acquitted. Consequently, all the three appeals are **allowed.** The judgment and order of conviction and sentence recorded by the trial court is set aside. The appellants are acquitted of the charge for which they have been tried and convicted. The appellants Bare and Vipin are reported to be on bail, they need not surrender, subject to compliance of the provisions of Section 437-A CrPC. The appellant Sanjay Singh @ Bhooray is reported to be in jail. He shall be released forthwith from jail, unless wanted in any other case, subject to compliance of the provisions of Section 437-A CrPC to the satisfaction of the trial court.

38. Let a copy of this order be certified to the court below along with the record for information and compliance.

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**(2022)06ILR A545**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 30.05.2022**

**BEFORE**

**THE HON'BLE MRS. SUNITA AGARWAL, J.**
**THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.**

Criminal Appeal No.1703 of 1989

**Jiut & Anr . ...Appellant (In Jail)**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Appellant:**
Sri Siddhartha Shukla, Sri Dinesh Kumar Pandey, Sri Ronak Chaturvedi (A.C.)

**Counsel for the Respondent:**
D.G.A., A.G.A.

**(A) Criminal Law - Appeal against conviction - Indian Penal Code, 1860 - Section 302 read with Section 34 - The Code of criminal procedure, 1973 - Section 161 - circumstantial evidence - no eye-witness account - duty of the prosecution to prove all the circumstances to form a complete chain unerringly pointing towards the guilt of the accused-appellants - leaving all reasonable hypothesis of a third person entering into the scene of the crime - circumstances from which conclusion of guilt is to be drawn should be fully established, "must" and "should" and not "may be" established - each and every circumstance brought in the chain of circumstance by the prosecution should be fully established beyond all reasonable doubt. (Para -23)**

Appellant no. 1 died - appeal abated - Sole surviving appellant is appellant no. 2 - information given by village Chaukidar (P.W.3) about deceased - stated that village Pradhan (P.W.4 , witness of inquest, chance witness) had suspicion about the reason of the death - statement in the inquest - deceased was a patient of Tuberculosis (T.B.) - body found inside the room in the house of deceased - no visible injury seen on dead body - No recovery memo of blood stained and plain earth brought on record - presence of child witness (PW-5, son of deceased) at the time of incident - doubtful . **(Para - 3,4,5,16,44)**

**(B) Criminal Law - appreciation of the testimony of a child witness - Indian Evidence Act, 1872 - Section 118 - competence of the persons to testify which also includes a child witness - while assessing evidence of child witness - Court must carefully observe his/her demeanor to eliminate likelihood of tutoring - rule of prudence - desirable to see corroboration of evidence of a child witness from other reliable witness on record - Court can rely upon the testimony of a child witness, if the same is credible, truthful and is corroborated by other evidence brought on record -** child witness (PW-5, son of deceased) could not be found to be trustworthy and his testimony cannot be read in favour of the prosecution. **(Para - 18,20)**

**(C) Criminal Law - Indian Evidence Act, 1872 - Section 106 - last seen theory –**

**last seen alive - not prudent to base the conviction solely on "last seen theory" - duty of the prosecution to prove the evidence of last seen beyond all reasonable doubt by the testimony of a witness who is truthful, consistent and free from embellishments - held -** prosecution failed to establish beyond reasonable doubt and the presence of PW-1 near the place of the incident on the fateful night so as to establish that PW-1 was the witness of last seen of the accused coming out of the house of the deceased while he was standing outside the house of P.W. 2 (witness of last seen).**(Para -23,24,40 )**

**(D) Criminal Law - motive of commission of crime – civil dispute -** Mere pendency of a civil suit between the deceased and the accused persons cannot be said to be a strong motive so as to treat it as a circumstance fully established for commission of the crime - Mere narration of motive in a case of circumstantial evidence without bringing anything further to prove the same cannot be taken as a circumstance to establish the case of the prosecution. **(Para - 36,)**

**(E) Criminal Law - suspicion cannot take the place of proof and even if the circumstances on record is a pointer to a strong suspicion, it in itself is not sufficient to lead to the conclusion that the guilt of the accused stands established beyond reasonable doubt - mode of appreciation of evidence - presumption of innocence - criminal trial is not like a fairy tale wherein one in free to give flight to one's imagination and phantasy - if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favorable to the accused should be adopted –** finding with regard to testimony of PW-1 and PW-4 - based on conjectures and surmises - trial court did not evaluate statement of PW-1 independently - not based on proper appreciation of the evidence on record - rather more out of the own imagination or belief of the trial court. **(Para-48,52)**

**HELD:-** Prosecution failed to establish the guilt of the accused-appellant (Brij Kishor) , beyond all reasonable doubt. Benefit of doubt goes to accused-appellant. **(Para - 53)**

**Criminal Appeal allowed.** (E-7)

**List of Cases cited:-**

1. Suresh & anr. Vs St. of Har., (2018) 18 SCC 654

2. Harbeer Singh Vs Sheeshpal & ors., (2016) 16 SCC 418

3. Bhagwan Singh & ors. Vs St. of M.P., (2003) 3 SCC 21

4. Digamber Vaishnav & anr. Vs St. of Chhattisgarh, (2019) 4 SCC 544

5. Suresh Vs St. of U.P. , (1981) 2 SCC 569

6. Sharad Birdhichand Sarda Vs St. of Mah., AIR 1984 SC 1622

7. Nizam & anr. Vs St. of Raj., (2018) 1 SCC 550

8. St. of Raj.Vs Kashi Ram, (2006) 12 SCC 254

9. Bhagwan Singh & ors. Vs St. of M.P., (2003) 3 SCC 21

10. Suresh & anr. Vs St. of Har., (2018) 18 SCC 654

11. Ganpat Singh Vs St. of M.P., (2017) 16 SCC 353

12. The St. of Punj. Vs Jagir Singh, Baljit Singh & Karam Singh, (1974) 3 SCC 277

13. Kali Ram Vs St. of H.P., (1973) 2 SCC 808

14. Latesh @ Dadu Baburao Karlekar Vs St. of Mah., (2018) 3 SCC 66

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.)

1. Heard Sri Raunak Chaturvedi, learned Amicus Curiae for the appellant Brij Kishor and Sri Rupak Chaubey, learned AGA for the State-respondent.

2. The present appeal is directed against the judgment and order dated 4th August, 1989 passed by the Ist Additional District & Sessions Judge, Gorakhpur in Sessions Trial No. 189 of 1987 whereby two appellants herein namely Jiut and Brij Kishor were convicted for the offence punishable under Section 302 readwith Section 34 IPC and sentenced for life imprisonment and a fine of Rs. 1000/- each.

3. At the outset, we may note that the appellant no. 1 Jiut had died during the pendency of the present appeal and the appeal has been abated on his behalf by the order dated 16.7.2019.

Sole surviving appellant is appellant no. 2 namely Brij Kishor who is lodged in the District Jail, Gorakhpur since 21.8.2019 in execution of the non-bailable warrant, as is evident from the report dated 31.8.2019 submitted by the Chief Judicial Magistrate, Gorakhpur.

We are, therefore, considering this appeal only on behalf of the appellant no. 2 Brij Kishor.

4. The prosecution story began with an information given by the village Chaukidar namely Nihor on 30.3.1986 at about 7:05 AM at the Police Station Maharajganj, District Gorakhpur about death of one Pitamber, the deceased herein, resident of village Parsameer, P.S. Maharajganj, District Gorakhpur. The said information provided by the Village Chaukidar was entered in the GD Rapat No. 5 at about 7:05 AM as proved by PW-8, as Exhibit Ka-9. PW-8 further proved that he was posted on the fateful day as Head Moharrir, Police Station Maharajganj and on the receipt of the postmortem report in the police station, case under Section 302 IPC was lodged on 1.4.1986 and entered in the GD as Rapat No. 27 dated 1.4.1986 at 20:45 Hours. The original GD was brought in the Court and the carbon copy thereof was proved as Exhibit Ka-10. The inquest of the dead body was conducted on 30.3.1986, commenced at about 10:30 AM and ended at 12:00 Noon. As per the statement in the inquest, deceased Pitamber was a patient of Tuberculosis (T.B.); the body was found inside the room in the house of Pitamber; no visible injury was seen on the dead body. Black colour blood was oozing out of the mouth and spread on both sides towards the ears of the deceased. The inquest report was proved by PW-7, the Sub-Inspector posted in the Police Station Maharajganj, being in his handwriting and signature as Exhibit Ka-8. In cross, PW-7 stated that the village Pradhan Ram Preet Singh was a witness of the inquest which is evident from the report itself.

5. At this juncture, we may also note the statement of PW-8, in cross, wherein he stated that the village Chaukidar Nihor while giving information of the death of Pitamber stated that village Pradhan had suspicion about the reason of the death.

6. The other documentary evidence on record are the Supurdiginama of torch seized from the witness PW-1 Ram Preet. The memo of recovery dated 2.4.1986 was proved by PW-6, the Investigating Officer as Exhibit Ka-2, being in his handwriting and signature. Another memo of recovery dated 2.4.1986 is about the recovery of blood soaked vest of Mitthu son of Pitamber which had been proved as Exhibit Ka-3, being in the handwriting and signature of PW-6. The postmortem report proved in the handwriting and signature of Doctor C.P. Singh (PW-9) is Exhibit Ka-

11. The ante-mortem injuries found on the person of the deceased Pitamber are as under:-

*"1) Faint brown colour patch on right side of laryngical prominance 1.75 cm x 1.5 cm.*

*2) Faint brown colour patch coupled with irregular margin on left side of laryingical prominance measuring 5cm x 2.5 cm.*

On internal examination of the body, brain and its membranes were found congested. Blood was found in subcutaneous walls and muscles of neck on front side. Pleura was adharent to the chest wall. The hyoid bone and thyroid cartilage were found fractured. The trachea was filled with frothy blood. The lungs were congested. Heart was empty and the buccal cavity was full of frothy blood. Digested food was found in the stomach. Intestines and bladder were empty. Spleen and kidneys were congested. In the opinion of the doctor, the death had occurred about 18 hours before the postmortem examination was conducted and the cause of death was asphyxia due to throttling. It was opined by the doctor that the death could occur in the night of 29/30.3.1986.

7. The Investigating Officer had entered in the witness-box as PW-6 and proved the reports prepared by him. In the cross examination, he stated that the vest of Mitthu son of the deceased was sent for forensic examination but report was not received till submission of the charge sheet. He also proved that the charge sheet was submitted by him after completion of the investigation as Exhibit Ka-4.

The formal witnesses, thus, proved the reports prepared by them during the course of investigation and medical examination.

8. Challenging the conviction by the trial court, it is argued by the learned counsel for the appellant that the star witness of the prosecution is the child witness (PW-5) who had been discredited by the trial court. PW-2 one witness of last seen had been declared hostile and he did not support the case of the prosecution at all. The remaining witnesses PW-1 and PW-4 had been relied by the trial court to convict the appellant. The findings returned by the trial court that the witness of last seen (PW-1) told the Gram Pradhan who entered in the witness-box as PW-4 about witnessing the accused persons coming out from the house of the deceased and that fact by itself was sufficient to record conviction, is based on conjectures and surmises. The evidence of PW-4 is a hearsay evidence, the only evidence of last seen on the testimony of PW-1 was not sufficient to hold the appellants guilty of commission of the crime. In any case, the prosecution has failed to form a complete chain of circumstances, each one to be proved beyond reasonable doubt, so as to bring home the guilt of the accused persons namely the appellant herein. In any case, burden of proving its case beyond all reasonable doubt lies on the prosecution and the onus to offer explanation upon the appellant would shift only in case, the prosecution has been able to prove the guilt of the accused/appellant herein beyond reasonable doubt. The trial court has erred in shifting onus upon the accused persons namely the appellant herein to offer explanation as to why they were present in the house of the deceased on the fateful night, when the prosecution has not been able to prove the presence of PW-1 at the

place wherefrom he allegedly seen the accused persons, beyond reasonable doubt.

Reliance is placed on the decision of the Apex Court in **Suresh and another vs. State of Haryana1** to assert that PW-1 being a chance witness, his testimony requires a very cautious and close scrutiny. The behaviour of PW-1 subsequent to the incident as he remained out of scene for a period of more than two days and had entered only at the instance of Gram Pradhan (PW-4) raise suspicion on his presence. The contention is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. Reference has been made to the decision of the Apex Court in **Harbeer Singh vs. Sheeshpal and others2.**

9. Further on the question of motive, it is submitted that the motive assigned by the prosecution for commission of the crime is too weak. Mere pendency of a civil suit in the civil court between the deceased and the accused persons cannot be said to be a motive strong enough for committing such a ghastly crime. At worst, it raises strong suspicion against the accused. The suspicion, however, so strong cannot take the place of proof and cannot be the basis of conviction. Reference has been made to the decision of the Apex Court in **Bhagwan Singh and others vs. State of M.P.3.**

It is then argued that the Investigating Officer did not collect incriminating material from the spot of the incident so as to prove the presence of the child witness in the house at the time of the occurrence. It was a blind murder of the deceased and the accused persons namely the appellant herein had been implicated only on the suspicion raised by the villagers because of the pendency of the civil suit between the deceased and the accused persons.

The role of the Gram Pradhan in the entire sequence of events is more of an investigator and prosecutor rather than a truthful independent witness.

10. Learned AGA, in rebuttal, argued that the evidence of last seen and the motive brought by the prosecution are clinching. The dead body was found in the house. The incident was of night. The fracture of hyoid bone found in the medical evidence is clearly suggestive of the homicidal death. The presence of the accused person namely the appellant herein, at the scene of the crime clearly established the guilt of the appellants. There is no suggestion of enmity of the Gram Pradhan. The hostile witness was contradicted with his statement under Section 161 Cr.P.C., wherein he also proved the presence of accused persons near the scene of the crime. Delay in recording Section 161 Cr.P.C. statement of the prosecution witnesses would not be fatal to the prosecution case. In the instant case, the factum of homicidal death came into knowledge only after the postmortem was conducted as there was no sign of injury nor any weapon was used as per the postmortem report. The GD was converted on 1.4.2006 and the case under Section 302 IPC was lodged though the accused remained unknown. The delay, if any, in recording statement of the prosecution witnesses stood explained with the GD entry dated 1.4.2006. The motive stated by the prosecution is admitted to the accused persons and in absence of any dispute about the same, it is a reason of strong suspicion

which can be brought in the category of motive to commit the crime. The chain of circumstances has been completed by the prosecution with the relevant circumstance of last seen and motive which are clinching in the incident. The evidence brought by the prosecution cannot be discarded on any suggestion given by the defence.

It is argued on behalf of the prosecution that the lacuna shown in the prosecution evidence is not such which would create a reasonable doubt in the minds of the Court. As the cogent evidence of prosecution witnesses cannot be discarded only on the doubt raised by the Court, inasmuch as, the doubt has to be a reasonable doubt which must not be based on any hypothesis.

To prove the factum of murder of deceased Pitamber, the prosecution had produced five witnesses of fact.

11. PW-3 Ram Nihor is the Village Chaukidar who proved the factum of giving information of the death of deceased Pitamber in the Police Station Maharajganj. In cross, PW-3 stated that he went to the police station alongwith the Gram Pradhan and Ram Preet Dhobi (PW-1) did not accompany him.

12. PW-2, the prosecution witness of last seen had turned hostile and did not support the case of the prosecution at all. In the examination-in-chief, PW-2 stated that he was sleeping in his house at around 11:00 PM and upon asking as to who went to his house, he replied that no one came. He then stated that he did not know anything and kept mum when he was asked further to explain as to what had happened at around 11:00 PM. PW-2 then stated that he did not see the accused persons coming out of the house of the Pitamber on the fateful night and that Ram Preet Dhobi (PW-1) did not go to his house to call him.

In cross, PW-2 was confronted with his statement under Section 161 Cr.P.C., contents of which he denied and stated as to how it was written that he had seen the accused persons coming out of the house of Pitamber was not known to him. The suggestion that he was won over by the accused persons was categorically denied by PW-2. From the testimony of PW-2, it is evident that he did not support the case of the prosecution at all. No part of his statement can be read in favour of the prosecution.

13. Now we are left with three witnesses amongst whom PW-1 is the witness of last seen, PW-4 is the village Gram Pradhan who is the witness of inquest. PW-5 is the son of the deceased who is a child witness aged about 7 years on the date of the incident (10 years on the date of deposition). This witness was the star witness of the prosecution. On appreciation of his testimony, however, the trial court rejected him as being the witness of the crime and recorded that the possibility of PW-5 Mitthu not being present at the time of the occurrence cannot be ruled out.

14. Testing the testimony of PW-5, we may further note that apart from his presence being doubtful on the spot, as noted by the trial court, the possibility of this witness being tutored also cannot be ruled out. As rightly noted by the trial court, PW-5, the child witness, in the cross-examination, stated that he narrated the entire incident to the Investigating Officer on the very next morning of the death of his father when the officer came to the village

in the presence of Ram Preet Dhobi (PW-1), Ram Preet Singh Pradhan (PW-4) and Bechu (PW-2). As per the statement of PW-5, he intimated the Investigating Officer that two accused persons namely the appellants herein were present in the room of his house on the fateful night. On the contrary, no such statement was recorded by the Investigating Officer and when crossed, Investigating Officer PW-6 categorically stated that no such statement was made to him.

PW-5, the child witness further stated in his examination-in-chief that he was threatened by the accused persons/the appellants herein that he should not tell anything to anyone otherwise he would be killed. This part of the statement was not found in the previous statement of PW-1 (Section 161 Cr.P.C. statement) as is evident from the cross-examination of PW-5 and the Investigating Officer (PW-6). PW-5 then stated that when he woke up, he lit up the lamp, to bring in the source of light to prove that he saw the accused-appellants. In cross, this witness (PW-5) stated that he had shown the Dibbi and the matchbox, which was lit up by him but it was not seized by the Investigating Officer. The Investigating Officer (PW-6), to the contrary, had categorically denied that no such Dibbi or matchbox was found by him at the place of the incident, i.e. the room wherein the incident had occurred.

Further statement of the child witness is very important to consider wherein he stated that after the accused persons went away, he called his father who did not speak and then he went to the village. Upon this statement of PW-5 in his examination-in-chief, when he was asked by the Court repeatedly as to what did he do after coming out, PW-5 remained silent and lastly replied to the Court that villagers were collected. In cross, the child witness stated that after the accused persons went away, Ram Preet Singh Pradhan (PW-4) reached at the spot and no one else had reached. He (PW-5) then told that he informed Ram Preet Singh Pradhan that the accused-appellants namely Brij Kishor and Jiut were inside the room and that apart from Ram Preet Singh Pradhan he did not talk to anyone on the fateful night and that in the next morning, he was sent by the Pradhan to the Police Station. The statement of PW-5, the child witness about coming out of his house after the accused had left, at about 11:00 PM on his own, is unbelievable, firstly, that being a child of seven years coming out of the house in the odd hours was not normal and further that his version of coming out of his house is lacking in material details and secondly, his version that Ram Preet Singh Pradhan (PW-4) came in the night is in contradiction with the statement of PW-4 who stated that he came to know through Ram Preet Dhobi (PW-1) in the next morning/afternoon that the accused persons namely Jiut and Brij Kishor were witnesses by him while they were coming out of the house of deceased Pitamber at about 10:30 PM. On confrontation about his statement under Section 161 Cr.P.C., PW-4 admitted that in his statement he had mentioned the names of accused persons, having been last seen by PW-1 Ram Preet Dhobi coming out of the house of deceased Pitamber. The statement of Gram Pradhan was recorded at the time when inquest was prepared, i.e. in the morning of 30.3.1986. On confrontation on this aspect, the Investigating Officer (PW-6) stated that he could not record the statement of the child witness (PW-5) before 3.4.1986 as the child was scared and was not in a position to make a statement.

15. From the above noted facts, it is evident that the Investigating Officer was not intimated by anyone on the next day about the presence of the accused persons/appellants in the house of deceased Pitamber having been seen by PW-5. The statement of PW-6, the Investigating Officer that the child witness (PW-5) was not in a position to make a statement prior to 3.4.1986 is in complete contradiction to the testimony of the child, wherein he stated that he gave the details of the incident on 30.3.1986, i.e. the date of report of the death in the presence of the witnesses namely Ram Preet Dhobi (PW-1) and Ram Preet Singh Pradhan (PW-4) and Bechu (PW-2). The trial court had rightly concluded that the inconsistencies in the statement of the child witness (PW-5) could have been ignored giving him advantage of being a child, had his statement been plain and simple but the statement of this witness is full of material improvement on vital points of the case.

As noted above, PW-5 could not explain as to what did he do after coming out of the house when the accused persons left and his father did not speak on his calling. The source of light, allegedly created by PW-5 could not be proved by the prosecution. The statement of the child witness (PW-5) that the entire village was collected and then that the Gram Pradhan only had reached in the night and the entire incident was narrated to him, could not be proved by the prosecution, inasmuch as, the Gram Pradhan (as PW-4) stated that he raised suspicion about involvement of the appellants only on the information passed on to him by the witnesses of last seen namely PW-1 and PW-2.

It was also rightly noted by the trial court that the recovery of blood soaked vest was made by the Investigating Officer on 2.4.1986, i.e. after a period of two days from the date of recovery of the body in the house though the blood soaked vest, according to the version of the child witness (PW-5), was given to the Investigating Officer on the very next morning, i.e. on 30.3.1986. As per the Investigating Officer, the vest of the child witness was given to him by one Haribhajan and the recovery memo Exhibit Ka-3 does not contain signature or thumb impression of the child to prove that it was given by him to the Investigating Officer. Further from the testimony of the child witness, we may note that he stated that he was sleeping with his father over a 'Kathri' covering themselves with a 'Rajai' (quilt). The Investigating Officer, on the other hand, stated that he did not find any 'Rajai' (quilt) at the place of the incident and only one "Kathri' was found. We may also note that a suggestion was given to the Investigating Officer that the child witness was not present in the village on 1.4.1986 and 2.4.1986 and that he was called from the house of his maternal aunt which was denied by him (PW-6).

It may be noted from the statement of the child witness that he stated that his maternal aunt was living in another village and he and his father (the deceased) went to the village of his aunt and came only 2-4 days prior to the incident. PW-5 though denied that he was in the house of his aunt on the date of the incident but admitted that his maternal aunt was alive on the date when he made deposition in the Court. PW-4, the village Gram Pradhan had admitted that after death of the deceased, the civil case for cancellation of the sale deed instituted by the deceased was being pursued by him by getting himself appointed as the guardian

of the child Mitthu, i.e. PW-5, the son of the deceased. Giving explanation for this conduct, PW-4 stated that since the child had no one as such he was pursuing the case, which fact is found incorrect from the testimony of PW-5 recorded after the statement of the Gram Pradhan. PW-5, the child witness further admitted that he was living with Ram Preet Singh Pradhan (PW-4) and came to depose in the Court alongwith the Gram Pradhan Ram Preet Singh though stated that he was not tutored by PW-4, about what was to be stated in the Court.

Lastly, it may be noted that PW-5 admitted that he was not attending any school and on a question he wrongly answered that there are ten months in one year.

16. For the aforesaid, on a careful evaluation of the testimony of PW-5, it can be concluded that the presence of this witness in the room of the house wherein dead body was found, on the fateful night i.e. 29/30.3.1986, is highly doubtful. It is hazardous to rely on the testimony of the child witness as it was not available immediately after the occurrence and the possibility of coaching and tutoring this witness (PW-5) by the Gram Pradhan namely PW-4 with whom he was residing also is highly probable.

17. The trial judge has recorded the demeanour of the child. The child was vacillating in the course of his deposition. From a child of seven years of age, absolute consistency in deposition cannot be expected but if it appears that there was possibility of his being tutored, the Court should be careful in relying on his evidence.

18. Agreeing with the findings of the trial court, on the doubt raised about the credibility of child witness (PW-5) we may further note that it is settled that while assessing evidence of the child witness, the Court must carefully observe his/her demeanor to eliminate likelihood of tutoring. As a rule of prudence, it is desirable to see corroboration of evidence of a child witness from other reliable witness on record. The Court can rely upon the testimony of a child witness, if the same is credible, truthful and is corroborated by other evidence brought on record.

In a recent decision of the Apex Court in **Digamber Vaishnav and another vs. State of Chhattisgarh4**, while noticing the principles of appreciation of the testimony of a child witness, it was noted by the Apex Court that Section 118 of the Evidence Act governs competence of the persons to testify which also includes a child witness. Evidence of the child witness and its credibility could depend upon the facts and circumstances of each case. There is no rule of practice that in every case the evidence of a child witness has to be corroborated by other evidence before a conviction can be allowed to stand but as a prudence, the Court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record. Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one. It was noted that the evidence of a child witness must be evaluated carefully as the child may be swayed by what others tell him and he is an easy prey to tutoring. The requirement of adequate corroboration of the testimony of a child witness before placing reliance upon the same is more a rule of practical wisdom than law. [Reference Paragraphs 22 and 23]

In his legendary style, Justice Y. V. Chandrachud as he then was stated in **Suresh vs. State of U.P.5** as follows:-

*"(11).....xxxxxxxxxxxxxxxxxx..... Children, in the first place, mix up what they see with what they like to imagine to have seen and besides, a little tutoring is inevitable in their case in order to lend coherence and consistency to their disjointed thoughts which tend to stray. The extreme sentence cannot seek its main support from evidence of this kind which, even if true, is not safe enough to act upon for putting out a life."*

19. We may further note that the child witness PW-5 did not claim himself to be an eye-witness of the incident, as according to him, he had only seen the accused persons/appellants inside the room on the fateful night where the dead body was found and as per his version he was threatened by the accused persons not to speak to anyone and they went away.

20. As noted above, we do not find corroboration of the testimony of child witness from any other evidence on record. Rather for the inconsistencies/embellishments in his statement and the possibility of the child witness (PW-5) being a tutored witness, we are afraid to rely on his testimony as a witness of last seen of the accused persons/appellants at the place of the incident on the fateful night. The crux is that PW-5, the child witness could not be found to be trustworthy and his testimony cannot be read in favour of the prosecution.

21. Now we are left with two witnesses namely PW-1 & PW-4. PW-1 claim himself to be the witness of last seen of the accused persons/appellants coming out from the house of the deceased on the fateful night.

22. We may note that the trial court had heavily relied upon the testimony of this witness (PW-1) of last seen and, in fact, solely relied on his statement to conclude that it was sufficient to connect the accused persons with the crime and that as no explanation was offered by the accused persons in respect of their presence in the house of the deceased they be held guilty. The trial court has further noted that the motive to commit the crime because of a civil litigation pending between the accused-appellants with the deceased was proved by the prosecution and the accused-appellants had no business to be at the residence of the deceased at the odd hours. No explanation had been given by the accused in respect of their presence in the house of the deceased and the circumstance that the deceased was found dead in the morning and his death was proved to be homicidal, the chain of circumstance put forth by the prosecution was complete and fully established the guilt of the accused leading to no other conclusion.

We are afraid to agree with the aforesaid findings returned by the trial court for the reasons noted herein below.

23. Before testing the testimony of PW-1 and PW-4, independently one by one, we may record that this is a case of circumstantial evidence and there is no eye-witness account. It was the duty of the prosecution to prove all the circumstances to form a complete chain unerringly pointing towards the guilt of the accused-appellants leaving all reasonable hypothesis of a third person entering into the scene of the crime. As has been held by the Apex Court in **Sharad Birdhichand Sarda vs. State of Maharashtra6**, the circumstances from which conclusion of guilt is to be

drawn should be fully established, "must" and "should" and not "may be" established.

The five golden principles constituting of the proof of the case based on circumstances, laid down by the Apex Court in the said case are noted as under:-

*"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 & Anr. v. State of Maharashtra, (1973) 2 SCC 793, 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."*

It is, thus, settled that each and every circumstance brought in the chain of circumstance by the prosecution should be fully established beyond all reasonable doubt.

It was noted in **Harbeer Singh** (supra) that:-

*"11. It is a cardinal principle of criminal jurisprudence that the guilt of the accused must be proved beyond all reasonable doubt. The burden of proving its case beyond all reasonable doubt lies on the prosecution and it never shifts. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. [Vide Kali Ram Vs. State of Himachal Pradesh, (1973) 2 SCC 808; State of Rajasthan Vs. Raja Ram, (2003) 8 SCC 180; Chandrappa & Ors. vs. State of Karnataka, (2007) 4 SCC 415; Upendra Pradhan Vs. State of Orissa, (2015) 11*

*SCC 124 and Golbar Hussain & Ors. Vs. State of Assam and Anr., (2015) 11 SCC 242]."*

As regards, the evidence of last seen or theory of last seen, it is stated by the Apex Court in **Nizam and another vs. State of Rajasthan7** that the "last seen alive" or the "last seen theory", undoubtedly is an important link in the chain of circumstance that would point towards the guilt of the accused with some certainty. The logic is that the "last seen theory" holds the courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of death of the deceased. It is, however, noted therein that the settled principle of the law is that it is not prudent to base the conviction solely on "last seen theory". The evidence of last seen, i.e. "last seen theory" should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.

As noted in **State of Rajasthan vs. Kashi Ram8**, the last seen theory is based on Section 106 of the Evidence Act which cast an obligation on the accused to offer a reasonable explanation in discharge of the burden placed on him. If the accused fails to adduce any explanation or offers a false explanation, the Court can consider it as an additional link in the chain of circumstances proved against the accused, so as to complete the chain. However, Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. [Reference Paragraph '23']

24. Meaning thereby, it is the duty of the prosecution to prove the evidence of last seen beyond all reasonable doubt by the testimony of a witness who is truthful, consistent and free from embellishments.

25. In light of the above legal principle, when we examine the balance evidence of the prosecution namely PW-1 and PW-3, we find that as per the statement of PW-1, he had seen the accused persons namely the appellant herein Brij Kishor alongwith the co-accused coming out of the house of deceased Pitamber on the fateful night at about 10:30 PM. According to the version of PW-1, he had seen the accused persons on lighting the torch, which he was carrying while standing in front of the house of Bechu (PW-2). Upon seeing the accused persons, he confronted them by asking as to what were they doing at the said place at that odd hours. The accused replied that a litigation relating to an agricultural field was going on and they went to the house of deceased Pitamber to settle the same by compromise. After saying that the accused persons went to their way. On the next day, he came to know that Pitamber was killed.

As per the testimony of PW-1, when the police came at the spot, he was not present there and was in his brick kiln. He was also not present when the body was sent for the postmortem. He came to know in the brick kiln from a villager that the body was taken for the postmortem at about 10:00 AM. His brick kiln was at a distance of two furlong from the house of deceased Pitamber. PW-1, however, stated that the same day when body was taken away, in the evening, he told the Gram Pradhan that he had seen the accused persons coming out of the house of the deceased in the night and prior to telling the said fact to the Gram Pradhan, it was not disclosed to anyone. When confronted, PW-1 stated that on the third day of the incident, when Gram

Pradhan passed on this information to the police, he was called in the village by the Investigating Officer and his statement was then recorded in the presence of the Gram Pradhan. PW-1 further stated that when he was interrogated by the Investigating Officer, Bechu (PW-2) was not present.

26. We may further note from the testimony of PW-4, the village Gram Prahdan Ram Preet Singh that as per his version, the fact of last seen was intimated to him by PW-1 Ram Preet Dhobi on the next day of the incident though in cross, PW-4 could not fix the time when the said fact was disclosed by PW-1. He however, stated that the inquest was conducted at about 9:30 AM and the Investigating Officer recorded his statement at the time when the inquest was written and that the time of the same was 9:30 AM. He was then confronted that whether he told the Investigating Officer about PW-1 having seen the accused persons coming out of the house of the deceased, he stated that since that was written in his statement by the Investigating Officer, he would have told him but was not sure about the time when that statement was made.

27. To ascertain as to when the statement of PW-4, the Gram Pradhan was recorded by the Investigating Officer, who was also a witness of the inquest, we have gone through the Case Diary.

28. A perusal thereof indicates that the Case Diary, Parcha No. 1 started from 1.4.1986 when the case under Section 302 IPC was registered. We may also note, at this juncture, that as per the statement of PW-8, the Head Moharrir; GD entry No. 27 of registration of the case was made on 1.4.1986 at about 20:45 Hours (10:45 PM). From a perusal of the Case Diary, it is evident that the Parcha No. 1 of the Case Diary commenced at about 20:45 Hours on 1.4.1986 and the inquest and the postmortem were copied therein. The statement of the Gram Pradhan as a Panch witness was recorded in the Case Diary, Parcha No. 2 on 2.4.1986 which began from 7:00 AM.

29. From a reading of the statement of the Gram Pradhan under Section 161 Cr.P.C., we may note that pressing his suspicion about the cause of the death of deceased, PW-4, Ram Preet Singh Pradhan stated that on getting information of the death of Pitamber at about 10:45 PM on 29.3.1986, he also went to the spot and saw that blood was coming out from the mouth of the deceased and it was flowing at the place where his son was sleeping. The vest of the son of the deceased was soaked with blood but the child could not say anything because of the fear and was only crying. The village Chaukidar Nihor and Ram Kishan Dhobi as also one Haribhajan were sent to the police station to give the intimation. The accused Jiut and his family members were creating rumor that Pitamber died on his own death due to TB and were creating a scene so that no information could be given to the police but when the Investigating Officer came, the inquest was done and the body was sent for postmortem. The accused persons also tried to get the postmortem report in their favour but when they failed, they absconded. PW-4 then stated that he started making enquiry on his own and then Ram Preet Dhobi told him that by chance he had seen the accused persons coming out of the house of the deceased in the torch light and also asked them the reason for going there.

30. As per the statement of PW-4 in the examination-in-chief, the fact of last

seen of the accused persons coming out from the house of the deceased was told by PW-1 Ram Preet Dhobi on the next day of the incident, i.e. on 30.3.1986. From the version of PW-4, he had intimated the Investigating Officer about the fact of last seen transpired by PW-1, the witness of last seen, who also came to know on 30.3.1986 that the deceased was killed, as per his own version in his examination-in-chief.

31. From the statements of PW-1 and PW-4, it seems that they got suspicious about the death of Pitamber on the very next morning when his dead body was found, i.e. on 30.3.1986 but confirmation of homicidal death could be made only after the postmortem report was received, which was conducted at about 2:00 PM on 30.3.1986. It is established from the record that PW-4 Ram Preet Singh Pradhan was a witness of inquest, but it is not explained by the prosecution as to why the Investigating Officer took the whole next day, i.e. 1.4.1986 in registering a case under Section 302 IPC and recording statements of material witnesses which was recorded on the next day, i.e. 2.4.1986. It is evident from the record that the accused persons were in the village on the next day of the incident.

32. It is evident from the record that the Gram Pradhan, i.e. Ram Preet Singh had been instrumental in solving the entire case by introducing the presence of child witness, PW-5, in the house, which was found doubtful, both by the trial court and also by us and further with the introduction of Ram Preet Dhobi (PW-1) as a witness of last seen. The Gram Pradhan PW-4 during the continuation of the trial was also contesting the civil litigation of cancellation of the sale deed as a guardian of the minor son of the deceased. The statement of Gram Pradhan that since there was no one in the family of the deceased so he was contesting the civil case, is found false from the statement of the child witness that his maternal aunt was alive at the time of deposition and 2-4 days prior to the incident, he and his father (deceased) came back from the house of his maternal aunt. What interest the Gram Pradhan had in getting the accused persons convicted can be inferred from the circumstances of the present case, wherefrom it is evident that he was taking active interest in getting cancellation of the sale deed of a land which was purchased by the accused persons namely Jiut and Brij Kishor, by getting himself as the sole guardian of a young child who was introduced in the witness-box as a witness of seeing the accused inside his house in the odd hours.

33. As to the conduct of PW-1, the witness of last seen, he stated that he came to know in the next morning that Pitamber was killed but he told the Gram Pradhan for the first time about the fact of seeing the accused persons coming out of the house of the deceased and that his statement was recorded by the Investigating Officer on the third day at the instance of the Gram Pradhan in his presence. From this part of the testimony of PW-1, it is evident that the statement of PW-1 was recorded by the Investigating Officer at the instance of the Gram Pradhan. The version of PW-1 that when his statement was recorded, the other witness of last seen namely Bechu (PW-2) who had turned hostile was not present, is found false from a perusal of the Case Diary which records that the statements of Ram Preet Singh Pradhan (PW-4), Bechu PW-2 and Ram Preet Dhobi namely PW-1 were recorded on the same day, i.e. 2.4.1986 at the place of the incident, when the investigation was commenced by the

Investigating Officer at about 7:00 AM. As per the sequence in the Case Diary, after recording statement of the first informant Ram Nihor Chaukidar, the statements of Panch witnesses were recorded and the Investigating Officer had then recorded the statements of witnesses of last seen namely Bechu (PW-2), Ram Preet Dhobi (PW-1).

34. Having analysed the statements of PW-1 and PW-4 conjointly, we may further note that the testimony of PW-4, the Gram Pradhan is a hearsay evidence, he did not project himself as the witness of any of the incriminating circumstance brought against the accused persons by the prosecution except that a case for cancellation of the sale deed was instituted by deceased Pitamber against the accused persons. We may also note from the cross-examination of PW-4 that he stated on his own that deceased Pitamber had no money to contest the case and he was begging for the money from the villagers and he (PW-4 Pradhan) also helped him financially.

35. Another witness of last seen Bechu had turned hostile and did not support the prosecution at all.

36. The motive of commission of crime, i.e. civil dispute instituted by the deceased against the accused persons though stated but cannot be said to be so strong so as to commit the murder, inasmuch as, from the version of PW-4, it transpires that deceased Pitamber had no money to contest the suit. Moreover, the suit was for cancellation of the sale deed executed in favour of the accused persons. It had not been established nor brought by the prosecution that the accused persons did not get possession of the purchased property and, thus, had immediate motive to commit the crime. It has also not come in the evidence nor can it be inferred from the circumstances brought forth by the prosecution that the suit had matured to the stage that the accused persons had an apprehension that they would loose the purchased land. Rather as per the version of PW-4, the Gram Pradhan, he was contesting the suit even after three years of the occurrence, when the deposition of the witnesses was recorded in the trial court. Thus, the prosecution though stated the motive for commission of the crime but had not established it by bringing forth such circumstance which would be strong enough to be the immediate cause of commission of the offence. Mere pendency of a civil suit between the deceased and the accused persons cannot be said to be a strong motive so as to treat it as a circumstance fully established for commission of the crime. Mere narration of motive in a case of circumstantial evidence without bringing anything further to prove the same cannot be taken as a circumstance to establish the case of the prosecution. [Reference **Bhagwan Singh and others vs. State of M.P.9** Para 32]

37. It is settled that in a case of circumstantial evidence, motive may be considered as a circumstance, which is relevant factor for the purpose of assessing evidence, in such cases where there is an unambiguous evidence to prove the guilt of the accused. It is true that the motive is primarily known to the accused himself and it may not be possible for the prosecution to explain what actually prompted or excited the accused to commit a particular crime but in a case like the present one where the only motive narrated is the pendency of a civil litigation where the accused persons were on beneficial side, in absence of unambiguous evidence, it cannot be treated to be a circumstance

which is such as to create a high degree of probability that the offence was committed by the accused persons.

38. As noted above, PW-1 cannot be found to be an independent witness but seems to be a witness prompted by the Gram Pradhan (PW-4) who was behind the entire prosecution story. The statement of PW-1 being the witness of last seen is, thus, not found to be credible. Even otherwise, PW-1 could not establish the reason for his presence at the house of Bechu (PW-2) wherefrom he had allegedly seen the accused persons coming out from the house of the deceased Pitamber. On confrontation of this witness, he admitted that Bechu was not present in the Brick Kiln on the next day when the dead body was found. The conduct of this witness in not coming forward to intimate the Investigating Officer about having seen the accused persons on the very next day when he got the information that the deceased was killed also shakes the credibility of this witness. The explanation offered by him that he was present in his brick kiln and for the fear that he would be abused by the police he did not go to the house of the deceased even on getting information that the police had reached there, is found to be an effort of the prosecution to fill up the lacuna. Also the presence of PW-1 at the place wherefrom he had seen the accused coming out from the house of the deceased was not natural. He could only be kept in the category of a chance witness whose testimony is to be evaluated with caution and circumspection before resting the conviction on the same.

39. We find it profitable to note the observations in Para '23' in **Harbeer Singh** (supra).

*"23. The defining attributes of a "chance witness" were explained by Mahajan, J., in the case of Puran Vs. The State of Punjab, AIR 1953 SC 459. It was held that such witnesses have the habit of appearing suddenly on the scene when something is happening and then disappearing after noticing the occurrence about which they are called later on to give evidence."*

The observations in Para '47' in **Suresh and another vs. State of Haryana1**0 are also relevant to be noted hereunder:-

*"47. .....xxxxx.....Nonetheless, the evidence of a chance witness requires a very cautious and close scrutiny. A chance witness must adequately explain his presence at the place of occurrence. [refer to Satbir v. Surat Singh, (1997) 4 SCC 192; Harjinder Singh v. State of Punjab, (2004) 11 SCC 253]. Deposition of a chance witness whose presence at the place of incident remains doubtful should be discarded [refer Shankarlal v. State of Rajasthan, (2004) 10 SCC 632]. The behavior of the chance witness, subsequent to the incident may also be taken into consideration particularly as to whether he has informed anyone else in the village about the incident. [refer Thangaiya v. State of Tamil Nadu, (2005) 9 SCC 650]. "*

40. The prosecution has, thus, failed to establish beyond reasonable doubt and the presence of PW-1 near the place of the incident on the fateful night so as to establish that PW-1 was the witness of last seen of the accused coming out of the house of the deceased while he was standing outside the house of Bechu.

41. In the totality and facts and circumstances of the present case, we find that the prosecution has not been able to bring the circumstances of implication of the accused-appellant in such a manner so as to establish their guilt in the commission of crime beyond reasonable doubt.

42. We may also record that the role of Investigating Officer in the whole investigation process is also questionable.

43. Record shows that even after the postmortem conducted on 30.3.1986 at about 2:00 PM, the Investigating Officer whosoever was Incharge, did not proceed with the investigation for more than 24 hours and the case was registered under Section 302 only on 1.4.1986 in the night at about 20:45 hours when the Investigating Officer only extracted the inquest and the postmortem in the Case Diary. The entire investigation was proceeded only on 2.4.1986 when the Investigating Officer went on the spot, recoveries were then made, the site plan was prepared. As per the statement of the Investigating Officer, he inspected the site of the incident after recording the statements of the witnesses. As stated in the examination-in-chief, PW-6 prepared the site plan after recording statements of Bechu, Nihor, Mitthu, Ram Preet Singh Pradhan, Ram Preet Dhobi. The site plan is dated 2.4.1986.

As per the statement of the Investigating Officer, he prepared the site plan at the instance of child witness Mitthu, which fact is further evident from the narration in the site plan wherein it is stated that the place "A" was shown by child witness Mitthu as the place where deceased was killed by throttling and from the said place itself, blood stained and plain earth were collected previously.

44. No recovery memo of the blood stained and plain earth was brought on record by the prosecution in consonance with the version of the Investigating Officer recorded in the site plan at Item No. 'A' of the index. The statement of the child witness, however, was recorded on 3.4.1986, a day after recording the statements of all other witnesses and completion of papers pertaining to the investigation. As per the first version of the child witness recorded in the site plan by the Investigating Officer prepared on 2.4.1986, he showed the place where the accused persons had killed the deceased by throttling his neck. The explanation offered by the Investigating Officer for delay in recording the statement of the child witness that the child was shaken by the incident and was not in a position to make a statement belied from the own version of the Investigating Officer recorded in the site plan as noted above.

45. Further the Investigating Officer, in cross, admitted that a 'Kathri' made of pieces of cloth was found from the place of the incident which was on a 'Puwal' but no recovery memo of the said 'Kathri' was prepared. The blood soaked vest of the child witness was not recovered on the first day of the investigation, i.e. 30.3.1986 and it was not handed over by the child witness PW-5 as against his testimony. The said vest was handed over on 2.4.1986 by one Haribhajan as noted in the recovery memo Exhibit Ka-3 and the statement of the Investigating Officer PW-6. As per the statement of the Investigating Officer, the said vest was sent to FSL for chemical examination but the results of the said examination was not brought by the prosecution before the trial court. The prosecution has, thus, failed to prove the recovery of blood soaked vest from the spot

of the incident as is narrated in the recovery memo Exhibit Ka-3 which admittedly does not contain the signatures or thumb impression of the child witness Mitthu.

46. As per the statement of the Investigating Officer, the investigation was initially conducted by SI Narendra Pratap Singh (PW-7) who had completed the inquest proceedings. The investigation was handed over to PW-6 after the receipt of the postmortem report. It could not be explained by the prosecution as to when the postmortem was conducted on 30.3.1986 at about 2:00 PM and report was received, at what time the investigation was handed over to PW-6. PW-6, the Investigating Officer who started the investigation on 1.4.1986 at about 20:45 Hours did not explain this gap.

Further from the statement of the previous Investigating Officer namely S.I. Narendra Pratap Singh (PW-7), it is evident that after reaching the spot on 30.3.1986, he only conducted the inquest and sent the body for the postmortem. It is not known as to who collected the blood stained and plain earth from the spot of the incident and why it was not produced in the evidence. PW-7 admittedly did not record the statement of anyone on the spot and only noted in the evidence that people present on the spot including the inquest witnesses raise apprehension about the cause of death.

47. It was a case of circumstantial evidence, the responsibility of the Investigating Officer to investigate the murder was more onerous, inasmuch as, he would be the first person to enter into the scene of crime and collect all incriminating circumstances/material so as to solve the crime so as to bring the culprits before the Court. In the instant case, it is evident from the record that the Investigating Officer (PW-6) who commenced investigation after two days of the incident instead of doing investigation on his own, was guided by PW-4 Ram Preet Singh Pradhan whose statement was recorded on the first day of the commencement of the Investigation, i.e. 2.4.1986. The entire investigation, as is clear from the record, proceeded in the manner in which it was prompted by Ram Preet Singh Pradhan namely PW-4. The investigation in this case, as is evident, was guided only in one direction just as to implicate the accused persons namely Jiut and Brij Kishor being the culprits since the beginning on the suspicion raised by the Gram Pradhan and was not independent at all. A vitiated investigation would ultimately prove to be a precursor of miscarriage of criminal justice. In such a case the Court would simply try to decipher the truth only on the basis of guess or conjectures as the whole truth would not come before it.

48. The suspicion raised by the Gram Pradhan because of the pendency of the civil litigation between the accused persons and the deceased had been the reason for the implication in the instant case. Though the needle of suspicion was pointed at the accused-appellants but the legal evidence in the shape of definite circumstances pointing unerringly towards the guilt of the accused-appellants could not be brought forth by the prosecution.

It is well settled that the suspicion cannot take the place of proof and even if the circumstances on record is a pointer to a strong suspicion, it in itself is not sufficient to lead to the conclusion that the guilt of the accused stands established beyond reasonable doubt. [Reference

**Ganpat Singh vs. State of Madhya Pradesh11** Paragraph '13']

49. In the entirety of the facts and circumstances of the instant case, we are afraid to agree with the conclusion drawn by the trial court that the chain of circumstance is complete and fully establishes the guilt of the accused persons leading to no other conclusion and that the accused had failed to furnish any explanation in respect of their presence in the house of the deceased. The reason being that the presence of the accused persons in the house of the deceased could not be established once the trial court itself had rejected the evidence of PW-5, the child witness.

50. As regards the testimony of PW-1 and PW-4, the trial court has committed an error in reading both the testimonies together and not evaluating the statement of PW-1, the witness of last seen, independently. The finding recorded by the trial court that PW-4 Gram Pradhan had confirmed that the fact of last seen was told by PW-1 to him on the day following the incident and that it was not believable that PW-1 was under possible pressure or influence of Ram Preet Singh Pradhan so as to falsely implicate the accused persons in the case of murder, is not based on proper appreciation of the evidence on record rather more out of the own imagination or belief of the trial court. The said finding is based on conjectures and surmises for the fact that the trial court did not evaluate the statement of PW-1 independently so as to analyse as to whether he (PW-1) had established his presence at the place wherefrom he allegedly had last seen the accused persons or whether his presence at the said place was natural. The conduct of PW-1 Ram Preet Dhobi in not coming forward to make a statement before the Investigating Officer (PW-7) who conducted inquest on the very first day and making a statement only at the instance of the Gram Pradhan after two days of the receiving of the dead body has also been completely ignored by the trial court. The trial court has wrongly treated the Gram Pradhan (PW-4) as a wholly reliable witness and conveniently ignored that he was also an interested witness, who was taking undue interest in the civil litigation initiated by the deceased against the accused persons, apart from being the creator of the entire prosecution story, since the beginning on his own suspicion. He (PW-4) cannot be treated to be an independent and reliable witness so as to base the conviction on his testimony.

51. In the totality of the facts and circumstances of the present case, we find that because of the irresponsible attitude of the Investigating Officers (PW-6 and PW-7), the lopsided investigation made by PW-6 has resulted in causing serious prejudice to both the prosecution as also the defence. The omission on the part of the Investigating Officer (PW-6) has result in miscarriage of justice as it left the Court only to guess-work rather than helping it to decipher the truth.

52. We also find it profitable to note the observations of the Apex court in **The State of Punjab vs. Jagir Singh, Baljit Singh and Karam Singh12** wherein while laying down the mode of appreciation of evidence and the general principles regarding presumption of innocence, it was observed by the Apex court that a criminal trial is not like a fairy tale wherein one in free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused

arraigned at the trial is guilty of the crime with which he is charged. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the Court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses.

Reference has been made to the decision of the Apex Court in **Kali Ram vs. State of Himachal Pradesh13**. Relevant paragraph '25' is quoted hereunder:-

*"25. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favorable to the accused should be adopted. This principle has a special relevance in cases where the guilt of the accused is sought to be established by circumstantial evidence. Rule has accordingly been laid down that unless the evidence adduced in the case is consistent only with, the hypothesis of the guilt of the accused and is inconsistent with that of his innocence, the court should refrain from recording a finding of guilt of the accused. It is also an accepted rule that in case the court entertains reasonable doubt regarding the guilt of the accused, the accused must have the benefit of doubt. Of course, the doubt regarding the guilt of the accused should be reasonable; it is not the doubt of a mind which is either-so vacillating that it is incapable of reaching a firm conclusion or so timid that it is hesitant and afraid to take things to their natural consequences. The rule regarding the benefit of doubt also does not warrant acquittal of the accused by resort to surmises, conjectures or fanciful considerations. As mentioned by this Court in the case or Slate of Punjab v. Jagir Singh, (Crl. A. No. 7 of 1972 d/ August 6, 1973) a criminal trial is not liked a fairy tale wherein one is free to give flight to one' In arriving at the conclusion about the guilt of the imagination and phantasy. accused charged with the evidence by the yardstick of witnesses. Every case own facts. Although the. to the accused the courts commission of a crime, the court has to judge the of probabilities, its intrinsic worth and the animu, in the final analysis would have to depend upon it benefit of every reasonable doubt should be given should not at the same time reject evidence which is ex facie trustworthy or grounds which are fanciful or in the nature of conjectures."*

We may further note the observations in **Latesh alias Dadu Baburao Karlekar vs. State of Maharashtra14** noted in Para '54' of the report in Suresh and another vs. State of Haryana (supra):-

*"54. .....xxxxxxxxxxxxxx.....In Latesh v. State of Maharashtra, (2018) 3 SCC 66 , this court had observed that:*

*"46.... When you consider the facts, you have a reasonable doubt as to whether the matter is proved or whether it is not a reasonable doubt in this sense. The reasonableness of a doubt must be a practical one and not on an abstract theoretical hypothesis. Reasonableness is a virtue that forms as a mean between excessive caution and excessive indifference to a doubt."*

53. On a careful appreciation of the evidence on record, with the degree of caution and circumspection required in the

facts of the instant case, we reach at an irresistible conclusion that the prosecution has failed to establish the guilt of the accused-appellant namely Brij Kishor herein, beyond all reasonable doubt. The benefit of doubt obviously has to go to the accused-appellant Brij Kishor.

The judgment and order dated 4th August, 1989 passed by the Ist Additional District & Sessions Judge, Gorakhpur in Sessions Trial No. 189 of 1987 is, therefore, liable to be set aside and the appeal deserve to be allowed.

We, therefore, **allow** this appeal while setting aside the judgment of the trial court.

The accused-appellant Brij Kishor is in jail. He shall be released from the jail forthwith, if he is not wanted in relation to any other crime.

The office is directed to send back the lower court record along with a certified copy of this judgment for information and necessary compliance.

The compliance report be furnished to this Court through the Registrar General, High Court, Allahabad.

Before parting with this judgment, we record our appreciation to Sri Raunak Chaturvedi learned Amicus Curiae who rendered valuable assistance to the Court. The Court quantifies Rs. 15,000/- (Rupees Fifteen Thousand only) to be paid to Sri Raunak Chaturvedi, learned Advocate as fee for his precious time provided in preparation and hearing of this Criminal Appeal. The said amount shall be paid to him by the Registry of the Court within the shortest possible time.

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**(2022)06ILR A565**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 20.05.2022**

**BEFORE**

**THE HON'BLE MRS. SUNITA AGARWAL, J.**
**THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.**

Criminal Appeal No.1862 of 1989

**Ram Chandra ...Appellant (In Jail)**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Appellant:**
Sri P.N. Lal, Sri R.L. Varma

**Counsel for the Respondent:**
D.G.A., A.G.A.

**Criminal Law- Indian Evidence Act, 1872- Sections 3 & 154- Hostile Witnesses- The evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence.**

Settled law that relevant parts of evidence of a hostile witness can be relied upon by the trial court.

**Indian Evidence Act, 1872- Sections 3 & 33 - Non-completion of cross-examination of the witness- Not only the specific part in which a witness has turned hostile but the circumstances under which it happened can also be considered, particularly in a situation where the chief-examination was completed and there are circumstances indicating the reasons behind the subsequent statement, which could be deciphered by the Court - The part of the testimony of a witness whose cross-examination is not over, would not make the entire examination as inadmissible. The evidence of the hostile witness who after examination-in-chief had abandoned the case of the prosecution because of the long delay in**