



**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**

D.B. Criminal Appeal No. 1670/2017

Vinod Kumar S/o Shri Omprakash, R/o Ward No. 5, Khanuwali,
P.S. Rawala, District Sriganganagar, at present lodged at Sub Jail
Anoopgarh District Sriganganagar

-----Appellant

Versus

The State of Rajasthan

-----Respondent

For Appellant(s) : Mr. Jagmal Singh Choudhary, Sr. Adv.
Assisted by Mr. Pradeep Choudhary
For Respondent(s) : Mr. B.R. Bishnoi, Public Prosecutor

**HON'BLE MR. JUSTICE DINESH MEHTA
HON'BLE MR. JUSTICE RAJENDRA PRAKASH SONI**

CAV Judgment

Reserved on : 06/03/2024

Reportable

Pronounced on : 05/04/2024

By the Court (Per Hon'ble Mehta, J) :

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1. The instant appeal under Section 374 of the Cr.P.C. is directed against the judgment and sentence dated 22.09.2017 passed by learned Addl. Sessions Judge, Anoopgarh camp Gharsana, District Sriganganagar (hereinafter referred to as "the trial Court") in Sessions Case No.13/2014, whereby the accused-appellant has been convicted for offence punishable under Sections 302 and 449 of Indian Penal Code and awarded sentence of life imprisonment.

2. The facts giving rise to the present appeal are that the complainant, who was eventually found to be the accused in the instant case filed a written report in the Police Station Rawla inter-alia averring that when he went to the house of his brother - Rajesh, at around 7-8 a.m. in the morning of 30.05.2014 for taking back his utensils, he found the gate to be closed and upon peeping through the gate, he saw his brother lying on the bed with certain head injuries. It was also stated therein that he then called the neighbors and found that his brother had been assaulted on his head with some sharp edged weapon due to which he had passed away.

3. On the written information so given, an FIR No.112/2014 came to be registered against unknown persons for offence under Sections 449 and 302 of I.P.C.

4. During the course of investigation, the Investigating Officer recorded statement of various witnesses and collected a few evidence on the basis whereof, he concluded that none other than the informant himself - present appellant had murdered the deceased.

5. After usual investigation, the police filed charge-sheet against the accused-appellant in the Court of Judicial Magistrate,



First Class, Gharsana whereafter, the case was committed to the trial court.

6. The trial Court framed the charges against the accused-appellant on 05.01.2015 for offence under Sections 302 and 449 of the Indian Penal Code. The accused denied the charges and asked for trial.

7. During the course of trial, 22 witnesses appeared in the witness box and 54 documents were produced and exhibited to prove the prosecution case. Appellant's statement were recorded under Section 313 Cr.P.C., who denied all the allegations levelled against him and pleaded innocence and contended that he has been falsely implicated.

8. After hearing the parties, learned trial Court found the offence proved against the accused-appellant and convicted him for offence punishable under Sections 302 and 449 of Indian Penal Code and awarded sentence of life imprisonment for commission of offence under Section 302 I.P.C along with fine of Rs.1000/- and in default of payment of fine to further undergo one month's simple imprisonment. A separate sentence of seven years' rigorous imprisonment for commission of offence under Section 449 I.P.C along with fine of Rs.1000/- and in default of payment of fine to further undergo one month's rigorous imprisonment was passed, however, with a stipulation that both the sentences would run concurrently.

9. Mr. Jagmal Singh Choudhary, learned senior counsel to begin with his submissions apprised the Court that the appellant has been convicted on the basis of circumstantial evidence, as there was no eye witness to the incident. He submitted that the case



against the accused - appellant has been found to be proved on the basis of recovery of weapon; recovery of clothes; evidence of last seen; and extra judicial confession, whereas on the basis of evidence on record, the trial court could not have reached to a conclusion that the appellant had committed murder of the deceased. He argued that the motive which the trial Court has found behind the murder was also imaginary and, therefore, the conviction and sentence awarded to the accused - appellant is liable to be quashed and set aside.

SUBMISSIONS ON BEHALF OF THE ACCUSED-APPELLANT

10. Learned senior counsel advanced extensive arguments in a bid to demolish the prosecution case on each of the count, which are concisely narrated hereinfra:-

(a) Recovery of weapon:

11. Firstly taking the Court through the recovery memo of axe (Ex.P/5), he submitted that the recovery of the axe has been shown to have been made from the house of the appellant under the police custody, presumably in the presence of Subhash(P.W.2) and Om Prakash(P.W.9). Thereafter, he took the Court through the statements of above referred persons Subhash(P.W.2) and Om Prakash(P.W.9) and stressed that Subhash(P.W.2) had simply stated that the police had recovered the axe from the yard of the accused's house and prepared recovery memo (Fard - Ex.5) without stating the fact, as to whether it was the appellant, who had disclosed the place where the axe was concealed. It was also argued that said witness did not even state that the axe after being recovered was packed and sealed. Learned senior counsel



then navigated the Court through the statement of Om Prakash(P.W.9) and submitted that as per this witness, the appellant had took out and handed over the axe from that part of the house, where many agricultural equipment were lying.

12. He submitted that with these incomplete statements, the recovery of axe cannot be said to be legally proved. And since the recovery of the blood stained axe - alleged to be the weapon of offence has not been properly proved, the appellant's conviction on the basis of such recovery cannot sustain judicial scrutiny.

(b) Recovery of clothes:

13. Taking the Court through Ex.P/6 being recovery of clothes, learned senior counsel submitted that the said recovery was also planted, inasmuch as the recovery memo dated 05.06.2014 shows that the appellant handed over a black coloured full sleeve shirt, having mark of blood on its front side and a white coloured blood stained pants. He showed that Subhash(P.W.2) does not state that the clothes, which were recovered vide recovery memo dated 05.06.2014 (Ex.P/6) were packed and sealed and argued that for such infirmity, the recovery of the clothes is liable to be discarded.

(c) Delay in Recovery:

14. In relation to the statement of Investigating Officer - Prahalad Ram(P.W.21), so far as recovery of axe, the alleged weapon of offence and recovery of clothes is concerned, learned senior counsel argued that these recoveries have been made after five days of the incident and that too on the basis of information said to be given by accused-appellant, while he was in police custody. Learned senior counsel argued that the weapon so also



the clothes were planted and confessional statement has been obtained under coercion and pressure.

(d) Blood stains on clothes & weapon of offence:

15. It was vehemently argued by Mr. Choudhary that the Investigating Officer had arrested the accused-appellant and engineered a false recovery. He drew Court's attention towards the part of the recovery memo which specifically mentioned that both the clothes were already washed and argued that when the recovered clothes were found to have been washed, it cannot be believed that blood stains could be seen or noticed that too on a shirt, which was black in colour. Learned counsel also argued that if the accused-appellant had washed the clothes, which he had worn at the time of committing the crime, then, why would he not wash the axe being weapon of offence? is beyond anyone's comprehension.

16. Learned counsel also emphasized that the appellant was arrested on 03.06.2014 and thereafter, information about existence of weapon/recovery was given on 04.06.2014 at 08.15 a.m. and disclosure statement about the clothes is shown to have been given on 05.06.2014 at 09.10 a.m., whereas the recovery of both the articles came to be made on 05.06.2014. Learned senior counsel argued that there is no explanation for 24 hours' delay in recovery of weapon of offence.

(e) Absence of indication of blood group:

17. Thereafter, learned counsel took the Court through Ex.P/47 – the FSL report and submitted that FSL report of the pants worn by the accused, so far as blood detection is concerned, gives positive report and is indicative of presence of human blood of 'AB' group,



whereas the FSL report of shirt and the axe showed existence of blood, but is inconclusive in relation to blood group. Learned senior counsel argued that maybe, the blood group of the deceased was 'AB' and the traces of blood found from the appellant's pants also show the blood to be of the same group that the deceased had, but the same cannot be a reason enough to hold the appellant guilty of the offence.

(f) Failure to get blood group of accused examined:

18. Learned senior counsel argued that the Investigating Officer did not get appellant's blood group examined and, therefore, his conviction on the basis of the FSL report Ex.P/47 is contrary to the position of law, as has been settled in the following judgments:

- (i) 1996 RCC p.12 (*Abdul Hamid & Ors. vs. State of Raj.*) Para-16
- (ii) (2008) 4 RLW 3490 ; 2008 2 Cri.L.R. (Raj.) 1701 (*Bhanwar Lal @ Bhanwara vs. State of Raj.*) para-5, 6, 12, 13 and 15
- (iii) (2011) 12 SCC 258 (*Sunil Rai vs. Union Territory of Chandigarh*) para-10, 29 and 30)

(g) Last Seen:

19. Learned senior counsel submitted that the appellant has been convicted, also because he was seen around the house of the deceased in the night of 29th May, 2014. Learned counsel argued that Om Prakash(P.W.9) is the only witness, who claimed to have seen the accused - appellant at around 11.30 – 11.45 p.m. of the night previous to the incident i.e. 29.05.2014. Reading the relevant part of the examination-in-chief so also cross examination of Om Prakash(P.W.9), learned counsel contended that testimony of this witness is liable to be discarded because of the previous animosity which the appellant and he had. Learned



counsel submitted that this witness is a very clever witness, who has improved his version and what he omitted to aver in his statement under Section 164 Cr.P.C., has been added while giving evidence in the Court, obviously, to cover up the gap in his statement. He submitted that it cannot be believed that a person of 52 years of age could identify another person in the night, that too, in a street without any light.

20. While iterating that the testimony of this witness is liable to be discarded, learned counsel argued that even if the same is taken to be correct that the appellant was wandering in front of the house of the deceased, he cannot be held guilty of the offence, for being lastly seen with the deceased.

21. Learned senior counsel argued that the learned trial Court has seriously erred in understanding the principles governing "last seen". He submitted that as per the testimony of Om Prakash(P.W.9), the appellant was found moving around the house of the deceased but not with the deceased (who was murdered that night inside his house). Learned senior counsel pointed out that as per the site map, the houses of the appellant and the deceased are in front of each other and argued that appellant's presence outside the house of the deceased was well outside his own house and hence, his walking cannot be taken to be unnatural or suspicious.

22. Learned counsel read the statement of Om Prakash(P.W.9) in its entirety and pin pointed various discrepancies such as having torch in his hands and presence of dogs, which was conspicuously absent in his statement under Section 161 Cr.P.C. and contended that his testimony does not inspire confidence.



23. In support of his arguments with regard to last seen evidence, learned senior counsel cited following judgments:-

(i) (2011) 12 SCC 258,

Sunil Rai @ Pauna & Ors. Vs. U.T. Chandigarh, Head Note A.

(ii) (2015) 12 SCC 644,

Vijay Shankar Vs. State of Haryana, Para 13

(iii) (2002) 8 SCC 45,

Bodh Raj @ Bodha & Ors. Vs. State of J & K.

(iv) *D.B.Criminal Appeal No. 135/1995 decided on 13.10.2023*

Smt. Leela Vs. State of Rajasthan, Para No. 24 & 25.

(h) Extra-judicial Confession:

24. Learned senior counsel was also very critical about the trial court's conclusion about extra-judicial confession, as according to him learned trial Court had completely misunderstood the concept and principles governing extra-judicial confession. He contended that the confession which has come in the testimony of Om Prakash(P.W.9) and Nihal Chand(P.W.11) cannot be said to be a confession in the eye of law. Learned senior counsel argued that both the witnesses in clear terms have stated that on 05.06.2014, when the appellant came with the Police, he was asked as to what he had done? And it was only then, the accused-appellant had allegedly accepted the guilt of having murdered his brother.

25. Taking the Court through the statement of Nihal Chand(P.W.11), learned counsel submitted that even as per this witness, the appellant had accepted his fault in front of all, when he came with the Police on 5th and 6th June, 2014.

26. Learned senior counsel firstly argued that there was no occasion or reason for the appellant to have confessed his guilt



before Om Prakash(P.W.9) and Nihal Chand(P.W.11), particularly when the relationship between Om Prakash(P.W.9) and appellant was strained – he emphasized that confessing a guilt before a person with hostile relation is out of question.

27. While disputing the very confession, learned senior counsel argued that such confession even if made, was made when the appellant was in police custody and therefore, the same is clearly hit by provision of Section 26 of the Evidence Act and the appellant's conviction on the basis of purported extra-judicial confession is liable to be set aside.

28. In support of his aforesaid arguments with regard to extra-judicial confession, learned senior counsel cited following judgments:-

- (i) (2011) 12 SCC 258,
Sunil Rai @ Pauna & Ors. Vs. U.T. Chandigarh, Head Note B
- (ii) (1974) 4 SCC 747
Jagta Vs. State of Haryana.
- (iii) (2015) 12 SCC 644
Vijay Shankar Vs. State of Haryana, Head Note C
- (iv) (2019) 2 RLW 1676
Sharvan Ram Nayak Vs. State of Rajasthan.
- (v) 2022 SCC Online SC 1400 ; 2022 AIR (SC) Page 5110
Subramanya Vs. State of Karnataka.
- (vi) Criminal Appeal No.437 Of 2016, decided by Hon'ble the
Supreme Court on 20.07.2023
Shatrughan Vs. State of Chhattisgarh.
- (vii) 2023 Cri. L. J. Page 1726
Munna Lal Vs. State of Uttar Pradesh.



(i) Motive:

29. Mr. Choudhary submitted that in order to derive motive, the trial Court has concluded that there was a land dispute between the appellant and the deceased, which conclusion is mainly based upon testimony of Om Prakash (P.W.9). Learned counsel underscored that the Investigating Officer (P.W.21) has clearly admitted during his cross-examination that no criminal or civil case or complaint were pending between the deceased and the appellant and also that he could not lay his hands on any record showing any dispute/case or even a *panchayat*.

30. Learned senior counsel further pointed out that during the course of investigation, the Investigating Officer recorded statement of appellant's sister Pushpa(P.W.14) and concluded that there was a land related dispute, but when said witness appeared in the witness box, she totally denied the prosecution story. He submitted that though said witness PW-14 (appellant's sister) has been declared hostile for not supporting the prosecution's case, but then, the fact that she had clearly denied the factum of any dispute, needs to be carefully considered.

31. Learned counsel argued that even other independent witnesses, namely, Devi Lal(P.W.7), Mangtu Ram(P.W.6) and Mani Ram(P.W.10), etc. have denied the factum of animosity and simply because they have been declared hostile, it cannot be said that there was a subsisting dispute between the appellant and the deceased and it was for such dispute, that the appellant had murdered the deceased.

32. In support of his aforesaid arguments with regard to motive, learned senior counsel cited following judgments:-



(i) (2015) 12 SCC 644

Vijay Shankar Vs. State of Haryana, Head Note B.

(ii) (2016) 16 SCC 192

Pankaj Vs. State of Rajasthan.

(iii) 2022 SCC Online SC 1454

Nandu Singh Vs. State of Madhya Pradesh.

(j) Delay in recording statements:

33. Learned senior counsel further argued that though the FIR was lodged on 30.05.2014, statements of witnesses who were of the same village were recorded very late, by pointing out that the statement of Om Prakash(P.W.9), under Section 161 Cr.P.C. (Ex.D/1) were recorded on 30.06.2014, whereas the statement of Mahaveer(P.W.15) and Ram Chandra(P.W.16) (neighbors of appellant) were recorded on 06.07.2014 (Ex.D/4 and Ex.D/5). He added that statements of other witnesses were also not recorded by the Investigating Officer promptly.

34. Having highlighted the delay in recording the statements, learned counsel submitted that though one witness had informed the Investigating Officer that he had seen the appellant in front of house of the deceased and a few of them had informed about the previous animosity, but such evidence also came to the notice of the Investigating Officer, when the statements of above referred persons, viz. Om Prakash(P.W.9), Mahaveer(P.W.15) and Ram Chandra(P.W.16) came to be recorded.

35. Reminding that the weapon of offence and clothes were recovered on 05.06.2014 in furtherance of the information given by the accused – appellant under Section 27 of the Evidence Act, learned senior counsel argued that delay in recording the



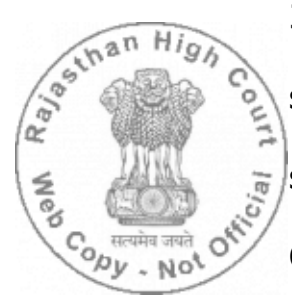
statement of these witnesses raises doubt about the fairness of the Investigation, and is indicative of the fact that false witnesses have been fixed to frame the accused-appellant.

36. In support of his contention that delay in recording statements of witnesses is fatal to the prosecution case, learned senior counsel relied upon the judgment of Hon'ble the Supreme Court in the case of ***Vijaybhai Bhanabhai Patel Vs. Navnitbhai Nathubhai Patel***, reported in **(2004) 10 SCC 583**.

(k) Suppression of report of dog squad:

37. It was also argued that though a dog squad was called on the spot, but its report was not produced before the trial Court. In order to satisfy the Court that dog squad was summoned, Mr. Choudhary took the Court through the relevant part of the statement of witnesses, namely, Sunil Kumar(P.W.18) and Kistura Ram(P.W.20) and then, towards the statement of Investigating Officer – Prahlad Ram(P.W.21) and pointed out that Investigating Officer has clearly stated that the report of dog squad was not received.

38. Learned senior counsel argued that had the appellant been the culprit, then the trained dogs would definitely have identified him, as he was admittedly present when the dog squad had arrived. He contended that the fact that dogs failed to pick on appellant's scent suggesting his involvement in the crime, proves the appellant's innocence. He emphatically argued that the Investigating Officer did not intentionally produce the report of dog squad as a part of charge-sheet because it was 'negative'. He added that non-furnishing, rather withholding the report shows that the investigating officer did not conduct fair investigation.





(l) Size of the injuries:

39. Mr. Choudhary, learned senior counsel cited the judgment of Hon'ble the Supreme Court in the case of *Shatrughan* (supra), particularly para-19 in a bid to further his argument that size of injury is a relevant factor to be considered and if the size of weapon of offence and the size of injury do not tally, an accused cannot be convicted. Inviting Court's attention towards the statement of Doctor(P.W.12), learned senior counsel submitted that the length and size of the injuries is about 1 inch, whereas the sharpened part of the axe was 11.5 cms and argued that the size of injuries do not tally with the size of the weapon of offence and the injuries could not have been caused by the weapon that has been allegedly recovered from the appellant and purportedly used for infliction of four injuries on the head of the deceased.

(m) Other arguments:

40. Certain ancillary arguments were also raised by the learned senior counsel with usual vehemence, which are being noted concisely in this paragraph:

(i) Arrest was illegal: there was no reason or material as on 03.06.2014 with the Investigating officer to arrest the appellant and still he was arrested and thereafter, evidence was created and false recovery was affected. Apart from obtaining confessional statement, keeping the appellant in illegal custody, Mr. Choudhary argued that as per the statements of the witnesses, which were recorded upto 03.06.2014, it had come to the notice of the investigating officer that the appellant's behaviour or body language showed that he had knowledge/information about the murderer. Taking the Court through the statement recorded upto



03.06.2014, learned senior counsel argued that no fact or material had by then come to the notice of the investigating officer so as to believe that it was the appellant, who had murdered his brother.

Learned senior counsel argued that since the arrest itself was illegal, entire evidence collected subsequent and in furtherance of such arrest was illegal and the same cannot be used to inculcate the accused-appellant.

(ii) Presence of more than one person: inviting Court's attention towards the site map, site inspection report and the photographs available on record, learned senior counsel argued that there were definitely more than one person, who were perhaps playing cards and there is every other possibility that someone other than the appellant had murdered the deceased.

(iii) No blood stains found on boundary wall: learned senior counsel also argued that according to the prosecution story shirt and pants of the accused-appellant were smeared with blood consequent to infliction of the axe blow and hence, the boundary wall of deceased's house, which was plastered with mud and sand could not have remained clean or spotless, as the culprit had escaped while scaling or climbing over the boundary wall.

(iv) Accused himself was the informant: learned senior counsel also argued that the fact that it was the accused himself, who had reported the incident to the police, is clearly suggestive of his innocence.

41. Mr. Choudhary, learned senior counsel for the appellant tried to demonstrate that neither the evidence adduced by the prosecution is trustworthy nor is each ring of the chain properly connected as is required in a case of conviction based on





circumstantial evidence, so as to conclude that it was the appellant and appellant only, who had committed the murder of the deceased.

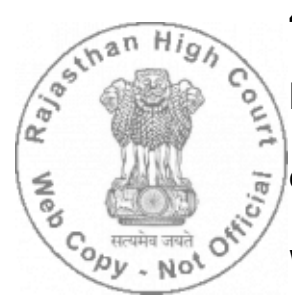
42. Learned senior counsel contended that the appellant has been framed by the Investigating Officer by creating false evidence and planting doctored witnesses, who could not withstand the legal scrutiny, yet the trial Court has concluded and held that the appellant had murdered the deceased without considering that the oral evidence given by the prosecution witnesses, including that of Om Prakash(P.W.9) was untrustworthy and motivated.

43. Learned senior counsel vehemently argued that in a conviction which is based upon circumstantial evidence, it is for the prosecution to prove that each ring in the chain is properly connected, whereas in the instant case not only the connection, even the rings themselves are absent.

SUBMISSIONS ON BEHALF OF THE STATE

44. Learned Public Prosecutor supported the judgment impugned and argued that the appellant has rightly been convicted for committing murder of his brother and the evidence that has been adduced by the prosecution is infallible. He submitted that the prosecution has proved its case beyond all reasonable doubts and each ring of the chain is properly connected. He further submitted that sufficient evidence has been produced to bring the charges against the accused-appellant home.

45. Responding to the arguments raised on behalf of the appellant, learned Public Prosecutor pointed out that number of witnesses, namely, Subhash(P.W.2), Shyam Lal(P.W.4), Mangtu





Ram(P.W.6), Devi Lal(P.W.7), Om Prakash(P.W.9), Nihal Chand(P.W.11), Pushpa(P.W.14), Mahaveer(P.W.15) and Ram Chandra(P.W.16) having their houses or lands close to the house/land of the deceased have deposed that there was a dispute between the appellant and the deceased about the agricultural land.

46. Having read the relevant part of the statements of above referred witnesses, learned Public Prosecutor submitted that there was previous animosity between the appellant and the deceased so much so the deceased never used to come at the appellant's place, who was his real brother and that Nihal Chand(P.W.11) has gone to the extent of saying that the deceased never used to go to the appellant's house as he had an apprehension that the appellant would give poison to him. Learned Public Prosecutor argued that the appellant had the motive to kill his brother. To buttress his argument, learned Public Prosecutor cited judgments of Hon'ble the Supreme Court rendered in the case of **Md. Anowar Hussain vs. State of Assam** reported in **2023 Cri.L.J (SC) 609** and **Singapagu Anjaiah vs. State of Andhra Pradesh** reported in **(2010) 9 SCC 799**.

47. In relation to the extra-judicial confession, learned Public Prosecutor submitted that the evidence of Om Prakash(P.W.9) and Nihal Chand(P.W.11) is sufficient to establish that the appellant had accepted his guilt of having murdered Rajesh - the deceased. Learned Public Prosecutor submitted that such admission of having committed the offence has to be believed and given its natural effect.



48. Responding to the argument of discrepancies in the recovery, learned Public Prosecutor submitted that Subhash(P.W.2) and Om Prakash(P.W.9), who are witnesses of recovery of axe (kulhari) and clothes have clearly proved the recovery. And merely because Subhash(P.W.2) has omitted to state that the axe (kulhari) and the clothes were packed in the bag and then sealed cannot render the recovery itself illegal or doubtful, particularly when Om Prakash(P.W.9) so also the Investigating Officer – Prahlad Ram(P.W.21) in expressed terms have deposed that the axe and the clothes after being handed over by the appellant, were packed and sealed. Learned Public Prosecutor argued that it is settled position of law that if the witnesses of recovery turn hostile, even the Investigating Officer can prove the recovery.

49. In a bid to support such contention, learned Public Prosecutor cited following judgments:

(i) (1999) 4 SCC 370

State of Himachal Pradesh Vs. Jeet Singh.

(ii) (1978) 4 SCC 435

Modan Singh Vs. State of Rajasthan.

50. Learned Public Prosecutor underscored that the FSL report clearly shows human blood and argued that presence of human blood is sufficient to convict the accused, in light of the judgment of Hon'ble the Supreme Court in the case of **Gura Singh Vs. State of Rajasthan** reported in **(2001) 2 SCC 205**.

51. Learned Public Prosecutor further submitted that the conduct of the appellant as per Section 8 of the Evidence Act is a relevant factor and if the statement of Devi Lal(P.W.7) is taken into account, it is clear that instead of being concerned for his brother,



whose corpse was lying, the appellant – accused was more concerned with his utensils, which were lying in the house of the deceased.

52. Learned Public Prosecutor emphasized that as per the testimony of Nihal Chand(P.W.11), the deceased never used to go to Vinod's place and have food as he apprehended that Vinod would administer poison to him and argued that previous animosity and motive has been amply and aptly proved by the prosecution.

53. To buttress this argument, learned Public Prosecutor cited judgment of Hon'ble the Supreme Court in the case of ***State of Karnataka vs. Suvarnamma*** reported in **2015 (1) SCC 323**.

54. Learned Public Prosecutor argued that since the accused-appellant had neither given any explanation as to why the witnesses had deposed against him, nor has he denied the allegation or evidence that has been produced against him, the appellant's conviction and sentence deserves to be upheld.

55. In response to the arguments of Mr. Choudhary that the FSL report is inconclusive so far as blood group is concerned, learned Public Prosecutor submitted that Forensic Laboratory can detect the presence of blood, even if the clothes have been washed, however, the blood group cannot be ascertained once the blood stained clothes have been washed. He submitted that the FSL report, which shows the presence of human blood on the axe and clothes is conclusive evidence and sufficient to convict.

ANALYSIS

56. Heard learned counsel for the parties and perused the record carefully.



57. There is no gainsaying the fact that there was no eye witness to the incident and the case in hand is based upon circumstantial evidence. The Hon'ble Supreme Court in the case of ***Sharad Birdhichand Sarda v. State of Maharashtra***, reported in **(1984) 4 SCC 116** has laid down golden principles, commonly known as the *panchsheel* with regard to conviction based on circumstantial evidence. These *panchsheel* have of late become fundamental rules and are followed with alacrity. A gainful reference of the observations of the Hon'ble Supreme Court in the said case can be made here:

"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 Sahabao Bobade v. State of Maharashtra : (1973) 2 SCC 793 : 1973 SCC (Cri.) 1033 : 1973 Cri. LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri.) p. 1047] 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.

58. Bearing these principles in mind, we shall consider and analyze the oral and ocular evidence produced by the prosecution.

59. It would be apt to deal with the arguments advanced by the appellant, one after another.

A. Recovery of weapon:

60. Recovery memo of the axe (Exhibit-P/5) shows that the same has been made in furtherance of the information under Section 27 of the Indian Evidence Act (Exhibit-P/46) given by the appellant. Apart from the investigating officer, two independent witnesses namely Subhash(P.W.2) and Om Prakash(P.W.9), had appeared to prove the recovery. True it is, that Subhash(P.W.2) deposed that the axe in question was recovered from the yard of the accused-appellant and recovery memo was prepared but he somehow forgot to mention that after being recovered, the axe was packed and sealed. But then, the testimony of Om Prakash(P.W.9) in this respect is complete; he not only recites the factum of recovery of the axe at the instance of the appellant, but also states that the axe which was handed over by the appellant, was duly packed and sealed by the investigating officer in front of him.

61. That apart, the investigating officer aptly proved the recovery from all angles and hence, simply because of the omission or lack of assertion on the part of one of the prosecution witnesses to the recovery namely Subhash(P.W.2) (that the recovered axe was packed and sealed in front of him), it cannot be



said that the recovery is faulty or that the axe was not sent for forensic examination in a sealed state.

B. Recovery of Clothes:

62. The argument that was advanced qua the recovery of the axe was practically echoed for questioning the recovery of clothes. The reasons, which we have given for repelling the arguments about recovery of axe, are equally applicable in relation to the recovery of the clothes. Given that, witnesses of recovery of axe so also of clothes, are the same persons, we do not wish to repeat what we have already observed in Para No. 60 above.

C. Delay in Recovery:

63. According to us, the argument of the appellant that the information in relation to the hidden axe was given on 04.06.2014 at 08:15 a.m. and information about the clothes was given at 9:10 a.m. on 05.06.2014, whereas these articles were recovered in the evening on 05.06.2014 and such delay in recovery of weapon and clothes (30 hours and 5 hours, respectively) is fatal to the prosecution's case, does not cut any ice, given the fact that the police station is about 22 to 25 kms away from the place of incident. A day's time lag between the recovery and the disclosure statement cannot be held unreasonable in the rural areas, where the police station is not in the close vicinity.

64. According to us, continuing interrogation and waiting for a day until every relevant information was gathered was a natural conduct of the investigating officer. That apart, even if it is assumed that there was an omission on the part of the investigating officer, the same alone does not render the recovery illegal and wipe out its bearing on appellant's conviction.

**D. Presence of Blood on the Clothes:**

65. A perusal of the recovery memo (Exhibit-P/6) reveals that the clothes had already been washed, when they were recovered. The recovery memo and the evidence show that the shirt of the appellant, which he allegedly wore at the time of commission of offence was black in colour and the pants were white in colour. We have every reason to be bewildered that how could a common man on a cursory look claim that the shirt, which was black in colour and was already washed, was having blood stains on its front side. According to us, white pants, after being washed may perhaps, show some spots suggestive of blood marks, but in no case an already washed black shirt can let the spots (if any) appear to naked eyes.

66. Pertinently, a perusal of the photographs of the house of the deceased (Exhibit-P/36 & P/37), shows that the floor and boundary wall of the house of the deceased which is about 5 feet in height were plastered by sand/mud. The prosecution believes that the accused had escaped scaling this wall which is approximately 5 feet tall. Hence, had the shirt of the appellant been stained with blood as claimed, it would certainly leave imprints of blood on the wall, plastered with mud & local sand.

67. The FSL report (Exhibit-P/47) indicates presence of human blood on the shirt, pants, gudari, pillow and bed sheet of the deceased so also on pants and shirt of the accused and the axe. But, so far as blood group is concerned, the FSL report shows that the blood spots on the pants of the deceased and on the pants of the accused were of 'AB' group.



68. It is noteworthy that the blood group of shirt, *gudari*, pillow and bed sheet of the deceased have been reported to be inconclusive. So is the position of the shirt of the accused and the axe that has been recovered. We can understand the report being inconclusive in relation to shirt of the accused, as the same was already washed. But, one would wonder that when out of eight samples sent to FSL, blood group of the blood stained articles (six in number) remained inconclusive, how can the Forensic Laboratory Report depict the blood group of the stains on the pants of accused – appellant! given the fact that the shirt so also the pants of the accused when recovered, were found to have been washed and report inconclusive with regard to six articles which were recovered-as they were smeared with blood or in unwashed state.

69. We are, therefore, of the view that merely on the basis of presence of human blood without matching of blood group on the shirt of the appellant and the axe recovered from his house, it will not be safe to hold the appellant guilty, as the FSL Report does not indicate blood group of all the articles sent for examination.

E. Failure to get blood group of the accused examined:

70. We are not much convinced with the arguments of learned senior counsel for discarding the FSL Report, as the investigating officer did not collect sample of appellant's blood (particularly his blood group). To buttress this argument, learned counsel cited three judgments (as mentioned in Para-18), but if the contextual facts of the case in hands are considered, we are firmly of the view that the prosecution's case cannot fall on this count.



71. It is neither the case of the prosecution that a fight between the deceased and the accused took place nor are there any signs of scuffle. As per the prosecution story, blows of axe were given on the head of the deceased, while he was sleeping and therefore, there was no question of blood of the assailant gushing out and spreading over the clothes of the deceased or person of the accused.

72. As such, the Investigating Officer had committed no error of law in not taking blood samples of the accused. According to us, the fact that the blood sample of the accused-appellant was not taken, has no bearing on the prosecution's case. Even if it is assumed that the blood group of the appellant, who is real brother of the deceased is the same, it cannot be taken that appellant's pants would bear his own blood marks, particularly when neither any scuffle took place nor was any injury suffered by him. In all the judgments cited by learned senior counsel for this purpose, there was instance of mutual fight or scuffle, whereas in the present case there was no scuffle. That apart, the accused-appellant has not chosen to explain the presence of human blood on his clothes, let alone the blood group.

F. Last Seen:

73. While convicting the accused-appellant, the trial Court has found the component of last seen to have been proved by the testimony of Om Prakash(P.W.9). While observing that the statement of Om Prakash(P.W.9) are improved if not motivated, we feel that even if his testimony, to the extent it tallies with his statement given under Section 161 Cr.P.C. is taken into account, then also, the circumstance of last seen cannot be said to have



been proved. Because, as per his deposition, Om Prakash(P.W.9), had seen the accused strolling out of the house of the deceased at around 11:30 p.m. – 11:45 p.m. on the previous night (29.05.2014). Such fact, even if taken to be true, in our firm view, does not fulfill what is legally required to establish the evidence of 'last seen'.

74. The site inspection report and the statements of number of witnesses clearly show that the house of the appellant and the deceased were almost in front of each other and therefore, if the appellant was found roving outside the house of the deceased, he was outside his own house as well.

75. So far as the theory of last seen is concerned, the settled legal position states that in case of conviction based on circumstantial evidence, the theory comes into application/play when a person is lastly seen with/in the company of the deceased/victim at any time proximate to the occurrence and not when a person was seen around the place of the incident. Indisputably, the deceased was found lying dead in his house; there is not even an iota of evidence suggesting that it was the appellant, who lastly went inside the house of the deceased immediately before his death. That apart, Om Prakash(P.W.9) stated that he had seen the appellant wandering outside the house of the deceased and not that he saw the appellant 'with the axe in his hands' which is claimed to be the weapon of offence.

76. On the basis of evidence that has been adduced, we are unable to accept that the vital component of 'last seen' has been aptly proved in the present case.



77. We hasten to observe that the trial Court has held the accused-appellant to be lastly seen with the deceased, on irrelevant consideration and based on erroneous appreciation of evidence.

78. In relation to the application of the 'last seen theory', it will be relevant to refer to the following decisions:

79. In the case of **State of U.P. vs. Satish**, reported in **(2005) 3 SCC 114**, Hon'ble Apex Court has observed thus:

"22. The last-seen theory comes into play where the time-gap between the point of time when the Accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the Accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the Accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the Accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases."

80. In **Rambraksh vs. State of Chhattisgarh**, reported in **2016 (12) SCC 251**, the Apex court has stated as follows:

"10. 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. Normally, last seen theory comes into play where 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 possibility of any person other than the accused being the perpetrator of the crime becomes impossible. To record a conviction, the last seen together itself would not be sufficient and the prosecution has to complete the chain of circumstances to bring home the guilt of the accused."

81. The above mentioned observation has been reiterated by the courts in numerous decisions. [See also *Bodh Raj @ Bodha and*





Ors. v. State of Jammu & Kashmir : 2002CriLJ4664, *State of Goa v. Sanjay Thakran and Anr.* : (2007)3SCC755, *Ramreddy Rajesh Khanna Reddy and Anr. v. State of Andhra Pradesh* : AIR(2006) SC 1656 and *Hatti Singh vs. State of Haryana*:(2007) 12 SCC 471]

82. In the case of **Krishan Kumar and Anr. Vs. State of Haryana** : (2023 SCC OnLine SC 1180), the Apex Court while applying the above enunciated principles relating to last seen theory had come to the conclusion that the theory of last seen is inapplicable to the case. The Court has observed thus:

"11. As noticed hereinbefore, 17 witnesses were examined in this case on the side of the prosecution and the indisputable fact is that none among them had deposed to have seen the Accused and the deceased together and alive at any particular point of time on the fateful day much less, to have seen them together and alive at any time proximate to the occurrence.

19. Despite the aforesaid very infirmity, the courts have not taken due care and caution to analyse and appreciate the evidence of the prosecution. The raison d'etre for our remark would come to the fore on a bare perusal of the appreciation of evidence undertaken in the instant case. We have already found that even after finding that none had seen the deceased lastly in the company of the Accused the trial Court held that the materials discussed viz., the evidence of PW-7, PW-8 and PW-10 would be sufficient to show the presence of the deceased with the Accused just prior to his murder.

20. Before appreciating the oral testimonies of PW-10, PW-8 and PW-7 and the manner of their appreciation by the courts below we think it apposite to consider the question whether the 'last seen theory', in its application, could brook presumption as to the presence of the deceased along with the Accused just prior to the occurrence, as drawn by the trial Court, in the absence of positive ocular evidence of prosecution witnesses of having seen the deceased in the company



of the Accused together and alive at a time proximate to the occurrence.

21. We have absolutely no hesitation to answer it in the negative as otherwise the application of the theory of 'last seen' in the absence of any other positive evidence to conclude that the Accused and the deceased were last seen together would be hazardous, as held in Satish' case (supra). Its indirect application is also impermissible. In this context, the decision of this Court in Hatti Singh's case (supra) also has relevance. In that case it was held that unless the time gap between the deceased having been seen lastly in the company of the Accused persons and the murder, is proximate it would be difficult to prove the guilt of the Accused only on that basis."

83. A reading of the observations made in above judgments makes it clear that the theory of last seen can be applied when the evidence would suggest that the deceased was 'last seen in the company of the accused alive'.

84. In the present case there is no evidence suggesting that the deceased was lastly seen in the company of the accused or "together and alive" at a proximate point of time before the incident. The trial court has thus, erroneously proceeded on the testimony of P.W.9 to introduce the theory of last seen and base the conviction on such count.

G. Extra Judicial Confession:

85. The trial court has concluded that it is a case of extra-judicial confession. In order to derive such conclusion, the trial court believed the testimony of Om Prakash(P.W.9) and Nihal Chand(P.W.11), who had deposed that the accused-appellant had accepted his guilt of having murdered his brother.

86. A simple reading of the statements of these two witnesses unravels that when they posed the question to the accused-



appellant, "what have you done?", then, the appellant purportedly accepted the guilt of having murdered his brother.

87. The statements given by these witnesses (Om Prakash and Nihal Chand) to the police under Section 161 Cr.P.C. appear to be tutored, if not motivated, if they are read in juxta-position with their statements produced in evidence by the accused-appellant (Exhibit-D/1 and D/2).

88. In the case of **Sahadevan and Anr. v. State of Tamil Nadu** reported in **(2012) 6 SCC 403**, Hon'ble the Apex Court while considering the admissibility and evidentiary value of extra judicial confession, after referring to various judgments, observed as under:

15.1. In Balwinder Singh v. State of Punjab 1995 Supp (4) SCC 259 : 1996 SCC (Cri) 59 this Court stated the principle that: (SCC p. 265, para 10)

10. An extra-judicial confession by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where an extra-judicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance.

X X X X

15.4. While explaining the dimensions of the principles governing the admissibility and evidentiary value of an extra-judicial confession, this Court in State of Rajasthan v. Raja Ram : (2003) 8 SCC 180 : 2003 SCC (Cri) 1965 stated the principle that: (SCC p. 192, para 19)

19. An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made.



89. In the case of **Sunil Rai @ Paua & Ors Vs. Union Territory, Chandigarh** reported in **2011 (12) SCC 258** which has been relied upon by the learned counsel for the appellant, the Hon'ble Supreme Court has observed thus:

27. Admittedly, the alleged confessional statement was oral and it was not recorded in writing. Admittedly, Sunil Rai had no personal acquaintance, much less any intimacy with PW-10. An extra judicial confessional statement made orally before a person with whom the maker of the confession has no intimate relationship is not a very strong piece of evidence and in any event it can only be used for corroboration (See S. Arul Raja v. State of Tamil Nadu, (2010) 8 SCC 233 paragraphs 48-56).

X X X X

28. For the aforesaid reasons we find it impossible to rely upon the evidence of PW-10 and, thus, goes the extra judicial oral confession by Sunil Rai.

90. According to us, even if the statement of these witnesses are believed, then it is required to be tested on the anvil of contemporaneous fact situation. It is noteworthy that statement accepting his guilt was purportedly made by the accused-appellant on 05.06.2014, when he was brought to the house of the deceased by the police for the purpose of recovery of the axe and clothes. According to us, such answer or response even if given, cannot be termed as extra-judicial confession for following multiple reasons: (i) the accused-appellant had no proximity of relationship with Om Prakash(P.W.9) and Nihal Chand(P.W.11) for which he would bring his heart out; (ii) there was no reason for the accused-appellant to have confessed his felony in presence of so many known and unknown persons; (iii) the circumstances in which the purported confession was given and lastly; (iv) at the time of confessing, the appellant was in police custody.



91. For the reasons enumerated in preceding paragraph, we are of the view that the trial court's conclusion about the extra-judicial confession is in the teeth of the settled position on the aspect of extra-judicial confession.

(H) Motive:

92. The prosecution had brought Subhash(P.W.2) and Om Prakash(P.W.9) in the witness box, both of whom deposed that there was a dispute between the deceased and the accused - appellant. They deposed that the deceased was unmarried and both the brothers were having strained relationship and that the deceased never used to go to the appellant's house and also that despite being a bachelor, the deceased would neither go to the house of the appellant nor would he ever have a cup of tea at his house.

93. It is to be noted that these two witnesses and some more witnesses testified that the deceased had given his share of the land to the accused-appellant for cultivation (*Ijara*), but no ocular evidence of pendency of any case or suit between these two brothers has been brought on record. Even the Investigating Officer in his cross-examination has accepted that no case was pending between the accused-appellant and the deceased.

94. On the basis of evidence and the material available on record, we are of the view that maybe, the witnesses have been able to germinate a seed of suspicion in the mind of the Court that because of the strained relationship, the appellant could have murdered his brother, but such suspicion about the reason to murder cannot be taken as the motive. There is a thin, yet clear line of distinction between a reason and a motive. Motive



presupposes a very high degree of possibility, due to which a normal person can go to the extent of taking away somebody's life.

95. We feel that solely because of the fact that two brothers were not in talking terms, it cannot be presumed that being disgruntled of such relationship, one would commit a heinous crime of killing his own brother. There is no instance or evidence of quarrel, scuffle or pending litigation. Motive pre-supposes pre-meditated mind, for which, an accused can plan and execute such plan to achieve his object. In our opinion, what has been produced by the prosecution before the Court, at the best can be a reason to suspect, but the same cannot be brought within the ambit of motive so as to convict the appellant.

96. A gainful reference of a recent judgment of the Hon'ble Supreme Court in the case of **Ramanand alias Nandlal Bharti Vs. State of Uttar Pradesh** (2022 SCC OnLine SC 1396) can be made here, wherein while elaborating the role of motive in cases based on circumstantial evidence, the court had differentiated between suspicion and motive and observed thus:

87. It is a settled principle of criminal jurisprudence that in a case based on circumstantial evidence, motive for committing the crime on the part of the Accused assumes greater importance. This Court in various decisions has laid down the principles holding that motive for commission of offence no doubt assumes greater importance in cases resting on circumstantial evidence than those in which direct evidence regarding commission of offence is available. It is equally true that failure to prove motive in cases resting on circumstantial evidence is not fatal by itself. However, it is also well settled and it is trite in law that absence of motive could be a missing link of incriminating circumstances, but once the prosecution has established the other





incriminating circumstances to its entirety, absence of motive will not give any benefit to the Accused.

88. Having regard to the nature of the evidence on record, there is something to indicate that the Accused Appellant had illicit relationship with Manju and wanted to settle in life marrying Manju. As noted above, in the past Accused Appellant had got engaged with Manju and was on the verge of getting married. At the relevant point of time when the Accused Appellant got engaged with Manju, it appears that one and all including the deceased Sangeeta were consenting parties. There is nothing on record to indicate that at the time of engagement of Accused Appellant with Manju, the deceased Sangeeta had raised hue and cry or had opposed such decision of her husband. Of course, this is something which is very personal. If at all we believe the illicit relationship of the Accused Appellant with Manju, then it is possible that the deceased Sangeeta might be an absolutely helpless lady and could not have done anything in that regard. However, the moot question is should this motive by alone be held sufficient to convict the Accused Appellant for the alleged crime and sentence him to death.

89. In the case of Sampath Kumar v. Inspector of Police Krishnagiri, (2012) 4 SCC 124, decided on 02.03.2012, this Court held as under:

29. In N.J. Suraj v. State: (2004) 11 SCC 346 : 2004 SCC (Cri) Supp 85] the prosecution case was based entirely upon circumstantial evidence and a motive. Having discussed the circumstances relied upon by the prosecution, this Court rejected the motive which was the only remaining circumstance relied upon by the prosecution stating that the presence of a motive was not enough for supporting a conviction, for it is well settled that the chain of circumstances should be such as to lead to an irresistible conclusion, that is incompatible with the innocence of the Accused.

30.

31. In any event, motive alone can hardly be a ground for conviction.

32. On the materials on record, there may be some suspicion against the Accused, but as is often said, suspicion, howsoever strong, cannot take the place of proof.





31. Suffice it to say although, according to the Appellants the question of the Appellant Velu having the motive to harm the deceased Senthil for falling in love with his sister, Usha did not survive once the family had decided to offer Usha in matrimony to the deceased Senthil. Yet even assuming that the Appellant Velu had not reconciled to the idea of Usha getting married to the deceased Senthil, all that can be said was that the Appellant Velu had a motive for physically harming the deceased. That may be an important circumstance in a case based on circumstantial evidence but cannot take the place of conclusive proof that the person concerned was the author of the crime. One could even say that the presence of motive in the facts and circumstances of the case creates a strong suspicion against the Appellant but suspicion, howsoever strong, also cannot be a substitute for proof of the guilt of the Accused beyond reasonable doubt.

90. Thus, even if it is believed that the Accused Appellant had a motive to commit the crime, the same may be an important circumstance in a case based on circumstantial evidence but cannot take the place as a conclusive proof that the person concerned was the author of the crime. One could even say that the presence of motive in the facts and circumstances of the case creates a strong suspicion against the Accused Appellant but suspicion, howsoever strong, cannot be a substitute for proof of the guilt of the Accused beyond reasonable doubt.

(I) Legality of Arrest:

97. According to this Court, fundamental rights guaranteed under Constitution enjoin upon an Investigating Officer that before arresting a person, he should have substantial oral or ocular evidence to form a belief, which should be more than a simple doubt or apprehension that such person is involved in the offence. After forming such opinion, the investigating officer should be satisfied that such person's arrest is necessary for the

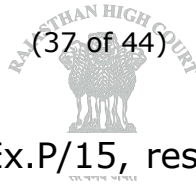


purpose of furthering the investigation and in order to ensure recovery of the requisite evidence linking him with the offence.

98. True it is, that at the stage of arresting a person, the Investigating Officer need not have concrete material or definite information and on the basis of reasonable belief, he can arrest a person, but such belief should be based on sound and prudent reasoning and not on the basis of suspicion or surmises.

99. On perusal of the record including the statements of witnesses, it clearly turns out that the appellant was apprehended by the Investigating Officer on 03.06.2014 whereas statements under Section 161 Cr.P.C. of almost all the witnesses were recorded after his arrest. That apart, as per the statements recorded by such date (03.06.2014), the only fact that had come to fore was, that both brothers were estranged. The appellant was therefore, arrested purely on surmise. It is a different matter, that thereafter, pursuant to the information given under Section 27 of the Evidence Act, purported recoveries were made.

100. By 03.06.2014, the investigating officer had recorded the statement of Mangtu Ram Nayak(P.W.6) and Devi Lal Vishnoi(P.W.7) – the neighbors of the appellant. These neighbors in their statements given under Section 161 Cr.P.C. had simply told that when they went to the house of the deceased at the request of the appellant, they found that the appellant's behavior was not normal and that they felt that the appellant was aware of the person who had murdered the deceased. The statements of both these persons given under Section 161 Cr.P.C. have been



produced as Ex.P/14 and Ex.P/15, respectively. The relevant part of the statement is reproduced hereunder :-

Ex.P/14 (Statement of Mangtu Ram) :

"... .. विनोद व राजेश की आपस में नहीं बनती थी इस कारण वह उसके घर भी नहीं आता था ना ही उसके घर से कोई चीज मंगवाता था वह अविवाहित था तो अक्सर अपनी भुआ के घर जाकर रोटी खाता था या लेट हो जाता तो मेरे घर से रोटी मंगवाकर खाता था।... .."

Ex.P/15 (Statement of Devi Lal) :

"... .. राजेश तथा विनोद की आपस में बोलचाल नहीं थी इस कारण वह विनोद के घर नहीं आता जाता था ना ही उसके घर से कोई चीज खाने पीने की लेकर जाता था"

101. A perusal of these statements show that there is hardly anything on the basis of which one could come to a conclusion or form an opinion that the appellant was the person who had murdered the deceased.

102. It will not be out of place to reproduce the relevant part of the charge-sheet, which contains the reason for arresting the appellant on 03.06.2014 :

"... .. दिनांक 2.06.2014 मुकदमा हाजा का अनुसंधान मन एसएचओ द्वारा शुरू किया जाकर पूर्व में मामूर मुखवीर से सम्पर्क कर बातचित की तथा तमाम स्थिति व बिन्दुओं के बारे में विस्तृत जानकारी हासिल की गई। मृतक के पड़ोसी मंगतूराम नायक व देवीलाल बिश्नोई से तपतीश व ब्यान लिये जाकर इतला देहिन्दा विनोद कुमार जो मृतक का सगा भाई है से पूछताछ करने कर्ता जूर्म को इकबाल करने पर विनोद कुमार को जरिये फर्द गिरफ्तार किया जाकर फर्द शामिल फाईल की गई।"

103. A perusal of the aforesaid part of the charge-sheet clearly shows that it was only on the basis of the statements of these two persons viz. Mangtu Ram (P.W.6) and Devi Lal (P.W.7), the



Investigating Officer had arrested the accused-appellant. The arrest was made on 03.06.2014 and there was no incriminating substance or credible information or reasonable ground to even suspect, which could have prompted the investigating officer to arrest the appellant.

104. If the statements of the above mentioned two persons recorded under Section 161 Cr.P.C. on 03.06.2014 are taken into consideration, no man with reasonable prudence can form a belief that the appellant (the brother of the deceased) had murdered the deceased.

105. It is noteworthy that entire material or evidence, may it be in the form of statements of other villagers or Pushpa(P.W.14) (being the sister of the deceased), came to be received much after the appellant's arrest (on 03.06.2014). Statements of remaining persons were recorded between 5th / 06th June and 20th June. Curiously enough, most of the prosecution witnesses came in the witness box and turned hostile. Hence, the appellant's arrest was in utter violation of provisions of Section 41(i)(ba) of the Code of Criminal Procedure. According to us subsequently gathered evidence cannot justify or render an otherwise illegal and arbitrary arrest as legal.

106. As the arrest itself was illegal, the possibility that the Investigating Officer, for reasons best known to him, has created or cooked up evidence in order to inculcate the appellant cannot be ruled out, in the backdrop of other striking features as noticed herein above.

(J) Other Arguments on behalf of appellant:

**(i) Presence of more than one person:**

107. Mr. Choudhary, learned senior counsel pointed out that the site inspection report reveals that playing cards and various other things were scattered all over the floor and argued that the possibility that someone had an altercation while playing cards with the deceased and in this process he had been murdered, cannot be ruled out. According to us, this argument of Mr. Choudhary does not hold any water because presence of cards or things lying on the floor do not necessarily mean that more than one person other than the deceased were present.

108. The presence of three scratch marks which have been reported to be fresh cannot be taken as a conclusive proof of the fact that three persons had broken into the house of deceased, but such marks do create a doubt in the mind about the possibility of presence of more persons other than the deceased.

(ii) Accused himself reported the incident:

109. Other argument advanced by learned senior counsel that it was the appellant who had immediately reported the incident to the police and therefore, he is innocent, does not appeal much to us. The conduct of reporting to the police about the incident cannot be taken as an evidence of innocence. After committing an offence a person may well inform/complain to the police so as to distract the police and divert its attention or get the focus away from him.

(iii) Size of the injury:

110. As per the appellant's counsel, the recovery memo and the statement of Investigating Officer show the size of axe as 11.5



cms, whereas the size of the wound as given in the injury report and as per the statement of Doctor(P.W.12) is 1 inch and had the infliction been made by the axe that was recovered from the appellant, the size of injury would have been equal to approximate size of the iron part of the axe.

111. We may observe that though the statement of Doctor(P.W.12) gives an impression that there were four injuries on the right side of the head of deceased and each of the injury is about one inch in length, inflicted with sharp edged weapon and grievous in nature, but a careful reading of the statement suggests that such impression is on account of overwriting or typographical error. Otherwise, a careful glance over the injury report reveals that injury No.4 is of 4' x 2½' x 2' inch.

112. According to us, the injury No.4 which is four inch (about 10.2 cms) in length can be caused by the axe that was recovered from the appellant and therefore, simply because other three injuries are smaller in size (1½; 1 and 1), it cannot be said that the injuries found on the body of the deceased do not match with the weapon of offence that had been recovered.

(iv) No blood stains on wall :

113. This Court finds some force in the contention of Mr. Choudhary that if the shirt of the accused-appellant when recovered, was found to be blood stained from the front side, the wall of the house of the deceased which is about 5 to 6 ft. and from which wall, the investigation claims that the accused-appellant after committing murder had fled, cannot remain clean or without blood marks. We feel that if the story projected by the



prosecution that the accused had fled after scaling the boundary wall and that while murdering the deceased, the blood got splashed and the appellant's shirt and pants got blood stains, is correct then, definitely such marks/stains of blood on the clothes would certainly leave some imprints on the boundary wall, which was painted with mud/sand.

114. As a parting remark this Court would like to observe that in the extant case, without any incriminating material or evidence, pointing towards the culpability of the accused-appellant, the arrest has been made and evidence has been collected after the appellant-accused was arrested. Furthermore, on the basis of so called information given under Section 27 of the Evidence Act, not only the recovery has been effected even the confessional statement has been obtained, while the appellant was in custody. The possibility that the appellant was coerced to confess and recovery of the clothes and the axe was planted cannot be negated, particularly when the blood group of six articles collected and recovered did not match (except in case of pants of the accused).

(v) Delay in recording statements :

115. We are not much convinced with the argument which, Mr. Choudhary had raised though feebly, about the delay in recording the statements. Having regard to the factual matrix, 20-30 days' delay in recording the statement of witnesses viz. Mahaveer (PW.15) and Ram Chandra (PW.16), cannot be said to be fatal to the prosecution case.



(vi) Suppression of report of Dog Squad :

116. It is not in dispute that the investigating officer had called the dog squad at the scene, its report was however not produced for the reasons best known to him. Withholding of report of dog squad on the one hand raises a doubt about the fairness of the investigation and on the other hand lends support to the hypothesis that if the appellant was involved in the murder of the deceased, the trained dogs ought to have identified him. Such thought gives us another reason to give benefit of doubt to the appellant.

CONCLUSION

117. Consequent to the analysis of factual matrix and after wading through the oral and ocular evidence, we hold that the prosecution has not been able to satisfactorily prove the requisite ingredients that are required in the case of a conviction based on circumstantial evidence, as has been culled out by Hon'ble The Supreme Court in the case of **Sharad Birdhichand Sarda** (supra).

118. There are yawning gaps and lacunae in the prosecution's case as set out hereinfra:

- (i) Nobody had lastly seen the accused with the deceased – he was found strolling outside the house of the deceased, which is also outside the house of the accused-appellant himself;
- (ii) the prosecution has failed to satisfactorily prove the motive with the accused appellant to murder the deceased, at the best a feeble suspicion has been raised. Such suspicion is not enough to support the conviction;





(iii) the blood group of the deceased did not match with the blood group of the blood stains found on the shirt of the appellant and the axe that was recovered at his instance;

(iv) on 03.06.2014, when the appellant was arrested, there was no material pointing towards his involvement in the offence;

(v) the confessional statement has been given and recovery has been affected, after an illegal and arbitrary arrest;

(vi) the so called admission of fault does not amount to extra-judicial confession and also because such extra-judicial confession was given in the police custody;

(vii) most of the statements and evidence furnished with the charge-sheet were collected after the appellant's arrest;

(viii) the presence of three scratch marks on the boundary wall of deceased's home, which is plastered with mud is suggestive of three or more than one person fleeing from the scene;

(ix) the absence of any blood mark on the boundary wall remains unexplained, given that the front side of the shirt and pants of the appellant were stained with blood;

(x) though the appellant was present when the dog squad was called, but the trained dogs did not identify the appellant; and

(xi) the investigating officer did not place on record the report of the dog squad.

119. In view of the aforesaid reasons and lapses in the prosecution, we feel that the rings of chain of evidence are not properly tied – "they are tied by a slender thread, fixed on a weak fulcrum and rested on slippery ground, that are neither able to



withstand the force of appellant's arguments nor are they capable to clear the judicial scanning with the lens of legal principles".

120. According to us, the prosecution has failed to prove that it was the appellant and the appellant alone, who had murdered the deceased - Rajesh and no one else.

121. The present criminal appeal is, therefore, allowed. The judgment dated 22.09.2017 passed by the learned Additional Sessions Judge, Anoopgarh, Camp Gharsana, District Sriganganagar is quashed and set aside.

122. Appellant Vinod Kumar S/o Shri Omprakash is acquitted of all the charges. He is in custody. He shall be released forthwith, if not wanted in any other case.

123. However, keeping in view the provisions of Section 437-A Cr.P.C., the acquitted accused appellant is directed to furnish a personal bond in the sum of Rs.40,000/- and a surety bond in the like amount before the learned trial court, which shall be effective for a period of six months to the effect that in the event of filing of a Special Leave Petition against the present judgment on receipt of notice thereof, the appellant shall appear before the Supreme Court.

(RAJENDRA PRAKASH SONI), J

(DINESH MEHTA), J

ArunV/-