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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 01.12.2014
Pronounced on: 27.02.2014

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CRL.A.740/2012

NAVEEN DABAS

.....Appellant

Through: Sh Jaideep Malik and Sh. Aman Saroha,
Advocates.

Versus

STATE

.....Respondent

Through: Sh. Varun Goswami, APP, for the State.
Insp. Lalit Kumar, PS Mandir Marg.
Insp. Sudhir Kumar, PS Begumpur.
SI Sandeep Tushir, PS Begumpur.

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CRL.A.1091/2012

REKHA

.....Appellant

Through: Ms. Anu Narula and Sh. Kunal Arora,
Advocates.

Versus

STATE

.....Respondent

Through: Sh. Varun Goswami, APP, for the State.
Insp. Lalit Kumar, PS Mandir Marg.
Insp. Sudhir Kumar, PS Begumpur.
SI Sandeep Tushir, PS Begumpur.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE VIPIN SANGHI

MR. JUSTICE S. RAVINDRA BHAT

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1. The present appeals preferred, by the accused challenge a common judgment dated 08.05.2012 by the Additional Sessions Judge, Rohini, Delhi in S.C. No.90/2011. By the impugned judgment, the appellants (hereafter referred to as “Naveen” and “Rekha”) were convicted for committing offences punishable under Section 302 read with Section 120-B and Section 201 IPC. Naveen was also convicted for the offence punishable under Section 27 of the Arms Act. Both of them were sentenced to undergo life imprisonment, besides other prison terms, fine and default sentences.

2. The deceased, Rekha's husband Vinod was repeatedly stabbed in the early morning of 23.03.2011. He was attacked by two men who had muffled their faces - when he was walking in the morning, in the vicinity of his neighbourhood. The police were alerted about this incident- as were the members of his family. Vinod was rushed to the hospital. He soon succumbed to his injuries. The incident remained a blind murder for some time since the police were clueless regarding the identity and whereabouts of the attackers. Claiming to have achieved a breakthrough, on the basis of the statements of Vinod's father, i.e. Vijay Singh, PW-6, who suspected his daughter-in-law's involvement in the killing, the police questioned her. The statements made by her in the course of questioning, led to her arrest and subsequent recovery of a burnt cell phone. Thereafter, Naveen too was arrested. Likewise, Mandeep, the third accused, (who was acquitted of all charges by the impugned judgment) was arrested. In the course of investigation, besides recording the statements of witnesses under Section 161 Cr.PC, the police also seized articles based upon the admissions made

by the accused. These included a burnt Samsung mobile phone at the behest of accused Rekha; a knife at the behest of Naveen. The police also obtained the mobile phone records of three mobile phone connections- all concededly owned by Naveen. The police filed a Final Report charging the accused for the offences they were ultimately tried for. Upon framing of charges by the Court, the accused pleaded innocence and claimed trial. During the course of trial, the prosecution, to support its allegations, relied upon depositions of 18 witnesses. Besides, documents such as the Crime Team report, call details supported by certificates under Section 65B of the Evidence Act, 1872; the Medico Legal Certificate (MLC) of Vinod; the Post Mortem Report (Ex.BW-7/A), Seizure memos, Personal Search Memos etc were also placed on record, and relied on.

3. The Trial Court, by its impugned judgment, held that the circumstantial evidence relied upon by the prosecution during the trial proved beyond reasonable doubt that the present appellants were guilty of the offences charged. A reading of the Trial Court's impugned judgment would reveal that its findings are founded largely upon the testimonies of PW-6 - Vijay Singh (deceased Vinod's father); PW-13 – Anjali (Rekha's friend and neighbour); the statements of police witnesses (PW-1, PW-14 and PW-18) who testified about the recovery of articles at the behest of Naveen and Rekha, and the mobile phone records. It is undisputed that Naveen knew Rekha because he used to teach her children (the daughter and a younger son). Equally, both the accused did not deny that one mobile phone (bearing no.9268001098) had been given by Naveen to Rekha. That cellphone connection was used by Rekha to routinely talk to him. The Trial Court

accepted the prosecution's allegations that in concert and unbeknown to anyone else, Rekha and Naveen used to communicate with each other through another phone number – 9289696849 and that even though the SIM card in respect of this connection was not recovered, the burnt mobile phone was recovered at the behest of Rekha's statements. The Trial Court was of the opinion that these circumstances proved beyond reasonable doubt that both the accused had a relationship and had conspired to kill Vinod - Rekha's husband.

Contentions of the appellants:

4. Sh. Jaideep Malik, learned counsel arguing on behalf of Naveen submitted that the findings of the Trial Court are based entirely on surmises and conjectures. It was submitted that the allegations levelled at Naveen was in all particulars identical as against Mandeep. Learned counsel highlighted the fact that the only incriminating article said to have been recovered and which possibly could have been attributed to Naveen was the knife. The Trial Court, however, rejected this part of the prosecution's allegations, when it concerned Mandeep. However, as far as it related to Naveen, the impugned judgment illogically proceeded to accept the same evidence to return a contrary conclusion to hold him guilty.

5. Learned counsel argued that there was no material on the record to substantiate the theory of conspiracy alleged to have been hatched by the accused to kill Vinod. Contending that whilst there was no dispute that Naveen had applied for all the three connections – 9289696849, 9268001098 and 9289695980, of which the instrument and the SIM were concededly recovered from his possession, there was no proof of the fact

that 9289696849 with the instrument was given to Rekha and none else. It was consistent case underlining throughout the trial and even in reply to the questions posed to Naveen under Section 313 Cr.PC in this regard that the said mobile phone connection with the SIM card was not with Rekha but with the accused Naveen's girlfriend. Learned counsel relied upon the evidence and the relevant questions to submit that Naveen had consistently maintained that the said mobile phone was with his girlfriend whose identity he did not wish to reveal and in the absence of any further evidence indicating that the mobile phone was with Rekha, no evidence of conspiracy with her could have been drawn. Learned counsel also highlighted the fact that several police witnesses had admitted during cross-examination that there were several individuals who had witnessed the attack on Vinod. The police, it was stated, was in a position to record the statement but failed to do so. This omission could not have resulted to the accused's disadvantage, and resulted in a finding based upon flawed analysis of circumstantial evidence which at best could be said to have raised strong suspicion but in the circumstance could not have amounted to proving the allegations beyond reasonable doubt. Stressing the importance of the rule applicable in circumstance-based evidence cases, i.e. that each circumstance should be proved beyond reasonable doubt as also to further link the circumstances which should be unbroken and that every hypothesis of the accused's innocence should be ruled out. Learned counsel stressed upon the judgments of the Supreme Court in *Sharad Birdhi Chand Sharda v. State of Maharashtra* 1984 (4) SCC 116 and *Hanumant Govind v. State of Madhya Pradesh* 1952 SCR 1091. It was urged that the prosecution sought to prove its case exclusively on the basis of police witnesses and in the absence of

any independent witnesses, both as to the incident as well as to the recovery of articles, the conviction recorded by the Trial Court is unsustainable in law. Learned counsel submitted that there were several material contradictions which undermined the prosecution story with respect to the recovery of the knife (Ex.P-8). In this regard, Sh. Malik, learned counsel highlighted discrepancies in the testimony of PW-18, who deposed that the knife was recovered near a dried canal bed (*sookhi nehar*) whereas PW-14 – the police constable – deposed that the knife was recovered from near the *sookhi nehar*, at a distance of one metre from the canal itself. PW-14, learned counsel emphasized, contradicted himself in the cross-examination by stating that the knife was recovered *from inside the canal after climbing down the embankment*.

6. Learned counsel urged that even though the prosecution alleged that the knife recovered at the behest of Naveen contained bloodstains, the FSL report (Ex.PW-18/K) did not establish that the blood group on the knife and that of the deceased were the same. Likewise, it was submitted that the Trial Court even upheld the contention that the recovery of the blood-stained clothes from the accused could not be said to have been an incriminating circumstance since there was no attempt by the prosecution to connect those signs with the injuries sustained by the deceased.

7. It was argued that the entire theory of conspiracy between the accused is based upon two assumptions which were not proved - much less proved beyond reasonable doubt; that there was an illicit relationship between Naveen and Rekha. The findings of the Trial Court, argued learned counsel for both the accused, are entirely flawed because they are based upon

suspicious and conjectures of PW-6 and erroneous reading of PW-13's evidence. It was highlighted that PW-13, a neighbour of Rekha had allegedly sought to implicate her in a Section 161 IPC statement. However, in Court she did not support the prosecution case in any material particular. Yet the Trial Court surmised – without any foundation of evidence – that Rekha had mentioned about some discord with her deceased husband and that the latter used to have liaisons with other males which were objected to by her. These surmises were not based upon testimony but were transferred into findings by the Trial Court based upon the questions put by the prosecution which had been refuted. It was argued that the Trial Court was under a duty to consider the totality of circumstances and not have a selective reading of the depositions of witnesses.

8. Ms. Anu Narula, learned counsel for the accused Rekha urged that the Trial Court was entirely unjustified in returning a finding that she harboured a secret relationship with Naveen. It was disputed that Naveen had given a mobile phone bearing no. 9289696849 which was routinely used by her to communicate with him in connection with the education of her children. Learned counsel strongly objected to the inferences drawn by the Trial Court, complaining that they were not based on any proof. It was submitted that Rekha's complicity in the murder of Vinod was entirely based upon the recovery of the so-called burnt mobile phone. Learned counsel highlighted that concededly the police witnesses admitted in the course of deposition that the said article was never sent for forensic analysis and was thus never proved to be a mobile phone. Ms. Anu Narula, learned submitted that the prosecution also did not likewise make any efforts to trace the SIM Card of

mobile phone number 9289696849 based upon the alleged statement of Rekha. Taken together with Naveen, it was submitted that the said phone was given to his girlfriend, which by itself, was a sufficient and reasonable explanation, learned counsel argued that the Trial Court, therefore, had no evidentiary basis to conclude that both the accused communicated with each other secretly through mobile phone no.9289696849 which was in Rekha's possession.

9. It was argued that the Trial Court in this case strayed from the well-settled law that extra-judicial confessions are inadmissible. Here, it was submitted that right from the decision in *Pulukuri Kottaya v. Emperor* AIR 1947 PC 67, the law is far too well settled that it is only that part of the statement which pertains to an article upon its recovery which is admissible and the knowledge thereof that can be taken into consideration, learned counsel submitted that in the present case, the recovery of a burnt article without establishing whether it was a mobile phone and in the absence of a connection between Rekha and the SIM Card, really proves nothing, much less her complicity or guilt in the commission of the crime.

10. Learned counsel argued that the Trial Court also fell into error in taking into account, the statements or even the absence of explanation of Rekha in the course of questioning under Section 313 Cr.PC. Learned counsel argued that the procedure mandated under Section 313 Cr.PC was only to alert the accused and seek explanation as to the incriminating circumstances which might have emerged during the trial. Under no circumstances can it be relied upon as evidence and not used to convict the accused. It was urged that in the present case, besides the prosecution's

inability to establish link between Naveen and Rekha which alone would have entitled the Trial Court to return a finding of guilt under Section 120-B read with Section 302 IPC, the mere silence or failure to answer certain questions under Section 313 Cr.PC could not have resulted in a finding of guilt. It was submitted that there was considerable doubt about the recovery of the burnt mobile phone which is shrouded in suspicion, learned counsel submitted what is termed as “serious discrepancies” with prosecution witnesses – PW-1 and PW-14. It was submitted that whereas PW-1 deposed that the burnt mobile phone was recovered from the gutter of her neighbour along with a Tata Indicom SIM Card, no such SIM Card was produced at the trial. Furthermore, in the cross-examination, PW-14 stated that the burnt mobile phone was recovered from a gutter. Since the recovery was from the gutter in the immediate neighbourhood of Rekha’s house, the police did not furnish any reason why the owner of the premises was not associated in the recovery procedure.

11. Learned counsel also submitted that most importantly the police did not have the matter investigated through a Forensic Science Laboratory (FSL) analysis and that during the course of trial, no attempt was made to establish that the SIM Card recovered pertained to mobile phone number 9289696849. It was submitted that the Trial Court ought to have held that these omissions and discrepancies were fatal only to warrant Rekha’s acquittal. Instead the Trial Court based itself entirely upon the suspicions based upon allegations which prejudiced its mind as to the existence of an unapproved relationship between the two accused.

Prosecution’s submissions:

12. It was urged on behalf of the prosecution that the case against Mandeep was held to be unsustainable because in law, his disclosure statement could not be said to have led to the recovery of something unknown since Naveen's confessional statement and recovery of the knife had alerted the police about the location of the knife and the circumstances surrounding it. This vital difference, urged learned counsel was ought to be borne in mind considering that the statement of Rekha led to the arrest of Naveen and thereafter, based upon his statements and admissions, the arrest of Mandeep.

13. As far as Naveen's conviction was concerned, the prosecution argued that no exception can be found with the approach and findings of the Trial Court. In this respect, the learned counsel relied upon Ex.PW-12/C and PW-12/L together with the relative certificates under Section 65-B of the Evidence Act (Ex.PW-12/A, Ex.PW-12/B & PW-18/M). It was submitted that a comparison of these two call details – 9289695980 (concededly seized from Naveen and owned by him) and 9289696849 (which was none other than the burnt mobile phone) revealed that a large number of *inter se* calls were made between the two. Learned counsel especially highlighted that in the night intervening 22.03.2011 and the morning of 23.03.2011, a total of 7 calls were made between 08.46 PM and 07.22 AM. The total duration of the calls was almost 2 hours and 40 minutes within a span of 11 hours. It was submitted that only 1 call thereafter was made between the two telephones at 09.00 PM on 23.03.2011 after which there were no further calls at all. Tracing the pattern of calls made between the two mobile connections – one admittedly emanating from Naveen's mobile phone - learned counsel stated

that it was too much of a coincidence that the calls seized immediately after the murder. Learned counsel also highlighted the fact that the last call was made at 07.22 AM on 23.03.2011 was too uncomfortably close to the incident to be called a coincidence. It was submitted that the Trial Court took notice of the fact – based upon the unrebutted testimony of PW-12 that the call details and the relative documents also established the movement of Naveen. Even though his residence was at some distance away from the place of incidence, the call details established from the mobile tower records that he had moved from close to the place of occurrence and that this was an extremely material and importance circumstance, which went to establish the prosecution story version.

14. Learned counsel urged that the explanation given by Naveen with respect to the third mobile phone about its being in the possession of his girlfriend, was not established by him at all. In this regard, it was submitted that whilst his concern to protect the identity and maintain the anonymity of his relations and the identity of the girlfriend was understandable, yet nevertheless, having regard to the nature of the criminal charges faced by him, Naveen was under a duty to produce credible material or evidence to rebut the strong inference that naturally arose out of these circumstances. Learned counsel relied upon Section 106 of the Evidence Act, to submit that once the prosecution proved certain material facts, the onus of proving those relevant facts which pointed to special knowledge of the accused lay upon him. In this regard, learned counsel stated that Naveen failed to discharge the onus and, therefore, his explanation under Section 313 Cr.PC about the possession of the mobile phone being with his girlfriend was correctly

rejected. Learned counsel relied upon the judgments of the supreme Court reported as *Jagdish v. State of M.P.* 2009 (9) SCC 495; *Gian Chand v. State of Haryana* 2013 (14) SCC 420 and *Shambu Nath Mehra v. The State of Ajmer* 1956 SCR 199. It was submitted that *Shambu (supra)* is an authority for the proposition that even though the burden of proof always lies on prosecution to establish the criminal charges beyond reasonable doubt, yet Section 106 of the Evidence Act is designed to meet certain exceptional cases in which it would be impossible or “at any rate disproportionately difficult” for the prosecution to establish facts which are “especially within the knowledge of the accused” and are strict proof without difficulty or inconvenience. Here it was urged that whether the mobile phone was in the possession of his girlfriend or not could easily have been proved by Naveen, by either producing her as witness or having her summoned during the course of proceedings. Since those special circumstances were within his knowledge, his failure, highlighted learned counsel for the prosecution fatally undermined his explanation which was corrected discarded. Counsel also argued that the accused was under a duty to explain the circumstances which were adverse to him, or incriminated him under Section 313 Cr. PC. His failure to do so, on the face of clear evidence reduced the burden of the prosecution. For this proposition, learned counsel relied on *Brajendra Singh v State of M.P* 2012 (4) SCC 289.

15. Learned counsel highlighted that there could be no controversy in the overall circumstances of the case with respect to the recovery of the knife at the behest of Naveen, PW-14, because it was not at the same time when Mandeep's weapon was recovered. Furthermore, counsel argued that there

was no suspicion about the recovery and seizure of the knife at the behest of Naveen, because it was not from a public place, but from somewhere hidden and within the special knowledge of the accused. The recovery had to be explained by Naveen, because his knowledge about the hidden knife was an incriminating circumstance which established his role in the crime. Counsel relied on the testimony of PW-14 and submitted that there were no material contradictions or discrepancies in his evidence and that the recovery of the knife was recorded by Ex. PW-14/M. PW-18 also corroborated this and further deposed that the knife was deposited in the *malkhana*, the same day, at 9:00 PM.

16. It was argued that Naveen's movements, corroborated by the cell-phone tower records and the testimony of PW-12, showed that he was at the crime scene and within the radius of a kilometre of the place of incident, at the time of its occurrence. The onus of explaining this incriminating circumstance lay upon him. However, he did not furnish any worthwhile explanation. Furthermore, the record established that an unusually large number of calls had been exchanged between Naveen and Rekha - who conversed from the third number, exclusively available to her, i.e. 9289696849. There was no reasonable explanation for this. Learned counsel refuted the accused's argument about credibility of police witnesses' depositions, stating that not always is it possible to enlist the service of public witnesses and that, consequently, the deposition of the police should not be viewed with suspicion. To say that police witnesses' should not be treated with distrust, learned counsel relied on *Pramod Kumar v State* 2013 Cr. LJ 3680.

17. Learned counsel submitted that the prosecution proved Rekha's guilt beyond reasonable doubt, because each circumstance alleged and proved was based on irrefutable evidence and the chain of circumstances was unbroken. Every hypothesis of her innocence was ruled out and the court was justified in holding that she was guilty as charged. Elaborating, it was submitted that the evidence of PW-6 and PW-13 showed that Rekha had a relationship with Naveen, who, admittedly, had given her a cell phone. Her second cellphone -also provided by Naveen (9289696849) was unknown to anyone and used by her exclusively to converse with Naveen. Though the police could not recover the phone, its identity as such could not be disputed; the seizure memo clearly described it. The trial court record, which reflected that it was indeed a cell phone, proved it. Furthermore, none of the prosecution witnesses were cross examined that the object recovered was not a burnt phone; nor did Rekha deny that it was a burnt phone. The recovery of the phone was crucial, because Rekha's exclusive knowledge of it, and place where it was hidden was incriminating. She could not dispute that the object recovered was not a burnt phone, because she did not say so during the Section 313 statement made in court.

18. Learned counsel for the State argued that the recovery of the phone could not be disputed because three witnesses: i.e PW-1, PW-14 and PW-18 deposed about this circumstance. Nothing worthwhile was forthcoming in their cross examination.

19. It was argued that a very significant aspect is that the police had no definitive clue or lead about the crime; for all intents it was a blind murder. However, the statements of Vijay's father and brother, coupled with Anjali's

statement to the police, led them to consider the call details of Rekha's mobile phone 9268001098. They then discovered that it was registered in Naveen's name; a lot of phone conversations had taken place between his mobile, 9289695980 and the one with Rekha. This led them to question Rekha first; she revealed that another phone connection (9289696849) was exclusively used to converse with Naveen. She also mentioned about the destruction of the Samsung mobile phone with the sim card. These were corroborated by the recoveries. Together with the fact that she had no explanation to offer to these facts, and, that she made an untrue statement under Section 313 Cr.PC, the prosecution urges that her conviction has to be upheld.

Analysis and conclusions:

20. The facts relating to the manner of Vinod's murder are not disputed. The earliest information received by the police was recorded in DD-9A (Ex.PW-10/E) at 07.48 AM. The police went to the site – evidenced by DD-15A (Ex.PW-10/C) at 08.30 AM. By then, the injured – Vinod - had been taken to hospital with grievous wounds. This is corroborated by the MLC which reflects his admission in the hospital at 08.15 AM (Ex.PW-18/O). He died soon after. The police subsequently appeared to have gone to the site, collected blood samples etc. For some while, the police appears to have reached a dead-end since no further clues about the identity of the attackers could be unearthed. The testimony of the Investigating Officer (IO) PW-18 reveals that during the course of routine questioning, the deceased's father – Vijay Singh apparently suspected Rekha's hand behind the murder. He had identified the body of Vinod by statement (Ex.PW-6/A) and had been

questioned by the police on 3-4 occasions. He revealed Rekha's telephone number - 9268001098. PW-18's evidence further reveals that the call details of mobile no.9268001098 and that of deceased Vinod – 9810181851 were obtained. It was stated that a mobile No.9289695980 was reflected in the call details and had apparently made several calls to Rekha for long duration. Upon receiving the ownership details of the said mobile nos. 9268001098 and 9289695980, the police learnt that both the subscriber of both mobile connections were the same, i.e Naveen Dabas. PW-18 had examined Vijay Singh and later he examined Anjali, PW-13 and on the basis of their statements, they suspected Rekha's involvement in the incident. This led to her arrest.

21. During the trial PW-18 deposed that Rekha had stated about another mobile no.9289696849 given to her by Naveen and that she used this to exclusively communicate with him. According to PW-8, Rekha disclosed that she had burnt the mobile phone after the incident and thrown it in a nearby gutter. The burnt mobile phone recovered was of Samsung make and was recovered under Memo – Ex.PW-1/D. Rekha was arrested at 02.40 PM on 29.03.2011. PW-18 further deposed that Rekha led them to Naveen's place; he was arrested under Memo – Ex.PW-14/F.

22. It is thus evident that several circumstances were relied upon by the prosecution to prove complicity of Naveen and Rekha. These were motive; the long conversations between Rekha and Naveen – initially disclosed by Rekha and subsequently corroborated by the call detail records and ownership of the mobile phone which the police was able to trace and recover from the concerned mobile service provider; recovery of the burnt

mobile phone, and the recovery of knives at the instance of Naveen and Mandeep. This Court proposes to deal with each of the circumstances in order to see whether the allegations levelled against the accused were proved beyond reasonable doubt; whether all the circumstances were so proved and that each link in the chain of circumstances likewise was proved beyond reasonable doubt. The Court would also see whether every hypothesis of the accuseds' innocence was excluded and that the prosecution was able to prove that it was the accused only, and none else, who could have committed the crime.

23. The first question is as to the motive. To corroborate the motive, the prosecution relies upon the testimonies of PW-6 and PW-13. PW-6 is the deceased's father – Vijay Singh. He deposed that Vinod and Rekha used to quarrel and that Vinod suspected Rekha's character. PW-6 said that he used to pacify the couple and asked them not to quarrel. He deposed that a few days before his death, Vinod had recounted that Rekha used to threaten him saying that he ought to be concerned only about his work, or else he would be taught an unforgettable lesson. He also mentioned that Rekha used to speak from the mobile phone no. 9268001098. PW-13 – Anjali was Rekha's neighbour. According to her, Rekha used to confide in her, about her marital problems and say that there were some tensions with her husband. She also deposed to having seen Naveen in Rekha's house as a tutor. She deposed that Vinod had broken Rekha's mobile phone since she used to talk to her sister and that this upset her. She also deposed that Vinod had relationship with others and that Rekha had seen text messages from his mobile phone. Apparently, Rekha told her that Naveen was her good friend. This witness

was declared hostile. She denied suggestions that Vinod had expressed his displeasure and asked the witness not to instigate Rekha. She also denied suggestion that Naveen had spoken to her from Rekha's telephone and asked her to be calm and not be provoked by Vinod's statement. She denied any suggestions about her communication with Mandeep on phone or that Rekha had spoken with Naveen for long time in her presence and told her about her husband's harassment. She altogether denied knowledge of Mandeep. She denied the suggestion in the cross-examination for the accused that Vinod used to quarrel with different people on account of his relationship with various girls.

24. It is thus evident that the prosecution's allegations with respect to motive for conspiracy being the strained relationship between Rekha and Vinod, on the one hand, and intimacy between Rekha and Naveen on the other hinges on the testimony of PW-6, who stated that Vinod used to suspect Rekha's character and that on one occasion, she had threatened to teach him with a lesson. So far as PW-13 is concerned, whilst it is evident that she was close to Rekha, her denial of some of the statements that she appears to have made during the course of investigation under Section 161 Cr.PC renders the prosecution story weak. This witness nowhere corroborates the intimacy or the degree of intimacy that the prosecution seeks to urge against Rekha and Naveen. All that she states is that Rekha used to have some marital tensions and that Naveen was her good friend. At the other end is the fact that concededly, a mobile connection (bearing no.9268001098) was given by Naveen to Rekha. Her explanation is that this was needed for her children to communicate with Naveen, their tutor. The

concern about needing to communicate with the tutor is a legitimate one; yet it is unusual for the tutor to obtain a mobile connection in his name for this purpose. If the matter were to be left at this, such an unusual circumstance *ipso facto* would not have amounted to motive. Yet, the disclosure of a secret mobile connection unbeknown to all else, its exclusive (and extensive use) as a means of communication between Naveen and Rekha adds a wholly different dimension to the matter. The secret communication channel and the lack of any explanation then, leads one to conclude that there was something which both the accused wished to keep under wraps. The mobile call pattern between the phone possessed by Naveen and Rekha - through the secret number 9289696849 shows that both of them wished to hide something. The suspicions of Vijay or the weak nature of Anjali's testimony would not establish that both the accused shared an illicit relationship. Likewise, it cannot be said that communication through a secret number 9289696849 proves an extra marital relationship between the two accused. However, what it points to most unequivocally is that these wished to be privy to certain secrets; the calls were far too uncomfortably close to the time the crime occurred. These circumstances, in the opinion of the court, support the ultimate conclusions of the Trial court that the accused harboured a common motive.

25. The motive is undoubtedly a significant element which the prosecution has to establish to fasten criminal liability upon an accused. In the case of direct evidence, motive fades into insignificance. However, where the trial is based upon circumstantial evidence, the need to prove motive gets highlighted. At the same time, motive is elusive in the sense that

what impels someone to behave in the manner that he or she does, ultimately lies locked in his or her mind. It is, therefore, all the more difficult to prove motive – much less exclusively. In these circumstances, whilst the importance of motive cannot be lost sight of, yet the absence of proof of motive should not blind the court from examining whether all other evidence led before it proves the charges, or not. In the present case, the nature of evidence led before the Court shows that motive could not have been merely based upon suspicions that Vinod voiced to PW-6, or the solitary statement of PW-13 that Rekha told her that Vinod was her friend. From these, it can be inferred that there were marital troubles between Vinod and Rekha. The secret parleys between Rekha and Naveen (who used to teach Rekha's children had become her friend) show that they had something important to hide from everyone. The extensive use of the mobile connection bearing number 9289696849 and the long conversations between the two, through the use of that number immediately before the death, in the opinion of the court, establishes that they had a motive to commit the crime.

26. The second aspect is as to the recoveries. It is undisputed that two mobile phones bearing number 9268001098 and 9289695980 were recovered from Rekha and Naveen respectively. By the time of the recoveries, the police was aware of the two numbers, as they had called for the mobile call records based on PW-6's testimony- as is evident from PW-18's deposition. However, at that time the police was unaware that a third phone number was with either accused (9289696849). The statement of Rekha provided this breakthrough. This is narrated by PW-18 in his deposition. This statement went unchallenged. Rekha also stated that she

had burnt that telephone and led the police to the spot, where it was recovered and seized under cover of Ex. PW-1/D. Her other mobile phone number 9268001098 was seized under Memo Ex. PW-1/D. During the hearing, it was urged that there was no scientific corroboration of whether the burnt object was a mobile phone and that witnesses were uncertain whether it was indeed so. It was also argued that the prosecution's inability to secure a forensic examination of the said object falsified its case that it was indeed so. The evidence here is that PW-1 deposed about the recovery and stated that it was a Samsung telephone, in a burnt condition. It was taken on record as Ex. P-3. The record of the trial court shows this:

"At this stage, MHC (M) has produced a sealed cloth pullanda with the seal of LK and the same is opened and one mobile phone and burnt condition is produced before the court and witness identified the same, which was recovered at the instance of accused Rekha from the gutter and the same is EX-P-3."

PW-14 also mentions about a *"Thereafter, at the instance of Rekha, a mobile phone in burnt condition was recovered from a gutter"*. Likewise, PW-18 also stated that a "burnt mobile" phone was recovered. In reply to Question No. 22, Rekha merely denied the suggestion but nowhere stated that Ex. P-3 was not a mobile phone. The testimonies of the prosecution witnesses in the opinion of the Court went unchallenged about the identity of the object, i.e. a mobile phone in a burnt condition. Thus, it is too late in the day for the accused to argue that the omission to forensically examine the object recovered was fatal to the prosecution's case. When neither accused challenged the introduction of the article, or ever cross examined the prosecution witnesses about the identity of the object as a burnt mobile phone, there was no occasion for the prosecution to prove the fact.

Furthermore, the Trial court was able to visually discern the identity of the object, because while introducing Ex. P-3 it recorded the description "Samsung make". For all these reasons, it is held that the accused's argument that no burnt mobile phone was recovered is meritless.

27. The next argument concerned recovery of Ex. P-3 itself. According to the prosecution, PW-1, PW-14 and PW-18 witnessed the event. It was argued on behalf of Rekha that there are inconsistencies and contradictions about where the recovery took place, sufficiently serious to undermine the entire allegations. Highlighting that PW-1 initially stated that the phone was recovered from Rekha's neighbour's gutter, it was argued that the same witness was unable to state the distance of Rekha's house from the gutter and give any particulars about the neighbour. Furthermore, in cross examination, she admitted that the gutter was under the house and the neighbour/houseowner's permission for the search and recovery was not obtained. PW-14 stated that a mobile phone was recovered from "a gutter". Accused's counsel highlighted that in cross examination this witness materially contradicted PW-1 and stated that:

"I cannot tell the exact distance between the house of the accused and the place from where the burnt mobile phone was recovered. It was a vacant plot, but I cannot tell the name of the said plot. No inquiry was made with regard to ascertain the owner of plot."

PW-18's evidence that the mobile phone in "almost burnt condition was recovered from a gutter near divider of Sector 20-21 of Rohini" was highlighted to say that this third version read with contradictions between

the versions of PW-1 and PW-14 completely belie the recovery of the burnt mobile phone Ex. P-3.

28. The accused's argument about the doubtful recovery of Ex. P-3 is seemingly convincing. Yet, in some particulars all the three witnesses to the recovery (PW-1, PW-14 and PW-18) seem to say the same thing: one, the burnt mobile phone was recovered from a gutter. PW-1 and PW-14 stated that the gutter was in Rekha's neighbourhood. PW-1 says it was under the neighbour's house; however PW-14 deposed that it was in a vacant plot. However, PW-18 says that it was in a divider. The statements of PW-1 and PW-14 are not irreconcilable, because they suggest to location of the gutter near or in a private property of a neighbour. However, PW-18's mention of a divider is discordant. Now, the seizure memo (Ex. PW-1/D) was witnessed by PW-1 and PW-18. In his cross examination, PW-18 stated that:

"After ten minutes burnt mobile phone was recovered at the instance of accused Rekha from the gutter. The gutter was near a public road at a distance of about 500-700 mts. from the house of accused Rekha."

29. It is thus clear that all witnesses were clear that the recovery was from a gutter, which was not at a great distance from Rekha's house. The discrepancies in their testimonies - that it was from a vacant plot, or near a house, in the opinion are not serious enough to undermine the basic fact that a burnt mobile phone, otherwise unknown to the police, was recovered at Rekha's instance from a gutter. This knowledge of the article is an important incriminating circumstance admissible under Section 27 of the Evidence Act, as knowledge of that object connected to something intrinsically part of the crime, was disclosed by Rekha in her statement to the police.

30. So far as recovery of the knife at the instance of Naveen is concerned, the prosecution argued that two knives were recovered - one at his instance (Memo Ex. PW-14/M) and the other at Mandeep's instance (Ex. PW-14/L0). PW-14 deposed that these were recovered pursuant to the disclosure statement of Naveen and Mandeep as well. In cross examination, PW-14 stated that the knives were buried in a canal. He also deposed that:

"accused persons searched for the knife for sometime and after some time, they gave us two knives, which were found buried inside the earth, till its blade and its handle was outside the earth and handle became visible after removing the grass/ bushes from the ground. The knives were recovered from the dry canal, after climbing down the bank of the canal. The bank of the canal were in the slight tilted position and knives were found on the side wall (natural wall of made of earth) of the said canal, just above the ground of the dry canal."

PW-18 corroborated this, but stated that the knives were recovered from bushes near the Sukhi Nahar. However he stated - in cross examination- that the bushes were *"part of the Sukhi Nahar"*. He stated that there was no water in the Sukhi Nahar.

31. The court finds no contradiction or implausibility in the evidence regarding recovery of the knife, as far as Naveen is concerned. At this stage, it would be necessary to address the accused's argument that Mandeep's acquittal and the rejection of the recovery of the knife would automatically result in rejection of that evidence as far as Naveen goes.

32. In the impugned judgment, the Trial court observed that three circumstances were relied by the prosecution against Mandeep, namely one, the recovery of blood-stained clothes as a result of the disclosure statement,

(Exhibit P-11 and P-12) from the residence of Mandeep on 29-03-2011. Two, recovery of blood stained knife (Exhibit P-8) at the instance of Mandeep from the bushes near Sukhi Nahar, Karala, Pooth Khurd village and three, that Mandeep had pointed out the place of occurrence to the police in the pointing out memo. The Trial court held- and correctly, that "*pointing out*" the place or the memo recording that is inadmissible in evidence as it did not result in recovery of an article or discovery of a fact (unknown to the police) under Section 27 of the Evidence Act, 1872. The place of occurrence was already known to the police. Furthermore, the mere recovery of blood stained knife or blood stained clothes does not complete the chain of evidence to implicate Mandeep in the offence. The prosecution failed to establish that Mandeep was Naveen's friend or that he was present at the spot at the time of occurrence. Call details of the mobile phone of Mandeep were not placed on record. There was no evidence or material to show or establish that Mandeep was near or at the spot.

33. The prosecution's reliance of recoveries against Mandeep was the alleged recovery of a knife and the blood stained clothes, which were worn by him on the date of the occurrence. Mandeep was arrested on 29-03-2011, six days after the occurrence/incident. The FSL report (Exhibit PW-18/K and PW-18/J), stated that blood was found on the clothes and the knife, but the blood group could not be ascertained. With regard to recovery of knife, Naveen Dabas had already recorded a disclosure statement mentioning that he and Mandeep buried it at the same place. The fact that knives were hidden, was known to the police, when they recorded Mandeep's disclosure statement.

34. The fundamental dissimilarity between the recovery of the knife at Naveen's instance and that of the recovery of a knife at Mandeep's instance thus is in the fact that the former's statement was made chronologically first. The subsequent recovery, at his instance, corroborated the statement and made the knowledge of the *location of a knife, otherwise unknown to the police*, relevant. Significantly, the dry canal (*Sukhi Nehar*) was at some distance from the village- PW-18 deposed that it was about a kilometre away from Sultanpur Dabas. The recovery of a knife, and the deposition of the doctor PW-7 that it was used to commit the crime, thus, amounts to linking the recovery with the murder, and the knowledge of Naveen about the location of the knife, makes his disclosure statement (to that extent) both relevant and incriminating. In this context, the decision of the Supreme Court in *State of Himachal Pradesh v Jeet Singh* 1999 (4) SCC 370, are relevant:

"There is nothing in Section 27 of the Evidence Act which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is "open or accessible to others". It is a fallacious notion that when recovery of any incriminating article was made from a place which is open or accessible to others. It would vitiate the evidence under Section 27 of the Evidence Act. Any object can be concealed in places which are open or accessible to others. For Example, if the article is buried on the main roadside or if it is concealed beneath dry leaves lying on public places or kept hidden in a public office, the article would remain out of the visibility of others in normal circumstances. Until such article is disinterred its hidden state would remain unhampered. The person who hid it alone knows where it is until he discloses that fact to any other person. Hence the crucial question is not whether the place was accessible to others or not but whether it

was ordinarily visible to others. If it is not, then it is immaterial that the concealed place is accessible to others.

It is now well settled that the discovery of fact referred to in Section 27 of the Evidence Act is not the object recovered but the fact embraces the place from which the object is recovered and the knowledge of the accused as to it. (Pulikuri Kottaya AIR 1947 PC 67). The said ratio has received unreserved approval of this Court in successive decisions. ([Jaffar Hussain Dastagir vs. State of Maharashtra](#) (1969 2 SCC 872), [K.Chinnaswamy Reddy vs State of Andhra Pradesh](#) (AIR 1962 SC 1788), [Earabhadrapa @ Krishnappa vs. State of Karnataka](#) (1983 2 SCC 330), [Shamshul Kanwar vs. State of U.P.](#) (1995 4 SCC 430), [State of Rajasthan vs. Bhup Singh](#) 1997 10 SCC 675)."

The prosecution therefore, succeeded in proving this aspect. Naveen was asked about this recovery, in the queries put to him under Section 313; he denied it.

35. Now, the court would consider the recovery of the phone from Rekha's possession. In her statement under Section 313 Cr. PC, stated that the mobile phone with connection 9268001098 was being used by her children. This was corroborated by Naveen too. However, there was also no denial that this number was owned or subscribed by him- as is evident from the reply to question number 39 in the queries under Section 313 CrPC. He acknowledged that this fact was "*a matter of record.*" Such being the case, the recovery of the burnt telephone assumes some significance. Although the prosecution did not send the phone for analysis as noticed earlier, the fact that the article recovered pursuant to Rekha's statement was a phone stood established. The next important link in the chain is whether the prosecution established that constant clandestine communication took place between the two accused, Naveen and Rekha. Here, it would be important to go over

what PW-18 deposed. The witness stated that after being informed about Vijay Singh's suspicions, the police obtained call details of number 9268001098. They were able to find out that a lot of conversations took place between that number and Number 9289695980 (concededly seized from Naveen and owned by him). They also found out that the ownership/subscription of the two were common, i.e Naveen. When Rekha was arrested, she disclosed a fact unperceived by the police and hitherto unknown, i.e that she *had been given a third cellphone with connection*, i.e 9289696849. The recovery of the burnt Samsung mobile (Ex. P-3) somewhat corroborated the disclosure statement. But what is more important is the call details in respect of this mobile phone connection (PW-12/L) are for the period from 01.03.2011; the customer application form and customer ID proof (Ex. PW-12/J and Ex. PW-12/K); and the certificate under Section 65-B of the Evidence Act relating to the call details in Ex. PW-12/L. Thus, it is proved that mobile number 9289696849 was:-

- (i) not known to the police to have any connection with Naveen or Rekha;
- (ii) its connection became apparent only after Rekha disclosed that such a cellphone connection was given to her by Naveen for exclusive contact with him.

Section 27 - which is an exception to the rule against admissibility of extrajudicial and inculpatory statements made by accused during police interrogation, under custody renders that part of the evidence which sheds light about the accused's knowledge (or awareness) to objective *facts* and *articles*. If the statement leads to recovery of such articles or unearthing of

those facts, (both hitherto unknown to the police) those parts of the statements are relevant and admissible. Explaining this, the Supreme Court, in *Earabhadrappa v State of Karnataka* AIR 1983 SC 1 stated as follows:

"Under s. 27 only so much of the information as distinctly relates to the facts really thereby discovered is admissible. The word 'fact' means some concrete or material fact to which the information directly relates. As explained by Sir John Beaumont in Pulukuri Kottaya v. Emperor (1):

"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".

For the applicability of s. 27 therefore two conditions are prerequisite, namely (1) the information must be such as has caused discovery of the fact; and (2) the information must 'relate distinctly' to the fact discovered."

The accused do not deny that the police were unaware of 9289696849 or that it had any connection with Rekha or Naveen. Thus, the disclosure of that mobile connection and the discovery of the fact (i.e the number and the calls made from it to Naveen's number (9289695980) made it admissible and relevant.

36. A look at the call details relating to mobile number 9289696849 (Ex. PW-12/C) reveals that for the 13 day period between 10-03-2011 and 23-03-2011, about 371 calls were made between 9289696849 and Naveen's number (9289695980). Of these, 103 calls were of 1000 seconds (16 minutes or more). Between 19-30 hours (7-30 PM) of 22-03-2011 and 07-22 AM of 23-03-2011, the total call duration between the two numbers was

11,173 seconds (3 hours 10 minutes). Tellingly, the last call- which was received from Naveen's number, lasted 907 seconds (little over 15 minutes) and eerily coincided with the time of the murder - between 7-30 and 7-42 AM.

37. Naveen's explanation is that though the connection (mobile number 9289696849) belonged to him, yet the mobile phone with that connection was with his girlfriend who lived in Rohini. He declined to name her, choosing to protect her anonymity. Rekha, however denied the telephone number altogether. However, no calls were made - except one call of 47 seconds duration in the late evening of 23-03-2011. After that last call, all activity ceased in relation to Mobile number 9289696849. Furthermore, intriguingly, four calls- one on 15-01-2011 and three on 10-2-2011 were made between 9289696849 and 9268001098 (the mobile phone admittedly recovered from Rekha's possession which she said was used by her children). These four calls further corroborate that Rekha could not have claimed ignorance about the telephone number 9289696849.

38. Section 106 of the Evidence Act is an exception to Section 101. Section 101 prescribes the general rule about the burden of proof:

"Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist".

Illustration (a) states -

"A desires a Court to give judgment that B shall be punished for a crime which A says B has committed. A must prove that B has committed the crime".

Section 106 is designed to meet exceptional cases in which it would be impossible, or at any rate very difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. "Especially" highlights and emphasizes that facts which are pre-eminently within the accused's knowledge are to be explained by him or her. In *Attygalle v. Emperor* A.I.R. 1936 P.C. 169 and *Seneviratne v. R.* [1936] 3 All E.R. 36, the Privy Council refused to construe this provision as reversing the burden of proof upon the accused. The provision does not dilute the principle that save in a very exceptional class of case, the burden is on the prosecution and never shifts.

39. In the context of Section 106 the Supreme Court observed, in *Joseph s/o Kooveli Poulo Vs. State of Kerala* (2000) 5 SCC 197 that:

"Such incriminating links of facts could, if at all, have been only explained by the appellant, and by nobody else, they being personally and exclusively within his knowledge. Of late, courts have, from the falsity of the defence plea and false answers given to court, when questioned, found the missing links to be supplied by such answers for completing the chain of incriminating circumstances necessary to connect the person concerned with the crime committed (see State of Maharashtra Vs. Suresh, (2000) 1 SCC 471). That missing link to connect the accused – appellant, we find in this case provided by the blunt and outright denial of every one and all the incriminating circumstances pointed out which, in our view, with sufficient and reasonable certainty on the facts proved, connect the accused with the death and the cause for the death of Gracy".

A similar view was expressed in *Ram Gulam Chaudhary and Ors. v. State of Bihar* (2001) 8 SCC 311 thus:

"In the absence of an explanation, and considering the fact that the appellants were suspecting the boy to have kidnapped and

killed the child of the family of the appellants, it was for the appellants to have explained what they did with him after they took him away. When the abductors withheld that information from the court, there is every justification for drawing the inference that they had murdered the boy. Even though Section 106 of the Evidence Act may not be intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases like the present, where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding death. The appellants by virtue of their special knowledge must offer an explanation which might lead the Court to draw a different inference".

In the facts of the present case, the recovery of the knife at Naveen's behest, recovery of the burnt mobile phone at Rekha's behest, the call details in respect of all the three numbers being produced before court, coupled with their proper certificates in accordance with Section 65-B (duly corroborated by the deposition of PW-12 and his cross examination) show that the two accused were in constant touch with each other. More than 350 calls were made between them within a fortnight; in a twelve hour span just before the time of death, the total call duration between the mobile phones of the two accused was over 3 hours. The last call- leading right up to the time when Vinod was murdered, was of 15 minutes duration. Barring one call, no calls were made thereafter. This coincided with Rekha's statement that the mobile phone was sought to be destroyed; it was corroborated by the recovery of the mobile. On the face of all these established facts, the accused were definitely under an onus to provide a reasonable or probable explanation. Rekha's total denial on the one hand, and Naveen's explanation that the mobile phone was not with Rekha (contrary to her knowledge of the phone), and his

explanation that it was with a girlfriend, are not reasonable convincing explanations.

40. In *Deonandan Mishra vs The State Of Bihar* AIR 1955 SC 801 the Supreme Court held as follows:

"It is true that in a case of circumstantial evidence not only should the various links in the chain of evidence be clearly established, but the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused. But in a case like this where the various links as stated above have been satisfactorily made out and the circumstances point to the appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation, and he offers no explanation, which if accepted, though not proved, would afford a reasonable basis for a conclusion on the entire case consistent with his innocence, such absence of explanation or false explanation would itself be an additional link which completes the chain. We are, therefore, of the opinion that this is a case which satisfies the standards requisite for conviction on the basis of circumstantial evidence."

41. In the present case, having regard to the totality of facts and circumstances apparent from the record, this court is of the opinion that the "panchsheel" or five golden principles (so described in *Sharad Birdichand Sarda v State of Maharastra* AIR 1984 SC 1622) governing proof in circumstantial evidence cases, -i.e the circumstances from which the conclusion of guilt is to be drawn being fully established; the facts so established being consistent with the hypothesis of guilt of the accused and their being explainable on no other hypothesis except that the accused is guilty; the circumstances being of a conclusive nature and tendency; such circumstances excluding every possible hypothesis except the one to be proved; and the chain of evidence being so complete as not to leave any

reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused- have all been proved beyond reasonable doubt. For these reasons, there is no infirmity with the findings and sentence of the Trial Court. The accused are directed to surrender to the sentence within 2 weeks and undergo the rest of the sentence awarded. The appeals are consequently dismissed.

**S. RAVINDRA BHAT
(JUDGE)**

**VIPIN SANGHI
(JUDGE)**

FEBRUARY 27, 2015

