Yogesh Sharma Vs. State

Yogesh Sharma Vs. State

SooperKanoon Citation : sooperkanoon.com/49972

Court : Delhi

Decided On : Mar-27-2015

Judge : G. S. Sistani

Appellant : Yogesh Sharma

Respondent : State

Judgement :

IN THE HIGH COURT OF DELHI AT NEW DELHI + CRL.A. 628/2010 % Judgment reserved on 02.03.2015 Judgment delivered on 27.03.2015 YOGESH SHARMA Appellant Through : Mr. Ashutosh Bhardwaj, Advocate with Ms. Jyoti Batra, Advocate Versus Respondent Through : Mr. Sunil Sharma, APP for the State. STATE CORAM: HONBLE MR. JUSTICE G.S. SISTANI HONBLE MS. JUSTICE SANGITA DHINGRA SEHGAL SANGITA DHINGRA SEHGAL, J.

1. Present appeal filed by the appellant under section 374(2) of Criminal Procedure Code, is directed against the impugned judgment dated 20.02.2010 and order on sentence dated 23.02.2010 passed by the Learned Additional Sessions Judge, Delhi in Sessions Case No.07/2007, whereby the learned Trial Court has held that:

5...In the totality of facts and circumstances of the case, I sentence the convict Yogesh Sharma @ Rahul Sharma to imprisonment for life. The convict shall also be liable to pay a fine of Rs.10,000/- in default to undergo sentence of one year.

The convict is further sentenced to RI for a period of 10 years u/s 397 IPC and also made liable to pay fine of Rs.500/- in default to undergo RI for one more year. No separate sentence is given u/s 392 IPC since the sentence has been awarded for aggravating offence u/s 397 IPC. The convict is also sentenced to undergo RI for a period of three years u/s 411 IPC and to pay fine of Rs.2,000/- and in default to undergo RI for six months

2. Brief facts of the case, as noticed by the learned Trial Court are as under:

2. The case of the prosecution is that on 25.6.2006 at about 9 p.m. PW41 ACP S.P. Kaushik (Then inspector and SHO Chandni Chowk) was on patrol duty with PW9Const. Meher Singh and when they reached Nai Sarak near shop No.819, they found a crowd of people gathered, and they were informed that one of the owner of the shop No.819 namely Sunder Lal Jain was lying in an injured condition at first floor portion of the shop ; that in the meanwhile PW42SI Rajbir Singh and PW8ASI Suresh Kumar also reached the place of occurrence ; that the police party reached the first floor portion of the shop where Sunder Lal Jain was lying in injured condition on a mattress with blood all over ; that the injured was immediately removed to hospital in a PCR Gypsy ; that dogs squad and mobile crime team were summoned ; that the statement of said PW21 Ajay Jain Ex. PW21/A son of injured was recorded in Hindi which translated in English reads as under :

that his father Sunder Lal Jain has been running a shop in the sale of sarees along with uncle Sushil Kumar Jain besides himself in the name and style of M/s Mala Silk and Sarees; that on that day i.e. 25.6.06 at about 11 a.m, his father Sunder Lal Jain aged about 55 years had come to the shop for the purpose of doing some accounting work of the firm since it was Sunday ; that at about 8 or 8.15 p.m. when he was present at his house that one Mr. Gullu Babu called him on their land line MTNL No.28267682 and informed him that the shutter of their shop was open but the glass door was closed; that the lights inside were also off but the air conditioners were running and nobody was responding from inside the shop ; that he along with his cousin Lokesh Kumar reached the shop on their scooter and found Gullu Babu, security guard and others outside the shop ; that they went

inside the shop and on the first floor found his father lying in a pool of blood on a mattress ; that he raised alarm and in the meanwhile the police party arrived ; that his injured father was still breathing and he was immediately removed to the hospital. In the same breath he also disclosed that he has just been informed by his brother PW2 Anil that his father Sunder Lal Jain has been pronounced dead in the hospital. On the basis of said statement, the present FIR Ex. PW-15/A was recorded. Police started investigation, collecting samples of blood from the spot, bed-sheet and several other items, mobile crime team attempted to lift chance prints from the spot. The deadbody was sent for postmortem and after that it was handed over to the family of the deceased and the body was cremated at Nigam Bodh Ghat, Delhi on 26.6.06.

3. It is the case of the prosecution that during the investigation the witnesses raised their suspicion on one Yogesh Sharma r/o Swatantra Nagar, Narela, Delhi who was missing along with one Sri Bhagwan @ Monu ; that PW20Kishan Kumar, brother of accused Sri Bhagwan @ Monu disclosed to the police that his brother came back home in the night of 25 the June 2006 and while crying confessed to him that he had been prevailed upon by Yogesh to murder Lala Sunder Lal Jain and they had looted some money as well and he was afraid of getting caught. During the investigation police teams were sent to Simla, Chandigarh, Amtritsar, Agra and several other places but in vain ; that the mobile phone of the accused Yogesh was put under surveillance and ultimately the accused persons were allegedly arrested from Kolkotta on 27.10.06 and they were found in possession of certain properties which they had purchased allegedly out of stolen money and later recovery of properties purchased from the ill gotten money were retrieved from Kolkatta on 31.10.2006 in the presence of public witnesses. After completion of the investigation, the present police report was filed against the accused persons.

3. The prosecution, in the course of the trial relied upon several exhibits and the testimonies of 45 witnesses. The appellant examined one defence witness.

4. The learned Trial Court, after scrutiny of the evidence, held that prosecution had been able to prove the case against the appellant and accordingly convicted and

sentenced him as has been stated hereinabove.

5. While arguing the appeal, learned counsel for the appellant Sh. Ashutosh Bhardwaj contended that the judgment of the learned Trial Court is contrary to the facts and law and same is based on surmises and conjectures; that there are several material contradictions in the testimonies of PW1 Ramesh Kumar and PW4 Deepak Prasad which proves that they are planted witnesses and had not seen the appellant entering the shop of the deceased; that PW21 Ajay Jain admitted in his statement that Rs.30,000-35,000/- were found intact in the only counter of the shop and the story of the prosecution that appellant entered the shop with a motive to rob Rs. 6-7 Lakhs is an afterthought; that PW5 Sushil Kumar Jain and PW21 Ajay Jain had not heard the deceased talking to the appellant on the previous day of the incident; that PW5 Sushil Kumar Jain and PW21 Ajay Jain deposed that the appellant was hired as a salesman-cum-helper and prosecution has failed to establish his knowledge about computers; that the arrest and recovery of articles from Calcutta are planted as PW5 Sushil Kumar Jain admitted in his statement that they were having business at Calcutta also and many businessmen were in contact with them and thus it was convenient for prosecution to arrange false witnesses from Calcutta; that there is no evidence on record to connect the appellant with the mobile numbers 9811443254 and 9830539875; that the appellant was arrested in the presence of PW38 Neha, the sole independent witness of his arrest but her signatures were not obtained by the police on the arrest memo; that there are contradictions on time and date of conducting the raid and arresting the appellant; that PW12 HC Jitender and PW39 SI Ram Niwas have given contradictory statements with respect to the address of the appellant in Calcutta; that testimony of PW25 Ajay Chawdhary is neither reliable nor trustworthy to the effect that he had rented his flat to appellant in the absence of any identity proof; that there is no evidence on record to suggest that PW40 Insp. Sunil Sharma, PW44 SI Ratan Lal and others visited Calcutta; that the testimony of PW9 Suman Guha has given contradictory statement about the place from where the articles were recovered; that the testimony of PW11 Pranav Roy that the appellant gave his mobile for sale is not trustworthy as the appellant kept the mobile phone of the deceased in his possession for more than four months and failed to explain the delay in sale; that the prosecution failed to produce the

recovered hotel bills where the appellant stayed in various parts of India during the period he was absconding; that Gullu Babu informed PW21 Ajay Jain on telephone that shutter of the shop was open but he was not arrayed in the list of witnesses; that the crime branch failed to produce the record of the finger prints lifted from the place of occurrence; that it was an afterthought that the mobile phone and one gold chain of the deceased was missing; that PW26 Kamal Gaur is a planted witness as his testimony does not inspire confidence that he was taking a walk near the railway station when he saw the appellant with blood stained clothes; that PW26 Kamal Gaur failed to produce any document in support of his version that the appellant was a member of a Multi Level Marketing Scheme.

6. It is finally contended that though the learned Trial Court has convicted the appellant under Section 302 of Indian Penal Code, it is a fit case where Section 304 Part-I of the Indian Penal Code should have been invoked because the plea of the appellant is that the deceased used to sodomize him and he committed the crime while exercising his right to private defence as has been stated by him in his statement recorded under Section 313 of the Code of Criminal Procedure. Reliance has been placed by learned counsel for the appellant in the case of Sumer Singh v. Suraj Bhan Singh & Ors, 2014 (3) JCC2282 wherein it has been held by the Honble Supreme Court that:

16. Presently, to the delineation on the first score. As stated earlier, the singular contention of Mr. Dash is that the accused persons exercised their right of private defence and even assuming they exceeded that right, they could only have been convicted for a lesser offence. Per contra, Mr. Jain would contend that no plea for exercise of right to private defence was taken under Section 313 of the Code. Statement and, in any case, the appellants had done nothing to provoke the accused persons to commit the crime in such a heinous manner. It is well settled in law that exercise of right of private defence even if not specifically taken in Section 313 of the Code, it can always be gathered from surrounding facts and circumstances. The said position has been stated in Vidya Singh v. The State of Madhya Pradesh, AIR 1971 SC1857 Sikandar Singh and Others v. State of Bihar, 2010 (3) 2265 : (2010) 7 SCC477and State of Rajasthan v. Manoj Kumar, (2014) 4 SCALE724?? 7. Similarly, in another case of State of Karnataka v. Shivappa

Gurusiddappa & Ors., AIR 1998 SC1536 the Apex Court has held that:

5. As accused 1 to 4 were in possession of land and as A. 4 was attacked, they had the right of private defence of their property and person. It is no doubt true as pointed by the High Court, number of injuries found on the dead persons were many and were not justified in causing so many injuries. In doing so they had exceeded the right of private defence. They have been rightly convicted under Section 304, Part I, IPC. As we do not find any substance in these appeals they are dismissed. The appellants are ordered to surrender to custody.

8. The above stated principles have been corroborated in the cases of Kashiram & Ors. v. State of M.P., (2002) 1 SCC71 Bahadur Singh & Anr. v. State of Punjab, (1992) 4 SCC503 Sunder v. State of Haryana, AIR 1992 SC1333 Mathura Yadav @ Mathura Mahato & Anr. v. State of Bihar, (2002) 6 SCC451 Subramani & Ors. v. State of Tamil Nadu, AIR 2002 SC2980and Lakshmi Singh v. State of Bihar, 1976 Legal Eagle (SC) 2980.

9. On the other hand Mr. Sunil Sharma, learned counsel for the State opposed the appeal filed by the appellant and argued that the case in hand was of circumstantial evidence; the prosecution has proved its case beyond reasonable doubt, that PW1 Ramesh Kumar and PW4 Deepak Prasad are totally reliable eye witnesses who saw the appellant entering the shop on the dreadful day and have also helped the police in the investigation; that the testimony of PW5 Sushil Kumar Jain and PW21 Ajay Jain are reliable and trustworthy as they heard the deceased talking on the phone with the appellant on the previous day who confirmed that he will be coming to the shop on Sunday i.e., 25.06.2006 for the repair of the computer; that there is no reason to doubt the testimony of PW26 Kamal Gaur who deposed that he met the appellant on the day of incident near the Narela Railway Station wearing a blood stained shirt; that similarly, there is no reason to disbelieve the testimonies of PW9 Suman Guha and PW11 Pranav Roy as they are natural witnesses having no enmity with the appellant and no reason to falsely implicate him in the present case.

10. We have heard the learned counsel for the parties, considered their rival submissions and perused the impugned judgment as well as material available on

record. In order to deal with the contentions of both the parties, it would be appropriate to examine the testimonies of material witnesses of the prosecution, more particularly the testimonies of PW1 Ramesh Kumar and PW4 Deepak Prasad, who claimed to have seen the appellant entering the shop on the day of the incident.

11. PW1 Ramesh Kumar deposed that he was working with one Sanjeev Chaddha who was dealing in sale of sarees and running the shop under the name and style of Raghuvansh Silk and Sarees and the deceased was running a saree shop in front of his shop under the name and style of Mala Silk and Sarees and that he had seen the deceased open the shop at about 2.30 p.m. on the day of the incident i.e., 25.06.2006, but the main glass door was closed from inside. PW1 Ramesh Kumar further deposed that he saw the appellant coming to the shop of the deceased at about 3.00 p.m. and after a short while the appellant left for taking tea and returned at about 5:30p.m. along with another person whom he was addressing as Monu. PW1 Ramesh Kumar further deposed that he went home after closing his shop but on the next day in the morning, he came to know that the deceased had been murdered after which he met PW5 Sushil Kumar Jain, brother of the deceased at the Subzi Mandi Mortuary and informed him about the happening on the previous day.

12. PW4 Deepak Prasad deposed that he was working at Mala Silk and Sarees and the day of the incident happened to be his weekly off but while he was going in a rickshaw to his house at about 5:30-6:00 p.m., he saw the appellant entering the shop of Mala Silk and Sarees by opening the glass door of the shop. He further added that about 9:00 p.m, PW2 Anil Kumar Jain informed him telephonically about the murder of the deceased and on his asking he reached the shop immediately where he saw that the deceased was being removed to the hospital. PW4 Deepak Prasad deposed that he informed PW2 Anil Kumar Jain and PW21 Ajay Jain, brother and son of the deceased respectively that he had seen the appellant entering the shop on the previous day around 5:30-6:00 p.m. along with another person.

13. PW1 Ramesh Kumar has categorically deposed that he used to work on Sundays and therefore there is every reason to believe that he happened to see the appellant entering the shop of the deceased on the fateful day. PW4 Deepak Prasad also gave a plausible explanation of his coming across the shop and seeing the appellant entering the shop as he was residing in Jogiwara, a place close to the shop. The version of PW1 Ramesh Kumar has been corroborated by testimony of PW5 Sushil Kumar and version of PW4 Deepak Prasad finds support from the statement of PW21 Anil Kumar Jain that they had seen the appellant entering the shop along with another person in the evening of 25.06.2006. The close examination and analysis of testimonies of PW1 Ramesh Kumar and PW4 Deepak Prasad, do not leave any doubt that appellant was seen entering the shop on the day of incident along with an another person.

14. The version of PW26 Kamal Gaur fortifies the case of the prosecution who deposed that he met the appellant on 25.06.2006 at about 8:00-8:15 p.m. near the railway station Narela wearing a blood stained shirt and when he was questioned about the blood and also that he had failed to attend the Multi Level Marketing State of U.P. v. Hari Prasad (1974) 3 SCC673 this Court dealing with the aspect of motive has stated that:

This is not to say that even if the witnesses are truthful, the prosecution must fail for the reason that the motive of the crime is difficult to find. For the matter of fact, it is never incumbent on the prosecution to prove the motive for the crime. And often times, a motive is indicated to heighten the probability that the offence was committed by the person who was impelled by that motive. But, if the crime is alleged to have been committed for a particular motive, it is relevant to inquire whether the pattern of the crime fits in with the alleged motive.

15. Scheme meeting on the same day, he took up a plea that his friend had met with an accident and he had taken him to the hospital.

16. From the above material on record, it is clear that the appellant was last seen in the company of the deceased. It has been held by the Honble Supreme Court in the case of Bodhraj v. State of Jammu & Kashmir, (2002) 8 SCC45 that:

31. 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 guilt in those cases. In this case there is positive evidence that the deceased, A-1 and A-2 were seen together by witnesses i.e. PWs 14, 15 and 18 in addition to the evidence of PWs 1 and 2. Similarly in the case of State of U.P. v. Satish, (2005) 3 SCC114 the Apex Court observed that:

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 guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses PWs 3 and 5, in addition to the evidence of PW2 The above stated view has been further corroborated in the case of Ramreddy Rajesh Khanna Reddy v. State of A.P., (2006) 10 SCC172 wherein it has been held by the Honble Supreme Court that:

27. The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and 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. Even in such a case the courts should look for some corroboration.

17. The appellant was apprehended from Calcutta on 28.10.2006 and was not available in Delhi since the day of incident i.e. 25.06.2006. DW1 Rajender Sharma, father of the appellant when examined deposed that the police had been coming to his residence on various occasions to enquire about the whereabouts of the appellant. It has emerged on record that the appellant from 25.06.2006 to 28.10.2006 stayed in various hotels and guest houses in various parts of the country under fictitious identity which finds support from the testimony of PW32 Mahinder Ahuja, Proprietor of Chand Hotel, Gunj Bazar, Shimla who identified the appellant as the person stayed in his hotel from 27.06.2006 to 29.06.2006 under the name of Kunal Sharma and proved the record Ex.PW32/A in the name of Kunal Sharma. PW33 Amit Kumar, owner of an electronic shop at Lower Bazar, Shimla deposed that the appellant had purchased a Discman (Small VCD player made in China) from his shop. PW28 Mohd. Sharif, Manager, Vijay Palace Hotel, Jaipur, Rajasthan also identified the appellant as the person who stayed in their hotel from 22.07.2006 to 24.07.2006 under the name of Rahul Sharma and proved the record Ex.PW28/A seized vide Ex.PW23/A. PW29 Gurdeep Singh Kukreja, Manager, N K Motel (N K Tower), 10 GT Road, Panipat, Haryana deposed that the appellant stayed in his hotel from 05.10.2006 to 07.10.2006 under the name of Rahul Sharma and proved the record Ex. PW29/A. PW13 HC Ram Niwas during investigation found that the appellant stayed at Hotel Himachal Palace, Chandigarh from 18.07.2006 to 21.07.2006 as per guest register Ex.PW13/A and also stayed at Harsh Hotel, Kurukshetra from 20.07.2006 to 21.07.2006 as per guest register Ex.PW13/C. PW23 Ct. Chander Mohan associated with the investigation deposed that he took the appellant to Hotel Vijay Palace, Jaipur where he was identified by PW28 Mohd. Sharif. PW40 Insp. Sunil Kumar Sharma, Investigating Officer during inquiries found that the appellant stayed at Hotel Sahara, Amritsar from 12.07.2006 to 14.07.2006 and at Hotel Kirandeep, Agra on 24.07.2006 as per record seized vide memo Ex.PW23/C. There is no reason to disbelieve the testimonies of the above named independent witnesses which proved that the appellant was hiding himself and lived under fictitious names in various hotels. The conduct of the appellant in absconding for a period about 4 months further goes against him and supports the case of the prosecution.

18. PW39 SI Ram Niwas during investigation traced the appellant from Calcutta after being informed on 24.10.2006 that the appellant was using mobile No.9811443254. The call details of this number were procured from the date of activation of the mobile i.e. 24.01.2006 till the date of incident i.e. 25.06.06 and the analysis revealed that the user of the mobile phone used to frequently contact a cell phone of Reliance Company No.9312575861 registered in the name of one Amit Kumar. Amit Kumar was located via technical surveillance and on inquiries he revealed that the said number was being used by his sister-in-law Neha (PW38). PW39 SI Ram Niwas further deposed that he took Amit Kumar to the house of PW38 Neha who was shown the photographs of the appellant. She identified him and disclosed that the appellant used to call her from cell No.9830539875 and the call details of the phone of PW38 Neha revealed the location of the phone number 9830539875 being used from Calcutta. PW39 SI Ram Niwas through enquiries found the exact location of mobile No.9830539875 and was led to the flat of the appellant and arrested the appellant at 1:30a.m. 28.10.2006 vide Ex. PW12/A.

19. PW21 Ajay Jain submitted the bill of purchase of a mobile make Nokia Ex.PW40/C having IMEI No.355030009250463. PW11 Pranav Roy stated that the appellant had given him a mobile during one of his visits to his restaurant Sanjha Chulha at Calcutta. The mobile was recovered from PW11 Pranav Roy. The fact that mobile with IMEI No.355030009250463 was handed over by the appellant to PW11 Pranav Roy at Calcutta points to the guilt of appellant as it is only the appellant who can explain how he was in possession of the mobile phone of the deceased. It is already in evidence that the appellant was absconding and hiding himself in Calcutta. The testimony of PW11 Pranav Roy goes against the appellant that the mobile of deceased was handed over to him by the appellant for sale.

20. PW9 Suman Guha deposed that he was working as a waiter in a restaurant Sanjha Chulha at Calcutta where the appellant was a regular customer and had developed friendship with him. PW9 Suman Guha deposed that appellant told him that he wanted to sell a videogame machine purchased by him as he could not get a license. PW9 Suman Guha further deposed that appellant had handed over two videogames, two TVs, one remote and keyboard to him to keep in his safe

custody. He further deposed that the appellant was shown to him by the police and he handed over the said articles to the police which were seized vide memo Ex. PW9/A.

21. The prosecution examined PW25 Ajay Chowdhary to prove that the appellant was residing in Calcutta and PW25 Ajay Chowdhary had let out his flat on a monthly rent of Rs.6,000/- to him but the appellant had given his name as Rahul. PW25 Ajay Chowdhary further deposed that since the appellant did not have an identity card and had only to stay for a short period of about 1 months, the appellant had given him a security of Rs.40,000/- and Rs.18,000/- for purchase of a motorcycle. PW25 Ajay Chowdhary proved that on 31.10.2006, appellant was brought to his house in police custody and the search was conducted in his presence and all the articles recovered there from were seized vide memo Ex.PW25/A which consisted of 8 CD games, two speakers, one key-board, one lap-top lead, one ear phone. PW25 Ajay Chowdhary deposed that he handed over Rs.58,000/- to the police which were seized vide memo Ex.PW25/B.

22. In view of the evidence which has emerged on record, the many fold contentions raised of learned counsel for the appellant are without force. The testimonies of PW9 Suman Guha and PW11 Pranav Roy, who are natural and local witnesses go to prove that they had no reason to falsely depose against the appellant and their evidence being reliable cannot be discarded. The mere fact that PW40 Inspector Sunil Kumar Sharma and PW44 ASI Rattan Lal mentioned different house Nos. belonging to PW25 Ajay Choudhary is ignorable as the witnesses were examined in Court after a delay of three years and the mistake might be due to passage of time but PW25 Ajay Chowdhary has categorically mentioned that the flat was situated at 8N, C.N. Roy Road, P.S. Tilijala, Calcutta and the flat number was C-2 and hence there is no discrepancy. The mere fact that Rs.58,000/- handed over by PW25 Ajay Chowdhary was not sealed is hardly of any consequence as the currency notes stolen had no identifiable mark nor the properties recovered were the stolen properties rather they were the items bought from the loot amount.

23. The contention raised by learned counsel for the appellant that there was no reason or motive of the appellant to commit the murder of the deceased also does not hold ground. It is well settled, in order to bring home the guilt of the accused, it is not necessary for the prosecution to prove the motive. The existence of the motive is only one of the circumstances to be kept in mind while appreciating the evidence adduced by the prosecution. If the evidence of the witnesses appears to be truthful and convincing failure to prove the motive is not fatal to the case of the prosecution. However, according to the prosecution the motive of murder was robbery and in pursuance of the same, a knife was used. No doubt PW21 Ajay Jain in his initial complaint Ex.PW21/A to police failed to mention reason for murder of the deceased but in his evidence on 28.6.2006 deposed that he had informed the investigating agency that cash amount of Rs.6-7 lakhs was missing from the cash box. The testimony of PW21 Ajay Jain has been corroborated by PW41 ACP S. P. Kaushik Investigating Officer. The information/application was untraceable on record but it is uncontroverted that statement of PW21 Ajay Jain was recorded under Section 161 of Code of Criminal Procedure on 28.06.2006 wherein he has stated to the police that cash amount of Rs.6-7 lakhs was missing and it was thereafter that the offence under Section 394 of the Indian Penal Code was added for investigation.

24. In State of U.P. v. Hari Prasad (1974) 3 SCC673 this Court dealing with the aspect of motive has stated that:

25. This is not to say that even if the witnesses are truthful, the prosecution must fail for the reason that the motive of the crime is difficult to find. For the matter of fact, it is never incumbent on the prosecution to prove the motive for the crime. And often times, a motive is indicated to heighten the probability that the offence was committed by the person who was impelled by that motive. But, if the crime is alleged to have been committed for a particular motive, it is relevant to inquire whether the pattern of the crime fits in with the alleged motive.

It is not necessary for the prosecution to prove the motive as the existence of motive is only one of the circumstances to be kept in mind while appreciating the evidence adduced by the prosecution. If the evidence of the witnesses appears to

be truthful and convincing, failure to prove the motive is not fatal to the case of the prosecution. Our view is fortified by the law laid down by the Apex Court in the case of State of U.P. v. Hari Prasad (1974) 3 SCC673 26. It has been pointed by the learned counsel for the appellant that there are major defects in the investigation. The chance prints were lifted from the spot but no attempt was made to take the finger prints of the appellant and send the same for comparison, thus benefit of doubt should be given to the appellant. We are of the opinion that though there is a lapse in the investigation conducted but there is enough evidence on record to prove that the appellant has committed the murder of the deceased. It is well settled by a catena of judgements that the defect in the investigation can not in itself be a ground for acquittal. Reliance can be placed in the case of C. Muniappan v. State of T.N., (2010) 9 SCC567 wherein it has been held by the Honble Supreme Court that:

55. There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the IO and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation. Similar view was taken by the Apex Court in the case of Sunil Kundu v. State of Jharkhand, (2013) 4 SCC422 (2013) 2 SCC (Cri) 427:

2013. SCC OnLine SC316 wherein it was held:

29...It is true that acquitting the accused merely on the ground of lapses or irregularities in the investigation of a case would amount to putting premium on the deprecable conduct of an incompetent investigating agency at the cost of the victims which may lead to encouraging perpetrators of crimes. This Court has laid down that the lapses or irregularities in the investigation could be ignored subject to a rider. They can be ignored only if despite their existence, the evidence on record bears out the case of the prosecution and the evidence is of sterling quality. If the lapses or irregularities do not go to the root of the matter, if they do not dislodge the substratum of the prosecution case, they can be ignored....

In another case of Hema v. State, (2013) 10 SCC192 it was observed by the Apex Court that:

18. It is clear that merely because of some defect in the investigation, lapse on the part of the investigating officer, it cannot be a ground for acquittal. Further, even if there had been negligence on the part of the investigating agency or omissions, etc. it is the obligation on the part of the court to scrutinise the prosecution evidence dehors such lapses to find out whether the said evidence is reliable or not and whether such lapses affect the object of finding out the truth.

27. Lastly, the learned counsel for the appellant urged that even if the case of the prosecution is accepted, the allegation proved against the appellant makes out a case under Section 304 part-I Indian Penal Code and therefore conviction of the appellant under section 302 Indian Penal Code is bad in law. It is argued that the appellant committed the act in furtherance of his right of private defence as indicated by the appellant in his disclosure statement Ex.PW12/C that the deceased used to call him on Sundays and used to sodomize him.

28. The law whether the case falls under Section 302 or 304 Part-I or 304 Part II has been discussed by the Honble Apex Court in the following judgements. In Pulicherla Nagaraju @ Nagaraja Reddy v. State of Andhra Pradesh (2006) 11 SCC444 the Supreme Court enumerated some of the circumstances relevant to find out whether there was any intention to cause death on the part of the accused. The Court observed: ...Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the

case falls Under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters - plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable Under Section 302, are not converted into offences punishable Under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable Under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any pre-meditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention... Similarly, in the case of Chacko @ Aniyan Kunju and Ors. Vs. State of Kerala (2004) 12 SCC269 it was held that : All "murder" is "culpable homicide" but not vice versa. Speaking generally, "culpable homicide" sans "special characteristics of murder is culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of the generic offence, IPC practically recognizes three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the gravest

form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as "culpable homicide of the second degree". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type 10. The academic of culpable homicide and the punishment provided for it is also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304. Distinction between "murder" and "culpable homicide not amounting to murder" has always vexed the courts. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences:

1. Clause (b) of Section 299 corresponds with Clauses (2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under Clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the "intention to cause death" is not an essential requirement of Clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim is sufficient to bring the killing within the ambit of this clause.

2. Clause (b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under Clause (2) of Section 300 can be where the assailant causes death by a fist-blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of

nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given. In Clause (3) of Section 300, instead of the words "likely to cause death" occurring in the corresponding Clause (b) of Section 299, the words "sufficient in the ordinary course of nature" have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real and if overlooked, may result in miscarriage of justice. The difference between Clause (b) of Section 299 and Clause (3) of Section 300 is one of degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word "likely" in Clause (b) of Section 299 conveys the sense of probability as distinguished from a mere possibility. The words "bodily injury ... sufficient in the ordinary course of nature to cause death" mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature.

29. For cases to fall under Clause (3) of Section 300 of the Indian Penal Code, it is not necessary that the offender intended to cause death so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. Rajwant Singh v. State of Kerala AIR 1966 SC1874is an apt illustration of this point. In Virsa Singh v. State of Punjab 1958 CriLJ818 Vivian Bose, J.

speaking for the Court, explained the meaning and scope of Clause (3). It was observed that the prosecution must prove the following facts before it can bring a case under Section 300 "thirdly". First, it must establish quite objectively, that a bodily injury is present; secondly, the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly, it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing

to do with the intention of the offender.

30. In Shiv Kumar Vs. State (NCT) of Delhi 2014(2) JCC1 282, it was held that in dealing with Exception 4 to section 300 in Mahesh Balmiki versus State of Madhya Pradesh, (2000) 1 SCC310 it has been observed:

7. Now Exception 4 to Section 300 IPC is in the following terms: Exception 4.--Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner. Explanation.--It is immaterial in such cases which party offers the provocation or commits the first assault. The requirements of this exception are: (a) without premeditation in a sudden fight; (b) in the heat of passion upon a sudden quarrel; (c) the offender has not taken undue advantage; and (d) the offender has not acted in a cruel or unusual manner. Where these requirements are satisfied, culpable homicide would not be murder.

31. The submission of learned counsel for the appellant is to be considered on the touchstone of law which has been laid down above. In our view all the requirements of exceptions as extracted hereinabove are not met. The act of the appellant was not in the heat of passion or upon a sudden quarrel. Helplessness of the victim is writ large on the face of the record, as he was stabbed 59 times which clearly indicates an intention to commit the murder of the deceased.

32. As per the postmortem report Ex.PW22/A prepared by PW22 Dr. S. Lal, the following external injuries were found on the body of the deceased:

a) Incised wound 5.5 X05 cm into muscle deep present on left side face over mandibular area, vertically placed. The wound was placed 0.5 cm in front of ear lobe and 8.0 cm from midline. b) Incised wound 8.5 X05 cm into muscle deep present on left side face over mandipular area, vertically placed. The upper end of wound was placed 3.5 cm left to angle of mouth and the lower end of wound was placed 2.5 cm left to midline of upper neck. c) Multiple incised wound (cut throat) intermingling to each other to form a large wound of size 13 X5cm into 1.5 cm deep over neck. The wound was placed 0.5 cm below the thyroid cartilage,

horizontally placed. The multiple tailing present on the right side of neck. The right angle of wound was placed 6 cm below the angle of mandible. The left angle of wound was placed 6.5 cm below the angle of mandible. The wound was cutting the tracheoa and underline vessels. d) Multiple incised wound (4 in number) intermingling to each other to form a large wound of size 5 X25 cm X bone deep present over midline upper chest over manubrium sterni.

The above injuries clearly show that full force was applied by the appellant while giving stab injuries to the deceased. In the case of Singapagu Anjaiah v. State of Andhra Pradesh 2010 (6) SCALE374 Supreme Court observed that ...no one can enter into the mind of the accused and his intention has to be gathered from the weapon used, the part of the body chosen for the assault and the nature of injury caused. Noticing that the appellant had chosen a crow bar as the weapon of offence and a vital part of the body, i.e., head for causing injury which had caused multiple fractures of the skull and indicated the force applied while using the weapon, the only conclusion was that the appellant intended to cause death of the deceased. Similarly in the case of Manubhai Atabhai v. State of Gujarat, (2007) 10 SCC358 it has been held by the Apex Court that:

8. The nature of intention has to be gathered from the kind of weapon used, the part of the body hit, the amount of force employed and the circumstances attendant upon death...

33. The appellant in his statement recorded under Section 313 of Code of Criminal Procedure categorically denied that the deceased was sodomizing him. The angle of sodomy is ruled out in view of the denial of appellant himself and the testimony of PW22 Dr. S. Lal who deposed that Anal opening was normal and no injury/old tear present in opening. PW22 Dr. S. Lal forwarded the anal swab to FSL and as per report Ex.PW3/A given by PW3 V. Shankranarayanan no semen was detected on the swab.

34. Considering the number of stab injuries given to the deceased by the appellant and the force used while giving the blows and the vital part chosen by the appellant, we can conclude that his intention was to commit murder of the deceased. The appellant gave repeated blows on the vital parts of the body of the

deceased using full force for the purpose and took undue advantage of the situation and acted in a cruel manner. Therefore, no case within the meaning of exceptions to section 300 of the Indian Penal Code is made out in the facts and circumstances of the case.

35. Thus having considered all the incumbent factors, we do not find any infirmity in the impugned judgment dated 20.02.2010 and order on sentence dated 23.02.2010 passed by the learned Additional Sessions Judge. Accordingly, the judgment against the appellant Yogesh Sharma is upheld. The present appeal is liable to be dismissed.

36. The appellant is on bail. His bail bond is cancelled and surety is discharged. He shall be taken into custody forthwith to serve out the life sentence. Copy of the order be sent to the concerned Trial Court as well as to the Superintendent Jail for necessary compliance. SANGITA DHINGRA SEHGAL, J.

G. S. SISTANI, J.

MARCH27 2015 gr