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IN THE HIGH COURT OF DELHI AT NEW DELHI
Crl. Appeal 102/2012

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Reserved on: 16th July 2015
Date of Decision: 28th July, 2015

MANI KAMAT @ DINESH **Appellant**
Through: Ms. Anu Narula, Adv.

Versus

State Govt. of NCT of Delhi **Respondent**
Through: Ms. Aashaa Tiwari, APP

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

SANJIV KHANNA, J.

1. The impugned judgment dated 24th May 2011 convicts Mani Kamat @ Dinesh (appellant) for murder of Jimmy Boodh (a girl aged about 19 years) in the intervening night between 4th and 5th July, 2008. By order on sentence dated 24th May, 2011, the appellant stands sentenced to undergo imprisonment for life, pay fine of Rs.10,000/- and in default to undergo Simple Imprisonment for one year with a direction that the appellant must undergo actual sentence of 35 years and till then grant of remission shall not be considered. Benefit of Section 428 of the Code of Criminal Procedure, 1973 (CrPC for short) shall be given. The conviction arises in the charge sheet filed in FIR No. 330/2008, Police Station Ashok Vihar under Section 302/376/511 of the Indian Penal Code, 1860 (IPC, for short).

2. The appellant has not questioned Jimmy Boodh's homicidal death in the intervening night of 4th and 5th July, 2008 in property No. H-5, Ashok Vihar, Phase – 1, Delhi. It is also not disputed that the dead body of Jimmy Boodh was noticed at about 7:00/7:30A.M. on 5th

July, 2008 on a plastic cot in the varandah on the second floor of the aforesaid property. Testimonies of Ram (PW-1), Dr. Rekha Gupta (PW-4) and Dr. Gopal Krishna Gupta (PW-12) and even Budhi Bahadur (PW-3) conclusively establish that Jimmy Boodh (deceased), who was working as a maid in House no. H-5 Ashok Vihar, Delhi, was found dead in the morning hours at about 7.00- 7.30 AM on 5th July, 2008. The aforesaid factum is also proved and established from the testimony of the police officers namely Inspector Bahadur Singh (PW-24), SI Rajiv Ranjan (PW-13), SI Matadin (PW-17) and Constable Dalbir Singh (PW-16) and others. Blood had oozed out from her mouth and nostrils, and could be seen on the walls/floor etc. Broken bangles were lying scattered. The neck of the deceased had marks and her face had turned slightly blue. The post-mortem report (Exhibit PW-11/A), opines that Jimmy Boodh had died as a result of manual strangulation (throttling), the cause of death being asphyxia. There were ante-mortem injuries on the neck consistent with pressure of manual grip, which was sufficient to cause death in normal course of nature. Diffused bruise was palpable on the right and left front of the neck with coalesced bruises placed vertically and obliquely with ill-defined finger tip marks between the bruises. On internal examination, massive bruising of sub-cutaneous tissues of the neck, platysma muscle on both side and front of neck, with extravasation was noticed. There was massive bruising with petechial haemorrhage over epiglottis and larynx.

3. Prosecution in the absence of eye-witnesses relies on circumstantial evidence. Impugned judgment in paragraph 12 refers to 5 circumstances and in the subsequent paragraphs elucidates why the

appellant is guilty and was the perpetrator who had committed murder of Jimmy Boodh. The said five circumstances are:

- i. Deceased Jimmy Boodh was employed as maid servant at H-5, Ashok Vihar, Phase-1, Delhi at the house of PW-4 (Dr. Rekha) and PW-12 (Dr. Gopal Krishna Gupta).
- ii. Deceased Jimmy Boodh was murdered on the night intervening 4th/5th July 2008 at H-5, Ashok Vihar, Phase – 1, Delhi.
- iii. House No. H-4, Ashok Vihar, Phase – 1, Delhi i.e. the house adjoining House No. H-5, Ashok Vihar, Phase – 1, Delhi (place of murder) was under construction on the night intervening 4th/5th July 2008 and accused was residing at House No. H-4, Ashok Vihar, Phase – 1, Delhi.
- iv. Recovery of small hairs from the right hand of deceased.
- v. Injuries on the person of accused specially scratch injuries at the time of his arrest.”

4. Circumstances (i) and (ii), we notice and observe, are mere statement of facts. They would not show or establish that the appellant-Mani Kamat was the perpetrator. Thus, the three circumstances relied by trial court are:

“(iii) Presence of the appellant in the adjacent house number ‘H-4, Ashok Vihar, Phase 1, Delhi’ in the intervening night of 4th and 5th July 2008.

(iv) Recovery of small hairs which as per FSL report match with the sample hair of appellant.

(v) Scratch injuries i.e. on the face, neck and chest of appellant noticed at the time of his arrest on 6th July 2008 at 8pm as established by MLC [Ex.PW5/A].”

5. With regard to circumstance no. (iii) we accept that the said fact is correct. Budhi Bahadur (PW-3), watchman residing in house number ‘H-4, Ashok Vihar, Phase 1’ has deposed that appellant was working

as *Baildhar* with a marble contractor and used to sleep in the said house under construction. Infact PW-3 in his cross-examination has asserted that in the night in question, the appellant was the only worker who had slept at house number 'H-4, Ashok Vihar, Phase 1'. However, in his cross-examination, PW-3 has accepted that the appellant used to sleep in the lobby on the ground floor. PW-3 had also slept in the house under construction 'H-4, Ashok Vihar, Phase 1'. The appellant in his statement under Section 313 CrPC when confronted with the aforesaid factual position has accepted that he was working and used to sleep in the house under construction i.e. H-4 Ashok Vihar, Delhi.

6. PW-3 (Budhi Bahadur) has testified that in the morning, the appellant had woken him up and stated that he had to go to his brother's place at Mayapuri for some work and would return after one hour. The appellant thereafter did not return. It was apparent that PW-3 has professed that when the appellant had conversed with him in the morning, he (PW-3) did not know about the murder of Jimmy Boodh, which came to his knowledge between 7 AM and 8 AM.

7. Deposition of PW-3 (Budhi Bahadur) reveals that the appellant had not absconded in the intervening night. He was present in the morning. The appellant had woken up and spoken to PW-3 that he was going to Mayapuri. Soon thereafter murder of Jimmy Boodh in the adjacent house 'H-5, Ashok Vihar, Phase 1' was noticed and police had reached the spot. Thereafter as per PW-3, the appellant did not return and had absconded.

8. After arrest of appellant- Mani Kamat purportedly on 06/07/2008 at 8PM, a t-shirt which was hanging with other clothes in house number 'H-4, Ashok Vihar, Phase 1' was recovered and taken

into possession vide Seizure Memo Ex.PW-13/E. Thus, the appellant had not taken with him his clothes and belongings which had remained in house number 'H-4, Ashok Vihar, Phase 1'. It is difficult to accept and believe that the police officers had not inspected the belonging of the appellant at house number 'H-4, Ashok Vihar, Phase 1', after they swung into action in the morning hours on 05/07/2008. As per FSL report (Ex.PW-9/C), blood was detected on the t-shirt but biological report states that species of origin could not be ascertained as there was no reaction. Thus FSL report does not state that the blood was of human origin.

9. The aforesaid evidence exposits that the appellant did not abscond and was to be seen and present in the house under construction even in the morning. He did not take his belongings. He had woken up PW-3 (Budhi Bahadur) and informed him that he was going to his brother's residence at Mayapuri. There is no evidence or material to suggest that this statement was false or the appellant did not visit his brother's residence at Mayapuri. Shortly after the appellant had left, police came to the spot and had started investigation. In this particular situation and keeping in mind the factual matrix, we do not think the assertion of the prosecution that the appellant had absconded should be given undue reliance and weight. There is considerable authority for the proposition that normally abscondence by itself does not prove the guilt, for a person may abscond due to fear of false implication or arrest [see **Durga Burman (Roy) versus State of Sikkim**, AIR 2014 SC 2993 referring to **S.K. Yusuf versus State of West Bengal**, (2011) 11 SCC 754].

10. Ram (PW-1) was working as a cook in house number 'H-5, Ashok Vihar, Phase 1', where the deceased Jimmy Boodh was working

as a maid. PW-1 in his testimony acknowledged that his employers Dr. Rekha Gupta (PW-4) and Dr. Gopal Krishna Gupta (PW-12) along with children had gone to see a movie and had returned at about 1AM. He used to sleep or reside at night in a room near the main gate of the said house. Testimony of Ram (PW-1) on several assertions made by him is rather ambiguous and unreliable. PW-1 (Ram) claims that at about 12:30 AM, he came out of his room as the dog in their house was barking. He had then seen a person crossing over from their house (House No. H-5) to the house under construction (House No. H-4). He had informed this fact to Dr. Gopal (PW-12) in the morning. PW-1 (Ram) testified that he could not see the face of the person who had crossed to the adjacent house, but as he had a glimpse of the person's back, he had identified that the appellant was the person who had jumped from house number 'H-5, Ashok Vihar, Phase 1' to *kothi* under construction (i.e. House No. H-4) in the said intervening night.

11. Identification of the appellant as the person who had crossed over as PW-1 (Ram) had seen his back, is unfathomable and facetious. This identification is open to grave doubts and should be rejected. The scaled site plan (Ex.PW-6/A) gives the location where the dead body was found in the *verandah* and the construction as it existed on the 2nd floor. The exhibit does mark and specifies open to sky area between House no. H-5 and H-4, but it would be difficult for a person standing on ground floor to see, particularly at night, a person jump or climb from House no. H-5 to House No. H-4 or identify the said person even if his face was not visible on the basis of the shape or size of the person's back. The assertion is too far-fetched. Moreover and importantly PW-1 (Ram) knew that the deceased Jimmy Boodh used to sleep on 2nd floor and his employers were not present in the house. In

case, PW-1 (Ram) had actually seen a person jumping/moving on 2nd floor and going to adjacent house, he would have immediately called out and enquired from Jimmy Boodh. If PW-1 (Ram) had noticed suspicious movement or activity, in normal course he would have ascertained whether any intruder had entered the house. He would have inquired and ascertained that no harm was caused to Jimmy Boodh. PW-1 (Ram) in his cross examination has accepted that the House no. H-4 under construction was built upto 4 stories in height. He knew PW-3 (Budhi Bahadur) was working there as a *chowkidar* and 5-6 persons used to work there. PW-1 accepted as correct that no one could have moved or gone from house no. H-5 to House no. H-4 without the help of a ladder. PW-1 claimed that a ladder (*seedi*) was lying on the roof of House no. H-4. However no such statement is made by PW-3 (Budhi Bahadur) or any of police witnesses who had scanned and inspected the area including house no. H-5. No ladder was noticed by any other person or seized and taken into custody. We therefore cannot rely upon this part/portion of the testimony of Ram (PW-1), implicating and identifying the appellant. We however accept that PW-1 was present in house no. H-5 and in the morning had at about 7/7:30 AM noticed that Jimmy Boodh had been killed.

12. PW-3 has accepted that he and Ram (PW-1) were taken to police station and kept there for one or two days. Thus both PW-1 (Ram) and PW-3 (Budhi Bahadur) were suspects and the police had interrogated them.

13. Inspector Bahadur Singh (PW-24) had inspected the scene of crime along with SI Rajiv Ranjan (PW-13) and as per the prosecution case seized pieces of small hair vide Seizure Memo (Ex.PW-13/A). Ex.PW-13/A records as follows:

“From near the body of the deceased following items have been picked up:

xxx

6. Hair found entangled near pipe of bed has been picked up and kept in the plastic box and sealed.
7. Small hair bunch stuck on the left hand of the deceased below the left sleeve of the cloth worn by deceased has been picked up and kept in the plastic box and sealed.

xxx”

14. After the appellant was arrested, sample scalp hair was seized by Inspector Bahadur Singh (PW-24) vide Seizure Memo Ex.PW-13/G. This hair sample and seized hair at No 7. vide Ex.PW-13/A were sent for FSL examination and as per report Ex.PW-9/A the two set of hairs on morphological and microscopical studies were found to be of human origin and similar in most of their characteristics. The report however mentions that no further opinion could be offered by the said division of the laboratory. The detailed analysis undertaken and the basis of the said opinion by the scientific expert are not on record. The report was proved by Naresh Kumar (PW-9) Senior Scientific Assistant (Biology) FSL Rohini. He was not cross-examined and questioned.

15. This forensic report it is submitted is a vital and significant evidence implicating the appellant. There is some debate in judicial and forensic field concerning reliability of forensic comparison of hair samples. Some studies in United States do suggest that post conviction DNA testing had resulted in doubts on the results of morphological hair comparisons. These studies observe that morphological hair comparisons should be treated as presumptive in nature and should be confirmed by nuclear DNA profiling or mitochondrial DNA

sequencing. Other studies suggest that methodology used in hair morphological examination process, experience of the hair examiner, equipment used and also temporal and quantum of hair examined, matter. In an earlier decision, this High Court in *Vijay Kumar @ Bhushan vs. State represented by SHO*, 2007 (94) DRJ 243, after examining case law and opinions on the subject, observed:

“On a consideration of all these decisions, it appears to us that even though the science of hair identification may be quite an advanced science and it may be possible to determine the source, it would not be safe to solely rely upon the similarity of hair to convict an accused person – there must be some other connecting evidence to link the accused person with the crime, although the analysis of hair would be an important piece of evidence. For this reason, we cannot be definitely say that the four strands of hair in the right fist of the deceased, which are apparently similar to hair of the Appellant, are the hair of the Appellant. Even the expert witness could not say that. But what is the position if we take other relevant evidence into consideration?”

16. However there is a problem and difficulty in accepting the prosecution version regarding seizure of the hair at Serial No. 7 from the place of occurrence. As per the Investigating Officer (IO) Inspector Bahadur Singh (PW-24) some small hairs were found in the right hand of the deceased. In addition, broken hair was lying on the cot. They were separately sealed. SI Rajiv Ranjan (PW-13) claims that the hair was present on the cot and wrist of the deceased and taken into possession vide Ex.PW-13/A. HC Sudhir Singh (PW-18) has similarly stated that hair was found on the cot and HC Ram Mehar (PW-21) testified that hair was lying on cot and hair was also lying in the hand of deceased. There is discrepancy in the said versions of PW-24, PW-13, PW-18 and PW-21 and what is recorded in Ex.PW-13/A. The witnesses have referred to small hair in the wrist or hand of the

deceased, whereas Ex.PW-13/A as noticed refers to small hair bunch stuck on the left hand below the left sleeve of the clothes. This discrepancy could be considered as insignificant, for the seizure memo Ex. PW13/A was prepared contemporaneously and would be more authentic. However, there are two difficulties in accepting what is averred and recorded in the seizure memo Ex. PW13/A. The Crime Team Report does not mention and record recovery of small hair from the left hand of the deceased below the left sleeve. Secondly, the photographs marked Ex.PW-7/A-1 to Ex.PW-7/A-15 taken by the crime team and then by the private photographer do not show presence of any small hair inspite of the fact that the photographs have been taken from different angles and after turning and moving the body of the deceased. As the recovery of the hair is being suspected, we would like to deal with this aspect in some detail.

17. The Crime team report marked Ex.PW-17/A which was proved by SI Matadin (PW-17) does not support the recovery and seizure of hair from the wrist/hand or below the right sleeve of the shirt worn by the deceased. SI Matadin (PW-17) and Constable Dalbir Singh (PW-16) of crime mobile team have deposed that they had inspected the scene of crime and taken some photographs. Subsequently a private photographer was called as Constable Dalbir Singh's (PW-16) camera did not work properly. From the deposition of PW-17 (SI Matadin) it is apparent that the scene of crime was thoroughly examined and scanned. The photographs reveal that body of deceased was moved and turned over for inspection and collecting evidence/material. The **crime team report** (Ex.PW-17/A) is in Hindi and the translation thereof would read:

“A body is to be found in the verandah on a plastic cot located in front of the terrace of a room. Bedding belonging to the deceased is lying below the bed. Blood has oozed and can be seen on both side of the deceased’s mouth. Eyes are closed and swollen and hair is open. Salwar worn by deceased is open and one side of the pajama is pushed up. Hands of the deceased have blood and some hair can be seen entangled in the plastic of the cot. Broken bangles of glass are lying on the roof near the deceased and all glass bangles of left hand are broken. One jersey is lying on the cot. At some distance shawls are lying. One shawl with marks is lying on the stairs. Ligature mark can be seen on neck of the deceased. A sky blue coloured chunni which has blood stains is lying near the dead body. A comb with tangled hair is also lying. Near deceased’s salwar, hair can be seen. Hair can be seen on the floor. Latch of the door leading to the roof was working (not broken). There is the passage which leads to the room of the deceased. A clock is lying there. The camera malfunctioned while taking the photographs. After four photographs, a private photographer was called for taking more photographs. Exhibits were picked up. Post-mortem report and rape opinion on the dead body is advised.”

18. The crime team report refers to hair found at different locations but does not mention or refer to hair in wrist/hand of deceased or left hand of the deceased below the left sleeve. The crime team report made contemporaneously, thus does not corroborate and in fact negates presence and seizure of hair from the wrist/hand or left hand below the left sleeve. The photographs do not indicate presence of small hair in the wrist/hand of the deceased or any small bunch of hair was stuck on the left hand of the deceased below the left sleeve of the cloth worn by the deceased. In fact the deceased was not wearing a full sleeve shirt or *kamiz*. The *kamiz* worn by her had a short sleeve. Thus, there is substantial and significant discrepancy with regard to recovery of small hair which as per the FSL report (Ex. PW9/A) matched with the sample hair of the appellant. In these circumstances, recovery of small hair is a grave suspect and could have been planted. This dents the FSL report and reliance placed by the prosecution on the same.

19. The last incriminating circumstance relied by the prosecution are the injuries mentioned in the MLC of appellant dated 06/07/2008 marked Ex.PW-5/A. The injuries recorded therein are as under:

- “i. Superficial linear scratch measuring 5 cm long on left lateral side neck.
- ii. Superficious scratch (linear) measuring 2cm long on anterior side neck just below cricoid cartilage.
- iii. Superficially linear scratch measuring 1cm long around 3cm below the manubrium sterni of anterior chest wall.
- iv. Superficial linear scratch measuring 1 cm long just below the left sterno clavicular joint of anterior chest wall.
- v. Superficial linear scratch measuring 1.5cm long on left side of nose (lateral to medial canthus of left eye).
- vi. Abrasion on right knee joint.
- vii. Subconjunctival haemorrhage of medial sclera of right eye.”

20. As per prosecution version and observed as plausible by the trial court, there was a struggle with the deceased retaliating and resisting the attacker, Thus the injuries recorded in the MLC Ex.PW-5/A connects and links the appellant with the crime in question. There are difficulties in accepting the prosecution version. The appellant-Mani Kamat, as per the case of the prosecution, was arrested after about 36 hours on 06/07/2008 at 8 PM. The arrest memo marked Ex.13-B and the personal search memos Ex.13-C do not mention or record the said injuries. Additional Public Prosecutor has however drawn our attention to Physical Inspection Memo of the arrestee at Page 395 of the trial court record. The said document has not been proved and given an Exhibit Number. It also has over-writing in the date which has been changed from 5th to 6th. Under the column ‘fresh’, the memo records

presence of injuries over right knee, right and left elbow, three nail injury marks over the chest region and fresh nail injury marks over neck and fresh injury over nose. The MLC Ex.PW-5/A does not mention or refer to any fresh injury on the two elbows and the memo does not refer to any injury in the right eye. As physical inspection memo has not been proved, doubt would remain as the exhibited documents Ex. PW-13/B and Ex. PW-13/C do not record or mention injury marks.

21. On the question of injuries, the trial court in Para 35 of the impugned judgment has recorded as under:

“35. While recording statement of accused u/s 313 CrPC specific question was put to accused regarding the injuries which were found on his person at the time of his arrest mentioned on his MLC Ex.PW-5/A prepared by Dr. R.S.Mishra but the same was not properly rebutted by the accused. IN these circumstances conclusion can be drawn that the nature of injuries on the body of accused i.e. the scratch marks as per MLC Ex.PW-5/A are only possible when a person struggles with another person. In this case injuries received by accused could only be possible when there was a struggle with deceased Jimmy Boodh and accused Mani Kamat.”

The aforesaid finding of the trial court with regard to the answer given by appellant-Mani Kamat in his statement u/s 313 Cr.P.C. is unacceptable and unconvincing. The only question on this aspect put to appellant in his statement under section 313 CrPC is Q.20, which reads:

“Q. 20 Its is in evidence against you that on 06/07/2008 you got recovered one red colour T-shirt Ex.P-3 hanging with the clothes at House No. H-4, Ashok Vihar, Phase-1 which was seized by police vide memo Ex.PW-13/E. You pointed out place of occurrence vide memo Ex.PW-13/F. You were taken to hospital for medical examination. Your MLC Ex.PW-5/A was prepared.”

The appellant had denied the suggestion stating:

“Ans. It is incorrect.”

Thus the MLC Ex.PW-5/A was put to the appellant but the assertion that there were fresh injuries was not specifically put to the appellant for his answer, though the trial court has relied upon the said fact as a highly incriminating circumstance. Failure to put the said question and ascertain or get explanation from the appellant is a lapse and error. We could have possibly recorded appellant's supplementary statement u/s 313 CrPC but would refrain as it would be a futile exercise, now that the appellant knows the importance of his answer.

22. The injuries are debatable for another reason which is significant and creates doubt. Budhi Bahadur (PW-3) who had seen and spoken to appellant in morning hours on 5th July 2008, has not spoken a word or testified that he had seen scratches or fresh injury marks on the nose, neck or the eye of the appellant. PW-3 is completely silent on the alleged injuries on the face, neck or eye of the appellant in the morning on 05/07/2008. Noticeably PW-3 in his testimony is fairly descriptive and has stated that the appellant had woken him up and informed him that he was going to Mayapuri to meet his brother and would be back after about an hour. Thus, there is merit in the contention that PW-3 would not have remained silent and would have spoken out if he had seen any injury on the face, neck and eye of the appellant. The inference being that the injuries indicated in the MLC Ex.PW-5/A were possibly inflicted afterwards.

23. Ram (PW-1) has stated that he had preceded to the house under construction i.e. H-4, Ashok Vihar, Phase – 1 and had then made his

way to the second floor roof of House no. H-5 Ashok Vihar, Delhi. Thereafter through a broken glass he had opened the latch of the door to reach the *verandah* where the dead body of Jimmy Boodh was lying on the cot. The unscaled site plan (Ex.PW-24/A) is unintelligible and vague for it does not show the exact location of the verandah, passage, rooms etc. on the second floor. The scaled plan (Ex.PW-6/A) which is elaborate conspicuously does not show the door opened by Ram (PW-1) by putting his hand through the broken glass. Importantly, when the police had arrived on the spot, the door connecting the second floor with the first floor of House no. H-5 Ashok Vihar, Delhi was open. This is accepted by the police witnesses namely PW-24 (Inspector Bahadur Singh) and PW-17 (SI Matadin). There is no indication that this door connecting the second floor with the lower floors was deliberately forced open by either pushing or by breaking the lock/latch. It is, therefore, submitted by the counsel for the appellant that it would be wrong to assume that the perpetrator had committed the offence after making his way from House no. H-4 Ashok Vihar. Apart from other possibilities, the perpetrator could have approached the second floor of H-5 Ashok Vihar from the lower floor itself.

24. In the present case, the prosecution version is predicated on circumstantial evidence, where conviction is sustainable when each incriminating piece of evidence is proved by reliable and cogent evidence and when each proved piece of evidence considered together forge a chain wherefrom no inference other than the guilt can be drawn against the person charged for having committed the said offence. In other words, the proved pieces of circumstantial evidence when taken together should not be capable of any explanation other than the guilt of the person charge sheeted [see *Sharad Birdhichand*

Sarda versus State of Maharashtra, (1984) 4 SCC 116 and Mohibur Rahman and Another versus State of Assam, (2002) 6 SCC 715]. The said test is not satisfied in the present case. In view of the aforesaid discussion on the evidence led by the prosecution, it has to be held that the same is sketchy and only raises doubts as to possible involvement of the appellant but does not form a complete chain from which an inference can be drawn that the appellant was the perpetrator and no other person could have committed the offence.

25. We accordingly, are of the view that the conviction of the appellant cannot be sustained. The appeal is accordingly allowed and the impugned judgment dated 24th May, 2011 and the order of sentence dated 24th May, 2011 are hereby set aside. The appellant is acquitted. The appellant will be released forthwith unless required to be detained in accordance with law in any other case.

(SANJIV KHANNA)
JUDGE

(R.K. GAUBA)
JUDGE

July 28th, 2015
vkkr/kkb