



2025:CGHC:7466-DB

AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

CRA No. 1579 of 2021

1 - Mohd. Israr Ahmad @ Raja S/o Mohd. Tajuddin Aged About 20 Years R/o Ward No. 10, Ramanujganj, Ramanujganj Chhattisgarh.

--- appellant

versus

1 - State Of Chhattisgarh Through Police Station Ramanujganj (Wrongly Mentioned As Shankargarh), District Balrampur Ramanujganj Chhattisgarh.

--- Respondent(s)

CRA No. 1650 of 2021

1 - Md. Sahil Bari S/o Md. Wasim Bari Aged About 18 Years R/o Village Ward No. 13 Ramanujganj, District Balrampur Ramanujganj Chhattisgarh.

---appellant

Versus

1 - State Of Chhattisgarh Through Police Station Ramanujganj, District Balrampur Ramanujganj Chhattisgarh. (P.S. Wrongly Mention As Sankargarh In Order Sheet)

--- Respondent(s)

CRA No. 1634 of 2021

1 - Moh. Shamsher Khan S/o Mohd. Rafiq Khan Aged About 19 Years R/o Ward No. 10, Ramanujganj, Police Station Ramanujganj, District Balrampur Ramanujganj Chhattisgarh

---appellant

Versus

1 - State Of Chhattisgarh Through The Station House Officer Police Station
Ramanujganj, District Balrampur Ramanujganj Chhattisgarh

--- Respondent(s)

For appellants : Mr. Ashutosh Trivedi, Advocate (in CRA No. 1579 of 2021) Mr. Chandresh Shrivastava along with Mr. Aditya Bhardwaj , Advocate (in CRA No. 1650/2021) Mr. Chandresh Shrivastava, Advocate (in CRA No. 1634 of 2021)

For Respondent(s) : Mr. Sangharsh Pandey, Govt. Advocate

Hon'ble Shri Ramesh Sinha, Chief Justice
Hon'ble Ravindra Kumar Agrawal, Judge
Order on Board

Per Ravindra Kumar Agrawal, Judge

12.02.2025

1. All these three criminal appeals are arising out of the same crime number and same sessions trial and common judgment, therefore, they are being heard and decided together.
2. The present criminal appeals have been filed under Section 374 (2) of the Code of Criminal Procedure, 1973, by the appellants against the impugned judgment of conviction and sentence dated 12/11/2021 passed by learned 1st Additional Sessions Judge, Ramanujganj, Dist- Balrampur, in Sessions Case No. R-117/2018 whereby the appellants have been convicted and sentenced as under:-

S.No.	Conviction	Sentence
1.	Under Section 120-B of IPC	R.I. for 3 years and fine amount of Rs. 500/-, in default of payment of fine amount, further R.I. for 15 days.
2.	Under Section 363 of IPC	R.I. for 3 years and fine amount of Rs. 500/-, in default of payment of fine amount, further R.I. for 15 days.
3.	Under Section 302 of IPC	R.I. for life time and fine amount of Rs. 500/-, in default of payment of fine amount, further R.I. for 30 days.

4.	Under Section 201 of IPC	R.I. for 05 years and fine amount of Rs. 500/-, in default of payment of fine amount, further R.I. for 15 days. All the sentences shall run concurrently.
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3. Brief facts of the case are that, on 04/09/2018, the father of the deceased (PW/1) Alimuddin Siddiqui lodged a missing report (Ex- P/24) with the averment that his minor son Ishan, aged about 14 years, had gone to school in the morning, has not been returned back. When he searched his whereabouts, his friend Upendra Yadav has disclosed that his son had gone with a person with his motor cycle towards bus stand, Ramajuganj. The missing report has been recorded in Rojnamcha (Ex-P/24) and the FIR (Ex-P/1) was registered for the offence under Section 363 of IPC against unknown persons. During the investigation on suspicion, the accused persons were taken into custody and the memorandum statement of the accused Mohd. Israr Ahmad @ Raja has been recorded as Ex-P/11. The memorandum of accused Sahil Bari has been recorded as Ex-P/12 and the memorandum statement of accused Mohd. Sahmsheer has been recorded as Ex-P/13 on 07/09/2018. The accused persons have disclosed about commission of offence and on the basis of memorandum statement of accused Mohd. Israr Ahmad @ Raja, mobile phone and his mark-sheet of Class-4 have been seized vide seizure memo (Ex-P/11A). From the memorandum statement of the appellant Sahil Bari, his motor cycle, mobile phone and class-7th mark sheet have been seized vide seizure memo (Ex-P/12A). On the basis of memorandum statement of Mohd Shamsheer, one stole, one mobile phone and mark-sheet of Class-2 have been seized vide seizure memo (Ex-P/13A). On the basis of memorandum statement of Mohd. Israr Ahmed, the dead body of the deceased Ishan has been recovered from Akelwa Marhul Kenal, Kanakpur Jungle and recovery Panchnama (Ex-P/7) was prepared. The dead body of the deceased was identified by Mohd. Mujeeb (PW/10) by the cloths and physic of the

deceased and identification Panchanama (Ex-P/6) was prepared. The inquest of dead body of the deceased (Ex-P/10) was prepared by the Police and presence of the witnesses and the dead body was sent for its post mortem to Community Health Centre, Ramanujganj where Dr. Sarad Chandra Gupta (PW/14) has conducted the post mortem of the dead body of the deceased and found ligature mark present around the neck and knot is absent. After conducting the post mortem, the doctor has opined that final opinion will be given after FSL report and his post mortem report is (Ex-P/20). Query was made to the doctor who conducted the post mortem as to on what point, the report from the FSL is to be obtained and the doctor has opined that neck shaping slide is preserved for the matching fibers with the material of ligature and further opined that it is not necessary that fiber will be present. It should be confirmed by FSL and his query report is (Ex-P/22). Another query was raised to the doctor about the nature of death and the doctor has given his opinion in query report (Ex-P/21) that cause of death is asphyxia due to strangulation and the nature is homicidal. Another query was also raised to the doctor as to whether from the seized stole the deceased can be strangled or not. The query report (Ex-P/23) was given by the doctor that it can cause death if apply with ample force and amplitude. Spot map (Ex-P/2) and (Ex-P/9) was prepared by the Police and (Ex-P/3) was prepared by the Patwari. The mark-sheet of Class- 7 of the deceased has been seized vide seizure memo (Ex-P/5). The search panchanama was also prepared with respect to the school bag and notebook etc. and Talashi Panchanama (Ex-P/14) was prepared. Dehati merg intimation (Ex-P/19) was recorded on 07/09/2018 on the instance of Mohd. Mujeeb (PW/10) against the present appellants. With respect to the age of the deceased the school register (Ex-P/19) was seized from Child Education Academy, Ramanujganj and after retaining its attested true copy (Ex-P/19c), the original school register was returned back to the school.

4. The skin slides of the deceased and stole seized from the appellant Shamsheer Khan were sent for its forensic examination to State FSL, Raipur from where report (Ex-P/30) was received and it is opined that in the skin slides of the deceased (Article A/1 to A/4) hair and piece of hair are present and in the fibre of stole (Article-B) are refined in nature. Merg intimation (Ex-P/36) was also registered. Statement of the witnesses under Section 161 of Cr.P.C. have been recorded and after completion of usual investigation, charge-sheet was filed against the appellants for the offence under Sections 363, 364 A, 302 and 120-B of IPC before the learned Chief Judicial Magistrate, Ramanujanj. The case was committed to the Court of learned Sessions Judge, Balrampur and the same was transferred for its trial to the learned trial Court.
5. Learned trial Court has framed charge against the appellants for the offence under Sections 120-B, 363, 364-A/34, 302/34 and 201 of IPC. The appellants abjured their guilt and claimed trial.
6. In order to establish the charge against the appellants, the prosecution has examined as many as 20 witnesses. Statement under Section 313 of Cr.P.C. of the appellants have also been recorded in which they denied the circumstances appears against them, plead innocence and have submitted that they have been falsely implicated in the offence. They have also submitted that the Police had detained them from 04/09/2018 and on 07/09/2018 they have been implicated in the false case.
7. After appreciation of oral as well as documentary evidence led by the prosecution, the learned trial Court has convicted the appellants and sentenced them as mentioned in opening paragraph of this judgment. Hence this appeal.
8. Mr. Chandresh Shrivastava, learned counsel for the appellant Sahil Bari (In CRA No. 1650/2021) and appellant Mohd. Shamsheer Khan (in CRA No. 1634/2021) has submitted that the prosecution has utterly failed to prove its

case beyond reasonable doubt. There are material omissions and contradictions in the evidence of prosecution witnesses which cannot be made basis to convict the appellants in the offence in question. The statement of the witnesses have been recorded after 3-4 days of the recovery of dead body. There is no last seen evidence with the close proximity of time of the death of the deceased and seen by the witnesses. The dead body of the deceased was recovered, not on the memorandum statement of the appellants but it was recovered from an open place and the villagers have been informed the Police about the dead body. There is no test identification parade conducted by the prosecution in the case. The last seen was disclosed by the witnesses (PW/4) Ibran and (PW/9) Mumtaz Ansari and (PW/18) Abu Bakar after 3-4 days of the incident that too after recovery of the dead body. The prosecution case is based on circumstantial evidence and the chain of circumstances are missing and therefore, the appellants cannot be convicted in such type of evidence which is not linked with each other. The prosecution is required to prove the case against the appellants beyond reasonable doubt in which they have failed to prove same, therefore, the appellants are entitled for acquittal.

- 9.** Mr. Ashutosh Trivedi, learned counsel appearing for the appellant Mohd Israr Ahmad @ Raja (in CRA No. 1579/2021) would submit that there are material omissions and contradictions in the evidence of prosecution's witnesses and they are inconsistent with each other. There is no evidence on record that the accused persons have hatched conspiracy to commit murder of the deceased. The evidence of recovery of dead body as well as identification of the accused persons are not reliable and there evidence are shaky. There is no recovery of any incriminating material from the present appellant and therefore, he is also entitled for acquittal.
- 10.** On the other hand, learned State counsel vehemently opposed the submissions made by learned counsel for the respective appellants and

have submitted that but for minor omission or contradictions, the evidence of the prosecution witnesses are fully reliable and sufficient to hold conviction of the appellants in the offence in question. The case of the prosecution is based on the last seen theory and recovery of dead body as well as the ligature by which they have committed murder of the deceased. The chain of circumstances are completed and duly proved by the prosecution by cogent and clinching evidence. The appellants have failed to explain as to on what point of time they departed from the company of the deceased and on their instance, the dead body was recovered from the jungle. Although, it was an open place but the place from where the dead body was found in the jungle is not visible to anyone and the dead body was recovered only on pointing out by the appellants. He would also submit that the conspiracy is always hatched in secrecy and there might be no direct evidence but the conduct of the appellant itself shows their conspiracy to commit murder of the deceased and in furtherance there are, they did so. Therefore, there is overwhelming evidence available on record against the appellants and their appeals are liable to be dismissed.

- 11.** We have heard learned counsel for the parties and perused the evidence available in the case.
- 12.** The initial question arose for consideration would be the nature of death of the deceased as his dead body was found in jungle after about four days of his missing.
- 13.** The doctor (PW/14) Dr. Sarad Chandra Gupta, who conducted the post mortem of the dead body of the deceased has stated in his evidence that on 07/09/2018, the dead body of the deceased Ishan who was aged about 14 years was brought before him for its post mortem and it was identified by Mohd. Aavej and Javed. While conducting the post mortem, he found rigor mortise present in all four limbs, decomposed and full of maggots, foul smell coming from body, bulging of face present, protruded of eyeball, washer

women (Head, face), peeling of skin all over body and falling of scalp hair due to decomposition, pressure abrasion (ligature mark) present around the neck and knot is absent. After conducting the post mortem, the doctor has opined that final opinion will be given after FSL report. In the query report (Ex-P/21) the doctor has opined that the cause of death is Asphyxia due to strangulation and the nature of death is homicidal. In cross-examination, he explained that while strangulation, the neck bone may or may not be fractured, it depends upon the pressure applied while strangulating the neck. There is no fracture found on the dead body of the deceased in the present case. He found that the death of the deceased is three days back from the date of conducting of the post mortem of the dead body. He denied the possibility of death of the deceased by hanging in view of the ligature mark found on his neck. He also stated in his cross-examination that if a person would be strangled by hand, the injuries which has been found on the dead body in the present case would not be found on the body and if the strangulation was with the cloth, the ligature should be on all sides of the neck but he has not found the ligature mark on the all side of neck. He further stated that by mistake, he could not mention in the post mortem report that the time of death is three days back from conducting the post mortem. He also proved the query report (Ex-P/22A) and (Ex-P/23A).

14. The witnesses to the inquest (PW/10) namely Raghu Ray (PW/5), Mohd. Shamim (PW/06), Tanvir (PW/7), Uday Ram (PW/8) and Mohd. Aavej (PW/12) have stated in their evidence that the dead body of the deceased was found in Kanakpur jungle, it was dead body of a child. They have proved the inquest (Ex-P/10). The learned trial Court after considering the missing report (Ex-P/1) and (Ex-P/24), recovery of the dead body from the jungle, evidence of the witnesses to the inquest and also from the post mortem report of the deceased (Ex-P/20) which has been proved by PW/14 Dr. Sarad Chandra Gupta, came into conclusion that the cause of death was

Asphyxia due to strangulation and nature of death is homicidal which is based on proper appreciation of evidence, neither perverse nor contrary to the evidence available on record.

15. So far as, the involvement of the appellants in the offence in question are concerned, the case of the prosecution is based on circumstantial evidence i.e. last seen theory and recovery of the death body on the instance of accused persons. The requirement to prove the case against the accused persons on the basis of circumstantial evidence has been settled by the Hon'ble Supreme Court in various judgments. In the matter of **Ravindra Singh Vs. State of Punjab, 2022 (7) SCC 581** has held in para 10 as under:

10. The conviction of A2 is based only upon circumstantial evidence. Hence, in order to sustain a conviction, it is imperative that the chain of circumstances is complete, cogent and coherent. This court has consistently held in a long line of cases [See *Hukam Singh v. State of Rajasthan* AIR (1977 SC 1063); *Eradu and Ors. v. State of Hyderabad* (AIR 1956 SC 316); *Earabhadrapa Krishnappa v. State of Karnataka* (AIR 1983 SC 446); *State of U.P. v. Sukhbasi and Ors.* (AIR 1985 SC 1224); *Balwinder Singh @ Dalbir Singh v. State of Punjab* (AIR 1987 SC 350); *Ashok Kumar Chatterjee v. State of M.P.* (AIR 1989 SC 1890)) that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances.

10.1. In *Bhagat Ram v. State of Punjab* (AIR 1954 SC 621), it was laid down that where the case depends upon the conclusion drawn from circumstances, the cumulative effect of the circumstances must be such as to negate the innocence of the accused and bring the offence home beyond any reasonable doubt.

10.2. We may also make a reference to a decision of this Court in *C. Chenga Reddy and Ors. v. State of A.P.* (1996) 10 SCC 193, wherein it has been observed that:

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

16.In the matter of para **Surendra Kumar and Another Vs. State of Uttar Pradesh, 2021 (20) SCC 430**, the Hon'ble supreme Court has held in 11 and 12 as under:-

"11. As the case against the appellants is entirely based on circumstantial evidence, it is necessary to determine whether the available evidence lead only to the conclusion of guilt and exclude all contrary hypothesis. The enunciation on the law of circumstantial evidence stood the test of time since *Hanumant Vs. State of Madhya Pradesh*¹ where Mahajan J., has written as under:-

"10.....It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused....."

12. The nature, character and essential proof required in criminal cases was discussed in detail by Fazal Ali J

in *Sharad Birdhichand Sarda vs. State of Maharashtra*² and the proposition of law culled out on circumstantial evidence was approved in many subsequent judgments and was recently reiterated by Krishna Murari J., writing the opinion for a three Judges Bench in *Shailendra* 1 AIR 1952 SC 343 2 (1984) 4 SCC 116 *Rajdev Pasvan & Ors. Vs. State of Gujarat & Ors.* 3 where it was succinctly laid down as under:-

"17. It is well settled by now that in a case based on circumstantial evidence the courts ought to have a conscientious approach and conviction ought to be recorded only in case all the links of the chain are complete pointing to the guilt of the accused. Each link unless connected together to form a chain may suggest suspicion but the same in itself cannot take place of proof and will not be sufficient to convict the accused."

17.In the matter of **Digambar Vaishnav and Another Vs. State of Chhattisgarh, 2019 (4) SCC 522**, the Hon'ble supreme Court has held:-

"14. One of the fundamental principles of criminal jurisprudence is undeniably that the burden of proof squarely rests on the prosecution and that the general burden never shifts. There can be no conviction on the basis of surmises and conjectures or suspicion howsoever grave it may be. Strong suspicion, strong coincidences and grave doubt cannot take the place of legal proof. The onus of the prosecution cannot be discharged by referring to very strong suspicion and existence of highly suspicious factors to inculcate the accused nor falsity of defence could take the place of proof which the prosecution has to establish in order to succeed, though a false plea by the defence at best, be considered as an additional circumstance, if other circumstances unfailingly point to the guilt.

15. This Court in *Jaharlal Das v. State of Orissa*, (1991) 3 SCC 27, has held that even if the offence is a shocking one, the gravity of offence cannot by itself overweigh as far as legal proof is concerned. In cases depending highly upon the circumstantial evidence, there is always a danger that the conjecture or suspicion may take the place of legal proof. The court has to be watchful and ensure that the conjecture and suspicion do not take the place of legal proof. The court must satisfy itself that various circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to rule

out a reasonable likelihood of the innocence of the accused.

16. In order to sustain the conviction on the basis of circumstantial evidence, the following three conditions must be satisfied:

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; and

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 it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused.

17. In *Varkey Joseph v. State of Kerala*, 1993 Suppl (3) SCC 745, this Court has held that suspicion is not the substitute for proof. There is a long distance between 'may be true' and 'must be true' and the prosecution has to travel all the way to prove its case beyond reasonable doubt.

18. In *Sujit Biswas v. State of Assam*, (2013) 12 SCC 406, this Court, while examining the distinction between 'proof beyond reasonable doubt' and 'suspicion' has held as under:

"13. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that "may be proved, and something that "will be proved. In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between "may be" and "must be" is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between "may be true and

"must be" true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between "may be" true and "must be" true, the court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense".

18. The Supreme Court in case of **Madhu Vs. State of Kerala, 2012 (2) SCC**

399 has held in paragraph 5 as under:

"5. The care and caution with which circumstantial evidence has to be evaluated stands recognized by judicial precedent. Only circumstantial evidence of a very high order can satisfy the test of proof in a criminal prosecution. In a case resting on circumstantial evidence, the prosecution must establish a complete unbroken chain of events leading to the determination that the inference being drawn from the evidence is the only inescapable conclusion. In the absence of convincing circumstantial evidence, an accused would be entitled to the benefit of doubt."

19. In the matter of **Nagendra Sah Vs. State of Bihar, 2021 (10) SCC 725** in

paragraphs 17 and 18 replying upon the golden principles enumerated in case **Sharad Birdhichand Sarda Vs. State of Maharashtra, 1984 (4) SCC 116**, the Supreme Court has held as under:

"17. As the entire case is based on circumstantial evidence, we may make a useful reference to a leading decision of this Court on the subject. In the case of **Sharad Birdhichand Sarda v. State of Maharashtra**², in paragraph 153, this Court has laid down five golden

principles (Panchsheel) which govern a case based only on circumstantial evidence. Paragraph 153 reads thus:-

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

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

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra where the following observations were made:

19.....Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

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

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

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

(emphasis added).

18. Paragraphs 158 to 160 of the said decision are also relevant which read thus:

"158. It may be necessary here to notice a very forceful argument submitted by the Additional

Solicitor-General relying on a decision of this Court in *Deonandan Mishra v. State of Bihar*, to supplement his argument that if the defence case is false it would constitute an additional link so as to fortify the prosecution case. With due respect to the learned Additional Solicitor-General we are unable to agree with the interpretation given by him of the aforesaid case, the relevant portion of which may be extracted thus:

9.....But in a case like this where the various links as started above have been satisfactorily made out and the circumstances point to the appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation,... such absence of explanation or false explanation would itself be an additional link which completes the chain."

159. It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier, viz., before a false explanation can be used as additional link, the following essential conditions must be satisfied:

- (1) various links in the chain of evidence led by the prosecution have been satisfactorily proved,
- (2) the said circumstance points to the guilt of the accused with reasonable definiteness, and
- (3) the circumstance is in proximity to the time and situation.

160. If these conditions are fulfilled only then a court can use a false explanation or a false defence as an additional link to lend an assurance to the court and not otherwise. On the facts and circumstances of the present case, this does not appear to be such a case. This aspect of the matter was examined in *Shankarlal* case where this Court observed thus:

30. Besides, falsity of defence cannot take the place of proof of facts which the

prosecution has to establish in order to succeed. A false plea can at best be considered as an additional circumstance, if other circumstances point unfailingly to the guilt of the accused." (emphasis added)"

- 20.** In view of the aforesaid law laid down by the Hon'ble Supreme Court we again examined the evidence available on record against the appellants.
- 21.**(PW/4) Ibram, (PW/9) Mumtaj Ansari and (PW/18) Abu Bakar are the witnesses of the last seen of the deceased with the appellants.
- 22.** PW/4 Ibram, is the student of the school in which the deceased was also the student. He stated in his evidence that at about 11 months back, the accused Wasim Bari took the Ishan with him by motor cycle and they had gone towards bus stand. He saw them about the distance from 10-12 fit which was the time of 4 pm. The deceased Ishan wore school dress. After two days, he came to know that Ishan has died. He stated in his cross-examination that the school leaving time of the school of Ishan and his school is same. On that day, there was no crowd in the school. He also shows is ignorance with respect to photograph (Ex-D/1) and has stated that the govt. pleader has asked him as to who has committed murder of the deceased. He further stated that on the date when he saw the appellant and deceased together, no one has made any inquiry from him about them. The person who has taken the deceased, is the son of Sahil Bari who is the son of Wasim Bari. Sahil was driving the vehicle and the deceased was sitting behind him. He know the accused Sahil because he was also the resident of the place where they had resided earlier. After two days, his father has informed him that the deceased is missing. His father has taken him to the father of the deceased who is his maternal uncle. He has further stated that except the son of Wasim Bari, he has not identified any of the other persons. He admitted that he had seen the deceased with Wasim, therefore, on suspicion Wasim Bari has committed murder of the deceased. He stated that

he know Wasim and identified him after seeing him. He further stated that he did not know the name of the son of Wasim and he was not in knowledge of the name of son of Wasim Bari. He admitted that from the distance of 200 meter, no one can identify the face of the other person who was standing on such distance. On the date of incident, he left his school earlier than the deceased. He further stated that in between the date of incident and recording of his statement in the Police-Station, he regularly had gone to school but had not disclosed the incident to anyone. He admitted that when Mustafa had taken him to the Police-Station then he disclosed at Police-Station that Ishan was being taken in the motor cycle and prior to that he has not disclosed the incident to anyone. He subsequently stated that he disclosed the incident to his father. He further admitted that he saw them from back side, therefore, he could not tell as to the color and number of the motor cycle.

23. PW/9 Mumtaz Ansari who is also the witness of last seen has stated in his evidence that on the date of incident when he was talking with the clerk of Janpad Panchayat on the gate of Janpad Panchayat office, he saw that the accused Sahil Bari was coming on motor cycle and the son of Alimuddin was sitting in the middle and another boy was sitting on his back. Sahil Bari went ahead by his motor cycle and near forest barrier he stopped his vehicle, another boy was also sitting in the motor cycle but he did not identify him. He saw all the four persons going towards Wadraf Nagar and he was behind them in his own Scorpio vehicle. Near Village- Lorgi, Sahil has turned his motor vehicle near Ramchandrapur road and he proceeded towards Wadraf Nagar Road. After 1-2 days of the date of incident, he met with the Alimuddin who inform him that his son is missing, then he disclosed him that he saw his son along with Sahil Bari and they are going on their motor cycle. In cross-examination, he stated that the garage of Alimuddin is situated in the distance of 20-25 meters from his house and he knew him since 7-8

years. He did not know as to how many members are there in the family of Alimuddin, he did not tell as to on which date he has seen the son of Alimuddin. He himself has not given any intimation to the Police and he stated that he asked Alimuddin that his son is missing and therefore, he has to go to Police. He admitted that the Police has taken him to the house of Alimuddin and till that time it was known by everyone that the deceased was being murdered. After about 3-4 days of missing of the deceased, he came to know about his murder.

24. He admitted that he himself has not given any intimation to the Police with respect to the kidnapping or murder of the deceased and he also could not tell as to the color and number of vehicle in which the deceased was being taken by the accused persons. All the four persons who were sitting in the motor cycle were going in the enjoying mood. He had seen the accused person in the Police Station, he also had seen the dead body of the deceased at Ramchandrapur Road Jungle. He admitted in his cross-examination that prior to the date of incident, Alimuddin has never informed him about any ransom call or demand of ransom money. Alimuddin has also not informed that for demanding the ransom, his son was being kidnapped. He stated that he is also contesting the election and member of Zila Panchayat, Balrampur. The father's name of Sahil is Wasim Bari. He did not know as to Wasim Bari had published a news article in daily news paper against one Manzer who is his relative. He did not know about the family of Wasim Bari and he is not related with him. He further stated that when Wasim Bari was in jail, Sahil Bari usually came to him for help. The Police has obtained his signature in various papers on three places i.e. the place where the dead body was recovered, in the house of Alimuddin and thirdly in Police Station. He further stated that he has informed the facts that the Ishan was being taken by motor cycle has been informed to Alimuddin and if it is not there in his Police statement, he could not tell the reason. He came to

know about the murder of the deceased on the date when his dead body was found. He himself has advised the father of the deceased Alimuddin for lodging of the missing report.

25. The third witness of the last seen is PW/18 Abu Bakar who stated in his evidence that on the date of incident, he had gone to Luragi turning to left the labourers at that time the son of Alimuddin was being taken by four persons including Sahil by motor cycle and they had gone towards Ramchandrapur Takia. After 1-2 days of his missing, he came to know about the incident of his murder. When he was declared hostile, he admitted that he informed Mumtaz that she had seen the deceased and the accused persons going, together in the motor cycle. He further admitted that Mumtaz had informed him that the persons with whom the deceased was going have committed his murder. In cross-examination, he admitted that he is the driver of Mohd. Mumtaz since three years. He further stated in his evidence that on the date of incident, the accused Sahil was driving the motor cycle, son of Alimuddin was sitting behind him and two more persons have sitting in the motor cycle but he did not identify them. In cross-examination, he further stated that he did not know about the family of Alimuddin. He did not inform the Police about the fact that he had seen the deceased with the accused persons. He further stated that at the time when he seen the deceased with the accused persons, a number of persons met on the way but he could not remember them. He further stated that after 15-20 days of the incident, the Police has recorded his statement. From the statement of PW/9 Mumtaz Ansari though it appears that he advised the father of deceased Alimuddin to lodge the missing report and informed that he had seen the deceased with the accused Sahil and other two persons but in the missing report (Ex-P/24), there is no mention of the accused Sahil or any other persons that the deceased was being taken by Sahil along with two other accused persons in

the motor cycle and it is only a simple missing report has been lodged by the father of the deceased Alimuddin.

26. PW/4 Ibran who is also the student of the same school were the deceased was studying have also not disclosed the fact that he had seen the deceased was being taken by the accused Sahil Bari on the motor cycle. Till his dead body is recovered, there is no report lodged by these three witnesses that they had seen the deceased with the company of the accused persons. Though there may be some sort of evidence that they have seen the deceased with the son of Wasim but identification of two other accused persons have not been established as to who are they.

27. The other circumstances relied upon the prosecution is the recovery of the dead body on the instance of the accused persons and the recovery panchanama (Ex-P/7). The witnesses of recovery panchnama are Mohd. Shamim (PW/6), (PW/5) Raghu Ray. (PW/5) Raghu Ray has stated in his evidence that he did not know the accused persons. He met with the Police at Kanakpur road and the Police asked from him the way to Kanakpur, he had gone to Village- Kanakpur along with Police persons where in the jungle, a dead body of boy was found. He has signed the document (Ex-P/7) on the instance of Police but he did not know its contents. In cross-examination, he stated that he is the resident of Village- Kanakpur. The Police has met him at Kanakpur road and asked to come with them to find out the way. Along with Police persons one Uday was also there and when they reached near the dead body, except them no other persons was there. After some time when they reached near the dead body, 50-60 persons gathered there. From the evidence of this witness, it is quite apparent that the accused persons were not there with the Police party when the dead body was recovered even he has not stated about presence of the accused Mohd. Israr Ahmad @ Raja with the Police persons.

28. PW/6 Mohd. Shamim has stated in his evidence that the accused persons have given their memorandum statement and disclosed about the incident. The Police has seized the motor cycle, Gamchha, mobile and mark-sheet in his presence. Near Kanakpur canal, the dead body was recovered and recovery panchanama (Ex-P/7) was prepared in which he has signed. He admitted that the Police has interrogated the accused persons together, no individual interrogation made by the Police. He admitted in his further cross-examination that on what date he reached to the Police Station he did not know. At the time of incident, it was rainy season. PW/6 Mohd. Shamim has not stated in his evidence that at the time of recovery of the dead body, PW/5 Raghu Ray was also present along with them. Whereas Raghu Ray has not disclosed about presence of PW/6 at the time of recovery of dead body. PW/5 Raghu Ray has also not stated anything about the accused persons that they were also present at the time when alleged recovery of dead body of the deceased was made. The place from where the dead body was recovered, it appears to be open place near Kanakpur canal and from the spot map prepared by the Police (Ex-P/9) prepared by the Police, it was 50 meter away from path way to the village. The path way of the village, itself shows that it was used by the villagers to come across the place and in such condition it cannot be said that the dead body was concealed or could not be seen by any other persons of the village or it can be pointed out only by the accused persons. When the recovery of dead body on the instance of the accused persons it is alleged, that the prosecution has to prove beyond reasonable doubt and beyond any suspicion that the accused persons have taken the Police to the place where the dead body was found and it was in there exclusive knowledge that dead body was lying there. In the present case, the recovery of the dead body on the instance of the accused Shamsher is suspicious and the evidences are shaky and not conclusive.

29. As the accused persons have been acquitted for the offence under Section 364 A of IPC on the ground that there is no evidence on record that the father of the deceased or any other person have received any ransom call and since the kidnapping for ransom has not been proved by the prosecution, it cannot be considered to be the motive to kidnaped the deceased and to commit his murder, for which the accused persons have conspired. Had the accused persons being conspired and kidnaped the deceased for ransom, they would have a telephonic call immediately and would have keep alive the deceased till the ransom call was being made or the ransom was being paid to them.

30. The evidence of last seen is a very weak type of evidence and only on that basis, the conviction of the accused persons are very difficult without corroboration with other circumstances pointing towards guilt of the accused persons.

31. In the matter of R. Sreenivasa Vs. State of Karnataka, 2023 Live Law (SC) 751, the Hon'ble Supreme Court has held that last seen theory can be invoked only when the same stands proved beyond reasonable doubt. In paras 15 to 17 of its judgment, it is held that:-

“15. The burden on the accused would, therefore, kick in, only when the last seen theory is established. In the instant case, at the cost of repetition, that itself is in doubt. This is borne out from subsequent decisions of this Court, which we would advert to

(a) Kanhaiya Lal v State of Rajasthan, (2014) 4 SCC 715, where it was noted:

‘12. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant.

(emphasis supplied)

(b) Nizam v State of Rajasthan, (2016) 1 SCC 550, the relevant discussion contained at Paragraphs 16-18, after noticing **Kashi Ram** (supra):

16. In the light of the above, it is to be seen whether in the facts and circumstances of this case, the courts below were right in invoking the "last seen theory". From the evidence discussed above, deceased Manoj allegedly left in the truck DL 1 GA 5943 on 23-1-2001. The body of deceased Manoj was recovered on 26-1-2001. The prosecution has contended that the accused persons were last seen with the deceased but the accused have not offered any plausible, cogent explanation as to what has happened to Manoj. Be it noted, that only if the prosecution has succeeded in proving the facts by definite evidence that the deceased was last seen alive in the company of the accused, a reasonable inference could be drawn against the accused and then only onus can be shifted on the accused under Section 106 of the Evidence Act.

17. During their questioning under Section 313 CrPC, the appellant-accused denied Manoj having travelled in their Truck No. DL 1 GA 5943. As noticed earlier, the body of Manoj was recovered only on 26-1-2001 after three days. The gap between the time when Manoj is alleged to have left in Truck No. DL 1 GA 5943 and the recovery of the body is not so small, to draw an inference against the appellants. At this juncture, yet another aspect emerging from the evidence needs to be noted. From the statement made by Shahzad Khan (PW 4) the internal organ (penis) of the deceased was tied with rope and blood was oozing out from his nostrils. Maniya Village, the place where the body of Manoj was recovered is alleged to be a notable place for prostitution where people from different areas come for enjoyment.

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

(emphasis supplied)

16. The cautionary note sounded in **Nizam** (supra) is important. The 'last seen' theory can be invoked only when the same stands proved beyond reasonable doubt. A 3-Judge Bench in **Chotkai v State of Uttar Pradesh, (2023) 6 SCC 742** opined as under. 15. It is needless to point out that for the prosecution to successfully invoke Section 106 of the Evidence Act, they must first establish that there was "any fact especially within the knowledge of the appellant

(emphasis supplied)

17. In the present case, given that there is no definitive evidence of last seen as also the fact that there is a long time-gap between the alleged last seen and the recovery of the body, and in the absence of other corroborative pieces of evidence, it cannot be said that the chain of circumstances is so complete that the only inference that could be drawn is the guilt of the appellant. In **Laxman Prasad v State of Madhya Pradesh**, (2023) 6 SCC 399, we had, upon considering **Sharad Birdhichand Sarda v State of Maharashtra**, (1984) 4 SCC 116 and **Shailendra Rajdev Pasvan v State of Gujarat**, (2020) 14 SCC 750, held that... In a case of circumstantial evidence, the chain has to be complete in all respects so as to indicate the guilt of the accused and also exclude any other theory of the crime.' It would be unsafe to sustain the conviction of the appellant on such evidence, where the chain is clearly incomplete. That apart, the presumption of innocence is in favour of the accused and when doubts emanate, the benefit accrues to the accused, and not the prosecution. Reference can be made to **Suresh Thipmppa Shetty v State of Maharashtra**, 2023 INSC 749”

- 32.** From the FSL report (Ex-P/30), the prosecution could not connected the same fibre of stole which was seized from the Shamser and the same was also found on the neck of the deceased and it is opined in the FSL report that in the slides (Article-A) which has been prepared from the skin of deceased, hair and pieces of hairs were present but there is no comparison of the fibers of stole in two articles.
- 33.** PW/1 Alimuddin who is father of the deceased have stated in his evidence that on the day of incident when his son could not return from the school, he started searching him and on the next day, Ibran Khan has informed him that he saw his son going with Sahil Bari and when he inquired from Sahil, he denied by the same. On 07/09/2018 he came to know that the accused persons have committed murder of his son for the ransom amount. Sahil is his neighbour and he helped him when his father were in jail in some offence. He sold his property of Jharkhand for the consideration of Rs. 8 lakh which was in knowledge of the accused Sahil Bari. He stated that accused Sahil was also in search of his son. On 05/09/2018 he lodged a missing report to the Police. In cross-examination, he admitted that he was having good relation with the accused Sahil. He voluntarily stated that

accused Sahil was also gone with him in search of his son and he first time stated before the Court that he only shown that he is in search of his son. He admitted that at the time of lodging of the report to the Police, he has not disclosed of any name accused persons or any suspected persons. On the date when his son was missing, he has not received any ransom call or any telephonic call. On 05/09/2018, Ibran Khan has informed him that he has seen his son with Sahil. He has lodged the report on 05/09/2018 at 12- 1 hours on the day but has not named any accused person in his report. Muzib has informed him about murder of his son.

34. PW/2 Rubi Jakia is the mother of the deceased has also stated that from 04/09/2018 her son was missing and on 05/09/2018 her husband has lodged a missing report. After about three days, she came to know that her son was being murdered. In cross-examination, she stated that the accused Sahil Bari is her neighbour. He further stated that whatever inquiry has been made it has been made from her husband. She also stated that no ransom call was made to her or any of her family members.

35. PW/3 Bhupendra Yadav is of Classmate of the deceased, he stated in his evidence that on 04/09/018 when he came out from the school, he saw that Ishan is also followed him. Both of them were come out from the school campus and when he reached near gate of school, someone has taken Ishan by his motor cycle and they had gone towards Ramanujganj, except this he did not know anything. The Police has inquired him about the incident and he disclosed them also that Ishan was taken by someone in his motor cycle. This witness has not declared hostile and has not stated about any accused persons that he saw the accused persons, who has taken the deceased Ishan with them. He would be the best witness as he was with the deceased at the time when the school was over and they came out from the school, but he has not supported.

- 36.** PW/8 Uday Ram who is the witness of inquest Ex-P/10, his name has been mentioned in the evidence of PW/6 that at the time of recovery of dead body, Uday was also there with the Police persons but Uday has not stated anything about the presence of PW/6 Shamim.
- 37.** PW/10 Mohd. Muzib is also in search of the deceased. He stated in his evidence that when the deceased could not be found at nearby places, they informed the Police on 04/09/2018 about his missing. When they inquired from the friends of the deceased, along with the father of the deceased Alimuddin then they came to know that the deceased had gone towards Ramanujganj by motor cycle. Thereafter, the Police persons has inquired from the friends of the deceased but his whereabouts could not be traced out. On the next day, the son of Nayin informed that the deceased was being taken by Sahil Bari who is the son of Wasim along with another person and then the Police has interrogated Sahil and he disclosed the entire incident. He is the witness of memorandum and seizure, he also stated that the dead body was recovered on the instance of all the three accused persons on 07/09/2018 which was recovered from Akelwa canal and he identified the dead body which is Ex-P/6.
- 38.** Mohd. Muzib (PW/10) though have stated that the dead body was recovered on the instance of accused persons, he is not the witness of recovery panchanama (Ex-P/7) and the reason best known to the prosecution as to why (PW/10) has not been made as witness to the recovery panchanama and the other persons have made witness to the recovery of the dead body. His presence has not been stated by the witness to the recovery panchanama Raghu Ray. He further stated in his cross-examination when he had gone to Kanakpur to search of deceased on 04/09/2018 at about 6-6.30 pm, they came to know about the fact that the deceased was being taken by motor cycle and thereafter, they lodged the report to the Police. He further stated that on 07/09/2018, the Police has taken him to the house of

the accused persons and whenever Police called him he had gone to the Police Station. He further stated that when the accused persons were being taken by the Police from their house, prior to that the dead body was already recovered. On 07/09/2018 in the day hours, the articles have been seized from the house of the accused persons and the seizure memo have been prepared in the Police Station and he has signed those seizure memo in the Police Station. In Para 48 of his evidence, he stated that at the time of recovery of dead body, he was not there. On the spot and he could reach there only after recovery of the dead body. Mohd. Shamim has informed him for recovery of the dead body and then he reached on the spot. At the time when they reached on the spot only three persons were there out of which one is Mohd. Shamim and two other persons are villagers and remaining persons are the Police persons. He further stated that at the time of recovery of the dead body, who was there along with Sahil Bari, he could not remember. He admitted that on 07/09/2018, no interrogation was made from the accused Sahil Bari but the memorandum statement of Sahil Bari was read over to him on 06/09/2018. Separate interrogation have been made from the accused persons by the Police. There are material omission and contradictions appears in the evidence of this witness and he could not be put into the witness of sterling quality in view of the other evidence available on record.

- 39.** PW/13, Vimlesh Singh who is the Patwari of the Village who prepared the spot map (Ex-P/3).
- 40.** From all these evidence, there are link which are missing to connect the chain of circumstance that it is the accused persons, who have kidnapped the deceased and has committed murder. There are material discrepancies in the evidence of witnesses of last seen and only on the basis of last seen, the appellants cannot be convicted as the same is not of that clinching

nature by which the burden can be shift upon the appellants to explain as to on what time they departed the company of the deceased.

41.It is settled principles of law that prosecution has Burden to prove its case beyond reasonable doubt and where two views are possible, arising based on the same evidence, the view which is favoruable to the accused should be taken into consideration and the accused should be given benefit of doubt. In the matter of **Digambar Vaishnav and Anr. Vs. State of Chhattisgarh**, (2019) 4 SCC 522, it has been held as under :

“19. It is also well-settled principle that in criminal cases, if two views are possible on evidence adduced in the case, one binding to the guilt of the accused and the other is to his innocence, the view which is favourable to the accused, should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence [See Kali Ram v. State of Himachal Pradesh, (1973) 2 SCC 808].

42.In view of the foregoing considerations, we are of the considered opinion that there are various components which are missing from the chain of circumstantial evidence and therefore, the appellants are entitled for benefit of doubt and thereby by giving them the benefit of doubt, all the criminal appeals are thereby **allowed**. Impugned judgment of their conviction and sentence are hereby **set aside**.

43.All the appellants are **acquitted** from all the alleged offences. The appellant Mohd. Israr Ahmad @ Raja and Mohd. Shamsheer Khan are in jail since 07/09/2018 and the appellant Mohd. Sahil Bari is in jail since 04/09/2018 and they be released forth with if not required in any other cases.

44.Keeping in view the provisions of Section 481 of the Bharatiya Nagarik Suraksha Sanhita, 2023, the appellants are directed to furnish a personal bond for a sum of Rs. 25,000/- each with one sureties in the like amount before the Court concerned which shall be effective for a period of six months along with an undertaking that in the event of filing of Special Leave

Petition against the instant judgment or for grant of leave, the aforesaid appellants, on receipt of notice thereof, shall appear before the Hon'ble Supreme Court.

45.Registry is directed to transmit the trial Court record along with a copy of this order to the Court concerned forthwith for necessary information and compliance.

Sd/-
(Ravindra Kumar Agrawal)
Judge

Sd/-
(Ramesh Sinha)
Chief Justice

Head Note

1. In absence of any definitive evidence of 'last seen' and also the proximity of time gap between last seen and recovery of dead body, the 'last seen' theory cannot be invoked when there is no other corroborative evidence to shift the onus of the accused under Section 106 of the Indian Evidence Act, 1872.

2. Where there is two view possible, the view which is in favour of the accused, should be taken into consideration.