

imprisonment and seven years rigorous imprisonment along with fine of Rs.-10,000/-, for the offence under Section 201 I.P.C.; in default of payment in fine to further undergo two months additional imprisonment. All the sentences have been directed to run concurrently.

2. It may be noted here that under the same impugned judgment, the trial court while deciding the Sessions Trial No. 506 of 2011 (State Vs. Pintu @ Arvind & 2 Others) has acquitted the accused Pintu @ Arvind, Pankaj and Bhudhar for the offence under Section 120-B I.P.C.

Background/Facts

3. Factual matrix of the case is that on 14th February, 2011 at 11:00 a.m., Village Chowkidar, namely, Dharak reported to the Jalalabad Police Station-Jalalabad, District Shahjahanpur that a dead body of unknown person aged about 35 years was lying near the wheat field of one Anwar Shah, on the road side of his village. The said body was also seen by people of nearby places. He assumed that the said corpse was of some outsider. The said information was registered in General Diary as G.D. No. 17 of Police Station-Jalalabad District Shahjahanpur at 11:00 am on the same day i.e. on 14th February, 2011 and after inquest (panchayatnama), the body of the deceased was sent for post-mortem.

4. On the basis of G.D. entry being G.D. No. 46 at 19:40 hrs dated 15th February, 2011, the instant case was registered as Case Crime No. 107 of 2011, under Sections-302 and 201 I.P.C., at Police Station-Jalalabad, District-Shahjahanpur.

5. On 18th February, 2011, on receiving information from an outside

source, the first informant Rajesh and his mother Munni Devi (P.W.-1 and P.W.-2 respectively herein) identified the dead body by seeing the clothes and the photograph. Thereafter it came to light that the dead body was of the brother of the first informant (P.W.-1), namely, Devendra Pal (deceased herein). On 20th February, 2011, the first informant/complainant (P.W.-1) submitted an application to the Inspector-in-Charge, Police Station Jalalabad, District-Shahjahanpur that on 13th February, 2011 at 4:00 pm, his brother Devendra Singh (deceased) was called and taken away by two persons, namely, Laddan and Ramdev (accused-appellants herein) on a Pulsar motorcycle bearing No. U.P. 27-9072. Accused-appellant Laddan had a single barrel gun. His brother Devendra Singh had rivalry with Pintu @ Arvind, Pankaj and Bhudhar from village Kiriakalan. All three were serving sentence in jail. They conspired from the jail itself to kill the deceased Devendra. When the accused-appellants Laddan and Ramdev took the deceased Devendra on the motorcycle and reached outside the village, Manoj alias Bhayatu, Makku and Alok also accompanied them on another motorcycle. Gavade and Parmeshwar of village of first informant it is alleged saw them, when they were going together. These persons committed murder of Devendra Singh and dumped his body in the area of Police Station Jalalabad. The deceased Devendra told the first informant that he was going to a wedding ceremony with the above persons and he would return by 12:00, noon on the next day. When his brother did not return on the next day, he enquired from his relatives about his brother but no information was received. On 18th February, 2011, he came to know that an unknown body was found in an area under the Police Station Jalalabad. On reaching

there, the unknown body was identified as that of his brother i.e. Devendra Singh (deceased). It was alleged that the accused-appellants Laddan and Ramdev had made the plan of murdering his brother while they were in jail.

6. The post-mortem of the unknown body (which later on was identified as body of the deceased Devendra Singh) was conducted on 15th February, 2011 at 03:30 p.m. by Dr. Kamal Kumar (P.W.-7) and in the autopsy report (Ex.Ka-4), P.W.-7 had opined that the cause of death of the deceased was shock and hemorrhage due to ante-mortem fire arm injuries.

7. After registration of the aforementioned case crime number, the Investigating Officer proceeded with the statutory investigation under Chapter-XII Cr.P.C. and on the basis of material and evidence collected by him during course of investigation including the statements of the witnesses recorded under Sections 161 Cr.P.C., the Investigating Officer submitted the charge-sheet dated 17th May, 2011 against Pintu alias Arvind, Pankaj and Bhughar under Section 120-B I.P.C. and charge-sheet dated 29th March, 2011 against Ram Dev and Laddan under Sections 302 and 201 I.P.C., which were marked as Exhibit Ka-3 and Ka-2 respectively. Upon submission of the aforesaid charge-sheets/police reports, cognizance was taken by the concerned Magistrate in exercise of power under Section 190 (1) (b) of Cr.P.C. Since the offence was exclusively triable by the Court of Sessions, after complying with the provisions of Section 207 Cr.P.C., the concerned Magistrate committed the case to the Court of Sessions in terms of Section 209 Cr.P.C.

8. On 21st September, 2011, the concerned Court framed charges against the accused-appellants Laddan and Ram Dev under Sections 302/34 I.P.C. and Section 201 I.P.C.

Prosecution Witnesses as were examined during trial

9. The trial commenced and the prosecution had examined nine witnesses, who were as follows:-

1	Rajesh Singh, first informant/complainant (brother of the deceased)	P.W.1
2	Munni Devi, (mother of the deceased and first informant)	P.W.2
3	Gavade (friend of the deceased)	P.W.3
4	Pushpa (wife of the first informant and Bhabhi of the deceased)	P.W.4
5	Yashpal Singh, the then S.S.I., Jalalabad Police Station, who investigated the instant case and submitted the charge-sheet dated 17th May, 2011 against accused Pintu @ Arvind, Pankaj and Bhudhar	P.W.5
6	Veer Singh, the then S.S.I. Jalalabad Police Station, who being Investigating Officer submitted the charge-sheet dated 29th March, 2011 against Laddan and Ram Dev	P.W.6
7	Dr. Kamal Kumar, who conducted the autopsy of the body of an unknown person, who was later on identified as the deceased	P.W.7
8	Pankaj Srivastava, the then Sub-Inspector, Police Station-Jalalabad, who prepared the arrest memo of Laddan and recovery memo of single barrel gun and five cartridges of 12 bore on the dictation of S.S.I. J.K. Tomar	P.W.8
9	Sunil Kumar, the then Constable of Police Station Jalalabad, who signed on the arrest memo of Laddan and recovery memo of single barrel gun and five cartridges of 12 bore	P.W.9

10. The prosecution in order to establish the charges levelled against the accused had also relied upon the following documentary evidence, which were duly proved and consequently marked as Exhibits:

1	Recovery memo of empty cartridges and mobile cover dated 14th February, 2011	Ex.Ka.-12
---	--	-----------

2	Panchayatnama/inquest report dated 14th February, 2011	Ex.Ka.-7
3	Post-mortem report dated 15th February, 2011	Ex. Ka.-4
4	Site plan with index dated 16th February, 2011	Ex.Ka.-5
5	Written report dated 20th February, 2011	Ex.Ka.-1
6	Recovery memo of gun and cartridge dated 28th February, 2011	Ex. Ka.-13
7	Charge-sheet dated 29th March, 2011	Ex.Ka.-3
8	Site plan with index dated 28th February, 2011	Ex.Ka.-6
9	Charge-sheet dated 17th May, 2011	Ex.Ka.-2
10	Forensic Science Laboratory report dated 16th January, 2012	Ex.Ka.-18
11	Forensic Science Laboratory report dated 20th October, 2012	Ex.Ka.-20
12	Forensic Science Laboratory report dated 20th October, 2020	Ex.Ka.-21

11. After completion of the prosecution evidence, statements of the accused were recorded under Section 313 Cr.P.C. The accused denied the prosecution version and stated that the witnesses gave false evidence under the influence of some people inimical to them. They had further stated that they were innocent and that they had been falsely implicated in the instant case as they were in jail since 2002.

The defence has not produced any witness in support of its case.

12. In order to prove the guilt and charges against accused, the prosecution got examined a total of nine witnesses, which included witnesses of fact and also witnesses of formal nature.

13. P.W.-1 Rajesh Singh in his examination-in-chief has stated that he himself saw the deceased while he was going with the accused-appellants Ram Dev and Laddan on a Pulsar motorcycle to attend a marriage ceremony. When they reached outside the village, they were followed by Alok Kumar, Manoj Kumar @

Makku and Maittu on another motorcycle. He then stated that when the deceased was going along with the accused-appellants, Parmeshwar and P.W.-3 Gavade also saw them. When the deceased did not return to his house, P.W.1 searched for him and thereafter he went to Laddan's place at village Badhau, District-Mirzapur. Laddan feigned ignorance and as per PW-1 said to him that he had no idea as to where the deceased was. He did not know anything about him as he did not come along with him. On 18th February, 2011, he came to know that an unknown dead body was found at Police Station-Jalalabad. On this information, he went to Police Station-Jalalabad along with his mother (P.W.-2), brother and maternal uncle and from the photograph and clothes, he identified the said dead body as that of his brother.

14. Further in his examination-in-chief this witness has further stated that there was enmity between his family and with the families of accused Arvind @ Pintu, Bhudhar and Pankaj and in that enmity, various murders happened from both sides. The deceased was an accused in the murder case of their brother. It is further stated that when the deceased was in jail in the murder case of Nanhe, he met with the accused-appellants Laddan and Ram Dev and they became friends. After the deceased was released on bail, accused Ram Dev, Laddan and Pintu, Pankaj and Bhudhar became friendly in jail, where they conspired the murder of the deceased. Thereafter when the accused-appellant Ram Dev and Laddan were released on bail, Pintu and others gave money to them for murdering the deceased. Since the accused Ram Dev and Laddan visited the house of first informant to meet the deceased, therefore, he knew them. Conspiracy of murder of the deceased was disclosed to him by Rampal and Gavade.

15. P.W.-2 Munni Devi has stated in her examination-in-chief that when she was coming from Jalalabad on a horse-carriage (Tanga) and reached Urvariya Jaan, she saw that the deceased was being taken away by the accused-appellants Ram Dev and Laddan. The latter had a single barrel gun while he was sitting on the motor cycle. She further stated that she returned to her home. When her son Devendra (deceased) did not return to his house, she, her son Rajesh, her brother Sukhpal, her nephew and other family members went to the residence of Laddan at village Badhau where he was tilling soil. When they enquired about the deceased, accused Laddan said that he would come to village Ashuwa and there all of them together would search for the deceased. They searched for the deceased but he was not traced out. In her examination-in-chief, this witness has also admitted that there was enmity between her family and accused Pintu, Pankaj and Bhudhar and several murders of each family had taken place on account of the said enmity.

16. P.W.-3 Gawade in his examination-in-chief has stated that the incident in question took place about four years ago. He had gone to jail for the murder of Amba Prasad. All the accused were also in jail. The deceased in this case, Devendra, was in jail. Ahmed was also in jail. Devendra had been released on bail earlier. When the accused Pintu, Bhudhar, Pankaj and Laddan were sitting and discussing, he saw with his own eyes and heard with his ears that they were conspiring the murder of the deceased Devendra for one lakh rupees, in which it was decided to take half before the murder and half after the murder. As per the plan, Devendra was murdered by the accused Bhudhar, Pankaj and Pintu with the help of

Ramdev and Laddan. Laddan is a friend of Ram Dev. He also stated that he and the deceased were in jail together in the murder case of Amba Prasad. This witness further stated that after four days had passed when he came out from jail, he came to know about the murder of the deceased.

17. The tenor of the prosecution to adduce this witness i.e P.W. 3 was to establish the theory of conspiracy hatched by the accused in jail to kill the deceased Devendra, while the trial court had itself turned down this theory of conspiracy and acquitted the accused Pintu @ Arvind, Bhudhar and Pankaj under Section 120-B of I.P.C. Therefore, there is no need to discuss the testimony of this witness further.

18. P.W.-4 Smt. Pushpa stated that on the date of incident at about 4 o'clock in the evening, the accused-appellants Laddan and Ramdev came near her house on a black motorcycle and the deceased Devendra went along with them on the said motorcycle by saying that he was going to attend a marriage ceremony. Laddan was a very good friend of Devendra. She had a grocery shop. Devendra Singh had taken five packets of Harsingar from her while he was going and after that the deceased did not return. She further stated that the accused-appellants shot and killed Devendra Singh and threw the body in the jungle of Sikandarpur village.

19. P.W.-5 was the then S.S.I. Yashpal Singh, who had investigated the case vis a vis accused Pintu @ Arvind, Bhudhar and Pankaj and had submitted charge-sheet dated 17th May, 2011 against them. He had stated in his examination-in-chief that he had recorded the statements of P.W.-2, P.W.3 and other witnesses at the behest of

P.W.-1. He further stated that during investigation, , he came to know that the deceased and the P.W.-2 were accused together in a murder case and had gone to jail together.

20. P.W.-6 the then S.S.I. Veer Singh, who investigated the case after transfer of S.S.I. J.K. Tomar and submitted the charge-sheet dated 29th March, 2011. He has stated in his examination-in-chief that he recorded the statements of witnesses of inquest and Constable Manoj Kumar who got the post-mortem of the body of the deceased conducted and also recorded the statement of S.I. Bhagwat Singh, who prepared the inquest. In his cross-examination, this witness has stated that it was correct to say that the deceased Devendra @ Din Dahade was a notorious criminal, against whom various gangster and kidnapping cases were pending.

21. P.W.-7 Dr. Kamal Kumar, who conducted the post-mortem of the body of the deceased has stated in his examination-in-chief that during post-mortem he found following ante-mortem injuries on the body of the deceased:

“1. Fire arm wound of entry size 3.0 cm x 2.5 cm x chest cavity deep through and through situated on left aspect of right side of chest. 5.00 cm below from the right axilla margins inverted blackening and tattooing is present around the direction of wound right to left and backward and downward.

2. Fire arm wound of exist size 4.00 cm x 3.5 cm present of left side of back, just below inferior angle of left scapule.

3. Fire wound of entry 3.00 cm x 3.00 cm x abdominal cavity deep – present on front of abdomen; margins inverted

blackening and tattooing is present around wound. Direction :- forward to backward.

4. Contusion size 6cm x 5.0 cm present on part of left of chest.”

22. This witness further stated that a banding piece and five metal fragments were found in the abdominal cavity and liver of the body of the deceased. He opined that the cause of death of the deceased was shock and hemorrhage as a result of ante-mortem injuries. The death of the deceased must have happened about one and half day ago.

23. P.W.-8 the then S.I. Pankaj Srivastava has stated in his examination-in-chief that he prepared the arrest memo of the accused Laddan on the dictation of S.S.I. J.K. Tomar. He also proved the signatures of S.S.I. J.K. Tomar which were appended on the recovery memo (Exhibit Ka-13) of the single barrel gun which is alleged to have been recovered from the possession of accused-Laddan.

24. P.W.-9 S.I. Sunil Kumar has stated in his examination-in-chief that he accompanied the S.S.I. J.K. Tomar and S.I. Pankaj Srivastava at the time of arrest of accused-Laddan. This witness signed on the arrest memo of accused Laddan and recovery memo of single barrel gun and five cartridges of 12-bore on the dictation of first Investigating Officer S.S.I. J.K. Tomar. He also proved the recovery memos of empty cartridges, mobile cover, three Chandrika Harsingar.

25. On the basis of the above exhaustive analysis of the evidence, the trial court found that the evidence adduced by the prosecution was cogent, consistent and reliable and the prosecution had succeeded to prove the guilt of the accused

beyond reasonable doubt and accordingly, convicted the accused-appellants Laddan and Ramdev under Section 302 read with Section 34 and Section 201 of the Indian Penal Code.

26. Being aggrieved by the impugned judgment and order of conviction passed by the trial court, the accused-appellants have preferred both the above appeals.

27. We have heard Mr. Om Narayan Pandey, learned counsel for the accused-appellants, Mr. Sandeep Kumar Dubey, learned counsel for the first informant and Mr. Amit Sinha, learned A.G.A. for the State.

Arguments

28. The submission of the learned counsel for the accused-appellant is that there is no direct evidence connecting the accused with the commission of the crime; the motive is absolutely weak vis a vis the accused-appellants; the prosecution case rests on circumstantial evidence in which the chain of events was absolutely missing.

29. Learned counsel for the accused-appellants further submits that no one had seen the deceased being taken away by the accused-appellants on 13th February, 2011. On 18th February, 2011, when the first informant/P.W.-1 came to know that a constable of the Police Station had found an unknown body on 14th December, 2011, then even after two days i.e. till 20th February, 2011 FIR was not lodged. Only after consultation and advice of an Advocate, the first informant/P.W.1 had given a written complaint to the Police Station- Jalalabad.

30. Learned counsel for the accused-appellants further submits that why the family members of the deceased had not

seriously searched the deceased nor they lodged the first information report naming the accused-appellants as they had seen that the accused his brother being taken away by them on 13th February, 2011. It is a vague and lame excuse that they were searching for the deceased by contacting relatives and also on the telephone and this continued for good five days. It all goes to show that indeed no one had seen the accused taken away the deceased and that is why no first information report had been lodged against the accused persons before 20th February, 2011.

31. It is also argued that as per the records, the deceased was a notorious offender/criminal due to which he was known as "Din Dahade" (broad daylight). When he was 19 years old only, the deceased committed his first murder. Various cases of murders and attempt to murders were stated to be pending against him. Therefore, this possibility cannot be ruled out that the deceased might have been killed by other criminals owing to his enmity.

32. It is also submitted that the conviction and sentence was passed by the trial court against the accused-appellants without appreciating the evidence properly. On the above premise, he submits that the impugned judgment was liable to be quashed.

33. During the course of argument, we find that a photo copy of recovery memo of single barrel gun and cartridges, which were alleged to have been recovered from the possession of the accused-Laddan on 28th February, 2011 had been exhibited as Exhibit-Ka-13 and it was treated as a secondary evidence before the trial court.

34. From the record, learned counsel submitted that it was not clear as to when, where and how the photostat copy of the memo of recovery came on record of the trial court. There was no order, by which the same had been accepted, exhibited and treated as secondary evidence. Also there is no mention of any law as to what procedure had been adopted for treating the photostat copy as secondary evidence.

35. At this stage, the issue, which would come up for examination before the court, would be as to what procedure had been adopted for treating a photostat copy of the above recovery memo as secondary evidence. The admissibility of photocopies as secondary evidence is primarily governed by the Indian Evidence Act, 1872, particularly Sections 63 and 65. For deciding the said issue, it would be worthwhile to reproduce Section 63 (2) and 65 (c) of the Indian Evidence Act, which are extracted here-under:

“63. Secondary evidence.---
Secondary evidence means and includes---

...

(2) copies made from the original by the mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

.....

65. Cases in which secondary evidence relating to document may be given.--*Secondary evidence may be given of the existence, condition or contents of a document in the following cases :*

.....

(c) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

.....”

36. From bare reading of aforesaid two sections of the Indian Evidence Act, we find that as per Section 63 (2) a document may be admitted as secondary evidence, being a copy prepared by mechanical process. However the correctness of the Photostat document had to be established. Section 65 (c) provides that when a party seeks to produce photostat copy, it has to lay a foundation to come up with a definite case that the original was destroyed or lost. This section makes it clear that a Photostat copy of a document can be produced in evidence only when it is alleged and proved that the original was in existence but was lost or destroyed or is in possession of the opposite party who had failed to produce it.

37. Perusal of the above two provisions simultaneously, shows that a photostat copy of a document can be allowed to be produced as secondary evidence only in the absence of the original document. When a party seeks to produce a photostat copy it has to lay the foundational facts by proving that the original document existed but is lost or is in possession of opposite party who failed to produce it. Allowing the production of Photostat copy by the court in evidence does not amount to its proof. Its probative value has to be proved and assessed independently. It has to be shown that it was made from original at a particular place and time. Unless the court is satisfied that the Photostat copy is genuine and accurate, it should not be read in evidence. The accuracy of photostat copy should be established on oath to the satisfaction of court by the person who prepared the copy or by one who can speak of its accuracy.

38. In the facts of the present case, from the records of the trial court, we find

that no application had been filed by the prosecution seeking photo stat copy of recovery memo of the single barrel gun and of the cartridges to be treated as secondary evidence after its exhibition by stating therein that the original had been lost or destroyed without the default or negligence of the prosecution and that the said photo stay copy was prepared through mechanical process. We have also not found from the records of the trial court that the trial court had passed any separate order allowing the application of the prosecution for treating the photo stay copy supplied by it for being treated as secondary evidence after its exhibition. We also find that no endorsement was made by the trial court to get the photocopy proved by the relevant person. It is not clear as to whether the said photo stat copy available on record marked as Exhibit-ka-13 was prepared from the original record or from a copy of the photostat. The same had also not been certified by the Police authority of the concerned Police Station verifying that the same was made from original record.

39. In our view, mere exhibition of a document does not dispense with proof of its execution. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon. [Reference-*Kaliya Vs. State of Madhya Pradesh reported in (2013) 10 SCC 758*]

40. On the other-hand learned A.G.A. for the State submits that though the

prosecution witnesses i.e. P.W.-1 to P.W.-4 were relatives or friends of the deceased, their evidence of them having seen the deceased last with the accused cannot be discarded and there is no such rule that the the evidence of family members cannot be relied upon.

41. It is then argued that without any doubt that the present case was based on circumstantial evidence in which the chain of events was been completed by the prosecution. The prosecution case has also been supported by the medical evidence. Therefore, the prosecution has proved the charge levelled against the accused-appellants beyond reasonable doubt. On the above premise, learned A.G.A. submits that the appeals have no merit and is liable to be dismissed.

Conclusion/ Discussion

42. We have examined the respective contentions urged by the learned counsel for the parties and have perused the records of the present appeal including the lower court records.

43. The only question requires to be addressed and determined in this appeal is whether the conclusion of guilt arrived at by the learned trial court and the sentence awarded is legal and sustainable in law and suffers from no infirmity and perversity.

44. We have carefully gone through the impugned judgment passed by the trial court and we find that the trial court has convicted the accused-appellants, namely, Ram Dev and Laddan only on two points/issues:

(i) the trial court held that the testimonies of P.W.1, P.W.-2 and P.W.-4

are reliable who claimed themselves have to last seen the accused going with the deceased while he was taken away by them on a motor cycle to attend a marriage ceremony on 13th February, 2011.

(ii) the trial court also held that since three empty cartridges of 12-Bore recovered from the place where the dead body of the deceased was found by the Police on 14th February, 2011 and the single barrel gun which was recovered from the possession of the accused Laddan on 28th February, 2011 were matched in the chemical analysis report of the concerned Forensic Science Laboratory and it was opined that the three empty cartridges were shot by the same gun, therefore, it was clear that the accused-appellant Laddan was involved in commission of crime in question.

45. For coming to the conclusion of the aforesaid two points/issues, we find that all the prosecution witnesses of last seen i.e. P.W.-1, P.W.-2 and P.W.-4 were elder brother, mother and Bhabhi (wife of first informant/P.W.1) of the deceased respectively and that they claimed that they had seen the deceased when he was going along with the accused-appellants, namely, Ram Dev and Laddan on a motorcycle on 13th February, 2011 to attend a marriage ceremony. Since P.W.-1, P.W.-2 and P.W.-4 are family members of the deceased, hence their testimonies require deeper scrutiny.

46. At the very outset, we are of the view that every criminal commits a crime covertly so that no one can know about his crime which he commits but in the present case, the accused-appellants Laddan and Ram Dev came to the house of the deceased and that too as per the prosecution along with a single barrel gun and took him

along with them in the presence of his family members and villagers and they had allegedly committed the murder of the deceased on the next date i.e. 14th February, 2011. This conduct of the accused-appellants in committing such crime is not natural. When as a matter of fact, the accused-appellants had ample of the opportunities to kill the deceased so that no person would have seen them when they committed the same. It is evident from the records, the deceased was also a notorious offender and occasionally he would have gone elsewhere away from his home for two to four days without informing anyone. In such a situation, the accused-appellants had ample opportunity to kill the deceased any time anywhere when they got a chance to find him alone.

47. It is also impossible to believe that the son and brother of a family had gone out with two persons on a motorcycle to attend a marriage ceremony after informing the family members back home that he would return on the next day by 12:00 noon and when he did not return for five days, then it was natural for the family members of the said person including his mother and brothers to go out to search him. In this case they start off with the search and investigate after about five days and that had after they got the news of his death. As per the prosecution case, when the deceased did not return on the next date i.e. on 14th February, 2011, the family members inquired about the whereabouts of the deceased from their relatives but only on phone till they received the information of his death. As per the testimonies of P.W.-1 and P.W.-2, they had gone to the place of Laddan also, where he was pouring soil. Then also they only asked Laddan about the deceased in casual manner. He also had replied that he did not

know where the deceased was. They did not ask Laddan sternly that when the deceased had gone with him and Ram Dev then why had he not returned till that date and when and where did they leave the deceased, and also how long had he been with them. It is also surprising to note that even after a lapse of five days i.e. 13th to 18th April, 2011, none of the family members of the deceased like P.W.-1, P.W.-2 and P.W.-4 had got lodged any missing report regarding the deceased. They had also not lodged any first information report naming the accused-appellants, when as a matter of fact they knew very well (as per testimonies of P.W.-1, P.W.-2 and P.W.-3), that the deceased went along with the accused-appellants on 13th February, 2011. This conduct of the family members of the deceased i.e. P.W.-1, P.W.-2 and P.W.-4 was absolutely unnatural. Even otherwise, it is also surprising to note that even after the first informant P.W.-1 and P.W.-2 (mother of the deceased) came to know about the murder of the deceased on 18th February, 2011 when they reached the Police Station and identified the unknown body as the deceased from the photograph and clothes, they did not lodge the first information report against the accused-appellants and after passing of two days i.e. only on 20th February, 2011 and after getting advice of an advocate, P.W.-1 lodged the first information report against the accused-appellants. Said aspects of the matter go to show that none of the family members i.e. P.W.-1, P.W.-2 and P.W.-4, knew as to when and with whom the deceased had left his house and where he had gone. That was the reason why the entire family kept mum and they did not make any complaint against any of the accused for full five days and waited for his return.

48. It is also pertinent to mention here that P.W.-1 in his cross-examination had stated that he did not know either the accused-appellant Ram Dev or the accused-appellant Laddan before the incident. He has also stated that he did know as to whether accused-appellant Ram Dev had gone to jail before the incident or not. This witness denied that the fact that accused Pintu and others had given money to Ram Dev and Laddan to kill Devendra. He had stated that he heard the said fact as rumour. There was nothing certain about anything.

49. From the aforesaid testimony of P.W.-1, it transpires that he did not know the accused-appellants Laddan and Ram Dev prior to the incident in question, meaning thereby as to how he identified that the persons were the Ramdev and Laddan who are allegedly had taken the deceased along with them on a motor cycle on 13th February, 2011.

50. So far as the testimony of P.W.-2 mother of the deceased is concerned, this witness in her cross-examination deposed that after a passage of five days when the deceased had left his house, she came to know that the deceased Devendra had died. She also deposed that often the deceased used to go out for two to four days even before the said incident. Due to that reason, she or any other family member did not make any effort to find out as to where the deceased had gone. Therefore, for five days P.W.-2 did not search the deceased as to where he had gone This she says was the case even if she knew that he had gone along with the accused-appellants. This evidence also fortifies that no one had actually seen the deceased going with the accused-appellants.

51. P.W.-2 at the end of her cross-examination, has admitted that she did not witness any incident of this case. At the behest of other person, she had deposed against the Pintu @ Arvind, Bhudhar and Pankaj. She also admitted that she never went to the Police Station regarding the incident in question nor any police personnel came to her house inquiring about the incident. She has specifically stated that she did not meet any police personnel regarding the incident.

52. The above testimony of P.W.-2 makes it clear that she did not know anything about the incident in question.

53. From the above deposition of P.W.-2 it transpires that she did not know as to where the deceased went and with whom on 13th February, 2011 and after 5-6 days after consultation of an advocate, the prosecution lodged the first information report against the accused, as is evident from the testimony of P.W.-1 and has been corroborated by the evidence of P.W.-2.

54. In our view, it is impossible to believe that none of the family members, whose one family member was missing, had not searched him seriously nor they lodged any missing report or first information report naming the two particular persons with whom they know the family member had gone. This fact goes to show that actually they did not see the accused while they were taking away the deceased along with them on the alleged motorcycle and after knowing that the deceased was murdered, the prosecution with the legal advice had engineered the present case by lodging the first information report against the accused-appellants. It is also surprising to note that none of the family members of the

deceased ever approached the accused Ram Dev, who is alleged to have taken away the deceased on 13th February, 2011 along with accused Laddan.

55. It is also important to mention here that the deceased, who allegedly gone on 13th February, 2011 at 04:00 p.m. with the accused-appellants was recovered/found on the next day i.e. 14th February, 2011 at 11:00 a.m., This meant that there was a gap of 19 hours in between the time he went and thereafter was found. It cannot be ruled thus that during those period of 19 hours, he must have come into contact with other persons as well. The Apex Court in the case of *State of Goa Vs. Pandu Rang Mohite reported in AIR 2009 SC 1066* has observed that the circumstances of last seen together does not ipso facto leads to inference that it was the accused who had committed the crime. There must be something more establishing the connectivity between the accused and the crime. The last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so short that possibility of any person other than the accused being the author of the crime becomes impossible. In the present case there is gap a of 19 hours when the deceased was last seen with the accused and the dead body was recovered. Thus is a very long period and it cannot be ruled out that in these 19 hours the deceased might not have come into contact with some other person as well.

56. So far as the matching of the three empty cartridges recovered from the place where the dead body of the deceased was found is concerned, we find that the alleged single barrel gun recovered from the possession of the accused Laddan as per the

report of the concerned Forensic Science Laboratory did not match. Here it may be noted that the accused Laddan was arrested on 28th February, 2011 along with the single barrel gun when he tried to escape as per the prosecution version. At the time of arrest of Laddan, except the single barrel gun, nothing else had been recovered from his possession like bag, clothes, money etc. It is impossible to believe that any person who tried to escape from an area, left his house empty handed. Even otherwise, it is also impossible to believe that after committing the crime, the criminal could roam in that very area for 14 days so that the police could catch him.

57. Apart from the above, perusal of report of the Forensic Science Laboratory shows that the disputed empty cartridges of 12-bore, which were marked as E.C.-1, E.C.-2 & E.C.-3 were having only mark of pin, while the tested cartridges marked as T.C.-1 & T.C.-2 found the sign of pin and sign of breech as well. This fact also makes the prosecution story doubtful and unreliable regarding the matching of the cartridges shot by the same gun which is said to have been recovered from the possession of accused-appellant Laddan.

58. There is also no evidence on record that empty cartridges were recovered from the place where the dead body of the deceased was found. There is no record of the fact that they were kept in the safe custody in the Police Station. This could not have been done as they were sent for chemical analysis to the concerned Forensic Science Laboratory after four months. This chain is also missing, which casts a dent/doubt in the prosecution story. Further more, if the theory of matching of the three empty cartridges and the recovered single barrel gun is taken to be

correct, then it is a single circumstance against the accused Laddan and only on the basis of this circumstances, the chain of circumstantial evidence would not be considered as complete. The five golden principles laid down by the Apex Court in the case of **Sharad Birdhichand Sarda vs. State of Maharashtra reported in (1984) 4 SCC 116** do not get satisfied.

59. We may also record that unless the presence of accused-appellants Laddan and Ram Dev was proved to have been at the spot where the dead body of the deceased was found, no inference can be drawn against them only on the basis of suspicion as it is trite law that suspicion may be strong but cannot take place of proof.

60. It is also possible that some other single barrel gun of the same lot and make was used in this crime by some unknown person as the deceased was a notorious offender against whom many cases of kidnapping, gangster, attempt to murder and murder were pending.

61. It is also trite law that 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.

62. Thus, in view of the discussion made herein-above we are of the opinion that the trial court has not examined the evidence of "last seen" in its correct prospective and erred in placing reliance on testimonies of P.W.-1, P.W.-2 and P.W.-4. We are thus not in concurrence with the view taken by the trial court while passing the impugned judgment of conviction. We are convinced that the prosecution had failed to prove its case beyond reasonable

doubt and also to prove that the crime in question had been committed by none other than the accused-appellants. The trial court only on the basis of suspicion convicted the accused appellants while passing the impugned judgment.

Conclusion

63. In view of the discussions and deliberations held above, the prosecution could not prove its case against the accused-appellants beyond reasonable doubt. Hence, both the appeals deserve to be allowed.

64. Accordingly, the both the appeals succeed and are **allowed**. The impugned judgment dated 7th December, 2020 passed by the Additional Sessions Judge/POCSO Act, Court No.43, Shahjahanpur in Sessions Trial No. 487 of 2011 (State Vs. Laddan and Ram Dev) under Sections 302, 201 and 120-B I.P.C. arising out of Case Crime No. 107 of 2011, Police Station-Jalalabad, District-Shahjahanpur, against the accused appellants, is hereby set aside.

65. The accused appellant-Ram Dev, who is in jail since 13th April, 2012 shall be released forthwith, unless he is wanted in any other case on compliance of the provisions of Section 437-A Cr.P.C. Whereas the accused-appellant Laddan, who is reported to be on bail, he needs not surrender before the court below. His bail bond shall be deemed to have been discharged.

66. Let a copy of this judgment be sent to the Chief Judicial Magistrate, Shahjahanpur henceforth, for necessary compliance.

(2025) 5 ILRA 113

**APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.05.2025**

BEFORE

**THE HON'BLE MRS. SANGEETA CHANDRA, J.
THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.**

Criminal Appeal No. 652 of 2001
With
Criminal Appeal No. 605 of 2001

Shera **...Appellant**
Versus
State of U.P. **...Respondent**

Counsel for the Appellant:
Sudeep Kumar, A.K. Pandey

Counsel for the Respondent:
Govt. Advocate

(A) Criminal Law - Appreciation of Evidence – Appreciation of Testimony - Indian Penal Code, 1860 – Sections 302, 307, 323 & 504 - Arms Act, 1959 - Section 3/25 - Evidence Act, 1872 - Sections 134 & 114 (g) - Quality, not quantity, of evidence is decisive - conviction can rest on testimony of closely related witnesses only if wholly reliable and of sterling character - benefit of doubt must be given where prosecution evidence suffers serious lacunae and main witnesses are found unreliable or only partly reliable - Suspicion, howsoever grave, cannot take place of a proof - Related/Interested witness - Testimony must be carefully scrutinised and corroborated if not wholly reliable - Acquittal on parity where co-accused are acquitted on same evidence - Standard of proof - There is a long distance between 'may be' and 'must be - Where principal witnesses are not wholly reliable and corroboration is lacking, and there is unexplained non-production of material witnesses with serious discrepancies in prosecution case, conviction is unsustainable and benefit of doubt must go to accused. (Paras 48, 49, 58, 60, 61, 63 to 68)