

MANU/DE/3673/2018

Equivalent Citation: 2018IXAD(Delhi)392

**IN THE HIGH COURT OF DELHI**

CRL.A. 323/2018, Crl. MB 451/2018, Crl. A. 412/2018, Crl. MBs 587 and 1082/2018

Decided On: 08.10.2018

Appellants: **Ashwani and Ors.**

**Vs.**

Respondent: **State**

**Hon'ble Judges/Coram:**

*Dr. S. Muralidhar and Vinod Goel, JJ.*

**Counsels:**

*For Appellant/Petitioner/Plaintiff: Vikram Singh, Harpreet Sandhu, Bhanu Pant and Nidhi Tiwari, Advocates*

*For Respondents/Defendant: Kewal Singh Ahuja, APP*

**Case Note:**

**Criminal - Murder - Conviction - Sections 302, 392 and 34 of Indian Penal Code, 1860 (IPC) - Present appeal filed to challenge judgment of conviction and order of sentence passed against appellant for commission of offence punishable under Sections 302, 392 and 34 of IPC - Whether judgment of conviction and order of sentence under challenge deserve interference - Held, circumstances from which conclusion of guilt to be drawn should be fully established - Facts so established should be consistent only with hypothesis of guilt of accused - Must show within all human probability that act done by accused - In present case, circumstances on record do not form complete chain - Do not unerring point towards conclusion of guilt of accused - Absence of consistent, convincing, reliable and cogent evidence on record - Prosecution failed to prove guilt of accused beyond reasonable doubt - No reason to uphold findings of conviction - Conviction and sentence set aside - Appeal allowed. [91]**

**JUDGMENT**

**Dr. S. Muralidhar, J.**

1 . These two appeals are directed against the impugned judgment dated 12th December, 2017 passed by the learned Additional Sessions Judge, Fast Track Court, Shahdara, Karkardooma Court, Delhi (hereafter the 'trial Court') in Sessions Case No. 173/2010 arising out of FIR No. 175/2010 registered at Police Station ('PS') Vivek Vihar, convicting both Appellants for the offences punishable under Sections 392 and 302 read with Section 34 of the Indian Penal Code ('IPC'). The appeals are also directed against the order on sentence dated 18th December, 2017 of the trial Court whereby for the offence under Section 302/34 IPC each Appellant was sentenced to imprisonment for life with the direction that he "would not be released on remission before actual 28 years of incarceration" and fine of Rs. 50,000/- each and in default to undergo simple imprisonment ('SI') for six months each; and for the offence under Section 392/34 IPC, each of them was sentenced to ten years RI with fine of Rs. 25,000/- each and in default of payment of fine to undergo SI for six months.

**2.** The matter regarding award of compensation to the legal heirs of the deceased persons was referred by the trial Court to the District Legal Service Authority, Shahdara in terms of Section 357-A of the Code of Criminal Procedure ('Cr PC).

**3.** The charge against the Appellants is that both of them on the intervening night of 9th/10th August, 2010 at 137, Janta Flat, Ground Floor, Vivek Vihar, sharing a common intention, committed theft of Rs. 50,000/-, a gold chain, a pair of earrings, a mobile phone Nokia 2626 in the house of Rajender Verma and Shobha Verma ('the deceased') and in order to commit theft, both the accused committed the murder of the deceased, thereby committing the offences punishable under Section 392/34 and 302/34 IPC.

**4.** The present appeals were admitted on 14th March, 2018. When the nominal roll was called for, it transpired that each of the Appellants has already undergone, as of 26th March, 2018 over seven years and seven months of imprisonment. The Court decided to advance the final hearing of the appeals itself instead of considering the case of the Appellants for suspension of sentence. It also requires to be noticed here that the Appellant Gaurav (the Appellant in CrI. Appeal No. 412/2018) was stated to have been receiving treatment at the Institute of Human Behaviour and Allied Sciences ('IHBAS') at Shahdara, Delhi during the time of his incarceration in jail. His record of treatment was called from IHBAS by the Court vide order dated 11th April, 2018. This record was received on 22nd May, 2018 and was allowed to be inspected by his counsel.

#### Reporting to the police

**5.** On 10th August, 2010, DD No. 10-A (Ex. PW-16/C) was recorded at 10:01 am at PS Vivek Vihar to the effect that at Flat No. 137 Janta Flat, Vivek Vihar a lady and her husband had been murdered. The mobile number of the informant was also noted in the DD No. 10-A. This was handed over to the Station House Officer ('SHO') Inspector Sanjay Drall (PW-25), who along with the police staff reached at Flat No. 137.

**6.** Earlier thereto, Sub Inspector ('SI') Onkar Singh (PW-26) along with Constable Vikrant (PW-13) reached the flat. The two bodies of Shobha and her husband Rajender were found lying in the front room inside the flat at the ground floor. Both legs of Shobha were tied with a cable wire and a handkerchief was tied on her mouth. A pillow was lying on the mouth of Rajender with bloodstains. Blood was also found on the other parts of his body.

#### Visit of the crime team

**7.** PW-25 then called the crime team which came and inspected the spot, took photographs and handed over the crime-scene report (Ex. PW-2/A). The said report noted that the examination took place between 11:30 am to 1:30 pm. The age of Rajender was noted as 60 years and that of Shobha as 55 years. ASI Astasham Ali (PW-2) was part of the crime team. He deposed that ASI Harshvardhan searched for finger prints but could not find any. Photographs were taken by Constable Manoj Kumar (PW-1), which were exhibited as Ex. PW-1/A1 to A10. Their negatives were exhibited as Ex. PW-1/B1 to B10.

**8.** PW-1 confirmed that in none of the photographs any iron box was shown lying in the room. According to him, the iron box was lying in the room adjoining the room where the dead bodies were lying. However, he admitted that the Investigating Officer ('IO') did not ask him to take photographs of the iron box. PW-1 also confirmed as correct that none of the photographs showed any gold chain. He also

did not remember any blood being scattered on the floor.

**9.** Hema (PW-5), the daughter of the deceased, came to the spot along with her husband, sister and other relatives. PW-25 recorded their statements and prepared the rukka (Ex. PW-25/A) and sent it to the PS through PW-13 for registration of the FIR. PW-25 on the pointing out of Hema (PW-5) prepared the site plan (Ex. PW-25/B).

**10.** According to PW-25, an iron box which was compressed from the left side was found there and seized vide memo Ex. PW-25/C. According to him, an artificial yellow colour chain entangled with long strand of ladies hairs was lying under the box. This was then seized and the pulanda was sealed. A pillow of white and yellow colour having bloodstains, a bed sheet of white and black colour, a gents pyjama of saleti colour, a blue and green colour diaper, a sky blue colour checkered handkerchief and a green and blue colour saree were lifted from the spot. These were kept in a separate pulanda and were sealed.

#### First information

**11.** In her statement (Ex. PW-5/A), PW-5 disclosed that she was living at Khanjhwala. She stated that she was supposed to meet her father that morning and for that purpose telephoned him at 5 am, but her father did not pick up the phone. She also tried the landline, but no one picked up the phone. She then called her sister Lalita, who instructed PW-5 to call the next door neighbour to find out if her parents were in the house. PW-5 called Suraj, who lived in the opposite house. He checked and told her that the inner room of the flat was locked from outside and that there was no one inside the house.

**12.** After a while, PW-5 received a call that some incident had happened with her parents. She then reached her parents' house. She found them dead on the ground floor in the same condition in which the police had found them. PW-5 disclosed to PW-25 that on the previous day, she had accompanied her father to the SBI Bank at JNU and they had withdrawn Rs. 50,000/-. She was supposed to have accompanied him on the date of the incident to renew a fixed deposit. On checking she found that Rs. 50,000/- cash, the earrings worn by her mother, the chain worn by her, a mobile ending with the number 7693 of Nokia 2626 make were all missing.

**13.** PW-5 also disclosed that about 20 days earlier, they had let out the room to one Ashwani age 22 to 23 years old, a resident of Village Nangla, District Bhagpat, UP and he had also brought along a companion to stay with him. Since neither of them were in their room, and even their belongings were not there, she was confident that Ashwani (Accused No. 1: A-1) and his dost (friend) had stolen the above articles and murdered their parents. PW-25 sent both the dead bodies for post-mortem through Constable Shiv Charan (PW-19).

#### Arrest and search of A-1

**14.** According to PW-25, he thereafter went along with SI Onkar Singh (PW-26) in search of the accused to the Shahdara Railway Station. According to PW-25, he received secret information that A-1 was present at platform No. 1. A-1 was apprehended on the pointing out of the informer while he was sitting on a bench. Upon interrogation, A-1 is supposed to have given a disclosure statement (Ex. PW-25/F) and arrested vide memo Ex. PW-25/G. It requires to be noticed that the only witness to both these documents was PW-26 i.e. SI Onkar Singh. The time of arrest of A-1 was shown as 9.30 pm on 10th August, 2010 at the Shahdara Railway Station. The person to whom the information was given about the arrest was shown as Sunil

Kumar (DW-3), the father of A-1.

**15.** From the personal search of A-1, PW-25 is supposed to have recovered the following articles:

- (i) One leather purse containing Rs. 70/-.
- (ii) A Nokia phone-1209 with sim card mobile number ending with the digits 5875.
- (iii) A Samsung black and yellow mobile phone with a sim card with a number ending with the digits 0703.
- (iv) A wristwatch of make 'Fast-track'

**16.** The personal search memo was again signed only by PW-26. In his deposition PW-25 stated that A-1 "had drawn out earring/bali from the small pocket of the right side of his jeans pant and a bundle of 100 notes of Rs. 500/- from his left pocket". These were, however, not mentioned in the personal search memo but in a separate seizure memo (Ex. PW-25/I), which again was signed only by PW-26 as witness. The said two articles were sealed.

**17.** According to PW-25, on the slip covering the bundle of notes of Rs. 500/- produced by A-1 from the left pocket of his jeans pant, there was a stamp of State Bank of India ('SBI'), Shakha (Branch) Munirka. The seizure memo Ex. PW-25/J was handwritten and ran into two full pages. It noted the serial numbers of each of the 100 currency notes. Again this memo was signed only by PW-26 as witness. All these memos were purportedly drawn up at the place of arrest i.e. the Shahdara Railway station..

**18.** Thereafter A-1 was supposed to have pointed out to PWs 25 and 26, the place of occurrence. A-1 was then brought to the PS and the case property was deposited in the malkhana.

Arrest and search of A-2

**19.** According to PW-25, on 11th August, 2010, he came to the Court of District Judge (East) in connection with the bail application of some other case. From the Court itself, accompanied by other police officials, PW-25 went in search of the co-accused Gaurav (A-2). When they reached near the Surya Nagar Flyover, secret information was received by PW-25 that A-2 would come to the Metro Station, Dilshad Garden. Accompanied by the informer, they reached there and A-2 was apprehended on the pointing out of the informer when he came from the side of Seemapuri and crossed the road.

**20.** A-2 is supposed to have made a disclosure statement (Ex. PW-6/C). He was arrested vide memo Ex. PW-6/A. A perusal of the said document shows that A-2 was arrested at 11:20 am on 11th August, 2010. The place of arrest is shown as in front of Dilshad Garden Metro Station near Seemapuri border, GT Road, Shahdara. His personal search was undertaken. He is supposed to have produced a mobile phone of Nokia make 2626 of grey colour from the right pocket of his jeans and regarding this a separate seizure memo (Ex. PW-6/F) was prepared. His personal search memo (Ex. PW-6/B) showed that Rs. 290/- was recovered from his possession. All these documents were attested by two police officials i.e. ASI Deshraj and HC Satbir. A-2 was also taken to the spot and then brought to the PS and the case property was deposited in the malkhana.

## Post mortem

**21.** The post-mortem of the deceased was performed by Dr. S. Lal (PW-23). As far as Smt. Shobha Verma was concerned, there were as many as six major nail mark injuries over the face and forehead. Injury Nos. 7 and 8 were reddish bruises over the upper lip and lower lip. Injury No. 9 was a deep bruise with swelling of size 5x4 cm on the right temple and injury No. 10 was multiple reddish bruises at places in the right upper limb of varying sizes.

**22.** The body was found with a black colour cable wire tied around both feet and ankle-joint and bilateral hands at wrist joint. The wire was removed and sealed. A red colour handkerchief tied around the oral cavity was found with the fixed knot on the back of the neck. A sub-conjunctival haemorrhage was present on bilateral eye. The nail was cyanosed.

**23.** The skull bones were found intact but there was sub scalpal extravasation of blood seen on the right temple and frontal area. The brain was congested. The cause of death was stated to be asphyxia due to ante-mortem smothering which was sufficient to cause death in the ordinary course of nature. The clothes of the deceased, the scalp hair, cable wire, handkerchief and the blood of the deceased were preserved and handed over to the IO along with sample seal in a sealed condition.

**24.** On the same day, PW-23 conducted the post-mortem of Shri Rajender Verma. The dead body was wearing half sleeves baniyan (vest) and blue kaccha (shorts). Sub-conjunctival haemorrhage was present on both eyes and the nails were cyanosed. Injury Nos. 1 and 2 were superficial lacerated wounds over the right side frontal area above the eyebrow and on the right side forehead 2 cm below the eyebrow. Injury Nos. 3 to 7 were multiple reddish bruises on the various areas on the face including the area above the eyebrow over the bridge of the nose, the lower and upper lip. Injury No. 7 was a wound over bumps with bruising associated with fracture of left lateral incisor in lower jaw. Injury No. 8 was reddish bruise 3 x 1 cm over left side upper gum area of upper jaw and Injury No. 9 was reddish bruise 6 x 5 cm middle outer of left arm placed 10 cm above elbow knuckle. Injury No. 10 reddish abrasion 2 x 1 cm over dorsum of elbow whereas injury Nos. 11 and 12 were reddish abrasions the over right and left tips of the shoulders respectively.

**25.** Sub scalpal extravasation of blood was seen over the fronto parietal area. The skull bone was intact. The cause of death was stated to be asphyxia due to ante mortem smothering which was sufficient to cause death in ordinary course of nature.

**26.** The post-mortem of Smt. Shobha Verma was undertaken at 11.20 am and of Shri Rajender Verma at 12:10 pm on 11th August, 2010. The time since death in both cases was about 24-36 hours. In his cross-examination, PW-23 clarified that there is a margin of 12 hours as 'buffer time' and denied the suggestion that in the present case the time since death was more than 36 hours.

## Trial

**27.** After preparation of the scaled site plan (Ex. PW-17/A) the charge-sheet was filed by PW-25 on 8th October 2010. After the call detail records (CDRs) were received, a supplementary charge sheet was filed on 6th January 2011. Charges against both accused were framed by the trial Court on 9th December 2010. On behalf of the prosecution, 27 witnesses were examined for the prosecution.

**28.** When the incriminating circumstances were put to each of the accused they

denied them. As far as A-1 was concerned, he admitted as correct that he asked Rajeev (PW-8) to arrange some accommodation for him as he had studied in the same school and class with him. He also admitted that PW-8 then asked Sushma (PW-9), who was teaching in the same school with him to arrange some accommodation; that PW-9 told PW-8 that a room was available in the house of Shri Rajender Verma; that A-1 along with PW-8 came and saw the room and took it on rent and after 2-3 days he shifted into the room.

**29.** A-1, however, denied that when he had come to Delhi he requested PW-8 that he did not have any ID proof and on the request of A-1, PW-8 gave his SIM number ending in 5875 for use by A-1. Incidentally, in his examination in Court PW-8 denied the above SIM number but confirmed that it was the same SIM number given by him to A-1. In his cross-examination, he stated that A-1 had used the SIM for 5-6 months and that it was a prepaid connection.

**30.** A-1 was confronted with the evidence of Sulochana Devi (PW-11), who resided in the house opposite to that of the deceased, to the effect that she had told the deceased 15-20 days prior to their murder that the conduct and character of A-1 was not good and asked them to get their house vacated from him. In response, he stated:

"The land lady of the house told me to vacate the room two days prior to the incident. It is incorrect that my conduct and character was not good."

**31.** A-1 in his statement denied as incorrect, that PW-5 who came to meet her parents on 9th August 2010 told them that A-1 would bring girls into the room and PW-5 asked her parents to get him evicted and that at the instance of her mother, PW-5 went to the room of A-1 to check his presence and found that he and A-2 were sleeping in the room. As regards his arrest from platform No. 1 of Shahdara Railway Station while denying it he had stated that he had been lifted from his house in village Nangla Rava, Distt. Baghpat, U.P. on 10th August 2010 at around 5 pm. He stated that he was called through Jagdish Pradhan of the village and his neighbours Dinesh and Kirpa Ram were also present.

**32.** A-1 denied the disclosure statement and the recoveries from his personal search. He, however, admitted as correct that Mukesh Kumar (PW-24) gave a mobile phone ending with the number 0703 which was in his own name to Shikha (sister of A-1) before getting a divorce from her for her use and when he asked him to return the phone she refused stating that she had given the phone to A-1 and that A-1 was using the said mobile phone. He also admitted as correct that Tarun Khanna (PW-21), the Nodal Officer of Bharti Airtel has brought the Original Customer Application Form (CAF) of the above mobile number in the name of Mukesh Kumar (PW-24).

**33.** A-1 stated that he had been falsely implicated. He maintained that he had vacated his room on 10th August 2010 and was at his house at village Nangla Rava, Distt. Baghpat. According to him, nothing was recovered from his possession and his signatures were taken by police on blank papers.

**34.** As far as A-2 is concerned, he denied even knowing A-1 or being involved in any manner in the offence. He too stated that he had been falsely implicated. His specific case was as under:

"I have been implicated falsely in the present case. I never met with co-accused Ashwini after year 2005, however, sometime I talked with him on telephone. I was arrested from my village at Tera Baghpat, U.P. My father, uncle Anil and Surender our neighbour were present and later on falsely

implicated in this case. Nothing was recovered from my possession. My signature were obtained by police on blank papers."

#### Defence evidence

**35.** For the defence, the first witness was Jagdish Prashad (DW-1), the uncle of A-1. According to DW-1 at around 7 to 7.30 pm on 10th August 2010 he was informed that some police officials in civil dress had come. DW-1 stated that A-1 had also met him in the village everyday from 6th August to 10th August. He stated that the police officials took A-1 away. In his cross-examination, DW-1 stated that he did not complain to anyone that the police had taken A-1 away. According to DW-1, he met A-1 on 7th August 2010 in the morning. He denied the suggestion that A-1 did not meet him from 6th August to 10th August 2010. He denied being a tutored witness.

**36.** Dinesh (DW-2) was a resident of the same village where A-1 came from. He too stated that from 7th August to 10th August 2010, A-1 was in the village. He stated that around 7 to 7.30 pm on 10th August some persons in plain clothes came there and he informed the pradhan and those persons in plain clothes took A-1 away. According to DW-2, on 7th August A-1 was present in his house and he visited him and even on 8th August he was present in the house of DW-2 in the morning. He denied that A-1 was present in the village on 6th August 2010. He remembered seeing A-1 on 9th August 2010 in the village.

**37.** Sunil Kumar (DW-3) is the father of A-1. According to him on 7th August 2010 A-1 came to the village. According to him A-1 did his B.Sc. from the Noida Centre of Manipal University and the distance between the college and his village was about 50 to 55 kms. The journey took one and a half to two hours. DW-3 stated that between 6th to 10th August 2010 A-1 was helping DW-3 in the fields and did not go to college.

**38.** Surender Singh (DW-4) was a resident of village Tedha, District Baghpat and A-2 was his neighbour. According to him, A-2 had come to the village 10 days prior to 10th August 2010 and he used to help his father in agricultural work. DW-4 was a college student. According to him on 11th August 2010, 5 or 6 police officials came to the village from the Crime Branch and took A-2 away. In his cross-examination by the APP, DW-4 stated that he had not made any complaint to the police or in any Court about A-2 being taken away on 11th August 2010. He claimed to have seen A-2 outside his house on 10th August 2010 at around 6 pm and no one else was with him.

**39.** Anil Kumar (DW-5) was a neighbour of A-2 in village Tedha. He claimed that he saw A-2 in his house at around 8-8:30 pm on 10th August 2010. He stated that on 11th August 2010 between 3 and 4 pm, 5 or 6 persons in civil dress came and took A-2 away. He too did not inform any police person or Court that A-2 was seen on 10th August 2010 at 8 pm in the village. He denied the suggestion of the APP that he had not seen A-2 on 8th October 2010 or one or two days prior in the village.

**40.** Vinod Kumar (DW-6) is the father of A-2. According to him on the intervening night of 10th/11th August 2010 at around 3 am, four persons in civil dress came in a private Bolero vehicle and took A-2 away. They disclosed that they were from the Crime Branch Delhi Police. DW-6 stated that A-2 was living in the house and was in search of some job and that 15 days prior to 10th August 2010, A-2 was helping him in the agriculture work.

**41.** Inter alia DW-6 admitted as correct that A-1 was studying in the class of A-2 but he was not aware if A-1 had taken any room on rent. He denied the suggestion that

A-2 used to reside with A-1 in a rented accommodation at Vivek Vihar. He admitted as correct that the mobile phone had been seized from A-2. He denied the suggestion that A-2 is not living with him since 15 days prior to 10th August 2010.

Impugned judgment of the trial Court

**42.** In the impugned judgment, the trial Court came to the following conclusions:

(i) PW-11 last saw A-1 in the house of the deceased. She deposed that on 9th August 2010 she saw A-1 standing on the roof at the grill at around 10.30 pm thereafter the deceased was not seen alive by anyone. Her presence in the place from where she saw A-1 so standing was natural and believable.

(ii) The presence of A-2 in the house of deceased on 9th August 2010 had been proved by PW-5.

(iii) According to PW-5 when she called Suraj on the morning of 10th August 2010 he stated that he did not find the accused at the house. The conduct of the accused persons in running away from the spot, together with the last seen evidence, is indicative of their guilt.

(iv) The recoveries effected from the possession or at the instance of the accused proved that they committed murder of both the deceased with a view to robbing Rs. 50,000/- cash and the jewellery.

(v) The version of PW-5 regarding the presence of the iron box in the room was corroborated by PW-1 and PW-25. PW-12, the Assistant Manager of SBI proved the withdrawal of Rs. 50,000/- by Mr. Rajender Verma on 9th August 2010.

(vi) The deposition of PW-21, the Nodal Officer of Airtel proved that mobile number ending with 7693 was issued in the name of PW-5 it was this mobile phone that went missing according to PW-5. There was no reason to disbelieve the testimony of PW-5 that she had given the above mobile number for use to her mother.

(vii) The identification by PW-5, who was partially blind and, therefore, could not identify articles during TIP was not unusual. Her vision was not that she could not recognise human beings. She could correctly identify the articles belonging to her otherwise by touching them.

(viii) Since PW-5 had seen both accused after the arrest, there was no requirement of getting the TIP of A-2 even though finger prints could not be detected from the spot the other evidence available on record was sufficient to prove the guilt of the accused. The failure to examine Suraj was not fatal to the prosecution.

(ix) The recoveries made from A-1 at the Shahdara railway station were believable when read with other evidence notwithstanding that such recovery was not witnessed by any public witness. The difference in the timings of the arrest of A-1 as mentioned by PW-5 and PW-25 was not a serious lapse.

(x) The Call Details Records (CDRs) of the mobile phones of A-1 and A-2 showed that they were in contact with each other after the incident. The SIM number ending with 5875 was given by PW-8 to A-1. PW-24 also gave his mobile phone ending in 0703 to his wife Shikha who in turn gave it to A-1



was using the number. A-2's mobile phone ending in 0164 was proved by Hussain Jaidi, Nodal Officer Idea Cellular (PW-22). The CDRs of the said mobile show that little 17 calls were exchanged between A-1 and A-2 through the numbers 0703 and 0164 respectively even after the incident on 10th August 2010.

(xi) The minor contradictions of the PWs could be safely ignored. Consequently, the prosecution had established the motive, the last seen theory, the recovery of the robbed articles and, therefore, there was no missing link which required to be proved. The post-mortem reports confirmed that the deaths were homicidal and the time since death was very close to the actual time of death.

(xii) The DWs not only contradicted each other but also the defence of A-1 who stated that he vacated the room on 8th August 2010 meant that till then he was residing in the room. DW-6 had admitted to A-1 and A-2 knowing each other and also about the seizure of the mobile phone from A-2. DW-4 and DW-5 did not appear to be trustworthy. Both of them admitted to coming to depose at the instance of the father of the A-2. The defence evidence not being trustworthy was discarded completely.

**43.** For the aforementioned reasons, the trial Court proceeded to hold both the accused guilty of the offences with which they were charged and proceeded to sentence them in the manner indicated.

Law relating to circumstantial evidence

**44.** This being a case of circumstantial evidence, it is necessary to recapitulate the settled legal position. In *Sharad Birdhichand Sarda v. State of Maharashtra* MANU/SC/0111/1984 : 1984 (4) SCC 116, the Supreme Court explained that a case based on circumstantial evidence should satisfy the following tests:

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

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

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

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

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

**45.** In *Ram Avtar v. State* MANU/SC/0095/1985 : 1985 Supp SCC 410, the Supreme Court explained that:

"...circumstantial evidence must be complete and conclusive before an accused can be convicted thereon. This, however, does not mean that there is any particular or special method of proof of circumstantial evidence. We must, however, guard against the danger of not considering circumstantial evidence in its proper perspective, e.g., where there is a chain of

circumstances linked up with one another, it is not possible for the court to truncate and break the chain of circumstances. In other words where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated."

**46.** In *Brajesh Mavi v. The State* MANU/SC/0514/2012 : (2012) 7 SCC 45, the Supreme Court explained:

"From the several decisions of this court available on the issue the said principles can be summed up by stating that not only the prosecution must prove and establish the incriminating circumstance(s) against the accused beyond all reasonable doubt but the said circumstance(s) must give rise to only one conclusion to the exclusion of all others, namely, that it is accused and nobody else who had committed the crime.

Evidence of last seen

**47.** The first circumstance which the prosecution has set out to establish is that the two accused were last seen with the deceased prior to their death. For this purpose, the prosecution relies on the evidence of Hema (PW-5), the daughter of the deceased and Sulochana Devi (PW-11), the neighbour of the deceased.

**48.** The Court has carefully perused the evidence of PW-5 who was herself visually challenged. The numerous improvements made by PW-5 emerged in her cross-examination by counsel for the defence. Even in her examination-in-chief, she did not mention about the comment made by PW-11 of the conduct of A-1. On this point the learned APP was permitted to cross-examine PW-5 and now she stated that it was correct that PW-11 had told her parents that the activity of A-1 and A-2 was not good and that the parents of PW-5 had asked A-1 to vacate the room and further that she (PW-5) had also stated this fact to the police.

**49.** In her cross-examination by counsel for the defence PW-5 stated that her statement had been recorded by the police 3 or 4 times. The first statement was at 11.30 am and the second at 4 pm both on 10th August 2010. She clarified that while the deceased lived on the ground floor of the two and a half storey building the first floor was vacant and the room in the second floor was rented out to A-1. PW-11 lived in the house opposite to the house of her parents. Suraj lived in the house to the right side of the house of her parents while Dhani Ram lived in the left side of the house of her parents. The numerous inconsistencies and improvements made by PW-5 in her deposition in Court included the following:

(i) She had not stated to the police that the time of her three calls to her parents was 6 am, 7 am and 8 am on 10th August 2010. She also did not give the police her mobile number as well as the landline of her parents.

(ii) She did not tell the police in her statement that her sister Lalita had told her not to worry when PW-5 called Lalita to tell her that their parents were not picking up the phone.

(iii) PW-5 did not tell the police that after one hour Lalita had told PW-5 that Lalita had also called her parents but they were not answering the phone.

(iv) PW-5 also could not recall the number of Suraj. On checking her mobile phone in the trial Court, she stated that she had saved his number in the name of his sister Divya and that she had called Suraj at around 8 to 8.30

am.

(v) She maintained that she had told the police that she had asked Suraj to go into the house of their parents to see whether the tenants were still there. However, in neither of her statements to the police (Ex. PW-5/A and Ex. PW-5/DX) she had mentioned these facts.

(vi) She also asserted that she had told the police that Suraj had checked from her parents' house and told her that the tenants were not there.

In fact, she had not so stated to the police.

**50.** It emerged in the cross-examination of PW-5 that the following facts were deposed by her for the first time in Court, and were not stated to the police earlier:

(i) Asking Suraj to check for her parents in the neighbours' house and that after so checked he told her that her parents were not there.

(ii) That she got perplexed and then left her house.

(iii) That when she was in the bus she received a call from Suraj that her parents were dead.

(iv) That she had noticed that mustard oil taken from pickle on the eyes of her mother.

(v) That the saree worn by her mother on 9th August 2010 was lying on a chair near the dead body.

**51.** In her further cross-examination, PW-5 stated that she had called the police at 100 number at 10 or 10.30 am and gave her mobile number which ended with 5927. It must be noticed that DD No. 10A records the mobile number from where the call was made as ending in 4118. She claimed that her sister Lalita had reached the spot within half an hour and that police did not record Lalita's statement.

**52.** PW-5 was confronted with her previous statement to the police where she had not stated about her mother telling PW-5 that A-1 used to bring his friends and girls to the room. Further, she was confronted with the previous statements where she had not told the police that her mother had further told her that A-1 used to bring girls to the room and that she wanted to get him evicted from the room. She had also not stated to the police that her mother had asked to go to the room and check the presence of A-1 and A-2. She also did not state to the police earlier that, when she went upstairs she found "two boys sleeping in that room" or that when she returned to the ground floor she told her mother that when the boys would wake up she would tell them to vacate the room.

**53.** PW-5 also did not tell the police that she was taking tea when A-1 came there and put an empty water bottle which he had borrowed from her mother and then went back swiftly. She also did not state to the police that she had asked A-1 not to put water bottle swiftly in a manner that her parents would be unable to see or that A-1 told her that he was doing so as they were busy in talks and it would not happen in future or that she then left to her parents' house and telling them that she would come again tomorrow.

**54.** PW-5 also did not state to the police anything about receiving a call from her mother at 8.30 to 9 pm to enquire if she had reached her house comfortably. She also did not state to the police that the next day at about 5 am she called her parents

to inform them that she was coming to their house and that her father should get ready.

**55.** PW-5 admitted as correct that she did not know A-2 by name prior to the occurrence and that it was the police who told her the name of A-2 after his arrest. She did not mention Gaurav in any of the statements given by her to the police at any point of time. She stated that she had told the police that she had seen A-2 sleeping in the room when her mother asked her to go to the room but in neither of the statements to the police this fact was mentioned. PW-5 also did not give any physical description of A-2 or the clothes worn by him.

**56.** PW-5 stated that her parents were completely blind. She admitted as correct that she too had poor eyesight. She admitted as correct that in the TIP she told the learned Metropolitan Magistrate (MM) that she could not identify the goods by looking at them but only by touch. She was not taken by the police to Tihar Jail for TIP of A-2.

**57.** As regards her purchasing a mobile phone from Balaji Telecom, Mukherjee Nagar on 30th October 2007 PW-5 stated that she had told the police about giving that mobile phone to her mother for use but in her previous statement to the police it was not so recorded. She admitted as correct the photograph in the CAF number ending in 7693, given to her mother did not have the photograph of PW-5.

**58.** There were more contradictions that emerged in the cross-examination of PW-5 on 1st August 2012. It transpired that she had not stated to the police earlier that she had been called by her father to accompany him to the bank on 9th August 2010. She admitted as correct that police officers had visited her house on 10th August 2010 and informed her that one of the accused had been arrested and that all her family members were present.

**59.** More importantly, PW-5 did not remember if she had given "any physical description of the tenant qua his height, built, colour, caste and having beard or not." In neither of her statements had she claimed that she stated to the police that she could identify the tenant who came to put the bottle but in fact in neither of her statements she had said so. She admitted that the police had brought both accused persons to her house on 11th August 2010. She claimed to have stated to the police that she had seen the face of the tenant but when she was confronted with the previous statements that was not found recorded.

**60.** The evidence of PW-5, as discussed above, does not give an assurance to the Court that she is speaking the entire truth and that she can be relied upon as a witness of the last seen evidence. The numerous contradictions and improvements made by her in her depositions before Court have not been noticed by the trial Court in the impugned judgment. The evidence of PW-5 as far as her examination-in-chief is discussed in para 8 of the Trial Court judgment but the numerous improvements made by her over a previous statement given to the police which was brought out in the cross-examination have completely been omitted by the trial Court.

**61.** There are two other persons that PW-5 mentions who she contacted in order to find out about her parents, one was her own sister Lalita and the other one was Suraj, the neighbour. The police does not appear to have examined either Lalita or Suraj. Considering that the eye sight of PW-5 herself is very poor and it has come in her cross-examination that she did her 12th from the National Association of the Blind (the fact not even noticed by the Trial Court), it was important for the IO to have recorded the statements of Lalita and Suraj to corroborate the version of PW-5.

**62.** Importantly, PW-5 did not tell the police in the first instance, despite her statement being recorded twice, about her going to the room of A-1 on 9th August 2010 and seeing him with A-2 sleeping in that room. This was the most crucial fact without which it could not be established whether A-1 and A-2 were last seen in the room.

**63.** As far as PW-11 is concerned, she did not support the prosecution. In her examination-in-chief, she stated that she had seen A-1 "once or twice standing at the first floor of the house of the deceased and that she had told the deceased for 15-20 days prior to the murder that the conduct and character of A-1 was not good and asked them to get the house vacated from A-1." However, she claimed she did not know if the deceased had asked A-1 to vacate the house. Also she stated that she "did not see any other person with accused Ashwani in the house of the deceased."

**64.** At that stage the APP sought permission to cross-examine PW-11. Now she categorically said that she had not seen A-2 with A-1 in the house of the deceased. She resiled from her previous statement to the police that she had told the deceased that the conduct and character of A-2 was also not good. She now stated that it is wrong to suggest that the deceased and his wife used to ask A-1 to vacate their house or that she (PW-11) had stated so to the police. She even denied having told the police that A-1 and A-2 had murdered the deceased and after committing robbery they had run away.

**65.** In the cross-examination of PW-11, it transpired that she was never asked to join the investigation by the police and did not by herself make any statement to them. She did not know how the police reached her house as she had not given her address to anyone. PW-11 stated that on the date of incident she had met the police but had not made any complaint against the accused. According to her, PW-5 met her afterwards, for about half hour at their house and except PW-5 she did not know any other relative of the deceased. PW-11 stated:

"On that day I had not told Hema that accused Ashwani is not having good conduct and character. From the date of murder till my recording of statement I never told Hema about the conduct and character of accused Ashwani."

**66.** PW-11 further stated as under:

"I had not complained to even any neighbour or my family members about the conduct of the accused Ashwani prior to the incident and thereafter. There was no tenant in the house of deceased prior to the accused. I do not know how much rent accused used to pay. I had never met accused personally. I do not know if any written rent agreement was executed between accused and deceased. Shobha (deceased) had told me the name of tenant as Ashwani. Vol. I had seen accused twice before the incident on the roof of third floor. There is only one room on the third floor."

**67.** PW-11 further stated "one day before the incident, I had seen accused Ashwani standing on the roof at the grill at about 10.30 pm. I had not seen accused standing at the grill before or after that day." PW-11 stated that her statement was not recorded by the police and that she did not tell her name and address to the police ever.

**68.** PW-11 again comes across as a totally unreliable witness. She was in fact declared hostile by the APP who cross-examined her. She completely disassociated herself as far as A-2 is concerned. Even as regards A-1 except saying that she had

seen him standing "on the roof at the grill" she does not state that she ever saw him in the room and particularly either on the date of the incident or even earlier. She disassociated from her statement about A-1 not having good conduct and character and about her mentioning about it to PW-5.

**69.** The Court finds that even while discussing the evidence of PW-11 the trial Court omits all the numerous contradictions which is apparent in her evidence and only mentions the fact that she had deposed that one day before the incident she had seen A-1 standing on the roof at the grill at about 10.30 pm. Her turning hostile as regards A-2 is not even adverted to by the trial Court. The trial Court again discusses PW-11 in para 44 of the impugned judgment but without noticing the numerous contradictions and improvements made by her.

**70.** The trial Court also appears to have not understood what last seen evidence actually means. In the present case, last seen has to be understood in the context of the deceased last being seen alive with the accused and not merely in the vicinity of the accused. Here, with the deceased living on the ground floor and A-1 having taken a room on the second floor, merely because A-1 is seen "on the roof near the grill" cannot be understood as A-1 being last seen with deceased. Further there is no evidence to show that A-2 was with A-1 and in any event that A-2 was last seen with the deceased.

**71.** The Supreme Court in State of UP v. Shyam Bihari (MANU/SC/1093/2009 : JT 2009 (11) SC 274 explained the circumstance of 'last seen' as the "close proximity of place and time between the event of accused having been last seen with the deceased and the factum of death". That kind of an evidence is not available in the instant case. In the written submissions of the learned APP before this Court again reliance is placed only on PWs 5 and 11 in support of the theory of last seen. The numerous improvements made by PW-5 rendering her an unreliable witness were not even adverted to.

Arrest of the accused not proved

**72.** The Court finds that even fixing the identity of the two accused in the present case appears to be doubtful. As far as the prosecution is concerned, only PW-5 and PW-11 could have described A-1 and A-2. None else could have given a description of either of them to the police. Without such description, the police could not have put out information for any secret informer to tell them about the presence of either A-1 or A-2. The system of secret informer cannot possibly work unless an IO is able to give such secret informer some description of an accused either orally given to the IO by a witness or a photograph or a CCTV footage from where a drawing could be made of such suspect.

**73.** In the present case, with no such description of either accused given by PWs 5 and 11 to the IO, the circumstance of arrest of A-1 based on the information given by secret informer is, therefore, not at all convincing. That PW-5 herself being partially blind and with her evidence about having seen A-1 and A-2 in the room on 9th August 2010 being an obvious improvement over her previous statement to the police, the result is that the police actually had no description of either A-1 or A-2 to proceed further in the matter. It is also significant that there were no chance prints lifted from the room where the murder took place which connected A-1 or A-2 to the crime. It is a mystery how without any details concerning A-1 and A-2 a secret informer could have given any information to the police about their presence.

**74.** PW-25 does not explain how he straightaway went to Shahdara railway station and to platform No. 1 to arrest A-1. Shahdara railway station is obviously a busy

place especially at the time of arrest of A-1, which in the arrest memo (Ex. PW-25/G) is shown as 9:30 pm. That no attempt was made to associate a single public witness in his arrest makes it suspicious. Neither PW-25 nor PW-26 state that they asked any person in the station or even an employee of railways to come as a witness and they refused. On the other hand, there is overwhelming evidence of the defence witnesses to show that the arrest of A-1 took place from his village in UP. The circumstance of arrest of A-1 at the Shahdara railway station platform No. 1 is wholly unbelievable.

**75.** Likewise, the so-called arrest of A-2 outside the Dilshad Garden Metro Station at 11:20 am on 11th August 2010 again without a single public witness attesting the arrest memo is wholly unbelievable. When arrests take place from such busy places, to not even attempt to associate members of the public or even the officials of the DMRC or even make the so-called ritualistic statement that such persons were asked but they refused to join, makes the circumstance of arrest of A-2 suspicious.

Recoveries not proved

**76.** The main motive for the crime appears to be the stealing of Rs. 50,000/- in cash which was with the deceased. This recovery of Rs. 50,000/- is supposed to have been made from the personal search of A-1. The personal search memo of A-1 (Ex. PW-25/H) shows that in his purse, there was only Rs. 70/-. That personal search memo only refers to two mobile phones with numbers ending 5875 and 0703 and a wrist watch. Further, this is not even attested by an independent witness.

**77.** A separate seizure memo is drawn up (Ex. PW-25/J) as regards as Rs. 50,000/-. A-1 is supposed to have been carrying hundred such notes of 500 rupees in his pant and all the currency notes are written and all of this is supposed to have been prepared sitting in the railway station with the only witness being PW-26. What is sought to be connected is the mark of SBI 'Shakha Munirka' with the date of 9th August 2010 and that this was the very sum of Rs. 50,000/- which was withdrawn by the deceased. This is where the trial Court has overlooked the evidence of PW-10 (Ashok Kumar Gupta).

**78.** In his examination-in-chief what he brought to the Court was the original record of a savings bank account in the name of Rajender Kumar Verma maintained with the JNU Old Campus Branch of SBI. The APP ought to have asked this witness two questions, (i) Whether SBI Munirka was a different Branch from SBI JNU because the counsel for A-1 elicited from this witness that "there were about 13-14 steps towards SBI JNU. It was a small branch." Also this witness did not deal with customer Rajender Kumar Verma on 9th August 2010 and he had "no connection with cash." The slip found over the bundle of notes purportedly recovered from A-1 was in fact not shown to PW-10 at all. He ought to have been asked whether that very slip was issued by the SBI JNU Branch where he was working. PW-10 stated as under:

"It is correct that there is no identification of the currency notes and they can be identified only on the basis of slip of the branch attached with them. Police did not meet me. I cannot tell the name of the officer of the branch to whom the police met in connection with this case. I have no knowledge if the bundle of notes were shown to the any of the officers of the branch by the IO."

**79.** It is, therefore, plain that even during investigation the slip found on the 500 rupee note bunch supposed it being recovered from A-1, was not actually shown to the PW-10 to confirm if these notes were in fact issued from that branch namely the SBI JNU Branch. It will be recalled that it is the stamp of SBI Munirka which was found on the notes.

**80.** The further factor is that this seizure memo is also not witnessed by any public witness. The evidence of PW-10 breaks the connection between the notes purportedly recovered from A-1 and those withdrawn by the deceased from his account with the SBI at the JNU Branch. Therefore, this recovery also stands disproved.

**81.** The ear rings supposed to have been recovered from the right jeans pocket of A-1 is also not reflected in the personal search memo but in a separate seizure memo (Ex. PW-25/I). There is another ear ring seized from A-2 for which there is a separate seizure memo (Ex. PW-6/E). It will be recalled that even for A-2 there is overwhelming evidence to show that he was arrested not outside the Dilshad Garden Metro Station but from his village in Baghpat.

**82.** No finger prints lifted from the room where the deceased were found. There was no other evidence to show the presence of either A-1 or A-2 in that room on the ground floor of the building. Even the room occupied by A-1 was not thoroughly searched and no prints lifted therefrom to show the presence of A-1 and A-2. Even in the case of A-2 neither is the arrest memo attested by any public witness nor is the seizure memo attested.

**83.** Therefore, important links in the chain of circumstances viz., the last seen evidence, the arrest of the accused, and the recoveries made from either of them have not been proved by the prosecution. Even identification of these objects appears to be doubtful from the evidence of PW-5 it is apparent that she was already shown these articles even before the TIP was conducted. She states that on 11th August 2010 "police came at my house and had shown me the ear rings and the mobile phone."

CDRs not proved

**84.** Turning next to the Call Details Records (CDRs), the Court finds that the mobile phone 0703 is shown to be in touch with the mobile number ending in 0164 twice on 7th August 2010 and on 10th August 2010 several times. This by itself does not establish any linkage between A-1 and A-2 with the evidence of the phones being issued in their respective names not being proved. While it is true that A-1 and A-2 had been studying in the same school, that was many many years prior to the occurrence. A-2 was presumably using the phone of his father but this one circumstance by itself will not connect both these accused with the crime.

**85.** The evidence of PW-22 is to the effect that phone number ending in 0164 was issued in the name of A-2 but the important part is the cell location and there is nothing to show that at any time on 9th August 2010 this mobile phone was in the vicinity of the house of the deceased. In any event, the CDR evidence failed since PW-22 stated this in his cross-examination:

"It is correct that the contents of Certificate under Section 65-B is stored in my desk top and as and when it is required in court, I take out the print of that and along with CDR I file it in court. It is correct that I do not possess the technical knowledge qua master server, its operation, its maintenance and also whether at any time electricity failed during recording of the calls mentioned in the CDRs or not. It is correct that I did the job of taking out CDR and affixing the Certificate under Section 65-B from my system and placed the same before this Hon'ble Court. It is correct that I have no personal knowledge about the CDR. It is wrong to suggest that I am placing incorrect CDR on the record."

**86.** This makes the evidence in the form of CDR inadmissible in evidence. The other



Nodal Officer who was examined i.e. PW-21 did not himself prepare the certificate under Section 65B IEA. He merely identified the signatures of one Vishal Gaurav who had prepared it. This is despite his statement in the cross-examination that:

"Vishal Gaurav is still working as Nodal Officer with Bharti Airtel Ltd. I do not know where the main server of Bharti Airtel Ltd. is located. Vishal Gaurav did not sign Ex. PW21/D in my presence. I have joined Bharti Airtel Ltd. in March, 2011. The call details in question of the aforesaid number were not taken out in my presence."

**87.** These difficulties in accepting the CDRs in evidence were also overlooked by the trial Court. In any event, merely because calls were exchanged between the two numbers would not make up for the failure by the prosecution to prove the other links in the chain of circumstances.

Motive not proved

**88.** Finally as far as the motive for commission of crime, it is stated to be the stealing of Rs. 50,000/- and the mobile phones. It has already been noticed that the recovery of Rs. 50,000/- from the personal search of A-1 has not been proved by the prosecution. That this was to the knowledge of A-1 that the deceased Rajender Verma withdrew Rs. 50,000/- from the SBI account is not proved. That what was recovered from him was the same Rs. 50,000/- was also not proved.

**89.** The ear ring being that of Smt. Verma is also doubtful since PW-5 identified it only by feel and touch and in any way the ear ring and mobile phone were already shown to her by the police before the TIP. With the recovery of these articles from the accused not being proved, there was no evidence to prove the motive for the commission of crime.

**90.** In order that failure to prove the motive can be considered not fatal to the prosecution, it must be shown that the other circumstances have been clearly established by the prosecution. The correct legal position was explained by the Supreme Court in *Arjun Marik v. State of Bihar* MANU/SC/1037/1994 : 1994 Supp (2) SCC 372 in the following words:

"...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 anybody 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."

Conclusion

**91.** For the aforementioned reasons the Court is of the view that both the accused are entitled to benefit of doubt as each of the links in the chain of circumstances put forth by the prosecution as constituting a complete chain has not been proved beyond reasonable doubt and in any event these do not point unmistakably to the guilt of the two accused.

**92.** The impugned judgment of conviction and the order on sentence passed by the trial Court is set aside. The Appellants shall be released forthwith unless wanted in some other case. The appeals are allowed and the applications are disposed of. Each of the Appellants will fulfil the requirements of Section 437A Cr.P.C. to the satisfaction of the trial Court. The trial Court record be returned forthwith with the certified copy of this judgment.

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