Kamlesh Singh Vs. State

Kamlesh Singh Vs. State

SooperKanoon Citation : sooperkanoon.com/981345

Court : Delhi

Decided On : Aug-06-2013

Judge : Kailash Gambhir

Appellant : Kamlesh Singh

Respondent : State

Advocate for Pet/Ap. : Mr. Sumit Verma

Judgement :

*IN THE HIGH COURT OF DELHI AT NEW DELHI + CRL.A. 533/2010 Judgment delivered on : August 06, 2013 KAMLESH SINGH ..... Appellant Through: Mr.Sumit Verma, Advocate Through: ..... Respondent Mr.Sunil Sharma, APP for the State versus STATE CORAM: HON'BLE MR. JUSTICE KAILASH GAMBHIR HON'BLE MS. JUSTICE INDERMEET KAUR JUDGMENT KAILASH GAMBHIR, J.

1. The present appeal under Section 374 (2) of the code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C) preferred by the appellant is directed against the judgment dated 16th February, 2010 and order on sentence dated 23rd February, 2010 passed by the learned Additional Sessions Judge, Patiala House Courts, New Delhi whereby the ld. ASJ held the appellant guilty of committing an offence under Section 302 of the Indian Penal Code, 1806 (hereinafter referred to as IPC) and awarded him sentence of life imprisonment for

the said offence of murder.

2. Before adverting to the contentions raised by both the parties and giving any findings on the said submissions, it would be appropriate to give a brief conspectus of facts. In a small tenanted room, four persons were sleeping during the intervening night of 21-22.02.2005 of 2005 comprising of PW-22 Kusuma, her husband Karu (deceased), her maternal uncle Kamlesh Singh (the appellant herein) and Shivam aged 12 years, son of Kusuma from her previous husband. At about 2/2.30 a.m., murder of Karu took place but surprisingly nobody came forward to depose having personally seen the said murder to have taken place. Kusuma in her statement recorded under Section 161 Cr.P.C. implicated her maternal uncle, the appellant herein as a murderer of her husband, while the appellant took a defence that there was some thief who had entered the room and he along with Shivam ran after the thief to apprehend him. Among the said four occupants in the room, one was murdered, second was a small boy, third was the wife of the deceased and fourth was the maternal uncle of the wife. Who could be the murderer of deceased Karu was a question to be answered by the prosecution. As per the prosecution, it was the appellant who had murdered Karu, but as per the appellant, somebody else had murdered Karu and in likelihood of circumstances, it was a thief who had entered the premises and later ran away or may be one Mr.Tulsi who was residing in the adjoining room, who allegedly had illicit relations with the wife of the deceased had made the said attempt.

3. The case of the prosecution in a nutshell is that on 22.2.2005 at 2.38 a.m. DD No.59B was recorded on the basis of information received in police station Sangam Vihar that one person is lying injured in H.No.709, Sangam Vihar, Budh Bazar. The copy of DD No.59B was given to SI Harinder Singh who along with Ct. Virender and Ct. Dalchan went to the spot at H.No.709, Gali No.9, Sangam Vihar and at the first floor of the aforesaid premises they found one dari (bed sheet), one shawl and one pillow with excess blood on it and they came to know that the injured has already been taken to the hospital in a PCR van. Thereafter, SI Harinder Singh left Ct. Virender at the spot for proper investigation and went along with Ct. Dalchand to AIIMS hospital where he obtained the MLC of the injured Karu S/o Sukhram Singh. The injured was unconscious and was unfit for

statement as per the opinion of the doctor concerned. SI Harinder Singh, got the case registered, under Section 307 IPC, and did not find any eye-witness there. He made request for crime team and a photographer to visit the spot. In the meantime, duty constable in AIIMS hospital informed vide DD No.62B in the police station that injured has expired. Thereafter, the offence was converted from 307 to 302 IPC. The investigating crime team inspected the spot and photographs were taken. The site plan was prepared by the investigating officer and samples from the site were taken in possession by the police. The statements of witnesses were recorded. The post mortem of the victim was conducted and post mortem report was obtained. Thereafter, the accused was arrested whose disclosure statement was recorded and at the instance of the accused, an axe was recovered by the accused from a small kitchen adjoining the room in question which was taken in possession by the police. The accused also got recovered his blood stained shirt which he was wearing at the time of the incident which was taken in possession by the police. On completion of investigation, accused was challaned for the offence under Section 302 IPC.

4. Charge under Section 302 IPC was framed against the appellant, to which he pleaded not guilty and claimed trial. To prove the said charge of murder against the appellant, the prosecution had examined 23 witnesses. Statement of the appellant was recorded under Section 313 of the Code of Criminal Procedure (Cr.P.C.), wherein he denied the incriminating evidence set up against him by the prosecution. The appellant in his defence has also examined 8 witnesses. The learned Additional Sessions Judge after taking into consideration the evidence adduced by the prosecution and the defence, reached to a conclusion that the prosecution has been able to establish its case against the appellant for the charge of murder beyond any reasonable doubt by proving all necessary circumstances in the chain of circumstantial evidence. The appellant was thus convicted under Section 302 IPC and was awarded sentence of life imprisonment for committing the said murder.

5. Addressing arguments to assail the said judgment on conviction and order of sentence, Mr. Sumit Verma, counsel for the appellant submitted that the entire case of the prosecution was based on circumstantial evidence but without their

being any alleged motive against the appellant. The contention raised by the counsel for the appellant was that motive is of paramount importance in a case based upon circumstantial evidence and in the absence of motive the case of the prosecution needs greater scrutiny. As per counsel for the appellant the circumstances as enlisted by the prosecution can be enumerated as under:i. In the intervening night of 21st/22nd February, 2005, appellant, deceased Karu, Kusma (PW

22) and Shivam (DW4) were present/ sleeping in the room in house where allegedly the murder took place. ii. Statement of Kusuma to PW-1: Anil Kumar (Jija of deceased), PW-4: Keshav Dev (landlord) and PW-5: Rajesh Kumar (landlords son), soon after the incident, that appellant Kamlesh had killed her husband and then ran away with Shivam. iii. Absconding of the appellant, since appellant was allegedly (as per prosecution case) arrested on 23rd February, 2005 from Anand Vihar Bus Terminal at about 9:15 p.m. iv. Recovery of Blood-stained Axe from Store cum Open kitchen in the same premises (which was thoroughly inspected by the Crime Team on 22nd February) in the early hours of 24th February. v. Recovery of Blood-stained Shirt from the bushes in front of Air Force Station, Tughlaqabad in the evening of 24th February.

6. Counsel for the appellant further submitted that the prosecution has failed to prove each circumstance beyond reasonable doubt and also circumstances do not form a complete chain to rule out the possibility of any other hypothesis but the innocence of the appellant. Counsel also submitted that admittedly there are missing links in the alleged chain of circumstances such as that the prosecution had failed to examine Shivam (son of Kusuma), who was present in the same room and was found running out after the said incident shouting chor chor. Counsel also submitted that the investigating officer of the case took contradictory stands firstly by saying that he had interrogated the child but he was unable to speak and then later his stand was that he did not record the statement of the child as he was not supporting the prosecution story. Counsel also submitted that the same very witness was examined by the defence as DW-4, so as to bring out the truth to the fore. Counsel further submitted that even Tulsi, son of the landlord and his wife, who was occupying adjacent room were not examined by the IO. Counsel

further submitted that the defence of the appellant is fully corroborated by the testimonies of PW-22 Kusuma, DW-4, Shivam and statement of the appellant recorded under Section 313 Cr.P.C. Counsel also urged that the learned Trial Court had wrongly placed reliance on hearsay evidence of PWs-1,4 and 5 in the form of Resgestae evidence ignoring the fact that maker of the alleged statement i.e. PW-22 Kusuma, has unequivocally denied having made any such statement to PWs-1,4 and 5. Counsel also submitted that if the statements of PWs- 1, 4 and 5 are to be accepted then PW-22 Kusuma would be an eye witness to the alleged occurrence but this also gets negated by the fact that Rukka sent by the police clearly recorded that no eye witness was found at the spot and also that no eye witness was present in the hospital. Counsel for the appellant also submitted that when the IO had reached at the spot at about 2.45 a.m., he found huge crowd present there but none of the person present their told him that they had heard Kusuma adage that her husband was killed by her maternal uncle Kamlesh and similarly, even in the hospital Kusuma and Anil Kumar who were present there did not take the said stand of Kusuma being an eye witness or any said narration of the appellant killing Karu was made by Kusuma to PW-1 Anil Kumar.

7. Counsel also submitted that so far the recovery of blood stained shirt and axe was concerned, no blood group of the accused was deducted thereon and nor any evidence was led to prove that the said blood stained clothes belonged to the appellant and with regard to the recovery of blood stained axe, counsel further submitted that the said axe was recovered on the disclosure of the appellant during the intervening night of 23 rd and 24th February, 2005 from the store-cum-open kitchen of the same premises but the said axe was not recovered by the crime team who had thoroughly inspected the spot and premises on 22nd February, 2005. Counsel for the appellant further submitted it cannot be said that the crime team who had thoroughly inspected the spot could not lay their hands on the said axe, had the same been there in such a small room. Counsel further emphasising on the aspect of the appellant absconding from the spot submitted that law on absconding is well settled that absconding may not be an evidence of guilty mind and a person may also abscond for fear of police arrest and harassment.

8. In support of his arguments counsel for the appellant placed reliance on the following judgments:i. Sattatiya @Satish Rajanna Kartalla V. State of Maharashtra, 2008(1) SCALE 39 ii. Prabhoo V. State of Uttar Pradesh, AIR 196.SC 111.iii. Sk. Yusuf V. State of West Bengal, 2011 (6) SCALE 51 iv. Bhaskaran V. State of Kerala, 1985 CRL.L.J.1711 9. Mr. Sunil Sharma, APP for the State, on the other hand, strongly refuted the submissions made by the counsel for the appellant and lent support to the judgment on conviction and order of sentence passed by the learned Sessions Judge. Counsel argued that it was the appellant who was present in the said room and had murdered Karu and thereafter, escaped from the scene of the crime with Shivam and while fleeing away started crying chor chor to pretend as if some thief had entered in the said room. Counsel also submitted that the appellant was encountered by PWs 1, 4 and 5, while he was running away with Shivam, even then, he made the same statement that they were looking for a thief. Counsel further submitted that a week prior to the said incident a quarrel had taken place between Karu and his wife and the appellant was scolded by Karu, when he tried to intervene in their fight and with a view to avenge his insult, the appellant had murdered Karu. Counsel also submitted that PW- 2 turned hostile but her initial statement made to PW-1, 4 and 5, informing them that the appellant had murdered Karu can be taken in the form of Resgestae evidence in terms of Section 6 of the Indian Evidence Act, 1872 and, therefore, even if PW-22 turned hostile the same would not impeach the credibility of testimonies of PW1, 4 and 5 who remained consistent in their depositions that they were told by PW-22 about her maternal uncle having killed Karu and thereafter, escaping from the scene of crime. Based on these submissions counsel for the respondent urged that this Court may not interfere with the well reasoned order passed by the learned Sessions Judge convicting the appellant for committing an offence under Section 302 IPC.

10. We have heard learned counsel for the parties at considerable length and given our anxious consideration to the arguments advanced by them. We have also gone through the entire material placed on record including the record of the Trial Court before taking a final view in this matter.

11. It is a settled law that criminal jurisprudence begins with the presumption that unless otherwise proved the person facing the trial would be deemed to be innocent. The burden to prove the charge against the accused is on the prosecution and not on the accused. The prosecution, if fails to connect the act of the accused with ultimate crime and where the material links constituting the chain of circumstantial evidence are found missing then the benefit of the same goes in favour of the accused.

12. Every criminal trial is based on direct and circumstantial evidence. Whereas, the former directly establishes the commission of offence while the later does so by placing unbroken chain of circumstances which can lead to irresistible inference of guilt. In the facts of the present case there is no direct evidence to prove the commission of crime of murder by the accused person, the appellant herein, and the case primarily rests upon the circumstantial evidence only.

13. It is a trite law that where the case is based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of conclusive nature and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused (Ref: Hanumant Govind Nargundkar vs. State of M.P. AIR 195.SC 343.). The said principles as set up by the Apex court have been reiterated time and again in one or the other form by the various judgments of the Apex Court and of High Courts.

14. In the recent judgment of the Honble Apex Court, in the case of Rumi Bora Dutta V. State of Assam, 2013 (7) SCALE 535 it was held that when a case totally hinges on the circumstantial evidence, it is the duty of the Court to see the circumstances which lead towards the guilt of the accused to have been fully established. The germane portion of the judgment is extracted below:

10. It is seemly to state here that the whole case of the prosecution rests on the circumstantial evidence. The learned trial Judge as well as the High Court has referred to certain circumstances. When a case is totally hinges on the circumstantial evidence, it is the duty of the Court to see that the circumstances which lead towards the guilt of the accused have been fully established and they must lead to a singular conclusion that the accused is guilty of the offence and rule out the probabilities which are likely to allow the presumption of innocence of the accused.

15. In yet another Birdhichand Sarda Vs. landmark judgment, in the case of Sharad State of Maharashtra, AIR 198.SC 1622.the Honble Apex Court held as under:

152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established: (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved as was held by this Court in Shivaji Sahebrao Bobade v. State of Maharashtra MANU/SC/0167/1973 :

1973. riLJ1783 where the following observations were made: certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict, and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions. (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty. (3) the circumstances should be of a conclusive nature and tendency. (4) they should exclude every possible hypothesis except the one to be proved, and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

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

154. It may be interesting to note that as regards the mode of proof in a criminal case depending on circumstantial evidence, in the absence of a corpus delicti, the statement of law as to proof of the same was laid down by Gresson, J.

(and concurred by 3 more Judges) in The King v. Horry (1952) NZLR 111 thus: Before he can be convicted, the fact of death should be proved by such circumstances as render the commission of the crime morally certain and leave no ground for reasonable doubt : the circumstantial evidence should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for.

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

156. This indicates the cardinal principle of criminal jurisprudence that a case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction. Horry's case (supra) was approved by this Court in Anant Chintaman Lagu v. State of Bombay :

1960. Crl L J 682.Lagu's case as also the principles enunciated by this Court in Hanumant's case (supra) have been uniformly and consistently followed in all later decisions of this Court without any single exception. To quote a few cases -Tufail's case : (1969) 3 SCC 19.(supra). Ramgopal's case :

1972. ri L J 47.(supra). Chandrakant Nyalchand Seth v. State of Bombay (Criminal Appeal No. 120 of 1957 decided on 19-21958), Dharambir Singh v. State of Punjab (Criminal Appeal No. 98 of 1958 decided on 4-11-1958). There are a number of other cases where although Hanumant's case has not been expressly noticed but the same principles have been expounded and reiterated, as in Naseem Ahmed v. Delhi Administration :

1974. Cri L J 61., Mohan Lal Pangasa v. State of U. P. :

1974. Cri L J 80., Shankarlal Gyarasilal Dixit v. State of Maharashtra :

1981. ri LJ 32.and M. G. Agarwal v. State of Maharashtra : [1963] 2 SCR 40.a five-Judge Bench decision.

16. Adverting to the facts of the present case it is to be seen whether the prosecution has succeeded in establishing the sequence of circumstances which can be called conclusive in nature and there is no unbroken chain leaving a gap of missing links and such circumstances are consistent with the hypothesis of the guilt of the accused absolutely conflicting with the innocence of the accused. As per the case set up by the prosecution, the circumstances which conclusively establishes the involvement of the appellant accused in the commission of the said murder mainly are that (1) he was present in the room where the murder had taken place (2) that the appellant had fled away from the scene of the crime immediately after the commission of the said crime along with Shivam, son of his niece (3) the appellant remained absconded till he was apprehended by the police form Anand Vihar bus terminal. (4) The recovery of blood stained axe from the store-cum-open kitchen of the same premises and recovery of his blood stained clothes from bushes in front of Air Force Station, Tughlaqabad on his disclosure of the same after his arrest.

17. As per the counsel for the appellant there are missing links in the alleged chain of circumstances, most importantly that the prosecution failed to examine Shivam son of Kusuma, who as per the case of the prosecution was present in the same room and ran with the accused from the scene of crime. Second important circumstance as per the counsel for the appellant was that prosecution failed to examine Tulsi, who was the son of the landlord, residing adjacent to the said tenanted room where the murder had taken place as well as non-examination of his wife.

18. Undoubtedly, no plausible answer has come forth from the prosecution as to why did they fail to examine Shivam, Tulsi and his wife. We do feel that the non-examination of Shivam by the prosecution who was 12 years of age on the date of the commission of the offence is a glaring lapse on the part of the prosecution. We are quite flabbergasted to find that in a small room, murder of one, out of four had

taken place but nobody out of the remaining three woke up at that point in time, as in the natural course, the deceased would have definitely cried or shrieked when he would have been attacked with the help of axe on his head. As per the MLC report, the deceased had received the following anti mortem injuries:

1. (i) A laceration of size 8.5 cms x .6 cms, margins irregular with hair and scalp tissue tags inside the wound which is present on the left side parietal area in coronal plane, lower end of the wound is 10 cms above left tragus, sub scalp tissue showing extravasation of blood in 6 x 7 cms area. Wound is carnial cavity deep. Left parietal and temporal bone showing depressed facture in an area of 8 x 5.5 cms, left side middle cranial fossa also found fractured. Subdural (about 100 ml) and epidural haemorrhage was seen. Left parieto temporal lobe lacerated in an area of 6 x 5 cms x 4 cms, intraparenchymal blood clots were also seen. (ii) Lacerated wound of size 10.5 cms x 2.5 cms obliquely present over left temporal area of scalp, lower end of which is at the level of left ears upper margin and upper end of wound is 7.5 cms above from the outer end of left eyebrow. Subscalp extravassation of blood was seen in corresponding area.

2. A stab wound of size 3 x 1.5 x 4 cms, longitudinally present over left angle of mandible, margins slightly abraded directed downward, forward and medially with extravassation of blood in soft tissue, left mandibular angle having depressed fracture 2 cms longitudinally, cutting left carotid and jugular vessel.

3. An incised wound of size 5*.3 cms subepidermal tissue deep placed in coronal plain over left shoulder.

19. With the nature of the said injuries sustained by the deceased it is difficult to believe that nobody could see the said murder having taken place in a small room/accommodation. PW-22 Kusuma, wife of the deceased had woken up because of some noise and when she could find the presence of her uncle at the gate of the room, then she tried to catch him but the uncle pushed her aside and fled away with Shivam and while stepping down on the stairs shouted chor chor while PW-22 Kusuma then noticed her husband with the blood smeared around him and then shouted that her uncle had killed her husband Karu. Shockingly, PW-22 Kusuma had turned hostile and did not stick to her first statement recorded

under Section 161 Cr.P.C although at no stage she took a stand that she had witnessed the murder to have taken place in the said premises. The only other witness Shivam, who could have come to the aid of the prosecution had appeared as a defence witness to support the appellant.

20. In the background of such a scenario, we do not find that the said circumstantial evidence conclusively establishes the guilt of the accused by mere fact that the appellant being one of the occupants of the room had left the scene of crime with Shivam. More particularly, when as per the deposition of the Shivam DW- 4, he got up and cried when found that somebody had stepped onto his hand and with his cry the appellant woke up and then ran with the impression that some thief had entered in their room. It is strange that by that time Shivam had also not noticed that his step father had already died and nor there is any evidence that even the appellant had raised the defence that he had noticed the murder of Karu. Undoubtedly, the act of absconding along with the last seen evidence of the accused being in the company of the victim is a very strong circumstance fatal to the accused but such a corroborative evidence must get strength only from the chain of other events, cumulative effect of which can conclusively establish the guilt of the accused clearly conflicting his innocence.

21. It is also a settled legal position as held in the case of Matru @Girish Chandra V. State of Uttar Pradesh, AIR 197.SC 1050.that mere act of absconding cannot by itself necessarily lead to a conclusion of guilty mind although such act is a relevant piece of evidence to be considered along with other evidence. It is also a settled legal position that in a given facts of the case, a person accused of an offence, may abscond out of fear of police arrest and harassment and in such like case the act of absconding may not be considered to be an evidence of guilty mind as held in S.K. Yusuf vs State of West Bengal 2011 (6) Scale 511. It cannot be lost sight of the fact that it is not the case of the prosecution that the appellant alone was in the company of the deceased victim and he was last seen by someone in the company of the victim. Here is a case where four persons were in the company of each other and out of them one had died but none of the other three have claimed that they had witnessed murder of the victim of the crime. Shockingly the wife of the deceased PW-22 Kusuma, even in her first statement

recorded under Section 161, Cr.P.C did not claim so. We are also amazed to find that it is a cry of Shivam which awakened the appellant and Kusuma. The cries of the victim surely would have taken place but did not awake any of these persons. The prosecution also failed to establish any motive on the part of the appellant to murder the husband of Kusuma except Kusuma, who in her first statement merely stated that the appellant was not happy with her marriage with Karu and even a week prior to the date of incident, Karu did not like the intrusion of the appellant during their routine fight. Such a fight or interjection on the part of the appellant in our view could not have instigated the appellant to an extent of prompting him to kill the husband of his niece Kusuma.

22. If even we believe that the appellant had killed Karu, still the prosecution had failed to prove on record any such strong motive on the part of the appellant, or any such circumstance which could provoke him to the extent of taking such a drastic step of eliminating the husband of his niece. Another incriminating evidence which could have gone against the appellant was the blood of the deceased on the weapon of offence and also on the shirt of the appellant, but both the FSL reports, though showed the axe and the shirt contained human blood but no report was given as to whether the category of the said blood tallied with the blood of the deceased.

23. On perusal of the judgment of the learned Trial Court, we find that one of the reasons given by the learned trial Judge to hold the appellant guilty for the commission of crime was, that the appellant failed to explain the circumstances in which he parted the company of the deceased and such failure on the part of the appellant was taken as a circumstance fortifying the prosecution case. Learned Trial court also observed that the appellant had given a false explanation for his absconding from the spot as in his statement recorded under Section 313 of Cr.P.C., he stated that he got up and saw somebody running out of the room after hearing the cry of Shivam and thereafter, both of them had started running by making the noise chor chor, when suddenly he was caught by prosecution witnesses. To support this reasoning the ld. trial court also placed reliance on Section 106 of Indian Evidence Act and catena of judgments of the Honble Supreme Court of India. There cannot be any dispute with the legal position as

envisaged under Section 106 of the Indian Evidence Act, which provides that when any fact is within the special knowledge of an accused person, the burden of proving that fact is upon him. The principle underlying Section 106 of the Evidence Act, which is an exception to the general rule governing the burden of proof applies only to such matters of defence supposed to be within the special knowledge of the person facing the accusation. This Section however, does not cast any burden on the accused person to prove that no crime was committed by proving facts especially within his knowledge nor does it warrants the conclusion, that if anything is unexplained, when the court thinks the accused could explain, he ought therefore to be found guilty. This legal provision thus, does not shift the onus of proving the guilt, which will always rests upon the prosecution and it is only in those cases where the prosecution succeeds in proving the facts which give rise to reasonable inference of guilt which can be negated by the accused by proving those facts, which are within his special knowledge and, which can dispel the prosecution case, and where the accused fails to bring on record the facts which are within his special knowledge or offers any false explanation than the same can provide an additional link in the chain of circumstances to fill the gap in such a chain. The help of this provision cannot be taken if the prosecution itself has failed to discharge its onus of conclusively establishing the guilt of the accused based on circumstantial evidence. This section cannot be used to undermine the well-established rule of law that save in very exceptional class of cases; the burden is on prosecution and never shifts.

24. In State of Maharashtra V. Suresh, (2001) 1 SCC 471.is one of the case which was relied upon by the learned trial court, but in the facts of that case, the accused himself had received injuries and the accused did not offer any explanation to such injuries but instead has given false answers and the court held that injuries sustained by the accused is a formidable incriminating circumstance and the false answers given by the accused can be counted as providing a missing link for completing the chain of evidence. While explaining the import of the said provision, it was held as under: Three possibilities may be countenanced when an accused points out the place where a dead body or an incriminating material was concealed without stating that it was concealed by himself. One is that he himself would have concealed it. Second is that he would have seen somebody else

concealing it. And the third is that he would have been told by another person that it was concealed there. But if the accused declines to tell the criminal court that his knowledge about the concealment was on account of one of the last two possibilities, the criminal court can presume that it was concealed by the accused himself. This is because accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the Court as to how else he came to know of it, the presumption is a well justified course to be adopted by the criminal court that the concealment was made by himself. Such an interpretation is not inconsistent with the principle embodied in Section 27 of the Evidence Act.

25. As already discussed above, in the facts of the present case the prosecution itself has failed to build the chain by conclusively establishing the circumstantial evidence to draw any inference of guilt of the accused and therefore, the prosecution cannot shift its burden on the accused to satisfactorily prove his innocence. The false explanation given by the appellant which is otherwise supported by the testimony of PW-22 and DW4, cannot provide an additional link in the chain of circumstantial evidence to hold the appellant guilty of committing the offence of murder.

26. Based on the above legal discussion, we find that the material on record did not a bridge the gap between the may be true and must be true, so essential for a court to record a finding of guilt of an accused based on the circumstantial evidence.

27. Although it is beyond our comprehension but it is a fact that PW -22 Kusuma, the only material witness did not stand firm on her initial deposition as the same by itself would have been strong evidence against the respondent, but unfortunately this witness turned hostile and in her deposition before the Court, she did not raise any reproachful finger at the appellant. We are in agreement with the contention raised by the counsel for the appellant that since PW-22 Kusuma had herself denied having made any statement to PW1, 4 and 5 informing that her maternal uncle (appellant herein) had killed her husband Karu then such a denial on the part of PW-22 in her Court deposition would not be relevant and admissible as

Resgestae under Section 6 of the Indian Evidence Act read with illustration (a) thereof. Such a denial on the part of PW-22 would render the said part of the evidence of PW1, 2 and 5 merely as hearsay evidence, which cannot be relied upon.

28. In Bhaskaran V. State of Kerala, 1985 Crl.L.J.

1711, it has been held that the statement should be spontaneous, contemporaneous by the person who has seen the actual occurrence. The Court has further held that if the maker of the alleged statement has unequivocally denied having made any such statement, then the very factum of any such statement having been made becomes doubtful. The germane portion read to be read in support of the present case is as follows:

4. At the trial, the appellant denied his involvement in the crime. It had been suggested that he was falsely implicated at the instance of his rivals. P.Ws. 1 and 6 turned hostile to the prosecution and failed to support the prosecution case that P.W 1 heard the outcry of the deceased or saw him escaping from the room leaving the knife there. She also denied having given Ext. P7 statement implicating the appellant. P.W. 2 is the only witness who supports the prosecution in that she saw a person going away from the house of the deceased while she was proceeding to that place attracted by the outcries made by the inmates. She had also deposed that the appellant was not seen in the house at that time or thereafter. The learned Sessions Judge accepted the testimony of P.W. 2 as proof of incriminating circumstances. The circumstances according to the learned Judge are the conduct of the appellant keeping away from the house immediately after the occurrence, the evidence of P.W. 2 that she was told by P.W. 1 that the appellant stabbed the deceased. The further circumstance is that the appellant was absconding until arrest on 28-10-1981. The statement said to have been made by P.W. 1 in the presence of P.W. 2 to the effect that the appellant stabbed the deceased has been admitted and acted upon as res gestae. The learned Judge had for the purpose of accepting that part of the evidence of P.W. 2 that she heard the utterances of P.W. 1 made use of Ext. P7 the first information statement denied by P.W.

1. It has to be noted that P.W. 1 has denied having made any such statement when examined. She has no case that she heard the deceased make any declaration or that she made any such statement to the hearing of P.W.

2. Ext. P7 a prior statement which could have been used for the purpose of contradicting or corroborating P.W. 1 and not as substantive evidence has lost importance when P.W. I has denied having made that statement. It is difficult to accept the testimony of P.W. 2 on this point, when P.W. 1 contradicts her. The so-called statement of P.W. 1 would not form res gestae and would only be hearsay.

5. Section 6 of the Evidence Act read with illustration (a) thereto shows that spontaneous statements in the course of the transaction are admissible as being res gestae. in Hadu v. State : AIR1951 Ori53 , the Court explained Section 6 of the Evidence Act as under: According to Section 6 what is admissible is a fact which is connected with the fact in issue as 'part of the transaction'. A transaction may consist of a single incident occupying a few minutes or it may be spread over a variety of facts etc. Occupying a much longer time and occurring on different occasions or at different places. The Madhya Pradesh High Court in Mahendra v. State of M.P. (at p.

112) said: Where the transaction consists of different acts, in order that the chain of such acts may constitute the same transaction, they must be connected together by proximity of time, proximity or unity of place, continuity of action and community of purpose or design. (See Amrita Lal v. Emperor AIR 191.Cal 188 at p. 196 : (1915) 16 Cri LJ 497.Hearsay statements to be admissible as substantive evidence of the truth of the facts stated therein must themselves be 'part of the transaction' and not merely uttered in the course of the transaction. Where the transaction is a single incident, a statement by a person who was perceiving the incident made simultaneously with the occurrence of the incident, may, with justification, be said to be part of the transaction inasmuch as it is the result of a spontaneous psychological reaction through perception.... While no doubt the spontaneity of the statement is the guarantee of the truth, the reasons for its admissibility under Section 6 is that it is a part of the transaction and not merely because it is spontaneous. The statement is relevant only if it is that of a person

who has seen the actual occurrence and who uttered it simultaneously with the incident or so soon thereafter as to make it reasonably certain that the speaker is still under the stress of the excitement caused by his having seen the incident.

29. After taking into consideration the totality of the facts and circumstances of the case and the evidence led on record by the prosecution, we find that many important links are missing so as to form the complete chain of evidence, which could conclusively establish the guilt on the part of the appellant consistent only with the hypothesis of the guilt of the appellant /accused. The only incriminating evidence against the appellant is that he had absconded from the scene of crime but the explanation given by him that he had woken up when Shivam had cried, find support from the testimony of the Shivam as well as Kusuma PW-22. The other explanation given by the appellant is that he and Shivam thought that some thief had entered in their room and later he was told by PW-2, Jai Parkash to run away because the son of the landlord Tulsi was also after his life. PW-22 herself turning hostile, non-examination of Shivam as a prosecution witness and rather becoming defence witness to support the appellant, nonexamination of Tulsi and his wife occupants of adjoining room to the room under the occupation of deceased Karu and his family, FSL reports not proving the blood group of the deceased, absence of motive on the part of the appellant, all these vital aspects create enough room to dent the prosecution story entitling the accused benefit of doubt. Mere fact that the appellant was not truthful in his defence evidence would not fill the gap of missing link in the absence of proper chain of evidence conclusively establishing the guilt of the accused in the commission of the crime of murder of deceased Karu.

30. In view of the above discussion, the judgment dated 16th February, 2010 and order on sentence dated 23rd February, 2010 passed by the learned Additional Sessions Judge, Patiala House Courts, New Delhi are hereby set aside. Appeal is allowed. Appellant is in custody. He is directed to be released forthwith, in case he is not required in any other case. KAILASH GAMBHIR, J INDERMEET KAUR, J August 06, 2013 pkb