
(2015) 07 SHI CK 0016

In the High Court Of Himachal Pradesh

Case No : Criminal Appeal Nos. 30, 67 and 190 of 2012

Amit Kumar and Others

APPELLANT

Vs

State of Himachal Pradesh and Others

RESPONDENT

Date of Decision : 09-07-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 313, 374, 378, 417
Penal Code, 1860 (IPC) — Section 120-B, 201, 302

Citation : (2015) 2 ShimLC 1001

Hon'ble Judges : Sanjay Karol, J;Piar Singh Rana, J

Bench : Division Bench

Advocate : N.S. Chandel, for the Appellant; V.S. Chauhan, Addl. AGs. and J.S. Guleria, Asstt. A.G., Advocates for the Respondent

Final Decision : Disposed off

Judgement

Sanjay Karol, J.—In the appeals filed under Section 374 Cr.P.C., convicts Amit Kumar and Vaishali have assailed the judgment dated 28.11.2011, passed by Sessions Judge, Solan, District Solan, H.P., in Sessions Trial No. 8-S/7 of 2010, titled as State of H.P. Versus Amit Kumar and others, whereby they stand convicted for having committed offences punishable under the provisions of Sections 120-B, 302 and 201 of the Indian Penal Code and both sentenced to serve rigorous imprisonment for life and pay fine in the sum of Rs. 25,000/- each, under the provisions of Section 302 read with Section 120-B IPC and in default thereof, to further undergo rigorous imprisonment for a period of two years. Also both the accused are sentenced to serve rigorous imprisonment for a period of five years and pay fine of Rs. 10,000/- each, under the provisions of Section 201 IPC and in default thereof, to further undergo rigorous imprisonment for a period of one year. Cr. Appeal No. 30 of 2012 stands filed by convict Amit Kumar and Cr. Appeal No. 67 of 2012 stands filed by convict Vaishali.

2. Also, assailing the aforesaid judgment, State has filed Cr. Appeal No. 190 of 2012, under the provisions of Section 378 of the Code of Criminal Procedure,

1973, against the judgment of acquittal of accused Naresh Kumar, on all counts, of similar charges.

3. It is the case of prosecution that in the morning of 06.08.2010, Bhim Singh (PW.1), Rakesh Kumar (PW.2), Vikash Sharma (PW.3) and Vijay Kumar (PW.20) independently noticed a dead body lying just below the road at a place known as Sikander Ghat. Bhim Singh telephonically passed on such information to ASI Mehar Chand (PW.35), who after making entry (Ex. PW.15/A) also informed Police Station, Dharampur, where also such information was recorded. Police officials Mehar Chand (PW.35) and Sukh Darshan (PW.36) reached the spot, where statement (Ex. PW.1/A) of Bhim Singh (PW.1), under the provisions of Section 154 Cr.P.C., was recorded on the basis of which FIR No. 97/10 dated 06.08.2010 (Ex. PW.30/C), under the provisions of Section 302 IPC was registered at Police Station, Dharampur, District Solan, H.P. Also Sukh Darshan prepared inquest reports (Ex. PW.1/B and Ex. PW.1/C); took into possession vide memos dead body (Ex. PW.1/F); blood stained soil (Ex. PW.1/D); other incriminating articles i.e. knife (Ex. PW.1/E), chappal and danda (Ex. PW.1/G) lying near the dead body. Dr. Sangeeta Dhillon (PW.14), who conducted the postmortem, after obtaining report (Ex. PW.14/D) of the State Forensic Science Laboratory issued postmortem report (Ex. PW.14/C). Independent witnesses as also police noticed an Identity Card/Press Card (Ex. P-4) of accused Amit Kumar lying near the dead body, who after initial interrogation, on 11.08.2010 surrendered before SI Sukh Darshan, hence arrested by Inspector Jagdish Chand (PW.39). Further investigation also revealed complicity of accused Naresh and Vaishali in the crime and were also arrested by ASI Choli Ram (PW.37) on 13.08.2010 and 14.08.2010 respectively.

4. Investigation revealed that Rajbir @ Gurbinder (deceased) was residing with his wife Vaishali (accused) as a tenant at Baddi, District Solan, H.P. Both accused Naresh Kumar and Amit frequently visited the deceased, which led to development of intimacy between Vaishali and Amit. Hence all the accused conspired to kill Rajbir. As a part of such conspiracy, accused Naresh and Amit came to the house of Rajbir and after consuming alcohol together went for a drive in a vehicle bearing registration No. HR-20S-0908 on the Kumarhatti-Nahan road. After reaching at a place, commonly known as Sikander Ghat they murdered Rajbir and threw his dead body alongwith a knife and danda from the car. Thereafter, accused Amit Kumar took the vehicle to his native place in District Mujaffarnagar (U.P.) and concealed it. He also destroyed the evidence by cleaning stains of the blood from the vehicle. Also all of them concealed their blood soiled clothes/apparels.

5. After their arrest, on 15.08.2010 all the accused got identified the spot of crime. Also by making disclosure statements they got recovered the car, their apparels and other incriminating material.

6. During investigation, police took into possession ATM card (Ex. P-10) of Amit Kumar, so found in the purse of Vaishali; a hand written note book of Vaishali

from her house; letter written by Vaishali from the house of Amit Kumar. The incriminating articles, so recovered were sent for opinion of the experts and reports of the State Forensic Science Laboratory and Handwriting Expert Ex. PW.32/D and Ex. PW.33/A to Ex. PW.33/C, were taken on record.

7. To establish proximity between the accused and the fact that during the night of occurrence of the incident i.e. 5/6.08.2010, they were in constant touch with each other and had long conversation, police took into possession call records of their respective mobile phone numbers.

8. Investigation revealed complicity of the accused in the alleged crime, hence Challan was presented in the Court for trial.

9. All the accused were charged for having committed offences punishable under the provisions of Sections 302 and 201 read with Section 120-B of the Indian Penal Code, to which they did not plead guilty and claimed trial.

10. In order to establish its case, in all, prosecution examined as many as thirty nine witnesses. Statements of the accused under Section 313 of the Code of Criminal Procedure were also recorded, in which accused Naresh Kumar pleaded false implication and accused Amit Kumar took the following defence:-

"I am innocent. I have been falsely implicated in this case. Brother of Vaishali is known me only because he is also the tenant of the same landlord whose shop I have also taken on rent. Shop has been divided into two parts. Premises with me are interconnected with the premises of the brother of Vaishali. In my absence the landlord and brother of Vaishali used to visit my premises as these were interconnected. I did not have any press card at any point of time. The press card allegedly recovered is not mine nor I am correspondent of any newspaper. Ex. P4 the alleged press card is not mine. I do not know any of the co-accused."

Also accused Vaishali took the following defence:-

"I am innocent. I have been falsely implicated in this case. I do not know accused Naresh Kumar and Amit Kumar is known to my brother because he was also a tenant of his landlord under whom my brother was also tenant. One factory Manager Sh. S.K. Sharma who has been examined as PW used to compel me to meet him alone which fact I had told Rajveer and Rajveer advised me not to go with him any where. I have cordial relations with Rajveer. Police had made me to write and sign at various places forcibly. I am also known by the name of Simran."

In defence, accused Amit Kumar examined one witness.

11. Trial Court, based on the testimony of the prosecution witnesses, found the prosecution to have established its case, beyond reasonable doubt only against accused Amit Kumar and Vaishali and not Naresh Kumar. Hence the present appeals. Correctness and legality of the reasoning adopted by the trial Court, as also its findings requires consideration by this Court.

12. We have heard, M/s. N.S. Chandel, T.S. Chauhan, on behalf of the convicts-appellant(s) as also Mr. J.R. Poswal, learned counsel, on behalf of the respondent (in Cr. Appeal No. 190 of 2012) and M/s. Ashok Chaudhary and V.S. Chauhan, learned Addl. AGs., and J.S. Guleria, learned Asstt. AG., on behalf of the State. We have also minutely examined the testimonies of the witnesses and other documentary evidence, so placed on record by the prosecution. Having done so, we are of the considered view that the reasoning adopted by the trial Court is not only perverse but is also not based on correct and complete appreciation of the testimonies of the witnesses and other evidence on record. Judgment of conviction is not based on legal evidence. Material so placed on record stands ignored. All this has caused serious prejudice to the convicts, resulting into miscarriage of justice.

13. In Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra, AIR 1973 SC 2622 : (1973) CriLJ 1783 : (1973) 2 SCC 793 : (1973) SCC(Cri) 1033 : (1974) 1 SCR 489 , the apex Court, has held as under:

"7. This Court had ever since Its inception considered the correct principle to be applied by the Court in an appeal against an order of acquittal and held that the High Court has full power to review at large the evidence upon which the order of acquittal was founded and to reach the conclusion that upon that evidence the order of acquittal should be reversed. The Privy Council in Sheo Swarup and Others vs. The King-Emperor AIR 1934 227 (Privy Council) , negatived the legal basis for the limitation which the several decisions of the High Courts had placed on the right of the State to appeal under Section 417 of the Code. Lord Russel delivering the judgment of the Board pointed out that there was "no indication in the Code of any limitation or restriction on the High Court in the exercise of its powers as an appellate Tribunal", that no distinction was drawn "between an appeal from an order of acquittal and an appeal from a conviction", and that "no limitation should be placed upon that power unless it be found expressly stated in the Code". He further pointed out at p. 404 that, "the High Court should and will always give proper weight and consideration to such matters as; (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses". In Sanwat Singh and Others Vs. State of Rajasthan, AIR 1961 SC 715 : (1961) CriLJ 766 : (1961) 3 SCR 120 , after an exhaustive review of cases decided by the Privy Council as well as by this Court, this Court considered the principles laid down in Sheo Swarup's case (supra) and held that they afforded a correct guide for the appellate court's approach to a case against an order of acquittal It was again pointed out by Das Gupta, J., delivering the judgment of five Judges in Harbans Singh and Another Vs. State of Punjab, AIR 1962 SC 439 : (1962) 1 SCR 104 Supp ;

"In many cases, especially the earlier ones the Court has in laying down such principles emphasised the necessity of interference with an order of acquittal being based only on "compelling and substantial reasons" and has expressed the view that unless such reasons are present an Appeal Court should not interfere with an order of acquittal (vide *Suraj Pal Singh v. The State*, (1952) SCR 194 ; *Ajmer Singh Vs. The State of Punjab*, AIR 1953 SC 76 : (1953) CriLJ 521 : (1953) 4 SCR 418 ; *Puran Vs. The State of Punjab (I)*, AIR 1953 SC 459 . The use of the words "compelling reasons" embarrassed some of the High Courts in exercising their jurisdiction in appeals against acquittals and difficulties occasionally arose as to what this Court had meant by the words "compelling reasons". In later years the Court has often avoided emphasis on "compelling reasons" but nonetheless adhered to the view expressed earlier that before interfering in appeal with an order of acquittal a Court must examine not only questions of law and fact in all their aspects but must also closely and carefully examine the reasons which impelled the lower courts to acquit the accused and should interfere only if satisfied after such examination that the conclusion reached by the lower court that the guilt of the person has not been proved is unreasonable. (Vide *Chinta v. The State of Madhya Pradesh*, Criminal Appeal No. 178 of 1959 decided on 18-11-1960; *Ashrafkha Haibatkhya Pathan v. The State of Bombay*, Criminal Appeal No. 38 of 1960 decided on 14-12-1960)

"..... On close analysis, it is clear that the principles laid down by the Court in this matter have remained the same. What may be called the golden thread running through all these decisions is the rule that in deciding appeals against acquittal the Court of Appeal must examine the evidence with particular care, must examine also the reasons on which the order of acquittal was based and should interfere with the order only when satisfied that the view taken by the acquitting Judge is clearly unreasonable. Once the appellate court comes to the conclusion that the view taken by the lower court is clearly an unreasonable one that itself is a "compelling reason" for interference. For, it is a court's duty to convict a guilty person when the guilt is established beyond reasonable doubt, no less than it is its duty to acquit the accused when such guilt is not so established."

[*Aher Raja Khima Vs. The State of Saurashtra*, AIR 1956 SC 217 : (1956) CriLJ 426 : (1955) 2 SCR 1285

14. Similarly, the apex Court in *Lal Mandi Vs. State of West Bengal*, AIR 1995 SC 2265 : (1995) CriLJ 2659 : (1995) 2 Crimes 185 : (1997) 10 JT 586 : (1995) 2 SCALE 571 : (1995) 3 SCC 603 : (1995) 3 SCR 134 : (1995) 2 UJ 237 , has held that in an appeal against conviction, the appellate Court is duty bound to appreciate the evidence on record and if two views are possible on the appraisal of evidence, benefit of reasonable doubt has to be given to the accused.

15. In the backdrop of settled principles of law we proceed to discuss the merits of the appeals.

16. Undisputedly it is not a case of direct evidence but that of circumstantial evidence. We shall first deal with the law on the point.

Law on circumstantial evidence

17. Law with regard to circumstantial evidence is now well settled. It is a settled proposition of law that when there is no direct evidence of crime, the guilt of the accused can be proved by circumstantial evidence, but then the circumstances from which the conclusion of guilt is to be drawn, should be fully proved and such circumstances must be conclusive in nature, to fully connect the accused with the crime. All the links in the chain of circumstances must be established beyond reasonable doubt, and the proved circumstances should be consistent, only with the hypothesis of guilt of the accused, being totally inconsistent with his innocence. While appreciating the circumstantial evidence, the Court must adopt a very cautious approach and great caution must be taken to evaluate the circumstantial evidence. [*Pudhu Raja and Another Vs. State, rep. by Inspector of Police*, (2012) 4 JCC 2751 : (2012) 9 JT 252 : (2012) 9 SCALE 177 : (2012) 11 SCC 196 ; *Madhu Vs. State of Kerala*, AIR 2012 SC 664 : (2012) CriLJ 1230 : (2012) 1 Crimes 148 : (2012) 1 JCC 620 : (2012) 1 JT 181 : (2012) 1 SCALE 226 : (2012) 2 SCC 399 : (2012) AIRSCW 782 : (2012) 1 Supreme 342 ; *Dilip Singh Moti Singh Vs. State of Gujarat*, (2002) 8 JT 497 , *Mulakh Raj, etc. Vs. Satish Kumar and others*, AIR 1992 SC 1175 : (1992) CriLJ 1529 : (1992) 2 Crimes 130 : (1992) 2 JT 554 : (1992) 1 SCALE 804 : (1992) 3 SCC 43 : (1992) 2 SCR 484 ; and *Sharad Birdhichand Sarda Vs. State of Maharashtra*, AIR 1984 SC 1622 : (1984) CriLJ 1738 : (1984) 2 SCALE 445 : (1984) 4 SCC 116 : (1985) 1 SCR 88 .

18. Also, apex Court in *Padala Veera Reddy Vs. State of Andhra Pradesh and others*, AIR 1990 SC 79 : (1989) 4 JT 223 : (1989) 2 SCALE 906 : (1989) 2 SCC 706 Supp : (1990) 1 UJ 137 , held that when a case rests upon circumstantial evidence, following tests must be satisfied:

"(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

(Also see: *Ramreddy Rajeshkhanna Reddy and Another Vs. State of Andhra Pradesh*, AIR 2006 SC 1656 : (2006) 4 JT 16 : (2006) 3 SCALE 452 : (2006) 10

SCC 172 : (2006) AIRSCW 1602 : (2006) 3 Supreme 175 ; Balwinder Singh Vs. State of Punjab, AIR 1996 SC 607 : AIR 1995 SC 607 : (1996) CriLJ 883 : (1995) 8 JT 81 : (1995) 6 SCALE 261 : (1995) 4 SCC 259 Supp : (1995) 5 SCR 10 Supp ; and Harishchandra Ladaku Thange Vs. State of Maharashtra, AIR 2007 SC 2957 : (2007) 10 JT 496 : (2007) 10 SCALE 464 : (2007) 11 SCC 436 : (2007) 9 SCR 562 : (2007) AIRSCW 6247 : (2007) AIRSCW 5394 : (2007) 6 Supreme 232 .

19. Each case has to be considered on its own merit. Court cannot presume suspicion to be a legal proof. In the absence of an important link in the chain, or the chain of circumstances getting snapped, guilt of the accused cannot be assumed, based on mere conjectures.

20. The apex Court in State of U.P. Vs. Ashok Kumar Srivastava, AIR 1992 SC 840 : (1992) 1 Crimes 576 : (1992) 1 JT 340 : (1992) 1 SCALE 149 : (1992) 2 SCC 86 : (1992) 1 SCR 37 , while cautioning the Courts in evaluating circumstantial evidence, held that if the evidence adduced by the prosecution is reasonable, capable of two inferences, the one in favour of the accused must be accepted. This of course must precede the factum of prosecution having proved its case, leading to the guilt of the accused.

21. In the instant case, prosecution refers to and relies upon the following circumstances against the accused:-

- "(1) Recovery of dead body and weapon of offence;
- (2) Deceased having died as a result of head injury;
- (3) Disclosure statement of accused Amit Kumar, Naresh and Vaishali which led to identification of spot of crime;
- (4) Deceased lastly seen in the company of the accused;
- (5) Amit Kumar as a correspondent was issued Press Card (Ex. P-4) which was recovered from the spot;
- (6) Recovery of ATM card (Ex. P-10), belonging to Amit Kumar from the purse of Vaishali;
- (7) Recovery of blood stained clothes of Amit Kumar, Vaishali and Naresh Kumar;
- (8) Recovery of letter written by Vaishali from the house of Amit Kumar. Also recovery of note book from the house of Vaishali;
- (9) Recovery of car containing blood stains so concealed by Amit Kumar and blood stained danda and knife from the spot;
- (10) Intimacy between Amit Kumar and Vaishali;
- (11) Past immoral conduct of Vaishali;
- (12) Evidence of the State Forensic Science Laboratory;

(13) Call details of mobile numbers of the accused, indicating their location at the spot of crime, frequency and duration of their conversations; and

(14) Destruction of evidence i.e. mobile phone of deceased Rajbir."

22. To establish the same we have minutely examined the testimonies of all the witnesses and other evidence on record.

23. That Vaishali and deceased Rajbir were married and were living together in the premises belonging to Bishan Dutt (PW.11) is not disputed, which fact in any case, stands established by the landlord.

24. Significantly, out of 39 prosecution witnesses, 11 independent witnesses namely Rakesh Kumar (PW.2), Vikash Sharma (PW.3), Abhinav Chandel (PW.5), Luxman Sharma (PW.7), Ajay Pathak (PW.9), Vijay Kumar (PW.10), Bishan Dutt (PW.11), Smt. Sharda Devi (PW.12), Naresh Sodi (PW.13), Shalender Kumar (PW.17) and Kuldeep Singh (PW.25), through whom the prosecution wants to establish its case, have turned hostile and not supported the prosecution.

25. We find testimonies of relevant police officials i.e. Amit Chauhan (PW.34), Mehar Chand (PW.35), Sukh Darshan (PW.36), Choli Ram (PW.37), Rama Nand (PW.38) and Jagdish Chand (PW.39) not to be inspiring in confidence. In fact, their version is self contradictory, rendering their testimonies to be uninspiring in confidence.

Circumstance No. 1: Recovery of dead body

26. Rakesh Kumar (PW.2), states that he saw dead body of a male with an injury on the head, lying near Sikander Ghat. Danda, knife and chappal were also lying there. Immediately he informed Bhim Singh (PW.1), who also states that telephonically he passed on the information to the Police at Police Post, Dagshai. Version of Vijay Kumar (PW.20) is also to similar effect, save and except that he also refers to a card lying near the dead body. Mehar Chand (PW.35) states that upon receiving such information he made entry (Ex. PW.15/A) in the daily diary and immediately rushed to the spot, where also he noticed the dead body. But this witness only refers to the chappal, Press Card and danda, lying near the dead body. So all did not see either the knife or the card. He furnished information at Police Station, Dharampur, from where Sukh Darshan (PW.36) after reaching the spot recorded the statement of Bhim Singh (Ex. PW.1/A), on the basis of which FIR No. 97/10 dated 06.08.2010 (Ex. PW.30/C) was registered at Police Station, Dharampur. Inquest reports (Ex. PW.1/B and Ex. PW.1/C) were prepared and body recovered. The same was sent for postmortem to the Community Health Centre, Dharampur, from where it was referred to the IGMC Hospital at Shimla. The dead body was identified by Abhinav Chandel (PW.5), brother of accused Vaishali. Thus, circumstance of recovery of a dead body, so identified to be that of Rajbir @ Gurbinder stands proved on record by the police.

Circumstance No. 2

27. Dr. Sangeeta Dhillon (PW.14) conducted the postmortem and based on the report of the State Forensic Science Laboratory (Ex. PW.14/D) issued postmortem reports (Ex. PW.14/C and Ex. PW.14/E). On physical examination, doctor found multiple lacerated wounds on various parts of the body. The cause of death, which was instant, was ante mortem head injury, which could have been caused with danda (Ex. P-2). For unexplainable reason doctor admits that "no injury with sharp edged weapon was observed as per post mortem report Ex. PW.14/C on the dead body of Rajbir deceased". We hasten to add that doctor had no reason to state such fact. In any event, death having taken place as a result of ante mortem head injury, stands proved on record.

Circumstance No. 3

28. Prosecution case with regard to disclosure statements, so made by the accused, which led to recovery of the incriminating articles and identification of spot of crime, in our considered view, stands falsified from record.

29. According to Inspector Jagdish Chand (PW.39), who took over the investigation on 11.08.2010, accused Amit Kumar surrendered same day. Accused Naresh Kumar, who was brought to the Police Station by Choli Ram (PW.37) was arrested on 13.08.2010 and accused Vaishali who was brought to the Police Station by Rama Nand (PW.38) was arrested on 14.08.2010. In the presence of independent witnesses Bhim Singh (PW.1) and Luxman Sharma (PW.7) on 15.08.2010, all the accused got the spot, where they had thrown the dead body, identified. Memo (Ex. PW.1/J) pertains to accused Amit Kumar, memo (Ex. PW.1/K) pertains to accused Naresh Kumar and memo (Ex. PW.1/L) pertains to accused Vaishali.

30. Significantly, Choli Ram does not state that he had brought Naresh Kumar to the Police Station. Also there are no arrest memos on record to corroborate version of these police officials. This only creates a doubt in our mind. But what falsifies their version is perusal of memo dated 06.08.2010 (Ex. PW.15/A), so proved by Rajinder Kumar Sharma (PW.15), who made entry in the daily diary register so maintained by the police, which records that accused Amit Kumar was already in police custody alongwith one Ashok Kumar. Now if Amit Kumar was already in custody, then where is the question of his arrest on 11.08.2010? And who is this Ashok Kumar? Why was he allowed to go scot-free? All this has not been so disclosed or explained by the police/prosecution. This totally shatters the credibility of police officials rendering their version to be false.

31. Conjoint reading of testimonies of the Investigating Officers i.e. Mehar Chand (PW.35), Sukh Darshan (PW.36), Choli Ram (PW.37), Rama Nand (PW.38) and Jagdish Chand (PW.39), who effected recovery of the incriminating articles on the spot, reveals that disclosure statement, so made by the accused, while in custody was not reduced into writing. Why so? and that too in a case of this nature has not been explained.

32. Memos (Ex. PW.1/J to Ex. PW.1/L) deal only with regard to identification of

the spot where the accused had thrown the dead body alongwith a danda and knife. Even on this issue Bhim Singh (PW.1) clarifies that neither the accused identified the exact spot nor was he aware as to when it was done. This version of his goes un-rebutted. Significantly Rakesh Kumar (PW.2) is absolutely silent on this issue.

33. Crucially Jagdish Chand admits to have visited the spot prior to 15.08.2010. Accused Amit Kumar already stood arrested prior to 11.08.2010. It is in this backdrop, identification of the spot by the accused pales into insignificance. Thus even this circumstance cannot be said to have been established on the record.

34. At this juncture, we may only observe that even on the question of recovery of incriminating articles pursuant to alleged disclosure statements made by the accused, we do not find the prosecution case to be true.

Circumstance No. 4

35. To establish this circumstance, prosecution seeks reliance on the statements of Bishan Dutt (PW.11) and Smt. Sharda (PW.12), who incidentally have not supported the prosecution case at all. They are neighbours residing in the same building. Categorically they have deposed that immediately prior to the occurrence of the incident none other than Vaishali and her husband were seen in the room or the building. Bishan Dutt, who owns the building where the deceased was staying as a tenant, has clarified that there are other occupants/tenants in the building, but none has come forward to establish proximity between accused Amit Kumar and Vaishali. Naresh Sodi has clarified that accused Amit Kumar and brother of accused Vaishali, who were his tenants, were carrying on their business. Earlier deceased Rajbir, who was his tenant, used to reside with his wife Vaishali and relationship between the two were not strained. Thus, even this circumstance has not been proved by the prosecution.

Circumstance No. 5

36. According to the prosecution, Press Card (Ex. P-4), allegedly belonging to accused Amit Kumar lying near the dead body, was recovered vide memo (Ex. PW.1/G) dated 06.08.2010 witnessed by Bhim Singh and Rakesh Kumar (PW.2).

37. Now Rakesh Kumar has not supported the prosecution on this count. He was declared hostile and cross-examined by the Public Prosecutor. Significantly in his un-rebutted testimony, he clarifies that police prepared the papers in the rain shelter at Bohali, which is at a distance of 1 1/2 km from Sikandar Ghat and not on the spot. But what is crucial is the testimony of Bhim Singh to the effect that "No press card was taken into possession from the spot but the press card was taken into possession when the seizure memo Ex. PW1/G was prepared." Even this witness does not state that seizure memo (Ex. PW.1/G) was prepared on the spot. In fact, according to him, it was prepared at the Panchayat Ghar, which is at a distance of 1 1/2 km from the spot where the dead body was recovered. In fact, he is categorical that "I did not see the press card on the spot." According

to him, press card (Ex. P-4) was seen for the first time in the hands of the police at the Panchayat Ghar. Naresh Sodi (PW.13), who also has not supported the prosecution, categorically denies having been informed by accused Amit Kumar that press card had fallen near the place where the dead body was recovered.

38. That the card belonged to accused Amit Kumar and was issued by an appropriate authority was a circumstance necessarily required to be proved by the prosecution. As already observed, there is no clear, cogent or consistent evidence to this effect. The statement of Bhim Singh is also silent on this issue. Police officials state that body was lying below the road, whereas card was lying towards the hillside. The width of the road is approximately 30-35 feet. This further renders prosecution case to be doubtful.

39. Vijay Kumar (PW.20), who had also seen the dead body in the morning of 06.08.2010, could not state with certainty as to whether press card (Ex. P-4) was the very same which was lying near the dead body. He clarifies that "This card was lying in a reverse position", meaning thereby that he had not seen the card to be that of accused Amit.

40. Mehar Chand (PW.35) does not clearly state that press card, which he had seen lying next to the body was the one which was seized by the police and Sukh Darshan (PW.36), who recovered the same, admits absence of any reference thereof, either in the inquest report (Ex. PW.1/B) or in the site plan (Ex. PW.36/C). Also card is not to be seen in the photographs (Ex. PW.5/A to Ex. PW.5/C), so taken by the police on the spot.

41. According to Sukh Darshan, press card (Ex. P-4) belonging to accused Amit Kumar was of the News Paper "Hindustan Times". But when we examine the testimony of Arun Kohli (DW-1), HRD Manager Hindustan Times, it is quite apparent that neither was it issued by the management nor any person by the name of Amit Kumar resident of Sai Road Baddi, Solan, H.P. worked as their correspondent.

42. Thus, in our considered view, prosecution has not been able to establish the circumstance of recovery of press card from the spot or the fact that the same belonged to accused Amit Kumar. On the contrary, defence taken by the accused to this effect stands probablized. The link in the chain thus stands broken.

Circumstance No. 6

43. Prosecution wants the Court to believe that ATM card (Ex. P-10) belonging to accused Amit Kumar was recovered from the purse of accused Vaishali vide memo (Ex. PW.6/A) dated 10.09.2010. Card was handed over to the police by Kirpal Singh (PW.6) father of the deceased, in the presence of independent witness Ashok Kumar (PW.22) and Kshama Dutt. Kirpal Singh states that after the cremation, Vaishali came to the matrimonial house. When she was taken away by the police, from her purse he recovered the ATM card belonging to accused Amit Kumar and handed it to the police.

44. We do not find this version of his to be true. No doubt, he is the father of the deceased, but his antecedents are not clean. He has past criminal record.

45. That apart, crucially the purse from which the card was recovered was neither produced nor taken into possession by the police as is so admitted by Jagdish Chand. Why so? has not been explained. Further there is nothing on record to establish that the card was ever used by accused Vaishali. Also none from the bank have been examined to establish ownership thereof.

46. Also no memo of personal search of the accused was drawn when she was arrested on 11.08.2010. Not only this, genuineness of the card and its possibility of being planted cannot be ruled out. To our mind, even this circumstance, cannot be said to have been proved, much less, beyond reasonable doubt.

Circumstance No. 7

47. Ajay Pathak (PW.9) allegedly handed over blood stained clothes i.e. Jean/pants (Ex. P-12), shirt (Ex. P-13) and pair of shoes (Ex. P-14) of accused Amit Kumar to the Investigating Officer Rama Nand (PW.38) in the presence of Hari Om Pathak (PW.8) and Bharat Singh (PW.30) vide recovery memo (Ex. PW.8/A).

48. Hari Om Pathak has not supported the prosecution. He denies having handed over any clothes of Amit Kumar to the police nor is he aware about the ownership of the clothes so produced in Court.

49. Bharat Singh, a police official, states that he visited Uttar Pradesh and effected recovery of clothes vide memo (Ex. PW.8/A). Testimony of Rama Nand is also to similar effect.

50. It is the case of prosecution that these blood stained clothes were sent for chemical analysis to the Forensic Science Laboratory. But what contradicts such stand is the version of expert Gian Thakur (PW.33) and report (Ex. PW.33/A) to the effect that no blood was found either on the clothes or on the shoes.

51. Clothes belonging to accused Vaishali were recovered by the police vide memo (Ex. PW.26/A), in the presence of police officials Pratima Devi (PW.26) and Choli Ram (PW.37).

52. Pratima Devi simply states that Vaishali produced her shirt (Ex. P-19), salwar (Ex. P-20) and dupatta (Ex. P-21), which were seized by the police vide memo (Ex. PW.26/A). Version of Choli Ram is also to similar effect.

53. However when we peruse the testimony of Dr. Gian Thakur (PW.33) as also report (Ex. PW.33/A), we find that no blood was found on the clothes. Accused Vaishali was arrested on 14.08.2010 and police took into possession her blood stained clothes vide memo dated 16.08.2010 (Ex. PW.26/A). It is highly improbable that an accused would have continued to wear such clothes for a period of one week. She had met and informed several persons about the missing of her husband. She had also visited her matrimonial house and met her father-in-law. Thus, even by way of this link evidence, prosecution has not been

able to establish such fact.

54. Clothes of accused Naresh Kumar were recovered vide memo (Ex. PW.37/A) in the presence of Choli Ram and Bishan Dutt (PW.11).

55. Bishan Dutt has not supported the prosecution case with regard to such recovery. Be that as it may, from the testimony of Dr. Gian Thakur, it is evident that no blood was found on the clothes and shoes of accused Naresh Kumar.

56. Thus, even by way of link evidence, prosecution has not been able to establish this circumstance.

Circumstance No. 8

57. Prosecution wants the Court to believe that vide recovery memo dated 16.08.2010 (Ex. PW.39/C), letter written by accused Vaishali was recovered from the house of accused Amit Kumar in the presence of independent witnesses Vikash Sharma (PW.3) and Umesh Sodi. This letter does not even remotely exhibit any intimacy inter se the accused. Be that as it may, we have serious doubt about its recovery.

58. Investigating Officer admits that first house of Vaishali was searched from where her note book (Ex. P-7) was recovered, where after only house of Amit Kumar was searched from where the letter in question was recovered. Now what was the occasion for the police to have first recovered the note book from the house of accused Vaishali remains unexplained. Except for the letter in question no other incriminating material, which required comparison, is on record. The letter is neither addressed to Amit Kumar nor does it record to have been written by Vaishali. In fact contents thereof only exhibit acrimony between the husband and wife on the lines, so stated by Kirpal Singh, contradicting the prosecution case. It also indicates the intent of accused Vaishali to continue her relationship with the deceased. All this despite being subjected to cruelties through the hands of her husband.

59. Premises occupied by accused Amit Kumar, as has emerged from the testimony of Abhinav Chandel (PW.5) was easily accessible and approachable by all. Naresh Sodi (PW.13), has not supported the prosecution. In his un-rebutted testimony he denies recovery of any letter (Mark "C") from the house of accused Amit Kumar. Witness admits existence of multiple accesses to the house of Amit Kumar and possibility of letter being planted cannot be ruled out.

60. That apart, we do not find testimony of Ajay Pathak (PW.9), who took over the investigation on 11.08.2010, to be inspiring in confidence.

61. It has come on record that accused Amit Kumar surrendered on 11.08.2010, accused Naresh Kumar surrendered on 13.08.2010 and accused Vaishali was arrested on 14.08.2010.

62. Letter was not recovered pursuant to any disclosure statement. Why is it that police officers, in a case of this nature, did not promptly visit the house of the

accused persons. The officer admits not to have searched the house of accused Amit Kumar till the time letter was recovered. Recovery of letter, thus itself is in doubt.

63. To match the handwriting of accused Vaishali, police had vide memo dated 16.08.2010 (Ex. PW.3/B) also recovered note book (Ex. P-7) containing the handwriting of accused Vaishali. Though Vikash Sharma does state that the note book was recovered from the house of Vaishali, but then he clarifies that it was not so done in his presence, for he would frequently leave the house as police was taking lot of time in carrying out search and seizure operations.

64. For all the aforesaid reasons and more particularly that letter does not indicate any familiarity between the accused, it cannot be said that prosecution has been able to establish this circumstance.

Circumstance No. 9

65. Prosecution wants the Court to believe that after murdering the deceased and throwing away his dead body, Amit Kumar took the blood stained car to his native place in Uttar Pradesh.

66. Ambi Lal (PW.29) states that on 16.08.2010 Vijay Kumar (PW.10) handed over the vehicle to him at Yamuna Nagar. Vehicle seized vide memo dated 16.08.2010 (Ex. PW.10/A) was taken for examination to the Forensic Science Laboratory, Junga for conducting the test. Significantly from the report so issued by the Laboratory (Ex. PW.33/B) and statement of Dr. Gian Thakur (PW.33), it is evident that blood stains detected in the vehicle were disintegrated for serological examination.

67. By way of link evidence prosecution has not been able to establish factum of murder having taken place in the vehicle.

68. That apart what is intriguing is as to how Ambi Lal learnt about the vehicle being parked at Yamunanagar (Haryana). For it is the case of prosecution itself that the vehicle was concealed at Shamli, District Muzaffarnagar, Uttar Pradesh and it has not come on record that the way to Shamli is through Yamunanagar.

69. Knife (Ex. P-6) was not shown to the doctor and blood found on the danda and the knife was insufficient for serological examination and inconclusive in respect of blood grouping. Hence even this circumstance cannot be said to have been established.

Circumstance No. 10

70. Through the testimonies of Abhinav Chandel (PW.5), Kirpal Singh (PW.6) and Shalender Kumar (PW.17), prosecution wants the Court to believe that accused Amit Kumar and Vaishali were having intimate relationship with each other. Having perused the testimonies of these witnesses, we find it not to be so. Both Abhinav Chandel and Shalender Kumar have not supported the prosecution and despite being cross-examined by the Public Prosecutor, nothing incriminating has

emerged from their testimonies.

71. It has come in the testimony of Abhinav Chandel that accused Amit Kumar used to reside in the godown which is just adjoining to the shop of this witness. Though she was in talking terms with this witness, he never saw accused Amit Kumar visit the house of accused Vaishali. In fact on 06.08.2010, Vaishali had disclosed to him that deceased had not come home.

72. Though it has come on record that Rajbir, Vaishali and Amit Kumar together had gone on a trip for 4-5 days, but then such fact would not even remotely suggest intimacy between the accused persons.

73. Kirpal Singh states that one month prior to his death deceased telephonically explained his desire of leaving Baddi for the reason that he suspected Vaishali of having relationship with others. But with whom? he does not state. There is no reference of either Amit Kumar or Naresh Kumar in such conversation. In fact, witness admits of Vaishali expressing anguish about the misconduct of her husband. Rajbir used to pickup quarrels with anybody and also give beatings.

74. Shalender Kumar (PW.17) also does not advance the case of prosecution on this count. Hence even this circumstance cannot be said to have been established on record.

Circumstance No. 11

75. To establish this circumstance, prosecution examined Nishan Ashesh (PW.23), former husband of accused Vaishali, according to whom the said accused was not of good character and was having extra marital relationship. This was in the past. In law, it cannot be taken to be a circumstance against the accused. Be that as it may, we do not find testimony of this witness to have proved such fact. His testimony is absolutely vague and unspecific. To us, he appears to be a disgruntled husband. He admits that in the year 2007, as also subsequently, accused Vaishali had filed a complaint against him at the Police Station where he had, in writing, undertaken to keep her nicely.

Circumstance No. 12

76. As per FSL report (Ex. PW.14/D) deceased had consumed alcohol. There is nothing on record to suggest that the deceased consumed alcohol with the accused. It has come in the testimony of Kirpal Singh (PW.6) that deceased would often pickup quarrel and beat people. Possibility of deceased being assaulted by persons other than the accused under the influence of alcohol, has not been ruled out by the Investigating Officers.

Circumstance No. 13

77. To establish that prior to the incident, all the accused had long conversation with each other and that they were together present at the spot of crime, prosecution refers to and relies upon call record of different mobile numbers 98822-10988 (IDEA), 98053-22275, 98163-06184 (AIR TEL), 98575-73453 (AIR

CEL) and 92153-00938 (TATA INDICOM-HR) w.e.f. 01.07.2010 to 08.08.2010. The documents, by no stretch of imagination, establish the location of the owners of the mobile numbers. Also there is no link, so established on record, with regard to the inter se conversation between the mobile numbers. Record pertaining to mobile numbers owned by the deceased and accused Naresh Kumar has not been orally proved on record though Devender Verma (PW.24) and Amit Chauhan (PW.34) have stepped into the witness box to prove the mobile record of accused Vaishali and accused Amit Kumar.

78. As such, even this circumstance cannot be said to have been proved on record.

Circumstance No. 14

79. Through the testimonies of Kuldeep Singh (PW.25), Ambi Lal (PW.29) and Choli Ram (PW.37), prosecution wants the Court to believe that accused Amit Kumar made disclosure statement (Ex. PW.29/B) to the effect that he had thrown away phone of the deceased in the canal and could get such spot identified. Prosecution evidence, on this count, in view of material contradictions on record, noticed earlier, with regard to the date of arrest of accused Amit Kumar, does not appear to be true. If accused had got the spot identified on 15.08.2010, there was no reason for him to have concealed the factum of throwing away of mobile phone, particularly when weapon of offence, was left by him at the spot of crime. Why would a person destroy mobile phone and not the weapon of offence? After all, police could have got evidence of conversation, if any, which the accused would have had with the deceased by proving log details from the service provider. It is not the prosecution case that the mobile contained some recorded conversation

80. The Court below miserably failed in correctly and completely appreciating the testimonies and correctly applying the legal provisions to the given facts and circumstances. We find defence of the accused to have been probablized on record. Genesis of the prosecution story of accused Amit Kumar having illicit relationship with accused Vaishali, motive behind the crime and the accused having connived with each other, where after they killed the deceased, cannot be said to have been established on record.

81. Thus, in view of the above discussion, it cannot be said that prosecution has been able to establish that the accused after entering into an agreement to cause murder of deceased Rajbir, murdered him and then removed the dead body and thereby caused evidence of commission of crime to disappear with an intent of screening themselves from legal punishment.

82. From the material placed on record, prosecution has failed to establish that the accused are guilty of having committed the offences, they stand charged for through unimpeachable testimony of the prosecution witnesses. The circumstances cannot be said to have been proved by unbroken chain of events. The chain of events does not stand conclusively established, leading only to one

conclusion, i.e. guilt of the accused. Circumstances when cumulatively considered do not fully establish completion of chain of events, indicating guilt of the accused and leading to no other hypothesis, other than the same.

83. Findings returned by the trial Court, convicting accused Amit Kumar and Vashali, cannot be said to be based on correct and complete appreciation of testimonies of prosecution witnesses. Such findings cannot be said to be based on clear, cogent, convincing, legal and material piece of evidence. Incorrect and incomplete appreciation thereof, has resulted into grave miscarriage of justice, inasmuch as accused stand wrongly convicted in relation to the charged offences. Also the Court below, in our considered view, has correctly and completely appreciated the evidence so placed on record by the prosecution, in acquitting accused Naresh Kumar.

84. Hence, for all the aforesaid reasons, appeals filed by accused Amit Kumar and Vaishali being Cr. Appeals No. 30 of 2012 and 67 of 2012 are allowed and the judgment of conviction and sentence, dated 28.11.2011, passed by Sessions Judge, Solan, District Solan, H.P., in Sessions Trial No. 8-S/7 of 2010, titled as State of Himachal Pradesh Versus Amit Kumar and others, is set aside and accused Amit Kumar and Vaishali are acquitted of the charged offences. They be released from jail, if not required in any other case. Amount of fine, if deposited by the accused, be refunded to them accordingly. Release warrants be immediately prepared. Appeal filed by the State being Cr.Appeal No. 190 of 2012 against the judgment of acquittal of accused Naresh Kumar, is dismissed. Bail bonds furnished by accused Naresh Kumar are discharged.

Appeals stand disposed of, so also pending application(s), if any.

Record of the trial Court be immediately sent back.