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*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL.A. 262/2015

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Judgment reserved on : 22nd May, 2015
Judgment delivered on: 29th May, 2015

RAM YASH @ LALLU & Anr. ..... **Appellants**

Through: Ms. Anu Narula, Advocate

Versus

STATE .....**Respondent**

Through: Mr. Sunil Sharma, APP for the State

CORAM :
HON'BLE MR. JUSTICE G.S. SISTANI
HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S. SISTANI, J.

1. Present appeal arise out of a judgment dated 03.06.2014 and order on sentence dated 25.08.2014 passed by the learned Additional Sessions Judge in Session Case No. 51/2012, by virtue of which the appellants have been convicted under Sections 302/201/34 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC"), and sentenced to undergo Rigorous Imprisonment for life and to pay a fine of Rs.25,000/- each for the offence punishable under Section 302 of the Indian Penal Code, and in default of the payment of fine to further undergo Simple Imprisonment for a period of six months; The appellants were further sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs. 5000/- each for the offence

punishable under Section 201 of the Indian Penal Code, and in default of the payment of fine to further undergo Simple Imprisonment for a period of three months. The appellant Madan Kumar is also convicted under section 411 of the Indian Penal Code and further sentenced to undergo rigorous imprisonment for a period of two years. All the sentences were ordered to run concurrently.

2. The brief facts of the case as noticed by the learned Trial Court are that :

> "Both accused Ram Yash @ Lallu @ Ramesh and Madan Kumar have been facing trial in this Court for the offences punishable under Section 302/34 of IPC on allegations of the prosecution that on 12.01.2006 at about 5:30 pm in a Truck bearing registration no. HR-47-7554 at footpath, Main Mathura Road, Opposite CRRI New Delhi within jurisdiction of PS New Friends Colony, both in furtherance of common intention committed murder of Shyam Kumar @ Pandit with knife and by pressing his mouth with blanket.
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> Both accused have also been facing trial in this court for the offences punishable under section 394/397/34 of IPC on the allegations of the prosecution that on the above mentioned date, time and place both accused in furtherance of their common intention after committing murder of Shyam Kumar @ Pandit , both robbed his truck No. HR-47-7554, mobile phone, Rs.1200/-, wrist watch and some other articles from the pocket of dead body of the deceased.
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> Both accused have also been facing trial in this court for the offences punishable under Sections 201/34 of IPC on the allegations that on the above mentioned date, time and place both in furtherance of their common intention after committing murder of

Shyam Kumar @ Pandit, both of them threw his dead body after wrapping it with *lungi* with intent to cause certain evidence connected with this offence to disappear knowingly with intent to screen themselves from bigger punishment.

Accused Ram Yash @ Lallu @ Ramesh apart from above also facing trial for the offences punishable under section 411 of IPC on the allegations of the prosecution that on 19.01.2006 on Service Road, Rohini Sector 24 Near Metro Station Rohini, he was found in possession of loaded truck containing 20 cartons of roof seal belonging to deceased Shyam Kumar @ Pandit which he got recovered from there which he retained or possessed or having or knowing reasons to believe the same to be a stolen property.

After committal, charges were framed against both accused persons vide order dated 16.01.2007 to which accused persons pleaded not guilty and claimed trial."

3. In order to bring home the guilt of the appellants the prosecution has examined 27 witnesses. Appellants alleged that they have been falsely implicated and claimed innocence in their statement recorded under Section 313 of Code of Criminal Procedure. Further they denied that any recovery has been affected from their possession or at their instance.

4. Ms. Anu Narula, learned Counsel appearing on behalf of the appellants submitted that the impugned judgment is based on surmises and conjectures and is against the settled proposition of law as the prosecution has failed to prove its case beyond reasonable doubt and the appellants have been falsely implicated in the case.

5. The Learned Counsel for the appellants contended that the Trial Court has overlooked the parameters governing the cases based upon circumstantial evidence. The Counsel also contended that the alleged circumstances and links in the present case are not well established and do not form a complete chain, nor they are of conclusive nature.

6. The Learned Counsel for the appellants submits that the Trial Court has erred in not appreciating that the alleged motive attributed to the appellants that they had committed the murder of Shyam Kumar alias Pandit (deceased) to loot the goods and sell them in the market has been completely disapproved in view of the fact that the entire goods i.e. 20 rolls of roof seal were found loaded in the truck and the goods were lying intact despite the duration of gap of 7/8 days from the date of incident i.e. 12.01.06 and the date of arrest of appellant no.1 i.e. 18.01.06. It is also submitted that Trial Court erred in not appreciating the fact admitted by the Prosecution Witnesses that the truck was parked in a good running condition and its various parts like battery etc, which could have been easily removed and sold, were all intact and the stated fact also belies the version of prosecution that the appellant had committed offence to accomplish their motive of looting.

7. Further the Learned Counsel for the appellants has also contended that the Trial Court has erred in not appreciating that the alleged link of "last seen" which has not been attributed against the appellant No.2 and has not been proved against the appellant No.1. and even the material on record including the testimonies of PW's clearly signify

that the alleged link of "last seen" of the deceased with appellant No.1 is improbable, unreliable and unworthy of credence.

8. The Learned Counsel for the appellants has also submitted that the Trial Court has overlooked the fact that the refusal of Test Identification Parade by appellant Ram Yash is justified, in view of the fact that he was shown to the witnesses in the police station and leaves no doubt that it was pointless to conduct the TIP proceedings.

9. Further the learned counsel for the appellants submits that the recovery affected after disclosure statement made by the appellant Madan Kumar is highly doubtful as PW2 Kishore Kumar Mishra had not joined the proceedings at the time of recovery of the watch. Hence, the alleged recovery was neither at the instance nor in the presence of appellant no. 2 (Madan Kumar).

10. Further the learned counsel for the appellants strongly urged that the Learned Trial Court has overlooked the fact that the recoveries effected by the investigation agency are highly doubtful and hit by Section 27 of the Indian Evidence Act. Elaborating her arguments the counsel submits that the lost truck was found parked at a public place and the recoveries were affected after 7 days when the complaint was made and this appears to be absurd, improbable and unbelievable. Further the learned counsel for the appellants submits that the recovery of the dead body is also from a crowded place. Hence, the alleged pointing out of the dead body by the appellants is of no consequence.

11. The learned counsel for the appellants also submits that the Trial Court has erred in not appreciating that the pointing out of places by appellants which was already in the knowledge of police was of no legal consequence; further there is no medical or scientific evidence on record to connect the appellant to the offence and there is no alleged weapon of offence which has been recovered and neither the mobile phone of the deceased nor the call details have been connected with appellants or proved by the prosecution.

12. The counsel for the appellants also submitted that the Learned Trial Court has erred in not appreciating that no public person, despite availability and opportunity was joined for any proceedings by the police.

13. Per contra, it was submitted by Mr. Sunil Sharma, learned APP for the State that from documentary evidence as well as oral evidence, the prosecution has been able to prove its case beyond any shadow of doubt. It is further submitted by the counsel for the state that all the ingredients i.e. motive, intention and actus-reus on part of both the appellants have been duly proved by the prosecution and the guilt of the appellants stands duly proved beyond reasonable doubt.

14. Another contention raised by the Learned Counsel for the State is that motive stands duly established. The motive to kill is clearly discernible when the goods were taken out of the possession of the lawful custodian and kept somewhere else. And, even if the appellants were not successful in selling the goods which were taken out of possession of the lawful custodian, the prosecution cannot be blamed.

15. It is further submitted by the counsel for the state that the refusal on part of the Appellants to join the TIP, points towards the guilt of the appellants.

16. With regard to the appellant Madan Kumar, the learned counsel for the State submits that despite efforts, he could not be traced out as he was continuously absconding and this fact portrays that he has a guilty mind and the aforesaid fact goes against the appellant under Section 8 of the Indian Evidence Act.

17. Lastly, the counsel for the state urged that the impugned judgement does not suffer from any infirmity which calls for interference and the appeal is liable to be dismissed.

18. 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.

19. Before dealing with the arguments of the parties it would be useful to examine the testimonies of the material witnesses examined by the prosecution. The material witnesses are PW1 Dr. B.L.Chaudhary, PW2 Kishore Kumar Mishra, PW4 Sh. Simran Pal Singh, PW6 Surender Jha, and PW7 Lal Kumar Thakur.

20. PW 2 Kishore Kumar Mishra (Brother-in-law of the deceased) in his testimony deposed that he identified the dead body of the deceased Shyam Kumar Thakur in the Mortuary, AIIMS hospital vide identification statement Ex.2/A dated 15.01.2006. PW 2 further deposed that the deceased had purchased the watch make Sonata

Golden in his presence and hence he identified the same via Ex.P1 before the Ld. Metropolitan Magistrate Geetanjali Goel on 22.08.2006 and his statement was also recorded by the IO. However, PW 2 in his cross examination stated that "I do not remember if in my first statement to the police after seeing the dead body I told to police that my brother in law used to wear watch make Sonata, which is present on his dead body or missing due to lapse of time". PW 2 further stated that "It is correct that watch Ex. P1 are freely available in the market".

21. PW 4 Sh. Simran Pal Singh in his testimony deposed that he is in the transport business and was having a truck trailor bearing No. HR-47-7554 which was driven by Shyam Kumar (deceased) for about one year and his brother-in-law was a conductor. PW 4 further deposed that Brother-in-law of the deceased went on leave for about 20/25 days prior to day of incident and Shyam Kumar (deceased) appointed another person named Lallu as conductor on the truck. PW4 next deposed that on 12.01.2006, the truck was loaded at ICD Tuglakabad with the sheets/rolls of Roof seal numbering 20 pilots and their clearing agent Surender had a word with him around 6 or 6:30 pm on that day and informed about the clearance of the documents. A sum of Rs.1300 was given by him to the driver (deceased) as advance. PW4 also deposed that he had spoken to the Shyam Kumar Thakur (deceased) at 10:30 pm on his mobile and thereafter, his mobile phone was switched off. PW4 further deposed that the mobile number of the deceased was 9312785008 and the vehicle remained untraced along with the driver and the conductor and a complaint with regard to the

same was made to the police. PW4 next deposed that he was called by the police after a week near Metro Station Rithala where his truck was found stationed at Main Road and appellant Lallu was also present there in muffled face, whose name was disclosed as Ram Yash and the information about the death of the driver was conveyed on 13.01.2006. PW4 also deposed that the entire goods were loaded in the truck were intact and the truck was in a good running condition. However, PW4 in his cross examination firstly stated that "I do not remember the name of the brother in law of Shyam Thakur (deceased), who worked on my truck as a conductor for some time." In the latter part of his cross examination PW4 stated that *"It is correct that the name of the earlier conductor was Ram Kishore. Ram Kishore had reported to me before proceeding on leave and he left on leave stating that one of his relatives was unwell. He told me that he shall come back within one-one and half month."* PW 4 further stated that he lodged the complaint orally about the missing of the truck and the driver at Police Station Sukhdev Vihar on 13.01.2006 by 10.00 AM but the copy of the same was not given to him. PW4 further stated that the appellant Ram Yash was shown to him in the Police Station Sukhdev Vihar after one or two days of the incident.

22. PW 6 Surender Jha in his testimony deposed that he is a partner in the firm Sandra Cargo Services at Ring Road Naraina and engaged in Cargo Clearing Business as Custom House Agent. On 12.01.2006, they got the articles of M/s Pure Leathers Pvt. Ltd. cleared at about 5:00 p.m. from ICD Tuglakabad and was handed over to Chaudhary

Transporter who hired the truck with registration no. HR 47–7554 from PW4 Simran Pal Singh. PW6 further deposed that at that time the driver was not present but there was a helper present at that moment in the truck whose name he can not recall and even mentioned that the helper who loaded the articles in the truck on 12.01.2006 is present in the court. PW6 next deposed that he was shown the photographs of the appellant Ram Yash in the Police Station and he identified him in the court with the help of the same.

23. PW 7 Lal Kumar Thakur (Brother of the deceased) in his testimony deposed that on 15.01.2006 he identified the dead body of his elder brother Shyam Kumar Thakur in the Mortuary of AIIMS vide his statement Ex. PW7/A, which bears his signature at point A and after the post-mortem dead body was received vide receipt Ex. PW2/A.

24. From the perusal of the testimonies of the aforementioned witnesses we see that there are glaring inconsistencies and contradictions in the statements made by them. In the case of ***Suraj Mal v. State (Delhi Administration) 1979 Cri LJ1087***, it was observed as under:

> *"Where witnesses make two inconsistent statements in their evidence either at one stage or at two stages, the testimony of such witnesses becomes unreliable and unworthy of credence and in the absence of special circumstances no conviction can be based on the evidence of such witnesses.*

25. The real issue and controversy raised in the present appeal relates to the involvement of the two appellants in the murder of the deceased and whether they are responsible for the commission of offence and

that the prosecution has been able to establish that the appellants had committed the murder of the deceased and are guilty of the offence.

26. In the facts of the present case there is no direct evidence to prove the commission of crime of murder by the appellants, and the case primarily rests upon circumstantial evidence only. 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. In other words, there must be a chain of evidences so 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.

27. The law on this aspect of circumstantial evidence is well settled. In the case of ***State of Goa v. Sanjay Thakran reported at 2007 (3) Scale 740*** the apex court reiterated the following tests which must be satisfied in case of circumstantial evidence to support a conviction:-

> *"13. The prosecution case is based on circumstantial evidence and it is a well-settled proposition of law that when the case rests upon circumstantial evidence, such evidence must satisfy the following tests: -*
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> *(1) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;*
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> *(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;*

> *(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and*
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> *(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."*

28. The well known principles laid down by the Supreme Court in the landmark judgment of ***Sharad Birdhichand Sarda v. State of Maharashtra AIR 1984 SC 1622***, are well known which read as follows:-

> *"150. It is well settled that the prosecution, must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this: where various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the Court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where there is any infirmity on lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a Court.*
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> *151. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is* ***Hanumant v. State of Madhya Pradesh 1953 CriLJ 129****. This case has been Uniformly followed and applied*

by this Court in a large number of later decisions up-to-date, for instance, the cases of ***Tufail v. State of Uttar Pradesh (1969) 3 SCC 198 and Ramgopal v State of Maharashtra 1972 CriLJ 473.*** *It may be useful to extract what Mahajan, J. has laid down in Hanumant's case (supra):*

> *"It is well to remember that in cases where tile evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established 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 a conclusive nature and tendency 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."*

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 1973 Cri L J 1783*** *where the following observations were made:*

*"(1)xxxxxxx 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."

29. In the recent judgment of the Hon'ble 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 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."

30. What, therefore, needs to be seen is whether the prosecution has established the incriminating circumstances upon which it places reliance and whether those circumstances constitute a chain so complete as not to leave any reasonable ground for the appellant to be found innocent.

31. With regard to Last Seen Evidence, it will be relevant to take into consideration the deposition made by PW6 (Surender Jha) who in his examination in chief clearly stated that he had seen the helper (Appellant Ramyash) at the time of loading of articles in the truck and further stated that the helper who had loaded the articles in the truck on 12.01.2006 is present in court. However, PW6 in his statement nowhere mentioned that he had seen the deceased with the appellant no.1 at the time of loading of the articles in the truck. Hence we are of the view that the observation made by the learned trial court that the appellant was last seen with the deceased is incorrect and does not connect the appellant Ram Yash with the commission of the offence.

32. In the case of in ***Muhibur Rahman vs. State of Assam (2002) 6 SCC 715,*** the Apex Court observed that:

> *"The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. There may be cases where, on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide. In the present case there is no such proximity of time and place."*

33. In ***Bodhraj vs. State of J&K (2002) 8 SCC 45***, the Hon'ble Supreme Court held that:

> *"It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases."*

34. Keeping in view the law discussed above and on the basis of evidence on record, we are of the opinion that, the evidence of last seen becomes doubtful.

35. Regarding the circumstance of recovery of truck, we are of the view that this by itself cannot be a circumstance to implicate the appellants unless it forms part of the chain of circumstances. PW4 in his testimony stated that when the recovery of truck was effected, it was in good running condition and all the articles i.e. 20 rolls of roof seal which were loaded in the truck were lying intact despite the duration of gap of 7/8 days from the date of incident. Thus we find it to be

quite unnatural that had there been any intention on the part of the appellants to murder the deceased and loot or take away his articles, the appellants would have waited for a week after committing the murder of the deceased to do away with the stolen articles and would have parked the truck in a public place which is accessible to all.

36. The counsel for the appellants also raised this contention that the recovery of the dead body is from a crowded place and that the pointing out of the dead body by the appellants is of no consequence. According to us this contention holds ground. With regard to this also, we find that there is insufficient material to link the appellants with the murder of the deceased. First of all, pointing out of places by appellants was in the knowledge of police, hence this was of no legal consequence. Secondly, no alleged weapon of offence has been recovered and neither the mobile phone of the deceased nor the call details have connected with appellants and not even proved by the prosecution. There is, therefore, no link between the recoveries affected by the prosecution that links the appellants with the deceased.

37. Counsel in her contentions pointed out that the prosecution failed to establish the motive for the offence. From the evidence adduced by the prosecution, we are of the view that this contention is not devoid of merit. Prosecution has not come out with any motive for commission of the crime by the appellants. Law is settled that it is not necessary for the prosecution to allege any motive and if there is reliable direct evidence, absence of motive will not adversely affect the prosecution case but, where the prosecution alleges motive, it must

prove it and absence of satisfactory proof is liable to cast a grave doubt as to the correctness of the prosecution versions ***See State of U.P. v. Hari Prasad 1974 SCC 203, Darbar Singh v. State of Punjab, 1975 SCC*** and ***Bishan Das v. State of Punjab1975 SCC 145.***

38. In ***Prem Kumar v. State of Bihar (1995) 3 SCC 228*** the Apex Court discussed the concept of motive as applicable to Indian criminal jurisprudence and held as under:

> *"5. ... It is true that this Court has held in **State of U.P. v. Moti Ram (1990) 4 SCC 389** that in a case where the prosecution party and the accused party were in animosity on account of series of incidents over a considerable length of time, the motive is a double-edged weapon and the key question for consideration is whether the prosecution had convincingly and satisfactorily established the guilt of all or any of the accused beyond reasonable doubt by letting in reliable and cogent evidence. Very often, a motive is alleged to indicate the high degree of probability that the offence was committed by the person who was prompted by the motive. In our opinion, in a case when motive alleged against the accused is fully established, it provides a foundational material to connect the chain of circumstances. We hold that if motive is proved or established, it affords a key or pointer, to scan the evidence in the case, in that perspective and as a satisfactory circumstance of corroboration. It is a very relevant, and important aspect –*
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> *(a) to highlight the intention of the accused and*
> *(b) the approach to be made in appreciating the totality of the circumstances including the evidence disclosed in the case. The relevance of motive and the importance or value to be given to it are tersely stated by Shamsul Huda in delivering the Tagore Law*

Lectures (1902) - The Principles of the Law of Crimes in British India, at page 176, as follows:

But proof of the existence of a motive is not necessary for a conviction for any offence. But where the motive is proved it is evidence of the evil intent and is also relevant to show that the person who had the motive to commit a crime actually committed, it, although such evidence alone would not ordinarily be sufficient. Under Section 8 of the Evidence Act any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact."

39. On the aspect of importance of motive in a case of circumstantial evidence, the judgment of the Supreme Court in ***Amitava Banerjee v. State of West Bengal (2011) 12 SCC 554***, also sheds valuable light. The legal position as laid down by Wills in his book ***'Circumstantial Evidence'*** and in prior judicial pronouncements was relied upon by the court which may usefully be extracted and reads as follows:

"41. Motive for the commission of an offence no doubt assumes greater importance in cases resting on circumstantial evidence than those in which direct evidence regarding commission of the offence is available. And yet failure to prove motive in cases resting on circumstantial evidence is not fatal by itself. All that the absence of motive for the commission of the offence results in is that the court shall have to be more careful and circumspect in scrutinizing the evidence to ensure that suspicion does not take the place of proof while finding the accused guilty."

40. With regard to the Test Identification Parade of the appellant Ram Yash, it will be relevant to take into the consideration the observation of the Learned Trial Court wherein it is specifically mentioned that

PW6 Surinder Jha during his cross examination stated that he had been shown the photographs of the accused Ram Yash in the Police Station. It is pertinent to mention the cross examination of PW4 Simran Pal Singh in this regard wherein he has stated that the appellant Ram Yash was shown to him in the Police Station Sukhdev Vihar after one or two days of the incident.

41. The Apex Court in ***Laxmipat Choraria and Ors. v. State of Maharashtra AIR 1968 SC 938***, categorically observed that showing of a photograph prior to the identification makes the identification worthless. The Supreme Court also observed that there could be no doubt that if the intention on the part of the prosecution is to rely on the identification of the suspect by a witness, his ability to identify should be tested without showing him the suspect or his photograph or furnishing him the data for identification. The same view was taken in the case of ***N.J. Suraj v. State (2004) 11 SCC 346*** wherein the Supreme Court observed that in view of the fact that the photograph of the accused had been shown to the witnesses, their identification in the test identification parade became meaningless and no reliance could be placed thereon.

42. From a consideration of the aforesaid decisions of the Supreme Court, it is apparent that the purported identification by PW6 Surender Jha and PW4 Simran Pal Singh at the time of Test Identification Parade is worthless because the appellant as well as his photograph were shown to them prior to the Test Identification Parade conducted on 23.01.2006. Hence, the appellants had already been shown to the said

witnesses even prior to the conduct of the Test Identification Parade. Consequently, we are in agreement with the submission made by the learned Counsel for the appellants that none of the witnesses have identified the appellants.

43. With regard to the Test Identification Parade of the case property i.e. watch Ex.P1(make Sonata, golden colour) belonging to the deceased, it will be relevant to take into the consideration the depositions of PW2 Kishore Kumar and PW22 Hakim Shah.

i) PW2 in his cross examination stated that " I do not remember if in my first statement to the police after seeing the dead body I told to police that my brother in law used to wear watch make Sonata which is present on his dead body or is missing due to lapse of time. It is correct that watch Ex.P-1 are freely available in the market. I had identified the watch before the Ld. MM out of 20-25 watches shown to me. I had come along with IO for the TIP of the watch but I cannot say whether watch was in the pocket of the IO or was tied in the handkerchief or was in the sealed condition."

ii) PW22 Hakim Shah (landlord of appellant Madan Kumar) deposed in his cross examination "It is incorrect to state that Madan was with Police when they visited my house to recover the watch. Vol. Police had called me to the PS, Madan was in their custody, however, Madan was left in the PS and I was made to accompany the police to my quarter" and he further

testified that "I do not know what was written on Ex. PW-22/A (Seizure memo). I do not know to whom this watch belongs."

44. Thus after perusing the above testimonies, we have reached to this conclusion that there is serious doubt regarding the recovery of the above mentioned case property and it nowhere links to the appellant Madan Kumar. It is beyond human imagination that the appellant Madan Kumar carried the incriminating material (watch make sonata) for about seven months from the incident

45. In view of the law referred to in the paragraphs aforegoing, 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 appellant.

46. It is well settled that when a case is based on circumstantial evidence, such evidence has to satisfy three tests. Firstly, the circumstances from which an inference of guilt is sought to be proved must be cogently and firmly established; secondly the circumstances should be of definite and unerringly point towards guilt of the accused; and thirdly the circumstances taken cumulatively must form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else. In the present case, evidence does not complete the chain.

47. For the reasons stated above, we feel that the evidence on record, as brought forward by the prosecution, is insufficient to form a complete

chain so as to convict the appellant on the basis of circumstantial evidence only. There is enough doubt in the case and the benefit goes to the appellants.

48. We may refer to the case of ***Sohan vs. State of Haryana 2001 3 SCC 620*** wherein Apex Court observed that:

> *"'An accused is presumed to be innocent until he is found guilty. The burden of proof that he is guilty, is on the prosecution and that the prosecution has to establish its case beyond all reasonable doubts. In other words, the innocence of an accused can be dispelled by the prosecution only on establishing his guilt beyond all reasonable doubts on the basis of evidence. In this case, if only the sessions judge had reminded himself of the above mentioned basic or fundamental principles of criminal jurisprudence, direction of his approach and course of his appreciation of evidence would have been different and thereby perversity in appreciation of evidence could have been avoided".*

49. In ***State of U.P. Vs. Ashok Kumar Srivastava 1992 Crl. L.J. 1104***, it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

50. In the light of the preceding discussion, we are of the view that the prosecution has not been able to establish the case beyond any shadow of doubt and this court is of the opinion that in the above conspectus

of facts, the finding of guilt recorded by the learned Additional Sessions Judge, against the appellants cannot be sustained. In these circumstances, we are inclined to grant benefit of doubt to the appellant Ram Yash and appellant Madan Kumar and the appeal, therefore has to succeed.

51. Consequently, we set aside the impugned judgment dated 03.06.2014 and order on sentence dated 25.08.2014 passed by the learned Additional Sessions Judge, Delhi, and acquit both the appellants. The appeal stands allowed. They are directed to be released forthwith, in case they are not required in any other case.

52. Copy of this order be sent to Superintendent Jail.

53. Copy of the judgment along with Trial Court Record be sent back forthwith.

G. S. SISTANI, J.

SANGITA DHINGRA SEHGAL, J.

MAY 29, 2015
gr