KUNA @ SANJAYA BEHERA

v.

THE STATE OF ODISHA

(Criminal Appeal No. 677 of 2010)

NOVEMBER 17, 2017

[N. V. RAMANA AND AMITAVA ROY, JJ.]

Penal Code, 1860 – ss.302, 203 r/w. s.34 – Alleged extra-marital relationship between appellant-accused and the co-accused – Dead body of husband of co-accused found hanging from the roof of a shed adjacent to deceased's house – PW1 (deceased's nephew) was the sole eye-witness – Trial court convicted the appellant and co-accused u/s.302 IPC r/w. s.34, however, discarded the prosecution case of illicit relationship between accused persons and the same being the motive of murder – High Court affirmed the conviction, accepting the prosecution's plea of motive of murder founded on extra-marital relationship between accused persons – On appeal, held: Testimony of PW1 with regard to illicit relationship between the accused persons lacks in persuasion – Evidence of PW1 is unacceptable being fraught with improbabilities, doubts and oddities inconceivable with normal human conduct and, thus cannot be the basis of conviction – In the present case, the incident at the first place was registered as a case of unnatural death and after six days of the occurrence it was converted into one u/s. 302/203/34, on the disclosures made by PW1, PW5, PW6 and PW8 – Testimony of PW5, PW6 and PW8 cannot be construed as substantive in nature, these witnesses having derived the knowledge from PW1 – Prosecution has failed to prove illicit relationship between appellant and co-accused and therefore, the motive for the murder by them – Dehors the testimony of PW1 and the alleged motive, there is no other tangible and clinching material on record in support of the charge against the appellant and the co-accused – Contrary view taken by the Courts below is against the evidence on record – Inference of motive drawn by the High Court is flawed – Appellant is entitled to benefit of doubt and is acquitted.

Evidence Act, 1872 – s.3 – Fact –"proved", disproved" and "not proved"– Standard of proof required for – Discussed.

A *Evidence– Of sole eye-witness – Held: Conviction can be based on the testimony of a single eye witness if he or she passes the test of reliability – It is not the number of witnesses but the quality of evidence that is important.*

Allowing the appeal, the Court

B **HELD: 1.1 Conviction can be based on a testimony of a single eye witness if he or she passes the test of reliability and it is not the number of witnesses but the quality of evidence that is important. In a case where the charge is sought to be proved only on circumstantial evidence, motive plays an important part** C **in order to tilt the scale.[Paras 17, 18][190-D-F]**

Mahamadkhan Nathekhan v. State of Gujarat **(2014) 14 SCC 589: [2014] 7 SCR 777 – relied on.**

1.2 The expression "proved", "disproved" and "not proved", lays down the standard of proof, about the existence or D **non-existence of the circumstances from the point of view of a prudent man, so much so that while adopting the said requirement, as an appropriate concrete standard to measure "proof", full effect has to be given to the circumstances or conditions of probability or improbability. It is this degree of certainty, existence of which** E **should be arrived at from the attendant circumstances, before a fact can be said to be proved. [Para 21][192-B-C]**

2.1 PW1 is related both to the deceased and the accused-appellant. Whereas the deceased was his uncle, the appellant is his cousin brother. He claimed to have accompanied the appellant F **from the video show till the place of occurrence. At the relevant time, he was admittedly intoxicated. The incident, as per the prosecution version, occurred between 1a.m. to 2a.m. in the intervening night in the house of the deceased which was located about 15 cubits from the compound where the house of PW1 was situated. The spot map prepared by the I.O. does not mention** G **about any source of light in the locality. It does not even indicate as to whether the area was lighted at the time of the incident so as to make the viewing of the incident possible by PW1 from the place, where he was located. Though PW1 claimed that the**

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duration of the incident was about one hour, he did not utter a sound or make a shriek or raise any alarm either to prevent the occurrence or to muster assistance from the inhabitants in the locality. This was more so as he admitted that there were about 150 to 200 inhabitants, lodging nearby apart from the fact that the houses of his relatives as well of the deceased were almost in the same campus. His plea that he did not disclose the incident to others immediately as he was threatened by the appellant does not explain or justify in any manner whatsoever his inexplicable silence or indifference during the time of commission of occurrence. Further, the incident at the first place was registered as a case of unnatural death and was after six days of the occurrence converted into one under Sections 302/203/34 IPC against the appellant and the co-accused on the disclosures made by PW1, PW5, PW6 and PW8. Apart from the fact that the testimony of PW5, PW6 and PW8 can by no means be construed to be substantive in nature, these witnesses having derived the knowledge from PW1, the analysis of the materials on record on the aspect of motive as made by the Trial Court is accepted. [Para 22][192-D-H; 193-A-C]

2.2 The testimony of PW1 with regard to the illicit relationship between the accused persons, lack in persuasion to conclude that the prosecution had been able to prove such relationship and therefore, the motive for the murder by them. [Para 23][193-D]

3.1 The medical evidence to the effect that death had occurred by asphyxia as a result of constriction of the neck and not due to hanging by rope, though conforms to the manner of execution of the offence, as narrated by PW1, however in view of inherent improbabilities and incongruities in his evidence, it is not safe to base the conviction of the appellant and the co-accused thereon. Dehors testimony of PW1, and the motive as alleged by the prosecution, there is no other tangible and clinching material on record in support of the charge against the appellant and the co-accused. The inference of motive by the High Court drawn from the evidence of PW1 and PW3, in the overall perspective, is apparently flawed. [Para 23][193-E-G]

A **3.2 On a totality of the consideration of all relevant facts and circumstances, it is opined that the evidence of PW1, as a witness of incident of murder, is wholly unacceptable being fraught with improbabilities, doubts and oddities inconceivable with normal human conduct or behaviour and, thus cannot be acted upon as the basis of conviction. The appellant and the co-accused are thus entitled to the benefit of doubt in the facts and circumstances of the case. [Para 24][193-H; 194-A]**

Anil Phukhan v. State of Assam **(1993) 3 SCC 282 : [1993] 2 SCR 389**; *Ramji Surya Padvi and Another v. State of Maharashtra* **(1983) 3 SCC 629 : [1983] 3 SCR 268**; *State of A.P. v. Patnam Anandam* **(2005) 9 SCC 237**; *Gulam Sarbar v. State of Bihar* **(2014) 3 SCC 401 : [2013] 12 SCR 1**; *Lokeman Shah and another v. State of West Bengal* **AIR 2001 SC 1760 : [2001] 2 SCR 1095**; *Vijayee Singh and others v. State of U.P.* **(1990) 3 SCC 190 : [1990] 2 SCR 573 – relied on.**

M. Narsinga Rao v. State of A.P. **2001 Crl.L.J. 515 – approved.**

Chuhar Singh v. State of Haryana **(1976) 1 SCC 879**; *Budha Satya Venkata S. Rao and Others v. State of A.P.* **(1994) Suppl. 3 SCC 639**; *Niranjan Panja v. State of West Bengal* **(2010) 6 SCC 525 : [2010] 7 SCR 113**; *Nagraj v. State represented by Inspector of Police, Salem Town, Tamil Nadu* **(2015) 4 SCC 739 : [2015] 3 SCR 450 – referred to.**

Case Law Reference

(1976) 1 SCC 879	**referred to**	**Para 9**
(1994) Suppl. 3 SCC 639	**referred to**	**Para 9**
[2010] 7 SCR 113	**referred to**	**Para 9**
[2015] 3 SCR 450	**referred to**	**Para 9**
[1993] 2 SCR 389	**relied on**	**Para 17**

[1983] 3 SCR 268	**relied on**	**Para 17**	A
(2005) 9 SCC 237	**relied on**	**Para 17**	
[2013] 12 SCR 1	**relied on**	**Para 17**	
[2014] 7 SCR 777	**relied on**	**Para 18**	B
[2001] 2 SCR 1095	**relied on**	**Para 19**	
2001 Crl.L.J. 515	**approved**	**Para 19**	
[1990] 2 SCR 573	**relied on**	**Para 20**	C

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 677 of 2010.

From the Judgment and Order dated 07.11.2007 of the High Court of Orissa in Criminal Appeal No. 129 of 2001. D

Krishnan Venugopal, Sr. Adv., Shivendra Singh, Ms. Deepanshi Ishar, Dharmendra Kumar Sinha, Advs. for the Appellant.

Shibashish Misra, Ms. Sylona Mohapatra, Advs. for the Respondents. E

The Judgment of the Court was delivered by

AMITAVA ROY, J. 1. The appellant, successively convicted by both the courts below along with one Pravati Behera under Section 302 of the Indian Penal Code, 1860 (for Short, hereinafter to be referred to as "IPC/Code") along with Section 34 of the Code is in appeal seeking remedial intervention. F

2. Whereas the Trial Court by the judgment and order dated 26.1.2001, as stated hereinbefore, convicted the appellant and the co-accused Pravati Behera, the High Court by the verdict impugned, though has affirmed the conviction of both, had left the co-accused at liberty to move an application for premature release from the jail and for appropriate orders under Sections 433 and 433-A of the Code of Criminal Procedure, 1973 (for short, hereinafter to be referred to as "Cr.P.C."). Noticeably, the G

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A appellant and co-accused had been charged along with Section 302 IPC for the offence under Section 203 as well but were acquitted thereof by the Trial Court. Though an appeal was preferred by the State against such acquittal, the High Court has affirmed their exoneration as well.

3. We have heard Mr. Krishnan Venugopal, learned senior counsel
B for the appellant and Mr. Shibashish Misra for the respondent.

4. The prosecution case unfolds with a written information lodged by Premananda Behra (PW12) with the police on 20.2.2000, whereby the unnatural death of his brother Santosh Behera by hanging from the roof of a shed adjacent to his (deceased) house, was reported. In the
C course of the investigation, following the registration of said information, Niranjan Behera (PW1) disclosed to Daitari Behera (PW5) that the appellant along with the co-accused Pravati Behera had in the intervening night of 19/20.2.2000 murdered the deceased in his house and thereafter had suspended his dead body from the roof of the nearby shed. PW1
D claimed to have witnessed the incident of murder. Following this information, the investigation took a different turn. The appellant and the co-accused were arrested and eventually, charge-sheet was laid against them.

5. Notably, on 26.2.2000, Gunahari Behera (PW6) and Makhan
E Behera (PW8) also came to the police station and reported that PW1 had disclosed to them as well to have witnessed the appellant and the co-accused committing murder of Santosh Behera (deceased) in his house and thereafter, hanging the dead body from the roof of the nearby shed. The investigating officer in the process of investigation, amongst others caused the inquest of the dead body to be made, prepared a spot
F map Ex. P-11, effected seizure, amongst others inter alia of a rope and also got the post-mortem of the dead body done before submitting the charge-sheet as mentioned hereinabove. The formal FIR was registered on 26.2.2000 under Sections 302/203 read with Section 34 IPC.

G 6. At the trial, the accused persons were charged under Sections 302/203/34 IPC. They having denied the allegations, were made to stand trial. The prosecution examined as many as 16 witnesses, and after recording the statements of the accused persons under Section 313 Cr.P.C. and on a consideration of the materials on record, the Trial Court convicted the appellant and co-accused under Section 302 IPC read

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with Section 34 of the Code and sentenced them to undergo imprisonment for life and to pay fine of Rs. 100/-, in default to suffer R.I. for 30 days. A

7. In recording the conviction, the Trial Court laid utmost emphasis on the testimony of PW1, who apart from narrating the incident of murder, also deposed about the extra-marital relationship between the accused persons, though they were related as nephew and aunt. Reliance was B also placed on the evidence of Musimani Behera (PW3), the mother of the deceased, who, perceived to have hinted at well to this unacceptable liaison. The Trial Court noted the opinion of Dr. Rupabhanu Mishra (PW11), who conducted the post-mortem examination that the cause of death of Santosh Behera was asphyxia as a result of constriction of the C neck and not due to hanging by rope. The Trial Court, however discarded the prosecution case of illicit relationship between the accused persons and the motive of murder stemming therefrom. It was however of the view that lack of motive notwithstanding, the testimony of PW1, PW5, PW6 and PW8 taken together proved the charge against the accused persons and, therefore, returned the finding of guilt against them, qua D the offences for which they had been charged.

8. Both the appellant and co-accused preferred separate appeals before the High Court and as hereinbefore stated, by the decision assailed, their conviction under Section 302/34 IPC and the sentence awarded thereupon was affirmed. The High Court, in determining so, sustained E the prosecution's plea of motive of murder founded on extra-marital relationship between the accused persons and arrived at the conclusion drawing sustenance from the evidence of PW1 as well as PW3, the mother of the deceased, who testified to have rebuked both of them for their deplorable conduct. The High Court, as well believed the version F of the incident, as narrated by PW1 and disclosed to PW5, PW6 and PW8 albeit after a lapse of three days. The High Court accepted the explanation of PW1 for the delay in such disclosure that the appellant had threatened him with dire consequences, if he did so.

9. Mr. Krishnan Venugopal, learned senior counsel for the appellant G has emphatically urged that as the testimony of PW1, the sole eye witness, as claimed by the prosecution, is wholly unbelievable, the conviction of the appellant is palpably illegal and is liable to set-aside. Apart from contending that the FIR filed after six days of the incident

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A was inexplicably delayed rendering the prosecution case unworthy of any credit, the learned senior counsel maintained that the High Court has grossly erred in accepting that the motive behind the murder was the illicit relationship between the accused persons, necessitating the elimination of the deceased. The learned senior counsel was particularly critical of the unnatural conduct of PW1, who incomprehensibly remained B indifferent and silent though his uncle was murdered in his view and that the incident, according to him, ranged for about an hour. Further, his unexplained silence about the gruesome murder by the accused persons for about three days also rendered him wholly untrustworthy, he urged. Mr. Krishnan argued as well that not only PW1 at the relevant C time was admittedly in an intoxicated state, his presence at the place of occurrence was not free from doubt. The learned senior counsel underlined that it being in the evidence that there were several houses of the close relatives of the deceased and PW1 in the locality, the claim of PW1 to be a silent eye witness to the incident, is wholly unbelievable. The learned senior counsel insisted as well that in absence of any material D on record that the area was sufficiently lighted, it was wholly unacceptable that PW1 could see the incident from his house at a distance of 15 cubits. In the attendant facts and circumstances, Mr. Venugopal maintained that the conviction of the appellant on the testimony of a solitary witness, whose version was laden with inconsistencies, absurdities, and E improbabilities, is patently illegal and cannot, in any view of the matter, be sustained in law. He discarded the evidence of PW5, PW6 and PW8, relied upon by the two courts below, on the ground that their testimonies were wholly inconsequential being in the nature of "hearsay", they having derived the knowledge of the incident from PW1, as reported to them by him. Mr. Venugopal has urged that if the version of PW1 is F disbelieved, as it ought to be, in view of the inherent incongruities, the other materials on record do not unerringly evince the complicity of the accused persons in the offence and thus, the appellant is liable to be acquitted. He argued as well that the injuries enumerated in the inquest report and the medical evidence/post-mortem report, also are inconsistent G and contradictory in description, thus rendering the prosecution version highly improbable. The learned counsel emphasised that the evidence on record by no means convincingly establish the illicit relationship between the accused persons and that the High Court did fall in error in accepting the same. The following decisions were cited in endorsement of the arguments advanced.

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1. ***Anil Phukhan vs. State of Assam***[1] A

2. ***Ramji Surya Padvi and Another vs. State of Maharashtra***[2]

3. ***Chuhar Singh vs. State of Haryana***[3]

4. ***State of A.P. vs. Patnam Anandam***[4]

5. ***Mahamadkhan Nathekhan vs. State of Gujarat***[5] B

6. ***Budha Satya Venkata S. Rao and Others vs. State of A.P.***[6]

7. **Niranjan Panja vs. State of West Bengal**[7]

8. ***Nagraj vs. State represented by Inspector of Police, Salem Town, Tamil Nadu***[8] C

10. In refutation, the learned counsel for the respondent-state has asserted that the evidence of the sole eye witness PW1 is coherent, consistent and cogent and is fully complemented by medical evidence and thus the prosecution having been able to prove the charge beyond all reasonable doubt, the conviction and sentence of the appellant and D his co-accused does not merit interference. Having regard to the vivid narration of the incident in minute details, as provided by PW1, the courts below were perfectly justified in relying on his sole testimony, he urged. As the medical evidence, mentioning the cause of death, is wholly corroborative of the version of PW1, there is no scope to doubt the culpability of the accused persons, he argued. The learned counsel E dismissed the demur of the defence that the evidence of PW1 was vitiated by contradictions, embellishments and inconsistencies. According to Mr. Misra, the statement on oath of PW1 is amply supported by that of Kumari Nomita Behera (PW2), the daughter of the deceased and PW12, who, in the next morning, did detect the dead body of the deceased in a F hanging posture from the roof of the adjacent shed, as deposed by PW1. As the testimony of PW1 together with that of PW3, the mother of the deceased persuasively prove the illicit relationship between the accused

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[1] (1993) 3 SCC 282 G
[2] (1983) 3 SCC 629
[3] (1976) 1 SCC 879
[4] (2005) 9 SCC 237
[5] (2014) 14 SCC 589
[6] 1994 Supp(3) SCC 639
[7] (2010) 6 SCC 525
[8] (2015) 4 SCC 739 H

A persons, the High Court was justified in accepting the same to be the motive for the offence, in the attendant facts and circumstances of the case, he insisted. The learned counsel for the respondent urged that as PW1 had been threatened with death by the appellant, if he dared to disclose the commission of offence, the delay on the part of the witness (PW1) to confide about the same in PW5, PW6 and PW8 after three days and the filing of the FIR after six days per se, is not fatal for the prosecution. The decision of this Court in ***Gulam Sarbar vs. State of Bihar***[9] was cited to reinforce the contention that when ocular evidence is in conformity with the medical evidence, conviction based thereon is legal and valid.

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11. To appropriately appreciate the competing assertions, it is expedient to evaluate the evidence having a direct bearing on the offence allegedly committed for the offence involved. PW1, who is the cousin brother of the appellant and incidentally the nephew of the co-accused Pravati Behera, deposed on oath that there was a lingering love affair between the accused persons from before the occurrence and that he had seen them in a compromising position in the house of the deceased, six months' prior to the incident. The witness stated that he informed about this to the mother of the deceased, who rebuked the accused persons. He stated that in the night of occurrence at 9.30 p.m., he had gone to witness a video show in the village, where the children of Parvati Behra, the co-accused were also present. According to him, in the course of the show, the appellant asked him to accompany him for liquor and though the witness initially resisted, he eventually left the video show with the appellant. He stated further that they then went to the house of Baisakhu Behera, where the appellant purchased liquor and consumed the same and forced the witness as well to drink. The witness stated that they then proceeded towards their respective homes and when they were nearing their houses, the appellant concealed himself in a lane near the house of the witness. PW1 stated that at that time, he saw the deceased and Pravati Behera coming out of their house to ease themselves. On their way back to the house, Pravati Behera entered first and when the deceased was about to enter, the appellant struck him twice from the back, as a result of which, he (deceased) fell down. According to the witness, the appellant sat on the chest of the deceased and pressed his neck by his hands and Pravati Behera covered hismouth

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[9] (2014) 3 SCC 401

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with her hands, as a result of which the deceased soon became suffocated and died. The witness stated that thereafter the accused persons brought a rope, tied it around the neck of the deceased and suspended the dead body from the roof of the adjacent shed. Thereafter, the appellant locked Pravati Behera in the house from outside and threatened to kill him, if he disclosed the offence to anyone, whereafter the witness returned home. PW1 stated that it was three days thereafter that he narrated the incident to PW5, PW6 and PW8.

12. In cross-examination, the witness in substance stated that his house, that of the deceased, PW12 and other relatives were located nearby and that the courtyard in between his house and that of the deceased measured about 15 cubits. The witness conceded that there were about 150 to 200 houses adjacent to his house, situated at a distance of 20 to 25 cubits. He further stated that at that point of time, he was little intoxicated, and he was then inside his compound. PW1 deposed as well that though the occurrence took place for about an hour, he did not raise any alarm asking for help. He admitted that on the next day, though about 5000 people had gathered, he did not disclose the incident either to them or to the police. He however sought to explain his conduct by stating that he did not do so as he had been threatened by the appellant but after three days, he gathered courage and informed PW5, PW6 and PW8 of the incident.

13. PW3, the mother of the deceased deposed that she had rebuked the accused persons on several occasions on noticing "secret talks' between them. The testimony of PW5 and PW6 in essence is that on 20.2.2000, PW1 disclosed to them the incident and the fact that he had witnessed the same. PW8 stated that about 5/6 days after the incident, when he asked PW1 about the same, he disclosed to him stating that the appellant and Pravati Behera had committed murder of Santosh Behera. To all these three witnesses, as stated by them, PW1 disclosed in sequence the facts, as narrated by him on oath.

14. Dr. Rupabhanu Mishra (PW11), who performed the post-mortem examination on the dead body of the deceased had apart from mentioning the external injuries by way of abrasions etc. opined that death was due to asphyxia by pressing of neck and was not due to hanging by rope. PW12, as already alluded to hereinabove, stated on oath that on 20.2.2000, he had gone to the house of the deceased to hand over the

A keys of his Sweet Meat Shop, where the deceased was employed, but was told by his wife from inside the house that he (deceased) had gone out by locking the door from outside. The witness stated that it was then 5/5.30 a.m. and when he returned with his torch light, he detected the dead body of Santosh Behera hanging from the roof of adjacent shed by a rope. He then requested PW5 to write a report which he thereafter B lodged with the police. S.I. Narendra Kumar Sarangi (PW16) is the Investigating Officer, who enumerated the steps taken by him during the investigation and proved amongst others Ex P-11, the spot map.

15. The accused persons in response to the questions, laying the incriminating evidence against them denied the correctness thereof and C stood by their plea of innocence.

16. Before recording the final conclusions on the basis of the evidence on record, beneficial it would be to briefly note the legal propositions enunciated in the authorities cited at the Bar.

D 17. That conviction can be based on a testimony of a single eye witness if he or she passes the test of reliability and that it is not the number of witnesses but the quality of evidence that is important, have been propounded consistently in ***Anil Phukhan***[1], ***Ramji Surya***[2], ***Patnam Anandam***[4] and ***Gulam Sarbar***[9] with the apparent emphasis that evidence must be weighed and not counted, decisive test being E whether it has a ring of truth and it is cogent, credible, trustworthy or otherwise.

18. That in a case where the charge is sought to be proved only on circumstantial evidence, motive plays an important part in order to tilt the scale was, amongst others underscored in ***Mohmadkhan Nathekhan***[5] F

19. With reference to Section 3 of the Evidence Act, which defines "proved", "disproved" and "not proved", this Court in ***Lokeman Shah and another vs. State of West Bengal***[10] recalled its observations in ***M. Narsinga Rao vs. State of A.P., 2001 Crl.L.J. 515*** as hereinbelow:

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> "A fact is said to be proved when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought under the circumstances of a particular case, to act upon the supposition

H [10] AIR 2001 SC 1760

that it exists, (vide Section 3 of the Evidence Act). What is required is materials on which the court can reasonably act for reaching the supposition that a certain fact exists. Proof of the fact depends upon the degree of probability of its having existed. The standard required for reaching the supposition is that of a prudent man acting on any important matter concerning him."

20. Prior thereto, in ***Vijayee Singh and others vs. State of U.P.***[11], this Court dwelling on the same theme, had recorded the following exposition:

"28. It can be argued that the concept of 'reasonable doubt' is vague in nature and the standard of 'burden of proof' contemplated under Section 105 should be somewhat specific, therefore, it is difficult to reconcile both. But the general principles of criminal jurisprudence, namely, that the prosecution has to prove its case beyond reasonable doubt and that the accused is entitled to the benefit of a reasonable doubt, are to be borne in mind. The 'reasonable doubt' is one which occurs to a prudent and reasonable man. Section 3 while explaining the meaning of the words "proved", "disproved" and "not proved" lays down the standard of proof, namely, about the existence or non-existence of the circumstances from the point of view of a prudent man. The section is so worded as to provide for two conditions of mind, first, that in which a man feels absolutely certain of a fact, in other words, "believe it to exist" and secondly in which though he may not feel absolutely certain of a fact, he thinks it so extremely probable that a prudent man would under the circumstances act on the assumption of its existence. The Act while adopting the requirement of the prudent man as an appropriate concrete standard by which to measure proof at the same time contemplates of giving full effect to be given to circumstances or condition of probability or improbability. It is this degree of certainty to be arrived where the circumstances before a fact can be said to be proved. A fact is said to be disproved when the court believes that it does not exist or considers its non-existence so probable in the view of a prudent man and now we come to the third stage where in the view of a prudent man the fact is not proved i.e. neither proved nor disproved. It is this doubt which occurs to a reasonable man, has legal recognition in the

[11] (1990) 3 SCC 190

A field of criminal disputes. It is something different from moral conviction and it is also different from a suspicion. It is the result of a process of keen examination of the entire material on record by 'a prudent man'."

21. The quintessence of the enunciation is that the expression B "proved", "disproved" and "not proved", lays down the standard of proof, namely, about the existence or non-existence of the circumstances from the point of view of a prudent man, so much so that while adopting the said requirement, as an appropriate concrete standard to measure "proof", full effect has to be given to the circumstances or conditions of probability or improbability. It has been expounded that it is this degree of certainty, C existence of which should be arrived at from the attendant circumstances, before a fact can be said to be proved.

22. It is on the touchstone of this legal exposition that the evidence in the case in hand, has to be appreciated. Admittedly, PW1 is the solitary eye witness to the incident. He is related both to the deceased and the D accused-appellant. Whereas the deceased is his uncle, the appellant is his cousin brother. He claims to have accompanied the appellant from the video show till the place of occurrence. At the relevant time, he was admittedly intoxicated. The incident, as per the prosecution version, occurred between 1 a.m. to 2 a.m. in the intervening night of 19/20.2.2000 E in the house of the deceased which was located about 15 cubits from the compound where the house of PW1 was situated. The spot map Ex. P-11 prepared by the I.O. (PW16) noticeably does not mention about any source of light in the locality. It does not even indicate as to whether the area was lighted at the time of incident so as to make the viewing of the incident possible by PW1 from the place, where he was located. It F is intriguing that though PW1 claimed that the duration of the the incident was about one hour and that the appellant first did assault the deceased from behind twice on which he (deceased) fell down, whereafter he (appellant) sat on his chest and throttled him and that co-accused Pravati Behera covered the mouth of deceased to facilitate his suffocation to G death, he did not utter a sound or make a shriek or raise any alarm either to prevent the occurrence or to muster assistance from the inhabitants in the locality. This is more so as he admitted that there were about 150 to 200 inhabitants, lodging nearby apart from the fact that the houses of his relatives as well of the deceased were almost in the same campus. His plea that he did not disclose the incident to others immediately as he

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had been threatened by the appellant does not explain or justify in any manner whatsoever his inexplicable silence or indifference during the time of commission of occurrence. In the overall scenario, the plea of the defence that the evidence of PW1 is highly improbable, absurd and doubtful, cannot be lightly brush aside more particularly in view of the test of essentiality of the degree of certainty, necessary to accept that the facts narrated by this witness as proved. To recall, the incident at the first place had been registered as a case of unnatural death and was after six days of the occurrence converted into one under Sections 302/ 203/34 IPC against the appellant and the co-accused on the disclosures made by PW1, PW5, PW6 and PW8. Apart from the fact that testimony of PW5, PW6 and PW8 can by no means be construed to be substantive in nature, these witnesses having derived the knowledge from PW1, we are inclined to accept the analysis of the materials on record on the aspect of motive as made by the Trial Court.

23. The testimony of PW1 with regard to the illicit relationship between the accused persons, his revelation to the mother of the deceased that he and the co-accused were seen in a compromising position in their house with the door open and the reprimand of the mother (PW3) for the "secret talks" between them (accused persons) lack in persuasion to conclude that the prosecution had been able to prove such relationship and therefore, the motive for the murder by them. The medical evidence to the effect that death had occurred by asphyxia as a result of constriction of the neck and not due to hanging by rope, though conforms to the manner of execution of the offence, as narrated by PW1, in view of inherent improbabilities and incongruities in his evidence, we do not consider it safe to base the conviction of the appellant and the co-accused thereon. Dehors testimony of PW1, and the motive as alleged by the prosecution, there is no other tangible and clinching material on record in support of the charge against the appellant and the co-accused. The inference of motive by the High Court drawn from the evidence of PW1 and PW3, in the overall perspective as discussed hereinabove, is apparently flawed.

24. On a totality of the consideration of all relevant facts and circumstances, we are of the unhesitant opinion that the evidence of PW1, as a witness of incident of murder, as projected by him is wholly unacceptable being fraught with improbabilities, doubts and oddities inconceivable with normal human conduct or behaviour and, thus cannot

A be acted upon as the basis of conviction. The testimonies of PW3, PW5, PW6, PW8 and PW11, even if taken on their face value, fall short of the requirement of proof of the charge beyond all reasonable doubt. The appellant and the co-accused are thus entitled to the benefit of doubt in the singular facts and circumstances of the case. The contrary view taken by the courts below is against the weight of the evidence on record and the exposition of law attested by the decisions cited at the Bar and traversed as hereinabove.

B

25. In the result, the appeal succeeds and is allowed. As a consequence, the appellant is acquitted and is ordered to be set at liberty if not required in connection with any other case.

C

Divya Pandey Appeal allowed.