

(2014) 11 CAL CK 0088

Calcutta High Court

Case No: CRA 138 of 2008 and CRR 844 of 2008

Mohan Singh

APPELLANT

Vs

The State of West Bengal

Prayag Dutt Tiwari Vs Mohan
Singh

RESPONDENT

Date of Decision: Nov. 26, 2014

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 164
- Evidence Act, 1872 - Section 145
- Penal Code, 1860 (IPC) - Section 201, 302, 34, 364

Citation: (2015) 1 CALLT 296 : (2015) 2 CCR 192 : (2015) 1 CHN 609 : (2015) 3 Crimes 81

Hon'ble Judges: S. Chatterjee, J; Nishita Mhatre, J

Bench: Division Bench

Advocate: Sekhar Bose, Senior Advocate, Sudipto Moitra, Souvik Mitter, Ashok Das, Biplab Das and Vijay Verma, Advocate for the Appellant; Manjit Singh, Public Prosecutor and Pawan Kumar Gupta, Advocate for the Respondent

Judgement

Nishita Mhatre, J.

A headless body of a male was found in a train at Sealdah station on 7th July, 2004 at about 10:15 p.m. The hands of the person killed were tied behind his back with a white shirt; his lower limbs had been severed from the body. The head of a man was found in a polythene bag beside the body. At about 11:50 p.m. an FIR was lodged by the In-charge, Sealdah G.R.P.S. mentioning the discovery of the dead body of an unknown person in the Jammu Tawai Express which arrived at Sealdah about 8 p.m. that evening. Accordingly, a case under Sections 302 and 201 of the IPC was registered against an unknown person.

2. On the same day i.e. on 7th July, 2004 a complaint was lodged in Faizabad by Prayag Dutt Tiwari, the son of Jagadish Prasad Tiwari, complaining that his father

had not returned home after leaving for work as usual at about 8:45 a.m. on 6th July, 2004. It was also mentioned that despite searching for Jagadish Prasad Tiwari over a long period of time there was no trace of him. The complaint was registered as G.D. No. 24 on 7th July, 2004 at 10:30 a.m.

3. On investigation, the police found photographs in the pocket of the shirt which was used to tie the hands of the deceased. These photos were found in an envelope on which the name of Mohit Studio, Faizabad was printed. The police then went to Faizabad, U.P. to investigate further. They were informed at the studio that photographs were those of one Jagadish Prasad Tiwari. The body and the head found in the train were photographed separately and after placing the head on the body appropriately. The photographs were taken to Faizabad where the police learnt from the sons of Jagadish Prasad Tiwari that the dead body was that of their father. On further investigation it was learnt that Jagadish Prasad was last seen together with the appellants and one Marutendar Pratap Singh on 6th July, 2004 at about 10:15 a.m. travelling in a jeep. On the basis of the information received and the investigation conducted, the police arrested the appellants and Marutendar Pratap Singh who later absconded and the case against him has been filed. The appellants claimed to be tried and accordingly the case was committed to the Court of the Additional Sessions Judge, Fast Track 3rd Court being Sessions Trial No. 3(11)2006 arising out of G.R.P.S. case No. 81 of 2004 dated 7th July, 2004. The appellants have been convicted after the testimony of 37 witnesses was recorded. They have been convicted under Sections 364, 302, 201 and 34 of the IPC. Each of them has been sentenced to suffer imprisonment for life and to pay a fine of Rs. 5000/- (Rupees five thousand only) and in default of payment of fine, to suffer simple imprisonment for six months for the offence committed under Section 302 read with Section 34 of the IPC. In respect of the offence punishable under Section 364 read with Section 34 of the IPC, they have been sentenced to suffer rigorous imprisonment for seven years and to pay a fine of Rs. 5000/- (Rupees five thousand only) each; and in default of payment of fine, to suffer simple imprisonment for six months. They have also been sentenced to suffer rigorous imprisonment for three years and have been fined Rs. 5000/- (Rupees five thousand only), each; in default of payment of such fine, to suffer rigorous imprisonment for six months for the offence punishable under Section 201 read with Section 34 of the IPC. All the sentences have been directed to run concurrently.

4. The learned Counsel for the appellants has argued that the case rests entirely on circumstantial evidence and is based on the theory of "last seen together". He has pointed out that the prosecution has relied on the testimony of PWs 15 and 16 to establish the theory in this case. He submitted that a strange practice was adopted by the trial Court of allowing the prosecution to plug the loopholes in the evidence by re-examining the witnesses after its own arguments were concluded and those of the defence were partly heard. The learned Counsel submitted that despite this indulgence shown by the trial Court to the prosecution for re-examining the

witnesses at such a late stage, the prosecution has not been able to prove its case against the appellants. The learned Counsel submitted that the evidence on record may establish that the deceased was last seen in a jeep with the appellants on 6th July, 2004 by PW 15. However, the statement of PW 15 was recorded under Section 164 of the Cr.P.C. on 10th September, 2004 more than two months after the body was discovered in the Jammu Tawai Express at Sealdah. The statement of Om Prakash Tiwari, the son of the deceased, was recorded similarly under Section 164 of the Cr.P.C. on 18th September, 2004. The learned Counsel pointed out that the first recorded statement of these witnesses did not implicate the appellants at all. He further submitted that if the theory of last seen together is to be made applicable in this case, the time lag between the moment the deceased was seen last with the appellants and the point of time his body was found in the Jammu Tawai Express is too huge. The learned Counsel further submitted that there is no evidence on record to indicate that the appellants travelled in the Jammu Tawai Express with the deceased although the charge framed against the appellants is that they murdered the deceased between 6th July and 7th July, 2004 between Uttar Pradesh and Sealdah. He then submitted that there are too many missing links in the story of the prosecution and therefore the case must fail. It has also been argued on behalf of the appellants that there was no evidence to prove that the appellants had either abducted or kidnapped Jagadish Prasad Tiwari. He submitted therefore that the appellants had been falsely implicated in the present case.

5. To counter these arguments raised on behalf of the appellants, the learned Public Prosecutor submitted that there has been no false implication in this case. It was only after the son of the deceased identified the photos contained in the envelope of Mohit Studio and the photos of the head and torso of the victim that Marutendar Pratap Singh was arrested and on interrogating him he named the appellants. Marutendar is absconding and has not faced the trial. The learned Public Prosecutor submitted that the motive for killing Jagadish Prasad is evident from the testimonies of PWs 12, 14, 17, 19, 26 and 27. He contended that previous enmity and the reluctance on the part of Jagadish Prasad to settle the pending litigation between Marutendar on the one hand and the appellants on the other in respect of landed property had caused the appellants to take this ghastly step. The learned Counsel pointed out that Jagadish Prasad had been shot and then his body was placed in the train. He argued that considering the timing of the train and its arrival at Faizabad it was possible for the body to be placed in the train after the victim was shot. The Post-mortem report, according to the learned Counsel, pitches the time of the incident as 36 to 72 hours prior to the post-mortem examination which was conducted at 3:30 p.m. on 8th July, 2004. The learned Public Prosecutor therefore submitted that considering the evidence on record there can be no doubt that the appellants were involved in the crime and it was because of their hostilities with Jagadish Prasad that they killed him.

6. With the aid of the learned Counsel for the parties we have scanned the evidence on record. There is no dispute that a mutilated body and the head of a man were found in the Jammu Tawai Express when it reached Sealdah station. The body was seized by PW 2 and an FIR was lodged by PW 1. Articles which were in the compartment along with the body were also seized. On receipt of the complaint, PW 7 started G.R.P.S. case No. 81 on 7th July, 2004 under Sections 302 and 201 of the IPC. The mutilated body and the head which was kept separately in a polythene bag were photographed by PW 8. They were sent for post mortem examination. PW 11 who conducted the post mortem examination opined that the death was due to a gunshot injury and that the other injuries on the body and the mutilation had occurred post mortem. The witness has conducted the post mortem examination from 3:30 p.m. on 8th July, 2004. He opined that the death had occurred about 36 to 72 hours prior to the examination. This would mean that the death occurred between 3:30 a.m. on 7th July and 3:30 p.m. on 5th July, 2004.

7. In order to prove that the body was that of Jagadish Prasad Tiwari, the prosecution has relied on the testimony of the first Investigation Officer-PW 36. He has stated that he went to Faizabad with the photographs contained in the envelope of Mohit Studio which was found in the pocket of the shirt used to tie the hands of the victim. He categorically stated that though the photos of the dead body had been received between 7th July and 11th July, 2004, he had not taken them to Faizabad as they were seized only on 2nd September, 2004. The Investigating Officer, examined as PW 37, who took over the investigation from the earlier Investigating Officer on 9th August, 2004, has stated that he seized the photographs of the dead body from the photographer.

8. The prosecution has then relied on the testimony of the owner of Mohit Studio-PW 23, who informed the police that the photographs contained in the envelope of his studio were those of Jagadish Prasad Tiwari.

9. The sons of the victim, namely, PWs 12, 14, 27 and 29 were examined in support of the prosecution case. PW 27 did not initially mention anything about the identity of the body found in the train at Sealdah. As mentioned earlier he was recalled on 11th July, 2004, after the arguments of the prosecution were over and the defence had completed half its arguments. He stated on oath that he was able to identify the photos of the dead body at Ext. 6 to be those of his deceased father. On recall, this witness has admitted in his cross-examination that he had not been shown the photographs of the dead body in Faizabad and that he saw them for the first time on 15th July, 2004 at Sealdah. The doctor who performed the post mortem, i.e., PW 11, has stated in his cross-examination that the relatives of the person who was dead did not identify the body till 16th July, 2004. He has denied the suggestion that the head and torso were not of the same person and based his opinion on the fact that the head fitted over the mutilated part of the neck. It must be noted here that no other forensic examination was done to ascertain whether the torso and the

head were of the same person.

10. Assuming the body was that of Jagadish Prasad Tiwari based on the identification by his son PW 27, we will now consider whether the appellants had any role to play in causing his death.

11. Jagadish Prasad Tiwari was a private typist working in the Faizabad Tehsil Court. There is evidence on record to show that it was his practice to reach the Court in the morning by 10 o'clock and to leave after the Court hours. The prosecution has relied on the evidence of some advocates, namely, PWs 20 and 21 and the law clerk PW 22, the Bar Association peon PW 25, to place on record the fact that on 6th July, 2004 the deceased had reached the Court in time. He had then taken out his type writer in order to start his day's work. That type writer was found chained as usual to the desk even at 6 o'clock in the evening when people started leaving the Court premises. These facts have been placed on record through the testimonies of the aforesaid witnesses. Therefore, the fact that Jagadish Prasad Tiwari reached the Faizabad Tehsil Court on 6th July, 2004 in the morning to attend his work has been proved.

12. The prosecution has examined some witnesses to prove that the victim was last seen in the company of the appellants and therefore they were responsible for his death. PW 13 has stated in his deposition that he met Jagadish Prasad at 10:05 a.m. on 6th July, 2014. Marutendar Pratap Singh @ W came and spoke to Jagadish Prasad. They both left soon thereafter and went walking towards Bikash Bhavan. According to this witness he was present at the place where Jagadish Prasad had his seresta till 12 noon. He heard of Jagadish Prasad's death on 11th July, 2004.

13. The other witness who the prosecution had relied on to prove theory of last seen together is PW 15. He claimed to have known Jagadish Prasad for over 9/10 years. He has stated that on 6th July, 2004 at about 10:15 a.m. when he was going towards Bikash Bhaban, Faizabad, he saw a jeep in which Jagadish Prasad was sitting on the rear seat with some unknown persons. He saw the appellants sitting beside the driver of the jeep. He claimed that he saw the jeep going towards Lucknow. The witness has identified the appellants in the Court. He has tried to explain the reason for the delay in informing the police that he had seen the deceased accompanying the appellants by stating that he left for Delhi on 8th July, 2004 for his daughter's admission. When he returned from Delhi after 20 to 25 days he informed Jagadish Prasad's son Om Prakash Tiwari-PW 14 of having seen his father in the company of the appellants in the jeep on 6th July, 2004. The witness has conceded in his cross-examination that he did not describe either the driver or the others sitting with Jagadish Prasad in the jeep as the police did not seek this information from him.

14. The prosecution has examined PW 16, a medical representative, known to Jagadish Prasad. He also claimed to have seen Jagadish Prasad riding pillion on the

scooter of Marutendar Pratap Singh. He then saw them getting off the scooter and boarding the jeep in which the appellants were sitting. The witness has stated that both Jagadish Prasad and Marutendar sat on the rear seat of the jeep along with two or three other persons. The jeep was then driven towards Lucknow. The witness has agreed in his cross-examination that the police did not require from him any information regarding the description of the other occupants of the jeep. The witness claimed to have seen Jagadish Prasad both on the scooter and in the jeep which was parked outside Bikash Bhaban because he was standing in front of that building on 6th July, 2004.

15. The next witness who the prosecution has relied on to substantiate their case against the appellants is PW 18. This witness has stated that on 6th July, 2004 he met Jagadish Prasad at 10 a.m. in the Court to get a document typed. According to this witness a person of around 27 or 28 years of age approached Jagadish Prasad and started talking to him. Jagadish Prasad addressed this person as "W". Jagadish Prasad told the witness to wait for him and left the place with "W" on a scooter. As he did not return, the witness left the premises. From the testimony of this witness the prosecution has sought to establish its case that Jagadish Prasad was last seen in the company of the appellants.

16. A careful analysis of this evidence would indicate that PW 15 did not disclose the fact that he had seen the deceased and the appellants together on 6th July, 2004 for more than 20 to 25 days. The pretext was that he was required to go to Delhi on 8th July, 2004 and returned only after 20 to 25 days. The statement of this witness has been recorded under Section 164 of the Cr.P.C. on 10th September, 2004. He learnt of the abduction of Jagadish Prasad when he read the newspaper the next day, i.e., on 7th July, 2004. However, this witness did not find it necessary to inform the police or the family of Jagadish Prasad that he had seen the appellants with Jagadish Prasad in the jeep. He left for Delhi only on 8th July, 2004. Therefore, there was ample time for him to inform the concerned persons. Surprisingly PWs 15 and 16, who claimed to have seen Jagadish Prasad in the jeep with the appellants as well as with the absconding accused, have not described either the driver of the jeep or the other occupants. The Investigating Officers made no effort to ascertain the whereabouts of either the driver or the other occupants of the jeep. While PW 15 talks about the presence of only the appellants in the jeep along with Jagadish Prasad, PW 16 mentions the presence of the absconding accused as well in the jeep. PW 13 has spoken about Jagadish Prasad leaving the Court premises with the absconding accused and walking towards Bikash Bhaban. PW 18 also corroborates the version of PW 13. Both these witnesses make no mention about the appellants. It is thus difficult to accept the version of the prosecution that the appellants, having been seen in the company of Jagadish Prasad just before his death, were responsible for his death. Admittedly the jeep was in motion when the witnesses saw it. Therefore they would have been able to get only a fleeting glimpse of the persons travelling in it. The prosecution has then attempted to suggest that the

victim had not been seen again after his departure with the appellants in the jeep on 6th July, 2004. This fact by itself cannot lead to the inference that it was the appellants alone who were responsible for the death of the victim. It is not possible to connect the appellants to the crime with certainty when there were other persons in the jeep, including the driver.

17. If the theory of last seen together is to be accepted then there should be no other persons in the company of the accused and the victim when they are seen together for the last time. In the present case witnesses have seen the absconding accused walking with Jagadish Prasad towards Bikash Bhaban, and later seen him in the jeep with Jagadish Prasad and the appellants. The driver of the jeep and two other persons were also in the jeep. Thus it was not just the appellants who were last seen together with the deceased. Om Prakash Singh, the son of Jagadish Prasad, has in his statement recorded under Section 164 of the Cr.P.C. stated that he was informed by one Anand Kumar Singh on 8th July, 2004 at 8.15 p.m. that Jagadish Prasad was detained by him and his family at the residence of his aunt in Faizabad. The body which was found in the train may not have been that of Jagadish Prasad as it was found on 7th July, 2004. It was much later, about 5 days after he was missing, that Jagadish Prasad's family learnt about him allegedly being in the company of the appellants on 6th July, 2004 in a jeep.

18. The next argument on behalf of the prosecution was that there was no reason for the witnesses to implicate the appellants, falsely. The learned Counsel for the State has submitted that the evidence on record establishes the fact that there was previous enmity between Jagadish Prasad and the appellants and also the absconding accused. In support of this submission that the appellants had a motive to commit the crime reliance has been placed by the prosecution on the evidence of Jagadish Prasad's sons, i.e., PWs 12, 14 and 27. PW 12 has mentioned that there were civil cases pending between the appellants on the one hand and Ashok Tiwari and Marutendar Pratap Singh, i.e., the absconding witness on the other. He has stated that his father used to look after these cases. Om Prakash Tiwari, PW 14, one of the sons of Jagadish Prasad, claimed that his father told him that a case was pending between the appellants and Bhabani Prasad, Ram Kumar Singh and others, which his father was taking care of on behalf of Ram Kumar and others. Ram Kumar Singh is the father of the absconding accused. The statement of this witness had been recorded under Section 164 of the Cr.P.C. on 18th September, 2004. The contents of this statement depict a completely different story from the one that the prosecution has tried to portray. He has stated therein that there were disputes between his father and Bijay Kumar Singh, a resident of his village. He has stated further that the sons of Bijay Kumar threatened to murder Jagadish Prasad. He has mentioned that Anand Kumar Singh, the son of Bijay Kumar Singh, was arrested pursuant to the complaint lodged by him because he was informed by Anand Kumar that Jagadish Prasad had been detained illegally at the residence of his aunt. However, in his cross-examination in the Court this witness has sought to deny his

version mentioned in the statement recorded under Section 164 of the Cr.P.C. PW 27 has also spoken about the pending litigation between the appellants and others including the absconding accused. He has stated categorically that his father was looking after the case on behalf of the absconding accused and some other persons. This witness has conceded that the family is on inimical terms with the family of one Ashwini Kumar Singh.

19. Evidence of the advocate representing the father of the absconding accused has also been led. He was examined as PW 26. He has stated that a suit for specific performance had been filed in respect of the certain plots of land and Jagadish Prasad was looking after the case in respect of some persons who were defendants while he was appearing for the plaintiff, i.e., the father of the absconding accused. The witness has stated that according to him Jagadish Prasad continued to assist the absconding accused even after the death of his father in the pending litigation. PW 19 has spoken about the pending litigation between himself and the appellants and that Jagadish Prasad used to represent him. He has also mentioned that the absconding accused and two other persons are the plaintiffs in the same suit while the appellants were the defendants.

20. This evidence on record merely suggests that there was litigation pending between the appellants on the one hand and the absconding accused on the other. Jagadish Prasad was overseeing the litigation for the absconding accused. As mentioned earlier pending civil litigation could not have been a sufficient motive for the appellants to allegedly kill the deceased. Besides the evidence on record demonstrates that several persons who were hostile towards Jagadish Prasad.

21. The learned Counsel for the State argued that the train reached Faizabad at a time when it would have been possible for victim's body to be placed in the train after he was fatally wounded with a firearm. In our opinion, this submission is of no consequence as in a criminal case an order of conviction cannot be based on probabilities. As rightly pointed out by Mr. Shekhar Basu, the charge against the appellants was that they had murdered Jagadish Prasad Tiwari in the train between Faizabad, Uttar Pradesh and Sealdah Railway station. However, there is no material on record to prove that the appellants actually travelled in the train. As stated earlier the charge was not that the appellants had killed Jagadish Prasad in Faizabad and then placed his body in the train, but that they had murdered him in the train. This charge has not been proved. It was also argued on behalf of the prosecution that the appellants could not give an explanation for their presence in the jeep and therefore the case of the prosecution that they were present along with Jagadish Prasad in the jeep only with the intention to do away with him must be believed.

22. The prosecution has tried to link the following events in order to establish the case against the appellants: (i) the appellants had a motive to kill Jagadish Prasad as he was not allowing them to settle certain land disputes; (ii) the appellants were absconding for a long period of time before they were arrested; (iii) the deceased

was last seen in the company of the appellants; (iv) the photographs in the pocket of the shirt used to tie the hands of the body found in the train were those of Jagadish Prasad and a medical prescription was also found revealing that it was from Faizabad; (v) the time of the incident was between 5th July and 7th July, 2004, as opined by the doctor who performed the post mortem examination; (vi) the timings of the train in which the dead body was found disclosed that it was possible for Jagadish Prasad to have been killed with a gun-shot and then his body to be placed in the train; (vii) there was no reason to falsely implicate the appellants. According to the learned Counsel for the State these circumstances form a chain which points to the guilt of the appellants in no uncertain terms.

23. In our opinion, there are far too many missing links in this chain and it does not lead to the inevitable conclusion that it is the appellants who killed the deceased. As stated earlier Jagadish Prasad was representing various persons who had litigations pending and several persons were inimically disposed towards him. Therefore, it cannot be said with exactitude that it is only the appellants who were responsible for his death. The theory of last seen together also appears to be falsified as Om Prakas Tiwari-PW 14, the son of the victim, had disclosed in his statement recorded under Section 164 that one Anand Kumar Singh who was arrested, on 8th July, 2004 at 8:15 p.m. had revealed that Jagadish Prasad had been confined in his aunt's house. Therefore, this version which surprisingly does not find place in the testimony before the Court would indicate that Jagadish Prasad Tiwari was alive even on 8th July, 2004. This is an important omission in the testimony of the witness. It has been argued by the learned Counsel for the State that the witness's attention had not been drawn to his statement recorded under Section 164 of the Cr.P.C. which was mandatory under Section 145 of the Evidence Act. It was submitted that the contradictions must be brought to the notice of the witness before they can be relied on. To fortify this contention the State has relied on the judgments in the case of Utpal Das and Another Vs. State of West Bengal, Anjan Ganguly and Others Vs. State of West Bengal, and Tahsildar Singh and Another Vs. The State of Uttar Pradesh.

24. In the case of Utpal Das and Another Vs. State of West Bengal, the Supreme Court has observed that a statement recorded under Section 164 of the Cr.P.C. cannot be used as substantive evidence. It can be used to contradict or corroborate a witness who has made the statement. The maker of such a statement may be cross-examined by using the statement made by him under Section 164 of the Cr.P.C. to demonstrate that the evidence of the witness is false. The credibility of the prosecution witness can be impeached with the aid of the statement under Section 164 of the Cr.P.C. The Court observed that it was for the defence to invite victim's attention to what was said in the first information report and the statement made under Section 164 of the Cr.P.C. for the purpose of bringing out the contradictions. In the absence of the same, the Court cannot read the statement under Section 164 of the Cr.P.C. and compare it with the evidence led in Court. A similar view has been

taken by a learned Single Judge of this Court in the case of Anjan Ganguly and Others Vs. State of West Bengal. A Bench of six learned Judges of the Supreme Court in the case of Tahsildar Singh and Another Vs. The State of Uttar Pradesh, has elucidated the manner in which a witness can be contradicted by confronting him with his previous statement. The Supreme Court has delineated the procedure which is required to be followed for this purpose. A similar view was taken by the Supreme Court in the case of Rajendra Singh and Others Vs. The State of Bihar, regarding the manner in which the contradictions can be brought forth in the deposition of a witness and his previous statement. Even if the attention of this witness was not drawn to his statement under Section 164 of the Cr.P.C. where he had disclosed that his father was alive on 8th July, 2004 his deposition contains embellishments, other contradictions and discrepancies which makes his evidence susceptible to be discarded.

25. It was argued on behalf of the State by relying on judgment in the case of Mahavir Singh Vs. State of Haryana, that all contradictions and discrepancies need not deter the Court from convicting the accused. It was submitted that once a chain of circumstances is found to be complete and no link is missing, the Court should convict the accused. This judgment does not aid the prosecution. The Supreme Court has observed if there are no material contradictions and the chain of circumstantial evidence is complete, the Court would take these factors into consideration while deciding whether to convict a person. However, the judgment has no application in the present case as we have seen that the chain of circumstances is not complete at all. The theory of last seen together is replete with deficiencies and therefore has not been proved in this case. In Mahavir Singh's case (supra) the Supreme Court discussed the manner in which evidence should be weighed when there is a time gap between the point of time when the deceased was seen alive together with the accused and when the victim was found dead. If the time gap is small, the possibility of any person other than the accused being the author of the crime could be ruled out. In the present case, the evidence on record indicates that the appellants were last seen together with the deceased on 6th July, 2007 in the morning between 10 and 10.30 a.m. The body of the victim was found in a train on 7th July, 2006 at about 8 p.m. i.e. about 34 hours later. The post mortem was conducted on 8th July, 2006 at about 3.30 p.m. and the time of death as ascertained by the doctor - PW 11 was 36 to 72 hours prior to the examination. Therefore, one cannot say with certainty that it was the appellants who were responsible for the crime because the time lag between the point at which they were seen and the discovery of the dead body is too long. The theory of last seen together, as we have noted, has not been proved to the hilt. The prosecution has failed to examine the driver of the vehicle and the other occupants. They would have been able to throw light on whether the deceased alighted from the car together with the appellants or prior to them or after them. This being a case of circumstantial evidence the investigating agency ought to have left no stone

unturned in order to bring home the charge against the appellants.

26. In the case of [Anant Bhujangrao Kulkarni Vs. State of Maharashtra](#), the Supreme Court has held that where the deceased was seen alive in the company of the accused and the other circumstance was that the dead body was found in a place which was not in the exclusive possession of the accused, a conviction cannot be based on just these two circumstances. Similarly in the present case, the appellants were seen in the company of Jagadish Prasad Tiwari after 10 a.m. on 6th July, 2004. The body was found in the Jammu Tawai Express on 7th July, 2004 at about 8 p.m. These two circumstances alone cannot connect the appellants to the crime. The other circumstances relied on by the prosecution also do not advance its case any further.

27. In the case of [State of Karnataka Vs. M.V. Mahesh](#), the Supreme Court has observed that in the case of circumstantial evidence there must be definite evidence to indicate that the accused was responsible for the crime. Without such clinching evidence, merely because the accused and the victim were last seen together, it would not be sufficient to convict the accused. A similar view has been taken in the case of [Dandu Jaggaraju Vs. State of A.P.](#), . The Supreme Court in the case of [K.T. Palanisamy Vs. State of Tamil Nadu](#), was dealing with a case of circumstantial evidence and the theory of last seen together. It was observed thus:

12. It is now well settled that in a case where an offence is said to have been established on circumstantial evidence alone, indisputably all the links in the chain must be found to be complete as has been held in [Sharad Birdhichand Sarda Vs. State of Maharashtra](#), in the following terms:

"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 while 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 Sahebrao Bobade v. State of Maharashtra* where the following observations were made:

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.

153. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

In this case the Supreme Court also observed that the conduct of the prosecution witnesses in not suspecting the appellant in any manner whatsoever on the day the alleged crime occurred was significant. The witnesses did not go to the place of occurrence. Despite the fact that the victim was missing, no missing report was lodged. Details about his clothes and jewellery were not, if any, would have been mentioned in the missing report. The fact that the deceased was last seen together with the accused should have been specifically disclosed in the first information report. In the present case also the names of the appellants are revealed only by the absconding accused on his arrest on 13th July 2004. The sons of the deceased who have been examined as prosecution witnesses have not mentioned the names of the appellants when their statements were recorded under section 164. In fact, PW 15 who had seen them on 6th July, 2004 told the victim's son only after he had returned from Delhi after 20 or 25 days, making his story unbelievable. It appears that the appellants have been arrested only because their names were mentioned by Marutendar, the absconding accused.

28. The learned Counsel for the State urged that the fact that the appellants were absconding pointed to their guilt. He drew our attention to the fact that the appellants were absconding when the chargesheet was filed. They surrendered before the court only on 21st February 2005. In the case of Bipin Kumar Mondal Vs. State of West Bengal, the Supreme Court has opined that merely because the accused was absconding and remained untraceable for a long time after the crime was committed, would not by itself be conclusive proof either of his guilt or of a guilty conscience. It is trite that in a case based on circumstantial evidence, the fact that the accused was absconding for some time could be considered for convicting the accused, provided, the chain of circumstances against the accused warrant no other conclusion but that he is guilty. We have already held that the chain of circumstances which could point to the guilt of the appellants is rife with gaping holes which the prosecution has been unable to plug. Therefore the fact that the appellants were absconding would be of no consequence in this case.

29. In the case of Surajit Sarkar Vs. State of West Bengal, the Supreme Court has opined that the defects in an investigation cannot be ignored and an innocent person cannot be held guilty of an offence which he has not committed. The investigation must be precise and focused leading to the inevitable conclusion that

the accused had committed the crime. If the investigating officer leaves glaring loopholes in the investigation, the defence would be fully entitled to exploit the lacunae. The Court cannot gloss over the gaps and find the accused guilty

30. It is well settled now that the evidence led in a case where there is no direct evidence must be considered with circumspection. In the present case as we have noted earlier the contradictions and the discrepancies are too many to be ignored. The lacuna in the investigation regarding the identification of the body was sought to be overcome by recalling the witnesses for further examination. Even after this was done after the arguments of the prosecution and the arguments of the appellants were partly heard, the prosecution has been unable to establish firmly that the appellants were responsible for the crime. The prosecution in this case has made no efforts to recover the firearms used to shoot the victim. It has also not made any effort to discover the weapons used to mutilate the body. No endeavour was made to establish that Jagdish Prasad was abducted although such a charge was framed against the appellants.

31. Considering all these factors it is not possible to accept the theory of the prosecution that the appellants were responsible for the crime. We have already mentioned that the chain of circumstantial evidence is not complete and therefore, the conviction based on isolated circumstances cannot lead to the inevitable conclusion regarding the guilt of the accused.

32. The appeal is allowed. The impugned judgment is set aside. The appellants are acquitted. They shall be set at liberty immediately if not required to be detained for any other offence.

33. In view of our decision in the appeal, CRR 844 of 2008 is dismissed.

34. Urgent certified photocopies of this judgment, if applied for, be given to the learned Advocates for the parties upon compliance of all formalities.