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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 25.09.2018

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Judgment delivered on: 12.10.2018

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CRL.A. 1494/2014

VIRENDER & ANR.

..... Petitioner

Through: Mr. Davlender Hora, Advocate with
Mr. Sikandar Khan, Advocate for
A-1 along with A-1 in person.
Mr. Padam Kant Saxena, Advocate
with Mr. Deepak R Dahiya, Advocate
(DHCLSC) for A-2 along with A-2 in
person.

versus

STATE

..... Respondent

Through: Mr. Rajat Katyal, APP for State
Inspector Raj Pal Singh, PS-Nihal
Vihar

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 appeal has been preferred by the two appellants Virender and Devraj @ Deva who were arrayed and tried as accused Nos. 1 and 2, to assail their conviction by the Ld. ASJ (FTC) (W): DELHI in Sessions Case

No. 49/2011, arising out of FIR No. 240/2010, under Section 302/34IPC, registered at PS Nihal Vihar, vide judgment dated 08.09.2014 and the order on sentence dated 16.09.2014 whereby both of them have been sentenced to life imprisonment with fine of Rs.5,000/- each. In default of payment of fine they have been directed to undergo rigorous imprisonment for a period of six months for the offence punishable under Section 302IPC read with Section 34 IPC.

2. The background facts of the case have been taken note of in para 1 of the impugned judgment. We reproduce the same herein below:

“Mukesh Kumar is carrying on work of Angel Iron Welding from Plot No.C-47, Naresh Park Extension and for that purpose he has kept 2 employees namely Yogesh @ Yogender Singh and Khairati, he has also let out some part of the factory and in that part break shoes are manufactured and in that factory 2-3 boys were working. Yogesh was working on daily wages for 5-6 months and used to sleep in the room in the plot. On 18.11.2010 at about 11:00 pm when Mukesh came to park his vehicle in the adjacent plot, he found that small gate of his factory was open. He got suspicious and went inside. He found the door of the room was partly bolted from outside. When he peeped through the gap between the door he noticed Yogesh lying on the takhat and in his neck orange colour welding wire was tied. Yogesh appeared to be dead. Mukesh further mentioned that other boy Khairati working in his factory told that 1 week before Diwali festival Yogesh has altercation with his uncle’s son working at Mundka, when Khairati inquired from Yogesh, he told that Virender his cousin had seen him with his wife in compromising position due to which he was beaten by his cousin. Khairati told that even thereafter Yogesh used to go to wife of his cousin and was having illicit relations. Mukesh suspected that he has been killed by his cousin and his companion. On this FIR No.240/10 u/s 302/34 IPC was registered.”

3. Charges were framed against both the accused under Section 302 IPC read with Section 34 IPC to which they pleaded not guilty and claimed trial.

4. To prove its case, the prosecution examined 24 witnesses, including PW1 Mukesh Kr. Yadav- Complainant; PW2 Manoj- Last seen witness; PW6 Bindravan- Landlord of A1- Virender; PW7 Khairati; PW9 Sharwan Kumar- Last seen witness, and PW16 Manoj Dhingra- Doctor who conducted the post mortem of the deceased.

5. 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.

6. 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.

7. Ld. counsel for A1- Virender, Mr. Davlender Hora submits that the present is a case 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 only to the guilt of the accused. He submits that the said chain is not complete. He further submits that the Trial Court has not believed the case of the prosecution insofar as the motive for commission of the crime is concerned. Thus, the said circumstance has not been proved on record.

8. Mr. Hora points out that the Trial Court has convicted the appellant on the basis of (i) last seen evidence, and (ii) the conduct of the appellants in

absconding on the night of the incident i.e., 18.11.2010, from the place where they were residing.

9. So far as the evidence relating to the deceased being lastly seen with the accused is concerned, the submission of counsel for the appellants is that the testimony of PW-2 and PW-9 – both of whom claim to have lastly seen the two accused with the deceased at about 8:45 to 9:00 p.m. on 18.11.2010, is full of contradictions. Learned counsels for the appellants submit that PW-2 Manoj stated in his cross examination that the statements of both PW-2 and PW-9 were recorded by the police in the police station at the same time in the night on 18/19.11.2010. In this regard, it is submitted that even though the statement of PW2 was recorded at about 1:30 – 2:00AM, yet, the name of the co-accused/A-2 was not disclosed either in the rukka or in the FIR which were prepared by ASI Suraj Singh in the early hours of 19.11.2010 at 02:30Am and 02:50AM respectively.

10. Ld. Counsels further submit that PW2 and PW9 were working in the adjoining factory engaged in the manufacture of brake shoes, whereas the deceased was working in the factory doing welding work. He submits that the two factories were running on the same plot as adjoining units. In this regard, learned counsels for the appellants submit that since PW-2 and PW-9 were working in the adjoining factory making brake shoes and not in the factory in which the deceased was working, they possibly could not have witnessed the accused with the deceased as claimed by them. In this regard, he relies upon the cross examination of PW-9, wherein he, inter alia, stated:

“The said factory was divided in two units by constructing a wall between them. It is correct that if someone is working in other factory, that is not visible from my factory. It is correct that there are two gates of the factory i.e. one gate for each unit. One gate is in front side and the other is on back side. It is correct that when stood at main gate, the other gate is not visible. It is correct that when one stood at the gate, the inner premises of the room of both the factories are not visible”.

Thus, PW2 and PW9 are not reliable witness.

11. Insofar as PW-1 is concerned, Id. Counsels for appellants submit that PW1 in his original complaint had claimed to have arrived at the factory only after the commission of the crime, yet, he casts a doubt on accused no.1 Virender without any basis, and also claims that Virender might have come with some other accomplice. The submission on behalf of appellant no.2 is that there was no basis for PW1 to claim that Virender was accompanied by some other person, or that some other person was also involved in the commission of the crime apart from Virender. He submits that PW1 is an untrustworthy witness since he has not explained the reasons for him parking his car outside his factory in the middle of the night on 18.11.2010. Ld. Counsel further submits that there was no occasion for PW1 to see that the smaller gate of the factory had been left open when he had gone to park his car near the other gate next to the vacant plot adjacent to his workshop.

12. Learned counsels submit that the statement of PW6 i.e., landlord of A1- Virender under Section 161 Cr PC was recorded only on 18.06.2011 i.e. after 7 months of the registration of the FIR and after the appellants had surrendered on 26.04.2011. Thus, the said witness is not reliable.

13. Learned counsels further submit that both the accused surrendered voluntarily before the Magistrate by moving an application. The fact that they surrendered before the court on their own points to their innocence.

14. Ld. Counsel for A2 further argues that so far as he is concerned, he had absolutely no motive to commit the crime. Even in respect of A1, the motive has not been proved.

15. Learned counsel for A2 has vehemently argued that after surrender of A2 before the learned Magistrate on 26.04.2011, he was interrogated by the I.O. in the Court premises and thereafter produced before the Court with muffled face. He submits that the face of the accused was not covered/ muffled prior to that and he had been shown to PW-2 and PW-9 in the Court premises. He submits that, thus, accused no.2 had refused TIP by the said witnesses. In this regard, he places reliance on his statement made under Section 313 Cr PC, wherein, in response to the last question no.34, he stated:

“I am innocent and have been falsely implicated in this case. On becoming aware that the police officials from Delhi are visiting at the native village of co-accused Virender and the police officials were asking about Deva and on being the apprehension of my false implication in the present case, I surrendered before the Court where I was shown to the public persons/ witnesses at outside of the Court room at the time of my surrender and later on I was falsely implicated in the present case.”

16. Learned counsels submit that there is a contradiction on the aspect whether any chance prints were lifted from the crime scene. The crime team report Ex. PW-18/A records that no chance prints were found present at the spot, whereas PW-20 ASI Suraj Singh stated in his cross examination that

chance prints were lifted by the crime team member and the name of the person who had who had lifted the chance prints was Ajit Singh. PW-20 stated that finger prints were lifted from takth and welding wire. Ld. counsels further submit that even the I.O. PW-24 had deposed that chance prints were lifted from the spot.

17. On the other hand, Mr. Katyal has supported the impugned judgment and countered the submissions of learned counsels for the appellants. We shall take note of his arguments in our discussion. He further submits that the finding returned by the Trial Court that the motive could not be established is not correct. The same was established from the testimony of PW1- Mukesh Kumar and PW7- Khairati.

18. Ld. Counsel for the appellants have argued that it is not open to the State to challenge the said finding in appeal, since the State has not preferred an appeal/ leave petition.

19. We may dispose of this objection of the appellants at this stage itself. Since the appellants stand convicted, there was no occasion for the State to prefer an appeal only to assail the finding on one aspect. The appeal/ leave petition is maintainable against the final decision of conviction or acquittal- as the case may be. The appeal/ leave petition is not directed against only a finding that may be returned by the Trial Court. It is directed against the final decision. It is always open to the respondent to support the final decision by arguing that some of the findings returned in the course of the judgment are erroneous. Attention may be drawn to Section 386 Cr.P.C., which, inter alia, provides that “*in an appeal from conviction*” the appellate

Court may “*alter the finding, maintaining the sentence.*” Thus, this submission of Ld. Counsels is rejected.

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

21. The present is a case based upon three incriminating circumstances against the appellants, which are: (i) PW2 and PW9 lastly saw the deceased in the company of the accused persons before his death; (ii) the conduct of the accused in absconding on the night of the incident i.e., 18.11.2010, from the place where they were residing; and (iii) motive attributed to A1-Virender.

22. The last seen evidence is premised upon the testimonies of PW2 and PW9.

23. PW2 deposed that he worked in factory at C-47, Naresh Park Extension in which break shoes were manufactured. Another unit of the said factory - doing welding work, was also plying from the said address. He stated that on 18.11.2010, at about 08:20- 08:30PM, the two accused persons had come to the factory doing welding work to meet the deceased- Yogesh. He further stated that when he left the premises at around 09:00PM, both the accused persons were present there with the deceased- Yogesh. He then went back to his house.

24. PW9- Sharwan Kumar was another worker working in the factory at C-47, Naresh Park Extension. He deposed that there are two units in the factory. In one unit, there was welding work and in the other unit of the factory, break – shoes were manufactured. He stated that on 18.11.2010, he

was working in the unit where break-shoes are manufactured. He had seen both the accused persons sitting with Yogesh. He further stated that at about 08:45PM, Yogesh and Virender were inside the factory with a third person whom they were referring to as 'Deva'. All three persons were talking to each other at that time when PW9 left the factory after finishing his work. Thus, both PW-2 and PW-9 have consistently deposed that they saw the deceased Yogesh with A-1 Virender and another person inside the factory premises, when they left the factory premises at about 8:45-9:00 p.m. PW-9 further stated that the person accompanying A-1 Virender was being referred to as 'Deva'.

25. The dead body of the deceased was found by PW1 on 18.11.2010 at 11:00PM. PW1- Mukesh Kr. Yadav deposed that he was running the welding workshop at C-47, Naresh Park Extension and that the deceased-Yogesh and PW7- Khairati were working as his employees. The deceased-Yogesh used to sleep in a room in the workshop itself. On 18.11.2010 at about 11:00 PM, he had gone to park his car in a plot adjacent to his workshop. While passing the front gate of his factory, he saw that the small gate of his factory gate was lying open. He went inside. He went to the room where Yogesh used to reside. The door was partly bolted from outside and on seeing through the gap in the door, he saw Yogesh lying on the takht in his room with an orange coloured welding wire wrapped around his neck. PW1 deposed that on seeing Yogesh, it appeared that he was already dead. Thereafter, PW1 came out of his factory and informed the police.

26. In his testimony, PW16- Dr. Manoj Dhingra, who conducted the post mortem on the body of the deceased, stated that the time since death was approximately one and a half days to two days at the time of conducting the post mortem. The post mortem on the dead body was conducted on 20.11.2010 at 01:00PM. As per the opinion of PW16, the time since death of the deceased comes between 01:00PM on 18.11.2010, and 01:00AM on 19.11.2010. Obviously, he could not have been dead till about 9:00 PM when the deceased was lastly seen in the company of the two accused by PW-2 and PW-9. His body was found by PW1 at 11:00PM on the same night, i.e., within two hours of the deceased having been lastly seen in the company of the accused persons. He was, therefore, murdered between about 9:00 PM and 11:00 PM.

27. The Supreme Court in *Bodhraj v. State of J&K*, (2002) 8 SCC 45 laid down that:

“31. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased, A-1 and A-2 were seen together by witnesses i.e. PWs 14, 15 and 18; in addition to the evidence of PWs 1 and 2.” (emphasis supplied)

28. PW2 has deposed that apart from the accused persons and the deceased, there was no other person present in the factory at the time when he and PW9 left the factory premises. The accused persons have failed to set up a defence that they had left the factory premises after meeting the deceased after PW-2 and PW-9 left the same at about 9:00 PM. In their statements recorded under Section 313 Cr PC, they do not state as to when they left the factory premises. No Alibi has been set up by them, much less established.

29. Ld. Counsels for the appellants have tried to cast a doubt on the authenticity of the testimonies of both these “last seen” witnesses. We shall now deal with their submissions in this regard one by one.

30. Ld. Counsels for the appellants submit that even though PW2 stated that his statement under section 161 Cr.P.C was recorded in the early hours of 19.11.2010 around 01:30-01:45AM, yet the name of the accused Devraj @ Deva/A-2 is not mentioned either in the rukka or the FIR. This submission of the ld. counsels is neither here nor there. In this regard, ld. APP, Mr. Rajat Katyal points out that the rukka was recorded on 19.11.2010 at 02:30 AM and the FIR No. 240/ 2010 was recorded 20 minutes later at 02:50AM. The recording of statements of persons interrogated under section 161 Cr.P.C is undertaken, once the first information report under section 154 Cr.P.C is registered. The FIR in this case was only registered at 02:50AM and investigation in the case was handed over to PW24- SK. Rana. Pertinently, PW24 stated that he received the investigation of this case at about 03:00AM. He reached the spot at about 03:15-03:30AM along with constable Virender and it was only after this that he had recorded the

statements of the employees of the factory, viz. PW2 and PW9. Pertinently, it was not suggested to PW-24 that the statements of PW-2 and PW-9 under Section 161 Cr PC were recorded around 1:30-1:45 AM, or that they were recorded before registration of the FIR. He was not confronted with the statement of PW-2 that his statement was recorded around 1:30-1:45 AM on the same night. Thus, the statements of these prosecution witnesses could not have been recorded at 01:30-01:45AM when the FIR itself had been registered at 02:50AM. The time mentioned by PW-2 as 1:30-1:45 AM – when his interrogation was undertaken is an approximate time. The same was mentioned in the testimony of PW-2 which was recorded on 01.12.2011. The incident is of 18-19.11.2010. Thus, the testimony was recorded after a lapse of little over a year. It appears that with passage of time, some amount of embellishment has crept in with regard to the said time. In any event, what emerges is that the said statements were recorded in the dead of the night. Thus, there is no merit whatsoever in this contention of the appellant.

31. The Id. Counsels for the appellants has also referred to the cross examination of PW-9, wherein he stated:

“The said factory was divided in two units by constructing a wall between them. It is correct that if someone is working in other factory, that is not visible from my factory. It is correct that there are two gates of the factory i.e. one gate for each unit. One gate is in front side and the other is on back side. It is correct that when stood at main gate, the other gate is not visible. It is correct that when one stood at the gate, the inner premises of the room of both the factories are not visible”.

32. The submission of the appellants is that the two adjoining units of the factory i.e., the welding unit and the break- shoe manufacturing unit are separated by a wall and a person working in one unit of the factory could not see the persons working in the other unit of the factory and, as such, PW2 and PW9 could not have possibly seen the accused with the deceased as claimed by them.

33. In the cross- examination of PW1- Mukesh Kr. Yadav i.e., the owner of the factory, he has stated that the main gate for entry to both the units of the factories is the same. There is also a gate towards the side of the vacant plot, however, the workers enter and exit the factory from the main gate. Mr. Katyal has relied upon the scaled site plan of the place of incident Ex. PW 11/A, to submit that the same shows that there is no dividing wall in the factory premises to partition the two portions i.e. the portion where PW-1 was running his welding unit and the other unit where shoe brakes were being made. He points out that there is common open area between the two units and there is visibility between the two units.

34. Having examined the evidence carefully, in our view, there is no merit in the submission of the appellants that, since PW-2 and PW-9 were working in the adjoining factory making brake shoes, and not in the factory in which the deceased was working, they possibly could not have seen the accused with the deceased together, as claimed by them. A perusal of the scaled site plan reveals that, firstly, the entry and exit, to and from either unit of the factory is only through a single main gate. PW-1 has deposed without challenge, that the same main gate entry was used by all the workmen in both the units for entry and exit into the factory premises. The plan Ex. PW-

11/A shows that there is no door in the portion marked “verandah” outside the room where the deceased Yogesh used to sleep, and where his dead body was recovered. There is an open unobstructed entry into the verandah leading to the room occupied by the deceased from the area/ passage shown as “tin shed” leading to the main gate. Reliance placed on the cross examination of PW-9 as quoted above, is of little use. It appears he was put the questions in cross examination generally, without reference to the scaled site plan Ex. PW-11/A. It cannot be made out from the cross examination of PW-9, as to which wall he had in mind while making the said statement. Pertinently, PW-2 was also with PW-9 and he too was the “last seen” witness. No such questions were put to him and his testimony that he had seen the accused with the deceased has not been denied. *Inter alia*, while exiting or entering the premises of the factory through the single main gate, passage of which is through the common tin shed, PW2 and PW9 could have witnessed the accused persons with the deceased- Yogesh in his room, as claimed by them. Thus, from the view, it was possible for PW2 and PW9 to have witnessed the deceased- Yogesh sitting with the appellants in the adjoining room.

35. The reliability of the last seen witnesses- PW2 and PW9 is further established by the fact that PW9 had stated that the deceased- Yogesh and A1- Virender were talking with each other and they were referring to the third person present as ‘Deva’, who is A2 in the present case. PW-9 was a stranger to A-2 Devraj. If he had not heard A-2 being addressed as “Deva”, he would not have learnt of the name of A-2. Pertinently, there was no confrontation of PW9 during his cross examination with his statement

recorded under Section 161 Cr.P.C.— presumably because he had named “Deva” in the said statement as well.

36. Ld. Counsels for the appellants have also raised doubts on the reliability of the owner of the factory- PW1 Mukesh Kr. Yadav. They have argued that A1 Virender was named as the suspect by PW-1 out of the blue. Pertinently, in his original complaint (rukka) Ex. PW 3/A1, Mukesh Kr. Yadav PW-1 had stated that he knew that the deceased- Yogesh was having illicit relations with the wife of A1- Virender. Due to this reason, the latter had even given beatings to the deceased some days prior to the date of incident. Mukesh Kr. Yadav PW-1 had, thus, stated that he suspected A1- Virender might have committed the murder of the deceased with some of his accomplices.

37. In his testimony before the court, PW1 stated that the deceased- Yogesh had told him that he had committed some mistake and hence there was dispute between him and his cousin- Virender (A1). He stated that on his asking, the deceased had told him that A1- Virender had seen his wife with the deceased- Yogesh in a compromising position and hence there was a quarrel between them. He stated that the deceased- Yogesh further informed him that he had already sought pardon from Virender and the matter had been resolved. PW1 stated that he had asked the deceased- Yogesh to stop visiting A1 and his wife. However, Yogesh did not stop visiting them. Pertinently, it was in this background that in the original complainant Mukesh Kr. Yadav PW-1 had suspected A1- Virender to have committed the murder of Yogesh with his accomplice(s). Thus, the

submission of the Id. Counsels that there was no basis for PW1 to raise allegations against A1- Virender is devoid of merit.

38. Ld. Counsels have also contended that there was no occasion for PW1 to have seen the main factory gate when he had gone to park his vehicle in the plot adjacent to his workshop. Firstly, in his testimony, PW1 has clearly stated that on 18.11.2010 at about 11:00 PM he had gone to park his car in the plot adjacent to his workshop and while passing from the front gate of his factory, he saw that the small gate of his main factory gate was lying open. Secondly, it was not suggested to PW1 that he could not have seen the small gate of the factory when he went to park his car on the adjoining plot while passing in front of the main gate. This submission is, therefore, rejected.

39. The contention of the Id. Counsel for appellants that PW1 did not explain as to why he came to park his car at the factory must be rejected at the outset. We may observe that Id. Counsel for the accused did not raise any question, or give any suggestions to PW1 during his cross- examination in this regard and, as such, these innovative arguments cannot be raised in appeal before this Court for the first time. There was no meaningful cross examination of PW-1 on the aforesaid aspects and his testimony was not challenged. Thus, there is no reason to now raise a doubt on the truthfulness of the said statement.

40. The conduct of the accused persons in absconding from the place where they used to reside is also an incriminating circumstance against the accused. PW6 has been examined as the person in whose house the accused person Virender A1 was staying as a tenant. In his testimony, PW6 stated

that in the month of November' 2010, Virender along-with his wife had gone to his native village and after two days of Diwali festival, came back to their house with one Dev Raj @ Deva. PW6 stated that A1- Virender told him that Deva- A2 was his co- villager and would be staying with him for one or two days. He further stated that on 18.11.2010, in the night, they all left his house and left behind the minor brother in law of Virender A1 in the said house. In his cross- examination, PW6 further stated that the accused A1 had taken all his belongings with him except one folding cot, one small-TV, one small LPG cylinder and some utensils which were later on taken by some relative of accused Virender in the presence of police.

41. The accused have sought to cast a doubt on the testimony of PW6 by urging that he was interrogated and his statement under Section 161 Cr.P.C. recorded after about 7 months of the incident. Thus, it is claimed, he has been planted as a witness by the prosecution. We cannot agree with this submission.

42. Just because the statement of Bindra van (PW6) u/s 161 Cr.P.C was recorded after 7 months of registration of FIR is no ground to disbelieve his testimony in court. Pertinently, PW6 was an independent witness. From his cross- examination, nothing has emerged to disbelieve his testimony. Furthermore, no challenge was raised by the accused to claim that A1- Virender and his wife did not leave their tenanted premises. So far as A2- Dev Raj @ Deva is concerned, there was no suggestion put by him to PW6 to say that he was not present with A1- Virender at his house on the fateful night. PW6 has categorically stated that some relative of A1- Virender had collected certain articles from his house, and this statement has also not been

disputed by the accused before the trial court. In our view, the testimony of PW6 is truthful and reliable. Thus, the conduct of the appellant Virender A1 abandoning his tenanted house on the night of the incident– with his wife and Dev Raj A2, without taking with them items like TV and a LPG cylinder, and leaving the minor brother-in-law of A1 is unnatural and suspect, and is another incriminating circumstance against the appellants.

43. The fact of the accused persons surrendered in court on their own does not enure to the benefit of the accused in the facts of this case. Firstly, the surrender came after over 5 months of them being named as the suspects by PW1, PW2 and PW9. Till then, they were not to be found. Secondly, they had absconded together on the date of the incident, after the incident as testified by PW6.

44. We may now proceed to consider the aspect that A2 Dev Raj @ Deva refused to join the TIP proceedings, and whether the same raises an adverse inference against him. Ld. Counsel for A2- Dev Raj @ Deva has vehemently argued that A2 had refused TIP because he and A1- Virender were not produced before the court with muffled faces and were shown to PW2 and PW9 on the day when they surrendered in the court on 26.04.2011. He further contended that his photographs had been taken by the police on the day he had surrendered in court on 26.04.2011 and shown to PW2 and PW9. It is pertinent to note that in his statement under section 313 Cr.P.C, A2- Dev Raj @ Deva has stated that he was shown to the public witnesses by police officer who arrested the appellants on 26.04.2011, when the appellants had come to surrender in court. However, A1- Virender, has not so stated in his statement recorded under section 313 Cr.P.C.

45. The two accused surrendered before the Court of their own. They did not choose to appear in muffled faces when they surrendered before the Court. Moreover, there was no occasion for the prosecution witnesses - especially PW2 and PW9, to be present in the court premises on 26.04.2011 when the accused surrendered. Pertinently, their examination before the court was conducted on and after 01.12.2011. PW9 was examined in the court on 23.03.2012. They are independent witnesses, and not family members of the deceased, who could be interested in attending the court hearings to sustain the conviction of the accused. Furthermore, in the cross-examination of these witnesses, it was not suggested that they had been shown the faces of the appellants on the day when the appellants had surrendered in the court. So far as PW2 is concerned, there is no cross examination on the said aspect. It was not suggested to him that the accused had been shown to him on the day of their surrender and arrest i.e. 26.04.2011, or any other day. So far as PW9 is concerned, his cross examination on this aspect reads as follows:

“I had seen Dev Raj accused first time with Yogesh and Virender as stated above and thereafter I had seen on the other dates in the Court while he was being produced from lock up. I have no knowledge when both the accused were apprehended by the police in this case. However, I came to know that police had arrested both the accused persons in this case. It is correct that I had identified both the accused persons also while they were in the police custody. I do not remember the name of the police officer who had shown both the accused to me”.

46. The above shows that PW9 stated that he had seen A2 firstly on the day of the incident, and thereafter on the day when he was produced from

the lock up. He does not say that he saw the accused on the day of his surrender/ arrest i.e. 26.04.2011. When Devraj @ Deva was arrested upon his surrender, he was not produced from lock up. On this aspect, there is no further cross examination of PW9. Pertinently, PW9 was not aware when the accused were apprehended. This also militates against the argument of the accused that they were shown to PW2 and PW9 on the day of their surrender/ arrest i.e. on 26.04.2011. He clearly states that he had identified the accused while they were in police custody- which could have happened only after their surrender/ arrest, and after police remand was granted.

47. PW15- Inspector Jai Singh; and PW17- HC Dewan Singh, who arrested the appellants on 24.06.2011, when they surrendered in court, have both deposed that when they produced the appellants before the court after investigation, both accused were got muffled by the Investigation Officer- PW24. There are no questions asked to PW15, PW17 or PW24 in their cross- examinations to suggest that they had not produced the appellants before the Id. Metropolitan magistrate in muffled face and as such, there is no evidence to disbelieve the testimony of these witnesses.

48. Importantly, it was not suggested to PW15 and PW17 that they had taken photographs of the accused persons. Pertinently, the reason given by A2 for refusing TIP before the Ld. MM was *"I do not wish to participate in TIP proceedings as my photographs have already been taken by the police."* This reason is at variance with the reason given by A2 in his statement recorded under Section 311 Cr.P.C.; it was not suggested to PW2 and PW9 that they had been shown the photographs of A2 prior to their coming for the TIP. Feeble suggestions were given to PW15 and PW24, which were denied

by them. Thus, this justification given by A2 for refusal to join the TIP is false and rejected. The refusal of A2 to join in the TIP raises the adverse inference that if he had joined the TIP, he would have been identified by PW2 and PW9 as the person accompanying A1 Virender when PW2 and PW9 saw them visit the deceased on the fateful night at the factory premises.

49. Ld. Counsel for A2 has contended that the chance- prints collected from the takth or the welding wire have not been led in evidence.

50. PW 24, the I.O. deposed that finger prints/ chance prints were taken on the spot but foot prints were not taken. The finger print report was marked by PW24 as mark PW24/ PA. A perusal of the said document shows that the prints taken from the utensils and some other things found at the spot, could not be developed. That being the position, there was no purpose of leading the finger print proficient report in evidence. It is in this light that the statement of PW24 that the finger prints could not be matched with those that of the accused, has to be read and understood.

51. Lastly, we may deal with the submission of Mr. Katyal that the finding returned by the Trial Court with regard to the absence of motive for commission of the crime is erroneous. In this regard, we may firstly refer to the Rukka Ex. PW1/A. The Rukka was prepared on the statement of PW1- Mukesh Kumar. In the said statement, he, inter alia, stated that he saw the deceased Yogesh lying on the takht and the welding wire of orange colour was tied around his neck. Yogesh appeared to be dead to him. He stated that another worker in his factory– Khairati had told him, that in the week before Diwali, the deceased Yogesh had a fight with his cousin (chachera bhai) who stays somewhere in Laxmi Park and works in some company.

Mukesh Kumar stated that when he came to know of the said dispute, he asked Yogesh the reason for the dispute. Yogesh informed him that his cousin had caught him (Yogesh) in compromising position with the wife of the cousin brother and, thereafter, there was a scuffle between the two. Mukesh Kumar stated that he learnt that Yogesh continued to visit the wife of his cousin brother and he continued to have illicit relationship with her. He stated that he doubted that Yogesh had been killed by his cousin (chachera bhai) Virender with the help of someone.

52. Thus, in the Rukka itself, by naming A1- Virender, PW1 narrated the motive for the commission of the crime. In his testimony recorded before the Court, he was consistent in this regard when he deposed as follows;

“A few days prior to Diwali, I had a talk with Yogesh as I had been informed by Khairati that Yogesh had some quarrel with son of his Chacha. On my asking about it, Yogesh had told me that he had committed some mistake and hence there was dispute between him and his cousin Virender. He claimed that Virender had seen his wife with him (Yogesh) in a compromising position and hence there was a quarrel between them. Yogesh further informed me that he had already sought pardon from Virender and matter had been resolved. I had asked Yogesh to stop visiting Virender or his wife. However, Yogesh did not stop visiting them.”

53. In his cross examination PW1 stated that Khairati had informed him about the illicit relationship between Yogesh and the wife of A1- Virender a few days prior to Diwali. He denied the suggestion that the story about the

relationship between Yogesh and the wife of Virender had been falsely concocted to falsely implicate Virender.

54. Khairati- PW7 in his examination in chief, while identifying the accused No.1- Virender, stated that he was the cousin of Yogesh. Yogesh used to visit the residence of Virender, situated somewhere in Nihal Vihar. He stated that about a week or ten days prior to Diwali, in the year 2010, Virender had given beatings to Yogesh. He asked Yogesh as to why Virender had given him beating, to which he replied that Virender had seen him in a compromising position with his wife Usha. He further stated that he brought this fact to the notice of PW1- Mukesh Yadav- that Yogesh was having an illicit relationship with the wife of his cousin brother Virender.

55. He was cross examined on behalf of the accused. While stating that he had not seen A1-Virender give beatings to Yogesh, he stated that he had seen the injury marks on the body of Yogesh while he was taking bath. There were minor abrasions on the body of Yogesh and that Yogesh had not taken medical treatment for those abrasions. He further stated that he had informed Mukesh Yadav- PW1 regarding the beatings received by Yogesh at the hand of A1-Virender on the next day of his coming to know about the said fact. He denied the suggestion that the deceased Yogesh had not told about the beatings given to him by Virender, or that the deceased Yogesh had not told him that A1-Virender had seen Yogesh with the wife of Virender in a compromising position. He denied false implication of the accused by him at the instance of PW1- Mukesh Yadav.

56. The statement of PW1 - Mukesh Yadav and PW7 – Khairati that the deceased had an illicit relationship with the wife of A1-Virender is based on

the personal knowledge derived by them from the deceased directly. The statement of these two witnesses corroborate each other. Thus, it stands proved on record that the deceased informed both PW1 and PW7 that he had an illicit relationship with the wife of Virender and upon seeing the deceased Yogesh in a compromising position with the wife of A1-Virender, A1-Virender had given beatings to the deceased Yogesh. PW7 was an eye witness to the injuries suffered by the deceased Yogesh as stated by him. The testimonies of PW1 and PW7, no doubt, by themselves do not establish the illicit relationship between Yogesh and the wife of A1- since the requirements of Section 60 of the Indian Evidence Act are not fulfilled. However, what has been established from the testimonies of PW1 and PW7 is that the deceased Yogesh had claimed that he had an illicit relationship with the wife of A1-Virender; that Virender had seen his wife and the deceased in a compromising position and; that on that account A1 Virender had given beatings to Yogesh– the deceased. From the testimony of PW7, it is also proved that the deceased did suffer injuries (abrasions on his body) which the deceased claimed were inflicted by A1- Virender.

57. Section 32 of the Indian Evidence Act deals with cases in which statement of relevant facts by person who is dead, or who cannot be found is relevant. So far it is relevant, the said section reads as follows;

“32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc ., is relevant.—Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of

the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:—

(1) when it relates to cause of death. —When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”

58. The verbal statement of the deceased made to PW1 and PW7 before his death is relevant to the circumstance of the transaction which resulted in his death. Since the death of the deceased has come into question in the present trial, the said statements made by the deceased Yogesh to PW1 and PW7 – with regard to his illicit relationship with the wife of A1-Virender, and the animosity harbored by Virender on that account, are relevant facts. The present case would also be covered by clause (3) of Section 32 of the Indian Evidence Act, which reads as follows:

“(3) or against interest of maker. —When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.”

59. The statement of the deceased to PW1 and PW7 that he had an illicit relationship with the wife of A1- Virender would have exposed him to a criminal prosecution under Section 497 IPC. We may observe that Section 497 IPC has been struck down by the Supreme Court now in ***W.P.(C.) No.***

194/2017, titled Joseph Shine v. Union of India, vide judgment dated 28.09.2018. However, at the relevant point of time, the said provision was still in force and the deceased Yogesh had no reason to believe that the said provision would, in future, be declared to be unconstitutional.

60. In the light of the aforesaid, we are of the considered view that the prosecution was able to establish the existence of motive for the commission of the crime by A1-Virender.

61. The submission of learned counsel for A2 Devraj @ Deva is that so far as his is concerned, he had no motive to commit the crime with A1. It is not essential that each of the accused involved with the commission of the crime should have a motive. It has come in the evidence of PW6-Bindravan that Virender introduced A2 as his co-villager. A2 was staying with A1 and had accompanied him when A1 went to meet the deceased along with A1. A2 was lastly seen with the deceased some time before his death. The conduct of A2 and A1 in jointly absconding and, thereafter, jointly surrendering, also establishes their nexus. Thus, there is no merit in the submission of learned counsel for A2 that absence of motive in him to commit the murder of the deceased should result in his acquittal.

62. Keeping in view the aforesaid discussion, we are satisfied with the circumstances when viewed together, complete the chain and the only conclusion that can be drawn is that the two accused committed the murder of the deceased. The deceased was throttled by the use of welding wire. The deceased - who was himself a young man, would have resisted the attempt to throttle him. However, it is evident that he was over-powered by the two accused and they continued to throttle him till he died.

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

64. Consequently, the appeal in respect of both the appellants stands dismissed in the aforesaid terms.

OCTOBER 12, 2018

**(VIPIN SANGHI)
JUDGE**

**(I.S. MEHTA)
JUDGE**

सत्यमेव जयते