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

+ CRL.A. 242/2018

AMIT SEHRAWAT @ LAMBA Appellant
Through Mr. Rajiv Mohan with
Ms. Priyanka Singh, Mr. M.A.
Karthik and Mr. Nipun Arora,
Advocates.

versus

STATE Respondent
Through Ms. Aashaa Tiwari, APP for the State
Mr. Sanjay Suri, Advocate for
complainant.

% Reserved On: 3rd February, 2020
Date of Decision: 20th February, 2020

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

MANMOHAN, J:

1. Present appeal has been filed by appellant-convict challenging the judgment dated 14th December, 2017 and the order on sentence dated 19th December, 2017 passed by District and Sessions Judge, North District, Rohini, Delhi in Sessions Case No. 57569/2016 arising out of FIR No. 34/2012 registered with Police Station Bawana, whereby he had been convicted under Sections 302/201 of the Indian Penal Code (hereinafter referred to as 'IPC') and sentenced to life imprisonment with a fine of Rs. 10,000/- for an offence punishable under Section 302 IPC and seven years

rigorous imprisonment with fine of Rs. 2,000/- for the offence punishable under Section 201 IPC.

CASE OF THE PROSECUTION

2. The case of prosecution, as noted by the Trial Court, is reproduced hereinbelow:-

“1. Case of the prosecution as disclosed from the report U/s 173 Cr.P.C. is that SI Anil Tushir on 28.01.2012 on receipt of telephonic information about DD No.53B reached MB Hospital along with Ct. Surrender and collected MLC of deceased Dinesh who was brought dead at 5.48 pm on 28.01.2012. Rakesh S/o Ishwar Singh (PW8) who had got the deceased admitted in the hospital gave his statement and stated inter alia that he had gone along with Mr. Lalit to Narela to get his Santro car repaired. When he came back at about 5.00 pm at the chaupal of his village, he found a crowd there. Mother and sister of his Mohalla companion Amit S/o Ram Karan (accused) were found perplexed and they were making enquires about their elder son Sachin. When he (PW8) inquired further, mother of Amit said “Mai toh barbad ho gayi. Amit ne apne dost Dinesh ke saath jhagda kar diya hai”. He stated further that he telephoned Ashu S/o Ramesh on 8800335864 as Dinesh and Ashu used to remain together, from mobile of his friend Modhu bearing no.9212637438 as balance in his mobile was inadequate. Ashu told PW8 that he had not met Dinesh today and thereafter PW8 telephoned Amit from his mobile no.9210225968 which was connected 3-4 times. Amit appeared frightened and said “Bhai mere se galti ho gayi hai. Maine Dinesh ka kaam tamaam kar diya hai usey bacha sakte ho toh bacha lo”. He asked from Amit about the place of quarrel and the place where Dinesh was killed. Amit told him that deceased Dinesh has been thrown in a pit near a factory located behind Hanuman Mandir, Nangal Mor, Khanjhawala Road.

2. Sh. Rakesh has stated further that he along with Lalit (PW10) drove his Santro and reached near Hanuman Mandir Nangal Mor and found Dinesh lying in an injured condition in a deserted place

in a pit. Effort to take out Dinesh from the pit was made who was crying in pain. Dinesh had uttered name of Amit 1-2 times. With the help of Lalit, Dinesh was brought to the car but in between Dinesh had fallen down at one place, was picked up and was taken to MB hospital where doctor declared him dead. There were injury marks of knife on the chest and back of Amit.

3. Sh. Rakesh has further stated that altercations used to take place between Amit and Dinesh on account of money transactions. Amit had threatened Dinesh 7-8 days ago. Brother of Amit namely Sachin, Dinesh, Arun and another boy of gali who was also named Sachin had been to Manali last month for 7-8 days. Expenses of trip of Sachin were borne by Dinesh. He stated that Amit along with his companion has murdered Dinesh.

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19. Charge against the accused was framed on 25.05.2012 U/s 302/201 IPC to which accused pleaded not guilty and claimed trial.”

FINDING OF THE TRIAL COURT

3. The conclusion of the Trial Court is reproduced hereinbelow:-

“65. PW25 and PW26 have categorically brought on record the clinching material incriminating evidence in the shape of motive and last seen against the accused which when read with other facts and circumstances of the case leave no hitch in concluding that it was accused Amit Sehwat @ Lambu and none else who committed the murder of deceased Dinesh.

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73. The aforesaid discussion of the testimony of PW26 proves the motive with the accused to murder the deceased and I have no hitch to observe that PW25 and PW26 have corroborated each other fully on motive aspect and have proved the motive with the accused Amit to murder Dinesh.

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80. The aforesaid testimony of PW26 is another piece of material incriminating evidence of last seen and is a clinching one

as PW25 and PW26 have not been shaken on this aspect at all during their detailed cross-examination. There is no hitch in concluding that accused Amit was with deceased around 4:15 PM on 28.01.2012 at his village and Dinesh (deceased) and accused Amit had left the gali abutting their houses on a motorcycle.

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90. A bare pondering over of the foregoing discussion leads to the categorical conclusion that Amit and Dinesh were together at village Bawana around 4 PM on a motorcycle and had left the village. PW8 has categorically proved that Dinesh was found in a pit and was removed to hospital where he was declared "brought dead". Onus thus shifted on the accused. Accused has failed to discharge the onus. Thus an adverse inference is drawn against the accused. Last seen theory combined with motive clinches the issue completely.

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95. Analysis of call detail records of aforesaid numbers indicates and corroborates the following facts:-

(i) Call detail record of accused goes in complete consonance with his disclosure statement and the version of the witnesses given u/s 161 CrPC. Location of accused Amit Sehrawat as per CDR is at Bawana, from 16.41 till 17.22 and it has changed to Badli thereafter. At 5.42, it has changed to Alipur Village and has remained at Alipur village upto 17:54:54. These locations are in complete consonance with the case put forth by the prosecution and proved by PW25, PW26 in particular and other PWs in general that accused and deceased were lastly seen by the prosecution witnesses at Bawana.

(ii) Accused after murder according to his disclosure statement had gone to Badli and Alipur. Recovery of knife has taken place from Badli Railway Station. So the version of accused in his disclosure statement is corroborated by discovery of facts which were within the exclusive knowledge of the accused and therefore, can be safely believed by having resort to Section 27 of the Evidence Act. The same can be taken as connective of all the links of the chain of circumstantial evidence.

(iii) Call detail record of deceased Dinesh also goes in consonance with the version of the prosecution. Location of deceased Dinesh at 4:41:24 is at Bawana which was the location of the accused Amit Sehrawat.

(iv) Location of phone of deceased has remained at Bawana upto 4:46:36 and thereafter it has changed to Village Pooth Khurd where witness (PW4) who had found the phone was residing. Location chart categorically establishes that accused Amit and deceased Dinesh were in fact together at 4.00 PM onwards till the murder. This fact gives 200% credence to the last seen theory and chances of false implication stand completely ruled out. Location chart proves / meets another argument of the defence that testimony of PW4 is not believable on the ground that this witness has deposed that he had found the phone at Kanjhawala. However, location chart goes in complete contrast with the argument of ld. Defence counsel and proves the point that PW4 being illiterate had given the wrong place of found of the phone as the witness had no occasion to go to Kanjhawala as he was residing in Village Pooth and according to his testimony, he had gone to his house after completing work of his employer. In this statement U/s 161 Cr.P.C. local address of this witness is C/o Devender, Phirni Road, Pooth Khurd, Bawana, Delhi.

(v) Call detail record proves that PW8 Rakesh Kumar has been won over by the accused as otherwise, he would not have deposed contra to the scientific evidence of CDRs. During cross-examination, he was given a suggestion that he had made a call to Ashu on his mobile phone bearing no.8800335864 from the mobile phone of Modhu bearing phone no.9212637438. As per prosecution case this call was made. Call detail record categorically establishes that such a call was made on 28.01.2012 on 17:16:41. Visualizing this, PW8 had to plead ignorance as to whether he had made a call to Amit on his mobile or not and he had to volunteer that he had made a call to Amit but he improved his version and stated that he had given a call to Amit to call him at the ground for playing. This fact proves that case put forth by prosecution is true.

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158. In view of the foregoing discussion, I have no hitch to held the accused guilty U/s 302 IPC. Accused is also held guilty U/s 201 IPC as he had called from the phone of Ravi to the deceased; he had taken away mobile phone of Dinesh and thrown it away; he had thrown his mobile phone and sim card which could not be recovered. All these acts were done by the accused in order to cause the evidence of the commission of murder to disappear with the intention of screening himself. Accused is also guilty therefore for the offence U/s 201 IPC as he has also given the information which he knew to be false.”

ARGUMENTS ON BEHALF OF THE APPELLANT-CONVICT

4. Mr. Rajiv Mohan, learned counsel for the appellant-convict contended that the Trial Court had erred in relying upon the testimonies of Deepak (PW-25) and Kaushalya (PW-26) to prove the ‘last seen’ circumstance as the said witnesses were closely related to the deceased. He stated that the testimonies of Deepak (PW-25) and Kaushalya (PW-26) were inconsistent, motivated and contained material improvements. He pointed out that their testimonies were not corroborated by any other witness. Therefore, according to him, testimonies of Deepak (PW-25) and Kaushalya (PW-26) cannot be relied upon to establish that the appellant-convict was last seen with deceased-Dinesh.

5. He further stated that the statements of the aforesaid witnesses under Section 161 Cr.P.C. were recorded after a delay of seven months and they had failed to provide an explanation for the delay.

6. Learned counsel for the appellant-convict contended that the alleged motive for committing the murder of deceased-Dinesh had not been established. He pointed out that even Deepak (PW-25) and Kaushalya (PW-26) believed that the monetary dispute between the deceased-Dinesh and

appellant-convict was a “*small issue between children*” which they would “*solve amongst themselves*” and that it was “*over a petty amount*”. He further stated that neither Deepak (PW-25) nor Kaushalya (PW-26) ever deposed regarding the quantum of money that was owed to the deceased-Dinesh.

7. Learned counsel for the appellant-convict submitted that the recovery of the alleged weapon of offence in the present case i.e. a knife cannot be relied upon as it had been recovered from a drain of a public toilet, which is a public place and accessible to all. In support of his submission he relied upon the judgment of this Court in *Shiv Narayan vs. State 2002 (61) DRJ 734 (DB)* and judgment of the Supreme Court in *State (NCT of Delhi) vs. Navjot Sandhu (2005) 11 SCC 600*. In any event, he stated that since the Doctor who had given his subsequent opinion regarding the knife was not examined, the said opinion cannot be taken into evidence against the appellant-convict.

8. He stated that as per the prosecution’s case, two blood samples of the deceased-Dinesh had been collected from the autopsy surgeon. He contended that while one sample had been sent to the FSL, the prosecution had failed to show where the second sample had gone and therefore, it is possible that the other sample was used to plant the blood of the deceased-Dinesh on the clothes of the appellant-convict.

9. Learned counsel for the appellant-convict also stated that the Trial Court had failed to appreciate the Call Detail Record (CDR) properly. He stated that the prosecution had failed to establish as to how the mobile phone of the deceased-Dinesh was traced and recovered. He emphasised that till the time of recovery of the mobile phone from Jai Prakash (PW-4) on 1st

February, 2012, none of the witnesses had disclosed the mobile number of the deceased-Dinesh to the police. He contended that the prosecution had failed to prove that the mobile number being 9211360822 was used by the deceased-Dinesh, as the owner of the said mobile number had not been examined. He pointed out that Jai Prakash (PW-4) had been using a different SIM card bearing number 9268275412 in the mobile phone and the CDR of that number had not been produced by the prosecution.

10. He emphasised that the prosecution had failed to prove that the deceased-Dinesh and appellant-convict were together at the time of the incident. He contended that even if the prosecution's case was to be believed, the fact that the location of the deceased-Dinesh and the appellant-convict was in village Bawana cannot be taken as an incriminating circumstance as both of them were residents of that village.

11. Learned counsel for the appellant-convict lastly stated that in the present case, the prosecution had failed to discharge the burden of proof and therefore, the Trial Court had erred in relying upon the statement of the appellant-convict recorded under Section 313 Cr.P.C. He submitted that the statement of an accused recorded under Section 313 Cr.P.C. can assume significance only when the prosecution is able to discharge its burden of proof, and it cannot be other way round. In support of his submission he placed reliance upon the judgment of the Supreme Court in *Nagaraja vs. State (2015) 4 SCC 739*. Consequently, he prayed that the impugned judgment and order be set aside.

ARGUMENTS ON BEHALF OF THE STATE

12. *Per contra*, Ms. Aashaa Tiwari, learned APP for the State stated that the testimonies of Deepak (PW-25) and Kaushalya (PW-26) had been

corroborated by the testimony of Praveen Sehrawat (PW-11) who had deposed that the deceased-Dinesh was present near his house on a motorcycle less than two hours before the incident and at that time, Kaushalya (PW-26) was calling out the name of the deceased-Dinesh. Learned APP pointed out that even though Praveen Sehrawat (PW-11) had turned hostile, his testimony on the aspect of 'last seen' circumstance had remained unchallenged. Therefore, according to her, the testimonies of the aforesaid witnesses proved that the deceased-Dinesh was last seen with the appellant-convict and in view of Section 106 Evidence Act, the onus was on the appellant-convict to prove otherwise and he had failed to discharge the burden of proof.

13. She contended that Praveen Sehrawat (PW-11) had deposed that he had spoken to the deceased-Dinesh on the phone and the same had been corroborated by the CDR of Praveen Sehrawat (PW-11) which showed that there were outgoing calls made to the mobile number of the deceased-Dinesh on the date of the incident. The relevant portion of Praveen Sehrawat's (PW-11) CDR is reproduced hereinbelow:-

“CALL DETAILS OF PRAVEEN SEHRAWAT

<u>Calling No.</u>	<u>Called No.</u>	<u>Date & Time</u>	<u>Duration</u>	<u>Direction</u>
9999323356 (Praveen)	9211360822 (Dinesh)	28.1.2012 16:41:25	8	Out
9999323356 (Praveen)	9211360822 (Dinesh)	28.1.2012 16:46:35”	7	Out

14. She pointed out that even though Rakesh (PW-8) had turned hostile, yet his earlier statement with respect to him calling the appellant-convict and also calling Ashu from the phone of Modhu had been corroborated by his

CDR and CDR of Modhu. The relevant portions of the said CDRs are reproduced hereinbelow:-

“CALL DETAILS OF MODHU

<u>Calling No.</u>	<u>Called No.</u>	<u>Date & Time</u>	<u>Duration</u>	<u>Direction</u>	<u>Last Cell ID</u>	<u>Location</u>
9212637438 (Modhu)	8800335864 (Ashu)	28.1.2012 17:16:41	24	Out	30210	Bawana
9212637438 (Modhu)	9211229065 (Rakesh)	28.1.2012 17:40:00	29	Out	30210	Bawana

CALL DETAILS OF RAKESH

<u>Calling No.</u>	<u>Called No.</u>	<u>Date & Time</u>	<u>Duration</u>	<u>Direction</u>	<u>Last Cell ID</u>	<u>Location</u>
9211229065 (Rakesh)	9210225968 (Amit Sehrawat)	28.1.2012 17:18:39	45	Out	30210	Bawana
9211229065 (Rakesh)	9210225968 (Amit Sehrawat)	28.1.2012 17:22:03”	40	Out	30210	Bawana

15. Learned APP for the State stated that mobile phone of the deceased-Dinesh had been found by Jai Prakash (PW-4) in village Pooth Khurd, who was a resident of the same village and the said mobile phone had been recovered vide seizure memo Ex. PW-4/B. She also relied upon the following CDR charts of appellant-convict and deceased-Dinesh to contend that they both were together at the time of the incident:-

“CALL DETAILS OF ACCUSED AMIT SEHRAWAT

<u>Mobile No.</u>	<u>Time</u>	<u>Duration & Direction</u>	<u>Last Cell ID</u>	<u>Location</u>
9210225968	16:41:47	47 In	30210	Bawana (Delhi)
	17:07:48	40 Out	29585	154/493, Village Pooth Khurd, Rajiv Tent House Bawana Road

17:09:12	90	Out	29586	-do-
17:14:23	138	Out	45440	Bawana Auchandi Road
17:18:39	45	In	29872	Khasra No.693/1, Lal Dora Abadi, Delhi.
17:22:03	40	In	30112	Badli New Delhi
17:27:01	474	In	28898	Saroop Nagar
17:42:45	37	Out	28865	Village Alipur
17:44:17	155	Out	28865	-do-
17:53:00	38	Out	28865	-do-
17:54:54	39	In	28864	-do-

CALL DETAILS RECORD OF DECEASED DINESH

<u>Mobile No.</u>	<u>Time</u>	<u>Duration & Direction</u>	<u>Last Cell ID</u>	<u>Location</u>
9211360822	16:21:16	8 In	30210	Bawana, New Delhi
	16:30:31	27 Out	30208	Bawana, New Delhi
	16:35:19	18 Out	28852	Bawana, New Delhi
	16:38:37	20 In	28851	-do-
	16:41:24	8 In	28852	-do-
	16:41:58	33 In	28851	-do-
	16:43:24	18 Out	28852	-do-
	16:45:29	24 In	28852	-do-
	16:46:36	07 In	28852	-do-
	17:38:40	14 Out	29585	Vill Pooth Khurd, Rajeev Tent House
	17:43:29	10 In	29585	-do-
	18:44:42	38 In	29585	-do-
	18:45:18	1 In	29585	-do-
	18:45:45	47 In	29585	-do-
	18:47:39	27 In	29585	-do-
	18:49:41	11 Out	29584	-do-"

16. Learned APP for the State stated that the aforesaid CDR chart of the appellant-convict and deceased-Dinesh showed that they were together from 16:41 to 17:22 on the date of the incident and thereafter appellant-convict's

location had changed to village Pooth Khurd (where appellant-convict threw the mobile phone of the deceased-Dinesh) and subsequently to Badli (where the appellant-convict had hidden the weapon of offence, i.e. knife) and then to Alipur village. Thus, according to her, the prosecution had established all the material circumstances and the chain of events was complete.

ARGUMENTS ON BEHALF OF THE COMPLAINANT

17. Mr. Sanjay Suri, learned counsel for the complainant contended that there had been multiple incidents regarding the monetary dispute between the deceased-Dinesh and the appellant-convict. He relied upon the statements of Deepak (PW-25) and Kaushalya (PW-26) to contend that the first incident was about one and a half year ago and the parents of the appellant-convict had been informed about the same. He pointed out that about seven-eight days prior to the incident, when the deceased-Dinesh had asked for his money back, the appellant-convict had extended threats to him. He emphasized that Deepak (PW-25) had overheard the appellant-convict three days prior also talking about “*teaching a lesson*” to the deceased-Dinesh. Therefore, according to learned counsel for the complainant, the monetary dispute was not petty and the prosecution had successfully established the motive in the present case.

18. He stated that none of the investigating officers had been cross-examined comprehensively on the issue of the CDR and there had been no challenge to the usage of the mobile numbers.

19. He stated that the contention of the appellant-convict that the blood had been planted on his clothes cannot be accepted as Head Constable Wazir Singh (PW-14) had not been cross-examined on this point. He further stated

that neither Head Constable Wazir Singh (PW-14) nor Constable Surender Kumar (PW-3) had deposed that there were two blood samples present in the articles that were deposited in the *malkhana*. Consequently, according to him, the said issues cannot be raised at this stage.

20. Learned counsel for the complainant stated that the knife had been recovered from a place which was within the exclusive knowledge of the appellant-convict. He laid emphasis on the fact that since the knife had been recovered from a hidden place, as deposed by Inspector Rakesh (PW-32), the recovery was admissible against the appellant-convict.

COURT'S REASONING

THE FIVE GOLDEN PRINCIPLES, CONSTITUTING THE PANCHSHEEL, OF PROOF OF A CASE BASED ON CIRCUMSTANTIAL EVIDENCE ENUMERATED

21. Having heard the learned counsel for the parties and having perused the evidence on record, this Court is of the opinion that the present case is based on circumstantial evidence. Consequently, it is essential to outline the conditions that have to be fulfilled before such a case can be said to be fully established. The Supreme Court in *Sharad Birdhichand Sarda vs. State of Maharashtra, (1984) 4 SCC 116* after referring to its earlier decision in *Hanumant, Son of Govind Nargundkar vs. State of Madhya Pradesh, 1952 SCR 1091* stated the five golden principles, constituting the Panchsheel, of proof of a case based on circumstantial evidence as follows:-

“(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be”

established. There is not only a grammatical but a legal distinction between “may be proved” and “must be or should be proved” as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Crl LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

“Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between ‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions.”

(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.”

(emphasis supplied)

THERE WAS NO DELAY BY DEEPAK (PW-25) AND KAUSHALYA (PW-26) IN MAKING THEIR STATEMENTS TO THE POLICE. IT WAS ONLY AFTER KAUSHALYA (PW-26) HAD APPROACHED THIS COURT BY FILING A WRIT PETITION, BEING W.P. (CRL.) 373/2012, THE STATEMENTS OF DEEPAK (PW-25) AND KAUSHALYA (PW-26) WERE RECORDED BY THE POLICE IN AUGUST, 2012.

22. This Court is of the view that there was no delay by Deepak (PW-25) and Kaushalya (PW-26) in making their statements to the police. Perusal of

the paperbook reveals that Deepak (PW-25) had deposed that he had approached the police to get his statement recorded, but the Investigating Officer had told him that he would record the statement later and similarly the statement of Kaushalya (PW-26) had not been recorded initially. In fact, Kaushalya (PW-26) had filed a complaint dated 23rd February, 2012 with the Commissioner of Police, raising the said grievance, which is reproduced hereinbelow:-

“To, Dated 23.02.2012
The Commissioner Police,
Delhi Police,
ITO, Delhi.

Subject: COMPLAINT AGAINST LOCAL POLICE PS BAWANA FOR NOT PROPERLY INVESTIGATING IN THE CASE FIR NO.34/12 U/S 302/201 IPC PS BAWANA AND FOR TRANSFER OF INVESTIGATION TO AN INDEPENDENT INVESTIGATING AGENCY LIKE CRIME BRANCH

Sir,

The applicant is the mother of the deceased Dinesh who was murdered by Amit, Sachin both sons of Ram Karan R/o Village Bawana, Delhi along with others. The applicant along with her husband, Deepak S/o Sh Bhagat Singh have gone number of times before SHO and ACP outer district to get their statement recorded in order to punish the guilty but we were turned off by the above mentioned officials.

We had clearly stated and if finds mention in the FIR that Sachin along with others are involved in the above mentioned case. Sachin along with others was seen following the motor cycle of the deceased and even threatening calls were made from the mobile of the deceased after his death in which the voice of Sachin s/o Ram Karan was clearly audible, threatening the applicant as well as her family members. The local Police is acting in connivance with the accused persons and is not taking

action against anyone else even when the applicant and others are providing sufficient proofs regarding the same. That there were nine stab injuries on the person of the deceased which is not possible to be inflicted by a single person. The applicant along with her family members have even shown the place of occurrence destroyed by the accused persons to wipe out material evidence but the local Police is not ready to investigate any further and they are bent upon in hushing up the matter in favour of the accused persons. The applicant along with other family members have shown sufficient proofs of the local Police about the enmity between Amit, Sachin and others and Dinesh on one hand on account of payment which my son Dinesh was demanding back.

Kindly intervene in the matter and transfer the case to the crime branch so that Justice can be done and the guilty punished according to law.

*Sd/-
Applicant
Kaushalya Devi
W/O Sh. Manphool Singh
R/o 559, Pana Beghwan,
P.S. Bawana, Delhi 39.*

Note: Copy of FIR along with Post Mortem Report and Photograph of deceased are appended.”

(emphasis supplied)

23. Subsequently, Kaushalya (PW-26) had approached this Court by filing a writ petition being W.P. (Crl.) 373/2012 and thereafter, the statements of Deepak (PW-25) and Kaushalya (PW-26) were recorded by the police in August, 2012. The orders dated 03rd August, 2012 and 5th September, 2012 passed in W.P.(Crl.) 373/2012 are reproduced hereinbelow:-

A) Order dated 03rd August, 2012 :-

“Status report has been filed and perused.

Grievance of the petitioner is that her statement along with statement of one another witness Deepak is not being recorded.

Learned Additional Standing Counsel submits that charge-sheet has been filed and further investigation is being carried out in respect of co-accused. FSL report is awaited. He further submits that in case witnesses approach the Investigating Officer their statements will be recorded.

List on 5th September, 2012.”

B) Order dated 05th September, 2012 :-

“Learned Additional Standing Counsel submits that statement of mother of deceased and one Deepak Sherawat have been recorded. In view of this statement, learned counsel for the petitioner seeks leave to withdraw the writ petition. Disposed of as withdrawn.”

(emphasis supplied)

24. From the aforesaid record it is apparent that the delay in recording the statements of Deepak (PW-25) and Kaushalya (PW-26) has been sufficiently explained by both the witnesses and the said delay cannot be attributed to them as they were running pillar to post to get their statements recorded. Consequently, the contention of the appellant-convict that the delay in recording the initial statement has remained unexplained by the witnesses is contrary to facts. In any event, delay in recording the statement does not automatically render their testimony false. The Supreme Court in **Bodhraj alias Bodha & Ors. vs. State of Jammu & Kashmir, (2002) 8 SCC 45** has held as under:-

“33. Another point which was urged was the alleged delayed examination of the witnesses. Here again, it was explained as to why there was delay. Important witnesses were examined immediately. Further statements were recorded subsequently.

Reasons necessitating such examination were indicated. It was urged that the same was to rope in the accused persons. This aspect has also been considered by the trial court and the High Court. It has been recorded that there was a valid reason for the subsequent and/or delayed examination. Such conclusion has been arrived at after analysing the explanation offered. It cannot be laid down as a rule of universal application that if there is any delay in examination of a particular witness the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for the delayed examination is plausible and acceptable and the court accepts the same as plausible, there is no reason to interfere with the conclusion.

(emphasis supplied)

THE PROSECUTION HAS PROVED THAT THE APPELLANT-CONVICT HAD MOTIVE TO COMMIT THE MURDER AS THE BORROWED AMOUNT HAD NOT BEEN RETURNED TO THE DECEASED-DINESH DESPITE SEVERAL DEMANDS AND THE APPELLANT-CONVICT HAD ALSO THREATENED THE DECEASED-DINESH BECAUSE OF THE SAID DISPUTE.

25. This Court is further of the view that though the motive is not a *sine qua non* for the conviction of an accused person, yet it is a relevant factor in a case based upon circumstantial evidence. In the present case, Deepak (PW-25) had deposed that about one and a half year ago as well as seven-eight days prior and three days prior to the incident, deceased-Dinesh had altercations with appellant-convict as he had not returned the money that he had borrowed from the deceased-Dinesh. The relevant portion of the testimony of Deepak (PW-25) mentioning these incidents is reproduced hereinbelow:-

“On 27.12.2011, Sachin S/o Ram Karan who is the elder brother of accused Amit Sehrawat and one Arun who is the grand son of Duli Chand and one Sachin S/o Sushil Kumar who are residents of same village as of my village, took Dinesh with them to

Manali. When Dinesh returned back to Delhi after about a week, he met me and stated to me that while they were in Manali, Sachin S/o Ram Karan had borrowed some money from him. Dinesh further stated to me that they have not been returning the said money. Upon this, I make Dinesh understand for not involving himself in such activities.

About 1½ year ago, Dinesh had an altercation with accused Amit Sehrawat and with Sachin on the issue of money as they were not returning the money borrowed from Dinesh. Thereafter, my cousin Dinesh has stopped talking or meeting with them. Upon this, accused Amit Sehrawat and Sachin S/o Ram Karan as well as other friends had raised objections.

Approximately three days prior to the murder of Dinesh, on or about 9 pm while I was returning to my house from my gher and while I was passing from gali in front of house of accused Amit Sehrawat, I saw said accused and Sachin were present alongwith their few friends and were talking to each other that Dinesh “haemin badnaam kar raha hain” and that they would teach a lesson to him.

On the next day, I met Dinesh by visiting his house and informed about the conversation heard by me and asked him to remain cautious, but Dinesh had not given any heed to it.

Approximately 7-8 days prior to the murder of Dinesh, accused Amit Sehrawat and Sachin had visited the house of Dinesh and threatened him that if he would again demanded the money, he would have to face the consequences.....”

(emphasis supplied)

26. The appellant-convict had failed to disprove the aforesaid incidents as Deepak (PW-25) had withstood the test of cross-examination.

27. The mother of deceased Kaushalya (PW-26) had also specifically deposed that one and half year ago, the appellant-convict had an altercation with deceased-Dinesh. She had further stated in her testimony that on 02nd

January, 2012, her son deceased-Dinesh had informed her that the brother of the appellant-convict had forcibly taken money from him and refused to return it, which had resulted in an altercation. She had also deposed that about seven-eight days prior to the incident, the appellant-convict along with his brother Sachin had threatened to kill the deceased-Dinesh because deceased-Dinesh had been demanding his money back. The relevant portion of the testimony of Kaushalya (PW-26) regarding these incidents is reproduced hereinbelow:-

“.....On 02.01.2012, when my son Dinesh returned back to our house from Manali, he informed me that Sachin S/o Sh. Ram Karan had taken money from him forcibly. After about 2 to 4 days thereafter my son Dinesh had demanded the said money from Sachin S/o Sh Ram Karan but Sachin S/o Ram Karan had refused to return back the said money. My son Dinesh informed me as well as to my husband that despite his demands, Sachin S/o Sh Ram Karan had refused to return back the money. Upon this, my husband Sh Manphool Singh had made Dinesh understand, that he should leave the company of the aforesaid boys. Upon this the aforesaid boys got annoyed with my son Dinesh.

About 7 to 8 days prior to the commission of murder upon my son Dinesh, accused Amit Sehrawat and his elder brother namely Sachin had visited our house and at that time my son Dinesh, me and my husband Sh Manphool were present at our house. In my presence, accused AMIT Sehrawat and Sachin threatened my son Dinesh that if my son Dinesh again approach them and demand money, they would kill my son. Upon this, I as well as my husband make them to understand but they used abusive language against us. In the meantime, my nephew Deepak also came to our house and he also make them to understand but they left while using abusive language against us.

About 1½ year prior to the commission of murder upon my son Dinesh, accused Amit Sehrawat, his elder brother Sachin had altercation with my son Dinesh over the issue of money.”

(emphasis supplied)

28. Consequently, it has come on record that as the borrowed amount had not been returned to the deceased-Dinesh, despite several demands, there was a dispute between him and the appellant-convict, and the latter had also threatened the deceased-Dinesh because of the said dispute. Accordingly, the prosecution has successfully proved that the appellant-convict had sufficient motive to commit the murder in the present case.

BOTH DEEPAK (PW-25) AND KAUSHALYA (PW-26) HAD LAST SEEN THE DECEASED-DINESH ALONG WITH THE APPELLANT-CONVICT LESS THAN TWO HOURS BEFORE THE INCIDENT. PRAVEEN SEHRAWAT (PW-11) CORROBORATES THE TESTIMONY OF KAUSHALYA (PW-26) AS HE HAD DEPOSED THAT HE HAD SEEN THE DECEASED-DINESH LEAVING ON A MOTORCYCLE WHILE THE MOTHER OF THE DECEASED-DINESH i.e. KAUSHALYA (PW-26) WAS SHOUTING HIS NAME.

29. In the present case, the prosecution has relied upon the testimonies of Deepak (PW-25) and Kaushalya (PW-26) to establish the 'last seen' circumstance. The relevant portions of the testimonies of Deepak (PW-25) and Kaushalya (PW-26) are reproduced hereinbelow:-

A. Testimony of Deepak (PW-25):-

".....On 28.01.2012 in between 4.30-5.00 pm, while I was sitting in front of my gher at Kanjhawala Road, I saw accused Amit Sehrawat came riding motorcycle bearing registration no.DL-11SA-7358 and Dinesh (since deceased) was sitting as a pillion rider. Accused Amit Sehrawat took the aforesaid motorcycle towards Kanjhawala and the said motorcycle was being followed by one Santro car. I saw Sachin and Amit Malik sitting on the back seat of the said Santro Car but I could not properly saw the faces of the persons sitting on the front seat of the said Santro Car. Upon seeing this, I immediately informed my Mausi Kaushalya and uncle Manphool Singh about the aforesaid facts. Upon this, my Mausi Kaushalya stated to me

that accused Amit Sehrawat has taken Dinesh with him on the pretext of returning the money borrowed by him from Dinesh. My Mausi Kaushalya further stated to me that she was under apprehension that accused Amit Sehrawat may harm Dinesh. Upon this, I made several calls on the mobile phone no.9211360822 of Dinesh from my mobile phone no.9212621217 or from my another mobile phone no.9211784882, but despite ringing bell, Dinesh had not picked up the phone. Thereafter, we started searching Dinesh but in vain.”

B. Testimony of Kaushalya (PW-26):-

“.....On 28.01.2012, while I was present at my house in between 4.30 to 5.00 pm, accused Amit Sehrawat came to our house on a motorcycle bearing registration no.DL11SA-7358 and my son Dinesh was present inside the house. Accused Amit Sehrawat rang the bell and when my son Dinesh came to the main door of our house he took him on the pretext that he would clear all the money due towards my son Dinesh. When I saw my son Dinesh accompanying accused Amit Sehrawat, I followed him up to the main gate, I saw Sachin elder brother of accused Amit Sehrawat present near one car parked in the gali and was accompanied by some boys. Upon this, I raised noise and called my son Dinesh but accused Amit Sehrawat took my son Dinesh in the aforesaid motorcycle and Sachin elder brother of accused Amit Sehrawat, followed the said motorcycle in the same car which I had seen parked in the gali along with 2 to 3 boys. Upon this, I started running towards the motorcycle being driven by accused Amit Sehrawat and tried to stop Dinesh for accompanying them. When I reached at in front of the house of Praveen S/o Sh Satbir whose house is situated in our gali, there I met my nephew namely Deepak. Deepak informed me that he had also seen Dinesh accompanying accused Amit Sehrawat in a motorcylce and the said motorcycle was followed by one car. I also informed to my nephew Deepak that I had also seen my son Dinesh accompanying accused Amit Sehrawat on a motorcycle being followed by one car and I tried to stop my son Dinesh from accompanying them but in vain.....”

(emphasis supplied)

30. Perusal of the aforesaid testimonies reveals that both the witnesses had seen the deceased-Dinesh along with the appellant-convict less than two hours before the incident. Despite being cross-examined at length, nothing material has come out in their cross-examination. In fact, the testimony of Praveen Sehrawat (PW-11) corroborates the testimony of Kaushalya (PW-26) as he had deposed that he had seen the deceased-Dinesh leaving on a motorcycle while the mother of the deceased-Dinesh i.e. Kaushalya (PW-26) was shouting his name. The relevant portion of the testimony of Praveen Sehrawat (PW-11) is reproduced hereinbelow:-

“.....Thereafter Dinesh made a call on my mobile No.9999323356 after half an hour from his mobile and informed me to take the money from him and he was standing outside my house. I came outside my house and he gave me Rs.500/-. But I do not remember his mobile number. I noticed that one person was also sitting on the rear seat and he had covered himself with a shawl. Mother of Dinesh was shouting name of Dinesh, Dinesh But Dinesh went away on motorcycle....”

(emphasis supplied)

SINCE THE APPELLANT-CONVICT HAS FAILED TO THROW ANY LIGHT UPON FACTS WHICH WERE SPECIALLY WITHIN HIS KNOWLEDGE, THE COURT CAN CONSIDER HIS FAILURE TO ADDUCE ANY EXPLANATION, AS AN ADDITIONAL LINK WHICH COMPLETES THE CHAIN

31. In view of the aforesaid finding that the deceased-Dinesh was last seen alive with the appellant-convict and the appellant-convict did not throw any light upon facts which were specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court considers his failure to adduce any explanation, as an additional link which completes the chain. The Supreme Court in ***Rohtash Kumar vs. State of Haryana (2013) 14 SCC 434***, while discussing the law relating to

‘last seen’ circumstance, has held as under:-

“32. In cases where the accused was last seen with the deceased victim (last seen together theory) just before the incident, it becomes the duty of the accused to explain the circumstances under which the death of the victim occurred.....

33. In Trimukh Maroti Kirkan v. State of Maharashtra [(2006) 10 SCC 681 : (2007) 1 SCC (Cri) 80] this Court held as under: (SCC p. 694, para 22)

“22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime.”

(See also Prithipal Singh v. State of Punjab [(2012) 1 SCC 10 : (2012) 1 SCC (Cri) 1] .)

34. Thus, the doctrine of “last seen together” shifts the burden of proof on the accused, requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard, would give rise to a very strong presumption against him.

(emphasis supplied)

32. Since the appellant-convict has failed to discharge the burden of proof, an adverse circumstance arises against the appellant-convict.

SINCE THE TIME GAP BETWEEN THE POINT WHEN THE DECEASED-DINESH WAS LAST SEEN ALIVE WITH APPELLANT-CONVICT AND WHEN HE WAS FOUND DEAD IS SHORT, THERE IS NO POSSIBILITY OF ANY OTHER PERSON BEING THE AUTHOR OF THE CRIME.

33. Since the time gap between the point when the deceased-Dinesh was last seen alive with appellant-convict and when he was found dead is short,

the possibility of any person other than the appellant-convict being the author of the crime is impossible. The Supreme Court in **Bodhraj alias Bodha & Ors.** (supra) has held as under:-

“31. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases.....”

(emphasis supplied)

IT IS SETTLED LAW THAT THE FACTUM OF RELATIONSHIP HAS NO EFFECT ON THE CREDIBILITY OF A NATURAL WITNESS AND IF THE TESTIMONY INSPIRES CONFIDENCE, THE SAME CAN BE RELIED UPON.

34. This Court is further of the opinion that the testimonies of Deepak (PW-25) and Kaushalya (PW-26) cannot be disbelieved on account of their relationship to the deceased-Dinesh, as contended by the appellant-convict. It is settled law that the factum of relationship has no effect on the credibility of a natural witness and if the testimony inspires confidence, the same can be relied upon. The Supreme Court in **Waman vs. State of Maharashtra (2011) 7 SCC 295** has held as under:-

“16. The fact of being a relative cannot by itself discredit the evidence. In the said case, the witness relied on by the prosecution was the brother of the wife of the deceased and was living with the deceased for quite a few years. This Court held that: (Sarwan Singh case [(1976) 4 SCC 369 : 1976 SCC (Cri) 646] , SCC p. 379, para 16)

“16. ... But that by itself is not a ground to discredit the testimony of this witness, if it is otherwise found to be consistent and true.”

17. In Balraje v. State of Maharashtra, this Court held that the mere fact that the witnesses were related to the deceased cannot be a ground to discard their evidence. It was further held that when the eyewitnesses are stated to be interested and inimically disposed towards the accused, it has to be noted that it would not be proper to conclude that they would shield the real culprit and rope in innocent persons. The truth or otherwise of the evidence has to be weighed pragmatically and the court would be required to analyse the evidence of related witnesses and those witnesses who are inimically disposed towards the accused. After saying so, this Court held that: (SCC p. 679, para 30)

“30. ... if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same.”

18. The same principles have been reiterated in Prahalad Patel v. State of M.P. [(2011) 4 SCC 262 : (2011) 2 SCC (Cri) 205] In para 15, this Court held that: (SCC p. 265)

“15. ... Though PWs 2 and 7 are brothers of the deceased, relationship is not a factor to affect credibility of a witness. In a series of decisions this Court has accepted the above principle (vide Israr v. State of U.P. [(2005) 9 SCC 616 : 2005 SCC (Cri) 1260] and S. Sudershan Reddy v. State of A.P. [(2006) 10 SCC 163 : (2006) 3 SCC (Cri) 503]).”

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20. It is clear that merely because the witnesses are related to the complainant or the deceased, their evidence cannot be thrown out. If their evidence is found to be consistent and true, the fact of being a relative cannot by itself discredit their evidence. In other words, the relationship is not a factor to affect the credibility of a witness and the courts have to scrutinise their evidence meticulously with a little care.”

(emphasis supplied)

35. In view of the aforesaid mandate of law, there is no merit in the contention of the appellant-convict that Deepak (PW-25) and Kaushalya (PW-26) were not independent witnesses.

36. Consequently, this Court finds that the testimonies of Deepak(PW-25) and Kaushalya (PW-26) have a ring of truth, are clear, cogent, consistent, credible, trustworthy and have been corroborated by other evidence and material on record.

THE WEAPON i.e. KNIFE, USED IN THE COMMISSION OF THE CRIME HAD BEEN RECOVERED AT THE INSTANCE OF THE APPELLANT-CONVICT AND NO PART OF THE KNIFE WAS OUTSIDE THE DRAIN FROM WHERE IT WAS RECOVERED. CONSEQUENTLY, THE PLACE OF RECOVERY OF THE WEAPON OF OFFENCE WAS WITHIN THE EXCLUSIVE KNOWLEDGE OF THE APPELLANT-CONVICT.

37. The weapon i.e. knife, used in the commission of the crime had been recovered at the instance of the appellant-convict vide seizure memo Ex. PW-6/B. As per the testimony of investigating officer Inspector Rakesh Kumar (PW-32), the recovered knife was concealed and no part of the knife was outside the drain from where it was recovered. The relevant portion of his testimony is reproduced hereinbelow:-

“.....Thereafter, on the next day i.e. 30.01.2012, Ct. Angrej Singh had joined the investigation of the present case alongwith me. On that day, accused Amit was taken out from the Lock-up, who led us to Samaypur Badli Railway Station. Upon reaching the said Railway Station, I had requested 4-5 passersby to join the investigation, but none agreed and left the spot without disclosing their names and addresses. Thereafter accused had pointed out towards one drain near the Urinal situated at the left side of the Foot over bridge. Accused himself had taken out a knife from the said drain (naali) and stated to us that he had used the said knife in the commission of offence. I had prepared the sketch of said knife which is already Ex.PW6/A. I had also

measured the said knife and mentioned the measurements on the sketch itself. I had kept the said knife in a cloth pullanda and said pullanda and said pullanda was sealed with the seal of RK. Seal after use was handed over to Ct. Angrej Singh. I had seized the said pullanda vide seizure memo already Ex.PW6/B. Both the memos bear my signatures at points-Y.....

XXXX by ld. counsel Sh. Gaurav Bhatia, Adv. for the accused.

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The said Urinal was in working order at that time. The drain was having water/urinal at that time. There was no gate installed in the said urinal. The said urinal was an open urinal without roof having two walls having height of 5-6 feet each. The said drain was on the left side from Northern/Delhi side. Even after the recovery of knife, I had requested 4-5 passersby to join the investigation, but they refused. I had not requested any railway police official/railway employee to join the investigation in this regard. No portion of said knife was outside the said drain. We had remained at the place of recovery of knife for about one hour.”

(emphasis supplied)

38. Perusal of the aforesaid testimony proves that the place of recovery of the weapon of offence was within the exclusive knowledge of the appellant-convict as it was not ordinarily visible to others. The Supreme Court in ***State of Himachal Pradesh vs. Jeet Singh, AIR 1999 SC 1293*** has held as under:-

“26. There is nothing in Section 27 of the Evidence Act which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is “open or accessible to others”. It is a fallacious notion that when recovery of any incriminating article was made from a place which is open or accessible to others, it would vitiate the evidence under Section 27 of the Evidence Act. Any object can be concealed in places which are open or accessible to others. For example, if the article is buried in the main roadside or if it is concealed beneath dry leaves lying on public places or kept hidden in a

public office, the article would remain out of the visibility of others in normal circumstances. Until such article is disinterred, its hidden state would remain unhampered. The person who hid it alone knows where it is until he discloses that fact to any other person. Hence, the crucial question is not whether the place was accessible to others or not but whether it was ordinarily visible to others. If it is not, then it is immaterial that the concealed place is accessible to others.

27. It is now well settled that the discovery of fact referred to in Section 27 of the Evidence Act is not the object recovered but the fact embraces the place from which the object is recovered and the knowledge of the accused as to it (Pulukuri Kottaya [Pulukuri Kottaya v. Emperor, AIR 1947 PC 67 : 74 IA 65]). The said ratio has received unreserved approval of this Court in successive decisions.....”

(emphasis supplied)

39. Consequently, the recovery of knife is admissible under Section 27 of Evidence Act as it had been effected in pursuance to the disclosure statement made by the appellant-convict and the judgments in ***Shiv Narayan vs. State*** (supra) and ***State (NCT of Delhi) vs. Navjot Sandhu*** (supra) offer no assistance to the appellant-convict.

40. The recovered knife was sent for FSL examination and human blood was found on it. The relevant portion of the FSL report (Ex. PW-21/B) is reproduced hereinbelow:-

“Form No.FSL/DELHI/03/33(07)/24.12.2007

*Forensic Science Laboratory
Govt. of NCT of Delhi
Sector 14, Rohini, Delhi-110085.
Tel: 011-27555811, Fax:011-27555890*

Accredited by the National Accreditation Board for Testing and Calibration Laboratories.

BIOLOGY DIVISION

Report No.FSL-2012/1218 Bio No.244/12 Dated 31.08.2012

Case FIR No.:34/12 Dated: 28.1.12 U/s.302/201 IPC
Police Station: Bawana Forwarding Authority: The SHO, PS:
Bawana, Delhi.

Portion of exhibits as detailed in the main Biology Report have been examined using various serological techniques. The results obtained have been analyzed as given below:

<i>Exhibits</i>	<i>Species of Origin</i>	<i>ABO Grouping/Remarks</i>
xxx	xxx	xxx
<u>'16'Knife</u>	<u>Human</u>	<u>No Reaction</u>

Sd/-
(DR. DHRUW SHARMA)
Assistant Director (Biology)
Forensic Science Laboratory
Govt. of N.C.T. of Delhi.”

(emphasis supplied)

41. Dr. J.V. Kiran had given his subsequent opinion with regard to the recovered knife and opined that the injuries caused to the deceased-Dinesh, as mentioned in the post mortem report, could be possible from the recovered knife. The relevant portion of the post-mortem report of the deceased-Dinesh (Ex.PW-22/B) and the subsequent opinion (Ex. PW-22/C) are reproduced hereinbelow:-

A. Post-Mortem Report (Ex.PW-22/B):-

*Department Of Forensic Medicine
Dr Baba Saheb Ambedkar Hospital
(Govt. of NCT of Delhi)
Rohini, Delhi – 110085*

Post Mortem Examination Report
POST MORTEM NO. 48 / 2012 Dated: 29—January – 2012
of Dinesh S/o Sh. Manphool Singh P.S. Bawana

Date and Time of starting of post mortem examination:
29/01/2012 at 12.00 P.M.

Time of completion of Post mortem: 02:00 P.M.

I. CASE PARTICULARS:

FIR No. 34/12 dated 28.01.2012 P.S. Bawana

Name of the Deceased: Dinesh S/O Manphool Singh

R/O: 559, Panna Begwan, Bawana, Delhi.

Age: 18 years Sex: Male

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IX. EXTERNAL EXAMINATION

Injuries:-

- 1. Stab wound 4.5 cm x 2.5 cm x pleural cavity deep (about 16 cm), single edged, vertically placed was present over inner front of upper third of left side of chest placed 6.5 cm left to midline point 2 cm below the upper end of chest bone. The wound was directed backward and outward. The stab wound pierced the chest through the first intercostal space, penetrating the upper part of anterior margin of upper lobe of left lung, through the parenchyma of the upper lobe of lung, out of the lung upto the 2nd intercoastal space in its posterior third.*
- 2. Stab wound 3.5 cm x 1.5 cm x about 16cm deep, single edged was present on inner front of middle third of left side of chest placed 6 cm left to midline point 10 cm below the upper end of chest bone directed obliquely i.e. backward, upward and from left to right. The stab wound pierced the chest wall through the left 3rd intercostal space, the front of pericardium upper part of front of heart, the posterior wall of left atrium, through the hilum of right lung upto the middle lobe of right lung.*
- 3. Stab would 2.7cm x 1.5 cm x chest muscles deep was present on outer aspect of left side of chest placed 10cm below the*

posterior axillary fold.

4. *Stab wound 1.7 cm x 0.8 cm x chest muscles deep was present on outer aspect of left side of chest placed 5.5 cm below injury no.3.*
5. *Stab wound 3.8 cm x 1.7 cm x about 16 cm deep horizontally placed single edged was present on midline back of lower chest placed 24 cm below the 7th cervical prominence directed forward, downward and to the left piercing the chest wall through the paravertebral aspect of left side of 10th intercostal space, the inner posterior aspect of left diaphragm and cutting the upper part of greater curvature of stomach.*
6. *Stab wound 3.3 cm x 0.6 cm x sacrum deep was present on inner aspect of back of right side of trunk at the junction between the buttock and the right back of abdomen placed 8 cm above the cleft between the buttocks and 2.5 cm below injury no.5.*
7. *Incised wound 2cm x 1cm x bone deep was present on back of left elbow.*
8. *Stab wound 2cm x 1cm x bone deep was present on back of lower third of left arm placed 8cm above left elbow prominence.*
9. *Stab wound 6.5 cm x 2cm x muscle deep, single edged was present on outer aspect of upper third of left thigh placed 16cm below the iliac crest.*

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XI. OPINION:

Cause of death is hemorrhagic shock consequent to penetrating injury to the chest via injury no.2 caused by sharp stabbing weapon and sufficient to cause death in the ordinary course of nature. All injuries are ante mortem, fresh in duration.

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*Dr. J V Kiran Kumar
Senior Resident”
(emphasis supplied)*

B. Subsequent Opinion (Ex.PW-22/C):-

“After examination of the said weapon of offence and the P.M. report, it is opined that the injuries mentioned in the P.M. report are possible by the said knife.

11-02-12
Dr. J V Kiran
SR FM Dept.”

(emphasis supplied)

42. The appellant-convict had contended that the subsequent opinion (Ex. PW-22/C) cannot be read as evidence because Dr. J.V. Kiran had not been examined. However, this Court finds no merit in that contention inasmuch as the subsequent opinion (Ex. PW-22/C) is admissible under Section 32 (2) of Evidence Act, as Dr. J.V. Kiran was not available for examination. In a similar case, the Division Bench of Orissa High Court in **Hadi Kirsani vs. State, AIR 1966 ORISSA 21** has held as under:-

“10. Where, therefore, the doctor is dead or cannot be found, the aforesaid decisions have no application. The injury report or the postmortem report of the doctor who is dead or cannot be found, is admissible and relevant u/s. 32 of the Evidence Act. Mohan Singh v. Emperor, AIR 1925 All 413 dealt with a case where the Civil Surgeon, who conducted the post-mortem examination, had since died. The Bench consisting of Sulaiman and Mukherjee, JJ. held that the post-mortem report was admissible under this Section. State v. Rakshpal Singl), AIR 1953 All 520 was a case where the attendance of a Medical Officer could not be procured without delay and expense. The injury report, submitted by him, was held to be admissible and relevant after it was proved by his Compounder. The same view has been taken by Division Bench in Ram Balak Singh v. State, AIR 1964 Pat 62 without any discussion of the principle (See para 9). In that case, the doctor, who performed the autopsy over the dead body, was abroad at the time of the trial.

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14. The position of law may, therefore be summarised thus—if the doctor is available for examination in court, the injury report or the post-mortem report given by him is not substantive evidence and is inadmissible unless he is examined it can be used for corroboration or refreshing memory or for contradiction of his evidence in court. If, however, the doctor is dead or is not available for examination in court under the circumstances mentioned in Section 32, the injury report or the postmortem report is admissible and relevant. What weight it would carry with a court of fact is altogether a different question. Its probative value would depend on the facts and circumstances of each case.”

(emphasis supplied)

43. In view of the aforesaid, this Court finds that the recovery of the knife is another relevant circumstance against the appellant-convict.

THE BLOODSTAINED CLOTHES OF THE APPELLANT-CONVICT HAD BEEN SEIZED VIDE SEIZURE MEMO (EX.PW-32/E) AND SENT FOR FSL EXAMINATION, WHO HAD OPINED THAT BLOOD OF THE DECEASED-DINESH BEING BLOOD GROUP ‘AB’ WAS PRESENT ON THEM.

44. Another important circumstance against the appellant-convict is the presence of blood of the deceased-Dinesh on the clothes of the appellant-convict. The bloodstained clothes of the appellant-convict had been seized vide seizure memo (Ex.PW-32/E) and sent for FSL examination, who had opined that blood of the deceased-Dinesh being blood Group ‘AB’ was present on them. The relevant portion of the FSL report (Ex.PW-21/B) is reproduced hereinbelow:-

“Form No.FSL/DELHI/03/33(07)/24.12.2007

*Forensic Science Laboratory
Govt. of NCT of Delhi
Sector 14, Rohini, Delhi-110085.*

Tel: 011-27555811, Fax:011-27555890

Accredited by the National Accreditation Board for Testing and Calibration Laboratories.

BIOLOGY DIVISION

Report No.FSL-2012/1218 Bio No.244/12 Dated 31.08.2012

Case FIR No.:34/12 Dated: 28.1.12 U/s.302/201 IPC
Police Station: Bawana Forwarding Authority: The SHO,
PS:Bawana, Delhi.

Portion of exhibits as detailed in the main Biology Report have been examined using various serological techniques. The results obtained have been analyzed as given below:

Exhibits	Species of Origin	ABO Grouping/Remarks
'1' Jeans Pant	Human	'AB' Group

xxxx

xxxx

xxxx

xxxx

Sd/-

(DR. DHRUW SHARMA)

Assistant Director (Biology)

Forensic Science Laboratory

Govt. of N.C.T. of Delhi."

(emphasis supplied)

45. The appellant-convict has sought to challenge the aforesaid circumstance by contending that the blood of the deceased-Dinesh was planted on his clothes by the police officers. However, this Court finds no merit in the said contention as neither Constable Surender Kumar (PW-3) nor Head Constable Wazir Singh (PW-14) had deposed that they had collected two blood samples of the deceased-Dinesh. In fact, Head Constable Wazir Singh (PW-14) had only deposed with respect to collection of knife and the subsequent opinion given by the autopsy surgeon. In any

event, there has been no cross-examination of these witnesses despite being granted an opportunity. Consequently, in absence of any cross-examination, the appellant-convict cannot raise these issues at this stage. The Supreme Court in *Mahavir Singh vs. State of Haryana, (2014) 6 SCC 716* has held as under:-

“16. It is a settled legal proposition that in case the question is not put to the witness in cross-examination who could furnish explanation on a particular issue, the correctness or legality of the said fact/issue could not be raised. (Vide Atluri Brahmanandam v. Anne Sai Bapuji and Laxmibai v. Bhagwantbuva.”

(emphasis supplied)

CDR OF APPELLANT-CONVICT AND DECEASED-DINESH PROVED THAT THEY WERE TOGETHER AT THE TIME OF THE INCIDENT. CDR ALSO CORROBORATES THAT THE APPELLANT-CONVICT THREW THE MOBILE PHONE OF THE DECEASED-DINESH IN VILLAGE POOTH KHURD AND KNIFE i.e. WEAPON OF OFFENCE NEAR SAMAYPUR BADLI RAILWAY STATION.

46. Further, this Court is in agreement with the contention of the learned APP for the State that the CDR of appellant-convict and deceased-Dinesh proved that they were together at the time of the incident.

47. In fact, the CDR of the appellant-convict and deceased-Dinesh had the same location i.e. village Pooth Khurd, even after the murder of the deceased-Dinesh, which leads to the inference that the appellant-convict was in the possession of deceased-Dinesh's mobile phone, which he then threw in village Pooth Khurd. The said mobile phone had been found and used by Jai Prakash (PW-4) who was a resident of village Pooth Khurd.

48. It is pertinent to mention that the weapon of offence in the present case had been recovered from a urinal situated near Samaypur Badli

Railway Station and as per the CDR of the appellant-convict his location after village Pooth Khurd had changed to Badli. Consequently, the CDR of the appellant-convict corroborates the recovery of the weapon of offence.

49. This Court is of the view that the contention of the appellant-convict that the investigating officer did not know the mobile number of the deceased-Dinesh is contrary to the facts inasmuch as the mobile number of the deceased-Dinesh had been mentioned in the FIR.

KEEPING IN VIEW THE FOLLOWING CIRCUMSTANCES, ESPECIALLY THE MEDICAL AND SCIENTIFIC EVIDENCE, WHICH IS OF CONCLUSIVE NATURE, THIS COURT IS OF THE VIEW THAT THE CHAIN OF EVENTS IS COMPLETE AND ALL THE CIRCUMSTANCES CUMULATIVELY POINT TOWARDS THE GUILT OF THE APPELLANT-CONVICT.

50. Keeping in view the aforesaid findings, the following circumstances have been proved and they form a complete chain of events:-

A. Deepak (PW-25) and Kaushalya (PW-26) had deposed that there was a monetary dispute between the deceased-Dinesh and appellant-convict and the appellant-convict had threatened the deceased-Dinesh about seven-eight days prior to the incident. This proves that appellant-convict had motive to kill the deceased-Dinesh.

B. On 28th January, 2012 i.e. the date of the incident, Deepak (PW-25) and Kaushalya (PW-26) had seen the appellant-convict with the deceased-Dinesh less than two hours before the incident.

C. The deceased-Dinesh was found by Rakesh (PW-8), who had taken him to the hospital where he was declared brought dead at about 5:48 pm on 28th January, 2012, as per the MLC (Ex.PW-18/A).

D. CDR corroborates that the appellant-convict was present with the deceased-Dinesh at the time of the incident and that the appellant-convict threw the mobile phone of the deceased-Dinesh in village Pooth Khurd where it was found by Jai Prakash (PW-4).

E. Appellant-convict was arrested on 29th January, 2012 and on the basis of his disclosure statement, a knife i.e. weapon of offence was recovered from a urinal situated near Samaypur Badli Railway station.

F. CDR confirmed that after the incident, the location of appellant-convict was in Samaypur Badli.

G. Blood stained clothes of the appellant-convict were seized vide seizure memo (Ex.PW-32/E). FSL report (Ex.PW-21/B) confirmed that the blood of the deceased-Dinesh i.e. 'AB' group was present on the clothes of the appellant-convict.

H. On 29th January, 2012, post-mortem of the deceased-Dinesh was conducted and the cause of death was opined to be hemorrhagic shock consequent to penetrating injury to the chest via injury No.2 caused by sharp stabbing weapon and sufficient to cause death in the ordinary course of nature.

I. As per the subsequent medical opinion (Ex.PW-22/C), injuries mentioned in the post-mortem report of the deceased-Dinesh were possible by the recovered knife.

J. FSL report (Ex.PW-21/B) confirmed that human blood was present on the recovered knife.

51. Keeping in view the abovementioned circumstances, especially the medical and scientific evidence, which is of conclusive nature, this Court is

of the view that the chain of events is complete and all the circumstances cumulatively point towards the guilt of the appellant-convict. The prosecution has successfully proved the last seen circumstance, motive, recovery of weapon of offence at the instance appellant-convict, bloodstained clothes of appellant-convict which match with the blood group of the deceased-Dinesh as well as the CDR entries. Consequently, it stands proved beyond reasonable doubt that the appellant-convict committed murder of the deceased-Dinesh.

CONCLUSION

52. In view of the aforesaid, this Court does not find any reason to interfere with the findings of the Trial Court. The orders on conviction and sentence are upheld.

53. Accordingly, present appeal, being bereft of merit, is dismissed.

54. Trial court record be sent back.

55. Copy of the judgment be sent to appellant-convict through the concerned Jail Superintendent.

MANMOHAN, J

SANGITA DHINGRA SEHGAL, J

FEBRUARY 20, 2020

js/rn