

**Pawan Vs. State**

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**Court :** Delhi

**Decided On :** Jan-04-2013

**Judge :** Badar Durrez Ahmed

**Appellant :** Pawan

**Respondent :** State

**Judgement :**

THE HIGH COURT OF DELHI AT NEW DELHI % + Judgment delivered on:

04. 01.2013 CRL. A. 144/2010 LAXMAN @ JANGA ... Appellant versus STATE ... Respondent Advocates who appeared in this case: For the Appellant For the Respondent /State : Mr Siddharth Aggarwal : Mr Sanjay Lao AND + CRL. A. 850/2010 PAWAN ... Appellant versus STATE ... Respondent Advocates who appeared in this case: For the Appellant For the Respondent /State : Ms Charu Verma : Mr Sanjay Lao CORAM:HONBLE MR JUSTICE BADAR DURREZ AHMED HONBLE MS JUSTICE VEENA BIRBAL JUDGMENT BADAR DURREZ AHMED, J 1.These appeals are directed against the judgment dated 30.11.2009 in Sessions Case No. 36/2009 delivered by the learned Additional Sessions Judge-I, North-East, Karkardooma Courts, Delhi, whereby the appellants Pawan and Laxman have been convicted for the offence punishable under Section 302/34 IPC and they have also been convicted for the offence punishable under Section 363/34 IPC. The said case arose out of FIR 391/2003 registered at Police Station Bhajan Pura under Sections 363/364/302/34 IPC. Upon conviction of the said appellants, the learned Additional Sessions Judge passed an order on sentence

on 05.12.2009, whereby the appellants Pawan and Laxman were sentenced to rigorous imprisonment for life for the offence punishable under Section 302 read with Section 34 IPC for having committed the murder of the deceased Brijesh. A fine of ` 2,000/- each was also imposed on the said appellants and in default of payment of the said fine, they were to undergo rigorous imprisonment for one year. Insofar as the offence under Section 363/34 IPC was concerned, the learned Additional Sessions Judge sentenced the appellants to undergo rigorous imprisonment for seven years. A fine of ` 1,000/- each was also imposed on them and in default of payment of the fine, they were to undergo rigorous imprisonment for six months. The sentences were directed to run concurrently in respect of both the convicted persons.

2. Initially, there were three accused in this case and they were Laxman @ Janga and Pawan (the present appellants) and one Praveen. However, since Praveen was a juvenile, he was dealt with under the Juvenile Justice (Care and Protection of Children) Act, 2000 and was presented before the Juvenile Justice Board. In the present appeals, we are only concerned with Laxman and Pawan.

3. The charge framed against Laxman and Pawan on 27.09.2004 was that on 03.11.2003 at about 3 pm at MCD School, C-4 Yamuna Vihar, Delhi, within the jurisdiction of PS Bhajan Pura, the appellants along with co-accused Praveen (juvenile), in furtherance of their common intention, kidnapped Brijesh Kumar, a minor child of 12 years out of the keeping of his lawful guardian without his consent and thereby they had committed an offence punishable under Section 363/34 IPC. The second charge was that the said accused had kidnapped the said Brijesh Kumar in order that he might be murdered and thereby they had committed an offence punishable under Section 364/34 IPC. The third charge was that on the said date (i.e., 03.11.2003) at about 7:30 pm in the jungle near Bheem Nagar and near L. N. Public School, the said accused, in furtherance of their common intention, committed the murder of the said Brijesh Kumar by causing his death and thereby committed an offence punishable under Section 302/34 IPC. We have already pointed out that Praveen was to be dealt with under the Juvenile Justice (Care and Protection of Children) Act, 2000. Insofar as the present appellants are concerned, they pleaded not guilty to the charges framed against them and they

claimed trial.

4. The sequence of events leading up to the apprehension and arrest of the appellants begins with the receipt of a phone call on 03.11.2003 at about 6:03 pm from PW1 Bhagwan Dass, who claimed to be the father of the said Brijesh Kumar. This call was received at the Police Control Room vide DD No. 15-A (Exhibit PW3/A). The sum and substance of the phone call was that his son Brijesh Kumar aged 12 years had been kidnapped by two persons from his school. By virtue of DD 17-A (Exhibit PW3/B) recorded at 6:10 pm, Sub-Inspector Manoj Bhatia was sent to investigate. At about 7 pm, the statement of PW1 Bhagwan Dass (Exhibit PW1/A) was recorded. In the said statement, PW1 Bhagwan Dass indicated that his son Brijesh Kumar, who is mentally weak, is a student of class V of C-4, Yamuna Vihar MCD School. He further stated that at about 12:45 pm, he left him in his school and returned home. When he was at home, at about 5:40 pm, two classmates Govind and Neeraj came to his house and brought Brijesh Kumars school bag with them. They also told him that during lunch time two men, after having enticed and induced Brijesh Kumar, took him away on a motorcycle and that he had not returned since then. It is also recorded in the statement that Brijesh Kumar was wearing a red check shirt, a sky coloured pant and black shoes. He also described Brijesh as having a wheatish complexion and of being about 4 feet 2 inches tall. He also indicated that Brijesh was fat.

5. On the basis of the said statement, a ruqqa was prepared at about 7:15 pm and thereafter the said FIR No. 391/2003 was initially recorded under Section 363 IPC at Police Station Bhajan Pura.

6. On 04.11.2003, a body was discovered by the U.P Police at Jungle Mohalla, Bheem Nagar, Hapur, U.P at about 2:50 pm. Some photographs were taken. On 05.11.2003, the post mortem examination of the body discovered by the U.P police was conducted at Hapur at 3:40 pm. The post mortem report is Exhibit PW15/A. It indicates that there were ante mortem injuries on the body, which are as under:- Injury No.1 : Ligature mark 35 cm x 1 cm x all round neck horizontal 4 cm below right ear, 5 cm below left ear, 6 cm below chin and 4 cm below occipital protuberance; Injury No.2 : Contusion 2 cm x 2 cm on left side of face near ear;

and Injury No.3: Contusion 4 cm x 2 cm on right side of face near ear. According to the opinion of PW15 Dr Y. P. Singhal, who conducted the post mortem examination, the death was due to strangulation as a result of the above noted injuries. However, it may be pertinent to note that PW15 Dr Y. P. Singhal in his deposition before Court had stated that the body was of a male aged about 16 years and that the time since death was approximately 1-1/2 days.

7. On 27.11.2003, the appellants were arrested together. They were allegedly interrogated and they made disclosure statements.

8. It is further alleged on the part of the prosecution that pursuant to the disclosure statements made by the appellants, certain recoveries were made on the next day, that is, on 28.11.2003. It is alleged that recovery of an angocha was made at the instance of Laxman from Hapur. Similarly, the recovery of a shirt, pant and belt were also said to have been made at the instance of the appellant Pawan. It is also alleged that recoveries had been made at the instance of the juvenile Praveen and those recoveries comprised of socks and shoes from Hapur. It is further the case of the prosecution that on 28.11.2003, PW1 Bhagwan Dass identified the dead body that was discovered at Hapur, through photographs and in respect of which the post mortem examination had been conducted inasmuch as the dead body had already been cremated by Hapur police. This is the sequence of events alleged by the prosecution.

9. The case is based on circumstantial evidence. The prosecution examined as many as 15 witnesses. The statements under Section 313 Cr.P.C of the appellants were recorded, who did not produce any defence witness.

10. The entire case rests on the allegation of the prosecution that the deceased Brijesh Kumar was last seen alive in the company of the appellants. In order to substantiate this allegation, the prosecution had produced three witnesses. The witnesses being PW4, Govind and PW5 Neeraj, who were the classmates of the deceased Brijesh Kumar and who had apparently seen Brijesh Kumar being enticed and induced to leave with two individuals during lunch time from the school on a motorcycle. The third witness is PW6 Uma Shanker, who is also related to the deceased Brijesh Kumar. Uma Shanker is said to have seen Brijesh Kumar in

the company of the appellants at Loni Chowk in the evening of 03.11.2003. Apart from this, the prosecution also seeks to bring home the case against the appellants on the basis of the purported disclosure statements made by the appellants which led to the aforementioned recoveries. It is clear that it is only these two circumstances, that is, the last seen evidence and recoveries which have been set up by the prosecution to establish the case against the appellants. It may be made clear at this juncture itself that no motive has been alleged or established.

11. Based upon the evidence led by the prosecution, the learned Additional Sessions Judge convicted and sentenced the appellants, as indicated above. The learned counsel appearing on behalf of Laxman @ Janga submitted that PW4 Govind, who was a classmate of Brijesh, stated that he saw two persons taking Brijesh from the school. The said witness also stated that the class teacher had asked them to take the school bag of Brijesh. However, he stated that he did not know as to how those persons had taken Brijesh with them. He stated that after lunch, all the students attended class, but Brijesh was absent. It is then that the class teacher had asked them to take the school bag of Brijesh. It was also stated by this witness that one Neeraj (PW5) was also his classmate and the two of them took the school bag of Brijesh to his house and gave it to his parents. It is further stated that on the next day, Brijesh's father along with the police came to his house and asked him if he had seen the faces of the persons who had taken Brijesh from school. He stated that he replied in the negative. He also stated that he had never seen the persons who took Brijesh after the date of the incident. He also stated that he could not identify those persons who took Brijesh even if they were shown to him as he had not seen them by their faces on the day of the incident. In other words, this witness did not identify the appellants and was declared hostile and was subsequently cross-examined by the prosecution. The learned counsel for the appellant sought to bring out a contradiction between the testimony of PW4 Govind and PW1 Bhagwan Dass by drawing our attention to the statement made by PW4 Govind in his cross-examination that he had reached the house of Brijesh at about 6:30 pm and remained there for about 5 minutes. He submitted that this is contradicted by the fact that the call to the PCR, which was recorded vide DD No. 15-A, had already been registered at 6:03 pm.

12. It was next contended by the learned counsel for the appellant Laxman that PW5 Neeraj also stated his inability to identify the persons who had taken away Brijesh from school. Consequently, he, too, was declared hostile and was cross-examined by the learned APP. Our attention was drawn to a suggestion made by the prosecution that one of the accused was present in Court today and the attention of the witness was drawn towards the accused Pawan. The learned counsel for Laxman submitted that from this suggestion itself, it becomes clear that even, as per the prosecution, Laxman was not involved in the alleged kidnapping from the school, because if that had been the case, the witness's attention would have also been directed towards Laxman. But, the prosecution chose to only draw the attention of the witness PW5 Neeraj to Pawan. Thus, according to the learned counsel for the appellant Laxman, as per the prosecution, the suggestion is that the two persons, who allegedly kidnapped Brijesh from school, were Praveen and Pawan and not Laxman.

13. The learned counsel for the appellant Laxman then drew our attention to the testimony of PW1 Bhagwan Dass, who is alleged to be the father of the deceased Brijesh Kumar. This witness stated that Brijesh was aged about 12 years at the time of occurrence and that he was mentally weak. He also stated that Govind and Neeraj came to his house at 5:40 pm. He also stated that the height of the boy (Brijesh) was 4 feet 2 inches. At this juncture, the learned counsel for the appellant drew our attention to the post mortem examination report as also the testimony of PW15 Dr Y. P. Singhal, where the height of the body was recorded as 150 centimeters, which translates to 4 feet 11 inches and not 4 feet 2 inches, as suggested by PW1 Bhagwan Dass. Furthermore, the learned counsel also drew our attention to the testimony of PW15 Dr Y. P. Singhal, where he noted that the body, whose post mortem examination he had conducted, also had a moustache of 0.25 centimeters and was back in colour. The suggestion made by the learned counsel for the appellant was that the body which was examined was not that of the deceased Brijesh Kumar.

14. In his cross-examination, PW1 Bhagwan Dass admitted that Brijesh was not his son but, was the son of his brother-in-law and was living with him, though he had not legally adopted him.

15. The next witness whose testimony was brought to our notice was PW6 Uma Shanker. According to the prosecution, he is a key witness inasmuch as he is the one who last saw the deceased Brijesh Kumar alive in the company of the appellants and Praveen. This witness stated that on 03.11.2003 at about 5 pm, he was going to Noida from his house on his two-wheeler scooter and when he reached Loni Chowk Circle, he saw his brother-in-law standing along with three local boys, namely, Praveen, Pawan and Laxman. One motorcycle bearing registration No. 2217 of Pulsar make was also stationed near Brijesh and the three boys. The witness is said to have identified Pawan and Laxman as the accused persons present in Court. He further stated that he called out to Brijesh as to why he was standing there. But, there was no response from him. It is further stated by him in his examination-in-chief that, in the meantime, Praveen started the motorcycle and Laxman made Brijesh sit on the pillion rider seat and thereafter he also sat on the said motorcycle, which went towards Ghaziabad. He further stated that Pawan went away on foot and he (PW6 Uma Shanker) went towards Noida. He further stated that on the same day, at about 9 pm, after returning from Noida, he came to know that Brijesh was missing. So, he went to his house and he saw police officials and other people gathered there. According to him, he told the police about the above incident and that police had recorded his statement. With the permission of the court, a leading question was put to him with regard to the complete registration number of the motorcycle as being DL 5SS-2217. He replied in the affirmative. In his cross-examination by the defence counsel, Uma Shanker stated that the accused persons were standing at a distance of 2025 steps from Loni Chowk. He also stated that the accused along with Brijesh left immediately after he had called Brijesh on seeing him. He then stayed at a cigarette shop for near about 15-20 minutes. He stated that the accused had not seen him and that he could not tell the exact number of vehicles parked there. This last question was apparently put to the witness in order to create a doubt with regard to his remembering the number of the motorcycle which was allegedly used by the accused. It is further pointed out in cross-examination that Uma Shanker had a mobile phone, but did not inform Bhagwan Dass about the manner in which Brijesh had been taken away by the accused persons. According to the said witness, this was normal for him.

16. The learned counsel for the appellant Laxman also sought to draw our attention to certain contradictions between the testimonies of PW7 Head Constable Jag Roshan and PW1 Bhagwan Dass. According to PW7 Head Constable Jag Roshan, the three accused were interrogated, but PW1 Bhagwan Dass stated that they were not interrogated. PW7 Head Constable Jag Roshan stated that the three accused were arrested on the pointing out of Bhagwan Dass, but PW1 Bhagwan Dass stated that it was on the pointing out of a secret informer that they were arrested. The testimony of PW13 Constable Praveen Kumar was also alluded to, who stated that the angocha was recovered from the fields and had burn marks on the corners and was approximately 9 inches x 4 inches. According to the learned counsel for the appellant, this was a different angocha to that described by PW1 Bhagwan Dass. Furthermore, PW15 Dr Y. P. Singhal had stated that the ligature mark was of 35 cms x 1 cm x all around the neck, which would mean that the length of the ligature mark was 13 inches, whereas the angocha was only 9 inches long. Therefore, according to the learned counsel for the appellant, the angocha was certainly not the murder weapon and was, therefore, of no consequence. He also stated that the angocha was not shown to the doctor at all for his opinion as to whether the ligature mark was possible by the angocha or not.

17. The testimonies of PW12 Inspector Vir Singh Tyagi and of PW14 Sub-Inspector Manoj were also referred to. It was contended by the learned counsel appearing on behalf of the appellant Laxman that, first of all, there was no motive and, therefore, no enmity between the appellant Laxman and the deceased Brijesh Kumar. There was, therefore, no reason to kill. With regard to the so-called last seen evidence furnished on the part of the prosecution, the learned counsel submitted that insofar as Laxman is concerned, even as per the prosecution case, as indicated by the suggestions given to PW5 Neeraj, Laxman was not part of the so-called kidnapping from the school. As regards the testimony of PW6 Uma Shanker, he is alleged to have seen Brijesh in the company of Laxman and Pawan at 5 pm at Loni Chowk on 03.11.2003. However, the body was found at Hapur at 2:50 pm on 04.11.2003, that is, 22 hours later. Even if we go by the post mortem report which gave the time since death as being 1-1/2 days, the point of time when the death occurred would be 3-4 am on 04.11.2003. This point of time was also 11

hours away from the point of time when PW6 Uma Shanker is alleged to have seen Brijesh Kumar in the company of the appellants. Therefore, according to the learned counsel for the appellant Laxman, the last seen evidence, as presented on behalf of the prosecution, apart from being a very weak kind of evidence, cannot be relied upon at all as the point of time between the last sighting and the occurrence of death are not proximate and there could be a myriad of intervening circumstances or individuals.

18. He also submitted that the recoveries were not believable at all inasmuch as the recoveries had been made after the dead body had been recovered on 04.11.2003. The recoveries were from an open area and, therefore, could not be foisted on the appellants. The so-called recoveries were also made after about 24 days from the date the body was found.

19. Consequently, the learned counsel for the appellant Laxman submitted that the impugned order of conviction and sentence ought to be set aside and the appellant Laxman ought to be acquitted.

20. The learned counsel appearing on behalf of the appellant Pawan reiterated the general submissions made by the learned counsel for the appellant Laxman and also emphasized that the last seen evidence was based on the foundation of three prosecution witnesses, namely, PW4 Govind, PW5 Neeraj and PW6 Uma Shanker. PWs 4 and 5 stated that they could not identify the persons who took Brijesh from the school. As such, their testimonies, do not, in any way, implicate the appellants. As regards PW6 Uma Shanker, the learned counsel stated that insofar as Pawan is concerned, Uma Shanker cannot be even regarded as the last seen witness inasmuch as the said witness stated that Laxman, Brijesh and Praveen went on the motorcycle, whereas Pawan went away on foot. Therefore, Pawan, even as per this witness, had parted ways with Laxman, Brijesh and Praveen.

21. Thus, insofar as Pawan is concerned, the factum of his having been last seen with Brijesh ends here.

22. The learned counsel further submitted that the recoveries are also highly doubtful. He submitted that the recoveries were made after 23 days of the discovery of the dead body and the articles, such as, the shirt, pant and belt, which are alleged to have been recovered at the instance of the appellant Pawan, were lying on properties which were open and accessible to all. He submitted that even the first witness Ramagya Chaubey, who was the guard of ARA factory, was not examined by the prosecution. A reference was made to the decision in the case of *Trimbak v. State of Madhya Pradesh: AIR 195.SC 3.* to state that recovery from an open and accessible place was of no consequence to the prosecution.

23. It was, therefore, contended by the learned counsel for the appellant Pawan that the chain of circumstances, which was required to be established by the prosecution, has not been established. The chain of circumstances leading unerringly to the guilt of the appellant, was missing. Consequently, he submitted that the impugned order of conviction and sentence be set aside.

24. The learned counsel for the State submitted that PW6 Uma Shanker had seen the deceased Brijesh Kumar in the company of the three accused, which included the present appellants, in the evening of 03.05.2003. He then referred to the testimony of PW14 SI Manoj Bhatia which, according to him, indicated that the statement of Uma Shanker was recorded on 03.11.2003 itself and thereafter the premises of the accused persons were raided, but they were not traceable. Their native places were also searched and there, too, they were not traceable. It is only on receipt of secret information on 27.11.2003 that the appellants were arrested at Loni Gol Chakkar (round-about). Subsequently, disclosure statements were recorded and it is then that the police party went to Hapur. The learned counsel for the State submitted that the disclosure statement of Laxman (Exhibit PW1/J) ought to be relied upon, where he had allegedly stated that *maine apne saafe se uska gala ghot diya (I strangulated him with my saafa.)*. According to the learned counsel for the State, the portion where it is stated that he was strangulated with a saafa, was admissible because it was not in the knowledge of the Investigating Officer and it only got corroborated by the post mortem report which came to the knowledge of the Delhi Police much later. He further stated that Pawan's disclosure that he could get the pant and shirt recovered was also admissible

since he did get the pant and shirt recovered.

25. The learned counsel for the State, therefore, submitted that the prosecutions case stood established on the basis of the last seen testimony of PW6 Uma Shanker; the conduct of the appellants inasmuch as they went missing from the very first day consequent upon the recording of the statement of PW6 Uma Shanker on 03.11.2003; the police at Bhajan Pura did not know that Brijesh had been killed till 27.11.2003; thereafter, the police had gone to the spot at Hapur to recover the body and clothes and angocha; whereas the clothes and angocha were recovered the body was not there; thereafter, the police went to the police station at Hapur where the photo of the person whose body had been discovered on 04.11.2003 was shown and the same was identified by PW1 Bhagwan Dass as being that of Brijesh Kumar. Thus, according to the learned counsel for the State, all the circumstances stand established and these circumstances taken together complete the chain and, therefore, the prosecution, according to him, has established its case beyond reasonable doubt. Consequently, he submitted that the impugned judgment and order on sentence ought not to be interfered with.

26. In rejoinder, the learned counsel for the appellants cited several decisions on the point of how much of a disclosure statement was admissible. The judgments were as under:(i) Sukhan v. Emperor: AIR 192.Lah 344 (FB); (ii) Pulukuri Kottaya v. Emperor: AIR 194.Privy Council 67; (iii) State v. Mohd. Afzal: (2003) 107 DLT 38.(DB); and (iv) State v. Navjot Sandhu:

2005. (11) SCC 600.

27. We need not refer to all the decisions cited by the learned counsel. It would be sufficient to refer to the decision in the case of Pulukuri Kottaya (supra), which is being followed till date. In the said decision, the Privy Council has observed as under:

8. The second question, which involves the construction of s. 27, Evidence Act, will now be considered. That section and the two preceding sections, with which it must be read, are in these terms:

25. No confession made to a Polio officer, shall be proved as against a person accused of any offence.

26. No confession made by any person whilst he is in the custody of a Police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

9. The explanation to the section is not relevant.

27. Provided that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a Police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

10. Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused. Mr. Megaw, for the Crown, has argued that in such a case the "fact discovered" is the physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity would all be admissible. If this be the effect of section 27, little substance

would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the Legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. On normal principles of construction their Lordships think that the proviso to S. 26, added by S. 27, should not be held to nullify the substance of the section. In their Lordships view it is fallacious to treat the fact discovered within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that I will produce a knife concealed in the roof of my house does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added with which I stabbed A these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant. (underlining added) 28. Therefore, it was contended by the learned counsel for the appellants that only that part of the disclosure statement which led to the recovery of the articles would be admissible and not any other part. Secondly, it was submitted that in any case, the recoveries by themselves would not mean anything unless and until the recoveries were linked with the offence. According to the learned counsel for the appellants, that link is missing.

29. Having analyzed the submissions of the learned counsel on both sides and having gone through the evidence in detail, we feel that the testimonies of three witnesses are of vital importance they being PW4 Govind, PW5 Neeraj and PW6 Uma Shanker. Insofar as PW4 Govind and PW5 Neeraj are concerned, they are the classmates of the deceased Brijesh Kumar. While they have stated that Brijesh

Kumar was taken away by two persons during lunch from the school, these witnesses have also stated that they would not be able to identify those two persons inasmuch as they did not see their faces. The testimonies of PW4 and PW5, therefore, only establish that Brijesh Kumar was taken by two persons from the school during lunch time. Their testimonies also establish that they carried the school bag of Brijesh Kumar on the asking of their class teacher to the home of Brijesh Kumar, where they handed over the same to his father PW1 Bhagwan Dass. Insofar as PW1 Bhagwan Dass is concerned, his testimony is relevant for the purpose that these two boys, namely, PW4 Govind and PW5 Neeraj had brought the school bag and had informed him that Brijesh Kumar had been taken away by two persons during lunch from school and that he was not at school thereafter. Therefore, the evidence of PW4 Govind and PW5 Neeraj cannot be regarded as the last seen evidence because they were unable to identify the persons with whom Brijesh Kumar left the school premises.

30. Insofar as PW6 Uma Shanker is concerned, he states that he had seen Brijesh Kumar in the company of the two appellants and Praveen at Loni Chowk at about 5 pm on 03.11.2003. Yet, what is strange is that despite the fact that he states that he had called out to Brijesh and Brijesh had not responded, he did not find this odd at all and it is for this reason that, according to him, he did not make a phone call to Brijesh's father even though he had a mobile phone. This does dent the credibility of the witness inasmuch as his conduct is somewhat unnatural. This is so because PW6 Uma Shanker is a relative of Brijesh Kumar and even though he called out to Brijesh Kumar, who did not respond and he allegedly left with the appellants and Praveen, he did not think it fit to even inform Brijesh's father Bhagwan Dass about this incident. It must be remembered that at 5 O clock in the evening in November in Delhi, the sun begins to set and it is not as if the child was in the company of these persons who were much older than him in the day-time in a location where he would normally have been in their company. Yet, PW6 Uma Shanker did not find this situation to be anything out of the normal. Coupled with this is the fact that, according to Bhagwan Dass, Brijesh was a twelve-year old boy and was mentally weak. Surely, PW6 Uma Shanker, who was a close relative of the boy ought to have found it odd that the boy was going off on a motorcycle with two other boys at around the time of sunset.

31. Apart from this, Uma Shanker has stated that Laxman, Praveen and Brijesh went on the motorcycle towards Ghaziabad and Pawan went on foot. It is obvious that the sequence of events connecting Pawan with the murder of Brijesh Kumar comes to an end here itself. Therefore, even according to this witness, Pawans role came to an end at this point, that is, at Loni Chowk at 5 pm on 03.11.2003. There is no other evidence other than the so-called recovery with which we shall deal with presently to connect the appellant Pawan with the kidnapping and murder of Brijesh Kumar.

32. Taking the sequence further, even if Uma Shanker is to be believed that he did see what he said he saw, the fact of the matter is that he saw Brijesh leaving in the company of Laxman and Praveen on a motorcycle at about 5 pm from Loni Chowk towards Ghaziabad. The body was discovered at 2:50 pm on 04.11.2003 at Hapur. The time gap between these two events is about 22 hours. Even if we take the time gap between PW6 Uma Shanker sighting Brijesh Kumar in the company of the appellants and the time of death as indicated by PW15 Dr Y. P. Singhal to be 3-4 am on 04.11.2003, the time gap would be 11 hours. This cannot be regarded as being proximate in time. And, therefore, in our view, even PW6 Uma Shanker cannot be considered to be the last seen witness as is usual in law.

33. In Mohd. Azad @ Samin v. State of West Bengal: (2008) 15 SCC 449. there is a reference to an earlier Supreme Court decision in the case of State of U.P. v. Satish: (2005) 3 SCC 114. where it has been observed that the last seen theory comes into play where the time gap between the point of time when the accused and the deceased were seen last alive and when the deceased was found dead was so small that the possibility of any person other than the accused being the author of the crime becomes impossible. And, even in such cases, as pointed out by the Supreme Court in Ramreddy Rajesh Khanna Reddy and Anr. v. State of Andhra Pradesh: (2006) 10 SCC 172. the courts should look for some corroboration. In the present case, the time gap is quite large and we cannot rule out the possibility of any person other than the appellants being the authors of the crime. Therefore, in our view, the last seen theory setup by the prosecution is not established at all.

34. It must also be pointed out that while cross-examining PW5 Neeraj, who had turned hostile, the learned APP had suggested that the two persons who had taken Brijesh Kumar from the school were Pawan and Praveen. In other words, they had ruled out Laxman at that point of time. It is also interesting to note that in conjunction with the aforesaid, PW6 Uma Shankers statement that Pawan had left on foot from Loni Chowk, disengaged Pawan from the next sequence. Therefore, while Laxman was absent in the alleged initial kidnapping, Pawan was absent in the events subsequent to the sighting at Loni Chowk.

35. We now come to the question of absence of motive. The prosecution has neither alleged and obviously has, therefore, not led any evidence to establish any motive. The absence of a motive in a case depending on circumstantial evidence is a factor which weighs in favour of the accused. This proposition is set out in the Supreme Court decision in State of U.P v. Kishanpal: (2008) 16 SCC 7. where it is held that motive assumes great importance in a case of circumstantial evidence and the absence of motive would definitely inure to the benefit of the accused. In the present case, no motive behind the alleged crime has been set up and consequently this is also a circumstance which would weigh in favour of the appellants.

36. We now come to the issue of recoveries. The recovery of the angocha at the alleged instance of Laxman and the recoveries of the shirt, pant and belt at the instance of Pawan from Hapur are in question. These recoveries were made from an open and accessible area. These recoveries were made allegedly on 28.11.2003, that is, 25 days after the incident. In Trimbak v. State of Madhya Pradesh (supra), the Supreme Court observed as under:6. When the field from which the ornaments were recovered was an open one, and accessible to all and sundry, it is difficult to hold positively that the accused was in possession of these articles. The fact of recovery by the accused is compatible with the circumstance of somebody else having placed the articles there and of the accused somehow acquiring knowledge about their whereabouts and that being so, the fact of discovery cannot be regarded as conclusive proof that the accused was in possession of these articles. In the present case, we may also point out that the body had been discovered from the vicinity of where these alleged recoveries had

been effected on 04.11.2003 itself. Therefore, there is a serious doubt as to whether these articles were not also recovered on the very same day. It can be safely presumed that when an unidentified body is recovered by the police, some sort of search is done around the area for any clues. Therefore, it could be quite probable that these very articles had also been found if not on the person or near the body but somewhere around the area where the body was discovered. It is also probable that the discovery of the dead body was known to the Delhi Police prior to the alleged recovery of the articles. Therefore, there is a serious doubt with regard to the recoveries themselves.

37. We may also point out that, according to the prosecution, it is the angocha which was used to strangle Brijesh Kumar, that angocha, as we have already mentioned above, was 9 inches by 4 inches in dimension, whereas the ligature mark is of 13 inches all around the neck. We fail to see as to how an angocha which was 9 inches could have caused a ligature mark of 13 inches around the neck of the deceased Brijesh Kumar. Therefore, the angocha can certainly not be linked with the murder of Brijesh Kumar.

38. There is another aspect of the matter which has troubled us and that is with regard to the identification of the dead body. The body is said to have been identified by PW1 through a photograph shown to him. But, PW1s description of his son Brijesh Kumar is that he was 4 feet and 2 inches in height, whereas the post mortem examination conducted by PW15 Dr. Y. P. Singhal indicates that the height of the body was 150 cms or 4 feet 11 inches. There is a big difference between somebody who is 4 feet 2 inches tall and somebody who is 4 feet 11 inches tall. Apart from this, the post mortem report indicates that the age of the person whom the doctor had examined was about 16 years, whereas the age given by PW1 Bhagwan Dass of his son Brijesh Kumar was only 12 years. We also find that the person whose post mortem examination was conducted had a moustache. This is unlikely for a boy of 12 years age. Therefore, there is some element of doubt even with regard to the identity of the dead body.

39. Even if we held that the recoveries were genuine and free from doubt, recoveries by themselves cannot form the basis of conviction. This is a well settled

principle. The recovery of incriminating articles has to be considered in the light of other relevant circumstances as well as the sequence of events suggesting a link between the accused and the crime. In the present case, since the last seen theory has broken down, the recoveries by themselves, even if taken to be genuine, cannot result in the conviction of the appellants.

40. For all these reasons, we are of the view that the prosecution has not been able to establish its case against the appellants beyond reasonable doubt. Therefore, the benefit must go to the appellants. The impugned judgment and order on sentence are set aside and the appellants are acquitted of all charges. The appellants are liable to be set free forthwith. It is so directed. The appeals are allowed. There shall be no order as to costs. BADAR DURREZ AHMED, J VEENA BIRBAL, J JANUARY 04 2013 SR

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