Riaz Ali Vs State (Govt. of Nct) Delhi

Court: Delhi High Court

Date of Decision: Feb. 22, 2012

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€" Section 161, 293, 293(4), 313, 428
Evidence Act, 1872 â€" Section 106, 114, 25, 27, 45
Penal Code, 1860 (IPC) â€" Section 201, 302, 363, 364, 376
Constitution of India, 1950 â€" Article 14, 21

Citation: (2012) 5 AD 308 : (2012) 194 DLT 706 : (2012) 2 JCC 1092

Hon'ble Judges: J.R. Midha, J; Gita Mittal, J

Bench: Division Bench

Advocate: Sumeet Verma, for the Appellant; Ritu Gauba, for the Respondent

Final Decision: Allowed

Judgement

1. The appellant in the instant case, assails his conviction for commission of offences u/s 364/302 of the Indian Penal Code (IPC) by the judgment

dated 8th February, 2008 and the order of sentence dated 12th February, 2008 whereby he has been sentenced to undergo rigorous

imprisonment for ten years and imposition of fine of Rs. 10,000/- for commission of the offence u/s 364 IPC. In default of payment of fine, he has

been sentenced to undergo simple imprisonment for a period of three months. For commission of the offence u/s 302 IPC, the appellant has been

sentenced to undergo imprisonment for life and a fine of Rs. 10,000/- was imposed upon him. Again for default of payment of fine, it has been

directed that he shall undergo simple imprisonment for three months. Both the sentences were ordered to run concurrently and the benefit of

Section 428 of the Cr.P.C. has been granted to the appellant. The case of the prosecution is in a narrow compass and is briefly encapsulated

hereafter. It is the case of the prosecution that on 25th December, 2005, Mohd Abdul Qadir, a six years old was playing outside his house no.

502, Gali No. 6, Ram Ghat, Wazirabad, Timarpur, Delhi. His sister-in-law Smt. Rabia Khatoon (PW 4) called him into the house at about 4.00

p.m. to which Mohd Abdul Qadir responded that he would come within half an hour but after about 5.00 p.m., she found him missing. PW 4 -

Smt. Rabia Khatoon searched for him in vain. She called out for him after coming outside the gate and after expiry of half an hour she made

inquiries in the neighbourhood when she was told that Mohd Abdul Qadir who was playing, had vanished. PW 4 informed her father-in-law Mohd

Hamid (father of Mohd Abdul Qadir) when he returned to the house.

2. The police intervention in the matter commenced with the report Exh. PW1/A attributed to Mohd Hamid, father of the deceased which is a

reproduction of his afore-noticed deposition. The endorsement by the police thereon (Exh. PW13/A) has been made at 9.35 p.m. on the night of

26th December, 2005.

3. Upon this information, the Police Station, Timar Pur registered FIR No. 690/2005 u/s 363 of the Indian Penal Code on 26th December, 2005

at 09.35 P.M.

4. It is in evidence that a total of nine persons of the family of Abdul Qadir were residing in the single room tenement. PW 4 has also given the

names of their neighbours as Sajid and Wajid and further stated that her father-in-law Mohd Hamid had returned at about 8.00 p.m. on the fateful

night.

5. It is further the case of the prosecution that PW 13 - ASI Virender Singh, and PW 18 - Constable Om Prakash made efforts to trace out the

child. In view of the information received from Mohd Mushtaqeen, the police made efforts to locate the appellant.

6. Mr. Sumeet Verma, learned counsel for the appellant has taken us carefully through the record. Mohd Hamid, father of the deceased child, has

appeared in the witness box as PW 1 and corroborated PW 4 on these aspects. PW 1 was running a barber shop in the Cycle Market, Chandni

Chowk, Delhi and stated that he had lodged a missing report regarding his son on the 26th December, 2005 after frantically searching for him. PW

1 has deposed that Mohd Mushtaqeen, a neighbour as well as his employee, informed him that he had seen Riaz, a carpenter (the appellant herein)

taking away my child"". PW 1 affirmed that he knew the appellant-Riaz who was a visitor to his house. Efforts to trace out the appellant were not

successful.

7. Mr. Sumeet Verma, learned counsel for the appellant has contended at some length that there are material contradictions in the testimonies

rendering the evidence unworthy of credence. We, therefore, deem it appropriate to notice the deposition of the witnesses. The evidence led by

the prosecution on the circumstances leading to the arrest of the appellant are firstly considered.

8. PW 18 - Ct. Om Prakash has deposed that information was received from Mushtaqeen by PW 13 - ASI Virender Kumar that he had seen the

deceased being taken by the appellant and also that the appellant was generally at the Cycle Market, Chandni Chowk as he resided there and

therefore PW 13 - Virender Singh accompanied by PW 18 - Ct. Om Prakash, PW 19 - Ct. Rajesh Kumar and PW 20 - Ct. Anil Kumar went to

the Cycle Market, Chandni Chowk in search of the accused in the early morning hours of 27th December, 2005. The search for Riaz, the

appellant at the Cycle Market was not fruitful.

9. PW 19 - Ct. Rajesh Kumar, who was part of the police party which had searched for the appellant, has stated that ""Hamid Qadir"" had

informed that the appellant was to be found at the Raen Basera (night shelter), Cycle Market, Chandni Chowk wherefrom information had been

received that he would reach Wazirabad in the early morning. It would thus appear that the appellant was residing at the Raen Basera (night

shelter), Cycle Market, Chandni Chowk, New Delhi. The other witnesses have also suggested that he was residing in the same general area. The

police party therefore reached Sur Ghat, Wazirabad. PW 13 did nakabandi on the road going towards Ram Ghat.

10. The witnesses on behalf of the prosecution have deposed that at about 5.45 a.m. on 27th December, 2005, the appellant came down from a

bus and was identified by Mohd Hamid. Thereupon inquiries were made from him. It is the case of the prosecution that the appellant had made a

confession. The appellant was arrested by PW 13-ASI Virender vide memo Exh.PW1/B and his personal search was conducted vide memo Exh.

PW1/C. After his arrest during interrogation, the appellant made a disclosure statement Exh. PW19/A that he could get the dead body of the child

recovered.

11. PW 13 - ASI Virender Singh produced the appellant before Inspector T.R. Mongia, the SHO of Police Station Timarpur, Delhi who then

took over the investigation of the case. The police team was joined by PW 1 - Mohd Hamid and PW 5 - Mohd Arif. The appellant is alleged to

have led the police party to a spot near the railway line in the area of Sriniwas Puri and at his instance, the body of Mohd Abdul Qadir, deceased

was recovered which was identified by his father PW 1 - Mohd Hamid & PW 5 - Mohd Arif (brother-in-law of Mohd Hamid).

12. The police has also effected seizure of a blade lying near the feet of the body. As per PW 8 - HC Raj Pal Singh, photographs were taken at

the spot which have been exhibited on record as Exh.PWA-1 to A-8 and their negatives as Exh.A-9 to A-16.

13. The police is stated to have simultaneously effected seizure of a shirt which had blood stains on the sleeves which was worn by the appellant -

Riaz when he had got down from the bus. This shirt was seized by the police vide seizure memo Exh. PW1/D on 27th December, 2005.

14. The learned Additional Session Judge considered the chain of circumstances brought on record including that it was the appellant who had

taken the deceased from near his house on 25th December, 2005 at about 5:00 pm and thereafter his dead body was found having injuries

inflicted with sharp edged object on his throat from the Sriniwas Puri Railway Track. The knowledge of the appellant regarding the place of the

dead body; the presence of the human blood on the sleeve of his shirt worn by him at the time of his arrest on 27th December, 2005; absence of

any explanation from the side of the appellant as to where he had dropped the deceased after taking away from near his house were held to be

important circumstances having immense inferential value. The trial court found that no explanation was given by the appellant regarding the

presence of human blood on the sleeve of his shirt nor the bruise on his cheek. The time of death of the deceased as opined in the postmortem

report point out to the time being approximately four hours after the deceased was taken away by the accused and it was therefore concluded that

nobody else accept the appellant had an opportunity to kill the deceased. It was held by the learned ASJ from the circumstantial evidence adduced

on record, it was the appellant who had taken away the deceased from near his house and thereafter had caused injuries on his neck with the

blade. Consequently, the appellant was found guilty of the charges and convicted by the judgment dated 8th February, 2008. By the order dated

12th February, 2008, the aforenoticed sentence was imposed upon him.

15. The instant case rests purely on circumstantial evidence. There is no direct evidence with regard to any aspect of the matter. The above

narration would show that the prosecution has attempted to prove the circumstance that the deceased was last seen in the company of the

appellant; that the dead body was recovered pursuant to disclosure by the appellant; and that the CFSL report connects the accused with the

crime. Ms. Ritu Gauba, learned APP for the State submits that the postmortem report also points out conclusively to the culpability of the

appellant-Riaz for the commission of the offence.

16. Mr. Sumeet Verma, learned counsel for the appellant on the other hand has contended that the prosecution has miserably failed to establish the

unbroken convincing chain which was to be proved by them which would lead to the only conclusion of guilt and culpability of the appellant and

which completely rules out the hypothesis of innocence of the appellant. Mr. Verma has disputed the authenticity of the last seen evidence relied

upon by the prosecution.

LAST SEEN TOGETHER EVIDENCE

17. The most important circumstance which the prosecution has relied against the appellant is the last seen evidence of the deceased being last

seen alive in the company of the appellant.

18. In this regard, prosecution has extensively relied upon the information given as well as testimony of PW 3 - Mushtaqeen in support of the case

that the deceased was last seen alive in the company of appellant - Riaz. PW 3 - Mushtaqeen is the sole witness in this regard to the effect that the

deceased was seen by him in the company of the appellant - Riaz.

19. In his deposition, PW 3 - Mushtaqeen had disclosed that he was an employee of Mohd Hamid, father of the deceased and also their

immediate neighbour; that the house of the deceased was barely two minutes on foot from his house and that the parties were on close visiting

terms. He has stated that on 25th December, 2005 at about 5.00 p.m. when he was present near the Masjid, he saw the appellant taking the

deceased with him and that he had not objected as the appellant was on visiting terms with the family of the deceased. PW 3 states that next

morning he learnt that deceased was missing and was untraceable and then told Mohd Hamid that he had seen the appellant taking the deceased

with him.

20. The first intimation that the deceased was missing was given by Mohd Hamid to the police which has been recorded as DD No. 11A dated

26.12.2005 (Exh.PW10/A) which does not contain any name of the accused nor mentions Mushtaqeen having made a disclosure of any fact. 21.

Mr. Verma has drawn our attention to the statement of PW 1 - Mohd Hamid purportedly recorded by the police on the 27th December, 2005

(Exh. PW1/DB) wherein PW 1 has stated that the police came to his house on the night of 27th December, 2005 and upon being told by Mohd

Hamid about the information received by him from Mushtaqeen, they have recorded the statement of his neighbour, PW 3 - Mushtaqeen.

22. Mr. Sumeet Verma, learned counsel for the appellant submits that even if the testimony of PW 3 - Mushtaqeen relating to the appellant and

deceased being last seen together is to be accepted, there is no proximity at all between the deceased being last seen in the company of the

appellant and the discovery of his body. He further points out that not only is there no proximity of time, there is no proximity of place as well

inasmuch as the deceased was last seen in the company of the appellant in the Wazirabad area whereas his body has been discovered at a distance

of more than 20 kms away at Sriniwas Puri.

23. Placing reliance on the pronouncement of the Supreme Court reported at State of Goa Vs. Sanjay Thakran and Another, Deepak Chadha Vs.

State, Deepak Chadha v. State.

24. In Sanjay Thakran (supra), the prosecution case was based on circumstantial evidence which included the last seen together evidence. The

Supreme Court placed reliance on earlier pronouncements reported at State of U.P. Vs. Satish, Padala Veera Reddy Vs. State of Andhra

Pradesh and others, Sharad Birdhichand Sarda Vs. State of Maharashtra, Gambhir Vs. State of Maharashtra, and Hanumant Vs. The State of

Madhya Pradesh, and reiterated the following tests which must be satisfied in case of circumstantial evidence to support a conviction:-

13. The prosecution case is based on circumstantial evidence and it is a well-settled proposition of law that when the case rests upon

circumstantial evidence, such evidence must satisfy the following tests: -

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

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

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human

probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of

guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

25. On the issue of last seen together evidence, in Sanjay Thakran (supra), the Supreme Court had laid down the following binding principle:-

28. ... It is a settled rule of criminal jurisprudence that suspicion, however grave, cannot be substituted for a proof and the courts shall take utmost

precaution in finding an accused guilty only on the basis of circumstantial evidence. This Court has applied the above-mentioned general principle

with reference to the principle of last seen together in Bodh Raj @ Bodha and Others Vs. State of Jammu and Kashmir, as under:

31. The 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 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...

[See also : State of U.P. Vs. Satish, and Ramreddy Rajeshkhanna Reddy and Anr. v. State of Andhra Pradesh JT 2006 (4) SC 16 (para 29)].

In Ramreddy Rajeshkhanna Reddy (supra), this Court further opined that even in the cases where time gap between the point of time when the

accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the

accused being the author of the crime becomes impossible, the courts should look for some corroboration.

In Jaswant Gir Vs. State of Punjab, it was observed that:

5....In the absence of any other links in the chain of circumstantial evidence, it is not possible to convict the appellant solely on the basis of the

''last-seen'' evidence, even if the version of PW 14 in this regard is believed...

xxx

29. From the principle laid down by this Court, the circumstance of last-seen together would normally be taken into consideration for finding the

accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused

and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the

deceased could completely be ruled out. The time gap between the accused persons seen in the company of the deceased and the detection of the

crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all

cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the

deceased last seen together and the crime coming to light is after a considerable long duration. There can be no fixed or straight jacket formula for

the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person

meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other

than the accused, being the author the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long

duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons.

Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or

approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together

would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place

where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by

any third party, then a relatively wider time gap would not affect the prosecution case.

(Emphasis Supplied)

26. Ms. Ritu Gauba, learned APP has submitted that the deceased being last seen alive in the company of the accused is an important piece of

evidence. Learned APP has placed reliance on the pronouncement of the Supreme Court reported at 2012 (1) SCC (Cri) 624, Amitava Banerjee

@ Amit @ Bappa Banerjee. In this case, the circumstances proved by the prosecution formed a complete chain pointing unequivocally towards

the guilt of the accused. The deceased was last seen together with the appellant around the time he was abducted, together with other proved

circumstances which were explainable only on one hypothesis which was that the appellant was guilty of killing the deceased. In this case, the

Supreme Court was concerned with a case under Sections 302, 364 and 201 IPC. The appellant was identified in a test identification parade by

the witness who had viewed him in the jungle. Another witness deposed that the appellant had borrowed a spade from him on the pretext of

planting and had wrapped its wooden part with newspaper and tied it with a string. As per the postmortem report, the death of the deceased was

due to asphyxia caused by throttling and strangulation (jute string was found on the neck of the deceased). The prosecution had authoritatively

established the fact that the appellant had been seen with the deceased going towards the jungle by a witness around the time of his death which

was established by medical evidence; recovery of dead body of the deceased from a freshly dug grave on the following day and two leaves of the

newspaper; a pair of chappals as well as a bicycle found nearby which belonged to the appellant. It was in this background that the court held that

the circumstances proved on record led to only one conclusion which was the guilt of the deceased. Unlike the present case, the deceased was last

seen alive in the company of the accused was only one of the circumstances proved against him.

27. While setting aside the conviction of the appellant in Deepak Chadha (supra) this Court had placed reliance on the pronouncement of the

Supreme Court in Sanjay Thakran (supra). These principles would guide the adjudication in the present case.

28. The evidence led by the prosecution has to be examined thus in the context of proximity of not only time but of place as well.

29. If the deposition of PW 3 is accepted, then the prosecution would have lead evidence that the deceased, Mohd Abdul Qadir was last seen

alive in the company of appellant, Riaz Ali at about 5:00 pm in the evening of 25th December, 2005. No evidence at all has been brought on

record thereafter till his dead body was recovered on 27th December, 2005 at 10:15 am as per Exh. PW 16/A.

30. It would appear that the time gap between the last seen together evidence and the time of death of the child as per the postmortem report

would be of about four hours. There is a gap of almost 40 hours between the last seen alive evidence and the discovery of his body.

31. The deceased was last seen alive in the Wazirabad area. It is in evidence that his dead body had been discovered more than 20 kms away in

the bushes in Srinivas Puri near railway tracks.

32. There is no evidence at all with regard to the spot where the deceased was murdered. There is also not a whit of evidence as to the manner in

which the body of the deceased reached Srinivas Puri. This important aspect of the matter is completely uninvestigated. The body has been found

in a public place. The last seen evidence is clearly separated both by time as well as place from the commission of the offence.

33. We find that even if the evidence of last seen together is accepted, the time gap between the deceased being last seen alive with the appellant

and the proximate time of crime as well as the distance which has been covered during that period renders it difficult to clinchingly fasten guilt for

the offence of murder on the accused.

34. Our attention is also drawn to the statement of Mushtaqeen purportedly recorded u/s 161 of the Cr.P.C. which is available on the record of

the Trial court. A perusal thereof would show that there is overwriting in the date which has been changed from 27th December, 2005 to 26th

December, 2005. Learned counsel for the appellant contends that this indicates the efforts made by the prosecution to falsely implicate the

appellant.

35. We find that there is substance in the submissions of Mr. Sumit Verma that PW 3 - Mushtaqeen for the first time disclosed only in the night of

the 26th of December, 2005 that he had seen the deceased in the company of the appellant in the evening of the 25th of December, 2005. There is

also weight in his contention that Exh. PW 1/DB establishes that the statement u/s 161 of the Cr.P.C. of PW 3-Mohd. Mushtaqeen was scribed

only in the night of the 27th of December, 2005.

36. PW 3 - Mushtaqeen has not only stated that he was residing in the immediate vicinity of PW 1 but has further stated that the house of the

deceased was situated in a thickly populated area. The same is also apparent from the fact that the deceased was living with his family which

consisted of eight or nine persons in one single room.

37. We find that it is in the testimony of PW 4 - Rabia Khatoon that the deceased child was playing with other children. It is in the deposition of

PW 4 - Rabia Khatoon as well that she had gone outside the main gate and called out to the deceased to come into the house but he was not

traceable. PW 4 has also stated that she had also made inquiries in the neighbourhood. It would be reasonably expected that there would be a hue

and cry in the locality upon a young child being untraceable, more so when he had been playing with other children when he was removed. Given

the proximity of Mustaqeen''s house to the residence of PW 1, PW 4 as well as the deceased, he would have learnt about the missing child

immediately.

38. Exh. PW1/A is the first intimation given to the police. PW 1 - Mohd Hamid, father of the deceased has also informed the police that he had

frantically searched for his child but could not trace him.

39. In case the deposition of PW 3 was to be accepted as truthful, we find no explanation at all as to why no information of what he had seen, was

given by him to the family of the deceased when his family was searching for him after 5.00 p.m. on 25th December, 2005 till evening of 26th

December, 2005.

40. The above circumstances render the evidence of PW 3 tenuous, flimsy and unreliable so as to, by itself, without any corroboration, sustain a

conviction for commission of offences u/s 364/302 of the Indian Penal Code.

SITE PLAN

41. So far as the place wherefrom the child was removed is concerned, the prosecution has proved a site plan Exh. PW13/B. This site plan makes

no reference to the person on whose pointing out the same has been prepared. It makes a vague reference to the place from where the deceased

was kidnapped and the path taken along which the witness had viewed the deceased being taken away.

42. PW 13 - SI Virender has stated that this site plan was prepared on the pointing out of PW 1 - Hamid Qadir. However PW 1 had not seen the

appellant taking the deceased. PW 3 - Mushtaqeen, who has claimed to have seen the appellant, does not state that he had pointed out the place

of occurrence to the police or that the site plan was prepared at his instance. The site plan also makes no reference at all to the place of residence

of the deceased or the house of PW 3 - Mushtaqeen. The site plan Exh. PW13/B is dated 26th of December, 2005. As noted hereinabove, the

first interaction between PW 3 - Mushtaqeen and the police was after the night of the 26th of December, 2005. The site plan Exh. PW13/B which

is dated the 26th of December, 2005 has therefore obviously not been prepared on the pointing out of PW 3 - Mushtaqeen.

43. So far as the place of occurrence is concerned, Mr. Sumit Verma, learned counsel for the appellant has submitted that the same has also not

been ascertained by the investigating agency. Our attention is drawn to the site plan Exh. PW13/B. Even though the alleged kidnapping has taken

place while the child was playing with children in the thickly populated neighbourhood, there is not an iota of evidence of his playmates, who were

the best evidence, on record.

44. The bald statement of PW 3 to the effect that he had seen the appellant taking the child with him is hopelessly incomplete. It is not possible to

discern from his evidence as to where, let alone in which direction, the child was being taken. It is left to imagination as to whether the child was

going in the direction of his own residence or away from it.

RECOVERIES/SEIZURES EFFECTED BY THE POLICE

45. Learned counsel for the appellant has strongly challenged the recovery of the shirt vide seizure memo Exh.PW1/D, allegedly worn by the

appellant for primarily two reasons. It is contended that the prosecution has failed to explain as to how, if the appellant was guilty of commission of

the offence, he was wearing the same blood stained shirt for almost two days after the date of occurrence. He has also drawn our attention to Exh.

PW1/D where he points out that the document (including the names and details of two of the witnesses at serial no. 1 & 2, both constables of the

Delhi Police) have been scribed in vernacular. Learned counsel contends that the name, Mohd Hamid (with full particulars) has been subsequently

interpolated as a witness in the seizure memo which is manifested from the fact that the same is in the English language. It is contended that the

interpolation by itself shows that the police was manipulating records to substantiate and support a false case against the appellant.

46. The learned ASJ has observed that the injury (hemorrhagic shock) was opined to be sufficient in ordinary course of nature to cause death. It

has been held that the injury was inflicted by the appellant with the intention to kill the deceased and according to the doctor it was possible to

cause such injury by the Topaz blade recovered from near the dead body of the deceased.

47. Learned counsel for the appellant however strongly challenges the seizure of the blade at the site. He contends that no weapon of offence has

been recovered. It is urged that learned trial judge has erred in holding that the weapon of offence had been recovered or that the injury was

inflicted by the appellant.

48. Ms. Ritu Gauba, learned APP for the State, has submitted that the weapon of offence, a topaz blade was seized at the spot and that the same

had blood stains. In this regard, she has placed reliance on Exh. PX which is a forensic science laboratory report prepared under the signatures of

V.Sankaranarayanan, a Senior Scientific Assistant (Biology).

49. The police claimed to have effected seizure of a Topaz blade having blood stains; earth control and blood stained earth control vide a seizure

memo Exh.PW1/F from the place where the body of the child was found.

50. A post mortem on the body of Mohd Abdul Qadir was conducted at the Aruna Asaf Ali Hospital. The post mortem report was proved on

record as Exh. PW2/A. We find that amongst other injuries, PW2 - Dr. Ashok Jaiswal who conducted the post mortem, has noticed the following

injuries on the body of the deceased Abdul Qadir:-

General Description

Clothes Worn & Their Description Body wearing a brown woolen jacket intact but has brownish stains on it, a maroon jacket, an orange T-shirt

all with brownish stain but intact, a white dirty pyajama, irregularly tied at multiple places, mud stained. xxxx

External Injuries:-

An oblique, incised wound extending downwards, from just below, angle of mandible, on left side of neck going across thyroid region, making a

sharp cut, on the body of thyroid cartilage, further going downwards to a point placed 5.5 cm below, angle of mandible on right side. Its

measurement were 10.5 cm x 2.5-3 cm. x 2.8-2.5 cm, being more deep on left side. It was found to be cleanly dividing soft tissues and major

neck vessels, on either side of neck, with massive blood, in between layers of neck.

51. After examination, the doctor gave the following opinion as the cause of death of the deceased and the injuries suffered by him:-

Opinion

1. Death due to haemorrhage shock consequent to injury no. 1

2. Injury no. 1 is sufficient to cause death in ordinary course of nature.

3. Injury no. 1 is Ante mortem in nature, caused by sharp edge weapon.

4. Injury no. 2, 3 & 4 are postmortem in nature.

5. Time since death is about 1 3/4 days.

52. Our attention has been drawn to the opinion of the doctor with regard to the time of his death. As per Exh.PW2/A, the death occurred at

about 13/4 days before the post mortem which was conducted at 3.00 p.m. on 27th December, 2005. From the opinion of the doctor, it would

appear that Mohd Abdul Qadir was murdered on 25th December, 2005 at about 9.00 pm.

53. We find that under the cover of a letter dated 27th February, 2006, from the SHO Timarpur, the following seven parcels in connection with

the case arising out of FIR No. 690/2005 were sent to the Forensic Science Laboratory, Rohini, Delhi:-

Parcel `1" : One sealed cloth parcel sealed with the seal of `VS" containing exhibit `I".

Exhibit `1" : One shirt having brown stains

Parcel `2" : One sealed cloth parcel sealed with he seal of `AKJ HOD SUBZI MANDI MORTUARY AAAGH DELHI - 54 containing exhibit

`2" kept in a match box.

Exhibit `2" : One blade having brown stains

Parcel `3" : One sealed polythene bag parcel sealed with the seal of `AKJ HOD SUBZI MANDI MORTUARY AAAGH DELHI-54" containing

exhibits `3a", `3b", `3c" & `3d".

Exhibit `3a" : One jacket having darker stains

Exhibit `3b" : One shirt having darker stains

Exhibit `3c" : One T-shirt having brown stains

Exhibit `3d" : One underwear having darker stains

Parcel `4" : One sealed glass container sealed with the seal of `AKJ HOD SUBZI MANDI MORTUARY AAAGH DELHI-54" containing

exhibit `4". Exhibit `4" : Vegetative material Parcel `5" : One sealed envelope sealed with the seal of `AKJ HOD SUBZI MANDI MORTUARY

AAAGH DELHI-54" containing exhibit `5".

Exhibit `5" : Brown gauze cloth piece described as `Blood cloth piece". Parcel `6" : One sealed cloth parcel sealed with the seal of `TRM"

containing exhibit `6".

Exhibit `6" : Vegetative material having brown stains.

Parcel `7" : One sealed glass bottle sealed with the seal of `CMO AAA GOVT HOSPITAL DELHI containing exhibit `7".

Exhibit `7" : Dark brown foul smelling liquid described as `Blood sample".

54. As per the Exh. PX, the result of the analysis reflected the following:-

1. Blood was detected on exhibits `1", `2", `3a", `3b", `3c", `3d", `5" & `6".

2. Blood could not be detected on exhibit `4".

xxxx

55. Mr. Sumeet Verma, learned counsel for the appellant has pointed out that Exhibit ""6? which has been noted in the report as vegetative material

sent by the investigating agency to the laboratory has shown no reaction at all. It is pointed out that the prosecution has thus completely failed to

identify the site of the offences, both kidnapping and place of murder.

56. We find that the seizures were effected by the police on 27th December, 2005. The investigating agency has deemed it appropriate to send the

same to the laboratory for the forensic examination almost two months thereafter on 27th February, 2006.

57. Learned counsel contends that the delay in sending the exhibits to the laboratory itself casts a strong doubt on the factum of recovery and urges

that in fact no recovery was effected at the instance of the appellant. He also urges that the articles have also been planted by the police.

58. Though the report finds human blood on shirt, blade and the clothes of the deceased, however the Forensic Science Laboratory was unable to

give any grouping of the blood so as to connect the blood stains with the blood of the deceased. No evidence of the blood grouping of the

deceased is also available on record.

59. Yet another objection is taken on behalf of the appellant to the mode of proof of the report of the Forensic Science Laboratory. It is pointed

out that the report dated 3rd June, 2006 has been signed by a Senior Scientific Assistant (Biology). The record discloses that the same has been

exhibited as Exh.PX in the testimony of the investigating officer PW 14 - Inspector T.R. Mongia. Learned counsel has objected that such a report

cannot be admitted by application of Section 293 of Code of Criminal Procedure inasmuch as the scientist who has given the report is not one of

the designated authorities under Sub-Section 4 of Section 293 of the Cr.P.C. and that the report could have been proved only by examination of

the scientist.

60. In this regard, Mr. Sumeet Verma, learned counsel for the appellant has placed reliance on the pronouncement of the Supreme Court reported

at Keshav Dutt Vs. State of Haryana, and the pronouncement of this court reported at 67 (1997) DLT 351 (DB), Raj Mani v. State. In Keshav

Dutt (supra), the Supreme Court has ruled that when the trial court relied on the report of the handwriting expert, it ought to have examined the

handwriting expert in order to give an opportunity to the appellant and the other accused to cross-examine the said expert. There being no material

to indicate that the accused admitted the report of the experts, the onus could not be shifted to the appellant to disprove the same when it has not

been formally proved. It was held that the expert opinion cannot be relied upon unless the expert is examined. The pronouncement of the Division

Bench of this Court in Raj Mani (supra) also holds that such a report would be non-admissible in evidence.

61. Ms. Ritu Gauba, learned APP for the State has placed reliance on the pronouncement of Supreme Court reported at Haryana Land

Reclamation and Development Corporation Ltd. Vs. Nirmal Kumar, In this case, the court placed reliance on the earlier pronouncements reported

at AIR 1963 SC 1531, Bhupinder Singh Vs. State of Punjab, Bhupinder Singh v. State of Punjab to hold that it cannot be held to be obligatory

that an expert who furnishes his opinion on the scientific of the chemical examination of substance, should be of necessity made to depose in

proceedings before the Court.

62. There can be no dispute to this well settled principle of law which has been codified in Section 293 of the Cr.P.C. The question which has

been urged before us is as to whether a report by a person not covered under Sub-Section 4 of Section 293 of the Cr.P.C. could be exhibited or

proved without formal proof. This is certainly not the principle laid down by the Apex Court in the Rajesh Kumar (supra).

63. The pronouncement of this court in Amarjit Singh v State, 1995 Crl. L.J. 1623 held that a Forensic Science Laboratory report is a relevant

piece of evidence and be admissible u/s 45 of the Indian Evidence Act. Such a report admitted in evidence without objection regarding its mode of

proof cannot be objected at a later stage of the case or in appeal.

64. In the instant case, though the cross-examination of the investigating officer does not disclose such a challenge. Even if the report of the

Forensic laboratory is to be accepted, the same is at best the evidence of the fact that human blood was found on the afore-noticed articles.

However there is no evidence that it was blood of the deceased Abdul Qadir.

65. Mr. Sumeet Verma, learned counsel for the appellant has strongly challenged the discovery of the body of deceased on the disclosure of the

appellant. It is also urged that no weapon of offence has been recovered at the instance of the appellant.

66. The learned Additional Sessions Judge has held that the earlier part of the disclosure statement (Exh.PW19/A) regarding motive for the crime

and admission regarding killing of the deceased are inadmissible in evidence by virtue of Section 25 of the Indian Evidence Act since a confession

made before a police officer in police custody is inadmissible under the said provision. The trial court held that the disclosure statement of the

appellant that the dead body of Abdul Qadir was lying in the bushes near Railway Track, Sriniwas Puri and the recovery of the dead body of

Abdul Qadir as a result are facts which are admissible.

67. Placing reliance on Section 27 of the Evidence Act and the pronouncements of the Supreme Court reported at Prabhu Vs. State of U.P., it is

urged by Mr. Verma, learned counsel for the appellant, that even if the disclosure statement of the appellant, Exh.PW19/A was to be believed,

only the reference to the discovery of the dead body at the end of the statement would be admissible in evidence. It is urged that the rest of the

statement is inadmissible in view of Section 25 of the Indian Evidence Act.

68. Our attention is drawn to the reliance in Prabhoo (supra) by the Supreme Court to the pronouncement by the Privy Council in para 9 which

reads as follows:-

9. ... Section 27 provides that when any fact is deposed to and discovered in consequence of information received from a person accused of any

offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact

thereby discovery may be proved. In Pulukuri Kotayya v. King (74 Ind App. 65: AIR 1947 PC 67) Emperor the Privy Council considered the

true interpretation of s. 27 and said :

It is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from

which the object is produced and the knowledge of the accused as to this and the information given must relate distinctly to this fact. Information as

to past user or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by

a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were

discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the information to his knowledge, and if

the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be

added "with which stabbed A.", these words are inadmissible since they do not related to the discovery of the knife in the house of the informant.

(p 77 of Ind. App) : (at p. 70 of AIR).

We are, therefore, of the opinion that the courts below were wrong in admitting in evidence the alleged statement of the appellant that the axe had

been used to commit murder or the statement that the blood stained shirt and dhoti were his. If these statements are excluded and we think that

they must be excluded, then the only evidence which remains is that the appellant produced from the house a blood stained axe and some blood

stained axe and some blood stained clothes. The prosecution gave no evidence to establish whether the axe belonged to the appellant or the blood

stained clothes were his.

10. Therefore, the question before us is this. Is the production of the blood stained axe and clothes read in the light of the evidence regarding

motive sufficient to lead to the conclusion that the appellant must be the murderer ? It is well-settled that circumstantial evidence must be such as to

lead to a conclusion which on any reasonable hypothesis is consistent only with the guilt of the accused person and not with his innocence. The

motive alleged in this case would operate not only on the appellant but on his father as well. From the mere production of the blood stained articles

by the appellant one cannot come to the conclusion that the appellant committed the murder. Even if somebody else had committed the murder and

the blood stained articles had been kept in the house, the appellant might produce the blood stained articles when interrogated by the Sub-

Inspector of Police. It cannot be said that the fact of production is consistent only with the guilt of the appellant and inconsistent with his innocence.

We are of the opinion that the chain of circumstantial evidence is not complete in this case and the prosecution has unfortunately left missing links,

probably because the prosecution adopted the shortcut of ascribing certain statements to the appellant which were clearly inadmissible.

69. On this very issue, in para 5 of Chhotu Singh (supra), the Supreme Court observed that the statement made by the appellant before the

Investigating Officer is admissible u/s 27 of the Evidence Act only to the extent that it proves that he had buried the dead body in the pit knowing

that the offence of murder was committed but does not, in the absence of any other material, conclusively prove that he committed the murder. The

conviction of the appellant u/s 302 of the IPC was set aside but his conviction u/s 201 IPC in the facts of the case was affirmed.

70. In the instant case, as per the disclosure statement of the appellant, Exh. PW 19/A, the only admissible part of the statement attributed to the

appellant is to the effect that he can show the place where the body is lying and get the same recovered. No other part of Exh. PW 19/A is

admissible in evidence.

71. In Deepak Chadha (supra), this court had occasioned to deal with recoveries effected at the instance of the accused person. In this regard,

para 18 of the pronouncement reads as follows:-

18. We do not propose to deal with the purity of the evidence relating to the two recoveries i.e. the recovery of the shirt and the knife at the

instance of the appellant, for the reason, in the decisions reported as Kalloo Passi vs. State, 2009 (2) JCC 1206; Narsinbhai Haribhai Prajapati vs.

Chhatrasinh & Ors., AIR 1977 SC 1753; Surjit Singh and another Vs. State of Punjab, ; Deva Vs. State of Rajasthan, , Prabhu Vs. State of U.P.,

the Supreme Court held that in the absence of other incriminating evidence, the circumstances of seizure of blood stained clothes at the instance of

the accused as also the recovery of a possible weapon of offence at the instance of the accused are wholly insufficient to sustain the charge of

murder against the accused.

72. The impact of the alleged recovery of the shirt having blood stains on its sleeves at the time of arrest of the appellant, Riaz Ali has to be

examined in the above background. As per the evidence placed before this Court, the deceased was murdered at around 9:00 pm on the night of

25th December, 2005. The appellant was arrested in the morning of 27th December, 2005 which was more than 36 hours after the murder. It is

strange that an accused person could be wearing a blood stained shirt for this long period, more so when he is visiting the place from where he had

kidnapped the deceased as alleged.

73. In this regard, Mr. Sumeet Verma, learned counsel for the appellant has placed reliance on the judgment of the Supreme Court reported at

Yamanappa Goolappa Shirgumpi and Others Vs. State of Karnataka, In this case, the Supreme Court disbelieved the claim of the prosecution

with regard to recovery of the evidence that the accused person was wearing the same blood stained clothes at the time of the arrest which he was

wearing when he assaulted the deceased even though he had sufficient time at his disposal to destroy his clothes or the stains of blood on them.

74. The present case is no different. Another curious aspect to the matter is the fact that the appellant was arrested in the very early hours of the

morning. As per the prosecution witnesses, he was arrested when he was coming out of a bus at about 5:45 am on a cold winter morning on 27th

December, 2005. The incident relates to the night of 25th December, 2005. It is difficult to believe that the appellant would be wearing only a shirt

and was not wearing any other winter clothing. Such clothing then would also be having bloodstains. As such, this piece of evidence by the

prosecution is certainly flimsy to say the least.

75. An important gap in the prosecution story has been caused by the failure of the investigative agency to obtain the blood group of the deceased.

There is no evidence at all with regard to his blood grouping or whether it matched the blood stains on the exhibits which were sent for forensic

examination. The prosecution has also not cared to obtain the blood grouping of the deceased so as to rule out the possibility of blood on the shirt

which was allegedly recovered being his own. In this background, the report of the laboratory that human blood was found on the exhibits, without

any material evidence on other important aspects loses significance. For this reason, the reliance placed by Ms. Ritu Gauba, learned APP on the

pronouncement of the Supreme Court in Rameshbhai Mohanbhai Koli and Others Vs. State of Gujarat, is of no assistance to the prosecution.

76. Mr. Sumeet Verma, learned counsel for the appellant has placed reliance on Supreme Court judgment reported at 2008 (1) Scale 399,

Sattatiya @ Satish Rajanna Kartalla v. State of Maharashtra wherein the Court has held that the credibility of the evidence relating to recovery was

substantially dented by the fact that even though as per the Chemical Examiner''s report the blood stains found on the shirt, pant and half blade

were those of human origin, the same could not be linked with the blood of the deceased. It is so in the instant case as well.

77. There is no public witness to the recovery of the body of the deceased and seizure of the blades from the spot as alleged. We may also note

that PW 1 - Mohd Hamid has categorically stated that his name is Mohd Hamid and not ""Mohd Hamid Qadir"". Yet every document prepared by

the police which has been placed before the trial court describes the father of the child as ""Mohd Hamid Qadir"".

78. No explanation is also forthcoming from the record as to how the officials from the police station from Timarpur effected the investigation as

well as recoveries and seizures at Sriniwas Puri which is way beyond their territorial jurisdiction. The prosecution does not disclose as to why the

officials at the police station, Sriniwas Puri were not joined in the investigation.

79. We find that it is in evidence that as per the seizure memo Exh. PW1/F, a blade was seized from the spot where the body of the deceased was

recovered by the police. However, PW 14 - Inspector T.R. Mongia categorically stated that this blade, which was recovered from the location of

the dead body, was not sent to the doctor along with the dead body for seeking an opinion as to whether it was the weapon of offence. As per

PW 14 - Inspector T.R. Mongia, the blade was forwarded to Dr. Ashok Jaiswal, Exh. PW2/B only on 24th February, 2006 to seek his opinion.

The doctor''s opinion Exh.PW2/C is undated and he has opined as follows:- ""xxx On considering the dimensions of the blade and considering the

dimensions of injury as per the PM report, I am of the opinion that injury no. 1 was possible by this blade. It is resealed with the seal of AKJ J/c

subzimandi mortuary AAA Govt. Hospital Delhi and handed over to the accompanying police official along with the opinion.

80. In his testimony, PW2 - Dr. Ashok Jaiswal has stated in cross-examination that ""injuries could have been caused by blade similar to the blade

shown to me or by any other similar sharp weapon"". In this background, it cannot be held that the blade which has been recovered from the site

was unmistakably the weapon of offence.

81. In the instant case, the blade has not been recovered pursuant to a disclosure statement. There is no evidence at all that the blood thereon was

that of the deceased. The recovery memo scribed by the police is shrouded in doubt. The prosecution thus has not been able to prove that the

particular blade allegedly recovered was the weapon of offence and the blood thereon was that of the deceased. The findings of the trial court are

not legally sustainable.

82. On the aspect of the investigations, we may note the statement made by the witnesses of the prosecution, PW 1 - Mohd Hamid; PW 3 -

Mustkeen; PW 4 - Rabina Khatoon; and PW 5 - Mohd Arif. We find that PW 1 stated that he did not make any statement to the police and that

he merely signed Exh.PW1/A. PW 4 has categorically stated that she did not make any statement to the police. PW 5 has stated that the police

did not record his statement.

83. The dispatch of the seized exhibits for the forensic examination has been effected almost two months after the seizures casting a doubt on the

case of the prosecution.

MOTIVE

84. The learned trial judge has found that the prosecution could not prove any motive on the part of the appellant to commit the offence. However,

it was held that failure on the part of the prosecution to prove motive on the part of the appellant is of hardly any consequence nor is it sufficient to

cast a doubt on the prosecution case.

85. Mr. Verma learned counsel for the appellant strongly urges that the prosecution has failed to prove any motive on the part of the appellant to

kidnap or murder the child. We find that the trial court has simply brushed aside this aspect of the matter holding the same to be of no

consequence. This circumstance by itself may be of no significance in a given matter. However, the evidence which has been led by the prosecution

has to be examined in its totality.

86. In Ashok Kumar Vs. State NCT of Delhi, placing reliance on the pronouncements of the Supreme Court on the issue of motive when a

prosecution rests on circumstantial evidence, it was ruled as follows:-

10. It can be seen from the above discussion that the prosecution''s case was based entirely on circumstantial evidence. In such cases, the Court

has to satisfy itself that the prosecution proves each circumstance alleged against the accused beyond reasonable doubt and also further proves that

each link in the chain of circumstances, equally, beyond reasonable doubt. Further, the Court has to always bear in mind that the circumstances

proved should be so strong as to unerringly point to the guilt of the accused and none else and lastly that even a single hypothesis of innocence is

ruled out (Hanumant Vs. The State of Madhya Pradesh, and Sharad Birdhichand Sarda Vs. State of Maharashtra, In cases where the prosecution

relies upon the theory of the accused being last seen in the company of the deceased - species of cases based on circumstantial evidence - the

obligation to prove each circumstance which includes the motive becomes crucial. So far as cases based on the last seen theory are concerned, the

Supreme Court had repeatedly emphasized that the time gap between the sighting of the accused and the deceased together and the death of the

deceased should be so narrow as to rule out the possibility of any other person"s involvement.

87. In Deepak Chadha (supra), the importance of motive in a case of circumstantial evidence has been dealt with. In the present case as well, there

is no suggestion of motive which would have led the appellant to kidnap or murder the child. It is not the case of the prosecution that any ransom

was demanded.

88. On the issue of motive, its significance and effect of absence, we may also refer to the pronouncement of the Supreme Court relied by Ms. Ritu

Gauba, learned APP reported at 2012 (1) SCC Crl. 624, Amitava Banerjee @ Amit @ Bappa Banerjee v. State of West Bengal.

BURDEN OF PROOF AND DOCTRINE OF INNOCENCE

89. The learned APP has vehemently urged that given the evidence of last seen together and the recovery of the body at the instance of the

appellant shortly after his arrest, his culpability for the commission of the offence is to be presumed.

90. In this regard, Mr. Sumeet Verma, learned counsel for the appellant has drawn our attention to the pronouncement on the aspect of burden of

proof and doctrine of innocence in 2010 (9) SCC 189, Babu v. State of Kerala. The Court ruled thus:-

27. Every accused is presumed to be innocent unless the guilt is proved. The presumption of innocence is a human right. However, subject to the

statutory exceptions, the said principle forms the basis of criminal jurisprudence. For this purpose, the nature of the offence, its seriousness and

gravity thereof has to be taken into consideration. The courts must be on guard to see that merely on the application of the presumption, the same

may not lead to any injustice or mistaken conviction. Statutes like Negotiable Instruments Act, 1881; Prevention of Corruption Act, 1988; and

Terrorist and Disruptive Activities (Prevention) Act, 1987, provide for presumption of guilt if the circumstances provided in those Statutes are

found to be fulfilled and shift the burden of proof of innocence on the accused. However, such a presumption can also be raised only when certain

foundational facts are established by the prosecution. There may be difficulty in proving a negative fact.

28. However, in cases where the statute does not provide for the burden of proof on the accused, it always lies on the prosecution. It is only in

exceptional circumstances, such as those of statutes as referred to hereinabove, that the burden of proof is on the accused. The statutory provision

even for a presumption of guilt of the accused under a particular statute must meet the tests of reasonableness and liberty enshrined in Articles 14

and 21 of the Constitution. (Vide: Hiten P. Dalal Vs. Bratindranath Banerjee, Narendra Singh v. State of M.P. AIR 2004 SC 3249; Rajesh

Ranjan Yadav @ Pappu Yadav Vs. CBI through its Director, Noor Aga Vs. State of Punjab and Another, and Krishna Janardhan Bhat Vs.

Dattatraya G. Hegde,

(Emphasis Supplied)

91. It is, therefore, well settled that the prosecution cannot invoke and shift the burden of proof of innocence on the accused without proving an

unbroken chain of circumstances which points only to the guilt of the accused person. Statement under

SECTION 313 Cr.P.C.

92. It has been urged by Ms. Ritu Gauba, learned APP for the State that the appellant has been unable to explain the evidence of him having been

last seen in the company of the deceased as well as the knowledge of the place where the dead body of the child was recovered. On this issue, in

Sanjay Thakran (supra), the Supreme Court has considered the impact of non-explanation of a circumstance or furnishing a false answer by an

accused person in the statement u/s 313 of the Cr.P.C. in the following terms:-

32. It is urged by Mr. Mahendra Anand, the learned senior counsel for the appellant(s), that the accused have not explained as to in what

circumstances the victims suffered the death in their statements u/s 313 Cr.P.C. and thus would be held to be liable for homicide. The learned

senior counsel for the appellant(s) placed reliance on the following observations of this Court made in Amit @ Ammu Vs. State of Maharashtra,

9. The learned Counsel for the appellant has placed reliance on the decision of this Court by a Bench of which one of us (Justice Brijesh Kumar)

was a member in Mohibur Rahman and Another Vs. State of Assam, for the proposition that the circumstance of last seen does not by itself

necessarily lead to the inference that it was the accused who committed the crime. It depends upon the facts of each case. In the decision relied

upon it has been observed that there may be cases where, on account of close proximity of place and time the factum of death, a rational mind may

be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death

or should own the liability for the homicide. The present is a case to which the observation as aforesaid and the principle laid squarely applies and

the circumstances of the case cast a heavy responsibility on the appellant to explain and in absence thereof suffer the conviction.

Those circumstances have already been noticed, in which case such an irresistible conclusion can be reached will depend on the facts of each case.

Here it has been established that the death took place on 28th March between 3 and 4 p.m. It is just about that much time that the appellant and

the deceased were last seen by PW 1 and PW 1.1. No explanation has been offered in the statement by the appellant recorded u/s 313 Cr.PC.

His defence is of complete denial. In our view, the conviction for offence under Sections 302 and 376 has been rightly recorded by the Court of

Session and affirmed by the High Court.

33. We have noticed the decision. However, the circumstances in the present case are not similar to the case where the event of the last seen

together has very close proximity with the time and place of the commission of the crime and other circumstances also favour the hypothesis of guilt

and consequently the fact that no explanation or false explanation offered by the accused was taken as a link in the chain of circumstances. [See

also : Birbal vs. State of M.P., (2000) 10 SCC 212; Raju Vs. State of Haryana, and Babu Vs. Babu and Another, Thus, in the circumstances of

the case, the accused persons not giving any explanation in their examination u/s 313, Cr.P.C. could not be taken to be a circumstance pointing

towards irresistible conclusion that they are involved in the commission of the crime.

(Emphasis Supplied)

93. PW 4 - Rabia Khatoon had stated that Abdul Qadir was playing with other children. She has also disclosed the names of other neighbouRs.

Despite these revelations, not a single person who would have been present at the spot where the child was playing or to the spot to which the

kidnapper had removed him, has been examined. No explanation for the same is ventured by the investigating agency.

94. It is vehemently urged by Ms. Ritu Gauba, learned APP that the choice of witnesses is the prerogative of the prosecution and that it is the

quality and not the quantity of the witnesses or the evidence which is relevant. In support of this proposition, reliance is placed on the

pronouncement of the Supreme Court reported at State of U.P. Vs. Krishna Master and Others, and (2011) 11 SCC 444, Rajesh Singh v. State

of U.P. There can be no dispute at all to this well settled principle.

95. In support of her contention that even though the investigation may have been defective, however, no benefit would enure to the accused,

reliance has been placed be learned APP on Sunder Singh Vs. State of Uttaranchal, However, given the case of the prosecution, it would appear

that the best evidence has been ignored.

96. The learned APP for the State has vehemently urged that the recovery of the dead body was shortly after the appellant was arrested and had

made disclosure statement. It is submitted that hence his false implication is ruled out.

97. The learned APP further has vehemently urged that official acts have to be presumed to have been correctly done in terms of Section 114 (e)

of the Indian Evidence Act. There can be no dispute at all to this proposition. However, this proposition is not applicable in this case as the

appellant has challenged the claimed acts of the investigating agency on the ground that the police has done no investigation. So far as a challenge

to the acts which have been claimed to have been done is concerned, there is no absolute proposition that every statement claimed to have been

recorded by the police or other particulars of the investigation were actually and correctly done. It is always open to the accused person to

challenge the same to support a plea of lack of credibility.

98. In Dinesh Borthakur Vs. State of Assam, the appellant was charged with killing his wife and daughter. In this case also, the prosecution

contended that the presumption of guilt be drawn against the appellant and the Court had ruled thus:-

33. A finding of guilt cannot be based on a presumption. Before arriving at an inference that the appellant has committed an offence, existence of

materials therefore ought to have been found. No motive for committing the crime was identified which, in the facts and circumstances of the case,

was relevant. How the links in the chain of the circumstances led to only one conclusion that the appellant and the appellant alone was guilty of

commission of the offence has not been spelt out by the learned Trial Judge.

99. The well known principles laid down by the Supreme Court in the landmark judgment reported at Sharad Birdhichand Sarda Vs. State of

Maharashtra, are well known which read as follows:-

149. The High Court has referred to some decisions of this Court and tried to apply the ratio of those cases to the present case which, as we shall

show, are clearly distinguishable. The High Court was greatly impressed by the view taken by some Courts, including this Court, that a false

defence or a false plea taken by an accused would be an additional link in the various chain of circumstantial evidence and seems to suggest that

since the appellant had taken false plea that would be conclusive, taken along with other circumstances, to prove the case. We might, however,

mention at the outset that this is not what this Court has said. We shall elaborate this aspect of the matter a little later.

150. It is well settled that the prosecution, must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence.

This is trite law and no decision has taken a contrary view. What some cases have held is only this: where various links in a chain are in themselves

complete, then a false plea or a false defence may be called into aid only to lend assurance to the Court. In other words, before using the additional

link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where there is any

infirmity on lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a Court.

151. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof

required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant Vs.

The State of Madhya Pradesh, This case has been Uniformly followed and applied by this Court in a large number of later decisions up-to-date,

for instance, the cases of Tufail v. State of U.P., (1969) 3 SCC 198 and Ram Gopal Vs. State of Maharashtra, It may be useful to extract what

Mahajan, J. has laid down in Hanumant"s case (at pp. 345-46 of AIR) (supra):

It is well to remember that in cases where tile evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be

drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the

accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the

one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a

conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been

done by the accused.

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

fully established:

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

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a

grammatical but a legal distinction between "may be proved" and "must be or should be proved as was held by this Court in Shivaji Sahabrao

Bobade and Another Vs. 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.

(Underlining by us)

100. In Vinay D. Nagar Vs. State of Rajasthan, also the Court was seized with a charge under Sections 302, 364, 450 and 201 of the IPC against

the appellant. The Supreme Court ruled that the circumstances on which the High Court has placed reliance do not establish the guilt of the

accused, nor does it exclude every hypothesis but the one proposed to be proved by the prosecution.

101. In the instant case, the testimony of the only witness of the prosecution on the aspect of the deceased being last seen in the company of the

appellant is extremely tenuous. WE have above discussed the recoveries effected which is the only other evidence brought on record. The

appellant has set up a case challenging the disclosure statement and all recoveries attributed to him.

102. Ms. Ritu Gauba, learned APP has also placed reliance on the pronouncement of the Supreme Court reported at 2012 (1) SCC Crl 10,

Jaspal Singh & Ors v. State of Punjab in support of her submission and submits that the deceased being last seen alive in the company of the

appellant, and in the light of the aforesaid recoveries, the burden lies on him to explain the abduction and murder. In Jaspal Singh & Ors. (supra),

the Supreme Court was seized with the case of custodial deaths. In para 44 of the pronouncement, the Supreme Court ruled that failure to explain

the circumstances in which the deceased had died would provide an additional link in the chain of circumstances. It was in this regard, the Supreme

Court referred to Section 106 of the Evidence Act, 1872 holding that the fact as to what happened to the victim after his abduction by accused

persons was within the special knowledge of the accused persons, therefore, they could have given some explanation. It was therefore held that the

presumption that the appellants were responsible for abduction, illegal detention and murder was rightly drawn.

We find that the observations of the Supreme Court were given in the particular circumstances which were before the court.

103. The appellant has taken a plea of being falsely implicated in the case. In this background, it would not be appropriate to draw an adverse

inference or a presumption of guilt against the appellant for the sole reason that he has not given any explanation with regard to the death of the

child.

104. The prosecution has not proved a single circumstance leading to the murder of the child beyond reasonable doubt. As noticed above, the

investigating agency has not even attempted to investigate and identify the place where the child was murdered.

The prosecution has miserably failed to prove the chain of evidence by which we could clearly and unequivocally reach to a conclusion which

points only to the guilt of the accused appellant for commission of the crime.

105. Before parting with the case, we must record our appreciation for the assistance rendered by Mr. Sumeet Verma, learned counsel for the

appellant as well as Ms. Ritu Gauba, learned APP for the State. Both learned counsels have ably guided us through the records and placed correct

position in law before us which has enabled us to record the present judgment. For the aforesaid reasons, the appeal is allowed. The impugned

judgment dated 8th February, 2008 passed by the Additional Sessions Judge and the order of sentence dated 12th February, 2008 are hereby set

aside and quashed. It is directed the appellant shall forthwith be released.