none of the prosecution witness neither in his statement recorded u/S 161 of Cr.P.C.

nor in his statement recorded during trial has stated that deceased had worn aforesaid chains at the time when he went with the appellant and co-accused, therefore, this fact appears doubtful that aforesaid articles were seized from the possession of the appellant and the same were worn by the deceased at the time of incident as held by the Apex Court in the case of Mohd Younus Ali Tarafdar Vs. State of West Bengal(supra) cited by the learned counsel for the appellant.

26. Prosecution has also recovered a clutch wire and nylon rope as the articles used in the crime on the instance of the appellant from his possession but there is nothing on record which could connect the same with the crime therefore the same are also of no relevance as held by Hon'ble the Apex Court in the case of Basheer Begum Vs. Mohammad Ibrahim and Others(supra) cited by the learned counsel for the appellant.

27. So far as the appellant's extrajudicial confession made before accomplice witness Mukesh (PW-1) and deceased's wife Babita (PW-6) is concerned, both the above witnesses have supported the prosecution case. Babita(PW-6) deposed that on the next day of the incident when she was at her parental house, appellant told her that he threw her husband deceased

into the river and murdered him. It has been argued on behalf of the appellant that Babita did not disclose the aforesaid facts till recording of her statement u/S 161 of Cr.P.C. i.e. till 07.10.2005, therefore the same cannot be relied upon. This fact has not been challenged that at the time of incident Babita (PW-6) was at her paternal house and she returned to her in-laws house after lodging of the report. Admittedly, her marriage was solemnized 4-5 months back before the incident therefore her conduct with regard to not disclosing the aforesaid fact cannot be said to be unnatural. She disclosed the aforesaid facts to the police when her statements were recorded u/S 161 of Cr.P.C. Her aforesaid statements are supported by the statements of accomplice witness Mukesh (PW-1) whose statement can very well be used as corroborative piece of evidence as held earlier. Appellant has not given any explanation as to when, where and how, he parted the company of the deceased therefore learned trial Court has not committed any error in holding this fact as proved that deceased was subjected to homicidal death and was murdered by the appellant.

28. In view of the aforesaid discussion, prosecution has succeeded in proving the fact that appellant having motive to commit murder of the

deceased, took him on his motorcycle with the help of co-accused and was last seen together with the deceased alive and committed his murder by throwing him in the river. Hence, the circumstances proved are unerringly pointing towards guilt of the appellant and we found no fault in the impugned judgment of conviction and order of sentence passed by learned trial Court. There is no merit in the appeal. Thus, the appeal is liable to be dismissed.

29. In view of aforesaid discussions, the impugned judgment of conviction and order of sentence passed by learned trial Court is hereby affirmed. This appeal filed on behalf of the appellant is hereby dismissed.

The Registry is directed to send back the Trial Court record forthwith alongwith copy of this judgment. Let a copy of this order be also sent to the concerned jail authorities for its speedy compliance and necessary action.

(Subodh Abhyankar)
Judge
24.06.2022

(Satyendra Kumar Singh)
Judge
24 .06.2022