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

+ **CRL. A. 1728/2014**

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Judgment reserved on: 30th November, 2016
Judgment pronounced on: 8th December, 2016

PREM SINGH

..... Appellant

Through: Mr. Joginder Tuli, Mr. Ashu Kumar Sharma,
Ms. Joshini Tuli and Ms. Babita Rana,
Advocates

VERSUS

STATE (GOVT OF NCT OF DELHI)

..... Respondent

Through: Ms. Aashaa Tiwari, APP for State

CORAM:

HON'BLE MR. JUSTICE G. S. SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J.

1. The present Criminal Appeal has been filed under Section 374(2) of the Code of Criminal Procedure against the impugned judgment dated 25.11.2013 and order on sentence dated 15.01.2014 passed by the Additional Sessions Judge, Saket Court, New Delhi in Sessions Case No. 70/11, by virtue of which the appellant has been convicted under Section 302 of the Indian Penal Code and sentenced to imprisonment for life and to pay a fine of Rs. 20,000/- and in default of payment of fine to further undergo simple imprisonment for a period of one year for the offence punishable under Section 302 of the Indian Penal Code.

2. The brief facts of the case as noted by the trial court are as under:

“On 27.05.2011 at 8.40 am, an information was received in PS Okhla Industrial Area. The informant told about murder of his niece at Tehkhand Balmiki Mohalla, Gopal Ji Ka Makaaan near Railway Line. The information was recorded as DD No. 2A. It was marked to ASI Ranpal. The IO reached at spot alongwith Ct. Sanjay. At 9.02 pm, another information was received about a lady having committed suicide at House No. 203, Balmiki Mohalla and it was recorded as DD No. 3A. Copy of it was also sent to ASI Ranpal. Dead body of one lady known as Smt. Poonam was found lying at House No. 13/2, Third Floor, Gupta Colony, Balmiki Mohalla, Tehkhand. Pieces of condom, one quarter bottle (half filled) on which golden border whisky was written, one tumbler and one bottle containing some water were found near the dead body. Apart from all this, one bottle of limca (half filled) and another water bottle were lying near western side wall of room. Two used condoms of pink colour were lying behind the doors. Sh. Dinesh Singh, brother of deceased met at spot.

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Crime team was called at the spot, who lifted chance prints. IO picked exhibits from the spot. Same were sealed by seal of P.K. photographer clicked photos from different angles. Dead body was sent to mortuary of AIIMS. IO collected call details of mobile phone belonging to Anoop Singh and his relatives. From inspection of call details, IO came to know that someone contacted deceased from three numbers belonging to one Shailesh. The latter was operating an STD booth. From

scrutiny of call details of Anoop Singh, the latter was found in contact with co-accused Prem Singh at the relevant time. After completion of investigation, both of accused were indicted by police for offences punishable U/s 302/120B/34 IPC.”

3. After the investigation was complete, charges under Section 302/120B/34 of the Indian Penal Code were framed against the appellant and the co-accused, to which they pleaded not guilty and claimed trial.
4. To bring home the guilt of the appellant and the co-accused, the prosecution examined 31 witnesses in all. The statements of the appellant and the co-accused were recorded under Section 313 of the Code of Criminal Procedure wherein they denied all the incriminating evidence and their involvement in the commission of the said offence. No defence witness was examined to substantiate their defence.
5. The learned trial court, after scrutinising the arguments addressed by the counsel for the parties and evidence adduced by them, concluded that no offence is made out against co-accused Anoop Singh and acquitted him of all the charges whilst, holding that the prosecution has been successful in establishing the guilt of the appellant beyond reasonable doubt and held him guilty under Section 302 of the Indian Penal Code.
6. Mr. Joginder Tuli, learned counsel appearing on behalf of the appellant, while assailing the judgment of the trial court, contended that the conviction of the appellant is perverse and based on conjectures and surmises, resulting in flagrant miscarriage of justice.

He further submitted that the impugned judgment cannot be sustained in law as the present case is a case of circumstantial evidence and the prosecution has failed to complete the chain of events for the offence.

7. The learned counsel vehemently argued that the trial court has grossly erred in not considering the inherent contradictions in the case of the prosecution, for which benefit of doubt ought to have been given to the appellant, as was given to the co-accused. To substantiate his argument, learned counsel for the appellant has relied upon a decision of the Apex Court in ***Sukhram vs. State of Madhya Pradesh*** reported in ***AIR 1989 SC 772***, wherein the Hon'ble Supreme Court held that where benefit of doubt has been given to a co-accused, the other co-accused would also be entitled to acquittal. The relevant paragraphs are as under:

“10. There is another aspect of the matter which has also escaped the notice of the High Court when it sustained the conviction of the appellant under Section 302 read with Section 34 and Section 436 read with Section 34 IPC while acquitting accused Gokul of those charges. Though the accused Gokul and the appellant were individually charged under Sections 302 and 436 IPC they were convicted only under the alternative charges under Section 302 read with Section 34 and Section 436 read with Section 34 IPC by the Sessions Judge. Consequently, the appellant's convictions can be sustained only if the High Court had sustained the convictions awarded to accused Gokul also. Inasmuch as the High Court has given the benefit of doubt to accused Gokul and acquitted him, it follows that the appellant's convictions for the two substantive offences read with Section 34 IPC cannot be sustained because this is a case where the co-accused is a named person and he has been acquitted and by reason of it the appellant cannot be held

to have acted conjointly with anyone in the commission of the offences. This position of law is well settled by this Court and we may only refer to a few decisions in this behalf vide Prabhu Babaji v. State of Bombay [AIR 1956 SC 51 : (1956) Cri LJ 147] , Krishna Govind Patil v. State of Maharashtra [(1964) 1 SCR 678 : AIR 1963 SC 1413 : 1963 (2) Cri LJ 351] and Baul v. State of U.P. [(1968) 2 SCR 450 : AIR 1968 SC 728 : 1968 Cri LJ 872].

11. It therefore, follows that even if the evidence of the prosecution witnesses did not suffer from any infirmity, the acquittal of the other named accused Gokul would stand in the way of the appellant being convicted constructively under Section 34 IPC for the substantive offences under Section 302 and Section 436 IPC.”

8. The learned counsel for the appellant urged that the trial court has based the conviction of the appellant on a DNA test of the condom allegedly found in the room of the deceased but failed to take into consideration the statement of the appellant recorded under Section 313 of the Code of Criminal Procedure, wherein it has been stated that the semen of the appellant was forcibly taken by the police officials after his arrest, in one of the condoms sent for the DNA test. Further, learned counsel drew attention of this court to the fact that DNA profiling was conducted only upon one of the two condoms found at the spot even though they were collected from the same place at the same time and sent to FSL at the same time. Further, there is nothing on record to suggest that the samples were kept under sanitary conditions at the police station.
9. The learned counsel further pointed out that DNA of the foetus inside the deceased did not match with the appellant or the husband of the

deceased (co-accused), which proves the probability of a third person responsible for the death of the deceased.

10. The learned counsel went on to submit that no independent witness has been examined by the prosecution to prove the presence of the appellant at the spot. He also contended that no recovery of any kind of weapon was made from the appellant. Furthermore, the recovery of the mobile phone of the deceased from the appellant was planted and pictures of his family from his personal mobile phone were transferred to the mobile phone of the deceased.
11. The learned counsel also submitted that prosecution has failed to prove that there was any motive on the part of the appellant to cause death of the deceased. Furthermore, it is a case of circumstantial evidence and failing to prove motive on part of the appellant to commit the crime is fatal to the case of the prosecution.
12. The learned counsel also pointed towards the fact that the crime team took 8 chance prints from the place of the incident but the results of the said chance prints are not exhibited anywhere which is fatal to the case of the prosecution.
13. Lastly, the learned counsel concluded his argument by stating that as per the MLC, the injuries on the appellant were one or two weeks old. However, difference between the date of MLC and the date of incident is almost three weeks.
14. In order to substantiate his argument that in cases based on circumstantial evidence, all the circumstances must be conclusive and the chain of evidence be so complete so as to leave no reasonable ground which leads to the innocence of the accused. Reliance was

placed on a judgment titled as ***Hanumant Govind Nargundkar v. State of Madhya Pradesh*** reported in ***AIR 1952 SC 343***, wherein the Apex Court held as under:

“10. It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.”

15. The learned counsel further relied upon a decision by the Hon’ble Supreme Court in ***Naseem Ahmed v. Delhi Administration*** reported in ***(1974) 3 SCC 668***, wherein it was observed as under:

“10. This is a case of circumstantial evidence and it is therefore necessary to find whether the circumstances on which prosecution relies are capable of supporting the sole inference that the appellant is guilty of the crime of which he is charged. The circumstances, in the first place, have to be established by the prosecution by clear and cogent evidence and those circumstances must not be consistent with the innocence of the accused. For determining whether the circumstances established on the evidence raise but one inference consistent with the guilt of the accused, regard must be had to the totality of the circumstances. Individual circumstances considered in isolation and divorced from the context of the over-all picture emerging from a consideration of the diverse circumstances and their conjoint effect may by themselves

appear innocuous. It is only when the various circumstances are considered conjointly that it becomes possible to understand and appreciate their true effect.”

16. On the converse, Ms. Aashaa Tiwari, learned Additional Public Prosecutor submitted that the impugned judgment does not call for any interference and the trial court has rightly convicted the appellant for the offence punishable under Section 302 of the Indian Penal Code.
17. Learned Additional Public Prosecutor argued that evidence adduced on record clearly establishes the guilt of the appellant which is duly corroborated by the medical and forensic evidence and the testimonies of the witnesses. She further submitted that there is no reason to disbelieve the findings of PW-26 Ms. Shashi Bala, Senior Scientific Officer that the DNA profiling conducted on the condom matches with the DNA of the appellant.
18. The Additional Public Prosecutor further argued that no explanation has been accorded to the injuries found on the body of the appellant found during his medical examination and there is nothing on record to suggest that the appellant was incapable of performing sexual intercourse or the appellant was forced by the police officials to give his semen for sample.
19. To substantiate her argument, the learned Additional Public Prosecutor relied upon a decision of the Hon'ble Supreme Court in ***Bhagwan Das vs. State of Rajasthan*** reported in ***AIR 1957 SC 589***, wherein the Apex Court held as under:

*“13. The learned Sessions Judge was of the opinion that the evidence of the doctor PW 11 made the story that Shivilal could walk for a little distance upto the Khala of Hukma or was able to talk so as to make a dying declaration, improbable. But the learned Judges of the High Court disposed of this matter by saying that the doctor was comparatively young and that his statement was not in accord with the opinion expressed in books on Medical Jurisprudence by authors like Modi and Lyon. But it cannot be said that the opinions of these authors were given in regard to circumstances exactly similar to those which arose in the case now before us nor is this a satisfactory way of disposing of the evidence of an expert unless the passages which are sought to discredit his opinion are put to him. This Court in **Sundarlal v. State of Madhya Pradesh** [AIR 1954 SC 28] disapproved of Judges drawing conclusions adverse to the accused by relying upon such passages in the absence of their being put to medical witnesses. The learned Judges of the High Court were, therefore, in error in accepting the testimony of these witnesses in support of the correctness of the two dying declarations nor could the statement of the deceased alleged to have been made in the circumstances of this case be considered sufficient to support the conviction of the accused. The recovery of the kassi is a wholly neutral circumstance because it has not been proved that it belonged to Bhagwandas.”*

20. The learned counsel for the State further relied upon a judgment of the Apex Court titled as **Smt. Kamti Devi vs. Poshhi Ram** reported in **AIR 2001 SC 2226**, wherein the Hon’ble Supreme Court held that the results of a DNA test are accurate and conclusive in nature. The relevant paragraphs are as under:

“4. The marriage between the appellant Kamti Devi and the respondent Poshhi Ram was solemnised in the year 1975. For almost fifteen years thereafter Kamti Devi

remained childless and on 4-9-1989 she gave birth to a male child (his name is Roshan Lal). The long period in between was marked by internecine legal battles in which the spouses engaged as against each other. Soon after the birth of the child it was sought to be recorded in the register under the Births, Deaths and Marriages Registration Act. Then the husband filed a civil suit for a decree declaring that he is not the father of the child, as he had no access to the appellant Kamti Devi during the period when the child would have been begotten.

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*11. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. **The result of a genuine DNA test is said to be scientifically accurate.** But even that is not enough to escape from the conclusiveness of Section 112 of the Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above.”*

21. To further substantiate her argument that the reports of a DNA test are scientifically accurate, the Additional Public Prosecutor relied upon

Santosh Kumar Singh vs. State Through CBI reported in (2010) 9

SCC 747. the Hon'ble Supreme Court held as under:

“53. It is the primary submission of Mr Sushil Kumar that the vaginal swabs and slides taken from the dead body at the time of the post-mortem examination had been tampered with and as there was some suspicion with regard to the blood samples taken by Dr. N.S. Kalra on 25th January, the DNA report too could not be relied upon. This is a rather far-fetched plea as it would mean that not only the investigating agency, that is, the senior officers of CBI and DSP Ohri in particular, the doctors who had taken the vaginal swabs and slides, the doctors and other staff who had drawn the blood samples, and the scientists in Hyderabad had all been in a conspiracy to harm the appellant. To our mind, this premise is unacceptable.

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67. The statements of Dr. Lalji Singh and Dr. G.V. Rao reveal that the samples had been tested as per the procedure developed by the laboratory, that the samples were sufficient for the purposes of comparison and that there was no possibility of the samples having been contaminated or tampered with. The two scientists gave very comprehensive statements supported by documents that DNA of the semen stains on the swabs and slides and the underwear of the deceased and the blood samples of the appellant was from a single source and that source was the appellant.

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71. We feel that the trial court was not justified in rejecting the DNA report, as nothing adverse could be pointed out against the two experts who had submitted it. We must, therefore, accept the DNA report as being

scientifically accurate and an exact science as held by this Court in Kamti Devi v. Poshi Ram [(2001) 5 SCC 311 : 2001 SCC (Cri) 892 : AIR 2001 SC 2226] . In arriving at its conclusions the trial court was also influenced by the fact that the semen swabs and slides and the blood samples of the appellant had not been kept in proper custody and had been tampered with, as already indicated above. We are of the opinion that the trial court was in error on this score. We, accordingly, endorse the conclusions of the High Court on Circumstance 9.”

22. Lastly, the learned counsel for the State placed reliance on another judgment of the Apex Court titled as ***Hardip Singh vs. State of Punjab*** reported in (2008) 8 SCC 557, wherein the Hon’ble Supreme Court held that the delay in sending the parcels of sample to the FSL cannot cause any prejudice to the appellant if the seal put on them is intact. The relevant paragraph is as under:

“17. The then Station House Officer, Inspector Baldev Singh, who was examined as PW 1, was posted at Police Station Ajnala on the date of occurrence. He received the said samples of opium along with case material, being produced before him by PW 5. It has come on evidence that Inspector Baldev Singh kept the entire case property with him till it was deposited in the office of the Chemical Examiner, Amritsar on 30-9-1997 through ASI Surinder Singh (PW 3). It has also come on evidence that till the date the parcels of sample were received by the chemical examiner, the seal put on the said parcels was intact. That itself proves and establishes that there was no tampering with the aforesaid seal in the sample at any stage and the sample received by the analyst for chemical examination contained the same opium which was recovered from the possession of the appellant. In that view of the matter, delay of about 40 days in sending the

samples did not and could not have caused any prejudice to the appellant. The aforesaid contention, therefore, also stands rejected.”

23. We have heard learned counsel for the parties and have also carefully examined the impugned judgment, the testimonies of various witnesses and the documents placed on record.
24. To examine the guilt of the appellant, we must appreciate the evidence adduced by the prosecution. The present case being a case of circumstantial evidence, it is a well settled law that where there is no direct evidence against the accused and the prosecution rests its case on circumstantial evidence; the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused. In other words, there must be a chain of evidence so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability, the act must have been done by the accused. All the links in the chain of circumstances must be complete and should be proved through cogent evidence.
25. Law with regard to the conviction on the basis of circumstantial evidence has been discussed in detail by the Supreme Court in the case of *Harishchandra Ladaku Thange vs. State of Maharashtra*, reported at *AIR 2007 SC 2957*. It would be useful to reproduce the relevant paragraphs:-

“8. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the

incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See **Hukam Singh v. State of Rajasthan 1977CriLJ639**, **Eradu v. State of Hyderabad 1956CriLJ559**, **Earabhadrapa v. State of Karnataka, State of U.P. v. Sukhbasi and Ors. 1985CriLJ1479**, **Balwinder Singh alias Dalbir Singh v. State of Punjab, 1987CriLJ330** and **Ashok Kumar Chatterjee v. State of M.P. 1989CriLJ2124**. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In **Bhagat Ram v. State of Punjab AIR1954SC621** it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt.

9. We may also make a reference to a decision of this Court in **C. Chenga Reddy and Ors. v. State of A.P. 1996CriLJ3461**, wherein it has been observed thus:

21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.

10. In **Padala Veera Reddy v. State of A.P. AIR1990SC79** it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

11. In State of U.P. v. Ashok Kumar Srivastava [1992]ISCR37 it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

12. Sir Alfred Wills in his admirable book 'Wills' Circumstantial Evidence' (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence:

(1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum;

(2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability;

(3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits

(4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt; and

(5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.

13. There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touchstone of law relating to circumstantial evidence laid down by this Court as far back as in 1952."

26. In another case titled as ***Sanatan Naskar and Anr. v. State of West Bengal*** reported in (2010) 8 SCC 249, it was observed by the Hon'ble Supreme Court as follows:-

"13. There cannot be any dispute to the fact that it is a case of circumstantial evidence as there was no eye witness to the occurrence. It is a settled principle of law that an accused can be punished if he is found guilty even in cases of circumstantial evidence provided, the prosecution is able to prove beyond reasonable doubt complete chain of events and circumstances which definitely points towards the involvement and guilt of the suspect or accused, as the case may be. The accused will not be entitled to acquittal merely because there is no eye witness in the case. It is also equally true that an accused can be convicted on the basis of circumstantial evidence subject to satisfaction of accepted principles in that regard. "

27. Similarly, in another case titled as ***Dr. Sunil Clifford Daniel vs. State of Punjab*** (Crl. Appeal No. 2001 of 2010 decided on 14.09.2012), the Hon'ble Supreme Court held as under:

"17. In Sharad Birdhichand Sarda vs. State of Maharashtra AIR 1984 SC 1622, it was held by this Court that, the onus is on the prosecution to prove, that the chain is complete and that falsity or untenability of the defence set up by the accused, cannot be made the basis for ignoring any serious infirmity or lacuna in the case of the prosecution. The Court then proceeded to indicate the conditions which must be fully established before a conviction can be made on the basis of circumstantial evidence. These are:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established;

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

(5) there must be a chain of evidence 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.

Thus, in a case of circumstantial evidence, the prosecution must establish each instance of incriminating circumstance, by way of reliable and clinching evidence, and the circumstances so proved must form a complete chain of events, on the basis of which, no conclusion other than one of guilt of the accused can be reached. Undoubtedly, suspicion, however grave it may be, can

never be treated as a substitute for proof. While dealing with a case of circumstantial evidence, the court must take utmost precaution whilst finding an accused guilty, solely on the basis of the circumstances proved before it."

28. Being a case of circumstantial evidence, the circumstances should be of such a conclusive nature so as to exclude every hypothesis. It must be such as to show that within all human probability the act must have been done by the accused beyond all reasonable doubt. To determine these aspects, we would consider the evidence in this case in detail.

Medical/Forensic Evidence

29. After perusing the arguments adduced by the counsel for the parties, we can draw an inference that the case of the prosecution solely rests upon the medical/forensic evidence. Hence, it would be pertinent to discuss the FSL report placed on record. The relevant portion of the FSL report is as under:

"Forensic Sample received on 17.06.2011

Parcel 1a : One sealed plastic dibbi sealed with the seal of "PK" containing exhibit '1a'.

Exhibit 1a : One damp foul smelling condom along with dirty yellowish putrefied liquid.

Parcel 1b : One sealed plastic dibbi sealed with the seal of "PK" containing exhibit '1b'.

Exhibit 1b : One damp foul smelling condom along with dirty yellowish putrefied liquid.

Parcel 2 : One sealed plastic container with the seal of "MSL DEPARTMENT OF FORENSIC MEDICINE AIIMS NEW DELHI" containing exhibit '2'.

Exhibit 2 : Foetus with umbilical cord and fleshy material.

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Parcel 7 : One sealed plastic dibbi sealed with the seal of “MSL DEPARTMENT OF FORENSIC MEDICINE AIIMS NEW DELHI” containing exhibit ‘7’.

Exhibit 7 : Gauze cloth piece having brown stains described as gauze of accused Prem Singh.

Parcel 8 : One sealed plastic dibbi sealed with the seal of “MSL DEPARTMENT OF FORENSIC MEDICINE AIIMS NEW DELHI” containing exhibit ‘8’.

Exhibit 8 : Gauze cloth piece having few brown stains described as gauze of accused Anoop Singh.

DNA EXAMINATION

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DNA profile was prepared for the exhibits ‘1b’, ‘2’, ‘7’ and ‘8’. However DNA profile could not be prepared for the exhibits ‘1a’ and ‘6’ due to non amplification.

RESULTS OF EXAMINATION

The alleles as from the source of exhibit ‘7’ (Gauze cloth piece of accused Prem Singh) are accounted in the alleles as from the source of exhibit ‘1b’ (condom). However the alleles as from the source of exhibit ‘7’ (Gauze cloth piece of accused Prem Singh) are not accounted in the alleles as from the source of exhibit ‘2’ (foetus). The alleles as from the source of exhibit ‘8’ (Gauze cloth piece of accused Anoop Singh) are not accounted in the alleles as from the source of exhibit ‘1b’ (condom) and exhibit ‘2’ (foetus).

CONCLUSION

The DNA profiling (STR analysis) performed on the exhibits provided is sufficient to conclude that the source of exhibit ‘7’ (gauze cloth piece of accused Prem Singh) is responsible for the biological stains i.e. seminal fluid present on the source exhibit ‘1b’ (condom) ”

30. In the light of the above, the testimony of PW-26 Ms. Shashi Bala, Senior Scientific Officer, FSL, Delhi (who conducted the forensic

examination) assumes importance wherein she proved the results of the FSL report. PW-26 deposed as under:

“Upon examination, I came to the conclusion that the Alleles from the source of exhibit 7 i.e. gauze cloth piece of accused Prem Singh are accounted in the Alleles as from the source of Ex. 1b (condom), however, the Alleles as from the source of Ex. 7 (gauze cloth piece of accused Prem Singh) are not accounted in the Alleles as from the source of Ex. 2 (foetus). The Alleles as from the source of Ex. 8 (gauze cloth piece of accused Anoop Singh) are not accounted in the Alleles as from the source of Ex. 1b (condom) and Ex. 2 (foetus).”

The DNA profiling (STR analysis) performed on the exhibits provided is sufficient to conclude that the source of Ex. 7 is responsible for the biological stand i.e. seminal fluid present on the condom (1b).”

31. PW-26 Ms. Shashi Bala in her cross examination stated as under:

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At this time, I cannot tell the exact date when I examined said samples. It depends upon the condition of sample of semen that its source could be determined. It is not hard and fast rule that after 30 days of taking semen sample, its source cannot be determined. Vol: it depends upon the condition of that sample.”

32. However, it is noteworthy that the appellant in his statement under Section 313 of the Code of Criminal Procedure stated as under:

“Q48 : It is in evidence against you that on 17.06.2011 Ms. Shashi Bala (PW-26) examined the exhibits sent to FSL and prepared a report Ex.PW26/A in this regard. What do you have to say?

Ans. The condoms which were sent by the IO to the FSL in one of the condoms my semen was forcibly taken by the

IO during my police custody in the police station. Hence, the report given by FSL is based on the condom planted by the IO.”

33. As far as the injuries on the body of the appellant are concerned, the appellant stated in his statement under Section 313 of the Code of Criminal Procedure which reads as under:

“Q34A It is in evidence against you that on 14.06.2011, Dr. Raghvendra Kumar (PW9) examined you accused Prem Singh and prepared MLC Ex.PW9/B and some injuries were found on your body. What do you have to say about those injuries.?”

A. I do not know how the injuries were caused. I used to play cricket in the village and the injuries may have been caused while playing.”

34. Attention of this court was also drawn towards the MLC of the appellant with regard to the injuries found on his body. The relevant portion of the MLC of the appellant is as under:

“All are looked liked scratch marks and appears to be 1-2 weeks old”

Further, the date on the MLC appears to be 14.06.2011, whereas the date of the incident as per the First Information Report was 26/27.05.2011. This appears to be in contradistinction with the MLC of the appellant as the gap between the MLC and the date of incident is around 3 weeks. Moreover, there were injuries also found on the body of the co-accused Anoop Singh, for which no explanation has been accorded. Henceforth, it would not be justified to rely upon this ground of the conviction as considered by the trial court.

35. After perusal of the medical/scientific and forensic evidence, we are of the considered view that the presence of semen of the appellant on one of the condoms i.e. exhibit '1b' found at the spot of incident is established. Whilst, there is no explanation accorded to why DNA profiling was done only on one condom i.e. exhibit '1b' and not on exhibit '1a' raises a doubt as to the admissibility of this evidence as both the condoms were collected from the same spot at the same time and sent to FSL at the same time.
36. In this backdrop, where the admissibility of scientific evidence is in doubt, it would be necessary to corroborate the results of the DNA report with the surrounding circumstances.

Motive

37. Since the case is based on the circumstantial evidence, motive plays a vital role in determining the guilt of the accused. To deal with the contention of the counsel for the appellant that there was no motive to commit the aforementioned offence, we are of the view that there is no direct evidence in the case and since it is a case of circumstantial evidence, thus, the prosecution has to establish motive for the crime. The test for proving a case of circumstantial evidence stands entirely on a different footing than a case of direct evidence.
38. The fact that the prosecution itself has failed to adduce any evidence on record to prove the motive on part of the appellant to commit the said offence convinces us to draw an adverse inference in this regard.

39. Moreover, the trial court also noted the absence of motive on part of the appellant to commit the aforementioned offence. The relevant portion of the impugned judgment is as under:

“So far plea of Ld. Defence counsel that accused Prem Singh had no motive to kill victim Poonam, is concerned, it is well settled that it is not necessary always that motive of accused to do crime is proved on record. Motive takes birth in the mind of a person and remains hidden in most of cases.”

40. The law relating to the role of motive in cases of circumstantial evidence is very clear as laid down in a catena of decisions of the Hon’ble Supreme Court and this court as well. The Apex Court in the case of ***Surinder Pal Jain vs. Delhi Administration*** reported in **1993 SCR (2) 226**, observed as under:

“12. There is no motive established in this case by the prosecution for the appellant to commit murder of his wife and the evidence of Tara Chand father of the deceased as well as the sister of the deceased and the tenants living in the same house disclosed that the relations between the husband and wife were cordial. In a case based on circumstantial evidence, motive assumes pertinent significance as existence of the motive is an enlightening factor in a process of presumptive reasoning in such a case. The absence of motive, however, puts the court on its guard to scrutinise the circumstances more carefully to ensure that suspicion and conjecture do not take place of legal proof.”

41. A similar view was upheld in a decision of the Hon’ble Supreme Court in ***Pannayar vs. State of Tamil Nadu by Inspector of Police*** reported in **(2009) 9 SCC 152**, wherein the Apex Court held as under:

“13. It has also come in evidence of Subbiah that the accused was a known person to his family members. One wonders as to why would the accused whom the deceased knew would venture to rob her. Motive of robbery does not seem to be present in the present case. The absence of motive in a case which depended on circumstantial evidence is more favourable to the defence.”

42. Similarly, in ***Gosu Jairami Reddy & Anr. vs. State of Andhra Pradesh (Criminal Appeal No. 1321 of 2006 decided on 26.07.2011)***, the Hon’ble Supreme Court held as under:

“13. It is settled by a series of decisions of this Court that in cases based on eye witness account of the incident proof or absence of a motive is not of any significant consequence. If a motive is proved it may supports the prosecution version. But existence or otherwise of a motive plays a significant role in cases based on circumstantial evidence.”

43. In another case titled as ***Munish Mubar vs State of Haryana (Crl. A. 294/2010)*** the Hon’ble Supreme Court held as under:

“20. In a case of circumstantial evidence, motive assumes great significance and importance, for the reason that the absence of motive would put the court on its guard and cause it to scrutinize each piece of evidence very closely in order to ensure that suspicion, emotion or conjecture do not take the place of proof.”

44. In view of the settled position of law, in the cases of circumstantial evidence, motive plays a significant role. We find that in the present case the co-accused was the husband of the deceased and to prove the involvement of the appellant, who was a friend of the deceased motive will assume significance. It is worth mentioning that from the scrutiny

of the records, it is apparent that the appellant was charged for the said offence only on the mere fact that he was in contact with the co-accused at the relevant time. We are of the opinion that merely on the basis of call details of the co-accused, no motive can be espoused on the appellant. Moreover, the prosecution has failed to adduce any other evidence on record to substantiate its case in relation to motive that the co-accused Anoop Singh, husband of the deceased conspired with the appellant to eliminate the deceased as he was doubting her character and mere details of call record is not sufficient evidence to connect the appellant with the commission of the aforementioned offence.

Other Evidence

45. It is further in evidence that PW-2 Shiv Muni Singh Yadav, a material witness, had failed to recognize the appellant in court. In his cross-examination, PW-2 stated as under:

“(Ld. Addl. PP pointed towards accused Prem Singh). I cannot say that he i.e. Prem Singh is same person. Accused Anoop Singh had requested to allow me for stay of Prem Singh at my house on that day. It is wrong to say that I am deliberately not identifying accused Prem Singh today. Vol: as it was 10.30 pm, I could not see him properly. I cannot say that it was 13th June 2011 when accused were brought to me by the police. It is wrong to say that on 13.06.2011, I had seen accused Prem Singh present in court today in the custody of police. It is wrong to say that I am not deposing properly against the accused person as the accused Anoop Singh is previously known to me.

xxxx

It is correct that I did not recognize the person who came with Anoop Singh in the night of 24/25.05.2011. Similarly, I could not identify the person who was brought by the police on 13.06.2011 along with accused Anoop Singh. It is true that I have signed documents mentioned above in police station. ”

46. From the above testimony of PW-2 Shiv Muni Singh Yadav, it is clear that he failed to recognize the appellant who allegedly came to his house (jhuggi) to ask for permission to stay in the intervening night of the day of incident. Moreover, no other witness has said anything about the appellant being connected with the commission of the said offence. This goes against the case of the prosecution and raises a serious doubt.
47. The attention of this court was also drawn towards the fact that the foetus inside the deceased did not match with the appellant or the husband of the deceased (co-accused), which is confirmed by the medical and forensic evidence discussed above in detail. This raises a doubt in our mind about the probability of a third person being involved in causing death of the deceased.
48. As far as the recovery of the mobile phone of the deceased from the appellant is concerned, it is the case of the appellant that the recovery of the mobile phone was planted and the pictures of his family taken from his personal mobile phone were transferred to the mobile phone of the deceased. In his statement under Section 313 of the Code of Criminal Procedure, the appellant has specifically denied the recovery of any such mobile phone and mentioned that this recovery was

planted and pictures of his family were transferred from his personal mobile phone to the allegedly recovered mobile phone by the police.

The appellant stated as under:

“Q19 : It is in evidence against you that two mobile phones, one make of NOKIA (black colour) and other make of LAVA were recovered from your possession and you stated that the phone make NOKIA was being used by deceased and on being checked it was found having no SIM however, some photographs were in it, both of these mobile phones were seized vide seizure memo Ex.PW18/D (of Nokia) and Ex.PW18/E (of Lava). What do you have to say?

Ans. It is incorrect as only mobile of make Lava was recovered from my personal search.

xxxx

Q49 : It is in evidence against you that on 27.06.2011 Virender Singh (PW-27) examined one NOKIA mobile phone model 2700-C-2(1) along with 2 GB memory SD card and prepared his report Ex.PW27/A in this regard. What do you have to say?

Ans. The photographs of my family which were installed by me in my mobile phone make Lava were transferred by the IO in the mobile make Nokia of the deceased and were sent for examination.”

49. If we are to believe this contention of the appellant for the sake of arguments, then there can possibly be no witness to such an act done by the Investigation Officer. Further, there is nothing on record to suggest that the recovery of the mobile phone of the deceased from the appellant cannot be planted. Moreover, it is not believable that after committing the offence of murder, such a person would transfer their family photographs to the mobile phone of the deceased.

50. In view of the above discussed settled law and after perusal of the evidence available on the record, the testimonies and the arguments adduced by the counsel for both the parties, we are of the considered view that the case of the prosecution solely rests upon the DNA test conducted on one of the condoms seized from the spot, whilst, there is no other corroborating evidence to support the story of the prosecution. There is no reason accorded as to why DNA profiling could not be done on the other condom that was collected from the same place at the same time. Further, we cannot rule out the possibility of error committed while conducting the DNA test and the condition in which the samples were kept. In this regard ***Modi Medical Jurisprudence and Toxicology*** assumes importance at ***Page 543***, wherein it has been noted as under:

“(a) Technical Errors

Firstly, the DNA-probe can be contaminated or degraded. This is specially the case with field samples. The contamination can be caused by bacterial , viral, other non-human DNA or by blood or saliva traces of police officers or laboratory personnel when handling the DNA. The degradation is especially likely when the DNA is in warm, moist conditions. Normally, DNA degrades in a couple of days and vaginal swabs even in a few hours since the vaginal secretions penetrate the DNA of the sperm.

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Another point is the handling of the recovered DNA-probe. The probe has to be put immediately in a deep freezing cooling as low as -70°C or even lower.

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Furthermore, the DNA samples can be mixed up by the police or the laboratory personnel, or the amount of DNA can be insufficient. Secondly, a significant 'source of error' is the incomplete digestion of the DNA by the restriction enzymes. The other extreme can be an over-digestion also called 'star activity'. Thirdly a 'band shift' can occur, meaning that the DNA fragments which are put in several lanes next to each other can influence each other's mobility, thus causing wrong results of the gel electrophoresis..

xxxx

Finally, the expert who determines a match can be biased or put in other words : ' ...people tend to see what they expect to see and it is true that there are very large financial interest in the success of the tests, and their continued adoption by the courts. The people carrying out the tests have vested institutional interests in prosecutions being successful'. All these points are, by far, not the only ones but they show that '... the practical problems of actually doing the test should not be underestimated.'

(b) Population Genetic Errors

To establish a match, the comparison of the DNA sample from the scene of the crime or from the victim and the DNA of the suspect is insufficient. The result would only imply that the samples are identical, yet this does not verify the hypothesis that the suspect is the factual offender. To ascertain that the frequency of such a matching DNA-profile that might occur by chance in the relevant population must be calculated."

51. Furthermore, we are of the considered view that there are various lacunas in the case of prosecution in establishing the chain of

circumstantial evidence against the appellant. Neither any last seen evidence nor any motive on the part of the appellant for commission of the said offence punishable under Section 302 of the Indian Penal Code was proved by the prosecution. Moreover, the prosecution has not produced any independent witness including a neighbour or a close relative of the deceased to show that they were having frequent fights and their relation was not cordial which instigated the husband of the deceased to conspire with the appellant to eliminate the deceased. Further, there is no cogent evidence brought on record which proves the guilt of the appellant beyond reasonable doubt. Henceforth, we are of the opinion that the prosecution has failed to complete the chain of evidence and the guilt of the appellant beyond all reasonable doubt and benefit of doubt be given to the appellant.

52. Accordingly, in view of the forgoing reasons, the appeal is allowed and the appellant is acquitted of all the charges levelled against him.
53. A copy of this judgment be sent to Jail Superintendent, Tihar Jail. The appellant is ordered to be released forthwith if not wanted in any other case.

SANGITA DHINGRA SEHGAL, J

G. S. SISTANI, J

DECEMBER 8th, 2016
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