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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 09.07.2018

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Judgment delivered on: 24.09.2018

+ **Crl. A. No.1444/2012**

MOHD. ALAM

..... Appellant

Through: Mr. Pramod Kumar Dubey, Advocate
(DHLSC) with Mr.Saurabh Kumar,
Advocate.

versus

STATE

..... Respondent

Through: Ms. Kusum Dhalla, APP for State
along with Inspector Sudhir Kumar,
P.S. Shalimar Bagh.

+ **Crl. A. No.144/2016**

MOHD. IQHLAK

..... Appellants

Through: Ms. Inderjeet Sidhu, Advocate
(DHLSC)

versus

STATE

..... Respondent

Through: Ms. Kusum Dhalla, APP for State
along with Inspector Sudhir Kumar,
P.S. Shalimar Bagh.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE I.S. MEHTA

J U D G M E N T

VIPIN SANGHI, J.

1. The present appeals have been filed by the appellants, namely, Mohd. Alam (Crl.A. 1444/2012) and Mohd. Iqhlak @ Asif (Crl.A. 144/2016) under Section 374(2) Cr.P.C., against the common judgment of conviction dated 26.04.2012 rendered by the learned ASJ, Fast Track Court, Rohini, Delhi in SC No.40/1 arising out of FIR 105/10 registered at PS Shalimar Bagh under Section 392/302/ 411/34 IPC vide which, all the accused have been convicted under Section 392 read with Section 34 IPC. They were also held guilty and convicted for the offence under Section 302 read with Section 34 IPC. Since they were convicted for the offence of robbery, they were not convicted for the offence under Section 411 separately.

2. There were three accused in the case, namely, Mohd. Alam accused no.1; Mohd. Iqhlak @ Asif accused no.2 and Mohd. Saddam @ Kalia accused no.3, who was a juvenile. Vide order on sentence dated 01.05.2012, accused no.1 Mohd. Alam has been sentenced under Section 392/34 IPC for a term of 10 years rigorous imprisonment with fine of Rs.5,000/-. In default of payment of fine, he has been directed to further undergo 2 ½ years simple imprisonment. For the offence under Section 302 IPC, Mohd. Alam has been sentenced to imprisonment for life with fine of Rs.5,000/-. In default of payment of fine, he shall further undergo 2 ½ years simple imprisonment. The sentences are to run concurrently. The benefit of Section 428 Cr PC has been given to the accused no.1 Mohd. Alam. Vide order of sentence dated

17.07.2012, Mohd. Iqhlak, accused no.2 has been identically punished for the aforesaid offences and he has similarly been treated insofar as benefit of Section 428 Cr PC is concerned. The aforesaid two appellants have preferred the present appeals.

3. The case of the prosecution, as taken note of in the judgment of the Trial Court, read as follows:

“One DD No.15B was recorded on 22.03.2010 at about 11:00AM about the dead body lying at C & D Block, near Railway Line, Haider Pur and Pipe Line in front of CNG Flats, Shalimar Bagh. This DD entry was handed over to SI Baljeet Singh, who left the spot with Ct. Sandeep and later on, he got registered the case under Section 302 IPC, on the same DD.

During investigation, copy of DD entry was collected. Photographs of the dead body were taken. Dead body was sent to mortuary of BJRM Hospital for postmortem. One shirt belonging to deceased Satish, from the place of occurrence, where the dead body was lying, was taken into possession. Call details were collected. Documents of one Anwar regarding his mobile phone were also collected on 28.03.2010.

Accused Mohd. Alam, Mohd. Iqhlak, Mohd. Saddam were arrested by preparing memos. Their personal searches were prepared. Accused persons pointed out the place of occurrence and also made the disclosure statements. One mobile phone belonging to the deceased was recovered from accused Mohd. Alam, which was sealed and seized in this case. One wrist watch belonging to the deceased was recovered from the accused Mohd. Saddam. One pant belonging to the deceased was recovered from Mohd. Iqhlak, which was sealed and seized, in this case. Accused Mohd. Iqhlak also got recovered a plastic pipe allegedly with which the deceased was

beaten to commit the robbery and was sealed and seized, in this case.

I.O. also got conducted the TIP of the case property on 28.04.2010, wherein witness Deepak identified the trouser, mobile phone and wrist watch.

On completion of investigation, charge sheet was filed under Section 392/302/411/34 of IPC against the accused persons, which was committed to the Court of Session on 08.07.2010 and was received on 13.07.2010”.

4. Charges were framed against all the three accused under Section 411 IPC and under Section 392/ 302 read with Section 34 IPC to which they pleaded not guilty and claimed trial.

5. To prove its case, the prosecution examined 24 witnesses, including PW1 Deepak Sharma- brother of deceased; PW2, Mangal Singh- uncle of deceased; PW3, Satpal- employer of the deceased; PW9, Umesh Kumar- Owner of sim no. 9953654659; PW10, Anwar- Grandfather of accused no. 1 Alam; and PW12, Ashok- Shopkeeper.

6. After completion of prosecution evidence, statements of the accused persons under Section 313 Cr.P.C. were recorded in which they claimed innocence and denied the entire case of the prosecution. Accused persons did not examine any defence witness.

7. On appreciation of evidence and material brought on record, the trial court convicted the appellants as aforesaid. Feeling aggrieved of the same, the appellants have preferred the instant appeals.

8. Ld. Counsel for Mohd. Alam, Mr. Pramod Dubey submits that the present case is based on circumstantial evidence. Thus, to prove the guilt of the accused, it was essential for the prosecution to conclusively establish a complete chain of circumstances, pointing to the guilt of the accused. He submits that the said chain has not been complete.

9. Mr. Dubey has argued that in-spite of the deceased- Satish not having been spotted after he left his home around 11.00P.M on 20.03.2010, no missing complaint was filed either by his employer– Satpal PW3, or by any of his family members. The submission is that the FIR came to be registered only on the evening of 22.03.2010, which too was after over 10 hours of the discovery of the dead body of the deceased– Satish at about 09-09:30 AM on 22.03.2010. The failure of either the family members of the deceased or PW3– the employer in reporting the fact that the deceased had gone missing for nearly 36 hours– before his body was recovered, raises suspicion with regard to their involvement.

10. Mr. Dubey submits that though, to PW-3 the body seemed to be of Satish in appearance, yet PW-3 did not inform the police. Instead, he claimed to have gone to the house of Satish to inform his family members that a dead body was lying at the railway line which seemed to be of Satish. He submits that this conduct of PW3 was unnatural. He further submits that though the body of Satish was identified by his brother Deepak in the morning on 22.03.2010 at 10:00AM, FIR was registered in the evening of 22.03.2010, only after the postmortem was conducted on the dead body. There is inordinate delay of about 10 hours in the registration of the FIR,

which points towards false implication. Ld. counsel further submits that the accused persons were only arrested after a gap of 8 days, thus, giving the prosecution ample time to plant evidence against them.

11. Learned counsel further submits that the prosecution has failed to establish the relationship of PW-3 as the employer of the deceased. No letter of appointment was produced on record, neither any receipt of salary paid was produced. No cheque payment from the account of PW-3 to the account of Satish was established.

12. Mr. Dubey further submits that the crime team had reached the spot between 9- 10 AM i.e., during the same time when the deceased's brother—Deepak PW1 uncle and employer PW3 allegedly identified the deceased, yet, in the crime team report Ex PW- 8/A, the name of the deceased is mentioned as “*unknown*”. This shows that the documents have been fabricated by the prosecution.

13. Mr. Dubey submits that so far as the accused Mohd. Alam is concerned, the prosecution has sought to establish his involvement in the case based on the recovery of the mobile instrument of the deceased from him. He submits that the prosecution has failed to connect the mobile phone instrument with the accused- Mohd. Alam. In this regard, the prosecution had examined four witnesses, namely, PW-9 Umesh Kumar; PW-10 Anwar, and PW-16 Mantoo Sahani. We will discuss their testimonies at the relevant stage.

14. So far as the accused Mohd. Iqhlak @ Asif is concerned, Ms. Sidhu has submitted that his involvement in the case is based on the recovery of a black striped pant and a PVC pipe which were recovered upon the disclosure of the accused and as such, the recoveries are doubtful. She has further submitted that there are no independent witnesses to the recoveries made in the present case and that all such recoveries are planted recoveries. She submits that mere recoveries of articles like the PVC pipe, shirt, pant and the mobile phone instrument at the instance of Mohd. Iqhlaq are not sufficient to convict him. In this regard, she has placed reliance on ***Prabhu v. State of UP***, AIR 1963 SC 1113; ***Kallo Passi v. State***, (2009) 2 JCC 1206.

15. Ms. Sidhu submits that, in his cross examination PW1-Deepak stated that he did not lodge any report about Satish– the deceased going missing even after receipt of information from Satpal since “*Satpal told us that he was knowing as to where Satish had gone.*” She submits that Satpal was aware about the whereabouts of the deceased– Satish. This raises doubts about the involvement of Satpal in the commission of the crime.

16. Ms. Sidhu invited our attention to the photographs of the deceased which were taken at the crime spot, and submitted that injuries were visible in the photographs. In this regard, she contended that the testimony of the IO is doubtful, as he had stated in his deposition that he could not see any injury on the body of the deceased.

17. In the alternative, Ms. Sidhu submits that the present case is covered under exception 4 of section 300 IPC warranting punishment under section 304 IPC.

18. On the other hand, the submission of Ms. Dhalla, learned APP is that the prosecution has been able to establish the entire chain of circumstances, which is complete and which points only to the guilt of the accused in the commission of the murder of the deceased. She fully supports the impugned judgment. We shall deal with her submissions as we deal with the submission of the appellants.

19. We have heard Id. Counsels for the parties, examined the evidence on record and have given out thoughtful consideration to the matter.

20. PW3– Satpal deposed that he was running Bala Tent House. The deceased– Satish was working in his shop. Satish used to reside in the godown behind the shop. He also used to visit his home from time to time situated at J-443, Jahangir Puri, Delhi. He used to reside with his uncle Mangal Sain and his wife along with brother–Deepak. He stated that on 20.03.2010, Satish told him that he had to go to his house at Jahangir Puri as there was some programme in his relation i.e., Jagran and he had to set up the generator for lighting. He stated that he came to his house from his shop at about 07.00P.M. and after closing the shop at about 09.00P.M., Satish left for his house. The fact that Satish left the shop/ godown on the night of 20.03.2010 is corroborated by the statement of PW1-Deepak, the brother of the deceased. He, inter alia, stated that on 20.03.2010 at about 09.30PM , his brother– the deceased Satish came to Jahangir Puri and at about 11.00PM in the night Satish told him that he was going to the godown of Bala Tent House and he left the house immediately. Thus, the last person to have met the deceased– Satish was PW1-Deepak, at about 11.00PM in the

night of 20.03.2010. The deceased— Satish was found dead near the railway line. The place where the dead body was found fell on the way from the house of Satish at Jahangir Puri to the shop/ godown of PW3 via Bypass. This is evident from the statement of PW3 wherein he stated that he while he was coming back to his shop on 22.03.2010, he saw a crowd near the railway line. He reached there and saw one naked dead body facing towards the ground which seemed to be of Satish from its appearance and built.

21. The post mortem Ex. PW13/A, which was conducted at about 03.15 P.M. on 22.03.2010 records the time since death as 38-39 hours. Thus, the death of the deceased— Satish took place around 12.15 AM – 01.15 AM on 21.03.2010. Thus, it appears that the deceased was encountered on the night between 20-21.03.2010 after he left his house at Jahangir Puri at about 11.00PM on the way to his shop/ godown.

22. PW3 has further deposed that on the next day i.e., 21.03.2010, he received a call from his client that the articles for the function had not been delivered. To his information, the deceased was at the shop and he deposed that he told his client that the deceased— Satish must be sleeping in the godown, so they should collect the articles from Satish. He deposed that he was told by his client, after some time, that Satish was not present in the godown and that the godown was locked. His attempt to contact Satish on his mobile phone number proved futile as the same was switched off. These developments took place on the morning of 21.03.2010 unbeknown to PW3 and to the family members of the deceased that he had already been done to death between 12.15- 01.15A.M. in the early hours of 21.03.2010.

23. PW3 deposed that he reached the house of Satish at Jahangir Puri and made enquiries about him from his family members and learnt that he had left the house about 11.00PM on the previous night- stating that he was going to the tent house. He deposed that he informed the family members of the deceased that Satish had not reached the tent house and was not there. Satish did not report for work the entire day, and in the evening PW3 again went to the house of Satish at Jahangir Puri to enquire about him. He learnt from the family members of the deceased that Satish had also not reached his home at Jahangir Puri. On the next date i.e., 22.03.2010 PW3- Satpal again made enquiries from the family members of Satish and they told him that Satish had not gone to the Jagran to manage the generator. It was then, while returning to his shop via Bypass, he located the dead body near the railway line at about 09-09.30AM of a naked male facing towards ground which appeared to be that of Satish. However, since he could not fully identify him, he reached the house of Satish in Jahangir Puri and informed the family members about one dead body lying near the railway line, which appeared to be that of Satish. Consequently, Mangal Sain- PW 2, the uncle of Satish and his brother PW1- Deepak accompanied him and reached the spot near the railway line where PW1- Deepak identified the dead body of his brother- Satish.

24. The fact that Satish had not returned to the shop/ godown on the night of 20.03.2010 was first realized by PW3 on the morning of 21.03.2010. The family members of Satish also learnt of Satish going missing from PW3- when he went to look for Satish at their house in Jahangir Puri during the day on 21.03.2010.

25. In our view, there was nothing amiss about the fact that Satish had gone missing not being immediately reported to the police, either by PW3, or by the family members of the deceased— Satish on 21.03.2010 itself. Satish was a grown up person, who was working in a tent house. The fact that he did not return to the shop/ godown on the night of 20.03.2010, no doubt, caused concern initially to his employer- PW3, and that explains the visit of PW3 to the residence of Satish in Jahangir Puri to enquire about him on 21.03.2010. However, there was no reason for PW3 or family members of the deceased— Satish to suspect foul play in Satish going missing, and to immediately rush to lodge the police complaint about the same. There was nothing unnatural about the conduct either of PW3, or the family members of the deceased in not making a police complaint about his going missing when they realized about the same on 21.03.2010.

26. The submission of learned counsel for the appellants that the conduct of PW3 is suspect, because he did not go to the police station and instead went to the house of Satish at Jahangir Puri after discovering the naked dead body near the railway line on 22.03.2010 is neither here nor there. A perusal of the photographs EX. PW 11/1 to 1 shows that the dead body was lying facing down in a muddy area. The death of the deceased was not an expected development for PW3. Moreover, the deceased had been dead for about a day and a half when the body was seen by PW3. Thus, he may have entertained doubts about the identity of the dead body. But he certainly felt that the body could be that of Satish. Thus, there was nothing unusual about PW3 going to the residence of the deceased— Satish, instead of proceeding to the police station.

27. The doubt raised on the case of the prosecution, on the premise that the crime team report Ex. PW8/A mentions the name of the deceased/ victim to be “unknown”, even though the body of deceased had been identified by PW1, PW2 and PW3, has no merit. The testimony of all these witnesses shows that they have consistently deposed that they had reached the spot around 10:00AM, pursuant to which they had identified the body of the deceased. On the other hand, the crime team report Ex. PW8/A indicates that the report was prepared on 22/03/2010 between 09:00AM to 10:00 AM. Thus, the crime team report was prepared before PW1, PW2 and PW3 had arrived to identify the dead body. This appears to be the reason why the crime team report mentions the name of deceased/ victim as “*unknown*”.

28. The submission of the appellant that there was delay in registration of the FIR has to be examined in the context of the facts of the case. The dead body of the deceased was discovered at about 09-09:30 A.M. on 22.03.2010. The body was naked with the face down. It was found near a railway line. When it was discovered and the crime team examined the crime scene, the identity of the deceased was not yet known. It was not even known whether the death of the deceased was natural, accidental or homicidal. It has come in the evidence of the I.O., PW23– Inspector Puran Chand that an information was received vide DD No. 15B at PS Shalimar Bagh regarding a dead body lying in Haiderpur in C & D Block. The DD entry was marked to SI Baljeet Singh. He went to the spot along with constable Sandeep. Thereafter, PW23, along with SHO, PS Shalimar Bagh, Inspector Jogender Singh Joon and other senior officers also reached the spot. One dead body

was lying in naked position in a small pit with its face towards the ground. The crime team was called. There was no apparent injury mark on the body of the deceased. The same was sent to mortuary, where the autopsy surgeon orally told about the injuries on the testicles and private parts. The postmortem was done only at about 3:15 p.m. vide Ex. PW-13/A. On the basis of the opinion given by the doctor, on the copy of DD No.15B, SI Baljeet Singh made a ruqqa and sent constable Sandeep Singh to the PS for the registration of the case. After the registration of the case, the investigation was handed over to PW23. Thus, when the body of the deceased was discovered, it was not known as to whose body it was and whether the death was homicidal, or not. In these circumstances, in our view, the registration of the FIR cannot be said to be belated, and the registration of the FIR after the conduct of the postmortem appears to be in order in the factual context.

29. The submission of learned counsels for the appellants that the body of the deceased had injury marks which were visible has no force. In the postmortem report Ex. PW-13/A, the doctor opined that all the injuries were anti-mortem in nature caused by blunt force impact. Railroad pattern bruises were caused by blunt cylindrical objects, penile and sac injuries were caused by kicks and blows, cause of death was vasovagal shock as a result of testicular sac injuries sufficient to cause death in the ordinary course of nature. Pertinently, there were no open cut marks in the body of the deceased with any sharp object. There was no bleeding noticed. The injuries were internal. Thus, we find no merit in the submission of counsel

for the appellants that, on the face of it, the body of the deceased showed that the death was homicidal.

30. It has been doubted as to whether the deceased was an employee of PW3 as he (PW3) has not produced any letter of employment to prove the same. We must reject this fallacious argument of the Id. Counsels. In their testimonies, PW1 and PW2 have consistently deposed that PW3 was known to them. Furthermore, they identified him as the employer of the deceased. They have been in consistent that PW3 was the owner of Balaji Tent House and that the deceased was his employee. PW-3 has also deposed that the deceased was his employee. PW-3 was running a tent house. The deceased was a petty employee. It is not uncommon in such trade to employ personnel on payment of salary in cash. Pertinently, neither PW-1 nor PW-2, nor PW-3 were cross examined to suggest that the deceased was not an employee of PW-3.

31. We may now turn to examine the manner in which the police cracked the blind murder of the deceased in the present case.

32. The initial I.O. of the case was Insp. Puran Chand- PW23. He stated that Deepak Sharma, PW-1 in his statement recorded under Section 161 Cr PC disclosed that the deceased was having one mobile phone Nokia having number 9716084995 when he left his house on the night of 20.02.2010. He was also wearing one wrist watch and was also having some money. He was wearing cream colour shirt and black colour pant having lining. PW 23 had collected call detail record of the mobile phone of the deceased Ex.

PW15/B from which he came to know that the last call- which was one SMS from the mobile phone of the deceased, was made at 8:22 p.m. on 20.03.2010 and after that his mobile phone had been switched off. Ex. PW 15/ B shows the IMEI of the mobile phone instrument of Satish as 354183030886300.

33. He stated that the said number was kept under surveillance/ observation at the office of Nodal Officer ACP Shalimar Bagh and it transpired that the said mobile instrument of the deceased Satish was reactivated with Vodafone mobile number 9953654659 on 22.03.2010. The call details of the said mobile number were got collected from the office of the ACP through email vide Ex. PW14/ A. The registered user of the said number 9953654659 was established to be one Umesh Kumar (PW9), resident of Bhalswa Dairy vide Ex.PW9/B.

34. On 24.03.2010, PW-23 reached Bhalswa Dairy at the address of Umesh Kumar PW9 with HC Sheshdhar and Const. Ramesh Kumar. The address of his place of work was found out, where Umesh Kumar- PW9 met them. He denied that the said mobile number 9953654659 had been issued to him. He informed that he had applied for a new mobile connection of Vodafone from PW12 Ashok at one Mittal Communication, I Block, Jahangirpuri, but the same could not be issued to him at that time. His statement under Section 161 Cr PC was got recorded.

35. PW-12 Ashok was the shopkeeper to whom PW9- Umesh Kr. had submitted his documents to for a new connection. He stated that PW-9 was known to him as he used to visit his shop for repairing radio and TV and he

was also residing nearby his shop. On 31.01.2010, Umesh Kumar had come to his shop. He, inter- alia, asked for a sim connection of Vodafone and handed over his identity proof i.e. copy of voter ID card and one photo on the application form and stated that he would collect the sim card later. Thereafter, he did not come back. He used the sim card issued in the name of Umesh Kumar for 2-3 days in his mobile phone. He stated that on 23.01.2010, Mohd. Alam accused – correctly identified in Court, came to his shop and asked for a sim card. He produced one mobile phone Nokia 1650 make and also got changed body of the same. He also handed over a copy of the voter ID card and photo. He also gave his contact number. PW-12 stated that he had handed over the activated sim card of PW9- Umesh Kumar to Mohd. Alam. He stated that he did not deposit the documents given by the accused Mohd. Alam to him. He stated that on 21.04.2010 or 22.04.2010, the police came to his shop and took into possession documents delivered to him by the accused Mohd. Alam. He identified the application form of Umesh along with his photograph and copy of voter ID card as Ex. PW-9/B, which bears his signatures and also the stamp of his shop Mittal Communication. He exhibited the documents submitted by Mohd. Alam as Ex. PW-12/A and the voter ID card of the accused Mohd. Alam as Ex. PW-12/B. He admitted as correct that the mobile phone number of the sim card issued in the name of PW9- Umesh Kumar was 9953654659. He delivered the active sim card of mobile number 9953654659 to Mohd. Alam against Rs.80/-.

36. PW23 applied for collecting further up to date CDR of the mobile phone of the deceased which was being used with the mobile number/ sim

issued in the name of Umesh Kumar. On 25.03.2010, PW-23 obtained the CDR Ex.PW 14/D and after going through the same, he found two calls were received on the mobile phone instrument of the deceased (IEMI No. 354183030886309) from another mobile number 9953905326 and in the evening two outgoing calls were made on the same Vodafone number.

37. Through the CDR's of the mobile phone number of 9953905326 (Mark- X), PW 23 learnt the said Vodafone number belonged to Anwar-PW10.

38. Subsequently, PW 10- Anwar was contacted at his house in Swaroop Nagar Extension and he informed that the said mobile number 9953654659 was of Mohd. Alam, his grandson from village relationship and he made a call to Mohd. Alam from his mobile phone, as they both were working together on 24.03.2010 and he also received calls from Mohd. Alam. In his testimony, PW-10- Anwar stated as correct that on 23.03.2010, he had called Mohd. Alam on his mobile phone. However, he also stated that he could not say whether the mobile phone of Mohd. Alam was 9953654659. He stated that he could not recollect Mohd. Alam's mobile phone number because he had saved Mohd. Alam's mobile contact number in his mobile phone. He also stated that police had made enquiries from him about mobile no.9953654659 and he had told the police that the same was of accused Mohd. Alam. He further stated that on 24.03.2010 Mohd. Alam had also made a telephonic call from the said no. 9953654659 to go to gym. He also stated as correct that he had told the police in his statement the above said facts. However, when he was cross examined by the accused, he stated that

he did not remember whether the mobile number 9953654659 was of the accused Mohd. Alam at that time, as whenever he used to call him only his name used to appear on the screen of his mobile phone.

39. Thereafter, efforts were made to locate Mohd. Alam in the jhuggies of SSI Industrial Area, Jahangirpuri, but he could not be found. On 27.03.2010, the I.O. PW-23 went for medical test due to injuries and joined the duties on 09.04.2010. During this period, the investigation of the case was carried out by SHO Jogender Singh Joon- PW22. PW-22 stated that on 28.03.2010 with the aid of a secret informer, the accused no.1 Mohd. Alam was arrested from near the jhuggi at SSI Industrial Area, GT Karnal Road. PW-22 stated that the accused Mohd. Alam produced one mobile phone instrument of Nokia 1650 black colour make with battery having Sim No.9953654659.

40. The mobile phone no. 9716084995 was being used by the deceased in his mobile phone instrument having IMEI No. 354183030886300/9 till the time of his death on the night of 20.03.2010, after which the instrument was switched off. On 22.03.2010, the said instrument was switched on with the mobile sim no. 9953654659 and a call (duration: 88 seconds) was made to the sim no. 9716327942, which was registered in the name of Manohar Pandit. Mantoo Sahni- PW16 was found to be using the no. 9716327942. In his testimony, PW16 stated that he was having number 9716327942 with sim of Aircel Company and at the time of its purchase, ID proof was given by his friend Manohar Pandit. He further stated that one Mohd. Alam used to work with him as labour and he had worked with him for 25 days. He

correctly identified Mohd. Alam in Court. PW 16 further stated that when he was working with accused Mohd. Alam, Mohd. Alam was not having any mobile phone with him. However, Mohd. Alam had noted his (PW 16) mobile phone number in his diary. He, however, denied having received any call from Mohd. Alam. This denial is, however, contradicted by the CDR referred to above, and to that extent the statement of Mantoo Sahni- PW16 cannot be accepted. However, what is pertinent is that he admits to have known the accused- Mohd. Alam and that Mohd. Alam had taken down the mobile number of PW16 in his diary. This statement of PW16, coupled with the CDR of the mobile no. 9953654659 used by the accused Mohd. Alam corroborates the testimony of PW12 that he gave the said sim card issued in the name of Umesh Kumar PW9 to the accused Mohd. Alam.

41. In view of the call detail records produced on record, the testimony of PW12- Ashok- who stated that he had handed over the activated sim card of PW9- Umesh Kumar to Mohd. Alam, coupled with the fact that a call was exchanged between 9953654659 and the number used by PW16- Mantoo Sahani i.e., 9716327942, the latter being a co- worker of the accused- Mohd. Alam, and the fact that calls were also exchanged between 9953654659 and the number of PW10 Anwar- who was the grandfather in relation from the village of the accused Mohd. Alam, it is conclusively established that it was Mohd. Alam who was actually using the mobile phone instrument of the deceased with the sim number of Umesh Kumar- PW9 issued to him (Mohd. Alam) by Ashok- PW12.

42. Ld. counsels for the appellants have argued that since PW10 was not able to recall the number used by Mohd. Alam, the number 9953654659 could not be attributed to have been used by Mohd. Alam. This argument has no merit. A person cannot be expected to remember every phone number that is saved in his phone. Just because he did not remember the mobile phone number used by Mohd. Alam, does not take away the credibility of the CDR's which have been legally proved by respective Nodal officers. A perusal of these call detail records of the deceased- Satish Ex. PW15/B, PW10- Anwar 'Mark X' and PW9- Umesh Kr. Ex. PW 14/A (used by Mohd. Alam) shows that the said mobile number was used in the phone having the IMEI no. 354183030886300, which was the IMEI no. of the mobile instrument of the deceased. Pertinently, the deceased was murdered on the night of 20.03.2010, but his phone having IMEI no. 354183030886300 was still being actively used on 22.03.2010 and 23.03.2010. Furthermore, the Investigating Officer PW22- Insp. Joginder Joon also deposed that when he arrested Mohd. Alam on 28.03.2010, the said accused produced the mobile phone of the deceased which was seized by PW22 vide seizure memo Ex. PW18/C. The accused Mohd. Alam has not explained in his statement recorded under section 313 Cr.P.C as to how he came into possession of the mobile instrument of the deceased. He has not explained why PW12 would name him as the user of the mobile phone number attributed to him. He has not explained how his identity documents reached the hands of PW12. Thus, the testimony of PW12 is completely corroborated and credible.

43. Thus, prosecution has been able to prove beyond reasonable doubt that the mobile phone of the deceased was recovered from Mohd. Alam on 28.03.2010.

44. So far as accused Mohd. Iqhlak is concerned, he has been convicted based on the recovery of (i) the deceased's pant at his instance; and (ii) the PVC pipe allegedly used to beat the deceased.

45. On 28.03.2010, PW22 upon the disclosure of Accused Mohd. Alam and Mohd. Saddam, apprehended A2- Mohd. Iqhlaq near Jahangirpuri Metro Station. Mohd. Iqhlaq was arrested vide arrest memo Ex. PW 18/J. In his testimony, PW22 stated that at the time of his arrest, accused Iqhlaq was wearing a black coloured striped pant which the accused told belonged to deceased and after committing murder, he (Mohd. Iqhlak) had taken off the pant from the body of the deceased and had worn the same. The pant was seized vide seizure memo Ex. PW 18/L. Thereafter, accused Mohd. Iqhlak took PW22 near the bushes near railway line near the place of occurrence and got recovered one rubber pipe of blue colour and told that it was the same pipe with which he had given beatings to the deceased. The rubber pipe was seized vide Ex. PW18/P.

46. The younger brother of the deceased, PW1 – Deepak Sharma deposed that when Satish- deceased had left his house in the night of 20.03.2010, he was having one mobile phone make Nokia, one wrist watch and some money. He further stated that his brother was wearing a black colour striped pant and one design shirt. The pant was correctly identified by PW1 during the TIP proceedings. Even during his testimony in Court, PW1 correctly

identified the black striped pant of his brother, seized vide Ex. PW 18/L. In his cross- examination, PW1 stated that he is able to recognize the black striped pant because he had himself given the said pant to his brother Satish-deceased. Even the I.O- PW22 correctly identified the said pant seized vide seizure memo Ex PW18/L in Court. Nothing came out from the cross-examination of these prosecution witnesses to disbelieve their testimony. Moreover, in his statement recorded under section 313 Cr.P.C, Mohd. Iqhlak did not give any explanation about the possession of the pant of the deceased, nor did he state that he was not wearing those pants at the time of his arrest. A2 Mohd. Iqhlak does not say that he removed the said pants from the dead body of the deceased which he found lying on the railway track.

47. The recovery of the PVC pipe Ex PW 18/P is even more damning so far as the accused are concerned. The PVC pipe Ex. PW18/P was stated to have been used to beat the deceased. The post mortem report Ex. PW 13/A was prepared by PW13- Dr. K. Goyal on 22.03.2010 itself, i.e., much before the recovery of PVC pipe on 28.03.2010. The Post Mortem report shows that there were ante- mortem rail- road pattern injuries inflicted on the body of the deceased. In his testimony, PW13 deposed that *“there were three rail road pattern bruises, transversely and slightly oblique placed over left gluteal region of sizes 7 x 1.25cm to 11 x 2.5cm”* on the body of the deceased. In a subsequent opinion given by the said doctor regarding the weapon of offence, the doctor opined that *“The rail road patter bruises mentioned in the post- mortem report no. 309 dt. 22.03.2010, on the body of Satish are possible by this pipe or by similar such other object....”*. During

their testimonies before the Court, both the I.O. – PW22 and the doctor who conducted the Post- Mortem of the deceased- PW13 correctly identified the PVC pipe. Moreover, as per the seizure memo of the pipe Ex. PW 18/P, the PVC pipe was recovered from the bushes near railway line. The pipe was not recovered from an open barren land, such that it would be visible to any person who may visit the place. The pipe was recovered from the bushes near the railway line indicating that the same was lying hidden and as such it was only known to the A2, as to where the PVC pipe was kept. Thus, in view of the subsequent opinion of PW13 and the nature of injuries sustained by deceased- Satish, the only possible inference which can be drawn is that the accused persons had used the said PVC pipe to cause the injuries to the deceased. The recovery of the said PVC pipe at the instance of A2 Mohd. Iqhlak establishes his knowledge that the pipe was lying in the bushes, and his knowledge that it was used at the time of commission of the crime. Its use is corroborated by the Post Mortem report and the doctor's opinion. A2 has not explained the source of his said knowledge, which clearly points to his involvement in the homicide of the deceased.

48. Reliance placed by Ms. Sidhu on the judgments of ***Prabhu*** (supra) and ***Kallo Passi*** (supra) is misplaced. In these cases, there was no independent evidence to substantiate the case of the prosecution to prove that the weapon of offence was used by the accused to commit the offence. The court had held that “*the mere recoveries of the blood- stained clothes, pieces of two daggers and a rehri at the instance of the appellant do not lead to a conclusion that the appellant is the perpetrator of the crime*”. However, the present case stands at a different footing. Apart from the recoveries, the

prosecution has successfully established the chain of circumstances in the present case. There is sufficient evidence on record which points to the guilt of the accused. The call detail records of accused- Mohd. Alam; the recovery of the mobile phone instrument of the deceased from the accused- Mohd. Alam; the medical evidence available on record; the recovery of the pant and the PVC pipe from and at the instance of A2; and; the consistent testimonies of the prosecution witnesses point to the guilt of the two accused.

49. Ms. Sidhu contends that even if the evidence against Mohd. Iqhlaq is to be believed, a case only under section 304 IPC is made out.

50. In *Sandhya Jadhav v. State*, (2006) 4 SCC 653, the Supreme Court held:

“8. For bringing in operation of Exception 4 to Section 300 IPC, it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

9. The Fourth Exception to Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of prosecution not covered by the First Exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not

otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two or more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact

and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression “undue advantage” as used in the provision means “unfair advantage.”

51. To bring a case within the exception 4th to section 300, it has to be established that (i) the act was committed without premeditation; (ii) in a sudden fight in the heat of passion upon a sudden quarrel; (iii) without the offender having taken undue advantage; and (iv) not having acted in a cruel or unusual manner.

52. The present is a case involving theft of certain articles including, inter alia, the wrist watch, mobile phone instrument and pant of the deceased. The commission of the murder of the accused persons was a premeditated act to commit robbery upon the deceased. As per the opinion given by PW13- Dr. K. Goyal, who had conducted the post-mortem of the deceased, on external examination there were three diffused bruises, coalescet scattered all over the chest, back of chest and abdomen of the deceased. There were multiple discrete bruises with over-lying abrasions scattered all over four limbs at places. Furthermore, there were three rail road pattern bruises, transversely and slightly obliquely placed over left gluteal region of sizes 7 x 1.25 c.m. No. to 11 x 2.5 c.m. No. The penis and scrotum of the deceased were extensively bruised and swollen and on cut sections blood clots were present in scrotal sacs with mark bruising of testis.

53. The nature of the injuries sustained by the deceased were grievous, sufficient to cause death in the ordinary course of nature. The accused did not set up a defence that there was a sudden quarrel in which they too received injuries from the deceased. The appellants had clearly taken undue advantage of the situation that the deceased was returning late in the night alone in- what appears to be, a secluded place and had acted in a cruel, brutal and an unusual manner. Thus, we find no merit in this argument of Ms. Sidhu.

54. In our view, the prosecution has been able to complete the chain of circumstances, and the only conclusion which emerges points to the guilt of the appellants in the commission of the murder of the deceased.

55. For the aforesaid reasons, the judgment of conviction passed against the appellants for the offence under Section 302/ 392 IPC read with Section 34 is hereby upheld and their conviction and sentence is sustained.

56. Consequently, both the appeals stand dismissed in the aforesaid terms.

(VIPIN SANGHI)
JUDGE

(I.S. MEHTA)
JUDGE

SEPTEMBER 24, 2018