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

+ **CRL.A. 1150/2016**

RAVI KAPOOR

..... Appellant

Through: Ms. Dimple Vivek, Advocate

versus

STATE

..... Respondent

Through: Mr. Ranbir Singh Kundu, ASC
(Crl.) for the State with
Mr. Hirein Sharma, APP for
the State and Ms. Suman
Saharan, Advocate.

+ **CRL.A. 633/2017**

AJAY KUMAR @ BHENGA

..... Appellant

Through: Mr. Jivesh Kumar Tiwari,
Advocate with Ms. Manishi
Bisht, Advocate.

versus

STATE

..... Respondent

Through: Mr. Ranbir Singh Kundu, ASC
(Crl.) for the State with
Mr. Hirein Sharma, APP for
the State and Ms. Suman
Saharan, Advocate.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE VINOD GOEL

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JUDGMENT
10.10.2018

Dr. S. Muralidhar, J.:

1. These appeals are directed against the judgment dated 26th August 2016 passed by the learned Additional Sessions Judge, South District, Saket Courts (hereafter 'the trial Court'), in SC No.40/2014 arising from FIR No.8/2009 registered at Police Station (PS) Vasant Kunj convicting the Appellants, Ravi Kapoor ('A-1' who has preferred Crl.A.1150/2016) and Ajay Kumar @ Bhenga ('A-2' who has preferred Crl.A.633/2017) for the offences under Sections 302, 364, and 394 IPC all read with Section 34 IPC and the consequent order on sentence dated 1st October 2016 whereby both of them were sentenced as under:

- (i) For the offence under Section 302 IPC: to imprisonment for life and fine of Rs.10,000/-, and in default of payment of fine, to undergo simple imprisonment ('SI') for six months;
- (ii) For the offence under Section 364 IPC: to rigorous imprisonment ('RI') for 10 years and fine of Rs.10,000/-, and in default of payment of fine, to undergo SI for six months; and
- (iii) For the offence under Section 394 IPC: to imprisonment for life and fine of Rs.10,000/-, and in default of payment of fine, to undergo SI for six months.

The sentences were directed to run concurrently.

2. At the outset, it requires to be mentioned that, along with the aforementioned two Appellants, Ajay Sethi ('A-3') and Mohammad Arif ('A-4') were also sent up for trial in the same case. By the impugned

judgment, A-3 was convicted for the offence under Section 413 IPC and A-4 was convicted for the offence under Section 411 IPC. By the aforementioned order on sentence, both A-3 and A-4 were sentenced by the trial Court to undergo imprisonment for the period already undergone by each of them.

Charge

3. The first charge against A-1 and A-2 was that during the intervening night of 7th/8th January 2009, both of them, in furtherance of their common intention, abducted Nadeem ('the deceased') who was driving a Tavera car bearing registration HR-55-HT-7278 from near the Munirka traffic light with the intention of committing murder and thereby committed the offence punishable under Section 364/34 IPC; secondly, that they caused deadly injuries to the deceased with a firearm and committed robbery of the aforementioned Tavera car and the personal belongings of the deceased and thereby committed the offence punishable under Section 394/34 IPC; and thirdly, murdered the deceased and thereby committed the offence punishable under Section 302/34 IPC. A separate charge was framed against A-1 for the offence punishable under Sections 394 and 397 IPC.

Discovery of the dead body

4. The criminal justice process was activated when information was received at the police control room ('PCR') at 7:44 am on 8th January 2009 that the dead body of an unknown male was found lying near the Spinal Injuries Hospital in Vasant Kunj. Inspector Randhir Singh (PW-23) reached the spot and was met there by SI Sukhram Pal (PW-11) and Ct. Rattan. They found

the dead body of a young male aged 24-25 years on the road leading to the Vasant Enclave behind the Spinal Injuries Hospital. The dead body was lying near electric pole No. 701. There was a gunshot injury on the left side chest of the deceased. No blood was lying on the ground or on the clothes worn by the deceased. A bullet was found inside the body of the deceased. There was no tyre mark at the place of recovery of the dead body. In the words of PW-23, it appeared that the “dead body was thrown there after committing murder at some other place”.

5. PW-23 then called the Crime Team/Dog Squad which inspected the place from where the dead body was recovered. A private photographer was also called. PW-23 noticed that the deceased was wearing a black string with locket reading ‘786’ on the neck. At that point, the dead body had not been identified by anyone.

6. PW-23 got the dead body preserved in the mortuary of Safdarjung Hospital. Through HC Thawar Singh (PW-6), he sent the *rukka* (Ex.PW-23/A) prepared by him to the PS for registration of the FIR. He also got published and distributed a hue and cry notice (Ex.PW-5/A).

Post mortem

7. The post mortem examination of the deceased was performed by Dr. Upender Kishore (PW-16) on 10th January 2009 at around 12:30 pm. He found one firearm entry wound on the left side of the front chest of the size 0.8 x 0.8 cm with bruising around the wound. There was no exit wound. He dissected the body and noticed the track of the travelling projectile. The opinion as to the cause of death was shock and haemorrhage resulting from

an ante mortem injury to the heart and right lung produced by a projectile of a rifle firearm sufficient to cause death in the ordinary course of nature. PW-16 also removed a bullet and handed it over to the IO in a sealed condition with the seal of the hospital along with sample seal.

Identification of the deceased

8. Meanwhile, on 9th January 2009, Subhash Chand Yadav (PW-3), whose Tavera vehicle was driven by the deceased, came to the PS after seeing the hue and cry notice. He identified the photograph in the hue and cry notice as that of his driver Nadeem, the deceased.

9. Mohammad Salim (PW-5), the brother of the deceased, was contacted by the police and shown the photograph which he identified as that of his brother. PW-5 also went to the Safdarjung Hospital and identified the dead body of the deceased. According to PW-5, the deceased always carried a purse containing his driving licence, voter identification card, and some papers. The deceased, according to PW-5, carried two mobile numbers and was wearing two chains, one white and the other gold. The deceased was also said to be wearing a wrist watch. These articles were not found on the dead body.

Disclosure in FIR 481/2008

10. Initially, PW-23 was the IO in charge of the case. According to him, he was also conducting the investigation in FIR No.481/2008 in which A-1 and A-2 along with two others had been arrested and were in police custody. PW-23 then states that during interrogation, A-1 and A-2 had disclosed that

A-3 had asked A-1 to urgently arrange for a white Tavera car for him as he had to give it to some other party. According to PW-23, SI O.P. Thakur (PW-22) recorded their disclosure statements (Exs.PW-22/B and C) in his presence.

11. Both A-1 and A-2 purportedly disclosed that they had asked the driver of the white Tavera car why he had jumped a red traffic light and asked him to produce the documents for the car. When the driver of the car opened the window, A-1 purportedly sat on the driver's seat and A-2 sat on the left side, thus compelling the deceased to sit between them. According to A-1 and A-2, they committed the murder near the Spinal Injuries Hospital. After he fell to the ground, they took the purse and gold chain worn by the deceased. They then took the Tavera car and drove to Sarita Vihar. A-1 is supposed to have further disclosed that he sold the Tavera car to A-3 for a sum of Rs.30,000/-. The aforementioned disclosures by A-1 and A-2 were purportedly made only on 6th April 2009.

Arrests in FIR 69/2009

12. The background to these disclosures is that A-1 and two others were arrested in FIR No.69/2009 registered at PS Vasant Vihar on 23rd March 2009. The IO in the said FIR was Inspector Palvinder Singh Chahal (PW-24) who stated that the arrests took place on the basis of secret information received concerning the accused in FIR No.69/2009. It appears that after the arrest of A-1, a country made firearm was recovered from the left side dub of his trousers. It was checked and found containing a live cartridge. From the right side front pocket of his trousers, a small cardboard

box containing three live cartridges and one empty shell of a fired cartridge were also recovered.

13. The case of the prosecution is that during the course of the interrogation of A-1 in FIR No.69/2009, he disclosed on 25th March 2009 about his involvement in FIR No.481/2008. According to the prosecution, at that stage no disclosure was made by A-1 or A-2 about their involvement in the present case. That disclosure is stated to have been made only on 6th April 2009.

Arrests and disclosures in the present case

14. On 8th April 2009, the investigation of the present case was entrusted to Inspector Sneh Noor Khan (PW-39). He was handed over the case file in which he found copies of the documents prepared in FIR No.481/2008 and that A-1 and A-2 had been arrested in that case and disclosed about their involvement in the present case. While A-1 was in police custody in the said case, A-3 was found to be in custody of the Anti Theft Squad ('ATS') in a vehicle theft case in FIR No.64/2009 under Section 379 IPC registered at PS Vasant Kunj. A-2 was already in judicial custody in FIR No.481/2008.

15. On 9th April 2009, PW-39 moved an application for production of both A-1 and A-2 in Court. PW-23 was also called to join the investigation. PW-23 pointed out the place from where the dead body of the deceased had been recovered and also briefed PW-39 on the investigations conducted till then.

16. PW-39 collected the disclosure statements of A-3 in FIR No.69/2009 in

which he is supposed to have disclosed that he had obtained 3 or 4 stolen Tavera vehicles from A-1. After obtaining the custody of A-1, A-2, and A-3, their disclosure statements were again recorded.

17. On 14th April 2009, A-1 and A-2 led the police team to the service road village Nangal Dewat jungle and pointed out the place of murder. Thereafter, they returned to the PS lockup. According to PW-39, the accused thereafter kept misleading the police about recoveries of incriminating articles/objects.

Events on 17th, 18th and 19th April 2009

18. The events that transpired on 17th April 2009 are noteworthy, and PW-39's narration of the same reads as under:

“On 17.04.2009, accused persons Ravi Kapoor, Ajay @ Bhenga led the police team to J Block Sarita Vihar while accused Ajay Sethi was also with us and both of them pointed out the place where they had parked Tavera of deceased robbed by them. The pointing out memo to that place was prepared which is already exhibited as Ex.PW21/H. While we were proceeding towards H Block, Sarita Vihar, one person rushed towards us and told his name as Mohd. Talib and inquired about the accused persons in our custody and he also identified accused Ravi Kapoor and Ajay @ Bhenga as the persons who had caused accident with his motorcycle while accused persons were driving a Tavera car bearing No.HR-55-HT-7278 on 08.01.2009 at about 5.30 am while he was going to buy milk from a milk dairy for Moharram festival. I enquired from accused Ravi Kapoor and Ajay @ Bhenga and they admitted the version given by Mohd. Talib. I recorded statement of Mohd. Talib in this regard. Thereafter, we returned to our office.”

19. On 18th April 2009, A-3 is stated to have led the police to the place

where he had thrown the original registration plates of the Tavera car and the four side glasses of that vehicle on which the correct registration number of the vehicle was etched. From the bushes along the Agra canal in Jamia Nagar, two big window glasses and two small window glasses of the Tavera with the vehicle registration etched thereon were stated to have been recovered.

20. On 19th April 2009, A-1 and A-2 took the police to the Airport Authority of India ('AAI') jungle. From there, A-2 got recovered a polythene bag containing a black wallet with the voter identification card of the deceased, visiting cards, etc. which was then seized and sealed. A-1 is supposed to have taken out one match box from bushes. On checking, the match box was found to contain a golden chain belonging to the deceased, which was then seized and sealed.

TIPs of articles

21. On 29th April 2009, an application was filed for the Test Identification Parade ('TIP') before the learned Metropolitan Magistrate ('MM'). On 11th May 2009, the TIP was conducted. PW-5 identified the purse as well as the chain of the deceased during the said TIP. On 25th June 2009, PW-3 is supposed to have identified the side glasses of the Tavera vehicle at PS Vasant Kunj.

22. Admittedly, the stolen Tavera vehicle was not recovered.

23. On 1st July 2009, a charge sheet was filed against the three accused with A-4 absconding at the time.

24. On 18th September 2009, PW-39 collected the FSL report (Ex.PW-34/A) which confirmed that the projectile recovered from the dead body of the deceased was fired from the country made firearm recovered from A-1 in FIR No.69/2009 registered at PS Vasant Kunj.

25. On 8th October 2009, A-4 was arrested in another FIR and subsequently he made a disclosure regarding his involvement in the present case. He revealed that the car stereo of the Tavera car was taken by him and the same was recovered at his instance. He is supposed to have disclosed that he along with one Shafiq of Meerut had obtained the Tavera car from A-2 and that the vehicle was further taken away by the named Shafiq. A supplementary charge sheet was then filed against A-4.

26. By an order dated 3rd February 2010, charges were framed against the four accused in the manner indicated hereinbefore. On behalf of the prosecution, 39 witnesses were examined. Relevant to the present appeal, both A-1 and A-2 maintained their innocence and claimed that they had been falsely implicated. No defence evidence was led.

Impugned judgment of the trial Court

27. In the impugned judgment the trial Court culled out the following circumstances which were sought to be established by the prosecution as a complete and continuous chain which pointed unerringly to the guilt of the accused:

- “(i) Vehicle bearing No.HR 55 HT 7278 make Tavera owned by PW3 Subhash Chand Yadav, was associated with Ages Call Centre.

- (ii) Deceased Nadeem had been employed by PW3 Subhash Chand Yadav as driver on vehicle No.HR 55 HT 7278. Deceased Nadeem, who was supposed to pick the staff of Ages Call Centre from Hero Honda Chowk and from other locations, went missing in the morning of 08.01.2009.
- (iii) PW-2 Subhash Chand Yadav lodged missing complaint Ex.PW-3/A about deceased and Tavera vehicle with Police Station Vasant Kunj on 09.01.2009.
- (iv) PW-4 K.C. Babu saw the dead body of deceased on the side of road of Nangal Dewat resettlement colony near Silvan Chef Restaurant, Vasant Kunj, at about 7.45 am on 08.01.2009.
- (v) PW-7 Md. Talib had a tiff with accused Ravi Kapoor and Ajay Kumar @ Ajay @ Bhenga, when his motorcycle was hit by Tavera vehicle and he saw accused Ravi Kapoor and Ajay Kumar @ Ajay @Bhenga, with Tavera vehicle bearing No.HR55 HT 7278 at about 5 am on 08.01.2009.
- (vi) Golden chain of deceased was recovered at the instance of accused Ravi Kapoor and was duly identified in test identification parade in the Court by PW-5 Md. Saleem (brother of deceased).
- (vii) Black colour wallet containing voter identity card of deceased and visiting card of Neeraj Travels, was got recovered at the instance of accused Ajay Sethi.
- (ix) Stereo which was taken out from the Tavera vehicle was got recovered at the instance of accused Md. Arif.
- (x) Projectile/bullet recovered from the dead body of deceased was fired from the weapon recovered from the possession of accused Ravi Kapoor in case FIR No.69/09, Police Station Vasant Kunj.”

28. The trial Court held that that there was sufficient evidence on the record to prove conclusively circumstances (i) to (iv) enumerated above.

29. As regards PW-7, the trial Court concluded that he was a reliable and

creditworthy witness and rejected the contention of the learned counsel for the defence that he was a planted witness. In other words, the trial Court accepted the case of the prosecution that A-1 and A-2 had hit his motorcycle from behind at around 5:30 am on 8th January 2009 when he was proceeding towards Madanpur Khadar on his motorcycle to purchase milk. As regards the confusion about the dates on which he made his statement to the police, with PW-7 saying that he made the statement on 8th January 2009 whereas PW-39 stating that it was recorded on 17th April 2009, the trial Court felt that he might have been confused about the date. The trial Court stated that although PW-7 may not have explained what the occasion was for him to meet the accused in the PS, the same has been explained by PW-39 in his deposition. The trial Court also held that it was not unusual for PW-7 to have noted down the number of the Tavera vehicle on his inner palm. Further, although he did not have any mobile phone, it was held that PW-7 might have threatened to dial 100 number only to scare A-1 and A-2.

30. The Trial Court also believed the recoveries effected of the golden chain and purse from the jungle at the instance of A-1 and A-2 respectively. The trial Court held that the testimony of PW-39 in that regard “inspired confidence of the Court as he has given graphic details of sequence and steps taken in investigation and trial of the accused persons who are in police custody i.e. from 13.04.2009 to 20.04.2009”. Consequently, the trial Court rejected the possibility of incriminating articles having been falsely planted on the accused.

31. Turning to the scientific evidence, the trial Court held that the evidence

of Mr. Puneet Puri (PW-34), Assistant Director (Ballistics), FSL confirmed that the deformed bullet recovered from body of the deceased was fired from firearm recovered from A-1 and was not seriously challenged in the cross-examination. The arrest of A-1 and the recovery of the firearm from him in FIR No.69/2009 were also not challenged.

32. As far as the motive in the present case is concerned, it was stated to be the murder of the deceased in order to steal the Tavera car. For the above reasons, the trial Court held that the prosecution had proved each of the links in the chain of circumstances beyond reasonable doubt and that they unmistakably pointed to the guilt of both the accused. By a separate order on sentence, the Appellants were sentenced in the manner noticed hereinbefore.

33. This Court has heard the submissions of Ms. Dimple Vivek, learned counsel for A-1, Mr. Jivesh Kumar Tiwari, learned counsel for A-2, and Mr. Ranbir Singh Kundu, ASC (Crl.) with Mr. Hirein Sharma, APP for the State.

Law relating to circumstantial evidence

34. This is a case based on circumstantial evidence. The settled legal position in that regard requires to be briefly recounted to begin with.

35. In ***Padala Veera Reddy v. State of Andhra Pradesh 1989 Supp (2) SCC 706***, the legal position was summarised thus:

- (1) The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
- (2) Those circumstances should be of a definite tendency unerringly

pointing towards guilt of the accused;

- (3) 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 none else; and
- (4) The circumstantial evidence, in order to sustain conviction, must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

36. In ***Ramreddy Rajeshkhanna Reddy v. State of Andhra Pradesh (2006) 10 SCC 172***, the Supreme Court opined:

“26. It is now well-settled that with a view to base a conviction on circumstantial evidence, the prosecution must establish all the pieces of incriminating circumstances by reliable and clinching evidence and the circumstances so proved must form such a chain of events as would permit no conclusion other than one of guilt of the accused. The circumstances cannot be on any other hypothesis. It is also well-settled that suspicion, however, grave may be, cannot be a substitute for a proof and the Courts shall take utmost precaution in finding an accused guilty only on the basis of the circumstantial evidence.”

37. In ***G. Parshwanath v. State of Karnataka (2010) 8 SCC 593***, the Supreme Court held:

“23. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact sought to be relied upon must be proved individually. However, in applying this principle a distinction must be made between

facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case. The Court thereafter has to consider the effect of proved facts. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accused and should exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused, where various links in chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court.”

Proved circumstances in the present case

38. As already noticed hereinbefore, of the ten circumstances culled out by the trial Court in the present case, the first four are not incriminating *qua* the present Appellants. There is no serious dispute that:

- (a) the deceased died a homicidal death by way of a firearm injury on his chest;
- (b) he was a driver working for PW-3 who owned the Tavera vehicle;
- (c) the dead body was recovered on the morning of 8th January 2009 from near the Spinal Injuries Hospital at Vasant Kunj.

Circumstance of 'last seen'

39. *Vis-a-vis* the present Appellants, the first incriminating circumstance that is sought to be proved by the prosecution is that they were seen by PW-7 at around 5:30 am on the morning of 8th January 2009 in the Tavera car which is claimed to have been driven by A-1. Although the trial Court has held PW-7 to be a truthful and reliable witness, there are certain facts which required to be noticed in order to examine the plea of the learned counsel for the Appellants that he was in fact a planted witness.

40. In the trial Court record, there is a statement of PW-7 recorded by PW-39 under Section 161 Cr PC on 17th April 2009. This was therefore more than three months after the alleged date on which at 5 am in the morning of 8th January 2009, the Tavera car driven by A-1 with A-2 in it, collided against the motorcycle driven by PW-7, from behind.

41. The Court has carefully perused the deposition of PW-7. In his examination-in-chief, he states that he was going to Madanpur Khadar from

Abu Fazal Enclave on a motorcycle belonging to his brother-in-law at 5 am on 8th January 2009. He was going to purchase milk from a dairy at Madanpur Khadar. According to him, when he reached the H-Block Market, a Tavera car came from behind and hit his motorcycle. It was travelling at a high speed. According to him A-1 and A-2, whom he correctly identified in the Court, emerged from the Tavera car. A-1 was having a wireless set. He stated that both A-1 and A-2 misbehaved with him saying that they were informers of the police. According to PW-7, he noted the Tavera vehicle registration number on his hand as HR-55-HT-7278. PW-7. PW-7 then purportedly told A-1 and A-2 that he was going to call the police on '100'. At that point, both A-1 and A-2 apologised to him and left.

42. The examination-in-chief of PW-7 took place on 3rd September 2011. For some reason, the learned Special Public Prosecutor ('SPP') in the trial Court did not seek the permission of the Court to put further questions to PW-7 by way of clarification or to even declare him hostile. By this time, it should have been clear to the SPP that the previous statement made by PW-7 to the police was on 17th April 2009 and in his examination-in-chief, he had not made any mention whatsoever of having been approached by the police or his having approached the police to make that statement.

43. It must be recalled at this stage that in the statement purportedly made by PW-7 under Section 161 Cr PC on 17th April 2009, he is supposed to have stated how he rushed towards the police who were carrying A-1 and A-2 with them in the police jeep while proceeding from J-Block to H-Block, Sarita Vihar and how he volunteered to the police about A-1 and A-2 having

collided with his motorcycle from behind at 5 am on 8th January 2009 while they were driving the stolen Tavera vehicle at high speed. None of this was spoken to by PW-7 in his examination-in-chief. Therefore, clearly he was not supporting the prosecution on this important aspect of him suddenly emerging at the scene and providing a vital piece of evidence to the police about seeing the two accused with the stolen vehicle shortly after they allegedly killed the deceased.

44. After the above examination-in-chief of PW-7 on 3rd September 2011, his cross examination took place more than a year later on 1st April 2013. This long gap has not been explained. The cross-examination of PW-7 further weakened the prosecution case. PW-7 repeatedly asserted that he spoke to the police on 8th January 2009 at 5 am. Apart from disclosing that he had completed his schooling up to Class VI, PW-7 maintained:

“My statement was recorded only once i.e. on 08.01.2009 by Insp. Khan at Sarita Vihar in the morning hours about 5.00 am. I cannot say whether any case was registered on that day or not. After 08.01.09 I did not join the investigations of this case. On that day, I did not convey any message at number 100.”

45. PW-7 further stated: “I was not having any mobile phone at that time. I never visited the police station. I did not call my Mousa at the spot. I never met to any police officials in connection with case till today”.

46. Unlike what the trial Court has observed, PW-7 does not appear to be ‘confused’ about the dates. He asserted more than once that his statement was recorded by Inspector Khan (presumably PW-39) on 8th January 2009; that he never went to the police or even called them on ‘100’; that he did not

have any mobile phone and for that matter never visited the PS. PW-7 is further silent about having been in Sarita Vihar on 17th April 2009 or having met the police on that date and having given a statement to PW-39 on that date.

47. What is strange is that even at this stage, the SPP in the trial Court does not appear to have made any effort to salvage the situation. After PW-7 disclosed that the names of the accused persons were told to him by PW-39 and that “I did not note down the number of Tavera”, the SPP in the trial Court sought permission to re-examine PW-7. However, the only question asked of PW-7 by the SPP in re-examination was as under:

“Q. Please specify as to whom the motorcycle No.8512 was belonging?

Ans. I cannot say as to who is the owner of this motorcycle but I may mention that my *Mousa* came on this motorcycle to my house and from him I took this motorcycle to purchase the milk.”

48. In other words, the SPP allowed the statement of PW-7 that he gave a statement to the police only once at 5 am on 8th January 2009 to remain unchallenged on the record. PW-7 was silent about his statement being recorded by PW-39 on 17th April 2009. Viewed from any angle, this Court is unable to concur with the trial Court that PW-7 is a natural and reliable witness. He is, at best, a chance witness but an unreliable one at that.

49. Turning to the evidence of PW-39 and especially to the portion in which he speaks about PW-7 rushing towards the police vehicle at Sarita Vihar on 17th April 2009 which has been extracted hereinbefore, it is plain that both

these pieces of evidence (i.e. of PWs 7 and 39), when read side by side, contradict each other on material aspects. In fact, with the SPP not having declared PW-7 to be a hostile witness and allowing his evidence to remain as it is, it is plain that the evidence of PW-39 about PW-7 making a statement on 17th April 2009 cannot be believed. Thus, the net result is that even if the evidence of PW-7 is taken to be truthful, it disproves the portion of the evidence of PW-39 in which he claims that when he was in Sarita Vihar with A-1 and A-2 on 17th April 2009, PW-7 rushed towards the police jeep and identified the two Appellants herein as the persons who were in the Tavera car which hit his motorcycle from behind on the morning of 8th January 2009.

50. The upshot of the above discussion is that the first major link in the chain of circumstances, i.e. A-1 and A-2 were last seen in the Tavera vehicle at 5 am on 8th January 2009 shortly after killing the deceased, has not been proved by the prosecution.

Recovery of stolen articles

51. The Court turns to the next incriminating circumstance pointed out by the learned ASC before us and which has also been noticed by the trial Court, i.e. the recoveries made at the instance of A-1 and A-2 of articles belonging to the deceased which connected them with the crime.

52. As far as A-1 is concerned, he is supposed to have made a disclosure statement about the place where he kept the golden chain belonging to the deceased. As noticed earlier, A-1 purportedly got the golden chain recovered from a match box thrown in the bushes near the jungle area of the boundary

wall of AAI. As far as A-2 is concerned, he is supposed to have made a disclosure statement which led to the recovery of the purse belonging to the deceased, again from the same jungle area.

53. Ms. Vivek, learned counsel for A-1, has drawn the attention of this Court to the recovery memo Ex.PW-21/I (also Ex.PW-21/P3) of the golden chain. It reveals that these recoveries took place within 65 yards of the place where the dead body was recovered. The fact that these recoveries were made from an open area on 19th April 2009, more than three months after the dead body itself was recovered, makes the recovery highly suspicious. These suspicions are not quelled by the fact that no independent witness was associated with the recovery. Nothing emerges to suggest that the IO even performed the usual ritual of asking passersby to join and being declined. Furthermore, if the motive for the crime was robbery, why the golden chain would be kept in a match box and flung into the bushes in the jungle and allowed to remain there for more than two months thereafter is not explained.

54. The recovery of the purse, again from the same area, more than three months after the deceased was killed is equally unconvincing. With the place of recovery being very close to the place where the dead body was found, it is difficult to believe that the police made no effort on the same day that they found the dead body to survey the area for the missing articles if indeed PW-5 already pointed out to the police that these articles were missing. The purported disclosures of A-1 and A-2 about the place where these articles could be located did not satisfy the requirement of Section 27 IEA. In other words, it was not as if, without such disclosures, the police

could not have located the missing articles by exercising due diligence. Merely because the articles were got identified by PW-5 in the TIP would not constitute proof of their recovery at the instance of the two accused in police custody.

55. Consequently the Court is unable to concur with the trial Court that these recoveries have been conclusively proved.

56. It must be mentioned here that as far as A-2 is concerned, even before this Court, the learned ASC (Crl.) could not point out any other incriminating circumstance that could connect him with the crime in the present case. With both the circumstances delineated above *qua* A-2 being held by this Court not to have been proved, he is entitled to the benefit of doubt.

Recovery of firearm and FSL report

57. Turning now to A-1, the circumstance on which considerable reliance has been placed by learned ASC (Crl.) is the recovery of the country made firearm from A-1 at the time of his arrest in FIR No.69/2009 on 23rd March 2009 together with the circumstance of the deformed bullet recovered from the dead body of the deceased matching the firearm as proved by the FSL report. He relied on the decisions in ***Husna v. State of Punjab (1996) 7 SCC 382***; ***State of Madhya Pradesh through CBI v. Paltan Mallah (2005) 3 SCC 169***; and ***R v. Tsekiri [2017] EWCA Crim 40*** to urge that the above single circumstance was sufficient to hold A-1 to be guilty of the offences for which he had been charged in the present case.

58. As noticed hereinbefore, the legal position with regard to cases based on circumstantial evidence is that it is not only imperative for the prosecution to conclusively prove each link in the chain of circumstances but also to show that the complete proved chain of circumstances leads unmistakably to the guilt of only the accused and no one else. Therefore, in a case of circumstantial evidence, it is not possible to convict an accused only on the basis of one of the circumstances in the chain being proved while the other links in the chain are not.

59. In the present case, of the three circumstances relied upon by the prosecution to establish the guilt of A-1, two of the circumstances, i.e. the circumstance of 'last seen' and the circumstance of the recovery of stolen articles belonging to the deceased have been held by this Court not to be proved.

60. As far as the third circumstance is concerned, it is correct that this Court has, in its judgment dated 4th January 2018 in ***State v. Ravi Kapoor 2018 (1) JCC 438***, upheld the conviction of A-1 in that case after accepting the case of the prosecution regarding the arrest of A-1 and the recovery from him of the firearm. However, that by itself does not relieve the prosecution in the present case of having to conclusively prove the guilt of A-1 by conclusively proving each link in the chain of circumstances. It is not as though, in ***State v. Ravi Kapoor (supra)***, the conviction of A-1 as upheld by this Court solely on the basis of his arrest and recovery of a country made firearm from his possession. That was but one of the circumstances in a complete chain of circumstances outlined in that judgment with each link being held to have

been conclusively proved by the prosecution.

61. The second factor is that although the FSL report does prove that the deformed bullet recovered from the dead body of the deceased could have been fired from the firearm recovered from A-1, it is not in dispute that the firearm recovered from A-1 after his arrest in FIR No.69/2009 on 23rd March 2009 is a country made one which had no particular unique characteristics. It will be recalled that from that time till 6th April 2009, A-1 did not disclose his involvement in the present case. It is nobody's case that there is no other country made firearm being used anywhere in the area in which the crime took place during this period. The possibility of the deceased having been done to death by another identical country made firearm having the same characteristics is not ruled out.

62. This solitary circumstance, even if held to be proved, is insufficient to conclusively prove the guilt of A-1 and no one else for the crime in the present case. In **Husna** (*supra*), the case of the prosecution was based on the eye witness testimony of a PW. The evidence of the recovery of the weapon from the accused and the matching of the empties recovered from the spot with the said weapon was held to corroborate the eye witness account. In other words, the ballistic evidence was not the sole basis on which the conviction was returned in that case.

63. Again in **Paltan Mallah** (*supra*), it was noticed by the Supreme Court that “the evidence of the ballistic expert coupled with two extra judicial confessions made to PW-5 and PW-124 support the prosecution case fully”. It was noted that there was further evidence to the effect that the accused in

that case “had got access to the weapons and that he was staying at the place of occurrence and doing various jobs”. It was also noted that the High Court had rejected the evidence of extra judicial confession “without any valid reasons. The report of ballistic expert also was not appreciated in the correct perspective by the High Court”. It is therefore plain that even in the aforesaid decision the ballistic evidence did not form the sole basis for the conviction.

64. In *Tsekiri (supra)*, the Court of Appeal in the United Kingdom based its conclusion as regards the guilt of the accused on the fact that his DNA was found on the articles left at the scene of the crime. It was held that there was no evidentiary or legal principle “which prevents a case solely dependent on the presence of defendant’s DNA profile on an article left at the scene of crime being considered by the jury”. Firstly, it must be noted that there are no jury trials in this country. Secondly, it is not possible to equate the probative value of DNA evidence with ballistic evidence. Thirdly, the prosecution in a case in this jurisdiction cannot stand relieved of its duty to satisfy requirements as per the well-settled legal principles governing cases based on circumstantial evidence simply because of one decision of the Court of Appeal in the United Kingdom in which a finding of guilt has been based solely on the DNA evidence found at the crime scene.

65. Consequently, this Court is unable to accept the plea of the learned ASC that only on the basis of the ballistic evidence it should be held that the prosecution has been able to establish the guilt of A-1 and A-1 alone for the offences with which he has been charged.

Previous criminal record

66. It was then submitted by the learned ASC that A-1 is a known criminal in the area involved in very serious offences; that in the appeal arising from FIR No.69/2009, this Court has upheld his conviction for a heinous crime; that A-1 is facing trial in FIR No.481/2008 for another heinous offence. It is pointed out that there are several other criminal cases registered against A-1 for serious crimes. It was submitted that these factors have to be kept in mind in deciding the guilt of A-1 in the present case.

67. While the above submissions would be persuasive at the time of deciding an appropriate sentence that should be awarded to A-1 if he is found guilty of an offence, his past criminal record does not constitute evidence of his guilt in the present case. Each case has to be proved by the prosecution on merits. The fact of involvement of an accused in other cases cannot relieve the prosecution of the burden of having to prove the guilt of such person in the case on hand beyond reasonable doubt. Consequently, the Court is unable to be persuaded to hold that only because of the involvement of A-1 in other crimes some of which have been already tried and the other which are yet to be tried, it should be held that the prosecution has proved the case against him in the present case beyond reasonable doubt.

Conclusion

68. For all the aforementioned reasons, the Court is unable to concur with the trial Court that the prosecution has proved beyond reasonable doubt the guilt of A-1 and A-2 for the offences with which they were charged in the present case. A-1 and A-2 are accordingly acquitted in the present case.

arsing from FIR No.8/2009 registered at PS Vasant Kunj of the offences punishable under Sections 302, 364 and 394 all read with 34 IPC. The impugned judgment of the trial Court and the order on sentence are accordingly set aside. The appeals are allowed.

69. The custody of A-1 and A-2 as far as the present case is concerned comes to an end. A-1 and A-2 will each fulfil the requirement of Section 437A Cr PC to the satisfaction of the trial Court at the earliest. The trial Court record be returned forthwith together with a certified copy of this judgment.

S. MURALIDHAR, J.

VINOD GOEL, J.

OCTOBER 10, 2018
dkb/shailndra