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IN THE HIGH COURT OF DELHI AT NEW DELHI
Crl. Appeal No. 7/2014

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Reserved on: 19th March, 2014
Date of Decision: 3rd April, 2014

NIPUN GOLA @ NIKHIL Appellant
Through Mr. Ajay Verma with Mr. Prateek Sisodia
And Mr. Gaurav Bhattacharya,
Advocates.

Versus

STATE ...Respondent
Through Ms. Rajdipa Behura, APP.

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Crl. Appeal 43/2014

AMIT @ CHUNNU Appellant
Through Mr. Pramod Kumar Dubey with
Mr. Shiv Pande and Mr. Nishaank
Mattoo, Advocates.

Versus

STATE ...Respondent
Through Ms. Rajdipa Behura, APP.

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

SANJIV KHANNA, J.

Nipun Gola @ Nikhil and Amit @ Chunnu, two appellants
impugn their conviction for murder with common intention, of Sunil
by Judgment dated 24th September, 2013 in Sessions Case No.

91/2011 arising out of FIR No. 186/2011. By order of sentence dated 26th September, 2013, two appellants have been sentenced to life imprisonment with fine of Rs.10,000/- each and in default thereof they have to undergo rigorous imprisonment for one year. Benefit of Section 428 Code of Criminal Procedure (“Cr.PC” for short) has been granted.

2. There is hardly any debate that dead body of Sunil was found on 21st June, 2011 at about 12.40 PM at A-4/48 and 49, New Kondli, Delhi. This information was received by the Police Control Room from a mobile phone and was recorded vide DD No. 2A. Thereupon Const. Krishan Yadav (PW8), PS New Ashok Nagar, Delhi along with SI Neetu Kumar (PW13) visited the spot and on the third floor in one of the rooms on the north-west side, dead body of a male aged between 18-20 years was found lying on the floor. There were four rooms on the third floor of the said house. A checked ligature cloth having two knots was tied around the neck of the body and two pillows soaked in blood were lying under the neck of the body. There were blade cut marks on both hands and on both sides of the chest. Clothes had been removed and Sunil was wearing an underwear. The room had been ransacked and the belongings were

lying scattered. On enquiry by Const. Krishan Yadav (PW8) and SI Neetu Kumar (PW13), it transpired that parents of the deceased had gone to their village in Nainital. SI Neetu Kumar (PW13) stated that lock of the iron box was found broken. Crime Team was called to the spot to inspect the scene of crime and submitted their report. SI Neetu Kumar (PW13) prepared the rukka (Ex. PW13/B) and the same was sent to the police station for registration of the FIR. Dead body of Sunil was sent to LBS Hospital Mortuary for preservation and thereafter the investigation was entrusted to Insp. Suraj Pal Giri (PW5).

3. The aforesaid factual position has been supported by Savitri Devi (PW3) who used to reside in another room on the third floor of the same property and has deposed that at about 12.00 noon she noticed that curtain of the room where Sunil was residing was protruding outside but the door was closed. She then went near the door to see whether anyone was present in the room, but no movement was noticed. Thereafter, she called the landlady who resided on the ground floor, who in turn called her son Manoj on the telephone. Manoj reached the spot and sometimes thereafter police reached the spot and entered the room. Sunil was lying on the floor

with a cloth covering his body upto neck. A rope was tied around his neck and Sunil was dead.

4. In the post mortem report (Ex. PW2/A) which was proved by Dr. Vinay Kumar Singh (PW2), he deposed that death was caused due to Asphyxia due to ligature strangulation caused upon the neck. All injuries were ante mortem in nature. Ligature strangulation was sufficient to cause death in the ordinary course of nature. He also pointed out that the deceased had consumed alcohol prior to his death and death in this case was homicidal.

5. The main issue and contention raised in the present appeal is whether the two appellants were perpetrators of the crime as held by the Trial Court. There are no eye witnesses and the prosecution relies solely upon circumstantial evidence. FIR (Ex. PW1/A) does not name the two appellants but states that on 20th June, 2011 at about 10 or 10.30 AM in the morning two boys along with deceased had entered the room in question and possibly the said unidentified boys/persons had committed the murder and therefore, an offence under Section 302 IPC was made out. On the question of identification of the two appellants as the perpetrators, we have to refer to the testimony of Savitri Devi (PW3) and Ramesh Singh Rawat (PW9) father of the deceased.

6. Savitri Devi (PW-3) in her court deposition has stated that Sunil along with his family used to reside in a room in front of her room on the same floor. In the month of May-June in the said year it was a Sunday. Sunil was present in his room but his parents had gone to the village for the engagement of his sister. Younger brother of Sunil left at about 10 A.M. Immediately after that Sunil went to the market and returned with two boys whom she identified as the two appellants, who were present in Court. They were in the room throughout the day and the main door of the room was locked. After taking meals at 11 P.M., she went on the roof to sleep. She returned in the morning at 12 noon and noticed the curtain outside the door of Sunil's room but the door was closed. As she did not notice any movement, doubts arose. She called the landlady, who called her son Manoj, who came there. Police reached and on opening the door, dead body of Sunil was found.

7. On cross-examination by the Public Prosecutor, Savitri Devi (PW3) accepted that it was the month of June and she did not notice whether it was a rope or cloth tied around the neck of Sunil. In the cross-examination, PW-3 accepted that she did not know the names of the appellant-accused and the family of deceased had recently

shifted to the room i.e. about 15 days prior to the occurrence and on Saturday parents of Sunil had gone to their village and before that she had not seen any friend of Sunil visiting the room. On Monday dead body of Sunil was found in the room and there were four families of tenants residing on the third floor. In all about 30 persons used to reside in the four tenanted rooms on the third floor and they used to interact with each other. During the day, she did not hear any noise from the room of Sunil but at 11 P.M. when she went up to the roof to sleep, volume of TV in Sunil's room was very high though she did not remember whether she had stated this fact to the police. She did not know whether the accused were friends of Sunil nor did she know if Sunil was addicted to drugs or anything else. On further cross-examination, she has stated:

“.....It is correct that I saw Sunil in the company of accused for few seconds while they crossed in front of my room. Vol. Accused and Sunil after climbing the stairs crossed in front of my room, open the lock of Sunil's room and went inside. Sunil opened the lock of his room. When Sunil was opening the lock both the accused were facing towards the door, their backs were facing towards my room. Vol. After turning their neck they were looking on the sides.

The distance between the stairs and the door of the room of the Sunil was around 5 feet. It is wrong to suggest that my room is not opposite to the room of Sunil. On being asked

repeatedly the witness gave the same answer about the position of her room and room of Sunil.....There are three tenants at the 2nd floor of the building. I did not see either Sunil or anyone leaving the room.....It is correct that I got suspicion since the door of room of Sunil was not locked.”

8. The landlady Rajanti has appeared as PW12 but her son Manoj did not appear as a witness. Rajanti (PW12) has deposed that she had rented out one room to Ramesh Rawat (PW9) on 5th June, 2011 at Rs.2000/- month and one room on the same floor was rented out to Sumitri Devi. Leading questions were put to her regarding the name of the lady tenant and Rajanti (PW12) stated that the name of the lady was Savitri Devi and not Sumitri Devi. However, in the cross-examination, she accepted that apart from Ramesh Rawat (PW9) there were other tenants one of whom was Savitri Devi.

9. The scaled site plan Exhibit 5/A discloses the room of Savitri Devi (PW-3) and the room where the body of the deceased was found. There was a common kitchen, a toilet and a staircase. On the same floor, there was another room in possession of one Harkesh as per site plan Exhibit PW-5/A, which was locked. Thus, as per the statement of Savitri Devi (PW-3), she had seen the two appellants with Sunil in the morning hours of 20th June, 2011 at about 10-11 A.M. Thereafter, she did not see Sunil and she has also claimed that

she did not notice Sunil or anyone leaving the room. PW-3 had identified the two appellants in the Court as the two boys, who had come to meet Sunil.

10. Ramesh Singh Rawat (PW-9) has deposed that he had two sons and a daughter and had occupied the room fifteen days prior to the occurrence. On 18th June, 2011 at 9 P.M. he alongwith his wife and daughter left for his native village in Nainital leaving behind his sons Sunil and Deepak. On 20th June, 2011 at 3 P.M. he received a call on his mobile No. 9818315304 from Sunil's mobile number 9871579820. Sunil had then enquired, how much money was lying in the box but he did not tell him and disconnected the phone. Thereafter, Sunil called him again two-three times enquiring about the same. He had told him that Rs.15,000/- were lying in the box. While speaking to Sunil, he heard some voices and on being asked, Sunil stated that Amit and Nikhil were present in the house with him. He even spoke to Amit on the phone. He identified the two appellants, Amit and Nikhil, in the Court as residents of Mandawali and friends of Sunil who used to visit his house as they had earlier resided in Mandawali for 15 years. He further deposed, that Rs.15,000/- were part sale proceeds of his land in Nainital and were

kept for the marriage of his daughter and were in the form of three bundles of Rs.50/- denomination. One of the bundles was of new currency notes. On 21st June, 2011 at about 2 P.M. he received a call from Delhi Police informing him that his son Sunil had been murdered. They reached Delhi on 22nd June, 2011 and since the house was locked, they went to the police station and collected the key. He then went to LBS Hospital Mortuary and identified the body of Sunil. He had taken with him to Nainital, 20 new currency notes of Rs.50/- out of one bundle, thus, leaving behind Rs.14,000/-. Out of the 20 new currency notes, he had utilised 18 currency notes and two new currency notes were still with him. Rs.14,000/- which were lying in the room were missing. He handed over the said remaining two new currency notes to the police which were seized vide seizure memo Exhibit PW-9/B.

11. On 24th June, 2011 at about 4 P.M. he had accompanied the police officer in search of the accused and they were apprehended on his pointing out and arrested vide arrest memos Exhibit PW9/C and Ex. PW/D. On personal search of Nikhil four new currency notes of Rs.50/- denomination were recovered from his pants and three new currency notes of Rs.50/- and a mobile phone

without SIM was recovered from Amit's pants. The currency notes recovered were of the same series as two Rs.50/- notes which PW-9 had already given to the police. The appellants were brought to the house in muffled faces and shown to Savitri Devi (PW3), who identified them and stated that both the appellants had come to the house on the day of occurrence, i.e., 20th June, 2011 and had remained there. Ramesh Rawat (PW9) further deposed that when he had spoken to Sunil on telephone, he believed that Sunil was intoxicated. He identified the mobile phone, which was marked Exhibit P-4 and stated that it belonged to his son Sunil. The currency notes seized from Nikhil and Amit were marked Exhibits P-2 and P3 respectively.

12. In the cross-examination, PW-9 accepted that Sunil had made three or four calls however, this fact was not mentioned in his statement under Section 161 marked Exhibit PW-9/DA. He stated that it was incorrect to suggest that Sunil had informed him about money being stolen, upon which he asked Sunil to call the police as he was busy in the engagement of his daughter. He denied the suggestion that Sunil had called the police thrice and made a complaint. He had also denied the suggestion that Sunil had informed

him that his friends had left. He further denied the suggestion that he had given Rs.50/- currency notes and the mobile phone to the police to be planted on the appellants. Ramesh Rawat (PW9) claimed that Sunil was facing a criminal case and volunteered that he and appellant Amit were involved in a criminal case at Juvenile Court (No such material/documentary evidence has been placed on record). He also stated that his son was not addicted to charas and ganja or any other intoxicant. However, he had asserted that it was correct that when he spoke to his son, he appeared to be intoxicated.

13. The call records of mobile phone of Sunil bearing No. 9871579820 for the period 1st June, 2011 to 30th June, 2011 were proved by Vishal Gaurav (PW4) as Exhibit PW-4/A. He further proved call records relating to IMEI Nos. 911100850216000 and 911100850215990 as per the records of Bharti Airtel Limited, which were marked as Exhibit PW-4/C and D respectively.

14. Call records of mobile No. 9871579820 on 20th June, 2011 are as under:

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Calling No.	Called No.	Date	Time	Dur(s)	Cell 1	Cell 2	Call Type	IMEI	IMSI No.	Type SMSC	Roam NW
9818315304	9871579820	20-jun-	07:42:08	32	238_9361	238_9361	IN	353108	404100	PRE -	

		11						025569 190	220083 469		
9871579820	8527606004	20-jun-11	08:57:54	26	238_46761	238_9361	OUT	353108 025569 190	404100 220083 469	PRE -	
9871579820	8527606004	20-jun-11	08:58:33	5	238_46761	238_9361	OUT	353108 025569 190	404100 220083 469	PRE -	
9871579820	9540453086	20-jun-11	08:58:54	41	238_46761	238_46761	OUT	353108 025569 190	404100 220083 469	PRE -	
9223492234	9871579820	20-jun-11	09:13:36	0	238_9361	-	SMT	353108 025569 190	404100 220083 469	PRE -	9032 3550 02
9871579820	8527606004	20-jun-11	09:29:04	68	238_46761	238_9361	OUT	353108 025569 190	404100 220083 469	PRE -	
9871579820	9540453085	20-jun-11	09:30:32	47	238_46761	238_9361	OUT	353108 025569 190	404100 220083 469	PRE -	
9871579820	8527606004	20-jun-11	09:48:56	29	238_46761	238_46761	OUT	353108 025569 190	404100 220083 469	PRE -	
9810491329	9871579820	20-jun-11	09:51:03	38	238_46761	238-46761	IN	353108 025569 190	404100 220083 469	PRE -	
9211988034	9871579820	20-jun-11	09:54:12	33	238_46761	238_46761	IN	353108 025569 190	404100 220083 469	PRE -	
9871579820	8527606004	20-jun-11	10:10:40	48	249_15621	249_15621	OUT	353108 025569 190	404100 220083 469	PRE -	
9871579820	8527606004	20-jun-11	10:15:32	19	249_15621	249_15621	OUT	353108 025569 190	404100 220083 469	PRE -	
1426BC6538 1C0623	9871579820	20-jun-11	12:43:16	0	238_9361	-	SMT	353108 025569 190	404100 220083 469	PRE -	9810 0519 17
1426BC6538 1C0623	9871579820	20-jun-11	12:43:28	0	238_9361	-	SMT	353108 025569 190	404100 220083 469	PRE -	9810 0519 17
9871579820	9815315304	20-jun-11	13:57:48	32	238_46761	238_46761	OUT	353108 025569 190	404100 220083 469	PRE -	
9871579820	100	20-jun-11	15:51:45	16	238_46761	238_46761	OUT	353108 025569 190	404100 220083 469	PRE -	
9871579820	100	20-jun-11	15:52:06	13	238_46761	238_46761	OUT	353108 025569 190	404100 220083 469	PRE -	
9871579820	100	20-jun-11	15:52:29	10	238_46761	238_46761	OUT	353108 025569 190	404100 220083 469	PRE -	
9871579820	9818315304	20-jun-11	15:55:57	53	238_46761	238_9361	OUT	353108 025569 190	404100 220083 469	PRE -	
9211988034	9871579820	20-jun-11	15:57:36	31	238_9361	238_9361	IN	353108 025569 190	404100 220083 469	PRE -	
9871579820	100	20-jun-11	15:58:24	3	238_46761	238_46761	OUT	353108 025569 190	404100 220083 469	PRE -	
9211988034	9871579820	20-jun-11	15:58:32	71	238_46761	238_9361	IN	353108 025569 190	404100 220063 469	PRE -	
9871579820	100	20-jun-11	16:01:44	4	238_46761	238_46761	OUT	353108 025569 190	404100 220013 469	PRE -	
9871579820	100	20-jun-11	16:03:31	54	238_46761	238_9361	OUT	353108 025569 190	404100 220083 469	PRE -	
9818315304	9871579820	20-jun-11	16:16:14	115	238_9361	238_46761	IN	353108 025569 190	404100 220083 469	PRE -	
1426B28969 3DBC66	9871579820	20-jun-11	16:17:07	0	238_46761	-	SMT	353108 025569	404100 220083	PRE -	9810 0519

								190	469		16
9211988034	9871579820	20-jun-11	16.21:05	171	238_46761	238_46761	IN	353108 025569 190	404100 220083 469	PRE -	
9211988034	9871579820	20-jun-11	16.47:35	72	238_9361	238_9361	IN	3531080 2556919 0	404100 220083 469	PRE -	
9211988034	9871579820	20-jun-11	17:47:17	93	238_9361	238_9361	IN	353108 025569 190	404100 220083 469	PRE -	

15. What is clearly discernible from the call records is that the deceased-Sunil had extensively used the mobile phone on 20th June, 2011 and calls were received from and made to various numbers. It is also discernible that the deceased had made a call to his father on mobile No. 9818315304 on 20th June, 2011 a number of times between 13:57 to 17:47 P.M. In between these phone calls, telephone calls were made to the police on No. 100.

16. Call records of Ramesh Rawat (PW9), i.e., telephone No. 9818315304 have not been placed on record by the prosecution. The police control room forms relating to calls made from telephone No. 9871579820 though exceedingly relevant and important have not been placed on record by the prosecution. The call records reveal that at least six phone calls were made to No.100 from telephone No.987159820 between 15:51 to 16:03 P.M. on 20th June, 2011. The conversation and the noting recorded by the police control room were significant and vital as they would have thrown light on what transpired and what was actually happening at that time. As noticed

above, PW-9 in his Section 161 Cr.P.C. statement marked Exhibit PW-9/DA had not stated that there were repeated exchange of calls between him and Sunil on 20th June, 2011. Ramesh Rawat (PW-9) had stated that his other son, Deepak had stayed back with the deceased-Sunil in Delhi. Deepak was not interrogated and was not produced or deposed as a witness. PW-9 in his deposition has claimed that Deepak had told him that at the time of incident he was not in the house and was away with his friends but even this fact was not mentioned in the statement of Ramesh Rawat (PW-9) recorded under Section 161 Cr.P.C. marked Exhibit PW-9/DA as was accepted by PW-9 in his cross-examination.

17. Appellants herein had filed an application under Section 91 of the Code of Criminal Procedure before the Trial Court for production of police control room records regarding calls made to No. 100 on 20th June, 2011 between 3.51 P.M. to 4.03 P.M. By order dated 6th September, 2011, notice was issued and thereupon on 2nd November, 2012, report was submitted by SHO, Police Station, New Ashok Nagar regarding the calls made to No. 100. The report submitted by the SHO, Police Station Ashok Vihar, is not on Trial Court record. It is also not available in the police records. Learned Additional Public Prosecutor

was asked to obtain police control room records relating to the calls but it has been stated that the call records in question have been weeded out or erased and are not available.

18. Even a layman examining the call records Exhibit PW-4/A could have realised the significance and value of the details/recording made at No. 100, looking at the timing and sequence and the calls exchanged between telephone Nos. 987159820 and 9818315304 between 1.57 to 5.47 pm. It is not understandable why and for what reason PCR forms were not obtained and filed. PW-9 claims that he had received a telephone call from Sunil stating that he wanted money or whether and how much money lying in the house etc., but there is no explanation why and for what reason PW-9 did not get in touch with his other son Deepak, who was in Delhi. Spate of calls made and exchanged was unusual and indicative of something undesirable and discomfoting happening. Due to absence of call records of Ramesh Rawat (PW-9), it cannot be ascertained whether PW9 called the police or got in touch with Deepak at that time. As per Savitri (PW-3), Deepak had left the room at about 10 A.M. on 20th June, 2011. It is difficult to accept and believe that Deepak did not return to his residence at all thereafter for more than 24 hours till

12 noon on 21st June, 2011. Deepak's whereabouts have not been investigated and adverted to by any of the witnesses.

19. It is also intriguing to note that there was a lull and no calls were made by PW-9 after the last call was made by him at 5.47 P.M. in the evening on 20th June, 2011 till next day 2.00 PM on 21st June, 2011 when police made a call and informed him as to the murder. In case Sunil was not picking up or responding, it was natural and normal for PW-9 to get in touch with his other son Deepak and make inquiries. Conduct of PW9 is unnatural and failure to adduce and collect relevant and crucial evidence goes against the prosecution.

20. Recovery of the mobile phone with IMEI No. 911100850215990 leaves behind unanswered questions and is not free from doubts. As per the details furnished by Vishal Gaurav (PW-4), the said instrument was used on 4th June, 2011 with mobile No. 8527606004 to make two calls and for making 13 calls with SIM No. 9871579820 between 5th to 7th June, 2011 and was used with SIM No.9818315304 on 5th June, 2011 to make one call. The said instrument i.e. with IMEI No. 911100850215990 was neither used to make or receive any calls or SMS after 7th June, 2011. The said instrument was not in use on the date of the occurrence, i.e., 20th June,

2011 and was also not used after the occurrence. IMEI number in which SIM No. 987159820 was used as per Exhibit PW-4/A was different, being 353108025569109. We do not know what happened to the said mobile phone instrument. There is no evidence to suggest and none of the witnesses have deposed that the said mobile phone was missing and was not traceable on or after 21st June, 2011. In these circumstances, we are not inclined to rely upon the alleged recovery of the mobile instrument with IMEI No. 911100850215990 from the pocket of Amit. The phone it appears was planted.

21. Similarly, the so-called recovery of three new currency notes of Rs.50/- from Amit and four bank notes of Rs.50/- from Nikhil, as per the deposition of Ramesh Rawat (PW-9) and the police officers is debatable and not proved beyond doubt. Ramesh Rawat (PW-9) has stated that Rs.14,000/- were stolen and taken away. The alleged recoveries from Appellants Nikhil and Amit were that of only four and three currency notes. It must also be noted that the balance, including the two bundles was not found.

22. Savitri Devi (PW-3) has stated that she had neither seen the two appellants nor Sunil after 10/11 AM on 20th June, 2011 but it cannot be ruled out that the two appellants may have left the room

and gone when Sunil was alive and a third person may have entered the room. It is apparent that the building in question had a number of rooms, which were occupied by different persons/tenants. There were other rooms in occupation of third parties, on the same floor. There was a lot of movement and footfalls in the property.

23. As already stated above and at the risk of repetition we record that Deepak was present in Delhi but his absence for a period of more than 24 hours, including his absence at night from the room raises questions and makes the prosecution version highly debatable. There is no material and evidence to show where was Deepak during this period and why and for what reason he did not come back to the room. It is apparent that something unusual was happening in the room and telephone calls were made at No. 100 and there was exchange of calls with PW-9. In such circumstances, it was natural and normal for PW-9 to get in touch with his son Deepak and he would have asked him to go to the room or made inquiries about well-being of Sunil. Calls records of Ramesh Singh Rawat (PW9) as noticed above, were not filed. PW-9's deposition along with calls made at No. 100, do indicate that, he (PW-9) suspected foul play. As per the prosecution version, PW-9 did not call and speak to Sunil on

21st June, 2011 and at about 2 P.M., PW-9 was called by the police and informed about death/murder of Sunil.

24. Failure to produce evidence and elucidate as to the whereabouts of Deepak, to produce Deepak as a witness, his purported absence of more than 24 hours, failure to produce police control room records so as to ascertain and verify the nature of the calls made from the mobile phone being used by the deceased, leaves huge gaps and casts doubts about the prosecution version. These aspects and gaps are not insignificant or inconsequential and cannot be ignored as mere lapse in the investigation. In the present case, this has damaged and impaired the prosecution case, making it unreliable and vulnerable to the charge, that the allegations have not been established beyond reasonable doubt.

25. A Division Bench of this Court of which one of us (Sanjiv Khanna, J.) was a member in *Sudhir Kumar v State* Crl.A No. **605/2013** decided on 2nd September, 2013 held as under:

“24. The discrepancies and gaps noticed in the prosecution case mentioned above are significant and not illusionary. 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.”

26. The detailed discussion on the aspect can be found in ***Dayal Singh v. State of Uttaranchal, (2012) 8 SCC 263*** wherein it has been observed:

“19. Now, we will deal with the question of defective or improper investigation resulting from the acts of omission and/or commission, deliberate or otherwise, of the investigating officer or other material witnesses, who are obliged to perform certain duties in discharge of their functions and then to examine its effects. In order to examine this aspect in conformity with the rule of law and keeping in mind the basic principles of criminal jurisprudence, and the questions framed by us at the very outset of this judgment, the following points need consideration:

(i) Whether there have been acts of omission and commission which have resulted in improper or defective investigation.

(ii) Whether such default and/or acts of omission and commission have adversely affected the case of the prosecution.

(iii) Whether such default and acts were deliberate, unintentional or resulted from unavoidable circumstances of a given case.

(iv) If the dereliction of duty and omission to perform was deliberate, then is it obligatory upon the court to pass appropriate directions including directions in regard to taking of penal or other civil action against such officer/witness.

20. In order to answer these determinative parameters, the courts would have to examine the prosecution evidence in its entirety, especially when a specific

reference to the defective or irresponsible investigation is noticed in the light of the facts and circumstances of a given case.”

27. After recording the aforesaid point for consideration, the Supreme Court referred to earlier pronouncements which throw light on the subject in the following words:-

“27. Now, we may advert to the duty of the court in such cases. In *Sathi Prasad v. State of U.P.* [(1972) 3 SCC 613 : 1972 SCC (Cri) 659] this Court stated that it is well settled that if the police records become suspect and investigation perfunctory, it becomes the duty of the court to see if the evidence given in court should be relied upon and such lapses ignored. Noticing the possibility of investigation being designedly defective, this Court in *Dhanaj Singh v. State of Punjab* [(2004) 3 SCC 654 : 2004 SCC (Cri) 851] , held: (SCC p. 657, para 5)

“5. In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective.”

28. Dealing with the cases of omission and commission, the Court in *Paras Yadav v. State of Bihar* [(1999) 2 SCC 126 : 1999 SCC (Cri) 104 : AIR 1999 SC 644] enunciated the principle, in conformity with the previous judgments, that if the lapse or omission is committed by the investigating agency, negligently or otherwise, the prosecution evidence is required to be examined de hors such omissions to find out whether the said evidence is reliable or not. The contaminated conduct of officials should not stand in the way of evaluating the evidence by the courts, otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party.

29. In *Zahira Habibullah Sheikh (5) v. State of Gujarat* [(2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8] , the Court noticed the importance of the role of witnesses in

a criminal trial. The importance and primacy of the quality of trial process can be observed from the words of Bentham, who states that witnesses are the eyes and ears of justice. The Court issued a caution that in such situations, there is a greater responsibility of the court on the one hand and on the other the courts must seriously deal with persons who are involved in creating designed investigation. The Court held that: (SCC p. 398, para 42)

“42. Legislative measures to emphasise prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day. Conducts which illegitimately affect the presentation of evidence in proceedings before the courts have to be seriously and sternly dealt with. There should not be any undue anxiety to only protect the interest of the accused. That would be unfair, as noted above, to the needs of the society. On the contrary, efforts should be to ensure a fair trial where the accused and the prosecution both get a fair deal. Public interest in proper administration of justice must be given as much importance, if not more, as the interest of the individual accused. In this courts have a vital role to play.”

(emphasis supplied)”

28. When we apply the aforesaid legal ratio to the present factual matrix, we feel that the prosecution version is not free from doubts or question marks, on account of unexplained gaps which creates the feeling that investigation was perfunctory and suspicious and material has been withheld. It is debatable whether any currency of Rs.50/- denomination of the same bundle was recovered from the appellants. In nut-shell, the prosecution has only been able to prove that the two appellants had visited the room along with Sunil between 10 and 11 A.M. on 20th June, 2011. There was exchange of phone calls between PW-9 and telephone No. 9871579820 and phone calls were made at No. 100 between 3 to 4 P.M. but the call details of the police control room have not been placed on record. We do not have any details as

to the whereabouts of Deepak and why he did not go back to the room for a period of 24 hours. With the said evidence, we do not think it has been established and proved beyond doubt that the appellants were the perpetrators and no one else could have committed the said offence. Possibility of a third person entering the room is not ruled out and is plausible. The prosecution version, it is apparent, was based upon suspicion as right from the beginning it was suspected that the two boys, who had come in the morning of 20th June, 2011, had committed murder of Sunil.

29. In view of the aforesaid discussion, we allow the present appeals and the conviction of Nipun Gola @ Nikhil and Amit @ Chunnu under Section 302 IPC read with Section 34 IPC is set aside. The appeals are accordingly disposed of.

(SANJIV KHANNA)
JUDGE

(G.P. MITTAL)
JUDGE

APRIL 03, 2014
kkb/VKR