

(2015) 09 CAL CK 0038
In the Calcutta High Court
Case No : CRA 100 of 2014

Bijoy Anand Bera and Others

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 15-09-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 100(4), 313, 428
Penal Code, 1860 (IPC) — Section 201, 302, 34

Citation : (2015) 4 CALLT 248

Hon'ble Judges : Debasish Kar Gupta, J; Mumtaz Khan, J

Bench : Division Bench

Advocate : Soubhik Mitter, Avisekh Sinha and Aindrila De, for the Appellant;
Ranabir Roy Chowdhury, Advocates for the Respondent

Final Decision : Allowed

Judgement

Md. Mumtaz Khan, J—This appeal has been preferred by the appellants assailing the judgment, order of conviction and sentence dated December 20, 2013 and December 23, 2013 respectively passed by the Ld. Additional District and Sessions Judge, 2nd Court, Hooghly in Sessions Trial No. 3 of 2013 arising out of Sessions Case No. 267 of 2012. By virtue of the impugned judgment and order appellants have been convicted and sentenced to suffer rigorous imprisonment for life and to pay fine of Rs. 25,000/- each in default to suffer rigorous imprisonment for 3 years each for committing offence under Section 302 IPC and also sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs. 10,000/- each in default to suffer rigorous imprisonment for one year each for committing offence under Section 201 IPC with a direction that both the sentences shall run concurrently and if the fine amount is realized 50% of that amount be remitted in favour of the wife of the victim and his minor son by way of compensation. The period of detention undergone during investigation or trial was also directed to be set off under the provisions of section 428 Cr.P.C.

2. The prosecution case, in brief, as follows:-

On May 22nd, 2012 at 08.45 hours PW2, Hariram Maji, got news about lying of a dead body near the new building of Baba Ceramic Factory in the Panchrokhi Village. He then went there and saw dead body of an unknown person, aged about 35 years, was lying in the field near bush beside the new building of Baba Ceramic Factory. He also saw there were marks of sharp cut injuries on the throat and hand of the deceased for which he suspected that the said person was murdered by a sharp cutting weapon somewhere else and the body was thrown to that place. Accordingly he lodged a complaint at the Polba P.S., District Hooghly.

3. On the basis of the above complaint a case was started at the Polba P.S. against some unknown miscreants and the investigation ensued and thereafter on completion of investigation charge sheet was submitted against the appellants under Sections 302/201/34 IPC. Charges under Sections 302/34 IPC and 201/34 IPC were framed on February 4th, 2013 against the appellants and when they pleaded not guilty to their involvement in the crime they were put to trial. Prosecution examined 27 witnesses including the complainant, brother-in-law and wife of the victim, his neighbours, employee, doctor besides the police personnels and also produced and proved the FIR, seizure list, inquest report, PM report, FSL report (Exbts. I to XIV) and the wearing apparels, chappal, motor cycle, vojali, controlled earth, photographs, video footage etc. (Material Exbts. I to XVII). Thereafter, on completion of trial and after examination of the appellants under Section 313 Cr.P.C. learned court below passed the impugned judgement.

4. Being aggrieved by the aforesaid judgement, appellants have preferred the instant appeal and the grounds raised in the appeal is that the learned Court below did not consider the facts and circumstances the case and the evidence on record in its proper perspective and made a wrong approach to the whole case and accordingly prayed for setting aside the impugned judgement, order of conviction and sentence.

5. The learned Advocate appearing on behalf of the appellants submitted that there was no eye witness to the incident in question and the entire case was based on circumstantial evidence and the circumstances from which the conclusion of guilt had been drawn had not been fully established and as such the impugned judgment, order of conviction and sentence passed by the learned Court below is liable to be set aside for the following reasons:-

1. As per the inquest report and the FIR dead body was found lying in the field near bush beside Baba Ceramic Factory in Panchrakhi village and the charges have also been labeled against the appellants that they caused the death of the victim at Panchrakhi Village near Baba Ceramic Factory adjacent to its new building in a bush but there was no evidence on record to show that the appellants were seen together with the victim at the said place and to cause death of the victim nor there was any evidence how the victim and appellant No. 1 travelled to Baba Ceramic Factory namely the P.O. which is 11 kms. from

Bibirhat

2. PW11, PW18 and PW19 claimed to have last seen together the appellant No. 1 and the victim but the time of reported seeing together differs from one witness to another. According to PW11, wife of the victim, on May 21, 2012 in the evening appellant No. 1 came to their house on foot and had talk with her husband and thereafter he went away on foot and after 10/15 minutes of his departure her husband went out from the house. According to PW18, on the relevant day at about 8.00/8.30 p.m. while he was sitting at Bibirhat rickshaw stand he saw appellant No. 1 was driving motor cycle with the victim who was sitting behind him as a pillion rider. According to PW19, sister-in-law of the victim, on the relevant day at about 8.30 p.m. appellant No. 1 came to their house with his motor cycle and called the victim and thereafter they went away together.

3. PW10, brother of the victim, PW11, wife of the victim, PW19, sister-in-law of the victim and PW20, employee of the victim had claimed that since prior to the incident appellant No. 1 used to threaten the victim with dire consequences but admittedly no GDE was lodged at the P.S. nor the matter was reported to the local people. Furthermore, the above story of strained relation did not appear to be believable in view of the statements of P.W.18 who had deposed that most of the time he had seen the victim moving in the motor cycle with the appellant No. 1 and one week prior to the incident also he had seen both of them riding in the motor cycle.

4. The motor cycle in question though seized from the house appellant No. 1 but neither the R.C. book nor the connected papers of the vehicle in question was seized and produced to prove the ownership of the same. Even any connection of the motor cycle with the crime has not been established by placing the same for identification before PW18 who reportedly saw the victim and the appellant No. 1 in a motor cycle.

5. There is no evidence on record to show the involvement of appellant Nos. 2 and 3 in the commission of murder of the victim and the only evidence by which prosecution had tried to implicate them was the reported recovery and seizure of blood stained wearing apparels of the appellant No. 2 from his house and blood stained wearing apparel of appellant No. 1 and 3 from the house of appellant No. 3 and one vojali from an open place accessible to all. But the wearing apparels in question belonged to the appellants and the presence of blood or the blood group had not been established as per the serologist report nor the prosecution had been able to prove that the vojali in question was used in committing the murder of the victim. Furthermore, reported recovery of the vojali in question was after 9 days of arrest of the appellant from an open place accessible to all and the same was also found without being sealed or labeled, so the belated recovery becomes doubtful. Even the provisions of section 100(4) Cr.P.C. relating to the search and seizure has also not been complied with.

6. PW10 and PW11 had claimed that on May 21, 2011 in the night at 10 p.m. they went to the house of the appellant No. 1 and they did not find appellant No. 1 in the house but that does not mean that he was absconding. Even the I.O. has himself has admitted that he apprehended appellant No. 1 from his residence. So mere absence from the house cannot be a ground to draw an inference of absconding.

7. Examination of the appellants under Section 313 Cr.P.C. was not done properly in order to give them a chance for explanation and even no question was put to them in respect of FSL report, bloodstained vojali and wearing apparel.

6. It is also submitted by the Ld. Advocated for the appellants that in the case of circumstantial evidence chain of circumstances must be completed by reliable and clinching evidence and most clearly point out to the guilt of the accused so as to lead to the conclusion that it is the accused only and no other person should have committed murder of the deceased but in the instant case prosecution has miserably fail to prove the chain of circumstances and the theory of last seen together and has also failed to prove the motive behind the commission of the offence of murder.

7. Reliance is placed by the Ld. Advocate for the appellant on the decisions of Kanhaiya Lal Vs. State of Rajasthan, (2014) AIRSCW 1828 : (2014) CriLJ 1950 : (2014) 4 JT 165 : (2014) 2 RCR(Criminal) 180 : (2014) 3 SCALE 598 : (2014) 4 SCC 715 , Inderjit Singh and another Vs. State of Punjab, AIR 1991 SC 1674 : (1991) CriLJ 2191 , 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 , Sk. Yusuf Vs. State of West Bengal, AIR 2011 SC 2283 : (2011) 3 Crimes 1 : (2011) 6 JT 640 : (2011) 6 SCALE 511 : (2011) 11 SCC 754 : (2011) 8 SCR 83 : (2011) AIRSCW 3748 : (2011) 4 Supreme 331 ; Jaswant Gir Vs. State of Punjab, (2005) 12 SCC 438 ; Surendra Vs. State of Rajasthan., (2012) CriLJ 2096 ; State of Goa Vs. Sanjay Thakran and Another, (2007) 5 JT 146 : (2007) 3 SCALE 740 : (2007) 3 SCC 755 : (2007) 3 SCR 507 ; Maruti Rama Naik Vs. State of Maharashtra, AIR 2003 SC 3884 : (2003) CriLJ 4326 : (2003) 7 JT 627 : (2003) 7 SCALE 270 : (2003) 10 SCC 670 : (2003) 2 UJ 1523 : (2003) AIRSCW 4468 : (2003) 7 Supreme 323 ; Varun Chaudhary Vs. State of Rajasthan, AIR 2011 SC 72 : (2011) CriLJ 675 : (2010) 11 JT 419 : (2010) 11 SCALE 502 : (2010) AIRSCW 6794 : (2010) 7 Supreme 523 ; Kuldip Singh and other v. State of Delhi, reported in (2014) 12 SCC 528 ; Rambilas and others Vs. State of Madhya Pradesh, AIR 1997 SC 3954 : (1997) 8 JT 359 : (1997) 6 SCALE 337 : (1997) 4 SCR 405 Supp ; Kansa Behera Vs. State of Orissa, AIR 1987 SC 1507 : (1987) CriLJ 1857 : (1987) 2 JT 193 : (1987) 1 SCALE 1137 : (1987) 3 SCC 480 : (1987) 2 SCR 1096 ; Mustkeem @ Sirajudeen Vs. State of Rajasthan, AIR 2011 SC 2769 : (2011) 3 Crimes 118 : (2011) 3 JCC 2117 : (2011) 7 JT 304 : (2011) 3 RCR(Criminal) 766 : (2011) 7 SCALE 481 : (2011) 9 SCR 101 : (2011) AIRSCW 4410 : (2011) 5 Supreme 66 ; Mohinder Singh Vs. The State, AIR 1953

SC 415 : (1950) 1 SCR 821 and Pancho Vs. State of Haryana, AIR 2012 SC 523 : (2012) CriLJ 832 : (2011) 4 Crimes 226 : (2011) 14 JT 55 : (2011) 4 RCR(Criminal) 665 : (2011) 2 SCALE 187 : (2011) 10 SCC 165 : (2011) 12 SCR 1173 : (2012) 1 UJ 163 : (2012) AIRSCW 452 : (2011) 7 Supreme 242 .

8. Ld. Advocate representing the state fairly submitted that there was no eye witness of the incident in question and the entire case is based on the circumstantial evidence and save and except recovery of blood stained clothings of the appellants and vojali there is no evidence against the appellant No. 2 and appellant No. 3.

9. Ld. Advocate representing the state further submitted that the relation between the appellant No. 1 and the victim was not cordial since prior to the incident as appellant No. 1 used to demand money from him and also used to give threat to the victim for dire consequences for non payment of his dues even in presence of inmates of the house which had been duly corroborated by PW.10, PW.11, PW.19 and PW.20.

10. Ld. Advocate representing the state also submitted that victim was last seen together with the appellant No. 1 in the evening of 21.05.2012 by PW.11, PW.18 and PW.19 and his dead body was found on the next morning and the autopsy surgeon, PW.26 had elaborately and specifically described the injuries found on the person of the victim and also opined that those injuries may be caused by a vojali and on that night at about 10 p.m. when PW.10 and PW.11 visited the house of the appellant No. 1 he was not found in the house and was absconding.

11. Ld. Advocate representing the state also submitted that motor cycle used in the commission of the crime was seized from the house of the appellant No. 1 and he also admitted the said motor cycle to be his own but during his examination under Section 313 Cr.P.C. he denied the same.

12. According to the Ld. Advocate representing state all the above circumstances lead to conclude the guilt of the appellant No. 1 in commission of murder of the victim.

13. Reliance is placed by him in the matter of Rohtash Kumar Vs. State of Haryana, (2013) 6 AD 580 : (2013) CriLJ 3183 : (2013) 8 JT 181 : (2013) 3 RCR(Criminal) 355 : (2013) 7 SCALE 472 : (2013) 14 SCC 434 .

14. We have given our thoughtful consideration to the submissions of the Ld. Counsel appearing for the respective parties and gone through the evidence of the prosecution witnesses and other materials on record for examining the propriety of the impugned judgement, order of conviction and sentence passed by the learned court below.

15. Admittedly none of the witnesses examined by the prosecution are the witnesses to the occurrence and the entire case is based on the circumstantial evidence. It is well settled proposition of laws that where the cases rests squarely on the circumstantial evidence the inference of guilt can be justified

only when all the incriminating facts and circumstances are found to be incompatible with the offence of the accused. The chain of circumstances should be of a conclusive nature and must be completed and most clearly point out to the guilt of the accused. This has been elaborately discussed by us in a judgment dated July 15th, 2015 delivered in the matter of Biswajit Jamadar @ Habla vs. State of West Bengal (in re: C.R.A. No. 671 of 2013) with the matter of Kanaiya @ Hukka Yadav vs. State of West Bengal (in re: CRA 594 of 2014). In the above judgment we arrived at the above conclusion taking into consideration the proposition of law settled by the Hon"ble Supreme Court in this regard in the matter of Hanumant Vs. The State of Madhya Pradesh, AIR 1952 SC 343 : (1953) CriLJ 129 : (1952) 1 SCR 1091 and the relevant portion of the above decision is quoted below:-

"10.....It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstance should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

16. While delivering the judgement in the above appeal bearing CRA 671 of 2013 with CRA 594 of 2014, we further took into consideration that the above proposition of law was repeated and reiterated by the Hon"ble Supreme Court time and again. Reference may be made to the decision of 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 and the relevant portions of the above decision are quoted below:-

"10. 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. (See Sukam Singh v. State of Rajasthan, Eradu v. State of Hyderabad, Earabhadroppa v. State of Karnataka, State of U.P. v. Sukhbasi, Balwinder Singh v. State of Punjab and Ashok Kumar Chatterjee v. State of M.P.). 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. In Bhagat Ram v. State of Punjab it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the

offences beyond any reasonable doubt."

(Emphasis supplied)

17. The learned Court below took into consideration the evidences of P.W. 10, 11, 18, 19 and 20 to arrive at a conclusion that appellant No. 1, had acquaintance with the victim and the victim had taken money from him and due to non payment of the same, appellant No. 1 used to threaten the victim with dire consequences and even on May 20, 2012 he threatened the victim and in the evening of May 21, 2012 victim was last seen together with the appellant No. 1.

18. The learned court below took into consideration the evidences of doctor, P.W. 26 who held P.M. examination and found one deep incised wound from chin to the right ear through skin subcutaneous tissues and platysma deeper at right side of neck goes obliquely upwards, one stab wound in front of throat 1 1/2" long and 1" deep injuring trachea, one 2 1/2" long and 2" deep chop wound at right side of base of neck injuring great vessels of carotid system right side, fracture at left elbow 3"x1" deep chop wound over left arm, 3 stab wounds 1" long and 3/4" deep over right side of posterior chest wall, 2 cm. long and 1/2 cm. deep incised wound at lateral aspect of right eye, 1/2" deep and 1" long stab wound over mid chest and shoulder and opined that death was due to over mentioned injuries ante mortem and homicidal in nature and this types of injuries may be caused by a vojali and also the evidences of P.W.12 and P.W.13, witness to seizure of the motor cycle used in the commission of the offence from the house of appellant No. 1, the evidences of P.W.14, P.W.15, witnesses to the seizure of the bloodstained wearing apparels of appellant No. 2 from his house on being led by him, the evidences of P.W.16, P.W.17, witnesses to the seizure of the bloodstained wearing apparels of appellant No. 1 and appellant No. 3 from the house of appellant No. 3 on being led by him and the evidences of P.W.22, P.W.25, witnesses to the seizure of the bloodstained vojali from mango garden from bush of "kachu" on being led by appellant No. 2 to arrive at a conclusion that it was none but the appellants who were involved in commission of the murder of the victim and thereafter caused disappearance of the evidence of murder.

19. So, the first circumstances alleged against the appellants was that there was animosity between the victim and the appellant No. 1 and the victim was last seen together in the company of appellant No. 1. To prove this prosecution had relied on the evidences of P.W. 10, 11, 18, 19 and 20. On perusal of the evidence of P.W.10, brother of the victim and P.W.11, wife of the victim, we find that appellant No. 1 was the private tutor of the son of the victim and they had friendship. According to P.W.18 also most of the time he had seen the victim moving with the appellant No. 1 in his motor cycle and one week prior to the death of the victim also he had seen both the victim and the appellant No. 1 riding in a motor cycle. So, from the above it apparent that appellant No. 1 had acquaintance with the victim and their relation was cordial and they used to roam together. With regard to the alleged threat to the victim for dire

consequences by the appellant No. 1 for his non payment of money taken from the appellant No. 1 we find that neither P.W.11, the wife of the victim nor P.W.10, brother of the victim could say the reason of such reported threat and it is only PW19, sister-in-law of the victim and PW20, erstwhile employee of the victim who have for the first time introduced a story of dues of money from the victim. P.W.20 even could not say the amount due from the victim nor has disclosed the source of his knowledge. P.W.19 has also not disclosed the source of her knowledge or the amount due from the victim. She even admitted that victim did not say her anything about the dues in question. She had also not stated the day, date, month, year or the period of reported threat to the victim by the appellant No. 1 whereas according to P.W.20, appellant No. 1 at first threatened the victim 15 days prior to his death. Furthermore, if P.W.20 had the knowledge of threat then why he did not inform this to police even after getting news of death of the victim. According to both P.W.10 and P.W.11, 5/6 days prior to the death of the victim appellant No. 1 threatened the victim with dire consequences and according to P.W.11 even on May 20, 2012 also appellant No. 1 came to their house and threatened the victim in similar fashion but admittedly no GDE was lodged at the P.S. nor the matter was reported to anyone. The learned court below did not take into consideration the above facts while coming to the conclusion that factum of lending money by the victim from the appellant No. 1 and for non payment of the same appellant No. 1 used to threat the victim have been established.

20. With regard to last seen together theory prosecution has also relied on the evidence of PW11, PW18 and PW19 who claimed to have last seen together the victim and the appellant No. 1 but we find that the time of reported seeing together differs from one witness to other. There was, however, no evidence on record that victim was last seen together in the company of either appellant No. 2 or appellant No. 3. According to PW11, wife of the victim, on May 21, 2012 in the evening appellant No. 1 came to their house on foot and had talk with her husband and thereafter he went away on foot and after 10/15 minutes of his departure her husband went out from the house whereas according to PW19, sister-in-law of the victim, on the relevant day at about 8.30 p.m. appellant No. 1 came to their house with his motor cycle and called the victim and thereafter they went away together. PW18, relative of the victim, had claimed that on the relevant day at about 8.00/8.30 p.m. while he was sitting at Bibirhat rickshaw stand he saw appellant No. 1 was driving motor cycle with the victim who was sitting behind him as a pillion rider and he reported this to the father of the victim at his house in presence of other family members. But none of the family members had supported this. Bibirhat according to P.W.1, was at a distance of about 11 kms. from the mango garden where dead body was detected but there is no evidence that appellants were seen at the said place. Furthermore, in view of the repeated threat of dire consequences by the appellant No. 1 to the victim it is very hard to believe that the victim accompanied appellant No. 1 in his motor cycle at such an odd hour without any resistance or raising any alarm or

making any attempt to flee away. Even assuming that the deceased did accompany the appellant No. 1 in his motor cycle, this circumstances by itself does not lead to the irresistible conclusion that the appellants had killed the victim and thrown the dead body in the field. It can not be presumed that the appellants were responsible for the murder, though grave suspicion arises against them. There was a considerable time gap between the victim boarding the motor cycle in question and the time when P.W.2 found the dead body. Circumstances of last seen together does not by itself and necessarily lead to the inference that it was the appellants who committed the crime. Reference may be made to the decision of *Kanhaiya Lal Vs. State of Rajasthan*, (2014) AIRSCW 1828 : (2014) CriLJ 1950 : (2014) 4 JT 165 : (2014) 2 RCR(Criminal) 180 : (2014) 3 SCALE 598 : (2014) 4 SCC 715 and the relevant portions of the above decision are quoted below:-

"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.

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 v. State of Rajasthan*."

21. In such circumstances no presumption could be drawn on the issue of last seen together merely relying on such statements of above witnesses. Learned court below completely overlooked the above aspect. As such the decision of the learned court below on this score is not sustainable in law. In view of the distinguishable facts and circumstances of this case, the decision of *Rohtash Kumar Vs. State of Haryana*, (2013) 6 AD 580 : (2013) CriLJ 3183 : (2013) 8 JT 181 : (2013) 3 RCR(Criminal) 355 : (2013) 7 SCALE 472 : (2013) 14 SCC 434 cannot come as an aid to support the case of the prosecution on that score.

22. Another circumstances which the prosecution has tried to prove against the appellants is the recovery of the weapon of offence namely one vojali, motor cycle and blood stained wearing apparels from the possession of the appellants. In this regard as we have already stated, prosecution has relied on the evidences of P.W.12 and P.W.13, witnesses to the seizure of the motor cycle in question, P.W.14 and P.W.15, witnesses to the seizure of bloodstained wearing apparels of appellant No. 2, P.W.16 and P.W.17, witnesses to the seizure of the bloodstained wearing apparels of appellant No. 1 and appellant No. 3 and P.W.22 and P.W.25, witnesses to the seizure of one vojali. It is true that one motor cycle was seized

from the house appellant No. 1 but neither the R.C. book nor the connected papers of the vehicle in question was seized and produced to prove the ownership of the same. Furthermore, any connection of the motor cycle in question with the crime has not been established by placing the same for identification before PW18 who reportedly saw the victim and the appellant No. 1 in a motor cycle. There was no evidence on record to show the involvement of appellant Nos. 2 and 3 in the commission of murder of the victim and the only evidence prosecution had tried to implicate them is the reported recovery and seizure of blood stained wearing apparels of the appellant No. 2 from his own house and blood stained wearing apparel of appellant No. 1 and 3 from the house of appellant No. 3 and one vojali. We find from the evidences of P.W.14 and P.W.15, witnesses to the seizure of the reported bloodstained wearing apparels of appellant No. 2 from his house that they are not the local witnesses. They were called by the father of the victim at his house and therefrom police asked them to accompany them to the house of appellant No. 2 and accordingly they got in the police car and went there. It also appear from their evidence that at the time of reported recovery they were standing outside the room where from those wearing apparels were recovered. Even personal search of the police personnels were not made before search. Similarly, at the time of reported recovery of blood stained wearing apparel of appellant No. 1 and 3 from the house of appellant No. 3, P.W.16 and P.W.17 were standing outside the house and were not present at the place where from those wearing apparels were recovered and personal search of the police personnels were also not made before search and seizure. It also appears that before search and seizure adjoining house owners were not called by the police nor any reason had been assigned. Thus, from the above it is apparent that provisions of law relating to the search and seizure has not been adhered to by the police. Moreover, the wearing apparels in question belonged to the appellants. P.W.22 and P.W.25 are the witnesses to the seizure of one vojali. According to them the said vojali was recovered on being led by the appellant No. 2 from the mango garden kept in bush of kachu. Admittedly appellant No. 2 was arrested by P.W.27, on May 28, 2012 and his statements were recorded on the same date but the reported recovery of the vojali in question was made only on June 5, 2012 i.e. after 9 days of his arrest from a place which was not in the exclusive possession of the appellants and the said place was easily accessible by other people. Moreover, none of the seizure witnesses has said about presence of any such blood stain on the vojali. Furthermore, the said vojali in question was sent to the FSL along with other seized articles only on June 26, 2012 and there is no evidence or explanation where those articles were kept after seizure. P.W.22 has admitted that prior to their arrival at the place of recovery 7/8 police personnel were present there. All those articles were also found without being sealed or labeled, so the belated recovery becomes doubtful. Even the blood group has not been established as per the serologist's report dated May 6, 2013 and, therefore, it could not positively be connected with the deceased. The evidence about the blood group is only conclusive to connect the blood stains with the deceased.

That evidence is absent and in this view of the matter, in our opinion, even this is not a circumstance on the basis of which any inference could be drawn. Moreover, no inference can be drawn against the appellants by mere recovery of a weapon as a result of a reported disclosure to the police, if no evidence connecting the weapon with the crime alleged to have been committed by the appellants. Therefore, this link in the chain of circumstances is also not established by the prosecution. The learned court below did not take into consideration the above fact of this case to apply the settled principle of law.

23. Another circumstances which the prosecution has tried to prove against the appellants is that appellant No. 2 and appellant No. 3 have made extra-judicial confession about their involvement in the commission of murder. It is well settled in the matter of acceptability of extra-judicial confession that it must be established to be true and must be made voluntary and in a fit state of mind and passes the touchstone of credibility. It is a very weak piece of evidence and requires appreciation with great caution. Both P.W.14 and P.W.15 have deposed that appellant No. 2 made extra-judicial confession about commission of murder of the victim in their presence and in presence of police personnels at the time of recovery and seizure of blood stained wearing apparels from his house while P.W.16 and P.W.17 have deposed that appellant No. 3 made extra-judicial confession about commission of murder of the victim in their presence and in presence of police personnels at the time of recovery and seizure of his and appellant No. 1's blood stained wearing apparels from his house. But, both the appellants had denied making any such extra judicial confession. Interestingly the above claim of those witnesses did not find any corroboration either from the I.O. or any other police personnel who were present there. We also find some material contradictions in the languages uttered/spoken by them in respect of the alleged extra-judicial confession made by the appellants. In view of the above we do not consider that it would be safe to accept their version in this respect.

24. Another circumstances which the prosecution has tried to prove against the appellant No. 1 is that he was absconding from his house on the relevant night. According to both PW10 and PW11 on May 21, 2011 in the night at 10 p.m. when they went to the house of the appellant No. 1 he was not found in the house. But that does not mean that he was absconding. There was also no evidence on record that appellant No. 1 absconded after the incident. Even the I.O. had not stated that after the incident he attempted to apprehend the appellant but he absconded. There is also nothing in the record that in order to apprehend the appellant warrant of arrest and/or proclamation had to be issued. On the other I.O. has himself admitted that he apprehended appellant No. 1 from his residence. Moreover mere absconding by itself does not necessarily lead to a firm conclusion of guilt of mind unless corroborated from other circumstances. It is a settled legal position that mere abscondence can not be taken as a circumstance to draw an adverse inference. Reference may be made to the decision of Sk. Yusuf Vs. State of West Bengal, AIR 2011 SC 2283 : (2011) 3 Crimes 1 : (2011)

6 JT 640 : (2011) 6 SCALE 511 : (2011) 11 SCC 754 : (2011) 8 SCR 83 : (2011) AIRSCW 3748 : (2011) 4 Supreme 331 and the relevant portions of the above decision is quoted below:-

"31. Both the courts below have considered the circumstance of abscondence of the appellant as a circumstance on the basis of which an adverse inference could be drawn against him. It is a settled legal proposition that in case a person is absconding after commission of offence of which he may not even be the author, such a circumstance alone may not be enough to draw an adverse inference against him as it would go against the doctrine of innocence. It is quite possible that he may be running away merely on being suspected, out of fear of police arrest and harassment. (Vide *Matru alias Girish Chandra Vs. The State of Uttar Pradesh*, AIR 1972 SC 1050 : (1971) CriLJ 913 : (1971) 2 SCC 75 : (1971) SCC(Cri) 391 : (1971) 3 SCR 914 , *Paramjeet Singh @ Pamma Vs. State of Uttarakhand*, AIR 2011 SC 200 : (2011) CriLJ 663 : (2010) 4 Crimes 165 : (2010) 10 JT 260 : (2010) 10 SCALE 258 : (2010) 10 SCC 439 : (2011) 1 SCC(Cri) 98 : (2010) AIRSCW 6616 : (2010) 7 Supreme 26 and *Rabindra Kumar Pal @ Dara Singh Vs. Republic of India*, AIR 2011 SC 1436 : (2011) 1 Crimes 217 : (2011) 1 JT 350 : (2011) 1 RCR(Criminal) 641 : (2011) 1 SCALE 615 : (2011) 2 SCC 490 : (2011) 1 SCC(Cri) 706 : (2011) 1 SCR 929 : (2011) 1 UJ 353 : (2011) AIRSCW 1865 : (2011) AIRSCW 606 : (2011) 2 Supreme 449 : (2011) 1 Supreme 353 Thus, in view of the law referred to hereinabove, mere abscondence of the appellant cannot be taken as a circumstance which gives rise to draw an adverse inference against him."

(Emphasis supplied)

25. Thus, we find that the circumstance from which the conclusion of guilt is to be drawn has not been fully established. Under the circumstances learned court below is not justified in holding that after the incident appellant No. 1 absconded from the place.

26. Learned court below convicted the appellants u/s 302/201 I.P.C. for commission of murder and causing disappearance of evidence after appreciating the evidence available on record. On critical analysis of the evidence of the prosecution witnesses on record we do not find any such evidence to the effect that the appellants in order to screen themselves from legal punishment caused disappearance of the evidence of offence. Moreover no such question to that effect was also put to the appellants during their examination u/s 313 Cr.P.C.

27. In view of the foregoing discussions, we find that the prosecution has failed to establish the chain of circumstances which could link the appellants with the crime. In this background we are of the considered opinion that learned court below has fell in error in coming to the conclusion that the prosecution has established its case based on circumstantial evidence beyond all reasonable doubt. As such the judgment, order of conviction and sentence passed by the learned court below are liable to be set aside.

28. In the result appeal succeeds. Consequently, this appeal is allowed, the judgment, order of conviction and sentence dated December 20, 2013 and December 23, 2013 respectively passed by the Ld. Additional District and Sessions Judge, 2nd Court, Hooghly in Sessions Trial No. 3 of 2013 arising out of Sessions Case No. 267 of 2012 are hereby set aside. Appellants are, therefore, acquitted and set at liberty from this case.

29. Copy of this judgement along with the lower court records be sent down to the trial court immediately by special messenger for information and taking necessary action.

30. Urgent photostat certified copy of this judgment, if applied for, be given to the parties upon compliance with the necessary formalities in this regard.

Debasish Kar Gupta, J.

I agree.