
(2016) 10 RAJ CK 0054

In the Rajasthan High Court

Case No : Criminal Appeal No. 72 of 2011.

Mohammad Arsad @ Layak S/o Mohammad Yakub, aged about 27 years, by caste Musalman, R/o Jhhavvari, Thana Jalalgarh, District Purniya (Bihar). (At present confined in Central Jail, Bharatpur) - Accused-Appellant @HASH State of Rajasthan through Public Prose

Date of Decision : 20-10-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 201, Section 302, Section 34, Section 364, Section 377

Citation : (2017) CriLJ 684 : (2016) 4 CriLR 2000 : (2017) 1 RajCriC 224 : (2017) 1 RLW 1 : (2017) 1 WLC 760

Hon'ble Judges : Ajay Rastogi and Dinesh Chandra Somani, JJ.

Bench : Division Bench

Advocate : Mr. Anshuman Saxena, Counsel, for the Accused-appellants; Mr. S.K. Saini, Public Prosecutor, for the State

Final Decision : Dismissed

Judgement

Mr. Dinesh Chandra Somani, J. - This Criminal Appeal No. 72/2011 has been filed under Section 374 of CrPC against the judgment of conviction and order of sentence dated 26.11.2010 passed by the learned Additional Sessions Judge (Fast Track) No. 2, Bharatpur Camp Kaman in Sessions Case No. 32/2008 whereby the accused-appellants have been convicted under Sections 364, 377, 302/34 & 201 of IPC and sentenced as follows:

-For the offence under Section 364 of IPC sentenced for ten years" rigorous imprisonment with fine of Rs. 2,000/- each and in default of payment of fine to further undergo one year"s rigorous imprisonment.

-For the offence under Section 377 of IPC sentenced for ten years" rigorous imprisonment with fine of Rs. 2,000/- each and in default of payment of fine to further undergo one year"s rigorous imprisonment.

-For the offence under Section 302/34 of IPC sentenced for life imprisonment with fine of Rs. 5,000/- each and in default of payment of fine to further undergo

one year's rigorous imprisonment.

-For the offence under Section 201 of IPC sentenced for five years" rigorous imprisonment with fine of Rs. 1,000/- each and in default of payment of fine to further undergo six months" rigorous imprisonment.

The substantive sentences were ordered to run concurrently.

2. Prosecution story in brief is that on 10.06.2007, the complainant, Noor Mohammad submitted a written report (Ex.P-1) to Damodar (PW-14), Assistant Sub Inspector of police at the place of occurrence stating therein that one Kalaam, Sayaboo, Tahir, and Asru introduced in our village Kharbar, one Maulana named Arsad to be well known to them, then the villagers on their recommendation, appointed Arsad for imamat in mosque. Arsad performed imamat in village mosque for a period of one year. Thereafter, he left imamat and went away before one month, after taking his salary. That in the intervening night of 08.06.2007 and 09.06.2007 at about 12:00 AM, Buddan, Fazzu, Maulana Arsad, Anwar, Mufti Azam and one other man armed with weapons came in a white coloured Esteem Car No. DL-2C- 0098 and one more car which was parked on Gadhaner Road. Aforesaid accused-persons kidnapped my minor son, Irfan. Upon raising voice by Irfan, I, along with Azeem, Hassan and other villagers reached to save Irfan from accused-persons but they forcibly dragged Irfan inside the car, opened fire and fled. Thereafter, they made a search for three days, then dead body of Irfan was discovered muffed in canal which is 100 meters away from Gadhaner Road.

3. That on the basis of above written report, FIR No. 113/2007 was registered at Police Station Pahari, District Bharatpur for the offences under Sections 147, 148, 149, 364, 302, 201 and 336 of IPC and investigation commenced. After completion of investigation, the Police filed charge-sheet against accused-appellants under Sections 364, 302, 201, 120-B and 377 of IPC. The trial Court framed charges against the appellants for the offence under Sections 120-B, 364, 377 alternatively 377/34, 302 alternatively 302/34 and 201 of IPC. Charges were read over and explained to the accused-appellants who pleaded not guilty and sought to be tried.

4. In order to support its case, prosecution examined 16 witnesses and exhibited 27 documents.

5. Thereafter, learned trial court put oral evidence of the prosecution witnesses and documentary evidence produced by the prosecution to the accused-appellants under Section 313 of CrPC. In reply to the prosecution evidence, the accused-appellants stated that the statements of witnesses are not true, there is animosity between the complainant, Noor Mohammad and other villagers and because of that Irfan was murdered and they have been falsely implicated in the alleged crime. The appellants did not produce any witness in defence. After completion of trial, the learned trial court acquitted the accused-appellants from the charge of Section 120-B of IPC and convicted them for the offence under

Section 364, 377, 302/34 and 201 of IPC and sentenced them as indicated herein above.

6. Being aggrieved with the judgment of conviction and order of sentence awarded to the accused-appellants, they preferred the present appeal before this Court against the judgment of learned trial court dated 26.11.2010.

7. Mr. Anshuman Saxena, learned counsel for the accused-appellants submitted that there are several infirmities and contradictions in the statement of prosecution witnesses, therefore, no reliance can be placed on the testimony of such witnesses. The prosecution witnesses have suppressed the genesis of the occurrence and have changed their statements at various places, therefore, the prosecution witnesses cannot be treated as credible and reliable witnesses. Therefore, the conviction and sentence based on the statements of such witnesses is not sustainable and is liable to be quashed and set aside.

8. Learned counsel for the accused-appellants also submitted that the case rests upon circumstantial evidence and golden rule for the same is that there should be no missing link in the chain of circumstances and all the chain of circumstances should be completed, but in the present case, the prosecution has miserably established any of the circumstances. Learned counsel also submitted that in the case of circumstantial evidence, conviction cannot be based only upon the theory of last seen together.

9. Learned counsel for the accused-appellants further submitted that there is material delay in lodging the FIR and the same has not been explained properly and it reveals that the case is falsely fabricated against the appellants. It is pertinent to mention that it is unbelievable that where a person has been kidnapped through fear of weapons by opening fire in presence of numerous persons and in such a case FIR is lodged after two days.

10. Learned counsel for the accused-appellants also submitted that the learned trial court has neither properly considered nor critically examined the statements of prosecution witnesses and in routine has discussed the same and passed the impugned judgment of conviction which is against the criminal jurisprudence, thus, the conviction of the accused-appellants is bad in law.

11. Learned counsel for the accused-appellants further submitted that recovery of slipper and cap of the deceased have falsely been connected with the appellants because the said recoveries have been made from the place which is near to the scene of crime which was already known and detected in site plan, Ex.P-12, therefore, the alleged information of appellants cannot be taken as adverse circumstance against them in the light of Section 27 of the Evidence Act. It is also argued that the learned trial court has failed to appreciate the statements of appellants recorded under Section 313 of CrPC in which they specifically stated the reason of their false implication and prayed to accept the appeal, setting aside the impugned judgment of conviction and order of sentence and to acquit the accused-appellants for the charges levelled against them.

12. Learned Counsel for the accused-appellants placed reliance on :

1. 1994 Supp (2) Supreme Court Cases 372, Arjun Marik & Ors. v. State of Bihar
2. (2002) 8 SCC 45 Bodhraj @ Bodha & Ors. v. State of Jammu and Kashmir
3. (2005) 12 SCC 438 Jaswant Gir v. State of Punjab
4. 2008 (3) RLW 2135 (SC) Sattatiya @ Satish Rajanna Kartalla v. State of Maharashtra
5. AIR 2014 Supreme Court 2548 Krishnan @ Ramasamy & Ors. v. State of Tamil Nadu

13. On the other hand, Mr. S.K. Saini, learned Public Prosecutor has supported the impugned judgment and submitted that the learned trial court has rightly convicted the accused-appellants on the basis of cogent and reliable evidence which prove their guilt beyond reasonable doubt.

14. Learned Public Prosecutor also contended that the accused-appellants can be convicted only on last seen theory because the time-gap between the point of time when the appellants and the deceased were seen last alive and when the deceased, Irfan was found dead is so small that possibility of any person other than the accused-persons being the author of the crime became impossible.

15. Learned Public Prosecutor further contended that the complainant is an illiterate person of rural background. His son was kidnapped in the intervening night of 8th and 9th, June 2007. Marriage of his two elder sons was fixed to be solemnized on 09.06.2007 in another village, baarat of his sons proceeded in morning and returned in the night of 09.06.2007. In the meantime and after the return of baarat, he and other persons continued the search of the deceased and informed the police through Sarpanch on 10.06.2007 soon after dead body of the deceased was discovered. In this way, the prosecution explained the delay in lodging the FIR. Therefore, the delay occurred is not fatal to the prosecution's case. The prosecution has proved the offence against the accused-appellants beyond reasonable doubt and prayed to dismiss the appeal being devoid of merits.

16. We have given our anxious consideration to the rival submissions of learned counsel for the accused-appellants and learned Public Prosecutor for the State and perused the material on record.

17. PW-1, Noor Mohammad is father of the deceased, Irfan and the FIR was registered on his written report Ex.P-1. According to the statement of PW-1, his two sons were going to marry before about 14 months, thus, they were busy in that programme. At about 12:00 hours in midnight of date 8th and 9th, Arsad, Anwar and three others came in a white coloured Esteem car of Delhi number, parked it at some distance from the road and came to his house armed with country made pistol (Katta) and gun. These persons kidnapped his son, Irfan aged about 13-14 years. The witness himself, Hasan, Azeem and many other

persons saw the accused-persons taking Irfan with them. They ran after them to save the child but the accused-persons dragged the child forcibly in the car, opened fire and fled. They made a search of the child. Dead body of the child was discovered in the side of canal on 10th at about 11-12 hours. They saw that the dead body was swollen, fowl smelling and bleeding in anus of the child. Soon after that police was informed and the police came on the spot where he gave written report Ex.P-1.

PW-2, Azeem is brother-in-law of the complainant who gave the same statement as given by PW-1, Noor Mohammad. The witness also stated that he himself, Hassan, Noor Mohammad and others ran after the accused-persons to save Irfan but the accused-persons opened fire, thus, they returned and thereafter, they became busy in the affairs of the marriage of his nephews.

PW-3 Chander Khan, PW-4 Waheed, PW-5 Faku and PW- 6 Hassan are the neighbours of the complainant Noor Mohammad who witnessed the incident of kidnapping of Irfan by accused-appellants in the midnight on gun point and supported the statement of PW-1, Noor Mohammad and PW-2, Azeem.

PW-11, Sahaji is wife of the complainant, Noor Mohammad and mother of Irfan, the deceased. This witness has stated that they were busy in the marriage function of her sons Arsad and Irsad. In the night at about 12:00 AM, Arsad, Anwar and three others dragged forcibly her younger son, Irfan aged 13-14 years in their car on gun point and fled. The witness also stated that Arsad taught Quran to her son Irfan in mosque. Irfan told her that before two months of the incident, Arsad committed sodomy with him in night. Then she scolded Arsad and asked him to leave the place. He left the place and because of that, he kidnapped her son Irfan and committed his murder.

PW-2, Azeem is brother-in-law of complainant, Noor Mohammad and he was in the village because of marriage of his two nephews, therefore, his presence in the house of the complainant at the time of incident of kidnapping of Irfan is natural. The witness has no animosity with the accused-persons. Therefore, there is no reason to disbelieve on the evidence given by PW-2, Azeem merely on the ground of relationship with the complainant.

PW-3 Chander Khan, PW-4 Waheed, PW-5 Faku and PW- 6 Hassan are residents of village Kharbar and neighbours of the complainant. There is no evidence of animosity of the witnesses with the accused-appellants and presence of these witnesses at the time of incident is natural, therefore, evidence given by them cannot be disbelieved.

PW-8, Dr. Naresh Yadav and PW-10, Dr. Sunil Sharma performed the autopsy over the dead body of the deceased, Irfan as the members of Medical Board and prepared post-mortem report, Ex.P-14. According to the post-mortem report, Ex.P-14 and the evidence given by PW-8 and PW-10, multiple abrasions (nail marks) with contusions were found around the mouth and nostrils of the deceased. The body of the deceased was partially decomposed, fowl smelled,

swollen with peeling skin & black-brownish coloured body. The witnesses also found tears in anus and in their opinion, the cause of death is due to asphyxia with consistent anal sexual intercourse which is sufficient to cause death in the ordinary course of nature. The death of the deceased was caused within 36 to 72 hours prior to post-mortem examination. Therefore, it is proved that Irfan died a homicidal death.

PW-14 Damodar, ASI in Police Station, Pahari on 10.06.2007, has stated that he reached in the jungle of village Kharbar Mazra on information where Noor Mohammad (PW-1) gave him a written report, Ex.P-1. He sent the report to police station with Constable Bhudev. Dead body of complainant's son, Irfan was partially muffled in the ground of canal. He prepared Panchnama Ex.P-2, memo of condition of dead body Ex.P-3 and memo of delivery of dead body Ex.P-4. He took samples of blood smeared and control soil from the spot, sealed the same and marked "A" vide memo, Ex.P-5. Vide memo Ex.P-6, he seized pajama (pantaloon) of the deceased, two pieces of naada, one blue coloured ball pen and a handkerchief, produced by complainant, Noor Mohammad stating the same to be belongings of the deceased. He also seized one more ball pen and disposable glasses of the deceased vide memo, Ex.P-7. He prepared site plan, Ex.P-12 and conducted postmortem of the deceased from the Medical Board. Place of recovery of dead body was photographed. In cross-examination, the witness stated that he did not prepare site plan of house of Noor Mohammad. They had no information about the incident prior to 10.06.2007.

PW-7, Subba also proved inquest report Ex.P-2, memo of condition of dead body Ex.P-3, seizure memo of blood smeared soil and control soil Ex.P-5, seizure memo of belongings of deceased, Irfan Ex.P-6, seizure memo of pen and disposable glasses Ex.P-7, site plan Ex.P-12 and Ex.P-13.

PW-15, Bhoop Singh stated that he took photographs, Ex.P-21 to Ex.P-26 on 10.06.2007 on police request through digital camera.

PW-16, Harmukh Lal, ASI in police Station, Pahari on 10.06.2007, has stated that on that day Constable Bhudev Singh brought written report, Ex.P-1 from the place of incident, whereupon, he registered FIR No. 113/2007 which is Ex.P-27.

PW-9 Ramkishan was Head Constable and Maalkhana Incharge of Police Station, Pahari, has stated that Investigation Officer deposited four sealed packets on 10.06.2007 and two sealed packets marked "E" and "F" on 27.06.2007 in Maalkhana and the entries were made in Maalkhana Register, Ex.P-5.

PW-12, Siyaram, Constable proved the arrest memo, Ex.P-16 and Ex.P-17A of accused-persons.

PW-13, Ramnath, the then SHO of Police Station, Pahari, Second Investigation Officer of the case, gave a detailed account of the investigation conducted by him and proved the informations, Ex.P-17 and Ex.P-18 given by the accused-appellants under Section 27 of the Evidence Act, recovery of cap of the deceased

vide Ex.P-9 at the instance of accused-appellant No.2, Mohammad Tariq Anwar, in consequence of information given by him and site plan of place of recovery of cap, Ex.P-11, recovery of slippers of the deceased vide Ex.P-8 at the instance of accused-appellant No. 1, Arsad, in consequence of information given by him and site plan of place of recovery of slippers Ex.P-10. The witness also stated that vide Ex.P-13, the accused persons certified the place of occurrence where they committed sodomy with the deceased, killed him and muffled his body in the earth, in consequence of informations, Ex.P-19 and Ex.P-20, given by them under Section 27 of the Evidence Act.

18. From the evidence given by PW-1, PW-2, PW-3, PW-4, PW-5, PW-6 and PW-11, it is proved that the accused-appellant No. 1, Mohammad Arsad performed imamat in the village mosque for about a year and he left the job of imamat and village before a month of the incident. Accused-appellant No. 2, Mohammad Tariq Anwar was also an Imam in the mosque of neighbouring village Hujra and he used to come to the appellant No. 1 to meet. Therefore, both the accused-appellants were known to the above prosecution witnesses. It is also not in dispute and it is proved by the evidence given by PW-1 to PW-6 and PW-11 that marriage of two elder sons of the complainant was going to be solemnized on 09.06.2007 and the complainant arranged a dinner on 08.06.2007 on the eve of marriage. The baarat of sons of complainant proceeded to village Punhana in the morning of 09.06.2007 and returned in the late evening on the same day. The case of the prosecution is based on following circumstances:

A. Motive

B. Last seen theory

c. Recovery of slippers and cap of the deceased at the instance of accused-appellants.

A:- Motive :

19. It is not in dispute and is proved from the evidence of PW-1 to PW-6 and PW-11 that appellant No. 1 was appointed Imam in the mosque of complainant's village to perform imamat. From the statement of PW-1, Noor Mohammad and PW-11, Sahaji, it is proved that the deceased, Irfan used to go to appellant No. 1 in mosque to study the Quran. According to the statement of PW- 11, the deceased Irfan told her before two months of the incident that appellant No. 1 committed sodomy with him. Thereafter she (PW-11) scolded the appellant No. 1 and asked him to leave the place. According to the statement of PW-5, Faku given in his cross-examination, appellant No. 1 used to beat, abuse and do villainy with the children to whom he used to teach. According to the statement of PW-6, Hassan, he heard that appellant No. 1 beats the children and is indulged in wrong-doings with children and because of that he was removed from the work of imamat. The above evidence puts a question mark on the character of the appellant No. 1. From the evidence of PW-8, Dr. Naresh Yadav, PW-10, Dr. Sunil Sharma and post-mortem report of the deceased, Ex.P-14, it is proved that

the deceased, Irfan was subjected to consistent anal sexual intercourse before his death.

20. PW-13, Ramnath, Investigation Officer has stated that he got conducted the potency test of accused-persons. Though the prosecution has not produced and proved the report of potency test of the accused-persons but only because of non-production of the test reports it cannot be presumed that accused-appellants are unfit to commit the offence of Section 377 of IPC. To our mind, the above circumstance goes against the accused-appellants.

B:- Last seen theory:

21. From the evidence given by PW-1, PW-2, PW-3, PW- 4, PW-5, PW-6 and PW-11, it is proved that in the intervening night of 8th and 9th June of 2007 at about 12:00 AM, the accused-appellants and three others came to the village of the complainant in a white Esteem Car of Delhi number, parked the car at some distance from the road and came to the house of the complainant armed with country made pistol (Katta) and gun. These persons kidnapped Irfan aged about 13-14 years who is son of the complainant, Noor Mohammad. After hearing voice of Irfan, PW-1, PW-2, PW-3, PW-4, PW-5 and PW-6 tried to save the child, Irfan from the accused-persons but the accused-persons dragged the child forcibly in their car, opened fire and fled. It is argued that regarding genesis of the occurrence, there are contradictions in the statements of prosecution witnesses recorded by the Investigation Officer under Section 161 of CrPC and statements recorded in the Court. It is pertinent to note that all the eye witnesses of incident of kidnapping of the deceased appears to be illiterate or semi-literate and are of rural background, therefore, some contradictions are natural but the contradictions are not so material, which may impress us to throw the prosecution case in whole. It is also pertinent to note that it is not the case of accused-appellants that they did not go to the house of the complainant and they were present at any different place at the relevant time. Moreover, it was suggested to PW-1, Noor Mohammad in his cross-examination that he invited the appellants for dinner on the eve of marriage of his sons. PW-1, Noor Mohammad however, denied the suggestion that he invited the appellant for the dinner. Almost the same suggestion was given to PW-11, Sahaji in her cross-examination and she also denied the suggestion having invited the accused-appellants for dinner. In this way, accused-appellants indirectly admitted their presence at the house of complainant at the relevant time, thus, it is proved that accused-appellants went to the house of complainant, Noor Mohammad in the intervening night of 8th and 9th June, 2007 and kidnapped his minor son, Irfan aged 13-14 years.

22. After the incident of aforesaid kidnapping of the deceased Irfan, he was never seen anywhere with any person and his dead body was discovered in the jungle on 10.06.2007 at about 11-12 hours in the canal which is about 600-700 meters away from the house of the complainant. This fact is proved from the statements of PW-1 Noor Mohammad, PW-2 Azeem, PW-5 Fakru, pW-6 Hassan,

PW-7 Subba, PW-11 Sahaji, PW-14 Damodar and documentary evidence i.e. written report Ex.P-1, inquest report Ex.P-2, memo of condition of dead body Ex.P-3 and site plan Ex.P-12.

23. From the post-mortem report, Ex.P-14 and statements of PW-8, Dr. Naresh Yadav and Pw-10, Dr. Sunil Sharma, it is proved that autopsy over the dead body of Irfan was performed on 10.06.2007 at about 3:50 PM and probable time of death of Irfan was within 36-72 hours at the time of post-mortem examination. Therefore, the time of kidnapping of the deceased falls within the probable time of death mentioned in the post-mortem report, Ex.P-14.

24. In view of the discussions made above, it is proved that the deceased, Irfan was last seen in the intervening night of 8th and 9th June of 2007 at about 12:00 AM with the accused-appellants in the village Kharbar when he was kidnapped by the appellants and three others and was forcibly dragged in a Esteem Car in which the accused-appellants came to the house of the complainant and fled from there. The body of the deceased was recovered from the side of canal which is situated about 600-700 meters away from the house of the complainant. The said recovery was made on 10.06.2007 at about 11-12 hours. In this way, there is a gap of almost 36 hours only between the point of time when the accused-appellants and the deceased, Irfan were seen last alive and when the deceased is found dead. The said time gap is so small that possibility of any person other than the accused-appellants being the author of the crime becomes almost impossible. This circumstance of last seen goes against the accused appellants.

25. It is pertinent to note that the complainant has named five persons including both accused-appellants in his report, Ex.P-1 but after investigation, the police did not charge-sheet the remaining three persons finding them to be not involved in the incident, therefore, it is not necessary to discuss in the judgment, the role of other three persons.

C:- Recovery of slippers and cap of the deceased at the instance of accused-appellants:

26. From the statement of PW-14, Damodar who is the first Investigation Officer, it is proved that on 10.06.2007, he seized one ball pen from the spot vide Ex.P-7 alleged to be of accused-appellant No. 1, Mohammad Arsad. At the time of seizure, PW-1, Noor Mohammad claimed the ball pen to be of appellant, Arsad. But no other prosecution witness stated that the ball pen seized from the spot vide Ex.P-7 was of accused-appellant No.1 Mohammad Arsad or was ever seen with him and he can identify the pen to be of accused-appellant No.1. To our mind, only on this weak evidence, the accused-appellant No. 1 cannot be connected with the crime of which he has been charged.

27. According to the statement of PW-12, Siyaram, accused-appellant No.1 and 2 were arrested on 18.06.2007 vide Ex.P-16 and Ex.P-17A respectively .

28. According to the statement of PW-13, Ramnath Investigation Officer, he seized one pair of slippers of deceased at the instance of appellant No. 1, Mohammad Arsad vide Ex.P-8 on 27.06.2007 in consequence of information given by him vide Ex.P-18 and site plan of place of recovery Ex.P-10 was prepared. According to the witness, he also seized one cap of the deceased on 27.06.2007 at the instance of appellant No. 2, Mohammad Tariq Anwar vide memo Ex.P-9, in consequence of information Ex.P-17 given by him under Section 27 of the Evidence Act and site plan of place of recovery, Ex.P-11 was prepared. The above statement is supported by the evidence given by PW-1, Noor Mohammad.

29. From perusal of the site plan of place of occurrence, Ex.P-12 prepared on 10.06.2007, site plan of place of recovery of slippers, Ex.P-10 prepared on 27.06.2007 and site plan of place of recovery of cap, Ex.P-11 prepared on 27.06.2007, it reveals that the places of recoveries of slippers and cap of the deceased, Irfan are very near to the place of recovery of his dead body, which is already known to the police personnels, the complainant and other witnesses of site plan, Ex.P-12 and other memos i.e. Ex.P-2, Ex.P-3, Ex.P-5, Ex.P-6, Ex.P-7 as they have visited the place on 10.06.2007. Therefore, the recoveries of pair of slippers and cap of the deceased on 27.06.2007 do not inspire confidence and the alleged informations of the appellants cannot be taken as adverse circumstance against them.

Delay in lodging FIR :

30. It is argued by learned counsel for the appellants that there is material delay in lodging the FIR and the same has not been explained which is fatal to the prosecution.

31. As discussed above, it is evident that the complainant is an illiterate person of rural background. Marriage of his two elder sons was fixed to be solemnized on 09.06.2007 in another village Punhana. The deceased, Irfan was kidnapped in the intervening night of 8th and 9th June, 2007 at about 12:00 AM. Baarat of complainant's sons proceeded in morning and returned in the late evening of 09.06.2007. From the evidence available on record, it is not in dispute that the village of the complainant is 15 kilometers away from Police Station, Pahari and about 3 kilometers away from Police Out Post (Police Chowki).

32. According to the prosecution, the deceased was kidnapped from his house in the intervening night of 8th and 9th June of 2007. It is not in dispute that the police was not informed soon after the incident of kidnapping, rather the police was informed on 10.06.2007, i.e. after discovery of the dead body of Irfan.

33. From the statements of PW-1, Noor Mohammad and PW- 2, Azeem, they started searching for the deceased soon after his kidnapping and after sometime became busy in departure of baarat and in the meantime continued the search. The police was informed through Sarpanch on 10.06.2007 soon after the dead body was discovered. In the circumstances of the present case, the delay of

about 36 hours occurred in lodging the FIR due to aforesaid reasons cannot be said to be unusual because a proper explanation has come out for the said delay. Therefore, the plea of delayed FIR has been rightly held to be without any substance.

34. In 1994 Supp (2) Supreme Court Cases 372, *Arjun Marik & Ors. v. State of Bihar* (supra), according to the informant (PW-6), the accused-persons came to the house of deceased persons on 19.07.1985 to raise further loan to purchase buffaloes and the deceased was not agreeable to advance them further loan. It is said that the accused-appellants stayed at the house of deceased persons to settle their previous account in morning & were served meals in the night. The accused-persons were lodged in a room on the upper storey of the house for the overnight stay, while deceased persons slept in the varandah adjacent to the said room. Next morning at about 6:00 AM, the house owner and his wife were found lying dead in a pool of blood and theft also took place. Hon''ble Supreme Court observed that the evidence that the appellant had gone to the deceased in the evening of 19.07.1985 and had stayed in the night at the house of deceased persons is very shaky and inconclusive.

In (2002) 8 SCC 45, *Bodhraj @ Bodha & Ors. v. State of Jammu and Kashmir* (supra), Hon''ble Supreme Court has held that last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of crime becomes impossible.

In (2005) 12 SCC 438, *Jaswant Gir v. State of Punjab* (supra), the main incriminating fact relied upon was that the deceased was last seen by PW-14 in the company of the appellant and the other accused and that he was given lift in the vehicle belonging to the appellant. The destination of the deceased was Pehwa, whereas the vehicle had come from Pehwa and was proceeding towards Devigarh which is in a different direction. Hon''ble Supreme Court observed that there is no apparent reason why the deceased would have chosen to go in the vehicle which was proceeding to some other destination and there is considerable time gap between the deceased boarding the vehicle of the appellant and the time when PW-11 found the dead body. In the absence of any other links in the chain of circumstantial evidence, it is not possible to convict the appellant solely on the basis of last seen evidence, even if the version of PW-14 in this regard is believed.

In 2008 (3) RLW 2135 (SC), *Sattatiya @ Satish Rajanna Kartalla v. State of Maharashtra* (supra), Hon''ble Supreme Court found that witness of "last seen" was untrustworthy and his evidence is full of contradictions, place of recovery of weapons was open place where everybody had access and the evidence of hawker could not be believed, thus, allowed the appeal and ordered to acquit the accused-appellant.

In AIR 2014 Supreme Court 2548, *Krishnan @ Ramasamy & Ors. v. State of Tamil Nadu* (supra), as per the prosecution story, the deceased was last seen on 4th April, 2004 in the company of accused-persons during festival at temple and the body of the deceased was taken from borewell by the fire service personnels after more than seven days. Hon''ble Supreme Court found that there is no other positive material on record to show that the deceased was last seen together with the accused and during intervening period of seven days. There was nobody in contact with the deceased, thus, allowed the appeal of accused-persons and directed to release them.

35. Because of difference in facts and circumstances of the case, the cases cited by the learned counsel for the appellants are not of much help to the appellants. Moreover, it reveals that the accused-persons can be convicted only on the last seen theory, provided the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused-person being the author of the crime becomes impossible.

36. The appellants in their statements recorded under Section 313 of CrPC have stated that the statements of witnesses are not true. There is animosity between the complainant, Noor Mohammad and other villagers and because of that Irfan was murdered. They have been falsely implicated in the alleged crime. When asked about the evidence given by PW-12, Siyaram regarding arrest of appellants vide arrest memo Ex.P-16 and Ex.P- 17, the accused-appellants stated that it is incorrect. It is pertinent to note that the appellants in their statements recorded under Section 313 of CrPC, took the defence that Irfan was murdered due to animosity between the complainant, Noor Mohammad and other villagers but no such suggestion was given to any witness in his cross-examination, therefore, the defence taken by the appellants in statements under Section 313 of CrPC is afterthought.

37. In *Munna Kumar Upadhyaya @ Munna v. State of Andhara Pradesh* reported in (2012) 6 SCC 174, Hon''ble Apex Court has held that statement under Section 313 of Cr.P.C. is to serve a dual purpose, firstly, to afford to the accused an opportunity to explain his conduct and secondly, to use denials of established facts as incriminating evidence against him. If the accused gave incorrect or false answers during the course of his statement under Section 313 of Cr.P.C., the Court can draw adverse inference against him.

38. As discussed above, the appellants denied the fact of their arrest which is otherwise proved by the prosecution by cogent evidence. The allegation levelled by PW-11, Sahaji in her statement recorded in the Court, regarding character of the appellant No. 1, was put to the appellants under Section 313 of CrPC but instead of giving any explanation, they merely said that it is incorrect. In this way, the appellants used denial of established facts as incriminating evidence against them and gave incorrect or false answers during the course of recording their statements under Section 313 of CrPC. The appellants also took an

afterthought defence of animosity between the complainant and other villagers which resulted in the murder of Irfan. The said defence is not proved, rather it is unfounded. Therefore, this circumstance also goes against the appellants.

39. In *Vijay Shankar v. State of Haryana* reported in (2015) 12 SCC 644, Hon"ble Supreme Court has held that in each and every case, it is not incumbent on the prosecution to prove the motive for the crime. Often, motive is indicated to heighten the probability of the offence that the accused was impelled by that motive to commit the offence. Proof of motive only adds to the weight and value of evidence adduced by the prosecution. If the prosecution is able to prove it's case on motive, it will be a corroborative piece of evidence. But even if the prosecution has not been able to prove it's case on motive that will not be a ground to throw the prosecution case nor does it corrode the credibility of the prosecution case. Absence of proof of motive only demands careful scrutiny of evidence adduced by the prosecution.

40. For a doubt to be a reasonable, it is trite that a reasonable doubt is not an imaginary or frivolous doubt. It must not be based on sympathy or prejudice but should be founded on reasons and common-sense and should be logically derived from the evidence brought on record or absence of evidence.

41. Each of the circumstances when joined together firmly and fully rule out the possibility of any such hypothesis, which may be compatible with the innocence of the accused-appellants. All the circumstances unerringly points towards the guilt of the accused appellants. The evidence produced by the prosecution is cogent and reliable and the prosecution has successfully proved the charge of Section 364, 377, 302/34 and 201 of IPC against the accused-appellants beyond reasonable doubt. The learned trial court has looked into every material aspect of the matter and was fully justified in convicting the appellants. There is no scope to interfere in the impugned judgment of conviction and order of sentence passed by the learned trial court.

42. For the above reasons, we see no infirmity in the impugned judgment to call for our interference.

43. Resultantly, the appeal is dismissed.