

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

% *Judgment Reserved on: 09.04.2019*

Judgment pronounced on: 02.08.2019

+ **CRL. A. 339/2004**

DINESH

..... Appellant

Through: Mr. Mukesh Kalia, Mr. Manav and
Mr. M.L. Yadav, Advocates.

Versus

STATE

.....Respondent

Through: Mr. Amit Gupta, APP for State with
Insp. Raman Kumar, ATO/Uttam
Nagar and SI Govind Singh, P.S.
Uttam Nagar.

+ **CRL. A. 389/2004**

SURENDER @ LAMBU

..... Appellant

Through: Mr. Mukesh Kalia, Mr. Manav and
Mr. M.L. Yadav, Advocates.

Versus

STATE (NCT OF DELHI)

.....Respondent

Through: Mr. Amit Gupta, APP for State with
Insp. Raman Kumar, ATO/Uttam
Nagar and SI Govind Singh, P.S.
Uttam Nagar.

+ **CRL.A. 393/2004**

JITENDER ALIAS KALA

..... Appellant

Through: Mr. Mukesh Kalia, Mr. Manav and
Mr. M.L. Yadav, Advocates.

Versus

STATE (NCT OF DELHI)

.....Respondent

Through: Mr. Amit Gupta, APP for State with
Insp. Raman Kumar, ATO/Uttam
Nagar and SI Govind Singh, P.S.
Uttam Nagar.

+ **CRL.A. 481/2004**

KAMALJEET

..... Appellant

Through: Dr. Kanwal Sapra, Mr. H.R. Dhamija,
Advts.

Versus

STATE (NCT OF DELHI)

.....Respondent

Through: Mr. Amit Gupta, APP for State with
Insp. Raman Kumar, ATO/Uttam
Nagar and SI Govind Singh, P.S.
Uttam Nagar.

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MR. JUSTICE VINOD GOEL

VINOD GOEL, J:

1. The present criminal appeals have been filed against the impugned judgment dated 21.04.2004 and order on sentence dated 26.04.2004 in Sessions Case 1/2001 passed by the Court of Ld. Additional Sessions Judge, Delhi ('ASJ') arising out of FIR no.1086/2000 lodged at P.S. Uttam Nagar under Sections 302/201/120B/34 of the Indian Penal Code ('IPC') and Sessions Case 2/2001 arising out of FIR no. 1107/2000 lodged against Surender @ Lambu (A-1) at P.S. Uttam Nagar under Sections 25/54/59 of the Arms Act. The appellants were convicted for the following offences:

Name	Section	Sentence
1. Surender, Dinesh and Jatinder.	• Section 302 read with 120B of the IPC.	Life imprisonment and a fine of Rs.1000. Rigorous imprisonment ('RI') of 3 months in default of fine.
2. Surinder, Dinesh, Jatinder and Kamaljeet.	• Section 201 read with 120B of the IPC.	RI for 4 years and a fine of Rs.1000/-. RI for 3 months in default of fine.
3. Surinder.	• Section 25 of the Arms Act.	RI of one year and a fine of Rs.1000/-. RI for 3 months in default of fine.

Background

2. On 16.11.2000, an information was received at 1:38 PM by Lady Constable Sudesh (PW-1) who was working as a telephone operator in PCR (PHQ), New Delhi that a dead body was lying in a *nalla* on main Najafgarh Road, Kakrola Mod near Vinod Motors. She transmitted the information to the Communication net of West District for conveying the same to the PCR Van. DD no.21A (Ex.PW-3/A) was recorded on the basis of this information by Roznama Munshi Constable Raj Kumar (PW-3) on 16.11.2000 at P.P. Matiala, P.S.

Uttam Nagar. This DD was assigned by HC Bhim Singh (PW-14) to HC Ram Vir (PW-9). Both of them proceeded to the spot. SI Rajbir Singh (PW-23), Chowki Incharge, P.P Matiala and Constable Tejpal (PW-16) also received this information vide DD No.21A and reached at the spot where a dead body was found. They found that PW-14 and PW-9 had already reached there. Photographs of the body were taken by a private photographer and PW-23 made an endorsement on DD no.21A for registration of the FIR under Sections 302/201 of the IPC.

3. The body was identified as one of Narender, by the parents of the deceased, Sh. Ram Parshad (PW-13) and Smt.Savitri Devi (PW-12). They informed the police that their son had been missing since 13.11.2000 and expressed a suspicion against the accused, Jitender (A-3), Surinder (A-1) and Dinesh (A-2) as the deceased was with them at about 7:30 PM on 13.11.2000 and last seen alive with them by PW-12 at around 8:30 PM on the same day. The police made a search of the respective homes of the accused but all three were found missing.

4. The post-mortem on the dead body was conducted by Dr. R.K Sharma (PW-19) on 17.11.2000 at 3 PM and he opined in the Post Mortem report (Ex.W19/A) that “*the time since death approximately 3 days*” and “*the cause of death was due to compression of neck and head injuries (intra cranial haemorrhage)*” thereby establishing that the death was homicidal in nature.

5. On 21.11.2000, enquiries were made from the deceased’s father and a search was made in his house. During this search, a letter

written by the sister of A-2 namely, Smt. Suman Kumari (PW-11) to the deceased was found in one drawer of a table. The father of the deceased informed the police that PW-11 used to take tuitions from the deceased at his house. The I.O., Inspector Sukhbir Singh (PW-25) then visited PW-11's home where her brother, Sudesh Kumar (PW-26) handed over a school register (Ex.CW1/A) containing PW-11's handwriting. While PW-25 was interrogating PW-11, A-1 and A-2 reached there and in their disclosure statements, Ex.PW-22/D and Ex.PW22-E respectively, they disclosed that they had killed the deceased, Narender in the room behind the *chakki* with the help of A-3. They further disclosed that with the help of A-4, they had wrapped the body in a bed sheet and carried it in the Van brought by A-4 and they had dumped the body in the *Nalla* on Najafgarh Road near Vinod Motors. A-1 and A-2 were arrested and they led the police to the house of A-4 where he was apprehended and a Van bearing registration number DNH-4256 was recovered pursuant to his disclosure statement (Ex.PW-22/G) in which he disclosed that he along with A-1, A-2 and A-3 had taken the body wrapped in a bed sheet in his Van and then dumped it near the *nalla* on Najafgarh Road, near Vinod Motors.

6. The motive of the murder was disclosed by A-1 in his disclosure statement. He disclosed that Jitender (A-3) was running a *chakki* in the front portion of Suman's (PW-11) house and used to reside in a room built in the back portion of the *chakki* itself. Suman (PW-11) used to take tuitions from the deceased and A-3 was having a

one sided love affair with her. A-3 started suspecting that the deceased, Narender and PW-11 were having an affair as the deceased had started visiting her house. A-1 and A-3 called the deceased to the *Chakki*, threatened and cautioned him not to have any relation with PW-11. Subsequent to this threat, the deceased became friendly with A-3 and also started visiting him. On 12.11.2000, when A-3 visited PW-11's house on the pretext of taking water, he saw PW-11 and the deceased in a compromising position. On the same evening, A-3 and A-1 narrated the entire incident to Suman's brother Dinesh (A-2). A-1, A-2 and A-3 decided to murder the deceased Narender and on 13.11.2000, they called the deceased to the *chakki* where they murdered the deceased after beating and strangulating him.

7. A-1 further disclosed that he along with A-2 then removed the deceased's purse, other papers and one ring from his finger and A-1 kept the same in his handkerchief. The dead body was wrapped in a bed sheet which was removed by A-2 from the cot of A-3. Then A-3 along with A-4 arrived in a van bearing registration number DNH-4256 in which they took the dead body and dumped it in the *nalla* near Vinod Motors. The bed sheet in which the dead body was wrapped was then allegedly burnt by A-3 using diesel and was thrown in a vacant plot behind the bushes.

8. During the investigation, on 23.11.2000 A-1 led the police to a vacant plot in Sector-17, Pappankalan from where he got recovered the purse, ring, etc belonging to the deceased from behind some bushes near a temple vide pointing out memo, Ex.PW22/N. He also

got recovered one country made pistol and two live cartridges wrapped in a handkerchief from the same plot vide pointing out memo, Ex.PW22/M, on the basis whereof a separate FIR No.1107/2000 was registered under Sections 25/54/59 of the Arms Act.

9. A-3 was arrested on 23.11.2000 and subsequent to his disclosure statement (Ex.PW22/Q), the bed sheet in which the dead body was allegedly wrapped and carried to the *nalla* was recovered pursuant to his pointing out memo Ex.PW22/Q3 from a vacant plot behind his house.

10. On 08.06.2001, the Ld. ASJ framed charges under Sections 302/120-B/201/34 against all the accused and Charge under Sections 25/27 of the Arms Act was framed against the accused, Surrender. The prosecution examined 26 witnesses to bring home the guilt of the accused persons whereas the accused examined two witnesses in their defense. Ms. Shashi Aggarwal was examined as a Court witness (CW-1).

Arguments on behalf of the appellants.

11. Mr. Mukesh Kalia, Advocate appearing on behalf of the accused, A-1, A-2 and A-3 had argued that the impugned judgment is not based on the settled legal principles but on conjectures and surmises and hence deserves to be set aside. The thrust of Mr. Kalia's arguments were premised on the contention that none of the recoveries at the instance of the accused are admissible in evidence and the motive for the alleged crime could not be proved as PW-11's

handwriting could not be conclusively matched with the letter that she had allegedly written to the deceased.

12. Dr. Kanwal Sapra, Advocate appearing on behalf of the accused, A-4 had argued that the phone number which was allegedly used to contact the other accused on the day of the incident could not be connected to his client as no proof of ownership was produced by the prosecution. He further argued that the Van recovered from the house of A-4 could in no way be connected to the alleged crime as no forensic or physical evidence was brought on record to connect him or the Van with the crime.

Discussion & Analysis

13. The present case is based solely on circumstantial evidence and therefore it would be prudent to reproduce below, the settled legal principles to be followed while basing a conviction on circumstantial evidence, as enunciated by the Supreme Court in Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116: -

“153.....

(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.”

Last seen evidence

14. The first link that the prosecution had tried to establish was the fact that the deceased was last seen in the company of the accused, A-1, A-2 and A-3 through the testimony of Smt. Savitri Devi (PW-12), mother of the deceased. PW-12 testified that her son, Narender was running a Coaching centre at C-33, Bhagwati Garden extension, Uttam Nagar, New Delhi for about 4 months prior to the incident. She deposed that A-3, described as *chakkiwala* had started becoming friendly with her son since 15 days prior to the incident and on “Monday”, A-2 and A-3 came to her house on a two wheeler scooter at around 1:30 PM and asked her son, Narender to come to the *chakki* on that day for a “*meat party*” at 7:30 PM. She further deposed that when Narender did not go to the *chakki* at 7:30 PM, A-2 and A-3 came to her house on a two wheeler and took him along with them.

15. She further deposed that at about 8:30 PM, she went to the *chakki* to call Narender for dinner and there, she found A-1, A-2 and A-3 along with her son. She became terrified after seeing A-1 there and saw her son pleading with A-1, A-2 and A-3 with folded hands to allow him to eat two meals a day with dignity. She deposed that she had suspected that the accused might do something untoward with her son and therefore, asked Narender to accompany her back to their

house but A-1 caught hold of Narender's hand and made him sit. When she kept standing there, A-3 caught hold of her hand and took her outside and assured her that they will cause no harm to her son. She came back to her house and sat down on the stair case of the office of her son, Narender and when her husband (PW-13) came back home, she narrated the entire incident to him.

16. Though PW-12 made several improvements and exaggerations in her examination-in-chief, she remained consistent and firm on one relevant and material particular that she had seen the deceased in the company of A-1, A-2 and A-3 on 13.11.2000 at around 8:30 PM, which inspires confidence. In this context, it would be relevant to turn to the decision of the Supreme Court in Sucha Singh v. State of Punjab, (2003) 7 SCC 643 where it was held that:

“18.....Stress was laid by the accused-appellants on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out the entire prosecution case. In essence, prayer is to apply the principle of “falsus in uno falsus in omnibus” (false in one thing, false in everything). This plea is clearly untenable. Even if a major portion of evidence is found to be deficient, in case residue is sufficient to prove the guilt of an accused, notwithstanding acquittal of a number of other co-accused persons, his conviction can be maintained. It is the duty of the court to separate the grain from the chaff. Where chaff can be separated from grain, it would be open to the court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove the guilt of other accused persons. Falsity of a particular material witness or a material particular

would not ruin it from the beginning to the end. The maxim “falsus in uno falsus in omnibus” has no application in India and the witnesses cannot be branded as liars. The maxim “falsus in uno falsus in omnibus” has not received general acceptance nor has this maxim come to occupy the status of a rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called “a mandatory rule of evidence.....”.

(emphasis supplied)

17. Following the dictum in Sucha Singh’s case (supra), it would not be prudent to throw out the entire testimony of PW-12 as she had remained firm and consistent on the one material particular of having last seen her deceased son, Narender with A-1, A-2 and A-3 on 13.11.2000 at about 8:30 PM.

18. When it is established that the deceased was last seen alive with the accused and the time of death is so proximate to the accused persons having been last seen with the deceased, the onus of proof would naturally shift to A-1, A-2 and A-3 to furnish an explanation which appears to be probable and satisfactory. This principle was elaborated by the Supreme Court in State of Rajasthan v. Kashi Ram, (2006) 12 SCC 254 where it was held that: -

“23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categorical in laying down that

when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. 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 his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain.”

(emphasis supplied)

19. In State of U.P. v. Satish, (2005) 3 SCC 114, the last seen principle was summed up by the Supreme Court as under: -

“22. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible.”

20. Following the ratio in Kashi Ram's case (supra), the Supreme Court in Sathya Narayanan v. State, (2012) 12 SCC 627 held that: -

“34. The appellant-accused having been seen last with the deceased, the burden of proof rests upon them to prove what had happened thereafter since those facts were within their special knowledge. In the absence of any explanation, it must be held that they failed to discharge the burden cast upon them by Section 106 of the Evidence Act, 1872. Admittedly, none of the appellants explained what had happened to the deceased even in their statements under Section 313 of the Code.”

(emphasis supplied)

21. The PMR on the body of the deceased was conducted on 17.11.2000, at 2 PM and the time since was mentioned as approximately 3 days. Even though there is a gap of more than 12 hours between the approximate time of death from the time the accused were seen with the deceased by PW-12, the accused chose not to give any explanation in their statement under Section 313 of the CrPC as to when they had parted company with the deceased on the previous day or vice versa or whether they were in his company on 13.11.2000, at around 8:30 PM. The accused have not been able to discharge the onus of the proof cast upon them under Section 106 of the Indian Evidence Act, 1872 ('IEA').

Motive

22. The prosecution has alleged that the motive for murdering Narender was because the sister of the accused, A-2 (PW-11) was

having an affair with the deceased, Narender. It is also alleged that the accused, A-3 was having one sided feelings towards Suman (PW-11) and on seeing both of them in a comprising position on 12.11.2000, he could not bear the same and hatched a plan along with A-1 and A-2 to eliminate Narender. The relevance of proving the motive in a criminal trial has been explained by the Supreme Court in State of U.P. v. Babu Ram, (2000) 4 SCC 515 where it was held that:-

*“11. We are unable to concur with the legal proposition adumbrated in the impugned judgment that motive may not be very much material in cases depending on direct evidence whereas motive is material only when the case depends upon circumstantial evidence. There is no legal warrant for making such a hiatus in criminal cases as for the motive for committing the crime. **Motive is a relevant factor in all criminal cases whether based on the testimony of eyewitnesses or circumstantial evidence.** The question in this regard is whether the prosecution must fail because it failed to prove the motive or even whether inability to prove motive would weaken the prosecution to any perceptible limit. **No doubt, if the prosecution proves the existence of a motive it would be well and good for it, particularly in a case depending on circumstantial evidence, for such motive could then be counted as one of the circumstances.** However, it cannot be forgotten that it is generally a difficult area for any prosecution to bring on record what was in the mind of the respondent. Even if the investigating officer would have succeeded in knowing it through interrogations that cannot be put in evidence by them due to the ban imposed by law”*

(emphasis supplied)

23. In Dandu Jaggaraju v. State of A.P., (2011) 14 SCC 674, the Supreme Court elaborated on the relevance of proving the motive in a criminal case and held that:

*“9. It has to be noticed that the marriage between PW 1 and the deceased had been performed in the year 1996 and that it is the case of the prosecution that an earlier attempt to hurt the deceased had been made and a report to that effect had been lodged by the complainant. There is, however, no documentary evidence to that effect. We, therefore, find it somewhat strange that the family of the deceased had accepted the marriage for about six years, more particularly, as even a child had been born to the couple. In this view of the matter, the motive is clearly suspect. **In a case relating to circumstantial evidence, motive is often a very strong circumstance which has to be proved by the prosecution and it is this circumstance which often forms the fulcrum of the prosecution story.**”*

(emphasis supplied)

24. The prosecution relied extensively on a letter, Mark ‘A’ (Q1) allegedly written by PW-11 to the deceased, Narender confessing her love for him and asking him to beware of her brother, A-2 and A-3. This letter was seized from the room of the deceased on 21.11.2000, vide seizure memo, Ex.PW13/B. A register (Ex.CW1/A) in the name of Suman containing pages S-1 to S-47 allegedly containing PW-11’s handwriting was handed over by Sudesh Kumar (PW-26) who is Suman’s brother. This register was seized vide seizure memo, Ex.PW22/A. Specimen handwriting of PW-11 were also taken by the IO Inspector Sukhbir Singh (PW-25). PW-11 turned hostile and

denied having written this letter or having an affair with the deceased. She stated that she does not know in whose writing this register (Ex.CW1/A) has been written. She admitted to giving 12 pages containing her handwriting to the police but deposed that she did not remember which were these papers. She further deposed in her examination-in-chief that she does not remember whether S48 to S50, Mark 'A' and A-3 and A-4 form a part of the papers containing her handwriting that were collected by the police. PW-26, who is admittedly the brother of A-2 and PW-11 had both turned hostile. However, PW-26 admitted his signatures on the seizure memo (Ex.PW21/A) of the register, Ex.CW1/A.

25. Since PW-11 denied writing the letter Mark-A (Q1) or writing in the register Ex.CW1/A, the Ld. ASJ opted to examine Mrs. Shashi Aggarwal as CW-1. CW-1 was a Hindi Teacher at SKVK school, Kakrola, Delhi, where PW-11 was studying. She was examined to prove that the register did belong to PW-11. CW-1 deposed that as per the particulars mentioned on the front of the register, it did belong to PW-11, Suman of Class-X, having roll no.36. In her cross-examination, she deposed that due to the large number of students, it is not possible for her to identify each and every student's handwriting; that she did not have any personal knowledge of the handwriting in the register and that she has deposed only after seeing the name slip on the cover of the register. She testified that the entire home-work in the register, Ex.CW1/A is in the same handwriting. She deposed that "*on the basis of Register Ex.CW1/A, I can say that this homework has been*

done by Suman herself.” She admitted the suggestions of A-2 that “*it is correct that cover is put by the student on the register.*” So, it is proved beyond reasonable doubt that the register, Ex.CW1/A belongs to Suman and is in her handwriting.

26. The letter Mark ‘A’ (Q1) along with handwriting sample marked S1 to S50 were sent for examination to the Govt. Examiner of Questioned Documents. The report of the Examiner is Ex. PW25/C. In this report the Examiner found that “*the person who wrote the blue enclosed writings stamped and marked S1 to S50 also wrote the red enclosed writing similarly stamped and marked Q1.*” The Govt. Examiner of Questioned Documents was cited as a witness but he could not be examined by the prosecution despite summons being sent to him repeatedly. However, on 07.11.2003, counsel for A-2 made the statement before the Ld. ASJ: “*I do not dispute the genuineness of report of handwriting expert which is Ex.PW25/C so far as its admissibility in evidence is concerned. However, the effect of the report in view of statement of alleged author made before the Court shall be argued at the appropriate stage.*”

27. In view of the statement given by the counsel for A-2, the admissibility of the report, Ex.PW25/C is not in doubt. Further, the report unequivocally states that the disputed handwriting in letter Mark ‘A’ (Q1) and sample handwriting, S1 to S50 are written by the same person.

28. The Ld. ASJ exercised the powers vested under Section 73 of the IEA and herself ventured to compare the handwriting in the letter

Mark 'A' (Q1) with the handwriting in the register, Ex.CW1/A vis-à-vis the specimen handwriting on the papers, S-48 to S-50.

29. At this stage, it would be appropriate to turn to Section 73 of the IEA which reads as under: -

“73. Comparison of signature, writing or seal with others admitted or proved.—

In order to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

30. The scope of the power conferred under this section was elaborated upon by the Supreme Court in Lalit Popli v. Canara Bank, (2003) 3 SCC 583 as follows: -

13. It is to be noted that under Sections 45 and 47 of the Evidence Act, the court has to take a view on the opinion of others, whereas under Section 73 of the said Act, the court by its own comparison of writings can form its opinion. Evidence of the identity of handwriting is dealt with in three sections of the Evidence Act. They are Sections 45, 47 and 73. Both under Sections 45 and 47 the evidence is an opinion. In the former case it is by a scientific comparison and in the latter on the basis of familiarity resulting from frequent observations and experiences. In both

the cases, the court is required to satisfy itself by such means as are open to conclude that the opinion may be acted upon. Irrespective of an opinion of the handwriting expert, the court can compare the admitted writing with the disputed writing and come to its own independent conclusion. Such exercise of comparison is permissible under Section 73 of the Evidence Act. Ordinarily, Sections 45 and 73 are complementary to each other. Evidence of the handwriting expert need not be invariably corroborated. It is for the court to decide whether to accept such an uncorroborated evidence or not. It is clear that even when an expert's evidence is not there, the court has power to compare the writings and decide the matter.”

(emphasis supplied)

31. After comparing the specimen writing in S-48 to S-50 with Mark ‘A’ (Q1), the learned ASJ concluded that both have similar characteristics and peculiarities and the letter Mark ‘A’ (Q1) is in Suman’s handwriting thus proving the motive on the part of the accused for committing the murder of Narender.

Recovery at the instance of the accused, Surender (A-1)

32. On 23.11.2000, a country made pistol .315” and two 8mm/.315” cartridges were recovered subsequent to the disclosure statement of A-1 (Ex.PW22/D), vide pointing out memo, Ex.PW-22/M. A polythene bag containing a black coloured purse (Ex.P5), one ring (Ex.P6), currency notes of denomination 10 (Ex.P7), one photograph of the deceased (Ex.P8) and some documents (Ex.P9/1-9) were also

recovered on the same day subsequent to this disclosure statement, vide pointing out memo Ex.PW-22/N.

33. The recovery of the pistol and the live cartridges was effected in the presence of SI Ram Kumar (PW-22), SI Rajbir Singh (PW-23) and Inspector Sukhbir Singh (PW-25). PW22, PW-23 and PW- 25 deposed in unison that the accused had taken them to Sector-17, Pappan Kalan where there was a small *Pipal* tree below which was a small temple. About 50 paces on the southern side of this temple the accused had recovered a polythene bag from inside some bushes and in this bag was the pistol and the cartridges. All the three witnesses deposed that no public witness was willing to join the recovery.

34. Counsel for A-1 had argued that in their cross-examination, PW-22, PW-23 and PW-25 had admitted that the place of recovery is an open place which is easily accessible to all and hence this recovery cannot be relied upon. In State of H.P. v. Jeet Singh, (1999) 4 SCC 370, the Supreme Court explained whether a recovery from an open place which is accessible to all can be relied upon in the following words: -

“26. There is nothing in Section 27 of the Evidence Act which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is “open or accessible to others”. It is a fallacious notion that when recovery of any incriminating article was made from a place which is open or accessible to others, it would vitiate the evidence under Section 27 of the Evidence Act. Any object can be concealed in places which are open or accessible to others. For example, if the article is buried in the main

roadside or if it is concealed beneath dry leaves lying on public places or kept hidden in a public office, the article would remain out of the visibility of others in normal circumstances. Until such article is disinterred, its hidden state would remain unhampered. The person who hid it alone knows where it is until he discloses that fact to any other person. Hence, the crucial question is not whether the place was accessible to others or not but whether it was ordinarily visible to others. If it is not, then it is immaterial that the concealed place is accessible to others.”

(emphasis supplied)

35. Following the ratio in Jeet Singh’s case (supra), the factum of the recovery from an open place which is accessible to all would be of no consequence if the recovered articles were concealed in such a way that only the accused would know their exact location. In the present case, PW-22, PW-23 and PW-15 deposed in unison that the pistol, cartridges and other belongings of the deceased were concealed behind some bushes and A-1 himself went inside the bushes and took out these articles. Hence the location of the recovered article at the instance of A-1 can be said to be within the exclusive knowledge of A-1.

36. The argument of the counsel for A-1 that the pistol and cartridges were sent to the FSL only on 21.12.2000 i.e. after a gap of almost 30 days and there is no explanation offered for this delay by the IO is not of any consequence in the present case as the prosecution has not alleged that this pistol and cartridges were used for murdering the deceased. A separate FIR no. 1107/2000 was registered under

Sections 25/54/59 of the Arms Act against A-1 on the recovery of the pistol and cartridges and a separate case registered as Session Case no.2/2001 was initiated against A-1 for the offence under Section 25 of the Arms Act. Under Section 25 of the Arms Act, mere possession of an unlicensed pistol is punishable. Hence, the factum of this pistol and cartridges being sent to the FSL for a ballistic examination is no consequence in the present case. These facts relating to the recovery of the pistol and cartridges were put to the accused in his statement under Section 313 of the CrPC to which he offered no explanation.

37. Coming next to the recovery of the alleged personal belongings of the deceased subsequent to the disclosure statement of A-1, Ex.PW22/D, a polythene bag containing a black coloured purse (Ex.P5), one ring (Ex.P6), currency notes of denomination 10 (Ex.P7), one photograph of the deceased (Ex.P8) and some documents (Ex.P9/1-9) were recovered vide pointing out memo, Ex.PW-22/N. PW-22, PW-23 and PW-25 who were the witnesses to this recovery admitted in their cross examination that these articles were not put to any Test Identification Parade (TIP) and were not even identified by anyone in Court. Even though the purse and the ring were of such a nature that needed identification by a person who had seen the deceased carrying/wearing them, but the photograph of the deceased and his personal documents (Ex.P9/1-9) need no identification as these articles irrefutably belong to the deceased. These facts relating to the recovery of the deceased's personal belongings was put to A-1 in his

statement under Section 313 of the CrPC but he chose not to offer an explanation.

Recovery at the instance of Kamaljeet (A-4)

38. Kamaljeet (A-4) was convicted for the offences under Section 201 read with Section 120B of the IPC as the Trial Court came to the conclusion that he had provided the Van which was used to dispose of the dead body. He had disclosed in his disclosure statement, Ex.PW22/G that A-3 had come to his house on 13.11.2000 and both of them had taken his van bearing registration number DNH 4256 to A-3's *chakki* where A-1 and A-2 were already present. He disclosed that Narender's dead body was wrapped in a bed sheet which was then taken by all of them in this vehicle to be dumped in the *nalla* near Vinod Motors. This Van was recovered pursuant to the disclosure statement of A-4 from his house at A-56, Bhagwati Garden in the presence of PW-22, PW-23 and PW-25.

39. This Van is registered in the name of Shri Satya Dev, father of A-4, his address is mentioned as A-57, Bhagwati Garden in the RC. The Trial Court had rightly observed that even though A-4's address in the chargesheet is mentioned as A-56 Bhagwati Garden, the RC of the car along with the Bail Bond and Personal Bond submitted by A-4 in Court establishes that both these addresses belong to A-4.

40. However, the recovery of this van is not enough to connect the accused with the alleged crime and the prosecution had to establish a connection between the recovered article and the alleged crime. In the present case the Van was recovered from A-4's house. Hence the

place of recovery i.e. A-4's house is the only knowledge that could be attributed to the accused. The burden lies on the prosecution to connect the recovered article i.e. Van with the alleged crime. The prosecution did not conduct any forensic examination of the Van to prove that the dead body was actually transported in this Van for being dumped at the *nalla* near Vinod Motors. The factum of the Van being recovered from A-4's house is also of no help as his house was open and accessible to several other people and not within his exclusive knowledge, as contemplated in Section 27 of the IEA.

41. The Trial Court arrived at the conclusion that since the dead body was recovered from the *nalla*, it must have been transported in some van and since A-4 had stated in his disclosure statement that his Van was used to transport the dead body, this disclosure statement has to be relied upon in entirety. We are of the opinion that the Trial Court erred in coming to this conclusion as the information relating to past user or history is inadmissible in evidence and only the place from where the article is recovered, is admissible in evidence. Consequently, the recovery of the van at the instance of A-4 is of no consequence. A-4 is therefore acquitted of the offences under Sections 201/120-B of the IPC.

Defence Witnesses

42. A-2 examined two witnesses in his defence to prove his *alibi* that he used to leave for work at 6:30 AM and return at 10:00 PM from 13.11.2000 to 20.11.2000. DW-1, Desh Raj who was working as a foreman with A-2 in Bakhara Bawas Management Board

Power House, Balabhgarh, Haryana deposed that the general working hours for the technical staff is from 8 AM to 5 PM. He also brought the attendance register of the employees for the year 2000. Photocopy of the attendance register for the month of November 2000 is Ex.DW1/A. As per this register, A-2's name is mentioned at serial no.21 and he was reporting for duty from 13.11.2000 to 20.11.2000. He further deposed that he does not know the time taken to travel from Uttam Nagar to Okhla. In his cross-examination, he admitted that A-2 was absent from duty on 20.11.2000.

43. DW-2 Rakesh Kumar is A-2's neighbour. He deposed that he has accompanied A-4 several times till Palwal. In his cross-examination he could not tell the date or time when he had accompanied A-2 till Palwal.

44. A-2 in his statement under Section 313 of the CrPC had stated that he was summoned at the Police Station on 20.11.2000, after he had returned home from work and was detained there for one day. The falsity in this statement is brought out by DW-1's cross-examination where he admitted that A-2 was absent from work on 20.11.2000. The attendance register for November 2000 (Ex.DW1/A) shows that A-2 was being marked absent on 20.11.2000 and 21.11.2000. Further, since A-2's shift was only till 5 PM, as deposed by DW-1, it is very much possible that A-2 would have reached home before 8:30 PM, which tallies with the time when PW-12 had last seen the deceased alive with A-1, A-2 and A-3.

45. Further, A-2 did not give any suggestion to his sister (PW-11) and brother (PW-26) during their evidence that on the date of the incident i.e. 13.11.2000, he had reached home from his office at 10:00 PM, as was claimed by him in his statement under Section 313 of the CrPC or even after 8:30 PM, when he along with A-1 and A-3 was seen by PW-12 in the company of the deceased.

46. The several inconsistencies in the statement of A-2 under Section 313 of the CrPC, the testimony given by DW-1 and Ex.DW1/A do not prove the *alibi* pleaded by A-2. Rather, it brings out his intention to conceal the truth by stating that he was at work on 20.11.2000, when he was not.

Conclusion

47. We are thus of the opinion that A-1, A-2 and A-3 have not been able to discharge the burden cast upon them by Section 106 of the IEA, after they had last been seen with the deceased before he was found dead. Further, the motive of committing the murder has also been proved through the letter (Ex.CW1/A) written by PW-11 to the deceased some days before he was found dead. The recovery of the deceased's personal belongings after A-1's disclosure is also an important link in the chain of circumstances. The recovery of the pistol and cartridges at the instance of A-3 has also been correctly believed by the Trial Court. In view of the facts and circumstances of the case, the chain of circumstance in the present case is so complete so as to be consistent with the guilt of A-1, A-2 and A-3. All the incriminating circumstances were put to the accused in their statement

under Section 313 of the CrPC to which they chose to give no reply. A-2 chose to plead an *alibi* in his statement under Section 313 but that has not been corroborated by the defence witnesses or the documents brought on record.

48. In view of the facts and circumstances of this case, A-4 (Kamlajeet) is acquitted for the offences under Sections 201/120-B of the IPC in Criminal Appeal no. 481/2004. The conviction of A-1 (Surender), A-2 (Dinesh) and A-3 (Jitender), appellants in Criminal Appeal no. 389/2004, Criminal Appeal no. 339/2004 and Criminal Appeal no. 393/2004 respectively under Sections 302/201/120-B of the IPC, is upheld. The conviction of A-1 under Section 25 of the Arms Act is also upheld. The bail bonds and surety bonds furnished by the said appellants are hereby cancelled. They shall surrender before the Trial Court within two weeks, failing which the IO concerned will immediately take steps to have them arrested and sent to custody for serving out the remainder of the sentence awarded to them in the impugned judgment.

49. We find that the Trial Court has not awarded any compensation to the legal representative of the deceased under Section 357 of the CrPC. Meanwhile Section 357A CrPC has been incorporated w.e.f. 31.12.2009. Pursuant thereto, the Government of NCT of Delhi has framed the Victim Compensation Scheme. Therefore, the Delhi State Legal Services Authority ('DLSA') is directed in terms of Section 357A (5) of the CrPC to forthwith undertake an inquiry and award and ensure disbursal of the appropriate compensation to the legal heirs of

the victim in terms thereof within two months. For this purpose, a certified copy of this judgment shall be delivered forthwith to the Secretary, DLSA with a further direction to submit a compliance report to the Roster Bench within three months from the date of receipt of a certified copy of this judgment. If no such compliance is forthcoming within the stipulated time, the Registry will place a note before the Roster bench for further directions.

50. These appeals are disposed of in the above terms. The Trial Court record be returned together with a certified copy of this judgment.



(VINOD GOEL)
JUDGE

(HIMA KOHLI)
JUDGE

AUGUST 02, 2019

