

**THE HIGH COURT OF TRIPURA
AGARTALA**

CRL. A(J) 45 OF 2018

Shri Abhijit Datta alias Ninka,
son of Shri Narayan Datta of
Gakulnagar, PS Bishalgarh,
District-Sepahijala.

....**Convict-appellant**

- Vs -

The State of Tripura

.... **Respondent**

CRL. A(J) 73 OF 2017

Smt. Suchitra Saha,
daughter of Sri Swapan Saha of
Kabiraj Tilla, PS-East Agartala,
Dist.-West Tripura.

....**Convict-appellant**

- Vs -

The State of Tripura

.... **Respondent**

**BEFORE
HON'BLE MR. JUSTICE S.TALAPATRA
HON'BLE MR.JUSTICE ARINDAM LODH**

For the appellant(s)

[In Crl.A(J) 45/2018]

: Mr. Raju Datta, Advocate.

For the appellant(s)

[In Crl.A(J) 73/2017]

: Mr. A. Basak, Advocate.

For the State-respondent

[In both the appeals]

: Mr. Ratan Datta, P.P.

Date of hearing : 29.01.2020

Date of delivery of Judgment & Order. : 29.05.2020

Whether fit for reporting : Yes

JUDGMENT & ORDER

(Arindam Lodh, J)

Preliminary:

By way of presenting two separate appeals as noted above, the appellants have called in question the judgement and order dated 27.10.2017 passed by the Learned Addl. Sessions Judge, West Tripura, Agartala in connection with Case No. S. T. (T-1)73 of 2016, whereby they have been convicted and sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs10,000/- each with default stipulations for the offence punishable under Section 302 read with Section 34 of Indian Penal Code (“IPC”).

2. In a brief outline of the material aspects, it could be noticed that in the present case, the appellants are accused of causing death of one Basanti Ghosh in a rented house. There had been no eye-witness to the incident but prosecution has relied upon the two witnesses, the landlord and his wife and the evidence of doctor who opined the cause of death as Asphyxia. The Trial Court has also accepted the evidence of these two witnesses and the opinion of the

Doctor. Therefore, the appellants stand convicted essentially on the basis of the evidence of the said witnesses. The reliability of such evidence has been assailed in these appeals apart from other contentions concerning the surrounding factors. The relevant fact and background aspects of the matter could be noticed, keeping in view of the points arising for determination in these appeals.

Background with relevant facts:

3. Put in brief, the prosecution case had been that on 03.08.2011 at about 1230 hours one Narayan Roy appeared at Amtali Police Station and submitted a written complaint stating inter alia that on the previous day i.e. on 02.08.2011 one male person along with two females occupied one of his dwelling huts as tenant. Between those two women, the male person introduced one as his wife and another as his cousin sister (daughter of father's sister). Both those women were present in the room and the man had gone somewhere. At about 11 O'clock the male person came to his room and after sometime of that we all fell asleep. Today on 03.08.2011 AD, Wednesday at 10 O'clock in the morning, after getting no sound from their room, when my wife went before their room to call them and opened the door, she noticed that the body of one of those two women was lying over the bed whom the man introduced as his wife and she had not responded when called. Remaining two persons were absent

in the room. Immediately I went to the Amtali PS and informed the incident and when the police officers came from the Amtali PS, they fully understood that the lady had died. There was stool over the floor and bed. After studying the whole situation, we are certain that the said unknown man and woman unitedly had killed her inside the room and fled away secretly. After getting one phone number on a paper which was collected from a small bag hanged on the wall of the hut and when the police officer made contact over that number, one person came to our house and identified the dead body and said the name of the deceased was Basanti Ghosh, W/o Ajit Ghosh, Vill-Madhupur, PS Para, PS-Bishalgarh. Other than this one small photograph was found inside the bag. The photo was of the unknown man who came to our house as tenant.

3.1 Pursuant to the said complaint, Amtali P.S. Case No. 91 of 2011 was registered under Section 302/34 of IPC against one unknown male person and two unknown female persons.

4. Being endorsed, SI K.C. Uchai visited the site of incident, prepared the hand sketch map with separate index and recorded the statements of available witnesses, seized one passport size photograph of accused Abhijit Datta and a small piece of paper where a mobile contact bearing no. 8014293125 was written by preparing a seizure list, seized the viscera of the deceased and sent the

same to the Tripura Forensic Science Laboratory for its examination and report. Thereafter, the case was endorsed to SI Utpal Majumder (PW-9) for investigation.

5. IO (PW-9), after taking over the charge of investigation examined some witnesses, seized one NOKIA Mobile phone under a seizure list, collected P.M. Report, dead body challan and forensic report. After completion of investigation submitted charge-sheet against the appellants before the magistrate, who committed the case to the Court of Sessions.

The Evidence:

6. After committal, the case was tried in the Court of Additional Sessions Judge, West Tripura. To support the prosecution case, in total 9 witnesses were examined and relevant documents and material objects were introduced as evidence on proof. PW-1 Narayan Roy (landlord); PW-2, Smt. Bandana Majumder (Roy), wife of PW-1; PW-3 Nityananda Dhar (deceased was his niece); PW-4 Krishna Ghosh (younger brother of deceased); PW-5 Sajal Rakshit (a tenant under PW-1); PW-6 Sima Rakshit (wife of PW-5); PW-7 Dr Ranjit Kumar Das (who was posted as in charge of the Department of Forensic Medicine, Govt Medical College, Agartala) conducted autopsy accompanied by Dr Pradipta Narayan Chakraborty); PW-8 Suman Kumar Chakraborty (who submitted report as Senior Scientific

Officer-cum-Assistant Chemical Examiner) ; PW-9 Utpal Majumder (the second investigating officer who submitted charge-sheet).

7. Out of the aforesaid witnesses, PW-3 is the formal witness related with the process of investigation.

Now, in view of the contentions urged and the issues involved, we may take note of the salient features of the testimonies of other witnesses, primarily the landlord and his wife who allegedly first saw the deceased inside the room and called her husband, thereafter, the medical officer and the investigating officer.

8. For convenience, let us first assess the evidentiary value of PW-2.

PW-2, Bandana Majumder (Roy), the most vital witness of the case, deposed that one day two female persons came to her house and decided to occupy one of her huts from 01.08.2011. However, on 02.08.2011 they along with a male person occupied the room along with furniture and other house-hold goods. The male person and the middle aged person introduced themselves as husband and wife and the young lady as cousin sister of the male person. She further stated that the male person went out of her house in the evening. Her husband (PW-1) came to the bed-room at about 11 pm after the closing the main gate and prior to closing the main gate the male person entered to his hut.

9. PW-1, Narayan Roy, claiming to be the landlord led in evidence, inter alia, to the effect that he wrote the ejahar (Exbt.1) in his own handwriting and identified his signature; that he had his own house having four numbers of dwelling huts two of which were given on rent, one being lying vacant he was in search of a tenant; that being an auto driver by profession for most of the time he used to remain outside from his house but his wife used to stay at house; that on 02.08.2011 two female and one male person had occupied his vacant hut as tenant, and the male person had introduced one of the two females as his wife and they occupied the hut having their discussion with his wife; that on 02.08.2011 he returned back home at 9 pm and came to know about the tenancy from his wife PW-2; he had a talk with the male person who introduced his a wife as Basanti Ghosh and another as his cousin sister and he talked with both of them but he did not ask the name of the tenant on that day; that the male person had returned to home at 11 pm when he talked with all of them and thereafter he went to his dwelling hut after closing the main gate; that on the next morning he got up at about 10 am and while proceeding from his house with his vehicle he found the door of the rented hut closed; that he was informed by his wife over telephone that having found the door closed she knocked the door but received no response;

that he came back home, verified the matter from his wife, knocked the door and having found no response he opened the door and noticed the wife of the tenant was lying on the bed and on his call he did not receive any response from her; that thereafter he went to the police station, reported the incident to the duty officer, police reached at his house, talked with him, entered into the room, recovered a purse which contain a photograph and mobile number, seized one passport size photograph of the husband of the deceased along with a piece of paper containing one mobile number from the said purse, seizure list was prepared to which he put his signature (Exbt.2); that in his examination-in-chief on his identification, the photograph, the small piece of paper and the red-brown purse were taken into evidence and marked as Exbts. MO-1, MO-2 and MO-3 respectively; that thereafter police made a call to the number written in the piece of paper, in response a person came to his house and identified the dead body of the deceased as Basanti Ghosh, wife of Avijit Ghosh; that he again went to PS and submitted the written ejahar; that in course of examination-in-chief he identified the person in the seized photograph as the husband of the deceased who was present in the Court and identified him as Abhijit Datta in the dock; that he also identified the woman who was introduced as cousin sister by the accused Abhijit and identified her as Suchitra Das.

9.1. In his cross-examination carried on behalf of accused Abhijit Datta, PW-1 deposed that he did not state in his ejahar that two of his dwelling huts were given on rent out of four huts and also did not state that at the material time one of the huts was lying vacant and he was in search of a tenant. This witness admitted that he did neither state to the I/O that on 02.08.2011 he returned back home at 9 pm nor did he state this fact in his written ejahar. He further deposed that in his written ejahar he neither stated he talked with either of the tenants immediately after their occupation of the rented hut nor he stated that he talked with the male tenant after his return to his house on that night.

9.2. On being subjected to further cross-examination, this witness stated inter alia as under:

“It is fact that my tenant never disclosed their name and identity in my presence.”

This witness also stated that-

“No deed of rent agreement was executed....”

9.3. In his further cross-examination on behalf of accused Abhijit, PW-1 attributed his knowledge that except the seized material none of the house-hold goods like furniture and other materials were seized by the police.

9.4. Being cross-examined by accused-appellant Suchitra Saha, he stated that he did not state in his written ejahar as well as to the I/O that he ever talked with Suchitra Saha on 02.08.2011. However, this witness denied the suggestion that at the request of police he identified Suchitra Saha as the cousin sister of accused Abhijit Datta.

9.5. This witness further stated that on the next morning her husband had left with his vehicle at 10 am. Having found no response from the rented hut of the tenant she knocked the door and peeping through the door she found the aged lady sleeping on her bed wrapping with a “katha” (blanket). She also found stool on the floor. Thereafter, she immediately called her husband (PW-1) over telephone, who accordingly came and informed the matter to the police station. Rest of her depositions were the replica of the version of PW-1. She also was a witness of the seizure lists and identified her signatures in the seized memos.

10. PW-2 when put to cross-examination admitted that she did not state to the investigating officer that the male person who occupied her dwelling hut introduced him as the husband of the deceased and cousin brother of another young lady. She further stated in cross that she did not state to the police that on the fateful night at

about 11 pm her husband closed the gate and the male person entered into his dwelling hut before the gate was closed by her husband.

10.1. More importantly, on being subjected to cross-examination she deposed, *inter alia*, as under:

“It is a fact that before we took sleep my husband did not state anything that he talked with the male person and found him to enter into his rented hut. It is also a fact he did not talk with a middle aged woman and the young lady.”

10.2. This witness in her cross-examination further stated and informed the Court that:

“It is a fact I had discussion only with the deceased and another lady to give one my dwelling hut on rent.

It is a fact never I discussed with the accused Avijit Datta to give one of my dwelling hut on rent.”

11. PW-4, Krishna Ghosh, the younger brother of deceased Basanti Ghosh identified the photograph of Basanti and the accused Avijit Datta having heard the death news of his sister from his brother-in-law Ajit Ghosh, the husband of Basanti.

11.1 In cross-examination the witness volunteered that his sister fled away with Avijit Datta after quarrel with her husband, which statement was not found in his statement under Section 161 CrPC.

12. PW-5, Sajal Rakshit was a tenant under PW-1. He deposed that he heard from Narayan Roy that a person along with two

females occupied one of his huts. In his deposition he stated that at about 9.30 am his wife over telephone informed him that his wife and PW-2 were not getting any response from tenants of the room that was occupied on the previous night. He came back and informed the matter to PW-1 and subsequently, both of them opened the door and found a lady lying dead on her bed. He further stated that thereafter, the matter was informed to the police. He is a witness to the inquest.

12.1. In his cross-examination he stated that he did not state to the police that on that day he returned home on receipt of telephone from his wife.

13. PW-6, Sima Rakshit deposed that they had no knowledge about tenancy of the hut. However, in the morning being informed by PW-2 that her newly inducted tenant was not responding to her call. She asked her to call her husband and accordingly on her call her husband came and further categorically stated that *“he called Narayan Roy. After a little while, Narayan Roy, the owner of the house returned home. Thereafter, Narayan Roy reported the matter to Amtali PS and immediately police came to our house.”* She further stated that police entered into the room and *“found a lady dead...”*.

13.1. In her cross-examination she said that she and her husband never had seen the tenants.

14. PW-7 is the doctor who conducted autopsy found multiple lacerated injury on the inner side of the of the upper lip and opined that cause of death was asphyxia as a result of smothering caused by soft to farm object.

14.1. In cross-examination he stated that in his opinion in the report he did not mention whether the cause of death was homicidal or not.

15. PW-9 is SI Utpal Majumder who after taking up investigation on 29.11.2011 from his previous IO, K. C. Uchai perused the investigation report and case docket. He also examined few witnesses, seized one Nokia Mobile set with Nokia battery as produced by Sujit Datta, collected PM Report, dead body challan, forensic report of viscera and arrested Avijit Datta@Ninka and on 21.09.2011 arrested Suchitra Saha. On completion of investigation he submitted charge-sheet.

15.1. In his cross-examination he stated that Test Identification Parade was not arranged.

16. Both the appellants were separately examined under Section 313 CrPC and they have stated that they have no knowledge about the incident. They denied that they took one of the huts of Narayan Roy on rent and they have been falsely implicated in the case and pleaded their innocence.

16.1. A relevant portion of the appellant Suchitra's statement reads as under:

*"Q.3. It is further appears from the evidence of PW-1 that on 02.08.2011 he talked with Shri Abhijit Datta and you Smt. Suchitra Saha and the middle aged woman was introduced as Basanti Ghosh as the wife of Abhijit Datta.
A. False statement. I don't know the accused Abhijit Datta."*

The Trial Court found the appellants guilty.

17. After conclusion of trial and after having heard the parties, the Trial Court found that there was no direct evidence about the commission of offence; and the entire prosecution case was hinging upon the theory of "last seen together".

17.1. The Trial Court accepted the genuineness of the evidence led in by PWs-1 and 2, the land lord and his wife that *"the accused persons were last seen together with the deceased at about 11 pm on the fateful night and they were found in the rented house of PWs-1 and 2 but on the following morning Basanti Das was found dead and the time gap is about 10 to 12 hours and the possibility of any person other than the accused persons being author of the crime is ruled out There is no evidence led on behalf of the defence that the accused persons left the house after 11 pm and the main gate of the house was either opened by the house owner for them to leave the house silently. Whenever the main gate of the house remained closed*

till following morning the accused might left the house silently after doing the crime otherwise they must have adduced evidence on their behalf.” Accordingly placing reliance upon the evidence led by PWs-1 and 2 the learned Trial Court convicted and sentenced the appellants.

Rival Contentions:

18. Assailing the conviction and sentence, Mr. Raju Datta and Mr A. Basak, Learned Counsels have contended on behalf of both the appellants that the conviction of the appellants is based on speculations and the prosecution had even failed to prove their identity. The Learned Counsels drawing our attentions to the evidence of PWs 1 and 2 strenuously argued that their evidence suffered from serious contradictions and there are lot of improvements and exaggerations.

18.1. According to Learned Counsels, the Trial Judge has committed serious error in relying upon the evidence of PWs 1 and 2. It has been submitted that there was none except PWs 1 and 2 who had seen the appellants occupying the room on rent.

18.2. Mr Raju Datta appearing on behalf of the appellant Suchitra Saha has drawn our attention to the statement of PW-2 wherein she admitted being subjected to cross-examination that before they went to sleep her husband did not say anything that he talked

with the male person and found him to enter into his rented hut and further admitted that her husband PW-2 did not have any conversation with the two women. But in examination-in-chief she stated that her husband informed her that before the main gate was closed the male person had entered into his rented hut.

18.3. Mr Datta, Learned Counsel for the appellant Suchitra has strongly urged that the Trial Judge has failed to interpret the application of the theory of “last seen together”.

18.4. Mr A Basak, Learned Counsel for the appellant Abhijit Datta has submitted there was no evidence that Abhijit had ever gone to the house for rent. He has further submitted that the entire prosecution story and the implication of the appellant with murder of the deceased is fabricated and without any basis.

18.5. Mr Basak has submitted that only based on the photograph allegedly found inside the purse of the deceased the appellant Abhijit was implicated which is impermissible in law.

18.6. Both the Learned Counsels for the appellants in the same terms have submitted that it is fit case to enable PWs 1 and 2 to identify the accused-appellants in the test identification parade (TIP, for short). According to them, the two investigating officers intentionally had skipped to arrange TIP only to make out a case

against the appellants and to cover up their failure to unearth the actual cause of death.

18.7. Lastly, they have submitted that prosecution has miserably failed to establish the guilt of the appellants and on mere suspicion they were implicated with the instant case.

18.8. In support of their submissions, the learned Counsels for the appellants had placed reliance upon some authoritative decisions of the Supreme Court as well as this Court. These are:-

- i. (2012) 2 SCC 334 [*Kailash Gour & Ors. v. State of Assam*]
- ii. (2014) 4 SCC 715 [*Kanhaiya Lal v. State of Rajasthan*]
- iii. (2008) 15 SCC 430 [*Krishnan v. State represented by Inspector of Police*]
- iv. (2006) 6 SCC 525 [*Niranjan Panja v. State of West Bengal*]
- v. (2013) 12 SCC 406 [*Sujit Biswas v. State of Assam*]
- vi. (2016) 12 SCC 251 [*Rambraksh alias Jalim v. State of Chhattisgarh*]
- vii. (2005) 11 SCC 133 [*Murlidhar & Ors. v. State of Rajasthan*]
- viii. *Judgement of Crl.A(J)No.28/2016 [Smt. Manju Debnath v. The State of Tripura] & Crl.A.(J)No.32/2016 [Sri Sanjoy Datta v. The State of Tripura] passed by this Division Bench of this Court.*

19. On the other hand, Mr. Ratan Datta, Learned Public Prosecutor strongly urged to uphold the judgement of conviction passed by the Trial Court against the appellants since according to him the findings of Court below were well-thought when all the

incriminating circumstances had been proved beyond reasonable doubt.

19.1. Learned PP relying upon the testimonies of PW-1 and 2 submitted that it was proved beyond any shadow of doubt that appellants along with the deceased occupied one of the huts of the said witnesses on 02.08.2011 and PW-1 after having conversation with the appellant Abhijit at 11 pm closed the main gate and entering into his own hut he informed his wife PW-2 that Abhijit Datta entered his occupied hut.

19.2. His next plank of submission was that in the next morning none of the appellants were found in the hut but the dead body of the deceased was acquainted as the wife of the appellant Abhijit Datta. Thus, according to Learned PP the theory of “last seen together” was well-established which circumstance alone pointed towards the guilt of the accused and he pleaded for maintaining the sentence declared by the Learned Trial Court.

19.3. Learned PP, finally, urged that the appellants and the deceased were found to be in the same hut on that fateful night and as such, in view Section 106 of the Evidence Act there would be a corresponding burden upon appellants to offer a cogent explanation as to what happened on that night and how Basanti Ghosh was killed for

the reason that these facts were within the special knowledge of the accused-appellants. But they failed to discharge their burden which only pointed towards the guilt of the accused-appellants.

19.4. To justify his submission Learned PP relied upon the following judgements:

- i. AIR 2012 SC 2163[Kanti Bharat Vajsur & Anr v. State of Gujarat];*
- ii. Judgement of Allahabad High Court passed in Shiv Kumar and another v. State of U.P. delivered on 17 th September, 2019.*

19.5. Learned Counsels for the appellants questioning this submission of Learned PP submitted that since prosecution never had raised this issue in course of trial, the said plea would not be sustainable in law before this Court.

20. We have given our thoughtful consideration to submissions made by Learned Counsels and also scaled the authorities cited at the bar.

21. In the instant case, the prosecution relied upon the following circumstances to establish the guilt of the appellants in absence of any eye witness:

- (i) On 02.08.2011 two female and one male person occupied one of their hut on rent;*

- (ii) Her husband PW-1 returned to house and closed the main gate. Before closing the gate the male person entered into his rented hut;
- (iii) On the next morning her husband left the house with his vehicle at 10 am;
- (iv) Having found no response on knock she peeped through the door of the hut and saw the middle aged lady sleeping on the cot being wrapped with “katha” (blanket);
- (v) Informed her husband PW-1 over telephone who returned immediately and informed the matter to the police station, subsequently police came and seized some articles;
- (vi) The death of deceased Basanti was homicidal in nature and the cause of death is asphyxia due to smothering caused by soft to firm object.

22. We would like to consider each of the circumstances relied upon by the prosecution as discussed hereinabove.

23. The solitary basis of conviction of the appellants is on the theory of “last seen together” broadly relying upon the testimonies of Bandana Majumder (Roy), PW-1 and her husband Narayan Roy, PW-2.

24. Before we delve into merits of the case we make it clear that the accused are convicted solely on the basis of last seen theory all the links in the chain of circumstances must be completed.

25. Now, keeping in mind to the circumstances as relied upon by the prosecution, at the outset, we shall examine and evaluate the evidence of PW-2, for convenience, as she first saw the deceased in the rented hut.

25.1. PW-2 stated that one day two female persons met her intending that they would occupy one of her huts on rent on 01.08.2011. However, they occupied it with one male person 02.08.2011 with their furniture and other household goods. Let us pause here and analyse this portion of evidence in realistic manner.

25.2. Firstly, PW-2 did not mention the date when they met her and through whom they approached her for taking one hut on rent. It is very unnatural that PW-2 did not inform the matter to her husband which is evident from her deposition. Further, it is not clear when the tenants occupied the room on 02.08.2011.

26. While returning the judgment and order of conviction and sentence, according to learned trial Judge, the following circumstances have been proved beyond reasonable doubt:-

1. (i).the death of the deceased is also homicidal in nature;

1. (ii).the accused persons were not only last seen together on the fateful night, PW 1 just before the occurrence met with the accused persons and the deceased on the rented hut and had talk with them.

1. (iii).the witness and others identified the accused persons and the deceased;

1.(iv).from the evidence of PWs-1 and 2 it clearly appears to this court that both the accused persons were last seen together with the deceased by PW-1 before the incident on the fateful night.

1.(v).from the evidence of PWs-1 and 2 it reveals that one day in the month of August,2011 two female came to the house of PW-1 and talked with PW-2 and they decided to take one of the dwelling huts of PW-1 on a rental basis and they decided to occupy the room on 01.08.2011 but they failed to occupy the room on the date fixed.

1.(vi).from the evidence of PWs-1 and 2 that on 02.08.2011 said female persons (inclusive of accused Suchitra Saha) accompanied by the male person occupied one of the dwelling huts and they also brought their furniture and other household goods.

1.(vii). from the evidence of PWs-1 and 2 that the male person and the middle aged women introduced themselves as husband and wife and the young lady was introduced as the cousin sister of the male person.

1.(viii). that two female and one male person started living in the house of PW-1 as tenant and the male person left the house in the evening and he returned back to the house at about 11 pm but it was not witnessed by PW-2. PW-1 while returned home at about 9 p.m. on 02.08.2011 he came to know from his wife (PW-2) about the occupation of one of his dwelling huts by the tenant and accordingly he talked with the male person who occupied one hut of the dwelling house as tenant and also talked with the wife of the tenant and his cousin sister.

27. A bare perusal of the circumstances as delineated by the trial Court, we have noticed that the learned trial Judge has heavily relied upon only on one theory that was the ‘last seen together’ since he found that PW-1 just before the occurrence met with the accused persons and the deceased on the rented hut and had a talk with them. Before we delve into the merits of the appreciation of evidence and decision thereon, let us have a survey of the law relating to the theory of ‘last seen together’.

28. In *Kailash Gour & Ors. Vrs. State of Assam*, reported in (2012) 2 SCC 34, a three Judge Bench of the Supreme Court had observed that (SCC p.49, para 39 & 40) --

“39. It is one of the fundamental principles of criminal jurisprudence that an accused is presumed to be innocent till he is proved to be guilty. It is equally well settled

that suspicion howsoever strong can never take the place of proof. There is indeed a long distance between the accused “may have committed the offence” and “must have committed the offence” which must be traversed by the prosecution by adducing reliable and cogent evidence. Presumption of innocence has been recognized as a human right which cannot be wished away. See Narendra Singh v. State of M.P. [(2004) 10 SCC 699] and Ranjitsing Brahamajeetsing Sharma v. State of Maharastra [(2005) 5 SCC 294].

40. To the same effect is the decision of this Court in S. Ganesan v. Rama Raghuraman [(2011) 2 SCC 83] where this Court observed:

39. Every accused is presumed to be innocent unless his guilt is proved. The presumption of innocence is a human right. Subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence in India.

The above views were reiterated by this Court in State of U.P. v. Naresh [(2011) 4 SCC 324].”

29. At para 43 of the judgment their Lordships had further observed that-

“43. At any rate, the legal proposition formulated by Bedi, J. based on the past failures does not appear to us to be the solution to the problem. We say with utmost respect to the erudition of our Brother that we do not share his view that the reports of the Commissions of Inquiry set up in the past can justify a departure from the rules of evidence or the fundamental tenets of the criminal justice system. That an accused is presumed to be innocent till he is proved guilty beyond a reasonable doubt is a principle that cannot be sacrificed on the alter of inefficiency, inadequacy or inept handling of the investigation by the police. The benefit arising from any such faulty investigation ought to go to the accused and not to the prosecution. So also, the quality and creditability of the evidence required to bring home the guilt of the accused cannot be different in cases where the investigation is satisfactory vis-a-vis cases in which it is not. The rules of evidence and the standards by which the same has to be evaluated also cannot be different in cases depending upon whether the case has any communal overtones or in an ordinary crime for passion, gain or avarice.”

30. In a recent judgment of a Division Bench of this Court in ***Crl.A(J) No.28/2016*** and ***Crl.A(J) No.34/2016***, titled as ***Smt. Manju Debnath v. the State of Tripura & Sri Sanjoy Datta v. the State of Tripura***, in which I was one of the members, has observed that-

*“16. A decision of the Gauhati High Court in **Milan Debnath vs. State of Tripura** reported in (2010) 4 GRL 1 has been pressed to service but this court finds that a species of circumstantial evidence viz. the last seen together has been elaborately discussed in the said report. It has been held that the circumstantial evidence relating to ‘last seen together’ must be of such nature that the entire chain of events is established and there is no room for any amount of suspicion. The suspicion may howsoever be grave cannot lead to conviction unless the offence alleged against the accused is found to be established beyond all reasonable doubt. Finally Mr. Datta, learned counsel has placed his reliance on a decision of this court in **Bhusan Tripura vs State of Tripura** reported in (2017) 2 TLR 593 where it has been enunciated that in every case based upon the circumstantial evidence the question that needs to be responded to is whether the circumstances as relied upon by the prosecution are proved by reliable and cogent evidence and whether all the circumstances so relied have formed a chain so complete so as to rule out the hypothesis of innocence of the accused (para-18 of the report).”*

31. In ***Rambraksh alias Jalim V. State of Chattisgarh***, reported in (2016) 12 SCC 251, the Supreme Court had held thus:-
(SCC. p.255, para 12 & 13)

“12. It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other words, a conviction cannot be based on the only circumstance of last seen together. Normally, 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 is found dead, is so

small that possibility of any person other than the accused being the perpetrator of the crime becomes impossible. To record a conviction, the last seen together itself would not be sufficient and the prosecution has to complete the chain of circumstances to bring home the guilt of the accused.

13. *In a similar fact situation this Court in Krishnan v. State of T.N. (2014) 12 SCC 279, held as follows: (SCC pp.284-85, paras 21 & 24).*

“21. The conviction cannot be based only on circumstance of last seen together with the deceased. In Arjun Marik v. State of Bihar, 1994 SCC (Cri) 1551 this Court held as follows: (SCC p.385, para 31).

‘31. Thus the evidence that the appellant had gone to Sitaram in the evening of 19-7-1985 and had stayed in the night at the house of deceased Sitaram is very shaky and inconclusive. Even if it is accepted that they were there it would at best amount to be the evidence of the appellants having been seen last together with the deceased. But it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the accused and, therefore, no conviction on that basis alone can be founded.’

.....

24. *In Jaswant Gir v. State of Punjab, (2005) 12 SCC 438, this Court held that in the absence of any other links in the chain of circumstantial evidence, the appellant cannot be convicted solely on the basis of “last seen together” even if version of the prosecution witness in this regard is believed.”*

32. Before the learned trial Court, defending the appellant, the judgment of the Supreme Court in the case of ***Kanhaiya Lal v. State of Rajasthan***, reported in **(2014) 4 SCC 715** was pressed into service. The learned Judge has reproduced the relevant portion of the judgment but hold that the instant case has no relevance with that of the said case. For greater appreciation of the case in hand and for

convenience, the relevant portions of the judgment are reproduced here-in-below: (SCC.p.717-719, paras 8 to 15)

“8. The prosecution case is that the appellant-accused Kanhaiya Lal committed the murder of Kala by strangulation and threw the body in the well. Nobody witnessed the occurrence and the case rests on circumstantial evidence. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances.

9. The prosecution in order to prove its case mainly relied on the following circumstances:

9.1.(i) The death of Kala was homicidal in nature;

9.2. (ii) Kala was last seen with accused Kanhaiya Lal when both of them visited the house of PW 4 Hurma on the night of the occurrence; and

9.3. (iii) Kala objected to the illicit intimacy of accused Kanhaiya Lal with the wife of his younger brother PW 3 Kama and that led to the occurrence.

10. The autopsy on the body of Kala was conducted by two doctors and one of them namely Dr. Rajesh Sharma has been examined as PW 1. According to him two external injuries were found on the neck, namely, an abrasion 5cm x 2 cm on the left side of the neck and bruise 3cm x 2cm on the parietal aspect of the neck in the right side and on its internal examination he noticed the fracture of vertebrae C3 & C4 and the fracture of Hyoid bone anteriorly and all the injuries were anti mortem. It is opined that the cause of death of Kala is due to neurogenic shock as well as hemorrhagic shock. Ext.10 is the post mortem report. Accepting the medical evidence it is clear that Kala suffered a homicidal death.

11. The primary, if not the solitary basis of the conviction of the appellant is on the theory of last seen, as the deceased Kala along with accused Kanhaiya Lal visited the house of PW 4

Hurma at 9.00 pm on 31.8.2003. PW 4 Hurma did not fully support the prosecution case and was declared hostile. In his examination-in-chief he has stated that on the occurrence night he returned home at 8.00 pm and about 9.00 pm accused Kanhaiya Lal and Kala came to his house and demanded Daru and he gave one bottle and received a sum of Rs.15/- from the accused Kanhaiya Lal and they returned together and the next day morning wife of Kala, PW 10 Shantibai came and inquired from him about her husband Kala and he told her about the visit of Kala with accused Kanhaiya Lal to his house the previous night. It is the testimony of PW 10 Shantibai that her husband Kala did not return home on the night of the occurrence and in the morning she went to the house of PW 4 Hurma and inquired and came to know from him about the visit of her husband along with accused Kanhaiya Lal to his house in the night. Though PW 4 Hurma was treated as hostile witness, the above testimony of him is corroborated by the testimony of PW10 Shantibai.

12. 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. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant.

13. The alleged illicit intimacy of the accused Kanhaiya Lal with Kamli, wife of PW 3 Kama, is said to be the cause for the occurrence. According to PW 3, his wife Kamli left him four years back and is residing with her parents in Sanchiya village. PW 10 Shantibai also in her testimony has confirmed that Kamli has been living in village Sanchiya for 4-5 years. It reveals that they were not living together for a number of years. It is the further testimony of PW 3 Kama that he has never seen Kamli and accused Kanhaiya Lal together and no person in the village told him so and it is only his brother Kala who informed him about the illicit intimacy between them. In this context it is relevant to point out that wife of Kala namely PW 10 Shantibai in her testimony has not alleged any illicit relationship between Kamli and accused Kanhaiya Lal. In such circumstances it is doubtful as to whether there was any illicit intimacy between them as alleged.

14. Further, PW 3 Kama and PW 10 Shantibai have categorically stated in their testimonies that there was no dispute between deceased Kala and accused Kanhaiya Lal and they had cordial relationship. Thus the motive alleged by the prosecution that Kala, as elder of the family dissuaded accused Kanhaiya Lal to sever his illicit relationship with his sister-in-law, Kamli had triggered the murder, is not established.

15. The theory of last seen – the appellant having gone with the deceased in the manner noticed hereinbefore, is the singular piece of circumstantial evidence available against him. The conviction of the appellant cannot be maintained merely on suspicion, however strong it may be, or on his conduct. These facts assume further importance on account of absence of proof of motive particularly when it is proved that there was cordial relationship between the accused and the deceased for a long time. The fact situation bears great similarity to that in *Madho Singh vs. State of Rajasthan* (2010) 15 SCC 588.”

33. In *Kali Ram v. State of Himachal Pradesh*, reported in (1973) 2 SCC 802, the Apex Court has observed as under: (SCC. p.820, para 25)

“25. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence.”

34. In *M.G. Agarwal v. State of Maharashtra*, reported in AIR 1963 SC 200, the Apex Court held that—if the circumstances proved in a case are consistent either with the innocence of the accused, or with his guilt, then the accused is entitled to be benefit of

doubt. When it is held that a certain fact has been proved, then the question that arises is whether such a fact leads to the inference of guilt on the part of the accused person or not, and in dealing with this aspect of the problem, benefit of doubt must be drawn only if the proved fact is wholly inconsistent with the innocence of the accused, and is entirely consistent with his guilt.

35. Here, we may profitably take note of the case of ***Sharad Birdichand Sarda***, reported in ***(1984) 4 SCC 116***, where the Apex Court held that—*Graver the crime, greater should be the standard of proof. An accused may appear to be guilty on the basis of suspicion but that cannot amount to legal proof. When on the evidence two possibilities are available or open, one which goes in the favour of the prosecution and the other benefits an accused, the accused is undoubtedly entitled to the benefit of doubt. The principle has special relevance where the guilt or the accused is sought to be established by circumstantial evidence.*

36. In ***State of West Bengal vs. Mir Mohammad Omar & Ors***, reported in ***(2008) 8 SCC 382***, the Apex Court has observed thus:-

“33. Prusumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved.

Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reach a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case."

37. Keeping in mind the ratio laid down in the aforesaid authorities of law, we shall consider each of the circumstance relied upon by the trial Court. The first circumstance as formulated by the learned trial Court that the death of the deceased is also homicidal in nature would be discussed later on and we would like to discuss the second circumstance formulated by the trial Court that the accused persons i.e. the appellants herein, were 'last seen together' with the deceased on the fateful night and that PW-1 just before the occurrence met with the accused persons and the deceased on the rented hut and had a talk with them.

38. According to us, this circumstance is the core issue of the whole case. The next two circumstances i.e. **1.(iii)** & **1.(iv)** that the witnesses had identified the accused persons and the deceased and PWs-1 & 2 had seen the accused persons together with the deceased at night are related to the circumstances **1.(ii)**. We shall minutely

examine and evaluate the evidence of the said circumstance while we shall discuss the evidence. We would like to first take up the circumstance **1.(v)** as drawn by the trial Court that the evidence of PWs- 1 and 2 reveals that one day in the month of August,2011 two female came to the house of PW-1 and talked with PW-2 and the resided one of the dwelling huts of PW-1 on a rental basis and they decided to occupy the room on 01.08.2011 but they failed to occupy the room on the date fixed.

39. Entire case is based upon the evidence of PWs-1 & 2. PW-2 Smt. Bandana Majumder (Roy) is the wife of PW-1 Narayan Roy who is the owner of the dwelling hut at which the deceased Basanti was found dead. PW-1 during his deposition has stated that he had four numbers of dwelling huts out of which two numbers were given on rental basis to the tenants and one of the dwelling huts was lying vacant and he was in search of a tenant.

39.1 PW-2 has stated that two females had approached her to occupy the vacant hut as tenant on rent and they were supposed to occupy the hut on 01.08.2011, but, they did not occupy on the said date and it was occupied on 02.08.2011. It is also surfaced from the depositions of PW-1 and PW-2 that the accused-appellants along with another female person at the time of occupying the hut had brought all

the furniture, articles and utensils along with them. To substantiate these statements prosecution has failed to bring any witness. Throughout this episode we have noticed that PW-2 could not tell the names of the accused persons but always she was telling two females who approached her for tenancy. To us, it appears very unnatural that PW-2 being the wife of the landlord of the hut belonging to PW-1 would not express her desire to know the names of the proposed tenants. She also did not disclose the fact of tenancy to anyone. They brought all the household goods inside the hut. The prosecution has failed to produce any witness who had witnessed the carrying of such household goods into the dwelling hut of the PW-1 and PW-2. PW-2 also had failed to divulge the names of the tenants i.e. the accused persons and the deceased even at the time when the investigating officer has recorded her statement under Section 161 of CrPC. Curious enough, PW-1 in his cross-examination has categorically stated that *“it is a fact that my tenant never disclosed their name and identity in my presence.”* It further reveals from the investigation and the depositions of the prosecution witnesses that the household goods and other materials were seized by the police. A suspicious circumstance will naturally arise as to whether the accused persons at all had brought the household goods or other materials along with them and if not so, why the prosecution had introduced the story of

bringing household goods and other materials into the hut. Further, it is hard to believe that a person will introduce a new tenant in his/her house without knowing their names and identity. This has raised serious suspicion in the first chain of circumstances of the case in respect of the fact that whether the appellants at all accompanied the victim to occupy the dwelling hut of PWs-1 and 2.

40. PWs- 5 & 6 who were occupying another hut of the house of PWs- 1 & 2 as husband and wife on rent deposed that they did not see the new tenants i.e. the appellants and the victim who occupied the room on 02.08.2011. PW-6 has stated that they were not aware that one of the rooms has already been occupied by the appellants and the deceased. PW-6, the wife of PW-5 has stated a total opposite version of PW-2 that the appellants had entered into the dwelling hut as tenant in consultation with her. She has stated that *“during our stay in the house of Narayan Roy as tenant, the wife of Narayan Roy stated that a person met with Narayan Roy and settled the matter of tenancy with Narayan Roy to stay in a room of Narayan Roy as tenant.”* Here again, we find that the story of occupation of the hut by the appellants along with the victim creates a suspicious circumstance. Further, according to PW-2, the tenants did not occupy the room on 01.08.2011 as they proposed to her. In this circumstance,

we are of the opinion that had there been any discussion for occupying the hut as tenancy between the appellants and PW-2, then, the fact of non-occupation of the hut must have been discussed and shared with her husband i.e. PW-1 in natural course of human conduct. Thus, even if we believe that the dead body of the victim was found within the said hut of PWs- 1 & 2 then also it throws enough rays of suspicion whether the appellants at all had occupied the room along with the victim. In view of what has been transpired from the above circumstance [1.(vii)] that a male person and the middle aged woman introduced themselves as husband and wife and the young lady was introduced as the cousin sister of the male person as deposed by PWs- 1 & 2 has given us enough space to suspect the said statements of PWs-1 & 2 in their evidence.

41. Now, proceeding to the next circumstance [1.(viii)], we are of the opinion that two female and one male person started living in the house of PW-1 as tenant and the male person left the house in the evening and he returned back to the house at about 11 pm will not be sufficient enough to establish the theory of 'last seen together'. If all the three persons had occupied the hut and started to live together, then, there would have been circumstances that they would take lunch, tea in the evening and dinner at night. During the course of

investigation, in the instant case, surprisingly, the prosecution has failed to bring any such evidence that the appellants along with the victim had cooked their foods and had eaten the same on that day and night. Had the appellants really been there, then, in our belief it would be most natural that there must have some remaining of the food that would be found when the investigating officer first entered into the room but no such material has been brought before us leading the prosecution case more suspicious to establish the circumstance that the appellants had started living in the house as tenant and the male person had left the house at evening and returned back to the house at about 11 pm. Here again, the link to the chain of circumstances of 'last seen together' is missed.

42. Next, the deposition of PW-1 appears to us natural for the reason that he has stated in his examination-in-chief that on 02.08.2011 when he returned home at 9 pm he came to know from his wife about the occupation of one of the dwelling huts by its tenant. According to us, in a normal course of human conduct the wife and the husband must share each other about the entry of any tenant into the house. From the statement of PW-1, it appears that for the first time he came to know from his wife about the occupation of dwelling hut by its tenant which is hard to believe.

43. Finally, we shall take up the circumstance [1.(ii)] that the accused persons were ‘last seen together’ with the victim and PW-1 just before the occurrence met with the accused persons and the deceased on the rented hut and had talk with the female persons one being the wife of the tenant and another is cousin sister.

43.1 To establish these circumstances, the prosecution as well as the trial Court has relied upon the evidence of PWs-1 & 2. Let us make a survey to what extent we can rely upon the statement of PW-1 first when he deposed that-

“I have also talked with the male person who occupied room as a tenant and his cousin sister. The name of the middle aged women who was introduced as the wife of the tenant was Basanti Ghosh as I have been stated by them.”

“I did not ask the name of the tenant on that day.”

“The male person returned home at about 11 pm, and thereafter I talked with him and his wife. Thereafter I went back to my dwelling hut after closing the main gate of my house. On the next day morning I get about 10 am and I went out of my dwelling hut with my vehicle while I found the door of the rented hut was found closed.”

43.2 If we split this part of evidence, we find lots of discrepancies, inconsistencies and un-natural conduct of PW-1. Question arise in our mind that when this PW-1 did not ask the name

of the tenant on that day, then, why suddenly the other tenants would disclose the name of Basanti Ghosh, the deceased? This is also one of the main doubtful circumstances and our suspicion in this regard is further fortified that when PW-1 in his cross-examination has categorically stated that – *“It is fact that my tenant never disclosed their name and identity in my presence.”* This suspicious circumstance throws further ray of doubts as to whether PW-1 at all had a talk with the appellants as well as the deceased Basanti Ghosh. More so, PW-1 in his cross-examination has specifically stated that he did not state to the police officer that he had a talk with the male tenant after his return to his house on that night and here we find that PW-1 has tried to improve his version what he has not stated in his examination-in-chief that he also had a talk with the male tenant on that night after his return to the house. In furtherance thereof, our suspicion in respect of the circumstance as to whether PW-1 had a talk with the tenants has been strengthened when we find that in cross-examination itself PW-1 has contradicted the statement which he has stated in his examination-in-chief that on the next day when police personnel came, they called a person in his house and that person identified the dead body of the deceased as Basanti Ghosh, wife of Abhijit Ghosh that means for the first time PW-1 came to learn about the name and identity of the person who came to his house after being called upon by the police.

This contradictory statement of PW-1 makes it aptly clear that PW-1 has tried to improvise his version while his statement was recorded by the investigating officer under Section 161, CrPC.

43.3 Interestingly, the prosecution has failed to bring home the person who according to PW-1 had come in the house of PW-1 and identified the dead body of the deceased as Basanti Ghosh. Resultantly, the link in the process of forming chain to identify the dead body is missed and remained doubtful.

43.4 We have further noticed that PW-1 in his cross-examination has stated he did not state to the I.O. that on 02.08.2011 he returned to his home at 9 pm. Here also, PW-1 has tried to improvise the prosecution story which he has stated in his examination-in-chief that he returned home on 02.08.2011 at 9 pm.

44. Next, if we look at the evidence of PW-2 in regard to the piece of evidence of PW-1 that he had a talk with the tenants on that fateful night, we find that PW-2 in her examination-in-chief has deposed that when PW-1 had entered into their bed room at about 11 pm he informed her that he closed the main gate of their house and before he closed the main gate the male person entered into his rented hut has been contradicted in her examination-in-chief when she has stated that –*“It is a fact that before we took sleep my husband did not*

state anything that he talked with the male person and found him to enter into his rented hut.” PW-2 has further stated in his cross-examination that-*“It is also a fact that he did not talk with the middle aged woman and the young lady.”* This has raised a serious suspicious circumstances in the mind of the Court about the core issue of the theory of ‘last seen together’ which the prosecution has tried to establish by approaching a story that PW-1 had a talk with the tenants at night on 02.08.2011. Furthermore, we have noticed that PW-2 has made statement in her examination-in-chief that- *“the male person and the middle aged woman introduced themselves as husband and wife and the young lady was introduced themselves as husband and wife and the young lady was introduced as cousin sister of male person.”* This statement has been introduced by PW-2 for the first time in her examination-in-chief in course of trial which statement, she has admitted in her cross-examination that she has not made such statement while her statement was recorded under Section 161 of CrPC by the I.O. For more clarity we may reproduce her statement in the cross-examination here-in-below in verbatim:

“It is a fact that I did not state to the police that the male person who occupied my dwelling hut on rent introduced him as the wife of the deceased and cousin brother of another young lady.

It is a fact that I did not state to the police that on the fateful night at about 11 pm my husband closed the gate and the

male person entered into his dwelling hut before the gate was closed by him.”

45. Interestingly, PW-6 one of the tenants of the hut of the PWs- 1 & 2 has admitted in her cross-examination that – “*it is fact that never I saw any of the tenants*” “It is a fact that myself and my husband never saw anybody to occupy the rented room of Narayan Roy.

46. In the backdrop of above discussion on the circumstances that were formulated by the learned trial Judge at Point No. **1(ii)** and second part of Point No. **1(viii)** are not beyond suspicion from which this Court can draw the only hypothesis other than the guilt of the appellants.

47. Next episode to the entire chain of circumstances is that on the next date at 10 am PW-1 had left his house with his vehicle-Auto rickshaw when he found the door of the newly rented hut was closed. His wife, PW-2 having found no response knocked the door of their rented hut and peeping through the door she found the middle aged lady sleeping on her ‘khat’ (bed) wrapping with a ‘Katha’ (blanket). Thereafter she immediately called her husband over telephone and her husband returned home and informed the matter to the police station. Subsequently police came and talked with them and thereafter police had entered into the room and has detected that the

middle aged woman was not alive. On this episode PW-6, the wife of PW-5 has stated in her examination-in-chief that PW-1 had informed her that he was not getting any response from inside the newly rented hut. Accordingly, PW-6 was asked to inform the matter to her husband and to call him. On her call her husband PW-5 returned home after a little while, Narayan Roy i.e. PW-1 also returned home who reported the matter to the Amtali PS and immediately the police came to their house and inquired about the matter and entered into the room and the lady was found dead.

48. This episode that the deceased lady was found inside the rented hut according to us is not of much importance for the reason that we are much more concerned as to whether the appellants herein were found to reside with the victim before the victim had occupied the hut of PWs 1 & 2. However, to test the credibility and integrity of the depositions of PWs 1 & 2 we would like to discuss few features of this episode. From the evidence of PWs 1 & 2 it is not clear whether the door was open from inside and if it was closed then they entered into the room by way of breaking the door. The evidence in regard to the circumstance is also very much shaky in respect of the fact that PW-1 has stated that he had left the house on the next day but he has not made any specific statement whether he found the gate that was

closed by him on the previous night was open. We have noticed that a suggestion was made by the side of the appellants to PW-1 in reply to which he stated that-“ *it is not a fact that on the basis of the photograph seized by police I falsely introduced the accused in the present case as my tenant.*”

49. During his further cross-examination on the part of the appellant Suchitra Saha this PW-1 had volunteered that he saw Suchitra subsequently at the police station after her arrest and to a suggestion he denied that he identified Suchitra Saha as the cousin sister of another appellant Abhijit Datta. The statements made by PW-1 voluntarily that he saw Suchitra subsequently at the police station after her arrest has added another feather to the entire suspicious circumstances that the PW-1 and 2 had never seen the appellants occupying the room with the victim. The PW-1 has further admitted in his cross-examination that he did not state to the investigating officer that he ever had a talk with the appellant Suchitra Saha on 02.08.2011 in his house. According to us, the integrity of PW-1 is under serious clouds and appears to be not dependable to convict the appellants.

50. During argument before this Court learned counsel for the appellants strenuously argued that it was the photograph, the only evidence which led the investigating agency to implicate Abhijit

Datta, one of the appellants as an accused in the instant case. If we give our anxious thought to the said submission of learned counsel and simultaneous reading of the evidence of PW-1 that he saw Suchitra Saha, another appellant subsequently after her arrest carries enough significance.

51. Lastly, as we said earlier, the entire prosecution case rests only upon the circumstantial evidence and in a case based on circumstantial evidence, according to us, sometimes motive behind the murder, plays an important role to establish the guilt of the accused persons. In the instant case, prosecution has miserably failed to bring home a case wherefrom we can gather some motive behind the commission of crime by the appellants. This is an important circumstance in a case of circumstantial evidence to complete the chain of circumstance.

52. As observed by the Supreme Court in *Kanaiyalal (supra)* that in a case of circumstantial evidence where the entire case rests squarely on circumstantial evidence, inference of the guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused of the guilt of any other person. Further it was observed that the circumstances from which an inference as to the guilt of the accused is

drawn have to be proved beyond any shadow of doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In the instant case, what has been transpired from the above scrutiny of evidence that none of the incriminating facts and circumstances have been proved reasonable doubt that the appellants had accompanied the victim to enter and occupy the said rented hut when she was found dead.

53. We have given our due consideration to the submission of learned Public Prosecutor that the appellants had failed to give any explanation how the victim was murdered as obligated under Section 106 of the Evidence Act. In our opinion, in the instant case, the situation was not like that of the circumstances where the accused persons are obligated to give explanation under Section 106 of the Evidence Act for the reason that none of the appellants were found inside the hut along with the victim so that obligation was cast upon them to explain how the victim died. That apart, mere non-explanation on the part of the appellants, in our considered opinion by itself cannot lead to proof of guilt against the appellants. It is one of the requirements where the accused persons are found together with the victim/deceased at the time of incident, or immediately before or just after the occurrence of the incident that means the Court can seek an

explanation from an accused when it is proved beyond any doubt that the accused are seen together with the victim at the time of incident, or immediately before or just after the occurrence of the incident without any gap of time.

54. Here, we feel happy to recollect the judgment of ***Vivian Bose, J. in Shambu Nath Mehra v. State of Ajmer***, reported in ***1956 SCR 199: AIR 1956 SC 404: 1956 Cri LJ 794*** which had laid down the legal principle underlying the shifting of burden of proof under Section 106 of the Evidence Act thus (vide SCC p. 393, para 38):-

“38. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are ‘especially’ within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word ‘especially’ stresses that. It means facts that are pre-eminently or exceptionally within his knowledge.”

(emphasis in original)

55. On this context, we have gone through the statements, the appellants made in their examinations under Section 313 of CrPC. When the appellant Abhijit Datta was noticed about the incriminating evidence laid down by the witnesses he replied that false investigation report was submitted in order to harass him and he was totally innocent. He further answered to the questions that false case was

launched against him and false evidence was given by the witnesses against him.

56. The appellant, Suchitra Saha when she was noticed to incriminating evidence against her she stated that false investigation report was submitted against him. A question was put to him which is reproduced below, for convenience:

“Question No.5: It further appears from the evidence of PW 1 that on 02.08.2011 he talked with Shri Abhijit Datta and you Smt. Sucharita Saha and the middle aged women was introduced as Basanti Ghosh as the wife of Abhijit Datta.

Do you have to say anything in this regard?

Ans. False statement. I do not know the accused Abhijit Datta.”

57. In the instant case, we do not find any evidence how this accused Suchitra Saha was linked with the accused Abhijit Datta. The investigating officer, as we find did not arrange for test identification parade to identify the accused. The investigating officer has not stated in his evidence on the basis of whose statement or on the basis of which evidence said Suchitra Saha was introduced as an accused in connection with the instant case.

58. Thus, keeping in view the principle laid down in the case of *Shambu Nath Mehra (supra)* when there is no such evidence that none of the accused were found together with the victim, immediately

before or just after the occurrence of the incident, there were no such facts which were ‘especially within their knowledge’. More so, as it is apparent from the records in course of trial the prosecution case was never proceeded on the footing that any of the facts was especially within the knowledge of the accused-appellants and, therefore, the principle in Section 106 of the Evidence Act would not apply. On the other hand, what we find that the prosecution all along proceeded with footing that PW-1 was the eye witness to the fact that he had seen the accused-appellants to reside along with the victim in his rented hut, which evidence of PW-1 as we discussed in the preceding paragraphs are wholly unreliable as his evidence is replete with contradiction, inconsistencies and further has suffered from lot of improvements and exaggerations.

59. In our considered opinion, the finding of the learned Additional Sessions Judge that the circumstances that PW-1 had seen the appellants along with the victim lady is well misconceived and the learned trial Judge has misread and misconstrued the judgment passed by the Supreme Court in **Kanhaiyalal case (supra)** as well as the decision of the Apex Court in ***Bodhraj alias Bodha & Ors. v. State of J & K***, reported in **(2002) 8 SCC 45**. The learned trial Judge has failed

to distinguish the principle laid down in the case of *Bodhraj (supra)* in the context of the present case.

60. In the result, what has been transpired from the overall assessment of the above evidence coupled with the discussion relating to each and every episodes of the entire chain of circumstances as outlined here-in-above, it is concretized that there is no eye –witnesses that both the appellants along with deceased occupied one of the huts of PWs 1 & 2, and that, what further revealed that PW-1 and PW-2 had last seen the appellants with the deceased and that, the fact that they murdered the deceased in the said hut which facts the prosecution has utterly failed to prove.

61. We re-iterate that in a case solely based on circumstantial evidence, all the circumstances relied upon the prosecution must be proved beyond reasonable doubt, and such proved circumstances should form a complete chain so as not to leave any doubt in the mind of the Court about the complicity of the accused. In the present case, none of the circumstances relied upon the prosecution has been proved beyond reasonable doubt, and there is no question of one complete chain of circumstances being formed that would point towards the guilt of the accused. In our opinion, the benefit of doubt should therefore be granted in favour of the appellants. We are accordingly of

the opinion that the Court below erred in convicting the appellants, Abhijit Datta@ Ninka and Suchitra Saha for the offence of murder of the deceased.

62. Accordingly, the impugned judgement of the Trial Court stands set aside and both the appeals are allowed. The appellants are acquitted from the charge levelled against them under section 302 of IPC. They are set at liberty.

Send down the L.C. Rs.

JUDGE

JUDGE