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Fahim vs.state

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Court : Delhi

Decided On : Feb-26-2018

Appellant : Fahim

Respondent : State

Advocate for Pet/Ap. : Mr. Harsh Prabhakar, Mr. Anirudh Tanwar, Mr. Harsh Singhal, Ms. Kusum Dhalla, Mr. Aditya Vikram, Mr. Avinash

Judgement :

$~ * + IN THE HIGH COURT OF DELHI AT NEW DELHI CRL.A. 997/2015 Reserved on:

6. h February, 2018 Decided on:

26. h February, 2018 SUNIL @ RAGHU ..... Appellant Through: Mr. Harsh Prabhakar, Advocate (DHCLSC) with Mr. Anirudh Tanwar and Mr. Harsh Singhal, Advocates. STATE + FAHIM STATE versus Through: Ms. Kusum Dhalla, APP. ..... Respondent AND CRL.A. 1053/2015 ..... Appellant Through: Mr. Aditya Vikram, Advocate (DHCLSC) with Mr. Avinash, Advocate. versus Through: Ms. Kusum Dhalla, APP. ..... Respondent CORAM: JUSTICE S. MURALIDHAR JUSTICE I.S. MEHTA JUDGMENT Dr. S. Muralidhar, J.:

1. These two appeals are directed against the judgment dated 16th October 2014 passed by the learned Additional Sessions Judge - II, Crl.A. 997/ 2015 & 1053/2015 Page 1 of 33 North West, Rohini Courts in Sessions Case No.24/2013

arising out of FIR No.313/2012 registered at Police Station (PS) Mahendra Park, convicting the Appellants Sunil @ Raghu (A-1) and Fahim @ Sonu (A-2) for the offences under Sections 3
IPC, Sections 377 and 511 IPC read with Section 34 IPC and Sections 3
IPC.

2. The appeals are also directed against the order on sentence dated 1st November 2014 whereby the two Appellants were each sentenced as under: (i) For the offence under Section 363 IPC to Rigorous Imprisonment (RI) for 7 years and fine of Rs.2,000/- and in default of payment of fine to undergo Simple Imprisonment (SI) for 15 days. (ii) For the offence under Section 377 read with Section 511 IPC to RI for 5 years and fine of Rs.5,000 and in default of payment of fine to undergo SI for one month. (iii) For the offence under Section 302 IPC to RI for life and fine of Rs. 1,00,000/- and in default of payment of fine to undergo SI for a period for 6 months. The entire fine amount was to be given to the parents of the deceased child Salman as compensation under Section 357 Cr PC. All the sentences were to run concurrently. Case of the prosecution 3. At about 10:26 am in the morning of 8th November 2012, information was received in the Police Control Room (PCR) from one Shahnawaz Ali that, Crl.A. 997/ 2015 & 1053/2015 Page 2 of 33 near the Electricity Office around the Big Apple store in Ram Garh Colony, a dead body of a young boy aged 15-16 years had been found (Ex.PW-7/A). This was reduced into writing as DD No.14A (Ex.PW-19/A). Sub Inspector (SI) Anoop Yadav (PW-19) received the said DD from the duty officer at PS Mahendra Park and proceeded to the spot along with Constable (Ct.) Sukhbir Singh (PW-18).

4. This was a vacant plot at A-46, Ram Garh, Jahangir Puri, Delhi. There was a boundary wall 5-6 ft. high surrounding the plot on all four sides. When PW-19 reached there, many public persons were already present. The Station House Officer (SHO) of PS Mahendra Park, Inspector Darshan Singh (PW-21), reached the spot at around 10:45 am. There PWs-19, 18 and Head Constable Ravinder Nath met him. The crime team officials were then called to the spot and photographs were taken. The crime team report (Ex.PW-1/A) noted that the plot was covered on all sides by a boundary wall and there were bushes under which

an approximately 15-year-old boy was found dead with his face downwards. His trousers were pulled down to his ankles and blood was oozing from his nose when his body was turned over. The tongue was under the teeth. On the left palm, the name Salman was written in the red ink. A cheque shirt and inner wear and a pair of slippers were found. They noticed blood and injury marks on his neck and chest.

5. In the meanwhile, one Naim (PW-11) came there and identified the dead body as that of Salman, son of Salim (PW-15). PW-21 directed PW-19 to shift the dead body with the clothes and slippers to the BJRM Hospital mortuary. PW-19 prepared the rukka (Ex.PW-19/B) which was sent for Crl.A. 997/ 2015 & 1053/2015 Page 3 of 33 registration of FIR to PS Mahendra Park. PW-21 reached the hospital at around 2 pm and recorded the statements of Naim (PW-11) and Salim (PW- 15), the father of the deceased. Thereafter PW-21 prepared the rough site plan at the instance of PW-19 (Ex.PW-19/G). Thereafter, they returned to PS Mahendra Park and the seized articles were deposited at the malkhana. According to PW-21, he searched for the accused persons but they could not be traced. On 8th November 2012 at around 1 pm, the post-mortem of the deceased was performed by Dr. Bhim Singh (PW-10). His report (Ex. PW- 10/A) confirmed that the death was due to strangulation and the injuries on the chest. No abnormalities were detected in the rectum and genital organs.

6. On 9th November 2012, the statement of Gullu (PW-16), the younger brother of the deceased was recorded. Thereafter, at the instance of PW-15, they reached the house of Sonu @ Fahim (A-2) from where he was apprehended. He was prima facie observed to be below 18 years. The Juvenile Welfare Officer, SI Kaptan Singh, was called and A-2 was then taken into custody. Anisa, the mother of Sonu, also reached there and put her thumb impression on the arrest memo. The disclosure statement of A-2 (Ex.PW-19/J), was recorded which was again signed by SI Kaptan Singh and Anisa. At the instance of A-2, the clothes he claimed to have been wearing at the time of the incident, a cream-coloured shirt and a cream-coloured pant, were recovered and sealed in a cloth pullanda. A-2 is stated to have produced one half-piece of brick from the place of incident from the bushes with which he is supposed to have caused injuries to the deceased. The brick was

sealed in a cloth pullanda. A-2s medical examination was thereafter conducted in the BJRM Hospital and his blood sample was also Crl.A. 997/ 2015 & 1053/2015 Page 4 of 33 seized. He was produced before the Juvenile Justice Board (JJB) and sent to an observation home.

7. On 11th November 2012, PW-21 along with PW-19 and Head Constable Sudesh Kumar (PW-20) reached near Kushal Cinema, Jahangir Puri at around 9 pm and, at the instance of a secret informer, they apprehended Sunil (A-1). One mobile phone with SIM-card was recovered from his possession. He was arrested and his personal search conducted. His clothes, including the shirt, pant, one inner, one underwear, and one pair of shoes were taken into possession and kept in a cloth pullanda which was sealed. His medical examination was conducted.

8. On 27th November 2012, the scaled site plan was prepared by SI Manohar Lal (PW-4). The exhibits of the case were sent to the Forensic Science Laboratory (FSL), Rohini. Charge 9. Thereafter, the charge sheet was filed. By an order dated 13th March 2013, charges were framed against both the accused as under: That on 07.11.2012 at about 10:00PM at Shop of Gaurav, I Block Jahangirpuri, Delhi within the jurisdiction of P.S. Mahendra Park you both in furtherance of your common intention kidnapped Salman S/o. Mohd. Saleem aged about 14 years old from the lawful guardianship of his parents and thereby you both committed an offence punishable U/s 3
IPC and within my cognizance. Secondly on 07.01.2012 at about 10.00PM at plot No.A-46, Ram Garh, Jahangir Puri, within the jurisdiction of PS Mahendra Park you both in furtherance to your common intention attempted to commit carnal intercourse against the order of nature with Salman and thereby Crl.A. 997/ 2015 & 1053/2015 Page 5 of 33 you both committed an offence punishable U/s 377/5
IPC and within my cognizance. Thirdly on 07.01.2012 at about 10.00PM at plot No.A-46, Ram Garh, Jahangir Puri, within the jurisdiction of PS Mahendra Park you both in furtherance to your common intention committed murder of Salman by strangulation and by causing brick blows on his chest and face and thereby you both committed an offence punishable U/s 3
IPC and within my cognizance. Recording of evidence 10. The prosecution examined 24 witnesses. It is important to note that on 23rd May 2013, the very first

day of trial, 22 witnesses were examined, including the investigation officer (IO), Inspector Darshan Singh (PW-21). The trial Court adopted the practice of getting some of the formal witnesses to tender affidavit by way of evidence. It so happened that some of these witnesses had to be recalled like SI Anoop Singh (PW-19) for further examination. This was done on 17th July 2014 on which date the prosecution evidence was closed.

11. On 10th September 2013, the statements of the two Appellants under Section 313 Cr PC were recorded. As far as A-1 is concerned, he denied the circumstances put to him and stated that he was innocent and had been falsely implicated. He further stated as under: I am innocent. I have been falsely implicated. I have been falsely implicated. Police had lifted my brother from my house and when I went to police station to know as to what was the matter, the police detained me there and falsely implicated me. I did not make any disclosure statement. 12. A-1 made an additional statement under Section 313 Cr PC on Crl.A. 997/ 2015 & 1053/2015 Page 6 of 33 27th August 2014 when the further results of the FSL were made available.

13. The statement of A-2 was also recorded on two dates, i.e. 10th September 2013 and 27th August 2014. He stated: I am innocent and have been falsely implicated by the police only to work out the present case. 14. Lokesh Mann (CW-1) was examined to confirm that the date of birth of A-2 was 5th January 1994 as per the school record. The trial Court proceedings 15. Before proceeding to discuss the judgment of the trial Court, it requires to be noted that an FSL report was initially submitted on 17th April 2013 (Ex.PW-13/A). Ex.1 (d) was the underwear worn by the deceased. Human semen was detected on the said exhibit. In the report of the biology division, the remark alongside the said exhibit was No Reaction*. The asterisk mark was to signify Group specific antigen degenerated.

16. Arguments were heard on 19th November 2013, 16th December 2013 and 28th January 2014. When the matter was again heard on 1st March 2014, the trial Court called upon the Additional PP (APP) to explain why the DNA was not detected on Ex.1 (d) and how the electronic evidence connects the accused with

the offence.

17. On 28th March 2014, the APP informed the trial Court that the IO who had initiated the process of DNA examination had not placed on record the report till date. The trial Court noted that the trial had already concluded on Crl.A. 997/ 2015 & 1053/2015 Page 7 of 33 10th July 2013 and that only when this issue regarding the DNA examination was raised during the final arguments that the Investigating Officer suddenly woke up and sent the exhibits for examination which according to learned defence counsel was to fill-up the lacunas. The trial Court observed that the DNA Fingerprinting Report is a material piece of evidence and can affect the conclusions either ways i.e. either in favour of the accused of against them and hence it will not be in the interest of justice to finalize and conclude the case without the said result. While granting adjournment till 3rd May 2014 for final arguments, the trial Court imposed costs of Rs.5,000 on the prosecution, leaving it open for the costs to be recovered from the salary of the officer responsible for the lapse.

18. On 3rd May 2014, an application was filed by the APP for deferring orders and for permission to lead evidence in respect of the DNA fingerprint report. On 5th May 2014, the costs were permitted to be deposited in cash and not deducted from the salary of the IO. On 9th May 2014, the IO submitted an application for re-examination of exhibits by FSL so that attempt can be made to segregate/separate the DNA by using Y Filter and Mini Filter Kit by the FSL since previously the same could not be generated on account of fungal growth. The counsel for the DLSA did not express any objection. The trial Court then, in the interest of justice, requested the IO to have the sample sent to the FSL again for segregation of DNA with a direction that the report should reach the Court by 2nd June 2014.

19. On 2nd June 2014, a supplementary charge sheet was filed on the ground Crl.A. 997/ 2015 & 1053/2015 Page 8 of 33 that the further DNA finger printing showed that the semen stain on exhibit 1(d) was found to be matching with the source of A-2. The witnesses in the supplementary charge sheet were directed to be summoned and one more opportunity for additional evidence was sought in respect of the supplementary charge sheet.

20. On 17th July 2014, Ct. Mahipal Singh (PW-6), SI Anoop Singh (PW-19), Head Constable (HC) Mukesh Kumar (PW-23) and A.K. Srivastava (PW-

24) were examined and discharged. Additional statements of the accused under Section 313 Cr PC were recorded on 27th August 2014. Thereafter, on 16th October 2014, the trial Court delivered the judgment holding both Appellants guilty of the offences under Section 3
IPC, Sections
IPC read with Section 34 IPC and Section 3
IPC. Trial court judgment 21. The conclusions of the trial Court in the 130-page impugned judgment were as under: (i) From the evidence of PWs-15, 16 and 17, it stood proved that the deceased was last seen alive in the company of the two accused between 11:00-11:15 pm on 7th November 2012. (ii) The medical evidence established the nature of injuries and confirmed that the death was caused by more than one person and was homicidal. (iii) The biological and serological report established the presence of human blood on the pant of A-2 which he was wearing at the time of the incident and also the presence of human semen on the underwear of the Crl.A. 997/ 2015 & 1053/2015 Page 9 of 33 deceased [Ex.1 (d)].. Although the original semen stains on Ex.1 (d) could not be accounted for in the initial report of the FSL, the DNA Fingerprint Report conclusively connected A-2 with the offence. (iv) The electronic evidence established that A-1 was using the mobile phone 8750023400 and its location was at Sanjay Enclave which is about 100-150 m from the scene of the crime at around 8:01 pm. This, therefore, was an independent confirmation of the prosecution version. (v) As regards the motive of the crime, it was held that absence of motive did not necessarily discredit the prosecution case if the chain of circumstantial evidence was so complete and it is consistent only with the guilt of the accused. It was held that the DNA Fingerprint report established that the motive was to commit carnal intercourse against the order of nature with the deceased and on account of the stiff resistance offered by him, he was killed. (vi) There was ample material on record to prove that both accused had acted in common consortium and had shared common intention to commit carnal intercourse against the order of nature.

22. By a separate order on sentence dated 1st November 2014, the trial Court awarded the sentences to the accused in the manner indicated hereinbefore.

23. This Court has heard the submissions of Mr. Harsh Prabhakar and Mr. Aditya Vikram, the learned counsel appearing for the Appellants, and Ms. Kusum Dhalla, the learned APP for the State. Crl.A. 997/ 2015 & 1053/2015 Page 10 of 33 A trial rushed through 24. At the outset, the Court is constrained to observe that this is yet another case where the learned ASJ who conducted the trial and delivered the impugned judgment has, not for the first time, in her enthusiasm for speeding up the trial process, committed a serious error by examining a disproportionately large number of prosecution witnesses (PWs) on a single day.

25. This Court has had occasion in the past to decry this manner of conducting a criminal trial by the very same learned ASJ.

In fact, this Bench has in the past few months had occasion to review a number of judgments of this particular learned ASJ and finds that in similar cases involving very serious offences punishable with the death sentence or life imprisonment, this learned ASJ fixes a single date for the entire prosecution evidence, within a month or two of the framing of charges. This results in defence counsel, who invariably are amicus curiae, insufficient time to prepare the defence after consulting the accused, some of whom may be in jail. When on a single day the learned ASJ records the evidence of an unusually large number of PWs, and these could include public witnesses, formal witnesses, expert witnesses and the IO, the defence counsel does not get the requisite time to prepare and ask meaningful questions in cross-examination.

26. In Sanjay Kumar Valmiki v. State 2014 III AD (Del) 505, this Court was dealing with an appeal against another judgment of the same learned ASJ who has authored the impugned judgment in the present appeals. There, Crl.A. 997/ 2015 & 1053/2015 Page 11 of 33 17 PWs were examined on the same day i.e. 7th March 2012. That happened to be the same day that the learned ASJ had appointed the AC. The resultant judgment was one of conviction for the offence of murder followed by an order on sentence recommending the award of the death penalty. While setting aside the said judgment and ordering a re-trial, this Court

observed as under: 17. the right of an accused to a fair hearing may be vitiated by an "overhasty, stage-managed, tailored and partisan trial". What has also been repeatedly emphasised is that providing an accused with the services of a lawyer is not an empty formality. The accused has a right "to have the guiding hand of the counsel at every step of the proceeding". In the present case, the failure by the learned trial Court to ensure that the accused was duly represented by a counsel even at the stage of the framing of charges was a serious infraction of his statutory and constitutional rights of access to justice. 19. It must be remembered that the more serious the crime the greater the need to ensure that there is no compromise whatsoever on the fair trial procedures. Otherwise the constitutional guarantee enshrined in Article 21 of a just, fair and reasonable procedure established by law, would be rendered illusory. The manner in which the trial has been conducted in the present case by the learned trial Judge leaves no room for doubt that there has been a serious infraction of the fundamental right of the accused to a fair trial. It has, resulted in a grave miscarriage of justice and for that very reason the impugned judgment convicting the accused and the consequential order on sentence awarding him capital punishment cannot be sustained in law. 27. In Manoj v. State (decision dated 6th February 2018 in Crl.A.835/2014), this Court was examining in appeal another judgment of the same learned ASJ, who has delivered the impugned judgment in the present case. In that Crl.A. 997/ 2015 & 1053/2015 Page 12 of 33 case, 22 PWs were examined on the same day i.e. 21st May 2013. Again this was the same day that the AC was appointed on behalf of the accused. Setting aside the judgment of conviction, this Court observed as under: 28. the constitutional right of the undefended accused to have a lawyer at State expense at the trial cannot be defeated by providing legal aid counsel with little or no experience in handling a complex case involving a charge under Section 302 IPC. Secondly, even if an experienced counsel is assigned, unless such counsel is given sufficient time to prepare and handle the case, the constitutional promise would be an empty formality.

29. In the present case, the proceeding dated 21st May 2013 of the trial Court showed that none was present for the accused on that day. In fact that was the day when the prosecution evidence was to commence. The accused informed the learned trial Judge that his counsel, Mr. Harish Chander, had stopped appearing

on account of an issue regarding payment. The accused then prayed that a legal aid counsel be assigned to him. On that very day, 21st May 2013, one Rajneesh Antil, Advocate who was present in the trial Court was appointed as AC. Without giving him any time to prepare himself, the trial Court immediately proceeded with the examination of 21 P.Ws. These include the two main eye-witnesses in the present case, i.e., (P.W. 15 and P.W. 20). Among the list of witnesses was also Dr. Manoj Dhingra (P.W.

12) who conducted the post-mortem report. It can well be imagined that the legal aid counsel appointed on that very date would have had no time whatsoever to familiarise himself with a case involving a serious charge under Section 302 IPC.

30. The zeal of a trial Judge to ensure speedy justice should not defeat the constitutional guarantee of a fair trial, particularly in cases involving serious charges punishable with death or life sentence. 28. In a trial involving offences punishable with imprisonment for life or death, where there are independent witnesses apart from the formal witnesses and the main witnesses to the investigation, the trial Court must Crl.A. 997/ 2015 & 1053/2015 Page 13 of 33 ensure that sufficient time is granted to the defence, especially if they are legal aid counsel for their cross-examination. Although the mandate in the Cr PC is to conduct the trial on a day to day basis, it would be an extreme proposition that the entire prosecution evidence is recorded on a single day in such cases involving grave offences. While it is necessary for the trial Court to be vigilant against defence tactics that might seek to unreasonably postpone the trial and use the interregnum to win over witnesses, it would be an over-reaction to have the entire prosecution evidence of as many as 22 witnesses recorded on a single day. In a case where the defendants face charges that are punishable with the death sentence and particularly where they are represented by legal aid counsel, the trial Court should exercise some caution as well as restraint to ensure that the counsel has sufficient time to prepare for the cross-examination. It must be realised, that counsel may have to consult the accused who is represented before putting specific questions to a witness. This requires some time and privacy and cannot be expected to happen in the court room in front of the judge.

29. This, of course, will vary from case to case, for e.g. the examination of several formal witnesses on the same day may not be a problem. Again, in a case which is fairly straightforward and not involving too many witnesses, it may not prejudice the accused if say more than 5 PWs, who are not formal witnesses, are examined on a single day. This will of course depend on the importance of a particular witness to the case. While no counsel should seek an unreasonably long time for completing the cross-examination of a material PW, the Court must ensure that sufficient time is granted, in cases involving serious offences, to the defence counsel, for that purpose. Crl.A. 997/ 2015 & 1053/2015 Page 14 of 33 30. Turning to the present case, both Appellants were represented by the same legal aid counsel. The record of proceedings for 23rd May 2013 shows that 22 PWs were examined and discharged on that date. The learned APP sought to drop two witnesses, namely Sanjeev (from the school) and SI Kaptan Singh, since they were "witnesses (of) repetitive facts". The learned trial Court acceded to that request and recorded that prosecution closes the evidence. In other words the entire prosecution evidence was led and closed on the same day.

31. Of these, four PWs i.e. PWs 11 and 12 were witnesses for identification of the dead body and PWs 15 and 16 were the father and younger brother of the deceased who were crucial witnesses to the circumstance of last seen. PW-10 was the doctor who performed the post-mortem and PW-13 was the scientific officer from the FSL. PWs 19 to 21 were the IOs and the HC who were witnesses for the investigation. The other PWs were formal witnesses.

32. The Court finds merit in the contention of counsel for the Appellants that grave prejudice was caused to the accused by the above 'super-fast' track procedure adopted by the learned trial Judge. The Court is unable to appreciate why the learned trial Judge considered it necessary to rush through the prosecution evidence in a case of this nature and how she failed to realise that it would result in a grave miscarriage of justice. Justice hurried is justice buried.

33. The question that then arises is whether the case should be remanded to the trial Court for a fresh trial?. Although this could have been an option, for reasons to follow the Court finds the prosecution case to be such that the Crl.A. 997/ 2015 &

1053/2015 Page 15 of 33 need for re-trial does not arise. Evidence of 'last seen' 34. The Court now proceeds to consider each of the circumstances constituting the complete chain which according to prosecution pointed unerringly to the guilt of each of the accused.

35. In order to prove that the deceased was 'last seen' in the company of the accused the prosecution relies on the evidence of (i) Mohd. Sharik @ Gullu (PW-16), the younger brother of the victim,; and (ii) Gaurav Sharma (PW- 17), the owner of the video-game parlour.

36. PW-17 was the owner of the shop in which the video games machines were installed and where the victim and his friends would often come to play games. PW-17 stated that at 10:30 pm on 7th November 2012 the last I had seen Salman with his brother, Gullu, Sonu and Sunil when leaving my shop. He resiled from his previous statement only to the extent that he had told the police that Sunil had consumed alcohol whereas in the Court he stated that he told the police that Sunil normally consumes alcohol at night and might have consumed the same (ho sakta hai, usne pee rakhi ho). According to Gullu (PW-16), both the accused went away from the shop with the deceased and A-1 asked Gullu to return home. There was hardly any cross-examination of either PW-17 or PW-16.

37. The deceased was found dead at a plot in Ramgarh and at that place he was not last seen with either of the accused. It is in this context that the prosecution relies on the evidence of PW-15. In his statement first made to Crl.A. 997/ 2015 & 1053/2015 Page 16 of 33 the police (Ex.PW-15/A) at the hospital, PW-15 stated that he had two daughters and five sons and that Salman was the eldest and he was aged 14 years. He had studied up to Class IV. PW-15 went on to state that on 7th November 2012, the deceased ate his dinner and left to play video games at around 9.30 pm. The deceased told PW-15 that he would return within half an hour. Gullu (PW-16), the younger son of PW-15 had left for the same video shop of Gaurav (PW-17) earlier than the deceased. At 10:30 pm, PW-16 returned home. When PW-15 asked PW-16 why the deceased had not returned, PW-16 informed PW-15 that the deceased had left from the video shop with A-2 and A-1, his two friends who used to come to play video games. A-1 had asked PW-16 to return

home.

38. PW-15 stated that after waiting for some time, he began searching for the deceased. At around 11.15 pm, when PW-15 reached the Pethawali Gali in Sanjay Enclave, he noticed A-2 and A-1 emerge from an empty plot. PW- 15 asked them about the deceased. They told him that the deceased had already left for his house. Since they were friends of the deceased, and he had noticed them often with the deceased in the video game shop, PW-15 did not suspect either of them at that stage. He continued searching for the deceased. On the morning of 8th November 2012, Naim (PW-11) informed PW-15 that the dead body of the deceased had been found in an empty plot in Ramgarh. PW-15 came to the plot to find that the deceased had already been moved to the hospital. PW-15 stated that he was confident that it was A-1 and A-2 who had murdered his son. The post mortem took place at around 1 pm by Dr. Bhim Singh (PW-10) and he estimated the time of death to be around 12 to 14 hours prior thereto. This placed the time of death at Crl.A. 997/ 2015 & 1053/2015 Page 17 of 33 around 12 midnight.

39. It does seem unusual that with his son not returning till late in the night on 7th November 2012, PW-15 would not go to the PS to lodge a missing report. He did not do this even the next morning. What is most unusual is that he waited for PW-11 to come and tell him after 12 noon that the body of the victim had been found in the empty plot and only thereafter decided to go there. In any event PW-15 was not a witness to the circumstance of 'last seen'. His testimony that he saw both accused near the plot at 11.15 pm does not inspire much confidence as this was disclosed by him more than 12 hours thereafter and that too only after the dead body was taken to the hospital y which time the police had already entered the scene.

40. While PWs 16 and 17 can be said to have proved that the deceased was in the company of the accused at around 10.30 pm, it must be remembered that the body was discovered in the empty plot the next morning at around 10 am. The gap between the time when the crime was discovered i.e. 10 am on 8th November 2012 and when the victim was last seen with the accused i.e. 10.30 pm on 7th November 2012 is significant. Added to this is the fact that the body was found in

an open plot. Therefore, this circumstance of 'last seen' can, at best, be said to raise a suspicion against the two accused but then suspicion cannot be substituted for concrete proof.

41. The circumstance of last seen becomes relevant only when the time gap between the deceased being seen last with the accused and the time when the crime is discovered is so small as to virtually rule out the possibility that someone other than the accused perpetrated the crime. It was Crl.A. 997/ 2015 & 1053/2015 Page 18 of 33 observed by the Supreme Court in State of U.P. v. Satish (2005) 3 SCC114as under: 22. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilty in those cases. 42. This was reiterated in Ramreddy Rajeshkhanna Reddy v. State of A.P. (2006) 10 SCC172and Jaswant Gir v. State of Punjab (2005) 12 SCC438 where the Court cautioned that in the absence of any other links in the chain of circumstantial evidence, it may be unsafe to convict an accused solely on the basis of the last-seen evidence. CDR of the mobile phone recovered from A-1 43. There was a crucial piece of evidence available to the IO which was for reasons best known to him, not developed. The CDRs of this phone were obtained but strangely the last call in the CDR chart (Ex. PW-8/C) is at around 8 pm on 7th November 2012 and not thereafter. Had the CDRs for the crucial time period i.e. between 10 pm on 7th November and midnight to 1 am on 8th November 2012 been obtained it would have indicated where A-1 was at the crucial time. It might have helped either the prosecution or A-1 himself particularly since he denies the circumstance of last seen.

44. In the examination-in-chief of the IO (PW-21) he identified this seized Crl.A. 997/ 2015 & 1053/2015 Page 19 of 33 mobile phone as "one dual SIM mobile

phone make Wing bearing IMEI No.357430045604186 and WEI No.357430045704184 with SIM of Idea bearing SIM of mobile number 8750023400" which was "recovered from the possession of accused Sunil."

In his cross-examination, he admitted that he had called "for the record of the SIM No.8750023400 from the service provider along with the details regarding the ownership."

From the evidence of Pawan Singh (PW-8) the Nodal Office of Idea Cellular Ltd. it was proved that the said number was issued in the name of Smt. Pancham wife of Ram Parvesh. He proved the CDR chart (Ex. PW-8/C) in which the last call for this number is 20.01 hrs on 7th November 2012. The failure of the IO to obtain the details of this phone for the later period after this call is strange considering that it would have provided vital clues on the location of A-1. For that matter, the IO does not appear to have collected the CDRs if any of PW15and A-2 which may also have helped in this context. The benefit of doubt is this regard, due to this lapse, must enure to the accused. Medical evidence 45. The post-mortem report (Ex. PW-10/A) confirms that death was due to strangulation. The injuries noted were:

"1. Multiple contusions with crecentric abrasions over front and both sides of neck varies from 0.8 cm x 0.6 cm to 2.5 cm x 1 cm.

2. Irregular multiple contusions on the upper part of chest in an area of 16 cm x 12 cm. On internal examination, the head and neck brain was pale. Effusion of blood was present in skin subcutaneous tissues of neck present below injury number 1 with fracture of hyoid bone of left side and contusions over thyroid and trachea was present, trachea was full of blood. Crl.A. 997/ 2015 & 1053/2015 Page 20 of 33 Chest shows effusion of blood in chest wall with fracture of sternum at the level of second rib with fracture ribs second and third on left side of chest, plural cavity was full of blood about one litre, left lung was punctured lacerated, would below fracture ribs."

46. Significantly, as regards the rectum and genital organs the remark was that no abnormality was detected (NAD). The medical evidence, therefore did not support the conclusion drawn by the trial court that forced carnal intercourse was either

performed or even attempted on the deceased. Therefore, while the medical evidence was proof of the circumstance of homicidal death by strangulation, it was a negative proof of the offence under Section 377 IPC. Arrests and recovery 47. The evidence of PWs 19, 20 and 21, who are the police officials involved in the investigation of this case, reveals that although the statement of PW-15 the father of the victim, raising doubts on the involvement of A-1 and A-2 was supposedly recorded on 8th November 2012 at around 1 pm, no attempt was made soon thereafter to trace either A-1 or A-2. It was only at 8.30 am on the next day i.e. 9th November 2012 that they went to the house of A-2 (Sonu) in the same I Block of Jahangirpuri along with PWs 15 and 16. They found him there and arrested him. This also raises a suspicion that if A-2 was involved in such a heinous crime he would not attempt to run away but would be available in his house, in the close neighbourhood. Moreover, although PW-15 was supposed to have accompanied the police team, his signature on the apprehension memo of A-2 (Ex. PW-19/A) or his Crl.A. 997/ 2015 & 1053/2015 Page 21 of 33 personal search memo (Ex. PW-19/I) is absent.

48. A-2 is supposed to have made a disclosure and led the police back to the spot and got recovered a half brick purportedly used by him to inflict the chest injuries on the victim. This half brick, a common object, was lying in the vicinity of the spot where the dead body was. This kind of a recovery of a common object from an open place long after the police have already visited the same spot does not inspire confidence. In Mani v. State of Tamil Nadu (2009) 17 SCC273 it was observed as under: 25. ... It need not be stated that where the discovery of the relevant articles have been made from the open ground though under the bush, that too after more than ten days of the incident, such discovery would be without any credence. It does not stand to any reasons that the Investigating Officer concerned did not even bother to look hither and thither when the dead body was found. We are, therefore, not prepared to accept such kind of farcical discovery which has been relied upon by into consideration the vital facts which we have shown above. the courts below without even taking 49. It is therefore not of much significance that on 28th December 2012, PW- 10 opined that the injury no.2 mentioned in the previous report could have been possibly inflicted with the said piece of brick. Neither the arrest of A-2 nor the recovery of the half brick at the

instance of A-2 inspires confidence.

50. Even the arrest of A-1 at 9.15 pm on 11th November 2012 from Kushal cinema in Block G of Jahangirpuri, i.e. the same area, purportedly on the receipt of secret information does not inspire confidence. His arrest memo and personal search memo is not attested by any public witness despite his arrest being from a public place. That he was available four days after the incident in the same area increases the suspicion about the manner of his Crl.A. 997/ 2015 & 1053/2015 Page 22 of 33 arrest. Errors by the trial Court 51. At this stage the Court would like to dwell on a serious lapse in the impugned judgment of the trial Court in recounting the circumstances, which according to the trial Court were established by the prosecution. In para 147 of the impugned judgment (internal page

126) the learned ASJ notes one of the circumstances proved as follows:

"That the accused Sonu was interrogated by the Investigating Officer during which the accused disclosed his involvement in killing of the deceased Salman."

52. Plainly the learned trial Judge overlooked Section 25 of the Indian Evidence Act and failed to realise that such a disclosure by A-2 to the IO was inadmissible in evidence. It should not have even entered the frame of consideration by the trial Judge of the evidence in a criminal case. This is a basic and fundamental error. Photographs 53. The trial Court also adopted a strange method of encircling portions of photographs which were made part of the judgment. The judge herself encircled by ink portions of the photographs to highlight supposedly incriminating aspects. The photographs made part of the judgment of the trial Court are Ex.PW-2/A3, A6, A7 & A11. In some of these pictures, the victim is shown face-up. However, the picture showing the position of the body when it was first found is Ex.PW-2/A17 where the deceased is shown to be laying face down. It is plainly seen that whereas one photograph shows Crl.A. 997/ 2015 & 1053/2015 Page 23 of 33 the body in the original position, thereafter the body has been turned over and placed at a different spot in the same location so as to take clearer photographs. Whether this should have been done is debatable but this Court nevertheless cannot concur with the trial Courts finding that the photographs, by themselves, are incriminating qua the accused. The DNA Fingerprint report 54. A

major circumstance that was held to be proved by the trial Court, was the confirmation by the second DNA Finger print Report (Ex. PW-24/A) that the DNA profile of the semen stain found on the underwear of the deceased (Ex. 1d) was found matching with the DNA Profile from the source of Exhibit 3 (blood gauze of A-2).

55. Before proceeding to discuss this report, and the manner in which it came to be produced, it is necessary to note that the report (Ex.PW-1/A) of the crime team which went to the spot at 11.15 am on 8th November 2012 only mentions that they found on the body of the victim the pant pulled down below the knees. There is no mention of any underwear. Even Naim (PW-11) who identified the body at the plot itself, does not make any mention about the underwear.

56. However, Ct. Sukhbir (PW-18) states in examination-in-chief that there was no cloth on his body except his underwear and pant near his knee on the legs. In his cross-examination he states, Nothing was found in the pant of the deceased and also nothing was found in the shirt of deceased. An identical statement was made by SI Anoop Singh (PW-19). This witness Crl.A. 997/ 2015 & 1053/2015 Page 24 of 33 also identified the clothes of the deceased which were identified collectively as Ex.P-5. The underwear finds mention in the seizure memo (Ex.PW-18/A) dated 8th November 2012. The said memo mentions a sealed packet containing clothes (pant, shirt, inner banyaan, underwear, Hawaii chappal). The Court finds it pertinent to note that the number 8 in the date line of the memo appears to have been overwritten. The post-mortem report mentions an underwear being found on the body of the deceased, apart from the pant, belt etc.

57. The said underwear was Ex. 1 d. When the said exhibit was sent to the FSL, on the first occasion, a report was given by Biology Division on 17th April 2013 (Ex. PW-13/B) that there was no reaction with semen since the group specific antigen had degenerated.

58. After the hearing in the trial Court on 1st March 2014, the FSL sent to the trial Court a DNA report dated 16th April 2014. The report noted that Ex. 1 (d) was one cut/torn underwear along with fungal growth. The result of the DNA analysis in the said report dated 16th April, 2014 was as under: Exhibits '1d' (Underwear of

deceased), '2' (Blood in gauze of deceased), '5' (Blood in gauze of accused) and '7' (Blood in gauze of accused) were subjected to DNA isolation. DNA was isolated from the source of exhibits '1d' (Underwear of deceased), '2' (Blood in gauze of deceased), '5' (Blood in gauze of accused) and '7' (Blood in gauze of accused). Amp F1 STR Identifier plus PCR amplification kit were used for each of the samples and data was analysed by Gene- Mapper IDx Software. Profile could not be generated from the source of exhibits '1d' (Underwear of deceased) as stains were degredated due to fungal growth. However male DNA profile were generated from the source of exhibits '2' (Blood in gauze of deceased), '5' (Blood in gauze of accused) and '7' (Blood in gauze of accused). Crl.A. 997/ 2015 & 1053/2015 Page 25 of 33 59. In other words, the Gene Mapper IDx Software was unable to generate a DNA from the source of Ex. 1 d (underwear of the deceased) as stains were degraded due to fungal growth.

60. Despite the above unambiguous report, the learned trial Court entertained an application on 3rd May 2014 by the IO seeking permission to lead further evidence in respect of the aforementioned DNA Fingerprinting report. In an order dated 9th May 2014, the learned trial Judge referred to the averment in the application that attempt can be made to segregate/separate DNA by using Y Filter and Mini Filter kit by FSL since previously the same could not be generated on account of fungal growth. The trial Court directed the same exhibit again be sent to the FSL for segregation of DNA in the interest of justice. This time, within less than a month thereafter on 30th May 2014, the same DNA Fingerprinting unit of the FSL stated that it had managed to isolate the DNA profile from the same Ex. 1 d. The conclusion in the said report (Ex. PW-24/A) was as under: The DNA profiling (Minifiler & YSTR analysis) performed on the exhibits '1d', '2', '3' & '4' are sufficient to conclude that the single DNA Profile from the source of exhibit '1 d' (Underwear of deceased Salman) is matching with DNA Profile from the source of exhibit '3' (blood gauze of accused JCL Fahim @ Murgi). However the single DNA Profile from the source of exhibit 'ld' (Underwear of deceased Salman) is not matching with DNA Profile from the source of exhibit '4' (blood gauze of accused Sunil@ Raghu) 61. The person who signed this report was A.K. Shrivastava, Deputy Director (Bio/DNA) (PW-24) whereas the person who has signed the earlier report was L. Babyto Devi. Both belong to the same FSL at Rohini. When the matter

came back to the Court, A.K. Shrivastava (PW-24), the author of Crl.A. 997/ 2015 & 1053/2015 Page 26 of 33 the second report, was examined. The cross-examination was cursory and the only suggestion put to him pertained to whether the examination had been done in a fair manner.

62. This evidence was perhaps the most critical part of the entire case as is realised by the learned ASJ herself. The underwear of the deceased, even by the time it was first examined by the FSL, had fungal growth and, as noted in the first report, semen stains had degraded and therefore no DNA profile could be generated. How, within less than a month thereafter, the same FSL was able to generate a DNA profile that could match the DNA profile of A-2 is unexplained. It must be remembered that the packet containing the underwear was still in the control of the police and was collected from and delivered back to the FSL by them. The manner in which the police has gone about filing an application, after receipt of a report of the FSL that went in favour of the accused, and took the same exhibit back to the same FSL and, within a month, got a report to the contrary from a different scientific officer, does not sit comfortably with this Court. Why the Minifiler and YSTR analysis using Y Filter and Mini Filter kit was not done earlier is also not explained. In technical matters of this nature, where the stains on the exhibit have already degenerated and there is no fresh sample available, it would not be safe to rely on a subsequent report which states something contrary to what is stated in the first. Over reliance on forensic evidence 63. This subsequent DNA Fingerprinting report has been held by the trial Court to constitute clinching evidence for several things, viz. (i) that it Crl.A. 997/ 2015 & 1053/2015 Page 27 of 33 conclusively connected A-2 to the crime, (ii) that it proves that the motive was to commit carnal intercourse against the order of nature with the victim, (iii) that it proves that the victim resisted the attempt and, therefore, was killed by blows on the chest and then finally strangulation.

64. The DNA analysis could, at best, be a corroborative piece of evidence and could not be considered to be a substantive piece of evidence. The unreliability of this evidence is apparent in the present case. While the FSL report dated 16th April 2014 stated that the DNA profile could not even be generated from the degraded semen stain, the second report dated 30th May 2014 stated the

opposite.

65. From the orders in the trial proceedings, it is plain that the trial judge was very concerned that the DNA evidence was not presented before the Court even till 20th March 2014 although the prosecution evidence had been closed on the first day itself i.e. 23rd May 2013. This anxiety on the part of the trial Judge led her into placing undue reliance on this evidence to hold that it conclusively connected the accused with the crime. Law relating to circumstantial evidence 66. Before discussing the evidence on record in light of the above submissions, it is necessary to recapitulate the settled legal position with regard to circumstantial evidence.

67. In Ram Avtar v. State 1985 Supp SCC410 the Supreme Court explained that: ...circumstantial evidence must be complete and conclusive Crl.A. 997/ 2015 & 1053/2015 Page 28 of 33 before an accused can be convicted thereon. This, however, does not mean that there is any particular or special method of proof of circumstantial evidence. We must, however, guard against the danger of not considering circumstantial evidence in its proper perspective, e.g., where there is a chain of circumstances linked up with one another, it is not possible for the court to truncate and break the chain of circumstances. In other words where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated. 68. In State of Tamil Nadu v. Rajendran (1999) 8 SCC679 the Supreme Court held: ... the law is fairly well settled that in a case of circumstantial evidence, the cumulative effect of all the circumstances proved, must be such as to negative the innocence of the accused and to bring home the charge beyond reasonable doubt. It has been held by a series of decisions of this Court that the circumstances proved must lead to no other inference except that of guilt of accused. 69. In Trimukh Maroti Kalan v. State of Maharashtra (2006) 10 SCC681 the Supreme Court held: The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken

cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with his innocence. Crl.A. 997/ 2015 & 1053/2015 Page 29 of 33 70. In Sharad Birdhichand Sarda v. State of Maharashtra 1984 (4) SCC116 the Supreme Court explained that a case based on circumstantial evidence should satisfy the following tests: (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, and (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. 71. In Brajesh Mavi v. The State (2012) 7 SCC45 the Supreme Court explained: From the several decisions of this court available on the issue the said principles can be summed up by stating that not only the prosecution must prove and establish the incriminating circumstance(s) against the accused beyond all reasonable doubt but the said circumstance(s) must give rise to only one conclusion to the exclusion of all others, namely, that it is accused and nobody else who had committed the crime. Circumstances proved and not proved 72. The circumstances that can be said to have been proved by the prosecution are the following: Crl.A. 997/ 2015 & 1053/2015 Page 30 of 33 (i) That the deceased was last seen in the company of the two accused at around 10.30 pm on 7th November 2012 at the video shop of PW-17. (ii) That the deceased was found dead in an open plot in Ramgarh at around 10 am the following day i.e. 8th November 2012 (iii) That the deceased had two external injuries one of which around the neck was a strangulation injury that was sufficient in the ordinary course of nature to cause his death.

73. The circumstances not satisfactorily proved by the prosecution are: (i) That A-1 and A-2 were seen crossing the boundary wall of the open plot at Ramgarh by PW-15 at around 11.15 pm on 7th November 2012. (ii) That A-2 after his arrest on

8th November 2012 at around 9.30 am made a disclosure and got recovered the half brick that was used to cause the chest injuries on the deceased. (iii) That A-1 was arrested on 11th November 2012 near Kushal Cinema at 9.15 pm and he made a disclosure statement leading inter alia to the recovery of his mobile phone. (iv) That the DNA Fingerprinting report obtained for the second time from the FSL proved that the semen stain on the underwear of the deceased matched the DNA profile from the blood gauze of A-2.

74. Turning to circumstances not proved, as already noticed the medical Crl.A. 997/ 2015 & 1053/2015 Page 31 of 33 evidence showed no sign of any attempt at unnatural sex with the deceased much less an attempt at such act. Further certain vital pieces of evidence like the CDRs of the mobile phones used by PW-15 and the accused was not developed and this constituted a serious lapse in the investigation. There was also no evidence whatsoever, that the accused forcibly abducted the victim so as to attract the offence of kidnapping under Section 363 IPC.

75. Finally, the prosecution has also failed to prove the motive for the crime. The inference drawn by the trial Court that the victim put up a stiff resistance to his being sodomised is not supported one bit by the medical evidence or for that matter, any other evidence. In a case of this nature, when all other circumstances have not been satisfactorily proved, the failure to prove motive adds to the doubt created about the guilt of the accused.

76. The circumstances proved do not form a complete chain. Those that have not been satisfactorily proved or not proved make it difficult for the Court to conclude that the circumstances proved point unerringly to the guilt only of the two accused and no one else. It is trite that suspicion howsoever strong cannot substitute proof.

77. As already noticed, there has been a serious miscarriage of justice as a result of the manner of conducting the trial by the earned trial Judge. Conclusion 78. For the aforementioned reasons, the Court grants both accused the benefit of doubt and acquits them of the offences under Section 3
IPC, Sections
read with Section 34 IPC and Sections 3

IPC Crl.A. 997/ 2015 & 1053/2015 Page 32 of 33 79. The impugned judgment of the trial Court dated 16th October 2014 and the subsequent order on sentence dated 1st November 2014 are set aside. The accused are directed to be released forthwith unless wanted in some other case.

80. Both Appellants will fulfil the requirements of Section 437-A Cr PC to the satisfaction of the trial Court at the earliest.

81. The appeals are allowed in the above terms. The trial Court record be returned forthwith together with a certified copy of this judgment. S. MURALIDHAR, J.

I.S. MEHTA, J.

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