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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 30th May, 2018
Pronounced on: 3rd July, 2018

+ **CRL.A. 249/2018 & Crl.M (Bail) No. 363/2018**

NAVEEN KUMAR VERMA

.....Appellant

Through: Mr. Vishesh Wadhwa with
Aditya Swarup Agarwal, Mr.
Yatharth Rohilla & Mr.
Abhishek Dua, Advocates

versus

THE STATE GOVT OF NCT OF DELHI

.....Respondent

Through: Mr. K.S. Ahuja, APP for State

+ **CRL.A. 362/2018 & Crl.M (Bail) No. 505/2018**

CHANDAN

..... Appellant

Through: Mr. B. Badrinath, Advocate

versus

STATE

..... Respondent

Through: Mr. K.S. Ahuja, APP for State

+ **CRL.A. 449/2018 & Crl.M (Bail) No. 658/2018**

RAJESH CHAUHAN

..... Appellant

Through: Mr. Harsh Prabhakar, Advocate
(DHCLSC)

versus

STATE

..... Respondent

Through: Mr. K.S. Ahuja, APP for State

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

JUDGMENT

Dr. S. Muralidhar, J.:

1. These three appeals are directed against the judgment dated 31st October 2017 passed by the learned Additional Sessions Judge-02, South District, Saket Courts in Sessions Case No.7165/2016 arising out of FIR No.273/2010 registered at Police Station ('PS') Saket convicting the three Appellants for offences under Section 302/34 IPC. The appeals also challenge the order on sentence dated 20th December 2017 whereby each of them were sentenced to undergo rigorous imprisonment ('RI') for life along with a fine of Rs.5,000/- each and in default of payment of fine, they were to undergo simple imprisonment for three months.

2. The three Appellants, i.e. Naveen Verma (Accused No.1: A-1) (Appellant in Crl. A. No. 249/2018), Chandan (A-2) (Crl. A. No. 362/2018) and Rajesh Chauhan (A-3) (Crl. A. No. 449/2018), were charged as under:

- (i) During the intervening night of 26th-27th September 2010, at Press Enclave Road in front of Select City Mall, Saket, the three of them along with Ashish (since deceased) hatched a criminal conspiracy to abduct, loot, and rob persons and thereby, committed the offence punishable under Section 120B IPC. Pursuant to the said conspiracy, at around 11:50 pm at Press Enclave Road in front of Select City Mall, Saket, all the three abducted Kajal Chatterjee (the deceased) in their car bearing registration DL 1LK 0379 and robbed him of his purse, jewellery, cards and other belongings and caused injury to him thereby committing the offence punishable under Section 394 IPC.

- (ii) Pursuant to the above conspiracy, A-1 used a deadly weapon, i.e. a country made *katta*, to rob and cause injuries to the deceased thereby committing the offence punishable under Section 397 IPC.
- (iii) All three accused, pursuant to the aforesaid conspiracy, shot the deceased with a country-made *katta* resulting in injuries which caused the deceased to die on 9th October 2010 and thereby, the three accused committed the offence punishable under Section 302/120B IPC.

3. By the impugned judgment, the trial Court has acquitted the three accused of the offence punishable under Section 394/120B IPC and A-1 of the offence punishable under Section 397 IPC. An additional charge framed against A-1 for possession of a firearm without license which is an offence punishable under Section 25/54/49 Arms Act was found to be not established and he was acquitted of the same. With regard to A-2 and A-3, additional charges under Section 411 IPC were framed pursuant to the recovery, at their instance, of certain articles which belonged of the deceased. These charges were also found to be not established and they were acquitted of the same.

Background

4. On 27th September 2010, Nabanita Chatterjee (PW-10) lodged a complaint about her husband, the deceased, having gone missing. He was working as an Assistant Manager in the Joy Luck Moon Restaurant and Bar at Select City Mall. After finishing the day's work, he had left for home at around 11:30 pm on 26th September 2010 and at 11:50 pm, he told her that he had boarded a cab and would reach home soon. However, he did not

reach home. His mobile phone was also found to be switched off.

5. Pursuant to the above missing report, a 'hue and cry' notice was issued and information was lodged on the ZIP Net on 27th September 2010 itself. No clues could be gathered. PW-10 again approached the police on 28th September 2010 and informed them that she suspected that her husband had been abducted but did not mention that she suspected any particular person.

6. It transpired that an unknown male aged around 26 years having a head injury was found unconscious on 60ft Road, Chhattarpur Pahari and was admitted at AIIMS trauma centre and an FIR No.402/2010 under Section 326 IPC had been registered at PS Mehrauli. PW-10 identified the injured person as her husband. More than ten days later, the deceased died of his injuries at the hospital on 9th October 2010. He remained unconscious throughout.

Post mortem examination

7. Dr. Sudhir Gupta (PW-33) conducted the post mortem examination of the body and noticed the following:

- “1. fire arm missile entry-wound measuring 1 cm x 1cm, oval in shape surrounded with tattooing and blackening measuring 5cm x 4 cms with scab formation. Further the wound was extended up to left cheek 4cm below the zygomatic process. Wound was communicating to skull cavity deep. The deceased was under surgical care.
2. Linear abrasion 11 cm on flexor aspect of left arm.
3. Stitched wound 3 cm x 9 cm, left ear lobule.”

8. The cause of death was opined to be the head injury caused by the fire arm. It was estimated that the bullet was shot within a range of 12 cm. There was no cross-examination of this witness.

Arrests, disclosures and seizures

9. During the course of the investigation, the statement of Neeraj Puri (PW-24), who first saw the victim lying on 60ft Road near Select City Mall, was recorded. The CDR of the mobile phone of the deceased was also collected. On 12th October 2010, information was received at PS Saket from PS Lodi Colony that A-2 and A-3 had been arrested in FIR No.154/2010 dated 21st October 2010 registered at PS Lodi Colony under Section 25/54/59 Arms Act. They had purportedly disclosed their involvement in the present case after their arrest in that case. A TATA Indica car bearing registration DL 1LK 0379 was also recovered from their possession. A tenant verification form, a character certificate and a voter ID card, all of which belonged to the deceased, were also recovered from the said car.

Arrests and disclosures

10. On 22nd October 2010, A-2 and A-3 were formally arrested in the present case when they were produced before the Court in the earlier case arising out of FIR No.154/2010. The time of arrest of A-2 and A-3 from the concerned Court located at Saket Courts Complex is shown as 3:25 pm. Shortly thereafter, at around 4:15 pm on the same date, A-1 was also arrested. No mobile phone was recovered from him upon the search of his person. He is purported to have made self incriminating disclosures of which

only certain portions were admissible.

11. On 23rd October 2010, the three accused persons led the Investigating Officer ('IO'), Inspector Pankaj Singh (PW-44), and Sub-inspector Dalip Kumar (PW-27) to the place of abduction and pointed out the exact location from where they had picked up the deceased near the gate of Sainik Farm (Ex.PW-27/E-G). The three accused persons also pointed out the place where they had thrown the deceased after robbing him on 60ft Road near 100ft Road, Chhatarpur (Ex.PW-27/H-J).

12. Thereafter, A-3 led the police officers to the roof of his apartment building to get recovered a ring which he stated had been stolen by him from the deceased (Ex.PW-27/S). The bloodstained trousers worn by A-3 at the time of the incident were also recovered and seized (Ex.PW-27/O). A-1 too purportedly took the police officers to his house for recovery of the *katta* used in the commission of the offence (Ex.PW-27/Q) and a bloodstained t-shirt worn by him at the time of the incident (Ex.PW-27/R).

13. On 25th October 2010, the fourth co-conspirator, Ashish (died during the pendency of the trial), was also arrested on the basis of secret information received by the IO. In his disclosure statement, he states that the three accused persons and he had planned to abduct people in their car. He disclosed that on the night of 26th September 2010, immediately prior to the incident narrated by A-1 above, they had consumed liquor and had picked up a person from near IFFCO Chowk who was travelling towards Mehrauli. He states that they then took Rs.1,500/- from him and dropped him off near

Qutub Minar Metro Station.

14. The TATA Indica car was found to be registered in the name of Ashok Sharma, the uncle of Ashish. The FSL experts who reached the spot lifted the blood stained pieces of the back seat cover and sent that to the FSL. The deceased's ring which had been recovered at the instance of A-3 was identified by PW-10 in a TIP.

15. The IO who took charge of the case after the transfer of PW-44, Inspector Dharam Dev (PW-34), prepared the site plan and collected the details of the transactions carried out at the Axis Bank ATM in Vasant Kunj from 9:00 pm to 11:00 pm on 26th September 2010. The CCTV footage was also taken. The mobile number ending 2394 used by A-1 was found to be in the name of some other person who could not be located. However, this mobile phone mostly remained in the area of Sultanpur where A-1 lives. Thereafter, the chargesheet was filed and charges were framed as indicated hereinbefore.

Trial

16. The prosecution examined 45 witnesses. In their respective statements under Section 313 Cr PC, each of the accused denied the incriminating circumstances against them and claimed to have been falsely implicated.

17. In his statement under Section 313 Cr PC, A-1 stated as under:

“I am innocent and falsely implicated in this case. Police officials of PS Lodhi Colony took me from my house and falsely implicated in this case. Nothing has been recovered from my possession or at my instance and the country made pistol

was planted upon me and my t-shirt was brought by the police official in my absence from my house. I did not make any disclosure statement and my signatures were obtained forcibly during my police custody. When I was in Tihar Jail, police officials visited my house and took my clothes and 5-6 mobile phones which belonged to my family members.”

18. A-2, in his statement, stated as under:

“I am innocent and falsely implicated in this case. I was security guard at Dwarka in a society where Rajesh was also working as a security guard. When police lifted Rajesh in case FIR No. 154/10 PS Lodhi Colony, they arrested me also and falsely implicated in this case. I and Rajesh Chauhan were acquitted in case FIR No. 154/10 PS Lodhi Colony.”

19. Similarly, A-3 stated as under:

“I am innocent and falsely implicated in this case. I was security guard at Dwarka in a society. Naveen was a property dealer for giving the property on rent. Naveen had given his mobile no. to me in order to get information from me about any property which was to be let out on rent. There was enmity between Ashish and Naveen and Naveen was falsely implicated by Ashish and when the call details of Naveen were searched, my mobile number surfaced on the same. Police enquired about me and as I was earlier in a murder case, in which I was acquitted by the court and my number was found in the call details of Naveen, I was implicated in this case falsely.”

Judgment of the trial Court

20. In the impugned judgment, the trial Court held that the prosecution had been able to prove the following circumstances beyond reasonable doubt:

- “(i) apprehension of the accused Chandan and Rajesh along with Indica car in question having blood stains of the deceased on the back seat.
- (ii) Recovery of blood stains of deceased over the recovered pant of the accused Rajesh.

- (iii) Use of the said car by the accused Ashish Sharma (already expired) along with accused Chandan, Rajesh, Naveen on the fateful night.
- (iv) Identification of accused Rajesh, Chandan and Naveen by PW39, showing that the accused Naveen, Chandan and Rajesh were together in the Indica car and looted PW39 just prior to the present incident.
- (v) DNA report showing the blood stains found on the back seat of the car, pant of the accused Rajesh matched with that of deceased.
- (vi) The mobile phone location of accused Naveen Verma showing his movements from Gurgaon to Vasant Kunj and thereafter at Faridabad.”

21. Further, it was concluded by the trial Court as under:

“On overall appreciation of the evidence, accused Chandan, Rajesh, Naveen Verma and Ashish Sharma (since expired) were found together in the alleged Indica car on the day of fateful night and while looting the deceased, killed him in furtherance of their common intention, hence found guilty for commission of offence u/s 302/34 IPC. As far as charge of robbery is concerned, the recovery of robbed article at the instance of accused Rajesh do not found to be credible thus not found guilty for commission of offence u/s 394/120-B IPC and 397 IPC. Furthermore, the circumstance of recovery of *desi katta* also not found credible, therefore no offence u/s 25 Arms Act proved against accused Naveen Verma. Prosecution also not able to prove offence u/s 411 IPC against accused Rajesh Chauhan and Chandan. No offence proved against accused persons u/s 201 IPC.”

22. The trial Court accordingly proceeded to convict the Appellants for the offence punishable under Section 302/34 IPC and sentenced them in the manner noted hereinbefore.

23. In the present appeal, this Court has heard the submissions of learned

counsel Mr. Vishesh Wadhwa on behalf of A-1, Mr. B. Badrinath on behalf of A-2 and Mr. Harsh Prabhakar on behalf of A-3. Mr. K.S. Ahuja, learned APP, appeared on behalf of the State and advanced arguments for the prosecution.

Law relating to circumstantial evidence

24. As this is a case of circumstantial evidence, it would be appropriate to recapitulate the factors to be taken into account in such cases as explained by the Supreme Court in ***Anjan Kumar Sarma v. State of Assam (2017) 14 SCC 359***:

- “(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' 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 of 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 [See: *Sharad Birdhichand Sarda v. State of Maharashtra (1984) 4 SCC 116*; *M.G. Agarwal v. State of Maharashtra AIR 1963 SC 200*].”

25. The Supreme Court, in ***Gagan Kanojia v. State of Punjab (2006) 13 SCC 516***, identified the following principles with regard to appreciation of circumstantial evidence:

- “1) There must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.
- 2) Circumstantial evidence can be reasonably made the basis of an accused person's conviction if it is of such character that it is wholly inconsistent with the innocence of the accused and is consistent only with his guilt.
- 3) There should be no missing links but it is not that every one of the links must appear on the surface of the evidence, since some of these links may only be inferred from the proven facts.
- 4) On the availability of two inferences, the one in favour of the accused must be accepted.
- 5) It cannot be said that prosecution must meet any and every hypothesis put forward by the accused however far-fetched and fanciful it might be. Nor does it mean that prosecution evidence must be rejected on the slightest doubt because the law permits rejection if the doubt is reasonable and not otherwise.”

Arrests not proved

26. It is pertinent to recall that the investigation in the present case was going nowhere due to lack of clues or information for almost a month after the incident before being reignited by the purported disclosures made by A-2 and A-3 who had been arrested in connection with FIR No.154/2010 registered at PS Lodhi Colony. Curiously, the disclosures made by them specifically mention the FIR No.273/2010 which was registered in the present case.

27. The veracity of such disclosures is extremely doubtful given that it is inconceivable that the two accused, A-2 and A-3, would have been aware of

the exact particulars of the FIR in the present case at the time of their arrest. Furthermore, A-2 and A-3 were acquitted of the charges framed against them in the case arising from FIR No.154/2010. Those acquittals have not been challenged and have attained finality. Therefore, the circumstances concerning their arrest and the subsequent disclosures made by them cannot be believed and should not be taken into account in considering the present case.

28.1. In this context, the decision of the Supreme Court in ***Lalta v. State of Uttar Pradesh AIR 1970 SC 1381*** is relevant. There, the First Appellant had filed a money suit in the Court of Civil Judge, Gonda against one Swami Nath on the basis of a promissory note and receipt. Swami Nath had filed a written statement in the suit denying having taken any such loan or executed any promissory note or receipt. Prior to the filing of the suit, Swami Nath had filed a complaint against the First Appellant and others alleging that they had forcibly taken his thumb impressions on a number of blank forms of promissory notes and receipts. The case arising out of the said criminal complaint ended in the acquittal of the First Appellant and the other persons complained against. The civil suit against Swami Nath, however, proceeded separately.

28.2. In the civil suit filed by the First Appellant, Swami Nath moved an application for a report being called from the Superintendent, Security Press, Nasik regarding the year of the revenue stamps affixed on the promissory note and receipts. The report received showed that the stamps had been printed on 21st December 1953 and were issued for the first time on

16th January 1954. The Civil Judge, on the basis of the said report, concluded that forged documents had been made the basis for filing the suit and ordered that a criminal complaint be filed against the First Appellant and others. This criminal complaint against them for the offences under Sections 193/194/209/465/467/471 IPC was filed. In the resultant proceedings, the First Appellant was found guilty under Section 467 IPC and sentenced for three years and under Section 471 IPC he was sentenced to two years and under Section 193 IPC, sentenced to two years. After his review application was dismissed by the High Court, the First Appellant approached the Supreme Court. It was argued that in view of the dismissal of the initial criminal complaint against him, the subsequent recording of conviction in the complaint filed by the Civil Judge was not sustainable.

28.3. The following observations of the Supreme Court are pertinent in this regard:

“It is manifest in the present case that the appellants cannot plead the bar enacted in s.403(1) of the Criminal Procedure Code. It is equally manifest that the prosecution of the appellants would be permitted under sub-s.(2) of s.403, Criminal Procedure Code. The question presented for determination in the appeal is, however, different. The question is whether where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppels or res judicata against the prosecution, not as a bar to the trial and conviction of the accused for a different offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted in terms of s.403(2), Criminal Procedure Code.”

28.4. After considering the decisions in *Queen v. Ollis* [1900] 2 Q.B.758 and *The King v. Wilkes* 77 C.L.R. 511 and the decision of the High Court of Australia in *Marz v. The Queen* 96 C.L.R. 62, the Supreme Court concluded that Section 403 Cr PC does not preclude the applicability of the rule of issue-estoppel. It was then concluded as under:

“If the rule of issue-estoppel is applied to the present case, it follows that the charge with regard to forgery must fail against all the appellants. The reason is that the case of Swami Nath is solely based upon the allegation that his thumb impressions were obtained on blank forms of promissory notes and receipts on January 7, 1955 by the use of force. If the finding of the Second Class Magistrate on this issue is final and cannot be reopened, the substratum of the present prosecution case fails and the charges of forgery under ss. 467 and 471, Indian Penal Code cannot be established against any of the appellants.”

29. Therefore, where the circumstances leading to the arrest of A-2 and A-3 from a TATA Indica car have been disbelieved by a competent court in an earlier trial in which their acquittal has attained finality having not been challenged, it cannot be open to the prosecution to re-litigate those same circumstances in a subsequent trial wherein the arrest of the accused persons from the TATA Indica car is sought to be established as a circumstance pointing unerringly to their guilt. Therefore, the very first circumstance of the arrest of A-2 and A-3 from the TATA Indica car has not been established beyond reasonable doubt.

30. It should also be recalled that the arrests of A-2 and A-3 led to the arrest of A-1. The arrests of A-2 and A-3 are shown to have taken place at 3:25 pm from Saket Courts while A-1 was arrested shortly thereafter at 4:25 pm from near Sultanpur Metro Station, MG Road. It has not been explained how A-2

and A-3 – who were in police custody at Saket Courts – would know the whereabouts of A-1 at that specific time. Furthermore, no mobile phone was recovered from the personal search of A-1 thus ruling out the possibility that his location could be determined by contacting him. In this light, the arrest of A-1 too is extremely doubtful and cannot be considered an established circumstance pointing to the guilt of the accused person.

Testimony of PW-39 unreliable

31. The prosecution has sought to heavily rely on the testimony of Ramu (PW-39) who is purportedly another victim of the three accused persons who was abducted and robbed by them immediately prior to the abduction of the deceased. As per his deposition, he was waiting for a cab when he was approached by the three accused and Ashish in a TATA Indica car asking where he wanted to go. They agreed to give him a ride to Chhatarpur. After some time, when they were near Arjun Nagar Metro Station, A-3 caught hold of PW-39's neck while A-1 pointed the *katta* at him as A-2 snatched his mobile phone and wallet which contained approximately Rs.5,000/- in cash and an ATM card. A-2 then used the ATM card to withdraw Rs.3,300/- from an ATM in Vasant Kunj before he was dropped off near Qutub Minar Metro Station.

32. What is odd, however, is that, despite his assertion to the contrary, PW-39 does not seem to have made a complaint to the police in this regard. The first statement by this witness was recorded on 30th May 2011 more than eight months after the incident. Furthermore, the details of the said ATM card and bank account have not been produced before the trial Court.

Even though the CCTV footage of the ATM in question was supplied to the police, it was never produced before the trial Court due to the footage not being clear. In this regard, it is pertinent to note that illustration (g) under Section 114 of the Indian Evidence Act 1872 (IEA) allows the Court to presume that “evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it”. Therefore, it is only natural that an adverse inference would be drawn against the prosecution in this case with respect to the CCTV footage as they have chosen not to produce it.

33. Included in the paper book is a letter written to Inspector Dharam Dev (PW-34) by Axis Bank on 10th January 2011 which confirms that they had copied the required CCTV footage and details of all transactions of the ATM at Vasant Kunj, New Delhi which took place between 9:00 pm and 11:00 pm on 26th September 2010. In light of the disclosures purportedly made by co-accused Ashish, it is not clear why the details of the withdrawals made on 25th September, 2010 were not sought. In the transaction details annexed to the aforementioned letter, three withdrawals were made of Rs.1,000/-, Rs.2,000/- and Rs.300/- at 11:24 pm, 11:25 pm and 11:26 pm respectively purportedly with the ATM card belonging to PW-39. However, the account number ending 6021 pertaining to the said three transactions has not been shown to be the account number of PW-39.

34. Furthermore, there are a litany of contradictions and inconsistencies in the deposition of PW-39 in light of his statement to the police under Section 161 Cr PC on 30th May 2011. These have been brought to light

during the course of his cross-examination where he was confronted with various aspects of his deposition which were not reflected in his statement to the police. It emerges that in the said statement, he had not mentioned to the police that he had told the persons in the car which stopped near him that he was going to Chhatarpur or that he had sat in the TATA Indica car and the driver had started driving towards Chhatarpur.

35. PW-39 further admits in his cross-examination that he had not told the police that one of the accused persons had taken his mobile phone and ATM card from him or that A-2 had withdrawn Rs.3,300/- from an ATM using his ATM card. While there is a mention of Rs.3,300/- being withdrawn from an ATM, he did not mention in his original statement that the car took a turn towards Vasant Kunj from where A-2 withdrew the money. It further transpires that no mention of PW-39 being thrown out of the car near Qutub Minar Metro Station was made by him to the police. Although he has claimed in his deposition that he went to PS Mehrauli on the next day from where he was sent to PS Jauna Pur and then to PS Gurgaon, MG Road where his complaint was not entertained, he had failed to mention this to the police in his statement recorded on 30th May 2011.

36. It is also pertinent to note that PW-39 has only identified the three accused persons for the first time in Court during the trial in 2014, i.e. four years after the purported incident. Such identification is doubtful and must be subjected to close scrutiny. In *Rameshwar Singh v. State of J & K (1971) 2 SCC 715*, it was observed as under:

“Before dealing with the evidence relating to identification of the appellant it may be remembered that the substantive

evidence of a witness is his evidence in court but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after the former's arrest is of vital importance because it furnishes to the investigating agency an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in court at the trial. From this point of view it is a matter of great importance both for the investigating agency and for the accused and a fortiori for the proper administration of justice that such identification is held without avoidable and unreasonable delay after the arrest of the accused and that all the necessary precautions and safeguards are effectively taken-so that the investigation proceeds on correct lines for punishing the real culprit. It would, in addition, be fair to the witness concerned who was a stranger to the accused because in that event the chances of his memory fading are reduced and he is required to identify the alleged culprit at the earliest possible opportunity after the occurrence. It is thus and thus alone that justice and fairplay can be assured both to the accused and to the prosecution. The identification during police investigation, it may be recalled, is not substantive evidence in law and it can only be used for corroborating or contradicting evidence of the witness concerned as given in court. The identification proceedings, therefore, must be so conducted that evidence with regard to them when given at the trial, enables the court safely to form appropriate judicial opinion about its evidentiary value for the purpose of corroborating or contradicting the statement in court of the identifying witness.”

37. Further, in ***Kanan v. State of Kerala (1979) 3 SCC 319*** it was explained by the Supreme Court as under:

“It is well settled that where a witness identifies an accused who is not known to him in the Court for the first time, his evidence is absolutely valueless unless there has been a previous T.I. parade to test his powers of observations. The idea of holding T.I. parade under Section 9 of the Evidence Act is to

test the veracity of the witness on the question of his capability to identify an unknown person whom the witness may have seen only once. If no T.I. parade is held then it will be wholly unsafe to rely on his bare testimony regarding the identification of an accused for the first time in Court.”

38. In the present case, considering that the three accused were total strangers to PW-39, it was essential for the prosecution to have organized a TIP at the earliest point in time to have him identify them. The failure to do so considerably weakens the evidence concerning his identification of these three accused in the Court for the first time during his deposition in 2014.

A-1's location not determined

39. The mobile phone seized (Ex.PW-4/C) which belonged to A-1 was supposedly handed over to the police by his mother who came to the police station to do so. The handset was of the dual-SIM type and each SIM-card slot bore its own IMEI number, the first ending 4883 and the second ending 4888. The said IMEI numbers are not reflected in the CDR (Ex. PW-19/D). Therefore, the CDR does not aid the prosecution's attempt to determine the location of A-1 at the time of the incident.

40. Even the manner in which the mobile phone came to be seized is doubtful with A-1's mother having come to the police station of her own accord several months after the arrest of A-1 to hand over the same. The ownership of the mobile number is also disputed as it was found to be in the name of one Ram Dash who could not be traced during investigation. The prosecution also failed to establish any link between A-1 and the said Ram Dash.

Doubtful recoveries

41. It must be noted that a knife was recovered from A-2 even though no knife was used in the commission of the offence. No bloodstains were found on the knife and the post mortem report reveals no injuries to have been caused by a knife. The trial Court too has disbelieved this particular recovery. The only property that A-2 was charged with stealing were the voter ID card of the deceased, a tenant verification form and a certificate of the restaurant where the deceased was working as an Assistant Manager. In any event, A-2 was cleared of the said charge and acquitted of the offence punishable under Section 411 IPC.

42. This assumes significance since the trial Court has also disbelieved the other recoveries made in the present case including a purported recovery of a bloodstained shirt at the instance of A-1, the DNA of which matched with that of the deceased. Even the recovery of the ring at the instance of A-3 was disbelieved.

43. In ***Mohd. Jabbar v. State*** (decision dated 21st May 2010 in Crl.A.1022/2018), this Court disbelieved this kind of evidence. It was noted as under:

“18. Way back in the year 1943, Justice Muneer, in the decision reported as AIR 1943 Null 5 Shera vs. Emperor had cautioned Courts to be vigilant against the known practice of the police to plant ordinary objects on the accused persons to prove access by the accused to the place where the crime was committed.

19. In the decision reported as AIR 1963 SC 1113 Prabhu vs. State of U.P., the recovery of a blood stained shirt and a dhoti as also an axe on which human blood was detected was held to

be weak evidence. In the decision reported as AIR 1977 SC 1753 Narsinhbhai Haribhai Prajapati etc. vs. Chhatrasinh & Ors., the recovery of a blood stained shirt and a dhoti as also a dharia (weapon of offence) were held to be weak evidence. Similarly, in the decision reported as AIR 1994 SC 110 Surjit Singh & Anr. vs. State of Punjab, the recovery of a watch stated to be that of the deceased and a dagger stained with the blood of the same group as that of the deceased were held to be weak evidence. The latest in the line is the decision of the Supreme Court reported as JT 2008 (1) SC 191 Mani vs. State of Tamilnadu in which recoveries of blood-stained clothes and the weapon of offence stained with human blood were held to be weak recoveries.”

44. In ***Bhupinder Kumar v. State*** (decision dated 22nd February 2010 in CrI.A.375/2006), this Court has pointed out that the recovery of ordinary objects is treated as very weak evidence. In that case, the Court found it strange that the “accused would be retaining different photocopies of useless documents”. Similarly, in the present case, it is not understood why the accused would be retaining the documents of the deceased in the TATA Indica car almost a month after the incident. Interestingly, the documents were not recovered in furtherance of any pointing out by the accused persons in terms of Section 27 IEA. The documents were recovered upon the search of the car. There was nothing to indicate the conscious knowledge or awareness of the accused with respect to the presence of those documents in the car.

Blood stains

45. The next circumstance that has been heavily relied upon by the prosecution is the matching of the bloodstains found on the inner back pocket of A-3’s trousers with the bloodstains on the back seat cover of the

TATA Indica car. However, it is inconceivable that A-3 would still be wearing those bloodstained trousers when he was arrested on 21st October 2010 almost a month after the incident.

46. The mere presence of the DNA of the deceased on the backseat of the TATA Indica car cannot be said to be clinching evidence pointing to the involvements of A-2 and A-3. No fingerprints of A-2 or A-3 were lifted from the TATA Indica car to show that either of them was present in it at the time of the incident. The ownership of the Indica car is not connected to A-2 and A-3. It is stated to be under the ownership of the uncle of the since deceased Ashish and no evidence in this regard about the connection of A-2 and A-3 with the car has been proved. Therefore, this evidence by itself cannot be said to unmistakably point to the guilt of the accused.

Weapon of offence not proved

47. A-1's guilt is sought to be established by the recovery of a *katta* at his instance. However, the FSL report did not find that the bullet fired at the deceased matched with the *katta* in question. In fact, the trial Court has not found the seized *katta* to be the one used in the killing of the deceased. Therefore, with the weapon used in the commission of the offence being undetermined, there is nothing to connect A-1 to the killing of the deceased.

Summary of conclusions

48. The position vis-à-vis each of the accused persons can be summarised thus:

- i. A-1: The recovery of the *katta* at his instance has been disbelieved and the FSL report does not even establish that the said *katta* was

used in the commission of the offence. Neither his arrest nor the recovery of a bloodstained t-shirt at his instance has been held to be reliably proved. The IMEI number of the mobile phone purportedly used by him which was given to the police by his mother does not match the IMEI number noted on the CDR of the mobile number purportedly used by him. Even his ownership of the mobile number ending 2394 is not established as it is in the name of one Ram Das who could not be traced. The dock identification of A-1 for the first time in Court by PW-39 does not inspire confidence.

- ii. A-2: He has already been acquitted of the offence punishable under Section 411 IPC by the trial Court as it has disbelieved the recovery of the items belonging to the deceased purportedly stolen by him. There is no evidence to connect A-2 with the commission of the offence seeing as the knife recovered from him was not used in the killing of the deceased and he had been acquitted in the trial arising out of FIR No.154/2010. It has not been established that he was the one who withdrew Rs.3,300/- using PW-39's ATM card since the CCTV footage was not adduced as evidence by the prosecution on account of it being unclear. The ATM card has not been recovered and it has not been shown that the bank account from which the withdrawals in question were made actually belonged to PW-39. The Axis Bank letter shows that the police sought details of transactions which took place on the night of 26th September 2010 and not on 25th September 2010 although a robbery was allegedly committed by the accused on that date as well.
- iii. A-3: He too has been acquitted in the trial arising out of FIR

No.154/2010 wherein the circumstances of his and A-2's arrests from the TATA Indica car have been disbelieved. He has also been acquitted of the offence punishable under Section 411 IPC by the trial Court as the recovery of the ring which was purportedly stolen from the deceased has been disbelieved. Further, the recovery of bloodstained trousers at the time of his arrest almost a month after the incident is not believable as it is inconceivable that he would be wearing the same trousers so long after the incident. Therefore, the matching of the DNA on the bloodstains with that of the deceased is not clinching evidence pointing to his guilt.

49. Consequently, the Court is satisfied that prosecution has failed to establish each link in a chain of circumstances that points unerringly to the guilt of the accused persons beyond reasonable doubt. The circumstance of the bloodstains on the backseat cover of the car matching the blood of the deceased cannot be sufficient to unmistakably point to the guilt of the three accused and no one else.

Motive not proved

50. Furthermore, in a case where other circumstances have not been proved beyond reasonable doubt, the motive for the commission of the crime assumes greater significance as explained in ***Arjun Mallik v. State of Bihar*** 1994 Supp (2) SCC 372:

“...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 anybody 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.”

51. Thus, where the other circumstances surrounding the offence have not been established beyond reasonable doubt, failure to prove the motive for commission of the offence would be fatal to the case of the prosecution. In the present case, once the trial Court found the Appellants not guilty of the offences under Sections 394/397/411 IPC and Section 25/54/49 Arms Act, it was incumbent upon the trial Court to insist that the prosecution establish the motive for the commission of the crime beyond reasonable doubt. In the absence of convictions for the offence under Section 120B IPC or Sections 394/397 IPC, the prosecution had to explain why the three accused would have murdered the deceased. In the absence of any proof of motive, an important link in the chain of circumstances against the accused persons remains unproved.

52. For all of the aforementioned reasons, the accused persons are entitled to the benefit of doubt. The impugned judgment and the consequent order on sentence of the trial Court are hereby set aside. The appeals are allowed and the applications are disposed of.

53. The three Appellants are to be set at liberty forthwith, unless wanted in some other case. They will fulfil the requirements of Section 437A Cr PC to

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

S. MURALIDHAR, J.

JULY 03, 2018

rd/anb

I.S. MEHTA, J.

