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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Death Sentence Reference 01/2016

Reserved on: November 20, 2017

Decision on: January 04, 2018

STATE

..... Appellant

Through: Mr. Rajiv Mohan, SPP for the State
along with Ms. Priyanka Singh and Mr. Tejasva
Mehra, Advocates.

Versus

RAVI KAPOOR & ANR

..... Respondents

Through: Ms. Dimple Vivek, Advocate for R-1
Mr. Amit Kumar with Ms. Meenakshi Dutta,
Advocate for R-2.

With

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CRL.A.840/2016

BALJEET MALIK @ POPPY

..... Appellant

Through: Mr. Amit Kumar with Ms. Meenakshi
Dutta, Advocates.

Versus

STATE (GOVT. OF NCT OF DELHI)

..... Respondent

Through: Mr. Rajiv Mohan, SPP for the State
along with Ms. Priyanka Singh and Mr. Tejasva
Mehra, Advocates.

With

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CRL.A.851/2016

AMIT SHUKLA

..... Appellant

Through: Mr. Amit Kumar with Ms. Meenakshi
Dutta, Advocate

Versus

STATE (GOVT. OF NCT OF DELHI)

..... Respondent

Through: Mr. Rajiv Mohan, SPP for the State
along with Ms. Priyanka Singh and Mr. Tejasva
Mehra, Advocates.

And

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CRL.A.911/2016

RAVI KAPOOR

..... Appellant

Through: Ms. Dimple Vivek, Advocate.

Versus

STATE

..... Respondent

Through: Mr. Rajiv Mohan, SPP for the State
along with Ms. Priyanka Singh and Mr. Tejasva
Mehra, Advocates.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE I.S. MEHTA

JUDGMENT

04.01.2018

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Dr. S. Muralidhar, J.:

Introduction

1.1 Death Sentence Reference No.1/2016 arises out of the judgment dated 14th July, 2016 of the Additional Sessions Judge-05 (South), Saket Courts, New Delhi in S.C.No.30/2014 arising out of FIR No.69/2009 registered at P.S. Vasant Vihar convicting three accused, Ravi Kapoor (A-1), Amit

Shukla (A-2) and Baljeet Malik @ Poppy (A-3) for the offences under Sections 364/302/201/394/468/471/482/34 IPC and convicting A-1 additionally for the offence under Section 25 of the Arms Act. The reference is consequential upon the order on sentence dated 22nd August, 2016 whereby for the offences under Section 302 IPC both A-1 and A-2 were sentenced to death.

1.2 The three accused have filed individual appeals questioning their conviction by the aforementioned judgment for the said offences and the order on sentence whereby as far as Baljeet @ Poppy (A-3) is concerned, he was sentenced to life imprisonment for the offence under Section 302 of the IPC and fine of Rs.10,000/-.

1.3 A-1 was also sentenced to fine of Rs.20,000/- for the offence under Section 302 IPC and in default to undergo simple imprisonment (SI) for six months and A-2 to a fine of Rs.1 lakh and in default to undergo SI for six months.

1.4 For the offence under Section 364 of the IPC all three accused were sentenced to imprisonment for life; A-1 was sentenced to fine of Rs.10,000, A-2 to fine of Rs.1 lakh and A-3 to fine of Rs.2 lacs and in default each of them to undergo SI for six months.

1.5 For the offence under Section 201 IPC all the three accused were sentenced to 7 years SI and fine of Rs.10,000/- and in default to undergo SI for 6 months.

1.6 For the offence under Section 394 IPC, all the three accused were sentenced to imprisonment for life and fine of Rs.50,000/- and in default to undergo SI for six months.

1.7 For the offence under Section 468 IPC all the three accused were sentenced to imprisonment for 7 years with the fine of Rs.20,000/- and in default to undergo SI for six months. For the offence under Section 471 IPC, all the three accused were sentenced to SI for two years.

1.8 For the offence under Section 482 IPC, all the three accused were sentenced to imprisonment for one year. For the offence under Section 25 of the Arms Act, A-1 was sentenced to SI for 2 years and fine of Rs.10,000/- and in default to undergo SI for 2 months. All sentences were directed to run concurrently. The sentence awarded to A-1 under Section 25 of the Arms Act was directed to run consecutively.

Case of the prosecution

2. The case of the prosecution is that Jigisha Ghosh, the deceased, the 28 year old daughter of Mr. J.N. Ghosh (PW-1) was working as Operations Manager in Hewitt Associates Private Limited for a period of 5 years prior to her death. An office cab used to pick up and drop the deceased. On 17th March, 2009 at around 12 noon, the deceased left her house in the office cab. She was expected to return home at 4 am on 18th March, 2009. When she failed to return from her office, PW-1 initially presumed that she had overstayed at the office as she had done on some occasions in the past. However, when the office cab came to the house of PW-1 the following day at about 3 pm to pick her up, PW-1 realised that the deceased had not stayed

in the office and in fact the office cab had dropped her back on the previous night. PW-1 then called the office of the deceased but no information as to her whereabouts was forthcoming. Mr. Jerry Joseph (PW-5), a senior colleague of the deceased at her work place, visited the house of PW-1 but could not provide any clue. When PW-1 called the deceased on her mobile phone, it was switched off.

3. On 19th March 2009, PW-1 inquired from the HDFC Bank and was informed that from the ATM account of the deceased, a sum of Rs.25,000/- was withdrawn on 18th March, 2009. It was further revealed that articles worth Rs.70,000/- had been purchased from different places using the debit card of the deceased. PW-1 suspected that the deceased had been kidnapped by some unknown persons. He, therefore, approached police station (P.S.) Vasant Vihar and gave a complaint (Ex.PW1/A). This was recorded by Sub-Inspector Neeraj Chaudhary (PW-47). PW-1 further informed PW-47 that by making a phone call to HDFC Customer Care, he had found that Rs.25,000/- had been withdrawn on 18th March, 2009 through the ATM card of the deceased and heavy shopping had been done by using her debit card. PW-1 further gave the following details:

“My daughter's height is 5'4", thin built, dark wheatish complexion, shoulder cut hair, oval face and having an old mark of burning at her left leg. My daughter was wearing a T-shirt of light yellow colour having three big buttons on the front side, a yellow colour striped pants, black coloured high heel shoes, a wrist watch of "rectangular design and dial frame", topaz and emerald fitted two gold rings and zircon and sapphire fitted silver rings on the fingers of left hand, a necklace of white pearl on her neck, earrings of white coloured pearls and a pink colour leather purse containing some amounts, ATM card, PAN

card, a book of Arti, I-Pad and two mobile phones make Nokia of 99106-40120 and 9910736140 numbers. I apprehend that some unknown person has abducted my daughter Jigisha. My daughter may be searched and legal action may be initiated. I have heard the statement and the same is correct.”

Investigation

4. On the basis of the above complaint, FIR No.69/2009 dated 19th March, 2009 was registered at P.S. Vasant Vihar under Section 365 IPC. PW-47, who took over the investigation made inquiries from the shop where the ATM card was used. He reached Reebok Store, PVR Saket Market. There the merchant copy and the invoices of the purchases made by the three persons were obtained. Purchases were made for a sum of Rs.4948 in the name of the deceased. Purchases had been also made from Planet M, Saket, Prem Watch Company, Reebok Store, Aashi Opticals and Amit Traders all at Sarojini Nagar Market. Cash was seen to have been withdrawn from the ATM of State Bank of Patiala (SBP) installed in the area of Mahipalpur.

5. The merchant copy (Ex.PW-13/B) and copy of the invoice (Ex.PW-13/C) of Rs.4,948/- was seized vide memo Ex.PW-13/A. This had the signature of the person who made the purchases. The signature was marked as ‘Q3’. One music CD had been purchased from Planet M-4 Store for a sum of Rs.299/-. The merchant copy, Ex.PW-12/B and the invoice, Ex.PW-12/C were seized under memo Ex.PW-12/A. This merchant slip also had an original signature of the person purchasing the article which was marked as ‘Q7’.

6. It was found that from Prem Watch Company, Sarojini Nagar a Timex Sports Watch for a sum of Rs.9,495/- had been purchased. The merchant slip Ex.PW-4/B and invoice PW-4/C were seized. There were CCTVs found

installed at Prem Watch Company. PW-47 requested the Store Manager to provide the recording for the relevant period. The Store Manager, Krishan Gopal (PW-18) produced 2 CDs containing relevant CCTV footage as well as 7 photographs of the recording of the relevant period from the hard disc of the CCTV installation. The merchant slip, invoice, both the CDs as well as 7 photographs were seized vide memo Ex.PW-4/A. The merchant slip also bore the signature of the purchaser which was marked as 'Q4'. It also contained the mobile phone of the purchaser. It is stated that the CDs were themselves Ex.PW-18/A and Ex.PW-18/B. After the seizure, they were kept with a seal at the *malkhana*.

7. From the Reebok Store at Sarojini Nagar Market, merchant slip, Ex.PW-10/B, copy of the invoice, Ex.PW-10/C were seized vide memo Ex.PW-10/A. From Aashi Optical where two sunglasses were purchased by using the same card and the invoice, Ex.PW-22/B was seized vide memo Ex.PW-22/A. From Amit Enterprises where one LCD TV was purchased, the merchant slip, Ex.PW-9/B was seized under memo Ex.PW-9/A.

8. PW-47 then received information that a dead body had been recovered in the area of Suraj Kund, Faridabad by the local police. PW-47 along with Inspector Atul (PW-48) and PW-1 then went there. The police officials of PS Suraj Kund showed them the photographs of the dead body, PW-6/A to PW-10/A. PW-1 identified the dead body as that of his daughter. It was revealed that the dead body was already deposited in the mortuary of Badshah Khan Hospital, Faridabad where the identity of the body was confirmed.

9. PW-47 then, on the instructions of PW-48, went to the ATM of SBP at Mahipalpur. He was, at that time, having the photograph of the victim as provided by her parents (PW-XI). PW-47 found that one Bhiva Ram (PW-2) was sitting beside the ATM. The photograph of the victim was shown to him. PW-2 then informed PW-47 that the girl appearing in the photograph was brought by three persons in a car, they took the girl to the ATM; while she was made to stand there, one of the three persons entered the ATM and thereafter all of them left the place together. The statement of PW-2 identifying the photograph was recorded (Ex.PW-2/A).

10. The CDRs of the two mobile phones used by the deceased were examined. The location as per the Cell ID was found in the area of Harsh Vihar Colony, Village Indergarhi, Ghaziabad. PW-47 then reached Harsh Vihar Colony. There one Kapil Sharma was found using the hand set with Reliance connection having IEMI number on which the SIM of the deceased was running till she was found missing. Kapil Sharma was examined. He stated that the mobile come into his possession when he was downloading the construction material from a truck. This IEMI number with SIM was seized vide memo Ex.PW-46/A.

11. On the incorporation of Section 302 IPC in the FIR, PW-47 handed over the file of investigation to PW-48 and joined the latter in the investigation. On 23rd March 2009, PW-45 received a secret information that the persons involved in the present case would come to the Nelson Mandela Marg. PW-48 authorized a raiding party comprising other police officials including

himself, SI Upinder, Inspector Palwinder Chahal (PW-45), S.H.O., P.S. Vasant Vihar, Constable Dara, Constable Love Kumar, Constable Mahesh, Constable Satbir, Constable Upender, Constable Jaspal as well as a secret informer. The informer pointed to a silver grey coloured Santro car coming from the side of Munirka. When the said vehicle was stopped, A-1 was driving the car, A-2 was seated on front left side seat and A-3 was sitting in the rear seat. All three persons were overpowered. PW-45, with the help of Constable Dara, apprehended A-1. A-2 was apprehended by SI Upinder Singh (PW-46) and A-3 by Constable Upender.

12. On the search of A-1 by PW-48, one country made fire arm was recovered from left side dub of his trousers. It was checked and was found loaded with one live cartridge which was then removed from the barrel. From the right side pocket of the pant of A-1, three live cartridges and one fired cartridge case kept in a small cardboard box were recovered. The three accused were personally searched and thereafter kept with muffled faces. The vehicle was checked and one Motorola wireless set from the driver seat between the legs of A-1 was recovered. The wireless set itself was seized.

13. A-1 was found wearing one gold chain. He produced it and said that the gold chain belonged to the deceased. Further, from the dash board of the car, 10 live cartridges were recovered. From the boot of the car, one grey colour bag having orange pocket was recovered. It contained one beacon light, one wireless set, one static wireless set, one Delhi Police Uniform set and a blue number plate with stars, a few ID cards of Star News in the name of Ravi Kapoor with his photograph, one ID card of PR Communication in the name

of Ravi Kapoor having his photograph, one PAN card in the name of Nirmal Awasthi. These were seized. From the same bag, one Chinese pistol loaded with 8 live cartridges, one dagger with cover and one open knife were recovered. From another bag, house breaking tools and other tools of the car including jack, etc., a bunch of keys containing 113 keys of different vehicles were also recovered. The car had a sticker of “Judge, Punjab & Haryana High Court” on the front screen. This was peeled off from the screen and was kept in a separate envelope. The rear seat of the car had a stain mark spreading over a significant area. The car itself was seized.

14. A-3 was, at the time of his arrest, wearing Reebok shoes. He was also having sunglasses with cover. These were the very items purchased by the three accused after the death of the deceased. Disclosures were made by the accused. A-1 is stated to have taken the police party to his house where the land lord Charan Singh (PW-17) and neighbour Satish (PW-20) agreed to join the investigation. A-1 took the police party to the bedroom and from the bed, he produced one white cap Reebok make and confirmed that he was wearing the cap at the time when purchases were made while using the debit card of the deceased.

15. At the instance of A-1, the police recovered one Tavera vehicle and seized it under a memo Ex.PW-47/C. On the further interrogation of the three accused, three supplementary disclosure statements were recorded. According to PW-47 all the three accused on 2nd April, 2009 pointed to the places of occurrence and the ATM and other shops from where they made purchases and they also pointed to the place where they had disposed of the

dead body. A-1 led the police party to his residence and produced one pant of brown colour, one striped shirt and one T-Shirt. He disclosed that he was wearing those clothes on the day of incident and while making purchases thereafter. On the same day, A-3 led the police party to the shop of R.K. Communication in the area of Masoodpur, Kishan Garh. He produced two Nokia mobile phones. The items recovered were got identified through a TIP.

16. On 1st May, 2009, the statement of Mr. Abhijeet Singh (PW-40), neighbour of the deceased was recorded under Section 164 Cr PC. On 18th May, 2009, the police visited SBP, Mahipal Pur wherefrom a CD containing footage of the CCTV recording dated 18th March, 2009 of the ATM of the bank installed in the area of Mahipal Pur was collected.

17. On 14th June, 2009, the police recorded the statement of Ms. Anu Arora (PW-38) who came to the PS and identified the Santro car of which she was the registered owner and which had been stolen on the intervening night of 19th/20th February 2009.

Charges

18. At the conclusion of the investigation on 5th December, 2009 a charge sheet was filed. Thereafter charges were framed against the three accused by the trial Court. The first charge was that of criminal conspiracy entered into between three accused during the period from 18th to 23rd March, 2009 to abduct the deceased, rob and murder her, dispose of the robbed articles and dead body. Thus, they committed an offence under Section 120B IPC. The second charge was that of abduction of the deceased punishable under

Section 365 read with Section 120B IPC. The third charge was committing the murder of the deceased and disposing of the body in the bushes near Suraj Kund, Faridabad thereby committing offences under Section 302/201 read with Section 120B IPC. The fourth charge was that of robbery of gold chain, two mobile phones, two rings and credit and debit card after causing injury to the deceased thereby committing an offence punishable under Section 394 read with Section 120B. The fifth charge was that A-1 committed forgery for the purpose of cheating of signing on the charge slip and other documents prepared by using credit card of the deceased, thereby committing an offence under Sections 468 and 471 IPC read with Section 120B IPC. The sixth charge was that the accused were found in possession of different property marks including different number plates of vehicles, sticker of judiciary, revolving light etc. which was kept dishonestly for the purpose of deceiving the authorities, thereby committed an offence punishable under Section 482 IPC read with Section 120B IPC.

19. A-1 was separately charged for the offence under Section 25 of the Arms Act for being found in possession of fire arms and ammunition, i.e., two country made pistols, 13 live cartridges and one empty cartridge without licence as well as a dagger and knife.

Statements of the accused under Section 313 Cr PC

20. The prosecution examined as many as 58 witnesses. In their respective statements under Section 313 Cr.P.C., the stands taken by the three accused were as under:

21. A-1 claimed that he has been falsely implicated in the case by one

Constable Prakash Chand Meena who was attached with Special Staff, South-East Madangir who had been demanding money from him and had also been making threatening calls. He asked for the call details of the mobile of the said constable to be analysed and also stated that in this connection he had already filed a complaint against the said constable at P.S. Sarita Vihar. A-1 also claimed that the photographs generated from the CCTV footages of Prem Watch Company were false and fabricated. He denied the statement of the Branch Manager of the HDFC and record provided by him to be false and fabricated. A-1 maintained that he had refused to participate in TIP as during custody, he was shown to the witnesses in Police Station.

22. As far as A-2 is concerned, he too maintained that he had refused to participate in the TIP proceedings as he was shown to the witnesses in the police station during custody. He claimed to have been falsely implicated in the case. A-3 too maintained that he was totally innocent. No defence witnesses were examined.

Impugned judgment of the trial Court

23. The trial Court has in the impugned judgment, after analysing the evidence, come to the following conclusions:

- (i) The contention of the accused that Bhiva Ram (PW-2) is a planted witness is without merit. The omission on the part of the Investigating Officer (IO) to obtain the appointment letter of PW-2, the attendance register or an identity card did not make the presence of PW-2 near the ATM at Mahipalpur at the relevant time doubtful. PW-2 had no occasion to falsely implicate the accused. Once the prosecution had

discharged the burden of showing that PW-2 was present near the ATM, then the onus shifted to the accused to prove that he was not present there.

(ii) PW-2 had clarified that he had gone to Tihar Jail on 27th March 2009 for the test identification parade (TIP) in which the accused refused to participate. PW-2 was called to the PS on 2nd April 2009 where he was shown to the accused. Therefore, his identification of the accused thereafter in the Court was not vitiated.

(iii) The order of the trial Court dated 13th September 2010 whereby the photograph of the deceased (Ex.PX-1) was permitted to be placed on record by the prosecution was not challenged by the accused. In any event the memo regarding identification of photograph was prepared and filed with the chargesheet.

(iv) PW-2 did not notice anything suspicious when he saw the deceased with the accused persons and therefore, he did not inform the police. PW-2 in fact noticed that one sticker of police of red and blue colour affixed on the rear side number plate of vehicle in which the accused brought the deceased at the ATM.

(v) From the deposition of Inspector Atul Kumar (PW-48), the explanation offered for putting off the recording of the statement of PW-2 under Section 164 CrPC till 23rd April 2009 stood satisfactorily explained.

(vi) The conduct of PW-11 in not immediately speaking to the security guard or driver of the cab or his office or the police after his call to the deceased was suddenly disconnected and he heard her scream did not indicate any foul play on his part. PW-47 and 48 also stated that they interrogated PW-11, the security guard and driver of the cab as well as the co-passengers but did not find any foul play on their part. Even otherwise no suggestion was made by the accused about PW-11 or the other PWs from the office of the deceased being involved in the crime.

(vii) The purchases made by the accused at various stores using the debit card of the deceased stood fully proved. The further fact that the goods/articles purchased in the shop were recovered from the one or the other accused satisfactorily proved the case of the prosecution in this regard.

(viii) The delay in obtaining the hard disc of the CCTV footage from Prem Watch Company (till 8th April 2010) would not *ipso facto* lead to the conclusion that the hard disc was tampered. Even when the hard disc was played in the Court, it did not reveal any tampering. Since the primary evidence in the form of hard disc was produced there was no need for a certificate under Section 65B of the Indian Evidence Act 1872 (IEA). The hard disc clearly showed all three accused were seen entering the shop. The witnesses from the Prem Watch Company also identified the accused in the Court. The voucher and charge slips obtained from the shop mentioning the name of the deceased. The

articles purchased were duly identified in the TIP by PWs.

(ix) Electronic data capture machine was not a computer and hence for the merchant copy/purchase/voucher slip generated by such machine, certificate under Section 65-B of the Evidence Act was not required. Further, all the evidence from the shop were collected before the arrest of the accused and therefore, there was no possibility of the accused being falsely connected with the purchases. The recovery of various articles from the accused stood proved. The accused failed to give any satisfactory explanation for being in possession of the stolen articles. This was a matter exclusively within their knowledge.

(x) As regards the medical evidence, it was clear that the death was homicidal. The non-lifting of finger print from the dead body, which was recovered two days after the death, was not fatal to the case of the prosecution. Prior to the post-mortem report, Investigating Officer (IO) was not unaware of the cause of death and therefore, he was not expected to lift finger prints from the neck of the deceased.

(xi) The questioned signatures of A-1 and A-2 on the voucher slips and customer slips while using the debit card of the deceased tallied with their respective specimen signatures. Devak Ram (PW-57), the handwriting expert proved this vital incriminating circumstance against the accused.

(xii) The record produced by Chandra Bali Chaudhary (PW-27) of

HDFC Bank, Vasant Vihar, New Delhi was admissible under Section 4 of the Banker's Books Evidence Act and was accompanied by certificate issued under Section 2A thereof.

(xiii) The arrest and recovery of articles at the instance of and pursuant to disclosures made by the accused persons could not be doubted only because the public witnesses were not associated.

(xiv) The recoveries from the Santro car in which they were travelling were also proved. These included 10 live cartridges, name tags meant for officers of the particular rank in the armed forces, khaki uniforms, dagger, pen knife and a loaded pistol. That the Santro car was a stolen vehicle was proved by Anu Arora (PW-38).

(xv) Thus, the circumstances from the conclusion of guilt of the accused could be drawn, were fully proved. The chain of circumstances was complete. There was no escape from the conclusion that it was the accused persons and none else who had committed the crime.

(xvi) However, the charge of conspiracy under Section 120B IPC was not proved. Accordingly, all of the three accused were convicted for the offences under Sections 364/302/201/394/468/471/482 read with Section 34 IPC. Additionally, A-1 was convicted for the offence under Section 25 of the Arms Act.

24. By a separate order on sentence dated 22nd August 2016, the trial Court

awarded the accused the sentences as noticed hereinbefore. By the same order dated 14th July 2016, the trial Court called for a pre-sentence report (PSR) from the Probation Officer (PO) in respect of the three accused. The trial Court also asked the IO to inquire into the financial condition of the three accused and the impact of the crime on the family of the victim. The PSR submitted by the PO *inter alia* referred to the conduct of A-1 and A-2 in jail being unsatisfactory and the fact that they were also involve in other criminal cases. The IO filed a report on the financial condition of the three accused. After examining the two reports, the trial Court came to the conclusion that while A-1 and A-2 were incapable of being reformed, A-3 was capable of reform and rehabilitation. Accordingly, for the offence under Section 302 read with Section 34 IPC, the trial Court recommended award of death penalty to A-1 and A-2 and imprisonment for life to A-3. It also awarded compensation to the family of the victim.

25. The submissions of Mr. Amit Kumar, learned counsel for Accused Nos. 2 and 3 as well as Ms. Dimple Vivek, learned counsel for Accused No. 1 have been heard. Mr. Rajiv Mohan, learned Special Public Prosecutor (SPP) for the State has also been heard.

In Re PW-2: Submissions of the accused

26. The submissions on behalf of the three accused in regard to the star witness Bhiva Ram ({PW-2) can be summarized as under:

(i) PW-2 was an untrustworthy witness. His identification of the accused in the Court was to no avail as he had seen the three accused in the PS. Even the vehicle in which they were supposed to have brought the deceased to the ATM at Mahipalpur was not shown to him. There was no way that PW-2

could have identified the deceased on 20th March 2009 as no photographs of the deceased were available on that date and if the photograph was not shown to him on the date, how could he have identified the deceased as being the same person who had come to the ATM?

(ii) The statement of PW-2 regarding the photograph as well as identification of the accused was recorded on 2nd April 2009. Therefore, the theory of last seen put forth by the prosecution was full of blemishes and doubtful and could not be relied upon to convict the accused. No efforts were made to collect the identity card of employment, job card; employment details of PW-2 nor any witnesses were examined to ascertain the presence of PW-2 at the ATM of SBP at Mahipalpur at 5 am on 18th March 2009.

(iii) In all probability, Ex.PW-2/A was not prepared on 20th March 2009 and the photograph was not shown to him on 20th March 2009. It had been incorporated to complete the chain of circumstances and developed the theory of last seen. Reliance is placed on the decisions in *Mahavir Singh v. State of Madhya Pradesh AIR 2016 SC 5231*, *Mohd. Abdul Hafeez v. State of Andhra Pradesh AIR 1983 SC 367*, *Joseph v. State of Kerala AIR 2003 SC 507* and *Ganpat Singh v. State of Madhya Pradesh* (decision dated 19th September 2017 in Criminal Appeal No. 630/2009).

PW-2: Submissions of the SPP

27. Mr. Rajiv Mohan, learned SPP, on the other hand submitted that PW-2 was a natural witness and he was unable to be shaken in his cross-examination. Mr. Mohan pointed out that there was no need for prosecution to have examined any other person to establish that PW-2 was employed as

security guard by the owner of the office in front of which he was seated which was situated opposite to the ATM of State Bank of Patiala, Mahipal Pur. This was an informal engagement which need not have any written contract to prove employment. Further, the statement of PW-2 was recorded under Section 164 Cr PC. This was consistent with what he had stated to the police earlier. The fact remains that the three accused refused the TIP which was organized on 27th March 2009. Learned SPP further pointed out that after Bhiva Rao saw the three accused taking the deceased at around 5 am on 18th March 2009, she was not thereafter seen alive. The conduct of the accused thereafter, as is evidenced by the purchases made by them at different stores and withdrawal of money using the ATM card was consistent with the theory of last seen as put forth by the prosecution.

PW-2: The Court's conclusions

28. The Court has again carefully perused the evidence of PW-2. Indeed, he appears to be a natural witness. Although it is argued that memo (Ex.PW-2/A) was not signed by him on 20th March 2009, it appears to be an allegation made without anything to back it.

29. As far as PW-1 giving the photograph to the police is concerned, there was no specific query put to him that he gave the photograph only on 20th March 2009. In the considered view of the Court, nothing much turns on this fact in the very minimal cross-examination of witness. In fact, there is no question put to him at all about handing over the photograph of the deceased to the police. While it may be that PW-1 did not hand over a photograph of the deceased to the police on 18th March 2009, PWs 47 and 48 do say that it was handed over with the rukka on 19th March 2009. PW-1 did not have to

go to the PS to hand over the photograph.

30. It is, therefore, not improbable that the police was able to show PW-2 the photograph on 20th March 2009. Ex. PW-2/A is the memo wherein he identifies the deceased on being shown her photograph. When a specific suggestion was put to him by the accused in his cross-examination that he was not shown the photograph on 20th March 2009, he denied it. The subsequent answer that his statement was recorded in April does not detract from his standing by his version that he did identify the deceased through the photograph on 20th March 2009 which is the date of Ex PW-2/A.

31. While it is true that photograph was brought on record in the trial Court subsequent to its order dated 13th September 2010, as pointed out by the trial Court that order was not challenged by any of the accused. In his cross-examination, PW-47 admitted that he had been summoned by the trial Court during the examination of PW-2 since at that time, the photograph of the deceased was not in the court file.

32. Turning to the cross-examination of PW-2, he clearly states that on 20th March 2009 the police came to his workplace and they showed him one photograph of the girl whom he had identified. He further states that on 20th March 2009 itself the memo regarding identification of the photograph was prepared and the police had obtained his signatures. What PW-2 also clearly states in his cross-examination is that he told the IO about the two boys “having put their arms around the neck of a girl” and that “the girl was scared”. When he was repeatedly asked why he did not report to the police about it, PW-2 stated that “I would have done so, if there was any scuffle or

beating.” In the circumstances, this too is not unnatural.

33. The fact that PW-2 was not given any letter of employment or no attendance register was maintained for his reporting for duty are not matters which should throw doubt on the veracity of his testimony. It is not the case of the accused that this was a formal employment where the strict statutory norms of labour are observed. The employment of security guards on verbal contract basis is not unusual. The fact that he did not recall immediately the names of other the offices in the same area is also not something unusual. There was a good reason for PW-2 to identify the Santro car used by the accused. He had noted the police sticker on it on the rear number plate.

34. As regards his visit to the PS, PW-2 clearly stated that he saw the accused in the police station after TIP and not before. He volunteered: "I had gone to Tihar on 27th March, while I had been called to the PS where I was shown the accused in PS on 2nd April”.

35. As regards CCTV footage of the ATM of SBP at Mahipalpur, the prosecution did not rely on it and therefore, it did not form part of the documents tendered along with the chargesheet. This Court nevertheless viewed it only to satisfy itself that it did not contain anything that could be stated to be in favour of the accused.

36. The Court is unable to discern any inconsistency in the various statements of PW-2 including the one made by him under Section 164 Cr PC. His evidence to the effect that he saw the deceased in the company of the accused at around 5 am outside the ATM of SBP at Mahipalpur has been

unable to be shaken by the accused. It is indeed a formidable piece of circumstantial evidence to prove that the deceased was 'last seen' with the accused as she was not seen alive thereafter. The Court is satisfied that the evidence of PW-2 is convincing and trustworthy and is sufficient by itself to prove that the deceased was last seen with the accused person at 5 am on 20th March 2009.

Other evidence of last seen

37. The above evidence also ties in with the evidence in the form of the depositions of (i) Babu Lal (PW-8), the security guard of Hewitt Associates who was in the cab that dropped off the deceased on 18th March 2009 at around 3.20 am outside the CPWD Colony in Vasant Vihar; (ii) Ravi Uniyal (PW-11) a colleague of the deceased who was also present in the cab which carried him, the deceased and other employees and who was dropped at his house prior to the deceased getting dropped off and (iii) Abhijeet Singh (PW-40), a resident of the CPWD Colony who noticed at around 4 am the deceased talking on her mobile outside the CPWD compound. Thus the sequence of the deceased leaving her office in the cab at around 3 am and being dropped outside her house at around 4 am has been proved by the prosecution.

38. It was submitted on behalf of A-2 and A-3 that the unusual conduct of Ravi Uniyal (PW-11) on the date of incident was not probed by the police. In the past, PW-11 had gone on an official trip to USA with the deceased for two months. He was the last person to call the deceased on her mobile. He heard her screaming after which the line was cut. However PW-11 did not

immediately contact her parents or even his office or call the police.

39. Human behaviour in certain circumstances does not have a rational explanation. Why PW-11 did not immediately get in touch with the parents of the deceased is a question that probably does not have an easy and ready answer. Nevertheless when the entire evidence is perused and the complete chain of circumstances developed and established by the prosecution is viewed from an overall prospective, the failure to probe this peculiar conduct of PW-11 can at best be said to be an oversight. It does not appear to make much difference to the conclusions that are inevitable from a reading of the entire evidence.

Homicidal death

40. The next circumstance is that death of the deceased was homicidal. The first person to reach the spot was Mr. Hakim (PW-35) whose statement was recorded by ASI Badan Singh (PW-41) under general diary (GD) No. 28A dated 20th March 2009 at PS Suraj Kund. The said GD was assigned to SI Raj Singh (PW-42) who identified the photograph, proved the inquest proceedings and collected the post-mortem report. Later, all these exhibits were deposited in the *malkhana*.

41. The opinion of Dr. Jitender Kumar Jhakar (PW-19) on the cause of death was deferred till the receipt of chemical analysis of viscera. His opinion that time that had elapsed between the death and the time of post-mortem was 3 to 5 days remained unchallenged. So was the evidence of Ravi (PW-6) the photographer who was asked by the Haryana police to photograph the body of the deceased found on 20th March 2009 to be lying in the bushes 2-3 kms

ahead of Suraj Kund.

Recovery of articles

42. The next circumstance which has been proved by the prosecution is that the accused were found in possession of the items robbed from the deceased. To recapitulate, the police were informed by PW-1 that Rs. 25,000 has been withdrawn from the account retained by the deceased with the HDFC bank on 18th March 2009. He further learnt from the bank that using the debit card of his daughter, articles worth Rs. 70,000 were purchased. This fact was mentioned in his complaint (PW-1/A). The above facts have been completely established by the police visiting the various stores where the articles were purchased and after having examined the relevant persons employed at those stores.

43. At the Planet-M Store, Saket, Mr. Yogesh Singh (PW-12) was examined and he confirmed that the CD have been purchased by using debit card at 10.52 am on 18th March 2009. Nothing much came from his cross-examination which could favour the accused.

44. At the Reebok Store, PVR Complex, Saket Mr. Saurabh Dutta (PW-13) was able to produce a copy of the credit/debit card, voucher slip as well as the cash memo (PW-13/A). He also produced the merchant copy (PW-13/B) and cash memo (Ex.PW-13/C). He also identified the signature on merchant copy.

45. Mr. Brijesh Kumar (PW-14) was a salesman in Reebok Store, Community Centre, PVR Complex, Saket from which shop the three

accused had purchased shoes worth Rs. 4,949. Here again, a merchant copy of credit/debit card voucher (Ex.PW-13/B) and cash memo (PW-13/C) were produced to prove the purchases made.

46. Mr. Rajesh Taneja (PW-22) of Aashi Opticals proved the purchases made from that store on 18th March 2009. Two pairs of sun glasses had been purchased by the accused from the said shop. By the time the accused went back to Reebok Store at Sarojini Nagar it was already 1.15 pm. The minor discrepancy as regards the time, if any, does not in any manner dilute the probative nature of the evidence in this regard.

47. The recovery of the above articles from the three accused has been satisfactorily proved by the prosecution. In a judicial TIP conducted on 24th April 2009 one gold chain belonging to the deceased, recovered from the accused, was correctly identified by the father of the deceased as well as witnesses. It is not at all possible to plant all of these articles on the accused as alleged by their counsel. The recoveries have been rightly believed by the trial Court. Its analysis of the evidence in this regard has not been shown to be erroneous.

Presence of the accused at Prem Watch Co.

48. Turning to the Prem Watch Company, we have four witnesses including the store owner Mr. Krishan Gopal (PW-18) speaking about the purchases made by the three Appellants using the debit card of the deceased and signing the slips. The depositions of Smt. Sunita Chaudhary (PW-4) and Mahesh Kumar (PW-26), with of them being employees of the said store and Mr. R.C. Mehta (PW-15) were cross-examined at length but the accused

were unable to elicit anything useful in their favour.

49. In this regard it must be mentioned that the CCTV footage which showed the presence of the three accused at the store corroborates the direct evidence of the above witnesses. This is perhaps one of the clinching pieces of evidence as far as the prosecution is concerned. The conduct of the accused after killing the deceased by using her debit card to make the above purchases is sufficient to provide the motive for the crime and the culpability of each of them not being limited to merely an offence under Section 394 IPC. There has been no credible alternative theory of the defence on this crucial circumstance.

50. Importantly, while PW-47 stated that he did not analyse the CCTV footage obtained from the ATM of SBP at Mahipalpur, he confirmed that the CCTV footage obtained from Prem Watch Company was shown to the persons who were at the sales counter at Prem Watch Company at the relevant time. These were Mahesh (PW-26), Krishan Gopal (PW-18) and Sunita.

51. It was contended by the counsel for the accused that the hard disk containing the CCTV footage was itself tampered and that the photographs therefrom were printed after it was sealed. This argument requires to be rejected since the witnesses have spoken to the fact that the photographs were developed even before the CCTV footage was handed over by the store owner to the IO in a CD.

52. It was then sought to be contended that only the photographs and not the

hard disk were not part of the charge sheet. It was further contended that the hard disc was played in the trial Court only at the end of the trial and therefore the accused had no opportunity to counter it. The above objections do not appear to have been taken before the trial Court at any time during the course of the trial. Moreover the same hard disc was again played before this Court in the presence of counsel. The footage was clear and unmistakably showed the presence of the three accused at the above shop. It is indeed a clinching piece of corroborative evidence.

53. A further objection is that the photographs available to the prosecution developed from the CCTV footage were not put to PW-2 (Bhiva Rao) whereas the photograph of the deceased was shown to him. The above submission in any event could not detract from the fact that even the photographs developed from the CCTV footage unmistakeably fixed the identity of the three Appellants. They appeared to have no explanation at all for their presence at the shop making the purchases and signing the slips. In fact the CCTV footage and the photographs also captured this aspect. It must be recalled that the electronic evidence in the form of the above CCTV footage is a corroborative piece of evidence. It corroborates what the aforementioned four witnesses have said about the presence of the three accused in the Prem Watch Co making the purchases using the debit card of the deceased.

Arrest of the accused

54. Counsel for the accused submitted that it was highly improbable that the accused persons would remain present in the area within the range of 1 to

1.5 km from the scene of crime; that they would be wearing some of the articles stolen from the deceased and carrying the mobile and making purchases using her debit card.

55. One answer to the above contention is available in the list of articles that were seized from the Santro car in which the three accused were travelling at the time of offence. The accused were using a police sticker on the car at a prominent place. This was in fact noticed by PW-2 as well. This was perhaps done to avoid questions being asked at the barriers erected on the roads by the traffic police. Secondly, the forged/fabricated stickers of a Judge of Punjab and Haryana High Court, police uniforms and car number plates with stars were all being used by these accused at various points in time only to avoid any suspicion being raised. It appears that the accused did expect to get away and were, therefore, in the same area with a certain degree of impunity. They were hoping not to be noticed much less, apprehended.

56. As regards the arrest of the accused, we have the evidence of PW-45 who states that on 23rd March 2009 at around 12.30 pm a secret informer disclosed that the three accused would come from Vasant Vihar side and go towards Vasant Kunj side in a Santro car bearing No. HR-18C- 3409. The information was recorded by DD No. 13A and conveyed to the IO (PW-48).

A team comprising the following persons was constituted:

- (i) PW-48 IO/Inspector Atul Kumar
- (ii) PW-47 SI Neeraj
- (iii) PW-46 SI Upender
- (iv) Eight constables, namely, Jaspal, Mahesh, Love Kumar, Rajender, Dara Singh, Raj Kumar, Satveer, Upender

(v) PW-45 Inspector Palvinder Singh Chahal.

57. They reached Nelson Mandela Marg. The barricades were erected on the road near the Power House. According to the prosecution, at 4 pm a Santro car with the aforementioned description of grey colour with tinted glass identified by the secret informer was spotted. It was being driven by A-1 with A-2 sitting in the front seat and A-3 in the rear side.

58. It was submitted by counsel for the accused that neither DD No. 13A nor 14A was made part of the charge sheet and therefore, it is not possible to ascertain whether such information was ever received at the PS or any raiding party was constituted to arrest the accused. A further contention on behalf of Ravi Kapoor is that the arrest did not take place at the time as alleged by the prosecution. Even the recovery thereafter of articles at the instance of the accused did not happen in the manner alleged by the prosecution. It is pointed out that while the prosecution states that the accused were arrested between 5 and 5.30 pm and thereafter Ravi Kapoor (A-1) got recovered some of the stolen articles/proceeds of crime, the witness to the recovery, Satish Sharma (PW-20) who was a neighbour of A-1 stated that he had joined the investigation of the case on the same date, i.e, 23rd March 2009 in the noon hours and recoveries were made in his presence.

59. As far as the last submission is concerned, the expression 'noon hours' does not specifically indicate any time. The Court is of the considered view that this is not such a material discrepancy so as to cast a serious doubt on the arrest of the accused or the recoveries made at their instance. As regards

the DD entries, the evidence of the IO and the other police officials involved lends sufficient assurance to the Court that the arrest did take place in the manner stated by the prosecution. The failure by the prosecution to show how the car actually reached the PS the failure to make DD Nos. 13 A and 14 A about the secret information not being made part of the case record the failure to indicate in the site plan the exact location of the policemen gathered to arrest the accused are not material omissions that weakens the case of the prosecution. Also, the mere fact that no chance prints were lifted from the car would not by itself lead to the entire prosecution case being disbelieved.

Specimen writings of the accused

60. An important piece of evidence to which the accused appeared to have no reply whatsoever, is the proof of handwriting on the merchant copy slips which confirmed that the writings were of either Ravi Kapoor (A-1) or Amit Shukla (A-2). As far as ATM withdrawal is concerned, notice under Section 91/160 CrPC was sent to the bank concerned. A reply thereto was furnished by PW-27 (Manager of the HDFC Bank) who issued a certificate under Section 2A of the Banker's Book of Evidence Act, 1891 and a copy of the bank statement (Ex.PW-27/B) of the deceased by which the account was shown belonging to the deceased and debit card recovered is linked to bank account of the deceased. As rightly pointed out by Mr. Mohan, this obviated the need of furnishing a certificate under Section 65B of the Evidence Act.

61. Mr. Devak Ram, Assistant Director, FSL Rohini (PW-57) proved the FSL report dated 2nd July 2010 (Ex.PW-57/A) which clearly showed the writing on the six merchant copy slips matched the specimen writings of

both A-1 and A-2. With there being absolutely no doubt created by the accused as regards the gathered evidence, the circumstances stood proved beyond reasonable doubt. It also formed a continuous chain of circumstances leading to abduction of the deceased and pointed to the criminal culpability of each of the accused.

62. It was contended by Ms. Dimple, learned counsel for A-1 that the collection of hand writing samples of A-1 by the IO on 1st April 2009 during the investigation and without the prior permission of the Court was impermissible in law. It was in violation of Section 311-A Cr PC which came into effect on 23rd June 2006 and on a collective reading of Article 20(3) of Constitution of India, Section 73 IEA and Sections 4 and 5 of Identification of the Prisoners Act (ITP Act). Hence the handwriting match of the accused Ravi Kapoor with the cash voucher receipts could not be held as admissible in evidence against him. Reliance is placed on the decisions in ***Kamam Nagaraju @ Snathakumar v. State of Andhra Pradesh*** (decision dated 30th June 2017 of the High Court of Telengana and Andhra Pradesh in CrI A 1586 of 2010), ***State of Bombay v. Kathi Kalu Oghad AIR 1961 SC 1808***; ***Tarini Kumar v. State AIR 1960 Cal 318***; ***Sapan Haldar v. State 181 (2012) DLT 225*** and ***Selvi v. State of Karnataka AIR 2010 SC 1974***.

63. In reply it is pointed out by Mr. Mohan, the SPP that such an objection was never taken by the accused at any stage of the proceedings before the trial Court. It is not even urged as a ground of appeal here. He relied on the decisions in ***State of Bombay v. Kathi Kalu Oghad (supra)*** and ***Rabindra Kumar Pal @ Dara Singh v. Republic of India (2011) 2 SCC 490*** to urge

that the giving of a handwriting specimen sample will not amount to a person being a witness against himself. He submitted that the decision in *Sapan Haldar v. State* (*supra*) was not applicable as in the present case the provisions of the ITP Act would not apply.

64. The above submissions have been considered. In the first place, there is no satisfactory explanation on the part of the accused as to why this plea was not urged first before the trial Court. Secondly, the offence being one punishable with life imprisonment or death sentence, the provisions of the ITP Act as discussed in *Sapan Haldar v. State* (*supra*) will not apply. Thirdly, in any event, the said decision does not account for the following observation of the Supreme Court in the two concurring judgment of Sinha CJI and Das Gupta J. in *State of Bombay v. Kathi Kalu Oghad* (*supra*):

“Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification were not included in the expression to be a witness.

“The question that arises therefore is: Is an accused person furnishing evidence against himself, when he gives his specimen handwriting, or impressions of his fingers, palm or foot. The answer to this must, in our opinion, be in the negative. The matter becomes clear, when we contrast the giving of such handwriting or impressions, with say, the production of a letter admissible in evidence under [s. 10](#), or the production of the plan of a burgled house. In either of these two latter cases, the evidence given tends by itself to incriminate the accused person. But the evidence of specimen handwriting or the impressions of the accused person's fingers, palm or foot, will incriminate him, only if on comparison of these with certain other handwritings or certain other impressions, identity between the two sets is established. By themselves, these impressions or the handwritings do not incriminate the accused person, or even tend to do so. That is why it must be held that by giving these impressions or specimen

handwriting, the accused person does not furnish evidence against himself. So when an accused person is compelled to give a specimen handwriting or impressions of his finger, palm or foot, it may be said that he has been compelled to be a witness; it cannot however be said that he has been compelled to be a witness against himself.”

65. Again in *Rabindra Kumar Pal @ Dara Singh v. Republic of India* (*supra*), the Supreme Court reiterated:

“Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression 'to be a witness'.”

66. For all of the above reasons, this Court negatives the plea of the accused that the failure to take prior permission of the Court for collecting the specimen hand writing of the accused would render the specimen handwriting inadmissible in evidence.

Section 34 IPC

67. A common argument on behalf of the three accused was that although they were initially charged for the offence under Section 120B IPC, they were ultimately convicted with the aid of Section 34 IPC. It is contended that this has caused severe prejudice as they were not aware that they had to defend themselves for the commission of offence with the aid of Section 34 IPC.

68. As is rightly pointed out by Mr. Mohan, Section 34 IPC is a rule of evidence and not a substantive offence. If the trial Court finds the element of common intention it can proceed to convict with the aid of Section 34 IPC notwithstanding that no specific charge as such has been framed against the accused. Further, the decisions in *Willie (William) Slaney v. The State of*

M.P. AIR 1956 SC 116, Anil Sharma v. State of Jharkand (2004) 5 SCC 679 and Vijay v. State (GNCTD) 2014 (4) JCC 2494 support the contention of learned SPP that even the charges framed under Section 120B IPC the Court can proceed to convict an accused for the offence with the aid of Section 34 IPC. The element of common intention is at large in the voluminous evidence placed on record by the prosecution.

Summation of proved circumstances

69. This Court is satisfied that the prosecution has been able to successfully prove the following circumstances which conclusively point to the guilt of each of the accused for the offences with which they were charged:

(i) The deceased was alive at about 4 or 5 am on 18th March 2009. She was dropped outside the CPWD Colony by the office cab and abducted from there. In this regard, the evidence of Abhijeet (PW-40) Ravi Uniyal (PW-11) and Babu Lal (PW-9) are relevant. .

(ii) The deceased was last seen in the custody of the Appellants outside the ATM of SBP at Mahipalpur at around 5 am on 18th March 2009. She was brought there by the accused in the Santro car and taken away from there by them. The evidence of PW-2 in this regard is trustworthy, reliable and consistent and sufficient to prove the circumstance of 'last seen'.

(iii) There was at this very time a withdrawal of Rs 25,000 from the bank account of the deceased maintained with HDFC Bank.

(iv) The deceased was last seen with the accused. Thereafter only her dead body was first spotted by Hakim (PW 35) on 20th March 2009. The evidence of ASI Badan Singh (PW 41) and SI Raj Singh (PW 42) of PS Suraj Kund are relevant in this context. The evidence of PW-1 identifying the dead body to be that of his daughter and pointing out what was missing from her person is also relevant. Their evidence has been convincing and unshaken in cross-examination.

(v) The post mortem conducted by Dr Jitender Jhakar (PW 19) confirmed that the death was homicidal and was caused by smothering. Gayatri Sen (PW-29), an expert from the FSL, Haryana who proved the FSL report which in turn confirmed the samples recovered from the death body matched biological samples of the deceased.

(vi) Each of the accused was found in possession of the items that were either taken from the deceased or purchased using her debit card. The testimonies of the sales personnel at the various shops visited by the accused proved the identity and presence of the accused at the shops making purchases using the debit card of the deceased. The charge slips signed by A-1 and A-2, the matching of the handwriting thereon with the specimen writings of A-1 and A-2 and CCTV footage of Prem Watch Co. all corroborated the eye witness testimonies. The articles were identified in a TIP by PW-1.

(vii) No credible explanation was offered by the accused for being found in possession of stolen articles or articles purchased using the debit card of the deceased after her death. The presumption under Section 114 of the

Evidence Act stood attracted. The decisions in *Ganesh Lal v. State of Rajasthan (2002) 1 SCC 731* and *Eearabhadrapa v. State of Karnataka (1983) 2 SCC 330* support the contention of learned SPP, based on illustration (a) under Section 114 of the Evidence Act that where the accused failed to account for the stolen goods found in their possession.

(viii) Although the offence under Section 120 B IPC may not have been proved, there was sufficient evidence for the common intention shared by the accused in committing the offences and therefore their conviction for those offences with the aid of section 34 IPC was fully justified.

70. The Court is satisfied that when the above proved circumstances are viewed collectively they point unerringly to the guilt of the accused and are inconsistent with their innocence. The Court affirms the conviction of the accused for the offences under Sections 364/302/201/394/468/471/482/34 IPC and the further conviction of A-1 under Section 25 Arms Act.

Sentence

71. Now turning to the question of sentence, the Court finds that the trial Court relied upon the PSR of the PO in relation to A-1 and A-2 and concluded that neither A-1 nor A-2 were capable of reform or rehabilitation. Their conduct in jail as under trials was a major factor that weighed with the trial Court.

72. At this juncture, it is necessary to observe that as long as the trial is underway, the prisoner is an 'under trial' and is not given the same tasks as a convict might be. Further, the under trial wards in Tihar Jail are usually

overcrowded by well over a 100%. It is mentioned in the written submissions of the learned SPP that A-1 was a ‘*sahayak munshi*’ for about 14 months by the time of sentencing and during that period his conduct was satisfactory. In any event the behaviour of a prisoner during his term as an under trial cannot be a sufficient marker for his potential for reform and rehabilitation. Likewise with A-1 whose jail conduct was found during his under trial stint to be unsatisfactory. It might be unsafe to conclusively determine, even while the prisoner is an under trial, that his conduct in prison can indicate his capacity for reformation. Such a determination would require observing the prisoner over some periods of time separated sufficiently in time and circumstance.

73. In any event, the exercise of calling for a PSR from the PO has to be preceded by a firm determination that the nature of the crime is such that it calls for the award of the extreme penalty. The Court has to be satisfied that the nature of the crime is such that can be characterised as ‘rarest of rare’. The jurisprudence that has developed around the award of the death sentence need not be discussed in detail. A reference only may be made to the decision in ***Gurvail Singh v. State of Punjab (2013) 2 SCC 713*** where the Supreme Court observed:

“To award death sentence, the aggravating circumstances (crime test) have to be fully satisfied and there should be no mitigating circumstance (criminal test) favouring the accused. Even if both the tests are satisfied as against the accused, even then the Court has to finally apply the Rarest of Rare Cases test (R-R Test), which depends on the perception of the society and not “judge-centric”, that is whether the society will approve the awarding of death sentence to certain types of crime or not. While applying this test, the Court has to look into variety of factors like society’s abhorrence, extreme

indignation and antipathy to certain types of crimes like rape and murder of minor girls, especially intellectually challenged minor girls, minor girls with physical disability, old and infirm women with those disabilities etc. examples are only illustrative and not exhaustive. Courts award death sentence, because situation demands, due to constitutional compulsion, reflected by the will of the people, and not Judge centric.”

74. In the present case, it is not clear as to which of the three accused - whether all of them or only some of them - actually committed the murder of the deceased. What is proved beyond doubt is that all of them were involved in the crime. Therefore, to differentiate, as the trial Court has done, between the accused by awarding the death penalty to two of them may also not be justified.

75. Homicidal killings are deeply troubling. They are reflective of the base instincts of human behaviour. Some homicidal killings are in degree more diabolical, repulsive and shocking than others. Section 302 IPC offers only two choices for punishment. Life imprisonment or the death penalty. It is this limited option that has driven the Supreme Court to devise the ‘rarest of rare’ test. The decisions from *Bachan Singh v. State of Punjab AIR 1980 SC 898* onwards underscored that life sentence is the rule and death sentence the exception. In *Aloke Nath Dutta v. State of West Bengal (2007) 12 SCC 230* it was observed that though the offence was gruesome, namely killing of his own brother for money, the case was not one which could be termed as ‘rarest of rare’. In *Mohinder Singh v. State of Punjab AIR 2013 SC 3622* the Supreme Court observed:

“16) The doctrine of “rarest of rare” confines two aspects and when both the aspects are satisfied only then the death penalty can be

imposed. Firstly, the case must clearly fall within the ambit of “rarest of rare” and secondly, when the alternative option is unquestionably foreclosed. *Bachan Singh* (supra) suggested selection of death punishment as the penalty of last resort when, alternative punishment of life imprisonment will be futile and serves no purpose.

17) In life sentence, there is a possibility of achieving deterrence, rehabilitation and retribution in different degrees. But the same does not hold true for the death penalty. It is unique in its absolute rejection of the potential of convict to rehabilitate and reform. It extinguishes life and thereby terminates the being, therefore, puts an end anything to do with the life. This is the big difference between two punishments. Thus, before imposing death penalty, it is imperative to consider the same.

18) “Rarest of rare” dictum, as discussed above, hints at this difference between death punishment and the alternative punishment of life imprisonment. The relevant question here would be to determine whether life imprisonment as a punishment would be pointless and completely devoid of any reason in the facts and circumstances of the case. As discussed above, life imprisonment can be said to be completely futile, only when the sentencing aim of reformation can be said to be unachievable. Therefore, for satisfying the second aspect to the “rarest of rare” doctrine, the court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme.

76. Having carefully considered the entire case from all perspectives, the Court is not satisfied that the crime here can be characterised as ‘rarest of rare’ that warrants the award of the death penalty for A-1 and A-2. The Court accordingly modifies the sentence awarded to A-1 and A-2 for the offence under section 302/34 IPC to one of imprisonment for life.

77. The fine amounts awarded by the trial Court for the offence under Section 302/34 IPC and the sentences and fine amounts awarded to the

accused in respect of the other offences by the impugned judgment and order on sentence of the trial Court are hereby affirmed.

78. The reference and the appeals are disposed of in the above terms.

S. MURALIDHAR, J.

I.S. MEHTA, J.

JANUARY 04, 2018

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