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*IN THE HIGH COURT OF DELHI AT NEW DELHI

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Crl.Appeal No. 265/2010

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Date of Decision: 20th DECEMBER, 2013

KANHAIYA LAL @ MOTTU SON OF NEK RAM Petitioner
Through Mr.R.C. Tiwari, Advocate

Versus

THE STATE THROUGH GOVT. OF NCT OF DELHI Respondent
Through Ms.Ritu Gauba, APP for the State

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MR. JUSTICE V.K. SHALI

GITA MITTAL, J

For judgment, see Crl.Appeal No.246/2010.

Gita Mittal
(GITA MITTAL)
JUDGE

V.K. Shali
(V.K. SHALI)
JUDGE

DECEMBER 20, 2013

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*Fresh. Col. M (bail) no 109/2014
For suspension of
Sentence for one month
Paroll/Bail.*

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*IN THE HIGH COURT OF DELHI AT NEW DELHI

+ Crl.Appeal Nos.246/2010, 265/2010, 378/2010 & 917/2010

% Date of Decision: 20th DECEMBER, 2013

+ Crl.Appeal No.246/2010

MOHD. SHAMIM & ORS. Petitioner

Through Mr.K.K. Verma, Advocate

Versus

THE STATE THROUGH GOVT. OF NCT OF DELHI Respondent

Through Ms.Ritu Gauba, APP for the State

WITH

+ Crl.Appeal No. 265/2010

KANHAIYA LAL @ MOTTU SON OF NEK RAM Petitioner

Through Mr.R.C. Tiwari, Advocate

Versus

THE STATE THROUGH GOVT. OF NCT OF DELHI Respondent

Through Ms.Ritu Gauba, APP for the State

AND

+ Crl.Appeal No. 378/2010

SONU Petitioner

Through Ms.Nandita Rao and
Ms. Neha, Advs.

Versus

THE STATE THROUGH GOVT. OF NCT OF DELHI Respondent

Through Ms.Ritu Gauba, APP for the State

AND

+ Crl.Appeal No. 917/2010

PRADEEP KUMAR

..... Petitioner

Through Mr.F. Haq, Adv.

Versus

THE STATE THROUGH GOVT. OF NCT OF DELHI Respondent

Through Ms.Ritu Gauba, APP for the State

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MR. JUSTICE V.K. SHALI

GITA MITTAL, J

1. The above appeals have been filed by the appellants assailing the judgment dated 15th December, 2009 whereby they have been convicted for commission of offences under Sections 394, 397, 120B read with Section 302/34 of the Indian Penal Code and the order of sentence dated 18th December, 2009 passed as a result thereof. Inasmuch as all the appellants stand convicted for commission of the same offence on the 13th December, 2003 upon a joint trial and raise similar questions of law and fact, these appeals are taken up together for consideration.

2. The case of the prosecution was that on the 13th December, 2003, PW-4 S.P. Narula came to the Police Station Friends Colony, New Delhi in an injured condition and informed that certain anti-social elements had looted his house bearing no.D-826, New Friends Colony, New Delhi. DD No.51-B was recorded at the police station and SI Ram Baresh was sent at the spot. They found Smt.

Soharsh Narula, wife of Shri S.P. Narula and his servant PW-5 Shatrughan Rai in an injured condition with the household articles scattered in the house. Smt. Soharsh Narula as well as Shatrughan Rai were sent to the Holy Family Hospital for treatment while complainant Shri S.P. Narula was sent to the All India Institute of Medical Sciences (AIIMS) through PCR No.E-27. Constable Sudesh Kumar and Constable Jagdish reached the house and were left at the spot for its preservation.

3. PW 4 Satya Paul Narula was declared fit for statement by the doctors at the AIIMS. On his statement, a case being FIR No.539/2003 was registered by the Police Station New Friends Colony, New Delhi under Sections 395/396/397/120B/412/307/34 of the Indian Penal Code and Sections 27/54/59 of the Arms Act.

4. So far as the statement of PW 4 Shri S.P. Narula is concerned, he had informed the police that on the 13th December, 2003, he had gone to a satsang at 5.15 p.m. at the Safdarjung Development Area as per his daily routine and had returned to his residence only at 8.10 p.m. when he found the lights of gate and porch switched off. He switched on the light and proceeded to the first floor. When he heard the cry of his wife, he went in the drawing room and saw that his wife had been caught hold by two boys who had also tied the hands of the domestic servant Shatrughan and had made him to lie down. PW 15 Sandeep Surma, a property dealer was also present whose mouth had also been tied up.

5. When PW 4 resisted the efforts of these boys to tie his hands, one of them hit him from behind as a result of which he fell down. The complainant states that he started raising a hue and cry whereupon one of the intruders hit him and his servant Shatrugan Rai with the dagger (chhura) and also caused injury to his wife Soharsh Narula. His wife tried to raise a hue and cry, whereupon one of the boys pressed her mouth and then tied the complainant's hands as well as the hands of his wife. The hands of PW 15 Sandeep Surma and PW 5 were tied behind their backs. Two of these boys then threatened and overpowered them while the other two boys ransacked and looted their house.

6. These boys took away a Citizen's watch and a gold chain with an Om pendant as well as the mobile phone from PW 15 Sandeep Surma. They snatched a Seiko watch from the complainant (PW 4) and also, broke open the locks of the Almirah and looted articles therefrom.

7. So far as the description of these boys is concerned, the complainant had informed the police that the boys were between 20-25 years of age. While one of them was of wheatish complexion, the other was of dark complexion. The boy who was armed with the dagger was wearing a jacket while the dark complexioned boy was carrying a pistol which he had positioned on the left temple of the complainant to intimidate him. The other two boys who had looted the house were of average physique. These boys had also cut the telephone line. PW 5 Shatrugan Rai had somehow untied the complainant's

hands. As there was no telephone available, the complainant rushed to the police station and made the afore-noticed complaint.

8. The site was visited by the crime team with the dog squad. The dogs followed the trail of the accused persons upto the main gate of the house. A site plan of the spot was made at the instance of PW 15 Sandeep Surma and the blood; 'sootrassi (cotton rope); blood stained gauze and a blood stained muffler were seized and sealed by the police and taken into possession.

9. As per SI Ram Baresh, he had proceeded to the Holy Family Hospital where he learnt that Soharsh Narula had been declared as having been brought dead and that she had been taken to the mortuary of the All India Institute of Medical Sciences in the custody of Constable Raj Singh.

10. PW 5 Shatrugan Rai was discharged after treatment. His MLC was proved in the evidence of PW 7 Dr. Anjana Kharbanda, CMO of Holy Family Hospital who had stated that she had prepared his MLC vide no.3.53792 (Exh.PW 7/A) and that Shatrughan Rai was having stab injury over his chest which was grievous in nature.

11. PW 7 Dr. Anjana Kharbanda also proved the MLC No.3.53793 (Exh.PW 7/B) pertaining to Soharsh Narula who was declared brought dead in the casualty. PW 7 had also issued the medical certificate Exh.PW 7/A regarding Soharsh Narula having been brought dead to the hospital. PW 7 Dr. Anjana Kharbanda had opined the cause of her death as '*strangulation*' in the certificate issued by her.

12. It is in evidence that on 15th December, 2003, a post-mortem was conducted on the dead body of Soharsh Narula by Dr. Prashant Kulshrestha vide the post mortem report no.1296/03 (Exh.PW 24/A). It is necessary to notice the material contents of the report of the post-mortem conducted on the dead body of Mrs.Soharsh Narula. The same has been proved in the evidence of PW 24 Dr. Raghuvendera, a junior resident from the Department of Forensic Sciences of AIIMS. So far as the external injuries on the body of the deceased was concerned, the report has noticed the following injuries:-

“On postmortem examination there were external injuries present. Abrasion size 1.4 cm length at lower end of left forearm. Another abrasion size 2.5 x 3 cm over lower back right side. One contused abrasion of size 1.5 cm x 0.5 cm over left mandibular angle. One laceration of size 3.1 cm below the right eye. One laceration of size .5 cm x .5 cm over lower lip. Nasal bone fracture.”

As per the opinion of the expert, the cause of death was opined as “asphyxia as a result of smothering which was sufficient to cause death in the ordinary course of nature”. So far as the injuries were concerned, it was opined that they were blunt force injury.

13. During investigation, the police recorded the statement of Ms. Anuja, (examined as PW 1 during the trial) the daughter of the deceased, who also deposed in court as the first prosecution witness. Though not an eye-witness, she played a vital role in preparation of the list of missing jewellery articles as well as identification of the recovered articles. According to PW 1 - Anuja, on

the 13th December, 2003, she had left the house no.D-826, New Friends Colony, New Delhi at about 3:30/4:00 p.m. to visit a temple in Karampura with her friend. When she returned to the house the next day i.e. 14th December, 2003 at about 10:00 a.m., she was informed about the robbery committed in her house and the fact that her parents were in hospital. She later found that her father was admitted in AIIMS and that her mother had died. Her sister had found a packet with a courier's address on the envelope in the house which was handed over to the police vide memo Exh.PW 1/A. PW 1 also stated that she had handed over a hand written list of missing articles which were initially noticed as missing from the house about two or three days after the incident. The prosecution has proved this list as Exh.PW 1/C. On 4th February, 2004, PW 1 Anuja, daughter of the deceased handed over another typed list of missing articles (Exh.PW 1/B) to the police. According to this witness, she had also prepared a handwritten list of still missing stolen articles (Exh PW 1/C) which was given to the police by her father on 18th December, 2003. Photographs of missing jewellery items (Exh.PW 1/D-1 to D-5) when they had been worn by the deceased mother, sister and herself were also shown to the police. These photographs along with other photographs were also handed over by this witness to the police.

14. As per the prosecution, secret information was received by PW 13-SI Suresh Sharma (who was then posted as Sub-Inspector in the Special Staff, South District) regarding presence of the accused in the present case in the Badarpur market. He was deputed to pass on this information to the SHO of the

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police station New Friends Colony. On the directions of the SHO, a raiding party was constituted consisting of PW 13-SI Suresh Kumar, PW 22-SI Prasun; Head Constable Ram Kishan of Special Staff, South District; SI Ram Baresh; ASI H.A. Khan; Ct. Ranbir and Ct. Jagdev.

15. The raiding party proceeded to the Badarpur market in a Government vehicle where they met the informer. On the pointing out of the secret informer, they apprehended appellants Pradeep and Mohd. Shamim who reached the spot on a motorcycle bearing no.DL 3S AJ 1815 of the Hero Honda Passion make. Personal searches of these two persons were effected vide memos (Exhs.PW 13/A & B respectively). The police witnesses have proved that the appellant Mohd. Shamim handed over one Seiko make wrist watch and one mobile of Panasonic make vide the memo Exh.PW-13/C to the police. The moter cycle was also seized vide memo Exh.PW 13/D.

16. The appellant Pradeep is stated to have led the police to his house in Balmiki Mohalla, Tuglakabad Extension and got recovered other jewellery items from his house which were part of the robbed articles. The investigating officer seized the articles vide Exh.PW 13/G.

17. Mohd. Shamim also took the police team to his house at Jhuggi No.228, Gola Kuan, Tehkhand, Okhla and got recovered a pulanda from below the wooden door on the roof of the house which pulanda contained nine jewellery articles consisting of one kara, one ear tops, one ladies ring, two brooches one silver chain, one silver chain along with pendent, one gold chain and pair of ear

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rings. Mohd. Shamim also got recovered one desi '*katta*' (weapon) of .315 bore and one live cartridge. The jewellery articles, the '*katta*' and the cartridge were separately seized and sealed by the investigating officer. The investigating officer prepared the sketch of the desi '*katta*' and live cartridge vide the memo Exh.PW 13/H.

18. PW 22 – SI Prasun has deposed that on interrogation, the two accused persons gave disclosure statements Exh.PW 13/E and 13/F which led to the discovery of the factum of the other appellants being involved in the offence in question. Their voluntary disclosures also led to the recovery of stolen properties (jewellery items) which were recovered vide memo Exh.PW 13/G and 13/W. The case property recovered from the accused Pradeep was proved on record as Exh.P 29 to P 34 while ear tops were produced as Exh.PW 34/A-1. PW 22 SI Prasun also identified the case property which was recovered from the accused Mohd. Shamim.

19. It is in the evidence that one gold chain with an Om pendant was earlier recovered from the accused. It is also in the testimony of PW 13 SI Suresh Sharma that one recovered wrist watch of the make Designer was handed over by him to the investigating officer. It is further in the evidence led by the prosecution that the appellants Pradeep and Shamim thereafter took the police team to the TSR stand in Tehkhand, Okhla. On the pointing out of the accused Shamim, Kanhaiya Lal @ Mottu son of Nek Ram was apprehended. His voluntary disclosure statement was recorded vide memo Exh.PW 13/L.

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Pursuant to this disclosure statement, Kanhaiya Lal son of Nek Ram led the police team to his jhuggi and from an almirah, he produced one cloth pulanda before the investigating officer. In this pulanda, it is alleged that one chain, gold bracelet, one gold ring gents, one silver pajeb, one pair of silver ear rings, two silver coins, two silver brooches and one key ring, all part of the robbed items were found. The accused also handed over one knife to the IO who prepared a sketch thereof vide memo Exh.PW 13/M.

20. Pursuant to their disclosure statement, these accused persons further led the police team to a jhugi in main market JJ Colony, Tehkhand, Okhla to the Khokha of accused Sonu and on their pointing out of accused persons, accused Sonu-appellant was apprehended and his disclosure statement was recorded as Exh.PW 13/Q. The accused Sonu handed over a blue coloured bag Classic with the words '*Top of the world; East; West; North & South*', written on it. This bag contained five ornaments one being a white pearl/diamond necklace, one diamond ring, one diamond pendent, one gold bracelet and two brooches. These articles were kept in a pulanda and sealed and one knife was also recovered from the bag. The IO prepared the sketch of the knife Ex.PW 13/R, kept the same in the same pulanda and sealed it with the seal of '*PM*' and seized both the pulandas vide memos Ex.PW 13/S & T.

21. Thereafter, the accused persons are stated to have taken the police team to Gali No.19, Ratia Marg, Sangam Vihar, Delhi and on the pointing out of the accused persons, accused Kanhaiya Lal S/o Laxmi Narain was apprehended. It

is claimed that he was interrogated and a disclosure statement was recorded vide memo Exh.PW 13/U and four ornaments were recovered from the first floor room of his house, which were also seized by the police.

22. These accused persons were identified by PW 13 SI Suresh Sharma as well as PW 22 SI Prasun in the witness box. These two police witnesses also identified the case property recovered from these persons respectively.

23. The prosecution has also claimed that the faces of the accused persons were kept muffled and they were produced before the concerned Magistrate along with an application for a Test Identification Parade (TIP). The appellants Pradeep Kumar, and Sonu refused to participate in the test identification parade (TIP). The appellant Mohd. Shamim finally agreed for getting his TIP done. The police contends that though the face of Mohd. Shamim was kept muffled during the period of two days police remand, however, on 23rd December, 2003, the accused Mohd. Shamim also refused to join the TIP before the concerned Magistrate in the Tihar jail.

24. The accused person also pointed out the jewellery shop of Dharam Pal and Manish Soni to whom some stolen property was sold. These jewellers were also arrested by the police. Based on the disclosures, Santosh Kumar, driver of the three wheeler scooter no.DL 1RC 8210 was arrested and from his possession, a bank note of Rs.500 was recovered along with his three wheeler scooter.

25. One Amjad Khan (since deceased) surrendered before the court who is alleged to have sold country made revolver to the appellant Shamim.

26. The Test Identification Parade of the recovered articles was conducted in the presence of PW 22- Ms. Ila Rawat, Metropolitan Magistrate by PW 1 Anuja, daughter of the deceased and of some the articles by PW 15 Sandeep Surma. It is stated that TIP of some of the jewellery items, which were foreign made, could not be carried out for the reason that similar jewellery was not available for mixing with the recovered articles. On completion of the investigation, the police filed a challan.

27. On completion of the investigation, the police filed a charge sheet in court. By an order dated 6th October, 2004, the court found a prima facie case for commission of offences punishable under Sections 120B/302/394/395/396 of the IPC against all the accused persons except Dharampal and Manish Soni. A prima facie case for commission of an offence under Section 390 of the Indian Penal Code was round made out additionally against the accused Mohd. Shamim, Sonu & Kanhaiya. A prima facie case for commission of offence under Section 412 of the IPC was found made out against the accused Dharam Pal and Manish Soni. Furthermore, a case under Section 27/54/59 of the Arms Act was found made against the accused Kanhaiya, son of Nek Ram. Charges were accordingly drawn up against accused persons by the order dated 6th October, 2004 to which they pleaded not guilty and claimed trial.

28. The prosecution examined 23 witnesses in support of its case. We find that thereafter the incriminating circumstances in the prosecution evidence were put to the accused persons who had opportunity to explain the same in their statements recorded under Section 313 of the Cr.P.C.

29. The appellants opted to lead defence evidence. Mohd. Shamim; Sonu; Kanhaiya (son of Laxmi Narain); Kanhaiya (son of Nek Ram) and Pradeep lead defence evidence to establish that they had been arrested from their respective residences and not in the manner alleged by the prosecution.

30. After a detailed consideration of the evidence, by the judgment dated 15th December, 2009, the trial court concluded that the offence of dacoity was not established inasmuch as it was the case of the prosecution witnesses that only four intruders were guilty of actually committing the crime. It was, therefore, held that the prosecution had made out a case of robbery and not dacoity. It was also held that the accused Manish Soni & Dharam Pal, though charged for commission of offence under Section 412 of the IPC, were guilty of offences under Section 411 of the IPC. We may note that Manish Soni and Dahram Pal have not assailed their conviction and/or the sentence imposed upon them.

31. The appellants Mohd. Shamim; Pradeep; Kanhaiya (son of Nek Ram) Kanhaiya (son of Laxmi Narain) and Sonu were found guilty and convicted under Section 120B IPC for conspiracy to commit offences under Section 394/397 as well as 302 of the IPC.

32. It was held that the appellants Mohd. Shamim; Kanhaiya (son of Nek Ram); Kanhaiya (son of Laxmi Narain) Pradeep & Sonu were guilty of commission of offences under Section 394 IPC read with Section 397 of the IPC. Furthermore, Kanhaiya (Son of Nek Ram) Mohd. Shamim; Pradeep and Sonu were found guilty of commission of offence under Section 302/34 IPC. The prosecution of the appellants under the Indian Arms Act failed for the reason that no sanction had been obtained against them.

33. The present appeals are based on similar grounds. The same evidence is relied upon to base the conviction of the present appellants and as such these appeals have been taken up together for the purposes of the present consideration.

34. Learned counsel for all the appellants have primarily assailed the judgment on the ground that the case of the prosecution with regard to the alleged secret information; disclosure statements; arrests and the recoveries is implausible and cannot be believed. The appellants also challenge as improper their identification of the four appellants by PW 4 Shri S.P. Narula; PW 5 Shri Shatrugan Rai and PW 15 Sandeep Surma.

35. Even if the evidence against the appellants was to be believed, it is urged that it is the case of the prosecution that no injuries were noticed by PW 7 Dr. Anjana Kharbanda, CMO, Holy Family Hospital in the MLC on the body of the deceased and, therefore, no injuries were inflicted on the body of the deceased by any of the appellants.

36. It is further contended that PW 7 opined the cause of death as strangulation. None of the eye-witnesses have given evidence of the deceased being strangled by any of the accused person.

37. PW 24 Dr.Raghuvendra who has proved the post-mortem report had on the other hand opined that the cause of death was 'asphyxia' due to smothering. It is contended that the doctor who conducted the post-mortem examination was not examined by the prosecution and the appellants were thereby deprived an opportunity to cross-examine him.

38. It is further urged that the gagging of the mouth of the deceased was not done with the intention of causing her death but was intended only to silence her protest. It is urged that the appellants had no intention to cause such injury as would result in the death of any of the persons in the house.

39. We have heard learned counsels for the appellants and Ms. Ritu Gauba, learned APP at great length. We may advert to the testimony of PW 4 S.P. Narula, one of the injured persons who has stated that when he returned from his spiritual class to his residence D-826, New Friends Colony, New Delhi on 13th December, 2003, at about 8.00 p.m., he saw that the door to his house was open and some noise was coming from the kitchen. He noted something cooking on the stove in the kitchen and felt that something unusual was afoot. At this stage, he heard the sound of shouting from the drawing/dining room. When he opened the door of drawing/dining room, somebody hit him thrice on his head and he started bleeding. PW 4 stated that to protect himself, he held

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one of the intruders. He saw that another intruder was holding and trying to overpower his wife which she was resisting. PW 4 told that person to let his wife alone.

40. At that stage, a third person came into the room and stabbed PW-4 on the left side and as a result, there was a lot of bleeding. However, PW 4 did not let go of the intruder whom he was holding. At this, the person who was holding the wife of PW 4, came and stabbed PW 4 three or four times. Then both of them tied the hands of PW 4 and gagged his mouth with a cloth and dragged him to the balcony in front of the drawing room where their servant Shatrughan and a property dealer Sandeep Surma had been tied. One of the persons tied the left leg of PW 4 with his wife's right leg.

41. PW 4 Shri S.P. Narula identified the accused Santosh, Pradeep, Kanhaiya (son of Nek Ram) & Sonu as the intruders who had come to the house and were involved in the incident. They had overpowered his wife and stabbed him with a "*churra*".

42. PW 4-Shri Satya Paul Narula has also deposed that his wife wanted to protest when she was told by the property dealer PW-15-Sandeep Surma to keep quiet. PW 4 states that he also tried to quieten his wife. At that time, one of the accused came and strangulated his wife with a rope. One accused grabbed the wrist watch from his hand as well as the money lying in his pocket. After some time, PW 4 told their servant, PW-5-Shatrughan Rai to untie his hands and go to the neighbour Mohan to get his hands untied.

43. We may also refer to the testimony of PW 5 Shatrughan Rai, another injured eye-witness who was working as a servant in the house of Col. Narula at D-826, New Friends Colony, New Delhi. On the fateful day at about 8.00 p.m., PW-15-Sandeep Surma was having a discussion with the landlady of the house (Smt. Soharsh Narula) and he was working in the kitchen at that time when two persons entered the house. Within five to seven minutes of their entry, there was a shout from the lady and on her shout, PW 5 Shatrughan Rai went to her. He saw that the two men were standing near her, one was armed with a knife while the other was holding a pistol. When PW 5- Shatrughan Rai entered the drawing room, he saw a third intruder also present who held PW 5 - Shatrughan Rai by the neck and was holding a pistol. The third person held PW 5-Shatrughan Rai by his muffler and had put the knife to his neck. At that stage, a fourth intruder also entered the house and these four persons took all three of the captives to a bigger room.

44. According to PW 5, at this stage, Mr. S.P. Narula also reached the spot and was badly beaten by these persons. They stabbed PW-4-Mr. S.P. Narula as well as PW 5 Shatrughan Rai with a knife and stuffed a cloth inside the mouth of deceased Ms. Narula and killed her. They took PW-15-Sandeep Surma to another room while they kept Mr. & Mrs. Narula and PW 5 in one room. These intruders looted the house. PW-5-Shatrughan Rai identified Kanhaiya (son of Laxmi Narayan); Pradeep; Sonu who were present, as three who had entered the house had beaten Mr.& Mrs. Narula, Sandeep and himself. The witness also

has stated that Kanhaiya (son of Nek Ram) could be the fourth person. However, he was not sure. The identification of Kanhaiya (son of Laxmi Narayan) as one of the intruders as by this witness is therefore unreliable.

45. The testimony of PW 15 Sandeep Surma with regard to the incident, is also material. He has stated that he reached D-826, New Friends Colony at about 7.30 p.m. on 13th December, 2003 to meet Mrs. Narula with whom some negotiations was going on regarding a property transaction. Only Mrs. Narula with her servants was present in the house and she was watching television. At about 8.00 p.m., the call bell rang and a person came with a courier packet which did not bear any name. Mrs. Narula told the person that the packet may be belonging to the tenant and he should give it to him. At this stage, this person took out a knife. The other person who had accompanied the knife-carrying person, was in possession of a 'katta'. On seeing the knife, Mrs. Narula started crying loudly. Hearing the cries, Mrs. Narula's servant came out. The intruders took all three into the drawing room after giving them a beating. The witness identified the appellant-Pardeep as the person who was carrying the knife and the appellant – Mohd. Shamim present in court as the person who was carrying the katta in his hand. After five or seven minutes, PW-4-Col. Narula also arrived there. Two associates of these two intruders who were also armed with knives followed him (Mr. Narula) into the house. The intruders were demanding keys from Mrs. Soharsh Narula. When the intruders did not get the keys from her, one of them tied her hands from behind while others gagged her

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mouth by putting piece of cloth into it. PW-4 – Col. S.P. Narula cried out on reaching the spot, whereupon Mohd. Shamim hit Mr.Narula on his head with the butt of the pistol. One of the intruders stabbed Mr.Narula in his abdomen. The intruder also gave a stab blow to the PW 5 whose hands were also tied. The intruders removed PW 15's mobile; a watch of Designer make; a gold chain; an Om locket and some cash from his purse. PW-15-Sandeep Surma's hands were also tied by the intruders. The intruders also robbed articles from the house.

46. PW 15 managed to escape from the room where he was confined only at about 9.00 pm and got his hands untied from labourers present at the neighboring house where construction was going on. He requested three or four boys to accompany him to the spot. When PW-15 returned to the house with the boys, the intruders fled from the spot. PW-15 identified Sonu present in court as the person who had removed his watch, golden chain, locket and mobile.

47. The challenge to the disclosure statements and recoveries is misconceived and unsustainable. The quantities of the jewellery items recovered at the instance of and from the appellants coupled with its identification as stolen articles as well as the oral testimony of the witnesses establishes the prosecution case beyond any doubt qua the appellants. The defence led by the appellants has been rightly rejected by the learned trial judge.

48. The appellants were armed with pistol, dagger (chura). It is no doubt clear from the sequence of events and the testimony adduced by the prosecution that pursuant to their criminal conspiracy all the accused persons had barged into the house of the complaint primarily with the intention of committing the robbery. This is evident from the testimony of witnesses that they had disconnected the telephone lines and immobilized the occupants including the domestic servant PW5 Shatrugan Rai. Similarly, the mouth of PW15 Shri Sandeep Surma, was also gagged. The purpose of tying the hands and the gagging the mouth of the victims was to ensure that they do not raise an alarm. The keys of the almirah were also demanded and the rooms ransacked and the jewellery stolen. The hands of Mrs.Soharsh Narula were also tied down and cloth was pushed into her mouth by the accused persons so that she is not able to raise an alarm. The site plan was prepared at the instance of PW15 Sh.Sandeep Surma. From the spot sutrassi, blood stained cushion cover, blood stained rope, blood stained pillow, blood stained gauze and blood stained muffler were seized by the police which were duly exhibited before the Court. PW15 Sh.Sandeep Surma has testified that it was at this point of time that the victim/deceased Mrs.Soharsh Narula was pushed into the bed room and her mouth was gagged by putting cloth in her mouth and made to lie on the ground. As a result of this, the victim/deceased Mrs.Soharsh Narula was unable to breath and she suffered asphyxia and consequently could not survive. It is also recorded in the MLC of the victim/deceased Mrs.Soharsh Narula that she was

brought dead. All these facts clearly show that the injuries were inflicted upon the deceased Mrs.Soharsh Narula were likely to cause death. Mrs.Soharsh Narula died because of asphyxia. The accused persons are deemed to have the knowledge that the injuries were of such a nature that the same will cause her death. Since these acts were done in furtherance of their criminal conspiracy, therefore, all the accused became liable.

49. The deceased Mrs.Soharsh Narula was not killed by use of any arms. Unfortunately the appellants attempted to silence her protests by stuffing a cloth in her mouth which led to her suffocation ('asphyxiation') and consequential death. There is no evidence of intention on the appellants to cause her death. Although, the acts do not fall in the first two categories of Section 299 IPC where the intention to kill or intention to cause such bodily injury is necessary, but it certainly does fall in the third category that the nature of injuries were such which were within the knowledge of the accused persons to be of such a nature as would cause the death of the victim. The knowledge of injuries being imminently dangerous and consequently in all probability causing death as enunciated in Clause 4 Section 300 IPC requires higher degree of knowledge which perhaps cannot be imputed to the accused persons in the instant case. This is on account of the fact that the larger purpose of immobilizing or neutralizing the victims including Mrs.Soharsh Narula (since deceased) was to ensure that the appellants succeed in committing the offence of robbery without any resistance from the occupants of the house. Therefore, in our view, the

offence of death of Mrs.Soharsh Narula cannot be categorized as an offence of murder but it certainly tantamounts to culpable homicide not amounting to murder within the third sub clause of Section 299 IPC and punishable under Section 304 Part II.

50. In this background, we hold the appellants guilty of culpable homicide not amounting to murder punishable under Section 304 Part II of the IPC.

51. Let us now examine the orders on sentences imposed by the learned trial judge. The trial court has found the appellants Kanhaiya son of Nek Ram, Mohd. Shamim, Soni & Pradeep, guilty for commission of offences under Sections 302/304 as well as 394/397 IPC. For their conviction, under Section 394/397 IPC, the trial court has sentenced them to life imprisonment and fined them in the sum of Rs.2,000/- each. In default of payment of fine, the defaulting appellant is required to undergo simple imprisonment of three months.

52. For commission of the offence under Section 302/34 of the IPC, the appellants have been sentenced to life imprisonment.

53. The trial court also convicted the appellants under Section 120B of the IPC. However, since they are sentenced as afore-noticed for the substantive offences committed in furtherance of conspiracy, no separate sentence under Section 120B of the IPC has been awarded to them.

It was also directed that the substantive sentences of imprisonment awarded to the appellants shall run concurrently.

54. It is noteworthy that the prosecution had also arrayed one Kanhaiya Lal son of Laxmi Narain, as a co-conspirator in the case who was also convicted by the impugned judgment dated 18th December, 2009. Kanhaiya son of Laxmi Narain had filed Criminal Appeal No.285/2010 which was accepted by this court by its judgment dated 17th September, 2013 whereby his conviction was set aside.

55. In the impugned judgment dated 18th December, 2009, it was held that though he was part of the conspiracy, he had not joined the present appellants in commission of the offences. We have rejected the finding of his complicity in the conspiracy in the judgment dated 17th September, 2013. The evidence on record also reflects that only the four appellants entered the house to commit the offence of theft and cause injury to the occupants of the house. Kanhaiya son of Laxmi Narain stands acquitted of the charges.

56. We have found that pursuant to a criminal conspiracy, the appellants entered the house of the deceased to commit robbery. In order to commit the robbery, they not only put fear of instant hurt but actually caused hurt and wrongfully restrained the deceased Smt. Soharsh Narula, her husband Shri S.P. Narula, their servant Shatrugan Rai as well as a visitor Sandeep Surma in the house. They forcibly and dishonestly took away valuables from these persons as well as from the house which have been recovered at their instance.

57. The above discussion also reflects the grievous injuries caused by the appellants to Smt. Soharsh Narula, her husband (PW 4 Sh. S.P. Narula), servant

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(Shri Shatrughan Rai) and their visitor (PW 15 Sandeep Surma) while committing the robbery. We have held that the appellants had the knowledge that the injuries inflicted on Soharsh Narula could result in her death. The injuries actually resulted in her death. The appellants also succeeding in commission of the robbery.

We hold that the appellants have rightly been found guilty for entering into conspiracy under Section 120B IPC for commission of offences under Sections 394/397 of the IPC. We also find the appellants guilty for commission of the offences under Section 394/397 and Section 299 of the IPC.

The judgment of the trial court finding the appellants guilty of commission of offence under Section 302 IPC shall stand modified to this extent.

58. Before us, it has been fervently prayed that the appellants are extremely young and first time offenders. By now they have undergone imprisonment of over nine years. Other than the Sonu whose sentence was suspended for a short period between 22nd April, 2008 to 29th April, 2008, the appellants have remained continuously in jail since they were arrested on 24th December, 2003. We have held that they entered the house of the deceased pursuant to the conspiracy to commit robbery. Grievous injuries resulted in their acts to overcome the resistance by the occupants of house and silence protests. We have found the appellants guilty of commission of the offence under Section

299 of the Indian Penal Code and have modified their conviction under Section 302 of the IPC.

59. So far as the sentence which must be imposed on the appellants for commission of the offence under Sections 394/397 of the IPC is concerned, we hereby sentence each of the appellants to undergo rigorous imprisonment for a term of ten years and also sentenced to pay fine in the sum of Rs.2,000/-. The appellants shall not be entitled to any remissions in the sentences. In case of default of payment of fine, the appellants shall undergo simple imprisonment of three months.

60. For the commission of the offence under Section 299 of the IPC punishable under Section 304 part II, we hereby impose on each of the appellants the sentence of rigorous imprisonment of ten years without remission and fine of Rs.5,000/- each. In case of default of payment of fine, each of the appellants shall further undergo simple imprisonment for three months.

61. The four appellants have been rightly held guilty by the learned trial Judge for an offence of conspiracy to commit the offence of murder and dacoity which has been converted into robbery and culpable homicide not amounting to murder by this court. Therefore, the appellants deserve to be sentenced separately for offence of criminal conspiracy as envisaged under Section 120B of the IPC. The statutory provision lays down that the sentence which can be awarded to the convict is two years onwards and in cases where no express

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provision is made, in that case it shall carry the same punishment as if the offence has been abetted.

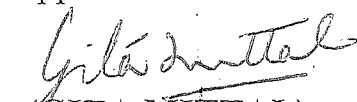
62. Having regard to the fact that all the accused persons have been already found guilty for the death of Soharsh Narula and sentenced to rigorous imprisonment of ten years, we are of the view that the interests of justice would be met in case they are sentenced for the offence of criminal conspiracy also to a sentence of rigorous imprisonment of ten years under Section 120B IPC and the said sentence shall run concurrently with the other sentences.

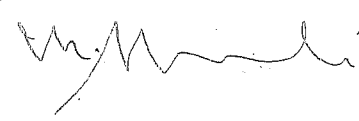
63. The substantive sentences awarded to the appellant have already been directed to run concurrently. This direction is maintained. The appellant shall also be entitled to set off the detention already undergone by them during investigation and trial of the case as well as the pendency of the present appeals in accordance with Section 128 of the Criminal Procedure Code.

64. The impugned judgment dated 15th December, 2009 and order of sentence dated 18th December, 2009 shall stand modified to the above extent.

These appeals are disposed of in these terms.

A copy of this judgment be supplied to each of the appellants forthwith.


(GITA MITTAL)
JUDGE


(V.K. SHALI)
JUDGE

DECEMBER 20¹⁷, 2013/aa