
(2014) 10 J&K CK 0028

In the Jammu And Kashmir High Court

Case No : Criminal Appeal No. 05 Of 2013, B.A. Nos. 64 and 140 Of 2013 and Criminal Reference No. 15 Of 2012

Ramzan Dhobi

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 16-10-2014

Acts Referred:

Citation : (2015) 1 JKJ 164

Hon'ble Judges : Virender Singh, J;Bansi Lal Bhat, J.

Bench : Division Bench

Advocate : S.T. Hussain, Advocate, for the Appellant; Mehraj-ud-din, G.A., for the Respondent

Final Decision : Allowed

Judgement

Virender Singh, J.â?"Appellant Mohammad Ramzan Dhobi son of Ghulam Mohammad Dhobi resident of Harel, Handwara (hereinafter to be

referred to as 'accused') after having been convicted and sentenced to imprisonment for life and a fine of Rs. 20,000/- for the charge of section

302 RPC and for imprisonment of 3 years under section 380 RPC vide impugned judgment dated 26.12.2012 handed down by learned Sessions

Judge Srinagar has preferred Criminal Appeal No. 05/2013. The entire record has also been submitted to this Court by the learned trial Court for

confirmation of the sentence as envisaged under section 374 Cr.P.C.. Hence, Cr. Reference No. 15/2012. The present incident is with regard to

case FIR No. 101/2001 registered in Police Station Nishat for the offences punishable under sections 302/380 RPC. On 24.12.2001, the

concerned Police swung into action on a written report lodged by PW Mohd. Maqbool Dar stating therein that his brother Abdul Rashid Dar

(since deceased), who was residing in his own house at Muftibagh, Harwan with his family and was running a Bakery Shop at Shot Mohalla, was

found murdered by some unknown persons in his rented shop during the intervening night as someone had struck something on his head. It was

further stated in the said report that the personal servant of the deceased, who was with him in the shop, absconding and that the dead body of

Abdul Rashid Dar was lying in the shop in a pool of blood. On this intimation, aforesaid formal FIR No. 101/2001 came to be registered and

investigation started.

2. During the investigation, it surfaced that an amount of Rs. 10,000/- and a wrist watch of the deceased were also missing. The accused came to

be arrested on 24.06.2003 from a Baker's Shop at Rangreth, who suffered a disclosure statement pursuant thereto a wrist watch of the deceased

was recovered. Ultimately, the investigation culminated into presentation of the chargesheet against the accused for the aforesaid offences. He was

accordingly charged and put to trial, which has ended in his conviction and sentence as referred to hereinabove.

Prosecution evidence, in brief, brought on record:

3. PW Mst. Shamima is the wife of the deceased, who stated that on 19.12.2001, she went to Tral and came back to Srinagar on 20th of

December and on the same day, accused came to their house at 4 pm and was served with Tea. Her husband was, however, not present at that

time and the accused again visited their house at 7 pm in the presence of her husband and stayed overnight with them and in the morning, he and

her husband went to the shop. She further stated that she had handed over an amount of Rs. 10,000/- to her husband for depositing the same in

the bank account of their daughter which her husband kept with him. They did not resume their work on the second day and started their work on

3rd day and on 5th day, she had to go to her parental house on Idd invitation. As she had to go to Char-e-Sharif along with her brother-in-law and

went to the shop to seek permission from her husband and when reached the shop, she found her husband dead and the dead body was in a pool

of blood. Many people had assembled there but the accused had escaped. She then stated that wrist watch of her husband was missing and that

the police arrived at the spot and the dead body was taken for conducting the

post mortem but no money was found in the pocket of deceased.

She further stated that accused was like her son and she used to wash even his clothes and that there were two other workers namely Bashir

Ahmad and Ghulam Mohi-Ud-Din working in the Bakery shop of her husband and had gone to their respective homes on account of Idd Festival

and the accused was the first one to return.

In her cross examination, this witness stated that when she gave Rs. 10000/- to her husband, nobody other than the accused was present there and

that the accused was working with them for three months prior to the occurrence. She stated that on an early occasion, accused had taken some

cash from the cash box of her husband but at that time the matter was not reported to the police and she enquired from her husband whether he

had beaten the accused upon which she was told that he (accused) was given slight beating and that he had apologized.

4. PW Ghulam Rasool Wani is the father-in-law of the deceased (Shamima's father) who stated that on 23rd of December, he had gone to the

shop of the deceased to invite him for lunch for 24th of December and on the same day at about 10 am, Shamima came to his house and sent her

daughter Khushboo to call her father from the shop. Khushboo came back and informed that her father (deceased) was seriously ill and then

Shamima along with her brother Parvez went to the shop and after reaching there, Parvez gave him a phone call that Abdul Rashid Dar had been

killed and he also went to the shop. He then talks of arrival of the police at the spot. He saw blood stained iron rod (Sambal) lying at the place of

occurrence.

In his cross examination, this witness stated that he alone had gone to the shop of deceased and when he visited the shop, another shop adjacent to

the shop of the deceased being run by one Nazir was open.

5. PW Parvez Ahmad Wani when stepped into the witness box stated that his brother in law (deceased) was running a Bakery Shop in which

besides the accused, two other persons from Tral were also working at the said shop and used to sleep there only and for celebrating Idd-ul-fitr,

the workers had gone to their respective places and on 21.12.2001, the accused came back and went to the house of the deceased and insisted

him to resume the work in the morning, but the deceased did not agree and

went to the shop on 22.12.2001. On 23rd of December also, they did their job in the morning and in the evening, the accused and the deceased stayed in the shop after closing the shutter and in the morning of 24th of December, the customers found the shop closed and nobody respondent from inside. The local people decided to open window from the back side, but despite knocking, nobody responded. He further stated that due to knocking, the bolts inside the shop broke and the dead body of the deceased was found in a pool of blood. This witness stated that the locals informed the police on phone about the incident, who arrived at the spot. Since Mohd. Maqbool Dar, the brother of the deceased, had come to their house and stayed there for the night, he went to the police and lodged the written complaint. This witness then talks of taking the wrist watch of the deceased by the accused besides Rs. 10,000/-. He had seen the iron rod also in the hands of the police which was blood stained. He is a witness to the seizure memos of dead body and some other articles i.e. blood stained shirt, a sweater, a pillow, a pheran and a trouser. In his cross examination, this witness stated that he saw the deceased during the night of 23rd/24th of December and he was at his shop on 23rd at 6 pm and at that time, the accused was also working. He stated that he had received an information on phone that deceased was unwell and he was to be taken to home as such he rushed on spot in an Auto, but when reached the spot saw 200/250 people assembled there. He then stated that the shutter of the shop was closed and it was not locked from inside and a person inside only could bolt it and one more way to enter the shop was from back side as there was window and a door from that side. He stated that before his arrival at the shop, some persons had entered the shop by breaking open the window. This witness stated that the iron rod was lying on the floor outside at a distance of 50 feet and the police had shown him the said rod after they had searched it. He further stated that the shop where the occurrence had taken place had a room on the back side and in between there was a wall with a door in the center which was bolted from inside the shop and no one could go inside and when he reached the spot, the door was not bolted and the police went inside through front window and not from Lack side.

6. PW Mohd. Maqbool Dar is the real brother of the deceased, who stated that he

had gone to in-laws of the deceased where he was told that his brother had been found dead in the shop and thereafter, he along with others went on the spot and found the shutter of the shop closed. They knocked at the shutter and then went from the backside and found the window open where from the dead body was seen in a pool of blood. This witness further stated that nobody went inside the shop at that time and he went to the concerned police and got an application drafted and presented to the SHO upon which formal FIR came to be registered. He stated that he had heard from wife of the deceased that the accused was working there and had come to their house in the morning of 23rd of December 2001 and after taking meals, accused and deceased went to the shop.

In his cross examination, this witness stated that he had no personal knowledge about the events stated by him on 23.12.2001 to 24.12.2001.

7. PW Abdul Majid Wani is another real brother of Shamima wife of the deceased. After depicting the prosecution case as stated by PW

Shamima, this witness talks of the arrest of the accused in his presence from Airport when his sister was also present. He stated that the wrist watch was also recovered and seized by the police in his presence. He is, however, categorical in stating that there was no specific mark on the said wrist watch.

In his cross examination, this witness stated that when the accused was arrested by the police, he and his sister were present and no other private person was there. He then stated that he had seen the accused 8/9 months prior also, although he was arrested after 18 months after the occurrence.

He stated that the police had prepared a memo, but he did not sign it nor his sister signed in his presence.

8. PW Nazir Ahmad, who was running a Karyana shop adjacent to the shop of deceased, when stepped into the witness box, stated that

deceased had three workers at his Baker's shop which included the accused also and that all the workers had gone to their homes on the eve of

Idd and the accused was the first to return on 21.12.2001. He saw him coming to the shop. Since the shop was closed, being Friday, the accused

went to the house of deceased at Darbagh Harwan and on the next day i.e.

22.12.2001, shop was opened when he saw the accused and the deceased. He further stated that the shop remained open on 22/23rd of December, but on 24.12.2001, it was closed and no bread was baked.

This witness further stated that many people assembled at the shop because the shutter of the shop was closed, but it was not locked from outside

and it created doubt and they opened the shutter and found the dead body lying inside the shop. Thereafter, the shutter was again closed and

people went to the police to lodge the report. He further stated that the police enquired from them as to who else was there during the night upon

which it was told to the police that accused was with the deceased during night and on 24-12-2001, he was found absconding. This witness is also

signatory to certain seizure memos prepared at the spot by the police.

In his cross examination, this witness stated that there is only a wall in between his shop and the shop of the deceased and from his shop, one could

not see inside the shop of the deceased. He stated that he opened his shop and went back in the evening. He also talks of seizure of the iron rod

by the police.

9. PW Haji Mohammad Subhan Dar who is also a Baker talks about the seizure of an iron rod from the place of occurrence by the police and of

certain blood stained clothes also.

In his cross examination, this witness stated that when he reached the spot, police had already opened the shutter.

10. PW Ghulam Nabi Shot stated that he knew the deceased and went to purchase the bread from the shop of the deceased and found the shop

closed and the people assembled there started enquiring about this fact upon which shutter was opened and the deceased was found dead. He

further stated that he had seen the deceased and the accused together on the shop one day prior to the occurrence and on the next day, the

accused was missing. He stated that the deceased and the accused used to sleep together in the shop. He is also a witness to the recovery memos

whereby the police took into possession the dead body. He is also a witness to certain other articles taken through separate seizure memos.

In his cross examination, this witness stated that his house is at a distance of 300/400 feet from the place of occurrence and the shop of the

deceased is visible from the door of Mosque and if the shutter is opened, half of

the shop could be seen from Mosque. He further stated that he has seen the deceased and the accused present after 'Assar' prayers, but not after evening prayers. He then stated that he did not remember if the police has recorded his statement that on 23.12.2001 Abdul Rashid Dar and Mohd. Ramzan were together in the shop at 8 pm. He stated that he could not say whether the accused and deceased were present in the shop at the time of 'Isha' prayers because he did not go from that side. This witness further stated that entry to the shop is through shutter, but the shop had a small window from backside. He is very categoric in stating that the shutter was opened from outside and before that, nobody had gone inside through the window and the shutter was opened prior to the arrival of the police and they had seen the dead body before informing the police. When this witness was confronted from his previous statement recorded under section 161 Cr.P.C. with regard to the names of the workers, he stated that he might have named the workers of deceased in his statement, but had forgotten those names. While giving the description of the shop, this witness stated that the shop belonged to Mosque and the deceased had taken it on lease and it had a small room and in between, there was a wall with small door.

11. PW Ali Mohd. Dar was declared hostile as he did not support the prosecution case on any count.

12. PW Bilal Ahmad Wani is brother-in-law of the deceased (Shamima's brother) stated that he went to the shop of the deceased on 23.12.2001

at 4 pm and enquired from the accused as to where the deceased had gone upon which he was told by the accused that deceased had gone to

collect money from his customers. He thereafter returned back and on the following day i.e. 24.12.2001 as usual he left for his shop at 8.45 am,

but got a message at 12.30 about the murder of the deceased. He stated that the accused was absconding and had taken a blanket with him

besides a watch and a chain. He then stated that accused was arrested after one a half year of the occurrence and at that time, he was

accompanying the police. Watch was got recovered from the possession of the accused which was seized in his presence and identified by him and

his sister.

In his cross examination, he disowned the statement recorded by the police

under section 161 Cr.P.C.. He is categoric about the date of arrest of the accused as 7th of June. He is also categoric about the recovery of the chain and watch at the time of the arrest of the accused.

13. PW Abdul Rahim Kralyari is primarily the witness of the seizure memos which includes the weapon of offence i.e. iron rod. However, he also

turns out to be a witness of last seen as he had seen the deceased and the accused together in the shop one day prior to the occurrence.

In his cross examination, this witness stated that he had seen the accused continuously for four days on the shop prior to the occurrence and seen

him even preparing the food in the shop one day prior to the occurrence. He however stated that when he reached the shop on the day of

occurrence, he noticed only one bedding in which the dead body of the deceased was lying from where it appeared that the deceased and the

accused had slept in one bedding only. This witness has been confronted from his previous statement recorded under section 161 Cr.P.C. with

regard to reaching at the place of occurrence and opening of the shutter. He is categoric in stating that his statement recorded under section 161

Cr.P.C. is in correct to the extent that after the evening prayer when he came out from the Mosque, he found Abdul Rashid Dar and his servant

Mohd. Ramzan present inside the house and were sleeping in the shop.

14. PW Ghulam Nabi Lone is again a witness to the seizure memo of dead body.

15. PW Hilal Ahmad Bhat is a police photographer who clicked certain photographs of the deceased in the baker shop and got them exhibited

during the trial.

16. PW Bashir Ahmad Khan and PW Ghulam Mohd. Din are the persons who were working with the accused at the shop of the deceased. They

stated that they had heard on radio news that the deceased was murdered and they were called in the police station to identify the accused.

However, these witnesses have no Where stated that the accused was brought before them. Rather, they stated that deceased had very good

relation with their workers as they were discharging their duties very honestly.

17. PW Mohd. Sultan Dar stated that he went near the shop of the deceased which is 500 feet away from his house and found the shutter of the

shop closed and certain persons present there lifted the shutter and saw the dead body inside and thereafter shutter was pulled down and the

police was informed upon which SP arrived at the spot. He stated that the police enquired from the next neighbour shop keeper who told that the accused was there during night. He disclosed the name of the neighbour shop keeper as Nazir Ahmad. This witness, however, disowned the statement recorded by the police under section 161 Cr.P.C. to some extent. This witness also happens to be the witness to the seizure memo prepared at the spot.

18. PW Ghulam Nabi Dar is another witness who after hearing news on Radio that Baker Abdul Rashid was killed reached the place of occurrence. He is a witness to certain recovery memos including the weapon of offence i.e. iron rod.

19. PW Naseer Ahmad Shah is Patwari and prepared the site plan regarding the place where the dead body was lying and got the same proved during the trial.

20. PW Aijaz Ahmad Mir, the then SHO of Police Station Nishat stated that the accused was arrested on 24th of June 2003 and during the investigation, it surfaced that accused and the deceased had exchanged hot words as the deceased was having Rs. 10000 with him to the knowledge of the accused and the accused in order to grab the said amount inflicted two blows of the iron rod on the head of the deceased resulting into his death.

In his cross examination he stated that the police had received an information about the accused working at Rangreth in a shop upon which the police party reached the place along with Shamima wife of the deceased who identified the accused. He, however, stated that he was not the part of the police party who arrested the accused and he was brought before him in the police station in the afternoon. When a specific question was put to this witness as to the mentioning of this fact in the CD file, he stated that this fact is not mentioned there. This witness further stated that only police party and the wife of the deceased were with the police when the accused was arrested.

21. PW Nazir Ahmad is a constable posted in Police Station Nishat. He stated that he along with I.O. went to so many places in search of the accused and lastly, they reached Rangreth on a Bakery shop and found the accused present who was arrested from the shop and brought to the

police station. This witness then stated that no document was prepared at the police station. However, rough memo of arrest was prepared. This

witness further stated that the accused after his arrest made a disclosure statement to the effect that he had kept a watch in the pocket of his pent

upon which police went again to Rangreth to seize the watch and the seizure memo was prepared in this regard and he had signed the disclosure

statement and that wife of the deceased had identified the accused and in this regard, identification memo was also prepared.

In his cross examination, this witness stated that the watch and pent were in a room on the back side of Bakery shop and when the disclosure

statement was made, no civilian was present at that time, but only police men were there. He is categoric in stating that wife of the deceased and

her two brothers were relieved after the arrest of the accused and they were not present at the time of the disclosure statement of the accused. He

stated that the papers were prepared at Rangreth but signatures were taken in the police station. This witness further stated that the accused was

arrested on 24th of June at 9 am and disclosure statement was made after the seizure of watch and pent.

22. PW Abdul Majid is also a police official who was posted in police station Nishat in June 2003. He stated that on 23.06.2003, Shamima wife

of the deceased came to the police station and stated that killer of her husband is at Rangreth and on the following day i.e. 24.06.2003, police

party under supervision of ASI Ali Mohd. along with wife of the deceased and two brothers went to Rangreth where Shamima identified the

accused at Baker's shop. He then stated that accused was thereafter arrested and from there only brought to the police station where he suffered a

disclosure statement to the effect that he had kept his pent at Rangreth in which watch make Libero was kept in his pocket. Disclosure statement

was reduced into writing and thereafter, the police went to Rangreth along with the accused and recovered the pent and watch at the instance of

the accused and in this regard, recovery memo was also prepared to which he was signatory. This witness identified the recovered articles during

trial.

In his cross examination this witness stated that Shamima wife of the deceased had come to police station on 23.06.2003 and informed the police

about the presence of accused at Rangreth, but no action was taken on 23rd when the information was conveyed to the police. This witness further stated that they had not informed the local police at Rangreth and only SP and SDPO were informed about the matter. He stated that when they reached Rangreth at 6 am, accused was making bread in the shop and two/four persons were present in the shop who had also witnessed the documents prepared by the police, but they did not sign the same in his presence nor their statements were recorded in their presence. He stated that an identity card was also recovered along with the watch and the name, parentage and residence of the accused could be known from identity card only. He further stated that he did not remember whether his statement under section 161 Cr.P.C. was recorded by the I.O. or not.

23. PW Ghulam Mohd. Najar is a Baker who was running a shop at Rangreth stated that he engaged the accused as Baker on his shop on monthly salary of Rs. 2000 as he knew him earlier and after 20 days of his engagement, police came in the morning along with a lady and took him along and thereafter the police came after 15 days and took the clothes of the accused also. He identified his signatures on the recovery memos but could not identify the watch allegedly recovered at the instance of accused.

In cross examination, this witness stated that he was not present in the shop when police came and took the accused but his brother Mohd. Yousuf was present. He further stated that when the police came to his shop after 15 days of the arrest of the accused, he was present. He stated that accused did not make any disclosure statement in his presence and that when the police came on the second visit to his shop, accused was not accompanying them.

24. PW Shah Ahmad Kant is from FSL (Serology section) who checked the blood stained articles and submitted his report. According to the report available on record, he also noticed blood stains of A-Group on the pent of the accused taken into possession on 24.06.2001 from the shop of a Baker at Rangreth. The other articles recovered by the police immediately after the occurrence are also having the same blood group.

25. PW Dr. Mohd. Tariq who was posted as Medical Officer, AD Barzulla conducted the post mortem of the deceased and found that there were multiple injuries on the head of the deceased and parietal bone of the skull was

broken in 11 pieces. He noticed that the brain matter was also coming out of the skull. In his opinion, death was caused by the injuries on the head. This witness stated that the police had also shown him the iron rod and he opined that the injury on the head could be caused by the said iron rod.

In cross examination, this witness stated about the dimension of the rod, but we do not feel the necessity of entering into that aspect, being irrelevant for the purposes of discussion.

26. PW ASI Ali Mohd. is the I.O. of the present case. He stated that on 24-01-2001, the complainant Mohd. Maqbool Dar brought a written complaint with regard to the present occurrence which was addressed to SHO of police station, contents thereof, were read over to him upon which a formal FIR under section 302 RPC came to be registered. He further stated that when he reached the place the occurrence, he found the shutter of the shop closed but not locked, as such he pulled up the shutter and then entered the shop along with other police personnel. The dead body of the deceased was identified by PW Mohd. Maqbool Dar. The place of occurrence was photographed also. This witness stated that the iron rod which was lying 50 feet away was also photographed and other items i.e. pheran, shoe, blood stained mattresses and one that was also seized on spot vide separate seizure memo signed by the witnesses. He further stated that the iron rod stained with blood was also taken into possession vide recovery memo. During investigation, it revealed that the deceased had kept three workers/servants in his shop and that during night, accused was with the deceased, who found missing in the morning. This witness further stated that the investigation of the present case was closed as accused could not be apprehended, but reopened under the orders of SP East and thereafter, he started conducting search of the accused and went to different baker shops and lastly went to shop at Rangreth along with two brothers in law of the deceased and wife of the deceased and found the accused at the shop of one baker from where he was arrested on identification of widow of deceased. One identity card was recovered from the accused. He was taken to the police station where he made a disclosure statement in Kashmiri language with regard to concealing of the wrist watch of the deceased in the back pocket of his pent

which was at Rangreth and thereafter he went to Rangreth and recovered a watch at the instance of the accused from the pocket of his pent and that the pent was also seized. This witness stated that during investigation it surfaced that in order to grab Rs. 10000, the accused had committed the murder of deceased by striking two blows of iron rod upon his head. Certain items seized by him could not be shown to him during trial because of fire incident occurred in the Malkhana and articles not brought before the trial Court.

What one finds from his cross-examination is that the deceased had taken Rs. 10,000/- from his wife in the morning at 7.30 am. Another important fact is with regard to the recovery of watch and pent allegedly made pursuant to the disclosure statement suffered by the accused. According to this witness seizure memo of the watch and pent was prepared in the presence of one constable Nisar and Abdul Majid and one civilian. The wife and the brother in law are the witnesses to the arrest memo.

27. This is all about the prosecution case available on trial Court record.

28. After the incriminating evidence was put to the accused, he denied the allegations and produced the following evidence in his defence:

29. D.W. Fayaz Ahmad Khawaja stated that he knew the accused and continuously from 17-12-2001 to 28-12-2001, he was working with him

as a labourer and that from 22.12.2001 to 24.12.2001. He continued to work with him for plucking the fruits and he saw the accused working on

24.12.2001 at 9 am.

30. D.W. Rayaz Ahmad Dhobi stated that his house is adjacent to the house of the accused and on 24.12.2001, accused had left his house for his work.

31. D.W. Manzoor Ahmad stated that he and accused were together on 23 and 24 of December, 2001 for packing fruits in the boxes.

32. D.W. Ghulam Mohi-ud-din Dhobi stated that he along with Manzoor Ahmad, Dilabar Ahmad and accused were together working in an orchard of a fruit merchant which belonged to one Fayaz Ahmad Khawaja.

33. D.W. Mohd. Sultan Dhobi stated that accused is his cousin and on 23rd and 24th of December, 2001, accused was working with Fayad

Ahmad Khawaja, a fruit merchant and was with him during those days. He stated

that during the night intervening of 23rd and 24th of December, 2001, accused was at his house with him and on 24.12.2001, he had gone for his work.

34. Heard Mr. Hussain, learned counsel for the appellant, Mr. Mehraj-ud-din, learned State counsel and also gone through the evidence available on trial Court record.

35. Mr. Hussain submitted that the prosecution case primarily hinges upon evidence of last seen together which plank, according to him, is not at

all proved. He submitted that the main witness to this effect is PW Shamima, wife of the deceased, who, when stepped into the witness box, stated

that her husband and the accused went together to the shop and at that time, she had handed over Rs. 10,000/- to her husband. This all happened

on 20th/21 of December, 2001. Whether the accused remained with her husband for another three days is not known to this witness and law

requires that last seen evidence together should have close proximity to the main occurrence, whereas in the case on hand, there is no cogent

evidence available on record in this regard. Learned counsel submitted that the evidence of PW Ghulam Rasool Wani and PW Parvez Ahmad

Wani on this aspect is otherwise contradicting each other, therefore, it would not be safe to rely upon their evidence also. Learned counsel

submitted that this piece of evidence deserves to be rejected.

36. Mr. Hussain further submitted that the motive which is alleged to be of theft of Rs. 10,000/- is simply preposterous and it appears that handing

over of Rs. 10,000/- to her husband by PW Shamima is a story which has been developed subsequently as this fact is not mentioned in the First

Information Report which has been lodged by the police on the written complaint of PW Mohd. Maqbool Dar, the real brother of the deceased

who had gone to the house of in-laws of his brother (deceased) where he was apprised of all the facts and then he along with his other family

members went on the spot and thereafter drafted the application and presented to SHO. Contrary to it, evidence of PW Ghulam Rasool Wani,

father of Shamima is that Shamima had come to his house on 24th of December at 10 am and then she sent her daughter Khushboo to call her

father from the shop as he was already invited for lunch on 24th of December, who informed them that her father was seriously ill and then

Shamima along with her brother Parvez Ahmad went to the shop. PW Shamima states that she went to the shop of the deceased to seek

permission for going to Char-e-Sharief and found her husband dead at the shop. Learned counsel submitted that may be there are many

discrepancies in the statement of prosecution witnesses with regard to the manner in which the first information report is lodged with the police by

Mohd. Maqbool Dar, but one fact at least is clear that before drafting the application for registration of formal FIR, PW Shamima was contacted

and in this eventuality, there could not be any scope for missing a very important fact of handing over of Rs. 10000/- to the deceased by PW

Shamima before deceased left for the shop along with the accused. He submitted that there is no whisper about the wrist watch also which is

subsequently recovered on 24th of June 2001 from the accused. According to Mr. Hussain, the motive as projected by the prosecution, thus falls

on the ground.

37. Mr. Hussain submitted that the other incriminating evidence which the prosecution has utilised in connecting the accused with the commission of

offence is the recovery of wrist watch which evidence is also of doubtful character. He submitted that not only the prosecution witnesses have

given contradictory statements vis-à-vis the date and place of arrest of the accused and the recovery allegedly made of the wrist watch of the

deceased at his instance, even the identification of the said wrist watch is also not proved, therefore, this circumstantial piece of evidence cannot

also be said to be an incriminating piece of evidence against the accused forming the complete chain.

38. Mr. Hussain lastly submitted that abscondence of the accused immediately after the occurrence as projected by the prosecution, although not

admitted by the accused, even if presumed to be correct, cannot be said to be a conclusive piece of circumstantial evidence pointing towards the

guilt of the accused when all other planks of circumstantial evidence put forth by the prosecution are stumbling badly.

39. He, thus, prays for acquittal of the accused.

40. Per contra, learned State counsel submitted that escaping of the accused from the place of occurrence immediately after the commission of

offence and thereafter recovery of wrist watch of the deceased at his instance

are two vital planks of circumstantial evidence pointing towards the guilt of the accused and even the evidence of last seen together is also proved by PW Shamima, wife of the deceased in whose presence the deceased and the accused left the house along with Rs. 10,000/- and thereafter also, both were seen at the Bakery shop on the evening of 23rd and 24th of December. According to learned State counsel, all these circumstances, if taken collectively, leave no room of doubt that the accused is the perpetrator of the crime for which he has been charged. He, thus, prays that the conviction and sentence as recorded by the learned trial Court deserves to be upheld.

41. It is well settled that circumstantial evidence can be relied upon for basing the conviction against the accused only when the evidence on its evaluation satisfies the following tests:

- i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- ii. those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;
- iii. 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 none else; and
- iv. the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

42. It is also well settled that the onus is on the prosecution to prove that the chain of circumstantial evidence is complete and the infirmity or lacuna in the prosecution case cannot be cured by false defence or plea. Each circumstance of evidence so proved should be as to exclude every hypothesis except the one sought to be proved.

43. The evidence brought on record by the prosecution in the instant case, thus, requires to be rescanned by us on the touchstone of settled legal position and in this exercise, we would discuss all the important aspects of the prosecution case.

44. The foundation of the prosecution case is that the accused committed the murder of the deceased for greed of Rs. 10,000/- and fled away with

this amount after committing the murder. To prove this fact, the prosecution has produced PW Shamima, wife of the deceased, who when stepped

into the witness box stated that she had handed over Rs. 10,000/- to her husband in presence of accused for depositing the same in the bank

account of their daughter. There is not a whisper of this fact in the written complaint of PW Mohd. Maqbool Dar, the first informant and real

brother of the deceased who verified all the facts and then lodged the written complaint. It appears that this all has been projected subsequently.

Another important act which goes against the prosecution is that there is no mention of missing of wrist watch also which aspect we will be dealing

with separately herein below. So in our considered view, this plank of circumstantial evidence turns out to be very weak in its character, as such,

deserves to be rejected.

45. The other two planks of circumstantial evidence are 'last seen theory' on which the prosecution is banking upon very heavily and the 'recovery

of wrist watch' of the deceased from the accused in June 2003 i.e. after about 18 months of the occurrence.

46. We, however, would, first of all, advert to the evidence with regard to the recovery of wrist watch allegedly made pursuant to the disclosure

statement of accused. In this regard, prosecution has produced PW Abdul Majid Wani, PW Bilal Ahmad Wani, two real brothers of PW

Shamima, PW constable Naseer Ahmad, PW Constable Abdul Majid, PW Ghulam Mohd. Najar a Baker at Rangreth at whose shop, the

accused was working after the occurrence and arrested and PW ASI Ali Mohd., the I.O. of the present case.

47. PW Abdul Majid Wani is categorical in stating that the accused was arrested by the police from Airport, when his sister was also present and no

other private person was there and that the police had prepared some memo in this regard but neither he nor his sister had signed the said memo.

He stated that there is no specific mark on the wrist watch of the deceased. PW Bilal Ahmad Wani when stepped into the witness box stated that

after one and a half year of the occurrence, he was accompanying the police and a wrist watch was got recovered from the possession of the

accused which was seized in his presence and identified by him and his sister (Shamima). He rather talks of recovery of a chain also (absolutely a

new fact) from the accused and is also very specific about the date of arrest of accused as 7th of June. He however stated that police did not record his statement under section 161 Cr.P.C.. Contrary to it, PW Constable Naseer Ahmad when stepped into the witness box stated that in search of the accused, police lastly reached Rangreth on a Bakery shop and found the accused present there from where he was arrested and brought to the police station where he suffered disclosure statement to the effect that he had kept a watch in his pocket upon which police went again to Rangreth to seize the watch and seizure memo was prepared in this regard. In his cross examination, this witness stated that when the accused suffered a disclosure statement, Shamima and her two brothers were already relieved and that the watch and pent were in a room on the back side of the Bakery shop. PW Abdul Majid, another police official when stepped into the witness box stated that when PW Shamima wife of the deceased informed them that killer of her husband is at Rangreth, he along with other police officials, PW Shamima and her two brothers under the supervision of ASI Ali Mohd. went to Rangreth on 24.06.2003, from where the accused was arrested and brought to police station where he suffered a disclosure statement pursuant to which wrist watch of the deceased was recovered. According to this witness, date of arrest of the accused is 24.06.2003, whereas according to PW Bilal Ahmad, date of arrest of accused is 7th of June. The matter does not rest here. PW ASI Ali Mohd. stated on oath that on the identification of the wife of the deceased, the accused was arrested from the shop of a baker at Rangreth and one identity card was recovered from the accused. According to this witness, the wrist watch of the deceased was also recovered from the pocket of the pent of the deceased and that the pent was also taken into possession. PW Ghulam Mohd. Najar a baker at Rangreth from whose shop the accused was arrested when stepped into the witness box stated that after 20 days of the engagement of the accused police came in the morning along with a lady and took the accused along and thereafter the police came after 15 days and took clothes of the accused also. He identified his signatures on the recovery memo but could not identify the watch allegedly recovered at the instance of the accused. In his cross examination, this witness stated that when the police initially took the accused in custody he was not present and his brother Mohd. Yousaf was present and

thereafter when police came on his shop after 15 days of the arrest of the accused, he was present but on the second visit to his shop, accused was not accompanying the police. PW Shamima in his statement on oath does not say a word about the arrest of the accused in her presence from the shop of Baker at Rangreth. As stated above, Mohd. Maqbool Dar, real brother of the deceased who lodged report with the police with regard to the present occurrence has also not whispered a word about removing of the watch of the deceased from his person.

48. The aforementioned evidence available on record vis-à-vis alleged recovery of wrist watch pursuant to the disclosure statement suffered by the accused is so shaky and inherently weak that it becomes very difficult for us to believe that the accused after his arrest, in fact, had suffered a disclosure statement pursuant to which wrist watch of the deceased was recovered. Not only that, even identification of the wrist watch (stolen property) having been the property of deceased is also not proved. It appears to be a crude padding by the prosecution agency in its endeavour to complete the investigation in a particular direction. Viewed thus, we are not inclined to accept that this plank of circumstantial evidence also as individually proved against the accused. Resultantly, the charge of section 380 RPC against the accused falls on the ground.

49. Let us now advert to the last seen theory on which the prosecution has desperately tried to rely upon. Assuming, when other main circumstances have been rendered highly doubtful, even if the circumstance of last seen is presumed to be correct, although we find many vital infirmities in the prosecution case to prove even this plank of circumstantial evidence as well, the same would be deficient for convicting the accused for the reason that the last seen theory is a weak type of evidence and unless there is other supporting evidence available on record, it would not be safe to establish the guilt of the accused.

50. Our view is fortified by a judgment of Hon'ble Supreme Court rendered in case titled Rishi Pal Vs. State of Uttarakhand, wherein it is observed in para 16 as under:

In Mohibur Rahman and Another Vs. State of Assam, , this Court held that the circumstance of last seen does not by itself necessarily lead to the inference that it was the accused who committed the crime. It depends upon the

facts of each case. There may however be cases where, on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide. Similarly in *Arjun Marik and Others Vs. State of Bihar*, , this Court reiterated that the solitary circumstance of (sic) the accused and victim being last seen (sic) will not complete the chain of circumstances for the Court to record a finding that it is consistent only with the hypothesis of the guilt of the accused. No conviction on that basis alone can, therefore, be founded. So also in *Godabarish Mishra Vs. Kuntala Mishra and Another*, , this Court declared that the theory of last seen & 160; together is not of universal application and may not always be sufficient to sustain a conviction unless supported by other links in the chain of circumstances. In *Bharat Vs. State of M.P.*, ; two circumstances on the basis whereof the appellant had been convicted were (i) the appellant having been last seen with the deceased and (ii) Recovery of ornaments made at his instance. This Court held: a Mere non-explanation cannot lead to the proof of guilt against the appellant. The prosecution has to prove its case against the appellant beyond reasonable doubt. The chain of circumstances, in our opinion, is not complete so as to sustain the conviction of the appellant.

51. In *Rishi Pal's case* (supra), Hon'ble Supreme Court has also referred to another case titled *Jaswant Gir Vs. State of Punjab*, wherein it is held that is it not possible to convict solely on the basis of 'last seen' evidence in the absence of any other links in the chain of circumstantial evidence and ultimately gave benefit of doubt to the accused persons therein.

52. We would like to record here that the witnesses produced by the prosecution have given contradictory statements to prove the presence of accused with the deceased immediately before the occurrence. It is also not proved to the hilt whether the accused was in the house of deceased on 20th of December 2001 or 21st of December 2001 as PW Shamima and her brother PW Parvez Ahmad Wani are contradicting each other. It would create doubt even with regard to handing over of Rs. 10,000/- to the deceased which is the backbone of the prosecution case. Close

proximity of place and time between the event of the accused having been last seen with the deceased is snapped in this case, therefore this plank

of evidence also cannot be termed as an incriminating evidence pointing towards the guilt of the accused.

53. Lot of stress has been laid by learned State counsel on abscondence of the accused to dub him as a perpetrator of the crime, but we are afraid

if the prosecution can derive any benefit from this aspect so as to prove the grave charge of murder against the accused to the hilt. Even otherwise,

this plank of evidence is also stumbling badly when evaluated with the attending circumstances having not been proved to the hilt.

54. We do not feel the necessity of finding fault with the investigation conducted in this case, although we find it to be shoddy one, reference

thereto already made wherever, we considered it appropriate.

55. One fact cannot lose sight of the Court is that incidentally the pent worn by the accused and taken into possession on 24.06.2003 pursuant to

his disclosure statement as the wrist watch of the deceased was kept in the back pocket of the said pent was having the same blood group as

Serologist found on the articles of the deceased taken into possession immediately after the occurrence. It is not understandable that the accused

would wear the pent which he was wearing at the time of commission of alleged offence and did not even wash it for long 18 months. After 18

months, the Serologist could not tell the origin of the blood as it must have disintegrated. This all speaks volumes of crude padding by the

Investigating Agency. This fact is otherwise falsified from the seizure memo exhibit EXPW-18/6 Dt. 24.06.2003 vide which the pent and watch

were taken into possession, but incidentally there is no reference of the pent seized of the accused, being blood stained. From where blood stain

appeared after 18 months of the occurrence is a strange theory which creates lot of doubt upon the investigation carried out in the present case.

56. Perhaps no other matter plank of evidence remains untouched by us in our discussion.

57. After churning the entire prosecution evidence available on record once again, all that we get is that the case of the prosecution is shrouded

under thick clouds of suspicion and nothing more. The prosecution, in our considered view, has not been able to prove any of the circumstances

pointing towards the guilt of the accused to say it beyond any shadow of reasonable doubt that it is the accused alone who is guilty of the charge of

302/380 RPC. Viewed thus, it would not be safe to convict him of the said charges. Consequently, the impugned judgment of conviction and

sentence slapped upon the accused by the learned trial Court deserves to be set aside giving him benefit of doubt. Ordered accordingly.

58. Resultantly, we allow Cr. Appeal No. 05/2013 filed by the accused. He is acquitted of all the charges framed against him and shall be released

forthwith, if not required in any other case.

59. Cr. Reference No. 15/2012 also stands answered accordingly.

60. Trial Court be notified of the judgment through Registrar Judicial without any delay. Original record shall also be sent back to the Court

concerned forthwith. Disposed of as such along with connected application(s).