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

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Date of Judgment: 3rd May, 2017

+ **CRL. A. 771/2014**

MD. RASHID

... Appellant

Through : Mr. Riaz Mohd, Advocate

versus

STATE

... Respondent

Through : Mr. Rajat Katyal, APP for the
State along with SI Khajan
Singh, P.S. Paharganj

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MR. JUSTICE VINOD GOEL

G.S.SISTANI, J. (ORAL)

1. With the consent of the parties, the present appeal is set down for final hearing and disposal.
2. Challenge in this appeal is to the impugned judgment dated 27.05.2014 and the order on sentence dated 29.05.2014 passed by the Trial Court in Sessions Case 13/13, FIR No. 200/12 PS Paharganj, by which the appellant has been held guilty for the offence punishable under Section 302 of the Indian Penal Code, 1860 (in short '*IPC*') and has been sentenced to undergo imprisonment for life and to pay a fine of Rs. 25,000/- and, in default of payment of fine, to undergo simple imprisonment for two months.
3. The case of the prosecution as noticed by the Trial Court is that on 02.10.2012 at 2:20 PM, an information was received at PP Santrashan from one Babu Lal (PW-8), receptionist of Hotel Karan Palace that a

boy and a girl had stayed the previous night in room no.207 of their Hotel; the boy had left the Hotel during the night and on the next date when room was forced open, dead body of a girl was found lying on the bed. A case was registered on the basis of the statement made by Babu Lal (PW-8), Receptionist of the Hotel, which was recorded by SI Yashpal (PW-21), PS Paharganj on reaching the Hotel. SI Yashpal (PW-21) reached the Hotel along with Head Constable Kuldeep Tyagi (PW-20) and W/Constable Bhanwari Devi (PW-17) on receipt of DD no. 20 recorded at PP Sangtrashan. It is the case of the prosecution that Shajia (hereinafter the '*deceased*') got married to the appellant initially in the year 2010 and they lived together as husband and wife in the area of Mustafabad. The marriage ended with a divorce in the very first year. Thereafter, Shajia started residing with her parents. In July, 2012 the appellant settled the matter and married the deceased once again and both of them started living together in Street No.2, Matkewali Gali, Chauhan Bangar. However, disputes arose once again between the appellant and the deceased. The deceased started residing with her parents from 21.08.2012 and also submitted a complaint to the DCP, North-East District on 28.08.2012. It is the alleged that on 01.10.2012, the appellant contacted the deceased on phone and expressed his desire to meet her. She left her parental house to meet him, but did not return. She was found dead in room no.207 of the Hotel. On 02.10.2012, when SI Yashpal (PW-21), Head Constable Kuldeep Tyagi (PW-20) and W/Constable Bhanwari Devi (PW-17) reached the Hotel, they found dead body of Shajia lying on the bed. SI called crime team, which reached the spot and inspected it. Inspector Subhash Meena (PW-24) also reached the spot with his

staff. During spot inspection, one black colour chunni and black colour T-Shirt(top), one bed sheet, two pillow covers, hairs, three glasses and two plastic water bottles, pair of lady chappal, a ladies purse, hair clip, one mobile phone from under the pillow, two broken mobile phones from the dustbin and key-take were recovered from room no.207 of the Hotel. These items were seized and sealed.

4. Learned counsel for the appellant submits that the prosecution has failed to establish the guilt of the appellant. It is submitted that the Trial Court has erred in passing the impugned judgment without appreciating the facts of the case and hence, the judgment is contrary to law. It is contended that the Trial Court has failed to consider that there is no evidence on record to show that the appellant was last seen in the company of the deceased. Counsel contends that the call records sought to be relied upon do not establish that the appellant had any contact with the deceased soon before her death. It is next contended that Manoj Kumar (PW-12) is a planted witness and his testimony is unreliable and not trustworthy.
5. The learned counsel has also laboured hard to submit that the presence of the appellant at the Hotel has not been established as no record of the Hotel has been produced to show that the appellant had hired one room in the Hotel inasmuch as the register of the Hotel has not been produced. The learned counsel submits that in case the appellant had hired a room, the Hotel management would have asked for his identity proof and only then it could have been proved that the appellant had stayed in the Hotel. Learned counsel next submits that the room where the deceased was found murdered, was locked from inside.

Thus, it cannot be said that who had gained entry into the room and murdered the deceased.

6. It is also submitted that the appellant had married the deceased in the year 2010, thereafter the marriage ended with the divorce in the very first year and thereafter, the appellant had no concern with the deceased. Learned counsel also submits that CCTV footage of the Hotel has not been proved as no certificate under Section 65-B of the Evidence Act has been produced.
7. It is the case of the appellant that the appellant was brought by the Delhi Police from Moradabad and falsely implicated in the case. Mr. Riaz Mohd. explains that the appellant had refused to participate in the Test Identification Parade (TIP) as he was shown by the police to the witnesses at the Police Station. As regards the refusal to give sample of blood, learned counsel explains that since the police had already taken the sample of the blood in the Hospital, he had refused to give it second time. Learned counsel submits that the present case is of circumstantial evidence. The prosecution has miserably failed to prove the circumstances which would conclusively point towards the guilt of the appellant.
8. Mr. Katyal, learned counsel for the State submits that the prosecution has been able to prove its case beyond any shadow of doubt. It is contended that the medical, electronic and the ocular evidence clearly point towards the guilt of the appellant. He submits that the CDR records have been proved by Rajeev Ranjan (PW-10), Nodal Officer, Tata Tele Services Ltd. to show that phone calls were made by the appellant to the deceased on the fateful day, i.e., 01.10.2012. In fact, 10 calls were made from the mobile phone of the appellant to the

mobile phone of the deceased. He further submits that Smt. Shammim Bano (PW-14), mother of the deceased has testified that on 01.10.2012, her younger daughter, Nisha had informed her that the deceased had gone to meet her husband and did not return thereafter. Mohd. Aslam (PW-19), brother of the deceased had also testified on the lines of PW-14. Ms.Nisha (PW-15), younger sister of the deceased also testified that on 01.10.2012, the deceased received a phone call from the appellant asking her to meet him at Seelampur. She testified that between 9:00 to 10:00 AM, the deceased had categorically informed her that she was going to meet the appellant at Seelampur. However, she did not return in the evening. The counsel contends that based on the testimonies of PW-14, PW-15 and PW-19, it would stand established that the deceased had informed PW-15 that based on her telephone call received from the appellant, she was going to meet him at Seelampur on the same day. The counsel has also placed strong reliance on the testimony of Manoj Kumar (PW-12), the rickshaw puller who had testified that he had brought the appellant and the deceased to the Hotel in question in his rickshaw and arranged a room. Counsel submits that the call details between the rickshaw puller and the appellant also prove that they were in constant touch with each other.

9. The counsel submits that the room was locked from inside because the room had a key take, which is like a card which is inserted to unlock the door and for this reason, the key was not found and thus, the appellant would have locked the room from outside and fled. Learned counsel submits that Babu Lal Sahu (PW-8), receptionist of the Hotel had also supported the case of the prosecution and has identified the

appellant as the male boy who was accompanied by the lady guest stayed in room no.207. He also submits that since the hard-drive containing the CCTV footage was seized, a certificate under Section 65-B of the Indian Evidence Act, 1872 was not required and the case of *Anvar P.V. v. P.K. Basheer and Others*, (2014) 10 SCC 473 would not be applicable.

10. We have heard the learned counsel for the parties, examined the Trial Court record and also considered their rival submissions.
11. The Trial Court had convicted the appellant on the basis of circumstantial evidence. The prosecution had established that the that the accused/appellant had called the deceased on 01.10.2012, met her and took her along to Paharganj. From there, they met Manoj Kumar (PW-12) near Avtar Hotel, who took them to Hotel Karan Palace, got a room booked there with the assistance of Manoj Kumar (PW-12), stayed at room no. 207 from 11:40 AM and absconded from there during the night intervening 01-02.10.2012, after murdering the deceased in the said room. The prosecution has established the following circumstances before the Trial Court:
 - (i) Medical evidence had proved that the cause of death was asphyxia as a result of smothering in the night intervening 01-02.10.2012.
 - (ii) The deceased had left her house on 01.10.2012 at about 9-10 AM to meet the accused and was thereafter, was in constant touch with the appellant.
 - (iii) The appellant had brought the deceased to Paharganj; where they met Manoj Kumar (PW-12) near Hotel Avtar.

- (iv) Manoj (PW-12) took the couple to Hotel Karan Palace and arranged a room for them.
 - (v) The appellant and deceased were last seen together in room no.207 on 01.10.2012.
 - (vi) An adverse inference was drawn by the Trial Court for the appellant refusing to participate in Test Identification Proceedings ('TIP') as well as refusing to give sample of blood.
 - (vii) The motive to murder was established as the pendency of a complaint by the deceased before the Crime Against Women Cell ('CAW Cell') against the appellant.
12. The Trial Court found that all the circumstances were consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence and had hence, convicted the accused/appellant herein.
13. The submissions of Mr.Riaz Mohd, learned counsel for the appellant, can be summed up under:
- (i) There is no last seen evidence on record;
 - (ii) The call detail records do not establish the contact between the appellant and deceased;
 - (iii) Manoj Kumar (PW-12) is a planted witness and thus, his testimony cannot be relied upon;
 - (iv) The presence of the appellant at the Hotel has not been established in the absence of records and register of the Hotel;
 - (v) The room where the body of the deceased was found was locked from inside and it cannot be said as to who gained entry and murdered the deceased;

- (vi) After the divorce of the appellant with the deceased, the appellant had no concern with the deceased;
 - (vii) The CCTV footage of the Hotel could not be relied upon as the same was not proved under Section 65-B of the Indian Evidence Act, 1872;
 - (viii) No adverse inference could have been drawn by the refusal of the appellant to participate in TIP or give sample of blood; and
 - (ix) The circumstances established by the prosecution do not conclusively point towards the guilt of the accused.
14. Prior to dealing with the rival contentions raised at the bar, we deem it appropriate to analyse with the testimonies of the prime prosecution witnesses.
15. Manoj Kumar (PW-12) has deposed that he is a rickshaw puller and used to ply his rickshaw in the area of Pahar Ganj. On the date of the incident, he was present near New Delhi Railway Station with his rickshaw, when he received a call from the appellant inquiring whether he could arrange a room for him. The witness replied in the affirmative. The appellant inquired about his whereabouts. The appellant then told him that he and his wife had already reached near Hotel Avtar in the area of Pahar Ganj. The appellant inquired as to how the witness would recognise him and proceeded to apprise the clothes he was wearing. Pursuant to the conversation, Manoj (PW-12) reached near Hotel Avtar and recognised the appellant. The witness has deposed that the appellant was accompanied by a lady, who was introduced as her wife. Manoj (PW-12) then took the appellant and the accompanying lady to Karan Guest House. The witness introduced the appellant to Babu Lal (PW-8), the manager of the

Guest House. Accordingly, Babu Lal (PW-8) arranged a room for the appellant. After leaving the appellant and the lady at the Hotel, the witness departed. On the next day, Babu Lal (PW-8) called the witness. Manoj (PW-12) reached the guest house and was informed by Babu Lal (PW-8) that the appellant had escaped after killing his wife. The statement of the witness was also recorded by the Police and he was escorted to the room of the Guest House. Manoj (PW-12) had identified the body of the lady who had accompanied the appellant when the witness had taken him to the Guest House for the booking of a room.

16. The witness was thoroughly cross-examined by the counsel for the appellant. Manoj (PW-12) stated that he had known Babu Lal (PW-8) for the last 5-6 years and he used to bring customers for the Guest House for a commission. He further deposed that the appellant had obtained his mobile number 2-3 days prior to the incident when he was present in front of New Delhi Railway Station with his rickshaw. At that time as well, the appellant had inquired about the availability of a room and the witness had replied in the affirmative. The appellant had taken the mobile number saying that he would call Manoj (PW-12) when in need of a room. He further stated that the police had looked into his call details and that he had informed the police about the clothes being worn by the appellant. The witness had not taken any other customer to Karan Guest House on the day of the incident. He deposed that he had taken the appellant and the lady on foot leaving his rickshaw near Hotel Avtar. Babu Lal (PW-8) had called the witness at 8 AM on the next day and he remained there till the evening. He also deposed that his mobile number is 9250250702

and was the same during the time of the incident. During his cross-examination, he did not remember the mobile number of the appellant, but clarified that he had given the same to the Police on the 2nd of October.

17. During the course of cross-examination, it also transpired that the even though the witness alleged to have informed the police of the meeting with the appellant 2-3 days prior to the incident and the clothes worn by the appellant, the same were not reflected in his statement under Section 161 Cr.P.C. (Ex. PW12/DA).
18. Babu Lal Sahu (PW-8) deposed that on 01.10.2012, he was employed as a receptionist at Hotel Karan Palace. He knew Manoj (PW-12). On 01.10.2012 at about 11:00 AM, Manoj (PW-12) came to him and enquired if any room was vacant. The witness informed that there was a vacancy in the Hotel. Later on 11:40 AM, Manoj (PW-12) again came, accompanied by a guest and a lady and informed that the couple were husband and wife. Manoj (PW-12) hired one room, i.e. room no.207, and after collecting the key departed with the couple for the room. No entry was made in the register of the Hotel as Manoj (PW-12) had stated that the couple would send their IDs from the room in sometime. At about 1:30 PM, the couple had lunch in the room and the waiter supplied the meals in the room itself. On the next day at about 2 PM, Balu Lal (PW-8) sent a waiter, namely Rizwan, to room no.207 to check the room. The waiter returned and informed that the room was locked from inside. The witness then accompanied Rizwan to the room and when Rizwan pulled the handle of the lock with force, the door opened. They switched on the lights and found the female guest lying dead on the bed. The witness called the police and upon

the arrival of the police, the investigation started. The witness also identified the appellant/accused as the person who had accompanied the deceased lady and Manoj (PW-12) on the date of the incident. The witness also identified the case property seized in his presence from the hotel room.

19. In his cross-examination, Babu Lal (PW-8) candidly deposed that before granting access to the room, an entry in the register is made after verifying the identity of the guests and the guests are made to sign in the said register.
20. We may also notice the testimonies of Nisha (PW-15) (younger sister of the deceased) and Aslam (PW-19) (brother of the deceased). Nisha (PW-15) deposed before the Trial Court that the deceased was her elder sister. The deceased got married to the appellant in 2010, who was recognised by the witness in court. After marriage, the deceased was treated well for 1-2 months, but thereafter, the appellant had started beating the deceased. The deceased was divorced by the appellant and the deceased started living with them. On 01.10.2012, the deceased received a phone call from the appellant requesting her to meet him at Seelampur. Accordingly at about 9-10 AM, the deceased left the house informing PW-15 that she was going to meet the appellant. The witness was informed by the Police on the next day, at about 5-6 PM that the body of her sister/deceased was recovered in a room of Karan Hotel, Paharganj.
21. When PW-15 was cross-examined by the counsel for the appellant, she deposed that the call was received between 9-10 AM by the deceased from the appellant and thereafter, the deceased had gone to meet the appellant alone. The witness did not know where her sister

had gone, though she said that she was leaving for Seelampur, where the appellant had called her to see him.

22. We need not go into the testimony of Aslam (PW-19) in great detail. Suffice it to say that in respect of the incident, the witness deposed that one day (PW-19 did not remember the date) at about 9 AM, his sister/deceased told him that she had received a phone call from the appellant and that he had called her. After informing the witness, his sister left their house to meet the appellant. PW-19 deposed that the date was 01.10.2012. Later the police informed his mother on phone that his sister/deceased had died.
23. Since the case of the prosecution was based on circumstantial evidence, we deem it appropriate to deal with the circumstances against the appellant and the submissions of the learned counsel for the appellant under separate heads.

MEDICAL EVIDENCE

24. Ct.Bhanwari Devi (PW-17), HC Kuldeep Tyagi (PW-20), SI Yashpal (PW-21) and Ins.Subhash Meena (PW-24) have deposed that on 02.10.2012, when they entered room no.207 at Hotel Karan Palace they saw the dead body of a girl lying on the bed. Thereafter, Ct.Bhanwari Devi (PW-17) took the dead body to Lady Hardinge Hospital.
25. As per the MLC (Ex. PW2/A), an unknown female of about 25 years was brought dead to the Hospital on 02.10.2012 at 7:20 PM by Ct.Bhanwari Devi (PW-17). Autopsy was later conducted on the dead body by Dr.Arvind Kumar (PW-1) and Dr.Pradeep Yadav. As per the

Post Mortem Report (Ex. PW1/A), the following fresh antemortem injuries were present on the dead body:

*“Face appears swollen and bloated. Hemorrhagic discharge/fluid coming out from mouth and nose. Lower lip left side 2X1 cm mucosa abraded, extravassation of blood seen diffusely on cut section. Lips edematous. Tip of tongue contused in an area of 0.5 X 0.5 cm.
No other injury seen all over the body.”*

26. In the opinion of PW-1, the cause of death was “*axphyxia as a result of smothering, which is sufficient to cause death in ordinary course of nature.*” The approximate time since death was about one and a half day and having regard to the fact that the autopsy was conducted on 03.10.2012 at 2:20 PM, it is safe to conclude that the death of the deceased was caused in the night intervening 01-02.10.2012.

CIRCUMSTANCES ESTABLISHED AT TRIAL

27. In this regard, the testimonies of Nisha (PW-15) and Aslam (PW-19) are relevant as both of them have categorically deposed that their sister/deceased had received a call from the appellant and that she was going to meet him at Seelampur at around 9-10 AM on 01.10.2012. At the same time the reliance placed by Mr.Katyal upon the testimony of Smt.Shamim Bano (PW-14) is unfounded as the same is merely hearsay as she was informed by Nisha (PW-15).
28. Further, the Call Detail Records also corroborate the factum of the appellant having called the deceased. We may note that there was a lapse on the part of the prosecution to collect the Call Detail Records of the deceased. However, the order sheets of the proceedings before the CAW Cell (Ex.PW24/D) establish that the deceased was using the

mobile number: 7838271936. Further the Call Detail Records of the contact numbers of the appellant and Manoj (PW-12) have been produced. These documents (Ex.PW10/A to Ex.PW10/H) have been proved by Rajeev Ranjan (PW-10), Nodal Officer, Tata Tele Services Ltd. As per the records, the mobile connection number: 9250250702 was that of Manoj (PW-12) [Customer Application Form (Ex.PW10/A)] and mobile connection no. 9289832161 is of the appellant [Customer Application Form (Ex.PW10/D)].

29. The CDR of the contact number of the appellant (Ex.PW10/F) as well as the Location chart (Ex.PW10/G) proves that the following calls took place between the appellant and the deceased:

<u>Time</u>	<u>Caller</u>	<u>Recipient</u>	<u>Duration</u>	<u>Location of the Appellant</u>
09:32:24	9289832161	7838271936	91	Ghaziabad
10:25:29	9289832161	7838271936	16	New Seelampur, Shahdara
10:26:16	9289832161	7838271936	29	New Seelampur, Shahdara
10:30:59	9289832161	7838271936	40	New Seelampur, Shahdara
10:35:58	9289832161	7838271936	74	New Seelampur, Shahdara
10:38:00	9289832161	7838271936	21	New Seelampur, Shahdara
10:39:31	9289832161	7838271936	31	New Seelampur, Shahdara
10:42:03	9289832161	7838271936	2	New Seelampur, Shahdara
10:43:13	9289832161	7838271936	47	New Seelampur, Shahdara
10:48:13	9289832161	7838271936	71	New Seelampur, Shahdara

30. The foregoing details establish that initially a call was made by the appellant to the deceased at 09:32 AM, which is in consonance with the testimonies of Nisha (PW-15) and Aslam (PW-19). The appellant then travelled to New Seelampur, where the deceased was going to meet the appellant.

31. The next link is in the testimony of Manoj Kumar (PW-12), wherein he had testified that on 01.10.2012, the appellant had called him enquiring whether he could arrange a room; pursuant to which, the appellant along with the deceased met Manoj (PW-12). This fact is corroborated by the Call Detail Records of the appellant and Manoj (PW-12). The CDRs of the two numbers (Ex.PW10/C and Ex.PW10/F) reveal that numerous calls were made between the numbers. The location of the appellant, while making the calls, has also been established by the Location chart (Ex.PW10/G). The documents reveal that on 01.10.2012, the following calls took place between PW-12 and the appellant:

<u>Time</u>	<u>Caller</u>	<u>Recipient</u>	<u>Duration</u>	<u>Location of the Appellant</u>
10:16:52	9289832161	9250250702	45	Naveen Shahdara
11:16:57	9289832161	9250250702	10	Bhaghirath Palace
11:17:37	9250250702	9289832161	14	Shriram Road Civil Lines
11:53:52	9289832161	9250250702	36	Asaf Ali Road
11:58:15	9289832161	9250250702	152	Paharganj

32. The foregoing details corroborate the testimonies of Nisha (PW-15), Aslam (PW-19) and Manoj (PW-12) that the deceased had gone to meet the appellant at Seelampur at about 9-10 AM. It also establishes that the appellant has travelled towards Paharganj after inquiring from Manoj (PW-12) about the availability of a room and ultimately arriving at Paharganj around Noon.
33. From there, as per the testimony of Manoj (PW-12), the couple met PW-12 who took them to Hotel Karan Palace and arranged a room. This fact finds corroboration in the testimony of Babu Lal (PW-8), who has deposed that the appellant and the deceased were brought to

the Hotel by Manoj (PW-12). After arranging a room, Manoj (PW-12) departed. The room allotted to the couple was room no.207. The couple ordered lunch on 01.10.2012 in the room. On the next day, Babu Lal (PW-8) found the body of the deceased lying on the bed after he had sent one waiter to check the room.

34. Hence, it stands established that the appellant had called the deceased to meet him at Seelampur and then accompanied her to Paharganj; all the while being in contact with Manoj (PW-12). After reaching Paharganj, Manoj (PW-12) arranged a room for the couple at Hotel Karan Palace and left. The couple were given room no.207, where the body of the deceased was found the next morning.
35. The submissions of Mr.Riaz Mohd, learned counsel for the appellant, that there is no last seen evidence and the presence of the appellant not being established is without any force. Manoj (PW-12) and Babu Lal (PW-8) are both witnesses of last seen to be read with the testimonies of the brother (PW-19) and sister (PW-15) of the deceased.
36. Further, we are unable to accept the contentions that Manoj (PW-12) was a planted witness as (1) no reason for him to falsely depose has been shown; (2) his testimony stands duly corroborated by the testimony of Babu Lal (PW-8); and (3) the fact of calls between the appellant and Manoj (PW-12) as proved by CDRs and PW-10 remain unchallenged and unexplained. The submission must also be rejected.
37. The submission that the presence of the appellant at the Hotel is not established in the absence of the records and register of the Hotel. Babu Lal (PW-8) had candidly deposed that entries of all guests are made in the register with corresponding documentation and signatures of the guests in the register. At the same time, PW-8 had stated that

the entry of the guests was not made as they were to send their identification cards from their room. The absence of the register and records does not affect the case of the prosecution in view of the testimonies of PW-8 and PW-12, which are consistent and reliable.

CCTV FOOTAGE

38. Learned counsel for the appellant has submitted that the CCTV footage was not admissible in evidence as no certificate under Section 65-B of the Evidence Act has been produced. *Per contra*, Mr. Katyal has submitted that since the original hard drive was seized and produced, the certificate under Section 65-B was not required.
39. Section 65-B was incorporated in the Evidence Act in the year 2000 by the Information Technology Act, 2000 with the purpose to sanctify secondary evidence in electronic form generated by a computer. At the same time, the mandate of certificate under Section 65-B is limited to secondary evidence by way of electronic record and not primary evidence. This is evident from the following paragraph of the judgment of the Full Bench of the Apex Court in **Anvar P.V. (Supra)**:

“24. The situation would have been different had the appellant adduced primary evidence, by making available in evidence, the CDs used for announcement and songs. Had those CDs used for objectionable songs or announcements been duly got seized through the police or Election Commission and had the same been used as primary evidence, the High Court could have played the same in court to see whether the allegations were true. That is not the situation in this case. The speeches, songs and announcements were recorded using other instruments and by feeding them into a computer, CDs were made therefrom which were produced in court, without due certification. Those CDs cannot be admitted in evidence since the mandatory requirements of Section 65-B of the Evidence Act are not

satisfied. It is clarified that notwithstanding what we have stated herein in the preceding paragraphs on the secondary evidence of electronic record with reference to Sections 59, 65-A and 65-B of the Evidence Act, if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance with the conditions in Section 65-B of the Evidence Act.”

(Emphasis Supplied)

40. A coordinate bench of this Court in **Kishan Tripathi @ Kishan Painter v. The State, 2016 SCC OnLine Del 1136: (2016) 230 DLT (CN) 3 (DB)** has held that CCTV footage stored directly in the hard drive of a computer being self-generated without human intervention and hence, is not secondary evidence requiring certification under Section 65-B. The bench had after quoting paragraph 24 of **Anvar P.V. (Supra)** had observed as under:

13. ...The aforesaid paragraph elucidates difference between primary and secondary evidence. When primary or direct evidence in form of original data be it a CD, hard drive or any other electronic record is produced, the same is admissible and taken on record. This takes care of the contention of the appellant that the CCTV footage should be discarded and not read in evidence in the absence of a certificate under Section 65B of the Evidence Act.

14. The CCTV footage is captured by the cameras and can be stored in the computer where files are created with serial numbers, date, time and identification marks. These identification marks/details are self generated and recorded, as a result of pre-existing software commands. The capture of visual images on the hard disc is automatic in the sense that the video images get stored and recorded suo-moto when the CCTV camera is on and is properly connected with the hard disc installed in the computer. It is apparent in the present case from the evidence led that no one was watching the CCTV footage when it was being stored and recorded. The recording was as a result of commands or instructions, which had already been

given and programmed. The original hard disc, therefore, could be the primary and the direct evidence. Such primary or direct evidence would enjoy a unique position for anyone who watches the said evidence would be directly viewing the primary evidence. Section 60 of the Evidence Act states that oral evidence must be direct, i.e., with reference to the fact which can be seen, it must be the evidence of the witness, who had seen it, with reference to the fact, which could be heard, it must be evidence of the witness, who had heard it and if it relates to the fact, which could be perceived by any other sense or any other manner, then it must be the evidence of the witness, who says who had perceived it by that sense or by that manner. Read in this light, when we see the CCTV footage, we are in the same position as that of a witness, who had seen the occurrence, though crime had not occurred at that time when the recording was played, but earlier.

15. HG wells in his book “The Time Machine” had said “Now I want you clearly to understand that this lever, being pressed over, sends the machine gliding into the future, and this other reverses the motion. This saddle represents the seat of a time traveler. Presently I am going to press the lever, and off the machine will go. It will vanish, pass into future Time, and disappear. Have a good look at the thing. Look at the table too, and satisfy yourselves there is no trickery.” Time machine is friction, albeit seeing the CCTV footage with your own eyes as a judge gives you an insight into the real world in the past. In the present case, the court has itself seen the CCTV footage, and has travelled back in time to the time when the occurrence took place and thereby has seen the occurrence in the same position as that of a witness, who would have seen the occurrence, if he was present. There cannot be a more direct evidence. This video recording which captures the occurrence, would be per se and mostly discerningly reliable and compellingly conclusive evidence, unless its authenticity and genuineness is in question.

16. Per force, we must rule out any possibility of manipulation, fabrication or tampering. The hard-disk CCTV footage must pass the integrity test. It is a two fold test, system integrity and record integrity. It is with this over cautious and pensive approach, that we have proceeded and have bestowed our

consideration. We would accept the genuineness and authenticity of the CCTV footage played before us, for good and sound reasons. System integrity test is satisfied by ocular testimonies of Rakesh Bhargava (PW-4), Ram Milan (PW-15) and police officers H.C. Rajpal Singh (PW-7) and Inspt. B.S. Rana (PW-18). System was working and contemporaneously storing data. They had viewed the data. On record integrity, i.e., contents of the record have remained unchanged, we were anxious as it was noticed that the list of documents at Sr. No. 27, filed with the charge-sheet, mentions compact disc (CD) indicative that the hard drive had been examined and secondary evidence was created. Examination of the police case file had revealed that the CD was created at the behest of the public prosecutor, before the charge-sheet was filed. This was certainly a lapse and the hard disc sealed and deposited in the malkhana should not have been opened, even for the purpose of making copies of the video files. However, in the facts of the present case, this transgression and deviation would not unsettle and nullify the authenticity of the CCTV footage for there is no evidence or even a suggestion that the appellant Kishan Tripathi was at any time under compulsion or force, was asked to enact the crime at the place of occurrence. Moreover, the CCTV footage was seen on 23rd February, 2009 by Rakesh Bhargava (PW-4) and the police officers HC Rajpal Singh (PW-7), Insp. B.S. Rana (PW-18) and Ram Milan (PW-15) who had operated and played the CCTV footage. We are satisfied that the recorded CCTV footage has not been interpolated or tampered in the light of the original hard drive, which has been played before us. The footage recorded consists of 405 files starting from 2:06 P.M. on 21.02.2009 till 2:14 P.M. on 23.02.2009, with self generated numbers. Time and date are mentioned on the files and the video. These are not one, two or three files, but more than 400 files, created over a span of several hours. This "internal evidence" establishes its genuineness. Hard disk in the present case is not only a physical object, but a document within the meaning of section 3 of the Evidence Act [See *Shamsher Singh Verma v. State of Haryana*, 2015 (12) Scale 597]. The Supreme Court in *Mobarik Ali Ahmed v. State of Bombay*, AIR 1957 SC 857, has held that execution of a document can also be proved by the "internal

evidence” contained in the contents of the document. The circumstantial evidence enforces our belief that the original document, i.e. hard drive, is original and authentic.”

(Emphasis Supplied)

41. In the present case, it is in the testimony of Ins.Subhash Meena (PW-24) that on 02.10.2012, PW-24 had seen the CCTV footage in the presence of Babu Lal (PW-8) and had taken the hard drive/hard disc from PW-8 vide Seizure Memo (Ex.PW8/G). PW-24 had then taken the assistance of one, Mohan Singh Basra, to prepare the CD from the hard drive.
42. Babu Lal (PW-8) has also deposed that the hard disc of the CCTV footage of the Hotel was seized vide Seizure Memo (Ex.PW8/G). Nisha (PW-15), HC Kuldeep Tyagi (PW-20) and SI Yashpal (PW-21) have deposed that they were shown the footage and they identified the appellant in the video.
43. We note that the Trial Court had refused to place reliance on the CCTV footage, but found that the same did not affect the case of the prosecution as having been established by ocular evidence. The relevant portion of the judgment reads as under:

“It is in the statements of PW20, PW21, PW8 that CCTV footage was played at the hotel and PW8 Sh. Babu Lal identified the boy and the girl as the accused and the deceased. But no reliance can be placed on the electronic evidence available in the form of hard disc, CD and pendrive. According to the Inspector Subhash Meena, he got the CD prepared from Mohan Singh Basra, private computer engineer. Firstly, there is no certificate U/s 65B of Evidence Act from the concerned person who prepared CD or copied data in pen drive. Secondly, because the IO has not cited Sh. Mohan Singh Barsa as a witness and thirdly, because when the technology devices

played in Court, persons visible therein were not identifiable because of poor quality of CCTV footage.

Even if the electronic evidence in the form of CCTV footage is discarded, this court does not find any ground to discard the testimony of PW8 Babu Lal and PW12 who have fully supported the prosecution version that the accused accompanied by the lady (since deceased) got the room booked on 01.10.2012, at about 11.40 a.m. and stayed there with her.”

(Emphasis Supplied)

44. It is clear from the foregoing discussion that the certificate under Section 65-B was only required for proving the pen drive and the CD, which are secondary evidence as having been copied from the hard drive. As far as the hard drive is concerned, the same being primary evidence was admissible *per se* under Section 62 of the Evidence Act.
45. Having observed so, we need not ponder over the footage in great detail as the presence of the appellant at the Hotel has been established beyond reasonable doubt by other evidence on record.

THE ROOM BEING LOCKED FROM INSIDE

46. Learned counsel for the appellant had submitted that since the room was locked from inside, it is not possible to ascertain who had gained entry and murdered the deceased. In response, learned counsel for the State has submitted that the room had a key-take/keycard lock. We may notice that the Ins.Subhash Meena (PW-24) had seized the key-take of the room vide Seizure Memo Ex.PW20/B which specifically mentions that the key-take was put in the switch board of the room and no key was there on the card. Such doors can be opened by the keycard, which is then put in the switch board to operate the lights of the room. It is clear that the door of the room had a keycard lock and

hence, it cannot be said that the room being locked raises a doubt as to who got access to the room. The appellant could have fled after locking the room behind him. Accordingly, the submission of the learned counsel for the appellant must be rejected.

REFUSAL TO PARTICIPATE IN TEST IDENTIFICATION PARADE

47. It has been submitted by the learned counsel for the appellant that the Trial Court has erred in drawing a negative inference from the refusal of the appellant to participate in the Test Identification Parade ('TIP') as the appellant was shown by the police to the witnesses at the police station.
48. Ins.Subhash Meena (PW-24) had moved an application (Ex.PW22/A) for conducting the Test Identification Parade of the accused/appellant. The application was assigned to Naveen Gupta (PW-22), Metropolitan Magistrate. PW-22 has deposed and proved TIP Proceedings (Ex.PW22/A) wherein it has been stated that the appellant/accused refused to participate in the proceedings as he had hired the hotel and the hotel staff would identify him in connivance with the police officials and also because his photographs had been taken.
49. We note that no evidence has been brought on record that the appellant was either previously shown to the witnesses or his photographs had been taken. No suggestion has been put to the police witnesses, Babu Lal (PW-8) or Manoj (PW-12) in the cross-examination about the pictures being taken or the appellant having been shown to the witnesses in the police station nor has any evidence been led.

50. In this regard, we may benefit from the following observations of a Single Judge of this Court in *Akil and Ors. v. State NCT of Delhi*, MANU/DE/1623/2015:

“19. Furthermore, after arrest, test identification proceedings of both the accused/appellants was conducted and both of them refused to join the test identification parade on the ground that they were shown to the witnesses and that their photographs were taken in the Police Station. The learned counsel for the appellants, referred to the supplementary statement dated 26.09.2008 wherein the complainant stated that she had earlier identified accused on 16.01.2007 for submitting that this fortifies the version of the accused that they were shown to the witness earlier. This submission is misconceived inasmuch as, firstly, no such suggestion was given either to the complainant or the Investigating Officer of the case that accused were shown to her and, therefore, the accused were justified in refusing to join the test identification parade. Moreover, as per this statement, she identified them in Patiala House Courts on 16.01.20107 [sic: 2007]. However, as per record, the TIP was conducted much prior thereto i.e. on 08.01.2007 when the accused refused to join the proceedings. That being so, there is no evidence on record to prove that accused were shown to the complainant before or they were justified in refusing to join TIP proceedings. Rather refusal on their part to join the test identification parade leads to an adverse inference against them that had they join the proceedings they would have been identified in the test identification parade. In Suraj Pal vs. State of Haryana (1995) 2 SCC 64, Hon'ble Supreme Court in similar circumstances held that Court would be justified in inferring that had the appellants participated in TIP, he would have been identified by complainant. What can be culled out from the aforesaid decision is that the identification of the accused by the complainant in court coupled with their refusal to join the TIP establishes the identity of accused as assailant of the crime.”

(Emphasis Supplied)

[See also *Alim @ Allo v. The State (N.C.T. of Delhi)*, MANU/DE/4616/2009 (paragraph 14); and *Veer Bahadur Singh and Ors. v. State and Ors.*, MANU/DE/0853/2015 (paragraph 18)]

51. A similar argument of being previously shown to the witnesses was made before the Supreme Court in *Suraj Pal v. State of Haryana*, (1995) 2 SCC 64, which was rejected. The relevant portion reads as under:

“14. Before dealing with the various contentions advanced by the learned counsel for the appellants as referred to above, we shall first state the object, purpose and importance of the test identification parade. It may be pointed out that the holding of identification parades has been in vogue since long in the past with a view to determine whether an unknown person accused of an offence is really the culprit or not, to be identified as such by those who claimed to be the eyewitnesses of the occurrence so that they would be able to identify the culprit if produced before them by recalling the impressions of his features left on their mind. That being so, in the very nature of things, the identification parade in such cases serves a dual purpose. It enables the investigating agency to ascertain the correctness or otherwise of the claim of those witnesses who claimed to have seen the offender of the crime as well as their capacity to identify him and on the other hand it saves the suspect from the sudden risk of being identified in the dock by such witnesses during the course of the trial. This practice of test identification as a mode of identifying an unknown person charged of an offence is an age-old method and it has worked well for the past several decades as a satisfactory mode and a well-founded method of criminal jurisprudence. It may also be noted that the substantive evidence of identifying witness is his evidence made in the court but in cases where the accused person is not known to the witnesses from before who claimed to have seen the incident, in that event identification of the accused at the earliest possible opportunity after the occurrence by such witnesses is of vital importance with a view to avoid the chance

of his memory fading away by the time he is examined in the court after some lapse of time.

15. In the present case it may be noted that the appellant Suraj Pal was arrested on 5-3-1976 and was admittedly brought from Mathura Jail to Palwal Sub-Jail by the Police of Hassanpur as another case against him was registered in that police station. An application Ext. PA was moved by the Sub-Inspector Sis Ram, PW 38 to the Sub-Divisional Magistrate on 17-3-1976 for his identification while the appellant Suraj Pal was already in judicial lock-up. This application was marked to the Executive Magistrate on 17-3-1976 itself and the Executive Magistrate fixed 23-3-1976 as the date for identification of the appellant Suraj Pal. But when the Executive Magistrate Shri M.S. Rao, PW 1 went to the Sub-Jail, Palwal where the appellant Suraj Pal was lodged, the appellant Suraj Pal tendered him an application Ext. PA-3 declining to get himself identified on the ground that he had been shown to the witnesses. The appellants Nathi and Puran along with some other co-accused were also lodged in Palwal Sub-Jail by the Mathura Police. On 24-5-1976 an application Ext. PC was made to the Sub-Divisional Magistrate, Palwal for holding the identification parade of the appellants Nathi, Puran and the co-accused Krishanbir. This application was also marked to the Executive Magistrate, Shri M.S. Rao, PW 1 who fixed the holding of identification parade at 5.00 p.m. same day in the Palwal Sub-Jail but Shri Rao for some reason could not hold the parade. Consequently the Sub-Divisional Magistrate, Shri Kaushik, PW 11 himself went to the Palwal Sub-Jail next day but appellants Nathi and Puran and the co-accused Krishanbir declined to stand the test of identification. Their statement to that effect was recorded by Shri Kaushik, PW 11. It is thus clear from this evidence that though the prosecution was anxiously taking steps to hold the test identification parade but the appellants themselves declined to submit themselves for test parade. It is true that they could not have been compelled to line up for test parade but they did so on their own risk for which the prosecution could not be blamed for not holding the test parade. The reason given out by the appellants for declining to stand the test of identification was that they were shown by the police to the witnesses but this allegation has been found to be baseless and unfounded by both

the courts below. We have perused the evidence in this behalf and find that there is absolutely no basis to say that the appellants or any of them were shown to the witnesses. If the appellants in exercise of their own volition had chosen not to stand the test of identification without any reasonable cause, they did so on their own risk for which they cannot be heard to say that in the absence of test parade, dock identification was not proper and should not be accepted, if it was otherwise found to be reliable.”

(Emphasis Supplied)

52. Accordingly, the appellant himself having consciously declined to participate in the identification parade for the specious reason of being shown to the witnesses or his photographs being taken, which are unfounded and baseless, an adverse inference has rightly been drawn. The dock identification by PW-8 and PW-12 establishes the identity of the appellant as the person having accompanied the deceased. Additionally, the appellant had admitted before the Metropolitan Magistrate (PW-22) that he had hired the Hotel and the staff would identify him.

REFUSAL TO GIVE BLOOD SAMPLE

53. During investigation, amongst other items, a bed sheet having brown and dirty stains [marked as 6a in FSL Report (Ex.PY)] was seized from the room and sent for analysis to the FSL. Both blood stains and human semen were detected on the bed sheet. In the FSL Report (Ex.PY), blood stains on the bed sheet matched with the alleges of the vaginal swabs (7c1 and 7c2) of the deceased. Since no male profile was generated from vaginal swabs (7c1 and 7c2), the male profile could not be compared. We deem it appropriate to reproduce the relevant portion of the FSL Report (Ex.PY) as under:

“CONCLUSION

The DNA profiling STA Analysis performed on the exhibit ‘6a’ (area 1-Blood stains on bed sheet) and ‘7c1’ & ‘7c2’ (Vaginal slides of deceased) provided is sufficient to conclude that the blood stains on the source of exhibit ‘6a’(area 1-Blood stains on bed sheet)’ and source of exhibits ‘7c1’ & ‘7c2’ (Vaginal slides of deceased) are similar however male DNA profile on exhibit ‘6a’(area 2-Semen stains on bed sheet) could not be compared as no male profile were generated on exhibit ‘7c1’ & ‘7c2’ (Vaginal slides of deceased).”

54. Ins.Subhash Meena (PW-24) had moved an application (Ex.PW24/C) for seeking fresh blood sample of the appellant; however, the appellant refused to give fresh blood sample as is evident from the FSL Report [Ex.PW24/D (admitted document)]. The appellant in his statement under Section 313 Cr.P.C. stated that the reason for denying blood sample was that the police had obtained the blood sample at the hospital. Again the rationale for denying the sample of blood is baseless. Thus, the Trial Court was correct in drawing an adverse inference that had the sample been provided, the same would of matched with the male profile generated on the bed sheet. Accordingly, the contention of learned counsel for the appellant is rejected.

MOTIVE

55. The Trial Court has given a finding that a complaint of the deceased was pending before the CAW Cell, though its contents could not be proved. The same was found to be the motive of committing the murder of the deceased. Since no ground have been urged by Mr.Riaz Mohd in this regard and are of the view that the Trial Court has

correctly appreciated the evidence in this regard, we agree with the findings of the Trial Court.

SUFFICIENCY OF CIRCUMSTANTIAL EVIDENCE

56. The final contention urged by the learned counsel for the appellant is that the circumstances proved do not conclusively point to the guilt of the appellant.
57. Prior to dealing with the contention of the learned counsel, we deem it appropriate to revisit the law on the subject. In the often quoted judgment of the Apex Court in ***Sharad Birdhichand Sarda v. State of Maharashtra*, (1984) 4 SCC 116**, Fazal Ali, J. had laid the following principles constituting the *panchsheel* of the proof of a case based on circumstantial evidence:

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established. There is not only a grammatical but a legal distinction between “may be proved” and “must be or should be proved” as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra[(1973) 2 SCC 793 where the observations were made

“Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between ‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions.”

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

(3) *the circumstances should be of a conclusive nature and tendency,*
 (4) *they should exclude every possible hypothesis except the one to be proved, and*
 (5) *there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”*

58. A coordinate bench of this Court, of which one of us (G.S. Sistani, J.) was a member, in ***Prem Singh v. State***, MANU/DE/1341/2016 has observed as under:

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

47. The principle of circumstantial evidence has been reiterated by the Hon^{ble} Apex Court in plethora of cases. In Bodhraj @ Bodha and Ors. v. State of Jammu & Kashmir, (2002) 8 SCC 45, the Hon^{ble} Apex Court quoted number of judgments and held as under:

“10. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See Hukam Singh v. State of Rajasthan : (1977) 2 SCC 99, Eradu v. State of Hyderabad : AIR 1956 SC 316, Earabhadrapa v. State of Karnataka : (1983) 2 SCC 330, State of U.P. v. Sukhbasi (1985) Suppl. SCC 79, Balwinder Singh v. State of Punjab : (1987) 1 SCC 1 and

*Ashok Kumar Chatterjee v. State of M.P. 1989 Suppl. (1) SCC 560). The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In *Bhagat Ram v. State of Punjab* : AIR 1954 SC 621, it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt.*

*11. We may also make a reference to a decision of this Court in *C. Chenga Reddy v. State of A.P.*,: (1996) 10 SCC 193, wherein it has been observed thus: (SCC pp. 206-07, para 21)*

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

*48. In *Trimukh Maroti Kirkan v. State of Maharashtra*, (2006) 10 SCC 681, the Hon^{ble} Supreme Court held as under:*

“12. In the case in hand there is no eyewitness of the occurrence and the case of the prosecution rests on circumstantial evidence. The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with their innocence.”

49. The same principles were reiterated in Sunil Clifford Daniel v. State of Punjab, (2012) 11 SCC 205, Sampath Kumar v. Inspector of Police, Krishnagiri, (2012) 4 SCC 124 and Mohd. Arif @ Ashfaq v. State (NCT of Delhi): (2011) 13 SCC 621.

50. In case of circumstantial evidence, the Court has to examine the entire evidence in its entirety and ensure that the only inference that can be drawn from the evidence is the guilt of the accused. For establishing the guilt on the basis of the circumstantial evidence, the circumstances must be firmly established and the chain of circumstances must be completed from the facts.

(Emphasis Supplied)

59. Coming to the case at hand, the prosecution has been able to establish the following circumstances beyond reasonable doubt:
- (i) On 01.10.2012 at 09:32 AM, the appellant called the deceased to meet him at Seelampur;
 - (ii) The appellant had called Manoj (PW-12) to enquire the availability of a room, to which PW-12 answered in the affirmative;
 - (iii) The appellant met the deceased at New Seelampur and travelled to Paharganj;
 - (iv) Upon reaching Paharganj around 11:40 AM, the couple met Manoj (PW-12), who escorted them to Hotel Karan Palace and arranged a room (room no.207) for the couple;
 - (v) The couple had lunch together in the room;
 - (vi) The deceased died due to asphyxia as a result of smothering in the intervening night of 01-02.10.2012;
 - (vii) The body of the deceased was found on 02.10.2012 by Babu Lal (PW-8) on the next day lying on the bed;

- (viii) Both PW-8 and PW-12 have identified the appellant during dock identification; and
- (ix) An adverse inference can be drawn that the DNA profile generated from the bed sheet seized from the room would of matched with that of the appellant, had he given the blood sample.

60. We may add that under Section 106 of the Evidence Act, when a particular fact is specially within the knowledge of a particular person, the burden is upon him to prove the same. We need not burden our opinion by reproducing numerous judicial pronouncements; one may only take note of the following observations of a coordinate bench of this Court, of which one of us (G.S. Sistani, J.) was a member, in ***Md.Shakeel v. The State NCT of Delhi***, MANU/DE/1334/2016:

“29. In the case of State of Rajasthan v. Kashi Ram, reported at 2006 AIR SCW 5768 [sic: AIR 2007 SC 144], it was held that accused is duty bound to show as to when he left the company of the deceased as it was only in the knowledge of the accused and Section 106 of the Evidence Act applies in such circumstances. Same was held in the case of Joseph v. State of Kerala, reported at (2000) 5 SCC 197. In the case of Ram Gulam Chaudhary and Ors. v. State of Bihar, reported at (2001) 8 SCC 311 the facts proved at the trial were that the appellants gave no explanation as to what they did after they took away the boy. The question arose whether in such facts Section 106 of the Evidence Act applied. It was held:

"When the abductors withheld that information from the court, there is every justification for drawing the inference that they had murdered the boy. Even though Section 106 of the Evidence Act may not be intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases like the present, where the prosecution has succeeded in proving facts from which a reasonable inference can be

drawn regarding death. The appellants by virtue of their special knowledge must offer an explanation which might lead the Court to draw a different inference".

30. In the case of Sahadevan alias Sagadevan v. State represented by Inspector of Police, Chennai, reported at 2003 (1) SCC 534, the prosecution established the fact that the deceased was seen in the company of the appellants from the morning of March 5, 1985 till at least 5 p.m. on that day when he was brought to his house, and thereafter his dead body was found in the morning of March 6, 1985. In the background of such facts the Court observed:

"Therefore, it has become obligatory on the appellants to satisfy the court as to how, where and in what manner Vadivelu parted company with them. This is on the principle that a person who is last found in the company of another, if later found missing, then the person with whom he was last found has to explain the circumstances in which they parted company. In the instant case the appellants have failed to discharge this onus. In their statement under Section 313 CrPC they have not taken any specific stand whatsoever.

23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially

within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in Re. Naina Mohd. AIR 1960 Madras 218. 24. There is considerable force in the argument of counsel for the State that in the facts of this case as well it should be held that the respondent having been seen last with the deceased, the burden was upon him to prove what happened thereafter, since those facts were within his special knowledge. Since, the respondent failed to do so, it must be held that he failed to discharge the burden cast upon him by Section 106 of the Evidence Act. This circumstance, therefore, provides the missing link in the chain of circumstances which prove his guilt beyond reasonable doubt.”

31. In the absence of any explanation rendered by the appellant, the prosecution has been able to establish an additional link in the chain of circumstances to prove the guilt of the appellant. We may, however, hasten to add that Section 106 of the Evidence Act would in no way shift the proof of burden which rests solely on the prosecution. But, in terms of Section 106 of the Evidence Act, an accused must render an explanation on facts which are within the special knowledge.”

(Emphasis Supplied)

61. In the present case, the prosecution has established that the appellant had taken the deceased along with her in room no.207; but nothing has come regarding when he departed from the company of the deceased. This adds an additional link in the chain of circumstances to prove the guilt of the appellant.
62. To conclude, the entire evidence brought on record and the circumstances proved by the prosecution, mentioned in paragraph 59 aforegoing, conclusively point towards the guilt of the accused/appellant and no other inference can be drawn. There is no

break in the chain of circumstances established by the prosecution. Hence, we find no infirmity in the judgment of the Trial Court convicting the appellant herein. Further, the sentence imposed on the appellant is also commensurate with the culpability of the appellant.

63. The appeal is dismissed.
64. Crl.M.B. 820/2017 seeking suspension of sentence is also dismissed.

MAY 03, 2017
// pst



G. S. SISTANI, J.

VINOD GOEL, J.