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

+ **CRL.A.694 of 2017**

Reserved on: 29th August 2018

Decided on: 4th October 2018

NEERAJ SAFI

.....Appellant

Through: Mr. S.B. Dandapani, Advocate
(DHCLSC).

versus

STATE

....Respondent

Through: Mr. Rajesh Mahajan, ASC for
State with Ms. Jyoti Babbar,
Advocate and Mr. Hirein
Sharma, APP.
Mr. Amit Khemka along with
Mr. Rishi Sehgal, Advocates
for the Complainant.

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE VINOD GOEL**

JUDGMENT

Dr. S. Muralidhar, J.:

1. This appeal is directed against the judgment dated 31st January, 2017 passed by the learned Additional Sessions Judge , South East, Saket Courts, New Delhi in Sessions Case No.200/14 (renumbered as 1204/16) arising out of FIR No.214/14 registered at Police Station ('PS') CR Park, New Delhi convicting the Appellant for the offences under Sections 302, 376 and 201 of the Indian Penal Code ('IPC'). The appeal is also directed

against the order on sentence dated 21st February, 2017, whereby for the offence under Section 302 IPC, the Appellant was sentenced to undergo rigorous imprisonment ('RI') for life along with fine of Rs.10,000/-, and in default of payment of fine, to undergo simple imprisonment ('SI') for one year; for the offence under Section 376 IPC, to undergo RI for ten years along with fine of Rs.5,000/-, and in default of payment of fine, to undergo SI for six months; and for the offence punishable under Section 201 IPC, to undergo RI for three years along with fine of Rs.3,000/-, and in default of payment of fine, to undergo SI for three months.

Background facts

2. The background facts of the case are that the Appellant was employed as a domestic help of the deceased, who lived alone in the ground floor of her house at Greater Kailash-II, New Delhi. The Appellant was employed with the deceased by the daughter of the deceased, who lived abroad, and who owned the ground floor. The Appellant lived in a separate servant quarter, which was situated in the parking area of the building.

3. The first floor was owned by another daughter of the deceased, who herself lived with her husband (PW-2) and family at Press Enclave, Saket, New Delhi. The front portion of the third floor, owned by the deceased, had been given on rent to a company which employed a security guard at the gate of the building. The duty hours of the security guard were from 8 pm to 8 am. The second floor of the building was given to the builder. It must be mentioned here that the deceased was the owner of the entire property which was demolished and reconstructed by a builder on collaboration.

4. PW-2, the son-in-law of the deceased, deposed that on 6th July, 2014, he had employed a carpenter to polish the furniture in the flat at first floor. That work continued up to 7th July, 2014 as well. At around 10 am on 7th July, 2014, PW-2 went to the house to supervise the work of the carpenter. According to PW-2, the carpenter finished his job at 4 pm, after which PW-2 paid him and left the premises at 4.15 pm for his official duties. He returned to his residence at Press Enclave at around 7.30 pm.

5. The deceased used to go for a daily walk at around 5.30/6 pm and would return around 7/7.30 pm. The deceased was 82 years old at the time of her death.

Events on the fateful day

6. At around 9.15 pm on 7th July, 2014, the Appellant went to the neighbour (PW-3) of the deceased, informing her that the deceased had not returned from her evening walk. PW-3 apparently scolded the Appellant for informing her so late and asked her own daughter to accompany the Appellant to the nearby park in search of the deceased. One other common friend informed PW-3 that she had met the deceased at around 7 pm and the deceased had informed her that she was returning home.

7. PW-3 telephoned the daughter of the deceased (not examined), i.e. the wife of PW-2, and informed her of her mother having gone missing. PW-3 also called the police from her mobile number, which fact is confirmed by the Police Control Room ('PCR') report (Ex.PW12/A). The call was made at 9.21 pm and the precise message was "*Ek lady park mein ghoomne gai thi jo abhi tak nahi ayi*". The further message recorded on the PCR past

midnight on 8th July, 2014 at 0033 hours notes that the dead body of the deceased was found on the second floor in a burnt condition. It notes “*jo AC mein short-circuit se aag lagi lagta hai, aag bujhi hui hai body par chot ka koi nisan nahi hai – inki ladi doctor bhi moka par hai – SHO or ATO with staff moka par.*”

8. ACP Rajender Pathania (PW-26) was the Station House Officer (‘SHO’) of PS CR Park. He received DD No.36-A (Ex.PW26/A) about the deceased having gone missing. The first person to reach the place was Sub-Inspector (SI) Virender Singh. In the meanwhile, having been informed by PW-3, the daughter of the deceased and her husband i.e. PW-2 also reached the place. She went upstairs to open the flat on the first floor with the key she had brought and found it full of smoke. On entering, they found the dead body of the deceased lying on a cot in a burnt condition. Her neck was found tied with a *chunni*. She was naked from the bottom. Her *salwar* and panty were lying by the side of the bed. PW-26 was informed and he along with his staff rushed to the spot. During this entire time, the Appellant was present.

Statement of PW-2

9. PW-26 recorded the statement of PW-2 (Ex.PW-2/A), converted that into a *rukka* and sent it for registration of the FIR on 12.10 am on 8th July, 2014 to the PS where FIR No.214/14 was registered at 12.20 am. In this statement, PW-2 talked about the carpenter having been engaged for work on the first floor flat which had been gifted to his wife by the deceased and about PW-2 reaching back to his residence from his official work at around 7.30 pm after having seen the carpenter off. He also adverted to the fact that

at around 9 pm, his wife got a call from PW-3, the neighbour of the deceased who informed her that the deceased had not returned home after her evening walk. He mentioned how he and his wife reached the spot and started looking for the deceased. While doing so, when his wife opened the flat on the first floor, they found that the flat was full of smoke. They found in the outer room inside that the bed and mattress were smouldering and on that bed, the deceased was lying in more or less the same condition. He also mentioned that the Appellant was at the time engaged as a full-time servant with the deceased at the house.

Crime Team's first visit

10. PW-26 called the crime team to the spot and the fire-brigade was also called. A team from the Central Forensic Sciences Laboratory ('CFSL'), CBI was also called. He also got the spot photographed and video-graphed by a private videographer Raj Kumar (PW-5). However, when later PW-5 was examined in the trial, he said he was called to the mortuary of Safdarjung Hospital on 10th July 2014, to photograph and video-graph the post-mortem of the deceased, which was then handed over by him in a CD (Ex.PW-5/A) with the photographs being marked as Ex.PW-5/1-36.

11. The crime team visit report (Ex.PW-13/A) shows that the team was present at the spot between 10.30 pm on 7th July, 2014 to 12.30 am on 8th July, 2014. It noted that the dead body of the deceased was found on the bed in a burnt condition. The details of the exhibits lifted were (i) burnt material of the bed and room; (ii) burnt AC Unit in the room on the wall. It was further noted by SI Sanjay Kumar (PW-13) "the dead body of the

deceased may please be sent to the hospital for post-mortem to ascertain the cause of death.” It is not clear here that the crime team lifted any chance prints/finger prints from anywhere in the room or from the door or knob of the door. The crime team was also called again on 11th July, 2014 by PW-26, but that will be adverted to shortly.

12. The exhibits recovered from the spot (Ex.PW-2/B to G) were the clothes of the deceased, the bed-sheet, pieces of foam from the mattress etc. The seizure memo Ex.PW-2/B was for the following exhibits:

- (i) Mobile phone, black colour Nokia make in a burnt condition, behind which the mobile number ending with the digit 9183 was written.
- (ii) The brown white lady’s purse in a burnt condition.
- (iii) A plaster-of-paris (‘PoP’) piece in a burnt condition.
- (iv) Earth-control sample.

13. Ex.PW-2/C was the seizure memo for seizure of a pair of *chappals* in a half-burnt condition, a clump of hair and pieces of mattress-foam. Ex.PW-2/D was for the seizure of a white and yellow bed-sheet, two pillows and a bedcover. Ex.PW-2/E was for the seizure of a blanket, a panty and *salwar*. Ex.PW-2/F was for the seizure of the mattress on which the dead body lay and Ex.PW-2/G was for the bed.

14. The dead body of the deceased was then shifted to the hospital. The MLC (Ex.PW-25/A) shows that she was brought to the hospital on 8th July, 2014 at 2.45 am with the ‘name of the relative/friend’ column left blank. However, the MLC contained a noting which simply stated ‘Constable Rajesh Kumar’ i.e. PW-9 who had accompanied the dead body to hospital

to get it preserved for the post mortem as per the directions of the SHO. The deceased was brought there in a dead condition. It was noted that there were 95% deep thermal and superficial burns on the body.

Arrest of the Appellant, disclosure and seizures

15. In his deposition, PW-26 states “I arrested the accused who is present in the court today vide arrest memo Ex. PW-2/H bearing my signatures at Point C.” A perusal of the said arrest memo (Ex.PW-2/H) shows that the accused was arrested at the house itself on 7.30 pm on 8th July, 2014 and the witnesses to the arrest were the daughter of the deceased and her husband (PW-2) apart from SI Rajiv Ranjan (PW-21). What led PW-26 to arrest the Appellant is not clear. What is apparent is that the Appellant was very much present throughout and made no attempt to run away or resist the arrest.

16. According to PW-26, he conducted the personal search of the Appellant; interrogated him and recorded his disclosure statement (Ex.PW-2/K). PW-26 further states that on the pointing out of the accused he recovered “the match box, a knife and kerosene oil from the room of the accused.” He prepared *pulandas*, sealed them with the seal of RR and prepared the seizure memos i.e. Ex.PW-2/L and PW-2/M respectively.

17. A perusal of the personal search memo (Ex.PW-2/J) of the Appellant shows that two mobile phones having IMEI numbers ending with the digits 1941 and 5994 respectively, apart from Rs.250/- in cash were recovered from him. This personal search memo is also attested by the daughter of the

deceased and PW-2, apart from PW-22. The disclosure statement (Ex.PW-2/K) again is attested by these three persons as is Ex.PW-2/L regarding recovery of the box of matches and the knife and Ex.PW-2/M regarding recovery of the plastic bottle with kerosene.

Crime Team's second visit

18. At this stage, it must be noted that PW-26 again called the crime team which took photographs of these recoveries (Ex.PW-8/1 to PW-8/7) and they gave a separate report in that regard (Ex.PW-17/A). ASI Sajjan Kumar (PW-17) was the person in charge of the District Crime Team. He along with HC Kirti (Finger Print Expert) and Constable Ashwani Kumar (PW-8) went to the spot. They carried out inspection of the servant quarters on the ground floor. Importantly, PW-17 stated “our finger print expert HC Kirti could not find any chance prints on the said articles.”

19. The crime team's report (Ex.PW-17/A) notes that the match box, knife and plastic bottle were lifted. The recommendation therein was to send the exhibits for FSL examination “as early as possible”.

Seizure of clothes of Appellant

20. The police custody remand of the Appellant was taken and he was further interrogated. He is supposed to have made a disclosure (Ex. PW-21/E) and got recovered his t-shirt, pant and underwear, which he supposedly had thrown in a dustbin in a park in front of S-Block of GK-2.

21. PW-26 again called the crime team which took photographs (Ex. PW-

13/12-15) and negatives (Ex. PW-19/12-15). The crime team gave a second report (Ex. PW-13/B). The seizure memo of the clothes of the accused was prepared (Ex. PW-21/F). It was not attested by any independent witness but only by SI Rajeev Ranjan (PW-21) and SI Birender Singh (not examined).

Post mortem

22. Dr Mohd. Shadab Raheel (PW-24), who was Senior Resident, Department of Forensic Medicine at Safdarjung Hospital conducted the post-mortem assisted by Dr Mohit Gupta. A perusal of the post-mortem report (Ex. PW-24/A) shows that the post-mortem commenced at 12 noon on 10th July, 2014. On the dead body was found a white kurta and white bra that were partially burnt, wrist watch on the left forearm and a black hair clip. Ligature material in the form of *chunni* was present wrapped around the neck. It was wound in three turns around the neck with knot lying in front of the neck. It is noted "ligature material was preserved with the knot was being fixed with black thread and the ligature material being cut opposite to knot its two free end tied with black thread, sealed and handed over to IO. The two free ends of the knot measure 13 cm and 15 cm and the long end opposite to them measure 69 cm in length. Videography of the case was done by the IO."

23. As far as the injuries on the external examination are concerned, four multiple reddish pressure abrasions were found present on left side of front of neck. There was a reddish pressure abrasion present on the right side of the front of the neck. There was a lacerated wound present on the under surface of the upper lip as well as under surface of the lower lip across

midline. The following injury, which was of some significance in the context of the present case, reads as under:

“4. Lacerated wound of size 2 cm x 0.5 cm, mucosal deep present over 6'o clock position at the vaginal orifice along with extravasation of blood and reddish coloured bruise of size 3 cm x 2 cm present on lateral wall of vagina on right side.”

24. The external post-mortem injuries were basically the burn injuries with the approximate area of the burn being 75% of the total body surface area. Ligature mark in the form of a reddish colour pressure abrasion was present around the neck “completing encircling the neck”.

25. As far as the internal examination was concerned, soot particles were absent in the trachea. There was a fracture of the fifth rib present in the midclavicular line on the left side along with extravasation of blood in the surrounding areas. Both lungs were congested. Petechial haemorrhage was present at interlobar surface of the lungs. Petechial haemorrhage was present over the pericardial surface. As far as the vagina was concerned, it was noted “collapse of posterior vaginal wall present. Rest as in injury No.3”.

26. The specimens preserved were:

- “Vaginal swab (high vaginal swab and low vaginal swab)
- 2. Perianal swab
- 3. Anal Swab
- 4. Body mop
- 5. Scalp mop
- 6. Vaginal mop
- 7. Nail Clippings of both hands
- 8. Ligature material

- 9. Clothes
- 10. Blood on gauze piece
- 11 .Scalp hair
- 12. Viscera to rule out poisoning.”

27. The time since death was noted as “about 2-3 days”. As far as the opinion as to the cause of death, it was noted as under:

“Death is due to asphyxia as a result of ante-mortem manual strangulation. Injury No 3 is suggestive of attempted smothering. Injury no.4 is ante-mortem in nature. Injury no 5-6 are post-mortem in nature. Injury no 1, 2 and 3 are sufficient to cause death in ordinary course of nature, collectively.”

Medical examination of Appellant

28. It must also be noted that on 9th July, 2014 itself at 11.30 am the medical examination of the Appellant took place. That MLC (Ex. PW-1/A) shows that his medical examination was undertaken by Dr M.S. Bakshi (PW-1). He opined that there was nothing to suggest that the Appellant was incapable of performing sexual intercourse in normal circumstances. There was no fresh external ante mortem injury present on the body. The absence of smegma was noted. No external injury was present over the genitalia. The samples seized were as under:

“Blood in gauze, underwear, pubic hairs, penile swab and control swab have been preserved, sealed, signed and handed over to the police along with the sample of seal.”

29. At this juncture, it must be noted that an un-scaled site plan was prepared by PW-26 on 8th July, 2014 (Ex. PW-26/C to Ex. PW-26/F). What is relevant is Ex. PW-26/D which depicts the room where the dead body was found, which was shown as being point ‘A’. Point ‘B’ and ‘D’ are places where the panty and *salwar* respectively of the deceased were

located. The split AC on the wall in a burnt condition was shown as point 'C'. A view of the same room from another angle in the un-scaled plan was Ex. PW-26/E.

CFSL Report

30. Also to be noted at this stage is the detailed report from the CFSL (Ex. PW-15/H). This refers inter alia to the purported confession of the Appellant to the crime about having forcibly committed sexual intercourse with the deceased and while she was unconscious, of having killed her by strangulating her with her own *chunni*. This report referred to the list of exhibits sent for examination in five columns – column one being the serial number, column two being the description of the exhibits, column three titled 'how, when and by whom found', column four being 'source of exhibits' and column five being the remarks. It refers to 16 such exhibits.

31. Under the subtitle 'nature of examination required', Question 1 asks whether any human semen is present on exhibits 'D' to 'I' and if yes to prepare a DNA profile. Question 2 is to prepare a DNA profile of exhibits 'L', 'M', 'B' and 'R'. These are the exhibits constituting the *pulanda* containing the underwear of the deceased (L), pubic hair of the accused (M), swab of the accused (N), blood of the accused (P), clothes of the accused (R), salwar of the deceased (D), penile swab of the deceased (E), perineal swab of the deceased (F), high vaginal swab of the deceased (G), low vaginal swab of the deceased (H) and vaginal mop of the deceased (I). Question 3 was whether any foreign material was present in Ex.J1 (nail clipping right side of the deceased) and J2 (nail clipping left side of the

deceased). Question 4 was whether the DNA profile of the exhibits pertaining to the deceased matched with the DNA profile of the exhibits pertaining to the Appellant, including J-1 and J-2. Another set of exhibits was forwarded by the CFSL. Ex. B was the pair of *chappals*, bunch of hairs of the deceased and the foam of the mattress of the bed. Ex. C was the bed sheet, two pillows with cover and the cover of the mattress. Ex. D was the plastic bottle with some oil, Ex. E the scalp hair of the deceased, Ex. F the ligature material, Ex. G the clothes of the deceased, Ex. H the scalp mop of the deceased and Ex. I the body mop of the deceased.

32. As regards these exhibits, the FSL report (Ex. PW-27/A) dated 7th November, 2014 prepared by Dr. B.K. Mohapatra (PW-27) described all the above exhibits. The procedure adopted and result of the examination, as set out in the FSL report is as under:

“7. Laboratory Procedure: Biological examination of the exhibits was carried out as per the procedures laid down in the Working Procedure Manual, Biology Division, CFSL (CBI), New Delhi. Further DNA isolation from the exhibits-D-1, D-2, D-3, E, F, G, H, I, J-1, J-2, K, L, M, N, O, P, R-1, R-2 and R-3 was carried out via organic extraction method and was subjected to multiplex PCR amplification for fifteen STR loci & amelogenin using AmpFISTR Identifier Plus Kit. Genotyping of the amplified products was carried out using automated DNA Analyzer.

Results of Examination:

8.1 Blood was detected on the exhibits: D-1, E, F, G, H, I, K and P.

8.2 Blood could not be detected on the exhibits: D-2, D-3, J-1, J-2, L, M, N, O, R-1, R-2 and R-3.

8.3 Semen could not be detected on the exhibits: D-1, D-2, D-3, E, F, G, H, I, J-1 J-2, L, M, N, O, R-1, R-2 and R-3.

8.4. DNA profile generated from the female fraction DNA obtained from the source of exhibits-D-1 (Bed Sheet), F (Perianal Swab), G (High Vaginal Swab), H (Low Vaginal Swab) and I (Vaginal Mop) was found to be consistent with the DNA profile of the deceased (Source of exhibit-K: Blood Stained Gauze).

8.5 Source of exhibits: D-1, F, G, H & I did not yield male fraction DNA for analysis.

8.6 Source of exhibits: D-2, D-3, E, J-1, J-2, L, M, N, O, R-1, R-2 & R-3 did not yield DNA for analysis.

8.7 Burnt debris materials was detected on the exhibits: J-1 & J-2.”

Crime Team's Inspection Report

33. Two other forensic reports required to be referred at this stage. There is a report titled ‘crime team inspection report’ which is dated 8th August, 2014 (Ex. PW-6/A). The signatories to the report are Ms Deepti Bhargava (PW-6) Senior Scientific Officer, Grade-II, of the Chemistry Division of the CFSL, CBI and Dr S.K. Chaudhary who was SSO-Physics (not examined). The important aspects of these reports are that:

“Electrical points were checked and no short circuiting detected in the electrical fittings. All the doors/windows were checked. No forceful entry or exit was detected in the house.”

34. The conclusions of the report are as under:

“Fire could have caused in this case due to application of accelerant/fuel as smell of the same was detected in the foam pieces lying on the double bed. There was no electrical short

circuiting and hence fire due to electrical short circuiting is ruled out.”

Report of Chemistry Division of CFSL

35. Then we have the report of the Chemistry Division of the CFSL which is dated 4th March, 2015 (Ex. PW-6/B), which is again signed by PW-6. It refers to the testing done of Ex. B (the pair of partially burnt slippers), bunch of hairs, burnt foam pieces, Ex. C (partially burnt bed sheet, burnt pillows with cover, partially burnt foam mattress), Ex. D (plastic bottle with live bluish brown liquid, Ex. E (whitish black colour bunch of hairs, stated to be the scalp hair of the deceased), Ex. F (light brown colour cloth piece with blood thread (the ligature material), Ex. G (partially burnt embroider from colour *kurta*, Ex. H (scalp mop of the deceased) and Ex. I (body mop of the deceased). The result of the examination was as under:

- “8.1 The exhibits 8, C, F and G gave positive test for the presence of residues of Kerosene.
- 8.2 The exhibit D gave positive tests for the presence of Kerosene.
- 8.3 The exhibits E, H and I gave negative tests for the presence of residues of petroleum products.”

Chemical Examination report

36. Then we have the chemical examination report (Ex. PW-6/C) which tested four exhibits. Ex.1 was the visceral material (stomach with contents with pieces of small intestine), Ex.2 was the visceral material containing liver section, spleen and half of each kidney, Ex. 3 was the sample of preservative used with saturated solution of common salt and Ex. 4 was the

blood sample of the deceased. While Ex. 4 gave positive tests for presence of carbon monoxide, Ex.1, 2 and 3 gave negative tests for the presence of common poison.

Charge sheet

37. PW-26 prepared and filed the charge-sheet on 27th August, 2014. The key conclusion drawn by PW-26 in the said charge-sheet was that after the deceased returned from her walk, the Appellant first raped her in the outer room on the first floor of the house and then strangled her with a *chunni*. He then got scared and wanted to change the entire scenario having watched what happened in films and TV serials and, therefore, set the room on fire and then quietly came back into his own room. When he noticed that his own clothes were soiled, he took all of them and on the pretext of searching for the deceased, went to the S-Block and threw them into the dustbin there. Basically, the entire disclosure statement of the Appellant was made the very basis for the above conclusion.

38. The trial Court framed the charges against the Appellant as noticed hereinbefore vide order dated 24th September, 2014. The Appellant pleaded not guilty and claimed trial.

Trial

39. The prosecution examined 28 witnesses. The Court has already adverted to the deposition of PW-1, the doctor who examined the Appellant.

40. PW-2 was the son-in-law of the deceased. He was first examined-in-chief on 10th November 2014, but the further examination-in-chief was deferred for want of case property. For the next six months, nothing happened. The examination-in-chief recommenced on 7th May 2015. His cross-examination took place on 27th May 2015. The significant statements made by him now were that no CCTV camera was installed at the first floor, but there was one installed at the ground floor where the deceased used to live. He also stated that “police did not seize any footage of CCTV from the ground floor in my presence”. He mentioned that his family used to visit the first floor twice in a week to get it cleaned and maintained.

41. PW-2 stated that the deceased also had a driver Man Singh and a cook Bhuvan, who used to cook food for her and remained at the premises from 8 am to 5 pm. When they reached the spot on the night of 7th July 2014, the driver and cook were not present. It is significant that neither the driver Man Singh nor the cook Bhuvan were examined by the prosecution as PWs. PW-2 claimed to have made three or four calls on the mobile number of the deceased before leaving his house that night, but it was switched off. The other important facet of his cross-examination was his statement that:

“No key was seized by the police in my presence nor any search was made by the police. The deceased used to have duplicate key of the main door of our first floor with her which was given to her by my wife right from the time when the building was constructed. It is wrong to suggest that deceased did not have any such key nor it was given to her by my wife.”

42. PW-2 then spoke of the carpenter engaged by him and stated as under:

“The carpenter had left the house at about 6.30 PM on

06.07.2014. On 07.07.2014 the carpenter had finished the work. The carpenter had done polishing work of the table in the rear bedroom at the first floor. Before leaving the flat carpenter had cleaned the house.”

43. PW-2 also introduced another character into the scenario being a girl engaged for cleaning the house twice a week. This girl incidentally was not examined as PW.

“More so, a girl was also engaged for cleaning the house twice a week. On that day she had also cleaned our flat after carpenter left the house after taking the duplicate key from the deceased. This fact was told to me by my wife. She was not present at that time at the fiat.”

44. PW-2 further stated that “on 7th July 2014 when he left the flat at around 4.15 pm, he did not meet the deceased.”

45. On 27th May 2015, for the first time in his cross examination, which he did not speak about in his examination-in-chief, PW-2 introduced yet another character into the scenario namely ‘Security Guard Santosh’. This security guard would later be examined as PW-28 after PW-2 filed an application before the trial Court under Section 311 Cr PC at a stage when the final arguments had concluded. PW-2 stated on 27th May 2015 in his cross-examination as under:

“Security Guard Santosh had told me the facts which I have narrated in my examination In chief after about 40-45 minutes when we settled at the place of incident and after discovery of the body. I had also personally enquired from the Security Guard about the said facts. I had told the said facts to the police in the same night at about 1.00 AM. I do not know if police had made enquiry from the said guard.”

46. In fact, it is confirmed by learned APP that the statement of the said security guard was not recorded by the IO under Section 161 Cr PC and does not form part of the trial Court record. A person who claimed to be that security guard deposed for the first time when he was summoned as a PW after the arguments in the trial Court concluded.

47. It must also be mentioned here that the APP informed the Court that there is a mention in the case diary about this security guard having been spoken to by the IO. The failure of the IO to record his statement under Section 161 Cr PC and not to mention the security guard as one of the PWs in the charge-sheet accounts for a serious lapse in the investigation, which does not have a reasonable explanation. It must be noted here that there was no whisper of any statement by PW-28 in the charge-sheet filed by the IO in the trial Court on 27th August, 2014. PW-2 stated in his cross-examination on 27th May, 2015 that “police had not recorded my statement with regard to the facts narrated to me by the security guard”.

48. The other PWs examined included Raman Anand (PW-4), the brother of the deceased, who identified her body at the Safdarjung hospital mortuary. The other son-in-law of the deceased, who lived abroad, was examined as PW-14. He confirmed that on 7th July, 2014 at around 9/9.30 pm Indian Standard Time (‘IST’), he received a call from the Appellant, who informed him that the deceased had not returned from the park where she used to go for her evening walk. He then asked the Appellant why he was informing him so late, to which the Appellant stated that he had tried to locate the deceased first but was unable to do so. Thereafter, the wife of

PW-14 (the daughter of the deceased) also got confirmation of the same from the neighbour of the deceased. PW-14 confirmed that the Appellant had been employed by him through his friend to take care of the deceased.

Security Guard summoned

49. On going through the trial Court proceedings, it is seen that the final arguments commenced on 26th April, 2016. The arguments were then again heard on 24th May, 2016 and concluded. The proceedings of 19th July, 2016 read thus:

“19.07.2016

Present: Mohd. Iqrar, Ld. Addl. PP for the State
Accused in JC.

Written submissions filed on behalf of the complainant. Copy be supplied to the State and the accused.

The case is listed for orders on 06.08.2016.”

50. It is at that stage on 27th July, 2016 that the complainant appeared in person before the trial Court with the handwritten application, and this was in the absence of the APP or the counsel for the accused. The order passed on that date reads as under:

“27.07.2016

Present: Sh. _____(PW-2), complainant.

File taken up on an application moved on behalf of the complainant for summoning Santosh, Night Guard stationed at the property at the time of offence. It is stated that the IO had examined him during the investigation but did not cite them as witness though he is a material witness in this case. He can throw light on the circumstances of the present case. It is stated

that the complainant is a senior citizen made all our efforts to trace Santosh and now he has been located.

Issue notice of this application to the counsel for the accused.

Put up on 06.08.2016, the date already fixed.”

51. Therefore, at a stage when the matter had already been reserved for orders on the conclusion of the arguments, the above application of PW-2 was entertained by the trial Court and notice was issued in the absence of the Special PP and the Appellant. On 6th August, 2016, the learned trial Court Judge was on leave and the matter was then listed on 11th August, 2016. At this stage, the learned Special PP, Mr Ansari, supported the application. The Special PP now told the Court that the said witness could not be produced as he “was not traceable” and that although the case was listed for orders, an application under Section 311 Cr PC could be moved at any stage till the judgment is pronounced. The learned counsel for the Appellant stated that she had no objection and accordingly the application was allowed and PW-28 was summoned as a PW.

52. On 1st September, 2016, PW-28 was examined. He stated in his examination-in-chief that he was deputed by ‘Pratiksha Securities’, in Gurgaon, to work as a security guard at the premises and that he had worked there for about one month between June and July, 2014 and that on 7th July, 2014, he was working as such and his duty hours were from 8 pm to 8 am. According to him, whenever he would reach the premises for duty at around 8 pm, he used to ring the bell of the ground floor, where the deceased was residing and she would come out to the balcony. Sometimes,

she used to come downstairs and would ask him whether he wanted water, tea, bread, etc. The deceased used to mark his attendance for duty.

53. According to PW-28, on 7th July 2014 at around 7.50 pm, when he came for duty, he rang the bell of the deceased on the ground floor, but she did not come out and did not respond to the bell. While he was waiting and wondering what to do, PW-28 saw the Appellant coming downstairs hurriedly who told him:

"santosh tum aa gaye ho, jahan baithe ho baith jao, mataji abhi aram kar rahi, mai unhe bata dunga ki tum duty pe aa gaye ho"

54. PW-28 then said:

"Thereafter, the accused went upstairs. Accused is present in the Court today correctly identified by the witness). At that time, accused was looking strange and appeared to be scared and nervous. I did not see mataji on that day at all."

55. According to PW-28, after about an hour, the Appellant came downstairs from the premises but PW-28 could not state from which floor he came. The Appellant came to PW-28 and sat next to him. PW-28 stated that at the time, he looked quite nervous and started murmuring stating that the deceased had gone for her evening walk but had not returned. PW-28 then confronted the Appellant and said when he had first reached for duty, the Appellant had told him that the deceased was taking rest upstairs and now he was saying that she had not returned from her evening walk. The Appellant then got up and told PW-28 that he was going to inform the neighbour of the deceased.

56. PW-28 then spoke about the neighbour subsequently calling the police and four police officials reaching the premises, as well as the daughter and the son-in-law i.e. PW-2 also coming there. He then stated, “police did not make any enquiry nor recorded my statement.” He also stated that during the time when the Appellant was upstairs after he had reached for duty, he saw no one else neither did he talk to anyone up till the time the Appellant came back downstairs and sat next to him as mentioned above.

57. In his cross-examination on 17th September 2016, PW-28 claimed that the company that employed him, did not issue any I-card to him. He further stated:

“I do not have any documentary proof as to my employment with that company. The company did not get my police verification done when the company employed me as Security Guard. I left the job as I wanted to earn more. I was earlier in the profession of driver. I thought that I would earn more by driving. One of the reason of leaving the job was that such incident had happened.”

58. He also stated that the company had provided him with the uniform but had deducted the amount for it and so, he did not return it to the company. He received Rs.8,000/- in cash from the company. According to him, during the time from 8 pm to 11 pm when he was on duty, no one talked to him. He claimed not to have met PW-2 before coming to the Court and denied that he had come to the Court on the asking of PW-2 or that he was deposing falsely at his instance.

Statement of Appellant under Section 313 Cr PC

59. The statement of the Appellant under Section 313 Cr PC was first

recorded on 25th February, 2016 i.e. much before the examination of PW-28. He admitted as correct the following facts:

- (i) The deceased was the owner of the property.
- (ii) She was 81 years old.
- (iii) About 2/3 years ago, she had got the property reconstructed from a builder on collaboration.
- (iv) She was living on the ground floor.
- (v) She had gifted the ground floor to her daughter (the wife of PW-14) who was, at the time, living in America with her family.
- (vi) The first floor was gifted by the deceased to the wife of PW-2, her other daughter.
- (vii) The second floor was owned by the builder.
- (viii) The third floor was also owned by the deceased and she had rented the front portion of that flat to a company based in Gurgaon and the rear portion was in her possession.

60. In response to the second question whether the deceased had employed a carpenter on 6th July, 2014 and that work continued till 7th July, 2014, the Appellant denied it and stated, “she did not employ any carpenter”. He also admitted as correct that PW-2 had come to the premises at around 10 am. . However, he did not know the time when PW-2 had left. He admitted as correct that PW-3 was a neighbour and a close friend of the deceased and that at 9.15 pm, he had gone to PW-3 and told her that the deceased had not come back from her walk.

61. The whole set of circumstances was put to him as far as Question No.6

is concerned, that PW-3 had scolded him for informing her so late; she then asked her daughter to go with the Appellant to search for the deceased in the park; that PW-3 also made calls to her friends; that Ms Jolly, a common friend informed PW-3 that she had met the deceased at around 7 pm who told her that she was going home; that PW-3 informed the wife of PW-2 about the deceased being missing and also calling the police and about PW-3 receiving calls from the wife of PW-14.

62. The Appellant stated that all the above were correct except the fact that Mrs. Jolly, the common friend had informed PW-3 that she had met the deceased at around 7 pm, and that the deceased had informed her that she was going home. The Appellant admitted as correct about PW-2 and the daughter of the deceased rushing with their son to the premises; that it usually happened that the deceased used to leave for her evening walk by 6 pm and return by 7/7.30 pm. He also admitted as a matter of record that the PCR motorcycle reached the premises at 9.45 pm and the Beat Officer HC Sube Singh (PW-22) also reached there and then the Duty Officer at PS CR Park was informed and then the SHO came. The Appellant admitted that it was a matter of record that PW-2 found the two police officers on motorcycle when he reached there and that PW-2 asked his wife to check the ground floor to see if the deceased had fallen down since she was a patient of asthma.

63. The Appellant denied that the wife of PW-2 gave photographs of the deceased to the police. He admitted as correct that he was working as a domestic help with the deceased and that Bhuvan, another servant, would

cook food for her and would also remain from 10 am to 5 pm. He also admitted as correct that PW-2 asked his wife as well as the Appellant to check the roof of the house; that PW-2 had found the Appellant standing outside the house and PW-3 told PW-2 that it was the Appellant who informed her that the deceased had not returned from the evening walk; that the other daughter of the deceased had employed him to look after the deceased.

64. Q. No.17 and the answer given by him read as under:

“Q 17 It is further in evidence against you that PW2 then asked his wife to check the first floor as PW2 had thought that the deceased might have gone there to check water tap / switches which she was habit of checking and further at around 5 p.m., the first floor was clean by a part time domestic help. What have you to say?

Ans. It is correct that PW 2 asked his wife to check the first floor but it is incorrect that deceased was in the habit to check the water tap/switches of first floor. I do not know whether the first floor was cleaned at about 5.00 p.m.”

65. He admitted as correct that the minute the wife of PW-2 entered the flat on the first floor, she came rushing out stating that it was ‘on fire’. He admitted as correct that the door of the flat had an automatic lock and that it was opened by the wife of PW-2. He denied that one key of the said flat used to remain with the deceased.

66. Incidentally, it must be pointed out that this key, which according to the prosecution was with the deceased was never recovered and no attempts were made to even find out where it was. The Appellant denied having told

PW-2 that the deceased was lying on the bed. On how the deceased was found in the room, he stated that PW-26 reaching the spot, being informed by SI Virender that there was a dead body on the first floor, finding the body in burnt condition were all a matter of record. However, he added that

“No chunni or cloth like material was tied on the neck of the deceased. Neither the deceased was naked from bottom nor her salwar or panty were lying by the side of the bed.”

67. As for his disclosure statement (Ex. PW-2/K), the Appellant denied having made any such disclosure. He admitted that police interrogated him when they met him first on 7th July, 2014, and stated, “my signatures were obtained on some blank papers by the police.” On the recovery of the match box, knife and plastic bottle from his quarters, he denied such a recovery. He stated, “nothing was recovered at my instance.” He answered that the factum of the crime team coming there as well as his own medical examination and the taking of the exhibits in the course of such medical examination were all matters of record. He admitted that the wife of PW-2 was present during all this, but according to him, she did not sign any document in his presence.

68. The Appellant admitted as a matter of record the subsequent proceedings, including the shifting of the dead body to the hospital, then to the mortuary as well as the post-mortem. He admitted as correct that police remand was obtained but he was never interrogated and did not make the further disclosure statement (Ex.PW-28/E). He denied the recovery of T-shirt, pant and underwear from the dustbin in front of S-Block. He further stated:

“The recovery is planted upon me by the police officials as they have already taken the said clothes from my room before taking me into custody in the morning of 08.07.2014.”

69. Question Nos.43 to 46 concerning the security guard and the answers thereto read as under:

“43 It is in evidence against you that the security guard namely Santosh was also there when PW2 reached the spot. He was engaged by the third floor tenants of the deceased for the security of the building. What have you to say?

Ans. It is correct.

Q 44 It is in evidence against you that PW2 had also asked from the security guard Santosh if he had seen the mother-in-law PW2 returning to her place when he joined duty at about 8 p.m. as she used to return from the park at around 7:30 p.m. as Santosh also used to ring the bell of the first floor flat when he used to come to his duty and the deceased used to ask from her after coming out from the balcony if he needs anything that is tea / water etc. What have you to say?

Ans. It is correct that PW2 had also asked from the security guard Santosh if he had seen the mother-in-law PW2 returning to her place when he joined duty at about 8 p.m. It is incorrect that Santosh also used to ring the bell of the first floor flat when he used to come to his duty and the deceased used to ask from her, after coming out from the balcony if he needs anything that is tea / water etc.

Q 45 It is in evidence against you that Santosh told PW2 that when he came on duty at 8 p.m., he as usual rang the bell but she did not respond and that he had seen you coming down through stairs to the parking area where Santosh used to sit for duty. What have you to say?

Ans. It is incorrect.

Q 46 It is in evidence against you that Santosh also told PW2 "tum duty pai aaye ho, jahan baithe ho baith jao, mataji uppar hain, main unko bata doonga ki tum duty par aa gaye ho". What have you to say?

Ans. It is incorrect. I never told above said facts to Santosh."

70. According to the Appellant, he along with other domestic help was interrogated by the police during the period of investigation. Question No.51 and the answer thereto are also significant and read as under:

"Q 51 It is in evidence against you that when PW2 asked from you as to what you had done as the deceased was her grandmother's age, you then told without any remorse on your face "rape kiya hai". On hearing, PW2 was shocked. What have you to say?

Ans. It is incorrect. I did not say anything to PW-2. The said fact is concocted by PW-2."

71. In response to Q. No.61, he again denied having made any disclosure statement to the police or having got recovered the match box or plastic bottle containing kerosene or the T-shirt, pant and underwear. His answers to Q. Nos. 63, 64, 65 and 66, as given by him on 25th February, 2016 read as under:

"Q 63 Why this case is made against you?

Ans: The police officials could not investigate the case. They were under heavy pressure of their higher authorities and media to solve the case in time. I was living alone in the same building and was working in the house of the deceased for whole day. The police in order to dose the investigation of the case, in connivance with PW-2, falsely implicated me in this case. I have not committed any crime as alleged by the police.

Q.64 Why PWs deposed against you?

Ans. They are interested witnesses and have deposed under the influence of the IO.

Q. 65 Do you want to lead evidence in defence?

Ans. No.

Q. 66 Do you want to say anything else?

Ans. I am innocent. I have been falsely implicated by the police. I came around 7 pm on the ground floor from my servant quarter and when I could not find the deceased in the house, I informed the same to the neighbour and made search for the deceased. In the meanwhile, I informed the daughter of the deceased who is living in USA. I always cooperated the police officials during the investigation. I did not try to escape and remained present during the whole investigation. I never used to go in first floor nor I had any keys of the said floor.”

72. After the deposition of PW-28 was recorded, a supplementary statement of the Appellant under Section 313 Cr PC was recorded on 17th September, 2016. Therein, he denied having seen PW-28 at the premises as a security guard on duty. According to him, PW-28 never worked as a security guard there. He denied that he had had any conversation with PW-28 and claimed that he was in his room and sleeping. He denied that PW-28 had met PW-2 at 11 pm on 7th July, 2014. Question Nos. 12 and 13 in the supplementary statement and the answers thereto read as under:

“Q.12 Why PW28 has deposed against you?

Ans. He has been deposing at the instance of ____ (PW-2). He is an introduced witness.

Q.13 What else do you want to say in this case.

Ans: I am innocent. PW28 never remained posted as Security Guard at the aforesaid premises. He is an introduced witness and has deposed falsely at the instance of ____ (PW-2) to falsely implicate me in this case.

Q.14 Do you want to lead evidence in defence.

Ans: Yes.”

Defence evidence

73. The Appellant then examined himself as DW-1 pursuant to an application filed under Section 311 Cr PC, which was allowed on 6th October, 2016.

74. The Appellant's deposition in examination-in-chief was virtually his version of the incident about the deceased not returning from her walk till 8 pm, about his going to the ground floor to search for her, about his calling her on her mobile thereafter which was switched off, about his going to the third floor to search for her since he had a key of that flat, then going to the lady neighbour and informing her, then going to the park to search for the deceased, thereafter calling the deceased's daughter in USA, about the lady neighbour telephoning the wife of PW-2 and then the police officials coming there, about them going to the terrace to search for her, the police enquiring from PW-2 and his wife once they arrived about the flat on the first floor and then all of them going there and the wife of PW-2 opening the flat, which when opened was dark and there was smoke coming out.

75. In his cross-examination by the Special PP, the Appellant stated that he

did not know if the key of the first floor used to be with the deceased or that he was deliberately concealing this fact. He denied the suggestion that the deceased used to go to the first floor after it was cleaned up by the maid to see if some light was left switched on or the water tap was left on. On the aspect of the security guard, he stated as under:

“It is correct that I used to interact with that guard. He was working there as security guard when I had started working as a servant of *mataji*. It is wrong to suggest that when that guard came on duty, he asked me about *mataji* and I told him that "*Santosh tum aa gaye ho jahan baith te ho baith jao, mataji abhi aram kar rahi, main unhe bata dunga ki tum duty par aa gaye ho*". I cannot at what time the said guard came on duty on that day.

76. He further stated about the security guard as under:

“It is wrong to suggest that I told that guard that *mataji* was not present on either of the aforesaid flats. I do not know the name of that guard. It is wrong to suggest that the name of that guard is Santosh who had appeared in the Court and identified me being the servant of *mataji* or that I am deliberately concealing this fact. It is correct that in between time 8 to 9 p.m. that guard had also not gone to either of the flat nor any person from outside came in the building.”

77. On being asked specifically about the kerosene oil bottle, the Appellant stated “the police handed over me that bottle and asked me to keep the same in the kitchen.” According to him, there was a common kitchen for the four servant quarters in the parking area. He denied the suggestion that the deceased used to call for the kerosene oil to clean the machine or that it used to kept in the servant quarters or that he had used it to burn the body. He stated that there was no pipeline gas connection in his quarters and that

he was given a cylinder to cook food.

78. On 8th November, 2016, an application under Section 311 Cr PC was filed for recalling the Appellant (DW-1). This was allowed. The Appellant added that on the day of the incident, Bhuvan came to cook food at the ground floor flat and he Appellant himself went to sleep in servant quarters. The deceased used to call him to serve food to her, but on that date, she did not call him. He tried calling her on her telephone but as it did not connect, he went upstairs and found that at the time, the deceased was not there. The Appellant denied that he was improving his defence or concocting a false story about the presence of Bhuvan. He admitted as correct that Bhuvan used to come to cook food at 10 am but claimed that he did not know if he used to go back at 5 pm.

79. The final arguments thereafter took place on 1st December and 15th December, 2016.

Impugned judgment of the trial Court

80. The trial Court in its impugned judgment listed out what according to the trial Court were the circumstances that formed a complete chain which pointed unerringly to the guilt of the accused. In para 29 of the judgment, it was noted as under (names concealed by this Court):

“1. The deceased was an old lady aged about 81 years. She used to live alone at the ground floor of the house No. __, Greater Kailash-II, New Delhi. The accused was the full time servant of the deceased to take care of her. He was employed by her daughter namely __ who used to live in USA. The accused used to live in the servant quarter at the parking of the building.

2. The first floor was in the occupation of the younger daughter of the deceased namely ____ who lives with her family at Press Enclave, Saket. The front portion of the third floor was on rent to a company which had employed a Security Guard at the gate of the building and his duty hours were from 8.00 p.m to 8.00 a.m.

3. The deceased used to go for evening walk in the park near her house at about 5.30/6.00 p.m and come back at about 7/7.30 p.m.

4. On 07.07.2014 at about 5.30 p.m, the deceased as usual went for the evening walk in the park near her house but went missing.

5. The accused informed the daughter of the deceased namely ____ in USA and PW3 ____, her neighbour about the missing of the deceased at about 9.00/9.15 p.m and PW3 informed the another daughter of the deceased namely __, wife of PW2 about her missing, (information qua fictitious missing of the deceased to PW3 ____ that too at about 9.00 p.m though the deceased used to return from the park at about 7.30 p.m to thwart the detection of crime at an early stage and to create confusion.)

6. The dead body of the deceased was found in burnt condition in the bedroom on the first floor of the house No. S-93, Greater Kailash-II, New Delhi at about 10.00 p.m.

7. The deceased was raped before her death.

8. The death was homicidal not the natural one. The deceased was set on fire after her death by the offender with the intention to cause the evidence to disappear to screen himself from legal punishment.

9. The exclusive presence of the accused at the place of occurrence in the said building between 8.00 p.m to 9.00 p.m when the death had taken place. (no one except the accused

entered and came out from the ground floor and first floor of the building between 8.00 p.m to 9.00 p.m, the time when the death had taken place).

10. The conversation held between PW28 Security Guard Santosh and the accused coupled with his abnormal/unusual conduct of going upstairs at about 8.00 p.m and coming back downstairs at about 9.00 p.m after an hour which was the time when the offence took place.

(Meeting of the accused with the Security Guard PW28 when he came on duty at 8.00 p.m and rang the bell and his telling to the Security Guard not to disturb the deceased and stating that she was sleeping, he would inform the deceased about his coming. At about 9.00 p.m, he told the Security Guard that the deceased has yet not returned from the evening walk.)

11. Continuous presence of the accused at the scene of crime to give an appearance that he was not involved in the crime.

12. The disclosure statements of the accused and the recovery of the incriminating material from the possession and at the instance of the accused.

13. Contradictory and inconsistent statements by the accused with regard to the presence of the Security Guard PW28.

14. Motive of the murder."

81. The trial Court held circumstances 1 to 3 as proved. Even circumstances 4 and 5 were held to be proved on account of the testimonies of PWs. 2, 3 and 21 notwithstanding the failure of the IO to collect the CDRs of the mobile phone of the deceased despite the fact that the deceased had had a conversation with her relative at around 7.55 pm and the same could have confirmed if she had gone for her walk to the nearby park at around 5.30

pm, which was her usual time. The trial Court held that circumstance No.6 stood proved conclusively. According to the trial Court, in view of the testimony of PW-2 and with one key of the first floor remaining with the deceased:

“there was every possibility for the deceased going to the first floor to check the taps and the switches on the day of alleged incident after coming from the park.”

82. As regards circumstances No.7 and 8, the trial Court referred to the medical evidence and came to the conclusion that in view of the testimony of PW-24 and the testimonies of the scientific officers i.e. PWs-6 and 27:

“it is crystal clear that the deceased was first raped and then strangled to death.

83. The trial Court further observed in para 47 that after the deceased was strangled to death, the assailant cut pieces of the mattress and used kerosene oil to show that the death resulted due to fire on account of short-circuit but the CFSL report and the report of the fire officer ruled out that possibility. This showed that the body was set on fire after death. The prosecution had examined all witnesses to rule out possibility of tampering with the body or the material seized during investigation. The prolapse of the vaginal wall, the lacerated wound present over 6 o'clock position at the vaginal orifice along with extravasation of blood and reddish coloured bruise on the lateral wall of vagina on the right side was “suggestive of forcible sexual penetration.” PW-24 had stated that those injuries “could be due to penetration or penetrative attempt.” It was noted that “it is not necessary that every penetration would always result into discharge or emission of semen. Simple penetration would amount to rape as defined

under Section 375 IPC.” There were external post-mortem injuries which were not ante mortem and suggested that they were caused after the death of the deceased. The absence of soot particles in the trachea of the deceased was clearly suggestive of the fact that the burn injuries were caused after the death of the deceased. These facts showed that:

“the assailant after committing the rape and strangulating the deceased to death, in order to disappear the evidence, burnt the body using the kerosene oil. The presence of kerosene oil is also proved from the CFSL report Ex. PW 6/B.”

84. The trial Court noted that the testimony of PW-3 about Mrs. Jolly having met the deceased in the park at around 7 pm and the discovery of the body at about 10 pm clearly showed that the death had resulted after 7 pm and before 10 pm. It was thus proved that the deceased was raped before her death and the death was homicidal. The deceased was set on fire with the intention to cause evidence to disappear. The assailant wanted to screen himself from legal punishment. Consequently, circumstances 7 and 8 stood proved.

85. As regards circumstances 9 to 13, the trial Court came to the conclusion that:

- (i) The evidence showed that no one except the accused entered and came out of the ground floor and first floor of the building between 8 and 9 pm, the time the death had taken place.
- (ii) The conversation between the Appellant and PW-28 coupled with his abnormal conduct of going upstairs at 8 pm and coming downstairs at 9 pm, the continuous presence of the accused at the scene of crime to

give an appearance that he was not involved, the disclosure statements and recovery of incriminating material at the instance of the accused, the contradictory and inconsistent statements by the accused with regard to the presence of PW-28 all led to the conclusion that it was the Appellant who was guilty of the crime and that these circumstance stood proved by the prosecution. According to the trial Court, since the prosecution had established the exclusive presence of the Appellant during the period when the incident took place, the burden was on the Appellant to explain the circumstances.

Thus:

“If the person is last seen with the deceased, he must offer an explanation as to how and when he parted company with the deceased. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so, he must be held to have discharged the burden. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed upon him by section 106 of the Evidence Act, that itself provides an additional link in the chain of circumstances proved against him.”

86. The Appellant gave false replies; got recovered the kerosene oil, knife and match box which he used in the commission of the crime and, therefore, his false statement and total denial “completely show that it was he and only he who committed the said act.”

87. Although there were no public witnesses to the recoveries of the kerosene oil, knife and match box and there were no chance prints on the said articles, it was noted that “nothing can be inferred on the appreciation

of the testimony of the above witnesses (i.e. PWs-2 and 26) that the above articles were planted on the accused.” The place from where the recoveries were effected was in exclusive possession of the Appellant and no one else had access to that room. Therefore, it could not be said that it was a planted recovery. The fact that the deceased was set on fire after the murder to give a colour that she had died of burn injuries was proved by the said recoveries. The testimonies of PWs-2, 21, 26 and 28 and the medical and CFSL reports “proved the exclusive presence of the accused at the scene of the crime.” The failure of the CFSL reports to inculcate the Appellant was not fatal to the case of the prosecution.

88. The Appellant was capable of performing sexual intercourse under normal circumstances. In order to give a colour that the deceased had died due to fire, her body was set on fire using kerosene oil. Thus, the Appellant had tried to make the evidence disappear. He tried to create an illusion to the neighbour and the daughter of the deceased that he did not know anything “though everything was in his knowledge.” He was looking nervous after the incident as was evident from the testimony of PW-28. It was noted that “he also changed his statement from time to time which made his conduct highly suspect and his conduct as deposed by some of the prosecution witnesses does not fit in with the normal human conduct of a guilty person. By normal standards, this certainly is a very unusual conduct.” The trial Court held that the evidence of false explanation was relevant under Section 8 of the IEA but was of considerable importance when it was “given soon after the alleged occurrence and was apparently designed to give to the facts and appearance favourable to the accused.”

Accordingly, the trial Court held that circumstances 9 to 13 also stood proved.

89. As regards the motive for murder which was circumstance No.14, the trial Court observed that “no direct / circumstantial evidence came as to the motive of the accused to commit the said offence.” But as explained in ***Krishna Pillai Sree Kumar v State of Kerala AIR 1981 SC 1237*** it was not “a *sine qua non* for the success of the prosecution that the motive must be proved. So long as the other evidence was convincing, a conviction could be written even without proving the motive.” According to the trial Court, there was sufficient incriminating evidence which conclusively proved that “it was the accused and only the accused who did the said act.” There was no reasonable doubt, the benefit of which could be given to the Appellant. To avail such benefit, the doubt has to be “actual and substantive” and should not “be mere vague apprehensions.”

90. The conclusion of the trial Court was that the prosecution had proved that:

“it was the accused and only the accused who raped the deceased, strangled her to death and then set her body on fire causing the evidence of the offence disappear with an intention to screen himself from the legal punishment which are the foremost ingredients of the offences punishable u/s 376, 302 and 201 IPC.

91. The trial Court then proceeded to sentencing the Appellant in the manner indicated herein before by the separate order on sentence dated 21st February 2017.

92. The Appellant was represented before this Court, as he was in the trial Court, by a legal aid counsel. Before the trial Court, he was represented by Ms. Kavita Yadav, Advocate and for the State there was a Special PP Mr. A.T. Ansari. In this Court, Mr. S.B. Dandapani, on the panel of the Delhi High Court Legal Services Committee, appeared on behalf of the Appellant. The State was represented by Mr. Rajesh Mahajan, learned Addl. Standing Counsel and Mr. Hirein Sharma, learned APP for State. Written submissions have been filed both by Mr. Dandapani and the counsel for the State. Separate written submissions have been filed on behalf of the 'Complainant' by Mr. Amit Khemka, Advocate.

Law relating to circumstantial evidence

93. At the outset, it must be noticed that this is a case based on circumstantial evidence. 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.”

94. 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.”

Circumstances not disputed

95. Although the trial Court has listed out as many as 14 circumstances in its impugned judgment, many of the circumstances are actually undisputed facts appearing from the record. In other words, the following ‘circumstances’ have not been disputed, even by the Appellant as was evident from his answers under Section 313 Cr PC:

- (i) The deceased, aged 81, lived alone in the ground floor of the house at GK-2.
- (ii) The Appellant was her full time servant. He had been employed by the daughter of the deceased whose husband is PW-14, both of whom lived in USA.
- (iii) The Appellant used to live in the servant’s quarter which was in the parking area of the building.
- (iv) The flat on the first floor of the building had been gifted by the deceased to her other daughter who lived in Delhi whose husband was PW-2.
- (v) The flat on the ground floor of the building, which had actually been gifted to the daughter who lived in the USA, was occupied by the deceased. The deceased herself retained the flat on the third floor, the front portion of which was given on lease to a company

and the rear portion of which was in the possession of the deceased.

- (vi) On 6th and 7th July 2014 a carpenter had been engaged by PW-2 to work in the flat on the first floor. That carpenter worked in the said flat till around 4.15 pm on 8th July 2014. PW-2 was also present supervising his work, and had paid the carpenter before leaving, without meeting the deceased that evening.
- (vii) The deceased left for her walk as usual at around 5.30 p.m. but after that was not seen alive.
- (viii) At around 9.15 pm, the Appellant went to the house of the neighbour PW-3 informing her of the fact that the deceased had not returned from her walk.
- (ix) Around the same time the Appellant also called the daughter of the deceased and her husband (PW-14) in the USA informing them of the same fact.
- (x) PW-3 called the police and they arrived there soon thereafter.

96. What also stands clearly established from the evidence is that the deceased died a homicidal death but not due to the burn injuries. The evidence of PW-24 is categorical that of all the six injuries noticed by him, the injury at Sl.no.6 was suggestive of “ligature strangulation post death” and that injuries 5 and 6 were post-mortem in nature. Injuries 1 to 3 (the injuries on the neck and lip) were sufficient to cause death in the ordinary course of nature, collectively.

Circumstance of last seen

97. Reconstructing the events of the evening of 7th July 2014, one question that arises is whether there is unimpeachable evidence to show, as concluded by the trial Court, that it is the Appellant who was last seen with the deceased? In other words does the evidence show that there was “exclusive presence” of the accused at the place of occurrence in the building between 8 pm to 10 pm when the death took place?

98. If one were to carefully reconstruct the sequence of events on the evening of 7th July 2014 and in particular, with reference to the place where the dead body was found, it is not in dispute that the body was found in the flat on the first floor of the building. What emerges from the evidence is that the deceased was not otherwise residing on first floor flat. She was residing on the ground floor flat. The key to the first floor flat was available with the owner of that flat i.e. the daughter of the deceased, the wife of PW-2. Although the prosecution has repeatedly stressed that there was a duplicate key of the flat available with the deceased, the police failed to investigate where this duplicate key was. Nothing was said by the Appellant about this duplicate key of the flat being available with the deceased or with him in the two disclosure statements made by him i.e. Ex.2/K and Ex.21/E. There were no finger prints or even chance prints on the door lock or anything to do with the door of the flat on the first floor. Why this was not examined is not known but the Court considers this to be a serious lapse in the investigation.

99. The evidence also shows that the wife of PW-2 opened the door of that

flat with the key that she had brought along with her. There was no forced entry into the room at all.

100. The last person to enter the flat earlier to the deceased was PW-2, who had engaged a carpenter to carry out some work there. That carpenter worked in the flat on the first floor till about 4.15 pm. PW-2 paid him, locked the door of the flat, left for the Parliament House library and thereafter returned home at about 7.30 pm. The carpenter was not examined as a PW.

101. With the dead body of the deceased having been found inside the flat, in order to get to the first step in the chain of circumstances, the prosecution had to show that not only had the Appellant entered the flat earlier but most importantly that the deceased had also entered the flat along with the Appellant. Here the narrative of the prosecution is that by giving some excuse (which is not clear), the Appellant took the deceased to the first floor flat after she returned from her walk. There is absolutely no evidence of this, not even in the testimony of the security guard (PW-28). The prosecution is, therefore, unable to explain how the deceased reached the locked flat of the first floor without the flat actually being opened by anyone.

102. The Court would like to stress on this point because it has not emerged even in the disclosure statements of the Appellant that he took the duplicate key of the flat when it was purportedly returned by a domestic help engaged by the deceased to clean the flat. This has emerged only in the evidence of

PW-2 but the domestic help has not been examined. PW-2 himself stated “no key were seized by the police in my presence nor any search was made by the police.” He simply stated that the deceased “used to have a duplicate key which was given to her by the wife of PW-2”, of which there is no evidence. Significantly, the wife of PW-2 who used her own key to open the flat and to find the deceased in a burnt condition was not examined as a prosecution witness.

103. The Court repeatedly asked counsel for the prosecution if there is any explanation as to how the Appellant entered the first floor flat and more importantly how he would have got the deceased into it. Without any proof that the deceased had a duplicate, without locating the duplicate key and without any disclosure by the Appellant that he used the duplicate key and then threw it away, this part of the case remains unproved by the prosecution.

Discovery of a 'mental fact'?

104. The case of the prosecution is that the Appellant who was in the servant's quarter somehow took the deceased to the first floor flat and once the deceased and the Appellant were inside the flat, he forcibly committed rape upon her. In this context, it requires to be noticed that a new argument was developed before this Court by Mr. Mahajan. According to him the disclosure made by the Appellant while in custody to the police was that he had '*sharirik sambandh*' (physical sexual intercourse) with the deceased can be construed as a statement leading to the discovery of 'mental fact' which was not known to the police earlier and came to their knowledge for

the first time when such disclosure was made on 8th July 2014. The precise formulation of this point by Mr. Mahajan, as repeated by him several times in Court, and as set out in the written submissions reads as under:

“This knowledge and mental awareness of the accused that deceased was subjected to ‘*sharirik sambandh*’ or physical relations/sexual contact becomes admissible u/s 27 of Indian Evidence Act, as it leads to a ‘fact discovered’ in view of the case law referred to hereinabove. As laid down in the cited cases, fact referred to in section 27 includes a mental fact as defined in section 3 IEA.”

105. In support of the proposition that this is a mental fact which was discovered by the police, he relies on the decisions in *Pulukuri Kotaya v. AIR 1947 PC 67*; *Mohd. Inayatulla v. State of Maharashtra (1976) 1 SCC 828*, *State of NCT of Delhi v. Navjot Sandhu (2005) 11 SCC 600*, *State of Maharashtra v. Damu (2000) 6 SCC 269*, *Pandurang Kalu Patel v. State of Maharashtra (2002) 2 SCC 490*, *Mehboob Ali v. State of Rajasthan (2016) 14 SCC 640* and recently *Charandas Swami v. State of Gujarat (2017) 7 SCC 177*. In para 3.9.1 of the written submissions, it is set out in bold and underlined as under:

“The deceased was subjected to “*sharirik sambandh*” was a ‘fact discovered’ pursuant to the information given by accused in his disclosure statement made on 8.7.2014. How a person not involved in the offence would be privy to such information, unless he had exclusive knowledge and mental awareness of the said fact.”

106. It is a settled position in law that statements that are self incriminating and made by an accused while in custody are inadmissible in evidence being hit by Section 25 and Section 26 of the Indian Evidence Act, 1872 (IEA). Any statement made by an accused in police custody which relates to his culpability in the commission of crime is obviously self-incriminating

and therefore inadmissible. Section 27 only permits so much of the fact that is discovered in consequence of information received from a person of an offence, while in custody of a police officer “as relates distinctly to the facts thereby discovered.”

107. In the present case, at the time when the so called disclosure was made by the Appellant, he was already in police custody. He was arrested at 7.30 pm on 8th July 2014. It is only thereafter that his disclosure statement was recorded. The question is whether the portion of the disclosure statement where the Appellant has incriminated himself about having had physical sexual intercourse with the deceased can actually be read as an admissible portion of his statement under Section 27 of the IEA. It must be understood that the charge against the Appellant is for committing the offence of rape punishable under Section 376 IPC. Relevant to that charge, the above statement purportedly made by the Appellant as part of his disclosure has been sought to be shown as admissible under Section 27 of the IEA by re-categorising it as a discovery by the prosecution of a ‘mental fact’, of which the Appellant had ‘exclusive knowledge’. It will be recalled that the Appellant has denied making any such disclosure either to PW-2 or to the police.

108. At this juncture it must be pointed out that even the trial Court has not based its conclusions as to the commission of rape by the Appellant on such discovery of ‘mental fact’ or held it to be admissible under Section 27 of IEA and rightly so because no such arguments were advanced before the trial Court. It is another matter that neither the medical nor forensic

evidence has in fact substantiated this so-called disclosure by the Appellant, that is, of having had actual physical sexual intercourse with the deceased.

109. The Court fails to understand how this portion of the Appellant's disclosure could at all be relied upon as it is clearly inadmissible in evidence. This so-called disclosure by the Appellant of the commission of crime is clearly hit by Sections 25 and 26 IEA and ought not at all be referred to by either the trial Court or this Court. However, in order to deal with the argument of Mr. Mahajan, even if the Court were to peruse the disclosure, it becomes apparent that Mr Mahajan is selectively reading the so-called disclosure. It talks about the Appellant having physical intercourse with the deceased and also the fact that in that process, he ejaculated on the bed sheet itself. It will be recalled that the forensic reports are clear that no semen was found on the bed sheet. No semen or even DNA of the Appellant could be found in the several bodily swabs taken from the deceased. In fact even the trial Court appears to have overlooked these crucial aspects.

110. The trial Court has referred to injury No.4 of the post-mortem and the fact that since there was a prolapse of the posterior vaginal wall, injury No.4 was suggestive of "forcible sexual penetration". It was then pointed out that PW-24 had noted that that injury could be "due to penetration or penetrative attempt." The trial Court has overlooked, as has Mr. Mahajan, the full answer given by PW-24 in his cross-examination which reads as under:

"The injuries which have been mentioned in the post mortem report could be due to penetration or penetrative attempt. The injuries can

also be possible if a blunt object is inflicted forcefully. Possibility of injuries on the person of the assailant can be there if the blunt object is inflicted force fully."

111. The above question became important because of the FSL report which ruled out the presence of any human semen on any of the exhibits which included not only the vaginal and anal swabs of the victim but even her clothes, the clothes of the Appellant and the bed sheets. DNA profile was generated from exhibits D-1 (bed sheet), F (peri-anal swab), G (high vaginal swab), H (low vaginal swab) and I (vaginal mop) but these very exhibits "did not yield male fraction DNA for analysis." Likewise, none of the other exhibits which included the clothes of the Appellant and the clothes of the deceased yielded any DNA. None of the other exhibits i.e. burnt white underwear of the deceased (D2), her green coloured *salwar* (D3), her anal swab (E), nail clippings of the right side of the deceased (J1), nail clippings of the left side of the deceased (J2), the Appellant's underwear (L), his pubic hair (M), his penile swab (N), his control swab (O) and his clothes i.e. his pants (R1), his half sleeved T-shirt (R2) and his underwear (R3) could yield DNA analysis. Incidentally, there is no semen stain on any of the articles. This is extremely significant as a piece of evidence as the presence of either the DNA of the Appellant or a semen stain on any of these articles would have amounted to clinching evidence of the presence of the Appellant in the room and of his having committed penetrative sexual assault on the deceased. That would also have been consistent with his so called disclosure statement, which is not the case at all.

112. The doctor's reply that the injury to the vaginal area was possible if a blunt object was inflicted forcefully was not further investigated by the prosecution at all. There was no such blunt object found anywhere near the body which contained the DNA of the deceased. It must be recalled that the accused was present at the spot throughout whilst the police was there. At no point in time did he leave the spot to go anywhere after PW-2 and his wife arrived there. His remaining there throughout is not the natural conduct of a person accused of an offence and that too of this nature.

113. This entire aspect of the medical and forensic evidence not supporting the case of the prosecution about the involvement of the Appellant in either having physical sexual intercourse or sexually assaulting the deceased with any object has sought to be brushed aside by the trial Court in the following lines:

“It is true that the exhibits of the deceased and her clothes on DNA analysis negate the presence of the semen of the assailant in the vaginal slides of the deceased but it is not out of context to mention that it is not necessary that every penetration would always result into discharge or emission of semen. Simple penetration would amount to rape as defined u/s 375 IPC. The injuries reported in the post mortem report clearly suggest that the deceased was first raped and then strangled to death.”

114. There is no evidence to support the above conclusion of the trial Court. There is no evidence to suggest that there was any 'simple penetration' of the deceased by the Appellant either by himself or any object. The injuries in the post-mortem report suggest injuries to vaginal area but not to the fact that the deceased was in fact 'raped' by the Appellant. PW-2 in his deposition stated that the Appellant purportedly told them that he had

committed rape and in fact used the English word 'rape' and that PW-2 and his wife were shocked at his usage of the same. The Appellant of course denied the assertion of PW-2 as to the language used by him by saying that this was a complete concoction by PW-2. In fact, the evidence of PW-2, which will be discussed in detail shortly hereinafter, shows that this was a major improvement that PW-2 made for the first time in Court six months after his examination in chief where he made no mention of it. Since PW-2 made no such statement to the police, there was no mention of it in the charge sheet either. Further, if at all this was to be treated as some kind of an extra-judicial confession, the settled legal position is that it had to be corroborated by other evidence which in a case like this would be the medical and forensic evidence, neither of which connected the Appellant to the crime.

115. It must also be noticed here that the Appellant was medically examined. There was no injury mark found around his genitals. If he did in fact ejaculate on the bed sheet, as purportedly disclosed by him (Ex.PW-2/K), the bed sheet at least should have had a semen stain or the DNA of the Appellant, neither of which has been established in the report of the FSL.

116. It is in the above background that one has to further examine the submission of Mr. Mahajan regarding Section 27 of the IEA. Before beginning to discuss the case law cited by Mr. Mahajan, the Court would like to note that as far as the trial Court is concerned, the application of Section 27 IEA has been dealt with very differently. It has been used only

in the context of the Appellant having got recovered the knife, the kerosene oil bottle and the match box (para 66 of the impugned judgment). It was not in connection with the discovery of a mental fact, which was not known to the investigating agency prior thereto, as is sought to be asserted by Mr. Mahajan.

117. The other aspect that the Court would like to advert to here is that the injuries suffered by the deceased around her vagina were noticed by PW-24 when he undertook the post-mortem on 10th July 2014 at 12 noon. This fact that she suffered a lacerated wound at the vaginal orifice was not something that would not have been discovered but for the disclosure made by the Appellant. If this disclosure which is self-incriminating is itself not admissible in evidence, then the question about the Appellant not having such information unless he was himself involved in the offence simply does not arise. This so-called disclosure made by the Appellant while in police custody which is self-incriminating, is legally impermissible to be admitted as evidence and it cannot be made admissible by making it appear as the discovery of a 'mental fact'.

118. None of the decisions cited by Mr. Mahajan in fact support such a proposition dealing with the earlier preposition in ***Pulukuri Kotayya*** (*supra*). In that case, the portion of the disclosure made by the accused regarding his culpability was inadmissible. Only the information supplied by him that the knife used in the commission of the offence was concealed in the roof of his house, which fact could not otherwise have been discovered by the police, was held to be admissible. In the present case, the

fact that the deceased was possibly assaulted in her vaginal area was a fact that would certainly have been and in fact was, discovered at the time of the post-mortem. This was not a fact exclusively within the knowledge of the Appellant. He was not in control or possession of the dead body of the deceased once it was discovered.

119. Again, in *Mohd. Inayatulla* (*supra*), while it was held that the fact discovered was not restricted to physical or material fact which can be perceived by the senses but also included mental fact, the circumstances were entirely different. There, three drums containing chemicals were carried away from the premises of the Bombay Trust in a car. A case of theft was registered. The gate keeper is said to have noted the registration number of the car, on the basis of which the accused was arrested. He is alleged to have confessed that “I will tell the place of deposit of the three chemical drums which I took out from the Haji Bunder on 1st August.” Applying Section 27, the threefold fact discovered was (a) the stolen chemical drums, (b) the place of recovery, and (c) the Appellant’s knowledge of such deposit. Splitting the statement as required under Section 27, only the first part of the statement i.e. “I will tell the place of deposit of the three chemical drums” was held to be the immediate and direct cause of the fact discovered and only that portion was held admissible under Section 27. The rest of the statement, namely, “which I took out from the Haji Bunder on 1st August”, constituted only the past history of the drums or their theft by the accused; it was not the distinct and proximate cause of the discovery and had to be ruled out of evidence altogether.

120. Applying the above principle to the instant case, the discovery of the deceased having been sexually assaulted was not made pursuant to the disclosure by the Appellant. It was a fact discovered during the post-mortem of the deceased which in any event would have revealed that fact irrespective of whether the Appellant made such disclosure or not. It is not even the case of the prosecution that the doctors were specifically told that the Appellant had made this disclosure and, therefore, they should carry out tests to find out whether the deceased was sexually assaulted and that only due to this disclosure; the lacerated wound around the vagina of the deceased was discovered. Therefore, this whole application of Section 27 IEA in this context is wholly misconceived. It is seeking to make admissible what is plainly inadmissible as evidence. The decision in ***Mohd. Inayatulla*** is, therefore, of absolutely no assistance to the case of the prosecution.

121. The Supreme Court in ***Mohd. Inayatulla*** explained what it meant by “distinctly” because only so much of the information as relates “distinctly to the fact thereby discovered” is admissible. This was interpreted as meaning “directly, indubitably, strictly, unmistakably.” The information referred to must be the “direct and immediate cause of the discovery”. In the present case, the so-called discovery fails these tests.

122. Then we have the decision of the Supreme Court in ***State of Maharashtra v. Damu*** (*supra*). The confession there led to the discovery of a fact concerning “the place from which the object was produced, the knowledge of the accused as to it.” There the disclosure led to the recovery

of the dead body from the canal. It was clearly noticed that recovery was “pursuant to and subsequent to obtaining the information” and had that information not been available “there would have not been any recovery of any fact at all.” The Court, therefore, fails to appreciate how the said decision could apply to the facts of the present case.

123. Turning next to the decision in ***Mehboob Ali v. State of Rajasthan*** (*supra*), it was observed in that case “for application of Section 27 of Evidence Act, admissible portion of confessional statement has to be found as to a fact which were the immediate cause of the discovery, only that would be part of legal evidence and not the rest. In a statement if something new is discovered or recovered from the accused which was not in the knowledge of the police before disclosure statement of the accused is recorded, is admissible in the evidence.” There, on the disclosure of the Appellant, the co-accused was arrested. The fact of the co-accused dealing in forged currency notes was not in the knowledge of the police. Statement of both accused led to the discovery of the fact and arrest of the co-accused not previously known to the police. It was held that the information furnished by the accused persons was admissible as it led to the identification and arrest of that co-accused and from his possession fake currency notes were recovered. Again, the Court fails to appreciate how this decision can be of any assistance to the prosecution.

124. Then we have the decision in ***Pandurang Kalu Patel v. State of Maharashtra*** (*supra*) where the above well known principles were reiterated. It was held that information regarding concealing of the article of

the crime does not lead to the discovery of the article but to the fact that the article was concealed at the indicated place to the knowledge of the accused. This was only a further explanation of the ratio in *Pulukuri Kotaya* (*supra*). In the present case, it was not the disclosure by the Appellant of the commission of rape which distinctly led to the discovery of the fact of the deceased being raped. In fact, the discovery was not of that fact but the fact that there was forcible sexual assault on the deceased which in any event would have been discovered as a result of the post-mortem by PW-24. Therefore, this did not distinctly relate to the discovery of that fact.

125. In *Charandas Swami v. State of Gujarat* (*supra*), the disclosure made by accused was about the location where the dead body of the deceased was dumped by him which was within his exclusive personal knowledge. Only that portion of his disclosure regarding the place where the dead body was dumped, and not that he had dumped it, was held to be admissible. This was because it was only the Appellant who had exclusive knowledge about the place of commission of the crime and about the location of the body and no such discovery or recovery of dead body would have been made but for such disclosure. Subsequently, the medical examination confirmed that the dead body recovered was that of the deceased. The facts in the present case are entirely different. The Court is, therefore, unable to agree with Mr. Mahajan that in the present case the disclosure made by the Appellant about his having had physical sexual intercourse with the deceased led to the discovery of the 'mental fact' pertaining to the same and was, therefore, admissible in evidence.

126. Mr. Mahajan in his written submissions contends that the deceased being subjected to '*sharirik sambandh*' was confirmed by the CFSL report, which mentioned that blood was detected on Exhibits D-1, E, F, G, H and I which were the bed sheet, anal swab of the deceased, pre anal swab of the deceased, the high vaginal swab, low vaginal swab and vaginal mop of the deceased respectively. He then shifts his stand by stating "finding of blood in vaginal and anal swabs of an 81 year old lady corroborated the post-mortem finding regarding sexual contact with the deceased."

127. When the Appellant purportedly made a disclosure about '*sharirik sambandh*', he was supposed to be talking of physical sexual intercourse and not about using any blunt object for forcible sexual penetration. In the absence of any semen in any of the above samples, the question of physical sexual penetration by the Appellant with the deceased was simply ruled out. Further, the Appellant is supposed to have disclosed about having ejaculated on the bed sheet as a continuation of his physical sexual intercourse with the deceased. That was also completely ruled out by the FSL report. It is, therefore, not understood how the mere finding of blood on the above exhibits, which again was only the blood of the deceased herself, can corroborate any act of the Appellant as regards physical sexual penetration of the deceased.

128. What should not be forgotten is that it was incumbent upon the prosecution to connect the Appellant with the crime and not simply prove that a crime was committed. In other words, while the medical evidence and the forensic evidence might show that a crime was committed with the

deceased, it is not enough to bring the Appellant into the picture and hold him guilty of the same. It had to be conclusively shown that it was the Appellant and the Appellant alone who committed the crime. The medical and forensic evidence fails on this test.

129. In the written submissions of the complainant, it is stated that the presence of blood on the above exhibits “clearly shows that as a result of rape the blood had oozed out of the vagina of the victim”. This is not a matter for conjecture or surmise. This is a matter for expert evidence. What PW-24 says is that the injuries were possible by using a blunt force object and not as a result of any physical rape of the victim. The so-called admission by the accused in his Section 313 statement that the injury at Sl.no.4 suggests “forcible penetration” is neither here nor there. The observation by the trial Court that “it is not necessary that every penetration would always result in discharge or emission of semen” overlooks the so-called part of the disclosure made by the Appellant where he apparently stated that after having forcible sexual intercourse with the deceased, he in fact ejaculated on the bed sheet. The complainant seeks to explain this away by saying that since the bed sheet was found burnt “it is quite possible that traces of DNA or semen were burnt out together with the bed sheet”. This is again a surmise and conjecture but does not lead to linking the Appellant with the crime. None of the above evidence conclusively links the Appellant with the crime and that is a point not addressed by the complainant or Mr. Mahajan in their respective written submissions.

130. According to Mr. Mahajan, because the Appellant ejaculated on the

bed itself, it explained why no semen could be detected on the clothes of the deceased. This is again a matter of conjecture. The smegma of the Appellant was also collected and there was no DNA of the victim on that smegma. The clothes of the Appellant or even the underwear of the deceased did not indicate any presence of semen. There is nothing in the narration of the prosecution about the Appellant, after allegedly having committed the crime, of going and washing himself or having had a bath to remove any traces of the commission by him of the crime. It must be remembered that he was present at the spot throughout and after his arrest was taken away for medical examination within 24 hours. Consequently, the Court is unable to appreciate the submission that because the bed sheet was partially burnt, it could be a reason for not finding semen on the bed sheet. The submission of Mr Mahajan that “once sexual contact with the deceased was conclusively established through post-mortem and CFSL report” is not based on the evidence on record. Neither the CFSL report nor the post-mortem conclusively establishes that it was the Appellant who had any physical sexual contact with the deceased.

Circumstance of burning of dead body

131. Another circumstance which is sought to be proved against the Appellant is his burning the body by using the kerosene oil kept in his room which he allegedly got recovered pursuant to a disclosure statement made by him. The witnesses to the above recovery were PW-2 and his wife (who was not examined). PW-2 for reasons to be disclosed hereafter is neither a truthful nor a reliable witness. He seems to be interested in the outcome of the case. Many of his statements have not been corroborated either by the

forensic or the medical evidence and the other evidence on record.

132. While it is true that the report of the Fire Department rules out the possibility of the fire having been caused due to a short circuit and that the assailant did attempt to burn the body with kerosene, the Court is not convinced that the discovery of these objects made from the room of the Appellant pursuant to his disclosure was conclusively proved, particularly since there were no chance prints or finger prints on the plastic bottle of kerosene which were looked for by the investigating agency. There was no burnt match stick found. A plastic bottle of kerosene and a match box are very common objects. Again, the knife which was purportedly used to slash the mattress at various points, when tested by the FSL, did not show any traces which suggested that it was the same knife that could have been used to cut the mattress or that those slashes could have been caused by it. A knife again is a very common object used in every kitchen. With these common objects being recovered from the room of the accused while he was in custody of the police, the possibility of these objects being planted just to make it appear that it was the accused who used the kerosene to burn the dead body should not be easily disregarded, particularly because the circumstances need to form a complete chain and if the earlier links in the chain have not been conclusively proved, intermediate links being proved would not advance the case of the prosecution.

133. Without the prosecution conclusively proving that it was only the Appellant who was exclusively present in the building and that it was him alone who was present in the room on the first floor with the deceased at

the relevant time, this discovery of the plastic bottle with some kerosene and a match box from the room of the Appellant is really not convincing as a clinching circumstance at all.

134. It is from this circumstance that the other circumstance about the Appellant trying to destroy the evidence and, therefore, the post crime conduct pointing further to his guilt, is sought to be drawn.

Evidence of PW-28

135. On the aspect of the Appellant being the person exclusively present with the deceased at the relevant time, the evidence of PW-28, projected by PW-2 as the same security guard he met on the night of the incident, becomes very important for the prosecution. It is important at this stage, therefore, to discuss in detail the evidence of PW-28.

136. As already noticed, PW-28 is supposed to be a security guard who was apparently questioned by the police as was seen from the noting in the case diary. However, PW-26, the IO, does not speak about making any enquiry from a security guard. PW-28 himself states that no questions were ever asked to him by the police. This is not, therefore, corroborated by the entry made in the case diary. The trial Court appears to have been carried away by the case diary entry and referred to Section 172 (2) Cr PC to hold that it could refer to the case diary to aid it in the trial. Where no statement of the witness is recorded under Section 161 Cr PC, no such fact is mentioned in the charge-sheet, and it is not relied upon by the prosecution in support of its charges against the accused, and it is not tendered with the charge-sheet

as a relied upon document, the Court finds it difficult to agree with the trial court that by merely referring to the case diary, a trial Court can use an entry therein as evidence against an accused in a criminal trial dealing with serious offences.

137. The circumstances under which the application of PW-2 (and not even the prosecution) under Section 311 Cr PC was made, after the arguments had concluded and order was reserved, makes it highly suspicious. It is to be noted that the Appellant certainly did not confirm that he was the same security guard. His subsequent statements under Section 313 Cr PC make it apparent that the security guard at the building was not the security guard who was examined in Court. The trial Court has unfortunately read the evidence of the Appellant as showing him to be inconsistent in his replies and therefore, shifting stands which led the trial court to conclude that his conduct was strange.

138. What is evident though is the considerable time gap in the examination of PW-2 being used by PW-2 to bring up a new element into the case of there being a security guard at the building who was also present there throughout. It is recalled that PW-2 himself did not mention about having talked to any security guard in his examination-in-chief. It was only after the long gap of over six months year when his examination in chief resumed that PW-2 disclosed about his having had a conversation with the security guard.

139. When PW-28 finally appeared in the trial Court, he had no documents

to show that he had in fact been employed by an agency in Gurgaon to be a security guard at the building. He was not identified by any of the other occupants of the building or even the neighbours, including PW-3. There was, therefore, nothing to show that the person who appeared as PW-28 was the same person who was the security guard of the building at the time of the incident, who disappeared after the incident on 7th July 2014 and apparently went untraceable, but then miraculously again reappeared in September 2016, when he was examined in the trial Court.

140. The trial Court erred in basing its conclusions on the evidence of PW-28. It also erred in holding that by looking to the case diary, it could take judicial notice of the entries therein and that it “clearly proves the presence of PW-28 on the spot on that date.” On the other hand, this raised serious doubts on the quality of investigation. Why did the IO not mention the presence of a security guard; why did he not record the statement of the security guard under Section 161 Cr PC? How is it possible to test the veracity of the version of such security guard if he is not able to show that he was in fact employed at the building in question at the relevant time?

141. The Court finds the evidence of PW-28 to be unreliable and untrustworthy, particularly since he speaks for the first time in the Court without his statement ever having come on record earlier. It is only through PW-28 that it was sought to be established that the Appellant was in and around the place and was behaving strangely and speaking inconsistently. If one takes PW-28 out of the picture, there is nothing to show that the Appellant was present anywhere near or in the room on the first floor of the

building where the deceased was ultimately found.

142. The Court is, therefore, not convinced that PW-28 can be relied upon to return the finding that it was the Appellant who was exclusively in the vicinity of the place where the dead body was found and that there was no one else who had entered the building between 6 and 8 pm when the occurrence allegedly happened.

143. Incidentally, the post-mortem report does not confirm that this was the time period during which the incident occurred; it in fact contra indicates it as the 'time since death' in the post mortem report is noted as 'about 2-3 days'.

144. The conduct of the accused also contra indicates the conclusions drawn by the trial Court about his guilt. The Appellant would not have taken the trouble to call the neighbour (PW-3) and also to call even the daughter of the deceased in the US who had in fact employed him and inform them about the deceased having gone missing. He would not have remained present at the spot throughout, in the vicinity of PW-2 and his wife. This is certainly not the conduct of a person who has committed such a serious crime. It is strange that despite noticing these facts, the trial Court used it against the Appellant to say that since this conduct was unusual, he must be the person who is guilty.

145. Therefore, in the chain of circumstances, what according to this Court the prosecution has failed to prove is as under:

- (i) That it was the Appellant who was exclusively found in and around the place where the dead body was found or even at the time of occurrence.
- (ii) That it was the Appellant who took the deceased to the first floor and once the deceased led herself into the flat using the duplicate key.
- (iii) That it was he who committed forcible rape upon her or penetrated her forcibly with an object.
- (iv) That after committing such rape he burnt the body by going down to his room, bringing some kerosene and then pouring the kerosene on the deceased and setting her on fire and then coming out of the room.
- (v) That the deceased was in fact subjected to physical sexual intercourse by the Appellant.

146. In this context, it must be noticed that even according to the trial Court, the recovery of the clothes of the deceased from the dustbin at 'S' block at his instance was not believable. Yet the trial Court brushed this aside as not being a very serious problem. The trial Court notes in this regard as under:

“The accused when interrogated on 08.07.2014 did not disclose that he had thrown the clothes in the dustbin of the park. He later disclosed about throwing of clothes in the park. While effecting the recovery, no witness from the park was joined. It is unbelievable that the dustbin of the park was not cleaned for three days. In these circumstances, the recovery of clothes from the park becomes suspect and cannot be believed. Further, the clothes of the accused were sent to CFSL but nothing

incriminating was found from the clothes to inculcate the accused.”

147. And yet the trial Court concludes that “even then, this itself does not prove fatal to the case of the prosecution”, since according to the trial Court, “the testimonies of PW2, PW28, PW21 and PW26, medical and CFSL reports prove the exclusive presence of the accused at the scene of crime.” Having discussed in detail the evidence of PWs 21, 28 and 26 and the medical and CFSL reports, the Court is unable to come to such conclusion.

Evidence of PW-2

148. That only leaves the discussion of the evidence of PW-2 himself. He was the son-in-law of the deceased and his conduct requires to be commented upon. The Court has already referred to the fact that in his statement under Section 161 Cr PC, he does not seem to have had suspicions against the Appellant. In his examination-in-chief, on the first date i.e. 10th November 2014, he made no mention of having talked to any security guard.

149. After his statement was recorded by the police and after the crime team, CFSL experts and the fire brigade reached the spot and carried out their investigation, PW-2 stated that he had remained present at the premises throughout the night. He also states “accused also remained present there.” He further states as under:

“We had also supplied the information qua other domestic helps who also used to do some work in the premises in question. The police also interrogated the accused, present in the court today, and arrested him vide arrest memo Ex. PW

2/H bearing my signature at point A.”

150. There was no mention on this date of a security guard or of PW-2 having talked to any security guard at all. As already noticed hereinbefore after this examination-in-chief on 10th November 2014, his next examination-in-chief continued more than six months later on 7th May 2015. Now for the first time he begins his examination-in-chief with the following statement:

“When I reached the place of incident, Sh. Santosh, Security guard hired by third floor tenants of my mother in law/deceased, to look after the security of the building, was found present. I asked him If he had seen my mother in law returning to her place when he had joined duty at about 8.00 pm as my mother in law used to return from park at about 7.30 pm, Santosh also used to ring the bell of the first floor flat of my mother in law at the time when he used to come to his duty and my mother in law used to come out in her balcony and ask him if he need anything including tea/water etc. Santosh told to me that on that day, when he came at 8.00 pm, he had rang the bell of first floor as usual but she did not respond, instead he saw accused Neeraj coming down through stairs to the parking area, where he used to sit for duty. Santosh also told me that accused told him that *‘tum duty pe aaye ho, Jahan bethie ho beth jao. Mataji uper hai, me unko bata dunga ki turn duty par aa gaye ho’*. “

151. This is what makes this entire insertion of the security guard into the scenario highly suspicious. This aspect only emerged in the testimony of PW-2 after a gap of six months, no other witness deposing about the presence of PW-28 at the spot and with the prosecution itself not choosing to even record the statement of PW-28 under Section 161 Cr PC, the circumstances of his ultimately being allowed to be brought on as a

prosecution witness become extremely suspicious.

152. Another factor is that the characters referred to by PW-2 in his deposition were not examined as prosecution witnesses. One such character was the domestic help who according to him on the day of the incident had used the duplicate key, after taking it from the deceased, to open the first floor flat and clean it. There is no such domestic help who was even spoken to by the police. This was an important link in the chain of circumstances which should have been examined further. The other character he refers to is one Mrs. Shanta Duggal, mother of a relative Mr. Raman Duggal, who is supposed to have spoken to the deceased on the mobile phone on the day prior to the incident and also on the day of the incident itself at around 7.55 pm, when the deceased had purportedly told her that she had just come back from her evening walk and would talk after five minutes. PW-2 specifically stated “after about 1-2 hours, I also spoke to the mother of Raman Duggal and she also confirmed the said facts to me.” No CDRs of the deceased’s mobile phone were collected and no Mrs. Duggal was examined by the police. Important aspects which would have provided essential links in the chain of circumstances were, therefore, not proved by the prosecution.

153. It is also only on 7th May 2015 i.e. six months after his examination-in-chief on 10th November 2014 that he adverted to a conversation he purportedly had with the Appellant as under:

“Thereafter, when I asked the accused as to what he had done as the deceased was of her grandmother age, then accused without any remorse on his face told me that ‘rape kiya hai’. We were shocked

how a illiterate person is using the word ‘Rape’.”

154. The fact that PW-2 could omit to mention to the police or even in his examination-in-chief six months earlier this utterance by the Appellant makes PW-2 highly suspect as a truthful or reliable witness.

155. PW-2 is a witness related to the deceased as her son-in-law. In the facts and circumstances of the present case, which will be discussed hereafter, he is also an interested witness. The law concerning related witnesses and interested witnesses is well settled. In *Dalip Singh v. State of Punjab 1954 SCR 145*, the Supreme Court explained:

“A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.”

156. In *Darya Singh v. State of Punjab (1964) 3 SCR 397*, it was observed by the Supreme Court as under:

“There can be no doubt that in a murder case when evidence is given by near relatives of the victim and the murder is alleged

to have been committed by the enemy of the family, criminal courts must examine the evidence of the interested witnesses, like the relatives of the victim, very carefully. But a person may be interested in the victim, being his relation or otherwise, and may not necessarily be hostile to the accused. In that case, the fact that the witness was related to the victim or was his friend, may not necessarily introduce any infirmity in his evidence. **But where the witness is a close relation of the victim and is shown to share the victim's hostility to his assailant, that naturally makes it necessary for the criminal courts to examine the evidence given by such witness very carefully and scrutinise all the infirmities in that evidence before deciding to act upon it...** [I]t may be relevant to remember that though the witness is hostile to the assailant, it is not likely that he would deliberately omit to name the real assailant and substitute in his place the name of the enemy of the family out of malice. The desire to punish the victim would be so powerful in his mind that he would unhesitatingly name the real assailant and would not think of substituting in his place the enemy of the family though he was not concerned with the assault. It is not improbable that in giving evidence, such a witness may name the real assailant and may add other persons out of malice and enmity and that is a factor which has to be borne in mind in appreciating the evidence of interested witnesses. **On principle, however, it is difficult to accept the plea that if a witness is shown to be a relative of the deceased and it is also shown that he shared the hostility of the victim towards the assailant, his evidence can never be accepted unless it is corroborated on material particulars.**" (emphasis supplied)

157. In *Jayabalan v. UT of Pondicherry* (2010) 1 SCC 199, the Supreme Court held as under:

"We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the

evidence of such witnesses must not be pedantic. **The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency.**” (emphasis supplied)

158. The legal position was succinctly encapsulated in *Raju v. State of Tamil Nadu AIR 2013 SC 983* as under:

“.....we are concerned with four categories of witnesses - a third party disinterested and unrelated witness (such as a bystander or passer-by); a third party interested witness (such as a trap witness); a related and therefore an interested witness (such as the wife of the victim) having an interest in seeing that the accused is punished; a related and therefore an interested witness (such as the wife or brother of the victim) having an interest in seeing the accused punished and also having some enmity with the accused. But, more than the categorization of a witness, the issue really is one of appreciation of the evidence of a witness. **A court should examine the evidence of a related and interested witness having an interest in seeing the accused punished and also having some enmity with the accused with greater care and caution than the evidence of a third party disinterested and unrelated witness. This is all that is expected and required.**” (emphasis supplied)

159. Thus, the legal position which emerges from the decisions of the Supreme Court cited above is that in evaluating the evidence of an interested witness, the Court must scrutinise their evidence carefully so as to ascertain whether it has a ring of truth. While their testimony is not to be viewed with suspicion merely because of their relationship with the victim, the Court must be satisfied that it is consistent and cogent.

160. In the present case one has to be very careful in accepting the testimony of PW-2 because he seems to be a witness interested in the outcome of getting a verdict of guilt confirmed against the Appellant. It is PW-2 who took the extra effort of waiting till the arguments concluded before the trial Court and even the judgment was reserved, to file an application about his having found out about the presence of PW-28. The Court has seen the said application dated 27th July 2016, found as part of the trial Court record. In para 8 of that application, PW-2 says that he happened to meet an old friend, who works in an NGO, who volunteered to search for the said Santosh. It is not known how the watchman's whereabouts could be traced, without even a photo of his being available. PW-2 is supposed to have contacted the IO for moving an application but the IO "showed his inability to do so." The circumstances of this application are highly doubtful. No attempt was made to find out if the Santosh so produced by PW-2 was the very Santosh who was the security guard at the building whom the Appellant spoke about.

161. For the above reasons, the Court finds PW-2 not to be a reliable or truthful witness. The conviction of the Appellant cannot be based on the evidence of such witness.

162. The Court also finds that the Appellant chose to examine himself as a witness although initially he desired not to. The mere fact that in his cross-examination, DW-1 said that no one came in building from 8 to 9 pm could not "clearly show his exclusive presence in the premises." DW-1 can only speak about what is within his knowledge and not about things that were

outside the purview of his knowledge. If he in fact was in his room in that time period, he clearly would not know who else could have been in or out of the building. None of what DW-1/the Appellant had stated points to his culpability in the crime.

Motive not proved

163. Now turning to the motive for the crime. This is a case where nothing belonging to the deceased was in fact stolen. Her house itself was not touched. She was found in a burnt condition on the first floor of the building in the flat gifted by her to her daughter. The trial Court seeks to explain the motive for commission of the crime as being the sexual urge of the Appellant and nothing else. With the medical and forensic evidence ruling out the possibility of the Appellant having committed the physical sexual assault on the deceased, the prosecution has failed to prove the motive for a crime.

164. In a matter of this nature, where other circumstances have not been proved beyond reasonable doubt, the proving of motive for the crime becomes extremely important. In *Arjun Marik v. State of Bihar 1994 Supp (2) SCC 372*, the Supreme Court explained as under:

“...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.”

165. The trial Court has overlooked the above legal position and erred in holding that not proving the motive was not fatal to the case of the prosecution.

Section 106 IEA does not apply

166. The prosecution sought to invoke Section 106 IEA to contend that it was incumbent on the Appellant to explain the circumstances under which the deceased was found dead on the first floor room. This was on the basis that it was the Appellant who was exclusively with the deceased at the time of commission of the offence.

167. The trial Court also seems to have adopted the same approach in the impugned judgment. For the reasons already discussed, this Court is of the view that the prosecution has not been able to prove that it was the Appellant alone who was exclusively with the deceased at the time of commission of the crime. If that is not a case, the question of invoking Section 106 of the IEA does not arise.

168. In a case of circumstantial evidence, every link in the chain of circumstances has to be proved beyond reasonable doubt and those proved circumstances forming a complete chain must unmistakably point to the guilt of the accused and no one else. That high threshold is not met in the present case. There are too many gaps in the chain of circumstances and

only a few links like the homicidal death of the deceased and the Appellant being her domestic help can be said to have been proved convincingly by the prosecution. Those important links which could unmistakably and conclusively point to the guilt of the Appellant have not been proved by the prosecution, much less beyond all reasonable doubt.

Summary of conclusions

169. To summarise the conclusions:

(A) The following circumstances have not been disputed, even by the Appellant as was evident from his answers under Section 313 Cr PC:

(i) The deceased, aged 81, lived alone in the ground floor of the house at GK-2.

(ii) The Appellant was her full time servant. He had been employed by the daughter of the deceased whose husband is PW-14, both of whom lived in USA.

(iii) The Appellant used to live in the servant's quarter which was in the parking area of the building.

(iv) The flat on the first floor of the building had been gifted by the deceased to her other daughter who lived in Delhi whose husband was PW-2

(v) The flat on the ground floor of the building, which had actually

been gifted to the daughter who lived in the USA, was occupied by the deceased. The deceased herself retained the flat on the third floor, the front portion of which was given on lease to a company and the rear portion of which was in the possession of the deceased.

(vi) On 6th and 7th July 2014 a carpenter had been engaged by PW-2 to work in the flat on the first floor. That carpenter worked in the said flat till around 4.15 pm on 8th July 2014. PW-2 was also present supervising his work, and had paid the carpenter before leaving, without meeting the deceased that evening.

(vii) The deceased left for her walk as usual at around 5.30 p.m. but after that was not seen alive.

(viii) At around 9.15 pm, the Appellant went to the house of the neighbour PW-3 informing her of the fact that the deceased had not returned from her walk.

(ix) Around the same time the Appellant also called the daughter of the deceased and her husband (PW-14) in the USA informing them of the same fact. PW-3 called the police and they arrived there soon thereafter.

(B) It stands clearly established from the medical evidence that the deceased died a homicidal death but not due to the burn injuries. Injury 5 (the burns) and Injury 6 “ligature strangulation were post-mortem. Injuries

1 to 3 (to the neck) were ante mortem and collectively sufficient to cause death in the ordinary course of nature.

(C) There is no evidence that prior to the death of the deceased, the Appellant entered the flat earlier and the deceased also entered the flat with him. There is no evidence that the Appellant took the duplicate key of the flat when it was purportedly returned by a domestic help engaged by the deceased to clean the flat. Significantly, the wife of PW-2 who used her own key to open the flat and to find the deceased in a burnt condition was not examined as a prosecution witness. Without any proof that the deceased had a duplicate, without locating the duplicate key and without any disclosure by the Appellant that he used the duplicate key and then threw it away, this part of the case remains unproved by the prosecution.

(D) The injuries suffered by the deceased around her vagina were noticed by PW-24 when he undertook the post-mortem on 10th July 2014 at 12 noon. This fact that she suffered a lacerated wound at the vaginal orifice was not something that would not have been discovered but for the disclosure made by the Appellant. If this disclosure which is self-incriminating is itself not admissible in evidence, then the question about the Appellant not having such information unless he was himself involved in the offence simply does not arise. This so-called disclosure made by the Appellant while in police custody which is self-incriminating, is legally impermissible to be admitted as evidence and it cannot be made admissible by making it appear as the discovery of a 'mental fact' for the purposes of Section 27 of the Indian Evidence Act.

(E) In the absence of any semen in any of the samples collected from the body of the deceased or her clothes or bed sheet, the question of physical sexual penetration by the Appellant with the deceased was ruled out. The FSL report also ruled out the Appellant having ejaculated on the bed sheet as a continuation of his physical sexual intercourse with the deceased. The finding of blood on the above exhibits, which was that of the deceased herself, cannot connect the Appellant to the crime of physical sexual penetration of the deceased. There was also no DNA of the victim on the smegma of the Appellant. The clothes of the Appellant or even the underwear of the deceased did not indicate any presence of semen. Neither the CFSL report nor the post-mortem conclusively establishes that it was the Appellant who had any physical sexual contact with the deceased.

(F) Without the prosecution conclusively proving that it was only the Appellant who was exclusively present in the building and that it was him alone who was present in the room on the first floor with the deceased at the relevant time, this discovery of the plastic bottle with some kerosene and a match box from the room of the Appellant is not convincing as a clinching circumstance.

(G) The evidence of PW-28, projected as the security guard, is unreliable and untrustworthy, particularly since he speaks for the first time in the trial Court after conclusion of arguments without his statement ever been recorded during the investigation come on record earlier. If PW-28 is out of the picture, there is nothing to show that the Appellant was present

anywhere near or in the room on the first floor of the building where the deceased was ultimately found or that there was no one else who had entered the building between 6 and 8 pm when the occurrence allegedly happened.

(H) Therefore, in the chain of circumstances, the prosecution has failed to prove:

- (i) That it was the Appellant who was exclusively found in and around the place where the dead body was found or even at the time of occurrence.
- (ii) That it was the Appellant who took the deceased to the first floor and that the deceased led herself into the flat using the duplicate key given to her by wife of PW-2.
- (iii) That it was he who forcibly committed rape upon her or penetrated her forcibly with an object.
- (iv) That after committing such rape he burnt the body by bringing some kerosene from his room downstairs and then pouring the kerosene on the deceased and setting her on fire and then coming out of the room.
- (v) That the deceased was in fact subjected to physical sexual intercourse by the Appellant.

(I) The conduct of the Appellant also contra indicates the conclusions drawn by the trial Court about his guilt. His calling the neighbour (PW-3) and the daughter of the deceased in the US and remaining present at the

spot throughout is not the conduct of a person who committing such a serious crime.

(J) PW-2 is neither a reliable nor a truthful witness. The conviction of the Appellant cannot be based on the evidence of such witness.

(K) With the medical and forensic evidence ruling out the possibility of the Appellant having committed the physical sexual assault on the deceased, the prosecution has failed to prove the motive for a crime.

(L) Since the prosecution failed to prove that it was the Appellant alone who was exclusively with the deceased at the time of commission of the crime, the question of invoking Section 106 of the IEA does not arise.

Conclusion

170. The crime in the present case is indeed horrific. An elderly has been done to death in the most inhuman manner. The evidence placed on record by the prosecution, however, has failed to prove that it is the Appellant who is responsible for the crime. Howsoever strong a suspicion might be, it cannot constitute proof and is insufficient to return a finding of guilt. The case against the Appellant had to be proved beyond reasonable doubt. The prosecution has failed to do that in the present case.

171. It is useful to recall the following observations of the Supreme Court in *Gagan Kanojia v. State of Punjab (2006) 13 SCC 516*, the Supreme Court made the following observations, when considering convictions made

on the basis of circumstantial evidence:

“Indisputably, charges can be proved on the basis of the circumstantial evidence, when direct evidence is not available. It is well settled that in a case based on a circumstantial evidence, the prosecution must prove that within all human probabilities, the act must have been done by the accused. It is, however, necessary for the courts to remember that there is a long gap between 'may be true' and 'must be true'. Prosecution case is required to be covered by leading cogent, believable and credible evidence. Whereas the court must raise a presumption that the accused is innocent and in the event two views are possible, one indicating to his guilt of the accused and the other to his innocence, the defence available to the accused should be accepted, but at the same time, the court must not reject the evidence of the prosecution, proceeding on the basis that they are false, not trustworthy, unreliable and made on flimsy grounds or only on the basis of surmises and conjectures. The prosecution case, thus, must be judged in its entirety having regard to the totality of the circumstances. The approach of the court should be an integrated one and not truncated or isolated. The court should use the yardstick of probability and appreciate the intrinsic value of the evidence brought on records and analyze and assess the same objectively.”

172. This was reiterated more recently in *Jose @ Pappachan v. The Sub-Inspector of Police, Koyilandy (2016) 10 SCC 519* in the following words:

“53. It is a trite proposition of law, that suspicion however grave, it cannot take the place of proof and that the prosecution in order to succeed on a criminal charge cannot afford to lodge its case in the realm of “may be true” but has to essentially elevate it to the grade of “must be true”. In a criminal prosecution, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof and in a situation where a reasonable doubt is entertained in the backdrop of the evidence available, to prevent miscarriage of justice, benefit of doubt is to be extended to the accused.

Such a doubt essentially has to be reasonable and not imaginary, fanciful, intangible or non-existent but as entertainable by an impartial, prudent and analytical mind, judged on the touch stone of reason and common sense. It is also a primary postulation in criminal jurisprudence that if two views are possible on the evidence available, one pointing to the guilt of the accused and the other to his innocence, the one favourable to the accused ought to be adopted.”

173. For the above reasons, the Appellant is acquitted of the offences under Sections 302, 375 and 201 IPC. The impugned order of the trial Court convicting Appellant for the aforementioned offences and the consequent impugned order on sentence are hereby set aside. The Appellant will be released forthwith unless required in some other case.

174. The appeal is accordingly allowed. The Appellant shall be set at liberty forthwith, unless wanted in any other case. He will fulfil the requirement of Section 437-A 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 04, 2018

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