

(2019) 02 P&H CK 0289

In the Punjab And Haryana At Chandigarh

Case No : Criminal Appeal No. 172-DB Of 2010

Mohammad Ulfat @ Ulfat And Others

APPELLANT

Vs

State Of Haryana

RESPONDENT

Date of Decision : 08-02-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 201, 302
Code Of Criminal Procedure, 1973 — Section 313
Evidence Act, 1872 — Section 30

Citation : (2019) 02 P&H CK 0289

Hon'ble Judges : Rajiv Sharma, J;Anupinder Singh Grewal, J

Bench : Division Bench

Advocate : Bijender Dhankar, Vishal Garg

Final Decision : Allowed

Judgement

1. This appeal is instituted against the judgment and order dated 28. 11.2009, rendered by learned Additional Sessions Judge, Faridabad, in Sessions Case No. 8 dated 10.02.2009, whereby the appellants, who were charged with and tried for the offences punishable under Sections 302/201/34 IPC, were convicted and sentenced as under :-

Name

Offence U/s

Period of

Fine imposed

Period

of the

Sentence

(Rs.)

of sentence

Convict

(RI)

in default

of payment

of fine (RI)

Mohammad

Ulfat

302/34 IPC

Life imprisonment

20,000/-

1 year

201/34 IPC

7 years

5,000/-

6 months

Babban

302/34 IPC

Life

imprisonment

20,000/-

1 year

201/34 IPC

7 years

5,000/-

6 months

Manoj

302/34 IPC

Life

imprisonment

20,000/-

1 year

201/34 IPC

7 years

5,000/-

6 months

2. The case of the prosecution, in a nutshell, is that Inspector Charan Singh (PW.4) received information on 28.10.2008 that dead body of a person was lying in a gutter near Ganda Nala of Sanjay Colony, Faridabad. He reached the spot. Dead body was retrieved from the gutter. Kishan Singh (PW.12) and Subhash identified the dead body to be that of their brother Keshpal. Kishan Singh got his statement recorded. According to the contents of the statement, Keshpal had gone to the house of Jai Bhagwan (PW.13) on 21.10.2008 to collect money. He did not come back. They searched for Keshpal. He along with his brother Subhash went to the house of Jai Bhagwan. Jai Bhagwan told them that he had given Rs. 15,000/- to Keshpal on 22.10.2008. Keshpal was accompanied by Manager son of Moti Lal and two other boys. Keshpal collected the money and left. They made enquiries from the landlord of Manager. They came to know that Manager had left the rented room. Statement of Kishan Singh is Ex.PB. FIR Ex.P1 was registered. Inquest report Ex.PC was prepared. Site plan is Ex.PC/1. The dead body was sent for post-mortem examination. Post-mortem report is Ex.PH.

3. On 30.10.2008, Inspector Charan Singh recorded the statement of Jai Bhagwan (PW.13). Jai Bhagwan stated that on 22.10.2008, at about 5.00 PM, Keshpal had come to him. He was accompanied by Manager son of Moti Lal, Babban and Ulfat. He had given Rs. 15,000/- to Keshpal. He along with Rajender Sharma (PW.2) was going towards Machhi Market. They noticed Manager, Babban, Ulfat, Manoj and Nandji standing in the company of Keshpal. He asked Keshpal why he had not gone home. Keshpal told that he shall stay with Manager over night. Thereafter, Keshpal did not meet him. On 28.10.2008, Kishan Singh and Subhash, brothers of Keshpal, came to him making enquiries about Keshpal. He told them that Keshpal had left on 22.10.2008 along with Manager and his companions.

4. Mohammad Ulfat was arrested on 20.11.2008. He was interrogated. He made disclosure statements Ex.PM and Ex.PM/1. Babban was arrested on 23.11.2008. He also made disclosure statement Ex.PJ. Manoj was arrested on 26.11.2008. He made disclosure statement Ex.PG. Investigation was completed and challan was put up after completing all the codal formalities. Manager and Nandji were declared proclaimed offenders.

5. The prosecution has examined as many as 16 witnesses in support of its case. Statements of the accused were also recorded under Section 313 Cr.P.C. They

denied the case of the prosecution. According to them, they were falsely implicated. The appellants were convicted and sentenced, as noticed above. Hence, this appeal.

6. Learned counsel appearing on behalf of the appellants vehemently argued that the prosecution has failed to prove its case against the appellants. Learned counsel appearing for the State vehemently argued that the prosecution has proved its case against the appellants beyond reasonable doubt and supported the judgment and order of the learned Court below.

7. We have heard learned counsel for the parties and gone through the judgment and record very carefully.

8. PW.2 Rajender Sharma testified that he was running a ration shop in Subhash Nagar, Faridabad. On 22.10.2008 at about 9.00 PM, he along with his neighbourer Jai Bhagwan was going towards Machhi Market. When they reached Machhi Market, they noticed that at a Paan shop, just near the Machhi Market, Babban; Manoj; Ulfat; Keshpal and Manager were standing. Jai Bhagwan inquired from Keshpal why he had not gone to his house. Keshpal told him that he would stay with Manager during night. Thereafter, they left that place. In his cross-examination, he deposed that the police had enquired from him on 20.11.2008 at about 7.00 PM. He also admitted that there was rumour that Keshpal had been killed by Manager, Manoj, Mohd. Ulfat etc.

9. PW.4 Inspector Charan Singh testified that Kishan Singh got recorded his statement Ex.PB. He went to the spot, prepared inquest report Ex.PC. He had also prepared the site plan Ex.PC/1. The body was sent for post-mortem examination at B.K. Hospital, Faridabad. In the cross-examination, he stated that he had not recorded statement of Jai Bhagwan on 28.10.2008. On 30.10.2008, Jai Bhagwan himself met him at Machhi Market and got recorded his statement.

10. PW.7 ASI Ramesh Chand deposed that he arrested Manoj on 26. 11.2008. He brought him to Faridabad. He interrogated him. Manoj confessed that he had murdered Keshpal in the Jhuggi at Machhi Market along with Mohd. Ulfat, Manager, Nandji and Babban. Disclosure statement of Manoj is Ex.PG. He got the post-mortem conducted on 29.10.2008.

11. PW.11 EHC Fakrudden deposed that he joined investigation on 23. 11.2008. Babban was interrogated by SI Bhartender. His disclosure statement is Ex.PJ. Spot identification memo was prepared. In cross-examination, he stated that Babban had disclosed that on 22.10.2008, he, Manager, Manoj, Ulfat and Nand Lal had consumed liquor with Keshpal in Machhi Market. He also disclosed that Keshpal was strangulated. They had taken away Rs. 19,000/- from the pocket of Keshpal. Manager, Ulfat and Nandji took the body in rickshaw. Manager had given him Rs. 500/-, shoes and shirt with the direction to burn shoes and shirt. The shoes and shirt were kept by him in his jhuggi. He could get the same recovered. He also disclosed that he had already spent Rs. 500/-. In his presence, nothing was got recovered by accused Babban. On 23.11.2008 itself,

Babban had got recovered shirt and shoes from his jhuggi.

12. PW.12 Kishan Singh is the material witness being brother of the deceased. He deposed that Keshpal was his younger brother. On 21. 10.2008, his brother Keshpal had gone to Jai Bhagwan to collect money. He did not come back. He and his brother Subhash went to the house of Jai Bhagwan to enquire about their brother. Jai Bhagwan told them that he had given Rs. 15,000/- to Keshpal on 22.10.2008. He also told that Keshpal was accompanied by Manager and two more boys. They went to the house where Manager used to reside. The land owners told them that Manager had already left to his village. On 28.10.2008, they came to know that a dead body was lying near a drain near Sanjay Colony. He and Subhash went to that place and identified the dead body. Dead body was taken to B.K. Hospital. On 22.11.2008, police had brought Ulfat to his house. The watch of his brother was recovered vide memo Ex.PK. Shoes and clothes of the deceased were recovered from the house of Babban on 23.11.2008. In his cross-examination, he deposed that he knew Jai Bhagwan. He as well as Keshpal were on visiting terms with him. They sold buffalos to him 10-20 times. He was told that Keshpal had gone to collect money from Jai Bhagwan by his wife. He and Subhash had gone to the house of Jai Bhagwan to inquire about Keshpal. Wife of Keshpal had not accompanied him. They stayed in the house of Jai Bhagwan for ten minutes. For the first time, he came to know on 26.10.2008 that Keshpal had gone to collect money. Earlier, they kept on thinking that he might have gone somewhere else to collect money as he usually used to go for that purpose. His brother Keshpal used to consume liquor occasionally. It was not possible to see injury mark on the body. After 29.10.2008, Subhash did not accompany him in further proceedings or to the police.

13. PW.13 Jai Bhagwan has been introduced by the police as a witness of last seen together. He deposed that he and Keshpal had worked together for seven years in Delhi. He was on visiting terms with him. They were going to the house of each other. About two months prior to the occurrence, he had bought a buffalo from Keshpal for Rs. 20,500/-. On 22. 10.2008 at about 5.00 PM, Keshpal had come to him to collect the money. He was accompanied by Manager son of Moti Lal, besides Babban and Mohd. Ulfat. He gave Rs. 15,000/- to Keshpal, At about 8.55 PM, he along with Rajender Pandit son of Jagdish Sharma were going towards market just to have a stroll. They noticed that five persons, namely Manager, Babban, Ulfat, Nandji and Manoj were standing with Keshpal near a Pan shop. He asked Keshpal why he had not gone to his house. He told him that during night he would stay with Manager. On 28.10.2008, Subhash and Kishan, brothers of Keshpal, came to him and enquired about Keshpal. He told them everything about 22.10.2008. Thereafter, he came to know that Keshpal had been murdered through newspaper and also rumours in the street. The amount of Rs. 15,000/- was given to Keshpal by him in the denomination of Rs. 1,000/- notes.

14. PW.14 HC Pardeep Kumar deposed that Mohd. Ulfat was interrogated by

Inspector Bhartender in the Police Station. He disclosed that after committing the crime, Rs. 3,500/- and a watch came to his share. On the back of watch, KP was written.

15. PW.16 SI Bhartender stated that he recorded the statement of Rajender Sharma on 20.11.2018. On the same day, he arrested accused Ulfat. Accused made disclosure statement Ex.PM. He further deposed that he arrested Babban on 22.11.2008. Babban made disclosure statement Ex.PJ.

16. The post-mortem was conducted by PW.9 Dr. Jitender Kumar Jhakhar. According to him, the cause of death was throttling (manual strangulation) coupled with gagging. He proved the post-mortem report Ex.PH.

17. Keshpal had gone to collect money from PW.13 Jai Bhagwan on 21.10.2008. He collected money from PW.13 Jai Bhagwan on 22. 10.2008. According to the prosecution, Keshpal had gone to the house of Jai Bhagwan in the company of Manager and two other boys. Thereafter, on the same day at about 9.00 PM, PW.13 Jai Bhagwan and PW.2 Rajender Sharma had seen Keshpal. Keshpal had gone to collect money on

21. 10.2008. Neither PW.12 Kishan Singh nor his brother Subhash had lodged any missing report. Their normal conduct would have been to lodge the report immediately within few hours, when their brother had not come back. They knew that their brother had gone to collect money from Jai Bhagwan (PW.13). PW.12 Kishan Singh deposed that he and Subhash had gone to the house of PW.13 Jai Bhagwan for the first time on 28.10.2008 only. PW.12 Kishan Singh also admitted in his cross-examination that he came to know on 26.10.2008 that Keshpal had gone to collect money from Jai Bhagwan.

18. In the report Ex.PB, only name of Manager accompanied by two boys has been mentioned. Case of the prosecution is that PW.13 Jai Bhagwan had told that Keshpal was accompanied by Manager besides Babban and Mohd. Ulfat. These names were not mentioned by Kishan Singh in Ex.PB. The recovery had been made on the basis of disclosure statements made by accused vide Ex.PM, Ex.PM/1, Ex.PJ and Ex.PG. No recovery was effected from Manoj. The FSL report is Ex.PH/1.

19. The dead body was recovered on 28.10.2008. The statement of PW.13 Jai Bhagwan was recorded on 30.10.2008 and that of PW.2 Rajender Sharma only on 20.11.2008. The theory of "last seen together" is applicable when the time gap between recovery of dead body and the deceased last seen with the accused is very short. In the present case, the dead body was recovered on 28.10.2008 and he was last seen in the company of the accused by PW.13 Jai Bhagwan and PW.2 Rajender Sharma on 22.10.2008.

20. Their Lordships of Hon'ble the Supreme Court in *Kanhaiya Lal v. State of Rajasthan*, (2014) 4 Supreme Court Cases 715, have held that circumstance of last seen together does not by itself necessarily lead to inference that it was the

accused who committed crime. There must be something more for establishing connection between accused and crime, that points to guilt of accused and none else. Mere non-explanation of being last seen together with deceased person on part of accused, by itself cannot lead to proof of guilt against him. Their Lordships have held as under :-

"12. The circumstance of last seen together does not by itself 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 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."

21. In *Mahavir Singh v. State of Haryana*, (2014) 6 Supreme Court Cases 716, their Lordships of the Hon'ble Supreme Court have held that last seen together theory normally comes into play only in a case where time-gap between point of time when accused and deceased were seen alive and when deceased was found dead, is small. Their Lordships have held as under :-

"12. Undoubtedly, it is a settled legal proposition that the last seen theory comes into play only in a case where the time-gap between the point of time when the accused and the deceased were seen alive and when the deceased was found dead (sic is small). Since the gap is very small there may not be any possibility that any person other than the accused may be the author of the crime. In the instant case, if we examine the medical report minutely, it becomes evident that the deceased Suraj Mal had been murdered one week prior to the post-mortem. Thus, it becomes evident that he had been killed in a very proximity of time when the deceased was seen alive with the appellant and Jagbir Singh, co-accused."

22. In *Nizam and another v. State of Rajasthan*, (2016) 1 Supreme Court Cases 550, their Lordships of Hon'ble the Supreme Court have held that "last seen theory" is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. The "last seen theory" holds the courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of death of the deceased. But it is not prudent to base the conviction solely on "last seen theory". "Last seen theory" should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so late seen. Where time gap is long, it would be unsafe to base conviction on "last seen theory". Their Lordships have held as under :-

"14. The courts below convicted the appellants on the evidence of PWs 1 and 2 that the deceased was last seen alive with the appellants on 23.1.2001. Undoubtedly, the "last seen theory" is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. The "last seen theory" holds the courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of

death of the deceased. It is well settled by this Court that it is not prudent to base the conviction solely on "last seen theory". "Last seen theory" should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.

15. Elaborating the principle of "last seen alive" in *State of Rajasthan vs. Kashi Ram*, (2006) 12 SCC 254, this Court held as under:-

"23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in *Naina Mohamed., Re.* (AIR 1960 Mad 218)"

The above judgment was relied upon and reiterated in *Kiriti Pal vs. State of W.B.*, (2015) 11 SCC 178.

16. In the light of the above, it is to be seen whether in the facts and circumstances of this case, the courts below were right in invoking the "last seen theory." From the evidence discussed above, deceased-Manoj allegedly left in the truck DL 1GA 5943 on 23.1.2001. The body of deceased Manoj was recovered on 26.1.2001. The prosecution has contended that the accused persons were last seen with the deceased but the accused have not offered any plausible, cogent explanation as to what has happened to Manoj. Be it noted, that only if the prosecution has succeeded in proving the facts by definite evidence that the deceased was last seen alive in the company of the accused, a reasonable inference could be drawn against the accused and then only onus can be shifted on the accused under Section 106 of the Evidence Act.

17. During their questioning under Section 313 Cr.P.C., the appellant-accused denied Manoj having travelled in their Truck No. DL 1 GA 5943. As noticed earlier, body of Manoj was recovered only on 26.1.2001 after three days. The gap

between the time when Manoj is alleged to have left in Truck No. DL 1GA 5943 and the recovery of the body is not so small, to draw an inference against the appellants. At this juncture, yet another aspect emerging from the evidence needs to be noted. From the statement made by Shahzad Khan (PW 4) the internal organ (penis) of the deceased was tied with rope and blood was oozing out from his nostrils. Maniya village, the place where the body of Manoj was recovered is alleged to be a notable place for prostitution where people from different areas come for enjoyment.

18. In view of the time gap between Manoj being left in the truck and the recovery of the body and also the place and circumstances in which the body was recovered, possibility of others intervening cannot be ruled out. In the absence of definite evidence that appellants and deceased were last seen together and when the time gap is long, it would be dangerous to come to the conclusion that the appellants are responsible for the murder of Manoj and are guilty of committing murder of Manoj. Where time gap is long it would be unsafe to base the conviction on the "last seen theory"; it is safer to look for corroboration from other circumstances and evidence adduced by the prosecution. From the facts and evidence, we find no other corroborative piece of evidence corroborating the last seen theory."

23. Their Lordships of Hon'ble the Supreme Court in Anjan Kumar Sarma and others v. State of Assam, (2017) 14 Supreme Court Cases 359, have held that in a case where other links have been satisfactorily made out and circumstances point to guilt of accused, circumstance of last seen together and absence of explanation would provide an additional link which completes the chain. In absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction. Their Lordships further held that suspicion alone cannot take place of legal proof. Their Lordships have held as under :-

"16. It is no more *res integra* that suspicion cannot take place of legal proof for sometimes, unconsciously it may happen to be a short-step between moral certainty and the legal proof. At times it can be a case of "may be true". But there is a long mental distance between "may be true" and "must be true" and the same divides conjectures from sure conclusions. (See *Jaharlal Das v. State of Orissa*, (1991) 3 SCC 27).

17. It is settled law that inferences drawn by the court have to be on the basis of established facts and not on conjectures. (See *Sujit Biswas v. State of Assam*, (2013) 12 SCC 406). The inference that was drawn by the High Court that the death was caused on 28.12.1992 within the time of 48 hours as mentioned in the post-mortem report is not correct. The post-mortem examination was conducted on 30.12.1992 at 12.00 noon and it was opined by PW 11 that the death occurred 24 to 48 hours prior to the time of post-mortem examination. Even if the time is stretched to the maximum of 48 hours, the death was after 12.00 noon on 28.12.1992. The deceased was in the company of the accused till 9.00

p.m. on 27.12.1992. The inference drawn by the High Court that the accused had killed the deceased on 28.12.1992 in the night-time and thrown the body on the railway track is not on the basis of any proved facts. The trial court is right in holding that there is no evidence on record to show that the deceased was with the accused after 12.00 noon on 28.12.1992.

18. x x x

19. The circumstance of last seen together cannot by itself from the basis of holding the accused guilty of the offence. In *Kanhaiya Lal v. State of Rajasthan* (2014) 4 SCC 715, this Court held that :

"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.

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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 vs. State of Rajasthan* (2010) 15 SCC 588."

20. In *Arjun Marik v. State of Bihar* 1994 Supp (2) SCC 372, this Court held that :

"31. Thus the evidence that the appellant had gone to Sitaram in the evening of 19.7.1985 and had stayed in the night at the house of deceased Sitaram is very shaky and inconclusive. Even if it is accepted that they were there it would at best amount to be the evidence of the appellants having been seen last together with the deceased. But it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the accused and, therefore, no conviction on that basis alone can be founded."

21. x x x

22. x x x

23. It is clear from the above that in a case where the other links have been satisfactorily made out and the circumstances point to the guilt of the accused, the circumstance of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction. The other

judgments on this point that are cited by Mr Venkataramani do not take a different view and, thus, need not be adverted to. He also relied upon the judgment of this Court in *State of Goa v. Sanjay Thakran* (2007) 3 SCC 755 in support of this submission that the circumstance of last seen together would be a relevant circumstance in a case where there was no possibility of any other persons meeting or approaching the deceased at the place of incident or before the commission of crime in the intervening period. It was held in the above judgment as under :

"34. From the principle laid down by this Court, the circumstance of last seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is after (sic of) a considerable long duration. There can be no fixed or straitjacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author of the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case."

24. As we have held that the other circumstances relied upon by the prosecution are not proved and that the circumstances of last seen together along with the absence of satisfactory explanation are not sufficient for convicting the accused. Therefore the findings recorded in the above judgment are not applicable to the facts of this case.

25. Due to the lack of chain of circumstances which lead to the only hypothesis of guilt against the accused, we set aside the judgment of the High Court (State of Assam v. Jit Kakati, 2013 SCC OnLine Gau 655) and acquit the appellants of the charges of Sections 302, 201 read with Section 34 IPC. The appellants are directed to be set at liberty forthwith, if not required in any other case."

24. Their Lordships in Anjan Kumar's case have also held that failure of accused to offer any explanation in his statement under Section 313 Cr.P.C alone is not sufficient to establish charge against the accused. Their Lordships have held as under :-

"21. This Court in Bharat v. State of M.P. (2003) 3 SCC 106 held that the failure of the accused to offer any explanation in his statement under Section 313 Cr.P.C alone was not sufficient to establish the charge against the accused. In the facts of the present case, the High Court committed an error in holding that in the absence of any satisfactory explanation by the accused the presumption of guilt of the accused stood unrebutted and thus the appellants were liable to be convicted."

25. It has come on record that Jai Bhagwan had very good relations with family of the deceased. However, he was constrained to disclose to family members of the deceased that he had seen the deceased in the company of the accused. According to the FSL report, no poison could be detected in exhibits-1a, 1b, 1c and 1d.

26. The case is based on circumstantial evidence. In a case based on circumstantial evidence, chain must be complete and all the circumstances must point towards the guilt of the accused. In the instant case, Keshpal had gone missing on 21.10.2008. No steps whatsoever were taken by PW.12 Kishan Singh and his brother Subhash to lodge the missing report. Statement of PW.13 Jai Bhagwan was recorded on 30.10.2008, and statement of PW.2 Rajender Sharma was recorded on 20.11.2008. It has come on record that relations of Keshpal's family with Jai Bhagwan were very cordial. If he had seen the deceased in the company of the accused, why he did not disclose to the family members of Keshpal about the same. According to PW.13 Jai Bhagwan and PW.2 Rajender Sharma, they had seen Keshpal in the company of the accused on 22.10.2008, but the body was recovered on 28.10.2008.

27. No recovery has been effected from Manoj. Name of only one person was stated in Ex.PB. Disclosure statements of the accused were recorded immediately after interrogation. PW.7 ASI Ramesh Chand admitted that he did not associate any independent witness, while interrogating the accused. PW.16 SI Bhartender Kumar also admitted that when statement of Ulfat was recorded on 20.11.2008, no independent witness was called at that time. PW.11 EHC Fakrudden deposed that accused Babban made disclosure statement Ex.PJ.

28. In Mohd. Khalid v. State of W.B., 2002 (7) Supreme Court Cases 334, their Lordships of the Hon'ble Supreme Court have held that Section 30 of the Indian

Evidence Act merely enables the court to take the confession into account. Principle is that the court cannot start with confession of a co-accused person. It must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt. Their Lordships have held as under :-

"34. Kashmira Singh's (AIR 1952 SC 159) principles were noted with approval by a Constitution Bench of this Court in Haricharan Kurmi v. State of Bihar (AIR 1964 SC 1184). It was noted that the basis on which Section 30 operates is that if a person makes a confession implicating himself that may suggest that the maker of the confession is speaking the truth. Normally, if a statement made by an accused person is found to be voluntary and it amounts to a confession in the sense that it implicates the maker, it is not likely that the maker would implicate himself untruly. So Section 30 provides that such a confession may be taken into consideration even against the co-accused who is being tried along with the maker of the confession. It is significant, however, that like other evidence which is produced before the Court it is not obligatory on the Court to take the confession into account. When evidence as defined by the Evidence Act is produced before the Court it is the duty of the Court to consider that evidence. What weight should be attached to such evidence is a matter in the discretion of the Court. But the Court cannot say in respect of such evidence that it will just not take that evidence into account. Such an approach can, however, be adopted by the Court in dealing with a confession because Section 30 merely enables the Court to take the confession into account. Where, however, the Court takes it into confidence, it cannot be faulted. The principle is that the Court cannot start with confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidences, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on some other evidence. That is the true effect of the provision contained in Section 30. We may note that great stress was laid down on the so-called retraction of the makers of the confession. Apart from the fact that the same was made after about two years of the confession, PWs 81 and 82 have stated in Court as to the procedures followed by them, while recording the confession. The evidence clearly establishes that the confessions were true and voluntary. That was not the result of any tutoring, compulsion or pressurization. As was observed by this Court in Shankaria v. State of Rajasthan, (1978) 3 SCC 435, the Court is to apply a double test for deciding the acceptability of a confession i.e. (i) whether the confession was perfectly voluntary and (ii) if so, whether it is true and trustworthy. Satisfaction of the first test is a sine qua non for its admissibility in evidence. If the confession appears to the Court to have been caused by any inducement, threat or promise, such as mentioned in Section 24 of the Evidence Act, it must be excluded and rejected *brevi manu*.

If the first test is satisfied, the Court must before acting upon the confession reach the finding that what is stated therein is true and reliable. The Judicial Magistrate, PWs 81 and 82 have followed the requisite procedure. It is relevant to further note that complaint was lodged before the Magistrate before his recording of the confessional statement of accused Md. Gulzar. The complaint was just filed in Court and it was not moved. The name of the lawyer filing the complaint could not be ascertained either. This fact has been noted by the Designated Court."

29. Their Lordships of Hon'ble the Supreme Court in *State of M.P. Through C.B.I. v. Paltan Mallah*, 2005 (3) SCC 169 have held that extra judicial confession made by a co-accused could be admitted in evidence only as a corroborative piece of evidence. Their Lordships have held as under :-

"18. Another incriminating circumstance sought to be proved against the accused is the extra-judicial confession alleged to have been made by the ninth accused Paltan Mallah wherein he named A-1, A-2, A-5 and A-6. It is alleged that he made the confession to PW 105 Satyaprakash Nishad and A-9 is alleged to have disclosed to PW 105 that these accused persons had given him money and he murdered Shankar Guha Niyogi for the sake of money. Under Section 30 of the Evidence Act, the extra-judicial confession made by a co-accused could be admitted in evidence only as a corroborative piece of evidence. In the absence of any substantive evidence against these accused persons, the extra-judicial confession allegedly made by the ninth accused loses its significance and there cannot be any conviction based on such extra-judicial confession. The High Court, in our view, has given cogent and satisfying reasons for the acquittal of the accused A-1 to A-8. We do not find any reason to interfere with such a finding, especially when this being an appeal against acquittal and this Court would be slow in reversing such a finding unless the High Court had made a perverse or erroneous appreciation of the evidence resulting in grave miscarriage of justice. The evidence adduced by the prosecution can only throw some serious suspicion against these accused which cannot be used as a substitute for evidence."

30. Their Lordships of Hon'ble the Supreme Court in *Sunil Mahadeo Jadhav v. State of Maharashtra*, 2013 (15) Supreme Court Cases 177 have held that in a prosecution based on circumstantial evidence, a case against accused can be said to be fully established if the following conditions are fulfilled :-

- (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established;
- (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused;
- (3) the circumstances should be of a conclusive nature and tendency;
- (4) they should exclude every possible hypothesis except the one to be proved,

and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

Their Lordships have held as under :-

"29. In this case, there is no direct evidence of an eye witness on how the deceased suffered the injuries which have caused his death and therefore the High Court has relied on the circumstantial evidence to convict the appellants for the offences under Section 302 read with Section 34 IPC.

30. A three-Judge Bench has held in *Sharad Birdhichand Sarda v. State of Maharashtra* that in a prosecution based on circumstantial evidence a case against the accused can be said to be fully established if the following conditions are fulfilled :

"(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established;

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused;

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused." These five golden principles relating to a case based on circumstantial evidence will have to be therefore borne in mind while analysing the evidence in this case."

31. The prosecution has failed to prove its case against the appellants beyond reasonable doubt. Accordingly, the appeal is allowed. The judgment and order dated 28.11.2009 are set aside. The appellants are acquitted of the charges framed against them. The appellants are in custody. They be released forthwith.