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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CRL.A.209/2016

Reserved on: January 04, 2018

Pronounced on: February 06, 2018

ANIL THAKUR

..... Appellant

Through: Mr. Bahar U. Barqi with Mr. M.
Rais Farooqui, Advocates.

versus

STATE NCT OF DELHI

..... Respondent

Through: Ms. Radhika Kolluru, APP.

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

JUDGMENT

Dr. S. Muralidhar, J.:

1. This appeal by, Anil Thakur, is directed against the impugned judgment dated 31st October 2015 passed by the learned Additional Sessions Judge (Special Fast Track Court), East, North East & Shahdara Districts, Karkardooma Courts, Delhi in Sessions Case No.95/13 arising out of FIR No.425/09 dated 26th November 2009, registered at Police Station ('PS') Shahdara, convicting him of the offences under Sections 376/302/201 Indian Penal Code ('IPC') and the order on sentence dated 26th November 2015 whereby the Appellant was sentenced to undergo

- (i) imprisonment for life and a fine of Rs. 10,000 for the offence punishable under Section 302 IPC and in default of payment of

fine, to undergo simple imprisonment ('SI') for a period of one month;

- (ii) rigorous imprisonment ('RI') for ten years and a fine of Rs. 10,000 for the offence punishable under Section 376 IPC and in default of payment of fine, to undergo SI for a period of one month; and
- (iii) RI for three years and a fine of Rs. 5,000 for the offence punishable under Section 201 IPC and in default of payment of fine, to undergo SI for a period of one month.

2. At the outset, it requires to be noticed that along with the Appellant – who was Accused No. 1 (A-1) – there were three other co-accused, i.e. Avdesh Pandey (A-2), Mahesh (A-3) and Zulfikar @ Bhondu (A-4). However, A-2 to A-4 were acquitted by the same judgment of the learned ASJ for the aforementioned offences, i.e. under Sections 302/201/34 IPC as well as the offence under Section 376 (ii) (g) IPC.

The case of the prosecution

3. On 25th October 2009, information was received at the Police Control Room ('PCR') at about 1.10 pm that a dead body was seen lying in a *ganda nala* at 1/4793, Balbir Nagar Extension, Street No.10 and this information was reduced in writing as DD No.20A. The said DD was assigned to Assistant Sub-Inspector S.P. Singh (PW-31) who then reached the spot along with Constable Narain Singh and found the dead body of a female aged 20-22 years. Inspector Ombir Singh (PW-36), who was posted at PS Shahdara as Inspector (Investigation) also reached the spot. According to

PW-31, he learnt that the dead body was of Dolly (deceased), the daughter of Mahesh Chand (PW-1) who was a resident of Pijanji Village, Sarojini Nagar. A missing person report had already been lodged in respect of the deceased. The crime team was called to the spot and photographs of the dead body were taken. Upon search of the dead body with the help of lady police, three rings of silver, one ring of iron, one ear top, cash amounting to Rs. 85, and one DTC ticket of Rs. 5 were seized (Ex.PW-23/A). The dead body was sent to Guru Tegh Bahadur ('GTB') Hospital for preservation.

4. Meanwhile, on 23rd October 2009, PW-1 had lodged a missing person report at PS Sarojini Nagar (Ex.PW-1/D). He stated therein that the deceased, who was working in a private company, had left home for her workplace in the morning of 22nd October 2009 and did not return home. According to PW-1, he tried to contact the deceased on her mobile phone but it was switched off. He kept searching for his daughter the whole night till the evening of the following day, i.e. 23rd October 2009. Thereafter he went to PS Sarojini Nagar and lodged a missing person report.

5. According to PW-1, on 26th October 2009, he came to know through the news that an unclaimed dead body of a young girl had been located by the police of PS Shahdara. PW-1 then went to PS Shahdara on 26th October 2009 and identified the dead body at the GTB Hospital mortuary to be that of his daughter. The statements of PW-1 and Rahul (PW-4), elder brother of the deceased, were recorded. It should be mentioned here that when they went to PS Shahdara, they were accompanied by Sharda (PW-2), mother of the deceased.

Post-mortem report

6. The post-mortem of the dead body was conducted by Dr. Shweta Garg on 26th October 2009 at the GTB Hospital. Her signature on the report was subsequently identified by Dr. Neha Gupta (PW-26). The post-mortem report (Ex.PW-26/A) revealed the following external injuries:

“(1) Reddish colour bruise of size 6 cm x 7.2 cm present over right side breast, upper inner quadrant, medially, 3 cm from midline.

(2) Reddish abrasion of size 2.cm x 2 cm present over forehead just above glabellas in midline.

(3) Reddish abrasion of size 0.5 cm x 1.2 cm present over left side forehead, 1 from midline, 2 cm above medial end of left eyebrow.

(4) Reddish abrasion of size 2.5 cm x 2 cm present over right side forehead, 2 cm above middle of right eyebrow, 1.5 cm from midline.

(5) Reddish abrasion of size 1 cm x 1.5 cm present over tip of nose.”

7. On the examination of genital area, hymenal tear was seen at 1, 3, 5, 7 and 9 o'clock positions. It was noted that the tears were extending beyond the hymenal marks. The time since death was stated to be “about three days”. It was further stated that the opinion as to the cause of death “will be given after receiving the report of viscera which is sent to CFSL for chemical analysis”. The injuries were ante-mortem and produced by “blunt force impact”. The tears present in vaginal hymen was said to be recent in origin. However, the low vaginal and high vaginal swabs and smears were kept for

chemical analysis “for the presence of semen and semen grouping”.

Investigation of the crime and arrest of the accused

8. The Court considers it pertinent to note that, on recovery of the dead body, no FIR was registered immediately for reasons that are as yet unknown. The FIR 425/09 (Ex.PW9/A) shows that it was registered only on 26th November 2009 at 10.50 pm. This happened to coincide with the date on which the investigation of the case was entrusted to PW-36.

9. On the next date, i.e. 27th November 2009, he along with ASI Surender Pal Singh inspected the place of recovery of the dead body. It has come in the evidence of PW-36 that one Ravi (PW-8), whom the deceased had contacted through her mobile phone, as noticed in the call detail records (‘CDR’), was called to the police station and his statement under Section 161 Code of Criminal Procedure (‘CrPC’) was recorded. According to PW-36, the parents and brother of the deceased came to the police station on their own and their statements under Section 161 CrPC were recorded.

10. It is in these statements that it was first disclosed by PW-2 that the deceased had informed her that A-1 was her friend. She also stated that A-1 had expressed a desire to marry the deceased. According to PW-2, she had noted down Anil’s number and had contacted him on 23rd October 2009 after Dolly went missing. She claims that Anil told her that he and Dolly were in the midst of an ongoing quarrel and had not spoken for 2-3 days. He is stated to have been evasive as to where she might be.

11. PW-36 stated that local inquiries were thereafter made on 29th November 2009 at Balbir Nagar, New Modern Shahdara, Jagatpuri etc. According to him, one Pradeep Jain (PW-5), who met the police near the railway *fatak* of Jagatpuri, identified the photograph of the deceased and stated that he had seen the deceased with A-1, A-2, A-3, and A-4 on 22nd October 2009. PW-36 then learnt that A-1 used to frequent a mobile shop located at Gali No.8, Jagatpuri. He recorded the statement of Mohit Aggarwal (PW-7) who was running the said mobile shop.

12. Thereafter, several attempts were made to trace the accused. On 3rd December 2009, PW-36 along with Head Constable Virender, Ct. Sanjeev, and Ct. Gagan are stated to have left for Sultanpur, UP and reached there on 4th December 2009. Raids were conducted at villages Purasukha and Sakrawa where the relatives of A-1 resided but none of the accused could be traced. A raid was also conducted at village Umri on 6th December 2009 but the accused could not be found. This continued at different villages from 9th-11th December 2009.

13. On 18th January 2010, PW-36 is stated to have gone to District Urai in UP by private vehicle. On 19th January 2010, they reached the Court of the learned ASJ, District Urai where A-4 was to appear in a case. However, the learned ASJ was on leave that day and the counsel for A-4 had moved an exemption application. When they returned to PS Shahdara on 20th January 2010, PW-36 came to know that A-2 had moved an application for surrender which was fixed for 21st January 2010. A-2 ultimately surrendered before the Link Metropolitan Magistrate on 22nd January 2010

where PW-36 interrogated him and arrested him. Since A-2 was a juvenile, the learned MM refused the permission sought for remanding him in police custody for three days and instead sent him to an observation home for boys. The learned MM directed PW-36 to have A-2's date of birth ascertained from the concerned school.

14. On 23rd January 2010, a secret informer purportedly told PW-36 and his team, who were at Mandoli Road at 7.00 am, that A-1 had returned to Delhi and would go to his house at Gali No.12, New Modern Shahdara. At around 7.15-7.30 am they noticed one person coming from Jagatpuri. That person was pointed out by the secret informer as A-1. PW-36 and his team immediately arrested A-1. Ct. Kishan Pal (PW-35), who was present there, knew A-1 as he had been posted at PS Shahdara for a long time.

15. Thereafter, A-1 is said to have led the police to his residence at No.4649/333, Gali No.12, New Modern Shahdara and purportedly pointed out the place where he committed the rape and murder of the deceased along with the co-accused persons. He is supposed to have pointed to a motorcycle bearing registration DL-5-SX-0930 and disclosed that it had been used to dispose of the dead body. A-1 is supposed to have led the police to the *ganda nala* where he along with the co-accused had disposed of the dead body. A-1 was then sent to GTB Hospital for medical examination.

Charge sheets filed

16. Initially, a charge sheet was filed in respect of A-1 and A-2 before the concerned Court. It was mentioned in the charge sheet that the investigation

qua A-3 and A-4 was ongoing and that a supplementary charge sheet will be filed after their arrest.

17. According to PW-36, he learnt that A-3 was in judicial custody in some other case which was being investigated by PS Mansarovar Park. With the permission of the Court, he was arrested from Tihar Jail on 6th May 2010 and produced before the Court on the following day. Permission was granted for his remand in police custody for one day and he underwent medical examination at GTB Hospital.

18. On 21st May 2010, PW-36 along with two other policemen reached the Court before which A-4 was going to surrender. When he did surrender, PW-36 arrested him with the permission of the Court. His interrogation led to a disclosure statement (Ex.PW-21/F). He was taken for medical examination and then remanded to judicial custody. A supplementary charge sheet was filed *qua* A-3 and A-4 after completion of the investigation.

19. At this stage, the Court finds it pertinent to note what is stated in the main chargesheet and in the supplementary chargesheet. According to the first chargesheet, in the afternoon of 22nd October 2009, A-1 had brought the deceased with him and both of them, along with A-3 and A-4, started consuming liquor. A-4 had secretly spiked the deceased's drink with a sedative tablet. Then, as per the chargesheet, A-1 had sexual intercourse with the deceased. Thereafter, when the other three accused also wanted to do so, the deceased refused, upon which the three accused forcibly raped her. When the deceased stated that she would lodge a complaint with the

police, A-1 strangled her with the belt and sat on her chest. A-3 and A-4 tightened the belt and after a while, the deceased went quiet. The four accused then placed her on a motorcycle and when they were passing by the *ganda nala* in Balbir Nagar, the deceased showed signs of struggle upon which A-1 again pressed her neck and the four of them then lifted her body and flung it into the *ganda nala*.

20. In the supplementary charge sheet, the details of the arrest of A-3 and A-4 were given. The details were also given of what possibly happened since the CDRs of the mobile phones purportedly used by A-1 and the deceased were now available. It was stated that on 22nd October 2009, A-1 called up the deceased and asked her to meet him at the gate of the PVR at Anand Vihar. He then took her home where A-2, A-3, and A-4 were consuming drinks. A-2, A-3, and A-4 then left the home of A-1. Thereafter, A-1 and the deceased ate food from Janata Hotel and engaged in sexual intercourse. The deceased is stated to have switched off her phone when she reached the house of A-1.

21. In the evening, A-2, A-3 and A-4 returned to A-1's house and all of them again consumed alcohol and *charas*. The fact of A-4 mixing a sedative tablet in the beer consumed by the deceased was reiterated. A-1 then had sex with her. Thereafter, A-2, A-3, and A-4 purportedly came into the same room and, with the acquiescence of A-1, raped the deceased. When the deceased turned on her mobile phone threatening to complain to the police she received a text message. At that point, A-2 snatched the phone and sent a text message to someone and then shut it down. This was at around 2.00

am.

22. At around 3.30 am, when the deceased refused to let the matter lie, A-1 strangled her neck with a belt and also sat on her chest. While A-2 held her, A-3 and A-4 pulled the belt tight. A-1 then pressed hard on the face of the deceased with a pillow. After checking that she was dead, they placed her dead body on the motorcycle which was being driven by A-2 and the deceased was made to sit between him and A-3. On the other motorcycle were A-1 and A-4. When they were in Balbir Nagar driving along the *ganda nala*, A-2 noticed that the deceased was still alive and that her eyes were opening and she was getting alarmed. At that time, A-1 again pressed her neck and then all four of them threw her dead body in the *ganda nala*.

Charges

23. After the two charge sheets were filed, the trial Court proceeded to frame charges and by an order dated 14th March 2011 the charges were framed against the four accused as under:

“I, Nisha Saxena, Additional Sessions Judge-05 (NE), Karkardooma Courts, Delhi, do hereby charge you (1) Anil Kumar (2) Awdesh Pandey, (3) Mahesh (4) Zulfikar @ Bhondu as follows:

That on 23rd October 2009 near dirty drain, Balbir Nagar, Delhi you all in furtherance of common intention committed murder of deceased Dolly by intentionally or knowingly causing death of deceased Dolly and thereby committed an offence punishable under Section 302/34 IPC and within my cognizance.

Secondly, that on the intervening night of 22/23rd October 2009 at H. No. 4649/333, Gali No. 12, New Modern Shahdara, Delhi

you all committed gang rape upon the prosecutrix Dolly against her wishes and without her consent and thereby committed an offence punishable under Section 376 (2) (g) IPC and within my cognizance.

Thirdly, after having attempted to kill Dolly you all in furtherance of common intention caused the evidence of commission of that offence to disappear by throwing the dead body in a dirty drain with the intention of screening yourself from legal punishment and thereby committed an offence punishable under Section 201/34 IPC and within my cognizance.

And I hereby direct that you all be tried by me for the aforesaid charges.”

24. What is significant to note is that the charges were framed in a manner such that all of them are indicted of having committed the crime together. In other words, it is not the case of the prosecution, as set out in the charge, that the crime was committed jointly and severally by the accused persons. As per the charge, either the accused persons committed the offences together or none of them did. This is evidenced from the first and second charge where there is no further individual charge made against any of the accused committing the substantive offence, whether it is murder punishable under Section 302 IPC or rape punishable under Section 376 IPC. The second charge, in fact, is only of gang rape punishable under Section 376 (2) (g). In the alternate, rape may have been committed by any of the accused individually in which case the offence would be punishable under Section 376 IPC which was not contemplated by the prosecution. The words used are “you all committed gang rape upon the prosecutrix” and not that as an alternative anyone of them committed rape upon her individually.

Impugned judgement of the trial Court

25. In the impugned judgment dated 31st October 2015, the circumstances put forth by the prosecution to prove its case were set out as under:

“(a) Post-mortem report Ex.PW26/A records that there were injuries on the body of the deceased and all the injuries were ante-mortem in nature and produced by blunt force impact. It also records certain injuries on the private part of the deceased. It also records that tears near her private parts and on the vaginal hymen are of recent origin. This shows that the deceased was sexually assaulted and killed and the motive of the offence was passion.

(b) The deceased and this accused Anil Thakur were acquainted with each other for some time before the date of death of the deceased.

(c) The deceased last left her home at about 10.00 am on 22nd October 2009. The calls detail record (Ex.PW14/C) shows that this accused spoke repeatedly from his mobile phone 9268241820 to the deceased on her mobile phone no. xxxxxx0532 on 22nd October 2009 before her mobile phone was switched off.

(d) The parents of the deceased lodged a missing report (Ex.PW-1/D) at police station Sarojini Nagar on 23rd October 2009 as they were residing within the territorial jurisdiction of that police station.

(e) On 22nd October 2009 at about 13.59 hours, the mobile phone of the deceased was switched of. The phone was again switched on around 2.14 am and at 2.14 am, 2.19 am and 2.20 am on 23rd October 2009 three SMSs were exchanged between the mobile phones of the deceased and that of Ravi Kumar (PW8) and then the phone was again switched of. From the records of the mobile phone company (Ex.PW16/E) it is apparent that at that time the mobile phone of the deceased was

located at New Modern Shahdara.

(f) Accused Anil Thakur was residing at New Modern Shahdara. The call detail records of mobile phone 9268241820 of the accused show that this accused at the relevant time was actually at New Modern Shahdara.

(g) The dead body has been recovered from a ganda nala at Balbir Nagar which is near the house of the accused.

(h) The deceased used to reside at Sarojini Nagar and thus her presence at New Modern Shahdara in East Delhi is not normal.

(i) On 23rd October 2009 as the deceased did not return home, the mother of the deceased (PW2) made a telephone call to this accused to enquire about the deceased. This accused initially said that he did not know any girl by the name of the deceased but on being informed that the caller is the mother of the deceased he said that he had some fight with the deceased about two or three days back and thereafter she is not in touch with him. He further stated that he would search for the deceased and also advised PW2 to look for the deceased. As per the case of prosecution this statement made by the accused to PW2 was obviously incorrect, as the deceased and this accused had spoken on phone on 22nd October 2009.

(j) The accused did not hand over his mobile phone during investigation.

(k) Conduct of accused Anil Thakur in absconding immediately after the incident. This accused absconded and could be taken in custody only on 23rd January 2010 despite efforts made by the police officials.”

26. The trial Court then proceeded to discuss the circumstances. Discussing the evidence, particularly those relating to the CDR of the phone purportedly used by A-1, i.e. 9268241820, the trial Court concluded that he had used the

phone to make calls to the mobile phone used by the deceased at 11.57 am and 1.10 pm on 22nd October 2009. The trial Court accepted the plea that on 23rd October 2009, at 2.14 am and 2.19 am, the location of the mobile phone of the deceased was shown at New Modern Shahdara. The CDR of that phone showed that three text messages were exchanged between the mobile phone of the deceased and the mobile phone number 9871432154 which belonged to Ravi Kumar (PW-8) who also spoke of sending two messages to the deceased on her mobile phone. The trial Court accepted the plea of the prosecution that since the CDR of the mobile phone used by the deceased showed that at the relevant time it was at New Modern Shahdara, the circumstance (f) above stood proved.

27. Importantly, the trial Court accepted the evidence of PW-2 regarding conversation she had with A-1 soon after the deceased had gone missing. The trial Court characterized her evidence as being “normal and natural of a mother whose daughter of marriageable age was missing for more than 24 hours and who knows that her daughter was having close friendship with this accused”.

28. Although the trial Court noted that the FIR in this case was registered only on 26th November 2009 whereas the dead body was recovered on 25th October 2009 and that “no reason has been shown as to why the FIR was not registered immediately on the recovery of the body”, it did not dwell further on this aspect.

29. The trial Court also accepted the plea of the prosecution regarding the

accused persons absconding and the time and manner of their arrests. The trial Court therefore, concluded that the prosecution had proved circumstances (a) to (k) beyond all reasonable doubt *qua* A-1 alone. As regards the guilt of A-1, the trial Court concluded as under:

“To my mind, the circumstances proved on record establish the guilt of this accused Anil Thakur. His contention in this court that he was not acquainted with the deceased is not at all believable. The deceased and the accused were in the same area on the night of the incident and the dead body of the deceased was found near the area where accused was living alone. His subsequent conduct of denying his being in contact with the deceased on the date of the incident is strong indication of the fact that he was aware of the seriousness of the issue. After the incident, he absconded. In the circumstances, I am of the opinion that the guilt of this accused of having raped and murdered the deceased stands established. As a consequence, it also stands established that he was the person who had concealed the dead body in the drain at Balbir Nagar, Shahdara.”

30. The trial Court proceeded to discuss the guilt of the other accused persons. As far as A-2 was concerned, although he had earlier claimed to be a juvenile, the Juvenile Justice Board (‘JJB’) by an order dated 3rd May 2010 held that he was about 18 years old on the date of the crime. PW-5, who had earlier told the police that he had seen A-2 along with the other accused throwing something which could have been a dead body in the *ganda nala*, did not support the case of the prosecution when he deposed in Court. He failed to identify A-2 and in fact he stated that A-2 was not the person whom he had seen throwing something in the *ganda nala*. It was held that the fact that A-2 refused to provide a sample of his semen and absconded after the incident for some time was not sufficient to conclude that he was guilty of

the offence. A-2 was, therefore, acquitted of all offences. As regards A-3 and A-4, the trial Court noted that PW-5 again refused to identify them as those throwing something in the *ganda nala* and therefore, acquitted them of all charges.

31. As a result, only A-1 was convicted of the offences under Sections 302 and 201 IPC, as if he committed them individually. Interestingly, A-1 was convicted for the offence under Section 376 IPC whereas the charge framed was that of gang rape under Section 376 (2) (g) IPC. The trial Court, by a separate order on sentence dated 26th November 2015 proceeded to sentence A-1 in the manner already discussed hereinabove.

Law relating to framing of charges

32. One of the issues arising for consideration is whether the trial Court could have proceeded to convict A-1 in terms of charges that were not framed against him in the first place. In particular, the argument made is that the charge framed was that all the accused together committed the crime and not that any of them individually committed it. The precise charge was only under Sections 302 and 201 IPC read with Section 34 IPC and not that any of them had committed those offences. Even more serious is that the second charge is that of gang rape committed by all of them. There was no separate charge against any of the accused individually committing rape punishable under Section 376 IPC.

33. The consequence of convicting an accused for a charge that is not framed against him has been discussed in several cases. One of the earliest

cases is *B.N. Srikantiah v. State of Mysore AIR 1958 SC 672*. In that case, it was explained that there was nothing, “whether by the trend of cross-examination or by anything on the record, to show that the Appellants were misled by this omission in the charge”. Further, it was held that where “no case of prejudice has been alleged or established and there are no facts on the consideration of which the conclusion could be reached that the conviction under Section 302 is vitiated as a result of prejudice” such a plea could not be accepted. It was pointed out that whether the accused was prejudiced as a result of omission of a charge would depend upon the facts and circumstances of every case. What is important to examine is whether, in the way in which the charge was framed, it gave the accused “no effective notice of the case they had to meet”.

34. The Supreme Court, in that case, also discussed the decision in *Willie (William) Slaney v. State of Madhya Pradesh AIR 1956 SC 116* where it was pointed out that if an irregularity in framing the charge is curable such that it could not vitiate the trial, it would have to be shown that some prejudice has been caused as a result of the omission to specify the precise charge. In the same case, the Court discussed the expressions “by the absence of a charge” and “no charge was framed” as occurring in Section 505 Code of Criminal Procedure 1898 and observed as under:

“We see no reason for straining at the meaning of these plain and emphatic provisions unless ritual and form are to be regarded as of the essence in charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form. To hold otherwise is only to provide avenues of escape for the guilty and afford to protection to the innocent.”

35. The precise situation in *B.N. Srikantiah* (*supra*) was that there was no charge under Section 34 IPC and, therefore, the accused would not be convicted for any of the substantive offences by application of Section 34 IPC. There was a charge for the substantive offence under Section 302 and then for the offence of abetment under Section 109 IPC. In that context, the Supreme Court observed as under:

“The imperfection in the charge is curable provided no prejudice has been shown to have resulted because of it. The appellants had notice that they were being tried as “sharers in the offence” and their liability was collective and vicarious and not individual. No doubt they, were charged, under Section 149 of the Indian Penal Code with being members of an unlawful assembly the common object of which was murder of the deceased but they were also charged that they with Accused Nos. 5 & 6 had committed murder by intentionally causing the death of the deceased. The prosecution led evidence to show that at least two of the Appellants were waiting for the arrival of the evening bus by which the deceased and his companions were travelling and that the appellants and others met them at the bund and there was a concerted attack by them followed by a chase and assault with choppers by all the appellants resulting in death because of 24 injuries of a serious nature given by the appellants collectively. Of these injury No. 5 individually and others cumulatively were sufficient in the ordinary course of nature to cause death. Section 34 is only a rule of evidence and does not create a substantive offence. It means that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done individually.”

36. In *A.S. Krishnan v. State of Kerala* (2004) 11 SCC 576, as regards a situation wherein a charge relating to criminal breach of trust was framed along with the charge of conspiracy, the Supreme Court has held that conviction simpliciter for criminal breach of trust would not be valid. The

Supreme Court appeared to have disagreed with the view taken by the High Court that “if the charge of conspiracy is followed by substantive charge of another offence, there is nothing to prevent the Court convicting an accused for the substantive charge even if the prosecution had failed to establish conspiracy”.

37. What is important to note further in the above case is that the charge of conspiracy was followed by the substantive charge of another offence. In the present case, however, there is no separate charge regarding a substantive offence committed individually.

38. In *Anna Reddy Sambasiva Reddy v. State of Andhra Pradesh AIR 2009 SC 2661*, it was contended on behalf of the appellant-accused that the convictions and sentences for the offence under Section 302 IPC simpliciter was not legally sustainable in the absence of any specific overt acts attributed to each of the accused. Repelling this contention, the Supreme Court summarized the decision *Willie (William) Slaney* (supra), as under:

“*Willie (William) Slaney* thus holds: that where the charge is rolled up one involving the direct liability and the constructive liability without specifying who are directly liable and who are sought to be made constructively liable, in such a situation, the absence of a charge under one or other or the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence, without a charge can be set aside, prejudice will have to be made out.”

39. It then proceeded to lay down the legal position under the CrPC as

under:

“42. The aforesaid legal position holds good after enactment of the Code of Criminal Procedure, 1973 as well in the light of Sections 215, 216, 218, 221 and 464 contained therein. In unmistakable terms, Section 464 specifies that a finding or sentence of a court shall not be set aside merely on the ground that a charge was not framed or that charge was defective unless it has occasioned in prejudice. Because of a mere defect in language or in the narration or in form of the charge, the conviction would not be rendered bad if accused has not been adversely affected thereby. If the ingredients of the section are obvious or implicit, conviction in regard thereto can be sustained irrespective of the fact that the said section has not been mentioned. A fair trial to the accused is a sine qua non in our criminal justice system but at the same time procedural law contained in the Code of Criminal Procedure is designed to further the ends of justice and not to frustrate them by introduction of hyper-technicalities. Every case must depend on its own merits and no straightjacket formula can be applied; the essential and important aspect to be kept in mind is: has omission to frame a specific charge resulted in prejudice to the accused.”

40. In ***Dalbir Singh v. State of U.P. AIR 2004 SC 1990***, the Supreme Court explained that “in order to judge whether there is a failure of justice, the Court has to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself”.

41. In ***Mohan Singh v. State of Bihar AIR 2011 SC 3534***, the same position was reiterated. In that case, it was held that no prejudice has been caused to the appellant “for non-mentioning of Section 302 IPC in the charge since all

the ingredients of the offence were disclosed”. It was further held that “on overall consideration of the facts and circumstances of this case we do not find that the Appellant suffered any prejudice nor has there been any failure of justice”.

The conviction for the offence of rape

42. In the present case, however, the prejudice to A-1 is writ at large since all the three substantive charges are for the offences being committed by all the accused together and not by any of them individually. Even the description of the charge in the charge sheet is about all of them getting together to commit the crime and not that A-1 alone had committed any of the offences.

43. In this context, the second charge clearly states that “you all committed gang rape upon the prosecutrix”. However, what A-1 has now been convicted for is for the offence under Section 376 IPC whereas the charge is of the offence under Section 376 (2) (g) IPC. Interestingly, in the main charge sheet as well as in the supplementary charge sheet, it is clear that, as far as A-1 is concerned, he is stated to have engaged in consensual sexual intercourse with the deceased. The charge sheets only speak to him being a silent spectator while the other accused persons committed gang rape upon the deceased. With the trial Court having come to the conclusion that none of the other accused were involved in the commission of the offence, the charge of gang rape under Section 376 (2) (g) IPC had to fail *qua* A-1 as well. There was no question of him committing gang rape all by himself.

44. Even in the charge sheets, no case has been made out against A-1 for

committing rape upon the prosecutrix. If there was no evidence according to the prosecution, clearly it was not a case of a mere failure to frame the charge even though all ingredients of the offence have been set out in the charge sheet. The evidence, as set out, is not that of rape being committed by A-1 individually on the prosecutrix.

45. Therefore, it is impermissible for the trial Court to convict him for that offence since it was not the case of the prosecution at all. None of the decisions cited by the learned APP, which have been discussed above, can save the glaring illegality of convicting the Appellant for an offence for which he is not accused by the prosecution in the charge sheet. Even if no specific charge in that regard was framed against him, it is imperative that at least some part of the charge describe the offence as being committed by A-1 alone. Such a description of the offence is not to be found in either charge sheet filed in this case.

46. There is no evidence whatsoever led by the prosecution to show that A-1 committed rape on the deceased. The case of the prosecution in both charge sheets is that the deceased had consensual sex with A-1. This was completely overlooked by the trial Court. While the post-mortem report of the deceased shows that she suffered extensive injuries on her private parts, it was never a case of the prosecution that this was as a result of A-1 committing rape on her. Given the nature of the injuries, the prosecution proceeded on the basis that the offence committed was that of gang rape involving the other co-accused. Further there was no forensic evidence matching the semen on the vaginal swabs with that of A-1 or any of the

accused. That case having failed, the trial Court could not have possibly proceeded to convict A-1 for the offence under Section 376 IPC. The Court, therefore, has no hesitation in setting aside the conviction of A-1 for the offence under Section 376 IPC.

The offence under Section 201 IPC

47. As regards the charge for the offence under Section 201/34 IPC, here again, the manner in which the charge is framed is that “you all, in furtherance of common intention, caused the evidence of commission of the offence of killing the deceased to disappear by throwing the body in the dirty drain”. There is no substantive charge under Section 201 IPC alone.

48. Here again, the trial Court made a serious error in convicting the Appellant for the substantive offence under Section 201 IPC without appreciating if the evidence on record could at all support such a charge. In other words, the evidence should point to the possibility of A-1 alone disposing of the body in the *ganda nala*. There should, at the very least, be some credible evidence, either direct or circumstantial, to show that it was A-1 alone who threw the dead body into the *ganda nala*. The evidence that has been put forth by the prosecution does not support such a conclusion. Therefore, the Court has no hesitation in setting aside the conviction of A-1 for the offence under Section 201 IPC as well.

The offence punishable under Section 302 IPC

49. As regards the offence of murder punishable under Section 302 IPC, on reading the charge sheets it is seen that there are specific acts attributable to

A-1, viz., placing the belt on the neck of the deceased and tightening it and thereafter sitting on her chest while A-3 and A-4 pulled the belt tighter. It is also stated in the charge sheet that when the accused realized that the deceased was still alive while they were taking the dead body on a motorbike, it was A-1 who had again pressed her neck. Therefore, in the two charge sheets, there are specific acts attributable to A-1 alone. In terms of the law explained by the Supreme Court in the aforementioned decisions, A-1 was aware of the case of the prosecution and therefore, there was no serious prejudice caused to him as he was not prevented from defending himself against the charge, even if it was not framed in that manner. Therefore, as far as the second charge for the offence punishable under Section 302/34 IPC is concerned, the conviction of A-1 does not get vitiated merely because there is no separate charge against him for the substantive offence under Section 302 IPC.

50. The case of the prosecution against A-1 for the offence punishable under Section 302 IPC is based on circumstantial evidence. In ***Sharad Birdhichand Sarda v. State of Maharashtra 1984 (4) SCC 116***, the Supreme Court explained that a case based on circumstantial evidence should satisfy the following tests:

- “(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 accused is guilty;
- (3) The circumstances should be of a conclusive nature and

tendency;

- (4) They should exclude every possible hypothesis except the one to be proved; and
- (5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

Deposition of PW-1

51. The Court would first like to begin with analysing the evidence of Mahesh Chand (PW-1), who is the father of the deceased and, therefore, an interested witness. In ***Jayabalan v. UT of Pondicherry (2010) 1 SCC 199***, the Supreme Court explained that

"in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim."

52. According to PW-1, the deceased was working in a private company and had left home for work on 22nd October 2009 but did not return. PW-1 states that he kept trying to contact the deceased on her mobile phone but it was not responding as it appeared to be switched off. He kept searching for her the whole night as well as the following morning. When she remained untraced, he went to PS Sarojini Nagar and lodged a missing person report

(Ex.PW-1/D) as DD No.28A dated 23rd October 2009 where it is noted that at around 8.15 pm, PW-1 had gone there and lodged the complaint. In that he states that his daughter was around 17 years old, fair complexioned, wearing blue jeans, shawl type *chunni* and sandals of light almond colour. He states that she left home around 11.00 am on 22nd October 2009. The DD was entrusted to SI Sanjeev Mandal (PW-3) who then took steps to trace her.

53. PW-1 further stated that on 26th October 2009, he came to know through the television news that an unclaimed dead body of a young girl had been found by the police of PS Shahdara. He then went to PS Shahdara wherefrom the police officials took him to the mortuary of GTB Hospital where he identified the deceased's body. His identification statement was marked as Ex.PW-1/A and he joined the inquest proceedings. PW-1 further stated that his son, Rahul (PW-4), and his friend, Ashok, had also gone there with him.

54. PW-1 further stated that A-1, whom he identified in Court, was having friendly relations with the deceased and would often call her on her mobile phone. He stated that he had himself called A-1 when the deceased went missing. A-1 purportedly told him that he himself was trying to locate the girl and advised PW-1 to also search for her. PW-1 stated that he could not readily recall the mobile number of A-1 but had noted down the number on a piece of paper. After referring to the said piece of paper, he stated the A-1's number as 9268241820.

55. PW-1 stated that his wife, Sharda (PW-2), also spoke to A-1 but was not able to throw light on the conversation between her and A-1. In his cross-examination, PW-1 volunteered that he had a conversation with A-1 on 23rd November 2009, i.e. even after the recovery of the body of the deceased. He further volunteered that the deceased was working in a company by the name of Revlon which had many branch offices in Delhi. PW-1 himself was a labourer and would usually leave for work at about 9 am. He volunteered that on 22nd October 2009, when he left for work, the deceased was still at home. He returned that day only at 10 pm.

56. PW-1 went to PS Shahdara for the first time on 26th October 2009 but, at that stage, did not disclose the name of A-1 as he was “mentally upset”. Even when he lodged the missing person report at PS Sarojini Nagar, he did not mention the name of A-1. He was confronted with his previous statement to the police (Ex.PW-1/DA) where he had not disclosed that he had called A-1 over the phone. It is, therefore, plain that neither at the time of lodging the missing person report on 23rd October 2009 nor at the time of the dead body being recovered did PW-1 disclose the name of A-1.

Deposition of PW-2

57. Turning now to the evidence of the mother of the deceased, Sharda (PW-2), she too stated that the deceased was working in a company. The deceased had three brothers of whom one was Rahul (PW-4) in whose name the mobile number being used by the deceased was registered. PW-2 also stated that the deceased left home at around 10.30 am on 22nd October 2009. Although, during her deposition in the trial Court, PW-2 states that the

deceased had previously informed her that she knew A-1 and also that she had spoken to A-1 twice, PW-2 did not disclose these facts to the police of PS Sarojini Nagar. She does not appear to have even mentioned the name of A-1 or given his mobile number to the police at PS Shahdara on 26th October 2009.

58. At this stage, it is important to refer to the statement first made by PW-2 to the police (Ex.PW-2/DA). Incidentally, this was recorded not immediately after the dead body was found but only a month later on 28th November 2009. Why there was a delay of one month in recording her statement is not explained. In that statement, she stated that the deceased was working in a company and was using the mobile phone which was registered in the name of PW-4. She spoke about PW-1 lodging a missing person report at PS Sarojini Nagar on 23rd October 2009. She mentioned that the deceased would often talk on the phone to a boy named Anil (A-1) who lived in Shahdara. She further mentioned that the deceased had told PW-2 that A-1 wanted to marry her.

59. PW-2, in her statement to the police, disclosed the mobile number of A-1 and that she herself had spoken to A-1 once or twice. When she called A-1 on 23rd October 2009, he told her that the deceased and him were in the midst of an ongoing quarrel and had not spoken for 2-3 days. She claims that he was evasive as to the whereabouts of the deceased before asking her to continue searching for the deceased and abruptly disconnecting the phone. When she again called him, she states that he continued to give evasive replies and after that there was no conversation.

60. However, in her deposition in the trial Court, PW-2 appears to have made improvements to her previous statement by suggesting that the deceased had told A-1 that she would not marry A-1 and “that she is a member of Schedule Caste and Anil was a member of Thakur community”. She further claimed that, in response to this, A-1 said, “*Jo cheese mujhe pasand aati hai usey main har haalat main hasil kar leta hoon*”.

61. The above statements were not disclosed by her when her statement was first recorded by the police. She also did not disclose that she “had talked to Anil. He told me that I should teach my daughter Dolly to do household work”. She disclosed that her statement was recorded for the first time by the IO of PS Shahdara on 28th November 2009. She claimed to have given her statement on 26th October 2009 but did not know whether it had been recorded. She claimed to have only given the name of A-1 to the police at that time.

PW-1 and PW-2 unreliable

62. It is plain from the deposition of both PW-1 and PW-2 that they did not mention the name of A-1 to the police till 28th November 2009, a month after the occurrence. It seems improbable that either PW-1 or PW-2 would be able to remember the mobile number of A-1 without referring to the piece of paper on which it was written. In her further cross-examination by the counsel for A-1, PW-2 stated, “My statement was recorded only once in PS Shahdara on 28.11.2009”. She also said, “I had given the name and mobile number of Anil on 26.10.2009 to officials of PS Shahdara. The police did not record my statement when I disclosed the name of Anil to them. Police

officers of PS Shahdara met me intermittently between 25th October 2009 and 28th November 2009”.

63. There is reason to believe, therefore, that till almost a month after the recovery of the dead body, PW-1 and PW-2 themselves did not know or suspect A-1 to be involved. The trial Court has, in the impugned judgment, merely noted this fact and also the fact that no reasons had been given by the prosecution “as to why the FIR was not registered immediately on the recovery of the dead body”. However, the trial Court has failed to examine the effect of this delay on the truthfulness of the depositions of these two interested witnesses.

64. It also appears strange that if their grown-up daughter, aged 17 years, was missing, that neither PW-1 nor PW-2 would first go to her place of work to find out if she had come for work. There appear to be glaring inconsistencies in the statements of PW-1 and PW-2, which raise serious doubts as to their veracity and reliability.

Location of A-1 and the deceased

65. No attempt appears to have been made by the IO of the case, Inspector Ombir Singh (PW-36), to find out where exactly the deceased was working. He begins his narration only from 26th November 2009 by which time, the CDRs of the mobile number of the deceased was already available to him. That CDR showed that on the intervening night of 22nd-23rd October 2009, three text messages were exchanged between the mobile phones of Ravi Kumar (PW-8) and the deceased. As noted by the trial Court, this was at

2.14 am, 2.19 am, and 2.20 am in the early morning of 23rd October 2009. The CDR showed that the mobile phone, at that point in time, was located at New Modern Shahdara.

66. As far as A-1 is concerned, through the evidence of Mohit Aggarwal (PW-7), the prosecution has sought to establish that the said mobile phone, although not issued in the name of A-1, was in fact being used by A-1. The CDR of the mobile number used by A-1 showed that at the relevant time, i.e. 2.14 am on 23rd October 2009, that phone was also at New Modern Shahdara. However, this by itself does not mean much since A-1 resides at New Modern Shahdara ordinarily.

67. It is significant that in his statement under Section 313 CrPC, A-1 did not dispute that he was using the said mobile phone. This is evident in his answer to Question No.8 which is as under:

“Q.8 It is further in evidence against you that your mobile number was 9268241820 and mobile number of deceased was 9015260532. What have you to say?

Ans. It is a matter of record.”

68. A-1 also admitted as correct that he was friends with the deceased and used to talk to her and that he was residing at Shahdara. He denied that PW-2 called him about the deceased having gone missing. He appeared to accept the fact that the deceased was working in a private company. He also did not deny that the phone that he was using was issued in the name of one Bhuvnesh Gupta. When the evidence in the form of the CDRs and the original customer application form was put to him under Section 313 CrPC, he answered that “it is a matter of record”.

69. From the answers given by A-1 himself, it could be safely concluded that the prosecution was able to prove that A-1 was using the mobile number 9268241820 which was issued in the name of one Bhuvnesh Gupta and he accepted the correctness of the CDRs of that mobile phone for the period from 1st July 2009 to 30th October 2009.

70. There has been extensive discussion in the trial Court judgment on the CDRs. The trial Court noted that both A-1 and the deceased had spoken to each other on 22nd October 2009 at 11.57 am and 1.10 pm. At the said times they were not at the same location. The location of the deceased and A-1 being together at any time thereafter is not established by the CDRs.

71. This Court has also carefully perused the very same CDRs (Ex.PW-14/C). The record of calls ends on 28th October 2009. The deceased and A-1 exchanged calls at 11.57 am, 1.10 pm, and 1.39 pm on 22nd October 2009. Thereafter, there is no exchange of calls between the two mobile numbers.

72. As for the location of the two mobile phones, the Court has examined the CDR marked as Ex.PW-16/F. From the said CDR it can be seen that when A-1 made a call to the deceased at 11.57 am on 22nd October 2009, the deceased was at the NDMC Community Centre, Laxmibai Nagar. She appears to have received some other call at 12.52 pm when she was at Sunlight Colony. At 1.10 pm, when she received a call from A-1, she was at Khichripur. When she spoke to him again at 1.39 pm, she was at Patparganj. At 2.14 am, 2.19 am, and 2.20 am on 23rd October 2009, when she exchanged text messages with the mobile phone of PW-8, she was in the

vicinity of Gali No.6, New Modern Shahdara.

73. Ex.PW-16/B when tallied with the Cell ID Chart (Ex.PW-14/E), shows that the location code for Nand Nagri, J.J. Colony, Shahdara is between 22272 and 22276. From the CDR of the phone used by A-1 (Ex.PW-14/C), it emerges that he was at location code 21394 (Jagatpuri) at 7.53 am on 22nd October 2009. Thereafter, at 9.51 am on 22nd October 2009, he was at location code 22210 (Vishwakarma Nagar, Shahdara). During the critical hours between 11.12 pm on 22nd October 2009 and 7.23 am on 23rd October 2009, he was at location 22275 which is at Nand Nagri, J.J. Colony, Shahdara. The exact address of A-1 at this point in time is not clear but going by the evidence of PW-36, when they ultimately arrested A-1 on 23rd January 2010, his address was given as Gali No.12, New Modern Shahdara.

74. A telecommunication tower may cover a large area. Apparently, A-3 and A-4 were also residents of the same area. These CDRs did not, therefore, help to establish that during the crucial hours of the intervening night of 22nd-23rd October 2009, the deceased was with A-1. If one compares this tower location, i.e. 22275 as depicted in Ex.PW-14/E, with the location details of the mobile phone of the deceased, there is a difference inasmuch as the location of her phone is shown as Gali No.6, New Modern Shahdara, Jagatpuri.

75. Whether the towers at Nand Nagri, J.J. Colony, Shahdara and those at Jagatpuri, New Modern Shahdara pertain to the same area could be

anybody's guess. Neither PW-14, who proved the CDRs for the phone of A-1, nor PW-16, who proved the CDRs of the phone of the deceased, could throw any light on this crucial aspect. In any case, CDRs can be corroborative evidence but not substantive evidence. They can only approximate the locations of the persons who may be using those instruments. It certainly cannot provide proof that A-1 was with the deceased during the intervening night of 22nd-23rd October 2009.

76. Yet again, this was but one circumstance, namely that it is possible that during the intervening night of 22nd-23rd October, 2009, the deceased and A-1 were in the same locality. It must be recalled that in the charge sheet, the case of the prosecution is that A-1 and the deceased had consensual sex during the intervening night of 22nd-23rd October 2009 and it was the other accused persons who also insisted on having sex with her and when she resisted, she was raped. The co-accused persons have all been acquitted and the State has not filed any appeal against their acquittal.

Motive not proved

77. The motive for commission of the murder itself is traced to the deceased threatening to go to the police after she was raped by the co-accused. It is this, according to the prosecution, which triggered the series of acts thereafter with A-1 strangulating her with a belt and then sitting on her chest and the other accused tightening the belt. If the involvement of the co-accused is done away with then there is no explanation as to what motive A-1 might have had to murder the deceased. After all, even as per the prosecution's version of events, the deceased and A-1 did have consensual

sexual intercourse. There was no question, therefore, of A-1 having any motive to kill the deceased after that. They were acquaintances known to each other and there must be a very strong reason for A-1 to take such an extreme step. No such motive emerges from the case of the prosecution.

78. In a case of this nature, where other circumstance cannot be said to be clearly established by the prosecution, motive assumes great significance. It forms a vital link in the chain of circumstances. With the co-accused taken out of the equation, the story of the prosecution has a huge gap as regards the motive for A-1 to individually commit the murder of the deceased. This aspect has been completely lost sight of by the trial Court. This was one important circumstance which, *qua* A-1, was not proved by the prosecution at all.

Circumstances (a) to (d)

79. At this stage, it is important to examine which of the circumstances put forth by the prosecution to prove the guilt of A-1 for the offence of murder of the deceased can be said to have been proved.

80. The prosecution has proved that the death of the deceased was homicidal. There were injuries on her private parts and there were recent tears on the vaginal hymen. That the deceased was sexually assaulted and then killed is proved by the medical evidence. Circumstance (a), therefore, can be said to be proved by the prosecution.

81. As regards circumstance (b), it is noticed that even in his Section 313 CrPC statement, A-1 does not dispute that he was acquainted with the

deceased before her death. Circumstance (b) can therefore be said to be proved.

82. Circumstance (c) is that the deceased last left her home at about 10 am on 22nd October 2009. According to the prosecution the CDR (Ex.PW14/C) showed that A-1 spoke “repeatedly from his mobile phone” to the deceased on her mobile phone on 22nd October 2009 before her mobile phone was switched off.

83. What has been proved by the CDRs of both phones is that the deceased is shown to have left her home at around 10 am on 22nd October 2009. The deceased and A-1 exchanged calls at 11.57 am, 1.10 pm, and 1.39 pm on 22nd October 2009. Thereafter, there is no exchange of calls between the two mobile numbers. Therefore circumstance (c) as put forth by the prosecution cannot be said to be proved.

84. Circumstance (d) is proved to the extent that PW-1 and PW-2 lodged the missing person report at PS Sarojini Nagar on 23rd October 2009.

Circumstance (e)

85. As regards Circumstance (e), PW-8 admits to sending the deceased an SMS. Interestingly, this witness actually turned hostile but one of his statements during his examination-in-chief is worth noting. He stated as under:

“I had received reply of my messages passed on to me by the deceased Doli on my mobile phone. One was ‘I love you too’ and another was ‘Please call me.’”

86. Despite receiving that message, why PW-8 did not call her till the next day is not clear. He had given a previous statement to the police – from which he resiled – to the effect that he did send a message from his mobile number to that of the deceased on the intervening night of 22nd-23rd October 2009. This clearly showed that the deceased was alive till about 2.14 am on the morning of 23rd October 2009. Whatever happened to her must have happened thereafter. In his cross-examination by the counsel for A-1, he admitted sending a message to her in the early hours of 23rd October 2009. His reply in this regard is:

“I had sent message to Doli at about 1/1.30 a.m. (night). I had received two messages of Doli on my phone within few minutes of my sending message to her. I had no conversation with Doli on intervening night of 22/23.10.2009.”

87. It appears that PW-8 himself was a suspect because he admits that the police had taken his parents to PS Shahdara but he was unable to provide a reason as to why. He admits that “it is correct that police had suspected me as culprit for the murder of Doli.” PW-8 had, in fact, been confined by the police for about four hours on 28th November 2009. He volunteered that “Doli was in private service at Ansal Plaza in the area of Lodhi Road, New Delhi.” Why this evidence was not further developed is a mystery.

88. Circumstance (e), therefore, is proved to the extent that it shows that the mobile phone of the deceased was at Gali No.6, New Modern Shahdara. This is, more or less, the same locality of A-1 which is supposed to be at Gali No.12, New Modern Shahdara.

Circumstances (f) to (h)

89. As regards circumstance (f) it was proved by the CDRs that in the intervening night of 22nd-23rd October 2009, as is apparent from Ex.PW-14/D, A-1 was in the vicinity of Block-B5, Nand Nagri, J.J. Colony.

90. The circumstance (g) regarding recovery of the dead body in a *ganda nala* at Balbir Nagar stands proved. It is of course true that Balbir Nagar is near the house of A-1 but that, by itself, cannot mean that A-1 was with the deceased during the relevant time.

91. Circumstance (h) that the deceased used to reside at Sarojini Nagar is proved. Her presence at New Modern Shahdara in East Delhi cannot be said to be proved, particularly since it is not shown whether the police actually went to her place of employment to find out whether at all she went to work on that day. The police appeared to have not inquired into what the deceased was otherwise doing.

Circumstance (i)

92. Circumstance (i), which is that the deceased did not return home prompting PW-2 to make a call to A-1, cannot be said to be proved. The evidence of PW-1 and PW-2 in this regard does not inspire confidence. It appears highly unlikely that PW-1 and PW-2 would know the mobile number of A-1 so as to make a call to him and that they would somehow have noted his number on a slip of paper. This part of the case of the prosecution raises serious doubt and neither PW-1 nor PW-2 can be said to be speaking the truth.

93. If indeed PW-1 and PW-2 knew that A-1 was friends with the deceased and used to talk to her often, there was no question of their not disclosing this fact immediately to the police. If indeed PW-2 spoke to A-1 on 23rd October 2009, i.e. the date immediately after her daughter went missing, and he gave an evasive reply, there is no way that she and her husband would not have disclosed this very crucial fact to the police upon finding the dead body of the deceased. This statement ought to have been recorded then and there with the police. That nothing happened till 28th November 2009 clearly shows that this entire story, namely that PW-1 and PW-2 knew that their daughter was friends with A-1 and that his mobile number was what it ultimately was discovered to be, is false.

94. When the dead body of a person who had gone missing is recovered, as has happened in this case, there can be no excuse whatsoever for the police not to immediately register an FIR. PW-36 has no explanation whatsoever to offer for this serious lapse. It appears that the case was developed from the CDRs of the deceased with PW-1 and PW-2 being clueless as to what happened to their daughter. They were also silent about what their daughter was actually doing. They did not appear to know where she was working. This appears strange considering that she was only 17 years old. The police also did not make any attempt to know where the deceased was working.

95. What was a blind case was probably developed through the CDRs by looking into the mobile phones that were in touch with that of the deceased and then trying to develop a case around it. Consequently, as far as circumstance (i) is concerned, it cannot be said to be proved.

Circumstances (j) and (k)

96. As far as the circumstance (j) is concerned, apart from the evidence of the IO, there is no independent evidence to show that A-1 did not hand over his phone to the IO. In any event, the IO was not precluded from obtaining the CDRs of that phone.

97. As far as circumstance (k) is concerned, there is considerable doubt on the manner in which A-1 was arrested on 23rd October 2010 and how he came to be identified by the police if they did not even have his photograph. It must be remembered that the mobile phone used by A-1 was in fact issued in the name of one Bhuvnesh Gupta whose photograph was on the customer application form pertaining to that mobile phone. Therefore, it would not have been possible for the police, without a photograph of A-1, to go looking for him. The evidence regarding A-1 having gone missing for several months and then being found in his own residence at Gali No.12, New Modern Shahdara is not very convincing. Circumstances (j) and (k) cannot be said to be proved beyond reasonable doubt.

Unproved circumstances

98. Now to examine what has not been proved, the crucial circumstance of the conversation between PW-2 and the accused on his mobile phone has not been proved. There is no proof of the motive for commission of the crime. The circumstances viewed collectively only probabilise that the deceased and A-1 were in the same locality on the intervening night of 22nd-23rd October 2009 and not that they were together. This circumstance by itself does not complete the entire chain of circumstances regarding the

murder of the deceased. It also does not stand proved that A-1 threw the dead body of the deceased in the *ganda nala* by himself.

99. Applying the law relating to circumstantial evidence, it cannot be said in the present case that each circumstance has been fully proved beyond reasonable doubt. There are many gaps in the chain of circumstances and crucial things have not been proved. It is not possible to base the conviction of the Appellant only on the CDR which by itself cannot constitute a substantive piece of evidence but only a corroborative piece of evidence. There are no recoveries made which could connect A-1 to the commission of the crime.

100. As a result, the Court is unable to agree with the conclusion reached by the trial Court that circumstances (a) to (k) above have all been proved by the prosecution beyond reasonable doubt. As has repeatedly been held by the Supreme Court, suspicion, however strong, cannot take the place of proof. The Appellant is, therefore, entitled to the benefit of doubt. He, therefore, stands acquitted even of the offence under Section 302 IPC.

Conclusion

101. The impugned judgment of the trial Court convicting the Appellant for the offences under Sections 302, 376 and 201 IPC and the order on sentence sentencing him in the manner indicated hereinbefore for the said offences are hereby set aside. The appeal is allowed in the above terms.

102. The accused shall be released forthwith unless wanted in some other case. He shall comply with the requirements of Section 437A CrPC to the

satisfaction of the trial Court. The trial Court record be returned together with the certified copy of this judgment.

S. MURALIDHAR, J.

I.S. MEHTA, J.

FEBRUARY 06, 2018
'rm/anb'

