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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment Reserved on 01st August, 2017

Judgment Pronounced on 16th August, 2017

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CRL.A. 696/2012

DINESH KUMAR MATHUR

..... Appellant

Through : Mr.Neeraj Chaudhari, Advocate

versus

STATE

..... Respondent

Through : Mr.Rajat Katyal, APP

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CRL.A. 180/2013

RAJ KUMAR @ RAJU

..... Appellant

Through : Ms.Rakhi Dubey, Advocate

versus

STATE

..... Respondent

Through : Mr.Rajat Katyal, APP

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE CHANDER SHEKHAR

G.S.SISTANI, J.

1. Both the appeals have been filed under Section 374 of the Code of Criminal Procedure, 1973 ('Cr.P.C.') against the judgment of conviction dated 22.05.2012 and the order of sentence dated 29.05.2012 passed by the Trial Court in SC 88/2010 arising out of FIR No. 49/2010 PS Geeta Colony by which the appellant in Crl.A. 696/2012 Dinesh Kumar Mathur (hereinafter referred to as '*appellant Dinesh*') has been convicted under Section 411 of the Indian Penal Code, 1860 ('IPC') and has been sentenced to undergo rigorous imprisonment for three years

and also fine of Rs.5,000/-, in default of payment of fine to undergo simple imprisonment of six months; and the appellant in Crl.A. 180/2013 Raj Kumar @ Raju (hereinafter referred to as '*appellant Raju*') has been convicted under Section 302/392 read with Section 397 IPC and sentenced to life imprisonment and fine of Rs.10,000/- for the offence under Section 302 IPC, and seven years rigorous imprisonment and fine of Rs.5,000/- for the offence under Section 392 IPC read with Section 397 IPC.

2. The case of the prosecution is that on 18.02.2010, following information was received at Police Station Geeta Colony vide DD No. 20-A: "*Gali No. 1, Shiv Market Khureji Petrol Pump ke saamne ek old lady jiske pair bandhein hain va ghar ka samaan loot ke le gaye*" (infront of Street No.1, Shiv Market Khureji Petrol Pump, an old lady's legs have been tied and household items have been looted.) ASI Satvinder Singh was informed about the call. He proceeded to the spot with Ct. Abodh. The SHO and PSI Niranjn Pathak were also informed about the call. They also proceeded to the spot and on reaching there, they found that an old lady named Nirmal Arora ('deceased') was lying on the bed with injuries from a sharp weapon on her face, neck and feet. Lot of blood was lying on the bed. The bed sheet, pillows and shawl were soaked in blood. The feet of the deceased were lying tied with wire of the press. Crime team was called at the spot. Chance prints were lifted. The body was sent to the mortuary. Statement of Som Nath Arora, husband of the deceased, was recorded wherein he stated that on 18.02.2010, he left the house for his office at about 9:30 AM and his wife was alone in the house. At about 2:20 PM, he was informed by his sister in-law Madhu Dang that she was informed by the

maid that his wife was bleeding on the bed. Within 15-20 minutes, he reached at his house where he found his wife lying dead. Rs.10,000/- lying in the drawer of the TV cabin were also missing.

3. On the statement of the husband of the deceased, FIR was registered under Sections 397/302 IPC. After post-mortem, the body of deceased was handed over to the legal heirs of the deceased. In his supplementary statement under Section 161 Cr.P.C, Som Nath Arora stated that mobile phone, Rs.10,000/- and gold chain of his wife were also missing from the house. During investigation, police collected the CDR of the mobile phone. It was found that the said mobile was being used with number 9871240643 which was in the name of appellant Dinesh Kumar. Appellant Dinesh was arrested under Section 412 IPC. The mobile phone was recovered from him. Appellant Dinesh Kumar gave disclosure statement that he had purchased the said mobile phone for Rs. 500/- from Raj Kumar @ Raju. On the pointing out of appellant Dinesh, appellant Raju was arrested. There was injury on the small finger of right hand of appellant Raju. A new mobile phone make Nokia 1209 was recovered from his right pocket regarding which he stated that he had purchased the said phone from the looted money. Rs.1,200/- out of the looted amount were also recovered from his possession. Another mobile phone "Classic Reliance" and a packet of tablet Nitrabet-103 were also recovered from appellant Raju. On interrogation, appellant Raju gave disclosure statement. Pursuant to the said disclosure statement, appellant Raju got recovered his blood-stained jacket and pant and blood-stained *darati* (sickle) from a polythene from the *kabristan* of Sarojini Park. The recovered clothes and *darati* were kept in separate *pullandas* and were seized and taken

into possession by the police. Site plan of the place of recovery was also prepared. The looted jewellery could not be recovered. Appellant Raju was got medically examined from SDN Hospital with regard to the injury on his finger. The finger prints of appellant Raju were taken and sent to Finger Prints Bureau, Malviya Nagar for opinion. The other exhibits were sent to FSL Rohini. The opinion of the doctor was obtained with regard to the recovered *darati* and the doctor gave the opinion that injuries mentioned in the postmortem report could have been possible by the said weapon of offence. Statements of witnesses were recorded and on completion of investigation, chargesheet was prepared under Section 302/397 IPC against appellant Raju and under Section 412 IPC against appellant Dinesh.

4. Charges were framed against the appellant Dinesh under Section 411 IPC and against the appellant Raju under Sections 302 and Section 392 read with Section 397 IPC. Both the appellant pleaded not guilty and claimed trial. In order to prove its case, the prosecution examined 27 witnesses. No evidence was led by the defence. Statements of the appellants were recorded under Section 313 Cr.P.C.
5. After examining the evidence before it, the Trial Court convicted the appellants as noticed in paragraph 1 foregoing, which has led to the present appeals.

SUBMISSIONS ON BEHALF OF APPELLANT DINESH

6. Mr. Neeraj Chaudhari, learned counsel appearing for the appellant Dinesh, submitted that the findings of the Trial Court are based on conjectures and surmises. He also submitted that judgment is perverse because of prejudice having been caused to the appellant and thus,

liable to be set aside.

7. It is also contended that there is no independent public witness in support of the alleged recovery of the mobile phone from the possession of the appellant. Evidence of police witnesses cannot be relied upon as it is doubtful and improbable, besides being biased.
8. Learned counsel for the appellant further submits that bare reading of the answers to the question nos. 37, 38 and 39 in the statement recorded under Section 313 Cr.P.C. of the appellant, would show that the appellant Dinesh has not denied that his mobile phone was seized from him. He further submits that mobile phone was purchased by him from appellant Raju for Rs.500/-. He submits that in the absence of any other evidence on record to show that the appellant had dishonestly received the stolen property and there was any reason to believe that the appellant has stolen the mobile phone, the appellant could not have been convicted under Section 411 IPC. It is contended that the appellant did not deny having purchase of the mobile phone from appellant Raju. He further did not deny that the mobile phone was recovered from him.

SUBMISSIONS ON BEHALF OF APPELLANT RAJU

9. Ms.Rakhi Dubey, learned counsel appearing on behalf of the appellant Raju, submits that the judgment and order on sentence passed by the learned trial Court suffers from complete non-application of mind and is perverse. It is submitted that there is no direct or ocular evidence against appellant Raju and being a case of circumstantial evidence, the Trial Court has ignored the well-settled principles which are to be considered while recording a finding of conviction in a case of

circumstantial evidence. It is submitted that the Trial Court has erred in not appreciating that the prosecution has not been able to complete the chain of events to prove the charge against the appellant Raju. The prosecution has failed to prove the motive, which is important in a case of circumstantial evidence. It is further contended that the testimony of Mahender Pal (PW-9) is not incriminating as the prosecution has failed to establish that the appellant was employed with PW-9 and thus, the testimony of PW-9 would carry no credibility.

10. Learned counsel for the appellant also contends that the recovery of the part of the weapon of offence is highly unreliable and not beyond suspicion for two reasons: *firstly*, for the reason that the recovery has been made from an open area and visible with naked eye and *secondly*, as the testimonies of three witnesses to the recovery are full of contradictions, as PW-10 has testified that there was a *chowkidar* inside the *kabristan* while PW-27 has deposed that no *chowkidar* was present at the *kabristan*. With regard to the height of the wall which was scaled, PW-10 has stated that the height of the wall was 7 or 7½ ft., while PW-21 has testified that the height of the wall was 5 or 5½ ft., whereas PW-27 goes on to testify that the height of the wall was 4 or 4½ ft.
11. It is also contended before us that besides the recovery of the part of the weapon of offence, there is no evidence which can connect this appellant with the commission of the crime. Counsel also contends that Sompal (PW-4) is a planted witness and his testimony cannot be relied upon. Ms.Dubey submits that this witness has categorically stated in his cross-examination that it is correct that he was running his shop on the mercy of the police and thus, his evidence cannot be relied upon.

Similar argument has been raised with regard to the testimony of Dr.Sayed Zaigham Raza (PW-11) whose evidence has been relied upon by the prosecution to show that the appellant had suffered an injury on his little finger of the right hand while using the weapon of offence. Ms.Dubey submits that it is highly unusual and improbable for an injured person to visit a Homeopathic clinic for treatment.

12. Attention of this Court is drawn to the testimony of Som Nath Arora (PW-3), the husband of the deceased, as per which he used to leave the house at 9:30 AM and would return at around 7 PM when his wife remained alone in the house except during the period 12 noon to 2 PM when the maid would come to work in the house. It is contended that in case the story of the prosecution is to be believed, then the appellant would not have ventured into the house around 12 noon when he was aware that the maid would come at 12 PM and remained till 2 PM while he had time between 9:30 AM and 12 noon and after 2 PM to 7 PM which would be more convenient rather than running the risk of the maid entering the house. It has also been submitted that no reliance can be placed on the testimony of Shanti (PW-5) who was employed as a maid, as her reactions were highly unusual that on finding the dead body she did not call the police or inform the immediate neighbours, but ran to the house of the sister of the husband of the deceased which was at a considerable distance.
13. In support of the submission that the recovery was hit by Section 27 of the Indian Evidence Act, reliance is placed on the Headnote of *Shiv Narayan & Anr v. State (NCT of Delhi)*, 2002 (61) DRJ 734 (DB). The relevant Headnote reads as under:

“Section 27 – Recovery of articles and weapon of offence –

Knife – Recovery of at the instance of accused – No public witness – Recovery of knife from open space visible to naked eyes – Not hidden – Murder took place 4.1.1996 – Knife recovered on 23.1.1996 – Open and accessible to others – Admissibility of evidence of accused – Held, weapon was ordinarily visible and not concealed rather lying on ground accessible to all – Recovery is hit by section 27 – Accused statement in admissible in evidence – Conviction and sentence set-aside – Appeal allowed.”

SUBMISSIONS OF THE STATE

14. In respect of CrI.A. 696/2012 of appellant Dinesh, Mr.Katyal opposed this appeal on the ground that the appellant has not been able to discharge the *onus* to prove the lawful possession of the mobile phone. Reliance is placed on Illustration (a) of Section 114 of the Indian Evidence Act which reads as under:

“(a) That a man who is in possession of stolen soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.”

15. In the other appeal CrI.A. 180/2013 preferred by appellant Raju, learned counsel for the State has drawn the attention of the Court to para 21 of the judgment to show that the Trial Court has carefully analysed the evidence on record and considered all the incriminating evidence against this appellant and rightly reached the conclusion of guilt, which requires no interference. Learned counsel contends that the evidence of Mahender Pal (PW-9) clearly establishes that the appellant was working with him. PW-9 was on friendly terms with the husband of the deceased and used to supply milk in the house of the deceased. On the fateful day, the appellant had taken leave for the day, i.e. from 9:30 AM till 6:30 PM. This witness testified that on 18.02.2010 at about 9:45 or 10:00 AM the appellant returned to the dairy after supplying milk and

told him that he is not feeling well and took leave. In the evening, the appellant came to the dairy at about 6:30 PM but again took leave stating that he is not feeling well and thereafter did not report back on duty. This, Mr.Katyal submits, is highly incriminating circumstance against the appellant.

16. Learned APP for the State also submits that *darati*, i.e. the weapon of offence, was recovered at the instance of the appellant in the presence of Rahul Tyagi (PW-10), SI Anish Sharma (PW-21) and Insp. Ranbir Singh Khatri (IO) (PW-27). He submits that the recovery was not made from an open space, as the *kabristan* was gated and once the gate has been affixed, it cannot be termed as an open space. He further submitted that the same was hidden in the roots of a tree and thus not visible to the naked eye. The contradictions with regard to the height of the wall do not go to the root of the matter and would not make the recoveries doubtful. It is contended that the blood stained clothes were also recovered and even though, the FSL could not ascertain the blood group, still it found human blood.
17. Strong reliance is placed by the learned counsel for the State on the testimony of PW-4. He submits that PW-4 has clearly identified the appellant as the person who had purchased the *darati* from him for Rs.50/-. It is submitted that no benefit can accrue to the appellant on the basis of the statement made in the cross-examination that he was running his shop at the mercy of the police, for the reason that Sompal was an Ironsmith (*lohar*) and was living in a *jhuggi* adjoining the road and selling agricultural instruments like *darati*, hammer etc. And in this context, he has stated that he was running his shop on the mercy of the police. This witness categorically denied the suggestion that he was

deposing falsely at the instance of the police or that the appellant had not purchased the *darati* from him.

18. Mr.Katyal also submits that from the disclosure statement of co-convict Dinesh Kumar Mathur, in addition to the recovery of clothes and the weapon of offence, it stands established that the mobile phone was also stolen by the appellant Raju and sold for Rs.500/- to the co-convict Dinesh Kumar Mathur and thus, he would stand connected to the offence. It has also been contended by Mr.Katyal, learned counsel for the State, that the appellant has failed to explain the recent injury on his little finger and the stand taken by him in the statement under Section 313 Cr.P.C. that being a rickshaw puller he has hurt himself while changing the chain is implausible, for the reason that such an injury could not be caused in the ordinary course of the fixing the chain of the rickshaw. Reliance is also placed on the testimony of the Doctor (PW-11). It is submitted that merely because he was a homeopathic doctor does not mean that he could not have provided first aid to the appellant. Mr.Katyal submits that even in the cross-examination, a suggestion was given to the Doctor that the injury on the finger of the appellant was a burn injury which was not found acceptable by the Doctor.
19. We have heard the learned counsel for the parties, examined the judgment of the Trial Court and the evidence brought on record by the prosecution. We propose to deal with the two appeals under different heads:

CRL.A. 180/2013 BY APPELLANT RAJU

20. The case of the prosecution is based on circumstantial evidence. The prosecution had sought to prove the following circumstances before the

Trial Court:

- (i) The accused was working at a milk dairy owned by PW-9 and used to supply milk at the house of the deceased.
 - (ii) Recovery of wooden handle (2 pieces) and two iron leaves of the *darati* (Ex.P-12) from the spot and the recovery of the blade of *darati* (Ex.P-1) at the instance of accused Raj Kumar on 23.02.10.
 - (iii) Recovery of blood stained clothes of accused Raj Kumar from the Kabristan, Sarojini Park, Shashi Nagar.
 - (iv) FSL result confirming the presence of blood on the blade described as *gandasa* and the clothes of accused and absence of explanation from the accused about the presence of blood on the said blade and cloths. FSL result confirming that the broken wooden pieces with metallic rod could be part of the metallic knife blade recovered at the instance of the accused.
 - (v) Opinion of the doctor that injuries no.1 to 17 mentioned in the postmortem report were possible from the said blade.
 - (vi) Accused had purchased a *darati* from PW-4 Som Pal on 17.02.10 i.e. one day before the murder of deceased.
 - (vii) Motive for the murder was robbery.
21. The first circumstance against the appellant Raju is that he was working as a delivery boy in the dairy owned by Mahender Pal (PW-9) and had taken a leave at the relevant time.
22. PW-9 deposed that he is running a dairy with the name of Suneja Dairy in his house since 1987 and Som Nath Arora has been his friend for the last 10-12 years. He used to supply milk at the house of Som Nath Arora and the appellant Raju, who was working with him for the last 4-

5 years, used to supply milk to his house. The appellant Raju was paid Rs.3,000/- per month and used to supply milk in different houses. On 18.02.2010 at about 9:45-10 AM, the appellant returned to his dairy after supplying milk and told him that he is not feeling well and took leave from him. In the evening, the appellant came at about 6:30 PM and again took leave stating that he is not feeling well. In his cross-examination, PW-9 stated that he did not use to take any receipt of making payments to the appellant Raju. We may also notice that Ins.R.S. Khatri (IO) (PW-27) had also stated in his cross-examination that he did not obtain any proof from Mahender about the employment of the appellant Raju and further voluntarily stated that it is a small dairy and no such record is maintained.

23. Ms.Dubey had tried to impose upon us that the employment of the appellant Raju in the dairy of PW-9 was not proved. The submission is premised on the absence of any records of the dairy. We find no force in this submission as such dairies rarely maintain proper records of their sales or their employees. It has also come in evidence that no records/receipts of payments to appellant Raju were maintained by PW-9. Accordingly, the contention must be rejected. Thus, the prosecution has been able to establish that the appellant Raju was working in the dairy owned by PW-9 and used to supply milk to the house of the deceased and on the fateful day, he had taken a leave under the pretext of being unwell.
24. The second incriminating circumstance against the appellant Raju was the recovery of the blade of the *darati* (Ex.P-1) at his instance which, along with the wooden handle (2 pieces) and two iron leaves of the *darati* (Ex.P-12), constituted the weapon of offence.

25. Som Nath Arora (PW-3) had deposed that the police had recovered a broken wooden piece and an iron measuring about 3-4 inches from the room in which the body of the deceased was found vide seizure memo (Ex.PW-3/A). Nothing came in the cross-examination barring that the broken wooden handle was lying on the bed near the pillow. Similarly, the Investigation Officer (PW-27) and SI Anish Sharma (PW-21) have deposed that two broken pieces of wooden handle attached with a pipe of iron were also found on the bed and two iron pieces (*pattiyān*) were also lying near the handle.
26. The primary bone of contention between the parties revolves around the recovery of the blade of the *darati* at the instance of the appellant Raju. The submission of Ms.Dubey was twofold: *first*, the recovery was from an open area visible by the naked eye and *second*, there was material contradictions in the prosecution witnesses rendering the recovery doubtful.
27. We proceed to analyse the testimonies of the relevant prosecution witnesses in this regard. One independent witness was arrayed at the time of the recovery, i.e. Rahul Tyagi (PW-10), who deposed that he was running a shop of cycle in Sarojini Park, Shashtri Nagar when 3-4 police officials along with appellant Raju came to his shop. Other shop keepers refused to join investigation, while PW-10 willingly agreed. He further deposed that there is a *kabristan* in front of the shop and he accompanied the police officials and the appellant Raju. From the roots of a *bargad* (banyan) tree, the appellant Raju took out a white polythene. The appellant took out a *darati* having blood stains on it, jacket and a pant from the polythene. There were blood stains on the arms and the front of the jacket. In his cross-examination, PW-10 stated

that they had climbed the wall of the *kabristan* to gain enter inside. The height of the wall of the *kabristan* is about 7-7.5 ft. He stated that there was a *chowkidar* inside the *kabristan* at the time. He further stated that the roots of the tree were above the ground and some portion of the polythene was visible from outside.

28. SI Anish Sharma (PW-21) deposed that on 23.02.2010, the appellant Raju disclosed that he had concealed the weapon of offence, i.e. *darati*, and the clothes worn by him at the time of the incident had been concealed by him in the *kabristan* near a tree at Shashtri Park. He deposed that the IO asked 5-6 passerbys to join investigation, none agreed, however, one Rahul Tyagi joined the investigation. After jumping the wall, they went inside the *kabristan*. There from the corner of a *bargad* tree, the appellant Raju took out a polythene. It contained a blood stained *darati* and blood stained pant and jacket. In his cross-examination, he stated that they did not search for any *chowkidar* in the *kabristan* and that the height of the wall was 5-5 ½ ft, which they climbed.
29. Ins.Ranbir Singh Khatri (PW-27) deposed that on 23.02.2010 that he alongwith other police staff and appellant Raju reached the *kabristan*, Sarojini Park. He requested public persons to join the investigation and on this, one Rahul Tyagi, who was working at a cycle shop agreed to join the investigation. The gate of the *kabristan* was closed at the time and they entered after jumping its wall. There was a *bargad* tree at the corner of the *kabristan*. Appellant Raju led them and from the roots of the said tree, he took out a polythene which was tied with a knot and produced before them. The knot was opened and the polythene was checked. From the polythene, one blade of *darati* having blood stains,

one blood stained jacket and pant were recovered. PW-27 was thoroughly cross-examined, wherein he denied the suggestion that Rahul Tyagi is a police informer. He stated that no *chowkidar* was present in the *kabristan* and its gates were closed. He admitted that the site plan (Ex.PW-27/F) does not show the gate of the *kabristan* and voluntarily deposed that the *kabristan* is not in use and remains closed. The wall of the *kabristan* is 4-4 ½ ft high and the iron mesh over the wall is 1.5-2 feet high.

30. From the foregoing, it is clear that there were discrepancies regarding the height of the wall and the presence of a *chowkidar*, but we are of the opinion that the same is not a material contradiction which casts a doubt upon the veracity of the depositions of the witnesses. Such *inter-se* discrepancies are normal and can be attributed to errors of observation and lapses of memory [See *Asha v. State of Rajasthan*, 1997 SCC (Cri) 712 (paragraph 9)].
31. The second limb of the argument of Ms.Dubey is that the recovery was from an open area visible to the naked eye and hence, outside the contours of Section 27 of the Evidence Act. In this regard, we may usefully refer to the judgment of the Apex Court in *State of H.P. v. Jeet Singh*, (1999) 4 SCC 370 wherein recovery was effected from tobacco bushes, heap of rubbish situated in the compound of the residence of the accused and his cowshed and the High Court had repelled the circumstance *inter alia* as recoveries made were “open and accessible to others”; this was reversed by the Supreme Court observing as under:

“26. There is nothing in Section 27 of the Evidence Act which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is “open or accessible to others”. It is a fallacious notion that when

recovery of any incriminating article was made from a place which is open or accessible to others, it would vitiate the evidence under Section 27 of the Evidence Act. Any object can be concealed in places which are open or accessible to others. For example, if the article is buried in the main roadside or if it is concealed beneath dry leaves lying on public places or kept hidden in a public office, the article would remain out of the visibility of others in normal circumstances. Until such article is disinterred, its hidden state would remain unhampered. The person who hid it alone knows where it is until he discloses that fact to any other person. Hence, the crucial question is not whether the place was accessible to others or not but whether it was ordinarily visible to others. If it is not, then it is immaterial that the concealed place is accessible to others.

(Emphasis Supplied)

[See also **Titu v. State**, ILR (2007) 1 Del 990 (paragraphs 28 and 29)]

32. Similarly, the Supreme Court in **State of Maharashtra v. Bharat Fakira Dhiwar**, (2002) 1 SCC 622 found the recovery of a blood stained grinding stone from tall grass from a place very close to the house of the accused/respondent not to be from an open place as “[u]ntil they were disinterred, at instance of Respondent, their hidden state had remained unhampered.”
33. In **Ibrahim Musa Chauhan @ Baba Chauhan v. State of Maharashtra**, 2013 (3) SCALE 207 the Supreme Court found the recovery of a plastic bag containing hand grenades from a heap in which lay broken tiles was not from an open place. The relevant portion reads as under:

“133. Undoubtedly, the appellant's disclosure statement had been made before the police, as well as the panch witness. The fact that he did not disclose the place where the contraband had been hidden remains entirely insignificant, for the reason that he had led the police party to the said

place, and that the said recovery had been made at his behest. The open space from where the recovery had been made though was accessible to anybody, it must be remembered that the contraband had been hidden, and that it was only after digging was done at the place shown by the appellant, that such recovery was made. Hence, it would have been impossible for a normal person having access to the said place, to know where the contraband goods were hidden.”

(Emphasis Supplied)

34. In a recent judgment, a coordinate bench of this Court, of which one of us (G.S. Sistani, J.) was a member, in ***Jite v. State***, MANU/DE/1791/2017 had repelled the submission that the recovery of the weapon of offence, i.e. dagger, was doubtful as being recovered from a park allowing access to the public in general, by finding that as the dagger was concealed in a heap of construction material and the same was recovered on the very next day, it could not be said to have been effectuated in an open and accessible place.
35. Coming to the case at hand, we find the recovery of the blade of the *darati* to be reliable. The Investigation Officer (PW-27) stated that the *kabristan* remains closed and not in use and hence, it cannot be said that the area was open or accessible. Be that as it may, all the three witnesses to the recovery (PW-10, 21 and 27) have testified that the recovery was effected from a polythene bag concealed amongst the roots of a *bargad* (banyan) tree and only part of the polythene was visible from outside. In such circumstances, the recovery cannot be said to be from an open area visible to the naked eye. As long as the polythene remained disinterred, its hidden state continued and its recovery remains inside the purview of Section 27 of the Evidence Act.
36. The judgment of this Court in ***Shiv Narayan*** (*Supra*) also does not

come to the aid of the appellant Raju as the knife in that case was recovered from an open plot adjacent to the factories, the knife was not buried or concealed under the earth or inside the bushes. Further the knife was lying in the open on the ground and was visible to naked eyes even during the night. The recovery was also effected after about 23 days from the occurrence of the offence. In such circumstances, it was held that the accused did not have exclusive knowledge of the location of the knife and hence, hit by Section 27 of the Evidence Act. In the present case, we have already held that the blade of the *darati* was concealed by the appellant Raju inside the *kabristan* amongst the roots of a *bargad* tree inside a polythene. The relevant portion of **Shiv Narayan (Supra)** is quoted below:

“19. As regard the recovery of knife at the instance of accused persons admittedly knife was recovered from an open plot adjacent to the factories. The knife was not buried or concealed under the earth or inside the bushes. Nor it was kept hidden under the wall. The alleged incriminating article as per the prosecution's version was found lying in the open on the ground near the wall on an open plot visible to naked eyes. As per Insp. Kali Ram Malik PW-30 there were lights in that plot and even at night time they could see the knife. The knife was visible because of lights. Therefore, the recovery of the alleged knife from an open space visible to naked eyes not hidden anywhere cannot be said to be a recovery admissible under Section 27 of the Evidence Act. What is admissible under Section 27 of the Evidence Act is not merely knowledge of the accused regarding the place of concealment of the material object but the fact that the accused himself had concealed it there to the exclusion of the knowledge of others. What is not covered cannot be discovered. The weapon found in open space near the wall not hidden in that circumstance the statement of the accused cannot said to distinctly lead to discovery of that weapon. In fact the murder in this case took place between 1st January, 1996 to the to the morning of 4th

January, 1996 because the dead body was recovered on 4th January, 1996 at 9.40 AM whereas the weapon of offence was recovered on 23rd January, 1996 from an open space. In such circumstance the recovery of knife from an open space visible to naked eyes from open space accessible to all and made after almost 23 days of the occurrence cannot be of any avail to the prosecution. Moreover, at the time of alleged recovery Insp. Kali Ram Malik PW-30 did not associate any independent witness though according to him there were number people collected at the time of recovery of the knife. It is a settled proposition of law that on the information furnished by the accused to the police officers which led to the recovery of the weapon is admissible in evidence under Section 27 of the Evidence Act, but admissibility alone would not render the evidence reliable. Admittedly there is nothing in Section 27 of the Evidence Act which renders the statement of the accused inadmissible if recovery of the article was made from any place which is “open or accessible to others”. Therefore, the crucial question would be whether it was ordinarily visible to others? If the answer is in the positive then the recovery would be inadmissible under Section 27 of the Evidence Act. The fact of the matter in the present case is the place wherefrom the alleged knife was recovered was not only open and accessible to others but according to the I.O. himself the weapon of offence was ordinarily visible. It was not concealed nor hidden. Therefore, it cannot be said that the accused had the exclusive knowledge as to where the weapon of offence was hidden or kept. When the weapon of offence was ordinarily visible and had not been concealed rather lying on the ground in a open ground accessible to all, the recovery in such circumstances, to our mind, is hit under Section 27 the Evidence Act.”

(Emphasis Supplied)

37. We may next notice the forensic evidence brought on record by the prosecution. The recovered objects were sent to the FSL; which by its report dated 21.10.2010 (Ex.PW-27/PX) stated that blood was found on the clothes (Exhibit ‘8a’ and ‘8b’) and the blade of the *darati* (Exhibit

‘9’) recovered at the instance of the appellant Raju. Further the wooden handle and iron leaves of the *darati* (Ex.P-12) seized from the spot and the recovered blade of *darati* (Ex.P-1) were also sent to the FSL. By its report dated 28.10.2010 (Ex.PW-13/A) opined that “*the broken wooden pieces with metallic rod from Exhibit-1 could be part of metallic knife blade marked Exhibit-9.*” Thus, the circumstances (ii), (iii) and (iv) duly stood established against the appellant Raju.

38. We proceed to analyse the medical witnesses. Dr.S.Lal (PW-1) had conducted the postmortem (Ex.PW-1/A) on the body of the deceased and had found the following *ante mortem* external injuries on the body of the deceased:

- “1. *Incised wound 6 x 0.5 cms x muscle deep over left side forehead horizontally placed 2.2 cms above the eye brow and 3.5 cms left to midline.*
2. *Incised wound 3 x 0.4 cms x muscle deep over left eye brow medial aspect and obliquely placed.*
3. *Incised wound 9 x 0.5 cms x muscle deep over left eye brow lateral aspect extend to bridge of nose, obliquely placed.*
4. *Incised wound 2.2 x 0.3 cms x muscle deep over right side forehead, horizontally placed 1 cm above the eye brow and 2 cms right to midline.*
5. *Incised wound 5 x 0.3 cms x nasal cavity deep over right side bridge of nose extent to right side face over cheek associated with another incised wound superimposed to incised wound of face make &-shape pattern over bridge of nose.*
6. *Incised wound 5 x 0.3 cms into muscle deep over right side face extent to right side bridge of nose, horizontally placed 1 cm below the injury No.5.*
7. *Multiple incised wounds intermingling/superimposed to each other to form a large wound of size 6 x 0.8 cms x muscle deep over right side of ankle joint, horizontally placed.*
8. *Incised wound 8 x 0.3 cms x muscle deep over right side face over mandibular area, horizontally placed 2 cms above*

the lower border of mandible and tailing of wound present over left angle of wound.

9. Multiple incised wound intermingling to each other criss-cross pattern in area of 4 x 3 cms over left side chin just below the lower lip.

10. Incised wound 3 x 2 cms x muscle deep over left side of face over lower border of mandible, horizontally place just left to midline, tailing of wound present on right side.

11. Incised wound (2 in number) of size 7 x 0.2 cms x muscle deep with tailing on left side, parallel to each other over left side of face over cheek extend to lobule of ear.

12. Multiple superficial incised wound of size varies from 5 x 0.2 cms to 0.5 x 0.1 cms over left ear.

13. Multiple incised wound intermingling/superimposed each other to form a large wound of 7 x 1.5 cms x muscle deep over left side middle of neck horizontally placed, multiple tailing present on left side of wound. The upper border of wound placed 7 cms below the lower border of mandible and right angle of wound just extend to right side of neck. The wound cut the neck muscles and carotids vessels of left side neck.

14. Incised wound 6 x 1 cm x muscle deep over right dorsum middle of forearm placed 9 cms above the wrist joint.

15. Incised wound 2 x 0.5 cms x muscle deep, horizontally placed 2 cms above the injury No.14.

16. Incised wound 11 x 1.2 cms x muscle deep over lower 1/3rd of right leg extend to lateral aspect of right ankle joint.

17. Incised wound 2 x 0.5 cms x muscle deep over middle of occipital protuberance and horizontally placed.”

39. The cause of death was opined to be haemorrhagic shock due to *ante mortem* sharp cut injury to neck vessels and sufficient to cause death in ordinary course of nature. Time since death was about 24 hours and having regard to the time of postmortem, the time of death can be estimated to be 1:45 PM on 18.02.2010. His subsequent opinion regarding the weapon of offence was also sought and PW-1 opined vide Ex.PW-1/B that the injuries no. 1 to 17 could have been caused by the

metallic knife blade (Ex.P-12).

40. The next incriminating circumstance pertains to the purchase of the *darati* by the appellant Raju from Som Pal (PW-4) on 17.02.2010, i.e. one day before the murder of the deceased. Som Pal (PW-4) had deposed that he is working as an Iron Smith (*lohar*) and sits in a *jhuggi* adjoining the road and also sells agricultural instruments like *darati*, hammer, etc. On 17.02.2010 at 5 PM, the appellant Raju came to his shop and purchased a *darati* from him. The boy had come on a bicycle used by milkman to deliver milk. The *darati* was sold to him for Rs.50/-. The witness had also identified the handle and the blade of the *darati* sold by him to the appellant Raju. PW-4 was cross-examined by the *amicus curiae* for the appellant Raju before the Trial Court. He affirmed the suggestion that he runs his shop on a bullock-cart at Patparganj Road, without any permissible either from MCD or the police. He further affirmed the suggestion that he is running his shop on the mercy of the police. He denied the suggestion that he was falsely deposing at the instance of the police or that the appellant Raju had not purchased the *darati* from him.
41. Learned counsel for the appellant Raju had contended that Som Pal (PW-4) was a planted witness as he was running his shop at the mercy of the police. We are unable to accept the submission as merely because the witness stated during his cross-examination that he runs his shop at the mercy of the police, this cannot *ipso facto* lead to the conclusion that PW-4 was a planted witness. Any person who is selling products of a bullock cart without licences would necessarily be at the mercy of the police when it comes to earning his livelihood, however, he cannot be said to be a planted/stock witness. It has not even been

shown that he had acted in such capacity in any other case, let alone a large number of cases.

42. We may also notice the testimony of Dr.Sayed Zaigham Raza (PW-11), who deposed that he is running a homeopathic clinic in the name of New Life Homeopathic Clinic. On 18.02.2010 at about 8-9 PM, the appellant Raju had come to his clinic with the injury on his little finger of right hand. Appellant Raju had informed that he had sustained the injury by falling. He did the dressing on the injury. PW-11 opined that the injury appeared to be caused by some sharp object. The dimensions of the injury were 0.25 cms x 0.50 cms below the nail. In his cross-examination, he stated that he is working as a doctor in homeopathy since 1981 and never uses allopathic medicines. He had not suggested appellant Raju to go to a hospital as it was a minor injury.
43. The appellant Raju was medically examined by Dr.Pawan Kumar (PW-23). PW-23 deposed that on 22.02.2010 at 6:15 PM, patient Raj Kumar @ Raju was brought for medical examination. There were no fresh external injuries and there was only one 3-4 days old injury on the tip of his right little finger. He had also proved the MLC (Ex.PW-23/A) in this regard. In his cross-examination, he stated that the injury was probably an abrasion or cut injury.
44. Though, Ms.Dubey had tried to impress upon us that the testimony of PW-11 is unreliable as it is improbable for an injured person to approach a homeopathic clinic for treatment, we find force in the submission for learned counsel for the State that merely because he was a homeopathic doctor does not mean that he cannot provide basic first aid to the injured. Even otherwise, the presence of the injury was duly corroborated by Dr.Pawan Kumar (PW-23) and the MLC of the

appellant Raju (Ex.PW-23/A).

45. Learned counsel for the appellant Raju had also drawn the attention of this Court to the testimony of PW-3 to show that it would have been better for the appellant Raju to strike between 9:30 AM-12 Noon and 2-7 PM. Again, we are unable to subscribe to this submission as it is highly unlikely that the appellant Raju, who used to deliver milk at the house of the deceased, would have such detailed knowledge of the time schedules of PW-3 and the maid (PW-5). Additionally, such imprudence on the part of the appellant/accused cannot be a ground to throw out the case of the prosecution.
46. Finally, it was also contended that the behaviour of Shanti (PW-5) was highly unusual. We may analyse the testimony of PW-5 in this regard. She had deposed that she works as maid servant in houses. In the house where the murder had taken place, she used to reach at 12-12:15 PM for doing household work. On 18.02.2010, she reached the house at about 12:15 PM. The main door of the house used to remain open and on that day it was open. She used to work on the first floor and the door at the first floor used to be bolted. When she reached the first floor, she saw the *bhabhi ji* in whose house she was working, lying on the bed. Her face was smeared with blood and blood was also lying on bed. The door of the first floor was open. She got scared and went to the house of a relative of the deceased at Priya Darshini Vihar and told her the facts. Then she returned with the relative/Madhu. The witness was then thoroughly cross-examined by the counsel for the defence. In her cross-examination, she stated that on seeing the deceased, she had raised alarm, but no one came there. She did not know who lives in the neighbourhood of the deceased. She came out of the 1st floor crying.

She further deposed that she did not know who lives on the ground floor and that it always remained locked. She did not find any person when she came to the street. A man was standing in the balcony of his house, she tried to inform him, but probably he did not listen to her. She then travelled to the house of Madhu, which took her 15-20 minutes and returned with her.

47. From the testimony of PW-5, it is clear that when the maid found the body of the deceased, she got scared, raised alarm and started weeping. She did not know any of the neighbours and the ground floor used to remain locked. She attempted to search for passers-by outside, however, none were found. She tried to disclose the incident to one person standing in his balcony, again, to no avail as the person ignored her plea. Only then did she travel to the relative of the deceased, i.e. Madhu (PW-7). Such conduct cannot be said to be unusual. It is normal for a maid having found a dead body to try to raise alarm and search of person outside and on failing to do so, rush to the house of the relative of the deceased. Merely because she did not approach the police also cannot be a ground to brand her conduct as improbable. This can be explained by the general reluctance of persons, especially those belonging to the lower working class, to approach the authorities.
48. The final aspect to be considered is the motive of commission of the offence. As deposed by Som Nath (PW-3), a mobile phone, about Rs.10,000-12,000/- and the gold chain and other ornaments worn by the deceased were missing. In this background, the motive was rightly ascertained by the Trial Court to commit robbery.
49. From the foregoing discussion, the following incriminating circumstances stand established against the appellant Raju:

- (i) The appellant Raju had taken leave from his employer (PW-9) at the time when the offence was committed.
 - (ii) He had purchased the *darati* (sickle) from Som Pal (PW-4) on 17.02.2010, i.e. one day prior to the commission of the offence.
 - (iii) The blade of the *darati* was recovered at the instance of the appellant Raju and it corresponded with the handle and iron leaves found at the place of incident.
 - (iv) Blood-stained clothes and the blade of the *darati* were recovered at the instance of the appellant Raju.
 - (v) Dr.S.Lal (PW-1) opined that the injuries no. 1 to 17 in the postmortem (Ex.PW-1/A) could have been caused by the weapon of offence.
 - (vi) The motive was to commit robbery.
 - (vii) The appellant Raju had an injury on the tip of the right hand little finger, which remained unexplained all along the trial.
50. It is settled law that when the case of the prosecution is based on circumstantial evidence, the incriminating circumstances should be conclusive in nature and point only towards the guilt of the accused and incompatible with his innocence. To put it tersely, the circumstances must show that the accused, in all probability, must have committed the offence. [See *Sharad Birdhichand Sarda v. State of Maharashtra*, (1984) 4 SCC 116 (paragraph 153); *Bodhraj @ Bodha and Ors. v. State of Jammu & Kashmir*, (2002) 8 SCC 45 (paragraphs 10 and 11); *Trimukh Maroti Kirkan v. State of Maharashtra*, (2006) 10 SCC 681 (paragraph 12); *Aftab Ahmad Anasari v. State of Uttaranchal*, (2010) 2 SCC 583 (paragraphs 13-15); *Prem Singh v. State*, MANU/DE/1341/2016 (paragraphs 46-50); and *Nathiya v. State*,

(2016) 10 SCC 298 (paragraphs 25-27)].

51. Weighing the incriminating circumstances enumerated in paragraph 49 foregoing on the touchstone of the well-settled law, we find that the prosecution was able to conclusively prove the guilt of the appellant Raju and no other inference could be drawn. There is no break in the chain of circumstances established by the prosecution.
52. Hence, we find no infirmity in the judgment of the Trial Court convicting the appellant Raju.

Crl.A. 696/2012 BY APPELLANT DINESH

53. We proceed to examine the appeal preferred by the appellant Dinesh, who stands convicted under Section 411 IPC. The appellant Dinesh stood convicted on the basis of the recovery of the robbed mobile phone from him and his failure to give any explanation for his possession.
54. The evidence of three witnesses being PW-21, PW-26 and PW-27 would be useful to consider the rival contentions of the parties. SI Anish Sharma (PW-21) deposed that on 22.02.2010, he had joined the investigation and then he along with the IO went to Geeta Colony. There they met the appellant Dinesh and a mobile phone of make Nokia of white colour was recovered from him belonging to the deceased. The appellant Dinesh was using the mobile with a different SIM. The appellant Dinesh disclosed that he had purchased the said mobile phone from his friend Rajkumar. SI R.N. Pathak (PW-26) deposed on similar lines testifying that the mobile was recovered and the appellant Dinesh disclosed that he had purchased the mobile from his friend Rajkumar.
55. PW-27 also deposed that after Som Nath had informed that one mobile phone make Nokia 1100 of white colour was missing, he had collected

its CDRs. From the CDR on 22.02.2010, he came to know that the looted mobile was being used on other SIM having last digits as 643, which was registered in the name of Dinesh Kumar. On 22.02.2010, they reached the house of the appellant Dinesh. He met them there and produced the mobile phone from the pocket of his pant. He disclosed that he had purchased the mobile phone for Rs.500/- from Raju, who used to study with him.

56. Som Nath (PW-3) had testified that *inter alia* the mobile phone of make Nokia of his wife/deceased having SIM in his name was missing. Ram Hari Singh (PW-17), Sub Divisional Engineer, MTNL and Vishal Gaurav (PW-18), Nodal Officer, Bharti Airtel had proved the CDRs of mobile numbers 9013341733 (Ex.PW-17/A and 17/B) in the name of Som Nath (husband of deceased) and 9871240643 (Ex.PW-18/A to Ex.PW-18/D). These showed that the robbed mobile phone having IMEI No. 351864015710373 was previously being used with the SIM having number 9013341733 and from 19.02.2010 from atleast 09:14:08 PM was used with 9871240643.
57. Accordingly, it was proved that the prosecution was able to prove that the robbed mobile phone was recovered from the appellant Dinesh, who was using it since atleast 9:14:08 PM on 19.02.2010. As regards to the absence of any witnesses but police witnesses, a coordinate bench of this Court in ***Titu (Supra)*** (paragraph 30) had observed that merely because all the witnesses of recovery were police witnesses and no independent public witness was joined for affecting the recovery would not be fatal. In the absence of any other cause, the recovery cannot be held to be doubtful only because only police personnel stood witness therein.

58. The question arises whether all the essentials ingredients of Section 411 IPC stand established? Section 411 IPC reads as under:

“Section 411. Dishonestly receiving stolen property.—Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.”

(Emphasis Supplied)

59. A bare perusal of the provision would show that the essentials are threefold: *first*, the stolen property was in the possession of the accused; *second*, some other person had possession of the property prior to the accused; *third*, the accused had knowledge or reason to believe that the property was stolen.
60. In the present case, the first and the second ingredient stand established. As for the third ingredient, such knowledge may be presumed by the court under Section 114 and Illustration (a) to Section 114 of the Evidence Act. The presumption is drawn only when the accused is unable to account for his possession. In ***Karnal Singh Uttam Singh v. State of Maharashtra***, (1976) 1 SCC 882, the Supreme Court had acquitted the appellant finding that “*the appellant had given a fairly acceptable explanation*” and “[t]he prosecution had been unable to *repel the effect of it.*”
61. In the present case, we find force in the submission of Mr. Chaudhari that the appellant Dinesh had neither denied that the mobile phone was seized from him nor did he deny that he had purchased it from appellant Raju. He had, accordingly, accounted for his possession and thus, the presumption could not have been drawn against him. Resultantly, it was upon the prosecution to show that the appellant had knowledge or

reason to believe that the mobile phone was stolen. In the absence thereof, the third ingredient of Section 411 was not established and the judgment and order to sentence against appellant Dinesh are liable to be set-aside. We have also been informed the appellant Dinesh had suffered incarceration for about 29 days and is already on bail.

62. To conclude, the prosecution was able to establish the complete ring of incriminating circumstances against the appellant Raju; but against the appellant Dinesh, it has not been shown that he had any knowledge or reason to believe that the mobile phone was stolen.
63. Accordingly, the Crl.A. 180/2013 preferred by appellant Raju is dismissed.
64. Crl.A. 696/2012 is allowed and the appellant Dinesh is acquitted of the charges framed against him under Section 411 IPC.
65. The personal bond and surety furnished by appellant Dinesh are discharged.
66. Copy of this judgment be sent to the concerned Jail Superintendent for updating the jail record.
67. Trial Court record be sent back along with a copy of this judgement.
68. In view of the foregoing order, Crl.M.B. 1871/2016 in Crl.A. 180/2013 seeking suspension of sentence until pendency of appeal is rendered infructuous and accordingly, dismissed.

G. S. SISTANI, J.

CHANDER SHEKHAR, J.

AUGUST 16th, 2017 //b//ka