Supreme Court of India
Arjun Marik vs State Of Bihar on 2 March, 1994
Equivalent citations: 1994 SCC, Supl. (2) 372 JT 1994 (2) 627
Author: F Uddin
Bench: Faizan Uddin (J)

PETITIONER:
ARJUN MARIK

Vs.

RESPONDENT:
STATE OF BIHAR

DATE OF JUDGMENT02/03/1994

BENCH:
FAIZAN UDDIN (J)
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FAIZAN UDDIN (J)
ANAND, A.S. (J)

CITATION:
1994 SCC Supl. (2) 372 JT 1994 (2) 627
1994 SCALE (1)821

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by FAIZAN UDDIN, J.- The judgment delivered in this appeal will also govern the disposal of Criminal Appeal No. 368 of 1992 which is an appeal preferred through Jail Superintendent by the same convicts against the same judgment which is under challenge in Criminal Appeal No. 367 of 1992.

2.Appellants 2 and 3, namely, Mulo Marik and Bansi Marik are sons of appellant 1, Arjun Marik. The three appellants were charged and tried for murders of Sitaram, his wife Smt Kamakhya Devi and their granddaughter Sugwa Kumari in their house situated at Chaitanya Nath, Jajware Path, Deoghar within the jurisdiction of police station, Deoghar (State of Bihar), in the intervening night of 19-7-1985 and 20-7-1985. It was alleged that the appellants after committing murders of three persons named above committed the robbery of the ornaments, cash and other belongings of the deceased which during the course of investigation were seized from their possession from their house on 20-7-1985. The appellants were, therefore, charged and tried under Sections 302, 394 and

411 of the Penal Code. Learned Additional Sessions Judge, Deoghar convicted the three appellants under Section 302 of the Penal Code and sentenced them to death. The appellants were also convicted under Sections 394 and 411 of the IPC for which they were sentenced to suffer rigorous imprisonment for 10 years and 3 years respectively. The substantive sentences awarded under Sections 394 and 411 were directed to run concurrently. After the conviction and sentence of death the learned Additional Sessions Judge made a reference to the High Court for confirmation of the death sentence. At the same time the appellants also challenged their conviction and sentence in an appeal before the High Court. The criminal appeal preferred by the appellants was dismissed whereas the sentence of death awarded by the learned Additional Sessions Judge was confirmed by the High Court. On special leave being granted, the three appellants named above have preferred this appeal.

3.The prosecution case as it emerges from a Fard-beyan, Exh. 3 made by the informant, Surnath Jha, PW 6 one of the nephews of the deceased Sitaram is that deceased Sitaram and his deceased wife, Kamakhya Devi were issueless and, therefore, they had kept with them their granddaughter deceased Kumari Sugwa. The deceased Sitaram was carrying moneylending business and amongst others had advanced loan to the appellant, Arjun Marik. On 19-7-1985 between 7 and 8 p.m. the appellant Arjun Marik accompanied with his two sons appellants 2 and 3, namely, Bansi Marik and Mulo Marik came to the house of Sitaram to raise further loan to purchase buffaloes. The deceased Sitaram was not agreeable to advance him further loan as he had advanced him Rs 10,000 about two months back for purchasing the buffaloes. Sitaram, therefore, insisted upon the appellant Arjun Marik to settle the old accounts first. But Arjun Marik continued to pursuade him to advance the loan on which Sitaram told him that his accounts would be settled next morning. It is said that the three appellants stayed at the house of the deceased Sitaram and the deceased Kumari Sugwa served them meals in the night. The three appellants were lodged in a room on the upper storey of the house for the overnight stay while Sitaram slept on a cot in the verandah adjacent to the said room. The deceased Kamakhya Devi, wife of Sitaram and his granddaughter, Kumari Sugwa slept in the verandah on the ground floor. Thereafter, the informant Surnath Jha, PW 6 went away to his own house situated just adjacent to the house of Sitaram.

4.Next day early morning at about 6 a.m. when Kumari Manju Devi, PW 7 and some other girls went to the house of Sitaram to fetch water from the water tap they witnessed Smt Kamakhya Devi and Kumari Sugwa lying dead in a pool of blood and, therefore, they raised an alarm attracting Murlidhar Jha, PW 1, Govind Charan Jha, PW 2, Sushil Prasad Jha, PW 4, Surnath Jha, PW 6 and Mangla Charan Jha. They also found the dead bodies of Kamakhya Devi and Sugwa lying there. Then they went up to the first floor and found that Sitaram was also lying dead and the three appellants were found absent from the house. The witnesses also found that the lock of the room on the ground floor and the lock of the box inside the room were found broken and articles were lying scattered. Some valuable articles, ornaments and currency notes worth about Rs 14,000 and some clothes and papers were found missing. In the meanwhile the police of the police station, Deoghar received intimation of the incident and, therefore, Doman Razak, PW 10 the Officer in charge of Deoghar Police Station arrived at the place of occurrence and recorded Fard-beyan, Exh. 3 of Surnath Jha at about 8 a.m. on 20-7-1985 at the place of occurrence itself.

5.Since Surnath Jha, PW 6 in Fard-beyan, Exh. 3 had stated the presence of the appellants at the house of the deceased who had overstayed there on the night of occurrence and were alleged to be missing from the house and, therefore, on 20-7-1985 at about 3 p.m. the Police Inspector, Doman Razak raided the house of the appellant, Arjun Marik situated in Village Bara within the jurisdiction of police station, Mohanpur, District Deoghar. During the raid it is said that Arjun Marik made his escape good from his house but then the appellants 2 and 3, namely, Bansi and Mulo were arrested and during the course of interrogation they are said to have produced a plastic bag containing the stolen ornaments, currency notes and other belongings said to have been stolen from the house of the deceased Sitaram. The said articles were seized as per seizure memo, Exh. 5.

6.The articles and currency notes seized from the house of Arjun Marik were put to test identification held by Upendra Sharma, PW 11, Circle Officer, Deoghar on 29-8-1985 in which the said ornaments, articles and currency notes are said to have been correctly identified by Murlidhar Jha, PW 1 and Surnath Jha, PW 6, the two nephews of the deceased, to be the articles and cash belonging to the deceased Sitaram and stolen from the house of Sitaram.

7.At the trial the three appellants adjured their guilt and pleaded to be tried. They took the plea that they were falsely implicated and the articles seized from the house of the appellant, Arjun Marik belonged to him alone and in support of their plea the appellants adduced evidence in their defence.

8.After evaluating the circumstantial evidence adduced by the prosecution the learned Additional Sessions Judge recorded the finding that the chain of circumstances was complete which established the guilt against the three appellants and, therefore, convicted them as said above. While awarding the death sentence the learned Additional Sessions Judge was of the view that the appellants committed the three murders under a pre-arranged and well-thought plan and such a cold-blooded murder fell within the category of rarest of the rare cases in which there can be no place for mercy. In appeal the High Court agreed with the view taken by the learned trial Judge and recorded its own findings that the circumstances which are cogently established and proved against the appellants are that the appellant Arjun Marik enjoyed the confidence of the deceased Sitaram; the three appellants had arrived at the house of Sitaram on 19-7-1985 at about 8 p.m. to raise another loan from him; and the three appellants stayed in a room of the house of the deceased Sitaram for the night adjacent to the verandah where dead body of Sitaram was found next morning; the appellants were found absent from the house of occurrence next morning when murders of Sitaram, Kamakhya Devi and Sugwa were detected by the witnesses; on 20-7-1985 at about 5 or 5.30 a.m. appellant Arjun Marik was seen in his village by Ratan Kumar, PW 8, returning with a bag in his hand from Deoghar; during the raid of appellant's house on 20-7-1985 at about 3 p.m. by the investigating officer, Doman Razak, PW 10, the appellants Bansi and Mulo produced the stolen articles which were identified by the witnesses and that the appellants made a false claim that the seized articles belonged to them. On these findings the High Court rejected the appellant's appeal and affirmed the conviction of the appellants and allowed the reference by confirming the death sentence against which these two appeals have been preferred.

9.There is no dispute that Sitaram Jha, his wife Smt Kamakhya and their granddaughter, Kumari Sugwa all died homicidal deaths. Dr Narendra Narayan Das, PW 9 performed an autopsy over their

dead bodies and stated that the injuries found on their person were anti-mortem and that they died homicidal death.

10.Learned counsel for the appellants first contended that the motive for the crime is said to be the greed for wealth and reluctance of deceased Sitaram to advance further loan to the appellant, Arjun Marik but in fact there is no material on record either to suggest that the deceased Sitaram was carrying on moneylending business or that the appellant Arjun Marik was indebted to him or ever took any sums on loan from the deceased. In this connection it may first be pointed out that mere absence of proof of motive for commission of a crime cannot be a ground to presume the innocence of an accused if the involvement of the accused is otherwise established. But it has to be remembered that in incidents in which the only evidence available is circumstantial evidence then in that event the motive does assume importance if it is established from the evidence on record that the accused had a strong motive and also an opportunity to commit the crime and the established circumstances along with the explanation of the accused, if any, exclude the reasonable possibility of anyone else being the perpetrator of the crime then the chain of evidence may be considered to show that within all human probability the crime must have been committed by the accused.

11.In the present case the prosecution in order to prove moneylending business of Sitaram has adduced the evidence of Murlidhar Jha, PW 1, Gobind Charan Jha, PW 2, Sushil Prasad Jha, PW 4 and Surnath Jha, PW 6, who are all nephews of the deceased Sitaram. Murlidhar Jha, PW 1 made a bald statement in para 7 of his deposition that deceased Sitaram was doing moneylending business and had lent more than Rs one lakh but at the same time he admitted that he had no knowledge if the deceased Sitaram had moneylending licence or not and that he had never seen any Bahi-khata with him for lending the money. He deposed that at the time of death of Sitaram, Bhutka Marik, Mina, Mahabir Shah, Mural Panda and others were his debtors but he cannot say how much loan was advanced to these persons. Similarly Surnath Jha, PW 6 in para No. 9 deposed that deceased Sitaram had a moneylending licence of Rs 5000 but his Mahajani business was of about Rs one lakh. He further stated that at the time of his death he had advanced loans to the tune of Rs 70 to 80 thousand and apart from the accused, one Mudal Jha, Mahabir Shah, Bankey Shah etc. were his debtors but surprisingly enough none of these persons were examined to show that Sitaram was doing moneylending business. Not only this but Surnath Jha, PW 6 goes to the extent to say that deceased Sitaram used to keep Bahi-khata and sometimes advanced loan on written hand notes but neither any hand notes nor Bahi-khata said to have been maintained by the deceased were produced to establish the fact that he was carrying on moneylending business. As regards the evidence of Gobind Charan Jha, PW 2 on this point he simply made a bald statement that Sitaram had advanced about more than 50,000 rupees on interest but did not give any details as to whom the sums were advanced and to what extent.

12. Sushil Prasad, PW 4, is yet another witness who deposed that the appellant Arjun Marik was on visiting terms with deceased Sitaram since about 30 years and used to borrow money from him. He also deposed that about one-and-a-half month prior to the occurrence Sitaram had advanced 10,000 rupees to the appellant Arjun Marik for purchasing two buffaloes and at that time two traders were also there with Arjun Marik from whom Arjun Marik had purchased the two buffaloes and each one of them was paid Rs 5000 by Arjun Marik. But this statement made in the court is clearly an

improvement from his police statement recorded by investigating officer, Doman Razak, PW 10 who made a categorical statement that Sushil Prasad, PW 4 had not stated that the appellant Arjun Marik was visiting the place of Sitaram for the last 30 years and used to take money from him on loan. He also deposed that Sushil Prasad, PW 4 did not disclose to him that one-and-a-half month before the occurrence Sitaram had advanced Rs 10,000 to the appellant, Arjun Marik for purchasing two buffaloes and that Arjun Marik had paid Rs 5000 to each of the two traders who were present there with Arjun Marik. Thus, from the evidence discussed above it is difficult to conclude that the deceased Sitaram was carrying on moneylending business and the appellant Arjun Marik used to take loan from him. It is, therefore, not possible for this Court to hold that the appellant could have entertained any idea or motive to do away with the deceased Sitaram with a view to wash off the alleged loans against him.

13.Learned counsel for the appellants next contended that all the material prosecution witnesses are the close relatives of the deceased Sitaram being his nephews and they are highly interested witnesses and, therefore, their evidence should not be accepted in proof of various circumstances with regard to the alleged commission of offence by the appellants. In this connection we may point out that mere relationship of the witnesses cannot be the sole basis to discard the evidence if it is otherwise found to be believable and trustworthy. However, when the Court has to appreciate the evidence of any interested witnesses it has to be very careful in weighing their evidence. In other words the evidence of an interested witness requires greater care and caution while scrutinising his evidence. The Court has to address to itself whether there are any infirmities in the evidence of such a witness; whether the evidence is reliable and trustworthy and whether the genesis of the crime unfolded by such evidence is probable or not. If the evidence of any interested witness or a relative on a careful scrutiny is found to be consistent and trustworthy, free from infirmities or any embellishment there is no reason not to place reliance on the same.

14.In Masalti v. State of U.P.I it was observed that it is perfectly true that in a murder trial when an accused person stands charged with the commission of an offence punishable under Section 302, he stands the risk of being subjected to the highest penalty prescribed by the IPC; and naturally judicial approach in dealing with such cases has to be cautious, circumspect and careful. In dealing with such appeals or reference proceedings where the question of confirming a death sentence is involved the Court has to deal with the matter carefully and to examine all relevant and material circumstances before upholding the conviction and confirming the sentence of death.

15.We are also aware of the fact that as a rule of practice, in appeal against conviction for offence of murder Supreme Court is slow to disturb a concurrent finding of fact unless it is shown that the finding is manifestly erroneous, clearly unreasonable, unjust or illegal or violative of some fundamental rule of procedure or natural justice. Further it has also to be remembered that in a murder case which is cruel and revolting it becomes all the more necessary for the Court to scrutinise the evidence with more than ordinary care lest the AIR 1965 SC 202: (1965) 1 Cri LJ 226 shocking nature of the crime might induct instinctive reaction against a dispassionate judicial scrutiny of the evidence in law.

16.It is true that in the present case the material witnesses are all relatives of the deceased and, therefore, having regard to the rule of caution we shall scrutinize their evidence with greater care and caution.

17.Learned counsel for the appellants then contended that the Fard-beyan Ext. 3 made by Surnath Jha, PW 6 and the FIR said to have been recorded on that basis have not been lodged/recorded at the time and hour mentioned in the Fard- beyan and FIR but much later and in any case after due deliberations and specially after the raid of the house, arrest of the appellants Mulo and Bansi and seizure of the articles from their house belonging to the appellants themselves and that the same are fabricated piece of evidence. Learned counsel for the appellants drew support to the aforesaid argument from the fact that even though the investigating officer, Doman Razak, PW 10 had received information of the crime in early morning of 20-7-1985 for which he had made an entry in Roznamcha Sanha yet the same was suppressed and not produced in the Court as it did not indicate the presence of the appellants in the house of Sitaram on the night of occurrence and even no doubt against the appellants was expressed, therefore, the investigating officer preferred to obtain Fard-beyan at a later stage after raid and seizure of articles implicating the appellants falsely. He submitted that his argument further finds support from the fact that the FIR was not sent to the Magistrate concerned forthwith as required by Section 157 of the Code of Criminal Procedure but it is said to have been despatched after considerable delay on 22-7-1985 and that too through a special messenger without disclosing the name of that messenger and without putting on record the material to show that the said Fard-beyan/FIR was received by the Magistrate concerned or not even on 22-7-1985. Learned counsel for the appellants submitted that Fard-beyan contained exactly the same articles with the same details and description as are given in the seizure memo of the articles Ext. 5 seized from the house of the appellants clearly indicating that Fard-beyan was recorded only after the seizure of articles on 20-7-1985 after 3.00 p.m. and these facts and circumstances cast a serious doubt in the prosecution case and render the prosecution story false and fabricated.

18.In order to appreciate the aforementioned contentions advanced by the learned counsel for the appellants we shall now minutely and closely scrutinise the prosecution evidence on the points referred to above.

19.Manju Devi, PW 7 is a witness who resided near the house of the deceased and related to the deceased. Her daily routine was to fetch water early morning from a tap installed in the courtyard of the house of Sitaram. She and I some other girls of the locality who had accompanied her to fetch water on the day of occurrence were the first to witness the dead bodies of Smt Kamakhya Devi and Kumari Sugwa in the verandah of the ground floor and, therefore, raised an alarm attracting several witnesses including Murlidhar Jha, PW 1 and Surnath Jha, PW 6 amongst others. Murlidhar Jha, PW 1 deposed in para 13 of his deposition that when he saw the dead bodies at about 5.00-5.30 a.m. he entertained a doubt on the appellants at that very moment. He goes on to state in the same para that the police station was at a distance of about 400-500 yards from the place of occurrence and Surnath Jha, PW 6 had gone to the police station at about 7 o'clock in the morning and that prior to that no information had been lodged with the police station. Thereafter, the Police Inspector arrived at the place of occurrence at about 7.30 a.m. and after about 20 minutes this witness left the place of

occurrence. Gobind Charan Jha, PW 2 another nephew of the deceased also deposed in para 9 of his deposition that Surnath Jha, PW 6 was going to the police station. Surnath Jha, PW 6 who is said to have given Fard-beyan to the Police Inspector at the place of occurrence on 20-7-1985 at about 8.00 a.m. himself deposed in para 1 of his deposition that having seen the three murders, broken lock and articles scattered in the room he thought it necessary to inform the police and then he went to inform the police about this occurrence.

20.Now coming to the evidence of the investigating officer, Doman Razak, PW 10 we find that he deposed in para 3 that on 20-7-1985 at about 7.30 a.m. he heard that two/three persons have been murdered near the Dharamshala and on hearing this rumour he recorded Station Diary Sanha No. 349 on 20-7-1985 in the diary of the police station and then along with Sub-Inspectors K.N. Singh and R. Singh and some Police Constables went to the house of Sitaram where he recorded Fard-beyan of the informant, Surnath Jha, PW 6. This, in our opinion, is totally a made up and unfounded story and is not free from serious doubt for the reasons which we shall record hereinafter.

21.There is positive evidence that when the girl Manju Devi, PW 7 saw the dead bodies raised an alarm and immediately thereafter three/four nephews of the deceased arrived at the place of occurrence in the early morning at about 5.30 a.m.

22.As seen above the police station was at a distance of only 400-500 yards from the place of occurrence. The evidence discussed above also goes to show that Surnath Jha had gone to the police station. It is, therefore, quite improbable that Surnath Jha having gone to the police station would not have lodged the report there and would have preferred to come back to the place of occurrence to make Fard-beyan later at 8.00 a.m. The Police Inspector, Doman Razak, PW 10 admits that he had received the intimation about the three murders and that he had recorded the same in the Roznamcha Sanha but has not produced the said entry of the Roznamcha Sanha which further deepens the doubt for which adverse inference in the natural consequence. Further a perusal of evidence of Anil Kumar Jha, PW 3 who is a witness to the inquest reports which were prepared at the place of occurrence on 20-7-1985 between 9.00 and 9.30 a.m. and that in all the three inquest reports "P.S. Case No. 112 of 1985, dated 20-7-1985" was written. It shows that the Police Inspector had registered the offence in the police station on the basis of the information received about the crime before leaving for the place of occurrence otherwise there was no question of recording the case No. on the inquest reports. It appears that the Sanha report was purposely not produced in the Court as it did not reflect any doubt on the appellants to be the perpetrators of the crime and it was at a later stage after deliberations that it was found that the appellants were the frequent visitors to the house of Sitaram and used to take loan from him and, therefore, on the basis of doubt the house of appellants was raided at 3.00 p.m. on 20-7-1985 and after having effected seizure of articles from that house, Fardbeyan, Ext. 3 was obtained from Surnath Jha, PW 6 in which doubt was expressed on the appellants. This is one part of the suspicious story of the prosecution case.

23.If we look to the evidence regarding raid and seizure that again is not free from doubt. It may be pointed out that the raid was conducted in a clandestine manner by the investigating officer, Doman Razak, PW 10. He stated that he along with the two Sub-Inspectors, Thakur and D.N. Paswan,

Hawaldar Aftab Khan and four armed Constables went to the house of the accused in Village Bara within the jurisdiction of the police station, Mohanpur for purposes of arresting the accused and raid their house. He arrested the appellants, Bansi and Mulo Marik but the appellant Arjun Marik is said to have ran away and strangely enough the police party could not chase and apprehend him. In the course of inquiry the two arrested appellants are said to have produced the ornaments and cash kept in a concealed plastic bag in the house. The Inspector compared the articles mentioned in FIR and then seized them under seizure memo Ext. 5. He took the signature of the accused/appellants Bansi Marik and Mulo Marik as witnesses to the seizure because according to the Police Inspector, Doman, no person of the village was ready to stand as a witness to the seizure. It is surprising to note that he was unable to give out the names of any of the villagers who had declined to stand as a witness to the seizure. He made no effort to take any other witness from the nearby villages which are very closely situated. Not only this Inspector Doman did not even inform or take into confidence the Station House Officer of the police station, Mohanpur within whose jurisdiction the house of the appellants was situated. The most surprising part of the seizure of articles from the house of the appellants is the fact that they are exactly of the same number, description and details as are mentioned in Fard-beyan Ext. 3 and the FIR which was recorded on the basis of Fard-beyan. Even the weight of the ornaments and the cash seized from the house of the appellants tally with the weight mentioned in Fardbeyan and the FIR, although Surnath Jha, PW 6 who gave Fard-beyan mentioning the details of the stolen articles and cash stated that he had never counted the money of his uncle nor touched it. He had simply seen the money in the box about two months prior to the occurrence and at that time there were 14,000 rupees in the box. Surnath Jha also deposed in para 20 of his deposition that he had never weighed the ornaments of her aunt and he had mentioned the weight in Fard-beyan as his deceased aunt had told him the weight of ornaments. It is difficult to believe such a statement that the deceased will tell the weight of the ornaments possessed by her and Surnath Jha wants us to believe that he remembered the weight of all these ornaments with the minutest details. This part of the story clearly gives an impression that neither Fard-beyan nor FIR were recorded till the police raided the house of the appellant, seized the articles at 3.00 p.m. and thereafter on the basis of the description of the articles seized, Fard-beyan and FIR were recorded. That may also explain as to why Bansi Marik and Mulo Marik were made the attesting witness. Probably they had not been named as accused till then. Thus, after a careful and close scrutiny with necessary caution and circumspection of the relevant evidence and material circumstances, we are of the view that the trial court as well as the High Court, both, ignoring the impact of all the inherent improbabilities and infirmities which are pointed by us in the foregoing paras, recorded the finding of guilt against the appellants which is manifestly erroneous and unreasonable.

24.The matter does not stop here. There is yet another serious infirmity which further deepens the suspicion and casts cloud on the credibility of the entire prosecution story and which has also been lost sight of by the trial court as well as the High Court and it is with regard to the sending of occurrence report (FIR) to the Magistrate concerned on 22-7-1985 i.e. on the 3rd day of the occurrence. Section 157 of the Code of Criminal Procedure mandates that if, from information received or otherwise, an officer in charge of police station has reason to suspect the commission of an offence which he is empowered under Section 156 to investigate, he shall forthwith send a report of the same to the Magistrate empowered to take cognizance of such offence upon a police report. Section 157, CrPC thus in other words directs the sending of the report forthwith i.e. without any

delay and immediately. Further, Section 159 CrPC envisages that on receiving such report, the Magistrate may direct an investigation or, if he thinks fit, to proceed at once or depute any other Magistrate subordinate to him to proceed to hold a preliminary inquiry into the case in the manner provided in the Code of Criminal Procedure. The forwarding of the occurrence report is indispensable and absolute and it has to be forwarded with earliest despatch which intention is implicit with the use of the word "forthwith" occurring in Section 157, which means promptly and without any undue delay. The purpose and object is so obvious which is spelt out from the combined reading of Sections 157 and 159 CrPC. It has the dual purpose, firstly to avoid the possibility of improvement in the prosecution story and introduction of any distorted version by deliberations and consultation and secondly to enable the Magistrate concerned to have a watch on the progress of the investigation.

25. But in the present case admittedly the report as alleged is said to have been despatched to the Magistrate concerned on 22-7-1985 by a special messenger, vide Ext. 2. It is, thus, clear that the report was not sent forthwith, in other words immediately and without delay as the incident had occurred in the intervening night of 19/20-7-1985 and according to Doman, PW 10 the officer in charge of the police station, the FIR was already recorded in the morning of 20-7-1985. If in fact the FIR was already recorded in the morning of 20-7-1985 there was no reason not to despatch the same to the Magistrate concerned till 22-7-1985. Though there is no material on record to show as to why delayed report was sent to the Magistrate on 22-7-1985 but the learned counsel appearing for the respondent-State submitted at the Bar that the investigating officer remained busy in the investigation on 20-7-1985 which was Saturday and since 21-7-1985 was Sunday the report was sent on Monday, 22-7- 1985. He submitted that in Bihar State even in murder cases FIR is never sent to the residence of a Magistrate on Sundays and holidays. If that be so, we are afraid such a practice can never be said to be healthy practice which renders the mandatory provision nugatory. If such a practice is prevalent it must be deprecated and it is high time that the authorities concerned should wake up and see that the provisions of Section 157 CrPC are complied with in letter and spirit.

26.Even if we ignore the question of delay there is no material on record to show that it was actually despatched and received by the Magistrate concerned and if so on what date and time. A mere note in the FIR itself that report was despatched by special messenger is not enough. There is no mention as to which Magistrate it was despatched. The evidence of investigating officer is totally silent about it. It is true that quite often there are valid reasons for the delay in the despatch of the first information report and it is not always a circumstance on the basis of which the entire prosecution case may be said to be fabricated, but it all depends on the facts and circumstances of each case where the circumstance of delay may lead to serious consequences. But in the present case as discussed above there are other circumstances discussed which cast a serious cloud on the prosecution case and this circumstance of delay in sending the FIR still hardens the suspicion and leads to the definite conclusion that the Fardbeyan and FIR both were recorded much later in point of time than the one as shown in the said documents and in any case in our considered opinion after the appellant's house was raided and seizure of the articles was effected.

27.This brings us to the evidence regarding the identification of the articles seized from the house of the appellant which is also not free from doubt. The articles were seized on 20-7-1985 but they were

put to test identification on 298-1985. No reason for this delay is forthcoming. The prosecution approached Upendra Sharma who at the relevant time was Circle Officer, Deoghar. The articles are said to have been identified by Murlidhar Jha, PW 1 and Surnath Jha, PW 6. The most surprising part of their evidence is that they go even to the length of identifying the currency notes which are said to have been stolen from the house of the deceased Sitaram. It is beyond comprehension as to how the currency notes could be identified by these witnesses. It may be pointed out here that all the articles said to have been seized from the house of the appellants are claimed by appellant 1, Arjun Marik as belonging to him and in support of his claim he has adduced evidence. The defence witness 2 is M.D. Mahto who is a cultivator of Village Bara where the appellants also reside. He deposed that the appellant Arjun Marik is a well to do person having about 150 to 200 bighas of land and owns about 40 to 50 cows and 15 to 16 buffaloes. Defence witness 3 is one Sahdeo Raut, resident of the same Village Bara and knows the family of appellant, Arjun Marik fully well. He also corroborated the statement of DW 1. Defence witness 4 is one Surya Narayan Poddar, resident of Village Kasai which is one-and-a-half kilometre away from Village Bara to which the appellants belong. DW 4 is a Goldsmith by profession. He stated that appellant Arjun Marik is known to him and he identified him in the Court. The witness deposed Arjun Marik has many cattles and produced 300 maunds of paddy. He further deposed that about 7/8 years back he had gone to the house of Arjun Marik to clean his ornaments and stated that he had cleaned one gold necklace, one nath, a silver hansuli, three pairs of mathias, two pairs of silver kara, one pair of silver payal, karanphool and balpatra. This evidence was led to show that appellant I was a man of means and status and he would have hardly resorted to such a criminal act as has been alleged against him.

28.Learned counsel for the appellants lastly contended that there is no convincing evidence to establish that these three appellants had approached the deceased Sitaram in the evening preceding the night of occurrence and that there was a huge gathering in the nearby temples and dharamshalas in the night of occurrence where hundreds of persons continued coming and going there and as the doors of the house of the deceased were open during the night and as the entrance on the ground floor of the house of the deceased remained open in the night someone may have entered the house, committed the crime and escaped with the belongings of the deceased and the appellants were implicated falsely on the basis of misplaced doubt. He further submitted that in fact the assailants were not known and, therefore, report to that effect without naming any one as culprit was lodged at the police station, Deoghar in which even the suspicion about the involvement of the appellants was not expressed and, therefore, that report was suppressed and, later on even when the Police Inspector, Doman Razak, PW 10 arrived at the place of occurrence the culprits were not known. It was at this stage that the speculations and deliberations as to who could be the miscreants who may have committed the crime, were thought of and merely on basis of misplaced doubts the house of the appellant was raided during which the articles belonging to the appellants were seized. So far as the manner in which the report was lodged, the reliability of the raid and seizure of the articles is concerned we have already dealt with the same in the earlier paras. As regards the question of the reliability of the evidence with regard to the visit of the appellants to the house of the deceased and their stay during the night of occurrence is concerned we shall examine the evidence in that behalf.

29.Murlidhar Jha, PW 1 is the first person who claims to have first seen the appellant on 19-7-1985 at about 8.00 p.m. going to the house of the deceased Sitaram. Murlidhar stated that he was coming to the main road through the lane of his house and on seeing Arjun Marik and his two sons asked them as to where they were going, to which Arjun Marik replied that he was going to Surnath Jha for taking money from him. But if we look to the statement of investigating officer, Doman Razak, PW 10 who recorded the police statement of this witness, we find that Murlidhar Jha, PW 1 never made such a statement to the police, vide paragraph 24 of Doman, PW 10. Not only this but it may be also pointed out that in his long statement Murlidhar does not anywhere disclose that at or about the said point of time when he saw the appellants in the lane, the witness Sushil Prasad, PW 4 had also arrived there. Whereas Sushil Prasad, PW 4 deposed in para 2 that on 19-7-1985 at about 8 in the evening when he was going through the lane in front of the house of deceased Sitaram, he saw Murlidhar Jha, PW 1 coming out of the lane on the road and Arjun Marik with two people entering inside the door of Surnath Jha. Arjun Marik greeted him and Sushil Prasad blessed him and Arjun Marik told him that the other two were his sons. When Sushil asked him as to why they did not go to their house that night, Arjun Marik replied that he had to settle his accounts with his Malik (meaning deceased Sitaram). This statement does not appear to be trustworthy at all for three reasons. Firstly, as if the appellants were only waiting for the arrival of this witness to come and see them entering the house of Sitaram. If Sushil Prasad saw them entering the door of Sitaram there was no occasion for Murlidhar, PW 1 to meet or talk to them. Sushil does not depose that Murlidhar had a dialogue with Arjun Marik as deposed by him. According to Murlidhar the appellant, Arjun had come to take further advance and not for settlement of any accounts. It was the deceased who was insisting for settlement of accounts first. Therefore, at that point of time when the appellants are said to be entering the house the question of settlement of account did not arise. Lastly the statement given by Sushil as stated above was not stated by him in his police statement, vide para 25 of the statement of the investigating officer, Doman, PW 10. Then comes Sumath Jha, PW 6 who deposed that the three appellants had stayed at the house of their uncle on the night of occurrence to whom food was served by deceased Sugwa and that he left for his house when the appellant and his uncle had slept in the upper storey and his aunt and niece Sugwa had slept in the verandah of the ground floor. But in cross-examination para 23 he stated that when he left for his house neither the appellants nor any of the inmates of the house had slept. The evidence of this witness has not been found to be trustworthy and consistent on other counts also.

30.As discussed earlier it has already been found by us that the Fard-beyan given by this witness which is shown to be given at 8 a.m. in fact appears to have been given some time after 3.00 p.m. after the raid and seizure of the articles from the house of the appellants and, therefore, it would not be safe to rely on this part of his statement also without corroboration which is not to be found. This brings us to the evidence of Ratan Kumar Singh, PW 8, the last witness on this point who is said to have seen the appellant, Arjun Marik at about 5-5.30 a.m. on 20-7-1985 somewhere near Joria of his Village Chhatami. He deposed that he met Arjun Marik on the way with a white colour plastic bag and asked him as to where from he was coming and Arjun Marik told him that he was coming from Deoghar and was having Khalli and Berun in the bag. This witness is resident of another village known as Chhatami and he is only a chance witness. In cross-examination he admitted that his father was Mukhia of Village Bara Panchayat prior to the occurrence and before that Bhagwan Marik the grandfather of the appellant Arjun Marik was the Mukhia who was defeated by his father in the

election. This witness besides being a chance witness, there is reason for him to depose against the appellants. If at all the appellant had committed the crime at Deoghar as alleged, he would be the last person to disclose to this witness Ratan Kumar that he was coming from Deoghar and thereby disclose his visit or presence at Deoghar at or about the occurrence. This apart the crime is said to have been committed by the appellant Arjun Marik and his two sons while at that early hour of the day of occurrence the appellant Arjun Marik alone is said to have been seen by PW 8. However, this evidence alone is neither here nor there.

31.Thus the evidence that the appellant had gone to Sitaram in the evening of 19-7-1985 and had stayed in the night at the house of deceased Sitaram is very shaky and inconclusive. Even if it is accepted that they were there it would at best amount to be the evidence of the appellants having been seen last together with the deceased. But it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the accused and, therefore, no conviction on that basis alone can be founded.

32.While concluding we may point out that there is evidence that the house of the deceased was about 400 yards away from the temples of Baba Baidyanath and there are many Dharamshalas and temples about 100 yards away from the house of the deceased. There is also evidence that Deoghar is crowded in the month of Shravan and lakhs of pilgrims come daily near about that area in that month. Police and Magistrates are also deputed on duty for 24 hours during that period. There is also evidence that on the date of occurrence there were large number of pilgrims coming and going in the temples and Dharamshalas. Surnath Jha, PW 1 in para 22 of his deposition stated that there were two doors in the house of the deceased, one towards the east and other towards north opening on two different lanes. He also deposed that on the night of occurrence at the time when he went out of the house the door on the north was closed while the door facing east was open and he did not know whether that door was closed or not.

There is no evidence to show that the said door was ever closed that night. Lakhs of persons were coming and going that night in the vicinity, the possibility could not be ruled out that anyone else entered the house at the dead of night, killed the inmates and escaped with the belongings of the deceased.

33.Thus, on a conspectus of all the evidence on record, we are of the firm opinion that the finding recorded by the trial court and High Court holding the appellants guilty of the offences charged with is erroneous and unsustainable. The two courts below did not advert to the inherent improbabilities in the prosecution evidence discussed by us and failed to appreciate the evidence on record in right perspective having regard to the infirmities pointed out by us in the foregoing paras and recorded the finding of guilt against the appellants which is manifestly erroneous and unreasonable.

34.In the result the appeals are allowed. The judgments of the two courts below convicting the appellants under Sections 302, 394 and 411 of the IPC and imposing the sentence of death and other sentences therefor are set aside and the appellants are acquitted of the offences charged with. The appellants be released forthwith if not required in any other offence. The articles seized from the

possession of the appellants as per seizure memo Ext. 5 be returned to the appellants.