Radhey Shyam Vs. State

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Court : Delhi

Decided On : Dec-22-2014

Judge : S.Ravindra Bhat

Appellant : Radhey Shyam

Respondent : State

Judgement :

$~ * IN THE HIGH COURT OF DELHI AT NEW DELHI % + RESERVED ON:

23. 09.2014 PRONOUNCED ON:

22. 12.2014 CRL.A. 1111/2013 RADHEY SHYAM versus STATE CRL.A. 119/2014 JAIPAL SINGH ..... Appellant ..... Respondent ..... Appellant versus STATE ..... Respondent Appearance: Mr. R.M. Tufail with Mr. Anwar. A. Khan, Mr.Abdul Faroor and Mr. Vishal Raj, Advocates for appellant in Crl.A.1111/2013. Ms. Nandita Rao, Advocate for appellant in Crl.A.119/2014 with Inspr. Jorawar Singh, PS Prashant Vihar. Sh. Vinod Diwakar, Advocate for State in both the appeals. CORAM: HON'BLE MR. JUSTICE S. RAVINDRA BHAT HON'BLE MR. JUSTICE VIPIN SANGHI S.RAVINDRA BHAT, J.

1. These appeals by accused are directed against a judgment convicting them for the offences under Section 302/392/411/34 IPC and Section 25 of the Arms Act rendered in SC No.181/2009 on 24.05.2013 by the learned Additional Sessions Judge. They also appeal against the sentence of life imprisonment and other

prison terms, as well as fine imposed on them by the order dated 6.7.2013.

2. The incident which led to the charge against the appellants (hereafter referred to by their names Jaipal and Radhey Shyam) occurred on 5.9.2005. Crl.A.1111/2013 & 119/2014 Ex.PW-3/A was registered pursuant to DD No.27A (Ex.PW-3/D) and intimation received by PS Prashant Vihar at 08:45 PM, through a wireless operator that one Promila (deceased), a resident of 54, Madhav Kunj had been murdered. The statement recorded by the deceaseds son, Puneet Vasudeva (Ex.PW-1/A also marked as Ex.PW-22/A), elaborated the circumstances.

3. The initial statement of Puneet who deposed as PW-1 was that on the day of occurrence, after he returned with his mother in the evening, after work, he left her alone in the flat and went with his father to the Sai Baba Temple. Upon returning at 07:30 PM, despite repeated attempts, his mother did not let him in; he used the intercom from the main entrance of the society - again without success. Likewise, he could not contact her on the mobile phone. His statement also was that upon his returning towards the flat, he encountered Radhey Shyam (whom he identified in the Court). He reported that Radhey Shyam told him that he was with Jaipal, upon his enquiry. He also saw Jaipal descending bare footed from the stairs which led to his flat. He noticed Jaipals slippers which he had earlier seen in the morning. Upon reaching the flat, he found that it was open and that articles were strewn around. He could not find his mother and after repeatedly searching, he found her in a box couch in a pool of blood with a plastic rope tied around her neck. She was bleeding from the nose and mouth; with the help of his father (Shyam Sunder Vasudeva, PW-6 and one Shri B.R. Gambhir PW-4), he took his mother to Saroj Hospital in PW-4s car. He untied the rope from his mothers neck and threw it near the ground floor. The doctor declared his mother brought dead.

4. It is upon the statement of PW-1, the police carried out investigation. The crime team went to the scene of occurrence and inspected it around 09:30 PM on 5.9.2005. Later its report Ex.PW14/A was prepared. Next day, the plastic rope and several other articles were seized; the post mortem report dated 6.9.2005 put down the cause of death as asphyxia as a result of ante-mortem strangulation by ligature which was sufficient to cause death. The accused Jaipal was arrested on

9.7.2005 (through arrest memo Ex.PW-19/A); his disclosure statement on 7.9.2005 implicated Radhey Shyam who was arrested on 8.9.2005 - through arrest memo (Ex.PW-19/K). After seizing the articles and obtaining the report of the Forensic Science Laboratory (FSL), the accused were charged with the offences that they were ultimately convicted of. They pleaded not guilty and claimed trial.

5. During the trial, the prosecution relied upon testimonies of 22 witnesses - the most material of them being PW-1 Puneet Vasudeva, son of the deceased; PW-6 Shyam Sunder Vasudeva, husband of the deceased, PW-19 SI Daya Krishan and PW-22 Investigating Officer (IO). After considering all these depositions and the materials adduced, the Trial Court found the accused - appellants guilty as charged. The appellants' contentions 6. It was urged on behalf of the appellants by learned amicus curiae Ms. Nandita Rao and Mr. R.M. Tufail that the findings of the trial court are based on a complete mis-appreciation of evidence. It was submitted, firstly, that the evidence against Radhey Shyam was catchy and tenuous. On this aspect, learned counsel highlighted that there was contradiction between the two alleged eye witnesses who saw Jaipal and Radhey Shyam going down the stairs. Whereas PW-1 identified Radhey Shyam in Court, his father, the other eye witness PW-6 could not do so, and, in fact,denied that he was able to precisely recollect Radhey Shyams identity due to lapse of time. It was contended that such being the case, the only tenuous basis for Radhey Shyams conviction was the alleged recovery of articles. Learned counsel contended that in the initial statement made by PW-1, there was no reference to any missing article or even a description of stolen goods. The attempt of the prosecution to introduce the theory of such stolen goods like wrist watches etc.-. seized by memo Ex.PW-19/L was a clear afterthought. Counsel contended that the recovery of such common articles without any specific description before-hand, could not have led to an inference that Radhey Shyam was a party to the conspiracy which led to the murder of the deceased. In this regard, learned counsel also relied upon the fact that in this case the Test Identification Parade (TIP) proceedings of Radhey Shyam was sought to be conducted on 12.09.2005; he had positively alleged that by then, he had been photographed and his identity revealed to PW-1. In these circumstances, there was no identification, especially in the light of PW-6s omission to recognize the accused during the course of the trial.

7. Considerable emphasis was laid on the fact that articles described in a very general manner, without any precision, such as a watch, without specifying the model or brand, and also the subsequent alleged recovery appear to be the entire basis of Radhey Shyams conviction. Learned counsel submitted that where the trial is based upon circumstantial evidence, the evidence adduced has to be of the highest order so as to satisfy the test of proof and that unless each link is proved beyond reasonable doubt, and all the links that would form the whole chain are likewise proved beyond reasonable doubt, there can be no finding of guilt. Likewise, the inference drawn from the circumstances adduced before the Court, mustunerringly point to the guilt of the accused and rule out every hypothesis of his innocence. In this regard, learned counsel relied upon the decision of the Supreme Court Sharad Birdhi Chand Sarda v. State of Maharashtra, 1984 (4) SCC116 Dhanraj v. State of Haryana, 2014 (6) SCALE620and Munish Mubar v. State of Haryana, (2012) 10SCC464 Learned counsel also submitted that the disclosure statement of Jaipal, which sought to connect Radhey Shyam could not have been looked into at all. In this regard, it was submitted that other corroborative evidence as to the presence of RadheyShyam in the crime scene or near-by, had to be proved beyond reasonable doubt. The lack of evidence could not have led the trial court to infer that Radhey Shyam was the other person accompanying Jaipal and that he had conspired with the latter to murder the deceased.

8. It was argued on behalf of Jaipal that the absence of any chance print or even any external material, the mis-description of the rope, the manner of its recovery and the prosecutions attempt to link the recovery of another commonplace article, i.e., rubber chappal, to Jaipal casts suspicion or doubt about its fairness. PW-1 had deposed that a purple plastic rope was tied around his mothers neck. However, during the trial, a pink coloured plastic rope was produced; what more the expert could depose in this connection,whoeven refused to identify the article produced in the Court as the one examined by him.In these circumstances, it could not be said that Jaipal was responsible for the crime of strangulating the deceased with a plastic rope. Furthermore, argued counsel, the crime team failed to pickup any prints even though there was nothing to suggest that the immediate vicinity of the crime had been described in any manner. Considering that the body

was found inside a box couch, the chances of finding the prints of those guilty of the offence was extremely high. The lack of such finger prints pointed to the police concluding beforehand, that Jaipal was the perpetrator of the crime, and consequently seeking to pursue that line of investigation. It was contended that there was nothing to show that the rubber slippers/chappal recovered in the vicinity of the deceaseds flat belonged to Jaipal. There was nothing to indicate that he had made the entry into the flat either bare footed or with the chappal. No foot-prints were discernible or lifted. In these circumstances, the prosecution could, at best, prove that Jaipal was seen in the vicinity - at the bottom of the staircase bare footed around the time the deceased have been killed. This could at best be termed as suspicious but by no means amounted to proof of his having committed the murder. Learned counsel argued that no public witness was joined when the articles were recovered and seized. It was highlighted that the testimonies of police witnesses again casts doubt on the prosecutions story. Both counsel also argued that the testimony of PW-1, a blood relative of the deceased could not have been relied upon. Counsel also relied on the observations of the Trial Court itself to argue that the accused should not be victimized for the faulty and defective investigation of the police.

9. It was further submitted that the State was under an onus to establish the link between Jaipal and the crime. The lack of any finger or foot prints in the premises of the deceased placed an onus upon the prosecution to positively establish that Jaipal, and no one else, could have been the offender. His mere presence in the vicinity, under alleged suspicious circumstances could not result in assumption that he played any role in the crime. That he was noticed by witnesses near the deceased's house could at best result in suspicion; this could result in conviction only on proof beyond reasonable doubt that he (and the other accused), and no other person or persons, were involved in the crime alleged against them. It was submitted that the failure of the prosecution to find out from the deceased's neighbours whether Jaipal had visited their house or flats at around the time of the crime pointed to its presupposition that he was the culprit. The prosecution after having determined that Jaipal was the offender, submitted counsel, then went about picking up the so called rope the next day. The mis-description of the colour of the rope; the inability of Mr. Gambhir to support the prosecution case that the

deceased was taken to the hospital in his car, and; other serious deficiencies in the prosecution evidence pointed to loop holes in its case, which was erroneously ignored by the Court, to the grave prejudice of the accused.

10. On behalf of Radhey Shyam, it was argued that the prosecution was clueless as to who was the alleged second culprit. This accused was arrested much later, after the crime, on account of the alleged statement of the co-accused Jaipal. Such evidence was weak and had to be necessarily corroborated. The prosecution not only did not corroborate the shaky link sought to be established, of Radhey Shyam but, in fact, utterly failed to prove it during the trial. Highlighting that the identification of Radhey Shyam was not positive because the deceased's husband outrightly denied that he was the second individual seen by him, with Jaipal, counsel urged that the Trial Court seriously erred in not giving any weight to the discrepancy.

11. It was argued that the so-called identification of the stolen articles was not sufficient to link Radhey Shyam to the crime of murder;it could, at best, implicate him for the lesser crime of possession of stolen articles. The mere recovery of articles without establishing the accused's link to the crime, in the light of the contradiction in the evidence of his identification should have resulted in his acquittal. The Trial Court, argued learned counsel, fell into error in returning a finding of guilt.

12. Learned counsel also impeached the recovery of the articles and their TIP identification. It was submitted that the deceased's son did not mention any missing or stolen article in the first instance, but sought to improve on his original version through supplementary statements. It was submitted that even the narration on the missing articles was general and no specific mark or distinctiveness was attributed to the missing articles. Thus, in the absence of any description or details of the brand, etc., it was easy for the police to secure identification of some generic articles. These could not be said to have resulted in the prosecution establishing that Radhey Shyam was guilty of murder. Contentions of the prosecution 13. The prosecution argued that the testimonies of P.W.1 Sh. Puneet Vasudeva (son of the deceased), P.W. 5 Sh. Rajesh Saini (resident of the

Mahadev Kunj Society) and P.W. 6 Sh. Shyam Sunder Vaudeva (husband of the deceased), clearly proved that Jaipal Singh used to iron clothes in Mahadev Kunj Society where the deceased lived. The testimonies of all three witnesses (P.W.1, P.W. 5 and P.W.

6) corroborate each other on this point, and no contrary inferences are forthcoming from their cross-examinations. The next circumstance proved against Jaipal is that on the date of the incident, he visited the house of the deceased to collect clothes, and was later seen running down from the deceased's flat, on the staircase, in a perplexed condition. This was corroborated by P.W.1 and P.W.6 with again, no contrary inferences forthcoming from their cross-examinations. Another circumstance against Jaipal is that his blue coloured slippers/chappals were discovered- they were lying outside the deceaseds apartment. This fact was deposed by P.W1and P.W. 5 in their testimonies. Furthermore, the recoveries made by the police pursuant to the disclosure statement recorded under Section 161 of Cr.P.C., such as the (blood-stained) T-shirt and pants which the appellant Jaipal was wearing at the time of the incident, the gold chains from the house of the deceased (later correctly identified in the TIP of the property), testimonies of P.W. 19 S.I. Daya Kishan (witness to recovery of the gold chain) and P.W. 22 I.O. Ram Mehar (corroborating P.W. 19s testimony), with no contrary inferences from their respective cross-examination, add up to the chain of circumstances against Jaipal.

14. Great stress was laid by the prosecution on the fact that Jaipal Singhs outright refusal to offer any explanation, when the incriminating circumstances along with the prosecutions case against him, based upon such available evidence, was put to him under Section 313 Cr.P.C by the learned Trial Court, undermines the veracity of the defence set up by him, and taken together with the circumstances proved against him, itself forms an incriminating circumstance. If Jaipal were indeed innocent, he should have utilised the opportunity to set up a defence and speak against the evidence sought to be proved against him at this stage, when afforded an opportunity to do so by the trial Court. However, the mechanical nature of the one-line answers, i.e. several I do not know and It is incorrect made in response to sixty-seven questions put by the learned Trial Court under section

313 of the Cr.P.C., without offering any further explanation, only go on to depict that the appellant came with a prepared mind-set to not cooperate in the trial process. This itself must be seen as one of the circumstances in the chain of circumstantial evidence mentioned above, unerringly pointing to the guilt of the appellant as the only reasonable conclusion.

15. As far as Radhey Shyam is concerned, counsel argued that the prosecution was able to establish his identity as the second boy who accompanied Jaipal Singh. The inability of the deceased's husband to positively identify him did not detract from the identification by PW-1. Furthermore, this accused could not take refuge from the association with Jaipal Singh, especially due to his lack of any effective cross examination of witnesses as regards the recovery of stolen articles and their identification during trial. Counsel submitted that the recovery of articles, coupled with his identification clearly established his role as a party to the crime, as it proved common intention to commit the offences he was charged with and ultimately convicted of. Analysis and Conclusions 16. Now, as far as the accused Jaipal is concerned, the testimonies of PW-1, PW-5 and PW-6 reveal that he used to take clothes from residents of the colony where the deceased lived, and return them after ironing them. PW-1 deposed that on the day of the incident, clothes were given by his deceased mother, and also that, at the time he returned home with the deceased, Jaipal was in the colony. He also deposed that soon thereafter he left for the temple with his father, PW-6- the latter corroborates his version on all these. PW-1 further stated that when he returned with his father, and tried to get into the flat, his mother did not open the door. After a while, he went to the colony entrance and phoned from the intercom placed there; again there was no response. His father was at the bottom of the stairs. When heading back to his flat, from the society entrance, he saw a boy in a nervous condition at the last stair of the building in which his flat was located. He inquired form him; that boy told PW1that he was with the presswala in the society complex, and pointed towards accused Jaipal who was descending the stairs. He also deposed that upon inquiring from him as to whether he was coming from his house, Jaipal did not respond. PW1then went to the second floor of the duplex flat and found it open much to his surprise because the said door used to be closed. The witness correctly identified accused Jaipal and Radhey Shyam in Court. The prosecution

version further was that Jaipal, upon being arrested, made a disclosure statement; this led to recovery of some gold from his person and watches, which he led the police to.

17. The argument on behalf of Jaipal is that the two main witnesses were related to the deceased and as a consequence, untrustworthy; he also argues that the contradiction by PW-5 (who denied that his car was used) is serious and material as to doubt the entire version altogether. It is further submitted that the inability of the crime team to lift even a single finger print, despite evidence of the flat being ransacked and the deceased being found in a box bed- leads one to surmise reasonably that there was foul play during investigation and that the police went ahead against him with a preconceived notion of his culpability. Highlighting other inadequacies, which were termed fatal such as the discrepancy in the colour of the plastic rope, the place and time of its recovery, and the inability of the prosecution to pin pointedly prove that the chappals recovered were his, it was sought to be brought home that his involvement could not be established conclusively, to rule out his innocence.

18. The single most damning evidence against Jaipal is that he was identified by PW-1 and his father PW-6. Significantly, PW-1 stated that on the day of the incident, he saw Jaipal in the morning as well as the evening- on both occasions he was with his mother; she spoke to Jaipal. The witness also stated that Jaipal used to occasionally borrow money from his mother and was in the know regarding where things were generally kept in their house. If these are kept in mind- since there was no cross examination on these aspects and there is nothing improbable either about these facts- that Jaipal was seen by both PW-1 and PW-6 in the manner they depose is not merely a strong possibility; it is a certainty. The deposition of PW-1 and PW-6 that their efforts to get into the flat proved futile initially, prompting PW-1 to go to the society entrance, to contact his mother (who, he assumed was locked up in the flat) with the intercom, is consistent. Both also say that Jaipal came down the stairs that led to their flat, after PW-1 was returning from the main society entrance. The reporting of the incident coincides with the time PW-1 mentioned to have discovered the body of his mother and later reported it to the police; it is at 08-45 PM (PCR intimation Ex. PW-21/A). The FIR

was recorded immediately after the body was taken to the hospital; this is clear from PW-1/A, statement of PW-1, in which he mentions whatever he deposed during the trial.

19. The recovery of articles at the behest of Jaipal by itself would not be of much importance. The prosecutions evidence in this regard, upon the deposition of PW-1 (who, in his initial statement did not report any loss of property, but later recorded a supplementary statement) again is of not much consequence, because the description of the articles stolen or lost is at best generic; the articles themselves are commonly described. Therefore, the TIP of the articles cannot be given too much importance. Likewise, the argument of Jaipal that the investigation was tardy inasmuch, as, the finger prints were not found so as to implicate him, or that the chappals were not shown to be his, again is of not much significance. The argument that the inconsistency in the colour of the plastic rope and the deposition of PW-15, the forensic expert, who denied having seen the exhibit produced in court, no doubt points to sloppy investigation. Therefore, the Court would, for the moment, keep aside these materials from consideration.

20. The crucial issue is how the Court is to view the evidence with respect to Jaipals presence near the flat of the deceased, almost contemporaneously with the time of the incident. Both PW-1 and PW-6 are unanimous about this; there is no cross examination about these facts. More crucially, these witnesses also stated that when attempts were made to get into the flat, it was locked from inside. Whereas PW-1 went to talk to his mother from the intercom at the entrance of the complex, PW-6 remained at the bottom of the stairwell leading to their flat. He saw Jaipal and another boy coming down the stairs. PW-1 also saw Jaipal; obviously he saw him from somewhere farther, as he was returning from the society entrance. When he went up, the door opened; he was surprised. He also deposed to inquiring from Jaipal whether he was returning from his (the witnesses house); Jaipal was silent. These facts taken together do not merely point to strong suspicion, but even to certainty about the involvement of Jaipal in the incident. Here, Section 6 of the Evidence Act, which embodies the principle of res gestae, is applicable. Though the actual incident, i.e. the murder and the actual entry into and exit from PW-1s flat, was not witnessed by either PW-1 or his father, the

immediate aftermath of the incident was witnessed by both of them, i.e. Jaipals descent from the stairs and going past PW-1. This later fact was part of the previous transaction. Section 6 makes such facts, which are so interwoven with the crime itself, whether they occurred at the same time and place or at different times and places, relevant in a criminal trial. The Supreme Court described this in the following terms, in Gentela Vijayavardhan Rao & Anr v. State Of Andhra Pradesh1996 (6) SCC241 The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or atleast immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of res gestae.

Since the fact- i.e. Jaipals presence was clearly established, near the vicinity of the flat- even to the extent that PW-6 saw him descending the stairs that led to the flat- it became relevant, being intrinsically connected with the event itself. Under these circumstances, the accused had to satisfy the court with a reasonable explanation, because what brought him there was known only to him. This obligation is cast on one who knows facts peculiar to the circumstances he or she is placed in, by virtue of Section 106, Evidence Act, which reads as follows:

106. Burden of proving fact especially within knowledge.When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustrations (a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him. (b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

21. The onus cast on an individual under Section 106, was explained by the Supreme Court in State of Rajasthan v. Kashi Ram 2006(12) SCC254in the following words:

23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain.

As noticed by the Trial Court, Jaipal had no explanation at all; he merely rested content with pointing at tardy investigation by the police. Had he visited some other flat, he could have said so in his statement under Section 313 Cr. PC and sought the Courts intervention in securing corroboration. He did not however, give any explanation. The Trial Court, relying on Section 114 Illustration (a) of Evidence Act, therefore was of the opinion that the prosecution had proved that Jaipal used to iron clothes in Mahadev Kunj Society, where the deceased lived, and that on the day of the incident, he visited the deceaseds flat to collect clothes for ironing, and in the evening at about 7 :30 PM was seen coming from the stair case of the deceaseds flat. Furthermore, the prosecution also proved that his name was reported at the earliest point of time. This Court concludes that these findings, coupled with the above discussion, leave no room for any doubt that Jaipal was culpable in the murder of the deceased.

22. Radhey Shyams culpability was sought to be established by the prosecution,by reliance on the disclosure statement of Jaipal, which led to his arrest, the recovery of articles from his house, their identification during trial by PW-1 and his evidence in Court identifying him as the second individual whom he saw on the date of the incident. Radhey Shyam on the other hand, submitted that he was not present at the site, or with Jaipal; he relied on PW-6s inability to identify him during the trial. Furthermore, the argument on his behalf was that if the evidence as to identification is discarded, there is nothing to implicate him, because there cannot be conviction for murder based only on recovery of allegedly stolen articles at the behest of an accused, whose role has not been clearly established.

23. In the first reporting of the crime, PW-1 had stated that he was not aware of the identity of the individual accompanying Jaipal. Radhey Shyam was arrested three days after the incident, and a day after Jaipal was arrested, i.e. on 8-09-2005. After the latters arrest, an attempt was made to have test identification parade on 10-9-2005; this could however not be carried out. When ultimately, Radhey Shyam was sought to be subjected to TIP, he refused to participate, alleging that his identity had been revealed to PW-1. It is a matter of record that PW-1 was able to identify this accused during the trial. However, when PW-6 was asked whether he could identify the other boy who was with Jaipal, he answered in the affirmative; when asked whether the individual was in court, he denied the suggestion. His repeated denial that the other boy was present in Court, despite the suggestion (after the prosecution sought permission of the Court to cross examine him on this aspect) that Radhey Shyam was the other boy, was emphasized further by him when he positively denied that he could not identify the other boy, due to lapse of time and change in body structure of the accused. This variance, in the opinion of the Court, assumes great significance, because PW-1 and PW-6 contradicted each other as to the identity of the other boy who was with Jaipal. The only other evidence to connect Radhey Shyam with the crime was the recovery of watches from his premises, upon his disclosure statement. Now, in this case, Ex. PW-19/L, the recovery memo in respect of seizure of four watches, including a Titan watch and Swarna HMT Quartz watch, was pursuant to the disclosure statement of Radhey Shyam. They were also identified by PW-1 in the

TIP proceedings (in respect of the articles). However, these cannot be conclusive with regard to his culpability for murder, particularly because of the contradiction as regards his identification by the two witnesses. This is clear from a long line of decisions of the Supreme Court, on the issue. In Sanwat Khan v State of Rajasthan AIR 1956 SC54 it was held that:

..In our judgment no hard and fast rule can be laid down as to what inference should be drawn from a certain circumstance. Where, however, the only evidence against an accused person is the recovery of stolen property and although the circumstances may indicate that the theft and the murder must have been committed at the same time, it is not safe to draw the inference that the person in possession of the stolen property was the murderer. Suspicion cannot take the place of proof.

Likewise in Mohd. Aman v State of Rajasthan AIR 1997 SC2960 the Supreme Court held that: "This apart, some of the reasons which weighed with us for not accepting the evidence regarding the find of finger prints, namely that there is a missing link between the identity of the articles seized and identity of the articles examined by the Finger Print Bureau and non-production of the glass tumbler during trial also persuade us not to accept the evidence adduced in proof of the above circumstance. So far as the foot prints are concerned, another reason for which we feel it unsafe to accept the evidence led in this regard is that the sample foot prints were not taken before a Magistrate. This apart the science of identification of foot prints is not a fully developed science and therefore if in a given case - unlike the present one - evidence relating to the same is found satisfactory it may be used only to reinforce the conclusions as to the identity of a culprit already arrived at on the basis of other evidence. That brings us to the evidence relating to the recovery of the four silver rings (Ext. P.5 to P.8) belonging to the wife of the deceased pursuant to the statement made by Mohd. Yusuf. To persuade the Court to hold that the above circumstance stood established the first and the foremost fact which the prosecution was required to prove was that those articles belonged to the wife of the deceased and that they were stolen at the time of the commission of the murder. Having gone through the evidence on record we are constrained to say that the prosecution has not been able to establish those

two facts and, therefore, we need not go into the question whether the evidence led by the prosecution relating to their recovery from Mohd. Yusuf is reliable or not. The First Information Report, that was lodged by Sabir Hussain (P.W. 10), did not give any list of articles that were stolen. He however claimed to have later on given a written statement containing such a list to the Investigating Officer and this statement was exhibited. In our considered view the trial Court was not justified in entertaining the statement as an exhibit because it was hit by Section 162 Cr.P.C. Be that as it may, P.W. 10 and Bano (P.W. 2), another relation of the deceased, testified that within a day or two of the murder they could ascertain what articles were missing from the house. The evidence of these two witnesses on this aspect of the matter cannot be safely relied upon for they admitted that they did not have access to the house till May 1, 1983 as it was in custody of the police and therefore they could not have occasion to know what articles were stolen. Even if we proceed on the assumption that the seized articles belonged to the wife of the deceased the prosecution has led no evidence, either direct or circumstantial, to prove that they were stolen at or about the time when the murder took place. In other words, unless the prosecution conclusively establishes that the articles recovered were stolen when the murder was committed, and not on an earlier occasion, there would be a missing link in the chain so far as the specific accusation levelled against the accused is concerned. Once it is found that the evidence relating to find of foot prints and finger prints of the appellant and the recovery of the four silver rings cannot be safely relied upon, the proof of the other two circumstance, namely that a blood stained knife was recovered after fifteen days of the incident pursuant to the statement of the accused and that few simple injuries were found on his person on April 20, 1983 when he was arrested would only raise a strong suspicion against him and not a conclusive inference of his guilt. The conviction of Mohd. Yusuf therefore cannot also be maintained.

10. As against Babu Khan the prosecution principally relied upon the recovery of a pair of anklets of the deceased's wife from his possession and his (Babu Khan's) blood stained trousers from the house of one Asgar pursuant to his statement. For the reasons for which we were unable to accept the evidence relating to recovery of alleged stolen articles from Mohd. Yusuf the circumstance relating to recovery of the anklets has to be left out of consideration. As regard the trousers we find

that it was recovered not from the house of the appellant but from the house of one Asgar (P.W.

9) who turned hostile and did not support the prosecution case. This apart, such a recovery after 10 days of the incident is of no moment. The only other circumstance which the prosecution alleged against Babu Khan is that at the time of his arrest on April 20, 1983, he was found to have some injuries on his person. On perusal of the injury report we find that the injuries were simple in nature and the doctor could not give any definite opinion from which it could be said that those injuries were caused at or about the time when the murder took place. In any view of the matter the above circumstance does not by itself establish his guilt."

This rule of caution was again followed in State of U.P v. Sukhbasi and Ors., AIR 1985 SC1224 Yet again, in State Of Rajasthan v. Talevar & Anr (2011) 11 SCC666the Supreme Court reiterated the law in these words: "the law on this issue can be summarized to the effect that where only evidence against the accused is recovery of stolen properties, then although the circumstances may indicate that the theft and murder might have been committed at the same time, it is not safe to draw an inference that the person in possession of the stolen property had committed the murder. It also depends on the nature of the property so recovered, whether it was likely to pass readily from hand to hand. Suspicion should not take the place of proof."

Earabhadrappa v State of Karnataka AIR 1983 SC446 is a decision where the Court took note of the fact that the accused had no explanation at all as to the possession of the stolen articles, which were recovered after a year. The special feature which was highlighted was that the ornaments were of a distinctive character; the Court then proceeded to draw the presumption that these were stolen at the time of murder, deducing that If the stolen articles were such as were not likely to pass readily from hand to hand, the period of one year that elapsed cannot he said to be too long particularly when the Appellant had been absconding during that period. There was no lapse of time between the date of his arrest and the recovery of the stolen property.

24. In the present case, the nature of the articles was such that they were fairly commonplace; they were not distinct. Their recovery could not mean that a presumption of guilt of the accused Radhey Shyam, in the absence of any other material evidence of linkage with the crime, could be recorded. Therefore, his conviction for murder was not justified; the overwhelming circumstance ruling out such conviction would be the failure of both witnesses to unanimously identify him; PW-6 denied his involvement altogether, even as PW-1 equally emphatically did, by identifying him. In these circumstances, it would be unsafe to convict Radhey Shyam for the offence under Section 302. As a result, his conviction under Sections 302/392 is hereby set aside. His conviction and sentence under Section 411/34 IPC, however is confirmed. In case he has undergone the sentence awarded (one years rigorous imprisonment) he shall be set at liberty, unless wanted in any other case.

25. Cr. A. 119/2014 is, for the above reasons, dismissed. Cr. A. 1111/2013 is allowed, in the above terms. S. RAVINDRA BHAT (JUDGE) VIPIN SANGHI (JUDGE) DECEMBER22 2014