



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

Cr.A. No. 326 of 2011

Judgments reserved on: 19.05.2017

Date of decision: 15th June, 2017

State of H.P.

...Appellant

Versus

Sunil Kumar

...Respondent/accused

Coram

The Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.

The Hon'ble Mr. Justice Chander Bhusan Barowalia, Judge.

Whether approved for reporting? Yes.

For the Appellant : **Mr. V.S. Chauhan, Addl. A.G. with Mr. Puneet Rajta, Deputy A.G. and Mr. J. S. Guleria, Asstt. A.G.**

For the Respondent/ Accused : **Mr. Hoshiar Kaushal, Advocate.**

Justice Tarlok Singh Chauhan, Judge.

This criminal appeal under Section 378 (3) of the Cr.P.C. has been filed by the State against the judgment of acquittal passed by the learned Additional Sessions Judge, Ghumarwin, District Bilaspur, H.P. (Camp at Bilaspur), on 21.4.2011, in Session Trial No. 25/7 of 2010, wherein the accused was charged and stood tried for an offence under Section 302 of the IPC.

2. The case of the prosecution is that Shri Ramesh Soni, Pradhan, Gram Panchayat Gatwad, lodged a daily diary rapat (DDR) No. 8(A) Ext. PW-22/A, on 26.3.2010, the translated version whereof reads thus:-

"At this time Sh. Ramesh Soni, Pradhan, Gram Panchayat Gatwad, telephonically informed that Madan Lal of village Lethwin, informed him on telephone that a person is lying near Lethwin and there is no moment in his body. He requested the police to visit the spot for conducting the proceeding. Acting on this information SI/SHO Prem Singh, ASI Ludar Mani, H.C. Amar Singh, No. 91, HHC Ramesh, No. 292, HHG Prittam Singh, HHG Yogesh Kumar and HHG Ashok Kumar left to Lethwin in vehicle No. HP-07A-0371 being driven by C. Brikam Ram, No. 448."

3. Pursuant to such report PW-22 S.I. Prem Singh went to the spot and recorded the statement of PW1 Sanju under Section 154 Cr.P.C. Ext.PW-1/A. The relevant portion whereof as translated reads as follows:-

"Raj Kumar @ Raju was younger son of his uncle late Sh. Suraj Bhan Chaudhary. Raju was having one elder brother and two sisters and both sisters are married. On 26.3.2010 he was present on the spot where the dead body of Raju was hanging with the tree. Body had sustained marks of injuries on his face and nose and smeared with the blood. He had a suspicion that Raj Kumar had not committed suicide but he was murdered. He made the inquiry on his own level and came to know later on that in the evening on 25.3.2010 that Sunil Kumar @ Jonny, r/o village Muhana, was accompanying Raj Kumar. He had suspicion that the accused Sunil Kumar had done away with the life of the deceased Raj Kumar."

4. The statement Ext.PW-1/A was sent to the Police Station, Bharari through C. Parveen Kumar, No. 311 for registration of FIR and FIR Ext.PW-20/B came to be registered. PW-22 S.I. Prem Singh was entrusted with the investigation and found that the body of the deceased Raj Kumar was hanging from eucalyptus (Safeda) tree. The investigator clicked the photographs Ext.P-14 to Ext.P-30 from his official camera and prepared the inquest paper Ext.PW18/B to Ext.PW-18/D and also prepared the spot map Ext.PW-20/D. The papers for conducting the post-mortem of the dead body of the deceased were prepared and thereafter post-mortem was got conducted at C.H. Ghumarwin. The blood which was found lying at a distance of 50-60 meters from the place where the dead body was found hanging was lifted and put in a plastic container and sealed with seal bearing impression 'D' in a cloth parcel and it was taken into possession vide seizure memo Ext.PW-8/A. At the same time, a passbook of UCO Bank of deceased Raj Kumar, an empty bottle of liquor 'Lalpari', half filled packet of Sudershan (tobacco), a pair of bathroom chapal, two keys and one lock were also found lying at a distance of 50-60 meters from the dead body and were taken into possession vide memo Ext.PW-18/B.

5. During the course of investigation, it was revealed that, on 25.3.2010, deceased Raj Kumar and the accused joined together at Dhadhol where deceased told the accused that he was going to bring his wife and had already withdrawn Rs.8000/- from the bank. They purchased one bottle of liquor from the liquor vend at Dadhol and proceeded towards Lethwin on foot. At Bhater the accused purchased a packet of Sundershan (Tobacco) from the shop of Asha Mahajan (PW2) and at that time deceased was also accompanying him. Both of them went on foot towards upper side of the road which leads to Lethwin and on the way they consumed liquor. After consuming liquor, the accused attacked deceased Raj Kumar on his face, as a result whereof, he fell down and became unconscious. Accused then took out Rs.7000/- from his pocket and assuming him to be dead hanged him eucalyptus tree with the piece of cloth to give it a colour that the deceased had committed suicide whereas, in fact, he had been murdered by the accused, after taking out the money as aforesaid.

6. It is the further case of the prosecution that while the accused was in police custody he made a disclosure statement under Section 27 of the Evidence Act Ext.PW-20/K in presence of witnesses Neeraj and Desh Raj to the effect that he had concealed his pant and shirt which he had worn at the time of

occurrence having blood stains, which had been washed by him and kept in his bedroom. He also concealed Rs.1410/- in the quilt which he could get recovered and led the police to his bedroom and got recovered pant and shirt alongwith currency notes of Rs.1410/- which were taken into possession by the police.

7. On 6.4.2010, the accused further made disclosure statement Ext.PW5/A, this time in the presence of witnesses Narinder Singh and Rajinder Singh to the effect that he had purchased two cell phones, on 26.3.2010, with the money which he had taken out from the pocket of Raj Kumar. One cell phone was purchased for Rs.2000/- from Krish Communication and another cell phone was purchased from Manoj Electronics for Rs.2000/- and he had concealed the cell phones in the almirah of his bed room, which he could get recovered and led the police party and witnesses to his bed room and got recovered both the cell phones alongwith cash memo which were taken into possession.

8. On completion of the investigation, a report under Section 173 Cr.P.C. together with the relevant documents was submitted in the Court and thereafter charges were framed against the accused under Section 302 IPC, to which he pleaded not guilty and claimed trial.

9. The prosecution in support of its claim had examined, as many as, 22 witnesses.

10. At the outset, it may be observed that the case of the prosecution rests entirely on circumstantial evidence based upon the theory of "last seen together".

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

12. The "last seen together" theory is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. The "last seen theory" holds the court to shift the burden of proof to the accused and to all a reasonable explanation as to the cause of the death of the deceased. It is well settled that it is not prudent to base the conviction solely on "last seen theory" which should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that preceded and follow the point of being so last seen.

13. It is more than settled that in case of circumstantial evidence, the circumstances from which inference as to the guilt of the accused is drawn, have to be proved beyond

reasonable doubt and there be a complete chain of evidence consistent only that the hypothesis of guilt of the accused and totally inconsistent with his innocence and in such a case if the evidence relied upon is capable of two inferences then one which is in favour of the accused must be accepted. It is clearly settled that when a case rests on circumstantial evidence such evidence must satisfy three tests:

- i) The circumstance from which an inference of guilt is sought to be drawn must cogently and firmly established.
- ii) Those circumstances should be of a definite tendency un-erringly pointing towards the guilt of the accused.
- iii) The circumstances taken cumulatively, should form a complete chain so that to come to the conclusion that the crime was committed by the accused.

14. Equally well settled is the proposition that where the entire prosecution case hinges on circumstantial evidence the Court should adopt cautious approach for basing the conviction on circumstantial evidence and unless the prosecution evidence point irresistible to the guilt of the accused, it would not be sound and safe to base the conviction of accused person.

15. In case of circumstantial evidence, each circumstances must be proved beyond reasonable doubt by independent evidence and the circumstances so proved, must form a complete chain without giving room to any other hypothesis and should be consistent that only the guilt of the accused (See: **Lakhbir Singh vs. State of Punjab, 1994 Suppl. (1) SCC 173**).

16. Factors to be taken into account in adjudication of cases of circumstantial evidence have been laid down by the Hon'ble Supreme Court as under:

- (i) The circumstances from which the conclusion of guilt is to be drawn should be fully established;
- (ii) The circumstances concerned "must" or "should" and "not" may be established. The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, this should not be explainable on any other hypothesis except with the accused guilt;
- (iii) The circumstances should be of conclusive nature and tendency;
- (iv) They should exclude every possible hypothesis, except they want to be proved;

(v) There must be a chain of evidence so complete as not to leave any reasonable ground for the reasons consisting that the innocence of the accused and must so that in all humane probability the act must have been done by the accused. (See: **Sharad Birdhichand Sarda vs. State of Maharashtra, (1984) 4 SCC 116, M.G. Agarwal vs. State of Maharashtra (1963) SCC 200**).

17. In **Brij Lala Pd. Sinha vs. State of Bihar, 1998 (5) SCC 699**, the Hon'ble Supreme Court held as under:-

"9. In a case of circumstantial evidence, the prosecution is bound to establish the circumstances from which the conclusion is drawn must be fully proved; the circumstances should be conclusive in nature; all the circumstances so established should be consistent only with the hypothesis of guilt and inconsistent with innocence; and lastly, the circumstances should to a great certainty exclude the possibility of guilt of any person other than the accused. The circumstances proved should lead to no other inference except that of the guilt of the accused, so that the accused can be convicted of the offences charged. Before the court records conviction on the basis of circumstantial evidence, it must satisfy itself that the circumstances from which inference of guilt could be drawn have been established by unimpeachable evidence and the circumstances unerringly point to the guilt of the accused and further, all the circumstances taken together are incapable of any explanation on any reasonable hypothesis save the guilt of the accused."

18. In **Bodh Raj @ Bodha & others vs. State of J&K 2002**

(8) SCC 45, the Hon'ble Supreme Court has observed under:

"31. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased, A-1 and A-2 were seen together by witnesses i.e. PWs 14, 15 and 18; in addition to the evidence of PWs 1 and 2."

19. Elaborating on the principle of last seen together, the Hon'ble Supreme Court in **State of Rajasthan vs. Kanshi Ram,**

2006 (12) SCC 254, held as under:

"23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probably and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a

case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself proves an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his, innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in **Naina Mohd., AIR 1960 Ncd 2018 : 1960 Cri LJ 620.**"

20. The legal position pertaining to appreciation of circumstantial evidence of last seen has been succinctly summarized by a Division Bench of the Hon'ble Delhi High Court in case titled **Arvind @ Choftu vs. State ILR (2009) Supp. (Delhi) 704** in the following words:

- (i) Last seen is a specie of circumstantial evidence and the principles of law applicable to circumstantial evidence are fully applicable while deciding the guilt or otherwise of an accused where the last seen theory has to be applied.
- (ii) It is not necessary that in each and every case corroboration by further evidence is required.
- (iii) The single circumstance of last seen, if of a kind, where a rational mind is persuaded to reach an irresistible conclusion that either the accused should explain, how and in what circumstances the deceased suffered death, it would be permissible to sustain a conviction on the solitary circumstance of last seen.
- (iv) Proximity of time between the deceased being last seen in the company of the accused and the death of the

deceased is important and if the time gap is so small that the possibility of a third person being the offender is reasonably ruled out, on the solitary circumstance of last seen, a conviction can be sustained.

(v) Proximity of place i.e. the place where the deceased and the accused were seen alive with the place where the dead body of the deceased was found is an important circumstance and even where the proximity of time of the deceased being last seen with the accused and the dead body being found is broken, depending upon the attendant circumstances, it would be permissible to sustain a conviction on said evidence.

(vi) Circumstances relating to the time and the place have to be kept in mind and play a very important role in evaluation of the weightage to be given to the circumstance of proximity of time and proximity of place while applying the last seen theory.

(vii) The relationship of the accused and the deceased, the place where they were seen together and the time when they were last seen together are also important circumstances to be kept in mind while applying the last seen theory. For example, the relationship is that of husband and wife and the place of the crime is the matrimonial house and the time the husband and wife were last seen was the early hours of the night would require said three factors to be kept in mind while applying the last seen theory.

21. The circumstances of last seen together cannot by itself form the basis of holding accused guilty of the offence. In **kanhaiya Lal vs. State of Rajasthan (2014) 4 SCC 715**, the Hon'ble Supreme Court held as under:

"12.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. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant.

15. The theory of last seen-the appellant having gone with the deceased in the manner noticed hereinbefore, is the singular piece of circumstantial evidence available against him. The conviction of the appellant cannot be maintained merely on suspicion, however strong it may be, or on his conduct. These facts assume further importance on account of absence of proof of motive particularly when it is proved that there was cordial relationship between the accused and the deceased for a long time. The fact situation bears great similarity to that in **Madho Singh v. State of Rajasthan (2010) 15 SCC 588.**"

22. The legal position on the subject has been elucidated in a recent judgment of the Hon'ble Supreme Court in **Pawan Kumar @ Monu Mittal vs. State of Uttar Pradesh and Ant, 2015 (7) SCC 148**, wherein it was observed as under:-

"36. In case where the direct evidence is scarce, the burden of proving the case of the prosecution is bestowed upon motive and circumstantial evidence. It is the chain of events that acquires prime importance in such cases. Before analyzing the factual aspects it may be stated that for a crime to be proved it is not necessary that the crime must be seen to have been committed and must, in all circumstances be proved by direct ocular evidence by examining before the court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The principal fact or factum probandum may be proved indirectly by means of certain inferences drawn from factum probans, that is, the evidentiary facts. To put it differently, circumstantial evidence is not direct to the point in issue but consist of evidence of various other facts which are so closely associated with the fact in issue

that taken together they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed (see **Bodhraj v. State of J&K**). In the case on hand, the evidence adduced by the prosecution as discussed above, clearly proves the chain of events connecting the accused to the guilt of the commission of the offence. The entire evidence brought on record by the prosecution, is not only convincing, but is also trustworthy. Even if the confession of Accused 4 and 7 made before PW 1 and PW 2, which is barred by Section 25 of the Evidence Act, is not taken into account, the other evidence on record adduced by the prosecution, is sufficient to hold the accused guilty of the offence.

37. This court has been consistently taking the view that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. In the present, on scrutiny of evidence on record, we are convinced that the prosecution had established beyond reasonable doubt the complete chain of events which points at the guilt of the accused."

23. Thus, it can be taken well settled that in the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction.

24. Having set out the legal position, we now proceed to determine as to whether the prosecution has been able to prove his case beyond reasonable doubt.

25. Indubitably, there is no direct evidence to connect the accused with the crime alleged to have been committed. The entire prosecution case rests on circumstantial evidence. It is well settled that when dealing with the question of guilt of person charged with a crime, there must be a clear and unequivocally proof of the "*corpus delicti*" and the hypothesis of delinquency should be consistent with all the fact proved.

26. It is vehemently argued by Mr. J.S. Guleria, learned Asstt. Advocate General that the impugned judgment rendered by the learned Additional Sessions Judge suffers vice of perversity, inasmuch as, the statements of witnesses, more particularly, PW2, PW10, PW20 and PW22 have not been appreciated in a right perspective and would it have been so then there was no question of the accused being acquitted.

27. Whereas, Shri Hoshier Kaushal, learned counsel for the accused would vehemently argue that as the prosecution has failed to prove its case beyond all reasonable doubt, the findings recorded by the learned Court below call for no interference.

We have heard the learned counsel for the parties and have gone through the records of the case. We have also minutely examined the testimonies of the witnesses and other documentary evidence placed on record.

28. According to Mr. J.S. Guleria, learned Asst. Advocate General, two circumstances prove the guilt of the accused beyond reasonable doubt:-

- i) The accused was last seen in the company of the deceased.
- ii) That the deceased had withdrawn Rs.8000/- on 25.3.2010 to which the accused was well aware and committed the murder and thereafter purchased two cell phones on 26.3.2010.

Circumstance No. 1

29. In order to prove that the accused was last seen in the company of deceased, strong reliance is placed upon the testimonies of PW2 Asha Mahajan and PW3 Anil Kumar. As regards PW2 Asha Mahajan, she in her examination in chief has stated that she was running a Karyana and stationery shop at Bhafer. On 25.3.2010 at about 9:15 -9:30 p.m. deceased Raj Kumar came to her STD shop and asked her to allow him to make call to Rohru but she refused as he was drunk. The accused then purchased a packet of Sudershan (Tobacco) from her and thereafter both the accused and the deceased proceeded on foot towards the upper side of the road which leads to Lethwin. In her cross-examination, she clarified that the

accused was also known as Jonny and was known to her for last 3-4 years but she was not in a position to state whether five roads lead to the village of the accused from her shop. She admitted that from 100 meters ahead of her shop a road leads to village Gahar. She further stated that she was not in a knowledge whether there was a short cut about 200 meters ahead of shop which lead to the house of the accused. She admitted that it was night, therefore, dark and she is not in a position to state about the colour of the clothes that Raj Kumar was wearing on that date but clarified that he was covered with chadder. According to her the distance to Lethwin from her shop is half kilometer. She lastly stated that the deceased and the accused were not talking with each other.

30. Coming to the testimony of PW3 Anil Kumar, he deposed that he is working as a Class-IV employee at Ayurvedic Dispensary, Ghumarwin and had gone to Shimla on 24.3.2010 as he had been called by his sister. On 25.3.2010, he alongwith his sister and her son came back from Shimla in the Shimla-Chamba bus and alighted at Dadhol at 10:30 p.m. From Dadhol, they boarded another bus Rampur to Katra and alighted from the same at Lethwin. From Lethwin, they started on foot towards their home and at some distance from the Lethwin they saw two persons sitting on the side of the road, whom he could not

identify. At this stage, the witness was declared hostile by the prosecution. Therefore, in such circumstances, it could be purely co-incidence that both these persons had come together. It would not be so to Court to jump to conclusion that the deceased and the accused were last seen together, particularly when PW3 Anil Kumar has categorically stated that though he had seen two persons sitting on the side of the road at about 10:30 p.m. at a little distance from Lethwin bridge but he could not identify any one of them.

31. Notably, this witness was cross-examined at length by the Public Prosecutor but he refused to support the case of the prosecution. At the same time this witness was cross-examined by the learned defence counsel and he admitted that on 26.3.2010 he had come to know from the people that Raj Kumar had committed suicide.

32. Now adverting to the testimony of PW6 Desh Raj, this witness admitted that to go to village Mohana from the shop of Asha Mahajan there are 5-6 paths. He further admitted that from 200 meters ahead from her house one path leads towards the house of the accused. Even PW22 SI Prem Singh has admitted that pucca motorable road is also towards village Mohana to the house of the accused from the distance of about 100 meters from the house of PW2 Asha Mahajan. She further stated that

accused was accompanying the deceased Raj Kumar but she emphatically stated that deceased and the accused were not talking with each other.

33. That apart PW16 Daulat Ram, the salesman of the liquor vend from the where the liquor was alleged to have been purchased had categorically deposed that on 25.3.2010 Raj Kumar had visited the liquor vend at 4:30 – 5:00 p.m. and purchased one liquor bottle 'Lalpari' and thereafter left the place. This witness nowhere stated that at that time the accused was accompanying him.

34. In addition to the aforesaid, it would be noticed that as per the statements PW PW1 Sanju, Vinod Kumar r/o village Bhater had disclosed to him that on 25.3.2010 accused was seen with Raj Kumar but the said Vinod Kumar had not at all been associated during the investigation nor his statement under Section 161 Cr.P.C. had been recorded. Not only this PW1 had further deposed that even Tinku had disclosed this factum to him but this person too had not been associated in the investigation nor his statement recorded under Section 161 Cr.P.C.

35. Adverting to the testimony of Desh Raj, who appeared as PW6, it would be noticed that in his entire statement he has no where stated that he disclosed to Sanju that on the date of occurrence he had seen the deceased and

accused together. Rather, this witness was declared hostile by the prosecution as he had not supported the case so set up by the prosecution.

36. Adverting to the testimony of PW22 S.I. Prem Singh, it would be noticed that he in his deposition has stated that accused had made a disclosure statement under Section 27 of the Evidence Act Ext. PW20/B, leading to the recovery of his pant and shirt which were worn by him on 25.3.2010 and had further led to the recovery of Rs.1410/-, which was concealed in the quilt. This disclosure statement was allegedly made in presence of witnesses Desh Raj and Neeraj. The clothes and currency notes were taken into possession vide seizure memo Ex.PW17/A and signed by the aforesaid Neeraj and Desh Raj. However, when Neeraj appeared as PW 7 and deposed that accused did not make any statement in his presence and was accordingly declared hostile by the prosecution. During cross-examination by Public Prosecutor, he maintained that the accused did not give any statement in his presence and denied having made statement portions A to A, B to B, C to C and D to D of his statement Mark-G later on exhibited as Ext. PW-20/H. However, he did admit that the accused had taken the police and witnesses to village Mohana and got recovered one pant and shirt from his bedroom which was already washed, but he

denied the recovery of currency notes amounting to Rs.1410/- and stated that he had only seen 500 rupees note only. On being cross-examined by the defence counsel PW-7 maintained that he had not gone inside the room when the currency note was recovered and stayed outside. He further stated that the pant and shirt were brought from inside the room but he could not say from which part of the room the pant and shirt were taken out.

37. Adverting once again to the testimony of PW6 Desh Raj, who was supposed to be another witness of disclosure statement, he in his statement maintained to have accompanied Neeraj to the house of the accused. According to him, the police had reached the house of the accused and prepared the parcel which according to SHO contained the currency notes recovered from the house of the accused and was asked to put his signatures on the memo and papers. Even this witness was declared hostile by the prosecution as he has also not supported its case. He was though cross-examined by the prosecution but nothing material could be elicited there from.

Circumstance No. 2

38. The only other circumstance, which is strongly relied upon by the prosecution is that the deceased has withdrawn

Rs.8000/- on 25.3.2010 from his account in UCO Bank which fact the deceased has disclosed to the accused and both of them purchased one bottle of country liquor, consumed it and thereafter accused and deceased reached Lethwin Bridge where the accused attacked Raj Kumar (deceased), who became unconscious, as assuming him to be dead the deceased was hanged by the accused on the Eucalyptus tree and also removed Rs.7000/- from his pocket.

39. The learned Asstt. Advocate General, would vehemently argue that there is ample amount of evidence to establish that after removing of Rs.7000/- from the pocket of deceased, the accused on the very next day purchased two cell phones for Rs.2000/- each and this fact stands established by PW10 Pradeep Kumar and PW20 Sanjeev Kumar.

40. The aforesaid allegations are sought to be substantiated on the basis of testimonies of PW6 Desh Raj and PW7 Neeraj Kumar, the witnesses of the disclosure statement allegedly given by the accused on 3.4.2010 with respect to the blood stained clothes which he was wearing at the time of occurrence and its recovery. Reliance is also placed on the statement of PW10 Pradeep Kumar and PW20 Sanjeev Kumar from whom the accused purchased two cell phones on 26.3.2010.

41. PW9 Parkash Chand, Manager, UCO Bank Dadhol has proved the statement of account Ex.PW9/A, which proves that a sum of Rs.8000/- have been withdrawn from the account by the deceased on 25.3.2010. However, there is no further proof that this amount was personally withdrawn by deceased and this fact stands admitted even by PW22 SI Prem Singh.

42. Much reliance is placed on the testimony of PW22 S.I. Prem Singh, who deposed that on 6.4.2010, the accused had made another disclosure statement under Section 27 of the Evidence Act Ex.PW-5/A that he had purchased two cell phones with the money which he had taken out from the pocket of Raj Kumar (deceased), which portion of the statement was rightly discarded by the learned Court below as not admissible under the Evidence Act. But, that apart, it would be noticed that this fact has not even recorded in the Statement of Ex.PW-5/A. One cell phone was disclosed to have been purchased for Rs.2000/- from Krish Communication and other for Rs.2000/- from Manoj Electronics, Berthin. The accused has further disclosed that he had concealed the cell phones in almira of his room beside the deck and would get the same recovered. This statement is alleged to have been given by the accused in presence of PWs Narinder Singh and Ravinder Singh witnesses. Thereafter, the accused led the police party and the witnesses to his bedroom

and got recovered both the cell phones and thereafter sealed the same into cloth parcel and taken into possession vide memo Ex.PW5/B.

43. PW5 Narender Singh, in his statement has fully supported the version of the investigation to this effect. According to him, the house of the accused is situated in the centre of the village whereas this fact was specifically denied by PW2, who had stated that it is towards the side.

44. The accused is alleged to have purchased two cell phones from PW10 and PW20. To prove that accused has purchased cell phones from them for Rs.2000/- each. However, their testimonies have been discarded by the learned Court below as the same according to it does not inspire confidence or faith to place any reliance on either of them.

45. Adverting to the testimony of PW10, he had deposed that he was running Krish Communication shop at Bus Stand, Ghumarwin and at on 26.3.2016 sold one cell phone of Lemon Duo for Rs.2000/- to Sunil Kumar r/o village Bharari, aged between 20 to 26 years and had issued receipt Ex.PW10/A. The bill book and bill Ex. PW10/A was presented by him to the police on 6.4.2010 and taken into possession vide seizure memo Ex.PW10/B. However, since, he did not identify the person to

whom he had sold his cell phone, he was declared hostile by the prosecution and did not thereafter support their case.

46. PW20 Sanjeev Kumar admitted that he had sold one cell phone of Sigma Tel Company to the accused on 26.3.2010 who was present in the Court. During cross-examination he admitted that the accused was not personally known to him. He also did not know his name prior to 26.3.2010 and was not even aware where the accused was residing, however, importantly, this witness clearly admitted that the name of the accused was disclosed to him by the police.

47. Having discussed in detail the statements of witnesses alongwith exhibited documents, it would be apparent that the evidence so led by the prosecution does not prove the guilt of the accused beyond doubt. It has come on record that deceased was having strain relations with his wife and had been consuming excess liquor during the period in question. Moreover, even if the prosecution story assumed to be true for a moment even then the same is totally improbable as it would be impossible for a person to firstly murder the deceased and thereafter carry his body single handedly on a tree and thereafter put a cloth (parna) around his neck so as to give it a colour of suicide.

48. More importantly, PW22 SI Prem Singh had himself moved an application Ex.PW18/A to the Medical Officer for conducting the post-mortem and in this application after narrating the spot position in detail alongwith articles lying near the dead body, the investigator concluded that the spot position revealed that the deceased under influence of liquor had committed suicide and earlier also the deceased always remained drunk.

49. The fact that the deceased being a drunkard has been proved even by PW1 Sanju who in his statement maintained that elder brother of Raj Kumar was mentally retarded. He further admitted that Raj Kumar was not having cordial relations with his wife and always remained disturbed. He also admitted that on the next day it had been published in the newspaper that it was a case of suicide.

50. PW18 Dr. Sunil Verma, conducted the post-mortem of the deceased and proved on record the report issued by him Ex.PW17/A and thereafter gave his final opinion Ex.19/F, which is as under:-

1. After going through the FSL report No. 646A SFSL Chem. (211) 10 dated 18.5.2010, attached with post mortem report. Quantity of ethyl alcohol in blood of said deceased was 43.92 mg%.

No other poison could be detected in liver, kidney, stomach and blood of the deceased.

2. After performing the post-mortem of said deceased I am of the opinion that the deceased died as a result of pressure on neck leading to cardiac arrest due to vasovagal inhibition mediated through parasympathetic system.
3. The injuries over body of deceased are Ante mortem in nature including ligature mark.
4. Deceased had consumed alcohol before death.
5. Stomach was empty.

51. While being cross-examined PW18 had clearly admitted to be correct that the pressure on neck leading to cardiac arrest due to vasovagal inhibition mediated through parasympathetic system could be due to self hanging. If that be so, then already observed earlier, the entire case of prosecution becomes difficult to believe, as admittedly prior to the cardiac arrest suffered by the deceased as a result of pressure on neck, he was very much alive and therefore, it would be impossible in such circumstances to believe that it was the accused who hanged him from the tree when he was very much alive.

52. It was no more *res integra* that suspicion cannot take the legal proof for some time, unconsciously it may happen to be a short step between merely certainty and legal proof. At times, it can be a case of "may be true" and "must be true", but

there is a long mental distance between “may be true” and “must be true” and same devoid conjectures from sure conclusion (See: **Jahar Lal vs. State of Orissa (1991) 3 SCC 27**).

53. Judged in the light of the exposition of law as laid down by Hon’ble Supreme Court, the various judgments referred to hereinabove, we are of the considered view that the prosecution has miserably failed to establish the charge against the accused and on the basis of the evidence so led in the Court, it is impossible to convict him. The circumstances relied upon by the prosecution, are merely conjectural and are capable of being explained on hypothesis other than the guilt of the accused. The evidence as discussed above does not substantiate the charge and suffers very serious infirmity and lack of credibility.

54. It is more than settled that interference with the judgment of acquittal by the trial Court is unwarranted except when it suffers from vice of perversity (See: **Brahm Swarup & Anr. vs. State of U.P., (2011) 6 SCC 288**).

55. We have no hesitation to conclude that the entire prosecution story is based only on suspicion, which in no event can take place of truth. The judgment rendered by the learned courts below neither suffers from illegality or infirmity much less perversity calling for interference by this Court.

56. In view of the detailed aforesaid discussion, we find no merit in this appeal and the same is accordingly dismissed.

(Tarlok Singh Chauhan)
Judge.

(Chander Bhusan Barowalia)
Judge.

June 15, 2017
Sanjeev

High Court of HP