

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved On: 1st September, 2009*
Judgment Delivered On: 7th September, 2009

+ **CRL.A. 136/2001**

SUBHASH CHAND Appellant
Through: Mr. K.K.Sud, Sr. Adv. with
Mr. Kunal Malhotra, Adv.

versus

STATE Respondent
Through: Ms. Richa Kapoor, Adv.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

PRADEEP NANDRAJOG, J.

1. The deceased Krishan Kumar @ Kukku, resident of Municipal Number 653 Sector-37 Faridabad, Haryana, along with his father Shri Ram Lal PW-16 used to run a tyre shop under the name and style of M/s Ram Lal & Sons, at Shop No.56-A Bankey Lal Market, Badarpur. At around 11.30 AM on 17.9.1990, Krishan Kumar went to deposit Rs.20,000/- in cash at the Badarpur branch of Central Bank. When he did not return till late evening, Ram Lal PW-16, father of Krishan

Kumar went to PS Badarpur, and at about 10.50 PM got recorded DD No.16A Ex.PW-16/1, that Krishan Kumar aged 30 years, height 5'4", of wheatish complexion wearing a sky blue coloured shirt, a dark blue coloured pant and a pair of hawai slippers had not returned ever since he went to Central Bank at 11.30 AM to deposit cash.

2. Since Krishan Kumar could not be traced till the next few days, at about 10.40 AM on 20.9.1990, Smt.Shobha PW-22, wife of Krishan Kumar visited PS Badarpur, where, at her instance, HC Naresh Kumar PW-1 registered FIR No.274/1990 Ex.PW-1/A for an offence punishable under Section 364 IPC, noting therein, that Krishan Kumar was seen on the day he went missing in the company of appellant Subhash Chand and another person on a scooter which was being driven by Subhash Chand towards Delhi; and that Subhash Chand owed some money to Krishan Kumar. Copy of the FIR was handed over to SI Shanker Singh PW-25 who was entrusted with the investigation.

3. Accompanied by Const.Raj Pal and Const.Anil Kumar as also Ram Lal PW-16, Ramesh Kumar PW-15 and Anil Kumar PW-8 (father and brothers-in-law of Krishan Kumar) who had accompanied Smt.Shobha to the police station for registration of the FIR, SI Shanker Singh went to Badarpur

Mathura Road and apprehended Subhash Chand from his shop. He i.e. SI Shankar Singh interrogated Subhash Chand and recorded his disclosure statement Ex.PW-8/A wherein Subhash disclosed his involvement, as also the involvement of co-accused Sukhbir and Sudesh, in the murder of Krishan Kumar. It stands recorded in the disclosure statement that the deceased was murdered in flat No.339A, Janta Flats, Sarita Vihar where the body was still lying and that the key of the flat was with co-accused Sukhbir. SI Shanker Singh seized a scooter bearing registration No.DNW-0906 which was parked in front of the shop of Subhash, as recorded in seizure memo Ex.PW-8/E. Thereafter Subhash led SI Shanker Singh and others to the house of Sukhbir and Sudesh where SI Shanker Singh arrested them and interrogated them and recorded their disclosure statements Ex.PW-15/1 and Ex.PW-15/2. Accused Sukhbir handed over a key Ex.P-21 which was seized as recorded in memo Ex.PW-8/D and accused Sudesh Kumari handed over a bunch of six keys Ex.P-20 stating that they belong to the deceased, which were seized as recorded in memo Ex.PW-8/C. All the three co-accused led SI Shankar Singh and as recorded in the pointing out memos Ex.PW-6/A, Ex.PW-6/B and Ex.PW-6/C, pointed out Flat No. 339-A, Janta Flats, Sarita Vihar, New Delhi.

4. Unfortunately, the arrest memos of the appellant as also the co-accused have not been filed along with the charge sheet and hence have not been proved. Had this been done, an important evidence pertaining to the time the appellant and the co-accused were arrested would have come on the judicial record and as would be evident from further facts noted by us, the same would have resolved a controversy as to whether the dead body of the deceased was recovered by the police from Flat No.339A, Janta Flats, Sarita Vihar, New Delhi at the instance of the appellant and his co-accused or whether the police recovered the same on independent information available.

5. Independent of the afore-mentioned events, at 1.25 PM on 20.9.1990, Const.Gulshan PW-26, the duty officer in the Police Control Room received information from an unknown person about Flat No.339-A Janta Flats, Sarita Vihar being locked from outside for the last three days and a foul smell emanating therefrom. HC Hari Chand PW-21 and two other constables, who were stationed in a PCR van in the area, were the ones to whom said information was sent over the wireless and they rushed to the spot. The information about the foul smell was also forwarded to PS Badarpur, within jurisdiction whereof the said Flat No.339-A fell, and at 1.30 PM DD No.4-A

was recorded at PS Badarpur that it was reported that foul smell was emanating from the flat in question. Pursuant thereto, SI Dinesh Singh and Const.Mehak Singh from PS Badarpur also reached the spot.

6. Unfortunately, SI Dinesh Singh and Const.Mehak Singh have also not been examined and thus through their mouth we have no evidence on record as to what they did and found when they reached the flat in question.

7. Thus, there is considerable confusion as to how access was made by the police to Flat No.339A, Janta Flats, Sarita Vihar, New Delhi. Whereas according to the testimony of the HC Hari Chand PW-21, he along with SI Dinesh Singh and Const.Mehak Singh who had also reached the flat and were posted at PS Badarpur, broke open the wire gauze of the house and found a dead body inside and thereafter SI Shankar Singh also came there, SI Shankar Singh PW-25, Ram Lal PW-16, Ramesh Kumar PW-15 and Anil Kumar PW-8 deposed that when they reached the flat it was found locked and the door of the flat was opened with the key Ex.P-21 which had been handed over by co-accused Sukhbir and upon entering the flat, the dead body of the deceased was found. It is relevant to note that SI Shankar Singh PW-25, when cross examined on the issue, admitted that HC Hari Chand PW-21, SI Dinesh and

Const.Mehak Singh were already present when they reached the flat. Thus, the evidence probablizes that access was made to the flat by the police personnel of PS Badarpur on getting independent information of foul smell emanating from the flat. We shall be discussing at the relevant stage whether there is a possibility of the prosecution trying to falsely link the recovery of the dead body at the instance of the accused and that the body was discovered independently and since the appellant was last stated to have been seen in the company of the deceased and the key of the flat was with co-accused Sukhbir, some manipulation has possibly been resorted to, to show the facts as projected by the prosecution.

8. It appears that for security purposes an iron grill on a frame was installed at the main door and hence HC Hari Chand has deposed about breaking the wire mesh to gain entry into the flat. He has used a lose phrase while describing the iron grill door.

9. SI Shankar Singh summoned the crime team as well as a photographer Const.Gajinder Singh PW-12 who took photographs (positives whereof got washed away due to a defect in the camera; negatives whereof are Ex.PW-12/1 to Ex.PW-12/12) of the dead body. Another photographer HC Vikram Singh PW-9 who had accompanied the crime team also

took photographs being Ex.PW-9/4 to Ex.PW-9/6; negatives whereof are Ex.PW-9/1 to Ex.PW-9/3, of the dead body. SI Shankar Singh seized the dead body and the gunny bag in which the dead body was found, as recorded in the memo Ex.PW-6/D. He lifted blood from the spot, blood control concrete and a blood stained saree Ex.P-9 (allegedly belonging to accused Sudesh) and a blood stained pyjama Ex.P-8 (allegedly belonging to accused Sukhbir) from the spot, as recorded in memo Ex.PW-6/E and seized the same. One khes Ex.P-15, one folding bed Ex.P-19, one pink coloured bed sheet Ex.P-10, one towel Ex.P-16, one steel jug Ex.P-12, two glasses Ex.P-13/1 and Ex.P-13/2, one kurta Ex.P-18, one mattress Ex.P-11, one empty bottle of liquor Ex.P-14 and a pair of hawai slippers Ex.P-17/1-2 lying at the spot were also seized as recorded in memo Ex.PW-6/F. He prepared site plan Ex.PW-25/3 of the flat.

10. Filling up the relevant forms for inquest proceedings i.e. Ex.PW-25/1, SI Shankar Singh sent the body to All India Institute of Medical Sciences for post-mortem examination.

11. With the recovery of the dead body and the circumstance of its recovery and the nature of injuries seen on the body, it became apparent that Krishan Kumar was

murdered and therefore, SI Shankar Singh, got the FIR, earlier registered only for the offence punishable under Section 364 IPC, amended and got added Sections 302/ 201/120B IPC to the same.

12. On the next day, i.e. 21.9.1990, at around 12.40 PM, Dr.D.N.Bhardawaj PW-7 conducted the post-mortem on the body of the deceased and prepared his report Ex.PW-7/A. He opined that the cause of death was asphyxia as a result of strangulation, and that the time of death was about 4 days prior to the time of conduct of the post-mortem i.e. the deceased probably died on 17.9.1990 at about 1.00 PM. After the post-mortem examination, he handed over a vest Ex.P-1, a pant Ex.P-2 and a shirt Ex.P-3 worn by the deceased and a curtain cloth Ex.P-4, a bed sheet Ex.P-5, a nylon rope Ex.P-6 and a white string (narra) Ex.P-7 which were tied around the ankles, hands and neck of the deceased as also a blood sample of the deceased on a piece of gauze which were taken possession of by SI Shankar Singh.

13. On 3.10.1990, Inspector Kulwant Sharma PW-27, from the special staff, South District, was handed over the investigation. He sent the articles seized during investigation to CFSL Lodhi Road, New Delhi. As recorded in the FSL report Ex.PW-28/3 human blood was detected on the saree, pyjama,

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bed sheet, vest, shirt, synthetic and cotton strings; and human blood of group 'A' was detected on the pyjama and the bed sheet seized from the spot. The blood group of the deceased could not be detected as the gauze/cotton on which it was lifted, on reaction gave no result.

14. On 7.10.1990 the investigation was transferred to SI Om Prakash PW-28. He summoned a draftsman Inspector Davinder Singh PW-5 who prepared site plan to scale Ex.PW-5/A, of the flat at the instance of Ramesh Kumar PW-15. On 21.10.1990, Ram Lal PW-16 father of deceased handed over to SI Om Prakash a diary Ex.PW-19/1 recording details of money transactions of Krishan Kumar with Subhash Chand and others and bearing the signatures of Subhash Chand on few pages; as also a piece of paper Ex.PW-16/2 recording the details of money transactions of Subhash Chand in relation to a Chit Fund Committee, who seized the same as recorded in the memo Ex.PW-16/3.

15. On 28.10.1990, Ram Prakash PW-11 handed over a possession letter Ex.PW-11/C dated 20.11.1989 of the Flat No. 339-A, Janta Flats, Sarita Vihar issued in his favour by Delhi Development Authority to SI Om Prakash who seized the same, as recorded in memo Ex.PW-11/B. His statement under Section 161 Cr.P.C. was recorded. Statement of one Ved

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Prakash PW-6, brother of Ram Prakash and statement of Baldev Raj PW-13, were recorded throwing light on flat No.339A, Janta Flats, Sarita Vihar, New Delhi being let out to the accused. Statement of Mahender Kumar PW-14, Uday Singh PW-17, Munni Lal PW-23 and Uday Bhan PW-24 pertaining to the deceased being last seen in the company of appellant Subhash and co-accused Sukhbir and his wife Sudesh were recorded. Statements of a few other persons which ultimately turned out to be inconsequential were also recorded.

16. Appellant Subhash Chand and accused Sukhbir and Sudesh were put to trial. The prosecution examined 28 witnesses in support of its case. Eschewing reference to the formal and procedural witnesses, we note the deposition of only those witnesses who are relevant for the purposes of disposal of the instant appeal and whose testimony has brought out the incriminating evidence against not only the appellant, but also the two co accused who have been acquitted.

17. We may note that as per the prosecution, the appellant and Sukhbir were indebted to the deceased and the motive for the crime was to do away with the deceased who would then be in no position to demand money from them.

Sudesh was the wife of Sukhbir and even she lent a helping hand. All three conspired to entice the deceased to flat No.339A, Janta Flats, Sarita Vihar, New Delhi which was taken on rent from Ved Prakash PW-6 through Baldev Raj PW-13 who was a broker. On 17.9.1990 all co-accused were seen in the company of the deceased by Mahender Kumar PW-14, Uday Singh PW-17, Munni Lal PW-23 and Uday Bhan PW-24.

18. Mahender Kumar PW-14 and Munni Lal PW-23 turned hostile and did not support the case of the prosecution.

19. Ved Prakash PW-6 deposed that flat No.339-A, Janta Flats, Sarita Vihar, New Delhi belonged to his brother Ram Prakash PW-11 and in July 1990, it was given on rent by him to Subhash and Sudesh through a neighbour Baldev Raj PW-13. That when the flat was let out, Sudesh told him that the flat was being taken on rent for her brother-in-law (Devar) who would come after a month. He deposed that on one occasion, when he visited the flat, he met Subhash and Sudesh there, but when he went there again on a later occasion, he found the flat locked. He deposed that on 26.8.1990 Baldev Raj PW-13 had handed over to him a sum of Rs. 550/- stating that it was given by Sudesh towards part rent, which was fixed at Rs.600/- per month, pertaining to the month of August. That, the balance sum of Rs.50/-, was paid by Sudesh on 17.9.1990

to Baldev Raj. On 20.9.1990 when he went to Okhla Bus depot for duty, his colleagues informed him that a foul smell was emanating from Flat No.339-A and that he should immediately go to the said flat since something appeared to be wrong there. When he reached the flat, police along with the three accused namely Subhash, Sukhbir and Sudesh, were already present there, investigating the matter.

20. Ram Prakash PW-11 deposed that the Flat No.339-A, Janta Flats, Sarita Vihar was allotted to him by Delhi Development Authority and that his brother Ved Prakash looked after all the affairs of the said flat. That he had handed over the possession slip Ex.PW-11/C of the said flat to the police.

21. Baldev Raj PW-13 turned hostile and disclaimed having been instrumental in letting out on rent Flat No.339A, Janta Flats, Sarita Vihar, New Delhi to appellant Subhash and Sudesh.

22. Uday Singh PW-17 deposed that he knew the deceased Krishan Kumar as he used to get his tyres repaired from the shop of the deceased. That he knew accused Subhash Chand whose shop was adjoining the shop of the deceased Krishan Kumar. That on 17.9.1990, at about 1.00 PM,

when he was driving a truck and was coming from Madan Pur Khadar bridge, he saw accused Subhash Chand and the deceased on a scooter driven by Subhash Chand at Sarita Vihar Corner. Another person was also on the pillion seat but he could not recognize him. He went to his village the day he saw the deceased and another person on the pillion seat of the scooter being driven by Subhash Chand and a month later when he returned, he learnt about the murder of Krishan.

23. On being cross-examined, he admitted that the road on which he claimed to have seen the deceased and the accused Subhash on a motorcycle had a divider. He stated that: *'the place where I parked the truck was at a distance of about 100 yards from the shop of accused Subhash. It is correct that when one goes from Sarita Vihar corner to the place where I parked the truck, the shop of Kuku lies at the left hand side on the way..... When I was coming driving my truck in order to park the same at the owner's house, I saw that accused Subhash, deceased Kukoo and one other person were going on the scooter. It is correct that there is a divider at Madanpur Khadar Road.'* He also admitted that his statement under Section 161 Cr.P.C. was recorded after about 5 or 6 days of his returning to Delhi after a month of his having last seen the deceased in the company of appellant Subhash.

24. It is apparent that as per PW-17 the truck being driven by him and the scooter being driven by Subhash were travelling in the opposite direction and the road was bisected by a divider. It may also be noted that the statement of PW-17 under Section 161 Cr.P.C. was recorded on 22.10.1990 as per the testimony of SI Om Prakash PW-28. We note that the said statement is not on the judicial record.

25. Uday Bhan PW-24 deposed that he knows accused Subhash Chand as he used to purchase electric appliances from the shop of Subhash Chand at Bankey Market, Badarpur, New Delhi. He also knew deceased Krishan Kumar as he was the son of his maternal uncle. On 17.9.1990 he went to Sarita Vihar in search for a shop to be taken on rent. At about 1.00 PM, he saw Subhash Chand, Krishan Kumar and another person on a two wheeler scooter. The scooter driven by Subhash was stopped near Janta Flats and Subhash, Krishan and said third person along with a lady went inside the flat. That accused Sukhbir was the third person on the scooter and accused Sudesh was the lady accompanying Subhash, Krishan and Sukhbir inside the flat. That he learnt about the murder of Krishan after many days.

26. On being cross-examined he stated that he attended the funeral ceremony of the deceased although he

did not attend the kriya ceremony. That he could not remember the date on which the body was consigned to flames. He learnt about the death of Krishan 3 or 4 days after 17.9.1990. We note that the statement of Uday Bhan under Section 161 Cr.P.C. was firstly recorded on 6.10.1990 by Insp.Kulwant Sharma PW-27 as deposed to by Insp.Kulwant Sharma and his supplementary statement was recorded on 21.10.1990 as deposed to by SI Om Prakash PW-28.

27. Ram Lal PW-16 deposed that he conducts business under the name and style M/s Ram Lal & Sons, at shop No.56-A Bankey Lal Market, Badarpur, Mathura Road. The deceased Krishan Kumar was his son and used to sit in the said shop with him. On 17.9.1990, Krishan Kumar @ Kuku went to the Badarpur Branch of Central Bank to deposit Rs.20,000/- in cash, but did not return thereafter. At around 7:00 PM on the same day, accompanied by accused Subhash Chand and his father, he visited the police station where Subhash Chand and his father went inside the room of the SHO while he i.e. Ram Lal stood outside. At 10.30 PM he was given a copy of the DD Entry No.16-A and the same bears his signatures. He deposed that he again visited the police station on 18.9.1990, but the SHO did not entertain him. On 19.9.1990 he again visited the police station where SI Shanker Singh told him to get Munni Lal

(who allegedly had seen the deceased with Subhash Chand when he went missing) to the police station. Finally on 20.9.1990, due to the intervention of the ACP, a report was lodged. Thereafter, the police accompanied him to his shop. Accused Subhash who was then present in his shop, which was adjoining the shop of Ram Lal, was apprehended. Subhash disclosed that he murdered Krishan Kumar and got the dead body recovered from a flat in Sarita Vihar. Ram Lal deposed that Subhash Chand had some money dealings with his son Krishan Kumar and that the diary Ex.PW-19/1 containing the record of financial dealings of his son was handed over by him to the police. In all, Subhash Chand owed Rs. 12.50 lacs to Krishan.

28. Ramesh Chand Chawla PW-19 deposed that he runs an electronic appliances shop at Bankey Lal Market, Badarpur, New Delhi. In 1989/1990 he floated a committee of which deceased Krishan and Subhash were also members. He paid Rs.65,000/- to Subhash on behalf of Krishan @ Kuku. Subhash and Krishan had some business dealings inter se. He deposed that the signatures on page 48 of diary Ex.PW-19/1 seem to be those of Subhash.

29. Smt.Shobha PW-22 deposed that the deceased Krishan Kumar was her husband and used to run a tyre shop

under the name of M/s Ram Lal & Sons at Badarpur. On 17.9.1990 at about 11.30 AM Krishan went to Central Bank of India to deposit Rs. 20,000/-, but he did not return. Her father-in-law and she made enquiries from various friends and acquaintances of Krishan and learnt that Krishan was with Subhash Chand. Subhash Chand resided in their neighbourhood and had his shop adjacent to the shop of Krishan Kumar. Subhash owed a huge sum of money to her husband, but refused to repay the same. In the evening of 17.9.1990, her father-in-law was informed by someone that Subhash Chand and another person took Krishan on a two wheeler scooter towards Delhi. She lodged an FIR Ex.PW-1/A with the police. About a month later, she identified a bunch of six keys shown to her by the police as those belonging to the deceased. That Krishan Kumar had advanced Rs.50,000/- to accused Sukhbir, but Sukhbir refused to repay the same.

30. In cross-examination she stated that on 17.9.1990, when her father-in-law informed her that Krishan was seen with Subhash Chand, she suspected that Subhash had taken Krishan along, with the intention of killing him. On being questioned that since she suspected Subhash Chand of having abducted Krishan with the intention to kill him, why did she not express her apprehension to the police on the same day, she

replied that her father-in-law went to the police station but the police officer refused to register any report against Subhash and merely recorded a missing person's report.

31. HC Hari Chand PW-21 deposed that on 20.9.1990, he was posted in the PCR Van patrolling in the area of Sarita Vihar, when information regarding foul smell emanating from flat No.339-A, Sarita Vihar was received by him. Accompanied by two other constables, he reached the spot. SI Dinesh Singh along with Const.Mehak Singh from PS Badarpur also reached the spot and broke open the wire gauge of the main door of the flat and on entering, found a dead body lying there. In the meantime SI Shanker Singh of PS Badarpur also reached.

32. On being cross-examined he stated that after he along with the other two constables reached the flat, they informed PS Badarpur and pursuant thereto, within 15/20 minutes SI Dinesh and Const. Mehak Singh from PS Badarpur also arrived.

33. SI Shanker Singh PW-25 deposed that on 20.9.1990, at about 10.40 AM he was handed over investigation of this case, and accompanied by Ct. Raj Pal, Ct. Anil Kumar, Ram Lal, Ramesh Kumar and one more person, he went to the shop of the accused Subhash Chand and apprehended him. He

recorded the disclosure statement Ex.PW-8/A of Subhash and seized a two-wheeler scooter having registration number DNW-0906 vide memo Ex.PW-8/E. Accused then led them to Chandermal Colony, Badarpur and got accused Sukhbir and Sudesh apprehended. He i.e. SI Shanker Singh recorded their disclosure statements Ex.PW-15/1 and Ex.PW-15/2 and seized a key handed over by Sukhbir vide memo Ex.PW-8/D and a bunch of six keys handed by accused Sudesh vide memo Ex.PW-8/C. He then arrested the three accused who led them to Flat number 339-A Janta Flats, Sarita Vihar, New Delhi. The lock of said flat was opened using the key recovered from Sukhbir and inside, a dead body wrapped in a gunny bag was found. The dead body was identified by Ram Lal, Ramesh Kumar and Anil Kumar as that of Krishan Kumar. He summoned the crime team and a photographer. He took possession of the dead body and gunny bag vide memo Ex.PW-6/D. He lifted blood, blood stained earth, earth control, blood sample, a blood stained saree and a blood stained pyjama from the spot and seized them vide memo Ex.PW-6/E. He also seized a khes, a folding bed, a pink coloured bed sheet, a towel, a steel jug, two glasses, a kurta, a mattress, an empty bottle of liquor and a pair of hawai slippers lying at the spot vide memo Ex.PW-6/F. He sent the body for post-mortem

examination; prepared site plan Ex.PW-25/3; recorded statements of the witnesses present there.

34. On being cross-examined he admitted that when he reached the flat on 20.9.1990, SI Dinesh Singh with other staff was already present there and that he did not record their statements. He denied that the FIR was ante-timed. He denied that the dead body was recovered after the wire gauge of the main door was broken open. He also denied that the dead body had already been recovered when he recorded the disclosure statement of Subhash.

35. Insp.Kulwant PW-27 deposed that the investigation of the case was handed over to him on 3.10.1990 and that he recorded the statements of Mahender Kumar and Ram Lal on 5.10.1990. That he recorded the statement of Uday Bhan on 6.10.1990.

36. SI Om Prakash PW-28 deposed that the investigation was transferred to him on 7.10.1990. He got prepared the site plan to scale. He recorded the statements of Ram Lal PW-16, Uday Bhan PW-24 and Smt. Shobha PW-22. He seized 13 papers and a diary, handed over to him by Ram Lal, recording various money transactions of the deceased vide memo Ex.PW-16/3. He recorded the statement of Uday Singh

PW-17 on 22.10.1990. A possession letter handed over to him by Ram Prakash PW-11 of Flat number 339-A Janta Flats, Sarita Vihar was also seized by him vide memo Ex.PW-11/B. He also recorded the statement of HC Hari Chand PW-21.

37. Vide impugned judgment and order dated 25.1.2001, the learned Trial Court has acquitted accused Sukhbir Singh and Sudesh Kumari of the charges framed against them. In returning the said finding, the learned Judge has discredited the testimony of Uday Bhan PW-24, who deposed having seen the three accused, namely Subhash, Sukhbir and Sudesh with the deceased in Sarita Vihar at around 1.00 PM on 17.9.1990, for the reason, he being a cousin of the deceased was expected to convey the said fact to the family of the deceased as soon as he learnt about Krishan being missing. His failure to do so evidenced an unnatural conduct leading to a doubt whether at all he was truthful. The motive against Sukhbir and Sudesh of Sukhbir being indebted to the deceased and hence the two gaining by killing the deceased, has been held as not established because except for the bald testimony of Smt.Shobha PW-22 the wife of the deceased, there was no documentary evidence to establish that Sukhbir owed any money to the deceased. Having rejected the evidence of last seen against both Sukhbir

and Sudesh and motive for them to murder the deceased, the learned Judge held that the mere recovery of key of the flat from accused Sukhbir where the dead body was recovered and the recovery of a bunch of keys belonging to the deceased from accused Sudesh, in absence of any other evidence, did not sufficiently connect them to the offence and hence they deserve the benefit of doubt.

38. The learned Judge has convicted appellant Subhash Chand on the basis of circumstantial evidence. The circumstances, noted by the learned Trial Judge, as forming a complete chain pointing towards his guilt and ruling out the innocence of Subhash Chand, are as follows:-

- a) LAST SEEN EVIDENCE: The learned Trial Judge has believed the testimony of Uday Singh PW-17 who deposed of having seen accused Subhash with the deceased and has noted the proximity of the time when the deceased was last seen alive with Subhash at around 1:00 PM on 17.9.1990 and the time of death as opined in the post-mortem report as around 1.00 PM on 17.9.1990; as also the proximity of place where the deceased was last seen with accused i.e. at Sarita Vihar Corner and the place where dead body of deceased was found i.e. in Flat No.339-A Janta Flats, Sarita Vihar.

- b) MOTIVE: The fact that Subhash owed money to deceased was held established from the diary Ex.PW-19/1 and paper slip Ex.PW-16/2, maintained by the deceased, recording therein the details of his money transactions, i.e. advancing of loans and collection of money. Some entries in the said diary proved that deceased Krishan Kumar advanced money to Subhash Chand on a number of occasions. At two places in the diary, the signatures of Subhash Chand were also appended, which were similar to his signatures on 11.9.2000 when he was examined under Section 313 Cr.P.C. Besides the said evidence, the learned Trial Judge also placed reliance on the testimonies of Ram Lal PW-16 and Ramesh Chand Chawla PW-19 in order to establish the debt and hence the motive.
- c) RECOVERY OF DEAD BODY: The dead body of Krishan Kumar was recovered at the pointing out by Subhash Chand, as recorded in memo Ex.PW-6/A.
- d) PLACE OF RECOVERY OF DEAD BODY: The dead body of Krishan Kumar was recovered from Flat No. 339-A, Janta Flats, Sarita Vihar. The testimony of Ved Prakash PW-6 proved that the said flat was taken on rent by Subhash

and Sudesh in July 1990 i.e. two months prior to the incident.

39. The first and the foremost submission urged during argument in the appeal was that the appellant was not charged with the offence punishable under Section 302 IPC. He was charged with the offence of having entered into a conspiracy with the co-accused to kill the deceased. The charge of conspiracy having failed, learned counsel urged that the appellant could not be convicted for the offence of murder because he was not charged for having committed an offence punishable under Section 302 IPC.

40. The argument is without any merit for the reason three charges were framed against the appellant; the third charge being as under:-

“That you all on 17.9.1990 at Sarita Vihar in pursuance of the criminal conspiracy entered amongst you all, you all committed the murder of Krishan Kumar @ Kuku by intentionally causing his death by strangulation and thereby committed an offence punishable under Section 302 read with Section 120-B IPC and within the cognizance of this Court.”

41. Though in conjunction with others, the appellant was aware that he was charged of committing acts pertaining to the actual murder of the deceased. The charge sheet filed against the accused clearly evidenced to the appellant that

according to the prosecution he along with Sukhbir had taken the deceased to Flat No.339A, Janta Flats, Sarita Vihar, New Delhi and this took place on 17.9.1990. The charge sheet also evidenced to the appellant that according to the prosecution, the appellant and co-accused Sudesh had taken the flat on rent. The witnesses of last seen i.e. PW-17 and PW-24 spoke about the role of the appellant. The witness to the letting of the flat namely PW-6 spoke about the role of the appellant. Counsel for the appellant extensively cross examined both witnesses. In a somewhat similar situation where more than one person were accused of the offence punishable under Section 302/149 IPC and there was no charge for the offence punishable under Section 302 IPC against any of the persons accused and only one namely Ishwar Singh was convicted for the offence punishable under Section 302 IPC, in the decision reported as 1976 (4) SCC 355 Ishwar Singh Vs. State of UP, the Supreme Court held that there was no infirmity in the conviction for the reason notwithstanding the charge framed for the offence punishable under Section 302/149 IPC and no charge being framed against Ishwar Singh for the offence punishable under Section 302 IPC, Ishwar Singh was fully aware of the factual matrix alleged against him and had cross

examined the witnesses, who, while deposing, attributed specific role to Ishwar Singh.

42. Learned senior counsel for appellant Subhash, urged that the circumstance of recovery of dead body at the instance of Subhash was wrongly held against the appellant for the reason evidence probablized that a dead body being in the flat had come in the knowledge of the police prior to the appellant being apprehended and prior to the appellant being shown as taking the investigating officer to the flat. Learned senior counsel urged that such a prior knowledge of the police rules out the discovery of any fact pursuant to the disclosure of the accused and hence makes the evidence of recovery of dead body inadmissible under Section 27 of Evidence Act.

43. With reference to the claim of Uday Singh PW-17 of having seen the appellant and the deceased on a scooter on 17.9.1990, counsel urged that the admission of Uday Singh that the road on which he saw the appellant and the deceased was a double carriageway having a divider in between and that his truck and the scooter were being driven in opposite directions, makes it highly improbable that Uday Singh could have recognized the driver and the pillion rider. The fact that Uday Singh's statement under Section 161 Cr.P.C. was recorded on 22.10.1990 i.e. after 1 month and 5 days of the

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incident, as per the learned counsel, made suspect whether at all Uday Singh was a truthful witness. Counsel urged that under the circumstances it has to be held that Uday Singh, a humble truck driver was planted by the prosecution.

44. Counsel urged that the diary Ex.PW-19/1 and the piece of paper Ex.PW-16/2 purportedly in the hand of the deceased have not been proved to be in the writing of the deceased and the signatures of the appellant at a page in the diary have not been proved to be the signatures of the appellant.

45. Last submission urged was that meaningfully read, testimony of Ved Prakash PW-6 was to the effect that tenancy of Flat No.339A, Janta Flats, Sarita Vihar, New Delhi was for the benefit of the devar of Sudesh who even paid the rent for the same. That the key of the flat was recovered from the possession of Sukhbir, husband of Sudesh, further established that Sudesh had retained the key of the flat till her devar came. That the dead body of the deceased was inside the flat and the key of the lock thereof was with Sukhbir meant that before the lock was affixed on the door of the flat, the body was already inside. Counsel further urged that the keys belonging to the deceased were recovered from Sudesh. It

was urged that there is no eye witness. Since the case of the

prosecution is based on circumstantial evidence, counsel urged that with the acquittal of Sudesh and Sukhbir the appellant would be entitled to a benefit of doubt as there is no evidence that the appellant acted alone and by himself.

46. Pertaining to the diary Ex.PW-19/1 and the slip of paper Ex.PW-16/2 we note that Ram Lal PW-16 the father of the deceased who was managing the business along with the deceased has deposed that he had personally obtained the signatures of Subhash on the same. Thus, we reject the plea of learned counsel that the signatures have not been proved as those of Subhash.

47. Pertaining to the recovery of the dead body of the deceased, having perused the record, we find that there is an obvious ambiguity on the point, i.e. whether the dead body was recovered on the basis of the disclosure of the appellant and on the appellant and the co-accused jointly pointing out the flat from where the dead body was recovered, or prior and independent thereto. The testimony of HC Hari Chand PW-21 coupled with a reading of DD No.4-A suggests, that the dead body was recovered by SI Dinesh, Const.Mehak Singh and HC Hari Chand, at about 2.00 PM, when pursuant to the receipt of information at police control room at 1.25 PM and recording of

emitting foul smell, the said police officials reached the flat and after breaking open the wire gauge of the main door, entered therein. Contrary to this, the testimonies of PW-8, PW-15, PW-16 and PW-25 suggest that the dead body was recovered at the instance of the appellant Subhash and co-accused Sukhbir and Sudesh, when, they on being arrested by SI Shanker Singh, led the police team to flat No.339-A, Janta Flats, Sarita Vihar, and with a key handed over by Sukhbir got the same unlocked.

48. In resolving the afore-mentioned ambiguity, we face a handicap, as there is no evidence of the time when the three accused were arrested; no arrest memos have been placed on record. Had the time of arrest of the accused come on record, one could have approximated the time when the police team led by the three accused would have reached the flat and if the same suggested a time prior to 1.30 PM i.e. prior to SI Dinesh, Const.Mehak and HC Hari Chand reaching the flat, one could have considered whether HC Hari Chand has misstated the correct facts. In absence of such evidence, it would be difficult to return a conclusive finding that the dead body was got recovered pursuant to the disclosure statement of the appellant. It is settled law that a fact already in the knowledge of the police cannot be rediscovered. It is true that

SI Dinesh, Const.Mehak and HC Hari Chand proceeded to the flat independent of SI Shankar Singh as per the case of the prosecution, but in view of the discrepancies in the testimonies of the witnesses whether the door of the flat was broken to gain access or whether the key provided by co-accused Sukhbir was used to open the lock, there is a possibility emerging that SI Shankar Singh has prepared the pointing out memos and the recovery memo of the body as if everything happened pursuant to the disclosure statement of the appellant. So closely and yet so divergently are the facts stated by the witnesses of the prosecution that it renders it virtually impossible to conclusively break the deadlock.

49. Clearly therefore, two divergent views are surfacing from the evidence on record. The law is settled on the point: that whenever two contrary views emerge, the one favourable to the accused must be adopted. Besides, PW-8, PW-15 and PW-16, being the brothers-in-law and the father of the deceased, the possibility of their deposing falsely to incriminate the accused cannot be ruled out. We may also note that SI Shanker Singh, in his cross-examination, has admitted that when he reached the said flat, SI Dinesh, HC Hari Chand and Const.Mehak were already present there. In light of the above, we give the benefit of the discrepancy to

Subhash and disregard the evidence of recovery of dead body at his instance.

50. Challenge to Uday Singh PW-17 being a truthful witness and there being a possibility of his being planted was the submission made. Since the other witness of last seen, namely Uday Bhan PW-24 has been disbelieved by the learned Trial Judge, and for good reasons, it would be vital for the prosecution as well as the defence as to what is the credibility of Uday Singh PW-17. It has to be noted that Uday Singh is a truck driver and could possibly be influenced by the police. The fact that his statement under Section 161 Cr.P.C. was recorded on 22.10.1990 i.e. after 1 month and 5 days of the deceased being found missing and 1 month and 2 days on the dead body of the deceased being recovered has also to be kept in mind. Uday Singh has justified his volunteering information to the police after more than 1 month by saying that he went to his village, but there is no evidence to support said assertion of Uday Singh. With this backdrop, was it possible for Uday Singh to have seen the appellant as the driver of the scooter and the deceased as the pillion rider thereon with a third person sitting at the rear. The relevant portions of the examination-in-chief and cross-examination of Uday Singh PW-17 read as under:-

“On 17/9/1990, when I was coming driving my vehicle from Madan Pur Khadar bridge at about 1:00 PM, Kuku and accused Subhash present in the Court today had met me at Sarita Vihra corner. They were on two wheeler scooter.....

Cross-examination:-

The place where I parked the truck was at a distance of about 100 yards from the shop of accused Subhash. It is correct that when one goes from Sarita Vihar corner to the place where I parked the truck, the shop of Kuku lies at the left hand side on the way..... When I was coming driving my truck in order to park the same at the owner's house, I saw that accused Subhash, deceased Kukoo and one other person were going on the scooter. It is correct that there is a divider at Madanpur Khadar Road.”

51. On a perusal of the above extracted portions, we can safely conclude that when PW-17 saw the deceased with the appellant on a two-wheeler scooter at Sarita Vihar Corner, he i.e. PW-17 was driving a truck from Sarita Vihar Corner in the direction of the shop of Krishan, while Krishan and Subhash were travelling in the opposite direction i.e. from the direction of the shop of Krishan Kumar towards Sarita Vihar Corner. Thus, the two vehicles were plying in the opposite directions i.e. were approaching each other till the point they crossed over. PW-17 has admitted that the road on which the vehicles were plying had a divider in between. It is apparent that the road is a double carriageway; the two carriageways being separated by a divider. It is thus obvious, that when PW-17

saw the appellant and the deceased, they were on the other carriageway. Unfortunately, we do not have the width of the carriageways; but being residents of Delhi and having travelled often in that part of the city, we take judicial notice of the fact that wherever roads in Delhi have two separate carriageways, the divider separating the carriageways have a width between 4 feet to 6 feet. This obviously rules out the possibility of PW-17 in his truck and the deceased and appellant in their scooter, coming in a straight line of direction against each other i.e. having a direct eye contact in the straight line, thereby not enabling PW-17 to have anything more but a fleeting glance of the passengers in the vehicles coming from the opposite direction. On a momentary and a fleeting glance of three persons on a scooter coming from the opposite direction on the other side of the carriageway, the witness himself driving a truck and in motion; the oncoming scooter also being in motion, it is doubtful whether Uday Singh could have recognized the driver as also the pillion rider on a scooter. The cumulative effect of the circumstances under which Uday Singh has surfaced, the topology of the road on which he claims to have seen the deceased and the appellant on a scooter and our reasoning in the preceding part of the instant para compels us to hold that it would be unsafe to

accept the testimony of Uday Singh that he had seen the appellant and the accused as claimed by him. In this connection it is important to note that as per Smt.Shobha PW-22, the wife of the deceased she learnt from friends of her husband that her husband was in the company of Subhash. Shobha has not disclosed the names of said persons. In any case, Shobha has not said that Uday Singh had told her that he had seen her husband in the company of Subhash on 17.9.1990. The possibility of the investigating officer filling in the blanks and hence planting Uday Singh as a witness cannot be ruled out.

52. Out of the 28 prosecution witnesses examined at the trial, 4 were cited as having last seen the deceased with the appellant. 2 of them, namely Mahender Kumar PW-14 and Munni Lal PW-23 resiled from their statements recorded under section 161 Cr.P.C. and were declared hostile. Out of the remaining 2, as noted in para 37 above (where the reasoning of the learned Trial Judge has been briefly noted), Uday Bhan PW-24 was disbelieved by the Trial Judge. The reasoning given was that being a cousin of the deceased, PW-24 is expected to have learnt about Krishan being missing soon after the missing persons report was lodged on 17.9.1990 and if he were a genuine last seen witness, he ought to have conveyed the

incident of his having seen the deceased with Subhash to the family of the deceased soon thereafter; his failure to do so does not inspire confidence, and gives an impression of his being a planted witness. Concurring with the reasoning given by the learned Trial Judge, we also discard the testimony of PW-24. Since we have found serious improbabilities in the version of the other witness of last seen and the fact that he has surfaced after 1 month and 5 days of the incident, we are left with no evidence of the appellant being last seen in the company of the deceased on 17.9.1990.

53. The remaining evidence against the appellant would be the testimony of Ved Prakash PW-6 and proof of the fact that the appellant owed money to the deceased i.e. had a motive for the crime.

54. Let us note the testimony of Ved Prakash PW-6. Relevant portions of his examination-in-chief are as under:-

“My brother’s name is Ram Prakash. Flat No.339A, Janta Flats, Sarita Vihar stands in my brother’s name. The said house was let out to accused Subhash and Sudesh both present in Court in July, 1990. Said house was given on rent to the said two persons through Baldev Raj who resides in the neighbourhood. Sudesh accused present in Court had represented at the time of taking the house on rent that the said house is being taken on rent for the residence of her Devar who will come to Delhi after about month..... On 26.8.1990

Baldev Raj aforesaid gave me a sum of Rs.550/- saying that said amount had been given to him by accused Sudesh for being handed over to me as rent for the month of August 1990. Agreed rent was Rs.600/- per month. Later on, on 17.9.1990 accused Sudesh gave the balance amount of Rs.50/- to Baldev Raj.”

55. For unexplainable reasons, in India, witnesses speak in a round-about manner. Unfortunately, the counsels engaged at the trial do not help the witnesses to speak with precision. The manner in which a question is posed to a person, more often than not, elicits the response thereto. Vague and directionless questions elicit vague replies. This compels the Courts to give meaning to the deposition of witnesses. Meaningfully read, the testimony of PW-6 establishes that the flat No.339A, Janta Flats, Sarita Vihar, New Delhi was let out for the residents of the devar of Sudesh. She had paid the rent for the flat. When the flat was let out, Sudesh and Subhash had come to him. Thus, it was Sudesh who had a concern with the flat i.e. the possessory rights thereof and not the appellant. The fact that the key of the flat was with Sukhbir, the husband of Sudesh also shows that the possession of the flat was with Sudesh and Sukhbir. That the bunch of keys of the deceased was with Sudesh also shows that the deceased was with Sudesh, for how else would Sudesh be in possession of the keys belonging to the deceased. Thus,

to single out the appellant on the basis of the testimony of PW-6; noting that the acquittal of Sudesh and Sukhbir has attained finality, would require the testimony of PW-6 to be read as if the appellant was in possession of the flat where the dead body of the deceased was found; a finding which cannot be returned.

56. Motive as an incriminating evidence is premised on the reasoning that because somebody has a motive it can be presumed that he did the act. This line of reasoning is what is known as presumptive reasoning. The reasoning is based on a presumption and not a fact. Thus, by its very nature, presumptive reasoning has always been treated as weak logic compelling the Courts to use motive as link evidence and not substantive evidence i.e. not to convict accused on basis of motive being the sole incriminatory evidence.

57. We conclude by holding that the prosecution has failed to list the chain of circumstances so complete that the only inference which can be drawn is the guilt of the appellant. Noting once again that the acquittal of Sudesh and Sukhbir has attained finality we give the benefit of doubt to the appellant and acquit him of the charge framed against him.

58. The appeal is allowed. The impugned judgment and order dated 25.1.2001 is set aside.

59. The appellant is on bail. The bail bond and the surety bonds furnished by him are discharged.

(PRADEEP NANDRAJOG)
JUDGE

(INDERMEET KAUR)
JUDGE

September 07, 2009
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