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

% *Reserved on: 17.01.2023*
Decided on: 02.02.2023

+ **CRL.A. 840/2017**

SHAILESH KUMAR Appellant

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

versus

STATE Respondent

Represented by: Mr.Prithu Garg, APP for the State

+ **CRL.A. 1078/2017**

MAHESH KUMAR Appellant

Represented by: Ms. Aishwarya Rao, Adv.

versus

STATE Respondent

Represented by: Mr.Prithu Garg, APP for the State

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MS. JUSTICE POONAM A. BAMBA

POONAM A. BAMBA,J.

1.0 Vide these appeals, the appellants, namely, Shailesh Kumar and Mahesh Kumar, both brothers have challenged the judgment dated 08.06.2017 passed by Ld. Addl. Sessions Judge-03(NE), Karkardooma Courts, Delhi, (“**impugned judgment**” in short), whereby the appellants

were convicted in S.C. No. 44815/2015, in FIR no. 410/2015, PS Khajuri Khas, u/Ss. 302/201/34 IPC ; and order on sentence dated 07.07.2017, whereby both the appellants were sentenced to undergo rigorous imprisonment for life under Section 302 IPC with fine of Rs. 10,000/-, in default to undergo simple imprisonment.

2.0 Briefly stating, the prosecution case is that on 11.04.2015, a DD No.-29B Ex. PW-9/A was received through PCR by PS New Usmanpur Pur, which was assigned to PW-15 SI Sonal Raj. PW-15 alongwith PW-19 Ct. Patil reached Shamshan Ghat, Wazirabad where dead body of a male was lying for cremation; PCR had already reached there. Purohit PW-12 Pandit Shiv Hari Om Shukla, met there and told that the appellants/accused persons Mahesh and Shailesh, brothers of the deceased accompanied the dead body and disclosed the reason of death as illness. As there was a sign of strangulation on the neck of the dead body, cremation was not allowed ; on which, argument took place. PW-15 SI Sonal Raj informed PS Khajuri Khas through DD No. 12A/Ex. PW-18/D, as the matter pertained to their jurisdiction. At PS Khajuri Khas, PW-17 SI Arjun was assigned investigation, who along with PW-6 Ct. Ashish reached Shamshan Ghat, inspected the dead body and also informed the crime team ; on receipt of information, PW-11 SI E.S. Yadav along with photographer Ct. Anil Kumar/PW-2 and finger print proficient Ct. Mahavir reached shamshan ghat. Photographs of dead body Ex. PW-2/A-1, A-3, A-7, A-12 and A-13 were taken and thereafter they visited the spot i.e. House no. A-872, Gali no. 20, Shri Ram Colony, Rajiv Nagar, Khajuri, Delhi (in short 'A-872') and took photos of the house/room of the deceased i.e. Ex. PW-2/A-2, 6, 8, 10 and 11 and SOC report Ex. PW-11/A was furnished. Dead body was sent for post

mortem ; in Post Mortem report, the cause of death was revealed as strangulation. Appellants/accused persons Mahesh and Shailesh were arrested for the murder of their brother Sunil on account of property dispute. During investigation, pursuant to disclosure of the appellants/accused persons, one telephone wire Ex.P-1, with which deceased was strangled, was recovered at the pointing out of the appellant Mahesh Kumar's instance. The appellants/accused were charge-sheeted for the offences punishable u/Ss. 302/201/34 IPC for the murder of their brother Sunil and also for removing the evidence.

3.0 After completion of investigation, charge-sheet was filed.

4.0 In support of its case, prosecution examined 18 witnesses.

5.0 The appellant Shailesh Kumar vide his statement under Section 313 Cr.P.C stated that he was innocent and had been falsely implicated in this case; at the time of incident, he was at his home about 30 meters away from the spot of death of his brother Sunil.

5.1 The appellant Mahesh Kumar in his statement under section 313 Cr.PC also stated that he is innocent and has been falsely implicated in this case; at the time of incident, he was at his shop, which is about one kilometer away from the place of incident.

6.0 The appellants in their defence produced three witnesses, namely, DW-1 Sh. Jagdish Prasad, their father, DW-2 Sh. Sushil, an old colleague of the appellant Mahesh and DW-3, the appellants' *Fufa* Sh. Chander Sen.

7.0 The learned Trial Court after considering the evidence on record, convicted the appellants/accused persons finding that the chain of circumstances stood proved, which unerringly pointed towards the guilt of the appellants/accused persons.

8.0. Ld. Counsel for the appellants argued that the present case is based on circumstantial evidence and the chain of circumstances connecting the appellants with the crime is not complete. Ld. Counsel submitted that the deceased Sunil was residing in a separate/adjoining house A-872, and was found dead in the said house. This fact has come on record by prosecution's own evidence i.e. crime team report Ex. PW-11/A, which mentions in column no. 5, 'inspection conducted at point 2, H. No. A-872, and also by way of scaled site plan Ex. PW-14/A. Appellant Mahesh Kumar was residing with his father Jagdish Prasad DW-1 and the appellant Shailesh Kumar was residing in a separate accommodation in the same gali and doing tailoring job as has come in the testimony of their father DW-1 Jagdish Prasad. Further, Ld. Prosecutor while cross-examining PW-7 Jitender Kumar Singh himself suggested to him that the deceased was residing at House no. 872. Even PW-17 SI Arjun Singh stated that he reached the place of incident i.e. ground floor, house no. 872-873 and further stated that the appellants/accused persons pointed out that their deceased brother, who was living separately, was found at the floor of house no. A-872-873. The prosecution has failed to prove that the appellants were last seen with the deceased, who was living separately and even motive behind them killing their own brother. The only witness of last seen and motive i.e. PW-7 Jitender Kumar Singh produced by the prosecution did not support the

prosecution case. It was further argued that as the appellants were living separately, the presumption under Section 106 Indian Evidence Act can not be drawn against the appellants. As regards motive, it has come in the testimony of DW-1 Jagdish Prasad that the appellants/accused persons had no dispute with the deceased.

8.1. Ld. Counsel for the appellants further argued that had the appellants been involved in the crime, appellant Mahesh would not have himself called the police at number 100 through his own mobile no. 9313091690, which has come on record to be in the name of the appellant Mahesh Kumar. Further, the appellants were arrested on 19.04.2015 from their houses after 8 days of the incident and they did not abscond. Same also shows that the appellants had nothing to do with the crime.

8.2 Ld. Counsel submitted that the post-mortem report dated 12.04.2015 had revealed that the deceased was strangled with some thin wire. Despite that the prosecution did not make any effort to look for that wire. In view of the same, recovery of wire Ex. P1 at the instance of the appellant (Mahesh) on 19.04.2015 much after the postmortem and after about 8 days of the incident from an open place is highly doubtful. More so, as no public witness was joined at the time of recovery. Thus, possibility of planting of the wire on the appellants cannot be ruled out

8.3. Ld. Counsel also argued that in view of the above, the prosecution has failed to prove its case and hence the appellants deserve to be acquitted.

9.0. Ld. Prosecutor argued that PW-12 Pandit Shiv Hari Om Shukla, their star witness has testified that the appellants/accused persons tried to cremate the deceased hurriedly by giving false reason of death as ‘illness’ ; and when PW-12 refused to do so and asked about the ligature mark around the neck of the deceased, the appellants/accused persons told that it was because the deceased used to wear a thread around his neck. PW-12 also stated that on his refusal to cremate the dead body, the appellants/accused persons started quarreling with him.

9.1. Ld. Prosecutor further argued that PW-18 Ins. Arvind Pratap Singh deposed that during investigation, PW-7 informed that on 10.04.2015, at about 4.00 pm, he had seen the appellants with the deceased and later at about 9.00 pm, he came to know about the death of the deceased. Ld. Prosecutor submitted that although, PW-7, their witness of last seen, did not fully support the prosecution case, it has come in his (PW-7’s) testimony that all the three brothers i.e. the appellants/accused persons and the deceased, were residing along with their father in house no. A-873 ; and that on the intervening night of 10-11.04.2015 at about 9.00 pm, he had received a call from DW-1/father of the appellants and the deceased, about death of the deceased. Therefore, it was for the appellants/accused persons to explain the cause of death of their deceased brother Sunil.

9.2. Ld. Prosecutor also argued that vide postmortem report Ex. PW-4/A and testimony of PW-4, it stands proved that the deceased died due to asphyxia as a result of ante-mortem ligature strangulation and injury no. (1) along with internal Neck Injury is sufficient to cause death in ordinary

course of nature. Pursuant to their disclosure, the appellants/accused persons got recovered the telephone wire Ex. P-1 from the bushes in a plot ; the place from where the telephone wire Ex. P-1 was got recovered, was in the exclusive knowledge of the appellants/accused persons. Said wire Ex. P-1 corresponded with the ligature mark found on the neck of deceased, as per subsequent opinion Ex. PW-1/A. These facts clearly show that it were the appellants/accused persons, who killed their deceased brother by strangulating him with the telephone wire.

9.3. Ld. Prosecutor further argued that chain of circumstantial evidence such as last seen, motive, cause of death, recovery of telephone wire etc. as put up by the prosecution, is complete and unerringly point towards the guilt of the appellants/accused persons. He further submitted that the Ld. Trial Court has thus rightly convicted the appellants/accused persons and the Ld. Counsel for the appellants/accused persons, has failed to point out any illegality in the impugned judgment, as such, these appeals are liable to be dismissed.

10.0. We have duly considered the submissions made by both the sides and have perused the record.

11.0 It is a case based on circumstantial evidence. Criminal justice system was set into motion on receipt of a call at No. 100 by PW-5, Ct. Ruby on 11.04.2015 at about 08:49 from the caller Mahesh through phone no. 9313091690, who informed about a quarrel at Wazirabad Wala Shamshan Ghat. She, after filling the PCR Form Ex.PW5/A, flashed the information to

all concerned officials including PCR vehicle. Her testimony to this effect is not disputed nor are the contents of PCR Form.

12.0 PW-3 ASI Jagdish, who was on duty at PCR vehicle on 11.04.2015, near Nanaksar Gurudwara, on receiving the aforesaid information at about 08:50 a.m., reached the Shamshan Ghat by PCR vehicle. He has testified to this effect and has further stated that on reaching the Shamshan Ghat, they came to know that dead body of a male person aged about 26-27 years was lying at the place of cremation, which had one mark around the neck and the name of the deceased was revealed to be Sunil Kumar son of Jagdish Prasad. Two brothers of the deceased were also present along with the dead body besides other family members and relatives. PW-3 has further testified that PW-12 Pt. Shiv Hari Om Shukla, the Pujari of the Shamshan Ghat told them that the appellants had asked him to quickly make an entry in the register and that they both were nervous (*ghabraye huye the*) at that time. They also informed that the deceased died due to illness. But he did not permit them to perform last rites of cremation as he noticed a mark around the neck of the deceased. PW-3 also told that the appellant Mahesh, the brother of the deceased had, in order to win confidence, called No. 100. It has also come in PW-3's testimony that after some time, PW-15 SI Sonal Raj also reached the Shamshan Ghat and thereafter, he left the Shamshan Ghat leaving the dead body under the supervision of PW-15 SI Sonal Raj. PW-3 in his cross-examination reiterated that both the appellants/accused persons as well as about 15 persons present there, on inquiry, told that the deceased had died due to illness.

12.1 PW-15 SI Sonal Raj of PS Usman Pur in his testimony has stated that at about 08:50 a.m. on 11.04.2015, he was assigned DD No. 29B/Ex.PW9/A, in connection of a quarrel at Shamshan Ghat. Accordingly, he along with PW-9 Ct. Patil reached Shamshan Ghat, Near Wazirabad Pul, Nanaksar. He has given the similar account as given by PW-3 Jagdish about a dead body with ligature mark around his neck lying for cremation and the appellants as well as some public persons were present there. He was also informed about the deceased having died due to illness at home i.e. Shri Ram Colony, Khajuri, Delhi, early in the morning the same day. He had seen the register maintained at Shamshan Ghat by Panditji i.e. PW-12 Pt. Shiv Hari Om Shukla. He also testified that as the matter pertained to Khajuri Khas, he passed on the information to PS Khajuri Khas. He has further deposed that PW-17 SI Arjun along with other police officials from P.S. Khajuri Khas reached Shamshan Ghat at about 10:10 a.m. He then handed over the matter to PW-17 SI Arjun and left the Shamshan Ghat. In his cross-examination he has stated that he had checked the official record maintained at Shamshan Ghat.

12.2 It may be mentioned that PW-8 HC Yashvir, the Duty Officer at PS Khajuri Khas on 11.04.2015 and 17.04.2015, has testified that on 11.04.2015, while was working at Duty Officer, at about 09:50 a.m., he was informed over phone by SI Sonal Raj (PW-15) about a quarrel at Shamshan Ghat, Nanaksar. This information was recorded by him vide DD No. 12A (Ex.PW6/A) and the same was assigned to SI Arjun Singh to take action. PW-8 was not cross-examined. DD no. 12A/Ex. PW-6/A reads :-

“DD no. 12 A Dated 11/4/13 P.S. K. Khas, Delhi.

Samay 9/50 baje din darj hai ki is waqt SI Sonal Raj ne P.S. New Usman Pur ne bajaranie telephone itla di hai ki Shamshan Ghat Nanaksar Jhagra Ph. No. 9971355943 from HC Vishwajeet No. 58/PCR, Hasb Aamad Itla telephone PCR call darj roj ki gayi. Itla ke bare me bajaranie telephone akab me SI Arjun Singh Sahab ko batlaya gaya jo baraye munasib karywahi rawana mauke ke hue”

12.3 PW-17 SI Arjun Singh of PS Khajuri Khas has testified that while he was on emergency duty on 11.04.2015, at about 09:55 a.m. on receipt of DD No. 12A/Ex.PW6/A, he along with Ct. Ashish Kumar (PW-6) reached Shamshan Ghat, where he met SI Sonal Raj (PW-15). He has also stated that Purohit Shiv Hariom Shukla was met and about 5-7 public persons were also present besides the appellants/accused persons, brothers of the deceased. He has also deposed on the same lines about the dead body lying at Shamshan Ghat having one mark around its neck, whose funeral was not permitted by the Purohit (PW-12). He has testified that both the appellants/accused persons were nervous and did not give any satisfactory reply regarding the death of their deceased brother. On inspecting the dead body, he noticed ‘V shaped’ mark on the neck of the deceased. He called crime team. Crime team officials, SI E.S. Yadav/PW-11 and the photographer Ct. Anil Kumar/PW-2 reached the Shamshan Ghat around 11:00 a.m. PW-2 took about 13 photographs (Ex.PW2/A-1 to Ex.PW2/A-13) of the dead body, the place where the dead body was lying and the place where the incident took place. SOC report/Ex.PW11/A was prepared. PW-17 also testified that he along with the crime team officials including photographer and both the brothers of the deceased i.e. appellants/accused persons, “*reached at place of incident*

i.e. at ground floor of H.No. A-872-873, Gali No. 20, Shri Ram Colony, Rajeev Nagar, Delhi. Photographer had taken photographs of both the aforesaid houses / tin shades jhuggis. H. No. A-872 was pointed out by both the aforesaid brothers stating that deceased was found at the floor.” He then shifted the dead body through Ct. Ashish (PW-6) to the hospital for preservation.

12.3.1. PW-17 also testified that after completion of inquest proceedings on 12.4.15, the dead body was sent for postmortem. On the same day, PW-4 Dr. Vishwajeet conducted postmortem vide postmortem report Ex. PW-4/A. After collection of four sealed parcels containing viscera etc. by PW-6 Ct. Ashish Kumar on 16.4.2015 and after discussing the matter with seniors, on 17.04.2015, he made endorsement Ex. PW-8/B on DD no. 12A dated 11.4.2015/Ex. PW-6/A and sent rukka for registration of FIR. On which, the present FIR Ex. PW-8/D came to be registered on 17.04.2015. The relevant portion of the rukka reads as under :

“..... DD No. -12A मिलने पर मन SI मय हमराही Ct. Ashish No. 1162/NE जाये मौका इतला शमशान घाट नानकसर नियर वजीराबाद पल दिल्ली पहुंचा जहाँ पर एक dead body जिसकी पहचान Sunil Kumar s/o Sh. Jagdish Prasad R/o. H. No. A 873, Gali No. 20, Shri Ram Colony, Rajeev Nagar, Delhi, Age 37 years के रूप में किया जो मौका पर SI Sonal Raj P.S. New Usman Pur पुरोहित शिव हरी ओम शुक्ला, मृतक Sunil Kumar का बड़ा भाई शैलेश कुमार व छोटा भाई महेश कुमार मुलाकि हुय। जो पुरोहित शिव हरी ओम शुक्ला ने पूछताछ पर बतलाया कि Register Gr. No. 21350/15 Dt 11/04/15 पर मृतक Sunil Kumar Age 36-years की Dead

body को अंतिम संस्कार के लिए जिसके बड़े भाई शैलेश कुमार s/o. Sh. जगदीश प्रसाद R/o. N. No. A-873, Gali 20 Shri Ram Colony Rajeev Nagar, Delhi-94 ने अलग लोगों के पास आकर Entary Register में कराई थी। जो मैंने मृतक की Dead body को चेक किया तो उस के गले पर रस्सी के निशान बने हुये थे। जो मैंने मृतक के भाई को पहले पुलिस को सूचना देने को कहा। इसी बात को लेकर कहा सुनी हो गयी थी। व अब आप मौका पर आये।.....” दिनांक 12/04/15 को मृतक Sunil Kumar का Postmortam, PM No-424/15, G.T.B. Hospital के तहत कराया गया। व PM Report No. 424/15 को भी Hospital GTB से हाजिर किया गया था। जिस पर डाक्टर साहब ने Cause of death इस प्रकार किया है “Time since death is about one and a half day, Asphyxia as a result autermartem ligature strangulation Injury No. (1) along with Internal Neck Injury is sufficient to cause death in ordinary course of nature. However viscera has been preserved and sent to CFSL/FSL to Rule out associated intoxication/poisoning” जो मुलाहिजा PM Report No. 424/15 Dt. 12/04/15 व अब तक के हालत से सर्वेष्ठ सूरत जुर्म u/s 302/201 IPC का सरजद होना पाया जाता है। लिहाजा तहरीर दफा कायमी मुकदमा दर पेश हो, मुकदमा दर्ज रजिस्टर करके अहिंदा तफ्तीश हवाले Insp. A.P. Singh, ATO/ P.S. Khajuri Khas साहब की जाये जो अहिंदा तफ्तीश अमल में लायेंगे। व इनका मुकदमा FIR बजरिये special messenger Senior Officer भिजवाई जाय।”

12.4 It has come in the testimony of PW-8 HC Yashvir that on 17.04.2015, while he was working as Duty Officer at about 12:15 p.m., rukka Ex.PW8/B was received from SI Arjun Singh/PW-17 for registration of FIR, on which he made endorsement Ex.PW8/C and registered FIR u/S. 302/201 IPC. Copy of FIR Ex.PW8/B along with rukka was sent to PW-18 Insp. Arvind Pratap

Singh, to whom the investigation was assigned through Ct. Ravit. PW-8 was not cross-examined.

12.5. PW-18 IO Inspector Arvind Pratap Singh deposed that after arresting the appellants/accused persons, disclosure statements of the appellants- Ex. PW 13/F (appellant Mahesh Kumar) and PW 13/E (Shailesh Kumar) were recorded. Their disclosure statements revealed that the appellants/accused persons had murdered the deceased, who was unmarried and addicted to liquor, with the help of wire to grab his share in the house; and they stated that they can get recovered the telephone wire used in the crime from the vacant plot behind PTS (police Training School), Wazirabad, Delhi which has many kikkar trees. Accordingly, on 19.04.2015 pursuant to their disclosure statements, the appellants/accused persons took PW-18 and PW-13 Constable Sudesh for the purpose of recovery of telephone wire. They led PW-18 and PW-13 to the said plot having kikkar trees and the appellant/accused Mahesh in presence of co-accused/appellant Shailesh lifted one telephone wire from the bushes of kikkar trees and produced the same informing that it was the same wire which was used to kill the deceased. Same was seized vide seizure memo Ex. PW13/I.

12.5.1. PW-13 Constable Sudesh also deposed on the same lines and also stated that vide request letter Ex. PW 13/K, the said recovered telephone wire (Ex. P1) was submitted to GTB Hospital along with the application Ex. PW-13/K for subsequent opinion, whether the ligature mark around the neck of the deceased, as per postmortem report could be caused by the said wire.

12.5.2. PW-18 also deposed that the subsequent opinion Ex. 1/A was collected through PW-1 Constable Vipin Kumar.

Admitted Facts

13.0. It may be mentioned that when above evidence was put to the appellants/accused persons during recording of their statements under Section 313 Cr.P.C, the appellants/accused persons admitted the following facts :

(i) that on 11.04.2015 at about 8.00 am, the appellants had brought their deceased brother's dead body for cremation to Shamshan Ghat, Wazirabad and entry in register at serial no. 21350 Ex. PW-12/A was made in that regard, in which they had given their mobile number 9313091690 and had put their signatures ;

(ii) that at cremation ground, on inquiry by PW-12 Pandit Shiv Hari Om Shukla, the cause of death of the deceased Sunil was disclosed to be illness, which fact was also recorded in the register Ex. PW-12/A. Even to PW-15 SI Sonal Raj, the cause of death of deceased Sunil was disclosed as 'illness' ;

(iii) that a ligature mark on the neck of deceased Sunil existed when the body of the deceased was taken for cremation, though in this respect, both the appellants/accused persons stated that the said mark around the neck of the deceased was an old mark because he used to wear a thread around his neck ;

(iv) that as PW-12 Pandit Shiv Hari Om Shukla was not ready to carry out cremation of their deceased brother Sunil, the appellant/accused Mahesh had made a call to the PCR ;

(v) that their deceased brother Sunil was liquor addict, but denied that they strangled him on account of property dispute stating that they have no such property.

13.1. Further, during his cross-examination, receipts Ex. PW-12/D1 and Ex. PW-12/D2 were put to PW-12 Pandit Shiv Hari Om Shukla, who admitted that he had issued the said receipts. PW-12/D-1 is 'Mritak Antyesti Praman Patra' and Ex. PW-12/D-2 is receipt 'lakdi mritak sanskar'. PW-12/D1 records reason of death 'atmahatya'. Meaning thereby, the appellants admittedly told PW-12, the cause of death of the deceased as 'illness' vide entry Ex. PW-12/A recorded in register maintained at the cremation ground ; whereas while obtaining receipt Ex. PW-12/D1, the reason of death was given as '*atmahatya*'

14.0. In view of the above admitted facts, the conduct of the appellants/accused persons giving different reasons of death of their deceased brother Sunil as 'illness' on one hand and 'suicide' on the other hand at cremation ground. Yet to PW-7 Jitender Kumar Singh in his cross-examination, the appellants/accused persons had suggested that someone had extended threat to kill their deceased brother few days back, so as to indicate the possibility of his being killed by someone, which was denied by PW-7. Further, in their statement under Section 313 Cr.P.C, the appellants/accused

persons explained the ligature mark around the neck of deceased being caused by a thread, which he used to wear around his neck. Vide post-mortem report Ex. PW-4/A and the testimony of PW-4, it has come on record that reason of death of the deceased was ‘asphyxia as a result of ante mortem ligature strangulation, injury no. 1...’

14.1. Relevant portion of postmortem report Ex. PW-4/A reads :-

“Date & time of receiving dead boy & Inquest papers 12/04/15 at 10:30 AM

Date & time of starting autopsy 12/04/15 at 10:35 AM

Date & time of concluding autopsy 12/04/15 at 12:00 PM

.....

(A) General Observation

Dead body of an adult male wrapped in white sheet and wearing no clothes, sub-conjunctival hemorrhage present in both eyes, Greenish discoloration over face, chest, abdomen, back and both thighs. Rigor mortis passing off. Postmortem staining cannot be distinguished due to decomposition. Ligature material not present around neck. Postmortem blisters and fading over chest, abdomen.

(B) Details of External Injuries (Antemortem)

(1) Reddish brown, abraded ligature mark is present completely and horizontally around the neck and beyond thyroid cartilage. In the midline the ligature mark is 0.6 cm wide and 8 cm below chin. The ligature mark goes horizontally backwards and is 0.5 cm wide and 6 cm below right angle of mandible. Mark goes horizontally backwards and is 0.6 cm wide and 8 cms below right mastoid. The ligature mark goes posteriorly and is 0.6 cm wide and 11 cm below occipital protuberance at midline, back of neck. Mark goes horizontally forwards towards left side neck and is 0.6 cm wide and 8 cm below left mastoid. Mark goes horizontally forwards and is 0.5 cm wide and 6 cm below left angle of mandible and then meets in midline. Neck circumference is 40 cm.

.....

(H) Opinion Time since death is about one and a half day.

Cause of death- Asphyxia as a result of antemortem ligature strangulation. Injury no. (1) along with internal Neck Injury is sufficient to cause death in ordinary course of nature. However, viscera has been preserved and sent to CFSL/FSL to rule out associated intoxication/poisoning

Signature & Designation of medical officer”

14.2. Reason of death – asphyxia as a result of ante-mortem ligature strangulation belies the appellant’s version of cause of death as ‘illness’ as recorded in the cremation register. Also, the appellants/accused persons admittedly insisted upon PW-12 to cremate the dead body on which, admittedly an argument took place between the appellants/accused persons and PW-12. This conduct of the appellants/accused persons is not above board and leave vital facts as to cause the death of their brother/deceased, their reason of passing it on as illness remain unexplained and do point a finger of suspicion towards the appellants/accused persons.

15.0. However, chinks in the defence of the accused and mere suspicion cannot be the basis for conviction of the accused. Prosecution has to stand on its own legs. Present case being based on circumstantial evidence, let us examine whether the prosecution has been able to place on record definite evidence to connect the appellants/accused persons with the crime. It would be worthwhile to refer here to the judgment in case titled **Madhu alias Madhuranatha and Another vs. State of Karnataka, (2014) 12 SCC 419**, wherein Hon’ble Apex Court in para 13 observed as under :

*“This Court has dealt **with the case of circumstantial evidence** time and again. It has consistently been held that a conviction can be based solely on circumstantial evidence. **The prosecution case must stand or fall on its own legs and***

cannot derive any strength from the weakness of the defence put up by the accused. However, a false defence may be called into aid only to lend assurance to the court where various links in the chain of circumstantial evidence are complete in themselves. The circumstances from which the conclusion of guilt is to be drawn should be fully established. The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable or point to any other hypothesis except that the accused is guilty. The circumstances should be of a conclusive nature and tendency. The evidence produced by the prosecution should be of such a nature that it makes the conviction of the accused sustainable. (Vide: Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622; State of Uttar Pradesh v. Satish, AIR 2005 SC 1000; and Paramjeet Singh v. State of Uttarakhand, AIR 2011 SC 200)."

16.0. Ld. Counsel for the appellants/accused persons argued that as per prosecution evidence/testimony of PW-17 SI Arjun Singh, it is established that the deceased was living in a separate house no. 872, where he was found dead. Prosecution has failed to lead any evidence to show that the appellants were last seen with the deceased. Their last seen witness PW-7 turned hostile. The prosecution therefore, failed to connect the appellants/accused persons with crime.

16.1 It is seen that vide testimony of PW-17 SI Arjun Singh, it has come on record that the deceased Sunil was residing in house no. A-872. PW-17 has stated that : "Thereafter, I took the IO at the house of Mahesh Kumar and Shailesh Kumar i.e. A-873. Gali No.20, Shri Ram Colony, which was inspected by IO in my presence. Thereafter, adjacent house bearing No. A-872 was also inspected by IO, there deceased was residing and his dead body was found.' PW-17 further stated that "Both the brothers of deceased

were accompanied, to their house as well as house of deceased, both houses were adjacent to each other. No document pertaining to ownership /possession of both the aforesaid houses was taken by me.” PW-17 also deposed that “we had also stayed at the house of accused persons as well as deceased for about 30 minutes. 2-3 ladies were present when IO visited the houses.” Further, Investigation Officer Ins. Arvind Pratap Singh /PW-18 in his cross-examination stated that “SI Arjun told me that the dead body was removed from adjacent house of accused persons to shamshan ghat. SI Arjun Singh attended the initial call of incident and he visited the spot and made inquiry from the family members as well as neighbours and then he came to know that dead body was removed from the adjacent house of accused person.... It is correct that deceased Sunil died in his house no. 872, both the accused had been residing with their families in the house. Father of the accused was also residing with them. I did not collect any document of ownership of the house.”

16.2. The fact that the deceased Sunil was residing in house no. A-872 has also been admitted by virtue of suggestion put by the Ld. Prosecutor to DW-1 in his cross-examination. In response to which, DW-1 stated that ‘it is correct that my son Sunil (deceased) was residing in House no. A-872’ My deceased son was residing in house no. A-872 for the last 14/15 years.’ Admittedly, despite getting details of owner of the House no. A-872, i.e. Sh. Surender Kumar, he was not examined as a witness, either to demonstrate to the contrary or with respect to any other fact. PW-18 Insp. Arvind Pratap Singh though tried to explain the same in his cross-examination by stating that he had interrogated the owner but he did not

want to give any statement as he was to sell his house. Nothing was mentioned about the action taken in that regard.

16.3. Even as per prosecution itself, the deceased was strangled by the appellants/accused persons at point 'A' in house no. A-872 as depicted in scaled site plan Ex. PW-14/A.

16.4. In view of the above, it is established that the deceased was living in a separate house no. A-872 and his dead body was recovered from the said house.

16.5. As per postmortem report Ex. PW-4/A of the deceased, his autopsy was concluded at 12.00 pm on 12.04.2015 and the time since death of the deceased has been opined to be 'one and half day'. As per which, the death is likely to have occurred around 12.00 am on 10.04.2015. It may be mentioned that the postmortem provides only an approximate time of death. (Modi's Medical Jurisprudence and Toxicology, 6th edition, page no. 151). In **Pattipati Venkaiah v. State of A.P. SCC P. 83 para 10 (1985 4 SCC 80)**, the Hon'ble Apex Court noted that medical science is not so perfect as to determine the exact time of death nor can the same be determined in a computerized or mathematical fashion so as to be accurate to the last second.

16.6. Further, in **Ram Udgar Singh vs. State of Bihar, 2004 (10), SCC, 443**, the Hon'ble Supreme Court in para 10 observed that '*So far as the plea relating to the time of death on the basis of medical evidence is concerned,*

emphasis is laid on the fact that rigor mortis could not have set in, in the dead body within two hours. The High Court has referred to several treatises on medical jurisprudence to conclude that the time which is usually three to four hours may vary according to climatic conditions. We find no infirmity in the conclusion.'

16.7. Thus, the deceased Sunil is likely to have died somewhere between 9 pm to 12 am on 10.04.2015. In view of these facts, it was for the prosecution to prove that the appellants/accused persons were seen with the deceased, prior to his death around that time.

Last Seen

17.0. PW-18 has deposed that during investigation/interrogation of PW-7 Jitender Singh, it was revealed that he had seen deceased Sunil sitting with his two brothers i.e., the appellants/accused persons on 10.04.2015 in evening hours. Whereas PW-7 in his testimony, did not say anything to this effect. Rather, in his cross-examination, PW-7 categorically denied having seen the appellants/accused persons with the deceased on that fateful day i.e. 10.04.2015 in the evening.

17.1. It may be mentioned that as PW-7 did not support the prosecution version, he was cross examined by the learned Additional PP but nothing of substance could be extracted.

17.2. Although, PW-7 stated that he used to visit the appellants' house as he was plying TSR and used to take the appellants' father to the hospital, as he had suffered paralysis in 2012 or 2013 ; and that he had visited the house of

both the appellants/accused persons about 20 days prior to 11.04.2015, when their father namely Jagdish Prasad had met him, but the appellants/accused persons were not present at their house as they were away for work. PW-7 has categorically denied that he had visited the house of Jagdish Prasad, father of the appellants at A-873 on 10.04.2015 at about 4 pm and had noticed that the deceased Sunil Kumar was residing at house no. A-872 those days. PW-7 also denied that on that day (i.e. 10.4.2015), he had met Sunil Kumar at house no A-872 and at that time, the appellants/accused persons were also present with the deceased Sunil Kumar and were talking to him and the deceased Sunil Kumar appeared tired/lazy. Thus, the only witness of the prosecution (i.e., PW-7) of having last seen the deceased alive in the company of the appellants/accused persons did not support the prosecution case. No other evidence in this respect was led by the prosecution.

17.3. The prosecution thus failed to prove that the appellants/accused persons were last seen with the deceased who was living in a separate house no. A-872.

18.0. Learned Prosecutor submitted that as per PW-1/A/the subsequent opinion, it has been opined by PW-4 Dr. Vishwajeet Singh that the ligature mark present around the neck of the deceased corresponded to the telephone wire/the ligature material Ex. P-1. Said opinion has remained uncontested as PW-4 was not cross examined by the appellants/accused persons. Same is borne out from the record. Ld. Prosecutor argued that the appellants/accused persons' involvement in the crime is evident from the fact that they got recovered the telephone wire (Ex. P1) with which the deceased was strangled.

18.1. Learned counsel for the appellants/accused persons on the other hand argued that the recovery of the wire Ex. P-1 at the instance of the appellants/accused persons, itself is doubtful. More so, as the recovery was made from the open public space. Even otherwise, the appellants/accused persons cannot be convicted on that account alone, particularly in absence of any other evidence connecting them to the crime. Ld. Counsel further argued that the incident allegedly took place on 10.04.2015. Postmortem report dated 12.4.2015 revealed that the deceased was strangled with some thin wire, but no effort was made for its recovery. Further, the appellants/accused persons were arrested on 18.04.2015 and they allegedly got recovered the telephone wire used in the crime on 19.04.2015 i.e. after 9 days of the crime, which also create doubt about the recovery and rather show that the same was planted.

18.2. It is seen that PW-18 IO Arvind Pratap Singh in his cross examination admitted that the recovery of telephone wire was made from the bushes in the vacant plot. He also stated that public persons usually pass through Pushta Road adjacent to the spot of recovery. He also admitted that the spot from where wire was recovered is easily accessible to public. He however tried to explain that the wire was recovered from abandoned place. Admittedly, no public person was joined though as per PW-18 himself, Pushta road is frequented by public persons. In this regard, reference is made to the judgment of this Court in **Shiv Narayan & Anr. Vs. State (NCT of Delhi) 2002 (61) DRJ 734 (DB)**, wherein it was observed that :-

“24.The alleged incriminating article as per the prosecution's version was found lying in the open on the ground near the wall on an open plot visible to naked eyes. What is admissible under Section 27 of the Evidence Act is not merely knowledge of the accused regarding the place of concealment of the material object but the fact that the accused himself had concealed it there to the exclusion of the knowledge of others. What is not covered cannot be discovered. The weapon found in open space near the wall not hidden in that circumstance the statement of the accused cannot said the distinctly lead to discovery of that weapon..... It is settled proposition of law that on the information furnished by the accused to the police officers which led to the recovery of the weapon is admissible in evidence under Section 27 of the Evidence Act, but admissibility alone would not render the evidence reliable.Therefore, the crucial question would be whether it was ordinarily visible to others? If the answer is in the positive then the recovery would be inadmissible under Section 27 of the Evidence Act.

18.3. In view of the above facts and circumstances and settled position of law, recovery of Ex. P1, telephone wire at the instance of the appellants/accused persons, from a vacant plot, a place accessible to public persons, cannot be stated to be in exclusive knowledge of the appellants/accused persons. Same therefore, can hardly be considered as incriminating evidence against the appellants/accused persons.

Motive

19.0. Much was argued by the Ld. Prosecutor that the appellants/accused persons killed the deceased for grabbing his share in the property i.e. House

no. A-873 in their father's name ; and that they had a motive to eliminate the deceased.

19.1. IO PW-18 in his cross-examination stated that he did not come across any record that there was a dispute of house between the accused persons and the deceased. Even PW-7 in his testimony stated that he did not see any quarrel between the brothers regarding property nor did their father ever tell him about any property dispute amongst his sons. Further, DW-1 Sh. Jagdish Prasad (father of the appellants/accused persons and deceased) has deposed that relation between the deceased and his other two sons/accused persons were cordial. Even in his cross-examination, DW-1 denied that the appellants/accused persons used to quarrel with the deceased in order to get his shares in the property and killed him to get rid of him. Not only that, PW-18/IO, in his cross-examination admitted that he did not collect the documents of ownership of the said house. Thus, the prosecution even failed to place on record any evidence to show that house no. A-873 was owned by the appellants'/accused persons' father, much less, the motive of the appellants/accused persons to kill the deceased to grab his share.

20.0. I also find substance in the plea of the appellants/accused persons that if the appellants/accused persons were to hide anything, they would not have informed about the death of their brother/deceased to the neighbours and could have easily cremated the dead body at night, instead of awaiting for cremation till the next morning.

21.0. In view of the above, the prosecution has failed to prove all the circumstances in the chain so as to link the appellants/accused persons with the crime i.e. murder of their deceased brother Sunil. Impugned judgment of conviction and order on sentence are therefore, set aside. The appellants/accused persons are acquitted.

22.0. Appeals are disposed of accordingly.

23.0. Concerned Jail Superintendent is directed to release the appellants forthwith, if not required in any other case.

24.0. Copy of the judgment be uploaded on the website and be sent to the concerned Superintendent Jail for updation of record and intimation to the appellants.

(POONAM A. BAMBA)
JUDGE

(MUKTA GUPTA)
JUDGE

FEBRUARY 02, 2023/csc