*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on: 20.03.2024
Judgment delivered on: 16.04.2024

\+ CRL.A. 304/2002
VIDESHI KUMAR ..... Appellant

VERSUS

STATE ..... Respondent

CRL.A. 421/2002

RAM NATH ..... Appellant

VERSUS

STATE ..... Respondent

Advocates who appeared in this case:

For the Appellants: Mr. Abhimanyu Sharma, Advocate (Through V.C.) in CRL. A. 304/2002
Ms. Sudesh Kumar Jethwa, Amicus Curiae in CRL.A. 421/2002

For the Respondent: Mr. Tarang Srivastava, APP for the State with Inspr. Yakub Khan, ATO/NDPS

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT
HON'BLE MR. JUSTICE MANOJ JAIN

JUDGMENT

MANOJ JAIN, J

1. Both the above appellants i.e. appellant Ram Nath and appellant Videshi Kumar have challenged their conviction and consequent order on

sentence[1] whereby they both have been held guilty for committing murder of Tuntun.

2. Since both the appellants were charged and tried together and have been held guilty vide common judgment and since in the present two appeals also, they both have taken similar contentions, we intend to dispose of both the appeals by this common judgment.

3. Investigation took off when on 31.07.1997 at about 8.35 AM, Key Man Tej Bahadur (PW8) informed the local police that body of a person, run over by the train, had been lying on EMU track. On the basis of such information, ASI Hazari Lal (PW12) along with police team rushed to the spot where they saw dead body of a male of 20-22 years lying on Railway track having two sharp cuts on the neck. The right ear of such person was found to be missing. The left hand was lying severed at some distance. Blood was noticed in the bushes situated at a distance of five steps from the dead body and one blood-smeared vegetable-cutting knife was also recovered. Severed hand was found lying at a distance of 195 steps away in the Southern direction. The driving licence contained in his wallet led to his identity and the name of the deceased was ascertained as Tuntun. Police was of the view that somebody had killed him with knife and thereafter the perpetrator, with the intention of

[1] Order of conviction dated 19.10.2001 & order on sentence dated 22.10.2001 passed in case FIR No. 496/97 PS N.D.L.S.

screening himself and to destroy the evidence, put the dead body on the railway track in order to give it a colour of train-accident and, therefore, case under Section 302/201 IPC was registered.

4. During investigation, police came across four material witnesses viz. Bodhan Manjhi (PW17), Gannauri (PW16), Ashok Singh (PW9) and Gul Shekhar (PW25) and their statements indicated that on the night intervening 30.07.1997 and 31.07.1997, deceased was last seen with both the accused persons (appellants herein) and they all had consumed liquor in the jhuggi of Gannauri and Bodhan Manjhi. It also came to fore that Tuntun was employed as labourer by Sardar Bhole (PW21) and accused Ram Nath was employed as driver and on the fateful night, Tuntun and both the accused came to jhuggi of Bodhan Manjhi and Gannauri. They all consumed liquor. Thereafter, Tuntun asked Bodhan and Gannauri to prepare meat and told them that they would return in a short while. Tuntun and both the accused left the jhuggi at about 7.00-8.00 PM but that they did not return. Ashok Singh (PW9) also corroborated the aforesaid version and claimed that in the night of 30.07.1997, when he was coming from the side of Gurudwara Nizamuddin in search of his brother Subodh Singh, he saw Tuntun and both the accused in an inebriated state and going towards Garbage dump (*Kura Mitti*).

5. Both the accused were eventually apprehended and their bloodstained clothes were also recovered and seized.

6. Autopsy report confirmed that two of the injuries on the neck i.e. injury no.1 and injury no. 2 were ante-mortem in nature which had been caused by a sharp-edged weapon. Injury no. 3 was opined as post-mortem in nature which was possible after being running over by a train. According to the autopsy surgeon, death was haemorrhagic shock consequent to injury no. 1 which was sufficient to cause death in the ordinary course of nature.

7. It was in the aforesaid backdrop that both the accused persons were sent up to face trial for commission of offences under Sections 302/201/34 IPC.

8. Both the accused/appellants were charged for said offences. They both pleaded not guilty and claimed trial.

9. Prosecution examined twenty-seven witnesses viz. PW1 HC Hari Shanker (Photographer of crime team), PW2 Insp. Devender Singh (Draftsman), PW3 Ashok Yadav (who identified the dead body of deceased), PW4 Ct. Ramesh Chand (who got pullandas after post mortem), PW5 HC Sant Raj (duty officer), PW6 Dr. Ashok Jaiswal (autopsy surgeon), PW7 R.S. Chahar, Assistant Station Master (who informed the police about lying of dead body on the Railway track), PW8 Tej Bahadur Singh (Key-man who had first seen the dead body lying on the Railway track), PW9 Ashok Singh (last seen witness), PW10 Ct. Kaushal Pratap (police official who accompanied the IO to the spot),

PW11 Gyanender @ Gyane (landlord of accused Ram Nath), PW12 ASI Hazari Lal (first IO), PW13 Ct. Ram Naresh (police official who deposited the exhibits with FSL), PW14 ASI Mangej Singh, PW15 Babli (for proving motive), PW16 Gannauri (last seen witness), PW17 Bodhan Manjhi (last seen witness), PW18 Vinod Singh (real brother of deceased), PW19 Ct. Ram Abhilash (police official who accompanied the first IO to the spot), PW20 HC Jeet Singh (MHCM), PW21 Kujender Singh (employer of deceased Tuntun), PW22 HC Baldev Raj (duty officer of PS N.D.L.S), PW23 Insp. Ved Prakash (SHO), PW24 SI Rohtash Singh, PW25 Gul Shekhar (last seen witness), PW26 Lal Bahadur (husband of Babli), PW27 Insp. Karam Chand (IO).

10. Both the accused, in their statements under Section 313 Cr.P.C., pleaded innocence and claimed that they had been falsely implicated. They denied that they had consumed liquor with Gannauri, Bodhan and Tuntun. As far as accused Ram Nath is concerned, he did admit that he was working as driver with PW21 Sardar Kujender Singh and used to drive his truck but he claimed that he did not know Tuntun. As far as accused Videshi is concerned, he claimed that he had no concern with Tuntun or for that matter his co-accused Ram Nath and he never met Gannauri, Bodhan and Ashok. Thus, they both claimed that they had been falsely implicated in the matter and had no concern with the murder in question.

11. Fact, however, remains that they did not lead any evidence in defence.

12. Learned Trial Court, while returning the finding of guilt, observed that fate of the case was largely dependent upon circumstantial evidence as the deceased was last seen by the witnesses in the company of both the accused on the night intervening 30.07.1997 and 31.07.1997 and that such aspect of last seen could not be dislodged. Learned Trial Court also relied upon the factum of recovery of bloodstained clothes and the report of Forensic Science Laboratory (FSL). Despite hostile testimony of PW15 Babli, learned Trial Court came to the conclusion that it was crystal clear that there was reason and motive behind the murder in question. Learned Trial Court also held that knife, which had been seized from the spot stood connected with the murder in question and accused could not explain about blood on their clothes. It also held that the circumstances were suggestive of the fact that accused had thrown or placed the dead body on the Railway track so as to make it appear a case of Railway accident in order to screen themselves from the legal punishment. Resultantly, both the accused were held guilty for all the offences and were sentenced.[2]

[2] Both sentenced to undergo life imprisonment for offence under Section 302/34 IPC with fine of Rs. 2,000/- and in-default of payment of fine, SI for three months and rigorous imprisonment for two years with fine of Rs. 500/- in default of payment of fine, simple imprisonment for one month for offence under Section 201/34 IPC. Substantive sentences to run concurrently.

13. Learned counsel for appellants have assailed the conviction, *inter alia*, on following grounds: -

(i) The alleged circumstance of "last seen together" is not at all inspiring and trustworthy as the material witnesses have not corroborated one another on material aspects.

(ii) Even otherwise the conviction is not sustainable merely on the basis of last seen evidence which is a very weak circumstance.

(iii) When the fate is dependent upon the circumstantial evidence only, it is the bounden duty of prosecution to prove the motive behind the alleged murder whereas herein, the prosecution has miserably failed to prove the same.

(iv) There is not enough clarity with respect to the type of knife – whether it was sharp-edged from one side or both sides. There is no explanation as to why no fingerprints could be lifted from such knife and, therefore, knife does not stand connected either with the murder in question or with the accused.

(v) There is time-gap between the time when the accused were allegedly seen together with the deceased and recovery of dead body which itself creates a doubt in the veracity of the case of prosecution.

(vi) There is no explanation as to why the alleged bloodstained clothes were not seized immediately. Moreover, no necessity was felt of ascertaining the blood sample of the accused in order to rule out that the bloodstains on the clothes of accused Ram Nath were not of his own blood.

(vii) Learned Trial Court did not appreciate the fact that one of the alleged key-witness of last seen circumstance had turned hostile.

(viii) As per alleged last seen theory, deceased was in inebriated state but concerned doctor, who had conducted the autopsy, did not find any evidence of consumption of alcohol. There is no viscera report to corroborate the same.

(ix) If the appellants were smart and clever enough and wanted to give the colour of train accident to a murder committed by them, they would not have dared to leave the alleged weapon of offence at the spot and would not have come to police station while wearing bloodstained clothes. Moreover, there is nothing which may indicate that they had ever fled away and, therefore, it is a clear case of false implication.

14. Since, essentially, the present case is based on circumstantial evidence, the following five golden principles known as *Panchsheel* in a case based on circumstantial evidence are required to be kept in mind:-

1. *The circumstances from which the conclusion of guilt is to be drawn should be fully established;*
2. *The facts so established should be consistent with the hypothesis of guilt and 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.*

15. Thus, in a case based on circumstantial evidence, there is no room for any missing link though it is not required that each such link must appear on the surface of the evidence as some of links can also be inferred automatically from the proven facts. Circumstantial evidence, in order to furnish basis for conviction, requires sufficiently high degree of

probability, clearly and discernibly, pinpointing that such accused is the perpetrator of the crime, and no one else.

16. Motive, in a case of murder based on direct evidence, is of little importance but if the case is based on circumstantial evidence, then motive assumes larger proportion. In *Tarseem Kumar V. Delhi Admn, 1995 CRI. L. J. 470*, Hon'ble Supreme Court has observed as under:-

> *"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."*

17. Thus, if prosecution fails to prove motive in a case based on circumstantial evidence, it would be a sort of advantage defence.

18. We also note that the crucial circumstance, and to some extent the sole governing circumstance, in the case in hand is that of last seen together. Theory of 'last seen together' comes into play where two persons are 'seen together' alive and after an interval of time, one of them is found alive and the other dead. If the period between the two is short, presumption as to the person alive being the author of death of the other can be drawn. Nevertheless, the time gap should be such as to rule out possibility of somebody else committing the crime.

19. Let's now see as to what are the circumstances on which the prosecution had built up its case. These can be culled out as under:-

(i) The most crucial circumstance is that of "last seen together". According to prosecution both the accused were seen together with the deceased at around 8-9 pm on the night intervening 30th and 31st July, 1997 and the dead body was eventually recovered at about 8:35 am on 31.07.1997 and on account of the proximity of the timing and the place, it becomes a crucial circumstance as the accused have also failed to give any explanation as to what happened thereafter.

(ii) The post-crime conduct of the accused goes against them.

(iii) When the accused were apprehended on 03.08.1997, the bloodstained clothes of accused Ram Nath were recovered and as per the forensic report, bloodstains on his such shirt matched with the blood group of deceased which suggests his direct complicity.

(iv) The weapon of offence i.e. knife was found smeared with blood and such blood was also carrying bloodstains of deceased.

(v) Last but not the least, there was motive to commit murder as accused Ram Nath was having illicit relationship with Babli. Tuntun (deceased herein) had come to know about such relationship and, therefore, he was killed by the accused.

20. We shall not mince any word in observing that none of the above circumstances have been proved by the prosecution in the desired manner.

21. Let us first take the aspect of motive.

22. If we have been able to understand the case of prosecution properly, accused Ram Nath was having illicit relationship with Babli (PW15) and he and his co-accused killed Tuntun as he (Tuntun) had learnt about such affair.

23. Fact, however, remains that Babli (PW15) has turned hostile and has not supported the case of the prosecution and, therefore, the aspect of motive does not stand proved in any manner.

24. On careful perusal of the case of prosecution, we also could sense that both these accused had been arrested in two other cases of murder and the victims therein were of the same vicinity.

25. Said two cases and the present one seem intrinsically interwoven.

26. Interestingly, victim in one such case is Raju, who is son of said Babli and in the other case also, the victim is one Shambhu who also seems to be her relative.

27. Both these victims were also allegedly eliminated by the accused persons as they too had learnt about above illicit relationship. Since these aspects were not very clearly brought on record either by the public witnesses or by the Investigating Officer and the learned trial court also did not take the same into account, we, in order to have our complete satisfaction, requested learned prosecutor to apprise this Court about the fate of said two cases.

28. Sh. Tarang Srivastava, learned Addl. P.P. for the State submitted, through Court Master, the certified copies of the judgment given in those two cases.

29. FIR No.508/1997 PS Hazrat Nizamuddin pertained to murder of Raju. The case related to murder of Shambhu is FIR No.510/1997, PS Hazrat Nizamuddin and the complainant is none other than Lal Bahadur (PW26 herein).

30. Raju was missing from 16.07.1997 and Shambhu was missing from night intervening 18.07.1997 and 19.07.1997. They both were also residents of the same area and they were also allegedly murdered by accused for the same reason.

31. Certified copies of the judgments given in those two cases brought to fore one enthralling coincidence. In both the aforesaid cases, besides both the present accused, even Babli (PW15 herein) was arrested as co-accused and she also faced trial in said cases. Curiously, those two cases were also based upon the circumstance of last-seen. Prosecution failed to prove the aforesaid circumstance of last-seen in both the above cases and resultantly, those cases resulted in acquittal**.** We feel that such important aspect, key witness Babli, who was to prove aspect of motive, being a co-accused in the above said two cases, should have been part of the present trial.

32. Be that as it may, it is quite obvious from the testimony of Babli (PW15) that the motive has not been proved in any manner whatsoever. Babli (PW15) has categorically deposed that she did not know Tuntun and she did not know any of the accused. She also claimed that she had no illicit relationship with any person. Despite the fact that she was cross-examined by the prosecution with the permission of the Court, she remained unyielding in her such stand. In her cross-examination, she though claimed that Tuntun had informed her that Raju had been

murdered by Videshi and Ram Nath and, therefore, a quarrel had taken place between Tuntun and said two accused and on the same night, Tuntun had been murdered. Be that as it may, her such deposition does not establish the motive in view of what she claimed in her examination-in-chief. She denied that accused ever used to visit her house. Also denied that she was in any kind of illicit relationship with the accused Ram Nath. If at all, she felt that the accused were behind murder of her own son, she would have said so in the present case where she was merely to depose as a witness. However, her testimony does not help prosecution at all.

33. Lal Bahadur (PW26) is husband of Babli and his testimony is also conspicuously silent qua the motive aspect. If Lal Bahadur (PW26) is to be believed then on 19.07.1997 when they found Shambhu to be missing they had gone to police station where they were told that Shambhu as well as Raju had been murdered by accused Ram Nath and Videshi.

34. This is the puzzling as nobody knows as to on what basis, Lal Bahadur (PW26) learnt about said fact on 19.07.1997 itself.

35. In order to find out the aspect related to motive, we have also evaluated testimony of Ashok (PW3) (brother of deceased) and Kujender Singh (PW21) (employer of Tuntun) but even their testimony does not come to the rescue of prosecution.

36. Gyanender @ Gyane (PW11) who happens to be the landlord of the jhuggi of accused Ram Nath has also categorically claimed that he did not know anything about any relationship between Ram Nath and Babli and therefore, the aspect of motive does not stand proved in any manner whatsoever. He does not know anything about the case or about the murder of Tuntun or Raju or Shambhu so much so he does not even know whether accused Videshi was also residing with accused Ram Nath.

37. Thus, the motive aspect has not been proved in the desired manner. In a criminal trial, it cannot be assumed on the basis of some guesswork or estimation.

38. Coming to the aspect of recovery of knife, we have no hesitation in holding that it does not stand connected to the accused and, therefore, it cannot be taken as a circumstance against the accused. It was never recovered from the possession or at the instance of accused. Rather it was found lying near the dead body.

39. Curiously enough, on one hand, the prosecution has alleged that the accused persons were very clever and guileful and in order to screen themselves from legal punishment, they had thrown the dead body on railway track to portray it to be a case of a train-accident and on the other hand, they were fool enough that after committing the alleged murder, they would leave the weapon of offence at the spot. This paradox is not

digestible. Secondly, no chance prints seem to have been collected from the knife and, therefore, it is not explained by the prosecution as to on what basis they were connecting the knife with the accused. Thirdly and most importantly, such knife Ex. P1 was seized vide Memo Ex. PW8/H and as per said Memo, the knife was having only one side sharp edge. The knife was seized in the presence of Tej Bahadur (PW8) and according to his deposition also, the knife was sharp from one end only. However, when the same knife was examined by the Autopsy Surgeon and when he entered into witness box, in his cross-examination he created a flutter by claiming that such knife was sharp from both the ends.

40. Thus, there is not enough of clarity about the type of knife. Moreover, the knife was neither recovered from the possession of accused nor at the instance of accused and therefore, it cannot be taken as a circumstance against the accused.

41. As regards the post-crime conduct, again, there is nothing which may suggest that the accused had absconded. Even the learned Trial Court had observed in its judgment that they had never absconded and were rather arrested from their respective jhuggis.

42. This leaves us with the remaining two circumstances, i.e., “last scene together” and “recovery of bloodstained clothes”.

43. As regards "last scene", there are four prosecution witnesses, i.e. Bodhan Manjhi (PW17), Gannauri (PW16), Ashok Singh (PW9) and Gul Sheikhar (PW25). If we read the statements made by these witnesses before the Police then it would emerge that on the night intervening 30.07.1997 and 31.07.1997, both the accused and the deceased were with Bodhan Manjhi (PW17) and Gannauri (PW16). They all consumed alcohol and thereafter they left jhuggi at about 7-8 pm claiming that they would return in a short while. Thereafter, they seem to have met Ashok Singh (PW9) between 8 to 9 pm and also met Gul Sheikhar (PW25) between 8:30 to 9 pm.

44. We have carefully analyzed the testimony of all these four witnesses.

45. As already noticed by the learned Trial Court, one such important last seen witness, i.e, Gul Sheikhar (PW25) has not supported the case of prosecution. He claimed that he did not know accused and Tuntun. He also denied that Tuntun had come with the accused that night and had consumed liquor.

46. On careful analysis of testimony of Gannauri (PW16) and Bodhan Manjhi (PW17), we are of the view that their testimony is also not inspiring enough.

47. First of all, it is not clear as to where they had consumed liquor.

48. If Gannauri (PW16) is to be believed then Bodhan Manjhi (PW17), who was his cousin, was also residing with him in his jhuggi. Thus, Bodhan had no separate jhuggi. In his cross examination, Gannauri seemed confused and gave contradictory answers by claiming that their jhuggis were combined and then claiming these to be separate. He deposed in his examination-in-chief that liquor was consumed in his jhuggi but in cross took divergent stand, claiming that it was consumed in the jhuggi of Bodhan. Bodhan Manjhi (PW17) has claimed that he was residing at separate jhuggi, which was at a distance of 50 yards. He claimed that on 30.07.1997, both the accused and Tuntun came to his jhuggi at about 7:00 am (sic) and at that time Gannauri (PW16) was also present in his jhuggi. He claimed that they all consumed country-made liquor at his jhuggi. As noticed above, according to Gannauri (PW16), the accused, deceased and Bodhan had rather come to his jhuggi (jhuggi of Gannauri) and liquor was consumed at his jhuggi. Thus, there is not enough of clarity whether Gannauri and Bodhan were having separate jhuggis or whether they were residing together. It is also not clear as in whose jhuggi, they had consumed liquor.

49. As per Gannauri (PW16) and Bodhan Manjhi (PW17), both the accused and Tuntun left claiming that they would return after some time and asked them to prepare meat but they did not return.

50. We take a little pause here.

51. If, at all, they had consumed liquor together and both the accused and Tuntun had asked them to wait for them so that they take meals together and later on, when they did not return that night, Bodhan and Gannauri remained absolutely unperturbed, unmoved and unruffled. They did not feel or sense anything unusual despite the fact that none of them returned, whole night. Any other person, in their place, would have surely tried to find out as to where had they vanished. However, their non-return did not upset Gannauri (PW16) and Bodhan Manjhi (PW17). They never bothered to find them out. They never bothered to report police about the said fact.

52. This becomes important because if Bodhan Manjhi (PW17) is to be believed, he categorically claimed that the next day, i.e. on 31.07.1997, he learnt that Tuntun had been murdered. If he had come to know the same, he should have, himself, contacted the police on 31.07.1997 itself. However, he remained tight-lipped mum and did not report anything to the police. Surprisingly, it was the police which contacted him on 02.08.1997. It is mystifying as to how police had been able to reach Bodhan and Gannauri. No light has been thrown as to what made the police to believe that they were holding vital information with them. We need not reiterate that it is not the case of the prosecution that Bodhan and Gannauri had themselves gone to the police station on 02.08.1997 as rather, as per admitted case of prosecution, it was the police who had called them. The basis thereof, however, remains unknown.

53. Bodhan Manjhi (PW17) also deposed in the witness box that he saw the dead body of Tuntun after two days at Hazrat Nizamuddin Railway Station. This fact is not believable as the body had already been sent to mortuary of Sabzi Mandi, same night for preservation and autopsy.

54. As per the case of the prosecution, both the accused were arrested on 03.08.1997, however, there is a serious infirmity and anomaly about said fact as well as according to Gannauri (PW16), who is a key witness for prosecution, the police had caught accused persons on 02.08.1997 itself in the evening. This is, obviously, not in consonance with the case of prosecution and, therefore, brings the element of uncertainty in the case of prosecution.

55. The testimony of Ashok Singh (PW9) also does not evoke much confidence.

56. He claimed that he was searching for his brother Subodh Singh and met both the accused and Tuntun. He inquired about Subodh Singh from them. He also learnt about the murder of Tuntun on the next day itself but for the reason best known to him, he also does not approach the police and it is also equally mystifying as to how the police reached him. If at all his brother Subodh was missing and he was searching for him, he would have certainly lodged some kind of report with police but there is nothing to corroborate the same. Rather according to him, his brother

came back next morning. Since his brother also remained missing same night the murder had taken place, it would have been appropriate had the police contacted Subodh Singh and had recorded his statement as well but nothing of that sort was attempted.

57. To add to the miseries, the police has not prepared any site plan depicting the place where the accused were last seen together with the deceased and the place of recovery of dead body. This important detail cannot be left for imagination. Be that as it may, the aspect of 'last seen together' does not stand proved conclusively. Moreover, it is weak kind of evidence which can never be said to be sufficient in itself for holding someone guilty, particularly when motive is also not proved.

58. The next crucial circumstance is the recovery of bloodstained clothes of accused Ram Nath.

59. This, also, is not believable for multiple reasons.

60. Firstly, it is not clear as to when the accused were apprehended for the first time – whether on 02.08.1997 or 03.08.1997. Secondly, if the landlord of accused Ram Nath is to be believed then though Ram Nath was his tenant but he had not been coming to the tenanted property for last more than 2-3 months. This is, on the face of it, bewildering and to make things worse, there was never any attempt from prosecution to controvert said fact or to seek clarification from him in this regard. The

clothes of accused Ram Nath were seized vide Memo Ex.PW9/A. It comprised one shirt of white colour having stripes and one grey (*sleti*) colour trouser. It would have been appropriate if before carrying out such search and seizure, the residents of the locality had been requested to join the investigation. Though, the recovery was effected in the presence of Ashok Singh (PW9) but he is not clear whether the shirt was having stripes or check.

61. The prosecution also heavily relied upon the report of Forensic Science Laboratory which has been proved as Ex. PX and Ex.PY. It was tendered in evidence by the concerned Investigating Officer. Though, we can understand that any such report is *per se* admissible in evidence in view of Section 293 of Cr.P.C. if the same is issued by the Government Scientific expert specified under Section 293(4) Cr.P.C., it, being such a vital piece of evidence and the case being purely based on several circumstances, the learned trial court should have rather used its powers under Section 293(2) Cr.P.C. and should have summoned the concerned expert. This would have also eliminated the element of any kind of prejudice from the side of defence. These reports were, merely, tendered in evidence by the Investigating Officer. It would have been certainly better had the concerned expert been summoned for proving the aforesaid report in accordance with law.

62. More importantly, as per such report, human blood 'A' group was noticed on three exhibits i.e. stone piece, knife and one shirt, which is claimed to be of accused Ram Nath. The ideal scenario would have been to, also, take blood sample of accused Ram Nath because if the blood group of accused Ram Nath is also the same, then prosecution may not be in any position to draw any advantage. However, if it was of different group, then, accused would have been under obvious obligation to explain as to why human blood of a different group finds place on his shirt. Moreover, the blood group of deceased has also been assumed to be 'A' merely on the basis of the blood on knife and stone. The bloodstained gauze cloth piece did not give any reaction. Be that as it may, in view of the aforesaid and keeping in mind the fact that it is a case purely dependent upon circumstances, the aforesaid FSL report does not help the case of prosecution. As already noticed, there is uncertainty about the type of knife – whether it was having single sharp edge or both the end were sharp.

63. In *R. Sreenivasa Versus State of Karnataka 2023 SCC OnLine SC1132*, Apex Court, while dealing with the evidentiary value of last seen together observed as under:-

> *"15. The burden on the accused would, therefore, kick in, only when the last seen theory is established. In the instant case, at the cost of repetition, that itself is in doubt. This is borne out from subsequent decisions of this Court, which we would advert to:*

(a) *Kanhaiya Lal* v. *State of Rajasthan*, (2014) 4 SCC 715, where it was noted:

> *'12. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant.'*
>
> (emphasis supplied)

(b) *Nizam* v. *State of Rajasthan*, (2016) 1 SCC 550, the relevant discussion contained at Paragraphs 16-18, after noticing *Kashi Ram* (supra):

> '*16. In the light of the above, it is to be seen whether in the facts and circumstances of this case, the courts below were right in invoking the "last seen theory". From the evidence discussed above, deceased Manoj allegedly left in the truck DL 1 GA 5943 on 23-1-2001. The body of deceased Manoj was recovered on 26-1-2001. The prosecution has contended that the accused persons were last seen with the deceased but the accused have not offered any plausible, cogent explanation as to what has happened to Manoj. Be it noted, that only if the prosecution has succeeded in proving the facts by definite evidence that the deceased was last seen alive in the company of the accused, a reasonable inference could be drawn against the accused and then only onus can be shifted on the accused under Section 106 of the Evidence Act.*
>
> *17. During their questioning under Section 313 CrPC, the appellant-accused denied Manoj having travelled in their Truck No. DL 1 GA 5943. As noticed earlier, the body of Manoj was recovered only on 26-1-2001 after three days. The gap between the time when Manoj is alleged to have left in Truck No. DL 1 GA 5943 and the recovery of the body is not so small, to draw an inference against the appellants. At this juncture, yet another aspect emerging*

from the evidence needs to be noted. From the statement made by Shahzad Khan (PW 4) the internal organ (penis) of the deceased was tied with rope and blood was oozing out from his nostrils. Maniya Village, the place where the body of Manoj was recovered is alleged to be a notable place for prostitution where people from different areas come for enjoyment.

18. In view of the time gap between Manoj being left in the truck and the recovery of the body and also the place and circumstances in which the body was recovered, possibility of others intervening cannot be ruled out. In the absence of definite evidence that the appellants and the deceased were last seen together and when the time gap is long, it would be dangerous to come to the conclusion that the appellants are responsible for the murder of Manoj and are guilty of committing murder of Manoj. Where time gap is long it would be unsafe to base the conviction on the "last seen theory"; it is safer to look for corroboration from other circumstances and evidence adduced by the prosecution. From the facts and evidence, we find no other corroborative piece of evidence corroborating the last seen theory.'

(emphasis Supplied)

16. The cautionary note sounded in *Nizam* (supra) is important. The 'last seen' theory can be invoked only when the same stands proved beyond reasonable doubt. A 3-Judge Bench in *Chotkau* v. *State of Uttar Pradesh*, (2023) 6 SCC 742 opined as under:

> *'15. It is needless to point out that for the prosecution to successfully invoke Section 106 of the Evidence Act, they must first establish that there was "any fact especially within the knowledge of the" appellant. …'*
>
> (emphasis supplied)

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

> *drawn is the guilt of the appellant. In Laxman Prasad v. State of Madhya Pradesh, (2023) 6 SCC 399, we had, upon considering Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116 and Shailendra Rajdev Pasvan v. State of Gujarat, (2020) 14 SCC 750, held that '... In a case of circumstantial evidence, the chain has to be complete in all respects so as to indicate the guilt of the accused and also exclude any other theory of the crime.' It would be unsafe to sustain the conviction of the appellant on such evidence, where the chain is clearly incomplete. That apart, the presumption of innocence is in favour of the accused and when doubts emanate, the benefit accrues to the accused, and not the prosecution. Reference can be made to Suresh Thipmppa Shetty v. State of Maharashtra, 2023 INSC 749*[4].

64. In *Nizam (supra),* it is observed by Supreme Court that undoubtedly, "last seen theory" is an important link in the chain of circumstances which would point towards the guilt of the accused with some certainty but also went on to observed that it was well-settled that it is not prudent to base the conviction solely on "last seen theory". "Last seen theory" should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.

65. In view of the forgoing discussion, we are of the view that it will not be safe to hold the accused guilty merely on the basis of the last seen together circumstance which is also not proved beyond shadow of doubt. Moreover, the accused and deceased were working together and in such a peculiar situation, their being together cannot be said to be unusual. In *Arun Shankar Vs. State of MP 2024 SCC OnLine SC 527*, the accused and deceased, being uncle and nephew, used to drink together and were

last seen together and Apex Court held that such last seen circumstance could not be taken as unusual circumstance, supplementing further that it was weak kind of evidence, in absence of motive. In the instant case, one such last seen witness is hostile and the testimony of others do not evoke confidence as they did not contact the police themselves. It is baffling as to how police contacted them. It is not clear as to when the accused were arrested. Learned trial court was also kept in dark about the other cases fastened upon accused, which murders had also been, allegedly, committed by them with the same objective. The motive, herein, is unclear and cannot be assumed from disclosure statements of accused, being inadmissible in evidence. There is no other connecting link or circumstance suggesting their complicity. There is no recovery at the instance of accused suggesting their involvement. Since the case was resting upon circumstantial evidence and since according to the prosecution, the accused were 'last seen together with the deceased' and thereafter his dead body was recovered next morning from the railway track, the Investigating agency should have prepared a site plan clearly pointing the places where they were seen together and the place from where the dead body was eventually recovered. Needless to emphasize, in such type of matters, the proximity between these two places is also of vital importance.

66. Ergo, we extend benefit of doubt to both the accused. Consequently, both the appeals are allowed and both the accused Videshi Kumar and Ram Nath stand acquitted of all charges leveled against them.

67. It is directed that the bail bonds submitted by them, when their sentence was suspended, shall remain valid for another period of six months from today in terms of Section 437-A Cr.P.C.

68. The present appeals are, accordingly, allowed and disposed of.

(MANOJ JAIN)
JUDGE

(SURESH KUMAR KAIT)
JUDGE

APRIL 16, 2024/*dr/st*