

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

**RESERVED ON : 29th August, 2012
DECIDED ON : 19th September, 2012**

+ CRL.A. 463/2009

SONU @ SONU SINGH @ GOPAL Appellant
Through : Ms. Rakhi Dubey, Advocate.

CRL.A. 835/2009

KULDEEP SINGH Appellant
Through : Mr.Siddharth Aggarwal, Advocate.

versus

STATE GOVT. OF NCT OF DELHI Respondent
Through : Mr.Sanjay Lao, APP.

**CORAM:
MR. JUSTICE SANJIV KHANNA
MR. JUSTICE S.P.GARG**

S.P.GARG, J.

1. The present appeal is directed against the judgment dated 24.01.2009 and order on sentence dated 31.01.2009 of learned Additional Sessions Judge in Sessions Case No.42/2008 by which the appellants Sonu @ Sonu Singh @ Gopal (A-1) and Kuldeep Singh (A-2) were
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convicted for committing offences punishable under Sections 302/397//34 IPC read with Section 120-B IPC and sentenced to undergo imprisonment for life with fine.

2. Virender Pal Dutta, his wife Karuna Dutta (since deceased), mother-in-law Bimla Devi (Mataji) used to reside at 259-RPS, DDA flats, Mansarovar Park, Delhi. Bimla Devi was completely bed ridden. PW-5 (Malti Sardar) was a maid in the house to take her care. On 10.02.2002, Virender Pal Dutta (PW-11) left for his shop as usual at about 6:00 A.M. PW-5 (Malti Sardar) after serving milk to Bimla Devi at about 7/8:00 A.M. went to the market to purchase milk and vegetables. After about half-an-hour when she returned, she saw that the door of the house was open and A-1 and A-2 were inside the house. A-1 caught hold of Karuna and A-2 gave knife blows on her chest. Karuna fell down. The accused caught hold of Malti Sardar and took her to Karuna's room. They threatened to kill her. When she pleaded mercy, she was asked not to raise noise or else she would be killed. They enquired from her as to where were the gold karas which the deceased used to wear. She expressed ignorance as the deceased used to keep the valuables in her absence. In the meantime, Shashi, washer-man's son went there to deliver ironed clothes. The accused also caught hold of him and made him to stand near

PW-5 (Malti Sardar). The accused went out of the house and bolted the door from outside. Shashi told Malti Sardar that one of the assailants was Sonu and he knew him.

3. Daily Diary (DD) No.11B (Ex/PW-2/A) was recorded at police station M.S.Park at 9:13 A.M. on getting information that a murder had taken place at House No.259, R.P.S., DDA flats, Mansarovar Park, Delhi. The DD was marked to ASI Dharambir Singh who with Constable Gajender reached the spot. He recorded Malti Sardar's statement (Ex.PW-5/A) and sent the rukka (Ex.PW-13/B) through Constable Gajender for lodging First Information Report. The investigation was taken over by Inspector Jagjit Singh. He summoned the crime team and got the scene of incidence photographed. Insp. Jagjit Singh (Investigating Officer) seized various articles lying at the spot. He conducted inquest proceedings and sent the body for post-mortem examination. Dr.Gaurav Vinod Jain (PW-3) conducted post-mortem examination of the body on 19.10.2002.

4. On 20.10.2002 A-1 was arrested from near house bearing Municipal No.A-59, Vivek Vihar at 9:00 P.M. Pursuant to the disclosure statement, he led the police to his house No.4649/50B, Gali No.11, Modern Shahdara, Delhi and recovered cash of ₹4,500/-, camera make

‘Halina’ and white shirt having sticker ‘BT BEST TAILOR’ Ganga Vihar. A-1 then took the police to gali No.12, Ram Nagar and recovered one dagger from the cattle diary of Gullu. The police along with accused (A-1) went to House No.5675/1/Kabul Nagar, near Tikona Park and arrested A-2. He also recovered a broken gold ‘Kara’ (in three pieces) lying in the left pocket of his pant. One shirt having sticker of ‘Garg Tailors’ which A-2 had worn at the time of incident was also seized. During the course of investigation, the police arrested Gulvinder @ Gullu (facing trial before Juvenile Court), and at his instance, one gold ‘Kara’ was recovered from the drawer of his bed at House No.1/2306, Ram Nagar, M.S.Park. The IO moved an application for conducting Test Identification Proceedings but the accused refused to participate in it. On 18.11.2002, the case property recovered in this case was identified in Test Identification Proceedings. The IO sent the exhibits to Forensic Science Laboratory and collected the reports. He recorded the statements of the witnesses conversant with the facts and after completion of the investigation, submitted a charge-sheet against the accused for committing the offences mentioned previously. The accused were duly charged and brought to trial.

5. The prosecution examined 31 witnesses to prove the charges against the accused. In their examination under Section 313 Cr.P.C., the accused pleaded false implication. They, however, did not prefer to lead any evidence in defence.

6. Homicidal death of deceased Karuna is not under challenge. PW-3 (Dr.Gaurav Vinod Jain) in the post-mortem report (Ex.PW3/A) conducted on 19.10.2002 at 11:20 A.M. opined that the cause of death was shock due to ante mortem injury to heart produced by a sharp/cutting stabbing weapon. He was of the opinion that injury No.1 was sufficient to cause death in the ordinary course of nature. He also gave his opinion (Ex.PW-3/C), that injuries Nos.1 to 5 depicted in the post-mortem examination report were possible with the knife shown to him. In the cross-examination, he elaborated that the weapon produced before him was a singled edged weapon. Time since death was about one day.

7. PW-5 (Malti Sardar) aged 48 years was employed full time maid to take care of Bimla Devi (Mataji). She was an illiterate lady from District Chobis Pargana, West-Bengal. She claimed that she could understand Hindi but it was difficult for her to speak it fluently. She deposed that she was working as full time maid in the said house for last six months. Her statement remained unchallenged on this aspect. PW-11

(Virender Pal Dutta) also testified that they had employed Malti Sardar as maid in the house. Being a maid, her presence in the house was quite natural and probable. She is a crucial witness to establish the guilt of the accused. Her statement (Ex.PW5/A) was recorded by the police soon after the occurrence and it formed the basis for registration of First Information Report under Section 302 IPC. She narrated the incident minutely and gave graphic details as to how and under what circumstances, the accused committed Karuna's murder. She also revealed that from the son of a washer-man who reached there to deliver ironed clothes, she came to know that one of assailants was known to him and his name was Sonu. The occurrence took place on 18.10.2002 at about 8:20 A.M. Daily Diary No.11B (Ex/PW-2/A) was recorded at the police station M.S.Park at 9:13 A.M. The rukka was sent promptly without any delay at 10:30 A.M.

8. Early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding truth of the version. In the case of '*Jail Prakash Singh v.State of Bihar & Anr.*' 2012 CRI.L.J.2101 the Supreme Court held:-

“The FIR in criminal case is vital and valuable piece of evidence though may not be substantive piece of evidence.

The object of insisting upon prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of actual culprits and the part played by them as well as the names of eye-witnesses present at the scene of occurrence. If there is a delay in lodging the FIR, it loses the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of large number of consultations/deliberations. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question."

9. While appearing as PW-5 in the court, Malti Sardar proved the version given to the police at the earliest point of time without any major variations. She deposed that when she returned after purchasing milk and vegetables, she saw A-1 and A-2 in the house. A-1 caught hold Karuna and A-2 stabbed her with knife on her chest. She further deposed that she was also caught hold by the accused and they threatened to stab her on stomach. She asked for mercy pleading that she was a widow and had small children. The accused then asked her not to raise noise or else they would kill her. She further stated that in the meantime, son of a washer-man arrived there to deliver the clothes. A-1 saw him and kept hand on his mouth and made him to stand near her. He was also directed not to raise noise. The accused left and bolted the door from outside.

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From the washer-man's son she came to know that one of the assailants was Sonu. In the cross-examination, she fairly admitted that she had put her thumb impression on her statement (Ex.PW5/A) in the police station. She did not know the accused prior to the incident. She also did not know the washer-man's son. She admitted that she had not given description of the accused to the police. She denied that she was suspected for Karuna's murder. She denied the suggestion that washer-man's son did not identify A-1 or that he was falsely implicated by her in connivance with other desperate residents of West-Bengal with whom she managed to murder Karuna.

10. A critical analysis of the statement of the witness shows that her presence at the spot has not been challenged. No suggestion was put that she was not working as a full time maid in the house. Material facts about the incident narrated by her remained unchallenged in the cross-examination. Nothing was suggested that the washer-man's son had not reached the spot for delivery of the clothes or that the child was not detained at that time. No ulterior motive was assigned to her to falsely implicate the accused with whom she had no prior acquaintance, ill-will or animosity. The accused alleged that she had a hand in Karuna's murder without laying any foundation for the charge. She is the most natural

witness who reached the spot at the time of occurrence from the market. She attributed specific roles to each of the accused. Her testimony could not be shattered despite searching cross-examination. Minor discrepancies highlighted by the learned counsel for the appellant are inconsequential. She identified both the assailants in the court. Of course, at the first instance, she did not identify A-2 and deposed that A-1 along with one more person who was not present in the court that day was there. She further stated that A-2 present in the court was not the other assailant. However, in the same breath, she identified A-2 to be the other assailant. She explained that she was unable to identify him at the first instance because A-2 had grown a beard. We have no reason to reject this natural and plausible explanation of a rustic illiterate witness. In fact it reflects that she had stated the truth and was not tutored.

11. Law relating to appreciate the testimony of a rustic witness is discussed in the case of *'State of Uttar Pradesh Vs. Krishna Master and Others'* (2010) 12 SCC 324 :

“15. Before appreciating evidence of the witnesses examined in the case, it would be instructive to refer to the criteria for appreciation of oral evidence. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is found, it is

undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

17. In the deposition of witnesses, there are always normal discrepancies, howsoever honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition, shock and horror at the time of occurrence and threat to the life. It is not unoften that improvements in earlier version are made at the trial in order to give a boost to the prosecution case, albeit foolishly. Therefore, it is the duty of the court to separate falsehood from the truth. In sifting the evidence, the court has to attempt to separate the chaff from the grains in every case and this attempt cannot be abandoned on the ground that the case is baffling unless the evidence is really so confusing or conflicting that the process cannot reasonably be carried out. In the light of these principles, this Court will have to determine whether the evidence of eyewitnesses examined in this case proves the prosecution case.

24. The basic principle of appreciation of evidence of a rustic witness who is not educated and comes from a poor strata of society is that the evidence of such a witness should be appreciated as a whole. The rustic witness as compared to an educated witness is not expected to remember every small detail of the incident and the manner in which the

incident had happened more particularly when his evidence is recorded after a lapse of time. Further, a witness is bound to face shock of the untimely death of his near relative(s). Therefore, the court must keep in mind all these relevant factors while appreciating evidence of a rustic witness.

29. At this stage, it would be well to recall to the memory the weighty observations made by this Court as early as in the year 1988 relating to appreciation of evidence and the duties expected of a Judge presiding over a criminal trial. In State of U.P. v. Anil Singh, 1988 Supp SCC 686 : 1989 SCC (Cri) 48 : AIR 1988 SC 1998, it is observed as under: (AIR pp. 1998-99)

“... in the great majority of cases, the prosecution version is rejected either for want of corroboration by independent witnesses, or for some falsehood stated or embroidery added by witnesses. In some cases, the entire prosecution case is doubted for not examining all the witnesses to the occurrence. The indifferent attitude of the public in the investigation of crimes could also be pointed. The public is generally reluctant to come forward to depose before the court. It is, therefore, not correct to reject the prosecution version only on ground that all witnesses to occurrence have not been examined. It is also not proper to reject the case for want of corroboration by independent witnesses if the case made out is otherwise true and acceptable. With regard to falsehood stated or embellishments added by the prosecution witnesses, it is well to remember that there is a tendency amongst witnesses in our country to back up a good case by false or exaggerated version. It is also experienced that invariably the witnesses add embroidery to prosecution story, perhaps for the fear of being disbelieved. But that is no ground to throw the case overboard, if true, in the main. If there is a ring of truth in the main, the case should not be rejected. It is the duty of the court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses. It

is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform.”

12. PW-7 (Master Shashi Kapoor) appeared for examination on 20.01.2004 after about 1 ¼ year of the offence. He was studying in second class, at the time of his examination. The Trial Court put preliminary questions to ascertain if he was a competent witness and understood the questions and was able to give rationale answers.

13. The Court was of the view that the child understood the sanctity of oath and was competent to testify. A child of tender age can be allowed to depose if it has intellectual capacity to understand questions and give rationale answers thereto. He testified that he used to reside with his grandparents in Itawa (UP). On the day of occurrence, he was living in Delhi with his parents who used to iron clothes. He further stated that he used to deliver ironed clothes to the customers. On the day of incident, he was sent to Nakul's house for giving the clothes. He was asked whether Nakul was an old man, young man or a child. To that, he replied that Nakul was a small boy like him. His father's name was Bittu. He went to Nakul's house in the morning for giving the clothes. Since this witness did

not support the prosecution and resiled from his statement recorded under Section 161 Cr.P.C., with Court's permission, learned APP cross-examined him. In the cross-examination, he stated that the police had met him in connection with this case. He however, denied that A-1 was known to him prior to the incident or that he was confined in the room by the accused. He however, admitted that Nakul's mother was lying dead in the house and blood was oozing out from her body. One domestic lady was doing the work in the Nakul's house. In the cross-examination on behalf of the accused, he stated that his statement was recorded by the police. His parents used to iron the clothes in the police quarters. He denied that the statement was made to the police under threat.

14. Apparently, PW-7 (Master Shashi Kapoor) did not support the prosecution completely and turned hostile. However, he admitted that his parents used to iron clothes in the locality and he used to go to the houses for delivering the clothes. It stands established that on the day of incident the child had gone to the house of the deceased to deliver clothes and had seen Nakul's mother lying dead there. The law to deal with the evidence of a hostile witness is well-settled. In the case of '*Rameshbhai Mohanbhi Koli & Ors v. State of Gujrat*' (2011) 11 SCC 111, the Supreme Court held:

“It is settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. [Vide Bhagwan Singh v.State of Haryana 1976 SCC (Cri) 7, Rabindra Kumar Dey v.State of Orissa 1976 SCC (Cri) 566, Syad Akbar v.State of Karnataka 1980 SCC (Cri) 59 and Khujji v.State of M.P. 1991 SCC (Cri) 916]

In State of U.P.V. Ramesh Prasad Misra 1996 SCC (Cri) 1278, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde V.State of Maharashtra 2003 SCC (Cri) 112, Gagan Konojia v.State of Punjab (2008) 1 SCC (Cri) 109, Radha Mohan Singh v. State of U.P. (2006) 1 SCC (Cri) 661, Sarvesh Narain Shukla v.Daroga Singh (2009) 1 SCC (Cri) 188 and Subbu Singh v.State (2009)2 SCC (Cri) 1106”

15. The child witness having no concern and relation with the family of the deceased has corroborated the statement of PW-5 (Smt.Malti Sardar) to the extent that the son of a washer-man reached the house at the time of occurrence in the morning to deliver the clothes. It further proves that the child had seen Nakul’s mother lying dead in the room and she was bleeding. Apparently, the child was there in the house. It appears that he has not presented true facts. Nevertheless, it stands established that he was

seen by PW-5 (Smt.Malti Sardar) when he went to deliver the ironed clothes. The cogent and clinching evidence of PW-5 cannot be disbelieved simply because he did not support the prosecution on all material facts.

16. The prosecution examined PW-4 (SI Sanjay Kumar Jha) who along with ASI Deepak Panwar, Const.Rajinder Pillay (police photographer) reached the spot on 18.10.2002 on the call of ACP Mahavir Singh. He testified that he examined the scene of the crime and developed six chance prints marked Ex.Q1 to Ex.Q6. The enlarged photographs after developing them were Ex.PW-4/A. He prepared inspection report Ex.PW-4/B and submitted it in his office. He handed over one copy of the inspection report to the Investigating Officer. In the cross-examination, nothing was suggested to him that the chance prints Ex.Q1 to Ex.Q6 were not lifted by him from the spot. He denied that the science of chance prints was not perfect.

17. On 08.11.2002, an application was moved by the Investigating Officer before learned Metropolitan Magistrate for permission to take palm prints of the accused persons. Order dated 08.11.2002 reads as under :

*“Pr : Both accused in J/C.
Inspr.Jagjit Singh.*

He has moved an application for taking permission for taking blood samples and palm prints. Both the accused have been asked whether they voluntarily wants to give palm prints and blood samples and both of them have stated that voluntarily they are ready to give the blood samples and palm prints. Both the accused persons have been told regarding their right of refusal but despite the knowledge of their rights they have voluntarily ready to give the blood samples and palm prints and accordingly the application of the Inspr.Jagjit Singh is allowed.

MM/08.11.2002”

18. Pursuant to that permission, the palm prints and blood samples were taken by the police.

19. PW-25 (SI Gyanender Singh) is an expert witness from Finger Print Bureau, PTS, Malviya Nagar, New Delhi. On 12.11.2002, he received the documents along with finger and palm impression slips marked Q1 to Q6 of suspects namely Sonu Singh @ Gopal, Kuldeep, Virender Pal Datta, Smt.Malti Sardar and Smt.Kuruna Dutta for comparison and expert opinion from FPB Crime Team. He also received photographs of the chance prints marked Q1 to Q6 along with their negatives from police photographer for examination. He enlarged the thumb impression of mark Q3 and S1 for examination exhibited as Ex.PW-25/A and Ex.PW-25/B. He testified that on 05.12.2002, he examined the said impressions and found that chance print marked Q3

was identical with the left thumb mark S1 on the finger impression slip of Kuldeep S/o Hira Lal. He examined other chance prints but those were not identical with the palm prints of any suspect. He proved report Ex.PW-25/C. In the cross-examination, he stated that he was dealing with the finger prints since 1986 and had examined/compared about 1,000 such finger prints. A-2 was not known to him. He claimed that science of finger prints was hundred percent correct. He denied that a false report was given in connivance with the police.

20. We have no reasons to discard the testimony of this independent expert witness who had no interest to falsely implicate the A-2 with whom he had no connection. He was not even known to him. The fact that no such report went against A-1 shows the authenticity of the report. No chance print lifted from the spot was found identical with the specimen finger/palm prints of A-1.

21. Section 45 Evidence Act also talks about finger impression. Under Section 4 of Identification Act, the police is competent to take finger prints of the accused. The science of identification of finger prints is an exact science (Refer HP Administration vs. Om Prakash, AIR 1972 SC 975) and it does not admit of any mistake or doubt (Jaspal Singh vs. State, AIR 1979 S.C.1708).

22. Presence of A-2's finger prints on the articles at the spot is an incriminating circumstance against him to establish his presence and complicity in the crime. A-2 failed to explain how and under what circumstances he was present at the spot. In the absence of any prior acquaintance with the victim, A-2 had no reason to visit the said house.

23. After their arrest A-1 and A-2 recovered blood stained shirts which they were wearing on the day of incident from their houses seized vide seizure memo Ex.PW-16/B and Ex.PW-16/G. These clothes were sent to FSL for comparison. We have examined FSL reports Ex.PW-29/G and Ex.PW-29/H.

24. As per FSL reports Ex.PW-29/G and Ex.PW-29/H, human blood of 'B' group was detected on the shirt marked Ex.7L belonging to A-2. Human blood was detected on the shirt of A-1 but it did not indicate the blood group. Apparently, deceased's blood group was 'B'. Detection of blood group of the deceased on the shirt recovered at A-2's instance is another incriminating circumstance to prove his presence in the house at the time of incident. A-2 has not explained how and under what circumstances blood group of the deceased was on his shirt.

25. On 21st October, 2002 the Investigating Officer produced A-1 and A-2 in muffled faces for Test Identification Proceedings before the

court. They were asked whether they wanted to participate in the TIP proceedings in which Malti Sardar and Shashi were to identify them as assailants in the case. Both the accused refused to participate in the proposed TIP. PW-8 (Shri R.K.Chauhan) proved TIP proceedings (Ex.PW-8/C). Their statements for declining TIP were recorded as:-

“Statement of accused Sonu Singh @ Sonu s/o Lal Singh r/o Mudhera P.S.Bharua Distt., Hamirpur

I do not want to join proposed TIP because witness Shashi s/o Dalip, Presswala knows him because his father lives in New Modern Shahdara near our house. Hence, I do not want to join proposed TIP.”

RO & AC
(Sign)

(-Sd-)
Metropolitan Magistrate”

Statement of accused Kuldeep Singh s/o Shri Heeralal r/o Gali No.2, Ram Nagar, Shahdara, Delhi.

I do not want to join proposed TIP because witness Shashi s/o Dalip knows me because I used to play cricket in the Ram Nagar area where his father used to do iron on clothes. Hence, I do not want to join proposed TIP proceedings.”

RO & AC
(Sign)

(-Sd-)
Metropolitan Magistrate”

26. A-2 did not join the proceedings stating that PW-7 was known to him. However, he did not give any explanation for declining TIP proceedings in which PW-5 (Malti Sardar) was also to participate. Similarly A-1 did not justify his refusal for identification from PW-5 (Malti Sardar). PW-5 (Malti Sardar) deposed that the assailants were not known to her prior to the occurrence. No suggestion was put to her that the police had shown them in the police station after their arrest. Adverse inference is to be drawn against the accused for their refusal to participate in the TIP proceedings.

27. Statements (Ex.PW-8/A and 8/B) reproduced above lend credence to the version of PW-5 and 7 that one of the assailants Sonu (A-1) was known to PW-7 Shashi, washer man's son. A-1 himself admitted in the above statement that Shashi knew him as his father lived in New Modern Shahdar near his house and he was 'presswala'.

28. PW-7 (Shashi) did not support the prosecution regarding A-1's identify in the court. PW-5 (Malti Sardar) was categorical to assert that from PW-7 (Shashi) she came to know that name of one of the assailants was Sonu. When the Investigating Officer inquired from PW-11 (Virender Pal Dutta) if any person with the name 'Sonu' was known to him, he replied that he knew one Sonu who was grandson of a maid

employed earlier in the house and was residing in Ram Nagar. The Investigating Officer took PW-7 (Shashi) there. After seeing the said 'Sonu' he was fair enough to state that he was not the assailant. PW-7 did not opt to identify a wrong person. PW-5 Malti Sardar's testimony coupled with the testimony of PW-11, PW-9 and Investigating Officer and the statement of the accused recorded above establishes that A-1 (Sonu) was the real assailant.

29. PW-11 (Virender Pal Dutta) testified that he found ₹40,000/-, some gold jewellery and one camera missing from the almirah. He also found the articles lying scattered near the almirah. PW-5 (Malti Sardar) deposed that the accused had inquired from her as to where were the golden karas. After the departure of the accused, she found that the 'karas' worn by her madam and her ornament on her neck were missing. A-1 was arrested on 20.10.2002 and made disclosure statement pursuant to which he recovered ₹4,500/-, one camera make 'Halina' seized vide seizure memo (Ex.PW-16/B). PW-17 (Chhote Lal) an independent public witness was joined at the time of recovery. He testified that A-1 was a tenant under him. On 20.10.2002 A-1 came to the tenanted room with the police. The police searched the room and recovered ₹4,500/- and a camera. In the cross-examination he stated that his statement (Ex.PW-

17/A) was recorded in the police station but he did not know its contents. No suggestion was put to the witness that A-1 had not reached the tenanted room and had not recovered the camera and cash of ₹4,500/- from the tenanted room. Presence of PW-17 (landlord) was also not denied in the cross-examination.

30. According to the testimony of PW-29 (Inspector Jagjit Singh) A-1 took them to house No.5671/1, Kabool Nagar near Tikona Park and got arrested A-2. It was a scooter repairing workshop run by A-2's father. A-2 was arrested and pursuant to his disclosure statement, he produced 'kara' of gold in three pieces from the left side pocket of the pant hanging on the hundi (hook) and seized vide seizure memo (Ex.Pw-16/D). The police was able to recover one 'kara' at the instance of co-accused Gulvinder @ Gullu (facing trial before the Juvenile Court) on 25.10.2002 seized vide seizure memo (Ex.PW-29/D). PW-18 (Sanjay Mittal) joined the investigation at the time of recovery of the gold kara at the instance of Gulvinder @ Gullu.

31. On 18.11.2002 PW-27 (Shri Rajneesh Kumar) conducted TIP proceedings of the case property in which Virender Pal Dutta participated. The said proceedings are Ex.PW-27/A. PW-11 (Virender Pal Dutta)

correctly identified camera and karas mixed with 'similar' cameras and other karas identical in colour, size and design.

32. Recovery of robbed articles from the possession of the accused is another strong incriminating circumstance against them. These articles were recovered at the instance of the accused from their respective houses. The articles were identified by PW-11 (Virender Pal Dutta) who had occasioned to observe these articles with the deceased and were found missing on the day of incident. The accused did not explain how and under what circumstances, they got possession of the robbed articles. They did not claim ownership of any such article. In the facts of the present case, it is unbelievable that victim would provided these valuable articles to plant upon the accused for false implication of the accused with whom they had no prior acquaintance or animosity. PW-11 must be interested to bring the real culprits to book and is not expected to create a false evidence against the accused.

33. The robbed articles were recovered from the possession of the accused soon after the incident. A legitimate presumption can safely be drawn under Section 114 (a) of the Evidence Act that the appellants not only took part in the robbery but also in the murder of the deceased. The circumstantial evidence discussed above categorically establishes

involvement of both the accused for the commission of robbery and murder.

34. In the case of '*Earabhadrapa v. State of Karnataka*', AIR 1983 SC 446 : the accused was charged for murder and robbery. He could be arrested after the lapse of a period of one year and some stolen articles were recovered pursuant to his statement under S.27, Evidence Act. Before the Supreme Court the argument was advanced that since a period of one year elapsed between the murder and the discovery of the stolen articles the only reasonable inference that could be drawn under S.114(a), Evidence Act was that the accused was merely the receiver of stolen property and had not committed the murder. Overruling the argument, their Lordships held that since the accused was absconding, the presumption of both murder and robbery could legitimately be drawn against him even though the stolen properties were recovered after the lapse of one year.

35. In '*Shri Bhagwan vs. State of Rajasthan*' (2001) 6 SCC 296, observation of the Supreme Court are relevant to appreciate the evidence in this case.

"The possession of the fruits of the crime, soon after it has been committed, affords a strong and reasonable ground for

the presumption that the party in whose possession they are found is the real offender, unless he can account for such possession in some way consistent with his innocence. It is founded on the obvious principle that if such possession had been lawfully acquired, that party would be able to give an account of the manner in which it was obtained. His unwillingness or inability to afford any reasonable explanation is regarded as amounting to strong, self-inculpatory evidence. If the party gives a reasonable explanation as to how he obtained it, the courts will be justified in not drawing the presumption of guilt. The force of this rule of presumption depends upon the recency of the possession as related to the crime and that if the interval of time be considerable, the presumption is weakened and more especially if the goods are of such kind as in the ordinary course of such things frequently change hands. It is not possible to fix any precise period in this regard. The Supreme Court has drawn similar presumption of murder and robbery in a series of decisions especially when the accused was found in possession of these incriminating articles and was not in a position to give any reasonable explanation. ”

36. The Supreme Court further held :

“In the present case the accused-appellant could not give an explanation as to how he came into possession of various gold ornaments and other articles belonging to the members of the deceased family. The appellant also could not give any reasonable explanation how he sustained injuries on his body and how his shirt became bloodstained. In the facts and circumstances, it is a fit case where the presumption under Illustration (a) to Section 114 of the Evidence Act could be drawn that the appellant committed the murders and the robbery. ”

37. In the recent case of ‘Geejaganda Somaiah vs. State of Karnataka’ (2007) 9 SCC 315, the Supreme Court held :

“28. Besides Section 27 of the Evidence Act, the courts can draw presumptions under Section 114, Illustration (a) and Section 106 of the Evidence Act. In Gulab Chand vs. State of M.P. where ornaments of the deceased were recovered from the possession of the accused immediately after the occurrence, this Court held : (SCC pp.577-78, para 4)

“It is true that simply on the recovery of stolen articles, no inference can be drawn that a person in possession of the stolen articles is guilty of the offence of murder and robbery. But culpability for the aforesaid offences will depend on the facts and circumstances of the case and the nature of evidence adduced. It has been indicated by this Court in Sanwat Khan vs. State of Rajasthan that no hard-and-fast rule can be laid down as to what inference should be drawn from certain circumstances. It has also been indicated that where only evidence against the accused is recovery of stolen properties, then although the circumstances may indicate that the theft and murder might have been committed at the same time, it is not safe to draw an inference that the person in possession of the stolen property had committed the murder. A note of caution has been given by this Court by indicating that suspicion should not take the place of proof. It appears that the High Court in passing the impugned judgment has taken note of the said decision of this Court. But as rightly indicated by the High Court, the said decision is not applicable in the facts and circumstances of the present case. The High Court has placed reliance on the other decision of this Court rendered in Tulsiram Kanu vs. State. In the said decision, this Court has indicated that the presumption permitted to be drawn under Section 114, Illustration (a) of the Evidence Act has to be read along with the ‘important time factor’. If the ornaments in possession of the deceased are found in possession of a person soon after the murder, a presumption of guilt may be permitted. But if several months had expired in the interval, the presumption cannot be permitted to be drawn having regard to the circumstances of the case. In the instant case, it has been established that immediately on the next day of the murder, the accused Gulab Chand had sold

some of the ornaments belonging to the deceased and within 3-4 days, the recovery of the said stolen articles was made from his house at the instance of the accused. Such closed proximity of the recovery, which has been indicated by this Court as an 'important time factor', should not be lost sight of in deciding the present case. It may be indicated here that in a later decision of this Court in Earabhadrapa Vs. State of Karnataka this Court has held that the nature of the presumption and Illustration (a) under Section 114 of the Evidence Act must depend upon the nature of evidence adduced. No fixed time-limit can be laid down to determine whether possession is recent or otherwise and each case must be judged on its own facts. The question as to what amounts to recent possession sufficient to justify the presumption of guilt varies according as the stolen article is or is not, calculated to pass readily from hand to hand. If the stolen articles were such as were not likely to pass readily from hand to hand, the period of one year that elapsed cannot be said to be too long particularly when the appellant had been absconding during that period. In our view, it has been rightly held by the High Court that the accused was not affluent enough to possess the said ornaments and from nature of the evidence adduced in this case and from the recovery of the said articles from his possession and his dealing with the ornaments of the deceased immediately after the murder and robbery a reasonable inference of the commission of the said offence can be drawn against the appellant. Excepting an assertion that the ornaments belonged to the family of the accused which claim has been rightly discarded, no plausible explanation for lawful possession of the said ornaments immediately after the murder has been given by the accused. In the facts of this case, it appears to us that murder and robbery have been proved to have been integral parts of the same transaction and therefore the presumption arising under Illustration (a) of Section 114 Evidence Act is that not only the appellant committed the murder of the deceased but also committed robbery of her ornaments. ”

38. It is relevant to note that during investigation an application under Section 164 Cr.P.C. was moved before the Metropolitan Magistrate and the accused opted to make confessional statement. However, subsequently they changed mind and decline to make any such contention.

39. In their statements under Section 313 Cr.P.C. the accused did not explain and give plausible explanation to the proved incriminating circumstances. They admitted that they were produced in muffled faces before the Magistrate before conducting TIP proceedings. They came up with the plea that they refused to participate in the TIP proceedings as they were shown to the witnesses before sending to judicial custody. This plea was taken for the first time and no such suggestion was put to PW-5 or PW-7 in their cross-examination. Even when the Magistrate recorded their statements for refusing to participate in the TIP proceedings, the accused did not claim that they were shown to the witnesses. The accused did not examine any witness in defence. They did not produce any family member to falsify the positive testimony of the witnesses about the recovery of the robbed articles from their respective houses. The discrepancies, contradictions and lapses in the investigation highlighted by the counsel for the appellant during the course of arguments have been

examined. All these aspects were considered by the Trial Court in the impugned judgment and no interference is called for.

40. Considering all these facts and circumstances of the case, we find no merit in the appeals preferred by the appellants. The appeals are accordingly dismissed.

(S.P.GARG)
JUDGE

(SANJIV KHANNA)
JUDGE

SEPTEMBER 19, 2012
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