Mohinder Sharma Vs. State

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Court : Delhi

Decided On : Feb-21-2013

Judge : Sanjiv Khanna

Appellant : Mohinder Sharma

Respondent : State

Judgement :
$~R-40. * IN THE HIGH COURT OF DELHI AT NEW DELHI Date of decision:

21. t February, 2013 + CRIMINAL APPEAL NO. 694/2012 MOHINDER SHARMA ..... Appellant Through Ms. Nandita Rao, Advocate. versus STATE ..... Respondent Through Ms. Richa Kapoor, APP for the State. CORAM: HON'BLE MR. JUSTICE SANJIV KHANNA HON'BLE MR. JUSTICE SIDDHARTH MRIDUL SANJIV KHANNA, J.

(ORAL): Mohinder Sharma by the impugned judgment dated 7 th January, 2012, arising out of FIR No. 249/2009, registered on 19th May, 2009 at Police Station Saraswati Vihar, has been convicted under Sections 302/394/397 of the Indian Penal Code, 1860 (IPC, for short) for committing the murder of Vadivale, the deceased in the night intervening between 18th and 19th May, 2009. The appellant has also been convicted under Section 25/27 of the Arms Act, 1959. By an order of sentence dated 24th January, 2012, the appellant has been sentenced to undergo Rigorous Imprisonment for life with the direction that he shall not be considered for grant of remission until he undergoes actual sentence of twenty

years. A fine of Rs.1 lac has been imposed upon the appellant for the offences under Sections 302/394/397 IPC. In default of payment of fine, the appellant has to undergo Simple Imprisonment for one year. The trial court further directed that the fine of Rs.1 lac, if recovered, shall be paid to the family of the deceased Vadivale as compensation under Section 357 of the Code of Criminal Procedure, 1973 (Cr.P.C, for short). For conviction under Section 25/27 of the Arms Act, 1959, the appellant has been sentenced to undergo Rigorous Imprisonment for three years and fine of Rs.2,000/-. In default of payment of fine, he has to undergo Simple Imprisonment for one week.

2. It is not disputed that Vadivale suffered a homicidal death. Body of Vadivale was found lying dead in a pool of blood in the morning of 19th May, 2009 at about 6.30 A.M. near CNG Petrol Pump, Britannia Chowk, F-Block, Shakurpur. The said fact has been stated by Peru Mal (PW-3), the son of the deceased, who was present at spot and is fully corroborated by DD No. 11A (Exhibit PW-2/A), which has been proved by Head Constable Sushil Kumar (PW-2), who was posted as a duty officer in Police Station Saraswati Vihar on the said date and time. PW-2 has deposed that on 19th May, 2009 at about 6.50 A.M. he had recorded DD No. 11A. The said DD entry (Exhibit PW2/A) records that at about 6.30 A.M. information was received from the wireless operator through intercom that at Britannia Chowk, near CNG Petrol Pump a body of one person was found lying in an injured condition. Inspector Sunil Kumar, who appeared as PW-27, went to the site along with Constable Devender (PW-24) and found one man aged about fifty years lying there. He was already dead and his body was smeared in blood. Blood was also present on the footpath. He met Peru Mal (PW-3) who identified himself to be the son of deceased and recorded his statement (Exhibit PW-3/A). This statement (Exhibit PW-3/A) became the rukka which led to the registration of FIR No. 249/2009, (Ex.PW-4/A) Police Station Saraswati Vihar, which was recorded at 9.30 A.M. on 19th May, 2009.

3. Before we dwell into other questions, at this stage, it is relevant to refer to the post-mortem report (Exhibit PW-1/A) which indicates the injuries which were found on the body of deceased Vadivale. The post-mortem was conducted by Dr. K. Goyal (PW-1). PW-1 has stated that clothes on the body were shirt, pant with belt

was having three cuts, underwear having two cuts, baniyan and a pair of chappals. On external examination, the following injuries were noticed:

1) Laceration 1.5x0.2 cm at lateral end of right eye brow with abrasions around, abrasions 1x0.5 cm just below right lateral canthus, 2.5x1 cm abrasion right forehead just above eye brow and multiple over chin.

2) Incised penetrating would 5 cm x 2 cm over middle of left thigh front about 12 cm below inguinal ligament area, placed vertically. Upper angle of the wound was more acute. On exploration the underlying soft tissues and muscles were cleanly cut. The left femoral artery in that area was found cleanly cut completely transversely with massive clots in surrounding soft tissues. The total depth of the wound was about 7-8 cm.

3) Incised would 2x0.5 cm transversely placed over anterolateral aspect of left thigh muscle deep about 21 cm below inguinal ligament and 13 cm above the upper margin of left knee.

4) Incised would 5 cm x 2 cm muscle deep transversely placed over lateral aspect of left thigh about 13 cm above left knee and 23 cm below inguinal ligament.

5) Incised would 3 x 1.5 cm transversely placed muscle deep over lateral aspect of left thigh just adjacent and behind injury No.

4.

4. PW-1 opined that all the injuries were ante mortem in nature. Injury No. 1 was caused by blunt force impact and injuries No. 2 to 5 were caused by sharp cutting weapon. Cause of death was pointed to be haemorrhagic shock as a result of injury to left femoral artery consequent upon injury No.

2. The said injury was sufficient to cause death in ordinary course of nature. Vide subsequent opinion dated 22nd June, 2009, PW-1 opined that injury Nos. 2 to 5 mentioned in the postmortem report (Exhibit PW-1/A) were possible with the weapon or similar like weapon which was produced before him. Opinion given by PW-1 along with the description of the knife and its sketch was marked Exhibit

PW-1/B. In the cross-examination, PW-1 has stated that it was correct that hemorrhagic shock was due to excessive bleeding.

5. The statement of PW-3 Perumal marked as Exhibit PW-3/A on the basis of which FIR was recorded reads as under: Perumal S/o Sh. Vadivale, aged 25 years, r/o L-320, J.

J.

Colony, Shakurpur, Delhi made the following statement: T Ph. 9871420729 I reside at the address mentioned above alongwith my family and do a private job in Karolbagh, Delhi. My father was a gardener in DDA and was posted at keshavpuram and he used to come back at home upto about 6:00 p.m. Yesterday i.e. 18-05-2009, my father did not come back and at about 9:30 p.m. He telephoned me on my mobile No. 9871420729 from his mobile No. 9873973918 and told me that he was coming back to the house from the office but he did not come back upto late hours of the night. We became anxious and started searching for (him), at about 6:30 a.m. in the morning when I was searching for my father near Britannia Chowk, a pedestrian told me that a man was lying on footpath near CNG Pump. Thereafter, when I came at the spot, I saw my father was lying dead on the footpath in a pool of blood and blood had oozed out in a large quantity. At the same time you (police) have reached the spot and I told you the facts and circumstances. You (Police) have recorded my statement at the spot and I have heard the same which is correct. Sd/- Perumal (In English) Attested by Sd/- Sunil Kumar (In English) Sunil Kumar S.I. P.S. Saraswati Vihar, Delhi 19-05-2009 6. On reading of the rukka, it is apparent that it was a blind murder case. The said fact is accepted by the prosecution as well. There was no indication of the culprits and perpetrators of the said crime. There were/are no eye witnesses also. The statement of PW-3, however, disclosed that he had spoken to the deceased (his father) on 18th May, 2009 at about 10 P.M. PW-3 in his statement before the court has stated that his father was carrying a mobile phone Nokia 2600 (Ex.P-4) of golden colour, which was purchased in the name of his mother in December, 2008 from JD Block, Pitampura. The mobile number of the deceased was stated to be 9873973918. His mobile number was stated to be 987140729. Wife of the

deceased and mother of PW-3, Mani appeared as PW-15. She deposed that on 23rd December, 2008, her son had purchased one golden colour mobile phone of Nokia make from Pitampura in her name for Rs.3,000/-. The retail invoice of the said the said mobile phone was proved by PW-15 and marked Exhibit P2. She has deposed that the said phone was used by the deceased Vadivale and on 18th May, 2009, the deceased had taken this phone while going to duty. On her further examination, she identified the cardboard box in which the mobile phone was packed at the time of purchase and the same was marked Exhibit P3. On the cardboard box, the IMEI number of the mobile phone Nokia 2600 was mentioned as 356396026901613. The purchase of the mobile phone by the deceased has been corroborated in the statement of PW-3. He has deposed that he had handed over the bill of the mobile phone in the name of his mother Mani (PW-15) to the police and the same was seized vide seizure memo Exhibit PW-3/F, which was signed by him. The purchase bill was also identified by him and marked Exhibit P2. He stated that on the cardboard box, the IMEI number of the phone was written as 356396026901613. The said mobile phone was sold to him by Gaurav Kochhar (PW-7). PW-7 testified that he was selling mobile phones in the name of H.R. Enterprises at JD-20A, Pitampura. On 23rd December, 2008, he had sold one mobile phone Nokia 2600 S gold bearing IMEI No. 356396026901613 to Mr. Mani (should be Ms. Mani) for Rs.3,000/-. He identified the invoice Exhibit P2, which was signed by his employee Dalbir Singh, whose handwriting and signatures he could identify. This became the starting point of investigation by the police 7. As regards missing of the mobile phone from the scene of crime, the prosecution has placed on record and proved letter dated 20 th May, 2009 written by Assistant Commissioner of Police, Sub-Division, Ashok Vihar, Delhi (Exhibit PW-11/C). The said letter was written to SHO Police Station Saraswati Vihar in connection with the FIR in question. The said letter records that one mobile phone bearing IMEI No. 356396026901613 was found missing or taken away by the culprit at the time of murder. Thereafter, the said mobile phone with IMEI No. 356396026901613 was put on surveillance and it was found that the said mobile phone instrument was being used with SIM card bearing No. 9718006863. The first such use with the said SIM No. 9718006863 was reported on 19th May, 2009 at 5.46 A.M. in the early morning soon after the occurrence on or after 10 P.M. in

the night of 18th May, 2009. The call details of the numbers called from SIM No. 98718006863 were enclosed along with the said letter and have been marked Exhibit PW-11/A. The said letter and the call details have been proved by SI Rajiv Gulati (PW-11), who at the relevant time was working as a Clerk of R.C. Saini, ACP and the Nodal Officer. PW-11 has deposed that he had handed over the records of call details of IMEI No. 356396026901613 from 1st January, 2009 to 20th May, 2009 to investigating officer Insp. Baljpit Singh (PW-29). He mentioned that SIM No. 9718006863 was found to be in use in the hand set bearing IMEI No. 356396026901613 from 19th May, 2009 at 5.46 A.M. till the time the call details were downloaded. He has deposed that on inquiry it was discovered that the SIM No. 9718006863 was issued in the name of Deva Nand Parshad, son of Kuldeep Parshad, resident of 212, Banjara Wali Gali. There is nothing in the cross-examination to dent or to create any suspicion about the testimony and statement made by SI Rajiv Gulati (PW-11).

8. Deva Nand Parshad appeared before the court as PW-19. He has deposed that he was a resident of Bihar and his son Babloo was residing as a tenant in House No. 212, Banjara Gali, Haiderpur, Delhi. He further deposed that he had come to Delhi to meet his son in December, 2008 and had purchased for him a mobile phone made in China from Kunal Communications situated at Haiderpur. At time of purchasing the SIM, he had given his voters I card to obtain the mobile connection in his name. He, however, did not remember the number. He deposed that he had given his photograph and had also signed the consumer application form at the time of purchase. He proved the consumer application form (Exhibit PW-18/A), which had his photograph and signature. He proved the copy of the election I card furnished at the time of taking the mobile connection, which was marked Exhibit PW-18/B. He stated that after purchasing the mobile phone he returned to his native village and after 4-5 days came to know from his son Babloo that he had lost the mobile phone. At that stage, the Additional Public Prosecutor was permitted to put some leading questions as the witness, PW-19 was not putting forth complete details. While answering the leading questions, which were put to PW-19, he admitted the mobile number allotted to him as 9718006863. He further deposed that the mobile phone along with the SIM card was lost but he neither made any complaint to the police about the loss of the mobile phone nor

reported the matter to the company to close the SIM/mobile number.

9. Learned counsel for the appellant urged that the testimony of PW-19 should be disbelieved as it does not inspire confidence. It should not be accepted that the mobile phone with SIM card No. 9718006863 was lost. It was submitted that there are an apparent contradictions in the testimony of PW-19 made by him in the court. PW-19 is a rustic villager and his testimony has to be read holistically before we form any opinion on whether to accept or reject the same as credible or unreliable. We have read his testimony carefully and find that the testimony should be believed and accepted as truthful. We say so for the following reasons. As a villager he may not have initially remembered the mobile phone number allocated to him but the said number is mentioned in the application form (Ex PW-18/A) itself. The mobile phone number was certainly in the name of PW-19, who had also furnished relevant documents relating to his identity and had signed the application form. Similarly, in the examination in chief, PW-19 has stated that he did not make any complaint to the police regarding the loss of the mobile phone/SIM as he had to hurriedly leave Delhi to go to his native village. He also stated that after purchasing the mobile phone he returned to his native village and after 4-5 days came to know from his son Babloo that he had lost the mobile phone. In the cross- examination, PW-19 has stated that mobile phone was lost when he was still in Delhi. This was a minor contradiction in the statement of PW-19 but we note that the statement of PW-19 was recorded on 30th July, 2010 nearly three years after the occurrence. The contradiction in the statement only reflects that PW-19 was not certain as to the exact date when the mobile phone along with SIM No. 9718006863 was lost by his son Babloo. The inconsistency in these statements does not reflect or create doubt that the mobile phone with SIM Card was lost. What is important and relevant is that call record details (Exhibit PW-11/A) show that the mobile phone No. 9718006863 was not in use during the period 1st January, 2009 to 13th January, 2009 and then from 27th January, 2009 till 20th April, 2009. PW-19s deposition on loss of mobile phone and SIM No. 9718006863 is supported by the call details (Exhibit PW-11/A) which indicate that the SIM card bearing No. 9718006863 was not in service during period from 1st January, 2009 till 13th January, 2009 and then from 27th January, 2009 till 20th April, 2009. The factum of SIM card No. 9718006863 not being in use from 1st

January, 2009 till 13th January, 2009 and then from 27th January, 2009 till 20th April, 2009 undoubtedly corroborates and supports the version of PW-19 that his SIM card was lost. PW-19 was not cross examined that whether any calls were made or received at his native place.

10. The Ld. Counsel for the Appellant submitted that the son of PW-19 was not examined and his testimony was essential to confirm the fact that PW-19 had lost the mobile phone and SIM No 9718006863. In our opinion, non-examination of the son of PW-19 does not make any difference to the prosecution version in the present case, in view of the call records. PW-19s testimony can stand on its own and does not require clutches. PW-19 being the registered subscriber should be given due credence.

11. There is another reason why we accept the plea of the prosecution that PW-19s statement about the loss of the mobile phone along with the SIM is credible and trustworthy. The call details of SIM with mobile No. 9718006863(Ex. PW-11/A) show that no calls were made between 1st January

1. 25 P.M. and 13th January

4. P.M. Thereafter, one of the numbers which had been frequently called was telephone No. 9350010957. As per Ex. PW-11/B there were conversations between the two numbers on 29 occasions. This number as per the application form Exhibit PW-6/D was allotted by Reliance Communications to one Visheshwar Singh, resident of A-32, Industrial Area Wazirpur, New Delhi-52. Along with the application form, Xerox copy of the driving licence was given as a proof of the said address. The investigating officer Insp. Baljit Singh (PW-29) has deposed that on inquiry regarding mobile phone number 9350010957, it was revealed that it had been issued on a fake identity. He further stated that on investigation it was found that Mobile number 9350010957 was being used by one Ram Narain Sharma who is the father of the appellant accused. This fact stands corroborated by the statements made by Gullu Malik (PW-16) and Bihari Lal (PW-17). PW-16 has deposed that he was residing at Janakpuri and has a videogame shop at A3/53, Sector-11, Rohini. He came to know Ram Narain Sharma in 2009, who was using mobile phone No. 9350010957. He further deposed that his mobile phone number

9873991531 was known to Ram Narain Sharma. He deposed that even on the date when his statement was being recorded in the trial court the mobile phone number 9350010957 which belonged to Ram Narain Sharma was within his knowledge. Earlier Ram Narain Sharma used to frequently communicate with him but now Ram Narain Sharma was not in touch with him. Similarly, Bihari Lal (PW-17) has deposed that he is a resident of Sector-11, Rohini and had a trading outlet at Plot No.2, Khasra No. 24/17, Master Mohallaa, Libaspur, Delhi. He has deposed that Ram Narain Sharma performed welding work on temporary basis for 2 to 2 months and had given his mobile Number as 9350010957 on which he used to call from his landline No. 27830009.

12. The Ld Counsel for the Appellant has urged that the testimonies of PW-16 and PW-17 should be disbelieved and rejected. It was submitted that PW-16 and 17 have not been able to prove their own numbers. It is not possible to accept the contention of the counsel for the appellant that the testimonies of PW-16 and PW-17 should be discarded as suspicious. PW-16 has specifically deposed that his mobile number 9873991531 was registered in the name of his wife Kanchan Malik. The mobile number 9350010957 belonged to Ram Narain Sharma. He had even deposed that he was in touch with Ram Narain Sharma who used to call him frequently earlier but had stopped communicating with him later on. PW-17 has elucidated the details of the work which Ram Narain Sharma used to do for his living, i.e., welding. The said witnesses viz., PW-16 and PW-17 had nothing to gain by deposing falsely about the telephone number of Ram Narain Sharma, the father of the appellant. It is not suggested that either PW16 or Pw-17 bore any animosity or ill-will towards Ram Narain Sharma. The appellant in his statement under Section 313 Cr.P.C was specifically questioned and confronted with the evidence of PW-16 and PW-17 relating to the mobile phone number of his father Ram Narain Sharma being telephone No. 9350010957. In reply, the appellant simply stated that this was incorrect. He did not explain or state that his father Ram Narain Sharma was not using any mobile number or was using any other number. Similar was his response to question Nos. 45 and 46. In response to question No. 47, the appellant had stated that he did not know whether Ram Narain Sharma had provided 9350010957 as his mobile number to Bihari Lal (PW-17) while seeking employment under him.

13. PW-29 Insp. Baljit Singh, the investigating officer in his testimony before court deposed that on inquiry from Ram Narain Sharma had stated that he was using the mobile phone number 9350010957, and that the mobile number 9718006863 was being used by his son, the appellant herein.

14. After getting the aforesaid details, the investigating officer PW- 29 finally arrested the appellant on 24th May, 2009 vide arrest memo (Exhibit PW-26/G) while he was coming out from his house in village Boodhpur. The arrest was affected by the investigating officer (PW29) along with SI Sunil Kumar (PW-27) and Constable Narender Kumar No. 1603/NW (PW-26). Two other police officers namely Constable Narender No. 1311 and Head Constable Rajpal were also present at the time of arrest but they were not examined. The seizure memo (Exhibit PW-26/E) records taking into possession one mobile phone Nokia 2600 of golden colour with mobile SIM card bearing No. 9718006863 from the pant of the Appellant. The said SIM was seized vide Exhibit PW-26/F. PW-29 has deposed that on further search of the appellant one buttondar knife was recovered from the pocket near the knee of the right leg of the appellants pant. The sketch of the knife was prepared and the same was seized vide Exhibit PW-26/A. The scooter of the appellant bearing registration No. DDS- 7045 LML VESPA was also seized vide seizure memo Ex.PW-26/C. From the dickey of the said scooter another mobile phone Nokia 1600 without any SIM was recovered and the same was seized and is Exhibit PW26/D. The seizure memo records IMEI number of mobile phone Nokia 1600 as 356280019820743.

15. Learned counsel for the appellant has submitted that the aforesaid recoveries alleged by the prosecution should be disbelieved for three reasons. Firstly, no public witnesses were joined or had participated in the recoveries. Secondly, the recovery of the mobile phone, SIM No.9718006863 and knife does not find mention in the personal search memo of the accused which is Exhibit PW-26/H. Thirdly, the appellant was in jail in connection with some other FIRs uptil 16th April, 2009 as recorded in Exhibit PW-30/E and, therefore, he could not have possessed SIM No.9718006863.

16. The contention that as the independent public witnesses were not joined in the recovery and were not signatories of the seizure memo, the testimonies of the police officers should be rejected, cannot be accepted. In State Government of NCT of Delhi versus Sunil & Another, (2001) 1 SCC 65.it has been observed: In this context we may point out that there is no requirement either under Section 27 of the Evidence Act or under Section 161 of the Code of Criminal Procedure, to obtain signature of independent witnesses on the record in which statement of an accused is written. The legal obligation to call independent and respectable inhabitants of the locality to attend and witness the exercise made by the police is cast on the police officer when searches are made under Chapter VII of the Code. Section 100(5) of the Code requires that such search shall be made in their presence and a list of all things seized in the course of such search and of the places in which they are respectively found, shall be prepared by such officer or other person and signed by such witnesses. It must be remembered that search is made to find out a thing or document which the searching officer has no prior idea where the thing or document is kept. He prowls for it either on reasonable suspicion or on some guess work that it could possibly be ferreted out in such prowling. It is a stark reality that during searches the team which conducts search would have to meddle with lots of other articles and documents also and in such process many such articles or documents are likely to be displaced or even strewn helter-skelter. The legislative idea in insisting on such searches to be made in the presence of two independent inhabitants of the locality is to ensure the safety of all such articles meddled with and to protect the rights of the persons entitled thereto. But recovery of an object pursuant to the information supplied by an accused in custody is different from the searching endeavour envisaged in Chapter VII of the Code. This Court has indicated the difference between the two processes in the Transport Commissioner, Andhra Pradesh, Hyderabad & anr. vs. S. Sardar Ali & ors. (1983 SC 1225). Following observations of Chinnappa Reddy, J.

can be used to support the said legal proposition: Section 100 of the Criminal Procedure Code to which reference was made by the counsel deals with searches and not seizures. In the very nature of things when property is seized and not recovered during a search, it is not possible to comply with the provisions of subsection (4) and (5) of section 100 of the Criminal Procedure Code. In the case

of a seizure [under the Motor Vehicles Act], there is no provision for preparing a list of the things seized in the course of the seizure for the obvious reason that all those things are seized not separately but as part of the vehicle itself. Hence it is a fallacious impression that when recovery is effected pursuant to any statement made by the accused the document prepared by the Investigating Officer contemporaneous with such recovery must necessarily be attested by independent witnesses. Of course, if any such statement leads to recovery of any article it is open to the Investigating Officer to take the signature of any person present at that time, on the document prepared for such recovery. But if no witness was present or if no person had agreed to affix his signature on the document, it is difficult to lay down, as a proposition of law, that the document so prepared by the police officer must be treated as tainted and the recovery evidence unreliable. The court has to consider the evidence of the Investigating Officer who deposed to the fact of recovery based on the statement elicited from the accused on its own worth. We feel that it is an archaic notion that actions of the police officer should be approached with initial distrust. We are aware that such a notion was lavishly entertained during British period and policemen also knew about it. Its hang over persisted during post-independent years but it is time now to start placing at least initial trust on the actions and the documents made by the police. At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law the presumption should be the other way around. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the legislature. Hence when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the court to believe the version to be correct if it is not otherwise shown to be unreliable. It is for the accused, through cross-examination of witnesses or through any other materials, to show that the evidence of the police officer is either unreliable or at least unsafe to be acted upon in a particular case. If the court has any good reason to suspect the truthfulness of such records of the police the court could certainly take into account the fact that no other independent person was present at the time of recovery. But it is not a legally approvable procedure to presume the police action as unreliable to start with, nor to jettison such action

merely for the reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions. (Underlining added) 17. The judgment in the case of Sunil and Another (supra) was quoted with approval by the Honble Supreme Court in subsequent decisions of in Dr. Sunil Clifford Daniel versus State of Punjab, JT 201.(8) SC 63.and in Munish Mubar versus State of Haryana, (2012) 10 SCC 464.In the case of Munish Mubar (supra), the Honble Supreme Court has also discussed the importance of information/explanation furnished by the accused when incriminating circumstances are put to him under Section 313 Cr.P.C. The relevant portion reads as under:24. It is obligatory on the part of the accused, while being examined under Section 313 Cr.P.C. to furnish some explanation with respect to the incriminating circumstances associated with him, and the Court must take note of such explanation, even in a case of circumstantial evidence, so to decide, whether or not, the chain of circumstances is complete. The aforesaid judgment has been approved and followed in Musheer Khan v. State of Madhya Pradesh, (2010) 2 SCC 748.(See also: The Transport Commissioner, A.P., Hyderabad & Anr. v. S. Sardar Ali & Ors., AIR 198.SC 1225.18. In regard to the second contention raised by the counsel for the appellant, it is correct that the personal search memo of the appellant (Exhibit PW-26/H) does not record recovery of the knife, mobile phone Nokia 1600 and mobile phone Nokia 2600, but the same were seized vide separate seizure memos being Exhibits PW-26/B (knife), PW26/D (Nokia phone 1600) and PW-26/E (Nokia phone 2100). At the time of arrest, a scooter was also seized vide Ex.PW-26/C but the said fact does not find mention in the personal search memo (Ex.PW26/H) of the appellant. The seizure of the scooter certainly cannot be doubted. Statements of Inspector Baljit Singh (PW-29), Constable Narender Kumar (PW-26) and Sunil Kumar (PW-27) are clear, categorical and in seriatim about the recoveries. There may be some discrepancy regarding how the said police officers had reached the spot in question, but this is understandable keeping in view the time gap between the date of arrest and the date on which the statements of the police officers were recorded and keeping in view the number of cases the said officers might have investigated.

19. We now deal with the last contention. It is noticeable from Exhibit PW-11/A that mobile SIM No. 9718006863 remained out of use from 26th January, 2009 till

20th April, 2009. As noticed above, this number was also not in use during the period of 1st January, 2009 till 13th January, 2009. After 13th January, 2009, the call record details (Exhibit PW-11/A) reveals that phone calls were made from mobile SIM No. 9718006863 to mobile phone of Ram Narain Sharma, the father of the appellant, i.e., at No. 9350010957.The mobile number 9350010957 was called to or from 29 times upto 20th April, 2009 as indicated by Ex. PW-11/B. What is also glaring from call records (Exhibit PW-11/A @ Page 441 of the Compilation) is the fact that the mobile handset Nokia 1600 with IMEI No. 356280019820743 was installed with SIM No. 9718006863. Nokia 1600 (Ex PW- 26/D) was recovered and seized from the appellant at the time of arrest.

20. The last conversation between PW-3 and deceased took place at 10.00 p.m. on 18th September, 2005 and thereafter PW-3 could not reach and talk to the deceased. The first call/SMS received on the said mobile set IMEI No. 356396026901610 with the SIM No. 9718006863 was recorded at 5.46 A.M. on 19th May, 2009. This is within few hours of the call and conversation between PW-3 and the deceased at 10 P.M. on 18th May, 2009. The time gap between the last conversation between PW-3 and deceased and the first call received on the mobile No.98118006863 in the instrument bearing IMEI No. 356396026901610, is hardly 6 to 7 hours. It was also night time. It is difficult, therefore, to accept the contention of the learned counsel for the appellant that the mobile handset could have changed hands and may have come into possession of the appellant from a third person. At this stage, it is also relevant to note that no such defence/claim was made by the appellant in his statement recorded under Section 313 Cr.P.C. The stand taken by the appellant in his statement under Section 313 Cr.P.C. in response to question No. 22 was that he did not know. In response to question No. 29, the appellant stated:Q.29 It is in evidence against you that you were arrested in this case vide memo Ex.PW26/G, personally searched vide memo Ex.PW26/H and you made your disclosure statement vide Ex.PW-26/I. What have you to say? Ans. It is incorrect. I am the BC of the area. I was called by the police at police station 21.5.2009 and thereafter I was illegally detained there for five days and thereafter I was produced in the court on 25.5.2009. Thereafter I was kept in the police station for another two days and falsely implicated in this case. I have made no disclosure statement as alleged by the police.

21. In addition to the call details (Exhibit PW-11/A), the prosecution has also placed on record and proved the call records of telephone No. 9718006863 from 1st March, 2009 to 31st May, 2009 through Ajeet Singh (PW-9) Nodal Officer of Idea Cellular Limited. The said call records were issued along with the certificate under Section 65B of the Indian Evidence Act, 1872 which is Exhibit PW-9/D. The call records are Exhibit PW-9/A. These call details show that the last call recorded on the said telephone number on 24th May, 2009 was at 2.53 P.M. Therefore, the call records (Ex.PW-9/A) corroborates the prosecution version that the appellant was arrested on 24th May, 2009. The time of arrest as mentioned in the arrest memo (Exhibit PW-26/G) is 6.30 P.M. The call records also reveal that earlier mobile phone SIM No. 9718006863 was installed and used in Nokia 1600 handset with IMEI No.356280019820743. Thus, the call details corroborate the fact that the police had been able to recover the two mobile phones from the appellant. Learned counsel for the appellant submitted that the seizure memo of Nokia phone 1600 (Exhibit PW-26/D) was put to the accused for his statement under Section 313 Cr.P.C. vide question No. 28 but the IMEI number 356280019820743 and the fact that the same IMEI number is mentioned in the seizure memo of Nokia phone 1600 (Exhibit PW-26/D) was not put to the accused. To countenance the said submission, learned Additional Public Prosecutor submits that the seizure memo (Exhibit PW-26/D) was put to the accused. A close examination of question Nos. 26 and 28 show that recovery of the mobile phone Nokia 1600 and the seizure memo (Ex. PW-26/D) which mentions the IMEI number of the said phone was put to the accused. Even if we disregard the position that the said IMEI number of Nokia 1600 is mentioned in the mobile call records of telephone No. 9718006863 and that recovery of Nokia phone 1600 was effected from the appellant, there is enough evidence to show that the police had in fact recovered Nokia mobile phone 2600 from the accused vide seizure memo Exhibit PW-26/E. Peru Mal (PW-3) and Mani (PW-15) son and wife of the deceased respectively had identified the said mobile phone and stated that it belonged to the deceased. They had also indicated that the said phone was of golden colour. The bill (Exhibit P2) and the cardboard box of the said phone (Exhibit P3) have also been proved. Recovery of Nokia phone 1600 from the appellant is also proved.

22. Learned counsel for the appellant next relied upon Bhugdomal Gangaram and Others versus State of Gujarat, (1984) 1 SCC 31.to contend that the statement of the investigating officer about the manner and mode in which he had conducted the investigation should be treated as hearsay as the persons whom he had interrogated for the purpose of investigation have not appeared as witnesses. As noticed above, it has been pointed out that Babloo son of Deva Nand Parshad and the father of the appellant Ram Narain Sharma have not appeared as witnesses. We note that as far as production of Babloo son of Deva Nand Prasad is concerned, the said aspect has been dealt with above and Deva Nand Parshad (PW-19) in whose name the telephone connection No. 9718006863 was registered was produced as a witness and has made a deposition in the court. He is the actual subscriber to the said number. Now as far as non-production of Ram Narain Sharma is concerned, it is sufficient to note that he is the father of the appellant. The appellant himself did not produce his father as a defence witness to support the contention that his father was not using the telephone No. 9350010957. We have also referred to above and dealt with the deposition of PW-16 and PW-17 who are independent public witnesses. They have deposed that the number 9350010957 was being used by Ram Narain Sharma, father of the appellant. The recorded subscriber of the said number was a non-existing person. It is not the prosecution case that Ram Narain Sharma had obtained the said number in his own name. We do not agree with learned counsel for the appellant that the statement of the investigating officer as to the manner, mode and the persons whom he had interrogated and spoken to for the purpose of investigation cannot be relied upon by the prosecution for the reason that the same is hearsay. The statement of the investigating officer to the limited extent covered and protected under Section 8 of the Evidence Act, can be read as evidence. Of course what is stated and deposed by an individual person to the Investigating Officer would be a third party statement and covered by hearsay, but the investigating officer can certainly refer to lead and clues during investigation and how he solved the case. This cannot be termed as hearsay. In this context it is apposite to rely upon a decision of this Court in Kiran versus State, Crl A No.672/2007 dated 8th March, 2010. The relevant portion is reproduced herein below:20. On the issue whether testimony of Radhey Shyam on the point that

Gharvari gave them the particulars of the whereabouts of appellant Beghraj is hit by the rule against admitting hearsay evidence, suffice would it be to state that in the illuminative book on THE ORIGINS OF ADVERSARY CRIMINAL TRIAL by John H. Langbein at page 239, there is a reference to Pursuit hearsay.

21. The debate pertaining to admission of evidence of dead persons or those who could not be found or easily brought before the court hinged upon not admitting hearsay evidence because hearsay evidence had three deficiencies. Firstly, the maker of the statement not being put to oath, it lacked redit because of the belief that a person under oath would, if nothing else, be scared of perjury. Secondly, the opposite party would be denied the beneficial tool of cross-examination and lastly may encourage tailor made tutored statements to be introduced by alleging the same to be made by the third party. The other view was that necessity compelled the admission of such statements for the reason why should relevant evidence be excluded in a tryst with truth. The latter point won the debate. A man in pursuit is not expected, due to necessity, to keep on recording whom he met, his or her address etc. for the reason when in pursuit, any useful information which facilitates pursuit is welcomed. A pursuit is an onward march where speed is of utmost importance and thus a person in pursuit is not to be tied down with the technicalities of making a contemporaneous record of the persons he or she met, much less requiring said person to be cited as a witness. (Underlining added) 23. We also reject reliance placed by the appellant on Abdulwahab Abdulmajid Baloch versus State of Gujarat, (2009) 11 SCC 62.wherein the Supreme Court had made the following observations:

37. Be that as it may, we feel that only because the recovery of a weapon was made and the Expert opined that the bullet found in the body of the deceased was fired from one of the weapons seized, by itself cannot 21 be the sole remise on which a judgment of conviction under Section 302 could be recorded. There was no direct evidence. Accused, as noticed hereinbefore, was charged not only under Section 302 read with Section 34 of the Indian Penal Code but also under Section 302 read with Section 120B thereof. The murder of the deceased was said to have been committed by all the accused persons upon hatching a conspiracy. This charge has not been proved.

38. The learned trial judge itself opined that the recovery having been made after nine months, the weapon might have changed in many hands. In absence of any other evidence connecting the accused with commission of crime of murder of the deceased, in our opinion, it is not possible to hold that the appellant on the basis of such slander evidence could have been found guilty for commission of offence punishable under Section 302 of the Indian Penal Code.

39. It is a matter of serious concern that despite recovery of weapon appellant had not been charged for commission of offence punishable under Sections 25 and 27 of the Arms Act. We have noticed hereinbefore the helplessness expressed by the learned trial judge in this behalf. The learned judge who had framed charges should have been more careful.

40. The learned judge also, in our opinion, was incorrect in drawing a presumption of commission of offence punishable under Section 302 of the Indian Penal Code by applying the provisions of Section 114 of the Indian Evidence Act keeping in view the principle that the prosecution must prove its case beyond all reasonable doubt.

24. In the said case, the Supreme Court noticed that the weapon of offence was seized after a period of nine months. Therefore, there was a great possibility that it could have changed hands. There was also allegation of conspiracy and Section 120-B IPC was invoked by the prosecution, but the said charge was not proved. In the instant case, the prosecution not only relies upon the recovery of the mobile phone Nokia 2600 but has also relied upon the mobile phone records relating to mobile No. 9718006863 and the fact that the said mobile SIM was used in the mobile phone Nokia 2600 of the deceased at 5.46 A.M. on 19th May, 2009. The mobile instrument of the deceased till 10 P.M. had a different mobile SIM No. 9873973918 which apparently belonged to the deceased himself. The said fact is clearly established by the testimony of PW-3, son of deceased who had last conversed with the deceased on the mobile No.9813973918 at about 10.00 p.m. in the night of 18th May, 2009. Thus, we do not think that between 10 P.M. at night and 5.45 A.M. in the morning of 19.05.2009 the mobile phone could have changed hands. It was for the accused to explain and state the circumstances in which he

came into possession/custody of this mobile phone. No such explanation has been tendered by the appellant in his statement under Section 313 of the Cr.P.C. The mobile phone in question remained in possession of the accused till it was seized by the police on 24th May, 2009 vide Ex.PW-26/E. In these circumstances, we feel that Section 114(a) of the Indian Evidence Act, 1872 can be invoked and should be applied. Section 114(a) provides that a Court can draw a presumption against a person who is found in possession of stolen goods, soon after the theft, to the effect that he had himself committed the theft or that he had received the goods knowing them to be stolen. The presumption under Section 114(a) of the Indian Evidence Act, 1872 is a rebuttable presumption of fact and the same can be disproved by providing relevant information by a person who is found to be in possession of stolen articles soon after theft. The burden of proof for explaining the circumstances in which a person got into possession of stolen articles is on the person in whose possession stolen articles are found. Presumption under Section 114(a) if of fact rather than law but is occasionally so strong that it can merit conviction when there is even slightest corroboration and is in conformity with facts. The presumption is not confined and restricted to cases of theft, but applies to all crimes including murder when it can be shown, proved and established that robbery and the said crime, which may be murder, forms part of one and the same transaction. Recent and unexplained possession of stolen property in a transaction of robberycum-murder would be presumptive evidence against the accused so charged of the offence of robbery and murder. However, care and caution has to be taken that inference is not drawn merely because the accused has been produced stolen goods because that would indicate possession of the stolen goods after theft or robbery. Each case has to be examined on its own factual matrix and no hard and fast rule can be laid down as to what inference should be drawn from certain circumstances. (See Sunder Lal versus State of M.P., AIR 195.SC 2.and Shivappa and Others versus State of Mysore, (1970) 1 SCC 487).

25. In Baiju v. State of M.P (1978) 1 SCC 588.the Supreme Court held as under:4 The question whether a presumption should be drawn under Illustration (a) of Section 114 of the Evidence Act is a matter which depends on the evidence and the circumstances of each case. Thus the nature of the stolen article, the manner of its acquisition by the owner, the nature of the evidence about its identification,

the manner in which it was dealt with by the appellant, the place and the circumstances of its recovery, the length of the intervening period, the ability or otherwise of the appellant to explain his possession, are factors which have to be taken into consideration in arriving at a decision... (Underlining added) 26. In Limbaji v. State of Maharashtra, (2001) 10 SCC 340.the Supreme Court observed that the presumptions under Section 114(a) is normally used in cases of circumstantial evidence when there is absence of direct evidence. It becomes a valuable tool in the hands of the court to reach the truth but care should be taken that the presumption of innocence in favour of the accused is not unduly diluted. The presumption under Section 114 (a) should be made use of with caution and keeping in mind the entire evidence. It would be safer to extend the presumption if there are additional incriminating circumstances re-enforcing the prosecution version like evidence to show that ornaments worn by the deceased were forcibly removed resulting in injuries on the body, disposal of the ornaments soon after the occurrence etc. Ratio of the different decisions of the Supreme Court was examined and it was elucidated that the midway ratio indicates that presumption can be invoked when there are sufficient incriminating circumstances which re-enforce the conclusion of guilt of robbery as well as murder, otherwise it would be only safe to convict a person for robbery and not murder.

27. In Ganesh Lal v. State of Rajasthan (2002) 1 SCC 731.the Supreme Court has made the following observations with respect to the various aspects which needs to satisfied before a presumption under Section 114(a) has to be drawn against the accused in cases where robbery and murder appear to form part of the same transaction:12. Section 114 of the Evidence Act provides that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to facts of the particular case. Illustration (a) provides that a man who is in possession of stolen goods soon after the theft may be presumed by the court to be either the thief or one who has received the goods knowing them to be stolen, unless he can account for his possession. The presumption so raised is one of fact rather than of law. In the facts and circumstances of a given case relying on the strength of the presumption the court may dispense with direct proof of certain such facts as can be safely presumed to

be necessarily existing by applying the logic and wisdom underlying Section 114. Where offences, more than one, have taken place as part of one transaction, recent and unexplained possession of property belonging to the deceased may enable a presumption being raised against the accused that he is guilty not only of the offence of theft or dacoity but also of other offences forming part of that transaction.

13. In Baiju v. State of M.P. [(1978) 1 SCC 58.:

1978. SCC (Cri) 142] ,Earabhadrappa v. State of Karnataka [(1983) 2 SCC 33.:

1983. SCC (Cri) 447] ,Gulab Chand v. State of M.P. [(1995) 3 SCC 57.:

1995. SCC (Cri) 552] , Mukund v.State of M.P. [(1997) 10 SCC 13.:

1997. SCC (Cri) 799] and A. Devendran v. State of T.N. [(1997) 11 SCC 72.:

1998. SCC (Cri) 220] para 20, murder and robbery were proved to have been integral parts of one and the same transaction and the presumption arising under Illustration (a) to Section 114 of the Evidence Act was applied for holding the accused guilty of not only having committed robbery but also murder of the deceased. The presumption was founded on recovery of stolen property belonging to the deceased.

14. While raising such presumption the time factor between the date of the offence and recovery of stolen property from the possession of the accused would play a significant role. Precaution has to be taken that the presumption may not be so stretched as to permit suspicion taking the place of proof. No hard-and-fast rule can be laid down.

15. A review of several decisions of this Court, some of which we have cited hereinabove, leads to the following statement of law. Recovery of stolen property from the possession of the accused enables a presumption as to commission of offence other than theft or dacoity being drawn against the accused so as to hold him a perpetrator of such other offences on the following tests being satisfied: (i) the offence of criminal misappropriation, theft or dacoity relating to the articles

recovered from the possession of the accused and such other offences can reasonably be held to have been committed as an integral part of the same transaction; (ii) the time-lag between the date of commission of the offence and the date of recovery of articles from the accused is not so wide as to snap the link between recovery and commission of the offence; (iii) availability of some piece of incriminating evidence or circumstance, other than mere recovery of the articles, connecting the accused with such other offence; (iv) caution on the part of the court to see that suspicion, howsoever strong, does not take the place of proof. In such cases the explanation offered by the accused for his possession of the stolen property assumes significance. Ordinarily the purpose of Section 313 of the Code of Criminal Procedure is to afford the accused an opportunity of offering an explanation of incriminating circumstances appearing in prosecution evidence against him. It is not necessary for the accused to speak and explain. However, when the case rests on circumstantial evidence the failure of the accused to offer any satisfactory explanation for his possession of the stolen property though not an incriminating circumstance by itself would yet enable an inference being raised against him because the fact being in the exclusive knowledge of the accused it was for him to have offered an explanation which he failed to do. (See Earabhadrappa v.State of Karnataka [(1983) 2 SCC 330.1983 SCC (Cri) 447] para 13, Gulab Chand v.State of M.P. [(1995) 3 SCC 57.:

1995. SCC (Cri) 552] para 4.) Similar observations have been made in State of Rajasthan v. Talevar & Anr (2011) 11 SCC 666.

28. The call details (Ex PW-11/A) corroborate the fact that Perumal (PW-3), the son of the deceased conversed with him last time at 10 pm on the 18th of May, 2009 and thereafter, the first call or SMS from the mobile phone of deceased with IMEI No. 356396026901613 was made to the SIM No. 9718006863 at about 05.46 AM in the morning of 19th May, 2009. As discussed above, between 10 PM in the night and 5 AM the next morning, the possibility of mobile phone changing hands was remote, if not improbable. Thus, it was upon the appellant to at least state as to how he came into custody of the mobile phone of the deceased. In the instant case, the appellant has not furnished any explanation/defence in his statement under Section 313 Cr. P.C as to how he came into the possession of the mobile

phone bearing IMEI No.356396026901613 which belonged to the deceased and could not be located at the scene of crime when the body of the deceased was found. Thus, the appellant herein has not discharged the burden cast upon him to expound the circumstances in which he got hold of the mobile phone of the deceased.

29. Learned counsel for the appellant in the end submitted that the offence at best is made out under Section 304 Part-II IPC and not under Section 302 IPC. In support of her contention, she relies upon post-mortem report (Exhibit PW-1/A) and the nature of injuries mentioned therein. We do not agree with the said contention. In the present case, the deceased walking at night was attacked and robbed of his mobile phone and other belongings. Under Clause (3) of Section 300 IPC it is not necessary that the accused should have the knowledge that the injury caused by him would result in death. The knowledge contemplated under Clause (3) of Section 300 IPC is objective. The said clause mandates that if an accused causes the intended injury which itself is sufficient to cause death in ordinary course of nature, the accused would be guilty of murder. The deceased was returning from duty on the fateful night and was unarmed. He was attacked with a knife. Multiple injuries were inflicted on the on different parts of the body of the deceased. The appellant has been, therefore, rightly been convicted under Section 302 IPC.

30. Dealing with the issue of the quantum of sentence, we would like to quote the observations of the Supreme Court in Sangeet v. State of Haryana 2012(11) SCALE 14 wherein it has been observed:

74. Under the circumstances, it appears to us there is a misconception that a prisoner serving a life sentence has an indefeasible right to release on completion of either fourteen years or twenty years imprisonment. The prisoner has no such right. A convict undergoing life imprisonment is expected to remain in custody till the end of his life, subject to any remission granted by the appropriate Government Under Section 432 of the Code of Criminal Procedure which in turn is subject to the procedural checks in that Section and the substantive check in Section 433A of the Code of Criminal Procedure. xxxx 78. What Section 302 of the

Indian Penal Code provides for is only two punishments-life imprisonment and death penalty. In several cases, this Court has proceeded on the postulate that life imprisonment means fourteen years of incarceration, after remissions. The calculation of fourteen years of incarceration is based on another postulate, articulated in Swamy Shraddananda, namely that a sentence of life imprisonment is first commuted (or deemed converted) to a fixed term of twenty years on the basis of the Karnataka Prison Rules, 1974 and a similar letter issued by the Government of Bihar. Apparently, rules of this nature exist in other States as well. Thereafter, remissions earned or awarded to a convict are applied to the commuted sentence to work out the period of incarceration to fourteen years.

79. This re-engineered calculation can be made only after the appropriate Government artificially determines the period of incarceration. The procedure apparently being followed by the appropriate Government is that life imprisonment is artificially considered to be imprisonment for a period of twenty years. It is this arbitrary reckoning that has been prohibited in Ratan Singh. A failure to implement Ratan Singh has led this Court in some cases to carve out a special category in which sentences of twenty years or more are awarded, even after accounting for remissions. If the law is applied as we understand it, meaning thereby that life imprisonment is imprisonment for the life span of the convict, with procedural and substantive checks laid down in the Code of Criminal Procedure for his early release we would reach a legally satisfactory result on the issue of remissions. This makes an order for incarceration for a minimum period of 20 or 25 or 30 years unnecessary.

31. Accordingly, we uphold the sentence of the appellant under Section 302/394/397 IPC and he is sentenced to undergo life imprisonment but strike off the observations on grant of remission etc,. However, we feel that the fine of Rs.1lac is excessive and the same is reduced to Rs.10,000/-. In case the appellant does not pay the fine, he shall undergo a Simple Imprisonment for a period of six months. The punishment under the Arms Act is upheld and maintained. The sentences awarded shall run concurrently and the appellant shall be entitled to benefit under Section 428 Cr.P.C. The appeal is accordingly disposed of. SANJIV KHANNA, J.

SIDDHARTH MRIDUL, J.

FEBRUARY 21 2013 VKR