



2026:AHC:130288-DB

HIGH COURT OF JUDICATURE AT ALLAHABAD

CRIMINAL APPEAL No. - 3418 of 2020

Kabir Khan

.....Appellant(s)

Versus

State of U.P.

.....Respondent(s)

Counsel for Appellant(s)	: Abhishek Mayank, Ram Jatan
	Yadav, Surendra Kumar Tripathi
Counsel for Respondent(s)	: G.A.

Along with :

1. Criminal Appeal No. 12 of 2021 :

Irshad

Versus

State of U.P.

Court No. - 2

HON'BLE J.J. MUNIR, J.

HON'BLE VINAI KUMAR DWIVEDI, J.

(Delivered by Hon'ble Vinai Kumar Dwivedi, J.)

Both these Criminal Appeal bearing Nos. 3418 of 2020 (Kabir Khan Vs. State of U.P.) and 12 of 2021 (Irshad Vs. State of U.P.) have been filed by accused-appellants Kabir Khan and Irshad, respectively, against the judgment and order of conviction

2. By the impugned judgment and order dated 03.11.2020, the learned Trial Court held the accused-appellants guilty and convicted them under Section 302 read with Section 34 of the Indian Penal Code. They were sentenced to imprisonment for life and a fine of Rs. 50,000/- each. In default of payment of the fine, they were directed to undergo additional simple imprisonment for a period of six months. Both the accused-appellants were also held guilty under Section 201 IPC and each of them was sentenced to undergo seven years' imprisonment and fine of Rs. 10,000/- each. In default of payment of the fine, each accused-appellant was directed to undergo additional simple imprisonment for a period of two months.

3. From the written report, Exhibit K-1, prosecution story in nutshell is that informant Sarvesh Kumar Sharma (PW-1) has filed this written report at police station Shahganj, District Agra stating therein that he is resident of 61/122/2, Rasoolpur, Sarai Khwaja, Police Station Shahganj, District Agra. He is engaged in electrical work and earns his livelihood to maintain his family. On 05.11.2013 at about 7:00 p.m., his younger son, Prince, aged about 12 years, was called by one Irshad, who worked at Shalimar Tent, and was taken away by him. After a considerable lapse of time, when his son Prince did not return home, he searched for him till late at night. However, his whereabouts could not be ascertained. On 06.11.2013, in front of his house near the Railway Ground, where garbage was lying, a large number of people had gathered. At about 7:00 a.m., when he reached there, he saw that his son Prince was lying on a heap of garbage. Fire was burning from all sides. His legs were tied. The body of his son

requested that his report be duly registered and appropriate action be taken.

4. On the basis of the above written report, Exhibit K-1, a first information report, Exhibit K-6, was registered by Constable Clerk Munesh Singh (PW-6) at police station Shahganj, District Agra at Case Crime No. 638 of 2013, under Sections 302, 201 IPC on 06.11.2013 at 07:50 a.m. against Irshad. On receiving the information about the incident, police came to the place of occurrence and Station House Officer, Sunil Kumar (PW-8) took simple ashes and bloodstained ashes from the place of occurrence before the witnesses of *fard* and prepared the *fard* recovery, Exhibit K-3.

5. Inspector Sitaram Saroj (PW-7) prepared *panchayatnama* of the dead body of the deceased Prince, Exhibit K-2/4, under the direction of the Station House Officer, Sunil Kumar (PW-8), and he also prepared other police papers, such as, letter to R.I., *challan nash*, *naksha nash* and letter to C.M.O., etc. After that, the dead body of the deceased Prince was sent for conducting post mortem.

6. Dr. R.V. Singh (PW-5) conducted the post mortem examination of the dead body of the deceased Prince and prepared the post mortem report, Exhibit K-5. In post mortem report, Exhibit K-5, medical witness Dr. R.V. Singh (PW-5) found following ante mortem injuries :

- (i) *Multiple abrasion 5 x 3 cm. front of neck,*
- (ii) *Bleeding from nose.*
- (iii) *Superficial to deep burn as coal like. Both upper*

brain were congested. The pylorus was congested. The hyoid bone was broken. The lungs were congested. The right chamber of the heart was full, and the left chamber was empty. The stomach contained pasty food. The small intestine contained digested food and gas. The large intestine contained feces and gas. The liver was congested. The gall bladder was half filled. The kidneys and spleen were congested. The genitals were burned.

7. Investigating Officer, Sunil Kumar (PW-8), took the charge of the investigation, recorded the statements of the witnesses under Section 161 Cr.P.C., prepared site plan, Exhibit K-12. After completing all the formalities, he filed charge-sheet, Exhibit K-13, against the accused-appellants Irshad and Kabir Khan, under Sections 302, 201 IPC in the Court of learned Magistrate having jurisdiction.

8. Since the case was exclusively triable by the Court of Session, hence learned concerned Magistrate committed the case to the Court of Session for trial.

9. Learned Sessions Judge, Agra framed charges against the accused-appellants Irshad and Kabir Khan under Sections 302/34 and 201 IPC on 04.04.2014. The accused-appellants denied from the charges levelled against them and claimed trial.

10. During the course of trial, prosecution adduced and relied on the oral evidence of the informant Sarvesh Kumar Sharma (PW-1), Atul Kumar (PW-2), Ashok Mishra (PW-3), Ravi Kumar (PW-4), Dr. R.V. Singh (PW-5), Munesh Singh (PW-6), Sitaram Saroj (PW-7) and Sunil Kumar (PW-8). Apart from oral evidence, prosecution also relied and supported their case on documentary

against them. They have stated that the allegations and the evidence put to them were false and incorrect. In addition to the above, accused-appellants have also stated in their statements under Section 313 Cr.P.C. that they were wrongly prosecuted and charge-sheet was filed against them on false grounds. They further stated that the police had taken them from their homes for inquiry and had falsely and illegally implicated them in the present case and challaned them. The accused-appellants also stated that they have not committed any crime and they were innocent.

12. Learned trial Court after hearing the arguments of the prosecution and defence and perusing the evidence as available on record held the accused-appellants guilty under Section 302 read with Section 34 IPC and sentenced them for life imprisonment and fine of Rs. 50,000/- each. In default of payment of fine, additional simple imprisonment for six months was awarded to them. The Trial Court also sentenced the accused-appellants under Section 201 IPC for seven years imprisonment and fine of Rs. 10,000/- each and in default of payment of fine, two months' additional simple imprisonment.

13. Aggrieved by the impugned judgment and order of conviction and sentence dated 03.11.2020, accused-appellants preferred these criminal appeals in this Court.

14. We have heard the arguments of learned counsel for the accused-appellants and also the arguments of learned A.G.A. for the State. We have gone through the evidence available on record and also perused the judgment and order of conviction passed by learned Trial Court.

and circumstantial evidence against the accused-appellants. Only so-called last seen together theory, concoctedly and afterthought, was produced by the prosecution to give a force to the prosecution story.

16. The prosecution was unable to collect any incriminating materials, objects, things, articles either from the place of occurrence or from the accused-appellants by which they could be legally connected with the commission of the alleged crime. It is also submitted on behalf of the accused-appellants that there is no evidence, direct or indirect, against them. However, despite this, the learned trial Court wrongly interpreted the evidence, which could not be relied upon or believed in any circumstances against the accused-appellants. The prosecution was totally unable to state and prove any motive for commission of the alleged crime by the accused-appellants. In other words, on behalf of the accused-appellants, it is submitted that in the present case, there is no motive or direct or circumstantial evidence only so-called last seen together theory was projected by the prosecution with a view to falsely implicate the accused-appellants, who are totally innocent in this case. The learned trial Court did not consider this legal point that a person cannot be convicted of a crime solely on the basis of the last seen together theory.

17. Thus, learned Counsel for the appellants has submitted that judgment and order of conviction and sentence passed by learned trial Court dated 03.11.2020 is wholly illegal and without any oral or documentary evidence. Hence, criminal appeals of the accused-appellants are liable to be allowed and judgment and

Prince, was found in front of the informant's house, lying in the heap of garbage at the Railway Ground on 06.11.2013 in the morning at 7:00 a.m. Informant Sarvesh Kumar Sharma (PW-1), who is father of the deceased Prince, has testified this fact by deposing his evidence in the Court. Other prosecution witnesses Atul Kumar (PW-2), Ashok Mishra (PW-3) and Ravi Kumar (PW-4) have also supported the last seen together theory of the prosecution. In other words on 05.11.2013 at 07:00 p.m., the deceased Prince was seen with accused-appellant Irshad. Thereafter, in the morning of 06.11.2013, dead body was found. All the prosecution witnesses have fully supported the prosecution story.

19. During investigation, complicity of the accused-appellant Kabir Khan also came into light for commission of the alleged crime. Learned Trial Court has appreciated the evidence in right perspective and in a legal manner and thereby given the finding with regard to conviction of the accused-appellants. The finding and reasoning given by learned trial Court is based on right appreciation of evidence and the law of the evidence as applicable in this regard, hence the criminal appeals preferred by the accused-appellants are totally devoid of merits, therefore, are liable to be rejected.

20. In the light of rival submissions of both the parties and from perusal of the written report filed by informant Sarvesh Kumar Sharma (PW-1), it is revealed that the informant (PW-1) has stated that on 05.11.2013 at 07:00 p.m., his younger son Prince aged about 12 years has been called upon by a man named Irshad, who took him away. After lapse of time, when his son

his evidence in the Court, this witness has deposed that “the date of incident is 05.11.2013 at 07:00 p.m., I was at my home, then Irshad had come to my home, who was working at Shalimar Tent House and is a resident of Shiv Nagar. Irshad had called my son from home. When my son did not return home after lapse of much time, then I and my family members searched Prince. However, Prince was not found. I have gone to see Irshad at his home at Shiv Nagar but he was not found at his home. Due to late night, I returned my home. On 06.11.2013 at 07:00 a.m., there was crowd gathered in front of railway ground. Then I went there and saw that the dead body of my son Prince was lying. His legs were tied. Fire was burning and due to this, lower part of his body below chest was burnt. I identified the dead body as of my son. At that time, at the place of occurrence, Atul, Devendra and many other people were present there and they told me that Irshad and Kabir Khan were seen assaulting Prince.”

21. Informant Sarvesh Kumar Sharma (PW-1) stated in his cross-examination that Irshad used to come to my house. Irshad had taken my son Prince at 07:00 p.m. When Irshad called and took my son, no one else was present at that time. From perusal of the cross-examination of this witness, it is revealed that this witness had searched his son till 10:00 p.m. at many places but he was unable to find his son. According to the statement of this witness, it appears that he returned his home at about 01:00-1:30 a.m. at night. This witness has also stated that at 01:30 a.m., he went to the house of Irshad. This witness has stated that he knows the house of Irshad. He went there with his brother Ravi and Irshad was not at his home. One girl came out of the house of

During his cross-examination, this witness further stated that the police had come on their own and he had not gone to report. He informed the police that Irshad had taken Prince with him. Later on, he went to the police station and got the report scribed by Ashok Mishra at the police station. In his cross-examination, this witness also stated that he woke up at 6:30 a.m., and after taking a cup of tea, he was sitting outside the house. Until 7:00 a.m., he had not received any information about the dead body of his son. He saw a crowd of people in front of his house. He went there and saw that his son's legs were tied and tongue was out of his mouth. Fire was burning from all sides, and all parts below the chest had been burnt. When he reached the place of occurrence, the police arrived at the spot. He searched for his son along with Ravi and his sister Baby. He searched collectively. He searched for his son for two hours. He had not given any information to the police station or police post (*chowki*) before finding the dead body of his son. It is true that he did not see the accused beating his son, nor did he see them committing murder or hiding the dead body.

22. Thus, from perusal of the evidence of the informant (PW-1) as deposed by this witness in the Court, it is clear that, according to this witness, when his younger son Prince had not returned home late at night, he began searching for him. This witness, along with his family members, searched for two hours. He searched for his son but could not find his deceased son, Prince. According to this witness, he also went to the house of the accused, Irshad. When he called upon the accused-appellant Irshad, a girl came out of the house and informed him that Irshad

23. The above conduct and behavior, as stated by this witness himself, indicate that he was sitting outside the house with a very calm and peaceful mind after having tea. The conduct and behaviour of this witness shows that this witness is not stating true facts in the Court. It is totally unnatural and against human behavior for a father, whose son has not returned home at night, and he sleep entire night in a peaceful and calm state, woke up in a routine manner, have tea at 6:30 a.m., and, regardless of the fact that his son had not come home, sit outside the house after tea. This conduct and behavior, as stated by this witness, clearly indicate that he is presenting a totally false and unbelievable story during recording of his evidence in Court. It is also noteworthy that this witness until 06:30 a.m. on 06.11.2013 had not went to police station or police post and also had not given any information about the missing of his son and also had not lodged the F.I.R. When this witness was sitting outside his house after having tea, he saw a crowd gathered in front of his house at the railway ground. The police were also present there. Many other people were also present there. Seeing the crowd, this witness went there and saw the dead body of a child was lying in the heap of garbage and burning. At this juncture, this witness identified the dead body of the child as his son Prince. Thereafter with full deliberation, concoction and afterthought, this witness went to the police station and got scribed the written report, Exhibit K-1, by Ashok Mishra (PW-3), in which he named the accused-appellant Irshad.

24. Apart from the above facts, as indicated by the conduct and behavior of the informant (PW-1), it is also revealed from the

him. It is also surprising that the accused-appellant Irshad, after killing the child, threw the deceased's body into the heap of garbage at the railway ground, which is situated in front of the house of the informant (PW-1). The informant (PW-1), Sarvesh Kumar Sharma, has also not given any evidence in this respect that what was the relationship between him and the accused Irshad, or why the accused Irshad came to his house and took his child Prince with him.

25. No enmity has been mentioned in the written report, Exhibit K-1, or in the evidence given by the informant (PW-1). The nature of the relationship between this witness and the accused-appellant Irshad was also not stated by him in his evidence. It is also not stated what was the motive or why the accused Irshad took Prince, younger son of this witness and murdered him. Thus from the evidence of this witness, it is clearly revealed that after many people were gathered at railway ground in front of his house police was also present there. Curiously this witness also reached at the place where the dead body of the child was lying then this witness identified the dead body of the child as his son Prince and concocting a false narrative and story got scribed a written report by Ashok Mishra (PW-3) at police station and falsely implicated the accused-appellant Irshad and lodged a written report in this respect. From overall perusal and analysis of the statement of this witness, we find that this witness is not a witness of last seen together. It is also clear that this witness had not seen accused-appellant Irshad taking his son from his home. The conduct and manner in which this witness allegedly searched for his missing son, deceased Prince, and lodged the written report only after

and reliable witness of the last seen together theory as adduced by the prosecution, hence in the light of observation, we find the evidence of this witness is wholly unreliable and liable to be rejected.

27. Atul Kumar (PW-2) stated in his evidence that he is a friend of the deceased, Prince. From the evidence of this witness, it also emerged that on 05.11.2013, between 7:15 and 7:30 p.m., while he was walking in the Railway Colony, Agra, he saw Irshad taking Prince with him from the colony toward the Cantt. railway station. According to this witness, he informed the father of the deceased about this fact.

28. In his cross-examination, he stated that "I could not tell that what was the day of the incident. Investigating Officer had recorded his statement on 06.11.2013. I could not tell the day. I had not seen accused beating and burning Prince. During the cross-examination by the trial Court, this witness stated that age of Prince was 10-12 years. My age at that time was 18 years." In his cross-examination, he has further stated that "I had met father of Prince in the morning of 06.11.2013. I met with father of Prince at the place of occurrence. Father of Prince was already present at the place of occurrence."

29. Thus, from the above statement as given by this witness in his cross-examination, question arises that when this witness had seen that accused-appellants Irshad and Kabir Khan were taking Prince with them, then why this witness had not told this fact to the informant Sarvesh Kumar Sharma (PW-1), father of the deceased Prince. According to the evidence of this witness itself, this witness met with father of the deceased at the place of

is clearly emerged from the evidence of this witness that prosecution projected this witness as a witness of last seen together to strengthen the prosecution story and also to give force to the prosecution case. In view of the above facts and circumstances, evidence of this witness is also totally unreliable and unbelievable.

30. Ashok Mishra (PW-3) was produced by the prosecution in support of the prosecution story. This witness has also stated in his examination-in-chief that “on the evening of 05.11.2013, I saw Irshad taking Prince with him, and Kabir Khan was also following them from behind.” According to this witness also, he searched Prince with informant Sarvesh Kumar Sharma and their family but whereabouts of Prince was unknown. According to this witness, accused Irshad was also not found at his home. Thereafter it is came to the knowledge that dead body of Prince son of Sarvesh Kumar Sharma, was lying half burnt in the heap of the garbage at railway ground. This witness also stated that “as told by Sarvesh Kumar Sharma, I had written *tehrir* in respect of the murder of Prince.”

31. During the cross-examination, this witness stated that “I had received information about the death of Prince on 06.11.2013 at 06:00 a.m. and I went to see. No information was received. I was taking tea at my house. There was crowd in front of railway ground. I had went from my house to see the place where crowd was gathered. There were many people gathered at the place of occurrence. The police were already present there when I reached at the spot. It is true that in my *tehrir*, this fact was not written that in the evening of 05.11.2013, I had seen Prince going

Investigating Officer has not written time, then I could not tell reason for this.”

32. Thus, from perusal of the evidence of prosecution witness Ashok Mishra (PW-3), who has written *tehrir* on the dictation of the informant (PW-1) Sarvesh Kumar Sharma, it is revealed that this witness has also narrated a false and fabricated story that he had also seen accused persons taking with them Prince son of informant on 05.11.2013 at evening. However, despite stating that the accused persons were carrying the deceased with them, this witness did not inform the informant, Sarvesh Kumar Sharma (PW-1), or any other responsible person about this fact. From the evidence of this witness, it emerged that this witness was also taking tea at his home in the morning of 06.11.2013 at 06:00 a.m. This witness also went at the place of occurrence at railway ground. Crowd of people was also gathered there. Curiously, this witness also went at the place of occurrence then this witness had seen the dead body of the deceased Prince.

33. From perusal of the evidence of this witness, it is clear that conduct and behaviour of this witness is totally abnormal and against the human nature. This witness is also neighbour of the informant Sarvesh Kumar Sharma (PW-1) and their houses are adjacent to each other. This witness was also projected and produced by the prosecution after due deliberation and afterthought and to inject force to the prosecution story and also to give a force to the evidence of informant (PW-1) and (PW-2). However, in this attempt, we find that evidence of this witness Ashok Mishra (PW-3) is not reliable from any point of view of law of evidence. Testimony of this witness is unbelievable and does

came to my house, called my nephew Prince, and took him away. We searched for our nephew, but he was not traceable. The next morning, at 7:00 a.m., a crowd of people had gathered near the heap of garbage at the railway ground. I also reached there. I went with my brother and saw that my nephew was lying dead near the heap of garbage, which was burning.”

35. In his cross-examination, Ravi Kumar (PW-4) has stated that “I received information about missing of Prince in the next morning. We reached the place of occurrence at 6:00 a.m. Ashok Mishra, my neighbour, came to my home and gave information. Both my brother and I were at home when Ashok Mishra arrived. Upon receiving the information, I, my brother Sarvesh Kumar Sharma, and Ashok Mishra all went to the spot. When we reached the place of occurrence, a crowd of people had gathered. I did not see Irshad or Kabir beating or burning Prince. I informed the Investigating Officer that Irshad was carrying Prince with him. If this fact was not recorded, I cannot give any reason for it.”

36. Therefore, from perusal of the evidence of prosecution witness Ravi Kumar (PW-4), it becomes clear that prosecution tried to project and produce this witness as a witness of last seen together but the prosecution has miserably failed in its attempt. From perusal of evidence of this witness, it is clear that this witness had received information about missing of Prince in the morning of next day. In other words, this witness has received information of missing of deceased Prince in the morning of 06.11.2013.

37. In view of the above statement, how can this witness be regarded as a witness of last seen together. It is evident from the

facts, it becomes clear that this witness is contradicting himself that Irshad had come at home and carried away his nephew on 05.11.2013 at 07:00 p.m. In the light of appreciation of evidence of this witness, it is also clear that this witness is not a witness of last seen together or taking away Prince with accused-appellant Irshad. Thus, we find that testimony and evidence of this witness also does not inspire any confidence and the same is not believable and reliable according to the facts and circumstances of the present case at hand, therefore, we also reject the testimony of this witness.

38. Hon'ble Supreme Court in the case of **Gambhir v. State of Maharashtra, (1982) 2 SCC 351** has held in para 9 that;

"The law regarding circumstantial evidence is well settled. When a case rests upon the circumstantial evidence, such evidence must satisfy three tests:

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

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

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused.

evidence in the present case at hand, we find that Prince aged about 12 years was missing from the evening of 05.11.2013 but informant Sarvesh Kumar Sharma (PW-1), father of the deceased Prince, has not given any information about the missing of his son to the police station or at the police post (chowki) that his son Prince aged about 12 years was missing. As per the evidence of PW-1/informant, as given in the Court, he along with other family members made a search for missing child Prince till late night but they were unsuccessful in their attempt to know the whereabouts of the missing child Prince. After searching till late night, informant PW-1 came to his home at late night and slept there, woke up in the morning of next day on 06.11.2013 at 06:30 a.m. and took tea. He was sitting outside the house in the open area. When PW-1 saw in front of his house that crowd of people had gathered nearby the heap of garbage at the railway ground, then this witness also due to curiosity reached at the place of occurrence and identified the dead body of a child as his son Prince. Before this witness has reached at the place of occurrence, police were already present there. How can a father of a missing child sleep in the night, wake up early in the next morning, have tea, peacefully and with cool mind sit outside the house in an open area without giving any information or lodging the first information report. When he reached at the place of occurrence which was located in front of his house, saw the dead body of his son and thereafter, he went to the police station, got scribed written report from Ashok Mishra (PW-3) naming accused-appellant Irshad and lodged the F.I.R. Thus, from the conduct and behaviour of this witness, we find that this witness is not a witness of last seen together. The

40. Informant Sarvesh Kumar Sharma (PW-1) had only stated that Irshad had come to his home, called Prince and carried him away. On the same point, Ashok Mishra (PW-3) narrated a different fact that this witness had seen on 05.11.2013 at evening that Prince was going with Irshad and accused-appellant Kabir Khan was following them from behind. On the same point, informant (PW-1) Sarvesh Kumar Sharma and Ashok Mishra (PW-3) are stating two different statements.

41. It is admitted fact by both sides that there is no direct evidence in the case. Prosecution only based its story on the theory of last seen together. In support of its theory of last seen together, prosecution adduced as many as four prosecution witnesses; informant Sarvesh Kumar Sharma (PW-1), Atul Kumar (PW-2), Ashok Mishra (PW-3) and Ravi Kumar (PW-4) but from the above discussions, it is amply clear that above prosecution witnesses are contradicting each other's statements. All the four prosecution witnesses mentioned above were adduced by the prosecution with the view to support and establish the theory of last seen together and to corroborate each other's evidence but the prosecution has miserably failed in its attempt. Since, in spite of corroborating each other's evidence, the prosecution witnesses Sarvesh Kumar Sharma (PW-1), Atul Kumar (PW-2), Ashok Mishra (PW-3), and Ravi Kumar (PW-4) have contradicted and falsified each other's statements..

42. In written report, Exhibit K-1, no motive was stated. From the evidence of the prosecution witnesses, it is also clear that the witnesses of the so-called last seen together theory have not stated in their evidence what was the motive and why the

K-1, is totally silent on this point. Prosecution witnesses of facts, such as, Sarvesh Kumar Sharma (PW-1), Atul Kumar (PW-2), Ashok Mishra (PW-3) and Ravi Kumar (PW-4) have not stated any words in their evidence that what was the enmity and cause which compelled Irshad to kill the deceased Prince. Thus, we find that in this case, prosecution was liable to prove motive against the accused-appellants by their evidence but prosecution is totally silent on this point, which makes the prosecution story highly suspicious and doubtful.

43. It is also a notable fact that according to the prosecution witnesses, accused-appellant Irshad carried the child Prince with him and murdered him. It is also evident from the prosecution evidence that accused-appellant Irshad was resident of other locality. It is totally unbelievable that the accused-appellant Irshad carried the child in presence of the informant PW-1/Sarvesh Kumar Sharma from their home, and after committing the murder of the child, why did the accused-appellant Irshad come again in front of the house of the informant PW-1 at the railway ground, throw the dead body of the deceased, and set it on fire. It is highly risky for any accused person to come in front of the informant PW-1 and hide the dead body of the deceased. Thus, prosecution story as narrated by the prosecution witnesses were found wholly unbelievable and unreliable. It is also a fact that the Investigating Officer could not collect any material or object from the place of occurrence that would legally connect the accused-appellants with the alleged crime. It is also noteworthy that Investigating Officer was unable to recover any material objects, things or articles from possession of the accused-appellants, by which accused-

prosecution to prove its case that victim/deceased was lastly seen in the company of the accused-appellants but in the present case at hand, prosecution was miserably unsuccessful to prove this fact that the deceased Prince was in the company of the accused-appellant Irshad before his death.

45. Hon'ble Supreme Court in the case of **Kanhaiya Lal v. State of Rajasthan, (2014) 4 SCC 715** has held in para 12 that;

“12. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant.”

46. Hon'ble Supreme Court in the case of **Ashok v. State of Maharashtra, (2015) 4 SCC 393** in para 12 held that;

“Initial burden of proof is on the prosecution to bring sufficient evidence pointing towards guilt of the accused. However, in case of last seen together, the prosecution is exempted to prove exact happening of the incident as the accused himself would have special knowledge of the incident and thus, would have burden of proof as per Section 106 of the Evidence Act. Therefore, last seen together itself is not a conclusive proof but along with other circumstances surrounding the incident, like relations between the accused and the deceased, enmity between them, previous history of hostility,

present case at hand, prosecution was wholly unable to discharge its initial burden of proof that Prince was called upon and carried away by accused-appellant Irshad. When prosecution was unable to discharge its initial burden, then onus of proof has not shifted on the accused-appellants under Section 106 of the Evidence Act.

48. We have also gone through the findings and reasoning given by the learned Trial Court. We find that the trial Court did not consider this legal aspect in its judgment and order of conviction. The trial Court has completely neglected this legal point and has not given any finding or reasoning on this aspect. Trial Court has also not considered this fact that evidence of prosecution witnesses, such as, informant Sarvesh Kumar Sharma (PW-1), Atul Kumar (PW-2), Ashok Mishra (PW-3) and Ravi Kumar (PW-4) are not the witnesses of last seen together.

49. The Trial Court, without properly appreciating and evaluating the evidence and in a casual and routine manner, totally believed the evidence of Sarvesh Kumar Sharma (PW-1), Atul Kumar (PW-2), Ashok Mishra (PW-3) and Ravi Kumar (PW-4) as reliable, which, in our opinion, is wholly unreliable. From perusal of the finding and reasoning given by the trial Court, we find that trial Court only by mentioning the evidence of prosecution witnesses held that chain of evidence against the accused-appellants is complete. The finding and reasoning of the Trial Court is totally against the evidence available on the record and it is also against the settled principles of law in this respect as enunciated by the Hon'ble Supreme Court in the above referred case laws. Therefore, we find that the finding and reasoning given by learned Trial Court is not sustainable in the eyes of law.

51. In view of the above, we find that judgment and order of conviction and sentence dated 03.11.2020 passed by learned Trial Court is liable to be set aside and the criminal appeal of the accused-appellants are liable to be allowed.

52. The criminal appeals are **allowed**. Accordingly, we set aside the impugned judgment and order dated 03.11.2020 of conviction and sentence passed against the accused-appellants by learned Trial Court in Session Trial No. 29 of 2014 (State Vs. Irshad and another) arising out of Case Crime No. 638 of 2013, under Sections 302/34 and 201 IPC, Police Station Shahganj, District Agra. The appellants are acquitted of the charge under Sections 302/34 and 201 IPC. The appellants, Kabir Khan and Irshad, are in jail and shall be released from prison forthwith unless wanted in connection with any other case and subject to fulfilling the requirements under Section 437-A Cr.P.C.

53. Let a copy of this judgment be sent to the learned Trial Court forthwith along with the Trial Court record for compliance.

(Vinai Kumar Dwivedi,J.) (J.J. Munir,J.)

July 01, 2026
Shubham