

Neutral Citation No. - 2023:AHC:226330-DB

Court No. - 46

Case :- CRIMINAL APPEAL No. - 7413 of 2018

Appellant :- Prem Shanker Upadhyay And Anr.

Respondent :- State of U.P.

Counsel for Appellant :- Apul Misra, Anil Kumar Tripathi, Ashish Jaiswal, Durgesh Kumar, Shashi Bhushan Mishra, Shashi Shankar Tripathi, Shri Prakash Dwivedi, Surya Pratap Singh Parmar A/C

Counsel for Respondent :- G.A.

and

Case :- CRIMINAL APPEAL No. - 53 of 2019

Appellant :- Guddu Mishra @ Sachchidanand Misra

Respondent :- State of U.P.

Counsel for Appellant :- Amrendra Pratap Singh, Ashwini Kumar Awasthi, Abhinav Singh Ac, Shri Prakash Dwivedi

Counsel for Respondent :- G.A.

and

Case :- CRIMINAL APPEAL No. - 359 of 2019

Appellant :- Teerthraj Gupta

Respondent :- State of U.P.

Counsel for Appellant :- Shri Prakash Dwivedi, Surya Pratap Singh Parmar

Counsel for Respondent :- G.A.

and

Case :- CRIMINAL APPEAL No. - 402 of 2019

Appellant :- Dharmendra Kumar Bind

Respondent :- State of U.P.

Counsel for Appellant :- Bare Lal, Anurag Pathak, Surya Pratap Singh Parmar A/C

Counsel for Respondent :- G.A.

and

Case :- CRIMINAL APPEAL No. - 495 of 2019

Appellant :- Kedar Mishra

Respondent :- State of U.P.

Counsel for Appellant :- Narendra Deo Shukla, Krishna Chandra Pandey

Counsel for Respondent :- G.A.

and

Case :- CRIMINAL APPEAL No. - 1345 of 2022

Appellant :- Shyamdev Vishwakarma

Respondent :- State of U.P.

Counsel for Appellant :- Shri Prakash Dwivedi

Counsel for Respondent :- G.A.

Hon'ble Ashwani Kumar Mishra,J.
Hon'ble Syed Aftab Husain Rizvi,J.

1. These bunch of appeals are instituted by the appellants, Prem Shanker Upadhyay, Chandra Prakash, Guddu Mishra alias Sachchidanand Misra, Teerathraj Gupta, Dharmendra Kumar Bind, Kedar Mishra and Shyamdev Vishwakarma challenging their conviction in Sessions Trial No.4 of 2010 (State Versus Dharmendra Kumar Bind and others) under Sections 147, 148, 302/149, 376 and 120-B I.P.C., Sessions Trial No.100 of 2010 (State Versus Kedar Mishra) under Sections 147, 148, 302/149 I.P.C. and Sessions Trial No.107 of 2010 (State Versus Dharmendra Kumar Bind and others) under Sections 376 and 120-B I.P.C. arising out of Case Crime No.812 of 2009, Police Station Oonjh, District Bhadohi. The maximum sentence awarded to the appellants is life imprisonment along with fine.

2. Accused-appellant Vijay Kumar Gupta son of Nand Lal has died during trial. Accused appellants are in jail since their conviction on 22.11.2018. Since all these criminal appeals, arise out of the same case crime number, therefore, they have been heard together and are being decided by this common judgement.

3. It transpires on record that informant Sarju son of Khetai (PW-1) was the village Chaukidar who received information at about six in the morning of 05.09.2009 that in the Village Chaurahata, Sangam Lal alias Gama Gupta, his wife, Smt. Savitri Devi and his daughters Anita and Rani as well as his grand daughter Gudiya have been done to death on the previous night. The village Chaukidar came to the house of the deceased and found the information to be correct. On such basis a written report was got scribed by the informant Sarju through Mithilesh Kumar Dubey, Pradhan of Village Sovari, pursuant to which Case Crime No.812 of 2009 came to be registered under Section 302 I.P.C., Police Station Oonjh, District Bhadohi, on 05.09.2009. As per the first information report, unknown persons had caused the death of aforesaid five persons. The written report (Ext.Ka-1) has been proved by the informant. Investigation proceeded in the matter and the Investigating Officer collected blood-stained earth as also blood-stained bricks lying at the spot vide Ext. Ka-6. According to prosecution the son of

the deceased Sangam Lal, namely, Awadhesh Kumar (PW-5) lived at Bombay in connection with his employment. Hearing the news of the incident, PW-5 returned to the village on the next day. He (PW-5) informed the Investigating Officer that mobile phone of his father bearing No.9793893044 was missing. The Investigating Officer requested the concerned Mobile Operator to put the aforesaid mobile number on surveillance. The Hand-set which contained mobile number i.e. 9793893044 was traced on the basis of IMEI No.359819017488400 during surveillance. It was also found during surveillance that the handset used in mobile No. 9793893044 was later being used in mobile No. 9651252031, on the basis of certain e-mail inquiries made from the private mobile operator. The Investigating Officer suspected the role of accused Vijay Kumar Gupta and Dharmendra in the offence and both these persons were, accordingly, arrested on 12.09.2009.

4. According to the prosecution, Vijay Kumar Gupta and Dharmendra made confessional statement before second Investigating Officer, namely, Ram Manorath (PW-23), as per which, Vijay Kumar Gupta had relations with one of the deceased daughters of Sangam Lal, namely, Rani. Vijay Kumar Gupta divulged the Investigating Officer that his relationship with Rani got revealed to her family members and all of them, including Rani assaulted and humiliated him. Date of this incident, however, is not specified in the confessional statement. In the confessional statement accused Vijay Kumar Gupta confessed that with an intent to take revenge he committed the offence with the support of the accused-appellants. The accused persons came to the house of deceased Sangam Lal and subjected the ladies to sexual assault and then slit their neck with Dav. Dav was recovered from the scene of occurrence. The mobile phone of Sangam Lal was also taken by the accused Vijay Kumar Gupta. On the basis of such confession made to the police the role of all the accused appellants surfaced culminating in their conviction and sentence vide judgement and order of court of Sessions, which is assailed in the present bunch of appeals.

5. It is worth noticing that PW-5 on his return from Bombay made a written report in which he implicated Mukund Lal, Kamla, Alagu, Chhallu,

Pancham, Paras, Goltan, Ram Dev and Ravindra Kumar in the offence on account of land dispute between these persons with the deceased.

6. The Investigation proceeded with conduct of inquest on 05.09.2009. The inquest papers have been produced during the trial as Ext. Ka-2 to Ka-5 and Ka-8. The post mortems have also been conducted of the deceased on 05.09.2009 itself. Post mortem reports were duly exhibited as Ext. Ka-9, Ka-10, Ka-11, Ka-12 and Ka-13. The post mortem reports have also been proved by Dr. Harish Kumar Patel (PW-22). As per the post mortem reports, the deceased had died on account of hemorrhage as a result of ante mortem injuries, which are specified hereinafter in respect of five deceased:

a. Post mortem examination was conducted on the dead body of the deceased Sangam Lal Gupta, aged above 65 years, on 05.09.2009 at 4.55 p.m. Following ante mortem injuries were found on the deceased:

- i. Incised wound 13 cm x 3 cm x bone deep over front of neck and right side of neck, vessel of neck, trachea and oesophagus cut.
- ii). Incised wound 20 cm x 5 cm x cavity deep on front of abdomen, 5 cm above umbilicus. Bowels protended out.
- iii). Incised wound 5 cm x 2 cm x muscle deep on front of left forearm at mid part present.

b. Post mortem examination was conducted on the dead body of the deceased, Savitri Devi, aged above 60 years, on 05.09.2009 at 5.05 p.m. Following ante mortem injuries were found on her:

Incised wound 15 cm x 3 cm x bone deep over front of neck and right side of neck. Vessels of neck, trachea and esophagus cut.

c. Post mortem examination was conducted on the dead body of the deceased, Gudiya, aged above 3 years, on 05.09.2009 at 5.30 p.m. Following ante mortem injuries were found:

Incised wound 13 cm x 4 cm x bone deep on front of neck and left side neck. Trachea & oesophagus and vessels of neck left side cut.

d. Post mortem examination was conducted on the dead body of the deceased, Km. Rani, aged about 20 years, on 05.09.2009 at 5.40 p.m. Following ante mortem injuries were found on her:

i). Incised wound 15 cm x 5 cm x bone deep on left side of neck, mid part artery and vein of neck cut left side.

ii). Incised wound 5cm x 2cm x bone deep right side of neck just below right ear.

e. Post mortem examination was conducted on the dead body of the deceased, Anita Devi, aged about 25 years, on 05.09.2009, at 5.20 p.m. Following ante mortem injuries were found on her:

i). Incised wound 14 cm x 5 cm x bone deep on front of neck to left side of neck, trachea, oesophagus, vessels of neck left side cut.

ii). Incised wound 8cm x 2cm x muscle deep on front of right shoulder.

7. Vaginal swabs of deceased, Rani was taken and sent for scientific analysis by the Forensic Science Laboratory, Lucknow. Semen stains have been detected on such vaginal slides. On the strength of it the court of Sessions has concluded that the deceased Rani had been subjected to sexual assault before brutal murder. The investigation ultimately concluded with submission of three separate charge-sheets against the accused. First charge sheet (Ext.Ka-26) came to be submitted on 08.12.2009 under Sections 147, 148 and 302 I.P.C. against six accused persons. A separate charge-sheet came to be submitted thereafter on 05.05.2010 against accused Kedar Mishra under Sections 147, 148 and 302 I.P.C. Yet another charge-sheet came to be submitted against all eight accused under Section 149/376/120-B I.P.C. on 14.05 2010. The Magistrate took cognizance on all three charge-sheets and committed the cases to the court of Sessions where three separate session trials came to be registered as Session Trial No. 4 of 2010, S.T. No.100 of 2010 and S.T. No. 107 of 2010. All the three session trials have been consolidated and have been decided by the impugned judgement.

8. During course of trial the prosecution has adduced following documentary evidence:

1. F.I.R., dt. 05.09.2009, Ext. Ka.34

2. Written Report, dt. 05.09.2020, Ext. Ka-1

3. Recovery memo of blood stained & plain 'Pieces of roof, dt. 05.09.2009, Ext. Ka-6

4. Search memo and recovery of 'Three Mobile', dt. 12.09.2009, Ext.Ka-14

5. Search memo and recovery of blood-stained and plain earth, dt. 05.09.2009, Ext. Ka-7
6. Search and recovery memo of 'Iron Dav', broken bangle, broken sacred thread, dt. 05.09.2009, Ext. Ka-27
7. Search and recovery memo of blood-stained and plain earth, dt.05.09.2009, Ext. Ka-28
8. Copy of Case Diary
9. Post Mortem Report of Sangam Lal, dt. 05.09.2009, Ext. Ka-9
10. Post Mortem Report of Savitri Devi, dt. 05.09.2009, Ext. Ka-10
11. Post Mortem Report of Gudiya, dt. 05.09.2009, Ext. Ka-11
12. Post Mortem Report of R, dt. 05.09.2009, Ext. Ka-12
13. Post Mortem Report of Anita, dt. 05.09.2009, Ext. Ka-13
14. Vidhi Vigyan Prayogshala Report, dt. 30.01.2010
15. Vidhi Vigyan Prayogshala Report, dt. 07.10.2017
16. Finger Print Report, dt. 23.11.2009
17. Panchayatnama, dt.05.09.2009, Ext. Ka-2
18. Panchayatnama, dt.05.09.2009, Ext. Ka-3
19. Panchayatnama, dt.05.09.2009, Ext. Ka-4
20. Panchayatnama, dt.05.09.2009, Ext. Ka-5
21. Panchayatnama, dt.05.09.2009, Ext. Ka-8
22. Charge-sheet, dt.15.05.2010, Ext. Ka-33
23. Charge-sheet, dt. 08.12.2009, Ext. Ka-26
24. Charge-sheet, dt. 11.12.2010, Ext. Ka-32

9. In addition to above documentary evidence, the prosecution has adduced oral testimony of informant Sarju as PW-1. PW-2 is Mithilesh Kumar, scribe of the written report who has turned hostile. PW-4 to PW-21, namely, Nawab Ali, Avdhesh Kumar, Nand Lal, Rojan Ali, Abrar, Lal Ji Singh, Nazma, Ram Sagar, Tej Pratap Singh, Sudama, Ram Charan, Hinch Lal, Ram Murat Bind, Kallu Ram, Raja Ram, Suresh Prasad Tripathi, Prem Bahadur Singh and Haushila Prasad have also turned hostile. None of these witness have otherwise seen the incident. Conviction of all the accused persons is based upon the testimony of PW-3, Farid Ahmed and PW-23,

Ram Manorath, both of whom are police personnels. PW-23, Ram Manorath is the main Investigating Officer while PW-27, Narendra Pratap Singh, Sub Inspector posted S.O. at Police Station Oonjh is also the Investigating Officer. Oral testimony has also been adduced of PW-24 to 28 who too are police witnesses. PW-24, S.I. Kashi Nath Singh is the fourth Investigating Officer who submitted charge-sheet in the matter. PW-25, Sunil Kumar Singh was the first Investigating Officer who conducted the investigation only for a day and had made recoveries from the place of occurrence. PW-26, Rakesh Kumar Tiwari had conducted the inquest proceedings on the dead body of Anita Devi. PW-27, Narendra Pratap Singh is the 5th Investigating Officer who had submitted supplementary charge-sheet and also added Section 376 I.P.C. during investigation. PW-28 is Jiya Lal who proved the chik F.I.R. and other police papers.

10. Since all the independent witnesses have turned hostile and conviction has been secured by the prosecution relying upon the testimony of PW-3 and PW-23 to PW-28, as well as documentary evidence, therefore, it would be necessary for the Court to consider the testimony of such witnesses as also the documentary evidence relied upon in this regard.

11. PW-3 at the relevant point of time was posted as Sub Inspector, Police Station Gyanpur, District Bhadohi. In his chief examination, PW-3 has stated that call detail records in respect of Mobile No. 9793893044 was called from the Airtel company, which was received and from its perusal it transpired that the mobile SIM of deceased Sangam Lal was operated from the hand-set bearing IMEI No.359819017488400, and it was put on surveillance. The identity report was received on 02.09.2009, as per which the aforesaid SIM was in the name of Sangam Lal who had died. It further revealed from the information received from Airtel that a new Mobile No. 9651252031 was active on the same hand-set. It further transpired that from Mobile No. 9651252031 contact was made with two other mobile nos.9793923814 and 9005061156. These two SIM numbers were issued to Sudama son of Lakshman and Lakshman Shanker Sharma. Both of them were residents of District Mirzapur. On the basis of call detail records of these two mobile numbers the involvement of another Mobile bearing no.9793591863

surfaced during investigation. The call detail records in that regard had been exhibited during trial as Ext.Ka-15 to Ka-22. The original enrolment form on which SIM Card no. 9651252031 was issued to Vijay Kumar Gupta was also exhibited.

12. We have perused the original records from which it is apparent that original enrolment form in respect of SIM allegedly issued to deceased Sangam Lal has not been produced or exhibited during trial. The only enrolment form which is on records is of Vijay Kumar Gupta in respect of his Mobile No. 9651252031 (Ext. Ka-23). This form is absolutely blank and contains signatures of none. Only the photocopy of the Voter Identity Card of Vijay Kumar Gupta is exhibited as Ext. Ka-24 which again contains no signatures authenticating it. This document otherwise is a photocopy.

13. In cross-examination, PW-3 has admitted that there exists no signature to authenticate the call detail records which have been received from Airtel company on e-mail. He has stated that these call details records have not been delivered by him either to the Superintendent of Police or to the Circle Officer. Apart from the e-mail, PW-3 made no inquiries to ascertain the identity of the persons to whom SIM cards had been issued. He has stated that only from the Airtel dealer of Varanasi, he had made certain oral inquiries but he could gather no information as to the identity of person to whom these SIM Cards were issued. Original call detail records, moreover, are neither exhibited nor are proved. PW-3 has further stated that some of the call detail records are not entirely legible and contains overwriting on it. As per PW-3, he had given these call details records to Investigating Officer but no receiving of it was obtained. Nothing was otherwise written on the call detail records at the time when it was received by the Investigating Officer. PW-3 also did not remember the date when his statement was recorded by the Investigating Officer. In his further cross-examination, PW-3 has stated that Mobile No. 9793893044 was being used by deceased, Sangam Lal. He had, however, not made any inquiries nor had certified that Mobile No. 9793893044 was issued to deceased Sangam Lal or was being used by him. He also did not remember the mobile number of his son i.e. PW-5. There are no documents to show that this mobile phone was

recovered from the accused. Only paper 64-A and 65-A (Ext. Ka-23 and Ka-24) have been referred to by PW-3 and it is admitted to the witness that these forms do not contain signatures of anyone. It is also admitted to PW-3 that forms 64-A and 65-A did not contain the signature of Vijay Kumar Gupta. PW-3 has also stated that most of the informations with regard to the use of these SIM numbers were received by him from the Investigating Officer. It was for the first time on 05.09.2009 that the witness has visited the place of occurrence at about 7 in the morning. He gathered no information about missing mobile of the deceased. A suggestion is also given to PW-3 that the version that mobile of deceased was misplaced, and its hand-set was utilized later by Vijay Kumar Gupta, is concocted by the Investigating Officer only to solve the prosecution case.

14. PW-23, Ram Manorath, in his examination-in-chief has stated that investigation of the case was entrusted to him on 06.09.2009. He has alleged that PW-5 disclosed him that Mobile No. 9793893044 of his father was missing. This fact apparently was mentioned in Parcha No.2 of Case Diary by PW-23. This witness has also referred to various communications made on telephone numbers so as to connect the initial missing mobile number of the deceased with it. PW-23 had also stated that the owner of Lucky telecom at Mirzapur, namely, Santosh Kumar Prajapati had informed him that Vijay Kumar Gupta had come to his shop on 06.09.2009 and SIM of Mobile No. 9651252031 was purchased by him on furnishing his Voter Identity Card. PW-23 has further stated that role of Dharmendra had surfaced on the basis of statement of Sudama Bind, as per which Mobile No.9793893044 was availed by his brother Dharmendra, who was stated to be friend of Vijay Kumar Gupta. PW-23 has also stated that on 12.09.2009 he had arrested Vijay Kumar Gupta and Dharmendra whereafter Vijay Kumar Gupta confessed that he was in love with late Rani daughter of his uncle (Phupha) Sangam Lal. Vijay Kumar Gupta also stated that once Sangam Lal Gupta and his wife spotted him in compromising position with Rani whereafter he was assaulted and humiliated by Sangam Lal and his family members. Rani had also joined her family members in his humiliation. It was thereafter that he spoke to other accused persons and with the help of Teerath Raj Gupta a

conspiracy was hatched to eliminate the deceased. PW-23 has elaborately explained the steps taken by him during investigation from time to time.

15. In his cross-examination, PW-23 has stated that in the second F.I.R. lodged by PW-5 name of other accused persons were mentioned. The initial F.I.R. was against unnamed persons. He has stated that the persons named in the second F.I.R. by PW-5 were exonerated since no evidence was found against them. He has further stated that on account of recovery of Mobile phone and the subsequent call detail records alone, the role of the accused persons was established in view of confessional statements made by the two accused. The confessional statement was recorded by PW-23 in the Case Diary. Out of the three mobile phones recovered by the Investigating Officer on 12.09.2009, two of these mobile phones belonged to Vijay Kumar Gupta, i.e. Mobile No. 9651252031 and 9005061156. Accused Vijay Kumar Gupta during interrogation allegedly admitted that Mobile No. 9651252031 was run on the hand-set which originally belonged to his *Phupha* Sangam Lal. The other mobile number belonged to Vijay Kumar Gupta. The third recovered mobile was of Dharmendra. SIM of this mobile number, however, was in the name of his brother, Sudama. These records have also been proved by PW-23.

16. Forensic Science Laboratory report dated 30.01.2010 is also exhibited in which semen stains have been found on item nos. 37 and 38 i.e. the slide of Vaginal swab of deceased Rani. Incriminating material produced during trial by the prosecution against the accused persons were confronted to them for recording their statement under Section 313 Cr.P.C. All the accused have stated that they have been falsely implicated in the matter and that they have not committed the offence. It has also been alleged that accused persons have been falsely implicated due to village enmity.

17. The trial court, on the basis of evidence led in the matter, has come to the conclusion that the accused persons have committed the offence in which the deceased Rani was subjected to sexual assault and thereafter her sister and other family members have been done to death. The finding has been returned by the court below that the prosecution has succeeded in establishing the guilt of the accused-appellants beyond reasonable doubt.

18. Aggrieved by the judgement of conviction and sentence, the accused-appellants have preferred the present appeals.

19. On behalf of the appellants, it is contended that the conviction and sentence of accused is not based on any admissible evidence on record and hence is unsustainable. It is also submitted that this is a case of circumstantial evidence in which the chain of events have not been connected by the prosecution. Learned counsels for the appellants argues that the confession of Vijay Kumar Gupta and Dharmendra since was made to police while they were in custody it cannot be read against the accused by virtue of section 24 to 26 of Indian Evidence Act. It is also argued that no recovery pursuant to such confession has otherwise been made from the accused persons. Therefore the confession is wholly inadmissible. It is further argued that the prosecution has not been able to establish the fact that mobile no. 9793893044 belonged to Sangamlal. In its absence the plea taken by the prosecution witnesses that its handset was later utilised by Vijay Kumar Gupta, is equally unsustainable. It is further argued that the mobile handset bearing IMEI No. 8991540907051314412 is also not proved to have been owned by Sangam Lal nor the mobile no.9651252031 is proved to be owned by Vijay Kumar Gupta inasmuch as Ex. Ka-23 and Ka-24 are neither signed by anybody nor the original documents in that regard have been proved. It is further argued that even if the location of phone numbers have been found near the place of occurrence, yet it would not lead to complicity of the accused persons, in the absence of any positive evidence to show that these mobile numbers were actually owned by accused persons or that the hand set of deceased was used by accused Vijay Gupta. It is also urged that mere fact that vaginal slides prepared from deceased Rani showed existence of semen stains would not ipso facto indicate involvement of the accused persons when there is no material or evidence on record to connect them with the offence.

20. Learned AGA, on the other hand, submits that this is a case of brutal murder of five persons and the involvement of accused persons are clearly established on the basis of call records of various mobile numbers as well as other evidence which have been led by the prosecution.

21. We have heard Sri Manish Tiwary, learned Senior Counsel, assisted by Sri Prakash Dwivedi, Sri Atharva Dixit, Sri Surya Pratap Singh Parmar, Sri Anurag Pathak, Sri Shashi Bhushan Mishra, Sri K.C. Pandey and Sri Anurag Dubey, learned counsels appearing for the respective appellants and learned AGA for the State. We have carefully perused the records of the present bunch of appeals and have also examined the trial court records pertaining to the present appeals. It is admitted to the prosecution that there is no ocular testimony of the incident in which five persons have been done to death. The incident has been reported by the village Chaukidar who gathered information about the unfortunate killing of five persons in the family of the deceased. The informant has been produced as P.W.-1. This witness has not disclosed as to how and from whom he gathered information about the brutal killings of five deceased. It is nevertheless admitted to P.W.-1 that such information was received by him at around 6:00 in the morning. The written report in respect of the incident was thereafter scribed by P.W.-2 who happens to be the village Pradhan. In the written report (Ex.Ka-1) there is no reference to the complicity of anyone, neither it is alleged that anyone has seen the incident. The FIR is against unknown persons.

22. It is reflected from the records that the son of deceased Sangam Lal, namely Awadhesh Gupta (PW-5) came from Bombay on coming to know of the unfortunate incident on the next day. A supplementary report has been lodged by P.W.-5 in which a separate set of persons were nominated as being the persons who had committed the offence. All these persons nominated in the supplementary report of P.W.-5 have ultimately been exonerated. This is so as P.W.-5 himself turned hostile during trial and has not supported his own allegations made in the supplementary report. P.W. 5 has merely stated that on the basis of information received, he had nominated other set of persons and he in fact, did not find their complicity in the offence. These persons have ultimately been exonerated under section 169 Cr.P.C.

23. The implication of the accused appellants essentially surfaces on the basis of the version introduced by the prosecution that the mobile phone of deceased Sangamlal had gone missing. It is then asserted by the prosecution that the hand set of mobile phone of Sangam Lal was later found in the

possession of accused Vijay Kumar Gupta, who inserted a subsequent SIM issued in his name bearing no. 9651252031. The IMEI number of the handset was put on surveillance and it is on the basis of telephone calls made in a series of transactions that ultimately the prosecution has been able to implicate the accused persons.

24. We have carefully examined the evidence on record and we find that the prosecution case is based upon the theory that the mobile phone of deceased Sangamlal had an Airtel connection bearing mobile SIM no. 9793893044. According to prosecution, this number belonged to the deceased Sangamlal and the phone itself had gone missing after the brutal incident of his murder. Learned counsel for the parties have addressed us at great length on the sanctity of the prosecution case in this regard. It is strenuously urged on behalf of the appellants that essential facts underlying the prosecution version have not been established.

25. The mobile SIM no. 979389044 was allegedly issued to the deceased Sangamlal. There is however no record placed before the court which may indicate that the aforesaid SIM was issued to Sangamlal. We have examined the testimony of prosecution witnesses which reveals that none of them have asserted that mobile SIM no. 9793893044 was the mobile number of deceased Sangamlal. The only testimony relevant in that regard is of P.W.-5. In his chief examination P.W.-5 has stated that mobile handset of his father was not traced. However, P.W.-5 has not specified the mobile number of his father. In the cross-examination P.W.-5 has turned hostile and has not supported the prosecution case of mobile no. 9793893044 as being the mobile number of deceased Sangamlal or such phone having been misplaced. We have also carefully perused the records put-forth by the Investigating Officer in the form of call detail records of handset bearing IMEI No. 359819017488400 which was put on surveillance. The call detail records contains no authentication by any responsible Officers/ employee of the Airtel Company nor there is any certificate issued in terms of section 65 B of the Evidence Act.

26. The prosecution case that the handset of mobile no.9793893044 was later utilised by accused Vijay Kumar Gupta for running his mobile SIM

No.9651252031, after the murder of Sangamlal, is clearly contrary to the evidence on record. The testimony of P.W.-23 refers to call details records of various mobile numbers and its contents are reproduced hereinafter:

“एस.ओ.जी. एस.आई. फरीद अहमद द्वारा मोबाइलों की सी.डी.आर. प्रस्तुत की गई, जिनका अवलोकन किया गया। विवरण इस प्रकार है-

1. सी.डी.आर. मोबाइल नम्बर 9651252031 जो मृतक संगम लाल के मोबाइल पर चला, दिनांक 15.08.09 से 07.09.2009 तक।

2. सी.डी.आर. मोबाइल नम्बर 9793923814 दिनांक 15.08.09 से दिनांक 07.09.2009 तक।

3. सी.डी.आर. मृतक संगम लाल के मोबाइल नम्बर 9793893044 दिनांक 01.07.09 से 04.09.09 तक।

सी.डी.आर. शामिल केस डायरी किया गया।”

27. The above details clearly show that mobile no. 9651252031 was being operated on the handset of the deceased between 15.08.2009 to 07.09.2009. If that be so, it is apparent that mobile no. 9651252031 was actually being operated on the said handset from even prior to the occurrence of the incident in question. The incident admittedly occurred in the night intervening 4/5.09.2009. If the handset belonging to the deceased was being utilised by mobile no.9651252031, since 15.08.2009 onwards, it virtually demolishes the prosecution case that the handset of deceased was taken by Vijay Kumar Gupta after murder of Sangamlal. There is otherwise no evidence to show that handset bearing IMEI No.359819017488400 belongs to the deceased Sangamlal. The evidence once is found lacking to demonstrate that mobile SIM no. 9793893044 was issued to Sangamlal or that the handset in question was actually owned by the deceased Sangamlal, the further prosecution version to connect handset bearing IMEI no. 359819017488400 with other mobile numbers loses its significance. It is otherwise admitted on record that in respect of all other mobile numbers, which were connected by the prosecution in the present case neither any authenticated CDR has been placed on record nor any certificate mandatorily required in terms of Section 65 B of the Evidence Act has been produced. In the absence of any certificate issued under section 65 B of Evidence Act as also on account of failure by the prosecution to prove that

the mobile no. 9793893044 was actually owned by deceased Sangamlal or that such phone was misplaced or that its handset was later utilised by Vijay Gupta the very basis to implicate the appellants by the prosecution fails.

28. We have also perused the judgment of the court below which refers to the transaction containing phone calls made from different numbers but the fact that no Section 65-B certificate was produced, nor even the call detail records were authenticated, has clearly been overlooked. The court below has also failed to notice that the prosecution had not succeeded in proving that mobile SIM bearing no. 9793893044 was actually issued to Sangamlal or that the handset bearing IMEI No. 359819017488400 was owned by Sangamlal.

29. In view of the deliberation made above, we find that the prosecution has not succeeded in connecting accused persons with the commissioning of the offence merely on the strength of location of different mobile numbers near the place of occurrence at the time of incident. The prosecution has miserably failed to prove that these mobile numbers were actually owned by the accused persons and unless the ownership of these mobile numbers are conclusively established, as that belonging to the accused persons, there further involvement on the strength of such call detail records would be wholly misplaced.

30. Though the prosecution alleges that SIM no. 9651252031 has been issued to Vijay Kumar Gupta, on the basis of information form of Airtel (Ex.Ka.-23) but the perusal of Ex.Ka.-23 would show that this activation form has been issued on 06.09.2009. The CDR details produced by P.W.-23 clearly shows that mobile no. 9651252031 was operational from 15.08.2009 itself. In the event the aforesaid SIM was activated from 15.08.2009, the question of such SIM having been issued on the basis of activation form filled on 06.09.2009 would clearly fall flat. We find substance in the contention of the appellants that the entire story to implicate the accused appellants on the strength of network of mobile phones is a desperate attempt by the Investigating Officer to somehow prove the case. These crucial aspect in the matter have been clearly omitted from consideration by the trial court.

31. Once the prosecution case to implicate the accused appellants on the strength of various calls made from different mobile numbers is disbelieved, there is hardly any other material to implicate the accused persons. There is absolutely no motive attributed to any of the surviving accused persons for committing the offence. There is no prosecution version of last seen in respect of any of the accused. In fact, there is nothing on record even to demonstrate that any of these accused persons were even remotely connected to the commissioning of the offence.

32. Learned State Counsel has placed heavy reliance upon the FSL report which shows existence of semen stains on vaginal slides prepared from the deceased Rani. However, the mere existence of semen stains on the vaginal slides ipso facto would not lead to implication of the accused appellants in the commissioning of the offence. There is neither any DNA report nor any other material to show that the semen stains was that of the accused appellants.

33. In order to establish a case based on circumstantial evidence, the prosecution will have to connect the chain of events in such a manner that it leads to a hypothesis of guilt attributed exclusively to the accused appellants. It will also have to be shown by the prosecution that there is no hypothesis consistent with the innocence of the accused available on record. The principles laid by the Supreme Court in the case of ***Sharad Birdichand Sarda vs. State of Maharashtra, (1984) 4 SCC 116*** is by now well accepted as laying the benchmark to be established by the prosecution in order to prove a case of circumstantial evidence. Paragraph 152 & 153 of the judgment of ***Sharad Birdichand Sarda vs. State of Maharashtra*** is reproduced hereinafter:

“152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be ' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved as

was held by this court in **Shivaji Sahebaro Bobade V State of Maharashtra 1973 CriLJ1783** where the following observations were made:

Certainly, it is primary principle that the accused must be and not merely may be guilty before a Court can convict, and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

153. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence".

19. In **Joseph vs. State of Kerala, (2000) 5 SCC 197**, Court has explained circumstances where under conviction can be based purely on circumstantial evidence. It observed:-

16. "it is often said that though witnesses may lie, circumstances will not, but at the same time it must cautiously be scrutinized to see that the incriminating circumstances are such as to lead only to a hypothesis of guilt and reasonably exclude every possibility of innocence of the accused. There can also be no hard and fast rule as to the appreciation of evidence in a case and being always an exercise pertaining to arriving at a finding of fact the same has to be in the manner necessitated or warranted by the peculiar facts and circumstances of each case. The whole effort and endeavor in the case should be to find out whether the crime was committed by the accused and the circumstances proved form themselves into a complete chain unerringly pointing to the guilt of the accused."

34. Once we analyse the facts of the present case on the principles laid down in the case of *Sharad Birdichand Sarda vs. State of Maharashtra (Supra)* we find that the chain of events to connect the accused appellants is clearly missing. We have already examined the evidence on record and have, for the reasons already specified, clearly found that the prosecution has failed to connect the accused appellants with the commissioning of the offence on the strength of call detail records. There is otherwise no enmity nor any motive for the accused appellants to commit the offence. There is no evidence of last seen or any other evidence to connect the accused appellant in the commissioning of the offence. Once the chain of circumstances is not

connected so as to support the hypothesis of guilt, exclusively attributed to the accused appellant, the question of appellants' conviction or sentence based on circumstantial evidence cannot be sustained. In that view of the matter, these bunch of appeals succeed and are allowed.

35. The judgment of conviction and sentence is reversed. The accused appellants shall be released on compliance of Section 437-A Cr.P.C. unless they are required in any other case.

36. The office is directed to transmit the lower court record along with a copy of the judgement to the trial court which shall ensure the compliance.

Order Date :- 21.11.2023

MN/ C.Mani.