

(2019) 02 MP CK 0030

In the Madhya Pradesh High Court

Case No : Criminal Appeal No. 2, 111 Of 2008

Meghpal @ Trigpal & Anr

APPELLANT

Vs

State Of Madhya Pradesh

RESPONDENT

Date of Decision : 14-02-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302
Evidence Act, 1872 — Section 25, 26, 27
Code Of Criminal Procedure, 1973 — Section 157

Citation : (2019) 02 MP CK 0030

Hon'ble Judges : Sanjay Yadav, J; Vivek Agarwal, J

Bench : Division Bench

Advocate : R.K. Sharma, V.K. Agrawal, A.K. Jain, F.A. Shah, V.K. Saxena

Judgement

1. This judgment shall govern the disposal of both the Criminal Appeals.
2. These appeals originate from the judgment dated 23rd October, 2007 passed in Sessions Case No.110/2007 by the Court of 4th Additional Sessions Judge (Fast Track Court), Dabra, Distt. Gwalior, whereby appellants have been convicted under Section 302 read with Section 34 of IPC with life imprisonment and fine of Rs.100/- each. It is further directed that in case of default of fine accused will undergo one month's additional simple imprisonment.
3. Learned counsel for the appellants submits that this is a case of circumstantial evidence where chain of circumstances is not complete and as per the prosecution story on 22.11.2006 TI police Station, Bilaua, B.R.Dwivedi (PW-15) received intimation on telephone that one person is lying dead in the bushes at Jaurasi Ghati and his motorcycle is standing by the side of road. When the police party reached Jaurasi Ghati, they found a Hero Honda motorcycle bearing No. MP07 KM 1850 and a dead-body at a distance of 20 meters. There were two pairs of slippers lying close to the motorcycle and one near the deceased. Besides this, one axe and a stick to hold axe were lying there separately. A huge stone having blood marks was also lying there and there were large injury marks

on the head and face of the deceased. There was a white colour Safi with black border tied to the throat of the deceased which prima facie revealed that it was a case of murder. When clothes of the deceased were searched for, a mobile was found bearing No.9826225656 and the numbers which were fed in that mobile were searched and a person who gave his name as Gaurav Vajpai (PW-8) was informed who in turn informed the police party that deceased is Ramu Vajpai son of Late Vijay Kumar Vajpai resident of 287, Tansen Nagar, Gwalior. Intimation was given to the senior officers and doctor of FSL team which came on the spot alongwith dog squad and tried to find out about identity of the accused.

4. Prosecution examined as many as 15 witnesses, namely Mahendra Sharma (PW-1) to prove that he had arranged for a room for the accused and searched for the accused in the morning of the incident and they were not found in their room; Laxminarayan Shivhare (PW-2), a witness of arrest of accused Ajju and his memorandum under Section 27 of the Evidence Act; Raju (PW-3) and Dharmendra (PW-4), who claimed that they had looked for the accused in their room and they could not be found there and they had not come to the work on the fateful day of 22nd November, 2006; Dinesh Kumar Patwari (PW-5), who had prepared spot map (Ex.P/3); Suresh Chandra Swarnkar Naib Tahsildar (PW-6) before whom identification of seized material had taken place; Ghanshyam Singh Chauhan (PW-7), witness of identification of dead-body alongwith Gaurav Vajpai, brother of the deceased, and other seized material; Gaurav Vajpai (PW-8), brother of the deceased who had received call from the police Station and reached the spot; Birendra Sharma (PW-9), another witness of arrest and memorandum of other accused persons; Dr. Pushpendra Singh (PW-10), who had conducted postmortem on the body of the deceased; Awadh Kumar (PW-11), Head Constable who had received clothes, Safi, viscera and a packet of salt; Ramakant Mishra (PW-12) and Anil Bhatnagar (PW-13) who claimed themselves to be eye-witnesses of the incident; Ajay Vajpai (PW-14), uncle of the deceased with whom police had allegedly visited the site at Bilaua where work of the deceased was going on and Shri B.R.Dwivedi (PW-15) IO of the case. As per B.R.Dwivedi (PW-15) he received intimation at about 11 am and after making entry in the Rojnamacha, he left the police Station to reach site of the incident and after visiting the site and from there the workplace of the deceased where it came to his knowledge that accused persons had not come for work, he returned back to the place of incident and then reached police Station alongwith Ajay Vajpai (PW-14) and lodged FIR (Ex.P/24).

5. Learned counsel for the appellants submits that though prosecution has implanted Ramakant Mishra (PW-12) and AnilBhatnagar (PW-13) as eye-witnesses narrating a story that on 22.11.2006 they were returning from Jaurasi temple when they had seen the incident and incidently they are also registered contractors, therefore, they were knowing all the accused persons as at some point of time they had done some work with them which has not been disclosed by them. They had used services of such accused persons as labourers but statements of such witnesses are not reliable and their conduct itself creates a

doubt about prosecution story. It is submitted that it is an admitted position that on 28.11.2006 they had given their statements to the police, one of which has been exhibited as Ex.D/1 by Anil Bhatnagar (PW-13). The reason, which has been shown for not giving their statements earlier or not narrating the story to the prosecution that they had witnessed the murder in the hands of known accused persons, that they were under fear and fright, and therefore, could not report the matter to the police earlier is neither possible nor realistic and this clearly shows that they are planted witnesses known to the complainant party inasmuch as Anil Bhatnagar is a resident of Railway Colony which is close to Tansen Nagar where the deceased was staying with his uncle Ajay Vajpai (PW-14) and his brother Gaurav Vajpai (PW-8). It is also submitted that IO has not carried out investigation in totality otherwise it is possible that Ramakant Mishra (PW-12) and Anil Bhatnagar (PW-13) might have been the real culprits and they falsely framed the appellants otherwise there was no reason for them to remain in anonymity for long six days, specially when they had crossed several police Stations on way to their home. It is pointed out that Anil Bhatnagar (PW-13) is resident of Gwalior and the distance between Jaurasi temple and Tansen Nagar is more than 20 kms and there are at least three police Stations on way including Jhansi Road police Station, whereas Ramakant Mishra (PW-12) is resident of Bhind and had travelled from Jaurasi to Bhind which reveals that they have more to hide than to reveal in regard to the present case.

6. Learned counsel for the appellants submits that Ajay Vajpai (PW-14) who is uncle of the deceased with whom deceased was staying has narrated that Bhura and Ajju had visited their house on 22.11.06 at about 8-8.30 am and had asked for Ramu. He called Ramu and then Ajju and Bhura told that they will settle his account. When he intervened and asked that why not they pay the money there itself, then Bhura said that money is with his brother Meghpal and he will pay the same there itself. Then Ramu took his motorcycle and was about to leave alongwith Bhura and Ajju, he asked Ramu to deposit a form of Bank of Baroda which Ramu kept and left on motorcycle towards Bilaua. At about 11 .15 am he received intimation that Ramu's dead-body is lying at Jaurasi temple and then he reached there. It is submitted that this is contrary to the story narrated by Gaurav Vajpai (PW-8), brother of the deceased, inasmuch as Gaurav Vajpai has submitted that he had received a phone call from one police official namely Sikarwar on his mobile from the mobile of his elder brother and then he had called his uncle PW-14 but could not contact his uncle and then he called his friend Amit Tomar and reached Jaurasi Ghati where he saw the dead-body in presence of the police officials and crowd of 8-10 persons. He has not shown presence of Ajay Vajpai (PW-14) on the spot though he has mentioned that police had prepared Naksha Panchayatnama and handover to him mobile and watch of the deceased vide Ex.P/7.

7. In view of such evidence, it is submitted that there are material contradictions in the evidence of prosecution witnesses inasmuch as B.R.Dwivedi (PW-15) has deposed that he had called Gaurav Vajpai and informed him about the incident,

whereas Gaurav Vajpai has stated that he had received a call from one Sikarwar. It is further submitted that in fact, Ajay Vajpai (PW-14) and Gaurav Vajpai (PW-8) were shown the slippers on the spot itself, and therefore, there was no justification in getting the slippers identified at a subsequent point of time. It is further submitted that a slipper worn by labourers is neither decorated nor branded to have been identified as to who was wearing which slippers. This is another weak link in the prosecution story inasmuch as witnesses have been made to identify accused persons on the basis of their slippers.

8. It is also submitted by the learned counsel for the appellants that as per the FIR when IO had taken Ajay Vajpai to Bilaua situated at 25 kms away from the place of incident, then they met Kashiram who had identified slippers, axe and Safi saying that such Safi was belonging to Bhura and axe was given by Mahendra, but this witness who could have been a vital person in the chain has not been examined by the prosecution. Even Mahendra (PW-1) has not deposed that he had given an axe to the accused.

9. It is also submitted that prosecution has tried to fit in a story of murder by introducing various characters like a clever director of a film, but the improbabilities are apparent on their face. It is pointed out that as per the story of Ramkant Mishra (PW-12) he had left Bhind at 5 am by bus and reached Gwalior by 7 am which is improbable as roads in 2006 were really in bad shape and a public transport with several stoppages on way would take at least 3 hours to reach Gwalior bus stand. From there he would have travelled a few kms to reach the house of Anil Bhatnagar (PW-13) as has been narrated by Anil Bhatnagar, and therefore, they could not have left the house of Anil Bhatnagar at 7.15 am as has been narrated by Anil Bhagnagar to reach Jaurasi temple at 8 am. It is also submitted that as per the IO he had received intimation at 11 am. Thereafter he made entry in the Rojnamacha, collected force and informed his superior officers and reached the scene of incident situated at a distance of about 9 kms from the police Station Bilaua. Then they searched the body of the deceased and discovered a mobile and thereafter they called on the number of Gaurav Vajpai (PW-8). As per Gaurav Vajpai (PW-

8) he had reached the spot at about 11.30 am which is again not possible, as IO had reached the spot at 11.15, therefore, it is not possible that a person in Tansen Nagar at a distance of 26-27 kms could reach the site of incident in less than 15 minutes time, specially when he had called his friend Amit Tomar and when Amit Tomar reached his house, then they had gone to Jaurasi valley. In this sequence, it is submitted that Gaurav Vajpaid had reached there, IO had taken Ajay Vajpai (PW-14) to Bilaua, where work of the deceased was going on which is shown to be at a distance of 25 kms from the place of incident and interrogated Kashiram who has not been examined and then searched for accused persons in their hutment, distance of which has not been shown, and then came to the place of incident, then reached police Station to lodge a report at 12.30 am as is mentioned in FIR (Ex.P/24). These improbabilities also point

out towards innocence of the accused. It is also submitted that IO has not examined any independent witness to corroborate presence of PW-12 and PW-13 at Jaurasi Temple though they have deposed that after Darshan they had taken snacks (tiffin) at Jaurasi.

10. Learned counsel for the appellants also submits that Ajay Vajpai's (PW-14) presence on the spot near about when police reached is also full of improbability inasmuch as on the one hand Gaurav Vajpai (PW-8) has deposed that he could not contact his uncle Ajay Vajpai, whereas Ajay Vajpai has not narrated his source of information that how and from whom he got information at 11.15 am about the dead-body of deceased Ramu lying in Jaurasi Ghati when according to B.R.Dwivedi IO (PW-15) he received intimation at 11 am through a anonymous call at police Station and thereafter when he reached the site of incident, they found a dead-body. On search of the body, they discovered a phone, whereafter they made call. All this could not have been taken place within 15 minutes to connect to Ajay Vajpai (PW-14). It is further submitted that Ajay Vajpai (PW-14) though has given his case diary statements but they were given three days after the incident on 25.11.2006. It is also pointed out that though he was with the police and visited work-site of the deceased, but he never narrated to the police authorities that he had last seen Bhura and Ajju in the company of the deceased and they had visited his house in the morning of the fateful day and had taken the deceased with them. This is another important miss in the link of chain of circumstantial evidence.

11. It is further submitted by learned counsel for the appellants that as per the version of Ramakant Mishra (PW-12) and Anil Bhatnagar (PW-13) they had seen accused dragging the deceased, but there are no drag injury marks on any part of the deceased as per postmortem report (Ex.P/18).

12. It is further submitted that IO has shown recovery of form of Bank of Baroda (Ex.P/20), account opening form of Bank of Baroda (Ex.P/21), family card (Ex.P/22) vide Ex.P/17 from the site, but these papers were allegedly seized vide seizure memo Ex.P/17 on the identification of Meghpal on 30. 11.2006 i.e. after a week of the incident. Similarly vide Ex.P/12 dated 22.12.2006 at the instance of Bhura seizure has been shown. The place of seizure is Jaurasi Ghati and the papers which have been shown to be seized are a black colour purse containing three notes of Rs.10 each, 2 photographs of Ramu Vajpai and one of his card, registration card of the motorcycle, a bill of Hero Honda, a copy of challan. It is submitted that Gaurav Vajpai (PW-8) has admitted that on 22.11.2006 he was handed over a watch and mobile of the deceased Ramu which addresses another peculiar feature that any person if he wanted to loot will leave mobile and watch to take away a purse containing inconsequential papers and just Rs.30. It is also pointed out that when doctor and FSL team alongwith dog squad had inspected the scene of crime, then showing recovery of purse and certain loose papers as have been recovered vide seizure memo Ex.P/17 & Ex.P/12 on 30.11.2006 & 22.12.2006 appears to be improbable specially when recovery of such papers has

been shown from the place of incident after 8 days & 30 days respectively of the incident in the month of November when the atmosphere is moist and dew falls in abundance in late evening and early morning of the day. It is pointed out that these papers as are contained in Ex.P/20, Ex.P/21 and Ex.P/22 are intact. Witnesses of seizure of these documents namely Shri Virendra Sharma (PW-9) has been examined by the prosecution and in his deposition he has categorically deposed that police had seized a polythene but no such polythene has been mentioned in the seizure memo Ex.P/17 in which such papers were contained and such papers could not have remained intact without there being any cover on such a dusty and barren site of the incident.

13. It is also pointed out that Raju (PW-3) and Dharmendra (PW-4) are planted witnesses inasmuch as there is no mention of their statements being taken and in fact admittedly it was Kashiram who had identified everything and searched for these labourers but his statement has not been recorded. No Farari Panchnama was prepared. It is also submitted that there was no compliance of Section 157 of Cr.P.C. which is mandatory as per the law laid down by the Supreme Court in the case of Meharaj Singh Vs. State of Uttar Pradesh as reported in 1995 Cri.L.J. 457.

14. It is also submitted by learned counsel for the appellants that Ramakant Mishra (PW-12) and Anil Bhatnagar (PW-13) have not given any reason for their presence at the site. Jaurasi is known for its Hanuman Temple. The day of the incident is Wednesday, whereas Hanuman Temple is usually visited on Tuesday and Saturday, and therefore, usually nobody will come from Bhind to visit Hanuman Temple on a Wednesday. These witnesses have not given any details of their works where they had met accused, registration number, date and time of the accused working with them and moreover they have given their statements for the first time on 28.11.2006 which makes their presence doubtful. Reliance has been placed on the judgment of the Supreme Court in the case of Raghunath v. State of Haryana as reported in AIR 2003 SC 165 wherein it has been held that when complainant party did not stop at two police Stations and proceeded straight to General Hospital, Gurgaon, the conduct of the complainant party is unusual and creates doubt about genesis of prosecution story. It has been observed that "we are of the view that in the ordinary circumstances, it is quite imperative that the complainant party could have stopped at the police station, sought necessary help from the police station and also gave the first hand information to the police". Reliance has also been placed on the judgment of the Supreme Court in the case of Shahid Khan v. State of Rajasthan as reported in AIR 2016 SC 1178 wherein statements of eye-witnesses were recorded after three days of the incident and no explanation was given regarding the same, and therefore, it was held that delay in recording the statements casts a serious doubt about they being eye-witnesses to occurrence, and therefore, evidence of witnesses was not considered to be reliable and conviction was reversed.

15. It is further submitted by learned counsel for the appellants that no FSL

report of the senior scientific officer who had inspected the spot alongwith dog squad has been produced on record which proves the innocence of the appellants. It is further submitted that it is not the duty of the accused to prove that the prosecution story is false, but prosecution has to discharge the burden of proving the case beyond reasonable doubt.

16. It is further pointed out by learned counsel for the appellants that learned trial Court has noted demeanour of Ajay Vajpai (PW-14) and observed that he was trying to lead the prosecutor and giving the replies prior to question being put to him. This is a serious aspersion on the integrity of the witness inasmuch as the observation of the trial Court which reads as under :-

"नोट- साक्षी अर्नगल तरीके से बड़ चढकर अभिभाषक महोदय के प्रश्न पूछने से पहले ही जबाव दे रहा है उसका यह आचरण ठीक नहीं है"

points out that he was a tutored witness and was knowing the chronology of the questions and could not keep him under control to wait for the questions being put by the counsel before answering the same. It is also pointed out that there is contradiction in the testimony of this witness inasmuch as in para 5 he has stated that during identification of Safi it was not torn. Such identification had taken place on 21.2.2007 after the postmortem report Ex.P/18 was furnished. In the postmortem report itself, it is mentioned that this Safi was cut when a red contused ligature mark was found around the neck of the deceased. It is further submitted that TIP had taken place to identify such slippers or Safi on 21.2.2007 i.e. after three months of the incident, whereas witnesses had already seen the slippers and Safi etc. on 22.11.2006 itself.

17. It is also submitted that this witness Ajay Vajpai (PW14) was with the police at the spot and had travelled to Billua, workplace of the deceased and other places but he never narrated this fact that the deceased was taken by Bhura and Ajju in the morning of the incident. This creates doubt about the integrity of this witness. Reliance has been placed on the judgment of the Supreme Court in the case of State of Orissa v. Mr. Brahmananda Nanda as reported in AIR 1976 SC 2488 wherein it has been held that if sole eye-witness has not disclosed the name of murderer for a day and half, then under such facts and circumstances his credibility is seriously effected. Relying on this judgment, it is submitted that Ajay Vajpai (PW-14) is not a reliable witness of last seen. It is also submitted that Birendra Sharma (PW-9) and Ghanshyam Singh Chauhan (PW-7) are planted and pocket witnesses inasmuch as both these witnesses are residing within circumference of 1 km from the residence of the deceased at Tansen Nagar and there omnipresence on 22.11.2006, 30.11.06 and 22.12.06 causes a doubt that they are not the witnesses of the spot but they were taken by the police alongwith them, and therefore, memos Ex.P/11, Ex.P/15 and Ex.P/16 shown to be made in their presence do not appear to be reliable.

18. Reliance has also been placed by the learned counsel for the appellants on the judgment of the Supreme Court in the case of State of U.P. v. Arun Kumar

Gupta as reported in AIR 2003 SC 801 wherein it has been held that if witnesses to recovery is not residing in the immediate proximity, discrepancy over whether the witness by himself came to scene of occurrence or was called renders his evidence as to recovery doubtful. In this regard, para 17 of the judgment is relevant which is reproduced as under :-

"17. In this regard, the prosecution relies on the evidence of PW-4. We have earlier noticed PW-4 is not a resident in the immediate proximity of the house of the respondent. He belongs to the same biradari of the complainant and lives behind the house of the Investigating Officer, PW-9. We find no reasonable explanation why such a person was called to be a witness to the recovery when there were any number of people available and who are residents of the houses in the immediate proximity of the house of the respondent. We also notice from the records that large number of people were present at the time of the recovery, therefore, prosecution should have come forward with some explanation why PW-4 was so selectively chosen to be the witness for the recoveries. We also notice, though the preparation of memos of the recoveries took a long time still for all the recoveries PW-4 is a common witness. There is also considerable discrepancy in regard to the manner in which PW-4 came to be a witness to the recoveries. From the evidence on record, it is seen that at one place it is stated that PW-4 had come to the house of respondent on hearing the commotion that took place because of the breaking open of the lock of the house. At another place, we find that I.O. PW-9 had summoned PW-4 from his house to be a witness for the recovery. This discrepancy also adds to the doubt in regard to the evidence of PW-4, therefore, in our opinion as held by the High Court it is not safe to rely on the evidence of this witness. PWs-7 and 9 who were police officers are also witnesses, who speak about the recoveries made from the house of the respondent. PW-9 at one point says that all the recoveries in question, were made by him and he left the house of the respondent around 11.00 or 11.30 P.M. in the night of 28th of May, 1988. While PW-7 who also present at that point of time says that PW-9 was there throughout the night of 28th of May, 1988 till the morning of 29th of May, 1988 when the recoveries were completed. Thus we find a material contradiction in the evidence of these two witnesses. From the records, we see that the recoveries of the bloodstained knife, the bloodstained earth was made on 29th of May, 1988. And according to the PW-9 he had made the recoveries and he had left the place by about 11.30 P.M. in the night. It is not possible to reconcile these two facts if actually PW-9 was the person responsible for preparing the recovery memos then, the date 29th May does not fit into prosecution case since according to this witness himself he left about 11.30 in the night of 28th of May, 1988. Therefore, there is force in the arguments of the learned counsel for the respondent that these recoveries can not be believed more so in the background of the fact that the bloodstained knife, the bloodstained earth was not sent to the serologist. This court in the case of Laxmi Singh Vs. State of Bihar (supra) has stated that :-

"To add to this another important circumstance is the omission on the part of the

prosecution to send the bloodstained earth found at the place of occurrence for chemical examination which could have fixed the situs of the assault. In almost all criminal cases, the bloodstained earth found from the place of occurrence is invariably sent to the Chemical Examiner and his report along with the earth is produced in the court, and yet this is one exceptional case where this procedure was departed from the reasons best known to the prosecution. This also, therefore, shows that the defence version may be true. It is well settled that it is not necessary for the defence to prove its case with the same rigour as the prosecution is required to prove its case, and it is sufficient if the defence succeeds in throwing a reasonable doubt on the prosecution case which is sufficient to enable the Court to reject the prosecution version."

19. Similarly, reliance has been placed on the judgment of this Court in the case of Babloo @ Rajendra v. State of M.P. as reported in 2009(1) J LJ 374 wherein in para 11 this Court observed as under :-

"11. The next judgment relied on by the learned counsel for the appellants is in the case of Ram Gopal v. State of M.P. {2001(2) J LJ 192}, wherein this Court has held that once the fact is discovered from the other sources there can be no fresh discovery even if relevant information is extracted from the accused and the Court has to be watchful that the protection of sections 25 and 26 of the Evidence Act is not whittled down. There must be a recovery in pursuance of the information furnished by the accused and that information should not have been previously known to the police. The discovery of hidden incriminating articles said to have been recovered by the accused is inadmissible in evidence if the police already knew where they were hidden. If the information is received from a witness to whom the accused had made an extra-judicial confession, then discovery of such hidden incriminating articles under Section 27 is immaterial. The same proposition has been laid down by the Apex Court in the case of Sukhvinder Singh v. State of Punjab {(1994) 5 SCC 152}, and in the case of Vijender v. State of Delhi {(1997) 6 SCC 171}. Thus, it is settled law that if the police is already aware about the hidden of incriminating articles then discovery of those articles under section 27 of the Evidence Act is immaterial and cannot be relied upon from convicting the accused."

20. It is further submitted by the learned counsel for the appellants that seized mobile has not been produced before the Court which was necessary for the prosecution. Even call details have not been produced as to who all had called on that number in the close proximity to the incident and on which number calls were made from said mobile phone even after its recovery. Reliance has been placed on the judgment of the Supreme Court in the case of Mohd. Aman and another v. State of Rajasthan as reported in AIR 1997 SC 2960 wherein it has been held that if seized articles are not produced and exhibited, then conviction on the basis of finger print report is not proper. In the present case, though FSL team admittedly visited the place but no finger prints have been brought on record nor any call details which points out that possibility of tampering and

fabrication of evidence cannot be ruled out. Therefore, placing reliance on the aforesaid judgments and facts, it is submitted that this is a case of false accusation. It is further submitted that defence could prove that the theory of last seen by Ajay Bajpai (PW-14) is not reliable and the eye-witnesses account of Ramakant Mishra (PW-12) and Anil Bhatnagar (PW-13) is also not trust worthy, therefore, in the present case of circumstantial evidence, the prosecution was required to show that the evidence produced by them was worthy of acceptance and irreproachable but because of so many missing links, even chain of circumstances is not complete, and therefore, the appellants are entitled to acquittal.

21. Learned Public Prosecutor Shri F.A.Shah on the other hand has drawn attention of this Court to the testimony of Raju (PW-3) to point out that Raju has categorically deposed that accused had not visited the site of work on the fateful day. It is also submitted that though FSL report is not on record, but no adverse inference can be drawn and has placed reliance on the judgment of the Supreme Court in the case of Ganga Singh Vs. State of M.P. as reported in (2013) 7 SCC 278 to point out that prosecution has proved its case beyond reasonable doubt about guilt of the accused and once such burden has been discharged by adducing reliable evidence, then that burden cannot be extended beyond a point and onus was on the appellants to point out that they are not guilty of the offence. Reliance has also been placed on the judgment of the Supreme Court in the case of Sheo Shankar Singh v. State of Jharkhand and another as reported in (2011) 3 SCC 654 wherein in para 66 it has been held that mere delay in the examination of a particular witness does not, as a rule of universal application, render the prosecution case suspect. It depends upon circumstances of the case and the nature of the offence that is being investigated. It would also depend upon the availability of information by which the investigating officer could reach the witness and examine him. It would also depend upon the explanation, if any, which the investigating officer may offer for the delay. In a case where the investigating officer has reasons to believe that a particular witness is an eye-witness to the occurrence but he does not examine him without any possible explanation for any such omission, the delay may assume importance and require the Court to closely scrutinize and evaluate the version of the witness but in a case where the investigating officer had no such information about any particular individual being an eye-witness to the occurrence, mere delay in examining such a witness would not ipso facto render the testimony of the witness suspect or affect the prosecution version.

22. Reliance has also been placed by learned Public Prosecutor to the judgment of the Supreme Court in the case of Shivaji Sahebrao Bobade and another v. State of Maharashtra as reported in AIR 1973 SC 2622 wherein it has been held that presumption of innocence of accused needs moderation. It has been held that Jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the

delinquent free and chopping the logic of pre-ponderant probability to punish marginal innocents. It has been further held that when scanning the evidence of various witnesses the Court has to inform itself that variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate against the veracity of the core of the testimony provided there is the impress of truth and conformity to probability in the substantial fabric of testimony delivered.

23. Reliance has also been placed on the judgment of the Supreme Court in the case of *Shyamal Ghosh v. State of West Bengal* as reported in (2012) 7 SCC 646 wherein in a murder trial finding the eye-witnesses to corroborate significant parts of chain of circumstances and based on last seen together coupled with recovery of dismembered corpse and weapons of offence and other crime articles, conviction was affirmed. In para 63 importance of presence of eye-witnesses at significant parts of chain of circumstances has been discussed in the following terms:-

"63. Then it was also contended that circumstantial evidence is a very weak evidence and in the present case, the complete chain having not been established, the accused are entitled to acquittal. This argument again does not impress us. Firstly, we have discussed in some details that this is not purely a case of circumstantial evidence. There are eye- witnesses who had seen the scuffling between the deceased and the accused and the strangulation of the deceased by the accused persons and also the loading of the mutilated body parts of the deceased contained in gunny bags into Maruti Van. Evidence establishing the 'last seen together' theory and the fact that after altercation and strangulation of the deceased which was witnessed by PW8, PW17 and PW19, the body of the deceased was recovered in pieces in presence of the witnesses, have been fully established. To a very limited extent, it is a case of circumstantial evidence and the prosecution has proved the complete chain of events. The gap between the time when the accused persons were last seen with the deceased and the discovery of his mutilated body is quite small and the possible inference would be that the accused are responsible for commission of the murder of the deceased. Once the last seen theory comes into play, the onus was on the accused to explain as to what happened to the deceased after they were together seen alive. The accused persons have failed to render any reasonable/ plausible explanation in this regard."

24. Placing reliance on such decisions, learned Public Prosecutor submits that prosecution has been able to establish the chain of circumstances beyond reasonable doubt coupled with the fact that there is evidence of last seen, so also an eye-witness account which is sufficient to draw only conclusion of guilt of appellants which does not call for any interference.

25. After hearing the arguments and going through the material on record, following analysis emerge after giving considerable thought to the material produced before us. (i) It is to be deciphered from the material on record that

whether the death of Ramu is homicidal or not. For this reference can easily be drawn from postmortem report (Ex.P/18) wherein postmortem Dr. Pushpendra Singh (PW-10) has noted cause of death due to asphyxia due to strangulation within 03 to 12 hours of the postmortem and death has been termed to be homicidal. Following injuries have been noted on the body of the deceased :-

"(1) Radish contused ligature mark evident around neck passing over thyroid cartilage 8 cm below tip of chin, 9 cm below right ear & 8 cm below left ear & 8.5 cm below occipital prominence, 43 cm in circumference & 2 cm in width. On cut section all neck structures corresponding to injury ecchymosed. Injury to neck structure ante mortem in nature.

(2) Lacerated wound evident on right side forehead & eye lateral angle & cheek 10 x 4 x skin deep. Signs of bleeding evident.

(3) Lacerated wound with depressed compound fracture 1 cm above left eye brow 4 x 3 x bone deep associated with swelling.

(4) Lacerated wound evident on left side parietal part 9 cm above tip of ear 5 x 1 cm x skin deep.

(5) Lacerated wound evident m Right side temporal part above ear size 3 x 1 cm x skin deep. Adjacent tissues contused. " Dr. opined that all injuries were ante-mortem in nature and were sufficient to cause death in ordinary course of nature. It was also opined that injuries to head were caused by hard and blunt object and to neck by using ligature material Safi. There are no incised wound found on the body of the deceased. Postmortem had taken place on 2.15 pm and the nature of injuries clearly reveals that death was homicidal.

26. Now it is to be seen as to whether the proposition led by the prosecution through Ajay Vajpai (PW-14) that deceased was taken away from his residence by the accused is a reliable piece of evidence or not. Ajay Vajpai (PW-14) has given his statements to the police admittedly on 25.11.2006, whereas he was present with the police throughout and IO had recorded FIR (Ex.P/24) after visiting the scene of incident, place where Ajay Vajpai was present and then they had visited the work-site of the deceased at Bilaua and then FIR was lodged, but throughout it is nowhere mentioned that Ajay Vajpai (PW-14) ever informed the police till recording of his 161 statement on 25.11.2006 that Bhura and Ajju had taken the deceased from his house in front of him. This is a material contradiction on the part of the prosecution inasmuch as serious doubt is casted about the testimony of this witness in the light of the law laid down by the Supreme Court in the case of Shahid Khan (supra). FIR (Ex.P/24) though cannot be considered to be an encyclopedia of the incident, clearly makes a mention that B.R.Dwivedi (PW-15) IO had taken Ajay Vajpai (PW-14) to the site where cement concrete mixing machine was functional and made enquiry from Kashiram about other labourers working at the site and then Kashiram had informed about absence of Bhura, Ajju, Shrichand and Khimma @ Khemchand. Thereafter they searched for the temporary hutments of the accused alongwith

Kashiram and then visited the place of incident when Kashiram had identified one pair of slippers to be that of Bhura and another to be that of Ajju and third pair of slippers to be that of Shrichand and Safi to be that of Bhura so also the axe lying there. If Ajay Vajpai (PW-14) had seen the deceased going out with Bhura and Ajju, then there was no occasion for him not to give their names as that would have helped the investigation to proceed in that direction rather than seeking the names of absent labourers from Kashiram, who has not been examined by the prosecution. This act of the prosecution is not a minor omission but leaves a vital gap in completion of chain of circumstances. Also there is no explanation by the prosecution for not recording the statement of Ajay Vajpai (PW-14) who was known to the IO and was available with the IO continuously from the scene of crime till 25.11.2006, therefore, reliance placed by the learned counsel for the respondent to the judgment in the case of Ganga Singh (supra) that when their witnesses were not tested by cross-examining them on such aspects and no question was put to the IO in this regard, then testimony of prosecution witnesses cannot be doubted, may be true in the given set of facts but at the same time in Ganga Singh (supra) itself the Supreme Court has held that if the defects in investigation causes serious doubt on prosecution case, then accused would be entitled to acquittal due to such doubt. Similarly, in the case of Sheo Shankar Singh (supra) though it has been held that delay in the examination of a particular witness does not, as a rule of universal application, render the prosecution case suspect, but at the same time, it would depend upon the explanation if any which the IO may offer for the delay. It has been held that in a case where the investigating officer has reasons to believe that a particular witness is an eye-witness to the occurrence but he does not examine him without any possible explanation for any such omission, the delay may assume importance and require the Court to closely scrutinize and evaluate the version of the witness. In the present case, Ajay Vajpai (PW-14) was all through with the IO and yet such a vital fact has not been narrated by him till recording of 161 statements that too after 3 days, therefore, it casts doubt about his authenticity to be an witness of last seen. In this regard, judgment of the Supreme Court in the case of Mr. Brahmananda (supra) can be placed reliance to discard the testimony of Ajay Vajpai (PW-14) to be a witness of last seen.

27. Therefore, this Court is required to scrutinize the evidence of Ramakant Mishra (PW-12) and Anil Bhatnagar (PW-13) who claim themselves to be the witnesses who had seen the body of the deceased being subjected to murder and dragging. Their testimony that they had seen the body being dragged is not corroborated by the postmortem report as no injury or bruise has been pointed out by Dr. Pushpendra Singh (PW-10) in the lower limbs of the deceased though admittedly the scene of incident is a part of Jaurasi valley where there are several bushes as have been shown in crime details form Ex.P/25. Further, their silence for six long days in not narrating the incident to the police, specially when they crossed several police Stations on way casts serious doubt about their testimony and this finds support from the judgment of the Supreme Court in the

case of Raghunath (supra) wherein their failure to report to police at first hour though two police Stations were on their way to General Hospital was found to be sufficient to discard their testimony. Ramakant Mishra (PW-12) and Anil Bhatnagar (PW-13) have tried to give an explanation that they were not feeling well, they were threatened by the accused and were afraid of them but this is to be seen in their socio- economic background as has been instructed by the Supreme Court in the case of Shivaji Sahebrao Bobade (supra) wherein it has been held in para 8 that when scanning the evidence of the various witnesses the Court has to take into consideration the 'behavioural pattern and perceptive habits'. The too sophisticated approaches familiar in courts based on unreal assumptions about human conduct cannot obviously be applied to those given to the lethargic ways of our villages. When scanning the evidence of various witnesses, the Court has to inform itself that variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate against the veracity of the core of the testimony. This being true socio- economic background of Ramakant Mishra (PW-12) and Anil Bhatnagar (PW-13) assumes importance. They are not rustic villagers. They themselves claim to be contractors and engaged in the profession of building contractors. They already knew the accused as they had availed their services at one or other point of time. It is possible that they might have not gathered courage to confront the accused as they were reportedly five in number but once they left the scene of crime, the explanation given by them that they were frightened and were not keeping good health is not of any relevance to explain six days silence in invoking their conscious to wake up to gather courage to give statement before the IO or share the incident with the IO on 28.11.2006. This theory of invocation of conscious appears to be not only too improbable but also too rustic to be believed and accepted, therefore, there is no reason to accept their presence on the scene of crime, coupled with the fact that they have failed to give vital details as to when they had actually come in contact with the accused and where and when accused had worked for them and it cannot be ruled out that their names were given by the IO or Ajay Vajpai (PW-14) as Anil Bhatnagar (PW-13) is a resident of close proximity of the residence of Ajay Vajpai and at his instance such statements were given by Ramakant Mishra (P-12) and Anil Bhatnagar (PW-13), and therefore, for want of delay, the explanation given by the witnesses, on close scrutiny deserves to be rejected and is rejected, specially when Ramakant Mishra (PW-12) belongs to the same Biradari as the deceased and Ajay Vajpai (PW-14), so also the pocket witness Birendra Sharma (PW-9). As has been held in the case of Arun Kumar Gupta (supra) in para 20 and 21 that extraordinary interest taken by the witnesses in investigation and remaining present on every important place and time in the course of investigation as has been the case of PW-9 does not inspire confidence and same is the case in regard to these vital witnesses coupled with the fact that I.O. has been so complacent that he did not bother to visit Jaurasi temple to collect evidence to corroborate visit of PW-12 & PW-13 of 22.11.2006 is a vital embellishment.

28. Thus, it is apparent that even postulation of hypothesis of eye-witnesses is to be discarded, the case has to rest only on the probability of circumstantial evidence for which all the links of the chain needs to be stitched together. Prosecution was required to show by examining Kashiram that in fact accused were working for the deceased and they were required to pay some money to the deceased to save themselves, on which they thought of eliminating the deceased. It has come on record that Bhura is a labour contractor and the deceased was a contractor, therefore, it is the contractor who has to pay money to the labour or labour contractor and it is not other way around. Secondly, the recovery of documents like bank form, purse, family card etc. at a belated stage on the identification of the accused from an open space where the crime had allegedly taken place casts doubt about such recovery.

29. Though recovery of axe has been shown but there is no injury on the body of the deceased caused by a sharp and hard object like an axe. Evidence of Ajay Vajpai (PW-14) in regard to identification of Safi is not corroborated by the evidence of Dr. Pushpendra Singh (PW-10) who conducted postmortem. Though scene of crime was visited by the FSL team and the dog squad but absence of their reports on record and production of such doctor who headed the team of FSL also casts doubt about the authenticity of prosecution story. In Ex.P/31 it is mentioned that B group of blood was found on Articles A, E, I, K1, K2 and K3, but there is no evidence on record to show that blood group of the deceased was B so to corroborate the blood group on the stone and clothes of the deceased to show that such stone was actually used to kill the deceased. At the cost of repetition, it is to be pointed out, as above, that there were no injury marks of dragging on the body of the deceased. In the case of Mousam Singha Roy and others Vs. State of W.B. as reported in (2003) 12 SCC 377 it has been held that even in the case of circumstantial evidence, the Court has to take caution that it does not rely upon conjecture or suspicion and the same should not be permitted to take the place of legal proof. The circumstances from which the conclusion of guilt is to be drawn, in the first instance be fully established and all the facts so established should be consistent with the hypothesis of guilt of the accused. 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 the present case, such hypothesis of guilt of the accused cannot be proved beyond reasonable doubt by the trial Court and chain of circumstances is also not complete, therefore, for the failure of the prosecution to establish beyond reasonable doubt that the deceased was last seen in the company of the accused, Ramakant Mishra (P-12) and Anil Bhatnagar (PW-13) had actually seen the incident, no definite finding can be given especially when it is not the case of the prosecution that there was bitter enmity between the appellants and the deceased and there was such a strong reason for them to eliminate the deceased. Even the quantum of transaction could not be established. Thus, the circumstances put forward have failed to satisfactorily prove the hypothesis of guilt of the accused. They are neither of conclusive nature nor exclude every

other hypothesis but the one proposed to be proved, hence, in the light of the law laid down by the Supreme Court in the case of Bakshish Singh v. The State of Punjab as reported in AIR 1971 SC 2016 we are of the opinion that conviction which has been recorded by the learned 4th Additional Sessions Judge cannot be maintained and is liable to be set aside and is set aside. From the record, it appears that all other appellants, except appellant No.1-Ajju @ Deshraj in Criminal Appeal No.111/08, are on bail. Their bail bonds be discharged. Appellant No.1-Ajju @ Deshraj be released forthwith if he is not required in any other case. Record of the trial Court be sent back.