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

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Reserved on : 23rd February, 2017

Date of decision : 9th March, 2017

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CRL.A. 37/2017 & Crl.M.B.No.60/2017

SUNIL KUMAR

..... Appellant

Through: Mr.Sumeet Verma, Adv.
with Mr.Abhijeet Sharma,
Adv.

versus

STATE

..... Respondent

Through: Mr.Varun Goswami, APP
for State.
S.I. Karamvir, P.S. Narela.

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CRL.A. 46/2017 & Crl.M.B.No.73/2017

ARVIND

..... Appellant

Through: Mr.Gaurav Bhattacharya,
Adv. for Mr. Ajay Verma,
Adv.

versus

STATE

..... Respondent

Through: Mr.Varun Goswami, APP
for State.
S.I. Karamvir, P.S. Narela.

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CRL.A. 95/2017 & Crl.M.B.No.151/2017

DINESH

..... Appellant

Through: Mr. Pramod Kumar Dubey
and Mr.Akshay Sehgal,
Advs.

versus

STATE

..... Respondent

Through: Mr.Varun Goswami, APP
for State.
S.I. Karamvir, P.S. Narela.

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

GITA MITTAL, J.

Crl.A.Nos.37/2017, 46/2017 and 95/2017

1. Sunil Kumar (*appellant in Crl.A.No.37/2017*); Arvind (*appellant in Crl.A.No.46/2017*) and Dinesh (*appellant in Crl.A.No.95/2017*) were subjected to a joint trial in SC No.58069/2016 before the court of Additional Sessions Judge-03 (North), Rohini Courts, Delhi arising out of FIR No.676/2012 registered by P.S. Narela.

2. Pursuant to their joint trial, by the impugned judgment dated 19th August, 2016, the Id. Additional Sessions Judge found the appellants guilty of commission of the offence punishable under Section 302 read with Section 34 IPC with which they were charged. As a consequence, by the order dated 24th September, 2016, the appellants stood sentenced to life imprisonment with fine of Rs.20,000/- and in default of payment of fine, it was directed that they shall further undergo simple imprisonment for one year and in case of the fine amount being realized, the same was directed to be distributed equally among the two brothers of the deceased, namely, Rama Yadav and Ram Achal Yadav.

3. Aggrieved by their conviction by the judgment dated 19th August, 2016 as well as the sentence imposed upon them, the appellants have preferred these separate appeals challenging the judgment and order on sentence.

Given the fact that the same evidence is being referred to by the appellants and identical questions of law and fact are raised, we have heard the appellants together and propose to decide all three appeals by this common judgment.

4. The case rests within a narrow factual compass. On the 13th of December 2012 at 1:35 pm, information was received by L/HC Krishna Kumari (PW-2) at P.S. Narela, Delhi from the Police Control Room that Rama Yadav had informed from the phone No.9650560103 that the dead body of his brother Munshi Yadav, who was missing since the day prior, from his house, was lying near the *juggis* at the roundabout at DSIDC, Bhora Garh, Narela. The same was registered as DD No.25A by the L/HC Krishna Kumari in the *roznamcha*. A copy of the DD was entrusted to S.I. Mahavir Singh.

5. Insp. Mahavir Singh (PW-17) and Head Constable Jasbir (PW-3) proceeded to the spot which were the fields of village Bhorgarh (near cremation ground), Narela, Alipur Road, Delhi, where they found the dead body of Munshi Yadav, who was identified by the informant Rama Yadav as well as his brother Ram Achal Yadav, with marks of injury on his face and his tongue stuck between his teeth. A cream coloured shawl was found tied around

the neck of the deceased. As per Insp. Mahavir Singh (PW-17), four cigarette butts and four broken plastic glasses were lying near the dead body.

6. Insp. Mahavir Singh (PW-17) recorded the statement (*rukka*) (Ex.PW4/A) of Rama Yadav as PW-4 at the spot itself which was duly thumb marked by Rama Yadav. Insp. Mahavir Singh (PW-17) made his endorsement (Ex.PW17/A) on the statement of Rama Yadav and handed over the *rukka* to Head Constable Jasbir Singh (PW-3) at 4:15 pm for registration of the FIR.

7. Based thereon, Head Constable Jasbir Singh (PW-3) proceeded to the police station and handed over the *Tehrir* to the duty officer. The computerized FIR No.676/2012 was generated at the police station Narela and a copy thereof was handed over to Head Constable Jasbir Singh (PW-3) along with *Tehrir* for handing over to Insp. Mahavir Singh (PW-17) at the spot.

8. In the meantime, Insp. Mahavir Singh (PW-17) had called for the crime team which reached the spot and conducted spot proceedings. The photographer took the photographs at the spot. The mobile crime team report (Ex.PW11/A) was handed over to the investigating officer.

9. So far as seizure of the four broken plastic glasses and four cigarette butts of the *Gold Flake* make are concerned, the same were separately seized in plastic boxes and were kept in a *pulanda* by Insp. Naresh Kumar vide seizure memos Ex.PW15/A and

Ex.PW15/B respectively. These seizures were duly sealed with the seal of “NK”. These articles were deposited on 13th December, 2012 with the *malkhana*, extract whereof was proved on record as Ex.PW13/A. Insp. Mahavir Singh (PW-17) is the sole witness to these seizure memos. The cigarette butts and plastic glasses were produced in court and proved on record as Ex.P-3 and Ex.P-4 (Colly.)

10. Insp. Naresh Kumar (PW-15) also prepared an unscaled site plan (Ex.PW15/C) at the instance of Insp. Mahavir Singh (PW-17).

11. It is necessary to note the statement made by Rama Yadav (PW-4), brother of the deceased in the *rukka* (Ex.PW4/A). As per the *rukka* (Ex.PW4/A), Rama Yadav (PW-4) had stated that he along with his family were residing on rent in the house of Ranbir Saini in Bhor Garh and that along with his younger brother Ram Achal Yadav, he used to vend vegetables. Munshi Yadav was his unmarried elder brother who was working as a labourer in a factory in the DSIDC, Narela and was residing with Rama Yadav (PW-4) only. It is stated in the *rukka* (Ex.PW4/A) that on the 12th of December 2012, Munshi Yadav returned in the afternoon from the factory as there was less work. He was present with Rama Yadav (PW4) in his shop till the evening and thereafter Rama Yadav proceeded with his “*rehri*” (vegetable cart for the “*fairi*” (round)). At about 6:30 pm, Rama Yadav (PW-4) met his brother Munshi Yadav who was accompanied by Dinesh at the Bhorgarh Chaupal. Dinesh was known to Rama Yadav as he was working in an

adjacent factory located in the DSIDC, Narela and used to keep meeting him. On asking, they told Rama Yadav (PW-4) that they were going to eat and drink together. However, his brother did not return till late night. On telephoning Dinesh, Rama Yadav (PW-4) was informed by him that he had no information about Munshi Yadav. Despite searching, their efforts to trace out their brother were unsuccessful. It was stated that on the 13th of December 2012 when telephonic inquiries were made from Dinesh, he still did not give a satisfactory answer and refused to come to meet them. Rama Yadav (PW-4) has stated that he had no information about Dinesh's room or the factory where he worked. When searching for their brother, they had discovered his dead body near the bushes in the agricultural fields near the roundabout of Bhorgarh Vijaya Bank. The police control room was informed about this. In the *rukka* (Ex.PW4/A), Rama Yadav (PW-4) has stated that his brother had marks of injuries on his face and that his brother had been strangled with a shawl. Rama Yadav (PW-4) had expressed belief that Dinesh was responsible for murder of his brother.

12. Inspector Naresh Kumar (PW-15) had caused the dead body to be removed to the mortuary of the BJRM Hospital through Constable Satbir (PW-8).

13. Thereafter, Inspector Naresh Kumar (PW-15) moved a request for autopsy of the dead body to the Incharge of the BJRM Hospital vide Ex.PW15/D1 enclosing the brief facts of the case (Ex.PW15/D2).

Along with the brief facts, the death report dated 14th December, 2012 (Ex.PW15/D3) was also prepared and submitted by Inspector Naresh Kumar (PW-15).

14. It is noteworthy that in the brief facts (Ex.PW15/D2), while detailing allegations of Rama Yadav with regard to Munshi Yadav going missing and recovery of his dead body, there is no reference to the cigarette butts or the plastic glasses alleged to have been recovered from the spot.

15. Mr. Sumeet Verma, Id. counsel for the appellant – Sunil Kumar has also drawn our attention to the death report form No.25.35(1)(B) (Ex.PW15/D3) after the Sr. No.21, where there is a specific column requiring “*Description of each article found on or near body. Description of each article found on body (to be labeled and sealed)*”. We find that Inspector Naresh Kumar (PW-15) has not mentioned recovery of either cigarette butt or of any plastic glasses against this requirement. Prior to the post-mortem, the dead body was identified by Ram Achal Yadav (PW-1) vide Ex.PW1/A and Rama Yadav (PW-4) vide Ex.PW4/B on which their signatures/thumb impression were affixed by Inspector Naresh Kumar (PW-15).

16. After the post-mortem, the autopsy doctor had handed over sealed exhibits which included a *pulanda* containing the clothes of the deceased Munshi Yadav duly sealed with the seal of “*FMT BJRM Hospital, Delhi*”; a second *pulanda* containing the ligature material which was wrapped around the neck of the deceased also

sealed with the seal of “FMT BJRM Hospital, Delhi” and a third envelope containing the blood sample of the deceased in a gauze duly sealed with the seal of “FMT BJRM Hospital, Delhi”. These articles were taken into possession vide seizure memo (Ex.PW15/E). Another sealed bottle containing blood sample of the deceased for examining from the aspect of alcohol content with the sample seal of “FMT BJRM Hospital, Delhi”.

Arrest and disclosures by the appellants

17. As per the prosecution, on the same day i.e. 14th December, 2012, secret information was received that Dinesh, who was wanted in the case, was standing near the Narela Railway Station. Inspector Naresh Kumar (PW-15) along with Constable Satbir (PW-8) and Head Constable Bijender (PW-12) reached the spot and on pointing out by their secret informer, apprehended Dinesh. After interrogation, he was arrested vide memo (Ex.PW8/A) and his personal search was conducted vide memo (Ex.PW8/B).

18. It is claimed that Dinesh had pointed out the place of incident i.e. the agricultural field near Bhorgarh near the Vijaya Bank square and a pointing out memo with regard thereto (Ex.PW8/K1) was duly prepared. The police has claimed that after his arrest, Dinesh made a voluntary disclosure statement (Ex.PW8/C) disclosing the manner in which offence was committed which was scribed by Inspector Naresh Kumar (PW-15).

19. It was the case of the prosecution that at the instance of the accused Dinesh, his associate Sunil (appellant in CrI.A.No.37/2017) and Arvind @ Munna (appellant in CrI.A.No.46/2017) were arrested vide Ex.PW8/D and Ex.PW8/E respectively near the house of Virender, village Bhorgarh, Narela, Delhi. Their personal search was conducted vide Ex.PW8/F and Ex.PW8/G. It is claimed that after their arrest, Arvind @ Munna and Sunil made the voluntary disclosure statements vide Ex.PW8/H and Ex.PW8/J respectively.

20. It is claimed that pursuant to the disclosure statement (Ex.PW8/C), Dinesh got arrested the other accused persons and that all the accused persons pointed out the place of occurrence i.e. village Bhorgarh near Vijaya Bank Square vide pointing out memos (Ex.PW8/K1 – attributed to Dinesh, Ex.PW8/K2 – attributed to Arvind and Ex.PW8/K3 – attributed to Sunil)

21. It is claimed by Constable Satbir (PW-8) as well as Inspector Naresh Kumar (PW-15) that on 14th December, 2012, the appellant Dinesh led them to village Pooth Khurd and from his rented house, at his instance, a grey coloured pant and a black coloured shirt having some blood stains which he was wearing at the time of commission of offence were recovered and converted into two sealed *pulandas* with the seal of “NK” and taken into possession vide memos Ex.PW8/L and Ex.PW8/M. These seized properties were deposited in the *malkhana*, extract whereof is proved on

record as Ex.PW13/B and the accused persons were sent to lock up.

22. So far as the disclosure statements (Ex.PW8/H and Ex.PW8/J) attributed to Arvind @ Munna and Sunil are concerned, there is, however, no discovery of new fact or evidence which was not already known to the police. Given the fact that the body had been already discovered by the police and it is claimed that the glasses used for consumption of alcohol by the deceased and accused persons, had been recovered along with cigarette butts, the *situs* of the crime was known to the police. Therefore, no evidence has been discovered or recovered as a result of the disclosure statements made by Sunil and Arvind which are therefore, hit by the prohibition under Sections 24 to 30 of the Indian Evidence Act and are rendered inadmissible.

23. It is also extremely noteworthy that the three disclosure statements are identical in their content with almost minor and insignificant variations. It is not the prosecution case that the two accused persons gave a common disclosure statement. There is no evidence as to where, how and when these disclosures were made. Given the similarity of the content of the statements, we have strong doubts as to whether these statements were actually made by the appellants.

Forensic examination

24. So far as the seized exhibits are concerned, they were sent to the Forensic Science Laboratory in two tranches.

25. The articles seized by the police from the spot i.e. one sealed plastic box containing four cigarette butts sealed with the seal of “NK”; one sealed *pulanda* containing one shirt sealed with the seal of “NK”; one sealed *pulanda* containing one pant sealed with the seal of “NK”; one envelope containing blood gauze of deceased sealed with the seal of “FMT BJRM Hospital Delhi” and one sample seal of FMT BJRM Hospital, Delhi were sent to the Forensic Science Laboratory, Rohini in five parcels vide Road Certificate No.9/12/13 dated 14th January, 2013. The FSL issued a receipt (Ex.PW13/D) in acknowledgement of the same on 14th January, 2013.

26. Thereafter on the 29th of January 2013, three more parcels were sent by the police station Narela through Ct. Ganesh (PW14) under Road Certificate No.24/21/13 (Ex.PW13/F) which included one sealed bottle containing blood for alcohol of deceased sealed with “FMT BJRM Hospital Delhi”; one plastic box containing four plastic glasses sealed with “NK” and lastly one sample seal of “FMT BJRM Hospital Delhi”. These were received by the FSL and a receipt dated 29th January, 2013 (Ex.PW13/F) was issued in acknowledgement.

27. It is noteworthy that police has not forwarded the sample seal of “NK” to the FSL for comparison and verification as to whether the seized articles had been preserved the condition in which they were recovered in a duly sealed condition.

Post-mortem

28. On the request of the police, an autopsy was conducted on the body of the deceased Munshi Yadav on 14th December, 2012. As per this post-mortem report (Ex.PW10/A), the following external injuries were observed on the body of the deceased :

- “(1) *Fracture deformity of nasal bone.*
- (2) *Contusion of lower limb in the middle.*
- (3) *Bruising of size 3cm x 2cm on tip of nose.*
- (4) *Face congested.”*

29. On external examination of the head, the doctor observed that “*there was sub scalp haematoma over frontal region and there was sub-dural hemorrhage on frontal region*”.

30. The doctor had observed the injuries as being ante-mortem in nature.

31. It was also observed by Dr. V.K. Jha (PW-10) that the body was smeared with soil and a shawl was tied around neck and knot was present on the front of the neck. The doctor had opined the cause of death as “*asphyxia as a result of smothering inflicted by other party*”. No opinion has been taken from the post-mortem doctor on the shawl whether it could have been the ligature

material and whether the deceased could have been strangled with it.

32. It is important to note that the post-mortem had commenced at 1:00 pm on the 14th of December 2012. So far as the time of death was concerned, it was opined on Ex.PW10/A that “*time since death is approximately 39 hours*” taking the time of death to around 10:00 pm on the 13th of December 2012.

Preparation of site plan

33. Inspector Mahesh Kumar (PW-16) has disclosed that on 12th January, 2013, he had visited the spot along with the investigating officer Inspector Naresh Kumar (PW-15). He stated that at the spot, he took rough notes and measurements at the instance of the investigating officer which were destroyed after preparation of the scaled site plan.

Filing of challan, court proceedings and framing of charge

34. After completion of the investigation, the police filed the chargesheet under Section 173 of the Cr.P.C. After consideration of the matter, by the Metropolitan Magistrate (North)-01, Rohini District Courts, copies of the documents were supplied to the accused persons in compliance with Section 207 of the Cr.P.C.

35. On the 15th of March 2013, noting that the offence under Section 302 of the IPC was triable exclusively by the Court of Sessions, the matter was committed to it for trial in accordance

with law and directed to be placed before the court on 20th of March 2013.

36. Thereafter the matter was considered by the Id. Additional Sessions Judge on the 2nd of May 2013 who was of the opinion that there was *prima facie* evidence of commission of the offence under Sections 302/34 of the IPC by the three appellants. Consequently, the following charges were framed against these appellants :

“I, Sanjeev Kumar, ASJ, Rohini, Delhi do hereby charge you accused persons (1) Dinesh S/o Batesur, (2) Arvind S/o Bmegu Nath and (3) Sunil Kumar S/o Shishpal are as under :

That in the intervening night of 12/13.12.2012 from 6.30pm to 1am (night) at Agricultural fields of Village Bhorgarh, near Cremation Ground, Narela, Alipur Road, Delhi, within the jurisdiction of PS Narela, you all accused persons in furtherance of your common intention committed murder of Munshi Yadav and thereby committed an offence punishable U/s 302/34 IPC and within my cognizance.

I hereby direct you accused to be tried by this court for the said offence.

*-s/d-
ASJ/Rohini/Delhi
02.05.2013”*

37. The appellants had pleaded not guilty to the charges and had claimed trial.

38. During trial, the prosecution examined 18 witnesses in support of its case. The incriminating circumstances and the evidence led by the prosecution were put to the three appellants

and they were given opportunity separately to explain the same in compliance with the requirement of Section 313 of the Cr.P.C. Thereafter by a detailed consideration of the evidence on record, by the judgment dated 19th August, 2016, the appellants were found guilty for commission of the offence and sentenced as noted above.

39. We have heard Mr. Sumeet Verma, ld. counsel for the appellant – Sunil Kumar (in Crl. Appeal 37/2017); Mr. Gaurav Bhattacharya, ld. counsel for the appellant – Arvind @ Munna (in Crl. Appeal No. 46/2017) and Mr. Pramod Kumar Dubey, ld. counsel for the appellant – Dinesh (in Crl. Appeal No. 95/2017).

40. Mr. Varun Goswami, ld. APP for the State has vehemently supported the conviction and sentence of the appellants. We have also carefully scrutinized the record of the trial court.

Motive

41. The present appeals arise out of a case of circumstantial evidence. The prosecution has primarily relied on the evidence of Rama Yadav (PW-4) who claimed that he had last seen the deceased Munshi Yadav alive in the company of one of the appellants, namely, Dinesh. So far as the other two appellants Sunil Kumar and Arvind @ Munna are concerned, there is no evidence that the deceased was last seen alive in their company. There is no ocular evidence at all of the deceased being seen or known to Sunil Kumar and Arvind @ Munna having been in the company of the deceased at any point of time.

42. It is trite that in a case of circumstantial evidence, motive is an important circumstance in the chain of circumstances which the prosecution would prove to establish the guilt of an accused person. We find that Rama Yadav (PW-4) has categorically stated in his evidence that he did not know any person by the name of Sunil Kumar. Even when his attention was drawn towards the appellant Sunil Kumar, Rama Yadav (PW-4) specifically stated that he did not know him. He further stated that he had no grudge against the accused person and that as per his knowledge, his deceased brother also had no grudge or grievance or complaint against the accused persons. When cross-examined by ld. counsels for Dinesh and Arvind @ Munna, he has again specifically stated that he did not know the accused Arvind at all though he knew him by face as one month before the incident, Dinesh and Arvind had visited his shop. Thus, so far as Dinesh is concerned, the testimony of Rama Yadav (PW-4) would show that there was no enmity or antipathy between the deceased and Dinesh and that as per Rama Yadav (PW-4), the two were amicably proceeding for eating and drinking together.

To sum up, the prosecution has led positive evidence that the appellants had no motive against the deceased.

Whether credible evidence of the recovery of cigarette butts and the plastic glasses

43. The appellants have challenged the recovery of four cigarette butts and the broken plastic glasses allegedly recovered. The

cigarette butts were allegedly recovered Ex.PW15/B vide seizure memo on 13th December, 2012 near the dead body when the dead body was recovered. The cigarette butts were produced in evidence as Ex-P3 (colly.). The broken plastic glasses have been recovered on the 13th of December 2012 vide seizure memo Ex.PW15/A and have been proved on record as Ex.P4.

44. The perusal of Ex.PW15/A and Ex.PW15/B would show that they have been witnessed solely by S.I. Mahavir Singh (PW-17). The recovery is also rendered suspicious as there is no public witness who has been joined in the recovery or the seizure.

45. It is noteworthy that as per PW-15 and PW-17, these two seizures were effected when the dead body was recovered at the instance of the brother of the deceased who has been examined as Rama Yadav (PW-4). Rama Yadav (PW-4) does not make any mention of the recovery of any cigarette or plastic glasses in his testimony. If they had been actually recovered in his presence, at that time, the investigating officer would have obtained his signatures in confirmation thereof.

46. The investigating officer has given no explanation as to why he has not got the recovery and seizure witnessed by Rama Yadav (PW4) or any public witness.

47. Mr. Sumeet Verma, ld. counsel for Sunil Kumar has drawn our attention to death report form No.25.35(1)(B) (Ex.PW15/D3). If the cigarette butts and broken glasses had actually been

recovered on the 13th of December 2012, undoubtedly while filing the death report on the 14th of December 2012, Inspector Naresh Kumar (PW-15) would have mentioned the same therein. The fact that he has not done so militates against the credibility of the claimed recoveries.

48. Undoubtedly, Rama Yadav (PW-4) falsifies the prosecution case that the appellants and the deceased ate and drank together before he was murdered. It is in the evidence of Rama Yadav (PW-4) that the deceased Munshi Yadav drank occasionally and he never smoked cigarettes.

49. Mr. Varun Goswami, Id. APP for the State has vehemently urged that the recovery cannot be doubted for the reason that the prosecution has established a clear chain from the seizure memos to the record of the *malkhana* register and the delivery of the seized articles to the Forensic Science Laboratory on which the FSL had given its report.

50. We have noted above the manner in which the recovered articles have been transported to the FSL in trenches and have pointed out that in neither of the road certificates, the same seal “NK” of the investigation officer has been sent to the FSL. There is therefore, no evidence to establish that the seized articles were duly seized, kept sealed and protected and delivered in such condition to the FSL after they were recovered.

51. The defence case has been put as suggestions to the prosecution evidence. It was suggested to Inspector Naresh Kumar (PW-15) that the accused were compelled/forced to smoke cigarettes to take false evidence against them. The witness denied the suggestion that no cigarettes butts were found at the place of occurrence. Similarly, a suggestion was put to investigating officer Mahavir Singh (PW-17) which he denied that no plastic tumbler or buds of cigarette were lifted from the spot or the same were planted later on in order to create false evidence against the accused persons. The witness also denied the suggestion that the appellants were made to smoke cigarettes forcibly or that the butts of cigarettes were falsely planted in the case to implicate them. The witness also denied the suggestion that no seizure memos of the tumblers and cigarettes butts were prepared at the spot.

52. When the claimed recoveries were put to Sunil as question No.39 while recording his statement under Section 313 of the Cr.P.C., he had explained thus :

“Q.39. Anything else you want to say?”

Ans. Yes, I have been falsely implicated in the present case, though, the other co-accused belongs to my village but they were not known to me prior to our arrest in the present case. I have never visited the place of occurrence. IO had obtained my signatures on blank papers and the same were falsely created as evidence in the present case. I was not arrested from the place and manner as stated by PWS. I was illegally lifted from my room and was illegally detained in the present case. No recovery was effected at my instance in the present

case. No such cigarette butts and plastic tumblers were seized from the place of occurrence. The same were planted upon us so as to create false evidence against me. IO of the present case forced me and other accused persons to smoke cigarette in the PS when I was in police custody. I have never smoked cigarettes in my entire life. I am a teetotaller and have never tasted alcohol in my entire life. I have no motive/animosity against the deceased. I am innocent. God please help me.”

53. Similarly, the appellant Arvind had tendered the following explanation :

“Q.39. Anything else you want to say?

Ans. Yes, I have been falsely implicated in the present case, though, the other co-accused belongs to my village but they were not known to me prior to our arrest in the present case. I have never visited the place of occurrence. IO had obtained my signatures on blank papers. I was not arrested from the place and manner as stated by PWS. I was illegally lifted from my room and was illegally detained in the present case. No recovery were effected in the present case at my instance. No such cigarette butts and plastic tumblers were seized from the place of occurrence. The same were planted upon us so as to create false evidence against me. IO of the present case forced me and other accused persons to smoke cigarette in the PS when I was in police custody. I have never smoked cigarettes in my entire life. I am a teetotaller and have never tasted alcohol in my entire life. I have no motive/animosity against the deceased. I am innocent. God please help me.”

54. The same evidence when put to the accused Dinesh was explained by him as follows :

“Q.39. Anything else you want to say?”

Ans. Yes, I have been falsely implicated in the present case, though, the other co-accused belongs to my village but they were not known to me prior to our arrest in the present case. I have never visited the place of occurrence. IO had obtained my signatures on blank papers. I was not arrested from the place and manner as stated by PWS. I was illegally lifted from my room and was illegally detained in the present case. No such recovery of clothes was affected at my instance. No such cigarette butts and plastic tumblers were seized from the place of occurrence. The same were planted upon us so as to create false evidence against me. IO of the present case forced me and other accused persons to smoke cigarette in the PS when I was in police custody. I have never smoke cigarettes in my entire life. I am a teetotaller and have never tasted alcohol in my entire life. I have no motive/animosity against the deceased. I am innocent. God please help me.”

55. A perusal of the unscaled site plan (Ex.PW15/C) prepared on 13th December, 2012 by Inspector Naresh Kumar (PW-15) as well as the scaled site plan (Ex.PW16/A) prepared by Inspector Mahesh Kumar (PW-16) shows a very unnatural placement of four cigarette butts arranged as if four people were sitting in a group. The four plastic broken tumblers have been placed separately as if the persons smoked in one place and then moved to consume alcohol in another place.

56. The above discussion would show that there is reasonable doubt on the authenticity of the recovery of the cigarette butts from the spot. The very recovery of the cigarette butts and tumblers in the claimed manner, therefore, is doubtful and suspect.

Whether the prosecution was able to establish that the appellants had consumed alcohol with the deceased prior to his death

57. The trial court has observed in its judgment with regard to the recovery on the spot of the four plastic glasses that *“it is also important to note that on the spot the four plastic glasses were found which points that they might have consumed alcohol on the spot. The photographs taken clearly show that these glasses were there and they had consumed some liquor”*.

We fail to understand as to how photographs of glasses establish that they were used for consumption of alcohol by the appellants and the deceased.

58. The prosecution has led evidence that these glasses were forwarded to the FSL for ascertaining the presence of alcohol on them. The examination report of the FSL has been proved as Ex.P-X on the record. The broken plastic tumblers were marked as Exhs.2A, 2B, 2C and 2D in the laboratory. After examination, the FSL has reported that *“ethyl alcohol could not be detected in exhibits 2A, 2B, 2C and 2D”*. Clearly, the finding of the trial court premised on the recovery of the glasses is erroneous and cannot be sustained.

59. More importantly, unfortunately, the trial court has erred in completely ignoring the report of the FSL. There is no mention at all of the report in the entire impugned judgment.

The presence of “alcohol like smell” in the stomach contents of the deceased

60. It is noteworthy that in the post-mortem report (Ex.PW10/A), Dr. V.K. Jha (PW-10) has reported an abnormal smell so far as stomach is concerned. The doctor has also noted the presence of undigested food. Against the column of abnormal smell, it is mentioned that “*hemoghis mucosa, alcohol like smell*”. This observation points towards two facts. The first is that prior to the murder, the food consumed had travelled from the mouth to the stomach of the deceased. Therefore, the deceased had not been murdered immediately after the consumption of food.

61. Furthermore, the autopsy doctor has merely observed an “*alcohol like smell*”. There is no categorical report that this smell could have been of alcohol or it could have been of a substance which smelt like alcohol. The benefit of doubt must enure in favour of the accused persons.

62. The fact that food was discovered in the stomach and the alcohol like smell was found on the internal examination of the stomach would show that some time had passed since the consumption of the food and alcohol prior to the murder of the deceased. In cross-examination, the doctor has stated that he had

examined the hand and legs of the deceased and had not noticed any struggle marks on the hands and legs of the deceased.

63. Therefore, the finding of the trial judge that the post-mortem report supported the prosecution case that the appellants and the deceased consumed alcohol before his death is not established from the post-mortem report.

Evidence of last seen

64. The above narration would show that Rama Yadav (PW-4) has testified that he has seen the deceased in the company of only one appellant, namely, Dinesh and that too at 6:30 pm. As per the post-mortem report, the time of death of the deceased works out to about 10:00 pm i.e. at a gap of almost 3½ hours.

65. The body of the deceased had been recovered not from a place which was within the control of any of the appellants but from agricultural field near the DSIDC complex.

66. The site plan (Ex.PW16/A) also established that there is no construction at all at the spot and only some bushes are mentioned. There is no construction in the area. Therefore, the body was found lying in the open fields over which the appellants had no control.

67. There is no evidence at all that the deceased continued to remain in the custody and control of the accused persons the whole

time after 6.30 p.m. when he was seen by PW-4 in the company of Dinesh prior to his murder.

68. There is not a whisper of evidence as to the proximity between the distance from Bhorgarh Chaupal, where the deceased was seen in the company of Dinesh at 6:30 pm, and the agricultural fields near the roundabout of village Bhorgarh, wherefrom the dead body was recovered.

69. On a consideration of the entirety of the evidence led by the prosecution, it has to be held that the evidence of the deceased having been last seen in the company of the accused person fails the proximity test, both in terms of proximity of time as well as that of place.

Recovery of clothes worn by Dinesh

70. The prosecution has placed heavy reliance on the recovery of clothes of Dinesh pursuant to his disclosure statement (Ex.PW8/C) on the 14th of December, 2014 from his rented premises. The clothes were seized vide Ex.PW8/L and have been mentioned as grey pant and black shirt.

71. These two seized articles were forwarded to the FSL. The shirt was marked as Ex.2 and pant was marked as Ex.3. It was reported by the laboratory in the report dated 28th October, 2014 (Ex.PW18/A) that blood could not be detected on Exhs.2 and 3.

The prosecution reliance on these clothes as evidence of guilt of the appellants is also misplaced.

The report of the biological and DNA examination by the Forensic Science Laboratory on the cigarette butts and its import

72. The prosecution has proved the report (Ex.PW18/A) dated 28th October, 2014 of the Biological Department on the four cigarette butts which were marked as Exhs.1A, 1B, 1C and 1D in the FSL. They were subjected to a biological examination as well as a DNA examination. The comparison was effected with the blood sample of the deceased which were provided by the hospital.

73. The report of the biological examination as contained in Ex.PW18/A was that the saliva was detected on Exhs.1A, 1B, 1C and 1D i.e. the cigarette butts. The DNA examination was conducted on the cigarette butts (Exhs.1A, 1B, 1C and 1D); Exh.4 (Blood on gauze of deceased); Exh.5 (Blood sample of Sunil); Exh.6 (Blood sample of Arvind) and Exh.7 (Blood sample of Dinesh). The laboratory concluded as follows :

“DNA profiling (STR analysis) performed on the exhibits provided is sufficient to conclude that the DNA profiles from the source of exhibit provided ‘4’ (Blood on gauze of deceased) were similar with the DNA profiles from the source of exhibit ‘1d’ (Cigarette Butt), DNA profiles from the source of exhibit ‘5’ (Blood sample of Sunil) were similar with the DNA profiles from the source of exhibit ‘1a’ (Cigarette butt), DNA profiles from the source of exhibit ‘6’ (Blood sample of Arvind) were similar with the DNA profiles from the source of exhibit ‘1b’ (Cigarette butt) and DNA profiles from the source of exhibit ‘7’ (Blood sample of Dinesh) were similar with the DNA profiles from the source of exhibit ‘1c’ (Cigarette butt).”

74. Therefore, the sole circumstance that the prosecution has sought to rely in support of the appellants’ guilt was that the DNA

from the appellants' samples matched the DNA of the saliva on the cigarette butts seized from the spot. It is to be noted that this circumstance by itself, does not establish an unbroken chain of circumstances which points unerringly towards the only hypothesis of the guilt of the appellants. The prosecution had to first establish by credible evidence that the cigarette butts were actually seized from the spot, as alleged. Apart from that, the prosecution had to led authentic and credible evidence that the deceased had smoked cigarette with the appellants shortly before he was murdered. In the instant case, the prosecution had led positive evidence of the complainant Rama Yadav (PW-4), brother of the deceased that the deceased never smoked cigarettes. This fact stands proven in the testimony of his own real brother.

75. Furthermore, the prosecution is unable to establish claimed recoveries of the cigarette butts or the broken plastic glasses from the spot.

76. The recovered glasses do not support the prosecution case that they were used for consumption of alcohol by the appellants with the deceased. No DNA has been isolated from these plastic glasses. If they had been used for consumption of alcohol, the laboratory would have isolated the DNA samples from these glasses as well.

77. The recovery of the cigarette butts has been challenged by the appellants which is supported by the fact that the investigating officer has not mentioned recovery of any such articles.

78. On a consideration of the totality of the evidence led by the prosecution, it would appear that the appellants have been able to cast substantial doubt in the evidence led by the prosecution.

79. Certainly, the prosecution has not able to make out an unbroken chain of circumstances pointing unerringly towards the only conclusion i.e. the guilt of the appellants.

80. In view of the above, the impugned judgment dated 19th August, 2016 and order on sentence dated 24th September, 2016 are hereby set aside and quashed and the appellants are acquitted of the charges which were framed against them in SC No.58069/16 arising out of FIR No.676/2012 registered by P.S. Narela. It is directed that the appellants be forthwith released from custody, if not wanted in any other case.

Crl.A.Nos.37/2017, 46/2017 and 95/2017 are allowed.

Let a copy of this judgment be served upon all the appellants through the Superintendent, Tihar Jail, Delhi forthwith.

Crl.M.(Bail)No.60/2017 in Crl.A.No.37/2017
Crl.M.(Bail)No.73/2017 in Crl.A.No.46/2017
Crl.M.(Bail)No.151/2017 in Crl.A.No.95/2017

81. In view of the judgment passed in the main appeals, these applications are rendered infructuous and disposed of accordingly.

GITA MITTAL, J

ANU MALHOTRA, J

MARCH 09, 2017/aj