

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.1939 OF 2008

Amitava Banerjee @ Amit
@ Bappa Banerjee

...Appellant

Versus

State of West Bengal

...Respondent

J U D G M E N T

T.S. THAKUR, J.

1. This appeal by special leave arises out of an order passed by the High Court of Judicature at Calcutta whereby the conviction of the appellant for offences punishable under Sections 302, 364 and 201 of the IPC and the sentence of life imprisonment awarded to him

have been affirmed. Briefly stated the prosecution case is as under:

2. Asit Kumar Mondal, Sub-Inspector of Police was at the relevant point of time attached to Jhargram Court. His family comprised his wife and a son named Snehasish Mondal @ Babusona aged about 10/12 years residing at 'B' Block of Thana Quarters' Complex at Ghoradhara, Jhargram. In the same complex, lived the appellant, whose father was also working as a Sub-Inspector of Police and was at the relevant time posted at Beliabera Police Station. According to the prosecution, the deceased Snehasish Mondal was friendly with the younger brother of the appellant and would usually play cricket with him in a park situate behind the residential quarters and by the side of the BDO office. A few days before the incident in question, the deceased is alleged to have come to the house of the appellant to collect a cricket bat and ball for play in the park mentioned above and seen the appellant in a compromising position with Mangala Deloi, PW10 aged about 20 years who was then working as a maid-

servant in the house of the appellant. The prosecution case is that the appellant apprehended loss of face in the locality on account of a possible disclosure of his involvement with his maid-servant which according to the prosecution was the motive for silencing the innocent boy for all times by killing him in cold blood.

3. On 12th of July, 1998, the deceased as usual went to play in the park but did not return home by the evening. The parents of the deceased panicked and started a search for the deceased which went fruitless. Asit Mondal, PW1 then lodged a missing report at the Jhargram Police Station who announced the disappearance of the boy in the locality on the public address system. According to Asit Mondal, in the course of the search for the missing boy he came to know that he was seen talking to the appellant and then going with him towards Kanchan Oil Mill on the latter's bicycle. When the appellant returned to his quarter at 9.00 p.m. without his bicycle he was questioned about the whereabouts of the deceased and the fact that he was seen taking the boy towards the

Kanchan Oil Mill but the appellant denied the same. About the bicycle the appellant stated that he had handed the same over to one of his friends.

4. On July 13, 1998, Jhargram Police Station received information about a freshly dug ditch filled up with a heap of loose earth in Sitaldihi jungle close to Kanchan Oil Mill. The police on receipt of this information rushed to the spot and found that a freshly dug ditch had indeed been filled up with loose earth and that a black coloured Hero bicycle was parked against one of the trees at some distance. The Executive Magistrate of the area was summoned to the spot by the police and the earth heaped over the ditch got removed only to discover the dead body of the deceased Snehasish Mondal with his hands tied at the back and a handkerchief stuffed into its mouth. Recovery of the dead body of the deceased and conduct of an inquest by the Executive Magistrate led to the registration of FIR No.91 of 1998 for the commission of an offence under Sections 364, 302 and 201 of the IPC on

the basis of a written complaint made to the above effect by Asit Kumar Mondal father of the deceased Babusona.

5. The police seized the bicycle from Sitaldihi jungle besides a cap which the appellant was allegedly wearing on the date of the incident. Post-mortem examination conducted by Dr. Rajat Kanti Satpati, PW 15 proved that the deceased had died as a result of asphyxia because of throattling/strangulation which was ante-mortem and homicidal in nature. In the course of investigation the police also seized a spade which the appellant had allegedly borrowed from Jadunath Das, PW 6 and which the appellant had on the fateful day left with Rukshmini Yadav, PW 11. Statements of witnesses who had last seen the deceased, in the company of the appellant, in the park and later going towards the Kanchan Oil Mill and inside the Sitaldihi jungle were also recorded. Suffice it to say that on the completion of the investigation a charge-sheet was filed against the appellant before the Court of SDJM Jhargram who committed the case to the Court of Sessions at Midnapore. The Sessions Judge in turn

transferred the same to the 5th Additional Sessions Judge Midnapore, for trial and disposal.

6. At the trial the prosecution examined as many as 22 witnesses in support of its case including Asit Mondal, PW1 and his wife Smt. Chhanda Mondal, PW 14, who supported the prosecution case. Gurupada Mondal, PW 2, who reported the presence of the bicycle and the ditch in Sitaldihi jungle to the police, Sunil Deloi, PW 5 who had seen the appellant coming out of the Sitaldihi jungle on 13th July, 1998 at 5.30-6.00 a.m., Jadunath Das, PW 6 who deposed about the borrowing of the spade by the appellant on 12th July, 1998 in the morning, Rajib Roy Chowdhary, PW 7, and Jiten Sen, PW 8 both of whom saw Babusona talking to the appellant in the park and then going towards Sitaldihi jungle on the latter's bicycle. Tarapada Mahato, PW 9 who saw the appellant and the deceased inside the Sitaldihi jungle on 12th July, 1998 in the evening, Rukshmini Yadav, PW 11 who testified to the appellant leaving a spade at her house on 12th July, 1998 in the evening, Tarun Banerjee, PW13 who saw the bicycle

in the Sitaldihi jungle and identified it as that of the appellant. Dr. Rajat Kanti Satpati, PW 15 who conducted the post-mortem examination, Dipak Kumar Sarkar, PW-16, Executive Magistrate, who conducted the inquest, Tapan Kumar Chatterjee, PW17 who made an entry in the General Diary under S.No.463 regarding the presence of a cycle and the ditch in the jungle and Swapan Kumar Mohanti, PW20, Judicial Magistrate, who conducted the test identification parade were also examined by the prosecution apart from the Investigating Officer Shri Kushal Mitra, PW22.

7. On a thorough and careful appreciation of the evidence adduced before it the Trial Court concluded that the prosecution had failed to establish the motive for the murder of the deceased as alleged by it. The Court held that Mangala Deloi, PW10 who was the star witness of the prosecution to prove the alleged motive had not supported the prosecution case in the Court. The witness had no doubt been examined even under Section 164 of Cr.P.C. where she had supported the theory underlying

the alleged motive but that version had been disowned by her at the trial. Since, however, the statement of the witness under Section 164 Cr.P.C. did not constitute substantive evidence the same could not be relied upon for convicting the appellant even when the witness had admitted that she had made a statement before the Magistrate. The Court all the same held that the circumstantial evidence available on record was so strong and so unerringly pointed towards the guilt of the appellant that the absence of a motive did not make much of a difference. In paras 68 and 69 of the judgment the Trial Court summarised the incriminating circumstances that were in its opinion firmly established and that formed a complete chain proving the guilt of the appellant. The Court observed:

"68. In the present case, accused Amitava was seen on 12.7.98 at about 5.30 pm at Ghoradhara park, Jhargram to take deceased Babusona therefrom by his cycle towards Kanchan Oil Mill. He was again seen at Sitaldihi jungle with Babusona and the cycle. On the same date he took the spade from the house of Jadunath. At that time he covered the handle of the spade with a piece of newspaper and tied the spade with the cycle with the help of Sutli. He kept the spade at the garden of Rukmini Yadab, PW11 at about 7/7.30 pm on the same day. He was seen in that night without

his cycle. On the following day i.e. On 13.7.98 at the very morning he was seen coming out from Sitaldihi jungle without his cycle in a suspicious and frightening manner as discussed earlier. At the material point of time when the accused went to Sitaldihi jungle on 12.7.98 with deceased Babusona, the accused was wearing a chocolate coloured full pant white half genji and one reddish cap and deceased Babusona was wearing yellow-orange coloured shirt, blue half pant and slipper. At the time when the accused was found coming out of Sitaldihi jungle in the morning of 13.7.98, he was seen wearing a chocolate coloured full pant and white genji, but without the cap. The accused is identified by several witnesses. His pant and genji were also seized by the police from his house, which are also identified by the witnesses, who saw him on 12.7.98 at the afternoon and also in the morning of 13.7.98. On 13.7.98 as per information of the witnesses police had been to Sitaldihi jungle and there discovered the place where the dead body of Babusona was kept under the earth. The S.D.P.O, S.D.O and the Id. Executive Magistrate were called along with a photographer. In their presence the dead body was recovered from the ditch after unearthing the same. The cycle of Amitava, two pieces of newspaper and hawai chappal of Babusona were recovered nearby the said ditch. Those are produced in court and identified the witnesses. The dead body was identified by PW1, father of deceased Babusona, as that of his son-Babusona. He lodged the FIR at that spot. Inquest was held over the dead body of Babusona in presence of the witnesses – both by the police and also by the Executive Magistrate. The hands and legs of deceased Babusona were found to be tied with electric wire and his mouth was gagged with handkerchief. Those articles were seized and produced in court and duly identified by the seizure witnesses. Thereafter the dead body of Babusona was sent to Jhargram S.D. Hospital where post mortem examination was held by the medical Board, including the medical officer, PW15. The post mortem examination was held at 6.45 pm on 13.7.98 and the doctors' opinion is that the death of Babusona took place about 24 hours back due to throttling/strangulation, which was homicidal in nature. After recording the statements of several witnesses, I.O. (PW22) arrested the accused and as shown by the accused the spade was recovered from the premises of Rukmini Yadab (PW11). That spade is

produced in court and identified both Jadunath, PW 6, and Rukmini, PW 11, and that spade is produced in court and identified by both Jadunath and Rukmini. Subsequently, on 15.7.98 as per the statement of the accused his reddish cap and sandal were recovered from the bush within Sitaldihi jungle in presence of the witnesses. Those articles are produced in court and identified by the seizure witnesses. The statement of the accused leading to such discovery is also brought into evidence. The statements of witnesses, Rajib, Jiten, Mongala, Rukmini and Jadunath were recorded by the Ld. J.M. Jhargram u/section 164 Cr.P.C. Excepting Mongala, all other witnesses have given substantive evidence in court in support of their earlier statement u/section 164 Cr.P.C.

69. Thus, on the basis of the aforesaid evidence, as discussed earlier, the chain of circumstantial evidence is built up and it is complete one. The standard of proof required to hold the accused guilty on circumstantial evidence is quite sufficient to establish the chain of circumstances. In my considered view, it is so complete leaving no reasonable ground for conclusion consistent with the innocence of the accused. The circumstances brought before the court is quite sufficient to conclude by holding the guilt of the accused. In the present case, there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

8. On the above findings the Trial Court found the appellant guilty of offences punishable under Section 302 of the IPC and sentenced him to imprisonment for life and a fine of Rs.2,000/- in default whereof the appellant was directed to undergo a further imprisonment for two months. No separate sentence was, however, awarded to

the appellant for the offences punishable under Sections 364 and 201 of the IPC though the said offence held proved.

9. Aggrieved by his conviction and sentence the appellant preferred an appeal before the High Court of Judicature at Calcutta. The High Court has by the judgment and order impugned in this appeal affirmed the conviction and sentence awarded to the appellant and dismissed the appeal. The High Court has while doing so re-appraised the evidence on record held that the circumstances proved at the trial were explainable on no other hypothesis except the guilt of the appellant. The High Court observed:

“If we assemble the above stated facts, evidence and circumstances and consider the same in proper perspective the circumstances and the evidence clearly lead to us to the only possible hypothesis that the appellant was the only person who was responsible for the murder of Babusona. There was no evidence before the Court to prove that deceased was found in the company of any other person on 12.7.98 before his murder. The evidence and circumstances clinchingly establishes that the appellant took away Babusona from Ghoradhara park on his cycle and Babusona was last seen by PW9 in the company of appellant in the Sitaldihi jungle and thereafter he did not return and his dead body was recovered on 13.7.98. Besides the appellant, no other person had the custody of the

deceased before his murder and the entire circumstances establishes and proves that the appellant was the murderer.”

10. The present appeal by special leave assails the correctness of the view taken by the courts below. We have heard at considerable length Shri Ranjan Mukherjee learned counsel for the appellant and Shri Pradeep Ghosh, learned senior counsel for the respondent both of whom were at pains to take us through the evidence adduced at the trial.

11. We may at the threshold say that this Court does not ordinarily embark upon a re-appraisal of the evidence where the courts below have concurrently taken a view on facts one way or the other. In a long line of decisions this Court has held that an appeal by special leave is not a regular appeal and that this Court would not re-appreciate evidence except to find out whether there has been any illegality, material irregularity or miscarriage of justice merely because a different view is possible on the evidence adduced at the trial is no ground for the Court to

upset the opinion of the Courts below, so long as the same is a reasonably possible view. Perversity in the findings, illegality or irregularity in the Trial, causing injustice, or failure to take into consideration an important piece of evidence have been identified as some of the situation in which this Court would re-appraise the evidence adduced at the trial and not otherwise. (See: **Radha Mohan Singh alias Lal Saheb and Ors. v. State of U.P.** (AIR 2006 SC 951), **Bhagwan Singh v. State of Rajasthan** (AIR 1976 SC 985), **Suresh Kumar Jain v. Shanti Swarup Jain and Ors.** (AIR 1997 SC 2291) and **Kirpal Singh v. State of Utter Pradesh** (AIR 1965 SC 712)).

12. It is our task now to examine whether the judgment under appeal suffers from any one or more of the above infirmities, having regard to the quality of the evidence adduced at the trial.

13. We may with that object in view refer to the essence of the depositions of the witnesses examined at the trial. In his deposition Asit Kumar Mondal, PW1, stated that he

was residing with his wife and only son Snehasish Mondal in 'B' Block of the Thana Quarters Complex at Ghoradhara, Jhargram. Amit Banerjee resided with his wife and their three sons in 'A' Block opposite to Block 'B' in which the witness resided. On 12th of July, 1998, the deceased had gone to play in Ghoradhara park situate in front of BDO office but did not return home till evening. He was, therefore, asked by his wife, PW14 to search for their son. In the course of the search he came to know from one Rajib Roy Chowdhury, PW7 also a resident of the same Thana Quarters Complex that he had seen Babusona sitting in the park at about 5.00-5.30 p.m. and later seen him going with the appellant on his bicycle toward Kanchan Oil Mill following the western road touching the said park. The witness also deposed about the missing report lodged by him in Jhargram Police Station marked Ex.13 comprising G.D. Entry No.438 dated 12th July, 1998. The G.D. Entry gave the description of the missing boy and the clothes that he was wearing at the time of his disappearance.

14. Chhanda Mondal, PW 14, who happened to be the mother of the deceased, has in her deposition stated that at about 2 p.m. on 12th July, 1998 Babusona, the deceased expressed his desire to go out for bringing two parrots promised to him by the appellant. At the instance of the mother, the deceased instead went for his drawing classes from where he returned at about 4.45 p.m. Soon thereafter and following a signal from the appellant he went up to the roof of the flat occupied by the appellant where the later was standing. Sometime later the appellant and Babusona were both seen by the witness going towards the nearby park. The appellant was wearing a cap on his head, one white ganjee and a chocolate coloured full pant.

15. Rajib Roy Choudhury, PW 7, deposed that he had seen Babusona sitting on a Bench at about 5.00-5.30 p.m. on 12th July, 1998 when the appellant came there, called out to Babusona and took him away on his bicycle by making him sit on the front rod of the cycle. The witness admitted that he was examined under Section 164 of the

Cr.P.C. which statement was exhibited as Ext.7/1. Also relevant at this stage is the deposition of Jitin Sen, PW 8, who testified that he had seen Babusona at the Ghoradhara Park when the appellant came there called the deceased and took him away on his bicycle. The deceased and also the appellant were, according to the witness, well known to him as both of them were sports lovers.

16. Tarapade Mahato, PW9, who was an employee of the Kanchan Oil Mill and a resident of village Kalinagar, in his deposition stated that on 12th July, 1998 at about 6.00-6.30 p.m. he was returning from his duty from Kanchan Oil Mill following the usual path he noticed a bicycle standing with the support of a tree inside the Sitaldihi jungle. He also noticed two boys one about 10-11 years and another 18-19 years standing at a distance of about 10/12 cubits from the said bicycle. The witness further stated that the boys on noticing him proceeded further inside the jungle holding each other's hands. On the following day i.e. 13th July, 1998, he came to know about

the recovery of a dead body from a ditch inside Sitaldihi jungle. He at once rushed to the place and saw the dead body of a boy aged 10/12 years lying in the ditch. He recollected that it was the same boy whom he had seen on the previous day. Witness further deposed that he identified the 18-19 years boy as the one whom he had seen on 12th July, 1998 in the Sitaldihi jungle in the test identification parade.

17. The prosecution has also placed reliance upon the deposition of Jadunath Das, PW 6, who also happened to be one of the residents of the police complex and knew the appellant and the deceased. According to this witness on 12th July, 1998 which happened to be a Sunday, the appellant called him at about 10.30 in the morning and asked for the spade which the witness owned as the former wanted to plant flowers. The witness further stated that the appellant took the spade and wrapped its wooden part with a piece of newspaper and 'Sutli' (jute string) and carried the spade with him tied to his bicycle. The spade was not, however, returned by the appellant to him. The

witness identified the spade seized by the police and marked Ex.11 to be the one which the appellant had borrowed from him on the date mentioned above.

18. Statement of Rukshmini Yadav, PW11 also bears relevance to the spade referred to by Jadunath Das, PW6. According to this witness, her children also take part in different sports. The appellant was according to this witness well acquainted to her and others in the locality. The witness stated that on 12th July at about 7.00-7.30 p.m. the appellant came to her house and called for her and kept one spade in the garden stating that he would take the same back on the following morning. The witness further stated that on 13th July, 1998 at about 9.00-9.30 p.m. the appellant accompanied by the police came to her house and the spade that was left by him was seized at his instance. A seizure memo Ex.10 was also prepared on which the witness had affixed her signature.

19. Aswini Deloi, PW 12 was examined by the prosecution to prove that he had reported the presence of a graveyard and a bicycle in the Sitaldihi jungle, and seen

the appellant coming out of the Sitaldihi jungle on the 13th July, 1998 early in the morning. At the trial this witness has partly supported the prosecution. He has stated that about 2½ years ago he had noticed one bicycle and some newspapers lying near graveyard but denied having reported the matter to the local police along with Gurupada Mondal, PW 2. He also denied having seen the appellant coming out of the Sitaldihi jungle in the morning of 13th July, 1998. The witness was declared hostile and was cross-examined. He was confronted with the statement made before the police which was denied. The refusal of the witness to support the prosecution case has not made any material difference having regard to the fact that Gurupada Mondal, PW2 has supported the prosecution and stated in his deposition that a black colour bicycle and the ditch which looked like a fresh graveyard and a pair of chappal lying nearby besides a newspaper was noticed by him inside the jungle and reported by him and Aswini Deloi, PW 12 to the police.

20. Tarun Banerjee, PW13 was occupying the ground floor flat in the 'B' Block of the complex and was familiar with the appellant as also the deceased-Babusona. According to his deposition on 12th July, 1998 when he returned home he learnt from his wife that Babusona was missing. He rushed to the house of Babusona's father and asked him whether a report regarding missing had been lodged with the police. Till mid-night Babusona could not be traced despite efforts made by police and a public announcement made on a loudspeaker. On the following day he noticed a gathering of people including police personnel on the Sitaldihi jungle. Asit Kumar Mondal, PW1 was also present on the spot and was weeping. A bicycle standing nearby was also seen by the witness which belonged to the appellant. He recognised the bicycle, as he too made use of it occasionally. He is also a witness to the seizure of the clothes which the appellant was wearing on the fateful day. Although the witness has been cross-examined extensively yet nothing has been extracted from him that could shake his credibility. In his cross-examination the witness has stated that the appellant had

on 12th July, 1998 at about 9.00/10.00 p.m. told him that his bicycle had been taken by one of his friends but he failed to disclose the name of his friend and said that the friend was simply known to him by name.

21. Dr. Rajat Kanti Satpati, PW15 conducted the post-mortem on the dead body of the deceased and found the following injuries:

"External Injuries:

- (1) Hematoma 1" x 1" over the occipital region of the scalp and ½" x ½" on the front and back of right pinna.
- (2) Scratch mark surrounding both the wrist joint.
- (3) Abrasion on buccal surface on upper lip.
- (4) Continuous horizontal ligature mark around the lower part of neck.
- (5) Old hemorrhagic mark both upper and lower jaw.
- (6) Eccymosis 10" x 6" upper part of back of chest and eccymosis 8" x 6" lower part of back and also eccymosis both of the axilla and noted. On section of the neck below ligature no parchmentization in the subcutaneous tissues. Haemorrhage is noted.

On further dissection carotid artery intact both sides intact. Muscles platysma mark and lacerated left laterally and haemorrhage in and around injuries. Fracture of the hyoid bone on the left side and haemorrhage around fracture hyoid which is resist to washing. Stomach healthy contains full particles.

In our opinion of death is asphyxia as a result of throttling/strangulation which is antemortem and homicidal in nature."

22. The witness further stated that injury no.4 could be caused due to tying of the neck with a substance like 'Sutli'. According to the witness the death of the deceased had occurred approximately 24 hrs. prior to the post-mortem examination which was conducted at 6.45 p.m. on 13th July, 1998.

23. Deepak Kumar Sarkar, PW16 is a witness to the recovery of the dead body of deceased Babusona from the ditch in the jungle and the inquest that followed.

24. Tapan Kumar Chatterjee, PW17 and Swapan Kumar Pal, PW18 are police witnesses. While the former has proved the GD No.438 dated 12th July, 1998 lodged by Asit Kumar Mondal regarding the missing report of his son Babusona, the latter is a witness to the seizure of the bicycle and the recovery of the dead-body from the ditch inside the Sitaldihi jungle. Dilip Bhattacharyya, PW 19, has scribed the first information report which he wrote under the instruction of the first informant, Asit Kumar Mondal and which has been marked Ext.1. In cross-examination the witness stated that as soon as the dead-

body was identified by the father of the deceased the officer-in-charge instructed him to write down the FIR and he accordingly wrote the FIR as per the narrative given by Asit Kumar Mondal, PW1.

25. Swapan Kumar Mahanti, PW20, Judicial Magistrate, recorded the statement of Rajib Roy Chowdhury, PW 7 and Jiten Sen, PW8 under Section 164 of the Cr.P.C. He also recorded the statement of Jadunath Das, PW6 and Rukshmini Yadav which was marked as Ext.11. Statement of Tarapada Mahato PW9 is also recorded by the witness. The Magistrate also testified the holding of a test identification parade on 6th August, 1998 as per the orders of the Ld. Sub-Divisional Judicial Magistrate, Jhargram. In his cross-examination the witness stated that he has administered oath to the witnesses for the statement recorded by him but the same is not recorded in the order-sheet or the statement. There was no serious challenge to the test identification parade in the cross-examination except that undertrial prisoners are produced by the Sub-Jailor and were mixed with the suspect. The

particulars of the cases in which the undertrial prisoners were in custody were not, however, recorded in the proceedings. Tapas Giri, PW21 took the photographs on the spot as per the instructions of police while Kushal Mitra, PW22 is the Investigating Officer who in his deposition has proved the various steps that were taken in the course of investigation including the seizures made, the statement of the witnesses recorded, the conduct of the inquest, the post-mortem and the test identification parade. The appellant led no evidence in his defence.

26. Mr. Mukherjee at the very outset argued that in a case based on circumstantial evidence proof of motive of the commission of offence of murder is extremely important. He submitted that prosecution had in the present case failed to prove the motive alleged by it which would break the chain of circumstances and resultantly benefit the appellant. He urged that even when Mangala Deloi, PW10 had supported the prosecution version regarding the alleged motive in her statements under Sections 161 and 164 of the Cr.P.C., the same did not

constitute substantive evidence in the case and could not, therefore, be made use of for holding the motive to have been proved.

27. Motive for the commission of an offence no doubt assumes greater importance in cases resting on circumstantial evidence than those in which direct evidence regarding commission of the offence is available. And yet failure to prove motive in cases resting on circumstantial evidence is not fatal by itself. All that the absence of motive for the commission of the offence results in is that the court shall have to be more careful and circumspect in scrutinizing the evidence to ensure that suspicion does not take the place of proof while finding the accused guilty. Absence of motive in a case depending entirely on circumstantial evidence is a factor that shall no doubt weigh in favour of the accused, but what the Courts need to remember is that motive is a matter which is primarily known to the accused and which the prosecution may at times find difficult to explain or establish by substantive evidence. Human nature being

what it is, it is often difficult to fathom the real motivation behind the commission of a crime. And yet experience about human nature, human conduct and the frailties of human mind has shown that inducements to crime have veered around to what **Wills** has in his book "Circumstantial Evidence" said:

"The common inducements to crime are the desires of revenging some real or fancied wrong; of getting rid of rival or an obnoxious connection; of escaping from the pressure of pecuniary or other obligation or burden of obtaining plunder or other coveted object; or preserving reputation, either that of general character or the conventional reputation or profession or sex; or gratifying some other selfish or malignant passion."

28. The legal position as to the significance of motive and effect of its absence in a given case is fairly well-settled by the decisions of this Court to which we need not refer in detail to avoid burdening this judgment unnecessarily. See **Dhananjay Chatterjee alias Dhana v. State of W.B.** 1994 (2) SCC 220, **Surinder Pal Jain v. Delhi Administration**, 1993 Suppl. (3) SCC 91, **Tarseem Kumar v. Delhi Administration**, 1994 Suppl. (3) SCC 367, **Jagdish v. State of M.P.**, 2009 (12) Scale

580, **Mulakh Raj and Ors. v. Satish Kumar and Ors.**
1992 (3) SCC 43.

29. It was next argued by Mr. Mukherjee that the evidence adduced at the trial does not form a complete chain and that apart from the improbability of the prosecution version there were certain gaping holes in the prosecution story which would render it unsafe for any Court to pronounce the appellant guilty. He urged that in a case resting entirely on circumstantial evidence it was necessary for the prosecution to establish the circumstances that may be said to be incriminating against the accused but the said circumstances ought to be consistent only with the guilt of the accused in order that the Court may declare him guilty. Both these requirements had, according to Mr. Mukherjee, failed in the instant case entitling the appellant to an acquittal.

30. Mr. Ghosh, on the other hand, argued that the circumstances relied upon by the prosecution had not only been firmly established but the same form a complete chain that leaves no room for any conclusion other than

the guilt of the appellant. He referred to the findings recorded by the two Courts below in this regard and submitted that the appellant had not been able to either question the evidence that proved the circumstances or the inference that inevitably flowed from the same.

31. The tests applicable to cases based on circumstantial evidence are fairly well-known. The decisions of this Court recognising and applying those tests to varied fact situation are a legion. Reference to only some of the said decisions should, however, suffice. In **Sharad Birdhichand Sarda v. State of Maharashtra**, 1984 (4) SCC 116 this Court declared that a case based on circumstantial evidence must satisfy, the following tests:

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

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) The circumstances should be of a conclusive nature and tendency.

(4) They should exclude every possible hypothesis except the one to be proved, and

(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

32. To the same effect are the decisions of this Court in **Tanviben Pankaj Kumar Divetia v. State of Gujarat** 1997(7) SCC 156, **State (NCT of Delhi) v. Navjot Sandhu @ Afsan Guru** 2005 (11) SCC 600, **Vikram Singh & Ors. v. State of Punjab**, 2010 (3) SCC 56, **Aftab Ahmad Ansari v. State of Uttaranchal**, 2010 (2) SCC 583. In **Aftab Ahmad Ansari** (supra) this Court observed:

"In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact must be proved individually and only thereafter the court should consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of the guilt. If the combined effect of all the facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts, by itself/themselves, is/are not decisive. The circumstances proved should be such as to exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution case succeeds in a case of circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever extravagant and fanciful it might be."

33. What, therefore, needs to be seen is whether the prosecution has established the incriminating circumstances upon which it places reliance and whether those circumstances constitute a chain so complete as not to leave any reasonable ground for the appellant to be found innocent. Both the Courts below have, as seen earlier, appreciated the evidence adduced in the case and enumerated the circumstances that have been according to them established by the prosecution. Having been taken through the evidence adduced at the trial to which we have referred in some detail in the earlier part of this judgment, we have no manner of doubt that the prosecution has satisfactorily and firmly established the following circumstances on the basis of the evidence adduced by it:

- (1) That at about 2 p.m. on 12th July, 1998 Babusona, the deceased expressed his desire to go out for bringing two parrots promised to him by the appellant. At the instance of his

mother, Chhanda Mondal, PW14, the deceased was instead sent for his drawing classes from where he returned at about 4.45 p.m. Soon thereafter and following a signal from the appellant he went up to the roof of the flat occupied by the appellant where the latter was standing. Sometime later the appellant and Babusona were both seen by Chhanda Mondal, PW14 going towards the nearby park. The witness again noticed the appellant proceeding on his bicycle wearing a cap on his head, one white ganjee and a chocolate coloured full pant.

(2) The deceased Babusona did not return home from the park till evening, whereupon the parents of the deceased started a search for him. Deposition of Asit Kumar Mondal, PW1 father and Smt. Chhanda Mondal, PW 14, mother of the deceased respectively clearly establish this fact.

(3) When the search undertaken by the parents proved fruitless, Asit Kumar Mondal lodged a missing report at the Jhargram Police Station, which report was registered under General Diary No. 438 dated 12th July, 1998 at 6.55 p.m. marked as Ext. 13 at the trial. The Jhargram Police Station on receipt of the report made an announcement regarding the disappearance of Babusona with the help of loudspeaker in the area. The deposition of Asit Kumar Mondal, PW1 and Chhanda Mondal, PW14 clearly establish this circumstance also.

(4) At about 8.30 p.m. on 12th July, 1998 the parents of the deceased Asit Kumar Mondal, PW 1 and Chhanda Mondal, PW14 saw the appellant entering his (appellant's) residential quarter from the rear door of the quarter. When PW 1 asked him about the whereabouts of the deceased the appellant initially hesitated and showed his ignorance regarding the whereabouts of Babusona. The deposition of Asit Kumar Mondal, PW 1

establishes that at that time the appellant was without any chappal on his feet and the cycle that he owned.

(5) The deceased-Babusona was last seen by Rajib Roy Chowdhury, PW 7 and Jiten Sen, PW8 in the park talking to the appellant and shortly thereafter going with the appellant on his bicycle towards the Kanchan Oil Mill which is in the same direction as of Sitaldihi jungle. The deposition of the said two witnesses has firmly established this fact especially because nothing has been brought out in their cross-examination which may discredit their version or render them unreliable.

(6) The deceased and the appellant were seen in the Sitaldihi jungle by Tarapada Mahato, PW9 while the said witness was returning home from Kanchan Oil Mill. On seeing the witness the appellant and the deceased proceeded deeper into the Sitaldihi jungle.

(7) On the following day i.e. 13th July, 1998 Jhargram Police Station received information about a newly dug ditch inside the Sitaldihi jungle at some distance from the residential complex where the appellant and the deceased used to live. This information was recorded in Diary No.463 dated 13th July, 1998 marked as Ext.17. The depositions of Gurupada Mondal, PW2 established this fact. On receipt of this information the police rushed to the place inside the Sitaldihi jungle and found a newly dug ditch covered with loose earth. Executive Magistrate, Shri Dipak Kumar Sarkar, PW 16 was also sent for besides a photographer named Tapas Giri, PW 21. In their presence and the presence of other witnesses the ditch was dug up and the body of the deceased recovered from the same. The deposition of Asit Kumar Mondal, PW 1, Gurupada Mondal, PW2, Kushal Mitra, PW 22, Sunil Deloi, PW5, Tarun Banerjee, PW13, Dipak Kumar Sarkar, PW16, Swapan Kumar Pal, PW18 and Dilip Bhattacharyya, PW19 firmly establish this fact.

(8) At some distance from the place where the dead body was buried, the police found a pair of hawai chappal, two leaves of Ananda Bazar Patrika Newspaper apart from the cycle that was parked against a tree. Asit Kumar Mondal recognized the hawai chappal to be that of his son-Babusona and the cycle to be that of the appellant. The cycle was also recognised by Tarun Banrejee, PW13 to be that of the appellant.

(9) Dead body of the Babusona was lying on his back with hands tied behind. The legs were also tied with the help of electric wire. One handkerchief was also stuffed inside the mouth of the deceased and 'Sutli' (jute string) was found around the neck of the deceased. The depositions of Asit Kumar Mondal, PW1, Gurupada Mondal, PW2, Dilip Namata, PW3, Sunil Deloi, PW5, and Kushal Mitra, PW22 establish this fact apart from establishing that there were marks of injuries on different parts of the body including the head.

(10) The deceased was found wearing blue coloured half pant and yellow orange mixed half shirt. These were the very same clothes the deceased was wearing when he was last seen alive. Depositions of Asit Kumar Mondal, PW1, Chhanda Mondal, PW14, Jiten Sen, PW8, Tarapada Mahato, PW9 and Kushal Mitra, PW22 establish this fact.

(11) The appellant was identified by the said Tarapada Mahato, PW9 in T.I. Parade conducted on 6th August, 1998, by Swapan Kumar Mahanti, Judicial Magistrate, examined at the trial as PW20, as the same boy whom he had seen inside the Sitaldihi jungle along with the deceased at about 6.00/6.30 p.m. on 12th July, 1998.

(12) From the Sitaldihi jungle a cap which the appellant was wearing on the fateful day was also recovered in the presence of Gurupada Mondal, PW2 and Dilip Namata, PW3.

(13) Apart from leaves of Anand Bazar Patrika, the 'Sutli' found tied around the neck of the deceased was also seized by the police along with the electric wire marked M.O. Ext.XIII. Depositions of Asit Kumar Mondal, PW1, Dilip Namata, PW3, Sunil Delio PW5, and Kushal Mitra, PW22 establish the fact.

(14) A spade that was dropped by the appellant in the evening of the 12th July, 1998 at the house of Rukshmini Yadav, PW11 telling the said witness that he would collect it the following day was also seized by the police at the instance of the appellant.

(15) The spade had been taken by the appellant on the morning of 12th July, 1998 from Jadunath Das, PW6, on the pretext of planting some flowers. The witness also proved that the appellant had wrapped the wooden part of the spade with newspaper and tied it with 'Sutli' (jute string) and carried the same on his bicycle.

(16) The deposition of Dr. Rajat Kanti Satpati, PW15 who conducted the post-mortem examination and opined that the deceased had died within 24 hrs. prior to the post-mortem which supports the prosecution version that the deceased was done to death around 6.30 or so in the evening on 12th July, 1998. The death was according to this witness homicidal and asphyxia caused for throttling and strangulation which fact is also clearly established by the prosecution. The doctor also found a ligature mark around the neck of the deceased which could be caused by the 'Sutli'.

(17) The clothes which the appellant was wearing according to the witnesses Sunil Deloi, PW5, Rajib Roy Chowdhury, PW7, Jiten Sen, PW8 and Smt. Chhanda Mondal, PW14 seized by Kushal Mitra, PW22 in the presence of Asit Kumar Mondal, PW1, and Tarun Banerjee PW13 during investigation were duly identified by them in the Court.

34. The above circumstances are, in our opinion, not only established, but they form a complete chain, that leaves no manner of doubt, that the crime with which the appellant stood charged was committed by him and no one else. The deposition of the mother of the deceased, that Babusona wanted to go to the appellant to fetch two parrots which the latter had promised, that he did after returning from the drawing tuition go to the appellant on getting a signal from him, sets the stage for drawing the deceased out of the house. He is shortly thereafter seen talking to the appellant who calls out for him in the park and carries him away on his bicycle towards Kanchan Oil Mill which fact has been proved by two witnesses whose deposition does not suffer from any embellishment or contradiction. The fact that Babusona and the appellant were seen together in Sitaldihi jungle around 6.00/6.30 p.m. on 12th July, 1998 is a highly incriminating circumstance, especially when according to the medical evidence the time of death of the deceased was also around the same time. The deceased having been last seen with the appellant around the time he was killed is a

circumstance which together with other circumstances proved in the case, are explainable only on one hypothesis that the appellant was guilty of killing the deceased. The fact that the appellant had borrowed the spade, tied it with 'Sutil' after wrapping the wooden part with the newspaper is fully established by the statement of Jadunath Das, PW6. So also the deposit of the spade on 12th July, 1998 in the evening with Rukshmini Yadav, PW11 stands established beyond any doubt whatsoever. The presence of the newspaper near the ditch where the deceased was buried and the recovery of the 'Sutli' from around the neck of the deceased where it had left a ligature mark are also telling circumstances which are explainable only on the hypothesis that the appellant was the author of the crime. Recovery of the cap which according to the prosecution witnesses was worn by the appellant on the date of occurrence from Sitaldihi jungle is also a circumstance that establishes that the appellant was in the jungle on 12th July, 1998 around the place from where the dead body was recovered. Similarly, the recovery of the bicycle which the appellant owned from

Sitaldihi jungle, from near the place where the dead body was buried is not explainable on any hypothesis except the guilt of the accused-appellant. The fact that the appellant had late in the evening on 12th July, 1998 left the spade at the house of Rukshmini Yadav, PW11 and entered the flat from the rear door without his chappals as also the fact that when asked where his bicycle was, he gave a false explanation too are incriminating circumstances which are important links in the chain of the circumstances.

35. Mr. Mukherjee's argument that Tarapada Mahato, PW9 could not have seen the boys standing in Sitaldihi jungle from inside Kanchan Oil Mill, has in our opinion, no merit whatsoever. The witness has clearly stated that he had seen the boys (appellant and the deceased) while he was going home by the path which he everyday takes for that purpose. Nowhere has the witness suggested that he had seen the boys from the precincts of the Mill. So also the argument that Tarapada Mahato, PW9 was a procured witness has not impressed us. There is nothing in the

cross-examination of this witness that may warrant rejection of his testimony. The mere fact that the witness did not volunteer to go to the police to say that the two boys i.e. the appellant whom he described as a boy aged 18/19 years old and the deceased whom he described as a boy 10/11 years old, were seen by him together in the Sitaldihi jungle on 12th July, 1998, would not make the deposition of this witness suspect. The statement of this witness was recorded when the police started questioning the employees of the Mill about the incident. Narration of what the witness had seen in the course of the investigation cannot be said to be so highly belated or afterthought as to cast a doubt about the veracity of the witness especially when the witness had not seen any crime being committed. He was simply a witness to a fact which could independent of other circumstances be a wholly innocent and innocuous circumstance. The criticism of the learned counsel against the conduct of the test identification parade is also without any merit. The fact that the suspect was kept in a room separate from the room in which the witness was made to sit before the T.I.

parade proceedings were held is much too clear from the statement of the magistrate who conducted the T.I. parade to call for any adverse inference. All told the investigation into the unfortunate incident and the collection of the evidence has been fair and objective. One reason for such fairness and objectivity could be the fact that the deceased and the appellant were both wards of police officials. There was, therefore, no room for favouring one over the other. In the totality of the above circumstances, we see neither any illegality, nor any miscarriage of justice in the judgments and orders under appeal to call for our interference.

36. In the result this appeal fails and is hereby dismissed.

.....J.
(V.S. SIRPURKAR)

.....J.
(T.S. THAKUR)

New Delhi

August 17, 2011