

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

Date of decision: 14th November, 2017

+ **CRL.L.P. 781/2015**

STATE (GOVT OF NCT OF DELHI) Petitioner

Through: Ms. Radhika Kolluru, APP.
SI Arun Kumar, P.S. Tilak Nagar.

versus

AKHIL AHUJA & ORS. Respondents

Through: Mr. Jitendra Sethi, Adv with
Mr. Ambar Tewari, Mr. Aditya
Madan and Ms. Anshika Sethi, Advs
for R-1.
Mr. H.S. Bhullar, Adv. with
Mr. Sarabjeet Kaur and Mr.
Tribikram Meelee, Advs for R-2
Ms. Inderjeet Sidhu, Adv. for R-3
along with respondent No.3 in person.

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

I.S.Mehta, J (Oral)

1. Instant is an petition by the petitioner-State seeking leave to appeal against the judgment of acquittal dated 08.07.2015 passed by the learned Additional Sessions Judge (ASJ), Fast Track Court, North-West District, Rohini Courts in Sessions Case No. 14/1/08 whereby the respondents, i.e. (1) Akhil Ahuja, (2) Kamal Prasad Bhandari and (3) Sizauddin @ Shiyazuddin, were acquitted of all the charges levelled against them for the offence under Sections

364A/302/201/411/34/109/120B IPC.

Case of the prosecution

2. Instant FIR is registered on the basis of the DD No. 37A dated 03.03.2001, i.e. ExPW45/A, at Police Station Tilak Nagar wherein the informant, i.e. Dinesh Kumar Gogna(PW45), brother of the deceased- Lincon Gogna has given the information to the Duty Officer that his younger brother, i.e. Lincon Gogna (since deceased), who was running a jewellery shop under the name and style of M/s M.C. Bangles at MC Building, Durga Complex, Tilak Nagar, on 02.03.2001 at about 11.00 AM left for his shop in his vehicle, i.e. cherry coloured Ford car bearing No. DL-4CF-8614. However, he did not return to his house at night to which his wife Bhawna(PW18) made a call to Dinesh Kumar Gogna and informed about Lincon's failure to return home, upon which the Dinesh Kumar Gogna called on Lincon's mobile phone from his landline phone but his phone was attended by someone else who introduced himself as Amit and informed that Lincon was not well and had been given an injection for inducing sleep and was sleeping, therefore, he would return later and further informed that he is at C-133, New Friends Colony. Accordingly, Dinesh Kumar(PW45) along with his wife reached the said address but learnt that there was no such address in New Friends Colony, therefore, he suspected that someone had kidnapped Lincon and lodged an FIR with P.S. Tilak Nagar and on the basis of the said information, i.e. ExPW45/A, an FIR No. 103/2001 (ExPW21/A) under Section 365 IPC was registered at P.S. Tilak Nagar and investigation of the incident were put forth and further investigation

was handed over to SI Sita Ram.

3. During the investigation, on the next morning the Delhi Police received information regarding the location of the said Ford car, i.e. DL-4CF-8614, of Lincon. On reaching the location the police found it parked near Good Year Chowk, Faridabad near a petrol pump on the road side and all the accessories like audio/music system as well as the tyres along with rims and stepney were missing from the car. At the said spot SI Sita Ram called the crime team, finger print expert and a photographer and needful was done. Further, on 04.03.2001 a wireless message was received regarding recovery of one dead body and accordingly a team of Delhi Police reached to a field at Village Feroz Pur, Faridabad where ASI Zile Singh P.S. Palwal Sadar was present and it was learnt that the local police had already carried out proceedings under section 174 Cr.P.C. and exhibits etc. had already been taken into possession by the local police. The dead body was found to be of Lincon therefore, the case was converted into a case of murder and Sections 302/201/34 IPC were amended in FIR No. 103/2001.
4. During the investigation two persons from village Feroz Pur, i.e. Ashok son of Suraj Pal and Birender Singh son of Chattar Pal, provide vital clues and told that one young boy having fair complexion and stout body had met them and as per his request, they had towed his cherry coloured vehicle. It was also learnt that said young boy had also contacted one mechanic and *puncture-wala* (puncture repair man) with whose aid, tyres, video-audio system and other accessories of the car were removed from the said car and

brought to Delhi by him in a Maruti van. Further vital information in this regard was provided by Dheer Singh, driver of that Maruti van and mechanic Manjeet Singh as well as two persons of Delhi who provided assistance to Akhil Ahuja for further transportation of said articles from Nehru Place to Hotel Park Royal in their tempo.

5. The deceased on the date of the incident was carrying his Mobile phone No. 9811224422, and when the call details were analysed it was learnt that he had received one call from the telephone No. 6239072 which was found to be of the Park Royal Hotel, Nehru Place. Upon further analysing the call details and the CCTV footage of the Park Royal Hotel it was revealed that in the said Hotel one another car, i.e. DL-1CF-1211, was found parked, which suspiciously existed from there. The said car was found to be owned by one Akhil Ahuja/accused A1.
6. During the investigation said accused A1-Akhil Ahuja made the disclosure statement of his involvement in commission of murder of the deceased-Lincon Gogna with the help of one co-accused Miss A (*Juvenile-in-conflict-with-law*). On the basis of the disclosure statement of Akhil Ahuja the police got effected the recoveries as stated in the charge-sheet from, the house of Miss A. Further, at the instance of Akhil Ahuja, pointing out memos were prepared and he was identified by the witnesses. The robbery articles were also recovered from the possession of Akhil Ahuja and from the house of Miss A.
7. During the investigation the brother of the deceased also disclosed that he had received a ransom call of Rs. 20 lacs on the

intervening night of 02.03.2001-03.03.2001. In support of this fact he has also handed over an audio cassette to the police on 19.03.2001 which was taken in possession by the police. Further, the location of the Ford cherry colour vehicle of the deceased at Greater Kailash, Part-II on the dated of the incident was also witnessed by one Pradeep Singh (PW12), a TSR driver.

8. Upon further investigation it was revealed that the respondent/accused-Akhil Ahuja came to know about the deceased-Lincon Gogna when he met him at one car accessories shop. Thereafter, he exchanged his telephone number with him and developed intimacy with him with an evil eye on his money. On 02.03.2001 he called Lincon Gogna at Park Royal Hotel on the pretext of his birthday celebration. Further it was revealed that he had already planned and told Miss A that he would bring Lincon at her house and that then they would kill him after giving him champagne to drink laced with Alprax pills. When Lincon did not showed up at the said Hotel, he called him up at about 10.20 PM from the Park Royal Hotel on which Lincon assured that he would reach there at around 11.00 PM. Thereafter, Akhil Ahuja took out his car from the parking area of the Park Royal Hotel and parked it near the main entry gate and started waiting for Lincon in the hotel lobby.

9. When Lincon reached there in his Ford car, the accused Akhil Ahuja sat in that car and told Lincon that the party was already over and asked him to go the house of Miss A, accordingly both of them reached the house of Miss A at GK-II, New Delhi. Upon reaching the house, Lovina (sister of Miss A) opened the door and then returned to

her room. Thereafter, Lincon was served champagne laced with Alprax, and then he started feeling drowsiness at 1.30 AM and then he was given rod blows by Akhil Ahuja and thereafter he was strangled. The jewellery articles worn by Lincon and his wallet were removed and the briefcase that he was carrying was opened upon which it was found containing gold ornaments.

10. Thereafter, Miss A called her servant, i.e. Kamal Prasad/co-accused, and asked him to wash the blood from the floor and then both of them helped Akhil Ahuja in removing the dead body of Lincon. The dead body was put in the Ford car of Lincon and thereafter the accused-Akhil Ahuja drove the car to Palwal, where he dragged the dead body of Lincon and put the same in a field at Village Feroz Pur, Faridabad.
11. After completion of the investigation the charge-sheet was filed on 31.05.2001 against the accused, i.e. (1) Akhil Ahuja, (2) Kamal Prasad and (3) Sizauddin. However, Miss A's charge-sheet was separated as the same was to be dealt by the Juvenile Justice Board.
12. The learned Additional Public Prosecutor for the appellant/State has submitted that the Court Below went wrong in not appreciating the material evidence as well as recovery of jewellery and other gold articles belong to deceased-Lincon Gogna on record and reached to the wrong conclusion and the instant appeal is based on circumstantial evidence of committing murder of the deceased Lincon Gogna on the intervening night of 02.03.2001-03.03.2001. Factually, ExPW9/A is the Post Mortem Report which shows the cause of death of the deceased-Licon; *asphyxia* as a result of

strangulation. The deceased-Lincon Gogna left his jewellery shop on 02.03.2001 along with the samples of gold bangles (bearing inscription "22Kdm MC") on receiving a call from a customer and he had informed Rajesh Kumar (PW3) his employee and Bhawna Gogna (PW18) his wife that he is going to show the samples of gold bangles to a customer and from there he will go to attend a birthday party. Thereafter, he reached to the house of the said customer-Payal Babbar (PW43) where he after showing the samples of the bangles had dinner. In the meanwhile he received a call (*which was made from the Park Royal Hotel*) from Akhil Ahuja-A1 who reminded him of attending the birthday party.

13. The deceased-Lincon Gogna reached to the Park Royal Hotel, Nehru Place, since the party was already over, Akhil Ahuja-A1 persuaded him to go to the house of Miss A at GK-II. Upon reaching to the said house at GK-II, they had drinks and when the deceased-Lincon got unconscious, Akhil Ahuja with the help of Miss A and her servant-Kamal Prasad/A2 robbed the gold bangles (bearing inscription "22Kdm MC"), gold chain, diamond ring, tulsi mala, two gold rings/bands, watch, etc. from the Lincon and subsequently, committed his murder.

14. The learned Additional Public Prosecutor for the appellant/State has further submitted that after committing the murder of the deceased-Lincon Gogna, Akhil Ahuja with the help of Miss A and her servant-Kamal Prasad put the dead body into the car of the deceased, i.e. cherry coloured Ford car bearing No. DL-4CF-8614. Then Akhil Ahuja drove the said car to Plawal in a field and thrown

the dead body of the deceased in the field and thereafter, got towed the said car with the help of one Ashok (PW4) and one Virender (PW26) to the shop of one Manjeet Singh (PW32) who on instructions of Akhil Ahuja removed the accessories of the said car and thereafter the car was taken to a puncture repair shop of Nanak Chand (PW11) where all the tyres along with rims and the stephny of the said car were removed and later all the said tyres were sold to Sizaidin-A3, who knowingly that those tyres were stolen procured them.

15. The learned Additional Public Prosecutor for the appellant/State has further pointed out that when the deceased-Lincon Gogna did not reached to his house on 02.03.2001, his whereabouts were taken care of and a call by Dinesh Kumar Gogna (PW45) ,brother of deceased-Lincon Gogna, was made on his Mobile No. 9811224422 which was attended by one Amit who informed that Lincon was not well and had been given an injection for inducing sleep and was sleeping, therefore, he would return later and further informed that he is at C-133, New Friends Colony. Accordingly, Dinesh Kumar(PW45) along with his wife reached the said address but learnt that there was no such address in New Friends Colony, therefore, he suspected that someone had kidnapped Lincon and lodged an FIR with P.S. Tilak Nagar and on the basis of the said information, vide DD No. 37A (ExPW45/A), an FIR No. 103/2001 (ExPW21/A) under Section 365 IPC was registered at P.S. Tilak Nagar.

16. The learned Additional Public Prosecutor for the

appellant/State has further submitted that on the basis of the said DD No.37A (ExPW45/A), when the investigation of searching the Lincon Gogna was put in the process, the Investigation Officer (IO) SI Sita Ram came across the call details record (CDR) of Lincon's mobile phone and upon analysing it was found that there was a call from landline number 6239072 of Park Royal Hotel, Nehru Place. Thereafter, the CCTV footage of the lobby of the said hotel in which the land line present was analysed which revealed that the accused Akhil Ahuja was making the call at the relevant time. It was further found that in the said hotel the accused Akhil Ahuja had parked his car- Opel Astra DL-1F-1211 on the intervening night of 02.03.2001-03.03.2001 and when Akhil Ahuja was interrogated he made disclosure statement of committing of murder of Lincon Gogna with the help of Miss A and her servant Kamal Prasad and further told that he has sold the tyres of Lincon's car to Sizauddin-A3. Thereafter, he was accordingly arrested.

17. The theory propounded by the prosecution is that the motive of committing the murder of the deceased-Lincon Gonga was robbery of the jewellery/articles which the deceased was carrying along with him on the intervening night of 02.03.2001-03.03.2001.

18. It is an admitted case of both the sides that the case of the prosecution is based on circumstantial evidence and there is no eyewitness to the commission of murder of the deceased-Lincon Gogna.

19. The motive plays an important aspect for consideration of commission of the crime in the instant case.
20. It is coming on record that the deceased-Licon Gogna and the accused-Akhil Ahuja were known to each other prior to the date of the incident as they were friends and it is because of this reason that Akhil Ahuja had invited the deceased-Lincon for the birthday party at Park Royal Hotel, Nehru Place. Since the accused-Akhil Ahuja and the deceased-Lincon Gogna were in friendly terms. Nothing subsequently is coming on the record that all of a sudden what went wrong to commit such a heinous crime of committing the murder of the deceased-Lincon Gogna by the accused-Akhil Ahuja. The accused-Akhil Ahuja may not have reached to the decision of committed the murder of his friend Lincon Gogna for the sake of robbery of petty gold jewellery.

Position in Law.

21. The law relating to circumstantial evidence is well settled. In ***Hanumant Govind Nargundkar v. State of Madhya Pradesh; AIR 1952 SC 343***, it was held:-

“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 be 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.”

22. The Apex Court in ***Sharad Birdhichand Sarda v. State of Maharashtra; AIR 1984 SC 1622*** spelt out the following principles governing the law relating to circumstantial evidence which is reproduced as under:-

“1. The circumstances from which the conclusion of guilt is to be drawn should be fully established;

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 Crl. A 805 of 2017 Page 23 of 36 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;

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.”

23. Further the Apex Court in ***State of Haryana v. Jagbir Singh; AIR 2003 SC 4377*** has made the observation as under:-

“It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See Hukam Singh v. State of Rajasthan AIR 1977 SC 1063; Eradu and Ors. v. State of Hyderabad AIR 1956 SC 316; Earabhadrapa v. State of Karnataka AIR 1983 SC 446; State of U.P. v. Sukhbasi and Ors. AIR 1985 SC 1224; Balwinder Singh v. State of Punjab AIR 1987 SC 350; Ashok Kumar Chatterjee v. State of M.P. AIR 1989 SC 1890. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In Bhagat Ram v. State of Punjab AIR 1954 SC 621, it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt. We may also make a reference to a decision of this Court in C. Chenga Reddy and Ors. v. State of A.P. (1996) 10 SCC 193, wherein it has been observed thus: Crl. A 805 of 2017 Page 24 of 36 "In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence....”

Place of the incident.

24. It is the prosecution case that on the intervening night of

02.03.2001-03.03.2001 when Dinesh Kumar Gogna(PW45) brother of the deceased-Lincon Gogna made a call to his brother, i.e. deceased-Lincon Gogna, on Mobile No. 9811224442 which was attended by one Amit who replied that Lincon was not well and had been given an injection for inducing sleep and was sleeping, therefore, he would return later and further informed that he is at C-133, New Friends Colony.

25. The prosecution in order to make a chain of circumstances alleges that the accused Akhil Ahuja made a call from his Mobile No. 9810006681 on the Mobile No. 9811224442 of the deceased-Lincon Gogna and later the accused Akhil Ahuja made a call from landline No. 6239072 of Park Royal Hotel, Nehru Place on the Mobile No. 9811224442 of the deceased-Lincon Gogna for inviting him to the birthday party on the intervening night of 02.03.2001-03.3.2001.

26. As per the prosecution the accused Akhil Ahuja telephone number on the date of the incident, i.e. 02.03.2001-03.3.2001, was 9810006681. However the SIM card of the said mobile number is in the name of one Varun Aneja. The said Varun Aneja is not been interrogated during the investigation as well as he is not cited as a witness to depose that the mobile No. 9810006681 was used by the accused Akhil Ahuja and not by him.

27. The I.O. Inspector Rajender Prasad (PW60) specifically admitted during his cross-examination that the SIM card of the aforesaid mobile number was in the name of one Varun Aneja. The said admission of Rejunder Prasad PW60 is reproduced as under:-

"...It is correct that as per record, mobile

SIM card number 9810006681 was issued to Varun Aneja..."

28. The PW45 Dinesh Kumar Gogna (brother of the deceased- Lincon Gogna) further tried to connect the accused Akhil Ahuja to the incident on the basis of the ransom call of Rs. 20 lacs made by the accused Akhil Ahuja to him on the basis of the conversation recorder in an audio cassette taken place between him and the caller of the said ransom call.
29. There is no explanation coming on record that why the voice sample of the accused Akhil Ahuja was not taken at the time of the investigation or subsequently during the trial before the Trial Court to bring home the guilt of the accused Akhil Ahuja. The cassette so placed before the Trial Court by the prosecution without complying with the certificate under Section 65B of Indian Evidence Act for its authenticity is no evidence. Similarly the CCTV footage of the Park Royal Hotel, Nehru Place without complying with the certificate under Section 65B of Indian Evidence Act for its authenticity is no evidence. Reliance is placed on the judgment of the Apex Court in case **Anwar P.V. vs. D.K. Basheer**; Civil Appeal No. 4226/12 decided on 18.09.2014.
30. Further the prosecution in order to establish the presence of the accused Akhil Ahuja on the intervening night of 02.03.2001-03.03.2001 at GK-II has examined Pradeep Singh PW12 a TSR driver to be a natural witness who has stated that he has seen two boys putting one boy in a cherry coloured Ford car and a girl standing there was saying to those boys that they should remove the third boy

immediately.

31. Before ascertaining the version given by PW12 it is *sine-qua-non* to understand the background of this witness. This witness is a witness who is not trustworthy as he himself is accused in a case under section 420 IPC registered in the same police station, i.e. P.S. Tilak Nagar, and the said admission is reproduced as under:-

"...It is correct that a case U/s 420 IPC was registered against me at PS Tilak Nagar about 6/7 months ago..."

32. Further, during the cross-examination PW12 failed to produce his driving license before the court and was also unable to remember the name of the owner of the TSR which he used to drive. Per contra as per his passport he is a goldsmith. Admittedly, as per his version he spoke to the two boys on the intervening night of 02.03.2001-03.03.2001 when he reached at GK-II as he was not familiar with the address but he failed to bring on record any details of the passengers to whom he was dropping at GK-II 'S' block. Further he is unable to explain where he exactly dropped the passengers at GK-II. Therefore, in the light of the aforesaid reasons the testimony of PW12 does not inspires confidence.

Recovery

33. The prosecution propounded the recovery of the incriminating articles qua against the accused Akhil Ahuja as shown in ExPW23/F and ExPW23/K at the instance of the accused Akhil Ahuja from H. No. S-368, Greater Kailash-II as shown in the site plan ExPW44/A.

34. The prosecution relied upon one Amit Luthra public witness and examined him as PW23 who has denied the recovery of the articles being recovered in his presence and further denied that any disclosure statement being made in his presence. He has also denied knowing the other two accused persons, i.e., Sizauddin(A-3) and Kamal Prasad (A-2). He further denied having seen any articles in the police station. He further denied that any mobile was recovered from the personal search of the accused Akhil Ahuja. He also denied that accused Akhil Ahuja led the police party to H. No.S-368, Greater Kailash-II, New Delhi and got recovered any article from there. However, he admitted his signatures on various memos and disclosure statement i.e. ExPW23/A to ExPW23/D, ExPW23/E1 to E4, ExPW23/F, ExPW23/G, ExPW23/H, ExPW23/J, ExPW23/K, ExPW23/L and ExPW23/M and stated that he had signed all the documents at the instance of PW45, i.e., Dinesh Kumar Gogna. He further stated that those documents were blank when he signed at the police station.

35. At the same time the prosecution has examined PW60 Inspector Rajender Prasad who has given a different version that the articles/jewellery so seized were recovered from No.30, G.K. II, i.e., house of accused Akhil Ahuja. The said statement of PW60 is reproduce as under:-

"...On 06/03/2001 also, accused Akhil Ahuja alongwith other two accused persons i.e. Kamal Prasad and Ayesha Bhagnani (juvenile), accused Kamal Prasad is present in the court today (correctly identified), led

the police party alongwith witness Amit Luthra to H-30, GK II i.e. house of accused Akhil Ahuja and on the second floor, in the room of right side and pointed out one briefcase lying near the T.V. of brown colour, on which, words "Secura" were written having brass locks and could be open with the type of numbers. The same was opened by accused Akhil Ahuja himself and produced one gents gold kara, four ladies gold kara, out of which, on one ladies kara, there were straight lines on sides and horizontal lines in the central portion. On second ladies kara, there were straight lines on sides and half moon like lines in the central portion. On third ladies kara, there were straight lines on the sides of the kara and in between there were square of white colour and on the fourth kara, there were two straight lines on the sides of kara and in between, there were half circle type design of white and pink colour. Accused Akhil Ahuja also produced two golden rings (challa), two gold rings having nine white pearl each, two pieces of Tulsimala and number 221 was found mentioned on the kunda of one piece of mala, one golden chain, one Rudraksh mala, ten female bangles, out of which, there were white colour design on two of the bangles, one Romson wrist watch having black colour glasses, one key, one Air Tel SIM card, one Magic SIM card, one mobile phone Panasonic with SIM card (during investigation, we came to know that this mobile phone was being used by accused Akhil Ahuja with the SIM card of deceased Linkan Gogna), one Siemmens mobile of

black colour made in Germany, one silver colour mobile of Motorola company, one membership card of DDA Sports Complex in the name of accused Akhil Ahuja, one DVD player of Samsung along with booklet, one silver colour remote of DVD player, one purse of green colour, which was having brown colour inside and was found containing Rs.4360/- in the denomination of 43 currency notes of Rs.100/- each, one currency note of Rs.50 and one currency note of Rs.10/-.

Jewellery including five karas and ten bangles also, on which, words "22 KDM" & "MC" were found written and key, all the gold articles, glasses, purse etc. i.e. as mentioned in seizure memo Ex.PW23/K from srl. No.1 to 12 and 19 were sealed in a pullanda with the seal of "RPA" and were seized."

36. The prosecution has not declared PW60 as hostile witness and not cross-examined him on this point.
37. In the instant case, the public witness PW23 Amit Luthra has not supported the prosecution version and went contrary to the statement made by PW59 and PW60.
38. However, when we look at the statement of PW60 Inspector Rajender Prasad, he too has stated in the examination-in-chief that on 06.03.2001 the accused Akhil Ahuja along with Miss A and the accused Kamal Prasad (A3) along with PW23 Amit Luthra led the police party to house No.30, G.K. II, i.e., house of accused Akhil Ahuja.
39. Whereas the prosecution case is that the recoveries were got

effected from the house, i.e. H. No.S-368, Greater Kailash-II, which is the house of Miss A and is the place of incident.

40. When the story of the recovered articles given by the prosecution is from the house of Miss A as shown in the site plan ExPW44/A and the public witness PW23 is not supporting the prosecution version, in such situation it cannot be said that the recovery as alleged is being proved qua against the accused. Further, PW60 is giving a different version of recovery made from the house of the accused Akhil Ahuja which is contrary to the version of the prosecution. Therefore, it cannot be said that the burden of proof which rests on the prosecution is stood complied with. Further the consequential identification of the jewellery item loses its significance.

41. So far the recovery of the tyres of the car of the deceased is concerned, the PW23 has not supported the version of the prosecution. However, it is not clear whether the accused No.3 Sizauddin was a tenant or servant at the shop owned by PW16-Salimuddin and the prosecution has not been able to show that the articles sold are the stolen articles.

42. The Apex Court in ***Trimbak vs. State of Madhya Pradesh; AIR 1954 SC 39*** has made the following observation:-

"5. We are satisfied that this was not the correct way of approaching the decision of a case under Section 411, I.P.C. It is the duty of the prosecution in order to bring home the guilt of a person under Section 411, I.P.C. to prove, (1) that the stolen property was in the possession of the accused, (2)

that some person other than the accused had possession of the property before the accused got possession of it, and (3) that the accused had knowledge that the property was stolen property. There is no reliable evidence to prove either of these facts."

43. Further "*the mere act of possession will not give rise to the inference that the person in possession is the receiver of the stolen property. No inference can also be drawn under section 114 of the Evidence Act in the absence of proof that the property found in possession of another had earlier been stolen*" reliance is placed on the judgment in case ***Smt. Sabitri Sharma vs. State of Orissa; 1986 SCC Online Ori 146.***

44. In view of the aforesaid facts and circumstances and discussion made above, nothing incriminating circumstance is proved qua against the accused persons/petitioners to bring home the guilt of the accused. Reliance is placed on the judgment of the Apex Court in ***Subhash Chand v. State of Rajasthan; (2002) 1 SCC 702*** wherein it was observed as under:-

"...human nature is too willing when faced with brutal crimes, to spin stories out of strong suspicions. Between may be true and must be true there is a long distance to travel which must be covered by clear, cogent and unimpeachable evidence by the prosecution before an accused is condemned a convict."

45. Therefore, we are in the agreement that the circumstances as discussed in the impugned order dated 08.07.2015 at para 5.0 and the

finding thereof requires no interference by this Court. Consequently, the petition seeking leave to appeal is dismissed.

46. LCR file be sent back forthwith along with a copy of this judgment.

47. No order as to costs.

**I.S.MEHTA
(JUDGE)**

**S.MURALIDHAR
(JUDGE)**

NOVEMBER 14, 2017

