**A.F.R.**

**Reserved on 08.02.2022**

**Case :-** JAIL APPEAL No. - 116 of 2019

**Appellant :-** Chatthoo Chero

**Respondent :-** State of U.P.

**Counsel for Appellant :-** From Jail, Mohit Behari Mathur

**Counsel for Respondent :-** A.G.A.

**Hon'ble Suneet Kumar,J.**
**Hon'ble Dinesh Pathak, J.**

**Suneet Kumar, J.**

1. Heard Sri Mohit Behari Mathur, Amicus Curiae, for the appellant and learned A.G.A. for the State.

2. The instant appeal has been filed against the judgment and order dated 22.06.2019 passed by Additional Sessions Judge, Fast Track Court, Sonbhadra, in Sessions Trial No. 66 of 2014 (State Versus Chatthoo Chero) under section 302 I.P.C., convicting the appellant.

3. As per prosecution case, the appellant/complainant lodged F.I.R. being Case Crime No. 120 of 2014, under section 302 I.P.C. on 30.04.2014, at 10.05 a.m. alleging that as per usual routine the family after taking dinner retired to sleep. The wife of the complainant/deceased (Shakuntala Chero), aged about 42 years, alongwith infant child, aged about three years, went to sleep at the DHABA behind the house. The complainant and his other two sons and two daughters slept in the DHABA on the opposite side of the house. In the morning, his son Kamlesh went behind and saw his mother (deceased) lying dead on the cot; there was blood all over and he ran and informed the complainant.

4. It is alleged that some unknown person caused injury on the neck by a sharp weapon. The incident occurred in the night of 29/30.04.2014. The panchayatnama was conducted on the same day

commencing 11.10 a.m. The complainant is one of the witnesses to the Panchayatnama.

5. As per the opinion of the Panchayatnama witnesses, some unknown person caused injury on the neck by a 'tangi' (axe). The Station House Officer (SHO) Ravindra Bhushan Maurya alongwith two constables visited the site of the incident on 04.05.2014, he found the complainant present. On interrogation, the appellant/complainant confessed having committed the offence at about 3.00 a.m. in the morning of 30.04.2014 by Kulhari (axe) slaughtering the neck of his wife. The accused/complainant informed the Investigating Officer (I.O.) that he is prepared to recover the crime weapon which he had hidden nearby after the incident. Accordingly, the accused/appellant was taken into custody at 13.00 hours, the I.O. and other officials alongwith independent witnesses followed the accused who recovered the axe. Post Mortem on the body of the deceased was conducted on 01.05.2014 at 3.00 p.m. The injuries noted are as follows:-

**Anti-mortem injury**

1. lacerated wound 7 cm x 2 cm on left neck, depth 9 cm. and 6 cm. below the left ear; neck bone fracture;
2. urinary bladder empty, uterus empty; dal and rice 200 gm. was found in the stomach, body weight 50 kg, aged about 42 years;

6. Forensic lab report notes that human blood was found on axe (kulhari), Kathari (thick Blanket), cord of cot, blouse, broken piece of glass bangles.

7. The prosecution to prove the charge in all examined 11 witnesses, 7 witnesses of fact and rest formal witnesses. The documentary evidence relied upon by the prosecution is marked Ex.-Ka-1 to Ex.-Ka-8.

8. Rajpati (P.W.-1) aged about 22 years, daughter of appellant-accused, reiterated the F.I.R. version and stated that the incident is of

29/30.04.2014, she alongwith her sister (Savita) was sleeping in a room, in another room her mother along with her younger brother (Vimlesh) was sleeping which is on the rear of the building. Her father (accused) alongwith her two brothers Santosh and Kamlesh were sleeping at the Dhaba on the opposite side of the building. Her brother went to pick mahua in the morning. P.W.-1 further stated that she proceeded towards the hilly area for answering nature's call; after sometime, her sister and brother returned and they saw her mother lying on the cot, and blood on the floor. Some unknown person had caused injury on the neck with an axe. In cross-examination, she stated that she was unaware as to who caused the injury. She, however, stated that there was some quarrel with her neighbour Rajnath Bharti. She further stated that the door of the house was open being the month of summer.

9. Savita (P.W.-2) aged about 28 years, daughter of the appellant-accused stated that the incident had occurred two years earlier, it was summer month. She and her brother Kamlesh were sleeping with their father in open place in front of the house; her mother (deceased) and younger brother Vimlesh were sleeping at the rear portion of the house. Before sunrise, she and her brother Kamlesh went on the western side of the house to pick mahua; on return, she found the neck of her mother slit and there was blood everywhere; mother had died. She expressed her ignorance about the person who could have caused the injury. She was declared hostile. In cross-examination by the prosecution, she stated that some quarrel took place with Rajnath Bharti @ Raju, their neighbour.

10. Kamlesh (P.W.-3), aged about 15 years, son of appellant-accused, stated that he has two brothers and two sisters. He further stated that in the morning, he saw that his mother was lying dead; blood was flowing from her neck; the neck was cut; his father was also present. He further stated that it transpires that Raju had committed the offence; Raju is resident of the same village; wife of

Raju and his mother used to quarrel and fight; the family of Raju is involved in the crime. He further stated that his father has been falsely implicated and is in jail. In cross examination, he stated that his family lives together happily and there was no quarrel between his mother and father.

11. Santosh Kumar (P.W.-4), son of Nageshwar Vishwakarma, aged about 21 years an independent witness, stated that he knew the deceased and the appellant; she died at her home; he visited them in the morning and saw the deceased lying on the cot; neck was cut; on the floor there was pool of blood; axe was employed in causing the injury; the appellant was present at the house; he was not aware as to who could have caused the injury.

12. Anil Kumar (P.W.-5), independent witness, on hearing hue and cry, went to the house of the appellant; the deceased was lying dead in the house of the appellant; when he reached Santosh (P.W.-4) was present along with appellant/accused.

13. Jai Kumar (P.W.-6) stated that the appellant is his Mama, the deceased his Mami; on receiving information of the incident, he went to their house; body of the deceased was lying; Administration was present; he further stated that he saw that the neck of the deceased was cut; panchayatnama was prepared in his presence; the appellant was also present. Sharp weapon was employed in causing injury.

14. Asha (P.W.-7) wife of Jai Kumar, stated that the appellant is her Mamiya Sasur (Maternal Father-in-Law), she received information on mobile; she accompanied Jai Kumar (P.W.-6), on reaching the house of the appellant she saw the body of the deceased; appellant was present; she was not aware as to who caused the injury; she had signed the panchayatnama but was not aware what was written in the document.

15. The statements of the witnesses of fact and independent witnesses reflect:

(i) the deceased succumbed to homicidal death;

(ii) the incident occurred in the night between 29/30.04.2014;

(iii) appellant along with his family members were present in the premises;

(iv) the neck of the deceased was injured by a sharp weapon;

(v) no motive has been spelled rather the relation between the husband and wife was cordial;

(vi) the witnesses of fact suspected their neighbour;

16. Head Constable Radhey Shyam Maurya (P.W.-8) stated that he registered the F.I.R. on 30.04.2014 (Crime Case No. 120/2014) under section 302 I.P.C. on a written complaint of the appellant against unknown person. He prepared the chik F.I.R. The information was duly recorded at 10.15 a.m. In cross examination, he stated that F.I.R. was promptly registered; the appellant himself had delayed in informing the Thana.

17. S.O. Indra Bhan Singh Yadav (P.W.-9) claims to be the scribe of the report as informed by the appellant. After reducing the information in writing the appellant put his thumb impression. He also put his signature on the Tehrir (information). In cross-examination, he stated that he visited the site, the appellant is illiterate, therefore, on his request, he reduced the complaint to writing.

18. Dr. Sanjeev Verma (P.W.-10) deposed that he conducted the post-mortem on the body of the deceased on 01.05.20214 at 3.00 p.m.; deceased was aged about 42 years; rigor mortis was present; lacerated wound 7cm x 2cm on the left side of the neck, 9 cm in depth, 6 cm below the ear-neck bone fractured; sharp cut injury

found; time of death is approximately 36 hours earlier; cause of death is due to shock and haemorrhage resulting from excessive bleeding. In cross-examination, he stated that a single assault was caused; repeated assault was not made.

19. Inspector Ravindra Bhushan Maurya (P.W.-11) stated that he received the investigation of the crime on 30.04.2014 and on the said date the formalities i.e. copy of chik, copy of report, Panchayatnama, statement of appellant-complainant, inspection of site, collecting blood stained soil and plain soil, piece of Kathari (thick blanket) was done and statement of witnesses was recorded.

20. Investigating Officer, P.W.-11, further, deposed that he recorded the statement of the witnesses who informed that on 22.04.2014 appellant attempted to hang himself and his daughter was screaming; Santosh Kumar Vishwakarma (P.W.-4) and Anil (P.W.-5) persuaded the appellant to climb down the tree. The rope was removed from the neck of the appellant; appellant was taking the extreme measure as there was some dispute with his wife with regard to his earnings; wife was not returning Rs. 2,400/- and Rs. 1,500/- of his earnings; similar statement was recorded of P.W.-4 and P.W.-5 with regard to the incident of attempt to suicide. He further stated that Gauri Shanker Chero informed him that the appellant and his wife was not having cordial relationship. The appellant was a moody person; he attempted to commit suicide but was rescued by the villagers; the appellant could have done anything on not receiving his money from his wife; it can be said that appellant caused injury to his wife. Appellant could have caused injury under the influence of alcohol/ ganja.

21. P.W.-11 further stated that on 04.05.2014 supplementary statement of the appellant was recorded, he confessed commission of the offence stating that at about 3.00 a.m. between the night of 29/30.04.2014, he caused injury to his wife on the neck with an axe. The appellant was taken into custody, the crime weapon was recovered at his pointing out from the rear Dhaba hidden between the

wall and covered roof (Chhajan/Chhajja). Crime weapon was recovered in the presence of independent witnesses; the statement of the accused and other witnesses was videographed; some of the witnesses to the Panchayatnama (Ganga Yadav) stated that the appellant was habitual consumer of ganja; for quite some time accused was having strained relationship with his wife. Appellant confessed the commission of the crime. After investigation on 06.06.2014 charge-sheet was filed against the appellant under Section 302 IPC. He further stated that after confession and discovery of the crime weapon the appellant accused was formally arrested and brought to Thana at about 3.15 p.m.; the site plan was prepared; other recovered items like clothes etc. was sent to Forensic Science Laboratory (FSL) for examination. In cross-examination, he stated that the crime weapon was recovered after 5 days of the incident.

22. The appellant-accused on being confronted with the prosecution evidence and the incriminating documentary material, in statement under section 313 Cr.P.C. denied the charge stating that he has been falsely implicated; wrong investigation was done; a false charge-sheet was filed; recovery of crime weapon was wrongly proved. He further stated that he had not killed his wife; he has been implicated falsely; the entire trial is based on wrong and false documents. He declined to produce any evidence in defence.

23. The trial court on considering the statement of the witnesses of fact, the documentary evidence and the recovery of the crime weapon at the pointing out of the appellant from his house, the presence of human blood on the axe and the clothes and other accessories of the deceased, was of the opinion that the prosecution proved the charge beyond reasonable doubt. Accordingly, convicted and sentenced the accused for life.

24. On closely and carefully analysing the statement of the witnesses of the fact the following circumstance is duly proved:

i. that the deceased, wife of the appellant succumbed to injury caused on the left side of the neck by an axe;

ii. that her body was found in the room where she went to sleep along with her younger son;

iii. that the crime weapon (axe) was recovered on the information and pointing by the accused;

iv. that children, including, adult children (P.W.-1 and P.W.-2) of the deceased and her husband were present on the premises in the night of the incident between 29/30.04.2014;

v. that the cause of death by a sharp weapon has been duly proved by the medical expert opinion P.W.-10;

vi. FSL report shows presence of human blood on the axe.

25. The time of death as per the confessional statement of the accused (3.00 a.m.) corroborates with the medical expert opinion i.e. 36 hours prior to the post mortem.

26. The trial court convicted the appellant and held him guilty of the offence placing reliance on Section 106 of the Evidence Act. It is noted in the impugned judgment that since the offence was committed in secrecy within the house of the appellant and his presence at the relevant time is proved, the onus would shift upon the appellant to explain as to how the incident had occurred. Since no explanation was forth-coming in the statement of the appellant recorded under Section 313 Cr.P.C., the trial court convicted the appellant.

27. The burden not being discharged by the accused and no explanation given by him in Section 313 Cr.P.C. statement is concerned, it is trite law that only after the prosecution discharges its burden of proving the case beyond reasonable doubt, the burden would shift on the accused. It is not necessary to reiterate this proposition of law with authorities.

28. The fact that a defence may not have been taken by an accused under Section 313 Cr.P.C. again cannot absolve the prosecution from

proving its case beyond all reasonable doubt. If there are materials which the prosecution is unable to answer, the weakness in the defence taken cannot become the strength of the prosecution to claim that in the circumstances it was not required to prove anything.

29. In **Sunil Kundu v. State of Jharkhand**[1]**,** Supreme Court observed **:**

> *"28. ... When the prosecution is not able to prove its case beyond reasonable doubt it cannot take advantage of the fact that the accused have not been able to probabilise their defence. It is well settled that the prosecution must stand or fall on its own feet. It cannot draw support from the weakness of the case of the accused, if it has not proved its case beyond reasonable doubt."(**Refer: Anand Ramachandra Chougule v. Sidarai Laxman Chougala and others**[2]**)*

30. If an offence takes place inside the privacy of a house and in such circumstances where the assailant has all the opportunity to map and commit the offence at the time and in circumstances of his choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, is insisted upon by the Courts.

31. In such circumstances, in view of the Section 106 of the Evidence Act, there will be a corresponding burden on the appellant to give a cogent explanation as to how crime was committed. The corresponding burden would also be on the inmates of the house, as to how the crime was committed.

32. As pointed out that Section 106 of the Evidence Act, is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases where the prosecution has succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the court to draw a different inference.

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1. (2013) 4 SCC 422
2. 8(2019) 8 SCC 50

33. Similarly, in **Vikramjit Singh v. State of Punjab**[3] Supreme Court reiterated: (SCC p. 313, para 14)

> *"14. Section 106 of the Evidence Act does not relieve the prosecution to prove its case beyond all reasonable doubt. Only when the prosecution case has been proved the burden in regard to such facts which was within the special knowledge of the accused may be shifted to the accused for explaining the same. Of course, there are certain exceptions to the said rule e.g. where burden of proof may be imposed upon the accused by reason of a statute."*

34. The question that arises is as to whether prosecution was able to prove the incriminating circumstances beyond reasonable doubt. The prosecution case is based on circumstantial evidence. The homicidal death of the deceased had taken place in the room in which the appellant, admittedly, as per the testimony of the witnesses of fact, was not present at the time of occurrence. A close scrutiny of the cite plan shows that appellant alongwith his two children was sleeping at the southern end of the thatched house which is marked "C". Moving further immediately south of the building the daughter was sleeping at spot marked "B", further south of the premises is the thatched house and still further extreme south is an open space where goats are tied and beside it is a room where the deceased was found murdered on the cot. Further, south of the room is road followed by open land and a house. On East, West and North, the thatched house is surrounded with open land and towards extreme North the hilly area is depicted. The room where the body of the deceased was found is adjacent to a road; ingress to the room is through a single door from outside the building; the room is not connected through the house. The room where the accused was sleeping and the room where the deceased was sleeping is not interconnected through the thatched house. The accused would have to cover the distance from outside the house i.e. through the open land to reach the room of the deceased. As per the cite plan, room of the deceased was accessible to any person being adjacent to the road and surrounded by open land; the door opens to the surrounding open land. Further, the prosecution evidence shows

3. [(2006) 12 SCC 306 : (2007) 1 SCC (Cri) 732]

that the building is a Dhaba, meaning thereby, that the place is accessible to public and the deceased was sleeping at the outer Dhaba adjoining the public road. There is no boundary wall; the open space (land) around the house leads to the hilly area accessible to public/strangers.

35. In the backdrop of the cite plan, the prosecution has not been able to establish the missing link i.e. connecting the presence of the appellant at the time of commission of the offence at about 3.00 a.m. in the night between 29/30.04.2014. As per prosecution case several persons were present in the house along with the appellant. The appellant came to be convicted on his confessional statement and the recovery of the assault weapon on his pointing out. The confessional statement will not be read against the appellant and the conviction would not rest on the recovery of the assault weapon alone in the backdrop of the statement of the witnesses and the cite plan showing that the room of the deceased was accessible to one and all, including, strangers. The door of the room was open being summer month (per P.W.-1).

36. The circumstance proved by the prosecution is that the appellant was not alone with his wife in the house when she was murdered. Admittedly, grown up children i.e. sons and daughters were also present; the witnesses of fact and independent witnesses have not been able to prove that the relation between the appellant and his wife was strained; the theory of strained relationship driving the appellant to commit suicide few days earlier of the incident for money was not proved by the witnesses examined by the prosecution, including, independent witnesses. The motive has not been proved nor assigned for commission of the offence.

37. The position of law is well settled that the links in the chain of circumstances is necessary to be established for conviction resting upon circumstantial evidence. This has been articulated in one of the

early decisions of the Supreme Court in **Sharad Birdhichand Sarda v. State of Maharashtra**[4]. The relevant paragraphs reads thus:

> *"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:*
>
> *(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.*
>
> *It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in* ***Shivaji Sahabrao Bobadev. State of Maharashtra*** *where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]*
>
> *Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."*
>
> *(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,*
>
> *(3) the circumstances should be of a conclusive nature and tendency,*
>
> *(4) they should exclude every possible hypothesis except the one to be proved, and*
>
> *(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.*
>
> *154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.*

38. In the present case, it is not the case of the prosecution witness that accused was seen either at the room of the deceased or moving towards the room where his wife was lying or the appellant moving out of the room of his wife at about 3:00 a.m. This material circumstance was relevant which the prosecution did not prove having regard to the location of the room of the deceased as shown in the cite plan. As noted earlier, the deceased was sleeping in a room

4. (1984) 4 SCC 116

which was not connected from within the house; the room was accessible to any person, including, all the family members. The room has single door opening in the open and the road. Appellant was not seen around the room of the deceased at the time of the alleged incident. There is no motive for commission of the offence. In this backdrop to shift the burden upon the appellant under Section-106 of Evidence Act, on mere suspicion to explain how the incident happened, prosecution has primarily shifted the burden of proof upon the accused to prove his innocence. The recovery of the weapon on the pointing out of the accused is one circumstance in the chain of circumstances, but that should connect the accused with the offence, which is missing. The prosecution failed to prove that in the night between 29/30 April 2014, he alone had accessed the room of the deceased. In absence of such an evidence there is scope/room for several probabilities. Suspicion, however, grave cannot take the form of proof.

39. In a case based on circumstantial evidence, motive assumes great significance. It is not as if motive alone becomes the crucial link in the case to be established by the prosecution and in its absence the case of prosecution must be discarded. But, at the same time, complete absence of motive assumes a different complexion and such absence definitely weighs in favour of the accused.

40. Now so far as the submission on behalf of the appellant/accused that in the present case the prosecution has failed to establish and prove the motive and therefore the accused deserves acquittal is concerned, it is true that the absence of proving the motive cannot be a ground to reject the prosecution case. It is also true and as held in **Suresh Chandra Bahri v. State of Bihar**[5], that if motive is proved that would supply a link in the chain of circumstantial evidence but the absence thereof cannot be a ground to reject the prosecution case. However, at the same time, as observed by the

5. 1995 Supp (1) SCC 80

Supreme Court in **Babu v. State of Kerala**[6], absence of motive in a case depending on circumstantial evidence is a factor that weighs in favour of the accused. In paras 25 and 26, it is observed and held as under :

> *"25. In **State of U.P. v. Kishanpal**[7], this Court examined the importance of motive in cases of circumstantial evidence and observed :*
>
> > *'38. ... the motive is a thing which is primarily known to the accused themselves and it is not possible for the prosecution to explain what actually promoted or excited them to commit the particular crime.*
> >
> > *39. The motive may be considered as a circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one. It is also settled law that the motive loses all its importance in a case where direct evidence of eyewitnesses is available, because even if there may be a very strong motive for the accused persons to commit a particular crime, they cannot be convicted if the evidence of eyewitnesses is not convincing. In the same way, even if there may not be an apparent motive but if the evidence of the eyewitnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction.'*
>
> *26. This Court has also held that the absence of motive in a case depending on circumstantial evidence is a factor that weighs in favour of the accused. (**Vide Pannayar v. State of T.N**.[8],)"*
>
> > *12. In the subsequent decision in **Shivaji Chintappa Patil vs. State of Maharashtra**[9], this Court relied upon the decision in Anwar Ali1 and observed as under:-*
> >
> > *"27. Though in a case of direct evidence, motive would not be relevant, in a case of circumstantial evidence, motive plays an important link to complete the chain of circumstances. The motive… …" (**Refer: Anwar Ali vs. State of Himachal Pradesh**[10])*

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6. (2010) 9 SCC 189
7. (2008) 16 SCC 73
8. (2009) 9 SCC 152
9. (2021) 5 SCC 626
10. (2020) 10 SCC 166

41. The conviction of the appellant rests on recovery of the assault weapon on his pointing out. The knowledge of the accused that he has hidden the crime weapon and recovered it in the presence of the Investigating Officer (I.O.) and other witnesses, followed by his information is not sufficient to link the appellant with the commission of the offence without there being a motive and the link/ connection of the appellant at the relevant time he being present in or around the room of the wife. The cite plan clearly shows that the room where the wife was sleeping is not connected through the house, the room is accessible from open land on three sides of the house, as well as, from the road. In other words, the room of the deceased can be accessed by any person just not the appellant or the other inmates residing in the house.

42. With regard to Section 27 of the Evidence Act, what is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused. In fact, thereafter, burden lies on the prosecution to establish a close link between discovery of the material objects and its use in the commission of the offence. What is admissible under Section 27 is the information leading to discovery and not any opinion formed on it by the prosecution.

43. The various requirements of Section 27 of Evidence Act, can be summed up as follows:

> *(1) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.*
>
> *(2) The fact must have been discovered.*
>
> *(3) The discovery must have been in consequence of some information received from the accused and not by accused's own act.*
>
> *(4) The persons giving the information must be accused of any offence.*

*(5) He must be in the custody of a police officer.*

*(6) The discovery of a fact in consequence of information received from an accused in custody must be deposed to.*

*(7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible.*

44. As observed in **Pulukuri Kotayya Versus Emperor**[11], it can seldom happen that information leading to the discovery of a fact forms the foundation of the prosecution case. It is one link in the chain of proof and the other links must be forged in manner allowed by law. To similar effect was the view expressed in **K. Chinnaswamy Reddy versus State of Andhra Pradesh and another**[12].

45. Under Section 27 of the Evidence Act, mere recovery of the blood stained weapon (axe) cannot be construed as providing acceptable proof for the murder without there being any substantive evidence. The Supreme Court considered this aspect in the case of **Mustkeem @ Sirajudin Versus State of Rajasthan**[13], as under:

> *"23. The AB blood group which was found on the clothes of the deceased does not by itself establish the guilt of the Appellant unless the same was connected with the murder of deceased by the Appellants. None of the witnesses examined by the prosecution could establish that fact. The blood found on the sword recovered at the instance of the Mustkeem was not sufficient for test as the same had already disintegrated. At any rate, due to the reasons elaborated in the following paragraphs, the fact that the traces of blood found on the deceased matched those found on the recovered weapons cannot ipso facto enable us to arrive at the conclusion that the latter were used for the murder."* ***(Refer: Jeeva Versus State of Rajasthan[14])***

46. The recovery of the crime weapon in the facts of the case in hand was made after five days, though the accused is the complainant and was present throughout the investigation but the crime weapon has not been linked with the commission of the offence.

47. Having regard to the prosecution evidence and the testimony of the independent witness, the trial court committed an error in

11. (AIR 1947 PC 67)
12. (AIR1962 SC 1788)
13. (AIR 2011 SC 2769)
14. D.B. Criminal Appeal No. 296 of 2019

convicting the appellant merely on the strength of recovery of the crime weapon on the pointing out of the appellant. The finding reached by the trial court is perse perverse, no reference or reliance was placed on the cite plan i.e. the room of the deceased was accessible to the public and not connected from inside the house. The offence, having regard to the cite plan cannot be set to have been committed in secrecy of the house by the appellant. The prosecution was unable to prove that appellant alone was accessible to the room of the deceased, further, whether he was seen either accessing the room of the deceased or leaving the room at the alleged time of the commission of the offence by any other person. This was a relevant material circumstance to connect the appellant in commission of the offence. Further, motive has also not been proved which was relevant in the given case solely based on the circumstantial evidence.

48. The jail appeal is **allowed**. The impugned judgment and order of the conviction and sentence is set aside. The appellant **Chatthoo Chero** is directed to be released forthwith, if not wanted in any other offence.

49. The appellant on being released the mandate of Section 437A Cr.P.C. to be complied.

50. Let the lower court record be sent back to the court below forthwith along with a copy of this judgment, for ascertaining necessary compliance.

51. We record our appreciation in assistance rendered by the learned Amicus Curiae. The counsel fee assessed at Rs. 20,000/- to be released to the learned Amicus Curiae.

**Order Date :-** 07.04.2022

K.K. Maurya