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IN THE HIGH COURT OF DELHI AT NEW DELHI
Crl. Appeal No. 605/2013

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Reserved on: 14th May, 2013
Date of Decision: 2nd September, 2013

SUDHIR KUMAR Appellant
Through Ms. Nandita Rao, Advocate.

Versus

STATE OF NCT OF DELHI ...Respondent
Through Ms. Richa Kapoor, APP.

Crl.Appeal No. 232/2013

SALMA ...Appellant
Through Ms. Anu Narula, Advocate.

Versus

STATE ...Respondent
Through Ms. Richa Kapoor, APP.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE VED PRAKASH VAISH

SANJIV KHANNA, J.

These two appeals by Sudhir Kumar and Salma arise from a common judgment and order of sentence dated 11th January, 2012 and 15th February, 2012 respectively. The two appellants have been convicted under Section 302/392/411/34 of the Indian Penal Code 1860 (IPC, for short). They have been sentenced to life imprisonment and fine of Rs.5,000/- each and in default of payment of fine to undergo

rigorous imprisonment for three months each, for the offence under Section 302/34 IPC; rigorous imprisonment for five years and fine of Rs.3,000/- each and in default of payment of fine, rigorous imprisonment for two months for the offence under Section 392/34 IPC; and simple imprisonment for three years for the offence under Section 411 IPC.

2. Before determining whether the appellants are the perpetrators of the alleged crime, it will be appropriate to delineate the undisputed factual position. On 30th January, 2007 at around 8.45 AM, dead body of a male aged about 30 years, was discovered lying in Vaishali Vatika (park) near Rukmani Devi Public School, Pitampura by Naresh Kumar Kadian (PW-20), a passerby, who informed the police at telephone number 100. The corpse was later identified to be of Vivek Kumar Agarwal. DD entry number 14 (Ex. PW14/A) was recorded at Police Post Pitam Pura, Police Station Shalimar Bagh by Ct. Ashok (PW14), after which SI Satinder (PW30) along with Ct. Jaswinder (PW8) left for the crime spot where they found a half-naked body lying in the grooves of Altmas trees, inside the park. Investigation was taken over by SI Satyavir Singh (PW26). The deceased was found wearing a blue wind sheeter, brown jersey, light green shirt and a white vest on the upper portion of his body but on the lower half, he was wearing only a brown colour underwear. On examination, on his private organ a pink colour condom containing seminal fluid was found. Forth was coming out from the mouth and injury marks were visible on neck and chin. The deceased was wearing black lining on his feet but black colour shoe was there only on his left foot. Near the body a black colour helmet, one

more pink colour condom, shoe of the right foot, a grey colour pant torn into two pieces with one part having a belt attached, one small pocket diary, one pen, one purse containing visiting cards and one key ring with four keys, including one on which TVS was engraved, were found scattered near the crime spot. A black colour rexine bag in which a driving licence issued to Vivek Kumar Agarwal son of N.C. Agarwal and other documents were kept was found on the nearby iron bench.

3. Ct. Rajesh Kumar (PW9) was sent with rukka at 11.30 A.M. and thereupon FIR No. 72/2007 (PW 3/A) was recorded at 11.45 AM in Police Station Shalimar Bagh, New Delhi. Ct. Rajesh Kumar (PW9) subsequently returned to the place of occurrence with the FIR at about 12.45 PM.

4. FIR (Ex. PW3/A) does not record if there were any suspects or possible culprits. Neither is there mention of any eye-witness to the crime or to affirm whether the deceased was last seen with another person. From the FIR it appears that the police was clueless up to that point and was proceeding with the investigation on the basis of material found near the corpse. The crime team report (Ex. PW23A) records that they had reach the spot on 30th January, 2007 and remained from 10.00 AM to 11.00 AM., after making a departure for the crime spot at 9.30 A.M. According to the crime team report, there were visible mark on deceased's neck and outside the park a motor cycle DL 8S AH 1647 black colour TVS Start was parked. Deceased's name is mentioned as Vivek Aggarwal son of N.C. Aggarwal and, in the age column, 30-32 years is recorded. Against the column stolen

property, dash (-) is indicated and “murder” is written. No chance prints could be developed but the Investigating Officer was directed to collect earth control sample from the spot. Photographs were taken, including of the shoe marks found adjacent/next to the dead body.

5. Insp. Satyavir Singh (PW26), the Investigating Officer has stated that two sets of foot prints were found in the damp mud, outside the railing of the park. Due to rain, these foot prints were filled with water. The inquest proceedings were completed by PW-26 and the post mortem was conducted on 31st January, 2007 by Dr. Upender Kishore (PW31). PW-31, in his post mortem report (Ex. PW31/A), has opined that the cause of death was axphyxia as a result of ante mortem strangulation by ligature. Time since death was one and a half days. Abrasions, bruises and one faint ligature mark were found on the neck. The ligature mark had completely encircled the neck. For the sake of completeness we record the PW31 has stated that subsequently a scarf was produced before him and he had verbally informed the Investigating Officer that the injury was possible by the scarf. Scarf produced before PW-31 was identified by him as Ex. P4.

6. Now we shall come to the disputed/debatable facts and contentions. Insp. Satyavir Singh (PW26) has deposed that on 1st February, 2007, he along with SI Satinder Dhull (PW-30), SI Satya Parkash (PW-25), ASI Gian Vir, HC Joginder Pal (PW-14), Ct. Neeraj (PW-11) and Ct. Rishi Raj and Woman HC Asha Rani (PW-13) were present at Deepali chowk where a secret informer apprised them regarding the appellants. They searched for the appellants and finally located them

when they reached GT Karnal Road towards bye-pass at 6.00 P.M. The secret informer had pointed towards Sudhir who was sitting on the front seat of the rickshaw and the appellant Salma who was sitting on the passenger seat. They were interrogated and then arrested vide arrest memos (Ex. 13/A & Ex. 13/B). The prosecution relies upon their disclosure statements (Ex. PW25/A and Ex. PW13/E) purportedly by Sudhir and Salma, respectively. PW26 has claimed that one wrist watch Maxima Quartz worn by the appellant Sudhir at the time of the arrest was taken in their possession vide seizure memo Ex. PW13/M and footwear worn by Salma and Sudhir Kumar were seized vide seizure memo Ex. PW13/N and PW13/G, respectively. PW26 has testified that afterwards they went to the residence of the appellants at Budh Vihar Phase I and one Nokia 2112 mobile phone, which belonged to the deceased, was found in the iron almirah (seizure memo Ex. PW13/K). Appellant Salma got recovered one scarf lying below the bed mattress which was seized vide seizure memo (Ex. PW13/G) and another mobile Nokia 2310 which was seized vide memo (Ex. PW13/I). Thereafter, along with police team the appellants were taken to the place of occurrence Vaishali Vatika where the park's watchman Som Pal (PW-4) met them. PW-26 recorded the statement of Som Pal (PW-4) and, subsequently, the appellants were taken for medical examination at night.

7. To avoid prolixity, we curtail the detailed narration by each police officer and relevant witnesses' statements, but would refer to them while dealing with the contentions from both sides and where it is apposite. It would be appropriate to note that SI Satya Prakash (PW25),

SI Satinder (PW30), HC Jogender (PW14), W/HC Asha Rani (PW13) and Ct. Neeraj Rana (PW-11) had also appeared as witness before the court and deposed. All of them have claimed and stated that they were present at the time when the two appellants were apprehended on 1st February, 2007 at about 7.20 PM as recorded and mentioned on the arrest memo Ex. PW13/A(Sudhir) and PW13/B (Salma). The said police witnesses have also testified on the recoveries and the disclosure statements except for Insp. Satinder (PW30) who has stated that he was standing on the ground floor when the recoveries were made from the tenanted premises. Thus his assertion in the examination on recovery of mobile phones etc. from the residence is hearsay and inadmissible. The statements of other police witnesses, apart from PW-13, are in seriatim and corroborate each other. There are some minor discrepancies regarding W/HC Asha Rani's (PW13) statement who has deposed that, after the arrest of the appellants, they were taken to the park and then to their residence; whereas other police officers have deposed that the appellants were taken to their residence first and then to the park. PW13 has also somewhat contradicted herself by claiming that Nokia phone 2112 was recovered from Sudhir as well as Salma. In general we do not see any major contradictions in the police statements though some doubt is created about the presence of W/HC Asha Rani (PW13) as it has been submitted before us that her presence was mandatory and had to be shown as appellant Salma is a woman.

8. Prosecution, in order to implicate the two appellants, essentially relies upon statement of Som Pal (PW4), the garden mali/watch man and the testimony of Dr. Upender Kishore (PW31), who had conducted the post mortem report (Ex. 31/A), to prove the last scene theory. They also rely on the FSL report (PW 28/A) along with Ex. PW13/F and PW13/G, i.e. the seizure memo of shoes of the appellants to prove their presence at the crime spot during the relevant hours. As per the FSL report, the soil present on the shoes matches with the soil of the park. Prosecution also substantially relies upon the disclosure statements and recoveries. It is claimed that deceased's phone i.e. Nokia 2112 was found at the appellants' residence. Reliance is placed on the call data records and it is further alleged that the appellants had also purchased new phone i.e Nokia 2310 from Rs.3000/- which were stolen from the deceased. They rely upon Harinder Singh (PW24)'s statement who has deposed that the deceased had taken loan of Rs.3,000/- from the Company and Jai Prakash (PW-6)'s statement who has averred that a new mobile phone was purchased by the appellants from his shop.

Deposition of Som Pal (PW-4)

9. Som Pal (PW4) has deposed that on 29th January, 2007, he arrived at the park at the time of his duty as guard/mali, i.e. at 5.00 PM. It started drizzling at 8.00 P.M. or 8.30 P.M. and he took shelter under the shed constructed in the park. At around 10 A.M., two boys and one lady entered the park gate and he enquired from them why they had come. They replied that they had come for a walk. When he questioned them why had they come at an odd hour, they left the park and proceeded towards Adharshila School. He identified the two

appellants as the persons who had come to the park. He testified that the next day, he had come to the park and had seen dead body of the third person.

10. In his examination in chief, PW-4 has not averred that he had seen the two appellants in the park with the police officers on 1st February, 2007 though the said position was categorically stated and deposed to by W/HC Asha Rani (PW13), Insp. Satya Prakash (PW25), Insp. Satyavir Singh (PW26) and Insp. Satinder (PW30). This is also the stand of the prosecution that PW-4 came forward when the appellants were taken to the crime spot by the police. PW-4 has in fact stated that he had reached the park at 11.00 AM in the morning i.e. on 30th Jan 2007, which would be the time before the rukka was sent for registration of FIR. Regarding the events that occurred on the day of the incident, in his examination in chief PW-4 has deposed that at about 12.30 P.M. i.e. post midnight, he returned to his house since his wife was unwell. In the cross-examination, he has stated that the appellants had left the park after 2-5 minutes and they had not come back. Thus the appellants and the deceased left the park at about 10 PM and thereafter he had not seen them near the park. Subsequently, during the cross-examination, PW-4 changed his stand and has averred that he had left the park for his house at 10.30 PM (and not 12.30 A.M.). To appreciate what he said in the cross-examination, it would be relevant to reproduce verbatim the said portion of the cross-examination:-

“However, there was light in the shed. The accused persons alongwith the deceased had come around 10.00 P.M. It was a chilly night and the accused persons as well as the deceased were wearing woolen clothes but I cannot give the description. I had not

asked for the names of the accused persons and the deceased. However, I had asked them about the reason of their visit. When I objected, the accused persons as well as the deceased left the park. They had stayed for 2-5 minutes. Thereafter they did not come to the park in my presence till 12.30 PM. I had not seen them in the nearby in the park. I had left the park for my house at about 10.30 P.M.”

11. If we accept the deposition of PW4 that he was in the park till 12.30 A.M. on 30th January, 2007, the prosecution case falters and has to be rejected especially in view of the call details they have relied upon and to which we shall refer to subsequently. However, if we accept the version of PW-4's statement where he has stated that he left the park at 10.30 P.M. on 29th January, 2007, his deposition would support the prosecution case but would be in contradiction with his examination-in-chief. It is thus difficult to accept one version over another. It is also apparent that PW4 has tried to conceal and not deposed whether that he had seen the appellants in the park on 1st February, 2007 in the evening, when the police had brought them to the park. In fact, PW-4's deposition is completely silent regarding the said detail which further casts a doubt on veracity of his statement.

12. Thus we have doubts and reservations regarding the identification of the appellants by PW4 in the court. The police did not conduct test identification parade (TIP) of the appellants and PW4 was not asked to identify the appellants during investigation. We are aware and conscious of the fact that identification in the court matters and has to be given due regard and credence (See CrI. A. 38/2009 titled ***Kunjumon @ Unni vs. State of Kerala*** decided recently by the Supreme Court on 21st November, 2012 where, after referring to earlier

judgments, it has been held that in the absence of TIP the weight that is to be attached to the identification of the accused in the Court is a matter for the courts to decide. It further held that holding of TIP is a rule of prudence which is required to be followed in cases where the accused is not known to the witness or the complainant. However, in the said case the Supreme Court observed that they are not dealing with a case of identification by ordinary witness but rather identification by a victim of crime who came face to face with the threat and intimidation). We are aware that TIP is in realm of investigation and is not obligated under the Code of Criminal Procedure (CrPC). However in instances like the present case where, since the witness had belatedly claimed that he was present and had seen the appellants on the fateful night and there are major contradictions and omissions in his statements, it would have been prudent to conduct a TIP proceeding. Som Pal (PW-4) was the watchman/mali of the park where the offence occurred and, as per the prosecution version, the offence had taken place when he was supposed to be performing his duty as such. In case he had left at 12.30 p.m. in the intervening night of 29th and 30th January, 2007, obviously the case of the prosecution is very weak. Especially, when he has stated that the two appellants had left the park at 10 p.m. and he had not seen them returning back. This is his deposition also in the examination-in-chief. Identification by PW-4 in the Court, therefore, is highly debateable and questionable. It is apparent that he should have been and must have been interrogated how he did not see the occurrence when he was supposed to be on duty at the time in question. Thus identification of the two appellants in the court by PW-4 is a suspect and should be disregarded. In view of

the aforesaid position, we are unable to place any reliance upon the testimony of PW4.

B. FSL Report (Ex. PW 28/A) and soil on the shoes

13. We have already noted contention of the prosecution that FSL Report (Ex. PW28/A) has opined that the soil found on the shoes seized (vide Ex. PW13/F & G) match with the soil of the park. Thus, it is claimed that the two appellants were present in the park on 29th January, 2007. In our view, there are two reasons why the FSL report (PW28/A) should not be relied upon. Firstly, the appellants were arrested after nearly three days of the occurrence i.e. after around 56 hours of the offence. As per the prosecution itself, it was raining. It is highly unlikely that the mud/soil would remain intact on the appellant's shoes even after lapse of considerable time. Secondly, prosecution witnesses have also deposed that these appellants were taken to the scene of crime i.e. the park after the arrest and that is also possibly when the soil could have come on the shoes. The reasons for these doubts are also due to the fact that the seizure of the appellants' shoes (Ex. PW13/F & G) was not done in presence of any independent witnesses. Therefore, the presence of soil on the shoes can be set up and is discredited. No reliance can be placed on the said FSL Report and the prosecution argument has to be rejected.

Recoveries of the mobile phone, watch and call records

14. This brings us to the main contention of the prosecution. As noted above, the wrist watch Maxima Quartz was found and recovered from the appellant Sudhir's wrist whereas recovery of mobile Nokia 2112 and 2310 is attributed to the disclosure statements of Sudhir Kumar and Salma (Ex. PW25/A and PW13/E) and said to have been made from their residence.

15. Harinder Singh (PW24) has stated that he was working as Director Marketing with Springwell Metress Pvt. Ltd when the deceased Vivek Kumar Aggarwal worked with them as Sales Representative. On 30th January, 2007, PW-24 had reached the park and seen the dead body. He had also seen one rexine bag with documents of the company. However, the Nokia handset given by the Company was missing at that time. He was informed that no cash was found or recovered from the deceased, though according to PW-24 on 29th January, 2007, Rs.3,000/- were given as loan to Vivek Aggarwal since he wanted to get medical examination of his pregnant wife. On 7th February, 2007, PW-24 had handed over a letter (Ex. PW24/A) to the Investigating Officer with a copy of the Reliance Mobile bill (Ex. PW24/B). He identified Nokia phone 2112 which was marked Ex. P2 as the phone given by the company to the deceased.

16. Sanjeev Lakra (PW21) Nodal Officer, Reliance Communication proved the computer generated call details (CDR) of phone number 9312436820 for the period 29th January to 30th January, 2007, which was marked Ex. PW21/C. He also proved call records of another mobile number 9312215780 for the period 28th to 30th January, 2007

(Ex. PW21/B), twenty five pages of details of the cell towers (Ex. PW21/D) and certificates issued under Section 65A and 65B of the Act. The service provider had given these details on the request of the police. In his cross-examination, PW-21 has deposed that he had no personal knowledge about the call records since these details were issued to the person whose name was mentioned on the certificate (Ex. PW21/D) dated 4th August, 2010. We only record that no name is mentioned on the said document. As per the prosecution version telephone number 9312215780 belonged to and was being used by Abdul Rauf (PW22).

17. Abdul Rauf appeared as PW-22. He has testified that he was permanent resident of Faizabad, U.P. but earlier worked in Delhi at Mayur Tent House, Multani Mohalla, Rani Bagh. He knew the appellant Salma as they both had resided in Budh Vihar, at one time. PW-22 was on visiting terms with uncle (Jeth) of Salma who was residing in Budh Vihar, Phase II. PW-22 has testified that he was using the mobile number 9312215780 for the last 6-7 years. On 30th January, 2007, at about 8.30 A.M., he had received a call from the appellant Salma, when he was about to go for work, requesting him to send his wife to prepare food since, Salma was ill. PW-22 supposedly declined. We shall refer to his cross-examination subsequently.

18. Prosecution also relies upon statement of Rajender Arora (PW7) who deposed that in February, 2007, Insp. Satyavir Singh (PW-26) came to his service centre and he furnished details of hand set Nokia 2112 with its ESN HEX No. 218ea796 for him. On the basis of the said details,

PW-7 had printed out the search results (Ex. PW7/A) which gave serial number and SPL number. It is apparent that Ex. PW7/A was printed on 21st February, 2007 which is the date recorded at the bottom of the said exhibit. However, the details mentioned in Ex PW-7/A do not give the telephone number. This is contrary to what PW7 has averred in his examination in chief that he had identified no. 9312436820 to be activated on the said phone. PW7, in his cross-examination, has accepted that telephone no. 9312436820 was not mentioned on Ex. PW7/A, and neither was this number mentioned in his statement under Section 161 Cr.P.C.

19. The telephone call records of telephone no. 9312436820 show outgoing calls on 29th January, 2007 after 18.59 Hrs as under:

Charge Party No.	Call Direction	Start Date	Time Hour	Start Time Min.	Start Time Sec.	Calld Party No.	Calling Party No.	Bill Duration	Orig Switch Id	Term Switch Id	Orig Bts	Term Bts	Service Type	Distance Band
9312436820	OUT	29-Jan - 07	21	3	5	9934212667	9312436820	127.2	LWDLHI2		62		0	4
9312436820	OUT	29-Jan - 07	23	39	0	9939827201	9312436820	119	LWDLHI2		102		0	4
9312436820	OUT	29-Jan - 07	23	41	20	9939827201	9312436820	307.6	LWDLHI2		102		0	4
9312436820	OUT	30-Jan - 07	8	26	30	9312215780	9312436820	46.4	LWDLHI2		102		0	0
9312436820	OUT	30-Jan - 07	8	32	19	6254251534	9312436820	67.9	LWDLHI2		102		0	4

Call records of mobile number 9312215780 on 30th January, 2007 at 8.26 Hrs records a call being made from telephone No. 9312436820 for 46.8 seconds.

20. The cell tower details (Ex. PW21/C) indicate that cell tower No. 102 was located in the area of Budh Vihar Phase-II and cell tower No. 62 was covering the area of Mangol Puri, though the tower was located at Vardhman Market, Pitam Pura. The incoming call from 9312436820 at

21.27.30 was received from cell tower No. 1 again located at Mangolpuri Industrial Area.

21. The above mentioned call details show that the mobile phone no. 93124 36820 was in Mangolpuri Industrial area till 21.03 Hrs. and was certainly in the area of Budh Vihar Phase II from 23.39 Hrs on 29th January, 2007 onwards and had remained in the said area till 8.32 Hrs on 30th January, 2007. The two appellants were residents of Budh Vihar, Phase I. Thus, if the recovery of the mobile phone of the deceased, as it is claimed by the prosecution is accepted, it is a pointer and implicates the appellants. Indeed we are aware that there have been cases where prosecution case has been accepted on the basis of call record details and the fact that the instrument or the mobile sim of the deceased was found with the accused. Call record details are exceedingly helpful and have solved or proved number of cases beyond doubt.

22. Having noticed the said facts, let us also note certain major discrepancies in the prosecution version regarding the recovery of the mobile phone and the purported call details. For the sake of convenience, we list them below:

A. Mobile phone number of the deceased is not mentioned in the FIR (Ex. PW-3/A). The crime team report (Ex. PW-23/A) does not indicate that theft or robbery was the motive. This is also not indicated in the FIR.

B. The police officers including the Investigating Officer Inspector Satyavir Singh (PW-26) has not stated or indicated how and on what

basis they suspected involvement of the appellants. PW-26, the Investigating Officer merely states that on the basis of the secret information, they detained the appellants at about 7 p.m. on 1st February, 2007. Why and how the Investigating Officer suspected involvement of the appellants, remains unfathomable and a mystery. In the present case, this is a relevant factor.

C. Letter (Ex. PW24/A) by which PW24 Harinder Singh, Director Marketing informed the Investigating Officer about the telephone number of the deceased is dated 7th February, 2007 i.e. six days after the appellants were arrested.

D. The Investigating Officer has not stated or deposed that he had carried out any investigation on the basis of telephone number or telephone instrument having number 9312436820 of the deceased, if he was informed about the number on 30th January 2007 as claimed. There is nothing on record to show that any investigation was made from Reliance Communications till the arrest of the appellant. This creates doubt whether the mobile phone instrument belonged to the deceased.

E. Ex. PW24/A letter dated 7th February, 2007 does mention and record that Harinder Singh (PW24) had informed the police on 30th January, 2007 that telephone Nokia 2112 with number 9312436820 was with the deceased but the factum is highly debatable and strange i.e. investigation did not proceed and no inquiries were conducted by the Investigating Officer on the basis of the mobile phone number. Investigating Officer had a murder case which he had to solve, without

virtually any clue to show involvement of a particular person. Normally in such cases, the Investigating Officer should call for call records and in most cases it is the starting point. However, statement of PW-26 does not reflect any steps to verify call records. This may be a lapse by the Investigating Officer but then the contention is that no investigation/inquiry till arrest reflects that mobile number instrument did not belong to the deceased. A serious doubt is created which the prosecution has been unable to clarify or explain.

F. PW-24's identification of mobile phone Nokia-2112 (Exhibit P-2) has to be read with caution. No TIP of the said phone was undertaken for the purpose of identification and only the phone instrument in question was shown. He has not deposed as to the telephone number of the phone allotted to the deceased. Reference is made to statement of Rajiv Kumar Goel (PW-2), who also identified the phone as belonging to deceased Vivek Aggarwal, but no TIP of the phone was done unlike the TIP of the watch. PW-2 did not remember the mobile phone of the deceased Vivek Aggarwal.

G. As noticed above details of handset Nokia 2112 with its ESN. HEX were obtained later, on 21st February, 2007 from Rajender Arora (PW7) i.e. many days after the appellants were arrested.

H. The call details for number 9312436820 were obtained from Reliance Communications vide letter dated 6th March, 2007 again more than one month after the appellants were arrested. Details of telephone No. 9312215780 were obtained on 6th April, 2007 as per email placed on record by the prosecution. However, statement of

Abdul Rauf (PW22) was recorded under Section 161 Cr.P.C. on 29th March, 2007 i.e before the police got hold of details vide email dated 6th April, 2007.

I. Investigating Officer had not carried out any investigation viz. telephone numbers mentioned in the call details on 29th and 30th January, 2007 i.e. telephone numbers 9934212667,9939827201 and 6254251534.

J. There is no evidence or material to show that Salma was a street walker. Salma has been described as wife of Mohd. Israfil Ansari and Sudhir Kumar has not been described as husband of Salma. However, both of them, it has been stated, were residents of A-1, Phase-I, Budh Vihar, Delhi.

K. Abdul Rauf (PW22), in his cross-examination, has stated that they i.e. he and Salma had lived for 7-8 months as neighbours in the year 2005-06. Salma had in fact left the tenanted house in the year 2006 and he was not aware about her new residence. He was not on visiting terms with her and was not aware regarding what the appellant Salma, her husband and her Jeth were doing. The cross-examination of PW-24 is reproduced below:

“The house of accused Salma was in front of my house when she was residing in my neighbourhood. There Salma live for about 7-8 months in the year 2005-06. She left her aforesaid house in the year 2006. I am not aware about new shifted residence of accused Salma. I did not visit the house of accused Salma at any point of time. I used to go to my duty from my house at about 8-8.15 AM and returned to my house at about 9.00 and sometime I performed my duty also at the Tent House. I have no visiting term with

accused Salma. I am not aware about the work of accused Salma, her husband and her Jaith. Today I am not in position to produce documentary proof of my mobile phone connection number. Vol. I had deposited my identity document to get aforesaid connection number. I am not aware about the murder incident of present case. Police official did not obtain my signature on any paper. Vol. My statement was recorded by the police in this case. My statement was recorded at my job place i.e. Mayur Tent House. No one was examined by the police there. I was not called by the police at PS in connection of present case. It is wrong to suggest that I am deposing falsely at the instance of police.”

Contention of the appellants counsel is that PW22 is a witness who has gone out of way to support the prosecution version when in fact he did not know and was not acquainted with Salma. There is no concrete proof that it was appellant Salma who had earlier conversed with Abdul Rauf (PW22) or who would have made such a call in the morning of 30th January, 2007.

L. Testimony or inference from the testimony of Abdul Rauf (PW-22) that there was conversation between appellant Salma and Abdul Rauf was not put to the appellants Salma and Sudhir in their statement under Section 313 Cr.P.C. It appears that the trial court itself was not convinced that the testimony of PW-22 was reliable.

23. Relying upon the aforesaid contentions, it was strenuously argued and contended before us that the recovery of telephone instrument Nokia 2112 with telephone number 9312436820 is planted and make belief. It was argued that the said telephone instrument was probably found at the park itself or was recovered from a third person or simply planted on the appellants. It is further submitted that there is

nothing to connect or prove that the telephone instrument with ESN HEX number 218ea796 was in fact being used with telephone number 9312436820.

24. We have considered the said contentions raised by the appellants. The bill (Ex. PW24/B) issued by Reliance Communication does not mention or give details of the instrument in the form of ESN HEX number. The hand set has been referred to and mentioned as SCH356. ESN HEX details (Ex. PW7/A) merely mention Sl. No. RNK GEC490155 and SPL No. 449616. The said RSN does find mention in the letter dated 6th March, 2007 written by Reliance Communications and records that MDN No. activated was 9312436820 issued to Springwell Mattresses Ltd., Mangolpuri with date of activation being 27th March, 2003. However, the said letter has not been proved and marked exhibit number. The discrepancies and gaps noticed in the prosecution case mentioned above are significant and not illusory. Appellants have succeeded in denting the prosecution version and have created doubts as to the actual story. It is apparent that certain factual aspects have been held back and have not been brought on record, creating grave suspicion. In some cases, lack of or improper investigation is ignored but in the present case the consequences or failure has resulted in incompleteness and uncertainty which leave a number unanswered queries and silence on material aspects. It causes and creates confusion and ambiguity on the involvement of the appellants.

25. We are equally not impressed with the case of the prosecution that the appellants had stolen Rs.3,000/- from the deceased and thereafter had procured new Nokia mobile 2310 for Rs.2950/- from Jai

Prakash (PW6) i.e. the said phone was procured from stolen money. The purchase bill (Ex. P-1) is not in the name of the appellants. It refers to IMEI No. 35454301216433 dated 30th January, 2007. It does not refer to the name of the person who had purchased the same. It refers to two telephone number 9811270144 and 9911335205 but no enquiries have been made with regard to the said mobile numbers. It will be illogical and improper to accept that the mobile phone Nokia 2310 was purchased by appellant Sudhir from the money which was stolen from the deceased. No such assumption can be drawn. Similarly, with regard to the watch or the fact that it was found to be missing, it is not indicated or stated in the FIR (Ex.PW-3/A) and crime team report (Ex. PW 23/A). Identification of the watch by Rajiv Kumar Goel (PW-2) is challenged and contested on the ground that such watches are easily available in the market and can be planted. PW-2 was not present at the time of arrest. The crime team report does not mention that theft or robbery was one of the motive.

26. Having noted the above discrepancies in the recovered phone instruments and the call details provided by the prosecution, it would be untenable to still rely on these. We have already dealt with and held that neither statement of PW-4, the mali or the FSL Report, to prove the soil marks on appellant's shoes, can be relied upon to establish that the deceased was last seen with the appellants. The prosecution has, therefore, not been able to establish any conclusive link and prove beyond doubt involvement of the appellants. In a case based upon circumstantial evidence, heavy onus lies on the prosecution to prove the complete chain of events which shall undoubtedly point towards

the guilt of the accused. Conviction cannot be based on shaky grounds and reasons or mere hunch. Due to lack of conclusive proof or incriminating material against the appellants, the prosecution has not been able to discharge this burden.

27. In view of the aforesaid, the conviction under Section 302/392/411/34 IPC and sentence of the appellants is set aside. We acquit them, giving them benefit of doubt. The appellants shall be released forthwith, unless required to be detained in any other case. Thus, the appeals are allowed.

(SANJIV KHANNA)
JUDGE

(VED PRAKASH VAISH)
JUDGE

SEPTEMBER 2nd, 2013
kkb