



2026:AHC-LKO:13675-DB

A.F.R.

**HIGH COURT OF JUDICATURE AT ALLAHABAD**

**LUCKNOW**

**CRIMINAL APPEAL No. - 9 of 2016**

**Ajay Kumar**

.....Appellant(s)

Versus

**State of U.P.**

.....Respondent(s)

Counsel for Appellant(s) : Neeta Singh Chandel, Arshad Hafeez Khan, Dinesh Kr. Sharma, Furkan Pathan, Piyush Kumar Singh, Prabha Shankar Pandey

Counsel for Respondent(s) : Govt. Advocate

*Reserved on 20.11.2025*

*Delivered on 20.02.2026*

**Court No. – 9**

**HON'BLE RAJESH SINGH CHAUHAN, J.**

**HON'BLE ABDHESH KUMAR CHAUDHARY, J.**

**(Per: Hon'ble Abdhesh Kumar Chaudhary, J.)**

1. The present Criminal Appeal under Section 374 (2) of the Code of Criminal Procedure, 1973 (in short Cr.P.C.) has been filed by the accused/appellant - Ajay Kumar, against the judgment and order dated 05.10.2015 passed by the Additional Sessions Judge,

Court No. 9, Barabanki, in Sessions Trial No. 992 of 2011 (*State Vs. Ajay Kumar*) arising out of Case Crime No. 133 of 2011 wherein he has been convicted and sentenced for punishment under Section 302 of the Indian Penal Code for life imprisonment, along with fine of Rs. 20,000/- with default stipulation.

### **CASE OF THE PROSECUTION**

2. The prosecution case can be succinctly narrated as that on 22.04.2011, the informant Omchand Yadav (P.W.-1) who was working as a watchman in village Chiloki, submitted a written complaint/*Tehrir* (*Exhibit-Ka-1*) at Police Station Safdarganj, District Barabanki, stating *inter-alia* that on the said date at about 11:00 PM, while he was on routine night patrol of the said village, certain villagers informed him that two dead bodies were lying in the Rakhuna Chiloki forest. The said informant on receipt of such information proceeded to the said place of incident along-with some villagers and on reaching the spot noticed that dead body of one woman was lying in a pit about 5 feet deep located at a field situated approximate 100 meters behind the Government Girls Inter College and a *gamcha* was also found wrapped around her neck and blood was oozing from her mouth. Further, at a distance of about 50 meters another dead body of a girl aged about 8–9 years was found lying in a drain, with a *tukda* of cloth tied around her neck. Various articles, including sarees, blouses, underwear, shirt and a bag, were found lying scattered at the place of incident. According to the informant, the condition of the bodies and the surrounding circumstances indicated that the victims had been murdered at the same very spot.
3. On the basis of the aforesaid written complaint/*Tehrir* (*Exhibit-Ka-1*), Case Crime No. 133 of 2011 under Section 302 of the Indian Penal Code was registered at Police Station Safdarganj,

District Barabanki, against unknown persons and subsequently, the investigation of the case was started. The Investigating Officer after recording of the statement under Section 161 Cr.P.C. and on completion of the investigation, found material indicating the involvement of the accused/appellant Ajay Kumar. Thus, a charge-sheet (*Exhibit-Ka-8*) came to be filed against the said accused/appellant-Ajay Kumar, under Section 302 of the Indian Penal Code before the competent Court and after following the due process of law, the case came to be committed to the Court of Session for Trial vide order dated 18.07.2011.

4. The learned Trial Court, after being satisfied that a *prima facie* case was made out against the accused/appellant Ajay Kumar, framed the charge against him under Section 302 of the Indian Penal Code vide order dated 12.08.2011. The charge was read over and explained to the accused/appellant Ajay Kumar in Hindi, wherein he denied the charges and claimed for Trial. Therefore, the case was taken up for Trial.

#### **PROCEEDINGS BEFORE THE TRIAL COURT**

5. To bring home the charges, the prosecution examined nine witnesses in the following chronological manner being: -

P.W.-1	Om Chand Yadav	Witness of Chik F.I.R.
P.W.-2	Dr. Sunil Kumar, posted as Senior Consultant of the District Hospital, Barabanki on 23.04.2011	Witness of Postmortem
P.W.-3	Smt. Sona Devi	Villager/witness of last seen.
P.W.-4	Smt. Dhuriya	Villager/witness of last seen.
P.W.-5	Vinod	Villager/witness of last seen.
P.W.-6	Ganesh	Brother-in-law of the

		deceased/ witness of motive
P.W.-7	S.I. Nirbhay Kumar Singh	Investigating Officer of the present case.
P.W.-8	Sandeep	Tea shop owner/ witness of last seen.
P.W.-9	S.I. Pradeep Kankan	Witness of <i>panchayatnama</i> .

6. Besides the aforesaid oral testimonies, the prosecution also relied on various documentary evidence exhibited during the course of Trial, running from *Exhibit Ka-1* to *Exhibit Ka-27*.
7. Upon completion of the prosecution evidence, the statement of the accused/appellant Ajay Kumar was recorded under Section 313 of Cr.P.C., wherein he denied all the circumstances put forth against him by the prosecution. In his additional statement, the accused stated that P.W.-6, Ganesh was a relative residing in his village and, due to prior enmity, had falsely implicated him in the present case.
8. The accused/appellant Ajay Kumar chose not to lead any defence evidence, as this Court finds that the learned Trial Court records that despite being afforded adequate opportunity, the accused/appellant Ajay Kumar did not adduce any evidence in his defence.
9. Upon consideration of the rival submissions and the evidence available on record, the learned Trial Court returned a finding that the prosecution had successfully established a complete and unbroken chain of circumstances through cogent oral and documentary evidence. The defence contention that no weapon of offence was recovered, was considered and rejected by the Trial Court, particularly in view of the recovery of material articles such as a *gamcha* and a piece of cloth found around the necks of the deceased persons, which were duly proved

through prosecution witnesses. The Trial Court further rejected the defence plea regarding absence of motive, holding that sufficient material existed on record to negate the said contention against the accused/appellant Ajay Kumar.

10. The learned Trial Court also placed reliance upon the evidence relating to the Court marriage of the accused/appellant Ajay Kumar with the deceased Shubhangi. Though the notary of the marriage was not examined, the Trial Court found that the oral evidence on record sufficiently established that the accused/appellant Ajay Kumar was commonly known in the village as the second husband of the deceased, which circumstance was duly corroborated by the testimony of prosecution witnesses.
11. While analyzing the evidence in its entirety, the learned Trial Court further held that the testimony of the prosecution witnesses with respect to the "last seen" circumstance was trustworthy and reliable, as no material contradiction was found between their statements recorded under Section 161 Cr.P.C. and their depositions before the Court. Further, the delay of two to three days in recording statements under Section 161 Cr.P.C. was held to be inconsequential in the facts of the case.
12. The learned Trial Court went on to conclude that since the deceased and her minor daughter were last seen in the company of the accused/appellant Ajay Kumar, shortly before their death and no plausible explanation was offered by the accused/appellant Ajay Kumar regarding the circumstances leading to their death, the presumption under Section 106 of the Indian Evidence Act could be invoked. Consequently, the learned Trial Court recorded its satisfaction in holding the accused/appellant Ajay Kumar guilty of the offences charged and sentenced him for life imprisonment under Section 302 I.P.C. along with fine of Rs. 20,000/- with default stipulation

vide judgment and order dated 05.10.2015, passed in Sessions Trial No. 992 of 2011.

### **PROCEEDINGS BEFORE THIS COURT**

13. Being aggrieved by the aforesaid conclusion of the learned Trial Court, the present appeal being Criminal Appeal No. 9 of 2016 came to be filed by the accused/appellant- Ajay Kumar.
14. The bail application of the accused/appellant- Ajay Kumar having been rejected by this Court, the accused/appellant- Ajay Kumar is in jail, since 23.04.2011 and as such the period of his incarceration is more than 14 years and 8 months.

### **SUBMISSION ON BEHALF OF THE PARTIES**

15. Learned counsel for the accused/appellant Ajay Kumar has submitted that Ajay Kumar has not been named in the F.I.R. (*Exhibit Ka-26*) and his conviction is based on circumstantial evidence, whereas as a matter of fact, there is no complete chain of evidence against him.
16. The post-mortem report dated 23.04.2011 and the evidence of Doctor reveals that the probable time since death was about 2 days, which apparently meant that the alleged incident might have taken place on 21.04.2011, at about 3-4 PM. However, according to him, there is no evidence that the accused/appellant Ajay Kumar was seen with the deceased or at the crime-spot by any of the witnesses soon before or after the occurrence of the incident.
17. Learned Counsel has vehemently submitted that there is no recovery of any article from the pointing out or from the possession of the accused/appellant Ajay Kumar. He further states that none of the witnesses have been produced by the prosecution to establish any link between the alleged recovery of crime weapon *i.e.* the piece of saree or *gamcha* with that of the accused/appellant Ajay Kumar.

18. According to the learned Counsel, the prosecution failed to prove any motive on the part of the accused/appellant Ajay Kumar to commit the alleged crime. He submits that motive is a very significant limb in cases sought to be proved by circumstantial evidence. He further states that neither there is any investigation nor any evidence on the aspect, as to why the accused/appellant Ajay Kumar would commit murder of the deceased at a place about 300 Km away from the village of the deceased and/or the accused/appellant Ajay Kumar. According to him, the appellant is not a beneficiary from the death of the deceased and rather it has come in the evidence that it is P.W.-6 (Ganesh), who is the real beneficiary from the death of the deceased.
19. The learned Counsel for the accused/appellant has strenuously argued that the Trial Court has presumed that the deceased is the wife of the accused/appellant Ajay Kumar, although the basis of the said relationship being the Notary affidavit dated 28.12.2010 was neither produced by the prosecution nor the same was proved by any witnesses.
20. According to the learned Counsel for the accused/appellant Ajay Kumar, the alleged circumstantial evidence of the last seen *i.e.* P.W-3 (Sona Devi), P.W.-4 (Smt.Dhuriya) and P.W.-5 (Vinod) are interested witnesses to support the beneficiary P.W.-6 (Ganesh), who is *devar* and all these witnesses belong to same village. In any case, he has highlighted that there are major contradiction in their deposition and do not inspire any confidence. He has submitted that the learned Trial Court has erroneously convicted the accused/appellant Ajay Kumar without any cogent evidence and ignoring the basic principle of criminal jurisprudence that in case of any suspicion on the testimony of the witnesses the benefit of doubt should always accrue in favour of the appellant/accused. Thus, he has prayed for exonerating the accused/appellant Ajay Kumar.

21. *Per contra*, the learned A.G.A. appearing for the State has supported the conviction order of the learned Trial Court. According to the learned A.G.A. the Trial Court has meticulously considered the various evidence, which has come on record and on the appreciation of the said evidence came to a conviction of guilt of the accused/appellant Ajay Kumar. He has further submitted that the contradiction pointed out by the Counsel appearing for the accused/appellant are not material and are merely human error which has been accepted by this Court to be natural variation and not material which would have any effect on the veracity of the deposition of the witnesses.
22. According to the learned A.G.A., a plain reading of the testimony of the last seen theory witnesses, it can be easily propounded that it is the accused/appellant Ajay Kumar, who was last seen in the company of the deceased, before she and her minor child was murdered and as such the learned Trial Court has rightly invoked the provisions of Section 106 of the Indian Evidence Act to seek the explanation from the accused/appellant Ajay Kumar, which he miserably failed and as such the Trial Court has rightly convicted the accused/appellant Ajay Kumar. Thus, according to him no interference was required in the impugned judgment and as such has prayed for dismissal of the present appeal.

### **ANALYSIS AND FINDINGS**

23. Heard Sri Piyush Kumar Singh, learned counsel for the appellant and Sri Umesh Verma, learned A.G.A. appearing for the State.
24. There is no dispute that the case of prosecution is based purely on circumstantial evidence in the form of motive and theory of last seen together, since no witness claims to have seen the alleged incident, wherein the deceased Subhangi and her 8/9 years old minor daughter was done to death.

25. At the vert outset, it needs to be recorded that the deceased persons are resident of village - Bhairabpur Dhoula, Police Station - Raunapur, District – Azamgarh, as has come in the testimony of P.W.-3 (Sona Devi), P.W.-4 (Smt. Dhuriya) and P.W.-5 (Vinod), all co-villager and witness of Last seen together theory, according to the prosecution story. Further, P.W.-6 (Ganesh), who is the brother-in-law (devar) of the deceased has also deposed that the deceased and the accused/appellant Ajay Kumar were resident of the aforesaid village and goes to an extent to say that both he and the accused/appellant Ajay Kumar were caught together by the police from their village and taken to the Barabanki postmortem house, wherein the dead bodies were got identified by the said witness P.W.-6 (Ganesh) by the police. Therefore, there is no gain saying in believing that whether it is the deceased or the accused/appellant, both of them are resident of village - Bhairabpur, District- Azamgarh.
26. As far as the discovery of dead bodies are concerned, it is more than evident that the same has been recovered from Rakhuna Chiloki forest, Village - Chiloki, P.S.: Safdarganj, Nawabganj, District: Barabanki. This Court takes note of the fact that the distance between village - Bhairabpur, District - Azamgarh *i.e.* the residence of the deceased and Police Station - Safdarganj, District- Barabanki *i.e.* the place for discovery of the dead body of the deceased is approximately 300 Kilometers. Therefore, a very crucial aspect of the present case, according this Court would be also to see as to what evidence has come on record to show, as to how and in what circumstances the deceased (or say the dead body of the deceased) travelled this 300 KM and what is the evidence to link the accused/appellant to the said place of crime spot.
27. No doubt, it is a well-established canon of criminal jurisprudence that conviction on a charge of murder may be

based purely on circumstantial evidence, however, the said conviction always comes with a caveat that such conviction ought to be based on evidence deemed to be credible and trustworthy. In cases involving circumstantial evidence, it is crucial to ensure that the facts leading to the conclusion of guilt are fully established and that all the established facts point irrefutably to the accused/appellant person's guilt. The chain of incriminating circumstances must be conclusive and should exclude any hypothesis other than the guilt of the accused/appellant. In other words, from the chain of incriminating circumstances, no reasonable doubt can be entertained about the accused person's innocence, demonstrating that it was the accused and none other who committed the offence. The law with regard to conviction based on circumstantial evidence has been crystallized by the Hon'ble Supreme Court in the case of *Sharad Birdhichand Sharda v. State of Maharashtra*, reported in (1984) 4 SCC 116; wherein it was held:

*“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:*

*(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established. There is not only a grammatical but a legal distinction between “may be proved” and “must be or should be proved” as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793] where the observations were made: [SCC para 19, p. 807] “Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between (1984) 4 SCC 116. 20 ‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions.”*

*(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.*

*(emphasis supplied)*

28. Having noted the principles governing a case based purely on circumstantial evidence, this Court proceeds to discuss the evidence led by the prosecution in order to bring home the charges against the accused/appellant Ajay Kumar. The evidence brought on record by the prosecution to establish the charge of murder against the accused-appellant Ajay Kumar, can be formulated into the following circumstances:
- (i) The first circumstances would be the discovery of dead bodies of two unknown persons lying in the Rakhuna Chiloki forest, P.S.-Safdarganj, Sub-district – Nawabganj, District - Barabanki;
  - (ii) The second circumstance would be the cause of death of the deceased persons;
  - (iii) The third circumstance would be the recovery of a photocopy of a Notary Affidavit dated 28.12.2010 relating to the solemnization of a marriage between the deceased lady and the appellant from the crime spot;
  - (iv) The fourth circumstance would be the motive for doing the deceased to death by the accused/appellant Ajay Kumar;
  - (v) The fifth circumstance would be the evidence of last seen together, so as to invoke the provision of Section 106 Indian Evidence Act and cast an onus on the accused/appellant Ajay Kumar to explain the circumstances under which the deceased was found murdered.
29. As far as the first circumstance is concerned, P.W.-1 has deposed that in Rakhuna Chiloki Forest, the dead body of deceased Subhangi was found in a pit behind the Government Girls Inter College with a *gamcha* (towel) tied around her neck and a dead body of minor girl lying near the drain. He proved the written complaint/*Tehrir* as *Exhibit- Ka-1*, which led to

lodging of a F.I.R. being case Crime No. 133 of 2011 (*Exhibit-Ka-26*) against unknown persons under Section 302 I.P.C. Thereafter, P.W.-9 proved the Inquest proceedings and the *panchayatnama* of both the deceased persons as *Exhibit Ka-12* and *Exhibit Ka-19*. Thus, the factum of discovery of dead bodies at Rakhuna Chiloki forest, village - Chiloki, Police Station - Safdarganj, District- Barabanki, stands proved.

- 30.** The second circumstances is the cause of death. As aforesaid, this Court finds that the investigation started with the lodging of F.I.R. and the *panchayatnama* records that the deceased Subhangi had a knot of *gamcha* tied around her neck and the identity of the said deceased could not be ascertained even after talking to several persons in the vicinity. Thus, to know the cause of death both the bodies were sent for post mortem. The post mortem reports of both the deceased (*Exhibit-Ka-2* and *Exhibit- Ka-3*) were proved by P.W.-2. The said witness, who is a Doctor and posted as Senior consultant at the District Hospital, Barabanki has deposed that a *contusion ligature mark 34cm X 2½ cm was present all around the neck at the level of thyroid cartilage*. He has also deposed that the death was caused due to ante-mortem strangulation and the injuries sustained by both the deceased were sufficient to cause death in the ordinary course of nature. Thus, the second circumstances relating to the homicidal death of the deceased also stands proved.
- 31.** The third circumstance would be the recovery of a photocopy of a Notary Affidavit dated 28.12.2010 from the crime spot relating to the solemnization of a marriage between the deceased lady and the accused/appellant Ajay Kumar. As regards the recovery of the said Notary Affidavit, the Investigating officer (P.W.-7) deposed that he recovered the said Notary Affidavit from the crime spot along with various articles strewn at the crime-spot like sarees, blouse, petticoats,

Mobile, cream, needles and thread, nail polish, bag etc., including the crime-weapon. However, this Court finds that a recovery memo (*fard*) was prepared as *Exhibit ka-5*, for all the articles, except the Notary Affidavit. Further, recovery of crime-weapon, *i.e.* part/piece of saree and *gamcha* used to tie around the neck so as to throttle the deceased persons were also marked as *Exhibit Ka-6* and *Exhibit Ka-7*; however no *fard*/recovery memo was prepared with respect to the Notary Affidavit, nor the same was filed along with the charge-sheet or has been brought on record.

32. Further, no witnesses have been produced to prove the factum of marriage between the deceased and the accused/appellant Ajay Kumar, nor to prove the contents of the said Notary Affidavit. The Notary Affidavit dated 28.12.2010 alleged to be a marriage certificate is not available on the record of the present case and has mysteriously vanished. This Court finds that according to the Investigating Officer, the Notary affidavit was one of the most vital document to ascertain the identity of the deceased persons and was also a link to the accused/appellant Ajay Kumar, however, this Court is absolutely clueless as to in what circumstances, the said Notary Affidavit was not brought on records of the present case.
33. Further, no doubt P.W.-3 in her statement has stated that the deceased is wife of the appellant, however, she has also stated that Shubhangi and her child were the residence of her village and the accused/appellant Ajay Kumar is from some other village and came to live along with the deceased only before 3/4 months, before the incident. Apparently, the factum of marriage seems to be unreliable for obvious reasons as it has also come in evidence that she does not know as to what the accused/appellant Ajay Kumar did for his living nor as to from which village he had come. Similarly, P.W.-4 although in his examination-in-chief stated the factum of a Court-marriage,

however, in her cross-examination she admits that she is not aware as to where and when the said marriage was performed. P.W.-4 also says that she and P.W.-6 (Ganesh/Devar) belongs to the same fraternity/*biradari* .

34. It is also easily verifiable from the testimony of P.W.-6 (Ganesh) that although, he has testified that the deceased and the accused/appellant Ajay Kumar had a Court-marriage and the said paper was shown to him by the Investigating Officer, however. in his cross examination he admits that the paper of Court-marriage shown to him by the Investigating Officer was being seen by him for the first time. Further, the Investigating Officer, has testified in his cross examination that he had never visited the house of P.W.-6 (Ganesh) and that is why there was no question of showing him the notarial affidavit of Court marriage. Interestingly, all these fact witnesses have deposed relating to the marriage of the deceased with the accused/appellant Ajay Kumar, however, none of them knew the name of the child aged about 8/9 years old nor they knew as to what the accused/appellant Ajay Kumar did for his living nor they knew, as to from which village the accused/appellant Ajay Kumar had come from. Thus, the testimony of these fact witnesses relating to the marriage does not boost of confidence and are untrustworthy and has to be taken with a pinch of salt, keeping in view that all these fact witnesses belong to the same village and same fraternity/*biradari*. Thus, the fact of marriage could not be proved form the evidence on record, however, this Court reasons to believe that some relation existed between the deceased and the accused/appellant Ajay Kumar.

35. The fourth circumstance is to be found from the reading of the evidence would be the theory of motive propounded by the prosecution for committing the offense of murder by the accused/appellant Ajay Kumar. As far as the theory of motive is concerned, it is trite law that proof of motive is not *sine qua*

*non* in a case of murder. However, in a case based purely on circumstantial evidence, motive if properly established, assumes great significance and would definitely provide an important corroborative link in the chain of incriminating circumstances and strengthen the case of prosecution. The reliance in this regard may be placed on the case of *Nandu Singh v. State of Chhattisgarh*, reported in *2022 SCC Online SC 1454*.

36. As far as the present case is concerned, there are five fact witnesses. Out of the said five witnesses, except for P.W.-6 (Ganesh), none of these witnesses have deposed anything relating to motive. A careful scanning of the evidence of P.W.-6 would reveal that the sole motive assigned for murder by him is the threat extended by the accused/appellant Ajay Kumar, during the life time of the deceased. According to the said witness, the accused/appellant Ajay Kumar had extended threat of life to the deceased- Subhangi, in case she did not stop following him. However, in his cross-examination, the said witness admitted that neither he nor the deceased -Subhangi had ever lodged any complaint related to the said threat. He also admits that the said fact of threat to life was not told by him to the police during his recording of statement under Section 161 Cr.P.C. Further, he admits in his cross-examination that after the death of his brother- Shankar, the village land came to be vested with Subhangi, his Bhabhi (sister-in-law) and after her death, the land presently came to be vested with him. Besides, the said stray statement of P.W.-6, there is no evidence nor any investigation, which has come on record to show the ill-motive of the accused/appellant. Thus, the motive as tried to be proved against the accused/appellant is absolutely far-fetched and no immediate or proximate reasons have come on record to show any motive of the accused/appellant to commit the offense of murder. The

accused/appellant Ajay Kumar admittedly is not even a beneficiary of death of the deceased person. Thus, we have no hesitation in holding that the evidence led by the prosecution to prove the theory of motive for commission of the crime as attributed to the accused/appellant Ajay Kumar, is far from convincing and a vital link in the chain of incriminating circumstances is snapped. In view of the above finding, unquestionably, the trial Court erred in holding that the prosecution has been able to prove the motive for the murder against the accused/appellant Ajay Kumar, beyond all manner of doubt.

37. The fifth circumstance would be the evidence of last seen together, as propounded by the prosecution, thereby, trying to shift the burden of proof by virtue of Section 106 of the Evidence Act and placing the accused/appellant Ajay Kumar under the onus to explain the circumstances under which Subhangi and her 8/9 years old minor daughter was found murdered. It is a cardinal principle of criminal jurisprudence that Section 106 of the Evidence Act shall apply and the onus to explain would shift on the accused only after the prosecution succeeds in establishing the basic foundational facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused. When the accused fails to offer a proper explanation about the existence of the said other facts, the Court can draw an appropriate inference against the accused. In cases based on circumstantial evidence, the accused's failure to provide a reasonable explanation as required under Section 106 of the Evidence Act can serve as an additional link in the chain of circumstantial evidence - but only if the prosecution has already established other essential ingredients including the foundational fact, sufficient to shift the onus on the accused. However, if the prosecution fails to

establish a complete chain of circumstances in the first place, then the accused's failure to discharge the burden under Section 106 of the Evidence Act becomes irrelevant.

38. The law concerning the invocation of shifting of onus under Section 106 of the Evidence Act has been explained by the Hon'ble Supreme Court in the case of *Shambu Nath Mehra v. State of Ajmer*, reported in *AIR 1956 SC 404*; wherein it was held as follows:

*“8. Section 106 is an exception to Section 101. Section 101 lays down the general rule about the burden of proof:*

*“101. Burden of proof.—Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.”*

*9. Illustration (a) says:*

*“A desires a court to give judgment that B shall be punished for a crime which A says B has committed.  
A must prove that B has committed the crime.”*

*10. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are “especially” within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word “especially” stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried....”*

39. Further, in *Tulshiram Sahadu Suryawanshi and Anr. v. State of Maharashtra*, reported in *(2012) 10 SCC 373*; the Supreme Court observed as under:

*“23. It is settled law that presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and*

*reaches a logical conclusion as the most probable position. The above position is strengthened in view of Section 114 of the Evidence Act, 1872. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process, the courts shall have regard to the common course of natural events, human conduct, etc. in addition to the facts of the case. In these circumstances, the principles embodied in Section 106 of the Evidence Act can also be utilised. We make it clear that this section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but it would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference.”*

40. A similar observation is found in ***Nagendra Sah v. State of Bihar***, reported in **(2021) 10 SCC 725**; wherein the Hon’ble Supreme Court has held that:

*“22. Thus, Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused. When the accused fails to offer proper explanation about the existence of said other facts, the court can always draw an appropriate inference.*

*23. When a case is resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of burden placed on him by virtue of Section 106 of the Evidence Act, such a failure may provide an additional link to the chain of circumstances. In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the failure of the accused to discharge the burden under Section 106 of the Evidence Act is not relevant at all. When the chain is not complete, falsity of the defence is no ground to convict the accused.”*

41. Recently, Hon’ble Supreme Court in the case of ***Anees v. State (NCT of Delhi)***, reported in **(2024) 15 SCC 48**; held in the following terms:

*“45. Section 106 of the Evidence Act cannot be invoked to make up the inability of the prosecution to produce evidence of circumstances pointing to the guilt of the accused. This section cannot be used to support a conviction unless the prosecution has discharged the onus by proving all the elements necessary to establish the offence. It does not absolve the prosecution from the duty of proving that a crime was*

*committed even though it is a matter specifically within the knowledge of the accused and it does not throw the burden on the accused to show that no crime was committed. To infer the guilt of the accused from absence of reasonable explanation in a case where the other circumstances are not by themselves enough to call for his explanation is to relieve the prosecution of its legitimate burden. So, until a prima facie case is established by such evidence, the onus does not shift to the accused.”*

***(emphasis supplied)***

42. Applying the aforesaid principles to the case at hand, the prosecution would be required to establish the basic foundational fact that the accused/appellant Ajay Kumar and Subhangi and her daughter (deceased) were last seen together, and to be specific during the time immediately preceding the incident. On a minute perusal of the testimony of the fact witnesses it is revealed from the deposition of P.W.-3 (Sona Devi) that she had seen the accused/appellant Ajay Kumar along with the deceased persons leaving the village. In her cross-examination, she deposed that she was not able to meet them as they were leaving the village and told that either on the 3<sup>rd</sup> or 4<sup>th</sup> day after they left, the Barabanki Police had come to her village. She does not say anything about the timing, but says it was during evening. Thus, the evidence relating to ‘last seen together’ is not proximate as there is a gap of 3-4 days between the incident of seen together and the crime committed. Further, the said witness is not sure about the number of days before she allegedly saw the deceased in the company of the accused/appellant Ajay Kumar. P.W.-4 (Dhuriya) also says that she had seen the accused/appellant Ajay Kumar leaving the village together some three years ago in the afternoon, however, he does not know as to at which place he had seen these people together.
43. P.W.-5 (Vinod) says that he had also seen the accused/appellant Ajay Kumar along with the deceased leaving the village around 11 AM. However, in his cross-examination, he has stated that it is correct that he has not seen the deceased and the

accused/appellant Ajay Kumar going together. Thus, an apparent contradiction appears in his statement. Further, he admits that the fact of having seen both the accused/appellant Ajay Kumar and the deceased leaving together from the village has not been told by him to the police, when his statement was recorded under Section 161 Cr.P.C. The next fact witnesses, namely P.W.-6 (Ganesh) admits in his cross-examination that he had not seen the accused/appellant Ajay Kumar and the deceased leaving together from the village. Thus, the factum of having seen the deceased in the company of the accused/appellant Ajay Kumar leaving together or as to on which date or time is seriously doubtful. Apparently, the P.W.-7 (Investigating officer) has stated in his testimony that he has recorded the statement of P.W.-3 (Sona Devi) and P.W.-5 (Vinod) on 06.07.2011 *i.e.* after more than 75 days of the incident and that of P.W.-4 on 11.07.2011 *i.e.* after more than 80 days. Although, different time of having seen the accused/appellant along with the deceased, leaving the village has been said by witnesses P.W.-3, P.W.-4 and P.W.-5 in their testimony, which appears to be minor inconsistencies, the delay in recording the police statement of those witnesses calls for a close scrutiny of their version. Keeping in view that human memory fades with time and any narration of facts or events would depend on the perception and on the knowledge, which the said witness has gained in the intervening period between the date of crime and the date of recording the statements.

44. In any case, it is apparent from the facts of the present case that admittedly, the dead bodies were recovered not after 3/4 days of having seen together, but also some 300 KM away precisely at Rakhuna Chiloki forest, Village - Chiloki, P.S.- Safdarganj, Nawabganj, District: Barabanki. Thus, the testimony of last seen together does not appear to be immediately preceding the incident or proximate to the happening of murder of the

deceased persons. The Hon'ble Supreme Court in the case of *Rambraksh Vs State of Chhattisgarh*, reported in (2016) 12 SCC 251; held that the last seen theory would be advantageous to the prosecution to prove a case based on circumstantial evidence only when the time gap between the last seen point and the discovery of the death is so small and proximate that no one else could have committed the crime, but for that person. The Supreme Court even in those cases where the accused was last seen in the company of deceased, went on to hold that even in these cases the circumstance of last seen together alone is insufficient and the prosecution must establish a complete chain of circumstances proving the accused's guilt. In the aforesaid judgment of *Rambraksh (Supra)*, the Hon'ble Supreme Court went on to hold as under:

“12. It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other words, a conviction cannot be based on the only circumstance of last seen together. Normally, last seen theory comes into play where the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that possibility of any person other than the accused being the perpetrator of the crime becomes impossible. To record a conviction, the last seen together itself would not be sufficient and the prosecution has to complete the chain of circumstances to bring home the guilt of the accused.”

*(emphasis supplied)*

45. Further, there are consistent line of judgment, starting from *Arjun Marik Vs State of Bihar*, reported in 1994 Supp(2) SCC 372; *Krishnan alias Ramaswamy and Ors. Vs State of Tamil Nadu*, reported in (2014) 4 SCC 715; and *Kanahiya Lal Vs State of Rajasthan*, reported in (2014) 4 SCC 715; which have held that evidence of last seen together is a weak evidence and conviction only on the basis of last seen together without there being any other corroborative evidence against the accused will

not be sufficient to convict the accused for an offence under Sections 302 I.P.C.

46. According to this Court, the best witness to narrate about the last seen together theory would had been P.W.-8 (Sandeep Kumar), the witness, who allegedly saw the accused/appellant Ajay Kumar and the deceased together at his shop of tea and samosa. However, the deposition of the said witness is of not much use as not only he refuses to identify the accused/appellant Ajay Kumar due to passage of time and his shop to be very busy, so as to identify a solitary client like the accused/appellant, but also testifies that no statement under Section 161 Cr.P.C was recorded by the police after the time of incident.
47. Thus, this Court finds nothing in the testimony of the fact witnesses which could even remotely suggest that the accused/appellant Ajay Kumar was last seen together immediately before or after the incident, as propounded by the prosecution, thereby, trying to shift the burden of proof by virtue of Section 106 of the Evidence Act and placing the accused/appellant Ajay Kumar under the onus to explain the circumstances under which Subhangi and her 8/9 years old minor daughter was found murdered. This Court finds that there had been a growing trend in the Trial Court to invoke the provisions of Section 106 of the Indian Evidence Act at the drop of hat, for getting that time and again the Hon'ble Supreme Court has held that Section 106 is not a panacea for the defect in proving the case against the accused/appellant Ajay Kumar. The prosecution case has to stand on its own legs and prove all the elements necessary to establish the offence against the accused/appellant Ajay Kumar.
48. In addition thereto, it is seen from the evidence that the F.I.R. was lodged on 22.04.2011, the postmortem was conducted on the dead bodies on 23.04.2011 and on the same date the

accused/appellant Ajay Kumar was arrested. The Investigating officer (P.W.-7) has stated that the accused/appellant Ajay Kumar was arrested on 23.04.2011 on the basis of Notary affidavit found from the crime spot on 22.04.2011. Admittedly, the said notarial affidavit has not been proved nor filed on record and the statement of the fact witnesses, which allegedly saw the accused/appellant Ajay Kumar together with the deceased going away from the village was recorded after more than two and half months of the incident, which creates a serious doubt on the testimonies of these fact witnesses.

49. From the evidence of P.W.-3 (Sona Devi) and P.W.-6 (Ganesh/*devar*) it also transpires that the deceased had a mother-in-law. However, the prosecution has not explained as to where the mother-in-law was on the date of the incident. Nothing is available on record to throw any light regarding the same. Likewise, the prosecution has also failed to provide any explanation whatsoever as to why the beneficiaries of death of the deceased person namely the mother-in-law and one Uma as named by the P.W.-6 in his cross-examination, were not examined in evidence. This Court also notes that although a mobile was recovered from the crime spot, however, no investigation was carried with the help of said mobile, which could had given vital information and evidence relating to the death of the deceased. Failure to examine them in evidence calls for drawing of adverse inference thereby, further denting the credibility of the prosecution case, especially the link of 'motive' for the murder of the deceased and the last seen theory proposed by the prosecution to convict the accused/appellant Ajay Kumar.
50. There is another doubtful aspect of the matter. Although, the presence of the Notary Affidavit cannot be doubt as P.W.-7 (Investigating officer) has deposed that the whereabouts of the deceased persons and the accused/appellant Ajay Kumar came

to be revealed from the said Affidavit only. However, the same has mysteriously vanished in thin air. Further, if for a while, the accused/appellant Ajay Kumar is presumed to be the real culprit, then the said notarial affidavit, which had the effect of connecting and leading to the accused/appellant Ajay Kumar with that of the deceased Subhangi, would have been altogether removed or destroyed or at least not left at the crime-spot by the accused/appellant. Leaving the said notarial affidavit at the crime-spot would have been a self-goal for the accused/appellant Ajay Kumar. Thus, allegedly recovery of only the said notarial affidavit from the crime spot and not other important document of the deceased like, the Aadhar Card, pension papers, property papers etc., creates a doubt about the complicity of the accused/appellant Ajay Kumar in the present case. The said fact is further testified from the statement of P.W.-7, who has testified that although the name of the accused/appellant Ajay Kumar was clear from the notary affidavit, however, the name of Shubhangi/deceased was not clear. Apparently, it seems that entire case started by presuming the accused/appellant Ajay Kumar to be guilty and evidence were as such collected to vindicate the said presumption rather than finding the real culprit, who was responsible for crime against the deceased. Further, the conduct of the accused/appellant Ajay Kumar after the incident *i.e.* being stationed at the village of the deceased as testified by P.W.-6 (Ganesh) is also a relevant factor to show his innocence, under Section 8 of the Indian Evidence Act. This Court finds profitable to quote a very interesting observation of the Supreme Court relating to standard of evidence required from the prosecution to prove a case based on circumstantial evidence. The Supreme Court in the case of ***Umedbhai Jadavbhai v. State of Gujarat***, reported in ***(1978) 1 SCC 228***; held that while convicting the accused based on circumstantial

evidence, there should remain no circumstance which aligns with the innocence of the accused. The observations made by the Court read thus:

*“7. It is well-established that in a case resting on circumstantial evidence all the circumstances brought out by the prosecution, must inevitably and exclusively point to the guilt of the accused and there should be no circumstance which may reasonably be considered consistent with the innocence of the accused. Even in the case of circumstantial evidence, the Court will have to bear in mind the cumulative effect of all the circumstances in a given case and weigh them as an integrated whole. Any missing link may be fatal to the prosecution case.”*

*(emphasis supplied)*

51. Further, this Court finds that no efforts have been made by the prosecution to lead and connect the articles or the crime weapon recovered from the crime-spot with the accused/appellant Ajay Kumar. There is absolutely no evidence on record nor any testimony of any of the witnesses to show that these articles were recovered at the behest of the accused/appellant Ajay Kumar or that these articles belonged to him or to show that as to how these articles belonging to the accused/appellant Ajay Kumar could have reached the crime-spot. No efforts have been made by the prosecution to prove any of the circumstances, which would lead to any inkling as to how and in what circumstances the deceased (or say the dead body of the deceased) were found some 300 kilometers from their ordinary place of residence. Apparently, it seems the prosecution has built its case entirely on the fourth and fifth circumstances to prove their case against the accused/appellant Ajay Kumar, which according to this Court have miserably failed and fallen like a pack of cards as these circumstances do not establish facts, which could irrefutably point towards the guilt of the accused/appellant - Ajay Kumar.
52. Thus, this Court has no hesitation in holding that the nature of circumstantial evidence available against the accused/appellant

Ajay Kumar, may would at best raise a doubt that he may have committed the offence but the same is not so conclusive that he can be convicted only on the evidence of the last seen together. Be that as it may, it is a settled proposition that whenever any doubt is created in the mind of the Court, the benefit shall accrue to the accused and not the prosecution. The present is a case where except for the weak evidence of last seen together, there is no other corroborative evidence against the accused/appellant Ajay Kumar. Therefore, the conviction only on the basis of last seen together cannot be sustained.

53. As a sequel to above, we are of the view that the prosecution has failed to prove the chain of incriminating circumstances against the accused/appellant Ajay Kumar by convincing evidence and beyond the shadow of doubt, so as to affirm his guilt. The Trial Court clearly erred while appreciating the evidence and in holding that the prosecution has proved the case against the accused/appellant Ajay Kumar beyond all manner of doubt. Hence, the accused/appellant Ajay Kumar deserves to be acquitted of the charge by giving him the benefit of doubt.
54. Resultantly, the impugned judgment dated 05.10.2015 passed by the learned Trial Court in *Session Trial No. 992 of 2011 (State Vs Ajay Kumar)* arising out of *Case Crime No. 133 of 2011*, is hereby reversed and set aside.
55. Consequently, we also direct that if the accused/appellant Ajay Kumar is in custody, he shall be released forthwith, if not wanted in any other case.
56. The appeal is *allowed* accordingly.

**(Abdhesh Kumar Chaudhary,J.) (Rajesh Singh Chauhan,J.)**

**February 20, 2026**

Anuj Singh