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

Judgment reserved on: 04th February, 2020

Judgment pronounced on: 20th February, 2020

+ CRL.A. No. 936/2018

PRADEEP KUMAR @ SONU

..... Appellant

Through: Mr. Ajay Verma, Advocate

versus

STATE

..... Respondent

Through: Ms. Aashaa Tiwari, APP for the State.

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 is directed against judgment dated 25.04.2018 and order of sentence dated 28.04.2018 passed by the learned Additional Sessions Judge, Special Judge, (NDPS), West District, Tis Hazari Courts, Delhi in Sessions Case No. 56749/2016 arising out of FIR No. 256/2011, under Sections 302/377/404 of the Indian Penal Code, 1860 (hereinafter referred to as '**IPC**') registered at Police Station Kirti Nagar, Delhi, whereby the learned Sessions Judge found the appellant-accused guilty and sentenced him as follows:

"For the above mentioned reasons mainly, keeping in view the proved guilt of the convict, for committing heinous offences mentioned above, this court takes some lenient view against the convict on the point of sentence.

Accordingly, the convict is hereby sentenced to undergo rigorous life imprisonment and to pay fine in sum of Rs. Fifty Thousand for the offence punishable under section 302 IPC. He is further sentenced to undergo rigorous imprisonment for ten years and to pay fine in sum of Rs. Ten Thousand for the offence punishable under section 377 IPC and in default of payment of such fine for this offence, he is further sentenced to undergo rigorous imprisonment for six months. He is also sentenced to undergo rigorous imprisonment for two years and to pay fine in sum of Rs. Five Thousand for the offence punishable under section 404 IPC and in default of payment of such fine for this offence, he is further sentenced to undergo rigorous imprisonment for three months.

Fine not paid by and on behalf of the convict today for any of the abovementioned offences. Benefit of section 428 Cr.P.C. is also given to convict. All the substantive sentences, mentioned above, shall run concurrently. Case property of this matter be disposed of as per law/ rules, after expiry of period of appeal/ outcome of the appeal, if so filed, as the case may be.”

2. Before going into the merits of the present appeal, it is relevant to recapitulate the brief facts of the present case, as elaborated by the learned trial court, which are as follows:

“2. Brief facts of the case of prosecution are that on 29.08.2011 at about 01:27 PM, on receipt of DD No.16A, PW-38 Inspector Braj Mohan, alongwith PW-36 Constable Bhim Singh, reached the spot i.e. House no. E-59, Kirti Nagar, Delhi, where PW-3 Mr. Sanjay Narang met them and told that a foul smell was emitting from the house of his brother Narender Narang (to be referred to as deceased hereinafter) at ground floor. The sliding door of the ground floor was found open and a foul smell was found there. The bedroom of deceased was found locked and its door was got opened by breaking the lock. A dead body was found lying on the bed inside the room, which was covered with a white bed sheet. After removing that bed sheet, it was found

that the deceased was lying naked. On the upper body of the deceased, a green colour bed sheet was wrapped. The dead body was decomposed and there were maggots on it. The feet of deceased were down from the bed. The face of deceased was upwards. Blood was scattered on floor and mattresses and blood stains were also there on the wall towards the feet of deceased. A bunch of hair was lying on the left side of dead body. A clutch wire was found tied on the neck of deceased. PW-38 recorded the statement of PW-3 and prepared rukka Ex.PW-38/A and sent the same to police station for registration of the FIR through PW-36 Constable Bhim Singh. Crime team was called at the spot which inspected the scene of crime. Photographs were taken and chance prints were lifted. Site plan was prepared. PW-38 collected the exhibits. Dead body was shifted to mortuary and postmortem was conducted. As per postmortem report, the cause of death was due to asphyxia subsequent to compression of neck created in a strangulation prepared by steel wire tied around the neck of deceased. All the injuries were opined as ante mortem in nature and of same duration. On a secret information, on 17.09.2011, accused herein was arrested from his native village Bilheri, District Hardoi, U.P. His disclosure statement was recorded and then accused handed over one mobile phone make Tata Indicom, black colour having connection no.9151402124, belonging to deceased. On the pointing out of accused, Juvenile in conflict with law namely Kamal Kishor @ Rajput (in short referred to as JCL hereinafter) was also apprehended, who was also reportedly involved in commission of crime in this matter, in furtherance of common intention, shared in advance with accused herein. JCL got recovered two more mobile phones of deceased and in these two mobile phones, JCL got fed his own contact numbers. PW-3 Sanjay Narang produced the empty boxes of three mobile phones of deceased of which Call Details Reports (in short CDRs) were obtained. It is relevant to mention here that the charge sheet against the JCL was filed before the Ld. Juvenile Justice Board concerned (in short JJB) and in this way, the accused herein namely Pradeep Kumar @ Sonu (in short referred to as accused hereinafter) is only facing trial in

this case in this court for the abovementioned offences, for which charge was framed against him.

After committal of this case to this court, arguments on the point of charge were heard from both sides and then charge under sections 302 and 377 IPC, both read with section 34 IPC, and also for offence punishable under section 404 IPC, was framed against this accused, to which he pleaded not guilty and claimed trial. Thereafter, case was fixed for prosecution evidence.”

3. To bring home the guilt of the accused, the prosecution has examined 40 witnesses in all. The incriminating evidence and circumstances were put to the Appellant during his statement recorded under Section 313 of Cr.P.C wherein he claimed to have been falsely implicated in the present case and examined one witness in his defence.
4. After appreciating and considering the rival contentions of the parties and scrutinizing the evidence, the learned Trial Court held the accused guilty and convicted him for the charged offence.
5. Mr. Ajay Verma, learned Counsel for the Appellant opened his submission by contending that the impugned judgment dated 25.04.2018 is based on conjectures and surmises and the same is against the facts and the settled proposition of law. He submitted that the learned Trial Court has ignored and omitted the material evidence and has disregarded the cogent evidence in favour of the appellant and has failed to appreciate the basic matter in dispute and it is beyond comprehension as to how the appellant has been categorized as the actual perpetrator of the crime because there is no direct evidence on record to establish that the appellant was involved in the commission of the alleged offence.

6. Learned Counsel for the Appellant further submitted that since the case of the prosecution 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 been done in the present case and if the chain of events is broken, the benefit of doubt has to be extended to the appellant. To substantiate his argument learned counsel for the appellant relied upon the case of ***Chandru @ Chandrasekaran vs. State Rep. By Deputy Superintendent Of Police CB CID and Anr*** reported in ***2019 SCC OnLine SC 176***.
7. Learned counsel for the Appellant further contended that the learned Trial Court has erred in relying on the testimonies of prosecution witnesses because there are major contradictions and discrepancies in the statements of the material prosecution witnesses, hence their evidence cannot be exclusively relied on as trustworthy and reliable. He further contended that the importance of motive in a case of circumstantial evidence is paramount and the absence of motive in a case of circumstantial evidence is critical to the version of the prosecution and since no motive has been proved by the prosecution in the present case, the appellant deserves acquittal.
8. Learned counsel for the appellant further contended that the recovery effected at the instance of the appellant cannot be relied upon as it has no evidentiary value and does not fall within the purview of Section 27 of the Indian Evidence Act. It was further contended that the recovery was effected in the presence of police officers and the same is not reliable, as no genuine and sincere efforts were made by

the Investigating Officer to authenticate the alleged recovery with the presence of any independent witnesses.

9. Learned Counsel for the appellant further contended that the medical & scientific evidence fails to corroborate the version of the prosecution. He further added that the learned trial court erred in convicting the appellant under Section 377 IPC, as there is no direct evidence on record to substantiate the version of the prosecution that there was a sexual relationship between the appellant and the deceased.
10. Learned counsel for the appellant further labored hard to show that the prosecution in the present case has relied upon the report tendered by (PW-32) SI Sushil Kumar, Finger Print Expert of the Delhi Police Fingerprint Bureau, for substantiating their version that the right thumb finger impression of the appellant (Mark S-1) matched with one of the chance prints (Q-5) obtained from the scene of crime. He further submitted that the abovementioned report does not complete the chain of circumstances unerringly pointing finger against the appellant and that it was the appellant who had committed the alleged crime. To substantiate his argument learned counsel for the appellant relied upon the case of *Sonvir vs State(NCT Of Delhi)* reported in *(2018) 8 SCC 24*.
11. Learned counsel for the appellant further contended that on the basis of non-explanation under Section 106 of Indian Evidence Act, 1872, the appellant cannot be convicted in a case based on circumstantial evidence especially when there is no evidence to corroborate the version of the prosecution. Counsel for the appellant lastly urged that

the trial court has failed to properly appreciate the facts and circumstances of the case; hence, the impugned judgment is liable to be set aside.

12. Ms. Aashaa Tiwari, learned APP for State, on the other hand, strongly refuted the submissions made by the counsel for the appellant and submitted that the impugned judgment is based on proper appreciation of the facts and evidence, no interference in the impugned judgment is called for by this Court; that the statements of prosecution witnesses and medical/scientific evidence are corroborative in nature and the prosecution has been able to prove its case beyond reasonable doubt.
13. Learned APP for State further submitted that motive is a relevant factor in all criminal cases, whether based on direct or circumstantial evidence, but the inability to establish motive in a case of circumstantial evidence is not always fatal to substantiate the version of the prosecution. She further submitted that the testimonies of PW-3 Sanjay Narang (*brother of the deceased*) and PW-5 Ms. Mamta Narang (*Sister-in-Law of the deceased*) are consistent and corroborative in nature and minor contradictions and discrepancies which have arisen in their testimonies can be ignored, due to lapse of time or due to mental disposition such as shock and horror at the time of the incident.
14. She further submitted that the prosecution has relied upon the recovery effected at the instance of the appellant and there is no cogent reason to doubt the aforementioned recovery merely for the

reason that the same was effected in the presence of police witnesses and is not supported with the presence of any independent witnesses.

15. Learned counsel for the State further contended that the crime team inspected the scene of crime on 29.08.2011 and lifted chance prints which were forwarded to the Finger Print Bureau and one of the Chance Prints (Q-5) matched with the thumb impression (Mark S-1) of the appellant, which evidently proves the involvement of the appellant in the commission of the alleged crime.
16. Learned APP for the State further added that in view of Section 106 of Evidence Act the burden was on the appellant-convict to explain as to how his thumb impression (Mark S-1) matched with one of the Chance Prints (Q-5) lifted from the scene of crime; however the appellant-convict had failed to discharge the said burden in his statement recorded under Section 313 CrPC and consequently, adverse inference had to be drawn against him.
17. Counsel for the state lastly urged that the evidence produced on record as well as the circumstances proved by the prosecution, form a complete chain pointing unequivocally towards establishing the guilt of the accused.
18. Based on these submissions, counsel for the State urged that this Court may not interfere with the well-reasoned order passed by the learned Trial Court convicting the appellant for the alleged offence.
19. We have given our anxious consideration to the submissions advanced on behalf of counsel for the parties at considerable length and also perused the material available on record.

20. The present is a case of circumstantial evidence and there is admittedly no eye witness to the murder of the deceased and no direct evidence has been brought to the notice of this Court. Therefore, it would be profitable to refer to the legal position with regard to establishing a case based on circumstantial evidence.
21. The Hon'ble Apex Court, in *Sharad Birdichand Sharda v. State of Maharashtra*, reported in **1984 AIR SC 1622**, whilst placing reliance on the five golden principles enunciated in its decision in *Hanumant v. State of Madhya Pradesh*, reported in **AIR 1952 SC 343**, elaborated the nature, character and essential proof required in criminal cases which rest on circumstantial evidence. It was held that is necessary that the chain of events proved by the prosecution must show that within all human probability the offence has been committed by the alleged perpetrator and by nobody else. The germane portion of the decision have been extracted herein below:

“152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh [AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] . This case has been uniformly followed and applied by this Court in a large number of later decisions up-to date, for instance, the cases of Tufail (Alias) Simmi v. State of Uttar Pradesh [(1969) 3 SCC 198 : 1970 SCC (Cri) 55] and Ramgopal v. State of Maharashtra [(1972) 4 SCC 625 : AIR 1972 SC 656] . It may be useful to extract what Mahajan, J. has laid down in Hanumant case [AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] :

‘It is well to remember that in cases where the evidence is of a circumstantial nature, the

circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.'

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 : 1973 SCC (Cri) 1033 : 1973 Crl LJ 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.

154. *These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.”*

(emphasis supplied)

22. In view of the dictum of the Hon'ble Supreme Court in ***Sharad Birdhichand Sharda (supra)*** and before proceeding to examine the evidence on record, it would be pertinent to peruse the testimonies of material prosecution witnesses, more particularly testimonies of PW-3 Sanjay Narang (*brother of the deceased*), PW-5 Ms. Mamta Narang (*Sister-in-Law of the deceased*) and PW-9 Mr. Ashok Pahwa (*cousin brother of the deceased*). PW-3 Sanjay Narang (*brother of the deceased*) during his examination in chief deposed as under:-

“My elder brother Sh. Narender Narang (deceased) was living at the ground floor at the above mentioned address. I was living with my family at the first floor of the same premises. My brother Narender Narang was divorcee and issueless. He was living alone at the ground floor.

On 26.08.2011 at about 8.30 pm, when I came back home from my shop situated at Azad market, I saw my brother Narender Narang at the ground floor who was performing Pooja at that time. Thereafter I went to the first floor.

On 29.08.2011 at about 11.00 am, when I was going to my shop, my wife (Smt. Mamta Narang) told me that there was some foul smell coming near stairs and gate of our house at the ground floor. I also felt the foul smell but I thought that, “KOI CHUHA MAR GAYA HOGA” and thereafter I left for my shop.

On 29.08.2011, I reached my shop at about 11.30 am. I performed puja and switched on the TV and started watching it. My wife telephoned me on my mobile No. 9716141060

telling me that the foul smell on the ground floor had increased and she asked me to call my elder brother Narender Narang. Thereafter I tried the mobile phone of my brother Narender Narang i.e. 9810230205 from my another mobile phone No. 9810214131 but the mobile phone of my brother was switched off. Thereafter I tried the another mobile phone of my brother Narender Narang (I do not remember its number) same was also found switched off. Till the time I was trying the above said two mobile phones of my brother Narender Narang my wife was on hold on phone with me. I asked my wife to disconnect the call and I told her that I would talk to my sister who might be knowing something about my brother Narender Narang.

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The house from the ground floor was giving a very bad smell. I called 2-3 neighbours to help me but as per their advise I telephoned the police at No. 100 from my mobile No. 9810214131. Police reached at the spot. The sliding door of the drawing room was not locked from inside and police could enter the premises at the ground floor through that door after opening the same. Since there was a foul smell coming from the house police could not stand inside and immediately came out. After some time the police officials from PS Kirti Nagar also reached the spot. The bedroom of my brother Narender Narang was found locked and the police officials broke open the said lock and entered the bedroom of Narender Narang. My friend Raju living in the said locality had also reached there who had helped the police officials to break open the lock of the door. I along with my cousin Sh.Ashok Pahwa and Raju also entered the bedroom. There was lot of blood lying on the floor as well as on the bed. One body was lying on the bed which was covered from the sheet. After removing the sheet I identified the dead body of my brother Narender Narang lying on the bed which was in naked condition. There was clutch wire (of two-wheeler) around the neck of the deceased. Police recorded my statement Ex.PW3/A bearing my signature at point A.

Police prepared site plan at my instance and same is Ex.PW3/B bearing my signatures at point A. The mobile phones from the house of my brother Narender Narang was

found missing. I had handed over the empty boxes of three different mobile phones (one of Tata Indicom another of Nokia and third one of LG mobile phone) of my brother Narender Narang to the police. Same were seized by the police vide seizure memo Ex.PW3/C bearing my signatures at point A.

Police had lifted the blood lying on the floor, on the wall of the room as well as earth control. Same was seized by the police vide seizure memo Ex.PW-3/D bearing my signatures at point A. Police had also seized two bed sheets, one green and one white, two mattresses, two pillows all blood stained, bunch of hair lying beside the dead body and one banyan and nicker of my deceased brother which were lying on the chair of the room, vide seizure memo Ex.PW3/E bearing my signatures at point A.”

23. During his cross examination he deposed as under:-

*“I met my brother on 26.08.2011 in the night at about 8.30 pm. it is wrong to suggest that I have not good relations with my deceased brother. I am dealing in old dhoti i.e I used to purchase old dhoties and sold the same in the factory. It is correct that my deceased brother used to deal in the same business. I alongwith my brother were living in the same house since birth. It is correct that my brother was residing alone in the ground floor. On Monday I came to know that my brother is lying dead on the ground floor. It is correct that daily I was not in contact or meet my brother. I used to met ,my brother after every 2-3 days. It is wrong to suggest that I had no good relations with my brother because was not meeting my brother daily. I am living in ancestral property measuring 300 sq.yds. worth about Rs. 10 Crore as per market value and both me and my brother are living in the said property. The documents of inheritance of the said property is in our name. My children and my wife were not daily meeting with my deceased brother. **I cannot tell who were the employees at the shop of my deceased brother. I cannot tell who were visiting the house of my deceased brother. It is correct that some person used to visit my deceased brother but I cannot tell their names.** Wife made a call to me on Monday i.e. 29.08.2011 at about 11.00a.m-12 noon. I left for my shop at about 11.00 a.m. I reached at my*

house at about 1.00-1.15 p.m on 29.08.2011. I made telephone call at about 1.27 p.m to the police. I cannot tell the name of the police official who reached on 100 number call. The police official who reached there stayed for few minutes and they called the local police. The police officials remained at the spot till evening hours. The doors of my brother key locked from inside. **It is not in my knowledge that my brother compelled other boys to have carnal intercourse with him.** The police official has lifted the exhibits from the spot i.e. beddings, clothes, bed sheet and also lifted the blood stained earth and earth control by breaking the floor. Police may enquiry from me at the spot and also at the PS. I do not remember if my signatures were obtained on my statement at the spot or at police station. My signatures were obtained on my statement at police station. **The cardboard boxes were found in the room of my deceased brother. The said cardboard boxes were found in the room of my brother when police searched the house and the same were taken in possession by the police. The ground floor where my brother used to live was sealed by the police when they left the spot.**”

24. Ms. Mamta Narang (Sister-in-Law of the deceased) stepped into witness box as PW-5 and deposed that:-

“On 29.08.2011, my husband was going to shop at Azad Market, Delhi. At about 11 am when my husband was leaving the house for his shop, I told him that there was a foul smell like a dead mouse, in and around the staircase of our house. My husband told me that the foul smell would finish by the passage of time. My husband left for his shop. The foul smell coming from ground floor of our house which was occupied by my jeth (elder brother-in-law) as we used to reside on the first floor. I made a call to my husband and told him that foul smell has increased and my husband came back at the house. He also felt the foul smell and neighbours also gathered outside the ground floor of our house. Neighbours advised my husband to make a call to the police and accordingly, my husband made a call to the police. Police came at our house. Before that, my husband made call to my jeth on his mobile phones but both the phones were switched off and my jeth had not gone to his godown from 26.08.2011.

The sliding door was opened and the ground floor of our house and foul smell was heavily coming from ground floor. My husband along with police officials entered the ground floor of the house of Narender Narang and found the bedroom was locked and foul smell was coming from the bed room. The door of bed room was broken and found dead body of Narender Narang lying on the bed which was covered with white sheet. The white bed sheet was removed from the face of Narender Narang and my husband identified his elder brother Narender Narang. I also identified the dead body of Narender Narang lying in the ground floor bed room. My husband told me that my jeth, Narender Narang was killed by tying wire around his neck. The dead body of Narender Narang was removed to Mortuary, DDU Hospital.”

25. During her cross examination she deposed as under:-

“ My jeth had his own separate kitchen at ground floor. My husband came back from his shop after about one and half hours since I made a call to him. Police remained at the ground floor of our house till night hours on that day. My statement was recorded by the police on the same day when the dead body was recovered. There was no dispute between my husband and jeth with regard to any ancestral property. I cannot tell the name and address of the persons who were regularly visiting my jeth. I cannot tell the name and address of the persons who were regularly visiting with my jeth. I cannot tell about the name and address of the friends of my jeth.”

26. Mr. Ashok Pahwa (cousin of deceased) stepped into witness box as PW-9 and deposed that:-

“Sanjay Narang and Narender Narang are sons of my Mama. On 29.08.2011 at about 01.00 PM Sanjay Narang telephonically informed me that both mobile numbers of Narender Narang are switched off and a foul smell is coming from his house. On hearing this, I immediately reached at E-59, Kirti Nagar. A huge crowd was present

there. Sanjay Narang had called at 100 number. Police also reached there. I alongwith Sanjay Narang, his wife Mamta and one Rajeev alongwith other people entered the house of Narender Narang. The sliding door of the house was lying open whereas the door of bed room was locked. With the assistance of police and other, the door was broke opened.

On entering the room, we saw that one bed sheet was lying on one person on the bed. The bed sheet was removed and it was dead body of Narender Narang in naked condition. The dead body was in a bad condition and there was a green colour cloth on the upper part of the dead body. Both feet of the dead body were hanging towards the floor. There was a wire on the neck of the dead body.”

27. From a conjoint reading of the aforesaid testimonies of the prosecution witnesses, it is evidently established that a foul smell was emanating from the house of Narender Narang (Deceased) i.e House No. E-59, Ground Floor, Kirti Nagar, Delhi. Subsequently, PW-3 Sanjay Narang tried to call the mobile phone of deceased i.e 9810230205 from mobile phone no. 9810214131, but the mobile phone of his brother was switched off. Thereafter, various neighbors had also gathered outside the ground floor of their house because of the foul smell emanating from the above-mentioned place of incident and one of them advised Sanjay Narang to inform the police officials.
28. After some time, the police officials from PS Kirti Nagar, Delhi, had arrived at the spot and the bedroom of the deceased was found locked. The lock was opened with the assistance of the police officials and there was a pool of blood lying on the floor as well as on the bed. On entering the bed room, one dead body was found lying in a naked condition on the bed which was covered with a sheet and there was a clutch wire tied around his neck and the same was

identified as the dead body of the deceased (Narendra Narang) by the abovementioned prosecution witnesses.

29. Further, corroborating the version of the aforesaid prosecution witnesses, PW-38 Inspector Braj Mohan deposed that:-

“On 29.08.2011 I was posted as Inspector Investigation at PS Kirti Nagar. On that day on receipt of DD No. 16A Ex.PW2/A at about 01:27 PM, I along with Ct. Bhim Singh reached the spot i.e., E-59, Kirti Nagar, Delhi where one Sanjay Narang S/o Late Mr.Rajpal Narang, R/o E-59, First floor met us and told that a foul smell was emitting from the house of his brother Narendra Narang at the ground floor. We reached the ground floor and found that the sliding door of the house was open and a foul smell was emitting from there. I along with Sanjay Narang entered the house and found that the door of bedroom of Narendra Narang was locked. That door was got opened by pushing (DHAKKA MAAR KAR KHOLA). We found that the dead body of a male person was lying on the bed covered with white bed sheet. After removing the bed sheet, Sanjay Narang identified that dead body as of his brother Narendra Narang. The dead body was naked. One green bed sheet was found wrapped on the upper portion of the body and the dead body was decomposed and there were maggots on it. We also found one clutch wire tied in the neck of deceased. Blood was also lying on the floor and bed as well as in the corner of the room. Blood was also found scattered on the wall of that room. One hair wig was also found near the dead body. I had recorded the statement of Sanjay Narang which is already Ex.PW3/A bearing my signature at point B. I prepared rukka Ex.PW38/A bearing my signature at point A and sent the rukka to police station for registration of the FIR through Ct.Bhim Singh. I also called the Crime Team at the spot. I also informed my senior officers, who also reached the spot. Crime team reached the spot and inspected the scene of crime and took photographs. The Incharge, Crime Team handed over the Crime Team report to me at the spot.”

30. During his cross examination he deposed that:-

“...On 16.09.2011 one secret informer met me and told that the accused persons wanted in this case namely Pradeep Kumar @ Sonu and Kamal Kishor @ Rajput, both R/o Village Bilaheri, District Hardoi, U.P. were present in their native village and if raided, they could be apprehended. I had informed the SHO in this regard. Thereafter, I had constituted a raiding party consisting of myself, SI Rampal, Ct. Praveen and Ct.Pradeep. We along with the secret informer left for the Village Bilaheri in a private Innova car No. DL-4C-AE-9394, which was hired by SHO and reached there at about 10:00/11:00 PM.

In early hours of 17.09.2011 we conducted raid in the house of Kamal Kishor but he was not found there. His brother told that Kamal Kishor was not present there. Thereafter, we conducted raid in the house of accused Pradeep @ Sonu in the same village. In his house, his brother Avdesh met and told that Pradeep was not present there and he had gone somewhere. We informed his brother to produce Pradeep @ Sonu before us in police station Hardoi. We came back to P.S. Hardoi and informed there regarding our visit.

At about 11.00 AM, Avdesh produced his brother accused Pradeep @ Sonu present today in the court (correctly identified) in P.S. Hardoi. The secret informer had identified the accused Pradeep @ Sonu and thereafter left from there. Due to rush of local public persons there, the concerned SHO had advised me to take the accused with us outside the police station. We took the accused to Shahjahan Pur Road, Hardoi. I had interrogated the accused and arrested him at 06:00 PM vide arrest memo already Ex.PW34/B bearing my signature at point Y and his personal search was conducted vide memo already Ex.PW34/C bearing my signature at point Y. The accused was interrogated and he made his disclosure statement already Ex.PW34/A bearing my signature at point Y.

During the formal search of accused one TATA Indicom mobile phone C-2901 was recovered. Accused disclosed that that mobile phone was of deceased and accused had robbed the same after the incident. The accused also disclosed that he had put his own SIM in that mobile phone and he was

using the same. I had sealed that mobile phone with SIM in a cloth pullanda with my seal of BM and seized the same vide seizure memo already Ex.PW34/D bearing my signature at point Y. Thereafter, we along with the accused reached Delhi in early morning of 18.09.2011. I had deposited the case property in malkhana.

The accused was sent to DDU Hospital and got the medically examined through Ct. Praveen. Thereafter, he was brought to police station. Ct. Praveen handed over two sealed parcel sealed with the seal of CMO DDU Hospital along with one sample seal to me and I had seized the same vide seizure memo already Ex.PW35/A bearing my signature at point Y.

Accused Pradeep led us to the place of occurrence i.e. House No. E-59, Kirti Nagar, Ground floor, Delhi and pointed out the bedroom and I had prepared the pointing out memo in this regard which is already Ex.PW35/B bearing my signature at point Y.

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On 21.10.2011, complainant Sanjay Narang handed over three empty mobile phone boxes on which the particulars of mobile phone including IMEI number were mentioned. I had seized the same vide seizure memo already Ex.PW3/C bearing my signature at point Y. I had deposited the case property in Malkhana. I had recorded supplementary statement of Sanjay Narang in this regard."

31. Perusal of the aforesaid testimony also reveals that the appellant was arrested vide arrest memo (**Ex.PW34/B**) and his disclosure statement (**Ex.PW34/A**) was recorded, which led to the recovery of mobile phone of the deceased. The appellant further led the police officials to E-59, Ground Floor, Kirti Nagar, Delhi and pointed out the scene of crime (*bedroom of the deceased*), on which the pointing out memo was prepared vide (**Ex.PW35/B**). The aforesaid version of PW-38 Inspector Braj Mohan, is further authenticated with the testimony of

Const Praveen Kumar, who stepped into witness box as PW-35 and deposed that:-

“On 16.09.2011, I was posted at P.S. Kirti Nagar. On that day, I had joined the investigation in this case with IO/Inspector Braj Mohan. IO had received the information regarding the suspect in this case. I along with the IO, SI Ram Pal and Ct. Satyawar left the police station in a private vehicle, whose registration number and make I do not remember at this moment due to lapse of time, and reached village Bilahari, P.S. Shahbad, District Hardoi, U.P. We had searched for accused Pradeep Kumar @ Sonu and Kamal, the suspects wanted in this case.

In the house of accused Pradeep, his brother Avdesh met. IO had directed Avdesh to produce his brother Pradeep before him in P.S. Shahbad as and when he would find any clue about him. On the same day i.e., on 17.09.2011 Avdesh had produced his brother Pradeep @ Sonu present today in the court (correctly identified) before the IO in P.S. Shahbad, Hardoi. Accused Pradeep was interrogated. Thereafter, we left P.S. Shahbad and on road at Shahjahanpur, the accused Pradeep was interrogated and arrested vide arrest memo already Ex.PW34/B bearing my signature at point B and accused signed at point X. His personal search was conducted vide memo already Ex.PW34/C bearing my signature at point B. Accused made his disclosure statement which was recorded by the IO in my presence already Ex.PW34/A bearing my signature at point B and accused signed at point X. At the time of arrest of accused, he had handed over one black mobile phone make TATA C-2901 with SIM stating that it was of Narender Narang (deceased) and he had inserted his SIM card in that mobile phone. It was sealed by the IO in a pullanda with seal of BM and taken into possession vide seizure memo already Ex.PW34/D bearing my signature at point A, SI Rampal signed at point B and accused signed at point X.

After reaching Delhi, accused Pradeep was taken to DDU Hospital where he was medically examined. After his medical examination, the doctor had handed over two sealed pullandas sealed with the seal of CMO DDU Hospital along with one sample seal to me and I had handed over the same to IO. IO

seized the same vide seizure memo Ex.PW35/A bearing my signature at point A. So long the pullandas remained in my possession the same were not tampered with by anyone in any manner.

Accused Pradeep led us to house No. E-59, Ground floor, Kirti Nagar, Delhi where the accused pointed out the spot while entering a bedroom. IO prepared the pointing out memo in this regard which is Ex.PW35/B bearing my signature at point A, SI Rampal signed at point B, Ct.Satyawan signed at point C and accused signed at point X. IO recorded my statement in this case.

I can identify the mobile phone, if shown to me.

At this stage, one sealed pulanda sealed with the court seal and bearing particulars of this case is produced by MHC(M). The same is opened, out of which one black mobile phone bearing serial number PK9MAB1861806012 and MEID No. A100004E8C9C81 is taken out having SIM cards of MTS bearing SIM card No, OMH8991071113583727646M01. The same is shown to the witness. The mobile phone is correctly identified by the witness. The mobile phone is already Ex.P-1 and the SIM card of MTS company is already Ex.P-2.”

32. Learned counsel for the appellant extensively argued that the recovery effected at the instance of the appellant cannot be relied upon as it has no evidentiary value and does not fall within the purview of Section 27 of the Indian Evidence Act. It was further contended that the recovery was effected in the presence of police officers and the same is not reliable, as no genuine and sincere efforts were made by the Investigating Officer to authenticate the alleged recovery with the presence of any independent witnesses.
33. So far as, the recoveries made at the instance of the accused is concerned, the Apex Court in a catena of judgments has held that the recovery and the pointing out memos which directly link with the commission of the crime are relevant and admissible in the eyes of law.

While dealing with such a case, the Hon'ble Supreme Court of India in the case of *Debapriya Pal vs. State of West Bengal* reported at (2017) 11 SCC 31 has held as under:-

“10. ...Under Section 27 of the Evidence Act only so much of recovery, as a result of the disclosure statement, which directly pertains to the commission of crime is relevant. Otherwise, such an evidence is barred Under Section 25 of the Evidence Act. Recovery of laptop does not have any bearing. It is neither the weapon of crime nor it has any cause of connection with the commission of crime. The law on this aspect is succinctly said in the case "Jaffar Hussain Dastagir v. State of Maharashtra: (1969) 2 SCC 872 in the following manner:

5. Under Section 25 of the Evidence Act no confession made by an Accused to a police officer can be admitted in evidence against him. An exception to this is however provided by Section 26 which makes a confessional statement made before a Magistrate admissible in evidence against an Accused notwithstanding the fact that he was in the custody of the police when he made the incriminating statement. Section 27 is a proviso to Section 26 and makes admissible so much of the statement of the Accused which leads to the discovery of a fact deposed to by him and connected with the crime, irrespective of the question whether it is confessional or otherwise. The essential ingredient of the Section is that the information given by the Accused must lead to the discovery of the fact which is the direct outcome of such information. Secondly, only such portion of the information given as is distinctly connected with the said recovery is admissible against the accused. Thirdly, the discovery of the fact must relate to the commission of some offence.”

(emphasis supplied)

34. Further, there is no good reason for this Court to disbelieve the said recoveries merely because the recovery witnesses 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:

“21. 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)

35. 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 recovery made by the Investigating Agency at the instance of the appellant as the testimonies of the prosecution witnesses in relation to the recoveries made pursuant to the disclosure statement are consistent, trustworthy and corroborative.
36. Further, at this stage, it is relevant to examine whether the medical evidence adduced by the prosecution finds support from the testimony of the prosecution witnesses. PW-17 Dr. Komal Singh, HOD, Department of Forensic, DDU Hospital conducted the post-mortem on the body of the deceased and proved the report as **Ex.PW.17/A**. Dr. Komal Singh stepped into witness box as PW-17 and deposed that:-

“On 30.08.2011, I was posted as above. On that day I conducted the postmortem on the dead body of Narender aged about 44 years male. The dead body was sent by Inspector Brij Mohan and Ct. Bhim Singh. On examination of the dead body the rigor mortis was found passed off.

Postmortem staining was found over back. Body was highly putrefied, swollen, having greenish discolouration with marbeelling of skin. Nails were cyanosed.

Ligature material (appears to be a clutch wire) tied tightly by a fixed knot around the neck. It is 32 cm in length. During extricating it, a beaded wooden necklace which was put on by the deceased got entangled with a wire.

While conducting the postmortem following external injuries were found: -

Ligature mark is present around the whole neck except on right lateral side of the neck (knot site) going obliquely to left side the neck above the upper border of thyroid cartilage in the form of band of size 0.4cm x 34cm x 0.2cm reddish brown in colour. Total neck circumference is 34 cm. The upper border of ligature mark is 7 cm below chin and the lower border is 10 cm above manubrium sternil. The mark is 6 cm below right mastoid and 6 cm below left mastoid. No other mark of fresh external injuries is present over the body.

On external examination the following observation regarding the neck was found: -

*Hyoid Bone/ Thyroid Cartilage/Cricoid Cartilage/Tracheal Rings & Mucosa/Any Foreign Body in Trachea: **On incision and dissection of neck, extravasations of blood and clots seen underneath the ligature mark, underlying tissue of neck, muscles, and up to the back of trachea. Hyoid bone fractured at right greater cornu with contusions. Other all cartilages of neck are intact. Mucosa of tracheal lumen is congested and tracheal lumen contains froth.***

Opinion: -

The cause of death was due to asphyxia subsequent to the compression of neck created in a strangulation prepared by steel wire tied around the neck. All injuries were ante mortem and were of same duration.

Time since death was found approximately four days prior to the postmortem. Manner of death was homicide.

Blood in gauze piece, clothes blood and viscera, anal swab and ligature material (wire) were sealed and handed over the IO. My detailed postmortem report is Ex.PW17/A

(running into 4 pages) which bears my signature at point A.”

37. Relevant portion from the Post Mortem report (*Ex.PW.17/A*) of the deceased is reproduced herein below :-

“BRIEF HISTORY (As per inquest Papers):Alleged history of found dead in a decomposed condition on 29.08.11 at 01.27 PM he was a 44 years male living in a rented house E-59, Ground Floor, Kirti Nagar, New Delhi. A clutch wire was tied around his neck.

GENERAL DESCRIPTION

Clothes worn & Their Condition: NIL

GENERAL EXAMINATION

- *(sic.) : Passed off.*
- *Post Mortem Staining: Present over back.*
- *Body was highly putrefied, swollen, having greenish discolouration, marbeelling of skin*
- *Condition of eyes : Closed with conjunctiva congested.*
- *Mouth/Tongue : Partially opened with anterior set of teeth visible, tongue protruding out. Maggots of 1 cm size crawling all over the body.*
- *Nails cyanosed.*
- *Ligature material (appears to be a clutch wire) tied tightly by a fixed knot around the neck. It is 32 cm in length. During extricating it, a beaded wooden necklace which was put on by the deceased got entangled with a wire.*

EXTERNAL EXAMINATION: External Injuries:

Ligature mark is present around the whole neck except on right lateral side of the neck(knot site) going obliquely to left side the neck above the upper border of thyroid cartilage in the form of band of size 0.4cm x34cm x 0.2cm reddish brown In colour. Total neck circumference Is 34 cm. The upper

border of ligature mark is 7 cm below chin and the lower border is 10 cm above manubrium sternii. The mark is 6 cm below right mastoid and 6 cm below left mastoid. No other mark of fresh external injuries is present over the body.

INTERNAL EXAMINATION.

A- HEAD

A- Scalp: Subscalp congested.

B- Skull: NAD

C- Brain, Meninges & Vessels: *Mild congested.*

D- Base of skull: *Intact.*

E-NECK

1. Hyoid Bone / Thyroid Cartilage / Cricoid Cartilage / Tracheal Rings & Mucosa / Any Foreign Body in Trachea: *On incision and dissection of neck, extravasation of Blood and clots seen underneath the ligature mark, underlying tissue of neck, muscles, and up to the back of trachea. Hyoid bone fracture at right greater cornu with contusion. Other all cartilages of neck are intact. Mucosa of tracheal lumen is congested and tracheal lumen*

2. CHEST (THORAX)

1. Ribs and Chest Wall : **NAD**
2. Oesophagus : **NAD**
3. Pleural Cavities : **NAD**
4. Lungs : ***Both lungs congested and oedematous. On C/s & D/s of both lunge exudated froth mixed with blood.***
5. Heart and pericardial sac: **NAD**
6. Large blood vessels: **NAD**

F. ABDOMEN

1. Abdominal wall : **NAD**
2. Peritoneal Cavity : **NAD**
3. Stomach:

- a Contents : Approx 500ml semi digested food.*
- b. Mucosa: Mild congested*
- c. Abnormal Smell: None*
- 4. Small intestine : Distended with gases.*
- 5. Large intestine, vermiform appendix: Distended with gases.*
- 6. Liver, gall bladder, biliary passages : Mild Congested.*
- 7. Spleen : Mild Congested*
- 8. Kidney, renal pelvis, ureter: Mild Congested.*

GENITAL ORGAN

- 1. Urinary Bladder : Empty*
- 2. Rectum : Empty*
- 3. Genital organs : NAD*
- 4. Uterus (Females) : NA.*

SPINAL COLUMN: Intact

Preserved: Blood in a gauze piece
Clothes
Blood and viscera(Preserved in common salt)
Anal swab
Ligature material(Wire)

OPINION:

- 1. TIME SINCE DEATH: Approx four days prior to post-mortem examination.*
- 2. The cause of death is due to asphyxia subsequent to the compression of neck in a strangulation prepared by steel wire tied around the neck. All injuries are ante mortem and are of same duration.*
- 3. Blood and viscera to be send to the CFSL to rule out associated poisoning.*
- 4. Anal swab send for detecting presence of semen.*
- 5. Manner of death is homicide.”*

38. A conjoint reading of the testimony of PW-17 Dr. Komal Singh and the post-mortem report proves the fact that the deceased died ‘due to

asphyxia subsequent to compression of neck created in a strangulation prepared by steel wire tied around the neck' and all injuries were ante-mortem in nature. Further, as per the Post Mortem Report, Anal Swab of the deceased was forwarded to the FSL department for detecting the presence of Semen.

39. Subsequently, it is relevant to highlight that (PW40) Ms. Manisha Upadhyaya, Asst. Director (Biology), FSL Rohini carried out the biological examination of all the exhibits forwarded in the parcels which were sealed with seal of '*BM, DFMT DDU HOSPITAL*' and '*CMO DDU HOSPITAL*'. The relevant portion of her statement recorded on 09.02.2018 is reproduced below-

"On 29.09.2011, 18 parcel in connection with FIR No.256/2011 were duly received at the FSL office. All the parcel were sealed with seal of BM, DFMT DDU HOSPITAL and CMO DDU HOSPITAL. I had examined all the exhibits and were serial numbered as exhibit 1 to exhibit 18 (a & b). The details of the same have been mentioned by me in my detailed report.

I have prepared the detailed biological report on 27.02.2012 which is running in three pages which is already Ex.PW-38/X bearing my signature at all the pages at point A. As per the analysis report the blood was detected on exhibit 1, 2, 3, 4C, 5, 6, 7, 8, 9, 11, 12 and 14. However, blood could not detected on exhibit 4A and 4B. The human semen was detected on exhibit 13 but semen could not detected on exhibit 1, 2, 4a, 4b, 4c, 5, 10, 15, 16, 17, 18a and 18b. The skin could not detected on exhibit 15 i.e., nail clippings. I had also prepared the serological report which is already Ex. 30/Y which is bearing my signature at point A. All the exhibits were re-sealed with the seal of FSL MU DELHI."

40. Relevant portion from the Report No. FSL-2011/B-5829 (*Ex. PW38/X*) is reproduced below :-

“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)

REPORT NO.FSL-2011/B-5829 BIO NO. 1165/11 Dated.
27.02.2012

- 1. Please quote the Report (Opinion) No. & Date in future correspondence & Summons.**
- 2. This report is Per se admissible u/s 293 Cr.P.C.**

To,
The SHO,
PS: Kirti Nagar
New Delhi.

Your letter No. 4491/SHO/Kirti Nagar Dated: 29.09.11
regarding 18 (Eighteen) Parcels in connection with the
case FIR No.256/11 Dated 29.08.11 u/s: 302/411/34 IPC
P.S. Kirti Nagar duly received in this office 29.09.11.

DESCRIPTION OF PARCELS & CONDITION OF
SEALS

SEAL INTACT AS PER F.A.'s LETTER

Sealed cloth parcels	:	16
Sealed envelope	:	01
Sealed polythene	:	01
		18 (Eighteen)

DESCRIPTION OF ARTICLES CONTAINED IN
PARCEL

Parcel '1' : One sealed cloth parcel sealed with the seal of "BM" containing exhibit '1' marked as 'S-1'.

Exhibit '1' :One mattress having dirty brownish blackish whitish stains.

Parcel '2' : One sealed cloth parcel sealed with the seal of "BM" containing exhibit '2' marked as 'S-2'.

Exhibit '2' : One mattress having dirty brownish blackish whitish stains.

Parcel '3' : One sealed cloth parcel sealed with the seal of "BM" containing exhibit '3' marked as 'S-3'.

Exhibit '3' : Two pillows having dirty blackish brownish stains.

Parcel '4' : One sealed cloth parcel sealed with the seal of "BM" containing exhibit '4a', '4b'and '4c' marked as 'S-4'.

Exhibit '4a' : One dirty foul smelling T-shirt.

Exhibit '4b' : One dirty brownish blackish foul smelling Nikker.

Exhibit '4c' : One dirty brownish blackish foul smelling bed sheet.

Parcel '5' : One sealed cloth parcel sealed with the seal of "BM" containing exhibit '5' marked as 'S-5'.

Exhibit '5' : One bed sheet having few dirty brown stains.

Parcel '6' : One sealed cloth parcel sealed with the seal of "BM" containing exhibit '6' marked as 'S-6'.

Exhibit '6' : One hair wig.

Parcel '7' : One sealed cloth parcel sealed with the seal of "BM" containing exhibit '7' mark 'A'.

Exhibit '7' : Dirty brownish blackish gauze cloth piece kept in a plastic container described as 'blood Guage'.

Parcel '8' : One sealed cloth parcel sealed with the seal of "BM" containing exhibit '8' marked 'B'.

Exhibit '8' : Two pieces of marble having few dirty stains described as 'Earth control' kept in plastic container.

Parcel '9' : One sealed cloth parcel sealed with the seal of "BM" containing exhibit '9' marked 'C'.

Exhibit '9' : Scrapping material of the wall, kept in plastic container.

Parcel '10' : One sealed polythene sealed with the seal of "DFMT DDU HOSPITAL" containing exhibit '10'.

Exhibit '10' : Dirty cotton wool swab on a stick kept in plastic container described as "Anal swab".

Parcel '11' : One sealed envelope sealed with the seal of "DFMT DDU HOSPITAL" containing exhibit '11'.

Exhibit '11' : Yellowish light, brown gauze cloth piece described as 'blood gauge'.

Parcel '12' : One sealed cloth parcel sealed with the seal of "CMO DDU HOSPITAL" containing exhibit '12'.

Exhibit '12' : Brown gauze cloth piece kept in plastic container described as 'blood sample'.

Parcel '13' : One sealed cloth parcel sealed with the seal of "CMO DDU HOSPITAL" containing exhibit '13'.

Exhibit '13' : Dirty yellowish gauze cloth piece kept in plastic container described as 'Semen'.

Parcel '14' : One sealed cloth parcel sealed with the seal of "CMO DDU HOSPITAL" containing exhibit '14'.

Exhibit '14' : Brown gauze cloth piece kept in plastic container described as 'blood sample'.

Parcel '15' : One sealed cloth parcel sealed with the seal of "CMO DDU HOSPITAL" containing exhibit '15'.

Exhibit '15' : Few nail clippings kept in plastic container.

Parcel '16' : One sealed cloth parcel sealed with the seal of "CMO DDU HOSPITAL" containing exhibit '16'.

Exhibit '16' : Few strands of hair kept in plastic container described as 'Public hair'.

Parcel '17' : One sealed cloth parcel sealed with the seal of "CMO DDU HOSPITAL" containing exhibit '17'.

Exhibit '17' : One underwear having dirty blackish stains.

Parcel '18' : One sealed cloth parcel sealed with the seal of "BM" containing exhibits '18a' and '18b'.

Exhibit '18a' : One pant's having dirty stains.

Exhibit '18b' : One dirty shirt.

RESULTS OF ANALYSIS

- 1. Blood was detected on exhibits '1', '2', '3', '4c', '5', '6', '7', '8', '9', '11', '12' and '14'.*
- 2. Blood could not be detected on exhibits '4a' and '4b'.*
- 3. Human semen was detected on exhibit '13'.*
- 4. Semen could not be detected on exhibits '1', '2', '4a', '4b', '4c', '5', '10', '15', '16', '17', '18a' and '18b'.***
- 5. Skin could not be detected on exhibit '15'.*
- 6. Report of serological analysis in original is attached herewith.*

NOTE: *Remnants of the exhibits have been sealed with the seal of 'FSL MU DELHI'.*

41. Perusal of the FSL report evidently establishes the fact that Semen was not detected on Exhibit '1' (*One Mattress having dirty brownish blackish whitish stains*), Exhibit '2' (*One Mattress having dirty brownish blackish whitish stains*), Exhibit '4a' (*One dirty foul smelling T-Shirt*), Exhibit '4b' (*One dirty brownish blackish foul smelling Nikker*), Exhibit '4c' (*One dirty brownish blackish foul smelling bed sheet*), Exhibit '5' (*One bed sheet having few dirty brown stains*), **Exhibit '10' (Dirty cotton wool swab on a stick kept in plastic container described as 'Anal Swab')**, Exhibit '15' (*Few Nail clippings kept in plastic container*), Exhibit '16' (*Few Strands of hair kept in plastic container described as 'Pubic Hair'*), Exhibit '17' (*One underwear having dirty blackish stains*), Exhibit '18a' (*One pants having dirty stains*) and Exhibit '18b' (*One dirty shirt*).
42. Perusal of the aforesaid FSL report also establishes the fact that there is no evidence on record to prove that there was sexual relationship between the appellant and the deceased or they used to get involved in anal intercourse because had there been full-fledged sexual intercourse, there would have been semen detected on the Anal Swab of the deceased and therefore, in the absence of such an evidence, it is doubtful whether there was any such act alleged to have been committed by the appellant.
43. Further, during the course of arguments, learned counsel for the appellant contended that the prosecution in the present case relied

upon the report tendered by the Finger Print Expert of the Delhi Police Fingerprint Bureau and the same cannot be considered as the sole ground for connecting the appellant with the commission of the alleged offence. (PW-32) SI Sushil Kumar had proved the aforesaid Finger Print Report as Ex.PW32/A and relevant portion from his testimony is reproduced herein below:-

*“On 10.10.2011, I received the relevant documents of FIR No.256/11 u/s 302/411/34 IPC P.S. Kirti Nagar i.e. copy of scene of crime, negatives and **photographs of chance prints Mark Q-1 to Q-7, specimen of two accused namely Pradeep Kumar and Kamal Kishor** along with a forwarding letter issued by the SHO P.S. Kirti Nagar for examination of finger prints and expert opinion. The said negatives, photographs and documents were marked to me for examination. **I had examined the case and found that the chance print Q-5 was identical with right thumb impression Mark S-1 on finger impression sheet of Pradeep Kumar (accused in this case)** r/o Village Bilhari P.S. Shahbad, District Hardoi, U.P. The remaining chance print Mark Q-1 to Q-4, Q-6 and Q-7 were found partial and smudged and do not disclose sufficient number of ridge details in their relative position for comparison, hence, they were found unfit for comparison/search.*

Duly mark enlarged photographs of identical prints Q-5 and S-1 along with description of point of identity were enclosed with the report. My detailed report in this regard is Ex.PW32/A bearing my signature at point A and countersigned by the Director Mr. R.K. Vajpayee at point B. The enlarged photographs are Ex.PW32/B and Ex.PW32/C and description report is Ex.PW32/D bearing my signature at point A countersigned by the Director Mr. R.K. Vajpayee at point B.”

44. Relevant portion from the report of the Finger Print Bureau is reproduced herein below:-

“Finger Print Report

“I RECEIPT

A Received a copy of scene of crime examination report bearing S.No. 790/11 dated 29.08.11 along with lifts of chance prints marked Q1 to Q7 from West Distt. Crime investigation team.

B Received photographs of chance prints marked Q1 to Q7 along with their negatives from police photographer for examination which were developed by West Distt. Crime investigation team.

C Received a Letter vide FPB diary No. 797/CW/FPB dated 05.10.11 from SHO-Kirti Nagar in the abovementioned case along with specimen finger/palm print slips of the following persons viz: -

1. Pradeep Kumar S/o Bahaiya Lal.

(Accused)

2. Kamal Kishore S/o Data Ram -do-

II QUESTIONNAIRE:

1. Whether chance prints marked Q1 to Q7 are IDENTICAL with any of the finger prints of the persons mentioned at Para-I (C) or Not?

2. Whether chance prints marked Q1 to Q7 are IDENTICAL with any of the finger prints on the record of the Bureau or not?

III RESULT OF EXAMINATION:

1. Chance print marked Q5 is IDENTICAL with Right Thumb impression marked S-I on the finger impression slip of Pardeep Kumar S/o Bahaiya Lal (Accused) R/o Vill. Bilhari PS Shah Bad Distt. Hardoi UP.

2. Chance prints marked Q1 to Q4, Q6 & Q7 are partial & smudged and do not disclose sufficient no. of ridge details in their relative positions for comparison, hence they are UNFIT for comparison/search.”

45. Perusal of the aforesaid report establishes the fact that the crime team inspected the scene of crime on 29.08.2011 and lifted chance prints marked Q1 to Q7 and from the above acknowledged chance prints, Q-5 was found to be identical with the thumb impression (Mark S-1) of the appellant. At this stage, we have no hesitation to hold that the aforementioned scientific evidence evidently connects the chain of circumstances and proves the involvement of the appellant in the commission of the alleged offence.
46. Further it is relevant to highlight that the appellant in his statement recorded under Section 313 Cr.P.C has simply denied the allegations made against him and from the above discussion and the scientific evidence produced on record, it is clear that the chance print Q-5 was found to be identical with the thumb impression (Mark S-1) of the appellant. Therefore, no explanation is given by the appellant as to how his fingerprint was detected from the scene of crime. Relevant portion from the statement of the accused recorded under 313 Cr.P.C is reproduced herein below:-

Q36:- it is in evidence against you that PW-32 SI Sushil Kumar, Finger PRINT Expert has proved the Finger print report as Ex.PW32/A, the enlarged photographs as Ex.PW32/B and Ex.PW32/C and the description report as Ex.PW32/D. What do you have to say?

A:- It is incorrect.

47. The Apex Court in the case of ***Prahlad vs. State of Rajasthan*** reported in ***2018 SCC Online SC 2548*** held that silence of the accused in the statement recorded under Section 313 Cr.P.C about

matters he/she is expected to explain leads to an adverse inference against them. Germane portion of the judgment is extracted below –

“9. No explanation is forthcoming from the statement of the accused under Section 313 Cr.P.C. as to when he parted the company of the victim. Also, no explanation is there as to what happened after getting the chocolates for the victim. The silence on the part of the accused, in such a matter wherein he is expected to come out with an explanation, leads to an adverse inference against the accused.”

(emphasis supplied)

48. It is well-settled law that the burden of proof is on the prosecution, to establish its case beyond reasonable doubt, especially in a case based on circumstantial evidence, by completing the chain of incriminating circumstances so complete that the needle of guilt is pointing only and conclusively towards the culpability of the appellant. It is only, when such a burden is discharged by the prosecution that the onus shifts on to the accused to prove any fact within his special knowledge, to establish that he is not guilty of the aforesaid alleged offence.
49. Since, the appellant failed to offer an explanation in his statement recorded under Section 313 Cr.P.C, with regard to the fact within his special knowledge, the burden of proof eventually shifts from the shoulder of the prosecution, as the appellant ought to have explained the incriminating circumstance pointing against him. 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.”

50. Section 106 of the Indian Evidence Act, 1872 has been interpreted and analyzed by the Apex Court as well as by the Division Bench of this Court in a catena of cases. In *State of W.B. vs. Mir Mohammad Omar & Ors.*, reported in (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)

51. In *Ram Gulam Chaudhary & Ors. vs. State of Bihar*, reported in (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)

52. In *Trimukh Maroti Kiran Vs. State of Maharashtra*, reported in (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. Keeping in view the law laid down above, it stands settled that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. Consequently, this Court is of the view that the appellant has failed to discharge the burden of proving the facts especially within his knowledge.
54. Further it is relevant to highlight that it is a settled law that the inability of the prosecution to establish motive is not always fatal to

the case of the prosecution and does not render any benefit to the accused, as the proof of motive will only be an important corroborative piece of evidence. Very recently, this bench in the case of ***Runeet Gulathi vs State, 2019 SCC OnLine Del 10208*** had an occasion to explain the relevance of motive in a case of circumstantial evidence. The relevant portion of the said judgment is reproduced herein below:

“121. It is settled law that motive is not a necessary element in deciding culpability but it is equally an important missing link which can be used to corroborate the evidence where conviction is based on circumstantial evidence. The Apex Court on several occasions has considered the law regarding basing of conviction by the Court on circumstantial evidence. It is useful to refer to the judgment of the Apex Court in Gambhir v. State of Maharashtra, (1982) 2 SCC 351, wherein the Apex Court had laid down that circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established. Referring to the above judgment of Gambhir v. State of Maharashtra (supra), principles were again reiterated by the Supreme Court in K.V. Chacko v. State of Kerala, (2001) 9 SCC 277, wherein following law was laid down in paragraph 5:

*“5. The law regarding basing a conviction by the Courts on circumstantial evidence is well settled. When a case rests upon the **circumstantial evidence**, such evidence must satisfy three tests: (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The circumstantial evidence in order to sustain conviction must be complete and*

*incapable of explanation of any other hypothesis than that of the guilt of the accused. **The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.***

(emphasis supplied)

122. With regard to the importance of establishing motive in a case of circumstantial evidence, **the Hon'ble Supreme Court of India in a very recent judgment titled as Sukhpal Singh v. State of Punjab reported in 2019 SCC OnLine SC 178, has held that the inability of the prosecution to establish motive in a case of circumstantial evidence is not always fatal to the prosecution case.** Relevant part from the aforesaid judgment is extracted below:

*“15. The last submission which we are called upon to deal with is that there is no motive established against the Appellant for committing murder. It is undoubtedly true that the question of motive may assume significance in a prosecution case based on circumstantial evidence. But the question is whether in a case of circumstantial evidence inability on the part of the prosecution to establish a motive is fatal to the prosecution case. **We would think that while it is true that if the prosecution establishes a motive for the accused to commit a crime it will undoubtedly strengthen the prosecution version based on circumstantial evidence, but that is far cry from saying that the absence of a motive for the commission of the crime by the accused will irrespective of other material available before the Court by way of circumstantial evidence be fatal to the prosecution.** In such circumstances, on account of the circumstances which stand established by evidence as discussed above, we find no merit in the appeal and same shall stand dismissed.”*

(emphasis supplied)

123. Herein it is relevant to highlight that in the **case based on circumstantial evidence, proof of motive will be an important corroborative piece of evidence but the inability of the prosecution to establish motive in a case of**

circumstantial evidence is not always fatal to substantiate their version.”

55. Consequently, it is settled legal proposition that absence of motive as alleged, is of no consequence when evidence on record establishes the crime. Undoubtedly, if the genesis of the motive of the occurrence is not proved by the prosecution, the testimony of the witnesses as to the occurrence cannot be discarded only by the reason of the absence of motive.
56. Hence in our view, after considering and re-appreciating the entire evidence in the light of arguments, we are of the considered view that the chain of circumstances are so well inter-connected and complete which rules out any possibility that there can be any other person other than appellant who had committed the offence. The circumstances from which an inference of guilt is drawn are cogently and firmly established and the circumstances have a definite tendency unerringly pointing towards the guilt of the appellant.
57. However, a perusal of the record transpires that the medical evidence on record does not support the case of prosecution on the aspect that there were sexual relationships between the appellant and the deceased because no semen was detected on the Anal Swab of the deceased and in the absence of such evidence it is doubtful as to whether the alleged act has been committed by the appellant. In this background, punishment for the offence punishable under Section 377 IPC against the Appellant/Pradeep Kumar without any substantive evidence is unwarranted.

58. Accordingly, the present appeal is partly allowed. The conviction under Sections 302/404 IPC is upheld. The conviction and sentence under Section 377 IPC is set aside. The appeal therefore is disposed of.
59. Copy of the order be communicated to the Trial Court as well as to the Jail Superintendent, Tihar Jail.
60. Trial Court record be sent back along with a copy of this order

SANGITA DHINGRA SEHGAL, J.

MANMOHAN, J.

FEBRUARY 20, 2020
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