

A.F.R.

Judgment Reserved on : 02.01.2023

Judgment Delivered on : 03.03.2023

Case :- CRIMINAL APPEAL No. - 1568 of 2020

Appellant :- Mahendra Singh And Another

Respondent :- State of U.P.

Counsel for Appellant :- Dinesh Kumar, Shri Krishan Yadav

Counsel for Respondent :- G.A., Ankit Agarwal

With

Case :- CRIMINAL APPEAL No. - 1971 of 2020

Appellant :- Baniya @ Balveer

Respondent :- State of U.P.

Counsel for Appellant :- Kripa Kant Pandey

Counsel for Respondent :- G.A., Ankit Agarwal

Hon'ble Pritinker Diwaker, A.C.J.

Hon'ble Nalin Kumar Srivastava, J.

(Per : Nalin Kumar Srivastava, J.)

1. Heard Sri Shri Krishan Yadav and Sri Kripa Kant Pandey, learned counsel for the appellants and Sri Amit Sinha, learned A.G.A. for the State.

2. The validity and sustainability of the judgment and order dated 26.02.2020 passed by Additional Sessions Judge, Court No.4 / Special Judge, Mathura in Sessions Trial No.663 of 2011 (State Vs. Mahendra Singh and others) arising out of Crime No.238 of 2011 under Section 302, 201, 120-B, 34, 404 IPC, Police Station Chatta, District Mathura and Sessions Trial No.304 of 2012 (State Vs. Mahendra Singh) arising out of Crime No.241 of 2011 under Section 4/25 Arms Act, Police

Station Chatta, District Mathura and Sessions Trial No.305 of 2012 (State Vs. Ganga Dhar) arising out of Crime No.242 of 2011 under Section 25 Arms Act, Police Station Chatta, District Mathura has been challenged by way of instant criminal appeals, whereby the appellants Mahendra Singh, Ganga Dhar and Baniya @ Balveer were convicted and sentenced to undergo imprisonment for life under Section 302/34 IPC with a fine of Rs.10,000/- each, in default thereof, to further undergo three months additional simple imprisonment, to undergo imprisonment for life under Section 120-B IPC with a fine of Rs.5000/- each, in default thereof, to further undergo three months additional simple imprisonment, to undergo three years rigorous imprisonment under Section 201 IPC with a fine of Rs.500/-each, in default thereof, to further undergo fifteen days additional simple imprisonment, to undergo two years imprisonment under Section 404 IPC with a fine of Rs.500/-each, in default thereof, to further undergo fifteen days additional simple imprisonment. Further, appellants Mahendra Singh and Ganga Dhar were convicted and sentenced to undergo two years imprisonment under Section 4/25 Arms Act with a fine of Rs.500/-each, in default thereof, to further undergo fifteen days additional simple imprisonment. All sentences were directed to run concurrently.

3. The prosecution story, in brief, finds place in the F.I.R., which was lodged on the basis of the written report Ex.Ka.-1 given by informant Bacchu Singh, wherein it was narrated that the informant is an employee in Railway Department and has cordial relations with his neighbour accused Mahendra Singh,

who uses to come to his house. The informant and his brothers have executed an agreement to sale on 08.07.2011 and the informant got Rs.2 lakh as his share, which were kept in his house. On 12.07.2011, the informant's daughter Bhagwan Dei received a phone call by Mahendra who wanted to have a chat with her mother Laxmi, wife of the informant. After receiving the call, Laxmi took some articles in a bag and went away from house stating that she was going to her parental home at village Nahra and to come back after two hours. Laxmi was seen by many people going towards Chatta alongwith accused Mahendra on Akbarpur Roadways. The informant made a phone call to Laxmi in the evening when she did not reach Nahra, but she was in haste and was unable to talk and subsequently her phone was switched off. The informant found that Rs.2 lakh, gold & silver jewels and clothings were missing from the house. After search, he found and identified the dead body of Laxmi at the Postmortem House, Mathura on 15.07.2011.

4. F.I.R. Ex.Ka.-10 was lodged against the named accused Mahendra Singh on 16.07.2011 at 13:00 P.M. by Constable Clerk Krishan Pal Singh, who also prepared the registration G.D. Ex.Ka.-11.

5. The investigation ensued and was taken over by C.O. Devendra Singh, who performed the proceedings of the investigation and during the course of investigation, the statements of relevant witnesses were recorded by him. The call details record of the mobile phones of the accused and deceased was also obtained. The dead body of the deceased was recovered and cash money and murder weapon knives were also

retrived on the pointing out of the accused persons. The investigating officer also prepared the site plans of the place of occurrence and recovery Ex.Ka.-13, Ex.Ka.-15 and Ex.Ka.-17.

6. The inquest of the deceased was performed and inquest report Ex.Ka.-5 was also prepared.

7. The autopsy of the dead body of the deceased was performed by Dr. R.S. Maurya, who after performing the postmortem of the deceased prepared autopsy report Ex.Ka.-2. The following injuries were found over the body of the deceased :

(i) Multiple lacerated wounds on inner aspect of left upper limbs average size 3 cm. x 1.5 cm. x muscular deep.

(ii) Lacerated wound 4 cm. x 1.5 cm. chest cavity deep on left side front of chest 2 cm. below from left breast.

(iii) Lacerated wound 5 cm. x 2 cm. x abdomen cavity deep on lower part of abdominal mid line.

As per opinion of Doctor, the cause of death was due to shock and haemorrhage, as a result of ante-mortem injuries.

8. After completion of the investigation, charge-sheet Ex.Ka.-18 was filed in the Court against accused Mahendra Singh, Ganga Dhar and Baniya @ Balveer under Sections 302, 201, 120-B, 34, 404 IPC.

9. The investigation of the case under Section 25 Arms Act was taken by S.I. Saleem Khan, who after performing the investigation of the case, prepared site plan Ex.Ka.-19 and Ex. Ka.-21, and submitted charge-sheets Ex.Ka.-20 and Ex.Ka.-22

against accused Mahendra and Ganga Dhar respectively, to the court.

10. The matter, being exclusively triable by the Sessions Court, was committed to the Court of Sessions for trial.

11. Charges under Sections 302/34, 201, 120-B, 404 of IPC were framed on 23.01.2012 against accused Mahendra Singh, Ganga Dhar and Baniya @ Balveer. Charge under Section 4/25 Arms Act was also framed against accused Mahendra Singh and Ganga Dhar on 28.06.2012. The accused persons pleaded not guilty and claimed to be tried.

12. To bring home the charges against the accused, the prosecution produced in all nine witnesses in oral evidence. They are (P.W.1) Bacchu Singh, informant, (P.W.2) Pooran Singh, (P.W.3) Bhagwan Dei, (P.W.4) Shri Chandra, (P.W.5) Dr. R.S. Maurya, (P.W.6) Constable Krishan Pal Singh, (P.W.7) S.I. Devendra Kumar Tyagi, (P.W.8) Devendra Singh and (P.W.9) S.O. Saleem Khan, who were examined.

13. In documentary evidence, written report Ex.Ka.-1, Postmortem Report Ex.Ka.-2, police papers related to postmortem report, pratisar nirikshak report, form 33, inquest, photo lash, letter to C.M.O., nakal report P.S. Chhata, Report of Bharat Singh Ex.Ka.-3 to 9, Chik F.I.R. Ex.Ka.10, G.D. Ex.Ka.-11, Seizure Memo of currency notes Ex.Ka.-12, Site Plan Ex.Ka.-13, Seizure Memo of Cash Ex.Ka.-14, Site Plan Ex.Ka.-15, Seizure Memo of Weapon Ex.Ka.-16, Site Plan Ex.Ka.-17, Charge-sheet Ex.Ka.-18, Site Plan Ex.Ka.-19, Charge-sheet Ex.Ka.-20, Site Plan Ex.Ka.-21, Charge-sheet Ex.Ka.-22, F.I.R. and Registration G.D. relating to the case under Arms Act as

Ex.Ka.-23, Ex.Ka.-24, Ex.Ka.-25 and Ex.Ka.-26 respectively have been proved.

14. (P.W.1) Bacchu Singh is the original informant and the husband of the deceased. He has supported the F.I.R. version in his examination-in-chief and has affirmed the fact that his wife Laxmi had left his house on 12.7.2011 after receiving a telephone call of the accused Mahendra alongwith two lac rupees, jewelleryes and clothes, as was informed to him by his daughter. On 15.07.2011, he had seen the dead body of Laxmi at Postmortem House, Mathura. He has proved the written report given by him to the police station as Ex.Ka.-1. However, he has admitted in his cross-examination that he had not seen his wife going alongwith the accused. He has stated that the accused used to come to his house from about one year prior to the incident. He has also proved the fact that Rs.90,000/- were recovered by the police from accused Ganga Dhar and the memo thereof was prepared by the police at the police station.

15. (P.W.2) Pooran Singh is the real brother of the informant and he has affirmed the fact in his deposition that he and his two brothers had executed an agreement to sale for a consideration of six lakh rupees and rupees two lakh each were received by all the three brothers, as per their respective shares. However, his testimony, as to the other facts of the case comes within the category of hearsay evidence. The noteworthy part of the deposition of this witness is that when two lakh rupees were distributed amongst all the three brothers including himself, he had made his signature over each and every currency note. Rupees four lakhs were in the form of rupees five hundred

notes, whereas rupees two lakh were in the form of rupees one hundred notes and he had signed over all the currency notes.

16. P.W.1 and P.W.2 both state that they found the dead body of the deceased at Postmortem house, Mathura on 15.07.2011.

17. (P.W.3) Bhagwan Dei, is the daughter of the deceased, who in her examination-in-chief has stated that on 12.07.2011, she had received a phone call from the accused Mahendra, who wanted to talk to her mother and after receiving that call, her mother left the house alongwith money, clothes and jewels telling her to come back within two hours, as she was going to her parents' home at Nahra. She herself went to leave her to the Tempo Stand. Thereafter, when she tried to contact her mother on phone, the phone was switched off and subsequently her dead body was found. She has further stated that when she was returning from the Tempo Stand after leaving her mother there, she had seen accused Mahendra Singh, Ganga Dhar and Baniya @ Balveer at the Tempo Stand.

18. It is noteworthy that all the aforesaid prosecution witnesses admit that the murder of the deceased was not committed before them.

19. (P.W.4) Shri Chandra is the witness of last seen and also of extra-judicial confession made by accused Ganga Dhar to him. In his deposition, he has stated that on 12.07.2011 at about 1:00 P.M., he had seen Laxmi wife of Bacchu, going alongwith accused Baniya @ Balveer and Ganga Dhar Nai at the Tempo Stand of the Village. Laxmi had taken a bag and on his query, she told that she was going to her parents' house. On 15.07.2011, he came to know that Laxmi has been murdered.

He has further stated that on 16.07.2011, Ganga Dhar Nai, the native of his village came to him and confessed the crime of murder of Laxmi, alongwith Mahendra and Baniya @ Balveer, being seduced by them. Accused Ganga Dhar further told him that in a planned manner, all the three accused had murdered Laxmi by using knife and the dead body was concealed under the grass near the tree besides the railway boundary. He has further stated that the fact of last seen and extra-judicial confession was disclosed by him to the Investigating Officer. He has further stated that he had no friendship with accused Ganga Dhar.

20. (P.W.5) Dr. R.S. Maurya has performed the autopsy of the deceased. Explaining the injuries found over the body of the deceased, he has stated that the death might have been caused on 12.07.2011 at about 1:00 P.M. He has further stated in his cross-examination that the injuries found over the body of the deceased have not been caused by use of sharp-edged weapon or knife rather the injuries might be inflicted by use of any blunt object.

21. (P.W.6) Constable Clerk Krishna Pal Singh is the scribe of the F.I.R., who has proved Chik F.I.R. Ex.Ka.-10 and Registration G.D. Ex.Ka.-11 and has also stated that on the basis of the written report of informant Bacchu Singh, F.I.R. was lodged by him.

22. (P.W.7) S.I. Devendra Kumar Tyagi, is the witness of inquest and has proved the inquest report as Ex.Ka.5. He has stated that on the information given by the informer, he had arrested accused Mahendra Singh and Ganga Dhar and rupees

fourty thousand cash each in the form of hundred rupee currency notes were recovered from their possession and recovery memo was prepared. He has further stated that both the accused confessed their guilt before the police and on their pointing out, two knives were retrieved by the police and one mobile phone was also handed over by accused Mahendra to the police and the recovery memo was prepared. Subsequently, on 27.08.2011, accused Baniya @ Balveer was also arrested by the police and on his pointing out, rupees ten thousand were recovered by the police from a box kept in the house of the accused, which were in the form of hundred rupee currency notes. Recovery memo Ex.Ka.-12 has been proved by this witness and the photo copies of the currency notes and their bundles were also proved as Material Ex.-1 to Material Ex.-9.

23. (P.W.8) S.H.O. Devendra Singh is the Investigating Officer of the case, who has proved the proceedings of the investigation in his deposition. The factum of arrest of accused Mahendra Singh, Ganga Dhar and subsequently of Baniya @ Balveer and recovery of knives on the pointing out of accused Mahendra Singh and Ganga Dhar and also of currency notes to the tune of total ninety thousand rupees from all the accused persons has been proved by this witness. He also proves recovery memos Ex.Ka.-14, Ka.-15, Ka.-16, Ka.-17, Site Plan Ex.Ka.13 and charge-sheet Ex.Ka.-18 as well and states that the case properties were sent to F.S.L. The alleged murder weapon, two knives have been proved by him as Material Ex.-10 and Material Ex.-11.

In the cross-examination, he has stated that nothing came to his knowledge regarding the love affair between the accused Mahendra and deceased.

24. (P.W.9) S.H.O. Saleem Khan, is the Investigating Officer of the case under Section 4/25 Arms Act. In his deposition, he has proved the proceedings of the investigation relating to both the cases under Section 4/25 Arms Act and the site plan as well as charge-sheet as Ex.Ka.-20, Ka.-21. As a secondary witness, he has proved the F.I.R. and Registration G.D. relating to both the accused, Mahendra and Ganga Dhar as Ex.Ka.-23, Ex.Ka.-24, Ex.Ka.-25 and Ex.Ka.-26 respectively, for the cases under Arms Act.

25. The learned trial court upon scrutiny of the evidence on record concluded that the case of prosecution was proved beyond reasonable doubt against all the accused persons and recorded conviction and sentence against the accused persons as hereinabove mentioned.

26. Assailing the impugned judgment on various grounds, learned counsel for the appellants have submitted that the prosecution case is based upon circumstantial evidence, but the chain of circumstances is not complete, so as to prove the guilt of the accused. Even the evidence of last seen has not been proved in proper manner. There was no motive for the appellants to do away with the deceased. The Investigating Officer also did not find even a whisper of evidence to the effect that appellant Mahendra Singh was having any affair with the deceased. The so called extra-judicial confession by appellant Ganga Dhar to (P.W.4) Shri Chandra is not a reliable piece of

evidence and there was no occasion for appellant Ganga Dhar to make any extra-judicial confession to P.W.4. The prosecution case does not find support from the medical evidence as well which also falsifies the alleged recovery of knives as murder weapons on the pointing out of appellants Mahendra Singh and Ganga Dhar. The statements of P.W.1 and P.W.2 are also not trustworthy. The F.I.R. has also been recorded belatedly and no plausible explanation has been offered by the prosecution in respect thereof. The investigation of the case is also faulty, which affects the prosecution case in material aspects. The conclusion arrived at by the prosecution is per se perverse and based on no credible evidence.

27. On the aforesaid grounds, a prayer to set-aside the impugned judgment and order and acquittal of the appellants has been made by the learned counsel for the appellants.

28. Per contra, learned A.G.A. has vehemently opposed the present appeals mainly on the ground that the last seen evidence is trustworthy and reliable piece of evidence. (P.W.3) Bhagwan Dei, the daughter of the deceased, had no reason to depose falsely before the court intending false implication of the appellants. The motive of the incident has also been proved by cogent evidence. The appellants wanted to grab the money from the poor deceased lady and in the accomplishment of this object, under the criminal conspiracy, they caused murder of the deceased and grabbed the money from her and a part thereof was recovered from their possession, which further substantiates the prosecution allegations. All the links make a complete chain of circumstances and are sufficient to prove the

guilt of the appellants. There is no material fault or discrepancy in the investigation. The prosecution case is also corroborated by the medical evidence. The informant, being worried and busy in search of his wife, could manage to lodge the F.I.R. only after getting the dead body of his wife and that was the cause for delay in lodging of the first information report. Extra judicial confession made by Ganga Dhar, one of the accused persons, is another piece of strong evidence against all the accused persons. On the aforesaid grounds, it has been stated by the learned A.G.A. that the prosecution story is proved by cogent and reliable oral and documentary evidence. There is nothing on record to suggest that the appellants have been falsely implicated by the informant or police. Hence, the appeals are liable to be dismissed.

Principles governing the cases based on Circumstantial Evidence -

29. Indubitably, present is a case based on circumstantial evidence and no direct evidence lies, on record, to indicate the involvement of the accused persons in the alleged crime. What the prosecution is under obligation to prove in a case based on circumstantial evidence, has been settled in umpteen of cases by the Hon'ble Apex Court and this Court as well.

30. In **Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116**, the Apex Court laid down the following five golden principles, i.e. the panchsheel of the proof of a case based on circumstantial evidence:

- (i) The circumstances from which the conclusion of guilt is to be drawn should be

fully established. There is not only a grammatical but a legal distinction between 'may be proved' and "must be or should be proved". 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.

(ii) 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.

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

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

(v) 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.

31. In **G. Parshwanath Vs. State of Karnataka, (2010) 8 SCC 593**, it was held that 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, where various links in the chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court.

32. Recently in **Raju Vs. State of Rajasthan, 2022 (121) ACC 954**, the aforesaid legal position has been reiterated.

33. Applying the aforesaid proposition of law in the present case, we are under obligation to search out whether having taken cumulatively, the circumstances are forming the chain which is so complete that there is no escape from the conclusion that within all normal and human probabilities, the crime was committed by the accused only and none else and the aforesaid conclusion must be free from any other hypothesis than that of the guilt of the accused.

Last seen Theory -

34. The first circumstance, which is relied upon by the prosecution, is the last seen theory. It has been submitted that the deceased was seen last time in the company of the appellants and thereafter her dead body was recovered. P.W.3, the daughter of the deceased, develops the story of last seen in her cross-examination where she states that while returning from the tempo stand, she had seen Bania, Mahendra and Ganga Dhar standing over the Tempo stand. She had made a specific statement that she had not seen anyone carrying her mother or killing her. Hence, the theory of last seen is not sufficiently proved by the evidence of P.W.3.

35. P.W.4, is another witness of last seen and states that on 12.07.2011 at about 1:00 P.M., he had seen Laxmi going with Bania @ Balveer and Ganga Dhar Nai at the tempo stand of the village who told him that she was going to her parental house. On 15.07.2011, he came to know that she has been murdered. He has further stated that on 12.07.2011 itself, when the

informant met him, he had disclosed this fact to him. It is noteworthy that (P.W.1) Bacchu Singh does not state even a single word in respect of meeting of deceased with P.W.4 or any conversation between them. Surprisingly, this fact was not mentioned in the F.I.R. Ex.Ka.-10, lodged four days thereafter by the informant, which was a material fact. It is significant to note that on the point of last seen, the deposition of P.W.4 does not find place in his statement recorded by the investigating officer P.W.8, as admitted by P.W.4 himself.

36. P.W.4 further states in his cross-examination that it is true that many persons were standing at the tempo stand and hence he is unable to tell as to with whom Laxmi had come and whether she was accompanied by anyone or was all alone. He is also unable to tell the time when Laxmi Devi went by tempo nor he has shown the place to the Investigating Officer where she was standing.

37. P.W.4 has also stated, in his cross-examination, that he did not meet any family member of Bacchu Singh at the tempo stand and except Laxmi, Ganga Dhar and Baniya @ Balveer, no other person met him at the tempo stand. This statement shakes the credibility of this witness in the light of the evidence of P.W.3, the daughter of the deceased, who has stated that she had gone to the tempo stand alongwith her mother and came back from there after her mother took her place in the tempo. This contradiction shows that P.W.4, in fact, was not present at the tempo stand and he is not a witness of last seen.

38. We find hearsay evidence of P.W.2 on the point of last seen, which is of no value. Notably, Badan Singh and Saudan Singh, who allegedly told P.W.2 in respect of last seen of the deceased in the company of accused persons, as P.W.2 states, are not examined as prosecution witnesses, nor they are named in the charge-sheet as witnesses.

39. On the basis of the aforesaid analysis, it is explicit that the evidence rendered by the prosecution in respect of the last seen is not reliable and trustworthy rather it is shaky and in fact, the prosecution evidence reflects that there was no witness of last seen. We also find that P.W.2 (Pooran Singh) and P.W.4 (Shri Chandra) nowhere state that appellant Mahendra was also seen by them at the tempo stand alongwith the deceased. It is true that the statement of P.W.3 (Bhagwan Dei) shows that the deceased had left her house on receiving a phone call by appellant Mahendra, but there is no cogent evidence to this fact that she actually went to the appellant Mahendra after leaving her house.

40. In **Dharam Deo Yadav vs. State of U.P., (2014) 5 SCC 509**, it has been held that "normally the last seen theory comes into play when the time gap between the point of time when the accused and deceased were seen last alive and when the deceased is found dead, is so small that possibility of any person other than the accused being the perpetrator of the crime becomes impossible. It will be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. However, if the prosecution,

on the basis of reliable evidence, establishes that the missing person was seen in the company of the accused and was never seen thereafter, as in the present case, it is obligatory on the part of the accused to explain the circumstances in which the missing person and the accused parted company. In such a situation, the proximity of time between the event of last seen together and the recovery of the dead body or the skeleton, as the case may be, may not be of much consequence".

41. Referring the statement of (P.W.5) Dr. R.S. Maurya, it has been vehemently submitted by the learned State counsel that at the time of autopsy of the dead body of the deceased on 15.07.2011, it has been found by the doctor (P.W.5) that the death of the deceased might have been caused on 12.07.2011 at about 1:00 P.M. He has also opined that the death might have been occurred three days before the postmortem. On the basis of said medical evidence, it has been submitted that soon after the last seen of the deceased in the company of the appellants, her homicidal death was caused.

42. The legal position in respect of the last seen theory has also been explained in a catena of decisions of the Apex Court and this Court also such as **State of Goa vs. Pandurang Mohite**, AIR 2009 SC 1066, **State of U.P. vs. Satish**, 2005 (3) SCC 114, **Mohibur Rahman & Another vs. State of Assam**, 2002 (2) JIC 972 (Supreme Court), **Rohtash Kumar vs. State of Haryana**, 2013 (82) ACC 401 (SC) (Paragraph 25), **Ashok vs. State of Maharashtra**, (2015) 4 SCC 393, **Niranjan Panja vs. State of West Bengal**, 2010 (6) SCC 525.

43. If we summarize the legal theory regarding last seen as emerges out from the observations made in the aforesaid judgments, we reach at a definite conclusion that in fact, it would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases where prosecution depends upon the theory of last seen together. Further, it is always necessary that the prosecution should establish time of death. Even if it is assumed that the death of the deceased in the present case happened on 12.07.2011, as may be inferred from medical evidence, the question stands as to on the basis of which evidence the prosecution succeeds to establish the theory of last seen and the answer is that there is no evidence.

44. It is true that the doctrine of established 'last seen together' shifts the burden of proof on accused requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard would give rise to a very strong presumption against him.

45. In an established last seen case, the prosecution exempted to prove exact happening of incident, as accused himself would have special knowledge of incident and thus would have burden of proof as per Section 106 Evidence Act, although the initial burden of proof is on prosecution to adduce sufficient evidence pointing towards the guilt of the accused.

46. Hence in the present case, the careful scrutiny of the evidence leads us to the definite conclusion that the last seen theory has gone and, at this juncture, we also find that the learned trial court relying upon the last seen theory has committed a grave error.

Extra Judicial Confession -

47. As another circumstance, to prove the guilt of the appellants, the prosecution has relied upon the extra-judicial confession made by appellant Ganga Dhar to (P.W.4) Shri Chandra. P.W.4, in his examination-in-chief, states that on 16.07.2011, appellant Ganga Dhar Nai had come to him in the village and requested to save him. He, while admitting his guilt, told that in the bad company of Mahendra and Balveer, he has committed a grave mistake and alongwith both of them he has committed murder of Laxmi. Further, he also disclosed the place of concealment of the dead body and the murder weapon (knife) and the bag of the deceased and the time of murder as well. However, in his cross-examination, he states that Ganga Dhar had come to him on 15.07.2011 and this contradiction had been put to him by the defence side in his cross-examination.

48. So far as the confessions are concerned, the law never says that the confessions, in any circumstance, cannot be relied upon at all. If one directly acknowledges his guilt in a criminal charge, he is said to admit his guilt, which in law is called as confession. However, if the confession has been caused by way of any inducement, threat or promise, it, in all circumstances, is irrelevant in a criminal proceeding.

49. As regarding extra-judicial confession, it was so held in **State of U.P. Vs. M.K. Anthony, (1985) 1 SCC 505** that extra-judicial confession appears to have been considered as a weak piece of evidence, but there is no rule of law, nor rule of prudence that it cannot be acted upon unless corroborated. It was also pronounced in **Narayan Singh Vs. State of M.P., (1985) 4 SCC 26** that it is not open to any court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend upon the nature of the circumstances, the time when the confession was made and the credibility of the witnesses, who speak about such a confession. Another authority on the subject is **Jagta Vs. State of Haryana, (1974) SCC (4) 747** wherein it was clarified that the evidence about an extra-judicial confession is, in the nature of things, a weak piece of evidence. If the same is lacking in probability, there would be no difficulty in rejecting the same.

50. If we translate the aforesaid theory into the facts and circumstances of this case, we find that (P.W.4) Shri Chandra, in his examination-in-chief, states not only about the confession made by appellant Ganga Dhar Nai to him on 16.07.2011, but the disclosure of this fact also that all the three appellants, after committing the murder of Laxmi by use of knife concealed her dead body near the trees under grass besides the railway boundary and her bag was also hidden there. He also states, in his examination-in-chief, that the extra-judicial confession was made to him by appellant Ganga Dhar on 16.07.2011. This statement takes us to the statement of P.W.8, the Investigating Officer, who has stated that on

16.07.2011, he had visited the place of occurrence and while coming back, he had recorded the statement of Shri Chandra son of Chibbo on the way and on the basis of his statement, the names of accused Mahendra, Ganga Dhar and Baniya @ Balveer came into light. We also find that for extra judicial confession, different dates have been stated by P.W.4 as to when appellant Ganga Dhar came to him and he tells both the dates as correct which makes his testimony doubtful so far as the factum of extra-judicial confession is concerned.

51. We are obliged to examine this aspect also as to why appellant Ganga Dhar chose (P.W.4) Shri Chandra to make his extra-judicial confession before him. P.W.4 is a farmer and resides in the same village where appellants Balveer and Ganga Dhar reside. As he states in his evidence, he is a common man having no influential credit nor holding any high official post or any intimate relations with the informant so that appellant Ganga Dhar would be under impression that he might have saved him. In his cross-examination, P.W.4 states that he belongs to Thakur caste and Ganga Dhar is Nai (Barber) by caste. They are not relatives to each other and he never happened to be in any friendship with Ganga Dhar. He also contradicts P.W.8, the Investigating Officer when he makes statement to disclose the fact of extra judicial confession to the police 3 - 4 days after its making, whereas P.W.8 states this date to be as 16.07.2011. This situation may also be taken into account that whether the factum of accused making confession, all of a sudden, in absence of any cogent reason on his part, especially when the Investigating agency had no clues

regarding crime, may be accepted as genuine and reliable. This fact also cannot be over-sighted that appellant Ganga Dhar is not said to be the main culprit, it was appellant Mahendra, whose name was disclosed as the person on whose call the deceased left her house.

52. Learned counsel for the appellants, referring to these statements, vehemently states that in the light of the aforesaid statement, there was no reason for appellant Ganga Dhar to go to the witness Shri Chandra and to make such a serious confession of the offence of murder, who was a common man and was never in a position to protect him.

53. After making a close scrutiny of the testimony of P.W.4 and the circumstances surrounding the extra-judicial confession, we find that the alleged extra-judicial confession in this case is not a reliable piece of evidence. Recently in **Union of India Vs. R. Metri, (2022) 6 SCC 525**, the Apex Court has held that extra-judicial confession is weak piece of evidence and unless such confession is found to be voluntary, trustworthy and reliable, conviction solely on the basis of the same without corroboration, is not justified.

54. We have no hesitation to hold that the principles enumerated in the aforesaid case law squarely apply to the facts and circumstances of this case. The alleged extra-judicial confession said to be made to P.W.4 by appellant Ganga Dhar is not trustworthy and requires solid corroboration which, no doubt, is missing in this case and hence, we ignore and reject the alleged extra-judicial confession, as relied upon by the prosecution.

Motive and Recovery of Currency Notes and knives -

55. In a catena of decisions, it has been settled that motive keeps a significant place and is countenanced in a case based upon circumstantial evidence.

56. Learned A.G.A. in his argument, as advanced before this Court, has impressed upon the fact that appellant Mahendra was having some affair with the deceased and this fact was also known to him that rupees two lac were kept in the house of the deceased, which were received by her husband P.W.1, as his share in the sale consideration of his land. It has been brought into the evidence that the deceased had left her house alongwith two lac rupees, clothes and jewelleryes. It has been submitted by the learned State counsel that to grab the money and jewellery aforesaid, the deceased was taken by the appellants and after taking the money and articles, they caused murder of the deceased and subsequently, Rs.90,000/- out of the aforesaid amount, were recovered in different parts from the respective possession of the appellants. It has been further submitted that the currency notes, which were recovered from the possession of the appellants, were bearing the signature of P.W.2 (Pooran Singh). P.W.2, in his deposition, has stated that he had made his signature over each and every currency note. It has been further argued that no doubt is left to presume that the currency notes retrieved from the appellants were the same, which were taken by the deceased with her while leaving her house.

57. Learned counsel for the appellants have submitted that the evidence of P.W.2 is not natural and he is an unreliable

witness when he states that he had made his signature over each and every currency note. P.W.2 has deposed that two lac rupees were in the form of 100/- rupee currency notes and four lac rupees were in the form of 500/- rupee currency notes and he had signed over all the currency notes. The bundles of 100/- rupees currency note were taken by the deceased while leaving her house.

58. Learned counsel for the appellants submit that in the light of the aforesaid statement of P.W.2, it may be assumed that two thousand currency notes in the form of Rs.100/- per currency note were taken by the deceased and P.W.2 had already made his signature over each and every note. It has been vehemently argued that it is neither natural nor believable that P.W.2 signed over two thousand currency notes without any reason and his statement does not appeal to the common sense. We find force in the contention of the learned counsel for the appellants. There was no need or justification to sign over two thousand currency notes and over other currency notes also, which were in the form of Rs.500/- currency notes.

59. Learned State counsel has submitted that P.W.7 proves that Rs.40,000/- each in the form of Rs.100/- currency notes were retrieved by appellants Mahendra and Ganga Dhar respectively and the signatures of Pooran Singh, P.W.2 were found over the first and last currency note of the bundle. Accordingly, Rs.10,000/- in the form of a bundle of Rs.100/- currency notes were retrieved by appellant Balveer from his house and in this bundle also, the signatures of Pooran Singh, P.W.2 were found over the first and last currency note.

60. However, the aforesaid recovery has been denied by the appellants in their statement under Section 313 Cr.P.C. It is noteworthy that no question regarding the recovery of Rs.10,000/- has been put to appellant Balveer in his statement under Section 313 Cr.P.C. Learned counsel for the appellant - Balveer vehemently argued that this omission on the part of the learned trial court creates a prejudice to the defence of the appellant, as he was not aware of the incriminating evidence of recovery of currency notes adduced against him.

61. Reliance has been placed upon **Nar Singh Vs. State of Haryana, (2015) 1 SCC 496** wherein it has been held that -

“(10). There are two kinds of examination under Section 313 Cr.P.C. The first under Section 313 Cr.P.C. (1) (a) Cr.P.C. relates to any stage of the inquiry or trial; while the second under Section 313 Cr.P.C. (1) (b) Cr.P.C. takes place after the prosecution witnesses are examined and before the accused is called upon to enter upon his defence. The former is particular and optional; but the latter is general and mandatory.”

“(11). Section 313 Cr.P.C. prescribes a procedural safeguard for an accused, giving him an opportunity to explain the facts and circumstances appearing against him in the evidence and this opportunity is valuable from the standpoint of the accused.....The object of Section 313 (1) (b) Cr.P.C. is to bring the substance of accusation to the accused to enable the accused to explain each and every circumstance appearing in the evidence against him. The provisions of this section are mandatory and cast a duty on the court to afford an opportunity to the accused to explain each and every circumstance and incriminating evidence against him. The examination of accused

under Section 313 (1) (b) Cr.P.C. is not a mere formality.”

62. In **Satbir Singh Vs. State of Haryana, (2021) 6 SCC 1**, it was reiterated like this -

“It is a matter of grave concern that, often, Trial Courts record the statement of an accused under Section 313 Cr.P.C. in a very casual and cursory manner, without specifically questioning the accused as to his defence. It ought to be noted that the examination of an accused under Section 313 Cr.P.C. cannot be treated as a mere procedural formality, as it is based on the fundamental principle of fairness. This provision incorporates the valuable principle of natural justice – “audi alteram partem”, as it enables the accused to offer an explanation for the incriminatory material appearing against him. Therefore, it imposes an obligation on the part of the Court to question the accused fairly, with care and caution. The Court must put incriminating circumstances before the accused and seek his response.”

63. In the facts and circumstances of the case and keeping in view the observations made in the aforesaid case laws by the Apex Court, we are of the view that serious prejudice has been caused to appellant Balveer by the aforesaid omission which goes against the prosecution.

64. Learned counsel for the appellants have vehemently submitted that, if any circumstance is not explained by the accused in his statement under section 313 Cr.P.C., this alone is not liable to be held them guilty. Reliance has been placed upon **Bharat Vs. State of M.P. (2003) 3 SCC 106**, wherein it has been observed that if the accused failed to offer any explanation in his statement under Section 313 Cr.P.C., it

cannot be held proof of his guilt. No doubt, the aforesaid law leans in favour of the appellants as the burden of proof lying upon the prosecution cannot be replaced.

65. The aforesaid submissions made by both the sides take us to meticulously scrutinize the evidence on record in reference to the motive to commit the crime and the alleged recovery of currency notes on the pointing out of the appellants.

66. To ascertain the fact whether appellant Mahendra had some affair with the deceased, we are obliged to peruse the oral evidence of P.W.1 (Bacchu Singh) and P.W.2 (Pooran Singh). P.W.1 deposes that appellant Mahendra is his neighbourer, who was well known to him and used to come to his house. We do not find even a whisper in the entire testimony of P.W.1 that his wife, the deceased and appellant Mahendra had any affair. His real brother P.W.2 has deposed that he has stated before the police that he had some doubt over the character of Mahendra. Mahendra used to visit the house of his brother Bacchu Singh much prior to the present incident.

67. P.W.3, the daughter of the deceased states that everyone in the house disliked the visit of Mahendra except her mother and she disliked him because he used to come in a drunken position.

68. Further, the attention of the Court is drawn towards the statement of P.W.8 (Devendra Singh), the first Investigating Officer, who has stated in clear terms that “ विवेचना में महेंद्र और मृतका श्रीमती लक्ष्मी देवी का प्रेम प्रसंग मेरी जानकारी में नहीं आया था, बल्कि

मृतका के पास दो लाख रुपये तफ्तीश में आई थी जिसकी वजह से उसका क़तल हुआ था”

69. In the light of the statement of P.W.1, the husband of the deceased and P.W.8, the first Investigating Officer, we arrive at the conclusion that there is no evidence on record to show that the deceased and appellant Mahendra had been indulged in some affair.

70. So far as the factum of recovery of currency notes on the pointing out of the appellants is concerned, the statements of P.W.7 (S.I. Devendra Kumar Tyagi) and P.W.8 (Devendra Singh) make a sketch of the story of recovery in the manner that Rs.40,000/- each were retrieved from the possession of appellants Mahendra and Ganga Dhar when they were arrested by the police and recovery memo Ex.Ka.-14 was proved by P.W.8, whereas Rs.10,000/- were retrieved on the pointing out of appellant Balveer, which remind us that the recovery of currency notes on the pointing out of appellant Balveer comes within the scope and purview of Section 27 of the Evidence Act.

71. As P.W.7 (S.I. Devendra Kumar Tyagi) deposes, accused Balveer had stated in the police custody that he alongwith other co-accused Mahendra and Ganga Dhar had murdered Laxmi and the dead body was concealed near the railway boundary and Rs.90,000/- got from her bag, were distributed amongst them and he got Rs.10,000/- as his share, which was concealed by him in a box in his house. Pursuant to that statement, when the police went to his house, he opened a box inside his house

and one bundle of Rs.100/- currency notes kept in a polythene was handed over by him to the police and the bundle bore the name of Pooran Singh over the first and last currency notes. The bundle of notes was seized and recovery memo Ex.Ka.-12 was prepared on the spot. P.W.8 (Devendra Singh) also proved the recovery memo. The aforesaid articles were proved as Material Exts. 1 to 9 by P.W.7. It is submitted by learned A.G.A. that the aforesaid recovery is admissible under Section 27 of the Evidence Act, which is a strong circumstance against the appellants and P.W.7 & P.W.8 are material witnesses to prove such recovery.

72. The aforesaid recovery has been assailed by learned counsel for the appellants. It has been argued that there is no public witness of the alleged recovery and the recovery is false and fabricated. In this connection, cross-examination of P.W.1, the informant / husband of the deceased has been referred who, in his cross-examination, has deposed that Rs.90,000/- were recovered from the possession of appellant Ganga Dhar only at 10:00 A.M. and the date was 16th. He also states that at the time of recovery, he was present on spot alongwith several persons of the village and appellant Ganga Dhar was also present in custody of the police. However, his signature was not obtained by the police over the memo and the recovery memo was prepared at the police station.

73. Since P.W.1 is the informant and the husband of the deceased, his testimony has a distinguished weight. It is very significant to note that on this point, the prosecution did not request the court to permit it to cross-examine P.W.1 and in this

situation, his aforesaid statement finds force and is binding upon the prosecution and it takes us to the relevant law promulgated in **Javed Masood and Another Vs. State of Rajasthan, (2010) 3 Supreme Court Cases 538** wherein it has been held that -

“19.....The testimony of Mohammad Ayub (PW 6) cannot easily be surmounted by the prosecution. He has testified in clear terms that PWs 5, 13 and 14 were not present at the scene of occurrence. It is not known as to why the public prosecutor in the trial court failed to seek permission of the court to declare him "hostile". His evidence is binding on the prosecution as it is. No reason, much less valid reason has been stated by the Division Bench as to how evidence of PW-6 can be ignored.

In the present case the prosecution never declared PWs 6,18, 29 and 30 "hostile". Their evidence did not support the prosecution. Instead, it supported the defence. There is nothing in law that precludes the defence to rely on their evidence.”

74. In the light of the aforesaid legal position, if we scrutinize the aforesaid statement of P.W.1, we find that according to P.W.1, Rs.90,000/- were recovered from appellant Ganga Dhar alone and if this statement is taken as it is, the story of recovery of Rs.10,000/- on the pointing out of appellant Balveer becomes totally false and baseless. This statement also clarifies that appellant Mahendra was even not present on the spot when Rs.90,000/- is said to be retrieved and no money was recovered from him. It is also significant to mention that Ex.Ka.-14, the recovery memo bears the date as

17.07.2011, whereas the informant P.W.1 states that the recovery was made on 16th.

75. For the recovery evidence under Section 27 of the Evidence Act, the required conditions are propounded like this in **Anter Singh Vs. State of Rajasthan, A.I.R. 2004 SC 2865** - "The first condition necessary for bringing this Section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only "so much of the information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded."

76. Learned counsel for the appellants has contended that the incident is said to be happened on 12.07.2011 and appellants Mahendra and Balveer were arrested by the police on 17.07.2011 and as per statement of P.W.8, they were having currency notes of the value of Rs.40,000/-, each in the form of Rs.100/- currency notes in the pocket of their pants. It is submitted that it is quite improbable that even after five days of the occurrence, they were wandering with the alleged currency notes, which were obtained by them from the deceased. It was also argued that there is no public or independent witness of the said recovery and the statement of P.W.1, who states that the recovery memo was prepared at the police station, itself falsifies the whole story of alleged recovery of currency notes.

In the facts and circumstances of the case, we find ourselves in agreement with the submissions of the learned counsel for the appellants.

77. It is also notable that the aforesaid recovery does not fall within the ambit of Section 27 of Evidence Act, as it was not made in consequence of any information received from both the appellants while in police custody.

78. We may recall the statement of (P.W.2) Pooran Singh, who stated in clear terms that on each and every currency note, he had made his signatures. Admittedly, the signature of (P.W.2) Pooran Singh, is not found on each and every currency note allegedly retrieved from the accused persons. This fact also cannot be ignored that the said currency notes were not put before P.W.2 at the time of recording of his testimony before the court and he had no opportunity to identify his signature over the currency notes and to prove that they are the same currency notes which were signed by him.

79. Another link to complete the chain of circumstances is the recovery of knives on the pointing out of accused-appellants Mahendra and Ganga Dhar, which are claimed to be murder weapons by the prosecution. The aforesaid knives have been proved as Material Exs.-10 and 11 by P.W.7. It is deposed by him that on 17.7.2011, both the aforesaid appellants were arrested by the police. Murder weapons, two knives, were retrieved on their pointing out, which was made subsequent to their statement made to the police confessing their guilt.

80. Learned State Counsel has vehemently submitted that the recovery of knives is a fact discovered pursuant to the disclosure statement made by both the appellants which is admissible under Section 27 of the Evidence Act. Recovery memo (Ex.Ka.-16) and the site plan of place of recovery Ex.Ka.-15 have been properly proved by the Investigating Officer P.W.8. Relying upon **Mahendran Vs. State of Tamil Nadu, (2019) 5 SCC 67**, he has submitted that relevant fact discovered on the basis of common memorandum of recovery prepared on the basis of disclosures made by the accused persons separately is admissible and this argument has been advanced in the light of the recovery memo Ex.Ka.-16, which is a joint recovery memo.

81. Learned counsel for the appellants has assailed the alleged recovery by arguing that the alleged recovery has been made on 17.7.2011, i.e. five days after the occurrence. There is no public or independent witness of the said recovery, as has been admitted by the Investigating Officer (P.W.8) Devendra Singh himself and the evidence of police officials only is not reliable.

82. The aforesaid rival submissions of both the sides take us to the evidence regarding the recovery of alleged murder weapons. Site plans (Ex.Ka.-15) and (Ka.-21) show that the recovery has been made from the field of Giriraj son of Babu. It is a huge field adjacent to the railway boundary and road. Railway crossing is also existing there at some distance and the recovery place situates in one side of the field which is

adjacent to railway boundary and road. Thus, the scene of recovery seems to be a place, visible and accessible to all.

83. In the similar situation, when the recovery of pistol was made from a place which was accessible and visible to anyone and moreover, it was also doubtful whether the said pistol was used in the alleged crime or not, it was held that information leading to discovery of fact is one link in the chain of proof and the other links must be proved in legally permissible manner and it was held, on facts, that the discrepancies and shortcomings in evidence considerably corrode credibility of prosecution version and the inevitable conclusion is that the prosecution has not established the accusations against the accused beyond reasonable doubt and consequently, he is entitled to be acquitted and that is held so in the case of **Anter Singh Vs. State of Rajasthan, (2004) 10 SCC 657**.

84. (P.W.7) S.I. Devendra Kumar Tyagi, while being contradicted on the point of the site of recovery, had made statement contrary to that of Ex.Ka.15 and Ka.-21. According to him, in all the directions of the place of recovery of murder weapon on the pointing out of appellant Mahendra Singh, there are empty fields, whereas in the relevant map in the west of the scene of recovery, railway boundary and road have been shown and it brings the veracity of the site of alleged recovery under cloud of suspicion. He further states that the two accused persons were arrested at a crowded place and public road, whereas the house of accused Balveer exists in a residential area. Despite that, the absence of public or independent witness of the said recovery also falsifies the story of recovery.

85. In continuation of the scrutiny of evidence regarding recovery of murder weapons, our attention is also drawn to the fact that no FSL Report in respect of the murder weapon, knives, is available on record to connect them with the alleged offence despite the fact that they were sent for chemical examination, as stated by P.W.8, the Investigating Officer.

86. The prosecution has a specific case that the deceased was murdered by use of knives, which are said to be retrieved from the possession of accused Mahendra Singh and Ganga Dhar. We are under obligation to peruse the medical evidence in regard to the recovery of aforesaid knives. As has been mentioned above, P.W.5 (Dr. R.S. Maurya), who has performed the autopsy of the deceased, has found several lacerated wounds on various parts of the body of the deceased. It would be apposite to note here that, in his examination-in-chief, P.W.5 nowhere suggests that the injuries found on the body of the deceased might be inflicted by use of knives. In his cross-examination, he has made a relevant statement that the injuries have not been inflicted by any sharp-edged weapon and significantly, he further states that the injuries have not been caused by knives or any sharp-edged weapon. At the cost of repetition, it is to be reminded that the present is not a case of eyewitness account, rather it is a case of circumstantial evidence where no one has seen the occurrence. Had it been the case based on ocular evidence, the significance of medical evidence might be put into question, but since there is no eyewitness of the occurrence, the medical evidence has its own significance and evidentiary value. Learned counsel for the

appellants vehemently submitted that the medical evidence does not support the prosecution version and the alleged recovery of knives is of no use for the prosecution because the knives were not used in the commission of the crime.

87. So far as the absence of public or independent witness is concerned, we notice that the law does not require such a procedure to be adopted at all times, but the strong suspicion is due to the fact that as per medical evidence, the death of the deceased was not caused by use of any sharp-edged weapon or by knives, as the prosecution claims (the medical evidence on this point shall be discussed later in this judgment) and we can successfully take note of the principle enumerated in **Sheesh Pal Vs. N.C.T. of Delhi, (2022) 9 SCC 782**, in this respect.

88. Thus, we find that not only the last seen evidence adduced by the prosecution is shaky and unreliable, as discussed above, which might be the first link to start with the chain of the circumstances, but another incriminating circumstance of extra-judicial confession has also not been found reliable and trustworthy on the basis of such evidence which, while subjecting to a rigorous test on the touchstone of credibility, is proved to be unacceptable.

89. Recently, in **Chandrapal Vs. State of Chhattisgarh (Earlier M.P.), AIR 2022 Supreme Court 2542**, a case depending upon circumstantial evidence, the Apex Court taking into account the evidence available on record, held that -

“According to prosecution, co-accused had made self-inculpatory confession before witnesses, disclosing involvement of other accused as well.

Extra-judicial confession is a weak kind of evidence and unless it inspires confidence or is fully corroborated by some other evidence of clinching nature, ordinarily conviction for the offence of murder should not be made only on the evidence of extra-judicial confession. In absence of any substantive evidence against the accused, the extra-judicial confession allegedly made by the co-accused loses its significance and there cannot be any conviction based on such extra-judicial confession of the co-accused.”

It was further held that -

“The time gap between the two incidents i.e., the day when accused was last seen with the deceased and finding of dead body was quite big. It was difficult to connect accused with the alleged crime, more particularly when there is no other clinching and cogent evidence produced by the prosecution. In absence of any other links in the chain of circumstantial evidence, the accused cannot be convicted solely on the basis of “Last seen together”, even if version of the prosecution witness in this regard is believable.”

90. The aforesaid observation squarely applies in the circumstances of the present case where the dead body of the deceased was found two days after her alleged last seen with the appellants.

91. The story of recovery of currency notes and knives from the possession of the appellants has also serious loopholes. During the investigation, nothing has come into light to show any illicit relation or extra-marital affair of the deceased with appellant Mahendra. All these circumstances, if put together, thrash out another element of ‘motive’ to commit the crime.

92. Since the recovery of currency notes from the possession of and on pointing out of the appellants has not been proved in the manner provided by law, the strong link of motive which could possibly be helpful for the prosecution to prove its case, is also not available to it. In fact, there was no motive of the appellants to do away with the deceased.

In this regard, the legal position is well settled in umpteen of decisions of the Apex Court, such as **Nandu Singh Vs. State of Madhya Pradesh (now Chhatisgarh), 2022 SCC Online Supreme Court 1454, Pannayar Vs. State of Tamil Nadu, (2009) 9 SCC 152, State of U.P. Vs. Kishanpal & Ors., (2008) 16 SCC 73, Suresh Chandra Bahri Vs. State of Bihar, 1995 Supp (1) SCC 80, Babu Vs. State of Kerala, (2010) 9 SCC 189 and Anwar Ali Vs. State of Himachal Pradesh, (2020) 10 SCC 166** and the crux we find is that the absence of motive in case depending upon the circumstantial evidence is a factor that weighs in favour of the accused. Motive plays an important link to complete the chain of circumstances and in the present case the chain of events do not provide a clear motive to substantiate the argument of the respondent.

Call Details Record -

93. Another aspect to link the accused-appellants with the alleged crime as alleged by the prosecution, is Call Details Record (CDR), which allegedly took place between the deceased and accused-appellant Mahendra Singh. P.W.7 (Devendra Kumar Tyagi), the Investigating Officer deposes that accused-appellant Mahendra handed over a mobile phone Spice M 4250 having no SIM to the police. P.W.8 (Devendra

Singh) also states that call details record of the deceased and accused-appellants were collected and mentioned in the case diary, which is available on record. However, nothing further has been stated by both the witnesses and the prosecution completely missed to prove the aforesaid CDR in the manner provided by law, which is an electronic evidence and is admissible as electronic record under Section 3 of Evidence Act as amended by Act 21 of 2000. However, the procedure and authenticity for the admissibility of electronic record depends upon factual situation and it is always required to see that the person producing electronic evidence, has whether furnished certificate as required under Section 65-B (4) of the Evidence Act. Though such certificate is not always mandatory and the Court, in the interest of justice, may relax its requirements, but at the same time, as held in **Anvar P.V. Vs. P.K. Basheer, (2014) 10 SCC 473**, safeguards provided under Section 65-B of the Evidence Act are to ensure the source and authenticity of electronic record, as electronic records are more susceptible to tampering, alteration, transposition, excision, etc. without any safeguard, the whole trial based on proof of electronic records can lead to travesty of justice.

94. Expostulating the evidence regarding the CDR, learned counsel for the appellants has impressed upon the provisions of Section 65-B (4) of the Evidence Act, which requires certain certificates to be produced by the party relying upon the electronic evidence. No such certificate is available on record which was necessary in the facts and circumstances of the case and the availability of which, could not be relaxed as the

aforesaid evidence of CDR, if proved properly in the manner prescribed by the Evidence Act, could throw some light upon the relations between the deceased and appellant Mahendra and thus, to enable the Court to draw any inference regarding the motive of the case.

95. On the basis of the aforesaid discussion, we are of the considered view that the prosecution has miserably failed to prove its case beyond reasonable doubt. Learned trial court though has analysed several factors relating to the case, but has not scrutinized the evidence on record in proper and legal manner and thereby, has accorded a perverse finding of conviction. The chain of the circumstances is never complete, which was essential to record a conviction of an accused in a case based on circumstantial evidence. All the material circumstances, like last seen, motive, recovery of murder weapon, extra judicial confession have not been proved for want of cogent and reliable evidence. The evidence rendered by the prosecution is shaky and not trustworthy. The medical evidence stands against the prosecution version. All these shortcomings denude the prosecution case and in the aforesaid legal and factual scenario, we have no option but to set-aside the impugned judgment and order and to record acquittal of all the appellants.

96. Recently, in **Ravi Sharma Vs. State (NCT of Delhi), (2022) 8 SCC 536**, where in the circumstances of the case, the Supreme Court found the last seen theory not to be true, motive was not proved, recovery of firearm was doubtful, material contradictions found in the evidence rendered and no sufficient

link to come to the irresistible conclusion pointing guilt only to appellant, it was reiterated that mere suspicion, howsoever strong it may be, cannot be a substitute for acceptable evidence. In the peculiar circumstances of the present case, the aforesaid theory also applies to this case.

97. Hence, the impugned judgment and order of conviction and sentence, which has been sought to be assailed, calls for and deserves interference. The criminal appeals are liable to be allowed and the same are, accordingly, allowed.

98. The impugned judgement and order dated 26.02.2020 is, accordingly, set aside. The convicts-appellants are accordingly found not guilty for the offence punishable under Sections 302/34, 120-B, 201, 404 IPC and 4/25 Arms Act. They are acquitted from all the charges. Convicts-appellants are in jail. They shall be released forthwith, if not wanted in any other case.

99. Let a copy of this judgment along with trial court record be sent to the Court concerned for necessary compliance. A copy of this judgement be also placed in the connected appeal.

Order date :- 03.03.2023

SS

(N.K. Srivastava,J.) (Pritinker Diwaker,A.CJ.)