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IN THE HIGH COURT OF DELHI AT NEW DELHI

*Reserved on: 22nd November, 2017
Pronounced on: December 14, 2017*

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CRL.A. 1526/2014

INDERPAL @ MANDHU

...Appellant

Through: Ms. Geeta Luthra, Senior Advocate with
Ms. Shivani Luthra Lohiya, Mr. Anshul Duggal,
Mr. Prem Chettri and Mr. Rajiv, Advocates

versus

STATE

...Respondent

Through: Ms. Kusum Dhalla, APP for State

**CORAM:
JUSTICE S. MURALIDHAR
JUSTICE I.S. MEHTA**

**JUDGMENT
14.12.2017**

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Dr. S. Muralidhar, J

1. This is an appeal directed against the impugned judgment dated 18th July 2014 passed by the learned Additional Sessions Judge ('ASJ'), Dwarka Courts, New Delhi in Sessions Case No.77/12 arising out of the FIR No.45/12, registered at Police Station ('PS') J.P. Kalan, convicting the Appellant for the offence under Section 302 Indian Penal Code ('IPC') and under Section 201 IPC read with Section 34 IPC. The appeal also challenges the order on sentence dated 6th August 2014 whereby, for the offence under Section 302 read with Section 34 IPC, the Appellant was sentenced to imprisonment for life and to pay a fine of Rs.20,000/- and, in default of

payment of fine, to undergo simple imprisonment for a period of one year. By the same order on sentence, for the offence under Section 201 read with Section 34 IPC, the Appellant was sentenced to undergo rigorous imprisonment for 3 years and a fine of Rs.3,000/- and, in default of payment of fine, to further undergo simple imprisonment for two months. The sentences were directed to run concurrently.

Background facts and police investigation

2. At the outset, it is required to be noticed that there were three accused persons in this case. The Appellant herein is the first accused (A1). The co-accused are Inder @ Sachinder (A2), who has filed a separate appeal which has not been taken up for hearing since he is absconding and Amit (A3), who has been acquitted by the impugned judgment of the trial court.

3. The Appellant, along with A2, has been convicted for the murder of one Lalit @ Gandhi ('the deceased') on the intervening night of 22nd-23rd April 2012 and thereafter, concealing the dead body in a *ganda nala* near Village Kanganheri, Delhi. It may be noted that, in the background of this case, there was an incident of firing on 7th January 2012 in which the deceased had fired at A1 and for which an FIR No.3/12 was registered at PS J.P. Kalan. There, A1 was the complainant.

4. As far as the present case is concerned, the prosecution case begins with the police control room (PCR) receiving a phone call at around 3.55 pm on 25th April 20012 regarding the deceased having gone missing from village Galibpur for the past three days. On this basis DD No.16A was drawn up. ASI Ved Prakash (PW20) received it on the same day at around 4 pm. PW20

along with Ct. Pradeep proceeded to Village Galibpur. There Azad Singh (PW21), father of the deceased, met him and informed him that on 22nd April 2012, his son had gone to Rohtak to meet his sister-in-law who was admitted to a hospital. However, his son had not returned. After waiting for three days, PW21 called the police from the phone of one Tony, s/o Ranbir Singh, as the phone of PW21 had poor connectivity.

5. After noting the above information, PW20 informed the Station House Officer ('SHO') of PS J.P. Kalan Inspector Rajesh Dahiya (PW35) of the above facts. PW35 asked him to bring PW21 to Village Kanganheri. According to PW20, PW21 had a back problem and could not accompany him. Therefore, Raj Kumar Daral (PW1), an uncle of deceased Lalit, accompanied PW20 to Village Kanganheri.

6. Meanwhile, on the same day, i.e. 25th April 2012, a team of police officials of the Anti-Auto Theft Squad ('AATS'), South West, comprising ASI Sahab Rao (PW29), HC Manoj Kumar (PW4), Ct. Hawa Singh, Ct. Anil (PW30), SI Sushil Kumar (PW28), HC Vijay, HC Vinod and Ct. Rajesh received a secret information at around 12 noon that two boys would be coming on a motorcycle from Village Ujwa travelling towards Village Rawta. The AATS left at around 2.30pm in two private vehicles for Jhuljhuli Mor at Nazafgarh. They reached Jhuljhuli Mor at around 3.05pm. About 10-15 minutes thereafter, they noticed two persons on a motorcycle coming from Village Ujwa. The police apprehended both the boys. On their formal search, a country-made pistol was recovered from the possession of the pillion rider whose name was later on revealed as Inderpal @ Mandhu,

i.e. A1. ASI Sahab Rao then prepared a *rukka* and handed over the same to PW30, Ct. Anil, for registration of an FIR. Ct. Anil then got the FIR No.44/12 registered at PS J.P. Kalan under Section 25 of the Arms Act. Further investigation of FIR No.44/12 was entrusted to SI Parveen Kumar (PW33) who also reached Juhuljuli Mor along with HC Krishan.

7. After SI Parveen Kumar (PW33) reached the spot, he arrested A1. The arrest memo (Ex. PW1/G) showed the time of arrest as 5.40 pm. Upon interrogation, A1 is supposed to have given a disclosure statement (Ex PW33/A) to the effect that he, along with Inder @ Sachinder (A2) and Amit (A3), had murdered one Lalit @ Gandhi on the intervening night of 22nd/23rd April 2012 with the very same pistol which was recovered from A1 in FIR No.44/12. According to PW33, A1 further disclosed that he along with his associates had disposed of the dead body in the *ganda nala* near Village Kanganheri.

8. PW33 then immediately informed Inspector Rajesh Dahiya (PW35), SHO, PS J.P. Kalan, of the above facts. PW35 asked PW33 to reach the *ganda nala* at Kanganheri along with A1. Thereafter, A2 was also arrested.

Pointing out of the deceased's body by A1 and A2

9. PW33 then proceeded, along with A1, A2 and the staff of the AATS, to the *ganda nala* opposite Haritma Tourist Complex, Village Kanganheri.

10. It has come in the evidence of PW33 that Inspector Rajesh Dahiya (PW35) reached Village Kanganheri at around 6pm. The crime team comprising ASI Attar Singh (PW22), Ct. Arun Kumar the photographer

(PW7), Ct Jitender and CT Manish Kumar also arrived at the *ganda nala* spot. Sometime thereafter PW20 and PW1 also reached there. According to the prosecution, thereafter two passers by Momin (PW15) and Naeem (PW 17) helped to take the dead body of Lalit out from the *ganda nala*. According to PW33, “the dead body was tied with one big stone”.

11. PW1 identified the body as that of his nephew, Lalit @ Gandhi. PW7, the crime team photographer, took photographs of the blood stains and bunch of hairs and the dead body. The photographs taken by him were marked as Ex.PW7/A-1 to A-25. A private videographer Krishan Dagar (PW26) video-graphed the taking out of the body. However, the said footage was not exhibited.

12. Inspector Rajesh Dahiya (PW35) got the statement of PW1 recorded and got the case registered in FIR No.45/12 under Section 302 through Ct. Anuj at around 8.15pm. PW35 lifted and seized blood stains on cotton gauze from the stairs of the *nala*, strands of hair from the stairs, blood with concrete, control sample of concrete and one right-footed, white-coloured sports shoe. The dead body was then sent to RTRM Hospital through HC Krishan. PW35 arrested both A1 and A2 in the presence of PW33.

Post-mortem report

13. On 26th April 2012, the post-mortem of the deceased was conducted at RTRM Hospital by Dr. Parvinder Singh (PW6) who noticed as many as nine external injuries, of which, three were lacerated wounds over the middle of forehead (bone deep), the midoccipital region of the skull with fractured underlying bone and the left occipital region of the skull. The remaining six

injuries were firearm injuries. He found the mid-pelvis fractured, the pelvic cavity containing blood, the neck structure severed, the right clavicle fractured medially, the first rib on the right side fractured and the first and fifth rib fractured. The cause of death as described by PW6 was as under:

“Death in this case was due to haemorrhage in shock along with cranio cerebral damage (head injury) consequent to the multiple injuries described in the PM Report. All the injuries were ante mortem and recent. Injuries no.4,5,6 and 7 were entry wounds caused by ammunition discharge from a rifled fire arm from a distant range (exact range will be given by ballistic expert). Injuries no. 8 and 9 were exit wounds of 7 and 6 respectively. Injuries no.1,2 and 3 were caused by hard blunt force impact. Injuries were collectively sufficient to cause death in ordinary course of nature. Time since death was approximately three and half days at the time of PM examination.”

Prosecution witnesses

14. PW35 who was the Investigating Officer (IO) of FIR No.45/12 stated that Momin (PW15) and Naeem (PW17), residents of Jagatpur, were the two divers who helped in taking out the dead body from the *ganda nala* on the pointing out by A1 and A2. PW35 prepared the rough site-plan (Ex.PW35/B), recorded the statement of the AATS staff members, collected the blood-stained hair etc. and prepared all other documentation.

15. According to PW35, upon being interrogated further, both A1 and A2 stated that they could assist in recovering the car used to carry the deceased's body and also help in getting the A3, Amit, arrested. According to PW35, A1 and A2 took them to various places in Delhi and Gurgaon but nothing could be recovered at their instance.

16. On 27th April 2012, PW35 is purported to have examined one Jai Singh, who had gone with the deceased to Rohtak on 22nd April 2012 and had dropped him at around 9.30pm at the periphery of Village Galibpur and claimed to have seen the accused in the nearby area.

17. PW35 claimed that A1 and A2 took the police to Rishikesh and on 28th April 2012 to Hotel Gaurav, near the bus stand where the manager of the said hotel, Atul Pawar, met them and confirmed that A1 and A2 had visited the hotel. He produced the visitors' register.

18. According to PW35, on 1st May 2012, A1 and A2 made supplementary disclosure statements and then took the police to Bani (a semi-forested area) of Village Surehera where they found a silver-coloured Maruti Esteem car. The crime team was then called to the spot to inspect the car. The door of the car was found already opened and the key already found inside the car. The crime team noticed bloodstains on the rear seat as well as in the area between the front and back seats. Three empty cartridges and one lead bullet were also lying there at a distance of 3-4ft from the car. The disposable plastic glass lying there was also bloodstained.

19. PW35 then claimed that pursuant to their disclosure statements, A1 and A2 took them to the place where they had shot the deceased in Village Galibpur. PW35 claimed to have examined Prakash (PW2) and Vijender Singh (PW3), opposite whose house the incident had taken place, and recorded their statements.

20. The prosecution examined as many as 35 witnesses. 14 of these were

public witnesses. 10 witnesses turned hostile.

Eye witnesses turn hostile

21. The case initially was based on direct evidence i.e. there were two eyewitnesses i.e. PWs 2 and 3. However, both PW2 and PW3 turned hostile and, therefore, the case became one of circumstantial evidence.

22. PW2 is supposed to have made a statement that on the intervening night of 22nd/23rd April 2012, when he was sleeping on his cot outside his house, at around 10pm, after hearing the noise of quarrel and firing, he woke up and noticed that A1, A2 and A3, having pistols in their hands, had fired at the deceased due to which he fell down near PW2's cot and died. He is further supposed to have stated that A1 had put a pistol to his temple and threatened to kill him if he disclosed anything about the incident and that after some time, the three accused placed the deceased's body in the car and, after cleaning the spot, went away from there. He is also supposed to have stated that the dog of one Vijender Singh, who resided opposite his house, also sustained fire shot injuries. He stated that after some time, the accused persons returned to the spot and washed it properly and collected their empty cartridges.

23. However, in his deposition in the Court, PW2 stated as under:

“I have been retired from DESU in December 2011 as *balidar*. I do not know anything about this case. Police had noted down my name and address and had also beaten me. Police did not record my statement. I did not tell anything to police as nothing had happened in my presence.”

24. Likewise PW3, Vijender Singh, denied having told the police that, on

the intervening night of 22nd/23rd April 2012, when he was sleeping on a cot on the roof of his house, at about 10pm, he heard noise coming from the street. He heard the sound of shots being fired. He found the three accused firing gunshots at the deceased, as a result of which, the deceased fell down near the cot of PW2 who was sleeping on the street.

25. However, in the Court PW3 stated as under:

“I do not know anything about this case as I had not seen anything related to this case. Police officials visited my house 2-3 times and they had taken me to PS where they made inquiries from me and I had told them also that I did not know anything related to this case. I do not know whether my statement was recorded by police officials or not but they had taken my signatures on some blank papers.”

Trial court's analysis of the circumstantial evidence

26. Therefore, the case, as noticed hereinbefore, became one of circumstantial evidence and the circumstances put forth by the prosecution and as discussed by the trial Court were as under:

- “(i) The dead body of deceased Lalit @ Gandhi was recovered at the joint disclosure statements and joint pointing out memo.
- (ii) The weapon of offence / pistol recovered from the commission of murder of the deceased as per the report of Forensic expert.
- (iii) The car Maruti Esteem bearing no. HR26BA- 2426 was used in the commission of murder of deceased which was recovered at the instance of accused Inderpal and Sachinder as the blood stains found present in the said car tallied with DNA profile of the hair of deceased.

- (iv) Accused Inderjeet and Sachinder were absconding and such abscondence incriminates them.”

27. The conclusions reached by the trial court on the analysis of the evidence were as under:

- (i) From a conjoint reading of the testimonies of HC Manoj Kumar (PW4), SI Sunil Kumar (PW28) ASI Sahab Rao (PW29) and Ct. Anil (PW30), it was concluded that the prosecution had been successful in proving that the Appellant was apprehended with the pistol along with two live cartridges by the police officials of AATS at Jhuljuli Mor when he confessed his involvement in the murder of the deceased and subsequent throwing of the dead body in the *ganda nala* at Kanganheri. The discrepancies in the testimonies were as regards the arrival of the AATS at the spot “is of no consequence.”
- (ii) The variation in the time of arrival of AATS as deposed by the above witnesses did not affect the prosecution story since when read as a whole, there was a ring of truth in what was deposed by these witnesses. It can thus be inferred that the AATS left the Jhuljuli Mor at about 5.45 pm and this version of the officials of AATS was supported by Ct. Anuj (PW10), HC Krishan Kumar (PW25) and SI Parveen Kumar (PW33).
- (iii) ASI Attar Singh (PW22) was not cross-examined as to the time of his reaching Kanganheri. From a conjoint reading of his testimony and that of Ct. Arun Kumar (PW7), HC Krishan Kumar (PW25), SI Parveen Kumar (PW33), ASI Ved Prakash (PW20) and Raj Kumar

Daral (PW1), it could be safely concluded that the Appellant along with co-accused Sachinder (A2) were brought from Jhuljuli Mor to Kanganheri at about 6pm; they were jointly interrogated by Inspector Rajesh Dahiya (PW35) and in terms of their jointly pointing out, the body of the deceased was retrieved from the *ganda nala* and a heavy stone was tied to the dead body with a rope.

- (iv) While the fact of murder of the deceased with the weapon of offence, found in the possession of the Appellant, was within the knowledge of SI Parveen Kumar (PW33), the exact location of the spot from where the dead body was retrieved was in the knowledge of nobody until Inspector Rajesh Dahiya (PW35) further interrogated A1 and A2. The testimony of police officials in this regard was corroborated by Raj Kumar Daral (PW1) and Krishan Dagar (PW26). Although PW1 had not supported the case of the prosecution in toto, he admitted to going to the spot accompanied by police officials. This part of his testimony supported the case of the prosecution. The joint pointing out memo (Ex. PW33/H and PW33/I) was admissible under Section 27 of the Evidence Act. As explained by the Supreme Court in *State v. Navjot Sandhu (2005) 11 SCC 600*, an inference can be drawn that it was A1 himself who had concealed the dead body in the *ganda nala*. Although PW15 and PW17 had not supported the prosecution, the testimonies of the police officials in this regard inspired confidence.
- (v) The weapon of offence recovered from the Appellant, when sent to the FSL for examination, confirmed that the bullets in the body of the

deceased were fired from the pistol recovered from A1. The opinion of the doctor that the injuries were 'rifle injuries' cannot be said to be the last word since the forensic expert opined that the bullet recovered from the body of the deceased was fired from the pistol recovered from A1.

- (vi) PW31, Atul Singh Pawar, although he later turned hostile, stated that two persons had stayed in his hotel, Hotel Gaurav, on the intervening night of 23rd-24th April 2012 at Rishikesh. Therefore, it could be safely concluded that the accused were absconding and this was also incriminating evidence since the accused did not properly explain their absence.
- (vii) The recovery of the car from which blood stains of the deceased were found and tallied with the DNA of the hair of the deceased was also proved. It was also proved that the car was recovered on the pointing out of the accused. Even though PW27 did not support the prosecution, the evidence of the police officials was found acceptable. As far as the sentences are concerned, by the separate order dated 6th August 2014, the sentences as noticed earlier were awarded by the trial court.

28. Both the accused persons have filed separate appeals. While the Appellant herein filed Crl.A.No.1526/2014, the co-accused Sachinder (A2) filed Crl.A.No.1368/2014. However, since A2 is absconding, his appeal has not been taken up for hearing. As far as the present Appellant is concerned, he was granted interim suspension of sentence on two or three occasions by

this Court during the pendency of the present appeal. He has, as on 13th November 2017 undergone 5 years, 1 month and 26 days of imprisonment, not including the remission earned.

29. This Court has heard the submissions of Ms. Geeta Luthra, the learned Senior Counsel appearing for the Appellant, and Ms. Kusum Dhalla, the learned APP for the State. The Court has again thoroughly examined the entire record as well as the impugned judgment of the trial court with the assistance of the counsel.

Law relating to circumstantial evidence

30. At the outset, the legal position as regards the circumstantial evidence, as explained by the Supreme Court in *Sharad Birdhichand Sarda v. State of Maharashtra (1984) 4 SCC 116* requires to be recapitulated as under:

“151. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is *Hanumant v. State of Madhya Pradesh 1953 Cri LJ 129*. This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of *Tufail v. State of Uttar Pradesh (1969) 3 SCC 198* and *Ramgopal v. State of Maharashtra 1972 Cri LJ 473*. It may be useful to extract what Mahajan, J. has laid down in *Hanumant's* case (at pp. 345-46 of AIR) (supra):

“It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances

should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.”

152. 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 Sahebrao Bobade v. State of Maharashtra* 1973 Cri LJ 1783 where the following 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.

153. These five golden principles, if we may say so, constitute the *panchsheel* of the proof of a case based on circumstantial evidence."

31. The circumstances, as culled out by the trial court, have been noticed hereinbefore. The Court would also add to those circumstances, the factum of arrest of the Appellant at Jhuljhuli Mor, the recovery of weapon from him and the co-accused and their subsequent confessions.

Recovery of the dead body

32. At the outset, it requires to be noticed that while the impugned judgment has been delivered in FIR No.45/12, which was registered at PS J.P. Kalan under Section 302/201/34 IPC, it is plain from the arrest memo drawn up in FIR No.44/12 - which was registered under Section 25 of the Arms Act - that the arrest of the Appellant had taken place on 25th April 2012 at 5.40 pm. The arrest memo was signed by Parveen Kumar (PW33) and co-signed by ASI Sahab Rao (PW29) as a witness.

33. The evidence of PW33 is to the effect that it is only after the above disclosure that he, along with the two accused persons and the staff of the AATS, went to the *ganda nala* at Kanganheri and only thereafter, Inspector Rajesh Dahiya (PW35) arrived there, followed by the crime team and ASI Ved Prakash (PW20) who came there with Raj Kumar Daral (PW1), the

uncle of the deceased. According to PW33, only thereafter, two divers, i.e. Momin (PW15) and Naeem (PW17), were called.

34. There is a serious discrepancy as regards the time when PW33 arrived at the *ganda nala* near Kanganheri with the two accused. According to him, this was slightly before 6pm. Turning to the evidence of PW15 and PW17, it is seen that they have totally contradicted the prosecution's case in this regard. They are the two divers who were called to assist the police in lifting the dead body from the *ganda nala*.

35. PW15 states that at the calling of SHO of PS Alipur, he and Naeem (PW17) went to the PS J.P. Kalan. He states that "they went to a particular point near *nala* at about 2.30pm. I do not remember the exact location or name of place." He stated that "At about 3pm, we took out a dead body from the said *ganda nala*. 6-7 police officials were present there. I do not know the name of the deceased." Naturally, the learned Addl. PP declared the witness hostile and proceeded to cross-examine him. He denied having made any statement that he, along with PW17, had gone to Village Kanganheri for labour work and that at about 6pm, when they were returning home, they stopped after seeing the police when they reached the *ganda nala*.

36. PW-15 particularly denied the suggestion that "on 25th April 2012, at around 6pm, I had taken out the dead body from the *ganda nala* which was tied with a heavy stone or that the said dead body was taken out at the instance of two persons, namely Inder Pal Mandhu and Sachinder". When further cross-examined by the accused, this witness stated as under:

“We had taken out the dead body till 03.00 pm. No stone was tied with the dead body and at that time the body was floating on the bank of the nala. We stayed at the spot till 07.00 pm. At about 6.30 pm, police brought 2 persons in custody and police directed us to again to brought the body in ganda nala and after this police took our photographs and the two persons after we again thrown the body in ganda nala. When we reached at the spot the body was floating and the police persons were already present. We did not visit the police station after this we came to our house after leaving the spot and we did not meet the police after this day.”

37. PW-15 is supported in all material particulars by the other diver PW-17. He too denied that it was only at 6pm that he had taken out the dead body tied with a heavy stone or that it was taken out on the pointing out by the two accused. He maintained that, “I had never visited the area of *ganda nala* prior to the above stated date and time. We used to work as divers in the area of Wazirabad only.”

38. The above two were independent witnesses and their failure to support the prosecution on this crucial aspect of recovery of the dead body from the *ganda nala* on the pointing out by the accused could not have been brushed aside as a minor variation or inconsistency in the case of the prosecution.

Inconsistencies in police testimonies

39. Even if one were to keep aside the testimonies of PW-15 and PW-17, it appears that the testimonies of the police witnesses themselves do not entirely support the prosecution case on this crucial aspect.

40. ASI Ved Prakash (PW20) states that he received the DD No.16A about the deceased going missing at about 4pm. He, along with Ct. Pradeep, went

to Village Galibpur where the father of the deceased (PW21) met them and informed them about the deceased having been missing since 22nd April 2012. PW20 states that he then spoke to SHO Rajesh Dahiya (PW35) who directed him to bring the complainant to Village Kanganheri. How PW35 could, at this time, have already known about Kanganheri being the place where the body was located is not clear. What is, however, clear is that without any reference to the arrest of the Appellant at Jhuljhuli Mor or the passing of that information to PW35, there is no way that PW35 could have asked PW20 to bring PW21 to Village Kanganheri.

41. It is the timing of events that is most crucial. When cross-examined, PW20 stated that he talked to the SHO at about 5pm from his mobile phone. Therefore, it would be safe to infer that PW35 knew that the dead body was at Village Kanganheri at that time, i.e. 5pm. According to PW20, the distance between the house of PW21 and Kanganheri was about 8km and he took about half an hour to cover the distance. He stated that when he reached the spot at around 5.30 pm, the SHO (PW35), SI Parveen Kumar (PW33), HC Krishan Kumar (PW25), Ct. Anuj (PW10), the crime team as well as the AATS staff were already present there along with both the accused persons. He claimed to have remained at the *ganda nala* from 5.30pm to 10.15pm.

42. This completely contradicts what was spoken to by both, SI Parveen Kumar (PW33) and Inspector Rajesh Dahiya (PW35). It must be recalled that according to PW33, only after he reached Kanganheri did PW35 arrive there at around 6 pm. He further states that the “crime team also came there after some time.” It is only thereafter, according to him, that ASI Ved

Prakash (PW20) arrived there with PW1 and the divers were called. When PW33 was cross-examined, he also maintained that the distance between Jhuljhuli Mor and the *ganda nala* is about 6-8kms and that he had gone there in a QRT Gypsy. He maintained that “when I reached *ganda nala* spot, no one was there.” He claimed to have informed Inspector Rajesh Dahiya, the SHO of PS J.P. Kalan, by his mobile phone from Jhuljhuli Mor at about 5.15 to 5.30 pm and thereafter left for *ganda nala* “after 15 minutes of making call to SHO.” According to him, PW35 arrived at the spot within 2-3 minutes of his reaching there and the crime team arrived 15-20 minutes thereafter. He deposes that ASI Ved Prakash (PW20) arrived at the spot within 5-7 minutes of the arrival of the crime team and that “by that time the dead body had not been extricated”.

43. What is also significant is that PW33 states that neither the stone nor the tying material was seized by the IO, as deposed by him in his statement earlier. The IO also did not lift any tyre marks from the vicinity of the *ganda nala*. The impression of the tyre marks of the Maruti Esteem car was also not taken by the crime team officials.

44. We then turn to PW35, Inspector Rajesh Dahiya, who states that at 5.15pm, when he was in the DCP Office, Dwarka, Delhi, he received a phone call from SI Praveen Kumar (PW33) about A1 having confessed to the killing of the deceased along with A2 and A3. He was also informed that both, A1 and A2, had been apprehended and that they had dumped the body of the deceased in a drain near Village Kanganheri. According to PW35, he flashed the message and informed the District Crime Team as well as the

videographer, Krishan Dagar, to reach the spot. He further states that, “At about 6pm, I, along with staff, reached the spot, i.e. drain near Haritma Tourist Complex, Kanganheri Village, Delhi.” According to him, PW33 had already reached the spot along with the two accused. He goes on to state that the staff of the AATS and the crime team had also reached by the time of his arrival at the spot. PW35 also states that, in the meanwhile, ASI Ved Prakash had come there with a DD entry regarding the missing deceased and that “he was making inquiries in respect of that DD”. It is only thereafter that A1 and A2 had pointed out to having thrown the dead body in the *ganda nala*. According to him, he then requested PW15 and PW17, who were passing by, to assist the police in taking out the dead body from the drain.

45. In his cross-examination, PW-35 claimed that the videography recording was vitiated and therefore, could not be filed. He claims that after about a week of the retrieval of the body, he came to know that the videography has been spoiled. He further disclosed that he had prepared the pointing out memo at about 10-10.30pm and prior thereto, had recorded the disclosure statements of both the accused, although he did not remember the exact time of doing so. He admitted that the description in the missing person report was informed to him by ASI Ved Prakash telephonically but that he did not note it down. According to him, it was only after PW33 informed him of the arrest of the accused at around 5.20pm that ASI Ved Prakash informed him about receiving the PCR call about the deceased being missing.

46. The above statements are not even supported by Ct. Anil (PW30), who was a member of the AATS. According to him, they started from Jhuljuli

Mor towards the *ganda nala* “at about 6.30pm and reached Kanganheri at about 7.30-8pm”. PW30 maintains that, “I along with SI Sahab Rao, SI Sushil, HC Manoj, HC Vinod, HC Vijay, Ct. Hawa Singh and Ct. Rajesh went to Jhuljuli Mor at about 2.30 pm.”

47. ASI Sahab Rao (PW29) was part of the AATS. In his cross-examination, he stated as under:

“At *ganda nala* spot I remained from 6.30pm to 8.40pm. None was present there prior to us and entire team of ours reached at the same time. I do not know what proceedings were conducting, as long as I remained at the *ganda nala* spot. The police crime team had come during my stay there at 8.35pm and one or two relatives of deceased came there at about 7.00pm. I do not know their name(s) or relationship. Someone from local police station had gone to call them but I do not know the name of said official, who had arrived after half an hour of my reaching there. Public people had gathered and I was busy in keeping them away. I cannot tell the number of those persons. However, they were 10-12 persons in number. No paper work was done in respect of FIR No. 45/12, in my presence. No interrogation of accused persons was done in my presence. Since I did not participate in the investigation so I cannot say if statement of any body was recorded by any police official.”

48. Therefore, there appears to be significant variations in certain basic details about when exactly the different police parties viz., the party led by PW-33, the party led by PW-35 and the crime branch officials, reached the *ganda nala* spot. It is not possible, if the team led by PW-33 was still at Jhuljuli Mor at about 6pm (after the arrest of A-1 at 5.40 pm), they could have reached the *ganda nala* spot before 6.30 pm. If one goes by the version of PW20, then PW35 already knew about a body being located at Kanganheri at 5pm and he was able to tell PW20 to reach the spot.

49. As far as the crime team is concerned, Ct. Arun Kumar (PW7) and ASI Attar Singh (PW22) were the relevant witnesses. PW7 had taken photographs at the Kanganheri *ganda nala* spot. He states during his cross-examination as under:

“On 25.04,2012, we received information at about 04.15 pm to reach the spot. We immediately left our office for ganda nala, village Kanganheri. I/C Crime Team made departure entry. We reached near ganda nala at about 5.30 pm and remained there till 8.15 pm. ATS staff, accused persons, SI Praveen and staff of the police station were already present there when we reached the spot. The divers were not present there when Crime Team arrived at the spot.”

50. PW7 further stated:

“The dead body was slightly visible from the place where I was standing. Dead body was not wrapped in a bag or cloth but it was wearing clothes.”

51. Indeed, the Court has also seen the photographs taken at that time even before the dead body was actually pulled out from the *ganda nala*. The dead body can be seen floating in the *ganda nala*. Therefore, it was clearly visible. The entire story of the accused pointing out the dead body and only thereafter the police being able to recover it does not inspire confidence at all. On the contrary, it appears probable that the body floating in the *ganda nala* was already known and which is why the two divers, PW15 and PW17, were called and asked to retrieve the dead body some time before 4.15pm itself. This also tallies with PW7 stating that he was asked at 4.15 pm itself to reach the spot. This completely falsifies the case of the prosecution that it is only after the arrest of A-1 at 5.40 pm and the subsequent disclosures of

A-1 and A-2 that the police came to know that the body of the deceased was in the *ganda nala*.

52. In the cross-examination of PW22, ASI Attar Singh, he states that on 25th April 2012, he received information at about 5pm. The distance between his office and the spot is 10-15kms. It is plain therefore, that even these witnesses were told by 5pm to reach the *ganda nala* spot. This fortifies the case of the defence that the police already knew about the dead body being found in the *ganda nala* much before the arrest of the two accused.

53. These are not minor contradictions or discrepancies as categorized by the trial court. It goes to the very root of the matter. If indeed the police already knew that the dead body of the deceased was floating on the surface of *ganda nala* then there was nothing for the accused to point out pursuant to any disclosure made by them under Section 27 of the Evidence Act.

54. Raj Kumar Daral (PW1), when he was cross-examined by the Addl. PP, denied that the body of the deceased was taken out from the *ganda nala* in his presence. When he was shown the seizure memo, he agreed that it bore his signature but stated “the same was taken in the PS on blank sheet”. Therefore, there was no support at all to the police’s claim about reaching the *ganda nala* after 6pm and recovery of the dead body of the deceased on the pointing out of the two accused.

55. The photographs produced before the Court also show that there was still sunlight when the two accused persons reached there and in the opinion of this Court, it does not appear to be around 6.30pm. In any event, with so

many contradictions even among the police witnesses, it must be concluded that the circumstances of arrest of the A-1 at 5.40 pm in FIR No.44/12; the accused persons going along with the police party to the spot, namely *ganda nala* at Kanganheri at around 6pm and; the recovery of the dead body from the *ganda nala* only on the pointing out of the two accused thereafter cannot be said to have proved beyond reasonable doubt.

Non of recovery of stone and rope

56. There is yet another important fact, namely that according to the prosecution, the dead body was tied with a heavy stone in order to make it sink to the floor of the *ganda nala*. Yet, neither the stone nor the rope with which it was tied to the body were seized by the police. Why this theory was introduced at all is a mystery. This was perhaps to make it appear that a dead body was not visible and that divers had to be sent to retrieve it. On the contrary, the photographs themselves show that some part of the dead body was visibly floating on the surface of the *ganda nala*. Clearly, therefore, it was not tied to a stone. The photographs do not show that any stone or rope was recovered or found with the body. It is unlikely that if indeed there was such a stone it would not have been photographed let alone not seized. This only adds to the falsity of the case of the prosecution regarding recovery of the dead body.

Recovery of the Maruti Esteem car

57. Now turning to the recovery of the car, the evidence of PW27, Sunil, is relevant. The story of the prosecution is that, at 10.30 am on 22nd April 2012, A1 had gone to PW27 and told him that A1's son was

seriously ill and therefore, he required Sunil's car to take his son to the doctor and that consequently, Sunil had then given his Maruti Esteem car to A1 who did not return it to him or even contact him.

58. When examined in court, PW27 failed to support the case of the prosecution. This is what he had stated:

“My uncle Sh. Satbir Singh is registered owner of esteem car no. HR 26 BA 2426. I had purchased the said car from my uncle 1-2 months prior to this case. On 25.4.2012 police took the said vehicle from the plot after taking keys from me and police asked for the documents for the car but I could not furnish the same as I had submitted the documents in concerned authority for transfer of the car in my name. Police told me that said car was a stolen vehicle and they were taking away the same. Police did not record my statement nor made inquiries from me at any point of time. The said vehicle is still with the police. I can identify the same.”

59. Further, in his cross-examination by the learned counsel for the accused, PW27 maintained that:

“Police did not make any document at the time of taking the keys from me. The car was not in working order so it was towed away by the police with die help of a Gypsy.”

60. This completely demolishes the case of the prosecution about the two accused persons having led the police to the car on 1st May 2012 at Village Surehera at around 10am. The fact that there was no independent witness to the supplementary disclosure statement regarding the call or even calling Sunil himself to identify the car makes the recovery of the car in the manner projected by the prosecution extremely doubtful. It also appears that no chance prints were lifted from the car as has been admitted by PW33 in his

cross-examination. The members of the crime team PW-22, as well as PW7, deposed about the visit to Bani at Village Surehera at around 10am on 1st May 2012 from where the Maruti Esteem car used by the accused persons was said to have been recovered. He states that this spot was at a distance of 3-4 kms from Village Surehera. He states that, “Nobody opened the lock of the car in my presence. There is nothing mentioned in my report whether the car was locked or not.”

Visit to Rishikesh

61. Regarding the visit to Rishikesh, PW33 stated that they had hired a private vehicle, which was a Tata Safari, but there were no entries regarding such a visit. PW35 stated that the two accused took the police to Hotel Gaurav, near the bus stand on 29th April 2012 where the manager of the hotel, Atul Pawar (PW31), met them. PW31 is stated to have identified both the accused and confirmed their visit. He is also supposed to have produced the photocopy of the visitors’ register for 23rd April 2012 (Ex.PW31/A).

62. PW31, however, also turned hostile. He refused to identify the accused persons in the Court as the same persons who had come to his hotel on 23rd April 2012. He admitted that there was some overwriting on serial numbers in the register, including in the relevant entries. Consequently, the circumstance of subsequent conduct of the accused, namely going to Rishikesh and staying in a hotel, was not able to be proved by the prosecution beyond reasonable doubt.

Recovery of bullets and matching with weapon of offence

63. The circumstance of the bullets recovered from the body of the deceased

matching the bullets which can be fired from the weapon seized from the accused cannot, by itself, form sufficient proof of his involvement in the crime. In this regard, it is seen that not a single question regarding the bullets found in the body of the deceased being fired from the pistol recovered from A1 was put to him in his statement under Section 313 Cr.PC. When this was pointed out to the trial court, a supplementary statement under Section 313 Cr PC was recorded on 8th July 2014. This is certainly therefore, a relevant factor.

64. A 9mm pistol was recovered from A-1. According to Dr. Parvinder (PW6), who conducted the post-mortem of the deceased, it was a 'rifle' firearm which was used from a distant range that caused the gun shot injuries which resulted in the death of the deceased. He added, "The country made guns are short guns and cannot be treated and termed as rifled gun." He also maintained that, "It is correct that there will be a difference between the wound caused by a rifled and short gunshot wound." It is also significant that there was no blackening or tattooing around the entry wounds.

65. Therefore, the circumstance regarding the bullets recovered from the body matching the bullets recovered from the bullets, cannot be said to have been proved beyond reasonable doubt.

Errors in the trial Court judgment

66. Turning now to the judgment of the trial court, this Court is unable to agree with its reasoning that there are only certain minor variations in the versions of the police witnesses as regards the AATS team proceeding from Jhuljuli Mor to the *ganda nala* at Kanganheri. As already discussed, there

are indeed significant variations which throw grave doubts on whether the arrest of the Appellant took place at 5.40 pm and that only thereafter he and A-2 took the police to *ganda nala* for pointing out the dead body.

67. Further, the Court notices that the trial court has overlooked an important aspect of the matter. The dead body was already seen floating in the *ganda nala* and the crime team was called to that spot at 4.15 pm itself. Further, when PW20 spoke to PW35 at around 5pm, he was asked by PW35 to reach the spot, i.e. *ganda nala* at Kanganheri, with PW21. This shows that PW35 already knew that there was a dead body in the *ganda nala*. This, coupled with the fact that both, PW15 and PW17, stated that they were called at 3pm to remove the dead body, falsifies the case of the prosecution about the police coming to know only after 5.40 pm of the fact of the body being thrown in the *ganda nala*, i.e. only after the arrest of the Appellant. This crucial aspect appears to have been completely missed by the trial court.

68. Another important aspect missed by the trial court is the falsity of the case of the prosecution regarding the dead body of the deceased being tied with a stone with the help of a rope. Neither the stone nor the rope was recovered which throws grave doubt on the prosecution's version of events. The recovery of the Maruti Esteem car was also extremely doubtful for the reasons already pointed out.

69. With major links in the chain of circumstances having not having been proved, the trial court ought not to have proceeded to convict the Appellant.

70. As regards the motive for the crime, even the trial court does not dispute that the prosecution has not led any evidence to establish motive. Yet, it wrongly records in para 129 as under:

“129. In the present case, the deceased Lalit @ Gandhi had fired upon accused Inderpal @Mandhu and he was facing charges u/s 307 IPC in case FIR No.44/12 (*sic* FIR 3/2012) where Inderpal @ Mandhu was complainant, therefore, accused Inderpal @ Mandhu and Sachinder might be having a grudge against him and wants to settle the scores with the deceased and where they got an opportunity, they have done away with the deceased.”

71. The above reasoning of the trial court is based purely on surmises and conjectures and is therefore, unsustainable in law. In a case of circumstantial evidence, the motive assumes significance where the other circumstances established do not form a continuous chain and in any event, do not unerringly point to the guilt of the accused to the exclusion of everyone else.

72. The trial court has also failed to notice that the blood stains in the Maruti Esteem car were not shown to match the blood group of the deceased. The arrest of the two accused persons appears to be extremely doubtful and therefore, none of the circumstances noticed by the trial court could be said to have been proved by the prosecution beyond reasonable doubt.

Conclusion

73. For all the aforementioned reasons, this Court is of the view that the Appellant is entitled to the benefit of doubt. The Appellant is accordingly acquitted for the offence under Section 302/201/34 IPC. The impugned judgment dated 18th July 2014, convicting the Appellant for the aforesaid

offences, as well as the order on sentence dated 6th August 2014 are hereby set aside.

74. The appeal is accordingly allowed but, in the circumstances, with no orders as to costs. Unless wanted in any other case, the Appellant shall be released forthwith. He will comply with the requirement of Section 437A Cr PC by furnishing a bond to the satisfaction of the trial court for the amount as may be determined by the trial court.

75. The trial Court record be returned together with a certified copy of this judgment to the trial Court.

S. MURALIDHAR, J.

I.S. MEHTA, J.

DECEMBER 14, 2017

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