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

Reserved on: 11th October, 2018

Decided on: 30th October, 2018

+ **CRL.A. 1197/2013**

INDERJEET

.....Appellant

Through: Mr. Javed Alvi with Mr. Subrat Chouhan, Advocates.

versus

STATE

....Respondent

Through: Mr. Hirein Sharma, APP for the State.

+ **CRL.A. 1534/2013**

VIKAS TOKAS @ VICKY

.....Appellant

Through: Mr. Ram Singh Soni & Mr. Ashok Kumar Soni, Advocates.

versus

STATE

....Respondent

Through: Mr. Hirein Sharma, APP for the State.

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

J U D G M E N T

Dr. S. Muralidhar, J.:

1. These two appeals are directed against the judgment dated 16th July, 2013 passed by the learned Additional Sessions Judge-II, South District, Saket Courts in Sessions Case No. 50/2011 arising out of FIR No. 139/2011 registered at Police Station (PS) Vasant Vihar convicting both Appellants

for the offence punishable under Section 302 read with 34 IPC and additionally Appellant Vikas Tokas @ Vicky (Accused No.1: A-1) (Appellant in Crl. A. No. 1534/2013) under Section 25 of the Arms Act. The appeals are also directed against the order on sentence dated 20th July, 2013 whereby for the offence punishable under Section 302 read with Section 34 IPC, A-1 and the co-accused Inderjeet (A-2, the Appellant in Crl. A. No. 1197/2013) was sentenced to Rigorous Imprisonment ('RI') for life and fine of Rs.25,000/- and for the offence under Section 25-B of the Arms Act, A-1 was additionally sentenced to RI for two years. Both sentences were directed to run concurrently.

2. The charge against the two Appellants was that on 8th May, 2011 at about 8.20 pm at the jungle opposite Baba Gang Nath Mandir, Nelson Mandela Marg, Vasant Vihar, both of them in furtherance of their common intention murdered Lalit Kumar @ Sunil @ Pappal (the deceased) thereby committing the offence punishable under Section 302 read with 34 IPC. Additionally A-1 was charged with having been found in possession of a country-made pistol which he used in the commission of the above offence, thereby committing an offence punishable under Section 27 of the Arms Act.

Information to the police

3. DD No. 37A recorded on 8th May, 2011 at PS Vasant Vihar noted that one Hari Singh (PW-3) had come at 8.23 p.m. to the PS and informed that in the jungle on the left side of the road opposite the Baba Gang Nath Mandir a young male was lying in a severely injured condition and was probably shot dead with a fire arm.

4. This information was passed on to the Station House Officer ('SHO') Inspector Vijay Pal (PW-22). Inspector Pawan Kumar along with Constable ('Ct.') Naresh and Manoj Dahiya (PW-15) left in a police jeep for the spot. They took the injured person to the Trauma Centre at the All India Institute of Medical Sciences ('AIIMS'). The MLC (Ex.PW-1/A) shows that the deceased was brought there at 8.46 p.m. on 8th May, 2011 by PW-15 with alleged history of a gunshot injury.

5. The deceased was examined by Dr. Devendra Garg (PW-1). He clarified that although in the original MLC (Ex.PW-1/A), it was not mentioned that the patient had been brought dead, it had been mentioned in the extra copy kept at the centre. PW-1 noticed entry and exit injuries caused by a firearm of the size 1x1 cm at the exit point of the wound.

At the scene of crime

6. Inspector Vijay Pal (PW-22) accompanied by Ct. Ashok (PW-21) reached the Trauma Centre. PW-22 took the photographs of the dead body with his mobile phone. Thereafter he returned to the spot and on the way dropped PW-21 at Munirka for getting the photographs developed. Present at the spot already were Inspector Ved Prakash, SHO and the other police staff including Inspector Pawan Kumar, Sub-Inspector (SI) Manoj Kumar (PW-19) and Head Constable ('HC') Gulab Singh (PW-23).

7. PW-22 called the crime team. He also met PW-3 at the spot. The mobile crime team report (Ex.PW-9/A) shows that the crime team was present from 10.30 pm to 11.30 pm. In the column titled 'details of exhibits lifted' it was

noted: “as per seizure memo prepared by IO.” SI Naresh Kumar (PW-9), in charge of the mobile crime team, deposed that at some distance from the jungle, just stepping down from the road, some blood was found scattered. PW-9 photographed the crime scene.

8. The seizure memos of the exhibits lifted from the spot were marked as Ex.PW-19/A and Ex.PW-19/B. Ex.PW-19/A pertained to the seizure of the blood soaked earth, the control earth, the blood stained stone and the control stone whereas the Ex.PW-19/B pertained to the lifting of a blue coloured cap with the letters DEA written on it and which was blood stained. The Court has been shown photographs taken at the spot which form part of the trial Court record. These show the presence of the blood stained cap at the spot.

Statement of PW-3

9. A *rukka* (Ex.PW-3/A) was prepared on the statement of PW-3 who stated that he was working in a private firm. At around 8.20 pm after dinner he was walking towards the Coolie Camp on Nelson Mandela Marg, near Vasant Vihar on the footpath. When he reached the opposite side of the Baba Gang Nath Mandir, from his left side he could hear the sound of firing. He heard the cries of a boy ‘*Bachalo Bachalo*’. When PW-3 turned towards the jungle, he noticed two young boys running from that spot. They crossed in front of him and ran towards the Coolie Camp which too was to his rear. One of them was thin, tall and fair wearing Jeans Pant and T-shirt. The other boy was shorter and he too was wearing Jeans Pant and T-shirt. PW-3 then quickly went to the PS and informed the police about the deceased lying in an injured condition.

10. The time of the recording of this *rukka* was at around 11.15 p.m. It was sent to the PS for registration of FIR No. 139/2011. The said FIR was registered at 12.30 am on 9th May, 2011. Ct. Ajay (PW-12), who was a beat constable in the area, identified the deceased from the photograph as Lalit, who was known to take smack and lived in Munirka Village. Later PW-22 ascertained the exact address of the deceased and reached his house. There they found his mother Uma Devi (PW-6) present. She identified her son from the photographs (Ex.PW-22/D-1 to D-6). There is some confusion whether the police met PW-6 at 2 am or 6 am on 9th May, 2011.

Statement of PW-6

11. PW-22 recorded the statement of PW-6 (Ex.PW-6/DA). In this statement PW-6 *inter-alia* stated that both A-1 and A-2 were friends of the deceased. The three would go out in the evenings for dinner. A-1 and A-2 were frequent visitors to the house of the deceased for the past two years. All three were drug addicts. About two and a half months earlier A-2 had called the deceased to his room and accused him of stealing a mobile phone. A-2 is stated to have physically assaulted the deceased; burnt his hands with the soldering machine and broken his finger. Since she was a poor woman, PW-6 was not able to muster the courage to give a police complaint.

12. From that time onwards A-2 bore a grudge against the deceased. As a result of his drug addiction the deceased had to quit his job at a CNG Station and was not earning anything. A-2 would often take meals at their place and sometimes would buy food stuff for the kitchen. A-2 then requested PW-6 to let him stay in the house and she also agreed. On 7th May, 2011 A-2 had

brought some of his personal belongings to the room of PW-6. When the deceased came to know of this he got angry with A-2 and refused to permit him to stay at their place. A-2 then returned to his place.

13. At around 5.30 pm on 8th May, 2011 when she was present in the room with her son, A-2 called from his mobile number ending with 0284 on her mobile number ending with 1578. However, this call was picked up by the deceased. After a while, A-2 came to the house and called the deceased out and asked him to accompany A-2. The deceased then replied that he would freshen up and join him. A-2 then left. At that time PW-6 came outside the house and noticed that A-1 was also standing there and both of them i.e. A-1 and A-2 left. 10-15 minutes later, the deceased told PW-6 that he was leaving to join A-1 and A-2. The deceased did not return even late at night.

14. While PW-6 kept waiting, at around 1 am A-2 came and told her that the deceased had met with an accident and that A-2 was going to the hospital to meet him. At this point A-2 left some of his belongings, including clothes, in the room. When PW-6 stated that she wanted to accompany A-2, he refused. He did not give her any information regarding the hospital where the deceased was admitted. PW-6 then called her brother-in-law Ram Prakash (PW-7) and told him about the deceased having met with an accident. PW-7 asked her to go to sleep and that they would take care of it in the morning. Thereafter, in the early hours of 9th May 2011, the police came there and showed her the photograph of the dead body of the deceased. In her statement PW-6 stated that she suspected A-1 and A-2 as being responsible for the murder of her son.

Post mortem

15. The post mortem of the deceased was conducted by Dr. Raghvendra Bagla (PW-24). In the post mortem report (Ex.PW-24/A), PW-24 noted the following injury:

“Gunshot wound measuring 3x2cms over the right lateral aspect of chest 14 cms below the axilla and 18cms right to midline. After piercing the skin, subcutaneous tissues and muscles, it entered the lateral aspect of right lung and then came out on the medial aspect of right lung and then entered the medial aspect of left lung and then it came out of the lateral aspect of the left lung. The it came out through an exit wound measuring 3x1cm on the posterolateral aspect of left chest, 12cms below the axilla and 15cms lateral to midline. The lungs and soft tissues of the track severely contused and lacerated. The chest cavity contained about 2 litres of blood.”

16. The cause of death was given as “respiratory failure due to ante mortem injuries to lungs produced by a projectile fired from a fire arm.”

Arrests, disclosures, recoveries

17. The clothes of the deceased were seized. While PW-22 was returning from AIIMS after the post-mortem examination, and reached near Aggarwal Sweets in Munirka, PW-19 met him and stated that he had got some information that A-1 and A-2 were present in the park of Baba Gang Nath Market. PW-22 organized a raiding party and requested four or five passersby to join. They declined and went away without leaving their names and addresses. PW-22 along with his team went to the spot indicated in the secret information and at the instance of the informer, A-1 and A-2 were apprehended.

18. PW-22 noticed some burn marks on the hands of A-1 and asked him about it. A-1 is supposed to have *inter-alia* disclosed that he had used a fire arm and in that process had received the burn injuries. A-1 was then taken to the Safdarjung Hospital. The MLC (Ex.PW-28/B) noted: “patient brought by Constable Ajay for medical examination at the Safdarjung hospital casualty”. Importantly it was noted that there was “alleged history of shooting by a desi gun to someone as stated by the police”. The notings were by Dr. Mohammad Rakibuddin whose hand writing was identified by Dr. Hari Shankar Niranjana (PW-28).

19. An important observation by Dr. Rakibuddin in the MLC was that he found “pin head size multiple red colour tattooing in the right distal forearm and dorsum of right hand and left hand.” He also found a stitch mark on A-1’s buttock 7 x 5 cm. He noted that A-1 had told him that this happened at a private hospital (Kapoor Hospital, Munirka). A-1 was advised review in the casualty of Safdarjung hospital.

20. A-1 was taken to PW-24 on 9th May, 2011 for examination. PW-24 took a swab from the injured portion of the forearm as well as from the hands. A control swab was also taken from the back. The injuries in the forearm were found to be about one day old. In his noting (Ex.PW-24/B), PW-24 opined that such injuries, as found on A-1, were possible by a firearm.

21. PW-22 then returned to the spot with A-1. Both A-1 and A-2 were arrested vide memos Ex.PW-19/G & Ex.PW-19/H. Both these memos show that they were apprehended at 2pm from the park behind Baba Gang Nath Mandir and the time of arrest was shown as 4.30 p.m. Disclosure statements

of both Appellants were recorded. Pursuant thereto, the clothes which A-1 and A-2 were wearing at the time of incident were got recovered. A-1 further disclosed that he could get recovered the country-made pistol and the treatment papers including OPD slips.

22. The admissible part of the disclosure by A-1 was that he had fled from the crime scene, gone to the Tikona Park and concealed the country made pistol there. While scaling the grill of the park, he got injured. First he went to a local hospital in Munirka and thereafter to the Safdarjung hospital for treatment. A-1 stated that he intended to get his wound stitched at the Safdarjung Hospital but seeing the presence of the police he left there and went to the Daya Memorial Hospital at Munirka.

23. Two rough site plans, without scale, were drawn up by PW-22. One was for the recovery of the pistol from the corner of the Tikona Park (Ex.PW-23/DB) and the other for the scene of crime (Ex.PW-22/C).

24. It must be mentioned at this stage that when A-1 first went to the Safdarjung Hospital for treatment he was given a slip (Ex.PW-12) stating that he had got injured. When they told him that it was a medico legal case he tried saying that he got injured accidentally. It also appears that two treatment slips were issued to him: one by Safdarjung hospital and the other by the Daya Memorial Hospital. These were found in the rear pocket of the pant of A-1 which was seized pursuant to his disclosure.

25. As far as the Daya Memorial exhibits are concerned, this was provided to IO by Dr. R.K. Kapoor (PW-5) in-charge of the Daya Memorial Hospital

in Munirka. In response to a letter of the IO dated 25th May, 2011, PW-5 replied by a letter dated 31st May, 2011 enclosing the OPD prescription with diagnosis issued to A-1 and the note of Dr. B.K. Mohanty (PW-4) who treated him. The payment receipt issued by Daya Memorial Hospital at 11.18 p.m. on 8th May, 2011 to A-1 in the sum of Rs.3,000/- was also furnished to the IO (Ex.PW-5/B). But for the above disclosure by A-1, the IO could not have known of the treatment received by A-1 at the Daya Memorial Hospital; that he received treatment there for the wound on his buttocks as a result of scaling of the wall of Tikona Park.

FSL Reports

26. The report dated 2nd September 2011 of the Biology Division of the FSL (Ex.PW-22/J, K) showed that while on the earth control and the pant and shirt of A-2 no blood could be detected, it was detected on all the other exhibits. Human blood was found on all exhibits except Ex.2 (vegetative material along with earth control) and Ex.9 (underwear of the deceased). Human origin blood was found on the piece of stone, the T-shirt and pant of the deceased and the jeans pant of A-1 (Ex.13/A). It stood confirmed by the FSL report that the blood group of the deceased (Group 'O') matched the blood group 'O' found on the jeans pant of A-1. Ex.PW-22/K described all the exhibits sent including the cap (Ex.5) which was shown to have blood of human origin.

27. The Ballistics Division of the FSL gave its report (Ex.PW-22/L) on 23rd December, 2011. Parcel No.11 was the swab (S-1) taken from the forearm of A-1. The report concluded on the basis of the chemical examination that fire

arm discharge residue was detected on S-1. It was further found that the hole on the right portion of the back side of the T-shirt (Ex.C-1) could have been caused by bullet discharged through a fire arm. The country made pistol was test fired successfully "using the cartridge in the laboratory stock and found to be in working order."

28. The main charge sheet was filed on 29th July, 2011. After the FSL reports were received a supplementary charge sheet was filed on 24th January, 2012.

29. By an order dated 20th August, 2011 the charges were framed against both accused in the manner indicated hereinbefore. On behalf of the prosecution, 30 witnesses were examined.

Statements under Section 313 Cr PC

30. In his statement under Section 313 Cr PC, A-1 denied the incriminating circumstances, including knowing the deceased or even visiting him. A-1 claimed to have been arrested from his house in the night of 8th May, 2011 and not at the park. He denied the injury marks on his hands or receiving treatment at the Daya Memorial Hospital. He admitted to refusing to participate in the TIP since, according to him, his photographs had already been taken and shown to the witnesses. A-1 denied the CDRs collected by the IO. He claimed to have been falsely implicated and did not wish to lead the defence evidence.

31. As far as A-2 is concerned, he stated that he knew the deceased 'very well' and 'was on visiting terms with him'. He denied all other circumstances

including his arrest. He too justified his refusal to participate in the TIP by stating that his photographs had already been shown to the witness. He too claimed to have been falsely implicated and did not wish to lead evidence.

Impugned judgment of the trial Court

32. In the impugned judgment the trial Court came to the following conclusions:

- i) The helplessness of PW-6 in not going to the police immediately after being informed that the deceased had met with an accident was understandable. PW-7 lived elsewhere and therefore he did not feel the urgency that she felt. Her conduct cannot be termed as questionable.
- ii) The non-compliance, if any, by the police with the procedural rules was not shown to be deliberate and in bad faith or to have caused prejudice to the accused. Therefore, there was no merit in the contention that the entire investigation should be held to be vitiated.
- iii) As regards the discrepancies and contradictions in the statements of the PWs, they did not go to the heart of the matter and shake their basic version. The evidence of the PWs could not, therefore, be rejected in toto.
- iv) The lapses in the investigation also were not such that the entire prosecution case should fail.
- v) The conduct of A-2 in coming in the dead of the night; leaving his belongings and misleading PW-6 about what happened to the deceased betrayed his involvement in the crime.

vi) The CDR shows that the calls were exchanged between the deceased and the two accused and these substantiated the prosecution case.

vii) With there being two site plans, one for the place of the incident and the other for the recovery of the weapon, it could not be said that the fire arm was planted. In any event this happened not too long after the arrest of the accused and the incident itself.

viii) The sanction to prosecute A-1 under Section 25 of the Arms Act appeared to have been granted after considering relevant facts.

ix) The refusal by the accused to participate in the TIP, A-1 denying that he knew the deceased, A-2's misleading statement to PW-6 that the deceased had met with an accident, the details of the injury of A-1, the blood on the clothes of A-1, the blood stain on his T-shirt, the gunshot injury on both hands of A-1 were all factors that cumulatively pointed to the guilt of the accused.

x) The opinion of PW-24 as to the approximate time of death also matched the sequence of events. The altercation between the deceased and A-2 as referred to in the statement of PW-6 provided the motive for the offence.

33. For the aforementioned reasons, the trial Court held both the Appellants guilty of the offence punishable under Section 302 read with 34 IPC and proceeded to sentence them accordingly. Additionally A-1 was held guilty for the offence under Section 25 of the Arms Act and sentenced separately for it.

34. This Court has heard the submissions of Mr. R.S.Soni, learned counsel appearing for A-1 and Mr. Javed Alvi, learned counsel appearing for A-2. Mr. Hirein Sharma, learned APP appeared for the State.

Law relating to circumstantial evidence

35. This is a case based on circumstantial evidence and the law in this regard is fairly well settled. The following observations made by the Supreme Court in ***C. Chenga Reddy v. State of Andhra Pradesh (1996) 10 SCC 193*** are instructive on the manner in which the circumstantial evidence is to be weighed:

“21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. In the present case the courts below have overlooked these settled principles and allowed suspicion to take the place of proof besides relying upon some inadmissible evidence.”

36. The following observations were made in ***Sattatiya v. State of Maharashtra (2008) 3 SCC 210***:

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

have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances...

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

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

“23. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact sought to be relied upon must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these

inferences, the court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case. The Court thereafter has to consider the effect of proved facts. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accused and should exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused, where various links in chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court.”

38. Finally, in ***Rajendra Pralhadrao Wasnik v. The State of Maharashtra*** (2012) 4 SCC 37, the Supreme Court held:

“12. There is no doubt that it is not a case of direct evidence but the conviction of the accused is founded on circumstantial evidence. It is a settled principle of law that the prosecution has to satisfy certain conditions before a conviction based on circumstantial evidence can be sustained. The circumstances from which the conclusion of guilt is to be drawn should be fully established and should also be consistent with only one hypothesis, i.e. the guilt of the accused. The circumstances should be conclusive and proved by the prosecution. There

must be a chain of events so complete as not to leave any substantial doubt in the mind of the Court. Irresistibly, the evidence should lead to the conclusion which is inconsistent with the innocence of the accused and the only possibility is that the accused has committed the crime.

13. To put it simply, the circumstances forming the chain of events should be proved and they should cumulatively point towards the guilt of the accused alone. In such circumstances, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person.”

Last seen

39. The case of the prosecution as spoken by PW-3 is that while he was returning from dinner and walking along the pavement opposite the Baba Gang Nath Mandir he heard the sound of gun fire and the scream of a young male asking to be saved. He then noticed two boys run from that spot from within the jungle towards his left. They ran past him and then towards the Coolie Colony which was to his rear. PW-3 then went to the PS and it is on his information that the police reached the spot. It was on his statement that the *rukka* was drawn out and the FIR registered. PW-3 was therefore one of the significant witnesses for the prosecution.

40. Unfortunately for the prosecution PW-3 turned hostile and claimed that he had given no statement to the police. He also claimed that he was made to sign blank papers. It will be recalled that a rough site plan (Ex.PW-22/C) was purportedly drawn up by PW-22 on the statement of PW-3. Yet, where PW-3 was standing on the pavement from where he saw the incident, was not indicated in the said plan. It was only indicated in the scaled site plan. In

any event with PW-3 having turned hostile, one important piece of evidence to prove the circumstance of last seen of the accused with the deceased was unavailable to the prosecution. Therefore it would be prudent to keep aside the evidence of PW-3 in toto.

41. At this stage it must also be noted that Mr. Soni, learned counsel appearing for A-1 pointed out that the signatures of PW-3 as appearing in the *rukka* did not tally with his signatures on the transcript of his deposition. He accordingly contended that there was a doubt whether PW-3 was at all present and saw the occurrence.

42. The above submission is to no avail since the Court proposes to proceed as if evidence of PW-3 ought not to be taken into consideration at all. The fact of the matter is that when the information was entered in the PS as DD No. 37A at 8.23 pm, it was promptly attended to by the police. We have PW-15 speaking about what happened when they reached the spot. He accompanied Inspector Pawan to the AIIMS Trauma Centre where the deceased was declared brought dead. The MLC also confirmed the presence of PW-15 at the AIIMS Trauma Centre at around 8.46 p.m.

43. Further we have the evidence of PW-1 who confirms that the deceased suffered a gunshot wound on his chest. The post-mortem report prepared by PW-24 also confirms this.

44. With PW-3 not being a reliable witness as to the last seen, we have to fall back on the evidence of PW-6 herself. She states that on her mobile number ending with 5178 she received a call from A-2 whose mobile

number ended with 0284 and this call was attended by the deceased. The CDR of the phone of A-2, which was exhibited by Israr Babu (PW-20) of Vodafone confirms that A-2 had indeed called a mobile phone used by PW-6 at 5.19 pm. PW-6 is consistent that this call was attended by the deceased who himself did not have a mobile phone.

45. The CDR of A-1 who was using a mobile number ending with 5560 which was again exhibited by PW-20 (with no cross-examination) shows that a call was made from the mobile phone of PW-6 to the number of A-1 at 5.32 pm. Then we have a call from A-1 to A-2 at 6.09 p.m. The cell location details show that all of these calls were made from locations in and around Munirka Village which is the area where all three i.e. A-1, A-2 and the deceased, were. In fact there were numerous calls exchanged during the period between 8.28 pm and 10.38 pm on 8th May, 2011 between A-1 and A-2. They apparently were in constant touch with each other soon after the incident. Likewise, the CDR of the mobile phone used by A-2 confirms this exchange of calls. In between he also called PW-6 at 8.32 p.m.

46. The anxiety of PW-6 about her son by calling A-2 at 1.09 am is also reflected in the CDR of A-2. The CDRs themselves tell a story about the deceased and the two accused being in touch with each other in and around the time of the incident. The CDRs also corroborate the statement of PW-6 that after A-2 had called the deceased on her mobile he came to the house to take the deceased away. The deceased did not immediately leave but after a while. A-2 calling A-1 and both of them then taking the deceased away is a scenario that is certainly supported by the CDRs.

47. Consequently, although the evidence of PW-3 is not available to the prosecution, the evidence of PW-6 in regard to A-2 having come and called the deceased and then A-1 and A-2 taking the deceased away has been conclusively proved by the prosecution. The deceased died within less than three hours of being last seen in the company of A-1 and A-2.

48. The FSL reports also support the case of the prosecution about A-1 being in the company of the deceased at the time of the firing. The jeans pant of A-1 contained blood of human origin the group of which was 'O', which is the blood group of the deceased. Apart from the bare denial, A-1 had no explanation to offer as to how his jeans pant could have the blood group of the deceased.

Recovery of the weapon

49. The next important circumstance is the conduct of A-1 in running away after the incident and concealing the weapon of offence in the Tikona Park. But for the disclosure of A-1 the police would not have been able to know that the weapon of offence was hidden in one corner of Tikona Park. It was vehemently argued on behalf of A-1 that just next to Tikona park was a residential colony and the park itself was a public park.

50. The time of the recovery was after the arrest of both the accused i.e. after 4.30 in the evening of 9th May, 2011. It should have been possible for the police to try and associate independent witnesses in the recovery. The evidence of PW-22 however points to the reluctance of the public to join in the recovery. Moreover, as pointed out by the learned APP the one person

who came forward to support the prosecution i.e. PW-3 ultimately turned hostile.

51. With the injury being caused by fire arm and the FSL report confirming that the injury was possible from the fire arm recovered at the instance of A-1, which firearm was to be in working condition, the evidence regarding recovery of the fire arm upon the disclosure of A-1 deserves acceptance.

Injury to A-1

52. What also probablises the recoveries is the disclosure by A-1 about the injury on his buttocks which he received by scaling the wall and jumping into the Tikona Park. This could not have been discovered but for A-1's disclosure. His further disclosure that he first went to a Doctor in Munirka who asked him to go to Safdarjung Hospital; going to the Safdarjung hospital and then coming back for treatment to the Daya Memorial Hospital all stand established by the evidence gathered by the prosecution. As rightly noticed by the trial Court, the documents proving the treatment received by A-1 at the Daya Memorial Hospital and the payment made by him for such treatment have been proved without any contra diction. His false denial of such treatment also raises serious questions about his conduct. A-1's mandatory MLC subsequently at Safdarjung Hospital further confirms that he received the injury on his buttocks which required stitches.

53. Another important circumstance is the presence of gunshot injuries on the right forearm and both hands of A-1. The swab (S-1) taken by PW-24 when sent to the FSL confirmed presence of gunshot residue. The blank denial of A-1 of all these incriminating circumstances was least helpful to

his case. The gunshot residue injuries on the hands of A-1 connects him with the weapon of the offence and therefore to the murder of the deceased.

54. Learned counsel for A-1 submitted that the request by the IO to PW-24 to give an opinion on the fire arm injuries was received by PW-24 on 10th May, 2011 at 3 pm whereas in his opinion he states “victim has produced for physical examination on 9th May, 2011 and swabs of the forearm (right) dorsal aspect of the both hands are taken”. Mr. Soni asked the Court to carefully peruse the date ‘9th May, 2011’ written in this document titled ‘opinion’ (Ex.PW-24/B). According to him, that date appeared to have been inserted subsequently thus making the entire document of doubtful validity.

55. The Court finds that in the cross-examination of PW-24 no question was asked of him about the above seeming contradiction viz., that the request for his opinion was received by him on 10th May 2011 whereas A-1 was produced before him for collection of swabs on 9th May, 2011. In the absence of any cross-examination on this aspect, the contention of the learned APP that this could be a genuine mistake of PW-24 writing the wrong date i.e. 10th May, 2011 instead of 9th May, 2011 appears plausible. The fact of the matter is that there was no need for PW-24 to fabricate the evidence in this regard. The swabs taken from the gunshot injuries on the hands of A-1 did test positive for gunshot residue in terms of the report of the FSL. These documents are not shown to have been manipulated.

56. It was then contended by learned counsel for A-1 that the chain of custody for the swabs to finally reach the FSL has not been satisfactorily

explained by the prosecution. In other words, the handing over of the swabs with the seal of the hospital to the IO, his depositing them in the *malkhana* and then taking it from the *malkhana* to the FSL has not been proved.

57. While these could be termed as lapses in the investigation, they do not, in the considered view of the Court, affect the credibility of the evidence of the prosecution taken as a whole. The FSL report notes the receipt of the parcel bearing the seal of AIIMS. There was no opportunity for tampering with such seal. Therefore, the objections raised by learned counsel for A-1 in this regard require to be rejected.

Cases cited by counsel for A-1

58. Mr. Soni placed reliance on the decision in ***Deepak Chadha v. State*** (decision dated 20th January, 2012 of this Court in CrI. A. No. 138/1999). That was a case based on circumstantial evidence. It was held there that the mere seizure of blood stained clothes and recovery of the possible weapon of offence would not by itself be sufficient to sustain the charge of murder. In the present case, however, these two are not the only circumstances which have been proved against the accused and therefore the decision is distinguishable on facts.

59. The next decision relied upon is the one in ***Mukeem v. State (NCT of Delhi)*** (decision dated 21st September, 2012 in CrI. A. No. 123/2012) in which it was *inter alia* held that the recovery of a knife from an open place six days after the incident would render such recovery suspicious. In the present case the recovery of the firearm was within a few hours of the arrest of the accused. It was less than 24 hours after the occurrence. Also, this is

not the only circumstances in the present case which stands proved against the accused.

60. The decision in *Arun @ Khadak Singh v. State* (decision dated 5th August, 2010 in Crl. A. No. 1052/2009) was relied on to submit that it was unlikely the both accused would remain in the vicinity of the place where the murder took place. Each case turns on its own facts. In the present case it is possible that the accused were under a delusion that they would not be apprehended and therefore chose to remain in and around the same area. Clearly the decision is distinguishable on facts.

Role of A-2

61. Turning now to the role played by A-2, Mr. Javed Alvi, learned counsel appearing on his behalf, sought to urge that there is nothing to show that A-2 was actually involved in the commission of the crime except some exchange of calls with the deceased.

62. As already noticed, PW-6 in her statement to the police (Ex.PW-6/BA) spoke of a quarrel between the deceased and A-2 a few months prior to the incident over A-2 accusing the deceased of stealing his mobile phone. She also in her previous statement to the police spoke of the deceased being unhappy with PW-6 having permitted A-2 to stay with them in their room.

63. Learned counsel for A-2 drew attention to the testimony of PW-6 where in her cross-examination she states as under:

“I had not stated to the police that Inderjeet had requested me to live in my house for about 10-15 days. I had not allowed accused Inderjeet to stay in my house. I had not stated to the police that

Inderjeet and Vikas had come to my house on 08.05.2011 to call my son at about 6.30pm. I had stated to the police in my statement that before that at about 5.30pm, accused Inderjeet had called on my mobile phone and the same call was received by my son Lalit. It is incorrect to suggest that no such call was received on my mobile phone which was being heard by my son Lalit.”

64. Mr. Alvi also referred to the confrontation of PW-6 with her previous statement and what has been noted in the transcript by the trial Court which reads as under:

“I had stated to the police in my statement that accused Inderjeet had called my son outside the house on 08.05.2011 at about 6.30pm (Confronted with statement Ex.PW6/DA, where it not so recorded). I had stated to the police that when Inderjeet and Vikas had come to my house on 08.05.2011 at about 6.30pm, my son told me that he was coming within 10-15 minutes(Confronted with statement Ex.PW6/DA, where it not so recorded). I had told the IO in my statement that Inderjeet and Vikas were standing outside my house. I had not stated to the IO that I had inquired from Inderjeet as to where Vikas was as I had also seen him in the company of my son and Inderjeet. I had not stated to the IO that Inderjeet had replied to me that Vikas was also injured and sustained injury to his hand and how he could take Lalit to hospital. I had stated to the police that Inderjeet had taken some of his belongings and left my house saying that he was going to hospital (Confronted with statement Ex.PW6/DA, where it not so recorded). I had stated to the IO that police had come to me at my house at about 6.00am on 08.05.2011 (Confronted with statement Ex.PW6/DA, where the time has not been mentioned specifically).”

65. There appears to be some mistake in what has been recorded by the trial Court about certain statements not being found in Ex.PW-6/DA. A careful perusal of Ex.PW6/DA in fact shows to the contrary. It appears to the Court that PW-6 was subjected to avoidable confusion by counsel for the defence

in her cross-examination. In fact she stated to the police that A-2 had requested her that he may be permitted to live in her house. She further stated that she had allowed him to stay in the house. She also did tell the police that A-1 and A-2 had come to her house at around 6.30 pm. Statements to the contrary were elicited from her in her cross-examination without actually drawing her attention to her previous statement. This shows that she was confused. However, it cannot be said that she was being untruthful.

66. What is plain is that PW-6 was misled. Subsequently, when she was confronted with her previous statement, it turned out that she had in fact stated those very things which counsel was suggesting that she had not. In sum, but for the confusion created in the mind of PW-6 by counsel for the defence, PW-6 actually deposed in Court more or less what she had told the police earlier (Ex.PW-6/DA). PW-6 was, therefore, both a truthful and a reliable witness.

67. Contrary to what is submitted by Mr. Alvi, the role of A-2 in the crime was as pivotal as that of A-1. While it was A-1 who wielded the fire arm, the instigation for the murder appears to be at the instance of A-2. It is he who bore a grudge against the deceased both on account of the false accusation against the deceased stealing his mobile phone and over the deceased resenting PW-6 allowing A-2 to stay at their place.

68. At this stage, a reference should also be made to the evidence of Smt. Chanderwati Tokas (PW-8) who was a landlady of the house which A-2 had

taken on rent. She confirms that he took away some of his belongings from the rented room just one day prior to 8th May, 2011. This corroborates PW-6 stating that he had come to leave some belongings in her house.

69. The conduct of A-2 also points to his guilt, as correctly concluded by the trial Court. His being constantly in touch with both the deceased and A-1 has been proved by the CDRs. PW-6 calling him at around 1.10 am to enquire about the deceased is also confirmed by the CDR. He is coming to the house of PW-6 at an odd hour and then misleading her by saying that the deceased has met with an accident indeed points to his guilt. With both A-1 and A-2 simply denying all the circumstances, even those which stood conclusively established by the forensic and medical evidence, the guilt of both of them stands proved by the prosecution beyond reasonable doubt.

Conclusion

70. The circumstances discussed by this Court as well as by the trial Court do form a complete chain with each of the links in the chain being conclusively established by the prosecution. Those circumstances taken cumulatively unmistakeably point to the guilt of both the accused.

71. Consequently, the Court finds no merit in either of the appeals. They are accordingly dismissed. The bail bonds and the surety bonds furnished by A-2 stand cancelled. He is directed to be taken into custody forthwith. The trial Court record be returned together with a certified copy of this judgment.

72. A copy of this judgment, and a soft copy of the paperbook, also be sent by the Registry through a Special Messenger forthwith to the Secretary,

Delhi State Legal Services Authority (DSLISA) to inquire into whether and what compensation, the legal representatives (LRs) of the deceased victim might be entitled to in terms of the Victims' Compensation Scheme framed under Section 357 A Cr PC. The amount, if any, found payable should be disbursed to the LRs without delay. This entire exercise be completed by the Secretary DSLISA preferably within three months from today.

S. MURALIDHAR, J.

VINOD GOEL J.

OCTOBER 30, 2018

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