

Rajesh vs.state

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Court : Delhi

Decided On : Feb-24-2018

Appellant : Rajesh

Respondent : State

Judgement :

\$~ * IN THE HIGH COURT OF DELHI AT NEW DELHI + RESERVED ON : OCTOBER28 2017 DECIDED ON : FEBRUARY242018 CRL.A.373/2017 Appellant Through : Ms.Aishwarya Rao, Advocate. versus Respondent Through : Ms.Aashaa Tiwari, APP RAJESH STATE CORAM: HON'BLE MR. JUSTICE S.P.GARG HON'BLE MR. JUSTICE C.HARI SHANKAR S.P GARG, J.

1. Challenge in this appeal is a judgment dated 4.2.2017 of learned Additional Sessions Judge in Sessions Case No.

arising out of FIR No.228/2011 registered at Police Station New Usmanpur by which the appellant-Rajesh was held guilty for committing offences punishable under Sections 302 and 397 IPC read with Section 392 IPC. By an order dated 08.02.2017, the accused was sentenced to undergo Imprisonment for life with fine `5,000/- under Section 302 IPC and Rigorous Imprisonment for seven years with fine `5,000/- under Section

IPC. The sentences were to operate concurrently. Crl.A.373/2017 Page 1 of 18 2. Briefly stated the case of the prosecution, as reflected in the charge-sheet, was that on 25.06.2011 Anand Raut (since deceased) came to Delhi from Indore by train to take BEL examination scheduled for 26.06.2011 at Janakpuri. During his

journey, the victim met the appellant-Rajesh in the train at Ujjain and friendship developed between the two. Rajesh was aware of the topography of Delhi and assisted the victim to reach his examination-centre without any difficulty; he accompanied the deceased to the said spot. After the examination was over, PW-5 (Mahesh Prajapati), who had also come to Delhi to take BEL Examination at Rohini from Nimach, Madhya Pradesh contacted Anand Raut on telephone and they decided to meet at Chandni Chowk. Subsequently, they all stayed together at Bodh Vihar, Motia Khan, Paharganj during the night intervening 26/27.6.2011. In the morning next day i.e. 27.06.2011, they all left Bodh Vihar. PW-5 (Mahesh Prajapati) decided to go back to Nimach, Madhya Pradesh as he was suffering from some ailment. He took bus from Tis Hazari and went to his native place leaving both the appellant Rajesh and victim Anand Raut together in Delhi.

3. On 28.06.2011, PW-1 Dig Vijay Singh, a security guard on night duty at DDA Forest Area, 144 Hectare, Sumalia Charagah was informed by a passerby that a dead body was lying under Khadar area in front of the Metro Depot. He informed the police from his mobile number 9210564575 at 100. The information was recorded in the Police Control Room vide PCR call (Ex.PW16/A). Daily Diary (DD) No.6A (Ex.PW-11/A) came to be recorded at Police Station New Usmanpur, Delhi at 9.45 a.m. The investigation was assigned to SI Sunil Sharma CrI.A.373/2017 Page 2 of 18 (PW-25) who along with Const.Ram Naresh (PW-27) went to the spot. He lodged the FIR by sending rukka (Ex.PW-25/B). No eye witness was present at the spot. Necessary proceedings were conducted at the spot; the body was sent for post-mortem examination. Further investigation was taken over by PW-28 (Inspector Ratan Pal).

4. Further case of the prosecution is that on 30.06.2011 at about 2.00 p.m., the appellant was arrested from Bus Stand Harduaganj, Aligarh (U.P.); certain recoveries were effected from his possession and at his instance. Statements of relevant witnesses were recorded at various stages of investigation. Victims father participated in the Test Identification Proceedings and identified the articles carried by the victim. The exhibits collected during investigation were sent to Forensic Science Laboratory for examination. Upon completion of investigation, a charge-sheet was filed against the appellant Rajesh before the court for commission of the

aforesaid offences. To establish its case, the prosecution examined 29 witnesses in all. In 313 Cr.P.C. statement, the appellant denied his involvement in the crime and pleaded false implication. He examined DW-1 (Satya Prakash) and DW-2 (Amarwati) in defence. The trial resulted in his conviction as mentioned previously. Being aggrieved and dissatisfied, the instant appeal has been preferred by the appellant.

5. We have heard the learned counsel for the parties and have examined the file. At the outset, it may be mentioned that the entire case of the prosecution rests wholly on circumstantial evidence.

6. Homicidal death of the victim is not in dispute. Victim's body was found at a secluded place. PW-1 (Digvijay Singh), security guard, CrI.A.373/2017 Page 3 of 18 put the police machinery into motion when he came to know that a dead body was lying under Khadar area in front of the Metro Depot. Post-mortem examination report (Ex.PW-20/A) prepared by PW-20 (Dr.Neha Gupta) revealed that the victim had sustained incised cut throat wound measuring 19X0.1X2.5 cm deep present horizontally over thyroid cartilage, 7 cm below chin in midline. Cause of death was ascertained as haemorrhagic shock as a result of ante-mortem injury to the neck and associated blood vessels produced by a sharp edged weapon. Time since death was about 1 day. Apparently, it was a case of culpable homicide.

7. The prosecution has heavily placed reliance on the testimony of PW-5 (Mahesh Prajapati) who too had visited Delhi to appear in BEL examination at Rohini on 26.06.2011. He proceeded from Nimach for the said examination on 25.06.2011 at about 3.30 p.m. and reached Delhi on 26.06.2011 at around 8:00 a.m. In his court statement as PW- 5, he informed that he went to Rohini examination centre by Metro after alighting at Tis Hazari. After the examination was over, he made a telephone call from his mobile 9770208030 to his friend Anand Raut (since deceased) on his mobile No.8982613665. The conversation continued for about minutes and he was informed that Rajesh (the appellant) had met him (Anand Raut) in Ujjain and had assisted him to reach the examination centre at Janakpuri. He was also informed that Rajesh kept sitting outside the said examination-centre till the examination was over. Anand Raut told him to seek guidance from Rajesh

to reach Chandni Chowk. On Rajesh's guidance, he reached Chandni Chowk Gurudwara. From there, he made a telephonic call to CrI.A.373/2017 Page 4 of 18 Anand Raut who informed him that he had arrived at Red Fort. Anand Raut then alone came to Gurudwara and informed that Rajesh had taken his bag to keep it at the place where they were to stay at night. Thereafter, they both visited various places by a DTC bus and finally went to Bodh Vihar, Matia Mahal to take Anand's bag. When they were present in Pahar Ganj area, Rajesh made a telephone call to Anand Raut to ascertain their location. Subsequently, Rajesh came there and informed him that he was resident of Aligarh, U.P. Thereafter, they all took meals at a nearby Dhaba and went to sleep at Bodh Vihar. Since he (Mahesh Prajapati) was not feeling well, he slept early and woke up at about 8:00 a.m. next morning. Due to illness, he was advised by Anand Raut to return to his home. When he did not find any train available at Nizamuddin Railway Station, he came to Tis Hazari and reached Nimach by taking a bus from there at 6:00 p.m.

8. PW-5 (Mahesh Prajapati) was acquainted with the victim; they were classmates at Indore Engineering College. Mahesh had visited Anand Raut's house two or three times and the last visit was about four months back. Both had come to Delhi to take BEL examination scheduled for 26.06.2011. In the cross-examination, the witness revealed that the telephone call was made by him to Anand Raut in between 12 noon to 1:00 p.m. and its duration was about ten minutes. He further informed that since he was suffering from piles, he did not like to stay in Delhi and opted to go back to his native place. He left Matia Mahal at about 10.00 a.m. on 27.06.2011. None had come to see him off at Nizamuddin Railway Station. Rajesh met them at the city bus stand, Pahar Ganj, at about 8:00 p.m. There were 5-6 rooms in the CrI.A.373/2017 Page 5 of 18 Dharamshala at Matia Mahal. He denied the suggestion that Rajesh was not seen at any point of time with Anand Raut.

9. Conduct of PW-5 (Mahesh Prajapati) throughout is highly unreasonable and unnatural. His sudden departure from Delhi to his native place on the pretext of physical ailment on 27.06.2011 at about 10.00 a.m. is suspect. PW-5 (Mahesh Prajapati) did not get himself medically examined that day. Allegedly, the physical ailment which forced him to go to his native place was piles. The said disease was not so acute to compel the victim to immediately return to his native place leaving

behind his friend Anand Raut, more so, when he finally left Delhi at around 06.00 p.m. During this period, he did not have any conversation with the deceased; he did not inform the deceased about his availability till 06.00 p.m. in Delhi. During this period, he did not get himself medically examined. After reaching home at Nimach, Madhya Pradesh, he again did not have any contact with the deceased or Rajesh and even the victims parents. He did not bother to confirm if Anand Raut had reached safely at his native place. In the cross- examination, he disclosed that information about the victims murder was conveyed to him by the Investigating Officer at his house at village Sawan, Disst. Nimach, Madhya Pradesh. He, however, did not reveal the date and time when the incident was reported to him by the Investigating Officer. This witness did not claim if PW-3 (Shankar) had any conversation with him on 28.06.2011. PW-3 (Shankar), in his examination-in-chief, stated that on receipt of an information about the recovery of victims dead body, he had a talk on telephone with Mahesh Prajapati (PW-5) who told him that Anand Raut had met him in Delhi. CrI.A.373/2017 Page 6 of 18 He further informed him that he, Anand Raut and Rajesh to whom the victim had met in the train while coming to Delhi had stayed at night in Delhi. He also told him that due to his illness, he after leaving Anand Raut and Rajesh together in Delhi had returned to Indore. PW-5 (Mahesh Prajapati) did not corroborate PW-3s version on this aspect. PW-3 (Shankar) did not reveal the phone number on which the said conversation had taken place with PW-5 (Mahesh Prajapati). It was also not disclosed as to when and at what time the said information was conveyed by PW-5 (Mahesh Prajapati) to him. Call Details Records of mobile No.9770208030 of PW-5 (Mahesh Prajapati) have not been produced or proved to confirm it.

10. PW-3 (Shankar) further informed that the Investigating Officer had informed him on telephone about the recovery of the dead body in the area of New Usmanpur on 28.06.2011 and in-turn he had conveyed this information to his brother-in-law PW-4 (Kishan Yashwant Raut). PW-4 (Kishan Yashwant Raut) - victims father informed in his Court statement that after the examination was over, his son Anand Raut had lastly talked to him on phone. In the said conversation, Anand Raut had disclosed that he was with a boy namely Rajesh who had met him in the train at Ujjain. The victim further informed that Rajesh remained with him from the time of journey by train till the time of making telephone call to him. In

the cross-examination, the witness elaborated that the said conversation took place at around 07.45 - 08.00 p.m. for 5 - 7 minutes. Seemingly, PW-4 (Kishan Yashwant Raut) has not given correct statement. As per PW-5 (Mahesh Prajapati), the examination was over at around 12.00 noon. PW-5 (Mahesh Prajapati) further Crl.A.373/2017 Page 7 of 18 claimed that after the examination was over, he made a telephone call from his mobile No.9770208030 to Anand Raut on his mobile No.8982613665. At that time, Anand Raut informed him that he did not face any difficulty to reach the examination centre as Rajesh, resident of Delhi, who had met him in Ujjain was well aware about its topography and had taken him to the examination centre and he remained sitting outside the centre till the examination was over. However, Call Details Records of phone 8982613665 of the deceased Anand Raut (Ex.PW-14/G), do not reflect any such conversation between the two at that time. The investigating agency did not collect CDRs of PW-5s mobile and that of the deceased for the date 26.06.2011.

11. Phone Nos.8982613665 and 8982150470 were in the name of Jamna Bai and Kishan Raut (PW-4), respectively. Seemingly, both these phone numbers were with the victim during his visit to Delhi. Mobile phone No.9870807070 was that of victims father (PW-4), PW-3 (Shankar), his uncle had mobile No.9826213660. As per Call Details Records (Ex.PW-14/G) of the deceased on 25.06.2011, there were continuous SMSs by the victim to his father from 08.02 a.m. to 11.21 a.m. From the past call records it is evident that the deceased used to remain in touch with his father almost every hour via SMSs and sometimes by voice calls. After 11.21 a.m., two more calls have been made till 11.47 a.m., then the next call available is at 08.16 p.m. It is highly unbelievable that the victim who used to get in touch with his father almost every hour would not have any conversation till 08.16 p.m., after meeting a stranger to inform him about his stay in Delhi. It is Crl.A.373/2017 Page 8 of 18 further relevant to note that from 23.06.2011 to 25.06.2011, there were frequent SMSs made to the deceased from No.3532323730. The investigating agency did not verify this number. It was also not ascertained as to who was the caller from this number with whom the deceased was in regular touch by SMSs before coming to Delhi. Strange enough, the investigation did not collect any CDR of the mobile of the deceased after 25.06.2011.

12. The mobile number of PW-5 (Mahesh Prajapati) is 9770208030. As noted above, the investigation agency did not place on record any Call Details Records of his mobile number for any date. No explanation for this vital omission has been offered. The call details were crucial to ascertain PW-5s location during the relevant period and his possible conversation with the deceased and others. As per the Call Details Records produced on record, the victim had only a voice call with PW-5 (Mahesh Prajapati) on 21.06.2011. The other call details available are only for the date 25.06.2011 and thereafter that of 28.06.2011 to 30.06.2011. It is astonishing as to why the call details of the mobile phone of PW-5 (Mahesh Prajapati) for 26.06.2011 and 27.06.2011 are not placed on record. Adverse inference is to be drawn against the prosecution for withholding this vital piece of evidence.

13. Analyzing the Call Details Records of the mobile numbers of accused Rajesh - 9548553133 (in the name of his father Satya Prakash) and 9058950389 (in the name of his mother Amarwati), it transpires that the Call Details Records are from 20.06.2011 to 30.06.2011. From 28.06.2011 to 30.06.2011, the location of the mobile in the name of his father is at Aligarh. During this period frequent calls have been made Crl.A.373/2017 Page 9 of 18 to No.9927342911 at location Aligarh. The investigating agency did not verify as to whom mobile No.9927342911 belonged and where was its location. Regarding mobile in the name of accuseds mother available CDR is only for the date 29.06.2011.

14. The investigation carried out by the investigating agency is not up-to-the-mark; it is highly defective and deficient. The victim had reached Delhi from Indore by train on 25.06.2011 to take BEL examination scheduled for 26.06.2011. Allegedly, the accused Rajesh had met him at Ujjain and both of them became friends. The investigating agency did not ascertain as to by which train, the victim had travelled to Delhi. It was also not verified if Rajesh had met the victim at Ujjain; the purpose of Rajesh to visit Ujjain was not verified. It is also unclear if both Rajesh and the victim had travelled on reserved tickets or were having ordinary unreserved tickets. No material evidence has emerged to infer if both Anant Raut and Rajesh had met at Ujjain or had developed so much friendship / intimacy during journey that Rajesh would remain with the victim throughout on 26.06.2011 more so when

both were strangers and unacquainted with each other before that. It is again unbelievable that the victim would repose confidence or trust upon a stranger to handover him his bag containing various articles. Needless to say, correct facts have not been presented by the prosecution. It appears that the victim and the accused were having some acquaintance through someone before the incident and there was some specific purpose of their meeting and stay in Delhi on 26.06.2011 and this aspect has not been investigated by the investigating agency. Crl.A.373/2017 Page 10 of 18 15. Again, it is not clear as to at what particular place, the deceased had stayed on 25.06.2011 at night after arriving in Delhi. Their stay at Bodh Vihar on the night of 26.06.2011 is also mysterious. The prosecution examined PW-8 (Mahant Panyadeep) who used to stay at Bodh Vihar. He informed that on 26.06.2011 Rajesh along with two boys had come to Bodh Vihar at about 09.00 p.m. On the next day at about 08.00 /09.00 a.m. they all left. On 27.06.2011, he had seen Rajesh standing outside the bathroom while other boys were taking bath. He was unable to identify the boys who had accompanied Rajesh. He further informed that Rajeshs father Satya Prakash used to live at Bodh Vihar though he was not regular and used to stay at night only. Satya Prakash was doing the job of white wash. In the cross- examination, he further disclosed that Satya Prakash was living in Bodh Vihar for the last about 12 years; Rajesh used to visit Bodh Vihar. Again the investigation is highly lacking. It was not verified if the accuseds father Satya Prakash lived at Bodh Vihar for about 12 years. Case of the prosecution is that Satya Prakashes place of residence was at Aligarh. It has not been discovered if accused Rajesh used to visit Bodh Vihar, and if so, for what purpose. It was also not ascertained if the accused Rajesh was resident of Delhi or Aligarh. Satya Prakash (DW-1) claimed himself to be the resident of Bhim Nagar, Harduaganj, Distt. Aligarh, U.P. Nothing was suggested to him in the cross- examination that he used to stay at night at Bodh Vihar for so many years. Similar is the testimony of DW-2 (Amarwati) - accuseds mother. Nothing was enquired from DW-1 (Satya Prakash) and DW-2 (Amarwati) in the cross-examination as to what job or business the Crl.A.373/2017 Page 11 of 18 accused was doing. Nothing was enquired if Rajesh had gone to Ujjain, if so, when and for what purpose. It was not asked if Rajesh used to live at Delhi, and if so, for what purpose and since when.

16. After the abrupt departure of PW-5 (Mahesh Prajapati) on 27.06.2011 at around 10.00 a.m. the movements of the deceased with the accused have not been ascertained or proved. No material has come on record to show as to till what time, both the appellant and the deceased remained together. Post-mortem examination of the body of the victim was conducted on 29.06.2011 at around 12.00 p.m. Time since death was about one and a half day. It can reasonably be inferred that the murder took place in the night intervening 27/28.06.2011. Last seen circumstance relied upon by the prosecution is that both the victim and deceased were seen together on 27.06.2011 at around 10.00 a.m. when PW-5 opted to go to his native place due to his purported physical ailment. No evidence has however surfaced on record to infer if after 10.00 a.m. both the accused and deceased remained together, and if so, at what specific place(s). The time gap when the occurrence took place and the appellant was last seen in the company of the deceased is undoubtedly quite long. Possibility of others to be in the company of the victim during the interregnum period cannot be ruled out. PW-5 (Mahesh Prajapati) had no conversation with the victim after his departure on phone.

17. It is vehemently urged on behalf of the prosecution that the accused did not give plausible explanation to the incriminating circumstances proved against him in 313 Cr.P.C. statement and admitted possession of the mobile set belonging to the deceased. True, CrI.A.373/2017 Page 12 of 18 the mobile phone of the deceased was recovered from Rajesh; it is so admitted by him in 313 Cr.P.C. statement. He explained that it was handed over to him by the deceased as his mobile phone was not in working condition. This explanation needs outright rejection. However, mere recovery of the mobile set of the deceased from the appellants possession is not sufficient to prove and infer that he was the perpetrator of the crime or had committed victims murder. In a case where the charge is sought to be proved only on circumstantial evidence, motive plays an important part in order to tilt the scale. The motive to commit murder in the instant case is too bleak. The victim had come to Delhi to take exam; he did not have substantial cash or other valuable articles with him. It is highly unbelievable that the appellant would commit victims murder only to rob his mobile and other articles of daily use. It has come on record that the victim had ATM card of Canara Bank. PW-17 (N.K.Chaudhary) brought the bank account statement (Ex.PW-17/A) pertaining to victims account No.2622108010116

for the period from 01.01.2008 to 15.07.2013. In this account, there was no withdrawal of any cash by the appellant using the said ATM. This account had not huge cash prompting the appellant to commit the heinous crime. The appellant had enough opportunity to flee with the articles belonging to the deceased when admittedly the bag containing all these articles was handed over to him by the deceased while taking exam and the appellant had allegedly gone alone to keep it at Bodh Vihar. There was no occasion for the appellant again to meet the deceased in the company of PW-5 (Mahesh Prajapati) at Pahar Ganj where they all had taken meals in a nearby dhaba before going to Bodh Vihar. It is highly difficult to believe that the appellant would take all these articles of daily use to his native place at Aligarh and keep it with him at the time of his alleged arrest by Delhi police on 29.06.2011. The circumstances in which the appellants arrest has been shown on 29.06.2011 from his native place Bhim Nagar, Harduaganj, Distt. Aligarh, U.P. are unconvincing. PW-28 (Insp.Ratan Pal) was not aware as to who was the perpetrator of the crime till appellants arrest on 29.06.2011. Before that, he had already conveyed the information to the victims parents about the recovery of the body of the deceased and they had arrived in Delhi for its identification on 29.06.2011. They had not suspected the appellants involvement that time. It falsifies the statements of PW-3 (Shankar) and PW-4 (Kishan Yashwant Raut) that from conversation with PW-5 (Mahesh Prajapati) they had come to know that the victim had met Rajesh in Delhi and he remained in his company till the departure of PW-5 (Mahesh Prajapati). It is further to be noted that PW-5 (Mahesh Prajapati) also did not inform the investigating agency if Rajesh had met the victim and they all were in Delhi on 27.06.2011 till 10.00 a.m. As per the testimony of PW-28 (Insp.Ratan Pal), the Investigating Officer, he collected the mobile Nos.8982613665 & 8982150470 of the deceased from victims maternal uncle and put these numbers on surveillance. He further informed that he was able to trace IMEI numbers which were 352820038266140 and 352820038266150. The said IMEI numbers were used on mobile No.9548553133 and 8287181114 and their location was ascertained at Bhim Nagar, Harduaganj, Distt. Aligarh, U.P. Apparently, prior to this, involvement of the appellant in the crime was not to the knowledge of the investigating agency.

18. PW-28 (Insp.Ratan Pal) further disclosed that after having discussion with the senior officers, a raiding team was organized and they reached by a private vehicle at Bhim Nagar, Harduaganj, Distt. Aligarh, U.P. at around 11.00 p.m. on 29.06.2011. It came to their notice that the mobile phone used in the IMEI numbers was that of Rajesh, son of Satya Prakash. It was, however, not elaborated as to how the necessary information in this regard was collected. The police team did not visit the appellants residence that night and waited till the next morning to apprehend him. Allegedly, the appellant was arrested when the police team came to know that he had left his house along with a black colour bag a short while back. At a distance of about 100 - 150 meters from the place of getting this information, the appellant was apprehended standing with a black colour bag on the road side. It was, however, not informed as to how and who identified or recognized the appellant to be Rajesh, the person involved in the incident. The police team also did not consider it fit to visit or raid the appellants house to find out any incriminating piece of evidence. Local police was not informed about their arrival and appellants arrest. No independent public witness was associated at the time of appellants arrest and recovery of various articles from his possession. It is highly unimaginable that after committing horrible crime, the appellant would continue to keep with himself deceaseds articles of daily use having no substantial value, after two days of the crime. CrI.A.373/2017 Page 15 of 18 19. Recovery of the crime weapon i.e. knife pursuant to the appellants disclosure statement on 30.06.2011 from a place opposite metro depot towards Khadar side is also trustless. Again, at the time of alleged recovery, no independent public witness was associated or joined. The knife was allegedly recovered from a distance of 10 / 12 meters away from the crime spot. It was not disclosed if the crime weapon was lying at a place which was specifically in the appellants knowledge and it was not an open place accessible to the public at large. It does not appeal to mind that after visiting the spot at the time of recovery of the body, the police team would not make any efforts to find out the crime weapon in the surrounding area and the knife allegedly used would remain lying undisturbed for so many days at the spot. Besides this, mere recovery of the knife is inconsequential. No finger prints of the appellant were detected on the knife. It was also not got ascertained as to what blood group was found on the said knife. On 01.07.2011, efforts were made by the

investigating agency to find out the source from where the said knife was purchased or procured by the appellant. These efforts remained unfruitful and the police was unable to find out the shopkeeper/vendor, from whom the said knife was purchased or arranged by the appellant. The knife allegedly recovered was not shown to PW-20 (Dr.Neha Gupta) who had conducted post- mortem examination on the body to find out if the injuries sustained by the victim were possible with the said weapon.

20. It can be inferred from various circumstances brought on record by the prosecution that the appellant had met the victim in Delhi and possibly remained in his company for some duration. It is so admitted CrI.A.373/2017 Page 16 of 18 by him in 313 Cr.P.C. statement too. It is, however, absolutely unclear as to what was the specific purpose of their meeting in Delhi; it is also not sure as to till what time the victim and the appellant remained together. Appellants plea that he had visited Delhi for distribution of wedding cards of her sister has no base. Nothing material emerged on record if on any particular date, appellants sister was to be married or the purpose of appellants visit to Delhi was distribution of wedding cards. No such wedding card has been produced before the police. It was also not informed as to, to whom the wedding cards were to be delivered or if any such wedding card was actually delivered to any relative in Delhi during the relevant period. It was not explained by the appellant as to how he was acquainted with the victim and what prompted him to remain in his company throughout till 27.06.2011 at 10.00 a.m. The appellant has apparently not presented true explanation to the incriminating circumstances appearing against him in 313 Cr.P.C. statement. Settled position of law, however, is that the burden to prove its case remains upon the prosecution and it must stand or fall on its own legs. This burden never shifts and remains always upon the prosecution. It cannot derive any strength from the weakness of the defence. The appellant seems to be have some nexus with the crime as his conduct throughout is dubious; he did not furnish true and correct explanation to the incriminating circumstances against him i.e. when he met the victim; what led him to remain in the victims company and how the deceaseds mobile came into his possession. In 313 Cr.P.C. statement, he introduced a new story regarding a quarrel to have taken place over a girl between the PW-5 (Mahesh Prajapati) and the CrI.A.373/2017 Page 17 of 18 deceased. The dispute over a girl seemingly

was quite possible. It was, however, not investigated by the police as to who the said girl was and what was the cause of quarrel. Possibility of the girls associates to be instrumental in the elimination of the victim cannot be ruled out. Again, the law is clear that mere suspicion is not enough to record conviction. Suspicion, however, strong cannot take the place of proof of guilt. The evidence adduced by the prosecution to prove its case is highly deficient and scanty and cannot amount to legal proof to base conviction. The role of PW-5 (Mahesh Prajapati) in the entire incident has not been investigated with proper zeal and no attempt was made by the investigating agency to contact and confront him at the earliest or to visit him at his place of residence.

21. In the light of above discussion, impugned conviction based upon scanty evidence cannot be sustained and is set aside. The appellants appeal is allowed. Conviction and sentence recorded by the Trial Court are set aside. The appellant shall be released forthwith if not required to be detained in any other case.

22. Trial Court record be sent back forthwith with the copy of the order. Intimation be sent to the Superintendent Jail. S.P.GARG (JUDGE) C.HARI SHANKAR (JUDGE) FEBRUARY24 2017/sa/tr CrI.A.373/2017 Page 18 of 18

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