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

Reserved on: 4th October, 2018

Decided on: 30th October, 2018

+ **CRL.A.174 /2004**

DEEPAK SARNA

....Appellant

Through: Mr Pramod Kumar Dubey, Mr Rohit Priya Ranjan, Ms Pinky Dubey, Mr Saurabh Kumar, Ms. Shweta Sharma, Mr Prince Tiwari, Ms Trisita Parashar, Mr Ayush Kaushik and Mr Vikhyat Oberoi, Advocates.

versus

STATE (NCT OF DELHI)

....Respondent

Through: Mr Kewal Singh Ahuja, APP for the State.

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE VINOD GOEL**

J U D G M E N T

Dr. S. Muralidhar, J.:

1. This appeal is directed against the judgment dated 9th February, 2004 passed by the learned Additional Sessions Judge, New Delhi ('the trial Court') in Sessions Case No.110/03 arising out of FIR No.975/2000 registered at Police Station ('PS') Malviya Nagar, New Delhi convicting the Appellant of the offences under Sections 302, 364 and 201 of the Indian Penal Code ('IPC') and the consequent order on sentence dated 10th February, 2004 whereby for the offence under Section 302 IPC, the Appellant was sentenced to life imprisonment along with fine of Rs.95,000/- and in default of payment of fine to further undergo rigorous imprisonment

(‘RI’) for four years; for the offence under Section 364 IPC, to undergo life imprisonment; and for the offence under Section 201 IPC, to undergo RI for four years along with fine of Rs.5,000/-, and in default of payment to further undergo RI for one year. It was directed that in case the fine amount was deposited, Rs.90,000/- will be paid to Mr Vinod K. Chaudhary (PW-1), the father of the deceased. All the sentences were directed to run concurrently.

2. The Appellant, who was arrayed as Accused No.3 (‘A-3’) was sent up for trial along with two other co-accused i.e. Gyan Prakash (‘A-1’) and Amit Singh (‘A-2’). However, by the impugned judgment, A-1 and A-2 were acquitted of all the offences with which they were charged.

Charge

3. The charge against all the three accused persons was, first, that they entered into a criminal conspiracy on or before 28th October, 2000 to abduct and murder Manish Chaudhary (‘the deceased’), thereby committing an offence under Section 120-B IPC; secondly, that they abducted the deceased and then murdered him by stabbing and strangulation and disposed of his dead body in a well in village Simbhavali after removing his belongings, thereby committing offences punishable under Sections 302/364/201/404 read with Section 120-B IPC.

Deceased goes missing

4. The case of the prosecution, as it emerged from the version of PW-1, was that PW-1 had an office at Ansari Road, Darya Ganj, Delhi, where he operated his family business of cargo and shipping. The deceased was his son and was also operating the business along with him. According to PW-1,

on 28th October, 2000, he had left his office at around 5.15 pm, and at that time, the deceased, Raj Gupta (PW-23), the driver of the company and a few other staff members had stayed back in the office.

5. The deceased purportedly left the office premises at around 6 pm, along with PW-23 and his driver. According to PW-23, they had made a plan to visit the Sai Baba Temple at Lodhi Road and left in the deceased's Maruti car bearing number 0804, which was a Maruti-800, silver colour, and was driven by the driver of the deceased. The driver was dropped off at the Income Tax Office Circle. Thereafter, the deceased started driving the car. He dropped PW-23 at Sai Baba Mandir in Lodhi Road. The deceased apparently told PW-23 that he was unable to come to the temple as he had to go to Deepak Sarna (A-3) to collect a payment of around Rs.80-90,000/-.

6. The deceased, who would normally reach back home by 9.30 pm, did not return home that night. When PW-1 tried calling the deceased on his mobile phone (ending in 6347), he was unable to get through. PW-1 continued trying to contact the deceased on his mobile phone till 4 am on 29th October, 2000. A number of friends and relatives were also contacted and plenty of them reached the residence of PW-1 by about 5 am. Various hospitals were also searched, but the deceased could not be located.

7. According to PW-1, after 8.30 am, they went to the shop of A-3 in Malviya Nagar. This was on account of the fact that PW-23 had informed PW-1 about the deceased telling him that he was going to A-3 to collect the money owed to him. According to PW-1, they asked the servants at the shop of A-3 whether the deceased had come there on 28th October, 2000. They

answered in the affirmative. Ashutosh (PW-6), a cousin of PW-1, then tried to speak to A-3 on the phone, but he could not be contacted. A message was left with the servants that as and when A-3 came to the shop, he should contact PW-1. The mobile phone number of PW-6 was also left behind with the servants, to be passed on to A-3.

8. At around 10.30 or 11 am, when A-3 came to the shop, he contacted PW-6 and informed him that the deceased had come to him at around 6.30 or 7 pm on 28th October, 2000. He further stated that the deceased had received a call on his mobile phone and had then left at around 8.30 pm. Thereafter, since they had failed to trace the whereabouts of the deceased and thought that A-3 was the last person who had been seen with the deceased, PW-6 took A-3 to the PS to get the missing report lodged.

9. On the evening of 29th October, 2000, PW-1 along with friends and relatives again went to the house of A-3 at around 11 pm. PW-1 has stated that he had known A-3 and his family for the last 28 years. A-3 again stated what he had told PW-6 the previous day, only this time he stated that the deceased had left at around 10 or 10.30 pm.

10. According to PW-1, the deceased had told him that he had given A-3 Rs.80,000/- to Rs.90,000/- from his personal savings. PW-1 later learnt that the deceased had in fact given A-3 Rs.4 to 5 lacs. According to PW-1, the deceased had also told him that A-3 was trying to avoid the deceased whenever he had demanded repayment of the money and, therefore, the relations between him and the deceased had become strained.

11. According to PW-1, the deceased was wearing a gold *kada*, gold chain and diamond ring when he was last seen on 28th October, 2000. He also had a mobile phone of Nokia make and a purse containing money and credit card. A suit and a new shirt were also in the car of the deceased. The bunch of keys with the deceased included not only the keys for the office but also the home.

Complaint to the police

12. On 29th October 2000 PW-6 gave a complaint at PS Malviya Nagar which was recorded as DD No.9-A (Ex. PW-6/1) to the effect that the deceased had gone missing after visiting the shop of A-3 at around 9.30 pm. The mobile number of the deceased was indicated in this complaint. It was stated that there was no suspicion against anyone. This complaint was entrusted to Sub Inspector ('SI') Gurdev Singh (PW-25). According to PW-25, when he first made inquiries from the family of the deceased, they informed him that they had no suspicion on anyone about the kidnapping of the deceased.

13. On 30th October, 2000, PW-1 himself lodged a report with the PS. This time, after analyzing the statements given by A-3, PW-1 felt that he was involved in the matter and as a result, he named A-3 as the last person in whose company the deceased was seen. The report is Ex.PW-1/1.

14. Subsequently, after making inquiries, which were unsuccessful, PW-25 came back to the PS. He received a copy of the FIR (Ex. PW-20/A) which was lodged by PW-1, raising the suspicion against A-3 stating that A-3 had given the deceased a call immediately before his having gone missing. On

31st October, 2000, the relatives of the deceased, including PW-6, Paramjit Singh (PW-5), Subodh (not examined) and some other relatives went to the PS and met PW-25. All of them along with a Constable reached the shop of A-3 at Malviya Nagar. The relatives of the deceased identified A-3. Upon his interrogation, A-3 is supposed to have made a disclosure statement (Ex. PW-2/1) in the presence of Constables Narender (not examined), Gurwir (not examined) and Ashok (PW-2). A-3 was arrested and his personal search conducted.

Recovery of the body

15. According to PW-25, pursuant to the disclosure statement made by A-3, PW-25 proceeded to village Simbhavali, UP. The Station House Officer ('SHO') of PS Malviya Nagar also started for the village in a separate vehicle, followed by relatives of the deceased. They reached village Simbhavali at 3.15 pm on 31st October, 2000. A-3 is supposed to have pointed out a well situated there and informed them that the dead body of the deceased had been thrown in the said well. PW-25 noticed that there were bloodstains on the boundary wall of the well which were faint and illegible. A-3 is further supposed to have disclosed that the clothes on the dead body were removed by A-3 and the other accused and there was only underwear on the body when it was thrown into the well. Some villagers with the help of rope and a bucket enabled PW-25 to see a portion of the body, as it initially was not visible from ground level.

16. PW-25 along with the SHO went to PS Simbhavali and joined SI Hukam Singh (PW-12) along with Constable Ranbir (PW-11) and Constable Paras.

They again reached the well and this time, with the help of the villagers, managed to take the body out. All the relatives of the deceased identified the body, which was thereafter sent to the hospital for post-mortem.

17. According to PW-25, in his disclosure statement A-3 informed about the involvement of other two co-accused persons and the police started looking for A-1 and A-2. They also sought to trace two other persons, namely, Arun and Bunty, who were supposed to have been with A-1 to A-3 in the commission of the crime. However, they were not traceable.

18. PW-25 then went to the place of the incident in Noida, during which time, A-3 was with him. According to him, A-3 pointed out the place of the incident and PW-25 prepared a site plan (Ex. PW-25/B). PW-25 states that A-3 disclosed that they had thrown the knife somewhere there but this could not be traced.

19. On 1st November, 2000, the Appellant was produced before the learned Metropolitan Magistrate ('MM'). Thereafter, A-3 was taken to PS Hauz Khas and placed in a police lockup at 8.30 pm.

Recovery of the car

20. On the morning of 4th November, 2000 PW-25 along with Constables Narender (not examined), Gurwir (not examined) and Ashok Kumar (PW-2) along with ASI Radhey Shyam (PW-16) went to recover the car belonging to the deceased. A-3 is said to have led them to a place in village Dehat, Uttar Pradesh. However, they could not find the car there. They went to PS Dehat, Kotwali District Ghaziabad where the local police informed them

that the car had been seized by them as abandoned on 31st October, 2000 and has been deposited in the said PS. PW-25 then seized the car vide seizure memo Ex.PW-25/C. From there he proceeded to collect the post mortem report and thereafter went to the well where the body was found and prepared a site plan of the well Ex.PW-25/B. He recorded the statements of Mange Ram (PW-9) and Rajpal (PW-10) in respect of recovery of the dead body on 4th November, 2000. The car seized was deposited in the Malkhana at PS Malviya Nagar. The car of A-3 was also seized on 8th November, 2000 vide seizure memo (Ex.PW-25).

Post mortem

21. The post-mortem was performed by Dr. Ajay Aggarwal (PW-19) at around 11.40 am on 1st November 2000. He found the following ante-mortem injuries on the body:-

“The following ante-mortem injuries were found on the body:

- (1) there was incised wound of 4 cm. X 2 cm on right side chest at the level of 10th rib in mid auxiliary line.
- (2) Incised wound of the size 3 cm x 1 cm on right cheek.
- (3) There was ligature mark of the size 34 X 2 cm around the neck.

On internal examination, brain and lungs were found congested. On abdominal examination, it was found full of blood, stomach was found empty and liver as well as small intestine were lacerated.”

22. The cause of death was stated to be ante-mortem injuries at serial numbers 1 to 3, which were sufficient in the ordinary course of nature to

cause death. The time since death was given as 3 days.

23. In his cross-examination, PW-19 admitted that he found two incised wounds on the body of the deceased. The ligature mark was visible with naked eye.

Change of IOs

24. PW-25 stated that on 9th November, 2000, he sustained injuries as a result of stone pelting at Kalkaji. The case was then transferred to SI Neeraj (PW-26). In his examination-in-chief, PW-25 stated that he joined the investigation of the case on 30th October 2000 and on that day itself, it transpired that Bal Mohan @ Vicky (PW-7) informed him that he along with the deceased had consumed liquor at the shop of A-3.

25. In his cross-examination, PW-25 admitted that the investigation remained with him till 8th November, 2000. On 5th November, 2000, PW-25 recorded the statements of certain public witnesses i.e. Paramjit Singh (PW-5), Ashutosh Roy (PW-6) and Alok Srivastava under Section 161 Cr PC. PW-25 after seeing the statements of PWs Paramjit Singh, Ashutosh and Alok Srivastava stated that these three witnesses had told the police in their statements under Section 161 Cr PC that A-3 had disclosed in front of them that the pant containing the keys of the deceased was also thrown in the well. However, after analyzing the statements under Section 161, it was found that while PW-5 had mentioned that the pant containing keys was thrown in the well, PW-6 and Alok Srivastava mentioned only the throwing of pants in the well but made no mention of the keys. It appears that no logs were maintained in the form of DD entries for the departure of the police

from the PS or even the corresponding entries at PS Simbhavali.

26. According to PW-25 on 9th November, 2000 he was injured and therefore the investigation of this case was transferred to Inspector Neeraj Kumar (PW-26).

Arrest of A-1 and A-2

27. How A-1 and A-2 were arrested in the present case is not clear. What is spoken of both by Head Constable Jasbir Singh (PW-3) and Constable Hari Babu (PW-14), both of whom were posted at Police Post, Pushp Vihar attached to PS Malviya Nagar, was that both A-1 & A-2 were arrested and were taken to PS Malviya Nagar where they made separate disclosure statements (Ex.PW-3/1) and (Ex.PW-3/2) respectively. Their personal search was undertaken and arrest memos (Ex.PW14/A) and (Ex.PW-14/B) respectively were prepared.

28. On 13th November, 2000 supplementary disclosure statements were made by them. Even PW-26 has stated that upon taking over the investigation on 9th November 2000, he found the co-accused A-1 and A-2 "sitting in the room of DO, PD Malviya Nagar and I met them". He had then proceeded to arrest the two co-accused and record their disclosure statements which have been referred to above. A-1 and A-2 too took the police to the same well and pointing out memos were prepared. They claimed to have thrown the body after removing the pant and a bunch of keys into the well. According to PW-26, he asked Constable Dharamvir (PW-24) to climb down into the well and a bunch of keys containing 8 keys and a jeans pant of blue colour stained with mud and blood was recovered.

These were sealed vide seizure memo (Ex.PW-3/9). According to PW-26, he got both A-1 and A-2 medically examined on 14th November, 2000.

Filing of charge sheet

29. On 23rd November, 2000 PW-26 was transferred from PS Malviya Nagar. He handed over the case file to SI Raj Shekhar (PW-21) for further investigation.

30. Not much happened with PW-21 as he too was transferred from PS Malviya Nagar in the month of January, 2001. It appears that ultimately, on 13th January 2001, the investigation was handed over to SI Ramesh Kaushik (PW-27). He got the supplementary statement of PW-1 recorded and got "the bunch of keys and two pants subjected to Test Identification Parade ('TIP')." He filed the charge sheet against the three accused as well as the supplementary *challan* against the two absconding accused Bunti and Arun. He also collected the report of the Forensic Sciences Laboratory ('FSL') (Ex.PW-27/A).

Trial

31. Charges were framed against the three accused by the trial Court on 3rd May, 2001 in the manner indicated hereinbefore. They pleaded not guilty and claimed trial.

32. On behalf of the prosecution, 29 witnesses were examined. As far as the statements under Section 313 Cr.PC are concerned, since A-1 and A-2 have been acquitted, it is necessary to notice the answers given by A-3 alone, who was convicted by the trial Court.

33. The Appellant (A-3) denied the incriminating circumstances put to him. In response to the suggestions in questions 18 and 22 that he was a friend of the deceased, he answered that the deceased was known to him but he was not his friend. A-3 denied having gone to the spot where the body was recovered. As regards recovery of the car, A-3 stated that its possession was handed over to the police by his father as per their instructions. He denied making any disclosure statements and claimed that his signatures/initials were forcibly obtained on blank papers by the police. A-3 denied having been associated with the recovery of the deceased's car from the PS Kotwali, Dehat, Ghaziabad. He denied having been taken there and brought back at PS Malviya Nagar. A-3 claimed that he had been falsely implicated. No defence evidence was led.

Impugned judgment of the trial Court

34. The trial court has in the impugned judgment listed out the following circumstances as forming a complete chain which unmistakably pointed to the guilt of the present Appellant:

- “1. Recovery of articles.
 - 1(a) Recovery of dead body on 31.10.2000.
 - 1(b) Recovery of bunch of keys and jeans pant of the deceased on 13.11.2000.
2. Recovery of car of the deceased.
3. Motive
4. Last seen/meeting evidence.

5. Defence.

6. Role of the IO/Investigating officer.”

- (ii) As regards the recovery of the body from the well, the trial Court noticed that PWs 4, 9 & 10 had all turned hostile. Even Constable Ashok Kumar (PW-2) claimed to have got the dead body recovered on 1st November, 2000 and not 31st October, 2000 as claimed by the prosecution. However, PWs 5, 6, 11, 12 and 25 were held by the trial Court to have supported the story of the prosecution. According to the trial Court, there was not even the ‘slightest scintilla of evidence’ which would show that the above witnesses harboured hostility against the accused and there was no reason why they should not be believed. As regards the U.P police officials, the trial Court declared that ‘it had implicit faith in their evidence’. It was accordingly concluded that the fact of recovery of the dead body at the instance of A-3 stood established beyond reasonable doubt.
- (iii) In the same breath, the trial Court found that the investigation by PW-25 was unsatisfactory. The recovery of the bunch of keys and jeans pants on 13th November, 2000 at the instance of A-1 & A-2 was disbelieved by the trial Court and they were held entitled to the benefit of doubt.
- (iv) According to the trial Court, the recovery of the car in the vicinity of the recovery of the dead body ‘further goes to invigorate the circumstantial evidence.’ There was no further discussion on this circumstance.

- (v) As regards the motive, the trial Court referred to the evidence of PW-1, which was supported by the evidence of PW-23 and it was held that although the fact that the deceased had paid A-3 a sum of Rs. 4 to 5 lacs appeared to be 'an afterthought', it stood proved that A-3 owed the deceased Rs.80,000 to 90,000/- and this provided the motive for the crime.

35. The trial Court next discussed the circumstance of last seen. It was held that the version of PW-1 stood corroborated by the versions of PW 5 & 6. It was proved that the deceased had stayed with A-3 till 9.30 p.m. on 28th October, 2000. The simple denial by A-3 in his defence was to no avail. Although the trial Court noted that there were major flaws in the investigation and the murder weapon could not be recovered and no copy of the FIR was sent to the MM or higher authorities, there were no chances the record being manipulated in favour of the prosecution. For the aforementioned reasons, the trial Court held the case against the Appellant to have been proved beyond reasonable doubt and proceeded to convict and sentence him in the manner indicated hereinbefore.

36. This Court has heard the submissions of Mr. Pramod Kumar Dubey, learned counsel for the Appellant and Mr. Kewal Singh Ahuja, the learned APP for the State.

Law relating to circumstantial evidence

37. This is a case based on circumstantial evidence and the law in this regard is fairly well settled. The following observations made by the Supreme

Court in *Sattatiya v. State of Maharashtra (2008) 3 SCC 210*:

“10. We have thoughtfully considered the entire matter. It is settled law that an offence can be proved not only by direct evidence but also by circumstantial evidence where there is no direct evidence. The Court can draw an inference of guilt when all the incriminating facts and circumstances are found to be totally incompatible with the innocence of the accused. Of course, the circumstances from which an inference as to the guilt 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...

... 17. At this stage, we also deem it proper to observe that in exercise of power under Article 136 of the Constitution, this Court will be extremely loath to upset the judgment of conviction which is confirmed in appeal. However, if it is found that the appreciation of evidence in a case, which is entirely based on circumstantial evidence, is vitiated by serious errors and on that account miscarriage of justice has been occasioned, then the Court will certainly interfere even with the concurrent findings recorded by the trial court and the High Court *Bharat v. State of M.P. (2003) 3 SCC 106*. In the light of the above, we shall now consider whether in the present case the prosecution succeeded in establishing the chain of circumstances leading to an inescapable conclusion that the appellant had committed the crime.”

38. In *G. Parshwanath v. State of Karnataka (2010) 8 SCC 593*, the Supreme Court made the following observations when considering a case hinging on circumstantial evidence:

“23. In cases where 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. Each fact sought to be relied upon must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on the one hand and inference of

facts to be drawn from them on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case. The Court thereafter has to consider the effect of proved facts. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accused and should exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. 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, where various links in chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court.”

39. The legal position was summarised in *Padala Veera Reddy v. State of Andhra Pradesh 1989 Supp (2) SCC 706*, as under:

- (a) The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
- (b) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- (c) The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else; and
- (d) The circumstantial evidence, in order to sustain conviction, must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

Last seen

40. The Court would first like to discuss the evidence of last seen. The prosecution has relied on PWs 1,5,6,7, 8 and 23 as being relevant for this circumstance. Of these, as rightly pointed out by learned counsel for the Appellant, only PWs 7 and 8 have actually spoken about the deceased being last seen in the company of A-3. Since both PWs 7 and 8 turned hostile, it is the other witnesses viz., i.e. PWs 1, 5,6 and 23 whose evidence will require to be carefully examined in regard to the evidence of last seen.

41. First, turning to the evidence of PW-1, he left the office before the deceased did and had no occasion to know if on the fateful day i.e. 28th October 2000, the deceased left to meet A-3. In his complaint to the police made on 30th October 2000 (Ex. PW-1/1), PW-1 stated that PW-23 told him that while dropping off PW-23 at the Sai Baba Mandir on Lodhi Road, the deceased told PW-23 that he was going to South Delhi to “meet his friend.” PW-1 did not name A-3 as that friend. He then stated in his complaint:

“We understand through our contact that Manish visited Mr. Deepak

Sarna at 8-L 81 B Lower G Floor at ---Malviya Nagar, N. Delhi. Upon contacting Mr. Deepak Sarna, he confirmed that Manish was with him from 7.30 pm till 10.15 pm at his automobile accessory at the above said address. He was last seen and was with Mr. Deepak Sarna after that there is no trace of him.”

42. But at that stage PW-1 did not suspect A-3. He merely stated in his complaint that: “It seems my son Mr. Manish Chowdhry has been detained by someone to cause harm to him.”

43. The next time PW-1 spoke to the police was when his statement under Section 161 Cr PC (Ex PW-1/DA) was recorded. Although this statement is undated, since it is signed by SI Neeraj Kumar (PW-26) who took over the investigation from PW-25 on 9th November 2000, it is safe to presume that this statement was recorded only thereafter. In this statement PW-1 stated that Vicky (PW-7) a friend of the deceased informed PW-1 on the phone that the deceased was with A-3 that evening. However, with PW-7 turning hostile, this part of the statement of PW-1 was not corroborated.

44. In Court, PW-1 deposed about his having gone along with Ashutosh (PW-6) to the shop of A-3 on 29th October 2000; how they first found his servants who told them that the deceased had come there; that on coming to know of the above fact PW-6 tried to contact A-3 on the phone; that PW-1 himself was nervous and perplexed at that time; that A-3 could not be contacted on phone by PW-6 which persuaded them to leave a message with the servants that as and when A-3 came to the shop he should contact them; that PW-6 left his mobile number with the servants; that at around 10.30 or 11.00 am, when A-3 returned to shop he contacted PW-6 on his mobile

phone informing him that the deceased had come to him and remained with him till 8.30 pm; that A-3 told PW-6 that the deceased had received a call on his mobile phone and left A-3 at 8.30 pm. In the cross-examination of PW-1 it was able to be elicited by counsel for the defence that all of the above statements were improvements. In other words none of the above details were given either in the initial complaint (Ex. PW-1/D1) or in the statement under Section 161 Cr PC (Ex. PW-1/DA).

45. While the above improvements could be viewed as affecting the credibility of PW-1, the fact remains that both in the first complaint given as DD No.9A on 29th October 2000 and in the FIR lodged by PW-1 on 30th October 2000 (PW-1/1) it was mentioned that the deceased had gone to the shop of A-3 in the evening of 28th October 2000.

46. Turning now to the evidence of Paramjeet Singh (PW-5), an acquaintance of PW-1, his statement under Section 161 Cr PC was recorded by SI Gurdev Singh (PW-25) only on 5th November 2000, although PW-25 is supposed to have taken over the investigation on 30th October 2000. There is no explanation for the delay. In Court, PW-5 deposed about his having gone to the shop of A-3 on 29th October 2000 with PW-1 and PW-6 and A-3 having told them that the deceased had come there in his car and left around 7 or 7.30 pm and later stating that the deceased left at around 10 pm, and this leading them to suspect A-3. This statement of his was unable to be discredited in his cross-examination. His further statement that for the second time on 31st October 2000 in the presence of the police, A-3 admitted to the deceased visiting his shop is consistent with what he stated in his

previous statement to the police. On this part too no contradiction could be elicited from PW-5 in his cross-examination.

47. We then have the evidence of Ashutosh (PW-6) who joined PW-1 in searching for the deceased from 28th October 2000 evening itself. Even his initial statement under Section 161 Cr PC was recorded by PW-25 only on 5th November 2000. However, it will be recalled that he gave a complaint on 29th October 2000 itself (DD No.9A) in which he stated that the deceased was last seen visiting A-3 in his shop at around 9.30 pm. While deposing in Court, PW-6 spoke of A-3 admitting to them on 29th October 2000 when they met him, that the deceased had visited his shop in the evening of 28th October 2000. PW-6 also deposed about the second time on 31st October 2000 when A-3, in the presence of the police admitted to the deceased coming to his shop and about his having committed a blunder. In his cross-examination, no contradiction could be elicited from PW-6 about the admission made by A-3 to him on 29th October 2000. In fact in his cross examination PW-6 stated: "It is correct that the missing report (DD 9A) has been lodged by me after having a talk with accd. Deepak." Therefore, both PWs 5 and 6 have supported the case of the prosecution that the deceased visited the shop of A-3 in the evening of 28th October 2000 and remained there till around 10 pm.

48. Turning now to Raj Gupta (PW-23), it will be recalled that in the complaint given by PW-1 to the police (Ex PW-1/1) PW-1 mentions specifically that PW-23 was dropped off by the deceased at the Sai Baba mandir on Lodhi Road and that the deceased told him that he was visiting a

friend. On this material aspect of the deceased dropping him off and then proceeding to South Delhi to visit A-3 no contradiction could be elicited from PW-23 in his cross examination. But then again the statement of PW-23 under Section 161 Cr PC was recorded only on or after 9th November 2000 by PW-26 after he took over the investigation.

49. The picture that emerges from the above discussion is that PWs 1, 5 and 6 are consistent that when he was met by them on 29th October 2000, A-3 admitted that the deceased had visited him on 28th October 2000 in the evening and was there till around 10 pm. However, this by itself will not make this an incriminating circumstance vis-a vis A-3, since the time and place of discovery of the dead body was not proximate to this event. It will be recalled that the post mortem report placed the time of death at 3 days prior thereto which takes it to the morning of 29th October 2000 and not the night of 28th October 2000.

50. The fact that the dead body was found three days later on 31st October 2000 and in a well in village Simbhavali in U.P. at a considerable distance from Malviya Nagar makes this circumstance of last seen a rather weak piece of evidence qua A-3. The legal position in this regard has been explained by the Supreme Court in *State of U.P. v. Satish* (2005) 3 SCC 114, as under:

“The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that 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 that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases.’

51. In *State of Karnataka v. Chand Basha (2015) 3 ACR 3439*, the Supreme Court explained:

“This Court has time and again laid down the ingredients to be made out by the prosecution to prove the ‘last seen together’ theory. The Court for the purpose of arriving at a finding as to whether the said offence has been committed or not, may take into consideration the circumstantial evidence. However, while doing so, it must be borne in mind that close proximity between the last seen evidence and death should be clearly established.”

Delay in recording the statements of witnesses

52. In the present case, the statements of most of the PWs under Section 161 Cr PC were recorded on 5th November 2000 or thereafter, i.e. more than seven days after the deceased went missing and at least five days after the arrest of A-3 on 31st October 2000 and his purported disclosure soon thereafter. The first IO, PW-25, was in charge of the investigation from 30th October till 9th November 2000. Therefore, the change of IO was also not an excuse for not immediately recording the statement of the key witnesses i.e. PWs 1, 5, 6 and 23. No convincing explanation has been offered by the prosecution for this delay.

53. In *Harbeer Singh v. Sheeshpal (2016)16 SCC 418*, the Supreme Court explained the law in relation to the delay in recording the statements of witnesses and the apparent effect of material improvements made by a witness while deposing in the Court. It was observed:

“The Explanation to Section 162 Code of Criminal Procedure provides that an omission to state a fact of circumstance in the statement recorded by a police officer under Section 161 Code of Criminal Procedure, may amount to contradiction if the same appears to be significant, and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact. Thus, while it is true that every improvement is not fatal to the prosecution case, in cases where an improvement creates a serious doubt about the truthfulness or credibility of a witness, the defence may take advantage of the same. [See *Ashok Vishnu Davare v. State of Maharashtra* (2004) 9 SCC 431; *Radha Kumar v. State of Bihar (now Jharkhand)* (2005) 10 SCC 216; *Sunil Kumar Sambhudayal Gupta (Dr.) v. State of Maharashtra* (2010) 13 SCC 657 and *Baldev Singh v. State of Punjab* (2014) 12 SCC 473]. In our view, the High Court had rightly considered these omissions as material omissions amounting to contradictions covered by the Explanation to Section 162 Code of Criminal Procedure. Moreover, it has also come in evidence that there was a delay of 15-16 days from the date of the incident in recording the statements of PW3 and PW9 and the same was sought to be unconvincingly explained by reference to the fact that the family had to sit for shock meetings for 12 to 13 days. Needless to say, we are not impressed by this explanation and feel that the High Court was right in entertaining doubt in this regard.

As regards the incident of murder of the deceased, the prosecution has produced six eye-witnesses to the same. The argument raised against the reliance upon the testimony of these witnesses pertains to the delay in the recording of their statements by the police under Section 161 of Code of Criminal Procedure. In the present case, the date of occurrence was 21.12.1993 but the statements of PW 1 and PW5 were recorded after two days of incident, i.e., on 23.12.1993. The evidence of PW6 was recorded on 26.12.1993 while the evidence of PW 11 was recorded after 10 days of incident, i.e., on 31.12.1993.

Further, it is well-settled law that delay in recording the statement of the witnesses does not necessarily discredit their testimony. The Court may rely on such testimony if they are cogent and credible and the delay is explained to the satisfaction of the Court. [See *Ganeshlal v. State of Maharashtra* (1992) 3 SCC 106; *Mohd. Khalid v. State of W.B.* (2002) 7 SCC 334; *Prithvi (Minor) v. Mam Raj* (2004) 13 SCC 279 and *Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi)* (2010) 6 SCC 1].”

54. While the evidence of all of the above witnesses do not have to be rejected in entirety on account of the above lapse, the possible references made by some of them to certain crucial incriminating aspects may require to be rejected on account of this delay, particularly since by 5th November 2000, the purported disclosure statement of A-3 was already available with the IO. For example both PWs 5 and 6, in their statements under Section 161 recorded on 5th November 2000, advert to A-3 stating on 31st October 2000 in the presence of the police to making a mistake. If their statements had been recorded contemporaneously with the recording of the disclosure of A-3 such statements would have been credible. Likewise, in his statement under Section 161 Cr PC recorded six days after the arrest of A-3, PW-23 discloses about the deceased telling him that A-3 owed him Rs. 80 to 90,000. Considering that this was supposed to provide the motive for the offence, the fact that neither PW-6 in his initial complaint (DD No.9A) nor PW-1 in his first complaint (Ex PW-1/1) makes any mention of this, makes the evidence of PWs 5 and 6 on this aspect unreliable.

Recoveries not proved

55. Coming to the recovery of the dead body of the deceased on 31st

October, 2000 a large number of witnesses are said to have spoken about the circumstance. As already noted by the trial Court three of the witnesses i.e. Baljeet (PW-4), Mange Ram (PW-9) and Raj Pal Singh (PW-10) turned hostile.

56. According to the prosecution, the disclosure was made by A-3 on 31st October, 2000 and the recovery was purportedly made on the same date i.e. 31st October, 2000 as can be seen from the pointing out memo (Ex. PW-2/4). Incidentally this has been attested by Constable Narendra, Constable Gurvir Singh and Constable Ashok Kumar (PW-2). The only one who was examined among these three was PW-2. Far from supporting the prosecution, he actually made a mess of it as already noticed by the trial Court. He gave a completely different version of the recovery having been effected on 1st November, 2000. There appears to be confusion as regards the precise date of the recovery which is evident from the following reply given by him:

“On 31st October 2000 I had not gone in searching the four persons, who, according to Deepak, were also involved in the murder. I do not know as to whether SI Gurdev Singh had gone in search of those four persons or not, on 31.10.2000. (Ld. counsel for the accused submits that he has not been supplied any statement of this witness recorded on 31st October 2000. He submits that if there is any statement dated 31st October 2000 of this witness and of constable Narender and Constable Gurvir Singh, the same be supplied. Ld. A.P.P. submits that as per the case diary statements of these three constables were recorded on 1st November 2000 and there is no statement dated 31st October 2000 of any of these three constables).”

57. Turning next to the evidence of SI Hukum Singh (PW-12), he admitted

in his cross-examination that his statement was recorded by PW-25 only on 4th November, 2000. He further admitted as under:

“I had not obtained sign. or thumb impression of accused Deepak Sarna in either daily diary or Panchnama Ex.PW5/1 to establish the presence of accused Deepak Sarna. I had not recorded any statement of accused Deepak Sarna to establish his presence at Village Simbhavali.”

58. It is doubtful whether he was at all present at the time of the recovery of the dead body. In his cross-examination he stated:

“I had further stated that accused Deepak Sarna led us to the well and pointed out to the same stating the above facts confronted with statement Ex.PW 12/DA where the said facts are not recorded specifically. Vol. I had mentioned this fact in my panchayatnama Ex.PW5/1.”

59. Likewise Constable Raghubir Singh (PW-11) also admitted that his statement was recorded only on 4th November, 2000 i.e. long after the recovery was already affected and not simultaneously along with the recovery. He too made numerous improvements as is evident from the following replies:

“I had stated in my statement under section 161 Cr.PC that accused Deepak Sarna was brought by Delhi police at PS Simbhavali. (confronted with statement Ex.PW11/DA where it is not mentioned that accd. Deepak Sarna was brought to PS Simbhavali.)

I had also stated in my statement that the accd. Deepak Sarna led us to the well and told in my presence that he after killing deceased Manish had thrown the dead body in the said well. (confronted with Ex. PW11/DA where this fact is not recorded).

I do not remember whether I stated in my statement u/s 161 Cr.P.C. that accd. Deepak Sarna was present when the dead

body was lifted out the well. The said fact is not mentioned in Ex. PW11/DA.”

60. The suggestion to PW-11, which he denied, was that the local villagers had already taken out the dead body from the well and this information was already available with the police of PS Simbhavali even before the Delhi Police could reach there. The prosecution has not been able to explain why the statements of PWs 11 and 12 under Section 161 Cr PC were not recorded on 31st October 2000 itself but only on 4th November 2000. They were also not witnesses to the recovery memo.

61. Two other PWs who are supposed to have gone with the police for the recovery of the dead body were PWs 5 and 6. Yet, neither of them were witnesses to any of the recovery memos drawn up in that regard.

62. As far as Paramjeet Singh (PW-5) was concerned, his statement to the police (Ex.PW-5/DA) was recorded only on 5th November, 2000, long after the recovery of the dead body had already been affected. He too turned out to be an unreliable witness as is evident from the answers pursuant to which he was confronted in the Court with his previous statement:

“I had told the police official that from the shop we had gone to the P.S. (confronted with Ex.PW5/DA where it is not so recorded). I had told the police that from the P.S. Deepak Sarna and police officials had gone to village Simbhavali (Confronted with Ex.PW5/DA where it is not so recorded). (The statement Ex.PW5/DA shall be read at the time of final arguments to appreciate this particular fact). I had told the police officials that accd. Deepak Sarna had pointed out the well in village Simbhavali and told that the dead body was in that well. (Confronted with Ex.PW5/DA where it is not, so recorded).

I had told the police that I had also seen the dead body floating in the well (Confronted with Ex.PW5/DA where it is not so recorded). In village Simbhavali my statement was not recorded by the police. I had signed the panchnama. In my presence police officials, had not obtained signature of Deepak Sarna on any paper prepared in village Simbhavali. In my presence police had not prepared any document to establish the fact that accd. Deepak Sarna had gone to Village Simbhavali.”

63. Interestingly, on this aspect PW-6 deposed in the Court that he, PW-5, Alok Srivastava and some others followed the police officials to Simbhavali village in a car and found A-3 there with the police officials and that A-3 “had pointed out the well, and told that the dead body was in that well.” But this deposition was by way of improvement as was evident from the following reply in his cross-examination:

“I had stated to the police in my statement dt. 5. 11. 2000 that accd. Deepak had told (disclosed) on 31st Oct. 2000 that he can get the dead body recovered from the well. (confronted with Ex. PW6/DA where it is not recorded that accd. Deepak had disclosed that he can get the dead body recovered from the well); (voltd. The statement was recorded by the police officials and not by me). I had dictated my statement to the police officials. I do not remember as to whether my statement had been read over to me or not. I do not remember as to whether I got incorporated in my statement Ex.PW6/DA that I had been read over the statement and the same is correct. (confronted with portion A to A of Ex.PW6/DA where it is so recorded). It is wrong to suggest that I am deliberately taking the shelter under the head 'I do not remember' to meet out the material omissions. I had told to police officials that accd. Deepak had pointed out towards the well in Village Simbhavali and told us that the dead body of Manish was lying in that well. (confronted with Ex.PW6/DA, where it is not so recorded).”

64. PW-25 himself was unclear on the question of recovery of the dead body which was supposedly at the instance of A-3, PW-25 stated as under:

“So far as I remember I did not record stt. U/S 161 Cr.P.C. of any witness on 31.10.2000. I had recorded a D.D. Entry in my own hand-writing in respect of my visit to village Simbhavali on 31.10.2000. I do not remember whether I recorded any DD Entry at P.S. Simbhavali on 31.10.2000 in respect of my arrival at Simbhavali. I do not remember whether I got signatures of accd. Deepak Sarna on any official record of P.S. Simbhavali or at the spot in respect of the fact that accused Deepak Sarna was taken at Village Simbhavali on 31.10.2000.”

65. The *panchnama* (Ex.PW-5/1) shows that it was prepared by a policeman at PS Simbhavali and it is not signed by any of the relatives or acquaintances of the deceased who are said to have been present there. It refers to certain enclosures, none of which appear to have been made part of the case property. As regards the place of occurrence and as far as the site plan of the well itself, it appears to be drawn up on 4th November, 2000 whereas the visit to that place was undertaken on 31st October, 2000. The stark fact is that all of the seizure memos concerning A-3 were witnessed by three policemen of whom two were not examined. The one who was viz., PW-2 failed to support the prosecution. The Court is therefore not satisfied that the evidence placed on record proves the recovery of the dead body at the instance of A-3.

66. The recovery of the keys and the jeans pant at the instance of A-1 and A-2 has already been disbelieved by the trial Court and therefore, this circumstance also cannot be used to connect A-3, the present Appellant,

with the crime. Moreover PW-25 was unclear whether it was A-3, who had told the police about throwing the keys and the jeans pant in the well. The following answers given by him bring this out:

“On 31.10.2000 when I recorded the disc. Stt. of accused Deepak Sarna I came to know the fact that pant containing keys of deceased were thrown in a well. I have gone through the disc. stt. dt. 31.10.2000 Ex.P.W.2/1 There is no such stt. regarding throwing of pant with keys of deceased Manish Choudhary into well.”

67. As far as the recovery of the car of the deceased is concerned, it is plain that the said car had already been recovered by the police at PS Dewat District, Ghaziabad. No blood stains were found in either that car or the car of A-3. The car so recovered was not sent to the FSL for an opinion. No chance prints were recovered from such cars. As far as the place of the incident itself, the site plan (Ex.PW-25/B) has no signature of any witness. No blood stains were found at the spot. The signature of A-3 is also not found there. This is true also of the site plan of the place of recovery of the dead body. It has already been noticed that the weapon of the offence was not recovered. Even the Call Detail Records of the mobile phones of the deceased and of A-3 or even PWs 1 and 6 were not collected. These might have given the police valuable clues of the movement of the deceased and the others on the date he went missing. Not insignificantly, the trial Court has itself commented adversely on the quality of investigation and has passed strictures against the IOs in the case.

Motive

68. The Court next examines the motive for the crime. There were three

reasons given by the prosecution to explain the motive. One was that the deceased was in a relationship with the sister of A-3 and A-3 was unhappy with this. There is no *iota* of evidence to prove this motive.

69. The second reason is that the deceased had given A-3 a loan of Rs. 80,000 to 90,000/- which he wanted to recover. This emerged both in the statement of PW-23 recorded on or after 9th November 2000 (Ex. PW-23/DA) and in the supplementary statement of PW-1 (Ex. PW-1/DA) recorded by SI Neeraj Kumar (PW-26) on or after 9th November, 2000 when he took over the investigation. This was not disclosed at the first available opportunity either by PW-6 whose complaint (DD 9A) was given on 29th October 2000 or PW-1 who gave a complaint on 30th October 2000. These statements were inadmissible as evidence. The legal position has been explained in *V.K. Mishra v. State of Uttarakhand (2015) 9 SCC 588* as under:

“15. Section 162 Code of Criminal Procedure bars use of statement of witnesses recorded by the police except for the limited purpose of contradiction of such witnesses as indicated there. The statement made by a witness before the police Under Section 161(1) Code of Criminal Procedure can be used only for the purpose of contradicting such witness on what he has stated at the trial as laid down in the proviso to Section 161(1) Code of Criminal Procedure. The statements Under Section 161 Code of Criminal Procedure recorded during the investigation are not substantive pieces of evidence but can be used primarily for the limited purpose: (i) of contradicting such witness by an accused Under Section 145 of Evidence Act; (ii) the contradiction of such witness also by the prosecution but with the leave of the Court and (iii) the re-examination of the witness if necessary.

16. Court cannot *suo motu* make use of statements to police not proved and ask question with reference to them which are inconsistent with the testimony of the witness in the court. The words in Section 162 Code of Criminal Procedure "if duly proved" clearly show that the record of the statement of witnesses cannot be admitted in evidence straightway nor can be looked into but they must be duly proved for the purpose of contradiction by eliciting admission from the witness during cross-examination and also during the cross-examination of the investigating officer. Statement before the investigating officer can be used for contradiction but only after strict compliance with Section 145 of Evidence Act that is by drawing attention to the parts intended for contradiction."

70. The third reason viz., the borrowing of 4 to 5 lakhs by A-3 from the deceased has been disbelieved even by the trial Court. PW-1 has admitted that he did not mention in his statement to the police about the deceased wearing a gold *kada*, diamond ring, gold chain and having a purse containing money and credit cards or the suit and new shirt being in the car. In any case, none of these items were recovered by the police. Consequently, the Court is not satisfied that the prosecution has been able to prove the motive for the commission of the offence. In a case of circumstantial evidence, where the other circumstances have not been cogently and conclusively proved by the prosecution, the motive for the commission of crime is a critical link and it becomes incumbent on the prosecution to prove it if it has to show that the complete chain of circumstances points unmistakably to the guilt of the accused. In *Arjun Marik v. State of Bihar* 1994 Supp (2) SCC 372, the Supreme Court explained:

"...mere absence of proof of motive for commission of a crime cannot be a ground to presume the innocence of an accused if the involvement of the accused is otherwise established. But it

has to be remembered that in incidents in which the only evidence available is circumstantial evidence then in that event the motive does assume importance if it is established from the evidence on record that the accused had a strong motive and also an opportunity to commit the crime and the established circumstances along with the explanation of the accused, if any, exclude the reasonable possibility of anyone else being the perpetrator of the crime then the chain of evidence may be considered to show that within all human probability the crime must have been committed by the accused.”

71. The result of the above discussion is that among the circumstances outlined by the trial Court, except the evidence that the deceased was perhaps in the company of A-3 till around 10 pm on the night of 28th October 2000, the other links in the chain of circumstances viz., the recovery of the dead body, the recovery of the clothes and the car of the deceased at the instance of A-3; and importantly, the motive for the commission of the crime have not been conclusively proved by the prosecution. In other words the prosecution has failed to show that it is A-3 and A-3 alone who is responsible for the death of the deceased.

72. In *Subash Chand v. State of Rajasthan 2001 Supp (4) SCR 163*, the Supreme Court explained that in a case of circumstantial evidence, the Court should:

“...proceed to examine each of the pieces of incriminating circumstantial evidence so as to find out if each one of the circumstantial evidence is proved individually and whether collectively it forges such a chain of incriminating circumstances as would fasten the guilt on the accused beyond by shadow of reasonable doubt.”

73. Further in the same decision, the Supreme Court observed:

“Though the offence is gruesome and revolts the human conscience but an accused can be convicted only on legal evidence and if only a chain of circumstantial evidence has been so forged as to rule out the possibility of any other reasonable hypothesis excepting the guilt of the accused. In *Shankarlal Gyarsilal Dixit v. State of Maharashtra AIR 1981 SC 765*, this Court cautioned - "human nature is too willing, when faced with brutal crimes, to spin stories out of strong suspicions". This Court has held time and again that 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.”

74. Incidentally, the case of the prosecution throughout was that five persons, including A-3, were involved in the murder. Against two of the five, viz., Arun and Bunti, no charges were framed. The charges were that A-1, A-2 and A-3 entered into a criminal conspiracy and pursuant thereto all three of them abducted and killed the deceased and then threw away the body in a well to conceal their crime. With the trial Court having acquitted both A-1 and A-2 the above case came apart. The trial Court has proceeded on the basis that notwithstanding the acquittal of A-1 and A-2, the remaining accused viz., A-3 can still be convicted as if he alone abducted and killed the deceased and all by himself disposed of the dead body. But then, that was never the case of the prosecution.

No substantive charge against A-3 under Sections 302, 364 and 201 IPC

75. This brings us to the question of the error committed by the trial Court in convicting A-3 for the substantive offence under Sections 302, 364 and 201 IPC although no charge to the effect was framed against him. As pointed out by Mr. Dubey, there were two charges framed against all three accused. The

first was for the offence of criminal conspiracy punishable under Section 120 –B IPC and the second for the offences punishable under Sections 302/364/201/404 IPC read with Section 120-B IPC. With A-1 and A-2 having been acquitted and that acquittal not having been challenged by the State, the charge under Section 120-B IPC had to fail even against A-3.

76. The second charge was against all the three accused collectively and not individually against the present Appellant (A-3). In other words, there was no charge against A-3 alone for the substantive offence punishable under Sections 302, 364 and 201 IPC. No move was made by the prosecution to amend the charges to that effect.

77. This is indeed a fatal flaw as explained in several judgments of the Supreme Court. In *Nanak Chand v. State of Punjab AIR 1955 SC 274*, the facts were that the Appellant along with six other co-accused was charged with committing the offences under Section 148 and Section 302 read with Section 149 IPC. The trial Court while acquitting three of the accused, convicted the Appellant and three others for the offence under Section 302 read with Section 34 IPC. In the further appeal, the High Court acquitted three of the remaining accused of the offence under Section 302 read with 34 IPC and convicted them for the offence under Section 323 IPC. It was held that Section 34 IPC did not apply. The High Court convicted the Appellant alone for the substantive offence under Section 302 IPC. The Supreme Court accepted the submission of the Appellant that this was impermissible in law. It was held: “The High Court could not do what the trial Court itself could not do, namely, convict under Section 302, as no

separate charge had been framed under that section.”

78. The Supreme Court in *Nanak Chand v. State of Punjab* (*supra*) then dealt with the plea of the prosecution that this at best was an error in the framing of the charge and therefore a curable irregularity. Rejecting that plea, the Supreme Court held (referring to the corresponding provisions of the 1898 Cr PC):

“In the present case, however, there is no question of any error, omission or irregularity in the charge because no charge under section 302 of the Indian Penal Code was in fact framed. Section 232 of the Code of Criminal Procedure permits an appellate court or a court of revision, if satisfied that any person convicted of an offence was misled in his defence in the absence of a charge or by an error in the charge, to direct a new trial to be had upon a charge framed in whatever manner it thinks fit. In the present case we are of the opinion that there was an illegality and not an irregularity curable by the provisions of sections 535 and 537 of the Code of Criminal Procedure. Assuming, however, for a moment that there was merely an irregularity which was curable we are satisfied that, in the circumstances of the present case, the irregularity is not curable because the appellant was misled in his defence by the absence of a charge under section 302 of the Indian Penal Code.

By framing a charge under section 302, read with section 149 of the Indian Penal Code against the appellant, the Court indicated that it was not charging the appellant with the offence of murder and to convict him for murder and sentence him under section 302 of the Indian Penal Code was to convict him of an offence with which he had not been charged. In defending himself the appellant was not called upon to meet such a charge and in his defence he may well have considered it unnecessary to concentrate on that part of the prosecution case.”

79. In *Suraj Pal v. State of U.P. AIR 1955 SC 419*, the facts were that the Appellant and 19 other accused were charged with committing offences under Sections 147, 323/149, 307/149 and 302/149 IPC. While the trial Court held all the accused guilty of the various offences, in appeal the High Court set aside the conviction of 10 of the 20 accused. Of the remaining 10 the High Court found that nine of them could not be convicted either under Section 307/149 or Section 302/149IPC. They were convicted for the offence under Section 323/149 IPC. However, the High Court held the Appellant alone guilty of the substantive offences under Sections 307 and 302 IPC. The Supreme Court noted that the specific charges framed referred to all of the accused acting together pursuant to a common object and firing upon the deceased. There was no amendment to the charge to call upon the Appellant to defend himself for the substantive charge for the offences under Section 302 and 307 IPC as if he was acting alone. The Supreme Court held this to be unsustainable in law and observed:

“The appellant might well have relied on the absence of any such amendment as being an indication that he was not called upon to defend himself on the footing of his being the author of the pistol fire. In a case so serious as that which involves the sentences of transportation for life, and of death, and particularly in a case like the present one, where the death sentence has been awarded in the trial court by distinguishing this appellant from all the other accused in respect of his individual act by way of pistol fire, it is difficult to say that the accused has not been prejudiced by the absence of specific charges under sections 307 and 302, Indian Penal Code.

Further, the medical evidence indicates that P.W. 2 as well as the deceased Surajdin had gun-shot wounds on their person. The evidence of the Doctor is to the effect that these wounds

may have been caused by a country pistol which, it is alleged, the appellant had in his hand. It has been suggested on behalf of the defence that the Medical Officer was not competent to speak about it and that if the prosecution wanted to rely thereupon, they should have called an arms expert to speak to the same. Whether or not this comment is legitimate, it is clear that if the appellant is to be found directly responsible for inflicting the wounds, noted as gun-shot wounds by the Medical Officer, he might well have availed himself of the opportunity to elucidate, by cross-examination or positive defence, the nature of the fire-arm which would have caused the actual injuries found on the bodies of PW-2 and of deceased Surajdin. **In all the circumstances above noticed, we are satisfied that the absence of specific charges against the appellant under sections 307 and 302, Indian Penal Code has materially prejudiced him.** We must accordingly set aside the convictions and sentences of the appellant under sections 307 and 302 of the Indian Penal Code.” (emphasis supplied)

80. Again in *Subran @ Subramaniam v. State of Kerala (1993) 3 SCC 32* the Supreme Court explained the legal position as under:

“11. Since, appellant 1 Subran had not been charged for the substantive offence of murder under Section 302 IPC, even the trial court, which tried the six accused persons, was not justified in recording a conviction against him for the substantive offence of murder punishable under Section 302 IPC after framing a charge against him for the offence under Section 302 read with Section 149 IPC only. A person charged for an offence under Section 302 IPC read with Section 149 cannot be convicted, of the substantive offence under Section 302, IPC without a specific charge having been framed against him as envisaged by law. Conviction for the substantive offence in such a case is unjustified because an accused might be misled in his defence by the absence of the charge for the substantive offence under Section 302 IPC simpliciter and, therefore, in defending himself, he cannot be said to have been called upon to meet that charge and he could very well have considered it

unnecessary to concentrate on that part of the prosecution case during the cross-examination of the prosecution witnesses. Therefore, the conviction of the first appellant for an offence under Section 302 was not permissible.”

81. In *State of West Bengal v. Bindu Laxman Dass 1995 SCC (Crl) 175*, the husband and wife were both charged with committing the offence under Section 302/34 IPC. With the husband being acquitted, the wife could not have been convicted for the substantive offence. The Supreme Court observed:

“Both husband and wife were charged with an offence under Section 302 read with Section 34 I.P.C. The charge which was based on the common intention of the two failed with the acquittal of the husband and there being no charge under Section 302 simpliciter against the wife she could not be convicted. In any case there is no evidence on the record to show that she independently committed the offence.”

82. In the present case, admittedly there was no charge framed against the Appellant (A-3) for the substantive offences under Sections 302, 364 and 201 IPC. Consequently, the trial Court could not have proceeded to convict him for those offences.

Conclusion

83. The net result of the above discussion is that the prosecution has not been able to prove each of the links in the chain of circumstances or that the proved circumstances point unmistakably to the guilt of the Appellant. In any event, the trial Court erred in convicting the Appellant for the substantive offences under Sections 302, 364 and 201 IPC when there was no charge framed against him to that effect.

84. The Appellant is accordingly acquitted of the offences punishable under Sections 302, 364 and 201 IPC. The impugned judgment of the trial Court and the order on sentence are accordingly set aside.

85. The appeal is allowed. The bail bonds and surety bonds of the Appellant stand discharged.

86. The Appellant will fulfil the requirement of Section 437-A Cr.PC to the satisfaction of the trial Court at the earliest.

87. The trial Court record be returned together with a certified copy of the judgment.

S. MURALIDHAR, J.

VINOD GOEL J.

OCTOBER 30, 2018

rd/mw