



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

% Reserved on: 20th March, 2023
Decided on: 26th June, 2023

+ **CRL.A. 1261/2019**

SANDEEP alias BABA alias IMRAN Appellant

Represented by: Mr.M.L.Yadav, Advocate.

versus

STATE Respondent

Represented by: Mr.Prithu Garg, APP for the
State with Inspector Sukhbir
Malik, P.S.Sultanpuri.

+ **CRL.A. 1378/2019**

ISTKAR ALI alias SALMAN Appellant

Represented by: Ms.Inderjeet Sidhu,
Advocate/amicus curiae.

versus

STATE Respondent

Represented by: Mr.Prithu Garg, APP for the
State (through VC) with
Inspector Sukhbir Malik,
P.S.Sultanpuri.

+ **CRL.A. 467/2020**

RAHUL alias SUNNY alias CHAND Appellant

Represented by: Mr.S.B.Dandapani, Advocate.



versus

STATE (NCT OF DELHI)

..... Respondent

Represented by: Mr.Prithu Garg, APP for the
State with Inspector Sukhbir
Malik, P.S.Sultanpuri.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MS. JUSTICE POONAM A. BAMBA

MUKTA GUPTA, J.

1. By way of these appeals, the appellants challenge common judgment of Trial Court dated 24th July, 2019 whereby the appellants were held guilty for murder of one Salman @ Mahesh Chand @ Luka (“deceased”); and the order on sentence dated 1st August, 2019 whereby all the three appellants were directed to undergo rigorous imprisonment for life alongwith fine of ₹10,000/- each in default whereof, simple imprisonment for six months for offence punishable under Sections 302/34 of the Indian Penal Code, 1860 (“IPC”). Further, appellant Rahul @ Sunny was held guilty for offences punishable under Sections 25 and 27 Arms Act and directed to undergo rigorous imprisonment for three years alongwith fine of ₹5,000/- in default whereof simple imprisonment for two months for each of these two offences.

2. Brief facts of the prosecution case are that on 3rd April, 2016, Guddo Mahto (PW-3), who was one of the tenants of Mangat Ram (PW-12) informed Mangat Ram that a foul smell was emanating from the room adjoining his room. Mangat Ram immediately reached at the second floor of



H.No.K-2/39, Krishan Vihar, where he also found a foul smell emanating from the room of appellant Salman. He found the door of the room closed and on opening the door, he saw a decomposed dead body of a male lying. Call was made to the police at number 100 and information about the dead body was given to the police which was recorded as DD No.10A. On receipt of this information, ASI Ashok Kumar (PW-18) reached the spot and informed Insp. Rajendra Parsad (PW-27) about the incident who also reached the spot. A stab injury was found on the left side of the chest and some injuries were also visible on the joint of knee. The deceased was wearing a grey colour vest and blue jeans. Crime team was called at the spot. The dead body was shifted to the mortuary at SGM Hospital. ASI Ashok Kumar prepared the *rukka* (Ex. PW-12/A) and got the FIR No.221/2016 registered under Sections 302/34 IPC and 25/27 Arms Act, at P.S. Sultanpuri.

3. Dr. Anurag Thapar (PW-15) conducted the post-mortem examination on the dead body of the deceased on 4th April, 2016 and vide his report (Ex. PW-15/A) opined as under:

“EXTERNAL EXAMINATION (Injuries etc.):

1. Stab wound 1.8 cm x 1 cm x ?, wedge shaped , obliquely placed on front of lateral border of left chest 5 cm lateral to left nipple and 15 cm below shoulder joint with one angle acute and other rounded. On exploration, underlying skin, s/c tissues, muscles cleanly cut injury track running medially downwards with extensive blood extravasation passing b/w 4 and 5 left ribs piercing lower lobe of left lung. About 100 ml of fluid and clotted blood chest cavity. Injury is chest cavity deep approximately 8 cm in depth.



2. *Incised wound, 2 x 0.7 cm x muscle deep on anterior - medial aspect of upper 1/3 of right leg.*
3. *Two Incised wounds, 4.5cm apartly placed, of size 2.3 x 1 cm x muscle deep and 2.5 x 0.9 cm X muscle deep on back of right knee joint.*

OPINION: *The cause of death is hemorrhagic shock due to Lung injury; all injuries are antemortem in nature. Injury no. 1 is sufficient to cause death in ordinary course of nature. All injuries are caused by a sharp, single edged weapon. However, blood and viscera have been preserved to rule out any prior intoxication.*

TIME SINCE DEATH : *Approximately 3 days prior to the post mortem examination [as per inquest papers] ”*

4. On 4th April, 2016 itself, upon a secret information, Salman @ Istkar Ali was apprehended from a park and was arrested vide memo Ex. PW-21/A and his disclosure statement (Ex. PW-21/C) was also recorded. Thereafter, on the information as disclosed by appellant Salman that Rahul @ Sunny would come towards AB Extension, Sultanpuri, the police party reached the said location, from where, appellant Rahul @ Sunny was apprehended and was arrested vide memo Ex. PW-21/F. Disclosure statement of Rahul @ Sunny (Ex. PW-21/H) was also recorded. Appellant Sandeep @ Baba was apprehended from near Jhuggi No.11, A-2 Block, Sultanpuri by a police team led by ASI Rishikesh. Sandeep @ Baba was arrested vide memo Ex. PW-21/P and his disclosure statement (Ex. PW-21/R) was also recorded. Upon completion of investigation, charge-sheet was filed by Insp. Ashok Kumar and the appellants were charged for offence punishable under



Sections 302/34 IPC and appellant Rahul @ Sunny was also charged for offence punishable under Sections 25/27 Arms Act.

5. Learned counsel appearing on behalf of appellant Sandeep @ Baba @ Imran assailed the impugned judgment on the ground that the present case was based on circumstantial evidence, and in such cases, unless the prosecution proves each and every circumstance definitely pointing towards the guilt of the accused, the accused cannot be held guilty. To prove the 'last seen' theory and the motive to commit the crime, the prosecution relied upon the testimony of Guddo Mahto (PW-3), Kanhaiya (PW-8), Narender @ Nonu (PW-9), Mangat Ram (PW-12) and Avinash @ Ashwani (PW-13). However, it was contended that the testimony of all these witnesses is doubtful because as per the post-mortem report (Ex. PW-15/A), the time since death is *"approximately three days prior to post-mortem examination"* and the time of post-mortem is 1:00 PM on 4th April, 2016, which means that the deceased was not alive after 1:00 PM on 1st April, 2016. Therefore, it is unknown as to how the witnesses had seen the deceased from 4:00 PM to 10:00 PM and this fact makes the prosecution version improbable and dents the story put forth by the prosecution. It was further contended that as per the photographs taken by the crime team (Ex. PW-7/A-1 to A-12), the first photograph clearly shows that blood was coming out of the room which again creates doubt on the prosecution version that the tenants residing on the same floor did not see blood for two days. Learned counsel further contended that no presumption under Section 106 of the Evidence Act would arise against the appellant as the room from where the dead body was recovered was taken on rent by the other appellant



Salman @ Istkar, as was deposed by landlord Mangat Ram (PW-12). Learned counsel also pointed out that appellant Sandeep had his own house in the same locality of Sultanpuri which is evident from his arrest memo (Ex. PW-21/P), and, therefore, it is inconceivable that a person would reside at tenanted premises despite having his own house in the same locality. It was further contended that as per the case of the prosecution, the appellant got recovered his blood-stained clothes, however, even those clothes do not connect the appellant with the alleged crime because as per the FSL report (Ex. PW-22/A), the blood on the said clothes could not be tallied with the blood of the deceased. Furthermore, the appellant was arrested on 6th April, 2016 i.e. after about six days from the date of alleged offence. It was submitted that it is further improbable that any person would retain blood-stained clothes with himself for six days after the commission of offence and, therefore, even the recovery of the said clothes becomes doubtful.

6. Learned counsel appearing on behalf of appellant Salman @ Istkar Ali assailed the impugned judgment and contended that the appellant was wrongly convicted. Learned counsel contended that the alleged incident took place in a two storeyed house in a crowded area with multiple tenants staying on all floors and, therefore, it cannot be said with certainty that the present appellants committed the offence as alleged. It was further contended that the version of prosecution witnesses with respect to the 'last seen' theory are unreliable as there are material contradictions in their testimony i.e. as per PW-3, deceased was last seen on 31st March, 2016 at around 10:00 PM; as per PW-12 and PW-8, deceased was last seen on 1st April, 2016 at about 8:00 PM and 10:00 PM respectively; and as per PW-9



and PW-13, deceased was last seen on 1st April, 2016 at about 4:00-5:00 PM. Even otherwise, it was contended that the time-gap between the time of death and the time when the deceased was last seen alive in the company of the appellant was almost three days which contradicts the 'last seen' theory. Furthermore, as per the post-mortem report, the time of death was around 1:00 PM on 1st April, 2016, and, therefore, the version of PW-3, PW-8, PW-9 and PW-13 to have seen the deceased in the evening of 1st April, 2016 is belied. Learned counsel also pointed out that as per the crime team report (Ex. PW-6/A), *rukka* (Ex. PW-12/A) and photographs (Ex. PW-7/A-1 to A-12), blood was seen outside the room near the door, however, none of the prosecution witness, especially the tenants staying in the nearby room noticed the same. It was pointed out that the sketch of the knife prepared by the doctor (Ex. PW-15/B) and the sketch of the knife prepared at the time of its recovery (PW-21/M) do not match. It was also pointed out that no ID of appellant was found from the room. Learned counsel also contended that the only recovery at the instance of the appellant was his blood-stained clothes which also do not connect the appellant with the alleged crime because as per the FSL report, the blood-stained clothes of the appellant did not tally with the blood of the deceased. To buttress her contentions, learned counsel relied upon decisions in (2007) 3 SCC 755 *State of Goa Vs. Sanjay Thakran*, (2023) 2 SCALE 79 *Jabir & ors. Vs. State of Uttrakhand* and AIR 2011 SC 2283 *S.K. Yusuf Vs. State of West Bengal*.

7. Learned counsel appearing on behalf of appellant Rahul @ Sunny @ Chand also contended that the testimony of PW-3 and PW-8 qua last seen evidence cannot be relied upon as the same is in contradiction with the time



of death mentioned in the post-mortem report. It was pointed out that at the place of incident several persons were living, however, no one heard any shrieks or screams of the deceased. Further none of the witnesses to the recovery of the knife stated that the said knife was stained with blood. Even the post-mortem doctor did not mention about stains of blood on the said knife. Further, there is a noticeable difference between the sketch of the knife prepared at the time of recovery and the one prepared by the post-mortem doctor. It was also pointed out that the place from where the knife was recovered, was accessible to public, however, no public person was made witness. As per the case of the prosecution, the motive behind the commission of offence was quarrel between deceased and appellant regarding distribution of robbed money, however, the prosecution failed to bring any witness to prove any quarrel between the deceased and the appellant. It was further pointed out that even after the alleged incident, appellant did not abscond and continued to live at his house at Paharganj and was apprehended from a park at Sultanpuri. In view of the aforesaid submissions, it is evident that the chain of circumstances implicating the appellant is not complete and thus, the appellant is entitled to the benefit of doubt.

8. On the other hand, learned APP appearing for the State submitted that the judgment of learned Trial Court was based on proper appreciation of facts and circumstances of the case and thus, the impugned judgment and order on sentence be upheld and consequently, the present appeals be dismissed. Learned APP relied upon the following facts :



- (i) PW-3, PW-8 and PW-12 deposed that in the second room on the second floor at H.No.K-2/39, Krishan Vihar, the appellants Istkar, Sunny and Baba were residing together with the deceased. PW-12 also deposed that he had rented out the said room to appellant Salman about three months prior to the incident.
- (ii) PW-9 and PW-13 deposed that they had last seen the deceased with the appellants on 1st April, 2016 at about 4:00-5:00 PM. As per PW-3 and PW-8, the deceased and the appellants were last seen together in their room on 1st April, 2016 at about 10:00 PM. Therefore, there is sufficient proof that the appellants and deceased were last seen together in the said room/spot.
- (iii) The dead body of the deceased was found from the room of the appellants after PW-3 and PW-8 noticed foul smell emanating from appellants' room.
- (iv) Appellant Istkar was arrested (Ex. PW-21/A) on 4th April, 2016 upon a secret information and pursuant to his disclosure statement (Ex. PW-21/C), his blood-stained clothes were recovered from his house at A-4/152, Sultanpuri. Appellant Rahul was arrested (Ex. PW-21/F) at the pointing out of appellant Istkar from AB Extension, Sultanpuri and pursuant to his supplementary disclosure statement (Ex. PW-21/L), he got recovered the knife used in the commission of the offence from beneath some stones under the root of a tree which was on the



way by the side of *nala* flowing from Sultanpuri to Mangolpuri. Appellant Sandeep was arrested (Ex. PW-21/P) upon identification by appellant Sunny and pursuant to his disclosure statement (PW-21/R), his blood-stained clothes were recovered from a trunk in his room.

- (v) As per the post-mortem report (Ex. PW-15/A), the cause of death was opined to be hemorrhagic shock due to lung injury and injury No.1 was opined to be sufficient to cause death in the ordinary course of nature. Further, as per the subsequent opinion (Ex. PW-15/C), the injury No.1 was opined to be possible with the knife recovered by the police.

9. Learned APP submitted that the appellants were residing with the deceased where the dead body was found and that the appellants were absconding from their room. Therefore, in terms of Section 106 of Evidence Act, the burden of proof shifted upon the appellants to give a satisfactory explanation with respect to the nature of events, for which, reliance was placed on the decision in (2019) 7 SCC 684 Ranjit Kumar Halder Vs. State of Sikkim and 2023 SCCOnLine Del 117 Deepak Vs. State.

10. Having heard the learned counsel for the parties and perusing the record, the following evidence emerges.

11. Guddu Mahto (PW-3) deposed that he used to reside with his friend Kanhaiya at K-2/39, 2nd Floor, Krishan Vihar. He stated that in the middle room, four persons namely, Istkar, Sunny, Salman and Baba were residing. He further stated that all four of them used to come late at night and were addicted to liquor and smack etc. He further stated that on the night of 31st



March, 2016, he had seen all four of them in their room but 2-3 days thereafter, they were not seen. He and Kanhaiya noticed a foul smell coming from the room about which they informed their landlord and the landlord accompanied them to that room and pushed open the door where they saw a dead body lying. The door of the room was neither locked nor bolted from inside and the landlord made a call to police at number 100. He identified the dead body to be of Salman. In his further examination, he stated that he had last seen all the accused persons alongwith the deceased together in their room on 1st April, 2016 at about 10:00 PM.

12. Kanhaiya (PW-8) deposed that he used to reside with Guddu at H.No.K-2/39, Krishan Vihar. He stated that on 1st April, 2016 at about 10:00 PM, he had seen all the four persons present in the tenanted room. On 2nd April, 2016, the said room remained bolted from outside and in the morning of 3rd April, 2016, he and Guddu noticed a foul smell emanating from the said room which they informed to their landlord. The landlord Mangat Ram arrived there and on opening the room, dead body of Salman was found lying on which landlord made a call at number 100.

13. Sahid Khan (PW-5) deposed that on 3rd April, 2016, he had left his residence early morning to purchase petrol and at about 7:15-7:30 AM, when he returned back to his house, he came to know that a dead body was lying in a room at the second floor of the premises. Mangat Ram was dialing some number, but the mobile phone fell from his hand, thereafter, he made a call at number 100 from his mobile phone and told his name to the recipient of the call and thereafter, handed over phone to Mangat Ram.



14. Mangat Ram (PW-12) deposed that his mother was the owner of H.No.K-2/39, Krishan Vihar, having three built-up floors and all the rooms of the said three floors were given on rent by him. He stated that on the second floor, in the second room, one Salman @ Istkar used to reside alongwith his two other associates, namely, Imran and Sunny. He further stated that the first room on the said floor was taken by one Ashok Kumar, S/o Kailash Chand for his labourers doing stitching work and the third room was occupied by Kanhaiya and Guddu. On 3rd April, 2016 at about 7:30 AM, he was present at his shop when Guddu came there and informed him that a very heavy foul smell was emanating from the room adjoining his room, on which, he immediately reached the said room. The door of the room was closed and on opening the same, a decomposed dead body of a male was found lying. He dialed number 100 from his mobile phone and handed over the same to Guddu to give the details but the phone fell on the ground and thereafter, he again informed the police from the mobile of Guddu. He further stated that he had handed over the copy of Aadhar card of Salman @ Istkar to the I.O. on the same day. He further stated that on 1st April, 2016, after about 8:00 PM, all the three appellants alongwith the deceased had visited his shop for purchasing milk. In his cross-examination, he stated that labourers of Ashok had gone to their respective native places at the relevant time.

15. Narender @ Nonu (PW-9) deposed that the deceased Mahesh @ Luka was his nephew and that on 3rd April, 2016, one person from the police station came to his house and informed him about the incident. Thereafter, he alongwith Avinash went to P.S. Sultanpuri from where they went to



mortuary at SGM Hospital and identified the body of the deceased (Ex. PW-9/A). He stated that the deceased used to remain in the company of the appellants and used to come home rarely. On 1st April, 2016, Mahesh had come to the house and in the evening at about 4:00-5:00 PM, three boys came to his house and took the deceased with them. Deceased told him that he was working as a waiter. He failed to identify the appellants in the Court on which he was declared hostile. In his cross-examination, he stated that his other nephew Avinash told him that deceased was living with Salman, Sunny and Baba. He further stated that in March, 2016, the deceased had told him about the quarrel between him and the appellant over distribution of money.

16. Avinash @ Ashwani (PW-13) deposed that the deceased told him that he had altercations with the appellants Salman and Sunny on distribution of money. He further stated that on 1st April, 2016, the deceased had come to his residence and at about 4:00 PM, the appellants also reached their residence and took the deceased with them. On 3rd April, 2016, he alongwith his uncle Narender reached the mortuary at SGM hospital and identified the dead body of the deceased (Ex. PW-13/A). In his cross-examination, he stated that his brother/deceased was involved in a case of theft of mobile phone and that he had started taking drugs in the company of the appellants.

17. ASI Ashok Kumar (PW-18) deposed that on 3rd April, 2016, he received DD No.10A at about 7:50 AM, on which, he reached H.No.K-2/39, Krishan Vihar, Sultanpuri and met landlord Mangat Ram. On reaching the second room on the second floor, he found a dead body lying. He briefed Insp. Rajendra Parsad about the same and thereafter, Insp. Rajendra Parsad



reached the spot and called the crime team. He got the dead body shifted to mortuary at SGM Hospital. He recorded the statement of Mangat Ram and prepared the *rukka* (Ex. PW-12/A) and sent the same for registration of FIR. Further investigation was taken over by Insp. Ashok Kumar.

18. Insp. Rajendra Parsad (PW-27) deposed that on 3rd April, 2016, he was looking after the work of SHO and on the said date, duty officer informed him regarding dead body at K-2/39, Krishan Vihar, on receipt of which, he rushed to the spot where dead body of a male aged about 20-25 years of height about 5 feet was lying on the floor of the room in a highly decomposed condition. There was a stab injury on the left side of chest and some injuries were also visible on the joint of the knee. The head of the dead body was facing North while the legs were facing South, near the gate of the room. In his cross-examination, he stated that the blood of the deceased was there upto the door step.

19. Insp. Ashok Kumar (PW-28) deposed that on 3rd April, 2016, he was on rest with official permission and that he reached P.S. Sultanpuri at about 5:00 PM from where he reached the spot. He prepared rough site plan (Ex. PW-28/A). On 4th April, 2016, he requisitioned the FSL team at the spot, who handed over one piece of cloth and blood on gauze to him, which were seized vide memo Ex. PW-20/A. Thereafter, he searched the said room where five documents on the lintel i.e. voter-ID of Usman, Debit Card of Punjab & Sindh Bank in the name of Usman, RC, Insurance and PUC certificate of vehicle No.DL-11-SB-3343 were found and seized vide memo Ex PW-20/C. On the same day, upon receipt of a secret information about 5:45 PM, he apprehended Salman @ Istkar Ali from a park and arrested him



vide memo Ex PW-21/A and recorded his disclosure statement (Ex. PW-21/C). Pursuant to his disclosure statement, appellant Salman got recovered one cream colour T-shirt, checkered shirt of blue and brown colour and one jeans all stained with blood kept on the slab in a room on the ground floor of his house i.e. H.No.A-4/152, Sultanpuri, Delhi which were seized vide memo Ex. PW-21/D. Thereafter, appellant Salman disclosed that appellant Rahul @ Sunny used to come towards AB Extension, Sultanpuri for purchasing smack and thereafter appellant Rahul was apprehended and was arrested vide memo Ex. PW-21/F and his disclosure statement (Ex. PW-21/H) was recorded. Pursuant to his disclosure statement, Rahul got recovered his blood-stained clothes from beneath a cot in a room on the first floor of his house i.e. H.No.9717, Gali No.8, Multani Dhanda, Paharganj which was seized vide memo (Ex. PW-21/J). On 6th April, 2016, the case-file was handed over to ASI Rishikesh who arrested appellant Sandeep @ Baba and the case-file was returned on 7th April, 2016. Thereafter, after completion of investigation, he filed the charge-sheet before the learned Trial Court.

20. ASI Rishikesh (PW-26) deposed that he had recorded the disclosure statement of appellant Rahul @ Sunny @ Chand (Ex. PW-21/L). Appellant Rahul @ Sunny led the police party to bridge over *ganda nala* in front of A-4 and B-2 Block on *kachi sadak* going towards Sultanpuri and from the said bridge, he took out one knife concealed beneath the stone and soil under the tree which was seized vide memo (Ex. PW-21/N). Thereafter, they reached near jhuggi No.11, A-2 Block, Sultanpuri and at about 11:45 PM, appellant Sandeep @ Baba reached there who was apprehended on the pointing out of



Rahul. Appellant Sandeep @ Baba was arrested vide memo (Ex. PW-21/P) and his disclosure statement (Ex. PW-21/R) was recorded. Pursuant to which, Sandeep got recovered one red colour T-shirt, one blue colour lower from his iron box from his jhuggi No.11 which he stated to have been wearing at the time of incident. These clothes were seized vide memo (Ex. PW-21/S).

21. In their respective statements under Section 313 of Code of Criminal Procedure, 1973 ("Cr.P.C."), appellant Sandeep @ Baba, Istkar @ Salman and Rahul @ Sunny @ Chand stated that they were falsely implicated in the present case and were arrested by the police from their house and they denied having made any disclosure statement to the police.

22. From the evidence of Guddo Mahto (PW-3) and Kanhaiya (PW-8) who were roommates in the tenanted room on the second floor of H.No. K-2/39 where they had been residing for the last six months from 3rd April, 2016, it is evident that they were the first ones to notice the foul smell in the morning of 3rd April, 2016 which fact was informed at 7.00 AM to Mangat Ram (PW-12) son of the landlady. The evidence of Mangat Ram, Guddo Mahto and Kanhaiya is consistent to the extent that H.No. K-2/39 was constructed up to three floors and all the rooms on all the floors were with tenants. There were three rooms on the second floor. In the middle room four persons, namely, both the Salman i.e. the appellant and the deceased, Sunny and Baba were residing. One room was in occupation of Ashok Kumar S/o Kailash Chand who was also in occupation of the entire first floor and had on rent one room in the second floor where his labourers used to do the job of jeans stitching, and in the third room on the second floor,



Guddo Mahto and Kanhaiya were residing. As per the evidence of these witnesses, at the time of incident Ashok Kumar had gone to his native place and was not present. Further, the room in which Ashok Kumar's employees were working on the second floor was lying vacant. The ground floor of the said house was occupied by a tenant, namely Guddo @ Shahid S/o Mohd. Mustaq. According to Mangat Ram, the room where the dead body of the deceased was lying was given on rent to Salman @ Istkar who along with his associates used to do the job of catering (waiter) and their friends also used to visit the room. Thus, few days prior to finding the dead body in the building it was Salman @ Istkar along with his associates in one room on the second floor and Guddo Mahto and Kanhaiya in the adjoining room residing at the relevant time. As per the deposition of Guddo Mahto, the middle room was occupied by Istkar, Sunny, Salman and deceased out of whom except Salman he identified the three appellants in the Court and according to him Salman was the deceased. He further deposed that probably on the night of 31st March, 2016 he had seen all of them in their room but 2-3 days thereafter they were not seen and finally they noticed foul smell emanating from the said room, when they informed the landlord who made a call to 100 number. However, when this witness came for further examination on 28th October, 2016 he clarified that he had last seen all the three accused present in the Court on 1st April, 2016 along with the deceased Salman in their room. Kanhaiya (PW-8) also stated that on 1st April, 2016 it was a Friday and at 10.00 PM he had seen the said four persons i.e. three appellants and the deceased in the said tenanted room and



on 3rd April, 2016 they observed a foul smell and informed the landlord, who arrived at 7.00 – 7.30 AM and informed the Police.

23. Though prosecution has also examined Narender, uncle of deceased who revealed the name of deceased as Mahesh @ Luka, and stated that on 1st April, 2016 deceased Mahesh came to the house and thereafter in the evening at about 4.00 – 5.00 PM three boys came to his house to take Mahesh along with them, with whom Mahesh went and thereafter never returned. When the three accused present in the Court were shown to this witness, he denied that those were the same persons with whom Mahesh accompanied on 1st April, 2016. He again said that the boy in the Red T-shirt (in JC) was one of the persons who had come to their house and was calling for his nephew Luka, and he had seen him from the balcony of third floor. He was accompanied by two other persons. He identified the boy in the Red T-Shirt as Istkar @ Salman, however he failed to identify the two other persons. Though in cross-examination by the learned PP he stated that the height and physical built of the other two accused was similar to the those who had come to his house, however he had not seen their faces clearly. However, Narender claimed that his nephew Avinash @ Ashwani, the real elder brother of Mahesh could identify them. Avinash @ Ashwani appeared in the witness box as (PW-13) and identified the three appellants as the persons who had come to his house on 1st April, 2016 at about 4.00 PM and took his brother Mahesh @ Luka along with them. From the testimonies of Avinash (PW-13) and Narender (PW-9) it is clear that the deceased Salman @ Mahesh @ Luka last went along with the three appellants on the 1st April, 2016 at 4.00 PM and then later at about 10.00



PM was seen by Guddo Mahto (PW-3) and Kanhaiya (PW-8) at the room, where after his dead body was found on 3rd April, 2016 in the morning.

24. The post-mortem of the deceased was conducted on 4th April, 2016 at about 1.00 PM, however no time since death was opined by the post-mortem Doctor and he only noted the time since death as approximately 3 days prior to the post-mortem examination (as per the inquest papers). Thus, even though it has been proved that the deceased was last seen with the three appellants at around 10 PM on 1st April, 2016, however, there is no medical opinion from which it could be ascertained that the death took place immediately after 10.00 PM on 1st April, 2016 so as to connect the three appellants to be the last persons with the deceased and shift the onus on to the accused under Section 106 of the Evidence Act.

25. There is yet another fallacy in the prosecution case. Guddo Mahto in his testimony stated that they noticed foul smell from their room. He and Kanhaiya went to the landlord and told about the foul smell. Thereafter, the landlord accompanied them to that room and pushed the door of that room which was neither locked nor bolted from inside. According to Kanhaiya (PW-8) on 1st April, 2016 which was a Friday at about 10.00 PM he had seen all the four accused in the said tenanted room last time and on 2nd April, 2016 the said tenanted room remained bolted from outside and on 3rd April, 2016 they observed a foul smell emanating from the same when they informed the landlord. Mangat Ram (PW-12) also stated that on 3rd April, 2016 at about 7.30 AM when he was present at his shop, his tenant Guddo came there and informed him of a heavy foul smell from his adjoining tenanted room on the second floor. He immediately reached at the



second floor of the house and observed the foul smell emanating from the room of accused Salman @ Istkar and the door of his room was found closed. He opened the door of his room and saw that a decomposed dead body of a male was lying and since he could not dial 100 number from his mobile phone as the phone fell down, he informed the Police at 100 number from the mobile of Guddo. It is thus apparent that the room where the dead body was lying was not locked by anything but lying bolted at best, and thus accessible to other people also.

26. The next evidence relied upon by the prosecution is that after the apprehension of Salman @ Istkar Ali at about 5.45 PM on 3rd April, 2016 itself, pursuant to disclosure statement Ex. PW-21/C he got recovered one cream colour T-Shirt, check shirt of blue and brown colour and one jeans, all stained with blood kept on the slab in a room on the ground floor of his H.No. A-4/152, Sultanpuri, Delhi. The prosecution also relies upon the recovery of blood stained clothes from beneath a cot in a room on the first floor of H.No. 9717, Multani Dhanda, Paharganj, seized vide memo Ex.PW-21/J at the instance of Rahul after his arrest. As per the testimony of ASI Rishikesh (PW-26) Rahul @ Sunny led the Police party to a bridge over *ganda nala* in front of A-4 and B-2 Block on *kachi sadak* going towards Sultanpuri and from the said bridge he took out a knife concealed beneath the stone and soil under the tree which was seized vide memo Ex.PW-21/N. Further, on the arrest of Sandeep @ Baba his disclosure statement was recorded and he got recovered one Red colour T-Shirt, one blue colour lower from his iron box from his jhuggi No. 11 which were also seized.



27. As per the FSL report Ex.PW-22/A, though a detailed analysis was carried out by Dr. Ruchi Sharma (PW-22) on all the exhibits mentioned above i.e. clothes recovered from the spot, the clothes recovered from the three appellants, as also the knife, no blood grouping could be found though it was opined to be of human origin. Further, from the DNA analysis the only comparison could be done was that the alleles from the source of exhibit '1' (gauze cloth piece of deceased Mahesh Chand) with the alleles from the source of exhibit '2' (teeth of deceased), '3' (blood stained nails of the deceased), '5' (cloth piece taken from crime scene), '14 and 15' (shirt taken from crime scene), '18 and 19' (bedding taken from crime scene), '21' (foam pieces from crime scene), '22' (blanket taken from crime scene) and '23' (mat taken from crime scene). Thus, blood grouping or the DNA profiling has failed to connect the three appellants to the offence committed.

28. The only evidence available with the prosecution to connect the recovered knife with the offence committed is the subsequent opinion on the weapon of offence by the post-mortem Doctor stating that the injury No.1 on the post-mortem report was possible by the knife produced or any other similar weapon (vide Ex.PW-15/C). Further, from the evidence of the prosecution witnesses, the prosecution has failed to prove any motive except that their used to be general quarrel between the deceased and accused. Thus, in the absence of last seen evidence of the appellants with the accused close to the time of death as the time of death could not be proved, motive, blood on the weapon of offence, the room being found not locked, thus not in exclusive possession of the three appellants and there being other people residing in the house, merely by proof of the subsequent opinion of the



Doctor that the injury was possible by the weapon of offence recovered or any other similar weapon, it could not be held that the prosecution has proved the foundational facts that the appellants committed the murder of the deceased. Therefore, the onus cannot shift to the appellants under Section 106 of the Evidence Act.

29. Hon'ble Supreme Court in the decision reported as (2015) 4 SCC 393 Ashok Vs. State of Maharashtra held that unless the prosecution discharges the initial burden of proof, the onus cannot shift to the accused. It was held:

"12. From the study of abovestated judgments and many others delivered by this Court over a period of years, the rule can be summarised as that the initial burden of proof is on the prosecution to bring sufficient evidence pointing towards guilt of the accused. However, in case of last seen together, the prosecution is exempted to prove exact happening of the incident as the accused himself would have special knowledge of the incident and thus, would have burden of proof as per Section 106 of the Evidence Act. Therefore, last seen together itself is not a conclusive proof but along with other circumstances surrounding the incident, like relations between the accused and the deceased, enmity between them, previous history of hostility, recovery of weapon from the accused, etc. non-explanation of death of the deceased, may lead to a presumption of guilt."

30. Even in the decision reported as (2019) 10 SCC 623 Rajender Vs. State (NCT of Delhi) Hon'ble Supreme Court held:

"12.2.4. Having observed so, it is crucial to note that the reasonableness of the explanation offered by the accused as to how and when he/she parted company with the deceased has a bearing on the effect of the last seen in a case. Section 106 of the Evidence Act, 1872 provides that the burden of proof for any fact that is especially within the knowledge of a person lies



upon such person. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company with the deceased. In other words, he must furnish an explanation that appears to the court to be probable and satisfactory, and if he fails to offer such an explanation on the basis of facts within his special knowledge, the burden cast upon him under Section 106 is not discharged. Particularly in cases resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, such failure by itself can provide an additional link in the chain of circumstances proved against him. This, however, does not mean that Section 106 shifts the burden of proof of a criminal trial on the accused. Such burden always rests on the prosecution. Section 106 only lays down the rule that when the accused does not throw any light upon facts which are specially within his/her knowledge and which cannot support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce an explanation as an additional link which completes the chain of incriminating circumstances.”

31. In view of the discussion aforesaid, since the prosecution has not been able to discharge its burden, impugned judgment of conviction and order on sentence are set aside.
32. Consequently, Superintendent Tihar Jail is directed to release the appellants forthwith if not required in any other case.
33. Copy of the judgment be uploaded on the website of this Court and be sent to the Superintendent Tihar Jail for updation of records, compliance and intimation to the appellants.

(MUKTA GUPTA)
JUDGE



(POONAM A. BAMBA)
JUDGE

JUNE 26, 2023
'vg/ga'



Signature Not Verified

Digitally Signed
By: JUSTICE MUKTA
GUPTA

CRL.A. Nos. 1261/2019, 1378/2019 & 467/2020

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By: POONAM BAMBA

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