

Court No. - 42

Case :- CRIMINAL APPEAL No. - 663 of 1991

Appellant :- Raju Sharma

Respondent :- State Of U.P.

Counsel for Appellant :- R.P.Singh, Satya Dheer Singh
Jadaun

Counsel for Respondent :- G.A.

Hon'ble Manoj Misra,J.

Hon'ble Mrs. Manju Rani Chauhan,J.

This appeal is against the judgment and order dated 30.03.1991 passed by the VIth Additional District & Sessions Judge, Kanpur Nagar in Sessions Trial No. 286 of 1987 by which the appellant - Raju Sharma son of Puttan Sharma has been convicted under Section 302 I.P.C. and sentenced to suffer life imprisonment.

In brief, the factual matrix of the case is as follows:

On 15.07.1986, post midnight, at about 00.30 hrs an information was given to the police regarding discovery of a body in a gunny bag at a corner near garbage dump of Navin Market of Kanpur City. Inquest report (Ex. Ka 9) was prepared at 04.30 hrs by Mohd. Yakub Ansari (P.W.7). The inquest report discloses that information of discovery of dead body was received from one Ram Bahadur (not examined). The post mortem examination was conducted at about 15:30 hrs (or 03.30pm) on 15.07.1986. Dr. A.K. Tiwari (P.W.5) prepared the post mortem report (Exhibit Ka-3). As per the post mortem report, multiple ante mortem incised wound injuries were found on the face and neck of the deceased. The larynx, oesophagus and both sides vessels of the neck were found cut. The cause of death was due to shock and haemorrhage as a result of ante mortem injuries. The time of death was estimated about three

days before. The post mortem report noticed that the body was in a state of decomposition. The length of the body was stated to be 5 feet 2 inches.

Interestingly, on 15.07.1986, at 3.30 p.m., at P.S. Harvansh Mohal, Kanpur Nagar, a written first information report (for short FIR) (Exhibit Ka-1), scribed by Krishna Lal (not examined), was lodged by Shiv Prasad (P.W.1), which was registered as Case Crime No. 252 of 1986, under Section 364 I.P.C. In the FIR it was alleged that P.W.1's brother, Ram Kumar, son of late Pooran Kushwaha, aged about 30 years, fair complexion, height 5 feet 2 inches, who had been bringing milk from the village and selling to shopkeepers in the city at Kanpur, like everyday, on 13.07.1986, had gone to Kanpur in connection with his business but did not return back. It was alleged that the family members had been searching for him and that they had discovered his milk containers, two in number, with an old lady, who described herself as Hasina Begum, later, she was examined as Sakina (P.W.4). It was alleged that though the whereabouts of Ram Kumar could not be ascertained but through milk vendors it was learnt that Ram Kumar had gone to Hulaganj to settle his account with one Raju Mithaiwala. It was alleged that the said information was given to him by Hasina Begum in the presence of Lalu son of Madhav (not examined) and others. After alleging as above, suspicion was expressed that Ram Kumar has been abducted and murdered. Later, in the day (15.07.1986), within an hour of lodging the FIR, the body of the deceased was identified by the informant at the mortuary.

During the course of investigation, the police disclosed recovery of a Tehmat (Lungi) of the deceased from the shop of the appellant in the presence of witnesses - Sri Prakash (not examined) and Babu (not examined) and prepared a recovery

memo (Exhibit Ka-15) dated 18.07.1986. The said recovery memo is however not signed by the appellant.

After investigation, a charge-sheet (Exhibit Ka-16) was submitted against the appellant by Shiromani Singh Chauhan (P.W.9) for offences punishable under Sections 364 and 302 I.P.C. The matter was thereafter committed to the court of session. Two charges were framed, namely, (a) that the appellant committed murder of the deceased Ram Kumar, punishable under Section 302 I.P.C.; and (b) that the appellant abducted the deceased Ram Kumar with an intent to commit murder, punishable under Section 364 I.P.C. The appellant denied the charges and claimed for trial.

During the course of trial, the prosecution examined nine witnesses. Their testimony in brief is as follows:

(a) Shiv Prasad (P.W.1- informant - brother of the deceased) stated that the deceased like every day left for Kanpur city in the morning to sell milk but did not return back till the evening, as a result, on the next day, P.W.1 went to the city to search for him. There, near central Dharamshala, where milk is sold, he met Hasina Begum who told P.W.1 that the accused had taken the deceased for settling the account. P.W.1 stated that the deceased had to collect milk dues of three months, outstanding against the accused. P.W.1 disclosed that the deceased wanted to buy a tempo therefore he used to sell milk on credit to the accused for getting a lump sum amount in return. P.W.1 stated that he identified his brother's body at the mortuary on the day he lodged the FIR. On recall, P.W.1 disclosed that when his brother left the house he was wearing a green colored shirt and a Lungi with squares. In his cross examination, P.W.1 admitted that his brother maintained a book of account which carries name of persons to whom his brother

used to sell milk, which is there, but he had not brought/produced. Upon suggestion that P.W.1 had named Raju Mithaiwala of Hulaganj as the suspect, P.W.1 admitted that he knew the name of Raju Sharma (accused-appellant) since before lodging of the FIR as also that he resided at Mohalla Moosa Toli and had a shop there, but in the report Raju Mithaiwala of Hulaganj was mentioned. P.W.1 also stated that the Tehmat and the shirt of the deceased was identified by him at the police station 3-4 days after the incident. P.W.1 denied the suggestion that his brother had been missing since much before 13.07.1986 and that he lodged a false FIR at the instance of the police. P.W.1 also denied the suggestion that the accused had no sweetmeat shop.

(b) P.W.2 - (Satish Chandra) stated that he saw the deceased in the company of the accused – appellant, at about 4 pm, near Nairaina Chauraha, sitting on a Rickshaw, going towards Ghanta Ghar (clock tower). P.W.2 stated that he inquired from Ram Kumar (the deceased) whether he was going to his home upon which the deceased told him that he is here to settle his account with Raju Sharma (Mithaiwala) (the accused-appellant) and would return home after settling his account. P.W.2 stated that, on the next day, between 11-12 hours, he met Omkar (not examined), a food grains dealer and brother of Ram Kumar, who informed P.W.2 that Ram Kumar (the deceased) had not returned back home since last evening. Upon which, P.W.2 told him that he saw Ram Kumar yesterday, at about 4 pm, near Nairana Chauraha. He stated that when he told this to Omkar, deceased's brother - Shiv Prasad (P.W.1) was present. In his cross-examination, upon suggestion that he was lying because he had business relations with the informant, he refuted the suggestion.

(c) P.W.3 - Rampati (wife of the deceased) disclosed that her husband had 2-3 months milk-dues to collect from the accused Raju Sharma and that he used to deposit the money with the accused because he wanted to purchase a Tempo. She also disclosed that the deceased had made deposit of Rs. 2,000/-, by way booking amount, to purchase a Tempo. The Tempo advance deposit receipt was proved by her and the same was exhibited. She also stated that her husband, a day before the incident, on Saturday, had taken her jewelery articles to Kanpur for sale to collect money for purchase of Tempo. She also stated that the deceased had left for Kanpur city wearing a shirt and Tehmat (Lungi). She stated that she had recognized the recovered Tehmat at the police station. She also recognized the Tehmat produced in court as that of her husband though in her cross examination she could not disclose any distinguishing features by which she could recognize it. To demonstrate that the deceased had cordial relations with the accused she disclosed that she had been with her husband at a function hosted by the accused. In her cross-examination, she denied the suggestion that she was lying and giving a tutored statement though she stated that in connection with the case she had come 8-10 times and few things have been told to her and few things she remembers.

(d) P.W. 4- Sakeena, who had been referred to as Hasina Begum by the informant, stated that deceased - Ram Kumar (the deceased) had left his empty milk containers with her for cleaning, at about 10-11 am, on that fateful Sunday, thereafter, he did not return back. She stated that on the next day deceased's wife had come and she had informed her that he had gone to Raju Sharma for settling his accounts. In her cross examination she stated that milk-men leave their containers for

her to clean but she is not in a position to tell the name of all of them though she remembers the name of Ram Kumar (the deceased). She stated that Ram Kumar had not told her the name of any person other than Raju Sharma. Upon being confronted with her statement, under section 161 CrPC, to the effect that the deceased had left with Munna Ghosi and thereafter he did not return, she stated that she doesn't know as to how that was written. She also could not disclose the date, month and the year when Ram Kumar (the deceased) last met her and told her that he was going to meet Raju Sharma.

(e) P.W.5 - Dr. A.K. Tiwari, apart from proving the post mortem report and the injuries noticed by him, stated that he conducted the post - mortem on 15.07.1986 at 3.30 pm and according to his estimate the deceased died about three days before.

(f) P.W.6 - Har Prasad stated that up to 17.07.1986 investigation of the case was done by him, where after the investigation was assigned to Jograj Singh (not examined). By that date he had recorded statement of informant - Shiv Prasad; FIR scribe – Krishna Lal; Smt. Hasina Begum; deceased's wife Ram Pati; deceased's brother Vishwanath and Onkar. In his cross-examination he stated that Hasina Begum had given her statement that Ram Kumar (the deceased) had gone with Ghosi and thereafter did not return back. He also stated that Hasina Begum had not used the word "Sharma" after Raju. He also stated that Shiv Prasad - informant had not shown him the book of accounts maintained by the deceased. He stated that informant had not told the police that the deceased had gone to Raju Sharma for collecting dues. P.W.6 stated that he had gone to Munna Ghosi's house at Mishri Bazaar on 15.7.1986 and 16.07.1986 but the house was found locked. He denied the

suggestion that Raju Sharma has been falsely implicated.

(g) P.W.7- Mohd. Yakub stated that on 15.07.1986 when he was posted at Chowki Parade, Kotwali, Kanpur Nagar, information was received, at about 2.00 am, regarding discovery of a body in a gunny bag, near garbage dump, at Naveen Market, after which, inquest proceedings were conducted at 4.30 am.

(h) P.W.8- Nand Lal Dubey proved the entry of the first information report in the general diary.

(i) P.W.9 - Siromani Singh Chauhan stated that the investigation of the case was started by Har Prasad Singh (PW6) whereafter it was assigned to Jograj Singh (not examined) and upon his transfer the investigation was taken over by him. He stated that on 18.7.1986 the house of the accused at Bhoosa Toli was searched by Jograj Singh (not examined), who prepared the memo relating to recovery of Tehmat. He proved submission of charge-sheet by him. In his cross-examination he admitted that the Tehmat was not recovered in his presence. He also stated that Jograj Singh, as per his knowledge, resides in District Hardoi.

The incriminating circumstances derived from the evidence led by the prosecution were put to the accused and his statement under Section 313 Cr.P.C. was recorded. The accused denied the incriminating circumstances and claimed that the witnesses were lying under the pressure of the police.

At this stage, we would like to put on record that the recovery of Tehmat allegedly made from the house of the accused-appellant in a search operation though is witnessed by Sri Prakash son of Kallu and Babu son of Rasool Bux but neither of them was examined during trial. Even the concerned

police officer, namely, Jograj Singh, who made the recovery was not examined. It may also be observed that neither from the paper book prepared by the office nor from the lower court original record it is ascertainable whether the incriminating circumstance of recovery was admitted by the accused-appellant in his statement recorded under section 313 CrPC inasmuch as the relevant page of the original record, at its bottom, where the answer is noted, is badly mutilated and appears to have been nibbled either by white ant or rodent. Under the circumstances, we referred to the manual typewritten copy of the paper book, which is available in the exhibits file. From there, we could find that the incriminating circumstance of recovery of Tehmat was put to the accused by way of question no.12 to which he replied by stating that he does not know. Thus, it can be safely assumed that the factum of recovery was not admitted by the accused and therefore it required proof.

After hearing both sides the trial court found the following circumstances proved: (a) that on 13.07.1986, the deceased had left his house for Kanpur City in connection with his milk business; (b) that at the time he left the house, he was wearing a Tehmat apart from other garments; (c) that the deceased had milk dues to collect from accused-appellant; (d) that the deceased was last seen alive with the accused-appellant in the evening of 13.07.1986 at about 4 pm; (e) that, thereafter, the deceased was not seen alive; (f) that on 15.7.1987 his body was recovered from a Bin with multiple injuries which suggested a homicidal death; (g) that the body had only underclothes on it; (h) that the Tehmat which the deceased was wearing at the time he left the house was recovered from the place owned and possessed by the deceased. By treating those circumstances

as to form a chain, in absence of any explanation from the accused appellant as to when he parted company with the deceased or as to how the deceased died, it was held that the chain of circumstances was complete and it pointed towards the guilt of the accused-appellant by ruling out all other hypothesis and, therefore, the appellant was liable for the murder of the deceased. The trial court, however, found charge of offence punishable under Section 364 I.P.C not proved.

We have heard learned counsel for the appellant; the learned A.G.A. for the State; and have perused the record.

The learned counsel for the appellant has assailed the judgment and order passed by the trial court by contending as follows:

(a) That, according to the post mortem report of the doctor, the death could have occurred three days before, which means that the deceased died in between 11.07.1986 and 12.07.1986, that is, three days before the post mortem which was conducted on 15.07.1986. This clearly suggests that the prosecution story that the deceased was seen alive in the evening of 13.07.1986 at 4 pm is completely unreliable.

(b) That, according to the statement of P.W.1 (deceased's brother), the deceased used to maintain a book of account mentioning the name of persons with whom the deceased had business dealings, which was in the possession of P.W.1, yet the same was not produced to demonstrate that there were milk dues payable by the accused-appellant to the deceased and, therefore, the motive for the crime as well as the circumstance that the deceased had gone to collect the dues was not proved.

(c) That in the first information report, which has been

lodged on 15.07.1986, at 3:30 pm, there is no disclosure with regard to the deceased being last seen with the accused-appellant by any particular witness. There is also no disclosure about the name of any witness who may have last seen the deceased with the appellant. Whereas, in the testimony of P.W.2 - Satish Chandra -- the witness who last saw the deceased with the appellant at 4.00 pm on 13.07.1986 -- it has come that on the next day, which would be 14.07.1986, he had told deceased's other brother, namely, Omkar, who is a food grains dealer, in the presence of the informant (P.W.1), that the deceased was seen last evening in the company of the accused-appellant, at about 4 pm, near Nairaina Chauraha. Absence of such disclosure by the informant (P.W.1) in the FIR clearly reflects that P.W.2 was set up later just to create false evidence of last seen. Moreover, the evidence of last seen is very weak, particularly, when it is not in close proximity with the place and time from where the body is recovered.

(d) That the recovery of the Tehmat from the premises of the accused-appellant, firstly, has not been proved as neither the witnesses of the recovery nor the Investigating Officer, namely, Jograj Singh, who allegedly effected recovery, was examined as a witness; secondly, the Tehmat had no distinguishable features, at least shown to the court, from which it could be ascertained that it was of the deceased; and, thirdly, the Tehmat, so recovered, has not been forensically examined to connect it with the deceased.

He thus contended that the judgment and order of the court below is liable to be set aside and the appellant is entitled to be acquitted.

Per contra, the learned A.G.A. supported the judgment and order passed by the trial court and submitted that opinion

expressed by the doctor that the death could have occurred 3 days before is not conclusive as there could always be a variation of about 12 to 24 hours in the estimation of time of death, particularly, when the body is examined after 48 hours of the time of death. He contended that the evidence of P.W.1 and P.W.3 clearly disclosed that the deceased had milk dues to be collected from the accused-appellant; and that, on the fateful day, he had left for Kanpur City and after reaching there had gone to settle the account with the accused-appellant. The motive for the crime is thus proved. P.W. 2 saw the deceased in the company of the accused-appellant, at about 4 pm, going on a rickshaw, where after the deceased was not seen alive and his body was recovered two days later suggesting that he was murdered in between and since the Tehmat worn by the deceased was recovered from the premises of the accused-appellant, in absence of any explanation from the accused-appellant, the chain of circumstances pointing to the guilt of the accused was complete. Hence, the conviction of the accused-appellant is justified.

We have given thoughtful consideration to the rival submissions and have perused the record carefully.

Before we proceed to analyze the evidence that has come on record, we may remind ourselves that this is a case based on circumstantial evidence. The law as regards proof of guilt by circumstantial evidence is well settled by a series of decisions of the Apex Court starting from *Hanumant Govind Nargundkar vs The State Of Madhya Pradesh* : AIR 1952 SC 343 and the celebrated decision in the case of *Sharad Birdhi Chand Sarda vs State Of Maharashtra* : 1984 (4) SCC 116, which is, that 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 circumstances 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.

When we break the prosecution evidence into parts, we find that the prosecution was successful in proving that the deceased had left his house for Kanpur city on or about 13.07.1987 in connection with milk business; that he gave his milk containers for washing to P.W.4 on 13.07.1987; that in the night of 15.07.1987, that is between 00.30 hrs to 02.00 hrs, his body was found in a gunny bag near a Bin at Naveen Market in Kanpur city; that the inquest was held at about 4.30 hrs on 15.07.1987; that post mortem was conducted at 15.30 hrs on 15.7.1987 which disclosed that the death was homicidal; that the FIR was lodged by P.W.1 at 15.30 hrs on 15.07.1987 without naming any one though it was alleged that from the information received it appeared that the deceased had gone for settling accounts with one Raju Mithaiwala at Hulaganj; and that later, on the same day, the body of the deceased was identified by P.W.1 at the mortuary.

As regards the motive for the crime, the incriminating circumstance that the deceased used to deposit milk dues with the accused-appellant and had gone to collect the same was denied by the accused-appellant in his statement recorded under section 313 CrPC by denying business relation with the deceased. No documentary evidence was produced by the

prosecution to prove existence of such deposit. The books of account though maintained by the deceased and available, as it appears from the statement of P.W.1, was neither produced in evidence nor shown to the investigating officer. A specific question was put to P.W.1 in that regard. He admitted having the books of account containing name of persons with whom the deceased had dealings but he did not produce the same. Non-production of the book of account maintained by the deceased, in view of illustration (g) to section 114 of the Evidence Act, gives rise to a presumption that if the same had been produced it might not have reflected any dues payable by the accused-appellant to the deceased. Hence, in our view, the prosecution by withholding the book of account maintained by the deceased and by not providing any documentary evidence as regards milk dues payable by the accused-appellant to the deceased has rendered its evidence, as regards motive for the crime, not reliable.

In so far as the circumstance of recovery of Tehmat worn by the deceased from the premises of the accused-appellant is concerned the same has not been proved. Neither of the two witnesses of the recovery nor the investigating officer who carried out the search operation to effect the recovery was examined by the prosecution. The factum of recovery was not admitted by the accused-appellant, therefore the burden was on the prosecution to prove the recovery, which it failed to discharge.

Hence, the evidence that remains to connect the accused-appellant with the murder of the deceased is the evidence of last seen provided by Satish Chand (P.W.2). Whether the evidence of P.W.2 in that regard is reliable, and, if it is so, whether sufficient to record conviction, is what needs to

be examined.

On careful perusal of the record, we find that statement of P.W.2 was recorded on 11.07.1989. In his statement in chief, he simply states that about 3 years ago from today, when he had come to Kanpur, at about 4.00 pm., while he was traveling from Nairaina Chauraha to Ghanta Ghar, on way, he spotted the deceased on a rickshaw with Raju Mithaiwala (the accused-appellant present in court). He stated that upon seeing the deceased he had asked him whether he is returning home, upon which, the deceased told him that he would return back after settling his account with the accused-appellant. P.W.2 stated that next day, in between 11 – 12, day time, he met deceased's brother Omkar (not examined), who complained that the deceased had not returned home, upon which, the witness told him that he had seen the deceased with the accused-appellant last evening at Nairaina Chauraha. He also stated that when he disclosed the above fact to Omkar, Shiv Prasad (informant – P.W.1) was present.

Interestingly, P.W.1 in his testimony stated that it was Hasina Begum (found to be Sakina-P.W.4) who had told him that the deceased had gone with the accused-appellant for collecting milk dues. P.W.4 does not specifically depose that she saw the deceased going with the accused-appellant though she claims in her cross examination that the deceased told her that he was going to the place of Raju Sharma. P.W.1 does not state that he came to know about the deceased being with the accused-appellant through P.W.2. Rather, he states that when Hasina Begum (P.W.4-Sakina) told him about the above fact, P.W.2 and others were present. In the FIR lodged by P.W.1 which was lodged a day later, that is on 15.7.1986, there is no disclosure about

getting information from P.W.2 (Satish Chand). Further, from the statement of P.W.2 made during his cross examination it appears that his statement was recorded by the investigating officer after 2-3 days which is suggestive of the fact that when no witness was found, he was made a witness. Non disclosure of receipt of any information from P.W.2 by P.W.1, who had been with P.W.2, is suggestive of the fact that P.W.2 has been set up later to create some kind of evidence. Hence, we are of the considered view that the testimony of P.W.2 that he last saw the deceased in the company of the accused-appellant is not reliable.

Even if we accept the prosecution evidence that the deceased was last seen with the accused-appellant on 13.07. 1986 at about 4.00 pm going on a rickshaw at Nairaina Chauraha that, by itself, would not be sufficient to throw burden on the accused to explain and, in absence whereof, to record conviction of the accused-appellant, particularly, when we have already found that the alleged recovery of Tehmat from the premises of the accused-appellant was not proved.

At this stage, we may notice the law relating to the probative value of the evidence of the deceased being last seen alive with the accused. In ***Mohibur Rahman v. State of Assam, (2002) 6 SCC 715***, the apex court as regards the probative value of the evidence of the deceased being last seen alive with the accused observed as follows:

10. *The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. There may be cases where, on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind may be persuaded to*

reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide.”

In the case of **State of Goa v. Sanjay Thakran, (2007) 3 SCC 755**, after taking notice of a number of decisions on the theory of last seen, the apex court held as follows:

34. From the principle laid down by this Court, the circumstance of last seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is after (sic of) a considerable long duration. There can be no fixed or straitjacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author of the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased,

and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case.

The legal principle deducible from the decisions noticed above is that the evidence of the deceased being last seen alive with the accused is of a weak type and, ordinarily, by itself, may not be sufficient to record conviction of the accused or shift the burden on the accused to prove his innocence. But where the place and time when the deceased was last seen alive with the accused is in close proximity to the place and time of death or discovery of the body of the deceased so as to rule out intervention of others in the crime, the burden may, in the facts of a case, shift on the accused to explain his innocence and in absence of explanation or a false explanation it may provide a missing link to the chain of circumstances to enable the court to hold the accused guilty.

In the instant case, the deceased, if at all, was last seen alive at 4.00 p.m on 13.07.1987 with the accused at Nairaina Chauraha in a public street. Deceased's body was recovered from a Bin in Naveen Market on 15.07.1987 post mid night. No evidence has been led to show that the Bin from where the body was recovered was next to the house of the accused-appellant. Further, no evidence has been led to show that the place where the body was recovered was in close proximity to the house of the accused-appellant. There is also no evidence led to show that Nairaina Chauraha was in close proximity to the Bin. Even if it was, no prudent person would accept that the deceased was murdered on or about 4.00 pm during day time and that too on a public street. Under the circumstances, the evidence led by the prosecution is not such which would exclude the intervention of others in the crime and thereby cast a burden on the accused-appellant to render an explanation.

Hence, we are also of the view that even if the evidence of the deceased being last seen with the appellant is accepted, in the facts of the case, it is not sufficient to hold the accused-appellant guilty for want of explanation.

At this stage, we may also refer to the testimony of Sakeena (P.W.4), who has been examined by the prosecution to prove that on the fateful day i.e. 13.07.1986 the deceased had provided the empty milk containers to her for cleaning and that he had left her by telling her that he is going to the place of accused-appellant. From her statement recorded in court it appears that she was confronted with her statement recorded under Section 161 CrPC wherein she had disclosed that the deceased had left with Munna Ghosi. The investigating officer Har Prasad Singh (P.W.6) was questioned in that regard and he admitted that Hasina Begum (Sakina-P.W.4) had stated that Ram Kumar had left with Ghosi and that thereafter he did not return. Further, P.W.6 stated that he had gone to search for Munna Ghosi on 15.07.1986 and 16.07.1986 but his house was found locked.

When we take a conspectus of the entire prosecution evidence, we find, firstly, that the circumstances as against the accused-appellant are not satisfactorily proved, secondly, the chain of circumstances is not complete and, thirdly, the involvement of some other person in the crime cannot be ruled out. Hence, the benefit of doubt must go to the accused-appellant. The conviction of the accused appellant is, therefore, unsustainable.

Consequently, the appeal is **allowed**. The judgment and order dated 30.03.1991 passed by the VIth Additional District & Sessions Judge, Kanpur Nagar in Session Trial No. 286 of 1987 is hereby set aside. The appellant is acquitted of the

charge of murder. If the appellant is on bail, he need not surrender.

Let the record as well as this order be sent to the court below for compliance.

Order Date :- 26.9.2019
Sunil Kr Tiwari