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A.F.R.

**1. Case :- CRIMINAL APPEAL No. - 210 of 1997**

**Appellant :- Suresh alias Chaveney**

**Respondent :- State Of U.P.**

**Counsel for Appellant :- S.O.P. Agarwal, Anurag Khanna , Dharendra Kumar Srivastava , Rajiv Sisodia, Vivek Saran**

**Counsel for Respondent :- D.G.A.**

**WITH**

**2. Case :- CRIMINAL APPEAL No. - 478 of 1997**

**Appellant :- Mukesh**

**Respondent :- State Of U.P.**

**Counsel for Appellant :- Anurag Khanna, Amit Rai , Kamesh Kumar Arya**

**Counsel for Respondent :- Govt. Advocate,**

**Hon'ble Mrs. Sunita Agarwal, J**

**Hon'ble Shamim Ahmed, J**

1. The above-captioned appeals have been preferred under Section 374(2) of the Code of Criminal Procedure against the judgment and order dated 28.01.1997 passed by the Fifth Additional District & Sessions Judge, Bijnore in Session Trial No. 11 of 1995, arising out of Case Crime No. 800 of 1994, under Sections 302/201 I.P.C., Police Station Kotwali Shahar, District Bijnor, whereby the Additional District & Sessions Judge, Bijnor has convicted and sentenced the appellants to undergo life imprisonment under Section 302 read with section 34 IPC and to undergo five years rigorous imprisonment under Section 201 IPC.

#### **INTRODUCTORY FACTS**

2. In brief, the prosecution case is that one Roshal Lal (P.W.1) the informant, the brother of the deceased, submitted a written report dated 13.10.1994 (Ext. Ka-1) to In-charge Kotwali Shahar, Bijnor stating therein that his elder brother Surendra Singh had given testimony against Sumer (elder brother of appellant Suresh alias Chaveney) in a murder case in which Sumer was convicted. Since then the family members of Sumer were having grudges with him. For the last few days, accused/appellant Suresh alias Chaveney used to take away his elder brother Rajendra (deceased) for buying lottery

tickets and was developing friendship with him. On 12.10.1994 at about 6.30 PM, his elder brother Rajendra (deceased) was standing with Raju (P.W.2) at the Ramlila ground then accused/appellant Mukesh came while pulling rickshaw on which accused/appellant Suresh alias Chaveney was sitting. Both the appellants took away his brother Rajendra in the presence of Raju (P.W.2) saying that they will enjoy the party of meat and wine at the hotel of Virendra situate at Chamarpeda as they had won the lottery. It was around 6.30 p.m., Prem Chand son of Ramswaroop and Tilak Raj (P.W.6) had witnessed the accused/appellants with Rajendra (deceased) at the hotel of Virendra.

Following day, i.e on 13.10.1994 in the early morning at about 4.00 AM, Yadram (P.W.5) went to the house of accused/ appellant Suresh alias Chaveney to book a car and there he saw that the accused/appellants were keeping a corpse in a sack whose legs were protruding outside. Both the appellants took out the said sack from the house and kept it on a rickshaw. Yadram (P.W.5) asked them as to what was in the sack, on which appellant Suresh alias Chaveney replied him that he took the revenge of enmity. They warned him (P.W.5) not to tell about it to any one, otherwise consequences would be bad to him.

On 13.10.1994 itself, when Roshan Lal (P.W.1) and his family members were searching for Rajendra then aforesaid persons disclosed the above facts and while searching for Rajendra the first informant reached near Singhal Dharmkanta where some women, men and children were standing. He had identified the dead body of his brother which was lying behind the Singhal Dharmakanta.

**3.** On the basis of the written report (Ext. Ka-1), First Information Report (Ext. Ka-4) was registered against the appellants as Case Crime No. 800 of 1994, under Sections 302/34 and 201 IPC at the Police Station-Kotwali Shahar, Bijnor on 13.10.94 at 9.05 AM. Check report (Ext.Ka-4) was prepared by Head Constable Ram Krapal (P.W.-8) and it has been disclosed in 'Nakal Rapat' and accordingly "Roznamcha" was prepared.

**4.** After registration of the first information report, the postmortem of deceased- Rajendra was conducted by Dr. R. K. Maheshwari (P.W.-3) on

12/13.10.1994 at 11:00 PM. The corpse of the deceased was brought by C.P. 573, Harswaroop Singh (P.W.-4), and C.P. 1109 Ramveer, to the Mortuary. In the postmortem report (Ext. Ka-2), 14 ante-mortem injuries were reported as under :-

*1. 5 lacerated wounds in an area of 9 cmx 8cm on the left side and right side of forehead and eyebrow, nose and right side of faces measuring 3.5 cmx1cm scalp, 5.5cmx1cm scalp deep, 6cmx1cm bone deep, 2cmx1cmxbone deep, 2.5cmx0.5 cmx bone deep.*

*2. Lacerated wound 2cmx1cmxscalp deep on right side of head, 6cm on above left ear.*

*3. Abrasion 3cmx0.5cm on the right ear pinna.*

*4. Abraded contusion 4cmx2cm on right side face, 5.5cm on face of mouth from right side.*

*5. Lacerated wound 4cmx1cmx scalp deep on the left side forehead just above left eyebrow.*

*6. Abraded contusion 3cmx2cm on left side face and 4cm in front of ear.*

*7. Lacerated wound 3.5cmx1.5cm x scalp deep on left ear pinna.*

*8. Multiple abraded contusion over an area of 10cmx2.5cm on left side neck and chin 6cm below left ear.*

*9. Lacerated wound 3cmx1cmx scalp deep on the right side top of head 13cm in front of right ear.*

*10. Abrasion 9cmx1cm on back of left fore arm 5cm above wrist.*

*11. Abrasion 2cm.x0.5 cm on radial aspect of right forearm below elbow joint.*

*12. three lacerated over an area of 8cmx5cm on back of head 2.5cmx1cmxscalp deep, 2cmx0.5cmx scalp deep and 2.5cmx1cmx scalp deep.*

*13. Contusion with traumatic swelling over in area of 7cmx5cm on right side face in front of 1 cm right ear.*

*14. Blood was oozing from left ear.*

**5.** The investigation of the case was initially conducted by the Investigation Officer, A.R. Mishra, Sub Inspector (P.W.9), who prepared inquest of the corpse of the deceased (Ext. Ka-6) and related papers, i.e., chalan lash (Ext. Ka-7), report of R.I. (Ext. Ka-8), photo lash (Ext. Ka-9), report of C.M.O. (Ext. Ka-10). The corpse of the deceased was sent by the Constable Harswaroop Singh (P.W.4) and Constable Ramvir Singh after

sealing it for postmortem. The Investigating Officer prepared recovery memo of blood stained earth and plain earth (Ext. Ka-11), blood stained Bori Taat (printed in hindi and english 'Maida Hari Bogh') and blood stained wooden broken danda (1 ft. 5 inch in length) (Ext. Ka-12), blood stained Chadar and blood stained broken piece of danda (Ext. Ka-14) and blood stained earth and blood stained piece of concrete (Ext. Ka-15). The Investigating Officer has also prepared the site plan of the place of occurrence (Exts. Ka-13 and 16) and sent the recovered articles to the Forensic Science Laboratory, Agra, through Chief Judicial Magistrate, Bijnor. He further deposited the recovered articles at the police station. The report of the Forensic Science Laboratory (Ext. Ka-17) is on record. The Investigating Officer recorded the statements of the witnesses and arrested the accused appellant Mukesh from outside his house, who confessed his guilt.

6. Following day, i.e., on 14.10.1994, the investigation of the case was entrusted to Rajvir Singh (P.W.-7) who recorded the statements of the witnesses Premchand, Tilak Raj (P.W.6) and Yadram (P.W.5) and also recorded the statements of accused/appellant Suresh alias Chaveney in the District Jail, Bijnor. After completion of the investigation, charge-sheet (Ext. Ka-3) was submitted against the accused appellants for the offence under Sections 302/34 and 201 IPC.

7. After receipt of the charge-sheet (Ext. Ka-3) cognizance of the offence was taken by the Chief Judicial Magistrate, Bijnor on 23.12.1994 and the case was committed to the Court of Sessions for trial. The trial court framed charges against the accused appellants for the offences under Sections 302/34 and 201 IPC on 25.02.1995, to which they denied and claimed to be tried.

#### **PROSECUTION EVIDENCE**

8. To bring home the guilt of the accused appellants, the prosecution examined as many as nine witnesses, viz.- informant Roshan Lal (P.W.-1) (brother of deceased Rajendra), who supported the prosecution version; Raju (P.W.-2) was declared hostile; Dr. R. K. Maheshwari (P.W.-3) proved the post-mortem report (Ext. Ka-2); Constable Harswaroop Singh (P.W.-4) brought

the corpse of the deceased to the Mortuary for postmortem; Yadram (P.W.-5) a witness of fact who supported the prosecution case; Tilak Raj (P.W.-6) was declared hostile; S.H.O. Rajveer Singh (P.W.-7) proved the charge-sheet (Ext. Ka-3); Head Constable Ram Krapal Singh (P.W.-8) proved the check report (Ext. Ka-4) and G.D. (Ext.Ka-5); Sub-Inspector A. R. Mishra (P.W.-9) proved the inquest(Ext. Ka-6).

9. After completion of the prosecution evidence, the statements of the accused appellants were recorded under Section 313 Cr.P.C. They were confronted with the incriminating evidence adduced against them during the course of trial, which they denied and pleaded innocence and stated that they were falsely implicated.

#### **TRIAL COURT FINDINGS**

10. The trial court after examining the evidence available on record believed the evidence of the prosecution witnesses as trustworthy and reliable, hence, by means of the impugned judgment and order convicted and sentenced the accused appellants for the offence as stated hereinabove.

11. Hence, these appeals at the behest of the convicted appellants.

12. Since the above-captioned appeals arise out of the common factual matrix and the judgment, both the appeals are being decided of by a common judgment.

13. Heard Shri Jai Raj Singh Tomar, learned *Amicus Curiae* on behalf of appellant-Suresh alias Chaveney in Criminal Appeal No. 210 of 1997 and Shri Vinod Kumar Tripathi, learned Advocate for the appellant-Mukesh in Criminal Appeal No. 478 of 1997 and Shri Patanjali Mishra, learned Advocate appearing on behalf of State-respondents in both the appeals and scanned the entire record and considered the arguments advanced.

#### **SUBMISSIONS ON BEHALF OF APPELLANTS**

14. Learned counsel for the appellants has submitted that the accused/ appellants have been convicted and sentenced under Sections 302/34 and 201 IPC without there being any concrete evidence against them. The judgment of the trial court is based on surmises and conjectures. It was a case of

circumstantial evidence and without there being a complete chain of circumstances, the appellants have been convicted.

15. To substantiate the aforesaid submission, it has been argued by the learned counsel for the appellants that informant Roshan Lal (P.W.1) had lodged the first information report against the accused appellants on a false story as disclosed by Raju(P.W.2), Premchand (not examined) and Yadram (P.W.5). Informant Roshan Lal(P.W.1) is not witness of any circumstance related to the alleged incident. There are discrepancies in the testimonies of the witnesses.

16. Learned counsel for the appellants further submitted that the deceased had sustained 14 injuries on his person caused by danda but there is no injury on the vital part of the body. In the post mortem report, as per the doctor (P.W.3) the death would have been occurred in between 9-10 PM till 4.00 AM in the morning of 12.10.1994, whereas in the cross-examination P.W.3 had stated that there was a possibility of death at 4.00 PM in the evening on 12.10.1994, therefore, there is a vast variation in the estimated time of death which creates a serious doubt about the time of the alleged incident testimony of prosecution witnesses.

17. Learned Counsel for the appellants further argued that there was no independent witness of the alleged recovery allegedly made at the instance of the accused appellants, the recovery was planted in order to frame the accused appellants by false and fabricated means. It is further submitted that the case rests on circumstantial evidence but none of the circumstances from which inference of guilt against the accused appellants could be drawn had been proved by cogent evidence.

18. Learned Counsel for the appellants has also argued that the motive to commit murder of deceased Rajendra was not proved by the prosecution but even then the trial court had convicted the accused appellants by misappreciation of evidence adduced by the prosecution.

#### **SUBMISSION ON BEHALF OF THE STATE-RESPONDENTS**

19. Learned counsel appearing for State-respondent, on the other hand, submitted that though the case rests on circumstantial evidence, but the

chain of circumstances established on the basis of cogent evidence available on record which clearly indicate involvement of the accused appellants in the commission of the crime in question.

**20.** It is pointed out that the accused appellants committed murder of Rajendra(deceased) and threw his body. The dead body of the deceased Rajendra and several articles were discovered at the pointing out of the accused appellants. All these circumstances established the guilt of the accused appellants in committing the murder of the deceased.

### ANALYSIS

**21.** We have heard learned counsel for the parties and gone through the material brought on record, it is manifestly clear that the trial Court has convicted the accused appellants merely on the basis of testimonies of the informant P.W.1-Roshan Lal and P.W.5-Yadram as well as recoveries made on the pointing out of accused/appellant Mahesh from the house of accused appellant Suresh alias Chaveney. It may be noted that P.W.2-Raju and P.W.6-Tilak Raj had been **declared hostile**.

**22.** To examine the guilt of the accused appellants, we must appreciate the evidence adduced by the prosecution. The present case being a case of circumstantial evidence, it is a well settled law that where there is no direct evidence against the accused and the prosecution rests its case 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. In other words, there must be a chain of evidence so 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. All the links in the chain of circumstances must be complete and should be proved by cogent evidence.

**23.** In the case of **Padala Veera Reddy v. State of A.P. : AIR 1990 SC 79**, wherein the Hon'ble Supreme Court laid down the guiding principle with regard to **appreciation of circumstantial evidence:-**

“(1) the circumstances from which an inference of guilt is

sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.”

**24.** In the case of **State of U.P. v. Ashok Kumar Srivastava : [1992] 1 SCR 37**, the Apex Court pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

**25.** In the case of **Sanatan Naskar and Anr. v. State of West Bengal** reported in **(2010) 8 SCC 249**, the Hon'ble Supreme Court propounded as under:-

"**13.** There cannot be any dispute to the fact that it is a case of circumstantial evidence as there was no eye witness to the occurrence. It is a settled principle of law that an accused can be punished if he is found guilty even in cases of circumstantial evidence provided, the prosecution is able to prove beyond reasonable doubt complete chain of events and circumstances which definitely points towards the involvement and guilt of the suspect or accused, as the case may be. The accused will not be entitled to acquittal merely because there is no eye witness in the case. It is also equally true that an accused can be convicted on the basis of circumstantial evidence subject to satisfaction of accepted principles in that regard. "

26. In regard to **appreciation of circumstantial evidence**, the Hon'ble Supreme Court in the case of **Sharad Birdhichand Sarda Vs. State of Maharashtra : 1984 Cri. L.J. 178** was pleased to observe in paras-150 to 158, which are quoted below:-

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

151. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The fundamental and basic decision of the Apex Court is **Hanumant v. The State of Madhya Pradesh**.(1) This case has been uniformly followed and applied by this Court in a large number of later decisions upto date, for instance, the cases of **Tufail (Alias) Simmi v. State of Uttar Pradesh**(2) and **Ramgopal v. State of Maharashtra**(3). It may be useful to extract what Mahajan, J. has laid down in **Hanumant's** case (*supra*):

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

**152.** A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in **Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra** where the following observations were made:

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say. they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

**153.** These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.

**154.** It may be interesting to note that as regards the mode of proof in a criminal case depending on circumstantial evidence, in the absence of a corpus delicti, the statement of law as to proof of the same was laid down by Gresson, J. (and concurred by 3 more Judges) in **The King v. Horry**,<sup>(1)</sup> thus:

"Before he can be convicted, the fact of death should be proved by such circumstances as

render the commission of the crime morally certain and leave no ground for reasonable doubt: the circumstantial evidence should be so cogent and compelling as to convince a jury that up on no rational hypothesis other than murder can the facts be accounted for."

**155.** Lord Goddard slightly modified the expression, morally certain by 'such circumstances as render the commission of the crime certain'.

**156.** This indicates the cardinal principle' of criminal jurisprudence that a case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction. Horry's case (supra) was approved by this Court in Anant Chintaman Lagu v. The State of Bombay(2) Lagu's case as also the principles enunciated by this Court in Hanumant's case (supra) have been uniformly and consistently followed in all later decisions of this Court without any single exception. To quote a few cases Tufail's case (supra), Ramgopals case (supra), Chandrakant Nyalchand Seth v. The State of Bombay (Criminal Appeal No. 120 of 1957 decided on 19.2.58), Dharmbir Singh v. The State of Punjab (Criminal Appeal No. 98 of 1958 decided on 4.11.1958). There are a number of other cases where although Hanumant's case has not been expressly noticed but the same principles have been expounded and reiterated, as in Naseem Ahmed v. Delhi Administration(1). Mohan Lal Pangasa v. State of U.P., (2) Shankarlal Gyarsilal Dixit v. State of Maharashtra(3) and M.C. Agarwal v. State of Maharashtra(4)-a five-Judge Bench decision.

**157.** It may be necessary here to notice a very forceful argument submitted by the Additional Solicitor-General relying on a decision of this Court in **Deonandan Mishra v. The State of Bihar**(5), to supplement this argument that if the defence case is false it would constitute an additional link so as to fortify the prosecution case. With due respect to the learned Additional Solicitor General we are unable to agree with the interpretation given by him of the aforesaid case, the relevant portion of which may be extracted thus:

"But in a case like this where the various links as started above have been satisfactorily made out and the circumstances point to the appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation-such absence of explanation of false explanation would itself be an additional link which completes the chain."

**158.** It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier, viz., before a false explanation can be used as additional link, the following essential conditions must be satisfied:

- (1) various links in the chain of evidence led by the prosecution have been satisfactorily proved.
- (2) the said circumstance point to the guilt of the accused with reasonable definiteness, and
- (3) the circumstance is in proximity to the time and situation.”

**27.** In regard to **motive**, in the case of **Sampath Kumar v. Inspector of Police Krishnagiri : 2010 Cri. L.J. 3889 (SC)**, the Apex Court was pleased to observe in para 15 which is quoted below :-

**"15.** .....One could even say that the presence of motive in the facts and circumstances of the case creates a strong suspicion against the appellant but suspicion, howsoever strong, also cannot be a substitute for proof of the guilt of the accused beyond a reasonable doubt."

**28.** In the case of **Bhagwan Jagannath Markad v. State Of Maharashtra : (2016) 10 SCC 537** the Hon'ble Apex Court summarized the principles for the appreciation of the credibility of witness where there are discrepancies or infirmaries in the statement:

**"19.** While appreciating the evidence of a witness, the Court has to assess whether read as a whole it is truthful. in doing so the court has to keep in mind the deficiencies, drawback and infirmaries to find out whether such discrepancies shake the truthfulness. ...Only when discrepancies are so incompatible as to effect the credibility of the version of witness , the Court may reject the evidence. ...The Cout has to sift the chaff from the grain and find out the truth. A statement may be partly rejected accepted."

**29.** In the present case, Roshan Lal (P.W.-1) has lodged the F.I.R. for the murder of his brother Rajendra. In cross-examination, the informant P.W.1 had deposed before the trial Court that when his brother Rajendra did not return home, he did not go to trace out his brother Rajendra (deceased) on 12.10.1994, rather on the following day, i.e., on 13.10.1994, he searched

for his brother Rajendra on the basis of the information given by witnesses Premchandra (not produced), Yadram (P.W.5) and Raju (P.W.2). He further stated that the accused/appellants after killing his brother Rajendra kept his dead body in a sack and threw it at the Dharam Kanta. P.W.1 also deposed that he came to know about all the facts as they were told by Premchandra (not examined), Yadram (P.W.5) and Raju (P.W.2) (declared hostile).

**30.** For the sake of convenience, the testimonies which have been relied upon by the trial court are being referred hereinafter, which would go to show that there are **material contradictions in their statements**, which cannot be thrown away lightly.

**31.** Roshan Lal (P.W.-1), in his testimony deposed that Surendra was his elder brother, who had given testimony against Sumer (elder brother of appellant Suresh alias Chaveney) in a murder case in which Sumer was convicted. Since then the family members of Sumer were having enmity with him. From the last few days, accused appellant Suresh alias Chaveney used to take away his elder brother Rajendra for buying lottery tickets and was developing friendship with him. He further stated that on 12.10.1994 his elder brother Rajendra was standing with Raju at the Ramlila ground then the accused appellant Suresh came and accused appellant Mukesh came pulling rickshaw. He further deposed that the appellants took away his elder brother Rajendra on a rickshaw. It was 4:00 p.m. and, thereafter, he stated that it was 7:00-7.30 p.m. He further stated that Yadram had gone to the house of Suresh for booking a car where Yadaram saw a corpse, which was kept in a sack on a rickshaw. The legs of the corpse were protruding out side the sack. They took away the corpse from the house of Suresh. Yadram asked appellant Suresh alias Chaveney about the corpse, and he told that it was the dead body of Rajendra and that he has taken revenge of his brother. Appellant Suresh alias Chaveney also warned Yadram that if he narrated anything to anyone, the consequences would be bad. This witness (P.W.1) further deposed that on the date of the recovery of the dead body he and his family members were searching Rajendra in the Mohalla. He saw that there was a lot of crowd at the Ramlila ground near the Dharmkanta on Ganj Road then Premchandra, Raju and Yadram told that the corpse of Rajendra was lying at

the Dharmkanta, where he reached and saw that the dead body of his elder brother was in a sack. Blood was oozing from his mouth and head. Thereafter, P.W.1 told the incident to his family members. He wrote the written report (Ext. Ka-1) in his hand writing and submitted in the Police Station on the basis of which the case was registered.

**32.** P.W.1, in cross examination, further stated that when his brother Rajendra did not return at night, he did not start his search. Following day, i.e., 12.10.1994 he made his searches. At the point of time of search, the witness told him about his brother Rajendra and the written report scribed giving narration as per the version of the witnesses. P.W.1 further stated that in the criminal case in which Surendra had given testimony against Sumer, 10-12 years back, deceased Rajendra was not a witness whereas, Vishnu and Chhote Lal were witnesses, they were living at Bijnor along with their family. In the case of murder, Sumer was convicted, wherein he was granted bail and the appeal was pending in the High Court. He further stated that Premchandra, Yadram and Raju had told him about the corpse of Rajendra. They also told him about this incident, then he went to see the corpse. He had narrated in the report that appellant Mukesh and others took away his brother Rajendra and after committing his murder kept his corpse in a sack and threw it on the land belonging to Nagarpalika. He had not mentioned about these things in the report and after some time he stated that he had mentioned the above in the report. He then stated that he did not tell the Inspector about this thing. He stated that he could not tell the reason about not mentioning the word 'Dharmkanta' in the report. He further deposed in the cross examination that he had written in the report that both the accused, after committing murder of his brother, threw his corpse at the Dharmkanta. The witness then stated that if that was not written in his statement he could not tell the reason.

**33.** Raju (P.W.-2), in his testimony, deposed that he knew the accused Mukesh and Suresh. They neither came on rickshaw before him nor they took away deceased Rajendra with them. The accused did not say anything to deceased Rajendra in his presence about party, meat or wine or going to the hotel of Virendra.

**34.** In the cross examination P.W.2 deposed that he did not know deceased Rajendra, he was not his friend. He did not know that deceased Rajendra was habitual of playing lottery. He came to know about the murder of Rajendra but did not go to the place where the body was lying. The investigating officer had not recorded his statement. When the statement of P.W.2 recorded under Section 161 Cr.P.C. was read out to him, he stated that he had not given any such statement to the Inspector, if as to how it was written was not known to him. This witness was, **declared hostile.**

**35.** Dr. Rajesh Kumar Maheshwari (P.W.-3), in his testimony, stated that on 13.10.1994, he was posted at T.B. Clinic Bijnor as the Medical Officer. He conducted postmortem of the deceased Rajendra at 11.00 P.M. through artificial light on the direction of the District Magistrate, Bijnor and Chief Medical Officer, Bijnor. The corpse was sent by the Sub-Inspector, P.S. Kotwali, Bijnor in a sealed cover alongwith 10 police papers. The corpse was brought by C.P.573 Harsh Swaroop Singh and C.P.1109 Ramveer of Police Station Kotwali, Bijnor. He found 16 antemortem injuries on the person of the deceased. He opined that the injuries on the body might have been caused by *Danda*. All the injuries inflicted upon the deceased were sufficient to cause death. He opined that the cause of death was due to shock and hemorrhage as a result of ante mortem injuries. He also opined that the death might have taken place in between 9:00-10:00 A.M. to 4.00 PM on 12.10.1994. However, in his cross-examination, this witness stated that the death might have occurred on 12.10.1994 in the evening of around 4.00 o'clock, therefore, there is a vast difference in time of death in his statement.

**36.** Constable Har Swaroop Singh (P.W.-4) in his testimony, stated that on 13.1.1994 he was posted at the Police Station Kotwali Shahar, District Bijnour on the post of Constable. The Sub-Inspector had carried out the *Panchayatnama* of the deceased Rajendra and, thereafter, the sealed cover dead body was handed over to him and one Constable Ramveer for carrying to the mortuary for postmortem examination. The doctor had conducted the post mortem of the deceased.

**37.** In the cross-examination, P.W.-4 stated that he reached the mortuary at 5.30 P.M. along with the dead body and delivered the papers to R.I. and,

thereafter, he had handed over the papers to the doctor. The doctor after conducting the postmortem examination of the dead body handed over the dead body to him at about 10.30 PM and, thereafter, he got the postmortem report received at the police station and registered his arrival at 11.00 o'clock, in the general diary.

**38.** Yadram (P.W.-5), in his testimony, stated that he knew the accused-appellant. The appellant, Suresh alias Chaveney was a Driver of a Maruti Car. He had gone to the house of the accused-appellant for taking the car on hire basis to visit Delhi, where he saw the accused-appellant Mukesh alias Chaveney coming out of his house holding a sack from where the legs of a corpse were protruding. This witness further stated that the accused-appellants were keeping the corpse in the rickshaw and seeing him they were amazed. On being asked as to what was happening the accused-appellants told him that they had taken the revenge of their enmity. The witness had further stated that the accused-appellants had dropped the corpse on an empty land behind the Dharamkanta at the Ramlila ground. He further stated that he saw that in the next morning the crowd was assembled at that point of recovery of the body. He had also seen the corpse which was of Rajender who was known to him from earlier. P.W.5 further stated that he had disclosed all this to the brother of Rajender, the informant, Roshan Lal. The accused-appellants had threatened him that, in case, he told anyone, he would be killed. He had also seen that *Bora* (sack) and one blood stained *Danda* was also found near the corpse.

**39.** In his cross-examination, P.W.5, stated that when the accused-appellants were carrying the corpse in sack, he identified the corpse by seeing its face as he knew deceased Rajendra from earlier and told that fact to Roshan Lal, the brother of the deceased, however he did not tell this fact to his family members and neighbours. This witness had further stated that he had told the Investigating Officer that he had identified the corpse while the accused-appellants were carrying the same and denied the fact that he did not tell the Investigating officer that he did not know that the corpse was of Rajendera, otherwise he would have told this fact to the family members of the deceased.

40. Constable Prem Chandra (P.W.-6), in his testimony, stated that he had not seen the accused-appellants sitting with the deceased-Rajendra at the hotel of Rajendra at 7.00-7.30 PM, as such this witness was **declared hostile**.

41. Raj Veer Singh, S.H.O. (P.W.-7) in his testimony, stated that on 14.10.1994, he was posted as Incharge/Inspector at Kotwali Shahar, Bijnor. The investigation was handed over to him from one A.R. Misra (previous I.O.). After taking over the investigation, he had recorded the statements of witnesses Prem Chandra, Tilak Raj and Yadram, and started searches for the accused-appellants on 25.2.1994. He also recorded the statement of Suresh alias Chavaney in the District Jail, Bijnor. After completion of the investigation, he submitted the charge sheet in the Court against the accused-appellants Mukesh and Suresh alias Chavaney.

42. Head Constable Ram Krapal (P.W.-8), in his testimony, stated that informant Roshal Lal had submitted the Tehrir (Ext.4) at the Police Station and he had scribed the Check F.I.R. No. 496. The Nakal Rapat No. 21, 9.05 dated 13.10.1994 was entered in the G.D. which was in his signature and that he prepared the G.D. (Ext. 5).

43. Sub Inspector A.R. Misra (P.W.-9) who is the first I.O., in his testimony, stated that on 13.10.1994, he was posted at Kotwali Shahar, Bijnor. The investigation of this case was entrusted to him. He, after recording the statement of scribe of the F.I.R. and G.D. alongwith jild including its papers, alongwith constables reached at the place of incident and prepared panchayatnama of deceased Rajendra. He sent the dead body for postmortem through constables Har Swaroop Singh and Ramveer Singh and recorded the statement of the informant. The Panchayatnama (Ext. Ka-6) was written and signed by him. Related papers Chalan lash (Ext. Ka-7), report R.I. (Ext. Ka-8), photo lash (Ext. Ka-9), report C.M.O (Ext. Ka-10) were written and signed by him. Recovery memo (Ext. 11) of blood stained plain earth collected from the place of incident was written and signed by him. Recovery memo (Ext. Ka-12) of blood stained bori taat and blood stained danda collected from the spot of recovery of the dead body was written and signed by him. He recorded the statements of witnesses of panchayatnama and

recovery memo. He inspected the place of the recovery of the body and prepared the site plan (Ext.Ka-13) which was written and signed by him. He further stated that he recorded the statement of Raju (P.W.2), made searches for accused-appellants and arrested Mukesh (accused appellant) and recorded his statement wherein he confessed his guilt and at his pointing out he visited the house of accused appellant Suresh alias Chaveney from where he collected a blood stained broken piece of Danda and a Chadar, and prepared recovery memo (Ext.14). He collected blood stained earth and blood stained piece of concrete from the house of Suresh and prepared recovery memo (Ext. Ka-15). He further stated that he collected blood stained earth, blood stained piece of concrete blood stained chadar, blood stained broken piece of *Danda* from the place of occurrence and prepared the site plan (Ext. 16), which was written and signed by him. Thereafter, he came to the police station and deposited the said articles in the Malkhana. After that, the investigation was conducted by the Incharge Ramveer Singh.

**44.** In his cross-examination, P.W.9, stated that except the case diary he had not prepared the memorandum of the statement of the accused. He further stated that he did not remember whether family members (Parents and others) of Suresh were residing in the house of Suresh or not. He further stated that description of danda was written in the recovery memo. Seeing the recovery memo, this witness stated that there was no mention of any kind of Hulia in it. He further stated that he had not obtained signature of the accused and he did not hand over carbon copy of the recovery memo to the accused. He further stated that on the recovery memo his name was not written because he himself scribed it.

**45.** It would be relevant to point out that Premchandra was not examined by the prosecution for the reasons best known to it. Raju (P.W.-2), in his deposition, stated that he was not standing at the Ramlila ground with Rajendra (deceased) on 12.10.1994 at 6.30 A.M. The appellants neither came on rickshaw nor took away Rajendra (deceased) with them. The accused appellants did not tell him that they were taking the deceased with them for drinking wine and having meat at the hotel of Virendra. He further stated that though he came to know about the murder of Rajendra, but did not go

to the place where the dead body of the deceased was recovered. The Investigating Officer did not record his statement under Section 161 Cr.P.C. Thus, P.W.2 was **declared hostile**. Tilak Raj (P.W.6) also denied that he saw the deceased Rajendra along with the accused appellants at the hotel of Virendra at 07:30 p.m., hence he was also **declared hostile**.

**46.** It is true that the F.I.R. of the incident was lodged as per the story told by P.W.2-Raju, P.W.6-Tilak Raj and Prem Chandra, but no one had seen the deceased going along with the accused appellants before the murder of the deceased or the body was found. As stated hereinabove, P.W.2-Raju and P.W.6-Tilak Raj were declared hostile and these witnesses had completely denied in their testimonies that they had seen the deceased along with the accused appellants before the murder of the deceased, hence the very basis of lodging the F.I.R. against the accused/ appellants appears to be doubtful and creates suspicion on the prosecution story.

**47.** So far as the recovery of blood stained 'broken piece of danda' and blood stained chadar (Ext. Ka. 14) made on the pointing out of accused appellant Mukesh from the house of accused appellant Suresh alias Chaveney, is concerned, it may be pointed out that the accused appellant Mukesh has though admitted that he was arrested while he was standing near his house but had denied the alleged recovery in the statement recorded under Section 313 Cr.P.C. and stated that the said recovery was not made from his house. The First Investigating Officer S.I. A.R. Mishra (P.W.9), in his cross-examination, admitted that there was no signature of the accused appellants on the recovery memo (Ext. Ka-14) of blood stained broken piece of danda and blood stained chadar nor a copy of it had been supplied to the accused/appellants. It is also relevant to note that a perusal of the recovery memo (Ext. Ka-14) would show that the Investigating Officer himself did not prepare the recovery memo but it was prepared on the dictation of S.H.O. Rajveer Singh, the second investigating officer (PW.7). From this fact, it can be easily inferred that the recovery memo was not prepared at the place of recovery in the presence of the witnesses rather it was prepared either at the police station or at some other place and the same was prepared at the instance of the Station House Officer Rajveer Singh (second investigating

officer), who was not the investigating officer on the date of recovery. Thus the recovery memo does not appear to be a genuine paper and creates strong suspicion on the prosecution story.

**48.** So far as the evidence of P.W.5-Yadram is concerned, he, in his cross-examination, though had deposed that he had identified the dead body of the deceased when the accused appellants were taking it in a sack but he had not stated so to the Inspector. It is clear that he did not recognize that the dead body was of Rajendra, otherwise, he would have informed the family members of the deceased. This testimony of P.W.5 casts a serious doubt itself as normally on seeing the dead body particularly when it had been identified, naturally, the person definitely would go tell the same to either the family members or to anyone known, but this aspect of the matter had not been considered by the trial court. It may further be pointed out that the trial court had committed a manifest error in not considering the fact that there were apparent contradictions in the testimony of P.W.5-Yadram as he, at one place, in his testimony, stated that he had identified the deceased on seeing its face and, at another place, he stated that he had identified the deceased by seeing its legs when the dead body was being carried in a sack by the appellant, but later on he denied the identification of the deceased.

**49.** The instant case purely rests on circumstantial evidence. In order to sustain conviction, a complete chain of circumstantial evidence must be formed which is incapable of explanation of any other hypothesis than that of the guilt of the accused. Such evidence should not only be consistent with the guilt of the accused but inconsistent with his innocence. No hard-and-fast rule can be laid to say that the particular circumstances are conclusive to establish guilt. It is basically a question of appreciation of evidence which exercise is to be done by the Court in the facts and circumstances of each case.

**50.** The evidence tendered in a court of law is either direct or circumstantial. Evidence is said to be direct if it consists an eyewitness account of the facts in issue in a criminal case. On the other hand, circumstantial evidence is evidence of relevant facts from which, one can, by process of intuitive reasoning, infer about the existence of facts in issue or *factum probandum*. In cases where evidence is of a circumstantial nature, the

circumstances from which the conclusion of guilt is to be drawn should, at the first instance, be fully established. Each fact sought to be relied upon must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic one on one hand and inference of facts to be drawn from them on the other hand. In regard to proof of primary facts, the Court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that facts lead to an inference of guilt of the accused person should be considered.

**51.** It would be significant to add that while dealing with circumstantial evidence there is always a danger that conjecture or suspicion lingering in the mind may take place of proof. Suspicion, however, strong cannot be allowed to take the place of proof and, therefore, the Court has to be watchful and ensure that conjectures and suspicions do not take place of legal proof.

**52.** There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistence with the innocence of the accused and must show that in all human probability the act must have been done by the accused, where various links in chain are in themselves complete.

**53.** The present case, which undoubtedly, is a case of circumstantial evidence, is to be looked into in the backdrop of the aforesaid legal principles. The prosecution has completely failed to prove beyond reasonable doubt complete chain of event and circumstances which unerringly points towards the involvement and guilt of the appellants. The prosecution also failed to establish any motive to the accused appellants for committing the murder of the deceased, the brother of the informant.

**54.** In the aforesaid facts and circumstances of the case, we are of the considered view that there are various lacunae in the case of the prosecution in establishing the chain of circumstantial evidence against the accused appellants. Further, there is no cogent or clinching evidence on record which proves the guilt of the accused appellants beyond reasonable doubt. Henceforth, we hold that the prosecution has failed to produce evidence to complete chain of circumstances and the guilt of the appellants beyond all

reasonable doubt, and the benefit undoubtedly has to go to the accused-appellants herein. The impugned judgment of conviction, thus found unsustainable and is liable to be set aside and the appellants are entitled to be acquitted by giving them the benefit of doubt.

**55.** Accordingly, both the appeals are **allowed**. The impugned judgment and order dated 28.1.1997 passed by the Fifth Additional District and Sessions Judge, Bijnor in Session Trial No. 11 of 1995 (State Vs. Mukesh and another), arising out of Case Crime No. 800 of 1994, under Sections 302/201 I.P.C., Police Station Kotwali Shahar, District Bijnor, is hereby set aside.

**56.** Appellants, **Suresh alias Chavaney** and **Mahesh** are acquitted of the charges under Sections 302/34 and 201 IPC. They are on bail and need not to surrender. Their bail bonds are cancelled and sureties are discharged.

**57.** Shri Jai Raj Singh Tomar, learned *Amicus Curiae* rendered valuable assistance to the Court. The Court quantifies Rs.15,000/- to be paid to Shri Jai Raj Singh Tomar, Advocate towards fee for the able assistance provided by him in hearing of the Criminal Appeal No. 210 of 1997. The said payment shall be made to Shri Jai Raj Singh Tomar, Advocate by the Registry of the Court within the shortest possible time.

**58.** The office is directed to send back the lower court record along with a certified copy of this judgment for information and necessary action.

**59.** The compliance report be submitted to this Court through the Registrar General, High Court, Allahabad.

**Order Date :- 31.05.2022**

Gulab/Mustaqeem.