Reserved

AFR

Criminal Appeal No. 654 of 1983

Narendra and other ..... Appellants

Versus

State of U. ..... Respondent

Hon'ble Vinod Prasad, J.
Hon'ble Surendra Kumar, J.

(Delivered by Hon'ble Vinod Prasad, J.)

This appeal emanates from the impugned judgement and order dated 14.3.1983 passed by IVth Additional Sessions Judge, Fatehpur in S.T. No. 2 of 1982, State Vs. Narendra and others, by which learned trial Judge has held all the three appellants Narendra (A-1), Dadhich @ Jageshwar (A-2) and Ram Prakash @ Nanka (A-3) guilty under Sections 302/34 & 201 IPC and has sentenced them to imprisonment for life on the first count and two years R.I. with fine of Rs.100/- on the second count, the defalut sentence being six months additional R.I.

Described laconically, case against the appellants, as was alleged during investigation and later on stated by the fact witnesses during the Session's trial were that an unknown dead body surfaced in the well of Kalicharan Yadav within the precinct of village Tikri, which was spotted by one Vishal Ahir. Discovery of the dead body was intimated to watchman Raghubar (P.W. 1) on 12.8.1979 by Vishal Ahir. Watchman Raghubar (P.W.1) came to the well and spotted the dead body himself. He thereafter came to police station Khaga the same day at 10.30 p.m. and intimated Head Moharrir Lalman Mishra, P.W. 7, about the same, which information was recorded in the GD by P.W. 4 vide Exhibit Ka.8 at serial no. 34. S.I. Chandra Tiwari (P.W. 6) after receiving the information of surfacing of the dead body proceeded for the spot on the following day 13.8.79 along with

Constables Ram Pratap Singh, Radhey Shyam Mishra carrying inquest register and copy of the GD entry Exhibit Ka-7. Dead body was fetched out from the well by said S.I. P.W. 6 and inquest on the cadaver of the deceased was performed vide Exhibit Ka-1. Diagram of the corps is Exhibit Ka-2 and thereafter the body was sealed. Seal impression of the cadaver is Exhibit Ka-3 and letter of request for performing post-mortem on the corpse of the deceased addressed to C.M.O. Is Exhibit Ka-4. Other letters addressed to the R.I. for returning of cloths of the deceased etc. are Exhibit Ka-5 and 6. Dead body thereafter was handed over to Constable Radhey Shyam and Chaukidar Raghubar P.W.1 for being carried to the mortuary for autopsy purposes. The aforesaid persons produced the dead body before Dr. J.S. Rai P.W.8 on the next day 14.8.1979. Papers regarding the dead body were received to the doctor, P.W. 8, at 12.10 p.m. and that very day autopsy was performed at 2.10 p.m. Doctor has noted following facts detected by him on the cadaver of deceased:-

"deceased was 24 years of age and four days had lapsed since his death. Rigor mortis were absent in both the limbs. Skin had peeled off. Nails had detached, hair loosened, skull suture loose, brain was congested, maggots were present. Eyes and tongue were protruding and scrotum were swollen and protruding. The brain of the deceased was lacerated and his stomach contained semi digested food. Faecal matter were present in the intestine. Cause of deceased death was shock and haemorrhage."

Following ante-mortem injuries was detected by the doctor on physical examination of the body:-

1. *Gun shot wound of entrance 1" x 1" x cavity deep on the left side of abdomen in axillary line, 2" above the left iliac bone, margins irregular, inverted blackened, direction from left to right, inward slightly down ward.*
2. *Contusion 2-1/4" x 1" right side of face upto forehead oblique just above the right ear.*

Internal examination of the corpse further revealed that iliac bone on the right side along with fourth vertebra were fractured. Peritoneum were lacerated and small intestine was punctured at places. Five big shot and one wad piece were recovered from the dead body, which were sealed and sent to the superintendent of police, Fatehpur. Post-mortem examination report of the deceased is Exhibit Ka-11. Calculating time estimation, deceased could have died in the night between 10/11.8.1979 between 7 to 8 p.m. Sustained physical injury by itself was sufficient in ordinary course of the nature to cause death and injury no.2 could have been a result of fall in the well.

After the dead body was exhumed from the well, it was identified by Sampatiya (P.W. 3), deceased's wife. She was the daughter of one Chandrapal, resident of village Ikonagarh.

After receiving of post-mortem examination report on 15.8.1979 that P.W.7 registered a case vide Crime No. 189 of 1979, under Section 302/201 IPC and prepared the GD entry Exhibit Ka-9. Investigation into the crime was handed over to S.O. Sadanand Rai. Special report regarding commission of the crime was dispatched through Constable Ram Nath Tiwari vide GD No.11 at 9.25 a.m. vide Exhibit Ka-10.

I.O. Sada Nand Tiwari (P.W. 9) vetted through the documents concerning the crime and then interrogated head moharir Lalman Mishra (P.W. 7) and SI Chandra Tiwari (P.W. 6) and penned down their statements. On 16.8.79, I.O. interrogated watchman Raghuvar (P.W. 1), witnesses Deshraj, Mohan Lal and Chandrapal. I.O. thereafter conducted spot inspection at the pointing out of those witnesses and prepared site plan map Ext. Ka-11. He thereafter returned to the village of the deceased where he interrogated Sampatiya (P.W. 3), widow of the deceased. From her village Banshi-Ka-Purwa, I.O. came to the village Shikarpur where he interrogated witness Maiku. On 17.8.79, accused Narendra was arrested and at his disclosure statement, I.O. came to the bank of a canal where some

blood had dripped down. Narendra informed the I.O. that it was the blood of the deceased, which had oozed out after he was shot at. From that place, blood stained and plain earth were collected and sealed by the I.O. and recovery memo in that respect Ext. Ka-12 was prepared. Both the blood stained and soil earth are material Exts. 1 and 2. I.O. prepared the site plan of the recovery spot vide Ext. Ka-13. On 28.8.79, I.O. received the postmortem examination report and inquest memo of the deceased. On 11.10.79, it was intimated to the I.O. that two of the accused Nanka (A-3) and Jageshwar (A-2) are in jail and, therefore, I.O. interrogated both of them. Concluding investigation, all the three accused were charge sheeted vide Ext. Ka-14 on 26.10.79. Investigation against fourth accused Kulli @ Amar Singh continued. Ultimately as an absconder, he too was charge sheeted on 29.12.79.

Charge sheeting of the accused resulted in their summoning by the Committal Magistrate who, finding their crime triable by Session's Court, committed their case to the Court of Session's for trial where, it was registered as S.T. No. 2 of 1982, State Vs. Narendra and others.

Learned Trial Judge / 4th Additional Session's Judge, Fatehpur charged all the accused under sections 302/34 and 201 I.P.C. on 19.11.1982, which charges were read out and explained to all of them and after understanding the same, all the accused abjured those charges and claimed to be tried and consequently, session's trial procedure was adopted by the learned Trial Judge to judge their guilt.

Prosecution in its effort to bring home its framed charges and accused to books, tendered nine witnesses, out of whom watchman Raghuvar informant P.W. 1, Deshraj (witness of last scene) P.W. 2, Maiku (witness for motive) P.W. 3, Chandrapal (father of the widow and father-in-law of the deceased and witness for motive) P.W. 4, Sampatiya (witness for motive and wife of deceased) P.W. 5 were the fact witnesses. SI Chandra Tiwari P.W. 6, head moharir Lalman Mishra P.W. 7,

Dr. J.S. Rai P.W. 8 and I.O. Sada Nand Rai P.W. 9 were the formal witnesses.

Accused in their statements under section 313 Cr.P.C. refuted all the incriminating circumstances appearing against them in the prosecution evidences and took the defence of their false implication because of enmity.

As has already been mentioned herein above, learned Trial Judge after marshaling of facts, critically appreciating evidences tendered before it, held that prosecution had been able to anoint the guilt of the appellants successfully without any ambiguity and, therefore, convicted them of the framed charges and sentenced them as has already been recorded in the opening paragraph of this judgment and consequently, in the instant appeal, said conviction and sentence has been challenged by the convicted accused.

Pending final outcome of the appeal, Ram Prakash @ Nanka (A-3) lost his life and, therefore, his appeal was abated on 15.12.2011. The appeals of rest of the two surviving appellants Narendra (A-1) and Dadhich @ Jageshwar (A-2) are now to be considered by us.

In the background of aforementioned facts and circumstances, we have heard Sri Ravindra Sharma and Sri S.S. Chandel, learned counsel for the appellants and Sri Sangam Lal Kesharwani, learned AGA for the State and have carefully perused the entire trial court record including oral and documentary evidences.

Castigating the impugned judgment of conviction and sentence, it was urged on behalf of the appellants that it is a case, which hinges upon circumstantial evidences. There is no eye witness account and only on the basis of motive and circumstance of last seen that the appellants have been convicted by the learned Trial Judge. It was urged that motive is wholly insufficient for the appellants to commit the crime and even if prosecution version is taken as it is, without addition or substraction, the motive could only with appellant Dadhich @ Jageshwar (A-2). A-1 had nothing to do with the said motive nor the prosecution witnesses had described any reason for him to participate in the crime and

consequently, there is total absence of any motive so far as Narendra (A-1) is concerned. It was next submitted that motive by itself is not sufficient to anoint guilt of the accused, as it cannot be a substitute and take place of proof beyond all reasonable doubt. It may be a circumstance but has to be countenanced by other surrounding circumstances. In a case of circumstantial evidence, accused can be held guilty only when all the attending circumstance brought on the record unerringly without any ambiguity and other hypothesis points out towards the guilt of the accused. It was further argued that evidence of last seen has been illegally and wrongly considered by the learned Trial Judge to be an incriminating circumstance against the appellants as, evidence of Deshraj (P.W. 2) does not indicate at all that at any point of time, deceased was in the company of the accused. He may be in the close vicinity but not in the company of accused and consequently the reason for accepting the evidence of P.W. 2, as a last seen evidence by the learned Trial Judge is without any basis and contrary to the evidences on record. It was, therefore, contended that none of the two circumstances are sufficient to bring appellants' case within the fold as proved and learned trial court had fallen in error in convicting the appellants. Appeal of both the appellants deserves to be allowed and they are entitled to acquittal submitted appellants' counsel. It was next argued that Deshraj P.W. 2 is the uncle of the deceased, Sampatiya P.W. 5 is deceased's widow, Chandrapal P.W. 4 is his father-in-law being father of P.W. 5 and, therefore, no independent witnesses had come forward to lend credence to the prosecution version, which lies in a realm of total uncertainty. Learned counsel wrapped up the submission by contending that appeal be allowed and appellants be acquitted and be set at liberty.

Learned AGA made gallant effort in canvassing that it is a case of circumstantial evidence and the circumstances brought on record without a second thought conspicuously points out towards the guilt of the appellants. Dadhich @ Jageshwar (A-2) had voluptuous eye on Sampatiya P.W. 5 and had an infatuation

for her and wanted to marry her but because Sampatiya P.W. 5 had relations and was entangled with the deceased Chheddu @ Ram Khelawan, therefore, Chandrapal P.W. 4 got her married with the deceased. This had affronted the accused, who avenged their failure by murdering the deceased and disposing of his dead body in side the well to conceal their crime. Deshraj P.W. 2, uncle of the deceased had spotted all the accused near the place where he had met the deceased for the last time while returning to his village Bansu-Ka-Purwa from village Tikri. Deceased was going to the village Tikri and both had met near the canal bank at Satti Bagh at 6.30 or 7 P.M. They had conversed with each other and the deceased had informed Deshraj P.W. 2 that he had gone to village Tikri to inform Bodi Pasi to cultivate his agricultural field which he had taken on lease. Near that place, P.W. 2 had spotted that three appellants were sitting on a culvert and appellant Dadhich @ Jageshwar (A-2) was armed with a gun. After sometime, gun shot fired was heard by Deshraj P.W. 2 and therefore, murder could have been committed by none else than Dadhich @ Jageshwar (A-2) and his associates (A-1 and A-3), harangued learned AGA. It was also informed that the fateful day was a Friday. Learned AGA, therefore, submitted that the chain of circumstances in the instant case is complete and appellants appeal being meritless, deserves to be dismissed.

After carefully analyzing rival submissions, collating facts and circumstances of the appeal, we find that there is no eye witness account of the incident. The entire prosecution version is based up on circumstantial evidence of motive and last seen. Law relating to circumstantial evidence cases is very well crystallized by a catena of decisions by the Apex Court. Before applying it to judge the veracity of the prosecution case in the present appeal, it will be appropriate to have a glimpse of the aforesaid decisions:-

In Musheer Khan @ Badshah Khan and Anr. v. State of M.P.:AIR2010 SC 762 it has been held by the apex court as under:-

".....Circumstantial evidence, on the other hand, has been compared by Lord Coleridge "like a gossamer thread, light and as unsubstantial as the air itself and may vanish with the merest of touches". The learned Judge also observed that such evidence may be strong in parts but it may also leave great gaps and rents through which the accused may escape. Therefore, certain rules have been judicially evolved for appreciation of circumstantial evidence.

49. To my mind, the first rule is that the facts alleged as the basis of any legal inference from circumstantial evidence must be clearly proved beyond any reasonable doubt. If conviction rests solely on circumstantial evidence, it must create a network from which there is no escape for the accused. The facts evolving out of such circumstantial evidence must be such as not to admit of any inference except that of guilt of the accused. {See Raghav Prapanna Tripathi and others v. State of U.P., AIR 1963 SC74}.

50. The second principle is that all the links in the chain of evidence must be proved beyond reasonable doubt and they must exclude the evidence of guilt of any other person than the accused.

(See : State of UP v. Ravindra Prakash Mittal, 1992 Cri LJ 3693 (SC) - (Para 20)} : (1992 AIR SCW 2417)

51. While appreciating circumstantial evidence, we must remember the principle laid down in Ashraf Ali v. Emperor - (43 Indian Cases 241 at para 14) that when in a criminal case there is conflict between presumption of innocence and any other presumption, the former must prevail.

52. The next principle is that in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and is incapable of explanation upon any other reasonable hypothesis except his guilt.

53. When a murder charge is to be proved solely on circumstantial evidence, as in this case, presumption of innocence of the accused must have a dominant role. In Nibaran Chandra Roy v. King Emperor, (11 CWN 1085) it was held the fact that an accused person was found with a gun in his hand immediately after a gun was fired and a man was killed on the spot from which the gun was fired may be strong circumstantial evidence against the accused, but it is an error of law to hold that the burden of proving innocence lies upon the accused under such circumstances. It seems, therefore, to follow that whatever force a presumption arising under Section 106 of the Indian Evidence Act may have in civil or in less serious criminal cases, in a trial for murder it is extremely weak in comparison with the dominant presumption of innocence.

54. Same principles have been followed by the Constitution Bench of this Court in Govinda Reddy v. State of Mysore - (AIR 1960 SC29) where the learned Judges quoted the principles laid down in Hanumant Govind Nargundkar and Anr. v. State of Madhya Pradesh, (AIR 1952 SC343). The ratio in Govind (supra) quoted in paragraph 5, page 30 of the reports in Govinda Reddy (supra) are :
"in cases where the evidence of a circumstantial nature, the circumstances which lead to the conclusion of guilt should be in the first instance fully established, and all the facts so established should be consistent only with the guilt of the accused. Again the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so complete as not to leave any reasonable doubt for a conclusion consistent with the innocence of the accused

and it must be shown that within all human probability the act must have been committed by the accused."

In **Sharad Biridhichand Sarda versus State of Maharashtra: AIR 1984 SC 1622** it has been held by the apex court as under:-

"150. It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this where various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the Court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a court.

151. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh, 1952 SCR 1091 : (AIR 1952 SC 343). This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of Tufail v. State of Uttar Pradesh, (1969) 3 SCC 198 and Ramgopal v State of Maharashtra, AIR 1972 SC 656. It may be useful to extract what Mahajan, J. has laid down in Hanumant's case (at pp. 345-46 of AIR) (supra) :
"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

152. 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 Sahebrao Bobade v. State of Maharashtra, (1973) 2 SCC 793 : (AIR 1973 SC 2622) where the following observations were made :
"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.
153. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

In **Sampath Kumar versus Inspector Of Police(2012)4 SCC 124**it has been held by the apex court as under:-

*"**29.** In N.J.Suraj v. State represented by Inspector of Police (2004) 11 SCC 346, the prosecution case was based entirely upon circumstantial evidence and a motive. Having discussed the circumstances relied upon by the prosecution, this Court rejected motive which was the only remaining circumstance relied upon by the prosecution stating that the presence of a motive was not enough for supporting a conviction, for it is well-settled that the chain of circumstances should be such as to lead to an irresistible conclusion, that is incompatible with the innocence of the accused.*

***30.** To the same effect is the decision of this Court in Santosh Kumar Singh v. State through CBI. (2010) 9 SCC 747 and Rukia Begum v. State of Karnataka AIR 2011 SC 1585 where this Court held that motive alone in the absence of any other circumstantial evidence would not be sufficient to convict the appellant. Reference may also be made to the decision of this Court in Sunil Rai @ Paua and Ors. v. Union Territory, Chandigarh (AIR 2011 SC 2545). This Court explained the legal position as follows :*

"31. .....In any event, motive alone can hardly be a ground for conviction.
32. On the materials on record, there may be some suspicion against the accused but as is often said suspicion, howsoever, strong cannot take the place of proof."

31. Suffice it to say although, according to the appellants the question of the appellant-Velu having the motive to harm the deceased-Senthil for falling in love with his sister, Usha did not survive once the family had decided to offer Usha in matrimony to the deceased-Senthil. Yet even assuming that the appellant-Velu had not reconciled to the idea of Usha getting married to the deceased-Senthil, all that can be said was that the appellant-Velu had a motive for physically harming the deceased. That may be an important circumstance in a case based on circumstantial evidence but cannot take the place of conclusive proof that the person concerned was the author of the crime. One could even say that the presence of motive in the facts and circumstances of the case creates a strong suspicion against the appellant but suspicion, howsoever strong, also cannot be a substitute for proof of the guilt of the accused beyond a reasonable doubt."

From the above exposition of law by the apex court it becomes evident that in cases of circumstantial nature, all the circumstances brought on the record and woven together must present a complete chain pointing out, unerringly, without any ambiguity or other reasonable prognosis, towards guilt of the accused and should only be compatible with it. If there is any other hypothesis, which can be

culled out or there is snapping of chain link, then accused cannot be held guilty.

Now applying aforesaid trite law on the facts and circumstances of the present appeal it transpires that so for as motive is concerned prosecution has mainly relied upon evidences of Maiku PW 3, ChandrapalPW4 and widow of the deceased Sampatia PW 5. According to all these witnesses only Dadhichi @ Jageshwar (A-2) had the motive as he had an infatuation for PW5 and wanted to marry her. Sampatia,PW 5, widow of the deceased had testified before the court that deceased was her husband and three months after her marriage he was done to death in hindi calander month of *Bhado.* In the evening deceased had left his house on Friday evening informing PW5 that he is going to Bodi Pasi in village Tikri to direct him to plough his agriculture field as Bodi Pasi had taken his agricultural land on lease and thereafter her husband did not return and later on following Sunday his cadaver was found. Corpse was fetched out of the well on Monday by the police and she had also gone to the spot along with other villagers and had identified his dead body of being her husband. Deceased had injuries on his body and the cadaver was sent to Khaga. (A-2) used to visit her village with Rakshapal @ Rajpal and used to see her. He had informed her father to marry her with him otherwise he will annihilate Chheddu. His father had told her about it but she had expressed her desire to marry only with deceased Chheddu and had refused to marry (A-2), as she was having an affair with the deceased and consequently her father had married her with the deceased because of which (A-2) had become annoyed. Chandrapal, PW4, father of Sampatia PW 5, had deposed in the trial that all the accused were pals of each other and (A-2) was a resident of village Bansu-Ka-purva and had infatuation for PW5. (A-2) had threatened PW5 not to tie nuptial knot of PW5 with the deceased as he desired to marry her and in the event she was married with Chheddu, he will murder him. Marriage of the deceased with PW5 had rankled (A-2). Maiku, PW 3 had stated that (A-2) had approached him and told him that only he will keep PW 5 with him and nobody else and when PW

3 told him that why he is behind the soul of PW5 and she was the wife of the deceased then (A-2) had informed him that he will meet the same fate which was meted out to Chheddu and thereafter (A-2) had left. From such testimonies it becomes clear that all these witnesses have narrated only motive for (A-2) to commit the crime. However on a close scrutiny their evidences does not inspire any confidence. Conduct of (A-2) of going to Maiku PW3 and informing him that PW5 will live with him only and with nobody else or that he will do away with the deceased does not inspire any confidence because Maiku, PW 3 was no body to help him. This was all the more bizarre and un-natural conduct after deceased was already murdered. Nothing has been recovered from the possession of or at the pointing out of (A-2). His gun was never recovered nor it was got tallied and hence use of the gun alleged to have been carried by the appellant (A-2) is not established. More over there is no evidences regarding the conversations made by the accused amongst themselves. PW5 herself had not stated that (A-2) had even tried to molest her or that he even tried to tease her and hence allegation that (A-2) was infatuated towards PW5 is a disproved allegation. No attempt was made by (A-2) to stop marriage of PW5 with the deceased nor there is any evidence to that effect. In para 5 of her deposition she had stated that " *Before the marriage I had no friendship with Dadhichi nor was on talking terms nor had acquaintance nor he used to meet me"*. Thus motive alleged against (A-2) for committing the crime lies only in ipse dixit without any credible evidence. At no point of time (A-2) interfered with the marital life of PW5 and the deceased. There are some more circumstances which indicate that probably (A-2) was not involved in the crime.PW3 was a close associate of deceased but after hearing the news of his demise he kept silent and did not inform any- body that day vide para 4 of his deposition. He had testified that *"the day body was taken out, that day I came to know that Chheddu has been murdered. After hearing the news I did not go. Chheddu is my friend. I did not remain in my house but had gone to do purahi".*

From such weak type of evidence it is difficult to conclude that (A-2) had compelling motive to do away with the deceased. Sampatia, PW 5 after demise of the deceased was remarried with son of PW4 and nothing was done by (A-2) against such a remarriage. Contrary to prosecution evidences there are documentary evidences on record indicating that deceased and PW3 were members of a gang of dacoits. He and deceased were involved in a dacoity incident and together had remained in jail also. They both were tried in S.T. No. 105 of 78, under section 399/402 IPC by II Additional Session's Judge, Fatehpur. They were arrested on 8.9.77 at 11 p.m. by S.O.Bhushan Singh along with other police personnel. In the arrest and recovery memo their names are mentioned vide Ext Kha-1. Another defence Exhibit Kha-2 also reveal that PW3 was involved in another incident of dacoity on 14.7.80 and was arrested by the police. Appellants have pleaded that the deceased was murdered by his own associates and this defence cannot be said to be impossible or not credible. Evidence of PW 4 & 5 also does not improve upon the situation. Attour, motive alone is insufficient to judge accused guilty of a murder charge. Motive howsoever strong cannot take place of proof beyond reasonable doubt . Unless it is convincingly established by all attending circumstances that charged accused alone is guilty of murder, motive singularly is of no avail to the prosecution to bring home the charge of murder against an accused. On this aspect we rely upon and refer some of the apex court decisions.

In Ramesh Baburao Devaskar and Ors. v. State of Maharashtra.:AIR 2007 Sc (Suppl) 1606 it has been held by the apex court as under:-

"22. Proof of motive by itself may not be a ground to hold the accused guilty. Enmity, as is well-known, is a double edged weapon. Whereas existence of a motive on the part of an accused may be held to be the reason for committing crime, the same may also lead to false implication. Suspicion against the accused on the basis of their motive to commit the crime cannot by itself lead to a judgment of conviction."

In yet another decision **Subimal Sarkar vs Sachindra Nath Mondal and others:AIR 2003 SC 1108** it has been held by the apex court as under:-

"10. We are in agreement with the finding of the High Court. It is true that the prosecution has been able to establish motive but then that by itself is not sufficient to base a conviction. The other circumstantial evidence that is established beyond reasonable doubt is the fact that the deceased died of strangulation. There is no material produced by the prosecution to show who actually committed this crime but there being no eye witnesses to the incident the prosecution will have to establish all the links in the chain of circumstances which would have to show that in all probability it is only the accused persons who could have committed this crime. This the prosecution has failed to establish."

Some other decisions on this aspect are **Rukia Begum Versus State of Karnataka:(2011)SCC 4 779 and Sampath Kumar versus Inspector of Police (2012) 4 SCC 124.**

This now takes us to another circumstance of last seen and we therefore now advert to it. From summation of evidences it is quite clear that the learned trial judge has totally misdirected himself on this aspect. The only witness of last seen is Deshraj, PW 2. He is not supported by any other witness nor any circumstance has been brought on record to countenance his deposition. Analytical perusal of his evidence however indicate that he had not stated anything which can bring prosecution version with in the ambit of last seen. This witness had no were stated that at any point of time deceased was seen by him in the company of the accused appellants. He may have met the deceased in the close vicinity but not in the company of the appellants. He had mentioned that while he was returning from village Tikri on Friday deceased was proceeding towards that village and they had come across each other at the bank of a canal in front of Sattibag at half past six or seven in the evening. Deceased had informed him that he was going to Bodi Pasi to told him to cultivate his agricultural field because he had taken his field on lease. Thereafter he had located all the appellants sitting on a canal culvert with (A-2) holding a gun at 7 or 6.45 p.m. and all the three of them were conversing with each other. When PW2 approached them they became silent.

There after PW2 returned back to his house at a distance of 1 ½ furlong. After some time he heard two gun fire shots towards Sattibag. Hearing of gunshots had not aroused his inquisitiveness. Three days thereafter he became acquainted regarding surfacing of deceased corpse from the well of Kali Charan. He could not identify the corpse immediately and only later on he could identify it as that of his nephew. Thus entire evidence stated in examination-in-chief by this witness does not indicate that deceased was accompanied by the appellants at any point of time and hence it is not a case of lase seen at all. We don't know for what reason fire was made and who made it. Learned trial judge held appellants guilty on the basis of pure conjecture and surmises in a case of strict liability and proof beyond all reasonable doubt. Such an evidence, as was deposed by PW2, does not inspire any confidence to us to concur with learned trial court's opinion. Factum of last seen was required to be established by leading cogent reliable and confidence inspiring evidences which must rule out all other hypothesises except to impregnate the accused of the crime. This was not done at all in the present case.

Turning towards impugned judgement we note only this much that the conclusions arrived at by the learned trial court at page 35 onwards of the impugned judgement does not establish prosecution case at all. Every aspect of the prosecution story lies in a realm of uncertainty and much can be argued against it. Vetting of prosecution allegations vis a vis tendered evidences projects a contrary picture than what has been adopted by the learned trial court and therefore we find ourselves in complete disagreement with it's conclusions.

Concludingly, we find that the learned Trial Judge has relied upon only the evidence of motive and last seen. As has already been pointed out that there is no evidence of last seen at all and only gun fire was heard by Deshraj (P.W. 2) when he was at his residence and he had never spotted the appellants in the company of the deceased and thus, it cannot be said at all that the deceased was in the company of the accused at any point of time. There is, thus misreading of

evidence and marshaling of facts by the learned Trial Judge. Motive alone is insufficient to nail in the accused in a serious crime like murder. In this appeal, we find that the chain of circumstances is wholly incomplete and guilt of the appellants has not been anointed convincingly with clarity and, therefore, are of the opinion that the impugned judgment cannot be sustained.

Resultantly, the appeal is **allowed.** The two surviving appellants Narendra (A-1) and Dadhich @ Jageshwar (A-2) are acquitted of the charges framed against them. They are on bail, they need not surrender, their personal and bail bonds are hereby discharged.

Let a copy of the judgment be certified to the trial court for it's intimation.

Dt.27.8.2012
Rk/Arvind/Tamang-