Ram Niwas Vs. State

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Court : Delhi

Decided On : Sep-27-2013

Judge : V.P.Vaish

Appellant : Ram Niwas

Respondent : State

Advocate for Pet/Ap. : Mr. Ajayinder Sangwan, Mr. Dushyant Yadav, Mr. Sanjay Lao, Ms. Saahila Lamba, Mr. R.K. Dikshit

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on:

23. d July, 2013 Date of Decision:

27. h September, 2013 % + CRIMINAL APPEAL No.1272/2011 RAM NIWAS Through: ..... Appellant Mr. Ajayinder Sangwan, Mr.Tarunesh Kumar & Mr. Dushyant Yadav, Advocates Versus STATE Through: ..... Respondent Mr. Sanjay Lao, APP for the State CRIMINAL APPEAL No.1317/2011 SATISH @ ATAL Through: ..... Appellant Mr. Ajayinder Sangwan, Mr.Tarunesh Kumar & Mr. Dushyant Yadav, Advocates Versus STATE Through: ..... Respondent Mr. Sanjay Lao, APP for the State CRIMINAL APPEAL No.1469/2011 CHARAN SINGH Through: ..... Appellant Ms. Saahila Lamba, Advocate Versus STATE (G.N.C.T. of Delhi) Through: CRL.A.No.1272/2011 ..... Respondent Mr. Sanjay Lao, APP for the State Page 1 of 41 CRIMINAL APPEAL No.818/2012 RAM SNEHI @ PINTOO

Through: ..... Appellant Mr. R.K. Dikshit, Advocate Versus STATE (G.N.C.T. of Delhi) Through: ..... Respondent Mr. Sanjay Lao, APP for the State CORAM: HON'BLE MR. JUSTICE P.K. BHASIN HON'BLE MR. JUSTICE VED PRAKASH VAISH VED PRAKASH VAISH, J:

1. All the four appellants, Ram Niwas, Ram Snehi @ Pintoo, Satish @ Atal and Charan Singh were tried on charges under Section 120B of the Indian Penal Code (IPC for short) and Sections 364/302/201/404 of the IPC for committing the murder of Avkash Singh.

2. On trial, learned Additional Sessions Judge-I (East), Delhi found all the accused persons/appellants guilty of the offences charged vide judgment dated 09.08.2011. Vide order on sentence dated 16.08.2011, each of them were sentenced to undergo rigorous imprisonment for life for the offence under Section 302 IPC read with Section 120-B IPC and also to pay a fine of Rs.5000/- each for the said offence and in default of payment of fine, they shall further undergo simple imprisonment for six months each. All the appellants were further sentenced to undergo rigorous imprisonment for a period of five years for the offence under Section 201 IPC read with Section 120-B IPC and to pay a fine of Rs.500/- each, failing which they shall further undergo simple imprisonment of one month each. The appellants have also been sentenced to undergo rigorous imprisonment for a period of five years for offence under Section 364 IPC read with Section 120-B IPC and to pay a fine of Rs.1000/- each for the said offence, failing which they shall further undergo simple imprisonment for one month each. The appellants were also sentenced to undergo rigorous imprisonment for a period of five years under Sections 404 IPC read with Section 120-B IPC and to pay a fine of Rs.1,000/- and in default of payment of fine, to further undergo simple imprisonment of one month each. Out of the total fine, a sum of Rs.25,000/- was directed to be awarded to the wife of the deceased. All the sentences were ordered to run concurrently.

3. Briefly stated, the case of prosecution is that on 15.04.2006 at about 2.00 p.m., the appellant Ram Niwas along with his friends had hired Maruti van of the deceased Avkash Singh for going to village Dinapur, P.S. Babarala, District,

Badaun, U.P. They were to return on 16.04.2006. However, when the deceased did not return till 18.04.2006, his father Dharambir lodged a missing report at P.S. Mandawali vide DD No.45A. Thereafter, he searched for his son on his own at various places. However, the deceased could not be traced. On 21.04.2006, Smt. Prakashi Devi, mother of the deceased made statement at P.S. Mandawali. On the basis of the said statement, the present case was registered. In the said statement, she suspected that her son had been kidnapped by Ram Niwas and his friends. The investigation was initially conducted by SI Rupesh Khatri, who went to P.S. Soro, District Etah, U.P. where the Maruti van of the deceased was found confiscated in case FIR No.95/2006 dated 23.04.2006 under Sections 41/102 of the Criminal Procedure Code (Cr. P.C. for short) and on enquiry it was revealed that the Maruti van was abandoned by its driver while it was being chased by the police party. the driver was revealed as Ram Niwas. The name of A roving enquiry was conducted by the father of the deceased in which it was revealed to him, when he went to village Dinapur, that his son was last seen with the residents of that village namely, Ram Niwas, his brother Satish @ Atal, Pintoo, Pokhpal @ Pokha and Charan Singh at village Karchhali. Thereafter on 18.05.2006, second I.O. SI Mangesh Tyagi came to know from P.S. Hayat Nagar, District Moradabad that a human skeleton was found in the forests of the Village Karchhali along with one underwear, baniyan, pair of socks and a gamcha. Dharambir, father of the deceased identified the skeleton and clothes to be of his son except the gamcha at Civil Hospital Mortuary, Moradabad. One of the appellants-convicts Ram Snehi was lodged at District Kasganj in case FIR No.129/2006 under Section 307 IPC and after obtaining permission of the Court, he was arrested and his disclosure statement was recorded wherein he disclosed that he along with other coaccused/appellants, namely, Ram Niwas, Satish and Pokhpal had hired the van of the deceased and later committed his murder and robbed the van and also robbed his gold chain, watch, purse and took off his clothes. Upon the skeleton, on 10.06.2006, further postmortem was got conducted at LBS Hospital and thereafter all the accused persons except Pokhpal were arrested. One brown shoe worn by the deceased was recovered on pointing of the appellant-Ram Snehi from an open space. The golden wrist watch of the deceased was got recovered by the appellant-Charan Singh. The gold chain of the deceased was recovered from the

house of the appellant-Ram Niwas on his pointing out and the pant and shirt of the deceased along with papers of the van were got recovered from the house of appellant-Satish @ Atal. On completion of investigation, chargesheet was filed against all the appellants/accused persons under Sections 365/395/302/201/120-B IPC. Thereafter, on consideration of material on record, a charge under Section 120-B IPC and Sections 364/302/201/404 IPC read with Section 120-B IPC were framed against all the appellants, on which they were tried by learned trial court, leading finally to the passing of the impugned judgment and order on sentence.

4. Learned counsel for the appellants urged that in the cases based on circumstantial evidence, entire chain of events must be completed beyond reasonable doubt to convict a person. For convicting a person for any offence, the guilt must be proved beyond all reasonable doubts and the chain of events must be complete. There is a delay in lodging of the FIR since as per Prakashi (PW-1), the deceased was supposed to come back on 16.04.2006. But his first missing report was lodged on 18.04.2006 whereas the FIR was lodged on 21.04.2006. There is a manipulation in the FIR wherein it has been mentioned that the deceased was wearing brown colour shirt, pant and red colour shoes, gold chain and watch, whereas, in the missing report dated 18.04.2006, it has been mentioned that the deceased wore brown colour shirt, brown shoes and there is no mention of gold chain and a wrist watch. Statement of Dharambir (PW-2) is self-contradictory, as he himself has given different version about knowing Ram Niwas. It is next contended that in the case based on last seen evidence, the proximity of time is a relevant factor for convicting a person on the basis of last seen evidence. The time gap must be so small that possibilities of any other person being the author of the crime must become impossible. In the present case, allegedly the appellant was last seen on 15.04.2006 and the skeleton was found on 22.04.2006 and thus in such a case, the possibility of some other person being the author of crime cannot be ruled out. Also in such a circumstance, it was not possible, within a week, for a dead body to become skeleton and the same has been opined by Dr. S.K. Verma (PW-10) who has stated that it would take at least two months to reach to the stage of skeleton. It is further contended that the recovery of clothes including underwear, baniyan, pair of socks and gamcha was planted since as per PW-11, no cloth was worn by the skeleton. As per the

testimony of SI Tirath Singh (PW-18) and Constable Hansraj (PW-24), a pair of socks was recovered near skeleton whereas as per Dr. S.K. Verma (PW-10), one leg was missing which also suggest that the socks were planted when the leg was itself missing. There is a discrepancy in the report of the doctors. Dr.Jagpal Singh Yadav (PW-14) who conducted the first post mortem on 23.04.2006 found 26 teeth whereas PW-10 has mentioned that all 32 common teeth were present except upper two. There is a discrepancy in the statement of prosecution witnesses about bringing the van to Delhi and deposition at the malkhana. The identification of the appellants is also highly doubtful and Rambresh (PW-23) who is an independent witness is a planted witness. The case of the prosecution that the appellants were absconding also does not come to the rescue of the prosecution. It is quite possible that the suspects were running out of fear of police arrest and harassment. The police have shown recovery of the one item from every appellant for making each one liable also shows their manipulation. The recoveries of articles is also highly suspicious since some of the articles referred were even not mentioned in the missing report dated 18.04.2006. No independent witness had been made for the recoveries and no site plans were prepared for the same. The recovery of pant and shirt from the appellant-Satish is also doubtful.

5. Learned counsel for the appellants lastly contended that the TIP of the recovered articles also makes the recoveries suspicious and unreliable. The DNA report claiming that the skeleton was of the deceased is also suspicious since the part which was sent for DNA, i.e. femur and lower jaw when teeth were itself in dispute. Also the said DNA report cannot be relied upon as it was neither tendered nor accepted in evidence.

6. Per contra, learned APP for the State contended that the appellants had been identified by the complainant in the Court as the person who had hired the vehicle and had taken the deceased along with them on 15.04.2006. The deceased did not return on 16.04.2006 or thereafter and a skeleton was found on 22.04.2006 from a place which was near the native village of one of the appellant coupled with the fact that all the appellants were missing from their houses. It clearly establishes that the appellants had kidnapped the deceased, robbed him of his van and other articles and committed his murder.

7. Learned APP further contended that the appellants have got recovered various articles from their respective possession. The body of the deceased was found in jungle area. In such a case, possibility of the body having been eaten by the birds and animals cannot be ruled out. The body has been identified as to be of the deceaseds on the basis of the identification by the father, clothes of the deceased and the DNA report. It was lastly contended by learned APP that the fact of apprehension of van as well as of the appellant-Ram Niwas absconding from the spot has been proved.

8. We have given our anxious thought to the rival submissions made by learned counsel for the appellants and learned APP for the State and also carefully gone through the material on record.

9. We shall deal with the various circumstances, as pointed out by learned counsel for the appellants one by one. I Circumstantial Evidence 10. Admittedly, the whole case against the appellants rests on circumstantial evidence. The law relating to circumstantial evidence is well settled. In dealing with circumstantial evidence, there is always a danger that conjecture or suspicion lingering on mind may take place of proof. Suspicion, however, strong cannot be allowed to take place of proof and, therefore, the Court has to judge watchfully and ensure that the conjectures and suspicions do not take place of proof. However, it is no derogation of evidence to say that it is circumstantial. Human agency may be faulty in expressing picturization of actual incident but the circumstances cannot fail. Therefore, many a times, it is aptly said that men may tell lies, but circumstances do not. In cases where 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. Each fact must be proved individually and only thereafter the Court should consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt. If the combined effect of all the facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself/themselves, is/are are not decisive. The circumstances proved should be such as to exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution case succeeds in a case of

circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. There must be a chain of evidence so complete as not to leave any reasonable ground for 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. Where the various links in a chain are in themselves complete, then a false plea or false defence may be called into aid only to lend assurance to the Court. If the circumstances proved are consistent with the innocence of the accused, then the accused is entitled to the benefit of doubt. However, in applying this principle, distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to proof of basic or primary facts, the Court has to judge the evidence and decide whether that evidence proves a particular fact or not and if that fact is proved, the question arises whether that fact leads to the inference of guilt of the accused person or not. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should be no missing links in the case, yet it is not essential that every one of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences or presumptions, the Court must have regard to the common course of natural events, and to human conduct and their relations to the facts of the particular case. II Last seen 11. With the development of law, the theory of last seen has become a definite tool in the hands of prosecution to establish the guilt of the accused. Undoubtedly, the last seen theory is an important event in the chain of circumstances that would completely establish and/or could point to the guilt of the accused with some certainty. But this theory should be applied by taking into consideration the case of prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.

12. Prakashi (PW-1), the mother of deceased Avkash Singh, in her testimony stated that on 15.04.2006 at about 2.00 p.m., the appellantRam Niwas had come to her house and had requested her son Avkash Singh (deceased) for hiring Maruti van to attend a function in Village Dinapur, District Aligarh. Accordingly, her son took the Maruti van along with Ram Niwas and stated that he will return back

by 16.04.2006. She further stated that at the time of departure, her son was wearing gold chain, golden wrist watch, badami colour pant and shirt and brown colour leather shoes. She further stated that she knew Ram Niwas from prior thereto as earlier on 03.04.2006 also, he had hired their Maruti van and at that time her son Avkash had returned back on 05.04.2006. She also stated that in between 03.04.2006 to 15.04.2006 also, Ram Niwas @ Ramu had visited their house on one occasion. However, when her son did not return back either on 16.04.2006 or 17.04.2006, so on 18.04.2006, her husband lodged a missing report about him in PS Mandawali. They, thereafter, make frantic search for their son, but no clue could be found. Then on 21.04.2006, she lodged an FIR alleging that appellant-Ram Niwas has abducted her son.

13. In her cross-examination, she, however, stated that the appellant- Pintoo was also present along with Ram Niwas at that time. She further stated that her husband and daughter-in-law were also present in the house when the appellant had come to hire their Maruti van. She further stated that accordingly the accused persons had stayed in their house for 10-15 minutes and had talk to her and her husband.

14. Dharambir (PW-2), father of the deceased, has also deposed on identical lines as Prakashi (PW-1). He also reiterated that the appellant-Ram Niwas had come to his house on 15.04.2006 at about 2.00 p.m. to hire a Maruti van. He further stated that on 10.04.2006, Ram Niwas and Pintoo had come to his house as they wanted to hire their Maruti van for going to Agra and he stated them to talk to his son Avkash Singh in that regard. He further stated that when his son did not return back till 17.04.2006, he went to Shakarpur where Ram Niwas used to deal in golgappa and from where he came to know that Ram Niwas along with three other associates had gone along with his son. Accordingly, on 18.04.2006, he lodged a missing report at PS Mandawali vide DD No.45A, copy of which is Ex.PW2/A and went to Village Dinapur, the village of appellant-Ram Niwas. There mother of Ram Niwas met him and stated that her son had not visited her house. However, some other persons of the village informed him that they may be present at Village Karchhali. He accordingly went to Village Karchhali which was about 50-60 kms. away from Village Dinapur and from there, certain persons informed him that a van

had come in their village and he should verify the facts from one Shopali. He accordingly went to house of Shopali who told him that Ram Niwas had come to his house on the night of 15.04.2006 along with his brother Satish and two other persons besides one driver in a Maruti van. He further stated that they all stayed at their house and after having meals, left in the night itself along with his son Charan Singh. He further stated that he also saw a photograph of a person in the house who Shopali identified to be of his son Charan Singh. Thus, sensing that his son might have been kidnapped, so he informed his son Pradeep in this regard and by the time, he returned back to his house on 21.04.2006, a case was got registered by his wife.

15. It has been contended with some vehemence that the prosecution has, relying upon last seen theory, must essentially establish the time when the accused and the deceased were last seen together as well as the time of death of the deceased. If these two aspects are not established, the very application of the last seen theory would be impermissible and would create a major dent in the case of prosecution.

16. The application of the last seen theory requires a possible link between the time when the person was last seen alive and the fact of death of the deceased coming to light. There should be a reasonable proximity of time between these two events. This proposition of law does not admit of much excuse but what has to be seen is that this principle is to be applied depending upon the facts and circumstances of the given case. The last seen theory comes into play where time 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 of any person other than the accused being the author of the crime becomes impossible.

17. The reasonableness of the time gap is, therefore, of some significance. If the time gap is very large, then it is not only difficult but even may not be proper for the Court to infer that the accused had been last seen alive with the deceased and the former, thus, was responsible for commission of the offence. The purpose of applying these principles, while keeping the time factor in mind, is to enable the Court to examine that where the last seen together and the time when the

deceased was found dead is short, it inevitably leads to the inference that the accused person was responsible for commission of the crime and the onus was on him to explain how the death occurred.

18. In the facts of the present case, the time factor is not important because both PW-1 and PW-2 have stated that their son (deceased) was accompanied by appellant-Ram Niwas and his associates on 15.04.2006, who had come to their house to hire their vehicle. The evidence that the gold chain of the deceased was found while being in possession of Ram Niwas further shifts the burden upon him as to how, when and in what manner he came into possession of the gold chain or when and how the deceased parted with his company. However, in view of the depositions of Prakashi (PW-1) and Dharambir (PW-2) who have deposed about the factum of last seen coupled with recovery of gold chain from Ram Niwas, the onus got shifted on the appellant-Ram Niwas to show that there existed some circumstances by virtue of which they parted from the company of the deceased. This onus the appellant has certainly failed to discharge. III Motive 19. Learned counsel for the appellants submitted that the Court below have erred in convicting the appellant, even though there is no evidence or motive against them. Learned counsel for the appellants also submitted that in a case of circumstantial evidence, the issue of motive to commit the crime in question, is of paramount importance, which could not be established in the instant case. The parameters laid down by this Court for deciding such a case of circumstantial evidence have not been applied.

20. Undoubtedly, in the case of circumstantial evidence, all the circumstances must be fully established and the facts so established must be consistent with the hypothesis regarding the guilt of the accused. The circumstances so established should exclude every other possible hypothesis except the one sought to be proved. The circumstances must be conclusive in nature with regard to the motive. We observe that in a case of circumstantial evidence, motive assumes great significance and importance for the reason that the absence of motive would put the court on its guard and cause it to scrutinize each piece of evidence very closely in order to ensure that suspicion, emotion or conjecture do not take the place of proof. However, the evidence regarding existence of motive which

operates in the mind of an assassin is very often, not within the reach of others. The said motive may not even be known to the victim of the crime. The motive may be known to the assassin and no one else may know what gave birth to such evil thought, in the mind of the assassin. In a case of circumstantial evidence, the evidence indicating the guilt of the accused becomes untrustworthy and unreliable, because most often it is only the perpetrator of the crime alone, who has knowledge of the circumstances that prompted him to adopt a certain course of action, leading to the commission of the crime. Therefore, even in the cases where the guilt of the accused can be deduced from the other circumstances, motive is not very important to be proved. IV Delay in FIR 21. The FIR in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the above report can hardly be over-emphasized from the standpoint of the accused. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain prior information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as names of eyewitnesses present at the scene of occurrence. Delay in lodging the FIR often results in embellishment which is the creature of an afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in and the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in lodging the FIR should be satisfactorily accounted for. This proposition of law is very well settled. It is true that FIR is not substantive piece of evidence. It is also true that the FIR need not be elaborate or meticulously prepared. Nevertheless, the importance of FIR made promptly cannot be minimized. The underlined object of Section 154 of Cr.P.C. is to obtain earliest information of an alleged criminal activity on record and the circumstances, before there is time for them to embellish the prosecution story.

22. The prosecution has also relied on the FIR which is Ex.PW1/A dated 21.04.2006. The FIR was lodged by the complainant-Prakashi (PW-1), mother of the deceased who stated in her complaint that her son Avkash Singh went missing on 15.04.2006. Reasonable explanation is given as to why FIR was lodged very late. It is found from the facts of the present case that the deceased left his house

with some of the appellants on 15.04.2006 and he was supposed to return on 16.04.2006. However, when he did not come back, father of the deceased started searching for him on 17.04.2006 and then on 18.04.2006 missing report was lodged by the husband of the complainant namely, Dharambir (PW-2) vide DD No.45A which is exhibited as Ex.PW2/A. Thereafter on 19.04.2006, husband of the complainant went in search of his son from where he was finally directed to Village Karchhali where he met with Shopali. While returning from the house of Shopali, he sensed that his son had been kidnapped and he informed his son Pradeep about his feelings from at STD booth. On 21.04.2006 at night, he reached home and by then FIR had been registered. The same fact has been stated by the complainant-Prakashi (PW-1) who stated on 18.04.2006 that her husband had lodged the missing report in P.S. Mandawali. They kept on searching for their son, but no clues were found. Search has been made at Village Dinapur also, but no clues were found there. On 21.04.2006, she lodged FIR naming Ram Niwas and his associates for abducting her son. The FIR was lodged after about seven days i.e. on 21.04.2006 before SI Rupesh Khatri (PW-5). In the present case, the delay in lodging FIR does not creates suspicion about the version of the prosecution. The trial Court has not committed any illegality by observing that there is no delay in the instant case and even if there is any delay, it is well explained. Therefore, this contention of the appellant is devoid of any merits. V Recovery of Articles 23. As per the case of the prosecution a golden colour wrist watch was got recovered by accused Charan Singh from his house. Accused Ram Niwas got recovered a gold chain from his house and from accused Satish @ Atal the pant and shirt of deceased Avkash Singh and the original driving licence and RC of his maruti van were recovered. At the instance of accused Ram Snehi @ Pintoo one brown colour shoe was recovered from the roadside. The maruti van of the deceased was allegedly found from the possession of appellant Ram Niwas when he upon seeing the police party ran away after leaving the maruti van. The gold chain was recovered later on at this instance.

24. Learned counsel for the appellants have stated that all the recoveries are planted inasmuch as no offender/accused will keep the pant, shirt, driving licence or RC etc. of the deceased in his possession even after five months of the incident lest he may be connected with the crime by the police. As regards the wrist watch

it was stated that no make or identity mark was stated in the initial complaint and thus, prosecution has failed to prove that the watch in question, if at all recovered, belonged to deceased. As regards the shoe it was stated that the same was admittedly recovered from an open place accessible to public. The gold chain was also stated to be planted.

25. Before proceeding to analyze the case of the prosecution qua recovery of incriminating articles some judicial decisions may be worth noting. In Shera vs. Emperor, AIR (30) 1943 Lah. 5, the Lahore High Court observed as under:When the evidence of recovery of stolen property is attacked, the Court has to examine the evidence in the light of the following alternative hypothesis: (1) The complainant might have been persuaded by the police to state in the first information report that property which in fact was not stolen had been stolen and to hand over such property to the police to be used in fabricating recoveries from the accused persons. This assumes a conspiracy between the informant and the police from the very start. (2) The police might have obtained property similar to the stolen property from the complainant or some one else and used it for the purpose of fabricating the recoveries. (3) The police might have suppressed some of the stolen property recovered from an accused person and utilized it in inventing a recovery from another accused person, (4) The property might have been recovered from a third party and used by the police in one of the impugned recoveries. In considering the possibility of the second hypothesis, regard must necessarily be had to the nature and value of the property recovered. It should be borne in mind that when a person hands over to the police valuable property with a view to enable the police to fabricate a false recovery of this property from someone else, there is always a possibility of the accused being acquitted and the owner of the property being deprived of such property. In the present case the property recovered consists of valuable ornaments of gold and silver and I do not consider that the police procured this property from someone else with the object of inventing false recoveries from innocent persons.. 26. In another decision in Reg vs. Jora Hasji (1874) 22 B.H.C.R 242 West J.

it was observed that `we must not allow the discovery of ordinary articles like lathis, knives, sticks and clothes to be introduced so as to admit what are

practically confessions to the police and that the discovery ought to be of a fact which is directly connected with the crime apart from the statement itself. 27. Also in State v. Wahid Bux & Ors., AIR 1953 All 314 it was observed as under: 4. .Further the articles recovered were of a very ordinary type. For instance, from Wahid Bux a Dua, a Jugnu and a patta were recovered. From Dori completely torn coat and a dhoti were recovered. From Chandu a lota, a tumbler, a longe were recovered. Nothing was recovered from the other respondents. These articles were of ordinary kind and could be found with anybody in the village and the witnesses did not point out any special features or marks of identification on them. They were not able to say to whom the articles belonged. In this view of the matter the learned Sessions Judge did not draw any inference from the fact that these articles were recovered from the possession of the aforesaid respondents. We are of opinion that the learned Sessions Judge was right in rejecting the testimony relating to the recovery of the articles. 28. As regards appellant-Charan Singh we may state that mere recovery of a golden colour wrist watch does not complete the circumstantial chain of evidence against him. The reasons are ample and clear. Admittedly, appellant Charan Singh was not accompanying appellant Ram Niwas at the time when he had gone to the house of Avkash Singh to hire the maruti van. The fact that he later on accompanied other co-accused persons from his house in village Karchali as stated to by his father Shopali does not stand proved in the entire prosecution case. In fact, Shopali entered the witness box as DW-2 but no question or suggestion was put to him in this regard by the prosecution and he himself was completely silent in this regard in his examination-in-chief. Thus, this mere statement of PW-2 Dharambir, which is in the nature of hearsay evidence, cannot be held to be admissible.

29. Furthermore, in the overall facts and circumstances of the case the fact that Charan Singh was found to be absconding from his house is also not sufficient to infer a conclusion of his guilt. The recovery of wrist watch at his instance after such a long gap and which too is commonly available in the market and the complainant having not disclosed any specific make or identification mark also does not inspire confidence. We, thus, need to go into the various contradictions as pointed out by the learned defence counsel in the deposition of various recovery witnesses in this regard as the prosecution has miserably failed in

proving the chain of circumstantial evidence against him.

30. As regards appellant-Satish @ Atal, again his identity being an accomplice of appellant -Ram Niwas, has not been deposed to by any of the prosecution witness except Dharambir (PW-2) whose deposition again in this regard is hearsay in nature. This fact was again not stated to by Shopali (DW-2) and prosecution had every chance to ask this question or to put a suggestion to this effect to him when he entered the witness box but for reasons best known to them neither any question nor any suggestion was put to him. Once again the recovery of pant and shirt of deceased Avkash Singh or the RC or driving licence of the Maruti van at his instance does not inspire any confidence as it is beyond any comprehension as to why an accused would like to retain the articles robbed in the commission of an offence lest he may be connected with the crime.

31. As regards, appellant-Ram Snehi @ Pintoo the recovery of one brown shoe from open place need not be discussed in detail as in view of the discussion hereinabove qua the recovery of other articles from appellants-Charan Singh and Satish, the same does not inspire confidence. The prosecution case is that one brown colour shoe has been recovered at the instance of appellant-Ram Snehi from an open place. It has not been made from any closed or concealed place, but from an open place, which is accessible to all and which creates suspicion in the mind of the Court. Also, the recovery from appellantRam Snehi @ Pintoo is of a brown shoe only and there are high degree of chances of plantation of the same. Therefore, merely on the basis of recovery of shoe and that too from an open place cannot form basis for the conviction of the appellant for such a grave offence.

32. No other evidence has come up against the appellant-Ram Snehi @ Pintoo on record. Also, both Prakashi (PW-1) and Dharambir (PW2) did not mention the name of the said appellant anywhere before their cross-examination.

33. As regards, appellant-Ram Niwas again it stands well established from the deposition of Prakashi (PW-1) and Dharambir (PW-2) that he came to their house on 15.04.2006 along with Pintoo to hire a Maruti van and deceased Avkash left along with them carrying the Maruti van. Thus, onus shifted upon appellant-Ram

Niwas to show as to under what circumstances he parted company with the deceased Avkash or his Maruti van. As regards recovery of gold chain neither it can be presumed that such a costly ornament would have been given by the family members of deceased Avkash Singh to the police simply to falsely implicate appellant-Ram Niwas nor the police can themselves plant such thing.

34. Thus, in view of aforesaid discussion, the appellants namely, Charan Singh, Satish@ Atal and Ram Snehi @ Pintoo are neither named in the missing report nor in the FIR. Moreover, Prakashi (PW-1) and Dharambir (PW-2), star witnesses of the prosecution have not named these appellants in their examination-in-chief. However, recovery of gold chain from the appellant-Ram Niwas and circumstances of last seen witnessed by Prakashi (PW-1) and Dharambir (PW-2) are well founded incriminating circumstances against him. PW-1 and PW-2 were cross-examined at length, but nothing incriminating could be elicited. There is no enmity between the appellant-Ram Niwas and the said witnesses to falsely implicate him. VI Medical evidence 35. As per the prosecution, skeleton was found in the forest area of Village Karchhali on 22.04.2006 pursuant to the information given by the watchman of Village Chachu Nangal. Constable Tirath Singh (PW-18) (inadvertently numbered as PW-18) on reaching the spot saw that human skeleton was lying there and near the skeleton some clothes, i.e., one gamcha of yellow colour, two socks of white colour having blood stains and one old baniyan on which Roopa Jain in English was written and one underwear in a torn condition was also lying there. The said PW-18 recorded the panchnama, collected the bone pieces and kept them in a gunny bag and converted into a parcel. The skeleton was sent for post mortem and according to the post mortem report dated 23.04.2006, the age of the deceased was found between 25 to 30 years with a stature of 166 cm, male and time since death to be about two months. As per the contents of the FIR, in the present case, the description of the skeleton seemed to match with the deceased, hence, the skeleton was sent to FSL for DNA analysis wherein it was opined in the DNA analysis report as DNA profile of source of Exhibit 3 (blood sample of Smt.Prakashi Devi) and DNA profile of source of Exhibit 4 (blood sample of Sh.Dharamvir Singh) are biological mother and father of the source of DNA profile of the Exhibit B-1 (Femur bone of deceased).

36. Initially though the DNA report was not put to the appellant under Section 313 Cr.P.C. However, as per order of this Court dated 6th March, 2013, the matter was remanded back to the trial Court for recording of additional statements of the appellants under Section 313 Cr. P.C. Before the trial Court on 15th May, 2013, all the appellants in their statements under Section 313 Cr.P.C. have stated that the said report to be false and manipulated. Even if we presume that the DNA is not conclusive proof of the identity of the deceased, non recovery of dead body is of no consequence. In Prithipal etc. vs. State of Punjab and Ors., (2012) 1 SCC 10, the Supreme Court observed that: 51. In Mani Kumar Thapa v. State of Sikkim [(2002) 7 SCC 157 :

2002. SCC (Cri) 1637 : AIR 2002 SC 2920]. this Court held (SCC p. 163, para

4) that in a trial for murder, it is neither an absolute necessity nor an essential ingredient to establish corpus delicti. The fact of the death of the deceased must be established like any other fact. Corpus delicti in some cases may not be possible to be traced or recovered. There are a number of possibilities where a dead body could be disposed of without any trace, therefore, if the recovery of the dead body is to be held to be mandatory to convict an accused, in many a case, the accused would manage to see that the dead body is destroyed to such an extent which would afford the accused complete immunity from being held guilty or from being punished. What is, therefore, required in law to base a conviction for an offence of murder is that there should be reliable and plausible evidence that the offence of murder like any other factum of death was committed and it must be proved by direct or circumstantial evidence albeit the dead body may not be traced.

37. Therefore, in murder case, it is not necessary that the dead body of the victim could be found and identified and thus conviction for the offence of murder does not necessarily depend upon corpus delicti being found. The corpus delicti in a murder case has two components - death as result, and criminal agency of another as the means. Where there is a direct proof of one, the other may be established by circumstantial evidence.

38. In the absence of corpus delicti what the Court looks for is clinching evidence that proves that the victim has been put to death. If the prosecution is successful in providing cogent and satisfactory proof of the victim having made a homicidal death, absence of corpus delicti will not by itself be fatal to a charge of murder. Failure of the prosecution to assemble such evidence will, however, result in failure of the most essential requirement in a case involving a charge of murder.

39. Further, learned counsel for the appellants contended that there are discrepancies in the statement of PW-14, PW-10, PW-21 and PW-28 regarding the number of teeth. On the one hand, as per the report prepared by PW-10, PW-21 and PW-28 exhibited as Ex.PW10/A, all 32 common teeth were present in the socket while as per the report of PW-14 (Ex.PW14/A), 14 teeth of upper jaw and 12 teeth of lower jaw were found present. In our opinion, it was rightly observed by the trial Court that opinion in the report given by PW-10, PW-21 and PW-28 is more authentic as PW-14 was not an expert in forensic while the doctors who performed the post mortem report at Delhi were all experts in forensic science.

40. It is also contended by learned counsel for the appellants that the clothes found near the body of the deceased had been planted. In this regard, we observe that Dharambir (PW-2) has stated that on 15.05.2006, he was questioned regarding the clothes of his son (deceased). After contacting his wife, he came to know that his son had purchased a pair of underwear and baniyan, one set of underwear and baniyan were worn by him and another set was left by him at the house. He took out one set of underwear and baniyan from his house and produced before the police. The police seized the same vide seizure memo Ex.PW2/B on that very day. PW-2 also stated that on 18.05.2006, when he was summoned by Insp. Neeraj Kumar (PW-31) at police station, he was shown a pair of socks, one underwear, one baniyan and one gamcha. He identified all of them to be of his son except the gamcha.

41. We observe that the clothes were seized much prior in time on 22.04.2006 then they were identified by PW-2 on 18.05.2006 and a pair was produced by him on 15.05.2006. Till that point in time, there was no indication of the skeleton to be that of his son and in such a case the possibility of clothes being planted is ruled

out. VII Criminal Conspiracy 42. The offence of criminal conspiracy is defined under Section 120A of the IPC whereas Section 120B of the code provides for punishment for the said offence. The foundation of the offence of criminal conspiracy is an agreement between two or more persons to cooperate for the accomplishment /performance of an illegal act or an act which is not illegal by itself through illegal means. Such agreement or meeting of minds create the offence of criminal conspiracy and regardless of proof or otherwise of the main offence to commit which the conspiracy may have been hatched, once the unlawful combination of minds is complete, the offence of criminal conspiracy stands committed. A conspiracy from its very nature is generally hatched in secrecy. It is, therefore, extremely rare that direct evidence in proof of conspiracy can be forthcoming from wholly disinterested quarters or from utter strangers. But, like other offences, criminal conspiracy can be proved by circumstantial evidence. Indeed, in most cases proof of conspiracy is largely inferential though the inference must be founded on solid facts. Surrounding circumstances and antecedent and subsequent conduct, among other factors, constitute relevant material. In fact because of the difficulties in having direct evidence of criminal conspiracy, once reasonable ground is shown for believing that two or more persons have conspired to commit an offence then anything done by any one of them in reference to their common intention after the same is entertained becomes, according to the law of evidence, relevant for proving both conspiracy and the offences committed pursuant thereto. Direct proof of a conspiracy is, of course, seldom available. In a case of conspiracy when there is no direct evidence, inferences from the proved facts and circumstances, to a larger extent, form the basis of the Courts conclusion. In dealing with such cases, based on circumstantial evidence, an inference of guilt need only be drawn when the circumstances are such as to be incapable of being reasonably explained on any other hypothesis than the guilt of the accused.

43. In the instant case, the factum of conspiracy stands proved from the recovery of article made from the appellant-Ram Niwas pursuant to his disclosure statement. Prakashi (PW-1) has stated in her statement that on the date of incident, appellant-Ram Niwas and his associates came to her house to get the vehicle from her son. In her crossexamination, she stated that her son left her

house on 15.04.2006 at about 1.45 or 2.00 p.m., Ram Niwas and his associates stayed at their house for 10-15 minutes. Her son told her that he was going with four persons out of which two were present at their house and two would meet them on the way. Dharambir (PW-2) has also stated in his testimony that his son left with the appellant-Ram Niwas on 15.04.2006 at about 2.00 p.m. and in his cross-examination, he has stated that his son had left the house with Ram Niwas and his associates. Also when the search was being conducted, the appellantRam Niwas was not present at his residence. Even if PW-1 and PW-2 had not named other associates, it is certain that someone or the other must have accompanied Ram Niwas as both PW-1 and PW-2 have stated from the very inception that Ram Niwas was accompanied with his associates. Although, it is not clear who were those associates but certainly there were some persons with whom Ram Niwas had conspired to commit the crime. Therefore, qua Ram Niwas, conspiracy also stands proved from the recovery of article and his conduct of abscondance from his residence when the search was being conducted. CONCLUSION 44 It will be worthwhile to quote certain observations of Supreme Court as regards the expression proved beyond reasonable doubts occurring in the cardinal rule of circumstantial evidences.

45. It was observed by the Supreme Court in Lal Singh vs. State of Gujarat, (2001) 3 SCC 221 that :84. The learned Senior Counsel Mr Sushil Kumar submitted that prosecution has not proved beyond reasonable doubt all the links relied upon by it. In our view, to say that prosecution has to prove the case with a hundred per cent certainty is a myth. Since last many years the nation is facing great stress and strain because of misguided militants and cooperation to the militancy, which has affected the social security, peace and stability. It is common knowledge that such terrorist activities are carried out with utmost secrecy. Many facts pertaining to such activities remain in personal knowledge of the person concerned. Hence, in case of conspiracy and particularly such activities, better evidence than acts and statements including that of coconspirators in pursuance of the conspiracy is hardly available. In such cases, when there is confessional statement it is not necessary for the prosecution to establish each and every link as confessional statement gets corroboration from the link which is proved by the prosecution. In any case, the law requires establishment of such a degree of probability that a

prudent man may on its basis, believe in the existence of the facts in issue. For assessing evidence in such cases, this Court in Collector of Customs v. D. Bhoormall [(1974) 2 SCC 544 :

1974. SCC (Cri) 784]. dealing with smuggling activities and the penalty proceedings under Section 167 of the Sea Customs Act, 1878 observed that many facts relating to illicit business remain in the special or peculiar knowledge of the person concerned in it and held thus: (SCC pp. 553-55, paras 30-32 and

37) 30. that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs absolute certainty is a myth, and-as Prof. Brett felicitously puts it - all exactness is a fake. El Dorado of absolute proof being unattainable, the law accepts for it probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus, legal proof is not necessarily perfect proof; often it is nothing more than a prudent man's estimate as to the probabilities of the case. 46. The Evidence Act does not insist upon absolute proof for the simple reason that perfect proof in this imperfect world is seldom to be found. That is why under Section 3 of the Evidence Act, a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. This definition of proved does not draw any distinction between circumstantial and other evidence. The use of expression determinative tendency in the aforementioned rule also seconds the view that the prosecution is not required to adduce such evidence which absolutely proves the guilt of an accused person. Thus, circumstantial evidence in order to furnish a basis for conviction requires a high degree of probability, that is, so sufficiently high that a prudent man considering all the facts, feels justified in holding that the accused has committed the crime.

47. The approach to be adopted by the Courts while appreciating circumstantial evidence was succinctly stated by Supreme Court in M.G. Agarwal vs. State of

Maharashtra, AIR 1963 SC 200 in following terms:18..It is a well-established rule in criminal jurisprudence that circumstantial evidence can be reasonably made the basis of an accused person's conviction if it is of such a character that it is wholly inconsistent with the innocence of the accused and is consistent only with his guilt. If the circumstances proved in the case are consistent either with the innocence of the accused or with his guilt, then the accused is entitled to the benefit of doubt. There is no doubt or dispute about this position. But in applying this principle, it is necessary to distinguish between facts which may be called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts, the court has to judge the evidence in the ordinary way, and in the appreciation of evidence in respect of the proof of these basic or primary facts there is no scope for the application of the doctrine of benefit of doubt. The court considers the evidence and decides whether that evidence proves a particular fact or not. When it is held that a certain fact is proved, the question arises whether that fact leads to the inference of guilt of the accused person or not, and in dealing with this aspect of the problem, the doctrine of benefit of doubt would apply and an inference of guilt can be drawn only if the proved fact is wholly inconsistent with the innocence of the accused and is consistent only with his guilt. 48. There are enough circumstantial evidence, as discussed above, to hold that it is nonetheless but the appellant-Ram Niwas who could have kidnapped the deceased and caused his death because it was the appellant with whom the deceased was last seen alive and, therefore, they must have been in possession of the articles of the deceased like his gold chain which was also subsequently recovered at the behest of the appellant-Ram Niwas and also proved to be that of the deceased Avkash Singh during TIP and trial also.

49. Therefore, if we look at the case, we find that the prosecution has succeeded in proving its case on circumstantial evidence against appellant-Ram Niwas. In the present case, all the witnesses are independent and they have not been shown to have any axe to grind against the accused/appellant-Ram Niwas and from the evidence of the several witnesses as mentioned above, it is clear that the deceased was last seen with the appellant-Ram Niwas in the afternoon of 15.04.2006, the recovery of material objects like gold chain, Maruti van as well as the evidence of Prakashi (PW-1) and Dharambir (PW-2) who have categorically

stated that the articles recovered were of the deceased only. However, it is a settled principle of criminal jurisprudence that the more serious the offence, the stricter the degree of proof required, since a higher degree of assurance is required to convict the accused. Thus, conviction of appellants Charan Singh, Satish @ Atal and Ram Snehi @ Pintoo cannot be maintained.

50. It is well settled proposition of law that the recovery of crime objects on the basis of information given by the appellants/accused provides a link in the chain of circumstances. Also failure to explain one of the circumstances would not be fatal for the prosecution case and cumulative effect of all the circumstances is to be seen in such cases. At this juncture, we feel it is apposite to mention that in State of Karnataka vs. K. Yarappa Reddy, (1999) 8 SCC 715, it was held that the Court must have pre-dominance and pre-eminence in criminal trials over the action taken by the investigating officers. Criminal justice should not he made the casualty for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it.

51. Hence, minor loopholes and irregularities in the investigation process cannot form the crux of the case on which the appellants can rely upon to prove their innocence when their strong circumstantial evidence deduced from the said investigation which logically and rationally point towards the guilt of the appellants.

52. In view of the aforesaid discussion, Crl. Appeal No.1272/2011 filed by appellant-Ram Niwas is dismissed. The judgment dated 09.08.2011 and order on sentence dated 16.08.2011 qua appellant-Ram Niwas are upheld. However, the Crl. Appeal No.1317/2011 filed by appellant-Satish @ Atal, Crl. Appeal No.1469/2011 filed by appellantCharan Singh and Crl. Appeal No.818/2012 filed by appellant-Ram Snehi @ Pintoo are allowed and they are acquitted. In case, they are in judicial custody, they be released forthwith, if not required in any other case. (VED PRAKASH VAISH) JUDGE (P.K BHASIN) JUDGE September 27, 2013 aj/gm