

Shahbuddin Vs. the State (Nct of Delhi)

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Court : Delhi

Decided On : Dec-21-2001

Reported in : 95(2002)DLT562; 2002(61)DRJ715

Judge : Usha Mehra and; C.K. Mahajan, JJ.

Acts : Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : Crl. A. No. 288 of 1997

Appellant : Shahbuddin

Respondent : The State (Nct of Delhi)

Advocate for Def. : Ravinder Chadha, Adv.

Advocate for Pet/Ap. : Rajesh Mahajan, Adv

Disposition : Appeal allowed

Judgement :

Usha Mehra, J.

1. The order of conviction an sentence have been assailed primarily on three counts; firstly, the recovery of weapon doubtful; secondly the inference drawn by the learned Additional Sessions Judge that the appellant absconded after committing crime was without foundation, nor motive proved for the alleged crime;

and finally prosecution failed to establish that the hair recovered from the fist (muthi) of the deceased was that of the appellant.

2. Before we appreciate the challenge raised by the appellant, we may glance through the relevant facts. Deceased Bano was the sister-in-law (Bhabhi) of the appellant. She was married to his brother Shabir. She had been living with her parents after her husband was involved in criminal case and sentenced. She had a son named Jahid from Shabir. Few months prior to this accident appellant brought her to Delhi from her parents house. She started residing in the house of Hasmat (PW-7) where appellant was also residing. On the fateful day i.e. 20th April, 1995 she was found murdered in the basement of that house of Hasmat. Her throat had been cut. Hasmat (PW-7) on getting the information that Bano had been murdered reported the matter to the police. Police seized broken bangles, chappal and bunch of black hair from her right hand fist (muthi). On the basis of the rukka recorded by Hasmat (PW-7) case was registered.

3. Hasmat (PW-7) informed the police that Bano had developed illicit relations with accused Shahbuddin as a result of which she became pregnant. When Shahbuddin was forced to marry her, he in order to get rid murdered her. Her throat was cut with an iron scrapper. Hasmat (PW-7) was running a shop of lath machine where the accused was also working. The iron scrapers are used in the lath machine, therefore, it was prosecution's case that accused Shahbuddin had access to iron scrapper with which he silenced Ms. Bano by cutting her throat. Further the said iron scrapper was recovered from the basement where murder took place. It was recovered at the pointing out of the accused. The hair recovered from the fist (muthi) of the deceased on examination by the CFSL were found to be that of the accused. He was, therefore, challenged under Section 302 IPC.

4. That the case when reached the court of Sessions, the author of the FIR e.e. Hasmat (PW-7) and his wife Anisa (PW-9) resiled from their earlier statements. They were declared hostile. They did not support the case of the prosecution. So much so Hasmat (PW-7) even resiled from the facts recorded in Rukka which was duly signed by him. Learned Additional Sessions Judge relying on circumstantial evidence convicted and sentenced the accused with rigorous imprisonment for life

and a fine of Rs. 1000/- and in default of payment of fine further undergo rigorous imprisonment for one month.

RECOVERY OF WEAPON OF OFFENCE - WHETHER DOUBTFUL

5. This circumstance in itself may not create any dent in the case of the prosecution but the cumulative effect of all the circumstances relied by the prosecution does create doubt. Recovery of blood stained scrapper alleged to be at the instance of the appellant, Mr. Rajesh Mahajan contended has not been proved. Reason for this submission being that the two independent witnesses, who alleged to have witnessed the recovery did not support the case of the prosecution. According to him learned Additional Sessions Judge fell in error in presuming that since recovery was testified by the police officials, therefore, despite independent witnesses it stood proved by the testimony of police witnesses. Mr. Rajesh Mahajan therefore contended that law in this respect is well settled. Once an independent witness cited by the prosecution to prove an incident does not support the case of the prosecution then that incident cannot be relied upon nor stood proved by the testimony of police officials. In such circumstances no credibility can be attached to the alleged recovery of weapon of offence at the instance of the accused. The evidence of those two independent witnesses was very material, in their regard he placed reliance on the observation of Supreme Court in the case of *Kashmira Singh v. The State of Madhya Pradesh*. : 1952 CriLJ839 wherein their Lordships observed:-

'The tendency to include the innocent with the guilty is peculiarly prevalent in India and it is very difficult for the Court to guard against the danger. The only real safeguard against the risk of condemning the innocent with the guilty lies in insisting on independent evidence which in some measure implicates such accused'.

6. He further placed reliance on the observation of the Supreme Court in the case of *Kehar Singh and Ors. v. The State (Delhi Admn.)*. : 1989 CriLJ1 wherein the Apex Court observed that police always get an independent witness of the locality so that the evidence may lend support to what is alleged by the police officers. Independent witnesses are associated as a matter of caution and fairness to give

credence to the story of the prosecution.

7. Mr. Ravinder Chadha counsel for the State countering Mr. Mahajan's contention placed reliance on the decision of the Supreme Court in the case of State Govt. of NCT of Delhi v. Sunil and Anr., reported in : 2001 CriLJ504 wherein the Apex Court observed that the evidence of the police officers, if otherwise trustworthy, may be acted upon. Simply because there was no independent witness, is no ground to discard the testimony of the police officers whose testimony otherwise is trustworthy.

8. Mr. Rajesh Mahajan contended that the dictum of the Apex Court in the case of Sunil and another (Supra) is not applicable to the facts of this case because in that case police had not associated any independent witnesses and, therefore, the Apex Court in the facts and circumstances of that case held that police officers, if otherwise are trustworthy, their testimony should be believed. But in the present case two independent witnesses were associated by the police. They when appeared in the court have not supported the case of the prosecution. They categorically stated that the blood stained iron scrapper was never recovered in their presence nor appellant pointed towards any iron scrapper. In such a situation when independent witnesses who were associated by the police to give credibility to the recovery do not support the version of the prosecution then said recovery certainly cannot be relied upon. Though at the first blush this argument of Mr. Rajesh Mahajan appears to be convincing but if we go deep into the matter we find it has no merits. If we accept this proposition then it would be a mockery of legal jurisprudence. If that be so then every accused would try his best to win over such witnesses thereby leaving the prosecution high and dry. It is in this background that the Apex Court in the case of Sunil and another (supra) held that if the evidence of the police officer is trustworthy or can be relied upon, in that case the court need not insist for the independent witnesses or the support of the prosecution version by the testimony of independent witnesses. In the facts of this case recovery of iron scrapper i.e. weapon of offence cannot be doubted simply because independent witnesses did not support the case of the prosecution. Argument of Mr. Mahajan on this count deserves rejection. Mr. Rajesh Mahajan then contended that if recovery cannot be doubtful on this count, it still cannot be

relied because weapon of offence in question was sealed with the seal of 'HK'. The said seal admittedly neither belonged to the investigating officer nor to any officer of the police party. No evidence was led by the prosecution to prove as to how the seal of 'HK' came to be used nor the said seal 'HK' after use was handed over to any independent person. This is a clear pointer to the fact that no recovery was made at the spot. Had the iron scrapper been recovered from the spot then it would have been sealed with the seal of the I.O. like other parcels were sealed with his seal. It appears the weapon was produced from the police station and was sealed with the seal of 'HK' at the police station. From these facts it is apparent that the recovery was neither made from the basement of the house of Hasmat (PW-7) nor at the instance of the appellant. It was fabricated and planted by the police in order to put noose around the neck of the accused. At the police station police was not having the seal of the investigating officer as it must have been handed over to an independent witnesses after use at the spot. Hence police was forced to use the seal of another police officer at the police station which happened to be with the initial of 'HK'. The use of the seal 'HK' lends support to the version of the accused that no recovery of alleged weapon of offence was made at his instance. Moreover finger prints were also not lifted from the alleged weapon of offence. The alleged recovery of weapon of offence can't be attributed to the accused. To support his contention Mr. Rajesh Mahajan drew our attention to the fact that prosecution withheld the report of the crime team. Had it been produced it would have proved that no weapon was recovered from the spot at the pointing out of the accused. thereforee he contended that this Court should draw adverse inference against the prosecution. Finally he contended that the alleged weapon of offence was wrapped in a polythene. It was hidden underneath the earth near the dead body. Had iron scraper been used by the appellant, he could not have wrapped it in a polythene and thus made available to prosecution evidence duly preserved and having blood stains. If he had hidden the weapon he would have wiped out the blood stains and thrown it far away. If the weapon had been used by the accused it would have got his finger prints on the same. But that is not the case. The cumulative effect of the circumstances as enumerated above does cast doubt of the recovery of the weapon of the offence at the instance of the appellant. No Explanationn has been rendered by the prosecution as to how the seal of 'HK'

came to be used when person with that initial was not member of the police party. From the record it is apparent that on all other documents and parcels prepared at the spot seal of investigating officer Rajender Prasad i.e. 'R.P.Y.' was used. It was only on sample of hari and recovery of weapon of offence that seal of 'HK' was used. Why only on these two articles seal of 'HK' was used whereas on all other articles seized and converted into pullandas at the spot the seal of the IO i.e. 'R.P.Y.' was used. This support the argument of Mr. Mahajan that the recovery of weapon might have been planted. It was not beyond doubt. Once it is found that there was doubt then the benefit of the same must go to the accused.

ABSCONDENCE

9. Turning to the question of abscondence of the appellant from the spot, there is no evidence on record to substantiate the same. The prosecution witnesses in no uncertain words testified that the appellant was not at the spot when the inquest proceedings took place. For example Allah Mehar (PW-2), father of the deceased stated that he reached Delhi after being informed about the murder of his daughter. He reached Delhi at night and straight away went to the house of Hasmat (PW-7). At that time he saw many persons present except the accused. Similarly Jalaluddin Saifi (PW-21), he did not see the accused there. Similar is the testimony of mother of the deceased (PW-1). Moreover, investigating officer in the inquest proceedings nowhere indicated the presence of the appellant at the spot at any time. Omission to make mention of the appellant in the first document i.e. the rukka speaks volume. This circumstance also lend support to the version of the accused that his name was subsequently added. He never gave a slip nor absconded. he in fact was not available at the spot when the police arrived. Moreover, independent witnesses namely Maqbool Ahmed (PW-6) and Vijay Pal (PW-5) have not supported the case of the prosecution in this regard. They denied that in their presence accused was apprehended or arrested. In fact prosecution unfolded its story by saying that the accused was found sitting near the gate of Kabristan at Mustfabad at the time of his arrest. This circumstance refutes the case of the prosecution that accused absconded. There is an unchallenged deposition of Hasmat (PW-7) to the effect that at the time he received this information the appellant was not present in the factory. he had already gone to

the factory of one Lala Ji. This statement of Hasmat (PW-7) remained unchallenged nor it was subjected to any cross-examination. therefore, from the rebutted testimony of Hasmat (PW-7) it can safely be concluded that the appellant was not present at the spot when police arrived nor absconded thereafter. Hence, the theory of abscondence as propounded by prosecution, in view of the overwhelming, falls to the ground.

MOTIVE

10. It is well settled principle of law that in a murder case based on circumstantial evidence motive plays an important part. It is a fact on record that nobody saw the accused murdering Smt. Bano. The prosecution has relied only on the circumstantial evidence. therefore, we have to analyses as to what could be the motive of the appellant in murdering his sister-in-law Smt. bano. She was the wife of his brother. No doubt, prosecution in order to prove motive relied on the statement of Hasmat (PW-7) given to police i.e. the Rukka as well as the statement of his wife Anisa (PW-9) made to the police. Prosecution's case was that the deceased brought Bano from her parent's house to Delhi about 4 or 4-1/2 months prior to this incident. While she was staying at Delhi int he house of Hasmat (PW-7) accused developed illicit relations with her and got her pregnant. In order to avoid embarrassment, Hasmat (PW-7) and his wife Anisa (PW-9) put pressure on the accused to get married to Bano. But accused was not interested in marrying Bano hence got rid of her by murdering her. This story of the prosecution unfortunately remained uncorroborated. The star witnesses of the prosecution, namely Hasmat (Pw-7) and Anisa (PW-9) have not supported the case of the prosecution. So much so Smt. Bismillah (PW-1) mother and Allah Mehar (PW-2) admitted he had no personal knowledge about Bano's pregnancy. When subjected to cross-examination he admitted that he was not told by anyone about deceased having illicit relation with the accused or of pregnancy. Similarly on this aspect of the case statement of PW-1 Smt. Bismillah also cannot be relied upon. She materially contradicted herself with regard to deceased being brought to Delhi by the accused. In her statement to police she stated that accused took the deceased from her parental house about 2-1/2 months prior to this incident. But in court she improved her statement when she changed her earlier version and said

that deceased was taken away by the accused about 4-1/2 months prior to the incident. The reason for this improvement apparently was to support the case of the prosecution. She realised that medical evidence would not prove that the deceased got pregnant from accused if deceased was brought to Delhi by him 2 or 2-1/2 months prior to the incident. From medical evidence it is apparent that deceased was four months pregnant prior to this incident. If PW-1 Bismillah's statement given to police was to be believed then motive could not be established. Then how the accused could be responsible for her four months old pregnancy. It was to tighten rope around the neck of the accused that PW-1 not only improved here earlier statement but changed it to suit the case of the prosecution. her statement thus does not prove motive for the murder. There is in fact no evidence produced by the prosecution to substantiate that accused parented the deceased and that was the motive to murder Bano.

RECOVERY OF HAIR

11. Now, coming to the question of recovery of bunch of hairs from the muthi (fist) of the deceased, Mr. Rajesh Mahajan contended that the same is doubtful for two reasons; firstly no photograph was taken of the deceased showing bunch of hairs in her fist. Five photographs (Ex. PW16/1-5) had been taken at the spot by the photographer at the pointing of the I.O. showing position of the deceased from different angles. But in none of these photographs hand of the deceased having bunch of hairs have been shown. This according to appellant is a strong circumstance to draw inference that there was no hairs in the right hand of the deceased. Had bunch of hair been in her muthi (fist) I.O. would have ensured that photographs of the same is taken. Instead right arm and hand have been shown under her hip so that nothing could be seen. So far as seizure memo Ex.PW-7/B allegedly having deceased's articles, it is contended that this was not prepared at the spot. It appears to have been prepared at the police station. To strengthen his arguments Mr. Mahajan referred to the statement of Hasmat (PW-7). He denied having signed seizure memo at the spot. Even though he was witness to the seizure memo yet he stated that it was got signed from him at the police station. Similarly Jalaluddin Saifi (PW-21) denied having witnessed the alleged recovery of article from the dead-body. Mr. Rajesh Mahajan contended

that none of the prosecution witness corroborated recovery of hairs from the fist (Muthi) of the deceased. There is no Explanation rendered by the prosecution as to why photographs of the right hand fist clutching hairs was not taken. The I.O. also could not furnish any Explanation for the same. We agree with the submission of Mr. Mahajan that duty was caused on the Investigating Officer to take photographs from all angles including of the right hand having hair in her fist. But not a single photograph in that position was taken. Though Mr. Mahajan very ably tried to persuade us to draw adverse inference but for the reasons to be stated, we are unable to agree with him. Admittedly no photograph of the right hand fist (Muthi) having hair was taken, but for the negligence of the investigating officer case of the prosecution can't be rejected if other evidence is available on record. If other evidence can prove the case of the prosecution, the accused can be acquitted. Moreover this argument of Mr. Mahajan can be countered with the seizure memo Ex.PW-7/B duly signed by Hasmat (PW-7). His assertion that this document Ex.PW-7/B was got signed from him at the Police Station stood refuted by his own testimony when he admitted that articles like Bangles, Chappal etc. were seized at the spot and he signed the Seizure Memo at the spot. In fact Ex.PW7/B is the seizure memo in which articles recovered from the person of the deceased namely Bangles, Chappals, hair etc. were written. This Memo was signed by Hasmat (PW-7). Ex.PW-7/B at S.No.1 depicts recovery of Hawaii Chappal at S.No.2, recovery of black hairs from right hand, at S.No.3 blood stained earth, S.No.4 control earth and at S.No.5 broken bangles. This clearly proves that hair were recovered from the right hand Muthi of the deceased. These were seized at the spot. therefore, the mere fact that photographs of right hand fist (muthi) was not taken by itself will not disprove the case of the prosecution.

12. Mr. Rajesh Mahajan then contended that Ex.PW-13/D i.e. personal search memo and Ex.PW-7/B i.e. seizure memo had not been prepared at the spot. The language used in both the exhibits i.e. Ex.PW13/D and Ex.PW-7/B is quite different. Ex.PW-7/B is in Hindi whereas Ex.PW-13/D is in English. It is unbelievable that a person who prepares two documents at the same time would use two different languages in preparation of the same. This shows that seizure Memo Ex.PW-7/B was in fact prepared later on at the Police Station after due

deliberation. To strengthen his arguments Mr. Mahajan referred to death report Ex.PW-4/A and contended that the recovery of the bunch of hair in the right hand fist of the deceased was not mentioned therein. This create doubt about the recovery of hair from the right hand fist (muthi) of the deceased. We find no force in this argument for the obvious reasons that number of documents prepared at the spot were executed both in Hindi as well as in English. Document Ex.PW-7/B admittedly is in Hindi but like Ex.PW-7/B there are other documents like Ex.PW-7/A, PW-13/J and Ex.PW-13/K which were prepared at the spot and are also in Hindi. therefore, ti cannot be presumed that those documents prepared in Hindi were prepared at the Police Station or vice versa. This by itself, to our mind, does not create doubt in the story of the prosecution. As regards non-mentioning of the hairs int he right hand fist of the deceased in Ex.PW-4/A in the last column of the said report description of each article found on or near the body of the deceased has been mentioned. In that column it has been mentioned that five articles were recovered from the spot namely (i) blood stained earth, (ii) control earth, (iii) broken glass bangles, (iv) black hair in her right hand and (v) blue colour hawai chappal. So it cannot be said that mention of hair was not there in the death report Ex PW-4/A.

13. So far as the recovery of hair from the hand of the deceased is concerned that stood proved from the seizure memo Ex.PW-7/B as well as from the death report Ex.PW-4/A. But the question for determination is how the prosecution linked the recovery of the hair from the right hand fist of the deceased with that of the accused. The question, therefore, requires consideration. It is to be ascertained whether the sample of hair of the accused for purpose of matching with the hairs recovered from the fist of the deceased any precaution were taken. We are in agreement with the contention of Mr. Mahajan that in order to dispel any suspicion as to the benefited of taking the sample or eliminate the possibility of fabrication of evidence, it is in the first instance eminently desirable that the sample hair of the accused ought to have been taken before or under the orders of a Magistrate. It has been so held by Supreme Court in the case of Mohid. Aman and Anr. v. State of Rajasthan : 1997 CriLJ3567 . Sample of hairs having not been taken in the presence of the Magistrate creates doubt, particularly when two independent witnesses on whom the prosecution was relying have not supported the case of

the prosecution, rather independent witnesses categorically stated that no sample hair of the accused was taken in their presence. So much so SI Viresh Kumar (PW-20) is completely silent with regard to the taking of sample hair of the accused in his presence.

14. In this view of the matter it can safely be concluded that neither the independent witnesses nor even the police witness supported the case of the prosecution with regard to the taking of sample hair of the accused. It becomes doubtful whether the sample hair belonged to the accused. The inference gets fortified further from the use of the seal of 'HK'. We have already expressed ourselves about the use of seal with initial 'HK' and concluded that this seal was used at the police station as it did not belong to the IO of this case. The inference which can be drawn is that some hairs of someone were taken by the police and sealed the same at Police Station with seal of 'HK'. Nothing has been placed on record to connect the alleged sample hair with that of the accused. In these circumstances, no sanctity can be attached to such a seizure or of sealing of the sample hair. In the absence of prosecution having proved that the sample hair belonged to the accused, the question of matching the same with those hairs recovered from the right hand fist of the deceased did not arise.

15. Mr. Ravinder Chadha's contention that the appellant in his statement under Section 313 Cr.P.C. admitted of taking his sample hair, to our mind, this contention has no merits. Prosecution cannot prove its case on the basis of the statement recorded under Section 313 Cr.P.C. nor can fill up the gap left by it. The prosecution has to stand on its own legs. It cannot draw strength from the statement of the accused. Moreover, we cannot lose sight of a very material fact that the appellant herein while cross-examining prosecution witnesses in no uncertain words had challenged the factum that sample hairs belonged to him. He suggested that from him no sample hairs were taken. Even to the Investigating Officer he suggested so. This shows he was denying the taking of his sample hair by the police. However, on 27.1.1997 when he was without the assistance of any counsel, the Court of his own appointed an amicus Curiae for that very day in order to record his statement under Section 313 Cr.P.C. That due to counsel's folly the defense set up by the accused and as put up to prosecution witnesses was

completely ignored when his statement under Section 313 Cr.P.C. was recorded. The variation appeared in the stand taken by the accused because of being deprived of a competent counsel. In such situation, we can say that appellant's right of effective defense was deprived. To support this conclusion reference can be made to the decision of Supreme Court in the case of Kishore Chand v. State of Himachal Pradesh, 1991 SCC (Cri) 172 wherein the Apex Court observed;

'that the right to defense includes the right to effective and meaningful defense at the trial. The poor accused cannot defend effectively and adequately. Assigning an experience defense counsel to an indigent accused is a facet of fair procedure'.

16. It was further observed that :-

'Though Article 39A of the Constitution provides fundamental right to equal justice and free legal aid and though the State provides amices curiae to defend indigent accused, he would be meted out with unequal defense if the youngster from the Bar who has either a little experience or no experience is assigned to defend him'.

17. Relying on the above observation, we can say that in his statement under Section 313 Cr.P.C whatever was stated the accused cannot be held responsible. He was without effective legal assistance. The amices Curiae appointed for him for that day in fact destroyed and pre juiced his defense as set up by him. We are of the view that sample hair ought to have been taken in the presence of a Magistrate. Having not done so and independent witnesses not supporting prosecution case of taking sample hairs of the accused, this circumstance cannot be used against the accuse. There appears to be something fishy, otherwise why the alleged sample hair was not sealed with the seal of the investigating officer? Why the sample hair was not taken in the presence of the Magistrate or his representative? Why SI Viresh Kumar (PW-20) has not supported the case of the prosecution to the extent that the sample of hair were that of the accused. Moreover, the alleged sample hair were not sent to the CFSL for almost 32 days. For this delay there is no Explanationn. The cumulative effect of the above is that prosecution failed to connect the alleged sample hair with that of the accused.

18. Now turning to the opinion expressed by the CFSL regarding matching of alleged sample hair with that of the hairs recovered from the right hand fist of the deceased, the report does not conclusively prove that those hairs were of the same origin. The CFSL report is Ex.PW-13/M reads as under:-

'The hair in exhibit 1 and 4 were found to be human in origin. Hair of exhibit 1 were found to be similar with the hair of exhibit 4 in most of their morphological and microscopical characteristics'.

19. This report of the CFSL, to our mind, is not conclusive. According to this report hair exhibit 1 was similar with that of exhibit 4. It does not say the hair of Ex.1 and Ex.4 were identical. The morphological and microscopical characteristic test is not a sure test for arriving at a conclusion that two hairs belong to one and the same person. To support our view, we are placing reliance on the decision of Kerala High Court in the case of George Chariyan and Ors. v. State of Kerala 1989 (3) Crimes 238. In that case the court observed that the hair analysis has not yet developed into a perfect science. This fact is accepted by all major authors of Medical Jurisprudence. Similar view was expressed in the case of Neeraj v. State of M.P. where in similar circumstances CFSL reported that hair were similar. The court observed that there is a distinction between 'similarity' and 'identity'. There can be similarity but the identity can still be different. In the present case result of analysis is that the sample hair and the hair recovered from the hand of the deceased were similar. Experts have not opined that the identity of the hair was the same or that the origin was from the same source. Identity of the hair being not established, it cannot be said that sample hair and hair recovered from the 'Muthi' of the deceased were of the same person. Similarity of hair does not conclusively prove that the hair came from the same origin or of the same person. This has been so held in the case of Mantu alias Sunil Kumar Bhuyan v. State 1984 (2) Crimes 815. On the same line is the judgment of Calcutta High Court in the case of Himangshu Pahari v. State 1986 Cri. L.J. 622.

20. Coupled with the above is another aspect which goes against the prosecution i.e. delay of 32 days in sending the sample to CFSL. Mr. Mahajan rightly contended that this delay was fatal. When the sample was not taken as per

general norms and procedure, and had not been sealed with the seal of the Investigating Officer and there was undue and unexplained delay in sending the same for analysis, it creates suspicion. It is so held by this court in the case of Des Raj v. State (83) 2000 DLT 282 and Matloob v. State : 67(1997)DLT372

21. Thus the chain of circumstances stood broken at every stage. Chain is in fact not complete. In this case link evidence is missing or not connected to the guilt of the accused. The independent witnesses have not supported the case of the prosecution. The circumstances relied by the prosecution linking the accused with the crime have not been proved beyond the shadow of doubt. These do not point unerringly towards guilt of the appellant. The Apex Court in the case of Mahmood v. State of UP : 1976 CriLJ10 held that it is not safe to base a conviction on any solitary incriminating circumstance which otherwise is too shaky, suspicious and fragile to furnish a sound foundation for conviction. Author of the FIR, Hasmat (PW-7) has not supported his version given in FIR. This broke the first and most vital link of the chain of circumstantial evidence. Hair recovered from the fist of the deceased have also not been proved to be that of the accused. This again shows a very important link missing from the chain. The Cardinal principle for basing conviction on the basis of circumstantial evidence has been laid down by the Hon'ble Supreme Court in the case of Sharad v. State of Maharashtra, AIR 1994 SC 1622.

22. Taking the above factors into consideration we are of the opinion that the case of the prosecution has not been proved beyond reasonable doubt. The appeal is accordingly accepted and the order of conviction and sentence are set aside.

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