

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment Reserved on: 9th August, 2017

Judgment Pronounced on: 16th August, 2017

+

CRL.A. 500/2016

KULDEEP SINGH

..... Appellant

Through : Mr. K. Singhal, Advocate

versus

STATE NCT OF DELHI

..... Respondent

Through : Ms. Radhika Kolluru, APP for the
State along with SI Praveen, P.S.
Narela.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE CHANDER SHEKHAR

G.S.SISTANI, J.

1. This is an appeal filed against the judgment of the Trial Court dated 31.03.2016 in SC 115/08 arising out of FIR 622/2007 PS Narela by which the appellant stands convicted under Section 302 of the Indian Penal Code, 1860 ('IPC') and the order on sentence dated 11.04.2016 by which the appellant has been sentenced to undergo life imprisonment for the offence punishable under Section 302 IPC with a fine of Rs.1 lakh, in default of payment of fine, to further undergo rigorous imprisonment for a period of one year.
2. Before the rival submissions of the learned counsel for the parties can be noticed, we deem it appropriate to reproduce the case of the prosecution as noticed by the Trial Court, which reads as under:

"1. On 30.11.2007 Smt. Santra came to police station Narela and reported that on 29.11.2007 at about 12:00 noon Kuldeep made a call to her son Amit and asked him to reach railway crossing Bankner, thereafter her son Amit aged about 20 years reached railway phatak Bankner where

Kuldeep along with one more boy whose name she does not know were present on motor cycle No.HR 10J 2718. Amit accompanied them. Amit was 5 ft 8 inch wearing white pants and one jacket long face there was tattoo of Mata on one hand and tattoo of face of lion on the other hand. She alleged that they both have taken away Amit by enticing him. During investigation Kuldeep was apprehended who confessed about the crime and disclosed that Bijender was with him. He pointed out the STD booth from where he made the call to Amit. The rehri wala from where he purchased the rope. He got recovered the dead body of Amit. Post mortem was got conducted. The motorcycle was seized. The pants, which he was wearing was also seized as blood stains were found on the pant. ...”

3. After investigation, the chargesheet was filed against the appellant Kuldeep. Appellant was initially charged under Sections 365 and 302 IPC. During the course of trial, after the evidence of Bijender Singh (PW-9) was recorded, an application under Section 319 Cr.P.C. was preferred and Bijender was also summoned. Again the charge was framed. Appellant Kuldeep was charged for the offence punishable under Section 120B IPC and accused Bijender was charged for the offences punishable under Sections 120B, 365 read with 120B and 302 read with 120B IPC to which they pleaded not guilty and claimed trial. Thereafter, the trial was conducted again.
4. To bring home the guilt of the appellant and accused Bijender, the prosecution examined 27 witnesses. The statements of both the accused under Section 313 Cr.P.C. was recorded, wherein they denied all the incriminating evidence and pleaded false implication. The defence did not lead any evidence.
5. After examining the evidence before it, the Trial Court found the chain incriminating circumstances against the appellant complete and convicted him under Section 302 IPC; but found that there was no

evidence of conspiracy against the co-accused Bijender and thus, acquitted him of all charges. Aggrieved, the appellant has preferred the present appeal.

6. Mr.Singhal, learned counsel appearing for the appellant Kuldeep, submits that the impugned judgment and order on sentence are illegal, perverse and liable to be set aside. The Trial Court has ignored the material evidence available on record and passed the impugned judgment in haste without correctly appreciating the facts of the case. It is contended that the Trial Court has lost track of the fact that in a case of circumstantial evidence, the prosecution is liable to prove each and every circumstance beyond reasonable doubt and the chain of events should be so complete to rule out the possibility of any verdict except that of the guilt of the accused. Mr.Singhal contends that the Trial Court has relied upon the following events to establish the guilt of the appellant:
 - (i) The circumstance of last seen;
 - (ii) Recovery of dead body at the instance of the appellant;
 - (iii) Recovery of pant with blood-stains worn by the appellant at the time of his arrest; and
 - (iv) Injury on the right hand small finger, which according to the prosecution has not been explained.
7. Mr.Singhal submitted that though an additional circumstance of the phone call having been received by the appellant from a STD Booth was also alleged before the Trial Court; the Trial Court rightly repelled the submission as Suresh Kumar (PW-4) did not identify the appellant as the person who had made a telephone call on the number of Amit ('deceased'). In the absence of this circumstance having been

proved, the same cannot be treated as incriminatory and to the detriment of the appellant.

8. It is contended that the theory of last seen which is sought to be invoked by the prosecution is by itself a weak form of incriminating circumstance. The prosecution has placed strong reliance on the testimonies of Rakesh (PW-1) and Ravi (PW-2). However, the Trial Court has failed to look into the various gaps in the story narrated by these witnesses. The Trial Court did not make any attempt to analyse the call records of PW-2, which would show that PW-2 was talking to the deceased over the telephone upto 1 PM and the phone of the deceased was not on the same location from where the calls were being made/received by PW-2. The learned counsel for the appellant submits that as per the case of the prosecution, the deceased had received a phone call from the appellant Kuldeep. And thereafter, the deceased had informed his mother (PW-7) that he was to meet appellant Kuldeep and left the house on 29.11.2007 at about 12 noon and did not return home. Mr.Singhal contends that the prosecution has failed to prove that the mobile phone bearing number 9971068499 belonged to the deceased. No supporting documents were placed on record, on the contrary, documents placed on record would show that the phone belonged to the father of the deceased. Mr.Singhal explains that this fact gains importance as in the complaint made by the mother (PW-7), the mother has provided her phone number which is the same number alleged to be used by the deceased and on which the alleged phone call was made. It is thus contended that there is no evidence on record that the mobile in question either belonged to the deceased or was being used by the deceased, on the contrary there is evidence to show that the mobile phone belonged to the father of the deceased and

was being used by the mother and in case this phone was in the possession of the deceased, there would be no reason for his mother to have provided this number to the police in the complaint so made by her.

9. Mr.Singhal next contends that to invoke the theory of last seen, the long time gap between to when the deceased was seen in the company of the appellant and his murder was not considered by the Trial Court and the theory of last seen was applied without application of judicial mind. It is contended that the time gap is an important and fundamental link in respect of the theory of last seen. Mr.Singhal contends that the dead body was recovered on 04.12.2007, i.e. after a gap of six days. As per the postmortem which was conducted on 05.12.2007, a specific board of experts was constituted. Dr.R.N. Tahlan (PW-13) and Dr.Varsh (PW-25) appeared in the witness box and deposed the gap in the time of death as 36 to 72 hours from the death. The opinion of the Doctors remained unchallenged and hence stands proved. In case the opinion of the Doctors are to be taken into consideration and in case death occurred 72 hours prior to the date of post-mortem, it would translate that the deceased died on 02.12.2007. On the other hand, the prosecution has not been able to show that the appellant was last seen in the company of the deceased on 02.12.2007. In effect, the gap between 29.11.2007 to 02.12.2007 is fairly long and there is nothing on record that no other person would have been in the company of the deceased between 29.11.2007 upto 02.12.2007. In such circumstances, the *onus* cannot be on the defence to show as to when they parted company under Section 106 of the Evidence Act.
10. In support of his arguments, Mr.Singhal has relied upon the judgments in the case of ***Rishipal v. State of Uttarakhand*, (2013) 12 SCC 551**

(paragraphs 19 - 25); *Kanhaiya Lal v. State of Rajasthan*, (2014) 4 SCC 715 (paragraphs 12 and 15); *Raj Kumar @ Raju v. The State of the NCT of Delhi*, 2013 (3) JCC 2272: 202 (2013) DLT 370 (paragraph 15); *Arun & Ors; Prithvi Raj & Krishan Kumar @ Krishna v. State*, 209 (2014) DLT 515 (DB) (paragraph 23) and *Mohd. Rashid v. State*, 223 (2015) DLT 327 (DB) (paragraphs 20 - 23).

11. In respect of the recovery of the dead body on 04.12.2007, learned counsel submits that has not been proved. Mr. Singhal submitted that the prosecution has projected PW-1 as a witness to the recovery, however PW-1 on his first day of examination-in-chief had stated that the body was recovered on the day of the complaint by the police, i.e. 30.11.2007, and they were only called to identify the body. He also drew the attention of this Court to the cross-examination conducted on 09.12.2009, as per which, PW-1 stated that the Haryana Police had already reached the spot prior to the appellant and the police party and hence, there can be no question of the recovery being at the instance of the appellant. Further, during his examination on 11.10.2010, the appellant stated that the police had recovered the body and they came to know after receiving a call from the police. Learned counsel concluded that the foregoing makes it clear the entire story of prosecution of joining the appellant Kuldeep and PW-1 in the recovery of dead body is an afterthought and concocted. Learned counsel for the appellant had also drawn the attention to the inconsistency in the testimony of PW-3 and PW-1 with regard to the time of the recovery as PW-3 stated it to be 2-3 PM while PW-1 deposed that it was between 3-4 PM. PW-1 nowhere states that the appellant was also accompanying them in the car or in any other car.

12. Learned counsel submits that PW-16 who is a police officer from Haryana Police did not state that the recovery was affected at the instance or in pursuance of the disclosure statement of appellant. He merely stated that when he reached at the spot, the appellant and the Delhi Police were already present and the body had been recovered and therefore, the testimony of PW-16 does not lead the case of prosecution anywhere except it shows that the Haryana Police was not joined initially and it was only an afterthought. Learned counsel also contends that the testimony of PW-22 shows a classic example of false stories being produced by the police officers. PW-22 says that the appellant Kuldeep was joined in the investigation on 02.12.2007 and 03.12.2007 and he was interrogated by SHO/ACP, however, nothing could be brought out. However, on 04.12.2007, on the road, the same appellant was interrogated by ASI rank officer and the appellant confessed to his guilt. It is submitted that the recovery was allegedly made in the presence of ASI level police officer without informing the higher officers and joining them. The PW-22 did not even deem it fit to call the Crime Team at the spot and did all the investigation on his own. As per PW-3, he was called by the Delhi Police to take the photographs of the dead body and the time was 12 noon on 04.12.2007.
13. Learned counsel submits that the prosecution alleged that the appellant was arrested on 04.12.2007 and at that time, he was wearing the same pant which he was wearing on the date of incident. Some blood marks were found on the bottom side of pant and the same was sent to FSL. The FSL opined that the blood of human origin was found on the pant worn by the appellant Kuldeep. The Trial Court assumed the same as an incriminating circumstance without

considering the fact that the pant was recovered after a gap of 6 days as per prosecution only, yet the appellant was wearing the same pant. The appellant has stated in 313 Cr.P.C. that he fell down and received injuries. It may be possible that he would have wiped blood from his injuries with his pant. Furthermore, until and unless the blood group is matched, it would be highly unsafe to believe that the blood found on the pant has connection with the crime in question. Mr.Singhal concluded that the Trial Court has presumed everything.

14. Mr.Singhal contends that the Trial Court considered the injury on right hand small finger of the appellant as one of the incriminating circumstance without giving any reasons as to how this circumstance is an incriminating one. The prosecution has failed to prove that the said injury was caused with a knife. However, the Trial Court erroneously, shifted the burden upon the appellant to explain the circumstance, without considering the fact that the appellant had duly explained the same by stating that he fell down 6 days ago and received the injury. It was the duty of the prosecution to clarify that the injury could not have been caused by fall, which the prosecution has failed to do so. Learned counsel finally contended that the prosecution had also failed to ascribe any motive to the appellant, which, in cases based of circumstantial evidence is of great significance. Though the appellant had attempted to show a story of an affair between the deceased and the wife of the appellant, the same could not be proved.
15. It was also contended that the conduct of the appellant must also be looked into. He joined the investigation on 02.12.2007 and 03.12.2007 upon being served with a notice. Even after joining the investigation, he did not abscond.

16. *Per contra*, Ms.Kolluru, learned counsel for the State, submits that the prosecution has been able to prove its case beyond any shadow of doubt. The evidence of the mother would show that a phone call was received by her son in her presence from the appellant. She had asked PW-1 to follow him. Thus, the Trial Court has correctly applied the theory of last seen. It is further contended that the dead body was recovered at the instance of the appellant on his pointing out. A complete reading of the testimony of PW-1 coupled with the arrest memo, pointing out memo which is duly supported by PW-1 would show that the dead body was recovered at his instance.
17. It is also submitted that the appellant Kuldeep had washed his pant which is evident from the fact that although blood was detected but the grouping could not be done and it is for this reason that the pant was worn by the appellant Kuldeep with blood-stains. She further submits that the testimony of PW-16 would prove that the phone belonged to the father and the said phone was switched off and the last call was made at 12:54 which would show that the phone was with the son, the deceased herein. Learned counsel submits that DD 18-A would show that PW-22 and PW-26 had left the Police Station in connection with the investigation of this case, this would show that PW-22 and PW-26 had a chance meeting with the appellant is incorrect. In response to the submission made by Mr.Singhal with regard to the time of death as per the postmortem report, Ms. Kolluru has placed reliance on the judgments in the case of *Solanki Chimanbhai Ukabhai v. State of Gujarat*, 1983 SCC (Cri) 379 (paragraphs 11 - 13); *Rakesh v. State of Madhya Pradesh*, (2011) 9 SCC 698 and *Mangu Khan v. State of Rajasthan*, AIR 2005 SC

1912 (paragraph 9) to submit that the time of death ascertained by the doctors is not conclusive and depends on numerous factors.

18. We have heard the learned counsel for the parties and examined the record before us. The Trial Court has convicted the appellant on the basis of following four incriminating circumstances appearing against the appellant:

- (i) That the appellant and the deceased were last seen together;
- (ii) The dead body was recovered at the instance of the appellant;
- (iii) Recovery of blood-stained pants of the appellant; and
- (iv) Unexplained injury on the little finger of right hand of the appellant.

19. We deem it appropriate to deal with the circumstances under separate heads:

LAST SEEN THEORY

20. One of the primary incriminating circumstance found by the Trial Court appearing against the appellant was that he was last seen in his company. It will be useful to examine the testimonies of Rakesh (PW-1) (brother of the deceased), Ravi (PW-2) (friend of the deceased) and Santra (PW-7) (mother of the deceased).

21. Rakesh (PW-1) deposed that on 29.11.2007, the appellant came to their village with one Bijender and called the deceased telephonically and told him to reach Railway *phatak* of village Bankner. The witness was present at home and the deceased informed him of the call and that the appellant wanted to purchase tin sheets. The deceased then left along with Ravi to meet the accused at Railway *phatak* Bankner. PW-1 also had some work and thus, he followed him. His mother had also advised as to why the deceased had been called by the appellant. PW-1 further deposed that he saw the appellant and his friend

Bijender on a motorcycle, who took the deceased along with them. Ravi was left behind, who told him that they had gone to the factory of Mahinder (father-in-law of the appellant). PW-1 and Ravi went to the factory of Mahinder, but it was locked. PW-1 called the deceased by the mobile of Ravi and the deceased told him that he is going with Kuldeep and Bijender to buy tin sheets and would return in about 15 minutes. He waited for the deceased and then once again called him, this time he stated that he was with the appellant and was going to Katlupur to buy tin sheets and would return in ten minutes. Later, PW-1 called from a PCO, the deceased again promised to return in a few minutes. Thereafter, the mobile phone of the deceased came switched off.

22. During cross-examination, PW-1 stated that after the deceased had received the call, he took tea and then left within 15 minutes. On the asking of his mother, PW-1 also accompanied the deceased to Narela. Thereafter, the deceased made a call to Ravi and then went with him to railway *phatak*, while the witness followed them.
23. The testimonies of Ravi (PW-2) and Santra (PW-7) are on similar lines. PW-2 also deposed that on 29.11.2007, the deceased had asked him to join him as he had to meet the appellant at railway *phatak*, Bakner as the appellant had to purchase some tin sheets. PW-2 went with the deceased to the railway *phatak* and met the appellant with Bijender. Thereafter, the deceased had left with the appellant and Bijender on their motorcycle. Santra (PW-7) deposed on 29.08.2009 that two years back on 29th day of November, her son/deceased was present in the house. He received a telephone call from one of his known person, who asked him that the appellant wanted to talk to him. The deceased had tea and then received another call. Upon enquiry,

the deceased informed that he had received a call from the appellant as he had to purchase iron tins. The deceased then left the house to meet the appellant. Her other son, Rakesh (PW-1), enquired where the deceased was going and then, Rakesh followed the deceased.

24. We may note that the postmortem of the deceased was conducted on 05.12.2007 by a board of doctors was constituted of Dr.R.N. Tehlan (PW-13), Dr.Varsha (PW-25) and Dr.J.S. Punia. The report (Ex.PW-13/A) and the testimonies of the doctors states that the deceased died 36 to 72 hours prior to the examination of dead body. Having regard to the time of conducting of postmortem, the time of death can be estimated to be between 10:15 AM on 02.12.2007 to 4:15 PM on 03.12.2007.
25. Prior to proceeding further, we deem it appropriate to discuss the judicial pronouncements cited by the learned counsel for the parties.
26. In ***Kanhaiya Lal (Supra)***, the Apex Court was dealing with a case wherein the only incriminating circumstance against the appellant therein was that he was last seen along with the deceased last night and both the Trial Court and the High Court had recorded an order of conviction. In this background, the Supreme Court had held that this singular piece of circumstantial evidence would not be sufficient to sustain an order of conviction.
27. To similar effect is the judgment in ***Rishipal (Supra)***, wherein the Supreme Court after referring to numerous judicial pronouncements held that merely because the appellant was last seen with the deceased and had returned with soiled clothes thereafter would, at best, raise a suspicion against the appellant and no more. It upheld the judgment of the High Court acquitting the appellant therein of the charge under Section 302 IPC.

28. Though learned counsel for the appellant had also relied upon the judgment in the case of **Raj Kumar @ Raju (Supra)** (paragraph 15), at the same time, no paragraph or line of any judgment can be read in isolation. In the case, the Trial Court had relied upon the complaint filed by the complainant therein to establish the circumstance of last seen even though there was nothing in his testimony before the Court, which was found to be illegal as the complaint was not a substantive piece of evidence. Accordingly, no support can be drawn from the judgment.
29. Another coordinate bench in **Mohd. Rashid (Supra)** had found that the distance between the place where the chance meeting with the deceased in the company of the accused/appellants therein had occurred, and the dead body was found was quite long and thus, entailing a time gap. This opened a possibility of the intervention of other persons and making the last seen theory doubtful. We deem it appropriate to reproduce paragraph 22, which reads as under:

“22. The "last seen" theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that the possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases, to positively establish and apply the principle of last seen per se and/or as a weighty factor when there is a long gap and possibility of other person(s) coming in between exists. In cases where positive evidence to conclude that the accused and the deceased were last seen together till the crucial moment is not coming forth, it would be hazardous to come to a conclusion of guilt. At best, it would indicate presence of the accused at the time and place so proved. [State of U.P. vs. Shyam Behari and Anr., (2009) 15 SCC 548, Bodhraj @ Bodha and Ors. vs. State of Jammu and Kashmir, (2002) 8 SCC 45, State of U.P. v. Satish, (2005) 3 SCC 114, Ramreddy Rajesh Khanna Reddy vs. State of A.P,

(2006) 10 SCC 172, Venkatesan vs. State of Tamilnadu, (2008) 8 SCC 456].”

(Emphasis Supplied)

30. In *Arun & Ors; Prithvi Raj & Krishan Kumar @ Krishna (Supra)*, a coordinate bench of this Court found that the circumstance of last seen was not established as the conduct of the prime witness (PW-13) was unnatural and his testimony unbelievable and unacceptable, the time of death was not ascertained as the doctor who conducted postmortem had deposed contrary to the postmortem report itself and the ocular testimonies as also belied by the call detail records of the appellants/accused. The bench ultimately acquitted the appellants of all charges against them.
31. Having discussed the judgments relied upon by the learned counsel for the appellant, we deem it appropriate to reproduce Section 106 of the Evidence Act:

“Section 106. Burden of proving fact especially within knowledge.— When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.”

(Emphasis Supplied)

32. The theory of last seen gains significance in criminal jurisprudence from Section 106 as it places the burden on the accused to prove a fact especially within his knowledge. Normally, it is for the prosecution to prove each and every fact against the accused/appellant beyond reasonable doubt, however, owing to the application of Section 106, if a fact is especially within the knowledge of the accused, he must account for it. The prosecution has to show that the accused and the deceased were last seen together and the time gap between the death and the last seen was so small as to exclude the possibility of other persons coming contact with the deceased. In such a case, the fate of

the deceased would remain in the exclusive knowledge of the accused. On the other hand, a huge gap may lead to the inference that other persons had intervened and the whereabouts of the deceased no longer remains in the especial knowledge of the accused. Then accused no longer has to account for his presence with the deceased. Hence, the time gap is of great significance as a huge gap may make it improper to place the burden on the appellant and in his failure, draw an adverse inference against him.

33. In the present case, the time gap between the last sight of the appellant with the deceased and the time when his death probably occurred is considerable and the theory of last seen cannot be invoked. The deceased was missing since 29.11.2007 at about 1 PM to 04.12.2007 and at best, his death can be said to have occurred on 02.12.2007 at 10:15 AM as per the medical evidence. The prosecution has not been able to show that the appellant had ever confined the deceased and had kept him somewhere prior to murdering him and thus, the huge time gap opens the possibility of intervention of other persons.
34. Ms.Kolluru had sought to rely upon the judgments in *Solanki Chimanbhai Ukabhai (Supra)*; *Rakesh (Supra)* and *Mangu Khan (Supra)* to submit that the time of death estimated by the PW-13 and PW-25 cannot be said to be conclusive. We find no force in the submission. The judgments relied upon find that otherwise creditworthy eyewitness account cannot be discredited by medical evidence until the same completely irreconcilable and the estimation of the time of death is based on numerous factors and its contradiction cannot be a ground to throw out the case of the prosecution. In the present case, there is no eyewitness account or any other evidence proving the time of death. Even if we disregard the time of death

estimated by the doctors, there is nothing to reduce the time gap and may only increase upto 04.12.2007.

35. Though we have proceeded in a manner to rely upon the testimonies of the prosecution witnesses. Mr.Singhal had also contended that the veracity of the witnesses is doubtful as running awry of the CDRs. PW-2 had deposed that he is using the mobile number 9971454997, while the number ascribed to the deceased is 9971068499. R.K.Singh (PW-16) had produced the records of the number of the deceased being Ex.PW-16/A to Ex.PW-16/D. The CDR (Ex.PW-16/C) and the reveals the following calls between the deceased and Ravi (PW-2):

<u>Time</u>	<u>Caller</u>	<u>Recipient</u>	<u>Cell ID of Caller</u>	<u>Cell ID of Recipient</u>
12:00:05	9971068499	9971454997	41153	41153
12:08:37	9971068499	9971454997	03373	41153
12:35:36	9971454997	9971068499	17693	42743
12:54:34	9971068499	9971454997	17693	17693

36. The limited Cell ID Chart (Ex.PW-16/D) shows that the Cell ID 17693 was located at Gogha Village, the remaining are unknown. In the absence of location of the remaining towers it cannot be said conclusively that whether two were together or separate.
37. Hence, the prosecution was unable to establish the theory of last seen as the time gap between the last sighting of the deceased with the appellant to the time of death was substantial, opening the possibility of the intervention of other parties. Shifting of burden under Section 106 of the Evidence Act was not warranted and thus, the circumstance has not been proved.
38. Even otherwise, in the absence of any other incriminating circumstance, the evidence of last seen alone has been frequently held to be insufficient to base an order of conviction.

RECOVERY OF THE DEAD BODY

39. It is the case of the prosecution that the appellant had made a disclosure statement on 04.12.2007 and had subsequently got recovered the dead body of the deceased from the area of Village Jhanjholi from the forest on the eastern side of western Yamuna canal from the area of district Sonapat. In this regard, the depositions of Rakesh (PW-1), SI Dalbir Singh (PW-14), SI Devender Singh (PW-22), Ct.Raj Kumar (PW-26) and Ins.Raj Kumar (PW-27) are relevant.
40. Ct.Raj Kumar (PW-26) deposed that on 04.12.2007, he was posted at PS Narela and had joined investigation along with ASI Devender Singh and Ct. Yashwant. During investigation, they were present at main road, Village Bakner, near Govt. School at about 1 PM when appellant was found coming on his motorcycle. ASI Devender stopped him and made enquiries and thereon, the appellant confessed to his guilt. Thereafter, the appellant was arrested vide arrest memo (Ex.PW-22/A). The appellant then took them to the place of the incident, i.e. forest near Jhinjholi, village Katlupur, where he had committed the murder of the deceased. Thereafter, the appellant pointed towards the dead body of the deceased which was found lying there in bushes at some distance and informed that the body was that of the deceased. Rakesh (brother of deceased) and Pawan (cousin brother of deceased) were called and they identified the dead body as that of the deceased. ASI Devender had prepared the site plan of the place of recovery (Ex.PW-22/E). In his cross-examination, he stated that the appellant was interrogated for half an hour on the road by the IO and many people/vehicles were passing from the road at the time of the interrogation. He further stated that they left Banknair Road at about 2:30-2:45 PM on 04.12.2007 and left for the forest of village

Katlupur/village Jhinholi and reached there at about 3 PM. The appellant was made to sit on the motorcycle of the IO and reached the forest. They left the spot at about 4-5 PM. Pawan and Rakesh reached the spot at about 3 PM on their own vehicle. Saidpur (Haryana) Police came to the spot after being called by the IO on phone.

41. Ins.Ram Kishan (PW-27) deposed that on 04.12.2007, he was posted at PS Narela as Inspector, Law and order. On the day, ASI Devender had informed by phone that the appellant had got recovered the dead body of the deceased Amit in pursuance of his disclosure statement and had requested for sending some senior police officials. The information was recorded vide DD 21-A at 3:35 PM on 04.12.2007 (Ex.PW-11/A). The DD was marked to PW-27 and he proceeded towards the site. On reaching the exact place, ASI Devender, Ct.Yashwant and Ct. Raj Kumar met him there along with the appellant. Rakesh and Pawan were also present. SI Dalbir, Incharge Police Post Saidpur Police Station, Kharkhoda along with other staff and photographer Vijay also reached there. The body of the deceased was found. Photographer Sandeep also reached the spot, who had been called by ASI Devender. Nothing came in his cross-examination, except that he had reached the spot at about 4 PM.
42. The IO at the time of the recovery was SI Devender Singh (then ASI) (PW-22). He deposed that during investigation, he came to know about the involvement of appellant Kuldeep and hence notice was sent to him under Section 160 Cr.P.C. directing him to appear in the PS on 02.12.2007 and was interrogated by PW-22, SHO and the ACP. He was again called on 03.12.2007 and sent to his house after interrogation. On 04.12.2007, he along with Ct.Raj Kumar and

Yashwant went to village Bakner where the appellant met him near the bank on a motorcycle. He was again interrogated and confessed to his guilt. He was arrested vide Ex.PW-22/A and his disclosure statement was recorded. Thereafter, the appellant led them to the forest of Katlupur near the *neher*/canal, where the appellant pointed out the dead body of the deceased, which was lying between bushes of *kikar* and the dead body was thereafter, recovered on the instance of the appellant Kuldeep. At the time, Rakesh (brother of deceased) came to the spot, when Rakesh was called through Ct.Yashwant prior to the recovery of the body when the appellant had disclosed that he could recover the body and upon their arrival, they also joined the investigation. The dead body was identified by Rakesh.

43. PW-22 was thoroughly cross-examined wherein he stated on 01.12.2007, the notice under Section 160 Cr.P.C. was served upon the appellant at his house by the witness personally. His time of appearance was mentioned as 10 AM and he reached PS Narela at about 11:30 AM and remained there till 3:30 PM. On 03.12.2007, the appellant was interrogated by the SHO, ACP and PW-22 between 10 AM to 5 PM. He also stated that on 04.12.2007, the appellant was interrogated by him for about 45 minutes to 1 hour. The appellant had led the police party to the forest of Katlupur at about 3 PM. They were accompanied by one public witness Pawan and brother of the deceased and his police staff as well as the appellant.
44. SI Dalbir Singh (PW-14) deposed that on 04.12.2007, he was posted at ICPP, Saidpur Police Chowki. On the day at about 3:30 PM, ASI Devender Singh of Delhi Police of PS Narela telephonically informed him that one Kuldeep had confessed about his involvement in case FIR 622/2007 PS Narela, wherein he had killed the deceased and

disposed of his body in the jungles of village Jhinjholi area towards east side of the Western Yamuna Canal. PW-14 went to the spot and ASI Devender, Rakesh and cousin of Rakesh met him. One dead body was also lying in the jungles in the area of village Jhinjholi. In his cross-examination, PW-14 stated that he had received the information from ASI Devender Singh at about 3:30 PM and had reached the spot after sometime along with Ct.Yashbir. He remained at the spot for about 2-2:15 hours. He also stated that when they reached the spot, there were about 15-20 persons available.

45. From the foregoing, it is clear that PW-27 and PW-14 had reached the spot after the appellant had already recovered the body and thus, they can at best be said to be the witnesses to the surrounding circumstances and not the recovery itself.
46. The final witness is the brother of the deceased (PW-1). Rakesh (PW-1) deposed on 07.08.2008 that on 30.11.2007, they had made a complaint to the police and on the same day, the body of Amit/deceased was discovered in the jungle of village Katlupur near a canal. They had been called by the police after the body had been discovered for its identification. Thereafter, the examination was deferred on two occasions and on 29.08.2009, PW-1 deposed that the FIR was lodged on 30.11.2007 and then they had made efforts to trace the deceased. On 04.12.2007, ASI Devender called them at Banknair Railway Phatak, Narela. His cousin Pawan also accompanied him. ASI Davender and other police officials met them there. Appellant was also with ASI Devender in police jeep. The police officials informed him that the appellant has disclosed about the murder of the deceased and was leading them to recover the dead body. The police officials and the appellant started in the police jeep and they followed

on their bike. They reached the area of jungles of Katlupur Village near the canal. The appellant pointed towards a place and there was blood lying on the ground. The appellant also pointed towards the bushes, where the dead body of the deceased was lying. During cross-examination, PW-1 stated that on 04.12.2007, ASI Devender had called them to visit the police station. He also stated that they had met the IO between 3-4 PM at the railway phatak Baknair, Narela along with his father, *mausha ji* (uncle) and other family members. They were in a Maruti Van and accompanied the IO. When they reached the said Katlupur forest, Haryana Police was already there. He along with Pawan stayed at PP Saidpur for about 10-15 minutes and then came back to his house.

47. Later on, when the witness was once again examined after the summoning of the accused Bijender (acquitted by the Trial Court), he deposed that on 04.12.2007, the body of the deceased was recovered from Katlupur by the police and they learnt the same after receiving a call from the police.
48. We find that there are numerous inconsistencies, contradictions and improbabilities in the versions of the prosecution witnesses. Even if we ignore the minor contradictions like the time of arrival, reaching of the spot and the vehicles used, there remain numerous glaring contradictions which go to the root of the case of the prosecution.
49. PW-26 and PW-14 have categorically testified that they had arrived after the recovery of the body and did not witness the actual pointing by the appellant herein. Regarding the remaining evidence, there is no clarity as to when the brother of the deceased, i.e. Rakesh (PW-1), had reached the spot. Ct.Raj Kumar (PW-26) deposed that Rakesh and Pawan arrived after the recovery had been effected and only identified

the body. There is no clarity in the version of PW-22. On the other hand, PW-1 had, during his examination on 07.08.2008, testified that the body had been recovered by the police on the day the complaint was filed, i.e. 30.11.2007. It was only when he was called for further examination after a gap of about an year, did he run with the story led by the police witnesses. This clearly suggests that the witness had been tutored. Even thereafter, he deposed that he was called to the railway *phatak* (crossing) and had proceeded along with the police party to the site of recovery, which remains in stark contrast with what had been deposed by PW-26. Further, the father, *mausha* (uncle) and other family members of PW-1 have been introduced, though they were not mentioned by anyone else or PW-1 himself previously. Additionally, he stated in his cross-examination that when they reached the site, the Haryana Police was already present there and thus, belying the entire story of the prosecution. If the Haryana Police had already learnt of the presence of the body, there cannot be any recovery at the instance of the appellant. The prior knowledge by the authorities would have removed the location of the body from the exclusive knowledge of the appellant and thus, outside the contours of Section 27 of the Evidence Act. We may notice the judgment of a coordinate bench of this Court in ***Raj Kumar @ Raju (Supra)*** wherein the Bench found that the police had already learnt the whereabouts of the body of the deceased a day prior to the alleged recovery and hence, there was no recovery in the eyes of law. The relevant paragraphs read as under:

19. When this fact about the dead body being in the house was already in the knowledge of the police on 13.4.2007 the recovery effected from the spot on the following day i.e. on 14.04.2007 is no recovery in the eye of law. It does not fall within the parameters of Section 27 of the Evidence Act.

20. Under Section 27 of the said Act, if an information is given by the accused which leads to a disclosure of a fact it will be a piece of evidence but if this fact has already been discovered, it would not be any evidence in the eye of law. In order to attract this provision the prosecution must prove that the fact disclosed by the accused was previously not within the knowledge of the investigating officer or the fact disclosed was of such a nature which was only in the knowledge of the accused and was not within the knowledge of any other person from whom the investigating officer may have received this information.

...

22. In (1997) 6 SCC 171 Vijender Vs. State of Delhi the Apex Court while elaborating on the provisions of the aforementioned provision of law had noted that where the dead body was already within the knowledge of the investigating officer, it could not be said that the recovery of the dead body was discovery of a fact falling within the purview of Section 27 of the said Act.

23. Having examined the evidence at hand we are constrained to hold that the recovery of this dead body was not made pursuant to the disclosure statement of the accused. It does not fit within the parameters of Section 27 of the Evidence Act. The knowledge that a dead body was lying in the store room of the house (E-86) of the appellant and a foul smell was emanating therefrom was known to the investigating agency prior to recording his disclosure statement that is why the police kept a vigil outside and locked the room of the house on 13.4.2007 itself."

(Emphasis Supplied)

50. Similarly, in the present case, if the appellant is to be believed in respect to his statement in cross-examination, then the Haryana police must have already learnt the location of the body even prior to the appellant/accused ever leading them there.
51. We may also notice that the narration of PW-22 is also improbable. According to him, the appellant/accused was summoned to the police station on two occasions during the investigation and interrogated by senior officials like the SHO and the ACP as well as PW-22 on hours

at end, to no avail. He did not crack. However, on the very next day, having run into the appellant, the ASI (PW-22) was able to extract the confession within less than an hour. It seems what PW-22 was unable to do in front of the senior officials in long hours could have been achieved by him within a short duration alone. On the intervening night of 03-04.12.2007, PW-22 became a master of the art of interrogation was able to crack the appellant within the span of an hour. This remains extremely improbable and raises a doubt as to whether the accused/appellant had ever confessed or not.

52. Accordingly, we have no hesitation in finding that the prosecution was unable to show that the dead body of the deceased was recovered at the instance of the appellant.

RECOVERY OF THE BLOOD STAINED PANT

53. The next incriminating circumstance proved by the prosecution before the Trial Court was the recovery of the blood stained pant at the instance of the appellant, which he was wearing at the time when he confessed to his guilt on 04.12.2007. Testimonies of PW-22 and PW-26 are relevant in this regard.
54. PW-22 was first examined on 15.07.2011 wherein he deposed about the entire chain of events of 04.12.2007, from the appellant confessing his guilt to his leading the police party to the STD Booth, *rehriwala* and the forest of Katlupur and did not mention anything about the recovery of the bloodstained pant. It was only on the next date, i.e. 27.09.2011, that he deposed that he had also seized the pant of the appellant, which he was wearing at the time of the arrest and small spots of blood were also present on the pant. The pant was seized by seizure memo (Ex.PW-22/G). PW-26 also deposed that the blood stained pant, which the appellant was wearing at the time, was also

seized vide Ex.PW-22/G. We may also notice that the Seizure Memo (Ex.PW-22/G) states that the an earth coloured pant is worn by the appellant and upon close inspection, it had sprinkles of blood on it (*khoon jaise chite*) which was seized.

55. The recovery fails to inspire any confidence as *firstly*, it does not stand to reason that the appellant would be wearing the same blood stained pants and roaming around when he knows investigations are pending and he is being summoned by the police; and *secondly*, it is not probable that only few drops of blood will be spilled on the pants of the perpetrator of the murder when the postmortem (Ex.PW-13/A) shows serious injuries from the head to the hip of the deceased. The pants would have been drenched in blood, such minor sprinkles are more likely to have been caused by the injury found on the finger of the appellant. Further, even though the FSL (Ex.PW-28/A and Ex.PW-28/B) proved the presence of blood, in the absence of conclusive serological examination, it cannot be held that the blood was of the deceased. In such circumstances, the non-examination of any public witnesses even though it was busy road further raises a cloud on the version of the prosecution.
56. Hence, the prosecution was unable to prove the incriminating circumstance beyond reasonable doubt and the benefit should be extended to the appellant.

INJURY ON THE FINGER

57. It was also held by the Trial Court that the injury on the little finger of the right hand coupled with the failure of the appellant to explain the cause of the injury added a circumstance pointing towards the guilt of the appellant.

58. Dr.Avdesh Kumar Bhagat (PW-5) had deposed that he had prepared the MLC of the appellant (Ex.PW-5/A) wherein he had observed a six days old injury on the right little finger of the appellant. The Trial Court had repelled the explanation of the appellant that the same was sustained owing to a fall as the injury was sharp and not blunt; and in our view, rightly so. Be that as it may, we find not even a whisper of evidence led by the prosecution to link the injury with the incident. The weapon of the offence has neither been recovered nor ascertained to say that the injury might have been caused while inflicting blows on the deceased. In this background, the presence of the injury cannot be taken as a incriminating circumstance against the appellant.
59. To conclude the prosecution has not been able to prove any of the individual circumstances beyond reasonable doubt; let alone a complete chain of incriminating circumstances as mandated in a case based on circumstantial evidence. The order of conviction recorded by the Trial Court cannot be sustained.
60. Accordingly, the appeal is allowed. The impugned judgment and order on sentenced are set-aside. The appellant be set at liberty, unless wanted in any other case.
61. Trial Court record be returned along with copy of this judgment.
62. Copy of the judgment be sent to the concerned Jail Superintendent to update his records.

G. S. SISTANI, J.

CHANDER SHEKHAR, J.

AUGUST 16th, 2017 //pst