Shaukat and Another Vs. State

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Court : Delhi

Decided On : Nov-24-2015

Judge : Sanjiv Khanna &Amp; R.K. Gauba

Appeal No. : Criminal Appeal Nos. 998, 861 of 2012

Appellant : Shaukat and Another

Respondent : State

Judgement :

Sanjiv Khanna, J.

1. Lakhinder and Shaukat by the impugned judgment dated 28th January, 2012 have been convicted under Section 302 read with Section 34 and Section 396 of the Indian Penal Code, 1860 (IPC, for short) for having committed murder and dacoity on Dina Nath at about 4.50 A.M near Shiv Mandir, Tulsi Nagar. Lakhinder has also been convicted under Section 412 IPC. By the order on sentence dated 31st January, 2012, the appellants have been sentenced to imprisonment for life, fine of Rs.10,000/- each and, in default of payment of fine, to undergo simple imprisonment for six months for the offence under Section 396 IPC. However, the impugned order on sentence records that, in view of the provisions of Section 71 IPC, no separate sentence was imposed for the offence under Section 302 read with Section 34 IPC and, in the case of Lakhinder, for the offence under Section 412 IPC (we have merely reproduced the order on sentence and are not

commenting on the same).

2. There is ample evidence to show that that the said Dina Nath was robbed and stabbed by three-four unknown persons at about 4.50A.M. on 12th June, 2010 near Tulsi Nagar Nala Road (see deposition of Vinod Kumar Sharma (PW-5), pujari of Shiv Mandir, Tulsi Nagar). Constable Dharamvir (PW-1) and ASI Veer Singh (PW-2) had taken Dina Nath to Hindu Rao Hospital where he was admitted for treatment at about 5.10 A.M. on 12th June, 2010 vide MLC Exhibit PW29/A (proved by Dr. Noor Ali (PW-29), who identified handwriting and signatures of Dr. M.D. Hassan). Dina Nath was declared unfit for statement and expired at about 10 A.M. on 13th June, 2010. Constable Dharamvir (PW-1) and ASI Veer Singh (PW-2) have testified that Dina Nath had informed them that he was stabbed by three to four boys, who then proceeded to steal his mobile phone and Rs.20-25/-.

3. Prosecution asserts that the two appellants, Lakhinder and Shaukat; Shahid @ Sheru (not arrested) and two juveniles had robbed and inflicted stab wounds on Dina Nath. The case set out in the charge sheet and before the trial court is entirely predicated on circumstantial evidence, viz: recovery of the mobile phone instrument of the deceased with IMEI No. 35523203719007 (1) from Lakhinder on 16th July, 2010, SIM card of the deceased Dina Nath bearing No. 9717146012 in the mobile instrument bearing IMEI No. 35905903158206(0) statedly used by Shaukat and call detail records (CDRs, for short). Statedly collaborative evidence is also relied upon to complete the chain of circumstances against the appellants. In order to appreciate and understand the prosecution case, it would be desirable, at first, to refer to the evidence relied upon against Lakhinder and Shaukat separately as this would be convenient and bestow clarity. To avoid repetition and incertitude, we would refer to the mobile phone instrument of the deceased with IMEI no. 35523203719007 (1) as the mobile instrument of the deceased and SIM Card of the deceased bearing no. 9717146012 as the SIM card of the deceased.

Case against Lakhinder

4. Lakhinder, as noticed above, was arrested on 16th July, 2010 at about 5.00 P.M vide arrest memo Exhibit PW-22/B and, as per seizure memo Exhibit PW-22/A, the mobile phone instrument of the deceased was recovered from him. At the time

of Lakhinder's arrest, the said mobile phone instrument had a SIM card with No. 9910922750 inserted in it. The said SIM card was also seized. It is important to note that the SIM card of the deceased was not recovered from Lakhinder.

5. CDRs of mobile SIM No. 9910922750 for the period between 1st June, 2010 to 30th September, 2010 marked Exhibit PW-20/E were proved by Vishal Gaurav (PW-20) of Bharti Airtel Limited, who also proved the certificate under Section 65B of the Indian Evidence Act, 1872 (Evidence Act, for short). This number was issued to Rama Nand, father of Lakhinder, as per customer application form marked Exhibit PW-20/C.

6. As per CDR Exhibit PW-20/E, SIM card with No. 9910922750 was inserted in the mobile phone instrument of the deceased at about 8.09 P.M. on 13th June, 2010. As noted above, Dina Nath was accosted, robbed and injured at about 5 A.M. on 12th June, 2010. The first use of the mobile instrument of the deceased with SIM card bearing No. 9910922750 is, therefore, nearly 40 hours after the instrument was stolen. We have to examine and adjudicate whether the presumption under Illustration (a) of Section 114 of the Evidence Act is sufficient to convict Lakhinder as one of the perpetrators. We shall also refer to other evidence presented against Lakhinder, when we expound and explain the reasons for our decision.

Case against Shaukat

7. Shaukat was arrested on 10th August, 2010 at about 10.45 P.M vide arrest memo Exhibit PW-22/F. The case against Shaukat is that he had used the SIM card of the deceased on the mobile instrument with IMEI No. 35905903158206 (0) and 3569001132469(0). As per CDRs of the SIM of the deceased marked Exhibit PW-20/B, the said SIM of the deceased was inserted in the mobile phone bearing IMEI No. 35905903158206 (0) for the first time on 13th June, 2010 at 11.34 P.M. The said SIM remained installed in the said instrument till 11.40 A.M. on 15th June, 2010. Thereafter, the SIM card of the deceased was inserted in another mobile phone instrument with IMEI no. 35696001132469(0) at 4.29 P.M. on 16th June, 2010 till 9.18 P.M. on 16th June, 2010. This mobile instrument, bearing IMEI No. 35696001132469(0), has not been recovered. It is the case of the prosecution

that Bhagwan Dass (PW-10), brother of Dina Nath, and Arun Singh (PW-9), friend of Dina Nath, had dialled and spoken to Shaukat on the SIM card of the deceased at 9.05, 9.07 and 9.18 P.M. on 16th June, 2010 when the said SIM card was inserted and being used in the mobile phone instrument bearing IMEI No. 35696001132469(0). We shall examine the said portion of their testimonies separately.

8. As per CDR Exhibit PW-20/B, the SIM card of the deceased was inserted in still another mobile phone instrument with IMEI No. 91000246063547(0) at 10.38 A.M. on 10th August, 2010 and the last call was at 5.48 P.M. on 10th August, 2010. Thereafter, the SIM Card of the deceased was inserted in yet another mobile phone instrument with IMEI No. 35532302045972(0) at 6.38 PM on 10th August, 2010 and the last call was at 7.17 P.M. on 10th August, 2010. As earlier recorded, Shaukat as per arrest memo Exhibit PW-22/F was arrested at 10.45 P.M. on 10th August, 2010. Neither the SIM card No. 9717146012 nor mobile phone instruments with IMEI No. 91000246063547 (0) or 35532302045972(0) have been recovered. We do not know and it has not been ascertained who was using the SIM Card of the deceased in the aforesaid instruments.

9. The question which arises in the case of Shaukat is whether the said insertion of the SIM card of the deceased in the mobile phone instrument bearing IMEI No. 35905903158206(0), assuming that the same was used by Shaukat, is sufficient to convict him for the robbery and murder of Dina Nath primarily predicated on the presumption under Illustration (a) of Section 114 of the Evidence Act. Other evidence, which is relied upon by the prosecution to implicate Shaukat has been noticed and examined below.

10. Mobile phone instrument with IMEI No. 35905903158206 (0), in which the SIM card of the deceased was inserted on 13th June, 2010 at about 11.34 P.M., as per the prosecution version, was recovered from Mohd. Taufiq (PW-28), cousin of Shaukat on 11th August, 2010 vide seizure memo Exhibit PW-22/K. We shall be referring to the debate and dispute regarding the said recovery and whether recovery from Mohd. Taufiq (PW-28) has been proved and, if established, would implicate the appellant Shaukat.

Other Evidence lead by the Prosection

11. Before we examine the ambit and scope of Illustration (a) to Section 114 of the Evidence Act, we would like to refer to other evidence relied on by the prosecution to implicate the appellants. Rajesh (PW-11), owner of a mobile shop at Anand Parbat has testified that he had sold SIM card No.9654575621 to one Pramod Sharma on the basis of his I.D. card, etc. PW-11 asserts that he sold SIM card No. 7838196086 to Shaukat on the basis of the I.D. card of Pramod Sharma but, for precaution, had affixed photograph of the Shaukat on the customer application form. Telephone No. 7838196088 as per customer application form marked Exhibit PW-27/A3 was issued in the name of Madhuri Devi (PW-17). Madhuri Devi (PW-17) has testified that she has not obtained the said number or signed the customer application form. Pramod Sharma (PW-12) has similarly deposed that he had not subscribed or obtained telephone No. 7838196086. Prosecution alleges that both telephone nos. 7838196088 and 7838196086 were used by Shaukat to communicate with Lakhvinder on mobile no. 9910922750. Prosecution relies upon CDRs of telephone nos. 7838196086 and another 7838196088 marked Exhibit PW-27/C2 and C3 to show that the two appellants were in touch with each other and were also in touch with telephone No. 9311577669 which, as per the customer application form marked Exhibit PW-25/B, was issued/allotted to one Ajmeri. The said Ajmeri or her daughter have not appeared and deposed. Again, the SIM card Nos. 7838196088 and 7838196086 have not been recovered. The CDRs of telephone Nos. 7838196088 and 7838196086 marked Exhibits PW-27/C2 and 27/C3 are relied upon the prosecution to impute that the users of these numbers were in touch with telephone no. 9654196927 issued and subscribed by one Ratti Ram (PW-13). Ratti Ram (PW-13) denies having procured the said number in his name. PW-13 also denies giving his ID or photograph to anyone for processing this number. The SIM card no. 9654196927 has not been recovered. The CDRs of 9654196927, marked Exhibit PW-27/C, were proved by Israr Babu (PW-27) who had also filed and proved a certificate under Section 65B of the Evidence Act marked Exhibit PW-27/D. The CDRs of telephone No. 9654196927 prosecution asserts would indicate that the said SIM Card was inserted in mobile phone instrument of the deceased at 9.41 P.M. on 12th June, 2010, i.e., after about 17 hours of the occurrence. As per the case of the prosecution, calls were

made from telephone no. 9654196927 to the telephone number of one juvenile on 12th June, 2010 at 9.41 P.M., and to the telephone no. 9910922750, i.e. telephone number of Rama Nand, father of Lakhinder, on 13th June, 2010 at 9.10 A.M. This SIM card was recovered from Lakhinder on 16th July, 2010 at the time of his arrest.

12. The CDRs marked Exhibit PW-27/C establish that the mobile phone instrument of the deceased was being used and was inserted with SIM card No. 9654196927 till 5.09 P.M on 13th June, 2010. The effect of this usage and insertion of SIM Card no. 9654196927 in the mobile instrument of the deceased has been examined by us subsequently.

13. At this stage, we would now like to examine the question of recovery of the mobile phone instrument with IMEI No. 35905903158206(0), statedly from Mohd. Taufiq (PW-28), cousin of Shaukat vide seizure memo Exhibit PW-22/K on 11th August, 2010. Head Constable Narain Dass (PW-22) and Inspector Naresh Chander (PW-31) have testified that this mobile phone instrument was taken out and brought from his jhuggi by Mohd. Taufiq (PW-28). Mohd. Taufiq (PW-28), however, asserts that he was taken to Police Station Sarai Rohilla on 11th August, 2010 and asked to handover the said mobile phone. Mohd. Taufiq (PW28) professes that he had purchased the mobile phone in question from the appellant Shaukat for Rs.900/-. The instrument with IMEI No. 35905903158206(0) was marked Exhibit P-2. In his cross-examination, Mohd. Taufiq (PW-28) changed his version and proclaimed that this mobile phone was handed over to the police only on 12th August, 2010 at 12 noon, as on 11th August, 2010 this phone was not in his possession, having been given for repairs. We are not inclined to accept this version given by Mohd. Taufiq (PW-28) in view of the seizure memo of the mobile phone marked Exhibit PW-22/K, which is dated 11th August, 2010. We would also observe that Shaukat was aware that the mobile phone instrument with IMEI No. 35905903158206(0) was with Mohd. Taufiq (PW-28).

Illustration (a) to Section 114 of the Evidence Act

14. With the aforesaid factual background and evidence, we would first examine the legal issue and effect of Illustration (a) to Section 114 of the Evidence Act and

its application to the facts in question. Section 114, illustration (a) of the Evidence Act, for the sake of convenience, is reproduced below:-

114. Court may presume existence of certain facts. ”The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume ”

(a) That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession; ?

15. Section 114 also highlights exceptional situations corresponding to each illustration, where the presumption may not be justifiably attracted. The exception applicable to Illustration (a) reads as follows:

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it: ” As to illustration (a) ” a shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business; ?

Presumptions under Section 114 give statutory recognition to inferences which would normally be drawn when the existence of background facts is established and proved. These presumptions, edificed on common sense principles, relate to presumption of facts. Section 114 postulates that Court may presume existence of any fact, which it thinks likely to have happened. Such inference should be drawn having regard to (i) common course of natural events, (ii) human conduct and (iii) public and private business. The Court, however, exercises discretion in raising such presumptions. Presumptions which are inferences of facts must be distinguished from presumptions in law, or legal fictions, for the presumptions under Section 114 are always discretionary and rebuttable.

16. The first portion of Section 114 is objective, while the last line of the provision requires consideration to be paid to the specificities of the case. Therefore, when deciding if to apply the presumption, the Court has to first elucidate upon and record findings on the facts of the case and, only then can it presume the existence of a fact which would logically follow these established facts.

17. Illustration (a) to Section 114 has been subject matter of several decisions of the Supreme Court in Wasim Khan versus State of U.P., AIR 1956 SC 400, Alisher versus State of Uttar Pradesh, AIR 1974 SC 1830 and Baiju versus State of Madhya Pradesh, AIR 1978 SC 522, but in order to avoid prolixity and repetition, we would refer to only two decisions: Limbaji and Others Vs. State of Maharashtra (2001) 10 SCC 340 and State of Rajasthan Vs. Talevar (2011) 11 SCC 666. In the latter decision, it has been held as under:-

Thus, the law on this issue can be summarised to the effect that where the only evidence against the accused is recovery of stolen properties, then although the circumstances may indicate that the theft and murder might have been committed at the same time, it is not safe to draw an inference that the person in possession of the stolen property had committed the murder. It also depends on the nature of the property so recovered, whether it was likely to pass readily from hand to hand. Suspicion should not take the place of proof. ?

18. Limbaji (supra) recorded that presumptions under Section 114, are drawn from the common experience of men and women, which would regard the fact when arising in a particular set of circumstances, to be so generally true that the Court may presume its existence in the absence of direct evidence. The facts of the particular case should, thus, be analysed through the lens of common sense and common experience to arrive at a conscious decision of whether to draw the presumption. To this effect and on this point, reference in Limbaji (supra) was made to Taylor's treaties on the Law of Evidence on the nature and scope of presumption similar to one in Illustration (a) to Section 114, the relevant portion of which reads as under:-

The possession of stolen property recently after the commission of a theft, is prima facie evidence that the possessor was either the thief, or the receiver, according to

the other circumstances of the case, and this presumption, when unexplained, either by direct evidence, or by the character and habits of the possessor, or otherwise, is usually regarded by the jury as conclusive. The question of what amounts to recent possession varies according to whether the stolen article is or is not calculated to pass readily from hand to hand.

This presumption which in all cases is one of fact rather than of law, is occasionally so strong as to render unnecessary any direct proof of what is called the corpus delicti. Thus, to borrow an apt illustration from Maule, J., if a man were to go into the London Docks quite sober, and shortly afterwards were found very drunk, staggering out of one of the cellars, in which above a million gallons of wine are stored, I think', says the learned Judge ” and most persons will probably agree with him ” that this would be reasonable evidence that the man had stolen some of the wine in the cellar, though no proof were given that any particular vat had been broached, and that any wine had actually been missed'. ?

19. The Supreme Court emphasized that the words soon after in Illustration (a) indicate that the test of recent possessionmust be satisfied when the court decides to apply the said Illustration. This time factor test would require analysis of several factors like the nature and character of the stolen property, i.e. whether it is freely and easily transferable, and the nature and conduct of the accused, i.e. whether he had absconded or concealed the stolen property, etc. When expensive and precious articles like ornaments, rare books, valuable paintings, etc. are stolen, the soon after test would be satisfied even if a long gap exists between the date of theft and the date of recovery from or at the behest of the accused. Reference was made to Earabhadrappa Vs. State of Karnataka (1983) 2 SCC 330, wherein the Supreme Court reiterated earlier judgments, remarking that no fixed time limit can be read into Illustration (a) to signify whether possession was recent or soon after ?. In some cases, such as when the accused has disappeared suddenly after the incident of theft or has absconded before he being caught and questioned, a period of even one year or more would not be too long. Secondly, presumptions envisaged by Illustration (a) to Section 114 can be extended to become the basis for conviction for a graver offence of robbery and murder, if they are a part of the same transaction. For Illustration (a) to apply to the aforesaid situation, it has to be

held: first, that there was theft by which the article was taken from the person, second, that the said theft was a component of robbery or dacoity and, third, the offender had caused hurt, attempted to cause death or had caused death. If all three are shown, the presumption would equally apply to graver offences. Lastly, on the question of the weight and evidentiary value being accorded in such cases relating to graver offences, the Supreme Court referred to Union Territory of Goa v. Beaventura D'Souza, 1993 SCC (Cri) 999, Surjit Singh v. State of Punjab, AIR 1994 SC 110 and Sanwat Khan v. State of Rajasthan, AIR 1956 SC 54 which fall in one line, and the decision in Gulab Chand v. State of M.P., (1995) 3 SCC 574 which falls in another line. The Bench then examined earlier decisions which follow a middle path between the two lines and wherein the presumption had been invoked as an additional reason to support a conclusion arrived at based on circumstantial evidence. The decision elucidates the facts which must be taken into account for the purpose of probative and evidentiary value, with reference being again made to the nature and character of the stolen goods; whether they are easily available and routinely dealt with, can be planted as evidence, frequently change hands, and the time gap existing between the occurrence and the recovery of the articles. In some cases, it will be proper to only infer that the accused, from whom recovery of the articles had been made, had received them or procured them. In other cases, it can be inferred that the accused had knowledge that the goods were stolen goods. Yet, in other cases, an inference may be made that the accused, who had produced the article, is guilty of murder as well. The Supreme Court referred to the observations in Sanwat Khan (supra), a decision of three Judges Bench, to the following effect:-

In our judgment no hard and fast rule can be laid down as to what inference should be drawn from a certain circumstance. Where, however, the only evidence against an accused person is the recovery of stolen property and although the circumstances may indicate that the theft and the murder must have been committed at the same time, it is not safe to draw the inference that the person in possession of the stolen property was the murderer. Suspicion cannot take the place of proof. ?

Gulab Chand's case (supra), it was observed, had been considered and explained in other decisions. In case of conflict between the decisions, greater weightage ought to be given to the dicta in Sanwat Khan (supra).

20. Where Illustration (a) applies and the test of recent possessionis satisfied, then the Court may draw a rebuttable presumption. This presumption can be negated when there is evidence already on record to the contrary (in which event, it is possible to urge that the presumption may not be drawn in the first place, in view of case specific facts) or when an accused offers an explanation by leading defence evidence or in his statement under Section 313 Cr.P.C. A fundamental principle of criminal law is to cast the burden of proof on the prosecution. However, this fundamental principle does not preclude application of Section 114; and a rebuttable presumption of an incriminating fact may still be drawn when supported by the facts of the case. It is only then that the accused is required to rebut the presumption by offering an explanation (see Mohd. Fazal versus State, Crl. A. No. 243/2009 decided on May 19th, 2014).

21. When we come to the factual matrix of the present case, it is evident as per the statements of Constable Dharamvir (PW-1) and ASI Veer Singh (PW-2), Dina Nath had been robbed and stabbed by the same perpetrators and, thus, the act of robbery and murder can be said to be a part of the same transaction. To this extent, the prosecution case is firm and established. Further, it is noticeable that the stolen or robbed articles in question were the mobile phone instrument with IMEI No. 35523203719007 (1) and SIM card with No. 9717146012. This mobile phone instrument was recovered from Lakhinder on 16th July, 2010, nearly one month and four days after the date 12th June, 2010, when Dina Nath was robbed and stabbed. However, the CDRs of SIM card No. 9910922750 indicate that Lakhinder had started using the mobile phone instrument of the deceased on 13th June, 2010 at 8.09 P.M. This significantly reduces the time difference between the robbery and the first use of the mobile phone instrument of the deceased with the SIM Card belonging to Lakhinder to about 40 hours. However, other evidence against Lakhinder connected with the use of the mobile phone of the deceased is sketchy and fractured. At best, it projects that the two appellants were in touch and knew each other and calls were made to common acquaintances or friends.

22. Error free CDRs with data like IMEI number give an equanimous assurance that the mobile phone instrument was used with the particular SIM card. CDRs with IMEI number, when authentic, would conclusively establish the calls made to and from the SIM card inserted and used in the mobile instrument for making or receiving calls. CDR data, therefore, lend great reliability and credibility as to the truth of the prosecution version. The chances of planting a mobile phone instrument or SIM Card, as incriminating evidence, are considerably reduced and greatly checked. Courts can, thus, rely upon the recoveries with a great degree of certainty and confidence. CDR data is an important and effective tool and evidence which facilitates and assists Courts in deciding whether or not to apply the presumption.

23. At the same time, it would be reasonable and proper to take judicial notice that there is a thriving market for second-hand mobile phone instruments. Pre-owned instruments change hands often and within a short time. A visit to any small or around-the-corner market is sufficient to acknowledge and accept that second hand phone instruments are sold and transferred freely and without hesitation, as neither the seller nor the purchaser are aware of the risk involved. Unlike ornaments or other articles of value, the sale and transfer of second hand mobile phone instruments, particularly those of lower value, is generally not treated with suspicion. Invariably, such transfers take place without proper documentation in the form of regular bills or vouchers. Of course, when there is evidence to show frequent sales or purchases with knowledge as to the antecedent of the seller, the effect of Sections 14 and 15 of the Evidence Act may have to be factored and examined.

24. Keeping in view the aforesaid factual position, the time gap of 40 hours in the present case, we have to hold, is substantial and not short or soon after for drawing the presumption, for during this period the mobile phone instrument of the deceased could have changed hands. In fact, the mobile phone instrument of the deceased was inserted with a SIM Card no. 965496927 at 5.09 P.M. on 13th June, 2010. There is no evidence to connect Lakhinder with this SIM Card, which was never recovered and the subscriber was never ascertained. We, therefore, do not think that it would be fair and correct to apply the presumption under Section 114

Illustration (a) only on the basis that the mobile phone instrument of the deceased was first used by Lakhinder on 13th June, 2010 at 8.09 P.M.

25. Faced with the aforesaid factual position, learned counsel for the State has submitted that the mobile phone instrument of the deceased with the SIM card of the deceased was used for making a call to the telephone number of Ajmeri (9311577669) at 6.38 A.M. on 12th June, 2010, i.e., within an hour of the occurrence. It is certainly correct and true that the time gap between the said call and the robbery is short and, if it was shown that Lakhinder had made the said call and spoken to the caller on 9377577669, the presumption under Section 114 Illustration (a) could be applied with full vigour. However, there is difficulty in accepting that Lakhinder must have made the said call from the mobile phone instrument of the deceased, which still had the SIM card of the deceased. Firstly, we do not know the caller who had received the call at 6.38 A.M. to telephone no. 9311577669. Customer application form of SIM Card no, 9311577699, marked Exhibit PW-25/B, gives the name of the subscriber as Ajmeri, but no enquiries have been made to ascertain and whether she was using the said SIM and who had made the said call and spoken to her. It is correct that CDRs of the number 9910922750, marked Exhibit PW-20/E, recovered from Lakhinder do show that calls were exchanged between Lakhinder and the number 9311577699, but then there are also calls to number 9311577699 by several others (see CDRs of telephone nos. 7838196088 and 7838196086).

26. Learned counsel for the State referred to CDRs of telephone no. 9654169927 marked Exhibit PW-27/C and submitted that this SIM had been inserted in the mobile phone instrument of the deceased on 12th June, 2010 at 9.41 P.M. Thereafter, calls were made to a telephone number of the juvenile, who had faced proceedings before Juvenile Justice Board at 9.41 P.M. on 12th June, 2010 and a call was made to the telephone number of Lakhinder (9910922750) at 9.10 A.M. on 13th June, 2010. There are difficulties in accepting the prosecution contention that this evidence implicates Lakhinder. The inference sought to be drawn is not acceptable. These facts may well go in favour of Lakhinder. SIM card No. 9654196927 has not been recovered. The said SIM card was issued to Ratti Ram (PW-13) but he denies having procured the SIM card. We also do not know the

telephone number of the juvenile, as the said details are not on record. The call from the mobile phone instrument of the deceased with SIM card no. 9654196927 on the telephone number of Lakhinder (9910922750) on 13th June, 2010 at 9.10 A.M. would possibly reflect that Lakhinder was not in possession of or using the mobile phone instrument of the deceased at that time. We cannot infer from the aforesaid facts that Lakhinder had used the mobile phone instrument of the deceased either on 12th June, 2010 at 9.41 P.M. or on 13th October, 2010 at 9.10 A.M. In these circumstances, merely on the basis of the recovery of the mobile phone of the deceased from Lakhinder on 16th July, 2010 and the fact that he had started using the said mobile phone instrument on 13th June, 2010 at 8.09 P.M., it is not safe and prudent to hold that the charge stands proven beyond doubt. At best, recovery of the said mobile phone would be a corroborative evidence but not sufficient or conclusive to hold that Lakhinder was involved and rule out involvement of another person, i.e. other than the appellant Lakhinder. Such involvement is not verily negated. It is pertinent to note that, as per Constable Dharamvir (PW-1) and ASI Veer Singh (PW-2), Dina Nath had, on the way to the hospital, avowed and implicated three or four unknown boys. As per the prosecution version, there were five persons or accused, including two juveniles, who were involved in the said occurrence. One perpetrator is yet to be arrested.

27. This brings us to the case against Shaukat who, it is claimed, had inserted and used the SIM card of the deceased in his mobile phone instrument with IMEI No. 35905903158206(0) on 13th June, 2010 at 11.34 P.M. There was a gap of about 30 hours between the said installation and the time of occurrence. This gap of 30 hours is not insignificant to dissertate the soon after test in the facts of the present case for the following reasons. Firstly, the SIM card of Dina Nath (9717146012) has not been located and seized. This SIM was used in another mobile phone instrument bearing IMEI No. 35696001132469(0) on 16th June, 2010 from 4.29 P.M. till 9.18 P.M and again in another mobile phone instrument on 10th August, 2010, i.e. the day on which the appellant was arrested. This reflects a frequent change of hands or multiple use. It is correct that Bhagwan Dass (PW-10) and Arun Singh (PW-9) profess that they had called the mobile number of the deceased 9717146012 on 16th June, 2010 at 9.05, 9.07 and 9.18 P.M., which is corroborated by the CDRs marked Exhibit PW-20/B, but we are not inclined to

accept the assertions by Bhagwan Dass (PW-10) and Arun Singh (PW-9) that they had spoken to a person who had divulged and introduced himself as Shaukat. The said allegations does not inspire confidence and were in all probability made after the witnesses were made aware that one of the alleged perpetrators was called Shaukat. The statements of Bhagwan Dass (PW-10) and Arun Singh (PW-9) under Section 161 of the Cr.P.C. were recorded on 28th September, 2010, i.e., after Shaukat was arrested on 10th August, 2010. The two witnesses did not make any such statement immediately after the calls on 16th June, 2010. Mobile phone instrument with IMEI No. 35905903158206(0) was not recovered from Shaukat but as per the prosecution version was found and handed over by Mohd Taufiq (PW-28), cousin of Shaukat on 11th August, 2010. Mohd. Taufiq (PW-28) claims that he had purchased the said phone from Shaukat for Rs.900/-. As the mobile phone instrument with IMEI No. 35905903158206(0) was not recovered from Shaukat, there can be some debate on the veracity of the version given by Mohd. Taufiq (PW-28) for if the said witness was using the mobile phone and had accepted earlier use, he would have been implicated instead of Shaukat. The evidence on record and proved is too precarious and feeble to be accepted and made the core foundation for convicting Shaukat in the given factual matrix.

28. Rajesh (PW-11)'s version that he had sold mobile SIM card No. 7838196086 to Shaukat also has some gaps, as the telephone connection was issued in the name of Pramod Sharma (PW-12) vide customer application form marked Exhibit PW-27/D2. Even if we accept this version of Rajesh (PW-11), the prosecution case would remain doubtful and unsure. The CDRs of telephone no. 7838196086, marked Exhibit 27/A3, would at best show that Shaukat was in touch with Lakhinder as well as with telephone No. 9311577669. However, it may not be possible to draw an affirmative or confirmatory inference from the said CDRs so as to implicate Shaukat with the murder of Dina Nath. Noticably, there is nothing to link and connect Shaukat with purchase or use of SIM no. 7838196088 purchased in the name of Madhuri Devi (PW-17). There are also calls from this number to Lakhinder and 9311577669. The said CDRs are a weak piece of evidence and only show that Shaukat was possibly using the SIM card with telephone No. 7838196086 and had remained in touch with telephone No. 9311577669, which was the telephone number to which a call had been made from the telephone

instrument of the deceased at 6.38 A.M. on 12th June, 2010. It may be noted that the said SIM card with telephone No. 7838196086 was not recovered from Shaukat.

29. Faced with the aforesaid situation, learned counsel for the State has referred to the statements of Lakhinder and Shaukat under Section 313 Cr.P.C. and relied upon decision of the Supreme Court in Dr. Sunil Clifford Daniel versus State of Punjab, (2012) CRL.L.J. 4657. The said judgment after referring to several earlier decisions elucidates the importance of the statement of the accused under Section 313 Cr.P.C. as this affords an opportunity to the accused to give an explanation as regards inculpatory circumstances put to him. It stands observed that if the accused fails to offer an appropriate explanation or gives a false answer, the said fact may be accounted as providing a missing link for the completion of chain of circumstances. In the present case, the appellants Lakhinder and Shaukat may have given vague answers in response to questions under Section 313 Cr.P.C., but we do not think the said answers by themselves can be counted as providing a missing link in the chain of circumstances. When we look at the evidence on record, proved and established cumulatively, it is clear to us that the prosecution case does not prove and establish that Lakhinder and Shaukat were the perpetrators, though there are indications that Lakhinder had used the mobile phone instrument of the deceased, but after a gap. As far as Shaukat is concerned, there are gaps and missing links to establish that he had used the SIM card of the deceased soon after the occurrence. The evidence would not indicate that Lakhinder and Shaukat, along with the juveniles or the unarrested person, were the perpetrators who had robbed and assaulted Dina Nath. The possibility of another person's involvement is certainly not ruled out or negated. Accordingly, the appellants Lakhinder and Shaukat are entitled to benefit of the doubt and should not be convicted for the murder and robbery of Dina Nath.

30. Conviction under Section 396 IPC requires five or more persons, who conjointly while committing dacoity commit murder. As per the versions given by two police officers, namely, Dharamvir (PW1) and ASI Veer Singh (PW2), Dina Nath had referred to presence of three or four boys. Dina Nath did not refer to the presence of 5 or more perpetrators. There is no evidence to indicate five or more

perpetrators.

31. Conviction of Lakhinder under Section 412 IPC would fail and has to be set aside for the same reason. However, looking at the evidence on record, we would hold that appellant Lakhinder did know or had reasons to believe that he had a stolen property with him. To this extent, he had acted dishonestly. Therefore, we would convert his conviction from Section 412 IPC to Section 411 IPC. Offence under Section 411 IPC is punishable with imprisonment of either description for a term which may extend to three years with fine or with both. We, accordingly, sentence the appellant Lakhinder to rigorous imprisonment for a period of two years and fine of Rs.10,000/-. In default of payment of fine, he shall undergo simple imprisonment for a period of six months. Section 428 Cr.P.C. would apply.

32. Resultantly, we dispose of the appeal, by acquitting Shaukat and setting aside his conviction under Section 302 read with Section 34 IPC and Section 396 IPC. Appellant Lakhinder's appeal is also partly allowed and his conviction under Section 302 read with Section 34 IPC and Section 396 IPC is set aside. Conviction of appellant Lakhinder under Section 412 IPC is converted to Section 411 IPC and the sentence is accordingly modified. Shaukat will be released, if he is not required to be detained in accordance with law in another case. Appellant Lakhinder would be released if he has already undergone the sentence imposed or upon undergoing and suffering the sentence awarded.