

Suresh @ Bona Vs. State

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Court : Delhi

Decided On : Jul-02-2013

Judge : Sunita Gupta

Appellant : Suresh @ Bona

Respondent : State

Advocate for Pet/Ap. : Mr. Bhupesh Narula, Ms. Ritu Gauba, Mr. Siddharth Aggarwal

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI + CRL.A. 941/2010 SURESH @ BONA Through: Appellant Mr. Bhupesh Narula, Advocate along with the appellant (in judicial custody) versus STATE Through: Respondent Ms. Ritu Gauba, APP CRL.A. 1211/2010 VIKAS @ SUNIL Through: Appellant Mr. Siddharth Aggarwal, Advocate along with the appellant (in judicial custody) versus STATE Through: % Respondent Ms. Ritu Gauba, APP Date of Decision: July 02, 2013 CORAM: HON'BLE MS. JUSTICE REVA KHETRAPAL HONBLE MS. JUSTICE SUNITA GUPTA JUDGMENT : SUNITA GUPTA, J.

1. Suresh @ Bona & Vikas @ Sunil seek to challenge the impugned order dated 30th January, 2010 and 6th February, 2010 whereby both the appellants were convicted for offence under Section 302/34 IPC and sentenced to undergo imprisonment for life and a fine of Rs.15,000/- each, in default of payment of fine to undergo rigorous imprisonment for six months each.

2. The factual matrix of the case is:- 3. On 17th September, 2007 on receipt of a telephone call from an unknown person at 10:25 pm regarding one person lying unconscious in front of shop No. 5632, Qutub Road near Hanuman Mandir and bleeding, DD No. 26A Ex. PW 2/A was recorded. The DD was handed over by Duty Officer to Constable Amit (PW-19) who handed over the same to ASI Ashwini Kumar (PW-13). ASI Ashwini Kumar along with Constable Amit Kumar reached the spot where Inspector Joginder Singh (PW-20) also reached, where they met one Chowkidar Veer Bahadur (PW-7) who informed them that one person was lying unconscious at Qutab Road and blood was oozing from his body. On reaching the spot, they found that one person aged about 27-28 years was found lying in front of Shop No. 5632 wearing white shirt with baniyan and white pant and blood was oozing from his nose and mouth. There was injury on his stomach at left side which seemed to be inflicted by some sharp weapon. The clothes were blood stained and the blood was also lying near the dead body on the ground. One TATA 40 No. DL 1 LB 192.was also stationed near that person. Two bags of black and red colour were also lying near the dead body. No eye witness was available at the spot. As such, ASI Ashwini Kumar prepared Rukka (Ex. PW-13/A) and handed over the same to Constable Amit Kumar for registration of the case. FIR (Ex.PW3/A) was recorded by HC Mehar Singh. After registration of the case, further investigation was handed over to Inspector Joginder Singh.

4. During the course of investigation, Inspector Joginder Singh called the crime team who inspected the scene of crime, took photographs and gave a report Ex. PW-8/A. Site Plan Ex. PW-20/A was prepared. Blood oozing from the wounds of the deceased, blood lying near the dead body, earth control, blood stained earth were seized vide seizure memos Ex.PW-4/G to Ex.PW-4/J.

On search of the dead body and from the pocket of the baniyan, one passport, visa, one electronic ticket from Delhi to Abu Dhabi in the name of Richpal and cash of Rs.4000/- in the denomination of Rs.1000/- each, all bloodstained were recovered. From the pocket of shirt Rs.156/- in denomination of one currency note of Rs.100/-, Rs.50/-, one coin of Rs.5/- and one coin of Rupee 1/- were recovered. From the wearing pant one Nokia 1600 mobile phone was recovered. On checking the bags lying near the dead body, wearing clothes, daily use articles and four

photographs were recovered. All the articles were seized vide separate Seizure Memos. Laxman Indoria, eye witness came at the spot. His statement was recorded. The dead body was sent to Mortuary of Maulana Azad Medical College through ASI Ashwini and Constable Amit. Inquest proceedings under Section 174 Cr.P.C. were conducted. After identification of the dead body and postmortem, same was handed over to the relatives of the deceased.

5. It is further the case of prosecution that on 19th September, 2007, Inspector Joginder Singh received a secret information that the accused wanted in this case are present at the back side of MCD store near Railway line. On the pointing out of secret informer both the accused were apprehended, interrogated and arrested vide arrest memos Ex. PW-13/C and Ex.PW-13/D. They made disclosure statements Ex.PW-13/A and Ex.PW-13/B. They were taken to nearby police booth at Qutab Road near Hanuman Mandir Gali. After leaving accused Suresh @ Bona in the custody of HC Sadhu Ram, Inspector Joginder Singh along with ASI Ashwini Kumar took Vikas at his residence, i.e., 6461/1, Gali Hanuman Mandir. He got recovered one blood stained half pant/knicker from iron shelf of his first floor room and he also got recovered one foreign currency note, i.e., dinar of Rs.25,000/- from almirah underneath the newspaper. Same were seized vide seizure memos Ex. PW-13/I and PW 13/J.

Thereafter, accused Vikas was brought back at the police booth near Qutub Road and after handing him over to HC Sadhu Ram, accused Suresh @ Bona took them to Hanuman Mandir Gali near a khokha where some bricks were lying and he got recovered one chura lying there which was blood stained. After preparing the sketch of chura Ex. PW13/K, it was sealed in a pullanda and was seized vide seizure memo Ex. PW-13/L. Thereafter, accused Suresh took them to Banke Birla Masjid where one Wasim met them at the gate of Masjid. At the instance of accused Suresh @ Bona, a brown colour purse was got recovered from inside the wall of Masjid, which on checking was found to contain photographs of the deceased and some torn papers. The same were seized vide seizure memo Ex. PW9/A. An application for conducting Test Identification Parade of both the accused persons was moved vide Ex. PW20/A. On 27th September, 2007, both the accused persons refused to participate in TIP proceedings. An application Ex.

PW20/B was moved for conducting Test Identification Parade of the recovered purse which was conducted by Metropolitan Magistrate. Exhibits were sent to FSL. After completion of investigation, charge sheet was submitted in the court.

6. Charge for offence under Section 302/34 IPC was framed against both the accused to which they pleaded not guilty and claimed trial. Prosecution examined 20 witnesses in support of its case. All the incriminating evidence was put to both the accused, while recording their statements under Section 313 Cr.P.C. Both of them denied the case of prosecution. According to accused Vikas, he was falsely implicated in this case at the instance of Laxman Kumar Indoria who is his step-brother and is residing in front of his house. He is a habitual complainant and is a police informer. He is desirous to grab his property. He had come to police station on the morning of the next day of the incident with some press reporters and asked him to give a share in the property to him or threatened him to implicate falsely in this case. According to him, he was lifted on the intervening night of 17-18th September, 2007 from his house at about 02.00 a.m. by Constable Arvind. Substantially similar plea was taken by accused Suresh. According to him, the case was registered at the instance of Laxman Indoria who is residing in front of his house and is informer of the police. According to him, he was lifted on 18th September, 2007 from his house at about 11/11.30 pm by Constable Arvind and then implicated in this case.

7. The accused examined two witnesses in support of their defence DW1 Smt. Sunita and DW2 Arti. DW1, Smt. Sunita is the cousin of Laxman Indoria and accused Vikas @ Sunil. She testified that Smt. Hardai, grand-mother of Laxman Indoria and Vikas @ Sunil is one and the same. From the first marriage of Smt. Hardai there were two children, namely, Babu Lal who is father of Vikas @ Sunil and other is Jugal Kishore. After the death of her husband Smt. Hardai entered into second marriage with Nathu Ram and from the said marriage four children were born, namely, Ram Narain, Bhagwan Dass, Madan Lal and Radhey Shyam. Ram Narain is the father of Laxman Indoria. Relations between family members of accused and Laxman were not cordial because Laxman is an informer of the police and extorts money by blackmailing the persons. He resides opposite the house of accused Vikas @ Sunil. The ground portion of the house of accused

Vikas @ Sunil has already been grabbed from his father by elder brother of Laxman Indoria namely Raj Kumar Indoria. Laxman Indoria was also demanding Rs. 5 Lacs from father of accused Vikas who expired in November, 2009. Laxman threatened father of accused Vikas that in case the demand is not fulfilled he will implicate his children in false case. DW2, Aarti has deposed on the same lines as DW1, Smt. Sunita that Laxman Indoria is her jeth and he is step brother of her husband Vikas @ Sunil. Smt. Hardai is grandmother of Laxman Indoria and her husband Vikas @ Sunil, first marriage was with Chaman Lal and two children namely Babu Lal and Jugal Kishore were born. Babu Lal is her father-in-law. After the death of Chaman Lal, Smt. Hardai entered into a second marriage with Nathu Ram. Four children were born out of the wedlock. One of them was Sh. Ram Narain who is the father of Laxman Indoria. She further deposed that her father-in-law Babu Lal expired on 8th October, 2009 and on his cremation, Laxman Indoria, his elder brother Raj Kumar Indoria and their real uncle Madan Lal were also present and they had spent money on the expenses for his cremation.

8. After hearing the parties and perusing the record, learned Additional Sessions Judge vide impugned order held both the appellants guilty of offence under Section 302/34 IPC and convicted them separately. Feeling aggrieved by the said order, the present appeal has been preferred.

9. We have heard Sh. Siddharth Aggarwal and Mr. Bhupesh Narula, Advocate, for both the appellants and Ms. Ritu Gauba, learned public prosecutor for State. It was submitted by learned counsel for the appellant that it was a blind murder, however, prosecution has based its case on the testimony of Laxman Indoria, and recovery of certain articles at the instance of accused persons. Testimony of Laxman Indoria has been severely attacked on the ground that he proclaims himself to be an eye witness of the incident and wants the court to believe that he had witnessed the entire incident. However, his conduct was referred for submitting that in fact, he is not a witness to the incident but is a witness of convenience for the prosecution who claims to know the accused persons for last 20-25 years but denies any relationship with them. However, the defence witnesses have amply proved that he is related to the accused persons and was on inimical terms with them. He is an interested witness. Although it was fairly

conceded that there is no rule of law that testimony of an interested witness cannot be relied upon, but it was submitted that the same should inspire confidence and the entire demeanour of the witness makes it clear that he is not a man worthy of credence. Veer Bahadur, PW-7 also claims to be an eye witness but he is hostile regarding identity of the accused persons. He neither helps prosecution nor the defence, inasmuch as, he deposed that he could not see the accused persons faces and saw their back only. Moreover, prosecution has tried to give a colour of robbery to be the motive for commission of crime but neither any charge of robbery was framed nor the same stands proved, inasmuch as, the belongings of the deceased were found lying at the spot. If the accused really intended to rob the deceased, they would not have left the bags which were found lying near him and the various articles recovered from the person of the deceased. Even regarding arrest of the accused, it was submitted that police officials have tried to give a colour as if the accused persons were arrested in pursuance to a secret information. However, there was no need of such secret information as it has come on record that Laxman Indoria was known to the accused persons from before and they were living in front of his house. That being so, where was the difficulty for the police officials to nab them from their house instead of waiting for some secret information to come and then to arrest them. The recovery alleged to have been effected at the instance of accused persons has also been challenged on the ground that from accused Vikas, recovery of Iraqi Dinar of Rs.25,000/- was alleged to have been effected. However, recovery simplicitor of any foreign currency is no offence unless it is proved that it belonged to the deceased. No evidence has come on record to show that the same belonged to the deceased. Moreover, different versions are forthcoming as to whether, it was Iraqi Dinar or dollar, which was recovered at the instance of accused. As regards, recovery of knife at the instance of accused Suresh, it was submitted that such knives are easily available in the market. Moreover, no blood was detected on the same. Further, the opinion of the concerned doctor was not sought as to whether it was the weapon of offence with which crime was committed. Moreover, there is no independent witness to the recovery. As such the recovery of knife at the instance of the accused is doubtful. As regards recovery of purse, it was submitted that the same is alleged to have been recovered from an open space, which was not in

exclusive possession of either of the accused. As such same does not connect them with the crime. As regards refusal on the part of the accused persons to join test identification proceedings, it was submitted that the same is inconsequential, inasmuch as, Laxman Indoria already knew the accused persons from before. Therefore, no purpose would have been served even if the accused would have joined the proceedings. As such, it was submitted that prosecution has miserably failed to prove its case beyond reasonable doubt and both the accused are entitled to acquittal.

10. Per contra, it was submitted by learned public prosecutor for the State that robbery was the motive for murder. The incident was witnessed by Laxman Indoria and he has given a true and vivid picture of the entire incident. There is no reason to disbelieve his testimony. Moreover, subsequent to the arrest of the accused persons, recovery was also effected at their instance viz. currency note of 25,000 dinar, purse, blood stained half pant and knife. All these recoveries connect the accused with crime. Moreover, injuries on the person of injured find corroboration from the medical evidence. The impugned order does not suffer from any infirmity which calls for interference. As such the appeals are liable to be dismissed.

11. We have given our thoughtful consideration to the respective submissions of learned counsel for the parties and have perused the record.

12. It has come on record through the testimony of PW-10 Sh. Pritam Singh that on 16th September, 2007 his son Richpal had come to Delhi by bus for going to Abu Dhabi. After arriving at Delhi, Richpal made a telephone call to him that he had reached Delhi and again a call was made that his flight was cancelled and he would go to Abu Dhabi on 18th September, 2007 and would stay in Gurdwara in the night. At about 12:30 a.m., he received a telephone call from the police that some accident had taken place. He informed his relatives who were residing in Delhi to enquire about the same from Police Station Nabi Karim. Thereafter, he came to Delhi and came to know that Richpal had been murdered by stabbing. When Richpal left the village for Delhi, he was having Rs.7000/- cash, two bags, some eatables, dollars to the tune of Rs.25,000/- and a mobile.

13. It has come in the statement of Vir Bahadur (PW-7) that on 17th September, 2007, he was doing the duty of Chowkidar at Qutab Road. At about 9:30 pm, he was going from Hanuman Mandir to Birla Mandir side. After 3-4 minutes when he was coming back towards the said Mandir, he saw a person lying unconscious in front of shop No. 5635. Blood was oozing out from the injury as if somebody had stabbed him. Two bags were lying near the said person. He saw two persons running on the road. Since there was no street light, he could not see the faces of those persons, but could see them only from their back. He went to Police Chowki, Nabi Karim to inform the police. When he came back, it was revealed that the person had died.

14. On receipt of telephone call regarding one person lying unconscious ahead of Hanuman Mandir who was bleeding, DD No. 26A (Ex. PW2/A) was recorded and was sent by HC Layakram (PW2) to ASI Ashwini Kumar (PW13) through Constable Amit (PW19), who went to the spot along with constable Amit. Later on Inspector Joginder Singh also joined them. The dead body was sent to MAMC Mortuary. Post-mortem on the body of Richpal Singh was conducted by Dr. Bheem Singh (PW-5), who gave his report Ex.PW5/A. On examination, he found external injury No. 1, incised stab wound 5.5 cm x 2cm x cavity deep present over the left side of trunk in the anterior axillary lying at the level of 8th rib, horizontally placed, inner angle was obtuse, outer angle acute, situated 17 cm below the left nipple and 13 cm above and outer to the umbilicus. On internal examination in the neck region, there was presence of clotted and fluid blood in the trachea. He opined that death was due to haemorrhagic shock consequent upon visceral injuries due to stab wound via injury No.1. Injury No. 1 was ante mortem, fresh in duration and could be caused by single edged sharp weapon. Injury No. 1 was sufficient to cause death in ordinary course of nature. Thus the fact that Richpal met homicidal death is not in dispute.

15. The crucial question for consideration is who was responsible for causing this homicidal death.

16. Prosecution has primarily relied upon the testimony of PW4 Laxman Kumar Indoria and PW7 Veer Bahadur.

17. So far as Veer Bahadur is concerned, testimony of this witness is confined to the fact that he saw a person lying in front of shop no.5632 in unconscious condition and blood was oozing out from his injuries. Although, he also saw two persons running on the road, however, he could not see them as street light was not on. This witness was cross examined by Id. Public Prosecutor and in cross examination he denied having stated to the police that he saw accused persons running towards Hanuman Mandir at about 10.15 P.M. and that he was not intentionally identifying them.

18. The star witness of prosecution is PW4 Laxman Indoria who has deposed that on 17th September, 2007 at about 8 P.M. he had gone to Chowk Singhara in his Santro car to meet his sister. On receipt of a telephone call from his house at about 10.00 p.m. that some guests have come to his house, he was returning from Chowk Singhara in his Santro Car. At about 10.15 p.m. he reached near Qutub Road, M.C.D. Store, Nabi Karim and saw both the accused across the road near Transport Office/Shop no. 5632. They had caught hold of one person and were scuffling with him and trying to snatch something. Resistance was being offered by that person. There was a blue coloured Tata 407, a cycle rickshaw parked there. Street light was falling on the said person and the vehicles. The person whom the accused persons had caught hold of and were robbing was a passenger on the said cycle rickshaw. The rickshaw puller put down the two bags of the passenger and ran away. While sitting in the car he asked the accused persons not to trouble that man. However he did not come out of the car as there was heavy traffic jam on that road at that time and it was not possible to stop and park his car. On hearing this, Suresh @ Bona took out a knife and stabbed that person while accused Vikas @ Sunil caught hold of that person from the back. Thereafter both the accused ran away towards gali Hanuman Mandir with the knife. He went to his home. He looked after the guests and took dinner with them. Thereafter he went to Railway Station to see them off as they wanted to go to Jaipur. He got very late at the railway station. From there he returned over there and found many police officers present at the spot and a dead body was lying there. He disclosed the entire incident to the police who recorded his statement. Police seized two bags of that person from the spot which contained daily wearing apparel, other articles and the passport of the deceased. On search of the dead body, a ticket from Delhi to

Abu Dhabi and Rs.156 in cash were found. There were four currency notes in the denomination of Rs. 1000/- each in the purse. Four photographs were recovered from the bag of the deceased. One mobile phone was also recovered from the search of the dead body. All these articles were seized vide separate seizure memos. He further deposed that on 15 th November 2007 he came to the court of Sh. Alok Aggarwal,M.M. where he identified the accused persons to be the same accused who stabbed Richpal Singh. He further deposed that both the accused are very well known to him for the last 20-25 years. They are of criminal background. He went on deposing that since the date he appeared as a witness, there is threat to his life.

19. As claimed by prosecution he is the solitary eyewitness of the incident. Although, there is no rule of law that a conviction cannot be based on the solitary testimony of a witness, but it should be of such a nature that Court can place implicit reliance on the same. A close scrutiny of his deposition reveals that it does not inspire confidence due to following:(i) The witness has made material improvements in his deposition inasmuch as, he was confronted with various portions of his statement recorded under Section 161 Cr.PC where various facts viz., when he reached the spot the accused persons were scuffling with the deceased and there was Hathapai and Cheena Jhapati, there was TATA 40 and cycle rickshaw parked there; accused were present across the road near the transport office outside the shop; the person whom the accused were robbing was the passenger of cycle rickshaw, were not recorded. These facts pertain to the basic substratum of the case. Omission to mention these facts in his statement recorded under Section 161 Cr.P.C. casts a serious doubt about his witnessing the incident. In Sunil W. Sambhudayal Gupta Vs. State (2010), 13 SCC 65.it has been laid down that the omissions which amount to contradiction in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution case, render the testimony of the witness liable to be discredited. (ii) The entire conduct of the witness is quite unnatural. According to him when he was going to his house via Qutub Road, MCD Store, Nabi Karim, he saw the accused persons across the road outside Shop No.5632, catching hold of one person, scuffling with him and trying to snatch from him. He called out at the accused persons by sitting in the car not to trouble that person. According to him, accused Suresh took out a

knife and stabbed that person while accused Vikas caught hold of that person. Thereafter they ran away from the spot. However, he did not come out of the car as there was heavy traffic jam on the road and it was not possible to stop the car. Assuming this to be correct, the least which he could have done was to inform the police or PCR about the incident and admittedly this was not done. Things did not end here. He went to his house, had dinner with the guests, went to see them off to railway station and it was only at 1:30 a.m. when he was returning from the railway station by the same route, then, he saw many police officers present at the spot and a dead body lying there, then he went to the spot and gave statement to the police. This entire conduct of the witness is very unnatural. (iii) It was admitted by the witness that when accused were produced in the Court of Sh. Alok Aggarwal, Metropolitan Magistrate, they were in muffled face and he identified them. In pursuance to a question put to the witness as to how he recognised them, he replied that he recognised them from their walk/gait. He however denied the suggestion that any of the accused are related to him. He also denied that accused Vikas is son of his real elder uncle or that accused Suresh @ Bona is his brother-in-law. He, however, admitted that accused persons are living in the same street in front of his house. He denied the suggestion that cross case bearing FIR No. 378/07 under Section 341/321 IPC dated 04.11.2007 between him and Madan Mati was going on and he appeared as witness. He also denied the suggestion that he alongwith Constable Arvind had gone to the house of the accused and asked them to dispose of their house and give their share to him. However, it has come in the statement of DW-1 Smt. Sunita and DW-2 Arti that this witness is closely related to both the accused as Smt. Hardai, grandmother of Laxman Indoria and accused Vikas was one. Vikas is the son of Babulal who was born out of the wedlock of Smt. Hardai with Chaman Lal, whereas Laxman Indoria is the son of Ram Narayan, who was born out of her second marriage with Nathu Ram. As such, this witness and accused Vikas are step brothers. It has further come in their testimony that while ground floor portion of the house of accused Vikas was already grabbed by elder brother of Laxman Indoria, Laxman Indoria also demanded Rs.5 lakhs from the father of accused Vikas and threatened to implicate his children in false case, in case the demand is not made. DW2 Aarti has also deposed that on 17th September, 2009 at about 02:00 a.m, Constable

Arvind came to her house and enquired about her husband and took him. House of Laxman Indoria is opposite her house and he was witnessing the entire thing. On the next morning at about 6:00/7:00 a.m. Laxman Indoria came to police station with 2-3 press reporters and in her presence demanded Rs.5 lacs or share in the property from her husband and father-in-law Sh. Babu Lal, otherwise threatened to implicate her husband in this case. There are a catena of decisions to the effect that defence witnesses are entitled to same weight as that of prosecution witnesses. In *Banti @ Guddu vs. State of M.P.*, 2004 SCC (Cri) 294, it was held that evidence of defence witness is not to be ignored by courts. Like any other witness, his evidence has to be tested on the touch stone of reliability, credibility and trustworthiness. Similar view was taken in *Dudh Nath Pandey vs. State of U.P.*, 1981 Cri LJ 618, where it was held that the defence witnesses are entitled to equal treatment with those of the prosecution. Courts ought to overcome their traditional instinctive disbelief in defence witnesses. Relying upon this authority in *Munshi Prasad and Ors vs. State of Bihar*, AIR 2000 SC 3031, it was held that defence witnesses are not to be treated differently from prosecution witnesses. The evidence tendered by the defence witnesses cannot always be termed to be tainted only by reason of the factum of the witnesses being examined by the defence. The defence witnesses are entitled to equal respect and treatment as those of the prosecution. The issue of credibility and trustworthiness ought also to be attributed to the defence witnesses at par with those of the prosecution. That being so, there is no reason to disbelieve the testimony of DW-1 Smt. Sunita and DW-2 Arti, that witness Laxman Indoria and accused are related to each other and their relations are strained. In fact, the same has also not been challenged by learned public prosecutor, as even no suggestion to the contrary was given to the witness. This material fact has not only been suppressed by the witness, but in fact he even denied the suggestion to this effect given by the defence counsel. In this scenario, the testimony of Laxman Indoria is required to be scrutinised with great care and circumspection. and (iv) The examination-in-chief of this witness was partly recorded on 02.06.2008, it was deferred and at that time he had deposed that a purse was also recovered from the search of deceased. However, when he appeared on the next date of hearing i.e. 24.07.2008 the witness suo-moto clarified that there was no purse on the deceased. This fact assumes significance,

inasmuch as, it is the case of prosecution that when the accused Suresh was apprehended, in pursuance of his disclosure statement, he got recovered one purse belonging to the deceased.

20. Under the circumstances, in our opinion, keeping in view the fact that the entire conduct of the witness having witnessed the incident is quite improbable and unnatural, and despite the fact that he was related to the accused persons and relations were strained, not only he tried to suppress the relationship, he also denied having any relationship with them or any strained relations with them and furthermore, material improvements were made in his deposition affecting core issues, it will be highly unsafe to convict the accused on the solitary testimony of this witness. It has been held time and again by the Honble Supreme Court and this Court that when the sentence is quite onerous, the burden also becomes heavy on the prosecution to prove its case beyond any shadow of doubt.

21. It is the submission of learned Public Prosecutor for the State that besides the oral testimony of Laxman Indoria, even the circumstantial evidence proves the complicity of the accused in the crime. It was submitted that the motive for committing the murder was robbery. At the outset, it may be mentioned that neither the charge sheet was submitted for offence of robbery nor any separate charge for robbery was framed by learned Additional Sessions Judge. Furthermore, it is not established beyond doubt that motive to commit crime was robbery only because on personal search of deceased, from his baniyan, Rs. 4,000/- in denomination of 1,000/- each along with his passport, visa, electronic tickets from Delhi to Abu Dhabi, from his shirt Rs. 156/- in currency and coins from the right pocket of his pant, a NOKIA 160 mobile phone were recovered. Near the dead body, two bags containing clothes and daily use articles and four photographs were recovered. If the intention of the accused was really to rob the deceased, it is not understandable as to why they left behind two bags which were found lying near the dead body and why the articles and mobile phone recovered from the personal search of the deceased were not taken by the accused. As such, a doubt is raised regarding the intention of the accused to rob the deceased.

22. It is further the case of prosecution that on 19th September, 2007, on the basis of secret information, both the accused were apprehended at about 7:00 pm at Qutub Road near police picket, Hanuman Mandir, Qutub Road behind MCD store. It does not appeal to reason as to where was the occasion for the police officials to wait for the secret information, inasmuch as, the accused were well known to Laxman Indoria and they were living in front of his house. That being so, for the purpose of apprehension of accused, police officials could have straight away gone to the house of the accused and nabbed them. But instead of doing so, as per prosecution version, on the basis of secret information, they were arrested on 19th September, 2007. It is the plea of accused Suresh that he was lifted on 18th September, 2007 from his house at about 11/11:30 pm by Constable Arvind whereas according to Vikas, he was lifted from his house on the intervening night of 17/18th September, 2007 at about 2:00 am by Constable Arvind. Keeping in view this plea of the accused, which has been substantiated by DW2 Aarti that, on 17.09.2007, in late night, at about 2 a.m., Constable Arvind came to her house and took her husband coupled with the fact that the circumstances of the case makes it clear that there was no need for the police officials to wait for any secret information but the accused could have been apprehended from their house and there is no independent witness to the arrest, arrest of the accused as projected by the prosecution becomes doubtful.

23. It is further the case of prosecution that after the arrest, the accused persons were interrogated. Accused Vikas @ Sunil made a disclosure statement Ex. PW-13/B. In pursuance to the disclosure statement, he led the police officials to his house No. 6461/1, Gali Hanuman Mandir, Nabi Karim from where he got recovered one half pant/knicker which was stained with blood and one Iraqi Dinar of the value of Rs. 25,000/- lying underneath a newspaper from his almirah, which were separately seized. Admittedly, there is no independent witness to the recovery of both these items despite the fact that recovery is alleged to have been effected from the house of accused and it has been admitted by both the police officials, i.e., ASI Ashwini and Inspector Joginder Singh that family members of the accused were present in the house at that time. No explanation is forthcoming as to why they were not asked to join the recovery proceedings. Even assuming for the sake of arguments that such recovery was effected, the question is whether

the same implicates the accused or not, inasmuch as, half pant was sent to FSL. As per the report although blood was detected on the same, which was of human origin but blood group could not be opined. Thus, it cannot be said with certainty that the blood, which was found on the half pant of the accused, was that of the deceased. Similar view was taken in *Sattatiya vs. State of Maharashtra and Ors.*, (2008) 3 SCC 2010. *State vs. Shahid Mian*, 2010 (166) DLT 35. Moreover, there was no occasion for the accused to retain blood stained half pant at his house after the commission of offence. As such, this circumstance is not reliable to establish the guilt of accused.

24. As regards recovery of Iraqi Dinar of the denomination of Rs.25,000/- a discrepancy was pointed out by learned counsel for the appellant that the father of the deceased has deposed that when his son left he was having Rs.25,000/- dollars and even learned public prosecutor gave a suggestion to this effect. That being so, the currency which is alleged to have been recovered from the house of accused Vikas was of Iraqi Dinar, therefore, it does not connect him with the crime. Although, this discrepancy is very minor in as much as being rustic villager, witness may not be able to differentiate between the foreign currency by terming it as dollar instead of Iraqi dinar but the fact remains that even if a foreign currency is recovered from the house of the accused that, ipso facto, is not an offence unless it is proved that it belonged to the deceased. No evidence has been led by the prosecution to prove that this Iraqi Dinar belonged to deceased.

25. As far as accused Suresh is concerned, it is the case of prosecution that in pursuance to the disclosure statement, Ex.PW13/A, he led the police party to a wooden khoka near Hanuman Mandir, Nabi Karim and got recovered one chura lying beneath the bricks. Here again, there is no independent witness to the recovery. Moreover, the chura was sent to FSL and as per the report of FSL, blood could not be detected on the same. In the absence of detection of blood on the chura, it cannot be said that it was the weapon of offence, which was used in the crime. Moreover, the weapon of offence was never shown to the concerned doctor who conducted the post-mortem of the deceased to seek his opinion whether the injury on the person of deceased could have been inflicted by this weapon of offence. Under the circumstances, even this chura does not connect the accused

with crime.

26. The other incriminating piece of evidence alleged against this accused is recovery of purse at his instance from inside wall of Bankey Birla Maszid. Recovery was alleged to have been effected in the presence of PW-9 Wasim Raja, who deposed that one person namely Suresh was in custody of police official and he got recovered one purse, however, this witness does not say that accused who was present in the court was the same who got the purse recovered and in cross-examination, he clarified that he had not seen the face of the accused accompanying the police. Under the circumstances, although according to this witness one Suresh got recovered one purse, however, from his deposition it is not established that it was the same Suresh who got the purse recovered who was wanted in this case. After recovery of purse on 23.10.2007, an application Ex.PW12/A was moved by Inspector Joginder Singh for conducting Test Identification Parade of the case property. On 29.10.2007, proceedings were conducted by Shri Vidiya Prakash (PW12), Metropolitan Magistrate. As per proceedings Ex.PW10/A duly proved by learned Metropolitan Magistrate, purse was correctly identified by complainant as belonging to his son, however, recovery of this purse simplicitor will not be sufficient to connect the accused with the crime. Although, it raises a pointing finger towards the accused but suspicion howsoever grave, is not sufficient to convict the accused. The presumption of innocence always tilts in favour of the accused and the burden of proof is heavy upon the prosecution to establish its case beyond reasonable doubt.

27. The other incriminating piece of evidence alleged against the accused persons is their refusal to join Test Identification Proceedings conducted by learned Metropolitan Magistrate. As per record, on 20.09.2007, an application Ex.PW11/A for conducting Test Identification Parade of both the accused was moved by Inspector Joginder Singh before learned Metropolitan Magistrate. On 27.09.2007, Shri Jagdish Kumar, M.M. (PW11) went to Tihar Jail, where both the accused refused to join TIP proceedings as per TIP proceedings, Ex.PW11/2 and PW11/3. In normal course, refusal to join Test Identification Proceedings in the absence of satisfactory explanation, raises an adverse inference against the accused that in case they had joined the proceedings they would have been identified by the

witnesses. However, things are somewhat different in the instant case because the accused were to be identified by Laxman Indoria who was previously known to the accused persons being their relative. That being so, no purpose would have been served even if the accused had joined the proceedings. In fact, according to Laxman Indoria, even when the accused were produced in muffled face before the Court of Sh. Alok Aggarwal, learned MM he could identify them from their walk/gait. That being so in the peculiar circumstances of the present case, refusal to join Test Identification Proceedings by the accused does not lead to any adverse inference against them.

28. In *Harendera Narain Singh vs. State of Bihar*, AIR 199.S.C. 1842, their Lordships of the Supreme Court had reiterated the well known principle of the criminal jurisprudence law that: The basic rule of criminal jurisprudence is that if two views are possible on the evidence adduced in a case of circumstantial evidence, one pointing to the guilt of the accused and the other to his innocence, the Court should adopt the latter view favourable to the accused.....

29. In *Data Xiva Naique Desai and Another vs. The State*, AIR 196.Goa, Daman and Diu 4, Honble Court reiterated the well known principles of the criminal jurisprudence which are reproduced as under: The learned Judge would be advised to observe the following general rules when he is dealing with the serious question of the guilt or innocence of persons charged with crime: (i) The onus of proving everything essential to the establishment of the charge against the accused lies on the prosecution; (ii) The evidence must be such as to exclude to a moral certainty every reasonable doubt of the guilt of the accused; (iii) In matter of doubt it is safer to acquit than to condemn; for it is between several guilty persons should escape than that one innocent person suffer; and (iv) the hypothesis of delinquency should be consistent with all the facts proved.

30. In *Swarn Singh Ratan Singh vs. State of Punjab*, AIR 195.SC 637.it was held by the Apex Court that in criminal cases mere suspicion, however, strong, cannot take the place of proof. The Court must also take into consideration that an accused is presumed to be innocent till charges against him are proved beyond reasonable doubt. Mere suspicion, however, strong it may be, cannot take the

place of legal proof.

31. Moreover, in *Kali Ram vs. State of Himachal Pradesh*, AIR 1973 SC 2773, the Apex Court had observed as follows: Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence. Rule has accordingly been laid down that unless the evidence adduced in the case is consistent only with the hypothesis of the guilt of the accused and is inconsistent with that of his innocence, the court should refrain from recording a finding of guilt of the accused. It is also an accepted rule that in case the court entertains reasonable doubt regarding the guilt of the accused, the accused must have the benefit of that doubt. Of course, the doubt regarding the guilt of the accused should be reasonable : it is not the doubt of a mind which is either so vacillating that it is incapable of reaching a firm conclusion or so timid that it is hesitant and afraid to take things to their natural consequences. The rule regarding the benefit of doubt also does not warrant acquittal of the accused by resort to surmises, conjectures or fanciful considerations. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex-facie trustworthy on grounds which are fanciful or in the nature of conjectures. The guilt of the accused has to be adjudged not by the fact that a vast number of people believe him to be guilty but whether his guilt has been established by the evidence brought on record. Indeed, the courts have hardly any other yardstick or material to adjudge the guilt of the person arraigned as accused. Reference is sometimes made to the clash of public interest and that of the individual accused. The conflict in this respect, in our opinion, is more apparent than real. It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilized society. All this highlights the importance of ensuring as far as possible, that there should be no wrongful

conviction of an innocent person. Some risk of the conviction of the innocent, of course, is always there in any system of the administration of criminal justice. Such a risk can be minimised but not ruled out altogether.

32. Keeping these broad principles in mind, prosecution cannot be said to have established its case beyond reasonable doubt. That being so, both the appellants are entitled to benefit of doubt. Accordingly, the appeals are allowed. Both the appellants are acquitted of the offence alleged against them. They be released forthwith, if not wanted in any other case.

33. Trial Court Record be sent back. SUNITA GUPTA, J REVA KHETRAPAL, J
July 02, 2013 rs

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