

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

+ **CRL.A.584/2014**

Reserved on: 01.05.2015

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Date of Decision: 28.05.2015

STATE

..... Appellant

Through: Mr. Varun Goswami, APP for the
State.

Versus

SURENDER SAINI & ANR.

..... Respondents

Through: Mr.Jitender Sethi & Mr.Haimendra
Jailija, Advs.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE ASHUTOSH KUMAR

ASHUTOSH KUMAR, J:

1. The present appeal on behalf of the State is directed against the judgment and order of acquittal dated 05.03.2012 passed by the Additional Sessions Judge-cum-Fast Track Court (Central), Tis Hazari Courts, New Delhi in Sessions Case No.98/2009 (reference FIR No.138/2008 PS Pahar Ganj) whereby the Respondents have been acquitted of the charges under Sections 302/364A/34 of the Indian Penal Code ('IPC' for short).

2. The Respondents, employees of Oxford Management Services, a Recovery Agency associated with HSBC Bank, had been chargesheeted and tried for the offence of killing Sajauddin (deceased), another employee of Oxford Management Services, who, for the last 5 months had been working as a field operator in the team of one of the Respondents namely Surender Saini (Respondent No.2). Vikas Mendiratta, owner of the aforesaid Oxford Management Services was also made an accused but was declared a proclaimed offender.

3. According to the FIR (Ex.PW.25/A), registered on the statement of one Harvinder Singh Sodhi (PW.5), on 13.05.2008 a telephone call was received by Surender Saini (Respondent no.2) from Noida Branch of HSBC Bank intimating that Rs.22,000/-, for which receipt was issued by Oxford Management Services, had not been paid to the bank. The receipt was purportedly issued by the Sajauddin (deceased). This information was given to Vikas Mendiratta, the proprietor of Oxford Management Services, on telephone, who instructed for calling Sajauddin (deceased) in the office of Oxford Management Services. At about 4 pm, Ajay Kumar (PW.2), another employee of Oxford Management Services also

came to the office and started working. The personal belongings of Sajauddin were searched and he was threatened of dire consequences in case he did not return the money. On the instructions of Vikas Mendiratta (P.O.), the Respondents made Sajauddin sit in the office till he arrived to speak with him. After about sometime, the deceased expressed his urge to urinate. He was taken to the bathroom by the aforementioned Respondents. Sajauddin did not come out of the bathroom for longer than the expected time. In the meanwhile, there was a commotion and a huge crowd had gathered on the ground floor, beneath the office building as a person had fallen down from the building. PW.5 had stated that in fact Sajauddin had fallen down from the third floor and had suffered serious injuries. Ajay Kumar Suneja (PW.2) also came and Harvinder Sodhi (PW.5) and aforesaid Ajay Kumar Suneja (PW.2) took Sajauddin to Ganga Ram Hospital. It was specifically alleged by PW.5 that the Respondents, had on the instructions of Vikas Mendiratta, kept Sajauddin (deceased) confined in the office for some time and made him sign a few papers.

4. Sajauddin was thereafter referred to Safdarjung Hospital. After about 5 days i.e. on 18.05.2008, he succumbed to the injuries.
5. Sub-Inspector Yogender (PW.37) along with Constable Mahesh Kumar (PW.16), after learning about the incident (DD No.39A at PS Pahar Ganj with regard to the person having fallen down from the building) reached the building of Oxford Management Services located at C-52, flatted factory complex, Jhandewalan, New Delhi. They learnt that the injured has been taken to Ganga Ram Hospital. Ct. Mahesh stayed back at the place of occurrence whereas Insp. Yogender proceeded for Ganga Ram Hospital. The MLC of Sajauddin was obtained by him (Ex.PW.8/A) which disclosed that Sajauddin was unfit for making any statement. The statement of PW.5 was thereafter recorded at the Ganga Ram Hospital.
6. Initially a case was registered under Sections 323/330/342/309/34 of the IPC against the Respondents and Vikas Mendiratta. After the death of the Sajauddin (deceased), sections 302 and 364A IPC was added along with other sections of the IPC.

7. The case of the prosecution swindles on the oral dying declaration of Sajauddin before his relatives, while undergoing treatment in the hospital, that he was assaulted, threatened and thrown out of the window of the bathroom from the 3rd floor, even though money was not embezzled by him.

8. The other material evidence which has been relied upon by the prosecution is the video clipping of the statement given by the deceased on 15.05.2008 which was recorded by Mukesh Kumar Yadav (PW.19) and Abhinav Upadhyay (PW.20), both of whom, at the relevant time, worked with the news channel, Star News.

9. In order to appreciate the contention of the State that the deceased was kidnapped, confined in the office, assaulted, threatened and thereafter thrown out of the window of the bathroom situated on the third floor of the building, leading to his death after about 5 days, we would be examining testimonies of the witnesses before whom the deceased made such statement. The Respondents have taken the plea before the Trial Court that the deceased, while trying to escape from the office of Oxford Management Services through the window of the bathroom, fell down

accidently, resulting in fracture of femur bone which proved fatal. The other plea of the Respondents is that the video clipping (Ex.PW.15/X) is required to be tested on the touchstone of admissibility in terms of Section 65B of the Indian Evidence Act, 1872 and in the alternative, whether the contents of such recording can be relied upon as being correct and truthful statement by the deceased.

10. Before we embark upon such an exercise, we would like to refer to the evidence of Dr.G.A. Sunil (PW.24) who conducted the post mortem on the person of the deceased. PW.24 has testified that the deceased was brought to the casualty of Sir Ganga Ram Hospital on 13.05.2008 at around 08:30pm with alleged history of “fall from height”. Thereafter, the deceased was shifted to Safdarjung Hospital where he expired on 18.05.2008 at about 12:35 pm. On examination of the body, swelling with underlying fracture of both femur, middle part with extravassation and haematoma around the fracture site was found. However, no other fresh external injury was present on the body. On internal examination, 4th to 7th rib on the right side and 3rd to 6th rib on the left side were found to be fractured. Lungs were oedematous and was found to be congested

with petechial hemorrhages. For ascertaining the cause of death, histopathology tests were required and for that, samples of brain and lungs were preserved in formalin for detection of fat embolism. The cause of death was initially kept pending till the reports were made available. On 27.09.2008, PW.24 opined the cause of death as “fat embolism” as a result of fracture of bilateral femur bones. The post mortem report is Ex.PW.24/A whereas the opinion of PW.24 is Ex.PW.24/B.

11. On being cross examined, PW.24 has clarified that fat embolism is a common complication in a long bone fracture. Fracture of femur bone, being the longest single bone in the body, led to accumulation of fat cells in the blood leading to multiple disorders with negative prognosis, compendiously called “fat embolism”.

12. From the deposition of PW.24, it is firmly established that the deceased did not die a natural death. Death was because of the "fat embolism" which was occasioned by fracture of femur bone. This could have been caused either by accidental fall or perhaps when the deceased was forcibly thrown out from height. The absence of any other ante

mortem injury on the person of the deceased, to a large extent, removes the doubt and possibility of the deceased being forcibly thrown out.

13. We would now refer to the testimonies of the witnesses who were told by the deceased about the cause of the injuries.

14. Smt.Yasmin, (PW.1) wife of the deceased has deposed that on 13.05.2008 at about 11 am, her husband (deceased) received a telephone call asking him to come to the office. He immediately left for the office. She has further deposed that her sister-in-law came to her house and told her that her maternal uncle, Md.Abdul Aziz (PW.4) had received a telephone call from Jhandewalan asking him to come to the office of Oxford Management Services with Rs.60,000/- and take away Sajauddin. She was further informed by her sister-in-law that when Md.Abdul Aziz (PW.4) insisted, he was allowed to talk to Sajauddin on telephone. Sajauddin apparently had told to PW.4 on telephone that even though he had not misappropriated money, he was being charged with theft and was being beaten up. Thereafter, the telephone line snapped.

15. PW.1 has stated that even prior to 13.05.2008, the deceased had expressed a sense of insecurity and felt that he could be falsely

implicated by the office staff. She was informed that from Ganga Ram Hospital, Sajauddin was taken to Safdarjung Hospital. She visited Safdarjung Hospital on 14.05.2008 where her husband (deceased) wept and told her that Ajay, Saurabh, Sodhi, Mahender, Rajesh Sharma, Ravi Sharma and Vikas Mittal had assaulted him.

16. What is noticeable is that during the period when the deceased was in hospital i.e. from 13.05.2008 to 18.05.2008, her statement was not recorded by the police. The police recorded her statement only on 18.05.2008, i.e. after the death of the deceased. She admits that the statement of the victim was not recorded as there was no permission of the doctor. She also confirmed that till the death of her husband, the doctors had not given any permission to record the statement of the victim. She has denied the suggestion that deliberately no statement was made either by the deceased or by her because of fear of their being implicated by the police.

17. Kasim (PW.3), brother of the deceased has deposed and stated about Md.Abdul Aziz (PW.4) having been called from the Jhandewalan office to bring Rs.60,000/- in order to secure the life of Sajauddin. He

has further deposed, that in the hospital, the deceased told him the names of Ajay, Vikas Mendiratta and Saurabh alleging that they had beaten him and had thrown him from the third floor of the office. The deceased took the names of the others also but PW.3 could not remember other names. However, he had made a note of the names on a piece of paper. Kasim (PW.3) admitted having called PW.19 and PW.20 from Star News who recorded the statement of Sajauddin on 15.05.2008. On being cross examined, PW.3 admitted that the names of the assailants were not told to him; rather the deceased disclosed it to one Pappu, who in turn told him the names. However, PW.3 denied the suggestion that while trying to escape from the bathroom window, the deceased had accidentally fallen down.

18. Md. Abdul Aziz, PW.4 (maternal uncle of PW.1) has deposed that he had received a telephone call on his mobile phone informing him that Sajauddin had misappropriated money and for securing his release, Rs.60,000/- was required to be paid. On his insistence, he was made to talk to the deceased on telephone, who had cried and told him that the Respondents were beating him. Thereafter, the telephone line got

disconnected. PW.4 has confirmed the fact that in the hospital the deceased had disclosed and named the Respondents, who had assaulted him. The deceased had expressed fear that if he would survive, he might be killed. PW.4 has categorically asserted that the deceased told him that Respondents had thrown him down from the window of the office. However, PW.4 had admitted that no effort was made by him to call the police or to file any written complaint.

19. Md. Abdul Wahid and Md. Azad, who are related to the deceased, have been examined as PW.13 and PW.15 respectively. They have spoken about names of office staff including the Respondents which were disclosed to them by the deceased, as persons who had thrown him from the window of the bathroom.

20. On analysis of deposition of the aforesaid witnesses, it becomes apparent that except Md. Abdul Aziz (PW.4), nobody else remembered the exact statement of the deceased. The names of the perpetrators are different. PW.1 has taken the name of persons other than the Respondents. Kasim (PW.3) was not informed by the deceased about the names of the persons who had thrown him from the bathroom window;

rather the deceased had spoken to one Pappu who in turn had informed PW.3. PW.13 and PW.15 have not made any categorical statement about the names disclosed by the deceased as to who actually had assaulted and how and by whom the deceased was thrown out of the window. Their statements under Section 161 Cr.P.C. were recorded after the death of the deceased, though all of them had visited the injured in the hospital, during the period when the deceased was admitted and had received treatment.

21. Md. Abdul Aziz (PW.4) is the only person who appears to have had a talk with the deceased while he was being confined in the office and was being questioned about the money which had not been deposited in the HSBC bank. The names of the malefactors are same and identical to the names given by Harvinder Sodhi (PW.5), the informant, in the FIR.

22. Harvinder Sodhi (PW.5) has not supported the prosecution version at the trial and has become hostile. In complete juxtaposition of his averments in the FIR, he has deposed that he came to the office on 13.05.2008 and there he learnt that Sajauddin had fallen from the third floor.

23. Vijay Singh, (PW.18) is a customer who deposed before the Trial Court that he had paid Rs.22,000/- to the deceased for which a receipt was granted to him. That amount had to be deposited in the HSBC bank. He had received a call from the bank that the money has not been deposited. This led him to inquire from the office of Oxford Management Services. It was then that Sajauddin (deceased) was called to the office to explain as to why the money which was received by him was not deposited. From the testimony of Vijay Singh (PW.18), it is very clear that the deceased worked for the Oxford Management Services which was a recovery agency for HSBC bank. It also establishes that there were allegations of embezzlement of money, which was paid to Sajauddin (deceased) but it was not deposited with the bank.

24. This fact coupled with the other circumstances, do point towards happening of one event that the deceased was called to the office of Oxford Management Services and was asked for clarification. We are inclined to accept the version of the prosecution that the deceased was confined in the office of Oxford Management Services for some time and

that too, at the instance of the Respondents whose names have been taken by Harvinder Singh Sodhi (PW.5) in the FIR.

25. Mukesh Kumar Yadav (PW.19) has stated that he recorded the interview of Sajauddin (deceased) in his mobile phone on 15.05.2008. He has stated that he along with Abhinav Upadhyay (PW.20) had gone to Safdarjung Hospital for covering a news. They had met 2 or 3 persons there who had informed them about the incident at Jhandewalan. He affirmed that he took the video clipping of Sajauddin with the help of his mobile phone. He had handed over the bill and cash memo of the mobile phone which was seized by the police vide seizure memo Ex.PW.19/A. Before the Trial Court, he identified the deceased in the video clipping (VCD Ex.PW.15/X). The video referred to above was played in the court room during the course of the trial.

26. Abhinav Upadhyay (PW.20) has also deposed that he reached the Safdarjung Hospital along with PW.19 where the interview of Sajauddin was recorded by Mukesh Kumar Yadav (PW.19). He had viewed the video clipping (Ex.PW.15/X) and identified it to be the same which was shot by them on the mobile phone of Mukesh Kumar Yadav (PW.19).

He confirmed the fact that questions were put to the deceased in his voice and the answers were given by Sajauddin.

27. The transcripts of the aforesaid video clipping were prepared in the presence of two witnesses namely Vinod Kumar Gupta (PW.11) and Parmod Yadav (PW.29). The transcript is Ex.PW.29/A.

28. SI Raman Kumar (PW.33) has stated that on 23.03.2009, he was directed by the IO of the case to prepare the transcript of the video clipping. He was handed over the CD in the presence of Vinod Kumar Gupta (PW.11) and Parmod Yadav (PW.29). He played the CD on the main server and prepared the transcript (Ex. PW29/A). He testifies to the fact that due care was taken during the preparation of the transcript of the CD. He has further deposed that he has a diploma degree in cyber law from Indian Law Institute and had the expertise to prepare the transcript of a CD. He also gave a certificate under Section 65B of the Indian Evidence Act (Ex.PW.33/K). The certificate referred to above is as under:

“It is certified that the transcript version of CD has been prepared through normal playing of the CD in question 'supplied by Star News the video out put was conceived by my senses as a

computer out put and the computer, Sound speakers and the monitor displaying video output was under my lawful control at the time of generating this video out put and derived from the computer in the ordinary course of the playing a video and the computer and other accessories were operating properly at the time of generating this electronic record into a documentary form. The Transcript prepared in such manner bears my signature. I possess a Diploma in Cyber Law from Indian Law Institute and well aware of control and handling of Computers.”

29. Learned counsel for the Respondents objected to the admissibility and the correctness of the evidence of PW.19 & PW.20 on the ground that no such interview could have been taken as the injured was unfit and doctors had not permitted any such statement to be recorded. The investigating officer SI Yogender (PW.37) and SI Ajay Karan Sharma (PW.35) had been visiting the doctors but no fitness certificate and clearance was given by them. Alternatively, it has been urged that the statement given by the deceased was not a truthful statement as he has completely denied that there was any monetary aspect for which he had been called in the office. A false statement was made by the Sajauddin (deceased) that the dispute regarding money was with somebody else and he was wrongly blamed for that. By referring to the transcript, it was argued that the Sajauddin (deceased) did not name any of the

Respondents; rather he took the names of Mahendra Sodhi, Rajesh, Vikas and many other persons.

30. With respect to the admissibility of the VCD, learned counsel for the Respondents submitted that Mukesh Kumar Yadav (PW.19) claims that he had recorded the interview of the deceased on his mobile phone and thereafter the video clipping was transferred through Bluetooth to FCP (final cut proof) in the office of Star News. The CD was telecast by the Star News on 20.05.2008, whereas the FSL report (Ex.PW.22/B) mentions the CD to be a “post production edited video”. It was, therefore, only imperative for the prosecution to have produced the original CD. The certificate under Section 65B of the Indian Evidence Act given by PW.33 has also been doubted, as such a certificate could have been given by the concerned authorities of the Star News, who could only have testified that there was no tampering with the original clipping.

31. It has been pointed out by the Respondents that with respect to the duration of the video tape, the witnesses namely PW.19, PW.20, PW.11 and PW.33 have given different assessment. SI Raman Kumar (PW.33)

has stated that he had prepared the transcript on 23.02.2009. On the other hand Insp. Om Parkash (PW.38) deposed that CD had remained in the office of FSL, Rohini from 09.02.2009 till 31.03.2009. If PW.38 is believed, then it was not possible for SI Raman Kumar (PW.33) to have prepared the transcript of the CD on 23.02.2009.

32. After going through the testimonies of the PW.19 and PW.20, it becomes apparent that they were told about the incident in which the deceased received injuries, by Md.Kasim (PW.3) when they had gone to the Safdarjung Hospital to cover some news. While the deceased was being taken from one ward to the other, PW.19 & PW.20 got the opportunity of taking the interview of the deceased, but without obtaining the permission of the hospital authorities or the doctors. Be that as it may, the mobile telephone of PW.19 through which the clipping was shot, was seized by the police. The cash memo and bill with regard to the purchase of such mobile phone was handed over by PW.19, confirming the fact that such mobile phone was in the possession of PW.19.

33. In order to test whether the transcript is genuine or not, we played the VCD during the course of hearing the appeal. We carefully watched the contents of the VCD and we affirm that the transcript is the true rendition of the questions which were put to the deceased and his response to each one of them thereto.

34. From what we saw and heard on playing the CD, it becomes clear to us that Sajauddin (deceased) was in a position to speak, but whether his statement is to be believed as true and correct version appears to be debatable. Different names were taken by him and a general blame was put on the entire office, of which he was an employee. With respect to the question as to why was he being blamed for embezzlement when somebody else had taken away the money, he did not offer any satisfactory explanation. However, he has stated that he was thrown out of the window of the bathroom of the third floor of the building by 5 or 6 persons.

35. In order to test whether Sajauddin (deceased) was making a correct and truthful statement, we have gone through the deposition of Dr. C.P. Singh, Assistant Director (Physics), FSL Rohini (PW.22) who submitted

a report after inspecting the place of occurrence (Ex.PW.22/A). The report reads as under:

“The team comprising of Dr. C.P. Singh, A.D. (Physics), Sh. Shankar Narayanan, S.S.A. (Bio), Dr. Bharti Bhardwaj, S.S.A. (Physics) and Sh. Indresh Mishra, S.A. (Bio) inspected the toilet on 3rd floor from where the fellow employees stated that the victim had tried to escape from the window. The said window was having a grill of which a portion of the grill was found without iron bars. This absence of iron bars provides rectangular space measuring approximately 14" X 13". This rectangular space was approximately 35" above the floor surface. Through this rectangular space on the grill a person of even a well built can easily slip out by himself.

The team also inspected terrace above the toilet. In doing so the door leading to the terrace was made to open the lock by watchman. This door leading to the terrace was in some other block which was lead by a corridor. The place above the toilet and above the alleged place from where the injured body of the victim was recovered has been examined. There was no sign of struggling on the terrace above the alleged place of falling at the time of inspection.

The premises of Oxford Management Services could not be inspected as the door was locked and could not be opened.

On inspection of place where the victim was reported fallen it was observed that the alleged point of fallen on the ground is diagonally towards the back side of the building approximately 6 feet away from the wall & 9 feet away from' the portion of the window of the above mentioned toilet found. In other words it was not just below the rectangular space in the grill of the toilet window.”

36. The report referred to above, inter alia, states that through such rectangular space between the window, any person could easily slip out and escape. However, to throw out somebody from the said window of the size 14'' x 13'' would be impossible. From a conspectus of the deposition of aforementioned witnesses and the surrounding circumstances, we are not inclined to accept that the deceased was making a correct statement. Sajauddin, it is apparent, wanted to exculpate himself from the allegation of embezzlement and also implicate and blame the staff in the office for the injuries suffered. The manner and way in which the statement was made leave a sense of disquiet and unease as to the content and substance. We have also noticed the following:

- i. PW.1, PW.3, PW.4, PW.13 and PW.15 do not take the names of the Respondents only but others also, clearly suggesting that either they were never spoken to by the deceased or they did not exactly remember as to what was told to them by the deceased.
- ii. Surprisingly the statement of the deceased was not recorded by the police from 13.05.2008 to 18.05.2008 on the ostensible ground of

doctors not granting permission for recording any statement of the injured (MLC reports that the injured is unfit for statement)

iii. Statement of other witnesses were also not recorded during the period when the deceased was alive and undergoing treatment.

37. In this context, it would be profitable to look into the statement of Dr.Prasun Kumar, CMO, Ganga Ram Hospital (PW.8). He has stated that on the MLC of Sajauddin bearing no.2283, he had opined that the patient was admitted in hospital in emergency was unfit for statement. The MLC (Ex.PW.8/A) was prepared by Dr.Vikas Sharma and Dr.Prasun Kumar (PW.8) identified his handwriting.

38. On being cross examined, Dr.Prasun Kumar (PW.8) stated that he was not in a position to say as to who had given the history of the patient but admitted that on all the MLCs, it was mentioned that the patient was conscious and oriented when he was brought to the hospital.

39. As noted above, we got the video played and saw that Sajauddin was conscious and oriented while answering the questions of PW.19 and PW.20.

40. The conventional and age old supposition that a person on the brink of the death would not resort to falsehood has been questioned by the Respondents in the present case. It has been argued that the statement of the deceased, either before his relatives or before PW.19 & PW.20, on a plain analysis, would appear to be a spiteful statement. Though the statement is general in nature but the deceased has alleged that everybody in his office was responsible for his plight. Such a statement does not and cannot stand the test of credibility.

41. One can assume the correctness of sworn statement of a witness, when it has been tested by the mode of cross examination. But to blindly rely on the statement of a person who did not speak on oath, and such statements not having been put through the wringer of cross examination, would not be just and proper. The immanent weakness subjoining dying declaration, precedentially speaking, requires it to be gone over with fine toothcomb to avoid any flawed or incorrect findings.

42. In Tapinder Singh VS. State of Punjab (1970) 2 SCC 113, the Supreme Court by following earlier decision in Kushal Rao vs. State of Bombay, AIR 1958 SC 22 has reminded the courts that a dying

declaration should be subjected to a very close scrutiny. The following observations were made by the Supreme Court (SCC p.119, Para 5):

"The dying declaration is a statement by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death and it becomes relevant under Section 32(1) of the Indian Evidence Act in a case in which the cause of that person's death comes into question. It is true that a dying declaration is not a deposition in court and it is neither made on oath nor in the presence of the accused. It is, therefore, not tested by cross-examination on behalf of the accused. But a dying declaration is admitted in evidence by way of an exception to the general rule against the admissibility of hearsay evidence, on the principle of necessity. The weak points of a dying declaration just mentioned merely serve to put the court on its guard while testing its reliability, imposing on it an obligation to closely scrutinize all the relevant attendant circumstances."

43. We do feel that in this case, a fastidious and puritan approach of insulating the disclosure of the deceased with a nimbus of “truthful last statement” of a person, might lead to incorrect, awkward and perhaps unjust findings.

44. If we put the dying declaration of Sujjauddin to the litmus test, we find that the statement is motivated, conjured up for the purposes of seeking revenge and also for forging or creating a cloak over the fact that

Sajauddin (deceased) had made any attempt to flee and in that process had fallen down.

45. The fact that the deceased collected money from Vijay Singh (PW.18) stands established by the testimony of aforesaid Vijay Singh. It is but natural that when Vijay Singh was inquired about his dues, he checked up with the Oxford Management Services. This led to the identification of the deceased as the person who had collected the money, had issued receipt for the same and had not deposited the money collected with the HSBC Bank. The deceased was, therefore, called in the office for clarification or for retrieval of the money. In this background, truthfulness of the disclosure of the deceased before PW.19 and PW.20 that he was deliberately thrown down from the window, seems to be doubtful. However, prior to his interview to the Star News, the deceased had an occasion to talk to Md.Abdul Aziz (PW.4) on 13.05.2008 and may be other family members. It appears that during the period that the deceased was undergoing treatment, the Respondents contend that the deceased, thought of saving his own skin by blaming

each and every employee of his office. It is difficult for us to accept that the statement is factually correct and worthy of reliance.

46. Nevertheless, on the strength of testimonies of Vijay Singh (PW.18), Md.Abdul Aziz (PW.4) and the FIR, lodged by Harvinder Sodhi (PW.5), even though he has turned a volte face during trial, we have no difficulty in holding that the deceased was asked to come to the office for clarification/retrieval of money and he was detained there for some time.

47. The FIR, though not a substantive piece of evidence, is a document which comes first in setting the criminal law in motion. There could be myriad reasons, why PW.5 did not support the prosecution version. We cannot underplay the fact that PW.5 was the first person who made categorical statement immediately after the deceased fell down on the ground. In fact, there was no occasion for PW.5 to have falsely accused the Respondents who were his co-workers.

48. The fact that when deceased expressed his urge to go to the bathroom, he was escorted by the Respondents, speaks volumes about the

wrongful restraint and wrongful confinement of the deceased, even though temporarily.

49. Wrongful restraint has been defined under Section 339 of the IPC whereas wrongful confinement has been defined under Section 340 of the IPC.

"339. Wrongful restraint.—Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.

340. Wrongful confinement - Whoever wrongfully restrains any person in such a manner as to prevent that person from proceedings beyond certain circumscribing limits, is said “wrongfully to confine” that person."

50. The punishment for wrongful confinement and wrongful restraint have been set out in Sections 341 and 342 of the IPC respectively.

"341. Punishment for wrongful restraint.—Whoever wrongfully restrains any person shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

342. Punishment for wrongful confinement.—Whoever wrongfully confines any person shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both."

51. Had the deceased not been confined in the office or restrained from moving out, there would have been no occasion for the Respondents to have accompanied him to the washroom. But for the deceased being under wrongful restraint or confinement , he would have made his exit through the staircase, i.e. the normal exit route. The reason why he chose to slip out of the window, thus, is not difficult to perceive. He was restrained and confined. In order to come out of the captivity of the Respondents, the deceased tried to slip out of the window. Such unfortunate attempt to escape because of the conduct of the Respondents, proved to be his nemesis.

52. No separate charge has been framed by the Trial Court under Sections 341/342 of the IPC. However, the offences under these provisions of the IPC being of a less grave genere than either Section 302 or 364A of the IPC, no separate charge is required to be framed for convicting the accused for the lesser offences, in case such offences appear to have been made out from the evidence adduced.

53. Conscious as we are of the powers and restraints of the Appellate court, in reviewing the evidence and materials relied upon by the Trial

Court in returning the verdict of innocence, we hold the Respondents guilty under Sections 341/342 of the IPC.

54. Considering the fact that the Respondents have remained in custody for 3 years which is much more than the maximum punishment prescribed for the offences under Sections 341 and 342 of the IPC, there does not appear to be any requirement for sentencing them for the aforementioned offences. The interest of justice is more than subserved with the period of custody which the Respondents have already undergone.

55. With respect to the charges under Sections 174A and 364A/34 of the IPC, we are in an agreement with the findings of the learned Trial Court.

56. The Trial Court has dealt with those charges in paragraphs 46 and 46 of the judgment.

"46. Insofar as offence punishable under Section 364 A/34 IPC is concerned, I am also of the considered opinion that Prosecution has not been able to establish that deceased Sajauddin was kidnapped or abducted or detained by the accused persons or any ransom was asked for by the accused persons. Although the Prosecution has examined PW4 Abdul Aziz who had deposed that he received ransom call on

13.05.2008 from one Gagandeep who asked him to come to the office with Rs. 60,000/- and take Sajauddin, yet said deposition cannot be relied upon. It is pertinent to note that though PW4 states that he received the alleged ransom call on 13.05.2008, yet he admittedly neither informed the wife of the deceased nor approached the police with respect to the alleged ransom call received by him. On the other hand, PW1 Smt. Yasmeen, wife of the deceased stated that she was informed by Anisa, her Nanad that their Mama Abdul Aziz had received the aforesaid call from office at Jhandewalan. The said Anisa incidentally, has also not been examined by the Prosecution.

47. Insofar as offence punishable under Section 174 (A) is concerned, it was argued by Ld. Defence Counsels that Prosecution has failed to establish beyond reasonable doubt accused failed to appear before the court, as required by Proclaimed Offender issued under Section 82 (1)Cr. PC or that they committed offence punishable under Section 174 (A) IPC. It was argued that only witness examined in this regard is PW39 Sh. A.S. Aggarwal, the then Ld. ACMM-01, Tis - Hazari Courts, Delhi who proved his order dated 15.11.2008 Ex. PW39/B whereby accused persons were declared PO. PW16 and 33 deposed regarding arrest of the accused persons on 15.01.2009. However, the Prosecution did not examine any public witness from whom enquiries were made about the whereabouts of the accused persons by the police official who executed process under Section 82/83 Cr. PC against accused persons. The Prosecution even failed to examine the said Process Server as a witness, and the Defence was thus deprived of the opportunity to cross-examine the Process Server or to ascertain whether he had in fact found the residence of all three accused locked on the day of his visit."

57. Thus, the Trial Court judgment does not suffer from any infirmity with respect to the charges under Sections 302/264A/174A of the IPC and brooks of no interference. However, as stated earlier, we have, on the evidence available in the case, convicted the Respondents under Section 340 and 341 of the IPC but have deemed it expedient in the interest of justice in not sentencing them as they have already undergone custody for about 3 years during trial which is more than the prescribed maximum punishment for the said offences.

58. The appeal is, thus, partially allowed with the modification *pro-tanto*.

59. Trial Court Record will be sent back.

(ASHUTOSH KUMAR)
Judge

(SANJIV KHANNA)
Judge

MAY 28, 2015
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