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

+ CRL.A. 955/2018

SEEMA alias PRABHA Appellant
Through: Mr. Ajay Verma, Advocate with
Mr. Nikhil Anand, Advocate
versus

THE STATE OF NCT OF DELHI Respondent
Through: Mr. Rajat Katyal, APP for State
with SI Raju Yadav, PS Sultanpuri,
Delhi.

AND

+ CRL.A. 757/2018

KISHORE KUMAR Appellant
Through: Mr. Bipin Kumar Jha, Advocate
with Mr. Narsingh Narain Rai and
Mr. Indu Bhushan Vimal,
Advocates.
versus

THE STATE (GOVT OF NCT OF DELHI) Respondent
Through: Mr. Rajat Katyal, APP for State
with SI Raju Yadav, PS Sultanpuri,
Delhi.

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Date of Decision: 24th May, 2019

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

MANMOHAN, J: (Oral)

1. While CrI.A.955/2018 has been filed by appellant-accused Seema @ Prabha, CrI.A. 757/2018 has been filed by appellant-accused Kishore Kumar challenging the judgment dated 22nd December, 2017 convicting them under Section 302 read with Section 120B IPC as also the order on sentence dated 08th January, 2018 by which both the appellant-accused have been directed to undergo rigorous imprisonment for life along with a fine of Rs.10,000/- each.

2. The case of the prosecution is that in the intervening night of 17/18th March, 2013, on the First Floor of House No. 6/39, Friends Enclave, Sultanpuri, Delhi within the jurisdiction of Police Station Sultanpuri, both the appellant-accused in pursuance to a criminal conspiracy committed murder of Saurabh, S/o. Shri Jagdish and husband of appellant-accused Seema @ Prabha, by strangulation and smothering with the help of a belt, chunni and pillow and thereby both the appellant-accused committed an offence punishable under Sections 120-B/302 IPC.

FINDINGS OF THE TRIAL COURT

3. The relevant portion of the trial court judgment dated 22nd December, 2017 is reproduced hereinbelow:-

“39. Coming now to the applicability of the section 106 of the Indian Evidence Act, 1872, I may state that the burden in the aforesaid facts and circumstances of the case squarely shifts upon the accused persons to explain the facts which are specially in their knowledge as to why there were regular phone calls between 06:00 PM to 01:40 AM. No doubt, in a criminal trial the burden of proving its case rests squarely upon the prosecution so as to prove the guilt of the accused beyond shadows of all reasonable doubts, but Section 106 Indian Evidence Act, 1872 is an exception

to the said general rule. It applies to all those facts which are exclusively to the said general rule. It applies to all those facts which are exclusively to the knowledge of the accused, or it will be exclusively difficult for the prosecution to prove those facts. No doubt, accused is not supposed to prove innocence beyond all reasonable doubts, but what is required of him is to bring out a preponderance of probability. But here in the present case in the statement recorded under Section 313 Cr.P.C. nothing has been brought on record by them regarding their uninterrupted phone calls for considerable period particularly on the day of incident, when the deceased was strangled and murdered. Therefore, in the absence of any explanation on the part of the accused persons as to how they were communicating with each other on the fateful day. I have neither any doubt nor any reason to disbelieve the story of prosecution. In fact, besides making a bald statement that they have been falsely implicated in the present case or nothing has been recovered at their instance, no positive evidence has been brought on record by them regarding their communication or it is also not denied that mobile phone numbers were not belonging to them. Even no such plea of alibi has been taken by any of the accused regarding their presence at the spot or around the spot.

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41. On the basis of circumstantial evidence brought on record by the prosecution while forming a chain as follows:

- That accused Seema @ Prabha is resident of 6/39, First Floor, Friends Enclave, Sultan Puri, Delhi.
- That SI Mahender Pratap was posted as SI in PS Sultan Puri.
- That after receiving DD No.5 B on 18.03.2013 SI Mahender Pratap reached at the spot along with SI Mukesh Kumar and HC Dara singh.
- That SI Mahender Pratap found one dead body on the bedding in a room situated on the first floor/spot.
- That injury marks were on the chin, right jaw, left cheek, ligature mark on the front of the neck and dark ligature mark on the back side of the neck.

- *That Crime Team was called at the spot and the spot was photographed and inspected.*
- *That on 18.03.2013 post-mortem on the dead body of deceased was conducted after which the dead body was cremated.*
- *The cause of death was verbally opined by the Doctor to be strangulation and smothering. On suspecting the said fact, the IO prepared a rukka and got the FIR registered.*
- *That on inquiry from public persons IO Insp. Puran Chand got suspicion about the involvement of the wife of deceased and after interrogation accused Seema @ Prabha confessed regarding her involvement in the present case with accused Kishore Kumar.*
- *That on the disclosure statement of accused Seema Chunni of pink colour and one Pillow were recovered, with the help of which they had strangled the neck and smothered the nose and mouth of deceased.*
- *That the said Chunni and Pillow were seized.*
- *That the accused Seema @ Prabha led the Police to the address of accused Kishore Kumar at Y-468, Janta Market, Camp No.1, Nangloi, Delhi and accused Kishore Kumar was arrested.*
- *That pursuant to the disclosure statement accused Kishore Kumar got recovered one leather belt of black colour.*
- *That the medical evidence on record establishes that the cause of death is asphyxia as a result of combined effect of strangulation and smothering which were fresh and ante mortem at the time of death.*
- *That as per the subsequent opinion of the medical evidence the injury mentioned in post-mortem report is possible by material i.e. Pillow, Belt and Chunni or the similar ones cannot be ruled out.*
- *That the mobile phone Make Huawei recovered from accused Kishore Kumar.*
- *That the mobile no.9213869863 was found in the name of accused Seema @ Prabha.*
- *That the mobile phone with No.9211570636 recovered at the instance of accused Kishore was registered in the name of his mother.*

- *That there was a regular call between the mobile phone of accused Seema @ Prabha and the mobile phone used by kishore from 06:00 PM onwards till 01:40 PM*

42. *The prosecution to establish the factum of death has examined Dr. Manoj Dhingra as PW 12 who deposed to the effect that on 18.03.2013, he along with Dr. Vivek Rawa conducted the post-mortem of deceased Saurabh with the alleged history of found dead in his house on 18.03.2013 at about 03:30 AM. The detailed PM report is exhibited as Ex.PW12/A bearing their signatures at point A and B. The cause of death was opined as asphyxia as a result of combined effect of strangulation and smothering which were fresh and ante mortem at the time of death.*

He further deposed to the effect that he received an application vide Ex.PW10/A along with three pullandas for subsequent opinion. All the three pullandas containing cream colour Pillow covered with green colour cover, and the pullanda no.2 containing black belt with metallic buckle. Pullanda No.3 was containing one pink colour Chunni of synthetic material. It is deposed that after going through the PM report and the exhibits produced before him, he opined that the injuries mentioned in PM report is possible by such materials or the similar ones cannot be ruled out. The subsequent opinion is Ex.PW12/B. This witness is not examined by Ld. Defence counsel to dispute the injuries and death caused by the articles produced in the pullandas.

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44. *The prosecution has proved the identity of the accused persons, the manner in which the offence has been committed, place of commission of the offence, the investigation including the documents prepared, post-mortem report etc. There is nothing which could shatter the veracity of the prosecution witnesses or falsify the claim of the prosecution. The prosecution witnesses have materially supported the prosecution case and the testimonies of the prosecution witnesses do not suffer from any infirmity, inconsistency or contradiction and are consistent and*

corroborative. The evidence of the prosecution witnesses is natural, trustworthy and corroborated by medical/circumstantial evidence and the witnesses of the prosecution have been able to built up a continuous link.

45. *Before coming to the conclusion to discuss the conduct of the accused persons which is relevant for coming to just conclusion, Section 8 of the evidence Act reads as under:*

8. Motive, preparation and previous or subsequent conduct.—Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact. The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Explanation 1.—The word “conduct” in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation 2.—When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.

46. *As it is established on record that there was no hue and cry on the part of accused Seema @ Prabha whose husband has been murdered. The presence of two kids is not shown in the house or it is also not disclosed by the accused that whether they were present there in the house. It is also not expected from a human being particularly lady that her husband was found dead who sustained injuries and she did not wake up. Even there was a possibility of appearance of anybody else at the spot in the night. When she was having mobile phone, instead of making call to the Police at 100 number or to her parents she went to the house of her parents to inform them that the deceased Saurabh not wake up. It is also not expected from a lady who was having two minor kids upto a maximum age of seven years that she left them at the spot*

and went to her parents home to inform their parents regarding the incident.

The call details so produced by the prosecution with CDR and CAF records, the mobile phone bearing No.9213869863 was registered in her name. CAF record has been proved as Ex.PW15/E. While the other mobile phone used by accused Kishore was found registered in the name of his mother. The call details has been filed by the prosecution w.e.f. 01.03.2013 to 02.04.2013 and from the call details it is apparently clear that accused Seema @ Prabha was using the same only to call the accused Kishore and she had hardly made any call on other number during the period for which the call details has been given. Even on the fateful day of incident, the accused Seema @ Prabha started making calls to the accused from early morning till 01:40 AM in the midnight.

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48. The testimonies of these two witnesses PW6 and PW7 cannot be discarded in totality. However, the facts as deposed by them regarding making of phone call at 100 number PCR and the information given by accused Seema @ Prabha to her brother regarding sustaining of injuries by deceased Saurabh are relevant to the extent that they are forming the chain and filling the link in the chain of circumstances which leads to establish that the accused Seema @ Prabha was present at the spot on the fateful night and she was aware that her husband had sustained injuries. She went to inform her parents in the night at around after 02:00 AM in the morning and her brother accompanied her to the place of incident i.e. her house. They also seen the deceased Saurabh in injured condition. Thereafter, the Police was informed by PW 7 Sanjay who is brother of accused Seema @ Prabha. Police is also reached there at the spot which is established by the document Ex.PW1/A proved by PW1 i.e PCR Form No.1 wherein the time of information is mentioned as 03:10:56 AM. Informant is Sanjay vide Mobile No.9289796962 regarding the address 6/99, Friends Enclave, West Sultan Puri, Delhi. In the PCR form, it is also mentioned that SHO with staff reached Mauka Par. From these facts it is established that offence of murder is committed which is

opined by Doctor in their report and cause of death has been opined as asphyxia as a result of combined effect of strangulation and smothering and injury 2, 3, 4, 5, and 6 which were fresh and ante mortem at the time of death. It is also opined that the strangulation and smothering along with injury no.2, 3, 4, 5 and 6 were sufficient in the ordinary course of nature to cause death.

Further in continuation of the chain of circumstances as till the deceased removed to Hospital there was no linkage between the accused Seema @ Prabha and accused Kishore has been established by the investigating agency. However, as the Doctors opined verbally is a case of homicide then on suspicion the IO interrogated the accused Seema @ Prabha who is the wife of deceased and where she admitted the commission of murder of her husband deceased Saurabh while forming a criminal conspiracy with the help of accused Kishore as she was in friendship with the accused Kishore. She also admits the use of Chunni, Pillow and Belt by the accused persons, while committing the offence. The used articles in the crime i.e. Chunni and Pillow has been recovered at the instance of accused Seema @ Prabha while the Belt and the mobile of accused Kishor has been recovered at the instance of accused Kishor and it is clear from Section 27 of the Indian Evidence Act (As referred above) that the disclosure statement leading to effecting the recovery is admissible in evidence.

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52. The rest of the part has been played by first IO SI Mahender Pratap and second IO Insp. Puran Pant and they have corroborated the testimony of other prosecution witnesses whose testimony has been discussed above, has established link between accused Seema @ Prabha and accused Kishore that they are in acquaintance with each other and are in touch on regular basis, as is apparent from the phone calls of mobile no.9211570636 and 9213869863. It is also established on record that the mobile No.9213869863 was registered in the name of accused Seema @ Prabha and the mobile 9211570636 was belonging to the accused Kishor while the same was registered in the name of his mother. It is also apparently clear that accused Seema @ Prabha was using

the mobile to have talks with the accused only. She hardly made any call to any other person which is apparent from the call detail vide Ex.PW15/C which has been duly authenticated by the certificate under Section 65 B vide Ex.PW15/A and Ex.PW15/B. It is also established that on 17.03.2013 since early morning onwards she was in constant touch with the accused till midnight 18.03.2018, 01:40 AM. The location of both the mobile at the time of incidence has been shown from the same tower.

Both the accused have not denied the phone calls with each other, neither any explanation has been put forward by both of them or making calls in the odd hours particularly on the day of incident.

53. *In view of the above discussion and taking into consideration the facts and circumstances and the arguments addressed at length by defence counsel and the Ld. Addl. PP for the State, I am of the considered opinion that the prosecution has been able to establish its case beyond reasonable doubt by adducing evidence documentary and scientific as well as oral testimony of the witnesses, except the accused Seema @ Prabha and accused Kishore none else has committed the murder of deceased Saurabh by strangulation as well as by smothering and causing injury no.2, 3, 4, 5 and 6, which were sufficient in the ordinary course of nature to cause death. Accordingly, I hold the accused Seema @ Prabha and accused Kishor Kumar guilty for the offence punishable under Section 120 B IPC for forming criminal conspiracy to commit murder. The accused persons are also held guilty for the offence punishable under Section 302 r/w Section 120B IPC."*

ARGUMENTS ON BEHALF OF APPELLANT-ACCUSED SEEMA @ PRABHA

4. Mr. Ajay Verma, learned counsel for appellant-accused Seema @ Prabha contends that there is no eyewitness and/or any direct incriminating evidence on record to prove that she is guilty of any offence.

5. He states that the deceased was heavily drunk/intoxicated at the time of his death and had unexplained injuries on his face when he had entered his house at 11:30 p.m. In support of his contention, he relies upon the testimony of PW7.

6. Learned counsel for the appellant-accused Seema @ Prabha submits that the alleged material evidence collected on the basis of disclosure statement was not admissible against the accused under Section 27 of the Indian Evidence Act, 1872.

7. He contends that there is no evidence on record to prove the motive and/or relationship between the two co-accused—as presumed by the prosecution. He points out that PW3 (Vijay), PW6 (Jamna Prasad) and PW7 (Sanjay) had not supported the case of the prosecution and accordingly the relationship between the appellant-accused Kishore Kumar and the accused Seema @ Prabha had not been proved. He emphasises that the landlord PW6 (Jamna Prasad) had deposed that he had not seen appellant-accused Kishore Kumar entering or leaving the house of Seema @ Prabha at odd hours.

8. He submits that since the prosecution story is based on circumstantial evidence, the entire chain of events had to be proved in a manner to arrive at a just conclusion of guilt of the accused without any hypothesis of guilt—which has not happened in the present case.

9. He contends that the investigation was defective in the present case as neither any chance print was taken nor the children of the deceased, who were present at the scene of crime, were examined. In support of his submission, he relies upon the judgment of the Supreme Court in *Abdulwahab Abdulmajid Baloch vs. State of Gujrat*, (2009) 11 SCC 625

wherein it has been held as under:-

“25. We have noticed as to how, perfunctorily, the investigation had been carried on. Even in a case of this nature proper charges had also not been framed. The documents had also not been properly brought on record. Indisputably, only Xerox of the seizure memo was sought to be brought on record invoking Section 294 of the Code of Criminal Procedure, which had no application. It, however, appears that during trial the original seizure memo as also the material objects were called for. The prosecution for reasons best known to it did not examine Shri Prajapati, one of the Ballistic Experts. Shri Rathod, however, was examined who proved his report.”

10. Learned counsel for appellant-accused Seema @ Prabha lastly submits that on the basis of non-explanation under Section 106 of Indian Evidence Act, 1872, the accused cannot be convicted in a case based on circumstantial evidence especially when there is no evidence to corroborate the prosecution story. In support of his submission, he relies upon the judgment of the Bombay High Court in ***Ulhas Sudam Gorhe vs. The State of Maharashtra, 2018 SCC OnLine Bom. 3389*** wherein it has been held as under:-

“6. The present case is based on circumstantial evidence. It is the settled position of law that in a case of circumstantial evidence the circumstances on which the prosecution relies must be consistent with the sole hypothesis of the guilt of the accused. In case of resting on circumstantial evidence, it is incumbent for the prosecution to prove each and every circumstance on which it proposes to rely. The circumstances so proved should be of conclusive nature i.e. they should have a definite tendency of implicating the accused. The circumstances so established should form a complete chain which should exclude every hypothesis of innocence and unquestionably point towards the guilt of the accused. In other words, the circumstances should be conclusive i.e. accused and the accused alone has committed the crime.

8. *It is to be noted here that the Trial Court has based conviction of the Appellant mainly on the ground that the Appellant has failed to rebut the presumption under Section 106 of the Indian Evidence Act and it has been treated as an exception to the general rule governing burden of proof by the prosecution.*

9. *The Supreme Court in the case of Shambhu Nath Mehra v. State of Ajmer reported in AIR 1956 SC 404, has held that Section 106 of the Indian Evidence Act is not a substitute for the burden of proof which rests on the prosecution. As noted earlier, in the present case, there is no evidence on record even to remotely suggest that the Appellant was in fact last seen in the company of the deceased Kavita either, at the time of noticing the dead body or prior thereto or he was seen in the vicinity of the scene of offence within the proximity of the relevant time. In the absence of such evidence, the failure of the Appellant to offer any explanation under Section 106 of the Indian Evidence Act cannot be used and termed as a circumstance against the Appellant nor can a presumption of guilt can be drawn on the failure of the Appellant. As noted earlier, there is no other material except mentioned above, available on record to connect the Appellant with the present crime. In other words, the prosecution has failed to lead any cogent and succinct evidence to base conviction of the Appellant. It appears to us that, the case of the prosecution is based on the presumption of accused was being in the said room without there being any evidence in that behalf and therefore, the only conclusion which we can draw is that the Appellant is entitled for a clean acquittal.”*

ARGUMENTS ON BEHALF OF APPELLANT-ACCUSED KISHORE KUMAR

11. Mr. Bipin Kumar Jha, learned counsel for appellant-accused Kishore Kumar states that there is an unexplained delay of more than thirteen hours in registration of the FIR by the police.

12. Learned counsel for appellant-accused Kishore Kumar states that the trial court has convicted his client on the basis of mobile call record only. He, however, asserts that the owner of the alleged mobile is not the mother of the appellant-accused Kishore Kumar as the bill mentions an address which is neither of the appellant-accused Kishore Kumar nor of his mother.

13. Learned counsel for appellant-accused Kishore Kumar also states that the prosecution had failed to prove the motive as he had no relationship with the co-accused Seema @ Prabha.

14. He submits that the alleged recoveries are inadmissible in law as they were recovered after the arrest of the appellant-accused from the place of occurrence itself. He emphasises that the alleged recovery of leather belt from the scene of crime is doubtful because as per deposition of PW18 (Insp. Puran Pant) no blood was found on the leather belt, but as per FSL report, blood was present on the belt. He, therefore, states that the entire story of the prosecution is doubtful.

15. He also contends that though the case of the prosecution is based on circumstantial evidence, yet the prosecution had failed to prove the complete chain of events. In support of his submission, he relies upon the judgement of the Supreme Court in **Kanhaiya Lal Vs. State of Rajasthan, CrI.A.No.595/2014**, wherein it has been held as under:-

“8. The prosecution case is that the appellant-accused Kanhaiya Lal committed the murder of Kala by strangulation and threw the body in the well. Nobody witnessed the occurrence and the case rests on circumstantial evidence. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be

incompatible with the innocence of the accused or the guilt of any other person. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances.

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11. The primary, if not the solitary basis of the conviction of the appellant is on the theory of last seen, as the deceased Kala along with accused Kanhaiya Lal visited the house of PW 4 Hurma at 9.00 p.m on 31-8-2003. PW 4 Hurma did not fully support the prosecution case and was declared hostile. In his examination-in-chief he has stated that on the occurrence night he returned home at 8.00 p.m and at about 9.00 p.m accused Kanhaiya Lal and Kala came to his house and demanded daru and he gave one bottle and received a sum of Rs 15 from accused Kanhaiya Lal and they returned together and the next day morning the wife of Kala, PW 10 Shantibai came and inquired from him about her husband Kala and he told her about the visit of Kala with accused Kanhaiya Lal to his house the previous night. It is the testimony of PW 10 Shantibai that her husband Kala did not return home on the night of the occurrence and in the morning she went to the house of PW 4 Hurma and inquired and came to know from him about the visit of her husband along with accused Kanhaiya Lal to his house in the night. Though PW 4 Hurma was treated as a hostile witness, the above testimony of him is corroborated by the testimony of PW 10 Shantibai.

12. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant.”

16. He lastly submits that Section 106 of the Indian Evidence Act, 1872 cannot be the sole basis for conviction of appellant-accused Kishore

Kumar as he is a stranger and there is no corroboration of the alleged confessional/ disclosure statement.

ARGUMENTS ON BEHALF OF THE RESPONDENT-STATE

17. Per contra, Mr. Rajat Katyal, learned APP for the State contends that the appellant-accused Seema @ Prabha was the owner of a mobile phone bearing No.9213869863, which was registered in her name. He points out that another mobile phone bearing No.9211570636 was seized at the instance of co-accused Kishore Kumar on 18th March, 2013. The seizure memo of the said mobile phone is reproduced hereinbelow:-

“Memo regarding seizure of phone Black HUAWEI

In the presence of the witnesses mentioned hereinafter Kishore S/o Sh. Lakhmi Saini R/o Y-468, Y Block, Janta Market, Camp No.01, Nangloi, Delhi, under police custody voluntarily led towards a room of House No.Y/468 and produced to me, the Inspector, a black colored mobile phone kept on the table of the aforesaid room. He disclosed that today on 18.03.2013 at about 1 AM in the night Seema alias Prabha had made a call on my this mobile No.9211570636 from her mobile No.9213869863 and called me at her home as per the plan. I, the Inspector, took into police possession the recovered body of the phone having IMEI No.A00000331650C2 along with SIM and Battery as a piece of evidence by means of this memo.

The Seizure Memo has been prepared.

Witnessed by:

*Sd/- SI Mahender Pratap
(In English)
SI Mahender Pratap
NO. D-1388
P.S.Sultanpuri*

Sd/- (Illegible)
Ct.Yashpal, No.1200/OD
P.S.Sultanpuri, Delhi

Sd/- (Illegible)
Insp. Puran Pant
SHO/P.S. Sultanpuri
Dt. 18.03.13”

18. He states that after investigation, it was found that the aforesaid number 9211570636 was obtained in the name of the mother of the co-accused Kishore Kumar. In support of his statement, he relies upon the letter dated 04th March, 2013 written by the Nodal Officer for Tata Telly Services Limited to the Inspector, Police Station Sultanpuri enclosing the Customer Application Form as well as the call detail record and a certificate under Section 65(B)(4)(c) of the Indian Evidence Act, 1872. The letter dated 4th April, 2013 written by Nodal Officer of Tata Telly Services Limited is reproduced hereinbelow:-

“April 04, 2013

Mr. Ram Kishore,
Inspector,
P.S. Sultanpuri,
Delhi.

Sub : Submission of CDR, CAF of Telephone Nos.9211570636,
9213869863 & Evidence Act Certificate.

Ref.: Your Letter Dated 02.04.2013 Case FIR No.212/13 U/S
302/120-B/34 IPC, P.S. Sultanpuri, Delhi.

Sir,

With reference to your above mentioned letter, we wish to submit
as under :

1. Mobile No. 9211570636:

Ownership Details: Mr. OMVATI SAINI, Y-497, J.J. COLONY-3, BLOCK-Y, NANGLOI, DELHI

Certified copy of CAF and supporting documents is also enclosed herewith.

Call detail Records for the period of 01.03.2013 to 02.04.2013 enclosed herewith of above mobile no. (8 pages)

2. Mobile No.9213869863:

Ownership Details : Ms. PRABHA, 6/23/2, FRIEND ENCLAVE, SEC-6, SULTAN PURI, NEW DELHI.

Certified copy of CAF and supporting documents is also enclosed herewith.

Call detail Records for the period of 01.03.2013 to 02.04.2013 enclosed herewith of above mobile no. (6 pages)

The above documents are computer generated and as per official record.

Certificate U/s 65B (4) (C) of the Evidence Act 1872 is also enclosed herewith.

Thanking you,

Yours faithfully,

For TATA Teleservices Ltd.

-s/d-

NODAL OFFICER – DELHI CIRCLE

Encl.: As above.”

19. Learned APP for the State refers to the CDR record to contend that there were daily calls between both the appellant-accused for long period of time. He points out that the appellant-accused Seema @ Prabha had primarily used her mobile phone to make calls to the co-accused Kishore Kumar and that around the time of incident i.e. from 12:13 AM till 01:36

AM on 18th March, 2013 the location of appellant-accused Kishore Kumar is in the area of incident. Also cell tower in respect to co-accused Seema @ Prabha is the same i.e. her location is in the same area under same tower. A chart, handed over by the learned APP, showing the call detail record as well as the location of the co-accused Kishore Kumar between 17th March, 2013 at 8 p.m. and 18th March, 2013 at 1.40 a.m. is reproduced hereinbelow:-

<i>CALLING NO</i>	<i>CALLED_ NO</i>	<i>CALL DATE</i>	<i>CALL TIME</i>	<i>DUR A TION</i>	<i>FIRST CELL</i>	<i>LAST_ CELL</i>
9211570636	9213869863	3/17/2013	8:02:01 pm	1351	43696-Ashok Mohalla Nangloi	28244-Property No. 85, Mustatil no.4, Killa no. 14/1, Vill. Nangloi (Popularly Known as H.No.85, Gali No.2) East Block Extension Friends Enclave, Delhi- 110041
9211570636	9213869863	3/17/2013	8:35:31 PM	525	43696-Ashok Mohalla Nangloi	43696-Ashok Mohalla Nangloi
9213869863	9211570636	3/17/2013	8:46:03 PM	2	28244- Property No. 85, Mustatil no.4, Killa no. 14/1, Vill. Nangloi (Popularly Known as H.No.85, Gali No.2) East Block Extension	28244-Property No. 85, Mustatil no.4, Killa no. 14/1, Vill. Nangloi (Popularly Known as H.No.85, Gali No.2) East Block Extension Friends Enclave, Delhi-

					<i>Friends Enclave, Delhi-110041</i>	<i>110041</i>
<i>9211570636</i>	<i>9213869863</i>	<i>3/17/2013</i>	<i>8:46:22 PM</i>	<i>331</i>	<i>43696-Ashok Mohalla Nangloi</i>	<i>28244-Property No. 85, Mustatil no.4, Killa no. 14/1, Vill. Nangloi (Popularly Known as H.No.85, Gali No.2) East Block Extension Friends Enclave, Delhi-110041</i>
<i>9211570636</i>	<i>9213869863</i>	<i>3/17/2013</i>	<i>8:52:13 PM</i>	<i>875</i>	<i>28244-Property No. 85, Mustatil no.4, Killa no. 14/1, Vill. Nangloi (Popularly Known as H.No.85, Gali No.2) East Block Extension Friends Enclave, Delhi-110041</i>	<i>28738-Plot no-E-2/14, Sultanpuri JJ[R], Delhi-110086</i>
<i>9211570636</i>	<i>9213869863</i>	<i>3/17/2013</i>	<i>9:29:04 PM</i>	<i>932</i>	<i>28017-Property No. G-188-189 J.J. Colony, Sultanpuri, Delhi-110041</i>	<i>28017-Property No. G-188-189 J.J. Colony, Sultanpuri, Delhi-110041</i>
<i>9211570636</i>	<i>9213869863</i>	<i>3/17/2013</i>	<i>11:48:30 PM</i>	<i>3</i>	<i>28240-Property No. 85, Mustatil no.4, Killa no. 14/1, Vill. Nangloi (Popularly Known as</i>	<i>28240-Property No. 85, Mustatil no.4, Killa no. 14/1, Vill. Nangloi (Popularly Known as</i>

					<i>H.No.85, Gali No.2) East Block Extension Friends Enclave, Delhi-110041</i>	<i>No.2) East Block Extension Friends Enclave, Delhi- 110041</i>
<i>9211570636</i>	<i>9213869863</i>	<i>3/17/2013</i>	<i>11:50:2 6 PM</i>	<i>11</i>	<i>28738-Plot no-E-2/14, Sultanpuri JJ[R], Delhi- 110086</i>	<i>28738-Plot no- E-2/14, Sultanpuri JJ[R], Delhi- 110086</i>
<i>9211570636</i>	<i>12526</i>	<i>3/18/2013</i>	<i>12:01: 31 AM</i>	<i>29</i>		
<i>12527</i>	<i>9211570636</i>	<i>3/18/2013</i>	<i>12:02: 04 AM</i>	<i>0</i>	<i>28242- Property No. 85, Mustatil no.4, Killa no. 14/1, Vill. Nangloi (Popularly Known as H.No.85, Gali No.2) East Block Extension Friends Enclave, Delhi-110041</i>	<i>28242-Property No. 85, Mustatil no.4, Killa no. 14/1, Vill. Nangloi (Popularly Known as H.No.85, Gali No.2) East Block Extension Friends Enclave, Delhi- 110041</i>
<i>12527</i>	<i>9211570636</i>	<i>3/18/2013</i>	<i>12:02: 42 AM</i>	<i>0</i>	<i>28242- Property No. 85, Mustatil no.4, Killa no. 14/1, Vill. Nangloi (Popularly Known as H.No.85, Gali No.2) East Block Extension Friends Enclave, Delhi-110041</i>	<i>28242-Property No. 85, Mustatil no.4, Killa no. 14/1, Vill. Nangloi (Popularly Known as H.No.85, Gali No.2) East Block Extension Friends Enclave, Delhi- 110041</i>

9211570636	9213869863	3/18/2013	12:13:45 AM	303	28738-Plot no-E-2/14, Sultanpuri JJ[R], Delhi-110086	27874-Plot No. B-2, Village Kirari, Suleman Nagar, Hari Enclave, Delhi
9211570636	9213869863	3/18/2013	12:23:10 AM	154	28017-Property No. G-188-189 J.J. Colony, Sultanpuri, Delhi-110041	28018-Property No. G-188-189 J.J. Colony, Sultanpuri, Delhi-110041
12527	9213869863	3/18/2013	1:10:16 AM	0	28017-Property No. G-188-189 J.J. Colony, Sultanpuri, Delhi-110041	28017-Property No. G-188-189 J.J. Colony, Sultanpuri, Delhi-110041
9211570636	9213869863	3/18/2013	12:25:45 AM	174	28018-Property No. G-188-189 J.J. Colony, Sultanpuri, Delhi-110041	28017-Property No. G-188-189 J.J. Colony, Sultanpuri, Delhi-110041
12527	9211570636	3/18/2013	1:13:14 AM	0	28017-Property No. G-188-189 J.J. Colony, Sultanpuri, Delhi-110041	28017-Property No. G-188-189 J.J. Colony, Sultanpuri, Delhi-110041
9211570636	9213869863	3/18/2013	1:35:32 AM	56	28018-Property No. G-188-189 J.J. Colony, Sultanpuri, Delhi-110041	28018-Property No. G-188-189 J.J. Colony, Sultanpuri, Delhi-110041
12527	9211570636	3/18/2013	1:36:33 AM	0	28018-Property No. G-188-189 J.J. Colony, Sultanpuri, Delhi-110041	28018-Property No. G-188-189 J.J. Colony, Sultanpuri, Delhi-110041
9211570636	9213869863	3/18/2013	1:39:35 AM	110	28242-Property No.	28018-Property No. G-188-189

					85, Mustatil no.4, Killa no. 14/1, Vill. Nangloi (Popularly Known as H.No.85, Gali No.2) East Block Extension Friends Enclave, Delhi-110041	J.J. Colony, Sultanpuri, Delhi-110041
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20. Learned APP states that there is no delay in lodging the FIR as it was only after the post-mortem that it was confirmed that the death of deceased Saurabh was a homicide. He points out that in the *Rukka* itself, the Investigating Officer had explained the circumstances under which the delay had occurred.

21. Learned APP also contends that there is nothing on record to suggest as to why the recoveries made by the Police were not admissible in law. In support of his contention, he relies upon the disclosure statement made by the appellant-accused as well as the seizure memos. The seizure memos of pillow, chunni and black coloured leather belt are reproduced hereinbelow:-

A) Seizure memo of the pillow:-

“FIR No.212/13, dated 18.03.13 u/s 302/120B/34 IPC PS Sultan Puri Delhi

Seizure Memo of Peacock coloured Pillow

In the presence of the witnesses mentioned hereinafter, Seema @ Prabha W/o Sh. Saurav D/o Sh.Kishan Kumar R/o House No.6/39, Friends Enclave, Sultanpuri, Delhi under the custody of W/HC Chand Kiran, No.548/OD voluntarily walked ahead and pointed out

towards the pillow lying over the bed kept on the right side of the door just after entering the room on the first floor of House No.6/39, Friends Enclave, Sultanpuri, Delhi and stated that was the same pillow from which the mouth of Saurav was pressed. I, the Inspector, picked up the recovered pillow of lined peacock colour having white coloured zip thereon and placed the same into a white polythene and kept the white polythene on a white cloth and sealed it with my seal of 'PP' and took the sealed parcel into the police possession through this memo as a piece of evidence.

The seizure memo of the pillow got prepared.

Witnessed by:

Sd/- SI Mahender Pratap

(In English)

SI Mahender Pratap

NO. D-1388

P.S.Sultanpuri

Sd/- (Illegible)

Ct.Yashpal, No.1200/OD

P.S.Sultanpuri, Delhi

Sd/- (Illegible)

Insp. Puran Pant

SHO/P.S. Sultanpuri

Dt. 18.03.13"

(emphasis supplied)

B) Seizure memo of the Chunni:-

"Memo regarding seizure of pink colored headcloth (Chunni)

In the presence of the witnesses mentioned hereinafter Seema alias Prabha W/o Sh. Saurav D/o Sh. Kishan Kumar R/o 6/39, Friends Enclave, Sultanpuri, Delhi under police custody of W/Ct. Chand Kiran, No.548/OD voluntarily led towards a room at First Floor of House No.6/39, Friends Enclave, Sultanpuri, Delhi and produced to me, the Inspector, a pink colored headcloth (Chunni) from a stack of clothes lying beside sewing machine kept on the floor near the wall in front of the door. While producing the same she disclosed that this is the very headcloth (Chunni) with which she strangled her husband

Saurav while making a noose. I, the Inspector, measured the recovered pink colored headcloth (Chunni) and found it to be 81.5 inch long and 35 inch wide. The headcloth (Chunni) has been converted into a parcel after keeping the same in a white polythene and then in a white cloth. The parcel has been sealed with my seal of 'PP' and taken into possession as a piece of evidence by means of this memo.

The Seizure Memo has been prepared.

*Sd/ Seema
(In Hindi) ”*

(emphasis supplied)

C) Seizure memo of the black coloured leather belt:-

“FIR No.212/13, dated 18.03.13 u/s 302/120B/34 IPC PS Sultan Puri Delhi

Seizure Memo of Black Coloured Leather Belt

In the presence of the witnesses mentioned hereinafter, accused Keshav Kumar S/o Lakhmi Saini, R/o Y-468, Y Block, Janta Market, Camp No.01, Nangloi, Delhi under the Police custody voluntarily walked ahead and identified the black coloured leather belt lying over the diwan kept adjacent to the wall on the right side inside the room constructed on the first floor of House No.6/39, Friends Enclave, Sultanpuri, Delhi and stated that he had strangled Saurav from the same belt by way of making it a noose around his neck. I, the Inspector picked up the belt lying upon the bed which was having a white aluminium type element buckle whereon NIKE was inscribed in English and (N) mark was dug thereon and even on the opposite side of the buckle NIKE and mark of NIKE was inscribed. And I placed it into a white polythene, kept the white polythene upon a white clothe and converted it into a parcel and sealed the same with my seal of 'PP' and took the sealed parcel into Police possession through this memo as a piece of evidence.

The seizure memo of the pillow got prepared.

Witnessed by:

Sd/- SI Mahender Pratap

(In English)

SI Mahender Pratap

NO. D-1388

P.S.Sultanpuri

Sd/- (Illegible)

Ct.Yashpal, No.1200/OD

P.S.Sultanpuri, Delhi

Sd/- (Illegible)

Insp. Puran Pant

SHO/P.S. Sultanpuri

Dt. 18.03.13”

22. Learned APP admits that the seizure memo of the belt does not record that there were any blood stains on it. He emphasises that with the naked eye, the police officials could not find the presence of blood on the belt. In support of his statement, he relies upon the testimony of PW18 (Insp. Puran Pant) wherein during the cross-examination, he has stated as under:-

“....I along with staff reached at the spot at about 5:00 pm. The chunni and pillow were recovered at the instance of accused Seema which were lying on the bed in the said room. The belt was also recovered which was lying on the said bed, at the instance of accused Kishore. No blood was there on the said belt.”

(emphasis supplied)

23. Learned APP emphasises that the usage of the belt in the crime was in the special knowledge of the appellant-accused.

24. He also points out that the Crime Branch tried to take chance prints from the scene of crime, but found none. In support of his statement, he

relies upon statement of PW13-ASI Ajit Singh and the report of the Crime Team. PW13 in cross-examination deposed that “*the finger print proficient had made efforts to lift the chance print but in vain*”. The relevant portion of the Crime Team report is reproduced hereinbelow:-

16.	Articles examined and chance prints Developed			
S.N.	Name of the Article	Nomenclature of chance prints Developed	No. of chance Prints Developed	Powder used
1	_____	_____	_____	_____
2				
3				
4				
5				

25. He lastly states that there is nothing on record to suggest that the children of appellant-accused Seema @ Prabha were present at the scene of crime. He states that in case the prosecution failed to bring the children’s evidence on record, the appellant-accused Seema @ Prabha could have produced her children in her defence. He submits that the appellant-accused Seema @ Prabha cannot claim benefit of faulty investigation, if any. In support of his submission, he relies upon the judgment of the Division Bench of this Court in ***Liakat Ali vs. State, 1998 DRJ (15) 63*** wherein it has been held as under:-

“7.....Next, we fail to understand as to how the non-examination of Siraj-ul-Hasan who according to the prosecution took Aliya deceased to the hospital in a scooter

rickshaw was any circumstance which went against the case of the prosecution. He is not a material witness and was given up as not being traceable. It was open to the defence to have taken steps to get him examined if the appellant really thought that he was a material witness and could throw some light on the case. In the absence of any such steps having been taken by the defence nothing could be made out by simply contending why he was not examined by the prosecution.”

COURT’S REASONING

THE CONDITIONS WHICH HAVE TO BE FULFILLED BEFORE A CRIMINAL CASE AGAINST AN ACCUSED BASED ON CIRCUMSTANTIAL EVIDENCE CAN BE SAID TO BE FULLY ESTABLISHED, ENUMERATED

26. Since this is a case where there is no eye witness, it is essential to outline the conditions which have to be fulfilled before a criminal case against an accused based on circumstantial evidence can be said to be fully established.

27. The Supreme Court in ***Sharad Birdhichand Sarda vs. State of Maharashtra, (1984) 4 SCC 116*** after referring to its earlier decision in ***Hanumant, Son of Govind Nargundkar vs. State of Madhya Pradesh, 1952 SCR 1091*** stated the five golden principles, constituting the Panchsheel, of proof of a case based on circumstantial evidence as follows:-

“(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established. There is not only a grammatical but a legal distinction between “may be proved” and “must be or should

be proved” as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 CrLJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

“Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between ‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions.”

(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.”

(emphasis supplied)

THE FACT THAT APPELLANT-ACCUSED SEEMA @ PRABHA WAS PRESENT IN THE SAME ROOM WITH THE DECEASED SAURABH BETWEEN 17TH MARCH, 2013 AT 11:30 P.M. AND THE TIME HE WAS MURDERED, IS AN ADMITTED FACT

28. To examine whether the aforesaid principles are satisfied, one will have to analyse the facts. In the present case, the facts are that the deceased Saurabh and his wife appellant-accused Seema @ Prabha were staying in a single room on First Floor at House No. 6/39, Friends Enclave, Sultanpuri, Delhi.

29. PW3 Mr. Vijay, brother of appellant-accused Seema @ Prabha, has deposed that his sister came to him on 18th March, 2013 around 01:00 a.m. and informed him that the deceased Saurabh had come back home at about 11:30 p.m. and slept. When she woke up in the night and tried to wake up the deceased, he did not get up and there were injury marks on his face. The relevant portion of the statement of PW3 Mr. Vijay is reproduced hereinbelow:-

“...In the intervening night of 17/18-03-2013 at about 01.00 am, my sister Seema @ Prabha came to my resident and she told me that her husband i.e. my brother-in-law namely Saurabh had come home at about 11.30 pm after taking a walk and thereafter, he slept and when my sister woke up and she tried to awake Saurabh but Saurabh did not wake up and there were injury marks on the face of Saurabh. After hearing this, I along with my brother Sanjay and other family members reached at the room of Seema. Saurabh was lying on the ground and there were injury marks on his face. We found him dead...”

(emphasis supplied)

30. It is apparent from the record that the learned counsel for appellant-accused Seema @ Prabha did not cross-examine PW3.

31. PW7 Mr. Sanjay, another brother of appellant-accused Seema @ Prabha has deposed that his sister came to him on 18th March, 2013 at about 2.30/3.00 p.m. and informed him that the deceased had come to the house with some injury marks on his neck and was not waking up from his sleep. The relevant portion of the testimony of PW7 Mr. Sanjay is reproduced hereinbelow:-

“...In the intervening night of 17/18.3.2013, my sister Seema @ Prabha, present in the court today (correctly identified by the

witness) who used to reside in the house of Jamna Prasad as a tenant came to my above said house at about 2.30/3.00 am and she informed us that her husband namely Saurabh who had come to the house having some injury marks on his neck and was not waking up from the sleep. Thereafter, I along with my brother Vijay and other persons reached at the tenanted room of Seema and Saurabh. There, we saw that Saurabh was lying on the ground. We called a Doctor known as Bengali and he after examination told that Saurabh had expired. Thereafter, I made a call at number 100.....

In cross-examination by Addl. PP, PW7 stated as under:-

It is correct that my sister Seema @ Prabha told me that deceased Saurabh had come to his house at about 11.30 pm after roaming and when she woke up in the night and tried to awake Saurabh, he did not wake up. She further told me that there were injury marks on the face of Saurabh....”

(emphasis supplied)

32. The appellant-accused Seema @ Prabha in her statement under Section 313 Cr.P.C. failed to give any explanation in respect of the incident in question and/or as to what transpired between 17th March, 2013 at 11/11:30 p.m. when the deceased Saurabh slept and the time he was murdered.

33. Though it is disputed by appellants-accused as to whether the deceased had suffered injuries before he returned home on 17th March, 2013 at 11/11:30 p.m. or later, yet the fact that appellant-accused Seema @ Prabha was present with the deceased Saurabh between 17th March, 2013 at 11:30 p.m. and the time he was murdered, is an admitted fact.

34. On 18th March, 2013 at 03.10 a.m. a call was made by PW7 (Sanjay), brother of appellant-accused Seema @ Prabha, regarding a

quarrel. The PCR Form recording the complaint of quarrel as well as the fact that the deceased Saurabh had come back home around 11 p.m. and slept and later on was found dead with injuries on neck and face with blood oozing out is reproduced hereinbelow:-

DELHI POLICE (PART I) ...-2013 3:10:56Dispatch 18-May-2013 3:12:28 CR.D.D. No,18 Mar 131550060Extn No,155	PART-II STAFF FILLED IN BY WIRELESS 6725		
Informant's @ NameSANJA 'A' (Male)	Van Selected Time	Msg transmitted to Van No.	At
i) Phone No.9289796967 ii) Address 6/23/2 FRIENDS ENCLAVE SECTOR-6 WEST SULTAN PURI NEW DELHI-110086 Contact Name _____	Time When Van reached spot Status Comments	Van Report Time	Van Free Time
Complaint QUARREL	18-Mar-20133:23:17	LBR-07	18-Mar-20133:23:18
Accident Addr. 6/99 FRIENDS ENCLAVE SECTOR-6 WEST SULTAN PURI NEW DELHI-110086	18-Mar-20134:08:25	18-Mar-2013 4.08.25	18-Mar-20134:15:16
Accident Info. JHAGRA 'B'	DCR No. Received 308 Report Received from VAN 18/03/2013 04-OB-39 SAURBH S/O JAGDISH AGE 92/94 YRS JO RAAT KO 11 BAJE KE KAREEB GHAR AAKR SOYA THA JO DEAD MILA HAI JISKI GARDAN AUR MUH PAR CHOT KE NISHAN HAI KHOON NIKAL REHA HAIN IP 18/03/2013 15:56 SHO SAHAB WITH STAFF MOKA PER....		

THERE IS NOTHING ON RECORD TO SUGGEST THAT THE CHILDREN OF THE DECEASED WERE PRESENT AT THE SCENE OF CRIME. IN ANY EVENT, THE CHILDREN OF THE DECEASED ARE ALSO THE CHILDREN OF APPELLANT-ACCUSED SEEMA @ PRABHA AND IF SHE WANTED, SHE COULD HAVE PRODUCED THE CHILDREN AS DEFENCE WITNESSES.

35. There is nothing on record to suggest that the children of the deceased were present at the scene of crime. In any event, the children of the deceased are also the children of appellant-accused Seema @ Prabha

and if she wanted, she could have produced the children as defence witnesses. Consequently, non-production of the children by the State has not prejudicially affected the appellant-accused.

IMMEDIATELY UPON ORAL CONFIRMATION THAT THE POST-MORTEM REPORT HAD CONCLUDED THE DEATH OF SAURABH WAS A HOMICIDE, AN FIR WAS REGISTERED. EVEN OTHERWISE THE APPELLANT-ACCUSED HAVE FAILED TO SHOW ANY PREJUDICE ON ACCOUNT OF DELAY, IF ANY, IN LODGING OF THE FIR

36. The body of the deceased was sent for post-mortem on the same day. The relevant portion of the post-mortem report dated 18th March, 2013 reads as under:-

“EXTERNAL EXAMINATION (Injuries etc.)

1. *Reddish colored bruise 3 x 2 cm seen in front of left ear lobe.*
2. *Reddish colored bruising of whole upper & lower lips seen over their inner aspect*
3. *Reddish colored bruise 4.5 x 3 cm over left cheek prominence.*
4. *Reddish colored bruise 4.5 cm x 1 cm surrounded by abraded margin seen over mid front of right jaw.*
5. *Laceration 2 x 0.5 x 0.5 cm over mid front of chin.*
6. *Reddish brown pressure abrasion mark seen completely encircling the neck, with circumference of 33 cm & width 3.7 cm, passing 7 cm below right mastoid process, then cross to the left side of neck just above the thyroid prominence in two layers lying at 6cm & 7.5 cm below*

chin, & then passing 5.5cm below left mastoid process & then over the whole nape of neck. The mark was lying semi obliquely over the neck. Both margins were deeply ecchymosed, the mark was dry, parchmentised. Cut section shows extravasation of blood in superficial & deep muscles of neck under the mark, more prominent in suprahyoid area. Inward fracture seen to both greater cornu of hyoid with extravasation of blood in surrounding tissue. Thyroid & cricoids cartilage are intact.

xxx

xxx

xxx

OPINION: The cause of death is due to Asphyxia as a result of combined effect of strangulation & smothering under injury no. 2, 3, 4, 5 & 6 which are fresh & antemortem at the time of death & is sufficient to cause death in ordinary course of nature in their combined effect."

(emphasis supplied)

37. On 18th March, 2013 at 4.35 p.m., FIR No.212/2013 was registered with the Police Station Sultanpuri. This Court is in agreement with the contention of learned APP that there is no delay in lodging the FIR as immediately upon oral confirmation that the post-mortem report concluded the death of Saurabh was a homicide, an FIR was registered. Further, this Court is of the view that the appellant-accused have failed to show any prejudice on account of delay, if any, in lodging of the FIR.

ATTESTING WITNESSES OF THE RECOVERIES HAVE DULY SUPPORTED THE RECOVERIES IN COURT AND NOTHING HAS COME IN THEIR TESTIMONY TO SUGGEST THAT THE RECOVERIES WERE PLANTED

38. On the same date at about 5.45 p.m., the appellant-accused Seema @ Prabha was arrested. In her disclosure-cum-confessional statement to the Police, she stated that she could get the *chunni*/head cloth as well as

pillow recovered, which had been used to kill the deceased. The part of the disclosure-cum-confessional statement that led to seizure of the pillow and *chunni*/head cloth is reproduced hereinbelow:-

“I can point out the place of occurrence and can get the head cloth recovered which was used in the incident. I can also get recover the pillow.”

(emphasis supplied)

39. In pursuance to the disclosure-cum-confessional statement of appellant-accused Seema @ Prabha, not only pillow and *chunni* were recovered, but the co-accused Kishore Kumar was arrested on 18th March, 2013 at 7.30 p.m.

40. At the instance of Kishore Kumar, a mobile phone bearing No.9211570636 was seized. In pursuance to the disclosure-cum-confessional statement made by Kishore Kumar, a black coloured leather belt was also seized from the scene of the crime.

41. This Court is of the opinion that other than bald submissions, there is nothing on record to suggest that the recoveries made by the police were inadmissible in law. In fact, the attesting witnesses of the recoveries have duly supported the recoveries in Court and nothing has come in their testimony to suggest that the recoveries were planted.

DISCOVERY OF BLOOD ON THE SAID ITEMS BY FSL FORTIFIES THE FACT THAT THE SAID ITEMS HAD BEEN USED IN THE PRESENT CRIME. THE RECOVERY OF CHUNNI, PILLOW AND LEATHER BELT AFTER THE DEAD BODY HAD BEEN SENT FOR POST-MORTEM PROVES THAT NO POLICE OFFICIAL COULD HAVE PUT BLOOD ON THE SAID ITEMS.

42. Forensic Science Laboratory (hereinafter referred to as ‘FSL’) to whom the *chunni*, pillow and black coloured leather belt were sent for

examination opined that human blood was present on all the aforesaid three items. But they could not point out the blood group as according to them, the Group Specific Antigens had degenerated. The FSL Report dated 12th July, 2013 is reproduced hereinbelow:-

“FORM NO.FSL/DELHI/03/33(07)/24.12.2007

Forensic Science Laboratory

Govt. of NCT of Delhi

Sector 14, Rohini, Delhi-110085

Tel: 011-27555811, Fax: 011-27555890

Accredited by the National Accreditation Board for Testing and Calibration Laboratories
(NABL)

BIOLOGY DIVISION

Report No.FSL-2013/B-2704 Bio No.343/13 Dated 12/7/2013

Case FIR No.212/13 Dated: 18.03.13 U/s 302 IPC

Police Station: Sultan Puri Forwarding Authority: The SHO PS: Sultan Puri,
Delhi

Portion of exhibits as detailed in the main Biology Report have been examined using various serological techniques. The results obtained have been analyzed as given below:-

Exhibits	Species of Origin	ABO Grouping/Remarks
'1a' Shirt	Human	'A' Group
'1b' Baniyan	Human	No reaction **
'2' Gauze cloth piece	Human	'A' Group
'3' Chunni	Human	No reaction **
'4' Pillow	Human	No reaction **
'5' Leather belt	Human	No reaction **

** Group Specific antigens degenerated.

Sd/-

(MS. SUNITA GUPTA)

Senior Scientific Officer (Biology)

Forensic Science Laboratory

Cum-Ex. Officio Chemical Examiner to the

Govt. of National Capital Territory of Delhi.

“This report is per se admissible u/s 293 Cr.p.c. However, the scientific expert (witness) shall be available for cross-examination, if required.

(emphasis supplied)

43. Though the factum of blood on chunni, pillow and leather belt had not been mentioned in the seizure memos, yet this Court is of the view that the discovery of blood on the said items by FSL fortifies the fact that the said items had been used in the present crime. Moreover, the recovery of chunni, pillow and leather belt after the dead body had been sent for post-mortem proves that no police officials could have put blood on the said items. The Apex Court in similar facts in ***Sunil Clifford Daniel vs. State of Punjab, (2012) 11 SCC 205*** has held as under:-

“42. A similar issue arose for consideration by this Court in Gura Singh v. State of Rajasthan, AIR 2001 SC 330, wherein the Court, relying upon earlier judgments of this Court, particularly in Prabhu Babaji Navie v. State of Bombay, Raghav Prapanna Tripathi v. State of U.P. and Teja Ram (SCC p.514, para 25) observed that a failure by the serologist to detect the origin of the blood due to dis-integration of the serum, does not mean that the blood stuck on the axe would not have been human blood at all. Sometimes it is possible, either because the stain is too insufficient, or due to haematological changes and plasmatic coagulation, that a serologist may fail to detect the origin of the blood. However, in such a case, unless the doubt is of a reasonable dimension, which a judicially conscientious mind may entertain, with some objectivity, no benefit can be claimed by the accused, in this regard.

xxx

xxx

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45. In John Pandian v. State this Court held: (SCC p. 153, para 57):

“57.....The discovery appears to be credible. It has been accepted by both the courts below and we find no reason to discard it. This is apart from the fact that this weapon was sent to the forensic science laboratory (FSL) and it has been found stained with human blood. Though the blood group could not be

ascertained, as the results were inconclusive, the accused had to give some explanation as to how the human blood came on this weapon. He gave none. This discovery would very positively further the prosecution case.”

(Emphasis added)

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50. It is obligatory on the part of the accused while being examined under Section 313 Cr.P.C. to furnish some explanation with respect to the incriminating circumstances associated with him, and the Court must take note of such explanation even in a case of circumstantial evidence, to decide as to whether or not, the chain of circumstances is complete. The aforesaid judgment has been approved and followed in Musheer Khan v. State of M.P. (See also: The Transport Commissioner, A.P., Hyderabad & Anr. v. S. Sardar Ali).

51. This Court in State of Maharashtra v. Suresh, held that, when the attention of the accused is drawn to such circumstances that inculcate him in relation to the commission of the crime, and he fails to offer an appropriate explanation or gives a false answer with respect to the same, the said act may be counted as providing a missing link for completing the chain of circumstances. We may hasten to add that we have referred to the said decision, only to highlight the fact that the accused has not given any explanation whatsoever, as regards the incriminating circumstances put to him under Section 313 Cr.P.C.”

(emphasis supplied)

SUBSEQUENT MEDICAL OPINION STATES THAT THERE IS A POSSIBILITY OF CAUSING INJURIES AS MENTIONED IN THE POST-MORTEM REPORT BY PILLOW, CHUNNI AND BLACK COLOURED BELT.

44. Subsequently, Dr. Vivek Rawat of SGM Hospital, Delhi to whom the pillow, chunni and black coloured belt had been forwarded, opined that there is a possibility of causing injuries as mentioned in the post-mortem report by such materials. The relevant portion of Dr. Manoj

Dhingra, PW12's testimony is reproduced hereinbelow:-

"I also received an application already Ex.PW10/A along with three pulandas sealed with the seal of PP for subsequent opinion. On opening, pulanda no.1, it contained a cream color pillow covered with green cover of size 54 x 37 cm, pulanda no.2 contained black belt with metallic buckle at 99x3.5 cm, pulanda no.3 was found containing one pink colour chunni of synthetic material. After going through the pm report, the exhibits produced before me and application for subsequent opinion, I opined that the injury mentioned in PM report is possible by such materials or the similar ones cannot be ruled out..."

(emphasis supplied)

THE DISCREPANCY, IF ANY, IN THE CUSTOMER APPLICATION FORM (CAF) IS IRRELEVANT AS THE INVESTIGATING OFFICER HAD SEIZED THE SAID MOBILE PHONE AT THE INSTANCE OF THE APPELLANT-ACCUSED KISHORE KUMAR AND NO CROSS EXAMINATION OF THE SAID WITNESS HAD BEEN DONE WITH REGARD TO SEIZURE OF THE PHONE.

45. It is also an admitted fact that while the appellant-accused Seema @ Prabha owned a mobile phone bearing No.9213869863, appellant-accused Kishore Kumar was using mobile No.9211570636. It has been argued that there is a discrepancy in the residential address of the mother of the appellant-accused Kishore Kumar as mentioned in the Customer Application Form (CAF).

46. We have perused the CAF of mobile connection No. 9211570636 and find that the said mobile connection had been issued on the basis of Election Identity Card of the mother of the appellant-accused Kishore Kumar and on the photocopy of said Election ID, customer's local address i.e., Y-468, J.J. Colony-3, Nangloi, Delhi, is mentioned. PW15 Mr. Rajeev Ranjan, Nodal Officer, Tata Tele Services Ltd. has deposed in this

regard and the relevant portion of his testimony is reproduced hereinbelow:-

“.....As per CAF of mobile no. 9211570636 the address of Omwati was Y-497, JJ Colony-3, Block-Y, Nangloi, but on the photocopy of ID proof of Omwati her address is mentioned as Y-468, JJ Colony-3, Nangloi, Delhi-41”

(emphasis supplied)

47. In any event, the discrepancy, if any, is irrelevant as the Investigating Officer had seized the said mobile phone at the instance of the appellant-accused Kishore Kumar and no cross examination of the said witness had been done with regard to the seizure of the phone.

SINCE THE DECEASED SAURABH HAS BEEN FOUND MURDERED UNDER UNNATURAL AND SUSPICIOUS CIRCUMSTANCES AND THE APPELLANT-ACCUSED SEEMA @ PRABHA BEING IN THE SAME ROOM AS THE DECEASED SAURABH AT THE TIME OF MURDER AND BEING AWAKE AS SHE WAS ON THE MOBILE PHONE AND THE APPELLANT-ACCUSED KISHORE KUMAR WHO WAS PRESENT IN AND AROUND THE SCENE OF CRIME HAD TO OFFER AN EXPLANATION AS TO WHAT TRANSPIRED BETWEEN 17th MARCH, 2013 11/11.30 P.M. AND THE TIME OF MURDER OF DECEASED SAURABH. SECTION 106 OF THE INDIAN EVIDENCE ACT, 1872 IS ATTRACTED TO THE PRESENT CASE. THE APPELLANT-ACCUSED HAVE FAILED TO DISCHARGE THE BURDEN OF PROVING THE FACTS ESPECIALLY WITHIN THEIR KNOWLEDGE.

48. Duly exhibited call records prove that the appellant-accused Seema @ Prabha was in constant touch with the appellant-accused Kishore Kumar over the mobile phone inasmuch as not only on a daily basis a number of calls were exchanged between the two co-accused, but the calls were of long duration, at times going upto thirty minutes. In fact, she

used her mobile phone primarily for making calls to co-accused Kishore Kumar.

49. Between 17th March, 2013 at 8:00 p.m. and 18th March, 2013 at 1:40 a.m., appellant-accused Seema @ Prabha spoke repeatedly to appellant-accused Kishore Kumar. The call data record, including the location of the mobile towers, show that appellant-accused Kishore Kumar on the date of the crime, i.e., late hours on 17th March, 2013 and early hours on 18th March, 2013 was present in and around the place of occurrence of murder and location of mobile phone of Seema @ Prabha also shows her presence at the place of occurrence.

50. Since the deceased Saurabh has been found murdered under unnatural and suspicious circumstances, the appellant-accused Kishore Kumar who was speaking to co-accused repeatedly till late hours and was present in and around the scene of crime and the appellant-accused Seema @ Prabha being in the same room as the deceased Saurabh at the time of murder and being awake as she was on the mobile phone, had to offer an explanation as to what transpired between 17th March, 2013 11/11.30 p.m. and the time of murder of deceased Saurabh. The said facts being in the special knowledge of the appellants-accused were required under Section 106 of the Indian Evidence Act to be explained by them.

51. The appellants-accused in their statements under Section 313 Cr.P.C. have simply denied the allegations against them. Consequently, this Court is of the view that Section 106 of the Indian Evidence Act, 1872 is attracted to the present case. Section 106 of the Indian Evidence Act, 1872, reads as under:-

“106. Burden of proving fact especially within knowledge.— when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.”

52. Section 106 of the Indian Evidence Act, 1872 has been interpreted and analysed by the Apex Court as well as by the Division Bench of this Court in a catena of cases. Some of the relevant judgments are reproduced hereinbelow:-

A) In ***State of W.B. vs. Mir Mohammad Omar & Ors., (2000) 8 SCC 382***, the Supreme Court has observed as under:-

“31. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty.

32. In this case, when the prosecution succeeded in establishing the afore-narrated circumstances, the court has to presume the existence of certain facts. Presumption is a course recognised by the law for the court to rely on in conditions such as this.

33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when

Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process the court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case.

34. When it is proved to the satisfaction of the Court that Mahesh was abducted by the accused and they took him out of that area, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning process would enable the Court to draw the presumption that the accused have murdered him. Such inference can be disrupted if the accused would tell the Court what else happened to Mahesh at least until he was in their custody.

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37. The section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference.”

(emphasis supplied)

B) In **Ram Gulam Chaudhary & Ors. vs. State of Bihar, (2001) 8 SCC 311**, the Supreme Court has held as under:-

“24. Even otherwise, in our view, this is a case where Section 106 of the Evidence Act would apply. Krishnanand Chaudhary was brutally assaulted and then a chhura-blow was given on the chest. Thus chhura-blow was given after Bijoy Chaudhary had said “he is still alive and should be killed”. The appellants then carried away the body. What happened thereafter to Krishnanand Chaudhary is especially within the knowledge of the appellants. The appellants have given no explanation as to

what they did after they took away the body. Krishnanand Chaudhary has not been since seen alive. In the absence of an explanation, and considering the fact that the appellants were suspecting the boy to have kidnapped and killed the child of the family of the appellants, it was for the appellants to have explained what they did with him after they took him away. When the abductors withheld that information from the court, there is every justification for drawing the inference that they had murdered the boy. Even though Section 106 of the Evidence Act may not be intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases like the present, where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding death. The appellants by virtue of their special knowledge must offer an explanation which might lead the Court to draw a different inference. We, therefore, see no substance in this submission of Mr Mishra.”

(emphasis supplied)

C) In ***Trimukh Maroti Kiran Vs. State of Maharashtra, (2006) 10 SCC 681*** the Supreme Court has held as under:-

“14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties. (See *Stirland v. Director of Public Prosecutions* [1944 AC 315; (1944) 2 All ER 13 (HL)] — quoted with approval by Arijit Pasayat, J. in *State of Punjab v. Karnail Singh* [(2003) 11 SCC 271 : 2004 SCC (Cri) 135]. The law does not enjoin a duty on the prosecution to lead evidence of such character

which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

“(b) A is charged with travelling on a railway without ticket. The burden of proving that he had a ticket is on him.”

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.

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22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime.....”

(emphasis supplied)

53. A Division Bench of the Delhi High Court in ***Tulsi Ram vs. State, 2017 SCC OnLine Del 7343*** has held as under:-

“44. It has been proved by the prosecution that the deceased was found dead in the dwelling house where she was residing with the appellant and was also last seen together with him. It becomes incumbent on him to offer a plausible explanation for the death of his wife.”

(emphasis supplied)

54. Consequently, this Court is of the view that the appellants-accused have failed to discharge the burden of proving the facts especially within their knowledge.

CIRCUMSTANCES IN THE PRESENT CASE ARE OF CONCLUSIVE NATURE WHICH FULLY ESTABLISHED THE GUILT OF BOTH THE APPELLANT-ACCUSED. IN FACT, THE CHAIN OF EVIDENCE IS SO COMPLETE AS NOT TO LEAVE ANY REASONABLE GROUND FOR A CONCLUSION CONSISTENT WITH THE INNOCENCE OF BOTH THE APPELLANT-ACCUSED.

55. Keeping in view the aforesaid, it is apparent that the following circumstances form a chain of events:-

- A) Appellant-accused Seema @ Prabha and deceased Saurabh were residing in a single room on First Floor at 6/39, Friends Enclave, Sultanpuri, Delhi.
- B) On 18th March, 2013, after receiving DD No. 5B, SI Mahender Pratap found dead body of Saurabh at around 03:30 a.m. in the aforesaid room.
- C) There were injury marks on the deceased Saurabh's chin, right jaw, left cheek, ligature mark on the front of the neck and dark ligature mark on the back side of the neck.

- D) On 18th March, 2013, a post-mortem was conducted in which the cause of death was opined to be strangulation and smothering.
- E) On the disclosure statement of appellant-accused Seema @ Prabha, one pink colour chunni and one pillow were recovered.
- F) The appellant-accused Seema @ Prabha led the police to the address of appellant-accused Kishore Kumar, from where he was arrested.
- G) Pursuant to the disclosure statement of appellant-accused Kishore Kumar, a mobile phone bearing No. 9211570636 and one leather belt of black colour was recovered from the scene of crime.
- H) As per the subsequent medical opinion, the injuries mentioned in post-mortem report were possible by pillow, belt and chunni or similar materials. Human blood was found on the pillow, chunni and black leather belt seized from the appellant-accused.
- I) The appellant-accused Seema @ Prabha was found to be the owner of mobile no. 9213869863.
- J) There were regular calls between the mobile phone of appellant-accused Seema @ Prabha and the mobile phone used by appellant-accused Kishore Kumar from 17th March, 2013 at 06:00 p.m. till 18th March, 2013 at 01:40 a.m.
- K) On the date of the murder, the location of the mobile phone of appellant-accused Kishore Kumar at the time of the incident was in and around the scene of crime. Also location of mobile phone of co-accused Seema @ Prabha was under the same tower as that of appellant-accused Kishore Kumar.

L) From the time the deceased Saurabh returned home in and around 11/11:30 p.m. on 17th March, 2013 till he was murdered on 18th March, 2013, appellant-accused Seema @ Prabha was not only present in the same room with the deceased (as apparent from the testimony of PW3 and PW7) but was also awake as is apparent from her mobile call record.

56. This Court is of the view that the aforesaid circumstances, specially the mobile record, the recoveries and medical evidence which are of conclusive nature, read with Section 106 of the Indian Evidence Act, 1872 fully establish the guilt of both the appellant-accused. In fact, the chain of evidence is so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of both the appellant-accused. The aforesaid circumstances show that the act of murder had been done by both the appellant-accused.

57. Consequently, present appeals being bereft of merit, are dismissed. Copy of judgment be sent to appellants-accused through Jail Superintendent.

MANMOHAN, J

SANGITA DHINGRA SEHGAL, J

MAY 24, 2019

KA/js/rn