

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

% **Reserved on: September 23, 2015**
Date of Decision: November 04, 2015

+ **Crl. A. 305/2012**

BUDHA Appellant
Through: Mr. Ajayinder Sangwan, Mr.
Tarunesh Kumar, Ms. Rishina
Parashar, Mr. Rohan Sharma, Mr.
Narendra and Mr. Irfan Firdaus,
Adv.

versus

STATE Respondent
Through: Ms. Aashaa Tiwari, APP with SI S.
K.Gupta-P.S. Kotwali

+ **Crl. A. 558/2012**

SUNDER alias RAJU Appellant
Through: Mr. Ravi Chaturvedi, Adv.

versus

STATE Respondent
Through: Ms. Aashaa Tiwari, APP with SI S.
K. Gupta-P.S. Kotwali

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

R. K. GAUBA, J:

1. The appellants have been convicted by the Additional Sessions Judge, in Sessions Case No.42/10, by judgment dated 24.12.2011, for the

offences punishable under Sections 302/120B/34 of Indian Penal Code, 1860 (“IPC”) and also for the offence under Section 201/34 IPC, holding them guilty on the charge of having entered into a criminal conspiracy and, pursuant thereto, having committed the murder of Manoj Kumar son of Suraj Pal on or about 10.02.2009 in the rented house of appellant Sunder @ Raju (accused no.1) in gali no.10, Village-Saboli and, thereafter, having caused the evidence of the offence to disappear with the intention of screening themselves.

2. By order dated 10.01.2012, the trial court awarded imprisonment for life with fine of Rs.10,000/-, on the first count and rigorous imprisonment for four years with fine of Rs.3,000/- on the second count to each of the appellants, directing that the substantive sentences shall run concurrently and that in default of payment of fine, they shall undergo further simple imprisonment for three months and one month respectively.

3. Manoj Kumar (the deceased) son of Suraj Pal (PW2), aged about 23 years, resident of village-Ginora P.S. Khanpur District-Bulandshehar, Uttar Pradesh, had been engaged in the year 2008-09 by a private company Simplex Infrastructure Limited (office at 82-83, Baikunth, Second Floor, Nehru Place, New Delhi) as driver of tractor no.UP-13P-8605, owned by his father (PW2) in connection with contract relating to a project of Commonwealth Games, at a site behind *Shanti Van*, near PAC Camp, Delhi, which falls within the jurisdiction of P.S. Kotwali (Central District) Delhi. After completing his duty on 10.02.2009, he did not return home and was reported, by his maternal uncle Nem Pal (PW19), to

be missing with the tractor. On 14.02.2009, the tractor was found parked on a vacant plot of land owned by one Jai Karan in C-Block Pratap Nagar, close to the area of P.S. Loni (U.P.) adjacent to the jurisdictional area of P.S. Harsh Vihar (North-East District), Delhi. On 17.02.2009, his dead body was found on the side of railway line behind house of one Naval Singh in village Saboli, which falls within the jurisdiction of P.S. Harsh Vihar (North-East District), Delhi.

4. The appellant Budha (accused no.2) had also been engaged by Simplex Infrastructure Ltd. (hereinafter referred to as "*the employer company*") for driving tractor no.UMC-3985, owned by Raj Kumar (PW3), in connection with the aforementioned project in the same area, from sometime around 07.02.2009, as replacement of the regular driver Jai Pal Singh, who had proceeded on leave. He (appellant Budha) had reported for duty with the said tractor (hereinafter referred to as "*the tractor of A-2*") till 14.02.2009 and then became absent.

5. On the statement (Ex.PW19/A) of Nem Pal (PW19), maternal uncle of Manoj Kumar (hereinafter referred to variously by his name or as "*the victim*" or "*the deceased*"), and on the basis of information available at that stage, FIR (Ex.PW8/B) was registered on 14.02.2009 at 08:00 PM for the offence under Section 365 IPC. After the tractor, and the dead body of Manoj Kumar, had been recovered on 14.02.2009 and 17.02.2009 respectively, the offences under Sections 302 & 392 IPC were added. During the course of investigation into this FIR, Budha (A-2) was arrested on 21.02.2009 while Sunder (A-1) was arrested on 27.02.2009. The investigating agency submitted the report under Section 173 of the

Code of Criminal Procedure, 1973 (“*Cr.P.C.*”) dated 18.05.2009, seeking prosecution of both the appellants for offences under Sections 365/302/392/201/120-B IPC. They were put to trial on the charge framed for the said offences on 21.08.2009. The learned trial court, believing the prosecution evidence, has found them guilty.

6. It emerges from the trial court record that conclusion about the complicity of A-1 has been reached primarily on the basis of evidence showing the murder having been committed in a room taken on rent by him in the house of Suresh Kumar (PW27), located in the vicinity of the house of Naval Singh in village Saboli, in the garbage dump behind which the dead body was discovered. It is stated that pursuant to the disclosure of A-1, his blood-stained trousers (Ex.P-2), the blood-stained clothes (including *pajama* and two trousers) of the deceased (collectively Ex.P-3) and the weapon of offence, *tawa* (hot plate) (Ex.P-1) were recovered, the blood-stains on all said items, matching with the DNA of the deceased as per the report (Ex.PW36/F) of Forensic Science Laboratory (“*FSL*”) connecting him to the crime.

7. In the case of A-2, he has been found to be involved in the criminal conspiracy, and the offence committed pursuant thereto, with A-1, on the basis of evidence showing the recovery of the wallet (Ex.PX-1) of the victim and his own shirt (Ex.PX), bearing blood-stains found by FSL in the DNA report to be matching with those of the deceased. The prosecution evidence based on the oral testimony of two other tractor drivers engaged by the same company (Simplex etc.), viz. Chhotu (PW17) and Tejpal (PW18), about they having “last seen” the deceased

going on his tractor with A-2, at about 08:00 PM on 10.02.2009, in the direction of Geeta Colony Flyover (which would be in the direction of area of P.S. Harsh Vihar and beyond) and about last telephonic contact by the deceased with his maternal uncle Nem Pal on his mobile phone no.9871047440 (hereinafter referred to as "*the mobile phone of PW19*"), calling from telephone no.69573323 of public call office ("*PCO*") manned by Tika Ram (PW9) from his electronic shop at railway road, village Saboli, at 22:10:57 hours of 10.02.2009 indicating he to be accompanied by A-2 and feeling apprehensive about his absence for some time, have also been accepted as corroborative to the other material showing involvement of A-2.

8. In addition to the above, the prosecution evidence, based primarily on the oral testimony of Manohar (PW15) and Munesh (PW16), both local residents of village Saboli, showing that the tractor of the deceased had been brought by A-1 and A-2 on 13.02.2009 and that it was parked at their instance at the place from where it was recovered, has been accepted by the trial court as the clinching proof of their respective role.

9. A-1 disputed the evidence about he having continued as a tenant in the house of PW27, taking the position that he had vacated the premises on 29.01.2009. He claimed that the evidence about recovery of clothes, weapon of offence etc., has been planted. He denied having anything to do with the parking of the tractor of the deceased at the place of its recovery. Similarly, A-2 disputed the "last seen" evidence as also the connection with the clothes or wallet recovered, further seeking to dissociate himself from the recovery of the tractor. He claimed that he

had been actually picked up by the IO, ASI Mohd. Yamin (PW37) on 15.02.2009 from village Haiderabad in District Bulandsehar U.P. and falsely shown arrested on 21.02.2009.

10. The pleas of the defence, and the evidence led by A-2 about his arrest on 15.02.2009, have been rejected by the learned trial court in the impugned judgment while holding both of them guilty.

11. The case of the prosecution that the deceased went missing sometime after 8 pm on 10.02.2009 from the area where he had been deployed with his tractor and thereafter was not seen alive, his dead body having been found on 17.02.2009 in a state of putrefaction with injuries indicating it to be a case of homicidal death has been proved through evidence which cannot be impeached.

12. The narration must begin with the testimony of Nem Pal (PW-19), the maternal uncle of the victim. The material on record shows that this witness had approached the police by making a call to the Police Control Room (PCR), which came to be passed on to the local police and logged as DD No.19A (Ex.PW6/A) at 02:15 pm on 12.02.2009 by Head Constable Rajesh Malik (PW-6) who was deputed as duty officer in Police Station Kotwali at the relevant point of time. It appears some distortion crept in the message since it seems to have been assumed by PW-6 that the matter being reported was about theft of a tractor bearing no. UP-13P-6605, noticeably the particulars of the tractor mentioned in the DD entry almost matching (save for the difference of figure '8') with those of the tractor of the deceased. What came to be clarified, mercifully, later during the enquiry into the DD entry by Head Constable Sata Nand

(PW-32) to whom it was marked is that Nem Pal (PW-18) had been more concerned about his nephew Manoj Kumar having gone missing, though with the tractor.

13. Head Constable Sata Nand (PW-19) ascertained from the PCR, the phone number of Nem Pal (PW-19) and enquired into the matter. He was told by PW-19, as also affirmed by the latter, that Manoj Kumar had last contacted him on his mobile phone sometime around 10:10 pm on 10.02.2009 from phone number 69578323. The enquiry made by PW-32, inclusive of visit to the PCO booth managed by Tika Ram (PW-9), revealed that the said phone was functional at PCO booth in village Saboli within the jurisdiction of Police Station Harsh Vihar. PW-9 confirmed to PW-32, on the basis of identification from a photograph of Manoj Kumar shown to him, that it was the victim who had made the call from his PCO booth to the mobile phone of PW-19 on the night of 10.02.2009. Based on these preliminary facts, Head Constable Sata Nand (PW-32) found it to be a case possibly involving offence under section 365 IPC, though committed within the jurisdiction of Police Station Harsh Vihar and, thus, registered a 'zero' FIR (Ex.PW8/A) at 9 pm on 13.02.2009 and made it over for further necessary action to the said Police Station (Harsh Vihar).

14. It appears that Police Station Harsh Vihar returned the matter to Police Station Kotwali insisting that the offence pertained to their jurisdiction. Nem Pal (PW-19), thus, came back to Police Station Kotwali on 14.02.2009 when ASI Mohd. Yameen (PW-37) recorded his statement (Ex PW 19/A) which captured the same set of facts as had been

mentioned in the 'zero' FIR (Ex.PW 8/A) registered on 13.02.2009. What needs to be highlighted here is that, during the phone call at 10:10 pm on 10.02.2009 from the PCO booth, the victim had told his maternal uncle Nem Pal (PW-19) that he was speaking from village Saboli and the driver of the vehicle described as "Escort" who had been with him had left the place about 15 minutes ago and he was feeling endangered. He was advised by PW-19 to somehow manage to return home.

15. Manoj Kumar did not return and was not seen alive. On 17.02.2009 in the afternoon, at about 1 or 2 pm, Parvesh (PW-20) resident of house in Gali No.1, D-Block, Pratap Nagar, Village Saboli, Harsh Vihar, Delhi, noticed a crowd having gathered in the fields in front of her house. She went to the place and saw a dead body lying beneath a heap of garbage. She informed the PCR by making a call from mobile phone number 9873808019. Woman constable Sunita (PW-21) logged this information in PCR form at 02:18 pm and passed it on to Police Station Harsh Vihar. In Police Station Harsh Vihar, Head Constable Jagpal Singh was working as duty officer. He recorded DD No. 17A (Ex.PW 13/B) at 02:25 pm and made it over to ASI Bhupender Singh (PW-30) for necessary inquiry. PW-30, accompanied by constable Anil, went to the place and found a dead body of young male person lying in the fields behind the house of Naval. He was unable to get the dead body identified immediately. By the said time, the FIR (Ex.PW8/B) had already been registered. PW-30 sent an information to the investigating officer (PW-37) of the case by getting DD No. 22A (Ex.PW6/B) recorded in Police Station Kotwali at 03:15 pm. Thus, PW-30 was joined, at the place of recovery of the dead body, by

ASI Mohd Yameen (PW-37), accompanied by Head Constable Sata Nand (PW-32). In the course of proceedings, at the said place, the police officials also joined Dhirender Raghav (PW-33) brother of the victim.

16. The depositions of PW30, PW32, PW33 and PW37 collectively prove that the dead body, regarding which PW20 had given the information was identified by PW33 as that of Manoj, the person reported by PW-19 to have been missing since the night of 10.02.2009. PW-30 called for the crime team to come to the place. The crime team staff included ASI Rajender Singh (PW-11), the photographer. The evidence shows that the investigation in the area at that point of time had led the IO (PW-37) to the house of Suresh (PW-27) where A-1 had been living as a tenant in one of the rooms on the first floor, the said room statedly being the premises where the murder was committed. The IO had used the services of the photographer (PW-11) for preserving evidence at that place as well. We shall revert to this part of the evidence a little later. For the present we may only note that PW-11 has proved that, while assisting in investigation at the place of recovery of the dead body, and in the house of PW-27 in village Saboli, he had exposed 28 negatives (Ex. PW11/A-29 to A-56) with the help of which he had prepared 28 photographs (Ex.PW11/A-1 to A-28).

17. Twelve of the above-mentioned photographs are of the place where the dead body had been found. They depict the dead body partly concealed beneath a dump of garbage in a corner behind two walls joining each other at an angle. The dead body is seen in tattered clothes with the face clearly indicating that it had been smashed and the body

seemingly swollen and bearing signs of putrefaction. Both the upper garments and the piece of cloth covering the lower portion can be seen to be virtually soaked in blood.

18. The dead body having been identified, the investigating officer (PW-37) proceeded to take necessary steps including by taking the dead body in his possession (vide seizure memo PW-30/A) and collecting the blood stained earth alongwith earth control sample from the area around (vide Ex.PW-30/B). It may be added here that alongside the dead body, the investigating officer had also found a mat and bed sheets. These alongwith the shirt, vest and underwear (collectively, Ex.PW7) taken off the dead body, alongwith the grass and leaves found stuck on it, in addition to sample of the hair of the deceased, all preserved during the autopsy by Dr. Akash Jhanjhee (PW-25) were later taken over by the investigating officer (PW-37), vide seizure memos (Ex.PW31/A to E).

19. The dead body was removed to the mortuary of Aruna Asaf Ali Government Hospital, Sabzi Mandi, Delhi and a request made for post-mortem examination through application (Ex.PW37/E) supported by the inquest papers including death report (Ex.PW37/C) and brief facts (Ex. PW37/D). The post-mortem examination was conducted by Dr. Akash Jhanjhee (PW-25) on 18.02.2009, after the dead body had been identified by Kuber Singh (PW-1) and Dhirender Raghav (PW-33), the brother-in-law and brother respectively of the deceased, vide their respective statements (Ex.PW1/A and Ex.PW33/A), in addition to similar statement (Ex.PW19/B) by PW-19.

20. PW-25 proved the autopsy report (Ex.PW25/A) affirming that during the post-mortem examination he had found the following ante-mortem injuries suffered by the deceased:-

- (i) *Lacerated wound 6 X 3 cm X bone deep present over ;the left side temporal side of the head 2 cm, above top of left ear pinna with margins abraded and bruised edges everted showing gaping and presence of the vital reaction (split laceration) underlying bone surface showed depressed comminuted fractures with fractured ends reddish and bruised and fractured fragments depressed inwards at places.*
- (ii) *Lacerated wound 3 X 2 cm. X bone deep present on the left parietal region of the head 1.5 cm above injury No. 1 margins abraded and bruised edges everted showing gaping and presence of the vital reaction (split laceration) underlying bone surface showed depressed comminuted fractures with fractured ends reddish and bruised and fractured fragments depressed inwards at places.*
- (iii) *Lacerated wound 3.8 cm. X 1.8 cm. X bone deep present over the left occipital region of the head lying 1 cm to the left of external occiput margins abraded and bruised edges everted showing gaping and presence of the vital reaction (split laceration) underlying bone fractured with fractured ends reddish and bruised lying exposed.*
- (iv) *Lacerated wound 5.5 cm X 2 cm X bone deep present over the left occipital region of the head 4 cm below external occiput underlying bone fractured with fractured ends reddish and bruised lying exposed.*
- (v) *Contusion, reddish with swelling 3 X 3 cm over left side face in front of left ear opening.*

- (vi) *Contusion–abrasion reddish 3 X 2 cm over left chin region with underlying bone fractured with fractured ends reddish and bruised lying exposed.*
- (vii) *Contusion-abrasion reddish with swelling 4 X 3 cm over right side forehead outer half above right eye brow.*
- (viii) *Contusion reddish 8 X 3 cm over front surface of right side chest region upper half.*

21. The autopsy doctor (PW-25) described the findings of internal examination as under :-

“Head – Scalp showed sub scalp bruising in the scalp layers and underneath over left side and back of the head. Skull showed depressed comminuted fractures involving left side temporal parietal of the skull vault with fissured fractures lines over lines left occipital bones with fractured ends reddish and bruised. Also present suture separation of the left limbs of lamboid suture with fractured ends reddish and bruised. Subdural hemorrhage overlined left cerebrum. Contusion-laceration of the under surface left temporal lobe. Subarachnoid hemorrhage over both sides cerebral hemispheres. Multiple petechial hemorrhages intra-cerebral present in the white matter of both side cerebral hemispheres. Ventricles were full of fluid blood. Skull base showed fractures of left side middle and posterior cranial fossae and right side anterior cranial fossae.

Neck Structure intact.

Chest- Right side third, fourth, fifth and six intercostals space muscle ;contused at the costro –chondral junction.

Both lungs putrifying.

Abdomen and Pelvis – Organs were found putrifying.

Spinal Column – Intact.”

22. In the opinion of PW-25, the death had occurred due to cranio-cerebral damage consequent upon blunt force impact to the head which was sufficient, in ordinary course of nature, to cause death. All the ante-

mortem injuries had been caused by blunt force impact and the autopsy findings were consistent with blunt assault before death. In the views of the autopsy doctor, the death had occurred around 7 to 8 days prior to the post-mortem examination. This means that the death would have occurred on the same night (10.02.2009) as on which the deceased had gone missing.

23. The post-mortem examination report and the opinion of the autopsy doctor were not challenged at the trial. We find no reason not to accept the same. Having regard to the nature of injuries noted in the autopsy report, there can be no room for doubt that the injuries had been inflicted voluntarily and intentionally. Given the fact that the injuries were sufficient in ordinary course of nature to cause death, knowledge that the injuries being inflicted would expose the victim to the likelihood of his death will have to be attributed to their author. We have, therefore, no hesitation in concluding that it was a case of culpable homicide amounting to murder under Section 300 IPC. We may add here that the defence only pleaded denial of involvement and has not come up with any theory, or plea, of the case falling under Section 304 IPC. Therefore, we hold that the prosecution has established it to be a case of murder punishable under section 302 IPC.

24. Before we subject to scrutiny the evidence indicative of complicity on the part of A-1 to A-2, it is proper that the circumstances in which the tractor of the deceased came to be recovered are taken note of.

25. Subhash (PW22) is a resident of C-Block Pratap Nagar, Saboli, Loni Border, Delhi. The plot of land in front of his house is owned by

Jaikaran (his brother-in-law) (*Sala*). The witness testified that, on 14.02.2009, he had come out of his house at about 08:15 am when he saw a tractor trolley parked on the said plot of land. He tried to find out as to whom the said tractor trolley belonged but with no success. He deposed that he had made a telephone call to police, on phone number 100, whereupon the police officials of local police station (Harsh Vihar) came and took away the tractor trolley.

26. The police proceedings, which we may now take note of, confirm what is deposed to by PW22. On 14.02.2009, at 08:35 AM, telephonic information was given to PCR which was passed on to Police Station, Harsh Vihar where DD No. 10A (Ex.PW13/A) came to be recorded by the duty officer (PW-13) about the tractor having been found parked on a plot of land near R.K.Public School, close to the *baithak* of Ramji Lal in C-Block, Pratap Nagar. The information was made over to Head Constable Sant Kumar (PW-14) who visited the place and found the tractor lying unattended. It is pertinent to note here that, at that stage, there was no case registered about any incident involving the said tractor, in as much as the FIR of the case at hand would be registered later in the night in Police Station Kotwali. Head Constable Sant Kumar (PW-14) took it as a matter pertaining to the jurisdiction of Police Station, Loni (UP) and, thus, informed the concerned police post Pipe Line of Police Station Loni whereupon SI Vijay Singh (PW-28), incharge of the police post, took the vehicle in his control. This is confirmed by HC Manoj Kumar (PW-5), MHC(M) of Police Station Loni on the basis of the *Malkhana* register (Ex.PW5/A).

27. The action taken by Head Constable Sant Kumar (PW-14) was duly reported by him through DD No.41B (Ex.PW14/A) recorded in Police Station (Harsh Vihar) at 11:15 pm. The connection of the tractor with the FIR respecting disappearance of Manoj Kumar, under investigation with PW-37, came to be later made and, thus, it was eventually taken over by SI Jai Singh (PW-29) on 26.02.2009, in the presence of constable Bhupender (PW-34). The tractor was subsequently released on *superdari* (vide Ex. PW2/A) to Suraj Pal (Ex.PW-2) and in the course of trial produced by him as evidence (Ex.P1).

28. Since the statement (Ex PW19/A) of the first informant (PW19), on which the FIR had been registered, had indicated that at the time of he going missing, the victim had, for his company, the driver of the vehicle described as "Escort", at least up to the time when he (the victim) had reached the area of village Saboli, the focus of the investigation necessarily had to be by following up on the said lead as also through enquiry from the PCO booth from where the last call was made.

29. The deposition of Nem Pal (PW19) about the last call on his mobile phone number from the PCO booth of Tika Ram (PW9) on the night of 10.02.2009 is confirmed not only by the evidence of PW9 but also by the call records of the service providers (the two telephone companies). Vishal Gaurav (PW26), Nodal Officer of Bharti Airtel Ltd., speaking on the strength, *inter alia*, of the certificate under Section 65-B of Evidence Act (Ex PW26/D) proved the call detail records (CDR) of mobile phone number (987107440) of PW19 for the period from 09.02.2009 to 11.02.2009 (Ex PW26/A). Similarly, Gagan Jeet Singh

Sidhu (PW12) Nodal Officer of Tata Tele Services proved the CDR (Ex PW12/A) for 10.02.2009 in respect of PCO booth telephone number (011-69573323), supported by certificate under Section 65-B (Ex PW12/B).

30. Whilst the documents (Ex PW26/C) produced by PW-12 reflect that the mobile phone number is registered in the name of Suman Lata wife of Jagveer Singh resident of 6, Deepak Vihar, Khoda, Ghaziabad (same address as of PW19), there is no reason why the word of PW19 that the phone was in his use on the relevant date should be disbelieved. Similarly the documents (Ex PW12/A) produced by PW12 in respect of the landline of PCO booth show that it was functional in the name of Nepal Singh son of Begraj at premises number 144, Village Saboli, Delhi. Noticeably, PW9 is the real brother of the said Nepal Singh. He (PW9), resultantly must be believed with regard to his connection with the PCO booth.

31. The call details of the PCO phone (Ex PW12/A) and of the mobile phone (Ex PW26/A) confirm that a call was made from the former to the latter at 10:10 pm on 10.02.2009. PW9, on his part, stated that the said call was made by a young boy and further that when the police made enquiries about the said call he had confirmed it to them on the basis of the logs (in the instrument). In the endorsement (Ex PW37/A) leading to the registration of FIR, the IO (PW37) had mentioned that the man at the PCO booth had confirmed him that the said call had been made by the deceased, identifying him from his photograph shown at the time of such

enquiry. The prosecutor examining PW9 did not, however, call upon the witness to prove any of such facts.

32. J.K.Jain (PW10) is engaged as Deputy Manager by M/s Simplex Infrastructure Ltd. which had employed, *inter alia*, the deceased as a tractor driver for the above-mentioned project. He deposed that besides the tractor of the deceased (owned by his father, PW2), the company had also engaged five or six other tractors which included tractor number UMC 3958. This tractor (UMC 3958) is owned by Raj Kumar (PW3) who, in turn, proved its make as "Escort 335". PW3 testified that his tractor, make "Escort 335", bearing the said registration number, was earlier driven by his regular driver Jaipal Singh but since the said driver had proceeded on leave on 06.02.2009, he had consulted the "*mistry*" the person (from whom he would get his tractor repaired) for arrangement for a substitute driver. It was on the suggestion of the said "*mistry*" that Budha (A2), who was without work during those days, was contacted on 07.02.2009 and requested to work as the driver on the said tractor. PW3 further deposed that he knew Dhirender (PW33), the elder brother of the deceased, and further that he was aware that Dhirender's tractor was also deployed at the same site where his tractor had been engaged. According to the PW3, when he had called up Dhirender to arrange for his new driver Bhudha (A-2), to be taken along to the site, Dhirender (PW33) had told him that he was going to attend some marriage and his younger brother Manoj (the deceased) would be going with the tractor to the site. Thus, his driver Budha (A-2) had met him near police chowki, Mayur Vihar and PW-3 had taken him (A-2) on his motorcycle to the said place

and when the deceased came there with his tractor he had handed over his keys of his tractor to Budha (A-2) asking him to go with Manoj (the deceased) to the project site (i.e. construction of a flyover by M/s Simplex Infrastructure Ltd.) in front of Geeta Colony.

33. Chhotu (PW17) and Tejpal (PW-18) were the other drivers also engaged, with their tractors, at the project site by M/s Simplex Infrastructure Ltd. during the relevant period. Both these witnesses have confirmed the engagement of Manoj (the deceased) and Budha (A-2) in the said work as drivers of their respective tractors by the said company. During cross examination of these witnesses, questions were raised as to the identity of the various tractors services of which had been availed by M/s Simplex Infrastructure Ltd. It came out clearly, particularly in the deposition of PW17, that there was only one tractor make “Escort” in use in the said project and that the said tractor, make “Escort”, was driven by Budha (A-2).

34. There is nothing in the cross examination of any of the above mentioned witnesses as can dispel the impression that amongst the fleet of tractors used for its construction project by M/s Simplex Infrastructure Ltd., the tractor of PW3, driven by Budha (A-2), was the only one with make of “Escort”. This, when seen in the context of the telephonic conversation of the deceased with his maternal uncle (PW19) at about 10:10 pm on 10.02.2009 from the PCO booth in village Saboli, leads to the conclusion that the “Escort” driver to whom the deceased in the said call had alluded, was no one else but Budha (A-2).

35. Chhotu (PW17) and Tejpal (PW18) provide what is presented by the prosecution as the “last seen” evidence. Both these witnesses have affirmed on oath that they had seen Budha (A-2) going with the deceased on the tractor of the latter (the deceased) at about 8 pm on 10.02.2009, heading towards Geeta Colony flyover. Questions were raised during their respective cross-examination as to the improbability of they having actually seen the two said persons together moving on the tractor. The witnesses have stuck steadfast to their position. There is no reason why we should entertain the possibility that they may not have been truthful. While it is correct that PW18 did not remember the registration number of the tractor of the deceased (the same had to be spoon-fed to him by the public prosecutor), such inability is inconsequential.

36. It may be that the relatives of the deceased may have made enquiries from the office of the company as to his whereabouts on 11.02.2009. But, the omission of the “last seen” evidence in the version of PW19 leading to the ‘zero FIR’ (of 13.02.2009) or the present FIR (registered on 14.02.2009) does not mean that the enquiries from the company would have covered these two individuals.

37. We, thus, accept the evidence of PW17 and PW18 and hold that each of them had seen Budha (A-2) going in the company of the deceased on his tractor which was moving after completion of work for the day, at about 8 pm on 10.02.2009 in the direction of Geeta Colony flyover. It may be added here that taking away of the tractor in the aforesaid manner by the deceased at the end of the working day was seemingly not the

usual practice. PW18 has clarified that all the tractors used to be parked under the flyover of Geeta Colony near the office of Simplex Company.

38. Whilst on the subject, we may also take note of the evidence about the conduct of Budha (A-2) after 10.02.2009. The prosecution alleged that his absence from duty is indicative of abscondance, possibly showing guilty mind. But PW10, the deputy manager of the employer company, proved the certificate (Ex PW10/A) and affirmed that the driver of tractor number UP 13P 8605 (i.e. the one driven by the deceased) had not reported for work from 11.02.2009 onwards, though having done duty during 13.01.2009 to 10.02.2009. Further, the tractor number UMC 3985 (the one driven by A-2) had done duty during 14.01.2009 to 14.02.2009 and thereafter failed to report for work from 15.02.2009 onwards. Chhotu (PW17) stated that Budha (A-2) had reported for duty (on his tractor) till 14.02.2009. Thus, it would not be correct to state that Budha (A-2) had shown any conduct from which intent to abscond or making himself unavailable immediately after 10.02.2009 may be inferred. However, after 14.02.2009, Budha (A-2) as per the witnesses did not report for duty.

39. The evidence of Manohar (PW-15) and Munesh (PW-16) provides the link between the appellants on one hand and the parking of the tractor of the deceased on the plot of land in front of the house of PW22, on the night of 13.02.2009. The evidence of these two witnesses (PW-15 and PW-16) has also proved the close relation between the two appellants. PW16, resident of H.No.1074, Gali no.11, Village Saboli, Pratap Nagar, Delhi, testified that Sunder (A-1) is his nephew while Budha (A-2) is the

husband of his niece Jagbiri. He also stated that both the appellants were frequent visitors to his house on account of the said relationship.

40. PW16 deposed that, on 10.02.2009, at about 09:45 or 10 pm, Budha (A-2) had come to his house and enquired about Sunder (A-1). He (A-2) had left the place on being told by PW16 that A-1 must be at his house. PW16 further testified that on 13.02.2009, at about 8 or 8:15 pm, Sunder (A-1) had come to his house requesting that the tractor of Budha (A-2) be parked at some safe place since he (A-2) had gone to some relative. PW16 deposed that he, accompanied by Sunder (A-1), had approached his neighbor Manohar (PW-15) requesting for his assistance.

41. The prosecution had claimed that PW16 had in fact told the investigating officer in his statement u/s 161 Cr.PC (Ex PW16/A) that Sunder (A-1) had informed him that Budha (A-2) wanted to sell the tractor trolley and it was in this context that Manohar (PW15) was contacted since he was dealing in tractors. PW16 refused to confirm such facts at the trial but affirmed the prosecution case that Sunder (A-1) had told him that the tractor of Budha (A-2) was parked near his "room" in the fields for the last 3-4 days and so arrangements had to be made for it to be parked at some safer place.

42. Manohar (PW-15) corroborated the word of PW16 that PW15 had come to PW16's house at about 8 or 8:30 pm on 13.02.2009 and having met Sunder (A-1), introduced to him as nephew of PW16, and on the request of the latter getting the tractor (at that time parked near a school in Village Saboli) shifted to be parked at the plot of land near C-Block, Pratap Nagar. PW16 had told him that the tractor belonged to his relative

Budha (A-2) and so had to be parked at some safe place. He also stated that PW16 had told him to get the tractor sold and that upon he showing disinterest it was even suggested by PW16 that the value of the tractor was not much and it could be sold to some needy person. PW15 added that this had aroused his suspicion but PW16 had assured that the vehicle was not stolen.

43. The evidence of PW15 corroborates the evidence of PW22, PW13, PW14, PW28 and PW5, already taken note of, about the circumstances in which the tractor of PW2, driven by the deceased on 10.02.2009, was recovered from the place of its parking that had been arranged by PW15 on the request of PW16 on 14.02.2009.

44. We have already noted the circumstances in which the dead body of the victim was discovered on 17.02.2009 near the house in D-Block, Pratap Nagar, Village Saboli, Harsh Vihar, Delhi, not far from place where the tractor had been earlier found on 14.02.2009. The evidence of Suresh Kumar (PW-27) proved that the house, behind which the dead body had been discovered concealed beneath a dump of garbage, was his house, one of the rooms on the first floor of which was in the tenancy of Sunder (A-1). The witness has affirmed on oath the factum of the tenancy as also that Sunder (A-1) had been missing from the said room, leaving it locked, for 3-4 days prior to 17.02.2009. He has conceded that there was no formal document executed in the nature of lease agreement, nor any rent receipt was issued by him to confirm the tenancy but clarified that he had let out the room to Sunder (A-1) because he was known to him from before and he was satisfied about his character and antecedents, the

transaction of lease being direct. He rejected the suggestion that Sunder (A-1) had not been his tenant.

45. Interestingly, at the stage of statement under Section 313 Cr.PC, Sunder (A-1), claimed that he had given up the tenancy on 29.01.2009. It is pertinent to note that during the statement of PW27, no suggestions about the cessation of the tenancy on 29.01.2009 had been given. Clearly, the answer in the statement under Section 313 Cr.PC, confirms the testimony of PW27 about Sunder (A-1) having been inducted as a tenant in the room in question. Since the tenancy stands proved, no suggestion that it was terminated on 29.02.2009 having been given to PW27, and no evidence having been led to that effect, it has to be concluded that the tenancy had continued and the room had remained under the lock, key and occupation of Sunder (A-1) till the day (17.02.2009) the investigating police reached the place.

46. The layout of the house in question is depicted in the site plan (Ex PW4/A) that was prepared by Constable Sonu Kaushik (PW-4) during the investigation. The said plan, coupled with the photographs taken by ASI Rajender Singh (PW-11) referred to earlier, together show that the room in the tenancy of Sunder (A-1), in the house of Suresh Kumar (PW-27), was at a corner at the first floor level of the building and was approached through the staircase leading from the ground floor. It came out in the statement of PW27 that he himself does not live in this property and that some of the other rooms also had been let out. Though clarifying that he would visit the place off and on, his last visit being 7-8 days prior to 17.02.2009, he stated that the other tenants had been away to their

respective native places during those days. Thus, during the relevant period, the entire property was lying unused, except for being accessible to Sunder (A-1).

47. The remaining sixteen, out of the total twenty eight, photographs (Ex PW11/A-1 to A-28) taken by PW11 on 17.02.2009 in the tenanted room in the house of PW-27 show the place to have been in use as residence by someone since furniture including two cots, some small tables, table fan and personal effects in the nature of footwear and clothes (hung on a line within the premises) can be noticed. Blood stains on the wooden frame of one of the said cots (placed sideways) and on the floor beside the walls is depicted vividly in these photographs. The room, as mentioned earlier, was located at the first floor level. Blood was found in the passage in front of the door of the room as also on the stairs leading to the ground floor. The above mentioned photographs bear testimony to the fact that the place was the scene of crime.

48. The evidence of ASI (PW-37), Suresh Kumar (PW-27), HC Satanand (PW-32), ASI Bhupender (PW-30) and Dhirender (PW-33) proves beyond doubt that the room in the tenancy of Sunder (A-1) was, the scene of violent assault against someone, what with blood stains found all over. These witnesses together proved that a trail of blood was noticeable in the stairs leading from the ground floor upto the tenanted room. The room upon being found locked had to be broken into, the lock (Ex P X) taken in formal possession by the IO vide seizure memo (Ex PW27/A). The IO seized the sample of blood from several places including the inside walls. He also took into possession blood stained

bricks (Ex P5 and P6) in addition to the blood-stained leg (Ex P4) of a cot lying inside besides earth control vide seizure memos (Ex PW27/B to PW27/H).

49. After the dead body had been recovered, and the scene of crime identified, the case was taken over for investigation by Inspector Sunil Shrivastav (PW-36) with effect from 17.02.2009. PW36 initially arranged for the post-mortem examination to be conducted on 18.02.2009 and then started search for both the suspects, i.e. the two appellants.

50. It is the evidence of PW36 (the final investigating officer) that, on 21.02.2009, Budha (A-2) was arrested from near old bridge, leading to ISBT, on river Yamuna, at about 06:30 pm on 21.02.2009 in the presence of SI Rakesh Kumar (PW-35), vide arrest memo (Ex PW35/B) after personal search vide Ex PW35/C.

51. Budha (A-2) contested the prosecution case about his arrest on 21.02.2009 from near the old bridge of River Yamuna, Delhi as reflected in the arrest memo (Ex PW35/B), his claim being that he had gone to village Haidrabad, District Bulandshahr, UP where his in-laws lived, in connection with marriage of Vijendri, sister-in-law, on 14.02.2009 and that he was picked up by the police from the said village on 15.02.2009 and brought to Delhi to be falsely implicated in this case. Suggestions to this effect were given during cross examination of PW36 and PW37. It was even claimed that PW37, who was investigating the case on 15.02.2009, had visited the villages Haidrabad and Kamalpur and that Budha (A-2) was apprehended by PW37 in the presence of Natho (DW1), the *Pradhan* of Village Haidrabad and this fact was duly documented and

endorsed by him (PW37), it being handedover to DW1. DW1 was examined at the instance of Budha (A-2) to prove the said fact. For corroboration, two other witnesses Dal Chand (DW2) and Nanhe (PW3), both local residents of the said village, were also brought in. During the statements of the first two said witnesses document Ex DW1/A was referred. It is claimed that this document was executed by PW37 to acknowledge the fact that he had taken over the custody of Budha (A-2) on 15.02.2009 and that he was taking him to Delhi.

52. The document Ex DW1/A does not inspire confidence for several reasons. Firstly, PW37 to whom it is attributed was not confronted with the same. There is no witness examined to prove the fact that it was actually executed or signed by PW37. All that DW1 and DW2 had to say in its regard was to prove their respective signatures thereupon. DW1, in fact, stated that it was executed on 15.01.2010. No effort was made to call her upon to correct the said statement wherein reference is made to a date which has no relevance to the case at hand. The document begins with the names and parentage of a number of persons, all presumably local residents of the village, followed by duly proved signatures of DW1 with her rubber stamp. Thereafter, there is a note added, in a different hand, about the custody of Budha (A-2) having been handed over to PW37. There is no proof as to who had scribed the said note or at what stage. There is no authentication by anyone below the said note.

53. Nanhe (DW3) is brother of Budha (A-2). He referred to document Ex DW3/A as a complaint made by him to SSP, Bulandshahr sent under postal certificate (Ex DW3/B). The postal endorsement is as illegible as it

could be. The document Ex DW3/A does not even bear the signature of the person (DW3) who claims to have sent it.

54. It is pertinent to note here that at the time of his arrest vide arrest memo (Ex PW35/B) dated 21.02.2009, information had been given by PW36 to Jasbiri wife of Budha (A-2) in village Kamalpur, District Bulandshahr. She would be the best person to dispute the said event of 21.02.2009 or to prove that her husband had actually been picked up from her parental home in village Haidrabad, District Bulandshahr on 15.02.2009 as is claimed in the defence plea. In these facts and circumstances the defence evidence to above fact is found to be not credible.

55. According to the evidence of PW35 and PW36, Budha (A-2) after arrest was interrogated and he made certain disclosures, his statement having been formally recorded, referring in this context to documents (Ex PW35A to PW35/G). A-2 statedly had pointed out the room in the tenancy of Sunder (A-1) and the place where the dead body had been disposed of, as documented vide Ex PW35/E and PW35/F respectively. Trite it is that the disclosures attributed to Budha (A-2) vide Ex PW35A to PW35/G and the purported statements inherent in the pointing out memos (Ex PW35/E and PW35/F) cannot be read in evidence, the same being hit by the provision contained in section 25 of Evidence Act, unless (and except to the extent) the same can be shown to have led to discovery of a fact, which would be relevant and admissible in terms of section 27.

56. The prosecution rests its case against Budha (A-2), additionally on the basis of recoveries of wallet (Ex PX1) and a blood stained shirt (Ex

PX) as documented vide seizure memo (Ex PW35/D). PW35 and PW36 have affirmed on oath that A-2 had led them to a place in the fields close to the old police post, in the vicinity of old (iron) bridge over Yamuna River, on the north side of the site office of Simplex Infrastructure Company and had got recovered a polythene bag which was found to contain the said articles (viz. wallet and shirt). The shirt (Ex PX) is described in the seizure memo (Ex PW35/D) to be bearing blood stains. The wallet (Ex.PX1) statedly of the deceased (Manoj) contained a pocket diary, two photographs and sundry papers. The recovered articles were seized and properly sealed before being taken over vide seizure memo (Ex PW35/D).

57. The wallet (Ex PX1) alongwith its abovementioned contents was put to test identification before a Metropolitan Magistrate (PW24) on 18.03.2009. For this purpose, Dhirender (PW33), the brother of the deceased, was called. The proceedings (Ex PW33/G) of the TIP conducted by the Metropolitan Magistrate (PW24), pursuant to application (PW36/C) have been duly proved by him, and also affirmed by Dhirender (PW33), with no contest whatsoever to the confirmation thereby reached that the said wallet (Ex PX1) was the property of the deceased (Manoj).

58. During the cross-examination of the witnesses to the abovesaid recoveries, it was suggested that the shirt (Ex PX) does not belong to Budha (A-2) and further that the wallet (with its contents) was planted. We do not find any discrepancies in the evidence of the witnesses. We have no reason to suspect that the wallet had been planted. It must,

however, be added that there is no admissible evidence available on which it could be safely held that the shirt (Ex PX) was of Budha (A-2). After all, allegations to this effect have been made only on the basis of the statement made by the accused in the custody of the police which cannot be taken into account. Be that as it may, the recovery of the shirt (Ex PX) at the instance of Budha (A-2) continues to be relevant since, as we would notice later, the DNA report of FSL connects it to the crime.

59. Inspector Sunil Shrivastav (PW36), SI Rakesh (PW35) and Dhirender (PW33) have testified that, on 27.02.2009, on the basis of secret information Sunder (A-1) was arrested from near Mandoli Chungi, Sewa Dham, Delhi at about 01:30 pm vide arrest memo (Ex PW33/C) after personal search (vide Ex 33/D). There is nothing in the cross examination as can raise doubts about the truthfulness of the prosecution evidence respecting the arrest of Sunder (A-1) on the date, time and place stated.

60. The abovementioned witnesses (PW33, PW35 and PW36) have deposed about the interrogation of Sunder (A-1) leading to he making certain disclosures (Ex PW33/F) and also pointing out (vide Ex PW27/M to PW27/O) the places of disposal of the dead body, of parking of the tractor and the tenanted room of A-1. For the same reasons as set out earlier in the context of disclosures attributed to the other appellant, we need only observe that this part of the material on record will have to be considered only in so far as it may be admissible on the basis of discovery of facts made pursuant thereto as permissible under section 27 of the Evidence Act. Towards this end, the prosecution relies on certain

recoveries made at the instance of Sunder (A-1), as documented vide seizure memo (Ex PW27/J to PW27/L).

61. PW36 deposed that Sunder (A-1) had led him, and the witnesses, to a pond in village Saboli and pointed out a place where blood stained clothes had been dumped. According to him, a local resident named Suresh had agreed to join in the effort and, with his assistance, a plastic bag was taken out from the pond which was found to contain a black colored trousers, a light grey colored trousers, one pajama, one quilt cover, one blouse and one lady's shirt (collectively Ex P3), all bearing blood stains which were seized, after being dried up and duly sealed in a parcel, vide seizure memo (Ex PW27/J), attested by the said local resident Sanjay, besides by PW35, PW33 and PW27. It is also stated that Sunder (A-1) had led the Investigating Officer to the house of Suresh (PW-27), where the room on the upper floor was in his tenancy and got recovered trousers (Ex P2) bearing blood stains which had been kept concealed under stone slabs close to the western wall of the courtyard which was also sealed in a parcel and then seized vide memo (Ex PW27/K) in the presence of PW35, PW33 and PW27. PW36 testified further that Sunder (A-1) had led him and the witnesses to a place near railway track on the north-west direction of the house of Suresh (PW-27) and got recovered a polythene bag which was found containing an iron *tawa* with wooden handle (hot plate) (Ex.P-1) which was found to contain blood stains and strands of hair which was seized after being sealed as per memo (Ex PW27/L) attested by PW27, PW33 and PW35. All the above-mentioned witnesses have deposed confirming the said recoveries.

62. Placing reliance on *Mustkeem v. State of Rajasthan*, (2011) 11 SCC 724, it has been argued on behalf of appellants that the prosecution cannot be allowed to seek reference to be made to the disclosures attributed to the two appellants about the relevance of various recoveries, particularly the identity of the person (s) to whom the recovered blood-stained clothes belonged or the use of *tawa* (Ex.P-1) as the weapon of offence.

63. In our considered opinion, there is no quarrel with the proposition that under Section 27 of the Evidence Act, it is the information leading to the discovery, which is admissible and the prosecution cannot present as its evidence, the opinion formed by the investigating agency on such discovery. In this context, we may refer to the observations in the celebrated case of *Pulukuri Kotayya v. King Emperor*, AIR 1947 PC 67, explaining the scope and ambit of Section 27 of the Evidence Act, as under:-

“... it is fallacious to treat the ‘fact discovered’ within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that ‘I will produce a knife concealed in the roof of my house’ does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added ‘with which I stabbed A’,

these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant”.

64. We, thus, take note of only the proof of recoveries made pursuant to the facts discovered on the basis of information that had been gathered from the special knowledge of the appellant.

65. We have gone through the evidence of the witnesses for the prosecution testifying to the recoveries of the blood-stained clothes (collectively P3) from the pond, blood-stained trousers (Ex P2) from its place of concealment within the house where tenanted room was in the possession of Sunder (A-1) and *tawa* (Ex P1) from the open place near the railway track, close to the tenanted premises. No discrepancies worth consideration have been shown to exist. There is no reason why the evidence about these recoveries should be discarded.

66. According to the prosecution case, the clothes (collectively Ex P3) included a blue trouser which was of the deceased and had been taken off the dead body and used, with the rest of the clothes taken from the place, to wipe off the blood stains from inside the tenanted room to destroy evidence. It was further claimed that the trousers (Ex P2) recovered from beneath from the stone slabs was of Sunder (A-1) and had received the blood stains at the time of the fatal assault on the deceased. There is no admissible evidence about the two said trousers to be of the deceased or of A-1 respectively, in as much as the prosecution makes allegations to such effect only on the basis of disclosures attributed to the accused which cannot be taken into account. The fact, however, remains that these

articles of evidence, recovered at the instance of Sunder (A-1) continue to be relevant in light of the report of the FSL to which we now refer.

67. The evidence of HC Jai Bhagwan (PW7) and HC Pradeep Kumar (PW23), the two police officials who had looked after the work of MHC(M) in the police station, Kotwali during the relevant period proves that the above-mentioned various exhibits were sent, in due course, to the FSL. The reports of FSL (Ex PW36/E to PW36/F) collectively show that the sealed parcels containing various exhibits were received with seals intact. Upon DNA profiling being done, it was found that the shirt (Ex PX) recovered at the instance of Budha (A-2) vide seizure memo (Ex PW35/D), trousers (Ex P3) recovered at the instance of Sunder (A-1) vide Ex PW27/J and *tawa* (Ex.P-1), also recovered at the instance of Sunder (A-1) vide Ex PW27/L, matched with the DNA profile drawn from the sample of the blood of the deceased preserved during autopsy.

68. The *tawa* (Ex P1) seized at the instance of Sunder (A-1) vide Ex PW27/L was taken before the autopsy doctor (PW-25) by the investigating officer (PW-36) on 05.03.2009 with request (PW36/A) for his opinion regarding possible use in the assault on the person of the deceased for causing injuries noted in the autopsy report. The opinion given by the autopsy doctor thereupon (vide Ex PW36/B) has been proved by the IO. It answered the query in affirmative indicating that the said article could have been the possible weapon of assault.

69. In our view, the prosecution has succeeded in bringing home the following facts and circumstances:-

- (i) M/s Simplex Infrastructure Ltd. (hereinafter referred to as “*the company*”) with office at 82-83, Baikunth, Second Floor, Nehru Place, New Delhi, had been awarded a project of Commonwealth Games, at a site behind *Shanti Van*, near PAC Camp, Delhi, and for the purpose of the said project, had taken on hire, in February, 2009, a number of tractors with trolleys;
- (ii) The tractor drivers engaged by the company included Manoj Kumar (the victim), appellant Buddha (A-2), Chhotu (PW17) and Tejpal (PW18).
- (iii) Manoj Kumar (the victim) was engaged as the driver of the tractor no.UP-13P-8605 (hereinafter “the tractor of the victim”), owned by his father Suraj Pal (PW2), its services having been availed by the company from 13.01.2009 onwards;
- (iv) The appellant Budha (A-2) had been engaged as a driver of tractor no.UMC-3985 make “Escort”, (hereinafter “the Escort tractor”), owned by Raj Kumar (PW3), its services having been taken by the company from 14.02.2009 onwards;
- (v) The appellant Budha (A-2) was introduced as the driver on the Escort tractor, on the request of its owner Raj Kumar (PW3), by the victim, to the project site on 07.02.2009;
- (vi) Though it was the normal practice for the tractor drivers to leave their respective tractors after finishing the duty for the day at a place under Geeta Colony flyover, on 10.02.2009 at about 08:00 PM, the victim was seen going away from the said place on his tractor with Budha (A-2) in the direction of Geeta Colony flyover;

(vii) On 10.02.2009 at 10:10 PM, the victim called his maternal uncle Nem Pal (PW19) on his mobile phone no.9871047440 from phone no.69573323 of PCO booth manned by Tika Ram (PW9), in village Saboli within the jurisdiction of P.S. Harsh Vihar, adjoining Loni area of the State of Uttar Pradesh, telling him that the driver of the Escort tractor, who had been with him till sometime ago, had left him alone and he was feeling apprehensive and in response to this Nem Lal (PW19) asked him (the victim) to somehow return home;

(viii) After the above mentioned telephonic contact, the victim was not heard from or seen alive;

(ix) On 12.02.2009 at 02:15 PM, Nem Pal (PW19) lodged information through PCR vide DD no.19-A (Ex.PW6/A) with police station Kotwali, whereupon inquiry was made by HC Sata Nand (PW32), *inter-alia*, from Tika Ram (PW9) confirming that the missing person (the victim) had made the aforementioned phone call to Nem Pal (PW19) from his PCO booth, in which view at the instance of HC Sata Nand (PW32), “zero FIR” (Ex.PW8/A) was registered at 09:00 PM on 13.02.2009 in police station Kotwali and made over to police station Harsh Vihar for investigation of offence under Section 365 IPC;

(x) Sunder (A-1) is the nephew of Munesh (PW16), resident of house no.1074, Gali No.11, village-Saboli, Pratap Nagar, Delhi, Budha (A-2) also being a relative, he being husband of the niece of Munesh (PW16);

(xi) Sunder (A-1) had been living as a tenant in a room, on the first floor in the house of Suresh Kumar (PW27) in D-Block, Pratap Nagar, Saboli, Harsh Vihar, Delhi.

(xii) On 13.02.2009, on the request of Sunder (A-1) at about 08:00-08:15 PM, Munesh (PW16) took the help of his acquaintance Manohar (PW15), also a local resident of village Saboli, to get the tractor of the victim parked on a vacant plot of land in front of house of Subhash (PW22), another resident of C-Block, Pratap Nagar, Saboli, Loni border, Delhi, explanation of Sunder (A-1) at the time being that the tractor belonged to Budha (A-2), who had gone away to some relative and, thus, the vehicle had to be located at some safe place;

(xiii) On 14.02.2009, at 08:15 AM Subhash (PW22) saw the tractor (of the victim) parked on the vacant plot of land owned by his brother-in-law and, upon not being able to trace its owner, he informed the police by making a phone call on number 100, which information reached police station Harsh Vihar at 08:35 AM and was reduced into writing vide DD no.10-A (Ex.PW13/A), during inquiry into which HC Sant Kumar (PW14) assumed it to be a matter pertaining to adjoining police post Pipe Line of police station Loni of U.P. and, thus, handed over the tractor to the officials of U.P. police, it having been entered in the *malkhana* of police station Loni, U.P. (vide Ex.PW5/A) on same date;

(xiv) Upon the police station Harsh Vihar returning the matter to police station Kotwali on 14.02.2009, FIR no.39/2009 (Ex.PW8/B)

was registered on the basis of statement of Nem Pal (PW19) in police station Kotwali on 14.02.2009;

(xv) On 26.02.2009 the tractor (of the victim) was taken over by the investigating officer from the U.P. police and connected to the case, at hand;

(xvi) On 17.02.2009, at about 01:00-02:00 PM, Parvesh (PW20) resident of house in gali no.1, D-Block, Pratap Nagar, village-Saboli, police station Harsh Vihar, Delhi, noticed a crowd having gathered in front of her house and, upon reaching the place, she saw the dead body of the deceased (at that stage unidentified), lying beneath a heap of garbage, the place being behind the property of Suresh Kumar (PW27) on the first floor of which Sunder (A-1) was living as a tenant at that time;

(xvii) Upon Parvesh (PW20) informing the police, the input was passed on by police station Harsh Vihar to police station Kotwali and, during the investigation that followed, it was confirmed, *inter-alia*, by Nem Pal (PW19) and Dhirender Raghav (PW33), the maternal uncle and brother respectively of the deceased that it was the dead body of Manoj Kumar, who had been missing from the night of 10.02.2009;

(xviii) After recovery of the dead body, during inspection of the area, investigating officer found blood trail on the staircase leading up to the tenanted room in the possession of Sunder (A-1), in the house of Suresh Kumar (PW27) and upon finding the door locked, forced it open, the inspection of the tenanted room revealed that it had been a scene of violent assault, the floor and walls of the room

along with furniture (cot) bearing blood-stains, whereupon exhibits in the form of blood-stained earth and blood-stained leg of the cot etc. were seized;

(xix) The autopsy report (Ex.PW25/A) prepared by Dr. Akash Jhanjhee on 18.02.2009, confirmed that the victim had been subjected to violent assaults the death was homicidal and had occurred on 10.02.2009 due to cranio cerebral damage, consequent upon blunt force impact to the head;

(xx) Budha (A-2) was arrested on 21.02.2009 from near old bridge of river Yauma and pursuant to his disclosure, and at his instance, wallet (Ex.PX-1) of the deceased, and a blood-stained shirt (Ex.PX) were recovered from a place close to the old police post on the north side of site office of Simplex Infrastructure company, in addition to polythene bag containing blood stained clothes (collectively Ex.P3);

(xxi) Sunder (A-1) was arrested on 27.02.2009 from Mandoli Chungi, Sewa Dham and pursuant to his disclosure, and at his instance, blood-stained clothes (collectively Ex.P-3), blood-stained trousers (Ex.P-2) and *tawa* with iron handle (Ex.P-1) were recovered from three different places, viz. a pond in village Saboli, from under the stone slab of the house where Sunder (A-1) was living as tenant, and from near railway track, village Saboli respectively; and

(xxii) The tests done in the FSL, on the various exhibits showed that DNA drawn from the blood stains on the shirt (Ex.PX) recovered at the instance of Budha (A-2) besides the trousers

(Ex.P-3) and *tawa* (Ex.P-1) both recovered at the instance of Sunder (A-1) match with the DNA drawn from the blood sample of the deceased.

70. Reliance is placed by the learned counsel for Buddha (A-2) on *Rishipal vs. State of Uttarakhand*, (2013) 12 SCC 551, to urge that the “last seen” evidence be discarded. It is his argument that the time of death not having been established with exactitude, the Court ought not infer that the said appellant had been the last in the company of the deceased so close or proximate in terms of time to the fatality as to exclude the possibility of any other person committing the culpable homicide.

71. It is well settled that “last seen” theory comes into play, when the gap between the time when the deceased was last seen alive in the company of the accused and the time when he was found dead in unnatural circumstances, is so small that the probability of any other person being the author of culpable homicide must be excluded. Such theory is not one of universal application. By itself, it may not always be sufficient to sustain a conviction. It is pressed into service when the case of culpable homicide is presented on the basis of circumstantial evidence. In cases where positive evidence cannot be mustered to conclude that the possibility of other persons coming in between, is non-existent or where the evidence about “last seen” is the solitary circumstance, the drawing of inference of guilt might generally be hazardous. In order to complete the chain, leaving no option for the court except to hold that the accused is guilty of the offence with which he is charged, such conclusion must find

support from other links in the chain of circumstances [*Arjun Marik v. State of Bihar*, 1994 Supp (2) SCC 372; *Godabarish Mishra v. Kuntala Mishra*, (1996) 11 SCC 264; *Mohibur Rahman v. State of Assam*, (2002) 6 SCC 715; *Bodhraj v. State of J & K*, (2002) 8 SCC 45; *Bharat v. State of M.P.*, (2003) 3 SCC 106; *Jaswant Gir v. State of Punjab*, (2005) 12 SCC 438 and *State of Goa v. Sanjay Thakran*, (2007) 3 SCC 755].

72. As noted above, the “last seen” evidence made available through the depositions of Chhotu (PW17) and Tejpal (PW18) is not the solitary circumstance on which prosecution rests its case. In fact, the “last seen” theory is presented only as the starting point showing the unusual manner in which the deceased was seen going away with the tractor, in the company of Budha (A-2), on the night of 10.02.2009, his presence with the deceased being confirmed upto the stage when the two of them had reached village Saboli, where the victim would die on the same night. The prosecution has cemented the charge on the basis of other circumstances indicative of continued involvement of Budha (A-2) and his associate Sunder (A-1), in dealing with the victim, and his tractor, in the wake of the event concerning “last seen”.

73. The victim had not been heard from or seen alive by those with whom he would ordinarily be in contact. At the time of going missing, in the company of Buddha (A-2) he was driving the tractor of his father. The tractor was in the control and possession of his close relative Sunder (A-1) on the night of 13.02.2009 when he (A-1) had arranged for it to be parked, at the instance of Munesh (PW-16) by his acquaintance Manohar (PW-15) on a vacant part of land in village Saboli for safe keeping. On 17.02.2009 the dead body of Manoj (the victim) was found in the heap of

garbage behind the property where Sunder (A-1) had been living as a tenant. The room in the tenancy of Sunder (A-1) was a scene of gory violence. The irresistible conclusion from these facts and circumstances is that Manoj (the victim) had been brought to the tenanted room in occupation of Sunder (A-1) where he was subjected to physical assaults. The autopsy report has shown that a number of injuries were suffered by Manoj (the victim) including blunt force impact on his head that caused internal hemorrhages and proved fatal. Having regard to the fact that the tractor of the victim was being handled all this while by Sunder (A-1) and Buddha (A-2), it can be safely inferred that the said vehicle must have been taken away from the possession of Manoj (the victim) by these two individuals. The wallet (Ex.PX-1) of the deceased was recovered at the instance of Buddha (A-2), pursuant to his disclosure, from a deserted place close to the old police post on the north side of the office of the company. But for the disclosure attributed to Buddha (A-2), the said recovery would not possibly have been effected. The blood stained shirt (Ex.PX), blood stained clothes (collectively Ex.P3), blood stained trousers (Ex.P2) and blood stained *tawa* (Ex.P1) as recovered, again pursuant to the disclosures made by the two appellants, only reinforce the impression as to their complicity in the crime.

74. Thus, the chain of circumstances is complete and admits no hypothesis other than that of the guilt of the two appellants. In our view, the learned trial court has appreciated the evidence adduced by the prosecution appropriately and has reached the correct conclusions. The impugned judgment does not suffer from any error or illegality.

75. In the result, the appeals are found devoid of substance and are dismissed. The convicted appellants be informed by serving a copy of this judgment on each of them through Superintendant Jail.

(R. K. GAUBA)
Judge

(SANJIV KHANNA)
Judge

NOVEMBER 04, 2015
ss/ak/vld

