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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 10th January, 2018
Decided on: 8th February, 2018

+ **CRL.A.568/2017 & CRL.M.(BAIL) 964/2017**

RAKESH alias SONU ...Appellant
Through: Mr. Dinesh Malik, Advocate with Mr. Akash Saini and Mr. Manish Malik, Advocates

versus

THE STATE NCT OF DELHI ...Respondent
Through: Ms. Radhika Kolluru, APP for State SI Naveen, PS-Kanjhawala

+ **CRL.A.629/2017**

NITIN DABAS ...Appellant
Through: Mr. Ashok Chhikara, Advocate with Mr. Anuj Malik and Ms. Arpan Kumari, Advocates

versus

STATE ...Respondent
Through: Ms. Radhika Kolluru, APP for State SI Naveen, PS-Kanjhawala

+ **CRL.A.635/2017**

KAPIL alias SUNNY ...Appellant
Through: Mr. Ajay Kumar Pipaniya, Advocate with Ms. Pallavi Pipaniya, Mr. Rohit Arora, Ms. Mahima Chaudhary and Mr. Yogesh Sharma, Advocates

versus

STATE (GOVT OF NCT OF DELHI)

...Respondent

Through: Ms.Radhika Kolluru, APP for State

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE I.S. MEHTA

JUDGMENT

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Dr. S. Muralidhar, J.:

1.1 These three appeals are directed against the judgment dated 10th March 2017 passed by the learned Additional Sessions Judge ('ASJ'), North District in SC No.57677/2016, arising out of the FIR No.125/10, registered at Police Station ('PS') Kanjhawla, convicting the three Appellants for the offence under Section 302 read with Section 34 of Indian Penal Code ('IPC'). Additionally, Nitin Dabas (Accused No. 1: A1) was also found guilty of the offences under Sections 25 and 27 of the Arms Act.

1.2 These appeals are also directed against the order on sentence dated 16th March 2017 of the learned ASJ whereby, for the offence under Section 302 read with Section 34 IPC, all three Appellants were sentenced to undergo life imprisonment along with a fine of Rs.1 lakh each and, in default of payment of fine, to undergo simple imprisonment ('SI') for one year. A1 was also further sentenced to rigorous imprisonment ('RI') for one year along with fine of Rs.1000/- and, in default of payment of fine, to undergo SI for one month for the offence under Section 25 of the Arms Act

and an identical sentence for the offence under Section 27 of the Arms Act. The sentences were directed to run concurrently.

Case of the prosecution

2. All the three accused, i.e. Nitin Dabas (A1), Rakesh @ Sonu (A2) and Kapil @ Sunny (A3), were charged for committing the murder of Rahul (deceased) on 8th July 2010 at the main road near Shamshan Ghat, in front of Bhagya Vihar on the side of the road in Village Rani Khera, within the jurisdiction of PS Kanjhawla, in furtherance of their common intention to commit that crime.

3. A1 and A2 were residents of the Village Rasulpur, Post Office Rani Khera. A3 was a nephew of one of the residents of the same village. Ravi Dabas (PW1) was the proprietor of Soni Builders which was having its office at Mubarakpur Road. According to the prosecution, the deceased, Neeraj (PW4), and PW1 were consuming drinks from 8 pm onwards on 7th July 2010 at the office of PW1 at Mubarakpur Road. At around 10.00-10.30 pm, A3 came to the said office in a drunken state. Due to some old dispute between them, a heated exchange ensued between the deceased and A3 in the presence of PW1 and PW4. Thereafter, A3 left the office after issuing a threat to the deceased (“*main tujhe dekh loonga*”).

4. After some time, the deceased started receiving calls on his mobile phone from A1, A2, and A3. After about two hours, A1, A2, and A3 came to the office of PW1 and there were talks for a compromise. A1, A2, and A3 stated that they wanted to drink more upon which the deceased stated that there were no more drinks left and it will have to be arranged from outside.

Thereafter, the deceased along with A1, A2, and A3 went out to arrange some more liquor. When, for a long time thereafter, neither the deceased nor the three accused returned, PW1 continuously made calls to the mobile number of the deceased but received no response.

5. PW1 and PW4, after locking up the office, went in search of the deceased as well as the accused on the main road towards Mundka. During this time, they made calls to the deceased's mobile number. Eventually, when they reached the main road near the cremation ground of Village Rani Khera, they noticed the blinking light of a mobile phone near the cremation ground and also heard it ring. On seeing this, both PW1 and PW4 went near the phone and noticed that the deceased was lying in an injured condition on the side of the road with blood profusely oozing out from his head. PW4 then called the police as well as Narender Singh (PW2), the father of the deceased.

6. It emerged from the deposition of PW2 that the deceased, after taking a meal on the night of 7th July 2010, had gone for a walk. The following morning, at around 4 am, PW2 received a call from PW4 stating that the deceased was lying in an injured condition near the cremation ground with blood oozing from his head on the Rani Khera Road. On receiving the said information, PW2 reached there along with his nephew, Anuj (PW6), in the latter's car. They found the deceased lying there in an injured condition. PW2, with the help of PW6, lifted Rahul and took him to Jaipur Golden Hospital. Rohit (PW8), a cousin of the deceased Rahul, also reached the hospital.

7. In the meantime, Constable Sharda Kumari (PW20), who was posted at the PCR–HQ received the information at around 3.38 am that on the Rani Khara Road near Shamshan Ghat “*ek ladke ke saath teen/chaar ladke maar peet karke bhag gaye*”. The police van which reached the spot gave the following information at 8 am that “*unknown ladke maar peet karke bhag gaye jisme injured pehle hi unknown hospital ja chukka hai. Mauka par kuch nahi hai*”. Constable Baljit Kaur (PW22), who was also posted at PCR–HQ, received the following information at 5.52 am where it was stated “*kal quarrel mein Nitin and Sunny and Sonu ne hamare ladke ko bohat maara peeta tha jo Jaipur Golden Hospital mein admit tha ab uski death ho gai hai*”.

8. It appears that there was yet another PCR message which was given at 5.08 am from the Jaipur Golden Hospital itself regarding the deceased having been admitted to Jaipur Golden Hospital.

Medical Evidence

9. Dr. Karim Dua (PW5) was on duty at the Jaipur Golden Hospital when the deceased was brought there at around 4.15 am by PW2 and PW6. The MLC noted it to be a suspected road traffic accident (‘RTA’). According to him, at that point in time, the deceased was unfit for statement. He had a cardiac arrest in the casualty and was revived with cardiac massage. On examination, the patient responded gasping. The pulse was not recorded since the heart sounds were not audible. He denied the suggestion that when the patient was brought to the hospital, he was already dead. On 8th July 2010, at around 6 am, the victim was declared dead by the hospital

authorities.

10. The post-mortem on the body of the deceased was conducted by Dr. J.V. Kiran (PW3) on 8th July 2010 at 4.00 pm. Inter alia, he found a firearm entry wound of 1.5 x 0.5 cm on the front aspect of the left temporal region of the scalp with margins showing contused abrasions. It was “directed forward and inward, fracturing and penetrating the left temporal bone, left frontal lobe up to the front of corpus callosum in between the two cerebral hemispheres from where a bullet was retrieved”.

11. There was another firearm entry wound 0.5 x 0.5 cm present at the back aspect of the left temporal region with an oval fracture of the underlying part of the temporal bone followed by sliding of the projectile under the scalp layers in forward direction up to the left temporal muscle within which a bullet was found entangled and was retrieved. The base of the skull showed fractures involving both anterior cranial fossae, left middle cranial fossa, and left posterior cranial fossa. The cause of death was cranio-cerebral damage consequent to penetrating injury to the head by the injury no.1 caused by a projectile discharged from a firearm. The time since death was stated to be around 12 hours. It was plain that the death was homicidal.

Investigation

12. Sub-Inspector Ravi Kumar (PW21), who was the initial Investigating Officer (‘IO’) of the case, upon receiving DD No.4A (Ex.PW21/A) reached the main road in Village Rani Khera near Shamshan Ghat along with Constable Udai Singh (PW15). He found blood on the side of the road towards Shamshan Ghat. He found a pair of red and black coloured sandals.

By this time, the deceased had already been shifted to the hospital. He found a mobile phone of Huawei Tata Indicom made of black colour. He also found two empty shells on the base of each of which KF 7.65 was written.

13. PW21 called Constable Vikas (PW14) to the spot and leaving him there, proceeded with PW15 to the Jaipur Golden Hospital. There he collected the MLC of the deceased who was declared unfit for statement. In the meantime, he also received DD No.10-B (Ex.PW21/B) regarding the death of the deceased. PW21 collected the death summary (Ex.PW21/C). He then shifted the dead body to the mortuary and returned to the spot. He called the crime team and got the spot photographed. PW21 prepared the sketch of the two empty shells (Ex.PW1/C), lifted the mobile phone, sandals and two empty shells from the spot and put them into separate *pulandas* and sealed them.

14. According to PW21, Ravi Dabas (PW1) met him at the spot and there he got the statement of PW1 recorded. This formed the basis for the *rukka* and the FIR. Further investigation was handed over to Inspector Mahesh Meena (PW30), the IO of the case. PW30 then got the blood lying on the spot lifted. Earth control of the road and the soil were also seized and kept in separate plastic boxes.

Arrest of the accused

15. PW30 was accompanied by PW21 in searching for the accused. According to PW21, a secret informer met PW30 at around 7 pm near the Mundka Railway Station and passed on the information that two assailants involved in the murder of the deceased would try to abscond from Delhi.

They then reached the Mundka Railway Station. On pointing out of the secret informer, A1 and A2 were apprehended. On search of A1, one pistol was recovered from the left dub of his pant. Both A1 and A2 were interrogated and then arrested. A motorcycle stated to be found near the railway station was also seized.

16. On 21st August 2010, A3 surrendered before the learned Metropolitan Magistrate ('MM'). PW30 then went along with Head Constable Rajesh (PW16) to the Court of the concerned MM. After his interrogation, A3 was arrested. A3 is stated to have made a disclosure and then pointed out the place of the occurrence. Thereafter, on 6th September 2010, along with SI Manohar Lal (PW18), PW30 got the scaled site plan prepared. He also got the customer application form ('CAF') and the call detail records ('CDRs') of the phone numbers used by the deceased (9289829262), A1 (9210702071), A2 (9210707590), and A3 (9210643710) prepared. The report of the ballistic division and the FSL result (Ex.PX and PY) were also collected.

Charges

17. A charge-sheet was filed in the trial Court on 4th October 2010 and thereafter by an order dated 19th April 2011 the charge was framed against the three accused persons as under:

“That on 8-7-2010 time not known at main road near Shamshan Ghat (cremation ground in front of Bhagya Vihar on the side of the road, village Rani Khera within the jurisdiction of P.S. Kanjhawala, you all in furtherance of your common intention did commit the murder of Rahul and thus you thereby committed an offence punishable U/s 302/34 IPC and within my cognizance.”

18. Additionally, a charge was also framed against A1 under the Arms Act as under:

“That on 8-7-2010 time not known at main road near Shamshan Ghat (cremation ground) in front of Bhagya Vihar on the side of the road, village Rani Khera within the jurisdiction of P.S. Kanjhawala, you were found in possession of loaded pistol and fired on Rahul and you were found in possession of said pistol with five live cartridges and thus you thereby committed an offence punishable U/s 25 R/w 27 of Arms Act and within my cognizance.”

19. The prosecution examined 30 witnesses. In their respective statements under Section 313 Code of Criminal Procedure ('Cr PC'), each of the Appellants denied the circumstances gathered against them. When asked if they had anything further to say, each of them claimed to have been falsely implicated. Each of them claimed to have been forcibly lifted by the police from their respective houses at Village Rasulpur. As far as A3 was concerned, he claimed that he surrendered after the police raided the house of his aunt at Nangloi.

Impugned judgment of the trial Court

20. In the impugned judgment dated 10th March 2017, the learned trial Court returned the following findings:

- (i) The trial Court first dealt with the circumstance of last seen. It discussed the depositions of PWs 1 and 4 and concluded that both were consistent on the point of the three accused coming to the office of PW1; the deceased Rahul leaving with them and thereafter Rahul being found in an injured condition near the cremation ground by the side of the road.

- (ii) The CDRs showed that certain calls were made “to each other during the period when they were taking drinks”. However, that did not contradict the two witnesses “as during this period any one of them could have gone outside for bringing something to take with the drinks or for any other reason and due to that reason there can be exchange of calls between them.”
- (iii) The IO “should have tried to find out the reasons for such calls but he did not make any such effort...” Therefore, the IO “was negligent in this regard.” However, the trial Court concluded that it was settled law that no benefit of negligence of the IO can be given to the accused “if otherwise the case of the prosecution against the accused is established”. Reference was made to the decision in *State of U.P. v. Hari Mohan (2000) 8 SCC 598*.
- (iv) The trial Court next dealt with the submission on behalf of the accused that according to PWs 1 and 4, the accused had left with the deceased at around 3.30 am whereas they found the deceased in an injured condition at around 3.30/3.50 am. The trial Court relied on the evidence of PW8 to conclude that the death of the deceased due to firearm injury was proved and the last-seen was established, as alleged by the prosecution.
- (v) The trial Court next discussed the circumstance of recovery of weapon of offence at the instance of A1. The empty cartridges were shown by the ballistic report as having fired from the unlicensed

pistol recovered on the personal search of A1. Even though there were no public witnesses to the recovery of the weapon, the trial Court concluded that PWs 19, 21 and 30 were consistent, corroborated each other and categorically deposed that A1 and A2 had been arrested from the Mundka Railway Station which thereafter led to the recovery of the pistol having five live cartridges in a magazine. The circumstance of recovery of the weapon from the possession of A1 as being the one from which the two projectiles were fired on the deceased were located stood proved and established.

- (vi) The presence of two empty shells at the spot was spoken to by PWs, 1, 14, 21, 6 and 8. The trial Court observed that even in the photograph Ex.PW7/A6 to A12 “the empty cartridges are visible lying on the spot.”
- (vii) The trial Court next dwelt on the recovery of the motorcycle of the deceased at the instance of A1 and A2. According to the trial Court, from the testimony of PW1, it emerged that “motorcycle of Rahul was Glamour Hero Honda and also that all the accused and Rahul left on two motorcycles.” It had come in the cross-examination on behalf of A3 that the three accused came on one motorcycle and from this it was clear “that they all moved on one motorcycle which was brought by the accused persons and the second motorcycle was of deceased Rahul.” The trial Court observed that neither PWs 1 or 4, PW8 or PWs 2 and 6 or even PWs 15 and 21 mention noticing the presence of Rahul’s motorcycle at the spot. Even PW14, who was guarding the

crime scene, did not say so. The photographer who took the photographs (Ex.PW6/A1 to A7) also did not. The crime team report also did not notice any motorcycle.

- (viii) According to the trial Court, the above testimonies made it clear that “Rahul left the office of PW1 on his motorcycle but when he was found injured near cremation ground, that motorcycle was not there which was got recovered by both the accused which they have kept concealed near the side wall of the village near Mundka Railway station.”
- (ix) As regards motive, the trial Court held that from the evidence of PW1 and PW4, it was clear that the motive was A3 taking revenge in which the other two accused helped him. Even otherwise, “merely because the motive is not established does not mean that benefit be given to the accused, if there is overwhelming evidence pointing towards the guilt of the accused as in the present case.”

21. For all of the aforementioned reasons, the trial Court convicted the three Appellants and sentenced them in the manner indicated hereinbefore.

22. This Court has heard the submissions of Mr. Dinesh Malik, Mr. Ashok Chhikara and Mr. Ajay Kumar Pipaniya, learned counsel for the Appellants and Ms. Radhika Kolluru, learned APP for the State.

Law relating to circumstantial evidence

23. Before discussing the evidence on record in light of the above submissions, it is necessary to recapitulate the settled legal position with

regard to circumstantial evidence.

24. In ***Ram Avtar v. State* 1985 Supp SCC 410** the Supreme Court explained that:

"...circumstantial evidence must be complete and conclusive before an accused can be convicted thereon. This, however, does not mean that there is any particular or special method of proof of circumstantial evidence. We must, however, guard against the danger of not considering circumstantial evidence in its proper perspective, e.g., where there is a chain of circumstances linked up with one another, it is not possible for the court to truncate and break the chain of circumstances. In other words where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated."

25. In ***State of Tamil Nadu v. Rajendran* (1999) 8 SCC 679** the Supreme Court held:

"... the law is fairly well settled that in a case of circumstantial evidence, the cumulative effect of all the circumstances proved, must be such as to negative the innocence of the accused and to bring home the charge beyond reasonable doubt. It has been held by a series of decisions of this Court that the circumstances proved must lead to no other inference except that of guilt of accused."

26. In ***Trimukh Maroti Kalan v. State of Maharashtra* (2006) 10 SCC 681**, the Supreme Court held:

"The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of

explanation on any hypothesis other than that of the guilt of the accused and inconsistent with his innocence.

27. In *Brajesh Mavi v. The State (2012) 7 SCC 45* the Supreme Court explained:

“From the several decisions of this court available on the issue the said principles can be summed up by stating that not only the prosecution must prove and establish the incriminating circumstance(s) against the accused beyond all reasonable doubt but the said circumstance(s) must give rise to only one conclusion to the exclusion of all others, namely, that it is accused and nobody else who had committed the crime.”

Evidence of last seen

28. In light of the above legal position, the Court proceeds to first examine the prosecution evidence in regard to the circumstance of ‘last-seen’. The version of PW1 and PW4, which has been believed by the trial Court, is that they were having drinks with the deceased from around 8 pm on 7th July 2010 in the office of PW1. According to them, at around 10.00-10.30 pm, A3 came there in a drunken condition, argued with the deceased and issued a threat to him as he left, saying “*mein tujhe dekh loonga*”. It is then stated that a couple of hours later, the three accused came to the office of PW1 in order to reach a compromise with the deceased. Thereafter, the accused purportedly expressed a desire to drink more in response to which the deceased told them that they would have to go out to arrange more liquor. Thereafter, the deceased is stated to have left with the three accused.

29. PW1 and PW4 further stated that between the time at which A3 left the office of PW1 after arguing with the deceased, and the time at which the three accused came to the office of PW1 together, the deceased kept

receiving calls on his mobile phone from the three accused. In the version of PW1 and PW4, the deceased left with the three accused around 12.30 am and thereafter was found dead at around 3.30 am with there being a three-hour gap.

30. The trial Court has missed one very crucial fact, viz., the distance between the office of PW1 and the spot at which the dead body of the deceased was found. The scaled site plan, when carefully perused, shows that there is hardly any distance between the two. It would not have taken three hours for the deceased to reach from the shop to the spot where the deceased was found dead with his mobile phone by his side.

31. From the versions of PW1 and PW4, it would appear that from 8 pm till about 12.30 am the deceased remained at the office of PW1. Neither of these witnesses states that he left that place in between to go anywhere. One has to reconstruct the timeline from the versions of PW1 and PW4 because that is the most crucial aspect in order to fix the precise locations. It has come in the cross-examination of PW1 himself that “Shamshan Ghat is at a distance of 400-500 meters from our office” and further that “it is correct that my house is in between my office and the place from where Rahul and his mobile phone were lying.”

32. It is further stated by PW1 that the three accused and Rahul “had left my office at about 12 midnight.” He then mixes up the time thereafter. In his examination-in-chief, he states that when after a long time Rahul did not return, he continuously made calls on his mobile phone and thereafter, after

locking up the office, he along with PW4 went in search of Rahul on Mundka Road. In his cross-examination, he admitted that from his office “one road goes to Mubarakpur, another leads to village Karala and the third road leads to Mundka from my office”. Yet, he stated, “I had not looked for Rahul on the other three roads and I had only looked for him only to the road leading towards the village”. His statement thereafter that, by his estimate, the police was informed between 1 and 2 am and thereafter Neeraj informed the father of Rahul, is clearly off the mark. The first PCR call is only at 3.38 am.

33. The timelines from the statement of PW1 is not corroborated by the record, i.e. either the scaled site plan or even the PCR form. This coupled with the fact that the time of bringing the injured into the Jaipur Golden Hospital, as revealed by the MLC, is around 4.20 am, the timeline as spoken by PW1 is simply way off the mark.

34. Turning now to PW4, although in his examination-in-chief he only refers to the first visit of A3 at around 10.30 pm, he states that A3 returned with A1 and A2 “after about two hours”. This will put the time at around 12.30 am. He states, “after about one hour from their leaving the office, we contacted on the phone of Rahul...but the phone was not received /attended by Rahul”. This will take it to around 1.30 am. Thereafter, he and PW1 went in search of the deceased and kept on making calls to his phone number. In his cross-examination, he claimed “I cannot tell the exact time when I left the office of Ravi but it must be between 1.00 am to 3.00 am”.

35. Even if this was true and they left the office of PW1 between 1.00 am to

3.00 am, they would have been at the Shamshan Ghat not later than five minutes thereafter. That would take it to 3.05-3.10 am and not 3.38 am. He confirms that “the body was lying at a distance of half a km from the office”. At that hour, the half kilometre could not have taken more than five minutes on a motorcycle on which he and PW1 were travelling in order to search for Rahul.

36. Apart from the PCR form not corroborating what PW4 has said about the time, even the father of the deceased, Narender Singh (PW2), does not do so. He claims that he received a call from PW4 at 4.00 am and then he along with his nephew, Anuj (PW6), reached the spot in the latter’s car. In his cross examination, he claims that when he reached the spot PW1 and PW4 told him that the three accused had shot the deceased. However, he did not give this information to the doctor. The MLC with the time of 4.15 am, as confirmed by PW5, shows that PW2 and PW6 informed PW5 that it was a road traffic accident.

37. If indeed, PW1 and PW4 had informed PW2 at the spot that it was A1, A2, and A3 who had shot the deceased then there was no way that PW2 would have told PW5 that it was a road traffic accident. In his cross-examination, PW5 confirms “the suspected history of RTA was disclosed by the persons namely Shri Narender Singh, father and Shri Anuj, brother of the injured.” Clearly, therefore, neither PW2 nor PW6 knew at that point in time how the deceased had died. If we even turned to the evidence of PW6, he too states that he received a call at 4.00 am from Rohit (PW8). In the meantime, he also received a call from PW2. Therefore, it was only between

3.30-4.00 am that anyone noticed the deceased lying in an injured condition. This, therefore, does not fit with the timeline given even by PW4.

38. If one turns to the deposition of PW8, who is the elder brother of PW1, he gives a totally different version about PW1 coming to his house at around 3.50 am purportedly telling him that A1, A2, and A3 had taken the deceased with them on the pretext of taking liquor and further telling PW8 that the deceased was lying unconscious near the cremation ground at the Rani Khara Road bleeding profusely from his head. PW8 then stated that he along with PW1 and PW4 reached the spot and it was PW8 who thereafter told PW6 about the incident. This means that PW8 ought to have remained present at the spot when PW2 and PW6 reached there. Neither PW2 nor PW6 have said anything to that effect.

39. More importantly, even PW1 makes no mention whatsoever of his going to his elder brother (PW8) to inform him first about finding the deceased in an injured condition. It would indeed be strange that, despite noticing that the deceased was injured, neither PW1 nor PW4 would immediately rush him to the hospital themselves but instead go to the brother of PW1 to inform him of what had purportedly happened. Incidentally, even PW4 does not state that they went to the house of PW8 at 3.50 am to inform him about the deceased lying in an injured condition on the Rani Khara Road near the Shamshan Ghat.

40. Therefore, the depositions of PW1 and PW4 read together with those of PW2, PW6, and PW8 do not explain the huge time gap between when PW1 and PW4 left the office of PW1 and when they found the deceased lying in

an injured condition on the main road just 500 meters from the said office. There is something missing in the narrations of both PW1 and PW4.

41. The trial Court was conscious of this serious lapse on the part of the investigation and chose to conveniently state that this was the “negligence of the IO”. However, such inconsistencies cannot be written off merely due to the negligence of the IO. They throw serious doubt on the truthfulness of the versions of PW1 and PW4 and for that matter PW6 and PW8. This had to be explained by the prosecution and it was not for the trial Court to gloss over such a serious lapse and make it appear unimportant.

Lack of corroboration from CDRs

42. In fact, the trial Court has used the expression ‘negligence’ to explain away the CDR not corroborating what was being stated by PW1 and PW4. A careful examination of the CDRs shows that although it was claimed that between the time when A3 left PW1’s office and the time when A1, A2, and A3 returned to the said office, the deceased was continuously being called by the three accused persons, no call was ever made by A3 to the deceased’s mobile number.

43. Indeed while there were calls made by A2 to A3 at around 12.30 am and 12.38 am on 8th July 2010, there was absolutely no call made by A3 to the deceased at all. In fact, A3 does not appear to have made a call to anyone at all. Calls were only made to A3 and that too only by A2. Apart from the above two calls, A2 called A3 at 1.28 am and 2.43 am. All that it shows is that A2 and A3 were not together else they would not be making calls to each other.

44. Now turning to the calls made by A2 to the deceased. It is seen that there is one call made at 12.59 am and another at 1.06 am. The deceased appears to have returned those calls at 1.18 am. A2 appears to have again called the deceased at 1.32, 1.39, and 1.42 am. All this shows is that, in fact, A2 and the deceased were not together at least between 12.59 am and 1.42 am. If indeed they all left together at around 12.30 am, as claimed, there is no way that they would be calling each other while they were together.

45. We then take up the calls purportedly made by A1. There were no calls whatsoever made except one to A2 at 9.03 pm and then again at 2.42 am and 2.53 am on 8th July 2010. As far as him receiving calls is concerned, A2 has called A1 at 2.59 am, 3.04 am and 3.09 am. Clearly, therefore, at least between 2.42 am and 3.09 am, A1 and A2 were not together.

46. These CDR details do not, therefore, bear out the contention that the deceased was with the three accused anytime between 12.30 am and 3.30 am as otherwise there would have been no calls exchanged. In fact, these calls were being picked up by the called party who was the deceased.

47. The strangest of course are the calls made to PW4 by the deceased during the time when he was proposed to be sitting with the deceased without going anywhere. There are calls made by the deceased to PW4, which was received by PW4 at 9.32 pm, 9.37 pm, and 9.42 pm (of 381 pulses duration) and there were calls returned by PW4 to the deceased at 9.51 pm, 11.20 pm, and 11.32 pm.

48. The CDRs show that a call made by the deceased, which was answered

by PW4 at 12.56 am. This does not quite fit with the version of PW4 that after the deceased and accused left the office of PW1, PW4 kept trying the mobile number of the deceased and received no response. In fact, the deceased was answering calls made to him by A2 even at 12.59 am and 1.06 am, a call made to him by A1 at 1.24 am and thereafter again calls made by A2 to him at 1.32 am, 1.39 am, and 1.42 am.

49. The deceased called PW1 at 1.45 am and PW1 called the deceased at 2.54 am which was of the duration of 72 pulses. This means that the deceased answered that call. PW1 in fact again called the deceased at 3.05 am, which was of the duration of 38 pulses. These were clearly not missed calls and these calls were answered by the deceased.

50. Even more bizarre is the call made from the mobile phone of the deceased to PW4 at 5.30 am on 8th July 2010 which lasted 119 pulses. This is simply unimaginable since by this time, the deceased was supposedly dead. The mobile phone lying next to the deceased was still flashing a light at around 3 am which is what is supposed to have helped PW1 and PW4 to locate him in the first place. All of this narration is totally falsified by the CDR.

51. The trial Court has simply attributed all of the above discrepancies to the negligence of the IO and has concluded that the accused cannot take advantage of the negligence of the IO. This is not merely negligence. This is falsification of the story put forth by the PW1 and PW4 about who was there in the office with them between 8.00 pm on 7th July 2010 and 12.30 am on 8th July 2010. The narration of PW1 and PW4 is impossible to reconcile

with the CDRs.

52. The Court is, therefore, not able to agree with the trial Court that the circumstance of last-seen has in fact been proved by PW1 and PW4.

Recovery of motorcycle is unconvincing

53. There is another important aspect regarding how the deceased is supposed to have left the office of PW1 in the company of A1, A2, and A3. Although it was sought to be shown that the deceased had a Glamour Motorcycle, no attempt was made to verify whether the motorcycle recovered from near the Mundka Railway Station belonged to the deceased. The said motorcycle was not shown to PW2, the father of the deceased, to verify if it is the same motorcycle that belonged to the deceased. Importantly, nobody noticed the motorcycle of the deceased anywhere near the spot where he was injured. It is, therefore, not known if at all he was on a motorcycle.

54. There is an interesting statement made by PW2 in his examination-in-chief. He states that on 7th July 2010, after taking his meal, “Rahul went for walk”. He did not say that Rahul went on a motorcycle that evening.

55. When PW1 first deposed in his examination-in-chief, he merely stated that after the deceased informed A1, A2, and A3 that there was no liquor available in the office and that it would have to be arranged from outside, he and the three accused “went out to arrange more liquor”. This deposition was recorded on 21st May 2011. At that time, he did not say that the deceased went on a motorcycle. He was cross-examined next on

22nd September 2011 and he simply again stated that “Nitin, Sonnu, Sunny and Rahul left the office after about 15-20 minutes. They must have left at around 12.00-12.15 am”. He did not mention about Rahul being on a motorcycle. PW1 was further cross-examined on 22nd November, 2011 when for the first time he stated, “I had not come out of my office to see Kapil, Nitin, Rahul and Rakesh. They had left on two motorcycles. They all had come on one motorcycle but I cannot tell the make and number of motorcycle. I had not come out of my office to see off Kapil, Nitin, Rahul, and Rakesh. They had left on two motorcycles. I had not disclosed this fact to police as the same was not asked from me. Make of Rahul's motorcycle was Glamour, Hero Honda and it was of double shade and at this stage, I cannot tell its number.”

56. This is a major improvement which destroys the credibility of this witness because he could not have simply stated, without coming out of his office, whether the deceased had in fact come on a motorcycle and left on a motorcycle. This was again a very serious lacuna in the prosecution evidence.

57. Turning to PW4, in his examination-in-chief recorded first on 22nd November 2011, he simply stated, “All the accused left the office of Ravi along with Rahul”. He did not say that Rahul left on a motorcycle. In his cross-examination on 1st June, 2012, he made these important statements:

- (i) “I do not remember if I narrated the fact of Rahul leaving the office of Ravi Dabas in the company of Kapil and others.”

- (ii) “When Rahul left then also I was sitting inside the office. I knew that Rahul had gone with Kapil, Nitin and Rakesh to fetch liquor but I cannot tell how they had gone as I was sitting inside the office. I cannot tell the time when Rahul had left the office.”

58. Therefore, it is not at all clear that the motorcycle recovered outside the Mundka Railway Station is in fact Rahul’s motorcycle and that Rahul came on a motorcycle to the office of PW1 and thereafter left on that motorbike when he went away with A1, A2, and A3. All of this is in the realm of surmise. How the trial Court was able to conclude that there is clear evidence in this regard is not understood.

59. Even when one turns to the evidence of PW6, he does not talk anything at all about the deceased having left for home on his motorcycle or ever looking for the said motorcycle. This part of the evidence is, therefore, not convincing at all.

Doubts surrounding arrest and recovery of weapon of offence

60. Apart from the recovery of the motorcycle not being convincing, even the arrest of the two accused, i.e. A1 and A2 from the Mundka Railway Station where they were supposedly sitting on a bench, is not convincing. The three witnesses who have spoken in this regard are SI Ashok Kumar (PW19), SI Ravi Kumar (PW21), and Inspector Mahesh Meena (PW30).

61. It is simply unbelievable that both the accused, i.e. A1 and A2, would be sitting on a bench in a public railway station after committing a murder and that too more than 14 hours after the incident. Furthermore, that they would

have left the motorcycle by a wall near Mundka Railway Station itself is again totally unbelievable. Needless to say that although the arrest and the recovery of the motorcycle, including the recovery of unlicensed pistol with five rounds on the personal search of A1 all happened at the railway station, no attempts appear to have been made to even call for the railway staff to act as witnesses. It is one thing to say that members of the public did not come forward. It is entirely another to say that no one from the staff of the railway station came forward. These are two entirely different things and one cannot be passed off for the other. This important distinction has been lost sight of by the trial Court.

62. Turning to the evidence of PW21, he admits that Mundka Railway Station “was situated at a distance of about 2.5 km from the place of occurrence”. He states that both A1 and A2 “were found sitting at Mundka Railway Station”. He admits that “no independent public person, including any employee of railway was joined during proceedings at the time of arrest of the two accused.” He admits that he did not notice whether or not “any railway employee was also present at the spot.” He admits that the IO “did not serve any written notice” on the railway officials available at the ticket counter as well as the railway *fatak* to join the recovery proceeding and also did not take any legal action against them for not joining the proceeding”. They are supposed to have remained at Mundka Railway Station from 7.00 pm till 10.00 pm and to have recorded all the disclosure statements at the railway station itself. All of this is completely unbelievable and unconvincing.

63. Turning now to the evidence of PW30. He too admits that he had asked only passers-by to join the arrest proceedings and during the time they remained at the Mundka Railway Station, i.e. up to 8.45 pm, he did not inform the local GRP regarding the arrest or recovery proceedings.

64. The Court is, therefore, totally unconvinced about the recovery of the weapon of offence and arrest of A1 and A2.

Lack of proof of motive

65. According to the trial Court, “there is a clear averment by the prosecution about the motive that Kapil had exchanged hot words with the deceased on some previous issues and that it was clear that the motive was to take revenge by Kapil in which the other two accused helped him”. The trial Court further goes on to say that even though the motive is not established if there is overwhelming evidence pointing towards the guilt of the accused, benefit thereof cannot be given to the accused.

66. The above approach of the trial Court is not consistent with the correct legal position as explained by the Supreme Court in ***Arjun Mallik v. State of Bihar 1994 Supp (2) SCC 372*** in the following words:

“mere absence of proof of motive for commission of a crime cannot be a ground to presume the innocence of an accused if the involvement of the accused is otherwise established. But it has to be remembered that in incidents in which the only evidence available is circumstantial evidence then in that event the motive does assume importance if it is established from the evidence on record that the accused had a strong motive and also an opportunity to commit the crime and the established circumstances along with the explanation of the accused, if any, exclude the reasonable possibility of anybody else

being the perpetrator of the crime then the chain of evidence may be considered to show that within all human probability the crime must have been committed by the accused.”

67. The trial Court failed to note that although PW1, in his examination-in-chief, stated that due to some old dispute a heated exchange of words took place between the deceased and A3, he made no attempt to elaborate as to what that old dispute was. He admitted that, “It is correct that Nitin was having no dispute with Rahul”. He reiterated this even in the cross-examination by counsel for A2. He stated, “Rahul was receiving calls from the mobile phone of Sunny”. Clearly, therefore, it was not A3 who was giving any of those calls. There was no call in fact made by A3 at all. Importantly, he states in his cross-examination by counsel for A3, “The old dispute on which quarrel took place was not discussed in my presence so I cannot tell about it”. Interestingly, he states, “I had not made any phone call to Kapil so as to inquire from him as to why Rahul was not picking up his phone”.

68. Neither PW2 nor PW6 state anything about Rahul having a quarrel with A3. As far as PW-4 is concerned, he too stated, “In my presence, Nitin Dabas had no argument with anybody”. He also stated, “I do not know why arguments took place between the deceased Rahul and Kapil. I cannot tell the reasons of arguments between them but they were arguing... Rahul had told me that he had been receiving threatening calls from Kapil, Rakesh and Nitin but I had not heard the calls”. The CDRs do not bear out this statement about the deceased receiving calls from A3 and A1.

69. As already noticed above, A3 never made a call to the deceased at all.

A1 just made one call. A2 made calls which were replied and responded to by the deceased and in fact even after the time when they were supposed to have left together. The important circumstance of motive cannot be said to have been proved by the prosecution at all. When the other circumstances have not convincingly been proved, the failure to prove the motive for the case would become fatal to the case of the prosecution.

Error of the trial court

70. Apart from the above errors in the impugned judgment, there is yet another erroneous statement made by the trial Court in the impugned judgment. The trial Court notes that the photographs showed the two cartridges lying on the ground at the scene of occurrence. On perusing the photographs from all angles, the Court is unable to find it showing the place where two cartridges were lying. Also PW7, the photographer, did not state that empty cartridges were found. They were not shown to him in the Court for identification. He states that he had left the spot at 8.00 am whereas the IO came to the spot at 10.30 am. The evidence of PW12, Inspector Sanjay Gade of the crime team, admitted that in the photographs taken of the scene of crime, the mobile phone stated to be lying next to the deceased was not visible. He also admitted that there was no photograph of the empty cartridge. He also admitted that neither PW1 nor PW4 were present when he reached the spot.

71. The Court finds that this is a case where the circumstances put forth by the prosecution, that were supposed to form a continuous chain, have in fact not been proved by it beyond reasonable doubt. It is trite that suspicion

cannot take the place of proof. Apart from the depositions of PW1 and PW4 being wholly unconvincing, even the corroborating evidence in the form of CDRs do not support the prosecution case.

72. There are other inconsistencies in the testimonies of PW14 (Constable Vikas) and SI Ravi Kumar (PW21) as have been pointed out by the counsel for the accused persons. However, in view of the conclusion reached by this Court on the evidence of the so-called independent witnesses, the Court is satisfied that the prosecution has miserably failed to prove the guilt of the three Appellants beyond all reasonable doubt and that, therefore, the benefit of doubt ought to be given to them.

Conclusion

73. For the aforementioned reasons, the Court sets aside the impugned judgment dated 10th March 2017 as well as the impugned order on sentence dated 16th March 2017 of the trial Court. The three Appellants are acquitted of the offence under Section 302 read with Section 34 IPC. Additionally, A1 is acquitted of the offence under Sections 25 and 27 of the Arms Act and the order on sentence in that regard is also set aside.

74. The appeals are allowed in the above terms. The pending application also stands disposed of. The three Appellants shall be released forthwith, unless wanted in some other case. The Appellants will fulfil the requirement of Section 437A Cr PC to the satisfaction of the trial Court at the earliest.

75. The trial Court record be returned along with a certified copy of this

judgment immediately. Another certified copy be also sent to the Jail Superintendent.

S. MURALIDHAR, J.

I.S. MEHTA, J.

FEBRUARY 08, 2018

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