Narender Kumar vs.state

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Court : Delhi

Decided On : May-31-2019

Appellant : Narender Kumar

Respondent : State

Judgement :

` * IN THE HIGH COURT OF DELHI AT NEW DELHI % Judgment pronounced on:

31. .05.2019 Judgment Reserved on:

19. 03.2019 + CRL. A. 670/2004 NARENDER KUMAR ..... Appellant Through: Mr. Sumeet Verma, Advocate. Versus STATE Through: Mr. Amit Gupta, APP with Inspector .....Respondent + CRL. A. 877/2005 Mukesh Kumar, PS-Hari Nagar. ASHOK KUMAR @ BEGAN ..... Appellant Through: Mr. Sumeet Verma, Advocate. Versus STATE .....Respondent Through: Mr. Amit Gupta, APP with Inspector Mukesh Kumar, PS-Hari Nagar. + CRL. A. 439/2004 RITESH KUMAR Through: Mr. Jitendra Sethi, Advocate. Versus ..... Appellant STATE Through: Mr. Amit Gupta, APP with Inspector Mukesh Kumar, PS-Hari Nagar. .....Respondent CRL.A6702004, CRL.A8772005 & CRL.A.439/2004 Page 1 of 23 ` CORAM: HONBLE MS. JUSTICE HIMA KOHLI HON'BLE MR. JUSTICE VINOD GOEL VINOD GOEL, J:

1. These appeals have been filed by the appellants against the impugned judgment dated 05.04.2004 passed by the Court of Ld. Additional Sessions Judge,

Delhi (ASJ) in Session Case No.SC No.1/2000, arising out of FIR No.5 lodged at P.S. Hari Nagar, Delhi under sections 364/365/302/201/394/201 of Indian Penal Code, 1860 (IPC), convicting them for the offences under section 364 read with section 34 IPC, section 302 read with section 34 of the IPC, section 392 read with section 34 of the IPC and section 201 read with section 34 of the IPC. The appellants have also impugned the order on sentence dated 07.04.2004 by which they were sentenced as under: i. Life imprisonment and fine of Rs.10,000/- under section 302 read with section 34 of the IPC. Rigorous imprisonment of 1 year in default of fine. ii. Life imprisonment and fine of Rs.5,000/- under section 364 read with section 34 of the IPC. Rigorous imprisonment of 6 months in default of fine. iii. Rigorous imprisonment for 10 years and fine of Rs.5,000/- under sections 392 read with section 34 of the IPC. Rigorous imprisonment for 6 months in default of fine. iv. Rigorous imprisonment for 7 years and fine of Rs.5,000 under sections 201 read with section 34 of the IPC. Rigorous imprisonment of 6 months in default of fine. CRL.A6702004, CRL.A8772005 & CRL.A.439/2004 Page 2 of 23 ` 2. By this common judgment, we propose to dispose of all the three connected appeals. Background 3. The prosecutions story in a nutshell is that on 11/08/1999 the appellants, Narender Kumar (A-1), Ashok Kumar (A-2) and Ritesh Kumar (A-3) hired a Tata Sumo having registration No.HR26 2644 from Verma Travels and Properties, Hari Nagar, Delhi for travelling to Haridwar. The vehicle was owned by one Raj Kumar Sharma (PW-1) and driven by the deceased, Kartar Chand. As per the hiring schedule, the vehicle was to return to Delhi on 12.08.1999. When this did not happen, enquiries were made by the owner of the vehicle namely Sh.Raj Kumar (PW-1), sister of the deceased, Smt.Pawana Sharma (PW-2) and her husband, Sh. Atam Prakash (PW-8).

4. On 16.08.1999, a secret information was received at P.S. Tateri, District Baghpat (Uttar Pradesh) that three unknown persons possessing illegal arms were trying to dispose of a Tata Sumo Car in city Baraut (U.P.) pursuant to which a team of Police Officials formed a picket near J.P Public School, Baraut and apprehended three persons, A-1, A-2 and one Sushil @ Papal (a juvenile) travelling in the Tata Sumo No.HR26 2644.

5. On 17.08.1999, A-1 and A-2 disclosed to the police officers of P.S Baraut that they along with A-3 had hired the said Tata Sumo car and after reaching Baraut, they had killed the driver with the help of a screw driver and rope and disposed of the body by throwing it into the Rajwaha. On the same day, A-1 and A-2 got recovered the body of CRL.A6702004, CRL.A8772005 & CRL.A.439/2004 Page 3 of 23 ` the deceased at the Jhal of the Rajwaha in village Bari Nangli Puthi, Nangli. The cause of death was opined to be Asphyxia due to strangulation by Dr. P.K.Sharma (PW-9). The information regarding the discovery of the dead body and other articles was transmitted to Delhi Police. A-3 was arrested subsequently on 25.08.1999, at Sagarpur bus stand, Delhi vide arrest memo Ex.PW29/B.

6. On 20.12.2000, charges under section 364 of the IPC read with section 34 of the IPC, section 302/3
of the IPC and under section 201 read with section 34 of the IPC were framed against A-1, A-2 and A-3. They pleaded not guilty and claimed trial.

7. The Prosecution examined 29 witnesses to prove its case. The statement of A-1, A-2 and A-3 were recorded by the Ld. ASJ separately under section 313 of the Code of Criminal Procedure, 1973 (Cr PC) and they pleaded their innocence. A-1 examined his father, Ishwar Singh (DW-2) and A-2 examined his father, Giani Ram (DW-1) in their defence. Arguments on behalf of the appellans:

8. Mr. Sumeet Verma, ld. counsel for A-1 & A-2 contended that the impugned judgment was not based on a sound appreciation of facts and law and deserves to be set aside. He argued that the evidence pertaining to the recovery of the Tata Sumo Car was erroneously accepted by the Trial Court. He urged that there were several discrepancies in the testimony of PW-20, PW-21, PW-23 and PW-27 who are witnesses to the recovery of the said Tata Sumo car. CRL.A6702004, CRL.A8772005 & CRL.A.439/2004 Page 4 of 23 ` 9. Learned counsel further argued that the Trial Court erred in accepting the evidence with respect to the recovery of the body of the deceased. He emphasised that the panch witnesses PW-4, PW-5, PW-6 and PW-7 had turned hostile and the identity of A-1 and A-2 could not be established beyond reasonable doubt. He contended that an adverse inference could not have been drawn against them for their refusal to participate in

the TIP as PW-25, Metropolitan Magistrate Shri S.K Gupta in whose presence the TIP was conducted, had specifically deposed that the accused were produced by the I.O in the court in unmuffled face. He further contended that PW-3 Shri Mahender Kumar, who had allegedly seen the accused A-1, A-2 and A-3 at the time of hiring the Tata Sumo Car in his office, deposed that only A-2 and A-3 came inside his shop while A-1 stood outside his shop meaning thereby, that he could not have seen and identified A-1.

10. Mr. Jitendra Sethi, ld. counsel for A-3 while adopting the arguments addressed by Mr.Sumeet Verma on behalf of A-1 and A-2, contended that the prosecution has miserably failed to connect A-3 to the crime. He pointed out that A-3 was not in the said Tata Sumo with A-1 and A-2 when it was recovered at Baghpat. He further argued that the recovery of the deceaseds dead body was not made pursuant to any disclosure statement made by A-3. He further contended that PW-3 had deposed in his cross-examination that he had seen A-3 when he was produced in the Court and therefore, no adverse inference could have been drawn on account of his refusal to join the TIP. CRL.A6702004, CRL.A8772005 & CRL.A.439/2004 Page 5 of 23 ` 11. Per contra, Ld. APP vehemently argued that there is no infirmity or illegality in the impugned judgment and order on conviction and the appeal ought to be dismissed as being devoid of any merit.

12. We have heard the learned counsel for the appellants and the APP for the State and gone through the records.

13. The Trial Court had convicted the appellants primarily on last seen evidence with the deceased, apprehension of A-1 and A-2 in the Tata Sumo car which was hired by A-1, A-2 and A-3 and recovery of the dead body at their instance. Last Seen evidence.

14. The testimony of PW-3 is of utmost importance in this regard as A-2 and A-3 came inside his office to book the Tata Sumo car whereas A-1 stood outside. PW-3 deposed that On 11.08.99, 2 persons came inside my shop. Accused whom I identify present in court and the other accused present in court (witness pointed towards Ashok) came there. Third accused did not come inside the shop (name of 3rd accused is Narinder). It was about 11:00 a.m. when they came and vehicle

was booked for evening time. They had booked the vehicle for Haridwar on the event of solar eclipse for a bath. They had told us they will board vehicle from there and other members of family will board on the way. Rs.500/- as advance was paid by accused Ritesh Kumar and accused Ritesh gave his address as RZ-10/261 West Sagar Pur, Gitanjali Parl, New Delhi. CRL.A6702004, CRL.A8772005 & CRL.A.439/2004 Page 6 of 23 ` 15. PW-3 further deposed that he was later on called to participate in the TIP of the accused in Tihar Jail which the accused refused and after declining the TIP, he saw all the accused when they were brought by the police to his shop. In his cross-examination he admitted that he had seen A-3 before the TIP while A-3 was in Police custody.

16. PW-1, who is the registered owner of the Tata Sumo car bearing registration number HR26J2644 deposed in his examination-in- chief that on 11.08.1999, Mahinder Verma (PW-3), who was the owner of Verma Properties & Tour Travels at Hari Nagar, had booked this vehicle for a trip to Haridwar. On the same date around 1-1:30 PM, he had telephonically called the deceased, Kartar Chand and informed him about the said trip. He further deposed that the deceased came to his house and he asked him to clean the vehicle. In the meanwhile, PW-3 again called PW-1 stating that the party who had hired the vehicle was present in the office and waiting for the vehicle. He deposed that after receiving this phone call, he handed over the keys of the Tata Sumo car to the deceased and directed him to reach PW-3s office situated in Hari Nagar whereupon the deceased proceeded to Hari Nagar. PW-1 deposed that he had telephonically confirmed from PW-3 that the vehicle along with the deceased had reached the latters office in Hari Nagar and had then left for Haridwar with the persons who had hired the Tata Sumo car.

17. PW-25, Sh. S.K Gupta, Metropolitan Magistrate in whose presence the TIP was to be conducted, deposed that On 16.09.1999 I was working as M.M. Delhi. I was link M.M. to Smt. A.B. Chandana, CRL.A6702004, CRL.A8772005 & CRL.A.439/2004 Page 7 of 23 ` M.M. Delhi. An application for TIP of accused Narender @ Pappu and Ashok Kumar @ Baigan was marked to me by Smt. A.B. Chandana, M.M. Delhi. Accused were produced in unmuffled face by the IO and accordingly TIP was fixed for 18.09.1999 at Central Jail Tihar, Delhi. 18. Here, it would be prudent to advert to the decision of the Supreme Court in Abdul Waheed

Khan v. State of A.P., (2002) 7 SCC175where the evidentiary value of a TIP was explained: in court. 9. As was observed by this Court in Matru v. State of U.P. (1971) 2 SCC75identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement (See Santokh Singh v. Izhar Hussain[(1973) 2 SCC406 The necessity for holding an identification parade can arise only when the accused are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In Dastagir Sab v. State of Karnataka, (2004) 3 SCC106 the 19. Supreme Court explained the effect of not holding a TIP No law states that non-holding of test identification parade would by itself disprove the prosecution case. To what extent and if at all the same would adversely affect the prosecution case, would depend upon the facts and circumstances of each case. CRL.A6702004, CRL.A8772005 & CRL.A.439/2004 Page 8 of 23 ` 20. It is clear from the ratio in Abdul Waheed Khans case and Dastagir Sabs case that TIP is not substantive evidence but only corroborative and not holding the same would not vitiate the prosecutions case completely. In the absence of a TIP, the Court is to sift and weigh the evidence to establish the identity of the accused. In the instant case, PW-3 had seen the appellants while in custody of the police before the TIP. The appellants were produced before Ld.MM (PW-25) in unmuffled faces. Hence, no adverse inference can be drawn against the appellants for refusing to participate in the TIP.

21. PW-2 deposed that on 11.08.1999, at about 2 pm, she had received a phone call from Verma Travels that the Tata Sumo car was booked for a trip to Haridwar and her brother (the deceased) went to PW-1 and from his place, he left for Haridwar at 4 pm. She stated that her brother was to return on 12.08.1999. PW-8, Shri Atam Prakash, who is the husband of PW-2 and brother-in-law of the deceased deposed on similar lines as PW-2. He also made a complaint dated 16.08.1999 (Ex.PW8/A) to the police.

22. The testimony of PW-3 with respect to the booking of vehicle No.HR26 2644 by A-1, A-2 and A-3 for a trip to Haridwar, went unrebutted and unchallenged in his cross-examination. His version of the events is corroborated by the testimony of PW-1 who had deposed that on 11.08.1999, the Tata Sumo car was booked by PW-3 to go to Haridwar and this car was sent to PW-3s office along with the deceased as the driver. PW-3s testimony is also corroborated by PW- 2 who deposed that she had received a call from PW-1 on 11.08.1999 CRL.A6702004, CRL.A8772005 & CRL.A.439/2004 Page 9 of 23 ` and he informed her that the Tata Sumo car was booked by Verma Travels owned by PW-3 to go to Haridwar on 11.08.1999 and her brother (the deceased) went to meet PW-1 from where he went to Haridwar. The testimony of PW-3 establishes the presence of the accused A-1, A-2 and A-3 with the deceased the last time he was seen alive on 11.08.1999. The above incriminating evidence was put to the accused in their statement under section 313 of the Code of Criminal Procedure, 1973 (Cr PC) to which they chose to give no explanation. Recovery of car 23. ASI K.K Singh (PW-20), Ct. Mukesh Kumar (PW-21), SI Satish Kumar Rai (PW-23) and SI Udai Veer Singh (PW-27) were the police officials who were present when the said Tata Sumo car was intercepted and recovered from the possession of A-1 and A-2. All these witnesses deposed on similar lines stating that on 16.08.1999, a special team was constituted as information was received that some criminals were looking to sell a stolen Tata Sumo car in District Baraut. Pursuant to receiving this information, they set up a trap near J.P Public School, Baraut. After some time, the said Tata Sumo car came and the police party managed to stop the vehicle at the speed breaker. They further deposed that the occupants of the vehicle fired two bullets at them but they saved themselves from being hit by the bullets and they overpowered the occupants of the said car. They further deposed that A-1, A-2 and Sushil (a juvenile) were taken into custody from the said car. A-1 and A-2 were correctly identified by PW-20, PW-21, PW-23 and PW-27 and even in their cross- CRL.A6702004, CRL.A8772005 & CRL.A.439/2004 Page 10 of 23 ` examination all these witnesses stood firm in their narration of essential facts and sequence of events.

24. The incriminating evidence with respect to the interception of the said Tata Sumo car was put to A-1 and A-2 in their statement under section 313 of the Cr

PC to which they simply denied. The testimony of PW-20, PW-21, PW-23 and PW-27 established the fact that on 11.08.1999, A-1 and A-2 were found in possession of the said Tata Sumo car which was hired and used by them to travel to Haridwar with the deceased as the driver. Recovery of the dead body 25. A-1 and A-2 got the dead body of the deceased recovered on 17.08.1999, pursuant to their disclosure to Sh. Prabal Pratap Singh, Station Officer, P.S. Baraut (PW-28) to the effect that they had killed the driver Kartar Chand (deceased) at Baraut with the help of a rope and screw driver and had thrown the dead body in the Rajwaha. PW- 28 deposed that A-1 and A-2 took the police party to Rajwaha where after some search, the body could not be found. He further deposed that A-1 and A-2 took the police party along the side of the Rajwaha for about 8 Km and when they reached village Bari Nangla Puthi, the body was found at the Jhal of Rajwaha, and A-1 and A-2 entered the Rajwaha and took out the deceaseds body. He stated that the Recovery Memo was prepared by the Police personnel posted as PS Manoli, District, Baghpat as the place of recovery was within their jurisdiction. He proved the Recovery Memo (Ex.PW13/E) of the body of the deceased which bears his signatures at point A and of A-1 and CRL.A6702004, CRL.A8772005 & CRL.A.439/2004 Page 11 of 23 ` A-2 at points C and D and of SI Pradeep Kaushik at point B. He deposed that the dead body was recovered on 17.08.1999 and the Panchnama was done by officials of PS Manoli District, Baghpat as the place of recovery was within their jurisdiction. He further deposed that the zero FIR (Ex.PW28/A) was registered and the report (Ex.PW28/B) was sent to the SHO, Hari Nagar, Delhi There is no cross-examination on the aspect of the disclosure made by A-1 and A- 2 to PW-28 and the recovery of the dead body from the Jhal of Rajwaha at their instance on 17.08.1999. PW-16, HC Vijender proved the DD No.13A (Ex.PW13/C) recording the telephonic information received from P.S. Baraut that the hired Tata Sumo No.HR26 2644 had been recovered in the jurisdiction of P.S. Baraut and its driver had been killed.

26. The panch witnesses, Desh Pal (PW-4), Narinder (PW-5), Pramod Kumar (PW-6) and Jai Dev (PW-7) did not support the prosecutions version about the Panchnama (Ex.PW4/A) and deposed that their signatures were taken on blank papers and they had not seen the accused persons at the time of signing these papers. The testimony of PW-4, PW-5, PW-6 and PW-7 alone does not mean that

the entire version of the prosecution should be thrown in the bin. Panchnama is a process which is formalized after the recovery. The disclosure made by A-1 and A-2 and the recovery of the body of the deceased, pursuant to their disclosure statements from the canal has been well proved by PW-28. This Police Officer (PW-28) has proved the Recovery Memo (Ex.PW-13/E) pertaining to the recovery of the body of the deceased. CRL.A6702004, CRL.A8772005 & CRL.A.439/2004 Page 12 of 23 ` The appellants could not cause any dent in the cross examination of PW-28 on recovery of the body of the deceased and there is no reason as to why the version given by the police officer who is a public servant should not be accepted. In criminal cases, it is not unusual for the panch witnesses to turn hostile. But that cannot vitiate or wash away the testimony of the Recovery Officer. This is the settled position in law laid as down by the Supreme Court in Modan Singh v. State of Rajasthan, (1978) 4 SCC435where it was held that: 9. On behalf of the defence it was submitted that the seizure witnesses were men of status in the village and their not supporting the recovery would be fatal to the prosecution. We would rather not place any reliance on the witnesses who attested the seizure memo. If the evidence of the investigating officer who recovered the material objects is convincing, the evidence as to recovery need not be rejected on the ground that seizure witnesses do not support the prosecution version.

(Emphasis added)

27. The above principle was re-iterated by the Supreme Court in Anter Singh v. State of Rajasthan, (2004) 10 SCC657where it was held that: 10. We shall first deal with the plea as to whether evidence relating to recovery is acceptable when non- official witnesses did not support the recovery and made departure from the statements made during investigation. In Modan Singh v. State of Rajasthan (1978) 4 SCC435: it was observed that where the evidence of the investigating officer who recovered the material objects is convincing, the evidence as to recovery need not be CRL.A6702004, CRL.A8772005 & CRL.A.439/2004 Page 13 of 23 ` rejected on the ground that seizure witnesses did not support the prosecution version. Similar view was taken in Mohd. Aslam v. State of Maharashtra (2001) 9 SCC362 It was held that even if panch witnesses turn hostile, which happens very often in criminal cases, the evidence of the person who effected the recovery would not stand vitiated.

(Emphasis added)

Defence witnesses 28. The accused had examined Sh.. Giani Ram, (DW-1) father of the accused A-2. He deposed that the police had taken his son (A-2) in custody on 14.09.1999, on the pretext of interrogation. When A-2 did not come home on that day, the next morning he went to the P.S. where he was told that his son had been taken to Baghpat and after 3 days he came to know that his son had been arrested in a case. He further deposed that he had lodged a complaint with the S.S.P. after the police could not locate his son. A photocopy of the said complaint is Mark-A. This complaint was never exhibited but was only marked as Mark A for identification. There is no evidence to prove that this complaint was received by the office of SSP or in any police station or it was entered in the Receipt/Dispatch register. DW-1 did not state that he had ever sent any telegram to the SSP. However, in his cross- examination, learned APP for the State filed a copy of the telegram (Ex.DW1/P-1) to confront him that whatever he had deposed, was not recorded in the telegram. DW-1 denied the suggestion that he had sent the telegram and made a complaint to prepare a defence for his son or that he did not produce A-2 at the Police Post. CRL.A6702004, CRL.A8772005 & CRL.A.439/2004 Page 14 of 23 ` 29. The copy of the telegram mentions that DW-1 who is the father of A-2, took him to P.P. Tateri as the police wanted to interrogate him; A-2 did not come back and the police might implicate him in a false case. It is not proved by A-2 as to when was the telegram in fact transmitted and from which post office and when was it received in the office of the SSP, Baghpat. DW-1 never stated that he had sent a telegram. He only stated that he had lodged a complaint with the SSP, copy whereof is Mark-A and bears his thumb impressions. Interestingly, in his statement under Section 313 Cr.PC, A-2 explained that My father has produced me before the Incharge Tateri, Distt. Baghpat Police Post on 14.8.1999 for interrogation. My father Gyan Chand also made complaint with SSP Meerut on 20.08.1999. Thus, A-2 himself admitted the fact that his father had lodged a complaint only on 20.08.1999, i.e. four days after his arrest. A-2 never claimed that his father (DW-2) sent any telegram.

30. DW-2, who is the father of A-1, deposed that on 14.08.1999, two police men had come to his house and had taken A-1 on the pretext of interrogating him. On

17.08.1999, he came to know that A- 1 was arrested after an encounter with the police.

31. A-1 and A-2 were asked about their arrest on 16.08.1999 at the time of recording their statement under section 313 of the Cr PC but they did not offer any explanation and simply denied the question. They did not claim that they were arrested on 14.08.1999. Neither the deposition of DW-1, nor that of DW-2 inspires confidence. Moreover, the deposition of DW-1 and DW-2 is not corroborated by oral or CRL.A6702004, CRL.A8772005 & CRL.A.439/2004 Page 15 of 23 ` documentary evidence and they are only interested witnesses being fathers of A-2 and A-1 respectively. A-2 claimed in his statement that his father (DW-1) had lodged a complaint with the S.S.P. on 20.08.1999 which fact was not deposed by DW-1. More important is the fact that A-1 and A-2 never put such a defence of their arrest on 14.08.1999, in the cross-examination of the relevant material prosecution witnesses, PW-20, PW-21, PW-23 and PW-27, who recovered the Tata Sumo car and apprehended A-1 and A-2 on the night intervening 16/17.08.1999. Such a defence was also not put to PW-28 to whom the disclosure was made by them pursuant to which the dead body of the deceased was recovered on 17.08.1999. Here, we would benefit from the observation of the Supreme Court in Sarwan Singh v. State of Punjab, (2003) 1 SCC240 where it was observed that It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross- examination it must follow that the evidence tendered on that issue ought to be accepted. A decision of the Calcutta High Court lends support to the observation as above. Analysis 32. The present case is based on circumstantial evidence. The Supreme Court in Gagan Kanojia v. State of Punjab, (2006) 13 SCC516re-iterated the principles to be followed while basing a conviction on circumstantial evidence as under: (1) There must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must CRL.A6702004, CRL.A8772005 & CRL.A.439/2004 Page 16 of 23 ` be such as to show that within all human probability the act must have been done by the accused. (2) Circumstantial evidence can be reasonably made the basis of an accused person's conviction if it is of such character that it is wholly inconsistent with the innocence of the accused and is consistent only with his guilt. (3) There

should be no missing links but it is not that every one of the links must appear on the surface of the evidence, since some of these links may only be inferred from the proven facts. (4) On the availability of two inferences, the one in favour of the accused must be accepted. (5) It cannot be said that prosecution must meet any and every hypothesis put forward by the accused however far-fetched and fanciful it might be. Nor does it mean that prosecution evidence must be rejected on the slightest doubt because the law permits rejection if the doubt is reasonable and not otherwise. 33. In the present case, the chain of events starts on 11.08.1999, with A-1, A-2 and A-3 hiring the Tata Sumo car from PW-3. PW-3 identified the accused, A-2 and A-3 as being the ones who had come inside his shop to book the Tata Sumo car and he testified that A-1 had also come with them but he remained outside his shop. PW-3 remained consistent throughout his testimony and nothing contradictory came out from his cross-examination thereby establishing the presence of the accused A-1, A-2 and A-3 with the deceased when he was last seen alive on 11.08.1999.

34. The said Tata Sumo car was intercepted and A-1 and A-2 were apprehended on the night intervening 16/17.08.1999. PW-20, PW-21, PW-23 and PW-27 stood firm in their testimony thus establishing the presence of the accused, A-1 and A-2 on 16/17.08.1999 in the Tata ` Sumo car that the deceased had driven from Delhi to Haridwar. A-1 and A-2 made disclosures to PW-28 that they had killed the deceased with the help of a rope and screw driver and had thrown the dead body in the Rajwaha. Both of them took PW-28 to the Rajwaha and at village Bari Nangla puthi, they got recovered the dead body of the deceased from the Jhal of the Rajwaha vide Recovery memo (Ex.PW13/E).

35. PW-9, Dr. P.K Sharma conducted that post mortem on the body of the deceased on 18.08.1999 and deposed that the deceased died because of asphyxia due to strangulation and the time since death was about 7 days thereby fixing the day on which the deceased was killed as around 11.08.1999, the date on which the deceased was last seen alive in the company of A-1, A-2 and A-3. The law relating to last seen evidence was elaborated by the Supreme Court in State of Rajasthan v. Kashi Ram, (2006) 12 SCC254where it was held that: 23. It is not

necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to CRL.A6702004, CRL.A8772005 & CRL.A.439/2004 Page 18 of 23 ` offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain.

(Emphasis added)

36. Following the ratio in Kashi Rams case (supra), in the present case, the time of death is so proximate to the deceased last seen alive with A-1 and A-2 that the onus of proof shifts upon them to explain how they had continued to occupy the Tata Sumo car without the deceased driver. This onus was admittedly not discharged by them during their statement recorded under section 313 of the Cr PC or in their evidence. The effect of not explaining the incriminating circumstance of being last seen with the deceased proximate to the time of his death has been elucidated by Supreme Court in Ashok v. State of Maharashtra, (2015) 4 SCC393where it was held that: 12. From the study of abovestated judgments and many others delivered by this Court over a period of years, the rule can be summarised as that the initial burden of proof is on the prosecution to bring sufficient evidence pointing towards guilt of the accused. However, in case of last seen together, the prosecution is exempted to prove exact happening of the incident as the accused himself would have special knowledge of the incident and

thus, would have burden of proof as per Section CRL.A6702004, CRL.A8772005 & CRL.A.439/2004 Page 19 of 23 ` 106 of the Evidence Act. Therefore, last seen together itself is not a conclusive proof but along with other circumstances surrounding the incident, like relations between the accused and the deceased, enmity between them, previous history of hostility, recovery of weapon from the accused, etc. non-explanation of death of the deceased, may lead to a presumption of guilt. (emphasis added) 37. Recovery of the dead body at the instance of the accused, A-1 and A-2 on 17.08.1999 is the final link in the chain of circumstances. At this juncture, it would be beneficial to allude to the decision of the Supreme Court in Anuj Kumar Gupta v. State of Bihar, (2013) 12 SCC383 where it was observed as follows: 18. In such circumstances, in the absence of any convincing explanation offered on behalf of the appellant-accused as to under what circumstances he was able to lead the police party to the place where the dead body of the deceased was found, it will have to be held that such recovery of the dead body, which is a very clinching circumstance in a case of this nature, would act deadly against the appellant considered along with rest of the circumstances demonstrated by the prosecution to rope in the appellant in the alleged crime of the killing of the deceased. Therefore, once we find that there was definite admission on behalf of the appellant by which the prosecuting agency was able to recover the body of the deceased from a place, which was within the special knowledge of the appellant, the only other aspect to be examined is whether the appellant came forward with any convincing explanation the said admission. Unfortunately though the above incriminating circumstance was put to the appellant in the Section 313 Cr PC questioning where he had an opportunity to to get over CRL.A6702004, CRL.A8772005 & CRL.A.439/2004 Page 20 of 23 ` explain, except a mere denial there was no other convincing explanation offered by him. 38. As discussed in the preceding paras, the testimony of PW-28 went unchallenged in his cross-examination. The incriminating circumstances relating to the recovery of the dead body of the deceased were put to the accused to which they did not offer any reasonable explanation. As explained in Anuj Kumar Guptas case (supra), mere denial is of no use and an adverse inference has to be drawn from such a denial. The contention of the defence counsel that the testimony of the official witnesses cannot be relied upon, is misconceived and not in line with

the judgment of the Supreme Court in State of Kerala v. M.M. Mathew, (1978) 4 SCC65where it was held that: It is true that courts of law have to judge the evidence before them by applying the well-recognised test of basic human probabilities and that some of the observations made by the Sessions Judge especially one to the effect that the evidence of officers constituting the Inspecting Party is highly interested because they want that the accused are convicted cannot be accepted as it runs counter to the well-recognised principle that prima facie public servants must be presumed to act honestly and conscientiously and their evidence has to be assessed on its intrinsic worth and cannot be discarded merely on the ground that being public servants they are interested in the success of their case. 39. An analysis of the evidence shows the presence of A-1 and A-2 during the entire sequence of events, from the point of booking of the CRL.A6702004, CRL.A8772005 & CRL.A.439/2004 Page 21 of 23 ` Tata Sumo car and recovery thereof to the point of recovery of the dead body at their instance, pursuant to their disclosure statements.

40. A-3 was not present when the car was intercepted and recovered. The dead body had already been recovered at the instance of A-1 and A-2 before A-3 was arrested. The disclosure statement (Ex.PW29/A) made by A-3 when he was arrested from Sagarpur bus stand, Delhi on 25.08.1999, did not lead to any recovery. Hence the same is inadmissible in view of sections 25 and 26 of the Indian Evidence Act, 1872. Therefore benefit of doubt has to be extended to A-3. In the light of the facts and circumstances of the case, we acquit the accused, A-3 in Crl.A. No.439/2004. A-3s bail bond and surety bond stand discharged. He will fulfill the requirements of Section 437A Cr PC to the satisfaction of the trial Court at the earliest.

41. Crl.A. No.670/2004 and Crl.A. 877/2005 are dismissed. The conviction and sentence of A-1 and A-2 are upheld. The bail bonds and surety bonds furnished by A-1 and A-2 are hereby cancelled. A-2 shall surrender before the trial Court within one week, failing which the IO concerned will immediately take steps to have him arrested and sent to custody for serving out the remainder of the sentence awarded to him. The Trial Court record be returned together with a certified copy of this judgment.

42. The three appeals are disposed of on the above terms.

43. We find that the Trial Court has not awarded any compensation to the legal representatives of the deceased under section 357 of the Cr PC. In the meanwhile, section 357A Cr PC has been incorporated in CRL.A6702004, CRL.A8772005 & CRL.A.439/2004 Page 22 of 23 ` the statue w.e.f. 31.12.2009. Pursuant thereto, Government of NCT of Delhi has framed the Victim Compensation Scheme. We therefore direct the Delhi State Legal Services Authority (DLSA) in terms of section 357A (5) of the Cr PC to forthwith undertake an inquiry and within two months, award appropriate compensation. He shall ensure disbursal of the compensation to the family of the victim, in terms of the said scheme. For this purpose, a certified copy of this judgment shall be delivered forthwith to the Secretary, DLSA with a further direction to submit a compliance report to the Court within three months from the date of receipt of a certified copy of this judgment. If no such compliance is forthcoming within the stipulated time, the Registry will place a note before Roster Bench for further directions. (VINOD GOEL) JUDGE (HIMA KOHLI) JUDGE MAY31 2019 CRL.A6702004, CRL.A8772005 & CRL.A.439/2004 Page 23 of 23