



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**CRIMINAL APPELLATE JURISDICTION**  
**CRIMINAL APPEAL NO.546 OF 2012**

Sanjay Ramchandra Pokharkar }  
 Age : 25 Years, Occup : ----- }  
 Residing At : Annasaheb Patil }  
 Society, }  
 Room No. 572, Sector – 4, Ghansoli, }  
 Navi Mumbai. } .....Appellant

V/s.

The State of Maharashtra }  
 (At the instance of Koparkhairne }  
 Police Station) } .....Respondent

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 Ms. Trupti Khamkar (Appointed through Legal Services Committee) a/w  
 Mr.Ashok A. Rao for the Appellant.

Dr. Dhanlakshmi S. Krishnaiyer, APP for the Respondent-State.

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**CORAM : MANISH PITALE &  
 SHREERAM V. SHIRSAT, JJ.**

**RESERVED ON : 29<sup>th</sup> JANUARY 2026.**

**PRONOUNCED ON : 30<sup>th</sup> MARCH 2026.**

**JUDGMENT: (PER SHREERAM V. SHIRSAT, J).**

1. The present Appeal has been filed challenging the impugned Judgment and Order dated 05.03.2012 passed by the Additional Sessions Judge, Thane in Sessions Case No. 356/10 whereby the Appellant has been convicted under Section 302 of the Indian Penal Code (IPC) and has been sentenced to undergo Imprisonment for life and pay a fine of Rs. 5,000/-

and in default to undergo Rigorous Imprisonment for 6 months. The Appellant has been acquitted of the offence under Section 201 of IPC by the Additional Sessions Judge, Thane.

2. Brief facts of the prosecution's case are as under:

a. On 27/05/2010, a missing complaint was filed by one Mangal Prabhu Gade, mother of the deceased, stating that her son Amol Prabhu Gade, aged 18 years old, had left the house at about 06.00 p.m on 26/05/2010. It is further the case that her son had told her that he was going for attending one marriage ceremony of his friend. It is further the case that when her son did not come back for the entire night and he could not be traced out, she filed missing report on 27/05/2010.

b. It is further the case that on 29/05/2010, an intimation was received by Rabale Police station that one dead body was lying in the creek beside Palm Beach road Sector-9, Ghansoli, Navi Mumbai. It is further the case that she and her brother, Sakharam Sitaram Nehere, identified the said body to be the body of Amol Prabhu Gade. It is further the case that it was disclosed in post mortem report that he died of a head injury due to heavy, hard and blunt object. Thereupon, Sakharam Sitaram Nehere, lodged the First Information Report and the offence was registered on the basis of the same vide C.R. No. I 125/10.

c. Thereafter, the investigation commenced. The present Appellant came to be arrested on 1/6/2010. Mobile phones and a gold chain belonging to the deceased were recovered. Upon completion of the investigation, a charge-sheet was filed against the accused-appellant.

d. Charges were framed under Sections 302 and 201 of the Indian Penal Code against the Accused-Appellant to which the Appellant pleaded not guilty and claimed to be tried.

3. To bring home the guilt of the Accused-Appellant, the prosecution in all examined 24 witnesses (PW1 to PW 24). The Appellant has examined one witness as his defence witness (DW1):

PW - 1	Sakharam Sitaram Nehere	Maternal Uncle of the deceased, the Complainant who registered FIR
PW - 2	Mangal Prabhu Gade	Mother of the deceased
PW - 3	Sudhakar Raghunath Vajde	Neighbour of the deceased. The deceased was using his bike.
PW - 4	Panduranga Bal Bhim Chaure	He saw the accused at Palm Beach on the night of 26/05/2010.
PW - 5	Vishnu Babu Rathod	Friend of the accused
PW - 6	Munna Brijbhushan Pande	Friend of the accused
PW - 7	Nitesh Raju Pawar	Friend of the accused
PW - 8	Anju Basu Kayal	She had a love affair with the accused. (hostile)
PW - 9	Shitala Prasad Ramachal	Shopkeeper of cycle repairing and cold drink shop near Dargah at Ghansoli.
PW- 10	Santoshkumar Mohanlal Yadav	Shopkeeper of Janu wine shop at Ghansoli.
PW-11	Suryakant Sitaram	Panch for Inquest panchnama

	Kadam	
PW-12	Moreshwar Vasant Madhavi	Informant who saw the dead body at Palm Beach
PW-13	Swapnil Shivaji Dhaste	Panch for the recovery of vodka and sprite bottles
PW-14	Deepali Yogesh Hedavu	Bank Manager of Manipuram General Finance and Leasing Ltd., which gave loan to accused in exchange of the gold chain.
PW-15	Sunil Bandu Patangrao	Panch for seizure of the mobile phones
PW-16	Vijay Chagan Pawar	Panch for seizure of one golden chain weighing about 7 to 7.5 grams having pendent of Ganpati, one receipt, extract of gold loan register, I.D. of the accused and driving license and the extract of the register.
PW-17	Sanjay Wasudeo Palekar	Executive of Loop Mobile India Company who provided call details and documents.
PW-18	Dr. Bhushan Vilasrao Jain	Medical Officer at N.M.M.C., Hospital, Vashi.
PW-19	Nandkishor Rarjanand Goswami	Panch for seizure of clothes and Nokia mobile
PW-20	Sunil Subhashchandra Tiwari	Nodal Officer, Aircel Ltd
PW-21	Sampat Baburao Sawant	API, the Investigating Officer
PW-22	Sharad Nikalje	Person who helped police to search for the phone from the creek /water
PW-23	Rakeshchandra Rambhuj Prajapati	Nodal Officer, Loop Mobile, who submitted CDR.
PW-24	Sanjay Shankarrao Bhunge	Investigating officer

4. The Learned Sessions Judge thereafter proceeded to record the statement under Section 313 of Cr. P.C. The Accused- Appellant, in his 313 statement, in reply to the question asked to him as to whether he wants to examine any defence witness, expressed his desire to examine one defence witness. The trial court afforded an opportunity to the Accused-Appellant to examine the defence witness. The Accused- Appellant examined the following witness.

DW 1	Sarita Manish Thite	Sister of the accused who stated that the gold chain pledged by the accused was belonging to her.
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5. After hearing the arguments of prosecution and defence, vide order dated 05.03.2012, the Sessions Court was pleased to convict the Accused-Appellant under Section 302 of the Indian Penal Code (IPC) and has been sentenced to undergo Imprisonment for life and pay a fine of Rs. 5,000/- and in default to undergo Rigorous Imprisonment for 6 months. However, the Sessions Court acquitted the Appellant under section 201 of the IPC.

6. Being aggrieved by the said order of conviction recorded by a Judgment in Sessions Case No. 356/10, dated 05.03.2012, passed by the Additional Sessions Judge, Thane, the Appellant has approached this Hon'ble Court by way of Appeal.

7. We have heard Ms. Trupti Khamkar, Learned Counsel for the Appellant and Dr. Dhanlakshmi S. Krishnaiyer, Learned APP for the State.

8. The Learned Counsel for the Appellant has submitted that although the prosecution has examined as many as 24 witnesses, still prosecution has not been able to prove its case beyond reasonable doubt. The Ld. Counsel

has further submitted that this is a case based on circumstantial evidence as there is no direct evidence and therefore the chain of evidence must be so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and must show that within all human probability that act must have been done by the accused. The Learned Counsel has further submitted that the Trial Court has disbelieved most of the evidence of the prosecution like the theory of last seen together, evidence of P.W. 4, PW 7, PW 9, CDRs and identification of the phone by IMEI number, but has only relied upon the recovery of gold chain which was pledged with the Finance Company. The Learned Counsel has further submitted that although P.W. 14 has deposed that the gold chain alongwith pendant was pledged with their Finance Company and there were documents which were executed pursuant to the loan having been granted as against the deposit of gold chain and pendant, however no documents have been exhibited or brought record by any of the witnesses and therefore in the absence of any cogent evidence with respect to the receipt, statement, the extract of register, the case of the prosecution has not been proved beyond reasonable doubt. The Learned Counsel further submitted that the accused/appellant has examined his sister whose evidence is believable in the facts of the case, which the trial court has erroneously disbelieved. The Ld. Counsel further submitted that prosecution has to prove its case beyond reasonable doubt but the accused has to prove only on the preponderance of probability which the accused has successfully proved and therefore prayed that the Appellant/Accused be acquitted.

9. The Ld. Counsel for the Appellant in support of its case has relied upon the following judgment.

***Shivdatta @ Biltu Subhodchandra Sah vs. The State of Maharashtra<sup>1</sup>***

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1 Criminal Appeal No. 872 of 2015

10. *Per contra*, the Ld. APP has submitted that the evidence of P.W. 2, P.W. 14, P.W.24 and P.W. 7, have proved the case of the prosecution beyond reasonable doubt. She has submitted that the recovery of chain was itself sufficient in the absence of any cogent material to disprove the said fact. She has submitted that the Court can take into consideration the fact of recovery of gold chain at the instance of the accused and can base its conviction on the said circumstance. She has submitted that there is no reason to disbelieve the testimony of the mother and brother of the deceased. She has further submitted that there is sufficient material on record to prove that the accused has committed the murder of the deceased and therefore, prayed that the conviction be sustained.

11. The Ld. APP in support of her contention, has relied upon the following judgments:-

***Mukund Alias Kundu Mishra and Anr. vs. State of Madhya Pradesh*<sup>2</sup>.**  
***Dahyabhai Chhaganbhai Thakkar vs. State of Gujarat*<sup>3</sup>.**

12. This is a case based on circumstantial evidence. There is no eyewitness. Therefore, as held time and again by this Court as well by various courts and the Hon'ble Apex Court, where the evidence is of a circumstantial nature or where the case is based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the Accused. Therefore, the circumstances should be of a conclusive nature and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so complete as not to leave any reasonable ground for a conclusion consistent with the

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2 (1997) 10 Supreme Court Cases 130

3 1964 (2) CRI. L.J. 472.

innocence of the Accused and it must be such as to show that within all human probability the act must have been done by the Accused.

13. In the present case, the trial court after critically analysing the evidence on record, has been pleased to out-rightly discard several circumstances and disbelieved the evidences of several witnesses examined by the prosecution, as not proved by the prosecution, viz.,

- a. The theory of last seen together, which the prosecution tried to prove by examining PW 4 and PW 7 has been disbelieved. The fulcrum of the case of the prosecution, which was the theory of last seen together has been totally disbelieved by the trial court. On the point of the theory of last seen the trial court has been pleased to observe that the evidence of PW-7 that he had seen the deceased with the accused on 26/5/ 2010, does not appear to be probable and therefore, the last seen theory brought by the prosecution cannot be accepted being not probable. The trial court has further disbelieved PW 4 as well, by observing that evidence of PW-4 also does not connect the accused to the alleged incident, as he has merely seen the accused on Palm Beach Road at 9 pm.
- b. The trial court has also disbelieved the evidence of PW 9, the shop owner who was examined by the prosecution to prove that the Accused had purchased cold drink on 26.5.2010 at about 6 pm, by referring to the admissions given by PW 9 and by observing that it is difficult to accept that PW 9 who has his cold drink shop can identify each and every cold drink bottle sold by him.
- c. The Trial Court has further disbelieved PW 13 by observing that the seizure panchnama shows that Vodka bottle and cold drink bottles were recovered near the bridge of the creek, but the said vodka bottle and cold drink bottle are easily available in the

garbage. Even with regard to the recovery of stone, the trial court has been pleased to observe that recovery of stone from that place also will not connect the accused to the alleged incident of murder.

- d. The trial court has further disbelieved the identity of the mobile phone which was allegedly recovered at the instance of the Accused- Appellant and even the CDRs. The trial court has been pleased to observe that the IMEI number of the said mobile phone is different than that of IMEI number provided by PW 17 (Executive of Loop Mobile India Company). As far as CDRs are concerned, the trial court has observed that PW 17, PW 20 and PW 23 were examined to ascertain the incoming calls of mobile but mobile number of the accused was not on record which can show that either he or the deceased were making contact with each other on that particular day.

14. Thus, the trial court discarded all the important links in the chain of circumstances, however, the impetus or the thrust has been on the recovery of the gold chain at the instance of the Appellant which according to the prosecution was pledged by the Appellant with one finance company and against which loan was obtained by the Appellant.

15. It is settled law that establishing one or two circumstances beyond reasonable doubt is not sufficient to hold that the entire chain of circumstances is complete. In this case, the trial court itself has discounted or disbelieved the important link in the chain of circumstances and therefore, on this count itself the conviction deserves to be set aside for having failed to establish the case as a complete chain of circumstances which would unerringly point towards the guilt of the accused. However,

since the trial court has relied upon one circumstance i.e recovery of the gold chain at the instance of the accused, it will be pertinent to see whether the said circumstance can be said to be proved beyond reasonable doubt by the prosecution.

16. In order to prove the said circumstance, the trial court has taken into consideration the evidence of PW - 2, PW - 14, PW - 16, PW - 24 and DW- 1. It will therefore be necessary to analyse the depositions of these witnesses to ascertain whether the prosecution has proved this circumstance beyond reasonable doubt.

17. PW-2, i.e. Mangal Prabhu Gade, is the mother of the deceased. She has deposed in her evidence that on that day at 4 pm, Amol (deceased) had gone out and he came back around 5 pm and thereafter, at about 6 pm, Amol left the house on the bike saying that he was to attend the marriage of his friend at Shetkari Samaj Hall. She has further deposed that at about 8 to 8:15 pm, she gave him a phone call and he told her that he would return home within half an hour. She has further deposed that after waiting till 9 pm, when she again tried to contact him, his phone was switched off, and thereafter she tried searching for him. She has further deposed that when her son had left the house, he was wearing one gold chain with pendant of God Ganpati and was having two mobiles, one of Sony Xperia and other was of Nokia make, one Pan Card in the pocket, one licence of motorcycle and one photo of herself and her elder son was with him. She has further deposed that while recording her statement, she has handed over the receipt of mobile phone of Nokia company and chain to police. She has further deposed that she had purchased the golden chain from Mateshwari Jewellers. She has also identified the said gold chain with pendant of God Ganpati in the Court. In the cross-examination, she has admitted that she

cannot give detailed address of the jeweller to show that she had purchased the golden chain from Mateshwari Jewellers shop. She has also admitted that the gold chains are available in the market and there is no personal identification mark on the muddemal golden chain. She has further admitted that while recording her missing complaint, she had stated that while going out of the house, her son was wearing golden chain, but she cannot assign any reason why the missing complaint does not disclose this fact. She also categorically admitted that while lodging missing complaint, she has stated that she had handed over the receipt of gold chain to the police, but cannot assign any reason why this fact is not mentioned in her police complaint. She has also further admitted that she had also stated while recording missing complaint that she had purchased gold chain from Mateshwari Jewellers, but cannot assign any reason why the said fact is not mentioned in her missing complaint. Further in the cross-examination she also admitted that she cannot give detailed address of the Jeweller from where she had purchased the gold chain. She has admitted that muddemal gold chains are available in the market and that there is no personal identification on the muddemal gold chain. She also further admitted that the fact about her son wearing the gold chain, handing over of the receipt of the gold chain to police was not mentioned in her missing complaint, however if the missing complaint at Exhibit 24 is perused she has mentioned about the gold chain worn by her son.

18. If the evidence of PW 2 is minutely scrutinised, then it can be seen that although she has orally deposed about handing over of receipt of gold chain to the Investigating Officer, the same has not been exhibited. PW 24, the IO, in his cross examination confirms that he had collected receipt of purchase of gold chain from the mother of the accused. However, the IO has failed to produce the same on record or prove the contents of the same.

Therefore, in the absence of any documentary proof, the same having not been substantiated in any manner, the oral testimony of PW 2 to the extent that the gold chain belongs to the deceased has not been cogently proved.

19. The prosecution has also examined PW-14, Deepali Yogesh Hedavu, the Branch Manager in Manipuram General Finance and Leasing Limited. It is the case of the prosecution that the accused-appellant, after committing the murder of the deceased, robbed the deceased of his gold chain and had pledged the same with the Manipuram General Finance company against the amount of Rs. 10,500/-. To establish the said fact, PW-14 was examined. PW-14, the Branch Manager in Manipuram General Finance and Leasing Limited, a finance company at Ghansoli, has deposed that as a Branch Manager, she used to verify the gold and approximate amount of loan to be paid on mortgage of such gold. She has deposed that as a general practice whenever any customer comes to them, they take from him his ID card and residence proof and after verifying the position and after compliance with other formalities, such as filling form, the loan used to be disbursed to the customer. She has deposed that on 28/5/ 2010, when she was present in the said finance company and the other staff members were also present, between 10 am to 2 pm, the accused had been to their company and had asked for a loan in lieu of the chain which was with him. She has further deposed that their staff by the name Manu Lapali made him understand the scheme and asked him for his ID proof, but he tendered his driving licence and light bill. She has further deposed that the accused handed over his gold chain and Manu Lapali checked the purity of gold and he was told that loan of 10,500/- can be paid to him. She has also deposed that she had personally checked that chain. She has further deposed that they had taken photograph of the accused and after completion of the formalities, the signatures were obtained and an amount of Rs. 10,500/- was paid to him and a receipt in token of the loan was obtained. She has further deposed

that the accused had told that his name is Sanjay. She has also deposed that the last four digits of the receipt given by the accused is 5009. She has further deposed that on 3/6/2010, the police had been to their office along with the accused and they had shown them the receipt which was with the accused. She identified that receipt and checked the data in their office and in the data, she found a photo of the accused. She has further deposed that thereafter she handed over the gold chain to the police and the other documents which were executed by the accused. She has deposed that the gold chain was approximately 6 gm and it was having a pendant. She identified that the muddemal documents, such as receipt of the finance company, the copy of the register, the statement of account of the accused to be the same. She has also deposed that the receipt bears her signature and she has issued it to the accused.

20. The prosecution has also examined PW-16, Vijay Chagan Pawar as a panch witness to show the recovery of gold chain from Manipuram Gold Loan Finance at Ghansoli. This witness has deposed that on 3/6/ 2010 at 12.30 pm, the police had called him at Kopar Khairane Police Station and another panch witness- Suresh was also called there. He has deposed that at that time accused, by name Sanjay Pokharkar, was also present at the police station and the police told them to listen to what the accused states and does. He has further deposed that in their presence, accused told that he had mortgaged gold chain of Amol with Manipuram Finance Limited and thereafter police drew a memorandum of his statement. He has further deposed that they went to Manipuram Finance Limited at Ghansoli led by the accused. He has further deposed that police seized one gold chain weighing about 7 to 7.5 gram having pendant of God Ganpati, one receipt, extract of gold loan register, ID of the accused and driving licence and extract of the register under seizure memo, which were packed and sealed. In the cross-examination, he has further deposed that he does not remember

whether he had signed in the register of Manipuram Gold Loan Finance.

21. PW-24 is the Investigating Officer (Sanjay Shankarrao Bhunge). He has deposed that on 3/6/2010, the accused had given a statement that he would show the gold chain of the deceased which was pledged at Manipuram Gold Loan and which was recorded in the presence of Panchas. He has further deposed that the accused took them to the shop of Manipuram Gold Loan and the Manager, Dipali Hedavu, had produced the said gold chain along with the documents pertaining to the transaction which was seized under panchanama. He has further deposed that he had collected receipt of purchase of gold chain. In the cross-examination, Investigating Officer has admitted that he did not recover any document pertaining to loan transaction from the accused. It will also be pertinent to note that for the reasons best known, the other documents such as receipt copy of register, statement of account of the accused, light bill, driving license which although seized by the IO have been merely marked as “article”. The contents have not been proved. Therefore, to that extent, there is no corroboration or material that has been brought on record or that the contents have been proved to show that the accused had indeed executed any documents. Even assuming that the documents are exhibited, which are not, still the contents need to be proved, which evidence is conspicuously absent. It is well settled law that whenever a document is marked as ‘Exhibit’ without objection, it will be presumed that a party having right of objection has waived formal proof of the document and in such situation, the entire contents of the document would be admissible in evidence. However, by such admission of a document, the truth and correctness of the contents by itself would not be established and there must be some evidence to support the contents of such document.

22. In defence, the accused-appellant has examined his sister, Sarita Manish Thite. She has deposed that her mother met with an accident in May

2010 and therefore, she has been taking care of her mother. She has deposed that her mother had no money and therefore, she asked her brother (the present appellant) to pledge gold chain of her son. She has further deposed that she had purchased that chain from Kamlesh Jewellers in Ghatkopar. She has further deposed that the chain is containing the pendant of God Ganpati, and it was weighing around 7 grams and 400 milligrams. She has further deposed that her brother had brought Rs. 10,500/- by pledging the chain. In the cross-examination, she has admitted that she has not filed any application before the Court for taking custody of this chain. She has also further admitted that the receipt produced by her in the proceeding was not produced prior to this. She has further admitted that she had not given the receipt of gold chain to her brother at the time of pledging and that there is no specific identification mark on the said chain to show that it is her chain. She has further deposed that she had purchased this chain on 22/9/2000 but she had not gone at Kamlesh Jewellers for purchasing this chain. She has deposed that she might have purchased this for Rs. 4,500/- to Rs.5000/-.

23. If the evidence of this witness is analysed it can be seen that even this witness has not produced any documents to show that the gold chain belongs to her. Her case is based on oral deposition which has not been shaken in the cross examination.

24. Indeed, the settled law is that the prosecution has to prove the case beyond reasonable doubt and the accused has to prove the case on the preponderance of probability. The prosecution, in the absence of any documentary evidence, has failed to prove the case beyond reasonable doubt. Although no documents have been produced by the defence witness either, but she has given a probable explanation which supports the case of

the Accused. The Accused has not stated that he had not pledged, infact it is his specific case that he had indeed pledged the chain with PW 14 for which he has obtained the loan. DW 1 has also identified the chain in the court to be the same and therefore in the absence of cogent material/evidence in support of the case of PW 2, about ownership of gold chain, the probative value tilts in favour of the Accused and this court is inclined to believe the defence of the Accused-Appellant which appears to be probable. Needless to repeat that the threshold of proving the case by the Accused is not as high as that of the prosecution, the accused has succeeded in establishing his case on the preponderance of probability. Thus in the peculiar facts of the present case, the Appellant has succeeded in establishing his case on the touchstone of preponderance of probability.

25. The trial court has erred in observing that the evidence of the defence witness appears to be afterthought for want of any supporting document/evidence when the trial court itself has come to the conclusion, that there is no evidence brought by either prosecution or defence to prove any such receipts with respect to purchasing of Article 15 ( gold chain). The trial court ought to have appreciated that the burden of proof as far as the accused is concerned is on the preponderance of the probability and not to prove the case beyond reasonable doubt.

26. A useful reference can be made to the following judgments

***Ramanand @ Nandlal Bharti Versus State of Uttar Pradesh<sup>4</sup>***

*“99. It is sufficient if the accused person succeeds in proving a preponderance of probability in favour of his case. It is not necessary for the accused person to prove his case beyond a reasonable doubt or in default to incur a verdict of guilty. The onus of proof lying upon the accused person is to prove his case by a preponderance of probability. In the American Jurisprudence, 2nd Edition, Vol. 30, the expression “preponderance of evidence” has*

<sup>4</sup> Criminal Appeal Nos. 6465 Of 2022

been defined in Article 1164. In America the term means “the weight, credit and value of the aggregate evidence on either side, and is usually considered to be synonymous with the term greater weight of the evidence”, or “greater weight of the credible evidence”. It is a phrase which, in the last analysis, means probability of the truth. To be satisfied, certain, or convinced is a much higher test than the test of “preponderance of evidence”. The phrase “preponderance of probability” appears to have been taken from *Charles R. Cooper v. F. W. Slade*, (185759) 6 HLC 746. The observations made therein make it clear that what “preponderance of probability” means “more probable and rational view of the case”, not necessarily as certain as the pleading should be.

“100. Again, at the cost of repetition, we may state that it is not necessary for us to go into the issue of false explanation, said to have been offered by the accused appellant as at the most a false explanation can be used as an additional link in the chain of evidence led by the prosecution. This issue pales into insignificance as the various links in the chain of evidence led by the prosecution having not been satisfactorily proved.”

***In Vijayee Singh and Ors. vs. State of Uttar Pradesh***<sup>5</sup> it has been held

as under :

“Somewhat to the same effect are the observations made by the Supreme Court in *Harbhajan Singh v. State of Punjab*, AIR 1966 SC 97. After citing *Woolmington's case* it is therein held that “The principle of common law is part of the criminal law of the country. That is not to say that if an exception is pleaded by an accused person he is not required to justify his plea; but the degree and character of proof which the accused is expected to support his plea, cannot be equated with the degree and character of proof expected from the prosecution which is required to prove its case. The onus on the accused may well be compared to the onus on a party in civil proceedings; just as in civil proceedings the Court which tries an issue makes its decision by adopting the test of probabilities, so must a criminal court, hold the plea made by the accused proved, if a preponderance of probability is established by the evidence led by him.” It can thus be seen that there is a dividing line between a case of the accused discharging the burden by preponderance of probabilities which is equated to proof of the exception and a state of reasonable doubt that arises on a consideration of the evidence and facts and circumstances as a whole, as regards one or more of the ingredients of the offence. Therefore, in a case where the prosecution has discharged its burden and where the accused pleads exception and if there is some evidence to support that plea the obligatory presumption under Section 105 is lifted and the may proceed further and establish his plea by a preponderance of probabilities or he may

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5 1990 SCC (3) 190

*carry his plea further and succeed in creating a reasonable doubt about an ingredient of an offence. Consequently in respect of the general exceptions, special exceptions, provisos contained in the Penal Code or in any law defining the offence, the accused by one of these processes would be discharging the burden contemplated under Section 105 but in cases of the exceptions covered by special statutes and where the burden of proof is placed on the accused to establish his plea, he will be discharging the same by preponderance of probabilities and not by merely creating a doubt.”*

27. Thus in wake of the depositions that have come on record, this court is of the opinion that the prosecution has failed to prove its case beyond reasonable doubt.

28. It was argued by the Ld. APP, that there is recovery of the gold chain of the deceased at the instance of the Appellant that by itself is sufficient and material circumstance to come to the conclusion about the involvement of the Appellant in committing the murder of the deceased. She has submitted that as theft of the gold chain from the person of the deceased and murder were committed in one and the same transaction and thereafter the stolen property was recovered at the instance of the Appellant, this Court may draw a presumption not only of the fact that the Appellant in whose possession the gold chain was found committed the theft but also that he committed the murder.

29. In support of the said contention the Ld. APP has relied upon the judgment of the Hon'ble Supreme Court in the case of ***Mukund Alias Kundu Mishra and Anr. vs. State of Madhya Pradesh***<sup>6</sup> wherein it has been observed as under:

*“9. Mr. Jain, appearing for the appellants, firstly contended that the prosecution failed to establish that any incriminating article was recovered from the respective houses of the appellants, far less, that it was stolen at the time of the murders. We are not impressed by this contention of Mr. Jain for on perusal of the record we find that both*

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6 (1997) 10 Supreme Court Cases 130

*the Courts below have discussed in detail the entire evidence adduced by the prosecution and given cogent and convincing reasons for accepting the same. Having gone through the evidence we are constrained to say that no other reasonable view of it could have been taken. Mr. Jain next submitted that even if it was assumed that the articles stolen from the house of Dubey's were recovered from the appellants it could at best be said that they committed the offence they stood convicted. We do not find any substance in this submission of Mr. Jain also. If in a given case as the present one the prosecution can successfully prove that the offences of robbery and murder were committed in one and the same transaction and soon thereafter the stolen properties were recovered, a Court may legitimately draw a presumption not only of the fact that the person in whose possession the stolen articles were found committed the robbery but also that he committed the murder. In drawing the above conclusion we have drawn sustenance from the judgment of this Court in **Gulab Chand Vs. State of M.P 1995 3 SCC 574**. We hasten to add that the other incriminating circumstances detailed earlier reinforce the above conclusions, rightly drawn by the Courts below. We therefore find no hesitation in upholding the convictions as recorded by the trial Court and affirmed by the High Court.”*

30. To counter the said submission of the Ld. APP, the Ld. Counsel for the Appellant has relied upon the latest judgment of the Bombay High Court in the case of **Shivdatta @ Biltu Subhodchandra Sah vs. The State of Maharashtra**<sup>7</sup> which has relied upon the judgment of the Hon'ble Apex Court in the case of **Sanwat Khan and Ors. vs. State of Rajasthan** wherein it is observed as under:

*“14 Before we advert to our findings it would be apposite to reiterate the settled law on circumstantial evidence. The Supreme Court in paragraph Nos.5 and 6 in the case of Sanwat Khan and Ors. vs. State of Rajasthan, has held as under:-*

*“5. .... The unexplained possession of stolen property is the only circumstance appearing in the evidence against the accused charged with murder and theft, and they could not be convicted of murder unless their possession of the property could not be explained on any other hypothesis except that of murder. In the absence of any evidence whatsoever of the circumstances in which the murders or the robbery took place, it could easily be envisaged that the accused at some time or other seeing the Mahant and Ganpatia murdered, removed the articles produced by them from the temple or received them from the person or persons who had committed the murder. The prosecution led evidence to prove that Mangu Khan, the father of these two persons, was planning to murder the Mahant since a long*

<sup>7</sup> Criminal Appeal No. 872 of 2015

time. Madari, PW. 7, who is an ex-convict, deposed that he was also being approached to join in the conspiracy to murder the Mahant. It is not improbable that any of these two or somebody else might have murdered the Mahant and some of the stolen property came into the these two brothers. Be that as it may, in the absence of any direct or circumstantial evidence whatsoever, from the solitary circumstance of the unexplained recovery of the two articles from the houses of the two appellants the only inference that can be raised in view of illustration A to Section 114 of the Evidence Act is that they are either receivers of stolen property or were the persons who committed the theft, but it does not necessarily indicate that the theft and the murders took place at one and the same time.

The accused produced these articles about a fortnight after the theft and the maximum that can be said against them is that they, received these goods knowing them to be stolen or that they themselves stole them; but in the absence of any other evidence, it is not possible to hold that they are guilty of murder as well. 6. The learned counsel for the State in support of the view taken by the High Court, placed reliance on a decision of the Madras High Court in -- '**Queen-Empress v. Sami**', 13 Mad 426. The head-note of the report says that: "recent and unexplained possession of stolen property which would be presumptive evidence against the prisoners on the charge of robbery would similarly be evidence against them on the charge of murder".

This head-note, however, does not accurately represent the decision given by the learned Judges. In the particular circumstances of that case it was observed that in cases in which murder and robbery are shown to form parts of one transaction, recent and unexplained possession of the stolen property while it would be presumptive evidence again a prisoner on the charge of robbery would similarly be evidence against him on the charge of murder.

Here, there is no evidence, direct or circumstantial, that the robbery and murder formed parts of one transaction. It is not even known at what time of the night these events took place. It was only late next morning that it was discovered that the Mahant and Ganpatia had been murdered and looted. In our judgment, Beaumont, C. J., and Sen J. in -- '**Bhikha Gobar v. Emperor**', AIR 1943 Bom 458 rightly held that the mere fact that an accused produced shortly after the murder ornaments which were on the murdered person is not enough to justify the inference that the accused must have committed the murder.

There must be some further material to connect the accused with the murder in order to hold him guilty of that offence. Our attention was drawn to a number of decisions which have been summed up in a Bench decision of the Allahabad High Court in -- '**State v. Shankar Prasad**', AIR 1952 All 776, in some of which a presumption was drawn of guilt from the circumstance of possession of stolen articles soon after a murder. We have examined these cases and it appears to us that each one of these decisions was given on the evidence and circumstances established in that, particular case, and no general

*proposition of law can be deduced from them.*

*In our judgment no hard and fast rule can be laid down as to what inference should be drawn from a certain circumstance. Where, however, the only evidence against an accused person is the recovery of stolen property and although the circumstances may indicate that the theft and the murder must have been committed at the same time, it is not safe to draw the inference that the person in possession of the stolen property was the murderer. Suspicion cannot take the place of proof.”*

*“14.1. The Supreme Court has held that even if the stolen property is recovered from the possession of the accused, it does not mean that he had also committed the murder and that the accused himself is the same person who has committed both the crimes. In the present case it is alleged that Appellant has stolen the amount of Bhishi money from Bharat’s room and killed him for that reason. To substantiate its case for theft the prosecution has relied on seizure panchanama Exh.28 and 29.”*

31. Juxtaposed, it appears that these two judgments of the Hon’ble Apex Court have taken a divergent view. In any case, the dichotomy, if any, has been resolved in the recent judgment of the Hon’ble Apex Court in the case of ***Limbaji v State of Maharashtra***<sup>8</sup> wherein it has been observed as under :

*(6.) (a) The above discussion paves the way for consideration of a more important question whether, having regard to the facts of this case, the presumption should be extended to the perpetration of the offence of robbery or murder or both. Presumption envisaged by illustration (a) to Section 114 has been stretched in decided cases to make a similar presumption as the basis for conviction for graver offences of robbery and murder, if they are part of the same transaction. Strictly speaking, such presumption does not come within the sweep of illustration (a), though in some cases illustration (a) has been referred to while upholding the conviction for robbery and murder. Extending the presumption beyond the parameters of illustration (a) could only be under the main part of the Section. The illustration only provides an analogy in such a case. With this clarification, let us examine whether there is scope to presume that the appellants committed robbery and murder sharing the common intention. While on this point, we have come across divergent approaches by this Court in various cases. In some cases, the extended presumption was drawn while in some cases the Court considered it unsafe to draw the presumption merely on the basis of recovery of incriminating articles from the possession of the accused soon after the crime. The decisions of this Court in *Union Territory of Goa v. Beaventura D’Souza*, 1993 Supp (3) SCC 304; *Surjit Singh v. State of**

8 (2001) 10 SCC 340

*Punjab, AIR 1994 SC 110 and Sanwath Khan v. State of Rajasthan, AIR 1956 SC 54, fall in one line, whereas the decision in Gulab Chand v. State of M. P., 1995 (3) SCC 574, falls on the other side of the line. In the mid-way we find certain decisions wherein the presumption was invoked as an additional reason to support the conclusion based on circumstantial evidence. We shall briefly refer to these decisions. In Union Territory of Goa v. B. D'Souza (supra) a two-Judge Bench of this Court held that discovery of incriminating articles including gold ornaments of the deceased and the absence of explanation for the possession of stolen articles does not by itself justify a presumption that the accused committed murder. Suspicion however strong cannot take the place of proof. The finding of the Sessions Judge based on the presumption "does not stand scrutiny in the eye of law". Unless there is something else to show that the accused alone were in the company of the deceased, the presumption cannot be drawn. It was held that there were no circumstances connecting the accused with the murder. The Court however convicted the accused under Section 411, IPC. In a more recent case, namely, Ronny v. State of Maharashtra, (1998 (3) SCC 625), the above decision was referred to and distinguished and the *raison d'etre* for not drawing the presumption was said to be that the injured witness did not implicate the accused and the recovery was after one month. However, on a perusal of the judgment in D'Souza case, it is not apparent that the injured witness was in a position to see and identify the accused at all. As regards the time factor, there was no categorical observation in D'Souza's case, that the lapse of one month's time would weaken the presumption. Another judgment rendered by the same Bench was in the case of Surjit Singh v. State of Punjab (supra). It was held therein that recovery of watch belonging to the deceased from a pawn broker after 15 days of the date of occurrence on the basis of the information furnished by the accused was held to be insufficient to connect him with murder by invoking Section 114 of the Evidence Act. At the most, it was held that he can be convicted under Section 411 and accordingly he was convicted and sentenced. Another case which broadly falls within first category is that of Sanwath Khan (supra). As it is a three-Judge Bench decision, we may refer to it in some detail. Two persons who were living in a temple were found lying dead in the temple premises. They succumbed to axe injuries. The house was found ransacked and almirahas etc. opened. One of the accused who was arrested 12 days later produced a gold kanthi which it was lying buried in his premises. Another accused who was arrested 17 days later produced a silver plate from his house where it lay buried in the ground. Both these articles belonged to the deceased. The High Court upheld the conviction by relying on the solitary circumstance of the recovery of two articles at the instance of the accused and the absence of explanation about their possession. On further appeal, the three-Judge Bench of the Supreme Court set aside the conviction under Section 302 and found the appellants guilty under Section 380, IPC. Mahajan J. speaking for the Bench observed as under :-*

*"In the absence of any evidence whatsoever of the circumstances in which the murders or the robbery took place, it could easily be*

*envisaged that the accused at some time or other seeing the Mahant and Ganpatia murdered, removed the articles produced by them from the temple or received them from the person or persons who had committed the murder."*

*The Court, after having referred to the possibility of someone else murdering the deceased observed thus :*

*"Be that as it may, in the absence of any direct or circumstantial evidence whatsoever, from the solitary circumstance of the unexplained recovery of the two articles from the houses of the two appellants the only inference that can be raised in view of illustration (a) to S. 114 of the Evidence Act is that they are either receivers of stolen property or were the persons who committed the theft, but it does not necessarily indicate that the theft and the murders took place at one and the same time. The accused produced these articles about a fortnight after the theft and the maximum that can be said against them is that they received these goods knowing them to be stolen or that they themselves stole them; but in the absence of any other evidence, it is not possible to hold that they are guilty of murder as well."*

*Having referred to the decisions of various High Courts, the Court concluded as follows:-*

*"In our judgment no hard and fast rule can be laid down as to what inference should be drawn from a certain circumstance. Where, however, the only evidence against an accused person is the recovery of stolen property and although the circumstances may indicate that the theft and the murder must have been committed at the same time, it is not safe to draw the inference that the person in possession of the stolen property was the murderer, suspicion cannot take the place of proof."*

*Now, it is time we refer to Gulab Chand v. State of M. P. (1995 (3) SCC 574) case, where presumption under Section 114 of the Evidence Act was carried to the utmost extent. In that case the accused were charged under Sections 120-B, 302, 394 and 397 for having committed the murder and robbery. The appellants were convicted under Section 380. On appeal by the State, the High Court reversed the order of acquittal and convicted the appellant Gulab Chand under Sections 302, 394 and 397. The conviction of the other accused was modified to one under Section 411. In that case, within a few days after the incident, on the search of the appellant's house, various articles were found including ornaments belonging to the deceased. Some of the ornaments were also recovered from a shop on the basis of the information given by the accused. The Court started the discussion with the preface: "it is true that simply on the recovery of stolen articles, no inference can be drawn that a person in possession of the stolen articles is guilty of the offence of murder and robbery. But, culpability for the aforesaid offences will depend on the facts and circumstances of the case and the nature of evidence adduced." After referring to the test of time factor for drawing the presumption under S. 114(a) as laid down in Tulsiram Kanu v. State (AIR 1954 SC 1), the Court observed, if the ornaments of the deceased were found in possession of a person soon after the murder, a presumption of guilt*

can follow. But if several months have expired, the presumption may not be permitted to be drawn. Having regard to the close proximity of the time of recovery and lack of credible explanation for the possession thereof and on account of dealing with the ornaments immediately after the crime, it was held that a reasonable inference of commission of offence could be drawn against the accused. In conclusion, the learned Judges observed:

"In the facts of this case, it appears to us that murder and robbery have been proved to have been integral parts of the same transaction and therefore the presumption arising under Illustration (a) of Section 114 Evidence Act is that not only the appellant committed the murder of the deceased but also committed robbery of her ornaments."

The above decision was cited with approval in the case of *Mukund v. State of M. P.* (1997 (10) SCC 130). The Court, having negated the contention of the appellant's counsel that mere recovery of stolen articles from the house pointed out by the accused could only lead to the presumption that the offence was committed under Section 411 but not the offences under Sections 302 and 394, observed thus :-

"If in a given case - as the present one - the prosecution can successfully prove that the offences of robbery and murder were committed in one and the same transaction and soon thereafter the stolen properties were recovered, a Court may legitimately draw a presumption not only of the fact that the person in whose possession the stolen articles were found committed the robbery but also that he committed the murder. In drawing the above conclusion we have drawn sustenance from the judgment of this Court in *Gulab Chand v. State of M. P.*"

At the same time, the Court was cautious enough to say that the other incriminating circumstances detailed earlier reinforced the ultimate conclusion. Various other incriminating circumstances were referred to in the judgment. *Gulab Chand's* case was also referred to in *Ronney v. State of Maharashtra* (1998 (3) SCC 625) and *Sanjay v. State (NCT of Delhi)* (2001 (3) SCC 193). But it is to be noted that in all the three cases decided subsequent to *Gulab Chand's* case, there were additional circumstances which shed light on the involvement of the accused. So also in the case of *Earabhadrapappa v. State of Karnataka* (AIR 1983 SC 446), presumption was raised that the accused who pointed out the places at which the ornaments and sarees of the victim were kept committed robbery and murder. Here again, quite a number of additional circumstances were noticed, apart from the recovery of stolen articles. Thus, as far as the factual matrix goes, only *Gulab Chand's* case stands apart. The recovery of the articles of victim soon after the crime at the instance of the accused and incredible explanation given by the accused for possession of the articles were held to be sufficient to raise the presumption of having committed robbery and murder, if they were otherwise part of the same transaction.

Before parting with the discussion on judicial precedents, we may advert to a recent decision in *State of Maharashtra v. Suresh* (2000 (1) SCC 484). The Bench consisting of K. T. Thomas and R. P.

*Sethi, JJ., observed that a false answer offered by the accused to explain away the incriminating circumstances which are supposed to be within his knowledge 'provides a missing link for completing the chain'.*

*Whether the approach of the Court and ratio of the decision in Gulab Chand's case is in consonance with the three-Judge bench decision in Sanwath Khan's case (supra) is, at least a debatable issue. When this decision was brought to the notice of their Lordships who decided Gulab Chand's case, it was merely observed that "the said decision is not applicable in the facts and circumstances of the present case". There was no further elaboration. **In this state of law, the safer course would be to give due weight to the dicta laid down and the ultimate conclusion reached by the larger Bench in Sanwath Khan's case.** We cannot go against that decision in so far as it applies to the present case.*

*(emphasis supplied)*

32. Therefore, going by the dicta laid down by the larger bench in Sanwath Khan's case ( supra) we are of the opinion that even though the case of the prosecution is that there is recovery of gold chain with pendant at the instance of the Appellant, that by itself cannot be a ground for holding him guilty for murder of the deceased in the absence of a strong motive, moreover when the prosecution has not been able to prove the other circumstances which could connect the Appellant with the death of the deceased. The recovery at the instance of the Accused-Appellant is also not fully substantiated with inchoate proof of the documents. In addition to the above the defence taken by the Appellant seems to be probable.

33. As it has been observed by various courts, no hard and fast rule can be laid down as to what inference should be drawn from a certain circumstance. Where the only evidence against an accused person is the recovery of stolen property and although the circumstances may indicate that the theft and the murder may have been committed at the same time, it is not safe to draw the inference that the person in possession of the stolen property was the murderer, as suspicion cannot take the place of proof.

34. The other judgment ***Dahyabhai Chhaganbhai Thakkar vs. State of Gujarat***, (supra) relied upon by the Ld. APP is not relevant to the facts of the present case. The issue involved in the cited case was with respect to appreciation of evidence and presumptions available under law when the plea of insanity is raised and therefore, it is not relevant and applicable to the facts of the present case.

35. It is trite law that in the case based on circumstantial evidence all the circumstances on which the prosecution relies must be duly proved. In the present case, the important links in the chain of circumstances itself are discarded and disbelieved by the trial court. The only circumstance taken into consideration is about the recovery of the gold chain which in the facts of the case is also not proved and therefore, the chain of circumstances is completely snapped.

36. This Court in the case of **Anil Sakpal vs. The State of Maharashtra**<sup>9</sup> has observed as under:

*“Para 23 In the case based on circumstantial evidence all the circumstances which the prosecution relies must be duly proved. In the present case as the important links in the chain of circumstances, itself are not proved and therefore the other circumstances pale into insignificance as the chain of circumstances is snapped. As has been held by the full bench of the Hon’ble Apex Court in the case of **Darshan Singh v. State of Punjab**<sup>10</sup> “Seen in this background, we need not go further and consider the evidence qua other circumstances sought to be proved by the prosecution since the failure to prove a single circumstance cogently can cause a snap in the chain of circumstances. There cannot be a gap in the chain of circumstances. When the conviction is to be based on circumstantial evidence solely, then there should not be any snap in the chain of circumstances. If there is a snap in the chain, the accused is entitled to benefit of doubt. If some of the circumstances in the chain can be explained by any other reasonable hypothesis, then also the accused is entitled to the benefit of doubt.”*

<sup>9</sup> Criminal Appeal 705/2012

<sup>10</sup> [2024] 1 S.C.R. 248

*“24. Taking into consideration the evidence that has been brought on record, it does not unerringly point towards the guilt of the Accused/Appellant. No doubt it raises suspicion about the involvement of the Appellant; however, it is a settled law that suspicion, however strong it may be, cannot take the place of proof beyond a reasonable doubt and the Accused cannot be convicted on the ground of suspicion, no matter how strong it is. An Accused is presumed to be innocent unless proved guilty beyond reasonable doubt. The circumstances brought on record also do not form a complete chain so as to lead to irresistible conclusion about the involvement of the Appellant in the present crime. Establishing one or two circumstances beyond reasonable doubt is not sufficient to hold that the entire chain is complete as the chain of circumstances must be so complete that it leads to no other conclusion than the guilt of the Accused person, which is not so in the present case. The degree of proof required to hold him guilty beyond reasonable doubt, on the strength of circumstantial evidence, is clearly not established. Due to the missing links finding of guilt cannot be recorded and the benefit of doubt must go to the Appellant.”*

37. Thus, taking into consideration the evidence that has been brought on record, it does not unerringly point towards the guilt of the Appellant. No doubt it raises suspicion about the involvement of the Appellant; however, it is a settled law that suspicion, however strong it may be, cannot take the place of proof beyond a reasonable doubt and the Accused cannot be convicted on the ground of suspicion, no matter how strong it is. An Accused is presumed to be innocent unless proven guilty beyond reasonable doubt. The circumstances brought on record also do not form a complete chain so as to lead to an irresistible conclusion about the involvement of the Appellant in the present crime. Establishing one or two circumstances beyond reasonable doubt is not sufficient to hold that the entire chain is complete as the chain of circumstances must be so complete that it leads to no other conclusion than the guilt of the Accused person, which is not so in the present case. The degree of proof required to hold him guilty beyond reasonable doubt, on the strength of circumstantial evidence, is clearly not established. Due to the missing links the accused cannot be held liable for the offence of 302 IPC and therefore benefit of doubt must go to the Appellant.

38. We are therefore satisfied that the prosecution has failed to bring home the guilt of the Appellant beyond reasonable doubt and the Appellant deserves to be acquitted.

39. As a result, we pass the following order:

**ORDER**

- i. The Appeal is allowed.
- ii. The conviction and sentence of the Appellant under Section 302 of the Indian Penal Code recorded vide impugned judgment and order dated 05.03.2012 in Sessions Case No. 356/10, passed by the Additional Sessions Judge, Thane, is quashed and set aside, and the Appellant is acquitted of all the charges he is charged with.
- iii. The Appellant is on bail. His bail bond stands cancelled and sureties are discharged.
- iv. The Appellant shall within a period of one week from the date of the order execute P R Bond in the sum of Rs. 25000/- under section 481 of the Bhartiya Nagrik Suraksha Sanhita, 2023 (corresponding to Section 437A of the Cr.PC) for his appearance, in the event an appeal is preferred against acquittal.

40. Appeal stands disposed of accordingly. Pending Applications, if any, also stand disposed of.

(SHREERAM V. SHIRSAT, J.)

(MANISH PITALE, J.)