IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.1 OF 2020

1. Mr. Pradeep Horo,
   s/o. Puno Horo,
   Age 22 years,
   r/o. Kalhakumari P.S. Lapunj,
   Bartoli, Ranchi and presently
   undergoing sentence at Central Jail,
   Colvale, Bardez, Goa.

2. Mr. Safar Khan,
   S/o. Nimaj Khan,
   Age 29 years, r/o. Agarma,
   Kolibera, Simdega, Jharkand
   and presently undergoing sentence
   at Central Jail Colvale, Bardez, Goa. .... Appellants

Versus

1. Police Inspector,
   Margao Police Station,
   Margao, Goa.

2. State,
   through PP,
   High Court of Bombay at Goa,
   Panaji, Goa. .... Respondents

Mr. Arun B. D'Sa, Advocate for the Appellants.
Mr. P. Faldessai, Additional Public Prosecutor for the State.

WITH
CRIMINAL APPEAL NO.25 OF 2020

Mrs. Ettandevi Gope @ Ashadevi
W/o. Shri Mangra Gope,
r/o. House No.110,
Kaimba Post-Tengriya,
P.S. Palkot, Dist. Gumla
State, Jharkhand. .... Appellant
(Presently in Judicial Lock-up)

Versus

State,
Through Public Prosecutor,
High Court of Bombay at Goa,
Panaji-Goa.

WITH
CRIMINAL APPEAL NO.26 OF 2020

Mr. Mangra Gope,
S/o. Shri Jatru Gope,
r/o. House No.110,
Kaimba Post-Tengriya,
P.S. Palkot, Dist. Gumla
State, Jharkhand. .... Appellant

Versus

State,
Through Public Prosecutor,
High Court of Bombay at Goa,
Panaji-Goa. .... Respondent

Mr. Anoop Gaonkar, Advocate under Legal Aid Scheme for the Appellants.
Mr. P. Faldessai, Additional Public Prosecutor for the State.

Coram:- M.S. SONAK &
SMT. M. S. JAWALKAR, JJ.

Reserved on:- 18th August, 2020

Pronounced on: 31st August, 2020

JUDGMENT (Per M. S. Sonak, J.)

These three appeals are against the common Judgment and Order dated 19.09.2019 made by the learned Sessions Judge, South Goa at Margao in Sessions Case (302) No.6/2018 convicting the appellants under Sections 302 and 201 r/w Section 34 of the Indian Penal Code (IPC) and sentencing them to undergo life imprisonment, apart from fine. Learned counsel for the parties agree that since, the challenge in these three appeals is to the common Judgment and Order dated 19.09.2019, it is only appropriate that the same are disposed of by a common judgment and order.

2. Criminal Appeal No.1 of 2020 has been instituted by Pradeep Horo (A1) and Safar Khan (A2) and these appellants are represented by Advocate Arun B. D'Sa.

3. Criminal Appeals Nos.25 of 2020 and 26 of 2020 are instituted by Ettandevi alias Ashadevi Gope (A4) and her husband Mangra Gope

(A3). These appellants are represented by Advocate Anoop Gaonkar, who was appointed under the Legal Aid Scheme. There was some delay in institution of these appeals. The condonation was not objected to and such delay is therefore condoned.

4. The State, in all these appeals, is represented by the Additional Public Prosecutor Mr. Pravin Faldessai.

5. A common charge was framed against all the accused persons on 24.05.2018 and the same reads as follows:

> " ***CHARGE***
>
> *(Sections 211, 212, 213 Cr.P.C.)*
>
> *I, Shri Edgar P. Fernandes, Addl. Sessions Judge-1, South Goa, Margao, hereby charge you, (1) Pradeep Horo; (2) Safar Khan; (3) Mangra Gope and (4) Ettandevi Gope alias Asha Devi as under:-*
>
> *That on 12.12.2017, at about 14.00 hrs. at Pedda, Varca, in the room of the accused no.3 Mangra Gope, you, with your common intention, committed murder by intentionally or knowingly causing the death of Shri Samuel Soren alias Rahul, and thereby committed an offence punishable under Section 302 read with Section 34 of the Indian Penal Code and within my cognizance.*
>
> *That on the aforesaid date, time and place, you, with your common intention, knowing that the offence of murder punishable with death or imprisonment for life having been*

committed did cause the evidence of the said offence to disappear by burying the dead body and throwing away the weapon of assault with the intention of screening yourselves from legal punishment and thereby committed an offence punishable under Section 201 read with Section 34 of the Indian Penal Code and within the cognizance of this Court.

And I hereby direct that you be tried by this Court on the said charge on this 24th day of May, 2018."

6. On the accused persons pleading that they are not guilty, the prosecution examined 20 witnesses in support of its case. Thereafter statements of the accused persons under Section 313 of the Criminal Procedure Code (Cr.P.C.) came to be recorded. Since, no defence evidence was led, the learned Sessions Judge, upon hearing the arguments has been pleased to make the impugned judgment and order convicting all the accused persons and sentencing them as aforesaid. Hence these appeals.

7. Mr. Arun D'Sa and Mr. A. Gaonkar, submit that the principles for evaluation of circumstantial evidence have not been correctly applied by the learned Sessions Judge in this case. They submit that the identity of the dead body was never established by the prosecution. They submit that there is no legal evidence to sustain the invocation of "*last seen theory*". They submit that so called recoveries are a sham and constitute nothing but rediscovery of already discovered objects. They submit that even the objects so discovered are neither

incriminating nor can they be connected with any of the accused persons. They submit that there was no scientific evidence adduced by the prosecution rather there is suppression of not only genesis of the incident but also the material evidence available with the prosecution. In this regard, they refer to the alleged attachment of scooty and SIM cards belonging to the deceased Rahul. Finally, they submit that the learned Sessions Judge has overstressed upon the statements of A3 and A4 under Section 313 of Cr.P.C., and thereby ignoring the legal position relating to such statements. They rely upon several decisions in support of their contentions.

8. For all these reasons, they submit that the accused persons are entitled to be acquitted of the charges framed against them.

9. Mr. P. Faldessai, learned Public Prosecutor defends the conviction of the accused persons on the basis of reasonings reflected in the impugned judgment and order. He submits that in the present case the prosecution has established the guilt of the accused persons beyond reasonable doubt. Mr. Faldessai also relies upon some decisions and submits that all these appeals are liable to be dismissed.

10. Admittedly, the prosecution in the present case has not adduced any direct evidence and the case rests entirely on the circumstantial evidence. The principles relating to evaluation of

circumstantial evidence are quite well settled and are succinctly set out by the Hon'ble Supreme Court in the case of ***Sharad Birdhichand Sarda v. State of Maharashtra***[1], in paragraphs 153-154 which read as follows :-

> *"153. 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 Sahabrao Bobade v. State of Maharashtra (1973)2 SCC 793 where the observations were made: (SCC p. 807, para 19)*
>
> *"19..... 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*

1 1984(4) SCC 116

accused.

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

(Emphasis supplied)

11. In this case, the learned Sessions Judge has not enumerated clearly the circumstances on which the conviction of the accused persons is sought to be based. However, from perusal of the impugned judgment and order and also upon consideration of submissions made before us by the learned Public Prosecutor, we find that the prosecution mainly relies upon the following circumstances :-

(i) homicidal death;
(ii) recovery of dead body and its identification;
(iii) recovery of T-shirt of A1 and finding of some DNA materials related to the deceased, thereon;
(iv) recoveries of danda, spade, clothes, iron pipe and bricks at the instance of the accused persons;
(v) last seen theory;
(vi) finding of blood of the deceased person in rooms of A3 and A4;
(vii) abscondance of accused persons including in particular A3 and A4;
(viii) the statements of A3 and A4 under Section 313 of Cr. P.C.

12. On the issue of death of Rahul being homicidal, we must say that there is ample medical evidence on record which establishes this circumstance. There was no serious challenge to this circumstance and

therefore, we find no error whatsoever in the learned Session's Judge concluding that the death of Rahul was homicidal in nature.

13. On the issue of identification of dead body, the prosecution has examined Prahalad Naik (PW6) – Site Supervisor and Patrach Soren (PW10) – brother of Rahul. The prosecution has however not bothered to adduce any scientific evidence i.e. evidence of any DNA matching or superimposition. The prosecution ought to have considered the production of such evidence, particularly since the dead body was recovered after a period of four to five days from the date of alleged incident and the dead body was decomposed to a great extent.

14. On the issue of identification, the testimony of PW6 does not deserve much credence because this witness has not at all deposed to having seen or known Rahul before he purportedly identified the dead body as being that of Rahul's. In fact, Elvino Furtado (PW7) – builder had deposed that Rahul was employed by him at his work site some years earlier and as such, he knew Rahul. However, PW7 was neither called upon nor did he on his own identified the dead body as being that of Rahul's.

15. PW10 the brother of Rahul has however identified the dead body as being that of Rahul's on the basis of facial features, legs, rosary and the clothes. From perusal of the cross examination, we find that

there was no serious challenge to the testimony of PW10. In case there were to be any serious challenge to the testimony of PW10 then perhaps the lacunae pointed out above might have assumed some significance. However, in the absence of any serious challenge and the fact that PW10 had actually identified the dead body on the basis of facial features, legs and items like rosary and clothes, we cannot say that the prosecution has totally failed in identifying the dead body as being that of Rahul's. The finding recorded by the learned Sessions Judge on the issue of identity, therefore, does not warrant any interference in these appeals.

16. The circumstance relating to identification of the dead body as being that of Rahul's or the circumstance that the death of Rahul in this case was found to be homicidal may be quite important circumstances but they are hardly sufficient to connect the accused persons to this crime and consequently to sustain the conviction of accused persons. The prosecution in terms of law laid down by the Hon'ble Apex Court in *Sharad Birdhichand Sarda (supra)* will therefore have to prove the circumstances at (iii) to (viii) as enumerated in paragraph 11 of this judgment and order. Further, the prosecution will have to establish that the circumstances so proved, unerringly point out to the guilt of the accused persons and do not support any hypothesis which is consistent with the innocence of the accused persons. It is trite that in such matters, the burden is always upon the prosecution though, in some circumstances, the onus might shift upon the accused persons.

There is in fact a presumption of innocence in such matters and therefore, it is for the prosecution to establish that the accused persons have committed the crime alleged beyond pale of any reasonable doubt.

17. The prosecution in this case has quite heavily relied upon the white T-shirt which was retrieved from the spot close to where the dead body of Rahul was found somewhere on 16th December, 2017 or 17th December, 2017. The prosecution contends that some DNA comparable to the DNA from the dead body of Rahul was found on this T-shirt (M.O. No.7) and this is a clinching circumstance to connect A1, to whom this T-shirt belongs, to the crime, particularly in the absence of any explanation forthcoming from A1 or any of the accused persons.

18. The prosecution has mainly examined Prahalad Naik (PW6) – Site Supervisor and Durga Lohra (PW1) – a labourer at the site, in support of this circumstance. Admittedly, the retrieval of this T-shirt was not in pursuance of any statement made by any of the accused persons so as to invoke the provisions of Section 27 of the Evidence Act and to render the portion of such statement, as leading to the discovery, admissible in evidence. The evidence of PW6, at the highest relates only to the aspect of retrieval of T-shirt quite close to the spot where the dead body of Rahul was discovered. However, PW6, nowhere deposes that this white T-shirt belongs to A1 or that he had ever seen A1 wear this white T-shirt. In fact, PW6 has deposed that A1 was working at the

construction site almost one year prior to the date of the alleged incident and that PW6 had never seen A1 from the date A1 left working at the site i.e. for past one year. In these circumstances, the testimony of PW6 can hardly assist the prosecution in connecting the T-shirt to A1.

19. Durga Lohra (PW1) a labourer at the site is the only witness who claims to have seen the A1 wear this white T-shirt. Therefore, the testimony of PW1 will have to be assessed and evaluated in order to determine whether the same deserves any credence.

20. The initial examination in chief of PW1 was recorded on 7th June, 2018. In his examination in chief or for that matter in his cross examination which also concluded on 7th June, 2018, PW1, no doubt, speaks of retrieval of white T-shirt from the spot close to the site where the dead body of Rahul was found, but PW1 does not say that this T-shirt belonged to A1 or that he had seen A1 wear this T-shirt at any time.

21. PW1 was however recalled and re-examined after a period of almost one year i.e. 9th July, 2019. Such recall was permitted possibly because when PW1 deposed on 7th June, 2018, the T-shirt (M.No.7) was not available for actual identification since, the same had been sent to the CFSL. Consequent upon receipt of M.O. No.7 from CFSL, PW1 was permitted to be recalled and re-examined. On this occasion again, PW1, in his examination in chief did not make any statement that the white T-

shirt belonged to A1 or that he had seen A1 wear this white T-shirt at any time.

22. However, in the cross examination, for the first time PW1 went on to state that he had seen A1 wearing the said T-shirt. PW1 however admitted that the clothes similar to T-shirt are available in the market. To the question as to whether there was anything specific on the T-shirt to say that the same belongs to A1, PW1 was evasive and simply stated that he had seen A1 wearing the T-shirt and that the T-shirt was picked up from the place of offence and had blood stains on it. In fact, this statement was made by PW1 not specifically in relation to T-shirt alone but in relation to T-shirt and purple clothes, which according to PW1 belong to A1 and A4 respectively.

23. According to us, the aforesaid testimony of PW1 is hardly sufficient to hold that the prosecution has conclusively established that the T-shirt indeed belonged to A1 or that A1 was seen wearing this white T-shirt at or around the time of commission of alleged crime. In the first place, PW1 did not depose to this crucial aspect when he first deposed before the learned Sessions Court on 7th June, 2018. This aspect was deposed to only after almost one year when PW1 was recalled and re-examined. This aspect was not deposed to in the examination in chief at the time of such re-examination but only in the cross examination.

24. Secondly, the statement of PW1 on this crucial aspect of connecting the white T-shirt to A1 is by no means categorical. Thirdly, PW1 admitted that the clothes similar to white T-shirt are easily available in the market and further there was nothing specific on the T-shirt as would enable PW1 to identify the said T-shirt as belonging to A1.

25. In fact, PW1, and even PW6 have chosen to describe the T-shirt as white T-shirt. The scene of retrieval panchanama, however had some other description in relation to T-shirt which was retrieved. Therefore, we called for M.O. No.7 in order to verify the position. On verification, we found that the T-shirt which was said to be retrieved had a prominent blue/black collar and bold printed designs on its front portion. Neither PW1 nor PW6 described this T-shirt by reference to the collar or more particularly bold printed designs on its front portion, which was really quite a distinguishing feature of the T-shirt. The prosecution in this case did not bring any evidence on record to suggest that any DNA material traceable to A1 was also discovered on this T-shirt. In this state of evidence, we can hardly say that the prosecution has proved beyond reasonable doubt that the T-shirt indeed belonged to A1 or that A1 was wearing this T-shirt at the time of commission of crime. The circumstance No. (iii) can therefore be not said to have been conclusively proved by the prosecution and the learned Sessions Judge was therefore not justified in taking this circumstance into consideration for convicting the accused persons.

26. The prosecution has then relied upon the recoveries of a danda (Exhibit 29) at the behest of A1 on 21st December, 2017; spade (Exhibit 34) at the behest of A3 on 28th December, 2017; iron pipe (Exhibit 36) and bricks (Exhibit 38) at the behest of A4 on 29th December, 2017. The prosecution contends that the statements of A1, A3 and A4, leading to discovery of the aforesaid incriminating items ought to be read into evidence by invoking the provisions of Section 27 of the Evidence Act. The prosecution contends that such statements are sufficient to sustain conviction of all the accused persons.

27. The evidence on record establishes that all the aforesaid items were recovered from the area very proximate to the spot where the dead body of Rahul was discovered. In fact, the material on record suggests that most of these items were recovered from a distance of five to six metres from the pit in which the dead body of Rahul was discovered.

28. The testimony of PSI Rahul Naik (PW13) makes it clear that the dead body of Rahul was discovered on 17th December, 2017 itself and recoveries upon which the prosecution seeks to rely were made on 21st December, 2017, 28th December, 2017 and 29th December, 2017. That apart, PW13 has clearly deposed that on 17th December, 2017 itself he had posted a guard at pit. He further deposed that since there was thick vegetation in the area, he secured presence of the labourers and

with the help of fire brigade team, he cleared thick vegetation bushes in order to retrieve the dead body. There is also evidence of PW1, PW5, PW6, PW7, PW8 visiting this very site on 16th December, 2017 or on 17th December, 2017 when they have alleged to have discovered the T-shirt, some women clothing and the pit in which the dead body of Rahul was ultimately found. Taking into consideration all these material, we cannot discount the contention of Mr. D'Sa that in all probabilities, the so called discovery of the danda, spade, iron pipe or bricks was nothing but a rediscovery from the site which the investigating agencies had already combed earlier and were therefore quite familiar with.

29. In ***Sukhvinder Singh and Ors vs State Of Punjab***, 1994(5) SCC 152, the Hon'ble Apex Court has held that Section 27 of the Evidence Act is an exception to the general rule that a statement made before the police is not admissible in evidence. However, vide Section 27 of the Evidence Act, only so much of the statement of an accused is admissible in evidence as distinctly leads to the discovery of a fact. Therefore, once the fact has been discovered, Section 27 of the Evidence Act cannot again be made use of to '*re-discover*' the discovered fact. It would be a total misuse - even abuse - of the provisions of Section 27 of the Evidence Act. Applying the ratio of this decision to the facts of the present case, we are satisfied that the prosecution could not have invoked the provisions of Section 27 of the Evidence Act to render admissible statements of the accused persons, which allegedly led to

rediscovery of danda, spade, iron pipe and bricks.

30. Then again, in this case the prosecution has really not established that the danda, spade, iron pipe and the bricks, which were allegedly recovered at the behest of A1, A3 and A4, were really any incriminating objects having connection with the crime as alleged by the prosecution. This, the prosecution had to establish in order to invoke the provisions of Section 27 of the Evidence Act.

31. In so far as the danda (Exhibit 29) is concerned, it is true that the benzidine test did indicate the presence of some blood thereon. However, there is absolutely no evidence to connect this blood to the blood of the deceased Rahul. The CFSL report itself states that typing of STR loci was not successful in the sample at Exhibit 29 and further no detectable DNA was observed at any locus since the sample was not suitable for comparison in the absence of detection of any alleles.

32. Besides, it was not even the case of the prosecution that this danda was used as a murder weapon in order to assault Rahul. Rather, it was the case of the prosecution that the dead body of Rahul was tied to this danda for transportation to the burial site. Even the medical evidence does not support such tying of the dead body to such danda. Accordingly, we are constrained to say that the danda which was allegedly recovered at the behest of the A1 can hardly be regarded as

some incriminating object qua the crime which is alleged.

33. No traces of blood or any DNA material were found on the spade (Exhibit 34). If the case of the prosecution that this spade was used by the accused persons to actually bury the dead body of Rahul is to be accepted, then it is inconceivable that no blood or DNA material relatable to Rahul was found on such spade, when particularly it is not even the case of the prosecution that the accused persons had tampered with such spade before it was dumped very close to pit in which the dead body of Rahul was ultimately discovered.

34. Same is the position with the iron pipe and bricks with which the accused persons are alleged to have actually assaulted Rahul and cause his death. The CFSL report clearly indicates that the immunological test did not detect any human blood on the iron pipe or bricks with which Rahul was supposed to have been badgered by the accused persons. The iron pipe is incidentally nothing but a small pipe used by women in the kitchen to flare the flames in a chulha. In this state of evidence, we can hardly say that the spade, iron pipe or bricks constitute some incriminating objects having nexus with the crime in question.

35. For all the aforesaid reasons, we are constrained to hold that the circumstance No.(iv) as referred to in paragraph 11 of this judgment

and order has not been conclusively proved by the prosecution.

36. Next we come to the circumstance that Rahul and the accused persons were last seen together and therefore, the onus was upon the accused persons to explain homicidal death of Rahul. In ***Ganpat Singh vs The State of Madhya Pradesh,*** 2017(16)SCC 353, the Hon'ble Apex Court has explained that the evidence that the accused was last seen in the company of the deceased assumes significance when the lapse of time between the point when the accused and the deceased were seen together and when the deceased is found dead is so minimal as to exclude the possibility of a supervening event involving the death at the hands of another. By reference to several decided cases, the Hon'ble Supreme Court has formulated the legal position, in the following terms :-

> *"The last seen theory comes into play where the time gap between the point of time when the accused and 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 author of crime becomes impossible. 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 accused and deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases"*

37. In order to invoke the circumstance of last seen, it is necessary that the prosecution establishes at least by way of a reasonable

approximation, the time at which the murder can be said to have taken place. In ***Shyamal Ghosh v. State of W.B.,*** (2012) 7 SCC 646, the Hon'ble Supreme Court has held that where the prosecution is relying upon last seen theory, it must essentially establish time when accused and deceased were last seen together as well as time of death of deceased. Last seen theory requires a possible link between the time when the deceased was last seen alive and fact of death of deceased coming to light. Reasonable proximity of time between these two events is a necessary ingredient and principle is to be applied depending upon facts and circumstances of a given case.

38. In ***Niranjan Panja vs State of West Bengal,*** 2010(6) SCC 525, the Hon'ble Supreme Court has held that where the prosecution depends upon the theory of `*last seen together*', it is always necessary that the prosecution should establish the time of death. Since, in the said case, the prosecution had failed to establish the time of death, the Hon'ble Apex Court did not rely upon the circumstance that the accused and the deceased were last seen together.

39. In the present case, the prosecution has merely produced on record the Memorandum of Autopsy at Exhibit 87. On the aspect of time of death of Rahul, the Memorandum of Autopsy merely says :-

> *"A) The approximate time since the death : is consistent with the police record".*

40. The doctor who conducted the inquest and prepared the Memorandum of Autopsy was never examined by the prosecution. The Memorandum of Autopsy does not give any significant clue or reason in support of aforesaid conclusion as to the time of death. There is no other evidence produced by the prosecution to indicate even by way of approximation the time of death of Rahul. In these circumstances, it will have to be held that the prosecution has failed to establish the time of death even by way of reasonable approximation in the present case. In the absence of any cogent and reliable evidence on the aspect of the timing of death, even by way of reasonable approximation it will not be really safe to rely upon the circumstance that some of the accused persons and Rahul were last seen together.

41. Apart from the aforesaid aspect, even upon assessment and evaluation of the testimonies of PW1, PW2, PW8 and PW15, we are not really satisfied that the prosecution has established beyond any reasonable doubt that some of the accused persons and Rahul were indeed last seen together before the murder of Rahul.

42. PW1 does not depose to personally seeing any of the accused persons and the deceased together on 12th December, 2017 or for that matter or any day. PW1 merely speaks about having heard Poonam Tirki (PW2) speak to Prahalad Naik (PW6) about some incident of 12th December, 2017. This can hardly be regarded as any direct evidence in

support of last seen theory.

43. PW2 also does not speak of having actually seen the accused persons and the deceased together on 12th December, 2017. PW2 only states that at 2.00 p.m., on 12th December, 2017 SushilaDevi (PW15) informed her that she heard the voice of Rahul from the room of A3 and A4 and so she accompanied PW15 to her room which was close to the room of A3 and A4. PW2 has then deposed that she too heard voice of Rahul. This, strictly speaking, is not some positive evidence in support of last seen theory. On the basis of such evidence, it is not possible to say that PW2 actually saw the deceased and the accused persons together at 2.00 p.m., or thereabouts on 12th December, 2017.

44. PW15 has also deposed that she heard voice of Rahul from the room of A3 and A4. However, PW15 has not deposed that she actually saw the deceased Rahul in the company of the accused persons. Both PW2 and PW15 have deposed that they saw A3, husband of A4 standing outside the room with his daughter and upon inquiries with him he has alleged to have stated that there was some matter between Rahul and his wife A4. PW2 and PW15 have also deposed that after some time they again came out from their room and this time they saw A4 standing outside the room and upon inquiries A4 has alleged to have informed them that Rahul was trying to outrage her modesty and therefore he had slapped Rahul.

45. The learned Sessions Judge, according to us has laid undue emphasis upon a stray sentence in the deposition of PW15 to the effect that A1, A2 and A4 were in the room of A3 when she heard screams of Rahul from the house of A3. Now PW15 has nowhere deposed that she actually saw A1, A2 and A4 enter the house of A3 at the relevant time. She has not even deposed of witnessing A1, A2 and A4 coming out of the house of A3 soon thereafter. Instead she has deposed to having seen A3 standing outside the house alongwith his daughter at the relevant time. In this state of evidence, it is really difficult to hold that the prosecution has succeeded in establishing the circumstances entitling it to invoke the last seen theory so as to shift the onus upon the accused persons.

46. Incidentally, if we take into consideration the position that the prosecution has failed to establish the timing of death of Rahul even by way of reasonable approximation and the conduct of the A3 and A4, then, the defence raised by A3 and A4 in their Section 313 Cr.P.C., statements, cannot be said to be totally implausible. The defence, in fact, is to a some extent, consistent with what was deposed to by both PW2 and PW15, who stated that both A3 and A4 told them that Rahul was misbehaving with A4 and therefore A4 had slapped Rahul after which he left their house. When it comes to defence, the standard of proof to be applied is that of preponderance of probabilities.

47. In any case, even if some credence is to be given to the testimony of PW2 and PW15 in support of the last seen theory, it is well settled that on the basis of such circumstance alone, there is no question of convicting any accused persons. In ***Navaneethakrishnan Vs State by Inspector of Police,*** (2018) 16 SCC 161, the Hon'ble Apex Court has held that undoubtedly, the last seen theory is an important event in the chain of circumstances that would completely establish and/or could point to the guilt of the accused with some certainty. However, this evidence alone cannot discharge the burden of establishing the guilt of accused beyond reasonable doubt and requires corroboration. In the absence of any other material evidence against the accused, they cannot be convicted solely on the basis of evidence that they were last seen together with the deceased.

48. For all the aforesaid reasons, we hold that even the circumstance No.(v) i.e. the circumstance entitled the prosecution to invoke the last seen theory has not been established by the prosecution in this case.

49. There is some evidence to establish that the blood of Rahul was found in the scrapping taken in the room of A3 and A4. The scientific evidence supports this circumstance. However, based upon such circumstance alone, it will be difficult to hold that the chain of circumstances is so complete so as to not leave any reasonable ground for

a conclusion of innocence of the accused persons. Besides, A4 in her statement under Section 313 has offered some explanation with regard to this circumstance though, we agree with Mr. Faldessai that the explanation may not be extremely convincing. All that we say is that based upon this singular circumstance, it will not be safe to sustain the conviction of the accused persons. In particular, this circumstance in no manner incriminates A1 and A2. In fact, there is absolutely no evidence in this case to incriminate A2. There is no evidence either regards any conspiracy or for that matter any motive. Therefore, the learned Sessions Judge, was not quite justified in roping A1 and A2 by applying the provisions of Section 34 of IPC.

50. There is also no evidence of abscondance as such. It is not even the case of the prosecution that A1 and A2 absconded. The case regards abscondance is only in relation to A3 and A4. However, the prosecution witnesses themselves said that A3 and A4 left almost two days after the alleged incident and that too, by telling the witnesses that they were leaving because they were informed of the ill health of A3's mother and A4's mother in law. In fact, A3 is alleged to have borrowed Rs.2000/- from one of the prosecution witnesses and only thereafter left for their native place alongwith their two children. The investigating agency apprehended A3 and A4 from their native place. This can hardly be regarded as any evidence of abscondance on the part of A3 and A4.

51. In ***Durga Burman (Roy) vs State of Sikkim***, 2014(13) SCC 35, the Hon'ble Supreme Court has held that '*to abscond*' means, go away secretly or illegally and hurriedly to escape from custody or avoid arrest. In the case before the Hon'ble Supreme Court, the evidence indicated that the accused had told others that they were going from their place of work at 'G' to their home at 'N'. They were admittedly taken into custody from their respective houses only, at 'N' on the third day of the incident. Therefore, in this circumstance, the Hon'ble Apex Court held that it was difficult to hold that the accused had been absconding. However, the Hon'ble Apex Court went further to hold that even if it was assumed for the sake of argument that the accused persons were not seen at their work place after the alleged incident, it cannot be held that by itself an adverse inference is to be drawn against them under the Evidence Act. This is because even the innocent persons known to be implicated in offence of murder, may abscond out of fear.

52. Finally, we find that the learned Sessions Judge in this case has relied quite heavily upon the certain explanations offered by both A3 and A4 in their statements under Section 313 of Cr. P.C. For example A4 has admitted that she had slapped Rahul because he was attempting to outrage her modesty. A4 has also admitted that A3 had told him that she has slapped Rahul because Rahul was misbehaving with her. A4 has also stated that on account of slaps, Rahul may have fallen down in their room and some blood might have spilled in the room. On the basis of

such statements, the learned Sessions Judge has concluded that the prosecution has succeeded in proving the complicity of all accused persons in this crime beyond reasonable doubt. However, in the state of evidence in this matter as well as the legal position as to the evidentiary value of Section 313 Cr. P.C., statement, we are unable to agree with such reasoning.

53. The evidentiary value of Section 313 Cr. P.C., the statement has been explained by the Hon'ble Apex Court in ***Balaji Gunthu Dhule v. State of Maharashtra,*** (2012) 11 SCC 685. In this case, the Hon'ble Supreme Court has held that as the law stands today, the statement of the accused recorded under Section 313 of the Code cannot be put against the accused person. The courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution. The statement made under this Section should not be considered in isolation but in conjunction with evidence adduced by the prosecution.

54. In ***State of U.P vs Lakhmi***, 1998(4) SCC 336, the Hon'ble Supreme Court has held that the words "*may be taken into consideration in such enquiry or trial*" in sub-Section (4) of Section 313 of Cr. P.C. would amount to a legislative guideline for the Court to give due weight to such answers, though it does not mean that such answers could be made the sole basis of any finding. The answers of the accused,

when they contain admission of circumstances against him are not by themselves, delinked from the evidence be used for arriving at a finding that the accused had committed the offence.

55. Taking into account the aforesaid legal position, even upon taking into consideration the statements made by A3 and A4, we cannot say that such statements offer any corroboration to any existing evidence on record to link the accused persons conclusively with the offence with which they are charged.

56. For all the aforesaid circumstances, we are quite satisfied that the prosecution in the present case has failed to prove conclusively the circumstances on the basis of which it seeks the conviction of the accused persons. Applying the test laid down in *Sharad Birdhichand Sarda (supra),* it is not possible for us to hold that the circumstantial evidence on record is sufficient to convict or rather sustain the conviction of the accused persons in this case.

57. In this case, it would not be out of place to observe that at least two prosecution witnesses, examined in the context of last seen theory turned hostile. Besides in this case, the prosecution had claimed that at the behest of A3 and A4 the scooty belonging to Rahul was recovered from Konkan Railway Station. It is also the case of prosecution that since A3 and A4 did not have keys to such scooty

though A3 and A4 had travelled by this scooty alongwith their two children whilst absconding to their native place, a mechanic had to be called to open the storage compartment of scooty. It is also the case of the prosecution that out of the storage compartment, a mobile phone was recovered which had two SIM cards. The prosecution seems to suggest that this mobile phone belonged to Rahul.

58. The prosecution has however not adduced any evidence whatsoever to establish that the scooty so recovered indeed belong to Rahul. The prosecution has also led no evidence whatsoever in relation to two attached SIM cards or mobile phone. Such evidence might have been important for determining the issue of guilt or innocence of the accused persons. There is no explanation whatsoever forthcoming from the prosecution as to why such leads were not investigated or if investigated why result of such investigation not placed before the Sessions Court in the course of trial.

59. It is true as contended by the learned Public Prosecutor that mere deficiencies in the investigation may not be good ground for acquitting the accused persons. However, these are quite serious deficiencies and such serious deficiencies at least warrant scrutiny and evaluation of evidence on record with greater caution.

60. For all the aforesaid reasons, we set aside the impugned

judgment and order and acquit the accused persons of the charges levelled against them. The accused persons shall now be set at liberty forthwith, if they are not required in connection with any other matter.

61. Registry to take steps to communicate this judgment and order to the accused persons and to the Superintendent of Colvale Jail so as to enable them to act on the basis of the same.

SMT. M. S. JAWALKAR, J M.S. SONAK, J

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