

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

+ **Crl. Appeal No. 243/2009**

% **Reserved on: 25th February, 2014**
Date of Decision : 19th May, 2014

Mohd. Fazal **....Appellant**
Through Mr. R.M. Tufail, Amicus Curiae with
Mr. Anwar A. Khan, Mr. Farooq Chaudhary
and Mr. Vishal Raj Sehijpal, Advs.

Versus

State **...Respondent**
Through Ms. Rajdipa Behura, APP.

Crl. Appeal 230/2009

Suraiya **....Appellant**
Through Mr. R.M. Tufail, Amicus Curiae with
Mr. Anwar A. Khan, Mr. Farooq Chaudhary
And Mr. Vishal Raj Sehijpal, Advs.

Versus

State **...Respondent**
Through Ms. Rajdipa Behura, APP.

Crl. Rev. Petition 361/2009

Naseem Bano **....Appellant**
Through Mohd. Saleem, Advocate.

Versus

State **...Respondent**
Through Ms. Rajdipa Behura, APP.

Crl. Appeal 511/2009

Mohan Seth		...Appellant
Through		Mr. R.M. Tufail, Amicus Curiae with Mr. Anwar A. Khan, Mr. Farooq Chaudhary And Mr. Vishal Raj Sehijpal, Advs.
	Versus	
State		...Respondent
Through		Ms. Rajdipa Behura, APP.

Crl. Appeal 1231/2010

State Govt. of NCT of Delhi		...Appellant
Through		Ms. Rajdipa Behura, APP.

Versus

Noor Ahmed Anjum and Ors.		...Respondents
Through		Mr. R.M. Tufail, Amicus Curiae with Mr. Anwar A. Khan, Mr. Farooq Chaudhary And Mr. Vishal Raj Sehijpal, Advs.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE G. P. MITTAL

SANJIV KHANNA, J.

These appeals including Crl. Revision Petition filed by Naseem Bano arise out of a common judgment dated 17th March, 2009 in Session Case No. 70/2003, relating to FIR No. 167/2003 P.S. Hazrat Nizamuddin. By the said judgment, Suraiya and Mohd. Fazal have been convicted under Section 302 read with Section 120-B of the Indian Penal Code, 1860 (IPC, for short) and Mohd. Fazal and Mohan

Seth have been convicted under Section 201/34 IPC. Noor Ahmed, Rahil and Mohan Seth have been acquitted for offences under Section 302 read with Section 120B IPC and the State has filed Crl. Appeal No. 1231/2010 seeking reversal. Criminal Revision Petition No. 361/2009 is with a similar prayer i.e. it seek conviction of Noor Ahmed, Rahil and Mohan Seth under Section 302 read with Section 120B IPC.

2. Suraiya is wife of Noor Ahmed and Rahil is their son. Mohd. Fazal is brother of Suraiya. Mohan Seth, it is claimed is their friend.

3. The deceased Shakeel ur Rehman was a neighbour of Suraiya and Noor Ahmed and was residing in property number 15/1 Jaipur Estate, Nizamuddin, New Delhi. It is an undisputed and accepted position that there were disputes and differences between Shakeel ur Rehman and Suraiya and her family regarding the said property. A suit for specific performance, CS No. 2151/1999 was filed by Shakeel ur Rehman against Fazal, Suraiya and ors. which was pending before the High Court and interim order had been passed. In fact on 7th April, 2003, FIR No. 169/2003 (Ex. PW8/DG) was registered on a complaint made by the appellant Suraiya with P.S. Nizamuddin.

4. There is also evidence that on 6th April, 2003, the deceased along with others had tried to raise a boundary wall on the disputed

property, which was objected to by Noor Ahmed, Suraiya etc. and as a result, complaints were made to the police, which were recorded as DD entries no. 10A (Ex PW 3/A/Ex.PW8/D) and 16A. Noor Ahmed in reply to question Nos. 5, 6 and 7, in his statement recorded under Section 313 Criminal Procedure Code, 1973 (Cr.P.C., for short) had accepted the aforesaid factual position and had accepted that he was called to the police station on 6th April, 2003. Police officers had advised the parties to patch up and resolve their disputes. Suraiya in response to question No. 5, in her statement under Section 313 Cr.P.C., accepted that there was a transaction for sale and purchase of plot No. 15/1, Jaipur Estate, Nizamuddin between her and Shakeel ur Rehman but, denied having received Rs.1 crore. Similarly, appellant Mohd. Fazal had stated that there was a transaction between Suraiya and Shakeel ur Rehman for purchase of property but denied payment of Rs.1 crore to Suraiya by Shakeel ur Rehman. Rahil, son of Noor Ahmed and Suraiya, however, in his statement under Section 313 Cr.P.C. stated that 'this was incorrect' and 'he had no knowledge'. Similar stand has been taken by Mohan Seth in his statement under Section 313 Cr.P.C.

5. Aniq ur Rehman (PW3) brother of the deceased, Lubna Habib (PW4) sister of the deceased and Naseem Bano (PW6) wife of the

deceased have testified about the facts as they occurred on 6th April, 2003. They have uniformly deposed that Shakeel ur Rehman and Aniq ur Rehman (PW3) were getting the boundary wall constructed, but this was objected to. It thus, led to disputes between them and Suraiya and others regarding the property and abuses were hurled. Aniq ur Rehman (PW3) had deposed about attempt or threat of physical violence. The two sides went to the police station and were advised to resolve their differences. In the evening, the deceased Shakeel ur Rehman was called to the house/ residence of Suraiya and Noor Ahmed for settlement. In his statement under Section 313 Cr.P.C. while replying to question No. 7, Noor Ahmed had accepted that Shakeel ur Rehman had come to their house after the police officers had advised them to patch up, though this has been denied and not accepted as correct by Suraiya and others.

6. Aniq ur Rehman (PW3), Ms. Lubna (PW4) and Ms. Nasim Bano (PW6) have asserted that Shakeel ur Rehman returned to his residence at about 7/7.30 PM, but soon thereafter he received a telephone call from Suraiya. He left for Suraiya's residence informing that he would come back after some time. Earlier, Shakeel ur Rehman had stated that the matter had been settled. Aniq ur Rehman (PW3) claimed that he had accompanied the deceased

Shakeel ur Rehman to the house of Suraiya, and came back and remained at 15/1 Jaipur Estate till about 10.30 PM. By that time Shakeel ur Rehman had not returned. Similar assertions have been made by Ms. Lubna (PW4) and Naseem Bano (PW6). When Shakeel ur Rehman did not return till 12 midnight, Lubna (PW4) made a call to Aniq ur Rehman (PW3), who was residing at 161/52 Jogabai Nagar, Delhi. Thereupon Aniq ur Rehman came to the residence of Shakeel ur Rehman. Attempts were made to speak to Shakeel ur Rehman on his mobile phones , but in vain. At 4.40 AM, Aniq ur Rehman (PW3) rang up No. 100 and made a complaint that his brother Shakeel ur Rehman had left for the house of Noor Ahmed/Suraiya @ Anjum and had not returned. DD entry No. 25A (Ex. PW16/A) was recorded. This was followed by another DD entry No. 27/A (Ex. PW 3/B) recorded at 7.15 AM on 7th April, 2003 at Police Station, Hazrat Nizamuddin. In Ex. PW3/B, it stands recorded that on 6th April, 2003, Shakeel ur Rehman had parked his vehicle and stated that he was proceeding to meet Anjum. Shakeel ur Rehman's two mobile phones with numbers 31078285 and 56023910 remained switched off and inspite of efforts, he could not be located. Shakeel ur Rehman aged 38 years, height 5'10", wheatish complexion, was wearing white shirt, grey pant and black shoes.

Subsequently, Aniq ur Rehman made another complaint Ex. PW3/A and FIR in question 167/2003 under Section 365/34 IPC (Ex. PW8/A) was recorded at 5.30 PM on 7th April, 2003. DD entry No. 10/A (Ex. PW8/DA) was also recorded. The complaint, on the basis of which FIR was recorded, no doubt, was written after taking professional help from a person well conversant with law and is in legal language, but this is not sufficient to disregard or disbelieve the factual contents thereof. The complaint/FIR is in accord and in consonance with the court testimonies of Aniq ur Rehman (PW3), Lubna (PW4) and Naseem Bano (PW6) that Shakeel ur Rehman had left for the residence of Noor Ahmed and Suraiya at about 7/7.30 PM on 6th April, 2003.

7. At this stage, we would like to repel the contentions raised by the convicted appellants, Noor Ahmed and Rahil that there is discrepancy as to the time mentioned in the FIR (Ex. PW8/A) i.e. 7.30 PM and the time as mentioned in DD entry No. 27/A (Ex. PW3/B) i.e. 10.30 PM and this goes to the root of the prosecution version and therefore, the charge should not be accepted. Aniq ur Rehman (PW3), Lubna (PW4) and Naseem Bano (PW6) have deposed that Aniq ur Rehman had remained at 15/1 Jaipur Estate till about 10.30 PM on 6th April, 2003 before going to his residence.

The oral complaint resulting in DD Entry No. 27/A (Ex. PW3/B) was recorded at about 7.30 AM on 7th April, 2003. The time 10.30 PM mentioned in DD Entry NO. 27/A, Ex. PW3/B, we do not think should be given undue importance and credence, contrary to the written complaint (Ex. PW3/A) made at 5.30 PM on 7.4.2003, which resulted in registration of the FIR (Ex. PW8/A). The ocular depositions clearly supports the time mentioned in the FIR (Ex PW 8/A). Even if there was difference or error in the time, the same was corrected shortly and without undue delay. The FIR was initially registered under Section 365/34 IPC on 7th April 2003 at 5.30 PM. Till 5.30 PM on 7th April, 2003, no one had any clue and family members of Shakeel ur Rehman were neither aware nor had the slightest idea as to what had happened. The complainants were not aware or conscious of the timing with reference to call details of Mohd. Fazal and Rahil. The difference in the timing is not relevant and material. What is material and relevant is that in DD entry No. 27/A (Ex. PW 3/B) as well as FIR (Ex. PW8/A), it was mentioned and recorded that Shakeel ur Rehman had gone to the house of Anjum and thereafter he was not traceable. His mobile phones were switched off. Thus, the court depositions of Aniq ur Rehman (PW3), Lubna (PW4) and Naseem Bano (PW6) support the initial complaint

(Ex. PW3/B), as well as written complaint resulting in FIR (PW8/A), that the deceased Shakeel ur Rehman had gone to the residence of Suraiya/Noor Ahmed and thereafter went missing.

8. There is ample evidence and material to show that after registration of FIR, Suraiya, Noor Ahmed, Rahil and others were interrogated [see court depositions made by SI Ram Sahai (PW19)], but initially no progress was made and investigation remained inconclusive and confused.

9. On 13th April, 2003, at 1.00 PM, as deposed by SI Ram Sahai (PW19), Mohd. Fazal and Mohan Seth were arrested at 1.00 PM vide arrest memos Ex. PW19/A and PW19/B respectively. They made disclosure statements Ex. PW19/E and PW19/F respectively as to the facts leading to the death of Shakeel ur Rehman which part is inadmissible, but they also admitted and disclosed that dead body of Shakeel ur Rehman was taken in a car to Haridwar by both of them and thrown at a little distance from Singdwar chowk by the side of Ganga Nahar. They were accompanied by one Madam Seema in the car, who was not aware about the purpose of the visit or the facts but she was taken by them to avoid any search/check of the vehicle and to avoid suspicion.

10. Shakeel ur Rehman had died homicidal death and he was strangulated and died due to asphyxia. [see paragraph 15 below].

11. There is enough evidence and material to show that Mohd. Fazal and Mohan Seth had gone to Haridwar in the intervening night of 6th and 7th April, 2003. Mohan Seth had stayed in a hotel at Haridwar and Mohd. Fazal came back to Delhi in the early morning of 7th April, 2003. (see paragraphs 13 and 14 below and other paragraphs)

12. After recovery of the dead body, Suraiya, Noor Ahmed and Rahil were arrested and charge-sheeted along with Mohd. Fazal and Mohan Seth.

13. SI Ram Sahai (PW19) has deposed that Insp. K.K. Gaur (PW24) along with other police officers and Mohd. Fazal and Mohan Seth thereupon drove to Haridwar. Laiq ur Rehman, another brother of Shakeel ur Rehman who deposed as PW5, Mohd. Tariq (PW7), nephew of the deceased and one Mohd. Javed (PW20) also went to Haridwar in another car/vehicle.

14. At Haridwar, dead body of Shakeel ur Rehman was recovered in the presence of SI Ram Sahai (PW19), Insp. K. K. Gaur (PW24), SI Ajay Kumar Singh (PW21) of Delhi Police, Laiq ur Rehman (PW5) and Mohd. Javed (PW20). SI Rajesh Kumar of Uttranchal

Police (PW13) was also present at the spot. Photographs (Ex. PW24/1 to 13) were taken. Recovery of the dead body was also videographed as deposed to by Nitin Gupta (PW12), a photographer/shop owner at Haridwar. SI Rajesh Kumar (PW13) has deposed that on 13th April, 2003, he was posted at Kankhal when the police officers from P.S. Hazrat Nizamuddin, Delhi had come to the said police station with Mohan Seth and Mohd. Fazal. He was deputed to accompany them to Singdwar and a videographer was with them. Mohd. Fazal pointed out a place at the distance of one and a half furlong towards the west of Singdwar and a dead body of a male wearing half shirt labeled 'M. Ilahi' and Sando baniyan was recovered. Dead body was identified as that of Shakeel ur Rehman. In the cross-examination, he deposed that information regarding dead body was communicated by them at P.S. Kankhal at 6.05 PM over the phone. He denied that the said dead body was visible and could be seen from the ghat and dead body was recovered in the early evening on 12th April, 2003. He had stated that police party from Delhi had reached P.S. Kankhal at 5.00/5.30 PM. Deposition of SI Ram Sahai (PW19) on the recovery of the dead body is almost identical. Similar deposition were made by Insp. K.K. Gaur (PW24) and SI A.K. Singh (PW21).

15. Post mortem on the dead body of Shakeel ur Rehman was conducted by Dr. Pradeep Kumar (PW9), Pathologist, District Hospital, Haridwar on 14th April, 2003. The post mortem commenced at 12.50 AM. He noticed that rigor mortis was absent and body was in advanced stage of decomposition. Eye sockets were empty, mouth was open and lips were dry hard. The skin peeled off at places leaving behind a greenish discoloration. Fingers and toes were black and dry hard. Hair of skull were loose and could be pulled out. Nails were also loose. Maggots of 0.5 to 1 cm in sizes were present. PW9 further opined that anti mortem injuries in the nature of ligature mark continuously, horizontally placed, lower down in the neck below the thyroid cartilage 9 cms below right ear, 8.5 cms below left ear and 10 cms below the chin were present. The groove was pale with reddish ecchymosed margins. No other external injury marks were seen due to decomposition. It was opined that the death was due to asphyxia as a result of strangulation and time since death was 3 to 5 days.

16. It was highlighted on behalf of the defence that Dr. Pradeep Kumar (PW9) had preserved body parts for DNA examination. However, PW-9 in his cross-examination had stated that he had recommended DNA report only because the police had asked for the

same. At the same time PW9 stated that the body had been identified and, therefore, he had not made any separate recommendation for DNA test. It is an accepted position that no DNA report was asked or obtained. The prosecution relies upon statement of Laiq ur Rehman (PW5), who identified the body was of Shakeel ur Rehman. PW5 has stated that he had identified the dead body from the hair and clothes of the deceased. Deceased was wearing white colour half sleeve shirt, an underwear, vest and grey colour socks. We do not think, we should disbelieve or reject identification of the dead body by Laiq ur Rehman (PW5). Laiq ur Rehman was brother of Shakeel ur Rehman and his testimony that he recognized the dead body of Shakeel ur Rehman should be accepted as truthful and correct. The dead body was cremated by the relatives of Shakeel ur Rehman and the last rites were performed on 14th April, 2003. PW5 in the cross-examination had stated that before cremation, the dead body was given a bath and denied the suggestion that the dead body did not belong to his brother and, therefore, proper burial was not performed. The clothes worn by the deceased i.e. shirt and the under garments were recognized by Naseem Bano (PW6), wife of the deceased, were marked Ex. P2. In the cross-examination, PW6 had stated that the label of the tailor had helped her to identify that the shirt belonged to

her deceased husband and the name of the tailor was 'M. Ilahi'. The clothes of the deceased were also identified by Lubna (PW4), sister of the deceased. Aniq ur Rehman (PW3), however, was not able to identify the clothes when they were shown to him in the court as they were in rotten condition. But this does not mean that we should disregard the depositions of Naseem Bano (PW6) wife of the deceased, brother Laiq ur Rehman (PW5) and sister Lubna (PW4). We, therefore, hold that the identity of the dead body as that of Shakeel ur Rehman was proved beyond doubt and there should not be any debate on the same.

17. Learned counsel for the defence has submitted that there is some discrepancy as to the timing of the recovery of the dead body and our attention was also drawn to the statement of Mohd. Javed (PW20). It was highlighted that Mohd. Tariq (PW7) had not stated a word regarding recovery of the dead body though he had also gone to Haridwar and was present at the time when the dead body was recovered, as per the testimony of Laiq ur Rehman (PW5) and Mohd. Javed (PW20). In the written arguments on behalf of the defence, it is pleaded that Mohd. Tariq (PW7) had, therefore, not gone to Haridwar at all. We need not go into the controversy, whether Mohd. Tariq (PW7) was present at the time when the dead body was

recovered, because he neither stated nor deposed to the said aspect. Mohd. Tariq (PW7) in his court deposition had only mentioned that he had received a call at 12 midnight from Aniq ur Rehman and had gone to his house at Jogabal Okhla, on his coming to know that his maternal uncle Shakeel ur Rehman was missing. They came to the house of Shakeel ur Rehman and tried to contact him on mobile phones. He waited for Shakeel ur Rehman to return till 4 AM but he did not return and his phones were switched off. The said witness was not cross examined. Mohd. Javed (PW20) has partly supported the prosecution case but has given different timings regarding visit to Haridwar. He has claimed that they had reached Haridwar in the morning and stayed in a hotel. However, he could not remember name of the hotel. He deposed that Mohan Seth and Mohd. Fazal were taken by the police to some place and thereafter they returned. They then accompanied the police to a place from where a dead body in a highly decomposed condition was recovered. Laiq ur Rehman told him that the dead body was of his brother, Shakeel ur Rehman. Local police was called. He identified Mohan Seth and Mohd. Fazal who were present in court. He was cross-examined by the Additional Public Prosecutor on various aspects purportedly averred/mentioned in his statement under Section 161 Cr.P.C. (Ex. PW 20/A). He

denied several suggestions but accepted that the dead body was wearing a white shirt, under wear and brother of Laiq ur Rehman had identified the dead body and also accepted that videography was done. In the cross-examination, Mohd. Javed (PW20) has stated that they had left for Haridwar at 5 AM and reached Haridwar at 11 AM and had gone from the hotel to recover the dead body at 2 PM. On the question of timing, we are not inclined to accept the testimony of Mohd. Javed (PW20). The testimony of videographer Nitin Gupta (PW12), who is an independent witness, is to the contrary. Similarly, the testimony of SI Rajesh Kumar (PW13) of P.S. Kankhal is to the contrary. We also have statements of Laiq ur Rehman (PW5), SI Ram Sahai (PW19), SI Ajay Kumar Singh (PW21) and Insp. K.K. Gaur (PW24) on identical terms. Examination of the order sheets of the trial court reveals that Mohd. Javed (PW20) was a reluctant witness. He initially did not appear inspite of summons and made repeated requests for exemption from appearance. Subsequently, non-bailable warrants were issued vide order dated 21st February, 2006. The said warrants were cancelled on an application moved on 17th April, 2006 and his testimony was finally recorded on 27th May, 2006.

18. The factum that Mohd. Fazal and Mohan Seth were taken to Haridwar on 13th April, 2003 by Insp. K. K. Gaur (PW24), SI Ajay Kumar Singh (PW21) with Mohd. Laiq ur Rehman and others was not denied by appellant Mohan Seth in response to question No. 17 of his statement u/s 313 Cr.P.C. He accepted that he was taken to Haridwar but claimed that he was not taken anywhere else and he remained in the custody of the police in a hotel. Mohd. Fazal on the other hand has denied the said facts stating that 'it was incorrect' or 'he did not know'.

19. Seema Grover, who as per the prosecution case had accompanied Mohan Seth and Mohd. Fazal and was cited as prosecution witness, did not depose in the court. In the order sheet dated 18th February, 2005, it is recorded that as per the public prosecutor, she had expired.

20. There are more factors and material which prove and establish that Mohan Seth and Mohd. Fazal had gone to Haridwar in the night intervening between 6th and 7th April, 2003. Firstly, on the basis of disclosure statement of Mohan Seth and Mohd. Fazal, Ex. PW19/F and PW19/E respectively, guest register maintained in Hotel Gautam Siddharth was recovered. Pawan Deep (PW10), had proved the said register and entry No. 1588 dated 7th April, 2003 at 2.00 AM wherein

Mohan Seth had checked in along with his wife. He had made departure entry at 9.30 AM on the same morning and then had made another arrival entry No. 1589 at 2.00 PM on 7th April, 2003. The last entry on the register was made on 13th April, 2003. This register was seized by Insp. K.K. Gaur (PW24) who has stated that he along with SI Ram Sahai (PW19) and others had gone to Hotel Gautam Siddharth and met Pawan Deep. On finding the said entry, they took into possession the Guest Register vide seizure memo Ex. PW10/A. Similar deposition was made by SI Ram Sahai (PW19).

21. Secondly, we have telephone call records in respect of mobile numbers 9810919733 (Ex. PW23/A) and 9810786388 (Ex. PW23/B) which were proved by R.K. Singh (PW23), Nodal Officer, Bharti Airtel. He had also proved the site details of the towers which were marked Ex. PW23/C. The details of the subscribers of the two mobile numbers were proved as Ex. PW23/D and as per the said details, the mobile number 9810919733 was issued to Mohd. Fazal and 9810786388 was issued to Mohd. Rahil Khan. The call details show that mobile telephone calls were exchanged between Mohd. Fazal and Rahil on 7th April, 2003 at 6.57 Hrs. and 07.04 Hrs. early morning and at that time Mohd. Fazal's mobile phone was connected to or received signals from mobile towers No. 7221 and 6662. As per the

mobile tower chart (Ex. PW23/C) (see full document on the trial court record), the two mobile towers were located at Brij Vihar, Ghaziabad and East Rohtas Nagar, respectively. This shows that Mohd. Fazal was not in Delhi in the early morning on 7th April, 2003 and this corroborates the case of the prosecution that Mohd. Fazal was returning to Delhi from Haridwar.

22. R.K. Singh (PW23) stated that they had also furnished call records of mobile no. 9818300840. The police case diary also records that the Investigating Officer had applied for call details of the deceased on 8th April, 2003 and was supposed to receive the same on the next day. Prosecution has not placed on record the call details of deceased Shakeel ur Rehman and Suraiya. But we do not think that in view of the evidence on record, the said lapse justifies clean chit to Suraiya or others, once their involvement and the prosecution version has been proved and established beyond doubt. We also notice that no questions were put to any of the three Investigating Officers namely SI Ram Sahai (PW19), Insp. Anil Kumar (PW22) and Insp. K.K. Gaur (PW24) on the said aspect or call details of 9818300840 or call records of Shakeel ur Rehman or Suraiya.

23. This brings us to the evidence of the two minor children of the deceased, Jafar (PW1) and Azhar (PW2), who were aged about 10

and 12 years at the time of their court depositions in October/November, 2003. The court before recording their testimony had ascertained whether the two witnesses, who were to depose without oath, were competent and were capable of answering questions. They had stated that on 6th April, 2003 at about 9 PM while returning from market they had seen Esteem car of Mohan Seth. Rahil and Fazal were standing near the driver seat, while Mohan Seth was sitting on the driver seat. They also recollected the number as DL 4CM 1494. When they arrived, Fazal also sat in the car and both of them drove away. Rahil went to his house. We have grave doubts about the said testimonies by PW1 and PW2 regarding what they had seen or noticed at 9 PM on 6th April, 2003. It is clear from their cross-examination that they could not remember or give details of car numbers which they in fact used or used to travel frequently. PW1 and PW2 had lost their father and it appears they had been tutored to make the statement regarding the car number and about the fact that they were returning at 9 PM on 6th April, 2003 when they saw Mohan Seth, Rahil and Fazal near the car. One of the reasons, we have disregarded and not accepted the said testimonies is the telephone call details of Mohd. Fazal and Rahil (Ex. PW23/A and B) which have established and proved beyond doubt that both of them

had conversed with each other on 6th April, 2003 at 19.56 Hrs. and a number of calls were earlier exchanged between them from 19.18 Hrs to 19.46 Hrs. Thereafter, Mohd. Fazal had made another call at 21.22 Hrs. which was connected through tower which was located in Nizamuddin. However, we are inclined to accept the statement of PW1 and PW2 to the effect that their father deceased Shakeel ur Rehman had gone to the house of Suraiya/Noor Ahmed at about 7 PM on 6th April, 2003 and thereafter he did not return.

24. On 16th April, 2003, on the basis of further interrogation of Mohan Seth as per prosecution version, Esteem Car bearing Regn. No. DL 4CM 1494 (Ex. PX) was recovered by Insp. Anil Kumar (PW22) who had taken over the investigation on 14th April, 2003. He had also arrested Suraiya and Noor Ahmed on 14th April, 2003 at 10.10/10.15 AM from their other house at Bara Hindu Rao (Ex. PW18/A and PW22/A). Rahil was arrested in the night intervening between 14th and 15th April, 2003 at 11 PM from the East Nizamuddin Market. The car was seized vide seizure memo Ex. PW19/G, and this fact was also deposed to by SI Ram Sahai (PW19). The car was locked and was towed to the police station and thereafter CFSL expert from Malviya Nagar was called for inspection and car was got opened and one pair of shoes was recovered from its dicky,

which was identified by Laiq ur Rehman (PW5) as that of the deceased Shakeel ur Rehman. The shoes were marked Ex. P1/1-2. The trial court relied upon the said recovery and this was another incriminating fact against the accused. At this stage, we may notice that the enquiries were made to ascertain from the vehicle registration authority, the registration number, chassis number and engine number of the car. On the basis of the said enquiries, as deposed by Insp. Anil Kmar (PW22), it was learnt that the correct number of the car was DL 7CB 4121 and the said car was registered in the name of ATS Infotech Ltd. This car was stolen from New Friends Colony Club and FIR No. 218/2002 dated 5th May, 2002, in this regard was registered under Section 279 IPC with the Police Station, New Friends Colony.

25. Mohan Seth was also prosecuted and challaned in the said FIR but was acquitted as per the judgment dated 11th March, 2005, certified copy of which was taken on record by the trial court vide order dated 14th February, 2007. The said judgment of acquittal in FIR No. 218/2002 under Section 279/411 IPC does not help Mohan Seth. While deciding the case, the Metropolitan Magistrate had rejected, application of the prosecution under Section 323 Cr.P.C. that the said prosecution should be clubbed with the present prosecution

case, observing that the cases were separate and there was no nexus or linkage between the two. However, we record and observe that the Metropolitan Magistrate had recorded that the recovery of the car must be disbelieved and Mohan Seth must be given benefit of doubt as the vehicle was recovered from Gurudwara Damdama Sahib, in an open space and no independent witness had joined. Keys of the car were also not recovered from Mohan Seth. Even if we disregard the recovery of the said car and the shoes, we feel there is sufficient evidence and material to conclusively prove the case against Mohan Seth under Section 201 read with Section 34 IPC. There is also sufficient evidence against other appellants as well as Noor Ahmed and Rahil.

26. In view of the aforesaid discussion, we feel that the prosecution has been able to conclusively prove the following facts:

- (i) There were disputes and litigation inter se between the deceased and Suraiya, Noor Ahmed and Fazal in respect of a property.
- (ii) Deceased Shakeel ur Rehman and Aniq ur Rehman (PW3) on 6th April, 2003 were trying to raise a boundary wall on the disputed property, which was objected to by Noor Ahmed/Suraiya. There was exchange of words and police was called to intervene. Parties were

asked to resolve and settle the matter, Pursuant to which discussions and talks for settlement were held.

(iii) At 7/7.30 PM, Shakir Ur Rehman returned home but received a telephone call on his landline phone from Suraiya. Thereupon he left and went to the house of Suraiya/Noor Ahmed.

(iv) Shakeel ur Rehman did not return and was not seen alive, thereafter. Complaints were made by Aniq ur Rehman and FIR No. 167/2003 under Section 365/34 IPC was registered.

(v) On 7th April, 2003, FIR No. 169/2003 was registered at the same Police Station on complaint made by Suraiya regarding the property.

(vi) Between 7th April, 2003 till 13th April, 2003, the accused were interrogated but no substantial progress was made. Shakeel ur Rehman could not be located and did not return.

(vii) Mohd. Fazal and Mohan Seth were arrested on 13th April, 2003 at 1 PM and thereafter, they made disclosure statements that they had thrown the body of Shakeel ur Rehman in Haridwar near Singdwar.

(viii) Police team along with Mohd. Fazal and Mohan Seth went to Haridwar at Singdwar and dead body of Shakeel ur Rehman was recovered.

(ix) Laiq ur Rehman (PW5) who had accompanied the police identified the dead body from hair and shirt of the deceased.

(x) Shakeel ur Rehman had died an unnatural death, asphyxia as a result of strangulation.

27. The factual conclusions elucidated above justify joint application and collation of two legal principles applicable to criminal prosecutions, namely, last seen evidence and recovery of the dead body of the deceased pursuant to the disclosure statement. In the present factual matrix, the combined effect of the two, leads us to miasmic conclusion with the highest degree of certainty required for conviction under the criminal law. The last seen evidence is applicable when the accused and the deceased were together at a particular time or place which is proximate and has close nexus with the place and time where deceased was injured/harmed. The proximity of the place and time, when possibility of a third party's involvement is ruled out, justifies the consequential inference as to the perpetrator. Recovery of the dead body at the instance of the accused on disclosure when covered by Section 27 of the Evidence Act, indicates three possibilities. One that the accused himself had concealed the body; secondly, he had seen another person concealing the body; or thirdly that he was informed or told by another person

that the body was concealed at a particular place/location. Explanation of the accused may assume great importance and relevance, in the last two possibilities, as the Court in the absence of any contra material/evidence can reliably assume that the body was concealed by the accused himself. This is because unless there is other evidence or material, only the accused can offer an explanation as to how he came to know of such concealment. Therefore, when the accused refrains from telling the court and maintains silence, the court would well be justified in holding that the concealment was by the said person (see *State of Maharashtra vs. Suresh* (2000) 1 SCC 471).

28. In *Suresh Chandra Bhari vs. State of Bihar* (1995) Supp (1) SCC 80, the Supreme Court has held:-

“71. The two essential requirements for the application of Section 27 of the Evidence Act are that (1) the person giving information must be an accused of any offence and (2) he must also be in police custody. In the present case it cannot be disputed that although these essential requirements existed on the date when Gurbachan Singh led PW 59 and others to the hillock where according to him he had thrown the dead body of Urshia but instead of the dead body the articles by which her body was wrapped were found. The provisions of Section 27 of the Evidence Act are based on the view that if a fact is actually discovered in consequence of information given, some

guarantee is afforded thereby that the information was true and consequently the said information can safely be allowed to be given in evidence because if such an information is further fortified and confirmed by the discovery of articles or the instrument of crime and which leads to the belief that the information about the confession made as to the articles of crime cannot

be false. In the present case as discussed above the confessional statement of the disclosure made by the appellant Gurbachan Singh is confirmed by the recovery of the incriminating articles as said above and, therefore, there is reason to believe that the disclosure statement was true and the evidence led in that behalf is also worthy of credence.

72. In the light of the facts stated above we are afraid the two decisions mentioned above and relied on by the learned counsel for the appellants have no application to the facts of the present case and do not advance the case of the appellants challenging the discovery and seizure of the incriminating articles discussed above. In Nari Santa the accused of that case was charged for the theft and it is said that in the course of investigation the accused produced certain articles and thereafter made a confessional statement and it was in these facts and circumstances it was held that there was no disclosure statement within the meaning of Section 27 as the confessional statement was made only when the articles were already discovered having been produced by the accused. Similarly the decision rendered in Abdul Sattar also does not help the appellants in the present case. In the case of Abdul Sattar recovery of wearing apparels of the deceased is said to have been made at the instance of the accused of that case more than three weeks after

the occurrence from a public place accessible to the people of the locality and, therefore, no reliance was placed on the disclosure statement and recovery of the wearing apparels of the deceased. But in the present case it was soon after the arrest of appellant Gurbachan Singh that he took the Police Officer while in custody to the place where according to him he had thrown the dead body of Urshia wrapped by the incriminating articles. Those articles were not found lying on the surface of the ground but they were found after unearthing the Khad gaddha dumping ground under the hillock. Those articles were neither visible nor accessible to the people but were hidden under the ground. They were discovered only after the place was pointed out and it was unearthed by the labourers. No fault therefore could be found with regard to the discovery and seizure of the incriminating articles.”

29. Scope and ambit of Sections 27 and 8 of the Evidence Act were elucidated in *Bheru Singh vs. State of Rajasthan* (1994) 6 SCC 107. Referring to the two earlier judgments, in *Anuj Kumar Gupta Vs. State of Bihar* (2013) 12 SCC 383, it was highlighted that recovery of a dead body from the place identified by the accused was admissible by virtue of Section 8 read with Section 27 of the Evidence Act as it reflected and indicated that the said fact was within exclusive knowledge of the accused. It was further observed:

“18. In such circumstances, in the absence of any convincing explanation offered on behalf of the appellant-accused as to under what circumstances he was able to lead the police party to the place where the dead body of the

deceased was found, it will have to be held that such recovery of the dead body, which is a very clinching circumstance in a case of this nature, would act deadly against the appellant considered along with rest of the circumstances demonstrated by the prosecution to rope in the appellant in the alleged crime of the killing of the deceased. Therefore, once we find that there was definite admission on behalf of the appellant by which the prosecuting agency was able to recover the body of the deceased from a place, which was within the special knowledge of the appellant, the only other aspect to be examined is whether appellant came forward with any convincing explanation to get over the said admission. Unfortunately though the above incriminating circumstance was put to the appellant in the Section 313 CrPC questioning where he had an opportunity to explain, except a mere denial there was no other convincing explanation offered by him.”

30. In a recent decision, *Harivardhan Babubhai Patel vs. State of Gujarat* 2013 (7) SCC 45, it has been held that it was beyond shadow of doubt that confessional part of any disclosure statement was/is inadmissible but the place from where the dead body of the deceased and other items were recovered, was admissible as it shows that the “facts discovered” were within the special knowledge of the accused, both as conduct of the accused under Section 8 as well as under Section 27 of the Evidence Act. In the said case, reference was made to the celebrated decision of the Privy Council in *Pulukuri Kottaya vs. Emperor* AIR 1947 PC 67 elucidating the term “fact discovered” envisaged in Section 27, which embraces the place from which the object was produced and the knowledge of the accused as

to it. However, the information given must relate distinctly to the said effect.

31. The factual conclusion reached above, proves beyond doubt that the deceased Shakeel ur Rehman had gone to the residence of Suraiya at 7/7.30 PM on 6th April, 2003 after receiving a phone call. Thereafter, Shakeel ur Rehman was not seen alive by the family members, though they made repeated attempts to contact him on the phone and also searched. Whereabouts and well being of Shakeel ur Rehman remained unknown and a mystery till 13th April, 2003, when appellants Mohd. Fazal and Mohan Seth were arrested and they made disclosure statements. Appellants Mohd. Fazal and Mohan Seth were taken to Haridwar and from the ghats near Singdwar, dead body of Shakeel ur Rehman at their instance was recovered. It is a fact that no one knew before the recovery of the dead body, what had happened to Shakeel ur Rehman, after he had gone to the residence/house of Suraiya on 6th April, 2003 at 7/7.30 PM. In the facts of the present case, recovery of the dead body collates and is reinforced with assurance of last seen evidence and this provides unequivocal certainty that the crime or the homicidal death had taken place at the residence of Suraiya and at no other place.

32. Mohd. Fazal as noticed above, is the brother of Suraiya and the telephone call records (Ex. PW23/A and 23/B) show and prove that Mohd. Fazal was in touch and was speaking to Rahil on 6th April, 2003 till 19.59 Hrs. Thereafter he had received one incoming call at 20.03 Hrs. from a third number and the next call thereafter was at 22.22 Hrs. i.e. after 1 hour and 22 minutes. At 22.22 Hrs, Mohd. Fazal was in Nizamuddin as his phone was connected with tower No. 0192. Earlier from 19.18 Hrs. till 19.59 Hrs. i.e. till about 8 O'clock, a number of calls were exchanged between Rahil and Mohd. Fazal and at that time mobile phone of Mohd. Fazal was connected with tower No. 0911 in Bhogal area, which is near Nizamuddin. We have already referred to and noticed the fact that the call details show that Mohd. Fazal was returning from Hardwar in the morning on 7th April, 2003 and then had made a call to Rahil at 6.56 Hrs. At that time Mohd. Fazal was connected to tower No. 7221 at Brij Vihar, Ghaziabad and at 7.04 Hrs he was connected to tower No. 6662 at Rohtash Nagar, Delhi. There were good and sound reasons why Suraiya, her husband Noor Ahmed and her son Rahil did not go or take the body from Delhi to Haridwar to conceal and dump the dead body of Shakeel ur Rehman. The reason was that they would have been immediately suspected because of their abscondence. Presence

of Mohan Seth and his going to Haridwar has also been established beyond doubt in view of the hotel records (see evidence of PW10).

33. Mohd. Fazal and Mohan Seth were arrested together and as per the police version they got cornered when interrogated on the basis of logs of mobile phone of Rahil and Mohd. Fazal. On question of joint disclosure and applicability of Section 27 of the Evidence Act, reference can be made to the decision of the Supreme Court in *State (NCT of Delhi) vs. Navjot Sandhu* (2005) 11 SCC 700, wherein it has been observed:

“Joint disclosures, to be more accurate, simultaneous disclosures, per se, are not inadmissible under Section 27. 'A person accused' need not necessarily be a single person, but it could be plurality of accused. It seems to us that the real reason for not acting upon the joint disclosures by taking resort to Section 27 is the inherent difficulty in placing reliance on such information supposed to have emerged from the mouths of two or more accused at a time. In fact, joint or simultaneous disclosure is a myth, because two or more accused persons would not have uttered informatory words in a chorus. At best, one person would have made the statement orally and the other person would have stated so substantially in similar terms a few seconds or minutes later, or the second person would have given unequivocal nod to what has been said by the first person. Or, two persons in custody may be interrogated separately and simultaneously and both of them may furnish similar information leading to the discovery of fact. Or,

in rare cases, both the accused may reduce the information into writing and hand over the written notes to the police officer at the same time. We do not think that such disclosures by two or more persons in police custody go out of the purview of Section 27 altogether. If information is given one after the other without any break almost simultaneously, and if such information is followed up by pointing out the material thing by both of them, we find no good reason to eschew such evidence from the regime of Section 27. However, there may be practical difficulties in placing reliance on such evidence. It may be difficult for the witness (generally the police officer), to depose which accused spoke what words and in what sequence. In other words, the deposition in regard to the information given by the two accused may be exposed to criticism from the stand point of credibility and its nexus with discovery. Admissibility and credibility are two distinct aspects, as pointed out by Mr. Gopal Subramaniam. Whether and to what extent such a simultaneous disclosure could be relied upon by the Court is really a matter of evaluation of evidence. With these preparatory remarks, we have to refer to two decisions of this Court which are relied upon by the learned defence counsel.”

34. The next issue in question is “which of the accused/appellants was/were the perpetrator and had committed the offence resulting in homicidal death i.e. had caused death of Shakeel ur Rehman by asphyxia/strangulation at the residence of Suraiya”? As noticed above, trial court held that Suraiya and Mohd. Fazal were responsible and accordingly they have been convicted under Section 302 read

with Section 120B IPC, while Noor Ahmed husband of Suraiya, Rahil son of Suraiya and Mohan Seth have been acquitted from the said charge. Mohan Seth and Mohd. Fazal have been convicted under Section 201/34 IPC.

35. On the conviction of Mohan Seth and Mohd. Fazal under Section 201/34 IPC, there cannot be any doubt. In fact we have some reservation on acquittal of Suraiya by the trial court for the offence under Section 201 IPC as she has been convicted by the same court for the offence under Section 302 IPC. Disposal of the dead body or its concealment was with her participation as a result of active abetment or with common intention. However, we are not proceeding further on the said aspect as State has not preferred any appeal and for an offence under Section 302 IPC, the minimum sentence is life imprisonment. In the revision filed by Naseem Bano also, no such prayer is made. (The said position holds good for Noor Ahmed and Rahil also)

36. Trial court while acquitting Noor Ahmed and Rahil for the offence under Section 302 IPC has observed that the litigation and dispute regarding construction of boundary wall was between Suraiya, her brother Mohd. Fazal and the deceased. Suraiya had called the deceased to her house and nothing else has come on record

to establish that Noor Ahmed had conspired with other accused and had participated in the commission of offence. Similarly for Rahil, it has been observed that he was son of Suraiya, but beyond that there was no other evidence except that purse etc. of Shakeel ur Rehman was recovered from his house, and that recovery was also debatable. It was observed that Rahil might have been speaking to Suraiya and Mohd. Fazal but this was not sufficient.

37. We agree with the said finding on the question of recovery of purse etc. which could have been easily planted and there was no reason for Rahil to keep the purse etc. of the deceased with him especially when he was aware that he and his parents were under cloud of suspicion. Rahil was arrested at 11 PM on 14th April, 2003 and the recoveries were purportedly made from his house. The second aspect/reason is being examined separately below.

38. The State in their appeal has submitted that reasoning given by the trial court for acquitting Noor Ahmed, Rahil and Mohan Seth under Section 302 read with Section 120B is specious and perverse, specially when the trial court had accepted that there was a conspiracy.

39. In a case of this nature where the crime/occurrence had taken place within four corners/walls of a house, the prosecution in most

cases faces difficulty in establishing the culprit or the perpetrator unless the occupants or family members of the said house come forward and disclose what had happened. In the absence of such insight, the prosecution is faced with an impossible task of proving and establishing which occupant or person had participated and their exact roles in the commission of the crime. In criminal law, the burden of proving that the accused had committed the crime and that too beyond reasonable doubt, is on the prosecution. The said legal principle is virtuous, sacred and unexceptionable as it protects innocents but the said principle is not designed and intended to be applied in an impractical manner with unrealistically wide interpretation; that silence on the part of the accused is always and universally acceptable and under no circumstances the accused should be or is required to give an explanation. The aforesaid legal position has been applied and accepted in several factual situations, as noticed above in the judgments under Section 27 of the Evidence Act. The said legal principle is applied pragmatically in common sensically manner, balancing the inconvenience, practical impossibilities and disproportionate labour involved in finding out and proving special facts in the knowledge of the accused, and the salutary protection, while ensuring that accused should not be put to relative and

disproportionate inconvenience or punished for inaptitude, impracticability or incompetency.

40. Section 106 of the Evidence Act and the illustrations appended thereto read:

“106. Burden of proving fact specially within knowledge - When any fact is specially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with traveling on a railway without a ticket. The burden of proving that he had ticket is on him.”

Referring to the aforesaid provision in ***Shambu Nath Mehra vs. State of Ajmer***, AIR 1956 SC 404, it was observed:

“9. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the

burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are Attygalle v. Emperor A.I.R. 1936 P.C. 169 and Seneviratne v. R. [1936] 3 All E.R. 36, 49. ...

10. xxxx

11. We recognise that an illustration does not exhaust the full content of the section which it illustrates but equally it can neither curtail nor expand its ambit; and if knowledge of certain facts is as much available to the prosecution, should it choose to exercise due diligence, as to the accused, the facts cannot be said to be "especially" within the knowledge of the accused. This is a section which must be considered in a commonsense way; and the balance of convenience and the disproportion of the labour that would be involved in finding out and proving certain facts balanced against the triviality of the issue at stake and the ease with which the accused could prove them, are all matters that must be taken into consideration. The section cannot be used to undermine the well-established rule of law that, save in a very exceptional class of case, the burden is on the prosecution and never shifts."

41. Similarly in *Trimukh Maroti Kirkan vs. State of Maharashtra*

(2006) 10 SCC 681, it has been held:

"14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. 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. Both are public duties. (See *Stirland v. Director of Public Prosecution* 1944 AC 315 quoted with approval by Arijit Pasayat, J. in *State of Punjab v. Karnail Singh* 2003 CriLJ 3892). The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable

of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

“(b) A is charged with traveling on a railway without ticket. The burden of proving that he had a ticket is on him.”

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.”

42. Recently in *Pritpal Singh vs. State of Punjab* (2012) 1 SCC

10, it has been elucidated:

“53. In *State of W.B. v. Mir Mohammad Omar* [(2000) 8 SCC 382 : 2000 SCC (Cri) 1516 : AIR 2000 SC 2988] this Court held that if fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of the accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of

his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. *Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused.* (See also *Shambhu Nath Mehra v. State of Ajmer* [AIR 1956 SC 404 : 1956 Cri LJ 794] , *Sucha Singh v. State of Punjab*[(2001) 4 SCC 375 : 2001 SCC (Cri) 717 : AIR 2001 SC 1436] and *Sahadevan v. State* [(2003) 1 SCC 534 : 2003 SCC (Cri) 382 : AIR 2003 SC 215] .)

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79. Both the courts below have found that the appellant-accused had abducted ShriJaswant Singh Khalra. In such a situation, only the accused person could explain as to what happened to ShriKhalra, and if he had died, in what manner and under what circumstances he had died and why his *corpus delicti* could not be recovered. All the appellant-accused failed to explain any inculcating circumstance even in their respective statements under Section 313 CrPC. Such a conduct also provides for an additional link in the chain of circumstances. The fact as to what had happened to the victim after his abduction by the accused persons, has been within the special knowledge of the accused persons, therefore, they could have given some explanation. In such a fact situation, the courts below have rightly drawn the presumption that the appellants were responsible for his abduction, illegal detention and murder.”

43. The aforesaid quotations expound the word ‘especially’ used in Section 106 of the Evidence Act as to mean the facts which are pre-eminently and exceptionally within the knowledge of the accused. Secondly, the section is designed to meet exceptional cases where

prosecution would be faced with disproportionate difficulty, if not an impossible task to establish facts which are especially within the knowledge of the accused.

44. The aforesaid provision i.e. Section 106 can be read with Section 114 which empowers the court to assume existence of facts which it thinks were likely to have happened. The true and correct position is that the State or the prosecution must prove basic factum probans in form of material or evidence from which presumption in law in the form of inference relating to further facts can be drawn. The burden of proof to establish the basic factum probans is solely and exclusively on the prosecution/State and not on the accused who has a constitutionally protected right of silence. When factum probans establishes one set of facts, the court can infer and presume probability about existence or non-existence of a further fact, unless the truth of inference is disproved. Thus, the prosecution/State must first establish facts from which it is legally permissible to draw reasonable inference regarding certain other facts and thereupon the court can insist that the accused by virtue of special knowledge regarding existence of such facts is required to offer an explanation for the court to draw a different inference. Read in this manner, the burden of proof, it can be said remains on the prosecution/ State and

not on the accused. The probative burden is on the State/prosecution and has to be discharged but the prosecutor is entitled to plead that in the absence of the evidence or explanation to the contrary adduced by the other side the court is entitled to presume and infer consequential facts. But the accused should not be asked to prove impossibility. The accused is not an investigator and lacks resources/power of the State. The accused may be required to explain and state what according to him had happened when he was present with the deceased at time of occurrence etc. The explanation may be offered by way of questions in cross-examination, or by way of explanation and statement under Section 313 Cr.P.C., or may otherwise appear to be apparent even from the prosecution version (in which case possibly it could be even argued that *factum probans* is not established). Whether or not the explanation offered by the accused in a given case should be accepted or rejected would depend on the facts of the case like the conduct of the accused, merits and probability of the explanation, attending circumstances etc. The said explanation again is not tested or evaluated on the highest parameter, but keeping in mind the facts including the difficult and practical impossibilities which the accused may face. The preponderance of

the probability is the criteria/test applicable when it comes to the explanation of the accused.

45. When we apply the aforesaid principles to the facts of the present case, we feel the following position emerges:

(i) As far as Suraiya, Noor Ahmed and Rahil are concerned, their presence in the house at 7/7.30 PM when the deceased Shakeel ur Rehman was called and came to their residence, has been proved and should be accepted. Suraiya being a lady could not have committed the said offence alone. Presence of her husband and son was axiomatic and normal. We do not find any explanation has been given by Noor Ahmed or Rahil as to their absence from the place of occurrence. In fact, the call details of Rahil (Ex. PW23/B) and Mohd. Fazal (Ex. PW23/A) as noticed above, on 6th April, 2003 starting 7.18 PM show number of calls being exchanged and the presence of Rahil at Nizamuddin as his mobile was connected through tower No. 911 in Nizamuddin. The presence of Noor Ahmed husband of Suraiya with them, when the deceased was called for discussion was natural and normal.

(ii) We do not agree with the reasoning given by the trial court that Suraiya and Fazal brother and sister had a property dispute and the same has no connection with Noor Ahmed and Rahil, husband and

son of Suraiya. The said reasoning keeping in view the social and cultural background of the family, merits rejection and has to be discarded. It is not acceptable and ignores practical reality.

(iii) As far as Mohd. Fazal is concerned, his involvement in the offence under Section 302 IPC would be a matter of debate as he was certainly not in the premises where Rahil was present, as both of them were in touch on phone till at least 7.59 PM. As per the prosecution case on 6th April, 2003 at 8.03 PM Mohd. Fazal had spoken to Suraiya on telephone no. 9891266685 (Suraiya's telephone number has not been proved but this being the prosecution case, we can read this factum against the prosecution). The next call made by Mohd. Fazal was at 9.22 PM.

(iv) The next question is whether the crime or offence had taken place between 8.03 PM and 9.22 PM or before. It is difficult to point out the exact time, when the offence may have taken place but one thing is certain that till 8.03 PM, Mohd. Fazal was not in the property i.e. the house of Suraiya and at 9.22 PM onwards on 6th April, 2003, he had started moving from Nizamuddin and by 9.27 PM his telephone was connected with mobile tower at Nehru Enclave. No direct question was put to Mohd. Fazal in his statement under Section 313 Cr.P.C. to get a response or reply regarding his presence between

8 to 9.22 PM on 6th April, 2003. It was not normal or necessary for Mohd. Fazal to be present in the property i.e. residence of Suraiya at that time unless he was called and asked. It would have certainly taken time to decide how to transport the dead body and conceal it, which by no means was an easy task. Modalities including arranging a proper car and person(s) of confidence who would have taken the dead body, was required. Therefore, for the offence under Section 302 read with Section 34 IPC or Section 120B IPC, we grant benefit of doubt to Mohd. Fazal and he is acquitted.

(v) As far as Mohan Seth is concerned, the prosecution has not produced any evidence on record that he was at the residence/property of Suraiya. His call records or details have not been placed on record. In these circumstances, we do not think there was any mandate or requirement under Section 106 of the Evidence Act on Mohan Seth to offer an explanation. Basic factum probans was not established and proved against him. His acquittal under Section 302 IPC is upheld and maintained.

(vi) We do not think separate offence and punishment under Section 120B is proved or required. An act of throttling resulting in death by asphyxia might have happened at the spur of the moment due to heated arguments etc. We do not think, it would be safe to

assume that there was a pre-agreement or agreement on telephone between Suraiya, Rahil and Mohd. Fazal. Calls or discussion could be to discuss terms of settlement etc. The calls could very well indicate panic and fear after the crime and need to conceal and cover up.

46. In view of the aforesaid discussion, we have reached the following conclusion:

- (i) Suraiya, Noor Ahmed and Rahil are guilty of having committed murder of Shakeel ur Rehman at their residence, between 7.00 and 9.22 PM on 6th April, 2003;
- (ii) There is no evidence to show that Mohan Seth was at the residence/property of Suraiya at that time and, therefore, he was rightly acquitted under Section 302 IPC for having committed murder of Shakeel ur Rehman;
- (iii) Mohd. Fazal, we hold and observe is entitled to benefit of doubt and prosecution has not been able to conclusively establish that he was present in the house/property of Suraiya at the time when the offence was committed.
- (iv) We uphold the conviction of the appellant Mohan Seth and Mohd. Fazal under Section 201 read with Section 34 IPC.

47. On the question of sentence, Suraiya has been sentenced to imprisonment for life and fine of Rs.2000/- for the offence under Section 302 IPC and on default of payment to undergo simple imprisonment for six months. In the given facts, Noor Ahmed and Rahil are awarded the same sentence i.e. imprisonment for life and fine of Rs.2000/- each and in default of payment to further undergo simple imprisonment for six months. Mohan Seth and Mohd. Fazal, for the offence under Section 201/34 IPC, were sentenced for imprisonment already undergone which was 5 years 11 months 6 days, on the date pronouncement of the order of sentence i.e. 19th March, 2009. Both of them were also to pay fine of Rs.1000/- each and in default to undergo simple imprisonment for 9 months. The said punishment is maintained.

48. By order dated 11th May, 2009, appellant Suraiya was granted regular bail on suspension of sentence in her appeal. She shall surrender within one month to undergo the remaining sentence as the appeal filed by her has been dismissed. Noor Ahmed and Rahil, who were acquitted by the trial court, but held to be guilty for the offence under Section 302 read with Section 34 IPC in the appeal preferred by the State, shall also surrender within one month to undergo the sentence as directed in paragraph 47 above.

49. Appeals including appeal filed by the State are disposed of.
Criminal revision is also disposed of.

(SANJIV KHANNA)
JUDGE

(G. P. MITTAL)
JUDGE

May 19th, 2014
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