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Reserved on: 19.11.2024

Delivered on: 03.12.2024

Court No. - 47

Case :- GOVERNMENT APPEAL No. - 728 of 2024

Appellant :- State of U.P.

Respondent :- Sajid S/O Ibnehasan

Counsel for Appellant :- Shiv Kumar Pal

With

Case :- CRIMINAL APPEAL U/S 372 CR.P.C. No. - 1070 of 2022

Appellant :- Sher Ali

Respondent :- State of U.P. and Another

Counsel for Appellant :- Anand Ji Mishra, Kaushal Kumar Pandey

Counsel for Respondent :- G.A.

Hon'ble Rajiv Gupta, J.

Hon'ble Vikas Budhwar, J.

(Per: Hon'ble Vikas Budhwar, J.)

1. Impugned in the present proceedings by way of Government Appeal No. 728 of 2024 at the instance of State of U.P. and Appeal under Section 372 of the Cr.P.C. No. 1070 of 2022 preferred by Sher Ali (informant) is the judgment and order dated 26.03.2022 passed by Additional Sessions Judge, Court No. 3, Ghaziabad in Session Trials No. 234 of 2018 (State of Uttar Pradesh Vs. Sajid) arising out of Case Crime No. 196 of 2018 under Section 364, 376(3), 302, 201 I.P.C. and Section 5/6 of the POCSO Act, P.S. Bhojpur, District Ghaziabad acquitting the accused respondents.

Facts

2. The prosecution story in brief is that on 25.05.2018, Sher Ali (P.W. 1), lodged a first information report in the Police Station Bhojpur, District Ghaziabad alleging that his daughter (victim) aged

about 12 years had gone out of the house at about 7:00 P.M. on 22.05.2018 whereafter she went missing. Despite constant efforts her whereabouts were not known, constraining Sher Ali (P.W. 1) to lodge first information report being Case Crime No. 196 of 2018 under Section 363 I.P.C. Post lodging of the first information report, Amar Pal Singh, Sub Inspector was appointed as the Investigating Officer on 25.05.2018. The statement of Sher Ali (P.W. 1) was taken on 06.07.2018 and he deposed that the whereabouts of the victim remained untraced since 22.05.2018 and P.W. 2 Muddashir, P.W. 3 Junaid along with Yunus and Rashid had seen the victim along with accused Sajid. Thereafter, on 09.07.2018 after disclosure of the said fact, the police officials raided the house of the accused Sajid. On 15.07.2018 on the basis of tip of an informer the accused Sajid was arrested and taken into police custody and after interrogation a confessional statement was made by accused Sajid that he had abducted the victim on 22.05.2018 at about 7-7:30 in the evening and since the victim who was a minor girl was demanding 5/10 rupees from the accused Sajid so the accused Sajid assured her to tender 5/10 rupees demanded by the victim and thereafter took her near the drain and proceeded to abduct her and outraged her modesty and after strangulating, she was done to death. On the basis of the confessional statement and on the pointing out of the accused Sajid, the police proceeded towards the place of incident while walking on the chak road and after proceeding ahead 8-10 steps, the skeleton (skull and bones) of the deceased was found along with the clothes, slippers, ponytail (hair) which was scattered therein. It is also alleged that inquest was prepared at the site and the body was sealed and thereafter in order to ascertain as to whether the skeleton was of the deceased victim or not, the residue of the dead body was sent to Forensic Laboratory. It is further claimed that for the sake of accuracy DNA test was also performed. Since Amar Pal Singh Sub Inspector (P.W. 5),

the first Investigating Officer stood transferred, thus, in his place the second Investigating Officer (P.W. 6) Sub Inspector Surendra Pal Singh was appointed to undertake the task of investigation, thereafter P.W. 7 Sub Inspector Gynandra Bodh was appointed as Investigating Officer. The Investigating Officer conducted the investigation and submitted the charge sheet in Case Crime No. 196 of 2018 against the accused Sajid accused-respondent under Section 364, 376, 302, 201 I.P.C. read with Section 5/6 of the POCSO Act. The case was committed to the Court of Sessions.

3. During the trial, the prosecution examined as many as 8 witnesses namely Sher Ali, informant (P.W. 1), P.W. 2, Muddashir and P.W. 3, Junaid (witness of facts). P.W. 4, Dr. Vikrant who conducted the post mortem, P.W. 5, Sub Inspector Amar Pal Singh, first Investigating Officer, P.W. 6, Sub Inspector Surendra Pal Singh, second Investigating Officer, P.W. 7, Gynandra Bodh, third Investigating Officer who submitted the charge sheet and P.W. 8 who proved the chik F.I.R. After prosecution evidence was closed the Trial Court recorded the statement of the accused Sajid under Section 313 of the Cr.P.C. The accused Sajid denied the allegations levelled against him and stated that he has been falsely implicated in the criminal case. The Trial Court found the accused Sajid innocent and acquitted him from the charges under Section 364, 376(3), 302 201 I.P.C. read with Section 5/6 of the POCSO Act.

4. In order to establish its case, prosecution had produced the documentary and oral evidence-

Documentary evidence

Inquest Report	Ka-1
Post Mortem Report	Ka-2
Site-Plan	Ka-3

Recovery Memo	Ka-4
Panchayatnama	Ka-5
Corpse-Photo	Ka-6
Corpse Challan	Ka-7
Seal Sample	Ka-8
Site-Plan	Ka-9
Final Report	Ka-10
First Information Report	Ka-11
General Diary	Ka-12

Testimony of the Prosecution Witnesses

5. **P.W. 1, Sher Ali** the informant has been examined as P.W. 1, he is the father of the deceased-victim. P.W. 1 in his examination-in-chief has deposed that the victim is 10 years of age and on 22.05.2018 she had proceeded from the house at about 7-8:00 in the evening and she was wearing salwar, kurti and was in hawai slippers. P.W. 1 further deposed that since 22.05.2018 he along with the family members were were constantly searching the whereabouts of the deceased but she was untraceable thereafter, on 25.05.2018 P.W. 1 through his brother Rashid who is scribe of the first information report got the written report submitted before the Police Station which transformed into first information report. P.W. 1 also gave a statement that after a period of 8-10 days from the date when the victim went missing i.e. 22.05.2018, Muddashir (P.W. 2) along with Yunus and Rashid who also belong to the same village apprised him that they saw the deceased victim with the accused Sajid and they are in a position to identify him also. He further deposed that the same was also apprised by the natives of the village and the same was also a matter of discussion between the villagers. P.W. 1 also deposed that after a period about two months,

the accused Sajid was arrested and thereafter the skeleton of the deceased victim along with the clothes and slippers were found. He further deposed that the accused Sajid had made a confessional statement that he had outraged the modesty of the deceased victim and thereafter murdered her and left the body. He along with his wife, his brother Gulsher and one Shahid Chaudhary who happens to be the Gram Pradhan of the village identified the skeleton to be of victim. He along with his wife had also identified the clothes and the slippers which belonged to his daughter and the police thereafter, the Panchnama was prepared in which there is a thumb impression of not only his wife along with him but also of the Gram Pradhan.

6. **P.W. 2 Muddashir** got himself examined as P.W. 2 and he in his examination-in-chief deposed that he knows the first informant (P.W. 1) Sher Ali. According to him the age of the deceased victim was about 9-10 years and on 22.05.2018 when he was standing outside his house then at about 7-7:30 in the evening he saw the accused Sajid talking with the deceased victim and he also heard that the deceased victim was demanding 5/10 rupees from the Sajid and Sajid assured her that he would give 5/10 rupees to the deceased victim if she accompanies him. The said fact has also been disclosed to the police. The body was found in the Jungle and the deceased is not alive. On 24/25.05.2018, P.W. 1-Sher Ali came to his house and he was apprised of the said fact.

7. **P.W. 3 Junaid** stepped in the witness box as P.W. 3. He in his examination-in-chief deposed that he knows Sher Ali (P.W. 1) informant and also his daughter, deceased victim who have been murdered. He also stated that on 22.05.2018 at about 7-7:30 in the evening when he was returning from work to his house and when he just approached the shop of Buddhe @ Muzaffar, he recognized the accused Sajid and after the said incident, he did not see the accused Sajid.

8. **P.W. 4 Dr. Vikrant** had conducted the post mortem. According to him on 16.07.2018 he was posted as Consultant in CHC Modinagar. He conducted the post mortem at 4:20 hour wherein the following was found.- (a) external examination some bones and human skeleton 1- below the skull towards jaws 2- Scapula 3- ileum 4- Radius, ulna 5- Tibia both sides 6- Femur 7- Few Ribs 8- Few Separated Vertebrae 9- Humerus of both Upper limbs through digital X ray 2- Molar teeth 2- Ribs. According to him, the skeleton was sent for DNA examination. Medical examination was done with the assistance and the advice of his associate Dr. Rakesh Kumar. He proved the factum of post mortem.

9. **P.W. 5 Sub Inspector Amar Pal Singh** the first Investigating Officer, deposed that he was assigned the task of conducting investigation with respect to the subject F.I.R. According to him post lodging of the first information report entire formalities were completed as prescribed and in vogue. He prepared the spot inspection map (Exhibit 3). He also took the statements of the Gulsher and Tabid which stands recited in the GD. In his statement he further deposed that he took the statements of the P.W. 1 Sher Ali-informant who apprised him that since 22.05.2018 the whereabouts of the victim is unknown and according to him P.W. 1 Sher Ali first informant apprised him that Yunus, P.W. 2 Muddashir, Rashid and Junaid, P.W. 3 had seen the accused Sajid along with the deceased victim, he further took the statements of the above noted witnesses. On the basis of the said statements on 09.07.2018, P.W. 5 along with the police officials raided the house of the accused Sajid. Thereafter on 15.07.2018 on the basis of a tip, accused Sajid was arrested and taken in police custody and he made a confessional statement that on 22.05.2018 at about 7-7:30 in the evening when the deceased victim was standing and demanding 5/10 rupees from him then he took her near the drain and thereafter proceeded to outrage her modesty and strangulated her to

death. On the said basis P.W. 1 along with the police officials went towards the chak road and after walking 50-60 steps and inside the agricultural field, 8-10 steps, the skeleton along with clothes and slippers and ponytail (hair) was found. However, there was no flesh available on the skeleton presumably due to the fact that the animals might have eaten it. P.W. 1 Sher Ali along with his wife and the Gram Pradhan who were present, had also identified that the skeleton was that of the deceased victim and thereafter Panchnama was prepared. The post mortem was conducted, body was sent for DNA test.

10. **P.W. 6 Surendra Pal Singh**, second Investigating Officer also got himself examined as a prosecution witness and according to him he was assigned the charge on 19.07.2018.

11. **P.W. 7 Gynandra Bodh**, third Investigating Officer deposed that he was assigned the charge of Investigating Officer, he conducted investigation and after thorough investigation, materials were collected regarding the involvement of the accused Sajid and he submitted the charge sheet.

12. **P.W. 8 Head Constable Raj Kumar** is the Head Moharrir. According to him he had recorded the contents of written report and chik report. He is formal witness.

Legal Position:

13. Before pondering into the niceties of the judgment of acquittal under challenge in the proceedings under Section 378(3) Cr.P.C. at the instance of the State, this Court has to re-memoirse itself the fact that the present proceedings are in a form of appellate jurisdiction occasioning scrutiny of a judgment of acquittal wherein there are certain limitations provided therein which needs to be recognised before the delving in the issue.

14. Broadly speaking until and unless the judgment under challenge is perverse and there are substantial and compelling reasons followed by

miscarriage of justice to be meted by the parties, this Court should not in routine manner interfere with the judgment of acquittal as the accused is possessed with double presumption of innocence.

15. To put it otherwise as a matter of right, this Court cannot at the instance of the appellant, who happens to be State exercise the jurisdiction while converting the judgment of acquittal into conviction.

16. The aforesaid principle of law has already been crystallized by Hon'ble Apex Court in plethora of decisions and just for the sake of illustration reference may be made to the judgment of **Rajesh Prasad Vs. State of Bihar (2022) 3 SCC (471)** wherein the Hon'ble Apex Court wherein the following was observed.-

"21. Before proceeding further, it would be useful to review the approach to be adopted while deciding an appeal against acquittal by the trial court as well as by the High Court. Section 378 CrPC deals with appeals in case of acquittal. In one of the earliest cases on the powers of the High Court in dealing with an appeal against an order of acquittal the Judicial Committee of the Privy Council in Sheo Swarup v. King Emperor² considered the provisions relating to the power of an appellate court in dealing with an appeal against an order of a acquittal and observed as under: (SCC OnLine PC)

"16. It cannot, however, be forgotten that in case of acquittal, there is a double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person should be presumed to be innocent unless he is proved to be guilty by a competent court of law. Secondly, the accused having secured an acquittal, the presumption of his innocence is certainly not weakened but reinforced, reaffirmed and strengthened by the trial court.

"..... But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration

to such matters as: (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognised in the administration of justice."

It was stated that the appellate court has full powers to review and to reverse the acquittal.

22. In Atley v. State of U.P.³, the approach of the appellate court while considering a judgment of acquittal was discussed and it was observed that unless the appellate court comes to the conclusion that the judgment of the acquittal was perverse, it could not set aside the same. To a similar effect are the following observations of this Court speaking through Subba Rao, J. (as his Lordship then was) in Sanwat Singh v. State of Rajasthan: (Sanwat Singh case⁴, AIR pp. 719-20, para 9)

"9. The foregoing discussion yields the following results: (1) an appellate court has full power to review the evidence upon which the order of acquittal is founded; (2) the principles laid down in Sheo Swarup² afford a correct guide for the appellate court's approach to a case in disposing of such an appeal; and (3) the different phraseology used in the judgments of this Court, such as, (i) "substantial and compelling reasons", (ii) "good and sufficiently cogent reasons", and (iii) "strong reasons" are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion; but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion

on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified."

The need for the aforesaid observations arose on account of observations of the majority in Aher Raja Khima v. State of Saurashtra⁵ which stated that for the High Court to take a different view on the evidence "there must also be substantial and compelling reasons for holding that the trial court was wrong".

23. M.G. Agarwal v. State of Maharashtra is the judgment of the Constitution Bench of this Court, speaking through Gajendragadkar, J. (as his Lordship then was). This Court observed that the approach of the High Court (appellate court) in dealing with an appeal against acquittal ought to be cautious because the presumption of innocence in favour of the accused "is not certainly weakened by the fact that he has been acquitted at his trial".

24. In Shivaji Sahabrao Bobade v. State of Maharashtra, Krishna Iyer, J., observed as follows: (SCC p. 799, para 6).

"6. ... In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents."

25. This Court in Ramesh Babulal Doshi v. State of Gujarat, spoke about the approach of the appellate court while considering an appeal against an order acquitting the accused and stated as follows: (SCC p. 229, para 7)

"7. ... While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be

sustained in view of any of the above infirmities it can and then only reappraise the evidence to arrive at its own conclusions."

The object and the purpose of the aforesaid approach is to ensure that there is no miscarriage of justice. In another words, there should not be an acquittal of the guilty or a conviction of an innocent person.

31.1. Ordinarily, this Court is cautious in interfering with an order of acquittal, especially when the order of acquittal has been confirmed up to the High Court. It is only in rarest of rare cases, where the High Court, on an absolutely wrong process of reasoning and a legally erroneous and perverse approach to the facts of the case, ignoring some of the most vital facts, has acquitted the accused, that the same may be reversed by this Court, exercising jurisdiction under Article 136 of the Constitution. [State of U.P. v. Sahai] d Such fetters on the right to entertain an appeal are prompted by the reluctance to expose a person, who has been acquitted by a competent court of a criminal charge, to the anxiety and tension of a further examination of the case, even though it is held by a superior court. [Arunachalam v. P.S.R. Sadhanantham]. An appeal cannot be entertained against an order of acquittal which has, after recording valid and weighty reasons, has arrived at an unassailable, logical conclusion which justifies acquittal."

17. Recently, the Hon'ble Supreme Court in **Babu Sahebagouda Rudragoudar and others Vs. State of Karnataka 2024 (8) SCC 129** the Apex Court had flagged a note of caution in the matters of exercise of appellate jurisdiction when the Appellate Court is confronted with an order of acquittal, the following was observed:-

"38. First of all, we would like to reiterate the principles laid down by this Court governing the scope of interference by the High Court in an appeal filed by the State for challenging acquittal of the accused recorded by the trial court.

39. This Court in *Rajesh Prasad Vs. State of Bihar* encapsulated the legal position covering the field after considering various earlier judgments and held as below: (SCC pp. 482-83, para 29)

“29. After referring to a catena of judgments, this Court culled out the following general principles regarding the powers of the appellate court while dealing with an appeal against an order of acquittal in the following words: (*Chandrappa case*, SCC p. 432, para 42)

‘42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Criminal Procedure Code, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may read its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, “substantial and compelling reasons”, “good and sufficient grounds”, “very strong circumstances”, “distorted conclusions”, “glaring mistakes”, etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of “flourishes of language” to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his

acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.”

40. Further, in *H.D. Sundara Vs. State of Karnataka* this Court summarised the principles governing the exercise of appellate jurisdiction while dealing with an appeal against acquittal under Section 378 Cr.P.C. as follows: (SCC p. 584, para 8)

“8. ... 8.1. The acquittal of the accused further strengthen the presumption of innocence;

8.2. The appellate court, while hearing an appeal against acquittal, is entitled to reappraise the oral and documentary evidence;

8.3. The appellate court, while deciding an appeal against acquittal, after reappraising the evidence, is required to consider whether the view taken by the trial court is a possible view which could have been taken on the basis of the evidence on record;

8.4. If the view taken is a possible view, the appellate court cannot overturn the order of acquittal on the ground that another view was also possible; and

8.5. The appellate court can interfere with the order of acquittal only if it comes to a finding that the only conclusion which can be recorded on the basis of the evidence on record was that the guilt of the accused was proved beyond a reasonable doubt and no other conclusion was possible.”

18. Broadly speaking the same principles also stands applied to the appeals under Section 372 of the Cr.P.C. by the informant/complainant.

19. Bearing in mind the principles of law so laid down by the Hon’ble Apex Court as referred to above the present case is to be proceeded with while giving it a logical end.

Submissions advanced on behalf of the State appellants and counsel for the informant

20. Sri Jay Prakash Tripathi, learned AGA along with Sri Anand Ji Mishra who appear for the informant have made the manifold submissions namely:

(a) the accused herein has committed offence which stood proved beyond doubt as the chain and sequence of the events consistently points out towards commission of offences beyond reasonable doubt;

(b) the accused were seen with the deceased lastly wherefrom she disappeared, thus, the last seen theory comes into play;

(c) once the prosecution witnesses had proved beyond shadow of doubts that the accused was lastly seen with the deceased victim then the onus stood shifted to the accused and in absence of proving otherwise, by no stretch of imagination, it can be said that the accused were innocent;

(d) it was only on the pointing out of the accused, the skeleton of the deceased victim stood recovered and once on the basis of the clothes and the slippers and the piece of hair (ponytail) which stood identified by the first informant and his wife to be of their own daughter (deceased victim), there is no element of doubt that the accused had not committed the offence;

(e) once P.W. 2 Muddashir and P.W. 3 Junaid happen to be a non-interested witness who had lastly seen the deceased victim with the accused Sajid then their deposition ought to have been given much weightage particularly when the defence has not discharged its burden of proving that the accused was not lastly seen with the deceased victim.

Analysis

21. We have given thoughtful consideration to the arguments advanced by the learned AGA and the counsel for the informant and perused the record carefully including the trial court records.

22. The first information report was lodged on 25.05.2018 at 12:35 hours alleging that the P.W. 1 Sher Ali's minor daughter (deceased victim) had gone out from his house at 7:00 in the evening wherefrom her whereabouts became untraceable. It is also alleged by the P.W. 1 Sher Ali that for 3/4 days there was rigorous search but in failing to know the whereabouts of the deceased victim, F.I.R. came to be lodged on 25.05.2018. According to the prosecution, P.W. 1 Sher Ali deposed that after a period of 8-10 days from the date of incident i.e. 22.05.2018 Yunus, Rashid and Muddashir, P.W. 2 apprised P.W. 1 that they had seen accused Sajid along with the deceased victim and the said fact was also apprised by the villagers and it was the matter of discussion between them. In a nutshell the prosecution story is that the deceased victim was lastly seen with the accused Sajid. Notably, as per the prosecution case in particular P.W. 5, Sub Inspector Amar Pal Singh, the first Investigating Officer on 06.07.2018 had approached the P.W. 1 Sher Ali for recording of the statement under Section 161 Cr.P.C. and he was apprised by the P.W. 1 Sher Ali that P.W. 2 Muddashir, P.W. 3 Junaid, Yunus and Rashid had apprised him about the fact that the deceased victim was lastly seen with the accused Sajid. Apparently, P.W. 2 Muddashir, in his cross examination by the defence stated that he saw the accused Sajid with the deceased victim on 22.05.2018 and on the same day he had apprised the said fact to his brother Rustom. He further deposed that his brother Rustom also apprised the said fact to the parents and family members of the deceased victim. He stated that the father of the deceased victim P.W. 1 Sher Ali had come to their house on 24/25.05.2018 at about 8:00 A.M. the said fact was also informed to him.

23. The aforesaid deposition of P.W. 1 Sher Ali, P.W. 3 Junaid itself shows that there are major contradictions which demolishes the prosecution theory. On one hand, according to the deposition of the P.W. 1 he was informed after a period of 8/10 days of the incident which occurred on 22.05.2018 regarding the fact that the deceased victim was lastly seen with the accused Sajid by Yunus, Rashid and Muddashir, P.W. 2, however, P.W. 2 Muddashir himself deposed that P.W. 1 had come to his house on 24/25.05.2018 at 8:00 A.M. whereupon the said fact was apprised. Further what is more interesting is that the first information report was lodged against unnamed accused on 25.05.2018, thus, the possibility cannot be ruled out that the present case is of false implication. Nonetheless P.W. 3- Junaid further deposed that he had not seen the deceased with the accused Sajid and he did not apprise the said fact to the friends or any body.

24. Pertinently, as per the prosecution case the deceased victim went missing from 22.05.2018 and the skeleton was recovered on 15.07.2018. The deceased victim was lastly seen with the accused on 22.05.2018, thus, what is relevant is the time gap when the deceased-victim was last seen with the accused and the time of the commission of the offence/the date when the skeleton was discovered. Admittedly, the time gap in the present case is over and above one and a half month.

25. The impact and the effect of time gap in the cases of circumstantial evidence has been explained in **Dharm Dev Yadav Vs. State of U.P. 2014 (5) SCC (509)** where it was observed as under:-

“19. It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other words, a conviction cannot be based on the only circumstance of last seen together. The conduct of the accused and the fact of last seen together plus other circumstances have to be looked into. Normally, last seen

theory comes into play when the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that the 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, 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. PWs 1, 2, 3, 5, 9 and 10 have all deposed that the accused was last seen with Diana. But, as already indicated, to record a conviction, that itself would not be sufficient and the prosecution has to complete the chain of circumstances to bring home the guilt of the accused.”

26. In Dhan Raj @ Dhand Vs. State of Haryana (2014) 6 SCC 745, the Hon'ble Apex Court observed as under:-

“15. The above mentioned circumstantial evidence was supported with the statement of Raj Singh (PW 15), that when he was visiting his brother the deceased on 24-1-1997 after the deceased had left, the three accused came to the deceased's house and enquired about him after disclosing their names. Before discussing the admissibility of the said statement, we would refer to the landmark decision of this Court in Sharad Birdhichand Sarda v. State of Maharashtra regarding circumstantial evidence, where this Court held regarding the question of the accused last seen with the deceased, that where it is natural for the deceased to be with the accused at the material time, other possibilities must be excluded before an adverse inference can be drawn. It is evident from the above that this Court refrains from drawing adverse inferences in a factual matrix which points towards the guilt of the accused. Thus, we will consider the statement of Raj Singh also in the same light.

16. As per the statement of Raj Singh, the three accused had come asking for the deceased but in the absence of other corroborating evidence and

independent evidence, it is not established that the appellant-accused had abetted the co-accused Sanjay in the commission of the crime. Also it can be the defence case that the said statement has been added as an afterthought to strengthen the case of the prosecution. We have found no material on record which corroborated the statement of Raj Singh who is an interested witness. Furthermore, there is no other evidence which indicates or establishes the presence of the appellant-accused near the place of commission of crime. Also, as noted by the trial court in the trial of Badal, no footprints were found in the surrounding kutchra area where the body of the deceased was found.

17. We have noticed in Madhu v. State of Kerala, facts of which were discussed earlier, that this Court in spite of the factum that the accused were sighted close to the place of occurrence at around the time of occurrence reversed the conviction as guilt was not established. In the present factual matrix, it is only an interested witness stating that the accused had come asking for the deceased. This factum alone does not establish guilt as no other evidence is found that they were near the Bizdipur area where the crime was committed or had visited the house of the deceased.”

27. In the case of **Ashok Vs. State of Haryana (2015) 4 SCC 393**, Hon’ble Apex Court had discussed the theory of last seen together while holding as under:-

"8. The "last seen together" theory has been elucidated by this Court in 9 Trimukh Maroti Kirkan v. State of Maharashtra, in the following words:

"22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. Thus, the doctrine of last seen together shifts the burden of proof onto the 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.”

9. *In Ram Gulam Chaudhary v. State of Bihar, the accused after brutally assaulting a boy carried him away and thereafter the boy was not seen alive nor was his body found. The accused, however, offered no explanation as to what they did after they took away the boy. It was held that for absence of any explanation from the side of the accused about the boy, there was every justification for drawing an inference that they had murdered the boy.*

10. *In Nika Ram v. State of H.P.4, it was observed that the fact that the accused alone was with his wife in the house when she was murdered with a "khukhri" and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt.*

11. *The latest judgment on the point is Kanhaiya Lal v. State of Rajasthan⁵. In this case this Court has held that the circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing the connectivity between the accused and the crime. Mere non-explanation on the part of the accused by itself cannot lead to the proof of guilt against the accused.”*

28. Further in **Chandrapal Vs. State of Chhattisgarh AIR 2022 S.C. 2542**, the issue of last seen was discussed as under:-

"14. In this regard it would be also relevant to regurgitate the law laid down by this court with regard to the theory of "Last seen together".

15. *In case of Bodhraj and Ors. v. State of Jammu and Kashmir', this court held in para 31 that:*

"31. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible...."

16. *In Jaswant Gir v. State of Punjab', this court held that 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 believed.

17. In Arjun Marik and Ors. v. State of Bihar, It was observed that the only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the accused, and therefore no conviction on that basis alone can be founded."

29. The Hon'ble Apex Court in Jabir and others Vs. State of Uttarakhand AIR 2023 Supreme Court SC 488 had laid down the parameters in the cases sustaining conviction on the basis of circumstantial evidence, it was observed as under:-

"21. A basic principle of criminal jurisprudence is that in circumstantial evidence cases, the prosecution is obliged to prove each circumstance, beyond reasonable doubt, as well the as the links between all circumstances; such circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else; further, the facts so proved should unerringly point towards the guilt of the accused. The circumstantial evidence, in order to sustain conviction, must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused, and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.⁵ These were so stated in Sarad Birdichand Sarda (supra) where the court, after quoting from Hanumant, observed that:

"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 Bobade v. State of Maharashtra (1973) 2 SCC 793 where the following 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."

These panchsheel precepts, so to say, are now fundamental rules, iterated time and again, and require adherence not only for their precedential weight, but as the only safe bases upon which conviction in circumstantial evidence cases can soundly rest.

22. This court is of the opinion that given the testimonies of two sets of witnesses (PWs2 &3 and PW-4 &5) who deposed to seeing the deceased with Husn Jahan and the first two accused, on 8th October 1999 and 9th October 1999, respectively, and also given the serious flaws in their testimonies, with respect to the knowledge of PW-1, the flaws in their testimonies regarding their presence at the place and time, deposed to by them, as well as other glaring inconsistencies, the prosecution cannot be said to have proved its case. If benefit were to be given to PW-1's statement, and he were to be believed that the police did not take any action, till he applied under Section 156 (3) his conduct, in not stating

anything during inquest proceedings, despite being informed about the facts, by PW-2, PW-3 and PW-4, that about seeing the boy in the company of A-3 Husn Jahan, on 08-10-1999, and later, on the early morning of 09-10-1999, undermines the prosecution story. Likewise, if the prosecution version that there was a previous enmity or grudge on the part of the accused, which constituted a motive to kill the child, is correct, the conduct of PW-4 and PW-5 in not taking any steps to ensure the safety of the child, when they saw him in the company of the accused, is unnatural. This is more so, because PW-5 is admittedly related to PW-1. As discussed previously, the testimony of PW-5 with respect to the circumstances under which he saw the deceased early morning of 09-10-1999, renders it untrustworthy and unbelievable.

23. This court is also of the opinion that apart from the above serious infirmities, there is no evidence, oral or any material object, which connects the appellant-accused with the crime. It has been repeatedly emphasized by this court, that the “last seen” doctrine has limited application, where the time lag between the time the deceased was seen last with the accused, and the time of murder, is narrow; furthermore, the court should not convict an accused only on the basis of the “last seen” circumstance.

24. Recently, in *Rambraksh vs. State of Chhattisgarh*,⁷ this court after reviewing previous decisions, stated as follows:

“10. It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other words, a conviction cannot be based on the only circumstance of last seen together. Normally, last seen theory comes into play where the time gap, between the point of time when the accused and the 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. To record a conviction, the last seen together itself would not be sufficient and the prosecution has to complete the chain of circumstances to bring home the guilt of the accused.

11. In a similar fact situation this Court in the case of *Krishnan v. State of Tamil* (2014) 12 SCC 279, held as follows:

“21. The conviction cannot be based only on circumstance of last seen together with the deceased. In Arjun Marik v. State of Bihar (1994) Supp (2) SCC 372) : (AIR Online 1994 SC 65).

“31. Thus the evidence that the Appellant had gone to Sitaram in the evening of 19-7-1985 and had stayed in the night at the house of deceased Sitaram is very shaky and inconclusive. Even if it is accepted that they were there it would at best amount to be the evidence of the Appellants having been seen last together with the deceased. But it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the accused and, therefore, no conviction on that basis alone can be founded.”

22. This Court in Bodhraj v. State of (2002) 8 SCC 45) held that:

“31. The last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible.”

It will be hazardous to come to a conclusion of guilt in cases where there is no other positive evidence to conclude that the accused and the deceased were last seen together.

23. There is unexplained delay of six days in lodging the FIR. As per prosecution story the deceased Manikandan was last seen on 4-4-2004 at Vadakkumelur Village during Panguni Uthiram Festival at Mariyamman Temple. The body of the deceased was taken from the borewell by the fire service personnel after more than seven days. There is no other positive material on record to show that the deceased was last seen together with the accused and in the intervening period of seven days there was nobody in contact with the deceased.

24. In Jaswant Gir v. State of Punjab (2005) 12 SCC 438): AIR Online 2005 SC 387), this Court held that in the absence of any other links in the chain of circumstantial evidence, the Appellant cannot be convicted

solely on the basis of "last seen together" even if version of the prosecution witness in this regard is believed."

Again, in Nizam & Ors. v State of Rajasthan,⁸ it was held as follows:

"Courts below convicted the Appellants on the evidence of PWs 1 and 2 that deceased was last seen alive with the Appellants on 23.01.2001. Undoubtedly, "last seen theory" is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. The "last seen theory" holds the courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of death of the deceased. It is well-settled by this Court that it is not prudent to base the conviction solely on "last seen theory". "Last seen theory" should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen."

25. In the present case, save the "last seen" theory, there is no other circumstance or evidence. Importantly, the time gap between when the deceased was seen in the company of the accused on 09-10-1999 and the probable time of his death, based on the post mortem report, which was conducted two days later, but was silent about the probable time of death, though it stated that death occurred approximately two days before the post mortem, is not narrow. Given this fact, and the serious inconsistencies in the depositions of the witnesses, as well as the fact that the FIR was lodged almost 6 weeks after the incident, the sole reliance on the "last seen" circumstance (even if it were to be assumed to have been proved) to convict the accused-appellants is not justified."

30. The aforesaid principle of law came to be followed in the case of **Dinesh Kumar Vs. State of Haryana AIR 2023 Supreme Court 2795** and **R. Sreenivasa Vs. State of Karnataka AIR 2023 SC 4301**.

31. Applying the principles of law as laid down in the above noted decisions in the facts of the case an irresistible conclusion stands drawn that there is a huge time gap between the alleged accused lastly seen with the deceased victim and the recovery of the body (skeleton)

which creates a doubt regarding involvement of the accused Sajid in the commission of crime.

31. Now another crucial question arises for consideration whether the skeleton which is being shown to have been recovered on 15.07.2018 was of the deceased victim or not. Admittedly as per the panchnama and the post mortem report only skeleton was found and there was no flesh. The deceased went missing from 22.05.2018 as per the prosecution story and the recovery of the body of the deceased dated 15.07.2018. The identification is stated to have been made by P.W. 1, Sher Ali and his wife with the aid and assistance of clothes, slipper and hair (ponytail). The skeleton was also sent for DNA test, however, there is nothing on record that there is any conclusive report that the skeleton was of the deceased victim.

32. Interestingly, P.W. 1 and P.W. 5 Inspector Amar Pal Singh, first Investigating Officer who claims to have recovered the skeleton on cross examination by the defence could not point out the time when he along with his team had gone from the police station and further does not remember whether the same stands mentioned in the GD report. One further question being raised to him, he showed his inability to apprise at what time the P.W. 1 and his wife were informed for identification of the skeleton.

33. The aforesaid circumstances itself creates a doubt upon the credibility of the prosecution story. Nonetheless, the entire prosecution story is based upon circumstantial evidence and it is not a case of eye witness testimony. Thus, an obligation stood cast upon the prosecution to complete the chain in all respect so as to indicate the guilt of the accused and exclude any other theory of the crime.

34. Plainly and simply, merely on the basis of the statements of two prosecution witnesses namely P.W. 2, Muddashir and P.W. 3 Junaid the accused Sajid cannot be said to have commissioned the crime

particularly when the overall circumstances do not support the prosecution case.

35. Cumulatively giving anxious consideration to the judgment and the order passed by the learned trial court acquitting the accused, this Court finds that the learned trial court has not committed any palpable illegality or perversity as the learned trial court has appreciated each and every aspect of the matter from the four corners of law while acquitting the accused. The view taken by the trial court is a possible and plausible view based upon not only the appreciation of the testimony of the prosecution witnesses and the documents so adduced therein but also upon the cardinal principles of law which govern the subject in question.

36. Thus, this Court has no option but to concur that the judgment and order of the trial court whereby the accused herein has been acquitted.

37. Resultantly, no ground is made so as to accord leave to appeal. Accordingly, leave to appeal is rejected. As the leave to appeal stands rejected, thus, the Government Appeal instituted by the appellant under Section 378(3) of the Cr.P.C. and the appeal of the informant under Section 372 of the Cr.P.C. also stands rejected.

38. The records be sent back to the court below.

Order dated:- 03.12.2024

Rajesh