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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CRL.A. 943/2015

Reserved on: March 07, 2018

Date of decision: March 22, 2018

SATYAPAL SINGH

...Appellant

Through: Mr. Chetan Lokur with Mr.
Nitish Chaudhary,
Advocates.

versus

THE STATE (NCT OF DELHI)

...Respondent

Through: Mr. Hiren Sharma, APP for
the State.

And

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CRL.A. 1002/2015

KUNWAR NEERAJ

...Appellant

Through: Mr. Farooq Chaudhary,
Advocate

versus

STATE OF NCT OF DELHI

...Respondent

Through: Mr. Hiren Sharma, APP for
the State

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE I.S. MEHTA**

JUDGMENT

22.03.2018

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Dr. S. Muralidhar, J.:

1. These appeals are directed against the judgment dated 27th April 2015 of the learned Additional Sessions Judge-01 (New Delhi District), Patiala House Courts in Sessions Case No. 127 of 2013 arising out of FIR No. 17 of 2013 registered at Police Station ('PS') Sagarpur convicting the Appellants, Kunwar Neeraj (A-1) and Satyapal Singh (A-4), for the

offences Section 302 Indian Penal Code ('IPC') read with Section 120B IPC and under Section 120B IPC read with Section 302 IPC and respectively. A-1 was also convicted for the offence under Section 25/27 Arms Act.

2. The appeals are also directed against the order of sentence dated 30th May 2015 whereby, for the offence under Section 302/120B IPC, A-1 was sentenced to undergo imprisonment for life with a fine of Rs.20,000/- and, in default of payment of fine, to undergo simple imprisonment ('SI') for a period of one year. For the offence under Section 25/27 Arms Act, A-1 was sentenced to undergo imprisonment for a period of five years with a fine of Rs.5,000/- and, in default of payment of fine, to undergo SI for five months. Both sentences of punishment were directed to run concurrently.

3. By the same order on sentence, A-4 was sentenced to undergo imprisonment for life with a fine of Rs.20,000/- and, in default of payment of fine, to undergo SI for one year for the offences under Section 302/120B IPC.

4. It must be noted at the outset that along with A-1 and A-4, four other accused, namely Dinesh Kumar @ Master (A-2), Ankit Sharma (A-3), Amit Gupta @ Monu Telli (A-5) and Punit @ Lambu (A-6) were sent up for trial. However, the benefit of doubt was extended to these four accused and they were acquitted of all charges framed against them.

Charge

5. The charge against all accused was that on or before 16th January 2013 at Delhi and Meerut, all the accused, A-1 to A-6, along with Yogesh @

Rinku [declared proclaimed offender ('PO')] entered into a criminal conspiracy to commit the murder of Ashok Kumar (deceased) as he, being a member of Scheduled Caste ('SC'), dared to marry Seema (PW-1) who belonged to the Thakur caste which had annoyed A-4, her father and thereby all of them committed offences punishable under Section 120B IPC.

6. The second charge against A-1 to A-6 was that pursuant to the aforementioned criminal conspiracy, A-1 to A-3, A-5, A-6 and the PO at the railway line near CVD Delhi Cantonment, East Sagarpur Delhi, committed the murder of the deceased by causing bullet injuries thereby committing the offence punishable under Section 302 read with Section 120B IPC. Additionally A-1 was charged with being found in possession of a *desi katta* containing a live cartridge and two other live cartridges at about 6 p.m. on 19th January 2013 near Harijan Chowk, Nasirpur without any valid licence thereby committing an offence punishable under Sections 25/27 of the Arms Act.

Case of the prosecution

7. The case of the prosecution is that Seema (PW-1), the daughter of A-4, was pursuing her B.Ed. course from Meerut University. There she met the deceased who was also studying in the same place and they developed a liking for each other. During one of the vacations, the deceased had gone to his parental home in Kanpur and informed his mother, Gudia (PW-10), that he had developed a friendship with PW-1. Sometime prior to completing of the B.Ed. course, both PW-1 and the deceased had visited the house of the deceased in Kanpur and met PW-10 and disclosed that they love each other and intended to get married. When PW-10 expressed

her desire to talk to the parents of PW-1, PW-1 stated that her parents would not talk on account of the difference in caste.

8. According to the prosecution, sometime prior to the deceased marrying PW-1, Satyapal (A-4) threatened Harish Chand (PW-9), the father of the deceased, that he should take care of his son and ensure that the deceased was not seen in Meerut or its vicinity. On 7th May 2010, the deceased and PW-1 got married at the Arya Samaj Mandir in Kanpur. PW-10 was present at the marriage. After marriage, the deceased and PW-1 stayed at the house of the parents of the deceased in Kanpur and a daughter was born to the deceased and PW-1.

9. According to the prosecution, A-4 never accepted the deceased as his son-in-law on account of the difference in caste. He is supposed to have made phone calls to PW-10 and threatened the deceased by saying, “*Mai tere ladke kaa murder karwa dunga, marwa dunga, mai tujhe barbaad kar dunga*”. In reply, PW-10 used to tell A-4 that they should all accept the alliance and be happy since the boy and girl were happy with their married life. However, A-4 supposedly always used to say that he belonged to the ‘Thakur’ caste and they were ‘Chamar’ and that he would never accept the deceased. A-4 further stated at a later stage that “*meri beti tera vansh nahi chala sakti*” to PW-10. It is further the case of the prosecution that after the daughter was born to PW-1 and deceased, when PW-10 congratulated A-4 on his becoming a grandfather, A-4 reiterated ‘*mai tujhe barbaad kar dunga*’.

10. It is stated that after the birth of the daughter, PW-1 got a job in the Central Vehicle Depot (‘CVD’), Ministry of Defence, Delhi. PW-10

apprehended danger to the lives of PW-1 and the deceased due to the threats uttered by A-4 and Meerut's relative proximity to Delhi, and advised them against shifting to Delhi. However, PW-1 assured her that if A-4 did anything then it would be first PW-1 who would be killed and only thereafter would the turn of the deceased come. PW-1 along with the deceased shifted to a house in Sagarpur, Delhi in a rented accommodation. They left their daughter with her grandparents, PW-9 and PW-10.

11. It is the case of the prosecution that after shifting to Delhi, the deceased had visited her in Kanpur on one occasion and told her that he suspected A-4 had deputed some people to follow them. Two persons had come to their house as well. PW-10 told the deceased that if he suspected any danger, he should not go back. PW-1 had also accompanied the deceased to visit PW-10, but they both chose to go back.

12. The deceased and PW-1 after shifting to Delhi resided at the house at Gali No. 2, East Sagarpur, Delhi. Since PW-1 was physically disabled, the deceased used to drop her at her place of work, i.e. CVD located at Delhi Cantonment.

13. According to the prosecution, on 24th December 2012, when PW-1 was present in her house and the deceased was not, two persons, one of whom was around 40 years of age and the other who was younger visited their house and told PW-1 that they had come from Kanpur and wanted to talk to her husband. When PW-1 informed them that he had gone to the shop, they asked her to call on his mobile. However, the deceased had left his mobile phone back at home. Meanwhile, the deceased returned. While

they were talking, the elder of the two persons tried to bolt the door from inside but PW-1 raised an objection stating that this was not the way to talk and she would call the landlord. The two persons then left the house stating that they themselves would call the landlord. On seeing the two persons, the deceased expressed doubts to PW-1 as to whether they had indeed come from Kanpur since he did not recognise them. Both the deceased and PW-1 then went downstairs only to find that the two persons had already left.

The incident

14. On 16th January 2013, at around 9 am, the deceased dropped Seema (PW-1) at the place of her work. She entered inside her office but was suddenly called by the guard at the gate. She came out from her office to the entry gate where she saw that the deceased had been brought there by four security guards in an injured condition as he was bleeding profusely.

15. Vinay Aggarwal (PW-4), the contractor working in CVD, Delhi Cantonment, had entered the CVD premises when, at 9:15 am, he heard the sound of a gunshot. Likewise, Jitender Singh (PW-5) who was a Storekeeper in CVD in Delhi Cantonment left his house at East Sagapur for his duty at 9.10 am. As he reached the railway track, he noticed the deceased was lying on the other side of the railway track in an injured condition, crying "*bachao bachao*".

16. Naib Subedar Kalyan Dutt (PW-13) posted as security JCO at NIP gate of CVD, Delhi Cantonment stated that he learnt at about 9 to 9.15 am that someone had been shot on the railway track leading from Delhi to Rewari. Some of the employees coming from that gate informed the

senior officer Kuldeep Singh Lohan (CSO) that the victim was lying on the track in an injured condition. The CSO then reached at the spot and on his instruction, PW-13 called the police control room ('PCR') at number 100 from his mobile phone.

17. The PCR form (Ex. PW-6/A) recorded that PW-13 had given a call from his mobile number at 9:15:08 am stating that "*rewari ko jaane waali line delhi cantonment se palam ke beech va palam ke beech mai sagarpur railway line par yaha ek aadmi ko goli maar di hai*". The message recorded in the right hand column of the PCR form at around 10:27:57 was that constable M.S Khan COD line "*ne bataya seema lady jo CV depot mai worker hai jo handicap hai jise chodne uska aadmi aata hai uske aadmi kee chaati mai goli maari thi jo bhaaga hua mere paas gate no. 5 COD line aaya tha jise hospital bhijwa diya hai*". The further message at 10:30:18 gave the name of the injured as Ashok Kumar and that he had been shot in the right side of his chest and he was in the operation theatre and that "*kisne goli maari nai bataya*". In fact, PW-4 was requested to help by some public persons and removed the deceased to the DDU hospital in his Wagon-R car with the help of PW-5.

Initial steps in the investigation

18. Sub Inspector Ramji Pandey attached to PS Sagarpur on receiving DD No. 11A namely the message received through wireless from the PCR, went to the spot at the railway track. Meanwhile, Inspector Richpal Singh (PW-15), Sub Inspector (SI) Madan Lal (PW-14), and Constable (Ct.) Nitin and Ct. Suresh also reached the spot. SI Madan Lal (PW-14) and Inspector Richpal Pal Singh (PW-15) went to the DDU hospital where the

deceased had already been brought in an injured condition and was undergoing treatment.

19. At the DDU hospital, the deceased was first examined by Dr. Arif Jafri at 10.05 am on 16th January 2013. In Ex.PX-1 it was noted that he had been brought there by PW-4. *Inter alia* it was noted that there was an “entry wound approximately 3 X 2 cm at the level of 4th intercostals mid clerical line right side, charring of skin around the wound, the depth was to be assessed upon surgery”.

20. Meanwhile, upon reaching the DDU hospital, SI Ram Ji Pandey looked for any eye-witness who might be present but found none. *Rukka* (Ex.PW2/D) was drawn up for registration of case under Section 307 IPC and 27 read with 54 and 59 of the Arms Act and sent through Ct. Kuldeep to the PS for registration of the FIR. Meanwhile, before Ct. Kuldeep could return with the copy of the registered FIR, the deceased succumbed to his injuries at 12:30 p.m.

21. From the search of the deceased, one ATM shopping card of Punjab National Bank, one brown colour purse containing Rs. 13, some visiting cards and one mobile phone of Nokia make were found. These articles were handed over to PW-15 by the doctor and they were converted into a sealed *pulanda* and taken into possession. The dead body was asked to be kept preserved in the mortuary.

22. PW-15 returned to the spot where Ct. Suresh, PW-4, and PW-5 were present. PW-15 then prepared the site plan (Ex. PW-15/C) at the instance of PW-5. The crime team had already reached the spot and left after their inspection. PW-15 lifted the blood stained soil, blood earth control and

blood stained bricks from the spot under the seizure memo (Ex. PW14/C). PW-15 informed the parents of the deceased to reach the DDU hospital on 17th January 2015 in the morning.

Version of PW-1

23. In her initial statement to the police, PW-1 implicated her father (A-4) as having conspired with others to kill her husband. However, in Court when she deposed, PW-1 stated that while her husband was removed to the DDU hospital, she was also taken there in a separate vehicle. During this period, she was not told that her husband has been shot but instead that he was stabbed by a knife and was in the ICU.

24. PW-1 claimed that she called up A-4 who was at Meerut and informed him about the incident. According to her, A-4 came to Delhi by the same evening. During the course of the day, she was taken to the police station at around 10-11 am and remained there till about 8 pm. After 8 pm, it became difficult for her to sit in the PS, so some lady police officials dropped her at her house. PW-1 stated that it was only on the next day that she came to know that her husband had succumbed to his injuries. She claimed to have met A-4 once in the PS itself. In the meantime, her father-in-law and brother-in-law of the deceased reached Delhi from Kanpur.

Medical evidence

25. The post-mortem of the deceased was performed on 17th January 2013 at around 12.30 pm by Dr. Komal Singh. The external examination revealed the following injuries:

“1. Gun shot entry wound present over right anterior aspect of chest at 4th inter costal space with blackening of its margin and

spreading of tattooing around 4 cm of surrounding area, 8 cm above right nipple. The wound was already stitched on opening the wound it was found to be oval in shape, margins were inverted, clotted blood present at its base.

2. Surgical incised wound (stitched) present on the right lateral side of chest, horizontally placed, 26 cm stitched and it went to the back at right side extending up to right scapula.

3. Surgical stitched wound present over right side of chest just below right nipple, size was 28 cm which extended from anterior abdominal wall epigastria area to the umbilicus.”

26. As far as internal examination is concerned, the examination of ribs and chest wall revealed the following:

“As mentioned above and on exploration of the No. 1 injury it goes medially and posteriorly at right 5th intercostal space around 500 ml of clotted and liquid blood present. Anterior chest wall at its inner surface showed contusions.”

27. The examination of the lungs revealed the following:

“Right lung collapsed. Lower part of upper lobe and middle lobe was penetrated by gun shot and for the it penetrated in diaphragm and reached out anterior surface of the right lobe of liver penetrated up to the 5 cm of the liver then reached to the right kidney at the hilum.”

28. The cause of death was determined to be haemorrhagic shock caused by gunshot injury. Injury No.1 was opined to be sufficient in the ordinary course of nature to cause death. The time since death was consistent with the hospital timing in the death report (Ex. PW-15/B) of the deceased.

29. According to PW-15, after the post-mortem was conducted, he examined PW-1, PW-9, and PW-10 and recorded their statements. PW-15 was informed about how the deceased and PW-1 had met in Meerut,

married, belonged to different castes as well as about A-4's opposition to this marriage.

Arrests

30. It is then stated that on 19th January 2013, PW-15 went to the house of PW-1 where A-4 met him. He then stated that A-4 was interrogated and thereafter brought to the PS. According to PW-15, A-4 did not disclose any facts initially. However, after thorough interrogation, A-4 disclosed that due to the wedding of his daughter with the deceased, he felt humiliated amongst society and was unable to digest it. A-4 contacted A-1 who was a resident of the same village, who demanded Rs.2 lakhs for murdering the deceased which A-4 agreed to pay. A-4 gave the description of the deceased and PW-1 to A-1 and also disclosed to him that PW-1 was an employee of the CVD, Delhi Cantonment and that the deceased used to drop her in front of the office every day after crossing the railway track.

31. According to PW-15, A-4 disclosed that he changed his behaviour to make PW-1 believe that he was happy with her marriage, took her into confidence and asked her the address of where she was residing in Delhi as she had not previously disclosed it to him and thereafter came to her room. A-4 claimed to have paid Rs.25,000 on one occasion and Rs.15,000 on another to A-1 and the rest was to be paid after the deceased was killed.

32. PW-15 then proceeded to arrest A-4. He then states that during the investigation, "it was revealed through secret informer" that the other accused, i.e. A-1 along with his associates, were available at Pink

Apartment, Near Harijan Basti Chowk, Nasirpur, Delhi. Therefore, PW-15 along with a team of police personnel and A-4 went to the Harijan Basti Chowk and laid a trap at Nasirpur Chowk.

33. PW-15 states that on 19th January 2013, at 5.30 pm, one i-10 car of grey colour came there. The secret informer was also with them and pointed out the car. The car was stopped and thereafter the secret informer went away. There were five persons inside the car. A-4 is said to have identified the driver of the car as A-1 and the other person sitting on the front seat as Dinesh @ Master. A-4 is further stated to have identified the three persons sitting on the rear seat as Ankit (A-3), Amit (A-4) and Punkit @ Lambu (A-5).

34. All five were apprehended. On search of A-1, a country made pistol was recovered from the left side pocket of his pant and two live cartridges were recovered from the right side pocket of his pant. On checking, one live cartridge was found inside the chamber of the pistol. During the search of the car, one exhausted cartridge was recovered from the driving seat. From A-2, one air gun was recovered and from A-4 and A-5, one *chura* each was recovered from their possession. All of them were arrested.

Seizure of mobile phones

35. Upon the personal search of A-1, A-3 and A-4, mobile phones were seized. It is stated that the accused persons led the police party to the place of incident and pointed out the spot where the deceased had been murdered. The site plan (Ex.PW-15/F) was prepared by PW-15. Accused then led the police to Kirti Nagar at Naushad Motorcycle Workshop

where one motorcycle which A-1 disclosed was used in the commission of the offence and parked there after the commission of the offence, was recovered.

36. PW-15 collected the call details records ('CDRs') of the mobile phones of the accused persons. During interrogation, according to PW-15, it was revealed by the accused persons that on 24th December 2012, A-1, A-2, and A-3 had gone to the house of the deceased to identify his address. A-1 and A-2 went inside the room of the deceased whereas A-3 remained standing outside in the *gali*. A-1 had called on the number of the deceased to confirm whether he was present in the house or not and it was revealed that the mobile phone number of the deceased was provided by A-4. Although the test identification parade ('TIP') was arranged, A-1 and A-3 declined to participate.

37. According to the prosecution, A-4 first contacted A-1 and in turn, A-1 contacted A-2, A-3, A-5, A-6, and the PO. They then conspired to murder the deceased. On 16th January 2013, A-1, A-3 and A-2 went to the spot, A-5, A-6 and the PO came on a motorcycle belonging to the PO. A-2 came on another motorcycle. A-1, A-2, A-5, A-6 and the PO attacked the deceased in the *gali* near railway track. The deceased ran towards the CVD to save himself but he was chased by them and A-1 fired upon the deceased.

38. A-1 is supposed to have made a call to A-4 on 15th January 2013 saying that the deal would be done the following day and the money should be released.

39. On the completion of the investigation, the charge sheet was filed and by an order dated 12th March 2014, the trial Court framed the charges as indicated hereinbefore.

The defence of A-1

40. 16 witnesses were examined by the prosecution. In his statement under Section 313 CrPC, A-1 denied the circumstances put to him. He claimed to have been arrested from Khaotli Village on 18th January 2013 and denied making any disclosure statement, claiming that his signatures were taken on blank papers in the PS. As for his coming in a car, A-1 stated that the car belonged to his wife. The IO had arrested him on 18th January 2013 and on 19th January 2013, the car was seized from his house.

41. A-1 denied having used the car on 16th January 2013. He claimed that the weapon recovered from him was never in his custody and it had been falsely planted on him. Since he had an apprehension of having already been shown to the witness at the time of arrest, he declined the TIP. While he did not deny that his mobile number was 9990438131, A-1 claimed to have been falsely implicated. He disclosed that A-4 was his cousin brother and that he had nothing to do with the alleged commission of offence. Supplementary statement was recorded on 25th March 2015 after the report of the Ballistic Division of the FSL was received.

The defence of A-4

42. As far as A-4 is concerned, when the circumstances against him were put to him, he denied them. What he did not dispute is that he came to know of the marriage of PW-1 with the deceased only after they got

married; that a girl child was born to them; that PW-1 had shifted to Delhi after PW-1 got the government job and that PW-1 was indeed disabled.

43. When asked whether A-4 talked to PW-1 after marriage, he stated “it is correct, sometimes”. On the specific aspect of his being arrested from the house of PW-1 on 19th January 2013, he stated, “It is correct, I was called by my daughter Seema and told about the incident, thereafter, I went to the PS where I was forced to sit there and thereafter, I came to know that I have falsely been implicated in the present case”.

44. A-4 did not dispute that a Nokia mobile phone having a Vodafone SIM card was seized from him. He, however, stated that he did not know when he was asked about the mobile phone 9761727256 being issued to him as proved by the records produced to the Court by Srar Babu (PW-7), Nodal Officer, Vodafone. He denied having agreed to pay A-1 a sum of Rs. 2 lakhs for killing the deceased or that he paid Rs. 40,000 in cash in two transactions.

45. When asked if he had anything further to say, A-4 stated as under:

“I am innocent and I have been falsely implicated in the present case. I am a government employee and I was on duty on that day at 510, Army Base Workshop, Meerut Cantt. U.P. I whole heartedly admitted the matrimonial tie of my daughter and blessed her with my heart and soul, I usually helped her financially and provided Shagun on different occasions, I also facilitated her in getting govt. job and also helped her in her verification after joining her job. Kunwar Neeraj is my cousin and I was on talking terms with him since a long time prior to the incident. I was shocked with the incident when my daughter Seema informed me very first time on my mobile phone on that day when I was on duty at Meerut Cantt. After hearing the sad news, I left for Delhi to my daughter and I myself went to the PS to enquire about the incident but

unfortunately the police implicated me falsely in this case. Welfare Officer Sandhya Nandini, from the office of my daughter Seema was also present there. Certain papers were got signed by me forcibly by the police and I did not make any disclosure statement.”

Defence witness

46. On his part, A-4 examined Ravinder Singh (DW-1) who was an LDC in the Army Base Workshop, Meerut Cantt. (UP) and brought the official record of the attendance of A-4 on 16th January 2013. The relevant record (Ex.DW-1/A) showed that A-4 was on duty on 16th January 2013 in the said office. He came to the office at about 8.30 am and left the office on medical leave at about 9.45 am on 16th January 2013.

47. During the trial, PW-1 and PW-9 turned hostile. In other words, PW-1 claimed that A-4 was not opposed to her marriage with the deceased and that he harboured no enmity towards them. She also admitted to being in regular touch with A-4 and meeting him often after marriage.

48. PW-9, the father of the deceased, also did not support the case of the prosecution. According to him, at no time did A-4 object to the marriage of PW-1 with the deceased. PW-10, however, maintained that A-4 was annoyed with his daughter for having married a person from a Scheduled Caste while she herself belongs to the Thakur caste.

The impugned judgment of the trial Court

49. According to the trial Court:

“even if the testimony of Smt. Seema, the daughter of accused Satyapal is accepted that eventually her father had accepted their marriage and had even given them financial assistance from time to time and she had visited their house and had been

given *shagun* by her father and also that he also helped in her verification for the purpose of getting the govt. job, but such conduct of the accused does not lead to the conclusion that he had forgiven his daughter or had forgotten that she had married to a boy of lower caste.”

50. Therefore, it was held that motive for committing the crime stood proved as the opposition of A-4 against the inter-caste marriage of his daughter with the deceased, against his own wishes, persuaded him to eliminate the deceased.

51. Turning to the circumstance of conspiracy, it was held as under:

“Though the identity of those two persons who had gone to the house of the deceased in order to do the recce could not be confirmed in evidence but it is clearly shown that there was in fact a conspiracy for committing the murder of the deceased, that was hatched by accused Satpal.

52. The trial Court then proceeded to discuss the CDR statements of A-1 and A-4 and their respective statements under Section 313 CrPC that they used to occasionally talk on account of being distant relatives were held as “not convincing”. The conclusion was that “rather, it shows that the accused in furtherance of his motive to kill his son-in-law, hatched a conspiracy and contacted accused Kunwar Neeraj for the purpose for which reason he was got in contact with him since July 2012”.

53. The arrest of the accused persons and their disclosures leading to the recoveries was believed by the trial Court. It was held that the ballistics report confirmed that the country made revolver used by A-1 was the weapon of offence and had been used for committing the murder of the deceased. This country made pistol was recovered from A-1 whose identity was disclosed by A-4. Therefore, it was concluded that A-4 had

hatched a conspiracy together with A-4 for murdering the deceased. The evidence as far as the other accused were concerned was held to be inadequate. They were thus given the benefit of doubt and acquitted.

54. A-1 was additionally convicted for the offence under Section 25/54/59 of the Arms Act and the other accused were acquitted. By a separate order on sentence, sentences were awarded to A-1 and A-4 in the manner indicated hereinbefore.

55. This Court has heard the submissions of Mr. Chetan Lokur, learned counsel for A-4, Mr. R.M. Tufail, learned counsel for A-1, and Mr. Hiren Sharma, learned APP for the State.

Law relating to circumstantial evidence

56. Before discussing the evidence on record in light of the above submissions, it is necessary to recapitulate the settled legal position regarding circumstantial evidence which is well settled. In ***Sharad Birdhichand Sarda v. State of Maharashtra 1984 (4) SCC 116***, the Supreme Court explained that a case based on circumstantial evidence should satisfy the following tests:

- “(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established.
- (2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.
- (3) The circumstances should be of a conclusive nature and tendency.
- (4) They should exclude every possible hypothesis except the one to be proved, and
- (5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent

with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

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

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

58. 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.”

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

“From the several decisions of this court available on the issue the said principles can be summed up by stating that not only

the prosecution must prove and establish the incriminating circumstance(s) against the accused beyond all reasonable doubt but the said circumstance(s) must give rise to only one conclusion to the exclusion of all others, namely, that it is accused and nobody else who had committed the crime.”

Circumstances put forth by the prosecution

60. The circumstances put forth by the prosecution are:

- (a) A-4 was not happy with the marriage of his daughter who belonged to the Thakur caste with the deceased who was an SC.
- (b) Despite a child being born, and the couple having moved to Delhi, A-4 was unable to overcome his resentment. While he outwardly made it appear to PW-1 that he had accepted the marriage, he was conspiring with A-4 to kill the deceased.
- (c) On 24th December 2012 a recce was undertaken by A-1, A-2, and A-3 to the house of PW-1 and the deceased in Delhi.
- (d) A-1 and A-4 were in regular touch over the mobile phone. A-4 had agreed to pay A-1 Rs. 2 lakhs for eliminating the deceased. A-4 paid an advance of Rs. 40, 000 to A-1 in two tranches of Rs. 25,000 and Rs. 15,000 prior to the incident.
- (d) On the fateful day, 16th January 2013, at around 9 to 9.30 am, A-1 and his associates came to the place near the railway line outside the CVD office and shot and killed the deceased as he was returning home after dropping PW-1.
- (e) A-4 was arrested by the police from the house of PW-1 in Delhi on 19th January 2013. He thereafter accompanied the police on that

day itself to the place where they stopped a car in which the other accused including A-1 were travelling.

- (f) A-1 and his associates were arrested on 19th January 2013 while they were travelling in a car in a public place. Firearms were recovered from them.

Motive not proved

61. To begin with, the prosecution has tried to prove the motive for the commission of the crime as the inter-caste marriage which was unacceptable to A-4 who, therefore, wanted to eliminate the deceased. Although spoken to by PW-10, both PW-1 and PW-9 denied this. PW-1 in fact went to the extent of saying that she continued to receive financial support from A-4.

62. In a case of circumstantial evidence where, as will be seen hereafter, the other circumstances are not firmly established by the prosecution, motive becomes relevant. The correct legal position was explained by the Supreme Court in *Arjun Mallik v. State of Bihar 1994 Supp (2) SCC 372* in the following words:

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

considered to show that within all human probability the crime must have been committed by the accused.”

63. It is, therefore, not as if proof of motive is unnecessary or irrelevant in all cases. While in the case of direct evidence, motive may not assume much significance, in a case of circumstantial evidence, the failure to prove motive would not be fatal only if all other circumstances have been established beyond reasonable doubt by the prosecution.

64. As already noticed, although PW-1 was put forth as a witness to support the case of the prosecution, she did not. In her testimony in the Court, she maintained that her relations with A-4 were cordial and that A-4 even continued to help her financially after the marriage. She also denied any knowledge of the two persons visiting her house on 24th December 2012 and was unable to identify them. No complaint was registered as regards the incident by PW-1 or the deceased or his family. Further, according to PW-9, no complaint had been lodged against A-4 or his family members.

Arrest of A-4 not proved

65. Without the arrest of A-4, the prosecution story was not plausible. Therefore, the arrest of A-4 was a very critical factor in the attempt by the prosecution to bring home the guilt of A-1 and A-4.

66. It will be recalled that according to the prosecution, during their visit to the house of PW-1 on 19th January 2013, the police found A-4 there. He was then taken to the PS and interrogated. On the other hand, the attendance record of the defence establishment at Meerut brought to the trial Court by DW-1 showed that on 16th January 2013, A-4 was very

much present at his workplace till around 9.45 am. The CDRs of A-4 showed that from 12.32 pm onwards on 16th January 2013, he was located in Delhi.

67. PW-1 herself stated that soon after she heard of the death of the deceased, she first called her father who arrived on that date in the evening itself, and she first saw him in the PS. All these factors considered together give rise to serious doubts about the prosecution version that A-4 was arrested on 19th January 2013 from the house of PW-1 in Delhi. It is highly improbable that A-4 was in the house of PW-1 on 19th January 2013 when the last rites of the deceased were being performed in Kanpur on that day. For the death ceremonies of the deceased, his parents and PW-1 and their child, all of them were in Kanpur. A-4 would have known that PW-1 was not going to be in her house in Delhi. It is highly unlikely that A-4 was somehow waiting in the residence of PW-1 in Delhi on 19th January 2013.

68. It was incumbent on the IO to investigate, perhaps through the CDRs, the movements of A-4 after he reached Delhi, as that would have shown whether A-4 had in fact reached Delhi in the forenoon during the day on 16th January 2013 or not. If he was not in Delhi then the CDR would show where he might have been. That investigation was not undertaken.

Criminal conspiracy not proved

69. There was no attempt by the prosecution to actually prove the commission of the offence of criminal conspiracy punishable under Section 120B IPC for either A-1 or A-4. The law in regard to criminal

conspiracy is well settled. In *Devender Pal Singh v. State NCT of Delhi* 2002 Crl LJ 2035, it was held:

“For an offence punishable under Section 120B, prosecution need not necessarily prove that the perpetrators expressly agree to do or cause to be done illegal act; the agreement may be proved by necessary implication. Offence of criminal conspiracy has its foundation in an agreement to commit an offence. A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and an act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful, punishable if for a criminal object or for use of criminal means.

14. No doubt in the case of conspiracy there cannot be any direct evidence. The ingredients of offence are that there should be an agreement between persons who are alleged to conspire and the said agreement should be for doing an illegal act or for doing illegal means an act which itself may not be illegal. Therefore, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused.

15. In *Halsbury's Laws of England* (Vide 4th Ed., Vol. 11, page 44, para 58), the English Law as to conspiracy has been stated thus,

Conspiracy consists in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. It is an indictable offence at common law, the punishment for which is imprisonment or fine or both in the discretion of the Court.

The essence of the offence of conspiracy is the fact of combination by agreement. The agreement may be express or implied, or in part express and in part implied. The conspiracy arises and the offence is committed as soon as the agreement is made; and the offence continues to be committed so long as the combination persists, that is until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration or however, it may be. The actus reus in a conspiracy is the agreement to execute the illegal conduct, not the execution of it. It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose. It is not, however, necessary that each conspirator should have been in communication with every other.”

70. In ***Gulam Sarbar v. State of Bihar (now Jharkhand)*** 2014 Crl LJ 34, the Supreme Court explained:

“The essential ingredients of criminal conspiracy are (i) an agreement between two or more persons; (ii) agreement must relate to doing or causing to be done either (a) an illegal act; or (b) an act which is not illegal in itself but is done by illegal means. What is, therefore, necessary is to show meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means. Mere knowledge or discussion or generation of a crime in the mind of the accused, is not sufficient to constitute an offence.

The offence takes place with the meeting of minds even if nothing further is done. It is an offence independent of other offences and punishable separately. Thus, the prosecution is required to establish the offence by applying the same legal principles which are otherwise applicable for the purpose of proving criminal misconduct on the part of an accused. Criminal conspiracy is generally hatched in secrecy thus direct evidence is difficult to obtain or access. The offence can be proved by adducing circumstantial evidence or by necessary implication. Meeting of minds to form a criminal conspiracy

has to be proved by adducing substantive evidence in cases where circumstantial evidence is incomplete or vague. The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them between the parties. Agreement is essential.”

71. The burden lies on the prosecution to show that each of the accused had agreed to commit the offence. As cautioned by the Supreme Court in *State v. Nalini (1999) 5 SCC 253*:

“A charge of conspiracy may prejudice the accused because it forces them into a joint trial and the court may consider the entire mass of evidence against every accused. Prosecution has to produce evidence not only to show that each of the accused has knowledge of the object of conspiracy but also of the agreement. In the charge of conspiracy the court has to guard itself against the danger of unfairness to the accused. Introduction of evidence against some may result in the conviction of all, which is to be avoided. By means of evidence in conspiracy, which is otherwise inadmissible in the trial of any other substantive offence prosecution tries to implicate the accused not only in the conspiracy itself but also in the substantive crime of the alleged conspirators. There is always difficulty in tracing the precise contribution of each member of the conspiracy but then there has to be cogent and convincing evidence against each one of the accused charged with the offence of conspiracy. As observed by Judge Learned Hand this distinction is important today when many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders.”

72. In the present case, what the prosecution was able to produce were the CDRs of A-4 which showed that there were calls exchanged with A-1. However, as rightly pointed out by Mr. Lokur, in a period of 79 days, only 34 calls were exchanged between A-1 and A-4. This is indeed not an unusually large number particularly since A-4 and A-1 were cousins from

the same village. Further, the CDRs showed that not a large number of phone calls were exchanged between A-1 and A-4 either shortly before 16th January 2013 or shortly after. The mere fact that there were two calls is not sufficient to prove the existence of criminal conspiracy involving A-1 and A-4.

73. There was no proof of payment of Rs. 40,000 by A-1 to A-4 as part of the agreed consideration for killing the deceased. The source of such money and the actual payment by A-4 to A-1 of Rs.40,000 has not been proved by the prosecution. No money was ever recovered from A-1 or A-4.

74. How the prosecution was suddenly able to arrest A-4 and that too on 19th January 2013 from the house of PW-1 is not explained. It could not have been mere coincidence that on that very date, i.e. 19th January 2013, the secret informer emerged and apprised the police about A-1 to A-3, A-5, A-6 and the PO coming in a grey i-10 car and the police being able to arrest the remaining accused and also make recoveries from them and based on their disclosures thereafter. In other words, the entire case was sought to be solved on 19th January 2013 itself. This again does not seem to be probable at all.

75. Although, as per PW-15, the accused, excluding A-4, were all arrested at the same time since they emerged from the i-10 car, the time between their arrests was shown with gaps of at least 45 minutes to 3 hours. Why A-1 would keep the alleged weapon involved in the offence along with the empty shell in the car and roam around the city freely was

not explained. The Court is, therefore, not convinced at all about this part of the prosecution case.

76. The prosecution has also not been able to counter the official attendance record produced by DW-1 pertaining to the employment of A-4 at the army base workshop in Meerut Cantonment. The fact that he had left his place of work at around 9.30 am 16th January 2013 and the call cell tower location details for the time around 6.30 pm show that A-4 was already in Delhi, has not been countered by the prosecution. From an overall prospective, it does appear that the prosecution story regarding A-4 being arrested from the house of PW-1 on 19th January 2013 cannot be said to have been satisfactorily proved.

77. This Court does not concur with the findings of the trial Court that the guilt of the two accused, i.e. A-1 and A-4, for murdering the deceased has been conclusively proved by the prosecution.

Concluding remarks

78. This is indeed a difficult case where the daughter of A-4 has not supported the case of the prosecution at all. Since it is the arrest of A-4 which led to the arrest of other accused, including A-1, if the arrest of A-4 itself is not believable, then the consequent arrests of the other accused and the alleged recoveries made from them are much less believable.

79. In a case of circumstantial evidence, it is incumbent on the prosecution to eliminate the possibility of any alternative possibility which might point to the guilt of some other person. In other words, it

must be shown that it is A-1 and A-4 and none else who have first conspired to, and then killed the deceased.

80. A detailed analysis of the CDR has been made on the side of the Appellants regarding exchange of calls amongst the mobile numbers of the accused. The location of A-1 on 16th January 2013 at 10.20 am is shown to be near the railway station whereas the incident of firing is stated to have already taken place by 9.10-9.15 am. Why A-1 would still remain in the same area after having fired at the deceased even one hour later is not understood. As far as the CDR of the mobile phone of A-4 is concerned, as already pointed out, there were about 30 calls exchanged between A-4 and A-1 over a period of 79 days and this can hardly be stated to be indicative of any criminal conspiracy. There were calls made by A-4 to A-5 and even A-1 to A-5, but A-5 had been acquitted and nothing turns on these calls either.

81. The calls made to A-4 by PW-1 on 25th December 2012 stand proved although the CDRs do not appear to have picked up the date of 16th January 2013. With PW-1 not supporting the case of the prosecution, she becomes an unreliable witness. In other words, the CDRs did not prove the case of the prosecution regarding criminal conspiracy between the accused to somehow eliminate the deceased and then, in furtherance of that common intention, actually murder the deceased in the manner as indicated by the prosecution.

Conclusion

82. In the considered view of the Court, the benefit of doubt ought to be given to the two Appellants and therefore, they are acquitted of the

offences under Section 120B IPC and 302 IPC. The consequent order on sentence is hereby set aside.

83. Unless wanted in any other case, the acquitted Appellants shall be released forthwith. They will fulfil the requirement of Section 437-A Cr PC to the satisfaction of the trial Court at the earliest. The appeals are disposed of in the above terms. The trial Court record be returned forthwith together with a certified copy of this judgment.

S. MURALIDHAR, J.

I.S. MEHTA, J.

MARCH 22, 2018

Rm