* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of Decision: 3.07.2012

\+ **CRL.A 670 OF 2007**

Vinay Kumar ... Appellant

Versus

State ... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr.L.K.Upadhyay, Ms. Sridevi Panikkar and Mr. Vivek Sood, Advocates.
For Respondent : Ms.Richa Kapoor, APP for the State

***AND***

\+ **CRL.A 826 OF 2007**

Munish Kumar ... Appellant

Versus

State ... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr.Vivek Sood, Mr.L.K.Upadhyay & Ms.Sridevi, Advocates.
For Respondent : Ms.Richa Kapoor, APP for the State

***CORAM:***
***HON'BLE MR. JUSTICE ANIL KUMAR***
***HON'BLE MR. JUSTICE V.K.SHALI***

**ANIL KUMAR, J.**
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1. The appellants have challenged their conviction in Sessions Case No.466 of 2006, titled as 'State v. Vinay Kumar & Anr.', arising from the FIR No.528 of 2002, under Sections 302/449/376/411/ Indian Penal

Code, PS Rohini convicting the appellant Vinay Kumar under Sections 120-B, 449/120-B, 376, 302/120-B of the Indian Penal Code and appellant Munish Kumar under sections 120-B, 449/120-B and 302/120-B of the IPC by judgment dated 7th September, 2007 passed by the learned Additional Sessions Judge, Delhi. The appellant Vinay Kumar was sentenced to rigorous imprisonment for 10 years and fine of Rs.2000/- and in default of payment of fine further rigorous imprisonment for two months for offence under Section 120-B IPC; rigorous imprisonment for 10 years and fine of Rs.2000/- and in default rigorous imprisonment for two more months for offence under Section 449/120-B of IPC and imprisonment for life and fine of Rs.2000/- and in default further rigorous imprisonment of two months for offence under Section 376 IPC and imprisonment for life and fine of Rs.2000/- and in default rigorous imprisonment for two months for offence under Section 302/120-B of IPC. Appellant Munish Kumar was sentenced to rigorous imprisonment for 10 years and fine of Rs.2000/- and in default rigorous imprisonment for two more months for offence under Section 120-B IPC; rigorous imprisonment for 10 years and fine of Rs.2000/- and in default rigorous imprisonment for two more months for offence under Section 449/120-B IPC and imprisonment for life and fine of Rs.2000/- and in default rigorous imprisonment for two months for offence under Section 302-120-B of IPC. The Sessions Court also ordered that all the sentences shall run concurrently and the period of

detention during investigation and trial be set off as provided under Section 428 of Criminal Procedure Code.

2. Both the accused have preferred separate appeals against the judgment of the learned Trial Court, however since the facts as well as the evidence in both the matters is the same and interconnected, the appeals are disposed of by a common judgment.

3. The case of the prosecution in brief is that on 19th August, 2002 Neelam Kler w/o Late Sohan Lal, who was employed in the State Bank of Patiala, Karala Branch had come back to her house, H. No. 19, Pocket no. F-24, Sector 3, Rohini, after work at about 5:15 p.m. and she had found her home to be in complete disarray. Her two children, the son named Bharat and the daughter named Sarika also resided with her in the same house. Seeing her house in shambles, she called out for her children, however they did not respond. When she went to the bedroom on the first floor she found the dead bodies of both her children lying on the double bed. Thereafter, Neelam Kler ran downstairs and approached the halwai and told him to call the police. She then came back to the house, cried a lot hysterically and ultimately became unconscious.

4. As per the prosecution, the police received information regarding a double murder at H. No. 19, Pocket no. F-24, Sector 3, Rohini vide DD No. 23. The information was sent through Ct. Kishan to SI Ombir Singh

who along with Ct. Krishan and Ct. Suresh reached the spot. In the meantime the SHO and Addl. SHO Hira Lal, also reached the spot and found that on the first floor, the dead bodies of Bharat and Sarika were lying on the bed. The goods in the house were lying scattered and the almirah was lying open. A television set was also found lying on the top most stair of the first floor. Thereafter, a rukka was given to Ct Kishan and an FIR No. 528/02 u/s 449/302 IPC was registered. The crime team was called for and on investigation 9-10 iron rods of the iron jaal on the top portion of the courtyard were found to be cut and bent downwards.

5. During investigation the scene was photographed. Photographs are Ex PW16/1 to 13. Finger prints were lifted as Ex PW18/A. A dog squad was called and the site plan was prepared. The bodies were also sent for post mortem and duly examined by Dr. Komal Singh on 20th August, 2002. On the floor near the double bed, a belt with the monogram of the Central School was lying, which was taken into possession. From the bedroom the bed sheet of the double bed, Ex PW2/H and an iron rod, Ex PW27/A was recovered, while from the roof, three ropes, one aari having a wooden handle and four blades were also taken into possession. Statement of one Narender Mehta, family friend of the victims was recorded, who had stated that he had passed from F-24, main Road, Avantika at about 4:15 PM on 19th August, 2002 and he had seen Vinay Kumar/son in law of Neelam and his servant Munish

going out of the house hurriedly. He had known both of the appellants very well at the time. Thereafter a notice u/s 160 of the Cr.P.C was issued and the appellant Vinay Kumar s/o Raj Kumar was directed to join the investigation. He was subsequently arrested on 20th August, 2002 at about 2:00 p.m. after which his disclosure statement was recorded. Subsequently appellant Munish Kumar was also arrested and he too had made a disclosure statement.

6. The case of the prosecution is that based essentially on circumstantial/evidence one chain of which is disclosure statements of the accused persons, leading to recoveries of certain articles at the instance of the appellants, which were the three watches, two from the appellant Vinay and one from the appellant Munish, two sets of black gloves, Ex. PX and Ex. PX1, and an amount of Rs. 10,000/-. Accused had also pointed out a tent shop from where the rope was purchased, a shop of hardware from where the four blades and the saw (aari) was purchased and a Kabari shop from where the iron rod was purchased. Statements of those shopkeepers were also recorded after which the accused person led the police party to the place of incident vide memo mark PW 3/A.

7. Thereafter, the postmortem report was collected and on perusal of the postmortem report of the deceased Sarika, it transpired that the Doctor had opined that sexual offence prior to the death was a possibility. Consequently, Section 376 IPC was added to the charges.

Exhibits of both the accused and Sarika were sent to CDFD, Hyderabad for DNA testing and the remaining exhibits were sent to FSL, Malviya Nagar. The recovered three watches were duly identified in TIP by Neelam Kler, mother of the victims. Also four post cards allegedly written by the accused Vinay to his mother-in-law Mrs. Neelam Kler, PW-2 from jail admitting to his guilt were taken into possession by the police.

8. After completing the investigation the challan was filed and the case was committed to the court of sessions. Later on, the DNA test report was also collected and a supplementary challan was filed. In order to substantiate its case the prosecution had examined 29 witnesses and thereafter, the accused persons were examined under section 313 of the Cr.P.C. The accused persons also produced two witnesses in their defense DW-1, Raj Kumar, father of the appellant Vinay and DW-2 Shyam Sunder Batra, a friend of appellant Vinay.

9. The Learned Trial Court considered the arguments of all the parties concerned and carefully weighed the evidence on the record and on the basis of the evidence of PW-3 who saw both the accused persons running out of the house in question; the recovery of the watches belonging to Neelam Kler which were found missing from the house- from which two of the watches were recovered from accused Vinay Kumar, and one watch was recovered from accused Munish, which were duly identified by Neelam Kler in TIP as well as during trial; the recovery

of the weapon of offence viz the belt used for strangulating one of the victims as per the endorsement of the doctor who conducted the postmortem; the recovery of the aari, blade of aari and rope used by the accused persons for entry in the house after cutting the iron jaal from the house and the DNA Test Report according to which the biological fluid present on the clothes of the victim, Sarika matched the DNA of the accused Vinay Kumar, the Trial Court concluded that the guilt of the appellants was established beyond any reasonable doubt.

**Appellants' Pleas**

10. The counsel for the appellant Vinay Kumar submitted that the star witness of the prosecution is undoubtedly PW-3, Narender Mehta, the family friend of PW-2 Neelam Kler, who had deposed that he had seen the appellants running out of the house of PW-2. He urged to discard the testimony of PW-3 Narender Mehta in light of the many alleged inconsistencies evident in his testimony. The learned counsel submitted that as per the testimony of PW-3, he claimed to have seen the accused persons at 4:15 pm on 19th August, 2008, running out of the house of Neelam Kler and that it is only during the evening time that he had come to know that the children of PW-2 had been murdered. Learned counsel further submitted that subsequent to the incident two statements of PW-3 were recorded i.e. one dated 19th August, 2002 and the other dated 20th August, 2002 which were exhibited as Ex PW3/DA & DB. However as per the learned counsel, PW-3 himself deposed that he did not go to the house of PW-2 on 19th

August, 2002. This fact was also corroborated by the deposition of PW-27, who deposed that he along with the SHO, ACP, DCP had reached the spot and that no person had met the police party at the spot claiming himself to have been aware of the facts of the case or who could throw light on the incident. In fact PW-27 was categorical in deposing that PW-3 had not met him at the spot till the time he remained on the spot up to 9:00 p.m. While on the other hand PW-22 had deposed to the contrary, stating that he had recorded the statement of PW-3 at 6/7 p.m. on 19th August, 2008, which according to the learned counsel is not possible since PW-27 himself had denied having met any person, who was aware of the facts of the case. Thus it is urged that these discrepancies cast serious doubt about the truthfulness of testimony of PW-3. The statement of PW-3, therefore, was not recorded on the date of incident as alleged by the prosecution and it is merely on account of concoction on behalf of PW-22. It is further asserted that the witness must have been added subsequently on the directions of the IO with the intention to falsely implicate the appellants.

11. The learned counsel also emphasized the discrepancies in the testimony of PW-3 who during his examination stated that he had come home at 8:00 p.m. which is when he heard about the incident from the neighbours, after which he reached the house of Neelam, PW-2 at 8:15 p.m. During the cross examination the said witness deposed to the contrary stating that he had heard about the incident from the persons

gathered in front of the spot at 6:00 p.m. Thus as per the learned counsel, these contradictions regarding the time of receiving the information and the source of the information is material in every aspect as it is reflective of the fact that he is not a genuine witness.

12. The learned counsel further contended that PW-3 while deposing in Court stated that the accused persons were seen running from the spot of occurrence. However this is material inconsistency with his two statements recorded u/s 161 by the police i.e. Ex PW3/DA and ExPW3/DB wherein the word "running" was not mentioned, instead only the term "walking fast" was used. According to the learned counsel if indeed the accused persons were behaving suspiciously, then it is unusual conduct on the part of PW-3 to have not stopped and enquired from them or in the very least to have at least gone to the house of PW-2 to check, if everything was alright.

13. It is further asserted that PW-3 in his examination in chief deposed that his statement was recorded by the police on 20th August 2008 after which he came back to his house. While subsequently in his cross examination PW-3 mentioned the time of recording the statement as 2:00 p.m. However he later on deposed to the contrary stating that he had attended the funeral at 2:00 p.m. Thus the learned counsel contended that the witness, PW-3 has contradicted himself on various accounts which is reflective of the fact that he is not a truthful witness. This inconsistency is also apparent from the deposition of PW-22 who

categorically deposed that the supplementary statement of PW-3 dated 20th August 2008 was recorded at about 10:30 p.m. In addition, the learned counsel contended that this statement had been endorsed by an unknown officer who was not examined and thus its genuineness has not been established.

14. The learned counsel has further expressed doubt on the deposition of PW-3 since as per his testimony both the accused persons had made their disclosure statements dated 20th August, 2008 in his presence, however, he is neither the witness nor the signatory to these disclosure statements Ex PW22/A and PW27/G nor does he make any reference about the disclosure statements in Ex PW3/DA and Ex PW3/DB. Further this fact is diametrically opposite to the deposition of PW-22 Sahib Singh who was categorical in stating that while the disclosure statement of accused Vinay was recorded at 5:00 p.m. on 20th August, 2008 at the police station, no public person was present there, other than he himself, Inspector Hira Lal and PW-27 SI Ombir Singh. Thus if in fact PW-3 was present in the police station, his signatures and name should have been on the disclosure statement as well as the personal search memo of accused Vinay, Ex. PW 27/E. It was further asserted that PW-3 in his testimony had categorically stated that the accused persons were not taken to any place nor had they led the police to any place in his presence. However in view of this deposition according to the learned counsel it is glaringly unexplained

why his signatures are appearing on the pointing out memo of the place of occurrence Mark 3/A, Ex. PW 27/H and from this, the only inference that can be drawn is that because he was a close friend of the victims' family, he agreed to sign any of the documents as per the desire of the police. Thus it is alleged that in the facts and circumstances PW-3 cannot be relied upon and he is not a genuine witness and his testimony cannot be relied on establishing the culpability of the accused.

15. Learned counsel for the appellant further urged that since PW-3 is a solitary witness to the alleged factum of having seen the accused persons running out from the house of PW-2 which fact has not been corroborated by any other evidence, therefore it cannot be substantial enough to inculpate the guilt of the accused persons. Learned counsel contended that even if the version of PW-3 is to be taken into consideration for the sake of argument, it is highly unlikely that the accused persons would have run out of the victims' house, as it would have attracted attention towards them and also since they were well aware of the timings of PW-2, the mother of the victims, so they would have known that she was to come back to the house by about 5:15 in the evening and there was ample time for them to go out without running.

16. The learned counsel vehemently argued that the Trial court grossly erred in relying upon the DNA finger printing report of the CDFD, Hyderabad since there were many manipulations by the police authorities in the collection and preservation of the samples/articles from the point of seizure to the point of its submission before the forensic analysis, which undoubtedly could have contaminated the samples and consequently would have affected the outcome of the report. According to the learned counsel, in the police remand application dated 21st August, 2002 the ground taken to remand the appellants to police custody was for the purpose of taking the blood samples of the accused persons' in order to facilitate DNA Analysis, for which two days of police remand was granted. However during that period no DNA samples were taken. Also as per the deposition of PW-25 Suraj Bhan, both the accused were taken to the hospital on 21st August 2002 and accused Vinay was examined vide MLC No. 1799 while accused Munish was examined vide MLC No.1800/21.08.02. However the learned counsel submitted that the MLCs of both the accused were not placed on the record with the clear intention of withholding it from the Court. It was also alleged by the prosecution that the garments, blood samples and MLC No. 1800 of Munish were handed over by the doctor to PW-25 Suraj Bhan which were seized vide seizure memo Ex PW25/A. However no explanation had been given by the prosecution regarding what happened to the garments, and the blood samples of accused Munish. In addition neither has the seizure memo regarding

the garments, blood samples and the MLC No. 1799 of Vinay has been placed on the record nor were the doctors of BSA Hospital, who examined accused Munish and Vinay on 21st August 2002 either cited or examined in Court, for which no explanation has been given by the prosecution.

17. Thereafter, on 23rd August, 2002 as per the MLC No. 1823/02, accused Vinay Kumar was again taken to the BSA Hospital at 11:35 a.m. by Constable Kishan PW-24 while as per the MLC No. 1824/02 accused Munish was taken to BSA Hospital at 11:40 am by Constable Pramod, PW-21, however neither of the witnesses had deposed about the same. Also no blood samples were taken for DNA analysis at this stage nor was the doctor who examined the appellants been cited as a witness. Thus the purpose of taking the accused to the hospital is not established by the prosecution.

18. At about 2:00 pm on 23rd August, 2002 the accused were produced in court after the expiry of two days of the police remand and they were further remanded to judicial custody. However as per the record on 23rd August, 2002 the accused were again taken to the hospital at 3:20 pm, without any permission from the court, since as per the learned counsel, procedural requirement necessitated that samples for DNA should be taken before an MM. As mentioned in the MLC, the accused persons were brought by HC Prakash Pradhan PW-20. The accused Munish was examined by Dr. Poonam PW-8 vide MLC

Ex. PW 8/A and accused Vinay Kumar was examined by Dr. Raman Bhutani vide MLC Ex PW14/A. Blood samples of both the accused were taken. However Dr. Raman Bhutani could not been examined as he had left the services of the hospital, because of which in his place Dr. Kuldeep Singh was examined as PW-14 since he was conversant with the handwriting and signatures of Dr. Raman Bhutani. However Dr. Kuldeep Singh testified in court only on the basis of the contents of the MLC, hence as per the learned counsel the non-examination of Dr. Raman Bhutani has caused great prejudice to the appellant Vinay Kumar as many clarifications regarding sampling, taking specimen sample seal, preservation of samples, precautions taken in sampling, role of technicians, etc could not be ascertained. Therefore it is contended that due to non-examination of this material witness the findings of the same cannot be relied on as against the appellant, since its sanctity has not been proved beyond all reasonable doubt. It is further contended that in the MLC of Vinay Kumar Ex PW 14/A the description of the seal in which the samples were taken is not given nor does it specify whether any specimen of the sample seal was taken by the police. PW-14 also did not depose anything regarding the details/description of any such seal or state the fact that the samples were sealed. Hence, it is contended that there was a good chance that the samples could have been tampered with. It is further submitted that this is not disputed that there was availability of surplus biological fluid with the police, hence as per the learned counsel it could have been

very easily been utilized by the police with the view to manipulate the evidence and inculpate the appellants.

19. It is also pointed out that as per the MLC No. 1823/02 Ex PW 14/A the samples of appellant Vinay Kumar were handed over to HS Prakash Pradhan (PW-20). However PW-20 has deposed diametrically opposite by stating that the pullandas in respect of Vinay Kumar and Munish were separately collected by the IO. Thus in light of the confusion regarding the collection of the samples which is imperative in ascertaining the validity of the report, the learned counsel asserts that the samples could have been tampered with and contaminated and the same cannot be relied upon and consequently the CDFD report implicating appellant Vinay cannot be relied on as well.

20. Learned counsel further contended that even though the pulandas of the DNA samples of the appellants, were deposited in the office of CDFD on 26th August, 2002, however the DNA typing report was prepared only after a lapse of more than 1 year on 15th October, 2003. There is absolutely no evidence regarding under whose custody the samples and garments of Sarika remained during the intervening period. There is also absolutely no explanation given for the delayed examination of the DNA material. As per the learned counsel even though the vaginal swab, vaginal smear and nail clippings of Sarika the victim was preserved and handed over to the police by the doctor during post mortem, however the vaginal smear and the nail clipping which

would have definitely yielded suitable material for DNA Typing was not send to the CDFD, Hyderabad. It was further contended that PW-29 had also deposed that the samples were received on 24th August, 2002, which is completely false as it is a matter of record and even corroborated by PW-20 that the samples were received on 26th August, 2002. Therefore, it is contended that in light of these inconsistencies the deposition of the witness PW-29 too has to be considered cautiously and his denial to the suggestion that there could have been contamination of the samples, since it reached after a delay of 72 hours, has to be disregarded. The analysis too admittedly was conducted after the lapse of a year, the delay for which is unexplained and renders allegedly a huge blow to the case of the prosecution.

21. Learned counsel further asserted that the entries in the Malkhana register only stipulate when the items were deposited in the malkhana, however, it does not specify as to the dates when they were removed from the malkhana for the purposes of being sent to FSL Malviya Nagar, or CDFD Hyderabad, etc. and they also do not mention whether the items were returned to the malkhana or not. In any case this is reflective of the shoddy investigation and therefore tampering with the evidence cannot be ruled out and thus the appellants are entitled to the benefit of the same. The learned counsel has highlighted the fact that though 18 plastic dibbas were specified in the malkhana register as Entry No. 2551, however only 16 of these item were re-

deposited in the malkhana after being sent to FSL Malviya Nagar. It is also submitted that as per PW-23 MHCM also only 16 plastic dibas were re-deposited on 12th April, 2005. On being specifically questioned which of the two plastic dibbas were not deposited, he could not specify the same. Thus the learned counsel contended that since the 18 plastic dibas also included the clothes of Sarika as well as her undergarments which were sent for DNA analysis, there is a possibility that the same could have not been deposited and therefore there was every possibility of it being tampered with.

22. Learned counsel has also submitted that the report of The Forensic analysis has come from FSL Rohini Ex PW 28/A and not from FSL Malviya Nagar as deposed by various witnesses. There is absolutely no evidence or explanation as to how and under what circumstances the samples reached FSL Rohini, whereas the entire documents and evidence shows that the pulandas were sent to FSL Malviya Nagar. As per the learned counsel the fact remains that the pulandas were analyzed at FSL Rohini, hence it is contended that the entire oral evidence of the witnesses and the documents showing FSL Malviya Nagar are false and fabricated. This is also reflective of the lack of sanctity in the investigation and the ploys employed to falsely implicate the appellants. Further the learned counsel pointed out that the sample parcels were received by the office of FSL on 1st November, 2002. However they were analyzed only after a lapse of 3 years on 22nd March,

2005 while the report was prepared on 8th April, 2005. Therefore it is contended that due to inordinate delay in examining the samples the same cannot be relied on.

23. Learned counsel has further contended that there is a break in the chain of custody of the biological evidence and since it is not complete the same is not substantial enough to implicate the appellants. As per the learned counsel the malkhana register does not specify the items that were sent to CFSL, Malviya Nagar and CDFD, Hyderabad, hence there is a lot of ambiguity and there is doubt impressed upon the fact that the garments of Sarika and PM Blood gauge were sent to FSL, Malviya Nagar and CDFD Hyderabad, simultaneously, which is not rationally possible. Therefore, learned counsel contended that the prosecution has not been successful in establishing the fact that the samples could not have been tampered with, because of which the appellants are entitled to the benefit of doubt.

24. Learned counsel further contended that there is a strong possibility that in light of the facts and circumstances, the present matter could have been a case of burglary/dacoity. As per the learned counsel the same conclusion was reached by the crime team at the time of investigation as well. The fact that the TV was found on the staircase, and that as per PW-24 who was present at the spot too had deposed the fact that 9-10 iron rods of jaal were found cut and were bent

downwards and that it gave the impression that somebody had come from over the jaal after cutting the same and entered the first floor. He further described the site of incident to be in complete disarray by deposing that the goods of the almirah were lying scattered outside the almirah and that it appeared from inspection at the spot that a dacoity or robbery has been committed. This fact has been corroborated by PW-27 as well.

25. Learned counsel further contended that the photographs of the spot of incident reveal that a helmet was lying on the TV set found on the stairs, however no investigation regarding the helmet was made, which according to the learned counsel would have been invaluable in apprehending the real culprits, and in proving the innocence of the appellants. In any case even as per the case of the prosecution the appellants had entered and left the house on foot, and no two wheeler was seized as well. As per the counsel the Trial court grossly erred in brushing aside the major lacunas in the investigation on the reasoning that the helmet could have been left by some witness or police official in a hurry. Thus the counsel contended that the prosecution has not been successful in proving the guilt of the appellants beyond all reasonable doubt and hence the appellants ought to be acquitted.

26. The learned counsel for the appellant has contended that the accused persons have been gravely prejudiced since the IO, Insp. Hira

Lal of the present case could not be examined. Learned counsel further submitted that the reason for non-examination of the IO concerned was, since he had expired in May, 2005. Therefore, in his place, PW-27 was recalled to prove the signatures of the IO. However the accused persons were not given the full opportunity to cross examine the witness as his cross examination was deferred after lunch on 13th November, 2006 and thereafter too no opportunity was given to the accused persons, which according to the learned counsel for the appellant gravelly prejudiced the appellants while putting up its defense, as the Learned trial Court disallowed certain pertinent questions asked by the appellants to the witness PW-27 on the flimsy ground that the witness had been called only to identify the signatures of the IO.

27. The learned counsel has further contended that the arrest memo was prepared on 19th August, 2002 hence for all purposes it is clear that the accused persons were arrested on 19th August 2002, which is contrary to the case of the prosecution, according to which the accused persons were arrested on 20th August 2002. Therefore, it is contended that there are clear manipulations made in the arrest memo as even the entry in the memo has been made with two different pens and while the date on the top is mentioned as 19th August, 2002 the date in column no. 6 is mentioned to be 20th August, 2002. These manipulations clearly render the document unreliable and raise glaring questions on the

investigation of the prosecution. The arrest of the appellant on 19th August, 2002 is also corroborated by the testimony of PW-3 and DW-1. Thus the case of the prosecution that the accused persons were arrested pursuant to a notice dated 20th August, 2002 issued under Section 160 of the Cr.P.C. are all manipulations by the concerned officials and has been established to be false.

28. The learned counsel for the appellants has contended that the Trial Court has grossly erred as it has based its judgments on conjectures and surmises rather than the facts proved on record. According to the learned counsel, the observations and conclusions of the Learned Trial Court are absolutely unfounded and baseless and based on surmises and conjectures.

29. It is further alleged by the learned counsel that the trial court was confused in its conclusions while holding that the accused persons were not sure as to who would become a prey of their act. It was reasoned by the Trial court that if Neelam Kler had been found in the house then she too would have become a prey of the act of the accused persons. Therefore, the Learned Trial Court was clearly not sure if the accused persons had come with a definite intention to kill a particular person and what the motive was? As the house of PW-2 was a self acquired property of Late Shri Sohan Lal, the husband of PW-2 who had died intestate, it was inherited by PW-2 along with her three children. Therefore, if the motive of the accused Vinay was indeed to usurp the

property, then it would have been only possible by killing PW-2 as well. Therefore the Trial court had grossly erred in accepting this as a motive to kill the victims by the accused persons. It is further asserted that there is no evidence as to when the accused persons had allegedly entered into the house nor has the time of the incident been established.

30. It is also contended that the documentation in the present matter was belated and antedated which is the reason behind the duplications which too was disregarded by the Trial Court. According to the learned counsel the case diary and the chargesheet were prepared by PW-22 hurriedly in order to comply with the limitation u/s 167 Cr.P.C. If the charge sheet had been prepared at the alleged date, time and place then there would have been no chance of duplication.

31. The learned counsel further asserted that no finger prints from the spot of occurrence had been lifted which is also corroborated by the deposition of PW-27, who categorically stated the same and which is contrary to the prosecution's case as well. The learned trial court had been hugely misguided to have dismissed the statement made by the PW-27 to have been on account of lapse of memory. However this serious lapse is liable in itself to exculpate the guilt of the appellants and the benefit of doubt is due to them. The learned counsel further emphasized that the Trial Court grossly erred in explaining away the undue latitude on behalf of the prosecution for not sending the finger

and palm impressions, which were specifically requested for by the Finger Print Expert.

32. The learned counsel further contended that PW-2 had categorically stated that in her presence none of the articles were seized from the room however, as per PW-27 Ombir Singh, a belt, an iron rod, an empty sweet box, from the room and three ropes, one aari and four blades were recovered from the roof top. Therefore the recoveries of the same in the absence of any public persons cannot be relied upon.

33. Learned counsel further submits that all the seizure memos, search memos etc. had been written by PW-22 Ct. Sahab Singh who was primarily present throughout during the investigation. Almost all the material memos were either witnessed by himself or PW-27 or SI Ombir Singh or both. No independent public witness of the locality had been joined as per the requirement under Section 100 of Cr.P.C. Therefore, it is contended that the recoveries in itself are of a doubtful nature and not substantial enough to inculpate the guilt of the appellant.

34. The learned counsel further urged the court that the statement of PW-2 also is not beyond reproach as it is fraught with inconsistencies. She hasn't explained why the FIR was not recorded by the police on her statement nor is there any record of the rooms being checked for the missing article which was done by her on 20th August 2002 and which

thereafter resulted in the finding that three of her watches were missing.

35. Learned counsel further contended that PW-22 Const. Sahab Singh and PW-27 SI Ombir Singh were witnesses to the alleged recovery of the watches from the appellants. However these watches were not produced before the court and therefore as per the learned counsel it cannot be concluded that the recovery of the said watches was proved against the appellants. The learned counsel further asserted that the manner in which the TIP was conducted was a complete farce, as the three watches were mixed up with four other watches, which would imply a ratio of 1 is to 1 which is contrary to the settled law and practice of conducting a TIP and all four watches were of HMT make which was pointless since none of the watches were of the HMT make. Instead watches of the Kawa or classic make, similar to the stolen watches ought to have been mixed up. It was further asserted that it wasn't clarified by PW-2 whether the stolen watches were in a sealed condition. It is also submitted that in light of the fact that one of the appellants is the son-in-law of PW-2 it would have been highly unusual to accept that they would have stolen only three low priced watches when he would have been fully aware of the valuable articles lying in the house.

36. Learned counsel also submitted that the aspect of conspiracy to carry out the alleged offence has not been established between the

appellants. As per the counsel there is absolutely no evidence, direct or circumstantial which implies the existence of conspiracy or that the appellants were party to any such conspiracy or that any act was done pursuant to it. Regarding the letters allegedly written by the appellant Vinay, learned counsel contended that it cannot be taken into consideration to prove the existence of a conspiracy or that anybody was a party to it, since the letters were written much after the incident when the conspiracy was not on foot. Relying on Mirza Akbar, AIR 1940 PC 176 the learned counsel contended that anything written or done after the conspiracy is over; accomplished, abandoned, not executed or otherwise is not relevant u/s 10 of the Indian Evidence Act.

37. The letters are in any case, of no consequence as they are not satisfactorily proved and cannot be admitted as confession under law. Thus they should be excluded from consideration while adjudicating the case.

**Pleas of the State**

38. The learned counsel for the state contended that the prosecution has been successful in proving the guilt of the appellants as has been rightly concluded by the Trial Court as well. Reliance has been mainly placed on the testimony of PW-3 Narender Mehta, who had categorically deposed that he had seen the appellants running out of the house no. 24/19, Secor-3 Rohini which is the spot of occurrence at about 4:15

p.m. which was immediately after the alleged incident as per the Post Mortem Report.

39. The learned counsel further asserted that the mother of the victims, PW-2 had identified the three watches in TIP which were missing from the house after the incident and were recovered from both the accused persons. While two of the watches were recovered from the room of accused Vinay the other watch was recovered from accused Munish. PW-2 Neelam Khler had also produced the letters of apology received from appellant Vinay in which he admitted to his guilt and while deposing about the same the appellants did not even cross examine the said witness.

40. The learned counsel further asserted that even the motive had been established as the appellant Vinay on account of being the son-in-law of PW-2 carried out the crime with the sole intention of usurping the property of PW-2.

41. Learned counsel further contended that even though PWs-12 & 5 the tent house owner and the hardware shop owner had both turned hostile, however there deposition need not be completely effaced from the record and can be taken into consideration to the extent that they both proactively identified the appellants as the persons who had purchased the rope, the blade and the saw respectively from both of them. The Kabari shop owner, PW- 5 had also deposed regarding the

fact that the appellants had purchased two iron rods two days prior to the date of the incident, which was clearly in view of carrying out the offence. The recovery of the rope, blade saw and the iron rods which were used by the accused persons to cut the iron Jaal at the roof in order to gain entry into the house is relevant in proving the guilt of the appellants.

42. Regarding the offence of rape the learned counsel for the state has contended that as per the DNA report the biological fluid present on the clothes of Sarika was a source of exhibits of the appellant Vinay, however, the same wasn't a source of exhibits of the accused Munish and thus it is contended that the scientific evidence of rape before murder by the appellant Vinay stands proved beyond all reasonable doubt.

43. Learned counsel further asserted that hundreds of crime cases are solved across the country with the help from the Centre for DNA Finger Printing Diagnostics (CDFD) at Nacharam. The centre for DNA fingerprinting and diagnostics (CDFD) is an autonomous organization funded by the Department of Biotechnology. The society of Centre for DNA Fingerprinting and Diagnostics (CDFD) was registered on 26th March, 1996 under the Andhra Pradesh (Yalangana areas) Public Sources Registration Act, 1300 fasli (Act of 1350 F). It is the only Government approved testing centre where DNA fingerprint solved crimes. Initially it was under the Centre for Cellular and Molecular

Biology (CCMB). The CDFD has analyzed many crimes cases through this technique.

44. Learned counsel further submitted that the Courts from all over the world have recognized the importance of DNA Evidence due to its 99.9% accuracy and reliability. Even in the absence of statutory recognition, it is submitted that the DNA testing is utilized in Indian cases. As per the learned counsel for the state such scientific evidence as DNA is accepted even under Section 45 of the Indian Evidence Act, 1872. The witness proving the DNA report is an expert witness and like all other witnesses he/she is examined, cross-examined and re-examined. In support of her submissions she has relied on the case titled as **Geetha v. State of Kerala, 2005 (2) DMC 286** wherein it was held that the report of DNA Fingerprinting issued from DNA Fingerprinting and Diagnostic Centre, Hyderabad which is a government undertaking for conducting DNA test can be admitted in evidence without examination of the expert under Section 293 of Cr.P.C.

45. Reliance was also placed on **Dharam Deo Yadav v. State of UP,** (para 52) where this Court had held that STRs is highly sensitive and is a conclusive test which produces results even in degraded samples.

46. Thus in the facts and circumstances as has been urged by the counsel for the State, the CDFD report is conclusive in proving the

guilt of the appellant and the Trial court has been right in relying upon it.

47. Learned counsel, Ms Richa Kapoor also submitted that the principles of law for appreciating the evidence of criminal conspiracy under Section 120 B IPC are well settled and have been proved beyond reasonable doubt as against the guilt of the appellant Munish.

48. The learned counsel contended that as per section 120-A of IPC, the criminal conspiracy contemplates as follows: When two or more persons agree to do or cause to be done (i) an illegal act or (ii) an act which is not illegal by illegal means, such an agreement is designated as a criminal conspiracy. Therefore the essence of the offence of conspiracy is the commission of an act by an agreement which is illegal. The agreement may either be express or implied or in part express and in part implied and the offence continues to be committed so long as the combination persists, that is until the conspiratorial agreement is terminated by the completion of its performance or by abandonment or frustration or whatever it may be.

49. She further contended that the offence of conspiracy requires some kind of physical manifestation of the agreement. Also there is no need to prove the express agreement nor is it necessary to prove the actual words of communication. The evidence of transmission of thoughts sharing the unlawful design may be sufficient in itself.

Therefore, conspiracy is proved by circumstantial evidence, as the conspiracy is seldom an open affair. In most cases it will be difficult to get direct evidence of the agreement, but a conspiracy can be inferred even from the circumstances giving rise to a conclusive or irresistible inference of an agreement between two or more persons to commit an offence.

50. In support of her submission she has relied on the judgment of **Noor Mohammad Yusuf Momin v. State of Maharashtra: AIR 1971 SC 885**, wherein it was held that "in most cases proof of conspiracy is largely inferential though the inference must be founded on solid facts. The learned counsel contended that the surrounding circumstances and antecedents and subsequent conduct, among other factors, constitute relevant material." According to her Lord Bridge in **R v. Anderson: 1985 (2) All E.R. 961** had also very aptly said that the evidence from which a jury may infer a criminal conspiracy is almost invariably to be found in the conduct of the parties.

51. The learned counsel further urged that one who commits an overt act with the knowledge of the conspiracy is guilty. And one who tacitly consents to the object of a conspiracy and goes along with the other conspirators, actually standing by while the others put the conspiracy into effect, is also guilty though he intends to take no part in the crime. One more principle which deserves notice is that cumulative effect of the proved circumstances should be taken into account in determining

the guilt of the accused rather than adopting an isolated approach to each of the circumstances.

52. On the point of admissibility of the evidence i.e. whether declaration by one conspirator made in furtherance of a conspiracy and during its subsistence is admissible against each of the co-conspirators, she submitted that the rule analogous to Section 10 of the Evidence Act shall be applicable. She further relied on **AIR 1965 SC 682** regarding the proof of conspiracy and scope and applicability of Section 10 of the Indian Evidence Act.

53. This court has heard the learned counsel for the parties in great detail and perused the entire evidence on record as well. The star witness of the prosecution is undoubtedly PW-3, Narender Mehta who deposed that he had seen the appellants running away from the house of PW-2 at about 4:15 pm on 19th August, 2002. PW- 3 was also known to PW-2, Neelam Kler, mother of the victims as he resided as a tenant on the ground floor in the same building from 1986 to 1991. He is also a family friend of the victim's family. Therefore it is to be considered and analyzed whether the testimony of PW-3 is reliable or not.

54. As per his deposition his shop and the place of incident is on the same road and it takes about 5 minutes from his shop to reach the place of incident on foot. PW-3 had also deposed that, at the relevant time he was passing by the place of incident in relation to his work.

Therefore, the presence of the witness PW-3 at the spot cannot be termed to be impossible or incredulous, so as to disbelieve it. He further stated that since he came to know about the incident in the evening he had informed the police thereafter. As argued by the learned counsel for the appellants, if indeed PW-3 had seen the appellants running out of the house, he should have become suspicious and should have stopped and enquired from them as to the reason for their presence at the spot. This plea of the appellant is not sustainable and cannot be accepted. These are not such circumstances which would have made PW-3 suspicious so as to stop them or enquire anything from them. Appellant Vinay is the son in law of the Pw-2 and even if he was running, it is not such a thing which would have alarmed the said witness. It has also been deposed that the appellant Vinay was walking fast and not running along with other Appellant. The said witness was a tenant and therefore, he knew appellant Vinay. Merely because he knew the said appellant does not mean that he should have stopped him to ask him as to why he is walking fast or running. The plea of the appellants is rather based on their own assumptions about how an earlier tenant would have behaved in such circumstances.

55. The inconsistencies in the deposition of PW-3 as alleged by the learned counsel for the appellants with regard to the time and the place and the source of information is immaterial since it is an admitted fact that the incident had taken place on 19th August, 2002 while the

witness was examined in the Court on 23rd July, 2004 and then cross examined on 15th April, 2005 and finally further cross examined on 2nd December, 2006. With such time gap there is every likelihood of the witness not recollecting the exact timings and instances. Human memory is not photographic so as to retain every minute aspect and every detail of a particular incident. With the passage of time the memory fades and cannot be expected to be the same as in the first instance. Therefore if the witness does not contradicts on material particulars with his statement, then the testimony of the witness can be relied upon. The learned counsel had also contended that PW-3 while deposing in Court stated that the accused persons were seen running from the spot of occurrence, however, this is materially inconsistent with his two statements recorded u/s 161 by the police i.e. Ex PW3/DA and ExPW3/DB wherein the word "running" is not mentioned, instead only the term "walking fast" is used. However this alleged inconsistency is also not substantial in itself to compel this Court to disregard the entire evidence of PW-3. It is apparent that the witness meant that appellants were exiting hurriedly from the premises. There are no such glaring inconsistencies in the statements of witnesses recorded by the police Ex PW3/DA and ExPW3/DB and the statement in recorded in the Court which will impel this Court to reject his testimony or hold that the deposition of Pw-3 is unreliable.

56. In any case the reliance on the witness is not without corroboration. Since as per the post mortem report, Ex PW 7/B of Dr. Komal Singh, CMO, Safdarjung Hospital, PW-7 had deposed the time of death to be 22 hours since the examination which was initiated at 12 pm on 20th August, 2002, therefore the time of death is roughly estimated to be 2:00 p.m. on 19th August, 2002 and the time when PW-3 had seen the appellants come out of the spot of incident was around 4:15 p.m. Thus the time of the alleged incident and the time as deposed by PW-3 of having seen the appellants on the concerned premises is proximate enough and therefore, can be taken into consideration for the purpose of last seen evidence.

57. Head Constable Sahab Singh, PW-22 who recorded the statement of Narender Mehta on the 19th August, 2002 and the supplementary statement on 20th August, 2002 was also examined. He too has supported the veracity of the two statements recorded. Learned counsel for the appellant has further disputed the very presence of PW-3 on the premises by relying on the testimony of PW-27, who had deposed that no person had met the police party at the spot claiming himself to have been aware of the facts of the case or who could throw light, on the incident and had specifically deposed that PW-3 had not met with him at the spot till the time he remained on the spot up to 9:00 p.m. However the presence of Narender Mehta, PW-3 at the spot had been confirmed by the deposition of PW-24 who categorically stated that

Narender Mehta was present at the spot 20 minutes after he himself had reached the spot. Regardless of this PW-27 merely deposed that it was not in his knowledge whether PW-3 had met with any other police officer at the spot on the day of the incident. Thus there is no categorical denial of the same, and in the very same breathe he even acknowledged the fact that statements of Narender Mehta dated 19th August, 2002 and 20th August, 2002 recorded under section 161 Cr.P.C. are in the handwriting of Ct Sahab Singh. The trial court also observed that even as per the deposition of DW-1 & DW-2, PW-3 was present at the place of incident. Thus the evidence of Pw-3 cannot be disbelieved or rejected on account of the deposition of Pw-27 as had been contended by the counsel for the appellants. The findings of the Trial Court in this regard, therefore, cannot be faulted.

58. The learned counsel for the respondent stated that the report of CDFD, Centre for DNA Fingerprinting and Diagnostics is admissible under Section 293 of the Criminal Procedure Code. It is contended that in any case the report has been duly proved as Exh.PW 29/A. The witness was examined who had deposed cogently about the report and who had been cross examined also at length by the accused/appellant. The Centre for DNA Fingerprinting and Diagnostics hereinafter referred to as CDFD is an autonomous organization funded by Department of Biotechnology (DBT), Ministry of Science and Technology, Government of India. It is contended that it is a registered society under the Andhra

Pradesh (Telangana areas) Public Societies Registration Act, 1300 Fasli (Act 1 of 1350F). The learned Public Prosecutor has also relied on Geetha v. State of Kerala & Anr, 2005 (2) DMC 286 to contend that the report of DNA fingerprinting issued by CDFD can be admitted in evidence even without examination of the expert under Section 293 of the Criminal Procedure Code. The learned Public Prosecutor refuting the argument of the accused that the blood samples of the appellant had not reached within 72 hours has contended that the blood samples were delivered within 72 hours and in any case DNA Fingerprinting technology is so advanced that even if the blood disintegrates, the DNA remains stable unless it is burnt by fire and has relied on Dharam Deo Yadav v. State of U.P, (13) Allahabad High Court 834. The learned counsel has also relied on DNA Tests in Criminal Investigation, Trial and Paternity disputes, a compendium of DNA analysis and its application in legal system by Alia Law Agency.

59. This cannot be disputed that any report of a Government scientific expert can be admitted under Section 293 of the Criminal Procedure Code which is as under:-

> "Section 293. Report of certain Government Scientific Experts-
> (1) Any document purporting to be a report under the hand of a Government Scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.

(2) The Court may, if it thinks fit, summon and examine any such expert as to the subject matter of his report.
(3) Where any such expert is summoned by a Court and he is unable to attend personally, he may, unless the Court has expressly directed him to appear personally, depute any responsible officer working with him to attend the Court, if such officer is conversant with the facts of the case and can satisfactorily depose in Court on his behalf.
(4) This section applies to the following Government Scientific experts, namely-
(a) any Chemical Examiner or Assistant Chemical Examiner to Government;
(b) the Chief Inspector of Explosives;
(c) the Director of Finger Print Bureau;
(d) the Director, Haffkeine Institute, Bombay;
(e) the Director (Deputy Director or Assistant Director) of a Central Forensic Science Laboratory or a State Forensic Science Laboratory; and
(f) the Serologist to the Government."

60. Under Section 293 of the Criminal Procedure Code a report of a scientific expert duly submitted by him for examination or analysis can be used as evidence without examining the expert under certain circumstances. The Apex Court in State of H.P v. Mastram, (2004) 8 SCC 660 had held that the report of DNA fingerprinting cannot be rejected on the ground that the Government scientific expert who has issued the same, is not enumerated under sub Section (4) 293 of Criminal Procedure Code. The Supreme Court had rather held that the report of DNA Fingerprinting has to be admitted in evidence under sub Section (1) of Section 293 as a report which is issued under the hand of a Government Scientific Expert. Therefore, the report exhibit PW.29/A of CDFD which has also been proved in the statement of

Sh.S.P.R.Prasad, PW-29 can be considered and is admissible under Section 45 of the Indian Evidence Act and cannot be ignored.

61. The learned counsel for the appellants have very emphatically relied on the Information and Prescribed Formats for DNA Fingerprinting Analysis which has been proved as exhibit PW.29/DA stipulating that blood samples (2-3 ml) should be collected in sterile blood collection material (EDTA vials) and that the samples should be sent in ice and thermos flask either by a messenger or through courier so as to reach CDFD within 72 hours after collection. The learned counsel for the appellants has also emphasized that the blood samples were taken on 23rd August, 2002 at about 4 PM though the accused had already been produced in the Court at 2 PM and remanded to judicial custody and there is no evidence as to who collected the blood samples from the hospital where the appellants were allegedly taken nor there is any record of receipt of those samples in the malkhana record of the appellants.

62. The learned counsel for the appellant has further contended that as per seizure memo Ex PW25/A DNA sample was taken on 20th August, 2002. However as per MLC, Ex PW 14/A the DNA was again taken on 23rd August, 2002. Thus as per the counsel, the surplus of DNA samples could have been easily used to manipulate the evidence by means of tampering with the clothes of the victim Sarita and

therefore the CDFD report should not be relied on. This argument may sound impressive at the first blush, however, it is to be repelled since the DNA samples were taken by means of taking the appellants blood while the CDFD report Ex. PW 29/A clearly stipulates that the biological fluid i.e. the semen present on the source of the clothes of the victim Sarika is comparable with the blood sample of appellant Vinay and it is not the case of the appellant that during his medical examination his semen samples were seized by the prosecution. Thus the question of manipulation does not arise and the fact that the DNA samples of the appellants were taken on two occasions does not prejudice the appellants in any way nor cast any doubt about this evidence.

63. Dr. Raman Bhutani had examined appellant Vinay on 23rd August 2002 at 4 pm for a general physical examination and for the collection of the blood sample of DNA Test at Baba Sahib Ambedkar Hospital, Delhi. However since he wasn't in the services of the hospital anymore, Dr. Kuldeep Singh, CMO, Baba Sahib Ambedkar Hospital, PW-14 who was conversant with the handwriting of Dr. Raman had endorsed the MLC prepared by him. As per MLC, Ex PW 14/A the blood sample was collected in EDTA vial and activator vial, i.e. in two vials having 5 ml each. He further deposed that as per the document the sample as well as the MLC was handed over to HC Parkash. The learned counsel for the appellant has doubted the proper collection of the DNA

samples since HC Prakash Pardhan, PW-20 had deposed that the samples were taken into possession by the IO and was subsequently received by him on the same night from the MHCM. As per the learned counsel this is a major contradiction and the same casts a doubt on the DNA samples and therefore, the same ought not to be relied on. However this argument cannot be accepted since as per the deposition of PW-23 HC Hari Kishan who was posted as MHCM at PS Rohini at the relevant time, was examined. He categorically deposed that on 23rd August, 2002 Addl. SHO Heera Lal the IO in the matter had deposited two pullandas duly sealed with the seal of SB and two sample seal, which was then deposited by him in the malkhana vide entry No. 2564 in register no. 19.

64. This fact is substantiated by the deposition of PW-20 as well who deposed that the pullandas were taken into possession by the IO and he had received the pulandas from the MHCM which he had taken to CDFD, Hyderabad for DNA testing. The endorsement on the MLC, Ex PW 14/A regarding the samples being handed over to PW-20 may have been made since PW-20 had accompanied the appellant at the time he was being medically examined. This can only be clarified by the Doctor who examined the appellant Vinay. However since he was unavailable he could not be examined on this aspect. In any case in light of the deposition of PW-23 as well as the documentary evidence pertaining to malkhana, the deposition of PW-20 cannot be doubted.

65. PW-20 had further deposed that he had left for Hyderabad by air at about 4:30 a.m. and reached in the night on 24th August, 2002. He also deposed that since 25th of August, 2002 was a holiday, as such he deposited the pulanda on 26th August, 2002. He also endorsed that till the pullandas were deposited, they remained intact and were not tampered with. Thus from the point of collecting the DNA samples to the point of submitting them to CDFD, the appellants have not been able to show which would create any doubt or such inferences can be deducted that there could be any tampering or contamination of the same. This is further substantiated by the document dated 26th August, 2002 acknowledging the receipt of the material objects & DNA testing charges, Ex PW 29/AB as it categorically stipulates that the seals were intact and tallied with the specimen seal sent. It also clarified and corroborated that the samples were brought by Shri Prakash Pradhan, HC No. 276/NW. The trial court too has negated the argument regarding the delay and has relied on 1996 Cr.L.J 822 DB holding that if delay in sending the sample is explained then it is not fatal to the case of the prosecution. It was further held in 1979 (4)SCC 746 that if a laboratory found the sample fit, then no benefit on account of alleged delay can be given to the accused. The trial Court further observed that in the present matter the laboratory had found the samples fit and conducted the test and gave the report, thus no benefit of the alleged

delay or alleged contamination of the samples can be claimed by the appellants.

66. The clothes of the deceased, Sarika were examined by the CDFD. Though the counsel for the appellants contended and alleged about tempering of the same. However a perusal of the post mortem report clearly shows that the clothes of the victim were handed over to the police in a sealed condition on the 20th of August, 2002. This fact is further substantiated from the perusal of the store room register (PART 1) which stipulates that in entry 2551/2002 Addl. SHO Heera Lal had deposited the black polythene containing the clothes of the victim sealed with the seal DKS, in the malkhana on 20th August 2002 which was thereafter handed over to PW-20 who had deposited the same with the CDFD in a sealed condition. Thus the plea of the learned counsel for the appellant that there had been or could be tempering with the clothes of the deceased cannot be accepted in the facts and circumstances.

67. Learned counsel for the appellant has further contended that though as per the malkhana register there were 18 plastic dibas deposited in the malkhana, as per the deposition of PW-23 there were only 16 dibas that were re-deposited on 12th April, 2005. The learned counsel contended that since one of the 18 items could have also been the clothes of the deceased Sarika, therefore, tampering of the same cannot be rules out. Learned counsel for the appellant has further

alleged that as per the malkhana register the pullandas in entry 2511/2002 were sent to the CFSL as well as the CDFD Hyderabad. It was thus contended that there was absolute confusion regarding which samples were sent where. And therefore the authenticity of the DNA samples should not be accepted.

68. At this stage it will be imperative to ascertain which of the items were sent to the CDFD, Hyderabad and which were sent to the FSL.

DESCRIPTION OF PARCELS & CONDITION OF SEAL/S THAT WERE SENT TO THE FSL, ROHINI AS PER THE REPORT:

| | | |
|---|---|---|
| "Parcel-'2' | : | One jar sealed with the seal of "DKS", labelled as PMR No.530/2002 Viscera of Sarika. It was found to contain exhibit '2'. |
| Exhibit-'2' | : | Unidentified tissues, material with brown liquid. |
| Parcel-'3' | : | One jar sealed with the seal of "DKS", labelled as PMR No.530/2002 Viscera of Sarika. It was found to contain exhibit '3'. |
| Exhibit –'3' | : | Unidentified blackish material, sticking inside the jar. |
| Parcel-'4' | : | One jar sealed with the seal of "DKS", labelled as PMR No. 530/2002 Sarika. It was found to contain exhibit '4'. |
| Exhibit-'4' | : | Long black hairs with root. |
| Parcel '5' | : | Ten small jars sealed with the seat of "DKS". It was found to contain exhibit '5'. |
| Exhibit-'5' | : | Tissues with nails stated to be nail clippings, of Sarika. |
| Parcel-'6' | : | One white envelope sealed with the seal of "DKS" labeled as PMR No. 531/2002 Bharat. It was found to contain exhibit '6', kept in a polythene packet. |
| Exhibit-'6' | : | Blood gauge cloth. |
| Parcel-'7' | : | One jar sealed with the seal of "DKS", labeled as PMR No.531/2002 Viscera of Bharat. It was found to contain exhibit '7'. |

| | | |
|---|---|---|
| Exhibit-'7' | : | Pieces of liver, spleen and kidney. |
| Parcel-'8' | : | One jar sealed with the seal of "DKS", labeled as PMR No. 531/2002 Viscera of Bharat. It was found to contain exhibit '8'. |
| Exhibit-'8' | : | Stomach and piece of small intestine with contents. |
| Parcel-'9' | : | One jar sealed with the seal of "DKS", labeled as PMR No.531/2002 Bharat. It was found to contain exhibit '9'. |
| Exhibit-'9' | : | Blood Sample vol. approx. 25 ml." |

THE ITEMS SENT TO CDFD, HYDERABAD AS PER THE REPORT Ex. PW 29/A:

1. A sealed plastic bottle containing postmortem blood of deceased, Sarika.
2. A small sealed plastic box, containing gauze cloth: vaginal swab of deceased, Sarika.
3. A sealed plastic coloured big polythene cover containing cothes of the deceased, Sarika.
4. Blood sample of accused Mr Vinay in two sealed vials.
5. Blood sample of accused Mr. Munish in two sealed vials.

Thus from the above it is clear that none of the items that were sent to the CFSL were sent to the CDFD, Hyderabad and that the 18 dibas do not include the polythene bag containing the clothes of the victim, Sarika.

69. It was held in State of Rajasthan v. Daulat Ram: 2004 Cr.L.J 2992 (2995) that the entire chain of biological evidence from the point of its seizure, collection of samples its preservation, deposition and preservation in CDFD and till the time it reaches in the hand of analyst has to be proved beyond reasonable doubt by unimpeachable evidence.

70. In cases involving biological evidence the concept of "chain of custody" needs to be established. "Chain of custody" means the complete record of biological evidence from the place of its extraction and up to its presentation in the Court and its complete documentation at every stage. The possession, time and date of transfer, and location of evidence from the time it is obtained to the time it is presented in the Court is called the "chain of custody".

71. The learned counsel for the appellant has not been able to show any missing link in the `chain of custody' so as to disbelieve or discredit the DNA samples or the sealed clothes of the deceased Sarika that were send to the CDFD, Hyderabad, for the purpose of DNA testing, as from the point of its seizure to its submission before the CDFD no tampering has been established nor can be inferred conclusively in the facts and circumstances.

72. Deposition of PW-29 who analyzed the DNA samples and matched the DNA samples of appellant Vinay with that of the blood found on the clothes of the victim Sarika is very material.

73. Sh.S.P.R.Prasad, Senior Technical Examiner, PW-29 who had proved his report dated 15th October, 2003 as exhibit PW.29/A had deposed that the postmortem blood and vaginal swab of the deceased Sarika did not yield DNA suitable for analysis. The DNA from the clothes of deceased Sarika were compared with the blood sample of

appellants Vinay Kumar and Munish and on comparison the DNA profile and biological fluids on the clothes of deceased Sarika was found to be comparable with the DNA profile of blood of Vinay Kumar, however, the biological fluids from the clothes of the deceased Sarika was not the source of blood sample of the appellant Munish. The witness also proved gene scan analysis as exhibit PW.29/B for which microsatellites; D18S51; D7S820; FGA; D13S317; D21S11; vWA; D5S818; D8S1179; D3S1358 and Amelogenin were used.

74. The said witness in the cross examination had disclosed that the vials of controlled blood samples were received on 24th August, 2002, however, the acknowledgement was given on 26th August, 2002 and he specifically denied the suggestion that EDTA vials were deposited in CDFD on 26th August, 2002. According to the said witness STR method was used for analyzing the DNA fingerprinting. According to him at the relevant time the STR method required 13 STR plus one amelogenin to determine the identity of the person, however, for DNA fingerprinting by STR method 9 STR plus amelogenin was used. He specifically denied the suggestion that the kit used was for 13 STR and not for 9 STR. He deposed that he conducted the test individually and the band in amelogenin is more important in lane No.2 to 4 than in lane No.1 and denied the suggestion that proper fingerprinting was not done. He also denied that if the samples are received after 72 hours the chances of contamination are more. The deposition of said witness is reliable and

has not been shaken by the counsel for the appellant in any convincing manner.

75. Learned counsel for the appellant has contended that PW-29 himself deposed that the samples were received on 24th and not 26th of August, 2002 and therefore there is inconsistency as to when the samples were received and in light of this the entire testimony of the witness PW-29 cannot be given much weightage. This plea is not sustainable and acceptable in the facts and circumstances of the case. As per the deposition of PW-29, the EDTA vials were not received by him personally. Therefore, much will not turn regarding the date of receiving the samples and DNA finger printing and report cannot be rejected or not relied.

76. PW-9 further deposed that the STR method was used for analyzing the finger print and that at the time STR method required 13 STR plus one amelogenin to determine the identity of the person, however in the present case only nine STR plus amelogenin since he was using the Ampflrstr profiler plus kit which was of an American company and as per the requirement of the kit there was only need to use 9 STR only. He further clarified that the kit was of applied bio Systems. He also categorically denied the suggestion that the kit is used for 13 STR and not 9 STR and further deposed that the literature to support the version would be available on the internet of the company's literature.

77. He further deposed that he could not get DNA in the vaginal swab and the post mortem blood, thus if any manipulation was done or any contamination of the samples was shielded by PW-29, then he would have detected DNA from these samples as well. The procedure followed by the expert PW-29 is thorough and unimpeachable, clearly supporting his findings and no doubt can be caste on his version and report. PW-29 had also deposed that the biological fluid present on the source of exhibit i.e. clothes of deceased Sarika did not match the source of blood sample of Munish, the implications of which shall be dealt with hereinafter.

78. A perusal of the procedure for collection & forwarding of the samples for DNA fingerprinting analysis provided on the website of CDFD proved as EX. PW 29/DA clearly stipulates that the blood samples (2-3 ml) can be collected in the sterile blood collection material (EDTA vials). These samples should then be sent in ice in a thermos flask either by a messenger or through courier, so as to reach CDFD within 72 hours after collection and as per the deposition of PW-20 all the necessary precautions were complied with and the samples were duly deposited within 72 hours with the CDFD. Thus the inevitable inference is that the procedure had been complied with and no tampering or contamination of the samples can be inferred in any manner.

79. Learned counsel for the appellant has also contended that even though the pulandas of the DNA samples of the appellants, were deposited in the office of CDFD on 26th August, 2002, however the DNA typing report was prepared only after a lapse of more than 1 year on 15th October, 2003. Thus it is contended that there is a good chance that the DNA samples would have disintegrated or could have got contaminated during the period. However, it is a scientifically accepted fact that DNA's can be preserved for a very long period of time, if the proper preservation procedures are followed. Thus the fact that PW-29 analyzed the samples after a period of one year does not affect its validity and analysis. In the case of Kali Ram v. State of Maharashtra, 1989 Cr.L.J. 1625 (Bom) it was held that Semen stains on the clothes can be found from five to 18 years, and that it is not proper to say that the examination of sperm and semen done after 4 months was valueless. It is also not the case of the appellant that PW-29 had any personal grudge as against the appellant, Vinay due to which reason he would have falsely implicated him in the matter.

80. While ascertaining the forensic evaluation of the biological evidence the following factors and parameters needs to be taken into consideration:

- Whether Forensic Laboratory is Government-recognised or not;
- Information about accreditation of laboratory must be obtained;

- Whether Forensic Scientists and Lab-Technicians are qualified and technically trained to do the job satisfactorily or not;
- Which type of method of testing the testing, the laboratory will adopt for use [in India BKm 2(8) probe is used by CCMB];
- What is the reputation of laboratory about its accuracy, quality control and the like;
- Which type of equipments will be used in the process of testing; whether they are in perfect condition; and whether they are latest and advance;
- What procedure will be followed by the laboratory for testing and re-testing of DNA;
- Whether proper precautions are taken to prevent contamination of sample during its collection, preservation and transportation;
- Whether the scientist, who will perform the test, knows fully about description and methodology of DNA profiling and about its technique and limitations and the complexities of the Forensic Science. [S]*

The facts deposed and established unequivocally demonstrate that all the necessary guidelines were adhered and followed and there are no cogent reasons to disbelieve the DNA Report.

81. The relevant testimony of PW-7, who conducted the post mortem is as under:

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> "On the same day, at 12 PM, I conducted post mortem on the dead body of Sarika a female aged 22 years.
>
> The deceased was wearing shirt, salwar, underwear blood stained. Shirt was sleeveless and was torn on both sides of the shoulder. Hair band and 11 hairpins. She was of average built, conjunctivae was congested and showed hemorrhagic spots, blood was present at vaginal orifice.
>
> On external examination: 1) There was scretch nail marks over the right side of the neck at the level of thyroid cartilage placed anteriority, size being 2 cm X 1 mm, 1 cm X 1 mm.

2) Teeth marks present at the pinna of the right ear, two teeth marks were present which were 5mm X 5 mm each.

3) Pressure abrasion on metel upper border of the right breast 4mm X 1mm.

4) Bruise over the outer surface of the right arm 5 mm X 5 mm.

On internal examination, brain was congested and oedematous, intracranial punctuated hemorrhagic were present. On examination of neck, clotted blood was present on right anterolateral connective tissues and muscles of the neck hyoid bone was fractured at its right cornu, clotted blood present around it, posterior surface of the cricoids cartilage showed clotted blood approximately 5 ml. There was frothy secretion in the trachea. On examination of the chest, visceral pleural showed tardieu spots. Both lungs were congested and oedematous and tardieu spots were also present over the visceral pericardium. Stomach contained 200 ml of undigested magi like noodles, hymen was torn, it was fresh injury, unterus was normal.

Opinion: Cause of death was asphyxia due to manual throttling, manner of death was homicide, all injuries were antimortem and were of same duration, time since death was approximately 22 hours. **Sexual assault prior to the murder cannot be ruled out.** Detailed report will be given after receipt of viscera and vaginal swab report.

Opinion regarding the belt: One sealed parcel was received from IO Inspector Hira Lal of PS Rohini which was found to be sealed of KKS. It was said to contain a belt which was used in strangulating brother and sister on 19-8-02, referring to my post mortem report, parcel was opened and was containing a school belt having the buckle bearing the monogram of Kendriya Vidyalaya. It was of approximately of 82 cm long and 3 cm broad. Strangulating marks over the neck of dead body of Bharat were possible by this belt. Belt was re-sealed with the seal of DKS and was handed over to the IO on 20-8-02. My detailed report in this regard is Ex.PW7/C signed by me at point A."

82. Thus the injuries on the body of the deceased, Sarika in addition to the DNA report that matched the DNA of the appellant Vinay with the

biological fluid (semen) found on the clothes of the deceased and the opinion of PW-7 stating that sexual assault prior to murder cannot be ruled out, all point towards the undeniable inference that the appellant Vinay had raped the deceased, Sarika and then murdered her by strangulation. Thus the findings of the Trial Court in this regard cannot be faulted.

83. It is also imperative to assess the recoveries effected as against the appellants. As per the case of the prosecution after recording the disclosure statement, the appellants had taken the police to the Hardware store belonging to Roshan Lal PW-4 as it was the store from where they had purchased the four blades and one aari. However during the examination of PW-4, the said witness had turned hostile and refused to identify the appellants as the very same person who had purchased the said items from his store. Regardless of the fact that the witness was declared hostile, it does not mean that his entire evidence needs to be effaced from the record. To the extent that it supports the case of the prosecution it can be taken into consideration. A perusal of the testimony clearly shows that even though PW-4 refused to identify the appellants, he did depose that four blades and one aari was purchased from his shop by two boys and subsequently he had even identified the four blades, Ex P-1 to P-4 and the aari, Ex P-5 recovered by the police as the ones which were sold by him. The four blades and one aari were brought in a sealed parcel bearing the seal of KKS and

therefore could not have been tampered with. Thus recoveries pursuant to the disclosure statement of the appellants have been established.

84. It is a settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross examine him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. Reliance for this can be placed on Bhagwan Singh v. The State of Haryana: AIR 1976 SC 202; Rabindra Kumar Dey v. State of Orissa: AIR 1977 SC 170; Syad Akbar v. State of Karnataka: AIR 1979 SC 1848 and Khujji @ Surendra Tiwari v. State of Madhya Pradesh: AIR 1991 SC 1853).

85. Similarly PW-5 Kishan Murari too turned hostile and refused to identify the appellants as the same persons who had purchased the iron rod Ex P-6 from his shop. However he did depose that on 20th August, 2002 the police along with the two appellants, who he identified in court, had come to his shop and that they had told the police that they had purchased the iron rod from the shop ¾ days prior to the incident. He also identified the rod, which was produced in court in a sealed pulanda bearing the seal of KKS, as the one being purchased from his shop. Therefore in light of the facts and circumstances this recovery too stands established as against the appellants.

86. As to the belt which was recovered by the police, the same was also examined by PW-7 during examination of the body at the time of post mortem, wherein he opined that strangulating marks over the neck of the dead body of Bharat was possible by the said belt. He had mentioned the same in his detailed report Ex. PW7/C. The learned counsel for the appellants has contended that there were chances of tampering with the belt, however this has to be ruled out as in his deposition, PW-7 has stated categorically that after examining the belt, it was resealed with the seal of DKS and handed over to the IO and the same was produced in the same sealed condition in court, which was thereafter opened and was then correctly identified by PW-7 as well as the mother of the victims, PW-2 in court. Therefore there is no question of the belt being tampered and is one of the fact in the chain to inculpate the appellant Vinay.

87. The three watches which were recovered from both the appellants i.e. two from appellant Vinay and one from appellant Munish, also needs to be considered. These watches were duly identified in TIP by the mother of the victims. PW-17 Sh. Inderjeet Singh MM posted at Tis Hazari Court was also examined who deposed that the TIP proceeding were conducted with due caution as 5 watches brought by the IO were mixed with the three watches recovered from the appellants. PW-2 had duly identified the watches as those belonging to her husband, her daughter and her son respectively. The same watches were thereafter

released on superdari to PW-2. The objections of the learned counsel that not enough watches were mixed up with the ones that were recovered is without much substance and does not dilute the evidentiary value of recoveries. The trial court has also observed that no such question, as has been canvassed by the learned counsel for the appellants, was put to PW-17 in his cross examination. If the Ld. MM was not satisfied about the watches brought to be mixed up with the three watches recovered from the appellants then he would have refused to conduct the TIP. Since the proceedings also reveal that as the property brought for being mixed up did not contain currency notes, therefore, the currency notes from the case property were removed and TIP of the Rs 10,000/- allegedly recovered at the instance of appellant Munish were not put to TIP. There are no cogent reason to doubt the TIP proceedings and the validity of the identification of the three watches on the basis of depositions and documents in the facts and circumstances.

88. Regarding motive the prosecution has contended that the motive of the appellant Vinay was to usurp the property of Neelam Kler by committing the offence. While the learned counsel for the appellants have contended on the contrary stating that the motive has not been established. She contended that if motive was to usurp the property then the appellant Vinay would have conspired to kill Nellam Kler as well. However as per the case of the prosecution as well he conspired to

kill the children only. It is also contended that in light of the facts and circumstances the case is that of dacoity and murder which as emphasized by the learned counsel for the appellant was the initial impression of the police authorities who reached the spot as well. The motive as alleged by the prosecution is plausible and rationally acceptable, since the only person to have gained from the incident was the appellant Vinay. He was married to the third child of PW-2. In the absence of the other two children, his wife would have inherited the entire property. The learned trial court has dealt with the motive by negating the arguments of the appellant that the motive would only stand proved if PW-2 had been murdered. Trial court has observed that murdering Neelam Kler alone would not have served any purpose as the remaining two children would have inherited the property, therefore elimination of the remaining two children was a must for appellant Vinay for the inheritance of the property by his wife. The reasoning and findings of the Trial Court for the motive are plausible and cannot be repelled on the pleas raised by the counsel for the appellant Vinay.

89. The plea by the learned counsel for the appellant of the possibility of dacoity and murder by the alleged dacoits cannot be accepted. Nothing much of value was taken from the house, except for the three watches which are not of much value. Intention intention of ransacking the entire house was to create the impression of dacoity or burglary.

90 What could be the motive of Appellant Munish? The motive against said appellant has not been abolished. There is no evidence produced by the prosecution to show that he had any ill-will towards the family of the deceased or that he had anything to gain substantially from executing the crime with appellant Vinay. Merely on the ground that he is the servant of the appellant Vinay and so a conspiracy was planned between the two is not sufficient to inculpate him.

91. Learned counsel for the appellant had contend that the entire investigation was a tainted. Oination of the helmet by not lifting any fingerprints or analyzing hair remnants has shielded the actual culprits and in any case as per the case of the prosecution itself the appellants had come on foot, hence there is no question of the helmets belonging to the appellants. The Trial Court has disregarded this argument on the reasoning that the helmet could have been left by some witness or police official in a hurry. This Court does not fault the reasoning of the Trial Court. Some of the witness including PW-2 who had first reached the spot deposed regarding the helmet on top of the TV set. In fact PW-2 had categorically mentioned about the TV set found on top of the stairs but she didn't mention about any helmet on top of the TV set. In any case it is very likely that during all the investigative works any of the persons present at the spot may have left his helmet behind. Regardless, the helmet does not in any case exculpate the appellant

Vinay nor creates any doubt in the version of the prosecution so as to give him any benefit of doubt.

92. Learned counsel for the appellant has further doubted the finger print report, Ex PW 18/A wherein it is stipulated that the chance prints were lifted from almirah lock, dibba(4), sweet steel and the same was developed, since PW-27 had categorically deposed that no finger-prints were lifted. However inspite of this the prosecution case does not suffer as the finger print report is not of much evidentiary value since the finger prints of the appellants were neither compared nor matched with the chance prints lifted from the spot and hence is not the basis for inculpating the guilt of the appellants. Learned counsel had also pointed out that the report had advised the police to send the fingers and palm impressions of the inmates, suspects and deceased for comparison with the developed chance prints, however it wasn't done. The trial Court viewed this as negligence on the part of the police but has not attributed much importance to it since negligence on the part of the police cannot demolish the prosecution case. In support of its reasoning the trial court has relied on the following judgments: Chotu v. State of Maharashtra 1997 Cr.L.J. 4304 and AIR 1997 SC 3471. In any case as per the disclosure statements of the appellants and the subsequent recoveries made, it is the case of the prosecution that the appellants had used gloves which were recovered at the instance of the appellants, Ex PX and Ex PX1. Therefore the appellants cannot benefit

from the non-comparison of their finger prints with the chance prints developed at the spot.

93. Learned counsel for the appellant also negated the FSL report, Ex PW 28/A on the ground that even though as per all the documents and the witnesses the pullandas were send to FSL Malviya Nagar, however the report was received from FSL, Rohini. Therefore it was contended that the same cannot be relied upon. A perusal of the evidence on record shows that the PW-21 Constable Parmod had deposed regarding the collection of the pullandas on 1st November, 2002 and depositing the same to FSL Mehrauli, while PW-23 HC Hari Kishan the MHCM had deposed that on 1st November, 2002 the pullandas were sent to FSL, Malviya Nagar through Constable Parmod Kumar. However the inconsistencies in this regard are not substantial since PW-28 Amar Pal Singh, Senior Scientific Officer, Chemistry Delhi was examined and he even proved the FSL Report, Rohini, Ex PW 28/1 which was authored by him. With respect to the FSL report the arguments of the learned counsel for the appellant is rational and the investigative process of the police authorities does suffer a blow, as the error is very apparent. However the fact remains that the conviction of the appellants does not base itself on the FSL Report as neither the Trial Court nor this Court has relied upon it. It is also not the case of the prosecution that the FSL Report holds any incriminating findings as against the appellants, therefore on any case it is not of any evidentiary value. Hence, since the

FSL report, Ex PW28/A has not been relied on in any way whatsoever, therefore the same is not sufficient to exculpate the appellants.

94. Learned counsel for the appellant had further argued that the very arrest of the appellants is doubtful since as per the deposition of PW-3 he went to the police station on 19th August, 2002, and later on appellant Munish and Vinay both were also brought to the police station on the same day. This fact is also substantiated by the deposition of DW-1 as well. Even the arrest memo of the appellant is inconsistent since at the top portion the date mentioned is 19th August, 2002 while the "date of arrest" column mentions the date as 20th August, 2002. The learned counsel for the appellant alleged that this is contrary to the case of the prosecution since as per their case it is only after issuing the notice u/s 160 of the Cr.P.C. that the appellant Vinay was arrested on 20th August, 2002, hence it is contended that this is reflective of the ploys employed at falsely implicating the appellants. However this court does not find much merit in the arguments of the learned counsel for the appellants since in the deposition of PW-3 he himself in the same breathe corrected himself and stated that the appellants were arrested on the 20th August, 2002, in any case doubt as to the exact date is bound to happen when the difference between the date of incident and the date of arrest is a day apart from each other. Also the deposition of DW-1 the father of the appellant Vinay is bound to be in the favour of his son and hence it cannot be believed blindly in

the face of documentary evidence. Regarding the arrest memo, normally the date of the FIR is mentioned at the top portion while the column for the date of arrest mentions the date on which the suspect is arrested. Hence there does not seem to be any evidence on record to lead to the inference that the appellants were arrested on the 19th and not the 20th of August, 2001. Hence this court does not find any illegality or unsustainability in the reasoning of the Trial Court.

95. The case of the prosecution is based on circumstantial evidence. While dealing with circumstantial evidence the onus is on the prosecution to prove that the chain is complete and any infirmity or lacunae in the prosecution case cannot be cured by a false defence or plea. The condition precedent which must be fully satisfied before conviction can be based on circumstantial are as follows:-

> (*1*) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;
>
> (*2*) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
>
> (*3*) the circumstances should be of a conclusive nature and tendency;
>
> (*4*) they should exclude every possible hypothesis except the one to be proved; and
>
> (*5*) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

96. The Supreme Court in a number of cases has observed that while appreciating circumstantial evidence, Court must adopt a very cautious approach and the conviction should be recorded or upheld only if all the links in the chain are complete pointing out to the guilt and every hypothesis of innocence is capable of being negated on evidence. This also cannot be disputed that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. The circumstance relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt. The Court must be satisfied of

> a. That the circumstances from which the inference of guilt is to be drawn, have been fully established by unimpeachable evidence beyond a shadow of doubt.
> b. That the circumstances are of a determinative tendency unerringly pointing towards the guilt of the accused, and
> c. That the circumstances, taken collectively, are incapable of explanation on any reasonable hypotheses save that of the guilt sought to be proved against him.

97. Hence in view of the evidence of PW-3, the recoveries affected at the instance of appellant and the scientific evidence of the DNA of the appellant matching with the biological fluid found on the clothes of the deceased, Sarika as per the CDFD Report, and the motive as established by the prosecution the chain of circumstantial evidence is complete and is substantial in inculpating the guilt of the appellant,

Vinay. Thus the judgment of the Trial Court convicting the appellant, Vinay is upheld, so far as conspiracy under Section 120 B is concerned, his conviction and sentence is set aside.

98. With regard to the conviction of the appellant Munish Kumar, servant of appellant Vinay, other than the evidence of PW-3 and the recoveries affected allegedly at the instance of the appellant there is absolutely no other evidence that links the appellant Munish to the offence committed in the present matter. The learned trial court has relied on many judgments upholding that conspiracy has been established by the prosecution, pursuant to which the appellant Munish was convicted u/s 120-B, 449/120-B and 302/120-B of the IPC. However a perusal of the evidence on record does not point out any direct or indirect evidence establishing the guilt of the appellant Munish. Even as per the CDFD Report, Ex PW 29/A the DNA sample of appellant Munish did not match with any of the exhibits provided to the CDFD. Nor has the prosecution been successful in establishing the motive as against the appellant Munish. Therefore in light of the facts and circumstances and the chain of circumstance not standing proved as against the appellant Munish, this court holds that he is entitled to the benefit of doubt on account of the prosecutions failure to prove its case beyond all reasonable doubt as against the appellant, Munish. Thus the appeal of appellant Munish is allowed and the judgment of the trial court convicting and sentencing him is set aside.

99. In the circumstances, the Criminal Appeal No.670/2007 filed by appellant Vinay Kumar is dismissed and his conviction by order dated 7th September, 2007 and his sentence by order dated 7th September, 2007 is upheld except his conviction under Section 120 B and sentence is set aside. The appeal filed by the appellant Munish Kumar being Criminal Appeal No.826/2007 is allowed and his conviction by the Sessions Court by order dated 7th September, 2007 and his sentence by order dated 7th September, 2007 is set aside. Appellant Munish Kumar is set free forthwith by the appropriate authorities. A copy of this order be sent to the Superintendent, Tihar Jail for releasing the appellant Munish Kumar forthwith.

**ANIL KUMAR, J.**

**V. K. SHALI, J.**

**July 3, 2012**
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