

State Vs. Surender Singh and ors.

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Court : Delhi

Decided On : Apr-30-2014

Judge : S. Muralidhar

Appellant : State

Respondent : Surender Singh and ors.

Advocate for Pet/Ap. : Mr. Varun Goswami, Mr. K.K. Sud, Mr. Vishal Dabas, Mr. Chirag Khurana, Mr. Ajay P. Tushir, Ms. Bonita Singh

Judgement :

IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on: April 3, 2014
Decision on: April 30, 2014 DEATH SENTENCE REF. No.2 of 2011 STATE
Petitioner Through: Mr. Varun Goswami, Advocate. versus SURENDER SINGH
AND ORS Respondents Through: Mr. K.K. Sud, Senior Advocate with Mr.
Vishal Dabas, Mr. Chirag Khurana, Mr. Ajay P. Tushir and Ms. Bonita Singh,
Advocates. AND CRIMINAL APPEAL No.955 of 2011 SURENDER SINGH & ORS
.... Appellants Through: Mr. K.K. Sud, Senior Advocate with Mr. Vishal Dabas, Mr.
Chirag Khurana, Mr. Ajay P. Tushir and Ms. Bonita Singh, Advocates. Versus
STATE Respondent Through: Mr. Varun Goswami, Advocate. CORAM:
HONBLE DR. JUSTICE S.MURALIDHAR HONBLE MS. JUSTICE MUKTA
GUPTA JUDGEMENT3004.2014 Dr. S. Muralidhar, J.

1. By the judgment dated 9th May 2011 passed by the Additional Sessions Judge-02 (South), Saket Courts, New Delhi in SC No.81 of 2009, Surender Singh (Accused No.1), Lakhpati Devi (Accused No.2), and Narender Singh (Accused No.3) have been found guilty of committing the murder of Urmila Devi, wife of A-1, and have been convicted of the offences under Sections 302 and 201 read with 34 IPC. By the order on sentence dated 10th May 2011, all three accused were sentenced to death for the offences under Section 302 IPC read with 34 IPC. For the offence under Section 201 read with 34 IPC, each accused was sentenced to seven years rigorous imprisonment (RI) and fine of Rs.1,000 and in default to suffer simple imprisonment (SI) for three months.

2. Death Sentence Reference No.2 of 2011 has been preferred by the State under Section 366 (1) of the Code of Criminal Procedure 1973 (Cr PC) seeking confirmation of the death sentence awarded to the convicts. The accused have preferred Criminal Appeal No.955 of 2011 challenging their conviction and sentence. The receipt of information of the crime 3. According to the prosecution on 17th October 2007 at about 7.59 am the Police Control Room (PCR) Police Headquarter, Delhi received information from Mobile No.9811861369 that one dead body was lying in House No.88, Humayun Pur Village, Safdarjung Enclave, New Delhi. Constable Ganesh (PW-15) filled up the PCR form (Ex. PW-14/A) and handed over the filled up Part-1 form to the Wireless/Net Operator. This was recorded by a Woman Head Constable (WHC) Vidhya Devi (PW-4) vide daily diary (DD) No.12A and the copy thereof was handed over to ASI Surender Kumar (PW-12) who was at the Police Station (P.S.) Sarojini Nagar. At the crime scene 4. Thereupon Inspector Sunil Kumar (PW-20) along with PW-12, Head Constable (HC) Rattan Lal (PW-13) and Constable Ganga Ram (PW-9) reached House No.88, Humayun Pur Village, Safdarjung Enclave, New Delhi where they found that A-1 and A-2 were present. In the first room a foul smell was coming from the diwan (bed). Four witnesses, PWs, 9, 12, 13 and 20 stated that on checking the diwan a dead body of a lady was found. PWs 9, 12 and 13 stated that both A-1 and A-2 were in scared condition. On enquiry, neither could give a satisfactory answer. The police team further went inside the house and found another room which was locked from outside. A-1 and A-2 were asked to open the door. On opening the lock, three children, Nivedita (PW-2), Surya Pratap (PW-3) and

Siddharth (PW-7) were found inside the room. They were in a state of shock and in a scared condition. On being asked by the police, the children stated that their mother, Urmila whose dead body was found, was murdered by A-1, A-2 and A-3.

5. The deceased bore injury marks on her neck, wrist, left ribs, right thigh (backside) and spinal cord. There was a lot of blood scattered on the dead body. PW-20 prepared a tehrir (Ex.PW-20/A). The rukka was sent for registration by PW-13. Meanwhile, the Additional Station House Officer, the Station House Officer (SHO) along with Constable Jai Lakshmi (PW-11) reached the spot. A crime team also reached the spot. ASI Umed Singh prepared the crime team report. Meanwhile, PW-13 went to the police station and got the case registered and came back to the spot and handed over the same to the Investigating Officer (IO) (PW-20). The dead body was sent to Safdarjung Hospital mortuary for preservation and post-mortem.

6. PW-20 prepared the death report form and the brief facts (Ex.PW20/B and B1). PW-20 then found one cot in the room which had blood stains and took the blood stained ban of the cot and kept it in a plastic box. He also took the ban of the cot without blood and kept it in a separate box. These boxes were sealed with the seal of SKC and marked as Marks C and C-1. Both the samples and the cot were seized under seizure memo Ex. PW-12/I. The clothes of the deceased like chunni, bichona, one khaki bag, one bed sheet, all having blood stains and found lying in the diwan (bed) were sealed in a plastic bag and the pullanda was sealed with the seal of SKC (Ex.PW-12/D). From the diwan the blood stained ply wood, and the plywood without blood were kept in two separate plastic boxes and sealed. They were Marks D and D1. Both samples and the diwan were seized under seizure memo Ex.PW-12/J.

A site plan (Ex.PW-20/C) was prepared.

7. PW-20 recorded the statement of the children and also interrogated A-1 and A-2. Their respective disclosure statements were recorded. A1 and A-2 were then arrested and searched. A-1 is stated to have taken the crime team to the roof of the adjoining house from where he got recovered one sword, which according to him, was used by A-3 in the commission of the offence. The sword was sealed in a

pullanda and seized by seizure memo (Ex.PW-12/E). At the instance of A-2 the clothes of A-1 and A-3 which after washing were kept for drying in the veranda inside the house were seized. These included a light green colour shirt and a white pajama of A-3 and chocolate colour T-shirt and black colour pajama of A-1. The clothes were sealed in two separate pullandas giving Mark A to the clothes of A-1 and Mark B to the clothes of A-3 and seized under a memo (Ex.PW-12/C). According to the prosecution, in the meanwhile Ram Karan (PW-6), brother of the deceased and Dilbagh Singh (PW-5), her uncle, arrived there and their statements were recorded. The custody of the children was handed over to PW-6.

8. PW-20 had also come across a kalandra against A-2 and A-3 under Sections 107 and 150 Cr PC at the instance of the deceased, Urmila, which had been filed before the learned Special Executive Magistrate. A copy of the same was marked A. Medical and forensic examinations 9. On 18th October 2007 Dr. G.A. Sunil Kumar Sharma, Assistant Professor, Department of Forensic Medicine, Safdarjung Hospital, New Delhi (PW-8) conducted a post-mortem examination of the deceased Urmila. There was a tear present over the cloth on her left chest. The abdomen was distended; there was greenish discolouration over the lower abdominal wall. Marbling was seen over upper chest and back, the face was suffused and congested. The ante mortem injuries recorded by PW-8 were as under:

1. Contused abrasion over right lower eye lid - size 3 x 1 cm.
2. Multiple small contusions (7 in number) over left lower face around the mouth and knees.
3. Contusion over lower lip, middle part - size 2 x 1 cm.
4. Linear abrasion over left lower face along the lower jaw - size 5x1 cm.
5. Multiple small contusions (5 in number) over anterior left neck - size ranging from 1 x 0.5 cms to 03 cms.
6. Stab injury over left lower chest - size 2.5 cms X10 cm cavity depth puncturing left lower lobe of the lungs.

7. Linear abrasion over posterior surface of right wrist - size 5 x 1 cms.
8. Linear abrasions (3 in number) over right forearm.
9. Stab injury over left arm - size 2 cms X15 cms, muscle depth over outer surface.
10. Incise wound over left forearm - size 1 cm X05 cm.
11. Multiple linear abrasions (5 in number) over left forearm.
12. Stab wound over right thigh - size 2.5 cms X1c., muscle depth.
13. Linear abrasion over right buttock - size 3 cm x 1 cm.
14. Incise wound over the front middle part of the left leg - size 2 cms x. 1 cm.

10. The examination of the chest revealed a blood clot in the left pleural cavity of an extent of 500 ml. The left lung was having a stab injury over the lower lobe. On examination of the neck structure, there was haematoma over subcutaneous and muscular plane on the left side. PW-8 opined that the cause of death was combined effect of asphyxia produced by smothering and manual strangulation and stab injury over the chest. Time since death was determined to be about 23 days. The salwar-kameez in white and green colour of the deceased and the blood in a gauze piece was preserved.

11. On 22nd October 2007 the statement of three children, PW-2, PW3 and PW-7 were recorded by Mr. Satish Kumar, Metropolitan Magistrate (MM) [PW-18]. under Section 164 Cr PC.

12. On 27th October 2007 PW-20 submitted a request to PW-8 for further opinion along with a pullanda containing the sword that had been sealed. On opening a sealed pullanda, which was sealed with a seal of SKC at 12 places, PW-8 found one rusted sword with a white iron handle. On considering the detailed injuries mentioned in the post-mortem report and weapon submitted, PW-8 opined that the injuries No.6, 8, 9, 10, 12 and 14 could have been produced by the submitted weapon.

13. The Forensic Science Laboratory (FSL) gave its test report that the blood was detected on one torn pyjama having a few brown stains (Ex.6a), one T-shirt (Ex.7a), one foul smelling torn gudri (Ex.8a), one quilt cover (Ex.8b), one cloth bag (Ex.8c), one cloth piece (Ex.8d), one dirty cut/torn damp foul smelling ladys shirt (Ex.9a), one dirty cut/torn damp foul smelling salwar (Ex.9b) and one glass bottle (Ex.10). Blood could not be detected on the sword with rusted blade and handle (Ex.1), the small jute pieces (Ex.3), the plywood pieces (Ex.4-5), one full sleeves shirt (Ex.6b) and one pyjama (Ex.7b). As far as the serological report dated 26th June 2008 of the FSL was concerned, the human blood on Ex.8a could not be detected and was deemed as an inconclusive result.

14. A-3 remained absconding. A charge sheet was filed against A-1 and A-2. On 8th February 2008 on the basis of the secret information A-3 was arrested from the house where the dead body was found. A supplementary charge sheet was filed against A-3.

15. Charges were framed against the accused for the offences earlier mentioned and they pleaded not guilty. The prosecution examined 21 witnesses. Statements of the accused under Section 313 Cr PC16 In his statement under Section 313 Cr PC, A-1 claimed that he was not present when the police arrived at the scene of the crime on the morning of 17th October 2007. He stated that he was called by the police to sign several blank papers in the police station and that nothing was recovered at his instance. In response to a question (No.17) specific to his arrest, A-1 claimed that he was at Gurgaon and he was called by the police. In response to another question (No.23), that the three accused along with the children, PWs-2, 3 and 7 used to reside in the same house, A-1 stated that in fact there were two houses. I myself along with wife Urmila, i.e., deceased and three children PW-2, PW-3 and PW-7 used to reside in H.No.88 and coaccused Narender and Lakhpati used to reside in another portion of the same house.

In response to question No.24 that on 15 th October 2007 after 8 pm, A-1 started beating the deceased and was quarrelling with the deceased and on the next morning the deceased was found murdered, he answered that it is wrong. I was not present at home.

He claimed that he had been falsely implicated in this case.

17. In her statement under Section 313 Cr PC, A-2 admitted that on 17th October 2007 the police officials came to the house. She stated, however I was present along with children in another room. Surender was at farm house and accused Narender was also not at home. However, dead body of Urmila w/o Surender was recovered.

In response to a question that a room was found locked and on being asked, A-2 opened the lock in which three children were found in a shocked and scared condition, A-2 answered, it is wrong. The room was already opened and the children were normal.

In response to the question that the three children informed the police officials that their mother Urmila was murdered by A-2 and the co-accused, she denied this and stated that the police officials had misguided the children and they made the statements under the influence of the police. A-2 also denied making any disclosure statements and stated that she was made to sign several blank papers in the police station. According to A-2, nothing was seized in her presence. As regards the question that the accused used to reside in the same house along with the children (question No.23), A-2 stated that there were two houses. In one house A-1 and his wife (deceased) along with their children used to live and in another portion of the same house A-2 along with A-3 used to reside. She further added that Urmila did not use to keep the children with her. Children used to reside with me only.

She denied that on 15th October 2007 after 8 pm A-1 was quarrelling with the deceased and started beating her and on the next morning the deceased was found murdered. She claimed that she had been falsely implicated in this case.

18. In his statement under Section 313 Cr PC, A-3 Narender Singh stated that he was not present at the crime scene when the police officials arrived. In response to the question he too maintained that he and A-2 used to live in a separate portion of the house. However, he was not in Delhi for around 4-5 months prior to the incident. As regards his arrest on 18th February 2008 he stated that I myself went

to PS.

A-3 also stated that he had been falsely implicated in this case. He stated that he wanted to produce two defence witnesses.

19. One defence witness, Rajbir (DW-1) was examined. He stated that he is living in Humayunpur Village and his house was about 8-9 houses from the house of A-1. At about 9 am on the date of incident, i.e., 17th October 2007, there was a gathering of public persons at the house of A-1. He stated:

I also reached near the house of A-1. The police officials had already gone inside before I reached there. At about 10 or 11 am the police officials had taken A-1 and A-2. After sometime, one dead body was taken from the said house by the police officials.

In his cross-examination, DW-1 stated that A-1, A-2 and A3 were living in the same house. A-3 was not married at that time. He stated that the adjacent house was of Ajit Singh but there was a building being built between the said house and A-1. DW-1 claimed that one could not go to the roof of Ajits house from the house of A-1 due to the construction. The judgment of the trial Court 20. On an analysis of the evidence, the learned trial Court in the impugned judgement dated 9th May 2011 held that the following circumstances were proved by the prosecution beyond reasonable doubt: (i) The accused persons and deceased were living in H.No.88, Humayunpur Village, Delhi; (ii) The children PW-2 Nivedita, PW-3 Surya Pratap and PW-7 Siddharth were also residing in the same house; (iii) The deceased and accused persons were not having cordial relations and there used to be some dispute over the property; (iv) The dead body of the deceased Urmila Devi was recovered from the bed box in House No.88, Humayunpur Village, Delhi with multiple injuries on the body; (v) The death had taken place around a day before, when the dead body was recovered; (vi) The dead body was having as many 14 injuries including 6 injuries with a sharp weapon and the death has taken place on account of the injuries as well as strangulation and smothering; and (vii) The accused persons failed to offer any explanation as to how and in what circumstances the deceased had died.

21. The learned trial Court held that the inmates of the house could not get away by simply keeping quiet. PWs 9, 12, 13 and 20 had made consistent and corroborative statements that A-1 and A-2 were in a scared condition when the police arrived at the crime scene. Further, it was held that the conduct of the accused persons in keeping the dead body in their house for a considerable period was also an indicator of their complicity in the crime. It was not a big house. It was a small house of 50 sq.yds area. Further, the deceased was a well-built lady of a height of 54. The barbaric murder as a result of the ante-mortem injuries found on the dead body as indicated by the post-mortem report could not have been carried out by a single person. The cause of death was the combined effect of asphyxia by manual strangulation and the stab injury over the chest. Thus the learned trial Court held that the deceased must have been fully overpowered before committing the murder. There did not seem to be any sudden provocation and that it was a premeditated action. The learned trial Court also noted that the motive for the crime was also proved by the earlier kalandra. The statements of the three children had been recorded under Section 164 Cr PC by PW-18 and he had not been cross-examined at all as to voluntary nature of the statements. Accordingly, it was held that the prosecution had successfully proved its case beyond all reasonable doubt. By the order on sentence dated 10th May 2011 the learned trial Court awarded each accused the death penalty for the offence under Section 302/34 IPC and seven years RI for the offence under Section 201/34 IPC. Statements of the three children under Section 164 Cr PC²² Appearing for the State Mr. Varun Goswami, learned Additional Public Prosecutor (APP), took the Court through the entire evidence. He submitted that while it could not be denied that in the trial Court the three children did not stand by their statements made to PW-18 under Section 164 Cr PC, their statements ought not to be discarded in toto. Certain portions of their statements, to the extent they supported the case of the prosecution, could be salvaged. Although such portions could not by themselves constitute substantive evidence, they could be relied upon if corroborated by other independent evidence. Mr. Goswami relied upon the decisions in *Anjanappa v. State of Karnataka* JT2013(14) SC340 *Attar Singh v. State of Maharashtra* (2013) 11 SCC719 *Paramjeet Singh @ Pamma v. State of Uttarakhand* (2010) 10 SCC439 and *Bhajju @ Karan Singh v. State of Madhya*

Pradesh JT2012(3) SC377 and Guruvinda Palli Anna Rao v. State of Andhra Pradesh 2003 CriLJ 3253 23. Countering the above submissions, Mr. K.K. Sud, learned Senior counsel appearing for the accused, submitted that the statement recorded under Section 164 Cr PC having been resiled from by the three children cannot be relied upon for any purpose other than for contradiction during their cross-examination.

24. In the present case PW-18 recorded the statement of three children under Section 164 Cr PC on 22nd October 2007. The eldest child (PW2) aged about 9 years of old, PW-3 aged about 7 years and PW-7 aged about 5 years at that time. The statements were marked Ex.PW-18/A, PW-18/C and PW-18/E respectively. PW-18 noted that the statements had been recorded voluntarily and satisfied the requirement of the law. There has been no cross-examination whatsoever of PW-18 by counsel for the accused.

25. In Guruvinda Palli Anna Rao, the Andhra Pradesh High Court observed that the statement recorded under Section 164 Cr PC cannot be treated as a substantive piece of evidence. Such statement can be made use of by the prosecution for the purpose of corroboration, or by the defence for contradiction.

26. In the present case the three children have to a substantial extent resiled from their respective statements under Section 164 Cr PC. The Supreme Court has, in a series of decisions, discussed the law on the aspect of admissibility of the statement of such witnesses. In *Paramjeet Singh @ Pamma v. State of Uttarakhand* the Supreme Court surveyed the earlier case law and held that the deposition of hostile witness can be relied upon at least up to the extent he supported the case of the prosecution.

It was further clarified that the evidence of a person does not become effaced from the record merely because he has turned hostile and his deposition must be examined more cautiously to find out as to what extent he has supported the case of the prosecution.

27. In *Bhaju @ Karan Singh v. State of Madhya Pradesh* it was held that when the witness turned hostile after making statement under Section 164 Cr PC, the court

will always have to take a very cautious decision while referring to the statements of such witnesses who turn hostile or go back from their earlier statements recorded, particularly, under Section 164 of the Cr PC. What value should be attached and how much reliance can be placed on such statement is a matter to be examined by the Courts with reference to the facts of a given case.

Likewise in *Attar Singh v. State of Maharashtra*, the Supreme Court reiterated that it is, therefore, open to the Court to consider the evidence and there is no objection to a part of that evidence being made use of in support of the prosecution or in support of the accused. If the evidence of a hostile witness is corroborated by other evidence, there is no legal bar to convict the accused. It was held that if some portion of the statement of the hostile witness inspires confidence, it can be relied upon. He cannot be thrown out as wholly unreliable.

In *Anjanappa v. State of Karnataka* the above principles were reiterated.

28. In the present case, this Court, therefore, agrees with the submission of Mr. Sud that the statements of the three children under Section 164 Cr PC cannot be looked into as substantive piece of evidence. Their statements can at best be used for confronting the children in their examination in Court. This legal position remains notwithstanding the fact that PW-18 has spoken to the statements being made before him voluntarily and his not being cross-examined on that aspect by counsel for the defence. At the same time, as explained by the Supreme Court in *Bhajju @ Karan Singh* the Court will have to examine what value should be attached and how much reliance can be placed on such statement.

29. Turning to the cross-examinations of PW-2, she stated therein that the three accused, the deceased and the children used to reside in the same house. She further stated that on the date of the incident the deceased gave us food and we slept.

She further stated that A-1 was not in the house but A-2 and A-3 were in the house. They were correctly identified by her in the Court. PW-2 stated that in the next morning she saw a crowd in the house. She was told by grandmother (A-2) who was present in the Court that her mother had died. In her cross-examination

PW-2 stated:

My statement was recorded by police. I had informed the police that on 15th October 2007 after 8 pm my father started beating to my mother and was quarrelling with her. Vol. It was heard by me so I informed the police about it. It is correct that I have not stated to the police that I have heard about it and not seen it.

(emphasis supplied) 30. PW-2 also made the following statements in her crossexamination:

It is correct that next date when police came they took us out from the room. It is incorrect to suggest that when police came to our house my Dadi had locked us inside the room. Confronted with portion E to E of the statement Ex.PW2/A wherein it is so recorded. It is correct that my statement was recorded by learned M.M.

31. When PW-3 was examined, he confirmed that on the date of the incident all the accused were present in the house. He too stated that his mother gave them food and they slept. He stated that A-1 was not in the house but A-3 and A-2 were present in the house. He too stated that A-2 was present with the children and informed them that their mother had died. When cross-examined by the learned APP, PW-3 stated that he did not tell the police that A-1 was beating the deceased on that date. He too stated that on the next day when the police came they took us out from the room but denied that A-2 had locked them inside the room. He admitted that statement was recorded by the learned MM. As regards PW-7, he too admitted that his statement had been recorded by the learned MM but immediately stated that he could not remember that fact.

32. It appears from the above depositions that the prosecution can rely on the confirmation by PW-2 and PW-3 that the accused were residing with the deceased and the children in the same house. The presence of A-2 and A-3 at the scene was spoken by to PW-2 and PW-3. PW-2 confirmed having informed the police that on 15 th October 2007 after 8 pm A-1 started quarrelling with the deceased and beating her. She confirmed being locked inside the room at the time the police

reached there. At the time of incident she was 9 years of old. She was, older than her younger siblings, in a better position to understand what transpired on the night of 15th October 2007. Although the further details given by PW-2 in her statement under Section 164 Cr PC about the role played by each of the accused in causing the death of her mother cannot be looked into, the statements referred to hereinbefore made by her in Court are corroborated by the corresponding statements to the same effect made in her statement under Section 164 Cr PC. Importantly, it confirms the presence of A-1 on the night of 15th October 2007. Both PWs 2 and 3 confirm the presence of A-2 and A-3. The statement of PW-2 and PW-7 also supports the case of the prosecution and confirmed that A-3 was present when the police arrived at the crime scene. DW-1 confirms that A-1 too was present at that time. The above evidence does prove beyond reasonable doubt about the deceased being last in the company of the three accused. Motive for the crime 33. Elaborate submissions were made by Mr. Sud that the motive of the crime has not been proved at all by the prosecution in the present case. He submitted that no question has been put to the accused persons under Section 313 Cr PC in this regard. Mr. Sud submitted that the kalandra (Mark A) which has been referred to by the learned trial Court to show that there was a quarrel between the deceased and A-1 regarding the house cannot be looked into at all for the purpose of motive since it was not proved in accordance with law.

34. The Court agrees with Mr. Sud on this aspect. However, even if the kalandra is kept aside, the fact of there being a quarrel between A1 and the deceased in the evening shortly before the murder has been spoken to, without contradiction, by PW-2. Since the accused were living together with the deceased and the children in the same house and given that it is a small house of 50 sq. yds, clearly the quarrel must have been heard by everyone. Also, Mr. Sud is not entirely right in his submission that there was no question regarding motive of the crime put to the accused under Section 313 Cr PC. There was a specific question (Question No.24) regarding the quarrel between the deceased and A-1 on the night of 15th October 2007.

35. On the question of motive in Suresh Chandra Bahri v. State of Bihar 1995 Supp (1) SCC80 the Supreme Court observed that the absence of proof of motive

does not render the evidence bearing on the guilt of the accused unreliable. It held:

21. At the very outset we may mention that sometimes motive plays an important role and becomes a compelling force to commit a crime and therefore, motive behind the crime is a relevant factor for which evidence may be adduced. A motive is something which prompts a person to form an opinion or intention to do certain illegal act or even a legal act but with illegal means with a view to achieve that intention. In a case where there is clear proof of motive for the commission of the crime it affords added support of the finding of the court that the accused was guilty of the offence charged with. But it has to be remembered that the absence of proof of motive does not render the evidence bearing on the guilt of the accused nonetheless untrustworthy or unreliable because most often it is only the perpetrator of the crime alone who knows as to commission of the crime.

36. In the present case, the incident of quarrel on the night of 15th October 2007 involving A-1 and the deceased, in the presence of the other accused, as spoken to by PW-2 cannot be brushed aside. The Court rejects the submission of the accused that the case of the prosecution must fail since it has been unable to prove the motive for the crime. In any event, this has to be seen in the context of the other evidence which will be discussed hereafter. As has been reminded by the Supreme Court in the above decision, ultimately it is the perpetrator of the crime alone who knows as to commission of the crime.

Section 106 Evidence Act 37. The Court next turns to an important circumstance regarding the discovery of the dead body of the deceased. The accused in the present case were unable to explain how the dead body of the deceased was lying in the (diwan) inside the house where they all lived together. Recovery of the dead body of the deceased is spoken to not only by the children (PWs 2 and 4), the police witness but even the accused A-1 does not deny this fact in her statement under Section 313 Cr PC (Question No.4). As rightly pointed by the Mr. Goswami, in the above circumstances Section 106 of the Evidence Act cast the burden on the accused to give an explanation since what happened inside the house in which they all lived together was exclusively in their knowledge. Section 106 of the

Evidence Act states when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

38. In *State W.B. v. Mir Mohd. Omar* (2000) 8 SCC382 the accused forcibly dragged the deceased Mahesh from the house where he was taking shelter on account of fear of the accused and took him away at about 2.30 am. Next day in the morning the mangled body of Mahesh was found lying in the hospital. The accused failed to explain as to what was happened to the deceased after he was abducted by them. The trial Court in that case held that there was a missing link in the chain of evidence after the deceased was last seen together with the accused persons and till the discovery of the dead body in the hospital. It granted the accused the benefit of doubt. However, the Supreme Court disagreed. In the context of Section 106 of the Evidence Act, it explained the law as under:

"1. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty.

32. In this case, when the prosecution succeeded in establishing the afore-narrated circumstances, the court has to presume the existence of certain facts. Presumption is a course recognised by the law for the court to rely on in conditions such as this.

33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it

thinks likely to have happened. In that process the court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case.

34. When it is proved to the satisfaction of the court that Mahesh was abducted by the accused and they took him out of that area, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning process would enable the court to draw the presumption that the accused have murdered him. Such inference can be disrupted if the accused would tell the court what else happened to Mahesh at least until he was in their custody."

39. In *Trimukh Maroti Kirkan v. State of Maharashtra* (2006) 10 SCC681 the Supreme Court observed:

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.

(emphasis supplied) 40. In the same decision, the Supreme Court further observed:

In a case based on circumstantial evidence where no eyewitness account is available, there is another principle of law which must be kept in mind. The principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of

circumstances to make it complete.

(emphasis supplied) 41. In *Sarojini v. State of M.P.* 1993 Supp (4) SCC 632 the Supreme Court explained the circumstances under which Section 106 of the Evidence Act can be relied upon to convict the accused. Although in that case the accused were not shown to be present when the deceased died, they were convicted on the ground that they were the occupants of the house where she was found dead.

42. Mr. Sud relied upon the decision of the Supreme Court in *Sharad Birdichand Sarda v. State of Maharashtra* AIR 1984 SC 1622 and submitted that the failure by an accused to offer an explanation can only constitute an additional link to complete the chain. The above submission overlooks the fact that in *Sharad Birdichand Sarda* the Supreme Court was not examining the legal position under Section 106 of the Evidence Act. The discussion in that case was essentially as regards a false explanation or a false defence raised by the accused when asked questions under Section 313 Cr PC. This becomes clear from the following passage:

158. It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier, viz., before a false explanation can be used as additional link, the following essential conditions must be satisfied: (1) various links in the chain of evidence led by the prosecution have been satisfactorily proved. (2) the said circumstance point to the guilt of the accused with reasonable definiteness, and (3) the circumstance is in proximity to the time and situation.

159. If these conditions are fulfilled only then a court can use a false explanation or a false defence as an additional link to lend an assurance to the court and not otherwise....

43. In any event, the failure by the accused to explain the important circumstance of the discovery of the dead body from inside a box diwan in the house in which they resided with the deceased would be an additional factor that weighs heavily

against them. Even though the above observations of the Supreme Court in Sharad Birdichand Sarda were made in the context of a false explanation, the failure by the accused in the present case to offer an explanation in terms of Section 106 of the Evidence Act as to how the dead body of the deceased with so many fatal injuries was lying in the box in the diwan inside their house must constitute an additional factor in the chain of circumstances which will be adverted to hereafter.

44. In the present case the Court has no hesitation in holding that the accused have totally failed to explain. This is indeed a strong inculpatory circumstance against the accused that has been proved beyond all reasonable doubt. The conduct of the accused 45. The fact remains that the accused did not inform the police despite the foul smell emanating in the house. This conduct of the accused showed their complicity in the crime. The medical evidence, which has not been countered, unmistakably proves that the cause of death was the combined effect of asphyxia produced by manual strangulation and stab injury over the chest. The dead body had 14 incised injuries. Considering that the deceased was a well built lady with a height of 54, the brutal and violent murder could not have been committed by an individual or even two persons as rightly noted by the learned trial Court. The deceased was obviously overpowered by at least three persons acting in concert. The learned trial Court therefore rightly opined that it was a premeditated action. Questions under Section 313 Cr PC46 Mr. Sud next submitted that there was no question under Section 313 Cr PC put to the accused as regards the cause of death. According to him the failure to put a question about the report of the FSL and with the regard to the common intention of the accused in committing the murder of the deceased was fatal to the case of the prosecution. He referred to the decision of the Supreme Court in Sujit Biswas v. State of Assam 2013 AIR (SC) 3817 and submitted that the failure to seek explanation as regards the incriminating circumstances associated with the accused is a serious illegality which vitiates the entire trial. Reliance was also placed on the decision in State of Maharashtra v. Sukhdeo Singh 1993 SCC700In reply, Mr. Goswami referred to the decisions in Suresh Chandra Bahri v. State of Bihar and Shobhit Chamar v. State of Bihar AIR 1998 SC1693and urged that the accused must show that failure to put a question caused actual and material prejudice and had resulted in a failure of

the justice.

47. In the present case, the questions put to the accused persons under Section 313 Cr PC included the following:

Q.7. It is further in evidence against you that PW2 Nivedita, PW3 Surya and PW7 Siddharth told the police officials that their mother Urmila has been murdered by you and your co-accused persons.

48. This has to be read with questions 4 and 18 which read as under:

Q.4 It is further in evidence against you that you and your co-accused Lakhpati was found present and a dewan was lying inside the room and foul smell was coming from dewan. On opening the dewan, a dead body of a lady soaked with blood was found lying there and the dead body was identified as of Urmila. Q.18 It is further in evidence against you that the dead body was sent for post-mortem and post-mortem report prepared by PW-8 Dr. G.A. Sunil is Ex.PW8/A and subsequent opinion as to the weapon of offence in which it was opined that injury No.6,8,9,10,12 and 14 could have been caused by Ex.P-11, is Ex.PW8/B. What you have to say?.

49. In other words only the incriminating circumstances concerning death of the deceased and the involvement of the accused have been put to the accused under Section 313 Cr PC. In *Bijoy Chand Potra v. State of W.B.* AIR 1952 SC105 the Court was dealing with inter alia Section 342 Cr PC of the Cr PC 1898 (equivalent to Section 313 of the Cr PC 1973). The Supreme Court held that it was not sufficient for the accused to merely show that he was not put a question but further that the failure to put such question had materially prejudiced him. In *Suresh Chand Bahri v. State of Bihar* it was observed:

26 It is no doubt true that the underlying object behind Section 313 Cr PC is to enable the accused to explain any circumstance appearing against him in the evidence and this object is based on the maxim *audi alteram partem* which is one of the principles of natural justice. It has always been regarded unfair to rely upon any incriminating circumstance without affording the accused an opportunity of

explaining the said incriminating circumstance. The provisions in Section 313, therefore, make it obligatory on the court to question the accused on the evidence and circumstance appearing against him so as to apprise him the exact case which he is required to meet. But it would not be enough for the accused to show that he has not been questioned or examined on a particular circumstance but he must also show that such non-examination has actually and materially prejudiced him and has resulted in failure of justice. In other words in the event of any inadvertent omission on the part of the court to question the accused on any incriminating circumstance appearing against him the same cannot ipso facto vitiate the trial unless it is shown that some prejudice was caused to him.

50. In the present case the substance of the evidence has been put to the accused under Section 313 Cr PC. However, the accused has not shown that this resulted in a failure of justice. The mere failure to put the cause of death as opined by the doctor to the accused has not been shown to have caused prejudice to the accused. In *Shobhit Chamar v. State of Bihar* it was held that a challenge to conviction based on noncompliance of Section 313 Cr PC should not be entertained unless the accused has demonstrated that prejudice has been caused.

51. The Court accordingly rejects the plea that the failure to put questions to the accused about the incriminating evidence is fatal to the case of the prosecution. The recovery of the sword 52. Mr. Sud then submitted that the manner in which the prosecution has gone about conducting the recovery of the sword based on the disclosure statements of A-1 and A-2 at instance of A-3 makes the entire case unbelievable. It was submitted that there were inconsistencies in the so-called depositions of A-1 and A-2 with regard to the sword. While A-1 is stated to have disclosed that I and my brother have hid the sword on the roof of the neighbouring house which I can get recovered, A-3 stated that I had thrown the blood stained sword on the roof of the house, i.e., the place of occurrence.

It was submitted that even the police witnesses were inconsistent as regards the manner of recovery of the sword. PW-9 stated that a sword was lying at the house. However, the photographs of the site or even the site plan did not mention the sword. PW-12 stated that the sword was recovered from their possession (A-2 and

A-3).

53. Mr. Sud criticised the following statement made by the PW-20 in his cross-examination as regards the recovery of the sword. The said passage reads as under:

I have not accompanied accused Surinder to bring the sword from the tin shed. Vol. I remained station at the roof of the accused house and accused Surinder brought it from the tin shed of the neighbouring house. I cannot say the approximate measurement area of the tin shed or of the neighbouring house from where the sword was recovered. I cannot say the approx measurement area in the tin shed or of the neighbouring house from which the sword was recovered. I do not remember now if there were occupants present in the neighbouring house from where the sword was recovered or it was lying vacant. I did not call any occupant of that house to join the investigation. The tin shed was covering the entire portion of the house from the upper side.

54. The Court does not find the above statement of PW-20 to be inconsistent with the other evidence. It is quite possible that it was A1 who recovered the sword.

55. Mr. Sud submitted that there was no satisfactory evidence of the receipt of the sword by PW-8. There was also no link evidence which would show that the sword had been not tampered with. There was no blood on the sword. According to him, the fact that the sword was in a slightly bent condition meant that the cut injuries noticed by PW-8 could not have caused by it. It is also submitted that the relevant entries to show that the sword was collected from the malkhana and sent to PW-8 for his opinion and the receipt back of the sword from him again have not been proved at all.

56. The fact of recovery of the sword from the roof of the adjacent house was spoken consistently by the police witnesses. Both PW-11 and PW-12 corroborated the above evidence by stating that the sword was recovered at the instance of A-1. The evidence of PW-8, which has been remained unchallenged, reveals that he saw the seals on the pullanda. No question was put to him as regards the tampering of the sword. No question was put to him that the sword was bent and

therefore could not have caused the incised wounds on the deceased. This Court also does not find merit in the submission of Mr. Sud that there was inordinate delay in getting the opinion on the sword. The sword was sent to PW-8 on 27th October 2007, i.e., within ten days of the date of occurrence and his opinion was obtained within ten days thereafter.

57. Mr. Sud submitted that there was a failure by the police to seize the lock and key of the room where the children were found. Mr. Goswami candidly stated that the lock and key were in fact not seized. The children were found locked in the said room which lock was opened by A-2 in the presence of the police. The failure by the prosecution to seize the lock and key is by itself not material. What is important is that the children (PWs 2, 3 and

7) have consistently stated that when the police arrived, the room in which they were locked was opened and they came out. Medical Evidence 58. Mr. Sud submitted that the medical evidence in the present case was wholly inadequate to conclude that the death had taken place 2-3 days prior to the date of the post-mortem. According to him, the inquest papers were not sent to the post-mortem doctor and this was a serious lapse in terms of Section 174 Cr PC. He referred to the death report which had placed the time of death at 1-2 days prior thereto and not to 2-3 days prior to the date of post-mortem. There were, therefore, inconsistencies in the two reports. According to Mr. Sud, the photographs of the body do not show that the death had taken place 2-3 days prior to the date of the post-mortem. The mere fact that there was a foul smell did not prove the actual time and date of the death. There were no maggots found on the body and therefore, the time of death as opined by the doctor was incorrect. He relied upon the decision of the Supreme Court in *Rupchand Chindu Kathewar v. State of Maharashtra* (2009) 17 SCC37 59. As already noticed, the death took place in the month of October 2007. The post-mortem report shows that there was greenish discolouration over the lower abdominal wall. Marbling was seen over upper chest and back. The face was suffused and congested.

60. Mr. Goswami placed reliance upon the medical literature which explained that there was an enormous loss of blood, as in the present case, the rate of

putrefaction may be slower. The medical literature placed by him before the Court is titled Lecture Notes of the Department of Forensic Medicine, University of Dundee and it states:

The rate of putrefaction is influenced by the bodily habitus of the decedent; obese individuals putrefy more rapidly than those who are lean. Putrefaction will be delayed in deaths from exsanguinations because blood provides a channel for the spread of putrefactive organisms within the body. Conversely, putrefaction is more rapid in persons dying with widespread infection, congestive cardiac failure or anasarca. Putrefaction is accelerated when the tissues are oedematous, e.g., in deaths from congestive cardiac failure, and delayed when the tissues are dehydrated.

(emphasis supplied) 61. In any event as already pointed out, PW-8 who conducted the post-mortem, was not cross-examined on this aspect by counsel for the accused. The unchallenged opinion of PW-8 as to the approximate time of the death fully supports the prosecution case. Section 154 Cr PC 62 Mr. Sud next submitted that the failure to comply with the requirement of Section 154 Cr PC in terms of sending the FIR to the Magistrate was a fatal omission. In that context, he referred to the decisions in *Balwant Singh v. The State* 1976 CLR (Delhi) 41, *Swaran Singh v. State* 1981 CrL LJ364 *Om Prakash v. State* ILR (1979) II Delhi 355, *Girish Yadav v. State of M.P.* 1996 SCC (CrL) 552 and *Bir Singh v. State of Uttar Pradesh* 1977 (SCC) CrL.

640. 63. The Court finds that there was no question put to the police witnesses as to the sending of a copy of the FIR to the Magistrate. PW-10 in his deposition stated as under:

On 17th October 2007, I was posted at P.S. Sarojini Nagar. At about 11.40 am Duty Officer had given me copy of the FIR of this present case, vide D.D. No.18A. I went to the DCPs office on official motorcycle, DL1N4953 and handed over the copy of the FIR to the concerned MM through Naib Court. Thereafter I came back to PS at about 3.40 pm and entered DD No.25A.

64. No question was put to the above witness to challenge him on the above statement. In the circumstances, the accused cannot now be heard to say that prejudice was caused or that there was failure by the prosecution to comply with the mandatory requirement of the law as regards sending a copy of the FIR to the magistrate. Circumstances proved beyond reasonable doubt 65. Before summarising the circumstances which stand proved beyond reasonable doubt, the Court considers it necessary to recapitulate the law on the subject. In *Sharad Birdhichand Sarda v. State of Maharashtra*, the Supreme Court spelt out the following five principles (or panch sheel) governing the law relating to circumstantial evidence:

1. The circumstances from which the conclusion of guilt is to be drawn should be fully established; 2. The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty; 3. The circumstances should be of a conclusive nature and tendency; 4. They should exclude every possible hypothesis except the one to be proved; 5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

66. On carefully examining the entire evidence and the impugned judgment of the learned trial Court, and after considering the submissions of counsel on both sides, the Court is of the considered view that the following chain of circumstances has been proved by the prosecution beyond reasonable doubt: (a) There was a quarrel between A-1 and the deceased in the evening of 15th October 2007 (b) On the morning of 17th October 2007, the dead body of the deceased was found lying in the diwan in the house where all the accused was residing. (c) Although A-1, the deceased and the children remained in one portion and A-2 and A-3 in another portion; both portions were in the same house which is a small house of 50 sq. yds. (d) None of the accused made a report to the police about a dead body lying in the house. (e) The police got information about foul smell coming from the house and possibility of there being a dead body in the house on the morning, i.e., 17th October 2007. (f) When the police arrived at the house at around 8.30 am on

17 th October 2007, they found A-1 and A-2 in the house in a scared condition and the dead body was discovered inside the box of the diwan. (g) The children were locked inside another room. When the room was opened the children were found in a shock and scared condition. (h) No explanation was offered by the accused as to how the dead body was in the house. (i) The medical evidence confirmed that there was a tear present over the cloth on left chest and abdomen was distended. Marbling was seen over upper chest and back. Face was suffused and congested. (j) The post mortem conducted by PW-8 revealed the cause of death to be the combined effect of asphyxia produced by smothering and manual strangulation and stab injury over the chest. The medical opinion was that death had taken place 2-3 days prior to the date of examination, i.e., 18th October 2007. (k) Based on the disclosure statement of A-1 the sword was recovered from the roof of the house adjacent to the house of the accused. (l) The nature of the injuries and the build of the deceased were such that the murder should have been the work of at least two or three persons.

67. The failure by the accused to offer an explanation under Section 106 of the Evidence Act is an additional circumstance which points to the guilt of the accused.

68. Mr. Sud referred to the decision in Subhash Chand v. State of Rajasthan 2002 (1) SCC702 in which it was noticed that human nature is too willing when faced with brutal crimes, to spin stories out of strong suspicions. Between may be true and must be true there is a long distance to travel which must be covered by clear, cogent and unimpeachable evidence by the prosecution before an accused is condemned a convict.

In the present case, however, the Court is satisfied that the five principles enunciated in Sharad Birdichand Sarda stand fully satisfied and that each link in the chain of circumstances noticed hereinbefore has been proved beyond reasonable doubt. Individual role of each accused 69. As regards the individual role of each of the accused, the Court notices that as far as A-1 is concerned, the fact that he had a quarrel with the deceased the previous evening has been spoken of by PW-2. In his statement under Section 313 Cr PC, A-1 claimed that

he was in Gurgaon and was called by the police on the morning of 17th October 2007. A-1 has not led any evidence to prove that he was in Gurgaon that morning. He had a mobile and could have produced the call data records to establish his presence in Gurgaon on the days preceding the morning of 17th October 2007. He, however, failed to do so. Although DW-1 does state that A-1 came on that morning, i.e., 17th October 2007, he too does not dispute the fact that when the police came to the spot on 17th October 2007 both A-1 and A-2 were present. This does not rule out the presence of A-1 on the night of 15th October 2007 when the murder is shown to have taken place.

70. A-1 was an occupant of the house in which death body was found. For more than a day after the crime, neither he nor the other accused came forward to lodge a report with the police. His children were locked inside another room of the house and had to be released after the police had received information.

71. The Court rejects the plea that the murder was as a result of a sudden quarrel between the deceased and A-1. The large number of multiple and savage injuries caused to the deceased show that it was a pre-mediated action.

72. As regards A-2, her presence in the house throughout was not denied even by her. There was no evidence to show that she did anything to prevent the killing. On the other hand, the bruises on the wrists of the deceased show that she must have been held by one person while the other two strangulated and hacked the deceased to death. A-2 did not lodge a complaint with the police about the death of the deceased. She had no explanation to offer as to how the dead body was found in the very house where all of them were residing. She was present when the police arrived at the spot and appeared perturbed. All the above circumstances and her conduct unmistakably reflect her complicity and participation in the crime. The mere fact that there were no injuries on A-2 accused and her clothes had no blood stains do not by themselves rule out her role in the crime.

73. As far as A-3 is concerned, his presence in the house on the evening of the murder was spoken to by PW-2 and PW-3 in their examinations-in-chief. That part of their testimonies supports the case of the prosecution. While his abscondence from the house by itself may not be an incriminating circumstance when viewed

separately, it would certainly be a strong inculcating circumstance when viewed in the context of the other circumstances. A-3 did not surrender himself to the police till seven months later. For a person who lived with the family this was too unusual a conduct. The sword used to cause the brutal injuries was stated to belong to A-3 although it was recovered at the instance of A-1.

74. The prosecution has been able to prove the manner in which the occurrence took place as well as the common intention shared by A-1, A-2 and A-3 in the commission of the crime. No denial of proper legal representation 75. Finally Mr. Sud submitted that the accused, i.e., A-1, A-2 and A-3 were denied proper legal assistance in the learned trial Court and therefore, there was a grave miscarriage of justice. He placed reliance on the decisions in Mohd. Sukur Ali v. State of Assam 2011 (4) SCC729 Mumtaz v. State (Govt. of NCT of Delhi) 2013 8 AD (Delhi) 88, Sushil Sharma v. State of NCT of Delhi 2013 X AD (SC) 321, Sunil Damodar Gaikwad v. State of Maharashtra 2014 (1) SCC129 Kishore Chand v. State of Himachal Pradesh 1991 (1) SCC286 Majjal v. State of Haryana 2014 (1) SCC798 and M.H. Hoskot v. State of Maharashtra 1978 (3) SCC544 He also referred to the decisions in Mohd. Hussain v. State (Govt. of NCT of Delhi) (2012) 2 SCC584 and Mohd. Hussain-II v. State (2012) 9 SCC408 and the recent decision of this Court in State v. Sanjay Kumar Valmiki 2014 III AD (Delhi) 505. Mr. Sud also referred to the record of proceedings in the trial Court on two dates, i.e., 23 rd July 2009 and 27th October 2010 when Amicus Curiae for A-1 and A-2 did not appear before the trial Court.

76. The Court has perused the order sheets of the trial Court right from the inception of the case. The charge sheet was filed on 8 th January 2008 and the case was committed to the Court of the learned ASJ by an order dated 19th March 2008. The accused were directed to be present before the learned ASJ on 2nd April 2008. On that date learned counsel for the accused was present. On 9 th May 2008 the charges were framed when again learned counsel for the accused was present.

77. PW-1 was examined and discharged on 5th August 2008. PW-2 and PW-3 were examined and discharged on 6th August 2008. On these dates learned

counsel for the accused was present. On 7 th August 2008 PW-4, PW-5, PW-6 and PW-7 were examined and discharged. They were cross-examined by learned counsel for the accused. On 16th December 2008 PW-8 was examined. The proceedings show that despite opportunities learned counsel for the accused did not examine the witness. Although the order sheets does not show that learned counsel appeared for the accused the transcripts of evidence show that when opportunity was given to learned counsel for the defence to cross-examine the witness he did not avail of it. Even if it was presumed that there was no counsel present on that date no effort was made by the accused to file an application for recalling PW-8 for cross-examination.

78. On 22nd January 2009 the examinations-in-chief of PW-9 to PW13 were recorded. However since the accused stated that their counsel was not present, the cross-examination was deferred. The Court noted that when after examination the witnesses had left, the counsel engaged by the accused appeared and filed his vakalatnama. Therefore, it is plain that no cross-examination took place of the above witness in the absence of learned counsel for the accused.

79. The order sheet of 23rd July 2009 shows that Mr. Rajeev Jain appeared as Amicus Curiae for A-2. When on the aforementioned date he informed the Court that he had just received the instructions to appear in the matter and needed to go through the record, the Court did not proceed with the matter to accommodate the request of Mr. Jain. On 20th April 2009 at the request of learned counsel for A-1 who stated that his file had been left at the Tis Hazari Court, the trial Court adjourned the bail application for 28th April 2009. A similar request for adjournment on behalf of learned counsel for the accused was made on 28th April 2009 and granted.

80. On 6th August 2009 PW-14 and PW-15 were examined, crossexamined and discharged. The order sheet recorded that all the accused were present. Mr. Manjit Kapil, their Advocate, filed his vakalatnama on their behalf. The transcripts also show that a number of opportunities to cross-examine PW-14 and PW-15 were granted by the trial Court.

81. On 23rd April 2010 the bail application of A-2 was rejected. A-2 was represented by Mr. Joginder Tuli, learned Advocate. It is seen that there was another private counsel engaged by A-2. On 19th May 2010 Mr. Tuli represented all the accused. PW-9 was cross-examined and discharged. The cross-examination of PW-10 by Mr. Tuli did not take place despite opportunity. PW-12 was partly examined. On 26th July 2010 Mr. Tuli was present. PW-12 was examined, cross-examined and discharged. On 27th July 2010 Mr. Tuli was present and PW-13 and PW-16 were examined, cross-examined and discharged.

82. On 28th July 2010 Mr. Tuli was present and PW-17 ASI Mahesh Chand was examined and discharged. On 4th October 2010 proxy counsel, Mr. Sandeep Kumar, for Ms. M. Begum, Advocate for the accused appeared and sought an adjournment. PW-11 was present for cross-examination but a request was made on behalf of the Ms. Begum. The Court waited till 12.15 pm and discharged the witness. It is seen that the Court recorded that despite opportunities given, the witness was not cross-examined.

83. On 5th October 2010 PW-19 was examined and cross-examined. It may be noted that later this witness was recalled and cross-examined by another counsel Mr. Pankaj Kumar, learned Advocate for A-2 and A-3 on 8th December 2010.

84. On 6th October 2010 Ms. Begum, learned Advocate representing the accused requested for an adjournment on behalf of Mr. Ramesh Gupta, learned Senior Advocate and the learned trial Court accommodated the request and adjourned the case for 20th October 2010. The witness, PW-20, who appeared on 20th October 2010 could not be examined. On 23rd October 2010 PW-20 was partly examined and on 25th October 2010 PW-21 was examined and discharged. The transcript of the evidence PW-12 shows that no cross-examination was done despite opportunity granted. Again an adjournment was sought on behalf of Mr. Ramesh Gupta. On 27th October 2010 Mr. Ramesh Gupta, learned Senior counsel, extensively cross-examined the IO. Mr. Ramesh Gupta was appearing for A-1.

85. On 27th October 2010, the examination on behalf of A-2 and A-3 was deferred on the ground that Mr. Tuli was no longer their counsel and that they wanted to

engage another counsel. On 2 nd November 2010, Mr. Pankaj Kumar, Advocate for A-2 and A-3 cross-examined PW-20 (IO) at length.

86. It is therefore seen that throughout the trial, barring two occasions, private counsel appeared for the three accused. The learned trial Court accommodated several of their requests and deferred crossexamination or adjourned the proceedings. In the circumstances, the submission that legal representation was denied to the accused is factually incorrect. This is not a case where the accused were not represented by the counsel even at the stage of examination of the witnesses as was in the case of Mohd. Sukuri Ali v. State of Assam. This is also not a case where the Amicus Curiae appointed by the Court was given inadequate time to prepare himself for crossexamining the prosecution witnesses as was in the case of State v. Sanjay Kumar Valmiki. The record of proceedings before the learned trial Court shows that on the one date on which the Amicus Curiae made a request for adjournment, it was granted by the trial Court.

87. None of the decisions cited by Mr. Sud including Kishore Chand v. State of Himachal Pradesh apply to the facts of the present case. The Court is clear that this was not a case where there was a failure of justice on account of the accused being unable to engage counsel to defend themselves or being provided with incompetent legal aid counsel who could not properly cross-examine the prosecution witnesses. On the contrary private counsel, although they were more than one appearing for the accused, adopted a strategy, for reasons best known to them, not to cross-examine some of the prosecution witnesses and not to seek the recall of some of them for further crossexamination. It is, therefore, not possible for this Court to conclude that there was any failure or miscarriage of justice on account of the incompetence of any legal aid counsel. The transcript of evidence shows that wherever they choose to avail of the opportunity, the defence counsel were able to cross-examine the prosecution witnesses as well as any other counsel/Amicus Curiae. This Court, therefore, rejects the plea of Mr. Sud that the accused suffered on account of incompetent representation on their behalf during the trial.

88. For all the aforementioned reasons, the Court concludes that there is absolutely no error committed by the impugned judgment of the learned trial Court convicting the three accused for the offences under Sections 302/34/201 IPC. Sentence 89. The question that next arises is whether the trial Court was justified in awarding death sentence to all the accused for the offence under Section 302 read with Section 34 IPC subject to, of course, confirmation by the High Court under Section 366 Cr PC. Mr. Goswami submitted that the present case falls within the category of rarest of rarest case as a helpless woman murdered by the three accused in a most brutal and dastardly manner.

90. No doubt in the present case there has been homicidal death of the deceased and the cause of death was opined as the combined effect of asphyxia produced by manual strangulation and a stab injury over the chest. Yet this Court is not persuaded to hold that crime can be characterized, in terms of the aggravating circumstances illustratively set out in a Constitutional Bench decision of the Supreme Court in *Bachan Singh v. State of Punjab* 1980 2 SCC684 as a rarest of rare case.

91. The decision in *Bachan Singh* required the Courts to consider not only the crime but the circumstances in which the criminal was placed. In the instant case, however, the learned trial Court appears to have taken note essentially of the fact that an innocent helpless woman has been murdered in a very brutal manner by the accused persons in furtherance of their common intention. The trial Court has not analysed the role of each of the accused and the mitigating factors vis-a-vis each of them. The trial Court failed to apply the law explained in later decisions of the Supreme Court including *Santosh Kumar Satish Bhushan Bariyar v. State of Maharashtra* (2009) 6 SCC498. The Supreme Court has in *Shankar Kisanrao Khade v. State of Maharashtra* (2013) 5 SCC546 emphasized that tests that have to be applied while awarding death sentence were three-fold: the crime test, the criminal test and the R-R Test. It was not the balancing test.

92. The nominal roll of the three accused shows that their conduct in jail is satisfactory thus far. None of them were previous offenders. More importantly there was no material whatsoever placed by the State before the learned trial Court or

this Court which would help conclude that the three accused are likely to commit a crime in the future or are incapable of being reformed. After the decision in Bachan Singh, it was incumbent on the State to place before the Court the relevant materials touching on the character and social conduct of the three accused in order to fulfil the requirement of the law laid down by the Supreme Court. Unless the Court is satisfied that there are absolutely no mitigating circumstances, and that the case falls under the category of rarest of rare, it should not award the death sentence.

93. For the aforementioned reasons, the Court declines to confirm the death sentence awarded to each of the accused. The impugned order on sentence is modified by sentencing each of the accused to life imprisonment for the offence under Section 302 IPC read with 34 IPC.

94. Death Sentence Reference No.2 of 2011 and Criminal Appeal No.955 of 2011 are accordingly disposed of. S. MURALIDHAR, J MUKTA GUPTA, J.

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