

Mohd Shakir Vs. State

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SooperKanoon Citation : sooperkanoon.com/1135232

Court : Delhi

Decided On : Mar-24-2014

Judge : Sanjiv Khanna

Appellant : Mohd Shakir

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI + CRIMINAL APPEAL No.600/2011 Reserved on :

3. d March, 2014 Date of decision:

24. h March, 2014 MOHD SHAKIR Appellant Through Mr. K.B. Andley, Sr. Advocate with Mr. M. Shamikh, Advocate. Versus STATE Respondent Through Ms. Rajdipa Behura, APP for the State. CRIMINAL APPEAL No.689/2011 MOHD JAVED & ANR. Appellants Through Mr. Anil Hooda & Mr. Rakesh Kumar, Advocates. Versus STATE Respondent Through Ms. Rajdipa Behura, APP for the State. CORAM: HON'BLE MR. JUSTICE SANJIV KHANNA HON'BLE MR. JUSTICE G.P. MITTAL SANJIV KHANNA, J.

: The aforementioned appeals arise out of a common judgment dated 20th April, 2011 in Sessions Case No.70/2008 arising out of FIR No.484/2007, Police Station Gokul Puri.

2. The three appellants, namely, Mohd. Shakir, Mohd. Javed and Mehfooz, by the impugned judgment dated 20th April, 2011 have been convicted under Sections 302, 364 and 201 read with Sections 120B of the Indian Penal Code, 1860 (IPC, for short). By order on sentence dated 26th April, 2011, they have been sentenced for the offence punishable under Section 302 read with Section 120B IPC to rigorous imprisonment for life and fine of Rs.2,000/- each, in default of payment to undergo simple imprisonment for six months. They have been also sentenced to imprisonment for ten years for the offence under Section 364 read with Section 120B IPC and fine of Rs.2,000/- each. In default of payment of fine for the said offence, they have to undergo Simple Imprisonment for three months. For the offence under Section 201 read with Section 120B IPC, they have been sentenced to imprisonment for three years and fine of Rs.1,000/- each. In default of payment of fine, to undergo simple imprisonment for thirty days. Benefit of Section 428 of the Code of Criminal Procedure, 1973 (Cr.P.C. for short) has been granted. The fourth accused, namely, Mohd. Ashfaq was acquitted from the charge under Section 302 and 364 read with Section 120B IPC, but was convicted under Section 411 IPC. Ashfaq was sentenced for the term of sentence already undergone and to pay fine of Rs.200/- and in default of which, he was to undergo simple imprisonment for fifteen days. The order on sentence records, fine stands paid by Ashfaq. Ashfaq was also asked to execute a bond, which was to remain in force for a period of six months.

3. It is stated at the Bar by the counsel for the appellants that Ashfaq has not filed any appeal and has accepted his conviction and sentence.

4. The charge against the appellants is that they had conspired to abduct Mohd. Idrish on 24th June, 2007 at about 2.45 P.M. at red light near Gokul Puri flyover and thereafter had murdered Mohd. Idrish and caused his body and other evidence of commission of murder to disappear.

5. At the outset, we notice that the dead body of Mohd. Idrish has not been located and found. Secondly, the three appellants were arrested, as per the prosecution version, more than six months after the date of occurrence on 15th January, 2008 at 7 P.M. As per the prosecution version, disappearance of Mohd. Idrish was on

24th June, 2007 between 3 and 4 P.M. This fact is deposed to by Mohd. Iqbal (PW-3) brother of Mohd. Idrish. PW-3 has stated that his brother Mohd. Idrish aged between 25-26 years had gone missing on 24th June, 2007. On 26th June, 2007 he had made missing report at Police Station Gokul Puri vide DD No.27A (Exhibit PW-3/A). Thereafter, the FIR in question was registered on 30th June, 2007 as Mohd. Idrish did not return. In his cross-examination, PW-3 has accepted that he had seen his brother Mohd. Idrish upto 3-4 P.M. on 24th June, 2007 in the house and thereafter PW-3 had gone to sleep. At this stage, we only notice that the appellants were not named in the DD No.27A or in the FIR. They were not the suspects.

6. PW-3 has deposed that deceased Mohd. Idrish was having mobile No.9911135484 and mobile telephone instrument of Motorola make. PW-3 had made repeated attempts to contact Mohd. Idrish on the said number but the number was switched off. He had submitted receipt/bill for purchase of the mobile instrument number marked Exhibit PW-3/B. The said mobile instrument bill mentions the IMEI No.as 358916003233892. The last digit is redundant and the first fourteen digits are relevant in a GSM phone as was held by the Supreme Court in State (NCT of Delhi) versus Navjot Sandhu and Others, (2005) 11 SCC600 7. As it was a blind case, the police had kept mobile SIM No.9911135484 as well as mobile instrument bearing IMEI No.35891600323389 under observation and had collected the call record details. On the basis of monitoring SIM No.9911135484, Sachin (PW-7) was interrogated. Sachin (PW-7) has in court deposed that on 10th July, 2007 he was returning to his residence on a cycle, when he had found an Idea mobile SIM lying by the side of the road about half a kilometre from Murad Nagar Power House. He inserted the said SIM in his mobile instrument but as there was no balance, he had discarded the SIM. One month post this incident, police came to his house and inquired about the SIM card. The police had also seized his mobile instrument by seizure memo Exhibit PW-7/A. He identified the mobile instrument Nokia 1100 which was shown to him in the court and marked Exhibit PW-7/P1.

8. Niranjana (PW-8) has stated that on 6th August, 2007 he had purchased mobile instrument Nokia 1100 and had proved the purchase memo Exhibit PW-8/P-1. The

testimonies of Sachin (PW-7) and Niranjan (PW-8) when read together only disclose that the mobile SIM card belonging to the deceased was found by PW-7 on the road side, half a kilometre from Murad Nagar near the Power House and the said SIM was used by PW-7 but upon realising that there was no balance, he had discarded the SIM card.

9. The prosecution in fact relies upon the investigation carried out by Additional SHO Police Station Gokul Puri, Inspector A.S. Negi (PW17). He has stated that on 15th January, 2008 a raiding team was constituted along with Special Cell officers and they had raided hotel Dawat A Mezwan and made inquiries from one Saifuddin. The said person admitted that he had handed over his identity documents to one Ashfaq for purchase of SIM card. Saifuddin identified Ashfaq and he was apprehended. Ashfaq on interrogation disclosed that he had purchased a Motorola mobile handset from Mohd. Mehfooz and had sent the same to his village at Purnia, Bihar where it was being used by his father. Subsequently, Ashfaq had accompanied the police team to Braham Puri Gali No.21, where Mohd. Mehfooz was apprehended and interrogated. Subsequently, Mohd. Shakir and Mohd. Javed were also arrested and the three appellants; Mohd. Shakir, Mohd. Javed and Mehfooz had made their disclosure statements, Exhibits PW-11/K, 11/J and 11/L respectively. The disclosure statement made by Ashfaq was marked Exhibit PW-11/I.

10. Pursuant to the disclosure made by Mohd. Shakir, one Maruti Zen Car DL6CC1515 was seized as it was suspected that the said car was used in the commission of the offence. On the basis of the disclosure statement by Mohd Shakir, a purse was recovered near farm house on Meerut road containing visiting card of Novelty Bangle Store with names of Vinod Jain, Sumeet Jain and Rajiv Jain. One pant was also found, seized and taken into possession.

11. Head Constable Vinod Singh, who appeared as PW-1, has stated that on 18th January, 2008, he along with some others had gone to village Deegoch, Police Station Rota, District Purnia, Bihar and along with one Uma Shanker reached the house of Ashfaq in the said village with Ashfaq. Motorola mobile instrument with IMEI No.35891600323389 was seized vide seizure memo (Exhibit PW-1/A). The

mobile phone was marked Exhibit P-1. PW-1 in his cross-examination accepted as correct, the suggestion on behalf of accused Ashfaq that he had told them about purchase of the mobile phone Exhibit P-1 from appellant-Mehfooz for Rs.500/- and this fact was also mentioned in the seizure memo. The appellants herein, however, in their cross-examination had suggested that Ashfaq had found the mobile phone Exhibit P-1 at Delhi on road.

12. On the question of recovery of the mobile phone Exhibit P-1, we feel there is sufficient evidence and material to show that the same was recovered from the village Deegoch while in possession of father of Ashfaq. The said fact is not only proved by the testimony of Head Constable Vinod Singh (PW-1), who had gone to the said village but also by the statement of Uma Shanker, Harijan Grameen Police, Bihar (PW-14), who had accompanied the police team from Delhi to the village of Ashfaq from where the mobile phone was seized vide Exhibit PW-1/A. However, PW-14 could not recognise the mobile phone due to lapse of time and was cross-examined by the Additional Public Prosecutor. In the cross-examination, he accepted that father of Ashfaq had handed over Motorola mobile phone C-168 and the same was taken into custody by the Investigating Officer. Mohd Saifuddin (PW-12) in his court deposition had stated that in the year 2008, date and month he did not remember, upon asking Ashfaq he had given his identity proof so that he could obtain a mobile SIM connection. Ashfaq was using the said number. It would be appropriate here to refer to the statement of Ashfaq under Section 313 Cr.P.C. in which he has stated that he had purchased the said mobile phone on payment of Rs.500/- from Mehfooz. He had stated that he was unaware that the handset belonged to the deceased Mohd. Idrish and that he was a bona fide purchaser.

13. However, we have grave doubts about recovery of the purse and the pant allegedly belonging to the deceased, Mohd. Idrish on the basis of the disclosure statements made by the appellants. There are several reasons for the same. The recovery of the pant and the purse is alleged to have been made on 16th January, 2008 nearly seven months after the date of occurrence on 24th June, 2007 and that too on land next to a busy thoroughfare i.e. a main road well frequented and extensively used. The said road was near the power house. Shabnam, wife of

Mohd. Idrish, who deposed as PW-2 had refused to identify the pant and had stated that it was torn, burnt and in a rotten condition. She, however, identified the purse in the TIP proceedings Exhibit PW-2/A and in the court deposition. Interestingly, Vinod Jain (PW-6) was shown the same purse and the visiting card and in the court deposition on 27th October, 2010 had stated that the purse was in a torn and a burnt condition and even the visiting card was partly burnt though was identified by him.

14. This brings us to the evidence of Imran and Shaeen @ Viccky, PWs-4 and 5 respectively. PW-4 turned hostile and claimed that he did not know Mohd. Idrish. He was once directed by Ameen, owner of the vehicle to go to Gang Nahar along with appellants Javed, Shakir, Mehfooz and Shaeen @ Viccky. Some others had accompanied them to Gang Nahar to take bath. They stayed there for half an hour. As far as he remembered, five persons had gone there and all of them had returned after taking bath. He was cross-examined and it was put to him that his statement under Section 164 Cr.P.C. Exhibit PW-4/A was recorded (the said statement could not be located in the trial court records but is available in a sealed envelope which has been opened). PW-4 was confronted with his statement Exhibit PW-4/A recorded under Section 164 Cr.P.C. but did not deviate from his court testimony and denied various suggestions given to him. Shaeen @ Viccky (PW-5) has, however, partly supported the prosecution case though he had also turned hostile and was cross-examined by the Additional Public Prosecutor. Crl.A. 600/2011 Section 164 Cr.P.C. marked Exhibit PW-5/A. PW-5 has stated that he knew Javed but he did not know Mehfooz, Ashfaq and Idrish. Imran was son of his brother-in-law. They had gone to Gang Nahar enroute to Meerut by car. When he was confronted with his statement (Exhibit PW-5/A) recorded under Section 164 Cr.P.C., he had deposed that he had stated facts as per the instructions of the police and as he was threatened. Further, he had not disclosed the said aspect with the Magistrate out of fear. He accepted that Mohd. Javed and the other accused, who were present in the Court, had gone to Murad Nagar, Gang Nahar by car and Mohd. Idrish was with them.

15. Learned counsel appearing for the appellants submitted that PW-5 had given the height of Mohd. Idrish as 5 feet 10 inches, which is incorrect. This, to our mind,

does not affect his deposition.

16. In addition to the said evidence, we have the call details of deceased Mohd. Idrish, which have been marked Exhibit PW-18/A. The call details show that on 24th June, 2007 between 2.39 P.M. to 2.47 P.M., a number of calls were exchanged between telephone Nos. 9911135484, which belonged to the deceased and 9999073830. The latter number, as per the court depositions, it is claimed belonged to appellant-Mohd. Javed. However, the call details also show SMS to telephone No.9911135484 on 25th June, 2007 at 6.26 P.M. This SMS was made the very next day after disappearance of Mohd. Idrish.

17. In view of the aforesaid discussion, the following facts emerge:- (i) The deceased Mohd. Idrish had a mobile telephone instrument with IMEI No.35891600323389 with SIM card No.9911135484. There was exchange of calls between appellant-Mohd. Javed and the deceased Mohd. Idrish on 24th June, 2007 between 2.39 to 2.47 P.M. (ii) On 25th June, 2007, SMS was sent to SIM No.9911135484 from telephone No.9911380018 at 6.26 P.M. We do not have court deposition on the said aspect, who had sent the SMS. At that time, SIM No.9911135484 had received the message from Cell Tower at Nizamuddin Cow. (The police diary reveals that one Polak son of Dinesh Chand Sharma, resident of C-2/171 Yamuna Vihar, Delhi was interrogated in respect of telephone No.9911380018 which perhaps was being used by him and from this number as per Ex. PW18/A SMS was sent to Idrish on his telephone No.9911135484 on 25th June, 2007 at 6.26 PM. In the trial court records, we have a note/response dated 10th November, 2008 written by Inspector A.S. Negi (PW17) regarding verification of the SMS dated 25th June, 2007 at 6.26 PM. The said verification note states that the said SMS was not received by the recipient Mohd. Idrish on his mobile No.9911135484 as Cell ID No.40404-65535 was dump cell ID i.e. when the mobile phone of the recipient was shut off. However, this fact has not been deposed to by PW17 Insp. A.S. Negi in his court deposition and it has also not been deposed to or proved by other evidence.) (iii) Sachin (PW-7) has deposed that on 10th July, 2007, he had found a mobile SIM with number 9811135484. This fact is established from Exhibit PW-18/A, which refers to the place of use as Mainapur, Ghaziabad on 10th July, 2007 at 19:04 and 19:05 with instrument bearing IMEI

No.35884900974269, which is also the IMEI number of the instrument being used by Sachin as per call records of telephone No.9999095257, which was issued in the name of Niranjana Singh as per Exhibit PW-15/A, father of Sachin, who had deposed as PW-8 and also as per the testimony of Sachin (PW-7). (As per the police diary Sachin (PW7) and Niranjana (PW8) were interrogated and had given different statements by whom and how the Idea SIM was inserted in the phone in question.) (iv) Prosecution has been able to show and prove recovery of mobile phone instrument of Motorola make with IMEI No.35891600323389 from father of Ashfaq from his village. The said instrument (Exhibit P-1) as per disclosure statement of Ashfaq was purchased by him from appellant- Mehfooz for Rs.500/-. Disclosure statement and recovery cannot be attributed to the appellants as the recovery does not fall under section 27 of the Evidence Act, 1872 and is inadmissible against the present appellants. Further call records of Ashfaq have not been proved and the statement of Ashfaq under Section 313 Cr.P.C. cannot be used against appellant-Mehfooz and accordingly against the appellants-Mohd. Shakir and Mohd. Javed. Ashfaqs statement and his disclosure (Exhibit PW-11/C) made at best can be used to establish recovery of a physical object, i.e., the mobile phone pursuant to disclosure made by him. Even against Mohd. Mehfooz recovery pursuant to disclosure could be debated as weak evidence in view of the fact that the police had first investigated and interrogated Mohd. Ashfaq and also recorded his disclosure statement (Exhibit PW-11/I). Pursuant to the said disclosure, recovery was made from the father of Ashfaq. (v) Recovery of pant and the purse pursuant to the disclosure statements should not be accepted. PW-2, wife of the deceased, did not recognise the pant but recognised the purse. The purse also as per Vinod Jain (PW-6) was torn and in a rotten condition. We are inclined to accept the contention of the appellants that the purse could have been planted in view of the aforesaid facts.

18. This brings us to the last crucial evidence of PW-5 and to the statement of PW-4 (Exhibit PW-4/A) recorded under Section 164 Cr.P.C. As already noted above, Imran (PW-4) in his court deposition did not support the prosecution version and Shaeen @ Vickey (PW-5) has partly supported the prosecution version. We have also gone through the statements under Section 164 of PW-4 and PW-5 (Exhibits PW-4/A and PW-5/A).

19. Shaeen @ Viccky (PW-5) in his statement (Exhibit PW-5/A) stated as follows:

On 24.06.07 I had a holiday because of Sunday. As I had no work to do I went to Javed at Brahmpuri in order to meet my maternal brother Imran where he worked. Most of the time Imran used to stay with them only but on that day he left for his home. On seeing me Javed said that he was going on an outing and told me to accompany him and that he would instantly call Imran to join us. He said that they will use the car Shakir Bhai. Then he made a call to Imran to come here. Till that time Shakir took out his Zen car and cleaned the same. When Imran came then all of us, I, Imran, Javed, Shakir and Mehfooz who works with Aslam and who is the elder brother of Javed left from there after sitting in the car. Imran was driving the car. We were going to Muradabad near Gang Nahar to take a bath. We took Idrish bhai in the car from the red light under Gokulpuri Flyover. When we reached Muradadbad Gang Nahar to take bath, we all took out our clothes and kept them in the car and started taking bath. Javed, Shakir, Idrish and Mehfooz were throwing water on each other when they were in the water. After sometime a broken glass had pricked into the foot of Idrish and he came outside and sat. Javed and Shakir came out and pulled him again in the water. After sometime I and Imran came out of the water and started talking with each other while standing on the road. Later on Javed, Shakir and Mehfooz came back and asked us about the whereabouts of Idrish. We answered them that he was with you only. Then we said he must be somewhere here, lets search him. Then Shakir Bhai said to Imran that you go. Thereafter all came to the car and wore clothes. When we asked to search for Idrish then Shakir said that he will not come, you leave from here. On this Imran said that why he will not come, his clothes are still in the car. Then Shakir told Imran to drive the car. I and Imran was sitting in the front seat and Imran was driving the car. On the way Javed had taken out the sim from the Idrish Mobile and had thrown the same. Mehfooz had thrown out the shoes and spectacles. Shakir had thrown out the clothes after taking out the money. Then Shakir revealed that they had killed Idrish by way of drowning him and this should not be disclosed to anyone because it will disgrace us in Manihari Community (Biradari) or else we will also kill you. I and Imran did not disclose these things due to this fear. Then due to interrogation by the Police and fear of getting wrongly implicated we spoke the truth.

20. Imran (PW-4) in his statement under Section 164 Cr.P.C. had stated as follows:

I work as a driver for one Amin resident at Brahmpuri. On 24.06.2007, I returned home early as I was on night duty. Nephew of Amin, Javed called me on my mobile around 11:00 AM instructing me to get Shakirs Zen car upon receiving the second phone call from him. Subsequently at about 2:00 PM he directed me to come to his home. Upon reaching there, Javed, Shakir and Mehfooz were present there. When we came out, on street beside Shaeen @ Viccky was standing there. Javed asked for Shaeen to come along. Shaeen @ Viccky used to keep visiting there. Javed said that Idrish, his uncles son, had to be picked up from Gokulpuri flyover and then we will all go to Muradnagar Gang Nahar for a bath. All of us sat in Shakirs Zen car No.DL- 6CC-1515. I was driving the car. We picked up Idrish from Gokulpuri flyover and then reached Gang Nahar. There Javed, Shakir, Idrish and Mehfooz started taking a bath in one place and instructed me and Vicky to take a bath at a distance from them. Javed, Shakir, Idrish and Mehfooz were good friends. As instructed I and Vicky started taking a bath at a distance. Javed, Shakir, Idrish and Mehfooz were spraying water on each other. A broken glass had pricked into the foot of Idrish and he came outside and sat. Javed, Shakir and Mehfooz came out and pulled him again in the water. After sometime we came out of the water, went to the car, got dressed and then stood in the sun as we were feeling cold. After sometime Javed, Shakir and Mehfooz returned, got dressed and asked to leave. I asked about Idrish Bhai, upon which Javed asked me to drive. I started the car. Further asking about Idrish Bhai, Javed retorted that your duty is to just drive the car. On the way back, Javed took the SIM out from Idrishs mobile and threw it. Shakir took out the money from the clothes and threw the clothes. Mehfooz threw Idrishs shoes and spectacles. When I asked about the reason, Javed and Shakir informed that they had killed Idrish by way of drowning and if we revealed this information it will disgrace us in Manihari Community (Biradari) and we will kill you as well. For the fear of our lives me and Vicky did not disclose this information to anyone. On 15.01.2008, when Insp. Negi arrested all of us, then me and Vicky disclosed the above mentioned information. Insp Negi, upon questioning us, finally let us go.

21. PWs-4 and 5 in the court depositions have not spoken about extra judicial confession made by the appellants to them. It is discernible that as per the testimonies of PWs-4 and 5, in court and even statements under section 164 Cr.P.C., they had not seen the actual act of violence or drowning in which Mohd. Idrish lost his life. They were not eye witnesses to the incident and what had transpired. This is rather intriguing and unacceptable. If PW-4 and PW-5 were present at the spot/place, they would have seen the actual occurrence. What is discernible from the said statements under Section 164 and also from the court deposition of Shaeen @ Viccky (PW-5) is that he along with the appellants, Imran, Ashfaq and Mohd. Idrish had gone to Gang Nahar to take bath but Mohd. Idrish did not return with them. He went missing and as per prosecution version he was drowned. PW-5 in his deposition has stated that there were about 1000 to 2000 persons in number taking bath, which appears to be again doubtful because the occurrence would have been seen by others.

22. PWs-4 and 5 were also suspects as they had also gone with the appellants, Ashfaq and the deceased to Gang Nahar. Further, PWs-4 and 5 had remained quiet for over six months after the occurrence on 24 th June, 2007 till 15th January, 2008 when it is claimed their statements under Section 161 were recorded and subsequently their statements under Section 164 were recorded on 17th January, 2008. In case PWs 4 and 5 were accomplice/approvers, the procedure as prescribed under Section 306 to 309 Cr.P.C. was not followed. The deceased would have put up a defence and certainly resisted any attempt to drown to kill him. This would have alerted others present at the spot. It has come on record that the deceased was well built with a good physique and was a regular visitor to the gymnasium (see deposition of PW-2, wife of the deceased Mohd. Idrish). What is equally apparent is lack of plausible and strong motive or reason for the appellants to kill/murder the deceased. It is not necessary to prove motive even in cases of circumstantial evidence but in the present case there is evidence and material to show that appellant Mohd. Javed was a cousin and close to the deceased-Mohd. Idrish, and it is doubtful and unfathomable why the said appellant would want to commit murder. The other appellant-Mohd. Shakir was also related to Mohd. Idrish. There is evidence to show that the appellants had searched for the deceased and had interacted with family members of Mohd. Idrish. Pre-

meditation looks distinct and is ruled out as PWs-4 and 5, as per the prosecution version, had also gone with the appellants and Mohd Ashfaq to Gang Nahar. In case the appellants wanted to kill/murder Mohd. Idrish and had any intention or a plan, they would not have taken PWs-4 and 5 with them.

23. In view of the aforesaid circumstances, at best, the prosecution has been able to show and prove that Mohd. Idrish along with the appellants Mohd. Ashfaq, PWs-4 and 5 had gone to take a dip in Gang Nahar near Meerut. There something happened and thereafter Mohd. Idrish did not return. Mohd. Idrish possibly got drowned. What was the reason and the cause of drowning is uncertain and there is no evidence and material to show that the three appellants had deliberately drowned and had acted with malice or with mala fide intention or even knowledge. PW-4 and PW-5 did not see and have not deposed how and why drowning took place. There is uncertainty and it would not be credible to presume or assume that the three appellants had committed the offence under Section 302 IPC.

24. Similarly, we do not think that offence under Section 364 IPC is made out as there is no evidence to show that the appellants had abducted/kidnapped the deceased. The deceased had gone for taking a dip in Gang Nahar and enjoy with the appellants and others. Pre- meditation or deliberate plan to kill/murder Mohd. Idrish has not been proved.

25. Section 201 IPC would not be applicable as the said provision applies only when an offence has been committed and a person knowing and having reason to believe that the offence has been committed, causes any evidence of commission of offence to disappear with the intention of saving the offender from legal punishment or with that intention gives any information in respect of the offence which he knows or believes to be false. Once we hold that no offence is proved, Section 201 IPC would not be applicable.

26. However, it is apparent that the appellants did conceal the said occurrence and death of Mohd Idrish from his family members and others. This is an incriminating fact but will equally implicate PW-4 and PW-5. Further, possibility exists that the appellants out of fear and apprehension, had not disclosed or revealed the true facts of accidental death/loss of Mohd. Idrish. This aspect cannot

be ruled out and is plausible. It can be inferred from the statements of PWs-4 and 5. In these circumstances, we are inclined to grant benefit of doubt to the appellants and they are hereby acquitted from the charge under Sections 302, 364 and 201 IPC.

27. However, the appellants would be guilty of dishonest misappropriation of moveable property under Section 403 IPC or rather dishonest misappropriation of the property possessed by the deceased at the time of his death under Section 404 IPC. In the latter section dishonest misappropriation or conversion of property for own use of property which was in possession of the deceased at the time of his death and has not been in possession of any person legally entitled to such possession, can be punished with imprisonment for a term which may extend to 3 years with fine. The punishment of imprisonment may extend to 7 years in case the offender was employed as clerk or servant by the deceased. The offence under Section 404 IPC is non-cognizable. In the present case higher punishment would not be applicable. Therefore, at best the appellants can be punished for offence under Section 404 IPC with imprisonment of either description of upto three years as they had misappropriated the mobile phone of the deceased Mohd. Idrish. The appellants have already undergone imprisonment of more than maximum term of 3 years rigorous imprisonment as stipulated. Accordingly, we convert the conviction of the appellants to Section 404 IPC.

28. In view of the aforesaid discussion, the appellants will be released as they have undergone the maximum sentence under Section 404 IPC, unless they have been detained in accordance with law, in another case. The appeals are accordingly disposed of. (SANJIV KHANNA) JUDGE (G.P. MITTAL) JUDGE
MARCH24h, 2014 VKR/kkb

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