

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

% Reserved on: 8th February, 2023
Decided on: 18th May, 2023

+ **CRL.A. 264/2019**

RAM TEJ

..... Appellant

Represented by: Mr. B. Badrinath, Advocate
(DHCLSC) with Mr. Rajesh
Raj, Advocate.

versus

STATE

..... Respondent

Represented by: Mr. Prithu Garg, APP for the
State with Insp. Mahender
Singh & SI Ranbir, P.S. Vasant
Kunj (South).

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MS. JUSTICE POONAM A. BAMBA

MUKTA GUPTA, J.

1. By way of this appeal, the appellant challenges the judgment of learned Trial Court dated 2nd May, 2018 whereby the appellant was convicted for committing rape and murder of 'A' (deceased). The appellant also challenges the order on sentence dated 30th May, 2018 whereby the appellant was directed to undergo imprisonment for life for offences punishable under Sections 302 and 376A of the Indian Penal Code, 1860 ("IPC"), and for both these offences the appellant was directed to deposit a fine of ₹10,000/- each in default whereof to undergo simple imprisonment for six months. Appellant was also directed to undergo rigorous imprisonment for one year along with fine of ₹2,000/- in default whereof simple imprisonment for one month for offence punishable under Section 404 IPC.

2. Brief facts of the case are that on 9th January, 2015 when the deceased did not return back home, her husband Bansidhar Gupta (PW-8) called the police at number 100 and lodged a missing report which was recorded vide DD No.3A (Ex.PW-10/A), at PS Fatehpur Beri on which SI Arun Kumar (PW-14) met PW-8 and tried searching for the deceased but the deceased could not be found. Thereafter, as PW-8 did not go to the police station, PW-14 lodged DD No.12B (Ex.PW-14/A) at 5.10 AM on 10th January, 2015 containing the physical description of the deceased and the clothes worn by her at the time when she left the house. On the other hand, at about 8.00 AM Jai Kishan (PW-4), who was working as a *chowkidar* at DDA Land, old Nursery, Ghitorni saw dead body of a lady in a half-naked condition near metro pillar No.41 on which he made a call to the police at number 100 which was recorded vide DD No.8A (Ex.PW-13/A), at PS Vasant Kunj (South). On receipt of this information, PW-8 along with the police officials of PS Fatehpur Beri and Vasant Kunj (South) rushed to the spot where the dead body was identified as the wife of PW-8. On the basis of DD No.8A, *rukka* (Ex.PW-38/A) was prepared and FIR No.30/2015 dated 10th January, 2015 under Section 302 IPC (Ex.PW-11/B) was registered at PS Vasant Kunj (South). The dead body was sent to mortuary at AIIMS where the post-mortem was conducted. Crime team was called at the spot and the articles lying around the body were seized.

3. Dr.Abhishek Yadav (PW-5), constituted a medical board pursuant to an application made by Insp. Mahesh in this regard, which conducted the post-mortem examination on the dead body of the deceased on 11th January, 2015 which tendered its report Ex.PW-5/C and opined:

- “1) A blue contusion of size 1 x 1 cm is present over the left side of lower lip at the inner aspect.
- 2) A reddish blue contusion of size 4 x 2 cm is present over the left ramus of the mandible near the midline. Another reddish blue contusion of size 2 x 1 cm is present along the lower border of the left ramus of the mandible just adjoining the injury on the ramus of the left mandible.
- 3) Ligature mark- a reddish ligature mark of width varying from 2 to 2.5 cm is present at the middle one third of neck over the thyroid cartilage. The ligature mark is completely encircling the neck and is horizontally placed. The ligature mark is 5 cm below the mentum and 9 cm above suprasternal notch in anterior midline of neck. The ligature mark is 5 cm below right mastoid tip and 5 cm below left mastoid tip on lateral aspect of neck. Total neck circumference is 28 cm.
- On dissection of neck, two haematomas of sizes 4 x 2 cm and 2 x 1 cm are present corresponding with injury no.2. a haematoma of size 3 x 2 cm is present at the base of ____ tongue. Congestion is present in the pharyngeal region just above the level of the ligature mark externally. Multiple petechiae are present on the laryngeal surface of the epiglottis. Thyro-hyoid complex is intact, laryngeal mucosa is congested.
- 4) A circular pressure contusion is present over the right ear lobule.
- 5) A linear laceration of size 1 cm is present over the lobule of the left ear associated with blood stain.
- 6) A reddish crescentic abrasion (nail mark) of size 0.8 cm, with concavity upwards, is present 3 cm below the left ear.
- 7) A laceration of size 1.5 x 0.8 cm is present over the mons pubis. Two lacerations of size 2 x 2 cm and 2 x 1.5 cm are present over the left and right side of upper part of the vaginal vestibule.
- 8) Multiple small lacerations of size varying from 0.5 to 1 cm are present circumferentially around the anal region at the level of sphincters.
- 9) The wooden stick, present in the vaginal canal is extending from the vulva to the left kidney. A red coloured underwear is recovered in the vaginal canal and has been sealed, signed and handed over to the police. it has entered the vaginal cavity causing contusion and multiple lacerations, perforated the anterior vaginal wall, peritoneal surface of the urinary bladder,

mesentry of the small intestine in the abdomen, posterior peritoneal wall on left side and then is lodged in the hilar region of the left kidney displacing the kidney upward and lacerating the hilar region. The track of this wound is 34 cm. whole length of the stick is 41 cm and the circumference of the stick is 6.5 cm.

10) the wooden stick, present in the anal canal, is extending from the anus to left kidney. It has entered the anal cavity causing contusion, perforated the recto-sigmoid junction, mesentry of the small intestine in the abdomen. Posterior peritoneal wall on the left side and then is lodged in the hilar region of the left kidney displacing the kidney upward and lacerating the hilar region. The track of this wound is 32 cm. Whole length of the stick is 43 cm and the circumference of the stick is 6.5. cm.

The tracks of the both the sticks in injury no. 9 and 10 are directed upward, backward, and to the left and are associated with 1000 ml of fluid and clotted blood in the peritoneal cavity.

11) A reddish grazed abrasion of size 6x6 cm is present over the interscapular region. the back in the midline.

12) A reddish curvilinear abrasion of size 15x0.2 cm is present over the outer aspect, right hip, running downward and inward.

13) A reddish curvilinear abrasion of size 6x0.2 cm is present parallelly and 1.5 cm medially along the lower half of the above abrasion.

(J) TIME SINCE DEATH

About one and a half day

(K) OPINION

The cause of death to the best of my knowledge is: Combined effect of ligature strangulation and shock due to visceral injuries and blood loss. The injuries no.3, 9 and 10 individually and collectively are sufficient to cause death in the ordinary course of nature. All the injuries are ante-mortem in nature. Viscera has been preserved to rule out concomitant intoxication, other samples have been preserved for relevant analysis."

4. During investigation, it was revealed from the call details that there were frequent calls between the deceased and one mobile number in the name of one Ram Dheeraj, who was a resident of C-18/1, Sulta Pur, near Fatehpur Beri. On reaching the said address, said Ram Dheeraj could not be

found, however, his daughter told that Ram Dheeraj was out of Delhi and that the mobile number was used by her *chacha*/appellant, who used to work at Kusum Nursery, Andheria Mor, near Chhatarpur Metro Station. Appellant was found present at the nursery and was interrogated, after which he was arrested (Ex.PW-23/A), his personal search (Ex.PW-29/A) was conducted and his disclosure statement (Ex.PW-29/D) was also recorded. After completion of investigation the charge-sheet was filed and the appellant was charged for offence punishable under Sections 201/376A/392/411/302 IPC. To prove its case the prosecution examined 41 witnesses and defence evidence in form of three defence witnesses was also led.

5. The appellant assails the impugned judgment on the ground that the prosecution had failed to establish his guilt beyond reasonable doubt and, therefore, the learned Trial Court erred in convicting the appellant for which the present appeal be allowed. It was contended by learned counsel that the investigating agency failed to bring on record the CDRs which they had allegedly examined on 10th and 11th January, 2015 pursuant to which the appellant was identified as one of the suspects. There is no material on record to show as to how, when and from whom were the record and location of mobile No.9711476409 obtained on the said dates. As per the prosecution case, the above-said number was found in the name of one Ram Dheeraj, whose daughter had disclosed that the said number was being used by the appellant, however, the statement of the daughter of Ram Dheeraj was neither recorded by the police under Section 161 of the Code of Criminal Procedure, 1973 ("Cr.P.C.") nor during trial and therefore, the learned Trial Court erred in not drawing an adverse inference against the

prosecution in not examining such a material witness. Further, the version of IO/Insp. Mahender Singh Dahiya (PW-38) with regard to obtaining call detail records of the phone number used by the deceased was contradicted by the version of the Nodal Officer of Idea Cellular (PW-28) when he deposed that he had received a request for the CDRs of mobile number of deceased on 27th February, 2015 vide letter (Ex.PW-28/A1). The version of the prosecution that the appellant was identified on finding the location of mobile number of the appellant and the deceased to be similar, is unbelievable when the CDRs in fact were not obtained by the investigating agency. Even otherwise, the mobile number allegedly used by the appellant i.e. 9711476409 was not used by the appellant as also deposed by Rahul (DW-1) who categorically stated in his cross-examination that the said number was being used by his '*badi maa*' and even Murari Lal (DW-2) deposed that appellant did not use a phone. Thus, the learned Trial Court erred in not considering the possibility that the appellant was not the actual user of the said mobile phone. It was further contended that the possibility of tampering of the DNA evidence cannot be ruled out when from the testimony of PW-18 and PW-24 it is evident that after receiving the *pullandas* relating to the deceased along with the sample seals, and also *pullanda* and sample seal pertaining to the appellant, these *pullandas* remained in the custody of PW-18 and PW-24 for a long time before being deposited with the PW-38 and even thereafter, all these articles were sent to CFSL only after a month later. It was further contended that there was no motive for the appellant to commit such a heinous crime, rather the husband of the deceased categorically deposed that the appellant was known to the family of the deceased for about 10-15 years and had cordial relations with

his family and thus, no enmity existed between the appellant and the deceased or her family. Reliance was placed on the decision in 2022 SCC OnLine SC 1454 Nandu Singh vs. State of Chhattisgarh to contend that complete absence of motive weighs in favour of the accused. It was further contended that the disclosure memos in the present case are inadmissible as the same were made in the absence of the public, which is in violation of the procedure laid down in Cr.P.C. as also by the judgments of the Hon'ble Supreme Court and therefore, the recoveries ought to be rejected. To support this contention, reliance was placed on the decisions in (2003) 2 SCC 202 State of U.P. vs. Arun Kumar Gupta, DRJ (34) 1995 412 Satish Kumar vs. State and 2022 SCC OnLine SC 1396 Ramanand @ Nandlal Bharti vs. State of Uttar Pradesh. It was contended that even otherwise the recoveries effected at the instance of the appellant at best bring a charge of dishonestly receiving stolen property and are not sufficient to prove that the appellant committed the offences charged with. Learned counsel for the appellant relied upon a judgment of this Court in Crl.A. 242/2010 Salamat Ali vs. State to contend that the appellant was denied fair trial due to negligence on the part of his counsel who failed to cross-examine important witnesses in the present case. It was further pointed out that as per Ramchela Jha (PW-3), he saw the deceased sitting as a pillion rider on a motorcycle with a person wearing a black jacket and it was the case of the prosecution that the appellant was wearing a black jacket when he was apprehended by PW-38, however, the investigating agency never seized the jacket of the appellant, which shows that the appellant was in fact not wearing any black jacket and, therefore, appellant was not the last person with whom the deceased was seen. It was contended that there was no

evidence to show that the appellant used the motorcycle. As per the defence witnesses, the appellant does not know how to drive a motorcycle and only knows how to ride a cycle. It was further pointed out that as per the CDRs of the deceased, the last call received by the deceased was of one Anwar Alam who was the Supervisor at the factory where the deceased used to work. However, statement of Anwar Alam was neither recorded under Section 161 Cr.P.C. nor during trial. Furthermore, DNA of the appellant was not found on any part of the body of the deceased and it was only found on the black *shawl* and the underwear of the deceased. It was also contended on behalf of the appellant that the learned Trial Court erred in not considering the version of the defence, the contradictions in the version of the prosecution witnesses and the fact that the chain of circumstances in the present case was not complete. It was submitted that the appellant need not prove his defence beyond reasonable doubt but only by preponderance of probability. It was submitted that even if false plea is taken by the appellant, the same cannot be the sole basis to convict him and reliance was placed on the decisions in (1980) 2 SCC 564 Baldev Raj vs. State of H.P., (1981) 2 SCC 35 Shankarlal Gyarasilal Dixit vs. State of Maharashtra and (2021) 5 SCC 626 Shivaji Chintappa Patil vs. State of Maharashtra.

6. On the other hand, learned APP for the State submitted that the present appeal is devoid of any merit and therefore, the impugned judgment be upheld. Learned APP relied upon the following facts proved by the prosecution to substantiate his arguments:

- i. As per Ravin Sachdev (PW-12), the deceased completed her work, collected her salary and left the factory at about 9.30 PM on 9th January, 2015 and her dead body was found at about 8.00 AM on 10th

January, 2015. As per the post-mortem report (Ex.PW-5/C), the time of death of the victim was between 11.40 PM on 9th January, 2015 to 2.40 AM on 10th January, 2015 and hence in consonance with the version of the prosecution.

ii. Ramchela Jha (PW-3) was the witness who last saw the deceased on a motorcycle driven by the appellant, who was wearing a black jacket. He also identified the appellant in the Court and denied the suggestion that there was fog on the day or that the photo of the appellant was shown to him prior to the TIP. His testimony remained unshaken till he was recalled for cross-examination by the appellant's counsel on 16th December, 2017, when he resiled from identifying the appellant.

iii. The appellant was identified as the suspect in the present matter after analysis of the CDR of the mobile number of the deceased on 11th January, 2015. From the said CDR, one number 9711476409 was reflecting multiple times which was found to be registered in the name of one Ram Dheeraj (PW-23), brother of the appellant. On reaching the residence of PW-23, Shivani, who was PW-23's daughter disclosed that PW-23 had gone to his village and his above-said mobile number was used by her *chacha* i.e. the appellant who worked at Kusum Nursery at Andheria Mor. After interrogating the appellant, the appellant was arrested vide memo Ex.PW-23/A.

iv. From the personal search of the appellant one Micromax mobile phone with mobile No.9711476409 (Ex.PW29/B) and 14 passport size photographs of the deceased (Ex.PW-29/C) were found. Further, pursuant to appellant's disclosure statement (Ex.PW-29/D),

appellant led the police to his room from where the mobile phone of make 'Salora' and polythene containing white envelope on which name of victim was written and salary of victim amounting to ₹6,609/- was recovered from a place at the roof on the edge of iron pipe; and from the other window of the same room, from behind a 'gatta type ply' one polythene containing one pair of *pajeb* and one *mangalsutra* was recovered; and all these articles were seized vide seizure memo (Ex.PW-29/F). Bansidhar (PW-8) correctly identified the *mangalsutra* and *pajeb* in TIP proceedings before learned Metropolitan Magistrate (Ex.PW-8/B). Ravin Sachdev (PW-12) deposed that he had paid the salary to his factory workers on 9th January, 2015 and a sum of ₹6,609/- was paid to the deceased in an envelope with victim's name written on it.

v. As per the DNA report (Ex.PW-1/B), the appellant's semen was detected on *shawl* and the underwear of the victim, and as per the testimony of Dr.B.K. Mohapatra (PW-1), the *pullanda* was found to be properly sealed and that he tallied the seal on the *pullanda* with the sample seal.

vi. As per the MLC of the appellant (Ex.PW-6/A), one abrasion was noticed which was likely due to struggle by the deceased during her rape and murder by the appellant. As per appellant's potency test report (Ex.PW-5/E), few more injuries were noted on the body of the appellant and it was opined that the appellant was potent and capable of performing sexual intercourse.

vii. As per the CDRs of the appellant and the deceased, multiple phone calls were found between these two numbers between 29th

November, 2014 and 9th January, 2015 including some calls at odd hours. The appellant's location on 9th January, 2015 was at Kusum Nursery (Beathel School, Vasant Kunj) until 7.05.39 PM. However, between 8.03.59 PM and 8.34.22 PM his location moved towards Chattarpur *pahari*. At 8.55.28 PM and 9.27.15 PM, his location was at Sultanpur and later at 9.58.46 PM his location was back at Kusum Nursery. The deceased's last location at 9.36.46 PM was at Sultanpur Village. Thus, the appellant moved out of Kusum Nursery and visited deceased's place of work at Sultanpur at about 9.30 PM which corroborates the case of the prosecution that both the appellant and the deceased were at the same place at that time.

7. Learned APP submitted that the defence put forth by the appellant that the mobile No.9711476409 was used by his *bhabhi* was falsified by his own statement under Section 313 Cr.P.C. where he stated that the police had come to Kusum Nursery on 11th January, 2015 with his niece Shivani and after arresting him, recovered the said mobile phone from him. Even otherwise, the said *bhabhi* was never examined as a witness and furthermore, the defence is falsified when the location analysis of the said mobile phone number shows its location to be Kusum Nursery on almost all days whereas house of appellant's brother is in Sultanpur. The appellant gave a false answer in his statement under Section 313 Cr.P.C. It was submitted by learned APP that in the light of above-described circumstances, the onus to give a satisfactory explanation shifted on the appellant by virtue of Section 106 of the Indian Evidence Act, 1872 failing which, adverse inference under Section 114 of the Indian Evidence Act must be drawn against the appellant, and reliance was placed on the decision

in 2001 SCC OnLine SC 1308 Ganesh Lal vs. State of Rajasthan. Learned APP drew distinction from the judgment relied upon by counsel for the appellant in Ramanand (supra) and contended that in the present case the IO had given a detailed description of the appellant leading the police to spot and effecting recoveries from concealed places i.e. from the room admittedly inhabited by the appellant. It was submitted that in that case the thrust of the Hon'ble Court was on "authorship of concealment" which was missing in that case, however, in the case in hand, the authorship of concealment is writ large from the testimony of the IO which is the primary distinguishing factor between the present case and Ramanand (supra).

8. Having heard both the parties at length and perusing the record, the following evidence emerges.

9. Bansidhar Gupta (PW-8) deposed that his wife/deceased used to do stitching work in a factory at Sultanpur and used to leave the house at about 9.30 AM and used to come back by 10.00 PM. On 9th January, 2015, the deceased left the house wearing green coloured shirt, gray colour *pyjami* which was covered with red colour *pyjami* and was also wearing a white and pink colour jersey along with a black and orange colour shawl on her head besides one printed scarf. She was also wearing gray colour *jutti*, *mangalsutra* and *pajeb* and was carrying a mobile phone of 'Salora' company. As the deceased did not return back home till 10.30 PM, he got worried, went outside his house and waited for the deceased till 11.00 PM after which he made a call on the mobile phone of the deceased, which was ringing but was not answered. Thereafter, he sought help from his neighbor who took him and his daughter to the factory of the deceased, where despite calling her wife again and again no one opened the door and thereafter, he

asked his neighbor to make a call at number 100, who asked him to wait for a while and after a while he himself made a call at number 100. The police official asked him to wait there as the PCR van is reaching and the PCR official accompanied him to the factory where they again called out the deceased but no one opened the door. Thereafter, police officials decided to break open the factory gate and inside the factory all the rooms were lying locked and the deceased was not found there. The police lodged the missing report and asked him to inform them if his wife/deceased came back and asked him to provide a photo of his wife/deceased in case she does not come back. He kept on calling his wife/deceased however, the phone rang but was not answered. Thereafter, in the next morning he received a call from the police and he went to Sultanpur *Chaupal* where police met him and he was informed that dead body of a female has been found near Manglapuri to DDA Nursery in the jungle. He identified the dead body as that of his wife. Thereafter, on 11th January, 2015 he was taken to mortuary at AIIMS where he identified the body of his wife (Ex.PW-8/A) and after the post-mortem the dead body was handed over to him (Ex.PW-9/B). He further stated that he was acquainted with Ram Dheeraj who was the elder brother of the appellant for about 10-12 years and that they used to visit each other's family. He further stated that on 16th February, 2015 he participated in the TIP proceedings and identified the mobile of make 'Salora', *pajeb* and *mangalsutra* of his wife.

10. Ramchela Jha (PW-3) deposed that on 9th January, 2015 at about 9.30 PM he was going towards his house and when he reached in front of Mohit Hotel, he saw deceased sitting as a pillion rider on a motorcycle going towards M.G. Road and that the rider was wearing a black colour jacket. He

stated to have known the deceased as she came to his office for seeking job of a lady security guard. On 16th January, 2015, while passing through the M.G. Road, he saw police officials walking at DDA Old Nursery and to know what was happening, he also went there and on seeing the appellant, he told the police that the appellant was the same person whom he had seen on 9th January, 2015 at about 9.30 PM on the motorcycle upon which deceased was sitting as a pillion rider. However, he turned hostile when he was recalled for cross-examination by counsel for the appellant and stated that he was not sure whether he was able to see the face of the accused and that there was fog at that time.

11. Jai Kishen (PW-4) deposed that he used to work as chowkidar at DDA land, old Nursery and on 10th January, 2015, at about 8.00 AM he saw one lady aged about 32-33 years was lying dead in a half naked condition with her legs and neck tied with a cloth. He made a call at number 100 on which police officials arrived there and recorded his statement.

12. Ravin Sachdev (PW-12) deposed that he was running a factory of garments at Sultanpur *Chaupal* and that he had about 30-35 employees in his factory of whom the deceased was one of the employees. On 9th January, 2015, he paid salaries of his workers and had given an envelope containing ₹6,608/- (Twelve notes of ₹500, six notes of ₹100, one note of ₹5 and two notes of ₹2) as salary to the deceased on which he had himself written the name of the deceased in English and after getting the salary, the deceased left. On 3rd April, 2015, he handed over the voucher book vide which he paid the salaries to his workers which was taken into possession by the IO vide seizure memo (Ex.PW-12/A).

13. IO/Insp. Mahender Singh Dahiya (PW-38) deposed that on 10th January, 2015, DD No.8A was assigned to ASI Matwar Singh, who had left for the spot with Ct. Ranjan. Thereafter, he along with W/Ct. Neeta left for the spot and on the way, Ct. Satyaprakash joined him. He reached the spot where a dead body of a female aged around 32-33 years was found lying in a half naked condition. The head of the body was lying in East directions and legs were towards West. The dead body was wearing a green colour shirt, white and pink color sweater, black colour printed socks and both the legs of the dead body were tied with gray *pyjama* and neck was tied with red colour cloth. Wooden pieces were lying inserted in both the private parts (vaginal and anal area). A tiffin box, two shawls i.e. one of orange colour and other of black colour, one orange scarf, brown colour ladies' shoes and yellow coloured polythene were lying near the body. Crime team was called at the spot and he came to know about DD No.12B at PS Fatehpur Beri and SI Arun of PS Fatehpuri Beri came at the spot along with the husband of the deceased. Husband of the deceased identified the dead body of the deceased. He prepared the *rukka* (Ex.PW-38/A) on which FIR was got registered. The body was sent to mortuary at AIIMS. The exhibits were lifted from the spot which were seized vide seizure memo (Ex.PW-15/A). Shawls, scarfs and polythene were seized vide seizure memo (Ex.PW-15/B), *katran* was seized vide seizure memo (Ex.PW-15/C) and tiffin and ladies' shoes were seized vide seizure memo (Ex.PW-15/D). He prepared the rough site plan (Ex.PW-38/C). Husband of the deceased told him that the deceased was carrying a mobile phone, she was to receive salary and ration from her factory on that day. The deceased was wearing *pajeb* and *mangalsutra* and was carrying a tiffin box. On 11th January, 2015, during investigation from

the call details it was revealed that there were talks between the deceased and the suspect whose number was reflecting the CDR and the address of the subscriber was C-18/1, Sulta Pur, near Fatehpur Beri. The said number was found to be subscribed in the name of one Ram Dheeraj and on visiting the said address, the daughter of Ram Dheeraj was found present who told him that Ram Dheeraj was out of Delhi and that the said number was used by her *chacha* i.e. Ram Tej (appellant), who used to work at Kusum Nursery, Andheria Mor, near Chhatarpur Metro Station. On reaching Kusum Nursery, appellant was present. During interrogation, the appellant was behaving abnormally and thereafter, he took the appellant to the PS Fatehpur Beri where during interrogation he confessed his crime and thereafter he was arrested (Ex.PW-23/A). In his personal search (Ex.PW-29/A), one Micromax mobile phone, 14 passport size photographs of the deceased, 3 identity cards of Kusum Nursery in the name of the appellant were found, which were seized vide seizure memo (Ex.PW-29/C). His disclosure statement (Ex.PW-29/D) was also recorded. Thereafter, the appellant led the police to the house of Ram Dheeraj from where the motorcycle bearing No. UP 16C 7537 was seized (Ex.PW-29/E). Thereafter, they came back to Kusum Nursery where the appellant led the police to the room where he used to reside which was at a distance of about 200-250 meters from the main road and from a place in the roof on one edge of iron pipe, which was affixed to support the roof, a mobile phone 'Salora' and one polythene containing white coloured envelope with the name of the deceased and the salary of the deceased (Twelve notes of ₹500, six notes of ₹100, one note of ₹5 and two notes of ₹2) were recovered. From the other window of the same room from behind a gatta type ply, one polythene

containing a pair of *pajeb* of silver colour and one *mangalsutra* were recovered wrapped in a piece of newspaper. All these recovered articles were seized vide seizure memo (Ex.PW-29/F). The appellant also got recovered his clothes which he was wearing at the time of the incident. On 14th January, 2015, the appellant refused to participate in the TIP proceedings. In his cross-examination, he stated that he had asked public persons to join the investigation when he reached the spot on the day of incident but none of them joined.

14. SI Arun Kumar (PW-14) deposed that on 9th/10th January, 2015 he received a call DD No.3A regarding missing of a female aged 33 years i.e. the deceased. Thereafter, he along with staff reached near *Chaupal*, Sultanpuri sewing factory where the caller met him and they searched the deceased inside the factory and also the nearby places but the deceased could not be found. He asked Bansidhar to bring photographs of the deceased and as Bansidhar did not come to the police station till 5.00 AM, he lodged the DD of missing of his wife vide DD No.12B (Ex.PW-14/A). On 10th January, 2015 at about 8.35-8.40 AM he got an information regarding a dead body lying near petrol pump, near metro pillar No.41, DDA Land, old Nursery, Ghitorni, and thereafter, he took Bansidhar and reached the spot where Bansidhar identified the dead body to be his wife/deceased.

15. Ram Dheeraj (PW-23) who was the brother of the appellant deposed that the appellant was working as a *mali* at Kusum Nursery, Vasant Kunj which belonged to his *mausa* Sohan Lal. He denied having known as to whom the motorcycle bearing No.UP 16C 7537 belong and denied having purchased the said bike from any person named Neeraj Ahuja. Thereafter

the witness was declared hostile as he was resiling from his previous statement.

16. Pawan Singh (PW-28) was the Nodal Officer at Idea Cellular who brought the CDR (Ex.PW-28/C) pertaining to mobile No.7836944656 which was in the name of Bansidhar for the period between 1st October, 2014 to 15th January, 2015. He also brought the Cell ID chart of the said number (Ex.PW-28/E).

17. Israr Babu (PW-30) was the Nodal Officer at Vodafone Mobile Services, who brought the CDR and the Cell ID chart (Ex.PW-30/B and Ex.PW-30/D respectively) of mobile No.9711476409 which was in the name of Ram Dheeraj.

18. As per the CFSL report (Ex.PW-1/A), semen was detected on one black shawl and red coloured underwear of the deceased, which tallied with the DNA of the appellant.

19. In his statement under Section 313 Cr.P.C. appellant Ram Taj stated that Bansidhar (PW-8) used to reside in the same locality and that his elder brother Ram Dheeraj and *bhabhi* Janki Devi were on visiting terms with PW-8 and the deceased. He denied having ever visited the house of PW-8. He denied having used the mobile No.9711476409. He admitted that the police came to Kusum Nursery with his niece Shivani and interrogated at Kusum Nursery as well as PS Fatehpur Beri. He further admitted that the police took a Micromax mobile phone belonging to his brother which was used by his *Bhabhi* which he brought on that day as he had to give it for repair at Mehrauli. He denied that the photograph of the deceased was recovered from him. He further denied to have made any call to the deceased and stated that the deceased was neither known to him nor met

him nor was the deceased with him. He stated that he was innocent and was falsely implicated in the present case. On 9th January, 2015, he reached the house of his brother Ram Kalap near Chhatarpur Durga Mandir at about 9.00 PM and remained there till about 10.30 PM. He stated that he had dinner at the house of his said brother. On 10th January, 2015, the police apprehend him from the gate of the nursery itself when he reached there after getting diesel with one Rahul who drove the motorcycle. He was not taken inside the nursery at the time of his apprehension and was brought there after taking police remand.

20. Rahul (DW-1) was a nephew of the appellant, who stated that on 9th January, 2015, the appellant came to his house at about 7.30-8.00 PM and stayed there upto 10.30-11.00 PM. In his cross-examination he stated that phone No.9711476409 was not used by the appellant and was “used by his mother. Again said it was being used by my *badi maa*.”

21. Murari Lal (DW-2) deposed that on 9th January, 2015, the appellant left the Nursery at about 7.15 PM and returned in the night at about 10.45-11.00 PM. On 10th January, 2015, the appellant returned on cycle after taking diesel in the evening at about 6.15 PM and when he reached at the gate of the nursery, the police personnel who were already present there apprehended him.

22. Malkhan Singh (DW-3) deposed that on 9th January, 2015 there was fog and on 10th January, 2015 in the evening at about 6.00 PM, the police personnel came to the nursery and when Ram Tej reached there on cycle with diesel, he was arrested by the police officers and taken to PS Fatehpur Beri. He stated that the appellant did not use any mobile phone.

23. As noted above, case of the prosecution is based upon the circumstantial evidence. The first circumstance sought to be proved by the prosecution is the evidence of last seen by examining Ramchela Jha (PW-3) in the witness box. This witness clearly deposed that he knew the deceased as she came to his office for a job of lady security guard and was working in a factory at Sultanpur near Chaupal. He deposed that on 9th January 2015 at about 9.30 p.m., when he reached in front of Mohit Hotel, he saw that deceased was sitting as a pillion rider on a motorcycle and going towards M.G.Road. The motorcycle rider was wearing black coloured jacket. He further deposed that on 16th January 2015, while he was passing through M.G.Road, he saw the police officials and he went to DDA old nursery to know what was happening. On seeing the appellant, he identified him to be the same person whom he had seen on 9th January 2015 at about 9.30 p.m. while going from Sultanpur Main Market towards M.G.Road on motorcycle with the deceased as the pillion rider. The examination-in-chief of this witness was conducted on 14th October 2015 and in the cross examination carried out on that day itself, he stood by his version in the examination-in-chief. In cross examination, he also clarified that he was called for identification in Tihar Jail, however, when he went to Tihar Jail, no identification was conducted. He denied that the Investigating Officer had shown him the photographs of the accused. After more than two years, on an application moved by the appellant under Section 311 CrPC, this witness was recalled for cross examination on 16th December 2017 when he turned hostile and said that he was not sure whether or not, he was able to see the face of the accused. In his cross examination by the learned APP on being declared hostile, he was asked to clarify which of his two statements i.e. one

given on 14th October 2015 or on that date i.e. 16th December 2017 was correct, to which, he kept quiet for a very long time and thereafter, stated that he could identify only the deceased lady on 9th January 2015 and not the appellant. From the sequence of events as noted hereinabove, it is evident that this witness was recalled deliberately after having won over so as to disclaim the identity of the appellant, for the reason, he turned hostile only on the point of identify of the appellant maintaining consistency with his previous statements of having seen the deceased on that night as a pillion rider on the motorcycle. It is well settled that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chooses to treat him as hostile and cross-examines him. The Court can consider that portion of the testimony of the hostile witness which inspires confidence as held by the Hon'ble Supreme Court in the decision reported as (1991) SCC (Crl.) 916 Khujji Vs. State of Madhya Pradesh. The statement of this witness was recorded soon after the incident and hence, this Court finds no ground to not place the reliance on his testimony.

24. At this stage, it would be relevant to note that Sh.Akash Jain, the then Metropolitan Magistrate, Patiala House was examined as PW-39 who categorically deposed that the appellant was produced in a muffled face for T.I.P., however, the appellant refused to undergo T.I.P. However, as noted above, the witness PW-3 had identified the appellant at the spot, hence, the subsequent identification sought to be conducted through T.I.P. was meaningless and no adverse inference can be drawn for refusing to join the T.I.P.

25. As per the post-mortem report, the time since death was 1½ days. The autopsy was conducted on 11th January 2015 from 11:40 am to 02:40

pm and thus, according to the expert, proximate time of the death of the victim was around 11:40 pm on 9th January 2015 to 02:40 am on 10th January 2015. This time of death also corroborates the testimony of PW-3 who saw the deceased going with the appellant rider at about 9.30 p.m. on the 9th January 2015.

26. Besides last seen evidence pursuant to the appellant's arrest, there are number of recoveries which connect the appellant to the deceased. At the time when the appellant was apprehended, he was found in possession of Micromax mobile phone with mobile No.9711476409 (Ex.PW29/B) which was proved to be in the name of his elder brother Ram Dheeraj, though the appellant in his statement under Section 313 CrPC stated that the phone belonged to his brother and was used by his *Bhabhi* for which a defence witness Rahul (DW-1), the nephew of the appellant was also brought in the witness box. However, instead of saying that this was used by Rahul's mother, he stated that it was used by '*badi maa*'. Even in his statement under Section 313 CrPC, the appellant does not deny the recovery of the mobile phone from his possession and only states that he has got the same on that date as the same was required to be repaired. The prosecution has also exhibited the call records of the mobile phone number recovered from the appellant bearing No. 9711476409. As per the call detail records, number of calls had been made from this number to that of the deceased. In his statement under Section 313 CrPC, the appellant claims that his brother Ram Dheeraj and *bhabhi* were on visiting terms with the deceased. Further, besides the appellant, his brother PW-23 also stated that the mobile phone was used by his wife who used to speak with the victim. However, the said witness i.e. the sister-in-law of the appellant has not appeared in the witness

box and the nephew who appeared as DW-1 has sought to divulge that the mobile phone number 9711476409 was used by his *badi maa*. Further the version of Ram Dheeraj and explanation of the appellant in his statement under Section 313 Cr.P.C. is belied by the CDR and location analysis of the said mobile phone which showed that the mobile phone No.9711476409 used to be at Kusum Nursery, Vasant Kunj for almost the whole day, which was the work place of the appellant, whereas, the house of Ram Dheeraj (PW-23) was situated in Sultanpur. Further, though Ram Dheeraj denied having purchased the Hero Honda Splendor motorcycle bearing registration No. UP-16C-7537 from PW-22, however PW-22, in his deposition clearly deposed about the sale of the said motorcycle and having executed the documents of sale.

27. Further, at the time of arrest, from the right pocket of the pant of the appellant, 14 passport size photographs of the deceased were recovered from the personal search of the appellant which were seized. Pursuant to the appellant's disclosure statement (Ex.PW-29/D), articles of the deceased i.e. her mobile phone make Salora, envelope containing cash of ₹6609/-, *mangalsutra* & *pajeb*, were recovered from the room of the appellant situated at the back side of the Kusum Nursery. Deposition of investigating officer in this regard is clear who stated that the appellant had disclosed that there was a place in the roof on one edge of iron pipe which was affixed there to support the roof and from there, he could get recovered the mobile phone and envelope containing salary in cash belonging to the deceased. Further, from the evidence of Bansidhar Gupta (PW-8), husband of the deceased, it was evident that when the deceased left for the work in the morning of 9th January 2015, she was wearing one *mangansutra* and one

pajeb which were recovered from a window in the same room of the appellant and these articles were correctly identified by PW-8 in the T.I.P. Ravin Sachdeva who was the employer of the victim has also appeared in the witness box as PW-12 and deposed that on 9th January 2015, he had paid salary of the workers and the salary envelop given to the victim was of ₹6609/-. He also stated about the denomination of the notes in which he gave the salary to the victim. Further, the victim's mobile phone of make 'Salora' with the IDEA SIM was seized from the premises of the appellant vide seizure memo Ex.PW-29/F. From the location chart of the victim's mobile phone number, it was evident that she was at Sultanpur village on 9th January 2015 for the entire day and her last location was at 9:36:46 hours.

28. The appellant has not been able to give any explanation whatsoever with regard to the recovery of the property of the deceased from his possession. Hon'ble Supreme Court in Ganesh Lal (supra) explaining Illustration (a) of Section 114 of the Evidence Act and the failure of the accused to render an explanation, held as under:

"12. Section 114 of the Evidence Act provides that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to facts of the particular case. Illustration (a) provides that a man who is in possession of stolen goods soon after the theft may be presumed by the court to be either the thief or one who has received the goods knowing them to be stolen, unless he can account for his possession. The presumption so raised is one of fact rather than of law. In the facts and circumstances of a given case relying on the strength of the presumption the court may dispense with direct proof of certain such facts as can be safely presumed to be necessarily existing by applying the

logic and wisdom underlying Section 114. Where offences, more than one, have taken place as part of one transaction, recent and unexplained possession of property belonging to the deceased may enable a presumption being raised against the accused that he is guilty not only of the offence of theft or dacoity but also of other offences forming part of that transaction.

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14. While raising such presumption the time factor between the date of the offence and recovery of stolen property from the possession of the accused would play a significant role. Precaution has to be taken that the presumption may not be so stretched as to permit suspicion taking the place of proof. No hard-and-fast rule can be laid down.

15. A review of several decisions of this Court, some of which we have cited hereinabove, leads to the following statement of law. Recovery of stolen property from the possession of the accused enables a presumption as to commission of offence other than theft or dacoity being drawn against the accused so as to hold him a perpetrator of such other offences on the following tests being satisfied: (i) the offence of criminal misappropriation, theft or dacoity relating to the articles recovered from the possession of the accused and such other offences can reasonably be held to have been committed as an integral part of the same transaction; (ii) the time-lag between the date of commission of the offence and the date of recovery of articles from the accused is not so wide as to snap the link between recovery and commission of the offence; (iii) availability of some piece of incriminating evidence or circumstance, other than mere recovery of the articles, connecting the accused with such other offence; (iv) caution on the part of the court to see that suspicion, howsoever strong, does not take the place of proof. In such cases the explanation offered by the accused for his possession of the stolen property assumes significance. Ordinarily the purpose of Section 313 of the Code of Criminal Procedure is to afford the accused an opportunity of offering an explanation of incriminating circumstances appearing in prosecution

evidence against him. It is not necessary for the accused to speak and explain. However, when the case rests on circumstantial evidence the failure of the accused to offer any satisfactory explanation for his possession of the stolen property though not an incriminating circumstance by itself would yet enable an inference being raised against him because the fact being in the exclusive knowledge of the accused it was for him to have offered an explanation which he failed to do. (See *Earabhadrapa v. State of Karnataka* [(1983) 2 SCC 330 : 1983 SCC (Cri) 447] para 13, *Gulab Chand v. State of M.P.* [(1995) 3 SCC 574 : 1995 SCC (Cri) 552] para 4.)

16. In *State of Maharashtra v. Suresh* [(2000) 1 SCC 471 : 2000 SCC (Cri) 263] a female child of tender years was raped and murdered. Case against the accused rested on circumstantial evidence. The accused when arrested was found to have injuries on his person and blood and semen on the underclothes. There were several other incriminating circumstances pointing to the guilt of the accused and this one, mentioned just before, termed by this Court in its judgment as “most formidable incriminating circumstance” was put to the accused but he could not give any explanation whatsoever and instead chose to deny the existence thereof. This Court held that a false answer offered by the accused on his attention being drawn to such circumstance renders the circumstance capable of inculcating him. The Court went on to say that in a situation like this such a false answer can also be counted as providing “a missing link” for completing the chain of circumstantial evidence.

17. In *Shivappa v. State of Mysore* [(1970) 1 SCC 487 : 1970 SCC (Cri) 215] this Court set out a little different line of logical thinking, for a judge of facts, by stating that if there was other evidence to connect an accused with the crime itself, however small, the finding of stolen property with him is a piece of evidence which connects him further with the crime; there is then no question of presumption; the evidence strengthens the other evidence already against him. It is only when the accused cannot be connected with the crime except

by reason of possession of the fruits of crime that the presumption may be drawn.

18. In A. Devendran v. State of T.N. [(1997) 11 SCC 720 : 1998 SCC (Cri) 220] this Court emphasized the need of taking into consideration, in arriving at a decision, the factors such as the nature of stolen articles, the nature of their identification by the owner, the place and the circumstances of recovery, the intervening period between the date of occurrence and the date of recovery and the explanation of the person from whom the recovery is made.

19. In the case at hand a little before the probable time of commission of the crime the accused was seen near the place of occurrence. We should not be misunderstood as holding the evidence of availability of the accused near the place of occurrence and his passing on a dantli (sickle) to a young girl child as evidence of "last seen together". We are only holding the presence of the accused near the place of occurrence a little before the time thereof and his having seen the likely victim of the crime thereat. The recovery of kuralias worn by the deceased was made at the instance of the accused and there is a time-lag of just two days between the offence and the recovery. An axe was recovered on an information given by the accused which is found to be stained with human blood on examination by the forensic science laboratory. The axe had mud, pieces of bone and shreds of flesh and fat on it at the time of recovery, as deposed to by the witnesses and perception of which facts needs no expertise. Clothes of the accused were recovered on being produced by him from his house. The four clothes were bundled up in a piece of cloth and kept hidden in an earthen pot. The manner in which the clothes were kept is not one in which the wearing apparels are ordinarily kept in the house. All these clothes were found to be stained with mud and human blood. The chaddi (underwear) was having stains of blood and semen — both. The accused is a bachelor. He had two injuries on his person which could have been caused at or about the time of occurrence. The nature of the injuries was such that they could have been caused either by the scratches of the victim resisting the act of the accused or by

the accused coming in contact with the rough surface of the ground in the course of commission of the crime. All these circumstances were put to the accused. His only answer to all such circumstances is galat hai (i.e. it is false or incorrect). The fact remains that the accused failed to offer any explanation of such circumstances and therefore they can be used as inculpatory circumstances against him and the necessary inferences flowing therefrom used as links in the chain of incriminating circumstantial evidence fastening guilt on him. The medical evidence shows that the victim girl was raped, her neck was twisted and she was throttled to kill her. On her death the two legs were chopped off and the kuralias worn by her were removed. The accused was in recent unexplained possession of kuralias. These several criminal acts — rape, killing and theft — were committed in one transaction. The availability of the abovesaid pieces of incriminating circumstantial evidence and their having remained totally unexplained forge a complete chain of incriminating circumstantial evidence so as to fasten guilt upon the accused beyond any reasonable doubt. The silence of the accused supplies the “missing link”, if any, as held by this Court in the case of State of Maharashtra v. Suresh [(2000) 1 SCC 471 : 2000 SCC (Cri) 263] . It is not only the recovery of stolen property but also availability of other strong circumstances which have fastened inescapable connectivity of the accused with the offences charged.”

29. The Photographer from the Mobile Crime Team took photographs of the place of occurrence which were exhibited as Ex. PW-13/A1 to A13 and their negatives were proved as Ex. PW-20/A1 to A13. Further, the following recoveries were made from the spot by the police with the help of officials of CFSL, CBI:

“a. Swab of blood, bloodstained leaves, control leaves, control piece of wood and broken pieces of bangles vide Seizure Memo (Ex. PW-15/A).

- b. One black shawl, one orange shawl, one red printed scarf and one yellow polyethene bag vide Seizure Memo (Ex. PW-15/B).*
- c. Some “katran” of cloth from near the dead body vide Seizure Memo (Ex. PW-15/C).*
- d. One pair of brown ladies’ shoes and one tiffin box vide Seizure Memo (Ex. PW-15/D)”.*

30. As per the post-mortem examination report (Ex.PW5/C), the lower half of the body was naked with broken sticks found inserted into the vaginal and anal canals; both knees were drawn towards the abdomen and tied passing around the back of the neck with the help of a light bluish grey cloth; a reddish ligature material (lower) was present encircling the neck in two loops with dried blood stains present over the vulva and anal region. As many as 13 external injuries were found on the victim’s body along with internal injuries due to the insertion of wooden sticks and other articles inside the vaginal and anal canals. The cause of death was opined to be the combined effect of ligature strangulation and shock due to viscera injuries and blood loss.

31. As per the DNA analysis, the appellant’s semen was detected on the shawl and the underwear of the victim using organic extraction method and the exhibits were subjected to multiplex PCR amplification for fifteen STR loci & amelogenin using AmpFISTR Identifier Plus Kit. This shawl recovered from the spot near the victim’s dead body along with the other articles was seized vide seizure memo Ex.PW15/B and sealed with the seal of MSD. The relevant page of the register of MHC(M) containing the entries with regard to the deposit of the pullanda in the sealed cover was proved by PW-37 as Ex.PW37/A. This sealed pullanda was deposited with

the CFSL, CBI Lodhi Colony on 3rd February 2015 by PW-26. As per the report Ex.PW-1/B, the FSL expert Dr.B.K.Mohapatra (PW-1) had found the pullanda to be properly sealed and had tallied the seal on the said pullanda with that of the sample seal of MSD. Similarly, as per the post-mortem report Ex.PW-5/C, one red underwear inserted into the vaginal cavity of the victim's body was preserved, sealed and handed over to the police as deposited by the two doctors namely Dr.Abhishek Yadav (PW-5) and Dr.Mantaran Singh Bakshi (PW-7) from Department of Forensic Medicine, AIIMS in their depositions. The said underwear was converted into a pullanda and sealed with the seal of Department of Forensic Medicine, AIIMS, New Delhi and when it reached to the CFSL expert, the seals were found to be intact. Further as per the MLC of the appellant number of injuries were found on his body indicating struggle at the time of rape and murder of the deceased. Thus these two clothes i.e. the shawl recovered from the spot and underwear of the deceased found inserted in her vagina, which both had the semen of the appellant as per DNA analysis, clinch the case of the prosecution that appellant committed the rape of the deceased, brutally inserted sticks in her vagina and anal cavities, tied her and strangled her to death.

32. Considering the circumstantial evidence as noted above, this Court finds that the circumstances relied upon by the prosecution unerringly point towards the guilt of the appellant in having committed the offence of murder and rape of the victim beyond reasonable doubt. Hence, this Court finds no error in the impugned judgment of conviction.

33. Considering the nature of offence, this Court deems it fit to issue notice to the appellant as to why his sentence be not modified to a fixed

term in terms of the judgment of Hon'ble Supreme Court in (2016) 7 SCC 1
Union of India vs. V.Sriharan.

34. Superintendent Tihar Jail is directed to produce the appellant in Court
on 19th May, 2023.

(MUKTA GUPTA)
JUDGE

(POONAM A. BAMBA)
JUDGE

MAY 18, 2023/akb

