

(2015) 12 DEL CK 0290
In the Delhi High Court
Case No : Criminal Appeal955/2013

Pintoo Biswas and Others

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 11-12-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 374(2)
Evidence Act, 1872 — Section 106, 8
Penal Code, 1860 (IPC) — Section 302

Citation : (2016) 1 JCC 394

Hon'ble Judges : G.S. Sistani and Sangita Dhingra Sehgal, JJ.

Bench : Division Bench

Advocate : R.K. Anand, Chetan Anand and Payal Juneja, Advocates, for the Appellant; Sunil Sharma, APP, for the Respondent

Final Decision : Dismissed

Judgement

Sangita Dhingra Sehgal, J

1. Present appeal has been preferred under Section 374(2) of the Code of Criminal Procedure against the judgment dated 05.04.2013 and order on sentence dated 17.04.2013 by which both the appellants were convicted for the offence punishable under Section 302 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 10,000/- each and in default thereof further simple imprisonment of three months.

2. The case of the prosecution as noticed by the trial court is as under:

"1. On 21.09.2008 at 09:25 hours, an information was received at Police Station Shakar Pur from Police Control Room regarding a quarrel at 87 A Kundan Nagra Gali no 1. On receiving the information, which was recorded as DD No. 10A,S.P. Singh along with Ct. Pavindra no. 1599/E went to the spot i.e. House no 83 A I floor Kundan Nagar Laxmi Nagar, and found in the inner room between double bed and Almirah a dead body of a female with foam in her mouth and nose and

strangulation mark on her neck. There was an extension cord wire lying near the dead body. The dead body was identified to be of Sushmita Dev w/o Sharad Bhatt, by Ms. Lavanya B Jarwa, who was residing in the second floor of same house on rent and was working with deceased in EXL Service.com (I) Pvt. Ltd. Co. The servant of the deceased Manoj was found missing from the house along with his belongings. The senior officers were informed; Crime team was called; Tehrir was prepared by ASI K.P. Singh and was sent for registration of F.I.R. through Ct Pavindra. Inspector V.K.P. Singh reached at the spot and made inquiries from Ms. Lavanya and Ms.Kavita the maid servant of the deceased Sushmita. On the basis of enquiry investigation was taken up further and accused were apprehended and they made a disclosure that they used an angochha for commission of the offence. During the investigation the mobile phone of make Nokia IMEI 352938102138498811 was recovered from Manoj which had Sim card of no 9800726845, and the purse of the deceased containing her passport, voter I card, pass book & chequebook etc. and a ladies wrist watch & a mobile phone make Nokia IMEI no 354162022051338 with card of no 9733639007 were recovered from Pintoo. Accused Pintoo also got recovered the angochha allegedly used in the commission of offence. The cause of death as per postmortem report was asphyxia consequent upon ligature strangulation and as per subsequent report it was possible by the angochha recovered from the accused Pintoo."

3. Shri R.K. Anand, Counsel for the appellants argued that the judgment of the trial court is based on conjectures and surmises and the trial court has failed to evaluate the evidence in the right perspective; that except recovery of a mobile phone from the appellant Manoj, there is no evidence whatsoever to connect the appellant with the commission of the crime; that the prosecution has failed to establish that the mobile phone recovered from the appellant Manoj belonged to the deceased Sushmita and that merely because appellant Manoj absconded soon after the commission of the crime would not be a sufficient ground to connect the appellant Manoj with the crime.

4. Counsel for the appellants further contended that the recovery memo of the recovered mobile phone and other articles were prepared in the absence of an independent witness and have been planted on the appellants to connect them with the crime. It is further contended that during investigation all the articles were recovered from West Bengal but surprisingly the local police were not joined as witnesses. On the same lines, it is argued that PW-7 Lavanya Barijwara or PW-8 Kavita never signed the memo of the extension cord and the broken lock of the room from where the dead body of Sushmita was recovered and the truthfulness of the recovery is doubtful. Counsel for the appellants added that it was highly unusual that accused Pintoo would hide the cloth i.e. Angocha used for the commission of the offence in his house in a manner so that it is readily available to the police. More so, the mere recovery of the Angocha does not connect the accused to the crime till the prosecution proves that the same was used to strangle the deceased.

5. It has also been strongly urged on behalf of the appellants that the SIM card allegedly recovered from the mobile phone seized from the appellant Manoj was found to be in the name of one Sanjay Mandal and not appellant Manoj or his mother Saraswati Saha. The summary of calls of the mobile phone placed on record does not link the mobile phone recovered from the appellant Manoj. It has been vehemently contended by the counsel for the appellants that the mobile phone recovered from appellant Manoj, the SIM card of which was found to be in the name of one Sanjay Mandal had the IMEI number 352938023549681.(IMEI number had been wrongly noted as 352938023849881). It is argued that the call details of IMEI No. 352938023549681 and 352938023849881 do not suggest that the mobile phone was used by appellant Manoj.

6. It is contended by the counsel for the appellants that in fact the deceased Sushmita had provided a mobile phone to the appellant Manoj for her own convenience to get her odd jobs done and the mere fact that the mobile phone was recovered from appellant Manoj does not connect him to the crime and prove that he had conspired or murdered the deceased Sushmita.

7. It is argued that the prosecution has failed to prove that PW-7 Lavanya Barijwara was residing in House No. 83 A 1st Floor, Kundan Nagar, Laxmi Nagar, Delhi with the deceased Sushmita and the prosecution could not have produced the rent deed executed between the landlord and PW-7 Lavanya Barijwara in support thereof.

8. Mr. Sunil Sharma, learned APP for the State, on the other hand, submits that the prosecution has been able to establish its case beyond any shadow of doubt as accused persons were seen at the spot of the incident by PW-2 Yashpal Jadeja and his testimony finds support from that of PW-7 Lavanya Barijwara and PW-8 Kavita. More so, there is circumstantial evidence pointing towards the guilt of the appellants. The evidence of PW-7 Lavanya Barijwara would show that the appellant Pintoo was a rickshaw puller and the deceased Sushmita used his rickshaw as and when required. With the passage of time, the appellant Pintoo gained her confidence and got employed appellant Manoj for doing some odd jobs and looking after her dogs. It is argued that from the testimony of PW-7 Lavanya Barijwara, it is clear that on the day of incident she had left for her office around 11.00 a.m. leaving the appellant Manoj and the deceased Sushmita at home and returned that day at 12 midnight. The learned APP argued that appellant Pintoo used to have lunch at the house of the deceased Sushmita as she trusted him like a brother and appellant Manoj used to sleep outside the room of the deceased and both the appellants had stayed on the night of 17th and 18th September, 2008 in the house of the deceased Sushmita. It is further argued that the conduct of the appellant Pintoo in handing over the rickshaw to PW-3 Kuldeep Singh on 20.08.2008 from whom he had hired the same and vacating the room taken by him on rent around the same time, as deposed by PW-15 Dev Dutt, supports the case of the prosecution. It is argued that testimony of both these witnesses stands corroborated by the evidence of PW-7

Lavanya Barijwara who testified that appellant Manoj stayed in the house of the deceased Sushmita for a few days till an alternative accommodation was found.

9. The learned APP in support of the case of the prosecution clarified that the mobile phone and the SIM card thereof recovered from appellant Manoj connected him to the crime as there is evidence to show that the SIM card was procured for the use of the deceased on the basis of the PAN card of PW-5 Tausif Rahi by PW-6 Ziaul Haq, a waiter in the nearby hotel and the SIM card was used and recovered from the mobile of appellant Manoj. During arguments, the learned APP admitted that there is a confusion on the last three digits of the IMEI number being 681 or 881 and submitted that in fact the last three digits of the IMEI number of mobile phone recovered from appellant Manoj was 680 as the deceased was using a mobile phone with IMEI 352938023549680 as per the record of the service provider and further added that PW-7 Lavanya Barijwara also supported the use of mobile phone with IMEI 352938023549680 in the TIP proceedings.

10. The learned APP while explaining the contention of the defence that no public witnesses had been joined by the prosecution at the time of recovery of the articles connected with the commission of crime argued that the raid was conducted in West Bengal around midnight and more so there being language problem, it was not possible to join either the public witnesses or local police.

11. Before going into the rival submissions of counsel for the parties, it is necessary to discuss the evidence which was emerged on record. The prosecution has examined 32 witnesses in all.

12. On 21.9.2008, PW-1 Gopal Singh Nim informed the PCR after coming to know that there was something amiss in the house No. 83 A, 1st Floor, Kundan Nagar, Laxmi Nagar, Delhi. On arrival, the police went to the first floor of house No. 83 A and saw a dead body.

13. PW-2 Yash Pal Jadeja deposed that he had rented out the first floor of his house to the deceased Sushmita, a resident of West Bengal who after three months had introduced him to PW-7 Lavanya Barijwara who took the top floor of the house and the two women shared the kitchen. Shortly thereafter, the deceased employed appellant Manoj to do some odd jobs and the appellant Pintoo who used to park his rickshaw in front of his sweet shop used to take the deceased Sushmita on his rickshaw to the market. According to PW-2 Yash Pal Jadeja, appellants Pintoo and Manoj were known to each other. PW-2 deposed that he had executed a Rent Agreement with deceased Sushmita but the same was not executed with PW-7 Lavanya Barijwara. According to this witness on 20.9.2008 he had seen both the appellants going with a bag and on enquiry appellant Pintoo had told him that he was going to drop his friend to the Railway Station. On the next morning, he came to know that deceased Sushmita had been murdered.

14. PW-3 Kuldeep Singh deposed that appellant Pintoo had taken a rickshaw on

rent from him as he was the owner of a rickshaw garage and that on 20.8.2008 had returned the rickshaw and told him that he was returning to his native village.

15. PW-4 Ganesh Sahu, an employee in the shop of PW-2 Yash Jadeja deposed that on 20.9.2008, he had seen the maid servant of the deceased Sushmita sitting on the stairs and on an enquiry informed that the door of the deceased was locked and at about 12 mid night, the same maid servant accompanied by PW-7 Lavanya Barijwara knocked his door and told him that they did not have the key of the room as the same was with deceased Sushmita who could not be telephonically contacted. PW-4 Ganesh Sahu deposed that on the request of PW-7 Lavanaya Barijwara, the lock of her room was broke open and again on 21.9.2008 at 8.00 AM the lock of room of deceased Sushmita was broken when they saw the dead body of the deceased lying between the bed and the fridge.

16. PW-5 Tausif Rahi testified that he was working as a Manager at Hotel Oasis, Darya Ganj, New Delhi for the past 5-6 years and knew PW-6 Ziaul Haq @ Akhtar, who was of his native village. PW-5 Tausif Rahi deposed that in February, 2008, PW-6 Ziaul Haq expressed his desire to purchase a SIM card and he helped him to purchase the same from a shop located in front of Oasis Hotel. On the request of PW-6 Ziaul Haq, he provided his PAN card as identity proof for purchase of the SIM card in his name. Later on, he was called to the Police Station Shakar Pur in connection with the SIM card purchased by PW-6 Ziaul Haq on his identity proof and he came to know from PW-6 Ziaul Haq that he had provided the SIM card to a lady known to PW-6 Ziaul Haq i.e. deceased Sushmita who had been murdered.

17. PW-6 Ziaul Haq admitted that PW-5 Tausif Rahi was known to him and was working as a Manager at Oasis Hotel, Darya Ganj. He further deposed that he purchased a second hand mobile instrument make NOKIA-1600, from one Shahid, resident of Umatoli, District Kishanganj, Bihar and that he had purchased a SIM card in February, 2008 for his use on the identity proof of PW-5 Tausif Rahi from "Mamaji Telecom Service" located in front of Hotel Oasis. He further deposed that during his employment at Royal Prince Hotel, he had come to know the deceased Sushmita and gave the SIM card to her on her request.

18. PW-7 Lavanya Barijwara deposed that she came to Delhi on 25.2.2008 from her native place at Shilong and joined EXL company at Gurgaon, Haryana and started residing at NCC Gate, Safdarjung Enclave, with her friend who got married and thereafter she started looking for a separate accommodation. PW-7 Lavanya Barijwara came in contact with deceased Sushmita who was working in the same company. During friendly talks with Sushmita, she offered to arrange for a rented accommodation in the same house where she was residing i.e. Laxmi Nagar, Kundan Nagar, Delhi, where PW-7 shifted on 14.5.2008 and occupied the second floor of that house where she used to sleep and started sharing the kitchen with Sushmita as she did not have sufficient household articles with her. PW-7 deposed in her testimony that appellant Manoj used to do

some odd jobs for Sushmita and appellant Manoj was introduced through appellant Pintoo, a rickshaw puller who used to take her to the market. At times, appellant Pintoo used to have lunch in the house of Sushmita. PW-7 Lavanya Barijwara further deposed that on 07.09.2008, Sushmita engaged PW-8 Kavita for cooking. She further deposed that appellant Pintoo stayed in the house of Sushmita on 17.09.2008 and 18.09.2008 and left on 19.09.2008 during morning hours to look for a room whereas appellant Manoj stayed. She further deposed that in the morning of 20.09.2008, when PW-7 went to the room of Sushmita, PW-8 Kavita also met her there and informed her that she was having pain in her feet and left for hospital. On that day, PW-7 proceeded for her office around 11.00 AM leaving appellant Manoj and Sushmita there at home. She deposed that she returned home from her duty around midnight and found PW-8 Kavita sitting on the stairs and that the room of Sushmita was locked from outside on which she questioned PW-8 Kavita about Sushmita and she informed her that when she returned from hospital at around 2.00 PM, the room of Sushmita was locked and appellant Manoj was not there. PW-8 Kavita further told her that she tried to contact Sushmita on phone but her mobile phone was found to be switched off. PW-7 further deposed that she went upstairs to her room the key of which was with Sushmita and it was found locked. PW-7 deposed that she got the lock of her room broken and spent the night there. On the following morning, she tried to contact Sushmita again but found her mobile phone switched off and as she had to go to office and some of her belongings were lying in the room of Sushmita and the lock of the room of Sushmita was also got broken. PW-7 further deposed that on opening the room of Sushmita, she noticed her body and froth coming from her mouth on which she became scared and ran downstairs followed by PW-8 Kavita and started shouting and calling the neighbours. PW-7 Lavanya Barijwara further deposed that deceased Sushmita used to wear three rings, earrings, chain, bracelets, etc. which were not on her body when PW-7 Lavanya Barijwara saw her lying on the floor. Her bag, which was of black colour having brown stripes over it, ladies watch and mobile phones were missing. She further deposed that appellant Manoj used to keep his bag at the house of deceased Sushmita but his bag was also missing. She further deposed that in her presence the dead body of deceased Sushmita was sent for post mortem and the broken lock and extension cord lying near the dead body of deceased Sushmita were also seized by the police. PW-7 identified mobile phone make NOKIA Ex.P1, wrist watch Ex.P2, ladies Purse Ex.P3 and mobile phone make Nokia as Ex.P4, belonging to deceased Sushmita.

19. PW-8 Kavita, maid servant of deceased Sushmita deposed that she used to cook, clean the house and clothes etc. of deceased Sushmita. She further deposed that appellant Manoj was also residing there as servant and used to look after her dogs and in her presence spent two nights i.e. 17th and 18th September, 2008. She further testified that on 19.09.2008 at about 09:00 a.m. after making lunch etc. with deceased Sushmita, PW-7 Lavanya Barijwara and appellant Manoj, she went to the hospital and when she returned at about 03:00

p.m. found the room of deceased Sushmita, PW-7 Lavanya Barijwara locked and appellant Manoj missing.

20. PW-13 HC Sompal proved the FIR Ex.PW13/A and rukka Ex.PW13/B. PW-10 Dr. Akash Jhanji proved the post-mortem report Ex.PW10/A of the deceased and opined the cause of death as asphyxia consequent upon ligature strangulation and asphyxia was sufficient to cause death in ordinary course of nature. PW-27 Ct. Ravinder proved the Arrest Memo of appellants Pintoo and Manoj as Ex.PW27/A and Ex.PW27/C respectively. He also proved the personal search of appellants Pintoo and Manoj as Ex.PW27/B and Ex.PW27/D respectively.

21. The case of the prosecution is entirely based on circumstantial evidence as well as on the last seen theory. It is settled law that in a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete, forming a chain and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused totally inconsistent with his innocence.

22. The principle of circumstantial evidence has been reiterated by the Hon''ble Apex Court in plethora of cases. In Bodh Raj @ Bodha and Others Vs. State of Jammu and Kashmir, , the Hon''ble Apex Court quoted number of judgments and held as under:

"10. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See Hukam Singh Vs. State of Rajasthan, , Eradu and Others Vs. State of Hyderabad, , Earabhadrapa Vs. State of Karnataka, , State of U.P. Vs. Sukhbasi and Others, , Balwinder Singh alias Dalbir Singh Vs. State of Punjab, and Ashok Kumar Chatterjee Vs. State of M.P.,). The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In Bhagat Ram Vs. State of Punjab, , it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt.

11. We may also make a reference to a decision of this Court in C. Chenga Reddy and Others Vs. State of Andhra Pradesh, , wherein it has been observed thus: (SCC pp. 206-07, para 21)

21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the

circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."

23. In *Trimukh Maroti Kirkan Vs. State of Maharashtra*, , the Hon"ble Supreme Court held as under:

"12. In the case in hand there is no eyewitness of the occurrence and the case of the prosecution rests on circumstantial evidence. The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with their innocence."

24. The same principles were reiterated in *Dr. Sunil Clifford Daniel Vs. State of Punjab*, , *Sampath Kumar Vs. Inspector of Police, Krishnagiri*, and *Mohd. Arif @ Ashfaq Vs. State of NCT of Delhi*, .

25. In case of circumstantial evidence, the Court has to examine the entire evidence in its entirety and ensure that the only inference that can be drawn from the evidence is the guilt of the accused. For establishing the guilt on the basis of the circumstantial evidence, the circumstances must be firmly established and the chain of circumstances must be completed from the facts.

26. Returning to the instant case in hand, it is an undisputed fact that the appellants were very well known to the deceased which has been proved by the deposition of PW-2 Yash Pal Jadeja (landlord), PW-7 Lavanya Barijwara (friend of deceased) and PW-8 Kavita (maid servant of deceased).

27. PW-7 Lavanya Barijwara, a friend of deceased who was living on the second floor, appeared in the witness box and deposed :

"xxxxxx One person namely Manoj, accused present in court (witness correctly identified accused Manoj) was engaged by Sushmita Dev for bringing household articles. Manoj was engaged by Sushmita Dev, through a Rickshaw puller namely Pintu, the said Rickshaw Puller Pintu is present in the Court (witness correctly identified Pintu). Accused Pintu used to visit the house of Sushmita Dev and Sushmita Dev used to go market and other places by the Rickshaw of Pintu. xxxxxxxx On 20.9.08, during morning hours when I went to the room of Sushmita Dev, Kavita met me there and informed that she was having pain in her feet and expressed that she wanted to go to the hospital. Around 9 AM Kavita left for hospital. On that day, I proceeded for my office around 11 AM leaving Manoj and Sushmita Dev there at home. (emphasis supplied) I returned home from my duty around midnight."

PW-8 Kavita, Maid Servant of deceased supported the version of PW-7 Lavanya Barijwara and deposed that :

"xxxxxx I used to cook and clean the house and clothes etc. of Sushmita Dev. Accused Manoj present before the Court, was also residing there as servant. Lawaniya was also residing on the upper floor of the house of Sushmita Dev, however, Lawaniya used to share kitchen with Sushmita Dev during night hours. Myself and Lawaniya used to sleep in the room of Lawaniya. Manoj used to sleep during night hours on the bed lying outside the room of Sushmita Dev. Manoj used to look after the pet dogs of Sushmita Dev and used to go to market for bringing household articles. Sushmita Dev used to go for her job. In my presence, accused Pintu along with his associates had come to the house of Sushmita Dev on 17 or 18.9.08. I was directed to cook food for them. Due to curiosity I tried to know as to who they were when Sushmita Dev informed me that one was Pintu, a rickshaw puller and another was his relative. Pintu and his associate spent two nights at the house of Sushmita Dev and thereafter during morning hours they went to search for a room and they did not return thereafter, in my presence. Manoj remained with us at the house of Sushmita Dev. On 19.9.08 it was Saturday. Around 9 AM after taking lunch etc. with Sushmita Dev, Lavinia and Manoj, I proceeded for hospital as I was having swelling in my leg. I returned home from hospital around 3 PM and found the room of Sushmita Dev as well as Lavinia locked."

(emphasis supplied)

28. As per the deposition of PW-7 Lavanya Barijwara and PW-8 Kavita, they left the house of deceased leaving appellant Manoj with her. This was the last time when appellant Manoj was seen with the deceased. PW-2 Yash Pal Jadeja, owner of a sweet shop on the ground floor where the incident took place, categorically stated that on 20.09.2008 around 2:30 p.m. or 3:00 p.m. he had seen appellants Manoj, Pintoo and one other associate. On enquiry, appellant Pintoo told him that he was going to drop his friend at Railway Station. Thereafter, the appellants were not seen till they were arrested from West Bengal on 26.09.2008.

29. On the aspect of burden of proof, the Hon"ble Supreme Court in State of Rajasthan Vs. Kashi Ram, , in para 22 and 23 held as under:

"22. In Sahadevan vs. State the prosecution established the fact that the deceased was seen in the company of the appellants from the morning of 5-3-1985 till at least 5 p.m. on that day when he was brought to his house, and thereafter his dead body was found in the morning of 6-3-1985. In the background of such facts the Court observed:

Therefore, it has become obligatory on the appellants to satisfy the court as to how, where and in what manner Vadivelu parted company with them. This is on the principle that a person who is last found in the company of another, if later found missing, then the person with whom he was last found has to explain the circumstances in which they parted company. In the instant case the appellants

have failed to discharge this onus. In their statement under Section 313 Cr.P.C. they have not taken any specific stand whatsoever.

23. It is not necessary to multiply with authorities. The principle is well settled. The provision of Section 106 of the Evidence Act itself are unambiguous and categorical 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 with the deceased. He must furnish an explanation which appears to 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 especially 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....."

30. In the case of Santosh Kumar Singh Vs. State thr. CBI, , the Hon"ble Supreme Court held as under:

"XXXX

"14. If an offence takes place inside the privacy of a house and in such circumstances, where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. "

XXXX"

31. On the aspect of last seen theory, it has been held by the Hon"ble Supreme Court in the case of Bodh Raj @ Bodha and Others Vs. State of Jammu and Kashmir, , that:

31. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased, A-1 and A-2 were seen together by witnesses i.e. PWs 14, 15 and 18 in addition to the evidence of PWs 1 and 2."

Similar view was taken by the Hon"ble Supreme Court in the case of State of U.P. Vs. Satish, .

32. The above stated view has been further corroborated in the case of Ramreddy Rajeshkhanna Reddy and Another Vs. State of Andhra Pradesh, , wherein it has been held by the Hon"ble Supreme Court that:

"27. The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case the courts should look for some corroboration."

33. On the aspect of factum of abscondence, this Court in Kaushal Singh Vs. State NCT of Delhi, , has made following observations:

"35. The circumstance of abscondence after the occurrence points an accusing finger against the accused. Abscondence being a conduct under Section 8 of the Evidence Act can be taken into consideration to prove his guilt"

34. Similarly in State of Karnataka Vs. Lakshmanaiah, , the Hon"ble Supreme Court held that the conduct of accused"s abscondence from the date of occurrence till his arrest was considered to be a vital circumstance and observed in the following words:

".....The High Court has also not discussed the circumstance that the respondent was absconding till the night of January 16, 1979 when he was arrested which is surely a link in the chain of circumstances to establish that the respondent alone had committed the offence of murder of his wife"

35. In Rukia Begum Vs. State of Karnataka, , the Hon"ble Supreme Court in para 10 held as under:

"10. No doubt it is true that for bringing home the guilt on the basis of the circumstantial evidence the prosecution has to establish that the circumstances proved lead to one and the only conclusion towards the guilt of the accused. In a case based on circumstantial evidence the circumstances from which an

inference of guilt is sought to be drawn are to be cogently and firmly established. The circumstances so proved must unerringly point towards the guilt of the accused. It should form a chain so complete that there is no escape from the conclusion that the crime was committed by the accused and none else. It has to be considered within all human probability and not in fanciful manner. In order to sustain conviction circumstantial evidence must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. Such evidence should not only be consistent with the guilt of the accused but inconsistent with his innocence. No hard and fast rule can be laid to say that particular circumstances are conclusive to establish guilt. It is basically a question of appreciation of evidence which exercise is to be done in the facts and circumstances of each case. Here in the present case the motive, the recoveries and abscondence of these Appellants immediately after the occurrence point out towards their guilt. In our opinion, the trial court as also the High Court on the basis of the circumstantial evidence rightly came to the conclusion that the prosecution has been able to prove its case beyond all reasonable doubt so far as these Appellants are concerned."

36. From the aforesaid settled preposition of law and established facts which are found on proper appreciation of the evidence by the court below, the series of following circumstances clearly establish the guilt of the appellants and the minor discrepancies that have been pointed out by the learned counsel for the appellants do not create any kind of dent in the testimony of the prosecution witnesses and do not destroy the prosecution version:

- i) The appellants were well known to the deceased.
- ii) The appellants were last seen by PW-7 Lavanya Barijwara and PW- 8 Kavita in the company of the deceased Sushmita and by PW-2 Yashpal Jadeja near the place of incident and thereafter they disappeared.
- iii) The belongings of deceased Sushmita were recovered at the instance of the appellants.

37. After perusing the facts and circumstances of the present case we conclude that the chain of circumstances is complete and there is no missing link in the circumstantial evidence put forth by the prosecution and hence the appellants are not entitled to benefit of doubt, it is only the appellants who could have caused death of Sushmita in the afternoon of 20.09.2008. When the prosecution has successfully proved that the appellants were seen by PW-2 Yash Pal Jadeja while they were leaving Delhi, there should have been some explanation on the record from the defence as to why they left Delhi immediately. In absence thereof, the courts below had no reason to disbelieve the evidence relating to above chain of circumstances and the recoveries made clearly point towards the guilt of the appellants and hence, it were appellants only who could have caused death with the knowledge that the act committed by them is likely to result in death of the deceased.

38. For the reasons stated above, we are of the opinion that the judgment of the learned Trial Court dated 05.04.2013 and order on sentence dated 17.04.2013 do not call for any interference. Thus, in our view, the learned Trial judge has rightly convicted the appellants under Section 302 of the Indian Penal Code. The appeal is dismissed.

39. The Trial Court record be sent back along with a copy of this order.