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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 8th September, 2015
Date of Decision: 4th December, 2015

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CRIMINAL APPEAL No. 32/2015

MOHD. SHAHID Appellant
Through Mr. K. Singhal, Advocate.

versus

STATE NCT OF DELHI Respondent
Through Mr. Varun Goswami, APP along with
Inspector Sanjeev Arora, P.S. Ashok Vihar.

CRIMINAL APPEAL No. 373/2015

SUNIL Appellant
Through Mr. Ajay Verma, Advocate.

versus

STATE Respondent
Through Mr. Varun Goswami, APP along with
Inspector Sanjeev Arora, P.S. Ashok Vihar.

CRIMINAL APPEAL No. 587/2015

IMRANA Appellant
Through Mr. Siddharth Mittal, Advocate.

versus

STATE Respondent
Through Mr. Varun Goswami, APP along with
Inspector Sanjeev Arora, P.S. Ashok Vihar.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.K.GAUBA

SANJIV KHANNA, J.

1. This common judgment will dispose of the aforementioned appeals by Imrana, Mohd. Shahid and Sunil, who by the judgment under challenge dated 31st July, 2014 have been convicted under Section 302 read with Section 120B of the Indian Penal Code, 1860 (IPC, for short) for having murdered Nasir, husband of Imrana in the intervening night between 10th and 11th February, 2009. Imrana and Mohd. Shahid have also been convicted for the offence under Section 201 read with Section 34 IPC. Imrana has been individually convicted under Section 211 IPC. By the order on sentence dated 15th November, 2014, the three appellants have been sentenced to imprisonment for life and fine of Rs.5,000/- each and in default, to undergo simple imprisonment for six months for the offence under Sections 302/120B IPC. Imrana and Mohd. Shahid have been sentenced to rigorous imprisonment for five years and fine of Rs.2,000/- each and in default, to undergo simple imprisonment for three months for the offence under Section 201/34 IPC. Imrana has been sentenced to rigorous imprisonment for three years and fine of Rs.1,000/- and in default, to undergo simple imprisonment for two months for the offence under Section 211 IPC.
2. It is not disputed or under challenge that the deceased Nasir was a *kabadi* who used to reside at D-534, Wazirpur, JJ Colony with his wife, one of the appellants herein, namely, Imrana. This was the second marriage of both Imrana and Nasir, solemnised about 2 months prior to the occurrence. After their marriage, Imrana and Nasir had cohabited for 8-10 days in the village Vankhala, Dist.

Bijnaur, U.P., before Nasir returned to his place of work i.e. Delhi. Nasir had brought Imrana to Delhi on 8th February, 2009 i.e. about 2/3 days before the occurrence.

3. It is an undisputed fact that Imrana and Mohd. Shahid belong to and were inhabitants of village Rajopur, Police Station Kotwali Dehat, District Bijnaur, U.P., whereas deceased Nasir was originally a resident of village Vankhala, Police Station Kotwali, District Bijnaur, U.P. The factum that Nasir had suffered homicidal death in the intervening night between 10th and 11th February, 2009 is proved from the post-mortem report (Exhibit PW28/A), which was conducted by Dr. Deepak Mathur (PW28). On external examination, a contused mark completely encircling the neck, running transversely around the neck measuring 39x1 cm and creating a groove was noticed. On internal examination, brain was found to be congested with betechial haemorrhages in white matter and bruising of strap muscles of the neck surrounding the mark with diffused extravasation of blood along the upper one-third of the muscle. There was also fracture of the upper horn of the hyoid bone at both ends covered with haematoma. The stomach contained semi-digested unidentifiable yellowish food and the walls were congested. The cause of death was opined as asphyxia following ligature pressure upon the neck. In cross-examination, PW-28 clarified that the ligature mark was visible to the naked eye. Dr. Deepak Mathur (PW28), in his deposition and in the post-report Ex.PW28/A, has stated that they had preserved the viscera to rule out the possibility of poisoning. We shall be referring to the said viscera report subsequently.

4. Presence of the appellant Imrana with the deceased Nasir during the intervening night of 10th and 11th February, 2009 is an accepted and admitted position. This factum is also proved by ACP Om Prakash (PW31), Insp. Satya Prakash (PW30), SI Dev Raj (PW29) and HC Naresh (PW11). SI Dev Raj (PW29) has stated that at about 8.10 A.M., DD No. 8 PP Wazirpur JJ Colony was marked to him regarding a quarrel at House No. D-534, Wazirpur JJ colony and he along with Head Constable Naresh Kumar (PW11) had reached the spot where a crowd had assembled. On going inside the house, one dead body was found on a cot and a lady was sitting in front of the door of the store room which was adjacent to the room where the dead body was lying. PW29 had spoken to the said lady, namely, Imrana and she had narrated that between 12 midnight and 1 A.M., some persons had knocked at the door of the house. She had given details as to how the mid-night offenders had gained or rather were allowed entry in their residence and had murdered her husband. Head Constable Naresh (PW11) has stated that on visiting the spot, he had noticed the dead body of a person known as Nasir *kabaadi* was lying on a *charpai* with strangulation mark of a rope around his neck. PW11 had seen wife of the deceased and that no other relative of the deceased was present on the spot. SI Dev Raj (PW-29), Inspector Satya Prakash (PW-30) and ACP Om Prakash (PW-31) have similarly deposed about the presence of Imrana at the spot, where they had seen the dead body of her husband Nasir on the cot/*charpai*. For reasons recorded below, we would accept that Irshad Ahmed (PW-1) and Jabbir (PW-3) were present and had reached the residence of Nasir and Imrana.

5. SI Dev Raj (PW29), Inspector Satya Prakash (PW30) and ACP Om Prakash (PW31) have deposed about the version given by the appellant Imrana as to how the occurrence had taken place. The said statement became the first information and was endorsed at about 11.35 A.M. by ACP Om Prakash (PW31) with the direction that an FIR should be registered. For the sake of completeness, we would like to reproduce the statement made by Imrana marked Ex.PW29/A and the endorsement made thereon by ACP Om Prakash (PW-31) in entirety:-

“Imrana alias Guddo w/o Late Shri Nasir, age 20 years, R/o D-534, Wazirpur JJ Colony, Delhi made her statement as under:

“I am staying alongwith my husband at the aforesaid address on rent. My maternal village is Rajopur, Police Station Kotwali Bijnaur, U.P. Approximately three years ago, I had got married with Irshad S/o Yamin, R/o Village Wahla Sherpur, Police Station Nahtolka, U.P. Approximately 1 ½ years ago, I had got divorce from Irshad. Approximately 2 ½ months ago, for the second time I got married with Nasir S/o Maqbool, R/o Village Bankhla, Police Station Kotwali, Distt. Bijnaur as per Muslim rites and customs with the consent of both the families. I stayed at my matrimonial house after marriage. My husband had stayed with me for almost 8/10 days and then had left for Delhi telling me that his shop had remained closed at Delhi. On Sunday i.e. 08.02.2009, my husband Nasir had brought me to his aforesaid rented accommodation. Both of us husband and wife had been living happily. In the night of 10/11.02.2009, both of us husband and wife were sleeping at our house having closed the door. At night at about 10.00 O’Clock, the power of the colony had got disconnected and did not get connected till the next morning. In the night, at about 12.00/01.00 O’ Clock, someone knocked at the door of our house and enquired whether the scrap dealer was there or not. My husband got up and woke me up. The people standing outside were saying that they had brought some articles and

were asking to open the door and receive the articles. I told my husband Nasir that it was late at night and had asked him not to open the door. But my husband told me that he deals in scrap and sometimes, people come at late night hours to sell articles. Persons standing outside had stated that they had copper, iron and empty bottles of wine with them. Hearing this, my husband Nasir opened the door and four boys from outside entered our room. At that time, I had stood near the gate in the room. My husband asked the said persons about articles and asked them to deliver the same. Then two of them pressed my husband's mouth and one of them caught his leg and the third one caught him at the waist and all the three carried my husband to the interior room. The fourth one among them put the shawl at my face which I had put on myself. I tried to raise an alarm but he prevented and did not allow me to shout. I could hear my husband Nasir say 'Save me, save me. They are killing me' was coming from the interior room. I asked them why they were killing my husband, but they did not give any answer. After some time, voice of my husband stopped coming from the room. Four persons went away from the room. When I went to the room and checked, I saw my husband lying on the cot. Towel was wrapped around his mouth and neck. I called my husband and shook his hand. But my husband did not answer or say anything. I came outside and raised an alarm in the street and knocked at the gate of a house nearby. No one opened their door nor did anyone come outside to help me. It was raining at the time and I sat outside my interior room. In the morning, someone knocked at the door of our house and when I opened the door, the person told me that he had bottles and asked for the scrap dealer to receive them. I had been weeping and I told him about the death of my husband. He asked me whether I had informed the Police Post. I told him that I knew nothing about this place. He told me that he would inform the Police instantly and he went away. After some time, police came to my house and people assembled. Four unknown persons have murdered my husband by strangulating his throat. Legal action may be initiated against them. I have heard my statement and the same is correct."

Sd/- Imrana
(In Hindi)

Attested by:
Sd/- Om Prakash

(In English)

Insp. Om Prakash
SHO/ Ashok Vihar

To
The Duty Officer,
Police Station Ashok Vihar,

It is officially submitted that on the receipt of information on wireless set from S.I. Satya Prakash, I/C PP, JJ Colony, W. Pur, I, the Inspector/SHO alongwith staff reached at the place of occurrence according to the information i.e. House No. D-534, Wazir Pur, JJ Colony by the official vehicle. I found SI Satya Prakash, ASI Dev Raj, Const. Naresh Kumar No. 1347/NW along with the staff present there. I found the dead body of a person on the folding cot in the interior room of the place of occurrence. On the inspection of the dead body, the mark of throat strangulation was found on the neck of the dead body and a towel was found on the lower part of the neck. On inquiry, it was learnt that the deceased was Nasir S/o Maqbool Ahmed, R/o D-534, Wazirpur JJ colony, Delhi. Deceased Nasir's wife Imrana was also found present at the place of occurrence. The District Crime Team along with the photographer came to the spot and inspected the place of occurrence and the photographer took photographs of the spot and dead body from different angles. The deceased's wife Smt. Imrana met us and got her foregoing statement recorded. The dead body was sent to the mortuary of BJRM Hospital, Jahangir Puri under the supervision of Const. Naresh Kumar, No. 1347/NW to get post-mortem conducted. From the perusal of the aforesaid statement and the inspection of the place of occurrence and that of the dead body, prima facie an offence punishable under Sections 302/34 of the Indian Penal Code seems to have been committed. Therefore, this writing is being sent through Constable Pradeep Kumar, No. 1271/NW to the Police Station for the registration of the case. After the registration of this case, the number of the same may be

intimated and the special report may be sent to the M.M. and the Senior Officers through special messenger. I, the Inspector alongwith the staff am busy with the investigation at the spot.

Date and Time of occurrence: At about 12.00 midnight to 1.00 AM Dt. 11.02.2009.

Place of occurrence: House No. D-534, Wazirpur, JJ Colony, Delhi.

Date and Time of dispatch of Writing : 11.02.09 at 11.35 A.M.

Sd/- Om Prakash

(In English)
(Inspr. Om Prakash)
SHO/Ashok Vihar
No. D-I/994
PIS No. 28740012
P.S. Ashok Vihar
11.02.2009

DD No. 10A at 11.50 A.M. Dt 11.02.2009
Case FIR No. 75/09 U/s 302/34 IPC
P.S. Ashok Vihar, Delhi
HC/DO
Sukhbir Singh
No.186/NW
PIS No.28821480
Dt. 11.02.09”

6. It would be appropriate at this stage to refer to the deposition of ACP Om Prakash (PW31). In his cross-examination on behalf of the appellant Mohd. Shahid, this witness (PW-31) has accepted that after reaching the spot, he had made inquiries from Imrana and 12-13 neighbours. He had instructed that the FIR should be registered on Imrana's statement. PW31 has also accepted as correct that on making inquiries, he felt assured that Imrana's version was truthful. It is therefore clear that at that time or initially, Imrana was not a suspect. Imrana in her statement under Section 313 of the Code of

Criminal Procedure, 1973 (Cr.P.C. for short) in response to question Nos. 70 to 72, has stated as under:-

“Q70. It is further in evidence against you that PW29 stated that you informed that last night (10/11-02-2009), you along with your husband Nasir were sleeping in the inner room and at about 12-1 midnight, someone knocked the door who wished to sell copper, iron and empty liquor bottles. What you have to say?

Ans: It is correct.

Q71. It is further in evidence against you that PW29 further stated that you informed that your husband opened the door and four persons entered the house and three of them caught hold of your husband and fourth one put your shawl on the mouth of your husband and killed him by strangulation. What you have to say?

Ans: It is correct.

Q72. It is further in evidence against you that PW29 recorded your statement vide Ex.PW29/A signed by you at point A and then he wrote the rukka vide Ex. PW29/B. What you have to say?

Ans: It is correct.”

7. A reading of Exhibit PW29/A would reveal that it is purely self-exculpatory in nature and does not record any confession as to the commission of the offence. To what extent this statement would be hit by Sections 25 and 26 of the Evidence Act, 1872 has been examined below. The said statement is not hit by Article 20 of the Constitution of India and Section 132 of the Evidence Act, 1872. In fact, the appellant Imrana relies upon the said statement and it is her contention that the same is the true and correct version as to the

occurrence. Imrana in her statement under Section 313 Cr.P.C., in response to question No. 90, had stated as under:-

“Q90. Do you have anything else to say?

Ans: I have given only one statement to the police on which the FIR was registered and thereafter no statement of mine was recorded by the police. On 11.02.2009 in the morning, I was taken to the PS and was also confined in PS. On the next day, my father got information regarding the death of my husband and reached at PS along with co-accused Shahid at about 01.00 pm. Co-accused Shahid is my neighbour like a brother from the village. I did not give any statement to the Doctor in the Hospital. Therefore, my MLC does not bear my signature. After making the false story, I have been falsely implicated in this case.”

8. The aforesaid statement under Section 313 Cr.P.C. records that Imrana accepts that she had given her statement or version on which the FIR was registered and thereafter, no other statement was recorded. She, however, claims that on 11th February, 2009, in the morning, she was taken to the police station and confined. Next day, her father got the information regarding the death of her husband and had reached the police station along with Shahid (i.e. the appellant Mohd. Shahid) at about 1 P.M. Section 132 of the Evidence Act would not be attracted in this case, as Imrana had never deposed as a witness in the witness box. There would thus be no question of compulsion. The majority judgment authored by Sinha C.J. in **State of Bombay v. Kathi Kalu Oghad and Others** AIR 1961 SC 1808, interprets clause 3 of Article 20 of the Constitution and holds that the Article would apply when the person making the statement was an accused who must have been compelled; the compulsion must be to

be a witness and against himself. The expression “to be a witness”, it was elucidated, would mean making oral or written statement but would not include giving thumb impression, impression of palm, foot or fingers or specimen handwriting or even exposing a part of body for the purpose of identification. The bar was to protect an accused from the hazards of self-incrimination and was not intended to put obstacles in the way of efficient and effective investigation into the crime and to bring criminals to justice. A person giving impression of his signatures or specimen of his handwriting was not giving testimony and far less, a self-incriminating testimony. The said marks/impressions were only a material for comparison in order to lend assurance to the court. It was neither oral nor documentary evidence, but belongs to a separate category. Thus, an accused cannot be said to be a witness simply because he has made a statement in the police custody without doing anything more. To bring a statement under the provision of Article 20 (3), the person must have stood in the character of accused person at the time of the statement and it would not be enough that he was arrayed as an accused any time after the statement was made. Ex.PW29/A would not attract, disabling provisions of Section 132 of the Evidence Act and Article 20 clause (3) of the Constitution.

9. We would now examine other provisions of the Evidence Act and the impact and effect of the Cr.P.C. The Supreme Court in **Aghnoo Nagesia versus State of Bihar**, AIR 1966 SC 119 expounded Sections 24 to 30 of the Evidence Act and Sections 162 and 164 of the Code of Criminal Procedure, 1898 to observe that the expression “accused of an offence” would cover a person accused of an offence at a trial,

whether or not he was accused of an offence when he had made the confession. Section 24 of the Evidence Act excludes use of confessions caused by inducements, threats or promises as contemplated therein. Sections 25 and 26 of the Evidence Act prohibit proof against any person of a confession made by him when he was in police custody made to a police officer or to a third person, except in the latter case when it was made in the immediate presence of a Magistrate. The said provisions exclude not only the whole of the confession relating to an admission of an offence, but also admission of any other incriminating fact, such as motive, preparation and subsequent conduct. Section 27 was in the form of a proviso and partially lifts the ban imposed by Sections 25 and 26 of the Evidence Act. Section 162 Cr.P.C. prohibits use of any statement made by a person to a police officer in the course of investigation for any purpose at any inquiry or trial in respect of an offence under investigation, save as mentioned in the proviso and cases falling under sub-section 2, which protects the application of Section 27 of the Evidence Act. Words of Section 162 Cr.P.C. are therefore wide enough to include a confession made to a police officer during the course of an investigation. These provisions proceed on the view that the confessions made by an accused to a police officer or to a third person while the accused was in custody of a police officer should not be read or used as evidence against him. These principles based upon public policy must be given the fullest effect to.

10. Section 154 of Cr.P.C. provides for recording of the first information which is not substantive evidence and can be used to corroborate the

informant under Section 157 of the Evidence Act or to contradict him under Section 145 of the Evidence Act, if the informant is called as a witness. If the first information is given by the accused himself, the effect of his giving the information is admissible against him as evidence of his conduct under Section 8 of the Evidence Act. Judgment in the case of Aghnoo Nagesia (supra) discusses in detail what is meant by the term “confession”, a term not defined in the Evidence Act, to observe that vide definition given in Article 22 of *Stephens’ Digest of Law of Evidence* as “admission made at any time by a person charged with the crime, stating or suggesting the inference that he had committed that crime”, stands discarded in Pakla Narayanswamy versus the King Emperor, LR (1939) I.A. 66 wherein it has been observed that a statement that contains exculpatory matter does not amount to confession, if the self-exculpatory statement was of some fact, which if true would negate the offence alleged to be confessed. Confession must admit in terms the offence or at any rate substantially all the facts, which constitute the offence. An admission of a gravely incriminating fact or even conclusively incriminating fact was not by itself a confession. (Confession therefore, we observe is a species of admission.) It was further observed that if an admission was used against the accused, the whole of it should be tendered in evidence and if a part of the admission was exculpatory and a part inculpatory, the prosecution was not at liberty to use in evidence the inculpatory part. But this principle was of no assistance to an accused where no part was exculpatory, and the prosecution tends to use the whole of the statement against the accused. Before ascribing and ruling the

aforesaid precept, the Supreme Court observed that Sections 17 to 31 of the Evidence Act grouped under the heading “Admissions” were applicable to criminal trials, subject of course to the bar and prohibitions dealing with such trials.

11. In *Aghnoo Nagesia (supra)*, the Supreme Court observed that when information report was given by an accused to a police officer and it amounts to a confessional statement, proof of confession was prohibited by Section 25 and such prohibition would not only relate to admission of the offence but of all other admissions of incriminating facts related to the offence contained in the confessional statement. This bar/prohibition against admission was subject to Section 27 of the Evidence Act and save and except the formal part identifying the accused as a maker of the report. Cases where an accused was the first informant and confessed commission of the offence were different from cases where the accused, though the first informant, claimed innocence and had made a self-exculpatory statement. Bar of Section 25 of the Evidence Act would not exclude or stand in the way of admitting a statement to a police officer by a person subsequently arrested if the same did not amount to confession.
12. In *Khatri and Hemraj v. State of Gujarat* AIR 1972 SC 922, the Supreme Court has elucidated that where an accused gives first information to the police, this fact of his giving the information was relevant under Section 8 of the Evidence Act. If the statement made was not a confessional statement, it would be admissible under Section 21 of the Evidence Act. However, if the statement was

confessional, it cannot be used against the accused in terms of Section 25, except to the extent permitted under Section 27 of the Evidence Act. In case of confessional statement resulting in registration of the FIR, the same could be also used for identifying the accused as the maker of the statement.

13. Section 25 of the Evidence Act has to be read with Section 161 of the Cr.P.C. as the latter provision protects an accused if a confession is made during the course of investigation. Relying upon Aghnoo Nagesia (supra), it has been held that a statement by an accused that he was present near the scene of crime could not be sufficient to discharge the burden on the prosecution and shift the burden on the accused. [See State of Gujarat v. Raghunath Vamanrao Baxi AIR 1985 SC 1092 and State of Maharashtra V/s P.K.Pathak, AIR 1980 SC1224)].
14. A detailed discussion on the question of self-exculpatory statement endorsed and recorded as the first information report, is to be found in Kanda Padayachi versus State of Tamil Nadu, (1971) 2 SCC 641, wherein reference was made to Pakla Narayanswamy (supra) to observe as under:-

“11. As held by the Privy Council, a confession has to be a direct acknowledgement of the guilt of the offence in question and such as would be sufficient by itself for conviction. If it falls short of such a plenary acknowledgement of guilt it would not be a confession even though the statement is of some incriminating fact which taken along with other evidence tends to prove his guilt. Such a statement is admission but not confession. Such a definition was brought out by Chandawarkar, J., in *R. v. Santya Bandhu* by distinguishing a

statement giving rise to an inference of guilt and a statement directly admitting the crime in question.

12. In *Palvinder Kaur v. Punjab* the statement made by the accused was that who had placed her husband's dead body in a trunk and had carried it in a jeep and thrown it into a well. But with regard to the cause of death, the statement was that her husband had accidentally taken a poisonous substance erroneously thinking that to be a medicine. This Court referred to *Pakala Narayanaswami case* and the dictum of Lord Atkin and held that a statement which contained self-exculpatory matter could not amount to a confession if the exculpatory matter is of some fact which if true would negative the offence alleged to be confessed. But the Court added that a statement to be a confession must either admit in terms of the offence or at any rate substantially all the facts which constitute the offence, and that an admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession. In *Om Prakash v. U.P.*, the appellant was convicted under Section 161 read with Section 109 of the Penal Code. Two statements made by him, Exs. P-3 and P-4, to the Assistant Agricultural Engineer, Aligarh were relied upon as confessions of bribery having been given by him to public servants and upon which the High Court had based his conviction. This Court set aside the conviction holding that neither of the two documents amounted to a plenary acknowledgement of the offence, that the statements were capable of being construed as complaints by him of having been cheated by the public servants named therein and that at best they might arouse suspicion that he had bribed them. In this conclusion, the Court approvingly cited *Pakala Narayanaswami case* and relied on the meaning of the word "confession" given therein by Lord Atkin. In *Faddi v. Madhya Pradesh*, the appellant filed a first information report on the basis of which the dead body of his step son was recovered and three persons were arrested. As a result of the investigation, however, the appellant was arrested and was sent up for trial which resulted in his conviction and a sentence of death. In an appeal before this Court, he contended that the first information report ought not to have been admitted by reason of Section 25 of the Evidence Act and Section 162 of the Criminal Procedure Code. The contention was rejected on the

ground that neither of the two provisions barred the admissibility of the first information report as that report was only an admission by the appellant of certain facts which had a bearing on the question as to how and by whom the murder was committed and whether the statement of the appellant in the Court denying the evidence of certain prosecution witnesses was correct or not. Such admissions were admissible under Section 21 of the Evidence Act and as such could be proved against the accused.

13. It is true that in *Queen-Empress v. Nana*, the Bombay High Court, following Stephen's definition of confession, held that a statement suggesting the inference that the prisoner had committed the crime would amount to confession. Such a definition would no longer be accepted in the light of *Pakala Narayana Swami case* and the approval of that decision by this Court in *Palvinder Kaur case*. In *U.P. v. Deaman Upadhyaya*, Shah, J., (as he then was) referred to a confession as a statement made by a person "stating or suggesting the inference that he had committed a crime". From that isolated observation, it is difficult to say whether he widened the definition than the one given by the Privy Council. But he did not include in the expression "confession" an admission of a fact, however incriminating, which by itself would not be enough to prove the guilt of the crime in question, although it might, together with the other evidence on record, lead to the conclusion of the guilt of the accused person. In a later case of *A. Nagesia v. Bihar*, Bachawat, J., after referring to Lord Atkin's observations in *Pakala Narayana Swami case* and their approval in *Palvinder Kaur case* defined a confession as "an admission of the offence by a person charged with the offence". It is thus clear that an admission of a fact, however incriminating, but not by itself establishing the guilt of the maker of such admission, would not amount to confession within the meaning of Sections 24 to 26 of the Evidence Act.

14. On the authority of those pronouncements by this Court, it is clear that the statement in question did not amount to a confession. It was an admission of a fact, no doubt, of an incriminating fact, and which established the presence of the appellant in the deceased's room but which clearly was not

barred under Section 26. The Sessions Judge and the High Court were, therefore, right in holding it to be admissible and in relying upon it. In this view, counsel's second contention also fails and has to be rejected."

15. Having examined the legal position, we would hold and observe that the statement made by Imrana marked Ex.PW-29/A which she affirms and reiterates in her statement under Section 313 Cr.P.C., would not be read as a confession which, in fact, it is not. However, the statement cannot also be read as a *primary* or core proof of the facts stated therein. The statement Ex.PW29/A, not being confession, would be admissible under Section 8 and also under Section 21 of the Evidence Act, but the prosecution must establish and prove their case and not just refer to the statement Ex.PW29/A. It would be only read as an explanation given by the appellant Imrana and evidence and material must be produced by the prosecution to show and establish that she was the perpetrator or one of the perpetrators involved in the offence.
16. We have referred to the evidence of the police officers who had visited the scene of crime i.e. residence of the deceased and the appellant Imrana [D-534, Wazirpur J.J. Colony, Delhi] in early morning hours of 11th November, 2009 and at that time, Imrana was found to be present in the house. This factual aspect stands affirmed by Ishad Ahmed, PW-1, who was also present at the residence of the deceased and the appellant – Imrana, a day earlier, till about 8:00 / 8:30 p.m. on 10.2.2009. Jabbir Ahmad (PW-3) has testified that he had seen Imrana at Jhuggi No.D-534, Wazirpur, J.J. Colony, Delhi, in the early morning of 11th November, 2009. Imrana's presence at

the said residence, being the wife of the deceased Nasir, was natural and normal, and stands established beyond any pale of debate. The place and time when the crime was committed is also beyond debate. The offence was committed in the intervening night between 10th and 11th February, 2009, when the appellant Imrana and deceased Nasir were together in the property D-534, Wazirpur, JJ Colony, Delhi. These facts deciphered and established are verifiably true. In the said factual background, we would examine Section 106 of the Evidence Act and the illustrations appended thereto, which reads thus:-

“106. Burden of proving fact especially within knowledge.—When any fact is especially 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 travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

xxxx”

17. The import of the aforesaid section was examined by one of us (Sanjiv Khanna, J.) in **Mohd. Fazal Vs. State** [Crl.A.No.243/2009 and other connected matters] decided on 19th May, 2014, wherein the following passage from **Shambu Nath Mehra Vs. State of Ajmer**, AIR 1956 SC 404 was quoted:

“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....

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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 case 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."

18. The following passage from *Trimukh Maroti Kirkan Vs. State of Maharashtra* (2006) 10 SCC 681 was referred to:

“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 Cri LJ 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 travelling 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.”

19. Reference was also made to *Pritpal Singh Vs. State of Punjab* (2012) 1 SCC 10; wherein it has been held:-

“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 Shri Jaswant Singh Khalra. In such a situation, only the accused person could explain as to what happened to Shri Khalra, 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.”

20. After referring to these pronouncements of the Supreme Court and the ratio thereof, in **Mohd. Fazal (Supra)** it was held as under :

“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.”

21. Recently in the *State of Rajasthan versus Thakur Singh*, (2014) 12 SCC 211 it stands observed that Section 111 of the Evidence Act lays down a rule that in a criminal case, the burden of proof is on the prosecution and Section 106 is intended to relieve the prosecution of that duty. Section 106 is to take care of a situation when the facts are “especially” within the knowledge of the accused and it is well nigh impossible or extremely difficult for the prosecution to prove the said facts given in the factual matrix. Thus, where a crime takes

place in a room or a dwelling house, the occupant whose presence is established at the time of occurrence when charged with the offence should offer some explanation and when no explanation is offered or the explanation offered is found to be false, the court can rely upon the said factual position as a stance against the accused.

22. In view of the aforesaid legal position and factual background, we would now examine the stand and stance of appellant, Imrana, with reference to Ex.PW-29/A and the version in her statement under Section 313 Cr.P.C. and other evidence on record. We have quoted verbatim Ex.PW-29/A and relevant portion of the statement of Imrana under Section 313 Cr.P.C. As per the said version unknown persons were allowed entry by the deceased Nasir after the former had knocked at the door, claiming that they had iron, copper and empty bottles to sell. Three had caught hold of her husband causing injuries and one of them had caught hold and had prevented Imrana from shouting. Another statement given by the appellant Imrana is that the police officers including Om Prakash (PW-31) after having made enquiries from both the Imrana and the neighbours, did not suspect Imrana's involvement. S.I. Dev Raj (PW-29), who was one of the first police officers to arrive at the spot, has affirmed that the I.O. had made enquiries from the neighbours. The *jhuggi* where the deceased and Imrana used to reside was thickly populated and there were Jhuggis on adjoining sides with the common walls. The examination of the police case file would reveal that the neighbours had claimed that some lady had knocked at the door but out of fear they did not open the doors and speak to her. ACP Om Prakash (PW-31) has accepted that he had enquired from the neighbours as

well as Imrana on his arrival at the scene of crime and after making enquiries from 12 – 13 persons he believed that the statement of Imrana was true. There is evidence to show that the broken bangle pieces were found at the scene of the crime. As against the aforesaid evidence there is tell tale and imperative evidence to show that Imrana was a co-participant and the version given by her as to the occurrence and cause of injuries is condescendingly false and radiates contrivance. The version is make belief and disguised to hide the truth. We would in the succeeding paragraphs refer to the said evidence and material.

23. We begin with reference to the evidence found at the scene of the crime and the FSL report marked Ex.PW31/G dated 9.4.2010. The photographs Ex.PW2/1 to 14 proved by PW2, indicate that the deceased was sleeping on a folding bed under a quilt. There were no marks or signs of resistance, struggle or fight with the alleged intruders who had committed the offence. The post mortem report does not mention and record any bodily injury other than the strangulation mark. The belongings in the room were not disturbed or looted and this was not the motive or objective behind the crime. Nothing was apparently stolen or removed. The room was not ransacked or searched for valuables. There is no indication of forced or unfriendly intrusion / entry into the premises. The photographs profess and pontificate that the offence was committed when the deceased Nasir was in deep sleep. The deceased was wearing a T-shirt and an under-wear at that time. Thus, he was sleeping with his lower undergarment and was not wearing anything over the under wear. No one, specially a person who was newly married would

open the door to invite unknown persons at the midnight hour without putting on his lower garments, and that too in presence of the newly wedded wife.

24. The scaled site plan marked Ex.PW16/A mentions two doors. One underneath the tin shade next to the main service road and the inside door next for entering the sleeping room, which could be accessed after crossing the passage and entry room the first floor. Common sense would predicate that no one would have invited unknown persons at midnight inside the room where Imrana was present, even if late Nasir for making quick money had got tempted and wanted to examine the goods statedly brought by unknown persons. It is in this context that viscera report of Nasir marked Ex.PW31/G by the Senior Scientific Officer (Chemistry) is pertinent and confirmatory. On examination, sample of blood, marked Ex.1C, was found to be containing Alprazolam. The said report also states that presence of metallic poison and alcohol could not be detected in the stomach, small pieces of intestines, pieces of liver, spleen and kidney. Alprazine is a drug which induces central nervous system depressant activity. It is a white crystalline powder which on oral administration is readily absorbed. It can have multi effect from task performance to hypnosis.
25. The FSL report marked Ex.PW31/G, which affirms presence of the said drug, would indicate the reason why Nasir did not offer any resistance or fight back. It would be reasonable to infer that Nasir under the influence of the said drug could not react or even knew what was happening. Photographs, pontificate that Nasir was in

slumber when he was strangled and affirm that the drug Alprazine had its effect.

26. Learned counsel for the appellants have submitted that there is no evidence to show and suggest that appellant Imrana had administered Alprazine, for testimony of Irshad Ahmad (PW1) that the deceased Nasir after taking tea had told PW1 that he was feeling sleepy or the tea was tasting bitter would not indicate that Imrana had administered the said drug. It was highlighted that Irshad Ahmad (PW1) in his examination-in-chief recorded on 2nd August, 2010 had professed that appellant Imrana had brought three cups of tea, which the deceased, appellant and PW1 had consumed. Nasir had complained that the tea was tasted bitter and had asked Imrana to taste it which was declined by Imrana. Irshad Ahmad (PW1) has asserted that soon after taking tea, Nasir started feeling sleepy. The version by Irshad Ahmad (PW1) it is submitted by the appellant should be disbelieved, for Irshad Ahmad (PW1) in his cross-examination on 14th November, 2011 had accepted that on 10th February, 2009, she had taken tea at about 4-5 p.m. and he had dinner at around 7-8 p.m. The time gap between the tea and the offence which was around midnight was highlighted. It is noticeable that PW1 in his testimony recorded on 2nd August, 2010 did claim that Nasir, soon after the tea had felt sleepy. After closing the shop, PW1 and Nasir went inside the room and had food, though PW1 sometimes also proclaimed that he alone had food. The aforesaid discrepancies are inconsequential, for it does not matter when and how Alprazine was administered, nor whether PW-1 and Nasir had food together or separately is of relevance. What is relevant and

material is that the deceased Nasir was drugged and was strangled while in sleep. The factum that the prosecution has not been able to show when and how the drug Alprazine was administered does not count, for it was impossible for the prosecution to adduce the said evidence. It was suggested that deceased Nasir could have himself taken the said drug. No such suggestion was given to the witnesses. That apart, presence of Alprazine in the blood would deflate and negate Imrana's version that Nasir was up and about, and had opened the doors permitting entry to the perpetrators. The FSL report marked Ex.PW31/G dated 9th April, 2010, therefore, punches holes and dents the plea and assertion of the appellant Imrana and affirms the prosecution case against her.

27. Irshad Ahmad PW1 had professed that on 10th February, 2009, while returning home he had seen the appellants Mohd. Shahid and Sunil. Portions of the aforesaid statement of PW1 including the assertion that Nasir had protested that the tea was bitter, and of interaction with Mohd. Shahid and Sunil, we feel, are an over-statement and not true and correct rendition of facts. We would not on the assertion of the taste of tea reach a conclusion or finding that the tea was infused with the sedative with the intent to drowse. Albeit, this assertion is inconsequential and does not invalidate or erase our finding that the deceased Nasir was drugged as is affirmed by the FSL report. Similarly, the exaggeration, that PW1 had seen Mohd. Shahid and Sunil, would not be a ground to reject and discard Irshad Ahmad's (PW1) deposition that he was with the deceased and Imrana till about 9 PM on 10th February, 2009 and on 11th February, 2009 at about 8 a.m., he reached the house of Nasir after being informed

about theft and that Nasir was beaten. On reaching Nasir's residence, Irshad Ahmad (PW1) had met Imrana, who was crying and had hugged him. Imrana had informed that unknown persons, four in number, had entered their *jhuggi* and killed Nasir after looting money. Irshad Ahmad (PW1) testified that the appellant Imrana had alleged that she was raped, which again is an over amplification and not a true statement. This was not stated by Imrana in Ex.PW29/A. Noticeably, this fact or that money was looted were not mentioned in the statement of PW1 Mark PW/DA recorded under Section 161 Cr.P.C. PW1 has however correctly avowed having seen Nasir lying dead on the cot and his face was covered with a towel. On removing the towel, PW1 noticed ligature mark on his neck. Police and media had reached the spot and that Imrana's statement was recorded by the police. Mobile phone of Irshad Ahmed (PW1), the witness himself affirms was taken by the police in custody and returned later. PW1 in response to a question put by Additional Public Prosecutor was positive that Nasir was using mobile phone number 9811423903, which was purchased on identity papers of Mohd. Farooq (PW8). On a leading question, PW1 had elaborated that PW1 had inquired from Imrana about this mobile telephone of deceased Nasir, but Imrana had profaned and pleaded ignorance. PW1 further testified that in the evening on 11th February, 2009, he had seen appellant Mohd. Shahid sitting near the bus stand of route number 115, near Nimri Colony and informed the police. Thereafter, he returned to the spot with the police and the appellant Mohd. Shahid was arrested vide arrest memo marked Ex.PW1/L. On personal search vide memo Ex.PW1/M, two mobile phones

including the mobile phone belonging to Nasir of Nokia make was recovered from him. The second mobile phone, which was also of Nokia make, had picture of a fish. The two mobile phones were seized and sealed vide memos Ex.PW1/A and Ex.PW1/B, which were signed by PW1 at point A. The mobile phone of Nasir recovered from accused Mohd. Shahid had a SIM card of IDEA, which did not belong to the deceased, Nisar. One more SIM card of IDEA was recovered from the appellant Mohd. Shahid. The Nokia mobile phone of red and cream colour of the deceased Nasir was identified by Irshad Ahmad (PW1) and marked as Ex.P5. The second mobile phone with a key ring of fish shape of yellow colour having the word “Shahid” on the one side and “Lovely” on the other side was identified by PW1 and marked Ex.P-6.

28. A significant assertion made by Irshad Ahmad (PW1) in his cross-examination was that Imrana was taken to the police station on 11th February, 2009 and was not released and permitted to go back home. The aforesaid factum is important and would show that appellant Mohd. Shahid had gained custody of the mobile phone of the deceased Nasir sometime in the intervening night between 10th and 11th February, 2009 i.e. the night when Nasir was stifled to death. When Imrana was in the police custody or at the police station, she could not have transferred and given possession of this phone.
29. Jabbir (PW3) is the elder brother of deceased Nasir, who used to also work as *Kabari* in Delhi. He affirms that Nasir had recently got married to appellant Imrana, and latter had come to Delhi from the village on 8th February, 2009, i.e. about 2-3 days before the occurrence. He confirms presence of appellant Mohd. Shahid in

Delhi and his arrest from the bus stand on 12th February, 2009 in the presence of Irshad Ahmad (PW1). He also affirms that in the morning hours of 11th February, 2009, he had seen the dead body of his brother Nasir, which was lying on the cot, and had ligature mark of a rope around his neck. Imrana at that time had professed and stated that four persons were responsible. Two of them had caught hold of Nasir, while two others had restrained her and pressed her mouth. It is noticeable that Jabbir (PW3) has not signed the personal search memo of the appellant Mohd. Shahid marked Ex.PW1/M, arrest memo marked Ex.PW1/L and the seizure memos of the two mobile phones marked Ex.PW1/A and B. This explains the reason why Jabbir (PW3) had not deposed and testified on recoveries etc.

30. SI Dev Raj (PW29) affirms his visit to the *jhuggi* in the morning hours on 11th February, 2009, the version of Imrana, questions asked from Imrana about the mobile phone number 9811423903 of Nasir and her ignorance as to where the mobile phone was. PW-29 affirms that Irshad Ahmad (PW-1) had met and informed them that Mohd. Shahid was sitting at the bus stop of route number 115. Mohd. Shahid was arrested from the said spot. Mobile phone of red and cream colour without SIM card was recovered from Mohd. Shahid and seized vide seizure memo marked Ex.PW1/A, which was signed by SI Dev Raj (PW-29) at point B. Another mobile phone of Nokia make with SIM card was seized from the appellant Mohd. Shahid and taken into possession vide seizure Ex.PW1/B. PW29 also proved recovery of the second SIM card.
31. Inspector Satya Prakash (PW30) has similarly testified as to his visit to the *jhuggi* on 11th February, 2009 and that on 12th February, 2009,

Mohd. Shahid was arrested at the instance of Irshad Ahmad (PW1) and the mobile phone of the deceased Nasir without SIM card and the second mobile phone with SIM card of Idea were seized vide seizure memos Ex.PW1/A and Ex.PW1/B, respectively. A second SIM card of Idea, was also recovered.

32. ACP Om Prakash (PW31), who was then posted as the SHO, has graphically narrated the facts noticed when he had paid a visit to the *jhuggi* at about 8.40 a.m. on 11th February, 2009; the statement made by appellant Imrana at that time; registration of FIR etc. ACP Om Prakash (PW31) has stated that he had inquired from Imrana as to the mobile phone of the deceased Nasir and she had disclosed the number as 9811423903, and had claimed that she (Imrana) did not know what had happened to the mobile phone. He has also testified on the arrest of the appellant Mohd. Shahid on 12th February, 2009 from the bus stand at the instance of Irshad Ahmad (PW1), recovery of the two mobile phones including one belonging to the deceased Nasir without SIM card and their seizure vide memos Ex.PW1/A and Ex.PW1/B. Another SIM card was recovered. Appellant Mohd. Shahid was arrested vide memo Ex.PW1/C.

33. As noticed above, Irshad Ahmad (PW1) has stated that deceased Nasir was using mobile number 9811423903, which was procured on the identity paper of Mohd. Farooq. The said Mohd. Farooq had appeared as PW8. This witness has accepted that deceased Nasir had a *Kabari* shop and had obtained a mobile connection on his identity papers proclaiming that he had handed over a photocopy of his election identity card to the deceased for the said purpose. However,

PW8 denied having the receipt of the SIM card or that mobile connection number 9811423903 was issued on his identity papers. We reject this portion and denial of Mohd. Farooq (PW8), in view of the positive testimony of Irshad Ahmad (PW1) and also of Deepak (PW20), Nodal Officer, Vodafone Mobile Services Ltd., who had proved the customer application form for mobile connection number 9811423903 issued on 9th April, 2008 on identity paper to Mohd. Farooq (PW8) i.e. the self-attested photocopy of PW8's driving license. The customer application form was marked Ex.PW20/B. It is correct that on the said application form Ex.PW20/B number 9999872003 was written but the same was struck off and thereafter number 9811423903 has been written. To us, it is obvious, that this correction was made when the SIM card was issued and this is not a case of interpolation or fabrication of documents. Deepak (PW20) had produced and proved the CDRs of mobile phone number 9811423903 for the period 25th December, 2008 to 11th February, 2009 marked Ex.PW20/A. The said witness had also proved certificate under Section 65B of the Evidence Act, which was marked Ex.PW20/D and the cell location chart marked Ex.PW20/E. IMEI mentioned and recorded in the CDR marked Ex.PW20/A is 35293702804264(0). This affirms that the SIM of telephone number 9811423903 was inserted and used in the mobile instrument with IMEI number 35293702804264(0).

34. Hussain M. Zaidi (PW19), Nodal Officer, Idea Cellular Ltd. had proved the customer application form for mobile telephone connection number 9639962567, issued to Mohd. Shahid vide Ex.PW19/C on the basis of his voter identity card marked

Ex.PW19/B. The said witness had also produced the call details of the said mobile connection for the period 1st January, 2009 to 11th February, 2009, which was marked Ex.PW19/A and had stated that the said details were retrieved from the company's main server and these details could not have been tempered with. However, he had not produce the certificate under Section 65B of the Evidence Act. Hence, we would read and examine CDRs of telephone number 9639962567.

35. The trial court has in the earlier portion of the judgement referred to the CDR of telephone number 9639962567 for 11th February, 2009, which shows that the SIM card of telephone number 9639962567 was installed in the instrument of the deceased with IMEI number 35293702804264(0) at about 1.40 hours on 11th February, 2009. However, the said chart has not been proved and is not an exhibited document, hence it cannot be taken into consideration. The CDR marked Ex.PW19/A ends on 7th February, 2009. Had care and caution been taken by the prosecution to prove the CDRs, they could have relied on them. We have to ignore and not take this evidence into consideration. The prosecution can, however, rely upon the seizure (memo Ex.PW-1/A) dated 12th February, 2009 which mentions the IMEI number of the mobile phone recovered from the appellant, Mohd. Shahid as 35293702804264(3) and the CDRs of the deceased Nasir's telephone number 9811423903 marked Ex.PW-20/A which were down-loaded on 17th September, 2012. The CDRs Ex.PW20/A confirm that the deceased was using a mobile instrument with IMEI No.35293702804264(0), i.e. the instrument recovered from Mohd. Shahid. Thus, the mobile instrument

belonging to and being used by the deceased was recovered and seized from Mohd. Shahid. Irshad Ahmad (PW1) had identified the phone. The mobile phone instrument of the deceased mark Ex.P-6 was proved and referred to by S.I. Dev Raj (PW29), Inspector Satya Prakash (PW30) and ACP Om Prakash (PW31). The last or the 15th digit of the IMEI Number changes has been specifically shown/indicated in bracket as it is not statistic. The first 14 digits are relevant and determinative. [See judgment in *State Vs. Mohd. Faizal and Anr.* reported 2007 (203) DLT 385]. The CDRs marked Ex.PW-20/A also shows that SIM card 9811423903 and the mobile phone in question were last used together on 10th February, 2009 at 21:59 hours.

36. It is clear to us that the appellant, Imrana, could not have committed the offence and strangled the deceased all alone. Involvement of a second person is, therefore, quite apparent. Imrana was new and had recently (2/3 days back) arrived in Delhi and was hardly acquainted with the residents of the locality. A co-participant/perpetrator could only be a person who was already known and close to her. Mohd. Shahid was known to her, and as per the prosecution both of them liked each other. Appellant, Mohd. Shahid was arrested in Delhi, a day after the occurrence and was found to be in possession of the mobile phone instrument of the deceased. Mohd. Shahid is the parlous second person and a joint participant in the offence strangulating Nisar. Appellant, Imrana has claimed that she was taken to police station and confined in the morning hours of 11th February, 2009. Irshad Ahmad (PW1) has testified that indeed Imrana was not allowed to return. Once the police had reached the

place of occurrence and interrogated Imrana, she had no occasion to get in touch with Mohd. Shahid. Thus the two appellants Imrana and Mohd. Shahid, did not interact and could not have met after 8:40 a.m. on 11th February, 2009. The CDRs for EX.PW20/A as noticed above prove and establish that till 21:59 hours on 10th February, 2009, mobile phone instrument of the deceased Nasir was being used by him with the SIM card. Thus it is in the intervening night between 10th February, 2009 past 21:59 hours and before 8:40 a.m. on 11th February, 2009, that the mobile phone instrument of the deceased had changed hands to come into the custody and possession of appellant, Mohd Shahid. The aforesaid finding proves and establishes a pertinent connect and link of Mohd. Shahid with the offence, when we cumulatively account for his closeness and involvement with the appellant, Imrana, prior to the incident. They belonged to the same native village. Even, as per the statement of Imrana, Mohd. Shahid was present in Delhi on 12th February, 2009, though she claims that Mohd. Shahid had reached the police station along with her father.

37. Recovery of the mobile phone of the deceased from the appellant, Mohd. Shahid would be covered by illustration (a) to Section 114 of the Evidence Act, as the recovery was “soon after” the crime was committed. We have expressly excluded the possibility of the appellant Imrana having passed on the mobile phone of the deceased on or after the police had reached the place of occurrence. It would be quite natural and logical to infer that the appellant, Mohd. Shahid had taken the phone with him before the police had started making enquiries about the phone from Imrana. The mobile phone went

missing the night and “soon after” Nasir was throttled to death. The death and loss of phone were a part of the same transaction. The plausible and apparent reason why the mobile phone instrument of the deceased was not left at the place of occurrence, were the telltale evidence of the calls made from the phone. CDR Ex.PW20/A of the deceased Nasir 9811423903 record exchange of calls with telephone No. 9702810355, which as per the prosecution was the phone number of Mohd. Shahid. We are aware and conscious that prosecution is unable to establish that Mohd. Shahid was a subscriber of this Idea Cell no. 9702810355, for the customer application form was untraceable [(See testimony of Sh. Hussain M. Zaidi (PW19) and Sh. Amar Nath Singh (PW23), who have proved and placed on record the complaint made to the police marked Ex.PW23/A]. However, the two appellant were unaware that the customer application form of number 9702810355 was untraceable.

38. This Bench has examined, presumption arising as under Illustration (a) to Section 114 of the Evidence Act, in Criminal Appeal 998/2012 ***Shaukat Vs. State*** and a connected appeal decided on 24.11.2015, to elucidate that no fixed time or period can be read into and set up as a test line, when we examine the question whether the possession was ‘recent’ or ‘soon after’, for the time or period is dependent upon several factors. The presumption envisaged by Illustration (a) to Section 114 of the Evidence Act can be extended to implicate an accused for a graver offence like robbery and murder, if they form part of the same transaction. Lastly, the weight or evidentiary value to be accorded in such cases would again depend upon factors, like the nature and character of goods stolen, whether they are easily

available and readily dealt with, whether they can be planted as evidence or could have frequent changed hand within the time gap between the occurrence and recovery etc. We are conscious that it may not be prudent to draw inference of involvement in cases of murder solely on the basis of possession of stolen property, for the said possession could raise suspicion or even strong suspicion, but may not be conclusive to establish that the holder was necessarily the perpetrator, but in the present case, we have not only referred to the recovery of the mobile phone of the deceased, but have noted and given cumulative effect to other material evidences like the relationship between the two appellants (Imrana and Mohd. Shahid), presence of the appellant, Mohd. Shahid in Delhi though he is not a resident of Delhi, the manner in which the offence was committed at the midnight, after Nasir was drugged and the story concocted by Imrana as a cover up, etc.

39. There is yet another aspect of this case. On the basis of disclosure statement of Mohd. Shahid marked Ex.PW1/C, the police got leads and had arrested the third appellant, Sunil from the guest house at C-116, Sector-44, Noida, U.P vide arrest memo marked Ex.PW1/F. Gaurav (PW-4) and Aditya Prakash (PW-5) have deposed about the arrest and recoveries from the appellant Sunil. They affirm that the police had interrogated Sunil who had produced a red colour pouch from his pocket. On inspection, it was found to contain one necklace having a golden thread, one necklace without thread, a pair of pazeab, two rings and a pair of ear tops. The jewellery were seized vide seizure memo Ex.PW-4/A and the appellant Sunil was arrested vide arrest memo Ex.PW-1/F. Gaurav (PW-4) identified the jewellery

articles, which were marked Ex.P-9 collectively. On a leading question, PW-4 clarified that the appellant Sunil was arrested on 13th February, 2009 and not on 11th February, 2009, as erroneously stated by him earlier. Aditya Prakash's (PW-5) deposition is affirmative and supports the prosecution case. PW-5 did not remember the date, month or year of the occurrence and on the particular day, but has averred that at about 12:30 a.m., one of the staff members of his guest house had informed him that police was searching for Sunil. PW-5 reached the guest house at about 5:00 a.m. and had noticed that Sunil was in police custody and another accused Mohd. Shahid was also present with the police. He was shown a packet containing jewellery stated to have been recovered from the packet found in Sunil's room. PW-5 had signed the recovery memo Ex.PW-4/A at point 'B'. PW-5 identified the jewellery (Ex.P-9). He was cross-examined by the Public Prosecutor on certain aspects mentioned in his statement under Section 161 Cr.P.C., but this cross-examination is inconsequential and irrelevant.

40. We do not think that the deposition of Gaurav (PW-4) and Aditya Prakash (PW-5) can be disregarded and disbelieved for the police personnel from Noida, Uttar Pradesh had not joined during the proceedings. Noida is adjacent to Delhi and a part of the National Capital Region. There is a ring of truth in the depositions of PW-4 and PW-5, which supports the prosecution version. The third appellant Sunil was arrested and from him, jewellery was recovered. The aforesaid jewellery has been identified by Irshad Ahmed (PW-1) and marked as Ex.P-9.

41. The jewellery in question belonging to the deceased Nasir and Imrana was taken away at the time of occurrence, in all probability for the reason that Imrana did not want to loose her right and claim on these valuables or give any opportunity to Nasir's family to stake a claim. The aforesaid articles were recovered at the behest and at the instance of Mohd. Shahid from the appellant, Sunil. Thus, as against, Mohd. Shahid the said recovery of the jewellery would attract the presumption under Illustration (a) to Section 114 of the Evidence Act, *albeit* it would not be a conclusive evidence to show his involvement in the murder. It would be a corroborating factor and when read with other material facts established and proved, expose and pin him. However, against the appellant Sunil, except for the recovery of the aforesaid jewellery items and that too at the behest of the appellant Mohd. Shahid, there is no other evidence or incriminating material to show his involvement or that he was one of the perpetrators. Irshad Ahmed (PW-1), no doubt avows as to the presence of Sunil at about 8:30 to 9:00 p.m. on 10th February, 2009 along with Mohd. Shahid, but we have not accepted this version and statement of PW-1 for several reasons. This part of PW-1's deposition, which is the edifice of the charge of conspiracy against Sunil is not proved and credible. However, as noticed above, this would not affect our finding that the appellants, Imrana and Mohd. Shahid, have been rightly convicted for the offence under Section 302 read with Section 120-B IPC. At best, it appears to us that appellant, Sunil had helped the appellant, Mohd. Shahid, whom he knew, as he had kept the jewellery and other articles belonging to Imrana and the deceased, Nasir, with him. It could be urged and

stated in favour of Sunil that Mohd. Shahid did not want to carry and move around with the said valuable articles in his possession.

42. Before we conclude, it would be appropriate to deal with the contention raised on behalf of Imrana, which the counsel highlighted also finds reference in the police case file. It was urged that Imrana had recently come to Delhi and had no acquaintances. The police officers had interacted with the neighbours, who had confirmed that a lady in the middle of the night had knocked at their doors and was possibly crying, but out of fear the neighbours did not open the door. The neighbours it appears felt that it was Imrana, who had knocked at the doors. If this version is to be accepted then we must accept the statement of Imrana that perpetrators were unknown intruders, who were allowed a friendly entry. For several reasons, elaborately discussed above, we have rejected the said statement. These need not be reiterated and re-stated once again. Indeed, falsehood and fabrication in Imrana's version having been uncovered and revealed, would add to the list of incriminating circumstances, indicting and encircling her. It is possible that Imrana may have knocked at the door to justify and support her facile story, for otherwise her conduct would have remained a suspect. Pertinently, Imrana did not use or call up the police at No.100 from the mobile phone of the deceased. This apparently was not done, as it would have exposed and implicated Imrana. The mobile phone instrument of the deceased with the SIM would have been taken into possession by the police and this would have led to difficulties and problem for Imrana and Mohd. Shahid.

43. Police case diaries can be relied only to the limited extent as stipulated in section 172 Cr.P.C. The Code stipulates that criminal court can ask for the police case diary and may use such diary not as evidence but as an aid, in such enquiry or trial. In the present case the police case diary show that police had acted objectively and on the first occasion were inclined to accept Imrana's elucidation as to the occurrence, but as investigation progressed, facts were ascertained and scrutinized, truth emerged and the falsity of Imrana's statement became apparent and certain.
44. In view of the aforesaid discussion, we dismiss the Criminal Appeal Nos. 587/2015 and 32/2015 preferred by the appellants Imrana and Mohd. Shahid and their conviction and sentences are maintained. However, the Criminal Appeal No. 373/2015 filed by the appellant, Sunil, is allowed and his conviction under Section 302 read with Section 120-B IPC is set aside and quashed. Appellant, Sunil will be released forthwith, unless he is required to be detained in accordance with law, in any other case.
45. The appeals are disposed of.

**SANJIV KHANNA
(JUDGE)**

**R.K. GAUBA
(JUDGE)**

**DECEMBER 4, 2015
Ssn/VKR**