Team Code - 1892

XVIII K.K. LUTHRA MEMORIAL MOOT COURT, 2022

Before

Hon'ble High Court of Killdare

CRIMINAL APPEAL NO. 1111 OF 2022

Cristo .....*Appellant*

v.

State… .....*Respondent*

ABOVE MENTIONED APPEAL HAS BEEN PREFERRED AGAINST THE JUDGEMENT/ORDER PASSED BY THE TRIAL COURT OF CALUMNY

WRITTEN SUBMISSION ON BEHALF OF THE APPELLANT

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STATEMENT OF FACTS

INTRODUCTION TO THE PARTIES

Killdare, a small state in south of Frisk, is a developing country with one of the lowest populations in the world and recently crimes have been on the rise in Killdare with the local Police failing to tackle the law and order situation arising.

Cristo is a post-graduate student at the University of Killdare and is friends with Lionel, a local resident who comes from a renowned family. Cristo and Lionel, both are teammates in University Football Team.

UNFOLDING OF EVENTS

Lionel after facing shortage of funds, asks Cristo to repay the amount previously lent to him. Cristo expressed his inability initially and promised to pay however he did not repay despite reminders.

One Night, while returning from Bob's Butchery, Cristo and Lionel stopped for a smoking break where they smoked 'Lucky Strike' cigarettes of imported quality carried by Lionel a few

blocks from Lionel's house in an isolated area after which Cristo left. However, Lionel never returned home after that, considering which his parents informed Police and reported their missing son.

The Police while investigating found a dead body in a narrow ditch in an isolated area near Lionel's Home. The Police informed Lionel's parents of the reason of death being blow on head and Lionel's parents confirmed the personal belongings of their son after which the body was sent for Post-mortem.

Police inquired Cristo where he revealed that he was in a rush to get back home and therefore had dropped Lionel a few blocks from his home. Further, Mr. Kun and Mr. Sergio revealed that Cristo owed money to Lionel. Under suspicion, Police took Cristo for questioning at the local Station.

As per Police, Cristo gave an alleged statement admitting to killing Lionel due to anger and jealousy on account of Coach Jose. M's biased behavior and Lionel's repeated demands for money. He was placed under arrest.

After a short investigation, the Police filed an investigation report accusing Cristo of offences under sections 302 and 201 of the Frisk Penal Code, 1860. The trial court Calmuny gave its indictment against the accused for prima facie commission of offences to which he pleaded not guilty.

After perusal of State Evidence, the trial court convicted Cristo stating that the State has successfully proven the indictment against him beyond reasonable doubts while stating that Cristo has failed to prove the hypothesis of his sudden disappearance.

The court accepted State's case on last seen and its arguments and sentenced Cristo to undergo rigorous imprisonment rigorous imprisonment for life along with a fine of Rs.10,000/- and rigorous imprisonment for a period of seven years and fine of Rs.5,000/- for commission of offences under Sections 302 and 201 of the Frisk Penal Code 1860 respectively.

STATUS QUO

Aggrieved by this, Cristo has preferred appeal before this Hon'ble High Court where the court has identified specific issues to be addressed.

ISSUES RAISED

ISSUE 1 Whether the trial court has correctly applied the applicable test of proving facts "beyond all reasonable doubt"?

ISSUE 2 Whether the essentials ingredients of section 299/300 and 201 of the frisk penal code have been met in the facts and circumstances of the instant case?

WRTITTEN PLEADINGS

A ISSUE 1: THE TRIAL COURT HAS NOT CORRECTLY APPLIED THE APPLICABLE TEST OF PROVING FACTS 'BEYOND REASONABLE DOUBT'

1. It is most humbly submitted before this hon'ble HC that in a case based on circumstantial evidence, every circumstantial evidence proving a fact should be closely scrutinized, and there should be no weak links, every weak link being a ground of reasonable suspicion, always calling for an acquittal.[1] It is submitted that the appellant, Cristo has been charged under section 302 and 201 of Frisk Penal Code (FPC) squarely based on the theory of last seen together. However, it is pertinent to note that time and again the theory in itself has been regarded as weak evidence.[2] Further, it is submitted that where prosecution has majorly relied on circumstantial evidence to prove the guilt of the accused, cogent ascertainment of motive becomes all the way more important.[3] In the instant case besides failing to establish a chain of circumstance which in all respects points towards guilt of Cristo, the respondent has miscarried the derivation of motive. It is further submitted that in the instant case the underlying principle of criminal jurisprudence ***Ei Incumbit probatio, Qui Dicit, Non Qui Negat*** has been gravely overlooked while taking the evidence on record into account. In the instant case where evidence cannot be cogently established parallel to the guilt of Cristo, he is subject to the benefit of doubt. Moreover, investigation of a cognizable offence is contingent on the procedures established by law and shall be far from the prejudices and beliefs of the IO leading such investigation. Further, it is submitted that in the instant case there has been no consideration at all of the defence taken by Cristo under Section 313 (1) FCrPC[4], the conviction may well stand

[1] Adambhai Sulemanbhai Ajmeri and Ors. v. State of Gujarat AIR 2010 SC 773.
[2] Sunita v. State of Haryana AIR 2019 SC 3571.
[3] Rishi Pal v. State of Uttarakhand AIR 2013 SC 3641.
[4] The Frisk Criminal Procedure Code, 1973, §313 (1).

vitiated.[5] Lastly, it is the humble submission of the appellant that it is not necessary for the accused to establish his case by the test of proof beyond a reasonable doubt rather the accused can establish his case by preponderance of probability, i.e. a probability of existence of a disparate version of the case than the one contented by the prosecution.

A.1 <u>Cumulative effect of chain of circumstantial evidence points needle towards innocence of the appellant</u>

2. It is humbly submitted before this hon'ble HC that in cases where the 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, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. As the principle laid down by the SC in the ever since followed, landmark judgement of ***Hanumant Govind Nargundkar v. State of M.P***.[6] relating to circumstantial evidence, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis of guilt but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. Each fact must be proved individually and only thereafter, the sum total of the proved fact has to be taken into consideration.[7] It is humbly submitted that in a case of murder, conviction on circumstantial evidence is permissible only when all the links in the chain of events are established beyond reasonable doubt and the established circumstances are consistent only with the hypothesis of guilt of the accused and totally inconsistent with his innocence.[8] Further reference shall be made to another landmark judgement of **Sharad Birdhichand Sarda v. State of Maharashtra**,[9] where the SC has enumerated five golden principles based on circumstantial evidence that must be fully established before conviction of an accused.

3. It is most humbly submitted that in the present case the trial court should have duly considered the standard proposition of law on circumstantial evidence and the conclusion of conviction should adhere to the principles laid down by the courts in India and not fantastic possibilities

[5] Reena Hazarika v. State of Assam AIR 2018 SC 5361.
[6] Hanumant Govind Nargundkar v. State of M.P AIR 1952 SC 343.also see Kansa Behera v. State of Orissa AIR **1987** SC 1507.
[7] Jagan Nath v. State of Himachal Pradesh1982 Cr LJ 2289.
[8] Munna Kumar Upadhyaya v. State of Andhra Pradesh AIR 2012 SC 2470. See also Sanatan Naskar and Ors. v. State of West Bengal 2010 8 SCC 249.
[9] Sharad Birdhichand Sarda v. State of Maharashtra AIR 1984 SC 1622.

nor freak inferences but rational deductions which reasonable minds make from the probative force of facts and circumstances. It is further submitted that the prosecution has resorted to the theory of last seen together while drawing circumstantial evidence towards the guilt of Cristo which has been taken up by the appellant further.

A.2 <u>The accused last seen together with the deceased prior to occurrence of death, would not establish the guilt of the accused.</u>

4. In a case based on circumstantial evidence of last seen together, circumstance on the basis of which a conclusion can be rested as to the involvement of an accused would become relevant only where there is no breakage in the chain of circumstances and the time gap must be such that there is no possibility for the intervention of external factor that may result in the commission of the very offence.[10] It is most humbly submitted before this hon'ble HC that in the absence of any eyewitnesses or tangible evidence, the theory of last seen together is the last resort available to the prosecution to prove his case. However, last seen together does not by itself or necessarily leads to the inference that it was the accused and only he, who committed the crime. There must be something more establishing connectivity between the accused and the crime. It is submitted that the 'last seen together' principle in the catena of judgments has been applied by the courts so cautiously that unless there is corroborating and circumstantial evidence, the conviction is not given. [11] Referring to the landmark judgement of ***Jaswant Gir v. State of Punjab***[12] the SC of India, addressing 'last seen theory' as a facet of circumstantial evidence is a weak kind of evidence if the conviction is to be solely based on it. In India, conviction cannot be given only on relying upon the fact that the deceased was last seen together with the accused.

5. It is a humble submission of the appellant that in order to attract the theory of last seen together, it must be shown that the accused and the deceased had been last seen together. The fact that both had been seen together on the same road is not enough.[13] True it is, that Lionel had died, the evidence that he was last found in the company of Cristo is a link in the chain of circumstances pointing to the guilt of the accused, but it cannot be deemed to be conclusive, unless it is further established that during the interval between the time when Lionel and Cristo were last seen together, and at the time when Lionel's body was discovered, every circumstance

[10] Latika Koteswara Rao v. State of Andhra Pradesh. 2009 Cri LJ 257.
[11] Satpal Singh v. State of Haryana AIR 2018 SC 2142.
[12] Jaswant Gir v. State of Punjab (2005) 12 SCC 438.
[13] Sir John Woodroffe & Syed Amir Ali, Law of Evidence, (LexisNexis, 21st edn.,2020).

was inconsistent with the innocence of the accused.[14] In the judgement by M.P. HC the court observed where there was no evidence led by the prosecution in order to prove the fact that there was no possibility of any other person approaching the deceased in the field, which is open to free access during the intervening period. Where the accused and the deceased were last seen standing on the field at 2.30 PM and the dead body of the deceased was found in the same field the next morning. Thus, looking at the time gap, it was held by the M.P. HC that the guilt cannot be clenchingly fastened on the accused.[15] Similarly in the present case both Lionel and Cristo were seen together late at night a few blocks near Lionel's home and his dead body was recovered by the police the next day later that night. It is submitted that one of the essences of last seen theory is the time gap between the parties seen together and the recovery of the dead body, which is so long in the instant case apparently defeating the version of the prosecution. Thus, the court should be cautious regarding the time gap being so long that there are possibilities of intervention by some other person and therefore the evidence of last seen of the deceased in the company of Cristo can be disbelieved.

6. Further it is submitted that the report of an expert indicating the time of death of Lionel is not conclusive proof.[16] Evidence of an expert, after all, is opinion evidence and cannot be safely relied upon, unless the basis of opinion is found to be formed.[17] The opinion of an expert is neither substantive piece of evidence[18] nor conclusive.[19] It is for the court to judge whether the opinion has been correctly reached on the data available and for the reason stated.[20] Medical evidence as to the time of death in a murder trial cannot be accepted as conclusive. The possibility of error of time factor cannot be eliminated, the time of death cannot be pinpointed with mathematical precision.[21] It is humbly submitted that in the present case the PM report indicating the exact time frame cannot be absolutely relied on and the opinion of Dr. Arsene hereinafter referred as PW 4 shall be taken as nothing more than an opinion with a probability of it being subject to inaccuracy. The same is substantiated by the fact that the PM report elicits no other material fact about the dead body and the injury other than a definite time of death between 12.00 AM to 2.00 AM. Therefore, corroboration of the PM report has to be sought by the prosecution to establish the case against the appellant.

[14] Lakhanpal v. State of Madhya Pradesh AIR 1979 SC 1920.
[15] Samandar Singh v. State of Madhya Pradesh 2009 Cr LJ 3708.
[16] Rajeev Kumar v. State of Bihar 2017 LQ/PatHC/2018/1389.
[17] Lachhmi Ram v. State of Himachal Pradesh 1971 Sim LJ (H.P.) 329.
[18] Khyali v. State 1980 All LJ 230.
[19] Gopal v. State of Rajasthan 1984 6 Raj Cr C 402 (DB).
[20] State v. Kanhu Chand Barik 1983 Cr LJ 133 (Ori) D.
[21] Pathipathi Venkaiah v. State of Andhra Pradesh AIR 1985 SC 1715.

7. Further moving with the next link of the chain of circumstance while referring to the testimony of Antonella hereinafter referred as PW 1, the golden principles of standard of proof required for recording the conviction on the basis of circumstantial evidence was not established by the prosecution. It is submitted that the respondent has relied on the testimony of PW 1 as another link to their broken chain of circumstance. The fact that she is an ocular witness confirming having seen Lionel in the company of Cristo in the restaurant where both of them decided to have their dinner does not conclusively prove that Cristo was the last person in the company of Lionel before his death. It is further submitted that the testimony of Mr. Pique hereinafter referred as PW 2 only confirms having seen Lionel and Cristo for a brief period on the bike enroute to Lionel's home. Testimonies of PW 1 and PW 2 to the most only throws light on the fact that they were seen together and not Cristo was last seen with Lionel. It is submitted that testimonies of PW 1 and PW 2 do not conclude the guilt or adds to such conclusion, therefore, the same have no relevance in the chain of circumstances while ascertaining Cristo's guilt.

8. It is most humbly submitted that the true question, in trial of fact, is not whether it is possible that the testimony may be false, but whether the facts are shown by competent and satisfactory evidence.[22] The testimonies of Chancerton hereinafter referred as PW 3 seems to be confusing and cannot be relied on as he is not sure of exactly who he saw that night where Lionel's dead body was found. PW 3 has deposed in the court that he saw two boys, roughly of the same age as Lionel and Cristo, indulging in a loud heated conversation with each other. It is submitted that during his cross examination he admitted that he did not know Lionel from before and that he was never called to identify Cristo by the IO. To this effect it can be ascertained that PW 3 did not know Lionel or Cristo however has identified Cristo in the trial. It is submitted that where a witness makes two contradictory statements with regard to a material fact and circumstance, his testimony becomes unreliable and untrustworthy and has to be rejected.[23] It is further submitted that eyewitnesses had little time to see the accused, the substantive evidence should be sufficiently corroborated by a test identification parade held soon after the occurrence and any delay in holding the test identification parade may be held to be fatal to the prosecution case.[24]The mere fact of witnessing two people quarrelling does not confirm one of them being Cristo.

9. It is most humbly submitted that PW 3 had run through the crime scene, the isolated roadside area, late at night and there has been no evidence or testimony of PW 3 mentioning the source

[22] Bunwaree v. Hetnarain 1858 PC 002.
[23] Ram Swarup v. State 1988 A Cr R 430 (Del).
[24] State of Maharashtra vs. Syed Umar Sayed Abbas and Ors. AIR 2016 SC 863.

of light at such a distant place. Referring to the judgement of ***Bollavaram Pedda Narsi Reddy and Ors. vs. State of Andhra Pradesh***, therefore, in the absence of cogent evidence that PW 3 by reason of the visibility of the light at the place of occurrence and proximity to the assailant had a clear vision of the action of the two people present there in order that their features could get impressed in the mind of PW 3 to enable him to recollect the same and identify the accused even after a long lapse of time, it would be hazardous to draw the inference that the appellant is the real assailant.[25] The Prosecution must prove beyond reasonable doubt that those two people were Cristo and Lionel and nobody else. It is submitted that when charges of heinous crime like murder are made on person, it is not safe to record conviction when the testimony is replete with serious discrepancies.[26] Thus while appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as whole appears to have a ring of truth.[27]

10. It is most humbly submitted that mere suspicion, however strong or probable it may be, is not an effective substitute for the legal proof required to substantiate the charge of commission of a crime and if the charge is grave, greater should be the standard of proof required. It is not enough that on the evidence, it can be said that the prosecution case may be true, because the prosecution has to travel the distance between 'may be true' and 'must be true'. A conviction can be sustained only if the offence is proved to the hilt.[28] Therefore it is submitted that where the court is in the realm of doubt, the benefit shall go to the accused. In a case resting on circumstantial evidence, there should be no missing link which creates a reasonable doubt about the identity of Cristo as against the testimony of PW 3 while the charge being brought home to the accused.[29]

A.3 <u>Only cogent proof of motive adds as a link to the cumulative of chain of circumstances</u>

11. It is most humbly submitted that while motive does not have a major role to play in cases based on eye-witness accounts of the incident, it assumes importance in cases that rest entirely on circumstantial evidence. Thus, in a case of murder, where the alleged motive for the crime was not only weak but it sounded illogical, it was held that absence of strong motive is something that cannot be lightly brushed aside.[30] And if motive as circumstantial evidence is put forth, it must be fully established.[31]

[25] Bollavaram Pedda Narsi Reddy and Ors. v. State of Andhra Pradesh AIR 1991 SC 1468.
[26] Gulab v. State of Rajasthan 1984 6 Raj Cr C 402 (DB).
[27] Jyotilal v. Dipak Dutta 1995 Cr LJ 930 (Cal).
[28] Natarajan Marayana Kurup v. State, (1982) Cr LJ (NOC) 69 (Ker).
[29] Karam Singh v. State AIR 1969 Ori 23.
[30] Rishi Pal v. State of Uttarakhand AIR 2013 SC 3641.
[31] R.A. Nelson's, Indian penal Code, (New Delhi LexisNexis Butterworths, 9th edn.,2003).

12. Further, it is humbly submitted that the close relatives and friends of the deceased have a tendency to exaggerate or add facts, which may not have been stated to them at all. The court has to examine the evidence of such witnesses with great care and caution.[32] It is submitted that Lionel lent money to Cristo for his daily expenses and recreational outings. The deposition made by Lionel's friends Mr. Kun and Sergio, hereinafter referred as PW 5 and PW 6 respectively, regarding the existence of a loan from which the prosecution has derived the motive of Cristo to cause the death of Lionel seems to be very exaggerated. Moreover, referring to the testimonies of Coach Jose M, hereinafter referred as PW 7 has deposed to never have caught a sight of Cristo quarrelling with Lionel during training. Neither PW 5 and PW 6 nor Lionel's father, Mr Pep hereinafter referred as PW 8 have ever seen both arguing or fighting with each other, and therefore, prosecution's contention of Cristo holding animosity against his dear friend Lionel is a far-reaching thought. It is humbly submitted that all such previous conduct of the appellant forms a relevant fact under section 8 of FEA.[33] It is a humble submission of the Appellant that the court shall cautiously evaluate the worth of such testimonies[34] While concluding the existence of motive and the evidence adduced by the prosecution to prove the motive are inadequate and insufficient failing to establish the motive, thus the accused will be entitled to acquittal.[35]

A.4 <u>Other material discrepancies in the chain of circumstance barring it to be conclusive</u>

13. It is submitted that in the instant case, prosecution has failed to produce the weapon of offence (blunt object) in the trial court, not it was shown to PW 4 for providing his opinion as to whether the injuries received by the deceased could be caused by that weapon.[36] In this connection, counsel for the appellant has placed reliance on ***Ishwar Singh v. State of UP*** [37] where in the Supreme Court has observed that it is the duty of the prosecution that the alleged weapon of the offence should be shown to the medical witness and his opinion invited as to whether any of the injuries on the victim could be caused with that weapon, following an earlier decision in ***Kartrey v. State of U.P.***[38]

[32] Sharda Bhirdi Chand Sarda v. State of Maharashtra AIR 1984 SC 1622.
[33] The Frisk Evidence Act, 1872, §8.
[34] Babu Ram v. State of UP, AIR 2002 SC 2815.
[35] Bhawani Devi v. State of Uttar Pradesh 1989 JIC 311 (All).
[36] Durga Lal v. State of Rajasthan LQ/RajHC/1987/416.
[37] Ishwar Singh v. State of UP 1976CriLJ1883.
[38] Kartrey v. State of U.P 1976CriLJ13.

14. It is submitted that even though Cristo was arrested, the alleged weapon used by him was not recovered. Of course, the case of the prosecution had to be examined de hors such omissions of the IO like non-recovery of weapons etc. But material discrepancies in the evidence of prosecution witnesses coupled with the unnaturalness of the prosecution case raise serious doubts about the prosecution case.[39] It is humbly submitted in the judgment of ***Mustkeem v. State of Rajasthan***[40] it was held that in view of the absence of an adequate motive coupled with the unreliable evidence of recovery of weapon of offence at the instance of the accused, it was held that the circumstantial evidence was not sufficient to convict the accused.

15. It is most humbly submitted before this hon'ble HC that condition necessary for bringing section 27 of FEA into operation is the discovery of a new fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence[41]. And it is for the prosecution to show that the articles recovered are connected with the crime.[42] Further, it is submitted that there is no discovery of facts when the facts were already known to the police from other sources. In the present case besides the discovery of Lucky Strike pack and the dead body of Lionel are not admissible under Section 27 of FEA since Cristo has never made a disclosure statement, also the prosecution has adduced no evidence to connect the recovery of Lucky strike box with the crime. Moreover, the IO had already recovered the dead body of Lionel even before approaching Cristo and the discovery that section 27 contemplates must be of some fact, which the police had not previously learnt from other sources and the knowledge of the fact should be first derived from information given by the accused.[43]

16. It is further submitted that the IO has neither spotted any blood stain on the clothes of the deceased nor any blood-stained clothes from Crito. There was no mark of struggle, or blood spot on the occurrence of crime. Not only this but the IO has also not adhered to the procedural requirement under section 100 (4) of FCrPC[44] which mandates that seizure must be witnessed by at least two independent witnesses. The failure to not have independent witnesses while preparation of memos for recovery of Lionel's body, Cristo's alleged identification of the crime scene and recovery of the Lucky Strike pack shows that this is not mere coincidence rather a deliberate attempt by the IO to give effect to their premonition and frame Cristo in a concocted story.

[39] Jai Prakash v. State of Uttar Pradesh and Ors. AIR 2020 SC 280.
[40] Mustkeem v. State of Rajasthan AIR 2011 SC 2769.
[41] Anter Singh v. State of Rajasthan, AIR 2004 SC 2865.
[42] Chinnaswany Reddy v. State of Andhra Pradesh, AIR 1962 SC 1788.
[43] Thimma v. State of Mysore, AIR 1971 SC 187.
[44] The Frisk Criminal Procedure Act,1973, §100 (4).

A.5 Failure of prosecution to prove the guilt of the accused beyond reasonable doubt supports the accused's version on preponderance of probability

17. It is most humbly submitted that where a party fails to call as his witness the principal person involved in the transaction who is in a position to give a first-hand account of the matters of controversy and throw light on them, it is legitimate to draw an adverse inference against the party who has not produced such a principal witness.[45]. Non production of an important witness is fatal to the prosecution.[46] and casts serious reflection on the prosecution story and also, justifies the court in drawing an adverse inference against the prosecution under section 114 (g) of FPC[47].

18. It is submitted that in the instant case the state has dropped guard as a witness, whose examination would have thrown light on the controversy of the appellant parting Lionel's company and veracity of his statement under section 313 FCrPC[48] and has failed to record any other evidence on the point in issue.[49] The non-explanation by the State as to its failure to produce guard or non-examination of such a material witness [50]only throws doubt over the prosecution case[51] leaving room for the court to draw an adverse inference. It is further submitted that the public prosecutor must not take the liberty to "pick and choose" his witnesses, as he "must be fair to the court, and therefore, to the truth."[52]

19. It is most humbly submitted before this hon'ble court that the prosecution has not been able to discharge the burden of proof casted on them to prove their case beyond reasonable doubt. To that effect it is submitted that the accused only has to point towards preponderance of probability and not adduce evidence in his defence to prove his innocence.[53] It is humbly submitted that though the same cannot be taken as substantive evidence,[54] however, if the accused takes a defence after the prosecution evidence is closed, under section 313(1)(b) FCrPC the Court is duty bound under section 313(4) FCrPC to consider the same.[55] If there has been no consideration at all of the defence taken under section 313 FCrPC, in the given facts

[45] Sudhakar Syndicate Pvt Ltd, Bangalore v. HM Chandranshakariah, AIR 1981 Kant 245.
[46] State v. Bhimal Singh, 1985 All LJ 1160, 1163.
[47] The Frisk Evidence Act, 1872, §114 (g).
[48] The Frisk Criminal Procedure Act,1973, §313 (2).
[49] Pandurang v. Ramchandra, AIR 1981 SC 2235.
[50] State of Uttar Pradesh v. Rajju AIR 1971 SC 708.
[51] Bir Singh v. State of Uttar Pradesh AIR 1978 SC 59.
[52] Rohtash Kumar v. State of Haryana (2013) 14 SCC 434.
[53] Hate Singh Bhagat Singh v. State of Madhya Bharat AIR 1953 SC 468.
[54] Munna Kumar Upadhyaya v. The State of Andhra Pradesh Through Public Prosecutor, Hyderabad, Andhra Pradesh AIR 2012 SC 2470.
[55] Reena Hazarika v. State of Assam AIR 2018 SC 5361.

of a case, the conviction may well stand vitiated.[56] It is submitted that in the present case the trial court has blatantly disregarded the accused's stand under section 313 and have not taken it into consideration while concluding conviction against the appellant. The very fact stated in his statement under section 313 speaks a lot about the situation in which Cristo parted the company of Lionel and to our mind a solemn duty is cast on the court in dispensation of justice to adequately consider the defence of the accused taken under Section 313 FCrPC.

20. An accused has been entitled to benefit of doubt and acquittal- where the accused can show a preponderance of probability in his version either from documents or evidences,[57] where there are infirmities in holding of identification proceedings, [58] where but for raising a very strong suspicion against the accused, the prosecution has not succeeded in proving the offence beyond reasonable doubt,[59]where the accused has been implicated due to enmity,[60]where there is doubt as regards the presence of the accused at the scene of occurrence.[61]

21. The FEA 1872 does not contemplate that the accused should prove his case with the same strictness and rigour as the prosecution is required to prove a criminal charge. In fact, it is sufficient if the accused is able to prove his case by the standard of preponderance of probabilities as envisaged by section 105, FEA 1872, as a result of which he succeeds not because he proves his case to the hilt, but because probabilities of the version given by him throws doubt on the prosecution case and, therefore the prosecution cannot be said to have established the charge beyond reasonable doubt[62]. Thus even a convicted accused is entitled to credence, if his testimony is otherwise straightforward and believable.[63] Shifting the onus on the accused under *section 106, FEA* cannot be invoked to make up for the inability of the prosecution to produce evidence of circumstances pointing to the guilt of the accused.[64] Since the prosecution has failed to prove the guilt of the accused through chain of circumstantial evidences, no duty is cast on the accused- appellant to prove his innocence.[65]

[56] Sujit Biswas v. State of Assam AIR 2013 SC 3817.
[57] State of Maharashtra v. PC Jaishah 1980 FA 247.
[58] Rajjan v. State (1980) 17 All Cr C 221.
[59] State of Maharashtra v. Sripad (1980) 1 FAV 229 (Bom).
[60] Uma Shankar v. State of Uttar Pradesh AIR 1979 SC 1456.
[61] Re Subramania and Ors (1979) Mad LJ (Cr) 546 (Mad).
[62] Sri Rabindra Kumar Dey v. State of Orissa AIR 1977 SC 1970.
[63] Murari v. State 1988 All Cr R 556.
[64] Sir John Woodroffe & Syed Amir Ali, Law of Evidence, (LexisNexis, 21st edn.,2020).
[65] Krishna Reddy v. State, (1992) 4 SCC 45.

B ISSUE 2: THE ESSENTIAL INGREDIENTS OF SECTION 299/300 & 201 OF THE FPC HAVE NOT BEEN MET IN THE FACTS AND CIRCUMSTANCES OF THE INSTANT CASE

22. It is most humbly submitted before this Hon'ble HC that so far as is given to the definition u/s 299/300 of FPC, the offence is described to be the *causing* of death by doing an *act* with at least the knowledge or intention in the actor that his act is likely to cause death. In determining the nature of the offence, regards then must be had to the essential elements which are common to all the offences related to homicide: (a) the mentality of the accused (b) the nature of his act, and (iii) its effect upon the human victim.[66] It is submitted that it is a duty casted on the prosecution that before he seeks to prove that accused is the perpetrator of the murder, it must be established that homicidal death has been caused. The findings that death was caused by a person is not, therefore, conclusive as pointing to any crime. For that purpose other elements are necessary. It is submitted that the fact that death, caused by a person may or may not be a crime, and if a crime it may not amount to homicide unless there is present the all-essential element of criminality. Further, it is submitted that the death of Lionel should be clearly connected with the act of violence by Cristo, not merely by chain of causes. Moreover, the failure of the prosecution to prove the existence of any offence with respect to Lionel's death strikes down the probability of commission of an offence under section 201 of FPC. The trial court has failed to justify the conviction of Cristo u/s 299/300 and 201 as he has not committed any act, whatsoever of causing bodily injury or to screen himself from the legal punishment.

B1 <u>Performance of an 'act' is quintessential to prove the offence under section 299/300 of FPC</u>

23. It is humbly submitted that the foremost requirement under sec. 299/300 of FPC is performance of a deliberate act by the perpetrator. The question to be considered at the first stage would be, whether the accused has done an act by doing of which he has caused the death of another. Proof of such causal connection between the act of the accused and the death leads to the second stage for considering whether the act of the accused amounts to "culpable homicide" as defined in Sec. 299. If answer to this question prima facie is found to be in affirmative, the stage for considering the operation of Sec. 300, is reached. This is the stage where courts should determine whether

[66] Dr. Hari Singh Gour, Penal Law of India, (Law Publishers India Pvt Ltd, 11th edn.,2003).

the facts proved by the prosecution bring the case within the ambit of definition of murder under sec 300.

24. It is humbly submitted that in the instant case in order to prove guilt of Cristo the connection between the act of Cristo and the death of Lionel caused thereby must be direct and distinct; and not too remote based on some superficial circumstances. The nature of the connection between the act and the death as drawn by prosecution is in itself obscure. It is submitted that if the same is obscured by the action of concurrent causes, or if the connection is broken by intervention of subsequent cause the requirement of existence of an act under sec. 299/300 is not fulfilled.[67]

B2 Absence of mens rea discourages the conclusion of conviction for offence u/s 299/300

25. It is humbly submitted that intent and knowledge in the ingredients of the sections 299/300 of FPC,1860 postulate the existence of a positive mental attitude and this mental condition is the special mens rea necessary for the offence. The intention or knowledge necessary in order to render culpable homicide must be clearly proved by the prosecution, which can usually be done by proof of circumstances. As held in catena of judgements the offence involves the doing of an act (which term includes illegal omissions) (a) with the intention of causing death, or (b) with the intention of causing such bodily injury as is likely to cause death, or (c) with the knowledge that the act is likely to cause death.[68] If death is caused in any of these three circumstances, the offence of culpable homicide is said to be committed.[69] Further it is submitted that intention is proved by or inferred from the acts of the accused and the circumstances of the case.
26. It is most humbly submitted that a man's intention is a question of fact and can be gathered from his acts. In deciding the intention of the accused, the court may consider the nature of the weapon used, the number of blows administered, the force used by the assailant etc. But in the instant case the prosecution has failed miserably in proving the guilty intention of the accused. Further it is submitted that in the course while convicting an accused, first, the investigation must establish quite objectively that the bodily injury is present; secondly, the nature of the injury must be proved.[70] These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that bodily injury, that is to say that it was not accidental or incidental or that some other kind of injury was intended. Once these three elements are proved to be present, the inquiry proceeds further and, fourthly, it must be proved that injury of the type,

[67] Ratanlal & Dhirajlal, The Indian Penal Code, (Wadhwa Nagpur, 20th edn., 2006).
[68] Ratanlal & Dhirajlal, The Indian Penal Code, (Wadhwa Nagpur, 20th edn., 2006).
[69] Anda v. State of Rajasthan, AIR 1966 SC 148.
[70] State of Orissa v. Ratnakar Sahu, 1979 47 Cut LT 439 (445)

described, made up of the three elements set out above, is sufficient to cause death in the ordinary course of nature.[71]

27. In a case of murder the recovery of weapon with which the injury may have been inflicted on the deceased is one of the important factors to bring home the charge of offence under section 302. But in the instant case where the weapon used, as contended by the prosecution, is not discovered, it is a question of consideration whether the intention was really to cause death. At the same time the counsel from the side of appellant humbly submits that it will be unsafe to convict Cristo for murder when, the investigation objective has not been accomplished as there has been no evidence on record that concludes if the injury sustained by the deceased is homicidal in nature let alone the same has been caused by malafide intention of Cristo. It is necessary for the Hon'ble HC as appellate court to critically scrutinize the evidence in detail as being the final court of fact.[72] The situation in hand compels the Hon'ble Court to rethink that if at all there is an offence committed here, the facts and circumstances in hand categorise the same as an offence of culpable homicide or murder, where the objective investigation is left undone and the injury or the cumulative effect of injury is highly insufficient to cause death in ordinary course of nature.

B3 Existence of an offence is primary to prove guilt under sec. 201 of FPC

28. It is most humbly submitted that section 201 of FPC is designed to penalise attempts to frustrate the course of justice.[73] It deals with two offences: (a) Causing the disappearance of an offence committed, with the intention of screening the offender from legal punishment, (b) Giving false information respecting an offence committed with the intention of screening the offender from legal punishment. In either case the intention must be to screen the offender.[74] Like any other offence there are necessary ingredients for implicating charges on the accused under this provision. That is to say: (i) an offence has been committed; (ii) the accused knows or has reason to believe that the offence has been committed;(iii) with such knowledge or belief the accused has: (a) caused any evidence of the commission of the offence to disappears, or (b) given any information respecting the offence, which he knew or believed to be false; and (iv) the accused has done so with the intention of screening the offender from legal punishment;[75] and (v) if the charge be of an aggravated form, as in the given case, it must be proved further that the offence

[71] Ratanlal & Dhirajlal, The Indian Penal Code, (Wadhwa Nagpur, 20th edn., 2006).
[72] Badan Singh v. State of M.P. AIR 2004 SC 26.
[73] Emperor v. Rino Sobedar (1912) 13 Cr LJ 721.
[74] Re Kottayan (1960) Cr LJ 65.
[75] Vijaya v. State of Maharashtra AIR 2003 SC 3787.

in respect of which the accused did as in (c) and (d) was punishable with death, or with imprisonment for life or imprisonment extending to ten years.[76]

29. Further it is humbly submitted that in the instant case the accused has been wrongfully implicated under the charges of section 201. As pointed out by the Supreme Court in ***Palvinder Kaur v State of Punjab***,[77] In order to establish the charge under this section, it is essential to prove that an offence was committed, mere suspicion that it has been committed is not sufficient. It is submitted that in the instant case the prosecution has failed to bring cogent evidence on record to form a chain of circumstance pointing towards guilt of the appellant and further to conclude that the death of Lionel was homicidal. At this juncture reference shall be made to a case wherein, lady was charged under section 302 and 201 of FPC on the allegations that she killed her husband and caused the disappearance of his body. The evidence proved only that the husband had died and that his body was found in a trunk and was discovered in a well. It was held that as there was no evidence to show the cause of the death or the manner or circumstance in which it came about, the accused could not be convicted even under this section.[78]

30. Furthermore, it is humbly submitted that another element of the offence under section 201 is 'may have known or may have reason to believe that an offence has been committed' which is not enough to warrant a conviction under this section. Where there is a possibility that the accused may not have known, or may not have had reason to believe, and he may have had only a suspicion that an offence had been committed, he is entitled to the benefit of doubt. In the instant case the prosecution's stand is merely based on suspicion since there is no belongings whatsoever at or near the crime scene that could be fastened with the accused. To that effect there must be direct and legal evidence to prove charge u/s 201, it cannot be presumed, as a matter of legal proof, that they must be deemed to have knowledge of the murder of the deceased,[79]and thus the accused should be acquitted of the charge under section 201.The prosecution has heavily relied on the contents of the investigation report regarding Cristo identifying the spot where he allegedly dumped Lionel's dead body. To that effect it is submitted that the conduct of the accused in pointing out the spot, where the dead body was, would show, at the most, that he had knowledge that a dead body was lying there. That knowledge could be

[76] Koshali Puranchander Rao & Anr v. The Public Prosecutor, Andhra Pradesh AIR 1975 SC 1925.
[77] Palvinder Kaur v. State of Punjab AIR 1952 SC 354.
[78] R.A. Nelson's, Indian penal Code, (New Delhi LexisNexis Butterworths, 9th edn.,2003).
[79] Nathu v. State of Uttar Pradesh AIR 1979 SC 1245.

acquired in various ways. Without any further evidence, it is not sufficient to hold that the dead body was thrown there by him.[80]

31. It is humbly submitted that for the application of this section what is caused to disappear must be evidence of the commission of the offence.[81] In the instant case, the prosecution did not even attempt to show, much less to prove, that any offence had been committed by anyone in respect of the death of the deceased, which should have been the foundation for establishing the offence under section 201 of FPC.

[80] Dadulla Dhanukai Ram v State of Madhya Pradesh (1962) 2 Cr LJ 690.
[81] Queen-Empress v. Lall 7 ILR All 749.

PRAYER

WHEREFORE IN THE LIGHT OF THE ISSUES RAISED, ARGUMENTS ADVANCED AND AUTHORITIES CITED, IT IS HUMBLY PRAYED THAT THIS HON'BLE COURT MAY BE PLEASED TO:

Set aside the impugned judgement/order as furthered by the Trial Court of District Calumny convicting the appellant under section 299/300 and 201 of Frisk Penal Code on the ground that:

1. Prosecution herein the Respondent has failed to establish its case against the accused beyond reasonable doubt and;
2. The ingredients of offence under section 299/300 and 201 of Frisk Penal Code is not made out.

And pass any order, direction or relief that this Hon'ble Court may deem fit in the interests of justice, equity and good conscience.

All of which is humbly prayed,
Counsels for the Appellant.