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

Judgment reserved on:28.01.2020
Judgment pronounced on:26.02.2020

+ CRL.A. No. 728/2018

MOHD. ZAKIR @ MOHD. ZAHIR

..... Appellant

Through: Mr. Anand Prakash, Advocate with
Ms. Varsha Arya, and Mr. Ajay Prakash,
Advocates

versus

STATE (GOVT OF NCT OF DELHI)

..... Respondent

Through: Ms. Aashaa Tiwari, APP for State with
ACP Govind Sharma, ACP, PS Kalkaji and
SI Amit Prakash, PS Amar Colony.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

SANGITA DHINGRA SEHGAL, J

1. Present appeal under Section 374 (2) of the Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C') has been preferred against judgment dated 18.04.2018 and order on sentence dated 20.04.2018 passed by the learned Additional Sessions Judge-05, South East District, Saket Courts, New Delhi in Sessions case No. 2282/2016 arising out of FIR No. 359/2011, under Sections 302/404/201/34 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC') registered at Police Station Amar Colony, New Delhi

whereby the learned Sessions Judge found the appellant-accused guilty and convicted him for the offences punishable under Sections 302, 201 and 404 of the IPC and sentenced him to undergo imprisonment for life and fine of Rs.2000/- for the offence punishable under Section 302 IPC, in default of payment of fine, rigorous imprisonment for 15 days. Further, the appellant-accused was sentenced with imprisonment of two years and fine of Rs. 1000/- for the offence punishable under Section 201 IPC, in default of payment of fine, rigorous imprisonment for 10 days; appellant-accused was also sentenced with imprisonment of one year and fine of Rs.1000/- for the offence punishable under Section 404 IPC and in default of payment of fine, rigorous imprisonment for 10 days.

2. The brief facts of the case, as mentioned by the learned Trial Court are reproduced as under:

“...that a PCR call vide DD No 10-A dated 23.09.2011 at Police Station Amar Colony was received regarding one unclaimed bag / bori lying at D-106, East of Kailash, Prakash Mohalla near Gate No.5, near drain and same was marked to Assistant Sub Inspector Balbir Singh (PW-17). Inspector Govind Sharma (PW-30) alongwith driver Jagat and Constable Mahavir also reached there where Assistant Sub Inspector Balbir Singh, Constable Lalit, Constable Vinod, PCR Van kite-29 with Head Constable Moti Singh were found. They found lying a white colour plastic bag near the gate which was opened and a dead body of 22-23 years old boy was found therein. One jute bag and two pieces of wire of compute record were also found lying in the said white colour plastic bag. There was a board of packing in the jute bag. Deceased was having ligature mark. One person, namely Hazi Shahid (PW-05) reached at the spot and he

identified the deceased as Faheem who was the son of his brother-in-law. Hazi Shahid stated that Faheem was missing since tomorrow 09:00 PM to whom there were searching. On search of deceased, Rs.21/- was recovered from his wearing jeans pant.

2. Inspector Govind Sharma prepared a tehrir and same was sent to police station for registration of FIR through Constable Vinod. Two wheeler/ Scooter bearing no. UP12-H-2123 of the deceased was also found lying near the spot i.e near the Shop No.3, DDA Market, East of Kailash, New Delhi. Crime team also called and same was reached who inspected the spot and took the photographs of the spot. On instructions of the Inspector Govind Sharma, scooter of deceased and room of the deceased i.e C-109, Prakash Mohalla was also inspected and photographs were taken. Dog squads also inspected the spot. Site plan of the spot was prepared. After removing the dead body of the deceased, three leaves having blood stains were also found and same were also taken into possession. The said scooter was taken into possession. RC was also found in the dicky in the scooter which was also taken into possession. Rs. 21/-, one plastic bag, one jute bag, one board of packing and two broken wires were also taken into possession. Case property was deposited into Malkhana. Postmortem of the dead body was also got conducted. On 29.09.2011, Investigating officer Govind Sharma came to know that accused Zakir Malik and his brother Sakir Malik had moved an application for surrender and pleading guilty before Ms. M.T. Kerketta, learned Metropolitan Magistrate, Saket Court, New Delhi. Accused Zakir was stopped when he was going to the Court and his statement was recorded and he was arrested. Accused Zakir was searched and keys of godown were recovered and thereafter godown was opened and computer and plastic cane were also taken into possession from the said godown. At the instance of the accused Zakir, a purse of the deceased containing the papers was got

recovered from the main hole of the gali behind the godown. Further, at the instance of the accused Zakir, Rs.13,000/- was got recovered from the shop i.e A-335, Shera Mohalla, Garhi and the same was also taken into possession. Hard Disk Drive of CCTV Cameras of recording were also taken into possession by the police. Postmortem report of the deceased was also obtained wherein cause of death mentioned as "in this case as a result of strangulation". Brother of the accused Zakir was found to be juvenile."

3. On the basis of the above complaint/information, First Information Report (FIR) No. 359/2011 under Section 302 IPC was registered at Police Station Amar Colony and investigation was taken up. After investigation, chargesheet under Section 173 of the Cr.P.C was filed against the accused Zakir for the offences punishable under Sections 302, 404, 411, 201 read with Section 34 IPC. Thereafter, on 07.08.2015 and 10.08.2015 supplementary charge-sheets were filed.
4. Vide order dated 03.09.2012, charges were framed against the appellant - accused Mohd. Zakir for the offences punishable under Sections 302, 201/34 and 404 IPC.
5. In order to bring home the guilt of the appellant - accused, the prosecution examined 31 witnesses in all. Thereafter, the statement of the appellant - accused was recorded under Section 313 of the Code on 06.05.2017, 12.05.2017, 22.05.2017, 12.07.2017, 19.07.2017 and 21.03.2018. Appellant-accused stood by his denial in the said statement and chose not to examine any witness in his defence.
6. After appreciating and considering the rival contentions of the parties and scrutinizing the evidence, the learned Trial Court held the

appellant - accused person guilty and convicted him for the charged offence.

7. Learned counsel for the appellant opened his submissions by contending that the two CD's (*Ex. PW-30/18*) and (*Ex. PW-30/19*) which were made out of the Hard Disc Drives (*Ex. PW-7/A*) and (*Ex. PW-21/A*) containing the CCTV footage of two persons going on a bike are secondary evidence in terms of the Indian Evidence Act and are inadmissible without the certificate as required under Section 65-B of the Indian Evidence Act. Moreover, adding to the same contention, the learned counsel argued that the testimonies of the prosecution witnesses reflect that the face of the appellant was not visible in the CCTV footage and the trial court erred in concluding that the CCTV footage in CD (*Ex. PW-30/18*) and (*Ex. PW-30/19*) clearly shows the face of the appellant. In support of his contention, the learned counsel relied on the case of *Anwar PV vs. P.K. Basheer & Ors.*, [2014]10 SCC 473.
8. The next contention of the learned counsel for the appellant was related to the Call Detail Records of the deceased, the appellant and the prosecution witnesses with regard to the CDR, the learned counsel has argued:
 - That PW-18 (Saleem/father of the deceased) has deposed about two calls, one made to the deceased on his mobile number 9999340109 on 22.09.2011 at 10 PM and the other made to Naushad on his mobile number 9818322650 at 10:03 PM on 22.09.2011, however, there is no entry about any of the aforesaid calls in the CDR (*Ex. PW-28/C*).

- That the CDR (*Ex. PW-31/F*) reflects that no outgoing/incoming call was made on the mobile No. 9999340109 of the deceased at about 8-8:15 PM which is contrary to the deposition of PW-24 (Naushad) who deposed that the deceased went to meet the appellant while talking on the phone at around 8-8:15 PM.
 - Learned counsel for the appellants further contended that the findings of the trial court that the Mobile No. 9999340109 was located at cell ID No. 404110012320511 at 6:20 PM on 22.09.2011 at around Moolchand crossing is contrary to the deposition of the Nodal Officer, Saurabh Agrawal (PW-31) who proved the CDR (*Ex. PW-31/F*) as per which, the mobile No. 9999340109 was at cell ID 404110015132902 i.e. Loni, Ghaziabad at 6:20 PM on 22.09.2011.
9. The learned counsel for the appellant further argued that the prosecution failed to prove the surrender application (*Ex. PW-25/A*) wherein the appellant pleaded guilty before the Ld. Metropolitan Magistrate beyond reasonable doubt. Adding to the said contention, the learned counsel argued that the prosecution failed to prove as to how the surrender application bearing the date of murder as 23.09.2011 was moved by the appellant when the deposition of PW-24 (Naushad) clearly reflects that the appellant was in police custody from 24.09.2011 to 27.09.2011.
 10. The counsel for the appellant argued that the recovery of articles at the instance of the appellant and that too in the presence of the police witnesses is not admissible as per law and cannot be said to be an

incriminating evidence against the appellant. The counsel further argued that the witnesses to the recovery have clearly deposed that no recovery was made from the appellant.

11. Placing reliance on the medical evidence on record, the counsel for the appellant contended that the post-mortem report (*Ex. PW-26/A*) reflects that the post-mortem was conducted at 4:20 PM on 23.09.2011 as per which the death had occurred within 24 hours. The counsel for the appellant contended that taking into consideration the time slab as provided in the post-mortem report, the death of the deceased occurred after 4:20 PM on 22.09.2011, hence, the prosecution failed to prove that the deceased was alive at 8:15 PM on 22.09.2011. The counsel for the appellant further contended that the trial court did not consider the fact that the prosecution failed to prove the large quantity of ethyl alcohol found in the blood of the deceased. Adding to his submission, learned counsel argued that the ligature mark on the person of the deceased was not possible with such a lengthy wire which as per the statement of PW-26 (Dr. Ashish Jain) was 93 cm and 96 cm each.
12. Placing reliance on *Tomaso Bruno and Anr.. Vs. State of U.P. reported in 2015 (2) JCC 884*, the learned counsel for the appellant while concluding his arguments, contended that the prosecution failed to prove the complete chain of circumstances against the appellant, hence, the judgment of the Trial court should be set aside and the appellant should be acquitted.
13. Negating the arguments of the learned counsel for the appellant, the learned APP for the state contended that the prosecution has been

able to establish each and every circumstance beyond reasonable doubt and all the circumstances form a chain which point only towards one hypothesis, that is the guilt of the appellant. Adding to her arguments, she contended that the case of the prosecution is further strengthened by the testimony of the prosecution witnesses who have deposed in consonance with the case of the prosecution.

14. Learned APP for the state further argued that the CDR's of the appellant (*Ex. PW-31/B*), the deceased (*Ex. PW-28/C*), Naushad (*Ex. PW-27/C*) and the father of the deceased (*Ex. PW-31/F*) corroborate the case of the prosecution and establish the presence of the deceased with the appellant just before the incident.
15. So far as the surrender application (*Ex. PW-25/A*) moved by the appellant through his counsel wherein the appellant admitted his guilt is concerned, the learned APP contended that the Ahlmad of the court of the learned Metropolitan Magistrate before whom the said application was moved, proved the same on record by identifying the signatures of the learned Metropolitan Magistrate.
16. Arguing in respect of the recovery of a purse containing one voter identity card of the deceased, two Airtel SIMS, two photographs of the deceased, sixteen visiting cards and eight receipts at the instance of the appellant, the learned APP argued that the same are admissible under Section 27 of the Indian Evidence Act against the appellant. Adding to the said contention, learned APP contended that even though the witnesses to the said recoveries have turned hostile, still, the recovery memo signed by the said witnesses is admissible against the appellant as an incriminating evidence. In support of her

contention, she placed reliance on *Rameshbhai Mohanbhai Koli & Ors. vs. State of Gujarat* reported in **2010 (11) SCALE 120**.

17. The learned APP for the state further argued that the perusal of the CCTV footage in the two CD's (*Ex. PW-30/18*) and (*Ex. PW-30/19*) clearly establishes that the appellant was involved in commission of the crime. Adding to the said submission, the learned APP for the state argued that the file no. 2 of channel no. 6 in CD NO. 2 show that at 2:24:57 AM, the appellant alongwith his brother was seen coming on the scooter having a bag in between them and at 2:26:05 AM, they were seen returning without the said bag on their scooter. She contended that the said fact is further evident from the file no. 2 of channel no. 7 in CD NO. 2.
18. Concluding her arguments, the Learned APP for the State contended that the subsequent opinion (*Ex. PW-26/B*) of PW-26 (Dr. Ashish Jain) who conducted the post-mortem of the deceased establishes that the ligature mark on the person of the deceased can be caused by the computer cords recovered by the Investigating Officer and there remains no dispute as to the same.
19. We have heard the counsel for both the sides at length and carefully examined the impugned judgment along with the material available on record as well.
20. The present case is based on circumstantial evidence; it is essential for us to determine whether or not a complete chain of events stand established from the evidence produced by the prosecution. What, therefore, needs to be seen is whether the prosecution has established the incriminating circumstances upon which it places reliance and

whether those circumstances constitute a chain so complete as not to leave any reasonable ground for the appellants to be found innocent.

21. The case of the prosecution commences from the discovery of the dead body of the deceased in a white bori at Gate No. 5, East of Kailash, New Delhi. In order to establish the recovery of the dead body the prosecution has relied on the testimony of PW-5 (Hazi Shahid), PW-13 (Retd. HC Moti Ram), PW-17 (ASI Balbir Singh), PW-22 (Ct. Sumit Singh) and PW-30 (Insp. Govind Sharma).
22. PW-5 (Hazi Shahid) identified the dead body of the deceased and deposed that:

“I am working as scrap dealer. I am residing at House No. A291, Prakash Mohalla. Faheem used to live at Prakash Mohalla. On 22.09.2012, Faheem was missing and we searched for him whole night, but he was not found. On the next morning, at about 7:30 am, I came to know that a dead body was lying near Gate No. 5, Prakash Mohalla, East of Kailash. I went there and saw that the dead body was lying in the jute bag and I found that the dead body was of Faheem. I identified the dead body as of Faheem.”

23. PW-13 (Retd. HC Moti Ram) deposed as under:

“On 23.09.2011, I was posted in the PCR as a in charge of the PCR van. My duty hours were from 08:00pm to 08:00am. I received a call from PCR control room at about 07:15am regarding lying of a bori outside the house at D block, East of Kailash. Now, I do not remember the house number. I reached there along with PCR van and found that a plastic bag (bori) was lying outside the house in the road side. In the meantime, ASI Balbir from the Police Station also reached at the spot. The bori was checked, which contained a cardboard

board box, which had dead body of male aged about 22-23 years. The bori also contained two pieces of a wire. I informed about this to the Control Room”

In his cross-examination PW-13 (Retd. HC Moti Ram) deposed as under:

“ASI Balbir had come from the Police Station. Some public persons had gathered at the spot. We had cordoned off the spot. I do not remember, if I had opened the bori or ASI Balbir had opened the same. The wire was not too big, but I cannot recollect how long were the two pieces of wire. I do not remember the colour of the wire.”

24. PW-17 (ASI Balbir Singh) deposed as under:

“On 23.09.2011, I was posted at PS Amar Colony. On receipt of DD no.10-A through telephone, I along with Ct. Lalit reached outside gate no. 5, between Prakash Mohalla and D Block, East of Kailash, where PCR van along with HC Moti Ram incharge met us. Ct. Vinod also reached there during patrolling. At the spot, one plastic bag of white colour was lying. On touching the salt bag, I felt about the existence of one dead body. I immediately informed to the SHO. SHO reached there on his government vehicle, driven by the driver. At the instructions of SHO, I opened the bag and found the one dead body of boy aged 22-23 years. I found ligature mark on the dead body. In the plastic bag, there was one bag, one card board and two pieces of one electric wire. One plug was attached with one piece of wire. The dead body was wearing blue and black checkdar shirt, black colour baniyan and blue jeans pant with cloth belt.

In his cross-examination, PW-17 (ASI Balbir Singh) deposed that:-

“I had reached at the spot, where the dead body was lying at about 07:30 am. The dead body was not taken

out from the 'nala'. The body was found lying just outside the backside gate of D block, East of Kailash. Prakash mohalla exits opposite to that of gate of D block. At the time when I reached there, the dead body was not taken out from the main hole. People had started gathering near the spot, after hearing the news of a dead body and after police officials had reached there. IO reached at the spot within about 10 minutes. IO had not asked any public persons to join the investigation as the investigation was not started till then. The SHO had reached at the spot along with his driver and the operator. Ct. Lalit and Ct. Vinod were already present at the spot along with me apart from the PCR Official."

25. PW-22 (Ct. Sumit Singh) deposed as under:

"On 23.09.2011, I was posted at CPCR, PHQ, ITO. On that day, at about 07:17:57 hours, I received a call from phone no. 9891101889, who informed on telephone that to the effect that "one abandon bori was lying near nala, gate no. 5, East of Kailash, Near Prakash Mohalla". I noted this information and filled the PCR Form and sent the information to the Police Station Amar Colony. I have seen the PCR Form, which is Ex.PW-22/A. I have also brought the attested copy of the same from the ACP, CPCR, PHQ."

26. PW-20 (HC Vinod Kumar) deposed as under:

"On 23.09.11 I was posted at PS Amar Colony. On that day I was on patrolling in the area of East of Kailash Garhi. At about 7.20 a.m. I reached near at gate no. 5 East Kailash where ASI Balbir Singh, Ct. Lalit and PCR van found. In the meantime inspector Govind Sharma had also reached at the spot. One white colour bag (bora) was lying near outside gate no. 5. The said bag was checked and it was found to be containing one dead body of a male of age 20-25 years. The ligature mark were seen on the neck of the dead body. One jute bag of

Khakhi colour was also found in the white bag. The jute bag was found to be containing one packing gutta and two wires. One wire was having one two plug on its one end and the second wire was having a tag on its one end.

In the meantime one persons namely Haji Shahid came who identified the dead body to be the body of Faheem s/o Saleem/father of the deceased brother in law of Haji Shahid. Inspector Govind Sharma had prepared rukka and given me and sent me to PS for registration of FIR. I took the rukka and after getting registered the FIR, I returned back to the spot at 10.25 a.m. with original rukka and copy of FIR and handed over the same to the IO. The crime team called at the spot and they conducted the inspection of the spot. Thereafter we left the spot and my statement was recorded in the evening by the IO Inspector Govind Sharma in the PS.”

27. PW-30 (Insp. Govind Sharma) deposed that:

“On 23.09.2011, I was working as SHO, PS Amar Colony. On that day, DD No.10-A (Mark PW30/A) was got recorded in the Police Station regarding one unclaimed bag lying at Gate No. 5 of D-Block, East of Kailash. The said DD was marked to ASI Balbir Singh for investigation. He along with Ct. Lalit went to the spot. Upon checking the said bag, the dead body of a male was found kept in the said bag. ASI Balbir Singh had informed me over the telephone and after receiving this information, I myself alongwith driver and wireless operator proceeded for the spot in my official vehicle.”

28. Hence, from a perusal of the aforesaid testimonies, it is evident that a dead body in a white bori was recovered from Gate No. 5, East of Kailash, New Delhi which was correctly identified by PW-5 (Hazi Shahid) to be of the deceased - Faheem. Moreover, two wires which

were in the said white bori were also seized via seizure memo (**Ex. PW-5/C**).

29. The next circumstance against the appellant is his arrest. In order to prove the arrest of the appellant, the prosecution has relied on the testimony of PW-20 (HC Vinod Kumar) and PW-30 (Insp. Govind Sharma). PW-20 (HC Vinod Kumar) in his deposition before the court submitted that:

*“On 29.09.2011 I had joined the investigation of this case along with the IO/inspector Govind Sharma, SI K.P. Shah, HC Ram Hari Pathak. We all went to Garhi village by govt. vehicle. The IO has apprised us that the accused persons namely Zakir Malik and Shakir Malik had moved the application for their surrender in this case before the concerned Magistrate. In the meantime the IO had received information that the accused Zakir was going to surrender himself in the police station Amar Colony. When we proceeded towards PS then on the way i.e. on Kalka Devi Mandir Marg at a little bit distance of the police station accused Zakir met us and he told to the IO that he wanted to surrender himself in this case. The IO had detained the accused Zakir and arrested him vide his arrest memo **Ex.PW20/A** bearing my signature at point A and his personal search **Ex.PW20/B** bears my signature at point A. One mobile phone Nokia 1600, cash of Rs.145/- and one bunch of 5 keys recovered in the personal search. The IO had interrogated the accused and recorded his disclosure statement **Ex.PW20/C** bearing my signature at point A.”*

30. PW-30 (Insp.Govind Sharma) in his examination-in-chief deposed that:

“During Investigation on 29.09.2011, I received an information from the court that two persons namely Zakir and Shakir had moved an application of surrender before

*the court. I also came to know that accused persons as mentioned above had left the court premises for their residence. On receipt of the said information, at about 2.00-2.15 p.m., accused Mohd. Zakir was noticed by me coming towards P.S Amar Colony. He was apprehended by me with the help of accompanying Staff. He was interrogated by me. After ascertaining that there was sufficient evidence against him for arrest, I arrested the accused in the present case vide arrest memo exhibited as **Ex. P.W. 20/A** and his personal search memo **Ex. P.W. 20/B** were prepared by me and both the memos bearing my signature at point-B. I also prepared body inspection memo of accused vide **Ex. P.W. 30/B**, bearing my signature at point-A.”*

31. From a perusal of the aforesaid testimonies, it is evident that on the receipt of the information that the appellant had moved a surrender application, the investigation agency was made aware of the persons who had committed the offence. The said surrender application was proved by the Ahlmad of the court who was examined as PW-25 (Salil) who deposed that:

*“On 29th September 2011, I was posted as Ahlmad in the Court of Ms. Mona Tardi Kerketta, Ld. MM at Room No. 214, Saket Court. On that day, an application for surrender was moved by the Counsel on behalf of the accused persons namely Zakir Malik and Shakir. The said application was disposed of by the Ld. MM on 30th September 2011. After filing of the charge sheet, I had attached the said application for surrender with the charge sheet. The application is **Ex.PW25/A**, bearing the signature of Ld. MM at point-A & point-B. I identify the signature of Ld. MM as I seen her while writing and signing during the normal course of duty.*

At the time of committal of the case to the Court of Sessions, the aforesaid application was also sent along with the case file.”

In his cross-examination PW-25 (Salil) deposed that:

“The order dated 30th September 2011 was written by Vijay, Naib Court and order was signed by Ld. MM at point-A. The said application (Ex.PW25/A) was filed on 29th September 2011. I do not know if Investigating Officer arrested the accused and produced him in the Court as I used to sit in Ahlmad Room. As per order dated 30th September 2011, "accused produced in Police Custody along with IO and IO stated that the accused had been arrested hence application was disposed of, accordingly". I had not written anything on application (Ex.PW25/A). It is correct that order encircled at point-X on the application (Ex.PW25/A) was written by the reader of the Court, which is signed by Ld. MM at point-B.”

32. The contention of the appellant with regard to the surrender application is that the testimony of PW-24 (Naushad) reflects that the appellant was in police custody from 24.09.2011 to 27.09.2011. Hence, there was no admission by appellant of committing the alleged offence. From the perusal of the testimony of PW-25 (Salil) it is evident that the appellant had made a surrender application (**Ex. PW-25/A**) pleading guilty of having committed the murder of the deceased. There is nothing on record which would impeach the credibility of the said witness. Moreover, we concur with the finding of the trial court that *“In statement under section 313 of the Code, when circumstance of filing application for surrender **Ex.PW-25/A** by the accused in the court of Metropolitan Magistrate was put to the*

accused, he answered that it was incorrect. He has not stated in the said statement that he had not filed the said application in the said court and said application did not bear his signature or said application was filed by the counsel without his advice”.

33. Hence, the failure of the appellant to provide any explanation in his statement under Section 313 Cr.P.C negating the surrender application and the reliable testimony of PW-25 (Salil) are the two circumstances which make it hard for this court not to accept the findings of the trial court as to the acceptability of the surrender application against the appellant.
34. Learned counsel for the Appellant laboured hard to bring forth that the recovery made pursuant to the disclosure statement of the appellant is not admissible as per the well-established law and the said articles were planted by the investigation agency in order to falsely implicate the appellant. It is apparent from the record that pursuant to the disclosure statement of the appellant (**Ex. PW-20/C**) and subsequent pointing out, the alleged articles including a computer along with monitor, keyboard, mouse, CPU and one plastic cane of white colour were recovered from the basement at 19, Main Market Garhi, which were seized vide seizure memo **Ex.PW10/C**. Further, the appellant led to recovery of a wallet containing one voter identity card of the deceased, two Airtel SIMS, two photographs of the deceased, sixteen visiting cards and eight receipts from the Main Hole near Property No. 19, Main market, Garhi, New Delhi which were seized vide seizure memo **Ex.PW10/B**. According to Section 25 of the Indian Evidence Act 1860, no credence can be placed upon the

confession made by the accused to a police officer, which reads as under:

“25. Confession to police officer not to be proved
No confession made to a police officer shall be proved as against a person accused of any offence.”

35. However, Section 27 of the Indian Evidence Act is in the nature of a proviso or an exception which partially lifts the prohibition imposed by Section 25 and reads as under:

“Section 27 of the Indian Evidence Act:
27. How much of information received from accused may be proved.--Provided that, when any fact is discovered as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

36. In the light of Section 27 of the Indian Evidence Act, 1872 whatever information is given by the accused in consequence of which a fact is discovered only that would be admissible in the evidence, regardless of the fact that such information amounts to confession or not. The basic idea embedded under Section 27 of the Evidence Act is the doctrine of confirmation by the subsequent events. The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from an accused; such a discovery is true and admissible. ***The information might be confessional or non-inculpatory in nature, but if it results in discovery of a fact it becomes reliable information.***

37. Further, the Division Bench of this Court in ***Rakesh Kumar Jha vs. State of NCT of Delhi (2013) 1 DLT (Cri) 79*** has extensively dealt with the admissibility of the confession made by the accused to the police. Relevant portion is reproduced hereunder:

“5. Before we proceed further, we need to decide to what extent confession made by the Appellant, recorded under DD Entry No. 11A, or the alleged extra judicial confession to Srinivas Kumar (PW-20) is admissible. On record, Appellant’s case is that he made no extra judicial confession to PW-20, over the telephone. However, statement of PW-20 needs to be deliberated upon only if we hold that Sections 25 and 26 of the Evidence Act do not prohibit or bar admission of the alleged extra judicial confession.

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7. In *Aghnoo Nagesia v. State of Bihar AIR 1966 SC 119*, the accused had himself gone to the police station and lodged a report, which was in the form of a confession. The principal question which arose was whether the said statement, or any portion thereof, was admissible in evidence. The Supreme Court reproduced the entire First Information Report and divided it into 18 parts. Sections 24 to 30 of the Evidence Act were elucidated upon and explained. **The term “confession” was interpreted to mean a statement made by an accused suggesting that he had committed the crime. Confession is an admission made by the person who admits the offence or substantially all the facts which constitute the offence. It is a statement made by a person suggesting that he has committed a crime. Whether a statement which is partly self-exculpatory amounts to a confession or not, is a question which need be examined in the present appeal.** It was observed that although a confession may consist of several parts, and some parts may not relate to actual commission of offence, but some may relate to the motive, the

cooperation, the opportunity, the provocation, the weapon used, the intention, concealment of the weapon and the subsequent conduct of the accused. ***Elucidating upon the scope and whether the bar of Sections 25 and 26 of the Evidence Act will apply to such statements, it was held as under:-***

"15. If proof of the confession is excluded by any provision of law such as s. 24, s. 25 and s. 26 of the Evidence Act, the entire confessional statement in all its parts including the admissions of minor incriminating facts must also be excluded, unless proof of it is permitted by some other section such as s. 27 of the Evidence Act. Little substance and content would be left in Sections 24, 25 and 26 if proof of admissions of incriminating facts in a confessional statement is permitted.

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18. A little reflection will show that the expression "confession" in Sections 24 to 30 refers to the confessional statement as a whole including not only the admissions of the offence but also all other admissions of incriminating facts related to the offence. Section 27 partially lifts the ban imposed by Sections 24, 25 and 26 in respect of so much of the information whether it amounts to a confession or not, as relates distinctly to the fact discovered in consequence of the information, if the other conditions of the section are satisfied. Section 27 distinctly contemplates that information leading to a discovery may be a part of the confession of the accused and thus, fall within the purview of Sections 24, 25 and 26. Section 27 thus shows that a confessional statement admitting the offence may contain additional information as part of the confession. Again, s. 30 permits the Court to take into consideration against a co-accused a confession

of another accused affecting not only him but the other co-accused. Section 30 thus shows that matters affecting other persons may form part of the confession.

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8. Accordingly, the statement recorded in the First Information Report was admissible, in respect of the identity of the accused as the maker of the same i.e. his name, address and other details and the fact that he had come to the police station to make the report, which was recorded and read over to him. **The other portions of the statement recorded in the First Information Report were not admissible, save and except the portions which come within the purview of Section 27 of the Evidence Act.** Therefore, the other portions had to be excluded.

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13. **In Bheru Singh v. State of Rajasthan (1994) 2 SCC 467**, there are some observations which purport that the motive recorded in the self-implicating First Information Report are admissible and not hit by Section 25 of the Evidence Act, as they do not amount to confession of committing any crime. However, as clarified by a Division Bench of this Court in **Mukesh v. State Crl. Appeal No. 615/2008** decided on 4.5.2010, in **Aghnoo Nagesia (supra)** three Judges of the Supreme Court have firmly held that confession not only includes admission of the offence but also other admissions of incriminating facts relating to the offence. Motive, therefore, has to be excluded.

14. Read in this manner, we have to completely ignore and discard the extra judicial confession allegedly made to PW-20 on telephone, on 14th May, 2006 at 1.15 -1.20 P.M., i.e. after the Appellant had gone to Police Station, Lajpat Nagar and DD entry No. 11A (**Ex. PW1/A**) was recorded at 1.00 P.M. The alleged extra judicial confession to PW-20 is hit by Section 26 of the Evidence Act. DD entry No. 11-A (**Ex. PW1/A**) is admissible to the limited extent that it discloses identity of the Appellant,

address and details of the maker of the First Information Report. This portion is admissible under Section 8 of the Evidence Act. Other portions of DD entry 11A have to be excluded, except the portion(s) which comes under the purview of Section 27 of the Evidence Act. This portion, noticed below, will consist of Appellant's statement that dead body of Suman Rai was lying in flat No. E-20, First Floor, Gautam Nagar, New Delhi, and the knife used and blood-stained clothes of the accused were lying in the same flat.

15. Head Constable Raghbir Prasad (PW-1) was the duty officer at the Police Station, Lajpat Nagar and had first interaction with the accused, at Police Station, Lajpat Nagar, where he had recorded his confessional statement, vide DD entry No. 11A (Ex. PW1/A). The DD entry reads as:

"I reside at 50 E, First Floor, Gautam Nagar, New Delhi in the Flat of Smt. Suman Roy and loved her. I came to know about her illicit relations with some other persons, on which some hot arguments took place between us. As a result, whereof I became furious and today at about 8:00 o'clock in the morning I finished her by giving knife blows. I had kept the blood-stained knife and clothes at the locale itself. I have locked the flat and the key of the flat is in my possession. I have come here at Lajpat Nagar Police Station to inform you, because I knew about the Lajpat Nagar Police Station only. (The underlined portion of the DD entry is admissible)"

(emphasis supplied)

38. In view of the law discussed above, it is clear that, Section 27 of the Indian Evidence Act, 1872 is applicable, if confessional statement leads to discovery of some new facts. It is further not in dispute that a fact discovered on information furnished by an accused in his

disclosure statement is a relevant fact and is admissible in evidence if something new is discovered or recovered from the accused which was not within the knowledge of the police before recording the disclosure statement of the accused (Ref: Kamal Kishore Vs. State (Delhi Administration), (1997) 2 Crimes 169 (Del)).

39. From a perusal of the record, we find that the prosecution in the present case has relied upon the recovery of a *computer along with monitor, keyboard, mouse, CPU and one plastic cane of white colour* from the basement of property bearing no. 19, Main Market, Garhi and *a wallet containing one voter identity card of the deceased, two Airtel SIMS, two photographs of the deceased, sixteen visiting cards and eight receipts* from the manhole near the property bearing no. 19, Main Market, Garhi at the instance of Appellant. The version of the prosecution is supported by the testimony of PW-20 (HC Vinod Kumar) and PW-30 (Insp. Govind Sharma). PW-20 (HC Vinod Kumar) in relation to the recovery at the instance of the appellant has deposed that:

“Pursuant to the disclosure statement accused Zakir had pointed out the place where dead body was thrown i.e. at gate no. 5 East of Kailash, D Block. The pointing out memo was prepared which is Ex.20/D bears my signature at point A. Thereafter accused Zakir had pointed out the place where the scooter of deceased was left at opposite shop no. 3 DDA Market, D-block, East of Kailash. The pointing out memo of the said place was also prepared which is Ex.PW20/E bearing my signature at point A. Thereafter pursuant to the disclosure statement accused Zakir led us at 19, Main Market Garhi in the basement

where the murder of deceased Faheem was stated to have committed. The basement was opened with the keys, which were recovered in the personal search of the accused Zakir. Banwari Lal, Care Taker of the premises was also found there. The IO had prepared the pointing out memo of the said place at the instance of accused which is already Ex.PW10/C bears my signature at point B. The computer along with monitor, keyboard, mouse, CPU and one plastic cane of white colour were recovered from the basement which were seized vide seizure memo already Ex.PW10/C bearing my signature at point B.

Thereafter accused Zakir led us at the ground floor of the said premises and pointed out a gutter inside the premises in a corner of ground floor and from where we got recovered one black colour purse which was wet and stained with mud and the same was found to be containing two photographs of deceased Faheem, two SIM of mobile phones and the 16 visiting cards of deceased and some slips containing some transactions along with one Voter I-card of deceased Faheem. The said purse was seized through seizure memo already Ex.10/B bears my signature at point B. The articles were seized in cloth pulanda with the seal of GS.

Thereafter the accused Zakir had led us at the ground floor A-35, Shera Mohalla Garhi. The shop was opened by the IO with the help of key recovered in the personal search of accused. The accused had got recovered Rs. 13,000/- from a wooden almirah lying open in the shop. The currency notes were in the denomination of Rs.500/- and were found to be wrapped in a piece of newspaper. The said currency notes were seized in the presence of Naresh nephew (bhanja) of

landlord. The seizure memo of the same is **Ex.PW9/A**. The notes were sealed in a parcel with the seal of GS. Thereafter we returned to police station. The case property was deposited in malkhana. The IO had recorded my statement in the police station. The accused Mohd. Zakir is present in court today.”

In his cross-examination PW-20 (HC Vinod Kumar) deposed that:

“No public person was present except Banwari Lal at the time of preparing of memos. There is a covered drain (nala) after one house of the said premises (i.e., there is one house between the premises in question and the nala) the accused Zakir himself took out the purse containing visiting card etc., from the main hole situated at ground floor at the back side of the building. I do not know if entire drainage of the building went out through the said main hole. I do not know if there is some other main whole in the building. It is correct that today the purse and the cards are not wet and they are dry.”

41. PW-30 (Insp. Govind Sharma) another witness to the recovery has deposed that:

“I also recorded disclosure statement of the accused vide memo **Ex.PW20/C**. As per disclosure statement, accused took the police team at Gate No. 5, D-Block, East of Kailash and he pointed out the said place, where he thrown away the body of deceased. The pointing out memo was prepared of the said place vide **Ex.PW20/D**. Thereafter, accused took the police team to a Shop No. 3, DDA Market, D Block, East of Kailash, where he left the two-wheeler scooter of deceased, which was used in carrying the body of deceased. The pointing out memo of the said place is already exhibited as **Ex.PW20/E**. Thereafter, the accused took the police team to the place

of murder i.e. 19, main market, Garhi and pointing out memo of the said place was also prepared vide **Ex. PW10/C**. During the said investigation, one public witness Banwari Lal was also joined.

During personal search of accused, keys of godown were recovered through the salt godown situated at Basement of Property number 19, main market was opened. Some articles i.e. keypad, monitor, mouse, CPU and one plastic colour white cane were recovered vide seizure memo already exhibited as **Ex.PW 10/A**. The said articles were shown to the deceased by the accused for selling as a scrap.

Thereafter, accused took the police team to a place i.e main hole, behind the aforesaid building, where he had thrown away the purse of deceased.

At the instance of accused, one black colour purse (wallet) containing voter I-Card, two passport size photograph. 16 visiting cards of different names, two SIM cards and few slips belonging to deceased were recovered. The articles of wallet were in wet condition and smeared with dirt. The articles were washed away with the help of water and thereafter dried in sunlight and thereafter, taken into possession vide seizure memo exhibited as **Ex.PW10/B**.

Thereafter, accused took the police team to his shop situated at A-35, Shera Mohall, Garhi. The said shop was got opened with the help of keys possessed by the accused. Thereafter, accused got recovered 26 currency notes in the denomination of Rs.500/-, which were kept by him on the wooden rack, which was belonging to deceased. The said money was wrapped in a piece of newspaper. A pullanda was prepared and the said currency notes and same was taken into possession vide seizure memo already exhibited as **Ex.PW9/A**. The said recovery was effected in the presence of public witness Naresh.”

In his cross-examination PW-30 (Insp. Govind Sharma) has deposed that:

“It is wrong to suggest that the disclosure statement was got signed by the accused Zakir by putting pressure and using force. No public witness joined the proceedings of recording disclosure statement of accused Zakir. It is correct that I also arrested JCIL Shakir.”

40. The factum of recovery at the instance of the appellant as discussed above is clearly corroborated from the testimonies of PW-20 (HC Vinod Kumar) and PW-30 (Insp. Govind Sharma). Learned counsel for the appellant has extensively argued that the recovery of the said articles which was effected in the presence of police officers is not reliable as no genuine and sincere efforts were made by the investigating officer to authenticate the recovery with the presence of an independent witness.
41. There is no good reason for this Court to disbelieve the said recoveries merely because the recovery witnesses PW-20 (HC Vinod Kumar), PW-30 (Insp. Govind Sharma) happen to be police officers. In this context, we rely on the case of ***Kripal Singh v. the State of Rajasthan*** reported in **(2019) 5 SCC 646**. The germane portion of the judgment is extracted below:

“17. The submission of the learned senior counsel for the Appellant that recovery has not been proved by any independent witness is of no substance for the reason that in the absence of independent witness to support the recovery in substance cannot be ignored unless proved to the contrary. There is no such legal proposition that the evidence of police officials unless supported by independent witness is unworthy of acceptance or the

evidence of police officials can be out rightly disregarded.”

(emphasis supplied)

42. We are thus of the opinion that in the instant case, non-joining of any public witness at the time of the recovery of the aforesaid articles is not a sufficient ground to doubt the truthfulness of the testimonies of the police witnesses on the above aspect or discard their evidence completely as the testimonies of the police witnesses inspire confidence.
43. Keeping in view the facts of the present case and applying the principles laid down by the Hon'ble Apex Court as well as on the basis of corroborative testimonies of the material police witnesses, we find no cogent reason to disbelieve the recoveries made by the Investigating team at the instance of the appellant. The testimonies of the prosecution witnesses in relation to the recoveries made pursuant to the disclosure statement are consistent, trustworthy and corroborative and the argument regarding inadmissibility of the recovery of the aforesaid articles made at the instance of the Appellant holds no ground.
44. So far as the contention in relation to substantiating the admissibility of CCTV footage and the relevance of producing the certificate under Section 65B of the Indian Evidence Act is concerned, we deem it appropriate to refer to the recent judgment of the Hon'ble Apex Court, in the case of *Shafhi Mohammad V. The State of Himachal Pradesh reported in (2018) 2 SCC 801*. The germane portion of the judgment is extracted below:

*“(7) Though in view of Three-Judge Bench judgments in **Tomaso Bruno and Ram Singh (supra)**, it can be safely held that electronic evidence is admissible and provisions under Sections 65A and 65B of the Evidence Act are by way of a clarification and are procedural provisions. If the electronic evidence is authentic and relevant the same can certainly be admitted subject to the Court being satisfied about its authenticity and procedure for its admissibility may depend on fact situation such as whether the person producing such evidence is in a position to furnish certificate under Section 65B(h).*

*(8) Sections 65A and 65B of the Evidence Act, 1872 cannot be held to be a complete code on the subject. In **Anvar P.V. (supra)**, this Court in para 24 clarified that primary evidence of electronic record was not covered under Sections 65A and 65B of the Evidence Act. Primary evidence is the document produced before Court and the expression “document” is defined in Section 3 of the Evidence Act to mean any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.*

*(9). The term “**electronic record**” is defined in Section 2(t) of the Information Technology Act, 2000 as follows:*

*‘Electronic record’ means data, record or data generated, image or sound stored, received or sent **in an electronic form or micro film or computer generated micro fiche.***

(10). Expression “data” is defined in Section 2(o) of the Information Technology Act as follows.

“Data” means a representation of information, knowledge, facts, concepts or instructions

*which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been **processed in a computer system or computer network**, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer'*

(11). The applicability of procedural requirement under Section 65B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. In such case, procedure under the said Sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in absence of certificate under Section 65B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65B(h) is not always mandatory.

*12. Accordingly, we clarify the legal position on the subject on the admissibility of the electronic evidence, especially by a party who is not in possession of device from which the document is produced. Such party cannot be required to produce certificate under Section 65B(4) of the Evidence Act. **The applicability of requirement of certificate***

being procedural can be relaxed by Court wherever interest of justice so justifies.”

45. From the above extracted portion of the judgment of the Apex Court, it is evident that the requirement of producing the certificate under Section 65B of the Indian Evidence Act is a procedural aspect and the requirement of its production can be relaxed whenever required and justified, in the interest of justice. Therefore, the argument raised by learned counsel for the appellant that the CCTV footage produced by the Investigating Officer is not admissible as the same was not verified by a certificate under Section 65B of the Indian Evidence Act, holds no ground.
46. In relation to identification of the accused in the CCTV footage (***Ex. PW-30/18***) and (***Ex. PW-30/19***), we found that the predecessor bench of this Court vide order dated 19.03.2019 had directed the learned Additional Sessions Judge-05, South-East district, Saket Courts, New Delhi, or the successor Court for recording additional evidence in terms of Section 391 (4) of the Cr. P.C. in relation to the DVD brought by Mr. Gaurav Sharma, Senior Scientific Assistant (CFU), FSL, Rohini.
47. Pursuant to direction of this Court ASJ-05, South-East District, Saket Courts, New Delhi recorded the additional evidence under Section 391 (4) Cr. P.C. The relevant portion of statement of Sh. Gaurav Sharma, Senior Scientific Assistant, CFU, FSL, Rohini recorded on 01.04.2019 reads as under:-

“Today I have brought official laptop along with duplicate copy of office copy of annexure DVD-1 and

DVD-2 in compliance of order dated 19.03.2019 passed by Hon'ble Delhi High Court. The DVDs produced before this Hon'ble Court are the same which I had produced before the Hon'ble Delhi High Court in compliance of the order passed by the Hon'ble Delhi High Court.

At this stage, DVD-2 inserted into the laptop brought and it contains 12 files in total which contains recording from channel No 5 to 8 all dated 23.09.2011. Each channel contains three files each. File No. 1 of channel No. 5 starts at 12:59:59 AM and it has recording upto 1:59:59 AM. File No. 2 of channel No. 5 starts at 1:59:59 AM and it has recording upto 2:59:59 AM. File No. 3 of channel No. 5 starts at 2:59:59 AM and it has recording upto 3:59:59 AM.

File No. 1 of channel No. 6 starts at 12:59:59 AM and it has recording upto 1:59:59 AM. File No. 2 of channel No. 6 starts at 1:59:59 AM and it has recording upto 2:59:59 AM. File No 3 of channel No. 6 starts at 2:59:59 AM and it has recording upto 3:59 59 AM File No. 1 of channel No. 7 starts at 12:59:59 AM and it has recording upto 1:59:59 AM. File No. 2 of channel No. 7 starts at 1:59:59 AM and it has recording upto 2:59:59 AM. File No. 3 of channel No. 7 starts at 2:59:59 AM and it has recording upto 3:59:59AM.

File No. 1 of Channel No. 8 starts at 12:59:59 AM and it has recording upto 1:59:59 AM. File No. 2 of channel No. 8 starts at 1:59:59 AM and it has recording upto 2:59:59 AM, File No. 3 of channel No. 8 starts at 2:59:59 AM and it has recording upto 3:50 59 AM.

At this stage, file No.2 of channel No. 7 is played in the laptop and at 2:24:56 AM on 23.09.2011. two persons on a scooter seen coming alongwith something

and returning back on the scooter at 2:26:07 AM without carrying.

Court observation: File No. 2 of channel No. 7 of DVD-2 is played in laptop in the presence of Learned Counsel for appellant, Learned Counsel for father of deceased, Learned Substitute Additional Public Prosecutor for the State. It is found that two boys seen on a scooter coming at 2:24:56 AM on 23.09.2011 carrying something and they are seen returning from the same location at 2:26:07 AM on 23.09.2011 without anything but faces of boys are not clear. The said DVD-2 is Exhibit CI.”

48. At this stage, we deem it appropriate to peruse the testimony of PW-30 (Investigation Officer) who deposed that:

“On 08.10.2011, I recovered hard disc of CCTV Footage of main road leading towards the place in which accused had moved the dead body of deceased. The said Disc was seized from Rajiv Agnihotri vide seizure memo already exhibited as Ex.PW21/A. The said CCTV footage was checked at the house of Rajiv Agnihotri and it was observed in the said footage that accused alongwith his brother Shakir was carrying the body of deceased in the plastic bag. On the same day, CCTV Footage from the house no. 105/1, East of Kailash of Sh. Kuldeep Khara was seized. The said Disc was played and it was observed that both the brothers were carrying the body of deceased in a white colour plastic bag on a two wheeler scooter and after throwing the body, they were seen empty handed on the same two wheeler scooter. I also prepared the seizure memos of said hard disc vide seizure memo already exhibited as Ex.PW7/A.

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At this stage, file no. 2, channel no. 7 of C.D. No. 2 is played on laptop and after watching the same, witness said that at 2:24:56 accused Zakir and Sakir are seen coming on scooter and having white coloured bag in

between them and at 2:26:07, they were seen returning without bag. By seeing the said C.D., I can clearly identify the accused Zakir (present in the court today). The number of the vehicle is not visible and the colour is greyish.”

In his cross examination of PW-30 (Insp. Govind Sharma) deposed that:

“The hard disk drive was seized on 08.10.2011 and it was in our custody for few days before sending to CFSL for opinion. It is wrong to suggest that no pointing out was done by the accused Zakir for the recovery of articles at Godown. I recorded the disclosure statement of accused on 29.09.2011 in my own writing at the place of arrest near Tagore International School, East of Kailash.”

49. From a perusal of the report of the Learned Sessions Judge dated 01.04.2019, it is evident that **‘two boys seen on a scooter coming at 2:24:56 AM on 23.09.2011 carrying something and they are seen returning from the same location at 2:26:07 AM on 23.09.2011 without anything but faces of boys are not clear’.**

The testimony of PW-30 (Insp. Govind Sharma) is relevant in this regard. The Investigating officer during his examination-in-chief stated that he has obtained the CCTV footage which shows the main road from where the body of the deceased has been moved by the accused. The Investigating Officer further testified that **‘The said CCTV footage was checked at the house of Rajiv Agnihotri and it was observed in the said footage that accused alongwith his brother Shakir was carrying the body of deceased in the plastic bag’.**

During his further examination he reiterated his stand in relation to

identification of the accused persons and deposed that ‘.....**I have seen live recordings of CCTV at the house of one Kuldeep Khera and Rajeev Agnihotri, the faces and vehicle was visible in the live footage.** It is seen and observed in the said footage that both the said boys were seen coming on the scooter having a bag in between them and after sometime, they were seen observed returning without bag. Their faces and scooter were clearly visible in that footage. On the basis of live footage seen at the house of one Kuldeep Khera and Rajeev Agnihotri as well as CCTV recordings on the C.D., today shown to me, I am able to identify both the boys shown in C.D. no.2 **Ex. PW30/19** channel no.6 of file no.2 are Zakir and his brother Sakir. Zakir is seen driving the scooter and Sakir is pillion rider in the file.....’. Again in his testimony he further reiterated his stand by deposing that ‘**By seeing the C.D, I can clearly identify the accused Zakir** (present in the Court today).’

50. In our view the deposition of PW-30 (Insp. Govind Sharma) is natural. There was no proof that the PW-30 (Insp. Govind Sharma) had any animosity towards the accused or any kind of interest and closeness to the deceased. Therefore, the question of not believing the statement of PW-30 (Insp. Govind Sharma) does not arise. Since the admissibility of the CCTV footage has already been accepted, the identification of the accused in the CCTV footage by the PW-30 (Insp. Govind Sharma) cannot be rejected.
51. Hence from the evidence discussed above, we concur with the findings of the Trial Court that accused Zakir alongwith his brother are seen coming on the scooter and having white colour bag in

between them and at 02:26:07, they were seen returning from the same location at 2:26:07 AM on 23.09.2011 without any bag.

52. The next contention of the appellant is related to the CDR on record.

The first contention in relation to CDR is that PW-18 (Saleem/father of the deceased/father of the deceased) deposed about two calls, i.e. one call made by him from his phone number 9412114575 to the mobile of the deceased bearing number 9999340109 on 22.09.2011 at 10 PM and the other call made by PW-18 (Saleem/father of the deceased/father of the deceased) to PW-24 (Naushad) on his mobile number 9818322650 at 10:03 PM on 22.09.2011, however, there is no entry about any of the aforesaid calls in the CDR (*Ex. PW-28/C*).

Secondly, the CDR (*Ex. PW-31/F*) reflects that no outgoing/incoming call was made on the mobile No. 9999340109 (*which pertains to the deceased*) at about 8-8:15 PM which is contrary to the deposition of PW-24 (Naushad) who deposed that the deceased went to meet the appellant while talking on the phone at around 8-8:15 PM.

Thirdly, the findings of the trial court that the Mobile No. 9999340109 was located at cell ID No. 404110012320511 at 6:20 PM on 22.09.2011 at around Moolchand crossing is contrary to the deposition of the Nodal Officer (PW-31) who proved the CDR (*Ex. PW-31/F*) as per which, the mobile No. 9999340109 was at cell ID 404110015132902 i.e. Loni, Ghaziabad at 6:20 PM on 22.09.2011.

53. The record reflects that there are four CDR on record. The CDR *Ex. PW-27/C* is that of PW-24 (Naushad) which was proved on record by PW-27 (R.K. Singh). The CDR *Ex. PW-28/C* is that of the father of the deceased which was proved on record by PW-28 (Bhim Singh). The CDR *Ex. PW-31/B* is that of the appellant which was proved on record by PW-31 (Saurabh Aggarwal) and the CDR *Ex. PW-31/F* is that of the deceased which was proved on record by PW-31 (Saurabh Aggarwal). Having perused the aforesaid CDR's, we deem it necessary to reproduce the relevant call logs which are as follows:

PW31/B- CDR OF ACCUSED

<u>Search No.</u>	<u>In/out Number</u>	<u>Date</u>	<u>Time</u>	<u>Record type</u>
9953938343	9999840109	22.9.2011	18:20:39	OUT

EX PW 28/C - CDR of Saleem/father of the deceased

<u>Search No.</u>	<u>In/out Number</u>	<u>Date</u>	<u>Time</u>	<u>Record type</u>
9412114575	9999340109	22.9.2011	10:11:53	OUT
9412114575	9999340109	22.9.2011	10:14:59	OUT
9412114575	9999340109	22.9.2011	12:28:57	OUT

EX PW 27/C – NAUSHAD- PW 24

<u>Search No.</u>	<u>In/out Number</u>	<u>Date</u>	<u>Time</u>	<u>Record type</u>
9412114575	9818322650	22.9.2011	12:28:59	IN
9412114575	9818322650	22.9.2011	22:03:04	IN
9818322650	9999340109	22.9.2011	22:03:35	OUT
9818322650	9412114575	22.9.2011	22:05:52	OUT

9818322650	9412114575	22.9.2011	22:06:15	OUT
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EX PW 31/F- (FAHEM- DECEASED)

Search No.	In/out Number	Date	Time	Record type
9412114575	9999340109	22.9.2011	10:11:53	IN
9412114575	9999340109	22.9.2011	10:14:59	IN
9953938343	9999340109	22.9.2011	18:20:39	IN
9718777353	9999340109	22.9.2011	18:31:04	IN
9990359894	9999340109	22.9.2011	20:21:11	IN
9412114575	9999340109	22.9.2011	22:01:12	IN
9818322650	9999340109	22.9.2011	22:03:53	IN

54. In addition to the aforesaid, a perusal of the testimony of PW-24 (Naushad) and PW-31 (Saurabh Aggarwal) is relevant in order to appreciate the said contention. PW-24 (Naushad) has deposed that:

“We were coming from Naraina and reached at Moolchand crossing, then on the way, Faheem (deceased) received a telephonic call of Mohd. Zakir. Mohd. Zakir had talked with Faheem regarding sale/purchase of computer scraps. After keeping laptops in the room at A-84, Garhi, at about 08:00/08:15 pm, Faheem went out of the room, while talking on mobile phone. Then, I asked him as to where he was going, then he replied that he was going to meet Mohd. Zakir I remained at my room i.e. A-84, Garhi.

At about 09:45/10:00 pm, I received a telephone call of Saleem/father of the deceased, (father of Faheem) and he informed me that he had made a call on the mobile phone of Faheem. In reply, receiver had addressed him as Papa', whereas Faheem had never used the word 'Papa' and he used to call him as Abbu. He

asked me to make a call on the mobile phone of Faheem. I made a call on the mobile of Faheem. My call was received, but one had responded and phone remained silent for about 10-15 seconds.”

In his cross-examination PW-24 (Naushad) deposed that:

“It is wrong to suggest that Fahim had no talk on telephone with accused Zakir in my presence. It is wrong to suggest that Fahim had not told me as to where he was going on the said evening of 22.09.2011. It is wrong to suggest that Fahim was not with me on 22.09.2011. It is wrong to suggest that Fahim had not gone alongwith me to Naraina. It is wrong to suggest that Fahim had not come to my room alongwith me. It is wrong to suggest that I being relative of family of Fahim, deposing falsely in order to settle the old score with accused Zakir.”

55. PW-31 (Saurabh Aggarwal) who proved the CDR (**Ex. PW-31/B**) and (**Ex. PW-31/F**) deposed that:

“Q. As per the location chart, what was the location of mobile no.'s 9953938343 and 9999340109 during the abovesaid call?

A. As per CDR of mobile no. 9953938343 on 22.09.2011 at around 18:20:39 under reflecting cell ID 404110012320511, the physical address of tower is 46. Garhi Amrit Puri, 131 A, Leela Ram Mohalla, East of Kailash, New Delhi.

As per CDR of mobile no. 9999340109, on 22.09.2011 at around 18:20:39 under reflecting cell ID 404110015132902, the physical address of tower is Bharat City Infrastructures Pvt. Ltd., Indraprastha, Loni, Ghaziabad.”

In his cross-examination PW-31 (Saurabh Aggarwal) deposed that:

“Q. Do you follow the (TRAI) guidelines and circular issued by the Government of India regarding the Nodal Officer duties?”

A. Yes we follow the guidelines issued by Department of Telecommunication.

Q. As a Nodal Officer are you authorized as per the guidelines of Vodafone which in question has to follow the guidelines of DOT (Department of Telecommunications to give technical details in the Hon’ble Court?

A. As a Nodal Officer, we are authorized to give technical details like CDR, Location Chart, SDR and CAF.

Q. How long, the CAF and CDR details are to be preserved by the Vodafone company?

A. The CDR is available last upto 1 year in online server.

Q. Can you tell me the circumference area of one tower?

A. No.”

56. From a perusal of the testimonies of PW-24 (Naushad) (9818322650) we found that the deceased received a telephonic call from Mohd. Zakir (accused) when they reached at Moolchand Crossing. The CDR of the deceased as well as the accused corroborates the testimony of PW-24 (Naushad). The CDR of the accused (9953938343) and deceased (9999340109) establishes that the deceased received a call from the mobile of accused (9953938343), on 22.09.2011 at around 18:20:39.

The testimonies of PW-18 (Saleem/father of the deceased/father of the deceased) (9412114575) and to PW-24 (Naushad) (9818322650) further reveal that on 22.09.2011 at 10:00

pm, PW-18 (Saleem/father of the deceased/father of the deceased) (9412114575) made a telephone call from his mobile to his son (deceased) on his mobile no. 9999340109 which was received by an unknown person and thereafter PW-18 (Saleem/father of the deceased/father of the deceased) called his brother in law i.e. PW24 (Naushad) to know the whereabouts of his son (deceased). The CDR of PW-18 (Saleem/father of the deceased/father of the deceased) (9412114575), PW-24 (Naushad) (9818322650) and deceased (9999340109) clearly corroborate the testimonies of these prosecution witness. Moreover, the CDR of the accused (9953938343) and deceased (9999340109) further reveals that the location of both the mobile phones were at the same place at the relevant point of time. In view of the above discussion, it stands proved:

- That on 22.09.2011 at about 06:20 pm the deceased received a call on his mobile phone number 9999340109 from the mobile phone of accused 9953938343;
- That the testimony of PW-24 (Naushad) further proves that at around 08:00/08:15 pm the deceased left from A-84, Garhi to meet the accused. In this context, PW-24 (Naushad) deposed that 'after keeping laptops in the room at A-84, Garhi, at about 08:00/08:15 pm, Faheem went out of the room, while talking on mobile phone. Then I asked him as to where he was going, then he replied that he was going to meet Mohd. Zakir';

- That the testimony of PW-18 (Saleem/father of the deceased/father of the deceased) (9412114575) and PW-24 (Naushad) (9818322650) further establishes that on 22.09.2011 at 10:00 pm, PW-18 (Saleem/father of the deceased) had made call to his son as well as PW-24 (Naushad) who know the whereabouts of his son (deceased);
- That the CDR's of accused (9953938343) and deceased (9999340109) further establishes that at the relevant time both the accused and deceased were at the same place.

57. Hence the contention of learned counsel for the appellant in relation to CDR holds no ground.
58. Having discussed the evidence on record we deem it appropriate to refer to the Medical Evidence on record. Dr. Ashish Jain conducted the post-mortem of the deceased and was examined as PW-26 deposed that:

“On 23rd September 2011, I was working as Senior Resident Doctor in the Department of Forensic Medicine and Toxicology at AIIMS. On that day, the dead body of one Faheem, 22 years male was brought to Mortuary along with 12 sheets of inquest papers for Postmortem with alleged history of "found dead at D-Block, East of Kailash on 23rd September 2011 at 07:20 am".

On external examination: following clothes were present on the body:

- i) *one blue colour jeans with brown cotton belt,*
- ii) *blue and white check shirt with lable Gas,*
- iii) *black west (baniyan) with lable Malo salivary stains were present on it.*

All clothes were intact. Rigour mortis were present all over the body. Postmortem lividity was present over back and dependent parts. Eyes were partially open. Mouth was open.

Following antemortem injuries were present over the body:

- i) ligature marks (2 in number) were present horizontally (transversely) over middle 1/3 of neck. Ligature marks were completely encircling the neck and running parallel and adjacent to each other, brownish in colour, width of upper ligature mark was 1 cm and lower one was 0.5 cm. Ligature marks were situated 7 cm below chin, 7 cm below right mastoid tip, 6 cm below left mastoid tip and 10 cm above suprasternal notch, circumference of neck was 38 cm, on dissection of neck subcutaneous hemorrhage was present underneath the ligature mark, hemorrhage was present within muscles of neck.*
- ii) Abrasion, linear vertically placed of length 20 cm reddish in colour was present over posterior aspect of left arm.*
- iii) Abrasion reddish in colour of size 0.5 cm x 0.5 cm was present over lateral aspect of left elbow.*

*After postmortem examination, I opined that cause of death in this case is asphyxia as a result of strangulation. Time since death was about one day. Viscera blood in gauze, nail clippings and cellophane impression of ligature mark were preserved, sealed and handed over to police. I prepared the postmortem report in detail, which is **Ex.PW26/A**, bearing my signature at point-A.*

On 17th October 2011, a request from the IO/Inspector Govind Sharma was received for subsequent opinion as to whether the ligature mark found on the dead body could be possible from the wire having 2 pieces, which was sent for examination. I examined the wire and the postmortem report and opined that the

ligature mark present on the neck of the deceased could be possible with ligature material i.e. plastic wire submitted by the IO. My subsequent opinion is Ex.PW26/B, bearing my signature at point-A.”

In his cross-examination PW-26 (Dr. Ashish Jain) deposed as under:

“Q. What do you mean by two ligature mark on the neck present horizontally and transversely?

Ans. The two ligature marks were adjacent to each other i.e. one below the other encircling the neck horizontally.

It is correct that one ligature mark was dark of 1 cm in width and other ligature mark was 0.5 cm and was light in nature. Both the ligature marks were surrounding the complete neck. It is correct that I started postmortem at 04:20 pm on 23rd September 2011 and in my opinion the time since death is within 24 hours of the starting of the postmortem. Ligature mark depends on the material used for strangulation. As per my opinion given to the IO, I cannot give a definite opinion that ligature material (i.e. Plastic wire) is also possible by the other same type of material. It is correct that at the time of inquest proceedings and also at the time of postmortem no material i.e. plastic wire was shown to me.”

59. From the testimony of PW-26 (Dr. Ashish Jain), it is evident that the “**cause of death in this case was asphyxia as a result of strangulation**”. Further, PW-26 (Dr. Ashish Jain) in his subsequent opinion (Ex. PW-26/B), opined that “**the ligature mark present on the neck of the deceased could be possible with ligature material i.e. plastic wire submitted by the IO. My subsequent opinion is Ex.PW26/B, bearing my signature at point-A.**”. Hence, from the testimony of PW-26 (Dr. Ashish Jain) it is established that the computer cords that were recovered alongwith the body of the

deceased is the weapon of offence which led to death of the deceased.

60. The submission of the counsel for the appellant is that the post-mortem report reflects that the post-mortem was conducted at 4:20 PM on 23.09.2011 as per which the death occurred within 24 hours. The counsel for the appellant contended that taking into consideration the time slab as provided in the post-mortem report, the death of the deceased occurred after 4:20 PM on 22.09.2011, hence, the prosecution failed to prove that the deceased was alive at 8:15 PM on 22.09.2011. We are not satisfied with the argument of the learned counsel for the appellant as in the post-mortem report it was opined that the death took place “*within 24 hours*” which cannot be taken to mean that the deceased was not alive at 8:15 PM on 22.09.2011. Moreover, the failure of the prosecution to prove the large quantity of alcohol in the blood of the deceased cannot be the sole basis to reject the otherwise established case of the prosecution. Hence, we are of the view that the argument of the counsel for the appellant holds no ground.

CONCLUSION

61. The case of the prosecution is based on circumstantial evidence. We deem it appropriate to refer to the dicta of ***Baiju Kumar Soni & Anr vs. State of Jharkhand*** reported at (2019) 7 SCC 773 wherein the court has reiterated the principles governing circumstantial evidence and held:

“14. The law on the point is very well settled that in a case based on circumstantial evidence, every

circumstance must be fully proved and all the circumstances must form a chain of evidence so complete as to exclude every hypothesis other than the guilt of the Accused. It was stated by this Court in Sharad Birdhichand Sarda v. State of Maharashtra: (1984) 4 SCC 116:

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an Accused can be said to be fully established:

(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, where the following observations were made:

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.

15. In Nizam and Anr. v. State of Rajasthan (2016) 1 SCC 550, the law on the point was reiterated while acquitting the Accused of the charges Under Section 302 read with 201 Indian Penal Code. Paragraphs 9 and 10 of the decision were:

9. The principle of circumstantial evidence has been reiterated by this Court in a plethora of cases. In Bodhraj v. State of J & K (2002) 8 SCC 45, wherein this Court quoted a number of judgments and held as under: (SCC pp. 55-56, paras 10-11)

10. 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. (See Hukam Singh v. State of Rajasthan: (1977) 2 SCC 99, Eradu v. State of Hyderabad: AIR 1956 SC 316, Earabhadrapa v. State of Karnataka: (1983) 2 SCC 330, State of U.P. v. Sukhbasi: (1985) Supp SCC 79, Balwinder Singh v. State of Punjab: (1987) 1 SCC 1 and Ashok Kumar Chatterjee v. State of M.P.: (1989) Supp (1) SCC 560). 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. In Bhagat Ram v. State of Punjab: AIR (1954) SC 621, it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the Accused and bring home the offences beyond any reasonable doubt.

11. We may also make a reference to a decision of this Court in C. Chenga Reddy v. State of A.P.: (1996) 10 SCC 193, wherein it has been observed thus: (SCC pp. 206-07, para 21)

21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the Accused and totally inconsistent with his innocence.”

(emphasis supplied)

62. Having discussed the evidence on record and the law applicable, we are of the view that the prosecution has been able to establish the following circumstances:

- That the cause of death was asphyxia caused due to strangulation by the two computer cords recovered in the white bori alongwith the dead body of the deceased;

- That the dead body of the deceased alongwith two computer cords of length 93 cm and 96 cm respectively was recovered in a white bori at Gate No. 5, East of Kailash, New Delhi;
- That the appellant alongwith his brother (JCL) moved a surrender application before the court of Learned Metropolitan Magistrate and the appellant was arrested on the receipt of the said information by the Investigating Officer;
- That the appellant made a call to the deceased at around 6:20 PM on 22.09.2011 which is evident from the CDR's (*Ex. PW-31/F*) and is corroborated from the testimony of PW-24 (Naushad) pursuant to which the deceased went to meet the appellant;
- That the recovery of articles including computer along with monitor, keyboard, mouse, CPU and one plastic cane of white colour and a wallet containing one voter identity card of the deceased two Airtel SIMS, two photographs of the deceased, sixteen visiting cards and eight receipts have been made pursuant to the disclosure statement of the appellant;
- That from the testimony of the Investigating officer it stands established that the appellant was riding on a scooter with a white bori in the CCTV footage (*Ex. PW-30/18*) and (*Ex. PW-30/19*).

63. In light of the preceding discussion, we find no infirmity in the judgment passed by the trial court and we see no reason to interfere

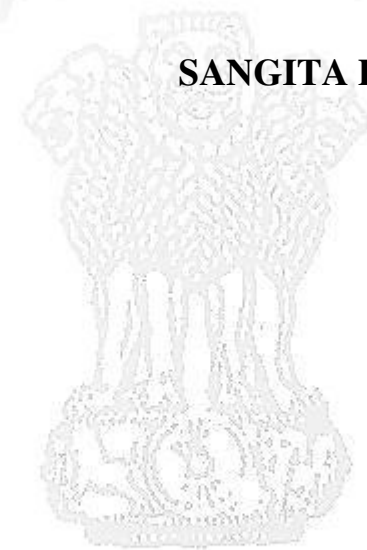
with the same. Accordingly, the conviction of the appellant is upheld.
The appeal therefore fails and is dismissed.

64. Copy of the judgment be sent to the Jail Superintendent, Tihar Jail.
65. Trial Court record be sent back along with a copy of this judgment.
66. Before parting with the judgment, it is relevant to mention that during the course of hearing we have opened the sealed cover containing CD and perused the same. The Deputy Registrar (Criminal) is directed to re-seal the same.

SANGITA DHINGRA SEHGAL, J.

MANMOHAN, J.

**FEBRUARY 26th, 2020
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