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*Criminal Appeal No.D-1025-DB of 2011 &
Criminal Appeal No.D-389-DB of 2013*

In the High Court of Punjab and Haryana at Chandigarh.

(I)

Criminal Appeal No.D-1025-DB of 2011

Date of Decision:- September 23, 2017

Kasam

.....Appellant

Versus

State of Haryana

....Respondent

(II)

Criminal Appeal No.D-389-DB of 2013

Usman

.....Appellant

Versus

State of Haryana

....Respondent

CORAM: Hon'ble Mr. Justice Rajesh Bindal
Hon'ble Mr. Justice Gurvinder Singh Gill

Present : Mr. Tarundeep Kumar, Advocate,
for the appellants.

Mr. Ankur Mittal, Additional Advocate General, Haryana with
Mr. Manoj Dhankhar, Assistant Advocate General, Haryana.

Gurvinder Singh Gill, J.

1. This judgment shall dispose of the above mentioned two appeals filed on behalf of accused Kasam and Usman challenging judgment dated 29.7.2011 and order dated 30.7.2011 passed by learned Additional Sessions Judge, Palwal vide which they have been convicted and sentenced as follows:

Name of convict	Convicted u/s	Sentence Imposed	In default of payment of fine
Kasam	365 of IPC	R.I. for 7 years and fine of ₹ 10,000/-.	Further R.I. for 1-½ years.
	392 of IPC	R.I. for 7 years and fine of ₹ 10,000/-.	Further R.I. for 1-½ years.
	302 of IPC	R.I. for life and fine of ₹ 20,000/-.	Further R.I. for 3 years.
Usman	365 of IPC	R.I. for 7 years and fine of ₹ 10,000/-.	Further R.I. for 1-½ years.
	392 of IPC	R.I. for 7 years and fine of ₹ 10,000/-.	Further R.I. for 1-½ years.
	302 of IPC	R.I. for life and fine of ₹ 20,000/-.	Further R.I. for 3 years.

2. On 21.2.2009, the complainant Jumma resident of Village Jalalpur, Nuh, Tehsil Naghina, District Mewat presented a written application in the Police Station Hathin wherein the complainant alleged that on 19.2.2009 Usman resident of village Beri had hired tractor from his brother Israil for going to Bhiwardi and that he was untraceable since then despite the fact that they had searched for him and the blue coloured tractor, Make Farm Track 30. The complainant further stated therein that though they had tried to contact his brother on his mobile phone No.99911-58319 but the said phone was 'switched off'. It is further alleged that even Usman was missing and he suspects that his brother had been done to death and the tractor has been

disposed off. Usman is stated to be brother-in-law (Sala) of Sattar and Sahaboo to be *sambandhi* (relative) of Usman. It is further stated that Kapil son of Dureji was also plying tractor with his brother, who had informed them.

3. Pursuant to recording of aforesaid statement of complainant Jumma, the police initially lodged FIR No.55 at Police Station Hathin on 23.2.2009 for offence punishable under Section 365 of Indian Penal Code, 1860 (for short, 'IPC'). The matter was investigated by the police. Upon receipt of a secret information as regards whereabouts of Usman, he was arrested on 8.3.2009 from bus-stand, Palwal. During interrogation he made several disclosure statements which were taken down in writing. Pursuant to his disclosure statement (Ex.PG), the accused Usman led the police party to the disclosed place and got the dead body recovered. Inquest proceedings were conducted. Post mortem examination was got conducted on the recovered dead body. The dead body was identified by PW-8 Ashu and Hamid. Accused Hasan was arrested on 12.3.2009 and upon interrogation, he also made disclosure statements which were taken down in writing by the police. Pursuant to disclosure statements made by both the accused, the accused got the tractor, trolley, watch and mobile recovered from the disclosed places which were taken into possession by the police. After conclusion of investigation challan was presented against both the accused in the Court of Sub Divisional Judicial Magistrate, Hathin on 20.5.2009 for offences punishable under Section 365, 302, 392 and 201 read with Section 34 of IPC. The learned Sub Divisional Judicial Magistrate, Hathin vide order dated 22.5.2009 committed the case to the Court of Sessions. The case was assigned to the Court of Additional

Sessions Judge, Faridabad who upon finding sufficient grounds to presume that accused had committed offences under Section 365, 392, 302, 201 read with Section 34 of IPC framed charges against the accused on 11.8.2009 to which the accused pleaded not guilty and claimed trial. Subsequently upon establishment of Courts at Palwal, the matter was transferred to the Court of Additional Sessions Judge, Palwal and the proceedings w.e.f. 15.10.2009 were conducted at Palwal.

4. The prosecution in order to establish the charges framed against the accused examined as many as 15 witnesses. PW-1 Dr. S.K. Dhattarwal, in his examination-in-chief, deposed that he had conducted post-mortem examination on the dead body and proved the post mortem report as Ex.PB. However, his cross-examination could not be recorded as case property had not been received. Subsequently he did not appear and thus his statement remained incomplete for want of cross-examination. PW-2 Dr. Sunil Gambhir who was associated with Dr. S.K. Dhattarwal for conducting post mortem examination stated in detail in respect of the observations recorded in the post-mortem report which was duly proved as Ex.PB. PW-3 Kishan Lal , Halqa Patwari who had prepared the site plan of the spot from where the dead body had been recovered proved the same as Ex.PD. PW-4 Constable Rakesh Kumar stated regarding delivery of special reports to the Ilaka Magistrate and other authorities on 23.2.2009.
5. PW-5 Kapil stated that on 19.2.2009 he and Israil (deceased) were working in the fields of Mathepur when Usman came there and hired tractor of Israil for loading a '*Khokha*' and compressor for Bhiwandi. He further stated that Israil

had taken his mobile bearing sim No.9911-58319 from him. He further deposed that Israil was wearing a '*Khakhi*' chaddar and a shirt of brown colour and a greenish pant and a green and blackish muffler. PW-6 Jumma, complainant deposed that on 19.2.2009 Usman, Sattar, Sabbu and Kasam had hired tractor from his brother Israil and when his brother did not return back, he lodged 'missing' report (Ex.PE) with the police. He further deposed that the tractor was of make Farm Track 30 and was blue coloured. He further stated that Kapil had told him later about the above stated four persons having taken away his brother along with his tractor. PW-7 ASI Mukesh Chand stated that on 8.3.2009 while he was posted in CIA Staff, Palwal, he was associated with investigation of the case with ASI Illiyas Khan, the dead body had been entrusted to him and Constable Rattan Singh for getting post-mortem examination conducted and they had taken the dead body to PGI, Rohtak for getting post mortem examination conducted.

6. PW-8 Ashu son of Jumma stated that on 8.3.2009 he and his uncle Hamid had come to Palwal and that Usman who was in police custody disclosed during interrogation that he had hired tractor of Israil and that he took Israil to Hathin where he was done to death by Usman and Kasim. He further deposed that Usman thereafter led the police party to the place where the dead body was lying. PW-9 Constable Gora Singh is a formal official witness who stated that on 15.4.2009 MHC Pritam Singh had handed over a packet for depositing the same with FSL and he accordingly deposited it on the same day with FSL Madhuban and handed back the receipt to MHC. PW-10 ASI Khem Raj is another official witness who stated that on 23.2.2009 formal FIR (Ex.PK) was

lodged by him on the endorsement of ASI Om Parkash. PW-11 ASI Om Parkash stated that he had verified the facts as contained in DDR No.15 dated 21.2.2009 and finding the facts to be true, he had made an endorsement (Ex.PL) on the basis of which the FIR was lodged. PW-12 Head Constable Hakmuddin stated about the disclosure statements made by accused on 13.3.2009 as well as on 15.3.2009.

7. PW-13 SI Mohd. Illiyas who is the Investigating Officer of the present case stated in detail in respect of the entire investigation conducted in the case and proved various statements recorded during investigation and the recovery memos prepared during the course of investigation. PW-14 Mubarik stated that on 19.2.2009 Usman and Kasam had taken the tractor of Israil on hire and that subsequently they killed Israil by strangulating his neck with 'saffi' and disposed off his dead body in the fields. He further proved the recovery memos Ex.PW and Ex.PR in respect of the recovery of tractor and trolley at the instance of the accused. PW-15 Head Constable Pritam Singh deposed that on 8.3.2009 he was posted as MHC at Police Station Hathin and that ASI Mohd. Illiyas had deposited the case property with him and as long as the case property remained in his possession the same was not tampered with.
8. Upon conclusion of the prosecution evidence, entire incriminating evidence appearing against the accused was put to the accused to enable them to explain the same but the accused denied the prosecution case in toto and pleaded innocence and stated that they have been implicated falsely. The accused, however, did not lead any evidence in their defence.

9. The learned Trial Court, upon perusal of the evidence on record, held that the prosecution has been successful in fully establishing the charges framed against the accused and accordingly convicted both the accused for offences punishable under Sections 365, 392, 302 and 201 vide judgment dated 29.7.2011. Aggrieved with the same, both the accused have filed separate appeals challenging their conviction.
10. The learned counsel for the appellants while assailing the impugned judgment submitted that the present case is based solely on circumstantial evidence and which is infact grossly insufficient to connect the accused with the offences in any manner. The learned counsel submitted that infact even the dead body which was recovered after 18 days of the occurrence was admittedly not in identifiable state and thus it cannot be said with certainty that the same was of Israil. The learned counsel further submitted that a large number of inconsistent disclosure statements recorded in the present case show that the prosecution has made desperate and unsuccessful attempts to frame the accused against whom there is no evidence worth credence. It has further been submitted that even the tractor alleged to have been recovered in pursuance of disclosure statements can not be said to be belonging to the complainant or the deceased. It has been submitted that the 'last seen' evidence in the shape of testimony of PW-5 Kapil also does not inspires confidence. The learned counsel thus submitted that in the absence of a complete chain of circumstantial evidence, the accused cannot be convicted for having murdered Israil and thus prayed for acquittal of the accused.
11. On the other hand, the learned counsel representing the State submitted that

the evidence led by the prosecution clearly suggests that it is the accused who had accompanied the deceased Israil and had killed him for the purpose of looting his tractor and trolley. The learned counsel has submitted that the recovery of tractor, trolley, mobile phone and wrist watch of the deceased at the instance of the accused leaves no manner of doubt that it is the accused who had murdered Israil. The learned counsel thus submitted that there is no infirmity in the impugned judgment and prayed for dismissal of the appeals.

12. We have considered rival submissions addressed before this Court and with able assistance of learned counsel have also perused the record of the case.
13. As per case of prosecution, Israil went 'missing' on 19.2.2009. It is alleged that Usman had hired tractor of Israil, and Israil along with his tractor had gone for taking the '*Khokha*' and compressor of the accused but did not return back. It was after 18 days that the dead body was recovered. Thus, there is no direct evidence regarding the occurrence and the prosecution relies on the circumstantial evidence in the shape of the 'last seen' evidence and the disclosure statements pursuant to which tractor, trolley, watch and mobile phone of the deceased was recovered.
14. Before evaluating the aforesaid circumstantial evidence, the contention raised by learned counsel for the appellants regarding identification of the dead body needs to be examined. Israil went 'missing' on 19.2.2009 and it was after 18 days i.e. on 8.3.2009 that the dead body was recovered. As per the testimony of PW-2 Dr. Sunil Gambhir, who had conducted post-mortem examination on the dead body, the body was not in identifiable state. The relevant extract

from the statement of PW-2 Dr. Sunil Gambhir is reproduced below:

“.....The clothes were smudged with decomposed tissues fluids. The skull & few vertebrae & the mandible were lying separated with the rest of the body. C1 to C6 vertebra were missing. The brain was missing. That the body was emitting foul smell. Maggots of varying size 1 to 1.5 cm crawling all over the body. Skin & soft tissues were missing from the skull & face, exposing all the bones underneath. Facial features were absent, not identifiable.....”

15. PW-6 Jumma and also PW-8 Ashu son of the complainant have both stated that the dead body was identified on the basis of the clothes that the deceased was wearing. The relevant extract from the testimony of PW-8 Ashu who had identified the dead body is reproduced below:

“.....The fact of deceased was totally decomposed and beyond recognition. We identified him on the basis of clothes which were recovered by the police on that date.....”

16. From the above referred statements, especially statement of PW-2 Dr. Sunil Gambhir it is evident that the dead body was not identifiable due to the fact that it was in a state of decomposition and facial features were absent. The witnesses however claim that the dead body was identified on the basis of the clothes which the deceased was wearing. Since the complainant i.e. PW-6

Jumma claims to be brother of the deceased and PW-8 Ashu is son of the complainant, therefore, they would certainly be in a position to identify the clothes of the deceased. However, a perusal of their testimonies shows that they have not given any description of the clothes.

17. A vivid description of clothes is, however, forthcoming in testimony of PW-5 Kapil, who stated that on 19.2.2009 he and Israil were working in the fields when Usman came there and hired the tractor of Israil. In other words he is stated to have 'last seen' the deceased. PW-5 Kapil while describing the clothes which Israil was wearing stated as follows:

“..... Israil was wearing a Khakhi chaddar and a shirt of brown colour and a greenish pants. He was also having a green and blackish muffler.....”

18. PW-2 Dr. Sunil Gambhir who had conducted the post mortem examination on the dead body of the deceased has also described the clothes which the deceased was wearing. The relevant extract from his statement reads as follows:

“..... Body was wearing:

- a) Greenish colour full sleeve shirt having six buttons in total, first four buttons open and intact, rest two closed in situ.
- b) A parrot colour round neck T-Shirt.
- c) An off white colour pant having a leather belt in loops

of it. Belt was having a black colour pouch, meant for phone.

- d) A greyish colour warm pajama having a elastic waist band around the waist.”

19. A perusal of the description of clothes as given by PW-5 Kapil and as described by PW-2 Dr. Sunil Gambhir shows that the descriptions are far from being similar. Since, the dead body is stated to have been identified on the basis of the clothes only and the description given by PW-5 does not tally at all with the clothes which the dead body was found to be wearing renders the identification highly doubtful. As such, it cannot be said with certainty that the recovered dead body was of Israil especially when the same admittedly was not in an identifiable state as has been specifically stated by the Doctor. No scientific examination like DNA test etc. was conducted which could have furnished some evidence as regards the identification. In the absence of any such evidence it is held that the prosecution has failed to lead convincing evidence so as to identify the dead body to be of Israil.
20. It is also worth noticing that from the medical evidence led by the prosecution it cannot be ascertained as to what was the cause of death. Though, the prosecution has tried to build up the case on the premises that the accused Usman and Kasam had strangulated Israil with the help of 'Saffi' (cloth) but there is no medical evidence to this effect. PW-2 Dr. Sunil Gambir, in his statement has not stated a word to opine as regards the cause of death. Absence of evidence as regards cause of death also causes a serious dent in the case of prosecution.

21. As regards the 'last seen' evidence in the shape of testimony of PW-5, a perusal of his examination-in-chief shows that he has stated that on 19.2.2009 at about 6-7 PM. he and Israil were working in the fields of Mathepur when Usman came there and hired tractor of Israil for loading of Khokha and compressor. However, PW-6 Jumma in his statement has named four persons who had hired the tractor of his brother and has attributed the source of said information to be PW-5 Kapil. The relevant extract from statement of PW-6 Jumma is reproduced below:

“Isrile since deceased was my brother and he used to drive a tractor. He used to fill earth in the area of Mathepur. Usman, Satta and Sabbu and Kasam had hired the tractor of my brother for Bhiwardi in Rajasthan on 19.2.2009...Kapil told me later that the above said four persons had taken my brother and brother's tractor on hire.....”

22. The aforesaid statement of PW-6 is rather not in tune with statement of PW-5 Kapil who has named Usman only. Further PW-5 Kapil has stated that Israil had taken his Nokia phone bearing Sim No.99911-58319 which is shown to have been recovered later in pursuance to a disclosure statement made by the accused but it is rather unusual that a person would lend his mobile phone to another without there being any specific reason or urgency for the same. It is further worthwhile to mention that despite the fact that PW-5 Kapil claims that he had 'last seen' the deceased on 19.2.2009 and the deceased had taken away his mobile phone but still he did not take any step for recovering his mobile

and it was after 17 days that his statement was recorded by the police when he furnished proof with regard to phone connection issued in his name. Thus, his statement does not inspire confidence so as to be relied upon as a trustworthy piece of evidence to establish important link in chain of circumstantial evidence.

23. In the present case, a large number of disclosure statements are stated to have been made by both the accused wherein different versions are forthcoming at different points of time. The said disclosure statements as well as the recoveries made in pursuance thereof are being briefly referred to as follows:

Disclosure statement of Usman (Ex.PG) made on
8.3.2009 :

As per disclosure statement Ex.PG, Usman disclosed that he along with Kasam had hired tractor from Israil on 19.2.2009, and that in the evening at about 6 PM, he and Israil went from village Mathepur to Hathin where Kasam met them and they proceeded towards Village Kondal to load a compressor and on the way they stopped the tractor and killed Israil by strangulating him with a 'saffi' cloth and looted the tractor, trolley, mobile phone and watch of Israil and disposed off the dead body.

Recovery of dead body on 8.3.2009 pursuant to aforesaid
disclosure statement Ex.PG :

Accused Usman led the police party to the disclosed place and got recovered the dead body which was taken into possession vide recovery memo Ex.PH.

Supplementary Disclosure statement of Usman dated 9.3.2009 (Ex.PT) :

Usman made a supplementary Disclosure statement (Ex.PT) wherein he stated that he and Kasam had sold the tractor to a tractor mechanic of Bhopal for Rs.50,000/- and that out of the said Rs.50,000/-, an amount of Rs.26,000/- was his share and the remaining Rs.24,000/- along with mobile and a watch fell to the share of Kasam. He further stated therein that he can get the tractor trolley recovered by going to Bhopal.

Disclosure statement (Ex.PU) dated 12.3.2009 of Usman :

On 12.3.2009 Usman made another disclosure statement wherein he stated that earlier statement regarding sale of tractor trolley was wrong and that he and Kasam had sold the trolley in Aligarh to an unknown person and had concealed mobile phone, watch and 'saffi' used for strangulating Israil in the tool box of trolley. He further stated therein that after they were returning back from UP to Faridabad for the purpose of selling tractor in Bagpur, a rear wheel of tractor got punctured and they fled away leaving the tractor at the spot.

Disclosure statement (Ex.PV) dated 12.3.2009 of Kasam :

On the same day i.e. 12.3.2009 accused Kasam also made a statement in the same terms as made by accused Usman as detailed above regarding the trolley having been sold in Aligarh and the articles having been concealed in tool box of the trolley and regarding abandoning tractor due to puncture of rear wheel.

Recovery memo (Ex.PW) dated 12.3.2009 regarding recovery of tractor :

Pursuant to the disclosure statements Ex.PU and Ex.PV made by accused Usman and Kasam the accused led the police party to the place where the tractor in question had been abandoned by them and got the same recovered which was taken into possession vide recovery memo Ex.PW.

Disclosure statement (Ex.PN) dated 13.3.2009 of Usman :

On 13.3.2009 Usman made yet another disclosure statement wherein he has stated that trolley of the tractor had been sold by him and Kasam in Meerut to a scrap dealer for a sum of Rs.16,000/- and that he knows the shop of the scrap dealer and can get the same recovered.

Disclosure statement (Ex.PO) dated 13.3.2009 of Kasam :

Kasam also made identical statement on 13.3.2009 to the effect that trolley had been sold by him and Usman in Meerut to a scrap dealer and that he could get the same recovered.

Disclosure statement(Ex.PP) dated 15.3.2009 of Usman :

On 15.3.2009 Usman made another disclosure statement to the effect that his earlier statement regarding sale of trolley in Meerut was wrong and that he and Kasam had concealed the trolley near Factory Empire at Sector 58, Ballabhgarh behind the wall.

Disclosure statement (Ex.PQ) dated 15.3.2009 of Kasam :

On 15.3.2009 Kasam also made an identical statement to the effect that his previous statement regarding sale of

trolley in Meerut was wrong and that he and Usman had concealed the trolley near the Factory Empire at Sector 58, Ballabhgarh near wall.

Recovery memo (Ex.PR) dated 15.3.2009 regarding recovery of trolley :

Pursuant to the disclosure statements Ex.PP and Ex.PQ the accused led the police party to Sector 58, Ballabhgarh and the trolley was got recovered which was taken into possession vide recovery memo Ex.PR.

24. A perusal of the above referred disclosure statements and the recovery memos reveals several discrepancies which leave much to be desired in the case of prosecution. First of all, it needs to be borne in mind that for the reasons best known to the prosecution, the registration number of the tractor in question is not forthcoming. It was only when the tractor in question was recovered that for the first time, the engine number and chassis number of the tractor is mentioned in the recovery memo. In the absence of any proof regarding ownership or registration of the tractor, it would rather be difficult to hold that the tractor recovered is the same tractor which the deceased was driving. Further the disclosure statements of both the accused recorded on 12.3.2009, 13.3.2009 and 15.3.2009 show that they have made identical statements, firstly on 12.3.2009 to the effect that the trolley had been sold in Aligarh; thereafter on 13.3.2009 to the effect that the trolley in question had been sold in Meerut; and thereafter on 15.3.2009 to the effect that the trolley had been concealed in Factory Empire in Sector 58 Ballabhgarh. The accused, even if they happen to be co-accused in the same case, are not interrogated in the presence of each

other and are supposed to be interrogated separately. It remains unexplained as to how absolutely identical statements were forthcoming from both the accused. Still further, while in the disclosure statements Ex.PU and Ex.PV of Usman and Kasam, respectively recorded on 12.3.2009, it is stated that the watch, mobile phone and “saffi” had been concealed in the tool box of the trolley, but the same are shown to have been recovered from the tractor recovered on 12.3.2009.

25. Further it is also pertinent to mention that though the disclosure statements Ex.PU and Ex.PV of Usman and Kasam recorded on 12.3.2009 and also the disclosure statements Ex.PP and PQ of Usman and Kasam respectively recorded on 15.3.2009 are attested by witnesses Mubarik and Hakamudeen but despite the fact that Mubarik has been examined by the prosecution as PW-14, he has not stated a word to the effect that the accused had made the said disclosure statements in his presence. Rather he is absolutely silent about the said disclosure statements. The other witness to the said disclosure statements namely Hakamudeen has not been examined by the prosecution. In view of the aforesaid position as regards the discrepancies and also the fact that PW-4 Mubarik has remained absolutely silent in respect of the said disclosure statements, it would certainly be not safe to rely upon the said disclosure statements and also the recoveries allegedly made pursuant to the said statements.

26. As an upshot to the discussions made above, we find that not only the circumstantial evidence led by prosecution is grossly insufficient and untrustworthy but even the dead body recovered cannot be said to be of

deceased Israil. As such, the accused cannot be held guilty for having kidnapped or abducted Israil or for having robbed and murdered him. The impugned judgment cannot sustain and accordingly deserves to be set aside.

27. Both the appeals are consequently accepted and the accused Usman and Kasam are acquitted of all the charges framed against them.

(Rajesh Bindal)
Judge

(Gurvinder Singh Gill)
Judge

September 23, 2017
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Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No