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State Vs. Satish

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Court : Delhi

Decided On : Apr-30-2015

Judge : G. S. Sistani

Appellant : State

Respondent : Satish

Judgement :

IN THE HIGH COURT OF DELHI AT NEW DELHI + CRL.A. 1236/2013 Judgment Reserved On:

5. h February 2015 Judgment Delivered On:

30. h April 2015 SAT PRAKASH @ LALA Appellant Through: Mr. Pradeep Chowdhary, Advocate Versus STATE (GNCT OF DELHI) Respondent Through : Mr. Firoz Khan Ghazi, APP for the State AND + CRL.A. 1210/2014 STATE Appellant Through: Mr. Firoz Khan Ghazi, APP for State Versus Respondent SATISH Through: Mr Naveen Gaur and Mr Abhijeet Bhagat, Advocates AND + CRL.A. 119/2015 MAHESH Appellant Through: Mr. Vivek Kumar Chaudhary, Mr. Vikrant Yadav, Mr. Rohit Arora, Crl. Appeal No.1236/2013 Crl. Appeal No.1210/2014 Mr. Ajay Kumar Pipaniya and Mr. Arjun Singh, Advocates Versus STATE Respondent Through: Mr. Firoz Khan Ghazi, APP for State CORAM: HONBLE MR. JUSTICE G.S.SISTANI HONBLE MS. JUSTICE SANGITA DHINGRA SEHGAL SANGITA DHINGRA SEHGAL, J CRL.A. 1236/2013 &

CRL.A. 119/2015 1. Present appeals arise out of a common judgment dated 18.07.2013 and order on sentence dated 30.07.2013 passed by the learned Additional Sessions Judge in Session case No.121/09 by virtue of which both the appellants have been convicted under section 364/302/201 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC"), and sentenced to undergo Rigorous Imprisonment for life and to pay a fine of Rs. 20,000/- each for the offence punishable under Section 302 of Indian Penal Code, and in default of the payment of fine to further undergo Simple Imprisonment for a period of six months. The appellants were also sentenced to undergo Rigorous Crl. Appeal No.1236/2013 Crl. Appeal No.1210/2014 Imprisonment for 10 years and to pay a fine of Rs. 10,000/- each for the offence punishable under Section 364 of IPC, and in default of the payment of fine to further undergo Simple Imprisonment for a period of six months. The appellants were further sentenced to undergo Rigorous Imprisonment for five years and to pay a fine of Rs. 5,000 each for the offence punishable under Section 201 of IPC and in default of payment of fine to further undergo Simple Imprisonment for three months. All the sentences were ordered to run concurrently.

2. The facts of the case, as noticed by the learned trial court are as under:

On 16.01.2009 D.D. No.7A was recorded at P.S. Alipur by Rajesh Kumar S/o Balijeet Singh that his cousin Sunil Kumar had left the house at 10 AM on 15.01.2009 on his Motorcycle No.HR29Q6770for going to Tihar Jail to meet his father, mother and brother who were in jail for Dowry Death case and on the other Motor Cycle his cousins Gaurav and Micky were going. When they reached at Lavanya farm house, one alto car met them and his cousin Sunil started talking with the occupants of that car and Sunil asked Gaurav to proceed and he will follow them. But thereafter he neither reached at Tihar Jail nor returned back home. The said DD was assigned to S.I. Bharat Bhushan for further investigation of the case. Thereafter on the same day, again DD No.30A was recorded at P.S. Alipur at the instance of Rajesh Kumar that in the morning he had lodged DD No.7A regarding missing of his cousin Sunil and he wanted to say that In-laws of Sandeep had threatened the family members of Sunil that they will kill them if they pursue the case of the persons (Mother, Father and Brother of Sunil) who were

lodged in jail for the murder of their daughter and thus suspected that they might have kidnapped Sunil. The said DD No.was also assigned to S.I. Bharat Bhushan. On Crl. Appeal No.1236/2013 Crl. Appeal No.1210/2014 the basis of aforesaid two DDs S.I. Bharat Bhushan prepared rukka and accordingly FIR u/S365of IPC was registered.

3. On 17.01.2009, information was received that the dead body of Sunil is lying in district hospital Ghaziabad. Thereafter on the secret information received, appellant Mahesh Kumar was arrested who confessed that he kidnapped and murdered the deceased Sunil with the help of respondent Satish and the appellant Sat Prakash because he had an illicit relation with the wife of the deceased Sunil. Pursuant to the disclosure statement made by the appellant Mahesh, an Alto car bearing registration No.DL8CNB2971which was used in the commission of offence was seized and on 31.01.2009 appellant Mahesh got recovered the driving license and election identity card of the deceased Sunil.

4. After completion of investigation, charge sheet u/s 364/201/302 of IPC was filed against the appellant Mahesh.

5. On 09.06.2009 appellant Sat Prakash @ Lala surrendered in the court and pursuant to his disclosure statement, one golden chain which belonged to the deceased was recovered.

6. Supplementary charge sheet u/s 364/302/201 qua appellant Sat Prakash and respondent Satish was filed by the IO.

7. In order to prove its case and to establish the guilt of the appellants and the respondent Satish, the prosecution examined as many as 29 witnesses.

8. The appellants and respondent were examined under section 313 of the Code of Criminal Procedure wherein they denied all the incriminating evidences led by the prosecution. Crl. Appeal No.1236/2013 Crl. Appeal No.1210/2014 9. Trial Court while passing the impugned judgment relied upon the eye witness account given by the ocular witnesses and other accompanying circumstances and found both the appellants guilty for the offences punishable under Section 302/364/201

of IPC and convicted them accordingly.

10. The learned counsel for the appellants submits that the impugned judgment is based on surmises and conjectures and is against the settled proposition of law. Further there is no motive established which could have perpetrated the appellants to commit the crime.

11. Counsel for the appellants also contends that the last seen evidence is unreliable. The statements made by PW-4 and PW-5 in their deposition shows that they have been tutored with a sole motive to frame the appellants. The counsel further submits that the appellant Sat Prakash was not even last seen by any of the witnesses more specifically PW-4 and PW-5. Hence the appellants have been made scape goats in this case which is prima facie visible from the averments and depositions made by the public witnesses.

12. Regarding recovery of the Alto Car at the instance of appellant Mahesh, counsel for the appellant submits that there were contradictions in the testimony of PW21SI Bharat Bhushan and PW24 Ct. Ashok, hence their testimonies cannot be relied upon.

13. The counsel for the appellants further submits that regarding the information about recovery of the dead body, PW-18 has contradicted the testimony of PW-13 who in his testimony deposed that the visiting cards and vakalatnamas were found with the dead body of the deceased and somebody from Ghaziabad police had made a call to Crl. Appeal No.1236/2013 Crl. Appeal No.1210/2014 him on 15.01.2009. However PW-18 had categorically stated in his cross examination that no identity proof was recovered on search from the dead body through which identity of the deceased could be verified. Hence, the version of PW-13 not only casts a shadow of doubt but also dents the prosecution story.

14. Counsel for the appellant further contends that the prosecution has shown that the appellants were not present in their house when the police visited their house. It is a well settled law that even if the act of absconding is proved, it is normally considered as a weak link in the chain of circumstances relied upon for establishing the guilt of accused persons.

15. In support of his submissions, reliance is placed by the counsel for the appellants in the case of Raghubir Singh Vs. State of U.P. reported at A.I.R. 1971 Supreme Court 2156, wherein it was held that - Even an innocent person may well try to keep out of the way if learns of his false implication in a serious crime reported to the police In an another case of Matru vs. State of Uttar Pradesh, AIR1971 SC1050it was held that:

Mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. Even an innocent man may feel panicky and try to evade arrest when wrongly susceptive of a grave crime: such is the instinct of self-preservation. The act of absconding is no doubt a relevant piece of evidence but its value would always depend on circumstance of each case. Normally the courts Crl. Appeal No.1236/2013 Crl. Appeal No.1210/2014 are declined to attach much importance to the act of absconding as it is a very small item in the evidence for sustaining conviction. It can scarcely be held as a determining link in completing the chain of circumstantial evidence which must admit of no other reasonable hypothesis then that of the guilt of the accused.

Similarly, it was held by the Apex Court in Roliman vs. State of Uttar Pradesh, AIR1972 and SC110that absconding by itself is not conclusive either of guilt or of guilt conscience.

16. Based on the aforesaid submissions, the learned counsel for the appellants urge for setting aside the impugned judgment dated 18.07.2013.

17. Per Contra, the learned counsel for the State submits that the prosecution has proved its case beyond reasonable doubt. The appellants had abducted the deceased Sunil on 15.01.2009 and thereafter they gave drugs mixed in tea after which deceased became unconscious and thereafter he was strangulated by the appellants and later his dead body was thrown in Ghaziabad.

18. Counsel for the State further argued that the testimonies of the witnesses so examined and the circumstantial evidence produced on record prove the guilt of the appellants. Counsel further submits that the testimony of last seen witnesses PW3, PW4 and PW5 is reliable and corroborated by the call details of the mobile

phone of both the appellants which proves the presence of the appellants at Lavanaya Crl. Appeal No.1236/2013 Crl. Appeal No.1210/2014 Farm House at about 10/10:30AM on 15.01.2009 where deceased was last seen alive with them.

19. Learned Counsel for the State further submits that from the testimony of the wife of the deceased Sunil i.e PW11 (Suman) and father of Suman (PW8), the motive is also established.

20. Counsel for the State further argued that the reasoning and findings recorded by the Trial Court are sound, and do not call for any interference.

21. We have heard learned counsel for the parties, considered their rival submissions and also carefully perused the trial court record. For the purpose of decision of this appeal, it would be useful to analyze the testimony of some of the important witnesses.

22. PW3 Ashok Kumar, PW4 Gaurav and PW5 Mamta are the witnesses of last seen evidence.

23. PW3 in his testimony deposed that on 15.01.2009 he was going to Tihar jail to meet his relatives and he left his house at about 10am. PW1 further deposed that after 5-10 minutes he reached opposite Lavanaya Farm House near GTK Road and saw his nephew Sunil (deceased) on his motorcycle, standing near one Alto car bearing No.DL8CNB2971and talking to the persons sitting in the car. PW1 next deposed that on the driving seat appellant Mahesh was sitting who is a friend of Sunil (deceased). PW1 also deposed that on 22.05.2009 he along with Rajesh, Gaurav and Mamta had gone to PS Alipur where he identified appellant Mahesh. PW1 further deposed that on 17.06.2009 he along with Gaurav and Mamata had gone to PS Alipur and identified appellant Sat Prakash as the same person who was Crl. Appeal No.1236/2013 Crl. Appeal No.1210/2014 sitting in the car of Mahesh. In the cross examination PW1 stated that he knew appellant Mahesh by face prior to the incident but does not know the appellant Sat Prakash and respondent Satish. PW4 Gaurav in his testimony deposed that on 15.01.2009 he along with his sister Mamta (PW5) went to Tihar Jail to meet his sister in law and his brother Sunil (deceased) also went with them on his motorcycle and when they

reached near Lavanaya Park, G.T Road, one Alto Car bearing No.DL8CNB2971was waiting there and appellant Mahesh was standing near the side of the said car and two persons were sitting in the car. PW4 further deposed that his brother Sunil (deceased) stopped his motorcycle on seeing the appellant Mahesh and started talking to him. PW4 next deposed that when Sunil (deceased) was asked to proceed, he said he will follow them and later when a call was made to Sunil (deceased), there was no reply. In his cross examination PW4 stated that deceased Sunil was son of his uncle (tau) and his mobile No.was 9582960774 but on 15.01.2009 i.e the day of incident, Sunil (deceased) was having mobile No.9213987652. PW4 also stated that he was not aware of the registration number of the car before 15.01.2009 and that appellant Sat Prakash and Satish were not known to him prior to the incident but he knew appellant Mahesh. PW5 Mamta is also a witness of last seen and in her testimony she deposed on the similar lines as PW4.

24. Counsel for the appellant raised the contention that the testimonies of PW3, PW4 and PW5 are not reliable and are an afterthought because in DD No.7A dated 16.01.2009 recorded at 9:00AM and DD No.30A Crl. Appeal No.1236/2013 Crl. Appeal No.1210/2014 dated 16.01.2009 recorded at 7:20PM, neither the name of the appellants nor the registration number of car is mentioned. In our opinion with regard to the contention raised by the counsel for the appellants, we agree with the view taken by the learned trial court that on perusal of DD No.7A ExPW6/A, it is evident that the DD entry has been recorded on the statement of PW6 Rajesh and it stands proved that one car was waiting at the Lavanaya Farm House and Sunil (deceased) started talking with the occupants of that car while PW4 and PW5 left and went to Tihar Jail. Further on perusal of DD no.30A it is evident that it was recorded by PW6 and this proves that both DD no.7A and DD no.30A were not recorded on the statements of PW3, PW4 and PW5 and their testimonies cannot be discarded merely because the name of appellant Mahesh is not mentioned in the DD.

25. From the aforestated versions it is borne out that on 15.01.2009 Sunil (deceased) had been last seen together with the appellant Mahesh and other two persons sitting in his Alto Car near Lavanaya Farm House. This had been

witnessed by PW-3, PW-4 and PW-5 at about 10:00am. On this score all the three witnesses have corroborated the statement of one another and they have no motive to falsely depose against the appellants.

26. In the case of State of Goa v. Sanjay Thukran 2007 (3) SCC755 Apex Court observed that there is no strait jacket formula applicable to cases of circumstantial evidence where the prosecution relies on the accused being last seen in the company of the deceased, to the following effect: Crl. Appeal No.1236/2013 Crl. Appeal No.1210/2014 There can be no fixed or straitjacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author of the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case.

27. In another case of Raghuvendra State of Madhya Pradesh, reported at 2015 (1) SCALE61 the Apex Court affirmed the conviction of the appellant for offence of murder based on circumstantial evidence. Since the deceased was last seen with the appellant and the dead body of the deceased was recovered soon thereafter, it left no room for doubt that the death of the deceased was caused by the appellant. Crl. Appeal No.1236/2013 Crl. Appeal No.1210/2014 28. In Kusuma Ankama Rao vs. State of Andhya Pradesh, reported at (2008)13 SCC257 the Apex Court observed as under:

14.So far as the last seen aspect is concerned it is necessary to take note of two decisions of this Court. In State of Uttar Pradesh v. Satish, reported at 2005 CriLJ1428 it was noted as follows: The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last 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 PW-2.

15. In Ramreddy Rajesh Khanna Reddy v. State of A.P reported at, AIR 2006 SC1656 it was noted as follows: 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.

Crl. Appeal No.1236/2013 Crl. Appeal No.1210/2014 29. In light of the above judicial precedents, we are in alignment with the learned trial courts view that the last seen depositions made by PW3, PW4 and PW5 coupled with the call details of mobile phones of the appellants establishes the presence of appellants at Lavanaya Farm House where deceased was last seen alive with the appellants and this clearly point towards the guilt of the appellants.

30. Regarding Motive, the prosecution relied upon the testimonies of PW8 Satish Kumar (father of Suman) and PW-11 Suman (wife of the deceased Sunil) to prove that appellant Mahesh had an affair with the wife (Suman-PW11) of the deceased Sunil and to do away with the deceased, the appellant Mahesh along with his friends; Satish and appellant Sat Prakash committed the murder of the deceased.

PW8 in his testimony deposed that appellant Mahesh was residing in his neighbourhood before the marriage of his daughter i.e PW11 Suman. PW11 in her testimony deposed that the appellant Mahesh was residing in her neighbourhood 10 years back and the sister of appellant Mahesh was her friend. PW11 further deposed that she was on talking and visiting terms with the appellant Mahesh. In her cross examination PW11 stated that she had some idea that appellant Mahesh had an evil eye on her.

31. In the case of State of U.P. v. Moti Ram and Ors. 1990 CriLJ1710, the Apex court held as under:

Very often, a motive is alleged to indicate the high degree of probability, that the offence was committed by the person, who was prompted by the motive. In our opinion, in a case when motive alleged against the accused is fully established, it provides a foundational material to connect the Crl. Appeal No.1236/2013 Crl. Appeal No.1210/2014 chain of circumstances. We hold that if motive is proved or established, it affords a key or pointer, to scan the evidence in the case, in that perspective and as a satisfactory circumstance of corroboration. It is a very relevant, and important aspect (a) to highlight the intention of the accused and (b) the approach to be made in appreciating the totality of the circumstances, including the evidence disclosed in the case.

32. In Sheo Shankar Singh v. State of Jharkhand and Anr., (2011) 3 SCC654 the Supreme Court has noticed the difference in the significance of proof of motive where prosecution is based upon circumstantial evidence and where it relies upon the testimony of eye witnesses in following terms:

15. The legal position regarding proof of motive as an essential requirement for bringing home the guilt of the accused is fairly well settled by a long line of decisions of this Court. These decisions have made a clear distinction between cases where the prosecution relies upon circumstantial evidence on the one hand and those where it relies upon the testimony of eyewitnesses on the other. In the former category of cases proof of motive is given the importance it deserves, for proof of a motive itself constitutes a link in the chain of circumstances upon which the prosecution may rely. Proof of motive, however, recedes into the background

in cases where the prosecution relies upon an eyewitness account of the occurrence. That is because if the court upon a proper appraisal of the deposition of the eyewitnesses comes to the conclusion that the version given by them is credible, absence of evidence to prove the motive is rendered inconsequential. Conversely, even if the prosecution succeeds in establishing a Crl. Appeal No.1236/2013 Crl. Appeal No.1210/2014 strong motive for the commission of the offence, but the evidence of the eyewitnesses is found unreliable or unworthy of credit, existence of a motive does not by itself provide a safe basis for convicting the accused. That does not, however, mean that proof of motive even in a case which rests on an eyewitness account does not lend strength to the prosecution case or fortify the court in its ultimate conclusion. Proof of motive in such a situation certainly helps the prosecution and supports the eyewitnesses.

33. In so far as the present case is concerned, the motive for committing murder is quite apparent and we agree with the view taken by the learned trial court that the appellant Mahesh had an inclination towards the wife (PW11-Suman) of the deceased Sunil and he used to like her so Mahesh had a motive to kill Sunil (deceased).

34. This is admittedly a case of circumstantial evidence. It is well settled law that where there is no direct evidence against the accused and the prosecution rests its case on circumstantial evidence; the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be in compatible with the innocence of the accused or the guilt of other person. In other words, 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 be such as to show that within all human probability the act must have been done by the accused. In Padala Veera Reddy Vs .State of A.P., AIR 1990 SC79 , it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests: Crl. Appeal No.1236/2013 Crl. Appeal No.1210/2014 (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (3) 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 none else; and (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of Explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

35. A reference may be made to a later decision of the Supreme Court in in C. Change Reddy and others Vs. State of A.P. 1996 CriLJ3461, wherein it has been observed that: "In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence..."

36. In the recent judgment of the Hon'ble Apex Court, in the case of Rumi Bora Dutta V. State of Assam, 2013(7) SCALE535 it was held that when a case totally hinges on the circumstantial evidence, it is the duty of the Court to see the circumstances which lead towards the guilt of the accused to have been fully established. The germane portion of the judgment is extracted below: Crl. Appeal No.1236/2013 Crl. Appeal No.1210/2014 10. It is seemly to state here that the whole case of the prosecution rests on the circumstantial evidence. The learned trial Judge as well as the High Court has referred to certain circumstances. When a case is totally hinges on the circumstantial evidence, it is the duty of the Court to see that the circumstances which lead towards the guilt of the accused have been fully established and they must lead to a singular conclusion that the accused is guilty of the offence and rule out the probabilities which are likely to allow the presumption of innocence of the accused.

37. In these circumstances, the only crucial factor that falls for determination is to see whether satisfactory evidence was available on record for bringing home the guilt of the appellants. The prosecution apart from relying upon the evidence of last seen produced from the testimonies of PW3, PW4 and PW5, has also relied

upon the evidence of call details of mobile phone of the appellants which proves that the appellant Mahesh and Satprakash were present at Lavanaya Farm House at about 10am on 15.01.2009 and also that appellant Mahesh had visited Ghaziabad on 15.01.2009, the area from where the body of the deceased Sunil was recovered.

38. Also the appellant Mahesh gave no explanation in his statement u/s 313 Cr PC as to why he was having a conversation with the appellant Sat Prakash so early in the morning on 15.01.2009 and also why he had gone to Muradnagar, Ghaziabad (the place where the body of the deceased was recovered). Further the appellants denied their presence at Lavanaya farm house at about 10:00-10:30am on 15.01.2009 where they were seen along with the deceased Sunil by PW3, PW4 and PW5 Crl. Appeal No.1236/2013 Crl. Appeal No.1210/2014 and further also failed to give any explanation about their whereabouts as to where they were on 15.01.2009 if not at Lavanaya Farm house.

39. It is also a settled legal position that Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond any reasonable doubt. It is only when such a burden is discharged the onus shifts on the accused to prove any fact within his special knowledge to establish that he was not guilty of the offence, we may usefully refer to the following para taken out from the judgment of the Apex court in Sucha Singh v. State of Punjab, reported in AIR 2001 SC1436as under:

We pointed out that Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases where prosecution has succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the court to draw different inference.

40. In a recent judgment in the case of Raj Kumar vs. State of M.P., 2014 Cri. LJ1943 the Apex Court reiterated the view that where the accused fails to give any explanation in his statement recorded under Section 313 Cr PC regarding any

incriminating material that has been produced against him, the Court will be entitled to draw such adverse inference against the accused as may Crl. Appeal No.1236/2013 Crl. Appeal No.1210/2014 be permissible in law. Relevant para of the said judgment is reproduced as under:"The accused has a duty to furnish an explanation in his statement Under Section 313 Code of Criminal Procedure regarding any incriminating material that has been produced against him. If the accused has been given the freedom to remain silent during the investigation as well as before the Court, then the accused may choose to maintain silence or even remain in complete denial when his statement Under Section 313Code of Criminal Procedure is being recorded. However, in such an event, the Court would be entitled to draw an inference, including such adverse inference against the accused as may be permissible in accordance with law."

41. In Raj Kumar (supra), the Court also took a view that once the accused has not denied his presence in the house on the night when the incident had taken place, then he was bound to explain as to under what circumstances the victim had died. After placing reliance on the judgment of the Apex Court in the case of Prithpal Singh vs. State of Punjab & Ors., (2012)1 SCC10and Mir Mohd. Omar, the Apex Court in the following para held as under: "... if fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of the accused. Section 106is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the Crl. Appeal No.1236/2013 Crl. Appeal No.1210/2014 prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the Court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused."

42. The Apex Court in the case of Shambu Nath Mehra vs. The State Of Ajmer 1956 AIR404while explaining the scope of Section 106 of the Indian Evidence Act

in the following para held as under:"That s. 106 of the Evidence Act does not abrogate the well-established rule of criminal law that except in very exceptional classes of cases the burden that lies on the prosecution to prove its case never shifts and s.106 is not intended to relieve the prosecution of that burden.' On the contrary, it seeks to meet certain exceptional cases where it is impossible, or disproportionately difficult, for the prosecution to establish facts which are especially within the knowledge of the accused and which can be proved by him without difficulty or inconvenience. But when knowledge of such facts is equally available to the prosecution if it chooses to exercise due diligence, they cannot be said to be especially within the knowledge of the accused and the section cannot apply."

Crl. Appeal No.1236/2013 Crl. Appeal No.1210/2014 43. Keeping in view the law laid down above, it stands settled that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. Thus we agree with the view taken by the trial court that both the appellants failed to offer an explanation regarding their presence at Lavanaya Farm House on 15.01.2009 at about 10:00/10:30am when the deceased Sunil was last seen alive with them by PW3, PW4 and PW5. Further both the appellants failed to explain why they went to Ghaziabad and that why their mobile phones were switched off on 15.01.2009. Hence by virtue of section 106 of Evidence Act, the onus shifted on both the appellants to prove the facts which were especially within their knowledge but non explanation of the incriminating evidence against both the appellants completes the chain of circumstances.

44. With respect to recovery of car bearing No.DL8CNB2971 it will be useful to peruse the testimony of SI Bharat Bhushan PW21 and Ct. Ashok Kumar PW24. PW21 in his testimony deposed that on 17.01.2009, he along with PW24 went to the house of appellant Mahesh and arrested him vide arrest memo Ex.PW21/D and pursuant to the disclosure statement (Ex.PW21/E) made by the appellant Mahesh, he got recovered the Alto car which was parked in front of his house and was seized vide memo Ex.PW21/F. PW24 deposed on the similar facts as PW21

and corroborated the testimony of PW21. Crl. Appeal No.1236/2013 Crl. Appeal No.1210/2014 45. From the testimonies of SI Bharat Bhushan PW21 and Ct. Ashok Kumar PW24 it stands established that appellant Mahesh used the Alto car bearing No.DL8CNB2971for commission of crime and the same was recovered at his instance. Trial court observed that there were some contradictions in the testimonies of PW21 and PW24 as PW21 in his testimony deposed that to make recovery of further articles he along with PW24 went to the house of appellant Mahesh on 31.01.2009 at 5:30pm, whereas PW24 deposed that they reached his house at 12 noon but their testimonies cannot be discarded as they were recorded after a long gap of almost three years.

46. These contradictions, in our opinion, are not material. In a plethora of judgments, the Apex Court has taken a view that minor contradictions, inconsistencies, omissions or improvements on trivial matters without affecting the case of the prosecution, should not be made a ground for the Court to reject the evidence in its entirety. In case of Mritunjoy Biswas Vs. Pranab @ Kuti Biswas and anr., reported at (2013) 12 SCC796 the Apex Court held as under:

As is evincible, the High Court has also taken note of certain omissions and discrepancies treating them to be material omissions and irreconcilable discrepancies. It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take Crl. Appeal No.1236/2013 Crl. Appeal No.1210/2014 advantage of such inconsistencies. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission (See Leela Ram vs. State of Haryana and another, Rammi alias Rameshwar v. State of M.P. and Shyamal Ghosh v. State of West Bengal).

47. In our opinion and on the basis of law discussed above, we agree with the view taken by the learned trial court that the testimonies of SI Bharat Bhushan (PW21) and Ct. Ashok (PW24) cannot be discarded because of minor contradictions. Further the Court, after going through the entire evidence must form an opinion about the credibility of the witnesses and otherwise also, in all criminal cases, normal discrepancies are bound to occur in the depositions of the witnesses due to normal errors of observation, namely, error of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence.

48. Regarding the recovery of other articles from the dead body of the deceased Sunil and the contradiction in statements made by PW13 Pradeep Rana and PW18 SI Abhay Ram of PS Niwari Ghaziabad, as noticed by the counsel of the appellants, we agree with the view taken by the learned Trial Court which reads as under:

103. PW-18 SI Abhay Ram of PS Niwati Ghaziabad has testified that he reached at the spot after receiving the information of recovery of one dead body. He has not stated that he had found any vakalatnama or visiting card of any advocate or Crl. Appeal No.1236/2013 Crl. Appeal No.1210/2014 that he had made any call to any advocate. No suggestion has been given to PW-18 SI Abhay Ram that he had recovered any vakalatnama or visiting card or made call to advocate Pradeep Rana on 15.01.09. Hence, I do not find any reason if he has recovered the vakalatnams of Pradeep Rana advocate why would he not have stated the said fact in the inquest papers ExPW12/A prepared by him. No suggestion has been given to him that any vakalatnama was recovered either from the search of dead body or at the spot of recovery of dead body. PW10 Lokesh photographer and PW12 Ct. Bhoop Singh and PW Ct. Mukesh Kr of PS Niwari UP in whose presence dead body was seized have also not stated that any vakalatnama were found at the spot of recovery of dead body. No suggestion in this regard has been given to him by Ld. Defence Counsel.

104. In these circumstances, I reject the testimony of PW-13 that somebody from Ghaziabad police himself made call to him on 15.1.09 and told him about his

vakalatnamas.

105. Hence, in view of above facts and circumstances, I held that prosecution has been able to prove that vakalatnamas ExPW13/1 to ExPW13/4, election I card ExPW21/1, driving license ExPW21/2 of deceased were recovered from the house of accused Mahesh, which is also an incriminating circumstance against accused Mahesh that he had taken these articles after committing the murder of Sunil probably to conceive the identity of deceased.

Crl. Appeal No.1236/2013 Crl. Appeal No.1210/2014 49. From the preceeding discussion, it stands established that recoveries of articles which belonged to the deceased were affected at the instance of appellants and non explanation of how the appellants came in possession of the articles belonging to the deceased is an incriminating circumstance in conjunction with other circumstances.

50. It also needs to be noticed that appellant Sat Prakash absconded to avoid his arrest and no explanation has been offered by the appellant Sat Prakash as to why he remained absconding for so long which is also an incriminating circumstance against him. Further from the evidence adduced by the prosecution, it stands established from the call details that appellant Sat Prakash was in constant touch with the deceased Sunil and on 15.01.2009 i.e the day of incident, both the appellants exchanged calls in morning and further from the call details it was established that both the appellants were present at Lavanaya farm House on 15.01.2009 at about 10/10:30am.

51. Another important observation made by the trial court was that appellant Sat Prakash refused to participate in the TIP and therefore his first time identification in the court by PW3, PW4 and PW5 cannot be rejected. In our opinion, we agree with the observation made by the trial court as his presence at the Lavanaya farm House on 15.01.2009 at about 10/10:30am stands established from the evidence produced on record.

52. Taking into consideration the entirety of the facts and circumstances of the case, which were proved on record, we find that the prosecution succeeded in establishing the case against the appellant Mahesh and Sat Prakash in committing

the murder of the deceased Sunil. The Crl. Appeal No.1236/2013 Crl. Appeal No.1210/2014 motive of the appellants was clearly proved on record. The testimonies of PW3, PW4 and PW5 as already stated above are inspiring and trustworthy. The admitted presence of appellant Mahesh and Sat Prakash on the morning of 15.01.2009 at about 10/10:30am as were last seen with the deceased by PW3, PW4 and PW5 and their presence at Ghaziabad, the place from where the body of the deceased was recovered, failure on the part of the appellants to give any explanation for the same and the recovery of car which was used in the commission of crime and recovery of other articles belonging to the deceased and most of the other circumstances discussed above and in the trial Court judgment, duly supported by evidence on record unerringly establishes the culpability of the appellants in committing the said crime.

53. For the reasons stated above, we are of the opinion that the judgment of the learned Trial Court dated 18.07.2013 and order on sentence dated 30.07.2013 does not call for any interference. Thus, in our view, the learned Trial Court has rightly convicted the appellants under Section 364/302/201 of IPC. Therefore, we do not find any merit in the appeals. The same are dismissed.

54. The copy of this order be sent to the Superintendent Jail.

55. The lower court record be sent back. CRL.A. 1210/2014 56. The State has preferred the present petition under Section 378(1) of Code of Criminal Procedure (Cr PC) to appeal against the judgment dated 18.07.2013, passed by the learned Additional Sessions Judge, in Sessions Case No.121/09, whereby the Crl. Appeal No.1236/2013 Crl. Appeal No.1210/2014 accused Satish was acquitted of the charges under Section 364/302/201 of Indian Penal Code.

57. Respondent Satish surrendered in the court on 12.05.2009 and he was arrested in the case on 13.05.2009. During the Test Identification Parade he was identified by the witness Rajesh PW6.

58. Learned counsel for the state submits that the trial court has passed the impugned judgment on hypothetical presumptions, conjectures and surmises and the order of acquittal of respondent Satish is perverse and lacks legality and thus it

is liable to be set aside.

59. Learned counsel for the State contended that the respondent Satish pointed out the place from where motorcycle of the deceased was recovered and the fact that he absconded to avoid his arrest are an incriminating circumstance against him.

60. We considered the contentions of the learned counsel for the State and in our opinion; nothing has been placed on record by the prosecution which connect the respondent Satish with the murder of the deceased Sunil. Relevant para of the impugned judgment is reproduced as under:

As far as accused Satish is concerned, the prosecution has failed to establish beyond reasonable doubt that on 15.01.2009 at 10/10:30Am accused Satish was present at Lavanaya Farm House along with the accused Mahesh and Satprakash, as I did not find testimonies of PW3, PW4 and PW5 reliable to the extent that they saw accused Satish with accused Mahesh and Satprakash in the absence of any corroborative evidence. The prosecution has also failed to prove that he was using the mobile phone No.9250542381 nor any recovery was proved against him which can connect him with the crime. As far as pointing out memo from where motorcycle was recovered is concerned same cannot be considered as incriminating circumstance as the Crl. Appeal No.1236/2013 Crl. Appeal No.1210/2014 recovery of motorcycle was already effected and similarly the pointing out of place of spot as well as recovery of dead body same are already known to the police. Hence in these circumstances, I hold that prosecution has failed to prove e beyond reasonable doubt that accused Satish was along with the accused Mahesh and Satprakash on the day of incident i.e 15.01.2009 and he participated in the abduction or murder of deceased Sunil. Therefore, I acquit accused Satish from all the charges i.e 364/302/201 of IPC. Accused Satish is in JC, he be released forthwith, if not required in any other case.

61. We agree with the view taken by the learned trial court. The counsel for the State has not been able to show that the findings of the Trial Court are unsustainable, illegal or perverse. This Court, on perusal of the evidence on record and the documents is of the opinion that there is no cogent evidence which point

towards the guilt of the respondent Satish. There is no ground to interfere with the judgment passed by the learned trial court and we, therefore uphold the acquittal of the respondent Satish. The appeal, is therefore, dismissed. SANGITA DHINGRA SEHGAL, J G. S. SISTANI, J APRIL30 2015 gr Crl. Appeal No.1236/2013 Crl. Appeal No.1210/2014

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