
(2015) 09 SHI CK 0014

In the High Court Of Himachal Pradesh

Case No : Criminal Appeal No. 125 of 2013-A

Vinod Kumar and Others

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 02-09-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 313, 374

Evidence Act, 1872 — Section 106

Penal Code, 1860 (IPC) — Section 100, 102, 105, 201, 302

Citation : (2016) 1 ShimLC 1

Hon'ble Judges : Sanjay Karol, J;Piar Singh Rana, J

Bench : Division Bench

Advocate : Ankush Dass Sood, Senior Advocate and Vinay Thakur, for the Appellant; Ashok Chaudhary, V.S. Chauhan, Addl. AGs. and J.S. Guleria, Asstt. AG, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Karol, J—In this appeal filed under Section 374 Cr.P.C., convicts Vinod Kumar and Gaitri Devi have assailed judgment dated 28.12.2012, passed by Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala, District Kangra, H.P., in Sessions Case No. 1-B/VII/2011/Sessions Trial No. 24 of 2012, titled as State Versus Vinod Kumar & others, whereby they stand convicted for having committed offences punishable under the provisions of Section 302 and 201, read with Section 34 of the Indian Penal Code and sentenced to serve rigorous imprisonment for life and pay fine in the sum of Rs. 5,000/- each, for commission of offences punishable under the provisions of Section 302 read with Section 34 IPC and in default thereof, further to undergo rigorous imprisonment for a period of six months and also sentenced to serve rigorous imprisonment for three years and pay fine in the sum of Rs. 2000/- each for the commission of offences punishable under the provisions of Section 201 read with Section 34 IPC and in default thereof, further to undergo rigorous imprisonment for a period of three months.

2. It is the case of prosecution that on 21.09.2010, Convict Vinod Kumar had liquor with deceased Pritam Chand in the shop of Surinder Kumar (PW.16) at village Padmal, Police Station, Baijnath, District Kangra, H.P. Then both of them left on a scooter driven by Pritam Chand. Same night, Gaitri Devi and Vinod Kumar (convicts) murdered the deceased. All the accused destroyed the body. Some parts of the dead body were cut and dumped in a septic tank and the remaining part was put in a gunny bag (Ex.P-4) and concealed under the stones and cow-dung. Finding Pritam Chand not to have returned home, his wife Urmila Devi (PW.9), made inquiries from the local residents and eventually on 24.09.2010, lodged missing report (Ex.PW.12/A) at Police Station, Baijnath. Searching for her husband, on 25.09.2010, she came to village Sudhala. There she observed foul smell coming from the cowshed owned by the convicts. Villagers got together and recovered a gunny bag concealed under the pile of stones and cow-dung. Inside the gunny bag, dead body of Pritam Chand was found. Upon information furnished to the police, Investigating Officer, SI Kailash Nath (PW.23) arrived at the spot and recorded statement of Urmila Devi under the provisions of Section 154 of Cr.P.C. (Ex.PW.9/A), on the basis of which FIR No. 126 of 2010, dated 25.09.2010 (Ex.PW.20/A) was registered at Police Station, Baijnath, District Kangra, H.P., against all the accused. Inquest reports (Ex.PW.10/B and Ex.PW.10.C) were prepared and vide recovery memo (Ex.PW.3/B) dead body was taken into possession. Samples of blood stained soil (Ex.P-2) so recovered from the spot was kept in a container (Ex.P-1) which was sealed and taken into possession vide memo (Ex.PW.3/A). Spot was got photographed. Gunny bag (Ex.P-4), Plastic piece (Ex.P-5), Pulinda (Ex.P-6) were taken into possession vide recovery memo (Ex.PW.3/C). Spot map was also prepared. Postmortem of the dead body was got conducted by Dr. Raj Kumar (PW.10), who issued postmortem report (Ex.PW.10/D). Investigation revealed that after committing murder of Pritam Chand, all the accused persons, destroyed the evidence. Disclosure statements dated 28.09.2010 (Ex.PW.5/A, Page-165) and 30.09.2010 (Ex.PW.5/B, Page-180), so made by convict Vinod Kumar and disclosure statements dated 28.09.2010 (Ex.PW.8/A, Page-166) and 02.10.2010 (Ex.PW.7/G, Page-183), so made by convict Gaitri Devi, further lead to discovery of incriminating articles i.e. weapon of offence; the material used by the convicts; personal articles of the deceased and his body parts. Recovery was effected vide memos (Ex.PW.7/A, Ex.PW.7/B, Ex.PW.7/F & Ex.PW.7/H). Scientific evidence was collected by the police. With the completion of investigation, which prima facie revealed complicity of the accused in the alleged crime, Challan was presented in the Court for trial.

3. The accused were charged for having committed offences punishable under the provisions of Sections 302 and 201 read with Section 34 of the Indian Penal Code, to which they did not plead guilty and claimed trial.

4. In order to establish its case, in all, prosecution examined as many as twenty four witnesses and statements of the accused under Section 313 of the Code of Criminal Procedure were also recorded.

5. Appreciating the testimonies of the prosecution witnesses, Trial Court convicted accused Vinod Kumar and Gaitri Devi for having committed offences punishable under Sections 302 and 201 read with Section 34 of IPC and sentenced as aforesaid. Hence the present appeal by the convicts.

6. No appeal against the judgment of acquittal of co-accused Kamla, Suman Lata and Hem Kumar stands filed or is sought to be filed by the State. Statement dated 24.12.2014 is on record to such effect.

7. We have heard Mr. Ankush Dass, learned Senior Counsel and Mr. Vinay Thakur, learned counsel, on behalf of the convicts-appellants as also M/s. Ashok Chaudhary and V.S. Chauhan, learned Addl. AGs., and J.S. Guleria, learned Asstt. AG., on behalf of the State. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that no case for interference is made out at all. We find the findings returned by the trial Court to be based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice. Prosecution has been able to prove its case, beyond reasonable doubt against the convicts.

8. Undisputedly no appeal against the judgment of acquittal of co-accused stands filed by the State.

9. It is a settled principle of law that when allegedly several persons commit an offence in furtherance of common intention and all except one are acquitted, it is open to the appellate court to find out, on reappraisal of evidence, whether some of the accused persons stood wrongly acquitted, although it would not interfere with such acquittal in the absence of any appeal by the State Government. The effect of such finding is not to reverse the order of acquittal into one of conviction or visit the acquitted person with criminal liability. The finding is relevant only in invoking against the convicted person his constructive criminality. (See: Brathi alias Sukhdev Singh Vs. State of Punjab, AIR 1991 SC 318 : (1991) CriLJ 402 : (1991) 1 Crimes 74 : (1991) 5 JT 217 : (1991) 1 SCC 519 : (1990) 2 SCR 503 Supp .

10. We clarify that we have not gone into the criminality of such of those persons, who stand acquitted.

11. Certain undisputed facts have emerged on record, as is evident from the statements of the convicts, so recorded under Section 313 Cr.P.C. as also deposition of convict Gaitri Devi, who examined herself as defence witness (DW-1). Convict Vinod Kumar admits to have consumed alcohol in the company of deceased Pritam Chand in the shop of Surinder Kumar (PW.16) at village Padmal. This was on 21.09.2010 at 7.30 PM. Thereafter, he admits to have left Padmal on the scooter of Pritam Chand. In his statement under Section 313 Cr.P.C. he has taken the following defence:-

"I am innocent. At about 11 PM at night on 21.9.10 when I was sleeping I heard the cries of my mother. When I rushed to that place I found that Pritam Chand was grappling with my mother with intention to commit rape with her. When I reached there I found a small knife there. I pushed back Pritam and gave blow of knife on the chest of Pritam. I pushed my mother inside the room. Pritam fell down and what happened thereafter I do not remember. Pritam was under the influence of liquor at that time."

12. Convict Gaitri Devi without admitting any fact in her statement under Section 313 Cr.P.C., has taken the following defence:-

"I am innocent. On 21.9.10 Pritam Chand came outside my room and knocked at the door at about 11 PM. When I opened the door, I found that Pritam was under the influence of liquor. He caught hold of me and tried to remove my salwar with intention to commit rape. I cried at the spot and my son Vinod Kumar arrived at the spot, who pulled Pritam Chand back and gave blow to Pritam with knife, which was lying there. Blow fell on chest of Pritam Chand. Vinod pushed me inside the room and in the meantime Pritam fell down on the ground. What happened thereafter I don't know. False case has been registered against me."

13. The law with regard to right of private defence is now well settled. It is a settled position of law that right of private defence commences as soon as reasonable apprehension of danger to body arises. The danger must be imminent, present and real. This right does not extend to inflicting of more harm than what is necessary to inflict for the purposes of defence. The right would be justified if the assault caused reasonable apprehension of death or grievous hurt to the person exercising such right. In order to find whether right of private defence is available or not, injuries received by the accused, imminence of threat to his safety, injury caused by the accused and the circumstance whether accused had time to take recourse to public authority are all relevant factors to be considered.

14. The Apex Court in Darshan Singh Vs. State of Punjab and Another, AIR 2010 SC 1212 : (2010) CLT 441 : (2010) CriLJ 1393 : (2010) 1 Crimes 78 : (2010) 1 JT 306 : (2010) 1 SCALE 467 : (2010) 2 SCC 333 : (2010) 1 SCR 642 : (2010) 4 SLR 215 : (2010) 2 UJ 600 : (2010) AIRSCW 832 : (2010) 1 Supreme 138 has culled out the following principles regarding right of private defence:-

(i) Self-preservation is the basic human instinct and is duly recognized by the criminal jurisprudence of all civilized countries. All free, democratic and civilized countries recognize the right of private defence within certain reasonable limits.

(ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.

(iii) A mere reasonable apprehension is enough to put the right of self defence into operation. In other words, it is not necessary that there should be an actual

commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.

(iv) The right of private defence commences as soon as a reasonable apprehension arises and it is coterminous with the duration of such apprehension.

(v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.

(vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.

(vii) It is well settled that even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.

(viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt.

(ix) The Penal Code confers the right of private defence only when that unlawful or wrongful act is an offence.

(x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self-defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened.

15. Further the Apex Court in *Sikandar Singh and Others Vs. State of Bihar*, AIR 2010 SC 3580 : (2010) CriLJ 3854 : (2010) 7 JT 637 : (2010) 7 SCC 47 : (2010) 8 SCR 373 : (2010) 7 UJ 3669 has held as under:-

"24. Section 96, IPC provides that nothing is an offence which is done in exercise of the right of private defence. The expression "right of private defence" is not defined in the Section. The Section merely indicates that nothing is an offence which is done in the exercise of such right. Similarly, Section 97, IPC recognises the right of a person not only to defend his own or another's body, it also embraces the protection of property, whether one's own or another person's against certain specified offences, namely, theft, robbery, mischief and criminal trespass.

25. Section 99, IPC lays down exceptions to which rule of self-defence is subject. Section 100 IPC provides, inter alia, that the right of private defence of the body extends, under the restrictions mentioned in Section 99 IPC, to the voluntary causing of death, if the offence which occasions the exercise of the right be an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault. In other words, if the person claiming the right of private defence has to face the assailant, who can be reasonably apprehended to cause grievous hurt to him, it would be open to him to defend himself by causing the death of the assailant.

26. The scope and width of the right of private defence is further explained in Sections 102 and 105 IPC, which deal with commencement and continuance of the right of private defence of body and property respectively. According to these provisions, the right commences, as soon as a reasonable apprehension of danger to the body arises from an attempt or threat, to commit offence, although the offence may not have been committed but not until there is that reasonable apprehension. The right lasts so long as reasonable apprehension of the danger to the body continues. (See: *Jai Dev Vs. The State of Punjab*, AIR 1963 SC 612 : (1963) 3 SCR 489 .)

27. To put it pithily, the right of private defence is a defensive right. It is neither a right of aggression nor of reprisal. There is no right of private defence where there is no apprehension of danger. The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger which is not self-created. Necessity must be present, real or apparent. (See: *Laxman Sahu Vs. State of Orissa*, AIR 1988 SC 83 : (1988) CriLJ 188 : (1986) 1 SCC 555 Supp : (1986) SCC 555 Supp .)

28. Thus, the basic principle underlying the doctrine of the right of private defence is that when an individual or his property is faced with a danger and immediate aid from the State machinery is not readily available, that individual is entitled to protect himself and his property. That being so, the necessary corollary is that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is sought to be averted or which is reasonably apprehended and should not exceed its legitimate purpose.

29. We may, however, hasten to add that the means and the force a threatened person adopts at the spur of the moment to ward off the danger and to save himself or his property cannot be weighed in golden scales. It is neither possible nor prudent to lay down abstract parameters which can be applied to determine as to whether the means and force adopted by the threatened person was proper or not. Answer to such a question depends upon host of factors like the prevailing circumstances at the spot; his feelings at the relevant time; the confusion and the excitement depending on the nature of assault on him etc. Nonetheless, the exercise of the right of private defence can never be vindictive or malicious. It would be repugnant to the very concept of private defence. (See: *Dharam and Others Vs. State of Haryana*, AIR 2007 SC 397 : (2007) CriLJ 791 : (2007) 1 JT 299 : (2006) 13 SCALE 280 : (2006) 10 SCR 391 Supp

30. It is well settled that the burden of establishing the plea of self-defence is on the accused but it is not as onerous as the one that lies on the prosecution. While the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea of self-defence to the hilt and may discharge the onus by showing preponderance of probabilities in favour of that plea on the basis of the material on record.

31. In *Vidhya Singh Vs. State of Madhya Pradesh*, AIR 1971 SC 1857 : (1971) CriLJ 1296 : (1971) 3 SCC 244 : (1971) SCC(Cri) 469 , this Court had observed that right of self-defence should not be construed narrowly because it is a very valuable right and has a social purpose. (Also see: *Munshi Ram and Others Vs. Delhi Administration*, (1968) CriLJ 806 : (1968) 2 SCR 455 ; *State of Gujarat Vs. Bai Fatima and Another*, AIR 1975 SC 1478 : (1975) CriLJ 1079 : (1975) 2 SCC 7 : (1975) 3 SCR 993 and *Salim Zia Vs. State of Uttar Pradesh*, AIR 1979 SC 391 : (1979) CriLJ 323 : (1979) 2 SCC 648 : (1979) SCC(Cri) 568 : (1979) 2 SCR 394

32. In order to find out whether right of private defence was available or not, the occasion for and the injuries received by an accused, the imminence of threat to his safety, the injuries caused by the accused and circumstances whether the accused had time to have recourse to public authorities are relevant factors, yet the number of injuries is not always considered to be a safe criterion for determining who the aggressor was. It can also not be laid down as an unqualified proposition of law that whenever injuries are on the body of the accused person, the presumption must necessarily be raised that the accused person had caused injuries in exercise of the right of private defence. The defence has to further establish that the injury so caused on the accused probalilise the version of the right of private defence."

16. Recently in *Ranjitham Vs. Basavaraj and Others*, AIR 2012 SC 1856 : (2012) CriLJ 2135 : (2012) 1 RCR(Criminal) 117 : (2011) 13 SCALE 221 : (2012) 1 SCC 414 : (2012) AIRSCW 2205 : (2011) 8 Supreme 260 , the Apex Court has reiterated the aforesaid principles by holding that:-

"It is well settled that the right of private defence cannot be weighed in a golden scale and even in absence of physical injury, in a given case, such a right may be upheld by the court, provided there is reasonable apprehension to life or reasonable apprehension of a grievous hurt to a person. Further, the onus of proof on the accused as to exercise of right of private defence is not as heavy as on the prosecution to prove guilt of the accused and it is sufficient for him to prove the defence on the touchstone of preponderance of probabilities. Furthermore, whether a person legitimately acted in exercise of his right of private defence is a question of fact to be determined on the facts and circumstances of each case. In a given case it is open to the Court to consider such a plea even if the accused has not taken it, but the surrounding circumstances establish that it was available to him. The burden is on the accused to establish his plea. The burden is discharged by showing preponderance of probabilities in favour of that plea. The injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and whether the accused had time to have recourse to public authorities, are all relevant factors to be considered."

17. The first question which needs to be examined is as to whether the defence taken by the convicts stands probablized on record or not. We shall examine the

same in the backdrop of aforesaid statement of law.

18. From the suggestion(s) put to the prosecution witnesses, we do not find the same to have been probablized. Mr. Ankush Dass Sood, learned Senior counsel as also Mr. Vinay Thakur, painstakingly took us through the following decisions rendered by Hon"ble the Supreme Court of India, emphasizing the ratio of law with regard to the manner in which the defence is required to be probablized by the convicts: (i) Suraj Narain Lal Vs. Emperor, AIR 1933 All 213 ; (ii) Mohammad Shafi Versus Emperor, AIR 1934 Lahore 620 ; Vishwanath Vs. The State of Uttar Pradesh, AIR 1960 SC 67 : (1960) 62 PLR 530 : (1960) 1 SCR 646 ; and Vijayee Singh and others Vs. State of U.P., AIR 1990 SC 1459 : (1990) CriLJ 1510 : (1990) 2 Crimes 584 : (1990) 2 JT 596 : (1990) 3 SCC 190 : (1990) 2 SCR 573 .

19. There is no dispute with regard to the ratio of law laid down therein. Convicts are only required to probablize the defence, so taken by them, unlike the burden which is sought to be discharged by the prosecution, which always has to be beyond reasonable doubt. But can it be said that the defence of the convicts stands probablized on record or not. In our considered view, not so. Such defence can be probablized even from the suggestion put to the prosecution witnesses. Prosecution witnesses have categorically denied the suggestion put to them and even by inference, the defence put to the witnesses can not be said to have been probablized. In fact, we find that the alleged act of attempt of rape on the part of the deceased, in self defence prompting convict Vinod Kumar to stab him, is not even suggested to the relevant prosecution witnesses.

20. Also we do not find the testimony of Gaitri Devi (DW.1), in any manner, to be inspiring in confidence. She states that on 21.09.2010, at about 11.30 PM someone knocked her door. On opening she found Pritam Chand, under the influence of liquor, to be there. He hugged her and tried to untie her salwar with an intent to commit rape. She tried to free herself from his clutches and cried for help. Soon her son Vinod Kumar (convict), who was sleeping in the adjoining room, came rushing and saw the deceased trying to commit rape. At that, Vinod Kumar pushed Pritam Chand on one side and after picking up a knife which was lying nearby, gave a blow in his chest. Then Vinod Kumar pushed her inside the room and Pritam Chand fell on the floor. What happened thereafter, she does not know. On 25.09.2010, Urmila Devi (PW.9) alongwith 10-15 other relatives came searching for Pritam Chand. From her cowshed foul smell was coming. Dead body of Pritam Chand kept in a gunny bag lying under the stones in the field near the cowshed was recovered. Same day at about 3.30 PM police arrived on the spot, when her two sons and daughters-in-law were also present. All of them were detained and taken to the Police Station where not only they were interrogated, but also beaten up severely. Nothing was handed over to the police either on 28.09.2010 or thereafter. She stands falsely implicated in the case. This she has stated in her examination-in-chief. Is this version of hers true? In our considered view, no. Her subsequent conduct belies the same.

21. Noticeably factum of attempt of rape on the part of Pritam Chand was never

disclosed to any person either immediately after the occurrence of crime; when the police arrested the accused or they were produced before the Court. It is not that any scuffle took place in which both the convicts sustained injuries and fell down unconscious. Her testimony is conspicuously silent as to what happened after she was pushed inside the room by her son. She had seen convict Vinod Kumar stab Pritam Chand. She could have cried for help, but choose to remain silent. She could have informed the villagers or Pradhan, but did not so. What all did she do till the time of recovery of the dead body also remains unexplained by her. Burden so stipulated under Section 106 of the Evidence Act remains undischarged. It is not that she was under any fear, threat or intimidation till such time. She admits that disclosure statements (Ex.PW.7/G & Ex.PW.8/A), recovery memos (Ex.PW.7/B & Ex.PW.7/D) bear her signatures. It is not her version that papers were signed out of any threat, fear, coercion or as a result of beatings given by the police. Also there is nothing on record to even remotely suggest that either the villagers or the police officials had ever, ever given any beatings to the convicts, much less this witness. Frail attempt of explaining her signatures on blank papers, so obtained by the police, does not in any manner help her, in view of her admission of not having made any complaint in that regard with any authority.

22. It is not that the accused was armed which prompted the convict to stab him. The imminent threat or danger to life or dignity remains unexplained and unproven on record. In a state of intoxication, deceased would attempt to commit rape of mother of his companion is not believable, more so in the absence of any prior history of his harbouring any evil eye on her.

23. In the present case, there is no direct evidence. Prosecution case is based on the following circumstances:-

- 1) Prior to occurrence of the incident, on 21.09.2010, convict Vinod Kumar and deceased Pritam Chand consumed liquor in the shop of Surinder Kumar (PW.16);
- 2) Deceased was lastly seen in the company of convict Vinod Kumar;
- 3) Deceased was found to be missing since the night of 21.09.2010;
- 4) Conduct of the accused;
- 5) Deceased died as a result of stab injuries;
- 6) Disclosure statements (Ex.PW.5/A & Ex.PW.5/B), so made by convict Vinod Kumar in the presence of HC Sampuran Singh (PW.5) and Surinder Kumar (PW.24);
- 7) Disclosure statements (Ex.PW.8/A & Ex.PW.7/G), so made by Gaitri Devi, in the presence of LC Mathura Devi (PW.8), Surinder Kumar (PW.24), Prabhat Chand (PW.7) and Suman Kumari (not examined);
- 8) Pursuant to the disclosure statements, recovery having been effected vide memos (Ex.PW.7/A, Ex.PW.7/B, Ex.PW.7/C, Ex.PW.7/D, Ex.PW.7/F & Ex.PW.7/H);

9) Recovery of dead body from the land/cowshed of the convicts;

10) Dragging of dead body of Pritam Chand and recovery of flesh/his body parts from the septic tank belonging to both the convicts.

24. Before we deal with the factual matrix, with profit, we discuss the law on the point.

Law on circumstantial evidence

25. Law with regard to circumstantial evidence is now well settled. It is a settled proposition of law that when there is no direct evidence of crime, the guilt of the accused can be proved by circumstantial evidence, but then the circumstances from which the conclusion of guilt is to be drawn, should be fully proved and such circumstances must be conclusive in nature, to fully connect the accused with the crime. All the links in the chain of circumstances must be established beyond reasonable doubt, and the proved circumstances should be consistent, only with the hypothesis of guilt of the accused, being totally inconsistent with his innocence. While appreciating the circumstantial evidence, the Court must adopt a very cautious approach and great caution must be taken to evaluate the circumstantial evidence. *Pudhu Raja and Another Vs. State, rep. by Inspector of Police*, (2012) 4 JCC 2751 : (2012) 9 JT 252 : (2012) 9 SCALE 177 : (2012) 11 SCC 196 ; *Madhu Vs. State of Kerala*, AIR 2012 SC 664 : (2012) CriLJ 1230 : (2012) 1 Crimes 148 : (2012) 1 JCC 620 : (2012) 1 JT 181 : (2012) 1 SCALE 226 : (2012) 2 SCC 399 : (2012) AIRSCW 782 : (2012) 1 Supreme 342 ; *Dilip Singh Moti Singh Vs. State of Gujarat*, (2002) 8 JT 497 , *Mulakh Raj, etc. Vs. Satish Kumar and others*, AIR 1992 SC 1175 : (1992) CriLJ 1529 : (1992) 2 Crimes 130 : (1992) 2 JT 554 : (1992) 1 SCALE 804 : (1992) 3 SCC 43 : (1992) 2 SCR 484 ; and *Sharad Birdhichand Sarda Vs. State of Maharashtra*, AIR 1984 SC 1622 : (1984) CriLJ 1738 : (1984) 2 SCALE 445 : (1984) 4 SCC 116 : (1985) 1 SCR 88].

26. Also, apex Court in *Padala Veera Reddy Vs. State of Andhra Pradesh and others*, AIR 1990 SC 79 : (1989) 4 JT 223 : (1989) 2 SCALE 906 : (1989) 2 SCC 706 Supp : (1990) 1 UJ 137 , held that when a case rests upon circumstantial evidence, following tests must be satisfied:

"(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) 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

(4) 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."

(See: Ramreddy Rajeshkhanna Reddy and Another Vs. State of Andhra Pradesh, AIR 2006 SC 1656 : (2006) 4 JT 16 : (2006) 3 SCALE 452 : (2006) 10 SCC 172 : (2006) AIRSCW 1602 : (2006) 3 Supreme 175 ; Balwinder Singh Vs. State of Punjab, AIR 1996 SC 607 : AIR 1995 SC 607 : (1996) CriLJ 883 : (1995) 8 JT 81 : (1995) 6 SCALE 261 : (1995) 4 SCC 259 Supp : (1995) 5 SCR 10 Supp ; and Harishchandra Ladaku Thange Vs. State of Maharashtra, AIR 2007 SC 2957 : (2007) 10 JT 496 : (2007) 10 SCALE 464 : (2007) 11 SCC 436 : (2007) 9 SCR 562 : (2007) AIRSCW 6247 : (2007) AIRSCW 5394 : (2007) 6 Supreme 232 .

27. Each case has to be considered on its own merit. Court cannot presume suspicion to be a legal proof. In the absence of an important link in the chain, or the chain of circumstances getting snapped, guilt of the accused cannot be assumed, based on mere conjectures.

28. The apex Court in State of U.P. Vs. Ashok Kumar Srivastava, AIR 1992 SC 840 : (1992) 1 Crimes 576 : (1992) 1 JT 340 : (1992) 1 SCALE 149 : (1992) 2 SCC 86 : (1992) 1 SCR 37 , while cautioning the Courts in evaluating circumstantial evidence, held that if the evidence adduced by the prosecution is reasonable, capable of two inferences, the one in favour of the accused must be accepted. This of course must precede the factum of prosecution having proved its case, leading to the guilt of the accused.

Circumstances No. 1, 2, 3, 4 and 9:

29. From the testimony of Surinder Kumar (PW.16), it is evident that on 21.09.2010, at about 7.30 PM both Vinod Kumar and Pritam Chand had consumed liquor in his shop at village Padmal. Thereafter, Vinod Kumar left his shop alongwith Pritam Chand on his scooter. Such fact also stands corroborated by Raj Kumar (PW.6) and Urmila Devi (PW.9). In any event, this fact stands admitted by convict Vinod Kumar, in his statement under Section 313 Cr.P.C. It be only observed that distance between village Padmal and Sudhala, the place where dead body was recovered is not much.

30. Now from the testimonies of Surjit Singh (PW.1), Swarup Chand (PW.2), Raj Kumar (PW.6), Prabhat Chand (PW.7), Urmila Devi (PW.9) and Mohar Singh (PW.18), it is evidently clear that from the night of 21.09.2010 deceased Pritam Chand was missing. Urmila Devi searched for her husband. She contacted several persons, including Surinder Kumar (PW.16), who on 23.09.2010, informed her that Pritam Chand and convict Vinod Kumar had consumed liquor in his shop. On 24.09.2010, as is evident from the testimony of Urmila Devi, missing report was lodged with the police. Members of BDC and Panch accompanied her at that time.

31. Further Urmila Devi (PW.9) states that while searching for her husband, she went to village Sudhala, where she noticed foul smell coming from the cowshed

belonging to convict Gaitri Devi. At that time, other villagers were also with her. Suspecting that her husband might have been killed, place was searched and one gunny bag/boru (Ex.P-4), so concealed under the pile of cow-dung and stones, was recovered. Bag was opened from which dead body of her husband (deceased Pritam Chand) recovered. Police arrived at the spot and her statement (Ex.PW.9/A) recorded. The dead body was identified by her vide memo (Ex.PW.3/B).

32. Inspector Kailash Nath (PW.23), who conducted the investigation, has corroborated such version. He has further deposed that the dead body was taken into possession vide memo (Ex.PW.3/B). Gunny bag (Ex.P-4) and Plastic piece (Ex.P-5), so found in the Pulinda (Ex.P-6), were recovered vide memo (Ex.PW.3/C). Factum of recovery of the dead body also stands corroborated by Surjit Singh (PW.1), Swarup Chand (PW.2), Anup Kumar (PW.3), Raj Kumar (PW.6), Prabhat Chand (PW.7), Urmila Devi (PW.9) and Mohar Singh (PW.18), who were present on the spot. The place of recovery of dead body has been identified to be that of the convicts.

Law on last seen & conduct:

33. Hon"ble the Supreme Court of India in Ravirala Laxmaiah Vs. State of A.P., (2013) 6 AD 410 : (2013) CriLJ 3147 : (2013) 8 JT 557 : (2013) 3 RCR(Criminal) 341 : (2013) 7 SCALE 450 : (2013) 9 SCC 283 , after taking note of its earlier decisions rendered in Nika Ram Vs. State of Himachal Pradesh, AIR 1972 SC 2077 : (1972) CriLJ 1317 : (1972) 2 SCC 80 : (1972) SCC(Cri) 635 : (1973) 1 SCR 428 : (1972) 4 UJ 932 ; Ganeshlal Vs. State of Maharashtra, (1992) CriLJ 1545 : (1992) 2 Crimes 161 : (1993) 1 DMC 326 : (1992) 2 JT 592 : (1992) 1 SCALE 811 : (1992) 3 SCC 106 : (1992) 2 SCR 502 and Trimukh Maroti Kirkan Vs. State of Maharashtra, (2007) CLT 471 Supp : (2007) CriLJ 20 : (2006) 2 DMC 757 : (2006) 9 JT 50 : (2006) 10 SCALE 190 : (2006) 10 SCC 681 : (2006) 8 SCR 156 Supp : (2006) 148 STC 638 reiterated the principle that where accused is last seen with the victim, it becomes his duty to explain the circumstances under which the victim died. It is a strong circumstance indicative of the fact that he is responsible for the crime.

34. Hon"ble the Supreme Court of India in Dharam Deo Yadav Vs. State of U.P., (2014) AIRSCW 2253 : (2014) CriLJ 2371 : (2014) 5 JT 31 : (2014) 4 SCALE 730 : (2014) 5 SCC 509 has further held that:-

"19. It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other words, a conviction cannot be based on the only circumstance of last seen together. The conduct of the accused and the fact of last seen together plus other circumstances have to be looked into. Normally, last seen theory comes into play when the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that the possibility of any person other than the accused being the perpetrator of the crime becomes impossible. It will 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. However, if the prosecution, on the basis of reliable evidence, establishes that the missing person was seen in the company of the accused and was never seen thereafter, it is obligatory on the part of the accused to explain the circumstances in which the missing person and the accused parted company. Reference may be made to the judgment of this Court in Sahadevan @ Sagadevan Vs. State rep. by Inspector of Police, AIR 2003 SC 215 : (2003) CriLJ 424 : (2002) 9 JT 366 : (2003) 1 SCC 534 ."

(Emphasis supplied)

35. In Krishnan Vs. State of Tamil Nadu, AIR 2014 SC 2548 : (2014) AIRSCW 3916 : (2014) 8 SCALE 135 ; and Harivadan Babubhai Patel Vs. State of Gujarat, (2013) 7 AD 193 : (2013) CriLJ 3944 : (2013) 3 JCC 1958 : (2013) 9 JT 274 : (2014) 1 RCR(Criminal) 28 : (2013) 8 SCALE 17 : (2013) 7 SCC 45 , the principle stands reiterated.

36. Significantly, in Rohtash Kumar Vs. State of Haryana, (2013) 6 AD 580 : (2013) CriLJ 3183 : (2013) 8 JT 181 : (2013) 3 RCR(Criminal) 355 : (2013) 7 SCALE 472 : (2013) 14 SCC 434 , Hon"ble the Supreme Court of India has held that:-

"34. Thus, the doctrine of "last seen together" shifts the burden of proof on the accused, requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard, would give rise to a very strong presumption against him."

(Emphasis supplied)

37. Thus, last seen theory comes into play where the time gap between the point of time when the accused and deceased were seen last alive and when the deceased died or is found dead, is so small that possibility of any person, other than the accused, being the author of crime becomes impossible. The burden would immediately shift upon the accused which remains undischarged. Testimony of Surinder Kumar of the deceased having left with the accused, late in the night, on the date of occurrence of crime is evidently clear.

38. Conduct of the convicts in the present case, is very relevant. Pritam Chand was last seen in the company of convict Vinod Kumar. According to the convicts deceased Pritam Chand came to their house is admitted by them. Now they did not lodge any report either with regard to alleged assault or indecent behaviour of Pritam Chand or disclosed anyone as to what happened to his body thereafter. In fact, Urmila Devi (PW.9) made enquiries from convict Vinod Kumar. Convicts tried to disappear the evidence by concealing the dead body and putting parts thereof in the pit.

Failure to explain incriminating material u/s 313 Cr.P.C.

39. In a case of circumstantial evidence, where no eyewitness account is available, when an incriminating circumstance is put to the accused and the said accused either offers no explanation for the same, or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. False answers given by the accused in Section 313 Cr.P.C. statement may offer an additional link in the chain of circumstances to complete the chain. [See: Dharam Deo Yadav Vs. State of U.P., (2014) AIRSCW 2253 : (2014) CriLJ 2371 : (2014) 5 JT 31 : (2014) 4 SCALE 730 : (2014) 5 SCC 509 ; Harivadan Babubhai Patel Vs. State of Gujarat, (2013) 7 AD 193 : (2013) CriLJ 3944 : (2013) 3 JCC 1958 : (2013) 9 JT 274 : (2014) 1 RCR(Criminal) 28 : (2013) 8 SCALE 17 : (2013) 7 SCC 45 ; and Rohtash Kumar Vs. State of Haryana, (2013) 6 AD 580 : (2013) CriLJ 3183 : (2013) 8 JT 181 : (2013) 3 RCR(Criminal) 355 : (2013) 7 SCALE 472 : (2013) 14 SCC 434 ; Anthony D'Souza and Others Vs. State of Karnataka, AIR 2003 SC 258 : (2003) CriLJ 434 : (2002) 9 JT 257 : (2003) 1 SCC 259 ; State of Maharashtra Vs. Suresh, (1999) 9 JT 513 : (1999) 7 SCALE 386 : (2000) 1 SCC 471 : (1999) 5 SCR 215 Supp : (2000) 1 UJ 326 and Swapna Patra vs. State of W.B. (1999) 9 SCC 242].

40. In Sharad Birdhichand Sarda Vs. State of Maharashtra, AIR 1984 SC 1622 : (1984) CriLJ 1738 : (1984) 2 SCALE 445 : (1984) 4 SCC 116 : (1985) 1 SCR 88 , Hon"ble the Supreme Court of India has held that before a false explanation can be used as additional link, Court must be satisfied that various links in the chain of evidence led by the prosecution have been satisfactorily proved; the said circumstance points to the guilt of the accused with reasonable definiteness; and the circumstance is in proximity to the time and situation.

41. In Rajkumar Vs. State of M.P., (2014) AIRSCW 1795 : (2014) CriLJ 1943 : (2014) 3 JT 587 : (2014) 2 RCR(Criminal) 45 : (2014) 3 SCALE 42 : (2014) 5 SCC 353 , Hon"ble the Supreme Court of India, held as under:-

"22. The accused has a duty to furnish an explanation in his statement under Section 313 Cr.P.C. regarding any incriminating material that has been produced against him. If the accused has been given the freedom to remain silent during the investigation as well as before the court, then the accused may choose to maintain silence or even remain in complete denial when his statement under Section 313 Cr.P.C. is being recorded. However, in such an event, the court would be entitled to draw an inference, including such adverse inference against the accused as may be permissible in accordance with law. [Vide: Ramnaresh and Others Vs. State of Chhattisgarh, AIR 2012 SC 1357 : (2012) CriLJ 1898 : (2012) 2 Crimes 146 : (2012) 3 SCALE 234 : (2012) 4 SCC 257 : (2012) AIRSCW 1917 : (2012) 3 Supreme 81 ; Munish Mubbar Vs. State of Haryana, AIR 2013 SC 912 : (2013) CriLJ 56 : (2012) 10 JT 41 : (2012) 9 SCALE 736 : (2012) 10 SCC 464 : (2012) AIRSCW 5454 ; and Raj Kumar Singh @ Raju @ Batya Vs. State of Rajasthan, (2013) 5 AD 433 : AIR 2013 SC 3150 : (2013) CriLJ 3276 : (2013) 8 JT 462 : (2013) 6 SCALE 635 : (2013) 5 SCC 722

23. In the instant case, as the appellant did not take any defence or furnish any explanation as to any of the incriminating material placed by the trial court, the courts below have rightly drawn an adverse inference against him. The appellant has not denied his presence in the house on that night. When the children were left in the custody of the appellant, he was bound to explain as under what circumstances Gounjhi died.

24. In Prithipal Singh etc. Vs. State of Punjab and Another etc., (2012) 1 JCC 254 : (2011) 4 RCR(Criminal) 791 : (2011) 12 SCALE 411(1) : (2012) 1 SCC 10 : (2012) 1 UJ 245 , this Court relying on its earlier judgment in State of West Bengal Vs. Mir Mohammad Omar and Others etc., AIR 2000 SC 2988 : (2000) CriLJ 4047 : (2000) 9 JT 467 : (2000) 6 SCALE 148 : (2000) 8 SCC 382 : (2000) 2 SCR 712 Supp : (2000) AIRSCW 3230 : (2000) 6 Supreme 172 , held as under:

"53.....if fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of the accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused."

(Emphasis supplied)

[See also: Neel Kumar @ Anil Kumar Vs. The State of Haryana, (2012) 2 RCR(Criminal) 941 : (2012) 5 SCALE 185 : (2012) 5 SCC 766 : (2012) AIRSCW 3766 ; and Gian Chand and Others Vs. State of Haryana, AIR 2013 SC 3395 : (2013) CriLJ 4058 : (2013) 4 JCC 137 : (2013) 10 JT 515 : (2013) 3 RCR(Criminal) 916 : (2013) 9 SCALE 544 : (2013) 14 SCC 420 "

42. It be also observed that none of the convicts have come forward to explain as to what happened after a stab injury was inflicted upon the deceased. It is not the case of either of the convicts that they sustained injuries or became unconscious.

43. Their conduct belies their innocence. Vinod Kumar has not come forward to explain as to where all did they go from the shop of Surinder Kumar (PW.16). Vinod Kumar does not state that Pritam Chand dropped him and left for his village on his scooter. Where did Pritam Chand go from there remains unexplained by him. The right of private defence in the given facts and circumstances does not arise.

44. Roshal Lal (PW.17) a revenue official has proved the factum of ownership of

the place, where the dead body and the incriminating articles were recovered, to be that of the convicts vide revenue records (Ex.PW.17/B & Ex.PW.17/C).

45. Thus far prosecution has been able to establish recovery of the dead body from the premises belonging to the convicts and the factum of deceased Pritam Chand & Vinod Kumar having consumed liquor and seen together immediately prior to the occurrence of the incident. Also since then deceased was found to be missing.

Circumstance No. 5

46. Postmortem of the dead body was conducted by Dr. Raj Kumar (PW.10), who issued report (Ex.PW.10/D). In view of advanced stage of decomposition of dead body, no exact opinion with regard to cause of death could be furnished. However, as per the doctor, considering the ligature marks and penetrating wounds on the chest, possibility of death as a result thereof, could not be ruled out. The doctor categorically opined that there was 2 cm. x 0.5 cm. penetrating wound on second intercostals stage, 5 cm. from midline with regular margins.

Circumstances No. 6, 7 and 8:

47. Disclosure statement dated 28.09.2010 of convict Vinod Kumar (Ex.PW.5/A) records that he had concealed mobile phone, purse, Phawra and knife, which he could get recovered from his house. Vide another disclosure statement dated 30.09.2010 (Ex.PW.5/B) he disclosed of getting recovered parts of body of deceased Pritam Chand which he had severed and then concealed in the septic tank of his toilets. These statements stand recorded in the presence of HC Sampuran Singh (PW.5) and Surinder Kumar (PW.24).

48. Surinder Kumar admits the disclosure statements to have been recorded in his presence. However, he was declared hostile only with regard to the factum of knife not being mentioned in the memo, by convict Vinod Kumar. But then such fact would not make any difference in view of admission of infliction of a knife blow to the deceased. If the weapon recovered was not the one so used by him, then obviously he is guilty of destruction of such evidence. Then where is the knife with which he stabbed the deceased.

49. S.I. Kailash Nath (PW.23) states that pursuant to the disclosure statement(s) convict(s) led the police party, in the presence of independent witnesses and got recovered articles vide recovery memos (Ex.PW.7/A, Page-167, Ex.PW.7/C, Page-171, Ex.PW.7/B, Page-167, Ex.PW.7/D, Page-174, Ex.PW.7/F, Page-181 & Ex.PW.7/H, Page-184). Recovery was effected in the presence of Smt. Urmila Devi (PW.9), Ward Panch Prabhat Chand (PW.7), Pradhan Smt. Suman Kumari (not examined) and Smt. Arpana (not examined).

50. When we peruse the testimonies of the witnesses so examined, we find there is no discrepancy with regard to the prosecution case of having effected recovery pursuant to such disclosure statements. Convict Vinod Kumar led the police to the place where he had concealed the mobile, spade and knife in his house and

the cowshed where body parts (flesh) of deceased Pritam Chand were kept.

51. Scientific evidence (Ex.PW.23/T & Ex.PW.23/U) does not corroborate the prosecution version of the body parts being that of the deceased, but then this fact alone would not render the otherwise inspiring version of the witnesses to be false or incorrect. Spot map (Ex.PW.23/D) indicates the place where articles stood concealed by convict Vinod Kumar.

52. SI Kailash Nath (PW.23) states that convict Gaitri Devi made disclosure statements (Ex.PW.8/A & Ex.PW.7/G) to the effect that she could get the spot identified and the articles i.e. underwear, pants, one pair chappal, knife and two sickles (Darats) recovered of which she had personal knowledge. Disclosure statements were made in the presence of Prabhat Chand (PW.7), Mathura Devi (PW.8), Surinder Kumar (PW.24) and Suman Kumari (not examined).

53. As per version of the Investigating Officer SI Kailash Nath (PW.23) as also independent witnesses, convict Gaitri Devi led the police to the place where such articles were concealed and get recovered vide memos (Ex.PW.7/B, Ex.PW.7/D and Ex.PW.7/H).

54. Bodh Raj (PW.11) is the Safai Karamchari of the Ayurvedic Department, who went into the septic tank and took out the parts of body of the deceased.

55. Thus, prosecution has been able to establish recovery of mobile phone, purse, Phawra, underwear, pants, chappal, knife, two sickles, body parts/flesh and currency notes, on the asking of the convicts, which were to their personal knowledge.

Circumstance No. 10:

56. There is yet another version which goes against the convicts. Pieces of bamboo, blade of grass, so recovered from the courtyard of the house of convicts as also room of Gaitri Devi, reveals that dead body stood dragged up to the septic tank. As has come in the testimony of Vijay Kumar (PW.4) and Prabhat Chand (PW.7) as also the Investigating Officer (PW.23), stones, blades of grass and bamboo were recovered and tell tale signs found on the spot.

57. The ocular version as also the documentary evidence clearly establishes complicity of the convicts in the alleged crime. The testimonies of prosecution witnesses are totally reliable and their depositions believable. There are no major contradictions rendering their version to be unbelievable.

58. From the material placed on record, it stands clearly established by the prosecution witnesses, beyond reasonable doubt, that the convicts are guilty of having committed the offences charged for. There is sufficient, clear, convincing, cogent and reliable piece of evidence on record to this effect. The circumstances stand conclusively proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the convicts stands proved beyond reasonable doubt to the hilt. The chain of events stand conclusively established and lead

only to one conclusion, i.e. guilt of the convicts. Circumstances when cumulatively considered, fully establish completion of chain of events, indicating the guilt of the accused and no other hypothesis other than the same. It cannot be said that convicts are innocent or not guilty or that they have been falsely implicated or that their defence is probable or that the evidence led by the prosecution is inconsistent, unreliable, untrustworthy and unbelievable. It cannot be said that the version narrated by the witnesses in Court is in a parrot-like manner and hence is to be disbelieved.

59. Thus, from the material placed on record, it stands established by the prosecution, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence, that convicts Vinod Kumar and Gaitri Devi in furtherance of their common intention committed murder of Pritam Chand and after causing his death, with an intent of screening themselves from legal punishment, tried to destroy his dead body.

60. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and complete appreciation of the material so placed on record by the parties. Findings cannot be said to be erroneous in any manner. Hence, the appeal is dismissed.

Records of the Court below be immediately sent back.