IN THE HIGH COURT AT CALCUTTA

CRIMINAL APPELLATE JURISDICTION

APPELLATE SIDE

CRA 574 OF 2019

Pritam Sinha Roy & Adrian Farnandez
Vs.
The State of West Bengal

Before: The Hon'ble Justice Arijit Banerjee
&
The Hon'ble Justice Apurba Sinha Ray

For the Appellant No. 1	:	Mr. Ayan Bhattacharyya, Adv. Mr. A. Ghatak, Adv. Mr. S. Roy, Adv.
For the Appellant No. 2		Mr. Fazlur Rahman, Adv. Mr. Rahul Rahman, Adv. Mr. Babul Hussain, Adv. Ms. Dona Sanyal, Adv.
For the State	:	Mr. Ranabir Roy Chowdhury, Adv. Ms. Zareen Khan, Adv. Ms. M. Sarkar, Adv.
Reserved on	:	27.02.2026
Judgment on	:	08.04.2026

Apurba Sinha Ray, J.:-

1. Needless to mention, there is no hard and fast rule that commission of an offence by an accused cannot be proved unless there is direct evidence. There are instances galore when the commission of offence was proved by the prosecution with the help of circumstantial evidence. In other words, even in the absence of direct evidence, if the

prosecution proves the complicity of an accused in committing the crime, with the aid of circumstances in such a manner that there would be hardly any doubt regarding his involvement in committing the crime, the prosecution will succeed. The celebrated principle in this regard is that an accused can be convicted on the basis of circumstantial evidence if the circumstances are proved in such a manner that chain of events is shown to be completed.

2. Let us see whether the prosecution has been able to bring home the charges against the present appellants by completing the chain of circumstances or events in such a manner that there would be no alternative view except their involvement in murdering the deceased. But before doing that it would be profitable if we discuss the factual matrix and arguments of the learned counsel of the appellants.

Allegations: Denials: Narratives

3. The case of prosecution is that one Albert John Khare being the brother-in-law of the deceased victim namely Kevin Alfred D'Silva, submitted a letter of complaint dated 27.12.2015, wherein he had stated that the deceased victim had not returned home since 26/27th December, 2015. Subsequently, his wife, namely Geraldino Khare, who, at the time was at her mother's home at Picnic Garden, was shown a picture of the deceased victim by two police personnel and upon her confirmation with regard to the victim's identity she was instructed to accompany the two police personnel. In the meantime,

owing to her information, the defacto complainant also came to the place and upon reaching the under construction building situated at 43 D/1A/1C, CN Roy Road, Kolkata-39, they found that the deceased victim was lying on the floor with his back rested on the wall and his hands and legs were tied with coconut rope. The victim was wearing a red coloured T-shirt and blackish blue pants with white socks. There were some visible injuries to his face. The victim was found in a room on the 1st floor of the said under construction building. Tiljala P.S. case No. 684 dated 27.12.2015 was started under Section 302 IPC against unknown accused persons.

4. Mr. Bhattacharyya, learned Senior advocate who appeared for the appellant no. 1 Pritam Sinha Roy has submitted that the present case is based on circumstantial evidence and conviction was pronounced only on the basis of last seen together theory. The theory of last seen together is a weak piece of evidence but unfortunately the last seen together theory which is nothing but a corroborative piece of evidence was made the basis for convicting the appellant no. 1. It is alleged by the sister of the deceased that the deceased left her house on 26.12.2015 with the appellant no. 2 Adrian Farnandez and it is also found from the materials on record that the deceased was in rehabilitation centre for de-addiction till 21.12.2015. He was released from the said centre on 22.12.2015 and the date of incident was 26.12.2015/27.12.2015. In the Post Mortem Report there was no mention when the deceased died. It is also evident from the depositions

of the witnesses that the victim went to a drug peddler, PW-9 Bablu Gupta, who handed over brown sugar to the victim. However, PW-9 had mentioned about 4 persons including one Sumit but there was no investigation done by the Investigating Officer to ascertain who was the person named Sumit. There is no evidence to show that actually PW 9 came back from the spot at about 10.30 a.m.

5. Mr. Bhattacharyya has also argued that there are two chance witnesses and they are PW-11 Somnath Halder and PW-14 Md. Rahaman. PW-11 deposed at the relevant time he saw 4 persons in the vicinity of the place of occurrence whereas PW-14 saw 3 persons quarrelling with each other. According to Mr. Bhattacharyya, even the last seen together theory, has not been proved by the prosecution.

6. PW-5 Khagen Mal saw two persons and in the identification parade he identified one person that is the appellant no. 2 being Adrian Farnandez.

7. PW-6 Bablu Haldar identified both the appellants. Similarly, PW 11 and PW 14 also identified both the appellants. However, the Judicial Magistrate who conducted the test identification parade was not examined. The accused persons were not given an opportunity to cross-examine the said Magistrate.

8. It is not conceivable as to why PW 9 who deposed that he was present at the beginning of the dispute and departed from the place of occurrence before the incident took place, was not made an accused. No forensic test was done over the seized items, no fingerprints were

taken from the left out wine bottles. The prosecution has failed to prove any motive since there is no reason for the cousins to murder another cousin. In the case of circumstantial evidence, proof of motive is relevant. Last seen together cannot be the fulcrum of proving the case. Recovery of shoes from PW-7 Abdul Gaffar was not proved in accordance with law. Evidence of PW-8 Md. Samim is also not reliable, although both of them identified the appellants. The recovery statement under Section 27 of the Evidence Act cannot be relied upon. The Test Identification Parade sheet was exhibited through the Investigating Officer and the same is not acceptable in the eye of law.

9. Mr. Bhattacharyya has strenuously argued that a police officer is not permitted to enter the place where the test identification parade is held and therefore, marking the test identification parade sheet as exhibit through the Investigating Officer is a serious irregularity committed during trial, and, therefore, Exhibit-13 is not admissible at all. The purchase receipt of the shoes was not proved. It is also argued that the appellants had access to shoes of the victim since they were residing with the victim. Therefore, recovery of shoes has no relevance.

10. Mr. Bhattacharyya has further submitted that the Last Seen Together Theory which is an aberration of burden of proof, hinges on two principles, viz., firstly, paucity of time and secondly exclusivity of association so that presence of a third person becomes empirically impossible. Given the presence of PW-9 Bablu Gupta who was treated as a witness by the Police, the aforesaid doctrine falls flat. In support

of his contention, he had relied upon several judgments which are as follows:

i. **Anjan Kumar Sarma and Ors. Vs State of Assam** reported in **AIR 2017 SC 2617, Para 18 & 21**
ii. **Manoj alias Munna vs. State of Chhattisgarh** reported in **AIR 2026 SC 241 para 10,24 to 33**
iii. **Arjun Marik vs. State of Bihar** reported in **1994 supp (2) Scc 372**
iv. **Kanhaiya lal vs State of Rajasthan** reported in **2013(3) SCC (Cri) 498**
v. **Sabitri Samantaray vs State of Odisha** reported in **(2023)11 SCC 813 (Para 18,19)**
vi. **Anees vs. State of Government of NCT, 2024 INSC 368 para 37**
vii. **Smt. Gargi vs. State of Haryana** reported in **2019 12 scale 617 (Para- 28, 28.1,28.3)**
viii. **Umesh Chandra & Ors. Vs State of Uttrakhand** reported in **2021 9 Scale 359 Para 10**
ix. **Jafar vs State of Kerela** reported in **2024 4 scale 1 para 7**
x. **Mustkeem alias Siarjudeen Vs. State of Rajasthan** reported in **AIR 2011 Sc 2769, para 27**
xi. **Umedbhai Jadavbhai vs. State of Gujarat** reported in **(1978) 1 SCC 228**

11. Mr. Fazlur Rahman, learned Counsel of the appellant no. 2 Adrian Farnandez submitted that the learned Trial Judge failed to appreciate the evidence on record in its proper perspective and arrived at an erroneous finding of guilt. According to him, the chain of circumstances is incomplete and broken at several stages and therefore, the prosecution has utterly failed to prove that the appellants were responsible for the alleged offence.

12. Mr. Rahman further argued that the learned trial judge relied upon the evidence of PW-5 and PW-6 who stated that they had seen two persons crossing the boundary wall of the under construction building but Exhibit-9 shows that boundary wall was open at the relevant time and therefore, question of crossing the boundary wall does not arise and therefore the testimony of witness in this regard is doubtful.

13. It was further contended on behalf of the appellant no. 2 that the prosecution failed to establish any motive or intention on the part of the appellants for committing the alleged crime, yet the Trial Court concluded that the death was caused by the appellants in furtherance of their common intention. The alleged recovery of shoes of the deceased from a shop was not proved in accordance with law and therefore such evidence relating to recovery of shoes cannot be relied upon. Although the deceased did not return home on 26.12.2015 no missing diary was lodged by the relatives of the deceased and no records were produced to support the claim that attempts were made to contact the appellant no. 2. It was further argued that examination under Section 313 of the Code of Criminal Procedure was not conducted properly. Several circumstances relied upon by the learned Trial Court were not put to them for explanation and therefore, the appellants were deprived of the statutory opportunity to explain the incriminating circumstances appearing against them. Learned Counsel had relied upon the following decisions:

I. **Nandu Singh vs State of Madhya Pradesh (Now Chattisgarh)** reported in **(2021) 19 SCC 301 PARA 9**

II. **Shivaji Chintappa Patil vs. State of Maharashtra** reported in **(2021) 5 SCC 626**

III. **Ravindra Singh vs state of Punjab** reported in **(2022) 7 SCC 581**

IV. **Syed Ibrahim vs. State of Andhra Pradesh** reported in **(2006) 10 SCC 601**

V. **Manoj Kumar Soni vs State of M.P** reported in **2023 SCC OnLine SC 984 Para 22**

VI. **Vinobhai Vs. State of Kerala** reported in **2025 SCC Online SC 178 para 8**

VII. **Smt. Omwati Vs. Mahendra Singh & Ors.** reported in **(1998) 9 SCC 81 para 9,10**

VIII. **State of UP vs. Wasif Haider and Ors.** reported in **2019 2 SCC 303 Para 24-25**

IX. **Sunil Kumar Sambhudayal Gupta & ors. VS State of Maharashtra** reported in **(2010) 13 SCC 657 para 33**

X. **Raja Ram vs. State of Rajasthan** reported in **(2005) 5 SCC 272**

XI. **Nazim & Ors. Vs State of Uttarakhand** reported in **2025 SCC Online 2117 Para 44 sub para C**

XII. **Manoj Kumar Soni vs State of M.P** reported in **2023 SCC OnLine SC 984 Para 22**

XIII. **Gireesan Nair & Ors. Vs State of Kerala** reported in **2023 1 SCC 180 Para 31,55,**

XIV. **Mausam Singha Rai & Ors. VS State of West Bengal** reported in (**2003) 12 SCC 377 Para 27**

XV. **Sharad Birdhi Chand Sarda Vs. State of Maharashtra** reported in **(1984) 4 SCC 116**

14. Mr. Fazlur Rahman, learned Counsel submitted that in a case based on circumstantial evidence, motive assumes great significance. Motive is required to be proved when the relation between the deceased and accused was cordial. In this regard, he referred to the case laws of **Nandu Singh (supra), Shivaji Chintappa Patil (supra), Ravindra Singh (supra).** Mr. Rahman further submitted that disclosure statement under section 27 of Indian Evidence Act cannot be the sole ground for conviction of accused. In this regard, he relied upon the decision of **Manoj alias Munna (supra), Vinobhai (supra).** He also pointed out that the Investigating Officer in the case in hand did not collect the finger prints on the wine bottles and other articles found at the place of occurrence and such failure gives a fatal blow to the prosecution case. In this regard, he referred to the judgment of **Smt. Omwati (supra).** Learned Counsel also argued that in view of the case law of **Sunil Kumar Sambhudayal Gupta & Ors. (supra)** if the witnesses stated for first time about the incident before the Court, such deposition which was not recorded under 161 Cr.P.C., lacks credence.

15. Mr. Rahman further submitted that in view of the judgment of **Nazim & Ors.(supra)** it is settled that last seen theory is a weak kind of evidence.

16. Mr. Rahman further argued that if the witnesses have had ample opportunity to see the accused before identification is held, it may adversely affect the trial and such Test Identification should not be relied upon. In this regard, he placed the judgment of **Gireesan Nair &**

Ors. (supra). After referring to the judgment of **Sharad Birdhi Chand Sarda (supra),** he submitted that when the evidence disclosed two possibilities, the possibility which benefits the accused should be taken into consideration. He also relied upon the judgment of **Mausam Singha Rai & Ors. (supra)** to point out that mere conjecture or suspicion alone cannot be the ground for punishing an accused.

17. Mr. Roy Chowdhury appearing for the State of West Bengal submitted that the foundation of the prosecution case rests upon the well-established principle of "last seen together". The evidence on record clearly proves that the deceased was last seen alive in the company of both the appellants on the evening of 26.12.2015. This crucial circumstance has been consistently and cogently proved by PW-6 Bablu Haldar, PW-9 Bablu Gupta, PW-11 Somnath Haldar and PW-14 Md. Rahaman, all of whom categorically placed the deceased in the company of the appellants within close proximity of the place of occurrence.

18. It was further submitted by the State Counsel that the time gap between the last seen and the discovery of the dead body was extremely short. The possibility of intervention by any third person is completely ruled out. In this regard, reliance was placed on the Division Bench judgment of this Court in **Tapas Biswas vs. State of West Bengal, CRA (DB) 44 of 2022, paras 35 to 36**, wherein it has been held that last seen evidence, when coupled with proximity of time and the failure

of the accused to offer any explanation, constitutes a strong and incriminating circumstance against the accused.

19. Mr. Roy Chowdhury has relied upon the observation of the Hon'ble Supreme Court in **Trimukh Maroti Kirkan v. State of Maharashtra, (2006), 10 SCC 681, para 12**, wherein it has been held that when the accused was last seen with the deceased and fails to explain the circumstances leading to the victim's death, an adverse inference under Section 106 of the Evidence Act is clearly attracted.

20. Mr. Roy Chowdhury has drawn our attention to the medical evidence on record. PW 13, the post-mortem doctor, has opined that the cause of death was smothering, which is a form of violent mechanical asphyxia, and that the death was homicidal in nature. Moreover, the post-mortem report discloses that the deceased had multiple ante mortem injuries on his person and that his hands and legs were found tied, which is wholly consistent with the manner in which the body was recovered from the place of occurrence.

21. Mr. Roy Chowdhury has also drawn our attention to the decision reported in **State of Uttar Pradesh v. Satish, (2005) 3 SCC 114, para: 22** wherein it is held that when medical evidence supports the ocular version and rules out accidental or natural death, such medical evidence lends strong assurance to the prosecution case.

22. It was further argued that the crucial incriminating link in the chain of circumstances is the recovery of the deceased's shoes and the post-offence conduct of the appellants.

23. During police custody, both appellants led the police to Baithak Khana Bazar, where the shoes belonging to the deceased were recovered from PW-7 Abdul Gaffar, and the same has been fully corroborated by PW-8 Md. Samim. The evidence clearly establishes that the said shoes were sold by the appellants immediately after the death of the deceased, thereby demonstrating a clear consciousness of guilt.

24. Mr. Roy Chowdhury further argued that criminal trials do not turn on invoices or billing details, particularly when identification of the article is proved through reliable oral evidence and surrounding circumstances.

25. In this regard, he placed reliance upon the Division Bench judgment of this Court in **Mekail Mondal & Ors. vs State of West Bengal, CRA 704 of 2016** wherein it has been held that absence of a formal memorandum under Section 27 of the Evidence Act is not fatal, and that the conduct of the accused, both before and after the occurrence, is a relevant fact under Section 8 of the Evidence Act.

26. According to Mr. Roy Chowdhury partial recovery is legally sufficient and there is no requirement in law that all articles connected with the offence must be recovered in order to sustain the prosecution case.

27. The Hon'ble Supreme Court in **Aghnoo Nagesia v. State of Bihar** reported in **AIR 1966 SC 119, at paras 21 to 23**, which was reaffirmed in **State of Maharashtra v. Damu** reported in **(2000) 6 SCC 269, at paras 35 and 36**, has held that so much of the information given by an accused in custody as distinctly relates to the discovery of a

fact is admissible under Section 27 of the Evidence Act, and that recovery of incriminating articles pursuant thereto, when read with post-offence conduct under Section 8, constitutes a strong incriminating circumstance pointing towards guilt. The accused failed to explain facts which were especially within their knowledge. In spite of presence of grave incriminating circumstances, the accused persons during their examination under Section 313 Cr.P.C. maintained complete silence and failed to offer any explanation whatsoever as to how and under what circumstances the deceased met a homicidal death.

28. In this regard, Mr. Roy Chowdhury relied upon the judgment of the Hon'ble Supreme Court in **State of Rajasthan v. Kashi Ram, (2006) 12 SCC 254, at para 23,** wherein it was held that when an accused fails to explain facts which are within his special knowledge, such failure becomes an additional incriminating circumstance against him. Accordingly, the silence of the accused strengthens the prosecution case and completes the chain of circumstances pointing towards their guilt. By referring to the decision of **Sharad Birdhi Chand Sarda V. State of Maharashtra** reported in **(1984) 4 SCC 116, paras 152-153** and also **Trimukh Maroti Kirkan (supra),** Mr. Roy Chowdhury argued that in the present case the chain is completely coherent and consistent. According to him the chains are firstly, homicidal death by smothering, secondly last seen together, thirdly, exclusive possession and control, fourthly, recovery of belongings immediately after death,

fifthly, failure of explanation under Section 106 of the Evidence Act. Although shoes were produced the defence raised the issue of difference in bill numbers, Mr. Roy Chowdhury argued that the bill is not evidence but identification of the shoes is the evidence which the Court should look into. The PW-2 and PW-4, being close relatives of the deceased, identified the shoes as belonging to him. The personal belongings are identified by appearance, wear, familiarity and long use, not by invoice numbers.

29. In **State of Rajasthan vs. Teja Ram** reported in **(1993) 3 SCC 507 para 9**, it was held that identification of articles by relatives is admissible even without production of bills or receipts.

30. Mr. Roy Chowdhury stated that the appellants have raised an issue regarding Test Identification Parade but according to Mr. Roy Chowdhury the said witnesses were not complete strangers. Moreover, the accused were seen in the locality and they were seen entering the premises. In this regard, legal decision was settled in **Dana Yadav v. State of Bihar** reported in **(2002) 7 SCC 295 para 38**, wherein it has been held that Test Identification Parade is corroborative in nature, substantive evidence is identification in Court. Even assuming any infirmity in TIP, dock identification remains unimpeached. Mr. Roy Chowdhury further contended that motive is not a mandatory requirement where direct or strong circumstantial evidence is available. In this regard, he relied on the judgments of **State of U.P. vs. Babu**

Ram reported in **(2000)4 SCC 515, para 16 and Nathuni Yadav vs. State of Bihar** reported in **(1998) 9 SCC 238 para 11.**

31. Mr. Roy Chowdhury pointed out that in the present case the manner of killing itself demonstrates intention. The hands of the deceased were tied, legs were also tied and thereafter smothering took place and subsequently, the body was abandoned by the appellants. Therefore, when the act itself speaks, motive fades into insignificance. Law does not require complete recovery and in this regard he has relied upon the judgment of the **State of H.P. vs. Jeet Singh** reported in **(1999) 4 SCC 370 para 26** wherein it has been held that partial recovery is legally sufficient and therefore, even if the jacket or belt of the deceased was not recovered, the recovery of shoes is sufficient to show the involvement of the present appellants. Therefore, the very act of selling the shoes of the victim establishes post-offence conduct and guilty conscience. Mr. Roy Chowdhury concluded his submission by contending that the learned Trial Court has correctly appreciated both ocular and medical evidence and further the learned Trial Judge applied settled principles of criminal jurisprudence and returned findings which are neither perverse, nor illegal nor based on conjecture. He has drawn our attention to the observation of the Hon'ble Supreme Court in **Sarad Birdhi Chand Sarda (supra)** wherein the Hon'ble Supreme Court has been pleased to observe that "*Circumstantial evidence is not weaker than direct evidence. When the chain is complete, it speaks with a certainty that no human testimony can rival.*" The

appeal according to him deserves dismissal and the conviction of the appellant under Section 302 read with Section 34 IPC deserves to be affirmed.

Court's View:-

32. From the above discussion it is found that the prosecution has relied upon five chains of events to prove the case against the appellants. Firstly, the homicidal death of Kevin Alfred D'silva. Secondly, the deceased was last seen together with the appellants. Thirdly, the post offence conduct of the appellants. Fourthly, the recovery of shoes at the instance of the appellants and fifthly, the failure of the appellants to explain incriminating circumstances against them under Section 106 of the Indian Evidence Act.

33. The appellants on the other hand have contended, inter alia, firstly that the last seen together theory cannot be the sole ground for conviction of the appellants. Secondly, the identification of the appellants before the Magistrate was not properly done, thirdly, the recovery of shoes from the shop of PW-5 is doubtful and fourthly, the depositions of witnesses who are nothing but chance witnesses do not inspire confidence.

Last Seen Principle : Exclusivity of Association : Paucity of Time

34. It is a settled principle of law which continuously holds the field that a conviction only on the basis of last seen together theory is not sustainable in the eyes of law and in this regard, the judgment reported in **Anjan Kumar Sarma and Ors. (supra), Manoj alias Munna vs.**

State of Chhattisgarh (supra), Arjun Marik (supra), Nazim & Ors. (Supra) are very much relevant for consideration. It is settled by those judgments that an accused cannot be convicted only on the basis of last seen together theory, unless there are other materials on record to support the guilt of the accused.

35. So far as this case is concerned, it appears that **the prosecution did not rely only upon the last seen together theory**. The prosecution has also relied upon several links which showed that the deceased's Adidas shoes were recovered from a shop owner who categorically identified the appellants in TIP as well as on dock in the court stating that the said two appellants sold the incriminating shoes of the deceased. Therefore, in the case in hand the prosecution is not relying upon only on the principle of last seen together but also upon other links which include recovery of the victim's shoes from the custody of the shop owner who deposed before the Court that the appellants sold the shoes to him. On this ground the present case is different from the cited judgments as aforesaid.

36. However, the issues whether the appellants were last seen together with the victim or whether the alleged shoes belonged to the deceased or whether the appellants sold the shoes immediately after the death of the deceased are to be examined and scrutinised with the help of cogent and reliable evidence. Let us examine the question, whether the principle of last seen together theory has been proved beyond doubt or not. If we peruse the contents of the FIR we shall find that there is no

whisper in this regard that the appellants were last seen together with the deceased immediately before the incident nor there was any mention regarding the recovery of the shoes of the deceased from the concerned shop owner. It is true that the FIR cannot be an encyclopaedia of events of a particular case. From the record it transpires soon after getting the information, PW-4, the sister of the deceased informed the defacto complainant that police Personnel showed her some pictures of a motionless body of a male person and being so informed by the police personnel PW 4 intimated the defacto complainant, PW 2, and requested him to come over to the spot immediately. After reaching the spot PW 2, PW 4 and other witnesses found that the brother of PW 4 was lying at the place of occurrence motionless and subsequently, he was declared dead. At the time of seeing the dead body for the first time, PW 2 noticed that although the victim had socks on his legs but there were no shoes on his feet. Needless to mention each case has to be judged by its own merits. Subsequent investigation reveals that the deceased left the house of PW 4's mother in the early evening of 26.12.2015 with the appellant no. 2 Adrian Farnandez and in the night the victim did not return. It was alleged that PW 4 tried to contact the appellant no. 2 Adrian over his mobile time and again but there was no response from the side of the appellant no. 2. The next morning the dead body of PW 4's brother was found in an under-construction building. On 28.12.2015 the present appellants were arrested and as per their leading statements the

alleged shoes of the victim were recovered from the shop of PW-5 and subsequently, during Test Identification Parade PW-5 identified the present appellants who came to his shop to sell the said shoes of the victim.

37. It is true that there is no eye witness who saw the appellants to commit the crime but there are witnesses who saw the appellants alongwith the victim in close proximity to the place of occurrence at the relevant time. Learned Counsel of the defence has challenged the deposition of such witnesses as false and fabricated firstly on the ground that they were chance witnesses and secondly, they were planted by the Investigating Agency.

38. The place of occurrence, according to the appellants was not under the exclusive control of the appellants at the relevant point of time and there was opportunity for any person to intrude the place of occurrence even after alleged departure of the appellants from the place of occurrence. In other words, according to the learned counsel of the appellants, the exclusivity of association of the appellants with the victim was not proved. Now, if we consider the evidence of PW-5 we shall find that PW 5- Khagen Mal, a masson by profession, has deposed that on 26.12.2015 at 11 p.m. he and Bablu Halder were going to the site of Bharpatty which was an under-construction building. He found two boys were coming out after jumping walls from that building. On 27.12.2015 he heard about the incident at about 10 a.m. and accordingly, he went to that house at Bharpatty. He found one boy tied

on first floor. He also found that hands and legs of the boy were in tied condition. He was interrogated by the Police. Subsequently, he was taken to Alipore Correctional Home for identification of the accused and he identified the convict being appellant no. 2 herein Adrian Farnandez. He also identified several articles seized by the Police. During his cross-examination he denied the suggestion that he identified the accused on dock and in the Test Identification Parade as per identification by the police. The PW 6 Bablu Halder has stated that on the relevant date at about 10.00-10.30 p.m. he was going to Dilir Math from Bharpatty and he found that two persons were crossing the boundary wall of a house which was constructed by his brother -in-law. He used to look after the work of his brother-in-law. On the next morning, he came there along with laborers for opening lock. When he went to the first floor, he found one boy lying in dead condition. He immediately informed the matter to his brother-in-law who came there along with other people.

39. The PW 9 Bablu Gupta has deposed that he is a resident of 41 C.N. Roy Road, Kolkata-39, Tiljala P.S. and he used to run one grocery shop. The deceased used to reside next to his house. Ani was his friend and Ani was also a friend of the deceased. On 26.12.2015 the deceased came to him at noon with a demand for brown sugar. He did not have brown sugar. The deceased went away and again came back between 8.00-8.30 pm. He alongwith the accused persons were there. He and one Sumit had brown sugar. Then they carried it and went to the Bharpatty building by jumping the wall of an under-construction

building on the first floor. They were four in number. The deceased was addicted and they had an altercation between themselves in English. The PW 9 did not understand the English language. He came back after seeing the dispute at about 10.00-10.30 P.M. On the next day he came to know that Kevin died. Police visited the place and showed him the photograph of Kevin and he stated to the Police that he knew the boy and police interrogated him. In his cross-examination he has stated that he used to supply brown sugar to the drug addicted boys who used to come to him. He has further stated that local people might have seen them when they used to take drugs. After coming back, he did not inform anybody else about the addiction of the other three boys.

40. PW-11 Somnath Halder had deposed that he was a resident of 143/56 Picnic Garden Road, Kolkata-39 and in the year 2015, he was at the same address. On 26.12.2015 at around 9.30-10.00 P.M. he was on his way to his house from Tiljala Thana More through Bharpatty. Near Bharpatty there was an under-construction building and when he reached the site of the said construction, suddenly he found four persons to enter into the construction after crossing the wall. Out of them one was Bablu Gupta. There were Anglo-Indians boys. He has further deposed that Bablu Gupta was all time in addiction to drugs. He came to his home. On the next day on 27.12.2015 after finding a gathering at that site, he reached the first floor of that under-construction building and found one of the Anglo-Indian boys was there and his hands were tied with a belt from the back portion and legs of

that boy were tied with rope. He found him dead. Police interrogated him and he disclosed all facts to the Police which he saw. He went to Alipore Correctional Home for identification and he identified the accused persons, in presence of the Magistrate, whom he saw at the night of 26.12.2015. He had also identified the appellants in Court. He denied the suggestion that Police showed him the appellants in the Police Station before identifying them in the correctional Home.

41. From the above deposition of four witnesses, it transpires that the place of occurrence where Kevin was murdered was an under-construction building and from the deposition of PW 11 it is found that on the relevant date around 9.30-10.00 p.m., four persons entered the said under-construction building after crossing the boundary wall. From the depositions of PW 5 and PW 6 it also transpires that they saw two persons coming out from the said under-construction building after jumping/crossing the boundary wall of that building around 10.30-11.00 p.m. All the said three witnesses had identified Adrian Farnandez in the Test Identification Parade as well as on dock. Pritam was also identified by PW 6 and PW 11 in the Test Identification Parade as well as on dock. PW 5 did not identify Pritam on dock. From the above deposition as well as from the rough sketch map (Ext.-1) it is found that there was a boundary wall in the under-construction building and the present appellants entered the said building after crossing the boundary wall along with PW 9 Bablu Gupta. From the deposition of PW 9 it is found that he accompanied the deceased and the appellants

to cross the boundary wall for going to the first floor of that under-construction building for taking drugs. From the deposition of PW 6 it also reveals that he used to look after the construction work of his brother-in-law who was a promoter and on the next morning on 27.12.2015 he went to the said under-construction building along with labourers for opening the lock. This goes to show that the under-construction building was not only surrounded by a boundary wall but the entrance of the said building was put under lock and key. The PW6 was not challenged in this regard. After opening the lock PW 6 went to the first floor of the said building and found the deceased lying in tied condition. He informed the matter to his brother-in-law.

42. Therefore, it is found from the above that there was a boundary wall surrounding the said under-construction building and entrance was kept under lock and key at the relevant point of time and further the concerned persons including the appellants and the deceased entered the said under- construction building after crossing or jumping the boundary wall to go to first floor of that building. The general public had no access to such building since the entrance of the said building was kept under lock and key. The general public will not cross or jump over the boundary wall of the building to secure entrance. Therefore, it can be said that the place where the murder of Kevin took place was not open to the public. The exclusivity of the place of occurrence and the exclusivity of association of the deceased with the appellants and the PW9 have been proved by the prosecution in this case. Therefore,

the case law of **Syed Ibrahim (supra)** which held that the place of occurrence is to be established beyond doubt, applies to the facts of this case.

43. Admittedly, Kevin was murdered and his hands were tied from the back side with a leather belt and his legs were tied with coconut string. The deceased was aged about 29 years, and he was an abled bodied person. Needless to mention, tying one's hands from his back and also tying his legs by coconut string could be done by at least two or more persons. It is quite impossible for a single man to tie the hands of an able bodied person from his back with a leather belt and thereafter to tie his legs with coconut string without resistance. Therefore, there is no doubt that there must be at least two or more persons to commit such murder or to assist another to commit such murder.

44. Now, let us consider whether the witnesses being PW 5, PW 6 and PW 11 could be relied upon. From the deposition of PW 5 it is found that he was a mason and was working in the said under-construction building. It is also found that PW 6 was looking after the said construction of his brother-in-law who was a promoter. His deposition was challenged on the ground that he signed as Babu Halder. But if we peruse the entire deposition of PW 6 we shall find that he has stated that he was an illiterate person but was able to put his signature. In the first page of his deposition, we have found that PW 6 Bablu Halder has signed in capital letters as "Babu Halder" but in the second page of the said deposition sheet he has signed as "Bablu Halder" in block letters.

Therefore, there must be a mistake on the part of the PW 6 in signing Bablu in the first page of the deposition but he was able to sign as Bablu Halder in the second page of the deposition. As he is almost an illiterate person, such a mistake should not give a fatal blow to the prosecution case. Both the PW 5 Khagen Mal and PW 6, Bablu Halder stood firm during their cross-examination. PW-11 was a resident of the locality and he knew PW 9 and other anglo-Indian Christians of his locality. He was returning to his home at the relevant point of time and he found four people entering the under construction building after crossing the wall. He has also stood firm during his cross-examination. He identified both the appellants in the Test Identification Parade as well as on dock. He stated there were four persons including one Bablu Gupta. This goes to show that at the relevant point of time four persons entered into the place of occurrence after crossing the boundary wall. It also gives credence to the deposition of Bablu Gupta to some extent. Now, if we go through the deposition of PW 9 (Bablu Gupta), he has stated that they were four in number when they crossed the boundary wall. However, his deposition was challenged since he had mentioned the name of Sumit as one of the accompanying persons. But from the deposition of PW 11 and also the deposition of PW 9 it is found that there were four persons who crossed the boundary wall of the under-construction building on the relevant date and time. The person who was called as Sumit by the PW 9 was present in the Court on the date of his deposition. He had identified the person Sumit who was in check

Shirt at the Court. This was not clarified from the said witness during his cross-examination. Therefore, in our considered view the four persons crossed the boundary wall of the relevant under-construction building on the relevant date and time and it was established by the deposition of PW 11 that the appellants, the deceased and PW 9 entered the said building after crossing the wall. In view of such firm deposition of PW 11, the deposition of PW 9 has got some credence.

45. However, PW 9's departure prior to the incident was not proved beyond doubt. The allegation of the defence that the PWs 5, 6 and 11 are planted witnesses has no basis, since the PW 5 and 6 were present at the place of occurrence soon after it was detected that one dead body was found in the relevant building and the police interrogated them on 27.12.2015 at the spot and they became the seizure list witnesses. PW 11, being a local person, reached the spot after getting the information and narrated the incident to the police. He was also interrogated at the spot. It is difficult to believe that police had arranged such fabricated evidence in such a short span of time. The presence of PW 5 and PW 6 at the spot on 27.12.2015 was very much possible since the place of occurrence was their place of work and, therefore, it is reasonable to believe that they would, in all probability, be present there after occurrence of such an untoward incident in their place of work. However it is not clear as to why PW 9 was kept beyond suspicion by the investigating agency, particularly, when there was no one who witnessed that PW9 returned from the place of occurrence leaving the

appellants and the deceased in the said building. It is not clear as to why the IO has considered such statements of PW 9 that as there was an altercation between the concerned boys in English he came back, as gospel truth? At this juncture, let us see the deposition of PW 14. He is also a resident of the locality. According to him, on 26.12.2015, he witnessed around 9 p.m three persons were abusing each other in English. On the next day he came to know one of them was murdered. He identified two appellants on dock and said that they were the two persons out of three whom he saw on the night of 26.12.2015. He also identified them in the TI Parade. Apart from his oral submission he had no document to show at the time of his deposition that he was a resident of the locality. From his deposition, it is clear that an altercation was going on between the said three persons around 9 pm on 26.12.2015. This also supports the portion of the deposition of PW 9 that there was an altercation between the deceased, and the appellants. However, at 9 p.m., PW14 noticed the above three quarrelling with each other, and PW 11 noticed four persons including PW 9 crossing the boundary of the building around 9.30/10.00 pm. This time gap is important to understand as to why there was a difference in number of concerned persons as per depositions of PW14 and PW11. However, even if PW 9 was present at the time of occurrence and he took part in committing the crime, does it absolve the appellants from their overt acts? Then, why didn't they cooperate with IO at the time of investigation on this point. However, in view of the deposition of PWs 5,

6, 11 and 14, it is very difficult to say that the prosecution is unable to prove the exclusivity of association of the victim and the appellants immediately before the death of Kevin. It is true that no time is mentioned in the PM Report as to when Kevin died. But such failure on the part of the Doctor cannot be a fatal blow since the prosecution was able to show that the death occurred after 10 p.m at the place of occurrence which was not open to the general public and before such death of Kevin, there was an altercation between Kevin and the appellants. On the next morning around 10 a.m., after opening the lock of the building, it was detected that Kevin was murdered. As the exclusivity of association between the deceased and the appellants at the relevant time is established, and the offence was committed at a secluded place beyond the reach of the general public at night, and the murder of Kevin was detected only after opening of the locked building, the condition relating to paucity of time favours the prosecution in the facts and circumstances of the case. In **Smt. Gargi (Supra)** time gap between last seen together and the detection of deadbody was 2 to 3 days, whereas in the case in hand, the time gap was of a few hours and deadbody was found in a surrounding place, not open to public.

MOTIVE: RECOVERY: IDENTIFICATION

46. The Counsel of the parties argued that generally motive is immaterial in ascertaining the complicity of an accused in relation to offence alleged to have been committed by him when direct evidence is available. But such a principle is inapplicable where the case hinges

purely on circumstantial evidence. In this regard they referred to several judgements reported in **Nandu Singh (supra), Shivaji Chintappa Patil (supra), Rabindra Singh (supra).**

47. In the case in hand, the factual matrix unfolds one after another some darker sides of our society which include consumption of drugs by some sections of the educated, young people; sale of drugs openly by the drug peddlers; failure of the rehabilitation centre for de-addiction of an addicted youth; market of smuggled or stolen goods; dissatisfaction and unruly behaviour of such youth under addiction in the locality; the failure of the guardians to guide their children in right direction of life; unsympathetic and inhumane attitude of some of the youth of our society under the influence of drugs and so on.

48. The addiction to drugs of the appellants and the deceased is palpable. The evidence in this regard cannot be said to be meagre. PW 4, the sister of the deceased, admitted that her brother Kevin was addicted to drugs and he was under treatment in a rehabilitation centre for several months. The evidence of PWs 9, 11, 14 and seized items from the place of occurrence show that the deceased and his companions were consuming drugs immediately before the incident. The motive of the drug addicts to commit crimes may be diverse. It may be the quantity or individual share of the drugs when the same is consumed by a group of drug-addicts, or may be the brand new addidas foreign shoes of the deceased which if sold in market of stolen goods (Chora market),

fetches a good amount of money and the same may not be of little importance for drug addicts.

49. The most unusual conduct of the appellants was that the appellant no. 2 along with appellant no. 1 sold the Addidas shoes. No explanation was given by the appellants as to whether the said shoes belonged to any one of them and the reasons for selling them. On the other hand, the body of Kevin showed that all though he wore socks, he did not have shoes on both feet. It is almost impossible to hold that one would walk or go for a stroll outside his home without any shoes although he wears socks. Therefore, the absence of Addidas shoes on the feet of the deceased and the evidence of the prosecution to the effect that the appellant no. 2 along with appellant no.1 sold one pair of Addidas shoes immediately after the incident of murder of Kevin strengthens the prosecution case in the absence of any explanation from the side of the appellants.

50. The recovery statement under section 27 of Indian Evidence Act was proved before the learned Trial Judge and the portion of the statements of the appellants that they would help the police to recover the shoes if they are taken to the concerned shop, are admissible and acceptable evidence, and pursuant to such leading statements the Adidas shoes were recovered. Not only such statements were recorded but the same were acted upon and the shoes were recovered from the shop of PW 7, who not only told the investigating officer that the appellant no. 2 who

was accompanied by the appellant no. 1, sold the shoes to him but also handed over the relevant shoes under seizure list. Subsequently, he commented such type of shoes is not available in Chora market (place for buying and selling smuggled and stolen items). He identified the appellants at the time of recovery of shoes, in the test identification parade before the Magistrate and also on dock during trial. The defence argued that the police helped the PW-7 to identify the accused before commencement of test identification parade in correctional home at the instance of the Judicial Magistrate, but such argument does not have much force, since it appears that the appellants themselves led the Investigating Officer to the shop where they sold the shoes. However, the defence was unable to unearth any material showing that the PW-7 was antagonistic towards the appellants for any reason. Therefore, the decision of **Manoj Kumar Soni (supra)** is not applicable in this case since the prosecution has relied not only upon disclosure statement under Section 27 of Evidence Act, but also upon the exclusivity of association of the appellants with the deceased coupled with the condition of paucity of time and further, their identification by the disinterested witnesses.

51. The defence took the plea that the Judicial Magistrates who conducted the Test Identification Parade through the witnesses identifying the appellants were not called on witness box and the defence was not given an opportunity to cross examine them and as a result, the defence suffered a great prejudice. It is also contended by

the appellants that marking of Test Identification Parade sheets through the Investigating Officer during his deposition is an incurable irregularity and such TIP record cannot be admissible evidence in the eyes of law.

52. Marking of documents is nothing but giving a number for Exhibited documents and the point of assessment of evidentiary value of such marked documents is left open for the learned trial judge who decides such issue at the time of final consideration of the case i.e. at the time of writing judgment. In this case PW 16 tendered the Test Identification Parade reports as Ext-18 & Ext-19 of five witnesses for consideration of the Court. Let us see whether the Learned Trial Judge had duly considered the evidentiary value of Test Identification Parade or not.

53. The nicety of holding and recording of Test Identification Parade in the form is that the concerned Magistrate is to record each and every minute details of the proceedings in the form, so that the learned Trial Judge or the appellate forum, as the case may be, gets the opportunity to ascertain whether the learned Magistrate had scrupulously complied with the conditions in conducting such parade or not. The usual conditions of a Test Identification Parade may be listed as follows:-

i) Such parade will be conducted inside the correctional home compound beyond the gaze of the attending witness or witnesses and also of any police officer.

ii) Before commencement of such Parade the Controller or the Deputy Controller of the correctional home brings the accused before the concerned Magistrate at the place of such parade beyond the view of any outsider including the attending witnesses and introduces them to the Magistrate who will record the name and other particulars of the said accused. The said officer also puts his signature signifying that the accused is produced and identified by him before the Magistrate at the very beginning of the process of Test Identification Parade.

iii) Thereafter, the said accused will be asked to be mingled with 9/10 under-trial prisoners, having more or less similar look, appearance, dress, height, stature etc. If the number of the accused is more than one, the ratio of under-trial prisoners should be increased by 1:10 approximately.

iv) After forming a queue of under-trial prisoners mingled with the accused as aforesaid, in front of the Magistrate, the witness will be called from a place of the correctional home wherefrom the place of parade is not visible.

v) On arrival at the desk of the Magistrate, the particulars of the witness are to be recorded in the relevant column of the form by the Magistrate.

vi) Thereafter the witness is asked to go near the queue of the under-trial prisoners and identify the accused, if any, in connection with the relevant case, from such queue.

vii) If such witness correctly identifies the accused, the Magistrate should record in the relevant column that the witness identifies the accused. In a case where witness fails to identify, same is also to be recorded by the Magistrate.

viii) Irrespective of his success or failure in identifying the accused, he shall be sent back outside of the precinct of the correctional home from a place other than the place where other witnesses are waiting for their turn.

ix) If there are other witnesses they shall be called one after another, and similar process will be carried out by the Magistrate. However, if there are spaces in the form after recording the process of first witness, the Magistrate can use the said form for second witness or subsequent witnesses provided they are produced on the same day.

54. Let us see whether the Concerned Magistrate has scrupulously followed the guidelines or not.

55. The relevant column in Ext-18 (by which three witnesses were produced to identify) records as follows:-

"*The two suspects are mixed up with 20 other inmates who have similar physical stature and are similarly dressed as far as practicable. Suspects are given the option to stand anywhere in the line as per their choice. Witnesses are kept away from the venue of T.I.P and outside the inner gate of ACCH from where neither the sound nor any sight of T.I.P. could be heard or seen. T.I.P. is held in broad day light. Witnesses are called one after another to take part in T.I.P. and the witness having taken part is kept away from the other witnesses yet to participate in T.I.P. Suspects are given the liberty to change their position after participation of each witness in T.I.P. I am satisfied that the T.I.P. has been conducted under conditions precluding any sort of collusion.*"

56. The relevant column in Ext-19 (by which two witnesses were produced to identify) records as follows:-

"*Both the suspects are mixed up with other inmates at the ratio of 1:10 and such other inmates are of similar physical stature and are similarly dressed, as far as practicable.*

Suspects are given the liberty to stand anywhere in the line as per their choice.

Venue of the T.I.P. is away from the place where the witnesses are kept and neither the sound nor the sight of T.I.P. could be heard or seen therefrom T.I.P. is being held in broad daylight.

Witnesses are called one after another to participate in T.I.P. and the witness having taken part is kept away from other witness yet to participate. Suspects are given the option to change their position in the line after participation of first witness.

I am satisfied that the T.I.P. has been conducted under conditions precluding any sort of collusion."

57. From the above it transpires that the Concerned Magistrate has complied with the requisite conditions before recording that witnesses identified the accused. Therefore even if the Judicial Magistrate was not produced during trial, it cannot be said that the defence was seriously prejudiced. The defence had challenged the Test Identification Parade report on the ground that the police showed photos of the witnesses before Test Identification Parade, but the same is not tenable since nowhere it is brought on record that by which police officer or where the accused were shown to the witnesses. There are several police witnesses but not a single police witness was challenged on this point. There were two IOs being PWs 15 and 16 but neither of them was challenged that he or she showed the accused to the witnesses before

they were placed in Test Identification Parade. No challenge was put to them that they showed the photos of the appellants before their Test Identification Parade.

58. Merely because a Magistrate was not brought as a witness to face the cross-examination of the defence, the prosecution case fails does not hold ground, particularly, when the appellants led the police to recover the incriminating shoes from a shop-owner who used to sell and purchase old shoes only and the said person identified the appellant no. 2 who being accompanied by the appellant no.1, sold the shoes to him. The I.O. was not an astrologer, unless the appellants led him to the correct shop where they sold the shoes, how could he (PW 15) reach the shop of PW 7 and seize the shoes of the deceased correctly. Therefore, non- production of the Magistrate as a witness for facing cross examination of the defence did not cause any tangible prejudice to the appellants. The prosecution relied upon not only this corroborative piece of evidence but also substantive evidence where PWs 7, 5, 6, 11 and 14 identified the appellants before the court and narrated their roles before the learned trial judge. In view of the above discussion it appears that the decisions in **Umesh Chandra (supra)**, **Gireesan Nair & Ors (supra), Jafar (supra)** are not applicable in this case, since there is no material to show that the appellants were shown to the witnesses before T.I.P.

59. However, a nice point was taken by the defence that the number and code imprinted on the shoes do not match with the number and code in the duplicate receipt. The said document was produced by the de facto complainant suo moto during investigation but no seizure list was prepared in his presence. The duplicate receipt was marked as Exhibit no 25 (with objection). He has identified the shoes before the learned trial court. In his cross-examination he admitted that although the receipt disclosed the code and number of the shoes was ADFT – D6 9472, the shoes bore the code and number as ART D 69472. The learned defence counsel strenuously argued that this goes to show the much claimed recovery of Adidas shoes on the alleged leading statements of the appellants falls flat. The appellants were framed.

60. An order of conviction cannot be set aside merely because there is a discrepancy in the code and number imprinted on the shoes which does not match with the code and number in the duplicate receipt. But most interestingly, the same is not the case here. The shoes were identified by the de facto complainant before the learned trial court as the same which was purchased from Dubai, UAE. If we scrutinize minutely we shall find that the learned Trial Judge recorded in re-examination of PW 2 that the *"Receipts bear bar Code number ADFT – D 6 9472"*. However, in his cross examination he stated *"the shoes bears the number ART D 69472".* Needless to mention, bar code number of an item in shops may differ with the specific item number. Therefore, although the receipt indicated bar code ADFT D6 9472, actual number

of the shoes was ART D 69472. Hence, there is no incongruity as alleged by the learned defence Counsel.

Believe or Not to Believe

61. The defence Counsel has submitted that the prosecution case is not believable since the prosecution failed to prove that the PW 4 was working in Dubai UAE and came back to India for celebration of Christmas in the year 2015. According to the defence Counsel a cousin cannot commit murder of another cousin unless there is some animosity between them. In this case it is found that the relationship between the deceased and the appellants was very good. PW 4 being the sister of the deceased did not state the alleged factual aspect before the concerned Investigating Officer during investigation and the said PW 4 improved the prosecution case during trial. The learned defence counsel has brought the contradiction taken during the cross-examination of IO to the attention of this Court wherein the IO has admitted that PW 4 did not state before him that on the relevant date the deceased left the house with Adrian after wearing Adidas shoes and so on.

62. Although the defence has taken the plea that PW 4 improved the prosecution case we find that PW 4 has stated in her deposition that,

> "*Yes, I have stated to police that on 26.12.15 like other days my brother came home with my cousin Adrian Fernandez. Yes, I told the police that they were talking in*

the house. Yes, I stated to police that I told them that my brother has improved. Yes, I stated to police that I stated them that I take my brother to Dubai for another 2/3 months. I stated to police that both my cousin and brother left home in the early evening. I stated to police that at that time my brother also left house. I stated to police that at that time my brother was wearing red T shirt with leather jacket, blue blackish jeans pant, one jacket, white socks and Adidas shoes. I stated to police that on that day we had to go to party. I stated to police that so my brother was supposed to come back on 26th Night so that we can go to the party but he did not return that night I stated to police that they showed me photographs in their mobile. I stated to police that he was wearing T shirt, blue blackish jeans pant and white socks. I stated to police that I noticed that his jacket and shoes were not on his body. I stated to police that I saw mark of injury over his forehead. I stated to police that I saw sand, bottle, plastic and papers, ropes. ".

63. Although PW 4 has stated that she stated everything to the Police, the I.O. being PW 16 has stated that all these statements were not made to him by PW 4. This Court is in a doubt as to why there is so much deficiency. We have considered the deposition of PW 16 as well as the deposition of PW 15 who was the intermediate I.O during official leave

of PW 16. Neither PW 15 nor PW 16 has clearly stated that they recorded any statement of PW 4. If the statement is not recorded there is no question of allowing such contradiction. Therefore, the deposition of PW 4 that she stated everything to the Police cannot be disbelieved since there is no deposition from the side of PW 16 and PW 15 that they ever recorded the statement of PW 4. What PW 4 had tried to say is that she divulged everything to the Police Officer during investigation. As the I.Os did not clearly say that any of them recorded the statement of PW 4 under Section 161 Cr.P.C. on this point alone, the case law of **Sunil Kumar Sambhudayal Gupta & Ors. (supra)** is not applicable in this case.

64. As regards the allegation that prosecution has failed to prove the factum that PW 4 came from Dubai for celebration of Christmas, we have to look into other materials on record and particularly Exts.-10 and 11. Ext.-10 (collectively)(14 pages) indicates the treatment of the deceased in Rehabilitation Centre namely the Genesis Foundation (a Therapeutic Healing Community For Marginalised), Kamalgazi (Bazar), Purbapara, P.O.- Laskarpur, Kolkata-700153. It shows that the deceased was in the rehabilitation Centre from 22.07.2015. Ext-11 is a letter dated 22.12.2015 addressed to the Secretary, Genesis Foundation by the deceased stating that he wanted to go for a holiday on 22.12.2015 to meet his sister who came down from Dubai. Moreover, he wanted to spend some time with his family during festival season. He has further stated he will be coming back on 27.12.2015

(Sunday). This letter was received and contained the signature of PW 12 Indrajit Ghosh, who has proved the said documents before this Court. Ext.11 was dated on 22.12.2015 that means the said letter was written by the deceased prior to the incident which occurred in the night of 26.12.2015. In the said letter being Ext.11 he has disclosed that his sister i.e. PW 4 herein, came down from Dubai and he wanted to spend some time with his family during festival season. It goes to show that PW 4 actually lived at the relevant point of time in Dubai and the said letter also supported the deposition of PW 4 in the sense that the said letter was written prior to the happening of the incident on 26.12.2015. Therefore, the said document being written prior to the incident cannot be disbelieved nor the fact that the PW 4 came from Dubai during the festival season to spend time with the members of her family in Kolkata. It is not unusual that a sister will bring some gift for her loving brother. Bringing of Adidas shoes from Dubai cannot be doubted particularly when the prosecution has been able to produce at least one duplicate receipt to that effect. Therefore, in overall assimilation of the facts and evidence we have found that there is no reason to disbelieve the deposition of PW 4 and also the deposition of the defacto complainant. In other words we cannot say that the prosecution case cannot be believed since no documentary evidence was produced from the side of the prosecution to prove that PW 4 was residing at the relevant point of time in Dubai, UAE.

65. It was argued that as there was good relationship between cousins, a cousin cannot cause death to another cousin. We have already discussed that the cousins referred to above in this case are all drug addicts and we have discussed that there might have been several issues amongst the drug addicts which tempted one drug addict to cause the murder of another drug addict. It is also found that two cousins of the deceased took away the shoes from his feet and also the leather jacket of the deceased soon after they found that the deceased was no more. They threw the leather jacket but was very much conscious about the worth of brand new Adidas shoes. They went to a market and sold the same in exchange of money. No normal cousin can do so. Therefore, argument of the defence does not impress this Court on this point. However, Mr. Bhattacharyya has taken a nice plea that as the deceased and appellants were living together the cousins had access to the shoes and leather jacket and in that case at best the appellants can be charged under Section 379 IPC. We appreciate the arguments by the learned Counsel of the appellant no. 1 in this regard, but so far as access to the shoes of the deceased is concerned, we would like to say that access to the shoes of cousin means that another cousin can use, wear shoes of another cousin, but it does not allow the concerned cousin to sell off the said shoes after leaving the owner of the shoes dead with socks on his feet. The cousin took the shoes from the feet of another cousin because the former knew that latter did not require the shoes anymore. They were very much apprehensive that if

any of them used the said shoes of the deceased they might have been apprehended, and therefore, it was better to dispose of the shoes by selling the same at a price.

66. Therefore, considering all aspects we find that the following chains of events are complete:

Firstly, the exclusivity of association of the deceased with the appellants just before the incident.

Secondly, the witnesses who saw the entry of the appellants with the deceased to a place which was not open to general public, and exit of the appellants without the deceased from that place, deposed and identified the appellants.

Thirdly, the depositions of witnesses are sufficient to show that the appellants were present with the deceased at the time of occurrence and they departed the place of occurrence leaving Kevin there.

Fourthly, the appellants fled away with the shoes of the deceased.

Fifthly, Kevin was found murdered with socks on his feet but without any shoes.

Sixthly, the appellants sold the shoes in a market.

Seventhly, on the leading statements of the appellants, the shoes were recovered from the concerned shop owner who deposed and identified the appellants for selling the said shoes.

Eighthly, the said shoes were identified by the defacto complainant.

Ninthly, the post mortem report and other materials on record show that the death of Kevin was ante-mortem in nature due to smothering.

Tenthly, prosecution was able to prove that the shoes were brought from Dubai by PW 4 and were gifted to the deceased on or about 22.12.2015.

Eleventhly, the absence of explanation from the appellants, which is an additional link, as to when they left Kevin, if they were not the offenders.

Twelfthly, the absence of explanation from the appellants, which is also another additional link, as to how and when they got the brand new Adidas shoes of the deceased.

67. Record shows that these circumstances were put before the appellants during their examination under Section 313 Cr.P.C. but there was no explanation from the side of the appellants in true sense.

68. In view of the above discussion the judgment of conviction and order of sentence dated 14.08.2019 and 16.08.2019 passed by learned Additional Sessions Judge, Fast Track, 1st Court, Alipore, South 24 Parganas in Sessions Trial No. 04(09)2016 arising out of Sessions Case no. 04(04)2016 convicting the appellants under Section 302/24 of the Indian Penal Code is hereby affirmed.

69. The instant appeal being **CRA 574 of 2019** is dismissed on contest.

70. The Trial Court Records be sent back to the Learned Trial Court immediately alongwith a copy of this judgment.

71. Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties on compliance of all necessary formalities.

I Agree.

(ARIJIT BANERJEE, J.)

(APURBA SINHA RAY, J.)